

Review Article

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The Impact of the Judicialization of the Unique Health System

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ABSTRACT

This study aims to discuss the right to health, comparing collective and individual health and analyzing the impact of judicialization on the Unified Health System (SUS). Therefore, it addresses the right to health, presenting its concept and minimum content; discusses the principle of integrality; discusses the judicial control of public policies, weighing up the reserve of the possible and the minimum existential; and defends the prioritization of public policies that benefit the community. As a methodology, bibliographic research was adopted based on the literary review of books, articles and legislation that are dedicated to the theme in order to seek solutions to reduce expenses with judicialization.

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Received: October 06, 2021; **Accepted:** October 12, 2021; **Published:** October 16, 2021

Keywords: Right to Health. Judicialization. Collective health. Public policy

Introduction

Among the social rights guaranteed by the 1988 Charter, public health can be considered inserted in the most ambitious project of the programmatic guidelines of the new constitutional structure: the universalization of access to health, with full financing by the public power, never before guaranteed in Brazil.

However, what has been observed is that, given the inefficiency of the government in providing the services, procedures and medicines that the population needs to enforce their right to health guaranteed by the CRFB/1988, a high number of lawsuits have been proposed claiming the satisfaction of individual citizens' needs.

This study aims to discuss the right to health, comparing collective versus individual health and analyzing the impact of judicialization on the SUS. The study is justified in view of the need to clarify points that are still unclear in the debate on judicialization, as well as to understand how the universalization of the health system can negatively impact collective health, when individual lawsuits compromise the global resource dedicated to the SUS.

As a methodology, a bibliographical research was carried out in books, articles and legislation that are dedicated to the study of the subject under analysis.

Right to Health

The concept of fundamental rights goes back to the need found, on the part of citizens, to impose limits on the abuses committed by the State against the indiscriminate use of its powers, through its constituted authorities. Thus, fundamental rights arise in a context in which the guarantee of rights to citizens was sought to the detriment of the exacerbated power of the State, based on guiding principles such as equality and legality, founders of the

Constitutional State. In this sense, despite the existence of scholars who defend that the origins of fundamental rights date back more than 2000 years before Christ (BC), in ancient and medieval civilizations, it is certain that we can only speak of fundamental rights from the existence of a State, in the modern sense of the term (FARIAS, 2018).

The modern conception of fundamental rights originates with the consolidation of the Democratic State of Law, with expansion of liberal ideals, implying control and limitation of state action. Although government benefits can certainly be identified in older communities, the struggle for rights to be guaranteed by the State is clearly identified with modern constitutionalism, here understood as the movement that, from the 18th century onwards, dedicated to agree on the delegation of power to the sovereign, while limits were established for state action (NEVES, 2007).

Thus, as explained by Dimoulis and Martins (2014), in order to talk about fundamental rights, it is necessary the coexistence of three elements: the State, the individuals and the normative text that regulates the relationship between the State and individuals.

These conditions were met only in the middle of the 18th century, when they took the form of important historical documents, such as the Magna Carta (1215), in England; the Petition of Rights (1628); the Habeas Corpus Act (1679); the Bill of Rights (1689) and the Act of Settlement (1701). Furthermore, the Virginia Bill of Rights already expressly proclaimed some kinds of fundamental rights, such as the right to life, liberty and property. Moving in the same direction, the Constitution of the United States of America (1791), by guaranteeing rights such as religious freedom, inviolability at home, due legal process, judgment by the Jury, among others (FARIAS, 2018).

Despite this evolution found in the face of the promulgation of various state documents in defense of fundamental rights, it is

considered that it was in France, in 1789, that the normative consecration of these rights occurred, with the promulgation of the Declaration of Human and Citizen's Rights, seen as a framework for expanding the list of legally protected rights. This document highlights, for example, the protection of the right to security, resistance, oppression, political association, the principle of presumption of innocence, free expression of thought, among others (FARIAS, 2018).

At that time, rights were considered negative, as they prohibited the State from intervening in the freedom to act – and to hire, possess and dispose of assets – of citizens. Public liberties, therefore, are subjective rights, opposable to the State, which, before 1789, was unknown in positive law (FERREIRA FILHO, 2008).

Fundamental rights are limitations imposed on the powers of the State, included in universal declarations and recognized by civilized societies, having, as a basis of validity, the general consensus of men about them. In the Brazilian scenario, the Constitution of 1824 and, later, that of 1891 already contained provisions of several fundamental rights in their constitutional text, the list being expanded with the Constitution of 1937 - in which rights were added such as the impossibility of applying life sentences, to security, to the integrity of the State, to the protection and employment of the popular economy. The 1946 Constitution, on the other hand, innovated by establishing several social rights relating to workers and employees, followed by the 1967 Constitution and the 1969 Constitutional Amendment 1, which, in turn, established a wide range of restrictions to fundamental rights and guarantees. Finally, the CRFB/1988 and also known as the Citizen Constitution, expanded the scope and relevance given to protected fundamental rights (FARIAS, 2018).

The location, after the preamble and the constitutional principles, its inclusion in the list of substantive clauses and its immediate applicability are examples of the constitutional relevance given to fundamental rights by the CRFB/1988. As Sarlet and Figueiredo (2012) assert, this relevance attributed to fundamental rights, in our current Magna Carta, concerns the fact that it was preceded by an authoritarian period, given that “the relevance to fundamental rights, the reinforcement of its legal regime and the configuration of its content are the result of the Constituent Assembly's reaction, and the social and political forces represented in it, to the regime of restriction of fundamental freedoms” (SARLET; FIGUEIREDO, 2012, p. 67).

Fundamental Right to Health: Concept and Minimum Content

The conceptualization of the right to health cannot be understood in a static way, being a process in permanent evolution; of systemic character, interrelated with a variety of other rights and which is constantly changing, with its own historical evolution (SCHWARTZ, 2001).

The first historical notion of the theme relates health as the absence of disease, and at the end of the 19th century, this concept takes on a liberal bias, by understanding this individual's state of disease as a harmful element to the functioning of industries, since the worker could not participate in the production process (DALLARI, 1988).

The development of this concept starts to add the notion of preventive health, as a way to avoid diseases through assistance measures, mainly sanitary. In this theme, one must have, as a matrix, the concept given by the WHO about health, arguing that

“health is the complete physical, mental and social well-being and not just the absence of disease”, encompassing a balance between man, in a physical and psychological dimension, and encompassing the environment in which he is inserted [1].

In fact, the concept of the right to health encounters several difficulties, ranging from the definition of the criteria to be used, through the choice of means to achieve it and the relationship with other branches of law, in addition to having an individual and a collective dimension.

Thus, the right to health has two facets: one related to its preservation and the other to its recovery. The right to health preservation has, in on the other hand, policies aimed at reducing the risk of disease, through a generic, non-individualized prevention of disease, while the right to health recovery aims to provide a positive state provision, with a welfare nature, in order to restore health of the individual (MAGALHÃES, 2008).

The modern concept of health has a collective dimension, allowing the dissemination and dissemination of preventive, corrective and care practices in the most diverse locations, encompassing the greatest number of recipients possible, through the premise of universality that guides the guarantee of this right. The contemporary care model no longer prioritizes individual actions, but starts to focus on society and its needs in terms of public health. Therefore, prevention, in all its forms, from the promotion of a healthy and dignified environment to citizens – with adequate conditions for survival, basic sanitation and healthy eating – came to be considered in the promotion of this right[2].

The right to health has become a social guarantee, valuing an individual and collective concept, in addition to the understanding that it depends on different factors, such as food, housing, basic sanitation, the environment, work, income, education, transport, leisure, as well as the multiple needs for intersectoral actions that are part of the proposed plans.

It is important to highlight that the urban occupation scenario in cities, with poles of wealth and poverty, being, on the one hand, the high economic standard, with access to all means and resources necessary for the quality of life, and on the other, concentrations of misery and contempt for human dignity is directly related to the profile of diseases and to the contemporary concept of the right to health.

Therefore, it appears that the right to health has a broad concept, which has a social, economic, cultural and mental dimension, surpassing the biogenetic view, being, in fact, the result of the quality of life of people and the community. The analysis of this quality takes place under a preventive and also repressive perspective of diseases.

In Brazil, the classification of the right to health as a fundamental right occurred with the enactment of the CRFB/1988, constituting one of the greatest advances of our Magna Carta, being included among the fundamental social or service rights, requiring the State to act that provides conditions for its implementation and realization.

By expressly making health a social right, according to Silva's teachings (2018, p.286-287), the Constitution considered these rights as “positive benefits provided by the State directly or indirectly, set out in constitutional norms, which enable better

conditions for life to the weakest, tending to equalize unequal social situations”.

In view of this, the CRFB/1988, by proposing a system for optimizing the norms of fundamental rights, imposed the responsibility, on the public authorities, to carry them out, through the implementation of concrete public policies, requiring that these have maximum efficiency and possible effectiveness, so that they achieve their goals and guarantee, in fact, the protected right.

The right to health would, in the view of Sarlet and Figueiredo (2012), have two dimensions: defensive and providing, this one attributing a duty to the State to carry out health effectiveness measures, and the other one constituting a negative aspect, of health preservation.

The right to health is, therefore, classified as a fundamental right of full and immediate effectiveness, universal, social and human, belonging to the list of those related to the existential minimum, with a welfare and preventive, universalist and guaranteeing nature, typical of a good state -being social.

The definition and legal nature of the right to health have the main purpose of promoting decent conditions of access and quality of life for individuals, both with regard to the effective prevention of diseases, treatment or care for the environment that surrounds them, as in the provision of essential services, with the creation of the SUS being a direct consequence of all the doctrinal perspectives on the protection of the right to health in Brazil.

Right to Health and the Principle of Completeness

The CRFB/1988, in addition to innovating, in the sense of inserting health as a fundamental right, created the bases for the institution of the SUS in Brazil[3].

The SUS was created with the main objective of promoting universal and equal access to all who are in the national territory and who need medical and hospital care, as well as medicines, surgeries, treatments and other policies related to public health, in order to prevent or treat disease.

The SUS is the main instrument implemented by the Brazilian State to seek effectiveness and guarantee public health for individuals, providing citizens with free access to health services. For this purpose, a system present in all federative entities, predominantly decentralized and preventive in nature, was conceived.

The SUS was established by Law 8.080/1990, having, as its initial task, the definition of which health actions and services will be able to guarantee the completeness of health care, making them compatible with the needs of the population and its sources of funding[4].

The guiding principles of the SUS do not constitute an exhaustive list, but they guide the entire performance of this system, in favor of the user-citizen. In addition to the principles that are expressly provided for in the constitutional text, there are other principles that are implicit in the Brazilian legal system.

The principle of universality is the basis of the system, resulting from a historical evolution regarding the guarantees of rights to citizens, typical of a welfare state that gained emphasis with the Health Reform Movement in the 1980s and expanded the range of SUS recipients, in contrast to the model previously adopted, in which only a restricted group of workers had support in health-

related issues (FARIAS, 2018).

The guarantee of universality, in addition to being an innovation in the Brazilian legal system, is closely related to the principle of equality, in its attempt to ensure the fundamental right to health, without any discrimination or privilege.

However, it is important to note that, within the concept of universality, the SUS established some requirements for care pharmaceutical, through Decree 7.508/2011. For universal access to the system, in terms of medicines, it is essential to comply with the requirements set out there[5].

Furthermore, directly related to this principle, there is the principle of equity, which aims to reduce social and regional disparities existing in the country, through health actions and services. Public health policies aim to provide individuals with a minimum level of guarantee, in which it is possible to establish a situation of dignity and reduction of inequalities across the country, expressing the idea of social justice.

With regard to the principle of comprehensive care, explicit in the constitutional text, it is initially emphasized that this is not to be confused with the principle of universal access, the first meaning that the service must cover all human needs, while the second implies attribution to any person.

Thus, as stated, the principle of comprehensive care refers to the care provided by the SUS, encompassing, as a priority, preventive conducts, as well as care conducts[6]. It is noteworthy that this action must take place in the most comprehensive way possible, in order to provide all users with the fulfillment of their needs, acting in a harmonious and articulated manner, observing the complexity levels of the SUS.

Integrity, however, does not mean access to any and all health services and supplies, by any citizen. The use of financial resources for the user has to be done in a proportional way, observing the equity and the maintenance of the system. Integrity must be understood as the existential minimum for the maintenance of the SUS (WEICHERT, 2010).

Integrity is also present in the relationship with the principles of efficiency and reasonableness, with innovation in public management and security, in the sense of prioritizing preventive activities, but it is limited to the competences of the SUS, that is, the activities of assistance to people, with actions to promote, protect and recover health, not being responsible for actions in other areas, even related to quality of life.

Note, however, that this principle only applies to system users. Comprehensive care is a right of effective SUS users, that is, those who choose to use the public health service; it presupposes the willingness to want to use the system. Integrity also requires the involvement of the various SUS actors in a search, through a democratic interaction, for consensus to achieve the realization of the right to health.

Another principle that governs the SUS is that of decentralization, understanding health as a stage for creative solutions and innovative alternatives that reflect the reality of each region, without following a single model.

The form of organization of the SUS presupposes the creation of a preponderantly decentralized structure, in which the Municipalities

receive the important task of implementing public, preventive or repressive policies, which meet the demands of the local population.

Thus, it can be said that the realization of the right to health occurs predominantly within the scope of Brazilian municipalities, which, through resources from the Union, the States, and even from their own revenues, invest in the necessary policies the population. The municipalization made this entity the main channel for the flow of SUS guidelines.

In addition, as a direct result of the principle of decentralization, there is the principle of regionalization, which states that health services must be organized in levels of increasing technological complexity, arranged in a geographically delimited area, and the population that will receive must be defined. attendance. Decentralization allows for greater efficiency in public policies, by bringing together the social reality of each location.

Furthermore, the SUS is a hierarchical network, managed by the Ministry of Health, at the federal level, from the development of guidelines and transfers of resources to other federative entities, through administrative consensus, mainly from the tripartite and bipartite inter-managerial committees (FARIAS, 2018).

Despite this decentralized action, it is noteworthy that the SUS is governed by the principle of unity, which means that it is a unitary, indivisible system, seeking to preserve and fully meet the needs of society. Thus, in each sphere of action, the system seeks, in a homogeneous way, to implement public policies.

With regard to community participation, this is a guideline that determines public agents the creation of means of community participation in the conduct of the SUS, whether at the stage of formulation, management or execution of health services, materializing, mainly, in the performance of the Health Councils and Conferences.

Judicial Control Of Public Policies

Although the level of demand of contemporary society is increasing, in the sense of seeking to meet social demands, there is the option, by the public manager, to ensure the maximum in revenue, minimizing the realization of these postulations. Thus, for the Judiciary, there is a need for an active posture with the scope of solving this problem, especially in light of the relevance of social rights. In this context, one of the most intense legal discussions of the present emerges: the judicial control of public policies and the effectiveness of fundamental rights, in conflict with the principle of separation of powers.

The norms of social law are, as a rule, vague and lacking in precision precepts, having as their recipient the Public Authorities and needing it for the execution of public policies and the provision of stipulated services.

This supplementary action of the Judiciary, however, could not occur freely and unconditionally. It is necessary that there has been a deviation from the natural course of the public interest in the administration or in the Legislative (ZANETI JÚNIOR, 2011). Within this view, among the activities of the Judiciary is the control of public policies, whether in the normative or administrative scope, allowing a broad discussion within society on decisions that interest the community as well as on the extent of control by the Judiciary (SÁ, 2002).

Brazilian jurisprudence, little by little, evolves in this matter, recognizing the role of the Judiciary as a guarantor of these rights, given the omission of the Executive and Legislative Powers, but this does not remove the need for a specific debate on the subject, especially, regarding the judge's technical capacity to deal with demands as complex and with systemic effects as public policies. Perhaps this is the biggest challenge in studying the relationship between the Judiciary and public policies.

The Judiciary assumes not a substitutive role for the Executive and Legislative, but a complementary one, fulfilling its constitutional function of intervention in public policies, when the omission of the public power to act in this way is proven.

It should be noted that this performance and growth of the Judiciary has been the object of great criticism, many of them correct, as pointed out by Fonte (2013, p. 182), which highlights the restricted view of the judicial body as a harmful element to its performance in the sphere of public policies, emphasizing that "its supposed inability to make macro-structural assessments, since its job is to deal with intersubjective conflicts, the so-called microjustice".

These restrictions do not remove or restrict the legitimacy of the Judiciary, but they warn about the need for its judicious performance, paying attention to the roles of other powers and observing constitutional determinations.

It is not the function of the judicial body to create or change public policies through their personal conceptions, but only to control their execution.

Now, if the Executive fails to fulfill the fundamental rights, it is up to the Judiciary to make it effective, under penalty of making the constitutional command an integral part of a mere political discourse.

The superiority of one power over another is not defended, but its action in the event of inertia or wrongful action, provided that they are duly proven within a judicial process, contributing to the scenario of the effectiveness of public policies.

The reserve of the possible and the existential minimum

The second half of the last century witnessed a multifaceted academic questioning of legal purism, with the emergence of diffuse research movements under the "Law and" formula. Although the most creative approaches – such as law and music, law and cinema, law and smell and even law and magic – are still in its infancy, the submission of legal categories to methods from other areas of knowledge, such as Sociology, Anthropology and Psychology, has solid literature and important bibliographic contributions. The sociology of law, legal anthropology and forensic psychology, for example, contributed to the critical assimilation of the rapid transformations of the legal phenomenon after World War II and, most especially, after the end of the Cold War and the beginning of an uncertain new global order (FARIAS, 2018).

Reinforced by the contemporary supremacy of the economic system in times of globalization (NEVES, 2007), the movement of approximation between Law and Economics, since its inception in the 1960s, has been one of the most prolific among the new methods of observing Law. Developed from texts by Profs. Ronald Coase and Richard Posner, from the University of Chicago, and Guido Calabresi, from Yale University (ROSA; MARCELLINO JÚNIOR, 2009), the economic analysis of law presupposes the submission of norms to an economic perspective, analyzing the behavior of individuals before the law and considering the

advantages of certain rules for the maximization of wealth.

Typical economic concepts, such as prices, supply and demand, rational choices, externalities, information asymmetry and other microeconomic topics (MANKIW, 2009.) are incorporated into legal research, which, gradually, also demands an adjustment of legislative options and decisions to these parameters.

In this way, economic analysis brings to law a consequentialist logic, concerned with the relationship between cost and benefit of legal rules. Efficiency in the management of limited social resources is a concern of Economic Science. This can contribute to planning public spending, allowing for greater prioritization of scarce social spending.

In fact, the argument that social welfare, provided by the State, should be weighed by economic planning, which would be restricted in times of crisis, was a great success and bordered on consensus in the political environment, since the last decades of the last century (ABREU, 2008).

With the accession of Margaret Thatcher to the British Government, in 1979, and the project of reinserting the UK economy at the top of world capitalism, the notion spread, among several countries, that the provision of services and the guarantee of standards could no longer be supported by the Government (FARIAS, 2018).

It is worth noting that social rights require government provision through the implementation of public policies and require more financial resources than civil and political rights. Abstaining, in simplistic reasoning, is always less costly than doing something. Thinking about the costs that a private health plan or the payment of private schools bring to a family budget also makes us believe that, when hospitals or schools are offered by the State, there will be a greater expenditure on government activity. When considering the purely economic bias of these choices – that is, when considering the importance of a service and its price – the tendency is to choose priorities, to focus resources.

In reality, freedom rights, civil or first generation, such as voting, coming and going, demonstrating, having access to justice and even private property, prove to be as or more costly than social benefits. This argument is developed in the book *The Cost of Rights: Why Liberty Depends on Taxes*, published in 1999, in the United States, by political scientists Stephen Holmes and Cass Sunstein. The authors refute the classification between positive and negative rights, arguing that all rights demand resources from the treasury and are, therefore, positive. They claim that, in order to calculate the costs of guaranteeing the right to property – perhaps the most basic of classical liberal theory – the expenses for the punishment of crimes against property must be added together, as well as the resources allocated to the military budget (HOLMES; SUNSTEIN, 1999).

Freedom of expression, also considered essential for liberalism, is not, according to the authors, totally negative either, since, although the State cannot intervene in individual or collective political manifestations, it must guarantee the maintenance of public spaces, such as squares and parks, where the population can demonstrate their claims. In this context, it is highlighted that the resources spent in these public places come from the taxation imposed on all citizens, including those who eventually disagree with the agenda of the protests carried out there. The same reasoning applies to the right to life (HOLMES; SUNSTEIN, 1999). In Brazil, although, among the eight Brazilian Political Charters, social rights have been enunciated since the third, the contemporary

Constitution brings an extensive - and only exemplary - article on social rights, consolidating the realization of the dignity of the human person in accordance with state benefits, while preserving the free market, private property and inheritance as necessary rights in a market economy.

Despite this, the citizen Constitution was promulgated in 1988 and, in 1989, President Fernando Collor was elected, with an explicitly neoliberal political platform, of reducing the State to a minimum. The implementation of the new constitutional order, therefore, went through, from the beginning, questionings of an economic nature. Rosa and Marcellino Júnior (2009, online) state that “the Constitution of the Republic arrived in Brazil when a political-economic model absolutely incompatible with the final purposes of the new constitutional order already predominated in Latin America”. In fact, the reforms developed in the 1990s in public administration generated a regulatory State that certainly changed the perspective of an originally guaranteeing and ruling Constitution, approved with reverence and historical commotion only a decade earlier.

Due to the claims related to the realization of the fundamental rights that have, as a common characteristic, the need to make available material means - financial and budgetary - to make their realization possible, a dependency related to the state's action for the realization of this range of rights, linked to the need to formulate public policies to become enforceable, as well as the allocation of public resources.

Thus, from the conception of this list of rights as dependent on an active state action, in the sense that, in addition to developing public policies, effective material means must also be made available to guarantee the population's rights, the discussion involving the reserve the possible versus the existential minimum that must be guaranteed to all citizens.

In the view of Sarlet and Figueiredo (2012), the reservation of the possible is characterized by limitations to the realization of fundamental rights under the factual and legal aspects. The factual dimension is understood as the total absence of resources for the realization of benefit rights, but it can also be related to how these resources are distributed, while the legal dimension concerns the existence of resources, without these being available or being able to be used by the recipients of the standard. The factual bias brings, as a consequence, the understanding that the absence of resources, as a means of not realizing rights, it must be duly proven by the public power, while the legal one is related to the state power in disposing of resources through the constitutional provision on the budgetary matter.

It is important to highlight the existence of a negative dimension related to the reservation of the possible, which tends to deny a provision that is too onerous to the citizen. The Judiciary must act with proportionality and reasonableness in face of the problem of lack of resources.

The possibility of the State's action, in its various facets, is umbilically linked to its budget, not being able to talk about control of public policies, without observing the budget rules, not admitting the defense of a Judiciary that imposes unlimited consequences for the expenses of the State.

The mere allegation of the existence of the reserve of the possible on the part of the government does not exempt it from fulfilling its constitutional obligations, it being incumbent upon it to objectively

prove the insufficiency of resources and the inexistence of a budget forecast.

The origins of the concept of the existential minimum began in Germany, where the relationship was directly related to the right to life and dignity of the human person; however, with the legal maturity that various States have gone through over the decades, especially due to the influence of the welfare state, this understanding began to have a sociocultural dimension, linked to the principle of equality.

In Brazilian territory, the pioneer in the study of the subject is the indoctrinator Ricardo Lobo Torres, based particularly on the studies of John Rawls and Robert Alexy and understanding that the existential minimum finds support in the principle of freedom, but in a tempered way. Thus, if within the existential minimum are the rights to freedoms that depend on the realization of material conditions for their true enjoyment, then, consequently, the right to the existential minimum will only be realized as the fundamental social rights are put into effect. In this approach, it is understood that fundamental social rights, in the strict sense, are confused with the idea of the existential minimum. In this sense, Ricardo Lobo Torres recognizes that state benefits of a fundamental nature correspond to subjective rights, which aim to satisfy the minimum existential for a life with dignity (TORRES, 2009).

Ricardo Lobo Torres (2009, p. 36) clarifies that not all fundamental rights are considered as having an existential minimum, but only those that generate rights to “dignified existential situations”, since “without the necessary minimum, existence ceases. of man’s survival and the initial conditions of freedom disappear”.

When it is stated that a right is part of the select list of those considered as belonging to the existential minimum, the guarantee of minimum conditions is imposed, in order to materialize the principle of human dignity, for the realization of this right.

The fundamental rights and those relating to the existential minimum are guaranteed by the State, through the provision of public services, financial benefits and legal security that is made available to individuals. In this way, the existential minimum works as an indicator of priority targets for government investment, being able to live in harmony with the legal reserve based on a valid allocation – backed by the dignity of the human person – of public resources (BARCELLOS, 2011).

The existential minimum corresponds to an essential part in the implementation of public policies, indispensable to guaranteeing the dignity of the human person, being carried out.

The lack, however, of sufficient financial support to meet social needs leads to allocation choices to be made by managers.

Thus, it is clear that the issue is complex, since it requires the establishment of objective criteria and priorities so that it is possible to resolve it case by case, according to the most urgent social needs.

The Judiciary must be a guaranteeing element of the realization of the benefits contained in the existential minimum, ensuring the requirements of life with dignity, observing, however, the existence of finite resources within the scope of public administration and, in the face of the case, acting with weight, and with based on reasonableness and proportionality.

These criteria are not, however, fixed and immutable, and cannot be previously established or listed in an exhaustive way. On the contrary, they will always be subject to the analysis of financial, legal and economic capacity, allied to the expectations and needs of the moment, leaving it clear that human needs cannot be confused with simple existence. Living with dignity does not mean surviving, given that the existential minimum must be analyzed in harmony with the right to life and the principle of human dignity (SARLET; FIGUEIREDO, 2012).

In this sense, it is clear that the allocation of resources should have, as a basis, the objectives adopted by the Constitution, in order to realize the protected rights and to avoid legal uncertainty for citizens, regarding the probability of such right being guaranteed by the power public or not, due to economic criteria.

It is essential to establish criteria for the allocation of resources, as well as the delimitation of the content of the minimum essential, which is perhaps the most arduous task when we talk about judicial control of public policies.

Final Considerations

The phenomenon of judicialization of social relations reflects the growth of the Judiciary Power in recent decades, increasingly regulating practices and themes that were previously distant from the daily life of this Power. The Judiciary starts to act in the realization of social, economic and cultural rights, in the excesses and omissions of the public power.

In the subject of this study, it was noticed that the growth of the Judiciary took place mainly because the Executive has not been fulfilling its constitutional role, not treating public health as a priority. The Brazilian State’s agenda privileges the achievement of economic goals, to the detriment of resources for health.

In recent years, the topic has become part of the daily life of Brazilian society, which has transferred to the Judiciary the role of guaranteeing its health expectations. The number of lawsuits filed against the State claiming health services and medicines has been growing significantly and the judicialization of health creates a distorted system, which benefits those who manage to file suits in court.

Excessive judicialization is far from being eradicated and its side effects remedied. The data involve the responsibility of the Executive, the Judiciary, society, and, in this regard, even though it is not a specific object of analysis in this study, it is important to record the judicial use to protect hidden interests, especially those of the pharmaceutical industry. It is an extremely organized sector, when they act in defense of their interests before the Executive, Legislative, Judiciary and regulatory agencies, seeking the insertion and redefinition of therapeutic guidelines.

The Judiciary, many times, due to flaws in its performance, becomes an instrument of this powerful industry, which encourages and seeks to introduce new drugs through individual actions, or camouflaged by interests in the judgment of Non-Governmental Organizations.

It is understood that the individual judicialization of health, as a rule, does not produce technical discussions, nor does it analyze public policies. It is, only, the general guarantee of the realization of the fundamental right, without going into any specificity of the subject. This posture undoubtedly generates blatant distortions and contributes to the inefficiency scenario of the SUS.

From the above, it is understood that the Judiciary has to improve its technical performance in the area of public health, understanding it in its collective, systemic and integral vision, and also incorporating the right to health as part of a public policy of responsibility not only the Executive, but the Judiciary and society. It is necessary to prepare for a democratic dialogue between the actors, with mechanisms and flow capable of making fair, transparent, financially advantageous choices and speeding up health demands.

With regard to municipalities, it is possible to conclude that city halls should check the medicines that are most requested in lawsuits and assess whether offering these medicines spontaneously to the population would be more advantageous in financial terms. Of course, if the budget of the municipalities allows it, offering medication spontaneously to those who need it is desirable, however any analysis must be made prioritizing collective health, which cannot be sacrificed for the benefit of the individual [7-20].

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