Judicialization of Health in Brazil: Categorization of decision-making stages by the Supreme Federal Court and the impacts on the Unified Health System

Judicialização da Saúde no Brasil: categorização das fases decisionais a partir do Supremo Tribunal Federal e os impactos no Sistema Único de Saúde

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ABSTRACT

This article intends to analyze the decision-making stages of the judicialization of public health policy in Brazil by the highest legal court in the country — the Supreme Federal Court of Justice (STF). Subsequently, we present the most relevant criticisms of the excessive judicialization of health, attempting, to list alternatives in order to discuss a possible program of improvements for public health policy, having as its main element the dialogue between the Brazilian Justice and Health Systems. The methodology used can be characterized as quali-quantitative, considering that data collection was used on the STF website for research and analysis of judicial decisions, as well as a biographically doctrinaire review.

Keywords: Judicialization of Health, Supreme Federal Court, Right to Health, Public Health Policy

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RESUMO
Pretende-se analisar as fases de decisão da judicialização da política pública de saúde no Brasil a partir da mais alta corte jurídica do país — o Supremo Tribunal Federal (STF). A seguir, relatam-se as críticas mais relevantes à excessiva judicialização da saúde, tentando, ao final, elencar alternativas para se discutir um possível programa de melhorias para a política pública de saúde, tendo como elemento principal o diálogo entre o Sistema de Justiça e o Sistema de Saúde brasileiros. A metodologia utilizada pode ser caracterizada como revisão de literatura de tipo narrativa, utilizando-se coleta de dados no sítio eletrônico do STF a partir da descrição de decisões judiciais, assim como revisão bibliográfico-doutrinária.
Palavras-chave: Judicialização da Saúde, Supremo Tribunal Federal, Direito à Saúde, Política Pública de Saúde

1. Introduction

In this article, we approach the origin, development and current situation of judicialization of public health in Brazil in its four stages of decision-making process by the Supreme Federal Court (STF). It must be stressed out that this approach allows the public officials to extent the understanding of this process, making possible changes during the decision-making process.

For this purpose, we will describe these four stages of decision-making by re-thinking the consequences of an excessive judicialization of health merged with alternatives that might promote a juridical and political targeting with a view to impact future judicialization processes and provide elements for improvement of action in the field of public health policies. In this sense, the discussion can, hereafter, strengthen the research agenda that compares Brazilian and Portuguese experiences, linting similarities and differences in these processes.

Focusing on the above-mentioned aim, this article will present a bibliographical review with the intention of studying in depth the theoretical and conceptual framework upon a judicialization of the right to health in the Brazilian Supreme Federal Court (STF) from 1990 up to the present days.

For this reason, we will take a quali-quantitative approach, considering that data collection was used on the STF website for argumentative description of juridical decisions — court jurisprudence — as well as a biographically doctrinaire review, with the selection of the main scientific documents regarding the Right to Health in Brazil.

2. The Concept of Judicialization

The classic concept of judicialization as global expansion (Tate, Vallinder, 1995) corresponds to two founding characteristics: a) the scope of activity of the Judiciary in ballot previously considered exclusive of the Executive and Legislative

Powers; b) submission of the Executive and Legislative Powers to the influence of modus operandi of jurisprudential proceduralism, highlighting the prominence of Judiciary Power from 1980/1990 up until the present days.

In this way, the judicialization of public policies would be seen as growing use of the Justice System, not dealing with the resolution of political conflicts (*politics*), but with the questioning of faults or omissions in production of public policy (*policies*) by the Executive, or, yet, with the inaction or legislative flaws in relation to the production of legal regulations (Oliveira, Couto, 2016; Oliveira, 2019).

For Barroso (2017), specifically on the causes of judicialization in Brazil, these three fundamental elements would be summarized: a) re-democratization of the country taking the promulgation of the Constitution of the Republic in 1988 as the apex, which strengthened the conception of the Judiciary as Political Power; b) the constitutionalization of public policies that can be judicialized for their effective completion, denominated comprehensive constitutionalization; c) consolidation and extension of the Brazilian constitutionality control system with the extensive right to preposition foreseen in the Brazilian Constitution.

In relation to the influence of this debate in the national juridical culture, this text has constructed an evolutive line of the decisions about judicialization of health taken by the STF, as defined in the table below, from 1990 up until the present days, delimiting four important stages of judgement of the Supreme Court: a) non-activism (1988-1996); b) absolutization of health (1997-2003); c) cost of rights: existential minimum vs. reserve for contingencies (2004-2009); d) Evidence-based medicine (MBE) (from 2009 up until the present days). This innovative characterization seeks to respond to the following question: What is the descriptive landscape of health judicialization, its impacts and consequences, based on the four stages of decision-making process used by the STF?

3. Stage 1 of the decision-making process by the Supreme Federal Court: Non-activism

We classify the first stage of decision-making process by STF regarding the materialization of the right to health as "Non-Activism", since the first judgement about this matter which appeared on the website of the supreme court lingers in a jurisdictional lacuna of almost a decade afterwards the 1988 Constitution.

In this way, the Non-Activism stage extends from the legal force of the 1988 Constitution — with the promulgation of fundamental social rights — until the year of 1997, when the STF takes a decision on the Petition 1.246/SC, reported by the Minister Celso de Mello, on the case of minor carrier of rare illness — Duchene's Muscular Dystropy. This means that it took almost ten years for a case of judicialization of health to reach the Supreme Court (Ferraz, 2019).

TABLE 1 Four stages of decision-making process used by the Supreme Federal Court (STF) on the judicialization of health rights in Brazil: main judgements

THE DECISION-MAKING STAGES OF THE SUPREME FEDERAL COURT	MAIN JUDGEMENTS
Stage 1: Non-activism (1988-1996)	1988 – Constitutionalization of the Right to Health Until 1996 – Without cases of health rights judged in the Supreme Court
Stage 2: Absolutization of Health	1997 – Petition (PET). 1.246/SC 1999 – Regimental Appeal in Bill of Review – AGR in AI No. 238.328-0/RS 2000 – Regimental Appeal in Extraordinary Appeal – AGR in RE No. 271.286- 8/RS 2000 – Extraordinary Appeal – RE No. 195.192- 3/RS
Stage 3: The Cost of Rights: Reserve for Contingencies vs. Existential Minimum (2004-2009)	2004 – Claims of Non-compliance with a Fundamental Precept (ADPF) n.º 45 2007 – Suspension of Early Authority – STA No. 91/AL
Stage 4: Evidence-based medicine (2009 up until the present days)	2009 – Public Hearing No.4 – Judicialization of Health 2010 – Regimental Appeal in the Suspension of Early Authority No. 175 – STA 175 – AgR/CE 2010 – National Health Forum (Fórum da Saúde/CNJ)

Source: Author's elaboration based on the research of jurisprudence on the website of the Supreme Federal Court (STF) <https://portal.stf.jus.br/>.

The main arguments attached for the STF's non-activism stage regarding the judicialization of health concern the persistent interpretation of the pragmatistic character and the limited efficacy of the recent constitutionalized regulations on the right to health, in addition to the justification on reserve for contingencies "as a condition of factual restriction characterized the scarcity of public resources considered in specific situations that involve provided social rights" (Moreira, 2011, p. 99).

To mark the "Non-Activism" stage, the Brazilian Legislative Power needed to approve a body of infra-constitutional regulations and provide the effectiveness to the recently promulgated Constitution, primordially including its quotational mandates. Since with the passing of the years, the Legislative has failed to do so, at least when responding to the rhythm and pressure expected by civil society, this came out of its position of inertia and started a series of demands before the Judiciary, generating, in consequence, some sort of a republican raid between these powers (Reisseinger, 2007).

The stage that we classify as "Non-Activism" ends in the second half of the 1990 decade, in the attempt of seeking a solution for the claimants before the inertia of Executive power in the organization and implementation of public health policy and, mainly, in the interests of healing the acting lacuna of Legislative power upon the regulation of the fundamental right to health.

4. Stage 2 of the decision-making process by the Supreme Federal Court: Absolutization of Health

We characterize the STF's second stage of decision-making process as "absolutization of health" (Ribeiro, Vidal, 2018). The fact that the STF conceded the grand majority or basically all the legal claims regarding the constitutional right to health without limiting its scope gives cause to such denomination, making absolute, in this way, mainly art. 196 of the Brazilian Constitution[1] withdrawing it, thus, from the range of planning and limited efficacy in which it was implicated. Or rather, absolutization of health meant to concede absolutely the right to health, without making it relative, including the regulatory integrity of its aims, principles and directives constitutionalized in the Political Charter of 1998 (Ferraz, 2019; Vasconcelos, 2020).

The decisions of this stage were based on the principle of dignity of the human person[2], in the inalienable right to life[3] and in the health value as an existential minimal for all human beings[4]. The second stage of STF concerning the decision-making process was consolidated in the year 1997, with the judgement of Petition (PET) 1.246-SC and ended with the Claim of Non-compliance with a Fundamental Precept (ADPF) n.º 45, from 2004, when finally, some degree of limitation occurred around the subject.

The main feature of the second stage of decision making — Absolutization of Health — deals with the initial trajectory of Judiciary as a main character in the enforcement of the right to health in the lacuna left by the other two powers: Executive and Legislative Powers. Such prominence is characterized, in the first

1. Art. 196. Health is a right of everyone and a duty of the State, guaranteed by means of social and economic policies that foresee the reduction of risk of illness and of other grievances and to universal and egalitarian access to actions and services which serve for its promotion, protection and recovery (CF/88).
2. The Art. 1: Federal Republic of Brazil formed for the indissoluble union of the States and Municipalities and of the Federal District, is constituted in the Democratic State of Law and is based on: (...)
   III – the dignity of the human person. (CF/88, emphasis added).
3. Art 5º Everyone is equal before the law, without distinction of any nature, guaranteeing the Brazilians and foreigners resident in the Country the inviolable right to life, liberty, equality, security, and property, in the following terms (CF/88, emphasis added).
4. For Torres (2008), pp.8), "There is a right to the minimal conditions of dignified human existence that cannot be subjected to an intervention by the State and that still requires positive state provision".

instance, by the absolutization of the right to health — a right with no obstacles at all — being qualified as a bearer of full and universal efficacy, without a need of any legislative regulation. As reported by Wang (2008): "as it is clearly stated that upon the decision between the right to health, concerning the right to life, and financial issues, these shall always have to be passed over in that relationship" (Wang, 2008, p. 546).

We stress out that these actions received by the Supreme Court were the matter of micro-justice — as individual and non-collective demands (Wang, 2008). There was no concern to the ministers regarding their consequences for public policy and, mainly, about the cost of materialization of these rights to health, which we denominate as a reserve for contingencies (or the reserve for allowable financing).

We still assert that this second stage of the STF's decision making process would be compromised with the denominated Ransom Principle, systematized by Dworkin (2010)[5] and that advocated that any health treatment — of any kind of complexity and financial cost — would have to be supplied to all citizens, then, according to this principle, health and the preservation of human life would be the most valuable assets for a community. For such a reason, the maximum financial resources should be applied to save all and any life, no matter how small the chances of survival could be and how much it would cost.

5. Stage 3 of the decision-making process by the Supreme Federal Court: Reserve for Contingencies vs. Existential Minimum

In this third stage of the STF's decision making process, we discuss how the Supreme Court took a turn in the decisions concerning the right to health in the sense of counterweighting the importance of the cost of rights, mainly the rights considered to be the second generation, or rather, rights that require a financial counterpart of the State for their prioritized enforcement, as is the case of the fundamental right to health.

We use the expression "cost of rights" in this topic ballast in the already classic work of Holmes and Sustein (2019), where "cost" means a quotation cost, and "rights" as important interests that can be protected in a reliable way by individuals or groups by using instruments made available by the State" (Holmes; Sustein, 2019, p. 5.).

5. According to Dworkin (2010), the Ransom Principle is based on the idea conceived by the philosopher René Descartes concerning health and human life as a supreme goods of the society and, also, inserted in a Society in which the sharing of goods would be unfair and unequal, it would be inconceivable to demand the poorest to pay for improvements of their health conditions. As it is reported: (...) health care must be equally distributed, so that even in a society with unequally distributed amount of richness and debauchery of equality, no one should be denied the medical care they need" (Dworkin, 2010, p. 434).

Therefore, there are two classic cases in the Supreme Court — considered leading cases in literature (Wang, 2008; Costa, Mota, Araújo, 2017; Ribeiro, Vidal, 2018) — concerning the theory of the cost of rights regarding this third stage of the STF's decision making process which concerns the right to health: the already mentioned Claim of Non-compliance with a Fundamental Precept — ADPF n.º 45 — MC/DF10, from 2004, and the Suspension of Early Authority – STA n.º 91/ AL, from 2007. These are only two cases, characterized, however, as of unequal repercussion (Pedron, Neto, 2018; Ribeiro, Vidal, 2018) in the sphere of the Supreme on Judgements about judicialization of health that specifically involve the dichotomous issue of the (financial) reserve for contingencies and the existential minimum.

The Claim of Non-compliance with a Fundamental Precept – ADPF 45 is considered leading case in the STF not only by representing the first decision on the theory of costs of rights, but also by discussing the issue of the insertion of the Judiciary in the enforcement of public policies, of the social rights and expressly of the reserve for contingencies and the existential minimum.

The ADPF 45 was the first decision on this issue of the Supreme Court in which a minister of the court explicitly elaborated a criterion in order to determine the appropriateness of the reserve for contingencies. The suggested criterion was based on the junction between the reasonableness of the claim and the financial availability of the State. If both formational elements of the criteria suggested by the minister were affirmative, provable and accumulative (reasonableness of the claim + the financial availability of the State), there would be a state obligation to enforce the right demanded, otherwise, it would mischaracterize the public entity's possibility of the practical realization of such rights, and, in the specific case in question, of the fundamental right to health.

Another leading case that deals with the theory of the cost of rights is the Suspension of Early Authority – STA n.º 91/AL12, from 2007, where minister and STF president, Ellen Gracie, partially deferred application of the state of Algoas in order to suspend the decision granted in a public civil action that determined the Alagoan Executive to supply the medication for the treatment of patients with chronic kidney diseases necessary during hemodialysis procedures and for transplanted patients.

The decision rendered by the Minister Ellen Gracie in the STA 91 determined that the state of Alagoas was not obliged to provide the medication pleaded in the lawsuit — an unprecedented fact in a decision aimed at a federal unit in Brazil. The argumentation was based on the theory of costs of rights, anchored in the reserve for contingencies, since it was based on the limitation of resources and on the need

to rationalize the expenses for the attendance of a greater number of people and not only of those carriers of the disease in question.

The STA 91/AL decision was a milestone for the advent and consolidation of the theory of the costs of the right to health, presenting as a defense the theory of the reserve for contingencies, summarized by the following citation of the minister's vote: "the management of national health policy, which is carried out on regional basis, seeks greater rationalization between the cost and benefit of treatments that must be provided free of charge in order to reach the largest possible number of beneficiaries". (STF – STA: 91 AL, Reported by: Min. President. J.26/02/2007; DJ:05/03/2007)

Thus, both the ADPF 45, of 2004, and mainly the STA 91/AL, of 2007, are considered paradigmatic decisions regarding the stage of the theory of the costs associated to fundamental social rights, and in this specific case, to the right to health. Both bring in their argumentations, in addition to the idea that the existential minimum should be respected, the importance of emphasizing the reserve for contingencies of public entities so that they do not compromise the stipulated budget for the health sector. In this respect, these decisions will have important impacts in public policy management processes, since, in this case, having an available budget from the Executives, even though in a rationally related perspective, causes repercussion in the way how health policies are organized in the Federal States and will cause new decisions be taken in the scope of this policy, while seeking to reduce costs of judicialization[6].

6. Stage 4 of the decision-making process by the Supreme Federal Court – Evidence-based Medicine (MBE)

The last stage of decision-making process in relation to the judicialization of health can be classified as Evidence - Based Medicine (MBE), once the utilization of scientific arguments based in academic literature is observed in the instance of the judicial process and in their decisions made by the Supreme Court, with the regard to the demands involving the right to health.

For the analysis of the stage of Evidence - Based Medicine (MBE), we will mention three episodes of the law field and of the right to health that present considerable reflections in legal and political terms: a) the Public Hearing No. 4, convened by Minister Gilmar Mendes, of the Supreme Federal Court, and held on April 27, 28, and 29 and May 04, 06, and 07, 2009 about the judicialization of the right to

6. Regarding this, please see MORAES, Israel Silva Judicialization of health: *How to reduce the expenses of the Health Minister?* 2016. XV, 183 f., il. Dissertation (Master Degree in Administration) – University of Brasilia (UnB), Brasilia, 2016. Retrieved from: <https://repositorio.unb.br/handle/10482/22488> on June 04, 2020.

health; b) the emblematic decision given a year later by the STF Plenary in the Regimental Appeal in the Suspension of Early Authority No. 175/2010 (STA 175 – AgR/CE), reported by Minister Gilmar Mendes, that presents a systematization of decisions of the previous stages of the Supreme Court and, mainly, criteria and parameters of judgement to be analyzed and followed both by legal personalities and by the technical-executive contribution of the managers of public policies in the analysis of the judicialization of health for the country; and c) the activities performed by the National Health Forum, the National Council of Justice (CNJ), established by Resolution No. 107, of the April 06, 2010, and its main decisions and impacts in the Brazilian law regarding health.

Therefore, the analysis of the fourth and final stage of decision making is based on the approach related to the Public Hearing on Judicialization of Health, taking into account the following aspects: conception, procedure and reflections on the so-called Judicialization of Health.

The Public Hearing on Judicialization of Health was held on April 27, 28, and 29 and May 4, 6 and 7, 2009, with the following subjects to be discussed and stressed out per: a) April 27 – "Access to Health Care in Brazil – Challenges to the Judiciary"; b) April 28 – "Responsibility of the Federal Entities and the Financing of the Unified Health System (SUS)"; c) April, 29 – "SUS Management – Legislation and Universality of the System"; d) May 4 – "Anvisa Registration, SUS Protocols and Therapeutical Guidelines"; e) May 6 – "Public Health Policies – Comprehensiveness of the System"; f) May 7 – SUS Pharmaceutical Assistance". It is observed that at that moment, subjects related only to the budgetary costs will result in elements that report a connection with the Unified Health System – SUS.

There are 37 specialists qualified for the Public Hearing, who were classified as follows: 17 (seventeen) representing law, including ministers, judges, lawyers of the Union, lawyers, promotors, attorneys, academics and federal prosecutors; 11 (eleven) representing civil society, including system beneficiaries and members of research institutions; 8 (eight) representing of the Ministry of Health and the medical sector; and 6 (six) public officials.

Gomes et al. (2014) when analyzing the lectures performed during the public hearing in question, concluded that the main results achieved were the result of the use of scientific evidence in the decision-making process by the Judiciary and Executive, namely: a) registry in the Brazilian Health Regulatory Agency – ANVISA; b) evidence of technological effectiveness and security; and c) economic efficiency based on the cost-effectiveness and budgetary impact.

Santos and Marques (2014) created, on the basis of the public hearing discussed, a table in which are listed the main ideas exposed in the Supreme Court at that time:

TABLE 2 Central ideas of the discussions provided in the Public Hearing on the Judicialization of Health

KEY POINTS	%
A – The right to health must be guaranteed through public policies.	12.8
B –The right to health is a constitutional guarantee that shall not depend on public policies.	7.9
C – Approach on the phenomenon of judicialization.	14.6
D – Approach on the financing of health policies.	7.9
E – Conflicts between individual and collective right.	6.7
F – Approaches referring to the decree of general repercussion, relevance of public hearing and proposal of Binding Precedent.	10.4
G – There are frauds in the lawsuit associated to health, as well as in the Public Administration.	5.5
H – There is solidarity among federal entities to guarantee the right to health.	1.8
I – The responsibility must be assigned to each federal entity, according to the competencies defined by law.	4.3
J – There are flaws in public health policies.	6.7
K – Conceptual approaches on health policies.	7.3
L – The right to health must be guaranteed through public policies, admitting, however, any exceptionalities.	1.8
M – Only the hyposufficient people can litigate through legal proceedings for the right to health.	1.2
N – Discussions without subjects of legal approach.	11.0

Source: Santos & Marques (2014), based on the information available on the website of the STF regarding the Public Hearing on Health. Retrieved from: <http://www.stf.jus.br/portal/cms/verTexto.asp?servico=processoAudienciaPublicaSaude>.

In accordance with the table above, a significant range of problems pertaining to the judicialization of health in Brazil was discussed: from the excessive judicialization up to the impact of the costs of rights, passing for the inter-federative competence and its reflections on public policies.

This debate follows on in the second episode of the fourth stage of the decision on the right to health by the STF: The Regimental Appeal filed by the Union in the Suspension of Early Authority No. 175 – AgR in the STA 175/CE, having its final decision provided in 2010.

The paradigmatic decision presented by the AgR in the STA 175 is configured like the first major decision after raising the questions during Public Hearing on the Judicialization of Health and, for this reason, it is cited in the majority of the

related decisions provided by other superior courts in Brazil, serving as a type of compass guiding the fate those judged on Judicialization issues up to present days.

We can summarize the vote of the Minister and the President of the STF, Gilmar Mendes, as rapporteur of the STA 175-AgR/CE (2010), in five basic parameters which determine judicial decisions on judicialization of the health: (1) competence division of the federal entities — Union, States, Federal Districts and Municipalities — with the aim of medication provision, related to the decentralization of the pharmaceutical assistance policies; (2) the Judiciary must intervene in order to comply with the public policies on eventual omissions or inefficient provision by the Executive; (3) Brazilian Health Regulatory Agency – ANVISA registration, as an essential condition for the supply of the requested medication; (4) the State will not be obliged to supply medication or treatments classified as experimental, i.e., that have not yet passed the clinical criteria required for commercialization and provision; (5) treatments and medication not regulated by public health policies, but already commercialized by the private sector, can be offered to the population as they are followed by ample probative instruction and with reduced possibility of precautionary measures (Oliveira, 2019; Ferraz, 2019).

One of the main reflections of the STA 175 – AgR/CE occurred in the recent decision published by the 1st Section of the Superior Court of Justice (STJ) in 2018 in the Special Appeal – REsp No. 1.657.156/RJ – T. 106 – "Obligation of Public Power to ptovide non-incorporated medication, through normative acts, to the Unified Health System". On this occasion, criteria were set for the Court to decide about the acquisition of medication not regulated by the SUS.

The criteria listed by the STJ T. 106 for the acquisition of medication or highly complex treatments were as follows: a) evidence, by means of reasoned and detailed medical report issued by the assisting medical personnel, concerning the indispensability or need for the medication, as well as the efficacy of the pharmaceuticals supplied by the SUS for the treatment of the decease; b) financial incapacity of the patient to bear the cost of the prescribed medicine — hyposufficiency criteria; and c) existence of a medication register in the respective regulatory agency – ANVISA.

Lastly, to conclude the fourth stage of decision provided by the Supreme Court, the third and last episode that contributed for the consolidation of Evidence-Based Medicine – MBE concerns the activities performed by the National Health Forum, by the National Council of Justice (CNJ), established by the Resolution No. 107, of April 06, 2010 and, in the trail of the Public Hearing on Judicialization of Health, and by the STA 175-AgR/CE.

The National Council of Justice (CNJ) has become an important institution for the evaluation and discussion of scientific criteria regarding the decisions made

on the issues of judicialization of health with the creation of the Nation Health Forum, with its respective State Health Committees, as an incentive to the qualification of judges on health law by Schools for Magistrates in Brazil, publication of Recommendations and Resolutions and creation of specialized courts on the right to health, all supported by opinions and reports written according to Evidence-Based Medicine MBE, by the Technical Support Nucleus – NAT/JUS, culminating, at last, in the production of its own public hearing for discussion of the main subjects on the right to health (Vasconcelos, 2020).

Table 3 demonstrates to us the main normative progress promoted by the Health Forum constituted by the CNJ:

TABLE 3 Main Normative Progress Promoted by the Health Forum - National Council of Justice (CNJ)

MAIN NORMATIVE PROGRESS PROMOTED BY THE HEALTH FORUM – CNJ	AIM
Ordinance No. 650, of 20/11/2009 – GT	To prepare research and propose specific measures and regulations regarding legal demands involving health care.
Recommendation No. 31, of 30/03/2010	To outline guidelines for magistrates regarding legal demands involving health care.
Resolution No. 107, of 06/04/2010	To establish National Forum for monitoring and resolution of health care demands – Health Forum.
Recommendation No. 36, of 12/ 07/ 2011	To recommend the adoption of measures to better subsidize the magistrates and other legal officials in the demands involving supplementary health care to the Courts.
Recommendation No. 43, of 20/ 08/ 2013	To recommend the specialization of Courts to process and judge acts that have as their aim the right to public health and to prioritize the judgement of processes related to supplementary health.
Resolution No. 238, of 06/09/2016	To effectively dispose of the creation and maintenance by the Federal Courts of Justice and to the Federal Regional State Health Committees, as well as the creation of NAT-JUS, and to establish rules for the specialization of branches to deal with acts on health, in counties with more than one court of Public Treasury.
Public Hearing from 11/12/2017	Judicialization of Health – 30 speakers of the most diverse profiles and opinions discussing the right to health in Brazil.

Source: Drafted by the author on the basis of the data available on the website of the CNJ <https://www.cnj.jus.br/programas-e-acoes/forum-da-saude-2/>.

From what was described above, when we approach descriptively the decision making stages of the Supreme Federal Court regarding the phenomenon of "Judicialization of Health ", from the moment of "non-activism" until the consolidation of scientific requirements for the success of the demand favoring the consolidation of the right to health through the debate of costs of rights, we discuss innovative elements that provide a more accurate vision of the judicialization of health Brazil possible to the scholars; how we provide perspectives that allow correlating these stages on impacts of the legal decision in the organizational and managerial processes to scholars and managers of public health.

Subsequently, we will analyze the consequences of the judicialization of public health policies in Brazil with a view to its corresponding improvement.

7. Consequences of the Judicialization of Public Health Policies in Brazil

The first consequence refers to the absence of effectiveness of the aforementioned Public Hearing on Health, held by the STF in 2009. As an important data reported by Santos, Delduque and Mendonça (2015) — is the fact that only 20% (twenty percent) of the central arguments and ideas discussed during the Public Hearing were used in subsequent trials held by the Supreme Court and the regulations promoted by the National Council of Justice – CNJ: "705 arguments arised from 63 speeches upon analysis, of which only 20% were considered as "strong" and 564 (80%) were consideres as "not strong", i.e., they did not cause any impact in the subsequent decisions provided by the STF and the CNJ…" (Santos, Delduque, Mendonça, 2015, pp. 186).

Yet, according to Asensi and Pinheiro (2015), in addition to the scant mention to the Public Hearing held by the STF in 2009, there is minor reference of Recommendations provided by the National Council of Justice (CNJ), in particular the Recommendations No. 31 and 36[7], which suggest strategies on how the judges should deal with the issue of judicialization of both public and supplementary health, as well as very rare references of the development of this discussion in important instances such as CNJ Health Forum and the State Health Committees organized in 27 Brazilian Federal Units.

Another consequence of the excessive judicialization of public health policies in Brazil concerns administrative and legal decisions that conceal popular participation subsumed in the form of debate, discussion or deliberation in the consultative and deliberative instances of public health policies, such as municipal,

7. Recommendation No. 31, of 30/ 03/ 2010. Retrieved from: <http://www.cnj.jus.br/atos-normativos?documento=877>, on June 02, 2020. And Recommendation No. 36, of 12/ 07/ 2011. Retrieved from: <http://www.cnj.jus.br/atos-normativos?documento=847>, on June 02, 2020.

district, statal and federal councils and conferences, in explicit disagreement with what was set forth in the CNJ Recommendation No. 31, d), I, of March 30, 2010, which establishes magistral visits to the Municipal and State Health Councils, with the aim of knowledge of system functioning.

In this regard, there is a lacuna between the institutionality of the SUS, composed by instances of participatory decision, and the framework of legal decisions. This is useful information to be considered by Public Administration in the defense of public interests and of health policies and associated programs.

Besides turning a deaf ear to popular participation, another critical point of judicialization of health in Brazil concerns the focus of legal decisions on the eminently curative aspect of the demands that are reflected in guidelines such as medication, surgical treatments, prothesis, orthosis; by subordinating preventive aspects such as access to vaccination, preventive examination and basic care, thus contradicting the Art. 198, II of the Federal Constitution, which essentially foresees comprehensive care, prioritizing the preventive care, without prejudice to the assistance services (Ferraz, 2019; Oliveira, 2019).

This perspective points out to how the elements of systemic logic that pervade the design of the SUS are not always considered in the context of legal decision. Thus, an important question shall be asked: how the impacts of judicialization reframe health policies?

It should be stressed that the majority of actions within the judicialization of health deal only with cases of micro-justice — individual and non-collective demands, not concerning whatsoever on the part of the legal officials, in particular magistrates, on the consequences for public policies and, mainly, on budgetary and financial cost of the materialization of individual rights to health, thus ignoring the consequences from the point of view of macro-justice.

A fundamental question — and almost a taboo — about the consequences of the judicialization of health in Brazil concerns the criminalization of public policy managers. According to Schulze and Neto (2015), some judicial decisions are worrisome due to the generation of legal and political insecurity for the integral members of the Executive Power, that possesses as a central objective the materialization and effectiveness of public policies for all citizens. The criminalization of management, as a result of poor judicialization, is stressed out by the authors (Schulze; Neto, 2015) as follows:

1) Judicial decisions that decree the imprisonment of the public managers or blockage of their personal bank account due to noncompliance with court decisions, for example, those that determine the provision of medication not made available by the SUS or urgent transfer to the Intensive Care Unit – ICU of a reference hospital;

2) Regarding the possible imprisonment of public managers, the Superior Court of Justice (SCJ), when being proclaimed in the subject of the Habeas Corpus – HC 266948/SE, of 2015 and HC 45139/RJ, of 2006[8] — we understand that the judge of the civil area (an area that includes the right to health) does not possesses the authority to decree imprisonment for non-compliance with judicial order;
3) And, while dealing with the determination of the criminal area, it is stressed out that the crime of disobedience is foreseen as a crime of less offensive potential, therefore the penalty varies from 15 days to 6 months of detention and fine, pursuant to Art. 330 of the Brazilian Penal Code (PC), characterized as a form of atypical conduct, which respects the principle of minimum intervention and the interpretation of the penal right as ultima ratio. In addition to the Law of the Special Civil and Criminal Courts – Law No. 9.099, of 1995, one shall have decriminalizing measures such as transaction and conditional suspension of the process;
4) And, lastly, still on the criminalization of public policy managers, and once convicted, after the termination of the penal process, observing the contradictory and broad defense, there would also be any definition of imprisonment before the possibility of substitution of the deprivation of liberty for restricting rights – pecuniary provision or service provision to the community or public entities.

Before these criticisms, mainly in relation to an intensification of the criminalization of public policy management, we will provide a list of alternatives measures to the consequences of a certain excess of judicialization of public health policies, mainly focusing on their improvement for better efficiency and effectiveness before the society.

8. Alternative measures for Improvement of Judicialization of Public Health Policies in Brazil

Considering the ideas developed up until now, we present, in short, some proposals that seek to confront the debates on judicialization of public health policies, stressing out political activism before the judicial activism of our times, which can be summarized as follows:

8. HC 266948/SE, Reported by: Minister Nefi Cordeiro, Sexta Turma, j. 05/02/2015, DJe 20/02/2015 & HC 45139/RJ, Reported by: Minister Hamilton Carvalhido, Sexta Turma, j. 18/10/2005, DJ 06/02/2006 pp. 358.

1) Priority of collective legal actions, with analytical rigor in the interpretation of the lawsuits deducted, extension of the dialogue between the Justice and the Health Systems, with extensive incentive to health mediation, conciliation and arbitration (Schulze; Neto, 2015), (Delduque; Castro, 2015);
2) Strengthening of popular participation, honoring the debates, discussions, guidelines, proposals and motions carried outby the participatory and deliberative instances of public health policies – Councils, Conferences, Committees and Chambers; and that these can be, consequently reverberated to the decision sector, whether these are pertinent to the Executive, Legislative or Judiciary, in order to contribute to the improvement of their efficiency, efficacy and effectiveness for the improved attendance of the population;[9]
3) The improvement in the management of the Unified Health System (SUS), according to its normative apparatus — from the Federal Constitution to decrees, directives and resolutions on matters concerned, including the Organic Law of the Health – LOS — in discussion between the members of the supervisory bodies, such as the Brazilian Controller General (CGU) and the Federal Court of Auditors (TCU), relying in its priority in incentives to reduce bureaucracy with the aid of the technological informatization system "Digital Revolution 4.0" (Oliveira, 2019; Vasconcelos, 2020).
4) Establishment of the health budget with the implementation of constitutional measures, such as taxation of large amounts of wealth, increase of the tax associated to inheritances and audit of public debt, in addition to re-thinking process of the criteria for tax exemptions and tax reliefs for large private groups. Another challenge is the revision or revocation of the Constitutional Amendment that imposes the spending ceiling on public health policies in Brazil – EC No 95, of 2016[10], which, according to Vieira and Benvides (2016) will be able to withdraw from the Unified Health system (SUS) around R$ 400B in its twenty years of existance.

9. The guidelines, proposals and motions approved by the delegates present at the 16th National Health Conference (CNS), held on August 4 to August 7, 2019, in Brasilia, capital of Brazil, can be found in CNS Resolution No. 617, of August 22, 2019. Retrieved from: <https://drive.google.com/file/d/1FoBYTndvh-8Z59XXmUAFDZ8PQIrncVngg/view>, on June 02, 2020.

10. Constitutional Amendment No. 95, of 15/12/2016. Retrieved from: <http://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc95.htm>, on June 02, 2020.

We did summarize, in this way, four points for presenting a minimum program as an alternative to improve judicialization in Brazil, always honoring the dialogue between legal personalities in the Justice System and the managers public policies in the Health System.

9. Final Considerations

This article pointed out the aspects related to the legal and normative development in the debate on the judicialization of public health policies in Brazil, stressing out, in an innovative manner, four stages of decision-making process by the Supreme Federal Court, as well as the main consequences in the legal formation of the right to health.

However, even though many of the arguments were based on the best elements existing in the guiding criteria of the current Evidence-Based Medicine (MBE), there are still considerable issues, associated to the budget matters and the effectiveness of the elements set forth in the resolutions, that culminate in a current framework of exhaustion of the system model of judicialization of health in Brazil and consequent criminalization of public policy management.

Judicialization of health does not intend to provide solution to the main issues associated to the public health system in Brazil. Whether unconsciously or not, the judicialization of these public policies does suffer from underfunding, underperformance or inequality in basic health care procedures, and yet from the regular provision of essential medication or the social determinants of health, which are tragically reflected on the most vulnerable ones. The criticism of their excessive interventionism in public policies questions the regular course in our Democratic Rule of Law.

Before this aforementioned crisis, only a joint effort between the members of the Justice System and the Health System is needed in order to improve de coordination of the efforts to enforce fundamental rights and guarantees associated to health, respecting deliberative and participatory instances of this public policy, which is fundamental in a country as markedly unequal as Brazil.

For this purpose, after describing in detail the four stages of decision making process by the Supreme Federal Court (STF) in Brazil, we stressed out four alternatives for a brief proposal in view to the improvement of stabilization of health as more collective decisions, respect to participatory democracy, as a principle inherent to the Unified Health System (SUS), responsible and transparent management and budget proposals consisting with a universal system, which would avoid chronic de-financing.

Only with institutional sensitivity of recognizing the progress in the four stages of decision making by the STF, combined with a critical and alternative

attitude towards excessive judicialization of health, can we inquire for the connection between the right to judicialized health and the right to constitutionalized health, retaining the best traditions gathered over 30 years of the Brazilian Unified Health System (SUS).

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