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HEALTH IN DISCUSSION: JUDICIALIZATION, JUDICIAL ACTIVISM AND LACK OF PUBLIC BUDGET IN BRAZIL

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Abstract:

Judicialization and social activism are realities that permeate political, economic and social relations in contemporary Brazilian society. These phenomena are often used by the subjects of law for the preservation of the Constitutional democratic order in the face of the deficiency of representativeness of the elective powers towards the society, within the current national political context. The magistrate today is driven to face demands whose high and increasing degree of complexity in the relations of modern societies and lifestyles does not allow him to remain in the outdated and inefficient legal method turned to positivist rationality. However, they appear as interference of the Judiciary in other Powers of the Republic, because in theory there would be no legitimacy to execute these interferences. One of the challenges is precisely to meet the needs of the population, especially in the area of health, bringing the mass of democratic issues closer to guaranteeing constitutionally predicted fundamental rights. Another relevant factor that justifies this discussion would be the imposition by the Judiciary of obligations whose financial costs provoke dislocations in the public budget, defined by the other two powers of the republic. Tangencing these aspects, the present bibliographic research is based on materials already prepared, especially books and scientific papers, using the deductive method, starting from general data to conclude the situations specified here.

Key-words: Health; Judiciary; Judicial Activism; Public Budget; Constitutional Principles.

Introduction

The Superior Courts in Brazil have been gaining prominence in recent decades. Issues that were previously debated only within the legal corridors, today gain media coverage and popular interest. It is not possible to define a single cause for the emergence and consolidation of this event, but the fact is that there is an irrefutable field for debates around judicialization and social activism.

The number of demands that reach the brazilian Supreme Court has increased significantly (judicialization), and added to the fact that the matters that reach it directly involve the other powers of the republic, without public opening for democratic discussion, can be considered as one of the reasons for current emphasis on the Supreme Court. In this way, the degree of intervention by the Judiciary over other powers is increased, also increasing the responsibility of the judges.

It is precisely about the increase of the brazilian judiciary, and numerous activist and countermajoritarian attitudes, that the need for judges to be increasingly committed to their decisions is demonstrated, demanding hermeneutical accountability.

In other words, in the era of the so-called new constitutionalism, a leading role in jurisdictional activity was identified - which until then was linked to common law countries, such as the United States of America and England - in countries of origin in civil law, case of Brazil.

Several States in the Federation spend more on paying for lawsuits seeking acess to health and medicine than they have on budgets. In São Paulo State, for example, the expenses of the State Department of Health on medications, due to judicial convictions in 2011, reached R$ 515 million reais (the local coin), almost R$ 90 million spent in addition to the budget for the year for medicines.

These challenges are what motivate the present research. The discussion of health in Brazil is a relevant factor, which needs further studies on the duty to fulfill the constitutionally guaranteed social right to health. This essay does not intend to exhaust the debate on the topic, but to nurture and seek ways to enforce the right to health, either through public policies or by a reasonable judicial supply.

1 Judicialization

The first step in situating the problem involving judicial activism in Brazil is to make it possible to dissociate it from what is understood as the judicialization of politics. It cannot be denied that both are employed in order to demonstrate the idea of the marked degree of judicialization that Brazilian law assumes at the current circumstance. And, even stating the need to differentiate between the two, it would not be wrong to establish such a characteristic as a common starting point for addressing these two themes. Historically, Maria Gloria Gohn (2017) analyzes the history of social movements and organized civil society entities (that fight for better qualities of life and work - new interpreters of the constitutional text), aperread in contrast to dictatorial political regimes, precede the manifestations judicialization.

For Luís Roberto Barroso (2011: 276-277), the judicialization of politics in Brazil, is forged by a context marked by three factors: redemocratization, comprehensive constitutionalism and the incorporation of a hybrid system of constitutionality control (which mixes the diffuse and concentrated modalities). This phenomenon appears as an inexorable characteristic, a fact, resulting from the transformations that occurred in Brazilian law with the emergence of the 1988 Constitution.

In this line of reasoning, the counterpoint between the judicialization of politics and judicial activism would occur due to the difference in the causes that gave rise to them. According to Lênio Streck (2011: 190), it is the hermeneutic situation established from the second post-war period that provides for the strengthening of (constitutional) jurisdiction, not only due to the hermeneutic character that assumes the right, in a post-positivist and overcoming phase of paradigm of the philosophy of conscience, but also for the normative force of the constitutional texts and for the equation that is formed from the inertia in the execution of public policies and in the deficient legislative regulation of rights foreseen in the Constitutions. This is what resides in what can be called the displacement of the tension pole of other powers towards the Judiciary.

Such events provoked a greater participation and interference of the State in society, which, due to the inertia of the other Powers, opened space for the jurisdiction, which came to eliminate the gaps left by the other arms of the State. Thus, the Judiciary started to play a determining role in defining certain standards to be respected.

Luiz Werneck Vianna is known for dealing with the issue of judicialization, in a work he writes co-authored with other jurists. He affirms that this subject is situated within the scope of what can be called publicization of the private sphere. In this sense, Luiz Werneck Vianna (1999: 15) reports that the expansive vocation of the democratic principle has implied a growing institutionalization of the law in social life, invading spaces that until recently were inaccessible to him, with certain dimensions of private life.

According to the understanding of Luiz W. Vianna (1999: 22), the new Constitutions, the remodeling of the State as well as the existence of new rights (such as diffuse ones) ended up creating a new relationship between the Powers, in which the Judiciary leaves of being an inert power and alien to social transformations.

It is possible to perceive, therefore, that the judicialization is much more an observation about what has been happening nowadays due to the greater consecration of law and constitutional regulations, which ended up allowing a greater number of demands, which, to a greater or lesser extent, will flow into the Judiciary; than a posture to be identified (as positive or negative). That is, this issue is linked to a contextual analysis of the composition of the legal scenario, making no reference to the need to create (or defend) a strengthened model of jurisdiction.

For all these reasons, it can be said that judicialization presents itself as a social issue. The extent of this phenomenon, therefore, does not depend on the desire or will of the judging body. On the contrary, it is derived from a series of factors originally outside the jurisdiction, which have their starting point in a greater and broader recognition of rights, pass through the inefficiency of the State in implementing them and result in the increase of litigation - characteristic of society of mass. The decrease in judicialization does not, therefore, depend only on measures taken by the Judiciary Power, but, rather, on a pleiad of measures that involve a compromise of all constituted powers.

2 Judicial Activism

Is strange the possibility of the Judiciary acting in favor or contrary to some behaviors is influenced by social, political and economic issues. After all, the judge must be neutral, apply the law, in short, he cannot carry out any activity to create legal norms.

More than two centuries ago, the first reflections on this topic emerded in the United States, since the trial of the Marbury v. Madison case (1803), which gave rise to the control of American constitutionality, called judicial review. In Brazil, in turn, the growth and intensity of the participation of the Judiciary occurred only after the Federal Constitution of 1988, which, in the words of Clarissa Tassinari (2013: 15), when it broke with the military dictatorship, an environment was created conducive - democratic, therefore, to the development of the idea of realizing citizens' rights. In other words, it was only with the notion of democratic constitutionalism - and precisely because of that - that the Judiciary's performance began to be considered from an activist perspective. Thus, under the influence of American doctrine, the issue involving the activism of the judiciary gained a prominent role in the Brazilian legal scene. The problem is that, differently from what happened in the United States, in the South American country, the performance of the Judiciary through an activist stance did not go through an (indispensable) problematization (that is, a rigorous academic debate), in the sense that, from the contributions brought by American jurists, only the intensification of jurisdictional activity was taken advantage of, which was strengthened to the point that a necessary judicial activism to defend rights was defended. In summary, a legal imaginary was created in which Brazilian law became dependent on judicial decisions, or rather, on judicial definitions about the most relevant issues in society.

Thus, through the 1988 Constitution, there was an increase in the political and institutional role of the Supreme Court, which added to the question of the existence of a judicialization of politics, there was a recognition of a link between Law and Politics. This circumstance had a great repercussion in the way of conceiving the performance of judges and courts, causing, in this way, the spread of judicial activism. It turns out that this was a topic that came to be faced from different perspectives, which generated a certain fragmentation in the understanding of what activism is.

In the words of Luiz Roberto Barroso (2017), judicial activism is a behavioral option of proactive conduct in the interpretive exercise of the Constitutional text, which results in a certain expansion of its content and applicability. It is a posture that seeks to extract the maximum potential from the constitutional text without, however, invading the field of free creation of law.

Amid the difficulty of defining judicial activism, but, on the other hand, with the existence of different understandings on the theme, in an attempt to systematize the existing conceptions, it is possible to list, for example, some perspectives of approach: a) how due to the exercise of the power to review (read, control the constitutionality) acts of the other powers; b) as a synonym for greater interference by the Judiciary (or greater volume of judicial demands, which, in this case, would configure judicialization much more); c) as an openness to discretion in the decision-making act; d) such as increasing the judge's procedural management capacity, among others.

It should be noted that, although it is possible to identify these trends in the context of Brazilian doctrine, it is difficult to find what could be called pure positions. In fact, what is meant is that, in most cases, these approaches end up mixing and becoming confused, without there being, therefore, a theoretical commitment to define what activism is.

In the collective work “Institutional Dialogues and Activism”, written by the research group New Perspectives on Constitutional Jurisdiction (successor to the Supreme Court's Jurisprudential Analysis Laboratory), judicial activism is identified as a “political-institutional process” by which it is assumed “A model of constitutional jurisdiction with a strong appeal for supremacy” (SILVA, 2010: 13). Furthermore, through research that consisted of analyzing the decisions of the Federal Supreme Court, previously developed by the group, it is possible to affirm that the jurisprudence carries out judicial activism, translating “into strategies of claiming competences that, *'a priori'*, would not be automatically recognized (SILVA: 2010: 20).

In this way, there is a conception of activism that can be summarized as the configuration of a Judiciary Power with supremacy, with competences that are not constitutionally recognized.

3 Health as Object of Judicialization and Judicial Activism

As a result, as previously seen, there was a re-materialization of the Constitutional texts that stopped being concise documents to become extremely long-winded, given the large number of rights and guarantees that came to encompass their structures. Among these rights and guarantees of human persons, health is the object of analysis in this article. It has an express provision in the Federal Constitution (1988): Article 196. Health is the right of all and the duty of the State, guaranteed through social and economic policies aimed at reducing the risk of disease and other diseases and the universal and equal access to actions and services for their promotion, protection and recovery. Article 197. Health actions and services are of public relevance, and it is the responsibility of the Public Power to dispose, under the terms of the law, on their regulation, inspection and control, and their execution must be carried out directly or through third parties and also by person physical or legal matter under private law. Article 198. Public health actions and services are part of a regionalized and hierarchical network and constitute a single system, organized according to the following guidelines

Through the Constitutional wording, it remains to be defined that health is "everyone's right" and "duty of the State", expressions that are sufficient for the matter to have guaranteed entry into the Judiciary Power, in addition, of course, to the fact of its insertion within of the Constitutional document itself. Notwithstanding, the Constitutional Charter also brings an entire archetype that involves all the Powers of the Republic, as well as all federated entities, assigning responsibilities for the cost, organization, implementation, execution, maintenance and inspection of these actions aimed at fulfilling this “duty”to the universal right to health.

In view of the Constitutional provision, the brazilian SUS (Sistema Único de Saúde), like the american Medicaid, was instituted, from the publication of Law number 8.080/90 (BRAZIL, 1990) which, according to its article 4, defines it as being, “the set of actions and health services, provided by federal, state and municipal public bodies and institutions, of the direct and indirect Administration and of the foundations maintained by the Public Power, constitute the Single Health System (SUS)”.

So that, being the responsibility of the Executive and Legislative Powers, the implementation of social and economic policies in the health area, through their own bodies such as the Ministry of Health at the federal level, Health Secretariats at State and Municipal levels, through studies and analysis of statistical data such as, for example, those provided by IBGE - Brazilian Institute of Geography and Statistics -, or sectors specialized in public health or epidemiologies, identify the main problems that affect a given location, and from these concrete data develop their public policies that they deem more effective, adequate and necessary to the particularities of that locality.

The Executive, with direct participation of the Legislative, establishes the guidelines, objectives and targets of the public administration in this area for capital expenditures with programs of continuous duration that exceed the annual budget - multi-annual law -, outline the goals and priorities that must be included in the annual budget - law of budgetary guidelines -, and subsequently establishes, also by law, the expenses linked to the corresponding recipe, only to be duly authorized by law - the principle of legality - to make the necessary expenses the implementation of that intended public policy - annual budget law. It is, therefore, subject to the public budget system, so that any action or omission by the public administrator in relation to finances, expenses and commitments of public resources without being previously supported in these normative budgetary guidelines, will result in the imputation of a fiscal crime responsibility, according to Complementary Law number 101/2000.

As the public administrator identifies a need for citizens that needs a certain measure, it is not lawful to simply “open the drawer of public coffers” and withdraw the amount that you need to meet that situation. The Constitutional budgetary system requires it to adopt prior measures that aim, in the last analysis, to maintain the operational costs of that entity within the financial possibilities, as well as, of course, the inspection in the use of these public resources.

From then on, they make available to the citizens of that locality certain treatments or pharmacological supplies by the public network, aiming at serving the health of the population, since it is a constitutionally imposed duty, as seen above. Evidently, all sorts of existing resources in this field are not included in these treatment and pharmacological listings, and this is not only due to the budgetary limitation, which alone is enough to justify absences, but also to technical limitations and specialized labor to certain situations, such as some organ transplant procedures that are only performed in other countries.

It happens that the citizen who does not find available in the Estate what he needs at that moment, turns to the Judiciary, appearing the impasse object of analysis of the present work. The claim filed by the court is endowed with particularities depending on the specific case that shouldinfluence the judicial decision: in a first hypothesis, there is the case of a certain treatment or drug with prediction in listings of the Ministry of Health or Secretaries of State or Municipality and that access is still denied. This situation certainly demands an imposing position on the part of the Judiciary without the excuse of undesirable reflexes being formulated in the budget program of the respective public entity, given the already insertion in the list of available treatments or medicines, which presupposes the respective commitment of resources.

In another north, there may be a situation in which the citizen is denied a specific drug, but denied by the fact that the request was made under the commercial name of this product while the Government has it, with the same active principle, but with a different commercial name. It is true that the position of the Judiciary in this case cannot be the same as that given in the previous example, as there is no plausible reason for obliging the public entity to comply with the whim of the jurisdiction with regard to its preference for a especial trademark.

But, another peculiar situation appears when, in the example above, the jurisdiction proves satisfactorily that even in the case of medication with the same active principle, the one available through the public network presents compounds that are, for example, allergic, and the only one that gives it what is appropriate is the trade name "x". In this hypothesis there is already, at least in theory, plausibility to meet this claim.

And there are situations that due to their low frequency and high financial costs - a binomial almost always present in diseases considered to be of rare incidence - their insertion in public health policies is not viable, and for that reason they are simply not offered. However, this is not an inconsequential omission, but a decision by the public administrator based on concrete elements that lead him to make a decision to elect some and disregard others, understanding that in doing so he will be serving the public interest to a greater extent. All these particularities, as seen, induce a minimum of logic that should guide the judicial decisions in this field, however, it is not what is observed in the Brazilian Courts. For example, on a first trial (BRASIL STF, 2000), it was decided that: "HEALTH - ACQUISITION AND SUPPLY OF MEDICINES - RARE DISEASE. It is up to the State (gender) to provide means to achieve health, especially when children and adolescents are involved. The Single Health System (SUS) makes the linear responsibility reached to the Union, the States, the Federal District and the Municipalities.". In a second trial (BRASIL STF, 2001), it was decided that: "Health. Medicines. Supply. Patient's hyposufficiency. State obligation. Regimental not provided".

The simple and direct application of the Constitutional provision to the jurisdiction is notorious, without due consideration of the possible consequences of this shallow interpretation. What has guided national decisions involving health issues, it seems, has been only the postulant's risk of death; since this risk is more patent, the greater the chances of obtaining a favorable decision from the Judiciary, determining that the public entity provide the requested treatment or the requested drug, without any kind of consideration about the consequences of this decision in the economic order and budget of the entity to whom this order is addressed. It is the most sincere manifestation of the so-called "mercy jurisprudence".

It is the manifestation, in all its terms, of a conflict between principles of a Constitutional order, where on the one hand there is the provision of that enunciated by Article 2- the independence and separation of powers -, on the other, the one sculpted in Article 5, XXXV- the inapastability of the judiciary in assessing an injury or threat to the law.

4. The Conflict Between Constitutional Principles and SolutionForm

The debate about the existence or not of a conflict of Constitutional principles is heightened when it comes to the judicialization of health, more precisely if the Judiciary, when accepting a postulation of violation or threat of law and determining that the Executive provides or supports the expenses of such a procedure would not be contrary to the principle of separation and autonomy of the Powers of the Republic.

Despite the impossibility of making statements of a general nature on this matter, it is certain that at some point this principle may be violated.

It occurs, however, that there may also be a collision between the principles of the reserve of the possible and the existential minimum, with prevailing now and then.

As a rule, the judicialization process in the area of health places a heavy burden on the public administrator, since he may find himself faced with a situation for which he does not have enough money.

Therefore, it is possible to intervene on the part of the Judiciary that will be characterized as an interference that affects the resources of the Public Administration. Such a conclusion leads to another equally impossible: the conflict of a principiological order is in place and needs a solution.

And this solution depends on a better elaborated construction compared to a conflict between rules, where one will succumb in the face of the other. In the case of principles, there will never be an annulment of one over the other, since they always influence the typical fact, whether to a lesser or greater extent, but they still influence it.

The solution of this kind of conflict occurs through the technique of precedence over one another, without the result implying the annulment of one in detriment of another. In this sense, Robert Alexy (2008: 93-94) teaches: If two principles collide - which occurs, for example, when something is prohibited according to one principle and, according to the other, allowed - one of the principles will have to give in. This does not mean, however, neither that the assigning principle should be declared invalid, nor that an exception clause should be introduced in it. In fact, what happens is that one of the principles takes precedence over the other under certain conditions. Under other conditions, the issue of precedence can be resolved in the opposite way. This is what is meant when it is stated that, in concrete cases, the principles have different weights and that the principles with the greatest weight take precedence.

He also addressed the theme Ronald Dworkin, presenting a differentiation between what he calls a norm rule and a norm principle. Gilmar Ferreira Mendes and Paulo Gustavo Gonet Branco drew a comparison between the positions of Dworkin and Alexy in the following terms: Dworkin accepts the idea that a normative principle and a rule are close, considering that both dictate legal obligations; what individualizes is not the greater or lesser degree of vagueness of the provision, but rather the type of policy they present (MENDES, 2014: 73).

The application of the norm-type rule differs qualitatively from the application of the norm-type principle, in which the rule is valid in the all or nothing way, or the rule is valid or not valid, therefore, disjunctively; and this does not automatically trigger the legal consequence foreseen in the normative text by the only occurrence of the hypothetically predicted fact, it has the weight dimension. That is how he states: “The principles can interfere with each other and, in this case, the conflict must be resolved taking into account the weight of each one” (MENDES, 2014: 73).

What it means to say: “Conflicts between principles are not resolved by taking one as an exception to the other. What happens is a confrontation of weights between the rules that collide.” (MENDES, 2014: 73).

Already under the focus of Alexy, who also recognizes a coexistence between principles and rules, but as extreme points of the set of norms and also have individualizing elements, this differentiation being so relevant in Alexy's theory that he designates it as “the key for the solution of central problems of dogmatic fundamental rights”(MENDES, 2014: 74).

Every standard/norm, he says, is a principle or a rule, and both categories differ qualitatively - with no variation in degree between them. The principles, in his view - and which starts here to distance himself from Dworkin -, are norms that order something to be accomplished to the greatest extent, within the existing legal and real possibilities. Therefore, the principles are optimization commands. The degree of compliance with what the principle provides is determined by its comparison with other opposing principles and rules (legal possibility) and by considering the factual reality on which it will operate (real possibility) (MENDES, 2014: 74).

The principles, then, determine that they are applied to the greatest extent possible, while the rule, when valid, must follow exactly what it determines, neither to whom nor beyond. Thus, while a principle is fulfilled by varying its degree of intensity, the rule only remains to be fulfilled or not. Is that the Alexy's way of resolving conflicts between principles using the precedence method, as discussed above.

Having made these considerations, it is easy to discover the solution to the problem faced: there is no need to talk about the annulment of the principles of autonomy and separation of powers - art. 2nd, of the Federal Constitution -, to the detriment of the unfeasibility of the assessment by the judiciary of injury or threat of right - art. 5, XXXV -, or vice versa, but what must be the precedence of one of them, without the dictation by the other remaining absolutely useless.

In another north, the most modern bibliography wave towards a re-reading of the ancient republican principle of autonomy and separation of powers. In this sense, Ciro di Benatti Galvão (2015: 88-89) proposes a reconfiguration of this principle in an attempt to give it more updated contours in order to put it in step with the evolution of constitutionalism, notably in what is called constitutionalism of effectiveness. This reconfiguration takes into account the fact that, dealing with constitutional jurisdiction, its immediate objective is to improve the primary objectives of current constitutionalism, with special emphasis on fundamental rights and the constitutional values they encompass. And to achieve this purpose, Ciro di Benatti Galvão continues, the principle of separation of powers must admit a positive or operative bias regarding the need for an increase in the capacity for rational, and even creative, performance of the bodies responsible for state functions, enhancing their typical functions, in order to become truly useful to the state reality and its individuals.

This conflict resolution formula applied in the practical field translates into initiatives such as the National Forum of the Judiciary for Health, led by the National Council of Justice in 2010, aimed at monitoring and resolving demands involving health-related benefits. Its creation was due to the growing number and diversified litigation involving, in the final analysis, the right to health and its reflexes in public budgets that are increasingly incisive (CNJ, 2020).

Relevant contribution made by the National Forum of the Judiciary for Health resides in two meetings held in 2014 and 2015, called I and II National Health Days, respectively, where the legal society was allowed to present postulates so that some of them could be debated and elected. to compose the so-called Statements of these meetings.

5 Conflict Between the Existential Minimum and the Possible Reserve

Recurring matters in the judicial demands that are pursued benefits by the State, such as the right to health, are the allegations, on the part of the citizen, of the "existential minimum", whereas matters of defense of public entities, as a rule, run through the question of the "reserve of the possible".

Existential minimum means a set of minimum requirements necessary for the existence of human beings and constitutes a fundamental right, without which the possibility of man's survival and the initial conditions of freedom disappear (TORRES, 2020). In other words, these are basic conditions without which human life would be rendered unfeasible, without mentioning any written norm or rule in view of its essentiality, although, in most cases, they are positivized in state legal systems.

For Ricardo Lobo Torres, the existential minimum does not have a closed concept, as it is linked to the reality and conditions of the environment in which it is intended to be inserted, therefore variable; in his words: "There is a right to the minimum conditions of dignified human existence that cannot be the object of State intervention and that still requires positive state benefits. The existential minimum has no specific constitutional diction or specific content." (TORRES, 2020).

For others, like Prof. Ana Paula de Barcellos, it is possible to identify content for the minimum existential regardless of the reality in which it is inserted. For her, the minimum existential is formed by four elements, three of which are of a material nature and one of an instrumental nature, they are: basic education, basic health, assistance to the needy and access to justice, respectively (BARCELLOS, 2008: 287).

On the other hand, the reserve of the possible, a matter invoked by public entities that oppose the claim of the existential minimum, refers to budgetary and financial issues that restrict the capacity for State action with regard to the provision of fundamental rights. A clear example is the provision contained in §1º, of article 5, of the Federal Constitution, which brings the principle of maximum effectiveness of fundamental rights and guarantees that has immediate application, under which it is not necessary to comment further on their partial inefficiency, since the State, as we know, does not guarantee to all citizens those rights and guarantees established therein in their entirety.

Although it would be desirable for all these guarantees to be guaranteed by the State, social rights have a positive, installment status, which involves costs, but the state's budgetary condition does not allow it to account for all of them; it is, therefore, a financial limitation. Therefore, it is up to the Public Power to make choices about which of these rights and guarantees it will prioritize, materializing them through social programs and public policies. The doctrine has termed this conduct as "tragic choices", since the option of prioritizing some right matters in passing over others, that´s why this nomenclature.

Ingo Sarlet and Mariana Figueiredo (SARLET; FIGUEIREDO, 2020) define the institute as the argument of reserving the possible unfolds in at least one aspect of eminently factual outlines, and another, of a legal nature. Regarding the factual aspect, the economic dimension and the real availability of resources (including goods and services), which, in principle, make up the object of the benefits, are highlighted. In addition to the budget constraints, which, at the limit, would correspond to the effective absence of financial reserves, the limitation of health resources, also restricted in their existence and availability, is questioned. The legal aspect of the reserve of the possible refers to the power or capacity to dispose of such resources, involving the constitutional norms of division of powers, as well as the weighting between constitutional principles of equal hierarchy.

These are allegations that require a substantial interpretative exercise on the part of the judge in view of the consistency of the foundations that each institute has.

It is precisely in this context that the valuable contribution of the Statements forged in the two National Health Days stands out, as stated in previous lines: there is a Statement, like the one in number 11, when mentioning that "In cases where the request in court action is for medicine, product or procedure already provided for in the official SUS lists or in Clinical Protocols and Therapeutic Guidelines (PDCT), it is recommended that the Judiciary Branch determine the inclusion of the applicant in a service or program already existing in the Unified Health System (SUS), for the purposes of monitoring and clinical control.", or even number 08, in which simple observance leads to the overcoming of the clash between the minimum existential or reserve of the possible, insofar as they stick to the rules of the relevant legislation public health.

Or yet, Statement number 14, from the 1st National Health Day that guides the State-Judge to prioritize public policies of the (SUS) Single Health System, removing them only in case of proven ineffectiveness or impropriety of the drugs or treatments provided there.

Conclusion

The promulgation of the 1988 Constitutional text symbolized a moment of radical change in the way in which the exercise of constitutional jurisdiction in Brazil was conceived. In summary, it is possible to affirm that, from that, two main expressions started to be directly linked to the jurisdictional activity: judicial activism and judicialization of politics.

On the one hand, it would be supplying the deficiency that is representative and representative of the other Powers of the Republic (Legislative and Executive), correcting any errors and curbing excesses, thus curing the needs of the population. On the other hand, this practice must be controlled, so that a system of "appealing jurisprudence" or "mercy jurisprudence" is not institutionalized, where everything can and is achieved.

It is possible to intervene on the part of the Judiciary that will be characterized as an interference that affects the resources of the Public Administration. This conclusion leads to another that is equally unavoidable: there is a conflict of a principiological order that needs an easy solution. Following authors researched in the present work, one way out would be to propose a reconfiguration of these principles in an attempt to assign them more updated contours in order to put it in step with the evolution of constitutionalism, notably in what is called constitutionalism of effectiveness.

It was also mentioned as solutions found by the powers the edition of Enunciated by the National Council of Justice, which in the realization of forums of the judiciary for health comes to debate the problems inherent to the judicialization of health, presenting interpretative solutions on the right to health.

A last option would also be the creation of parameters for the judicial solution of specific cases involving the right to health, as did the Supreme Court in the Suspension of Early Guardianship 175, which determines: i) To investigate whether or not there is a public policy that meets the health claim required by the party; ii) If the claim claimed by the party is not among those provided for by SUS, it is necessary to verify whether this fact results from: ii.a) legislative or administrative omission; ii.b) administrative decision not to provide it; ii.c) legal and express prohibition on its offer; iii) The analysis of the motivation for not providing that claim by SUS. Here, the hypothesis of SUS providing alternative treatment, but which does not meet the author's needs or even if it does not have any specific treatment for that author's case, should be analyzed; iv) That there be ample procedural instruction, with ample production of evidence in order to allow the judge to reconcile the subjective dimension (individual and collective) with the objective dimension of the right to health, so that the decision produced is better evaluated within the general context and not only in the presence of the author's risk of death, that is, in the final analysis the supremacy of the public interest over the private.

The conclusion reached is in the sense of the existence of an effective direct - and growing - relationship between the performance of the judiciary and the public budget of the federated, even though the legal finance system bring instruments to safeguard the public administrator - Attachment for Tax Risks - yet, even if indirectly, it forces the public administrator to carry out a kind of "allocation" of part of the public resources available in order to meet these unpredictable situations, the which ultimately prevents him from fully drawing up an administration project aimed at public health according to his criteria and often according to the government plan under which he created his political platform that led him to be legitimately elected to office.

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