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Institutionalization and judicialization of health: the Brazilian' crisis scenario

Institucionalização e judicialização da saúde: o cenário de crise brasileiro

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Abstract

This work analyzes Brazilian institutional crisis established from the perspective of the judicialization of health and the effects caused by the lack of systemic communication between the different spheres of government (Executive and Judiciary). The methodology used was doctrinal and legislative research through the method of bibliographic, dissertation, and argumentative procedure. As a result, we verified the difficulty of obtaining the social right to health in its fullness, mainly due to the long queues for simple medical tests and procedures, which increases the judicialization and, consequently, the budgetary impact, especially from the point of view of the state. In this context, it is necessary to use broader communication techniques, such as the structural process, institutional dialogue, and magistrate

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assistance tolls, such as NAT-JUS, which aims to solve complex issues systemically and not just individually.

Keywords: Judicialization of health; Institutional crisis; Three Branches of the State; Social Systems Theory.

Resumo

Esse artigo tem como pressuposto analisar a crise institucional estabelecida da perspectiva da judicialização da saúde e seus efeitos causados em razão da ausência de comunicação sistêmica entre as diferentes esferas de governo (Executivo e Legislativo). A metodologia utilizada foi a pesquisa doutrinária e legislativa através do método bibliográfico, dissertativo e argumentativo. Como resultado, verificamos a dificuldade de obter o direito social à saúde em sua integralidade, especialmente por conta das longas filas por simples exames e procedimentos, que aumentam a judicialização e, consequentemente, o impacto econômico, especialmente do ponto de vista estatal. Nesse contexto, é necessário a utilização de técnicas comunicativas, como o processo estrutural, o diálogo institucional e os métodos de assistência judiciária, como NAT-JUS, que tem como objetivo resolver assuntos complexos de forma sistêmica e não individual.

Palavras-chaves: judicialização da saúde; crise institucional; os três poderes; teoria dos sistemas.

Introduction

The purpose of this article is to analyze how the intensification of the institutional crisis between two of the three branches (Executive and Judiciary) during the Covid-19 pandemic shows the absence of communication between these spheres, especially when the situation intensifies and worsens without a single and unified management of the problem.

After almost two years of this event, it was clear that the virus had spread unprecedentedly throughout the world, bringing diverse and incalculable consequences for all countries globally, especially Brazil. In this sense, each state coped with the problem differently, with the numbers of the Brazilian crisis – for the most diverse reasons – being as high as the numbers of the United States of America and India of infected and dead people.

In this context, it is essential to highlight that the lack of planning and communication in crisis in general impacts citizens' daily lives, which implies an increase in the judicialization of health and systemic instability.

Therefore, the chosen theme's importance is evident, especially when we approach a subject such as health, a delicate and crucial social right and source of the most profound debates. That is why the present work intends to bring the theme and its practical-legal consequences for the discussion.

Separation of Powers as a fundamental pillar of a Democratic State: the historical conflict between the Executive Branch and the Judiciary Branch

The importance of the Separation of Powers is not recent, being a fundamental pillar of any modern constitutionalism and becoming an inherent value to it, with rare cases of constitutions that do not adopt it as a basic structure of the relationship between the powers (Lima 2020a, p. 195). In this context, it is evident how this democratic pillar serves as the basis for contemporary democracies, based on modern constitutionalism.

The first phase of the separation of powers theory goes back to Montesquieu (1996), who wrote in 1748 that the judge must be no more than the mouth that pronounces the words of the law. With these words, he demonstrates that the judge's role would only be to utter what was already written, applying it to the concrete case with a very restricted and limited interpretation. This was a critical historical moment, culminating, from 1517 onwards, in the Protestant reforms of Luther, Calvin, and many others that developed and opened up space for interpretation and historical and cultural phenomena that opened up the way of thinking and interpreting (Lopes *et al.,* 2022, p. 6).

It is evident that values, principles, and norms, in general, in a complex society, when not enforced, lose their self-implementation weight, given that power structures are built based on democratic organizations and the proper functioning of each.

It is known that the European model of separation of powers was the result of a revolution, with a consequent change of order, in which the classes that were in the lower strata of society changed their position, being the result, therefore, of a model of abuse and containment of power. Brazil, in turn, had the implementation and adoption of the separation of powers to provide social stability, guided, especially, to keep those in a lower layer in the same place and ensure that those in power continued in power (Lopes *et al.,* 2022, p. 11-12).

In this context, the Brazilian separation of powers is far from the European model; behold, it has a different historical and social foundation. Thus, considering that since the beginning, we have had the birth of this European theory arising from such divergent situations, it was not to be expected that its evolution would occur in the same way.

In a worldwide trend, initiated with the Constitutions of Portugal (1976) and Spain (1978), the promulgation of the Federal Constitution brought a recovery of the guarantees of the Judiciary. So, the Judiciary ceased to be a technical-specialized department and became a real political power, capable of enforcing the Constitution and the laws, even in confrontation with the other powers (Barroso, 2009, p. 12).

Article 2 of our Federal Constitution establishes that the power of the State is one so that the legislative, executive, and adjudicating functions must be intertwined in the task of promoting the objectives outlined by the legal order.

In this context, there was a creation of rights by the Judiciary in cases of "constitutional ineffectiveness syndrome." In this regard, the Judiciary turns out to be fundamental to give

effect to constitutional norms, especially when there is a delay on the part of the legislator in regulating fundamental rights subject to a legal reservation (Goes, 2021, p. 94).

The Constitution by determining a vast list of individual and social rights, brought a set of subjective social benefits that the State should guarantee – even though the public power had a factual reality significantly different from the constitutional reality, not having the structure and the ability to deal with such a high proportion of constitutionally guaranteed rights. The most remarkable example of such an issue is the right to health, which is universally guaranteed to all, regardless of social status – that is, to the poor and also to the rich who can eventually pay for the treatment – and without the need for any direct contribution.

The issue, however, which is still under construction, is recognizing that rights – whether constitutional or infra-constitutional also imply limits to these rights and duties, embodied in the financing of issues, such as life and health, which should not be seen as supreme and unavailable rights (Cechin, 2021, p. 210-212).

From this point of view, in the process of enforcing rights and duties, it is crucial that the Legislative, Executive, and Judiciary, each within their predetermined area of attribution, choose the stages, social risks, and recipients, in particular, those who will have priority in care and such specific protection will be provided to them (Pierdoná, 2019, p. 167).

The three branches of state must function independently, which consequently implies that such entities fulfill their roles in a determined and specific way to implement social rights as the Federal Constitution determines. It is crucial, in this context, to mention that the three branches must function without direct interference in the decisions of the other, except in cases permitted by the Constitution.

In any case, although the Constitution itself determines that the State must have a less absentee policy and posture, especially regarding social rights, the scope of creative freedom has limitations, such as fundamental clauses (Canela Júnior, 2009, p. 42) and the budget prepared by the government. The selection, therefore, must be made by each power – Executive and Legislative – within its respective area, respecting the constitutional precepts that provide for distribution, a criterion that must also be respected by the Judiciary when issuing its decisions (Pierdoná, 2019, p. 167).

It is usual that politicians, when seeking to implement rights, must make tragic choices. This situation occurs with some frequency from the point of view of resource allocation when the government faces scarcity, which unfortunately cannot be avoided in all cases (Calabresi and Bobbitt, 1984, p. 18).

Such choices, however, end up being judicialized, since the public awareness of the rights of each citizen and the programmatic determinations of the Constitution are broader than those that the State can support, among other issues.

There is a clear need for Public Administration to find the best way to direct tax revenues to public health systems – and other social rights, which sometimes ends up needing more efficient public policies in specific sectors. This choice, of course, is always political since the allocation and reallocation of resources have their mistakes and successes typical of the activity of the public manager (Mascarenhas, 2020, p. 286).

Indeed, the new constitutionalism, with post-positivist inspiration, is characterized by the protagonism of judges and courts to the detriment of the normative autonomy of the legislator, which has some risks, such as a "Judicial State of Law," embodied in the distortion of the Democratic State due to the predominance of the Judiciary (Góes, 2021, p. 97).

Despite the separation of powers and the constitutional determinations on the subject implying the need for harmonious coexistence between the Executive, Legislative, and Judiciary, there was a real need for decision-making in the sense of reviewing choices made.

The errors occur from the executive, legislative, and also judicial points of view. Ultimately, the country is ruled by people, subjected to errors, and precisely because of this, the Constitution allows and provides mechanisms for controlling the constitutionality of such acts.

One of the most unequivocal examples of continuous interference between the Judiciary and Executive and Legislative branches lies in the COVID-19 pandemic crisis.

Once the state of public calamity had been declared, amidst the chaos of the pandemic, an unprecedented institutional crisis had installed in Brazil: on the one hand, infinite acts of the Executive were constantly debated and rewritten by the Legislative while they were, at the same time, disallowed by the Judiciary (Salvo *et al.,* 2022, p. 228-229).

Contrary to cooperative federalism, the guidelines of the federal, state, municipal, and district governments were not in unison, especially regarding preventive measures – such as, for example, isolation and vaccination (Freitas, 2020, p. 288). Likewise, it is possible to verify that judicial decisions are handed down in the same sense, sometimes disallowing the executive branch's conduct and demonstrating the absence of limits between powers.

This lack of coordination caused a shock to Brazilian health: the SUS (Brazilian Unified Health System), an exemplary model in the public health system, which has already proved to be fully effective in previous outbreaks and epidemics, set in motion a system that was capable of detecting and responding to first cases of Covid-19 (Bueno *et al.,* 2021, p. 35-36), but ended up collapsing not long after, mainly due to the lack of structure, investment, and organization.

The impact on our health system is notorious. A study carried out by the Conselho Federal de Medicina (CFM - Brazilian Medical Council) that considers the comparison between March and December 2020 with the same period of the previous year found that the pandemic caused a decrease of 27 million exams, surgeries, and other elective procedures, between these, almost all are considered unscheduled or not treated because it was not urgent or emergency.

In another study assumed by FIOCRUZ (2021, p. 5), shortly after what could be considered the most severe phase of the pandemic, it appears that except for drugs, all other groups analyzed (promotion and prevention actions in health, procedures with diagnostic purposes, clinical and surgical procedures, transplants, orthoses, prostheses, and specific materials, in addition to complementary health care actions), had a sharp drop shortly after the start of the pandemic and even with a specific increase, no returned to the previous level, with particular emphasis on surgical procedures, which had a drop of more than 50%.

However, even more seriously, we find that the accumulation of exams and procedures currently represents 1,102,146 (one million, one hundred and two thousand, one hundred and forty-six) hospital procedures dammed up in the public health system (FIOCRUZ, 2022).

From this perspective, it is well known that several of the consequences of the pandemic are fully understood – deaths, unemployment, job losses, lower wages, economic stagnation – and other effects of the pandemic are marked by great uncertainty – the size of the recession, the resumption of economic growth – however, the shaken expectations make it inevitable and necessary for a state response to this enormous challenge (Mendes, *et al.*, 2020).

It is clear that the pandemic event was never expected, and it is impossible to demand that the country and the public health system be prepared for such an event. However, it is possible to understand, from the analysis of the events that occurred in recent years, that despite the above, the institutional crisis installed in the Brazilian scenario at least played some role in the worsening of the crisis, leaving still severe consequences to be resolved in the post-pandemic period.

Judicialization, judicial activism, and systemic communication problems

The intervention of the Judiciary in the Executive is not recent. In the 80', when Brazil went through the so-called "Brazilian Hyperinflation", the Judiciary was reached to intervene and treat currency as everyone's money, uttering individual, and sometimes conflicting decisions. Although these decisions were based on distrust of public opinion about how the Executive manipulated the indices at the time, ended up being considered disastrous due to the lack of perception of the situation, especially because when you deal with divergent interests, decisions are usually contradictory (Lopes *et al.,* 2022, p. 6- 7).

Indeed, activism is always linked to more intense participation of the magistrate in implementing fundamental rights and guarantees, resulting, in most cases, from a delegation by the Legislative and Executive Branches, either because such powers prove to be ineffective in the development of public policies, or because the issue is controversial; it is clear that most of the time politicians prefer to avoid solving the problem and having a negative image in front of voters (Silva, 2017, p. 7).

Luís Roberto Barroso (2009, p. 12), Minister of the Supreme Court, understands by judicialization that some issues of wide political or social repercussion are being decided by Judiciary Power and not by traditional political instances, such as National Congress and the Executive branch.

From this point of view, it is noteworthy that article 5, item XXXV of the Federal Constitution glorifies the principle of non-obviation of jurisdiction, so when there is a concrete legal problem brought to the magistrate, he or she cannot refuse to resolve it under the argument that there is no specific law to support their conduct.

In this regard, some authors divide judicialization and activism, considering that the first one exists when there is a constitutional norm that allows a subjective or objective claim to be deduced from it, and it is up to the judge to know it, deciding the matter; Judicial activism, on the other hand, is the choice of a specific and proactive way of interpreting the Constitution,

expanding its meaning and scope; it is installed, usually, when social demands are not being effectively (Barroso, 2009, p. 14).

Thus, it is clear that the activity of the Judiciary, which sometimes goes beyond what is determined in the legal norm, cannot be criticized without first considering that justice is always inert; so, the judges will decide based on the provocation of those under its jurisdiction so that its decisions are essential to expand and implement the application of the law, bringing justice to the concrete case, especially when there is no legal norm applicable to the claim.

However, as is known, the phenomenon of activism cannot extrapolate the limits imposed by the core of fundamental rights; that is, the creation of rights in the solution of the concrete case cannot be disconnected from the essential spirit of the constitutional norm. In this context, the creation of law by the Judiciary will be validated and considered legitimately democratic; therefore, when its role is carried out to overcome the ineffectiveness of the norms, it leads a true proportional judicial activism to guarantee constitutional rights, even if there is a supervening regulatory rule (Goes, 2021, p. 95-96).

So, the intervention of the Judiciary must be based on the legal control of the reasonableness of the act of public power. Thus, it is possible to implement, through judicial intervention, the fundamental essence of rights, but as a fair measure to achieve the intended ends (Silva, 2017, p. 8-9).

From the specific perspective of health, the academy widely discusses the need for the Judiciary to respect the choices made by the Legislature when organizing the social security system. In this context, the criticism is about situations where these choices do not respect the constitutional precepts, under penalty of undue interference, compromising the division of constitutionally provided functions (Pierdoná, 2019, p. 180).

In decisions uttered by the Federal Supreme Court, it is clear the understanding that health is an unavailable good (Lima, 2016, p. 694). However, it is important to emphasize that the universality of social protection is essential for implementing public policies in the health area and must be progressively implemented by the Legislative and Executive Branches. So, the interference of judicial decisions, in this case, ends up harming an entire system, implementing public policies in a constitutionally unforeseen way (Pierdoná, 2019, p. 180).

The debate about whether or not the Judiciary can enforce the right to health has always had as its tormentor the postulate of "reserving what is possible"[3]; in short, it means that resources are scarce and social needs are infinite, and it would be up to the Executive to analyze what is most important.

The problem, as mentioned, is that rights are costly, especially when considered universal. In this respect, it is also necessary to analyze the complexities involving the assumption that the right to health is unavailable and providing it irrationally in any pleadings promoted in the Judiciary.

Thus, far beyond all the conflicting and controversial topics that surround social rights, it is relevant to highlight the discussions that concern the judicialization of health, demonstrating

[3] In portuguese: "Princípio da reserva do possível". About it, please check: Silva, V. G. da. and Nascimento, C. F. do. (2022) Reserve of the Possible and the Existential Minimum: limitations to the realization of fundamental rights, Research, *Society and Development*, 11(16), p. e478111638153. doi: 10.33448/rsd-v11i16.38153.

in a particular way that the judicial activism carried out by Brazilian courts has also had an impact on the budget prepared by the Executive Branch.

Indeed, it should mention that, despite the universality intrinsic to health, it is clear that such rights, when guaranteed, have an essential fiscal impact on the State, a fact that cannot go unnoticed by the Judiciary, that is, the State should grant for everyone the health resources needed, but still considering the fact that, when one judicial decision guarantee the right to health with an astronomic value, this decision has an impact in the right to health to the others that are not contemplated to this decision.

The Judiciary must consider such issues when analyzing the legality of decisions taken by other powers, a foundation without which there is no support for modifying such conduct.

The high number of judicial decisions determining the granting of medicines or medical treatments has worried public managers, who, in addition to being obliged to comply with these determinations, are also compelled to reorganize the health system in order to reallocate resources and structures used in favor of the beneficiaries of court orders.

Analyzing the amounts spent in response to the judicialization of health makes the level of concern jump from "alarming" to "unsustainable in the long term."

The Judiciary has an evident technical deficiency in dealing with health issues, precisely due to the complexity of the health area itself, given, in particular, the economic problem that ends up entering the scenario and that goes far beyond the patient and involves different characters, such as the doctor, the health market, laboratories, NGOs, hospitals and law firms themselves (Avila and De Melo, 2018, p. 88).

Another problem fibs in the rapid transformations of the world – from a technological, social, cultural, and customs point of view. From this perspective, technology is developing new things like never before, at a speed greater than economic growth and the economic and financial possibilities of families, companies, and public budgets, implying the prolonged economic crisis that passes Brazil. Therefore, it seems inaccurate to assume that all medical technologies should be available to everyone, regardless of contribution duties or evidence of effectiveness (Cechin, 2021, p. 212-213).

It is necessary to discuss the high number of decisions granted to compel the public power to offer certain drugs, which were sometimes inserted in the market a short time ago and have a much higher cost than those provided by the State. There are, in addition, processes that do not even discuss products that are not recognized as medicines since they are still in the experimentation phase by the National Health Agency (ANS - Agência Nacional da Saúde) and, for this very reason, have not been released for trade (Lima 2016, p. 703).

It is important to emphasize again, from this perspective, that all rights have community and financially public costs, especially the social ones, which are materialized in public expenses with immediate expression in the sphere of the holders, and that expands in the exact measure of the costs (Nabais 2002, p. 12).

The new actions negatively impact the tight public budget. Even before the pandemic, the budgetary impact was exorbitant: in 2015, for example, the State of São Paulo spent BRL 200,000,000.00 (one billion, two hundred million reais) to comply with 51,000 processes. The

amount is more than twice the cost currently incurred to serve 700,000 people in a program for high-cost medicines in the aforementioned federated State (Lima 2021, p. 157).

The problem of budget management due to the expenses caused by judicialization is under the main focus of the practical incompatibility between the universality of SUS service and the completeness of the supply of goods and services, bearing in mind, in particular, that the treasury has a finite source of resources and it is not financially sustainable to offer any treatment, regardless of costs, to all users, even in a universal system (Mascarenhas 2020, p. 292).

The decisions, sometimes, have a clear intention of granting the respective jurisdictions the full right to health; however, a significant part of the same decisions was based on standard arguments, which do not use the arguments brought by the State, closing the communication from other systems. For example, we identify this judicial attitude when costly drugs are granted based on simple prescriptions without justification in favor of new medications or against those available through the SUS (Lima 2016, p. 711).

It is necessary, in this regard, to criticize the lack of communication between judicial decisions and the social and fiscal impact of such determinations. The decisions of the Supreme Court that consider the right to health untouchable usually use an excessive and disproportionate use to social needs, increasing the systemic pressure in a way that, perhaps, its operational capacity cannot withstand (Lima, 2020a, p. 91).

It should also be noted that constant social integration limits the dynamics of systems: with its communications, a system influences directly – or indirectly – the other systems that are part of society. Such an influence is inevitable. A problem, however, arises when the level of irritation is so great that it requires the affected systems to increase the complexity of their operations.

The STF is aware of the national social ineffectiveness of its decisions. They may even become individually practical, but this effectiveness in the concrete case will have little or no coercive force at the national level. Indeed, it is undeniable that, in the Supreme Court, there is indeed a legal rationality defined in the sense of realizing the right to health when the observation sticks to the vision of micro justice (justice between the parties), which, however, approaches of a symbolic performance as a new elite is forged that has technical instruments to reach the STF.

In the long term, this rationality of the Court will not be sustainable because, instead of immunizing society with its communication, the law is irritating the political (Public Administration) and economic systems in order to subvert the order of these subsystems, leading to them to break of autonomy and, therefore, corrupting its binary code, which works as a communicational unit. Consequently, communication disorder will harm the global social system (society) more than the micro-effectiveness offered by judicialization (Lima, 2016, p. 713).

Such issues may have a direct impact on the public health budget due to the funding of millionaire medicines for specific actions. Such decisions further intensify judicial activism, which can sometimes be erroneous, but, at other times, ends up being justified in the absence of planning and action by the public power itself.

So, is it clear that judicialization currently requires an intra and extra-procedural dialogue between the most diverse institutions and actors to the extent that such decisions and determinations are prepared to deal with the specificity and complexity of these problems (Mascarenhas 2020, p. 299).

However, it is clear that, in the past few years the current actors of the Executive, Legislative, and Judiciary demonstrated the almost inability to function harmoniously under the terms that our Federal Constitution advocates, when suitable, use the separation of powers to delegitimize the intervention of the Judiciary, and it has been possible to identify the evolution of an institutional crisis already being strengthened and intensified on all sides – Executive, Legislative, and Judiciary.

Executive and Judiciary: how to reconcile the performance of these powers without excessive interference?

All the examples mentioned so far show the political crisis between the three branches seems to be just growing with time, in a working pattern, which needs to be improved and organized more consistently than we have been able to perceive happening in recent years. Indeed, it is unreasonable for such measures to be carried out only unilaterally, without considering the broader context of the situation – not only at the local level but also at the national level – because of the most urgent needs, especially of the neediest populations.

Some solutions, in this sense, can be raised.

First, it is necessary to point out the importance of collective procedural agreements, which are instruments of intra-procedure dialogue between democratic institutions, including enabling judicial control over the effectiveness of this agreement, bringing procedural law closer to administrative law and the magistrate to the public manager, in a relationship of dialogue and balance, and not in a power relationship in which one overlaps the other (Mascarenhas, 2020, p. 302-305).

Second, collective conventions, enshrined even by the Consumer Protection Code, end up providing dialogue, making each party concede a little in their demands so that everyone reaches a common point in which the collective is prioritized in favor of the individual.

In any case, this institutional dialogue needs to be significantly improved since the current procedural system still needs to be improved and adequate to provide minimal responses to the problems of judicialization of health (Mascarenhas, 2020, p. 302-305).

From this point of view, it is also essential to mention the so-called theory of dialogue between institutions, born in Canada and which aims to emphasize the role played by a constitutional inspection carried out by magistrates and reconcile the relationship between the Legislative and Judiciary branches as interpreters of the Constitution and fundamental rights (Hogg and Bushell, 1997).

Indeed, it is notorious that in cases where highly complex issues related to fundamental rights are discussed, they are the main defining factors of structural problems. It is understood as a state of structured non-compliance, not strictly illicit, but which is not considered as an

ideal state of things. In other words, it is a situation that needs reorganization or even restructuring (Didier Jr., 2020, p. 103-104).

The problem in dealing with structural issues in individual cases, therefore, is that the priority criteria collapse into a "first come, first served" system; that is, whoever filed a lawsuit will be served, winning the case and not solving the problem – which is collective but was treated individually (Didier Jr. 2020, p. 103-104).

In this context, the doctrine of the structural process was created based on a structural problem, seeking a transition between the State of non-conformity to an ideal situation. It develops itself in a biphasic procedure, which includes the recognition and definition of the structural problem and establishes the restructuring program or project that the related agents will follow. It leads, then, to the proposition of a procedure marked by flexibility, with the adoption of atypical forms of intervention and mechanisms of judicial cooperation, with the central purpose of consensus, adapting the process (Vitorelli, 2018, p. 6-7).

In this regard, the structural decision, which aims to restructure what was disorganized, has a complex content and must determine how to achieve the result. The players take action to achieve that objective, considering its particularities. It is also important to remember that structural decisions are far from the so-called judicial activism since the structural process needs flexibility and consensus, especially from the parties involved (Didier Jr., 2020, p. 109-115).

As previously mentioned, the problem of funding and the judicialization of health is that the SUS, a universal and egalitarian system, sometimes has its budget underutilized with decisions and judicial processes, harming an entire community in favor of an individual who had the opportunity to bring a successful and sometimes costly lawsuit to the public coffers.

In this sense, we also mention that the Conselho Nacional de Justiça (CNJ - National Council of Justice) is aware of these problems. In particular, the difficulty of the magistrate to evaluate the medical report and understand if the proposed treatment has indeed a scientific nature as base of its indication, led to the creation of the Núcleo de Suporte Técnico (NAT-JUS - kind of technical support center on medical issues), which presupposes the creation of opinions, notes, and specialized libraries to allow the formation of the magistrate's conviction regarding the issue (Cechin 2021, p. 213).

As a paradigmatic example, in Araguaína, in the State of Tocantins, the government established an agreement with the City Hall, its Ombudsman, and the Health Department, together with a Technical Support Center made up of a multidisciplinary team of specialists in public health, nurses, pharmacists, and doctors. This experience produced a significant reduction in judicialization: in 2013, 72% of health claims were resolved administratively through the City Hall Ombudsman, and NAT's work in partnership with the Public Prosecutor's Office and the Public Defender's Office, with only 28% of cases followed the judicial route; in 2014, despite almost twice as many claims demanding the right to health with the Ombudsman, 80% of cases were resolved administratively (Avila and De Melo, 2018, p. 99-100).

A broader view of the actors involved in promoting the social right of health is essential; in this context, these players must work daily to develop alternatives to integrate the Judiciary and other competent administrative bodies to improve decisions on the subject. Besides that,

the dialogue of inter-institutional interaction should serve as a model in other areas of great complexity that face severe problems of ineffectiveness and persistent omission regarding social rights and require a general and urgent restructuring. In short, the institutional dialogue is in full development in health (Avila and De Melo, 2018, p. 103).

The importance of institutional dialogue, especially from the point of view of health, is notorious, since judicial decisions, in this case, are not based only on determinations with demands that are sometimes impossible to comply with but on commands that end up compelling others powers to comply with constitutional determinations and solve the problem in a less burdensome way for the public coffers, enabling the organization of the other institutions involved.

This theory has been widely used in the case of collective demands, in which the Judiciary decides to take measures, preserving legislative and administrative competencies, only determining that the powers comply with their constitutionally imposed determinations, placing the Judiciary as an articulator among the other branches (Avila and De Melo, 2018, p. 85).

Thus, several solutions exist to the need for more dialogue between the institutions, especially between the three branches. In this context, all the responsible ones must observe situations broadly, structurally, and not just individually, especially preventing those singular decisions from harming specific planning of public policies.

Conclusion

From the context presented, we saw that the institutional dialogue between the powers is essential for a harmonious State and one with effective public policies.

In this regard, it is clear that the public health currently developed by the Brazilian State needs to be more efficient for our unequal population. Said inequality, in particular, has been even more marked after the pandemic devastated Brazilian health structures.

The SUS, an exemplary model for providing health services, needs urgent re-planning from the point of view of care to eliminate the queue that is currently so long.

It is evident, therefore, that when the Judiciary carries out the control, this must be done within constitutional limits, so it is necessary that the Legislative and the Executive, within their legal specificities, respecting the constitutional precepts, select the risks and priority recipients and, having done what is legally appropriate and permitted, have their actions supported even by the Judiciary, under penalty of the outbreak of this tripartite system.

It is notorious that, at the same time that judicial decisions help access health from an individual point of view, the budgetary impact of the judicialization of health and judicial activism prevent such measures and public policies from being taken, harming the state budget for health purposes, and consequently raising even more inequalities in the country.

Indeed, there is a clear need to use broad conflict resolution measures, such as the structural process, institutional dialogue, and collective agreement, to allow the government to face this

situation, not only to resolve isolated cases in the court, but also to take actions that really impact positively the public health.

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