MEDIATION OF THE RIGHT TO HEALTH BY THE COURT OF JUSTICE: ANALYSIS OF THE DEMAND[1]

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ABSTRACT: The objective of this study is to understand how the State of Mato Grosso Court of Justice has contributed with the implementation of the right to health, as the formal mediator in answering the health demands of individuals and families within the Unified Health System. This is a qualitative, descriptive-exploratory study, developed as a documental analysis. The documental base refers to a "database of public domain", which consists of proceedings made available on the Institutional Portal of the State of Mato Grosso Court of Justice. The judicial decisions comprised our data *corpus*. Results point out that the Judiciary has made efforts to solve disputes within its own scope of public power, limiting its mediator role in assuring the right to health, which is reduced to the mere provision of goods and procedures.

DESCRIPTORS: Right to health. Nursing. Family. Legal aspects.

MEDIAÇÃO DO DIREITO À SAÚDE PELO TRIBUNAL DE JUSTIÇA: ANÁLISE DA DEMANDA

RESUMO: Trata-se de estudo com o objetivo compreender como o Tribunal de Justiça do Estado de Mato Grosso tem contribuído na efetivação do direito à saúde, ao atuar como mediador formal no sentido de responder às necessidades de saúde demandadas por pessoas e famílias no contexto do Sistema Único de Saúde. Constitui estudo qualitativo, descritivo-exploratório, desenvolvido como análise documental. A base documental encontra-se arquivada em "banco de dados de domínio público", constituindo-se em arquivos acessíveis e disponibilizados no Portal Institucional do Tribunal de Justiça do Estado de Mato Grosso. As decisões judiciais compuseram nosso *corpus* de dados. Nossos resultados apontam que o judiciário tem buscado resolver contendas no âmbito do próprio poder público, limitando sua função mediadora na garantia do direito à saúde, sendo este direito tomado de forma reduzida ao fornecimento de alguns insumos e procedimentos.

DESCRITORES: Direito a saúde. Enfermagem. Família. Aspectos judiciais.

MEDIACIÓN DEL DERECHO A LA SALUD POR TRIBUNAL DE JUSTICIA: ANÁLISIS DE LA DEMANDA

RESUMEN: Este estudio tiene como objetivo entender cómo el Tribunal de Justicia del estado de Mato Grosso ha contribuido en la efectuación del derecho a la salud, cuando actua como mediador formal en el sentido de atender las necesidades de salud exigidas por las personas y familias en el contexto del Sistema Único de Salud. Estudio cualitativo, descriptivo-exploratório desarrollado com análisis de documentos. La base de los documentos se presente em "base de datos de dominio público", que constituyen en archivos accesibles y disponibles en el Portal Institucional del Tribunal de Justiça do Estado de Mato Grosso. Las decisiones de los tribunales conforman nuestro *corpus* de datos. Nuestros resultados señalan que el poder judicial ha tratado de resolver las disputas dentro de la propia administración pública, limitando su papel de mediador para garantizar el derecho a la salud, y este derecho puesto de forma reducida en el suministro de ciertos insumos y procedimientos.

DESCRIPTORES: Derecho a la salud. Enfermería. Familia. Aspectos legales.

INTRODUCTION

Studies regarding the experience of falling ill and seeking care for individuals and families, within the Unified Health System (SUS), in the State of Mato Grosso,[1-2] have helped to understand how legal proceedings have contributed with implementing the right to health, while working as mediators, changing the Therapeutic Itineraries (TIs) of individuals and families. The TI has been considered a health evaluation tool, as it shows the "peregrination" of individuals and families, with various health problems, across the different levels of healthcare, by the health professionals that treated them, and how that occurred, mapping them in different cities. Furthermore, it also allows for assessing the resolvability achieved in each specific location, the multiple costs of that experience of falling ill, and the healthcare networks that are created by these people, thus showing how the right to health has been consubstantiated in the SUS.[2]

In these networks, it is observed some cases in which individuals and families turn to the judiciary entities for mediation to make their right to health effective; thus the judiciary works as a formal mediator, as it has the qualification to do so, considering its institutional purpose and that its main attribute is the mediation of conflicts, as is the case of the Department of Public Prosecution, Legal Aid, and the Court of Justice.[3] As a initial premise, we consider that these entities have worked as formal mediators, changing, to some extent, people's TIs, either regarding their access to technologies and goods, such as medications and exams, or making their health needs visible to healthcare services and professionals.

Health is one of the main rights recognized in Brazil, with an important place in the Federal Constitution,[4] which defines it as an essential social right, of universal character, that must be assured by the Government, and implemented through social and economic policies. This essential right to health is reaffirmed in Law 8080, of September 19 of 1990, which addresses "the conditions for the promotion, protection and recovery of health, the organization and operation of the corresponding services, in addition to other measures".[5:1]

Despite being recognized in the National Constitution, in the State of Mato Grosso, juridical proceedings have been moved with the purpose to assure that the citizens' right to health is made effective. In the present study, specifically, we are interested in this demand at the State of Mato Grosso Court of Justice, which has the mission to assure justice is made through jurisdictional work, aiming at social peace.[6]

The general objective of the present study was to understand how the State of Mato Grosso Court of Justice has contributed with the implementation of the right for health, by working as the formal mediator to answer the health demands of individuals and families in the context of the SUS in the State of Mato Grosso. The specific objectives were: type of demand for the right to health, relating it to the disease; juridical discourse related to the demand – by the author and the defendant or his/her representative, as well as the argument of the concession or denial of the right by the judge; and the mediation role of this entity and its effectiveness.

METODOLOGY

This qualitative, descriptive-exploratory[7] study was developed as a documental analysis, in which the document was the text of the State of Mato Grosso Court of Justice judicial second-instance decisions regarding demands of the right to health.

The document is, herein, considered as a memory and consist of a precious source by which it is possible to reconstruct the proof of a particular activity;[8] in this case, of the judicial system in the State of Mato Grosso. It is also useful because it is not a fragment of any random document, but, rather, it regards the full meaning of the judgment of a demand of right to health and, if a researcher works with documents, he/she must locate the pertinent texts and evaluate its credibility and representivity, despite our initial difficulty to interpret the discourse full of terms and concepts uncommon to us, as they are from the field of Law

Our document is considered a primary source, containing the reports and claims of Appeals Court Judges, in the records of the demand for the right to health; thus, we consider that those contain qualified statements of the Mato Grosso judiciary regarding the right to health. The documental base is filed in a "database of public domain", and are, thus, accessible and made available on the Institutional Portal of the State of Mato Grosso Court of Justice, following the link Jurisprudences at "available services", in PDF format. Therefore, these documents are public and filed in public juridical files of the government[8], referred to as "judicial decisions".

This file is organized according to some classification criteria[8] of the State of Mato Grosso Court of Justice, which include the Judgment Chambers, in which we performed a preliminary survey with the purpose of finding the "location", in the file, where we would be able to comprise a satisfactory *corpus* of documents of interest to our object of study. The location was defined as the Civil Chambers and the Group of United Private Law Civil Chambers, in a number of six and two, respectively.

After establishing the location, we used specific inclusion criteria to perform the survey in these chambers: 1) by the "full content" of the proceeding files; 2) by "filtering the search", using the descriptor "right to health"; 3) proceedings evaluated by all the judges (including retired judges); 4) demands judged in the period between April 1st of 2008 and march 31st of 2009, regardless of the date the proceeding started; 5) class of the proceeding writ of mandamus or collective writ of mandamus.

In the survey, all the chambers contained documents regarding the right to health, which was of our interest, and were, thus, collected as PDF files, totaling 346 proceedings. After excluding the repeated files, a total 338 files comprised our database. The survey period was from April to June of 2010, involving a group of researchers, master's graduates and undergraduates involved in research apprentice programs.

Each proceeding was read carefully so we could understand its full content and elect its basic structure components. From this first reading, we identified that these proceedings use a specific language and follow a particular style.

These components supported the construction of a descriptive-analytical table, using *Excel* (*Windows* 2007), in which the text of each proceeding was decomposed, exhausting the information it contained. This table was, thus, comprised by pre-categories, which provided information regarding each of the 338 proceedings in terms of a: 1) number of the protocol; 2) chamber of judgment; 3) district; 4) type or appeal; 5) author; 6) defendant; 7) date of the proposition on the second-level instance; 8) date of judgment; 9) abstract; and 10) object of the demand. Therefore, this table guided the retrieval of information from each proceeding, and also allowed for making a general map of our database. The data presented in the table were submitted to analysis, quantitative regarding its absolute and relative distribution, and qualitative in terms of its discourse analysis, particularly regarding the discourse contained in the abstract of the proceeding.

This study is connected to a larger, original study approved by the Research Ethics Committee at Julio Muller University Hospital, under protocol 671/CEP-HUJM/09, although the *corpus* analyzed herein is of public domain.

RESULTS

Preliminary results of the present study[9] showed that of the 338 analyzed proceedings, the district of Cuiabá, the capital of Mato Grosso, originated the largest number of demands, i.e., 56.80% (192). The second largest demand originated in Várzea Grande, accounting for 8% (27), followed by Sinop (18), Rondonópolis (15), Tangará da Serra (14) and Alta Floresta (11), which, together, accounted for 17.15%; the remaining demands, 18.04% (61), are distributed across 25 different cities.

It appears that the demands are distributed according to population in the State, but not exclusively to this factor, because Sinop (110,513 inhab.) and Sorriso (57,799 inhab.) have a considerably uneven distribution, of, respectively, 18 and two. These neighbor cities are located in North-Central Mato Grosso. Sorriso is home to a Regional Health Department, which perhaps contributes with its smaller juridical demand; however, the effects of the structure of healthcare and judicial services on the generation of demands of right to health require more in-depth studies.

The following demands (five to 10) are distributed among three different cities; while smaller demands (one to four) are distributed among 21 cities, nine of which have only one demand. Together, these demands account for 22.05% of the total.

The preliminary results[9] also point out that 95.27% (322) of the proceedings are referred to as "appeal", as they consists of actions that are running in the second instance of the juridical system, i.e., in the State of Mato Grosso Court of Justice. Appeal refers to the way that the individual feeling harmed by a judicial decision reports to the authority who upheld that decision, or the superior authority, to change or annul the decision that has been made.[10]

Considering the 322 appeals, the most common was the "bill of review" (245), accounting for 77.78% of the total. On the other hand, the "inter-

locutory appeal" is the most common (218) type of "bill of review", accounting for 88.98% of the proceedings.[9] In juridical terms, "bill of review" is used to refer to an appeal against an interlocutory decision, i.e., one that is upheld before the proceeding is fully completed. In the case of an "interlocutory appeal", it is é interposed when the decisions may cause a severe injury and of difficult recovery to one of the parties.[9] Therefore, the group of appeals at the State of Mato Grosso Court of Justice, the demands for rights have mostly been interpellated a "bill of review", with celerity being conceded in the juridical instance, implying the probable life risk that is related to the violated right, which will later be more thoroughly analyzed, based on the juridical discourse contained in the abstract of the proceedings.

The author of the proceeding, or its applicant, is named differently, as follows: injured, appellant, objector, petitioner or interested. All of them have one fact in common, with is to be a party in the cause and, unhappy with the judicial decision, they turn to the decision or dispatch given by the judge, interposing a appeal; also one who requests or requires their right, with a legitimate interest on something that must have legal protection. This is important, because of the 338 proceedings, the greatest applicant in the State of Mato Grosso Court of Justice is public power itself (290), either the State of Mato Grosso (278), or one of its cities (12), accounting for 85.80%. Clients as applicants (27), account for 7.99% of the proceedings. Considering the remaining proceedings (6.21%), we emphasize that the demand by public agreements – Mato Grosso Health (2), or private – Unimed Cuiabá (3), and, also, the Department of Public Prosecution (3) and Legal Aid (1), as authors.

The public power is author of these proceedings because they refer to second-instance appeals, i.e., the client is not receiving an answer to a specific need[11] at a public healthcare service, and, for this reason, files a judicial appeal to achieve it. The public power, therefore, representing most of the proceedings in the state of Mato Grosso, interposes through an "official statement", a second-instance appeal at the State of Mato Grosso Court of Justice, in proceedings in which it is the defendant in 1st instance.

The Department of Public Prosecution, on the other hand, is the defendant in most (152) second-instance proceedings, accounting for 44.97% of the proceedings, because it represented the client in the fist-instance appeal. Therefore, two large institutions debate on most proceedings: The Department of Public Prosecution on one side, representing the client; and the State of Mato Grosso, becoming the applicant of the appeal.

The State of Mato Grosso Court of Justice, in view of being the second-instance author, received and deferred in part to the State of Mato Grosso only 3.41% of the appeals (11); as the remaining were denied and dismissed. That is, it sought to maintain the decision of the first instance, welcoming the client's demand, as to guarantee their right to health.

The following analyses are based on the abstract of the proceedings, which contain the summary and the decision of the judge, presented in two parts: the first contains the key-words, or expressions that indicate what was discussed; and the second is the result from the judgment, the "decision".[8]

This analysis frequently reveals the terms "right to health", based on the Federal Constitution, the "duties of the State to provide that right", de denial of the judge regarding the author's justifications to not providing the required demands, and the most common demand was for medications.

Regarding the object of the demand, most requested medications (162), accounting for 47.93% of the 338 proceedings. Considered as a significant element of healthcare, the Ministry of Health created the National Policy for Medications to guarantee the safety, efficacy and quality of medications, their rational utilization and the accessibility of the population to the medications considered essential.[12]

This Policy established lists of medications to be provided by the SUS, which includes from essential to high-cost drugs. Nevertheless, despite these guarantees, most proceedings analyzed in our study were demands for medications, which shows they are not easily obtained in the public health system in the state of Mato Grosso, which agrees with the reality that is observed across the country[13], as medications are the first demand in judicial proceedings.

Studies show that in spite of the increase of judicial demands for medications, there is not an equal incorporation of new drugs to ordinances and clinical protocols.[14] The same occurs for procedures and goods that are often demanded, as is the case of food supplements, which are not incorpo-

rated by the ordinances. However, further detailed studies of our *corpus* of analysis shall show if the demands occur due to the new for new drugs or for drugs included in the National Policies for Medications but that are unavailable in the SUS.

The claims of the state of Mato Grosso for not providing the medications refer, first, to the budget administration, which does not permit to provide the medication at "no cot"; it is also alleged that the demanded medications are not listed in the ordinances and clinical protocols of the state. A study[9] has shown that, in general, these claims are contested by the judges, with the argument that budget issues and meeting clinical protocols are not above the right to life. Other studies report that health budgets are small considering the demand.[15-17] Yet, others, state that the budgets being small does not mean it is inflexible,[15] and there should be several sources, as stated in the Federal Constitution, in addition to the fact that the country has a great power of negotiation to acquire new drugs.[14]

The claims of the State are denied, in most abstracts analyzed herein, as stated before, because health is a right and, according to the juridical discourse, life is a greater and inviolable right. Therefore, the right to health is mentioned in every abstract of judicial decisions, recurrently described as: "the right to health guaranteed by the constitution"; "right to life and health", "health– a right of all, indiscriminately" and "the Federal Constitution guarantees the inviolable right to life to all" (art. 5th, caput).

The right to health is the main claim to defer the sentence in favor of the clients, which allows us to understand that this right is the maximum guarantee stated in the constitution, and is above all the ordinances and clinical protocols established by the state, as in this phrase that often appears in the judges' decisions: "[...] the right to health cannot be relativized over administrative policies –constitutional premise [...]" (judicial decision 41).

We highlight that Brazil is one of the only countries in the world that guarantees the right to health, and not the right to healthcare services;[15] however, we ask if this right, as claimed by the juridical discourse, has not been limited to fractions of the needs, as they are very broad,[11] but of poor visibility. In the judicial proceeding, that need appears, since the beginning, as a requirement for certain products and procedures, such as medications, exams or surgeries. Therefore, we question the possibility of the resolvability and effectiveness of the right to health, by means of the mediator role of the State of Mato Grosso Court of Justice.

We agree that the right to health requires a universal access to healthcare, counting with the necessary resources, offered by quality services,[11] involving intersectoral efforts, and considering its definition as a Social Right,[5] which involves broader actions than the timely provision of specific items.

Along with the claim to the right to health, the judge affirms it is a duty of the State to protect that right of the population: "The State, while protecting health, must provide, at no cost, medications to institutions with insufficient supplies, and no non-statutory, exclusively regulating laws can limit the provision of the referred social right, which is crucial and of an immediate nature" (judicial decision 63).

Based primarily on the Federal Constitution, the judge usually concedes the claimed demand. Some studies question the action of the judiciary regarding the concession of demands against the State, as they recall that the needs may be infinite, but financial resources are not.[17]

The judicial proceeding, as observed in the 338 cases analyzed herein, do not incorporate a follow-up of what was decided; and there is no control of the benefit granted in terms of the need still existing or not after a period of time. Therefore, the judiciary does not have the necessary mechanisms to track if the decision was implemented; or regarding its effects on the client's health condition.

We understand that the judicial demand originates in an unmet health need, hence dependent on effective management and healthcare practices, that meet the principles of Health Comprehensiveness and Resolvability, although the claims refer to the need for medications, usually justified for not meeting consensus, by means of protocols and ordinances. Therefore, the judiciary has aimed to solve contents within the scope of the public power, thus limiting its mediator role in assuring the right to health.

FINAL CONSIDERATIONS

With the enactment of the Federal Constitution, healthcare becomes a responsibility of the State, guided by the fundamental principles of Universality, Comprehensiveness and Fairness, with a decentralized organization and social participation. However, although it has been

organized by means of legal and administrative devices, these guarantees are not yet effective in implementing the right to health. Despite the constitutional guarantee to the right to health, patients have turned to the State of Mato Grosso Court of Justice when their demands are not met in the different healthcare services in the state. Therefore, through judicial demands, they seek the implementation of their right.

This judicial demand regarding the right to health, in our State, was qualified in this study, which showed they are usually timely, and consisting of well established individual needs; mostly medications, and do not offer the required visibility to the client's broader needs, such as those living with a chronic disease, considering that it affects their entire life and impose various needs, and that benefits are limited to the timely need and do not generate collective actions to allow for reorganizing the healthcare services and the care they provide.

It is necessary to reflect about the form of mediation provided by the judiciary, with a view to a synergy of efforts between this power and the health sector, thus contributing with the reorganization of the healthcare network to guarantee comprehensiveness and resolvability. We hope that the present study results contribute with the implementation of the right to health in the professional field, including nursing, as it points to the strengths and weaknesses of the mediating instance in providing effective mechanisms of citizenship in healthcare.

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