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ORIGINAL ARTICLE

JUDICIALIZATION OF HEALTH: CONTINGENCY RESERVE AND BASIC HUMAN DIGNITY

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ABSTRACT

Objective: to analyze cases of judicialization of health, describe their outcome and discuss the repercussions of the legal decisions for health care and the Unified Health System. Method: a case study, carried out from May to July 2020, in the websites of the Court of Justice of Rio de Janeiro - Brazil, Regional Federal Court of the Second Region and Superior Court of Justice. The analysis was based on the theory of contingency reserve and basic human dignity. Results: four cases about judicialization in health were identified, which were characterized as a mechanism for guaranteeing labor rights, evidencing the need for more efficiency in the public policies to improve access to health. Final considerations: the dilemma between human life and economy emerged in the legal decisions, and judicialization presented itself as a mechanism for guaranteeing rights. It contributed to the discussion about lawsuits in health and about the low ability to serve people with complex needs.

DESCRIPTORS: Judicialization of Health; Right to Health; Unified Health System; Public Policy; Nursing.

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INTRODUCTION

Health concepts are historically determined and are related to the cultural, social, political and economic context of the different human groups. In more recent times in history, such concept has already taken shape in its negativity, such as absence of disease, with Utopian positivity, as complete well-being and, perhaps, more objectively, linked to the social and economic determinants reflected in the living conditions of social groups. Health is the expression of quality of life and results from factors such as eating habits, housing, leisure, dignified income, environment, work, transportation, employment, freedom and access to health services[1-2].

In Brazil, the Health Reform, arising from the discussions of the 8th National Health Conference held in 1986, established as a recommendation the right to health and the effective implementation of the Unified Health System (Sistema Único de Saúde, SUS), both being elevated to the status of a constitutional guarantee. The first is made explicit in Article 196 of the Magna Carta as "a right of all and a duty of the State", and the second is present in Article 198, which ratifies that the public health actions and services are part of a regionalized and hierarchical network and constitute a single system, with universal access for the population[3].

Despite the legal protection established by the 1988 Federal Constitution, it can be observed that, since the 1990s, the neoliberal ideals began to ground the economic and political guidelines in Brazil, resulting in repeated attacks against the SUS. Neoliberalism is an economic and political ideology that, based on its exploratory logic, aims at maximizing profit with a reduction in the production cost, in addition to favoring deregulation of the social and labor rights. Such situation has resulted in downsizing of the public machine, reduction in the amount of human and material resources and decrease in the investments in the health system units[4].

In this logic, the SUS has faced an unfavorable scenario, from a reorganization of the Brazilian State, with proposals that differ from those advocated by the Health Reform, following guidelines from financial organizations such as the World Bank and the International Monetary Fund (such as destatization and privatization). Over the decades, this situation has contributed to scrapping of the SUS and to more precarious working conditions in the public health service units[4].

From this scenario, judicialization of health was intensified as a means to guarantee access to health goods and services, conferring the Judiciary Power the leading role in the effective implementation of the right to health. Thus, when assessing some judgments referring to the granting of health-related goods and rights, it is noted that the terms "basic human dignity" and "contingency reserve" are commonly present as the main grounds for the decisions. Most of the times, the first is resorted to by the Prosecutor's Office, by the Public Advocacy Office or by lawyers in defense of those whose right to health is impeded. The second is generally used as an argument by the State in its response to refuse to grant the desired right[5].

Basic human dignity can be understood as the minimum conditions of dignified human existence. On the other hand, contingency reserve is built upon the understanding that the public budget is finite, and that the social, economic and cultural rights have an economic quantification and should only be granted by the State if there is budget available[6]. Then, there is certain polarization to justify granting, or not, of the legal decision.

Such polarization encouraged the development of this study, whose objectives were to analyze cases of judicialization of health, describe their outcome and discuss the repercussions of the legal decisions for health care and the Unified Health System.

METHOD

A qualitative research study, of the explanatory case study type. Case studies are applied to explain, explore or describe current phenomena within their own context; in this sense, they are characterized as an analysis with emphasis on the description and relationship of situations that involve the researched phenomenon. In case studies with a qualitative approach, the fundamental characteristics considered are as follows: interpretation of contextual data, constant search for answers and questions, complete and in-depth portrait of reality, use of several information sources, natural generalization and disclosure of the different views about the object[7].

This type of study is suitable when the research aims at analyzing the "how" and the "why", and the researcher has little control over a situation that is naturally influenced by social issues. In addition to that, case studies can go beyond a qualitative research, using a combination of qualitative and quantitative evidence[8].

Data collection was carried out from May to July 2020, in secondary databases, specifically in the websites of the Court of Justice of Rio de Janeiro, Regional Federal Court of the Second Region, and Superior Court of Justice. The three Courts were chosen at random and the criterion for inclusion of cases were those whose proceedings had started in the last three years. In addition, to allow for an in-depth analysis of the phenomenon, it was defined that collection of the cases would cease from the moment that at least one case related to the judicialization of health that used the theories of basic human dignity and contingency reserve in the enactment of the sentence was identified, in each state of the Southeast region and at the appeal level.

Data collection was conducted using a form containing the following: locations where the lawsuits were distributed; dates on which the lawsuits were filed; case numbers; reasons that justified the legal decisions; parties involved in the legal cases; and outcomes of the proceedings.

Data analysis was based on the following procedures: synthetic description of the selected cases, focusing on content that allowed understanding the specific problem and, subsequently, comparison of the content of the legal decisions with the legislation and with the theories of contingency reserve and basic human dignity. Such theories provided conceptual support for the analysis and discussion of the cases of judicialization of health.

It is to be noted that, in the elaboration of this study, it was sought to comply with the steps recommended by the Consolidated Criteria for Reporting Qualitative Research[9-10]. Furthermore, it is emphasized that this study does not require submission to the Committee of Ethics and Research with human beings, as the data presented come from open access websites, available to everyone who views such portals and their contents. However, the ethical precepts established in Resolution 466/2012 were respected.

RESULTS

Based on the criteria established for data collection, four cases were found in the Southeast region: one in Rio de Janeiro, one in São Paulo, one in Minas Gerais, and the last one in Espírito Santo. The cases selected were initiated in 2019 and were still in progress in the months of data collection (from May to July 2020).

The cases will be narrated, identified and named below, as they are public domain data. The presentation brings up the central elements of the case, such as the description of the factual situation, what motivated the demand, the requests, the grounds used and

the legal decision.

Case 1 - Court of Justice of Rio de Janeiro (case No. 0050737 41.2019.8.19.0000)

The plaintiff, an older adult with a disease called ICD N 146 (prostate cancer), due to refusal of the municipality of São João da Barra-RJ to provide adequate treatment for his disease, sued the municipality for a suprapubic prostatectomy surgery, nurse caregiver during and after surgery, medium-size adult diapers and wheelchair, according to the medical reports attached to the case.

The Judiciary Power granted the plaintiff's request, in an early decision (due to the risk of death), for the appropriate surgical procedure to be performed in a public hospital or, in the absence of a vacancy, for hospitalization and surgery to be provided in the associated network or in a private hospital at the expense of the municipality.

Case 2 - Court of Justice of São Paulo (case No. 1001104-15.2019.8.26.0464)

The Prosecutor's Office of the State of São Paulo, in order to safeguard the rights of a person unable to exercise her own judgment, filed a lawsuit against the municipality of Pompeia-SP and the State of São Paulo, so that both would pay for the treatment of compulsory hospitalization of a person who uses impairing drugs, according to medical indication, enabling her to have a dignified life.

The Judiciary Power granted the request of the São Paulo Prosecutor's Office for hospitalization, at the expense of the municipality, safeguarding the physical and mental health of the patient who uses impairing drugs, causing the public administration, even if compulsorily, to comply with its role as responsible for enforcing the essential public policies, that is, preventive and curative health of the population.

Case 3 - Court of Justice of Espírito Santo (case No. 0007022-19.2019.8.08.0011)

The case originated from the plaintiff's need, who has acute promyelocytic leukemia with serious risk of death, to obtain arsenic trioxide from the state of Espírito Santo and the municipality of Cachoeiro de Itapemirim-ES, so that his treatment could be provided. The lower court judge decided, as a matter of urgency, to force the state and the municipality to provide such medication.

The municipality appealed the aforementioned lower court decision, arguing that the requested drug is not part of the National List of Essential Medications and that, therefore, it did not have the duty to grant it to the patient. However, the Court of Justice of Espírito Santo, when considering the appeal and following the majority case law, decided not to grant the appeal, maintaining the decision, which ordered granting of the medication.

Among the reasons stated by the court, the following stood out: "Contingency reserve and budgetary challenges are not instruments that support the Administration's position in ceasing to adopt measures that ensure constitutionally recognized rights as essential." The Court also emphasized that granting of the medication should be jointly and severally bore by the municipality and the state.

Case 4 - Court of Justice of Minas Gerais (case No. 1.0000.19.159680-8/001)

The case arose from the plaintiff's need to be transferred to a hospital specialized in the treatment of blood and hematopoietic organ diseases, in order to proceed with the treatment of "hematological disease, e.g.: Bicytopenia (anemia + thrombocytopenia) and leukocytosis with lymphocytosis". The lower court judge decided, as a matter of urgency, to force the state of Minas Gerais and the municipality of Betim MG to transfer the patient

to the competent hospital and advance the required treatment.

The municipality appealed the decision, alleging that the treatment intended by the plaintiff was not available, and that such lower court decision, if upheld, "may result in the denial of the right to health to thousands of people, withdrawing from the collective the funds intended for medications and health programs to meet the current lawsuit".

However, when considering the appeal, the Court of Justice of Minas Gerais decided to maintain obligation of the transfer and of the intended treatment, emphasizing that "health is everyone's right and the State's duty", and that the latter must guarantee "appropriate medical treatment and the necessary drugs compatible with the contingency reserve and basic human dignity provision."

Even acknowledging solidarity of all the federated entities regarding the right to health, in this case, due to the fact that the procedure intended by the plaintiff is highly complex, the Court understood that the obligation must be fulfilled only by the state of Minas Gerais, exempting the aforementioned municipality, as it has proved not to have the conditions to fulfill it, which would harm the plaintiff-patient himself.

DISCUSSION

According to the results presented and aiming to meet the objectives proposed, the discussion was elaborated from the following category: "Tension between the right to health and the State's material conditions".

Articulation between constitutional law and the adjustments with the social and economic policies represents a major challenge for the managers. However, the contingency provision, based on German law, serves as an argument that, in order to implement a right, there must also be corresponding budgetary and financial support, which, in administration, cannot be used as synonyms[11].

From the linking of human rights to the taxing power, the concept of basic human dignity emerges for everyone who is below the level of contributory capability. This line of reasoning asserts that, with regard to health protection in the SUS as a right, given its universalization, there can be an extrapolation of basic human dignity by allowing its use even by the most economically privileged[12].

The cases analyzed by this study point out that, when preparing the list of health services to be provided, as well as the medications to be made available to the citizens, the Government first assessed the most relevant and urgent needs to be met and the resources available for such purpose. At a second moment, the focus were the technical aspects of efficacy in the appointments and medications.

Vocalization difficulty by an increasingly expressive segment of the social policies' target population perpetuates its invisibility in the executive and legislative powers. Judicialization becomes the instrument that guarantees health care in procedures and medications outside those established by the National List of Essential Medications and for obtaining services neglected by the SUS managers[13]. Furthermore, given the evolution speed of health technologies, as well as the vertiginous inflation of costs, contingency reserve has been evoked to contest mandatory action measures, issued by the judiciary power[13].

However, it is important to emphasize that the principle of contingency reserve cannot be used as a shield to prevent the State from fulfilling its role in the effective implementation of essential public policies, especially with regard to health, with the need for the principles of basic human dignity to prevail, as long as the citizens prove that non-assistance will

deprive them from the minimum of their quality of life, especially regarding their health [14].

Nevertheless, it is noticed that the State uses the principle of contingency reserve to justify the limitation of the right to health, denying appointments and medications. Based on this denial, the Judiciary Power is required, in the event of omission by the other powers, to act incisively, so that the right to health is fulfilled.

The cases analyzed in this research show that the phenomenon of lawsuits for propaedeutic or therapeutic procedures not incorporated by the SUS brings to light ethical dilemmas of different shades, from the point of view of the managers, the judiciary power and the health professionals. If, on the one hand, the right to life and health cannot be overcome by economic justifications, on the other hand, from the managerial point of view, there are limits between individual interest and collective well-fare[15].

From the point of view of the judiciary system, the artifice of judicialization of health-related causes implies an apparatus of technical counseling for the specificity of the issues in this sector, so that abuses that harm ethics in society are not committed. For example, with regard to the requests for hospitalization/treatment, for such protection to be granted by the Judiciary Power, the indispensability of the measure must be proved by means of a medical report. It is also indispensable to confirm exhaustion of the extra-hospital resources, if they have been implemented, and also to demonstrate the citizens' impossibility to pay for the treatment/hospitalization with their own resources, showing that the imposing judicial measure is indispensable[16].

Health professionals also commit abuses by indicating high-cost non-standard treatments, without due concern for social ethics, since such costs will be shared by the entire society, even knowing the existence of similar ones with proven efficacy, although with better cost-effectiveness ratios[15-16].

Thus, there is a need to seek more efficiency in the formulation of public policies, with monitoring parameters based on scientific evidence, so that the guarantee of rational use and access to technologies, medications and a network of quality services is made effective, without the need for intervention of the Judiciary Power. Such measures are in line with the constitutional guarantees of the right to health and the enhancement of equality in society[17].

Finally, in its Article 196, the 1988 Federal Constitution (CF/88) guarantees the right to health, which must always be adjusted to the social and economic policies, also aiming to protect the universality of the services provided by the State, as well as of the other state obligations arising from the public budget, and to preserve a reasonably equal service to all citizens[3].

Thus, in order for the State to be able to meet the citizens' wishes within the scope of social rights (Article 6 of CF/88), it is necessary to devise public policies. Given this assertion, it is necessary to bear in mind that, when infringed, basic human dignity cannot be relativized. And when confronted with contingency reserve, basic human dignity will be in constant tension, being difficult to point out, in an abstract manner, which one and in what situation should prevail.

This study has limitations in relation to the coverage area and to the number of cases discussed, but it can encourage new studies to broaden discussion on the topic. It is suggested to develop other research studies, having the courts of other Brazilian regions as research locus, so as to weight application of the constitutional principles under discussion.

FINAL CONSIDERATIONS

Judicialization proves to be an important mechanism for guaranteeing rights, but the dilemma between human life and economy emerges in the legal decisions, with the State presenting resources based on contingency reserve, in opposition to basic human dignity in the right to life and health.

However, the social rights within the constitutional text ratify the decisions based on the concept of basic human dignity because they are necessary to the fundamental interests and, in this case, the argument of the contingency reserve theory by the government is not justified. What society wishes is that the State fulfill its role, ensuring social well-being through mechanisms for redistributing wealth, reducing inequalities and honoring the constitutional principles.

The contribution of this study lies in discussing the growth in the number of lawsuits in view of the weakening of the health system. The analysis of the current health context and its low ability to care for people with complex assistance needs also stand out as contributions.

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