



## Article

## The Effects of the Novel Coronavirus Pandemic of the Judicialization of the Right to Health Before the Federal Supreme Court

Os reflexos da pandemia do novo coronavírus na judicialização do direito à saúde perante o Supremo Tribunal Federal.

Las reflexiones de la pandemia del nuevo coronavirus sobre la judicialización del derecho a la salud ante la Suprema Corte Federal

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### Abstract

**Objective:** to identify whether the pandemic situation interfered with the extent and way in which issues relating to the right to health were assessed by the Federal Supreme Court. **Methodology:** documentary research was carried out, which, after consulting the Federal Supreme Court database, with the filter using the term “health”, returned a total of 1,178 rulings, 447 from the pre-pandemic period and 731 from the pandemic period, which were analyzed and classified according to thematic relevance. After the classification stage discards, 70 rulings were identified in the pre-pandemic period and 167 rulings in the pandemic that effectively deal with the right to health. **Results:** the pandemic imposed numerous challenges on the health system, so that the Judiciary was urged to speak out in the face of the now established controversies. In these manifestations, it was identified that there was an increase in demands for concentrated control and in the absolute quantity of decisions involving the right to health, as well as that qualitatively, in general, the previous decision-making pattern was maintained, although new themes have emerged. **Conclusion:** the study concluded that the Supreme Court's tendency remains in favor of the recognition of health rights, using arguments such as the non-offense of the separation of powers and the impossibility of arguing on the possible reservation to prevent their granting.

### Keywords

Pandemic. Coronavirus. Right to Health. Judicialization of Health. Judicial Decisions.

### Resumo

**Objetivo:** identificar se a situação pandêmica interferiu na extensão e no modo como as questões referentes ao direito à saúde foram apreciadas pelo Supremo Tribunal Federal. **Metodologia:** foi

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realizada pesquisa documental, que, após consulta na base de dados do Supremo Tribunal Federal, com o filtro pelo termo “saúde”, retornou um total de 1.178 acórdãos, sendo 447 do período pré-pandêmico e 731 do período pandêmico, os quais foram analisados e classificados conforme a pertinência temática. Após os descartes da etapa de classificação, identificaram-se 70 acórdãos no período pré-pandêmico e 167 acórdãos no pandêmico que versam efetivamente sobre o direito à saúde.

**Resultados:** a pandemia impôs inúmeros desafios ao sistema de saúde, de modo que o Poder Judiciário foi instado a se manifestar ante às controvérsias ora instauradas. Nessas manifestações, identificou-se que houve aumento nas demandas de controle concentrado e no quantitativo absoluto de decisões envolvendo o direito à saúde, bem como que qualitativamente, em geral, o padrão decisório anterior foi mantido, embora novos temas tenham surgido. **Conclusão:** o estudo concluiu que a tendência da Suprema Corte permanece favorável ao reconhecimento de direitos sanitários, tendo, para tal, argumentos como a não ofensa à separação de poderes e a impossibilidade de arguir a reserva do possível para impedir sua concessão.

#### **Palavras-chave**

Pandemia. Coronavírus. Direito à Saúde. Judicialização da Saúde. Decisões Judiciais.

#### **Resumen**

**Objetivo:** identificar si la situación de pandemia interfirió en el alcance y la forma en que las cuestiones relativas al derecho a la salud fueron evaluadas por el Supremo Tribunal Federal.

**Metodología:** se realizó una investigación documental que, consultada la base de datos del Supremo Tribunal Federal, con el filtro del término “salud”, arrojó un total de 1.178 sentencias, 447 del período prepandemia y 731 del período pandémico, que fueron analizados y clasificados según relevancia temática. Descartada la etapa de clasificación, se identificaron 70 sentencias en el período prepandemia y 167 sentencias en la pandemia que abordan efectivamente el derecho a la salud. **Resultados:** la pandemia impuso numerosos desafíos al sistema de salud, por lo que se instó al Poder Judicial a pronunciarse ante las controversias ahora establecidas. En estas manifestaciones se identificó que hubo un aumento en las demandas de control concentrado y en la cantidad absoluta de decisiones que abordan el derecho a la salud, así como que cualitativamente, en general, se mantuvo el patrón de toma de decisiones anterior, aunque han surgido nuevos temas. **Conclusión:** el estudio concluyó que se mantiene la tendencia de la Corte Suprema a favor del reconocimiento de los derechos a la salud, utilizando argumentos como la no infracción de la separación de poderes y la imposibilidad de argumentar la reserva de lo posible para impedir su otorgamiento.

#### **Palabras clave**

Pandemia. Coronavirus. Derecho a la Salud. Judicialización de la Salud. Decisiones Judiciales.

#### **Introduction**

The Federal Constitution (1) considers it a state duty to promote the health and well-being of the population (art. 196, caput, Federal Constitution/88/Brazil), a condition for a dignified life and a fundamental objective of the republic (art. 3, IV, Federal Constituion/88). Health is a right for all, to be guaranteed by appropriate public policies. It is a right that involves the prevention of diseases, the promotion of health and even the cure of illnesses that may affect the subject (2).

In a constitutional order in which the right to life and physical integrity are protected, it is only natural that failure to guarantee health would result in the emptying of those rights (2). And as fundamental duties, they interact with the principle of solidarity in society, which is responsible for their realization under the mantle of shared responsibility.

The Federal Supreme Court has already had the opportunity to state that the programmatic nature of the constitutional rule in question, intended for all political entities, cannot be turned into an inconsequential promise:

Otherwise, the government, by defrauding the just expectations placed in it by the community, will illegitimately replace the fulfillment of its unavoidable duty with an irresponsible gesture of governmental infidelity to what is determined by the State's own Fundamental Law (3).

The dynamics of realizing the right to health, on the other hand, do not disregard the social context and the historical moment. In this respect, recent years have presented unprecedented challenges for all nations. The world has been hit by a serious health crisis caused by the so-called New Coronavirus (COVID-19). The World Health Organization (WHO) recognized the pandemic level of the disease on March 11, 2020 and, since then, the adversities have been growing. The emergency has brought to light new contingencies and challenges to be solved by the powers that be. These challenges have been even greater in the health system, which has suffered great pressure and stress due to the extreme demand for care. Agile responses through measures to manage and contain the pandemic were demanded from the executive and legislative branches. The judiciary, in turn, has also been called upon to speak out. In Brazil, many issues involved the omissions of the central government in managing the crisis (4), which led other federal entities to take the lead in safeguarding the lives of the population.

Considering the emergency scenario and the need to better manage existing resources, it is important to point out that the applicability of the right to health goes through various concepts in such a way as to sometimes create a certain idea of opposition between life and the economic factor. This duality can lead to conflicts that are taken to the courts for resolution. The Federal Supreme Court has ruled that, between protecting the inviolability of the right to health and making financial interests prevail, for ethical-legal reasons, the inalienable right to health should prevail (5).

In view of the immediate applicability of art. 196 of the Federal Constitution/88 (1), when it comes to making the right to health a reality, there are also clashes over administrative functions. In this regard, it is important to highlight the idea that Germano Schwartz (6) brings in his book, that health is part of the social system, which belongs to the system of life, that is, one system within another, which necessarily entails mutual influences. The author (6) discusses how complex this system is and the countless factors that influence it, including issues such as the services needed by the population and political positions, which result in the provision of health to society. As a result, in the event of poor or non-provision, the state's jurisdiction may be called upon to manifest itself. In an analysis of judgments made in the context of the right to health, Fernando Rister de Sousa Lima (7) points out that the Supreme Court does not usually link the legal and political systems in such a way as to allow an exchange of communication.

At the same time, the widespread judicialization of relevant issues has led the Federal Supreme Court to establish various general repercussion theses on the right to health. As an example, it was defined that the Federation entities are jointly and severally liable in demands for healthcare services,

And in view of the constitutional criteria of decentralization and hierarchization, it is up to the judicial authority to direct compliance in accordance with the rules of distribution of competences and to determine compensation for those who have borne the financial burden. Topic nº. 793/Supreme Court (8).

This means, in short, that when there is a plurality of parties in a lawsuit aimed at providing health care, “it will be up to the judicial authority to direct compliance in accordance with the legal and infra-legal rules on the distribution of tasks” (9). Making the right to health a reality, Brazil’s highest court has also set guidelines for the supply of medicines not registered with ANVISA (Theme Nº. 500/Supreme Court) (10) and for the “delivery of high-cost medicines” - an expression used by the Supreme Court itself when discussing the subject (Theme No. 6/Supreme Court) (11).

The Supreme Court’s intense action on the matter and the context of the health crisis resulting from the pandemic reflect the panorama that gave rise to this research. We sought to identify whether there was a qualitative or quantitative change in the Supreme Court’s actions during the period studied. The general objective, then, was to identify whether the pandemic situation interfered in the extent and way issues relating to the right to health were considered by the Supreme Court. To this end, two-time frames were established - the period immediately prior to the pandemic and the period in which the pandemic was at its most intense - and evaluation metrics were established based on the constitutionality control instruments that justify the Supreme Court’s being called upon. There was therefore a segmentation between diffuse control claims and concentrated constitutionality control claims.

In diffuse control, there is a concrete situation of injury in which there is a question of unconstitutionality that is prejudicial to the examination of the merits. It is a concrete and incidental control, aimed at the direct protection of violated or threatened subjective rights. In Brazil, any judicial body is competent to prosecute and judge a case that has a constitutional issue as its background. This case can be brought before the Federal Supreme Court through ordinary or exceptional appeal procedures. As a rule, the Supreme Court’s most intense activity will be in examining extraordinary appeals filed by interested parties.

In concentrated control, on the other hand, there is an abstract examination of the contested act against the Constitution. In lawsuits of this nature, the main question is whether the act of public power is unconstitutional. In Brazil, this control is carried out exclusively by the Federal Supreme Court (art. 102, I, “a” of the Federal Constitution/88) (1) or by the Courts of Justice (art. 125, §2 of the Federal Constitution/88) (1) through specific legal actions. Examples include the direct action for unconstitutionality provided for in Law No. 9.868/99 (12) and the motion for breach of fundamental precept, detailed in Law No. 9.882/99 (13).

## Methodology

The research method used was documentary research, which in addition to obtaining data from books, scientific articles, searches for other sources in newspapers, legal acts, statistical compilations, etc. (14). Electronic research was used to collect data, in which information is extracted from electronic addresses (15). A number of steps were then carried out between august and november 2022.

In the first stage, the time frame for the analysis was delimited, considering a pre-pandemic period and a pandemic period. The beginning of the pandemic period was marked on March 11, 2020, the date on which the WHO considered it to be a health emergency. The end of the pandemic period was set for May 22, 2022, the date on which the Public Health Emergency of National Concern (PHEIC) was declared over in Brazil (16).

In the second stage, the research blocks were defined as block 1, from December 29, 2017 to March 10, 2020, and block 2, from March 11, 2020 to May 22, 2022. The definition of the pre-

pandemic period (block 1) was temporally limited to correspond to the number of days between the start of the pandemic and the end of the SPIN in Brazil, i.e. 802 days.

In the third stage, a quantitative survey was carried out of Supreme Court rulings using the word “health”. It should be noted here that we opted for a more comprehensive search using the word “health” rather than the term “right to health”. As a result, the judgments analyzed at this stage totaled 1,178, of which 447 were in block 1 and 731 in block 2.

After consulting the Supreme Court's case law, i.e. the set of decisions relating to the chosen topic, in the predefined date range and applying the “health” filter, the selection of rulings was made using a research method based on defining a set of characteristics and attributes that the sample should present in order to be considered as a decision dealing with the right to health. For inclusion, the judicial decision, in a qualitative analysis, should contain the protection of the provision and/or guarantee of the right to health as the main claim in the case, whether in concentrated or diffuse control. As a result, decisions that only indirectly addressed the issue were excluded from the analysis.

In the fourth stage, a qualitative analysis was carried out to identify decisions on the right to health and on other issues using the positive criteria for classifying judgments. The criteria used were that the content of the claim should necessarily address the issue of the right to health from the following points of view: (a) granting of the health benefit; (b) maintenance of the benefit already granted; (c) denial of the benefit; (d) federal competence to grant the benefit; and (e) impossibility of analyzing the issue because it involves re-examining the evidence.

In the fourth stage, a qualitative analysis was carried out to identify decisions on the right to health and on other issues using the positive criteria for classifying judgments. The criteria used were that the content of the claim should necessarily address the issue of the right to health from the following points of view: (a) granting of the health benefit; (b) maintenance of the benefit already granted; (c) denial of the benefit; (d) federal competence to grant the benefit; and (e) impossibility of analyzing the issue because it involves re-examining the evidence.

We chose to search using the term “health” rather than “right to health”, which increased the number of rulings to be analyzed since it is a broader term. As a result, there were a number of rulings that dealt with subjects unrelated to the study, such as: health professionals holding multiple jobs (17); lawsuits alleging serious damage to public order, health, safety and the economy (18); revision of the SUS table of procedures (19); lawsuits involving public health workers' unions (20); habeas corpus due to the patient being in the COVID-19 risk group (21); medical examinations in public tenders (22).

After applying the classification criteria, 377 decisions were discarded from block 1 and 564 from block 2. Thus, given the proposed limits, 70 judgments were identified that effectively dealt with the right to health in block 1 and 167 judgments in block 2. The 70 judgments in block 1 and the 167 judgments in block 2 then made up the scope of the study.

The analysis of quantitative and qualitative aspects considered only collegiate decisions. The research was therefore limited to examining rulings on the subject, using a classification that took into account the legal grounds used. This restriction sought to better understand the view of the Supreme Court's collegiate body, thus excluding one-person decisions (monocratic decisions). We also sought to identify whether there was a decision on the merits or whether only other issues were considered by the judges. If the study covered such decisions, block 1 would return, in addition to the judgments studied, 640 monocratic decisions on the right to health, while block 2 would have 1,157 decisions of this nature.

## Analysis and discussion of results

### *Quantitative aspects*

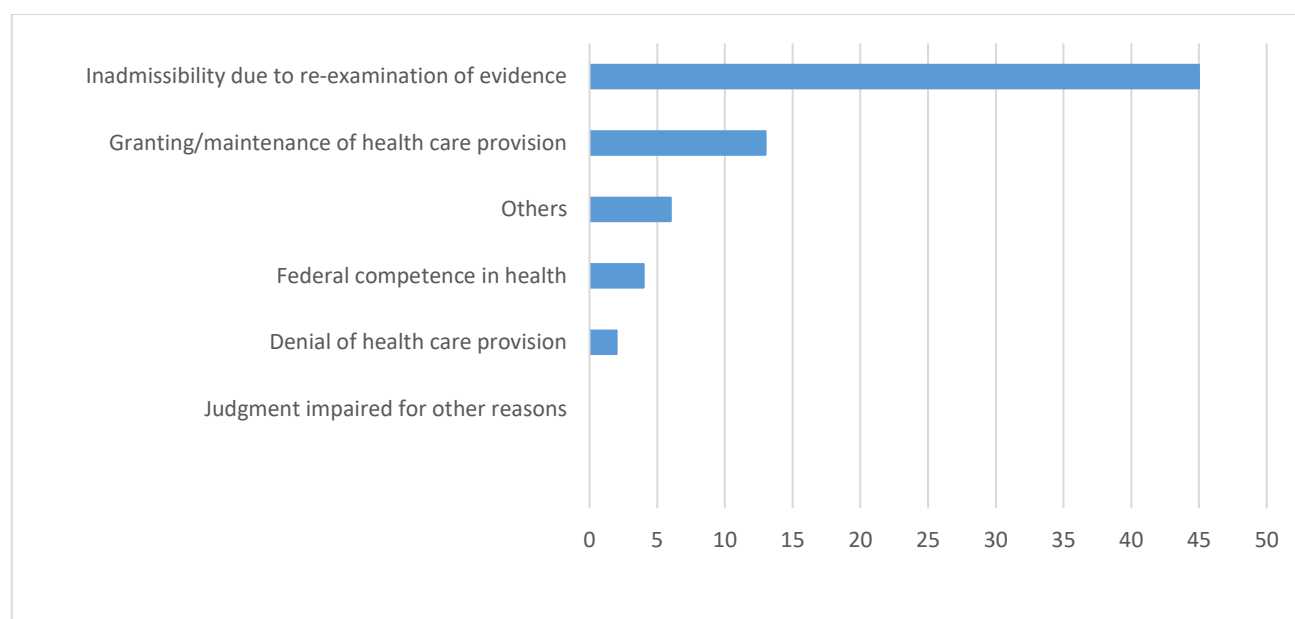
The first stage of the research involved the quantitative aspects of the pre-pandemic (block 1) and pandemic (block 2) periods. The aim was to investigate the figures relating to claims on the right to health in the Supreme Court.

The quantitative aspect of the period, block 1, brought together 70 judgments, while block 2, the pandemic, brought together 167 judgments, from which the analyses of this study were based. Thus, there were 97 more decisions handed down in the pandemic period when compared to the same period prior to the start of the pandemic, an increase of 41.9% in the number of collegiate decisions handed down on the subject over a period of four years and four months.

After analysis, it was found that the 70 judgments in block 1 and the 167 in block 2 present various grounds for examining the issue.

In block 1, 13 decisions upheld the right to health, 2 denied the right as requested, 4 dealt with jurisdiction, 45 with the impossibility of re-examining evidence (23) and 6 with other issues:

Graph 01. Theme of block 1 rulings on the right to health

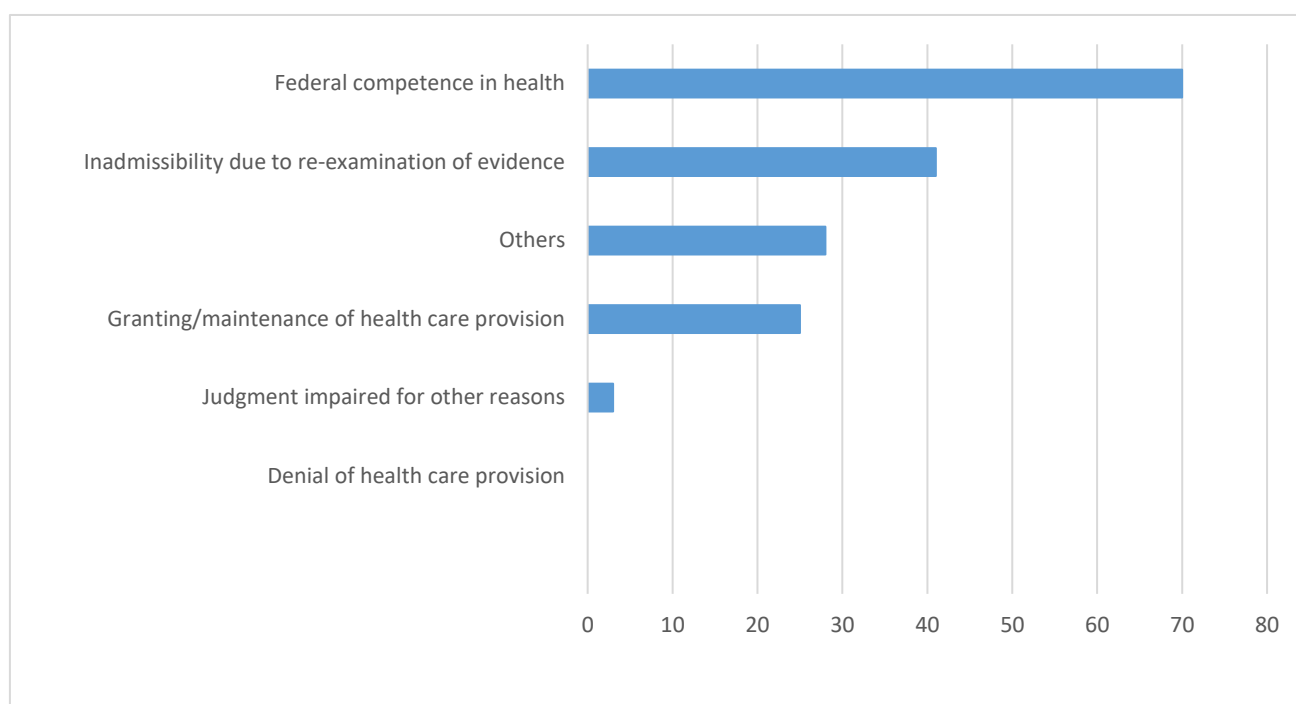


Source: own elaboration.

In block 2, of the 25 decisions that upheld the right to health, none denied the right in the form requested, 70 dealt with jurisdiction, 41 with the impossibility of re-examining evidence (23); 28 on other matters and 3 without analysis of the merits:



Graph 02. Theme of block 2 rulings on the right health



Source: own elaboration.

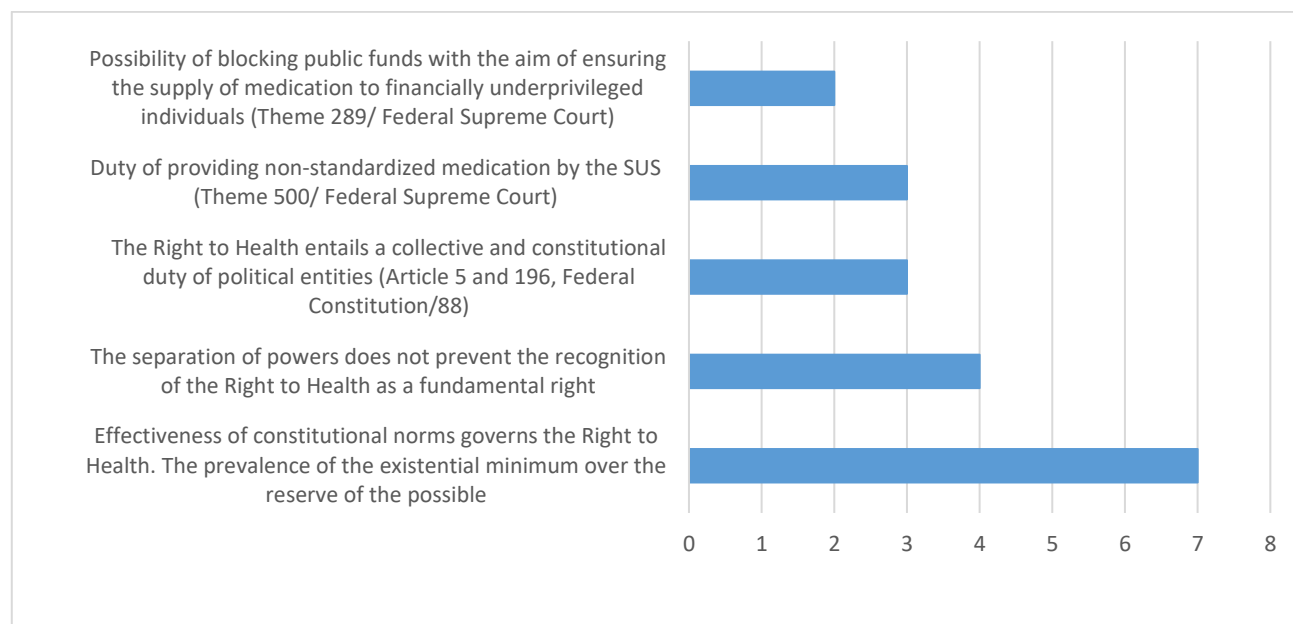
When examining the rulings that dealt with the right to health, in block 1, all came from diffuse control of constitutionality by the Supreme Court, while in block 2 83.23% came from diffuse control and 16.77% from concentrated control. In addition, of the 25 rulings that upheld or granted the right to health, seven were the result of concentrated control, i.e. 28%.

### *Qualitative aspects*

The second stage of the research involved the qualitative aspects of the judgments from the pre-pandemic and pandemic periods. The aim was to examine the legal grounds used by the Supreme Court in the cases in which the right to some health benefit was upheld or recognized.

Considering the thematic relevance, we decided to analyze whether there were any changes in the arguments that supported granting or maintaining the right to health during the debate in the Supreme Court. After analyzing the eligible rulings in block 1 that upheld or granted the right to health, the following analysis was carried out:

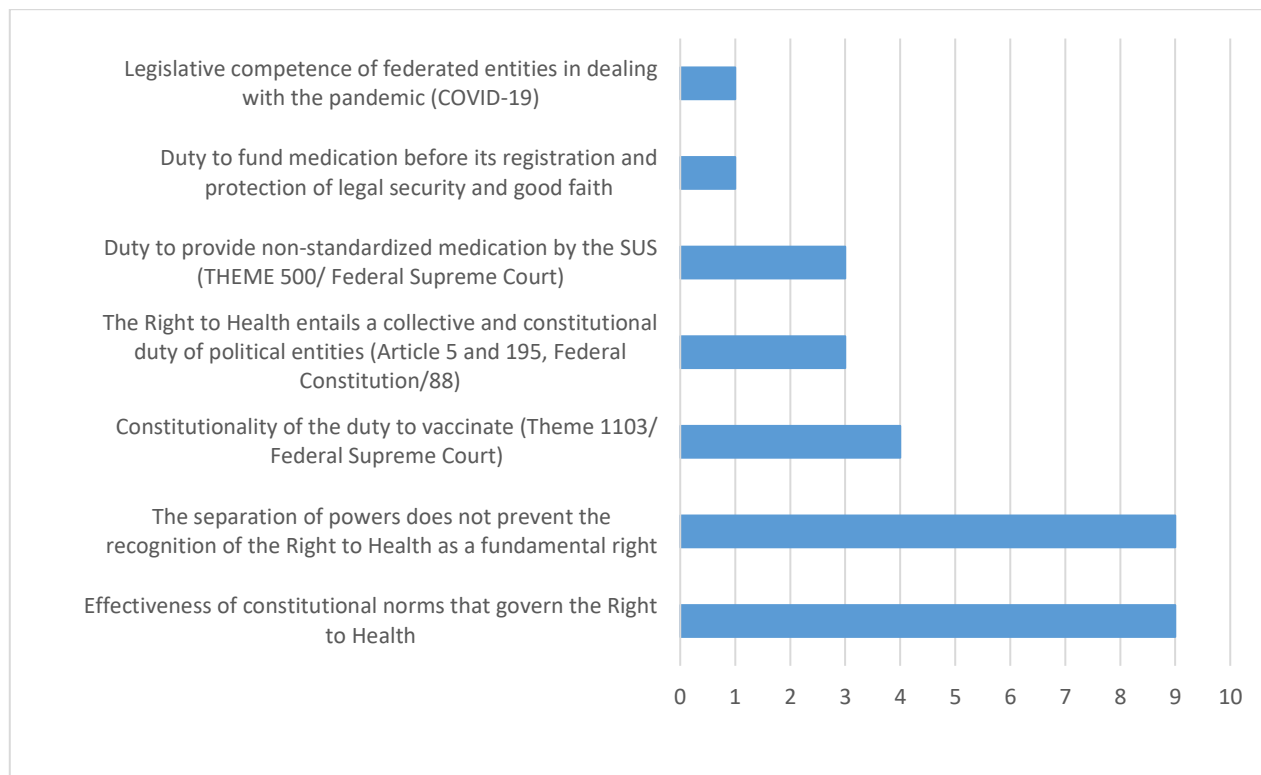
Graph. 03. Arguments block 1



Source: own elaboration.

On the other hand, in the analysis of the 25 rulings in block 2 that upheld or granted the right to health, the following findings were made:

Graph. 04. Arguments block 2



Source: own elaboration.



The graphs presented and an examination of the rulings allow us to highlight relevant points, both before and after the pandemic. As shown in graph 04, with the pandemic, the Supreme Court was called upon to rule on issues that had not been questioned before, such as the constitutionality of compulsory vaccination and the intervention of the Judiciary in the face of omission by the Executive or management of the right to health.

It should be noted that only two rulings were identified which denied the right to health in the form requested. These were the third Interlocutory Appeal in Suspension of Injunction no. 1,019 (24), judged on October 3, 2019, with Justice Dias Toffoli as rapporteur, and the Interlocutory Appeal in Suspension of Provisional Guardianship No. 101 (25), judged on October 3, 2019, with the same rapporteur, both included in block 1. In both cases, the central argument involved the impossibility of SUS paying for treatments whose scientific evidence was not favorable to the use of the health benefit sought.

As for the classification of the means of control, there was a clear increase in concentrated constitutionality control actions, although diffuse control issues still made up most judgments. Among those dealing with the right to health, no concentrated control actions were identified in block 1, while in block 2, of the 167 judgments, there were 28 with this type of control. On the other hand, the legal grounds involving potential damage to the economy of the municipal entity if health provision was maintained were accepted in only one decision in block 2 (26). Even in this case, the right to health was guaranteed against the Union and the member state, both of which were jointly and severally ordered to provide the health service.

Following the examination of the legal grounds, it was found that the thesis that the realization of rights does not constitute a violation of the separation of powers was present in both blocks of rulings. However, perhaps due to the context of the public emergency, block 2 saw a more forceful tone from the Judiciary, as in the Referendum on the Precautionary Measure in Direct Action for Unconstitutionality No. 6.625 (27), which, by a majority, modulated the validity of articles of Law 14.035/2020 (28), which provided for procedures for the acquisition and contracting of goods, services and supplies intended to deal with the pandemic and whose validity had been defined by legislative choice.

With regard to the separation of powers, the Federal Supreme Court maintained the position that “the regular exercise of the judicial function, for this very reason, as long as it is guided by respect for the Constitution, does not transgress the principle of the separation of powers” (29). This was a much-debated argument in block 2, being read as a means of contingency to deal with state omission or erratic management in an emergency situation.

One of the most common grounds used by the Treasury is compliance with the reserve of the possible. The theory of the reserve of the possible is the result of comparative law and indicates that if the state does not have a sufficient budget to meet a demand for the provision of a social right, it can be relieved of this obligation. In short, it is an argument that involves budgetary issues and state political choices as to its direction. According to Fernando Rister de Sousa Lima (7), the Federal Supreme Court is not open on this issue and the author believes that legal decisions cannot break with the political system, i.e. the functions of each power. With regard to the supply of medicines and the medical interventions requested, he adds that the Federal Supreme Court is completely in favor of such assistance. Camilla Japiassu Dores Brum and Roberto Freitas Filho (30), while not claiming that the

Supreme Court jurisprudential position is the most appropriate, reflect on the extent to which the Judiciary can oblige the state to grant measures to make the right to health a reality. In short, the restriction of resources, when alleged, has been considered by the justices as administrative mismanagement by the public manager, with the existential minimum prevailing until then (30).

In this regard, it is worth adding that Elísio Augusto Velloso Bastos and Heloisa Sami Daou (31) address the unsustainability of the economic argument when used against the guarantee of social rights. This is because the allocation of the budget is given by administrative choice and is therefore an act of will and should be viewed with “deep strictness, questioning and justification, because it is certain that social rights are all essential for a dignified life” (31).

Other arguments present in the decisions were health as a joint and constitutional duty (Theme 793/ Federal Supreme Court) (8), the supply of medication not standardized by the SUS (Theme 500/ Federal Supreme Court) (10), the possibility of blocking public funds in order to guarantee the supply of medication to a person with low income (Theme 289/Federal Supreme Court) (32), the constitutionality of compulsory vaccinations (Theme 1103/Federal Supreme Court) (33), the supply of medicines not registered with ANVISA (Theme 1161/Federal Supreme Court) (34) and the legislative competence of federal entities to deal with COVID 19 (ADPF 811) (35).

And as could be expected, many extraordinary appeals are not heard due to procedural issues, the most common of which is the prohibition on re-examining evidence. In fact, in the vast majority of situations involving the granting of health benefits, it is necessary to evaluate the factual-probatory framework in order to assess whether there has been an offense against any constitutional rule.

## Conclusions

The right to health as an autonomous branch has undergone severe challenges due to the health crisis resulting from the new coronavirus (COVID-19). This research carried out a quantitative and qualitative analysis of Supreme Court rulings to identify possible changes in the judgment profile. To this end, a temporal cut was made with decisions handed down during the pandemic and decisions handed down in the period prior to the pandemic. The main conclusions are as follows:

a) From a quantitative point of view, it can be concluded that there has been an increase in the number of right to health cases heard by the Supreme Court during the pandemic. Over the same period of time, the Supreme Court's trend has remained in favor of recognizing rights of this nature. In absolute numbers, there were more decisions granting or maintaining health benefits.

b) Still on the quantitative side, it is confirmed that, during the pandemic period, the right to health received significant attention in the judgment of cases arising from concentrated control of constitutionality. It could be argued that the dynamism of legislative and executive acts, which were sometimes the subject of disagreement as to the appropriateness of measures, demanded faster and more direct action from the Court.

c) Following in the quantitative aspect, a significant increase in judgments related to federal competency has been observed. In fact, while in block 1, competency issues were identified in 5.71% of the rulings on the right to health, in block 2 this number rises to 41.32%. Although it is not the object of the current research, it is worth remembering that between 2019 and 2020, the Supreme Court reaffirmed the common competence of the federation entities in the provision demands of the health area (Theme 793/Supreme Courts) (8). With an open and unclear thesis, the judgment in question may have given room for the numerical increase in health litigation on this subject. A little before the

closing of this text, the Supreme Court approved another extraordinary appeal with general repercussion to decide the limits of federal competencies in health matters (Theme 1234/STF) (36).

d) In qualitative terms, it can be concluded that the main arguments in favor of the right to health persist in the Supreme Court's case law. The Court maintains its position in favor of recognizing the right to health as a fundamental right that can be challenged by the Judiciary. Judicial recognition of this right does not offend the separation of powers and the reserve of the possible does not prevent the granting of health benefits.

e) Continuing with the qualitative aspect, the pandemic period led the Supreme Court to consider new issues. The collegiate body was forced to decide on the legislative competence of the federal entities and on the constitutionality of the duty to vaccinate (Theme 1103/Supreme Court) (33).

An analysis of the Supreme Court's actions in protecting the right to health during and after the pandemic confirms the widely favorable view of the possibility of the Judiciary intervening to ensure the well-being of citizens from the perspective of preventing illnesses, promoting health or seeking a cure for diseases (2). In the same way, it reinforces the view proposed by some that budget restrictions are not an insurmountable barrier to citizens seeking health services in court (31). In reality, this is an issue that involves appropriate decision-making on the part of public managers, which is therefore subject to judicial control.

As we have seen throughout this research, the Supreme Court sees no offense against the separation of powers in the judicial enforcement of the right to health. In the panorama of state functions, it is up to the Executive Branch to provide the population with access to adequate services, including from a public health perspective. If the executive branch performs this activity incompletely or inadequately, it is the judiciary's task to monitor its actions and, depending on the case, make the right claimed by the individual viable. The role of the judiciary in granting rights is not to be confused with the role of the executive branch in implementing public health policies.

Finally, it should be noted that possible biases were identified and taken into account in the data analysis. Although the Code of Civil Procedure indicates deadlines for the magistrate to issue his decisions, it is known that according to the internal rules of each court and the way the agendas are organized, the frequency of judgments can vary. Therefore, even for reasons of the maturity of certain issues, the oldest case will not necessarily be decided before the others. In this context, as the research was done by date of the decision, it is necessary to point out that the return of the number of judgments in the research, by not considering the date of filing the appeal, cannot in itself lead to the conclusion that there was a greater or lesser number of requests for judicial protection of the right to health in the periods studied.

In line with the general objective of this research, it was found that there has been an increase in court decisions on the right to health, but without significant changes in the legal grounds used by the Supreme Court. The pandemic may have been a time for greater reflection on the importance of health benefits, since the figures indicate a trend towards their recognition.

#### **Conflict of interest**

The authors declare that there is no conflict of interest.

#### **Authors' contribution**

All the authors contributed to the conception, drafting, revision and approval of the article.

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