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Article

The legal basis for the judicialization of the health of cancer patients in Belo Horizonte

A fundamentação jurídica da judicialização da saúde de pacientes oncológicos em Belo Horizonte

La base jurídica para la judicialización de la salud de los pacientes con cáncer en Belo Horizonte

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Abstract

Objective: the present work aims to identify the legal basis used by lawyers in the initial petitions, the result of the requests for injunction and the outcome of the lawsuit of lawsuits filed from 2014 to 2020 by patients who were diagnosed with malignant neoplasia undergoing treatment in the Belo Horizonte public health system from 2014 to 2019. **Methodology:** cross-sectional descriptive study with data collection through the application of a questionnaire to the legal proceedings of patients with breast, prostate, lung and colon cancer, which were chosen because they are the most common in the population and brain cancer because it is frequent in judicialization. **Results:** 25 pinces of legislation and 125 different legal provisions were found. Around 99% of the actions are based on Federal Constitution of 1988CF/88, followed by case law (88%) and Law 8,080/90 (71.3%). The most used legal provisions were art. 196 of Federal Constitution of 1988, which appeared in 96.2%, followed by article 6 (62.7%). In 70.2% of the legal actions, the last result of the demand was favorable to the request for the initial petition of the process. **Conclusion:** The legal basis for the actions was general, following the precept of health as a right for all and a duty of the state. In this way, the legal argument is built on the concept that the constitutional guarantees of the right to life and human dignity override any other argument thet permeates political and/or material interest that may be argued by the Public Administration.
Keywords: Health Judicialization; Health Legislation; Right to Health; Health Law.

Resumo

Objetivo: o presente trabalho objetiva identificar qual a fundamentação jurídica utilizada pelos advogados nas petições iniciais, o resultado dos pedidos de liminar e o desfecho da demanda das ações judiciais ajuizadas de 2014 a 2020, por pacientes que foram diagnosticados com neoplasia maligna em tratamento no sistema de saúde público de Belo Horizonte, de 2014 a 2019. **Metodologia:** estudo descritivo transversal, com coleta de dados por meio de aplicação de questionário aos processos judiciais de pacientes com câncer de mama, próstata, pulmão e cólon, que foram escolhidos por serem os mais incidentes na população e o de encéfalo por ser frequente na judicialização. **Resultados:** foram encontradas 25 legislações e 125 dispositivos jurídicos distintos. Cerca de 99% das ações são fundamentadas pela Constituição Federal de 1988, seguido das jurisprudências (88%) e Lei 8.080/90 (71,3%). Os dispositivos jurídicos mais utilizados foram o Artigo 196 da Constituição Federal de 1988, que apareceu em 96,2%, seguido do Artigo 6 (62,7%). Em 70,2% das ações judiciais o último resultado da demanda foi favorável ao pedido da petição inicial do processo. **Conclusão**: A fundamentação jurídica das ações foi generalista, seguindo o preceito da saúde como direito de todos e dever do Estado. Dessa forma, a argumentação jurídica se constrói sob o conceito de que as garantias constitucionais do direito à vida e à dignidade humana se sobrepõem a qualquer outra argumentação que permeie os interesses de cunho político e/ou material que venha a ser argumentado pela Administração Pública.
Palavras-chave: Judicialização em Saúde; Legislação em Saúde; Direito à Saúde; Direito Sanitário.

Resumen

Objetivo: el presente trabajo tiene como objetivo identificar la base jurídica utilizada por los abogados en las peticiones iniciales, el resultado de las solicitudes de medidas cutelares y el resultado del processo de demandas interpuestas entre 2014 y 2020 por pacientes diagnosticados con neoplasia maligna en tratamiento en el sistema público de salud de Belo Horizonte entre 2014 y 2019. **Metodología**: cruzada -estudio descriptivo con recolección de datos mediante la aplicación de un cuestionario a los procesos judiciales de pacientes con cáncer de mama, próstata, pulmón y colon, los cuales fueron escogidos por ser los más comunes en la población y el cáncer de cerebro por ser frecuente en judicialización. **Resultados:** Se encontraron 25 leyes y 125 disposiciones legales diferentes. Alrededor del 99% de las acciones se basan en la Constitución federal de1988, seguida de la jurisprudencia (88%) y la Ley 8.080/90 (71,3%). Las disposiciones legales más utilizadas fueron el

art. 196 de la Constitución federal de1988, que apareció en un 96,2%, seguido del artículo 6 (62,7%). En el 70,2% de las acciones judiciales, el último resultado de la demanda fue favorable a la solicitud de petición inicial del proceso. **Conclusión:** El fundamento jurídico de las acciones fue general, siguiendo el precepto de la salud como un derecho de todos y un deber del Estado. De esta manera, el argumento jurídico se construye sobre el concepto de que las garantías constitucionales del derecho a la vida y a la dignidad humana prevalecen sobre cualquier otro argumento que permea interés político y/o material que pueda ser argumentado por la Administración Pública.
Palabras clave: Judicialización de la Salud; Argumentación Jurídica; Derecho a la Salud; Derecho Sanitario.

Introduction

The judicialization of health refers to legal actions to obtain medicines, supplies and other products of interest to health[1]. In Brazil, it originated with the right to health in the 1988 Federal Constitution (CF)[2]. Today, the judicialization of health is a growing and complex phenomenon, involving the powers of the republic, the justice system, the health sector and society[3], encompassing the incorporation of technologies, supplementary health and public health policies. A study by the Instituto de Ensino e Pesquisa (INSPER)[4] indicates that between 2008 and 2017, the number of specific health lawsuits increased by 130%, while the total number of lawsuits in general grew by 50%. As for spending on judicialization, in 2016 around R$1.6 billion was spent. In a period of seven years (2009 - 2016) there was an increase of approximately 13 times in spending on judicialization[4].

In the public health system, judicialization can be an ally, since it can reveal the system's shortcomings, pointing out where the deficits in public policies lie[5]. It can also be seen as an extension of citizen participation, since it stems from a fundamental right[6]. On the other hand, judicialization can have negative effects, such as interfering in public policies, promoting inequality, burdening the health and justice systems[7].

The judicialization of health has been used to serve the most diverse interests, such as associations between the pharmaceutical industry and legal and health professionals[8]. In these cases, there is an attempt to shorten the distance that the medical industry has to pass between producing new technologies and incorporating them into the Unified Health System (SUS)[9]. It is important to emphasize that the relationship between doctors and patients is asymmetrical, in the sense that doctors are the holders of technical knowledge about the technologies prescribed, while patients, in most cases, have limited knowledge about what they have been prescribed[10,11]. A large proportion of judicial decisions are based solely on medical prescriptions, without the support of scientific evidence as to therapeutic effectiveness or advantage over other available lower-cost technologies[12].

The existence of the so-called "injunction industry" occurs when private health companies use the right to health provided for in the first part of Article 196 of the Federal Constitution, the technical ignorance of legal operators and the tendency of the Judiciary to grant injunctions in health actions, in order to better sell their products. Another contributing aspect is the strong focus of lawyers on litigation and legal disputes, with no predisposition for solutions such as mediation and conciliation[13]. The judicialization of health has become a gateway for citizens to access health services in the SUS, by providing access to people who have their requests granted through lawsuits, allowing them to obtain care more quickly than those who seek traditional SUS channels or services not available in the public network[14].

The majority of legal claims in health are based on the constitutional right to health by individual claimants, who achieve success rates with a highly receptive judiciary. This scenario can contribute to the worsening of health inequalities in Brazil, privileging access to health for citizens who can afford a lawyer and/or who are literate in how to access their rights[15].

Requests for medicines stand out because they represent a large proportion of the demands made in lawsuits[16]. Among the most judicialized drugs are those used in cancer treatment, which are often very expensive[17]. Cancer is one of the main causes of morbidity and mortality in the world, producing a greater demand for therapeutic alternatives[18], which generates pressure for the development of new technologies, which end up bringing products to the market at much higher prices than existing alternatives[17]. Due to the importance of cancer and the high cost of medicines for judicialization, we chose cancer treatments as the focus of the research.

This study aims to identify the legal grounds used by lawyers in the initial petitions, the outcome of the requests for injunctions and the outcome of the lawsuits filed from 2014 to 2020 by patients who were diagnosed with five cancers and were being treated at SUS in Belo Horizonte from 2014 to 2019.

Methodology

This is a descriptive, cross-sectional study of lawsuits with health claims against the State of Minas Gerais in the Case Management System of the Minas Gerais State Health Department (SIGAFJUD), whose plaintiffs are patients who were treated by the SUS in Belo Horizonte (SUS-BH) with a diagnosis of one of the five malignant neoplasms selected (breast, prostate, lung, colon and brain) between 2014 and 2019. Breast, prostate, lung and colon cancers were chosen because they are the most prevalent in the population, and brain cancer because it is frequently involved in legal proceedings[19]. Thus, lawsuits from 2014 to 2020 of patients diagnosed with cancer between 2014 and 2019 available on SIGAFJUD until February 2021 were analyzed[20].

The eligibility criteria for the lawsuits were: lawsuits by plaintiffs who were diagnosed with one of the five selected cancers by SUS-BH services between 2014 and 2019 and whose records were in SIGAFJUD until February 2021. The period of the lawsuits found according to this criterion was from 2014 to 2020.

Data was collected by applying a questionnaire directly to the lawsuits. One of the most important documents in a lawsuit and a source of information for the research is the initial petition. The initial petition is the first document in the case, in which the lawyer tells the story of the case in detail, with evidence, legal grounds and requests[21].

In the questionnaire, the variable 'Legislation used in the initial petition' is a variable with an open field, which was fed by recording all the legal provisions used as arguments to support the request in the initial petition. The information on legislation was obtained by recording data on the legal provisions present in the topic "Law" in the initial petitions. Article 319, III of the CPC states that the initial petition shall state the legal grounds for the claim[22].

The variable 'Injunction or Anticipation of Injunction' is a variable that represents a judicial decision that anticipates the effects of what was requested in the initial petition. The categories were: 'Yes', if an injunction was granted in the case; and 'No', if an injunction was not denied in the case.

The variable 'Outcome of the lawsuit' shows, in relation to the request made by the plaintiff in the initial petition, what the judge's last decision was at the time the questionnaire was applied. The categories are: 'Decision favorable to the user', when the plaintiff's request is granted in full; 'Decision

partially favorable to the user', when the plaintiff's request is granted in part; 'Decision unfavorable to the user', when the plaintiff's request is rejected.

It is important to note that all the analyses were based on the flow of information obtained from the lawsuit variables. For all the variables there is the category 'No information', which means that the information was not available at the time of collection. The lack of information on the variables may be due to a lack of access to all the procedural documents or because the information does not actually exist.

The study was approved by the Research Ethics Committee of the Instituto René Rachou/Fundação Oswaldo Cruz, and the report was registered on the Brazil Platform under number 5.422.223.

A limitation of the research is the fact that the analysis did not manage to cover the other legal arguments in the initial petition beyond the legal provisions.

Results

The research universe included 336 lawsuits, of which it was possible to access the legal grounds presented in the initial petition in 209 lawsuits. The outcome of the request for an injunction or preliminary injunction in 309 lawsuits. And the outcome of the lawsuit in 316 lawsuits.

The initial petitions to which this study had access had a structural pattern stratified into four parts, with some variations and subdivisions: the qualification of the party with the personal details of the plaintiff; the report 'Of the facts' that motivated the lawsuit; the title 'Of the right', with an exposition of the legal provisions and reasoning to support the allegations and arguments of the case; and, finally, the 'Requests', with one or more requests for granting directed at the judge.

In 69% of the cases, at some point during the proceedings, the judge granted a request for an injunction or preliminary injunction, ordering the defendant to provide the requested goods before the case became final and even before the defendant was served with a summons to defend himself in the proceedings[23]. There have been cases in which the preliminary injunction was granted by the judge of first instance, and some cases in which the plaintiff was denied the request for advance relief and appealed to the second instance, through an interlocutory appeal, and had the request granted. Due to the fact that health lawsuits deal with the right to life and, in the vast majority of cases, with urgencies, the requirements of *periculum in mora*, which is the danger of irreparable damage resulting from delaying the trial, and *fumus boni iuris*, which is the existence of evidence that demonstrates to the judge the legal possibility of the request and the veracity of the allegation, often without the need to hear the defendant in order to grant the benefit in advance.

Regarding the outcome of the lawsuit, in 70.2% of the cases the last result of the lawsuit was favorable to the request in the initial petition, plus the 4.5% of partially favorable decisions for the plaintiffs. In only 19.3% of the cases was the judge's final decision totally unfavorable to the plaintiff's request, which indicates a trend of lawsuits being granted.

By collecting the legal devices used by the plaintiffs' defenders to support the initial petition, it was possible to understand the legal argumentation and its patterns of use in these specific actions by plaintiffs with cancer.

The frequency of legislation and legal provisions, here considered articles, present in these lawsuits (N=209) are listed in Table 1. We found 125 different legal provisions used in the legal grounds of the lawsuits' initial petitions. The laws used were: the Federal Constitution; Constitutional

Amendment 29, on minimum resources for financing public health actions and services; the Minas Gerais State Constitution; the Organic Health Law (Law 8080/90); the Elderly Statute (Law 10.741/03); the Organic Law of the Municipality of Belo Horizonte (LOMBH); the Statute of Children and Adolescents (Law 8069/90); the Statute of People with Disabilities (Law 13146/00); the Health Code of the State of Minas Gerais (State Law 15474/05); the Writ of Mandamus Law (Law 12016/09); the Public Defender Law (Complementary Law 80/94); the Consumer Law (Law 8078/90); the Law on the Concession and Permission to Provide Public Services (Law 8987/95); the Code of Civil Procedure; the Civil Code; the Criminal Code; Decree 7508/90, on the organization of the SUS; the American Convention on Human Rights (Decree 678/92); the International Covenant on Economic, Social and Cultural Rights (Decree 591/92); State Decree 45015/09, designating a civil servant as a health authority; Ordinance 339/13, which redefines the Expansion Component of the Basic Health Unit Requalification Program (UBS); Ordinance 399/06, which publishes the 2006 Health Pact; Ordinance MS 1286/93, which provides for the necessary clauses in service provision contracts between the State, Federal District and Municipalities; Ordinance 741/05, which provides for CACON; the Basic Operational Standard NOB/SUS/96, which "promoted progress in the decentralization process, as it created management conditions for municipalities and states"; and the various jurisprudences, which are the set of decisions on interpretations of laws made by the courts.

Table 1. Legislation and articles used as legal support in the initial petition (N=209):

Legislation		**Articles of legislation**	**%**
Federal Constitution	FC	1, 3, 5, 6, 23, 30, 37, 127, 129, 153, 158, 182, 183, 186, 186, 193, 195, 196, 197, 198, 199, 200, 202, 203, 204, 208, 212, 227, 230	99,0
Constitutional Amendment	EA 29	In full	16,7
State Constitution	CEMG	2, 10, 11, 158, 182, 183, 191	15,3
Laws	LAW 8080	2, 3, 4, 6, 7, 8, 9, 15, 16, 17, 18, 19, 35, 43, 45, 70	71,3
	LAW 10741	2, 3, 9, 15, 30, 74, 79, 81	12,9
	LOM	3, 126, 130, 138, 141	12,4
	LAW 8069	1, 3, 86, 88	0,5
	LAW 13146	2, 18, 79	0,5
	LAW 15474	12, 15	1,0
	LAW 12016	7	0,5
	LC 80/94	4	2,4
	LAW 8078	22	0,5
	LAW 8987	6	0,5
Codes	CPC	8, 34, 300, 303, 334, 497, 536	4,8
	CC	247, 248, 249	0,5
	CP	135, 135-A	6,2
Decrees	DEC 7508	8, 15, 16, 17, 18, 9	0,5
	DEC 678/92	4, 6	32,1

	DEC 591/92	12	32,1
	DEC MG 45015/09	4	0,5
Ordinances	ORDINANCE GM/MS 339	In full	0,5
	ORDINANCE MS 1286/96	In full	0,5
	P 741/05	2	0,5
Basic Operational Standard of the Unified Health System	NOBSUS 01/96	In full	0,5
Jurisprudence			88,0

Source: Own elaboration.

Almost all the lawsuits (99%) are based on the Federal Constitution, followed by case law (88%), Law 8.080/90 (71.3%), DEC 678/92 and DEC 591/92 (32.10%), which are always used together, Constitutional Amendment 29 (16.70%), the State Constitution of Minas Gerais (15.30%), Law 10.741 (12.90%) and the Organic Law of the municipality of Belo Horizonte (12.40%).

The majority of the initial petitions (88.4%) used case law, which is a set of recurring judicial decisions on a given subject. There are also case law precedents, "which are the guidelines resulting from a set of decisions handed down with the same understanding on a given matter"[24], as arguments to support the request.

It was possible to obtain the percentage in which each legal provision contained in the legislation appeared (Chart 1). The most frequently used legal provision was Article 196 of the FC/88, which appeared in 96.2% of the arguments in the initial petitions, followed by Articles 6 (62.7%), 5 (61.2%) and 198 (53.1%), all of the FC/88.

Once we knew how often each legal provision appeared in the initial petitions of the cases in which we had access to this information, we tried to understand what it is and what arguments underpin each reasoning (Chart 1).

Chart 1. Arguments underlying the most frequent legal grounds in the initial petitions of lawsuits (2014-2020):

Legal basis	N	%	Arguments on wich the grounds are based
ART. 196 FC/88	201	96,2	It states that "health is everyone's right and the duty of the state, guaranteed through social and economic policies aimed at reducing the risk of disease and other illnesses and universal and equal access to actions and services for its promotion, protection and recovery".
JURISPRUDENCE	184	88	As there are so many of them and they are not organized by legal provisions like articles of law, it was not possible to select them individually. The prominence of the use of case law as argumentation also demonstrates the leading role of the judiciary.

ART. 6º FC/88	131	62,7	It states that "social rights are education, health, food, work, housing, transportation, leisure, security, social security, maternity and childhood protection, and assistance to the destitute, in the form of this Constitution".
ART. 5º FC/88	128	61,2	It states that "everyone is equal before the law, without distinction of any kind, and Brazilians and foreigners residing in the country are guaranteed the inviolability of the right to life, liberty, equality, security and property".
ART. 198 FC/88	111	53,1	It states that "public health actions and services are part of a regionalized and hierarchical network and constitute a single system, organized according to the following guidelines: decentralization, with a single directorate in each sphere of government; comprehensive care, with priority for preventive activities, without prejudice to assistance services; community participation".
ART. 2º LAW 8080/90	104	49,8	It states that "health is a fundamental human right, and the state must provide the indispensable conditions for its full exercise".
ART. 6º LAW 8080/90	91	43,5	It presents the actions that are included in the field of action of the SUS
ART. 7º LAW 8080/90	89	42,6	It lays down the principles that the actions and services that make up the SUS must follow
ART. 23 FC/88	84	40,2	Provides for "the common competence of the federated entities to take care of health and public assistance, the protection and guarantee of people with disabilities".
ART. 12 DEC 591/92	67	32,1	It says that states that ratify the "International Covenant on Economic, Social and Cultural Rights must recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and must adopt measures to ensure the full exercise of this right".
ART. 3º FC/88	67	32,1	It broadly presents the fundamental objectives of the Federative Republic of Brazil, which are: "to build a free, just and supportive society; to guarantee national development; to eradicate poverty and marginalization and reduce social and regional inequalities; to promote the good of all, without prejudice to origin, race, sex, color, age or any other form of discrimination".
ART. 5º DEC 678/92	66	31,6	It guarantees the right to personal integrity on a physical, psychological and moral level, with emphasis on the prohibition of torture and the enhancement of human dignity.
ART. 10 DEC 591/92	65	31,1	It presents protection and assistance for the family, special protection for mothers, pre- and post-natal care, assistance measures for children and adolescents and the prohibition of child labor.

ART. 4º DEC 678/92	65	31,1	It focuses on the guarantees of the right to life, which must be protected by law and, in general, from the moment of conception. It stipulates that no one may be arbitrarily deprived of life. And it prohibits the use of the death penalty.
ART. 4º LAW 8080/90	65	31,1	It presents the "constitution of the SUS as the set of health actions and services, provided by federal, state and municipal public bodies and institutions, direct and indirect administration and foundations maintained by the Public Power".
ART. 1º FC/88	54	25,9	It lays down the foundations of the Brazilian Republic, which are: "sovereignty; citizenship; the dignity of the human person; the social values of work and free enterprise; political pluralism".

Source: Own elaboration based on legislation

Discussions

Judicialization of cancer has a predominance of requests for medicines[25]. However, the problem of the judicialization of cancer is not to be confused with that of the judicialization of medicines in general, because the SUS funding model for cancer treatment is parameterized for each type of cancer and for each staging/therapeutic line, and not for each type of medicine. Medicines are supplied after the patient has been included in the APAC system of the Outpatient Information System (SIA), and the provider is then reimbursed by the Ministry of Health, according to a pre-established table. There is no single list of antineoplastic drugs incorporated into the SUS, nor are there up-to-date clinical protocols and therapeutic guidelines for all types of cancer[26].

The difficulty in accessing more modern drugs can have an impact on reducing patient survival[12], but this does not mean that they will have a better quality of life, with many petitions based on the argument of the right to hope[27].

The study found that the legal basis of the lawsuits was general, following the precept of "health as a right of all and a duty of the state" in Art. 196 of FC/88[2] and without arguments focused on specific legislation in oncology.

Article 196 of the Federal Constitution was used as a basis in almost all of the lawsuits in the study. This legal provision states that "the right to health shall be guaranteed through social and economic policies"[2]. To this end, public policies are necessary in order to "organize public government functions for the promotion, protection and recovery of the health of individuals and the community". However, both the representatives of the plaintiffs and the judges have a simplistic interpretation of this article, limiting the right to health to "the right of all and the duty of the state". The command that the duty of the state is made effective through public policies is ignored. Thus, when a broader interpretation of Article 196 is not made, what happens is that curative demands are privileged and, in many cases, the right to health is reduced to access to medication[28].

This simplistic argument, based on health as a right for all, is associated with a large number of decisions based solely on medical prescriptions, without the need for other evidence[29]. In this sense, Silva and Osório-de-Castro[12] state that medical prescriptions "can be the driving force behind judicialization". In other words, the medical prescription is the initiating element of the legal action for medicines. The prescription is then "accepted as sovereign by the courts", under the condition that the patient's real need cannot be questioned, especially in the case of cancer, where the urgency of the treatment is an aggravating factor.

The findings of the research follow the scenario of the judicialization of health already pointed out in the literature, with a high number of requests for the provision of health benefits being granted by the Judiciary, occurring on the grounds that the Constitution guarantees health as a "right of all and a duty of the State". It is customary to exclude the continuity of this article, which states that the guarantee must be given "through social and economic policies aimed at reducing the risk of disease and other illnesses and universal and equal access to actions and services for their promotion, protection and recovery"[2][23][25][26]. This understanding goes against the grain of the process of building the SUS as a social public policy to make the right to health universally effective[23].

Because the arguments are very broad, there is not much variation in frequency when you look at the stratification by the plaintiff's cancer. The argument is built around the idea that the constitutional guarantees of the right to life and human dignity take precedence over any other political and/or material interest that may be argued by the Public Administration.

Related to this findingthe subtopic "guarantee of the existential minimum" was frequently identified in the initial petitions. The argument put forward by the plaintiffs' representatives is predominantly to the effect that citizens have the right to demand that the state act positively to provide them with the existential minimum. The state has an obligation to respect this existential minimum, which is made up of public health, because without these benefits there will be no human dignity. This also means respecting the minimum effectiveness of social rights. Thus, the existential minimum to be ensured to the plaintiff is equivalent to broad and immediate access to medical treatment appropriate to her illness[33].

Within this context, the so-called "reserve of the possible" has also been frequently identified, as the argument that other public policies are compromised is not an argument that can be accepted without proper demonstration. The amounts spent by the Public Administration to comply with judicial demands in health raise the issue of the reserve of the possible, which is the public budget limitation. However, magistrates' decisions tend to emphasize the right to health and life over financial limitations.

The prevailing view follows the trend that deficiencies in the public purse cannot be elevated to "obstacles to the realization of fundamental social rights, especially in cases involving a fundamental right". Individuals cannot expect the impossible from the state, and the state cannot deny them the minimum of existence[34].

Case law was used as grounds in 88.04% of the lawsuits. The uniform nature of the case law of the STF and STJ has created a kind of standard to be followed for actions dealing with the judicialization of health [35].

With regard to case law, there are important themes for the judicialization of health that have appeared in the lawsuits, such as the STF's understanding in RE 657.718/2019 that "the State cannot be obliged to supply experimental medicines". In turn, STA No. 175, which originated from a request for a high-cost medication not registered with ANVISA, led the STF to set parameters for the issue of judicialization of health, recommending that judicial intervention should occur due to policies that have already been established and which may have been ignored by the Public Administration. With rare exceptions, the state should not be ordered to provide healthcare services that have not been registered with ANVISA, nor should it be ordered to provide medicines that are in an experimental phase.

Regarding the orientation of judicial decisions on the matter, STF Minister Luís Roberto Barroso argued that the judge can only order the inclusion of medicines with proven efficacy on the official

list. "Excluding experimental and alternative ones. He must opt for substances available in Brazil, for generic and lower-cost medicines and must consider whether the medicine is indispensable for maintaining life"[36].

One highlight was the Repetitive Appeal 1657156 which resulted in Theme 106 of the STJ on the "obligation of the Public Power to supply medicines not incorporated in normative acts of the SUS". The consolidated understanding was that:

> "The granting of medicines not incorporated into SUS normative acts requires the cumulative presence of the following requirements:
> i) Proof, by means of a reasoned and detailed medical report issued by a doctor who assists the patient, of the indispensability or necessity of the medication, as well as the ineffectiveness, for the treatment of the illness, of the drugs supplied by SUS;
> ii) financial inability to afford the cost of the prescribed medication;
> iii) existence of registration of the drug with ANVISA, observing the uses authorized by the agency (RR1657156/RJ)."[37]

However, these requirements have not prevented the granting of interim relief in health lawsuits, as most meet the requirements of Article 300 of the CPC, which states that "when there is evidence of the likelihood of the right and the danger of damage or the risk to the useful outcome of the process, urgent relief will be granted"[38].

In 2019, the STF ruled on Extraordinary Appeal 855178/SE, establishing the thesis that "the responsibility of state entities is joint and several in demands for healthcare services, and it is up to the judicial authority to direct compliance in accordance with the rules on the distribution of competences and to determine compensation for those who have borne the financial burden"[39].

Law 8080/90 (71.30%) or the Organic Health Law regulates the organization, direction and management of the Unified Health System and provides for the conditions for the promotion, protection and recovery of health, prescribing universal and equal access to health services[40].

Decrees 678/92 and 591/92 always appeared together in 32.10% of the lawsuits. DEC 678/92 promulgates the American Convention on Human Rights (Pact of San José da Costa Rica). Brazil, as a signatory to this Pact, undertakes to "respect the rights and freedoms and to guarantee their free and full exercise to all persons under its jurisdiction". Among the guarantees are the right to a dignified life, and the provision that "every human being has the right to a standard of living that guarantees himself and his family minimum conditions of health and medical care", among others[41].

DEC 591/92 promulgates the International Covenant on Economic, Social and Cultural Rights. One of its provisions is the creation by signatory countries of conditions to ensure that all persons receive medical care and services in the event of illness[42].

Constitutional Amendment 29 (EC-29), which appears in 16.70% of the justifications, was created with the aim of overcoming the SUS financing problems faced in the 1990s. It determines the linking and establishment of the "calculation basis and minimum percentages of budgetary resources that the Union, the States, the Federal District and the municipalities would be obliged to apply in public health actions and services"[43].

The Constitution of the State of Minas Gerais (CEMG) (15.30%), like the other state constitutions, must follow the principles of CF/88 and follow the maxim of Art. 25 § 1 CF that all powers not prohibited by the Constitution fall to the states[2]. However, the CF/88 reserves a large

number of competences for the Union, leaving little scope for the states[35]. The provisions alleged in the lawsuits were general regulations on the state's responsibilities in health services.

Law 10741/03 (12.90%) provides for the Statute of the Elderly Person and regulates measures aimed at protecting the rights and prioritizing the elderly. There were many lawsuits represented by the same lawyer, which used the same pattern of legislative arguments. One action even used the Statute of the Elderly Person, without the plaintiff being an elderly person. There is clearly a template for court petitions that is ready to be followed, with the only change being the plaintiff's personal information. And this model has been successful.

Specific legislation on the rights of cancer patients was not found as a legal basis for the lawsuits. The only specific provision related to cancer found as grounds was Ordinance 741/05, on the High Complexity Oncology Center (CACONS).

Judicialization can be a reductionist movement when it comes to health and health rights. The judicialization of health is predominantly about curative health actions, with requests for medicines, exams, surgeries, in short, the most diverse health technologies, and actions related to the "prevention of diseases or related causes or conditions" are rare[44].

It is important to note that Article 196 of the Federal Constitution of 1988 states that "the right to health shall be guaranteed through social and economic policies"[2]. Thus, in order to achieve the objectives set out in this constitutional article, it is necessary to use public health policies, with the aim of organizing public government functions for "promotion, protection and recovery"[2]. Thus, the development of public policies must necessarily incorporate the principle of equity, specifically in the context of health. After all, as De Araújo and Quintal[23] say, "the legal provision alone does not make it possible to enjoy this right and implement the proposed guidelines". Considering only the part of Article 196 of the CF/88 which states that health is "a right of all and a duty of the state"[2] restricts the right to health and neglects the importance of public policies, in which the fulfillment of the state's obligation depends on the adoption of both social and economic measures[23].

The findings of this study, as well as those of De Araujo and Quintal[23], show that the majority of decisions are granted on the basis of simplistic arguments based on the first part of Article 198 of the 1988 Federal Constitution, which consequently fails to take into account existing public policies and disregards the entire process of building the SUS around the realization of the right to health in a comprehensive and universal manner. Possibly, the advice of health professionals through the Technical Advisory Nuclei (NATs) to judges, and the necessary rapprochement and constant dialogue between the actors involved in the judicialization of health, can help achieve the second part of Art. 196 FC/88.

Fina Considerations

Most of the court decisions granted the plaintiff's request, which is based on the first part of Article 196 FC/88, which states that health is the right of all and the duty of the state. There is a lack of use of Article 196 CF/88 by judges in a complete way, who, when judging, should consider the second part of Art. 196 to promote the guarantee of health with observance of "social and economic policies aimed at reducing the risk of disease and other aggravations for equal access to health services that carry out promotion, protection and recovery".

When a citizen applies to the courts for an inadequate benefit for their case and this request is granted, there is an impact on public policies, which are responsible for providing health not only for the needs of the plaintiff, but for an entire population.

The lawsuits in the survey presented a diagnosis of an excess of individual claims, high success rates and a superficial legal debate permeated around the incomplete Article 196.

Conflict of interest

The authors declare that there is no conflict of interest.

Authors' contribution

Figueiredo IVO contributed to the conception/design of the article, data analysis and interpretation, writing of the article, critical revision of its content and approval of the final version. De Castro MSM contributed to the conception/design of the article, data analysis and interpretation, writing of the article, critical revision of its content and approval of the final version. De Miranda WD contributed to the conception/design of the article, critical revision of its content and approval of the final version. Da Silva GDM contributed to analyzing and interpreting the data, critically reviewing its content and approving the final version of the article. Dos Santos FP contributed to the conception/design of the article, critical review of its content and approval of the final version. De Sousa RP contributed to the conception/design of the article, critical revision of its content and approval of the final version.

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