

Scientific Journal of Applied Social and Clinical Science

BEYOND THE RESERVATION OF THE POSSIBLE: THE DENIAL OF MISMANAGEMENT OF PUBLIC POLICIES AS A DIRECT CAUSE OF THE INEFFECTIVENESS OF THE SOCIAL RIGHT TO HEALTH

Karla Roberta da Fonseca Nunes

Master from the Postgraduate Program in Economic Law and Development: Human Development, Business, Taxation and Accountability at Cândido Mendes University. Specialist in Civil Law, Civil Procedure and Consumer Law by: Universidade Cândido Mendes, Rio de Janeiro. Lawyer and Procedural Analyst at the Public Defender's Office of the state of Rio de Janeiro. City: Rio de Janeiro o. Lattes: <http://lattes.cnpq.br/4577080616306098>

Susana Cadore Nunes Barreto

PhD student in the Postgraduate Program in Rights, Institutions and Business/ UFF, Rio de Janeiro. Master in Law by: Universidade Estácio de Sá (UNESA). Specialist in Civil-Constitutional Law by: ``Universidade do Estado do Rio de Janeiro`` (UERJ). Public Defender of the State of Rio de Janeiro. Lattes: <http://lattes.cnpq.br/6558755004678918>
Work submitted and approved in GT1 - Institutional Arrangements, Innovations and Public Policies, at the III Brazilian Congress of Law and Public Policies: Homage to Professor: Maria Paula Dallari Bucci, em 20/10/2023.

All content in this magazine is licensed under a Creative Commons Attribution License. Attribution-Non-Commercial-Non-Derivatives 4.0 International (CC BY-NC-ND 4.0).



Abstract: The research investigates the institutional stance of municipal and state entities in challenges presented in individual legal demands that postulate the right to medicines, supplies or health treatments, with the observation on the generic argumentation of the principle of reserving what is possible in specific cases of unaccompanied judicialization of a real verification and presentation of existing budget data, wasting the opportunity to diagnose the reasons for the ineffectiveness of the public policy exposed in the judicial demand.

Keywords: Public policy; Health; Scarcity; Management.

INTRODUCTION

To know that the implementation of social rights by the State occurs through public policies, it is necessary to analyze not only the creation, but also the management of the policies created in order to verify whether the way in which public managers act is in line with constitutional dictates. In order to conceptualize the institute of public policies, the words of Maria Paula Dallari Bucci are brought up, when she explains that they are government action programs whose objective is to coordinate the means available to the State and private activities, to achieve socially relevant objectives and politically determined¹.

In this context, in the context of health, public policies must aim not only to reduce

the risk of disease and other health problems, valuing universal and equal access to actions and services to promote, protect and recover health, but also good management of public matter, trying to maximize available resources to cover the largest possible part of the population, avoiding a shortage of public funds.

In the study, public policies are analyzed based on their sequential and interdependent phases, brought by Leonardo Sechi², proposed as follows: identification of the problem; agenda formation; formulation of alternatives; decision making; Implementation; evaluation and termination. And, according to Rogério Gesta Leal³, even if the implementation of a public policy has to be progressive and conditioned on available state resources, not starting the implementation of these constitutional, binding and mandatory public health policies or failing to invest as much as possible so that society can enjoy reasonable assistance to health, would give rise to a state omission subject to judicial review.

Therefore, the present study assumes the phenomenon of judicialization of health as a global phenomenon⁴, but observes the Brazilian phenomenon with specificities and heterogeneity which still does not allow, even due to the incipient existing research⁵, conclude by a positive preponderance⁶ or negative⁷ of the phenomenon.

Given this given scenario, the objective is

1 BUCCI, Maria Paula Dallari (organizador). *Políticas públicas: reflexões sobre o conceito jurídico*. São Paulo: Saraiva, 2006, p. 14
2 SECCHI, Leonardo. *Políticas Públicas: conceitos, esquemas de análise, casos práticos*. Cengage Learning. São Paulo. 2ª ed. p. 13. 2013

3 LEAL, Rogério Gesta. *O Controle Jurisdicional de Políticas Públicas no Brasil: possibilidades materiais*. In: SARLET, Ingo Wolfgang (org). *Jurisdição e Direitos Fundamentais: volume 1*. Porto Alegre: Livraria do Advogado, 2005. p. 168.

4 LAMPREA, Everaldo. *The Judicialization of Health Care: A Global South Perspective*. *Annual Review of Law and Social Science*, Annual Reviews, v. 13, p. 431–449, 2017.

5 ANDIA, Tatiana. S.; LAMPREA, Everaldo. *Is the judicialization of health care bad for equity? A scoping review*. *International Journal for Equity in Health*, BioMed Central, v. 18, n. 1, 18:61, 2019.

6 BIEHL, João.; SOCAL, Mariana P.; AMON, Joseph. J. *The Judicialization of Health and the Quest for State Accountability: Evidence from 1,262 Lawsuits for Access to Medicines in Southern Brazil*. *Health and Human Rights*, v. 18, n. 1, p. 209-220, 2016.

7 WANG, Daniel Wei Liang. *Revisitando Dados e Argumentos no Debate sobre Judicialização da Saúde*. *Journal of Institutional Studies*. *Revista Estudos Institucionais*, v. 7, n. 2, p. 849-869, maio/ago. 2021.

to extract from the inherent judicialization of public health policies, a source of analysis on the current form of institutional behavior of the State, and to propose an adjustment to the generic claim of the Principle of the Reserve of the Possible, so that it can be used the opportunity for judicialization as a way of investigating the reasons for the ineffectiveness supposedly reported in the judicial demand.

The study deepens the concept of accountability as the responsibility of one person or organization towards another, for some activity or some type of performance⁸. The concept is directly related to that of democracy. The tendency is that the more rooted democratic values are in society, the greater the accountability. In a society with full accountability, public managers are expected to be accountable for their actions, including in legal proceedings.

PROBLEM AND OBJECTIVES OF THE WORK

The scarcity of budgetary resources is identified as one of the major causes of non-effectiveness of public policies, being used in the present research, for the purposes of understanding the principle of reserving the possible, the theoretical frameworks of tragic choices.⁹ c with the necessary revisions brought by Cass Sustein¹⁰.

In Brazil, with judicial defenses in individual cases as the object of observation, we initially investigate: a) whether the argument “principle of reserve of the possible” is used, indiscriminately, to justify the non-implementation of already defined public policies? b) and when the argument is used, is it supported by the presentation of budgetary

data and public sources that demonstrate the tragic choice?

The objective of the research is to investigate whether the defendant public entity carries out the exercise of investigating any other cause, even if competing, for the ineffectiveness of the public policy complained of, in particular, the mismanagement of resources already reserved for this purpose.

This is because, it is assumed as a fact of life, that it is possible for both causal phenomena - lack of funds and/or poor management - to exist concomitantly or in isolation, and therefore, criteria are proposed that prevent generic argumentation and uncompromised with the principle of reserving what is possible, without arguing, at the same time, the management of the budget allocated to public policy, so that the real causes of non-implementation are not obscured, and so that an attempt at a solution is sought of the problem.

Therefore, the generality of the “reserve of the possible” argument is identified as a possible problem, without the State presenting, in a reliable and public way, data that is minimally checkable to the jurisdiction, about the budgetary values reserved (or not) for that public policy, as well as demonstrating the adequate management of that value, especially when accused in judicial cases.

The objective is, with the proposal to verify in specific cases, that an adequate diagnosis and prognosis be possible to solve the problem. In the research, the aim is to uncover a denial (or assumption) of the State in recognizing administrative failures as one of the direct causes of the ineffectiveness of social rights, failing to elect only the scarcity of resources

8 BUTA, Bernardo Oliveira; TEIXEIRA, Marco Antonio Carvalho; SCHURGELIES, Vinicius. *Accountability nos Atos da Administração Pública Federal Brasileira*. Belo Horizonte: Pretexto. 2018. Available in: https://pesquisaeasp.fgv.br/sites/gvpesquisa.fgv.br/files/arquivos/accountability_nos_atos_da_administracao_publica_federal_brasileira.pdf. Acesso em: 25 jul. 2022.

9 CALABRESI, Guido Calabres; BOBBIT, Philip. *Tragic Choices – The conflicts society confronts in the allocation of tragically scarce resources*. Norton, New York, 1978.

10 SUNSTEIN, Cass. *Social and Economic Rights? Lessons from South Africa*. Const. Forum, V, 2000.

as causing the ineffectiveness of already existing public policies, without even the consideration, and eventually, the assumption of the occurrence of administrative and executive failures of a public policy.

The present work, therefore, focuses on analyzing the institutional stance of that entity that refuses to investigate the causes of the problem of not adequately implementing a public policy denounced in a legal action, under the generic argument of “reserving the possible”, with the aim of encouraging habitual litigants in health claims, whether States and Municipalities, to use concrete cases of judicialization to reveal possible cases of mismanagement of public policies, as a beginning to search for a solution to the problem.

METHOD

The methodological choice was the bibliographical research of the theoretical references mentioned in this summary, as well as the analysis of the report of the National Council of Justice on Judicialization and Society of 2021¹¹. The case described by André Luiz Batista da Costa was also reported¹² referring to the Municipality of São Lourenço da Mata, in Pernambuco, one of the scopes of the research still in progress is to carry out a documentary analysis of the challenges presented in the individual demands offered in the individual processes in progress in that State Court in 2016, so that it can be checked if there was any mention of the fact that there was no budget transfer that year. At this point, the research is still ongoing, evaluating the difficulties in accessing facts which, at that time, were not yet completely digitized.

ANALYSIS OF RESULTS ACHIEVED

From the research of recent studies published reviewing data on judicialization in Brazil, there is uncertainty about the impacts of demands as promoters or complicators of public policies, resulting from a heterogeneity of demands, and research that is still incipient due to samples limited and not exactly generalizable.

However, a repetitive behavior is identified in the demands, which is the allegation of the Principle of the Reserve of the Possible in a generic way, and without proof of unionizable data, on the part of the defendants.

It is also observed that this stance is more common in Municipalities than in States, with the suggestion that the administrative and defensive staff of the States would be more attentive to the rules of accountability than those of the Municipalities, which can be confirmed by the data collected by the report of the National Council of Justice on Judiciary and Society of 2021, which used data from 2019: in graph 59 of the mentioned report, it is seen that 34.1% of the responding municipal Health Departments did not have data on as judicialization compromised the budget allocated to health, compared to 19.0% of state Health Departments that did not have such data.

The second data analyzed is that when there is a more real panorama of what happens, considering the departments that responded, the majority percentage of interference is limited to up to 10% (ten percent), as 57.1% of the State Secretariats responded and 49.3% of Municipal Secretariats of health. Still in this report, there was a question about the existence of a system for consulting the

11 NATIONAL COUNCIL OF JUSTICE. Judicialization and health: actions for access to quality public health. Brasília: CNJ, 2021. https://www.cnj.jus.br/wp-content/uploads/2021/06/Relatorio_Judicializacao-e-Sociedade_2021-06-08_V2.pdf Acesso em 23/08/2023.

12 COSTA, André Luiz Batista da. Judicialization of Public Health Policies in Brazil: Undue judicial interference or consequence of poor management. Belo Horizonte: Dialética, 2021.p. 112.

number of filed demands, with 79.5% of the Municipal Secretariats responding for its non-existence, 17.5% for its existence as of 2015, and 3, 0% for existence for years prior to 2015. The State Health Departments responded that in 61.9% there has been a consultation system since 2015, while 38.1% responded that the system does not exist.

Despite the indication of lack of knowledge about budgetary data by state entities themselves, there are no reports of challenges admitting administrative and management failures in the implementation of public policies, which reveals, at the very least, an adversarial stance on the part of public entities, without the certainty of that, if there was an expressed collaborative stance, there would be the possibility of detecting an administrative failure more quickly. An emblematic example occurred in the municipality of São Lourenço da Mata in Pernambuco, which remained for 12 (twelve) months without receiving transfers from the National Health Fund (FNS), while this amount was erroneously allocated to the municipality of Pombos, which received the most the amount of more than one million and six hundred thousand reais. The peculiarity of the case is the fact that, despite the intense judicialization, it was only in State Accounting (TCE), which is number 018.556/2016-2, that the Federal Audit Court (TCU) identified that the city stopped receiving funds from the National Health Fund (FNS) for twelve months, totaling more than one million and six hundred thousand reais. The error was only identified by the TCU, with the FNS taking seventeen months to communicate the erroneous transfer to the municipality of Pombos, despite the need for the municipality of São Lourenço da Mata to respond to intense judicialization, which must have at least had the effect of diagnosis the absence of transfer, as at least a positive effect of the demands, signaling the existence of the problem and the

need to search for its real causes.

CONCLUSIONS

The phenomenon of judicialization, worldwide, appears to be inherent to the implementation of public policies in the area of Health. In Brazil, there is the characteristic of individualized judicialization and with a heterogeneity of types of demands that make assertive conclusions about their causes difficult, the which in itself already demonstrates the impossibility of using the principle of reserving what is possible in a discriminated and generic way, especially as there is little public and understandable public data on the public budget allocated to public health policies.

Despite so many types of demand, there is, however, a preponderant and generalist discourse of using scarcity of resources to defend the State and Municipalities, without any commitment to demonstrating this reality through budgetary or public data.

This repetitive behavior of not assuming other causes, such as poor management of public policies, camouflages cases in which it would be possible, due to the flood of legal demands, to diagnose possible mismanagement of public resources, given that when a public policy is judicialized of health, as a rule, the formal and material competence of the choices made is not questioned, but rather managerial incompetence.

Proposing an institutional change, with the replacement of a defensive posture for a collaborative posture between the entities in question, when contesting by making data available, whether on public transparency portals or in their own individual judicial demands, suggesting an increase in the concept of accountability in the sense of expecting responsibility from one person or organization to another, in order to implement more effective public policies.

REFERENCES

- ANDIA, Tatiana. S.; LAMPREA, Everaldo. **Is the judicialization of health care bad for equity? A scoping review.** International Journal for Equity in Health, BioMed Central, v. 18, n. 1, 18:61, 2019.
- BIEHL, João.; SOCAL, Mariana P; AMON, Joseph. J. **The Judicialization of Health and the Quest for State Accountability: Evidence from 1,262 Lawsuits for Access to Medicines in Southern Brazil.** Health and Human Rights, v. 18, n. 1, p. 209-220, 2016.
- BUCCI, Maria Paula Dallari (organizadora). **Políticas públicas: reflexões sobre o conceito jurídico.** São Paulo: Saraiva, 2006.
- BUTA, Bernardo Oliveira; TEIXEIRA, Marco Antonio Carvalho; SCHURGELIES, Vinicius. **Accountability nos Atos da Administração Pública Federal Brasileira.** Belo Horizonte: Pretexto. 2018. Disponível em: https://pesquisa-eaesp.fgv.br/sites/gvpesquisa.fgv.br/files/arquivos/accountability_nos_atos_da_administracao_publica_federal_brasileira.pdf. Acesso em: 25 jul. 2022
- CALABRESI, Guido Calabres; BOBBIT, Philip. **Tragic Choices – The conflicts society confronts in the allocation of tragically scarce resources.** Norton, New York, 1978.
- CONSELHO NACIONAL DE JUSTIÇA. **Judicialização e saúde: ações para acesso à saúde pública de qualidade.** Brasília: CNJ, 2021. https://www.cnj.jus.br/wp-content/uploads/2021/06/Relatorio_Judicializacao-e-Sociedade_2021-06-08_V2.pdf Acesso em 23/08/2023.
- LAMPREA, Everaldo. **The Judicialization of Health Care: A Global South Perspective.** Annual Review of Law and Social Science, Annual Reviews, v. 13, p. 431–449, 2017.
- LEAL, Rogério Gesta. **O Controle Jurisdicional de Políticas Públicas no Brasil: possibilidades materiais.** In: SARLET, Ingo Wolfgang (org). *Jurisdição e Direitos Fundamentais: volume 1.* Porto Alegre: Livraria do Advogado, 2005.
- SECCHI, Leonardo. **Políticas Públicas: conceitos, esquemas de análise, casos práticos.** Cengage Learning. São Paulo. 2ª ed. 2013
- SUNSTEIN, Cass. **Social and Economic Rights? Lessons from South Africa.** Const. Forum, V, 2000.
- WANG, Daniel Wei Liang. **Revisitando Dados e Argumentos no Debate sobre Judicialização da Saúde.** Journal of Institutional Studies. Revista Estudos Institucionais, v. 7, n. 2, maio/ago. 2021.