



JUDICIALIZATION OF PUBLIC HEALTH IN BRAZILIAN LEGAL AMAZON

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ABSTRACT

Judicialization is the legal phenomenon whereby the judiciary receives cases that must be resolved in the course of legislative proceedings or administrative procedures conducted by the legislature or executive branch, respectively, which occurs due to the lack of required actions to achieve these targets by means of public social policies. The hypothesis of this study is to analyze and understand the perception of the public health Judicialization in Brazilian Legal Amazon.

KEYWORDS

Human Rights. Social policies. Public Health.

INTRODUCTION

This right was established in art. 6, of the Constitution of the Federative Republic of Brazil in 1988 - CRFB/88 - and represents a fundamental social right of the Brazilian people and Rondonia state.

Thus, in 1990, the effective creation of the Unified Health System - SUS - was removed from legislation, and the Brazilian government began providing health in a decentralized manner with three federal entities (federal, state and municipalities).

THE JUDICIAL CASES

To elucidate the lack of knowledge about medications and hospitalization, the Superior Court convened on May 2009, the public hearing entitled "Judicialization of the Right to Health," in order to generate allowances to judges for judgments on issues concerning the implementation of the right to health, i.e., to establish guidelines to assist judges in assessing the causes which have as their object of conflict, affirmation or violation of the right to health.

Ingo Sarlet explains that:

We have to acknowledge that the existence of these factual and legal limits, i.e., possible reservation and parliamentary reservation in budgetary matters, imply certain flexibility with in the efficacy and effectiveness of rendered social rights.

[...]

Such an argument grows in relevance considering that our constitutional order (rightly so) expressly prohibits the death penalty, torture and imposition of inhuman and degrading punishment, even for convicted heinous crime for the most elementary requirements of reasonableness and one's own sense of justice – which, based on an alleged (and even proven) lack of resources – virtually condemns to death the person whose only crime was to be a victim of harm to his own health and was not able to afford the cost of treatment. (free translation) (2010, 55).

Yet, even after the public hearing, one can see that competence is not strictly defined in the law, and that citizens often specifically trigger the municipalities or the three federal entities causing a significant increase in the number of proceedings before the judiciary in which the right to health requires effectiveness, according to the CNJ, which is included in the "Official Memorandum Recommendation nº 31," published in the Official Newspaper - DJe - on 07/04/2010, p. 4-6.

Ricardo Torres asserts that:

In Brazil, the important part of teaching is adopting a balanced position on the issue of an individual award for health services, seeking to delimit it according to extension of the existential minimum, with recognition of the rights of the poor and destitute and the State's obligation to ensure preventative and emergency medicine." (free translation) (2009, 225)

Therefore, the Brazilian Federal Constitution of 1988 guarantees social rights that require the provision to be subject to the existential minimum in the sense of what the individual can rationally expect from society, i.e., to justify the limitation of the state due to its socio-economic and structural conditions.

THE HIPOTHESIS

Rondonia is a Brazilian Legal Amazon state whose contemporary society is marked by a structural paradox, which is true for all of Brazil (NUNES, 2014,8). On one hand, there are a number of health-related social achievements in formal terms that have been accomplished with the enactment of federal, state and local laws (NUNES, 2014, 9). On the other hand, this coexists with the fact that some segments of the population still live in undignified socioeconomic conditions, especially if they are in need of clinical or outpatient treatment, specifically medication and hospitalization (NUNES, 2014, 10).

The general objective of this work is to understand the jurisprudence about the legitimacy of the Secretary of Health of Rondonia on the Judicialization cases, when he is touted as the constraining authority in deferrals of injunctions in writs of mandamus to procure medicines and hospitalizations, which has caused a mass of lawsuits in the state of Rondonia, being ultimately judged by the Superior Court.

The research methodology is divided into two approaches:

- (i) **Theoretical Approach** – the literature review; and
- (ii) **Exploratory Approach** – exploratory research of subjective passive polarity precedents originates from the special selection query platform installed on the Brazilian Superior Court website.

In this context, the analysis of case law on the subject, particularly the judgments rendered by the Superior Court for the Secretary of Health of Rondonia as the constraining authority, is justified by the need to understand who holds the responsibility to ensure effectiveness for the right to health in Brazilian Legal Amazon society.

RESULTS AND ANALYSIS OF LEGITIMACY

Judicialization is the legal phenomenon whereby the judiciary receives a significant number of cases that must be resolved in the course of legislative proceedings or administrative procedures performed by the legislature or executive branch, respectively. The absence of necessary actions by society for the implementation of public policies related to health is the foundation for the occurrence of legalization in Brazil.

Considering all these aforementioned adopted mea sures,

the Brazilian Superior Court of Justice - STJ – was obliged to establish constraining authority in the reasonable judgment of the filing of writs of mandamus for Rondonia in order for resources to be effective in its operations and to ensure the existential minimum.

The Brazilian Superior Court considered the Secretary of Health for the State of Rondonia, as constraining authority, to be competent to determine the allocation of financial resources and law budgets in order to implement public policies:

Table 1 – Important theme cases

BRAZILIAN SUPERIOR COURT JUDGMENT			
REGISTRATION	JUDGMENT REPORT	DISCUSSION AND FUNDAMENTS	DECISION
AgRg 38.746 RMS RO 2012/0161088-5	Min. Herman Beijamin	The direction of the Health System, at the state level, is the responsibility of the Department of Health, pursuant to art. 9, II, of Law n. 8.080 /1990. Currently, if there is any failure to protect the health of the people by a federal entity, the Department of Health is the authority responsible for taking care of the them and holds sufficient power to correct this situation.	It seems possible, therefore, to rule out the legitimacy of the Secretary of Health to attribute to a third party which is hierarchically subordinate.
AgRg 43.371 RMS RO 2013 / 0238141-8	Min. Eliana Calmon.	The First Section, in the judgment of 38.746 RMS / RO (judged on 04/24/2013, unpublished judgment), recognized the passive legitimacy of the Secretary of Health for the State of Rondônia to decide constraining authority in an injunction which postulates the delivery of medication or performance of medical treatment. Precedents. 2. Ordinary appeal provided for determining the return of the case to the court of origin, in order to continue in the trial of the writ.	The legitimacy of the Secretary of Health to attribute to a third party which is hierarchically subordinate.
AgRg 42.081 RMS RO 2013 / 0115836-3	Min. Sérgio Kukina	The precedent decision on 04-24-2013 by the First Section of the Superior Court of Justice in the trial of n. 38.746 RMS/RO, Reporter Minister Benjamin Herman. 2. Regimental Interlocutory was provided to dismiss the above.	The legitimacy of the Secretary of Health for the State of Rondonia to decide: In a writ on the right to argue in favor of the subjective active polarity that the provision of medicinal products or medical treatments.
AgRg 42.479 RMS RO 2013 / 0135432-6	Min. Castro Meira	1. A writ of mandamus was filed by the State Public Defender, seeking delivery of medication to the Plaintiff. 2. Regimental Interlocutory was not provided.	The Secretary of Health for the State of Rondonia sued in response to the injunction as constraining authority.

Source: Judicial cases are available at: <<http://www.stj.jus.br/SCON/infojur/doc.jsp>>. Accessed on Mar. 7th, 2015.

Judicial activism means establishing all political potential without interfering in other fields of law, which the Brazilian Federal Constitution of 1988 collaborates in an incisive way, since the Constitution has many gaps and gives rise to double interpretation. Thus, the ambiguity ends up creating a situation for the Judges conducive to act as legislators in order to meet these gaps. Legalization is not the fault of the judiciary.

And BARROSO explain that:

The judge, by vocation and training, will usually be prepared to carry out the justice or micro justice of the case. He does not always have the information, the time or even the knowledge to assess the impact of certain decisions made in specific cases about the reality of an economic sector or the provision of a public service. Nor is he subject to political responsibility for disastrous choices. An emblematic example in this regard has been in the healthcare sector. (free translation) (2008, 16)

It is in this sense that we can say that the texture of the constitutional text is a propelling factor of judicial activism, in that it does not provide accurate moorings of interpretation and exposes the judge to immediate pressure to implement the program outlined in the Constitution without immediate regulatory effectiveness. Therefore, while legalization stems from institutional models, activism is an attitude; a proactive way of interpreting the Constitution.

CONCLUSION

The Ministers of the Brazilian Superior court of Justice understand that although the municipalities have become responsi-

ble for implementation of public health policies by establishing a closer relationship to Brazilian citizens seeking care in hospitals in a particular city, the state, as well as the Union are responsible for planning and financing of public policies in this area.

As a rule, this is part of the typical function of the State and Federal executive branch. Federal institutional design draws up planning policies and makes budgetary allocations to the states, and the states are responsible for undertaking the planned policies and correctly applying health budgets.

Thus, on the subjective passive polarity of writs in the cases analyzed above, it has become undisputed that positive actions necessary to guarantee the fundamental right to health of the population are the responsibility of the Secretary of Health for the State of Rondonia – Brazilian Legal Amazon.

As envisioned in the series of judgments above, the process involves conflicts between federal agencies due to failures in the provision of health services by Unified Health System which are not related to the supply of medicines, and the absence of inpatient beds, since they do not observe the principle of Possible Reserve.

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