CHALLENGES OF THE PLEDGE OF PUBLIC FUNDS IN SOCIAL HEALTH ORGANIZATIONS: EFFICIENT MANAGEMENT IN SMART CITIES

Leonardo de Souza Moldero[1], Moisés Figueiredo da Silva[2] and Antônio Pires Barbosa[3]

INTRODUCTION

Health as a constitutionally guaranteed social right is a recent achievement in Brazil. Although previous constitutions had addressed the topic tangentially (MENDES; BRANCO, 2011, p. 685), it was only with the promulgation of the Constitution of the Federative Republic of Brazil, in 1988, that health was affirmed as a fundamental right, to the extent that its article 196 defines health as a "right of all and a duty of the State", guaranteeing its universal and equal access through social and economic policies aimed at promotion, Health protection and recovery (BRAZIL, 1988).

The express guarantee of health, as a fundamental social right, represented a milestone in the structuring of public health policies in the country, constituting an important breakthrough with the *status quo ante*; Considered second generation, it includes very broad protection to even ensure the effectiveness of the principle of the dignity of the human person (MAIA, 2012).

The Unified Health System (SUS), created as a response to this constitutional determination, was designed under the principle of universality, ensuring that every citizen, regardless of their social security affiliation or financial condition, has full and free access to health services. According to Moisés Figueiredo da Silva (2023), the SUS "configures one of the largest and most complex public health systems in the world", ranging from the

[1]Lawyer
Master's student in the stricto sensu graduate program in Smart and Sustainable Cities at Universidade Nove de Julho
Student of the lato sensu graduate program in Medical and Biomedical Law at the Brazilian School of Law
Specialist in compliance, internal audit and ESG from IBMEC-SP
Bachelor of Laws from São Judas Tadeu University
[2]Dr. student and Master in Smart and Sustainable Cities at Universidade Nove de Julho – UNINOVE
Specialist in Public Administration and City Management, Graduated in Public Management
[3]Dr. and Master in Business Administration from Fundação Getúlio Vargas – FGV
Graduated in Medicine
Full Professor of the Professional Master's Program in Health Systems Management and the Academic Master's Program in Smart and Sustainable City Management at Universidade Nove de Julho
Professor of the Undergraduate Program in Medicine in the area of Collective Health and Primary Health Care

simplest care, such as blood pressure measurement, to highly complex services, such as organ transplants. The SUS, therefore, is positioned as one of the greatest social achievements in Brazil, being a vital instrument for the realization of the right to health and human dignity.

Although aimed at promoting social welfare, the financing and sustainability of the SUS face recurrent challenges. The system is supported by a budget composed of resources from the Union, the States and the municipalities. The Federal Constitution, in its article 198, paragraph 1, determines that these resources must be ensured by these governmental spheres, with the requirement of a minimum annual investment amount. Constitutional Amendment No. 29 of 2000 and Complementary Law No. 141 of 2012 were fundamental normative milestones in establishing guidelines for public health financing and ensuring a minimum application for SUS activities and services. However, despite being normative advances, such measures have proven to be insufficient, since the sources of financing and the criteria for allocating public resources remain undefined, which compromises the sustainability and expansion of the health system (CELUPPI *et al*., 2019).

In view of the inefficiency and restrictions of the Unified Health System to meet the demands of the population, aggravated by the normative limitations on public spending, a new institutional arrangement was adopted that allowed the State to establish partnerships with private entities for the management of health units, especially through Social Health Organizations (OSS). which are private non-profit entities and assume responsibility for the management of essential health services through management contracts with the government. Acting in a complementary way to the SUS, these organizations manage various activities, such as the administration of hospitals and health centers, being remunerated with public funds. Law No. 9,637/1998 regulates the operations of OSS, establishing guidelines that aim to ensure the transparency and effectiveness of contracts signed with the State.

The partnership between the government and the OSS, however, has generated controversies, particularly in relation to the pledge of public funds transferred to these entities. As these are public resources, the legislation ensures them protection by the principle of immunity from seizure (BRASIL, 2015, art. 833, item IX), with the aim of ensuring that they are directed exclusively to the fulfillment of their institutional purposes. However, the contracts signed by OSS often include the subcontracting of specialized companies and liberal professionals — a process commonly called "fourthization" — to provide medical and hospital services. When there is default on the part of the OSS, these providers seek the Judiciary to ensure the receipt of the services performed, a phenomenon

that contributes to the judicialization of health. This phenomenon, supported by the fundamental right of access to justice (BRASIL, 1988, art. 5, XXXV), shows an impasse: how to reconcile the right of creditors to timely and fair payment for the services provided with the public nature of the funds transferred, legally protected by immunity from seizure, with the objective of preserving the resources destined to the maintenance of public health services?

The Court of Appeals of the State of São Paulo (TJSP) has been the scene of important decisions that seek to resolve this conflict. In recent years, the São Paulo court has analyzed, on several occasions, the possibility of seizing public funds transferred to OSS for the payment of debts with service providers. The decisions, even if they are not peaceful, reveal a growing movement to make the principle of immunity from seizure of public funds more flexible.

This context of judicialization has profound implications for the SUS and for the management of public health policies in Brazil. The absence of effective control and audit mechanisms on the allocation of these funds, added to the lack of transparency in the operations of the OSS, puts at risk the continuity of the health services offered to the population. As observed by Cambi and Boff (2015), "the right to public health must ensure the provision of quality of life to people, and must be classified as a fundamental right to benefits, which depends on the positive action of the State and demands the implementation of public policies and budgetary resources for its implementation", so that it is not just a matter of access, but, effectively, of quality, and the inefficiency in the management of resources directly compromises the quality of services provided to the population.

In addition, the debate on the seizure of public funds is not limited to the legal sphere, but also involves issues of governance and public management. In a scenario of increasing digitalization and implementation of smart cities, the use of technologies to optimize the management of public services becomes a crucial issue. Smart cities offer a series of technological tools, such as automated auditing systems and predictive contract management, which can help control the resources allocated to OSS and avoid unnecessary judicialization. The concept of smart cities involves the interconnection of urban systems to improve the efficiency of public services, and health is one of the sectors most impacted by this transformation (REZENDE; BLIACHERIENE, 2017).

This study also connects directly to the United Nations Sustainable Development Goals (SDGs), especially SDGs 3 (health and well-being) and 16 (peace, justice and strong institutions) (UNITED NATIONS, 2015). The sustainability of the Unified Health System

(SUS) and the ability of Social Health Organizations to fulfill their contractual obligations effectively, transparently, and fairly are essential for achieving these global goals, guaranteeing the right to health and promoting efficient and equitable governance.

OBJECTIVE

In this context, this study aims to analyze the jurisprudence of the TJSP on the pledge of public funds destined to OSS and discuss its implications for the continuity of essential health services. From a qualitative research, based on the documentary analysis of judgments and the bibliographic review, it is intended to offer an in-depth view of the challenges and opportunities for the improvement of public governance, especially in a scenario of smart cities. In the end, it is expected that the study will contribute to the improvement of public policies and the effectiveness of the SUS, ensuring the protection of the right to health and the efficiency of the services provided to the population.

METHODOLOGY

The methodology of this study is qualitative, with a descriptive and documentary approach, centered on judicial decisions and bibliographic review. This methodological choice enables an in-depth and detailed analysis of the legal and social phenomena related to the pledge of public funds destined to Social Health Organizations (OSS), as well as their implications for the continuity of essential health services and for public governance in a context of smart cities.

QUALITATIVE AND DESCRIPTIVE APPROACH

Qualitative research is characterized by the search for understanding complex phenomena, taking into account the context and particularities of the cases analyzed. Minayo (2013) highlights that, in qualitative research, the researcher explores meanings, understandings and interpretations that subjects and society attribute to their experiences. Thus, the central objective of this research is to analyze judicial decisions and understand how they influence the management of public funds within the scope of OSS and their relationship with the continuity of health services, in view of the challenges imposed by judicialization.

In addition, a descriptive approach is adopted, with the objective of mapping and characterizing the judicial decisions on the seizure of public funds in the Court of Justice of the State of São Paulo (TJSP). As Gil (2008) emphasizes, descriptive research is useful to describe the characteristics of a certain phenomenon or group, in this case, judicial

decisions, their grounds and their impacts on the governance of OSS. This approach makes it possible to detail the context and implications of these decisions for the actors involved, especially creditors, OSS and the State itself.

DOCUMENT ANALYSIS

Documentary analysis is one of the main methods of this study. An analysis of collegiate decisions of the Court of Appeals of the State of São Paulo was carried out, focusing on rulings that address the issue of the seizure of public funds transferred to the OSS. As a source of data, the judgments available in the court's public repository of jurisprudence, accessible electronically, following the criteria established by the research, were used.

The choice for documentary analysis is justified by the relevance of judicial decisions for the understanding of the central theme of the study. The Court of Appeals of the State of São Paulo has been an important scenario for deliberation on the possibility of seizure of public funds destined to OSS, and its decisions reflect jurisprudential trends that directly affect the management of public health. According to Cellard (2012), documentary analysis allows access to information that favors the understanding of social and historical processes, which may not be accessible by other means of data collection, adding the layer of time to sociological exegesis.

DATA COLLECTION AND SELECTION

To ensure the systematization of data collection, a careful search was carried out in the jurisprudence database of the Court of Justice of the State of São Paulo, using the following descriptors: "social organization", "attachment", "public funds" and "health". These descriptors were connected by the logical operator "and" to refine the search. We opted for court rulings handed down in the second instance, seeking collegiate decisions, which have a greater interpretative weight, since they involve a more in-depth analysis of the legal matters discussed.

In addition, filters were applied to delimit decisions within a specific time interval, from January 1, 2015 to September 31, 2024, in order to capture a recent and updated overview of case law on the subject (SOUZA; ANTONELLI, 2023). The focus on decisions rendered in the second instance and classified as "interlocutory appeals" ensures that the study covers only the appropriate appeal to challenge interlocutory decisions involving the seizure of financial assets, under the terms of article 1,015, sole paragraph, of the Code of Civil Procedure (BRASIL, 2015).

After applying the filters, a total of one hundred and two judgments were reached. Afterwards, only decisions that address the provision of health services were considered, excluding those involving discussions of an eminently procedural nature or matters unrelated to health, reaching seventy-seven judgments, which, in turn, were grouped according to the recognition or not of the immunity from seizure of the amounts discussed, in order to enable a comparative analysis and allow the identification of the legal grounds that served as the basis for each decision, This is important to understand the main arguments used by the magistrates and the consistency of the decisions over time.

CONTENT ANALYSIS

Content analysis, as suggested by Bardin (2011), was used to systematize and interpret the information extracted from the judgments. The objective was to identify the main legal bases that supported the decisions in favor of and against the seizure of public funds destined to OSS. To this end, the judgments were read in detail, highlighting the most relevant passages, such as the summaries, the legal grounds invoked by the reporting magistrates and the justifications for maintaining or revoking the constrictive act.

This analysis technique made it possible to categorize the decisions into two large groups: those that recognized the possibility of seizure and those that support the immunity from seizure of public funds. Subsequently, the factual circumstances that contributed to the decision of the judges were identified, such as the distribution of the burden of proof and the nature of the financial asset involved. This categorization was fundamental for the construction of a comprehensive view of the reasons for deciding and the practical effects of the decisions for the management of the OSS and for the creditors.

LITERATURE REVIEW

In addition to the documentary analysis, a literature review was carried out with the objective of contextualizing the legal and administrative discussion on OSS, the pledge of public funds and smart cities. Books, scientific articles and legislation relevant to the subject were consulted. Authors such as Cambi and Boff (2015)**,** Paim (2018)Silva (2010), Sarlet and Figueiredo (2008) and Celuppi *et al*. (2019) provide a solid theoretical basis on the right to health and the role of OSS in the context of the SUS, while Rezende and Bliacheriene (2017) discuss the implications of smart cities for public governance.

The literature review followed the criteria of relevance and contemporaneity, giving priority to recent publications and articles indexed in recognized academic databases, such as Scielo, Revista dos Tribunais and Google Scholar. In addition, legal and normative

publications were reviewed, such as the Federal Constitution of 1988, Complementary Law No. 141/2012 and Law No. 9,637/1998, which regulates OSS. This review was essential to theoretically anchor the discussion on health financing, the judicialization of OSS, and the challenges of public governance in smart cities.

LIMITATIONS OF THE RESEARCH

Although qualitative research allows for a detailed and in-depth analysis of the topics covered, it also has some limitations. First, the documentary analysis is restricted to the scope of the Court of Justice of the State of São Paulo, which means that the findings may not reflect the jurisprudence of other Brazilian courts. In addition, the research focused on a specific period (2015–2024), which, despite ensuring an updated view of the topic, does not cover the entire history of decisions on the pledge of public funds in OSS.

Another point to be considered is the limitation imposed by the very nature of qualitative analysis. The interpretation of judgments, even if theoretically grounded, may contain a degree of subjectivity inherent to the reading and understanding of legal texts. However, we sought to minimize this subjectivity through the use of rigorous techniques of content analysis, data categorization and triangulation with the literature review.

ETHICS IN RESEARCH

The research followed the ethical precepts recommended for studies in social and legal sciences, respecting the confidentiality of personal information eventually present in the documents analyzed. Although the judgments are publicly accessible, the information was treated ethically, avoiding undue exposure of any of the parties involved in the legal proceedings.

The methodology of this study was designed to ensure the depth and accuracy of the analysis on the seizure of public funds transferred to OSS, using a qualitative, descriptive and documentary approach. By combining the analysis of TJSP rulings with a robust literature review, the research aims to offer a significant contribution to the understanding of the legal and administrative challenges faced by OSS and SUS in a scenario of increasing judicialization. The detailed analysis of the judicial decisions, contextualized by the literature review, aims to clarify the implications of these decisions for the financial sustainability of OSS and the continuity of public health services in Brazil.

DEVELOPMENT

LITERATURE REVIEW

The Right to Health in Brazil

The right to health in Brazil has undergone profound transformations over the last century, culminating, with the promulgation of the 1988 Constitution, in a new paradigm in relation to public health policies.

The positivization of health as a fundamental right of a social nature (BRASIL, 1988, art. 6), constituted an unquestionable disruptive milestone characteristic of the new constitutional system, ensuring the right to health as a "right of all and a duty of the State" (BRASIL, 1988, art. 196), whose concept was inspired by the definition contained in the preamble of the Constitution of the World Health Organization, in which "health is a state of complete physical, mental and social well-being and not just the absence of disease or infirmity" (1946), and expanded to include prevention and well-being.

Sarlet and Figueiredo (2008) reinforce this understanding by stating that "the 1988 Constitution was aligned with the broader conception of the right to health, as advocated by the WHO, which, in addition to an eminently curative notion, includes the preventive and promotional dimensions in the protection of fundamental justice".

For Maia (2012), "the Constitution of the Republic gives primacy to prevention and promotion of the defense of health, but without forgetting the repressive or curative dimension. It is in this broad sense of health that the protection of human dignity rests through health activity of triple facet – promotional, preventive and curative – and this should be the guiding path of the Public Power in its public policies".

In contrast to the structuring of the current health system – with liberal inspiration – in which "those who had financial conditions were cared for by private doctors, while the rest of the population was subjected to charity and houses of mercy" (CAMBI; BOFF, 2015), the constituent legislator chose to establish, in the constitutional text, a single system for public health actions and services, in a regionalized and hierarchical network, which will observe, among other guidelines, comprehensive care, with priority for preventive activities, without prejudice to care services (BRASIL, 1988, art. 198).

According to Sarlet and Figueiredo (2008),

> The fundamental right to health involves a complex of different legal-subjective positions regarding its object, and can be reduced to the notions of right of defense and right to benefits. As a right of defence (or negative right), the right to health aims to safeguard individual health and public health against undue interference, by the State or private subjects, individually or collectively provided. As a right to benefits (positive law), and specifically as a right to benefits in a broad sense, the right to health imposes duties to protect personal and public health, as well as duties of an organizational and procedural nature (*e.g.*, organization of health care services,

> forms of access to the system, distribution of financial and health resources, and so on; as well as the regulation of the exercise of the rights of participation and social control of the SUS, notably through the Health Councils and Conferences). In turn, as a right to benefits in the strict sense, the right to health is the basis for the most varied claims to the provision of material benefits (such as treatments, medications, exams, hospitalizations, consultations, etc.). In this context, it is worth noting the growing tendency of national doctrine and jurisprudence towards the affirmation of the judicial enforceability of subjective positions linked to the protection of the existential minimum – which, in turn, goes beyond mere physical survival, to accommodate the guarantee of minimum material conditions for a healthy life (or as close to it, according to the personal conditions of the individual) and, therefore, for a life with a certain quality.

The reforms promoted by the constituent legislator in the field of health, in addition to consolidating a constitutional guarantee, represented a milestone in public policies and in the Brazilian health system in force at the time of the promulgation of the 1988 Constitution.

This is because until that moment, the Brazilian health system had remained practically unchanged since sanitary changes in 1910. For more than seven decades, a tripartite model characterized its structure: public health, supported by special programs of the Ministry of Health, health and mixed units of the Sesp Foundation, health centers and posts of state and municipal secretariats, as well as the production of vaccines and medicines by state-owned companies; social security medicine, which served only workers who contributed to social security, performed in public hospitals and medical assistance posts (PAM) of the National Institute of Social Security (INPS) and, later, of the National Institute of Medical Assistance of Social Security (INAMPS), Regional Labor Offices (DRT) and Fundacentro; liberal medicine, with doctors and dentists in private offices, in addition to group medicine, operated in medical cooperatives, health insurance, laboratories, clinics and private, university, charitable and philanthropic hospitals (PAIM, 2009, p. 28–29).

This arrangement reflected a scenario of exclusion and inefficiency, where the right to health was not fully guaranteed, and quality medical care was conditioned by financial condition and linkage to the social security system, so that the majority of the population, especially the most vulnerable, depended on charitable or philanthropic institutions to receive medical care (CAMBI; BOFF, 2015).

As one of the main results of the Brazilian health reform movement, with the rupture with this liberal and excluding model, the SUS was instituted by the constituent legislator as the main instrument to universalize access to health – a constitutional guarantee aimed at integrating public health actions and services into a regionalized and hierarchical network, which must observe, among other guidelines, comprehensive care, with priority given to preventive activities, without prejudice to care services (BRASIL, 1988, art. 198).

Paim points out that "it could be considered a health policy of a 'macro-social' nature derived from the Brazilian health reform project, articulating a set of specific policies

(primary care, hospital care, urgency and emergency, regulation, humanization, health promotion, among others) and developing different health practices" (2009, p. 29).

Discussions about the right to health have gained even more relevance with the development of the Brazilian constitutional doctrine.

The applicability of the constitutional norm that guarantees the right to health is of fundamental importance, because, in view of its full and imposing character, it imposes, since the promulgation of the Constitution of the Republic, the implementation by the State, due to its full character. The constituent power, by defining health as a social right, ensured that this prerogative was not merely declaratory, but binding and fully effective.
According to Silva (2012, p. 148), Article 196 of the Constitution of the Federative Republic of Brazil establishes that the right to health, although dependent on the creation of public policies and specific institutions, constitutes a mandatory constitutional imposition. Thus, it configures a positive provision that the State must ensure through the implementation of actions and services that promote universal and equitable access to health.

The Portuguese jurist Canotilho also reinforces that social rights are applicable and binding legal rules of all State organs (1991, *apud* SILVA, 2012, p. 148), by stating that

> the recognition, for example, of the right to health is different from the constitutional imposition that requires the creation of the National Health Service, intended to provide existential benefits immanent to that right. As the benefits also have a subjective and an objective dimension, it is considered that, in general, this service is the object of the claim of individuals and of the duty specifically imposed on the legislator by means of constitutional impositions. However, as the claim cannot be judicially demanded, and therefore does not fit into the classic model of subjective law, the doctrine tends to emphasize only the objective duty of the provision by public entities and to minimize its subjective content. Here again, the material characterization of a fundamental right does not tolerate this inversion of plans: the rights to education, health and assistance do not cease to be subjective rights because the material and institutional conditions for the enjoyment of these rights are not created. (1983, *apud* SILVA, 2012, p. 148–149).

In addition, Silva maintains that

> Health actions and services are of public relevance, so they are entirely subject to the *regulation, inspection and control of the Public Power*, under the terms of the law, which is responsible for executing them directly or by third parties, individuals or legal entities governed by private law. If the Constitution assigns to the Public Power the *Control* of health actions and services, means that over such actions and services he has full power of domination, which is the meaning of the term *Control*, especially when it appears next to the word *Surveillance* (2010, p. 831).

The full applicability of the right to health, guaranteed by the Constitution, thus requires that the State act effectively and continuously, creating the institutional and political conditions necessary for all citizens to be able to exercise this right in a full and equitable manner.

The creation of the Unified Health System (SUS) represented a significant break in relation to the previous model of restricted access to health services, establishing a universal and equitable system that promotes health as a right for all, regardless of socioeconomic conditions. By prioritizing prevention as a central strategy for improving the health of the population, the SUS included millions of Brazilians who were previously excluded from free medical care. Today, consolidated as one of the largest public health systems in the world, the SUS offers comprehensive and free services, ensuring the fundamental right to health for the entire population.

The consolidation of the SUS, however, brought with it great challenges. The main one is related to its financing. As Cambi and Boff point out (2015), the maintenance of a universal and free system such as the SUS requires a significant volume of resources, under greater funding from the federal government by mandatory transfer, without prejudice to voluntary transfers resulting from agreements signed between the governmental spheres; In addition to chronic underfunding, the system faces poor public management, hindering the expansion and improvement of health services, especially in poorer and underserved regions of the country – "administrative mismanagement, unconcerned with verifying the real needs of the population, is marked by investment in areas of lesser importance, but with greater political return for the rulers". Constitutional Amendment No. 95/2016, which established a ceiling for public spending for twenty years, further aggravated this situation, "removing the margin to carry out a countercyclical fiscal policy that would entail adverse shocks" (SCHUERZ, 2023).

Funding limitations have made it urgent to search for alternatives in the management of health services, especially because the Unified Health System (SUS) was not conceived as entirely public, since the Constitution provides for the possibility of performing services by individuals or legal entities under private law, and allows health care to be exercised by the private sector. through public law contracts or agreements (KRÜGER; REIS, 2019). In this way, partnerships were established between the State and private entities, such as Social Health Organizations (OSS).

Social Health Organizations (OSS)

Social Organizations, established by Law No. 9,637/1998, are non-profit legal entities governed by private law, with activities in teaching, scientific research, technological development, protection and preservation of the environment, culture and health (BRAZIL, 1998). Thus qualified by the government, Social Health Organizations (OSS) emerge as a State response to the funding crisis and the limitations imposed on the percentage of

personnel spending (CELUPPI et al., 2019), to the extent that they sign management contracts with the executive branch, assuming the administration of various health services, such as hospitals, Outpatient clinics and specialty centers, in return, receive budgetary resources and public goods, through permission to use, necessary for the fulfillment of the management contract (BRASIL, 1998, art. 12).

Social Health Organizations play a central role in the execution of public health policies in various regions of Brazil, being responsible for the management of important health units.

The arrangement generated several debates, both in the management and legal fields, not remaining unscathed by criticism.

Mansur *et al* (2021) defend the effectiveness of this management model for public hospitals, highlighting that "twenty years after the model was implemented and perfected, there are few authors who dispute the effectiveness and efficiency of the results associated with the contracting of management with recognized Social Health Organizations".

On the other hand, Krüger and Reis (2019) maintain that

> these institutions contracted and contracted by the State, because they are governed by private law and have as a principle *lower cost and greater efficiency*, are not committed to the principles of universality, integrality, equal access, reduction of inequalities and deliberative popular participation. It is from this whole process of deconstruction of the foundations of the SUS that we have seen these management models being increasingly strengthened by the State with new legal arrangements. Thus, for the execution and management of these services, the State structured a legal framework for the creation of social organizations (Law No. 9,637/1998 and Decree No. 3,100/1999), which are private institutions, managed by the rules of private law and non-profit, which can enter into contracts with the State for the execution and management of services. The law grants theoretically non-profit entities, qualified as OS, the benefit of receiving public equipment and resources to manage the units autonomously, hire employees without public tender, buy without bidding, not be inspected by the councils, having freedom in the management of services, and may even close their doors to users.

In this vein, by assuring social organizations the credits provided for in the budget and the respective financial releases, the main point of controversy arises: the (un)seizability of public funds transferred to Social Health Organizations due to contractual default with third parties. This, as they are resources of public origin, would theoretically be protected by the institute of immunity from seizure provided for in article 833, item IX, of the Code of Civil Procedure (BRAZIL, 2015). The judicialization of health, driven by the default of these entities with subcontracted service providers, raised questions about whether this protection constitutes a true safe conduct.

The increase in judicialization involving Social Health Organizations can be attributed to the subcontracting model adopted by these entities, to the extent that, in addition to the

acquisition of inputs, materials and the provision of peripheral services (security, cleaning and maintenance, for example), many of them also delegate part of the health services they should provide, establishing contracts with private companies or self-employed professionals; however, when they face financial difficulties and are unable to meet their obligations to subcontractors, these creditors resort to the Judiciary to ensure the payment of the amounts due. Thus, judicialization becomes a mechanism for protecting the rights of creditors, although it ends up generating conflicts with the principle of immunity from seizure of public funds, raising relevant questions about the sustainability of this model.

Jurisprudence on the subject has fluctuated over the years. The Court of Appeals of the State of São Paulo (TJSP), in this regard, has issued important decisions on the possibility of seizure of financial assets of OSS to guarantee the payment of debts, as in recent years it has begun to admit, more frequently, the seizure of these amounts, especially when private entities do not discharge the *burden of payment* of the public origin of the constrained values. These judgments indicate a relaxation of the principle of unseizability, especially when the seizure is seen as a necessary means to ensure the provision of fundamental services to the population.

This context imposes a dilemma on public governance: how to ensure the financial sustainability of OSS, ensure fair payment to creditors and, at the same time, protect public resources essential for the continuity of health services? A possible solution to this impasse may lie in the adoption of new technologies and more efficient management systems, as suggested by the concept of smart cities.

Smart Cities and Public Health

The concept of smart cities has gained space in the debate on public governance and resource management, especially in areas such as transportation, security, energy, and, of course, health. Smart cities refer to urban areas that use emerging technologies — such as the Internet of Things (IoT), big data, and artificial intelligence — to improve the efficiency of public services and increase the quality of life of their inhabitants (GIFFINGER et al., 2007). In the context of health, smart cities offer opportunities to optimize the management of services, improve resource allocation, and prevent the waste of public funds.

The use of digital technologies allows for a more rigorous inspection of the execution of contracts signed between the government and the OSS. Real-time monitoring tools, for example, can be used to track resource utilization and ensure that health funds are spent efficiently and transparently. In addition, the implementation of predictive management

systems "based on best practices, processes, planning, management and maximization of resources supported by an information technology platform and followed by efficient state regulation" (REZENDE; BLIACHERIENE, 2017), can help identify problems before they result in defaults or the interruption of health services, making judicialization unnecessary

Another relevant aspect of smart cities is the use of artificial intelligence to assist in decision-making. By collecting and analyzing large volumes of data, artificial intelligence can predict future demands, allowing public managers to make more informed decisions about resource allocation. In the healthcare industry, this predictive capability can be particularly useful for avoiding hospital overcrowding, improving drug inventory management, and optimizing patient flow.

However, the implementation of smart cities faces significant challenges, especially in developing countries such as Brazil. Regional inequalities, a lack of digital infrastructure in many areas, and budget limitations are obstacles to large-scale adoption of these technologies. In addition, cybersecurity and data protection issues also need to be carefully managed, not least to avoid predictive damage to individuals' privacy, since smart cities depend on the collection and analysis of large volumes of personal data (KITCHIN, 2016).

Although the full adoption of smart cities in Brazil still faces a challenging path, the potential of these technologies to improve public governance and optimize the management of health services is undeniable. In this context, the implementation of digital tools and monitoring systems can constitute a viable solution to the challenges faced by OSS and to the judicialization of health, promoting more efficient and transparent governance.

ANALYSIS AND DISCUSSION OF THE RESULTS

The analysis of the results of this research focuses on the interpretation of the rulings of the Court of Justice of the State of São Paulo (TJSP) related to the seizure of public funds destined to Social Health Organizations (OSS), as well as on the discussion of the impacts of these decisions on the sustainability of the Unified Health System (SUS) and the continuity of essential public health services. The study also discusses the challenges surrounding the governance of these entities in the context of smart cities.

The Pledge of Public Funds in Social Health Organizations

The analysis of the rulings revealed that the case law of the TJSP, in relation to the seizure of public funds transferred to Social Health Organizations, presents a tendency to flexibility, to the extent that, if certain factual or procedural conditions are met, financial assets can be seized to guarantee the payment of private creditors. In total, seventy-seven

judgments were analyzed, of which twenty-six upheld the absolute immunity from seizure of public funds intended for OSS, while fifty-one appeals tended to make the immunity from seizure of these amounts more flexible, admitting the effective constriction of financial assets of social organizations, even if partially.

The jurisprudential dichotomy is directly related to the factual circumstances of each case, especially with regard to the destination of the funds and the issues involving the distribution of the burden of proof.

The judgments that preserved the absolute immunity from seizure of financial assets of Social Health Organizations gravitate around the understanding that the funds transferred by the State to these organizations are protected by the public nature of their destination, as provided for in article 833, item IX, of the Code of Civil Procedure (BRAZIL, 2015). In the judgment of interlocutory appeal No. 247780-54.2019.8.26.0000, by the 26th Chamber of Private Law, the rapporteur, Judge Berenice Marcondes Cesar, reasoned that

> "the impossibility of blocking amounts from public funds intended for investment in health services is expressly provided for by law (article 833, item IX, of the CPC) and is already a direct result of the constitutional rule that confers public relevance to health actions and services (article 197, 'caput', CF/88). Such a normative framework allows us to understand that any public funds transferred to a private entity for the cost of health services should be considered unseizable, as it is intended for services of public relevance".

In addition, the basis of the preponderance of the public interest in the provision of health services in relation to the private interest of the creditor is highlighted. On the issue, Judge Jacob Valente decided, in the judgment of interlocutory appeal no. 021960-12.2022.8.26.0000, that:

> It is clear that the intended seizure will certainly give rise to a risk of damage to the population served by the health entities that are benefited due to the agreements made between the Municipalities and the executed one.
> (...)
> Finally, it should be noted that the public interest in providing health services to the population without financial resources must prevail over the private interest of the creditor, who may seek satisfaction of its credit through the seizure of other assets of the debtor's assets.

On the other hand, the rulings in favor of the seizure of the financial assets of the Social Health Organizations, as a means of ensuring compliance with the contracts, based on the absence of proof, by the OSS, of the public origin of the amounts, or on the confusion of these resources with receipts of a private nature.

In the judgment of interlocutory appeal No. 2124896-18.2022.8.26.0000, by the 13th Chamber of Private Law, under the rapporteurship of Judge Nelson Jorge Junior, the following understanding was established:

> The provision of the service it performs benefits the citizen of the municipality, but this cannot justify a frame, a shield to prevent the fulfillment of the contractual obligations signed, as it would show a strong nonsense that disorganizes the human contribution.
> Therefore, since the differences between the service it performs for profit purposes and the remuneration intended for the service of the citizen are not demonstrated, there is no plausibility in the allegations, and the seizability of the constricted amount as determined by the lower court should prevail for the time being.

Also noteworthy is the current that defends the unenforceability of the institute of immunity from seizure in the cases of provision of services directly related to the object of its contracting; in the assessment of Interlocutory Appeal No. 2290565-60.2021.8.26.0000, in which the possible deconstitution of the constriction of OSS assets is discussed, in an action for the execution of an extrajudicial title based on a hospital layette lease agreement, the reporting judge concluded that

> (...) even though the Appellant receives a subsidy from the Government, in view of its field of activity, the funds received become private and, although they are intended for the provision of health services, it is precisely because of these services that it contracted the debts that are now being enforced.
> Such funds are intended for the payment of its suppliers and their debts, judicial or extrajudicial, and the acquisition of inputs and expenses arising from the exercise of the core activity itself, so that there would be no sense in determining a cause for unseizability, in the hypothesis. Therefore, in the absence of sufficient evidence that the constriction has fallen specifically on funds originating from the Government, for application in the health area, it is not possible to determine the release of the amounts subject to seizure in the records.

We present below a summary table of the main grounds of the judgments analyzed:

Position	Foundation	Quantity
Immunity from seizure	Social Organizations are subject to the control of the Government and obliged to account for the public resources received, under penalty of losing their qualification. These resources are linked to the core activity of Social Organizations — the provision of public health services, which are essential and cannot be interrupted. For this reason, the immunity from seizure provided for in article 833, item IX, of the Code of Civil Procedure applies.	26
Attachment	It is the duty of the Social Organization to prove the public origin of the funds received, as well as to distinguish them from the amounts arising from remuneration for services provided privately. If it does not discharge the burden of proof assigned to it, the seizure of the financial assets subject to constriction prevails. It should be noted that there is no impediment to the seizure of amounts of private origin, and the immunity from seizure applies exclusively to amounts proven to come from public resources.	36
Attachment	Judicial constriction of assets that falls into a bank account other than that provided for in a contract with the Government, without the Social Organization discharging, in the same way, the burden of proving the public origin of the resource and its destination for health.	4

Attachment	Once the resources are transferred to the collaboration between the Social Organization and the public entity, the responsibility for managing these values becomes the responsibility of the Social Organization itself. In this case, the protection provided for in article 833, item IX, of the Code of Civil Procedure does not apply, due to the provisions of article 42, item XIX, of Law No. 13,019/2014.	2
Attachment	Immunity from seizure is not enforceable against charges for services performed or inputs provided by the Social Organization, according to article 833, paragraph 1, of the Code of Civil Procedure, allowing the seizure of a percentage of the funds transferred.	9

Source: Data prepared by the author based on the analysis of the TJSP rulings.

Impacts on the financing and continuity of health services

The judicial decisions that authorize the seizure of public funds transferred to the OSS have direct implications for the continuity of health services. OSS, as non-profit entities that depend entirely on public resources to carry out their activities, face a dilemma when their accounts are blocked to satisfy debts with third parties. On the one hand, blocking these amounts can ensure that service providers and suppliers receive the amounts due; On the other hand, this practice compromises the financial flow necessary for the maintenance of health services, negatively impacting the quality and continuity of care for the population.

The underfunding of the SUS, with possible lack of transfers, is one of the main factors that contribute to the ineffectiveness of Social Health Organizations. Entities often have to make difficult choices about which debts to prioritize, and late payments to service providers is a relatively common practice. This scenario is aggravated by the lack of clarity regarding the mechanisms for overseeing OSS, which creates an environment conducive to judicialization.

Judicialization has also generated an increase in the administrative costs of OSS, which need to dedicate part of their resources to judicial defense and the payment of convictions. This situation generates a vicious cycle: the more they face financial problems, the greater their dependence on judicialization to resolve contractual issues, which ends up generating more expenses and further affecting their ability to provide health services.

Another relevant point is the impact of these decisions on the financial planning of Social Health Organizations. As the public funds transferred by the State must be applied exclusively in the execution of the contracted health services, any blocking or diversion of these resources compromises the efficiency of public management. Rezende and Bliacheriene (2017) They advocate a revolution in the management of public health policies, with the implementation of modern management techniques added to the application of intelligence for administrative decision-making, monitoring and evaluation of

public policies and administrative acts – among which, the transfer of public funds to private entities. In addition, court decisions, by making the immunity from seizure of public funds more flexible, create an environment of legal uncertainty for OSS, which start to face greater instability in their operations.

Legal and Administrative Challenges for Smart Cities

In the context of smart cities, the discussion about the pledge of public funds acquires a new dimension. The application of emerging technologies to improve public governance and optimize the delivery of health services is one of the promises of smart cities. Giffinger et al. (2007) highlight that smart cities are characterized by the ability to integrate urban systems, using technologies such as *big data* and the Internet of Things (IoT) to monitor, predict and optimize the allocation of resources.

The use of these technologies in the context of OSS can be a solution to mitigate financial management problems and, consequently, reduce the judicialization of health. The use of predictive financial management systems, for example, can help OSS to more accurately predict their expenses, allocate resources more efficiently, and avoid default. In addition, automated auditing tools can ensure greater transparency in the use of public funds, making it difficult to misuse resources and increasing the confidence of creditors and society.

However, the implementation of smart cities in Brazil faces considerable challenges, especially related to the digital divide and the lack of technological infrastructure in many regions of the country. While large urban centers, such as São Paulo and Rio de Janeiro, have advanced in the implementation of technologies to improve public management, more peripheral regions face difficulties in adopting these innovations. As a result, OSS operating in areas with less technological development may continue to face challenges related to the transparency and efficiency of their financial management, perpetuating the cycle of judicialization.

Discussion of the results in the light of the literature

The results of this research corroborate the studies by Cambi and Boff (2015) and Paim (2009), which point to the challenges faced by the SUS in the management of public resources by OSS. The relaxation of the jurisprudence on the seizure of public funds reflects an attempt by the courts to balance the rights of creditors with the need to ensure the continuity of health services. However, this flexibility also puts the execution of public

policies at risk, especially in a scenario of chronic underfunding and increasing judicialization.

On the other hand, the results also indicate that the adoption of emerging technologies, such as those proposed by smart cities, can be a viable solution to improve the governance of OSS and reduce the need for judicialization. Smart cities offer an environment conducive to innovation in public management, providing greater transparency, efficiency, and sustainability for health services.

FINAL CONSIDERATIONS

The main objective of this study was to analyze the issue of the pledge of public funds transferred to Social Health Organizations (OSS), in the light of the jurisprudence of the Court of Justice of the State of São Paulo (TJSP), and to discuss the implications of this practice for the continuity of essential health services, as well as for public governance, especially in the context of smart cities.

The results of the analysis revealed a growing flexibility on the part of the TJSP with regard to the seizure of public funds intended for Social Health Organizations. In several rulings, the judges recognized that, in cases of default by the OSS, especially when this directly affects the payment of third-party service providers and suppliers, the seizure may be allowed if the social organization does not discharge the burden of proving the purity of the public origin of the financial assets, without any confusion with any other values of private origin; There is also a growing understanding regarding the unenforceability of the rule of immunity from seizure of values, even if originated from public funds, if resulting from charges for the provision of health services or supply of inputs and materials, with which the Social Health Organization has committed itself to the Public Power. These understandings, however, generate a conflict between the need to guarantee the payment of creditors and the preservation of the continuity of health services, which, in the practical field, can jeopardize the financial sustainability of these entities and compromise the execution of public health policies.

The Unified Health System (SUS), based on the principles of universality, integrality and equity, depends on efficient management and adequate funding to fulfill its constitutional function of guaranteeing health as a right of all and a duty of the State. The study demonstrated that the OSS management model, although it has been introduced as a solution to the efficiency problems of the SUS, faces financial difficulties that often result in default and, consequently, in the judicialization of contracts. As Cambi and Boff (2015) state, the effectiveness of the right to health depends not only on the existence of public

policies, but on their adequate execution and financing. The lack of sufficient resources and poor management are significant obstacles to the proper functioning of the OSS and, consequently, to the SUS itself.

The judicialization of the relations between OSS and their service providers is a reflection of the structural problems that affect the management of public resources in Brazil. The research identified that OSS, by not complying with their financial obligations, generate an overload for the Judiciary, which in turn creates a vicious cycle in which judicialization ends up increasing the administrative costs of these organizations and, consequently, further affecting their management capacity.

In this scenario, the implementation of smart cities emerges as a viable alternative to improve public governance and the management of OSS. Smart cities, by utilizing emerging technologies such as *big data*, artificial intelligence, and the Internet of Things (IoT), have the potential to optimize resource allocation and increase the efficiency of public services. These technologies can be used to monitor the use of public funds in real time, ensuring greater transparency and efficiency in the execution of contracts signed with OSS. In addition, predictive management systems can help predict defaults and avoid interruptions in health services, minimizing the need for judicialization.

However, the adoption of advanced technologies in the context of OSS faces significant obstacles, especially in regions of Brazil where technological infrastructure is precarious. In addition, as Rezende and Bliacheriene (2017) point out, "the concept of integrated health management within the *smart cities* project is absolutely necessary in its different aspects yet, they are not addressed or welcomed in the public health system".

It is therefore concluded that the seizure of public funds destined to OSS is a delicate issue, which requires a balance between the protection of creditors' rights and the guarantee of the continuity of public health services. The current jurisprudence of the TJSP reflects an effort to find this balance, but the situation is still unstable, especially in a context of underfunding of the SUS and increasing judicialization. The adoption of new technologies in the context of smart cities can be a solution to some of the problems identified, but their implementation requires robust public policies and effective inter-institutional coordination.

With regard to future research, it is necessary to explore in more depth the feasibility of applying technological solutions in the management of OSS, as well as to evaluate the long-term impact of judicialization on SUS financing. In addition, comparative studies between different Brazilian states, and even between countries that face similar challenges in the field of public health, can provide valuable *insights* on how to mitigate the negative effects of judicialization and improve the management of OSS.

REFERENCES

1. Bardin, L. (2011). *Análise de conteúdo*. São Paulo, SP: Edições 70.

2. Brasil. (1988). *Constituição da República Federativa do Brasil de 1988*. Brasília, DF.

3. Brasil. (1990). *Lei nº 8.080, de 19 de setembro de 1990*. Dispõe sobre as condições para a promoção, proteção e recuperação da saúde, a organização e o funcionamento dos serviços correspondentes e dá outras providências. Brasília, DF.

4. Brasil. (1998a). *Lei nº 9.637, de 15 de maio de 1998*. Dispõe sobre a qualificação de entidades como organizações sociais, a criação do Programa Nacional de Publicização, a extinção dos órgãos e entidades que menciona e a absorção de suas atividades por organizações sociais, e dá outras providências. Brasília, DF.

5. Brasil. (1998b). *Lei nº 9.656, de 03 de junho de 1998*. Dispõe sobre os planos e seguros privados de assistência à saúde. Brasília, DF.

6. Brasil. (1999a). *Lei nº 9.790, de 23 de março de 1999*. Dispõe sobre a qualificação de pessoas jurídicas de direito privado, sem fins lucrativos, como Organizações da Sociedade Civil de Interesse Público, institui e disciplina o Termo de Parceria, e dá outras providências. Brasília, DF.

7. Brasil. (1999b). *Decreto nº 3.100, de 30 de junho de 1999*. Regulamenta a Lei nº 9.790, de 23 de março de 1999, que dispõe sobre a qualificação de pessoas jurídicas de direito privado, sem fins lucrativos, como Organizações da Sociedade Civil de Interesse Público, institui e disciplina o Termo de Parceria, e dá outras providências. Brasília, DF.

8. Brasil. (2000). *Emenda Constitucional nº 29, de 13 de setembro de 2000*. Altera os arts. 34, 35, 156, 160, 167 e 198 da Constituição Federal e acrescenta artigo ao Ato das Disposições Constitucionais Transitórias, para assegurar os recursos mínimos para o financiamento das ações e serviços públicos de saúde. Brasília, DF.

9. Brasil. (2012). *Lei Complementar nº 141, de 13 de janeiro de 2012*. Regulamenta o § 3º do art. 198 da Constituição Federal para dispor sobre os valores mínimos a serem aplicados anualmente pela União, Estados, Distrito Federal e Municípios em ações e serviços públicos de saúde; estabelece os critérios de rateio dos recursos de transferências para a saúde e as normas de fiscalização, avaliação e controle das despesas com saúde nas 3 (três) esferas de governo; revoga dispositivos das Leis nºs 8.080, de 19 de setembro de 1990, e 8.689, de 27 de julho de 1993; e dá outras providências. Brasília, DF.

10. Brasil. (2015). *Lei nº 13.105, de 16 de março de 2015*. Código de Processo Civil. Brasília, DF.

11. Brasil. (2016). *Emenda Constitucional nº 95, de 15 de dezembro de 2016*. Altera o Ato das Disposições Constitucionais Transitórias, para instituir o Novo Regime Fiscal, e dá outras providências. Brasília, DF.

12. Cambi, E., & Boff, D. B. (2015). Efetividade do direito à saúde pública no Brasil. *Revista dos Tribunais, 954*, 119–151.

13. Celuppi, I. C., & et al. (2019). 30 anos de SUS: Relação público-privada e os impasses para o direito universal à saúde. *Saúde em Debate, 43*, 302–313.

14. Giffinger, R., & et al. (2007). *Smart cities: Ranking of European medium-sized cities*. Vienna, Austria: Centre of Regional Science.

15. Kitchin, R. (2016). The ethics of smart cities and urban science. *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences, 374*(2083).

16. Maia, M. C. (2012). O direito à saúde à luz da Constituição e do Código de Defesa do Consumidor. *Revista de Direito do Consumidor, 84*, 197–221.

17. Mendes, G. F., & Branco, P. G. G. (2011). *Curso de direito constitucional* (6th ed.). São Paulo, SP: Saraiva.

18. Minayo, M. C. S. (2013). *O desafio do conhecimento: Pesquisa qualitativa em saúde* (14th ed.). São Paulo, SP: Hucitec.

19. Organização das Nações Unidas. (2024). *Objetivos de Desenvolvimento Sustentável*. https://brasil.un.org/pt-br/sdgs

20. Organização Mundial da Saúde. (1946). *Constitution of the World Health Organization*. https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1

21. Paim, J. S. (2009). Uma análise sobre o processo da Reforma Sanitária brasileira. *Saúde em Debate, 33*(81), 27–37.

22. Paim, J. S. (2018). Sistema Único de Saúde (SUS) aos 30 anos. *Ciência & Saúde Coletiva, 23*, 1723–1728.

23. Rezende, N. F., & Bliacheriene, A. C. (2017). Direito à saúde e políticas públicas de saúde para as smart cities. *PIDCC: Revista em Propriedade Intelectual Direito Contemporâneo, 11*(1), 76–87.

24. São Paulo. Tribunal de Justiça do Estado de São Paulo. (2020). *Agravo de instrumento nº 202