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PUBLIC POLICY PLANNING AND JUDICIAL CONTROL: LIMITS AND POSSIBILITIES

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Arianne Brito Cal Athias[1], Lisbino Geraldo Miranda do Carmo[2] and Paulo Henrique da Silva Costa[3]

ABSTRACT

The research aims to understand the role of planning and judicial control in public policies, analyze their limits and possibilities, and examine whether exercising such control may disrespect the separation of powers and harm the provision of public services by the State. Analyzing the importance of planning as an indispensable requirement for any public policy, with a technical and political bias. The Judiciary has an increasing role in monitoring public policies, aiming to ensure that government actions are aligned with the objectives of the Constitution. However, this judicial intervention can cause problems when it results in decisions that directly alter planning, potentially impacting the stability and continuity of government actions, and analyzing administrative acts regarding their merit. The research examines the limits of judicial control in public policies and the positive and negative impacts of this intervention. The issues discussed include the role of planning, how judicial

[1] Post-doctorate in Law Generations of Human Rights within the Framework of Social Rights Comparative Perspective: Brazil and Spain - 2021 at the University of Salamanca USAL/Spain (2022). PhD in Administrative Law from PUC São Paulo (2007). Master in Law from the University of the Amazon (2001). Associate Professor II at the Federal University of Pará - UFPA, seconded to the Public Prosecutor's Office of the State of Pará to hold the position of Advisor to the Attorney General of Justice.
Professor of the Postgraduate Program in Law and Development in the Amazon - PPGDDA (Professional Master's Degree) at UFPA. Full Professor I of Undergraduate and Postgraduate Program in Fundamental Rights (Master's Degree) at the University of the Amazon - UNAMA. Vice-President of the Institute of Administrative Law of Pará - IDAPAR.
E-mail arianneathias@gmail.com
ORCID: https://orcid.org/0000-0002-2887-1989
[2] Master in International Law from the Autonomous University of Asunción -UAA-PY, validated by the University of the Amazon - UNAMA; Professor of Tax Law at the University of the Amazon. Specialist in Human Rights from the Integrated Colleges Brazil-Amazon - FIBRA, Specialist in Civil Procedural Law from the Higher School of Magistracy of Pará; Specialist in Criminal Law and Criminal Procedural Law from the University of the Amazon - UNAMA; Judicial Analyst at TJPA.
Member of the GEPCEND Group - Study and Research Group Constitutions, Structuralism and New Rights. PPGDF - @unama_gepcend and Member of the Study Group Human Rights, Environmental Sustainability and Socioeconomics (DHSAS) - PPGDF UNAMA.
E-mail: lisbinounama@gmail.com
ORCID: http://orcid.org/0000-0002-2581-5789
LATTES: http://lattes.cnpq.br/6182097085008910
[3] Master's student in Fundamental Rights at the University of the Amazon – UNAMA. Specialist in Public Law and Criminal Law at the Brazilian School of Law – EBRADI. Member of the research group Democracy, Hermeneutics and Process at the University of the Amazon – UNAMA.
Lawyer. Parliamentary Advisor to the Legislative Assembly of the State of Pará.
E-mail: adv.paulohenriquecosta@gmail.com
ORCID: http://orcid.org/0009-0007-5118-3416
LATTES: http://lattes.cnpq.br/3356778692536387

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control is exercised, and the constitutional possibilities and limitations of this control. The text emphasizes that, while the judiciary can intervene to protect constitutional rights, this intervention must be carefully balanced so as not to overburden the public administration with decisions that require technical expertise and long-term planning. It concludes that despite the importance of judicial control, which can improve public policies, making them more effective and inclusive, the separation of powers must be respected and the functions of the Executive and Legislative branches must not be replaced, avoiding decisions that compromise the stability and planning of government actions.

Keywords: Control. Planning. Public Policies. Government Actions. Judiciary.

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INTRODUCTION

Public policies are a multifaceted object of study in the Brazilian legal-administrative sphere, characterized as essential instruments for achieving the fundamental objectives of the State. Their conceptual and operational complexity has given rise to significant doctrinal and jurisprudential development in recent decades, especially regarding their definition, implementation, and control. This field of study, which lies at the intersection of Law and Public Administration, demands a systematic analysis of both its theoretical foundations and its practical aspects, especially considering their fundamental role in the enforcement of constitutional rights and guarantees. In the definition of Maria Paula Dallari Bucci (2006): “Public policies are government action programs aimed at coordinating the resources available to the State and private activities, for the achievement of socially relevant and politically determined objectives”. Essential for any development, they can be implemented through positive actions on the part of the State, but with no objection to the private sector participating in this process. Classifying them within an uncertain administrative panorama, without legal certainty and with political instability for long-term activities, is a difficult task.

Especially with regard to administrative and legal aspects, to ensure the implementation of these policies, which are complex, great planning is required by the public administration, with the participation of several bodies, integrating technicians and society.

The judicial control exercised by the Judiciary Branch, which, in theory, seeks to ensure that the public administration complies with constitutional precepts, when it comes to public policies, directing the state apparatus to a certain sector of society, often without the necessary analysis or discussion to assess the possible impacts of this imposed change.

This research will be limited to clarifying the limits and possibilities of judicial control within public policies, analyzing its positive and negative impacts on public planning, and seeking to understand to what extent the Judiciary Branch can intervene, without causing negative damage, both from an administrative and legal perspective.

In this context, the following question emerges as the central problem of this research: what are the limits and possibilities of judicial control in the planning of public policies? To investigate this issue in a structured manner, the following guiding questions are established: What is the primary function of planning in the development cycle of

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public policies; how is the interference of judicial control in the administrative sphere configured in the current situation; and what are the constitutional parameters that legitimize the action of the Judiciary in the modulation of public policies. As a hypothesis, there is the possibility that the judicial control currently exercised in Brazil in the scope of public policies, about planning, clearly directs certain segments of society, where the guidelines to be followed are established to achieve the desired objectives aiming at the development and benefit of the citizen. It is not a typical function of the Judiciary to frequently make this type of interference, also because it does not have the expertise and technical material necessary for assertive decisions, often wanting to govern and define in judicial decisions which direction the country should follow, and the separation of powers must be respected. The research objectives should not be confused with possible purposes or applications of its results (Mazucato, 2018, p. 48). Following this understanding, the research objectives will be: to understand the function and importance of planning in public policies; to analyze the judicial control carried out by the judiciary within the scope of public policies, verifying the positive and negative impacts; to understand the legal-constitutional limits and possibilities that judicial control can exercise over the function of planning and directing public policies.

The justification is based on analyzing and clarifying the function of planning in the development of public policies and the role of judicial control within this area, understanding the legal limits and possibilities that the judiciary has to determine changes or direct what is done by the State.

The sections discussed are dominated by theoretical research, with a qualitative approach. Its nature is basic, with an analysis of hypothetical-deductive logic. It had an exploratory, descriptive, and explanatory character. Regarding the procedure, documentary bibliographic research was carried out, due to the need to analyze the constitutional, doctrinal, and legal foundations of Brazil.

THE FUNCTION AND IMPORTANCE OF PLANNING IN THE ELABORATION OF PUBLIC POLICIES IN BRAZIL

The first movements related to the planning in the Brazilian State, were in the mid-1930s, during the great crisis of 1929, which exposed major social and economic problems that demanded alternatives and strategies from the public administration (Justen, Frota, 2006).

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For more detailed knowledge of what is defined as planning, Justen and Frota (apud Lopes, 1990, p.12) explain: ‘’coherent and comprehensive method of formation and implementation of guidelines, through central control of vast networks of interdependent bodies and institutions, made possible by scientific and methodological knowledge’’. The Brazilian Constitution of 1988 determines the obligation of the State to carry out the planning function, a determination listed in its article 174, caput: “As a normative and regulatory agent of economic activity, the State shall exercise, by the Law, the functions of inspection, incentive, and planning, being decisive for the public sector and indicative for the private sector.” Gilberto Bercovici (2006) teaches: “in Brazilian development, the role of planning was fundamental. The Brazilian developmental State imposed upon itself the task of coordinating, dynamizing, and reorienting economic and social transformations; planning coordinates rationalizes, and gives unity of purposes to the State’s actions, differentiating itself from a conjunctural or case-by-case intervention” [5]. Planning differs from a plan, since the latter coordinates, guides, organizes, and directs the State’s actions, unlike case-by-case or occasional actions (Bercovici, 2006). This planning must, directly and indirectly, seek social and economic change in society, with short-, medium, and long-term public policies.

There is planning of state actions, for political and administrative decisions that must be divided into impacts and foresee possible future results, requiring a strong State, capable of direction and organization, providing security to citizens that public policies will reach their doorsteps, with implementation of these policies in the short, medium and long term.

The constitutional objectives of the republic were predetermined in the 1988 Constitution, listed in Article 3 of the Constitution, among them, to eradicate poverty and marginalization and reduce social and regional inequalities.

Therefore, the State must present the mechanisms and actions necessary to achieve these objectives, even though the Brazilian public administration is not technically or politically prepared to formulate policies for continued development, despite numerous attempts by various governments (Bercovici, 2006).

Discussions about Public Policies are increasingly important for the actions of the State, even though the implementation of mainly social programs for income distribution, without proper planning, such as what the criteria for beneficiary entry and exit about the granting of the benefit would be, thus creating huge costs, which increase every year and

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have no government movement to dissolve or replan, largely due to purely political and electoral issues.

The planning activity had turbulent times in the mid-1980s when the world was going through serious global and national crises, such as economic loss of control, high unemployment, devalued wages, and soaring inflation that reached a record 100% during this period.

Because of this fact, society no longer had confidence in the State, especially in its role as a planner. In this context, the public mechanism of the Multi-Year Plan emerged, which is still used today, where it deals with planning, especially budgetary issues in all entities of the federation. (Justen, Frota, 2006).

In this sense, Bercovici (2006, p. 156) teaches:

‘’That is why the concern of the 1987-1988 constituent was to modernize budgetary instruments, seeking integration between planning and budgeting in the medium and long term. To this end, the 1988 Constitution provides for three budgetary laws, the multi-year plan, the budgetary guidelines, and the annual budget, which must be integrated and compatible with global planning (according to Art. 165, §4º). The Multi-Year Plan, introduced by articles 165, I, and 165, §1º of the 1988 Constitution, is based on the connection between the government’s annual actions (provided for in the annual budget) with a longer time horizon (necessary for effective planning). The problem with the multi-year plan is its viability, given the lack of concern for planning by governments after 1988. Furthermore, its relations with other plans provided for in the Constitution are not clear, even though art. 165, § 4, determines its compatibility with other national, regional, and sectoral plans of the constitutional text.

Planning is required to comply with the principle of legality. During the actions and studies Of the actions that support it, it is necessary, mandatory, and essential to align it with the public budget, which is discussed within parliament, which gives it a participatory and democratic character.

Construction is carried out based on many discussions and debates, in which simple and complex social and economic demands are presented, which will show the public authorities which problems require planning in order to find alternative solutions. Although the definition of which problems and demands are priorities, we leave it to the political game, mainly because we are a country with great geographical, economic, and social differences.

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Through planning, it is possible to control the State's actions, since it must establish the guidelines that must be followed, despite some questions from some scholars, about the obligation of the public authorities to link their actions to the planning carried out. The budget, together with planning, must create a link that must be followed by the State, since to implement any type of public policy, a budget forecast is necessary, at least partially. Otherwise, a scenario favorable to cases of administrative impropriety, among other irregularities, is created.

Failure to consider important issues during any discussion of public policies will lead to serious problems that generally begin in the economic sphere, with even more significant impacts on the lives of citizens. Imbalances in public accounts are caused by failure to plan and budget, with catastrophic consequences, such as the crisis experienced by the Brazilian population during the government of President Dilma Rousseff.

THE 1988 FEDERAL CONSTITUTION AND THE POSSIBILITIES OF JUDICIAL CONTROL OVER PUBLIC POLICY PLANNING

Montesquieu conditioned freedom to his great thesis on the separation of powers between the judicial, legislative, and executive functions. The theory was consecrated at a historical moment, at the birth of liberalism, where the aim was to weaken the State and its interference in the private lives of citizens. It was in this context that the first generation of fundamental rights was born (Grinover, 2009).

The Democratic State of Law came as the successor to the Social State of Law, with the Judiciary assuming new functions, through intervention in other bodies that are responsible for the planning and execution of State programs, a typical function of the Executive and Legislative Branches (Costa, 2015, p. 210).

This intervention is based mainly on the alleged defense of the Federal Constitution, where judicial control demands that the respective powers fulfill the objectives of the Republic, listed in Article 3 of the Constitution, among them, eradicating poverty and marginalization and reducing social and regional inequalities.

Ada Grinover explains this topic: “And to achieve these fundamental objectives (to which is added the principle of the prevalence of human rights: art. 4, II, of the Federal Constitution), the State must organize itself in facere and praestare, influencing social reality”.

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Due to this scenario, the control function of the judiciary increases, teaches Ada Grinover: “Now, the State's duty of abstention is replaced by its duty of dare, facere, praestare, through a positive action that truly allows the enjoyment of the rights of freedom of the first generation, as well as new rights”. Seeking to operationalize the achievement of fundamental objectives, Ada Grinover (apud, JUNIOR, 2011, p. 17-19) teaches:

‘’For the social State to achieve these objectives, it is necessary to achieve goals, or programs, which imply the establishment of specific functions for the Public Authorities, for the achievement of the objectives predetermined by the Constitutions and laws. Thus, once the constitutional or legal command is formulated, it requires the State to promote the actions necessary for the implementation of the fundamental objectives. And the power of the State, although one, is exercised according to the specialization of activities: the normative structure of the Constitution provides for its three forms of expression: legislative, executive and judicial activity’’.

In the context of the emergence of second-generation fundamental rights, which are economic and social rights, which occurred during the transition from the Liberal State to the Social State, which brought substantial changes in the conception of the State and mainly in which areas the actions of the public power should be focused (Grinover, 2012).

Administrative merit was rarely questioned by the Judiciary before the Federal Constitution of 1988, with judges always leaving decisions to managers, even for strictly legal reasons, with express prohibition in the Constitution itself, regarding the separation of powers.

However, any injury or threat to the right cannot be excluded from consideration by the Judiciary. , thus enabling control over the legality of administrative acts and decisions, which is typically the responsibility of the Executive and Legislative branches.

Public policies are aimed at the development of society and must necessarily meet the objectives listed in the Federal Constitution, which brought social guarantees based on human dignity, the result of much social struggle by the civil population and social movements. The Magna Carta is capable of providing guidelines for order and conformity with the political, social, and administrative reality. Both the Executive and Legislative branches must discuss and plan public policies based on these constitutional foundations, seeking to achieve full development following this line of thought.

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It is important to emphasize and it is essential to address within this theme that the Brazilian reality presents several deficiencies in the provision of services by the State, without any quality criteria for providing education, security, health, and social assistance.

Due to this scenario, in order to comply with constitutional precepts, the Judiciary intervenes in public policies, directing which ones should be implemented and even setting a deadline to comply with the decision. This control is well-founded, but it usurps the function of the other branches of government.

We will cite the case of public policies to combat drugs, where the Supreme Federal Court adopted the understanding that possession for personal use is not a crime, with a maximum quantity of 40 grams, if no other issues are identified in the specific case. However, we will not delve into this topic in depth.

The Legislative Branch, through the Chamber of Deputies and the Federal Senate, reacted incisively, with many criticizing the content of the decision, understanding it as an invasion of the powers of the National Congress, which is the appropriate place to hold this type of discussion, where the representatives of the people are in fact.

Well, in this case, we can see the interference of the judiciary, which does indeed exercise some control, changing the guidelines adopted in recent years in the country regarding drug repression, with a direct impact on administrative issues and procedures carried out mainly within the scope of police procedures.

In the area of problem-solving, public policies must be understood as the result of alignment, agreement, and compatibility of those who have the constitutional authority to plan and execute, mediated by social, political, and governmental actors, given the complexity of the demand so that the positive benefits of the state reach all citizens.

Judicial control can impact the implementation of public policies, especially when there are many court decisions that determine changes or suspension of policies, thus causing great confusion, deviating from planning, which outlined long-term guidelines, without calculating any interference by the judiciary.

In addition to this consensus, the analysis from a technical perspective, especially a legal one, for reasons of legal viability, must be well-crafted, in compliance with the constitution and not devising policies for some in favor of others, so that there are no legal grounds for control by the judiciary.

It is worth noting that any social program, for example, that excludes or hinders access for a certain part of the population will certainly be subject to control by the

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judiciary. For example, the Bolsa Família program, which has several criteria, in which any inclusion or withdrawal will have a major impact on financial-budgetary planning, should be widely discussed, even within the procedural records, thus ensuring greater transparency and legal certainty, since any possible elaboration or alteration occurs within the scope of the judiciary.

JUDICIAL CONTROL: ITS MEANS OF INTERVENTION AND OBJECTIVES

Brazilian law has its roots in North American law, where constitutional control was inaugurated in this country in the famous case of Madison versus Marbury, which decided on the supremacy of the constitution over the law.

The Popular Action Law emerged with the possibility of discussing administrative merits, which had been little analyzed by the judiciary before the Federal Constitution of 1988, where it was established in its article 5, item LXXIII, that:

‘’Any citizen is a legitimate party to file a popular action that aims to nullify an act that is harmful to public property or to the property of an entity in which the State participates, to administrative morality, to the environment and historical and cultural heritage, with the author being exempt, unless bad faith is proven, from legal costs and the burden of defeat’’.

According to the constitutional determination, it is not possible to discuss harm to public property without discussing administrative merit, thus entering into the administrative act, without the need for illegality. Ada Pelegrinni Grinover (apud DINAMARCO, 2000, p. 434):

It was the popular action that paved the way for the Judiciary about the control of the merit of the discretionary act, owing to it the ‘’demystification of the dogma of the substantial insurability of the administrative act’’, causing ‘’suggestive opening for some approximation of the examination of the merit of the administrative act’’

Currently, popular action is little used, but it has great historical importance in the theme of judicial control of public policies, the great instrument for discussing acts of public power, is carried out through the control of constitutionality and other legal means, discussed in the Courts of Justice of the States and the Federal Supreme Court. These discussions were held in the proceedings of Direct Actions of Unconstitutionality – ADI (articles 102 and 103 of the Federal Constitution/88 and Law 9,868/1999), Declaratory

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Actions of Constitutionality – ADC (articles 102 and 103 of the Federal Constitution/88) and even through the Writ of Mandamus (art. 5, LXIX of the Federal Constitution/88).

Increasingly, the Judiciary does not only have compensation or prevention when subjective rights are harmed or threatened with harm but also embarks on a planned activity, to seek, through its actions, to transform social reality and concretely incorporate constitutional orders. (COSTA, 2015)

Former Supreme Court Justice Celso de Mello, a great scholar and doctrinaire of administrative law, had through a single-judge decision in the proceedings of ADPF

no. 45-9, which states that certain requirements must be met for the judiciary to intervene in the control of public policies, namely: (1) the limit set by the existential minimum to be guaranteed to the citizen; (2) the reasonableness of the individual/social claim made against the Public Authority and (3) the existence of financial availability on the part of the State to make the positive benefits claimed from it effective. (Grinover, 2012, p. 132). Part of the vote of Minister Celso de Mello stands out:

‘’it is true that the institutional functions of the Judiciary and this Supreme Court, in particular, do not ordinarily include – the task of formulating and implementing public policies (JOSÉ CARLOS VIEIRA DE ANDRADE, ‘’Fundamental Rights in the Portuguese Constitution of 1976’’, p. 207, item no. 05, 1987, Almedina, Coimbra), since, in this domain, the responsibility lies primarily with the Legislative and Executive Powers. This responsibility, however, although on exceptional grounds, may be attributed to the Judiciary, if and when the competent state bodies, by failing to comply with the political-legal obligations that fall upon them, come to compromise, with such behavior, the effectiveness and integrity of individual and/or collective rights imbued with constitutional stature, even if derived from clauses with programmatic content. It is worth noting, given this context – as this Supreme Court has already proclaimed – that the programmatic nature of the rules outlined in the text of the Political Charter “cannot be converted into an inconsequential constitutional promise, under penalty of the Public Power, defrauding the just expectations placed on it by the community, illegitimately replacing the fulfillment of its unpostponable duty with an irresponsible gesture of governmental infidelity to what is determined by the State Law itself (RTJ175/1212-1312, Rel. Min. Celso de Mello)”. (...)

However, given these premises, I must give significant importance to the theme of the ‘’reservation of the possible’’ (STEPHEN HOLMES/CASS R. SUNSTEIN, ‘The Cost of Rights’, 1999, Norton, New York), particularly in terms of the enforcement and

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implementation (always onerous) of second-generation rights (economic, social and cultural rights), the fulfillment of which by the public authorities imposes and demands positive state benefits that concretize such individual and/or collective prerogatives''. (...) ''The central goal of modern Constitutions, and the 1988 Charter in particular, can be summarized, as already explained, in the promotion of human well-being, the starting point of which is to ensure the conditions of human dignity, which includes, in addition to the protection of individual rights, minimum material conditions of existence. By determining the fundamental elements of this dignity (the minimum existence), the priority targets for public spending will be precisely established. Only after these are achieved will it be possible to discuss, the remaining resources, and what other projects should be invested in. The minimum existence, as can be seen, associated with the establishment of budgetary priorities, is capable of coexisting productively with the reserve of the possible.''

''It can be seen, therefore, that the conditions imposed by the 'reserve of the possible' clause on the process of realizing second-generation rights – which are always onerous to implement – always reflect a binomial that includes, on the one hand (1) the reasonableness of the individual/social claim made in fact of the Public Power and, on the other hand, (2) the existence of financial availability of the State to make effective the positive benefits claimed from it''. (Emphasis added.) (...)

''If such State Powers act unreasonably or proceed with the clear intention of neutralizing, compromising, the effectiveness of social, economic and cultural rights, affecting, as a causal consequence of an unjustifiable State inertia or abusive government behavior, that intangible core embodied in an irreducible set of minimum conditions necessary for a dignified existence and essential to the very survival of the individual, then, as previously emphasized – and even for reasons based on an ethical-legal imperative – the possibility of intervention by the Judiciary will be justified, to make it possible for everyone to access the goods whose enjoyment has been unjustly denied to them by the State''

Judicial control needs to be carried out in a timely and harmonized manner, reserving itself to analyze issues pertinent to fundamental rights and constitutional guarantees, seeking to ensure that everyone has dignity, can respect, and, as certain prudence would say, not directly interfere in the planning of public policies, respecting the separation of powers, but ensuring that government actions do not cause any type of

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harm to society and are not based on illegality, but comply with the precepts and objectives of the Federal Constitution.

In this core, we also address the principle of reasonableness that should guide judicial decisions that deal with public policy issues, seeking to guarantee minimum conditions for a dignified human existence, such as the right to basic education, health, basic sanitation, security, and social assistance, among others.

For each right, it is necessary to plan a public policy that, through positive benefits, with government actions, designed not only regionally, but nationally, integratively and participatively, will materialize these rights through schools, hospitals, health and paving, and may even be initiated by the judiciary to carry out preventive control, encouraging the participation of civil society in the elaboration of these policies, using this form of external control.

FINAL CONCLUSIONS

The study of public policies in the Brazilian context highlights the centrality of strategic planning as a structuring element of state actions. The articulation between planning and budget execution emerges as an essential prerequisite for achieving government objectives, particularly about the optimization of public resources and the effectiveness of the actions implemented.

The examination of judicial control over public policies reveals a permanent institutional tension. While on the one hand, such control represents a fundamental guarantee for the preservation of constitutional rights, on the other, its intensification may compromise the implementation of planned policies. It is observed that the legitimacy of this judicial intervention must consider the limits imposed by the separation of powers, safeguarding the specific competencies of the Executive and Legislative branches in the formulation and implementation of public policies.

The results obtained point to the need for a balance between administrative planning and judicial oversight. Judicial control finds legitimate grounds in cases of violation of fundamental rights or the existential minimum, without, however, authorizing interferences that destabilize the implementation of public policies. The conclusion is that it is important to consolidate a governance model that combines technical-administrative knowledge with appropriate judicial control mechanisms, safeguarding both the efficiency

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of public management and the objectives of social justice provided for in the Brazilian constitutional order.

The analysis of public policies in Brazil reveals a multifaceted panorama, in which strategic planning plays a crucial role in the definition and execution of government actions. Effective integration between planning and budgeting is essential to ensure that policies achieve their objectives efficiently and sustainably, avoiding problems such as waste and ineffectiveness.

Judicial control, although essential to ensure compliance with constitutional precepts and the protection of fundamental rights, presents significant challenges. Judicial intervention in public policies can generate complex impacts, affecting the planning and continuity of state actions. The Judiciary must exercise its control with caution, respecting the separation of powers and avoiding overlapping the functions of the Executive and Legislative branches.

Research indicates that effective public policy requires a balanced approach, where meticulous planning and judicial oversight come together. Harmonized to promote social and economic development. Judicial control should be restricted to cases where there is a clear violation of fundamental rights or the minimum subsistence level, thus avoiding excessive interference that could compromise the implementation and stability of public policies. Building a governance system that values both technical expertise in public administration and adequate judicial oversight is essential for continued progress and the achievement of social justice in the country.

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