Revista ARACÊ
ISSN: 2358-2472

THE DILEMMA OF THE RISE OF SOCIAL RIGHTS TO THE STATUS OF FUNDAMENTAL RIGHTS IN BRAZIL: A STUDY ON THE REALIZATION OF THE RIGHT TO HEALTH[1]

https://doi.org/10.56238/arev7n2-279

Submitted on: 01/25/2025 **Publication date:** 02/25/2025

Clara K. Rodrigues de Brito[2], Luciana Machado Cordeiro[3] and Sergio Victor Tamer[4].

ABSTRACT

With the advent of the Universal Declaration of Human Rights, social rights began to have a strong impact on the international arena, generating minimum guidelines for a Democratic State of Law. In Brazil, the broad institutionalization of these rights was affirmed in the 1988 Constitution, proclaimed as a legal framework for democratic transition, being responsible for the rise of social rights to the level of fundamental rights. However, there are some divergences and gaps in the realization of these rights at the factual level, especially the fundamental right to health. Considering these incongruities in the implementation and realization of the right to health in Brazil, the following problem arises: to what extent does the relativization of social rights, especially the right to health, violate the discourse of well-being and social justice, implemented by the Brazilian Constitution? To search for possible answers, the deductive method was used, based on the analysis of bibliographic material with a qualitative approach, with the objective of improving ideas through indexed information on the present theme. It was concluded that the perception that social rights have a merely programmatic normative character is mistaken. In this sense, the relativization of the right to health must comply with legal criteria, given that social rights are recognized as pillars of the set that makes up the existential minimum. Regarding the subsumption of judicial decisions involving the right to health, it was concluded that they should be weighed according to the specific case. The application of the Principle of the Reserve of the Possible, on the other hand, must occur at the request of the State and supported by evidence that proves the budgetary incapacity of the Public Power.

---

[1] Article originally presented and published at the XII CONPEDI Meeting, held at the University of Buenos Aires – UBA, Argentina, in the WG: Social Rights, Public Policies and Security II. p.57 -78.

[2] Dr. in Law – Economic Enterprises, Development and Social Change – from the University of Marília – UNIMAR; Master in Law – Economic Enterprises, Development and Social Change – from the University of Marília – UNIMAR; Master's student in Legal and Political Sciences at the Portucalense University Infante D. Henrique – (credits completed); Coordinator and Professor of the Lato Sensu Graduate Center at SVT College. Email: clarardebritoadv@gmail.com

[3] Dr. student in Law – Economic Enterprises, Development and Social Change – at the University of Marília – UNIMAR; Master in Law from the Portucalense University Infante D. Henrique – UPT; Master's student in Law – Economic Enterprises, Development and Social Change – at the University of Marília – UNIMAR.
E-mail: lucianamachadoc@hotmail.com

[4] Post-doctorate in Law from the Portucalense Infante D. Henrique University – UPT; PhD in Constitutional Law from the University of Salamanca – Spain (recognized in Brazil by the University of Marília - UNIMAR; Master's Degree in Public Law from the Federal University of Pernambuco; Graduated in Law from the Federal University of Maranhão; Coordinator of the lato sensu Specialization course in Legal and Political Sciences and professor of Constitutional Law at FAP – Faculdade do Baixo Parnaíba; Executive Director of SVT College.
Email: sergiotamer@gmail.com

Revista ARACÊ
ISSN: 2358-2472

Keywords: Fundamental Rights. Right to Health. Social Rights. Principle of the Reserve of the Possible. Relativization of the Right to Health.

Revista ARACÊ
ISSN: 2358-2472

INTRODUCTION

With the growth and evolution of society, changes arise in paradigms sedimented in its models and organizations. Starting from this desire for change to meet latent demands, new contours of positivization and aggregation of new rights are being drawn. In this sense, the social movements that took place in the twentieth century are responsible for polishing the values necessary to safeguard rights capable of guaranteeing a dignified existence for the individuals who make up society.

In Brazil, the framework for the positivization of such rights comes from the redemocratization movements that took place in the 1980s, giving rise to the new Fundamental Law of 1988. Although doctrinally fundamental rights are classified into dimensions, it should be emphasized that social rights carry with them essential elements to guarantee the realization of individual freedoms.

In this context, the dignity of the human person is the key that (re)connects all the dimensions of fundamental rights, although the first generation rights are realized through the abstention of the State, the second generation rights called social rights need a positive action by the State so that they can be implemented.

Based on this premise, the proposed theme aims to work on the following research problem: to what extent does the relativization of social rights, especially the right to health, violate the guidelines established by the discourse of well-being and social justice, implemented by the current Brazilian Constitution?

To validate the hypotheses intended in this article, the deductive method was used, based on the analysis of bibliographic material with a qualitative approach, with the objective of improving ideas through indexed information on the present theme.

The present study is justified due to the divergences between the forms of interpretation of the normative efficacy arising from social rights, especially the norms arising from the right to health, because the dialectic present in the legislation in force in Brazil demands an integrated hermeneutic study that does not allow the restriction of rights in an unlimited way, since the legal system itself presents the means to solve such demands.

In this sense, the first topic addressed the historical panorama of the evolution of social rights, reassembling the population's desires arising from the movements for the constitutionalization of these rights, especially the right to health. In the second topic, the premises of the laws related to health were discussed, as well as the sources of funding to

Revista ARACÊ
ISSN: 2358-2472

guarantee health actions in Brazil. In the third topic, the inherent issues about the subsumption of judicial decisions in the context of health were addressed, as well as the limits to be observed by the magistrate, along the lines established by the Brazilian legal system.

Finally, the final considerations arising from the research in vogue were presented, based on the law posed, as well as the applications of the principles and values socially shared by the Federal Constitution of 1988. It is noteworthy that the present study did not address issues involving supplementary health, since it is being improved through private service contracts under the mantle of State regulation and through the National Health Agency, with specific rules being applied to this relationship.

THE DILEMMA OF THE RISE OF SOCIAL RIGHTS TO THE *STATUS* OF FUNDAMENTAL RIGHTS IN BRAZIL

In the current context of historical evolution that society finds itself in, social rights are products of the results obtained from the revolutions that occurred in the twentieth century.

The animosities arising from the conflicts between capital and labor caused a severe structural change in the world public sphere, as well as a radical change in the conduct of several states, thus altering an abstentionist role originating from an extremely liberal era. This paradigm shift gave rise to more interventionist state actions in favor of a State focused on latent social demands (PIOVESAN, 2017).

The emergence of this new state behavior gave rise to several historical milestones — throughout the century — that influenced world behavior, such as the Universal Declaration of Human Rights, which established social rights as a structural part of the Democratic State of Law. Also in this sequence, the International Covenant on Economic, Social and Cultural Rights dated 1966, which ratified the magnitude of social rights at the international level, affirmed the necessary observance of the State in relation to the pursuit of material equality and the achievement of social/distributive justice, especially in favor of the most vulnerable (RAMOS, 2019).

It is noteworthy that the Constitution of Mexico of 1917, as well as the Constitution of Germany of 1919, played a fundamental role in the consecration of social rights in the international scenario, since the sum of these episodes with other historical factors narrated above fostered an international discourse more concerned with human rights in all

Revista ARACÊ
ISSN: 2358-2472

its dimensions, which culminated in the positivization of social rights in various legal systems (FERNANDES, 2020).

The main objective of the recognition of social rights occurs as a result of the desire to provide all people with minimum material conditions so that they can enjoy individual freedoms. In this Cotejo, Daniel Sarmento (2006, p.62) states: "that with the advent of the Social State, there was a recognition of the need for state intervention, through the formulation of public policies especially aimed at the protection of the most vulnerable, socially speaking".

Although social rights are portrayed as second-generation rights, in which positive action by the State is required, it should be emphasized that they are indispensable for the exercise of other rights that have the dignity of the human person as their matrix.

This is because the dignity of the human person is the key that connects all dimensions of human rights, and it is from it that all rights gain the structural scope so that they can be claimed. Crossing this lucid line, it is perceived that social rights are part of the set to the existential minimum (HABERMAS, 2010).

The preamble of the current Brazilian Constitution brings with it a set of normative statements that establish the values, objectives, justifications and ideals affirmed by our original constituent that illuminate the interpretative bias of the yearnings of the Brazilian people. Thus, it praises that:

> We, representatives of the Brazilian people, gathered in the National Constituent Assembly, to establish a Democratic State, destined to ensure the exercise of social and individual rights, freedom, security, well-being, development, equality and justice as supreme values of a fraternal, pluralistic and unprejudiced society, founded on social harmony and committed, in the internal and international order, with the peaceful settlement of controversies, we promulgate, under the protection of God, the following Constitution of the Federative Republic of Brazil (BRAZIL; CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL, p.01).

It is noteworthy that the preamble of the 1988 Constitution itself determines that the exercise of social rights are pillars for the enjoyment of individual rights (since social rights are recorded ahead of individual rights). In this sense, the perception that social rights have a merely programmatic normative character is completely wrong, even if such a perception has been in force for many years in Brazil (BARROSO, 2020).

Thanks to the historical character of human rights, it was understood that the fundamental norms are mirrored in it. Therefore, they must be adaptable to the dynamic evolution of society. Thus, the State-Judge began to interpret the constitutional text in the

Revista ARACÊ
ISSN: 2358-2472

light of the Theory of Fundamental Social Rights. According to Clenio Schulze (2014, p.161), "the constitutional values embodied in the dignity of the human person, in fundamentality, universality, inalienability, historicity and the immediate applicability of rights gave rise to a change of perspective".

Gilmar Mendes and Paulo Gonet (2013, p.515-516) state that "these rights are species of human rights that present as a requirement for their realization, the requirement of intermediation by state entities, either in the performance of a factual provision or in the performance of a legal provision".

In this vein, there is no doubt as to the normative efficacy of such rights, moreover the constitutional text itself is clear on this issue. In this comparison, according to Mendes and Gonet (2013, p.692):

> Currently, the Brazilian Constitution not only expressly provides for the existence of social rights in article 6, specifying their content and form of provision in other provisions, such as, for example, articles 196, 201, 203, 205, 215, 217, among others. Nor does it make a distinction between the rights provided for in Chapter I of Title II and social rights (Chapter II, of Title II), by establishing that rights and guarantees have immediate application (article 5§1 of the FC/88). It can be seen, therefore, that social rights were accepted by the Federal Constitution of 1988 as authentic fundamental rights.

Although the doctrine is categorical in asserting that state action is indispensable to implement policies to guarantee social rights, it aims to preserve minimum conditions of subsistence and quality of life for the population. The realization of such rights is always a tense issue in the spheres of Brazilian Powers.

This is because, by going beyond the normative issues of interpretation of social rights, our system is faced with another worrying issue brought about by the rationalizing element of the funding of these actions. In view of these observations, it can be assured that social rights have long been treated with the same importance as first-generation fundamental rights, enjoying the same normative treatment.

Nevertheless, the great dilemma of social rights does not refer to the degree of normative efficacy that their positivizations have, but rather to a question of the funding of these actions. Currently, one of the biggest problems of social rights in Brazil is the right to health, because, in Brazil, the constitutional text ensures that this right must be performed satisfactorily, respecting the needs of each person (QUEIROZ, 2011).

This statement is faced with another dilemma regarding the application of the Principle of the Reserve of the Possible, which, in turn, clashes with the full guarantee of

Revista ARACÊ
ISSN: 2358-2472

the right to health, because, according to the Brazilian legal system, "the right to health is part of a set of fundamental premises to the existential minimum" (BRANCO; MENDES, 2020. p. 518). Structuring these points of tension present in our normative system, the following topics will address the limits and parameters of the right to health, affirmed in the Brazilian legal system.

THE RIGHT TO HEALTH IN BRAZIL: LEGAL COMPOSITION OF THE UNIFIED HEALTH SYSTEM (SUS) AND COSTING

The concept of health is understood as an open statement, considering that it undergoes mutations according to the complex dynamics of society's understanding of well-being. This is because the idea of health is not limited to the absence of diseases. Based on this conception, the World Health Organization (WHO) defines health as "a state of complete physical, mental and social well-being and not just the absence of affections and diseases" (WHO, 1946).

In Brazil, the right to health is based on a fundamental right of social order. In this sense, article 196 of the Federal Constitution of 1988 determines that "health is a right of all and a duty of the State, guaranteed through social and economic policies aimed at reducing the risk of disease and other health problems and universal and equal access to actions and services for its promotion, protection and recovery" (BRASIL, 1988. p.111). However, the guarantee of the right to health is not exhausted only in this article, being spread across several parts of the Brazilian legal system, on forms of principles, norms and recommendations.

The principles and guidelines that inform public policies aimed at health are established in the body of the Brazilian constitutional text in articles 194, 196 and 198, in addition to being established in article 7 of Law No. 8,080/90 (Organic Health Law – LOS). Such provisions bring with them the guidelines inherent to the provision of health services, as well as determine the federative organization of the Unified Health System (SUS) throughout the country.

Article 7 of the Organic Health Law prescribes that public actions and services aimed at health ensure that such services must be implemented by the Government or under its tutelage. In this regard, health services must be developed along the lines established by provision 198 of the Brazilian Constitution, and must therefore observe all the principles that emanate from it.

Revista ARACÊ
ISSN: 2358-2472

The Brazilian Constitution did not make clear the difference between the guidelines and the fundamental principles of the SUS. However, there is doctrinal consensus that the two constitute guiding mechanisms to sustain the coordination and systematization of health services and actions, since the Unified Health System (SUS), in general, is composed of several associative arrangements, whose common purpose is to provide and safeguard the well-being and health of the population (RAMOS, 2017).

To remedy this gap, the doctrine established the differences and relevance between the principles and guidelines of the SUS. In this sense, they understand that the guidelines are listed in article 198 of the Federal Constitution, based on decentralization and comprehensiveness, on assistance and participation of the community, they also present the critical premises to be analyzed by the three spheres of the Public Powers, while the principles are affirmed in article 194 of the Brazilian Political Charter of 1988 (FIGUEIREDO, 2015).

Likewise, the sole paragraph of article 194 establishes a set of goals for the Brazilian State with the purpose of guiding and vectorizing the actions to be developed in the field of public health policies, including delimiting the discretionary action of the public power. The conjunction between the principles and guidelines that inform the Unified Health System are indispensable for the efficiency and strengthening of health actions throughout the national territory.

Based on this premise, it is highlighted that the set of these integrative principles of the SUS are divided into eight elements: health as a right, universality, comprehensiveness, equity, problem-solving, humanization of care, intersectoriality, and community participation (RAMOS, 2017).

The Principle of Health as a right aims to emphasize that it is a fundamental guarantee inherent to any human being, and the Constitution instituted it as a duty of the State to ensure and provide the support to guarantee its exercise. Such a guarantee must be implemented through socioeconomic programs that can guarantee universal and equal access to public health actions and services. Thus, such policies should guide the protection and recovery of community health both in the individual and collective fields.

The Principle of Universality is affirmed in article 194, I and in article 196 of the Federal Constitution of 1988. Likewise, it is recommended in article 7, I and IV, of Law No. 8,080/1990 (Organic Health Law). This principle highlights that health is inherent to everyone. Therefore, access to it must be universal and equal.

Revista ARACÊ
ISSN: 2358-2472

Germano Schartz emphasizes that "every citizen has the right to be served by the SUS, for the simple fact of being a citizen, respecting his individual autonomy to be served outside such a system if that is his decision" (SCHWARTZ, 2001. p. 22). Such assistance must occur regardless of any contractual prerequisites, such as private health insurance.

In turn, the Principle of Equity brings with it the material equality provided for in health care, and thus, there must be a prioritization of health actions, based on the evaluated conditions of the characteristics inherent to the population groups to which it applies. Such criteria will always be established in the molds instituted by the Government, at any level of management, which means that the benefits will be equal in the measures of their inequalities (FLEURY, 1997).

The Principle of Integrality is established in article 98, II, of the 1988 Constitution of Brazil, as well as in item II, of article 7 of the LOS. This principle determines that "integrality in health is a social action that results from the democratic interaction between actors in daily life and from their practices in the provision of health care at the different levels of care in the health system" (ALVES et al, 2017. p.166).

Thus, the care of users must be carried out in an integral way, observing not only the sick organism, but the human person, in all its fullness. Comprehensiveness should, therefore, be understood as a principle that crosses different levels of debates on practices in the health sector. In this sense, it is up to the manager, the health professional and the entire connected network to carefully observe the real needs of the community.

The Principle of Problem-Solving Capacity, on the other hand, focuses on the efficiency and appropriateness of resolutions of health policies and services, which consists of the provision of comprehensive, effective and continuous support to the population. From this principle emanates the strategic mapping so that the Government can intervene, efficiently, in the causes and risk factors, continuously seeking new methods and knowledge applicable to the field of health (VILLAS-BÔAS, 2014).

The Principle of Intersectoriality is linked to the development of integrated actions of the health service, together with other bodies, to articulate programs and policies aimed at health, whose execution may include areas not covered by the SUS, maximizing the material, financial and technological resources available in the public health network, thus avoiding unnecessary spending or duplication of means for the same purposes, resulting from it the idea of complementation and maximum efficiency of the use of public machine apparatuses (VILLAS-BÔAS, 2014).

Revista ARACÊ
ISSN: 2358-2472

The Principle of Humanization of care refers to the perspective of empathy and care that the health professional must offer to the population, seeking to meet the values arising from the right to life, representing the strengthening of the SUS, in addition to reverberating the feeling arising from the process of democratic renegotiation arising from the Brazilian Federal Constitution of 1988.

This principle is articulated with the democratic idea of division and participation of the factors that make up the health system, with co-responsibility between public agents, users and society, so that both establish a solidary bond of collective participation in the process of management and effectiveness of the SUS (CERQUEIRA, 2017).

Finally, in relation to the Principle of Continuity, which is found in article 198, III of the Federal Constitution of Brazil of 1988, the population must participate in the planning, execution and inspection of public resources destined to the public health sector. Such participation should occur through representatives of civil society, who can present their analyses and make proposals aimed at giving more positive results in the use of public health policies originating from the SUS.

This manifestation of society's participation brings a democratic bias praised by the Brazilian legal system. Furthermore, it is essential to remember the teachings brought by Ingo Sarlet and Mariana Figueiredo (2008, p. 171):

> It is about the densification of a special dimension of fundamental rights, which, in the context of the rights to benefits in the broad sense, act as rights of participation in the organization and procedure, evidencing the democratic-participatory facet*, in casu*, of the right to health, to resume the idea of a *status activus processualis*, as advocated for a long time by Peter Häberle. Through direct participation (even if possible limitations of a concrete nature are admitted), the Constitution ensures that the individuals themselves interact in the process of defining public health policies, intervening in what will be the realization of this fundamental right, in addition to later exercising social control over these same actions.

The general principles of integration of the Unified Health System have the purpose of radiating the constitutional feeling emanating from the constituent power, at the time of the elaboration of the normative imperative. This premise aims to establish parameters for the scope intended by the norm at the time of its elaboration.

Thus, it is up to the Government and the various layers of the public sphere to guarantee the effectiveness of the integrative principles of the Unified Health System, designed by the Brazilian constituent that, upon entering our legal system, begins to produce all legal effects, even if it requires complementary norms that guarantee the fullness of its effectiveness (KELSEN, 1986).

Revista ARACÊ
ISSN: 2358-2472

On the other hand, one cannot fail to address the informing principles of the Unified Health System, also known as SUS guidelines. And, although the two endings are correct, for didactic purposes, the nomenclature SUS guidelines will be adopted in this article, considering that the distinction between the general integrative principles and the informing principles of the SUS will be clearer.

Thus, the guidelines (informing principles) that guide the information system of the Unified Health System are divided into five: decentralization, hierarchization, regionalization, financing and social control. It is noteworthy that they have a more technical bias and are oriented to the organization and performance of the SUS, unlike the integrative principles that seek an almost abstract ideal established by constitutional feelings that need complementary laws to produce all their effects. The guidelines, on the other hand, function as mechanisms that help the integrative principles to take shape, because through them the real realization of the right to health occurs through the action of the SUS, even if in an unsatisfactory way.

Thus, the decentralization guideline, provided for in article 194, item VII and 198 in items I and III of the CF/1988, culminating in article 7, IX, "a", of the Organic Health Law, determines the attributions and the exercise of health policy in a democratic manner, with the redistribution of responsibilities for health actions and services to be performed by the three spheres of the Brazilian federation: by the federal, state and municipal entities (PINAFO; OAK; NUNES, 2006. p. 1506)

It is important to highlight that allocations and decisions should preferably be made by the municipality, because it is the entity closest to the population, being, therefore, the first federated entity to become aware of the real demands of local health, consequently increasing the probability of solving or minimizing the problem.

The hierarchization guideline represents the definition of the degrees of complexity for the population's care, obeying the geographic criteria (regionalization) for coverage of the public health network, in which primary care should absorb the greatest demand selectively, referring the most severe cases to the services responsible for treating the most complex demands (FLEURY, 1997).

Regionalization is the guideline responsible for the provision of the health service, responsible for ensuring access to the population to all categories of services, which consists of the decentralized and hierarchical network, aiming to guarantee the population

Revista ARACÊ
ISSN: 2358-2472

an organized health network based on the classification of care, which will be defined as low, medium and high complexity (PINHO, 2012).

Regarding this regionalization, Guido de Carvalho and Lenir Santos state that "this does not only mean distributing, especially, the services, but also and above all, organizing them with indispensable technical and human resources support, with sufficient resources and defined decision-making power" (CARVALHO, 1995. p. 56).

Considering this statement, the fourth guideline of the SUS arises, which consists of financing, and it should be clarified that the Unified Health System is funded by the Social Security of the Union, the States, the Federal District and the Municipalities, in addition to other sources established by law, such as contributions, donations, donations, asset disposals, fees, fines, emoluments, among others listed not only in article 32 of the Organic Health Law, as well as in the extravagant legislation of the Brazilian legal system (CARVALHO; SANTOS, 2006).

Finally, the fifth guideline of the SUS consists of social control, which means that the SUS allows society to interact with the Public Power, helping the strategic planning of health policies, setting its priorities, helping to define the use of resources and supervising the execution of the planning of established policies (PINAFO CARVALHO; NUNES, 2016).

It should be noted that, in addition to the fundamental principles of the SUS, there are several complementary principles, such as:

> Article 7 of the Organic Health Law brings in its body other complementary principles, such as: the preservation of people's autonomy in the defense of their physical and moral integrity, choosing for themselves the most effective procedure for the preservation of health. (BRAZIL, LAW NO. 8,080/1990, ART. 7, III); the right to information of the people assisted about their health. (BRAZIL, LAW NO. 8,080/1990, ART. 7, V); the dissemination of information regarding the potential of health services and their use by the user. (BRAZIL, LAW NO. 8,080/1990, ART. 7, VI); the use of epidemiology to establish priorities in the allocation of resources and programmatic guidelines. (BRAZIL, LAW NO. 8,080/1990, ART. 7, VII); the integration of health, environment and sanitation actions at the executive level. (BRAZIL, LAW NO. 8,080/1990, ART. 7, X); the conjunction of financial, technological, material and human resources of the Union, States and Municipalities in the provision of health care services to the population. (BRAZIL, LAW NO. 8,080/1990, ART. 7, XI); the ability to solve services at all levels of assistance at the level of complexity. (BRAZIL, LAW NO. 8,080/1990, ART. 7, XII); and the organization of health services in order to avoid duplication of means for identical purposes (FIGUEIREDO, 2015. p. 131).

In this sense, the Unified Health System (SUS) corresponds to a hierarchical and regionalized structure, along the lines of the principles of equality, integrality and collective participation, which implies asserting that both the services performed directly by the

Revista ARACÊ
ISSN: 2358-2472

Government or through contracts and agreements, signed with third parties or private individuals, must comply with these principles.

In addition, the Unified Health System (SUS) is a structure of integrated and decentralized social action of a constitutional nature, motivated to defend the right to health as an intrinsic premise of the right to life. In this sense, it is possible to cover the other premises that guarantee the minimum civilizational level for a dignified life

SOURCES OF FUNDING FOR THE UNIFIED HEALTH SYSTEM (SUS)

Regarding the costing and distribution of competencies among the federated entities for health promotion by the Unified Health System (SUS), it is noteworthy that Brazil has 5,561 municipalities in its 26 states, most of which are unable to offer the policies of actions and services indispensable to provide the health of its population. As a result of this scenario, the SUS is systematized in regional structures, seeking to contemplate coverage and comprehensive care for the population.

In this sense, currently, the hierarchy addressed in provision 198 of the Federal Constitution is materialized through joint planning prepared by the federated entities, together with the "participation of the Ministry of Health (representing the Federal government), the National Council of Health Secretaries – Conass (representing the member states) and the National Council of Municipal Health Secretariats – Conasems (representing the municipalities)" (BRITO; SILVA; CARMO, 2021. p. 95).

Therefore, by imperative of provision 23, II and IX of the CF/1988, the federated entities enjoy concurrent competence to promote health, public assistance, in addition to promoting basic sanitation programs. However, it is up to the Union to prepare guidelines of a general nature, and to the member states the supplementary competence, according to item XII, §§ 1, 2 and 3 of article 24 of the Brazilian Constitution.

On the other hand, municipal competence was not affirmed by the Constitution of the Federative Republic of Brazil of 1988, having been enshrined only after the enactment of the Organic Health Law of 1990, in which article 18 established the policies of competence of the municipality, which consist of issuing supplementary norms of local interest to promote the health of the population (DALLARI, 2003).

The actions of the federated entities for health promotion are developed based on the plans approved in the meetings between the Ministry of Health, the National Council of Health Secretaries, and the National Council of Municipal Health Secretariats, and

Revista ARACÊ
ISSN: 2358-2472

implemented by their bodies. At the federal level, by the Ministry of Health; in the state, by the State Secretariats; and in the municipalities, by the Municipal Secretariats.

With regard to the form of funding, the Federal Constitution of 1988 clarifies that the federated entities finance the Unified Health System (SUS), and that both must generate the necessary revenues to support the expenses with public health actions and services. This model, however, has presented several clashes resulting from the fiscal austerity policy adopted by the last governments.

Budgetary limitations for the sector, especially due to the absence of sufficient resources in the municipalities, have become an obstacle to overcoming this issue. Thanks to these impasses, debates about the funding and actions of the SUS are always present in political and social movements in defense of health in the country.

The percentages of financial investment by the Union, States and Municipalities for SUS are decided in accordance with Complementary Law No. 141/2012. Therefore, the municipalities and the Federal District are responsible for at least 15% of the general collection for health. For member states, the percentage value is 12%. As for the Federal Government, the value must observe an equation composed of the amount carried over in relation to the previous financial year, added to the value corresponding to the variation in the Gross Domestic Product in the year prior to the presentation of the Annual Budget Law (LOA) plan (PINHO, 2012).

In view of the above, the right to health in Brazil can only be realized through accounting bookkeeping intrinsically linked to the collection with the purpose of promoting such costing. This imposition of legal parameters, established by fiscal responsibility, fosters utilitarian government conducts, based on legal certainty and the misuse of the institute of the reserve of the possible.

RIGHT TO HEALTH AND BUDGET: AN ANALYSIS OF THE DIFFICULT SUBSUMPTION OF JUDICIAL DECISIONS

One of the striking characteristics of the current Brazilian legal system is the complexity generated by its rigid and long-winded aspect as a result of the large number of principles, laws, ordinances, normative acts, recommendations, etc. Inevitably, the sum of these factors generates the occurrence of real and apparent antinomies.

Before entering into the subsumption of judicial decisions related to the right to health, it is necessary to analyze that in Brazil the legal system is based on the

Revista ARACÊ
ISSN: 2358-2472

interpretation of the norm in the light of the constitution. In this sense, the Federal Constitution constitutes the structural pillar of the legal system. Therefore, each and every rule must observe the parameters established by it, under penalty of unconstitutionality.

And although the normative texts are not able to provide for all the conducts and demands of society, it can be assured that the Brazilian legal system has clear guidelines for the framing of *hard cases*, that is, there are pre-established criteria that must be observed[5].

Such criteria emanate from our formal and material structure, permeated by the fundamental precepts through the axiological content expressed in the constitution, with a "clear division between law and morality, between validity and justice, between the 'being' and the 'ought to be' of law" (FERRAJOLI, 2006. p.436). This is because the Brazilian legal system brings with it the positivization of socially shared moral values through the legal principles that frame our normative system (ZANON JUNIOR, 2015).

Thus, the legal guarantee must be present in this composition, because it is no use having the positive declaration of due rights, but also the guarantee of the enjoyment of these rights. The guarantor action of the judiciary has, as a result, to safeguard the promises not fulfilled by the legal system, when it does not observe the normative bookkeeping, that is, the established law.

However, it is very common to confuse the term judicial activism and judicialization. There is a clear difference between them. Thus, the first translates as a phenomenon of judicialization. According to Luis Barroso (2009, p.18), "activism is an attitude, a choice of a specific and proactive way of interpreting the Constitution, expanding its meaning and scope". In other words, it is an exaggerated action by the judiciary to encompass a constitutional ideal, an interpretation that goes beyond the framework established by the idea of normative subsumption, based only on principles.

In this vein, Luiz Roberto Barroso (2009, p.15) characterizes activist behaviors as follows:

> (i) the direct application of the Constitution to situations not expressly contemplated in its text and regardless of the manifestation of the ordinary legislator; (ii) the declaration of unconstitutionality of normative acts emanating from the legislator, based on criteria less rigid than those of patent and ostensible violation of the Constitution; (iii) the imposition of conducts or abstentions on the Public Power, notably in matters of public policies.

[5] Article 4 When the law is silent, the judge shall decide the case according to analogy, customs and general principles of law (BRASIL; DECREE-LAW No. 4,657, 1942. p. 01)

Revista ARACÊ
ISSN: 2358-2472

It is noted, therefore, that the phenomenon of judicial activism is responsible for giving rise to legal uncertainty, since the magistrate's reasoning is based on subjective elements, masked by the normative force of legal principles. The indiscriminate use of principles by the judiciary goes back to the bias of political delegitimization arising from a discomfort with the situation of corruption debated in the country in recent decades (TEIXEIRA, 2012).

The magistrate's desire to respond and combat the political movement based on purely political and/or partisan ideals or disagreements cannot move the state machine under penalty of serious violations of rights, and dismantling of the Democratic Rule of Law itself, thus moving away from the normative bias coming from the guarantee judge.

Judicialization, on the other hand, corresponds to the analysis of demands arising from the social or political repercussion on the decision-making sieve of the judiciary. In this case, the judiciary aims to implement the established right, without directly interfering in the exclusive competence of another Power. The notion of judicialization aims to guarantee the rights formally declared in the normative system, especially those arising from the Fundamental Law (Constitution) (BARROSO, 2020).

Furthermore, it can be highlighted that judicialization emanates from the process of redemocratization that gave rise to the current Brazilian Constitution. In this sense, the top of the judiciary is classified as a political body whose function consists of enforcing constitutional norms, in other words they are the 'Guardians of the Constitution'. This perspective underlies the breadth of constitutionalization of several matters, never addressed by previous Brazilian constitutions (BRAGA, 2021).

Therefore, it is possible to note that judicialization is an instrument whose purpose is to guarantee the implementation of fundamental rights declared in the 1988 Constitution. It is important to emphasize that the judicialization of fundamental rights is a collateral reflection of the crisis of Brazilian institutions as a result of the omissive or inefficient conduct of the implementation of state public policies that can guarantee the enjoyment of constitutionally enshrined rights.

In general terms, activism refers to the conduct of the magistrate when innovating in decisions, moving away from the limits established by the established law. On the other hand, judicialization corresponds to the resolution of demands, the purpose of which requires the enforcement (guarantee) of rights.

Revista ARACÊ
ISSN: 2358-2472

In view of these considerations, we move on to the analysis of the subsumption of judicial decisions related to the right to health. From this perspective, it is asserted that fundamental rights have as their premise the sedimentation of the existential minimum to the person. Health is no different, given that we are facing the presence of a fundamental right recognized and enshrined by article 196 of the Federal Constitution of 1988 (ADAMY, 2018).

The cited article demonstrates the socio-legal relevance that the right to health holds in the Brazilian legal system, since it establishes a clear imposition on the Public Administration and society on the duty to ensure the implementation and enjoyment of such right to all. In addition, it has specific rules to observe the criteria and the form of provision of these services, clearly established in Laws No. 8,080/1990 (Organic Health Law); 8.142 /1990 (Management of the Unified Health System); 12.446/2011 (Provides for the Conditions for the Promotion, Protection and Recovery of Health, the Organization and Operation of the Corresponding Services); Complementary Law No. 141/2012 (Regulates § 3 of article 198 of the Federal Constitution to Provide for the Minimum Amounts to be Applied Annually by the Union, States, Federal District and Municipalities in Public Health Actions and Services), among other regulatory diplomas present in the extravagant legislation of the federated entities.

Therefore, there are no doubts about the indispensable implementation of the health guarantee, in particular compliance with paragraph 1 of article 5 of the current Brazilian Constitution. Regarding this bias, Ingo Sarlet and Mariana Figueiredo (2010. p.117) argue that the implementation of health should be "granted the maximum possible efficacy and effectiveness, within the scope of a process in which the necessary optimization of the set of fundamental principles (and rights) must be taken into account, always in the light of the circumstances of the concrete case".

The great embarrassment caused by judicialization comes up against the finiteness of public resources. In this sense, the dilemma arises about the limits of the enforceability of the right to health. This is because, by requesting the legal guarantee of the realization of this right, space is opened to raise the Principle of the Reserve of the Possible, commonly called in vogue due to the absence of a budget that can cover all the public policies necessary to fulfill the desires and promises desired by the Unified Health System.

Although our legal system welcomes and shares the possibility of applying the principle of the reservation of the possible due to the budgetary capacity of the State, it

Revista ARACÊ
ISSN: 2358-2472

should be noted that it can only be applied after the analysis of the concrete case, because the desire emanating from the original constituent, as well as from subsequent laws, defends the maximum effectiveness of the right to health.

The analysis of the concrete case is indispensable to curb utilitarian conducts or actions by the State. This does not mean that the magistrate can decide and interfere, indiscriminately, on where the Public Administration can allocate resources in the health sphere, since the activist conduct on the part of the judiciary gives rise to legal uncertainty, and violates the deliberative management carried out within the health structure in Brazil (MAZZA; MENDES, 2013)element.

It is noteworthy that the actions of the Unified Health System are defined by the health councils, which count on the direct participation of the population through various social actors to deliberate and outline the health actions to be developed in all spheres of the national Public Administration. In the same sense, it is emphasized that the supervision of the application of these resources must be observed by the internal and external control bodies of the Administration, as well as by the public prosecutor's office and society as a whole (FIGUEIREDO, 2015).

And it is also highlighted that the subsumption of decisions arising from the judicialization of public policies, aimed at health, must consider the rationalizing element of the reserve of the possible. This does not imply defending the summary or primary application of the argument of inefficiency of budgetary resources commonly used by state prosecutors' offices (municipal or state) to camouflage the omissions of the Public Administration.

It is noted, therefore, that hermeneutics and reasonableness are indispensable instruments to ensure a judgment that can meet and balance the reach of the social purposes sought by the complex Brazilian legal system. Although it should be emphasized that it is an arduous task to balance and produce a "just decision", considering the difficult mission of equating, in a single operation, principles, rules and values, because, in the light of the Theory of Chaos, it is possible to say that we are facing a chaotic phenomenon (MORIN, 2015).

Therefore, it can be stated that the necessary subsumption of decisions arising from the judicialization of the right to health must observe the budgetary capacity of the Public Power, provided that the application of the possible reserve is raised. The maximum effectiveness of health actions is exhausted when the spending ceiling set by law is

Revista ARACÊ
ISSN: 2358-2472

reached, as well as by the faithful execution of the spending plan developed by the deliberative participation of the health councils in all spheres of Public Administration (MAZZA; MENDES, 2013).

Furthermore, the non-observance of these parameters produces decisions that go beyond the legal limits established by the Brazilian legal system itself, since the protection of the right to health is regulated by specific laws and plans, designed to ensure the maximum normative and principled effectiveness of the right in vogue. Thus, any judicial decision that exceeds these limits contributes to the dismantling of the Democratic Rule of Law itself by violating constitutionally defined attributions for each Power.

Finally, the final conclusions, and it is important to recall the problem proposed by the present study, which consists of analyzing to what extent the relativization of social rights, especially the right to health, violates the guidelines established by the discourse of well-being and social justice, implemented by the current Brazilian Constitution.

FINAL CONSIDERATIONS

Considering the foregoing on the present subject, it is concluded that the perception that social rights have a merely programmatic normative character is mistaken, even though such perception has been in force for a long time in Brazil, since both doctrine and jurisprudence have shown that this dilemma has long been overcome, considering that social rights are understood as one of the pillars of human rights and are essential for the realization and exercise of other rights. rights linked to the core of the dignity of the human person.

The defense of human dignity is the normative core that connects all generations of rights, thus admitting that social rights are recognized as necessary and indispensable elements to the set that make up the existential minimum.

It was also found that, although the set of health-related norms are didactic as to the source and form of funding of health actions, even presenting guiding principles and guidelines for such implementations of public policies to be observed in the light of the maximum effectiveness affirmed in the Constitution, the finiteness of resources fosters the judicialization of such right enshrined in the Brazilian Constitution of 1988.

And, regarding judicialization, it was found that there is a strong discussion about the limits of judicial decisions, especially those related to the right to health. From this perspective, even in the face of the complexity of harmonizing the norms and principles

Revista ARACÊ
ISSN: 2358-2472

established in the Brazilian legal system, there is a clear limitation to the exercise and prerogatives of each Power, and it is not up to the Judiciary to produce decisions that affect the harmony of powers and corrupt the system of checks and balances inherent to the Brazilian normative system.

Thus, the conduct of judicial activism is irreverent to the legal system because it violates constitutional rules, consequently generating legal uncertainty, weakening of institutions and dismantling of the Democratic Rule of Law itself.

Based on this finding, the subsumption of judicial decisions – to the concrete case involving health – must observe the normative and principled set in its entirety, as well as the application of the Principle of the Reserve of the Possible, provided that it is claimed by the State and supported by sufficient evidence that demonstrates the budgetary incapacity of the Public Power.

It is considered that the maximum effectiveness of health action depends on the spending ceilings established by law and on the faithful execution of the spending plans formulated by the deliberations of the Health Councils present in all layers of the Public Administration, under the joint supervision of society and the internal and external control bodies of the Public Power.

Furthermore, although there is a joint effort to implement the ideal of health desired by the desires of the Brazilian people, the collection is far below the real demands raised by the population. However, it is recognized that a large part of the realization of the right to health derives from the legal vigor, caused by the demands legitimately orchestrated by the various layers of the public sphere, based on faithful compliance with the current legislation.

Revista ARACÊ
ISSN: 2358-2472

REFERENCES

1. Adamy, P. (2018). Direitos fundamentais e as relações especiais de sujeição. Revista Brasileira de Políticas Públicas, 8(1), 360–376. https://www.arqcom.uniceub.br/RBPP/article/view/4644

2. Alves, L. R., Souza, M. L., & Silva, R. C. (2017). A dicotomia do princípio da integralidade do SUS. Cadernos Ibero-Americanos de Direito Sanitário, 6(1), 153–166.

3. Barroso, L. R. (2009). Judicialização, ativismo judicial e legitimidade democrática. Anuario Iberoamericano de Justicia Constitucional, (13), 17–32.

4. Barroso, L. R. (2020). Curso de direito constitucional contemporâneo: Os conceitos fundamentais e a construção do novo modelo (9th ed.). Saraiva Educação.

5. Braga, R. P. (2021). Jusristocracia e o fim da democracia: Como uma tecnocracia jurídica assumiu o poder (1st ed.). Editora E.D.A. Educação, Direito e Alta Cultura.

6. Branco, P. G., & Mendes, G. F. (2020). Curso de direito constitucional (15th ed.). Saraiva Educação.

7. Brasil. (1988). Constituição da República Federativa do Brasil. https://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm

8. Brasil. (1942). Decreto-Lei nº 4.657, de 4 de setembro de 1942. Lei de Introdução às normas do Direito Brasileiro. http://www.planalto.gov.br/ccivil_03/decreto-lei/del4657compilado.htm

9. Brito, C. K. R., Silva, J. P. A., & Carmo, V. M. (2020). Dos conflitos oriundos da vacinação contra a Covid-19: Um estudo a partir da biopolítica e bioética do art. 3º da Lei nº 13.979/2020. http://site.conpedi.org.br/publicacoes/7x02k736/la2108q4/lnwrkk0g17OIoJ8z.pdf

10. Carvalho, G. I., & Santos, L. (1995). Sistema Único de Saúde (2nd ed.). Hucitec.

11. Carvalho, G. I., & Santos, L. (2006). Sistema Único de Saúde: Comentários à Lei Orgânica de Saúde (Leis 8.080/90 e 8.142/90) (4th ed.). Unicamp.

12. Cerqueira, M. A. T., & Castelar, M. (2017). A humanização do atendimento psicológico na rede pública de saúde, de Salvador–Brasil. Revista Psicologia, Diversidade e Saúde, 6(2), 74–82.

13. Dallari, S. G. (2003). Direito sanitário. In M. I. Aranha (Ed.), Direito sanitário e saúde pública (pp. 11–28). Ministério da Saúde. https://bvsms.saude.gov.br/bvs/publicacoes/direito_san_v1.pdf

14. Ferrajoli, L. (2006). Direito e razão: Teoria do garantismo penal (Rev. ed.). Revista dos Tribunais.

15. Fernandes, B. G. (2020). Curso de direito constitucional (12th ed.). JusPODIVM.

16. Figueiredo, H. C. (2015). Saúde no Brasil: Sistema constitucional assimétrico e as interfaces com as políticas públicas. Juruá Editora.

17. Fleury, S. (1997). A questão democrática na saúde. In S. Fleury (Ed.), Saúde e democracia: A luta do CEBES (pp. 15–30). Lemos.

18. Habermas, J. (2010). The concept of human dignity and the realistic utopia of human rights. Diánoia, 55(64), 3–25. https://doi.org/10.1111/j.1467-9973.2010.01648.x

19. Kelsen, H. (1986). Teoria geral das normas (J. F. Duarte, Trad.). Sérgio Fabris.

20. Mazza, F. F., & Mendes, Á. N. (2013). Decisões judiciais e orçamento: Um olhar sobre a saúde pública. Revista de Direito Sanitário, 14(3), 42–65. https://www.revistas.usp.br/rdisan/article/view/75519

21. Mendes, G. F., & Branco, P. G. G. (2013). Curso de direito constitucional. Saraiva.

Revista ARACÊ
ISSN: 2358-2472

22. Morin, E. (2003). Da necessidade de um pensamento complexo: Representação e complexidade. In Da necessidade de um pensamento complexo (pp. 69–77). Garamond.

23. Morin, E. (2015). Introdução ao pensamento complexo (5th ed.). Sulina Editora.

24. Organização Mundial da Saúde. (1946). Constituição da Organização Mundial da Saúde. https://edisciplinas.usp.br/pluginfile.php/5733496/mod_resource/content/0/Constitui%C3%A7%C3%A3o%20da%20Organiza%C3%A7%C3%A3o%20Mundial%20da%20Sa%C3%BAde%20%28WHO%29%20-%201946%20-%20OMS.pdf

25. Pinafo, E., Carvalho, B. G., & Nunes, E. F. P. A. (2016). Descentralização da gestão: Caminho percorrido, nós críticos e perspectivas. Ciência & Saúde Coletiva, 21(5), 1511–1524.

26. Pinho, A., Silva, J. C., & Oliveira, M. R. (2012). Manual básico de saúde pública: Um guia prático para conhecer e garantir seus direitos (1st ed.). Edição dos autores.

27. Piovesan, F. C. (2017). Direitos humanos e justiça internacional (7th ed.). Saraiva.

28. Queiroz, M. S. A. (2011). Judicialização dos direitos sociais prestacionais. Juruá Editora.

29. Ramos, A. C. (2017). Curso de direitos humanos (4th ed.). Saraiva.

30. Ramos, A. C. (2019). Curso de direitos humanos (6th ed.). Saraiva.

31. Ramos, E. M. B. (2014). Universalidade do direito à saúde. EDUFMA.

32. Sarlet, I. W. (2010). A titularidade simultaneamente individual e transindividual dos direitos sociais analisada à luz do exemplo do direito à proteção e promoção da saúde. Revista Brasileira de Direitos Fundamentais & Justiça, 4(10), 217–238. https://dfj.emnuvens.com.br/dfj/article/view/449

33. Sarlet, I. W., & Figueiredo, M. F. (2008). Algumas considerações sobre o direito fundamental à proteção e promoção da saúde aos 20 anos da Constituição Federal de 1988. Revista de Direito do Consumidor, (67), 125–172.

34. Sarmento, D. (2006). Livres e iguais: Estudos de direito constitucional. Lumen Juris.

35. Schulze, C. J. (2014). Direito à saúde: Novas perspectivas. In L. Santos & F. Terrazas (Eds.), Judicialização da saúde no Brasil (pp. 45–60). Saberes.

36. Schwartz, G. A. D. (2001). Direito à saúde: Efetivação em uma perspectiva sistêmica. Livraria do Advogado.

37. Teixeira, A. V. (2012). Ativismo judicial: Nos limites entre racionalidade jurídica e decisão política. Revista Direito GV, 8(1), 38–62. https://www.scielo.br/j/rdgv/a/dr6L3MVvFz4MsrCShHytnrQ/abstract/?lang=pt

38. Villas-Bôas, M. E. (2014). O direito à saúde no Brasil: Reflexões bioéticas à luz do princípio da justiça. Edições Loyola.

39. Zanon Junior, O. L. (2015). Garantismo jurídico: O esforço de Ferrajoli para o aperfeiçoamento do positivismo jurídico. Revista da ESMESC, 22(28), 13–38. https://doi.org/10.14295/revistadaesmesc.v22i28.p13