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Judicialization of health and democracy

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The "judicialization of health" phenomenon appeared in the area of Collective Health and was immediately construed as a threat to equity, an opposition between individual and collective, wealth and poor, and not as a tension, a conflict between law and rights. In general, the scientific production on the theme is based on assumptions, almost always implicit, on the damages caused to SUS (the Brazilian Public Healthcare Service) by an also assumed noncritical intervention (nontechnical) of the Judiciary. The authors of the studies sought to demonstrate that judicial demands tend to jeopardize a more rational allocation of resources based on epidemiological and clinical criteria and not on the enforceability of the subjective right.

The article "Profile of judicial demands filed against the Ministry of Health for the provision of nutrition formulas") belongs to this wave of investigations, based on the judicialization-inequity dyad. The great merit of this work, in shedding light on the restrictions of coverage or access strategies to unaffordable foods, which can be strategic inputs to ensure the safety or the survival of specific segments of children and adults, is to open an avenue for reflections on the interfaces between the existing technologies and therapeutic alternatives, when

reaffirming the importance of nutrition to health. Additionally, the study contributes to determine the distribution of lawsuits: the demands derived from only 63 cities, and among them five in special accounted for a significant portion of the judicial demands against the Ministry of Health in 2013.

Limitations of the study are clearly indicated by the author(s). Problems of range and quality of data hinder inferences. The fact that the observation unit is the receiving process (although not knowing the outcome in terms of effective coverage) by the Ministry of Health is what hinders estimations of the universe of lawsuits for nutrition formulas, and not the demands submitted to the judicial system, inasmuch as the states and municipalities are also involved in the demands. Failure to record in the proceedings the trustees' compliance or non-compliance does not allow definite inferences either on the irrational nature (especially those that draw the authors' attention: requests without diagnosis) of these demands.

Such procedural barriers can be overcome either by the efforts of the Judiciary in disclosing and providing access to the proceedings, or by improving the records of the judicial demands by the Health executive bodies, including those that have become reference for the decisions of the Public Prosecutor and the instances of the Judiciary.

Thus, the debate to be held is not on the content and form of the article but on the need to deepen the knowledge on the relationships between the so-called republican powers (Executive, Legislative and Judiciary) and, therefore, to enhance the understanding of the underlying logics of norms or regulations issued either by the Ministry of Heath or the Judiciary. To assume that the normativity of health-related government bodies is exclusively informed by "technical" criteria and that the normativity of other government branches is non-specialized and likely to be captured by private interests is at best naïve and makes up an explanatory model in which Health is either a victim of the Judiciary or the Legislative. Such opposition between the "good" norm and the "bad" public norm (the opposition between government bodies) helps to conceal actual tensions and conflicts. After all, what is being discussed in terms of equity if the paper itself mentions, without details, that SUS' coverage varies from state to state and municipalities?

The projection of the Judiciary and the blurring of the institutions traditionally specialized in politics (parliament) do not derive unreasonable ambitions from a group of magistrates. The second postwar outlines changes with respect to the penalties imposed to government authorities that violate human rights, and the best example is the Nuremberg tribunal, which judged the crimes of Nazi leaders. But from the war also came the stimuli for the constitutions to set out fundamental values to be preserved by

the sovereign States (the so-called democratic constitutionalism) and the Welfare State, with its ambition to organize capitalism and promote harmonious relationships between the social classes, bringing law to the core of social life.[1]

On the other hand, the welfare legislation, intrinsically undetermined and incorporating material aspects, questioned the formal purity of law in liberal orthodoxy. Controversial interpretations of rights in real cases led to the incorporation to the judges' duties the implicit legislation by means of norms and standards that broaden the presence of the Judiciary in the public life. In Brazil, the 1988 Constitution laid the grounds for the expansion of the legal regulations of social relations. Neoliberalism, which questions again labor and social rights in its defense of a minimum State, erodes the role of cohesion of unions and associations and paradoxically fosters the search of consumers/citizens in a fragmented way to a Judicial system that justifies its decisions based on constitutional rights.

The Legislative, Executive and Judiciary have the obligation to define the form and content to undetermined social rights. Obviously, the process of defining and redefining the rules for access to health services are neither linear nor deprived from ambiguities. Conflicts of interest, lobbies, are present in social life. Although every public institution has specific barriers (technical) to deter "invasions" of agents and rationalities unrelated to their bureaucracies, there are no unbiased or neutral rules. There are always many ways to justify decisions, and it should be understood that these are also dispute arenas.[2]

Therefore, the hypothesis (not clearly stated) that the Judiciary is an illegitimate instance because it does not have technical expertise to define rules for SUS' coverage is a good thread but requires consultations on the literature about the subject to avoid the risk of depriving the concept of technique from its political meanings. Health institutions will only accomplish their duty of screening needs and demands if and only if they can expand the scope of coverage and present themselves as nuclear in the processes of innovation and supply of preventive, diagnostic and therapeutic options.

The "comparative advantage" of healthcare over the Judiciary organs would precisely be the provision of a customized menu to be regularly adjusted, while the judicial demand refers to one or more items to be consumed/used regardless of the evolution of the case. Paradoxically, justice "eternizes" prescriptions/medications that should be used only in emergencies and also divests itself from any responsibility for consequences from improper medications/indications, hindering the initiative and creativity of the health system. However, the role of healthcare cannot be exercised in a context of critical shortage of assistive resources.

Social demands can and should be directed to diverse bodies and require an in-depth academic debate to prevent naturalization of a certain distribution of power between groups and mediate the relationship between the State and society. The 1988 Constitution, the same that promulgated SUS, recreated the Public Prosecutor, to which was assigned the defense of the legal order of democracy and the social and individual interests. It is also necessary to recognize incompatible and incongruent positions, such as, for example, the fact that some intellectuals who underline the Judiciary's lack of technical knowledge appeal to it to solve problems of coverage and prices relating to the their private health plans, in order not to reduce the debate to a set of non-contextualized evidences.

It would be impossible to address all these elements in the scope of an article. The fundamental debate on the judicialization of health is not the abdication of technical standards, but the need to recognize that such rules are not neutral and that the existence of an own code would not conceal the description and analysis of conflicts. The realistic approach of social tensions is the adequate path to find institutional alternatives for the democratic ruling of access to health.

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