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RIGHT, JUSTICE AND JUDICIALIZATION IN ORAL HEALTH

Direito, justia e judicializao em sade bucal

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ABSTRACT

The right to health is a social right provided by the Brazilian Constitution, essential to the well-being and dignity of the human being. The aim of this study is to analyze the requests for dental treatments in the Brazilian National Health System of Minas Gerais state in the judiciary, in order to know their characteristics, as well as the legal, principle and biological argumentation (characterized by the need of the patient of the Brazilian National Health System) used by the judges in the elaboration of their decisions. A survey was made covering the judgments listed on electronic websites given by the Minas Gerais Court of Justice in the period from 2006 to 2016, resulting in 27 judgments adequate to the study. The results denote that the actions were postulated individually, with 93% of success in favor of users, and reports or requisitions were submitted in 88% of the actions. The main complaints that originated the requests for dental treatment were grouped into five groups. The most requested dental treatments were surgery for the placement of implants (seven judgments), followed by orthodontic appliance (five judgments). The legal basis was based on the 1988 Constitution for theoretical justification, and the article 196 was the most cited, in 25 of the 27 judgments. In the reasoning based on the principle argumentation, the right to health was the most used (20 judgments), strengthening this social right, followed by the principle of the dignity of the human person (12 judgments), the principle of reserve of possible (10 judgments) and the right to life (eight judgments). Justice has been sought as an alternative to access health services, but the consequences of this fact must be analyzed beyond the individual benefited because it involves the whole society.

Keywords

Dental Care; Right to Health; Judicialization of Health.

RESUMO

O direito à saúde é um direito social respaldado em nossa Constituição, imprescindível ao bem-estar e à dignidade do ser humano. O objetivo deste trabalho é analisar as solicitações de tratamentos odontológicos no Sistema Único de Saúde do Estado de Minas Gerais levadas ao Poder Judiciário, para conhecer suas características e as argumentações jurídicas, de princípios e biológicas (caracterizadas pela necessidade do paciente do Sistema Único de Saúde) utilizadas pelos desembargadores na elaboração dos votos. Foram pesquisados no site do Tribunal de Justiça de Minas Gerais os acórdãos proferidos no período de 2006 a 2016, resultando 27 acórdãos adequados ao estudo. Os resultados denotam que as ações foram postuladas individualmente, com 93% de êxito em favor dos usuários, sendo que foram apresentados laudos ou requisições em 88% das ações. As principais queixas que originaram as solicitações por tratamento odontológico foram agrupadas em cinco grupos. O tratamento odontológico mais solicitado foi cirurgia para colocação de implantes (sete acórdãos), seguido por aparelho ortodôntico (cinco acórdãos). A fundamentação jurídica foi embasada na Constituição de 1988, sendo que o artigo 196 foi o mais citado, constando em 25 dos 27 acórdãos. Na fundamentação baseada na argumentação de princípio, o direito à saúde foi o mais utilizado (20 acórdãos), fortalecendo esse direito social, seguido do princípio da dignidade da pessoa humana (12 acórdãos), do princípio da reserva do possível (10 acórdãos) e do direito à vida (oito acórdãos). A Justiça tem sido procurada como alternativa de acesso aos serviços de saúde, devendo os reflexos desse fato serem analisados além do indivíduo beneficiado, pois envolvem toda a sociedade.

Palavras-Chave

Assistência Odontológica; Direito à Saúde; Judicialização da Saúde.

Introduction

Fundamental rights represent a set of values and interests recognized as necessary for the existence of the human being. These rights, inherent to all as people, are universal, a quality that differentiates them from other rights, which exist only and are recognized in the case of the existence of special predefined situations¹. However, fundamental rights should not be considered only those involving individual rights of negative provision by the State. Quite the contrary: for the consolidation of these rights, it is necessary to analyze from their insertion in the collectivity². The recognition by the State of the existence of a right to health makes it responsible for the prevention, treatment and control of diseases and also for the creation of conditions to ensure access to the necessary health goods and services. As a corollary of the fact that all human rights (economic, social, cultural, civil and political) are considered interdependent and indivisible, governments are responsible for implementing progressive conditions to guarantee the right to health, as well as rights related to education, information, privacy, decent living and working conditions³.

As a social right, the right to health aims to serve the population equally, delimiting with norms the conducts and actions for the collective⁴. The implementation of the National Health System (SUS) can be considered as a means to effect this social right, since two of its doctrinal bases – equity and social justice – aim to reduce inequalities. The application of equity allows different places and people, with different needs, to be served by different solutions and efforts, with distribution of investments and actions focused on the needs of the population⁵, thus promoting social justice.

Provided for in the Federal Constitution of 1988 (CF/1988), the SUS is the result of a new political and organizational formulation of health services and actions, ensuring health promotion, protection and recovery activities based on the doctrinal principles of universality, equity and integrality as provided for in Article 196 of the CF/1988:

¹COMPARATO, Fábio Konder. *Fundamento dos direitos humanos*. 1997. Available at: <http://www.iea.usp.br/artigos>. Accessed on: 09 Jan. 2019.

²CORREIA, Marcus Orione Gonçalves. Os direitos sociais enquanto direitos fundamentais. *Revista da Faculdade de Direito, Universidade de São Paulo*, v. 99, 305-325, 2004. Available at: <http://www.revistas.usp.br/rfdusp/article/view/67627>. Accessed on: 06 Jan. 2019.

³BRAVEMAN, Paula; GRUSKIN, Sofia. Poverty, equity, human rights and health. *Bulletin of the World Health Organization*, v. 81, n. 7, p. 539-545, 2003. Available at: <https://www.who.int/bulletin/volumes/81/7/Braveman0703.pdf>. Accessed on: 06 Jan. 2019.

⁴DALLARI, Sueli Gandolfi. O direito à saúde. *Rev. Saúde Pública*, São Paulo, v. 22, n. 1, p. 57-63, fev. 1988. Available at: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0034-89101988000100008&Ing=en&nrm=iso. Accessed on: 24 Jul. 2018. <http://dx.doi.org/10.1590/S0034-89101988000100008>.

⁵VIANA, Ana Luiza D'Ávila; FAUSTO, Márcia Cristina Rodrigues; LIMA, Luciana Dias de. Política de saúde e equidade. *São Paulo Perspec.*, São Paulo, v. 17, n. 1, p. 58-68, Mar. 2003. Available at: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0102-88392003000100007&Ing=en&nrm=iso. Accessed on: 16 Jul. 2018. <http://dx.doi.org/10.1590/S0102-88392003000100007>.

Health is everyone's right and a duty of the State, guaranteed through social and economic policies aimed at reducing the risk of disease and other health problems, and the universal and equal access to actions and services for its promotion, protection and recovery⁶.

Among the various policies built on the doctrinal principles of universality, equity and integrality, which guide the Brazilian public health system⁷, the National Oral Health Policy (PNSB) was created with the purpose of repairing the historical abandonment of the oral health of the population and lack of commitment to it. Named Smiling Brazil, the policy seeks to ensure actions for the promotion, prevention and recovery of oral health in the individual and collective scope of the Brazilian population⁷. The program expanded access to free dental treatment, providing changes in the oral health of its population and generating positive reflexes on their general health⁸.

However, the construction of the SUS has not yet reached its full development and, on several occasions, when an individual or a group of people seeks care and access is denied⁹, either by lack, or by incompleteness, by mismanagement, the demand of the Judiciary has been observed, transforming it, in some cases, into the only resource for guaranteeing health, life and human dignity¹⁰. As well as health, access to Justice should be considered as an integral part of the human rights list¹¹. The Judiciary has stood out as a way to guarantee the rights of the most vulnerable and protect them, since citizens have started to use the resources created by the legislator in order to provide alternative ways for the defense and eventual

⁶BRASIL. *Constituição da República Federativa do Brasil de 1988*. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm. Accessed on: 24 Jul. 2018.

⁷GIOVANELLA, Lígia; ESCOREL, Sarah; LOBATO, Lenaura de Vasconcelos Costa; NORONHA, José Carvalho de; CARVALHO, Antônio Ivo de. (Orgs.). *Políticas e sistema de saúde no Brasil*. Rio de Janeiro: FIOCRUZ, 2008. Available at: <http://www.redalyc.org/pdf/4063/406341771017.pdf>. Accessed on: 06 Aug. 2018.

⁸MINISTÉRIO DA SAÚDE – MS. *Portaria n. 399, de 22 de fevereiro de 2006*. Divulga o Pacto pela Saúde 2006 – Consolidação do SUS e aprova as Diretrizes Operacionais do Referido Pacto. Available at: http://bvsms.saude.gov.br/bvs/saudelegis/gm/2006/prt0399_22_02_2006.html. Accessed on: 01 Mar. 2020.

⁹BIEHL, João; PETRYNA, Adriana. Tratamentos jurídicos: os mercados terapêuticos e a judicialização do direito à saúde. *Hist. cienc. saude-Manguinhos*, Rio de Janeiro, v. 23, n. 1, p. 173-192, 2016. Available at: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0104-59702016000100173&lng=pt&nrm=iso&lng=pt. Accessed on: 16 Aug. 2018. <http://dx.doi.org/10.1590/S0104-59702016000100011>.

¹⁰RAMOS, Edith Maria Barbosa; DINIZ, Isadora Moraes; MADUREIRA, Amanda Silva. O Conselho Nacional de Justiça: O Fórum da Saúde e o excesso de judicialização. *Cad Ibero-Americanos de Direito Sanitário*, Brasília, v.4, n.4, p. 81-89, 2015. Available at: <https://www.cadernos.prodisa.fiocruz.br/index.php/cadernos/article/view/224/374>. Accessed on: 16 Aug. 2018. <http://dx.doi.org/10.17566/ciads.v4i4.224>. Accessed on: 16 ago. 2018.

¹¹BACKMAN, Gunila et al. Health systems and the right to health: an assessment of 194 countries. *The Lancet* 2008; v. 372, n. 9655, p. 2047-2085. Available at: https://www.who.int/medicines/areas/human_rights/Health_System_HR_194_countries.pdf?ua=1. Accessed on: 04 Jan. 2019. [http://doi.org/10.1016/S0140-6736\(08\)61781-X](http://doi.org/10.1016/S0140-6736(08)61781-X).

achievements of rights¹². This movement, called judicialization, occurred in several areas, including health and policy¹³.

The judicial route has often been used by citizens to challenge decisions that deny access to procedures or medicines not listed in the list of procedures¹⁴ of the National List of Health Actions and Services (RENASES) under the SUS, a publication contained in the Ordinance of the Ministry of Health n. 841/2012¹⁵. To this end, they use the Judiciary¹⁶. The CF/88, which highlights health as a right, allows questioning of any law before the judge and the court¹⁷. Consequently, the Brazilian Ministry of Health had an increase in medicine spending of more than 98% between 2002 and 2007, and 252% with exceptional medicines between 2003 and 2007¹⁸.

In view of the above, this study aimed to analyze the requests for dental treatments at the SUS of Minas Gerais (MG) in the Judiciary, knowing its characteristics, as well as the legal argumentation and principles used by the judges in the preparation of votes.

Methodology

For the development of this study, we opted for the qualitative methodology, using documental analysis as a strategy¹⁹.

¹²VIANNA, Luiz Werneck; BURGOS, Marcelo Baumann; SALLES, Paula Martins. Dezesete anos de judicialização da política. *Tempo soc.*, São Paulo, v. 19, n. 2, p. 39-85, nov. 2007. Available at: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0103-20702007000200002&lng=en&nrn=iso. Accessed on: 03 Jan. 2019. <http://dx.doi.org/10.1590/S0103-20702007000200002>.

¹³BORGES, Daniele da Costa Leite; UGÁ, Maria Alice Dominguez. As ações individuais para o fornecimento de medicamentos no âmbito do SUS: características dos conflitos e limites para a atuação judicial. *Revista de Direito Sanitário*, v. 10, n. 1, p. 13-38, 2009. Available at: <http://www.revistas.usp.br/rdisan/article/view/13144>. Accessed on: 03 Jan. 2019. <https://doi.org/10.11606/issn.2316-9044.v10i1p13-38>.

¹⁴DITTRICH, Rebecca; CUBILLOS, Leonardo; GOSTIN, Lawrence; CHALKIDOU, Kaiipso; LI, Ryan. The international right to health: what does it mean in legal practice and how can it affect priority setting for universal health coverage? *Health Systems & Reform*, v. 2, n. 1, p.23-31, 2016. Available at: <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2629&context=facpub>. Accessed on: 16 Aug. 2018. <https://doi.org/10.1080/23288604.2016.1124167>.

¹⁵MINISTÉRIO DA SAÚDE. *Portaria n. 841, de 2 de maio de 2012*. Publica a Relação Nacional de Ações e Serviços de Saúde (RENASES) no âmbito do Sistema Único de Saúde (SUS) e dá outras providências. Available at: http://bvsms.saude.gov.br/bvs/saudelegis/gm/2012/prt0841_02_05_2012.html. Accessed on: 11 Dec. 2019.

¹⁶NUNES, Francisco de Assis. *Judicialização da saúde*. 37f. Monografia (Especialização) – Prática Judiciária, Universidade Estadual da Paraíba, Campina Grande, 2014. Available at: <http://dspace.bc.uepb.edu.br/jspui/bitstream/123456789/5485/1/PDF%20-%20Francisco%20de%20Assis%20Nunes.pdf>. Accessed on: 20 Jun. 2018.

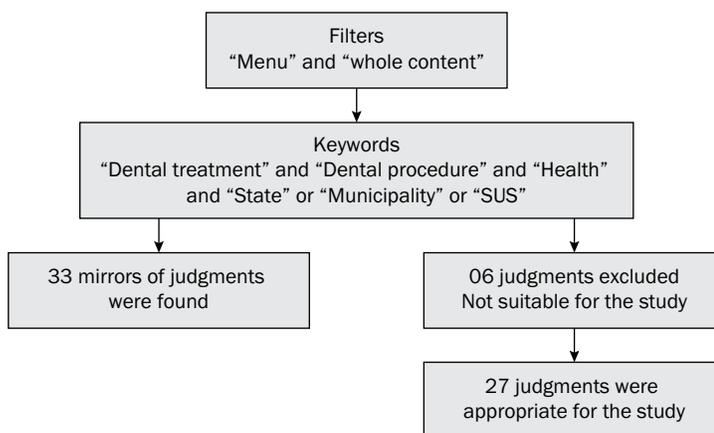
¹⁷BARROSO Luís Roberto. *Judicialização, ativismo judicial e legitimidade democrática*. [Syn]Thesis, Rio de Janeiro, v. 5, n. 1, p. 23-32, 2012. Available at: <http://www.e-publicacoes.uerj.br/index.php/synthesis/article/view/7433/5388>. Accessed on: 20 Jun. 2018.

¹⁸REVEIZ, Ludovic. Litigios por derecho a la salud entres países de América Latina: revisión sistemática de la literatura. *Rev Panam Salud Publica*, v. 33, n. 3, p. 213-222, 2013. Available at: <https://www.scielosp.org/pdf/rpsp/2013.v33n3/213-222>. Accessed on: 13 May. 2018.

¹⁹MINAYO, M.C.S. *O desafio do conhecimento: pesquisa qualitativa em saúde*. 14. ed. São Paulo: Hucitec, 2014.

Secondary data were used, extracted from the decisions given by the judges who act in the second instance of the Court of Justice of the State of Minas Gerais (TJMG). All judgments involving lawsuits for dental treatment from 2006 to 2016, made available and consulted on the TJMG website on July 17, 2017 and August 12, 2017 were analyzed. The choice to work with judgments of second instance stemmed from the fact that these are the result of the judgment of appeals filed by users who disagreed with the result of the judgments handed down at first instance or when reviews were need, when the judgments were unfavorable to the State as a defendant.

In the research of the judgments, the filters “abstract” and “date of publication” were initially used, and the descriptors “dental treatment” and “health” and “state”. A second pair of filters – “whole content” and “publication date” – and the descriptors “dental procedure” and “health” and “municipality” and “SUS” were used in an attempt to expand the sample of judgments. Figure 1 represents the search flowchart and the result.



Source: Court of Justice of Minas Gerais
Own preparation

Figure 1. Flowchart of the search for judgments in the second instance of the Court of Justice of Minas Gerais, between July and August 2017

In the structure of the body of the judgments, the votes were analyzed. The votes are always established by a chamber composed of three judges: the rapporteur, the reviewer and the vowel, it was analyzed, understood and interpreted.

The content analysis was performed based on the proposal by Graneheim and Lundman²⁰, which briefly includes the following steps: identification of the units of analysis, condensation of each unit, interpretation and grouping of categories in themes.

After thorough reading of the votes of the judgments, three topics of interest were identified: the reason explained by the applicant, the legal arguments and the principles, used by the judges as the basis of the decision.

This research does not require submission to the Ethics Committee, because data collection was performed in a public database, made available through the Internet.

Results

In the 27 judgments analyzed, it can be observed that 92.5% of the judicial decisions obtained approval, that is, they were favorable to the SUS user, and only 7.5% were rejected (Table 1).

All judgments were individually held, and 88.8% of the users submitted, in the application for dental treatment, report or account of dentist or doctor, while 11.2% did not present a report or this was not mentioned in the judgments.

Table 1. Distribution of the results of judicial decisions given, in the analysis of votes of judgments, in demands for dental services in the Court of Justice of Minas Gerais, 2017 (n= 27)

Result	n	%
Granted	25	92.5
Dismissed	2	7,5
Ownership of the Lawsuit		
Individual	27	100
Group	0	
Urgency		
Yes	17	62.9
Not	3	11.2
Not presented	7	25.9
Report		
Presence	24	88.8
Absence	3	11.2

Own preparation Source: Minas Gerais Court of Justice

²⁰GRANEHEIM, Ulla; LUNDMAN, Bertil. Qualitative content analysis in nursing research: concepts, procedures and measures to achieve trustworthiness. *Nurse Educ Today*. v. 24, p. 105-112, 2004. Available at: <https://www.ncbi.nlm.nih.gov/pubmed/14769454>. Accessed on: 12 Mar. 2018.

The main complaints that led to the requests for dental treatment in the second instance were divided into five groups, reported in Chart 1.

Chart 1. Distribution of the reasons for requests to the Judiciary according to the complaint reported in the judgment, in claims for dental services, Minas Gerais Court of Justice, 2017 (n= 27).

1. General commitments
Poor health, compromised functions Myositis, xerostomia, sinusopathy Sequelae of face cancer treatment Autoimmune pathologies, mucosal dryness
2. Problems with Temporomandibular Joint (TMMA)
TMI dysfunction with acute pain Dysfunction of the arches, occlusal problems Malocclusion, arthralgia TMI dysfunction with risks of worsening of the condition
3. Poor oral health
Absence of dental elements Advanced periodontal disease Avulsion tooth by trauma Masticatory capacity deficiency Need for total prosthesis Alveolar bone resorption Removal of all dental elements Accessory root canal and restoration Dental trauma Orthodontic problems Special patient

Own preparation Source: Court of Justice of Minas Gerais

The most requested dental treatments were surgery for implant placement (seven judgments), followed by orthodontic apparatus (five judgments), endodontic treatment with subsequent rehabilitation (two judgments), orthodontic documentation (one judgment) and treatment under general anesthesia (one judgement). In some judgments, the required dental treatment was not made explicit.

The legal reasoning was based on the CF/88 for theoretical justification, and Article 196 was cited in 25 of the 27 judgments; followed by article 198, cited 10 times; and Articles 6 and 23, nine times (Table 2).

Other legal arguments were cited in the decisions, such as Law No. 8,080/1990²¹ (Organic Health Law), cited in 10 judgments; Law 8,069/1990²² (Statute of the Child and Adolescent, ECA) when the applicant, represented by his legal representatives, was a child and/or adolescent; and Law No. 10,741/2003²³ (Statute of the Elderly), when it came to the elderly.

Article 186 of the State Constitution²⁴ was also cited by the judges, reaffirming the guarantee by the Rule of the universal right to health through public policies.

Art. 186 - Health is everyone's right, and assistance to it is the duty of the State, ensured through social and economic policies aimed at eliminating the risk of diseases and other health problems and universal and equal access to actions and services for their promotion, protection and recovery.

Sole paragraph - The right to health implies the guarantee of:

I – decent conditions of work, housing, food, education, transportation, leisure and basic sanitation;

II – access to information of interest to health, obliged the Public Power to keep the population informed about health risks and damage and on prevention and control measures;

III - dignity, gratuity and good quality in health care and treatment;

IV – participation of society, through representative entities, in the elaboration of policies, in the definition of implementation strategies and in the control of activities with impact on health.

²¹BRASIL. *Lei n. 8.080, de 19 de setembro de 1990*. Dispõe sobre as condições para a promoção, proteção e recuperação da saúde, a organização e o funcionamento dos serviços correspondentes e dá outras providências. Available at: http://www.planalto.gov.br/ccivil_03/leis/l8080.htm. Accessed on: 12 Mar. 2018.

²²BRASIL. *Lei n. 8.069, de 13 de julho de 1990*. Dispõe sobre o Estatuto da Criança e do Adolescente e dá outras providências. Available at: http://www.planalto.gov.br/ccivil_03/Leis/l8069.htm. Accessed on: 12 Mar. 2018.

²³BRASIL. *Lei 10.471, de 01 de outubro de 2003*. Cria o Estatuto do Idoso. Available at: http://www.planalto.gov.br/ccivil_03/LEIS/2003/L10.741.htm. Accessed on: 12 Mar. 2018.

²⁴ASSEMBLEIA DO ESTADO DE MINAS GERAIS. *Constituição 1989, de 21 de setembro de 1989*. Available at: <https://www.almg.gov.br/consulte/legislacao/completa/completa-nova-min.html?tipo=Con&num=1989&ano=1989>. Accessed on: 11 Dec. 2019.

Chart 2. Distribution of legal arguments used in trials in the second instance, according to the absolute frequency of requests for dental care at the Minas Gerais Court of Justice, 2017 (n= 27)

Laws and decrees used as a legal argument	Absolute frequency.
CF/88 Article 196. "Health is everyone's right and a duty of the State, guaranteed through social and economic policies aimed at reducing the risk of disease and other health problems, and the universal and equal access to actions and services for its promotion, protection and recovery."	25
CF/88 Article 198. "Public actions and services [...] comprehensive care, with priority for preventive activities, without prejudice to social services."	10
Law No. 8.080/1990 Provides for the conditions for the promotion, protection and recovery of health, the organization and functioning of the corresponding services and provides other measures.	10
CF/88 Art. 6. "[...] social rights to education, health, food, work, housing, transportation, leisure, security, social security, protection to motherhood and children, assistance to the homeless."	9
CF/88 Article 1. "[...] III - dignity of the human person"	5
CF/88 Art. 5. "[...] right to life, freedom, equality, security and property."	5
CF/88 Art. 30. "[...] VII - provide, with the technical and financial cooperation of the Union and the State, health care services of the population."	3
CF/88 Article 197. "Public importance includes the actions and health services, which must be made available by public authorities, in accordance with the law, for regulation, supervision and control, and shall be executed directly or through third parties and also by individuals or private corporations."	3
CF/88 Article 194. "Social security comprises an integrated set of initiative actions of the Public Authorities and society, aimed at ensuring the rights related to health, social security and social assistance."	2
Law No. 8,069/1990 Article 7. "Children and adolescents have the right to protection of life and health, through the implementation of public social policies that allow the birth and healthy and harmonious development, in conditions worthy of existence."	2
Constitution of the State of Minas Gerais Art.186. "[...] dignity, gratuity and good quality in health care and treatment."	2
CF/88 Art. 18. "[...] Union, the States, the Federal District and the Municipalities, all autonomous"	1

Continue

Continuation

Laws and decrees used as a legal argument	Absolute frequency.
CF/88 Art. 24. “[...] XIV - protection and social integration of persons with disabilities;”	1
CF/88 Art. 37. “The direct and indirect public administration of any of the powers of the Union, the States, the Federal District and the Municipalities shall obey the principles of legality, impersonality, morality, publicity and efficiency and, also, the following:	1
CF/88 Article 193. “The social order is based on the primacy of work, and has as an objective social well-being and social justice.”	1
CF/88 Article 195. “Social security shall be financed by society as a whole, directly and indirectly, in accordance with the law, through resources from the budgets of the Union, the States, the Federal District and the Municipalities, and the following social contributions: [...]”	1
CF/88 Article 227. It is the duty of the family, society and the State to ensure children, adolescents and youth, with absolute priority, the right to life, health, nourishment, education, leisure, professional training, culture, dignity, respect, freedom and family and community life, as well as to guard them from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression.	1
Law No. 9,313/1996 ²⁵ It provides for the free distribution of medicines to people with HIV and AIDS patients.	1
Law No. 10.74/2003 Provides for the Elderly Statute and other measures.	1
Code of Civil Procedure ²⁶ Art. 70. “Every person who is in the exercise of his or her rights has the capacity to stand trial.”	1

Own preparation Source Court of Justice of Minas Gerais

In the reasoning based on the argumentation of principle, the right to health was the most used (20 judgments), strengthening this social right, followed by the principle of human dignity (12 judgments), the principle of reserve for the possible (10 judgments) and the right to life (eight judgments).

²⁵BRASIL. *Lei n. 9.313, de 13 de novembro de 1996*. Dispõe sobre a distribuição gratuita de medicamentos aos portadores do HIV e doentes de AIDS. Available at: http://www.planalto.gov.br/ccivil_03/leis/l9313.htm. Accessed on: 11 Dec. 2019.

²⁶BRASIL. *Lei n. 13.105, de 16 de março de 2015*. Código de Processo Civil. Available at: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm. Accessed on: 11 Dec. 2019.

Table 2. Distribution of legal principles arguments, used in second instance judgments, when requesting dental care at the Court of Justice of Minas Gerais, 2017 (n = 27)

Principles of Law	Frequency in judgments	
	n	%
Right to health	20	25.3
Dignity of the human person	12	15.2
Reservation of the possible	10	12.6
Right to life	8	10.1
Existential minimum	6	7.6
Universality	6	7.6
Reasonability	5	6.3
Equality	5	6.3
Integration	3	3.8
Social law	1	1.3
Proportionality	1	1.3
Child protection	1	1.3
Justice of bioethics	1	1.3

Own preparation Source: Court of Justice of Minas Gerais

Discussion

The results of the research show a small number of judgments delivered in the period from 2006 to 2016 by TJMG judges, with only individual dental treatment demands by SUS users and curative treatments being more required than preventive treatments.

Oral health has little expression in the judicialization of health in the State of Minas Gerais, because, in a period of 10 years, only 27 judgments were selected, which demonstrates ignorance by a large part of the population about the process of judicialization of the right to oral health, comparing it with other demands, such as pharmaceutical assistance by the State²⁷.

As decisions of a court of second instance were analyzed, the study only included decisions in which there was an appeal by the party dissatisfied with the decision of first instance of judgment, seeking a review of this decision and a second trial of the action, or in the cases of necessary review of the decision, mandatory when the State is defendant and obtains an unfavorable judgment. The study does not yet include court decisions whose outcome was favorable to users at first instance and/

²⁷ MINAS GERAIS. Tribunal de Contas do Estado. *Relatório sob a Macrogestão e Contas do Governador do Estado de Minas Gerais*, 2015. p. 398. Available at: <https://www.tce.mg.gov.br/img/PrestacaoContasEstado/2015/RelatorioTecnico.pdf> Accessed on: 12 Apr. 2018.

or who were not the subject of an appeal and, therefore, did not generate judgments. Thus, these limitations permeate all the results presented.

Of the judicial decisions of the 27 judgments examined, only three contain the rejection of citizens' requests. In the first, it was found that the report was vague and laconic, not providing elements that related the real health status of the plaintiff. In the second, there was a request for dental expertise for better clarity in the decision. The third was based on the financial issue in favor of the State, based on the reservation of the possible.

The highlighted reasons for refusal show that the large number of acceptances to the requests of users of the SUS results from the Judiciary, generally, by dispensing with the opinion of official reports or certificates that technically bathe the decisions of the judge. The judges are not oral health technicians and are based on reports issued by dentists of public or private services (one of the reports was issued by a doctor), without standards, sometimes emotionally appealing or obscure, without knowledge of the continuity of treatment and its guarantee²⁸.

The unanimity of the judgments analyzed showed that only individual applications were made, which makes us reflect on the possibility of individual requests compromising the collective interest – because there is a need to achieve a fair distribution of social goods, a fair justice²⁹.

These associated factors – predominantly deferred individual requests – can be seen by some as a risk of increased inequality due to the privilege of individual demands, which can generate a lack of resources for the supply of collective needs because they have been displaced to meet orders^{30, 31}. The individual right could represent an obstacle to the needs of the entire population, since, when determining as an obligation of the State the full care of all the needs of an individual, there would be a prioritization of the rights of some citizens despite the others, privileging the individual and not the collectivity³².

²⁸NUNES, Francisco de Assis. *Judicialização da saúde*. Monografia (Especialização) – Prática Judiciária, Universidade Estadual da Paraíba, Campina Grande, 2014.

²⁹SILVEIRA, Denis Coitinho. Teoria da justiça de John Rawls: entre o liberalismo e o comunitarismo. *Trans/Form/Ação*, Marília, v. 30, n. 1, p. 169-190, 2007. Available at: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0101-31732007000100012&lng=en&nrm=iso. Accessed on: 10 Mar. 2018. <http://dx.doi.org/10.1590/S0101-31732007000100012>.

³⁰VIEIRA, Fabiola Sulpino. Ações judiciais e direito à saúde: reflexão sobre a observância aos princípios do SUS. *Rev. Saúde Pública*, São Paulo, v. 42, n. 2, p. 365-369, Apr. 2008. Available at: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0034-89102008000200025&lng=en&nrm=iso. Accessed on: 04 Jan. 2019. <http://dx.doi.org/10.1590/S0034-891020080005000010>.

³¹SILVA, Virgílio Afonso da; TERRAZAS, Fernanda Vargas. Claiming the right to health in Brazilian courts: the exclusion of the already excluded. *Social Science Research Network*, 2008. Available at: <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1747-4469.2011.01252.x>. Accessed on: 04 Jan. 2109. <https://doi.org/10.1111/j.1747-4469.2011.01252.x>.

³²GONTIJO, Guilherme Dias. A judicialização do direito à saúde. *Rev Med Minas Gerais*, n. 4, p. 606-611, 2010. Available at: <http://rmmg.org/artigo/detalhes/345>. Accessed on: 08 Jan. 2019.

Equity, one of the principles of health systems, is an ethical concept based on the principle of distributive justice and, on health, reflects the concern to reduce inequalities of opportunities to be healthy³³. However, from the perspective of an individual who is ill – therefore, with an urgent need – it is considered that his demand should be met in an integral and expedited manner, because there is the possibility of him suffering from the state's inefficiency or inefficiency in fulfilling its legal obligations to guarantee the right to health and life. Expecting a sacrifice of your physical integrity or even your life for collective rights would not be a doable attitude in terms of individual conduct³⁴.

The urgency was claimed in 59% of the analyzed lawsuits, with the argument that the lack or delay to solve the diagnosed problem would result in a greater compromise of the user's health.

The complaints that motivated citizens to seek the judicial system were organized into three groups, demonstrating the variety of problems presented. Of the dental procedures requested, 25 were curative; one judgment addressed the request for dental documentation tests for TMJ dysfunction (temporomandibular joint) and another referred to the need for submission to general anesthesia for dental treatment in patients with disabilities.

The legal reasoning in most judgments was based on the CF/88 for theoretical justification, and Article 196 (health as a right) was the most cited, in 25 of the 27 judgments, followed by Article 198 (full attendance) and Law No. 8,080/1990 (Regulation of the SUS), cited 10 times, and Article 6 (social law), nine times.

Article 198 of the CF/88, which deals with integrality and is one of the principles of the SUS, and Law No. 8,080/1990, which regulates the provision of health services in the public system, refers to the organization of the State in a hierarchical and regionalized network that constitutes a single system, with shared competence of federal entities. The law also provides for the conditions for the promotion, protection and recovery of health, as well as the organization and functioning of the corresponding services.

Despite proposing regionalization and hierarchization, the joint responsibility of the public power is to ensure the health of the citizen regardless of which sphere of the State will execute it.

The articles that report on the fundamental principles of CF/88 (arts. 1 and 5) were used as legal arguments in the judgments, showing the importance of

³³ BRAVEMAN, Paula; GRUSKIN, Sofia. Poverty, equity, human rights and health. *Bulletin of the World Health Organization*, v. 81, n. 7, p. 539-545, 2003.

³⁴ VENTURA, Mírian; SIMAS, Luciana; PEPE, Vera Lúcia Edais; SCHRAMM, Fermin Roland. Judicialização da saúde, acesso à justiça e a efetividade do direito à saúde. *Physis*, Rio de Janeiro, v. 20, n. 1, p. 77-100, 2010. Available at: http://www.scielo.br/scielo.php?script=sci_rtext&pid=S0103-73312010000100006&lng=en&nrm=iso. Accessed on: 08 Jan. 2019. <http://dx.doi.org/10.1590/S0103-73312010000100006>.

the dignity of the human person and that, before the law, we are all equal, with an inviolable right to life, freedom and equality.

Social security was represented by articles 194 and 195 of the CF/88, guaranteeing rights related to health, social security and social assistance and that the financing of these actions should be done by all the society.

Other legal arguments were cited in the decisions, showing that the choice of legal reasoning is made in a manner consistent with the demand requested and specific to it. When the applicant, represented by his legal representatives, was a child and/or adolescent, Law N. 8,069/1990 (ECA) was used as an appeal against the statement of reasons; in the case of the elderly, the argument was aided by Law N. 10,741/2003.

The judges also based their decisions on state laws, reaffirming the guarantee, by the State, of universal right with dignity and gratuity and good quality in health care and treatment through public policies.

In the rationale based on the argumentation of principles, the right to health was the most used, strengthening this social right, followed by the principle of the dignity of the human person, the principle of the reserve of the possible and the right to life. The right to health is not exclusively intended to prevent the risk of death or ill³⁵, but also guarantees the life of the citizen with a minimum of quality and the dignity of the human person. The right to health, in addition to qualifying as a fundamental right that assists all people, represents an indissoluble constitutional consequence of the right to life, so that these rights are intertwined – there is no life without health and dignity.

The principle of reservation of the possible showed a weighting of lawyers on the scarcity of resources, because it is worrying to exercise rights without drawing limits of guarantee by financial contribution. By the principle of reasonableness, the real need of the user is carefully considered, presented in an objective and true report, and the availability of financial, technical and physical resources, aiming to serve the user in a way that does not compromise the community³⁶.

As limits of this study, we point out the restriction of the data obtained, since the judgments of second instance were consulted by the public availability of data. A deepening of this study is necessary, considering the principle of the right to life with dignity, guaranteed in the Constitution for all.

³⁵ ORGANIZAÇÃO MUNDIAL DA SAÚDE – OMS. *Constituição da Organização Mundial da Saúde*. Nova Iorque, 22 jul. 1946. Available at: <http://www.direitoshumanos.usp.br/index.php/OMS-Organiza%C3%A7%C3%A3o-Mundial-da-Sa%C3%BAde/constituicao-da-organizacao-mundial-da-saude-omswho.html>. Accessed on: 10 Mar. 2018.

³⁶ BALESTRA NETO, Otávio. A jurisprudência dos tribunais superiores e o direito à saúde – evolução rumo à racionalidade. *Revista de Direito Sanitário*, São Paulo, v. 16, n. 1, p. 87-111, mar./jun. 2015. Available at: <http://www.revistas.usp.br/rdisan/article/view/100025/98615>. Accessed on: 20 Jun. 2018. <https://doi.org/10.11606/issn.2316-9044.v16i1p87-111>.

Final considerations

Considering the judicialization in the dental area, it was found, examining the judgments of the second instance, that: (i) the search for justice for resolution of lawsuits in the dental area is still small; (ii) decisions lack adequate technical reasons; (iii) the rights to health, life and dignity are important foundations used by judges; and (iv) the reservation of the possible and the existential minimum are principles that have been considered in the judgments, which may mean the attempt to balance between individual and social rights.

However, the phenomenon of judicialization cannot be generalized as a form of appropriation of access to justice and the SUS by the elites. Inequities linked to the Judiciary may arise in the health services themselves or be aggravated by them. The process demonstrates problems in the implementation of public policies that can guarantee universal and integral access to health services, and should be analyzed in a localized way by managers.

Thus, the scenario of judicialization of health represents a challenge for both the Executive and Judicial powers. Although the demands are individually proposed, the other party to the lawsuits in the right to health cannot be considered only the public entity in isolation, but an entire community. By declaring that the State is succumbing, the effects of this decision will overlap with the benefited individual, because it falls on a common good – almost always the public budget. In this way, the Judiciary should use the principles of distributive justice as guiding when considering its decisions.

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