

Judicialization of health in Brazil and Colombia: a discussion in light of the new Latin American constitutionalism¹

A judicialização da saúde no Brasil e na Colômbia: uma discussão à luz do novo constitucionalismo latino-americano

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Abstract

This study aims to analyze the judicialization of health in Brazil and Colombia in light of the new Latin American Constitutionalism (NLC), a conceptual framework adopted in the region that breaks with the European and North American classic constitutional models. In Brazil, the Constitution of 1988 came as a response to a long period of military governments, and in Colombia the Constitution of 1991 emerged in a context of human rights abuses and high level of violence. The NLC is materialized from these new political letters and based on increasing forms of participation and expansion of the role of the Judiciary and people's rights, including health. However, the constitutions that brought a broad bill of rights have failed to face market-oriented policies and privatization of health services, thus limiting the realization of the right to health to increasing litigation. In this scenario, the role of the Judiciary, which has been strengthened by the new constitutions, gained importance as the branch capable of realizing a provided but precluded right. The identification of health needs and claims by social segments is presented as a basic principle in this process and indicates the rescue of the NLC for the realization of the right to health through structural litigation.

Keywords: Judicialization of Health; New Constitutionalism; Latin America; Brazil; Colombia.

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Resumo

Este artigo busca analisar a judicialização da saúde no Brasil e na Colômbia à luz do novo constitucionalismo latino-americano (NCLA), corrente conceitual adotada na região que rompe com os modelos constitucionais europeus e norte-americanos clássicos. No Brasil, a Constituição de 1988 veio em resposta a um longo período de governos militares e, na Colômbia, a Constituição de 1991 surgiu em um contexto de abusos de direitos humanos e altos níveis de violência. O NCLA se materializa a partir dessas novas Cartas Políticas e se sustenta no incremento das formas de participação e na ampliação do papel do Judiciário e dos direitos, como o da saúde. Entretanto, as constituições que trazem uma ampla carta de direitos não conseguiram enfrentar as políticas orientadas para o mercado e a privatização dos serviços de saúde, colocando em xeque a efetivação do direito à saúde e levando ao aumento das ações judiciais. Nesse cenário emerge o protagonismo do Judiciário, fortalecido pelas novas constituições, como poder estatal capaz de concretizar um direito previsto, mas marginalizado. A identificação das necessidades de saúde e reivindicações de segmentos sociais apresenta-se como princípio basilar nesse processo e sinaliza o resgate do NCLA para a efetivação do direito à saúde por meio do litígio estrutural.

Palavras-chave: Judicialização da Saúde; Novo Constitucionalismo; América Latina; Brasil; Colômbia.

Introduction

This study aims to analyze the judicialization of health in Brazil and Colombia in light of the new Latin American constitutionalism (NLC), a conceptual framework adopted in the region that breaks with the European and North American classic constitutional models and welcomes the cultural, social, political and democratic demands of peoples (Bragato; Castilho, 2014). In this context, rescuing the principles of the NLC can contribute to rethinking the health litigation process in both countries, with a view to the full realization of the right to health.

Colombia and Brazil have presented a significant increase in lawsuits involving such right since the 1990s, a phenomenon that has been called “judicialization of health.” The loss of legitimacy of the health system in both countries is reflected in the growing number of relief lawsuits. In 2018 207,734 lawsuits were filed in Colombia due to the violation of the right to health (Colombia, 2019). As for Brazil, according to data from the National Council of Justice (CNJ), demands increased from 1,778,269 in 2018 to 2,228,531 in 2019 (Schulze, 2019).

The judicialization of health has been studied from different perspectives in the Brazilian context, focusing on the characteristics of lawsuits, the effects on the health system and aspects related to the conduct of judges in their decisions. Access to the Judiciary is a constitutional right and a mechanism for exercising citizenship, but there are criticisms about its impact, as it can generate budgetary consequences, such as the diversion of resources from priority policies (Ferraz, 2011; Vieira, 2008).

Critics of judicialization still emphasize the predominance of individual claims, inequality in access to justice, the lack of respect for the separation of powers and the influence of the pharmaceutical industry. On the other hand, there is the perception that, as judicial decisions allow access to treatments not incorporated into the health system, they can signalize unmet individual and collective needs, thus becoming an important assessment tool for public policy (Andrade et al., 2008; Campos Neto; Gonçalves; Andrade, 2018; Fleury, 2012; Gomes et al., 2014; Machado; Dain, 2012).

The new Latin American constitutionalism in Brazil and Colombia

In Colombia, judicialization is held responsible for advances in social rights by guaranteeing the applicability of the Constitution and the protection of the dignity and life of minorities and victims of the violence that plagues the country (Uprimny; García-Villegas, 2002).

It is worth mentioning that the comparison between Brazil and Colombia is strategic as in addition to the convergence in relation to the relevance of judicialization for access to health, both countries had their current Constitutions promulgated at the same historical moment (Brazil in 1988, Colombia in 1991), based on a process of democratic rupture against a context of human rights abuses and profound social inequalities. At the same time, although the two health systems have differences, particularly on the scope of the right to health, financing and public-private relationship (Almeida, 1999; Cebes, 2014; Gargarella, 2017; Holst; Giovanella; Andrade, 2016; Vélez, 2016), the changes imposed on the Brazilian system may have turned both of them more alike.

Methodologically, the comparative analysis of political phenomena works as a theoretical device and tool to control results (Bulcourn; Cardozo, 2008), being advantageous the comparison of countries with similar historical circumstances in important aspects to understand the processes within each context (Evans; Rueschemeyer; Skocpol, 1985). To this end, we conducted a narrative literature review, which included articles, books, legal documents and statistical reports available in the main databases of scientific literature on the countries, such as the Scientific Electronic Library Online (SciELO), the CNJ (Brazil) and the *Defensoría del Pueblo* (Colombia). The analysis involved a comparison between the judicialization of health and the theoretical bases of the NLC, in which we sought an alternative point of view for this debate based on its three main characteristics: the expansion in the forms of participation; the expansion of rights and the strengthening of the Judiciary. We made no distinction between judicialization and judicial activism², concepts that will be discussed as part of the same movement.

Theoretical basis

Constitutions are not just matrixes of political processes, but a synthesis of the clash of forces and social struggles, related to the historical moment of the development of collectivities (Wolkmer, 2010). In Latin America, the history of constitutionalism was marked by the dispute between conservatives and liberals, who came together (“Fusion Constitutionalism”) in the middle of the 19th century to face the republican ideals brought by European revolutions, instituting the main constitutions of the region (Gargarella, 2013; Gargarella; Courtis, 2009). However, these constitutions arose from undemocratic processes, led by elites (Pastor; Dalmau, 2010) and, although liberalism defended the adoption of rights in a universalist way, these were related to property rights and distributed unequally (Gargarella; Courtis; 2009).

By the end of that century, a new regime sought economic growth through tough discipline imposed on the population (“Order and Progress” regimes), leading to social conflicts and authoritarian governments. Constitutionalism was then ruled, with exceptions, by exclusionary legal systems, limits on political rights and concentration of power in the Executive, which applied coercive measures. From the 1970s on, Latin America was impacted by a political crisis and serious human rights abuses, in addition to suffering a social and economic crisis related to fiscal adjustment programs (Gargarella, 2013). During the 1980s and 1990s, amid manifestations of civil society, the new Latin American constitutions began to materialize, to a large extent, as a result of the re-democratization processes of several countries, having as pillars the participation in the constituent processes and the clamor for social

² For Streck (2016), while judicial activism is related to the personal view and the will of the judges, judicialization is contingent and its effect - positive or negative - depends on the degree to which it is observed.

changes. Brazil enacted the first constitution of this movement, in 1988³, followed by Colombia (1991), Paraguay (1992), Peru (1993), Venezuela (1999) and the plurinational Constitutions of Ecuador (2008) and Bolivia (2009) (Avritzer, 2017; Gargarella, 2013, 2017; Gargarella; Courtis; 2009).

As for Brazil, the 1988 Constitution (CF/88) was directly influenced by the struggle to overthrow the military dictatorship, since it emerged to oppose the authoritarian Constitution of 1967 (Gargarella, 2017). Civil rights were restored and expanded and the new Constitution sought to correct the problems and abuses of the previous one, creating barriers against human rights violations and anti-democratic actions, restoring the direct and secret vote, introducing changes in the organization of powers and including an unprecedented role to social rights (Avritzer; Marona, 2014; Gargarella, 2013, 2017). In addition, CF/88 enshrined pluralist foundations in the religious, philosophical, political and cultural fields (Wolkmer, 2010). Although the social and political movements demanded a Constituent Assembly appointed by the people, the convened congress was composed of parliamentarians elected in 1986, belonging mainly to moderate sectors (Pisarello, 2012, 2014), which may explain the mixed character of the constitution.

Colombia, despite having a long tradition of civilian governments and regular elections, faced a period of high levels of violence, human rights violations and serious social inequality (Uprimny, 2004; Uprimny; García-Villegas, 2002). The crisis peaked when the State lost control of various parts of the territory due to the presence of guerrillas, paramilitary groups and drug trafficking, which culminated in the occupation of the Supreme Court by the guerilla group *Movimiento 19 de Abril*

(Gargarella, 2013). In 1990, based on the demand of various sectors of society for democratic expansion and the establishment of a new social contract, the then President César Gaviria called for a constituent assembly⁴ that counted on the participation of previously marginalized groups, such as demobilized guerrillas, indigenous and religious minorities. (Díaz, 2010; Uprimny, 2004, 2006; Uprimny; García-Villegas, 2002). The result was a Constitution that promotes human dignity, equity and democratic participation (Iturralde, 2013).

The NLC originated from these new political charters and represents a re-elaboration of the classic constitutionalism, insofar as it innovates constitutional foundations and practices through the expansion of rights and participation (Avritzer, 2017), in addition to legitimizing and representing the democratic struggles and emancipatory actions of the Latin American people. This perspective brings the constitution as a space to express popular sovereignty (constituent power) over the configuration of the state, overcoming the view of the constitution as merely limiting the constituted power (Pastor; Dalmau, 2010). In this sense, the new Latin American constitutions unveil tensions typical of citizenship, such as the relationship between universality and equality, particularity and difference, involving three basic characteristics: the expansion of rights, including health; reconfiguration of the role of the Judiciary; and the increase in forms of participation in different instances of power⁵ (Avritzer, 2017; Avritzer; Marona, 2014). However, although the constitutional provision and consecration of fundamental and social rights have advanced, the vertical power structure has been maintained in the president's hands (Gargarella, 2013, 2017; Gargarella; Courtis, 2009).

3 Although some authors claim that the bases of the NCL can be identified only from the Colombian Constitution of 1991 (Nárdiz, 2016; Pastor; Dalmau, 2010), it is generally considered that the Brazilian Constitutional Charter of 1988 brings advances that justify its framing from the NCL perspective, such as the institution of popular participation, the pluralist characteristic and the inclusion of mechanisms for valuing and multicultural protection (Avritzer, 2017; Gargarella, 2017; Wolkmer, 2010).

4 The Constituent Assembly was convened by a controversial mechanism, either decreed the state of emergency, to fulfill the reformist objective, or qualified by the Supreme Court of Justice (Díaz, 2010).

5 Although the first two characteristics are present in Neoconstitutionalism, they appear in a peculiar way in Latin America, where the search for democracy is a priority issue. Moreover, the NCL shares with Neoconstitutionalism the positive dimension of the constitution and its centrality in the legal system, both in its development and interpretation (Grijalva, 2017; Pastor; Dalmau, 2010).

The expansion of rights in Brazil and Colombia and the challenges for the realization of the right to health

Regarding the expansion of rights, both the Brazilian and the Colombian constitutions have advanced, as they recognize the rights to diversity, land and the preservation of the cultural heritage of traditional communities. However, the former constitution performed it in an incipient way, while the latter advanced to a greater extent. (Avritzer, 2017). In addition, the list of social, economic and cultural rights - including the rights to leisure, adequate food and housing, education and health - has been expanded, with a broad interpretation of the recipients, such as the elderly, children and the disabled, establishing a new break with classic constitutionalism, which institutes these rights in a generic way, without worrying about their individualization or collectivization (Courtis, 2006; Gargarella; Courtis, 2009; Pastor; Dalmau, 2010).

The right to health, specifically, was recognized in Brazil as a “right of all and duty of the State” (Brasil, 1988, art. 196), appearing also in article 6 of CF/88 as a social right and in article 194 as part of the social security system. Articles 196 to 200 establish general issues on the health system, covering its financing and organization of assistance (Brasil, 1988). In the Colombian constitution, article 49 provides for the right to health for all people, guaranteeing “access to health promotion, protection and recovery services” and establishing the duty of everyone to “seek comprehensive care for their health and their community” (Colombia, 1991, our translation).

The right to health in Brazil was materialized from the creation of the Brazilian National Health System (SUS), which represented a major advance for the population (Moutinho; Dallari, 2019), but there are still challenges to be faced for its effectiveness. Although CF/88 brings this right as universal, the constitutional text itself presents a contradiction in allowing health care to be carried out by the private sector, transforming citizens into consumers (Cebes, 2014). There are also challenges related to the system itself and to structural

aspects of society that interfere in the realization of social rights, such as inequality and the non-implementation of redistributive and inclusive public policies (Garbois; Vargas; Cunha, 2008; Paula et al., 2009; Silva, 2013). Such challenges are present in the current Brazilian context, as austerity policies and attacks on rights and social policies seriously threaten the financing, access and quality of care (Costa; Rizzotto, 2017; Holst; Giovanella; Andrade, 2016; Moutinho; Dallari, 2019).

The reduction in public spending raises the participation of families in the direct cost of their health, bringing the Brazilian health system closer to the model of universal coverage currently advocated by multilateral organizations such as the World Bank. This model assumes that health is the responsibility of people, families and companies, and the State is responsible for investing in basic actions aimed at the poor and vulnerable, discriminating groups according to their ability to pay (Araujo et al., [2019?]; Cebes, 2014; Heredia et al., 2015; Holst; Giovanella; Andrade, 2016).

These pressures and changes imposed on the Brazilian system may indicate a new convergence with Colombia, given that the *Sistema General de Seguridad Social en Salud* (SGSSS) [General System of Social Security in Health] is considered an exemplary experience of universal coverage (Hernández-Álvarez, 2014). In its health reform, Colombia was directly influenced by the model conducted by the World Bank and the International Monetary Fund, implying a reduction in social spending and a decline in public services (Santos; Ferreira, 2015; Vélez, 2016). The SGSSS institutionalized two population affiliation regimes: one contributory (through labor remuneration) and the other subsidized, which was created to ensure assistance to the non-working population and below the poverty line (Almeida, 1999; Vélez, 2016). The Colombian model is also identified as structured pluralism, whose main characteristic is the transformation of the State into a modulator and articulator, leaving the provision of services to eminently private entities: health promoting entities (HPE) operate as insurance companies and administrators, and service provider institutions (SPI) are responsible for providing health services (Almeida, 1999; Londoño; Frenk, 1997).

Once again, the approximation of the two systems is identified, with a view to increasing the regulatory role of the Brazilian State while intensifying the transfer of the provision of services to private entities, such as social health organizations (Soares et al., 2016). It is noteworthy, in Brazil, the recent creation of the Agency for the Development of Primary Health Care, an autonomous social service of legal entity of private non-profit law, with the prerogative of hiring public and private entities (Brasil, 2019) that will pass to play a central role in the provision of primary health care services.

The constitutions and the new role of the Judiciary

The second characteristic of the NLC is related to the expansion of the role of the Judiciary, which has acquired important prerogatives in relation to other powers, particularly the Executive (Avritzer, 2017). Latin American judges gained greater political armor due to the expansion of terms of office and changes in nomination and removal procedures (Ríos-Figueroa, 2011). Thus, the increase in the independence of the Judiciary presents itself as a movement related to political and legal systems that intend to consolidate democracy and equality through a high burden of individual, social and collective rights (Grijalva, 2017). Another important aspect related to the expansion of the role of the Judiciary in the NLC is the expansion of access to justice by citizens through the creation of various instruments for constitutional adjudication, such as support [amparo], relief [tutela], *habeas corpus*, *habeas data*, among others. (Ríos-Figueroa, 2011). Access to justice also involves observance of due legal process and the accountability of each state entity with regard to the length of court proceedings and transparency, conditions that, according to Pautassi (2018), are directly related to access to health services.

In Brazil, CF/88 provided the Judiciary with a high level of independence, both for its broad constitutional guarantees and for the enshrining

of an effective accountability capacity of other powers. The independence of the judges was further strengthened by the guarantee of a lifetime mandate, high and irreducible salaries and protection against interferences in their budget, careers and selection processes (Santiso, 2004). Public civil action was also instituted, promoting judicial protection in matters of environmental, consumer and occupational safety and the right to health in some cases (Courtis, 2006).

In the Colombian case, a relevant advance refers to the creation of relief lawsuits, a fast, low-cost judicial procedure that can be proposed by any individual to any judge, without the need for a lawyer or proof of interest in the demand (Gargarella, 2013; Landau; López-Murcia, 2009; Pisarello, 2014; Uprimny, 2006). The 1991 constitution also created the Constitutional Court, which has become one of the strongest in the world (Landau; López-Murcia, 2009) and whose main function is to protect the fundamental rights, supremacy and integrity of the constitution, from the concentrated control of constitutionality (Iturralde, 2013). The role assumed by the Court is also due to political-structural factors, such as the crisis of representation in the country, the weakness of social movements, opposition parties and the role of the Legislative, associated with the concentration of power in the Executive, in a movement of rebalancing among powers (Landau; López-Murcia, 2009; Uprimny, 2004, 2006; Uprimny; García-Villegas, 2002).

It is worth emphasizing the new understanding of judicial precedent, which became legally binding, and the Court's decisions overlap with regulations promulgated by the National Congress (Iturralde, 2013). The Colombian Court is still limiting the illegalities committed by the Executive, as in cases of abuse of emergency powers by the President⁶ or in the replacement of the Legislative power at various times, encouraging and supervising the application of policies (Avritzer, 2017; Landau; López-Murcia, 2009; Uprimny, 2004, 2006). For this purpose, the Court relies to a large extent on the doctrine of the "Unconstitutional State of Things,"

⁶ The declaration of state of exception (state of emergency prior to the 1991 Constitution) was a traditional measure in Colombia, which remained in that state from 1949 to 1991 (Uprimny, 2004).

whose action covers all citizens who are exposed to a condition considered as unconstitutional (Landau; López-Murcia, 2009)⁷.

In Brazil, on the other hand, the constitutionality control is mixed, combining the diffuse control, carried out by all the judges in specific cases, and the concentrated/abstract control, exercised by the Brazilian Supreme Court (STF), improved by the expansion of the direct action for the declaration of unconstitutionality for several state actors and civil society entities. The STF assumed centrality in the function of keeping and standardizing the interpretation of the Constitution and judicial review in constitutional matters, with binding force of its decisions, in the context of Extraordinary Appeal (Avritzer, 2017; Avritzer; Marona, 2014). However, there is a resistance to the binding aspect of previous decisions, as each judge feels free to interpret the law, even in similar situations (Hoffmann; Bentes, 2008). At the same time, there is the challenge of dealing with economic, political and media interests, which may influence the decisions of judges (Grijalva, 2017). In the Brazilian case, there are contradictions in the relationship between independence and accountability of the Judiciary itself, since there are no means of vertical control of its performance, becoming a “power above the country and the laws” (Santiso, 2004, p. 126).

The expansion of popular participation in Brazil and Colombia

The expansion of popular participation is the main advance of the NLC, since it means the rescue of the relationship between popular sovereignty and the government. The key points of these participation mechanisms are legitimacy and control over constituted power, without replacing representative democracy (Pastor; Dalmau, 2010). In Brazil, participation in the formulation and decision-making processes of

public policies has been expanded in several parts of CF/88, from the first article (which deals with popular sovereignty) to articles dealing with social rights and the organization of powers by means of plebiscite, referendum, popular initiative and generation of deliberative spaces, such as public policy councils (Avritzer, 2017; Avritzer; Marona, 2014; Brasil, 1988). In addition to representative democracy, accomplished by universal suffrage, the Brazilian political regime incorporates citizen participation through presence and contribution in decision-making spaces and also through social control in the implementation of public policies. In health, there are mandatory spaces for participation and social control in the three management levels, such as conferences and health councils, involving equal representation between community, government agencies and entities. There are also ombudsmen, which promote individual participation and complement collective structures (Campos; Salgado, 2018).

The Constitution of Colombia presents the country as a participatory republic in its first article and brings, in addition to the instruments of representative democracy, participatory democracy, which includes plebiscites, referendums, initiatives and public consultations, in addition to two mechanisms that do not exist in Brazil⁸ the revocation of mandate (political recall) and the open council. The first involves a popular vote to revoke the term of mayors or governors, while the second presupposes a public meeting in which the population can participate directly to discuss matters of interest to the community (Nárdiz, 2016). Regarding the health system, participation aims to exercise organizational and quality control of services, which can be individual or collective, community or institutional (Delgado-Gallego; Vázquez-Navarrete, 2006).

Full popular participation in the two countries, however, faces challenges related to the lack

7 The Unconstitutional State of Things is widely used in cases involving prisoners or people affected and displaced by armed conflicts (Landau; López-Murcia, 2009).

8 Since 2015, the Proposal of Amendment 21/2015 to CF/88, which creates the right of revocation and the popular veto has been pending in the Brazilian Senate.

of adequate and timely information, apathy and political demotivation on the part of the population, in addition to asymmetries in the representation processes caused by socioeconomic inequalities (Campos; Salgado, 2018; Delgado-Gallego; Vázquez-Navarrete, 2006). In Colombia, participation is considered to be far from ideal, because of purchase of votes, political influence of economic actors and hyperpresidentialism (Nárdiz, 2016), challenges that are also observed in the Brazilian reality. As for the right to health in Brazil, there is still control of councils by managers, which goes against the legal provision that such collegiate bodies should be hierarchically superior to them (Campos; Salgado, 2018); and in Colombia there is fear of retaliations and loss of access to services (Delgado-Gallego; Vázquez-Navarrete, 2006).

The new Latin American constitutionalism and the judicialization of health in Brazil and Colombia

We discussed the dimensions of the NLC in the previous sections, in view of its different theoretical currents. There is a consensus around the main characteristics of the new constitutions in the region, such as the increase in forms of democratic participation and the insertion and recognition of a range of fundamental and social rights, including the right to health. The strengthening of the Judiciary power stands out from the expansion of its prerogatives of action and the ways of access to justice, but with the maintenance of hyperpresidentialism and the vertical concentration of power.

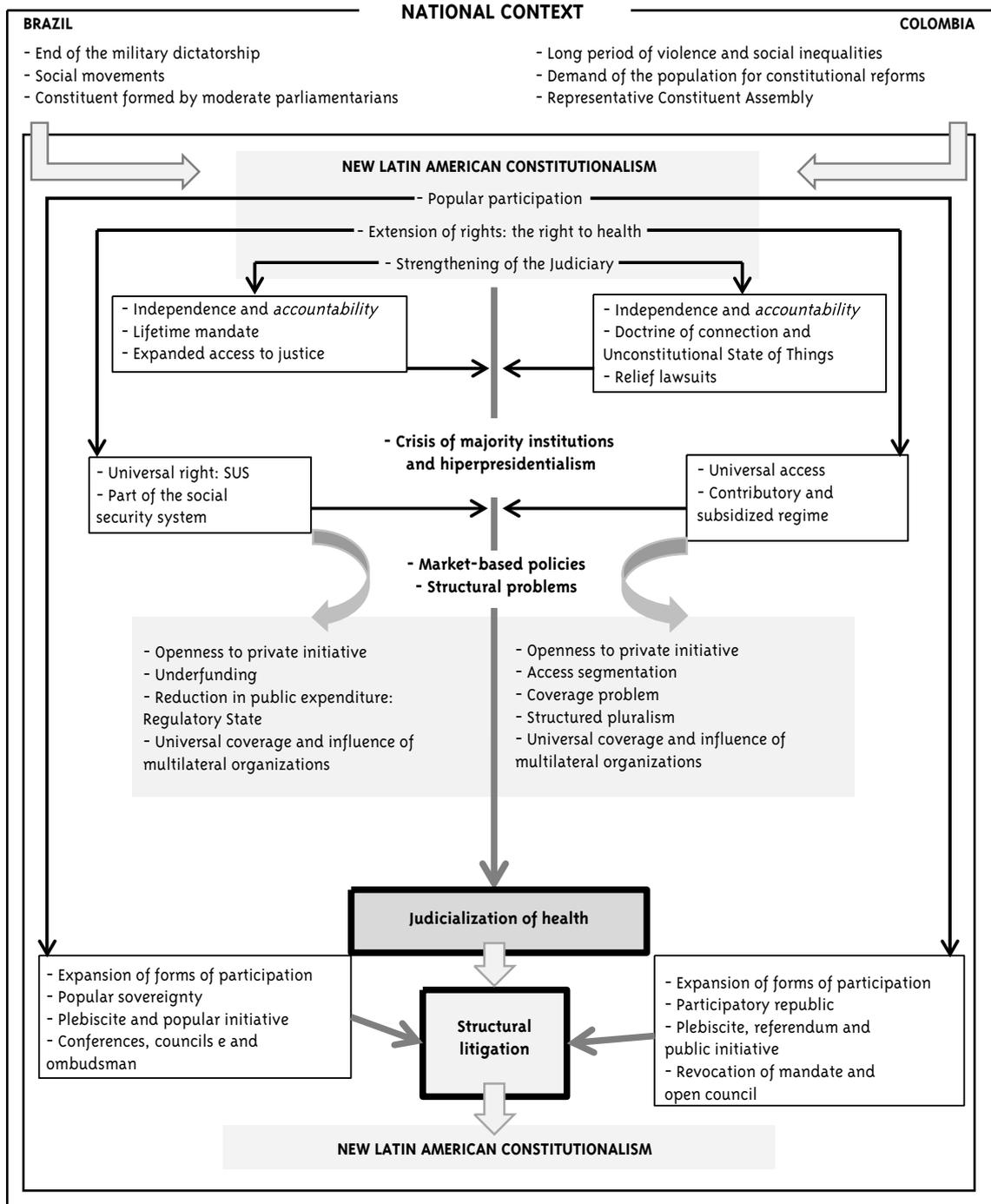
On the other hand, the same constitutions that bring a broad charter of rights have failed to face the pressures of market-oriented economic policies (Gargarella, 2013; Pisarello, 2014), undergoing amendments aimed at transferring resources and skills to the private sector, state reduction, privatization, among others, which weakened and made social policies unfeasible and the enforcement of guaranteed rights (Grijalva, 2017).

In Colombia, there was a softening of the political coalition responsible for the progressive character of the 1991 charter, associated with the economic policies implemented by the Gaviria government (1990-1994) and the change in the Constitution carried out by President Pastrana (1998-2002) in order to protect foreign investments (Pisarello, 2012, 2014; Uprimny, 2006). In Brazil, in addition to the 1993 constitutional review, the government of Fernando Henrique Cardoso (1995-2003) submitted 35 proposals for constitutional amendments to facilitate privatizations (Pisarello, 2012, 2014).

Thus, in view of the contradictory relationship present in the new constitutional texts and the prioritized policies in Brazil and Colombia, we propose a debate on such variables in the discussion of the judicialization of health in both countries (Figure 1). In other words, the right to health, which could be realized by effective policies, is relegated to the background with the prioritization of austerity and market-oriented economic policies, in parallel to the strengthening of the private initiative in healthcare, in addition to other challenges presented by both health systems. In this context, the protagonism of the Judiciary emerges, strengthened by the new constitutions, as the state power capable of realizing a predicted, but marginalized right. This scenario describes the fundamental conditions to explain the accelerated increase in lawsuits involving the provision of health services in Brazil and Colombia: the recognition of the right to health, the non-realization of that right and the strengthening and receptiveness of the Judiciary to protect it.

Respect for the constitutional text also imposes interpretative guidelines for constitutional rights and principles on ordinary justice (Grijalva, 2017). Gargarella (2006) argues that in deliberative democracies, judges should not remain passive with non-compliance with social rights. For the author, the involvement of the Judiciary enriches the democratic debate, since it occupies the strategic function of receiving the demands of those marginalized or affected by the decisions of other powers.

Figure 1 – Explanatory scheme for the discussion of the judicialization of health based on the foundations of the new Latin American constitutionalism



In order to dimension this phenomenon, we cite recent data that reveal the reality of the countries. In 2018, health lawsuits in Colombia

accounted for 34.21% (n = 207,734) of total reliefs, which meant a figure of 41.68 lawsuits per 10,000 inhabitants (Colombia, 2019). In the case of

Brazil, CNJ data reveal an increase in the volume of lawsuits in recent years, with an increase of 25.32% from 2018 to 2019⁹ (n = 2,228,531)¹⁰, at a rate of 106.39 health suits per 10 thousand inhabitants¹¹ (Schulze, 2019).

Regarding the types of requests, in Colombia (2019) the most frequent ones were for treatments (24.93%), which is different from Brazil, where the main demand was for medicines in SUS, accounting for 24.43% (Schulze, 2019). As for defendants, HPE were the most demanded entities in Colombia (85.41%), and the majority of the lawsuits referred to benefits included in the system by the Health Benefits Plan. The subsidized regime had a higher volume of lawsuits (49.45%), which raises the hypothesis that HPE may be prioritizing the service of members affiliated to the contributory regime (Colombia, 2019). In Brazil, in a study commissioned by the CNJ with a sample of 164,587 lawsuits, we observed greater litigation in supplementary health, especially in the first instance. In addition, states with high coverage of private health plans were the ones that presented the largest number of lawsuits (Azevedo; Aith, 2019).

Regarding the performance of the supreme courts, the Colombian Constitutional Court has been using reliefs to protect social rights, including the right to health. Despite the 1991 Constitution restricting the use of relief lawsuit for civil and political rights, the Court started to use the connection doctrine to protect social rights indirectly. It means that, for a social right to be safeguarded by the Judiciary, its non-application must imply a violation of a fundamental right directly applicable, such as the right to life, physical integrity or human dignity (Uprimny, 2006). In 2008, the Court issued judgment T-760, which sought to correct structural flaws in the Colombian health system

based on accumulated individual relief lawsuits. Among the orders issued are the unification of the benefit plans among regimes, the guarantee of adequate financing, the monitoring by users and the accountability, by the government, on the results obtained (Cano, 2015). From then on, the Court's jurisprudence culminated with the publication of the Statutory Law on the Right to Health (Law 1,751/2015), in which this right was enshrined as fundamental, therefore liable to be demanded directly by the relief (Colombia, 2019).

In Brazil, the STF initiated a movement to ensure greater legitimacy to its performance by calling public hearings, such as the one held in 2009, related to health actions and services. Based on the issues discussed, the Court judged a case involving the right to health in the state of Pernambuco¹², whose results have been influencing further judgments in the matter. Among the arguments of the magistrates is the view that the Court cannot exempt itself from the non-realization of the right to health by the competent bodies, and that acting in this sense it is fulfilling its mission and honoring the Constitution (Maggio; Dallari, 2017). Maggio and Dallari (2017, p. 74) emphasize that, although certain analyzes consider that the judgment went beyond the content of the case, there was "constitutional-sanitary strengthening of the right to health" as well as changes in the performance of the Executive and Legislative.

Gloppen (2006) and Uprimny (2006) emphasize that an active role of courts in the field of social rights raises a series of dilemmas and criticisms, such as the affront to the separation of powers; the technical incapacity of the judges and their illegitimacy to override the decisions of the other elected powers, representatives of the citizens; interference with resource allocation; and the emptying of social movements, which would shift

9 Annual percentage increase calculated from the data presented by Schulze (2019).

10 According to Schulze (2019), two new categories of research were added: provision of medication (health plans) and supplementary health tax.

11 Calculation of the volume of lawsuits per 10,000 inhabitants based on Schulze (2019) and demographic data provided by Comisión Económica para América Latina y el Caribe (Cepal) at <<https://bit.ly/2YApjNA>>.

12 Public civil lawsuit aimed at taking administrative measures by the municipality of Petrolina to improve the service to SUS users, by Hospital Dom Malan (Maggio; Dallari, 2017).

their demands to the Judiciary. However, Gloppen (2006) also affirms that although the strengthening of rights by the courts is potentially costly, both in economic terms and in terms of democratic space, the need to prioritize the most vital issues is reinforced.

Uprimny (2006), when focusing on the right to health, highlights that on the one hand, if judicial intervention damages the equity of care, policy coherence and the financial sustainability of the system, on the other hand, it represents for the plaintiffs the satisfaction of their basic needs and the improvement of their quality of life. This analysis does not exhaust the debate about the judicialization of health from the perspective of the role assumed by the Judiciary from the new constitutions of Brazil and Colombia. There are discussions on the emancipatory and transformative potential of judicial decisions, which are based on the idea that the progressive power of decisions lies in the realization of the hope deposited in constitutional texts, making social actors find a catalyst for political mobilization (Uprimny, 2006; Uprimny; García-Villegas, 2002).

The potential for social transformation of the Judiciary's performance in the judicialization of social rights is related to several variables, such as the capacity of judges to give legal effect to the rights demanded and the observance of decisions by the authorities, and the availability of legal aid and barriers to access to information, among others (Gloppen, 2006). In this area, access to justice and the correction of health inequalities are of great importance, given that several are the questions about the real transforming role of judicialization. As evidenced in the CNJ study, the profile of the analyzed judicial demands seems to corroborate the hypothesis that there are asymmetries in the conditions of access, in addition to possible effects of regressiveness in relation to the distribution of health system resources (Azevedo; Aith, 2019). Similar results were found in Colombia (2019), where the most developed regions had a higher volume of lawsuits, probably due to the ease of access to justice, the offer of high-tech health services,

the population density and the cultural level of such localities.

The debate around the impacts and capacity of judicial decisions producing effective social changes has been concentrated in the defense of structural litigation, a model of judicialization that goes beyond individual jurisdiction, restricted to the specific case, but has the potential to give effect to the results of the lawsuit through structural changes. When analyzing the Colombian case, Cano (2015) points out that the structural litigation is considered successful when the sentence, in addition to benefiting the claimants, promotes structural changes (normative or public policies) that affect a large number of people, especially the most vulnerable, with a view to correcting inequalities, in addition to providing spaces for deliberation and motivating social mobilization around the theme. Furthermore, in order to guarantee the success of the judicialization, the decision must fall on the implementation of existing policies and not create new ones; and also, the implementation of the policy must be monitored by social organizations. In this perspective, when delivering judgment T-760/2008, the performance of the Colombian Constitutional Court can only be considered partially successful, since it failed to promote citizen participation (Cano, 2015).

As for the Brazilian case, Lima (2015) classifies structural litigation as a type of collective litigation that affects different groups of people in different ways, with different interests in relation to the object of the process. Such litigation involves changes in the functioning of complex state institutions, such as health systems, and presupposes that all interests are represented in a legitimate and pluralized way, from obtaining information for the proper understanding of the problem, alternatives, opportunities and solutions, to consultation with each legitimate collective about their concerns and aspirations. The author also stresses that as long as the procedural participation of the involved groups has not been achieved, structural changes will not be possible. In addition, because important aspects only become evident when the sentence is implemented, the

legitimacy and social acceptance of the decision may interfere with its effectiveness (Lima, 2015).

Therefore, participation is the central issue of structural litigation, both in Colombian and Brazilian cases, which represent the rescue of the principles of the NLC as grounds for rethinking the judicialization of health in both countries, with a view to full realization of the right to health (Figure 1). Colombia is ahead of Brazil in the search for structural solutions, in view of the Constitutional Court's lawsuit to give collective effects to relief lawsuits. The Brazilian Judiciary, on the other hand, is considered to be more resistant to collective lawsuits (Hoffmann; Bentes, 2008), although this has been changing in recent years (Azevedo; Aith, 2019; Lima, 2015).

We highlight that the judicialization of politics in Brazil is recognized as important to support rights and rationalize public administration, as part of the democratic game and the locus favorable to the exercise of citizenship (Vianna et al., 1999). However, social change and structural reforms will only be successful if judicialization goes beyond specific court orders and involves all people impacted by decisions, and not just the plaintiff, the judge and the defendant (Lima, 2015).

Final considerations

Judicialization, according to the NLC perspective, is part of the movement to guarantee the right to health, associated with greater strength and autonomy for the Judiciary to protect this right which, in the context of the region, has been threatened by structural issues and unfavorable economic policies. Although judicialization is a relevant phenomenon both in Colombia and Brazil, the information presented reveal that in the latter country reality is even more worrying, highlighting the need to replace the litigation model for a more just one, which affects the population in a collective way and promotes structural transformations in the population. It is not the matter of denying individual lawsuit as a legitimate mechanism, as it is a right of every citizen. However, it also highlights issues that need to be discussed and prioritized, taking new paths so that judicialization

can really be used in a way that the right to health becomes effective.

In parallel we highlight the importance of discussing the role of the Judiciary in this process, as it is fundamental to the protection of the right to health. However it has also contributed to sustaining individual and private interests, for not focusing on structuring issues, as it interferes uncritically in health budgets and yield major pressures of power. Social participation is the basic principle, representing the democratic axis of the NLC and the permanent struggle of the peoples of the region.

We envisage a research agenda to deepen the findings of this study, in view of the changes imposed on the Brazilian health system that has been approaching the Colombian model. However, despite the convergences brought by the NLC, from the perspective of judicialization the Colombian legal system is more advanced than the Brazilian legal system regarding the enhancement of structural and emancipatory effects.

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