

THE EVOLUTION OF HEALTH JUDICIALIZATION IN BRAZIL: FROM ATOMIZED LITIGATION TO BINDING PRECEDENTS

A EVOLUÇÃO DA JUDICIALIZAÇÃO DA SAÚDE NO BRASIL: DOS LITÍGIOS ATOMIZADOS AOS PRECEDENTES VINCULANTES

LA EVOLUCIÓN DE LA JUDICIALIZACIÓN DE LA SALUD EN BRASIL: DE LOS LITIGIOS ATOMIZADOS A LOS PRECEDENTES VINCULANTES



<https://doi.org/10.56238/sevened2026.009-070>

Aline Cristina de Oliveira Amaral Barbosa¹, Tereza Cristina Sorice Baracho Thibau²

ABSTRACT

This article analyzes the evolution of the judicialization of the fundamental right to health in Brazil, highlighting the paradigm shift from an atomized litigation model to a rationalization structured by binding precedents. Initially, the study examines the institutional expansion of the Judiciary and its intervention in public policies as a response to state inertia. Subsequently, it investigates judicial activism regarding healthcare, analyzing the case law of the Superior Courts, with an emphasis on the integration between STJ Theme 106 and STF Themes 6, 793, and 1.234. It demonstrates that this new legal framework, by redefining competencies and centralizing the funding of medications not included in official lists, imposes evidence-based medicine criteria and administrative deference, consolidating budgetary pragmatism in health management. The article concludes that this arrangement aims to ensure the sustainability of the Unified Health System (SUS) and the Brazilian federal order, promoting a hermeneutic reconfiguration of the “existential minimum” within the boundaries of the “reserve of the possible”.

Keywords: Judicialization of Health. Expansion of Judicial Power. Provision of Medicine. Binding Precedents.

RESUMO

O presente artigo analisa como se deu a evolução da judicialização do direito fundamental à saúde no Brasil, evidenciando a transição paradigmática de um modelo litigioso atomizado para uma racionalização estruturada por precedentes vinculantes. Inicialmente, examina-se a expansão institucional do Poder Judiciário e sua intervenção em políticas públicas como resposta à inércia estatal. Em seguida, investiga-se quanto ao ativismo judicial em matéria de saúde, analisando a jurisprudência dos Tribunais Superiores, com ênfase na integração entre o Tema 106 do STJ e os Temas 6, 793 e 1.234 do STF. Buscou-se demonstrar que, essa nova dogmática, ao redefinir competências e centralizar o custeio de medicamentos

¹ Master's Student in Law. Universidade Federal de Minas Gerais (UFMG).

E-mail: alineamaral.barbosa@gmail.com Orcid: <https://orcid.org/0009-0007-5074-324X>

Lattes: <http://lattes.cnpq.br/6184460518756647>

² Dr. in Law. Universidade Federal de Minas Gerais (UFMG). E-mail: tthibau@gmail.com

Orcid: <https://orcid.org/0000-0002-2883-2584> Lattes: <http://lattes.cnpq.br/6998162043069456>

não incorporados, impõe filtros de medicina baseada em evidências e deferências administrativas, consolidando o pragmatismo orçamentário na gestão sanitária. Conclui-se que tal arranjo visa assegurar a sustentabilidade do Sistema Único de Saúde e a ordem federativa brasileira, promovendo uma reconfiguração hermenêutica do denominado mínimo existencial sob as balizas da reserva do possível.

Palavras-chave: Judicialização da Saúde. Expansão do Poder Judicial. Fornecimento de Medicamentos. Precedentes Vinculantes.

RESUMEN

El presente artículo analiza la evolución de la judicialización del derecho fundamental a la salud en Brasil, evidenciando la transición paradigmática de un modelo de litigiosidad atomizada hacia una racionalización estructurada por precedentes vinculantes. Inicialmente, se examina la expansión institucional del Poder Judicial y su intervención en políticas públicas como respuesta a la inercia estatal. A continuación, se investiga el activismo judicial en materia de salud, analizando la jurisprudencia de los Tribunales Superiores, con énfasis en la integración entre el Tema 106 del STJ y los Temas 6, 793 y 1.234 del STF. Se buscó demostrar que esta nueva dogmática, al redefinir competencias y centralizar el financiamiento de medicamentos no incorporados, impone filtros de medicina basada en la evidencia y deferencia administrativa, consolidando el pragmatismo presupuestario en la gestión sanitaria. Se concluye que dicho arreglo busca asegurar la sostenibilidad del Sistema Único de Salud y el orden federativo brasileño, promoviendo una reconfiguración hermenéutica del denominado “mínimo existencial/vital” bajo los límites de la “reserva de lo posible”.

Palabras clave: Judicialización de la Salud. Expansión del Poder Judicial. Suministro de Medicamentos. Precedentes Vinculantes.

1 INTRODUCTION

The Constitution of the Federative Republic of Brazil of 1988 (CRFB/1988) provides in its article 196 that "health is a right of all and a duty of the State", ³and "universal and equal access to actions and services for its promotion, protection and recovery" of health must be guaranteed⁴. However, given the ineffectiveness of its implementation, public health is one of the most judicialized areas in Brazil. The social and economic differences of the Brazilian population are aggravated by the inherent complexity of the public health system itself, making it significantly difficult to guarantee access to health for all, especially the most economically vulnerable.

The search for medicines, especially those of high cost or not included in the dispensation lists of the Unified Health System (SUS), has generated vast legal discussion, forcing the formation of numerous jurisprudences, culminating in the establishment of binding precedents by the Federal Supreme Court (STF). In this scenario, the judicialization of issues related to the right to health emerges as a crucial mechanism to ensure access to essential and high-cost treatments and medicines. The judicialization of this matter, not infrequently, generates judicial decisions that have recognized the imperative need for certain drugs and therapies, ensuring that patients in critical conditions have access to the indispensable resources for the maintenance of their health and life.

The success in obtaining high-cost drugs through the courts led to the filing of thousands of lawsuits throughout the country and, in view of the lack of objective parameters to define when and to whom a certain drug should or should not be granted, different parameters were adopted in different corners of Brazil. Therefore, the need arose for greater uniformity of jurisprudence regarding the different understandings adopted by Brazilian courts in relation to the granting or not of certain medicines. In view of this fact, both the Federal Supreme Court and the Superior Court of Justice have created several precedents in order to provide a more agile solution to the demands in this area, however, without achieving the expected effectiveness.

Intensified from the 1990s onwards, the judicialization of health in Brazil began to be recognized by the Superior Courts as a public health problem of national repercussion, which exposes the failures in the provision of universal and comprehensive services. In view of this scenario, the evolution of judicial control has sought, through recommendations of the National Council of Justice, the incorporation of scientific evidence and the strengthening of

³ BRAZIL. [Constitution (1988)]. **Constitution of the Federative Republic of Brazil of 1988**. Brasília, DF: Presidency of the Republic, 1988. Available at: https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed on: June 15, 2024.

⁴ Ibid., art. 196.

institutional dialogues to mitigate the conflict between individual demands and the sustainability of the collective protocols of the SUS. This trend reflects the need to overcome dysfunctional judicial models in favor of decisions that guarantee legal certainty and the efficient allocation of public resources.⁵

In this regard, it is noted that the Judiciary has played a leading role in the implementation of public health policies, especially regarding the mandatory supply of high-cost medicines by the State. This phenomenon, from a social perspective, reflects the role of the Judiciary in filling gaps and ensuring the observance of fundamental rights to health in the face of the limitations and structural inequalities existing in the public health system, demonstrating, at the same time, the need to seek more effective solutions. On the other hand, it cannot be forgotten that such decisions significantly affect the public budget, preventing the public administrator from allocating limited resources to the projects initially planned, a circumstance that has been causing asymmetries between the different constitutional functions of each of the three Branches of the State.

It is undeniable to admit that magistrates do not derive their authority from popular choice and do not submit to mechanisms of political accountability to the electorate. Thus, the Judiciary, by acting due to the absence or interference of the Public Administration in the area of public health, ends up generating dysfunctions in the classic model of separation of powers, designed to ensure that the will of the people is manifested through the norms elaborated and sanctioned by the representatives elected by them. It is then observed that the absence of direct legitimacy of the members of the Judiciary constituted one of the central elements to understand the tensions produced by the judicialization of public health policies.

In addition, the exponential increase in lawsuits in the health area overloads the judicial system, generates delays in the processing of cases, and hinders the speed in the resolution of other cases. In turn, the multiplicity of judicial decisions in the health area, often divergent, generates legal uncertainty and hinders the implementation of more consistent and uniform public policies.

The tension generated by this dynamic challenges the stability of the constitutional arrangement, established to guarantee harmony and independence between the Branches. By centralizing public policy decisions, the Judiciary can end up disregarding the institutional and budgetary capacities of the Legislative and Executive branches, creating distortions in governance.

⁵ SANTOS, José Luiz Gondim dos et al. Judicialization of health care in the Western Amazon: collective decisions of the jurisdictional court of justice in the State of Acre, Brazil. *Journal of Human Growth and Development*, [S. l.], v. 32, n. 1, p. 30-42, 2022. DOI: <https://doi.org/10.36311/jhgd.v32.12615>. Available at: <http://www.jhgd.com.br>. Accessed on: 24 May 2024.

The scenario thus requires a rereading of precedents in light of the practical consequences of judicialization, redefining the limits of judicial protection to avoid the collapse of state harmony.

2 METHODOLOGY

This article adopts the hypothetical-deductive approach method, adopting the premise that the model of atomized litigation in health is unsustainable, and then demonstrates, through the analysis of judgments and doctrine, the hypothesis that the rationality of binding precedents constitutes an institutional response to the growing judicialization of the right to health, aiming at the sustainability of the Unified Health System. The research has a qualitative nature and an exploratory-descriptive purpose, seeking to understand the reconfiguration of the legal dogmatics of the right to health in Brazil.

As for the technical procedures, bibliographic and documentary research were used. The bibliographic survey covered the contemporary constitutional and procedural doctrine, with emphasis on theories on judicialization of politics, judicial activism and management of health systems. Monographic works, scientific articles and specialized journals were consulted in national and international legal databases.

The documentary research focused on the analysis of the binding jurisprudence of the Superior Courts. The time and thematic focus favored the *leading cases* that transformed the model of protection of the right to health, specifically STA 175, a jurisprudential framework, Topic 106 of the Superior Court of Justice (STJ) and Topics 6, 793 and 1,234 of the Federal Supreme Court (STF). The analysis of these paradigms sought to identify the *ratio decidendi* and the established theses, correlating them with the current Brazilian context. The interpretation of the data was carried out in the light of constitutional hermeneutics, observing the tension between the existential minimum and the reserve of the possible.

3 JUDICIALIZATION OF POLITICS AND THE EXPANSION OF THE JUDICIARY

In Brazil, the judicialization of public health policies is driven by the marked discrepancy between the constitutional text, which guarantees health as a universal right of immediate applicability, and the operational and financial reality of the SUS, often marked by underfunding and mismanagement⁶. The judicialization of politics and the consequent

⁶ ESPÍNDULA, Nathalia Letícia Souza Oliveira; LIMA, Bruno Soares de; SOUZA, Norma Valéria Dantas de Oliveira; PERES, Patrícia Lima Pereira; CARVALHO, Eloá Carneiro. Reflection on the judicialization of health in chronic non-progressive encephalopathy. *Bioethics Journal*, Brasília, v. 32, 2024, p. 1-9. Print version ISSN 1983-8042 | On-line version ISSN 1983-8034. p. 1-3. Available at: <http://dx.doi.org/10.1590/1983-80342.024>.

expansion of the judiciary are topics discussed in the legal and political literature in several countries. These concepts refer to the increase in the influence of courts and judges on traditionally political and legislative issues, that is, that belong to the typical sphere of deliberation of the Legislative and Executive Branches, such as the implementation of public health policies.

Judicial intervention is not restricted to isolated cases, but covers the entire structure of the system, from administrative acts and bidding processes to the provision of highly complex procedures. This phenomenon, called "judicialization of politics", is seen on the one hand as a tool for strengthening democracy and citizenship, but, on the other hand, it raises debates about equity, since it can privilege groups with greater capacity for judicial claims to the detriment of the collective planning of the public system⁷.

José Eisenberg explains the expansion of the judiciary from two distinct but interrelated perspectives: (i) judicialization: refers to the transfer of decision-making power from the Executive and Legislative Branches to the Justice system, in which judges and courts assume the prerogative to legislate and execute laws, that is, judicialization makes the Judiciary more political; (ii) courtization: this is a movement opposite to judicialization; in courtization there is dissemination and adoption of methods and procedures of decision-making typical of the Judiciary by the other powers, that is, the policy itself is influenced by the rules and logics of the court.⁸

The phenomenon of judicialization is seen by the doctrine in different ways. In analyzing the conduct of the members of the Federal Supreme Court (STF), Oscar Vilhena Vieira argues that the politicization of its jurisdiction was accentuated with the CRFB/1988, highlighting, on the other hand, that the constituent legislator significantly expanded the legitimacy for the filing of actions for direct control of constitutionality, as established in article 103 of the constitutional rule, expanding the list provided for in the previous rule, which legitimized only the Attorney General of the Republic. The author points out that this change contributed to new political and social actors transforming the STF into an instance of review of the majority decisions issued by the legislature, welcoming the demands of political groups that were defeated in the representative arena.⁹

For Rodrigo Albuquerque de Victor, the crisis of the Social Welfare State generated an omission of the political powers in the realization of social rights and this omission was

⁷ *Ibid.*, p. 1-9.

⁸ EISENBERG, José. Pragmatism, reflexive law and judicialization of politics. In: VIANNA, Luiz Werneck (Org.) **Democracy and the three powers in Brazil**. Belo Horizonte; Rio de Janeiro: UFMG; IUPERJ/FAPERJ. 2002, p. 47.

⁹ VIEIRA, Oscar Vilhena. Supremacacy. **Revista Direito GV**, São Paulo, v. 4, n. 2, p. 441-464, jul./dez. 2008. Available at: <https://periodicos.fgv.br/revdireitogv/article/view/35159/33964>.

the fuel that transformed the Judiciary into the main actor to demand and control the implementation of these policies. In this sense, the author argues that,

[a]spite of the fact that it was in the modeling of the *Welfare State* that social rights gained space in the Constitutions, it was with their decline, in the 1970s, that the Judiciary gained strength. This is because according to the *welfare model*, the State, through government actions (Legislative and Executive Branches), takes upon itself the function of promoting the outdated catalog of social rights stamped in the Constitution. From the moment that the political powers assume and fulfill the commitment to materialize social demands, the place of the Judiciary becomes secondary. The liberal (or neoliberal) conception resurrected in the 70s, on the other hand, meant the distancing of the hand of the State, as well as the distancing between representatives and represented. The welfare state, committed to social benefits, gives way to free enterprise.¹⁰

It is extracted from the thought of the aforementioned author that the resurgence of the neoliberal conception led to the distancing of the State from social benefits and, as a result, there was a distancing between the population and its political representatives, an opportunity in which the Judiciary ascended, aiming to fill the gap left by the political representatives of the people.

Luiz Roberto Barroso, constitutionalist and retired Supreme Court Justice, points out the difference between the terms activism and judicialization, which are easily confused, both in the legal and political spheres. For the author, judicial activism "expresses a posture of the interpreter, a proactive and expansive way of interpreting the Constitution, enhancing the meaning and scope of its norms, to go beyond the ordinary legislator".¹¹

With regard to judicialization, he points out that "it does not result from the will of the Judiciary, but from the constituent".¹² The Supreme Court Justice understands judicialization as a multifaceted phenomenon that results from the growing participation of the Judiciary in issues that traditionally belonged to other spheres of power, highlighting three main causes for judicialization:

- (i) **Expanded access to the Judiciary and institutional strengthening:** Increased access to the Judiciary, coupled with the strengthening of judicial institutions, contributes significantly to judicialization. The growth in the number of lawyers, the expansion of free legal aid services, the greater awareness of rights by citizens, and the strengthening of institutions such as the Public Prosecutor's Office and the Public

¹⁰ VICTOR, Rodrigo Albuquerque de. **Judicialization of public policies for early childhood education: characteristics, limits and tools for legitimate judicial control.** São Paulo: Saraiva, 2011. p.19.

¹¹ BARROSO, Luís Roberto. Judicialization, judicial activism and democratic legitimacy. **Revista Atualidades Jurídicas**, Brasília, OAB, n. 4, 2009. p. 17. Available at: <https://www.oab.org.br/editora/revista/users/revista/1235066670174218181901.pdf>. Accessed on: June 23, 2024.

¹² *Ibid.*, p. 17.

Defender's Office facilitate access to justice. In addition, the Judiciary has been strengthened as an autonomous and independent institution, capable of deciding on a wide range of issues. This accessibility, combined with institutional robustness, encourages citizens to turn to the judicial system for dispute resolution and the protection of rights;¹³

- (ii) **Expansion of fundamental rights:** The incorporation of a wide range of fundamental rights into modern constitutions, such as the 1988 Constitution of the Federative Republic of Brazil (CRFB/1988), has broadened the scope of the Judiciary. This Constitution, known for its progressive and comprehensive character, establishes an extensive catalog of social, economic and cultural rights, consequently, many demands for rights turn into lawsuits when citizens or groups realize that these rights are not being properly guaranteed or implemented by the State. This expansion of rights, therefore, leads to an increase in judicial litigation, since the Judiciary is often called upon to intervene to ensure these rights, given the inalienability of jurisdiction;¹⁴
- (iii) **Insufficiency or inertia of the Legislative and Executive branches:** Judicialization is also driven by the ineffectiveness or omission of the Legislative and Executive branches. When these powers fail to legislate adequately or to implement effective public policies, there is room for judicial intervention. Barroso points out that, in many cases, the lack of action or the inadequate action of these powers forces citizens to seek a solution in the Judiciary to ensure the effectiveness of their rights. It should be noted that legal instruments were created capable of implementing the protection of these rights, with emphasis on the hybrid control of constitutionality existing in the national system. Therefore, the Judiciary assumes a leading role, often filling normative gaps or determining the implementation of public policies, which can include everything from the guarantee of health treatments to the protection of environmental rights.¹⁵

Therefore, it can be inferred from Barroso's lesson that the main difference between judicialization and judicial activism is that judicialization is a broader and more structural phenomenon, related to the increase in the influence of the judiciary on social and political issues. Judicial activism, on the other hand, is an interpretative approach that can occur

¹³*ibid.*, p. 24

¹⁴BARROSO, Luís Roberto. Judicialization, Judicial Activism and Democratic Legitimacy. (SYN)THESIS, Rio de Janeiro, v. 5, n. 1, p. 23–32, 2012. p.24. Available at: <https://www.e-publicacoes.uerj.br/synthesis/article/view/7433>. Accessed on: 5 jul. 2024.

¹⁵BARROSO, Luís Roberto. Judicialization, Judicial Activism and Democratic Legitimacy. (SYN)THESIS, Rio de Janeiro, v. 5, n. 1, p. 23–32, 2012. p.24. Available at: <https://www.e-publicacoes.uerj.br/synthesis/article/view/7433>. Accessed on: 5 jul. 2024.

within this phenomenon, where judges adopt a more "dynamic" and "creative" posture when interpreting legal norms, expanding the reach of these norms.

In the same sense, Werneck, Burgos and Salles define the idea of the judicialization of politics not as a simple judicial activism, but as a complex and permanent process resulting from profound transformations in Western societies since the second post-war period. The authors understand that legislators, aware of the loss of effectiveness of traditional mechanisms, encourage the opening of channels in the Judiciary to resolve conflicts that classical politics cannot solve, and the projection of the role of the judge in almost all aspects of social life is part of the contemporary scene of democratic culture. They see judicial action as a factor of rationalization and homogenization of normative production, especially to "correct" distortions in state legislation and ensure the prevalence of the Constitution.¹⁶

Barroso stresses that, despite the judicialization of politics, one should not attribute to the Ministers of the STF a deliberate intention to establish judicial hegemony, instead of the result of an ideological, philosophical or personal ambition choice of the Ministers, arguing that the Supreme Court is limited to strictly fulfilling its constitutional¹⁷ role. On the other hand, on another occasion, he warned Barroso that "the first drastic consequence of judicialization is the elitization of the debate and the exclusion of those who do not master the language or have access to the *loci* of legal discussion",¹⁸ also highlighting that such a transfer of political debate to the scope of the Judiciary, even if not desired, "brings an excessive dose of politicization of the courts, giving rise to passions in an environment that should be presided over by reason".¹⁹

Analyzing the limited effectiveness of social rights in comparison with individual rights, Virgílio Afonso da Silva stresses that the low effectiveness of social rights cannot be attributed only to the absence of "political will", emphasizing that the Judiciary cannot be seen as a substitute for this will. The author states that the emphasis given to "success stories" in the realization of social rights by the justice system is overestimated, because the implementation of social rights inherently requires political means and civil society engagement. Virgílio also warns that the division of tasks model (in which the government

¹⁶ VIANNA, Luiz Werneck; BURGOS, Marcelo Baumann; SALLES, Paula Martins. Seventeen years of judicialization of politics. **Tempo Social**: Revista de Sociologia da USP, São Paulo, v. 19, n. 2, 2007. p. 39-45.

¹⁷ BARROSO, Luís Roberto. Year of the STF: Judicialization, activism and democratic legitimacy. **Legal Consultant**, São Paulo, Dec. 22, 2008. Available at: https://www.conjur.com.br/2008-dez-22/judicializacao_ativismo_legitimidade_democratica/

¹⁸ BARROSO, Luís Roberto. Constitution, Democracy and Judicial Supremacy: Law and Politics in Contemporary Brazil. **Revista Jurídica da Presidência**, Brasília, v. 12, n. 96, Feb/May, 2010, p.14.

¹⁹ *Ibid.*

implements and judges control and correct) is not a point of balance, but rather a model that endorses judicial activism as the main way of protection.²⁰

Barbosa and Carvalho warn that, as a rule, members of the Judiciary do not have popular legitimacy nor do they submit to the political control of the electorate by their decisions, highlighting that "the magistrate does not suffer the same restrictions that the political public agent has in the management of public policies", this characteristic generates a distortion in the tripartite arrangement of the State, whose functioning presupposes that the popular will is manifested, mainly, through norms elaborated by the elected representatives²¹.

In addition, the aforementioned authors pointed out that when the definition of the content of the right moves from the Legislative to the Judiciary, there is a weakening of the former and a tension in the balance, compromising the system of checks and balances. In addition, they point out that legislators and magistrates act under different incentives, limitations, and rationalities with regard to the formulation of public policies, the implementation of rights, and the protection of fundamental rights, and there is no reason to suppose that judges have an ethics of correction intrinsically superior to that of elected representatives²².

Political scientist Ran Hirschl, a specialist in comparative law, argues that, in recent decades, the world has undergone a profound transformation in governance, marked by the judicialization of politics. According to the author, this phenomenon, which initially focused on issues of individual rights and civil liberties, evolved into what the author called "mega-politics": dilemmas of extreme political relevance that define the very identity and boundaries of a nation²³. Mega-politics encompasses sensitive and complex issues, ranging from the resolution of electoral disputes and the legitimization of regime change, to existential questions about collective identity and the relationship between religion and state.

It is important to highlight that, when analyzing the global expansion of judicial protagonism, Hirschl points out that the strengthening of the courts does not result from a

²⁰ SILVA, Virgílio Afonso da. **The Judiciary and public policies**: between social transformation and obstacles to the realization of social rights. in: Cláudio Pereira de Souza Neto & Daniel Sarmento, *Direitos sociais: fundamentação, judicialização e direitos sociais em espécies*, Rio de Janeiro: Lumen Juris, 2008: 587-599. p. 591 and 592.

²¹ BARBOSA, Leon Victor de Queiroz; CARVALHO, Ernani. **Judicial Activism**: between myth and veiled juristocracy. *Revista Política Hoje*, Pernambuco, v. 25, n.2, p.7-20, 2016. p.13-14. Available at: <https://periodicos.ufpe.br/magazines/politicohoje/article/view/8661/14658>. Accessed on: 08 Jun. 2025

²² BARBOSA, Leon Victor de Queiroz; CARVALHO, Ernani. **Judicial Activism**: between myth and veiled juristocracy. *Revista Política Hoje*, Pernambuco, v. 25, n.2, p.7-20, 2016. p.14-15. Available at: <https://periodicos.ufpe.br/magazines/politicohoje/article/view/8661/14658>. Accessed on: 08 Jun. 2025

²³ HIRSCHL, Ran. *The Judicialization of Mega-Politics and the Rise of Political Courts*. **Annual Review of Political Science**, [s. l.], v. 11, p. 93-118, 2008. Available at: <https://ssrn.com/abstract=1138008>. Accessed on: 21 Dec. 2025

movement of judicial resistance, but from a strategic maneuver by the political and economic elites. According to the author, in the face of the uncertainty of the electoral results, these groups choose to shield their preferences through the constitutionalization of rights and the empowerment of the Superior Courts. In this sense, juristocracy emerges as a mechanism for preserving hegemony, in which the Judiciary starts to act as a guarantor of the stability of policies that, in the majoritarian democratic game, would be subject to change.²⁴

It is noted that Hirschl proposes a realistic perspective of judicialization and politics, suggesting that this transfer of decision-making power from central political issues to the Judiciary often occurs with the support or initiative of political elites. By shifting the decision-making axis to the courts, political elites shield their interests against future legislative defeats and avoid the direct political cost of sensitive issues, using jurisdiction as a shield against electoral consequences, mitigating any wear and tear at the ballot box.

In this context, in which the judicialization of politics is consolidated as a structural characteristic of the Brazilian Democratic State, converting the Judiciary into a central arbiter of public resource allocations and mega-politics, the imperative need to rationalize jurisdictional activity emerges, otherwise activism will be transformed into chaotic voluntarism. It is understood that, if judicial intervention is also legitimized by the inertia of representative spheres in the realization of social rights, the pulverization of individual and discrepant decisions, especially in complex demands such as those related to the right to health, threatens the isonomy and sustainability of public policies.

Corroborating the urgency of containing this decisional dispersion, Daniel Amorim Assumpção Neves points out that the standardization of jurisprudence is an indispensable element of the Democratic Rule of Law, since the attribution of identical legal solutions to similar factual situations is a condition for the preservation of isonomy. The author points out that the stability of precedents not only guides social conduct, allowing those under jurisdiction to act in accordance with the law, but also promotes legal certainty, predictability and confidence in the system, discouraging unnecessary litigation.²⁵

And it is precisely with the intention of ordering the expansion of the judiciary and mitigating the risk of decision-making subjectivism that the Judiciary has institutionally used the formation of mandatory precedents as a mechanism of control and stabilization. In this scenario, the formation of these precedents occurs as a response to the inertia or omission of the Executive and Legislative Branches in providing basic services or formulating efficient

²⁴ Ibid. p. 39-45.

²⁵ NEVES, Daniel Amorim Assumpção. **Manual de direito procedual civil**. 9th ed. Salvador: Ed. Jus Podivm, 2017.

legal frameworks, transferring to the Judiciary the responsibility of ensuring access to health goods and services.²⁶

It is believed that this strategy not only standardizes the jurisdictional provision, but also redefines the very substance of constitutional guarantees, highlighting that, in contemporary times, the dogmatics and the realization of the right to health have been profoundly modified and restructured by the consolidation of several binding theses.

4 THE ROLE OF JUDICIAL PRECEDENTS IN DEFINING THE RIGHT TO HEALTH: THE OBLIGATION OF THE SUPPLY OF MEDICINES BY THE STATE

A judicial precedent is a decision rendered by a court in a specific case that sets a guideline for resolving similar issues in future cases. In general, a precedent is configured as a previous decision that guides the application of the law in subsequent cases with analogous facts and issues, serving as a parameter for uniformity and continuity in jurisprudence.²⁷

In the *Common Law* system, precedents are fundamental and considered the main source of law. Judicial decisions not only resolve concrete cases, but also establish general and binding rules for the solution of future cases. In *the Common Law*, any judicial decision can serve as a precedent with binding effect, helping to create and define legal norms.²⁸ Judicial decisions not only resolve concrete cases, but also create individualized legal norms. This is because by applying the law to a specific case, the judge establishes a standard that can be used to resolve similar cases in the future. Therefore, judicial decisions are seen as individual legal norms in the context of the legal system.²⁹

Alexandre Freitas Câmara points out that:

[...] In legal systems linked to the common law tradition, the judge in the next case is the one who says that a judicial decision is a precedent. Let us explain it better: when, in a legal system linked to the Anglo-Saxon tradition, a court judges a case, it does not know whether or not that decision will be considered a precedent in the future. It is only when a second case subsequently arises in the circumstances of which are

²⁶ ESPÍNDULA, Nathalia Letícia Souza Oliveira; LIMA, Bruno Soares de; SOUZA, Norma Valéria Dantas de Oliveira; PERES, Patrícia Lima Pereira; CARVALHO, Eloá Carneiro. Reflection on the judicialization of health in chronic non-progressive encephalopathy. *Bioethics Journal*, Brasília, v. 32, 2024, p. 1-9. Print version ISSN 1983-8042 | On-line version ISSN 1983-8034. p. 1-5. Available at: <http://dx.doi.org/10.1590/1983-80342024>

²⁷ BUENO, Cássio Scarpinella. *Manual de direito procedual civil*. 3rd Ed. São Paulo: Saraiva, 2017. p. 633.

²⁸ MELLO, Patrícia Perrone Campos; BARROSO, Luís Roberto. *Working with a new logic: the rise of precedents in Brazilian law*. p. 05. Available at: <https://www.conjur.com.br/dl/artigo-trabalhandologicaascensao.pdf>. Accessed on: 02 June 2024.

²⁹ DIDIER JÚNIOR, Fredie. BRAGA, Paula Sarno; OLIVEIRA, Rafael Alexandria. *Civil Procedural Law Course: theory of evidence. Evidentiary law, evidentiary actions, decision, precedent, res judicata and anticipation of the effects of the guardianship*. 11 ed. Salvador: Jus Podivm, 2016. p. 316-317.

analogous to those of the previous case that the court responsible for adjudicating on that second case will assert that that first decision is a precedent.³⁰

As Hermes Zaneti Jr. points out, until the enactment of the 2015 Code of Civil Procedure, although there were binding mechanisms, such as binding precedents, the dominant ideology treated precedents as mere instruments of persuasion, used to reinforce arguments, but not as binding norms in general. This cultural and normative view limited the impact of precedents, which were seen more as suggestions for guidance than as mandatory for future decisions.³¹

On the other hand, it has been noted in the Brazilian legal system, an approximation of the *common law* and *civil law systems*, especially from the CPC/15 which, in this vein, in its article 311 provides that: "caput: the protection of evidence will be granted, regardless of the demonstration of danger of damage or risk to the useful result of the proceeding, when [...] II- the allegations of fact can be proven only by documentary evidence and *there is a thesis established in a trial of repetitive cases or in a binding precedent*". As a consequence of this legal provision, it can be said that precedents and binding precedents have become part of the list of direct and immediate sources of Law in Brazil.³²

Further on, article 926 of the CPC/15 establishes a fundamental principle for the functioning of the Brazilian legal system: the uniformity of jurisprudence. This article determines that the courts must standardize their jurisprudence, as well as keep it stable, complete and coherent³³.

Such standardization enables: (i) legal certainty: the predictability of judicial decisions is essential to plan and make decisions with confidence; (ii) equality: the application of the law in a materially equal way for all is one of the guarantees of the Democratic Rule of Law and the uniformity of jurisprudence contributes to ensuring this equality; (iii) efficiency: the standardization of jurisprudence contributes to the speed in the resolution of claims, speeding up the judgment of widely discussed issues; (iv) legitimacy: when the courts act in a coherent and predictable manner, society's trust in the judicial system increases.³⁴

In turn, article 927 determines the observance, both by judges and by the courts,

³⁰ CÂMARA, Alexandre Freitas. **The new Brazilian civil procedure**. 2nd ed. São Paulo: Atlas, 2016.

³¹ ZANETI JR., Hermes. **The binding value of precedents**. Theory of formally binding normative precedents. 5. ed. São Paulo: JusPodivm, 2021. p. 404.

³² THIBAU, Tereza C.S. Baracho. *et* OLIVEIRA, Izabel Cristina de. **Valorization of judicial precedent in Brazilian law: the approximation of two legal systems**. *In*: Temas de direito público (coord. Raphael S. Rodrigues, Rodrigo A. Magalhães *et* Thiago Penido Martins. Belo Horizonte: Conhecimento Editora, 2021. p. 209 – 230.

³³ BRAZIL. Law No. 13,105, of March 16, 2015. **Code of Civil Procedure**. Brasília, DF: Presidency of the Republic, [2015]. Article 926. Available at: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm. Accessed on: 6 jan. 2026.

³⁴ *Ibid.*

I- the decisions rendered by the Federal Supreme Court in concentrated control of constitutionality; II- the statements of the binding precedents; III – the judgments handed down in an incident of assumption of jurisdiction or resolution of repetitive claims and in judgment of extraordinary and special repetitive appeals; IV – the statements of the precedents of the Federal Supreme Court in constitutional matters and of the Superior Court of Justice in infra-constitutional matters; V – the orientation of the plenary or the special body to which they are linked.³⁵

In this regard, the National Council of Justice (CNJ) issued Resolution No. 444 of February 25, 2022, establishing the National Bank of Precedents (BNP), expressly counting on article 2 of the aforementioned normative act, which is considered to be a precedent in the Brazilian legal system:

Article 2 For the purposes of this Resolution, the following are considered: I – Qualified precedents: the judicial pronouncements listed in items I to V of article 927 of the Code of Civil Procedure; and II – Precedents, in a broad sense: among others, requests for standardization of the interpretation of a law under the jurisdiction of the Superior Court of Justice (STJ), the statements of precedents of the Superior Military Court (STM), the Superior Electoral Court (TSE), the Superior Labor Court (TST), the Courts of Justice (TJs), the Federal Regional Courts (TRFs), the Military Courts of Justice (TJMs), of the Regional Electoral Courts (TREs), of the Regional Labor Courts (TRTs) and the representative requests of controversy of the National Panel for the Uniformization of the Federal Special Courts (TNU), as well as the normative precedents and jurisprudential guidelines of the Superior Labor Court.³⁶

The CNJ's resolutions have the *status* of primary normative act (competence according to article 103-B of the CRFB/1988), and are, therefore, of mandatory compliance, which demonstrates the concern with the uniformity of jurisprudence and the strengthening of the system of precedents adopted in the current Code of Civil Procedure. On the other hand, it can be seen that such provisions have also considerably strengthened the Judiciary, which, through qualified precedents, has transformed different areas of law, especially the right to health.

In the context of the right to health, the judicialization of pharmaceutical services is a topic of central relevance, being the subject of several qualified precedents. Within the scope of the Federal Supreme Court, Topics of General Repercussion 006, 500, 793 and 1,234 are

³⁵ BRAZIL. Law No. 13,105, of March 16, 2015. **Code of Civil Procedure**. Brasília, DF: Presidency of the Republic, [2015]. Article 927. Available at: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/113105.htm. Accessed on: 6 jan. 2026.

³⁶ NATIONAL COUNCIL OF JUSTICE. **Resolution No. 444 of 02/25/2022**. Establishes the National Bank of Precedents (BNP) for consultation and dissemination by bodies and the general public of judicial precedents, with emphasis on the judicial pronouncements listed in article 927 of the Code of Civil Procedure in all its procedural phases. Available at: <https://atos.cnj.jus.br/atos/detalhar/4415>. Accessed on: June 10, 2024.

more important, while in the Superior Court of Justice (STJ), the emphasis is on Repetitive Theme 106 (*Leading Case* REsp 1,657,156/RJ).

Widely used by the national courts, Repetitive Theme 106 was assessed on 05/03/2017, judged on 04/25/2018 and became final on 12/17/2022, however, the judgment was published in May 2018, remaining for years as the only precedent to set parameters for analysis regarding the granting of medicines not incorporated in SUS normative acts. By means of the aforementioned precedent, the Citizen Court established the following cumulative requirements:

- (i) Proof, by means of a substantiated and detailed medical report issued by the physician who assists the patient, of the indispensability or necessity of the medication, as well as the inefficacy, for the treatment of the disease, of the drugs provided by the SUS; (ii) financial inability to bear the cost of the prescribed drug; (iii) existence of registration with ANVISA of the drug.³⁷

It is observed that, notwithstanding the universality of the right to health, advocated by the Constitution of the Republic of 1988, the jurisprudence of the court consolidated the understanding that such guarantee is not absolute or unconditional. The establishment of these cumulative requirements by the STJ sought, essentially, to institute rationality filters to the system, harmonizing the existential minimum with the reservation of the possible. It is envisaged that, by requiring robust proof of the ineffectiveness of standardized treatments and the demonstration of hyposufficiency, it seeks to prevent the judicial route from becoming a shortcut to individual choices of high-cost treatments, to the detriment of collective public policies already structured by the State, under the terms proposed by the public manager.

The Topic of General Repercussion 500 (*Leading Case* RE 657.718/MG), of which the then Justice Marco Aurélio was drafted, was filed on 09/28/2011 and became final on 12/04/2020. The established thesis fostered discussions by establishing, as a general rule, the State's exemption from the obligation to provide medicines without registration with ANVISA. However, the Court has reserved exceptional situations in case there is an unreasonable delay by the agency (period longer than that provided for in Law No. 13,411/2016); as long as the drug is registered with renowned international agencies; has already applied for registration in Brazil and there are no therapeutic alternatives registered

³⁷ BRAZIL. Superior Court of Justice. **Special Appeal No. 1,657,156/RJ (Topic 106)**. Rel. Min. Benedito Gonçalves. Available at: https://processo.stj.jus.br/processo/revista/documento/mediado/componente=ATC&sequential=82869018&num_registro=201700256297&data=20180504&type=5&format=PDF. Accessed on 20 Dec. 2025.

with ANVISA.³⁸ In conjunction with these requirements, those previously established in the judgment of Topic 106 of the STJ were analyzed.

Another relevant aspect to be pointed out is that the established thesis determined the obligation that such lawsuits be filed against the Union. However, the application of General Repercussion Theme 500 in conjunction with Repetitive Theme 106, although it has pacified criteria for the concession, was not able to solve, by itself, the complex federative conflicts arising from solidarity between the entities. Also, the Topic of General Repercussion 793 (*Leading Case* RE 855.178/SE), written by Justice Luiz Fux, assessed on 11/26/2014 and final and unappealable on 09/08/2022, was still pending judgment, in which it was discussed, in light of the CRFB/1988, on the existence, or not, of joint and several liability between the federative entities, regarding the adoption of practical measures to guarantee the right to health, ranging from the free delivery of medicines, to the financing of indispensable medical therapies for people without financial resources³⁹.

On May 23, 2019, the Federal Supreme Court, when judging the Motion for Clarification in Extraordinary Appeal No. 855,178/SE,⁴⁰ ratified the thesis of joint and several liability of federated entities in health care claims, however, the decision brought a new understanding of the application of this liability. The STF established that, in addition to solidarity between federated entities, it is up to the judicial authority to direct compliance with decisions in accordance with the rules for the division of competences. This implies that the judging body must determine which federative entity should bear the financial burden of judicial decisions, ensuring reimbursement to those who effectively bore the costs. Such guidance aims to ensure a more equitable distribution of financial responsibilities, preventing a single federative entity from bearing expenses that should be shared.

The rapporteur presented three fundamental reasons for the modification of the interpretation of the joint and several liability of federated entities in matters of health, a topic that had already been addressed by the Brazilian Supreme Court, in the Regimental Appeal in the Suspension of Preliminary Relief No. 175/CE,⁴¹ in the following terms:

³⁸ BRAZIL. Federal Supreme Court. **Extraordinary Appeal No. 657.718/MG. Topic 500**: Duty of the State to supply medicine not registered by ANVISA. Rapporteur: Justice Marco Aurélio. Brasília, DF, May 22, 2019. Available at: <https://portal.stf.jus.br/jurisprudenciaRepercussao/verAndamentoProcesso.asp?incidente=4143144&processnumber=657718&processclass=RE&themenumbr=500>. Accessed on: 9 jan. 2026.

³⁹ BRAZIL. Federal Supreme Court. **Motion for Clarification in Extraordinary Appeal No. 855.178/SE**. Rel. Min. Edson Fachin. Available at: <https://portal.stf.jus.br/jurisprudenciaRepercussao/verAndamentoProcesso.asp?incident=4678356&processnumber=855178&processclass=RE&themenumbr=793>. Accessed on 20 Dec. 2025.

⁴⁰ Ibid.

⁴¹ BRAZIL. Federal Supreme Court. **Regimental Appeal in the Suspension of Preliminary Injunction No. 175/CE**. Rapporteur: Justice Gilmar Mendes. Full Court. Judged on: 17 mar. 2010. DJe-076, div. 29 Apr. 2010. Available at: <https://www.stf.jus.br/arquivo/cms/noticianoticiastf/anexo/sta175.pdf>. Accessed on: 5 jan. 2026.

- Increase in Demands and Expenses: Decade after the establishment of the thesis of joint and several liability by the STF, there was a significant increase both in the number of demands related to the judicialization of health and in the public expenditures associated with compliance with these judicial decisions. This growth highlighted the need for a review of the approach to avoid financial collapse and the overload of federative entities⁴².
- Destructuring of the Unified Health System (SUS): The judgment of the AgR in STA No. 175/CE contributed to the destructuring of the SUS, allowing anyone to sue against the system without considering the laws in force and the agreements established within the scope of public policies. This resulted in an imbalance in the system, compromising the efficiency and effectiveness of health policies.⁴³
- Damage to the Provision of Basic Health: The unrestricted solidarity, as established in the AgR in STA No. 175/CE, led to a serious damage to the provision of basic health, which should be mainly the responsibility of the Municipalities. Often, these federative entities are forced to pay for extremely expensive treatments, which affects the ability of the Municipalities to offer essential health services to the population.⁴⁴

As the author Ana Paula Barcelos points out:

[...] The original constituent did not leave it to the free discretion of the ordinary legislator, that is, of the majority episodically in power, the establishment of priorities, much less how much they should invest in the areas of education and health, mainly. On the contrary, it linked it from the outset to the priorities it previously established, indispensable to the achievement of the proposed goals, and, more than that, to how much should be invested in the respective sectors, in order to make the respective public policies even indictable by the judiciary in the light of the principle of efficiency to which the public administration is subject.⁴⁵

Thus, in addition to reaffirming the State's solidarity with regard to the obligation to guarantee the right to health, the thesis established in the Theme of General Repercussion 793 was aligned with the provision of article 198 of the CRFB/1988, determining the observance of the principles of decentralization and hierarchization, which govern the SUS. Nevertheless, due to the impact caused after the establishment of Topics 500 and 793, thousands of lawsuits were again taken to the Judiciary, raising doubts as to the need for the

⁴² *Ibid.*

⁴³ BRAZIL. Federal Supreme Court. **Regimental Appeal in the Suspension of Preliminary Injunction No. 175/CE**. Rapporteur: Justice Gilmar Mendes. Full Court. Judged on: 17 mar. 2010. DJe-076, div. 29 Apr. 2010. Available at: <https://www.stf.jus.br/arquivo/cms/noticianoticiastf/anexo/sta175.pdf>. Accessed on: 5 jan. 2026.

⁴⁴ *Ibid.*

⁴⁵ BARCELLOS, Ana Paula. **The legal effectiveness of constitutional principles**. Rio de Janeiro: Renovar, 2008.

inclusion of the Union in the lawsuits aimed at the granting of medicines which, although not incorporated within the scope of the SUS, are registered with ANVISA, a situation different from that provided for in Topic 500.

It is verified that the absence of a clear definition of which federative entity should appear in the passive pole and bear the financial burden of non-incorporated medicines generated a new wave of predatory litigation and budgetary disorganization and, in this scenario of uncertainties, the Federal Supreme Court was impelled to decide on the issue, culminating in the establishment of the Theme of General Repercussion 1,234 (*Leading Case*: Extraordinary Appeal 1.366.243/SC), with the rapporteurship of Justice Gilmar Mendes, filed on 01/27/2022, and which, although it has not yet become final, redefined the demands involving technologies not incorporated into the SUS, also making clear the situation of incorporated medicines.

In parallel with the issues related to health, the Topic of General Repercussion 698 (*Leading Case* RE 684.412/RJ) was being processed, an important milestone for the definition of the limits of the Judiciary to determine obligations to make public policies aimed at the realization of fundamental rights. Filed on 05/07/2012, Topic 698 became final and unappealable on 11/17/2023, with the establishment of the following theses:

1. The intervention of the Judiciary in public policies aimed at the realization of fundamental rights, in case of absence or serious deficiency of the service, does not violate the principle of separation of powers. 2. The judicial decision, as a rule, instead of determining specific measures, must point out the purposes to be achieved and determine the Public Administration to present a plan and/or the appropriate means to achieve the result. 3. In the case of health services, the deficit of professionals can be made up for by public tender or, for example, by the reallocation of human resources and the hiring of social organizations (OS) and civil society organizations of public interest (OSCIP).⁴⁶

Analyzing the content of the first thesis, it is observed that it establishes that the Judiciary has the power-duty to intervene in public policies aimed at the realization of fundamental rights, whenever there is an absence or serious deficiency of the public service. This action is not considered a violation of the principle of separation of powers, as it aims to correct state omissions that compromise essential rights. Such a thesis was not new and the STF only reaffirmed what its consolidated jurisprudence did.⁴⁷

⁴⁶ BRAZIL. Federal Supreme Court. **Extraordinary Appeal No. 684,612/RJ (Topic 698)**. Rel. Min. Luis Roberto Barroso. Available at: https://portal.stf.jus.br/jurisprudencialRepercussao/verAndamento_Process.asp?incident=4237089&processnumber=684612&processclass=RE&themenumbr=698. Accessed on 20 Dec. 2025.

⁴⁷ *Ibid.*, p. 16-17.

The second thesis defines the methodology of the judicial decision, establishing that, as a rule, the judge should not determine specific and specific measures, but rather point out the purposes and goals to be achieved. In this sense, it makes it clear that it is up to the Judiciary to order the Public Administration to present, within a certain period, an action plan and the appropriate means to achieve the result, preserving the discretion of the administrator, who has the technical expertise to decide the best execution route.⁴⁸

The third thesis applies the principle of discretion to the specific case of the lack of health professionals, determining that the personnel deficit does not necessarily need to be filled by public tender, and the administration may opt for valid alternatives, such as the reallocation of human resources or the signing of contracts with Social Organizations (OS) or Civil Society Organizations of Public Interest (OSCIP). In a broad way, the thesis makes it clear that the Judiciary should not impose a single form of solution to the issue that is the object of the litigation, and should respect the manager's choices about the most efficient management model for that factual reality.⁴⁹

The three theses established sought to minimize the excessive judicialization in the health area, which disorganizes the budget and compromises the rational allocation of scarce resources. In this sense, the STF establishes the understanding that judicial intervention in public policies must be guided by criteria of reasonableness and efficiency, prioritizing structural and systemic solutions instead of casuistic decisions, which benefit only specific individuals or hospitals to the detriment of the general health system.⁵⁰

The aforementioned understanding impacted the conduct and judgment of Topic 1234 of the STF (*Leading Case*: Extraordinary Appeal 1.366.243/SC), representing a profound restructuring of the judicialization of health in Brazil by establishing objective criteria to organize judicial competences, financing and the technical rigor of decisions. In view of the complexity and legal uncertainty about the supply of medicines, the Federal Supreme Court appointed a Special Commission to apply the self-settlement method in case of conflicts in this area, to seek an interfederative and more collaborative dialogue.

The result of this process was the partial ratification of three main interfederative agreements, defining four fundamental points, which guided the entire discussion: (i)

⁴⁸ Ibid. p. 17.

⁴⁹ BRAZIL. Federal Supreme Court. **Extraordinary Appeal No. 684,612/RJ (Topic 698)**. Rel. Min. Luis Roberto Barroso. p. 18. Available at: <https://portal.stf.jus.br/jurisprudencialRepercussao/verAndamentoProcess.asp?incident=4237089&processnumber=684612&processclass=RE&themenumbr=698>. Accessed on 20 Dec. 2025

⁵⁰ BRAZIL. Federal Supreme Court. **Extraordinary Appeal No. 684,612/RJ (Topic 698)**. Rel. Min. Luis Roberto Barroso. Available at: <https://portal.stf.jus.br/jurisprudencialRepercussao/verAndamentoProcess.asp?incident=4237089&processnumber=684612&processclass=RE&themenumbr=698>. Accessed on 20 Dec. 2025.

responsibility, costing and reimbursement: Covers the rules on who must pay and how reimbursement for the supply of medicines must be made, whether they are incorporated or not incorporated by the SUS; (ii) Extrajudicial methods of dispute resolution: Focused on the creation of solutions within the administrative sphere of the SUS to prevent judicialization and resolve conflicts between users and managers; (iii) Monitoring of SUS users: Involves monitoring the patient from the administrative request to the end of judicial treatment, using mechanisms and protocols to avoid financial imbalances and budget deprogramming (which resulted in the creation of the National Platform) and (iv) Federative rearrangement: Includes any other topics that arise in the debates and that are directly or indirectly linked to the judicialization of public health in Brazil.⁵¹

As a result, agreements were entered into covering, among other topics, competence and costing. Regarding jurisdiction, the definition of the competent forum to process and judge claims for medicines not incorporated into the public policies of the SUS, but registered with ANVISA, is now based on the value of the annual treatment, with the Federal Court being the cases whose cost is equal to or greater than 210 minimum wages, considered the Government's Maximum Sale Price (PMVG) with a zero rate on the List of the Drug Market Regulation Chamber (CMED).⁵²

It should be noted that, according to the definition established in the established thesis, medicines that are not included in the public policies of the SUS, as well as those provided for in official protocols (PCDTs), but requested for purposes other than those approved, are classified as "not incorporated". The definition also covers drugs not registered with Anvisa and *off-label use* that are not included in Ministry of Health protocols or in lists of basic components. It should be noted that, for cases of medicines without sanitary registration, the jurisdiction remains exclusively with the Federal Court and the action must be filed against the Federal Government, under the terms of General Repercussion Theme 500.⁵³

Regarding funding, the actions proposed in the Federal Court are fully funded by the Union, which must make full reimbursement to States or Municipalities via Fund-to-Fund transfer, if they are compelled to comply with the decision. In the lawsuits that are pending in the State Courts, the Union will reimburse 65% of the disbursements in cases with a value

⁵¹ BRAZIL. Federal Supreme Court. **Extraordinary Appeal No. 1,366,243/SC (Topic 1234)**. Rel. Min. Gilmar Mendes. Full Content. p. 6-7. Available at: <https://portal.stf.jus.br/processos/downloadPeca.asp?id=15370982407&ext=.pdf>. Accessed on 20 Dec. 2025.

⁵² *Ibid.*, p. 1-12.

⁵³ *Ibid.*, p. 3-4.

between 7 and 210 minimum wages. For oncological drugs in lawsuits filed before June 10, 2024, the federal reimbursement is set at 80% of the amount paid.⁵⁴

For medicines incorporated into the public policies of the SUS, the federative entities agreed to follow the administrative and judicial flow detailed in Annex I of that interfederative agreement. In this regard, the magistrate must determine the provision specifically in relation to the public entity (Union, State or Municipality) that has the administrative obligation to provide it, according to the rules for the distribution of competences of the SUS. This direction respects the organization of the health system and ensures that the financial and operational responsibility falls on the manager technically responsible for the respective pharmaceutical component.⁵⁵

As for the requirements for granting the medication, they are: proof by scientific evidence of a level act (medicine by evidence), inexistence of substitute medication within the scope of the SUS, analysis of administrative denial, limitation of price and sale value, registration with ANVISA and responsibility for clinical follow-up. It is reinforced that the burden of the author is to demonstrate, through high-level scientific evidence (such as randomized clinical trials or meta-analysis), the safety and efficacy of the drug, in addition to the lack of an incorporated therapeutic substitute.⁵⁶

The highlight of the thesis refers to the judicial analysis of the administrative act. As stated in the ruling, the Judiciary has the duty to carry out a mandatory analysis of the legality of CONITEC's administrative act or the refusal to supply, under penalty of nullity of the jurisdictional decision. This analysis must verify whether the act is in accordance with the constitutional guidelines and the public policy of the SUS, and the incursion into discretionary administrative merit is prohibited.⁵⁷

In order to consolidate and give full efficiency to the decisions made about the judicialization of public health, binding precedent 60 was proposed. Its wording establishes that the request and administrative analysis of drugs, their judicialization and all jurisdictional and administrative developments must mandatorily comply with the terms of the three interfederative agreements approved by the STF.

The administrative request and analysis of drugs in the public health network, the judicialization of the case, as well as its developments (administrative and jurisdictional), must comply with the terms of the 3 (three) interfederative agreements

⁵⁴ *Ibid.*, pp. 4-5.

⁵⁵ BRAZIL. Federal Supreme Court. **Extraordinary Appeal No. 1,366,243/SC (Topic 1234)**. Rel. Min. Gilmar Mendes. Entire Content, p. 7-8. Available at: <https://portal.stf.jus.br/processos/downloadPeca.asp?id=15370982407&ext=.pdf>. Accessed on 20 Dec. 2025.

⁵⁶ *Ibid.*, p. 1-12.

⁵⁷ *Ibid.*, p. 12-13.

(and their flows) approved by the Federal Supreme Court, in collaborative judicial governance, in topic 1,234 of the general repercussion system RE 1,366,243. (Binding Precedent 60)⁵⁸

The main objective is to create a directional and univocal system, preventing dispersed decisions from ignoring the rules of competence and costing agreed between the Union, States and Municipalities. In the same sense, the judgment of Topic 0006 of the General Repercussion (*Leading Case*: Extraordinary Appeal (RE) 566.471/RN), a controversy analyzed in the light of articles 2, 5, 6, 196 and 198, §§ 1 and 2, of the Constitution of the Republic, discussed the obligation of the state to provide high-cost medicines to patients with serious, hyposufficient diseases. The lawsuit, filed on 10/09/2007, only had its final and unappealable decision registered on 10/04/2025, culminating in a thesis that is linked to the General Repercussion Theme 1,234.

It was defined that, as a rule, the lack of inclusion of the drug in the SUS dispensing lists (RENAME, RESME, REMUME, among others), regardless of the cost of the drug, prevents the supply through the courts. However, the rule was exceptional. In this sense, the understanding was established that, exceptionally, it is possible to grant medicines registered with ANVISA, but not incorporated into the SUS dispensation lists, when the following requirements are cumulatively observed:

2. It is possible, exceptionally, to grant a drug registered with ANVISA, but not incorporated into the dispensation lists of the Unified Health System, provided that the following requirements are cumulatively met, the burden of which is on the plaintiff:
 - (a) refusal to supply the drug through the administrative route, under the terms of item '4' of Topic 1234 of the general repercussion;
 - (b) illegality of the act of non-incorporation of the drug by Conitec, absence of a request for incorporation or delay in its assessment, in view of the deadlines and criteria provided for in articles 19-Q and 19-R of Law No. 8,080/1990 and Decree No. 7,646/2011;
 - (c) impossibility of substitution by another drug included in the SUS lists and in clinical protocols and therapeutic guidelines;
 - (d) proof, in the light of evidence-based medicine, of the efficacy, accuracy, effectiveness and safety of the drug, necessarily supported by high-level scientific evidence, that is, only randomized clinical trials and systematic review or meta-analysis;
 - (e) clinical indispensability of the treatment, proven by a substantiated medical report, including describing the treatment already performed; e
 - (f) financial inability to bear the cost of the medicine.
3. Under penalty of nullity of the judicial decision, pursuant to article 489, § 1, items V and VI, and article 927, item III, § 1, both of the Code of Civil Procedure, the Judiciary,

⁵⁸ BRAZIL. Federal Supreme Court. Application of Precedents in the STF. **Binding Precedent 60**. Judicial Concession of Medicine registered with ANVISA but not incorporated into SUS. *p.* 54-55. Available at: <https://portal.stf.jus.br/jurisprudencia/sumariosumulas.asp?base=26&sumula=9260>. Accessed on 20 Dec. 2025.

when assessing a request for the concession of non-incorporated medicines, must obligatorily:

- (a) analyze the administrative act of non-incorporation by Conitec or the refusal to provide the administrative route, in light of the circumstances of the specific case and the governing legislation, especially the public policy of the SUS, and it is not possible to incursion into the merits of the administrative act;
 - (b) assess the presence of the requirements for dispensing the medicine, provided for in item 2, based on prior consultation with the Technical Support Center of the Judiciary (NATJUS), whenever available in the respective jurisdiction, or with entities or persons with technical expertise in the area, and may not base its decision solely on a prescription, report or medical report added to the file by the plaintiff; e
 - (c) in the event of judicial approval of the drug, to officiate to the competent bodies to evaluate the possibility of its incorporation within the scope of the SUS".
- [...].⁵⁹

From reading the entire content of the ruling, it can be seen that the Federal Supreme Court was based on three premises: (i) **Sustainability of the SUS**: As public resources are finite, it is essential to establish parameters that apply to the entire community and excessive judicialization is seen as a factor that compromises the organization, efficiency and sustainability of the SUS; (ii) **Equality in access to health**: Although a court decision benefits a specific individual, it generates systemic effects that can harm the majority of the population dependent on the public system, directly affecting the principles of universality and equality in access to health services; and (iii) **Medicine by evidence**: The Judiciary must act with self-restraint and deference to the analyses of specialized technical bodies, such as CONITEC, which have the necessary knowledge to evaluate the efficacy, safety and cost-effectiveness of a drug, ensuring that judicial concessions are supported by high-level scientific evidence.⁶⁰

By establishing that the proof must be made in the light of evidence-based medicine, it means that there must be scientific proof of the efficacy, accuracy, effectiveness and safety of the drug, and an average report that attests only to the need for treatment is not enough. In the same way as occurred in Topic 1,234, Topic 0006 gave rise to Binding Precedent No. 61, which reads as follows: "The judicial concession of a drug registered with ANVISA, but not incorporated into the dispensation lists of the Unified Health System, must comply with

⁵⁹ BRAZIL. Federal Supreme Court. **Extraordinary Appeal No. 566,471/RN (Topic 6)**. Rel. Min. Marco Aurélio. Draftsman of the Judgment: Justice Luís Roberto Barroso. p. 5-6. Available at: <https://portal.stf.jus.br/jurisprudenciaRepercussao/verProgressoProcesso.aspincident=2565078&numeroProcesso=566471&classeProcesso=RE&numeroTema=6>. Accessed on 20 Dec. 2025.

⁶⁰ BRAZIL. Federal Supreme Court. **Extraordinary Appeal No. 566,471/RN (Topic 6)**. Rel. Min. Marco Aurélio. Draftsman of the Judgment: Justice Luís Roberto Barroso. Available at: <https://portal.stf.jus.br/jurisprudenciaRepercussao/verProgressoProcesso.aspincident=2565078&numeroProcesso=566471&classeProcesso=RE&numeroTema=6>. Accessed on 20 Dec. 2025.

the theses established in the judgment of Topic 6 of the General Repercussion (RE 566,471)".⁶¹

In summary, it is verified that the jurisprudential evolution analyzed evidences a paradigmatic rupture in the protection of the right to health in Brazil, reflecting the transition from an atomized judicialization model based on judicial voluntarism to a system that seeks rationalized judicialization. The imposition of rigid filters established in Evidence-Based Medicine and the obligation of deference to CONITEC's administrative decisions signal that the implementation of Article 196 of the 1988 Constitution of the Republic, although it remains universal, does not dispense with systemic organization and budgetary responsibility.

Thus, the system of precedents fulfills its constitutional function of stabilization, converting the judicial process into a technical instance of control of legality and correction of state failures, and no longer into an instrument of unrestricted replacement of public management, thus ensuring that the protection of individual rights does not compromise the very survival and equality of the Unified Health System.

On the other hand, it is observed that the requirement for detailed reports that prove the ineffectiveness of all SUS alternatives and the presentation of high-level scientific studies imposes a technical burden that the common citizen may have difficulties in bearing, depending on the speed that the disease requires. Thus, a dichotomy is created, since rationalized judicialization may end up serving only those who have specialized lawyers and private doctors capable of producing the required robust technical evidence, while the underprivileged will continue to depend on the overloaded structure of the public health system to produce such documents.

5 FINAL CONSIDERATIONS

The judicialization of politics and the expansion of the judiciary are inescapable traits of the contemporary Constitutional and Democratic State and, in Brazil, this phenomenon takes on even more intense contours due to the structural weaknesses of public policies and the high degree of constitutionalization of social relations. There is no doubt that the performance of the Brazilian Judiciary represents a fundamental instrument for the protection of fundamental rights and the containment of state abuses, on the other hand, its excessive exercise can generate institutional distortions that weaken the democratic space, also putting at risk the legitimacy of judicial decisions.

⁶¹ BRAZIL. Federal Supreme Court. Application of Precedents in the STF. **Binding Precedent 61**. Judicial Concession of Medicine registered with ANVISA but not incorporated into SUS. Available at: <https://portal.stf.jus.br/jurisprudencia/sumariosumulas.asp?base=26&sumula=9296>. Accessed on 20 Dec. 2025.

In this context, by defining public policies for health, education, etc., or determining specific measures that require public expenditures not programmed by the public manager, the Judiciary comes close, in a risky way, to the role of substitute for the administrative function and, without the proper limits being observed, this circumstance can cause serious distortions in the democratic system, tarnishing the balance between the Powers of the State. Considering the current scenario, it becomes an enormous challenge to understand the limits of judicial action with a view to ensuring the effectiveness of constitutional rights, without assuming the political role that, democratically, should be exercised only by the representatives elected by the people.

As analyzed throughout this study, it can be stated that the trajectory of the judicialization of health in Brazil reveals a clear transition from the atomized and voluntarist litigation model, to a rationalized and structured judicialization under the aegis of the system of mandatory precedents, converted by the CPC/2015 into an immediate source of law.

The jurisprudential path, which began with the construction of the first requirements of Topic 106 of the STJ and culminating with the complex federative engineering of Topic 1,234 of the STF, demonstrates that the implementation of article 196 of the CRFB/1988 ceased to be a purely principled agenda, to become a challenge of governance and budget management, which will also require, dialogical integration between the Powers of State.

For many years the idea of an absolute separation between *civil law* and *common law* theories was promoted, however, with the passage of time and the growing need for a more agile judicial system, there was a convergence between the two legal traditions, resulting in the creation of mechanisms similar to precedents, typical of the *common law* system, but which needed adaptations to be increased in Brazil. The Brazilian legal system is based on the Roman-Germanic tradition, characterized by positive law, therefore, it is not expected that the legal system adapts to precedents, but rather that they are molded according to the order that absorbs it.

Finally, it is concluded that the recent integration between the theses of Themes 6 and 1,234 represents the apex of this movement of judicial self-restraint in health matters. By conditioning jurisdictional protection to Evidence-Based Medicine and to the prior analysis of administrative denial, the Federal Supreme Court instituted technical filters that aim to protect the sustainability of the Unified Health System, against the risk of administrative and financial collapse caused by unlimited individual demands. However, the challenge that is imposed, from now on, is no longer only legal, but political-administrative.

The coexistence between the law and binding judicial precedents is a reality in the Brazilian legal system, however, it is observed that the law must remain as the guide of

judicial decisions and precedents, and it is certain that it is necessary to find a balance between the role of each of the Powers of State, so that the maintenance of the precepts of the Democratic State can be guaranteed, as one that effectively fulfills the promises described by the Brazilian Constitution.

REFERENCES

- Barbosa, L. V. Q., & Carvalho, E. (2016). Ativismo judicial: Entre o mito e a juristocracia velada. *Revista Política Hoje*, 25(2), 7–20. <https://periodicos.ufpe.br/revistas/politicahoje/article/view/8661>
- Barcellos, A. P. (2008). A eficácia jurídica dos princípios constitucionais. *Renovar*.
- Barroso, L. R. (2008, dezembro 22). Ano do STF: Judicialização, ativismo e legitimidade democrática. *Consultor Jurídico*. https://www.conjur.com.br/2008-dez-22/judicializacao_ativismo_legitimidade_democratica/
- Barroso, L. R. (2010). Constituição, democracia e supremacia judicial: Direito e política no Brasil contemporâneo. *Revista Jurídica da Presidência*, 12(96), 1–14.
- Barroso, L. R. (2009). Judicialização, ativismo judicial e legitimidade democrática. *Revista Atualidades Jurídicas*, 4, 1–17. <https://www.oab.org.br/editora/revista/users/revista/1235066670174218181901.pdf>
- Barroso, L. R. (2012). Judicialização, ativismo judicial e legitimidade democrática. *(SYN)THESIS*, 5(1), 23–32. <https://www.e-publicacoes.uerj.br/synthesis/article/view/7433>
- Brasil. (1988). Constituição da República Federativa do Brasil de 1988. https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm
- Brasil. (2015). Lei nº 13.105, de 16 de março de 2015 (Código de Processo Civil). http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm
- Brasil. Superior Tribunal de Justiça. (2018). Recurso especial nº 1.657.156/RJ (Tema 106). <https://processo.stj.jus.br>
- Brasil. Supremo Tribunal Federal. (2010). Agravo regimental na suspensão de tutela antecipada nº 175/CE. <https://www.stf.jus.br>
- Brasil. Supremo Tribunal Federal. (2015). Embargos de declaração no recurso extraordinário nº 855.178/SE (Tema 793). <https://portal.stf.jus.br>
- Brasil. Supremo Tribunal Federal. (2024). Recurso extraordinário nº 1.366.243/SC (Tema 1234). <https://portal.stf.jus.br>
- Brasil. Supremo Tribunal Federal. (2020). Recurso extraordinário nº 566.471/RN (Tema 6). <https://portal.stf.jus.br>

- Brasil. Supremo Tribunal Federal. (2019). Recurso extraordinário nº 657.718/MG (Tema 500). <https://portal.stf.jus.br>
- Brasil. Supremo Tribunal Federal. (2023). Recurso extraordinário nº 684.612/RJ (Tema 698). <https://portal.stf.jus.br>
- Brasil. Supremo Tribunal Federal. (2024). Súmula vinculante nº 60. <https://portal.stf.jus.br>
- Brasil. Supremo Tribunal Federal. (2024). Súmula vinculante nº 61. <https://portal.stf.jus.br>
- Bueno, C. S. (2017). Manual de direito processual civil (3. ed.). Saraiva.
- Câmara, A. F. (2016). O novo processo civil brasileiro (2. ed.). Atlas.
- Conselho Nacional de Justiça. (2022). Resolução nº 444, de 25 de fevereiro de 2022. <https://atos.cnj.jus.br/atos/detalhar/4415>
- Didier Júnior, F., Braga, P. S., & Oliveira, R. A. (2016). Curso de direito processual civil: Teoria da prova (11. ed.). JusPodivm.
- Eisenberg, J. (2002). Pragmatismo, direito reflexivo e judicialização da política. In L. W. Vianna (Org.), *A democracia e os três poderes no Brasil*. UFMG; Luperj.
- Espíndula, N. L. S. O., et al. (2024). Reflexión sobre la judicialización de la salud en la encefalopatía crónica no progresiva. *Revista Bioética*, 32, 1–9. <https://doi.org/10.1590/1983-803420243743ES>
- Hirschl, R. (2020). Rumo à juristocracia: As origens e consequências do novo constitucionalismo. EDA.
- Hirschl, R. (2008). The judicialization of mega-politics and the rise of political courts. *Annual Review of Political Science*, 11, 93–118. <https://ssrn.com/abstract=1138008>
- Mello, P. P. C., & Barroso, L. R. (2024). Trabalhando com uma nova lógica: A ascensão dos precedentes no direito brasileiro. Recuperado de <https://www.comjur.com.br>
- Neves, D. A. A. (2017). Manual de direito processual civil (9. ed.). JusPodivm.
- Santos, J. L. G., et al. (2022). Judicialization of health care in the Western Amazon: Collective decisions of the jurisdictional court of justice in the State of Acre, Brazil. *Journal of Human Growth and Development*, 32(1), 30–42.
- Silva, V. A. da. (2008). O Judiciário e as políticas públicas: Entre transformação social e obstáculos à realização dos direitos sociais. In C. P. Souza Neto & D. Sarmento (Orgs.), *Direitos sociais: Fundamentação, judicialização e direitos sociais em espécies* (pp. 587–599). Lumen Juris.
- Thibau, T. C. S. B., & Oliveira, I. C. de. (2021). Valorização do precedente judicial no direito brasileiro: A aproximação de dois sistemas jurídicos. In R. S. Rodrigues, R. A. Magalhães, & T. P. Martins (Coords.), *Temas de direito público* (pp. 209–230). Conhecimento Editora.

- Vianna, L. W., Burgos, M. B., & Salles, P. M. (2007). Dezesete anos de judicialização da política. *Tempo Social*, 19(2), 39–85.
- Victor, R. A. de. (2011). *Judicialização de políticas públicas para a educação infantil*. Saraiva.
- Vieira, O. V. (2008). Supremocracia. *Revista Direito GV*, 4(2), 441–464. <https://periodicos.fgv.br/revdireitogv/article/view/35159/33964>
- Zaneti Jr., H. (2021). *O valor vinculante dos precedentes: Teoria dos precedentes normativos formalmente vinculantes* (5. ed.). JusPodivm.