The enforceability of judicial power over public healthcare: reflections on (in)appropriate techniques in enforcement measures to protect claims of extreme urgency*

Dos poderes executivos do juiz na judicialização da saúde pública: reflexões sobre a (in)adequação das técnicas de execução indireta para tutelar as situações de extrema urgência

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ABSTRACT

This present paper mainly focuses on enforcement measures in claims involving urgent rendering of goods and public healthcare services. Generally in these cases, there are financial consequences following from the enforcement of mandatory injunctions which are not immediately fulfilled in flagrante delicto to the party's health. This indicates that typical—and non-typical—indirect enforcement measures are not always effective to provide judicial relief. Therefore, this paper demonstrates that, in cases of extreme urgency, the judge must take direct enforcement measures (subrogation) to provide effective judicial relief to protect the party's health or even the party's life.

KEYWORDS

Judicialization — public healthcare — interlocutory relief — direct enforcement — coercive measures

RESUMO

O presente artigo tem como objetivo geral estudar as medidas executivas nas demandas envolvendo prestações urgentes de bens e serviços de saúde pública. Como regra, nestes processos, há determinação de cumprimento de ordens de fazer, com reflexos financeiros, e esses mandados não são cumpridos imediatamente, com flagrante prejuízo à saúde do jurisdicionado. Esse aspecto demonstra que nem sempre as medidas de execução indireta típicas e atípicas são suficientes para atingir a efetividade da tutela jurisdicional. Nesse sentido, pretende-se demonstrar que, em situações de extrema urgência, o juiz deve adotar medidas de execução direta (sub-rogatórias), a fim de prestar a adequada tutela jurisdicional à saúde e até mesmo à vida do jurisdicionado.

PALAVRAS-CHAVE

Judicialização — saúde pública — tutela de urgência — execução direta — medidas coercitivas

1. Introduction

Demands for public health services are, as a rule, complex, in terms of their causes and consequences, as not only legal, but also often ethical, moral, political and economic factors need to be considered.

For the purposes of this study, however, two aspects deserve highlighting, one of a more general order, concerning the delimitation of rational decision-making parameters, and a more specific one, aimed at execution of court decisions that determine, in favor of the citizen, the delivery of public health goods and services.

In the first section, we highlight, briefly, how court decisions in this matter, in principle, must be exceptional. The rule should be the search for interinstitutional dialogue, in order to facilitate universal provision of goods and services related to public health.[1] It is understood that, exceptionally, injunctions may be granted in situations of extreme urgency.

In the following discussion, the objective is to study the decision-making parameters established on this subject according to precedents of the STJ and the STF.

We also evaluate the executive powers of the judge, including atypical ones (art. 139, IV, of the CPC), to demonstrate that, when a decision is possible, not always indirect measures of execution have the power to guarantee the fundamental right to the protection of health care.

Lastly, it is important to note, this research follows a hypothetical-deductive approach.

2. Issues surrounding the judicialization of public health: on the impossibility of interinstitutional dialogue for the concession of interlocutory relief

The issue of judicialization of public health is notoriously complex. While it deals with the extension of a fundamental right provided for in the Constitution, it also concerns, in terms of what is extracted from the legal

[1] The coronavirus pandemic, which causes Covid-19, only reinforced the importance of a universal and efficient health system, capable of serving the population, and in particular, the economically vulnerable, in the face of possible unpredictable and unavoidable facts.

system, scarcity of financial resources, in a scenario of unlimited needs, with demand for universal provision of services, especially for citizens lacking financial resources, and for orientation on how to obtain rights through the courts. Furthermore, there is the main issue of prohibition of judicial activism, which, undemocratically, permits invasion of the spheres of competence of the other state functions.

Thus, it is argued that the model should be court action characterized by exceptionality. SUS legislation,[2] including pharmaceutical assistance regulations, must be respected.[3] Although in practice this is not always the case,[4] this is the rule, and exceptions must be justified in the legal system itself.[5]

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[2] Briefly, the SUS normative system consists of: a) Federal Constitution (arts. 6 and 196-200); b) Lei Orgânica da Saúde (Law No. 8.080/1990), which regulates, throughout the national territory, "the health actions and services, performed independently and jointly, on a permanent or occasional basis, by natural persons or legal entities in public or private law" (art. 1); c) Law No. 8142/1990, which supplements the Lei Orgânica da Saúde to provide for the participation of the community in the SUS, through Conferences and Health Councils, in addition to intergovernmental transfers of resources to health funds; d) Law No. 12,401/2011, which changed provisions of Lei Orgânica da Saúde to provide for therapeutic care and the incorporation of health technologies in the SUS; and) Law No. 12,466/2011, which amended the Lei Orgânica da Saúde to assign the force of law to the forums known as Comissão Intergestores Tripartite (CIT) and Comissões Intergestores Bipartite (CIB), as well as Conselho Nacional de Secretarias Municipais de Saúde (Cosasems); f) Decree No. 7.508/2011, which regulates the Lei Orgânica da Saúde, which concerns the SUS Organization, Health Planning, Health Care and Interfederative Articulation; g) Supplementary Law No. 141/2012, which ties resources health actions and services and regulates the interfederative appointment criteria; h) Supplementary Administrative Rules, especially the MS Ordinance 3.916/1998, which deals with the National Medicines Policy, and CNS Resolution No. 338/2004, concerning the National Pharmaceutical Assistance Policy.

[3] As Marco Antonio da Costa Sabino correctly observes, "the magistrate who decides on health issues must, at least, have an understanding of the SUS, exactly to know: a) that there are plans, programs and actions undertaken by these numerous bodies; b) to some extent, that there are specific bodies dealing with pharmacological monitoring of epidemiological, curative medicines and others, essential to disassociate the health request from the pernicious image vis-a-vis the Public Power, to provide, at any cost, as much as required; and c) again, to some extent, the attributions of these bodies, which will enable the judge to investigate whether the Public Administration has not already performed, or is in the execution or planning phase, the judicially postulated health action". Cf. SABINO, Marco Antonio da Costa. *Saúde & judiciário*: a atuação judicial (limites, excessos e remédios). Curitiba: Juruá, 2016. p. 160-161. Nesse sentido, Cf. MAPELLI JÚNIOR, Reynaldo. *Judicialização da saúde*: regime jurídico do SUS e intervenção na administração pública. São Paulo: Atheneu, 2017. p. 196-197.

[4] In this sense, Cf. MAPELLI JÚNIOR, Reynaldo. Judicialização da saúde: regime jurídico do SUS e intervenção na administração pública. São Paulo: Atheneu, 2017. p. 196-197.

[5] From this perspective, as Lenio Luiz Streck explains, the judge can only fail to apply the law in the following cases: a) if the law is considered unconstitutional, through diffuse or concentrated control of constitutionality; b) when there is application of contractory resolution criteria; c) when applying the interpretation in accordance with the Constitution; d) when applying partial nullity without textual reduction; e) in the case of a declaration of unconstitutionality with textual reduction; f) when there is failure to apply a rule in the face of a principle, understood deontologically as a norm, applicable by the "letter of the law"

It is understood that judicial action should be limited to extreme situations of urgency, understood as cases in which the denial of the injunction may, in principle, cause irreversible damage or entail difficulties in terms of obtaining compensation. In these cases, urgency prevents a possible consensus solution, including the perspective of government improvements with respect to universality of services.

The ideal solution to these public health problems should start with inter-institutional dialogue between the subjects and entities involved, mainly through collective action. This attempt at consensus, guided by the republican spirit, should, at least in theory, optimize public service, including the universality of health benefits, in addition to alleviating the negative impact on the separation of powers.

If the consensual solution is not possible in the specific case, it will require timely intervention by the court, as an exceptional measure,[6] necessarily, due to the coercive nature of the law.[7]

After all, obeying the Constitution, in a democratic environment, does not depend exclusively on the discretionary judgment of the authority.[8]

In a more in-depth earlier study,[9] it was concluded that the current existential minimum paradigm does not have sufficient objectivity for granting legal measures. At the time, an alternative to this model was proposed, now

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principle, and not as rhetorical *standards* or performative utterances. Cf. STRECK, Lenio Luiz. Aplicar a "letra da lei" é uma atitude positivista? *Revista NEJ* — Eletrônica, v. 15, n. 1, p. 171-172, Jan./Apr. 2010.

6 TESHEINER, José Maria Rosa; THAMAY, Rennan Faria Krüger. Ativismo judicial e judicialização da política: determinação judicial de políticas públicas. *Revista Brasileira de Direito Processual* — RBDPro, a. 23, n. 92, p. 132, Oct./Dec. 2015.

7 In the sense that it is the coercive nature of the law that makes it effective in legal practice cf. KELSEN, Hans. *Teoria pura do direito*. Translation by João Baptista Machado. 6. ed. São Paulo: Martins Fontes, 1998. p. 56-60. For more on the coercive character of the legal system, cf. SCHAUER, Frederick. The best laid plans. *Yale Law Journal*, New Haven, v. 120, p. 586-621, 2010; NINO, Carlos Santiago. *Introducción al análisis del derecho*. 2. ed. ampl. e rev. Buenos Aires: Editorial Astrea, 2003. p. 102-105. In Brazilian doctrine, cf. VILANOVA, Lourival. *As estruturas lógicas e o sistema de direito positivo*. 4. ed. São Paulo: Noeses, 2010. p. 74; CARVALHO, Paulo de Barros. *Direito tributário*: linguagem e método. 5. ed. rev. and wide São Paulo: Noeses, 2013. p. 138. Joseph Raz doubts whether coactivity is really a necessary condition of the legal system, or whether it follows logically from law. In his view, although "humanly impossible", it is "logically possible" to have a legal system that does not contain sanctions, or that does not authorize compliance with them by means of force. Cf. RAZ, Joseph. *Razão prática e normas*. Translated by José Garcez Ghirardi. Rio de Janeiro: Elsevier, 2010. p. 156-157.

8 SCHAUER, Frederick. *The force of law*. Cambridge: Harvard University Press, 2015. p. 92 e 168.

9 REIS, Sérgio Cabral dos. *Tutela jurisdicional nas demandas por prestações de saúde pública*: o juiz como interlocutor social e democrático. Tese (doutorado em direito) — Curso de Pós-graduação em Direito, Universidade Federal de Santa Catarina, Florianópolis, 2018.

qualified by the idea of "objective bipolarity", which, in a nutshell, guides the granting of the judicial measure, when it verifies, by means of minimum evidential elements, that: a) the health of the citizen will suffer irreversible or irreparable damage if the measure is denied; b) if the requested measure is valid, its implementation entails a "significant improvement in the quality of life" of the citizen, which is normally the case with rare, chronic or genetic diseases. Individual relief, in this sense, is reserved for extreme cases.

If, in the request for satisfactory individual protection, the interpretation must be restrictive, in the case of collective judgment, on the contrary, the interpretation is broad, in terms of the group benefiting from the measure suffering potentially irreversible health damage. For example, if the death of children in municipal maternity hospitals, due to lack of beds or personnel, qualifies for the relevant procedures, it demands a measure that effectively corrects the service, where possible. In the same way, if a particular drug has negative health consequences, a collective decision is, in theory, recommendable. The same reasoning applies to damages caused by the ineffectiveness of a given procedure. In this sense, collective guardianship, for the purposes this study, must be granted when the "public health policy is manifestly inadequate". As the interpretation is broader in collective relief, the discharging function of jurisdiction may be reconciled with the restrictions imposed by democratic governance, i.e., if it is verified in the records that the administrative omission is prejudicial, the root decision must be respected. In this case, in other words, it must be determined whether, regarding public health policy, there is serious structural fault, as, after all, it is not constitutionally admissible for public authorities to invoke a prerogative that, collaterally, causes irreparable harm to citizens.

As can be seen, it was also concluded, in this earlier extensive research, that collective relief is preferable, given the elimination of decision-making casuistry or prevalence of a lottery system that privileges some over others, thus generating isonomic and universal service provision, favoring the middle classes or those who, in practice, have little practical access to justice. It must be remembered, however, that the Brazilian legal system establishes other decision-making parameters that must be observed by the judge during instruction and, of course, at sentencing. Those parameters even correspond with the above, with respect to irreversible harm to the health of the population. In this sense, in terms of a parameter of action, it is up to the Judiciary Branch to check whether the public administration is consistently investing in provision of health services, effectively applying the budget, in

which case they should have a more moderate approach. On the other hand, if it is verified that the State has not been implementing these investments, judicial control must be more intense.[10] In other words, administrative planning with the objective of equality and universality, if reasonable, should also be considered in the judgment, including how to ponder the ideas arising from the *principle of reserve for contingincies*

It is worth remembering that, prior to the delivery of collective judgment, the judge, concerned with the systemic effects of a decision, must verify state funding capacity regarding relevant public policy. However, in light of the theory of dynamic distribution of the burden of proof, it is incumbent on the State to prove, in a robust and unequivocal way, that the concession of the provision encounters an insurmountable obstacle in the *principle of reserve for contingencies*,[11] which should not be admitted when formulated abstractly. In clear terms, public authorities are responsible for proving, in the process, the impossibility of carrying out a certain court order with all the resources it has and the priorities it has chosen.[12] And it is not viable to demand this proof from the bodies conducting the class action, as only the public administration has access to the data in its entirety.

Despite these generic parameters, it is certain that recent judgments of the STJ and the STF attributed even more rationality to the cases involving requests for public health benefits. This will be analyzed, briefly, under the following heading.

3. Decision parameters established by the STJ and the STF regarding the judicialization of public health

As stated, the solution through court decision, for this study, is only justified in situations which compromise the effective protection of the law,[13]

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[10] SOUZA NETO, Cláudio Pereira de. A judicialidade dos direitos fundamentais: críticas e parâmetros. In: SOUZA NETO, Cláudio Pereira de; SARMENTO, Daniel (Coord.). *Direitos sociais*: fundamentos, judicialização e direitos sociais em espécies. Rio de Janeiro: Lumen Juris, 2010. p. 542-543.

[11] 2010. p. 542-543. 11 GRINOVER, Ada Pellegrini. O controle de políticas públicas pelo Poder Judiciário. In: GRINOVER, Ada Pellegrini. *O processo*: estudos e pareceres. 2. ed. rev. e ampl. São Paulo: DPJ, 2009. p. 48.

[12] 2009. p. 48. 12 GOTTI, Alessandra. *Direitos sociais*: fundamentos, regime jurídico, implementação e aferição de resultados. São Paulo: Saraiva, 2012. p. 94.

[13] ABRAMOVICH, Victor. Acceso a la justicia y nuevas formas de participación em la esfera

such as situations of extreme urgency. In other cases, taking into account the premise that judicial jurisdiction is minimal in intervention in the SUS,[14] with respect to the debate, participation and attempts at a consensual solution, the judge acts, not as protagonist, but as a social and democratic interlocutor. When a reasonable solution is not possible through dialogue, the court decision will prevail in resolving the conflict.

This issue of the judicialization of public health, as is well-known, is complex and fraught, since, at least in theory, it involves legitimate interests of various social sectors, and, in order to lend rationality to the issue, the Superior Courts, have been developing decision-making paradigms.

In the guidelines established by *CNJ Recommendation* No. 31/2010, resulting from *Public Hearing No. 4* of the STF, it was observed that judges must avoid authorizing the supply of drugs not yet registered by Anvisa, or in an experimental phase, with exceptions provided for by law. It is also recommended that judges consult the public official, preferably electronically, before granting the emergency measure. Equally, judges should check with the National Commission of Ethics in Research (Conep), if applicants for the judicial measure do experimental research programs in laboratories, in which case they must assume responsibilitry for ensuring continuity of the treatment. Furthermore, as to the granting of individual measures, it is recommended that the beneficiary be registered in the respective public policy program, if it already exists. Finally, before delivering the judgment, the judge must visit the administrative public health entity, to understand the reality of the problem.[15]

In general, the dominant jurisprudence of the STF signals that: a) relative therapeutic protocols must be observed in terms of the supply of medicines and public health services; b) the right to health care is collective, but also individual; c) there is solidarity between the three federative entities, arising from common constitutional powers;[16] d) there is a relative presumption in

política. In: SCHWARTZ, Rodrigo Garcia (Org.). *Direito administrativo contemporâneo*. Administração pública, justiça e cidadania: garantias fundamentais e direitos sociais. Rio de Janeiro: Elsevier, 2010. p. 35.

14 NUNES, António José Avelãs; SCAFF, Fernando Facury. *Os tribunais e o direito à saúde*. Porto Alegre: Livraria do Advogado, 2011. p. 67.

15 The contemporary judge, it is worth emphasizing, is not a "chambers judge". If, before, the order was that the judges only speak through the records and isolate themselves, to maintain not only impartiality, but also appearances, they now need to be open up to society, for example, receiving the parties, communicating ethically with the press and seeking to understand what is at stake in processes.

16 In this case, perhaps the correct criterion would be the following: a) if there is no doubt about the competence of the federative entity responsible for providing the medicine, or performing

favor of the treatment offered by the SUS, based on evidence-based medicine;[17] e) as the registry of medicines at Anvisa is essential, the public administration may not be condemned for the provision of experimental treatments.[18]

Relative to *Suspensão de Tutela Antecipada* No. 175 of the STF (STA 175 AgR/CE-STF), led by rapporteur of Minister Gilmar Ferreira Mendes, whose vote was unanimously followed by, it was established that: a) the supply of mandatory drugs is the joint liability of federative entities (art. 23, II, of the CRFB and art. 7, XI, of Law No. 8.080/1990); b) in the case in judgement, there is no violation of the principle of separation of powers, for Judiciary powers guarantee the right to health, through provision of essential drugs or treatment. In his vote, the rapporteur recalled the thesis enshrined in the judgment of ADPF 45/2004, in the sense that there is constitutional legitimacy for control and intervention by the Judiciary in implementing public policies, in the case of unjustifiable state inertia or government abuses; c) considering the case in judgement, there is no invasion of administrative competence by the Union or disorder in its sphere of action, including due to the fact that, as to the practical development of this responsibility, there must be a model of cooperation and coordination of joint actions by federal entities; d) on account of the arguments above, there is no serious damage to the economy and public health.

It should be noted that, in this case, it was determined that the Union, the state of Ceará and the municipality of Fortaleza should provide a woman with Niemann-Pick type C condition a drug that would increase her survival chances and improve her quality of life, as the family could not afford it.

In 2018, the STJ – in Tema 106 of *Recurso Repetitivo* (REsp No. 1.657,156) - ruling on the obligation of the public authority to provide medicines not incorporated in SUS normative acts, established the following:

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the medical procedure, it would have sole responsibility to carry out the judicial order; b) if there are any doubts as to the responsibility, joint condemnation of the federative entities is necessary. As in the STF, however, there is no precedent regarding this distinction, it is up to the judge to always accept joint liability, so that the defendant of the lawsuit may be represented, alone or jointly.

17 For a deeper insight into the theoretical and practical aspects of evidence-based health, cf. SCHULZE, Clenio Jair; GEBRAN NETO, João Pedro. *Direito à saúde*: análise à luz da judicialização. 2. ed. rev. e ampl. Porto Alegre: Verbo Jurídico, 2019. p. 181-230.

18 CUEVA, Ricardo Villas Boas. Parâmetros para a judicialização do direito à saúde. In: LEMBO, Claudio; CAGGIANO, Mônica Herman; ALMEIDA NETO, Manoel Carlos de (Coord.). *Juiz constitucional*: estado e poder no século XXI. Estudos em homenagem ao ministro Enrique Ricardo Lewandowski. São Paulo: RT, 2015. p. 514.

The granting of medicines not incorporated in normative SUS acts requires the cumulative presence of the following requirements: i) Proof, through a reasoned and detailed medical report issued by a doctor assisting the patient, of the indispensable need for the drug, as well as the ineffectiveness, for the treatment of the disease, of drugs provided by the SUS; ii) financial incapacity to bear the cost of the prescribed drug; iii) existence of registration of the drug at Anvisa, observing the uses authorized by the agency.

The STF, in turn, in 2019, also faced the issue of medicines "not registered with Anvisa", focusing on health control, safety and efficacy of drugs not available on the Brazilian market. In this judgment - Tema 500 of Repercussão Geral (RE 657.718) -, the following was established:

> 1. The State cannot be required to provide experimental drugs. 2. The absence of registration with Anvisa prevents, as a general rule, the supply of medication by court order. 3. The judicial granting of medication without registration is possible, exceptionally, in case of unreasonable delay by Anvisa in considering the request (a term greater than that provided for in Law No. 13.411/2016), with the meeting of three requirements: (i) the existence of a drug registration request in Brazil (except in the case of orphan drugs for rare diseases); (ii) registration of the drug in recognized overseas regulatory agencies; and (iii) the non-existence of a therapeutic substitute registered in Brazil. 4. Actions that demand supply of medicines without registration with Anvisa should necessarily be proposed with respect to the Union.

Thus, according to the STF, the rule is that there is no obligation for the public authority to dispense medicine not registered with Anvisa. In addition, it was defined that, with judicial determination in favor of supply of the drug, the public entity that should bear the costs

is the Union. It was, finally, stated that treatments not performed in Brazil cannot be funded by the public authority.

There was still a need to decide on the issue of high-cost medication, "registered with Anvisa", and therefore available on the Brazilian market, but not incorporated in the free of charge dispensing policy of the SUS. In particular, on 11/03/2020, the STF - Tema 006 of

Repercussão Geral (RE 566.471) - ruled that for the public authority there is no obligation to provide medicines not listed in the SUS dispensing lists.

Exceptionally, however, it is possible, provided the following conditions are met: a) when there is evidence of lack of assets; b) when there is a medical report proving the need for medicine; c) when the reports are prepared by an expert trusted by the magistrate (or by the judicial health centers established in some courts); d) when the reports are based on scientific medical evidence; e) when there is proof that there is no therapeutic substitute or similar drug already dispensed by the SUS; f) when the drug is under analysis for incorporation into the SUS and the deadline for analysis has expired.

Thus, exceptionally, it is possible that any citizen may receive a high-cost drug that is not on the list. But who would be responsible for a high-cost drug not included in the SUS lists which, exceptionally, should be dispensed by order of the court? In 2019, in *Tema 793*, the STF ratified the following thesis:

> The federation entities, as a result of common competence, are jointly and severally responsible for the service demands in the area of health, and in view of the constitutional criteria of decentralization and hierarchization, it is up to the judicial authority to direct compliance according to the rules for the division of competences and determine reimbursement for those who bore the financial burden.

Given this, it is observed that, if these parameters are fulfilled in the specific case, and it is not possible to reach a consensus among the subjects involved, as the situation is urgent, it will be possible to grant a judicial measure with executive force. Concerning realization of the fundamental right to health, obeying the Constitution in a democratic scenario, this is not behavior which depends exclusively on discretionary judgment of the authority.[19]

Thus, if the rationality parameters are present, the jurisdiction is required to enforce, in the context of the case, the fundamental right to public health services, but, as will be seen, the issue is complex, providing serious challenges for jurisdiction.

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[19] SCHAUER, Frederick. *The force of law*. Cambridge: Harvard University Press, 2015. p. 92 e 168.

4. Fundamental right to the effectiveness of interlocutory relief from the Public Treasury and provision of atypical executive judicial powers

Once the issue of rational parameters in the decision-making process has been resolved, the problem of the effectiveness of the decision becomes relevant, especially in cases of extreme urgency, which, if not resolved immediately, could cause irreparable damage or damage that is difficult to repair.

In these cases, due to the nature of the fundamental right to health, "appropriate procedural techniques" to implement the court order regarding the appropriateness of the emergency relief involving public health provision, the question arises as to how to carry out this measure. Hypothetically, as it is not possible, in principle, to conduct inter-institutional dialogues, it is imperative to carry out executive activity, in order to ensure the protection of the right to public health services.

Note that the ineffectiveness of executive measures encourages a crises of efficiency that plagues state jurisdiction, represented by its inability to resolve conflicts satisfactorily and instil a sense of justice, a fact that makes it impossible to guarantee expectations as to the interpretation of the legal order, in addition to inadequate social control, reinforcing power structures.[20] It is necessary, therefore, to rethink the execution with regard to the Public Treasury, challenging former dogmas.

It should be understood that controlling the insufficiency of normative protection of fundamental rights is inherent to jurisdiction.[21] In reality, the atypical executive powers of the judge and the fundamental right to efficient supervision arise from substantive due process of law and, to some extent, correlate with the theme of diffuse control of constitutionality. If judges can control the constitutionality of a normative act, they can also control the lack or insufficiency of legal regulation, when this proves essential to the protection of a fundamental right. Control of unconstitutional omission, which, according to the diffuse model, can be performed in the specific case.

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[20] FARIA, José Eduardo. O judiciário e seus dilemas. *Revista do Advogado*, n. 56, p. 64, Sept. 1999.

[21] MARINONI, Luiz Guilherme. Do controle da insuficiência de tutela normativa aos direitos fundamentais processuais. In: MACEDO, Elaine Harzheim; HIDALGO, Daniela Boito Maurmann (Org.). *Jurisdição, direito material e processo*: os pilares da obra ovidiana e seus reflexos na aplicação do direito. Porto Alegre: Livraria do Advogado, 2015. p. 253-265.

In matters involving the judicialization of health, for example, it is not rare for the judge in the case to encounter insufficient legislative regulation. In other words, following the decision, especially in urgent situations, it is difficult to enforce compliance and, with effect, protect this right in reality.

It is not uncommon to hear about patients waiting long periods for a procedure that should take place as a result of the Judicial decision. In this situation, it is argued that the judge must protect the right to health through atypical executive measures, after recognizing the ineffectiveness or insufficiency of a procedural ruling.

This thesis, according to the principle of "least possible restriction", does not damage the right of defense, as, in the assessment of suitability of the executive technique, one must consider the fact that it is also least harmful to the legal sphere of the Public Treasury.

Note that there are two distinct discourses: one on the material right to health and another — based on the first — on procedural law, as to the proper technique for effective jurisdictional protection.[22]

Mainly by virtue of art. 139, IV, of the CPC, there is no doubt, considering the Brazilian legal system admits the use of atypical executive means, of subrogation or bench warrant, as it is also inherent to the jurisdictional function.[23]

If the legal order confers executive competence, it must, at the same time, provide all the conditions for the material right to be effectively protected. On the other hand, if it is true these atypical means enhance the effectiveness of the process, it is no less correct to say that they should be seen, in respect of the democratic legislator, as exceptional measures subsidiary in relation to the procedural techniques already disciplined in the legislation. In this case, "it is up to the judge to act in such a way as to impose no more than the minimum necessary for the protection of the fundamental right".[24]

Thus, in the event that the executive means typified by the legislative prove to be insufficient to provide effective compliance with the decision, the

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[22] Ibid., p. 255 e 263-265.

[23] CÂMARA, Alexandre Freitas. A eficácia da execução e a eficiência dos meios executivos: em defesa dos meios executivos atípicos e da penhora de bens impenhoráveis. In: ALVIM, Arruda et al. (Coord.). *Execução civil e temas afins* — do CPC/1973 ao Novo CPC: estudos em homenagem ao professor Araken de Assis. São Paulo: RT, 2014. p. 15-17.

[24] Luiz Guilherme Marinoni, Do controle da insuficiência de tutela normativa aos direitos fundamentais processuais, op. cit., p. 259.

judge may use atypical means; safeguarding, however, compliance with due process in favor of the party, whose legal status should be minimally harmed.

It should be remembered that, in the current scenario, fundamental rights must be effectively protected through the process, which cannot be conceived as a mere abstract and rhetorically ineffective instrument of legislative commitment. In this context, the right of action (art. 5, XXXV, of the CRFB) is not understood as a simple formal right of access to jurisdiction, completely detached from material law. On the contrary, the process, as a manifestation of a constitutional duty, must enable "jurisdictional protection", an expression whose concept relates to material law, which must be verified in terms of facts.[25]

It is important to understand, moreover, that material law must be protected, preventively and remedially, by the three branches of state power, and this protection, not labelled as insufficient or excessive, must satisfy assumptions of maximum proportionality. From this perspective, in their interpretation of procedural rules, judges must seek the solution that, respecting the parameters of due legal process, has greater effectiveness to the protection of material law. To do so, the atypical executive powers of the judge, generically provided for in art. 139, IV, of the CPC, are a procedural clause, in the sense that they enable the application of the normative text to social dynamics.[26]

5. Generic limits of the atypical executive powers of the judge

The Brazilian legal system is not the least advanced. Pursuant to art. 536 of the CPC, with regard to a court decision that recognizes the enforceability of an obligation, the judge may, ex officio or upon request, through specific authority or guardianship of the equivalent practical result, determine necessary measures to the creditor's satisfaction. In this context, the judge may determine, among other measures, the imposition of a fine, search and

[25] COMOGLIO, Luigi Paolo. Giurisdizione e processo nel quadro delle garanzie costituzionali. *Rivista Trimestrale di Diritto e Procedura Civile*, Milano, Giuffrè, a. XLVIII, n. 1, p. 1.076-1.077, Mar. 1994.

[26] ZOLLINGER, Marcia Brandão. Proteção processual aos direitos fundamentais. Salvador: Juspodivm, 2006. p. 153, 159 e 168.

seizure, the removal of people and goods, the undoing of works and the prevention of harmful activity, and, if necessary, request the police assistence.

In turn, it may confer the mentioned art. 139, IV, of the incumbent CPC upon the judge "to determine all inductive, coercive, mandatory measures or sub-rogations necessary to ensure compliance with the judicial order, including actions requiring financial payment".

It is a rule that, generically, invokes executive powers of the judge or the general clause of jurisdictional protection,[27] through the use of mandatory and executive techniques, through inductive and coercive measures to ensure compliance with judicial orders, including fulfilment of payment obligations[28] (Statement 48 of Enfam).[29] This rule, of course, must be applied in judicial decisions concerning urgent situations.

It is interesting to note that there are, in the doctrine, those who consider coercive and inductive measures a kind of mandatory guardianship.[30] In this sense, measures, such as the periodic fine (a typical measure), compel the subject to comply with the obligation, while inductive measures consist of assigning indirect sanctions, restricting a right of the party, such as a prohibition of business activity, as long as the default persists, or even, in extreme cases, imprisonment.

It is understood, however, that while coercive measures propose a negative sanction, inductive ones, on the contrary, suggest a benefit, an advantage or an incentive for compliance.

In any case, the legal text does not establish a difference in effectiveness between these measures, and thus it is argued the judge can exercise a degree of creativity, to ensure effective compliance with the court order.

It has been argued, for example, that the following inductive or coercive measures are possible: a) prohibiting the individual debtor to perform certain

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27 ABELHA, Marcelo. *Manual de direito processual civil*. 6. ed. rev., atual. e ampl. Rio de Janeiro: Forense, 2016. p. 289.

28 In the sense that there is also an order for fulfillment of a sentence that establishes an obligation to pay, cf. NEVES, Daniel Amorim Assumpção. Medidas executivas coercitivas atípicas na execução de obrigação de pagar quantia certa — art. 139, IV, do novo CPC. *Revista de Processo*, São Paulo, a. 42, n. 265, p. 109, Mar. 2017.

29 Statement no. 48 of Enfam: "Art. 139, IV, of CPC/2015 conveys a general power of effectiveness, allowing the application of atypical measures to ensure compliance with any judicial order, including in the scope of the execution of judgment and in the execution process based on extrajudicial instruments".

30 WALDRAFF, Célio Horst. Os poderes mandamentais do juiz no novo CPC e a superação da multa do art. 475-J do CPC/1973. Revista eletrônica do Tribunal Regional do Trabalho da 9a Região, Curitiba, v. 5, n. 50, p. 113-130, May 2016.

functions in business companies or in public administration; b) prohibition to contract with the public administration; c) unavailability of movable and immovable property; d) prohibition of credit card use; e) suspension of tax benefit; f) suspension of contracts, including access to telephone, internet, cable television services etc., as long as they are not essential for survival (such as supply of energy and water); g) prohibition to attend certain places or establishments; h) confiscation of the passport (if possible, except in maintenance payment cases, or at least restricting the right to free movement); i) temporary seizure, with dispossession, of assets (e.g. vehicles), provided they are non-essential (e.g.: clothing or professional equipment); j) suspension of vehicle licenses; k) blocking of bank account; l) construction embargo; m) closing of the establishment; n) restriction on the company working hours; o) extension of deadlines for compliance with the obligation etc.[31]

There are those who argue that art. 139, IV, of the CPC also authorizes civil arrest.[32] From this perspective, prison is a coercive measure, which should not be confused with imprisonment for debts, as the constitutional prohibition (art. 5, LXVII) is interpreted as meaning the arrest relates only to patrimonial obligations,[33] with the express exception of the case of default of maintenance obligations,[34] pursuant to art. 522, § 2, of the CPC.

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[31] In this sense, cf. MEIRELES, Edilton. Medidas sub-rogatórias, coercitivas, mandamentais e indutivas no código de processo civil de 2015. Revista de Processo, São Paulo, a. 40, n. 247, p. 231-245, Sept. 2015.

[32] In the contrary sense, cf. Daniel Amorim Assumpção Neves, Medidas executivas coercitivas atípicas na execução de obrigação de pagar quantia certa — art. 139, IV, do novo CPC, op. cit., p. 119.

[33] Prison is constitutionally prohibited, as observed by Luiz Guilherme Marinoni, for pecuniary debts. In this sense, "prison can only be used when the decision does not require expenditure and depends on the exclusive behavior of the party. Beyond this, it can only be used when no other means of execution proves capable of giving effect to the judicial decision". Cf. MARINONI, Luiz Guilherme. *Tutela de urgência e tutela da evidência*: soluções processuais diante do tempo da justiça. 2. tir. São Paulo: RT, 2017. p. 177. In the same sense, claiming "that, *exceptionally*, as long as certain parameters are observed, it is possible to use civil imprisonment as an atypical coercive measure for realization of rights without patrimonial content", cf. DIDIER JR., Fredie et al. *Curso de direito processual civil*: execução. 7. ed. rev., atual. e ampl. Salvador: Juspodivm, 2017. v. 5, p. 637. Under the aegis of CPC/1973, cf. GUERRA, Marcelo Lima. Direitos fundamentais e a proteção do credor na execução civil. São Paulo: RT, 2003. p. 134-137. In the opposite sense, cf. TALAMINI, Eduardo. *Tutela relativa aos deveres de fazer e de não fazer e sua extensão aos deveres de entrega de coisa* (CPC, arts. 461 e 461-A, CDC, art. 84). 2. ed. rev., ampl. e atual. São Paulo: RT, 2003. p. 514., 2003. p. 514. Also in the opposite sense, with respect to CPC/2015, cf. MEDINA, José Miguel Garcia. *Execução:* teoria geral, princípios fundamentais e procedimento no processo civil brasileiro. 5. ed. rev., ampl. e atual. São Paulo: RT, 2017. p. 319.

[34] Luiz Rodrigues Wambier and Eduardo Talamini understand that civil imprisonment cannot be restricted to alimony debts arising from family law, since the constitutional concept of

Finally, it is argued that, even without immediately ensuring fulfilment of the requested provision,[35] procedural arrest, similarly to the contempt of court of American law,[36] would be justified to ensure respect for compliance with the court order, without prejudice to the fundamental right to effective legal protection.[37]

Although the text of art. 139, IV, of the CPC deals with the Common

Law convention, in which judges have indeterminate power to apply measures of indirect execution,[38] it is clear that the judge must be prudent in its application.[39] Preferably, it should only be used in a "subsidiary" way, i.e., when typical measures are flagrantly inadequate. From this perspective, so that executive powers of the judge are not used arbitrarily, it is essential to verify, in this case, the restrictions established by the incidence of maximum proportionality. Possible abuse may even be the object of interlocutory appeal (art. 1015, sole paragraph, of the CPC). In this context, measures that directly affront the constitutional system will not be admissable.[40]

As Eduardo Talamini maintains,[41] the effectiveness of execution is proportional to the possibility they exceed limits of reasonableness, with respect to possible judicial abuse of defaulters; so that the use of such coercive measures, especially obligations to pay, will find the correct limit in the

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alimony "encompasses any and all payments essential for the livelihood of the right holder. So, it covers remunerative amounts or the provision of services on a personal basis. It also covers indemnities for the subsistence of the victim of unlawful conduct. Even more: positive state benefits relating to fundamental rights can also be of this nature — such as the right to medication, medical treatment, hospital beds, education etc." Cf. WAMBIER, Luiz Rodrigues; TALAMINI, Eduardo. *Curso avançado de processo civil*. 16. ed. refor. e ampl. São Paulo: RT, 2017. v. 3, p. 495-496.

35 COSTA, Eduardo José da Fonseca. A "execução negociada" de políticas públicas em juízo. *Revista de Processo*, São Paulo, a. 37, n. 21, p. 342, Oct. 2012.

36 HAZARD JR., Geoffrey C.; TARUFFO, Michele. American civil procedure: an introduction. New Haven; Londres: *Yale University Press*, 1993. p. 202-204.

37 Defending, under the aegis of CPC/1973, "criminal" imprisonment as a measure of civil procedural coercion relating to the indirect execution of the obligation to make non-fungible, cf. LAMY, Eduardo de Avelar. Prisão penal e coerção processual civil. Genesis — *Revista de Direito Processual Civil*, Curitiba, v. 6, n. 19, p. 76-88, Jan./Mar. 2001.

38 Marcelo Lima Guerra, Direitos fundamentais e a proteção do credor na execução civil, op. cit., p. 121.

39 It is interesting to note that the proper application of extremely open normative texts is also part of the concern of the Common Law doctrine. With regard to injunctions, see LEUBSDORF, John. Preliminary injunctions: in defense of the merits. *Fordham Law Review*, v. 76, n. 1, p. 35, 2007.

40 The STF, illustratively, in the field of tax law, signals its position through Precedents No. 70, 323 and 547.

41 TALAMINI, Eduardo. Medidas coercitivas e proporcionalidade: o caso WhatsApp. *Revista Brasileira de Advocacia*, São Paulo, a. 1, n. 1, p. 17-43, Jan./Mar. 2016.

exceptionality of the measure, after the exhaustion of traditional means of debt satisfaction, including, in light of the rule of lesser onerousness provided for in art. 805 of CPC/2015, the need for substantial foundation and, mainly, respect for rights and guarantees assured in the Federal Constitution. (It does not seem reasonable to mandate payment under penalty of imprisonment or prohibition of professional practice, freedom of movement etc.).[42] Therefore, the atypicality arising from art. 139, IV, of the CPC is characterized, as a rule, by "subsidiarity".[43]

In other words, important principles for the judge to recognize in the use of atypical executive powers are: a) exhaustion of typical executive measures, except when they are flagrantly ineffective in the specific case; b) the possibility of compliance by the debtor, in line with non-punitive character of the measure; c) the efficiency of the measurement, in terms of its coercive character; d) compliance with the postulates of proportionality and reasonableness, establishing a correlation between the coercive measure and the origin of the outstanding credit; e) the lowest cost of the measure; f)

respect for contradictory practice as a previous influence; g) respect for the duty of adequate reasoning; h) respect for constitutional guarantees and fundamental rights in general (freedom of movement; right to work etc.).[44]

Although there are serious limitations to the Public Treasury, regarding the public official directly responsible for fulfilling the obligation, these

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[42] In the same sense, Daniel Amorim Assumpção Neves suggests, correctly, that atypical executive measures should only be used after exhaustion of typical measures. In the case of obligations to pay, for example, in addition to the normal sequence of acts of patrimonial execution, guided by binomial attachment-expropriation, the CPC provides for the "protest of sentences" (art. 517) and the "inclusion of the executed in the registry of defaulters" (art. 782, §§ 3rd to 5th). So, only when, in the context of the specific case, these typical measures prove to be ineffective. to art. 139, IV, of the CPC. It should be noted, however, that as atypical measures do not have a sanctioning nature, they should only be used when it is effectively shown that they are able to pressure the execution of the obligation. Furthermore, still based on the teaching of Daniel Amorim Assumpção Neves, the principle of minimum equity, that is, immunity from seizure rules, and the maximum respect for human dignity. Cf. Daniel Amorim Assumpção Neves, *Medidas executivas coercitivas atípicas na execução de obrigação de pagar quantia certa* — art. 139, IV, do novo CPC, op. cit., p. 107-150.

[43] In this sense, note Statement No. 12 of the FPPC: "The application of atypical subrogation and coercive measures is applicable in any obligation to comply with the sentence or execution of an extrajudicial executive instrument. These measures, however, will be applied in a subsidiary manner to the typified measures, with observation of the contradictory, still deferred, and by means of a decision in light of art. 489, § 1, I and II".

[44] In a similar sense, cf. WAMBIER, Luiz Rodrigues; TALAMINI, Eduardo. *Curso avançado de processo civil*. 16. ed. refor. e ampl. São Paulo: RT, 2017. v. 3, p. 494-495.

measures can be applied, especially when involving urgent situations. In other words, if there is a real risk of causing

irreparable damage to the health of the citizen in case of non-compliance with the court order, or if the measure may significantly improve quality of life, it is theoretically possible to creatively apply art. 139, IV, to the public official.

6. The insufficiency of the "indirect execution" system in emergency relief granted in the demand for public health services

Despite all these possibilities, court practice has demonstrated that "forced execution", due to a series of factual-legal difficulties[45] **is not the most efficient way to implement, in court, a measure that has an impact on a given public policy**.[46] The demands for individual public health benefits, for example, are of a structural nature, with a focus on polycentric and diverse interests, not conducive to the executive logic of the traditional individualized process.[47] Therefore, confirming these considerations, the reflections that follow appear timely and necessary for the purposes of this study.

The first is related to the observation that, when it comes to a court decision that directly or indirectly affects the performance of government policies, such as health benefits not covered by government planning, the exercise of powers granted by art. 139, IV, of the CPC can cause an undesirable estrangement of the spheres of state power. Take, for example, the arrest of a civil servant or even of a political minister, such as a Secretary of Health. This

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45 In respect of these difficulties, cf. VITORELLI, Edilson. Atipicidade dos meios de execução no processo coletivo: em busca de resultados sociais significativos. *Revista de Processo*, São Paulo, a. 43, n. 275, p. 287-289, Jan. 2018.

46 Eduardo José da Fonseca Costa, A "execução negociada" de políticas públicas em juízo, op. cit., p. 35.

47 As Edilson Vitorelli observes, "such situations exemplify the need to think of litigation beyond what is expressed in the process. It's not just a child, or a medical examination. It is irradiated collective litigation, i.e., litigation that affects varied social subgroups, of equally varied forms and degrees of intensity, with conflicting interests, which leads to a high degree of intra-class conflict as well as a high degree of complexity in the formulation of the collective claim, since not all members of the group expect the same result from the process". See Edilson Vitorelli, Atipicidade dos meios de execução no processo coletivo: em busca de resultados sociais significativos, op. cit., p. 289.

is a legal situation that, in practice, can create a degree of inter-institutional instability, which may destabilize the democratic harmony.

It is true that the opposite also occurs, i.e., confusion is also created as to the interpretation of the indelible clause of separation of powers when judicial decisions which are fully effective are not complied with. This confirms the thesis that judicial decisions, in this area, must be exceptional. In other words, in the specific case of the legalization of health benefits not provided for in the government's ordinary actions, the execution of judicial decisions should be restricted to cases in which the citizen suffers irreversible health damage, or in the case of chronic rare diseases or genetics, may benefit from an effective improvement in quality of life. This must be added to other objective criteria that confer rational decision-making.

Less impactful, but also potentially destabilizing, is the determination by the Public Treasury to, first, include in the budget the funds necessary for the progressive fulfilment of the right to health, as well as, secondarily, to apply this money correctly.[48] The intervention of the Judiciary in budgeting is always an unpopular measure and in fact undemocratic, so that it must accrue exceptionality. As an executive parameter, judicial determination in the field of public policies may take place through "negotiated execution ",[49] providing, on the one hand, democratic governance and, on the other, the effective transformation of social reality in approximation with the promises of the social and democratic state of law. Here, of course, the parameter should be the execution of structural collective judgments, which is not part of the scope of this study.

Thirdly, it should be noted that coercive measures are not always suitable for urgent cases. There are cases, in the claims for public health services and medicines, where the urgency is so great, that only one measure of sub-rogation remains,[50] which is immediate seizure of finances in public accounts, to ensure the immediate protection of the health of the

citizen, to prevent irreversible harm. It should be noted that the STF, in ADPF 664, established an understanding that the indiscriminate blocking of public funds through judicial decisions is not admitted, as the Constitution prohibits transposition, relocation or transfer of resources from one category

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48 Ada Pellegrini Grinover, O controle de políticas públicas pelo Poder Judiciário, op. cit., p. 48.

49 Eduardo José da Fonseca Costa, *A "execução negociada" de políticas públicas em juízo*, op. cit., p. 25-56.

50 In defense of the application of subrogation measures against the public administration, cf José Miguel Garcia Medina, *Execução*, op. cit., p. 309.

or agency to another without prior legislative authorization. It is allowed only in cases involving the payment of public authority debts by judiciary bond.

However, it may be said that the case did not concern a situation involving threat to the citizen, which is why, when considering this precedent, it is possible to use the technique of distinction. In others words, although the rule concerns the impossibility of provisional execution against the Public Treasury, aside from social security cases, including those arising from work accidents, it allows for situations that may compromise the dignity and life of the citizen (thesis of defeasibility).[51]

Therefore, if the citizen has low economic sufficiency and vulnerable to health problems, and it is shown minimally that the public system does not provide safe, effective provisions, it is possible to grant an injunction to ensure the drug or access to the indispensable treatment. On the judge, of course, falls the burden of proper justification for this exceptional executive measure. To the citizen, on the other hand, beholds the duty of proof of relevant expenditures, under penalty of reimbursement to the treasury.

Note that, in the case of drug supply, the STJ (Item 84) defined that "it is up to the judge to adopt effective measures to carry out decisions, and they may, if necessary, even determine the sequestration of the debtor's assets (blocking), according to prudent discretion, and always with adequate reasoning".

If these extremely urgent cases call for greater exercise of the executive powers of the judge, it is correct to say, on the other hand, when the measure is not so urgent, it is possible to use techniques of indirect execution, through coercive measures.

The most common technique for voluntary compliance with obligation concerns the use of the coercive fine,[52] which is applicable, also, in relation to the Public Treasury (Topic 98 — STJ). It is a procedural technique of an

[51] MAIDAME, Márcio Manoel. Execução contra a Fazenda Pública. In: ASSIS, Araken de; BRUSCHI, Gilberto Gomes (Coord.). *Processo de execução e cumprimento de sentença*: temas atuais e controvertidos. São Paulo: RT, 2020. p. 943.

[52] Roger Perrot, analyzing the theme in the light of the French system, clarifies that, if the debtor exhibits negligence in relation to compliance with the court order, the cost may be a private penalty in favor of the creditor. See La coercizione per dissuasione nel diritto francese. Tradução de Mariacarla Giorgetti. *Rivista di Diritto Processuale*, Padova, a. LI, p. 666-667, July/Sept. 1996.

accessory nature,[53] which aims at fulfilment of the main obligation,[54] not to be confused with the contempt of court of Anglo-American law.[55]

In particular, art. 537 of the CPC regulates the matter, eliminating several doctrinal divergences.[56] Initially, it clarified that the fine is independent of the request of complainant [57] and may be applied in the knowledge phase, in provisional relief or in the sentencing, or in the phase of execution, provided it is sufficient and compatible with the obligation and that a reasonable period for compliance is determined. Secondly, it was made clear that the judge may, ex officio or upon request, modify the amount and frequency of the fine due or exclude it, if it is verified that: a) it was insufficient or excessive; b) there was demonstration of partial supervening compliance with the obligation or just cause for non-compliance. Thirdly, unlike other legal systems[58] and in line with the Franco-Belgian system, it was determined that the amount of the fine will be due to the creditor.[59] In addition, in relation to the rationalist process paradigm,[60] it was clarified that the decision that fixed the fine is subject to

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53 On the accessory legal nature of the coercive fine, Cf. GUERRA, Marcelo Lima. *Execução indireta*. São Paulo: RT, 1998. p. 115.

54 On the correlation between the penalties and the specific jurisdictional protection of obligations, in terms of compliance or otherwise cf. GRINOVER, Ada Pellegrini. Tutela jurisdicional nas obrigações de fazer e não fazer. Revista de Processo, São Paulo, a. 20, n. 79, p. 65-76, July/Sept. 1995.

55 As Neil Andrews observes, "the party that does not comply with an injunction will be held responsible for contempt, even if it the Court is later convinced to reverse the granting of the injunction". Cf. ANDREWS, Neil. O moderno processo civil: formas judiciais e alternativas de resolução de conflitos na Inglaterra. Orientação e revisão da tradução Teresa Arruda Alvim Wambier. 2. ed. rev., atual. e ampl. São Paulo: RT, 2012. p. 302- 303. In the same sense, cf. INGMAN, Terence. The english legal process. 9. ed. Oxford: *Oxford University Press*, 2002. p. 172-173.

56 The issue of the incidence of the coercive fine on compliance of obligations to pay was not very clear, however. For Daniel Amorim Assumpção Neves, this procedural technique may only be considered pertinent in situations in which, although possible, due to strong patrimonial indications, there is difficulty in constricting assets. When the debtor has no assets, the measure is innocuous. Cf. Daniel Amorim Assumpção Neves, *Medidas executivas coercitivas atípicas na execução de obrigação de pagar quantia certa* — art. 139, IV, do novo CPC, op. cit., p. 139.

57 The Brazilian system is different from the Portuguese and German models, which require a coercive fine, upon request made by the creditor. Cf. PEREIRA, Rafael Caselli. A multa judicial (astreintes) e o CPC/2015: visão teórica, prática e jurisprudencial. Salvador: Juspodivm, 2016. p. 83.

58 In Portugal, the allocation of amounts related to the coercive fine, without limit, is divided equally between the State and the creditor of the obligation. Differently, in Germany, although there is a ceiling provided for by law, the whole amount is the responsibility of the State. Cf. Rafael Caselli Pereira, *A multa judicial (astreintes) e o CPC/2015*, op. cit., p. 83.

59 Critical of the Brazilian model, with the argument that it can generate enrichment without cause, cf. LEAL, Márcio Flávio Mafra. Ações coletivas. São Paulo: RT, 2014. p. 207.

60 The current Brazilian CPC, although much celebrated, remains tied to the liberal-rationalist paradigm. Worthy of mention, to cite one example, is the topic of the suspensive effect of the

provisional compliance, and must be deposited with the court, allowing for collection of the amount after the final decision of the judgment in favor of the complainant. Finally, it was recommended that the fine will be due from the day on which non-compliance with the decision and will pertain as long as the decision that led to it is not complied with.

As can be seen, the Brazilian system, compared to other legal entities,[61] is fairly advanced. It is possible to go further, however. From this perspective, considering that "third parties" also maintain obligations in relation to certain processes[62] (art. 77, IV, of the CPC), it is understood that it is not feasible to put forward a political obstacle regarding the application of the coercive fine directly to the public official responsible for compliance.[63]

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appeal. In particular, the Brazilian system resembles the French, in that, by virtue of arts. 500 and 501 of the respective CPC, it is excluded from the sentence in the first instance, at least as a rule, subject to immediate and automatic executive effectiveness, with the transit in res judicata.

61 To illustrate, we observe that, in Italy, since the 2009 procedural reform, specifically art. 614-bis, the coercive fine has been provided for in a more generic way, but, still, restricted to obligations relative to non-fungibles. Interestingly, the legal concept is not applicable to employment relationships, including in the public sphere. Furthermore, the application of the fine depends on the request of the interested party. On the subject, cf. BONATO, Giovanni. As reformas da execução no processo civil italiano. In: ZUFELATO, Camilo et al. (Coord.). *I Colóquio Brasil-Itália de Direito Processual Civil*. Salvador: Juspodivm, 2016. p. 280-289. For a critique about the limits of Italian indirect execution of this procedural reform, cf. CHIARLONI, Sergio. *L'esecuzione indiretta al sensi dell'art*. 614-bis do CPC: confini e problemi. Revista de Processo Comparado — RPC, São Paulo, a. 1, v. 1, p. 223-236, Jan./June 2015; FONSECA, Elena Zucconi Galli. *Misure coercitive fra condanna e tutela esecutiva. Rivista Trimestrale di Diritto e Procedura Civile*, Milão, a. LXVIII, n. 1, p. 389-401, Mar. 2014; BOVE, Mauro. La misura coercitiva di cui all'art. 614-bis c.p.c. *Rivista Trimestrale di Diritto e Procedura* Civile, Milão, a. LXIV, n. 3, p. 781-793, Sept. 2010.

62 Regarding the subject, still under the aegis of CPC/1973, cf. ARENHART. Sergio Cruz. A efetivação de provimentos judiciais e a participação de terceiros. In: DIDIER JR., Fredie; WAMBIER, Teresa Arruda Alvim (Coord.). *Aspectos polêmicos e atuais sobre os terceiros no processo civil e assuntos afins*. São Paulo: RT, 2004. p. 951-993.

63 Under the CPC/1973 regime, defending the inapplicability of the fine of the public official which, directly, disregarded the legal precept, cf. Eduardo Talamini, *Tutela relativa aos deveres de fazer e de não fazer*, op. cit., p. 246-247. In the same sense, cf. AMARAL, Guilherme Rizzo. *As astreintes e o processo civil brasileiro*: multa do artigo 461 do CPC e outras. 2. ed. rev., atual. e ampl. Porto Alegre: Livraria do Advogado, 2010. p. 128. As an ineffective coercive fine, however, in relation to compliance with court orders directed at implementation of public policies, since it falls on public treasury revenue, and not on the agent responsible for its management, cf. SALLES, Carlos Alberto de. *Ação civil pública contra omissões do poder público: limites e possibilidades*. In: SALLES, Carlos Alberto de (Org.). Processo civil e interesse público: o processo como instrumento de defesa social. São Paulo: RT, 2003, p. 221. For this reason, part of the doctrine has already admitted the application of the coercive fine on the public official. Rafael Caselli Pereira, for example, understands that "the public official causing the damage shall be responsible for the payment of the quantum of the cumulative penalty, and be subject to a possible fine for undermining the dignity of justice and litigation in bad faith, and even need to respond for the crime of disobedience". Cf. Rafael Caselli Pereira, *A multa judicial*

This is a dilemma faced by the judge in the specific case, but it is true that, only in this way, may the institute present itself as an effective measure in relation to the Public Treasury. If the coercive fine were directed only at the State,[64] the legal entity, the community would be penalized twice, as, in addition to not immediately observing the use of public resources in a constitutionally adequate way, it would need to pay, using other public resources, due to the mismanagement of the government.[65] The official physically represents the State, and, as regards social protection, in many cases, it is not possible to

work abstractly, so that if the decision is still endowed with effectiveness, it must be complied with, so that there is no executive intervention. The effectiveness of the decision, as already highlighted in this study, depends on the procedural technique adopted.[66]

Thus, the matter is addressed in PL No. 8.058/2014,[67], concerned with the special process for the control of public policies and intervention by the Judiciary. Pursuant to art. 21 of this Bill, if the responsible authority does not fulfil the obligations determined in the sentence or in the temporary relief, the judge may apply coercive measures provided for in the CPC, including periodic fines arising from joint liability of the non-compliant public entity and the authority responsible, from the time of the personal subpoena for compliance, without prejudice to liability for an act of administrative

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(astreintes) e o CPC/2015, op. cit., p. 132-133. Correctly, Leonardo Carneiro da Cunha argues that, "before imposing the fine on the public official, due notice must be given, summoning him to comply with the decision and warning him of the possibility of exposing himself to the pecuniary penalty". Cf. CUNHA, Leonardo Carneiro da. *A fazenda pública em juízo*. 13. ed. refor. Rio de Janeiro: Forense, 2016. p. 139.

64 On criticism related to application of coercive fines against the state, cf. Márcio Flávio Mafra Leal, *Ações coletivas*, op. cit., p. 189-190.

65 CAMBI, Eduardo. Neoconstitucionalismo e neoprocessualismo: direitos fundamentais, políticas públicas e protagonismo judicial. São Paulo: RT, 2009. p. 430.

66 Note that the STJ has precedents stating that extending responsibility to the official is not a possible policy of coercive sanction applied to the Public Treasury as a result of its failure to effectively participate in the process. A contrary understanding would end up violating the principles of right to full defense and full legal process. Illustratively, cf. AgRg in AREsp 196.946/SE, rap. ministerHumberto Martins, Second Panel, 5/2/2013, DJe 5/16/2013. Regarding the writ of mandamus, the STJ admits the application of the coercive fine to the enforcement authority. In particular, there is a precedent in the sense that there is no obstacle for penalties to also fall on the recalcitrant authority that, without just reason, causes embarrassment or fails to comply with the court decision rendered in the course of the mandatory action. So, the public official who participated in the mandatory procedural relationship may legitimately appear as a defendant in the face of claims for execution of penalties. See AgInt in REsp 1405170/PR, report minister Sérgio Kukina, First Panel, judged on 6/11/2019, DJe 6/18/2019.

67 Cf.: www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1283918.

improbity or sanctions imposed for crimes of responsibility or disobedience, or the intervention of the Union in the state or state in the municipality.

Despite this trend, it should be reaffirmed that the great dilemma faced by the judge when analyzing the claim for individual relief based on urgency concerns the fact that the coercive fine is hardly ever an effective executive measure to protect the health of the citizen. In other words, the coercive fine may be applied, but, later, no specific protection for compliance with the main obligation (provision of public health) is obtained; not to mention the need to execute the value of the fine, reversing the relationship of means and end.

In fact, deciding responsibly on the appropriateness of urgent relief reveals a complex antecedence. The degree of complexity increases much more when the executive technique must be defined proportionately adequate to protect the right at risk. It is important to repeat, coercive measures are not always able to adequately protect the law, a situation that demands the prompt action of subrogation measures.

This work supports the thesis that, given the constitutional limits of the judicial protection of the right to public health benefits, one of the determining criteria for the provision of the application of temporary relief is minimum proof that the citizen suffers irreversible harm to their health. If there is an immediate risk, it is undeniable that, at least as a rule, one cannot wait a certain time to verify that the measure caused the effect expected, provided the timely fulfilment of the obligation. This can also be seen in the proper and proportional calibration of the fine.

Coercive measures, in general, are relevant if there is a certain "time" to comply with the court order, but in the case of situations of extreme urgency, i.e., where irreversible damage to the citizen is possible at any time, coercive measures are not presented as the best way.

What is meant, in other terms, is that if the risk of harm is imminently irreversible, sub-measures should be directly executed to promptly enforce the right. If by force of extreme urgency, the case demands, for example, immediate supply of medication or surgery, it must be possible to comply with the order, not determining compliance with the measure by the government, as, eventually, even under the coercive measure, undesirable irreversible damage may occur between the determination and its fulfilment.

In this way, the judge, given the objective of making the decision that grants effective interlocutory relief, must be diligent regarding the adoption of the coercive fine, as it is not uncommon that immediate sequestering of

public funding is the most appropriate executive technique.[68] If a surgery, for example, should be carried out in a few days, the immediate cost of this procedure (preparatory acts, travel, etc.) is the most effective measure, compared to waiting for the public official to satisfy the obligation, not to mention that normally the system entails reporting the case to the legal prosecutor, for challenge or procrastination.

Of course, the judge must observe the real possibility of the health provision being carried out by the public authority, because, if it cannot make it feasible, it "should pay for the cost in a specific private institution".[69] The issue, evidentially, is not simple, as it involves a judicial determination relating to an entity not yet participating in the process (private hospital, for example), but which, under the law (art. 77, IV, of the CPC), must comply with the provision, if this procedure is actually possible. Note that any failure to comply with this order may constitute contempt of court and the judge, without prejudice to the criminal, civil and procedural sanctions, may apply a fine of up to 20% of the value of the case, according to the seriousness of the conduct (§ 2 of art. 77 of the CPC).

But it should also be noted that, in addition to the duty to protect the life of the claimant, it is essential, in these exceptional cases, that the judge analyzes the possibility of universalizing the measure, so as not to harm the principles of impersonality and the supremacy of public over private interest. If, in the social context of the issue, it is possible to defer the measure to another claimant in a similar situation it is a sign that the measure is not case-by-case and arbitrary. On the other hand, it is worth adding that, under the republican principle, if there is an advance of public funds, the jurisdiction will always bear in the face of the executive measure the duty to later prove the proper use of public spending, under penalty of compensation and any other enforcement consequences, and risk of negative entry of their name in the financial system.

It is true that, if the case implies continuity in the provision of public health, it is possible that the execution is negotiated later, in the sense of meeting, at the same time, the interests of the right to health and democratic governance. However, immediately, the concern must be the protection of health, to avoid the risk of irreversible harm or, conversely, to provide

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[68] Márcio Flávio Mafra Leal, Ações coletivas, op. cit., p. 190.

[69] ALVES, Francisco Glauber Pessoa. Ações de saúde contra o poder público: ensaio de um roteiro decisório. *Revista de Processo*, São Paulo, a. 41, n. 259, p. 365, Sept. 2016.

substantial improvement in tquality of life. The jurisdictional protection, in this context, must always be timely.

Thus, apparently, the coercive fine should be reserved for collectivized jurisdiction, when, in theory, there is a little time to test the adequacy of the public health policy. From this perspective, it seems that the coercive fine is a procedural technique that, if decision parameters set out in this work are observed, will be reserved for fulfilment of collective, structural decisions.

The same reasoning must be applied to the technique of judicial intervention dealt with in arts. 102-111 of Law No. 12,529/2011, widely applied in structuring measures of US law.[70] In this case, even if the exceptionality of the measure is recognized,[71] it is observed that, in addition to placing at risk the federative system, the judicial administrator would end up with the same administrative and financial dilemmas faced by the public official responsible. In the same sense, federal intervention in member states (art. 34, VI, of the FC) and state intervention in the municipalities (art. 35, IV, of the CF) risks the same ineffectiveness. Furthermore, the status of the political official with regard to the *Lei de Improbidade Administrativa* (art. 11, II, of Law 8.429/1992) and, again, their possible arrest does not entail, immediately, jurisdictional action.[72] Therefore, a practical measure compatible with the right to health should be sought, given that, in urgent situations, indirect execution measures will be for a subsidiary plan.

It is important to clarify, to conclude this study, that, even in the face of anticipatory measures, the irreversibility of the effects of the decision cannot be an insurmountable limit, as the judge, rather than recklessly deny the request, attributing to the prior judgment of the legislator the responsibility of the decision, must analyze the weight of the values at stake, taking into account the principle of proportionality. Through a rationally motivated decision, the judge must consider the benefits and harms of the concession or denial of the measure, i.e., measure the *periculum in mora* by comparing it with

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[70] Regarding the understanding that it is also applicable in public bodies, especially in the modalities of supervisory and co-managerial intervention, cf. ARENHART, Sérgio Cruz. A tutela coletiva de interesses individuais: para além da proteção dos interesses individuais homogêneos. São Paulo: RT, 2013. p. 357. Further, citing examples defending the usefulness of judicial intervention for the effectiveness of structuring decisions, cf. Fredie Didier Jr. et al., Curso de direito processual civil, op. cit., p. 638.

[71] LEONEL, Ricardo de Barros. *Manual do processo coletivo*. 4. ed. rev., ampl. e atual. São Paulo: Malheiros, 2017. p. 514.

[72] Eduardo José da Fonseca Costa, A "execução negociada" de políticas públicas em juízo, op. cit., p. 35-38.

the inverse scenario. Furthermore, if the situation is "of the most urgent", given the negative effects resulting from the denial of the right of the claimant, the judge must grant tutelage *inaudita altera parte*. It is possible to require, before the measure, the provision of a guarantee or surety bond, if the time factor does not compromise the effectiveness of the measure, but, on the other hand, it cannot be assumed that this injunction bond is a natural consequence of irreversibility. In some cases, the injunction bond can be dispensed with, especially when dignity of life is at stake.[73]

7. Final considerations

The research hypothesis is therefore confirmed, in the sense that: a) the decision, in the demands for public health services, is an exceptional measure, reserved for cases that, due to the "urgency factor", do not enable the construction of consensus solutions; b) the judge, in situations of urgency involving the life of the claimant, should almost always make use of direct or subrogatory measures in order to make the court decision effective; c) in other cases, the complexity of the litigation must be recognized, as it is structural and polycentric in nature, and should not, in principle, be decisive.

Judges, given requests involving public health provision, must have two concerns. First of all, they must observe decision-making rationality, especially in situations of extreme urgency. In particular, the recent precedents of the STJ and the STF serve as a model

of decision-making rationality. On the other hand, once the decision is considered substantially correct, the main issue relates to the need for its effectiveness, to protect the health and life of the claimant.

In this second respect, it appears in practice that not even indirect execution measures are effective. As seen, the setting of coercive fines on the Public Treasury and even the threat of arresting the administrator is unfruitful in the scope of preventing irreparable harm to the health of the claimant. In this sense, the state and the judge must have the sensitivity to resolve the issue directly, based on the peculiarities of the case.

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[73] LUCON, Paulo Henrique dos Santos. Tutela provisória e julgamento parcial no CPC de 2015: avanços e perspectivas. In: *VVAA. O novo código de processo civil*: questões controvertidas. São Paulo: Atlas, 2015. p. 329-332.

Orders to act, therefore, cannot be formulated in a mechanical way, disconnected from the reality of the case. If the situation is extremely urgent, in other words, there may not be time for measures of coercion or threat, so the judge, based on the art. 139, IV, of the CPC, should adopt a more effective implementation.

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