SPECIAL CIVIL FEDERAL JUDGES AND THE RIGHT TO HEALTH: VALUE OF THE CASE, ABSOLUTE COMPETENCE, AND THE CONSENSUAL SOLUTION OF CONFLICTS

JUIZADOS ESPECIAIS FEDERAIS CÍVEIS E DIREITO À SAÚDE: VALOR DA CAUSA, COMPETÊNCIA ABSOLUTA E A SOLUÇÃO CONSENSUAL DE CONFLITOS

Edith Maria Barbosa Ramos[1]
Paulo Roberto Barbosa Ramos[2]
Jémina Glaúcia Serra Araujo da Silveira[3]

ABSTRACT

This research aimed to discuss the value of the case involving the right to health and the issue of absolute competence in the Special Civil Federal Courts (JEFs). It was also intended to reflect initially on judicial control of public health policies and the consensual solution of conflicts involving public health. The research used a deductive method and for collecting information, the main procedures were bibliographic and documentary. As a conclusion, we sought to warn of the importance of the correct definition of the desired economic expression with the cause filed in the courts, as well as the legal possibility of using technical expertise and the benefits of using alternative means of solution conflict. Finally, it was emphasized that the absolute competence of the JEFs and the high rate of judicialization of health claims in this microsystem

1 PhD in Sanitary Law, Oswaldo Cruz Foundation - FIOCRUZ/Brasília/DF. Doctorate in Public Policy, Federal University of Maranhão. MA in Law, Federal University of Minas Gerais. University graduate in Law, Federal University of Maranhão. Professor of the Law Department e do Master's Degree in Law and Institutions of the Justice System, Federal University of Maranhão. Coordinator of the Center of Studies in Sanitary Law (NEDISA/UFMA). Professor and Researcher of CEUMA University. Honorary Member of the Ibero-American Network of Sanitary Law and the Lusophone Association of Health Law - ALDIS. E-mail: edithramosadv@yahoo.com.br.

2 Undergraduate degree in Law, Federal University of Maranhão (1992), MA in Law, Federal University of Santa Catarina (1997), PhD in Constitutional Law, Pontificial Catholic University of São Paulo (2001). and Postdoctoral Research in Constitutional Law, University of Granada - Spain (2010/2011). Former president of the National Association of Members of the Public Prosecution of Defense of the Rights of the Elderly and Disabled - AMPID (2004/2007), Vice-President and President of the National Council of Elderly Rights of the Presidency's State Officefor Human's Rights (2004/2007) and District Attorney of the Rights of the Elderly, São Luís/ MA (1998/2015), ex-coordinator of Master's Degree in Law and UFMA Institutions of the Justice System (2012/2018). Currently full professor of the Department of Law, Federal University of Maranhão, Coordinator of the Center of Constitutional Law Studies of the same institution, Research professor, University Center of Maranhão and Prosecutor of External Control of Police Activity of the Public ProsecutionProsecution of the State of Maranhão.

3 MA in Law and Institutions of the Justice System, Federal University of Maranhão - UFMA. Graduate degree in Law, Federal University of Piauí - UFPI, graduate certificate program in Social Security Law, Norte do Paraná University. Currently Judiciary Analist - Judiciary Area, Maranhão Judiciary Section.

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indicate the need for verticalization of the issue in order to provide greater predictability regarding the interpretation and application of the respective procedural rules in this specific reality.

KEYWORDS: Right to health. Special Civil Federal Courts. Public Health Policies. Judicial Control of Public Policies.

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RESUMO

A presente pesquisa teve por escopo discutir o valor da causa envolvendo o direito à saúde e a questão da competência absoluta nos Juizados Especiais Federais Civis (JEFs). Tencionou-se, ainda, refletir de forma inicial sobre controle judicial de políticas públicas de saúde e a solução consensual de conflitos envolvendo a saúde pública. A pesquisa utilizou método dedutivo e para o levantamento das informações, os principais procedimentos foram bibliográficos e documentais. À guisa de conclusão, buscou-se alertar para a importância da correta definição da expressão econômica pretendida com a causa ajuizada no âmbito dos juizados, bem como para a possibilidade legal da utilização de perícia técnica e para os benefícios da utilização de meios alternativos de solução de conflitos. Por fim, destacou-se que a competência absoluta dos JEFs e o alto índice de judicialização de demandas de saúde nesse microssistema indicam a necessidade de verticalização da questão a fim de propiciar maior previsibilidade quanto à interpretação e aplicação das respectivas normas processuais nessa realidade específica.

PALAVRAS-CHAVE: *Direito à saúde. Controle Judicial de Políticas Públicas. Juizados Especiais Federais Cíveis. Políticas Públicas de Saúde.*

INTRODUCTION

A diversity of social, political and cultural factors in the 20th Century gave rise to an increased judicialization of conflicts and of the law itself, strengthening the role of the Judiciary as a "[...] privileged institution in upholding rights in Brazil." (ASENSI, 2013, p. 192).

By bringing new substantive rights and procedural guarantees to both individuals and the collective, the Constitution of the Federative Republic of Brazil of 1998 has in effect considerably amplified forms by which individuals and collectives may have access to the Judiciary, highlighting the political role of this branch in Brazilian democracy, by investing it with the important mission of upholding the citizen's constitutional rights (SADEK, 2010).

Therefore, with the process of redemocratization and the constitutional guarantee of fundamental and social rights, including the right to health, the expression "judicialization of health" began to gain traction, so that, once the inefficiency of the State in the upholding of these rights was verified, many claims began to be brought before the courts, demanding that the State furnish material goods such as medicine, treatments, hospitalizations, among others. (FALAVINHA; MARCHETTO, 2016).

With that in mind, beyond the emblematic cases of dominant case law which helped direct judgements involving the subject in question, the National Council of Justice (CNJ) has sought to lead and stimulate the role of the Judiciary, seeking to establish a judiciary policy for public health, through strategies that go from the creation of the National Judiciary Health Forum to the establishment of State Health Commitees, along with recommendations about how judges should rule regarding the claims presented to them, with the intention of estab-

lishing parameters and directives for judicial actuation in matters of public health. (ASENSI; PINHEIRO, 2015).

This is because, faced with the phenomenon of judicialization of public health, an apparent lack of uniformity is found regarding the rulings on the matter, sometimes favoring more theoretical and generic fundaments, other times favoring diverse factual data that could influence the laws that could be applicable to the subject. (ALVES, 2017).

In this area of interest, it was observed that, among other factors, the granting of injunctive relief, eminently exceptional in Brazilian procedural law, had become a rote act in the field of judicial demands for public health, with significant impacts for the effectiveness of Brazilian health law. (VENTURA *et al.*, 2010).

It becomes, then, that debates take place not only regarding the extension of social rights to health, but also about the limits and possibilities of judicial control over public policy regarding such rights. In this context, the Judiciary Branch has sought developements so as to better service this growing demand, highlighting the importance of the role of Special Federal Courts (JEFs), which, guided by more practical and modern values, introduced new concepts to the means of conflict resolution.(BOCHENEK; NASCIMENTO, 2011).

Regarding the right to health, the Federal Supreme Court (STF) has reaffirmed case law about the solidary liability of federal entities in their duty of providing health assistance, in accordance with a decision uttered in the analysis of the Extraordinary Appeal (RE) 855.178 [4], under presiding judge Minister Luiz Fux, which attained recognized general repercussion via the Virtual Plenary.

In this setting, the handling of a public health claim against the Union falls under the jurisdiction of the Federal Justice, according to Article 109 the Federal Constitution (CF) of 1988 (BRASIL, 1988). It is important to note, however, the absolute power of special federal courts, that is to say, if such a court can be found at the respective judiciary section or subsection, the cases that do not go over the predicted jurisdictional limit (sixty minimum wage salaries) will be necessarily taken to the special courts instead of civil courts, even should those specialize in health matters.(ZEBULUM, 2017).

From the preceding considerations, the present paper attempted to analyze some of the peculiarities of the health-related claims and their procedural steps within the specific reality of the Special Civil Federal Courts (JEFCs). Because of this, this research made use of the deductive method, with the historical appropriation of concepts such as the right to health, special civil federal courts and the judicial control of public health policy. The main methods of data collection were bibliographic and documental. Regarding the bibliographic research, information was sourced from articles belonging to different databanks and indexers, published entirely in Portuguese, accessed for free. Furthermore, books and scientific magazines regarding the scope of Constitutional Law and Civil Procedure Law were selected using the following search keywords: Constitutional Law; Civil Procedure Law; Right to Health; Judicial Control of Public Policy and Special Civil Federal Courts. Let it be said that this paper sought to overcome rigid methodological postures, submitting the analysis to many contextual variables, be they legal, social, economic or political, so that black-and-white considerations and

4 See RE 855178 RG, Judge-Rapporteur: Min. Luiz Fux, judged in 03.05.2015, General Repercussion Electronic Procedure - Merit DJe-050, Disclosed 03.13.2015, Published 03.16.2015.

scientific objectification might be avoided and a socially grounded investigation might be undertaken.

Considering the presented methodology, this paper was structured in the following manner: The first chapter and its developements analyze the value of a cause involving the right to health and the question of the absolute jurisdiction of special federal courts. This is followed by the second chapter, which analyzes possible actions for legal control of public health policy in the special federal court. The third chapter broaches the possibility of the production of forensic evidence in health claims within the scope of special federal courts. Finally, the last chapter discusses the possibility of the role of government in the consensual resolution of conflicts in public health.

1 VALUE OF CASE REGARDING RIGHT TO HEALTH AND THE QUESTION OF ABSOLUTE JURISDICTION OF SPECIAL FEDERAL COURTS

The value of the case is the fundamental subject when reflecting about the laws of health access. Before the chasm between codified law and fully realized rights, as well as the inevitable necessity of resource allocation for this area, the just distribution of said resources is a great challenge, demanding additional moral considerations when confronted with the fact that the market is still its primary criteria for distribution, by virtue of the correlation between social class and health, and, consequently, poverty remaining an obstacle for access to this right. (RAMOS, 2014).

According to Rawls' theory, health is mentioned as a natural good, along with vigor, intelligence and imagination. Such natural goods constitute, along with primary social goods, the general primary goods, presumed by the author as those desired by all, having use which is independent of the rational plans of each individual. (RAMOS, 2014).

Presented as broad categories, primary social goods correspond to rights, freedoms, opportunities, income and welfare, and thus are considered in virtue of their link with society's basic structure. "[...] freedoms and opportunities are defined by the rules of the most important institutions, and the distribution of goods and welfare is regulated by them." (RAWLS, 1997, p. 98).

In Rawls' hypothetical arrangament, primary social goods are distributed equally across society, while natural goods are not defined by their importance, nor defined in the way in which they ought to be treated or distributed across society. In this perspective, the author clarifies that, as long as these can be influenced by the basic structure, they are not under its direct control. (MARIO, 2014).

The principle of common interest would be applied to the natural goods, through institution-adopted measures, capable of promoting the objectives of all in a similar manner. (PARANHOS *et al*., 2018).

Through Rawls' formulation, Mario (2014) understands that the absence of health does not impact social injustice, since although it can be affected by a society's basic structure, it is not a concern of distribution in a well-ordered society (in conformity with the principles of justice), such that "[...] the individual has much more responsibility than the institutions belonging to the basic structure, for it must be considered that income, welfare, opportunities and liberties have already been equitably distributed." (MARIO, 2014, p. 5-6).

In the same manner, Rawls' idealization allows for the construction of a theory of justice for the simplest and most idealized case, one that is only posteriorly concerned with extensions towards more realistic contexts, in which not all people are normal. Idealized therefore towards active and patently cooperative members of society, his approach does not include a distributive theory for health care, since it spares no consideration towards illness. (DANIELS, 1985).

Regardless, Norman Daniels seeks, in Rawls' theory, the justification over why should health be understood as a matter of justice, proposing an extension of his theory of health (MARIO, 2014). To lay the foundations of a right to health in Rawls' theory, Daniels (1985) argues that one could merely add health care to the list of primary social goods. Such a solution, however, would bring its own, new set of problems, such as (DANIELS, 1985):

a) it would demand comparisons of interpersonal utility, which Rawls hoped to avoid;

b) the classification of these goods in comparison to welfare and income would depend on facts about the respective historical and social period;

c) it would abandon the useful generality afforded by the notion of a primary social good, risking the generation of a long list of important needs.

In such a way, Daniels (1985) concludes that the best strategy to understand Rawls' theory would be to include the institutions and practices of medical assistance among the basic institutions involved in fostering a just equity of opportunities.

Daniels argues that if, according to Rawls' theory, one must take positive measures to increase the opportunities afforded to disfavored individuals and furnish a just equity of opportunities - eliminating formal or legal barriers, along with social factors such as family history or advantages in the natural lottery -, the use of resources do combat natural disadvantages introduced by illness should be equally relevant, though pointing out that illness is not only a product of the natural component of this lottery, since "[...] social conditions that differ by class, contribute significantly to the etiology of disease [...]" [5] (DANIELS, 1985, p. 46, our translation).

It is understood that the advent of simpler and more celeritous institutions for the guaranteeing of access to health care is an important and foundational element in the process of the advent of a just equity of opportunities. In Brazil, this important role is fulfilled by the special courts, among other institutions.

Since 2004, the number of demands brought before the Special Civil Federal Courts - JFECs has surpassed half of all claims brought before a federal court, which demonstrates the importance of studies regarding the peculiarities of this distinct jurisdictional activity, so

5 Original: "[...]social conditions, which differ by class, contribute significantly to the etiology of disease [...]." (DANIELS, 1985, p. 46).

as to assist operators of Law in the comprehension of inherent factors to the new macrosystem of jurisdiction. (ROCHA, 2012).

In the terms of Article 3 of the Law 10.259/2001, the Special Civil Federal Courts - JFECs have the jurisdiction to sue, conciliate, mediate and judge causes of Federal Justice jurisdiction with economic value of up to sixty minimum wage salaries, save in expressly described cases. (BRASIL, 2001).

On the 7th of November of 1984, the Small Claims Court (JEPC) was instituted, via Law 7.244/1984, the first to address the judgment of cases of smaller economic value, expressly inserting the principles of orality, simplicity, informality, procedural economy and celerity. Until then, all claims were taken before common courts, which discouraged many citizens from seeking the courts as a means of conflict resolution. (GONÇALVES, 2007).

Later on, in accordance to Article 98 of the Federal Constitution of 1988[6], the Special Civil Courts - JECs - were created, through the Law 9.099 of September 26th, 1995, revoking the Law 7.244/1984 (GONÇALVES, 2007). At a federal level, there was the inclusion of the Law 10.259 of July 12th, 2001, after the inclusion of Paragraph 1 in Article 98 of the Federal Constitution of 1988[7], initially through Constitutional Amendment 22/1999 and currently through accordance with Constitutional Amendment 45/2004, with the application of Law 9.099/1995 and the Civil Procedure Code (WAMBIER;TALAMINI, 2018).

Being a useful instrument for the expansion of access to the courts, this new way of approaching jurisdiction constitutes a legislative advance of the constitutional order, by attending to old societal grievances, especially those of the disadvantaged population, of a Justice System capable of delivering "[...] legal protection of courts in an informal, much more celeritous and truly effective manner." (TOURINHO NETO; FIGUEIRA JÚNIOR, 2018, p. 63).

Differently to what is established by the Law 9.099/1995, the Law of Federal Special Courts - JEFs expressly states that the Special Civil Court's jurisdiction, in the forum where it is installed, is absolute, according to Article 3, Paragraph 3 of the Law 10.259/2001 (WAMBIER; TALAMINI, 2018).

With that said, it is not possible to modify its jurisdiction through connection or *continentia causarum*, making it impossible to gather connected procedures in a single procedural step, for instance, in the Common Federal Courts and the JFECs. In these cases, with one demand being prioritized over another, the suspension of the procedure would be a plausible alternative, supported by Article 313, Item V, Subitem *a*, CPC/2015 (CUNHA, 2009 *apud* WAMBIER; TALAMINI, 2018).

It must also be said that, in locations devoid of a Special Civil Federal Court - JFEC, the postulant can go to the Common Federal Courts or JEF in the closest jurisdiction. The case may not be taken before the Special State Court (JEE), in accordance to Article 20 of Law 10.259/2001 (WAMBIER; TALAMINI, 2018).

6 "Article 98. The Union, in the Federal District and in the territories, and the states shall create: I - special courts, filled by togated judges, or by togated and lay judges, with powers for conciliation, judgement and execution of civil suits of lesser complexity and criminal offenses of lower offensive potential, by oral and summary proceedings, allowing, in the cases established in law, the settlement and judgement of appeals by panels of judges of first instance; [...]" (BRASIL, 1988, n. p.).

7 "Art. 98. [...]: § 1º Federal legislation shall provide for the establishment of special courts within Federal Justice. " (BRASIL, 1988, n. p.).

Furthermore, as a consequence of this absolute jurisdiction of the JEFCs, a health care claim that does not exceed the limit of sixty minimum wage salaries (barring exceptions described in Article 3, Paragraph 1 of the Law 10.259/2001) cannot be taken before a Common Court, even should it specialize in matters of health care (ZEBULUM, 2017). Regarding procedural implications of the legal imposition of absolute jurisdiction, one can also highlight:

> a) the need to observe a jurisdictional rule, on pain of declaring the jurisdiction which has received the case records as improper, and the transference of the case records to a proper jurisdiction; and b) the possibility of effective control by the judge of the value of the cause attributed by the party in question. (GONÇALVES, 2007, p. 97).

Although the laws governing the JEFs state their jurisdiction as "absolute", such a trait differs in how classic civil procedure broaches the question, such that "[...] among other peculiarities, approves the possibility of modifying the jurisdiction, whether because of the party – *ratione persone* (*v.g* childhood and youth) –, or because of the subject – *ratione materiae* (*v.g.* family)." (TOURINHO NETO; FIGUEIRA JÚNIOR, 2018, p. 118).

While in traditional civil procedure the role of monetary value in defining jurisdiction is relative and prone to being extended, the same does not happen in JEFs in the case of claims outside of its jurisdiction. Fittingly, the express exclusion of the JEFs' jurisdiction, whether by the nature of the subject or the party, makes it legally impossible to extend the jurisdiction. (TOURINHO NETO; FIGUEIRA JÚNIOR, 2018). Therefore, the JEFs include many circumstances where the so-called "absolute jurisdiction" could be modified, altering the previously established jurisdiction.

On the subject of health care, there often arises doubt regarding the competent court to judge a claim seeking the furnishing of continuous-use medication for indeterminate periods of time. It is worth noting the impossibility of granting waivers to limit the economic benefits to the JEFs' value limits, since the right to life is inalienable and must be protected in these kinds of demands. (BOCHENEK; DALAZOANA, 2017).

In these cases, the Law of the JEFs expressly states in its Article 3, Paragraph 2, that the monetary value of the case must correspond to the sum total of 12 (twelve) installments not yet due and the eventual expired installments, so long as it does not surpass the limit of 60 (sixty) minimum wage salaries. Thus, in the case of supplying continuous use medication, its monthly cost must not surpass the value of five minimum wage salaries so that the case may be taken before a JEFC (ZEBULUM, 2017). As a way of providing examples and corroborate this understanding, it can be compared to this recent judgement of the TRF1:

> CIVIL PROCEDURE. NEGATIVE CONFLICT OF JURISDICTION BETWEEN FEDERAL JUDGE AND SPECIAL COURTS JUDGE. SUPPLY OF MEDICATION. SYNTHETHIC PHOSPHOETHANOLAMINE. **CAUSE VALUE. ECONOMIC BENEFIT SOUGHT BY THE PLAINTIFF. KNOWN CONFLICT. JURISDICTION OF THE SPECIAL FEDERAL COURT.** 1. The value of the cause must mirror the effective economic benefit that is intended by the plaintiff, and, if of an inferior value to sixty minimum wage salaries, according to the head provision Article 3 of the Law 10.259/2001 must be taken to the Special Federal Court. 2. According to the. STJ, **the Special Federal Courts have jurisdiction for the judgement of matter of furnishing of medication whose value does not exceed sixty minimum wage salaries.** Precedent: Conflict of Jurisdiction 0020641-48.2017.4.01.0000/DF, Federal Judge-Rapporteur Kassio Nunes Marques,

> Third Section, e-DJF1 15/09/2017. **3. Regarding the value of the cause, Article 292, Paragraph 2, CPC/2015 dictates that the value of the installments not yet due will be equal to one yearly installment, if it is an obligation requiring an indeterminate period of time or more time than 1(one) year, and, if by less than this period, will be equal to the sum total of installments. Otherwise, Paragraph 2 of Article 3 of the Law 10.259/2001 in regards to the obligations not yet due, within the jurisdiction of the Special Court, the sum total of twelve installments must not exceed the value referred to in the head provision of Article 3. 4. Regarding the case records, considering the very low cost of the substance referred in the header, it is possible to infer that the economic pretension in this discussion does not exceed the limit of 60 (sixty) minimum wage salaries, considering the period of 1 (one) year. 5. Known conflict to declare the 27th Court of the Judiciary Section of the Federal District as the one who raised the allegations.** The 3rd Section of the 1st Section Regional Federal Tribunal, by unanimity, gave cognizance of the conflict, to declare in favor of the jurisdiction of the 7th Court of the Judiciary Section of the Federal District. (BRASIL, 2017a, n. p., our highlight.).

In the cases of a buildup of cases demanding the award of moral damages, it is even necessary to provide a justification of the agreed amount for the purposes of appraising the jurisdiction of the courts. (BOCHENEK; DALAZOANA, 2017).

The identification of the receiver of the formulated requirement, understood as the figure of the State judge, accrues, therefore, great relevance, as it must correspond to the legal aspects of jurisdiction in all its forms (value, matter, territorial or hierarchical), "[...] under pain of, depending on the case, be opposed in response to the defendant or even the judge himself, *ex officio* [...]" (TOURINHO NETO; FIGUEIRA JÚNIOR, 2018, p. 227).

Regarding the power to interrupt eventual conflicts of jurisdiction between a JEF court and another common court of the same judicial district, the Federal Supreme Court - STF recognized the Extraordinary Appeal - RE 590409 to the jurisdiction of the corresponding Court of Appeals. With this provision, there was the waning of the previous understanding that attributed this power to the Superior Court of Justice - STJ , issuing Precedent 428 of the STJ[8] (PEDROSO; ARAI, 2011).

If conflict occurs between JEFC judges, the incident must be brought before the respective Panel of Appeals, when belonging to the same jurisdiction. Otherwise, it must be brought before the corresponding TRF or the STJ. In the latter case, when composed of distinct Panels (TOURINHO NETO; FIGUEIRA JÚNIOR, 2018).

The importance of the correct definition of a claim's value is therefore seen, so as to avoid the unnecessary prolonging of a claim and the consequent tardiness in the eventual concession of judicial relief, above all those relating to right to health care.

It must be said as well that not any party may be figured as defendant or plaintiff in a suit brought before a JEF, according to Article 6 of the Law 10.259/2001. For instance, the defendant must necessarily be the Union, a government agency, a foundation or a federal public company, while the plaintiff can only ever be a natural person, micro-compoanies and small companies. (WAMBIER; TALAMINI, 2018).

8 It is the TRF's jurisdiction to judge conflicts of jurisdiction between special federal courts and federal courts of the same judiciary section, according to Statement 428, Special Court, judged in 03.17.2010, DJe 05.13.2010, current ruling, according to information retrieved in the STJ's website (BRASIL, 2010).

This means that the JEF's jurisdiction regarding the party must be considered in two points: relating to the jurisdiction described in Article 109, Item I, of the CF/1988[9] as well as the positions occupied by the plaintiff and defendant in the procedural poles (BOCHENEK; NASCIMENTO, 2011).

In the specific case of suits regarding public health care, it must be highlighted that, in the specific case of claims involving public health, by virtue of the public healthcare system - SUS lacking legal personality of its own, it falls to the public and private entities that integrate it (the latter ones in a complimentary fashion) to have the "[...] responsibility for the managing, regulation and rendering of all actions and public health services." (DALLARI; AITH; MAGGIO, 2019, p. 11).

Another aspect of the JEFs that deserves mention is the fact that, within its scope, the Public Treasury lacks two of its main procedural prerogatives that it enjoys in common procedures, as deadlines are counted in simple format and there is no demand of necessary re-examination, in the terms of Articles 9 and 13 of the Law 10.259/2001, respectively (WAMBIER; TALAMINI, 2018).

Another matter is that within the JEFs, the unenforceability of an attorney's assistance is not subject to any value limit, unlike the JEE, where the presence of an attorney is optional only in the case of the claim's value not surpassing twenty minimum wage salaries. (WAMBIER; TALAMINI, 2018).

On that note, the Law of the JEFs goes beyond, so as to describe the figure of a judicial representative, a third party, designated by law, not necessarily an attorney, with powers of conciliation, transaction and discontinuance in claims of JEF jurisdiction, according to the head provision of Article 10 of the Law 10.259/2001 (BOCHENEK; NASCIMENTO, 2011).

Regarding that point, Alvim and Cabral (2018) clarify that competent parties can represent themselves, as long as they possess the option of being represented by another. The incompetent, however, must necessarily be represented by their proper legal representatives, while the relatively incompetent, though able to represent themselves, must be assisted by their legal representatives.

In addition, let it be said that, even though the Brazilian Bar Association has filed a declaratory action of constitutionality against this legal device, the Federal Supreme Court has decided for its constitutionality in actions of civil nature, in accordance with ADI 3168[10]EFS. (BOCHENEK; NASCIMENTO, 2011).

All these factors end up contributing not only to a greater ease of access to the JEFs, along with creater celerity in the handling of the claims, including those regarding health care.

9 "Art. 109. The federal judges have the competence to institute legal proceeding and trial of: I - cases in which the Union, an autonomous government agency or a federal public company have an interest as plaintiffs, defendants, privies or interveners, with the exception of cases of bankrupcy, of job-related accidents, and those subject to the Electoral and Labour Courts; [...]" (BRASIL, 1988, n. p.).

10 EFS. EFS. EFS. EFS. EFS. EFS. EFS. EFS. ADI 3168, Judge-Rapporteur: Min. Joaquim Barbosa, Full Court, judged in 08.06.2006.

2 JUDICIAL CONTROL OF PUBLIC HEALTH POLICY IN FEDERAL SPECIAL COURTS

In Brazil, it is observed that the right to health care has passed through a movement of juridification as well as judicialization. In the former case, conflicts to not pass through judicial appreciation and the enforcement of law occurs through legal institutions in an extra-judicial manner, especially in pre-procedural steps. In the case of judicialization, however, conflict is passed through the filter of the Judiciary Branch through some procedural instrument, such as in the form of a Public Civil Action (ASENSI, 2013). It is important for the aims of this research to highlight the judicialization of this social right, that is to say, the prompting of the Judiciary Branch in the enforcing of the right to public health care within the scope of the JEFCs.

The expression "Judicialization of Health" began to be used in the 1990s, with the process of redemocratization and the constitutional guarantees of fundamental and social rights, including the right to health. Considering the State's inefficiency, however, several claims arrived at the courts, demanding through judicial decisions that the State provide specific material goods such as medicine, treatments, hospitalizations, among others (FALAVINHA; MARCHETTO, 2016).

Until 1988, the achievements related to the right to health were divorced from the Judiciary Branch, being sought primarily through social movements, such as the sanitary movement initiated in the 70s. With the Judiciary Branch strenghtened and a more politicized legal system, the State was beset by claims to concretize the codified constitutional plan, originating a new logic to the pressuring of the constitutional branches, through the strenghtening of the "judicialization of politics" (FALAVINHA; MARCHETTO, 2016).

Before the great repercussions of the legal claims relative to health relief services, there came the expression of "Judicialization of Health", being possible to conceive that this term is derived from "Judicialization of Politics", regarding the capacity to influence the political landscape that such decisions had (FALAVINHA; MARCHETTO, 2016).

Borges and Ugá (2009) add that the study of the phenomenon of judicialization, constituted by the influence of the Judiciary Branch in political and social institutions, has not only begun to be considered after the promulgation of the 1988 Magna Carta, but also through strong influence of the work "The Global Expansion of Judicial Power"[11], coordinated by Neal Tate and Torbjörn Vallinder (1995), which, conceptualizing the expression "judicialization of politics", undertakes analysis of the determining influences for the occurrence of this phenomenon..

The authors highlight two foms of the expression "judicialization of politics" considered more notable by Neal Tate and Torbjörn Vallinder in the above mentioned work. One of them, called Judicialization *from within*, is characterized by the use of typically judicial procedures by the Executive and Legislative Branches, such as the administrative judges or courts and the Parliamentary Inquiry Committees (BORGES; UGÁ, 2009).

11 TATE, C. Neal; VALLINDER, Torbjörn. The global expansion of Judicial Power. New York: New York University Press, 1995.

The other, more common form, called Judicialization *from without*, is based on the Constitution and the mechanisms of checks and balances, resulting in the rule of the judicial sphere of influence with the objective of controlling the actions of the Legislative Branch and protecting society against the abuse of power by the Executive Branch, through revisions of legislative and administrative acts by the courts (BORGES; UGÁ, 2009). This is the type adopted by this research, since it seeks to analyze the peculiarities of judicial claims regarding public health, especially in the scope of JEFCs.

Within the Judiciary Branch, the theme of health care is presented as one of the most trodden paths by actions for damages. Causes for the increase of judicial claims include the lack of infrastructure in health care units, a consumerist legislation, the awareness of the population of their own rights, and even abuse practiced by the victim itself, in the so-called industry of damages (SILVA, 2009).

In this manner, the number of claims in this area have been exorbitant, reaching up to 62.291 claims in the five Regional Federal Courts (TRFs) in June 2014, as well as a grand total of 330.630 claims among all Courts of Appeals in the country in the same period. (CONSELHO NACIONAL DE JUSTIÇA, [2015]).

From 2008 to 2017, a growth of aproximately 130% in the number of first instance claims related to health care, a much higher number than the 50% growth of the full scope of first instance procedures verified in the same period, according to research presented in the Justice Research Propositve Analytic Report - "Health judicialization in Brazil: a profile of the claims, causes and propositions of solutions, year 2019" -, conducted by the Institute of Teaching and Research (Insper), contracted by CNJ, through the Public Call and Selection Notice (CONSELHO NACIONAL DE JUSTIÇA, 2019).[12]

In truth, the reality of the judicialization of public health could be even worse, if a share of the health relief services had not been granted to private enterprise, according to the constitutional provision in the latter part of Articles 197, and 199, of CF of 1988[13] (SABINO, 2016).

In effect, the State is not the only one to work with societal health care, thanks to the presence of complementary health care and supplementary health care, which are possible through agreements of the SUS with private entities, and, through contractual instruments with health plan providers, respectively. (FIGUEIREDO, 2018).

Though there is legislation about the conditions for the promotion, protection and recovery of health care, the organization and workings of the corresponding services (Law 8.080, of 09.19.1990), along with the law about public and private health care and insurance (Law 9.656, de 06.03.1998), there is no specific regulation regarding civil liability in the area of health care (SILVA, 2009).

12 The research obtained its basis for data collection through the Law of Access to Information (LAI), which allowed for the identification of 498.715 procedures of first instance, spread between 17 state courts, as well as 277.411 procedures in second instance, spread between 15 state courts (CONSELHO NACIONAL DE JUSTIÇA, 2019).

13 "Article 197. Health actions and services are of public importance, and it is incumbent upon the Government to provide, in accordance with the law, for their regulation, supervision and control, and they shall be carried out directly or by third parties and also by individuals or private legal entities. [...]. Art. 199. Health assistance is open to private enterprise. Paragraph 1. Private institutions may participate in a supplementary manner in the unified health system, in accordance with the directives established by the latter, by means of public law contracts or agreements, preference being given to philanthropic and non-profit entities. " (BRASIL, 1988, n. p.).

In the same vein, Barroso (2007) points out that in judicial claims regarding this matter, there are values that pit the right to life and health against the separation of Powers, with no "[...] easy legal nor morally simple solution for this question." (BARROSO, 2007, p. 4).

The right to health is a social right described in Article of the CF/88, granted to all through Article 196, which also establishes as a duty of the State to reduce the risk of disease and other ills through social and economic policy, along with the guarantee of universal and equitable access to the actions and services for its promotion, protection and recovery. (BRASIL, 1988).

In spite of this constitutional provision, the concept of health is one that eludes consensus. The present formulations in the international normative instruments demonstrate a high degree of heterogeneity regarding this right, from illness relief to the granting of an adequate lifestyle, basic services and medical assistance, which denotes the complexity of the conceptual configuration of this right. (RAMOS, 2014).

In this sense, the author states that, being a complex right that was conceived as universal in its application, the right to health implies a series of distinct yet interconnected elements, involving at the very least :

a) the right of not having one's health harmed by third parties;

b) the right to the establishment, by the State, of policies that protect public health through the environment and social security, therefore fostering the prevention of threats to the health of the people; and

c) the right to sanitary assistance.

Until the second half of the 20th Century, medical knowledge had hegemonic influence as the legitimate discourse about health and illness. After this period, considering the difficulty of producing a satisfactory concept for "health", sociological studies began to anlyse the possible connotations that the words "health" and "illness" received in the social environment (AITH, 2017).

With this, three types of approach were born in the area of health-related policy making. (AITH, 2017):

a) discussions about the individual as majorly responsible for their own health;

b) reflexions regarding the influence of the social environment over the health of the individual; and

c) the influences of luck, fate and even religion as a representation that part of the population attributed to health and illness.

As a social right, the right to health is classified as a Second Generation right, intimately linked to the principle of equality and the idea of the Social Welfare State, as it grants people not only a myriad of social rights, but also better conditions of labor, health and leisure (PANSIERI, 2012).

Historically, the rise of so-called social rights is related to reactions to the prevailing liberal model of the 18th and 19th Centuries, in the search for an alternative system that guaranteed protection to the economically disfavored (MEDEIROS, 2011). In such a way, social rights are identified as of recent formation, bringing to mind the 1917 Mexican Constitution and the 1919 Weimar Constitution (AUAD, 2008).

One of the traits associated with these rights is its positive dimension, as they seek the intervention of the State to provide for the individual's many needs, instead of opposing its mismanagement in the area of individual liberties (CARVALHO, 2013).

Beyond this positive or assistential dimension, be it in ample terms as in the distribution of resources or the organization of health care procedures, as in a strict sense, such as the availability of doctors' appointments, surgeries and medication, the right to health holds yet a negative or defensive dimension, as it imposes the abstention of its unviability. (SILVA *et al.*, 2016).

In the same vein, the right to health possesses double fundamentality, formal and material, which envelops fundamental rights and guarantees, therefore being designated in such a manner in the Brazilian constitutional order. In that sense, while formal fundamentality is linked to the positive constitution right, its material conterpart refers to the relevancy of the of the legal interest which is protected by the constitutional order, such as an important right for the protection of human dignity (SARLET, 2007).

According to the nature of a conflict between the fulfillment of the right to health, one can opt for many types of procedures, depending on the peculiarities of each case. For the protection of this social right on an individual basis, for instance, the ordinary action and writ of mandamus (DUARTE, 2011). The defense of collective interests regarding a social right such as the right to health, however, can make use of a system that is thus configured:

> [...] actions for the collective defense of individual interests, such as the collective writ of mandamus and collective civil actions; actions for the defense of essentially diffuse or collective interests, such as public civil actions and popular actions ; actions for the defense of the constitutionality of laws and affirmation of rights before the Constitution (such as the concentrated and diffused controls of constitutionality pertaining to the laws and actions that seek the affirmation of constitutional rights for lack of regulation by the Legislative Branch). (CASAGRANDE, 2008, p. 78-79 *apud* DUARTE, 2011, p. 299).

For the epistemological break proposed by this research, it is important to take note of which of these actions are permitted within the JEFs, which propose to utilize criteria of orality, simplicity, informality, procedural economy and celerity, as described in Article 2 of the Law 9.099/1995, and, supplementarily applied to the JEF as stated in Article 1 of the Law 10.259/2001 (PEREIRA, 2006).

In this context, it is observed that the JEF law itself expressly excludes some of these procedural instruments, regardless of the value of the claim, due to their incompatibility with the proceedings of the JEFs, as they hold greater complexity or importance (WAMBIER; TALAMINI, 2018). So states Article 3, Paragraph 1, of the Law 10.259/2001:

> Article 3 - The Special Civil Federal Courts have the power to sue, conciliate and judge causes of jurisdiction of Federal Courts up to the value of sixty minimum wage salaries, as well as executing their sentences.
>
> Paragraph 1 - The Special Civil Courts do not have the power to judge:
>
> I - stated in Article 19, Items II, III and XI of the Federal Constitution, actions referring to the writ of mandamus, expropriation, division and demarcation, popular, fiscal executions and for administrative dishonesty, along with claims over homogenous diffuse, collective or individual rights or interests

> II - the Union's real property, government agencies and federal public foundations;
>
> III - the anullment or cancellation of federal administrative acts, save those of pensionary nature and fiscal assessment;
>
> IV - that which seeks to impugn the dismissal of civil public servants or disciplinary sanctions applied to the military. (BRASIL, 2001, n. p.).

In this way, it can be noted that the writ of mandamus, for instace, so broadly utilized in the Common Courts, must not be filed in a JEF. In equal manner, the claims over homogenous diffuse, collective or individual rights or interests must not be judged within the JEFs, as per the above legal provision.

Regarding this point, it is worth noting the JEFs' jurisdiction regarding the defense of diffuse or collective rights or interests through individually proposed actions by rights holders or their procedural substitutes (BRASIL, [2017b]).

Regarding the right to health, such a caveat deserves mention, as, though there is resistance in classifying the right to health as collective or diffuse, the possibility of the role of the Public Prosecution and the Public Legal Defense through public civil action indicates the encompassing bias that the concept of health carries within itself (ALVES, 2013).

Futhermore, pertaining to the active standing to propose actions before the JEFs, the Public Prosecution and Public Legal Defense are not listed in the roster of those eligible by Article 6 of the Law. The STJ, however, recognizes the jurisdiction of these institutions when acting in favor of individuals in cases involving the furnishing of medication/medical treatment, whose value must not exceed 60 (sixty) minimum wage salaries. (BRASIL, [2017c]).

Equally, homogenous individual rights can be protected by the JEFs, as long as they are claimed by the rights holder or in an active facultative joinder of parties, which characterizes claims known as "mass actions", as they pertain to similar goals by an indeterminate amount of individuals (BOCHENEK; NASCIMENTO, 2011).

3 THE POSSIBILITY OF SUBMISSION OF NEW FORENSIC EVIDENCE IN HEALTH CLAIMS WITHIN THE SCOPE OF THE SPECIAL FEDERAL COURTS

The possibility of submitting forensic evidence has a divergent ruling in the Special State Civil Courts and the Special Civil Federal Courts, which can cause doubt or even confusion.

The State Courts do not allow this mode of evidence, since the necessity of submitting forensic evidence "[...] necessarily indicates that the cause is complex, and therefore cannot be known, processed and judged before the Special State Civil Courts." (WAMBIER; TALAMINI, 2018, p. 360).

Otherwise, the Federal Courts allow for the submission of a "technical examination" as expressly stated in Article 12 of Law 10.259/2001. This is a type of simplified forensic evi-

dence in which the judge designates a forensic expert to produce a technical report up to five days before the audience (WAMBIER; TALAMINI, 2018).

The existing technical examination in JEF procedures, so long as it also represents a form of clarification of a factual question, differs in many aspects of judicial forensics established in traditional civil procedure (BOCHENEK; NASCIMENTO, 2011).

The existing distinctions include (BOCHENEK; NASCIMENTO, 2011): the perspective that, within the scope of the JEFs, a judge may designate as an expert any person who possesses knowledge about the object to be evaluated, while the Civil Procedure Code (CPC) states a preference for professionals at university level, subscribed to a competent professional body with proven expertise in the matter. Furthermore, at the beginning of the procedure in the JEFs, the judge is able to select an expert, as long as the fundamental regularity and necessity of the examination is verified, which occurs in the CPC only after the presentation of a defense by the defendant.

It must also be considered that within the JEFs, the deadline for the elaboration of the examination and submitting of reports is reduced. In addition, within the Federal Courts, the legal fees must be paid in advance, while the CPC states that they must be paid in advance by the applicant party, even if not in full.

As corroboration to the possibility of submission of technical examinations in the JEFs, including in matters of health care, Court of Appeals Judge Carlos Moreira Alves of the TRF1 states:

> Substantial orientational precedent agrees with this Court and the Superior Court of Justice that in actions regarding the protection of the right to health, there included the furnishing of medication, whose economic content represents a value under the limit of 60 (sixty) minimum wage salaries established by Article 3, of the Law 10 259/2001, it must be recognized the jurisdiction of the Special Court, which was not invalidated by the degree of complexity presented by the demand or the necessity of technical examination. (BRASIL, 2018c, n. p.).

In spite of this statement, Federal Judge José Carlos Zebulum alerts that the JEFs' special procedures do not allow the postulant the same possibilities of evidence submission that exist in the common procedures, which often incur serious difficulties regarding the presenting of a summary decision, and implies, in most of health care related procedures, the concession of preliminary effects of urgent protection, based majorly in a simple medical prescription (ZEBULUM, 2017).

In actions that seek the protection of a health-related right, Luciana Gaspar Melquíades Duarte adds that probatory diligence oscillantes depending on the type of filed claim: if of first or second necessity (DUARTE, 2011). To the jurist, the expression "health demands of first necessity" designates the providing of essential aspects to the right to life, involving all those that, urgent or otherwise, are vital to survival. The "health demands of second necessity, in turn, constitute the search for health-related aspects that, disconnected from the perservation of life, otherwise contribute to physical, mental and social wellness (DUARTE, 2011). Therefore, regarding the probatory guarantee demanded in these actions, the author concludes that:

> It is certain that, in cases of urgency pertaining to urgent *health demands of first necessity,* probatory diligence must not be increased, but reduced, keeping in mind the risk of loss of life, which is much higher in the prevailing legal framework.
>
> On the other hand, before *health claims of second necessity*, the claim's instruction must be rigorous and eloquent, fit to convince the magistrate of the real factual necessity of that judicially-required relief. (DUARTE, 2011, p. 302, author's highlight).

It is also verified, depending on the case at hand, the possibility of submission of forensic evidence, as long as it is simplified, within the JEFs. It must be observed, however, the construction developed by Lazzari (2014, p. 82), who understands that the complexity of the case or necessity of forensical examination dos not diminish the jurisdiction of the Special Courts. According to the author, the criteria chosen by the legislator was the claim's value, which is of an absolute nature. It must also be remembered that this is the position adopted by the STJ, which considers the claim's degree of complexity or necessity of forensic examination to be irrelevant.

4 THE ROLE OF THE GOVERNMENT IN THE CONSENSUAL DISPUTE RESOLUTION REGARDING PUBLIC HEALTH

With the significant increase of the number of ongoing procedures within the scope of the Judiciary Branch, it has become imperative to allow the use and aplicability of the resolution of disputes by the parties, as an alternative to the institutions of justice in the resolution of conflict in its myriad forms, among them those involving the Public Administration. Mediation is understood as a consensual method of dispute resolution by the parties, capable of restoring dialogue between them, creating an environment that is receptive to agreement, becoming, therefore, an alternative to the current problems regarding the growing demand for conflict resolution.

It has been observed that the movement filed by the issuing of Resolution 125/2010, of the National Council of Justice, categorically marked a paradigm shift that was settled with the issuing of the new Civil Procedure Code (Law 13.105/2015) and, moreover, a new Law of Mediation (Law 13.140/2015). These acts of law institutionalized within the country a multi-door justice system. (VIANA, VIANA, 2016).

The role of the Public Treasury, within and without the courts, depends on the rule of strict lawfulness. In other words, means that a public administrator cannot act without being authorized by the law. The inalienability of public property and rights have often brought about the oposition to the possibility of conflict resolution by the parties in the Public Finances. To Viana and Viana (2016, p. 32), however:

> This point deserves revision. The notion of inalienability has been progressively relativized. The inalienability of a right must not be confused with it being intransigible, which happens only when the law forbids is transaction. Such is the case of Article 17, Paragraph 1, Law 8.429/1992 (Law of Administrative Dishonesty) – sole case of express forbiddance of transaction in the

> Brazilian legal framework (SOUZA, 2012, p. 173). What is more, even should the right be inalineable, there is no alienation in the act of regulating it, allowing therefore that means of conflict resolution byt he parties be employed for such a goal (FACCI, 2015, p. 239-240).

It is noticed, therefore, that the legal framework has long admitted the submission of Public Finances to the possibility of adoption of conflict resolution by the parties[14], making it necessary that public entities, such as health administrators and prosecutors be more amenable to the policies of conciliation and mediation (SCHULZE; GEBRAN NETO, 2015).

Viana as Viana (2016) highlight that some public entities are still opposed to conciliation, under allegations of inalienability of the public interest. However, as long as it upholds the law, a transaction undertaken by the Administration does not represent a liberty taken with a right or interest, as taught by Fioreza:

> A thought that seems to be behind the denial of the possibility of conciliation by the Public Administration is that the transaction represents a liberty taken regarding a right or interest, which is not true. A private individual who is legally sued can transact, offering a sum of money to the plaintiff, solely to free him or herself of the moral inconvenience of responding to a judicial summons, though ignorant of the validity of the request and even considering this an action with a low chance of success. They will be, therefore, exercising the right to freely dispose of their property. The Administration cannot do the same, of course. It can, however, admit to the author's pretensions if the alleged right possesses legal fundamentation, which is substantially different from the attitute taken by the private individual in the above example, because the transaction, to the Administration, will not be based in the exercise of a right, but in the upholding of the will of the law. Furthermore, in cases such as this, the Administration has the duty of seeking conciliation, for it would otherwise be offending the principle of lawfulness stated in the head provision of Article 37 of the Federal Constitution, by not observing the legal provision in which the demanded right is sustained. (FIOREZA, 2010, p. 2 *apud* DELDUQUE; ALVES; DINO NETO, 2015, p. 579).

The Law of Federal Courts, for instance, expressly states the possibility of conciliation, transaction or voluntary discontinuance by the Union's judicial representatives, government agencies, foundations and federal public companies, as per the sole paragraph of Article 10, Law, constituting sentences that ratify the agreement as a judicially enforceable instrument, as pert the sole paragraph of Article 22, Law 9.099/1995, and Article 515, Item II, of CPC/2015 (WAMBIER; TALAMINI, 2018).

This authorization, however, is often ignored by these federal entities. The only one that has sought to act in this manner before the JEFs is the National Institute of Social Welfare (INSS), reaching agreements in claims with probable validity to the insured, which ends up sparing the Public Administration from paying the entire amount owed, along with delayed interest, monetary correction and damages fees in the case of procedures that are still within the Panels of Appeals, contributing to the recognition of the party's rights in a more celeritous manner (DELDUQUE; ALVES; DINO NETO, 2015).

14 Whether through the Chamber of Federal Administration Conciliation and Arbitration, whether through means of conduct adjustment described in the Child and Teenager Act, the Code of Consumer Defense, competition legislation, environment legislation, the Elderly Act and regulatory national law.

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Furthermore, in the absence of agreement, there is the possibility of establishing incidental arbitration, as long as it does not depend of judicial intervention, in accordance to what is allowed by Articles 24 to 26 of Law 9.099/1995, Law of the Special Civil and Criminal Courts, c/c Article 1 of the Law 9.307/1996, which deals with arbitration (WAMBIER; TALAMINI, 2018).

It must also be said that the permissions established by the Law 9.307/1996 were introduced by the Arbitration Law Reform, with the promulgation of the Law 13.129/2015, fulfilling the pre-requisite of specific legal authorization and eliminating controversies regarding the possibility of the Federal Government using arbitration to settle its conflicts with private persons (ROCHA; SALOMÃO, 2017).

With that said, judgements by arbitration according to the Law 9.099/1995, though having the essential nature of arbitration, must not be conflated with what is stated in the Law 9.307/1996. The choice of an arbitrator, for instance, is made among lay judges, and the acts practiced before a State judge are carried over. Within standard arbitration rules, however, according to the Law 9.307/1996, it is enough that the arbitrator be agreed upon by the parties, and the arbitration procedure is established independently from the suit, which will be dismissed, according to Article 485, Item VII, CPC/2015 (WAMBIER; TALAMINI, 2018).

Arbitration can be defined as a method of dispute resolution where a neutral third party, who does not represent the State, imposes a binding agreement between the parties. (BONATO, 2014).

Determined by the Law 9.307/1996, this dispute resolution technique occurs, therefore, through the intervention of one or more designated persons by private agreement, determined without the intervention of the State, through a decision with the same efficacy as a judicial ruling. (CARMONA, 2009).

On the other hand, conciliation prizes itself on the resolution of disputes involving only the affected parties, putting an end to conflict, while mediation seeks not only the resolution of a dispute, but also the restoring of social relations among the conflicting parties (CABRAL, 2017). The difference between these two can be seen in their contents, as:

> [...] in conciliation, the objective is the agreement, that is to say, the parties, even if adversarial in nature, must come to an agreement to avoid a judicial procedure, or put an end to it should it already exist. In conciliation, the conciliator suggests, interferes, advises, while in mediation, the mediator facilitates communication without spurring both parties to an agreement. In conciliation, conflict is resolved without analyzing it in depth. Often, the conciliator's intervention occurs in the sense of forcing an agreement. It is different, therefore, from mediation, due to the fact that its handling of conflict is superficial, often finding a result that is only partially satisfactory. In mediation, however, if there is an agreement, it represents total satisfaction of the mediated parties. (MORAIS, 2012, p. 115).

It is worth noting that conciliation is already described in the 1973 CPC, as well as other special laws, while the regulatory framework for mediation in Brazil was only instituted with the promulgation of the Law 13.140/2015. Furthermore, in the procedural scope, the new CPC also listed this mechanism as a means of social pacification. (CABRAL, 2017).

The legal framework of mediation - the Law 13.140/2015, approved in 06.26.2015 – also represented an important step, as it admitted the possibility of the Public Administration making use of this institution, even if within certain parameters. (ROCHA; SALOMÃO, 2017).

The law of mediation must be complemented by the March 16th 2015 CPC in what it is not incompatible with, since, being posterior and specific, would supercede the CPC/2015 in such matters (GRINOVER, 2016).

By the way, the new Civil Procedure Code - CPC A propósito, o novo Código de Processo Civil - CPC states one of its premises as the incentive to consensual methods of dispute resolution (judicial mediation and conciliation). Within the paragraphs of Article 3 is described the duty of the State to foster, if possible, the consensual resolution of conflicts, to be incentivized among all institutions linked to the practice of justice, before or after the procedure, determining, in its Article 165, the obligation of the Courts to create judicial centres for consensual dispute resolution, responsible for holding conciliation and mediation sessions and hearings and for the developement of programmes aimed as assisting, guiding and encouraging the resolution of disputes by the parties themselves. (GRINOVER, 2016).

As for the theme, the 2015 CPC expressly states that the conciliator may suggest resolutions for the dispute, while the mediator merely assists the parties finding consensual solutions by themselves, according to Paragraphs 2 and 3 of Article 165, *in verbis*:

> Article 165. [...]
>
> Paragraph 2 - A conciliator, who shall act preferentially in cases in which the parties have no prior relationship, shall be able to suggest solutions for the dispute, the use of any type of coercion or intimidation to force the parties to settle being forbidden.
>
> Paragraph 3 - A mediator, who shall act preferentially in cases where there is a prior relationship between the parties, shall help those who have an interest in the case to understand the issues and confliction interests, in such a way that they may, by re-establishing communication, identify, in their own, consensual solutions that generate mutual benefits. (BRASIL, 2015b, n. p.).

In this sense, some scholars affirm that while the conciliator takes on a significantly proactive role, the mediator has a more passive role in the process of putting together an agreement. In truth, however, the doctrine diverges over the difference between these two methods, sometimes treating them as different, sometimes as mediation in a broad sense. (ROCHA; SALOMÃO, 2017).

There are those who understand that in extrajudicial mediation, whose specific legal framework is the Law 13.140/2015, the mediator can also suggest solutions for the dispute, which would not transgress against the mediator's principle of neutrality, since mediation is also ruled by the principle of consensus-building, as per Article 2º, Item VI, of the same law (ROCHA; SALOMÃO, 2017).

Here it is worth mentioning the reflexion developed by Zanferdini and Mazzo (2015), when developing an important reflextion about the classic work Access to Justice by Mauro Cappelletti and Bryan Garth (1988), highlighting that the third restorative wave elevates the question of access to court representation to a broader concept of access to justice, offering new focus (ZANFERDINI; MAZZO, 2015, p.89) . Even when not forgetting the techniques fromt he two first restorative waves, the third wave seeks to be broader than its predecessors,

centralizing its attention in the general system of institutions and mechanisms, peoples and procedures as employed to process and avoid litigation, advising and encouraging a wide variety of reforms, encompassing modifications in the procedural forms, alteration in court structure, use of lay persons or paraprofessionals, as well as the adoption of private or informal mechanisms for the solution of litigation, among which mediation and conciliation stand out. To Zanferdine and Mazzo (2015, p. 89) in that moment "it is possible to comprehend the breadth of the expression access to justice as emplyed by authors Mauro Cappelletti e Bryant Garth (1988), which does not end at having access to the Judiciary, nor can it be studied in the strict limits of access to pre-existing judicial bodies".

In conflicts regarding the right to health, the adoption of alternative conflict resolution mechanisms, inside or outside of judicial procedure or even before their starting point, may reduce the SUS' vulnerability in the juducial scope before the allocation of resources as demanded by judicial rulings (DELDUQUE; ALVES; DINO NETO, 2015).

Conciliation, for instance, should be sought more often within judicial procedure, since it allows the parties themselves to establish the terms and conditions for the claim's resolution, with the direct participation of the parties, along with a much faster resolution than in litigation, even fostering the *undrowning* of the Judiciary Branch (DELDUQUE; ALVES; DINO NETO, 2015).

By the way, conciliation can be presented as an alternative to the slowness in the resolution of procedures regarding the protection of health, by virtue, for instance of frequent delays due to deadline extensions by the Government for the fulfilling of judicial decisions, or even because of the difficulty of accessing technical information due to a procedure's constant data flow (DELDUQUE; ALVES; DINO NETO, 2015)

In these cases, usually regarding when the parties request medication or treatment due to illness, this slowness can leave the protection of the plaintiff's health or even life itself unfulfilled. (DELDUQUE; ALVES; DINO NETO, 2015).

An agreement might for, for example, when a party judicially requires medication, surgical intervention or medical treatment not offered by the SUS, and the system possesses something similar that can fulfill these needs. In these cases, the party may be offered medical consultation with SUS doctors to analyze the adequacy of this alternative for this clinical condition, therefore offering quicker health relief if possible. (DELDUQUE; ALVES; DINO NETO, 2015).

There is the possibility of negotiation, when the treatment or furnishing of medication is duly stated within the SUS, but was not yet furnished to the plaintiff by some circumstantial factor, such as delays in bidding, lack of suppliers, delivery delays, among others. In these cases, the Government may propose a deadline for this error to be corrected, when possible (DELDUQUE; ALVES; DINO NETO, 2015).

The Public Administration itself benfits from these alternative methods, since an administrative or agreement-driven solution avoids the expenditure of resources with the payment of costs of loss of suit, delayed interest, monetary correction or even fines for the delay in the execution of judicial decisions or bad-faith litigation (DELDUQUE; ALVES; DINO NETO, 2015).

The perspective developed by authors can be expressed in numbers, as it must be considered that the Union's expenditures with judicial procedures related to health care, for

instance, jumped from R$ 70 millions in 2008 to R$ 1 billion in 2015, a growth of more than 1.300%, according to an audit by the TCU in Procedure 009.253/2015-7, Bench Decision 1787/2017 – TCU – Plenary (BRASIL, 2017d).

Along with the need for greater use of these alternative methods for conflict resolution, the CNJ has instituted the National Judiciary Policy for the adequate treatment of disputes in the scope of the Judiciary Branch, via Resolution 125/2010 from 11.29.2010, subsequently altered by Amendment 2 of 2016, establishing the creation of Courts for the alternative resolution of disputes (CABRAL, 2017).

Considering these incentives, one can observe the creation of progressively more judicial or extrajudicial centres/chambers that seek an amiable solution to disputes regarding the right to health, in the attempt of avoiding or mitigating the judicialization of these cases. Among them, it is worth mentioning: The Permanent District Chamber of Health Mediation (CAMEDIS)[15]; the Chamber of Health Conciliation of Salvador[16]; the Chamber of Health Conciliation of Alagoas (CCS/AL)[17]; the Chamber of Health Ligitation Resolution (CRLS), created by the Public Finances of the State of Rio de Janeiro (PGE/RJ)[18]; and the Interinstitutional Committe of Administrative Resolution of Health Claims (CIRADS), created by the AGU of the State of Rio Grande do Norte (DELDUQUE; ALVES; DINO NETO, 2015).

Finally, one can highlight the Chamber of Health Rights Mediation (Cameds), an electronic tool for the extrajudicial conciliation realized by federal judges of the Judiciary Subsection of Imperatriz, winning the "Conciliating is Cool" prize, promoted by the CNJ in the federal judge category, using the *WhatsApp* application to solve 250 cases in five months of operation (CONSELHO NACIONAL DE JUSTIÇA, 2017).

CONCLUSIONS

Standing before the growing protagonism of the Judiciary Branch in the enforcing of public health policy, the JEFs, guided by criteria of orality, simplicity, informality, procedural economy and celerity arise as an important instrument of access to justice to those who require protection regarding the right to health.

Relating to this fundamental constitutional right, the STF has already reaffirmed an understanding about the solidary liability between units of the Federation in the duty of fur-

15 As seen in: BRASIL. Public Legal Defense of the Union. Press Office. [Câmara de mediação em saúde...]. 2013b. Available at: https://www.dpu.def.br/legislacao/leis?id=10523:camara-de-mediacao-de-saude-e-instituida-no-distrito-federal&catid=79. Accessed in: Oct. 2nd 2018.

16 As seen in: CONSELHO NACIONAL DE JUSTIÇA. Câmara de Conciliação de Saúde resolve 80%... 2017a. Available at: http://www.cnj.jus.br/noticias/judiciario/85328-camara-de-conciliacao-de-saude-resolve-80-dos-casos-na-bahia. Accessed in: Oct. 2nd 2018.

17 As seen in: CONSELHO NACIONAL DE JUSTIÇA. Tribunal prepara câmara de conciliação em saúde em AL. 2017b. Available at: http://www.cnj.jus.br/noticias/judiciario/84350-justica-alagoana-planeja-camara-de-conciliacao-em-saude. Accessed in: Oct. 2nd 2018.

18 As seen in: PROCURADORIA GERAL DO ESTADO (Rio de Janeiro). Câmara de Resolução de Litígios de Saúde (CRLS). 2016. Available at: https://pge.rj.gov.br/mais-consenso/camara-de-resolucao-de-litigios-de-saude-crls. Accessed in: Oct .2nd 2018.

nishing health relief, as per the decision proferred in the analysis of RE 855178[19], by Judge-Rapporteur Luiz Fux, which had recognized general repercussion, via the Virtual Plenary.

In this setting, one can highlight that the handling of a health claim with the Union as the defendant is the point of origin of the Federal Justice's jurisdiction, according to Article 109 of the CF/1988, mentioning, however, the absolute jurisdiction of the JEFs.

In this way, if there is a Special Federal Court in the respective judiciary section or subsection, cases that do not surpass the defined monetary limit (sixty minimum wage salaries) will be necessarily proposed within the Special Courts, and not in the Federal Courts, even if those specialize in matters of health care.

With that said, the objective was to analyze some peculiarities in health claims made within the scope of the JEFCs, such as the criteria for the definition of the value of a health claim, the possible actions for the judicial control of public health policy in the JEFs and the possibility of utilizing forensic examination and alternative methods of dispute resolution in thses procedures.

As per the legal ruling of the absolute competence of the Special Civil Federal Courts, this research has sought to make light of the importance of the correct definition of the economic expression intended by the case, so as to avoid delays relating to the providing of health relief, due to errors springing from the incorrect handling of a case.

Furthermore, this research broached the legal possibility of the use of forensic examinations in these procedures, as long as in a simplified form, as well as about the benefits of the use of alternative methods for conflict resolution in this scope, bringing important judicial or extrajudicial centres/chambers that seek an amiable solution to conflicts regarding health care, in an attempt of avoiding or mitigating the judicialization of these cases.

The legal ruling of the JEFs' absolute jurisdiction and the high density of judicialization in health claims in this microsystem, however, indicate the need for a deepening of debate in this area, so as to allow for greater predictability regarding the interpretation and application of the respective procedural norms in this specific reality.

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