





# The role of the Public Defender's Office in guaranteeing the right to access healthcare: An integrative review

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## ABSTRACT

The Federal Constitution of 1988 ensures the constitutional guarantee of access to justice, full and free legal assistance, in addition to allocating the Public Defender's Office as a permanent institution, essential to the State's jurisdictional function. Thus, the present work aims to carry out an integrative review of the literature that deals with the role of the public defender's office in guaranteeing the right of access to health, highlighting its constitutional role and mission, closely linked to the evolution of the fundamental right of access to a fair legal order, an instrument for the realization of the existential minimum. This is an exploratory research, with data collection carried out from 11 selected articles, through bibliographic research and also adopting a qualitative approach, substantiated by empirical research. The present study is based on the premise that the role of the Public Defender's Office in the judicialization of access to health can be used as an instrument for structuring the Unified Health System (SUS), especially in relation to the correction of failures and injustices for access to health by low-income citizens of Alagoas. In this context, the judicialization of health presents itself to citizens as a legitimate and democratic alternative for the realization of fundamental rights and access to health. As well as the institution's challenges in formulating political and social strategies orchestrated with other mechanisms and instruments of democratic guarantee, which improve the health and justice systems with a view to the effectiveness of the right to health. It is concluded that the performance of the Public Defender's Office indicates that the judicialization of health can be used as an instrument for structuring the Unified Health System (SUS), especially in relation to the correction of failures and injustices for access to health by citizens of the popular classes.

## RESUMO

A Constituição Federal de 1988 assegura a garantia constitucional do acesso à justiça, da assistência jurídica integral e gratuita, além de alocar a Defensoria Pública como instituição permanente, essencial à função jurisdicional do Estado. Assim, o presente trabalho tem por objetivo realizar uma revisão integrativa da literatura que trata da atuação da defensoria pública na garantia do direito de acesso à saúde, destacando seu papel e missão constitucional, intimamente atrelados à evolução do direito fundamental de acesso à ordem jurídica justa, instrumento de concretização do mínimo existencial. Trata-se de pesquisa exploratória, com coleta de dados realizada a partir de 11 artigos selecionados, por meio de pesquisa bibliográfica e adotando, ainda, abordagem qualitativa, consubstanciada por pesquisa empírica. O presente estudo parte da premissa de que a atuação da Defensoria Pública na judicialização para acesso à saúde pode ser utilizada como instrumento de estruturação do SUS, especialmente em relação à correção de falhas e injustiças para o acesso à saúde pelos cidadãos alagoanos de baixa renda. Nesse contexto, a judicialização da saúde se apresenta aos cidadãos como alternativa legítima e democrática de concretização de direitos fundamentais e acesso à saúde. Bem como, os desafios da instituição em formular estratégias políticas e sociais orquestradas com outros mecanismos e instrumentos de garantia democrática, que aperfeiçoem os sistemas de saúde e de justiça com vistas à efetividade do direito à saúde. Conclui-se que a atuação da Defensoria Pública indica que a judicialização da saúde pode ser utilizada como instrumento de estruturação do SUS, especialmente em relação à correção de falhas e injustiças para o acesso à saúde pelos cidadãos das classes populares.

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## Introduction

In the contemporary democratic context, the institutional action of the Public Defender's Office on behalf of citizens of the popular classes expresses legitimate claims and modes of action for the guarantee and promotion of citizenship rights widely affirmed in international and national laws<sup>1</sup>. The Federal Constitution of 1988 ensures the constitutional guarantee of access to justice, full and free legal assistance, in addition to allocating the Public Defender's Office as a permanent institution, essential to the State's jurisdictional function.

In this sense, access to justice is especially necessary for the less favored portion of the population, which lives with difficulties in obtaining basic health services. Thus, meeting the demands of this portion of the population has the potential to guarantee effective citizenship while collaborating for the adequate structuring of public health<sup>2</sup>.

In Brazil, it was estimated that, in 2000, 70 million people did not have access to medicines, which corresponded to approximately 41% of the Brazilian population (VIEIRA; ZUCCHI, 2007). In addition, spending on medicines represents the largest weight in the total spending of families on health, impacting the budget, especially among the poorest - which characterizes it as highly regressive (IBGE, 1998; IBGE, 2004; SZWARCOWALD *et al.*, 2004). It is observed that there have been advances in public policies and actions for pharmaceutical services; However, there are still difficulties in the population's access to the medicines necessary for comprehensive health care.

As a result, the judicialization of public health policies has found a fertile field for its development. The links between Law and Collective Health have intensified in recent decades, with the consolidation of jurisprudence and interventions of the Judiciary in health management<sup>3</sup>. The claims put to the Judiciary are based on the constitutional right to health, which includes the state's duty to provide individual health care, in a comprehensive, universal and free manner, in the Unified Health System (SUS), under the joint responsibility of the Federal Union, states and municipalities<sup>4</sup>. In this context, the Public Defender's Office plays an increasingly relevant role, at the state, district and federal levels.

Within the game of forces that shape the debates about the judicialization of health, it is undeniable that the repercussion of this phenomenon has reached numerous reflections and academic research in the political and institutional spheres, capable of influencing institutional initiatives and adjudicative activity. The truth is that it is in the deficiencies and insufficiencies of the SUS that we find the power that justifies the judicialization of health. Even if the increase

<sup>1</sup> VENTURA, Miriam; SIMAS, Luciana; PEPE, Vera Lúcia Edais; SCHRAMM, Fermin Roland. Judicialização da saúde, acesso à justiça e a efetividade do direito à saúde. *Physis – Revista de Saúde Coletiva*, v. 20, n. 1, 2010. p. 79-80

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<sup>3</sup> VENTURA, Miriam; SIMAS, Luciana; PEPE, Vera Lúcia Edais; SCHRAMM, Fermin Roland. Judicialização da saúde, acesso à justiça e a efetividade do direito à saúde. *Physis – Revista de Saúde Coletiva*, v. 20, n. 1, 2010. p. 79-80

<sup>4</sup> VENTURA, Miriam; SIMAS, Luciana; PEPE, Vera Lúcia Edais; SCHRAMM, Fermin Roland. Judicialização da saúde, acesso à justiça e a efetividade do direito à saúde. *Physis – Revista de Saúde Coletiva*, v. 20, n. 1, 2010. p. 2.

in the performance of the justice system affects management, at least in part it is a consequence of the deficiencies of the public administration itself.

Despite the current that rejects the importance of access to justice as a way of demanding the realization of rights, stating that judicialization and the protagonism of the Judiciary are excessive and unreasonable, there is an evident effort by researchers who view judicialization as an instrument capable of effecting access to health goods and services, including, positive for the SUS, and especially for its users who resist being “stratified out of existence”<sup>5</sup>. In this context, Telma Menicucci, José Machado and Luís Roberto Barroso, recognize access to justice, especially collective demands, as a possibility for judicialization to have a positive effect on the implementation of public policies<sup>6</sup>, in order to promote the change and updating of public policies for pharmaceutical services<sup>7</sup>.

The narrative critical of the judicialization of health also goes unnoticed that litigation to obtain available health services is common, however, its access requires a long wait for care, which may even imply late diagnosis or loss of the opportunity for treatment. This aspect of the judicialization of health, however, lacks the attention of academic studies. The profile of the Public Defender's Office points out that many of the citizens' claims concern access to services, treatments and medicines provided for in public policies<sup>8</sup>.

In fact, the thesis that claims that judicialization is an instrument of the elites has nothing to do with the judicialization of health in Brazil, since it is an instrument available to all social classes, and notably to individuals and groups of the popular classes, the main excluded in access and victims of the precariousness of the public system. It is precisely for them that the judicialization made possible by the work of the Public Defender's Office - presents itself as the most precious instrument for access to health.

Thus, the present study aimed to carry out an integrative review of the literature that deals with the role of the public defender's office in guaranteeing the right of access to health, highlighting its constitutional role and mission, closely linked to the evolution of the fundamental right of access to a fair legal order, an instrument for the realization of the existential minimum. This is an exploratory research, with data collection carried out from 11 selected articles, through bibliographic research and also adopting a qualitative approach, substantiated by empirical research.

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<sup>5</sup>BIEHL, João. Patient-Citizen-Consumers: judicialization of health and metamorphosis of biopolitics. *Lua Nova*, n. 98, p. 77- 105, 2016. p. 94, 100

<sup>6</sup>MENICUCCI, Telma Maria Gonçalves; MACHADO, José Angelo. Judicialization of health policy in the definition of access to public goods: individual rights versus collective rights. *Brazilian political science review*, Rio de Janeiro, v. 5, 2010. p. 61-64. Disponível em: [http://socialsciences.scielo.org/scielo.php?script=sci\\_arttext&pid=S198138212010000100002&lng=en&nrm=iso](http://socialsciences.scielo.org/scielo.php?script=sci_arttext&pid=S198138212010000100002&lng=en&nrm=iso). Acesso em: 24 de outubro de 2022. p. 61-64.

<sup>7</sup>BARROSO, Luís Roberto. Da falta de efetividade à judicialização excessiva: direito à saúde, fornecimento gratuito de medicamentos e parâmetros para a atuação judicial. *Jurisp. Mineira*, Belo Horizonte, v. 60, n. 188, p. 29-60, jan./mar., 2009. p. 47-50.

<sup>8</sup>SANT'ANA, Ramiro Nóbrega. Atuação da Defensoria Pública para a garantia do direito à saúde: a judicialização como instrumento de acesso à saúde. *Rev. Bras. Polít. Públicas*, Brasília, v. 8, n.º 3, 2018. P. 194-211.

## Methodology

It is an integrative literature review, which provides a synthesis of scientific data on a given research problem and the application of the results of the data with significant evidence for Law. In addition, it can corroborate knowledge gaps for future investigations. The integrative review is elaborated from the following stages: Development of the guiding question; search of literature in databases; data collection from studies; critical evaluation of the selected studies; analysis and discussion of the results and presentation of the integrative review.

Its methodological rigor brings together six segments: i) formulation of the research question; ii) establishment of the inclusion and exclusion criteria and database to be used; iii) categorization that includes the organization and summarization of information; iv) evaluation of the included studies by means of critical and detailed analysis; v) interpretation of the results; and vi) synthesis of knowledge.

The guiding question of this study was developed based on the recognition that the challenge of ensuring individual access is added to the need for cooperation between the institutions of the Justice System and the managers of the SUS for the structuring of public health policies. Therefore, the guiding question established for this review was: The Public Defender's Office occupies a central role in the Judicialization of Health, as it has the ability to articulate the individual demands it receives and transform them into a vector for the development of the SUS.

The choice of descriptors related to the judicialization of health through the Public Defender's Office was made after a search in the databases of articles that addressed the performance of this institution, in order to recognize all possible terms used in the studies.

The search and selection of the articles included in the review were carried out by two reviewers independently and the final results were similar. This double check is part of the second stage of the elaboration of an integrative review, where the criteria for inclusion and exclusion of studies/sampling or literature search are established and ensures the reliability of the research.

The selection of studies was carried out through the careful reading of titles and abstracts, so that for the final selection of the articles, the full texts were read, and those that presented the role of the Public Defender's Office in the judicialization of health were chosen, being an instrument of an instrument for structuring the SUS, as a central theme, through bibliographic survey, using the identification, location and compilation of data written in books, articles from specialized journals, publications of official bodies and others.

The inclusion criteria defined for the selection of articles were: Articles published in Portuguese; articles in full that portrayed the theme related to the performance of the Public Defender's Office in guaranteeing access to health and articles published and indexed in these

databases. Studies that did not investigate the proposed theme, review articles, and that did not meet the required inclusion criteria were excluded.

To survey the articles in the literature, a search was carried out in the following databases: Digital Library of the Chamber of Deputies (*Biblioteca Digital da Câmara dos Deputados*), Library of the Federal Justice Council (*Biblioteca do Conselho da Justiça Federal*), Higher School of the Federal Public Prosecutor's Office (*Escola Superior do Ministério Público da União*) and SciELO, using the following descriptors: “right of access to health”, “public defender's office”, “judicialization of health”.

The data collection of the studies was carried out using the instrument developed, proposed and validated by Ursi<sup>i</sup>, which presents the following items: Identification of the original article, objectives, methodological characteristics of the study, interventions measured, results found and level of evidence<sup>ii</sup>.

### **Results and discussion:**

Based on the search in the databases, the method of selection and inclusion of the studies occurred as follows: In the first stage, the intention was to identify studies that addressed the role of the Public Defender's Office in promoting access to health services and whether they met the criteria described above, and 21 articles were selected by reading titles and abstracts. In the second stage, these 21 articles were read in full. Using the inclusion and exclusion criteria, 11 articles were selected. If there was disagreement among the evaluators about the criteria analyzed, a specific discussion was held about the article in question, confronting ideas based on the criteria adopted for the review.

The results are presented considering the main categories pointed out in the articles analyzed during the integrative review. For data extraction, a collection instrument was used with the following items: Year; authors; period; goal; methodological approach; technique/instrument; and challenges during the Public Defender's Office in ensuring access to health.

Of the 11 articles selected, 1 was published in 1995 (Neto, 1995); and 10 between 2009 and 2020 (Barroso, 2009; Ventura, Simas, Pepe, Schramm, 2010; Menicucci and Machado, 2010; Silva, 2013; Sant'ana, 2013; Sant'ana, 2017; Lima and Sant'Ana, 2016; Biehl, 2016; Sant'ana, 2018; Rocon, Wandekoken, Barros, Duarte and Sodré, 2020). There is an increase in the number of scientific articles published after the emergence and strengthening of Public Defender's Offices in the states of the federation, as well as with recognition of the importance that the Judicialization of health plays in the implementation of public health policies. In this context, the Public Defender's Office has highlighted its role in promoting access to health services for the neediest population, which depends exclusively on the SUS. In addition to this argument, it is clear that access to Justice through the specialized public service provided by the Public Defender's Office has allowed access to other public services in addition to health

(education, housing, etc.) responsible for achieving the existential minimum in favor of the principle of human dignity.

It is also observed that there is repetition of authors in the publications collected, which shows that academic production in this thematic area remains concentrated among the same researchers, with a greater variation prior to 2017.

In addition, it is noted that there is little variety in relation to the periods, so that most of the articles were published in journals in the area of Law, and even in the journals of the Defender's Offices themselves. This fact can be justified in view of the fact that the area of Collective Health has become a transdisciplinary scientific field, aggregating various forms of production and fields of knowledge (human, social sciences and health).

It is also evident that among the 11 selected articles, 8 are theoretical articles (Neto, 1995; Barroso, 2009; Menicucci and Machado, 2010; Silva, 2013; Sant'ana, 2013; Lima and Sant'Ana, 2016; Sant'ana, 2015; Biehl, 2016), and 3 through bibliographic research and also adopting a qualitative approach, substantiated by empirical research (Ventura, Simas, Pepe, Schramm, 2010; Menicucci and Machado, 2010; Rocon, Wandekoken, Barros, Duarte and Sodr , 2020; Sant'ana, 2018). After a detailed categorization of the content of the 11 selected articles, 3 discussions were identified that deal with common ideas in relation to the mismatch between the SUS provided for in the 1988 Constitution, the reality of institutional practice and the relevant role of the Public Defender's Office in favor of access to health and justice.

Figure 1 outlines the selection process for the studies in this integrative review.

Figure 1

### *Results and discussions:*

Item	Discussions	Nº	Authors/year
1	The Public Defender's Office with a prominent role in promoting access to health services for the neediest population that depends exclusively on the SUS.	01	Sant'ana, 2013.
2	The access to justice captured in the CF/88 and the Public Defender's Office for the effective materialization of said access.	03	Lima and Sant'Ana, 2016; Silva, 2013; Neto, 1995.
3	The work of the Public Defender's Office demonstrates that the judicialization of health can be used as an instrument for structuring the SUS, especially in relation to the correction of failures and injustices for access to health by low-income citizens.	07	Sant'ana, 2018; Biehl, 2016; Sant'ana, 2015; Barroso, 2009, Menicucci and Machado, 2010; Ventura, Simas, Pepe, Schramm, 2010; Sant'ana, 2018.

*Note: Systematization of the author based on the 11 articles selected by the integrative literature review.*

For the purposes of analysis and better presentation of this article, we now move on to the exposition of the discussions indicated in the table.

### **The Public Defender's Office with a prominent role in promoting access to health services for the neediest population that depends exclusively on the SUS**

Two articles emphasized the understanding of the relevance of the Public Defender's Office in guaranteeing the right to health, as well as in the construction and improvement of the SUS. Judicialization has been a recurrent means used in order to guarantee the constitutional right to health and presents itself as a dilemmatic phenomenon, taking into account the construction of the SUS in Brazil and the development of health services, concluding that the Public Defender's Office amplifies the desires of the needy population for better health services. In spite of the remarkable development caused by the creation of the SUS, the new exclusion that we have after the 1988 Constitution is even more dangerous, because this system that is open to all generates only formal inclusion. Everyone has the right to health services, but in reality, few obtain the desired full access<sup>iii</sup>.

In the absence of clearer options, SUS users have sought access to the Judiciary for certain health services when they lack state support or coverage of their health plans. It is in this context that the relevant role of the Public Defender's Office arises in guaranteeing the right to health of underprivileged citizens, precisely those most excluded and subjected to the poorest quality services<sup>iv</sup>.

In this sense, the previously excluded population found in the Public Defender's Office the key to obtaining both access to justice and access to health. The firm and organized performance of the Public Defender's Office throughout Brazil allowed the effective inclusion of many citizens who lived on the margins of the SUS. It provided real access to health services to SUS users who, despite the formal attribution of a constitutional right to health, were unable to access essential services to safeguard their health or even their lives<sup>v</sup>.

### **The access to justice captained in the CF/88 and the Public Defender's Office for the effective materialization of said access**

There is no way to deal with "Access to Justice" without reference to the Public Defender's Office. In this context, the Public Defender's Office is the institution duly led by the Federal Constitution in charge of providing access to justice to those in need. This is because the institution aims to guarantee a fair legal order, which guarantees to the needy not only formal access to the bodies of the Judiciary, but also real access and effective protection of their interests; and one of the challenging missions of the Public Defender's Office in the current context is to seek the effectiveness of the rights of people in situations of misery<sup>vi</sup>.

In this way, the Public Defender's Office is the public institution intended to promote Access to Justice for the violated collective individual rights of the most vulnerable portion of the population. Thus, the reduction of poverty through the empowerment of this class without the capacity for social self-determination constitutes one of the few ways out of the crisis of the contemporary democratic system. The social insertion of the excluded, making them autonomous and self-sustainable in relation to their life projects, through affirmative actions

of the State, with the creation of Public Defender's Offices, empowers individuals for effective political participation, creating the opportunity for the people to effectively influence the democratic game, reversing it in their favor.

Therefore, the fulfillment of the right of access to justice, via the Public Defender's Office, has been increasingly responsible for reducing the poverty patterns experienced by the population, since the promotion of full and free legal assistance, judicial or not, has provided an increase in the population's access to basic human rights related to the existential minimum<sup>vii</sup>.

On the other hand, since “way back”, shortly after the current Public Defender's Office of the State of Rio de Janeiro, which was called Legal Aid, it already highlighted the aforementioned institution as the “most beautiful of the essential functions of justice, as it is the one that most fully fulfills the historical ideal of advocacy allied to the contemporary sense of citizenship”<sup>viii</sup>.

**The work of the Public Defender's Office demonstrates that the judicialization of health can be used as an instrument for structuring the SUS, especially in relation to the correction of failures and injustices for access to health by low-income citizens**

There are many theoretical and practical difficulties, at the time of its realization, of various orders: Philosophical, political, legal, social, economic, cultural and technical-scientific. The difficulties in articulating these elements and establishing the necessary agreements on the content and the way to guarantee them have been the distancing between the law in force and the law experienced in practice by millions of people around the world.<sup>ix</sup>

Studies on the phenomenon of judicialization in Brazil reveal some deficiencies and insufficiencies of the Brazilian health and judicial system to satisfactorily respond to its health responsibilities. The judicialization of health expresses problems of access to health in its most generic sense, that is, as a dimension of the performance of health systems associated with supply, and that the phenomenon can be considered as a legitimate resource for reducing the distance between the current right and the lived right<sup>x</sup>.

This is because the deficiencies or insufficiencies of the SUS are recognized as a factor that leads to judicialization. In this way, it was recognized that the increase in the performance of the justice system, although it has repercussions on management and influences decision-making, at least in part was a result of the deficiencies of the public administration itself, which sees judicialization as a struggle of vulnerable groups and people who resist being “stratified out of existence”<sup>xi</sup>.

In fact, judicialization is predominantly a positive instrument for the SUS or for its users, in the same way, Telma Menicucci and José Machado, in which the authors recognize access to justice and the possibility of judicialization having a positive effect on the



implementation of public policies. Finally, it is worth highlighting the study by Luís Barroso, who, although he recognizes the legitimacy of individual demands, highlights that requests should be restricted to what is provided for in public policies. Collective demands, on the other hand, have a broader scope, in order to promote the change and updating of pharmaceutical services policies<sup>xii</sup>.

This challenge that lies ahead of the Public Defender's Office is also an opportunity, as acting with a collective focus can benefit many SUS users in addition to those who sought legal assistance from a Public Defender<sup>xiii</sup>.

Finally, the path to this collective action certainly passes through the institutional partnership with other members of our justice system: The Judiciary and the Public Prosecutor's Office. And, of course, by the creation of an interface between this Justice System and health managers. The collaboration - and the demand - between these institutions, at all levels of the Federation, can help the SUS to perceive and face many of the obstacles and obstacles to the provision of quality public service, especially to the poorest population<sup>xiv</sup>.

## **Conclusion**

The creation of the Public Defender's Office is, therefore, a positive effect of this civil and political right of access to justice and in favor of access to health for the popular classes of our country. With this delineation with reference to the performance of the Public Defender's Office, it is concluded that, for the most part, judicialization is a reaction of citizens to failures in the implementation of SUS policies, a situation that causes serious injustices of access to the detriment of citizens of the popular classes. For this reason, the judicialization of health, notably in the structuring form carried out by the Public Defender's Office, should be considered a precious democratic instrument for the realization of the right to health according to the parameters established in the Federal Constitution of 1988<sup>xv</sup>.

It is concluded that the effectiveness of the right to health requires a set of broader political responses and government actions, and not merely formal and restricted to court orders. The performance of the Public Defender's Office through lawsuits has been configured as an important deliberative instrument in the management of SUS health care, however, States and managers have the obligation to provide effective services capable of, observing the massive judicialization of health, implementing decision-making that matters in improving access to health within the scope of the SUS. It is also concluded that the performance of the Public Defender's Office indicates that the judicialization of health can be used as an instrument for structuring the SUS, especially in relation to the correction of failures and injustices for access to health by citizens of the popular classes<sup>xvi</sup>.

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