Judiciary policy for health

Bruno Dantas
Minister of the Federal Court of Accounts of Brazil

Bruno Dantas has a notable career as a public servant and specialist in civil law. He is the youngest minister ever to take office at the Federal Court of Accounts – Brazil (TCU). He has 11 years of experience as a legislative aide, four of which as the Chief Legislative Aide of the Senate. He also worked at the National Council of the Public Ministry (CNMP) and National Justice Council (CNJ). Since 2014 in TCU, Dantas carries out his role combining in-depth knowledge of the practical aspects of the law and the theoretical framework that is the basis for legal doctrine and academic studies This is a result of his doctor's and master's degree in Civil Procedural Law, from the São Paulo Catholic University (PUC-SP). His is a university professor and teaches classes in undergraduate and graduate courses. He is the author of several books and scientific articles. As a TCU minister, he performs in areas that have a great potential for innovation, such as telecommunications and digital inclusion, as well as areas that pose significant ethical challenges, such as judicialization of health. In this interview for the TCU Journal, minister Bruno Dantas comments on relevant topics related to the current moment in the Country, talks about his career and about results obtained in TCU audits.

1. You are the youngest minister of the Court. It was like that in the Federal Court of Accounts (TCU), in the Senate's Office of Legislative Aides and in the National Justice Council (CNJ) and the National Council of the Public Ministry (CNMP). Your successful history in the Public Administration started early, at age 20, in a high school level examination for admission to the Justice Court of the Federal District (TJDF), where you worked in the Family Court in Samambaia, a city of the Federal District. How do you think that the concepts of ethics and innovation made a difference in your career?

I was raised in a low-income family and, though I was born in the capital city Salvador, I spent all my childhood and adolescence in the interior of Bahia, in Feira de Santana. When I moved to the Federal District, I was only 19 years old and I went to live in Taguatinga, where I lived from 1998 to 2003. In spite of the financial hardships and sacrifices, my parents always managed to provide me with good education and I always thought that studying hard and focusing on the preparation for a good career in the public sector would be the best way to show them that the investment had paid off. As my family had no tradition whatsoever in the legal area – my mother was a bank employee

and my father, a dealer, and I was the first person in the entire family to earn a higher education degree -, I always knew that I would have to build my own path. Of course, I came across brilliant and generous people throughout this journey, people who taught and helped me a lot. Looking back, I see that I would not have had so many good opportunities if people had not seen me as a determined, honest, and capable person. Whenever possible, I try to repay the success I have had in life by encouraging and advising my students, collaborators and friends. I truly believe that the world is full of opportunities and we definitely need enthusiasm to pursue good objectives and a little bit of luck to come across good people who may, although subtly, suggest us safe paths to follow.

2. You were the rapporteur of a major telecommunications audit, in the data collection modality. This work resulted in an executive Summary of the digital inclusion public policy, and was the basis for the Public Dialogue event carried out by the Federal Court of Accounts (TCU). In this event, participants discussed issues related to the management of the digital inclusion public policy, issues related to infrastructure and access policy; in addition to issues related to digital content and literacy What would you highlight of this work in the field of innovation?

The change of attitude. Especially on the part of the court as a result of the audits that it conducts, regarding the successful implementation of a digital inclusion public policy capable of overcoming the challenges posed by the current reality in Brazil and that effectively achieves its goals. This is actually innovation. The studies conducted in this area, consistent with the importance of the use of information and communication technologies for the economic, social, and political growth of the country stood out in the audit, which resulted in the Judgment (Acórdão) 2.151/2015 – Plenário. The audit modality was data collection, conducted by the Department of External Control - Civil Aviation and Telecommunications Infrastructure (SeinfraAeroTelecom), specialized and responsible for overseeing the policies and actions related to the digital inclusion policy of the federal government. The work of the audit team allowed us to define the fundamental bases for a successful digital inclusion public policy, in addition to identifying the possible challenges to be faced in the future, not only by the TCU, but also by all players committed to the success of this policy.

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3. Another major debate coordinated by you within the court was connected with the Judicialization of Health. Notwithstanding the ethics and the use of innovation in the resolution of health issues within the Judiciary, what would you highlight of the discussions raised in another recent TCU event, the Public Dialogue – Judicialization of Health?

The issues related to the Judicialization of Health, limits, possibilities and impacts of this phenomenon, could not go unnoticed within the TCU, which prompted the performance of the "Public Dialogue" on the theme. In summary, the debates addressed aspects such as the challenges resulting from the phenomenon of Judicialization of Health, the health mediation as an alternative, as well as the reflection and presentation of good practices, paths to be followed and possible solutions. It is evidently a complex issue, which involves the Society, the Public Administration and the Judiciary. This is so because the concretization of the fundamental right to health, in this perspective, involves different players. Among them, the person entitled to the right to health, which may be represented by a private lawyer or by the Public Defender-, the Public Prosecutor's Office – in the defense of inalienable individual rights, in addition to homogeneous, social, diffuse and collective rights -, the

federal state responsible for the provision of the health service-, the Federal Government, the States, the Municipalities, in the concurrent competence-, and the judging authority – state and federal judges and tribunals. In addition to the complexity resulting from the plurality of characters involved, the debate on the Judicialization of Health becomes even more intricate and controversial in light of a clear dilemma, which is the right to health, the limit of resources to concretize this right, as well as the issue of the concretization of the right of an individual and the exercise of the collective right to health. Taking this context into account, I understand that it is essential to reflect and present a coordinated action which involves these different players, for the improvement of the activities conducted, taking into consideration all the dimensions of the right to health and maximizing the use of the available resources.

4. Taking into account the activity conducted by the Judiciary, how is the issue of the Judicialization of Health faced?

When conducting a historical digression about the Judicialization of Health in Brazil, we may highlight that, for some time, the judicial action had been strongly oriented by the very personal convictions of the judges, with no major concerns about the overall effects of this individual and pulverized action on the public policy as a whole. Undoubtedly, this activism caused the decisive expansion of the health services by the judicial way, in several areas, with one of the paradigmatic instances being the acknowledgement of the responsibility of the Government to grant antiretroviral medication to HIV patients. In the past years, however, the Judiciary has wished to act in a systematic way, with the goal of presenting to Society decisions that are not made in an "isolated" manner. Today, the Judiciary is increasingly aware of its responsibility to standardizing the jurisprudence and to keeping it stable, integral and coherent, fundamental aspects in the concretization of the principles of juridical security, effectiveness and isonomy. The judicial protagonism, in terms of health, required the setting up of a more coordinated and strategic action. This is what one may clearly notice these days.

5. How does the National Justice Council present itself when analyzing the phenomenon of the Judicialization of Health in Brazil?

Before becoming a Minister of the TCU, I was an Advisor of the National Justice Council (CNJ) for two years, as a representative of society appointed by the Federal Senate, and I more systematically the action of the Judiciary, with a view to establishing a participated actively in an assignment, which makes me very proud. Throughout the past decade, The National Justice Council (CNJ) has led and encouraged "Judiciary Health Policy". The strategies involve from the creation of the National Forum of the Judiciary for the Health as well as State Health Committees up to recommendations on how the judges can decide the demands under their responsibility. With the commitment of the National Justice Council, it has been devised a judiciary policy that involves not only the action of the legal institutions, but also its interface with political and participative institutions.

6. Amongst the several suggestions presented by the CNJ, indicate one that is an example of an innovative action within the Judiciary?

Amongst the several actions taken, we may highlight that in 2010, the CNJ published Recommendation n° 31, with a view to providing guidelines to the tribunals in relation to the performance of actions that helped the magistrates in their decisions. Among other actions, this Recommendation encouraged the tribunals to enter into covenants with the goal of providing technical support comprised of physicians and pharmacists to assist them in the analysis of the clinical issues presented by the parties, taking into consideration the regional peculiarities. It is an innovative step, because by acknowledging the technical-scientific complexity of the issues related to the right to health, it is established a mechanism of collaboration between the judging authority and experts who might provide essential information for the proper resolution of the conflict.

Which other recommendations presented by the CNJ deserve to be highlighted, taking into account the action of the magistrates when facing issues related to the right to health.

In addition to collaboration based on technical support, as mentioned, the CNJ listed measures that the magistrates and tribunals should consider. For instance, (i) informing the cases, as much as possible, with medical reports, description of the disease - including the ICD (International Classification of Diseases) code - prescription of drugs - with generic name or active principle - products, orthoses, prostheses and inputs in general, with exact dosage; (ii) avoiding authorization of drugs that have not yet been registered by the Anvisa (Brazilian Health Surveillance Agency), or that are in experimental phase, except in the cases expressly defined in the legislation; (iii) when-

ever possible, and preferably via an electronic medium, listening to the public managers before analyzing emergency measures; (iv) including legislation related to health law in the administrative law program of the respective public examinations for admission to the career of magistrate, in addition to incorporating health law in the capacity building and improvement programs of the, magistrates; (v) visits by magistrates to the Municipal and State Health Councils, as well as to the public health centers or to those centers associated to the Unified Health System (SUS), to drug dispensaries and to hospitals capable of providing Oncology services like the Unit of High Complexity Assistance in Oncology (Unacon) or the Center of High Complexity Assistance in Oncology (Cacon).

7. Currently, as a result of your initiative and having you as the rapporteur, the TCU is conducting, the first audit related to the quality of the mobile telephony service in Brazil. What led you to make this proposal?

Brazil has been undergoing in the past decades a healthy denationalization process of public services. The first stage of this process was fundamentally focused on the universalization of the services and, in order to achieve that, it was important the establishment of goals to be fulfilled with the passing of time. However, this universalization has often been achieved at the expense of quality, and this is the general perception of society in the field of mobile telephony. My idea was to create an audit matrix, together with the TCU technical staff, to reflect indicators that have more correlation with the life of the citizen. This would make it possible to assess whether or not ANATEL (the National Telecommunications Agency) has been satisfactorily fulfilling its legal duty of ensuring that the telephone companies provide a quality public service to the Brazilian population.

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8. One of the recurrent themes in the TCU Plenary in 2015 was the condemnation of the use by the public authorities of Special Purpose Entities, the so-called SPEs, with private companies with the goal of bypassing the bidding process requirement. How do you analyze this phenomenon?

The Brazilian legal framework is quite complex and the administrative law rules assign to the Government negotiating supremacy and power of empire precisely because it represents the whole of the citizens. However, those same rules bureaucratize and restrict the flexibility and the agility of the Government to a great extent with the purpose of preventing misconduct, like corruption. Therefore, it is common the view that, when compared to the private companies, the Government action is heavy and slow. The fact is that this modeling has a reason and the managers often do not accept it and intend to obtain the best of both worlds. In an attempt to escape the rigor of the bidding law, some state-owned companies like Petrobras, Caixa and Correios, have been resorting to a sophisticated, although condemnable, resource. Instead of purchasing a product or hiring services through a bidding process, they choose to pick a private partner and constitute with this partner a Special Purpose Entity with minority participation of the state-owned company. With this distribution of the social capital, the new company then becomes a private law entity. However, in order for this SPE to be hired by the public authorities, it would have to participate in and win a public bid. Now comes the cunning that the TCU has been condemning: a shareholder's agreement is made in order to transfer the formal control of the entity to the state-owned company thus artificially fabricating the hypothesis of waiver of bidding process defined in tem XXIII, article 24 of Law 8,666. As rapporteur, I observed this resource in two cases and I order that the TCU General Secretariat of External Control (SEGECEX) conduct a survey in order to learn how many similar corporate structures exist in the Country. From this result, we will find out the exact dimension of the maneuver and decide what to do in order to curb this illicit practice.