

## JUDICIALIZATION OF HEALTH: THE BRAZILIAN CASE AND A BIOETHICAL REVIEW

Patricia Borba Marchetto<sup>1</sup>

Diego Hermínio Stefanutto Falavinha<sup>2</sup>

Helio Veiga Junior<sup>3</sup>

### Abstract

The Judiciary has been used by Brazilian society to seek for the concretion of rights to health through bringing actions in order to force the State to grant drugs, surgeries and other services, creating the concept of Health judicialization, which is an expression derived from the concept of judicialization of Politics, gaining significance in the Brazilian territory. Unfortunately, as will be seen in the next sections, the legalization of Health has taken negative proportions focusing critics on the intervention of the Judiciary in Health and Politics. Nonetheless, the excessive and disorderly legalization of Health do not have their reasons only in poor performance of the Judiciary, but find their genesis in the governmental inefficiency, corruption and market influences. Thereby, the aim of this article is to instigate that the issue of legalization of Health in the Brazilian case is complex, not being enough the occasional interventions in the Judiciary, but a set/group of actions to measure the real dilemmas/quandaries and argue/fight/work towards effective actions to solve it through the balanced performance of all actors, governmental and social involved.

**Keywords:** Judicialization of politics; Judicialization of health; constitutional law; bioethical

### INTRODUCTION

The Judicialization of health care is an expression that derives from the concept of Judicialization of politics that gained extreme significance in the Brazilian territory concerning the judicial branch interference on the Brazilian court decisions for health care cases which implies a tenuous bond between the law and the public

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<sup>1</sup> Professor of Law at Faculty of Humanities and Social Sciences, State University Paulista (UNESP). Franca, São Paulo, Brazil. Professor of Law at Faculty of Science, Arts and Humanities, State University Paulista (UNESP). Araraquara, São Paulo, Brazil. Doctor of Law at Barcelona University – Spain. E-mail: pmarchetto@fclar.unesp.br

<sup>2</sup> Program in Sociology of Federal University of São Carlos - (UFSCAR). São Carlos, São Paulo, Brazil. Master of Law at Faculty of Humanities and Social Sciences, State University Paulista (UNESP). Franca, São Paulo, Brazil. Member of the Group Observatory of Bioethics and Law at the State University of São Paulo (UNESP). E-mail: diego.falavinha@gmail.com

<sup>3</sup> Master of Law at Faculty of Humanities and Social Sciences, State University Paulista (UNESP). Franca, São Paulo, Brazil. Family Law Legal Specialist at Federal University of Uberlândia. Uberlândia, Minas Gerais Brazil. Member of the Brazilian Institute of Family Law - IBDFAM. Member of the Group Observatory of Bioethics and Law at the State University of São Paulo (UNESP). Law Professor at Faculty of Humanities and Social Sciences in Mario Palmério Foundation. Attorney at Law e-mail: helioveiga.law@gmail.com

policy speech. From the work of Tate and Vallinder (1995), called "The Global Expansion of Judicial Power" that the term "Judicialization of Politics" took global expression being used in various fields in social and legal sciences<sup>4</sup>.

Unfortunately, as it will be seen in the next topics, the Judicialization of health has taken negative proportions focusing on the criticism of the intervention of the judiciary in health and politics. However, excessive and disorderly Judicialization of health is not based only in a negative posture of the judiciary, but it also finds its genesis in a governmental inefficiency, corruption and market influences.

Thus, using data from official political agencies linked to the information obtained at the Public Hearing on Health held in 2009 in the Brazilian Constitutional Court, it sought to demonstrate that the current issue of the Judicialization of health care is not only based on the unpreparedness of The Judiciary Branch to sort out issues related to the right to health care, and also that merely legal measures are not sufficient to improve this situation.

Therefore, this article seeks to instigate that the issue of Judicialization of health care in the Brazilian case is complex, not simply by specific Judiciary interventions, but a set of actions to equate the real dilemmas and strive for effective measures to sort it out with the participation of government and society.

## JUDICIALIZATION OF HEALTH CARE IN THE BRAZILIAN CASE: PRESENTING AND CRITICIZING THE JUDICIARY.

The use of the term "Judicialization of Health" took place in the early 1990s, where Brazil began to experience the effects of the new Constitutional order. So with the return of democracy and the constitutional guarantee of fundamental and social rights, various lawsuits came to court seeking the effectiveness of the promised rights against the failure of State obligation concerning the health care.

It is interesting to point that in the Brazilian scenario until 1988 all the achievements related to the right to health care were not related to the Judicial Courts, because they were perpetrated on the basis of social movements, such as the sanitary movement that had started around the late 70s. The Brazilian Democratic State Law inaugurated by the new constitutional order introduced a new logic concerning the pursuit of the fulfillment of social rights. With a strengthened Judicial Branch and a more politicized legal system it has opened a new range to press the Brazilian State Government to materialize the constitutional plan.

It is then initiated by strengthening the "Judicialization of politics" a new logic of pressure to the constituted powers. The dynamics of litigation related to benefits linked to the right to health care was overwhelming impressive that it earned itself the expression of "Judicialization of Health Care", with a particular

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<sup>4</sup>Tate (1995, p. 27-37) identifies assumptions for the Judicialization of politics that molds with the Brazilian case as: i) a democratic system of government; ii) a "political rights"; iii) use of the courts by the opposition to prevent the creation of laws that for the ordinary procedures wouldn't stop; iv) existence of "ineffective majoritarian institutions"; v) a discredit originally responsible for the creation of public policy institutions; and vi) a purposeful inertia of "majoritarian institutions" in taking decisions on sensitive cases.

attention to the requests of the cocktail of drugs for HIV. The success of the litigations triggered into a large number of lawsuits that shook the structures of the Judicial Branch that had been trapped into the liberals and individuals dilemmas.

In this logic, it is possible to determine that the historical view that conforms with the subtle differences of “Judicialization of Health Care” is the beginning of the 1990s, which reveals the possibility of promoting lawsuits related to social rights, such as health care, so the Brazilian State would be compelled by Court Decisions to provide certain material support as medication, treatments, hospitalizations, among others. Such judicial decisions are able to influence the politic field, so it is conceivable that the term “Judicialization of Health” derives from “Judicialization of Politics”, being another meaning of its possible meanings.

The public politics were then discussed directly in the Judicial Branch since the creation of the 1988 Brazilian Constitution and the Judiciary begun to hold the possibility of influencing on issues related to social rights (Vianna et al, 1999).

That was the logic used by the Brazilian entities that moved their forces to combat the AIDS epidemic. Generally known as NGO, AIDS such Non-Governmental entities have established the link of discussion between government and civil society, summing up the individual needs of each seropositive with the social need for mobilization for a broad public health care policy.

Several strategies were used by the NGOs. In this range of strategic actions of the NGOs, the Judiciary won major highlight with the lawsuits whose objective was to obtain permission to have a public health care treatment for AIDS, given the new perspectives held in the 1988 Brazilian Constitution. The judges came to be seen as “heroes”<sup>5</sup> whom were capable of guaranteeing life to the people who needed the high-cost drugs, known as ‘cocktail of AIDS’, uttering decisions that influence state policies with the dome of the rights established by the Constitution.

The success of the movement against AIDS in the Judicial Branch, strengthened the notion of a “judge hero” capable of solving social inequalities and regarded as the ultimate guarantee for the attaining for social rights, pressing the government to take several steps to guarantee the right to health care treatment for people with HIV, creating laws or public policies. Soon appeared a bunch of precedents on the subject of AIDS, where courts widely recognized the obligation of the State to: i) ensure all medications for their treatment; ii) Ensure withdrawing the GFTS<sup>6</sup> - Guarantee Fund for Time of Service, to defray expenses of the disease process; and, iii) reinstatement of workers and military, respectively dismissed and excluded by discriminatory issues. (VENTURA, 2002, p. 99th).

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<sup>5</sup>The “Judge Hero” is presented in a similar concept to the “Judge Hercules” devised by Ronald Dworkin, for the promotion of the justice through the law from a perspective of knowing the moral nuances of society that he was in. (VERÍSSIMO, 2006).

<sup>6</sup>GFTS, or “Guarantee Fund for Time Labored” is the free translation for “FGTS”. FGTS is an acronym for “Fundo de Garantia por Tempo de Serviço”, which is a sort of a portion of the worker’s income, usually 8% of the total income, that is deposited at his/her

Given this situation, the Brazilian State was forced to take measures to ensure a satisfactory manner to guarantee the right to health care to people with AIDS. Thus, the right to treatment was universalized by the Brazilian Federal Law number 9.313/96, with the free distribution of medications. The case of AIDS instigated Brazilian society to rely on the Judicial Branch to seek for the guarantee of the right to health care, in particular with lawsuits claiming material support such as drugs as part of medications, surgeries, treatments, prosthetics, among others.

The lawsuits that came with a high degree of urgency, a subjectivity grounded in the right to health care, which demonstrated the need for the Brazilian State to provide material health support pressed the judiciary to grant favorable decisions imposing obligation for the Brazilian State to ensure health care to the population who depended on the public health care system.

Since the year of 2000 the number of lawsuits started to increase steeply which consequently increased the amount spent by the Executive Branch to fulfill judicial decisions (MARQUES; DALLARI, 2005; VIEIRA; Zuchi, 2007). Within the Federal Court, in 2002, there was a record of at least one lawsuit a year ordering material health support. By the year of 2011, the number of lawsuits claiming for health care support increased to 1.931 lawsuits per year (BRAZIL, 2012).

The Ministry of Health has spent on buying medicines, resulted from Court decisions, about R\$ 2.44 millions in 2005. In 2011 the amount of public money spent was approximately R\$ 243.9 millions, representing an increase of 10,000% (BRAZIL, 2012).

From a report called "Health data: Contextualization" - Brazil (NAFFAH FILHO et al, 2010) some data about the lawsuits and the expenses incurred in the State of São Paulo were presented.

By analyzing the costs for 66.060 items involved in the 23.003 lawsuits in the judiciary until the year of 2010, it reached a monthly amount of R\$ 42,712,559.81 (forty two millions, seven hundred and twelve thousand, five hundred and fifty nine reais<sup>7</sup> and eighty one cents), estimated at R\$ 512,550,717.72 (five hundred and twelve millions, five hundred and fifty thousand, seven hundred and seventeen reais and seventy two cents) annually spent by the Government to fulfill the decisions derived from the lawsuits. This amount is equivalent to more than 4.5 times the annual cost of hospitalizations for transplants of organs and tissues, and about 90% of the annual expense of SUS<sup>8</sup> with diagnosis in the clinical laboratory in the State of São Paulo (NAFFAH SON et al, 2010).

With this information it is possible to see that the hope of seeking rights through the onslaught of the judiciary in politics begins to fall apart being able to cause various legal, political and social upheavals. The "Judicialization of health care" brings interesting debates about the role of Brazilian institutions concerning the

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bank account as a social guarantee to be spent when the worker needs to purchase a necessary material for his/her health among other necessities.

<sup>7</sup> "Real" is the name for the currency in Brazil.

<sup>8</sup> SUS is the acronym for "Sistema Único de Saúde", which can be translated as "Brazilian Public Health Care System".

promotion of social rights and creation of public policy for the population necessity. Thus, the figure of the “judge hero”, who were able to positively influence the political field in order to achieve the social rights for society, were replaced for the “judge villain”, who were capable of misrepresenting the political order and cause greater social inequality, which was a target of criticism.

The issue is complex because the judge whom acts and mediates the lawsuit that claims medications or any other health provisions finds himself/herself in a lonely, high-risk situation over the decision he or she is has to take. By ruling in favor of the plaintiff who claims for some sort of health care against the Brazilian State, the judge may condemn another human being who also depends on the Brazilian Health Care System that cannot afford to lose that lawsuit and pay the plaintiff what he or she is claiming for in that lawsuit for his or her specific medical treatment.

Thus, it emerges big criticisms concerning the “Judicialization of health care” and the fear of “unrestricted individual justiciability” (Silva, 2011, p. 203). Wang (2009, p. 41/42) when analyzing some of the major decisions of the Brazilian Superior Courts, concluded that:

Brazilian judges' decisions usually: (1) consider the right to health only as an individual right; (2) do not observe the economic and distributional consequences of their decisions; (3) rarely consider the scarcity of resources and the costs of rights; (4) ignore scientific recommendations that contraindicate treatment request; (5) do not take into account existing public policies; (6) ignore the existence of opportunity costs, because it sees only one who has brought this right allocative choice made by a judicial decision, disregarding what is left to gain in terms of enforcement of rights by an alternative use of those resources; (7) do not promote a dialogue with the public administration responsible for the implementation of public policies, to know the reasons why a particular policy has not been implemented, nor to know the possibility to enforce the decision against other rights which the government needs to turn into effectiveness.

The critics are incisive on the Judicial Branch, but they do not include extrinsic causes that can generate an excessive and harmful “Judicialization of health care”. Thus, it is necessary to conceive and relate with other critical perspectives, such as misallocation of public resources, corruption and the influence of the private health care areas such as private health care plans, pharmaceutical companies among other aspects that interfere negatively in the “Judicialization of health care” process.

## **THE INFLUENCE THAT POLITICAL, SOCIAL AND MARKET FACTORS HAVE ON “JUDICIALIZATION OF HEALTH”.**

The expenses concerning the health rights derived from the lawsuit decisions are extremely high, and according to the critics, they do not respect any criterion related to the democratic nor technical choices.

It has been said that “rights cost money” (HOLMES; SUNSTEIN, 1999). This scenario of costs for promoting the rights in society raises questions about the inherent condition that State resources are scarce, which is a fact that communicates with the so-called theory of the possible reserve.

The Theory of “Possible Reserve”, which is a translation of the German expression “*Vorbehalt des Möglichen*”, is a construction imported from The German Law from the 1970s and regularly invoked as counterargument to the judicial control of the Public Policies and the granting of material support in health care when it questions the importance of financial limits for their completion, a scenario of scarce resources and that sometimes “tragic choices” (Calabresi and Bobbitt, 1978) are required.

In general, this theory takes into consideration two aspects, one factual and one legal. The first one leads to a lack of personal capital or material conditions, and the second points the need for budget forecasting and financial resources, both for the effectiveness of the constitutional rights concerning the health care treatment. The Theory of “Possible Reserve” can invoke the necessary elements to achieve social rights, once to effective these rights in society it becomes necessary to count on the public money. (FAZOLI; FALAVINHA, 2010).

There are several studies that state that resources are scarce and it is not possible to guarantee a satisfactory distribution so that all the individuals will have their rights guaranteed. It is necessary the accomplishment of political choices for allocating resources, a fact that would prevent the Judicial Branch to take action on conceiving the Judicialization of health care, once it has no legitimacy to allocate public resources as well as by granting the Judicialization of health care, it does not generate distributive justice.

It is redundantly obvious that judges do not have democratic legitimacy to allocate resources directly. However, they do have the duty to act when there is a clear affront to the constitutional rights and political branches are not fulfilling their role of representing the best interests of the society.

If it were not so, what would be the reason to say that resources are scarce without a prior analysis of the distribution of these resources by the government? With a perfunctory analysis it is possible to observe that such arguments do not take place so as to assist a real debate and are not able to achieve in a truly satisfying way for society. It isn't a valid argument to just point out that expenses with the health Judicialization are significant and that the Judiciary dismantles the public policies to provide material support in lawsuits related to health instead of promoting distributive justice. Monetary resources can be considered scarce however does this shortage not operate beyond the judiciary?

Thus, considering the existence of legal and factual assumptions (possible reserve and scarce resources) to guarantee the right to health is an important perspective, since these rights to health “cost money”. However, this guarantee should not be trivialized and used as an authority's argument to not provide social rights or to establish public policies for certain situations that should be prevalent in the government agenda. Therefore, there

is an obvious necessity to make choices and condone them with a judicial control, which is the center of the discussion of contrary positions concerning the legal intervention, once the judges do not have democratic legitimacy and enough technical knowledge concerning the health care public system budget and administration.

However, it is important to point that a reason for the increase of lawsuits whose object is the "Judicialization of health" and the demand for health services and health material support is linked to the notorious lack of belief in the Executive and Legislative Branches by the Brazilian population. Despite major advances in the realization of social rights, especially health and the creation of public policies in the Brazilian contemporary scenery for the last twenty-five years, social issues continue to exist without a successful solution, and when the subject is health, it is then easy to realize the inconvenient reality that shows the lack of medicines, number of hospitals without basic structures and the lack of doctors.

Public policies are instruments that should guide people's needs, but are discretionary and planning instruments, and may have an ambivalent nature - being "good" or "bad". The representatives of democracy are the ones who shall accomplish the choices for allocation of financial and material resources and shall legalize the public policy to reach a specific sector of society. Thus, it is possible to choose whether the public policy will be prioritized related to health or to the industry sector, education or commercial sector, finally, the nature of public policy allows its manipulation by a network of power and capital, which in most cases will not prioritize the most tenuous social needs and the Democratic and Social State of Constitutional law.

This logic is important for two reasons: i) demystify the judiciary as the only "villain" of the misallocation of resources for health; and, ii) show that the lack of effectiveness of the right to health and other social rights by democratic institutions contribute to an excessive Judicialization. Therefore, to corroborate such assertions fundamentals that demonstrate misallocation of resources by the Brazilian government and corruption will be used (in the sense of misuse of public investments to benefit private interests) factors that hinder the development of public policies concerning the realization of the right to health.

Firstly it is revealed the misallocation of resources for payment of external debt in exchange of what is waived for health, secondly the disproportionate waste of public money on certain measures of low social interest, such as investing in institutional advertising rather than investing the public money in the health care public system itself, and thirdly, the lack of government investment in public health as it is.

Cunha (2012) states through the recent years the Brazilian government has used most of its budget for the payment of interest and amortization of debt, sacrificing, in contrast, social investments in education, health, culture, housing, sanitation, among others.

This question is affirmed by the Citizen Audit Association (2012) which demonstrates that the federal government spent in 2012 almost half of its funds to pay the public debt, spending approximately R\$ 753 billion, leaving funds for health based only on 4.17% of the quoted amount.

In 2012, there was a cut of more than R\$ 5 billions for health announced in the budget, which then led into a cut of R\$ 55 billions to pay for the public debt (MENDES, 2012).

For the professor of Health and Economics, University of São Paulo Public Health School, Áquilas Nogueira Mendes (2012), the health budget is being swallowed by the economic policy of the Brazilian government and the absence of public investments in the country assumes that private spending is increasing. In 2009 it was spent on private health 52% [of all health spending], while on the public health, it was only 48%.

Brazil is the only country that has a universal system and invests more on issues related to the private health sector than the public (Cunha, 2012). In fact, these choices are not prioritizing the needs of society and much less notorious promoting distributive justice that the judiciary is often accused of disrespecting.

Besides the example related to the handling of the federal budget to prioritize the payment of the public debt and the majority of the investment for the private health sector, there are other inconsistencies in the policy choices of resource allocation at the expense of social rights.

The spending on credit cards of members of the federal government that is subsidized with public money, known as corporate card, reached R\$ 59.6 millions in 2012, while the spending on parties and tributes in 2011 was R\$ 54.2 millions, the budget forecast for 2011, spending on advertising was over R\$ 600 millions and the "Lula government" spent almost R\$ 10 billions in advertising (EXPENSES ..., 2013).

Analyzing the statements of representatives of health at the Public Hearing on Judicialization of health held on 27, 28 and 29 April 2009 and 04, 06 and 07 May, 2009 at the Brazilian Supreme Court – also known as STF, which is an acronym for "Supremo Tribunal Federal", we could observe that there was a lack of compliments to the Brazilian government and remaining complaints indicating the absence of specific public policies in health, low budget, misallocation of resources and insecurity of public services.

The unanimous position by all representatives of health at the public hearing at the Brazilian Supreme Court – STF was related to government inefficiency. The neglect of the Brazilian government to the public health is a major influence to the process of Judicialization, because of ineffective or nonexistent policies end up being the target of lawsuits to force the state to fulfill its obligations relating to health (Guedes, 2009).

It was observed that such neglect is done by small budget excused for health (JATENE, 2009; Guedes, 2009), and problems related to their own allocation of these scarce resources, resulting in the expression used by JATENE (2009) "social apartheid" that demonstrates the severe impoverishment of the public health system in Brazil, related to the disparity in the distribution of health resources and lack of hospital beds to population.



The public system also has flaws in its own management of their human resources and their excessive bureaucratization<sup>9</sup> (Cutait, 2009) and that combined with cases of absence of certain public policies or its inefficiency will collide with a universal, integral and equitable public health care system.

Some of these cases were part of the explanations brought to the public hearing, as the absence of policies for rare diseases (FELIX, 2009), reinforcing the need for state initiatives to implement new technologies in health (Diniz, 2009; FELIX, 2009), dynamic adaptation of protocols and guidelines for treatment on the Brazilian Health Care System (Guedes, 2009; PICON, 2009), the Health Government Department does not fund research in the Brazilian Public Health Care System (Segalla, 2009).

Misallocation of resources promoted by the representatives of the people and democracy is not the only problem once there is also the phenomenon of corruption responsible for embezzling sums of the poorest areas, such as health, to satisfy the ambitions of power and capital.

Thus:

All of it produces severe prejudice to Brazil, which loses resources for contracting above market prices; hires workers for the area without a purpose or even when there is a purpose the Brazilian State unintentionally hire disqualified workers, gives tax incentives that are distorted; defrauds bids; requires bribes; sells information, all at the expense of the exchequer, reaching, according to surveys, the loss of about 5% of the Gross Domestic Product - GDP. (OLIVEIRA, 2012, p. 282).

And according to the Organization called Transparency International (2012), Brazil comes in 69<sup>th</sup> place in the ranking of global corruption.

Besides the low ranking, according to a report published by DECOMTEC/FIESP in 2010, the average annual cost of corruption reaches almost R\$ 70 billions and for the values dispensed with health, almost 40% is diverted from its public budget to corrupt practices. In 2007, the Brazilian Health Care System's budget was approximately R\$ 41.3 billions and about 367.400 inpatient beds were kept at that time with that amount. If the average amount spent on corruption were applied properly for the Brazilian Public Health Care, it would be possible to create and maintain double inpatient beds in 2007, totaling nearly 700.000 inpatient beds (DECOMTEC / FIESP, 2010).

The junction of the misallocation of resources with corruption shows that significant amounts are spent, but the situation of the right to health remains almost unchanged. Blaming only the Judicial Branch for the responsibility of the Brazilian public health care system ineffectiveness and the public policy created out of adjustment is insufficient to understand the magnitude of the problem related to the Judicialization of health in

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<sup>9</sup>The Brazilian Public Health Care System is a public system that has its own problems: [...] Public Administration is tied, it hinders dynamic decisions and its own human resources, since it does not stimulate such a system, in general, to recycle all working on it. Thus, many of those working in the Brazilian Public Health Care System, doctors and other health professionals are not always with the best knowledge to the moments of the day-to-day. And, in its entirety, there must be an interference for this to be real in the categories of finance, management and human resources training (Cutait, 2009).

Brazil. Thus, if the judiciary does not operate in the logic of distributive justice, the Brazilian government does not act legally concerning the equitable distribution of monetary resources. It is obvious that the judiciary needs to rethink their interference and undertake certain limits on their performance concerning the public policies and the right to health, adjusting the logic presented with the theory of the "Possible Reserve", but the current tendency to apportion blame in the Judicial Branch interference is unsatisfactory to seek any solution to the issue. With the data presented, it is possible to observe that the representatives of democracy also make choices that undermine the realization of social rights, particularly the right to health.

So besides not satisfying the constitutional functions, when the democratic institutions do not accomplish rights, they create a precedent concerning the health Judicialization, which is one of the possibilities for controlling the democracy.

Also, besides the misallocation of resources and corruption, health should not be treated as a market commodity, but as a right of every human being able to compose a complex number of factors relating to their physical, mental and social well-being, as seen in the first part of this paper. However, this perspective does not conform perfectly in the contemporary capitalist society, which seeks to transform everything in a logic of production and consumption, which would overturn the prospects for solidifying a Democratic and Social State of Law. The right to health became a market product and is traded daily, mostly ignoring human subjectivity and establishing market parameters and profit as their objective.

The accumulation of lawsuits in the judiciary by ordering drugs, surgery, inpatient beds as well as other material health support, causing an excessive and ineffective Judicialization, can be related to the big business groups' financial interests. Is there a lack of technical knowledge of the Judiciary for granting the unrestricted access to health through a lawsuit or is there is a network of power based on capital that substantially influences such contracts? One methodological approach was performed using, as the main example, the influence of the pharmaceutical industry, to achieve a satisfactory understanding of the health issue as a marketing product and the criticisms regarding the "Judicialization of health".

Pharmaceutical industries raise much capital and its main objective is to transpose the purpose of improving their profits (NWOBIKE, 2006), contradicting its social function to seek treatment, drug development and give rise to new possibilities for a better quality of life for all individuals.

In this logic, the pharmaceutical industry grant greater concern with the profits of their products (drugs) than properly with the possibility of access to pharmaceuticals for the entire population. One of the strategic marketing approaches used by this business sector is the very "Judicialization of health" as a strategy to impose their products on the market (Angell, 2008).

For the drugs to be on the market in Brazil it requires regulatory approval by the National Health Surveillance Agency, named in Brazil as ANVISA. This Regulatory Agency makes studies that are capable of proving the efficacy of such drugs before the big pharmaceutical companies put the drugs safely on the market for every individual as a consumer of that specific drug. Allied to this perspective, the Public Brazilian Health Care System, whose acronym is SUS – Sistema Único de Saúde, has a list of medications called “RENAME”, which shows the drugs that must be provided free to the population.

In order to subvert the order of medicines distributed free, or simply to implement new products in the market, not always innovative or more effective than others, the pharmaceutical companies are lobbying with physicians and associations with chronic diseases, to induce the need for particular drugs, often costly, reaching people who seek the State negative concession for a specific drug or treatment, so they can compel the State, through judicial proceedings, to grant new products (ANGELL, 2008; CHIEFFI and ROACH, 2009).

Two surveys (CHIEFFI; ROACH, 2009; CAMPOS NETO et al, 2012) were able to demonstrate a possible link between doctors, lawyers and pharmaceutical industry in São Paulo and Minas Gerais.

Chieffi and Barata (2009), evaluating the period from January 1 to December 31, 2006 in São Paulo, found out that 3.007 lawsuits were registered ordering medications in Legal Electronic Control System of the State of São Paulo, which referred to 2,712 patients, with 2,927 lawsuits registered under the name of lawyers representing their clients.

Among the 2,927 lawsuits, 549 agents who proposed a lawsuit were lawyers and 878 different physicians were responsible for prescribing medications ordered. Only 1% of lawyers were responsible for the filing of 35% of lawsuits, removing lawyers linked to agreement on judicial assistance and some prosecutors, only two lawyers were responsible for a large number of such lawsuits (CHIEFFI and ROACH, 2009).

It was observed that only 32 lawyers were responsible for about 1,463 lawsuits against the Brazilian State, requesting, generally, 578 drug prescriptions by 816 different physicians. Among these doctors, 77 had more than ten prescriptions in 14 cases and appear in more than 20 lawsuits.

Only 21 drugs were requested in this period, and most costly, as "Adalimumab 40 mg" responsible for 249 lawsuits (which currently costs about three thousand reais) (BRAZIL, 2012), and only 07 were distributed by SUS at the time. A single lawyer were responsible for more than 70% of the lawsuits that required judicially the drugs palivizumab, rituximab, bevacizumab, and aripiprazole about 70% of the lawsuits that required the drugs adalimumab, erlotinib, peginterferon and estanercepte were also filed by a single lawyer.

Out of 31 lawyers, 21 concentrated their lawsuits in almost one drug, 7 filed lawsuits requiring up to 2 drugs and there were only 4 lawyers who filed lawsuits requiring for three or more different drugs, a fact that draws attention to the specificity between a lawyer and too much product.

Campos Neto et al (2012) when analyzing the lawsuits for drugs in Minas Gerais in the period between October 1999 and October 2009, analyzed 2,412 actions requiring 2,880 drugs with 18 different drugs, being predominant the presence of private doctors and lawyers in particular lawsuits.

Among other results, Campos Neto et al (2012) established the existence of a possible link between lawyers, doctors and pharmaceutical companies, among the lawsuits filed by the office called "A", 43.6% of those had a doctor called "X" as the physician who prescribed the drug adalimumab produced at The Abbott Lab. This information demonstrates a high concentration of filed lawsuits that concerns some doctors and some law firms. This may be an indication that the Judicial Branch and the medicine have been used to serve the interests of the pharmaceutical industries.

With the lengthy time gap between the drug registration of a medicine, the establishment of its national price and its regular marketing, the pharmaceutical industry observed the judicial process as a faster way to include their new drugs on the market and apply them to the prices they want once The state is obliged to provide them with urgency, pay prices available without any possibility of negotiation or even a bidding process (CHIEFFI and ROACH, 2009).

It is possible to observe that the pharmaceutical industry is able to manipulate and act with various marketing strategies to ensure its bigger purpose of profit.

The data presented are sufficient for the purposes of this topic, because it was able to propose a reflection on how health is treated in the contemporary market logic, turning into a consumer product, often dispersed from the feature of their fundamental right.

The influence of the pharmaceutical industry has a fundamental importance in the process of the "Judicialization of Health" in an excessive and disjointed manner with constitutional guidelines. They represent one of the business groups that most profit in the world and because of their strong economic and financial influence they ought to be out of the political and decision-making processes as a way of inhibiting other interests beyond the social (PICON, 2009).

With all the information brought by this paper, one can conceive that the judiciary suffers importantly indirect pressure from large corporate branches, which sometimes goes unnoticed because it is part of an action disguised marketing ploy setting a great handler situations.

Besides the lack of the judges' technical knowledge, it is important to analyze criticisms to the "Judicialization of health" as well as it is important to design the capitalist logic of the companies that deal with health, once they can be very influential concerning the use of the state by judiciary, to enforce their marketing

profitable incomes. In this sense, there is an urgent need to devise the influences caused in the "Judicialization of health" for its characteristic and marketing process.<sup>10</sup>

## FINAL REFLECTIONS FROM A BIOETHICAL POINT OF VIEW.

The final considerations about this paper seek to demonstrate that there other issues influence excessively and disproportionately the Judicialization of politics. However, the purpose of this topic is not to repeat what has already been discussed throughout the text, but to demonstrate that understanding the extent of responsibility of other actors, governmental and social, the Judicialization of health also deserves a view of bioethics.

Bioethics is no longer exclusively propagated in the 70s, only based in principles, based on justice, non-maleficence, autonomy and beneficence, in order to establish parameters for performances of medicine and biomedicine.

Thus Bioethics is still a subject of research and reflection at the heart of contemporary medical debates, not losing his mastery, however, bioethics won dimensions able to intervene on various subjects related to life and the possibility of conceiving greater dignity.

In this sense, bioethics has developed into a global bioethics and approaching human rights, showed as an important meaning of reflection on issues related to life, health, death and the environment (MARCHETTO et al, 2012).

Moreover, Brazil has important bioethical actors such as Volnei Garrafa who has great influence on this transformation of bioethics, creating from the Sixth Brazilian Congress of Bioethics 2002, the concept of "bioethical intervention", expression originally created in Brazil.

The "Bioethical Intervention" recognizes the inequality between rich and poor individuals as one of the factors to be considered in analyzing situations, and bioethics proposes interventionist practices with the aim of contributing to the creation of equitable conditions between individuals and the State (GARRAFA; PORTO, 2003).

Bioethics also value ethics to be observed beyond the private perspective, in the sense of classical biomedical application of the 70s, and pass to highlight the possibility of social analysis, health and environmental (GARRAFA; 2003) actions.

The main objective of the bioethical intervention is the realization of human rights and prevalence of human dignity, represented by the possibility of access to health and other rights essential to human survival

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<sup>10</sup>We claim that it is everyone's right to have the access to the right to health (or health as a right) and maintain the expectation that it is an universal right. though, in practice, this is actually health as a commodity, we know that, effectively, treatment is a right exercised even by only a few. "(Cintra, 2008, p.437).

(GARRAFA; PORTO, 2003b). Thus, "shifting the focus of bioethics to social issues, the human rights referential emerges as appropriate, together with the other proposition made by the bioethical intervention, to deal with these issues" (OLIVEIRA, 2011, p. 102).

Bioethics brings its characteristic "multi" and "inter" disciplinary and "trans" disciplinary for issues that involve known dogmatically economic, social and cultural rights in the international context and social rights in national majority constitutional theory, especially the right to health.

Bioethics would be a center for which converge common concerns arising from various disciplines, and its main feature would be the juxtaposition of contributions, which means, the lawyer, biologist, philosopher and so forth present their perspectives to the formation of bioethics as field of reflection (DURAND, 2003, p. 26th).

And this bioethical thinking is absolutely necessary to understand what was presented in this paper, once only with a multidisciplinary view that is able to understand that other actors, who are beyond the judiciary, contribute to excessive Judicialization of the right to health that is able to create multiple measures to seek a balance for the realization of the right to health in the Brazilian society, through political, social, and institutional actions, not just trying to solve the problem within a legal view or by just an institution.

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