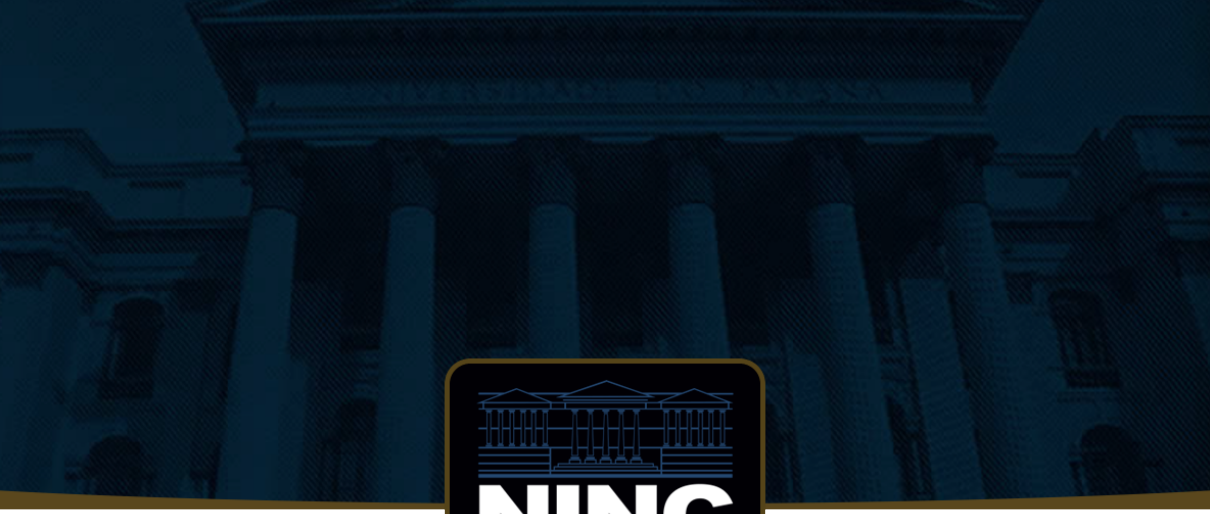

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Recognizing the public right to healthcare: the approach of Brazilian courts*

Reconhecendo o direito público à saúde: a abordagem dos tribunais brasileiros

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Resumo
Este artigo analisa aspectos da judicialização da política de saúde no Brasil. Discute-se a questão no contexto da separação dos poderes do Estado, a tutela judicial do direito público à saúde, as denominadas "discricionariedades administrativas técnicas" e, finalmente, a necessidade de lastro orçamentário para conferir eficácia às decisões dos tribunais. Para aprofundar a análise do tratamento que o Brasil empresta à judicialização da política, este artigo também compara a experiência brasileira com a experiência de outros países que vivem o mesmo fenômeno.

Palavras-chave: Direito brasileiro; direito à saúde; judicialização da política de saúde; tripartição dos poderes do Estado; discricionariedade administrativa técnica; igualdade perante a lei; orçamento público.

Abstract
This paper considers aspects of the judicialization of health care policy in Brazil. It discusses the issue in the context of the separation of the powers of government, judicial protection of the public right to healthcare, the so-called "technical administrative discretionary prerogatives," and finally, the need for a budget to provide for the efficacy of court decisions. To further the analysis of Brazil's treatment of the judicialization of politics this paper also compares Brazil's experience with the experience of other countries witnessing the same phenomenon.

Keywords: *Brazilian Law; right to healthcare; judicialization of healthcare policy; three branches of government; technical discretionary prerogative; equality before the law; government budget.*

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CONTENTS

In Brazil, the topic of the "judicialization of healthcare policy" continues fomenting debates in the three branches of power and naturally provokes interest of judges' academies and schools.[1] The recent National Council of Justice (CNJ) Recommendation no. 31, of 30 March 2010, on healthcare assistance, and CNJ Resolution no. 107, of 6 April 2010, that establishes the National Judiciary Forum for the monitoring and settlement of healthcare assistance claims is clear evidence of the importance and timeliness of the subject in Brazilian society.[2] The current significance of the topic of judicialization of healthcare policy is manifested in the joint academic pursuit undertaken by the Fluminense Federal University, Judiciary Sciences Centre, Nupej, and University of Paris Descartes, Institute of Health and Law, IDS. Federal Senate Bill no. 338, of 2007, further evidences the primacy of the topic by amending law no. 8.80/1990 that deals with the

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[1] NOBRE, Milton. **The installation of the Fórum Nacional do Judiciário** (National Forum for Judicial) monitoring and resolution of the demands of health care [published speech]. Conselho Nacional de Justiça (National Justice Council); speech given on 2010 August 3. Retrieved from: <http://www.cnj.jus.br/portal/images/programas/forumdasaude/discurso_cons_milton.pdf>. (stating "people speak of the 'judicialization of healthcare policy,' as though referring to a distortion that needs to be combatted like an epidemic of judicial actions, whereas the constant observation of reality, according to the essential methodological attitude in any scientific field shows exactly the opposite to be true. In many cases, calling upon the judiciary is the only efficacious remedy that is actually available to society for confronting certain dysfunctions and insufficiencies of the system. These insufficiencies and dysfunctions are derived from, and this is the real cause to be eliminated, the lack of clear rules concerning the rights and obligations of each of the participants, as well as their responsibilities and limitations."). Brazil is a federal republic made up of federal, state, and municipal levels of governance.

[2] BRAZIL. National Justice Council Recommendation no. 31 of 2010 [statute on the Internet]. Access on 2013, March 3. Retrieved from: <http://www.cnj.jus.br/atos-administrativos/atos-da-presidencia/322-recomendacoes-do-conselho/12113-recomendacao-no-31-de-30-de-marco-de-2010> (holding healthcare study and mobilization seminars, bringing together judges, members of the public prosecutor's office and managers, in order to promote better networking in the subject area, with the objective of obtaining technical support from medical doctors and pharmacologists to help the judges form a judgment of high quality in terms of their evaluation of the clinical questions presented by the litigants; promoting visits by the judges to the State and Municipal Healthcare Councils, to public healthcare units and the accredited units of the SUS (single healthcare system) in order to gain practical knowledge of how they work); BRAZIL. National Justice Council Resolution no. 107 of 2010 [statute on the Internet]. Retrieved from: <http://www.cnj.jus.br/atos-administrativos/atos-da-presidencia/323-resolucoes/12225-resolucao-no-107-de-06-de-abril-de-2010>. Access on 2013, March 13. (proposing specific normative measures aimed at optimizing procedural routines, organizing and structuring specialized judicial units, and normative measures to prevent judicial conflicts and to define strategies in healthcare law, Including legislation on healthcare as an independent subject in the Administrative Justice program for the corresponding judges' entrance exam, in accordance with the list of minimum required subjects established by CNJ by-law no 650/2009 - <http://www.cnj.jus.br/atos-administrativos/11896:portaria-n-650-de-20-de-novembro-de-2009>).

supply of therapeutic procedures and distribution of medication by the *Sistema Único de Saúde* (Single Healthcare System). [3]

The judicialization of healthcare policy is not unique to Brazil. It is also found in a limited degree in the United States and to the same extent as in Brazil in other Latin American countries such as Uruguay, Argentina, Chile, Paraguay, Colombia, Ecuador, Venezuela, Bolivia, Peru and Mexico.[4]

Strictly on the procedural level, the expression "judicialization of healthcare policy" is present whenever Government acts or omission give rise to legal action, brought against a public healthcare authority regarding healthcare policy, that asserts the right to protection of healthcare in light of unconstitutionality or violation of current legislation.[5]

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[3] BRAZIL. Senate Bill no. 338 of 2007 [statute on the Internet]. Retrieved from: <http://www.senado.gov.br/atividade/materia/detalhes.asp?p_cod_mate=81517>. Access on 2013, March 3; Law 12.401 of 2011; Retrieved from: <http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2011/Lei/L12401>.htm (stating "the importance of the subject matter of this report and the need to find solutions that safeguard the right to universal and egalitarian access to actions and services for health promotion, protection and recovery, as stipulated by Article 196 of the Federal Constitution, led the healthcare managers, the Judiciary Power, the Public Prosecutor's Office and representative segments of civil society to promote (in recent years) various debates about the increased role of the judiciary in examining public healthcare policies. In April 2009, the Federal Supreme Court held a Public Hearing in order to prepare an assessment of the actions subject to its judgment, in which 5 out 6 of the planned topics were directly related to the 'judicialization of healthcare policy' in the context of the single healthcare system (SUS)").

[4] MANNING, S.; RADAZZO, K. Leveling the Playing Field? Litigant Success Rates in Healthcare Policy Cases in the U.S. Courts of Appeals. **The Justice System Journal**, v. 30, n. 2, 2009. p. 247 (discussing increased litigation over termination of health benifits since Goldberg v. Kelly); CHILE. Constitutional Court Judgment No. 976-07 of 2008; COLOMBIA. Constitutional Court Judgment no. T-760 of 2008 [statute on the Internet]. Retrieved from: <http://www.corteconstitucional.gov.co/relatoria/2008/T-760-08.htm>. Access on 2013, March 3; ARGENTINA. Buenos Aires National Supreme Court, Recurso de Hecho Law B. 537. XLIV 2010; URUGUAY. Court of Appeals in Civil Matters, 2nd Judicial Rotation, Judgment no. 159/2008; URUGUAY. Court for Administrative Litigation, 3rd Judicial Rotation, Action for Amparo (constitutional relief) IUE 2-27081/2009; URUGUAY. Court of Appeals in Civil Matters, 5th Judicial Rotation, Judgment no. 94/2012.

[5] Article 196 of the CRFB/1988 [statute on the Internet]. Retrieved from: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm>. Access on 2013, March 3. (inferring healthcare is considered a subjective public right from language that states, "everyone is entitled to healthcare, which is a duty of the State, guaranteed by social and economic policies intended to reduce the risk of illness and other grievances and to ensure universal and egalitarian access to actions and services for health promotion, protection and recovery."); BRAZIL. Federal Supreme Court, **STA 175 AgR/CE**, DJ-e 76, p. 70, 30 April 2010; German Federal Constitutional Court. Guiding Principle of the Decision of the First Senate (Leitsatz zum Beschluss des Ersten Senats), 1 BvR 347/98 of 2005. Retrieved from: <http://www.bundesverfassungsgericht.de/entscheidungen/rs20051206_1bvr034798.html>. It should be noted that judicial review by the Supreme Federal Tribunal (STF) occurs on both a diffuse and abstract basis. Much like the United States' system of diffuse review, lower courts of general jurisdiction can deal with constitutional questions while the STF exercises appellate jurisdiction over these concrete cases and controversies. Additionally, Direct actions challenging constitutionality in the abstract (i.e. without a specific cases or controversy) can be brought by a certain government and non-governmental individuals and entities specified by the Constitution. The exercise of abstract review requires a quorum of eight (of eleven) justices, and six votes are required to declare an act unconstitutional. Decisions in direct action abstract review are binding erga omnes. KRITZER, Herbert M. (editor). The Legal Systems of the World: A Political, Social, and Cultural Encyclopedia. Denver: Oxford, 2002.

A typical example of the judicialization of healthcare policy in Brazilian courts arises when actions are filed, individually or collectively, against a Public Healthcare Authority for the supply of medicines not incorporated into the SUS. In fact, although the SUS is a universal, egalitarian, free and comprehensive system, certain medical treatments and products may not be made available to the general public. This lack of availability can be attributed generally to either of the following two situations: 1) the lack of public healthcare policies (laws, rules or administrative proceedings) that support or coincide with the patient's claims; or 2) the Public Healthcare Authority's failure to comply with the existing policies, often due to the lack of a clear definition of the division of authority among federal entities. Strictly speaking, the judicialization of healthcare policy is found only in the first situation, in which healthcare policies are lacking and the existing policies somehow frustrate the citizens' demands for medication necessary to protect their health.[6]

To ensure adequate examination of the procedural aspects of the judicialization of healthcare policy, especially from a comparative perspective, this study will be limited to court cases related to healthcare policies established by administrative acts or rules. That is to say, this study will focus on procedural law in cases relevant to public healthcare authorities, known in Brazil as "public procedural law", in the United States as a subset of administrative law concerned with "administrative procedure," and in Europe and the rest of Latin America as "administrative jurisdiction" or "administrative justice."[7] The scope of this analysis does not include judicial protection extended to healthcare policies derived directly from law, since such protection depends more on the principles of constitutional jurisdiction. Additionally, and most importantly, this study will not focus on judicial protection derived directly from law because the majority of the litigation over public healthcare rights in Brazil do not involve question of constitutionality – whether by act or omission– of healthcare laws.[8]

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6 BRAZIL. Federal Supreme Court, STA 175, 17 Mar. 2010; Public Hearing 4 (judicial disputes on the subject of "healthcare law" mainly arise from the Public Healthcare Authority (SUS) denying a request because the requested medicine is not registered, an administrative decision of the Anvisa refusing to register a healthcare product (including drugs that are purely experimental or whose efficacy have not been demonstrated scientifically). The SUS failing to regularly provide the healthcare action (medicine or treatment) even though it is registered with the Anvisa: (a) administrative decision based on the lack of scientific evidence for the requested healthcare treatment or product – an alternative treatment is proposed (but not found suitable by the claimant); (b) decision based on the lack of scientific evidence for the requested healthcare treatment or product– without any specific treatment for the claimant's pathology; (c) administrative decision justifying treatment based on new healthcare products or treatments – not tested by the SUS (not included in the test protocols); 3. The Public Healthcare Authority (SUS) regularly supplies the healthcare product (requested medicine or treatment), but in a certain specific case rightly denies the claimant's request: administrative decision based on the unsuitability of the healthcare product or treatment for the claimant.

7 BUENO, C. S.; SUNDFELD, C.A. **Direito Processual Público** (Public Procedural Law) São Paulo: Malheiros, 2000; BURNHAM, W. **Introduction to the Law and Legal Systems of the United States**. 4.ed. St. Paul: West, 2001.

8 Public Hearing 4, initiated by the Federal Supreme Court in STA 175: (stating "after hearing the testimony of the representatives of the various sectors involved, I think it is necessary to rethink the question of the

Is it necessary to require specific judicial protection for the public right to healthcare protection? Is there a need for specialized public healthcare courts and procedural rules based on the German model with its social law jurisdiction and procedural legislation?[9] Is it not enough to have the existing courts and procedural rules applicable to public disputes in general, as is the case in both Brazil and the United States?

Answers to these questions can be pursued by examining the procedural questions the Government most often raises in court. The arguments are mainly based on the juxtaposition of individual disputes involving the right to healthcare protection, on the one hand, and the duties of the general public, on the other. In the same vein, it will be helpful to examine the basic principles of jurisdiction of the courts over administrative authorities, which, in the healthcare cases, should also be guided by the concept of effective judicial protection.

1. SHOULD THE JUDICIARY GET INVOLVED IN MAKING GOVERNMENT HEALTH POLICY?

As one example of the abundant Brazilian case law on the subject, it is worth mentioning the case of a patient with physical impairments who asked to be supplied an orthotic device necessary for the treatment of a post-polio disorder. The Public Healthcare Authority, in one of its defenses, alleged that there was no obligation to supply a medical device not included in a standardized list in official programs. Their argument was as follows:

> *The Judiciary, hearing a request for medication, implies an infringement of Art. 2 of the Constitution ("The Legislative, the Executive, and the Judicial, independent and harmonious among themselves, are the powers of the Union") to the extent that it (the Judiciary) would*

'judicialization' of healthcare law in Brazil. This is so because in the majority of cases judicial intervention is not motivated by an absolute omission in the public healthcare policies intended to safeguard the right to healthcare but rather by the need for a judicial determination for the enforcement of policies that already exist. Thus, there is no problem of judicial interference with the free evaluations or margin of discretion enjoyed by the other branches of government with respect to the formulation of public policies. That fact may be relevant when establishing a criterion or parameter to decide cases like this one, in which the debates primarily concern the interference of the Judiciary Branch in the sphere of the other Branches.").

9 Sozialgerichtsgesetz. Retrieved from: <http://www.gesetze-im-internet.de/sgg/index.html>; Zehntes Buch Sozialgesetzbuch - Sozialverwaltungsverfahren und Sozialdatenschutz - (SGB X). Retrieved from: <http://www.gesetze-im-internet.de/sgb_10/index.html>; BUSTILLOS, L. O. **Introducción a los Fundamentos del Derecho Procesal Social en Alemania:** Jurisdicción y Seguridad Social (Introduction to the basics of social procedural law in Germany: jurisdiction and social security). Niterói, Brazil: Seminário sobre Estado de Direito (Seminar on the Rule of Law), 2010 (noting "in Germany, there has been a discussion since 2004 about the possibility of uniting the jurisdictions of public law, i.e., combining the special financial, social and administrative jurisdictions into a single jurisdiction of public law. Rather than being motivated by problems inherent in the nature of the jurisdiction, however, such efforts at reform through unification are based on pragmatic considerations in order to solve the problem of the saturation of judges in one jurisdiction and enable their transfer to another jurisdiction.").

> *be exercising a function specifically designated to the Executive, by redirecting resources from the specific public policies in existence to an individual case, regardless of the seriousness of the case.*[10]

Still, the court decided that:

> *since healthcare is a social right, it should be taken care of by the state, through public policies, especially the SUS (Single Healthcare System). According to the Constitution of 1988, such public policies constitute a set of governmental actions. It is therefore a right of an eminently constitutional nature, whose obligatory provider (of the right) must be the state, which has the duty of developing the necessary programs so that, together, the three public entities (branches of government) will achieve the higher purpose, which is giving effect to that right. Thus, for the primary purpose of ensuring the effectiveness of that right, the Federal Constitution distributes to the (Brazilian) Union, the States, the Federal District and Municipalities the responsibility for such actions and services.*[11]

In another request to be supplied a portable insulin pump and all the accessories necessary for its use, the administrative authorities once again argued that the request offended the principle of the separation of powers, alleging that "it is the Executive that has the authority to delineate public policies and define which medications will be supplied gratuitously to the public, by weighing the rights of the individual against those of the rest of the community, given the need to comply with the principle that the individual must not demand the impossible of the state."[12] Nevertheless, more than once, the court has decided in the patient's favor:

> *a Democratic state governed by the Rule of Law inherently offers the possibility of judicial review of administrative acts; the Federal Supreme Court itself has increasingly recognized the possibility of judicial questioning of the State's refusal to supply various pharmaceuticals listed in the Clinical Protocols of the SUS, for the treatment of certain illnesses.*[13]

The role of the Judiciary in determining that public policies established by administrative and infra-legal measures need to be edited or revised must be tempered by the principles that guide judicial protection of citizens against administrative authorities.[14] To this end, the Euro-American Code stipulates that the scope and intensity of judicial supervision should be as follows:

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[10] BRAZIL. Federal Regional Court of the 4th Region, no. 0001647 (04.2008.404.7210/SC), 2010, Mar. 3.

[11] BRAZIL. Federal Regional Court of the 4th Region, no. 0001647 (04.2008.404.7210/SC), 2010, Mar. 3.

[12] BRAZIL. Federal Regional Court of the 4th Region, no. 0001647 (04.2008.404.7210/SC), 2010, Mar. 3.

[13] BRAZIL. Federal Regional Court of the 4a Região, no. 200.04.043511-1/PR, 2010, Feb. 11 (appeal for review).

[14] GRINOVER, A. P. **O Controle Jurisdicional de Políticas Públicas.** Rio de Janeiro: Forense, 2011 (being studied for the purpose of regulating judicial procedure for public policy control); BLANKE, H. J. **Margenes de**

The mission of the Judiciary in the administrative jurisdiction is to uphold the Rule of Law, supervise the legality of administrative proceedings, and to protect and enforce rights and legitimate interests.

To this end, the administrative jurisdiction rules on the following claims, in particular: (a) the annulment of administrative acts or norms; (b) mandatory and prohibitory injunctions, including enacting administrative acts or norms; (c) orders to hand over a certain thing.

The Judiciary must examine the legality of the administrative authority's acts or omissions. Review of legality encompasses errors of jurisdiction, procedure and form (formal or external legality) as well as errors of content (substantive or internal legality). Review of content refers to examining the legal grounds of the individual act [questions of law], factual determinations [questions of fact], and legal classification of the events [mixed questions of law and fact]. [The court also] verifies whether the administrative authority has abused its power. Even when the administrative authority has applied ill-defined legal concepts, the court may examine whether they have been correctly interpreted and applied.

Regarding the review of discretionary powers, it is the duty of the Judiciary to examine in particular: (a) whether the administrative authority's act or omission exceeded the limits of its discretionary powers; (b) whether the proceedings were suited to the purpose established in the regulation granting the powers; (c) whether there were actually infringements of fundamental rights or principles, such as equality, proportionality, good faith, protection of legitimate expectations, and prohibition of arbitrary action. The Judiciary also reviews the failure to exercise a discretionary power.[15]

Discricionalidad y de Apreciación. Buenos Aires: Fundacion Konrad Adenauer, 2012; ABERASTURY, Pedro. **La justicia administrativa**. Buenos Aires: Lexis, 2006; (noting, in regards to German law, "according to the case law of the Federal Administrative Supreme Court, an ill-defined concept of law is fully reviewable and only in special cases does the Public Authority have the last word in decision-making in configurations involving a margin of discretion. For the purpose of reviewing examination decisions (in schools, universities, etc.) the Federal Constitutional Court has further expanded the subject-matter jurisdiction of the courts, declaring that the supervision of arbitrary rulings by the Public Authority must be supplemented by supervision of the 'justifiability' of administrative decisions. Another category of cases in which the Public Authority has a margin of discretion involves administrative decisions of a predictive nature, in case of a risk to the public, or planning decisions, especially in environmental law, genetic engineering and economic law with respect to the Nuclear Power Plant Construction Act. The basic idea here is that it is necessary to comply with the special responsibility of the executive authorities when it comes to evaluating risks. That argument is contradictory, at the very least, for the simple reason that, just as the Public Authority, the administrative courts may consult experts. However, even in cases involving a margin of discretion, the courts are acknowledged to have the authority to supervise the Public Authority's decisions. Against that backdrop, orienting itself according to Art. 114 of the Code of Administrative Justice), the court examines whether the Public Authority of civil service career candidates.").

[15] Text prepared in three Euro-American research seminars "Model Administrative Jurisdiction Code", held by the Research Group "Effectiveness of Jurisdiction" in Fluminense Federal University, Niterói (Brazil), and at the German University of Administrative Sciences, Speyer (Germany), between the years 2008 and 2010; approved in the 3rd Seminar held in September 2010 in Niterói. The authors of the code were Pedro Aberastury, Hermann-Josef Blanke, Gabriele Bottino, David Capitant, Jesús María Casal, Diana-Urania Galleta, Ricardo Garcia Macho, Leonardo Greco, Lorena Ossio, Gilles Pellissier, Ricardo Perlingeiro Mendes da Silva, and Karl-Peter Sommermann.

The above-cited stipulations would be no different if the content of the disputed administrative acts relate to public healthcare. This is true except with respect to the technical aspects that might require the Judiciary to have special qualifications to ensure the quality of the judicial supervision, as will be mentioned below.

Thus, the Judiciary does not go beyond its institutional functions to ensure effectiveness of the right to healthcare when it exercises judicial review over healthcare policies, because the right to healthcare is a fundamental right in Brazilian case law.[16] For this reason, the Judiciary involves itself in the healthcare policies otherwise subject to administrative acts and standards. That power of judicial review is not limited to repairing the harm caused by an erroneous policy, but also includes the review of policies and orders to revise the corresponding administrative acts or rules.[17]

2. DOES THE JUDICIARY HAVE THE EXPERTISE TO INTERFERE WITH THE HEALTHCARE POLICYMAKING?

As already noted, the National Council of Justice (CNJ) Resolution no. 107 established the National Judiciary Forum to monitor and settle healthcare assistance claims. According to Article 2 of that resolution, one of the objectives of the National Forum is to "propose concrete normative measures to organize and structure specialized judicial units."[18] That proposal supports the need for the courts to promote judge's visits to the healthcare units and for judgeship schools to promote courses and events on that subject.[19]

In fact, the constant specialization of the courts is an inherent measure of the quality of judicial performance and therefore of the principle of effective judicial protection. It is assumed that the judges are best suited to answer the specialized questions repeatedly referred to them, since that enables them to gain in-depth knowledge and reduce the margin of error.

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16 BRAZIL. Federal Supreme Court, Decision STA 175, 2010, 17 March. Retrieved from: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=610255>.

17 BRAZIL. Higher Court of Justice, AgRg no REsp. no 1.136.549/RS, 2009/0076691-2, 2010, June 21. Retrieved from: <http://www.stj.jus.br/webstj/processo/Justica/detalhe.asp?numreg=200900766912&pv=010000000000&tp=51> (deciding "since social rights must not be dependent on the good will of the administrator, it is of fundamental importance that the Judiciary act as the supervisor of administrative activities. It would be twisted to think that the principle of the separation of powers, originally conceived for the purpose of guaranteeing fundamental rights, might be used to interfere with the assertion of fundamental social rights [...]. The correct interpretation of the principle of separation of powers in public policies is that the Judiciary's activities should be limited only when the Public Healthcare Authority acts within the limits permitted by law.").

18 BRAZIL. National Justice Council Recommendation no. 31 of 2010 [statute on the Internet]. Retrieved from: <http://www.cnj.jus.br/atos-administrativos/atos-da-presidencia/322-recomendacoes-do-conselho/12113-recomendacao-no-31-de-30-de-marco-de-2010>. Access on 2013, March 3.

19 BRAZIL. National Justice Council Recommendation no. 31of 2010 [statute on the Internet]. Retrieved from: <http://www.cnj.jus.br/atos-administrativos/atos-da-presidencia/322-recomendacoes-do-conselho/12113-recomendacao-no-31-de-30-de-marco-de-2010>. Access on 2013, March 3.

The specialization of judicial bodies in the subject area of healthcare would, however, entail fractionalization of judges and bodies with jurisdiction solely over public healthcare law. In Brazil, there are no judicial bodies specializing in health or public healthcare.[20] Certain noteworthy examples of specialized judicial bodies may, however, be found in Europe. In England, for example, the Mental Health Review Tribunal makes decision on compulsory detention in mental health facilities for treatment purposes.[21] In France, the law of the 4th of March, 2002 (*Loi Kouchner*) and the law of the 9th of March, 2004 (*Loi Perben II*) have created certain courts specializing in public healthcare.[22] In Germany, it is worth mentioning the example of the "special healthcare senates" within the social rights courts, as shown by the Code of Judicial Procedural of Social Law.[23]

Moreover, the possibility of judicial review of administrative technique questions – also known as "margin of discretion in technical matters"– in the field of public healthcare is inherent to the right to effective judicial protection. In addition to the specialized legal aspects of healthcare law, there is increasing demand for a court with scientific and technical expertise in healthcare and healthcare management in order to decide such cases.

However, in a system such as Brazil's, in which judges are necessarily educated in the law, such technical knowledge is derived from court appointed expert opinions. The role of the judge is at risk of becoming secondary or dependent in that respect.[24]

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[20] In the capital city of the State of Rio de Janeiro, the Lower Treasury Courts adopted a procedure in which civil servants in the field of healthcare (who are employed by the Public Authority) prepare, within the court's own offices, a technical report on the legal actions initiated and submit it immediately to the judges, who examine the report before performing any judicial acts. That system reduces the number of disputes by preventing the continuation of existing spurious disputes and discouraging new ones, because the judge is promptly supported by an official opinion on the claim presented. In substance, however, that procedure is *sui generis* and is not comparable with a court that has a panel of multidisciplinary judges, since the opinions are drafted by the challenged Public Authority itself. On the one hand, it is intended to make up for the lack of a prior hearing of both parties when granting the precautionary measures "inaudita altera pars", which are common in proceedings concerning healthcare; on the other, it is intended to make up for a gap in the Brazilian legal system which, failing to distinguish between a prior administrative dispute and a prior administrative complaint, requires the absence of such measures as a prerequisite for filing a judicial action.

[21] BRADLEY, A. W.; EWING, K. D. **Constitutional and Administrative Law.** 14.ed. London: Longman; 2007.

[22] Law no. 2002-303 of 4 March 2002 (The Kouchner Act) (written on the rights of patients and the quality of the healthcare system and added provisions to the Public Health Code that created three specialized centers in Paris, Lyon and Marseilles for criminal law issues in the healthcare sector. In France, there are other courts specializing in healthcare, such as the inter-regional courts of social and healthcare pricing – that have jurisdiction over disputes related to reimbursement "by installments" in the daily prices and the prices of other healthcare, social or socio-medical public services (L. 6143-4 CSP, which instituted five competent courts in France: in Bordeaux, Lyon, Nancy, Nantes and Paris) and the courts of technical reviews that exercise jurisdiction over malpractice, abuses, fraud and other offences committed by medical doctors, surgeons, dentists, "midwives", pharmacists and medical assistants when treatment is given or services are provided to social security beneficiaries.").

[23] Sozialgerichtsgesetz, § 10, 2 [statute available on the Internet].Retrieved from: <http://www.gesetze-im-internet.de/bundesrecht/sgg/gesamt.pdf>. Access on 2010, December 31.

[24] TARUFFO, M. **Sobre las Fronteras, Escritos Sobre la Justicia Civil** (On the Borders, Writings on Civil Justice). Bogota: Temis, 2006. (enumerating important, hard-to-solve problems in the use of scientific proof, by

Would the judge be the hostage of the experts? This question generates a certain discomfort and justifies the National Council of Justice's recommendation that courts seek alternative means of raising judge's level of medical expertise, through specific judge training programs, including, for example, visits to public healthcare establishments and events that bring together judges and healthcare managers.[25]

The United States presents an interesting response to the concern that expert testimony in cases turning on technical questions may reduce the trier of fact's role to a secondary capacity. In the United States both parties to a proceeding find, prepare, and present their own expert testimony. Court-appointed experts are possible, but rare.[26] The trier of fact, often a jury in the United States' system, makes a determination based on the trier of fact's evaluation of the competing testimony. This approach is based on the idea that there are often conflicting perspectives on technical questions and that the trier of fact should be presented with those divergent perspectives before making a determination.[27] While the trier of fact, whether a judge or a jury, makes credibility determinations, the issue of admissibility of expert testimony is a question of law and is determined by the judge pursuant to Federal Rule of Evidence (FRE) 702.[28] FRE 702 states that a court may allow an expert to testify when:

> *(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) "the testimony is based on*

calling attention to the "judge's capacity to actually function as a peritus peritorum (expert among experts) on occasions on which he is called upon to make direct use of scientific knowledge when formulating the final decision". He points out, "Resorting to science as an instrument of rationalization of the metal-juridical aspects of the judge's reasoning therefore opens numerous possibilities which, although undoubtedly interesting, nevertheless give rise to a great number of thorny problems concerning both the validity of the scientific knowledge used in the trial and extremely important issues regarding the manner in which the judge performs his role and works out his evaluations."); GRECO, L. **Instituições de Processo Civil** (Institutions of Civil Action). v. 2. Rio de Janeiro: Forense Jurídica, 2010. (stating, "it is hard to see how the judge can refrain from acknowledging the truth revealed by the expert evidence, because the judge does not possess, or is not presumed to possess, the expert's knowledge. Therein lies the great risk of expert evidence: it transforms the expert into a judge." and noting that "the difficulty of understanding and evaluating highly specialized knowledge also justifies a certain resistance in Germany and the United States to judicial review of public policies, which are relegated to internal problem-solving committees of the Public Authority itself or of the regulatory agencies, or considered policy matters to be decided upon by the authorities themselves."); PENALVA, E. P. **Introducción al Derecho Procesal Penal** (Introduction to Law of Criminal Procedure). 2.ed. Managua: Editorial Hispamer; 2002. (finding the difficulty of expert evidence requires the judge be more careful in establishing the grounds for his decisions, in such a way that the judge is not allowed to act as an expert nor the expert to act as a judge).

25 BRAZIL. National Justice Council Recommendation no. 31 of 2010. [statute on the Internet].. Retrieved from: <http://www.cnj.jus.br/atos-administrativos/atos-da-presidencia/322-recomendacoes-do-conselho/12113-recomendacao-no-31-de-30-de-marco-de-2010>. Access on 2013, March 3

26 BURNHAM, W. **Introduction to the Law and Legal System of the United States.** 4.ed. City: West, 2011.

27 BURNHAM, W. **Introduction to the Law and Legal System of the United States.** 4.ed. City: West, 2011.

28 Federal Rules of Evidence for United States Courts of 2011, Pub. L. No. 93-595, 88 STAT 1926 (December 1, 2011).

sufficient facts or data;" (c) The testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.[29]

As can be seen, the role of the judge in the United States with respect to admitting expert testimony under FRE 702 is broad. The requirement of 702(a) is a relevancy requirement, but the requirements of 702(b), 702(c), and 702(d) require the judge to test whether the testimony offered has a reliable basis.[30] Another value to this rule is that it addresses, at least in part, the concern that exists in Brazil as well as in the United States that the judge's and trier of fact's role will crumble in the face of expert testimony.

The question, however, arises whether we also consider courts with a multidisciplinary composition of judges. In France, the courts specializing in public healthcare include a medical doctor, a veterinarian and, possibly, a pharmacologist, who act as the judge's permanent assistants: they are civil servants, and the medical doctor is a public healthcare inspector who has graduated from the *École des Hautes Etudes en Santé Publique* (Higher Institute of Public Healthcare) in Rennes.[31] The German example has aroused quite a bit of interest. In Germany, the social law judicial system, with lay judges, permits judges with healthcare training to settle disputes of public healthcare law.[32] The great advantage is that, since they are actual judges rather than mere expert assistants (assistant civil servants), these agents' actions have greater legitimacy thanks to the guaranteed effective independence of judges.

3. CAN THE JUDICIARY PROTECT AN INDIVIDUAL'S PUBLIC HEALTHCARE RIGHTS WITHOUT CONSIDERING OTHER INDIVIDUALS IN THE SAME SITUATION?

The existence of thousands of "healthcare law" cases indicates the extent to which we are faced with questions of public interest that demand suitable judicial measures.[33] In fact, if we look at the main causes of such disputes, we find a single public healthcare authority's action is repeatedly challenged because the widespread effect of its behavior does not impact one claimant alone.[34] This raises the question whether

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[29] Federal Rules of Evidence for United States Courts of 2011, Pub. L. No. 93-595, 88 STAT 1926 (December 1, 2011).

[30] Advisory committee's note on Fed. R. Evid. 702, Pub.L. No. 93-595, 88 STAT 1926 (December 1, 2011).

[31] Law no 2004-806 (Law of 9 August 2004) (formerly called L'École nationale de santé publique).

[32] Sozialgesetzbuch, § 12, 3 [statute available on the Internet]. Retrieved from: <http://www.gesetze-im-internet.de/sgg/index.html>. Access on 2010, December 31.

[33] BRAZIL. National Justice Council preliminary report no. 107 of 2010 (finding here are 112, 24 judicial actions involving public healthcare law currently underway in the Brazilian state and federal courts). Retrieved from: <http://www.cnj.jus.br/images/programas/forumdasaude/relatorio_atualizado_da_resolucao107.pdf>.

[34] MANNING, S.; RADAZZO, K. Leveling the Playing Field? Litigant Success Rates in Healthcare Policy Cases in the U.S. Courts of Appeals. **The Justice System Journal**, v. 30, n. 2, 2009. p. 247; CHILE. Constitutional Court

current procedural instruments in Brazil relating to class actions are up to the task of handling questions of public law that affect public interests.[35]

The Judiciary should follow the principle of equality before the law, ensuring equal treatment for everyone under its jurisdiction who is in the same factual situation. This principle justifies procedural instruments such as class actions, binding judicial precedents and model proceedings (*Musterverfahren*) that guide courts in resolving similar cases. Additionally, these procedural instruments also serve the goals of ensuring broad access to justice and reducing repetitive judicial proceedings.

However, in a public law case involving an administrative authority's acts or behavior, equal treatment before the law by the Judiciary is a natural consequence of the duty of equality. This duty of equality has always been binding on Government Agencies in their substantive duties and in the extrajudicial sphere.[36]

It is unacceptable to impose duties on administrative authorities, which benefit individual claimants, without proper regard to the needs of society as a whole. There is no logical reason why an administrative act originally intended for society as a whole should benefit only litigants. Besides fragmenting and undermining the healthcare system, this mechanism involves the risk of excluding minorities who do not have access to the justice system, departing from the idea of a universal and egalitarian healthcare system.[37]

Such questions should have one-time *erga omnes* decisions. The solution should not reside solely in the system of class actions. Brazil has no solid basis for a specific judicial procedure compatible with the unique nature of public law in relation to private law cases. Class actions– which are traditionally connected with private law – generate

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Judgment No. 976-07 of 2008; COLOMBIA. Constitutional Court Judgment no. T-760 of 2008; ARGENTINA. Buenos Aires National Supreme Court, Healthcare Law of 2010; URUGUAY. Court of Appeals in Civil Matters, 2nd Judicial Rotation, Judgment no. 159/2008; URUGUAY. Court for Administrative Litigation, 3rd Judicial Rotation, Action for *Amparo* (constitutional relief) IUE 2-27081/2009.

35 PERLINGEIRO, Ricardo ERLINGEIRO Death of a Concept?,6 (December 1, 2011). Mendes da. A Impugnação Judicial de atos Administrativos na Defesa de Interesses Difusos, Coletivos e Individuais Homogêneos (Judicial challenges of administrative acts in defense of homogeneous individual, common, and collective interests). **Congresso Colombiano de Derecho Procesal** (Colombian Procedural Law Convention).Bogota: Universidad Libre, 2007. p. 919-938.

36 CASSAGNE, J. C. **Derecho Administrativo** (Administrative Law). Buenos Aires: Lexis; 2006. (considering the administrative precedent to be the true source of administrative law); GARAY, A. F. **La Igualdad ante la Ley** (Equality Before the Law). Buenos Aires: Abeledo-Perrot; 1989 (stipulating that the administrative act must be accompanied by a specific statement of grounds in case it ceases to follow administrative precedent).

37 SARLET, I. W.; FIGUEIREDO, M. F. **Algumas Considerações Sobre o Direito Fundamental à Proteção e Promoção da Saúde aos 20 Anos da Constituição Federal de 1988** (Introduction to the Law of Fundmental Rights and Healthcare Promotion in the 20 years of the Federal Constitution of 1988). Retrieved from: <http://www.cnj.jus.br/index.php?option=com_content&view=article&id=11691&Itemid=1225> (noting, "the resulting difficulties are demonstrated in practice, especially in the borderline healthcare cases, so that the judicial re solution of such questions, even when attained, still has dubious, even perverse side effect, in that it safeguards the law solely for those who can afford access to the Judiciary.").

great expectations yet fail to achieve the desired effect in terms of protecting public rights.[38]

With these considerations we will venture to make a few suggestions *de lege lata* and *de lege ferenda* to improve the Brazilian judicial system concerning litigation of public healthcare disputes. We shall again use the example of a request for medication from the SUS.

The Federal Supreme Court has pointed out that:

> *the Judiciary, whose vocation is to specify a just solution for a specific case (microjustice), is often not in a position to examine a certain claim for a social right, to analyze the overall consequences of the allocation of public resources to the benefit of one party to the invariable detriment of the whole.*[39]

Along the same lines, some scholars wish to exclude from individualized juridical proceedings, claims for new medication not included in the official lists on the grounds that such cases are essentially collective in nature and should be decided as such.

However, there is no clear way to deprive the citizen of the right to call upon the state to provide judicial services to satisfy a public right. Equally improper would be conditioning such services on decisions in class actions initiated by third parties. To deprive the citizen of access to justice and conditioning the recognition of rights upon third-party initiated class actions would contradict to the principle of effective judicial protection and of the Rule of Law.

In fact, upholding an individual's request for the SUS to supply the claimant with new medication is equivalent to judicial recognition that the list of medicines should be modified. Such recognition is undoubtedly of general public interest. Assuming that the Judiciary considers it necessary to include the medication in the list, the natural tendency would be for the SUS not just to supply the medicine to the claimant, but to voluntarily promote modification of the list and make the medication available to everyone in the same situation. Such a measure would be an indirect consequence of

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[38] The results, as was only to be expected, have not been optimal, and have created a good deal of confusion. GRINOVER, Ada Pelegrini; WATANABE, Kazuo; MULLENIX, Linda. **Os Processos Coletivos nos Países de Civil Law e Common Law** (Class Actions in Civil Law And Common Law Countries). São Paulo: Revista dos Tribunais, 2008. (discussing collective actions, which should be brought by those who are suitably representative, have recently featured the opt in/opt out mechanism typical of class actions. That mechanism allows a group to be included in or excluded from the class action). Yet how is it possible for a certain citizen or group of citizens to be excluded from the scope of a judicial decision which, for example, orders the Administrative Authority to grant benefits? Besides that, how can we reconcile individual actions with collective actions, in issues affecting the Public Authority which, by reason of their unity, should be decided all at once? Would conflicting decisions on issues arising from the same behavior threaten the structure of the Public Healthcare Authority? Law no 7.347 of 1985 (Law of Public Civil Action). (limiting the territorial scope of judicial decisions from class actions to the seat of the corresponding) .Yet, how is it possible to judicially restrict administrative behaviors that are regional or national in scope, whose effects transcend those territorial limits?

[39] Supreme Admin. Court, Decision no. 175, 17 Mar. 2010.

the judicial decision. To do so, however, the socioeconomic impact and public interest of that measure would have to be exhaustively discussed in advance in the judicial proceedings. The need for prior exhaustive discussion is based on the fact that it is unacceptable for a judge, when delivering a judgment, to ignore the indirect effects of his decision on other patients.

Similarly, in a lawsuit in which it was argued that the medicines Pegylated *Alpha-2a* or *Alpha-2b Interferon* and *Ribavirin* were necessary for the treatment of chronic hepatitis C, one of the judges of the Superior Court of Justice found that "according to the principles of democracy, equal treatment before the law, and the feasibility requirement (*Vorbehalt des Möglichen*), it is not a duty of the state to provide an individual service if it could not be viably provided under equal conditions to all the other individuals in the same situation".[40]

However, the ideal solution would require enacting a new law in Brazil. The better solution would be to consider the basis of the individual claims as grounds to suspend considerations of the merits of the individual claim and to combine the claim with other like claims in an action brought by an independent public body. Such review would fall within the exclusive jurisdiction of a single court capable of issuing a decision with *erga omnes* effects, so long as the original case is suspended for a reasonable time, without prejudice to granting requests for urgent measures.[41]

4. THE RELEVANCE OF FINITE RESOURCES TO THE COURT'S ROLE IN RESOLVING ACCESS TO HEALTHCARE CASES?

In an individual claim to be supplied the medicine *Clexane 40 mg* free of charge, within 30 days after childbirth, the Public Healthcare Authority argued that budgetary constraints precluded relief in this claim, since the Public Health Authority had limited

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[40] BVerfGE 33, 303-358 (the feasibility requirement can be likened to the German *Vorbehalt des Möglichen*, which the German Constitutional Court has generally interpreted as meaning that the judiciary can only impose a duty on the state to provide services that citizens could reasonably expect of the state); BRAZIL. Higher Court of Justice , no. 24.197/PR, 2007/0112500-5, *Mandado de Segurança* (Writ of Mandamus).

[41] This is one of the provisions of the Euro-American Model Administrative Jurisdiction Code prepared by legal scholars associated with Fluminense Federal University and the University of Administrative Sciences of Speyer, Germany. It also coincides in part with the text currently under discussion at the Ibero-American Procedural Law Institute, which appointed a special committee to prepare a Model Administrative Jurisdiction Code, presided over by GRINOVER, Ada Pellegrini (**Código Modelo de Processos Administrativos – Judicial e Extrajudicial – para Ibero-América**. Buenos Aires: IIDP, 2012 Aproved by the General Assembly of the Ibero-American Institute of Procedural Law on XXIII Session of Ibero-Americanas de Direito Processual, that occurred in Buenos Aires, on June 8, 2012. The Project was concluded in February of 2012 by the Revising Committee, which is made up by professors Ada Pellegrini Grinover, Brazil (President); Ricardo Perlingeiro, Brazil (Secretary-General); Abel Zamorano, Panama; Adriáns Simons, Peru; Angel Landoni Sosa, Uruguay; Carlos Manuel Ferreira da Silva, Portugal; Euripides Cuevas, Colombia; Gumesindo García Morelos, Mexico; Ignacio M. Soba Bracesco, Uruguai; Juan Antonio Robles Garzón, Spain; Maria Rosa Gutiérrez Sanz, Spain; Odete Medauar, Brazil; Ruth Stella Correa Palacio, Colombia; Sergio Artavia Barrantes, Costa Rica.

economic-financial capacity. It is said that public entities work with scarce resources and have duties to meet the needs of the entire population. The court – in accordance with the predominant case law accepted:

> *the generic assertion of budget limitations related to the feasibility requirement (Vorbehalt des Möglichen). However besides the fact that the non-availability of funds to meet the initial claim has not been specifically demonstrated, it is not sufficient to prevent the realization of the constitutional right under review, especially in light of the well-known fact that the Government has abundant allocations earmarked for far less important interests than the health of the population (for example, advertising, special events, etc.), which can and should be redirected, when necessary, to satisfy the population's basic rights.*

Moreover, it was affirmed that:

> *it is not an undue interference by the Judiciary in the sphere of action reserved to the other branches (of government) but on the contrary, positive judicial action to provide services based on the relevant constitutional grounds and on the illegal omission of the administrative authority in attending to it; especially when that authority, in concrete terms, did not present any grounds that prevented its accomplishment in the least.*[42]

In fact, the lack of budgetary allocation could never interfere with the judicial recognition of rights to public healthcare, or even with the enforcement of sentences against the Public Healthcare Authority. The public budget is an essentially political instrument that depends on the law. Social rights, including the right to healthcare, flow from the Constitution or specific legislation. An administrative authority cannot deny the social rights established by the Constitution and legislation because of budgetary constraints. Both legislation and the Constitution charges the administrative authority with guaranteeing these rights and it would be contrary to the Rule of Law if judicial recognition of rights could be imagined to depend on the political intent of the Legislative or Executive branches when drawing up the budget.

Consideration should, however, be made when ensuring effective enforcement of urgent court orders of the limited human, material or financial resources available to the public healthcare authority. This includes resource limitations such as: the lack of professional specialists, hospital beds, equipment for treatments and examinations, etc. Such considerations are permissible when ensuring effective enforcement of urgent court orders because, in general, the judicial realization of the claimants' rights must not affect the goods or services available to ensure the continuity of an essential

[42] Trial Apelreex7917-SE, 2009.85.00.001348-8, 14 Jan. 2010.

public service. Therefore, it is necessary to seek a balance between public and private interests.

This idea that budgetary constraints do not excuse non-compliance with constitutionally guaranteed rights is also prevalent in the United States. In *Goldberg v. Kelly* the United States Supreme Court considered whether an individual's welfare benefits could be terminated without an evidentiary hearing.[43] The welfare authority cited the excessive costs of providing evidentiary hearings as the reason for not conducting a pre-termination hearing.[44] The Supreme Court ruled that "[w]hile the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process."[45] The approach in *Goldberg* in which a constitutional guarantee to due process could not be overcome for budgetary reasons, matches the approach adopted in Brazil in which the constitutional guarantee to healthcare could not be overcome by budgetary constraints. A central difference is that in the United States there is no constitutional guarantee to healthcare as there is in Brazil.

While the idea that budgetary constraints do not excuse non-recognition of constitutional rights may be obvious, there are diverging approaches on the manner in which rights are recognized. This is significant because diverging approached to recognition of rights can lead to different outlooks on budgetary constraints. Christopher Newdick compares the individual-centric and the community-centric approaches to rights recognition.[46]

Under the individual-centric approach, rights are vested in the person and may be asserted just as any other right that belongs to an individual. In the community-centric approach, on the other hand, rights belong to society and the recognition of a right in any individual case depends on the effect of recognition on society as a whole.[47] Since rights belong to society in the community-centric approach, judicial protection should be afforded to guarantee that all members of society have equal opportunity to benefits.[48] This emphasis leads to greater weight being given to judicial protection of procedural rights.[49] Under the individual-centric approach, however, judicial protection

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43 *Goldberg v. Kelly*, 397 U.S. 254, 256 (1970).

44 *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970).

45 *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970).

46 NEWDICK, C. Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity. **Common Market Law Review**, v. 43, 2006, p. 1645.

47 NEWDICK, C. The European Court of Justice, Transnational Health Care, and Social Citizenship - Accidental Death of a Concept? **Wisconsin International Law Journal**, v. 26, n. 3, 2009, p. 846.

48 NEWDICK, C. The European Court of Justice, Transnational Health Care, and Social Citizenship - Accidental Death of a Concept? **Wisconsin International Law Journal**, v. 26, n. 3, 2009, p. 846.

49 NEWDICK, C. The European Court of Justice, Transnational Health Care, and Social Citizenship - Accidental Death of a Concept? **Wisconsin International Law Journal**, v. 26, n. 3, 2009, p. 846.

is designed to guarantee "that which is properly mine."[50] This emphasis leads to greater weight being given to judicial protection of substantive individual rights.

Brazilian courts, as well as the ECJ, adopt the individual-centric approach and offers judicial protection of substantive individual rights.[51] It is clear in a jurisdiction that offers judicial protection for individual substantive rights that budget restriction cannot justify denying a right that belongs to the individual. This is the situation in Brazil and in the ECJ. It is equally clear that in a jurisdiction that takes a community-centric approach and provides judicial protection of procedural rights must take into account the effect that recognition of a right in an individual case has on the budget since the right belongs to society as whole.[52]

In the procedural sphere, however, the specificity of the topic comes from the fact that public healthcare claims are predominantly asserted through urgent judicial measures (such as claims for injunctive relief). In urgent judicial measures, judicial recognition of a substantive right and protection of that right coincide in time. This is so that the weighing of public versus private interests is one more prerequisite for granting the measure. Additional conditions precedents include the requirements of *fumus boni iuris* and *periculum in mora*.

5. FINAL CONSIDERATIONS

In sum:

1. The judicialization of healthcare policy is no exception to the three-branch system of government since it is the duty of the Judiciary to protect rights by exercising complete jurisdiction over the Public Healthcare Authority. This includes by reviewing its discretionary functions and scientific content.
2. The shortage of public funding is not an obstacle to judicial recognition of public healthcare rights, despite material impossibility of enforcing the decision being considered a legitimate excuse on the part of the administrative authority. Given the lack of public resources, especially human and material resources, the courts must weigh public versus private interests before granting urgent measures concerning healthcare law.

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50 NEWDICK, C. Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity. **Common Market Law Review**, v. 43, 2006, p. 1645.

51 NEWDICK, C. Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity. **Common Market Law Review**, v. 43, 2006, p. 1645.

52 NEWDICK, C. Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity. **Common Market Law Review**, v. 43, 2006, p. 1646 (stating that "[w]ithin the constraints imposed by finite budgets, a policy to promote substantive, individual rights is likely to under-estimate the costs of diverting resources from one group of patients to another.").

3. The creation of specialized courts might be considered, perhaps even with a multidisciplinary panel of judges bringing together healthcare professionals in order to ensure high-quality judicial services, particularly when it comes to administrative questions of a scientific nature.
4. The Brazilian class action system is neither adequate nor effective in protecting public rights and consequently public healthcare rights. The healthcare law cases – if based on public policies– should provide single decisions of general applicability, in order to prevent the Judiciary from serving as a tool to circumvent the administrative authority's duty to follow the principle of equal treatment before the law.
5. A single specialized judicial body composed of multidisciplinary members may help safeguard the principle of equal treatment before the law while at the same time reducing the number of repetitive trials and improving the quality of judicial services in public healthcare matters. Such a body would be situated on the federal or State levels. The specialized body would decide on federal, State or municipal healthcare policies, even when individual claims only incidentally imply healthcare policy questions.

Finally, it should be noted that, except for the suggested specialization of certain judicial bodies in the healthcare field, the remaining conclusions show that the "judicialization of healthcare policy" and the judicial protection of public healthcare rights may be carried out efficiently in accordance with the fundamental principles of jurisdictional action vis-à-vis the public health authorities, without requiring any special rules of procedure.

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