LAW AND ECONOMICS IN THE HEALTH CARE SYSTEM: AN ANALYSIS OF ITS COSTS AND EFFICIENCY

ANÁLISE ECONÔMICA DO SISTEMA DE SAÚDE: UM ESTUDO DE SEUS CUSTOS E EFICIÊNCIA

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Abstract: The following article, elaborated according to the inductive approach, seeks to evaluate the health care system in the optics of Law and Economics, emphasizing the Brazilian and American models. Public health in Brazil comprises the citizen's right to be provided with adequate health treatments and the State's duty of assuring its effectiveness as a universal and free right. In the American model, health is not ensured as an express fundamental right, and there is not a uniform system to promote services to all the population. Therefore, while in Brazil the State's obligation to safeguard its free fruition to all individuals difficults its fulfilment, in United States, a decentralized and complex system, with particular reference to private insurance, impedes the offer of adequate services to those who need attendance. Considering economic concepts, the efficiency of both systems is still low, in a way that their costs overcome their efficiency.

Keywords: Health care system; Law and Economics; costs; efficiency.

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Resumo: O presente artigo, elaborado segundo o método indutivo, busca avaliar o sistema de saúde pública sob a ótica da Análise Econômica do Direito, destacando-se os modelos brasileiro e americano. A saúde pública brasileira consiste tanto no direito do cidadão em receber tratamentos quanto no dever do Estado em conferir-lhe efetividade de modo universal e gratuito. Já no modelo americano, a saúde não é garantida como direito fundamental expressamente, não havendo um sistema uniformizado para a prestação de serviços a toda a população. Assim, enquanto no Brasil a obrigação estatal de promover a fruição gratuita desse direito a todos dificulta a sua concretização, nos Estados Unidos, um sistema descentralizado e complexo, com ênfase em seguros privados, impede a oferta de serviços adequados àqueles que necessitam de atendimento. A partir de conceitos econômicos, concluiu-se que ainda é baixa a efetividade de ambos os sistemas, em que os custos sociais superam à eficiência.

Palavras-chave: Sistema de saúde; Análise Econômica do Direito; custos; eficiência.

1. INTRODUCTION

From the analysis of the current context, there are a lot of problems in the legal systems, in special the Brazilian and American ones, regarding the adequate effectiveness of fundamental rights. Mainly in relation to the enforcement of the right to health, this aspect becomes urgent due to the constant difficulties of the State in concretizing it to those who are really vulnerable and need quality health care services. Considering the importance of the effective concretization of this right to the part of population economically underprivileged, health is nowadays a widely discussed subject, with the intention of providing more protection and legal applicability.

The leading aspect to be comprehended is the constitutional and legal provisions in both countries, based on a descriptive analysis. While in Brazil all the citizens have a constitutional guarantee to access any health care service, United States has decentralized systems for specific parts of the population, and this right is not even predicted in the Constitution. The two models present difficulties to execute satisfactory health care treatments, even though in a different way, which will be developed further.

Having this background in mind, the general objective of this article is to evaluate, founded on concepts of Economic Analysis of Law (or Law and Economics) the efficiency of health care systems and their costs, notably, for the part of the population who cannot bear the expenses with medical treatments by themselves. The problem is deep and there are no easy answers to solve it, since it comprises a lot of variables, but this analysis tries to, at least, bring some light to understand the health care systems and the need for more efficiency.

2. DEFINITIONS AND CONTEXTUALIZATION OF THE FUNDAMENTAL RIGHT TO HEALTH IN THE LEGAL SYSTEM

The present research is founded on an analysis of the fundamental right to health and its economic implications in the legal systems adopted

by Brazil and United States. In view of the fact that health care services are a fundamental right of the citizens, it is necessary to analyze initially how fundamental rights were built, their definition and efficacy.

Despite the theoretical difficulty in defining what is a fundamental right, in general, they seek to provide, above all, the fundamental elements for a life based on liberty and human dignity. Taking into consideration the protection of legal interests that are essential to individuals, similarly, these rights must be formally written in a normative instrument with maximum legal force, in order to assure their effectiveness, namely, the Constitution of a country.

Therefore, fundamental rights can be comprehended according to distinct conceptions. The first notion was based on the idea of a natural right. Due to the circumstance that, originally, the main concern of society was about protecting individual precepts, the State was only responsible for permitting the realization of these rights, and not for intervening in the execution of collective aspirations (CANOTILHO, 2004).

On the other hand, it is possible to consider, in a formal and positivist conception, that fundamental rights are those established by the current law in these terms (HESSE, 1998). They represent so important positions that the decision about guaranteeing them or not cannot be merely left to the simple parliamentary majority (ALEXY, 2015). These circumstances lead to the fact that fundamental rights not only project subjective rights of individuals, but also objective basic principles of a democratic State based on the rule of law (HESSE, 2009).

Because fundamental rights are a variable and relative classification, for didactic reasons, they can be divided in different generations or dimensions, pursuant to the characteristics presented throughout each historical period. The fundamental right to health, approached in this study, is considered a second-generation right, what does not mean, however, that it reveals characteristics only inherent to social rights.

Second-generation rights can be considered participation rights, resulting from the social and political revolutions of the twentieth century, known as equality rights (PISARELLO, 2007). Basically, they consist in social, cultural, economic and collective rights, the foundation of

what is called the Welfare State,[2] and require active public policy to make the guarantee of exercise and concretization of these rights effective (LUÑO, 2006).

Because of the changes in the organization of society, the State does not perform merely a secondary function in order to allow individual liberty, but acts aiming to realize public policy to collectivity. Considering the new social conditions and the need to guarantee other activities and services, the State takes over a special role to promote more effectively the fundamental rights (HESSE, 2009).

In the current context, social rights are provided in the article 6º of the Brazilian Federal Constitution and contemplate rights to education, health, social security, among others. Nevertheless, they do not represent simply the rights established in this article, but also include other implicit or explicitly written in the constitution text, besides those rights defined in other legislations and international treaties, as authorizes the article 5th, §2nd of the Brazilian Constitution.

As described by Pisarello (2007), social rights are usually related to the satisfaction of individual basic needs in areas such as health, alimentation, education, labor and housing. Thus, these legal interests pursue to promote the realization of material conditions for the full exercise of fundamental rights, which benefits the whole society. Although their guarantee is recognized to all collectivity, the concretization of these rights is necessary, remarkably, to the most economically vulnerable individuals, in order to reduce inequalities between the most favorable groups and those that still need help from the public branches.

Social rights also present a double dimension: subjective and objective. The subjective dimension is verified in the possibility that these rights are requirable by individuals who need to exercise them, what leads, in Brazil, to discussions about the difficulties of a public policy judicial review, because of the scarce availability of resources and the limitations re-

2 The Welfare State seeks to assure minimal patterns of wealth, health, housing, alimentation and education to all citizens as a political right, and not as a way of charity (WILENSKY, 1975). Originated in the beginning of the twentieth century, due to the insufficiency of the Liberal State, this model is different not much because of the intervention of public structures in the improvement of social life, but mainly because this action is claimed by the population as a right (BOBBIO, 2004).

sulting from the so-called reserve of the possible principle. The objective dimension deals with the relation between the system of constitutional objectives and values that guides society, seeking to concretize the human dignity principle and the reduction of social inequalities (SARLET, 2013).

In the Brazilian context, the fundamental right to health was consecrated for the first time in the Federal Constitution of 1988[3], that establishes, in the article 196, that all citizens have a right to receive adequate health treatments in a universal and equal way, and the State has the duty to assure its maximum effectiveness. It is considered, above all, as a social or second-generation right, since it demands an active role by the State in the concretization of health promotion measures, such as medicine supplying, health treatments and basic sanitation (SARLET, 1988).

It is related, particularly, to the right to life and to the human dignity principle itself, seeking to guarantee physical and psychic welfare of human beings as an essential legal interest.[4] The Brazilian Federal Constitution, when establishes that health care is a fundamental right, also assigns to the State the duty to promote actions and public policy able to assure access to protection services and reduction of sickness risks. In this view, implementation, supervision and control are essentially a role of the public branches, in the terms of the articles 197 and 198.[5]

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3 Conformingly to the article 196 of the Brazilian Federal Constitution, "health is a right of everybody and a duty of the State, assured through social and economic public policy that aims the reduction of the diseases risk and other problems and the universal and equal access to actions and services to its promotion, protection and recuperation" (translated).

4 During the creation of the World Health Organization (WHO), the preamble of its Constitution, describes that "health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". Thus, health depends not only on physical and psychological characteristics, but also on the social and economic environment provided by public entities.

5 The article 197 of the Brazilian Federal Constitution states that health care actions and services are considered as matters of public relevance, which means that the State is responsible for describing, according to the law, their regulation, supervision and control, and their execution must be made directly or throughout third parties and, also, by physical or juridical persons of private nature. The article 198 of the same constitutional text provides that the public health care actions and services integrate a regionalized and hierarchized set and constitute a national system, organized according to the following guidelines: I – decentralization, with unique direction in each sphere of the government; II – integral attendance, with priority to the preventive activities, but without harming the attendance activities; III – community participation.

To achieve this goal, the State can concretize preventive actions that, indirectly, cause effects on health care, such as investments on basic sanitation, potable water and public health care, or also curative actions that can be realized by services related to medical treatments, hospital attendance, medicine supplying, among others (BRANCO; MENDES, 2014).

Therefore, it is evident that the citizens' right to health is, as a result, a fundamental duty of the State, which must make health care effective through the institution and execution of public policy. In the Brazilian Constitution, that can be inferred in the article 196, when imposes that: a) health is a right for everybody; b) it is a duty of the State; c) concretized by means of social and economic policies; f) that seeks to reduce risks of sickness and other problems; d) by universal and equal access (BRANCO; MENDES, 2014). In summary, fundamental right to health can be presented by different views according to the analysis of the situation and is characterized as an individual, collective and metaindividual right (RAMOS, 2005).

In the constitutional text, it is possible to abstract that, when the State attends to social demands related to health, this positive act must be conceded to all citizens, equally and universally. By defining health as a right for everybody, there is a character of generality, meaning that nobody can be obstructed from pursuing a State activity to make this right effective. Equality implies that it is not possible to grant distinctions or privileges of treatment to identical situations. Universality presupposes a solidary responsibility between the entities of the Federation.

In the USA, health care is not expressly protected by the Constitution as a fundamental right, notably because the American constitutional text came into force in 1789 and, back to this historical period, the framers were more concerned with guaranteeing freedom from government, rather than providing for rights to governmental services such as health care. Though, that does not mean that social rights are not protected as relevant fundamental rights, but only that it is mostly established in infraconstitutional regulations or other public acts. For instance, the right to health is specified by the Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act (HIPAA), among others.

Because health has never been specifically written on the constitutional text, the question is not whether one has a right to health care

that one can pay for, but whether the government has the obligation to provide care to those who cannot afford it (SWENDIMAN, 2010).

In most of the decisions, the Supreme Court has not yet recognized the existence of an implicit right to health in situations where a person cannot afford to pay for health care. Even if the Constitution and Supreme Court interpretations do not identify a constitutional right to health at the government's expense, Congress has enacted laws which establish specific statutory rights of individuals to receive medical services from the government. Besides, governmental obligations to provide health services can be found in many States' constitutions (SWENDIMAN, 2010).

By guaranteeing health as a fundamental right for everyone and establishing guidelines for its full exercise, the Brazilian Federal Constitution and the American Constitution do not specify the way by which health care services will be offered to the community. There are not enough determinations about some requisites, such as how the State must supply medicine or medical treatments to all the individuals, including those who have financial conditions to afford these measures by their own income (CIPRIANI; CRISTÓVAM, 2017). This fact will be only regulated, as a public policy, through infraconstitutional law, what will be analyzed further below.

Thus, the effectiveness of fundamental right to health present evident difficulties, due to the restricted budget capacity of the State's entities to concretize it to those who need to benefit from medical treatments or medicine. Considering the importance of the effective realization of this right to the part of the population that does not have enough financial resources, it is relevant to discuss about the applicability of Law and Economics as a way of concretizing a dignity right to the people that demand help from the State for free.

3. SOME CONSIDERATIONS ABOUT LAW AND ECONOMICS

The doctrine known nowadays as Law and Economics has its origins in the University of Chicago, United States, since 1960's, especially with the 1970's crisis of the Welfare State, based on the studies of Ronald

Coase, Guido Calabresi and Richard Posner. This theory seeks to connect the areas of Law and Economy, bringing economic concepts to the analysis and prediction of consequences of a judicial decision (ARRUDA, 2014). This conception constructs a new vision about predictability and certainty to the legal system, sustaining how judicial decisions should be, in order to verify their consequences and efficiency (BERNABÉ, 2019).

The main goal is to avoid the previous positivist idea that Law shall not use other elements besides the legal terms, since this movement reaches an interdisciplinary conception when applies economic criteria in the resolution of social problems. Against the traditional sense that the Law can only be analyzed trough legal doctrine based on justice and legislation, Economy recognizes that this conception can be improved by economic concepts, with the criteria of efficiency (MERCURO; MEDEMA, 1999).

In contrast to what many people usually think, Economics does not deal only with numbers and business, but, actually, it is the science of rational choice in a world where resources are limited in relation to human wants. The goal of Economics is to explore the implications of assuming that man is a rational maximizer of his satisfactions, so, as a conclusion, people respond to incentives (POSNER, 1986).

Therefore, using sources of Economy to the comprehension of legal institutes and the solution of legal problems, Economic Analysis of Law is based mainly on the scarcity of resources and the efficient allocation in a society, creating incentives for people to act and follow a specific conduct (TIMM, 2018). Taking into consideration the premise that the individual is a rational being moved along with certain behaviors, the idea is that Law cannot be founded on theorizations without analyzing the effects of legal decisions to the society and what are the most efficient solutions.

Economists are also interested in studying legal concepts because both disciplines deal with incentives. Pursuant to Miceli, "the economic approach to law assumes that rational individuals view legal sanctions (monetary damages, prison) as implicit prices for certain kinds of behavior, and that these prices can be set to guide these behaviors in a socially desirable direction" (MICELI, 2004).

Some critics argue that Law cannot be founded on the economic concept of efficiency; instead, it should seek for goals such as fairness and justice. But efficiency is just one of the meanings of justice, related to the adequate distribution of wealth in society (distributive justice) and how an equitable distribution can be achieved with the least sacrifice in resources (MICELI, 2004).

To sustain the importance of the Economic Analysis of Law, Coase explains that, according to a classical definition, "a law is an obligation backed by a state sanction", but the main question is: "how will a sanction affect behavior?". Trying to answer this questioning, economists provided a scientific theory to predict the effects of legal sanctions on behavior, in which sanctions are like prices. The response to these sanctions is similar to the response to prices: people usually respond to higher prices consuming less of an expensive product; for the same reason, people respond to more severe legal sanctions by doing less of the sanctioned activity (COOTER; ULEN, 2011).

Including elements of Economics in the Legal System means that, similarly to the study of prices in the market, an analysis of costs and benefits deriving from a judicial decision or the imposition of a new legislation will be made, in order to verify the efficiency of these measures. Efficiency is a very important aspect to policymaking, since it provides an empirical study about waste of money, that can be useful for legal practitioners when evaluating laws' effects on important social values. Otherwise, not only efficiency is studied by the Economic Analysis of Law, but also the effects of legal measures on the distribution of income, in order to predict who really bears the burden of alternative taxes (COOTER; ULEN, 2011).

In a representative democracy, many policymakers, including executives, legislators and regulators, may set public policies under a flawed perspective that does not make clear the purposes and viable alternatives to society. In a view that describes public policy according to a common perspective, only in terms of legal theory, the main question would be: what impact will it have on our nation or region? Is it fair or reasonable? Otherwise, this question can be formulated through the lens of law

and economics, as: will the outcome of the policy or law be efficient? (HATXIS; MERCURO, 2015)

It is possible to notice that, in Law and Economics, one of the central aspects is the analysis about the consequences of a judicial decision or a public policy, which makes it easier for a judge or a lawmaker to make the most efficient decision. Afterall, specially in hard cases, there are no right answers, but the most efficient analysis of their possible effects.

According to a common-sense definition, a person is working efficiently when he or she works in her maximum capacity with minimum effort. Moreover, "a government is operating efficiently if it is providing the greatest possible wellbeing for its citizens at the least possible cost. And society as a whole is operating efficiently if its citizens are as well off as possible given the society's resources" (BELLINGER, 2007).

In this vision, a lot has been described about efficiency and the best consequences of a decision. Despite the different concepts that efficiency can assume, Posner sustains that efficiency means wealth maximization, which was initially defined as something monetary and founded strictly on the Law, but, nowadays, is considered as one of the various interdisciplinary criteria to choose the best consequences of a judicial decision. This economic aspect is related to predicting behaviors, by using rationality of choices and interdisciplinary criteria to comprehend wealth maximization. Wealth maximization, however, is not the only aspect to be considered in a judicial decision, but it must be analyzed in an ample point of view, in which Law is an instrument to realize social goals (POSNER, 1997).

One of the main principles in the study of Law and Economics is scarcity, in the terms of the natural premise that resources in society are limited, while human desires are infinite, emerging the need to make certain choices about possible alternatives and to submit sacrifices in order to allocate resources (GONÇALVES, 2017). Applying this concept to the fundamental right to health, due to the lack of budgetary resources to attend all social demands, it is fundamental to enforce this right according to the State's limitations. Therefore, the simple legal protection in a norm is rather pointless if there are not enough resources to enforce it (BARCELLOS, 2002).

Besides, the theory of the reserve of possible is accordant to this comprehension, reinforcing that the inherent costs of the concretization of fundamental rights, for example, the right to health, constitute a limit that must be observed by the State. This fact is justified because the reserve of possible determines that, to demand the effectuation of a right, the factual context shall be observed (OLSEN, 2008).

Pursuant to what has been exposed, the discussion that permeates judicial lawsuits and public choices should be founded on the theory of the reserve of possible, according to which the effectiveness of social rights to material actions is conditioned to the reserve of financial capacities of the State, since they are fundamental rights that depend on public policy financed by the public budget (SARLET; FIGUEIREDO, 2010).

The expression reserve of possible seeks to relate the limitation of economic resources available with the ample needs that must be furnished to the society, so that, additionally to legal discussions about the enforcement of some rights against the State, it is relevant to take into consideration the limitations of material possibilities (BARCELLOS, 2002). In this context, the effectuation of all fundamental rights, both prestational and defense rights, relies directly on the availability of resources by the State, because no right can be considered as absolute (HOLMES; SUSTEIN, 2011).

According to Galdino, there are not properly free rights, because, even those considered by the traditional doctrine as individual rights generate positive costs, what imposes to the State's entities the duty to organize the effectuation of their guarantees observing the budgetary planning (GALDINO, 2005).

Thus, not being an absolute right, it depends on the unequivocal demonstration of the existence of elements that prove lack of financial or economic conditions of the person who needs medical treatment, legitimacy, adaptation of the treatment, material availability of resources and its non-destination to other purposes. The fact that health care is not an absolute right does not withdraw its fundamentality and immediate efficacy in order to obtain its enforcement. The theory of the reserve of possible cannot be used, by itself, to create obstacles in order to ensure this fundamental right under the argument of lack of

public resources, what shall be analyzed with a set of other elements presented by the individual (SILVA, 2010).

It is relevant to contemplate, based on the existential minimum and the reserve of possible, the availability of resources, the necessity and the liability of the State in providing voluntarily, through public policy and execution of services, or compelled by the Judiciary Branch, the minimum condition for a person's dignified existence (SILVA, 2010). There is, in this aspect, the public administrator's duty related to the options and choices of priorities, according to some established criteria.

Therefore, the State shall be responsible for attributing the maximum effectiveness for the fundamental right to health, when involving positive and individual acts, if the demanding demonstrate lack of financial or economic conditions. It is important to highlight, in this manner, the principle of the maximum effectuation of constitutional norms as an essential presupposition to be considered by the interpreter in the concretization of constitutional guarantees. The application of this principle, besides being an interpretative guideline, consists in an incisive command to give validity to article 5th, §1nd of the Brazilian Federal Constitution (SILVA NETO, 1999).

Calabresi and Bobbit, when evaluating the increasing number of judicial lawsuits related to the concretization of public policy and fundamental rights, asseverate that certain decisions made by judges can characterize tragic choices, based on an analysis of the consequences of these decisions in the social, political and economic context. Since both authors were judges, it is necessary to exempt that this study is founded basically on decisions formulated by magistrates, but can permeate both the judicialization of the fundamental right to health and the supplying of medical treatments in the administrative sphere.

Pursuant to this conception, there are some kinds of scarcity that make tragic choices particularly painful necessary, and these choices can be defined as tragic or not. Scarcity, in some cases, can be avoided to some commodities by making them available on the market. However, this does not apply to all the commodities, so that, for some of them, society must define allocative methods, which can privilege some social classes at the expenses of others. This can provoke a conflict

between, in one side, values in which society determines the beneficiaries of certain distributions and the limitations of scarcity and, on the other, moral values that prioritize life and welfare of the population.

It is in this conjuncture that tragic choices appear, it means, in the moment that society tries to make allocations to preserve moral and social foundations. There are cases in which it is possible to make a choice and still ensure the essential values of society, a hypothesis that a tragic choice is replaced by an allocation that does not generate moral contradictions. Otherwise, the choice will be considered tragic, what can lead to the allocation of scarce resources to certain people and, at the same time, generate a conflict with socially important values (BOBBIT; CALABRESI, 1978).

Applying this concept to the aforesaid topic, the conclusion is that, in Brazil, by destining specified resources to the enforcement of health public policy with unlimited gratuitousness, there is an allocation of scarce goods to some social groups at the expense of others. A judge, when authorizes the supplying of a medicine to an infirm individual, and the lawmaker, by describing health as a free right in the Law nº 8.080/90, make a tragic choice, because the same resources could be destined to investments in public health care to those who are really needy.

Tragic choices are related, above all, to the economical impossibility of the public branches to attend all the social needs. This way, allocative tragic choices involve an analysis of costs, because there are not fundamental rights neither public policy without costs in order to make them effective (BOBBIT; CALABRESI, 1978).

Similarly, Holmes and Sustein (2011) defend that, even though the traditional doctrine uses to characterize rights as inviolable, peremptory and decisive, any right which effectiveness depends on an economic expense can be considered absolute and be protected unilaterally by the State without observing the budgetary consequences. Having in mind that rights depend on scarce resources, they demand, consequently, financial choices to their concretization.

With particular reference to health care access, Aaron and Shwartz (1985) highlight that the point of the scarcity is more relevant, considering the usual idea in society that it is immoral or repugnant to think

about the costs of these rights. However, thinking this way became unaffordable, and the resources destined to public health care must be allocated according to a context of scarcity and uncertainty (AARON; SCWARTZ, 1985). Decisions in this area must analyze how much it is necessary to make available to individuals, who shall be assisted and the conducts of potential beneficiaries, it means, to use allocative methods due to the scarcity of resources.

4. APPLYING LAW AND ECONOMICS IN THE FUNDAMENTAL RIGHT TO HEALTH

After examining the point of the definition and historical construction of the right to health and the foundations of Law and Economics, it becomes necessary to establish a panorama about the current system responsible for the concretization of this right to the population in Brazil and in USA, seeking to comprehend its insufficiencies and the actual crisis of this model in both countries.

In Brazil, due to the fact that health care is considered as a fundamental right and a duty of the State in promoting its actions and services universally, the article 198[6] of the Federal Constitution determines the creation of a Unique Health care System, the "Sistema Único de Saúde – SUS", in order to execute, control and organize actions involving public health care.

One of the main innovations in this system, inspired by the British model[7], is the express provision, in the article 196, of universal, integral

6 This way, the article 198 of the Brazilian Federal Constitution states that the health care public actions and services integrate a regionalized and hierarchized net and constitute a unique system, organized according to the following directives: I – decentralization, with unique direction in each sphere of the government; II – integral attendance, with priority to preventive activities, but also including assistance services; III – participation of the community (translation).

7 The National Health Service (NHS), created in 1948, provides universal access to all the population, based on the principles of equity and integrality, throughout a public and decentralized structure. According to the NHS Constitution, the legal instrument that regulates the parameters, principles and rights of the health care system adopted in the country, the coverage to medical treatments is free, except when otherwise stipulated by the Parliament (ENGLAND).

and equal access to health care services, bringing to the State the duty of realizing measures for the promotion and protection of this right. The universality of the access to health care services no longer restrict the access to other requirements. It is also assured the integrality of the attendance, considering the individual in his totality, and analyzing not only the presence of diseases, but all social conditionings from any nature.

After the promulgation of the Brazilian Federal Constitution, health and its unified system were regulated, on the infraconstitutional scope, by the Law nº 8.080/90[8]. In the terms of the article 4º of the legislation, Unique Health care System – SUS can be defined as a set of actions and services, realized by public federal, state and municipal organs and institutions. The goal is to promote integral attendance of the population, executing essential services and activities (MENDES, 2013).

Furthermore, the article 43[9] of the Law nº 8.080/90 predicts the gratuitousness of health care services, seeking to exempt the Brazilian population of any payments to benefit from these services, even though, in practice, the ample and unrestrained gratuitousness consists in a barrier to the effectuation of this right in adequate levels to all the individuals.

Although the express provision about a universal, equal and free system, that has the goal of making health care effective to all the Brazilian population, currently, in daily situations, it is visible how public health is still ineffective to those who need these services. The lack of medical attendance in public hospitals, medicine and instruments capable of promoting quality health care services demonstrate the need for an alteration in the system, in order to concretize the constitutional text.

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8 According to the article 2th of the Law nº 8.080/90, health is a human fundamental right, so the State has the duty to promote the indispensable conditions to its full concretization. §1nd The duty of the State in assuring health care consists in the formulation and execution of political, economic and social conditions that aims to the reduction of diseases risk and other problems and the establishment of conditions that guarantee its universal and equal access to actions and services to its promotion, protection and recuperation (translation).

9 The article 43 of the Law nº 8.080/90 ensures the gratuitousness of health care actions and services stays preserved in the public services, excepting contractual clauses established with private entities.

Aiming to contextualize the actual crisis in the provision of health care services, estimates of the Brazilian Institute of Geography and Statistics, "Instituto Brasileiro de Geografia e Estatística – IBGE", demonstrated that, in 2013, public expenses in this sector corresponded to only 3,6% of the Gross Domestic Product (GDP), a percentage that, according to the World Health Organization (WHO), is considered very low for a country with a universal coverage system (WHO). Meanwhile, European countries with universal system invested, on average, 8,3% of their GDP in actions for health care promotion (MENDES, 2013).

Demonstrating the alarming situation of health care services in Brazil, the Federal Council of Medicine evaluated that, in 2013, the value invested by the federal, state and municipal governments totalized the quantity of R$3,05 per day for each citizen, that means an annual expense of R$1.098,75 *per capita*. Taking into account the total of two hundred billion of Brazilians users of SUS, these investments are below the necessary patterns for the guarantee of health to the population. In comparison, other countries have invested higher values, such as United Kingdom (annually US$3.598 for each habitant) and Germany (US$5.006) (CFM, 2016).

Also, in 2014, merely 6,8% of the public budget was destined specifically to health care promotion, considering the expenses of the Union, states and cities. Brazilian percentage invested is the third worst among the thirty-five countries of the American continent and is much above the annual average, of 11,7% (CFM, 2017).

From the concrete statistics, it is possible to visualize the crisis in the Brazilian system to concretize health care services, because it is common for individuals that depend on the state protection to only achieve it throughout the judiciary branch, due to the lack of resources to promote quality medical treatments. There is also in Brazil the widely discussed problem about judicialization of the fundamental right to health, due to the inactivity of the Public Administration to promote effective services.

On the other hand, the health care system presented by the United States is quite different in comparison to Brazil. Despite being one of the most economically developed countries in the world, in promotion of public health, the system instituted in USA has suffered lots of critics

throughout the years. That fact is justified because there is not a uniform and universal model. The United States spends nearly one fifth of its Gross Domestic Product (GDP) on health care, more than three trillion a year, but does not deliver an excellent health service to the population (ROSENTHAL, 2017).

The system is based mainly on private securities, and there is only a State financial contribution to two kinds of founds: 1) *Medicare*, that consists in a program of the federal govern, presenting national and uniform regulation destined to retired individuals, it means, that are more than 65 years old and their dependents; 2) *Medicaid*, a program controlled by the states, which implies the heterogeneity of the coverage, because it depends on different financial capacities of the American federation entities. It aims to protect specially people with low income, through the demonstration of financial incapacity.

Out of these two programs offered by the government, most part of the population has to afford the costs of a private insurance. In order to reduce the consequences of the absence of a public sector destined to people that does not fit the programs provided by the State, the number of private financing based on insurances of groups has increased, involving, above all, ample sectors of workers and companies (FAVERET FILHO; OLIVEIRA, 199).

Meanwhile, in 2010, the USA approved a reform that pursued to attribute social characteristics to the public health care model, previously of an individual nature. As a way of improving the efficiency and the attention to health care promotion, the Patient Protection and Affordable Care Act created an organized market for selling health care insurance, called National Health Insurance Exchange, that presents lower prices and amplifies the access to low-income citizens (COSTA, 2013). Due to the reduction of costs, American citizens have become compelled to make a health care insurance, through their employers, individually or through public programs, under penalty of the payment of penalties.

To corroborate the information about the American health care system, researchers estimate that, in 2014, 283,2 million people in the USA or 89,6% of the population had some type of health insurance, with 66% of workers covered by a private health insurance plan. Among

the insured, 115,4 million people or 36,5% of the population received coverage through the US government. Besides, nearly 32.9 million people had no health insurance, causing difficulties to the concretization of this important right (SMITH; MEDALIA, 2015).

Yet, even though the government plays a small role in the concretization of the fundamental right to health, USA is one of the countries that most expend resources with health services. In comparison to other countries members of the Organization for Economic Cooperation and Development – OECD, public spending on health care *per capita* in USA is greater than any other country, except Norway and the Netherlands, with expenses of $8.713, more than double of the OECD average of $3.453. Brazil spends only $1.471 per capita, an incredibly low quantity of resources for a country with a universal health care system (OECD). Also, in a research that evaluated the quality of health care services in one hundred eighty-eight countries, United States was ranked at the 28th position, below almost all other rich countries (GBD 2015 SDG COLLABORATORS, 2016).

The arguments used to justify why USA spends so much in health services, while present, in contrast, bad results on the matter of enforcing this right to the population are not only the price Americans pay for their health care providers, but is centralized on two assumptions: the way health insurance is managed and the complexity of American health care system.

The United States relies on profit-making health insurance companies to pay for essential and elective care. This way, the insurance company uses part of the money payed to cover the individual's expenses and medical bills and the remainder is soak up to cover the costs of marketing and administration, as well as their profit. Most of the other developed countries have decided that basic health insurance must be a nonprofit operation, due to the social characteristic of this right, to avoid market influences. Also, in many developed countries, health insurance plans are required by Law to guarantee coverage for anybody, but American insurance firms, though, are allowed to choose their customers, to avoid an "adverse selection", which means people who only decide to make a health insurance when they are diagnosed with a disease (REID, 2010).

Besides, the second problem refers to the sheer complexity of American health care system, that is very fragmented and decentralized, since there is not a unique system or an organized set of rules governing medical treatments. This factor, combined with the administrative bureaucracy, makes American medicine more complex and more expensive than it needs to be, promoting low quality services to the population.

The analysis made until now has the objective of applying some concepts of Law and Economics, such as cost, allocation of resources and efficiency, to guarantee the adequate concretization of the right to health, with emphasis to the approach of the American and the Brazilian health care systems. As explained, efficiency means, in synthesis, assuring the maximization of benefits with the lowest costs. The main goal is to reach an optimum situation in which there are not damages in one's situation or, still, that people eventually damaged can be compensated by those who had benefits, according to budgetary criteria.

Under this scenario, health is accepted as a "fundamental commodity", which means that the demand for improvements is similar to the analysis of the demand for other services and goods. However, because health is not tradeable or purchased directly, it is not possible to evaluate it exclusively in the context of a market. On the other side, it is possible to verify the individual demands for health care, involving the purchase of goods such as health insurance and other health care services (DEVLIN; MORRIS; PARKIN, 2007).

Economists, in general, highlight a difference in the demand for most goods and services. Some of them can be considered a "want", which is someone's desire to consume something, while others can be a "demand", which means a want held on the willingness and ability to pay for it. In view of the health care complexity, some considered that health care is not a want or a demand, but a "need", related to the capacity to benefit from a good or service. Health is quite different from other goods particularly because of its uncertainty, that is, people cannot know when they will become ill (DEVLIN; MORRIS; PARKIN, 2007).

In order to prevent the gaps derived from the uncertainty and lack of predictability of illness, United States decided to address the problem through insurance markets, whereas Brazil adopted a unique, universal

and totally free model of health care. Both countries present evident difficulties in executing a quality health care system, for the reason that services offered to the population are not satisfactory. Nevertheless, considerations about the efficiency and social costs of the systems show that the problems presented by them are quite opposite.

In the United States, adopting a system based mostly on insurance market can be problematic, since these companies work with a given probability of the event arising. In some conditions, the individual may have a pre-existing chronicle disease and will probably not be covered by an insurance company, generating a gap in cover due to the lack of protection.

On the contrary, in the Brazilian system, as described previously, the Constitution guarantees universality and integrality of the fundamental right to health, while the infra-constitutional law predicts ample gratuitousness in offering medical treatments, medicine and hospital attendance. Despite the excellent intention of the lawmakers in the definition of a universal and totally free right, it is rather pointless to have a legal provision for ample gratuitousness to the citizens if, in practice, these services are not really efficient for those who need them.

According to the statistic information provided before, there are few financial resources in the public budget to enforce this fundamental right to everyone who need it. That is justified because a universal and gratuitous system demands, in return, a big amount of expenses to fund these treatments to society. However, Brazil does not present sufficient resources to guarantee free services to the whole population, which brings up the urgent necessity to promote structural changes in the system.

Specifically with regard to health, the point of scarcity is more relevant, since resources may be allocated in accordance with a context of scarcity and uncertainty (AARON; SCWARTZ, 1985). The measures taken in this scope must consider how much to make available to individuals, who must benefit from the government system and the criteria to be fulfilled by the beneficiaries, defining allocative methods due to the scarcity of resources (AMARAL, 2001).

By imposing to the State the duty of supplying medical treatments or medicine to an individual with sufficient conditions to bear

its expenses, public resources are allocated that, otherwise, could be destined to the collectivity disadvantaged and that need to obtain the same treatments for free. Besides, due to the fact that Brazilian health care system does not establish any fees for the individual to access these services, the country has seen an expressive raise in litigation that seek to obtain, in case of an administrative denial, a judicial decision recognizing the right to have a specific treatment, based on the article 196 of the Constitution.

Differently, the United States present a health care system based on different kinds of government programs, that attend only a small part of the society and is characterized by its fragmentation and decentralization. One of the crucial critics about this model is the fact that not everybody can have access to medical treatments by public programs, along with its sheer complexity. Mostly, the American citizens are not contemplated by the government programs and, as a consequence, are compelled to buy a private insurance.

Under the optics of the allocation of resources in the public budget, it is positive that some requirements of eligibility are described for people who will be benefited from the public system, due to the difficulties of providing health care treatments to everybody, even those who have sufficient financial income. However, the main point is that, as a result of the complexity of the system and the strict requirements, still many people who cannot afford to pay for a private insurance cannot access public programs.

The American program called Medicaid is regulated by each state of the Federation, and so it present different requirements according to the regulations and public acts enacted. The requirements are also complex, since many criteria are taken into consideration when analyzing the possibility of an individual be included in the State's program, which generates many administrative costs and few benefits.[10] One of

10 For more information about the access to Medicaid and its requirements of eligibility, please consult: AMERICAN COUNCIL OF AGING. **Medicaid Eligibility:** 2020 Income, Asset & Care Requirements for Nursing Homes & Long-Term Care. Available at: <https://www.medicaidplanningassistance.org/medicaid-eligibility/>. Access on: 20 jan. 2020.

the alternatives to solve this problem is the transformation of the Medicaid into a single-player health insurance system, which means the creation of a program controlled by the central government with unified requisites of eligibility, such as the Medicare.

The United States is still the only developed nation that do not offer a universal health care system, and, on the contrary, presents a system that relies on private insurance. A single-payer and universal health care could help keep costs of providing these services for two reasons: it means that the government can regulate and negotiate the price of drugs and medical services, and it eliminates the need for a vast private health-insurance bureaucracy (MERELLI, 2017).

It is important to notice that, assuring universal coverage to American citizens does not mean that everybody should have access to all medical treatments and services without paying any fees, what happens in Brazil and has presented lots of difficulties to concretize every medical service to everybody for free. However, at least health should be recognized as a relevant right to the population and lower prices should be guaranteed, in order that people could contribute economically with the system according to their resources.

The changes in health care known as Obamacare have represented some progress, but it is still small comparing to the necessary improvement to ensure social characteristics, and not only market and price aspects, to the program. There is a higher proportion of Americans than people in other developed nations that deny themselves access to needed health care due to its costs and difficulties in paying their medical bill. There are also approximately twenty million uninsured Americans, and even those who have health insurances face ever higher fees and coinsurance (REINHARDT, 2019).

With emphasis on the basic concepts of Economic Analysis of Law, it is possible to conclude that society's resources are limited, whereas human desires are limitless, which leads to the need for choices about alternatives and sacrifices for budgetary allocation. Applying this notion to the fundamental right to health, the lack of sufficient resources to meet all the demands, it is essential to observe the State budgetary limitations to create and execute public policy related to health care. On the contrary, the costs

of this right, even though predicted in the Constitution, will be too high in comparison to the efficiency provided to the citizens.

5. FINAL CONSIDERATIONS

According to the concepts analyzed on this article, it became possible to comprehend how the legal systems, particularly those presented by Brazil and United States, protect and assure health care services, based on models with different characteristics. Brazil seeks to enforce health as a fundamental right on its Constitution, through the provision of universality and gratuitousness of this guarantee. Otherwise, United States does not enforce health as a constitutional right and presents a complex State program, but its costs are still very high.

The delimitation of this approach was a study based on the Economic Analysis of Law, seeking to verify the costs and efficiency of both systems, besides the need for changes in order to improve health care services. This problem is justified, mostly, on the fact that the constitutional or legal provisions that describe public health systems in both countries are still inefficient, due to the budgetary challenges faced by public authorities and the lack of quality services.

Law and Economics can be an excellent instrument for judges, public authorities and lawmakers to verify the impacts of certain proposals that aim the implementation of fundamental rights, public policy or other relevant social actions to the country, examining how they affect the government budget and economic costs. When the public measure is the concretization of social interests, like the right to health, the inclusion of economic elements is useful to analyze the costs and benefits arising from the action, in order to achieve a fair decision to society.

Considering the analysis of the effectuation of the fundamental right to health in the Brazilian and American systems pursuant to Law and Economics, it is evident that the implementation of this right depends on a model that predict attendance for those who need medical treatments, in accordance with the financial or economic resources of the person. In Brazil, providing a public, universal and totally free system generates lots of costs for the State, but with low efficiency for the citizens. On the

other hand, in the United States, a private, decentralized and complex system, based essentially on private insurance, cannot offer quality services to those who need public assistance.

Therefore, these changes involve a tragic choice, according to which the public authorities cannot fulfil all social demands, and allocative decisions related to a process of costs, since there are not fundamental rights nor public policy without costs for their implementation. That is why it is still necessary to improve the health care systems presented by both countries, seeking to provide medical treatments with less costs and more efficiency.

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