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THE APPLICATION OF BIOETHICS AS LEGAL BASIS IN JUDICIAL SENTENCES CONCERNING RIGHT TO HEALTH IN BRAZIL

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Abstract: The right to health is linked to life and human dignity. Among the instruments to make it effective, the phenomenon of health litigation has become prominent. In Brazil, courts are increasingly faced with the task of rendering verdicts concerning matters related to health. Nowadays, judges have to deal with issues about health policies, technology incorporations, drug supplies, human autonomy, genetics, and biotechnologies, among others. Lawsuit sentences are now to be built upon the resolution of ethical, legal and philosophical questions. Bioethics presents itself as an instrument and method to help solve legal cases involving the right to health. This paper intends to show that bioethics can be applied in verdicts of lawsuits regarding to right to health in Brazil. It highlights that bioethics can be considered a source of law due to its normative dimension, as well as a hermeneutic method. This essay also aims to show the role for bioethics to help interpret the law and solve hard cases within health law and the right to health. Lastly, it aims to justify the presence of bioethics as legal reasoning to be used by judges in the foundation of their verdicts in lawsuits involving the right to health.

Keywords right to health, health litigation, judicial decision making, bioethics

La aplicación de la bioética como fundamento jurídico en las sentencias judiciales relativas al derecho a la salud en Brasil

Resumen: El derecho a la salud está vinculado a la dignidad humana. Entre los instrumentos para hacerlo efectivo se ha destacado el fenómeno de la judicialización de la salud. En Brasil, los tribunales cada vez más deben decidir sobre asuntos relacionados con el derecho a la salud. Jueces deben tratar temas sobre políticas de salud, biotecnologías, medicamentos, autonomía humana, genética, entre otros. Las sentencias judiciales ahora deben resolver cuestiones éticas, legales y filosóficas. La bioética se presenta como un instrumento y un método para ayudar a resolver los casos legales del derecho a la salud. Este estudio pretende mostrar que la bioética puede ser aplicada en sentencias judiciales sobre casos de derecho a la salud en Brasil. Se destaca que la bioética puede ser considerada una fuente de derecho por su dimensión normativa, así como un método hermenéutico. Este ensayo también tiene como objetivo mostrar el papel de la bioética para ayudar a interpretar el derecho y resolver casos difíciles dentro del derecho a la salud. Por último, pretende justificar la presencia de la bioética como razonamiento jurídico a ser utilizado por los jueces en la fundamentación de sus veredictos en juicios que involucren el derecho a la salud.

Palabras clave: derecho a la salud, judicialización de la salud, toma de decisiones judiciales, bioética

A aplicação da bioética como fundamento jurídico em sentenças judiciais relativas ao direito à saúde no Brasil

Resumo: O direito à saúde está vinculado à dignidade humana. Dentre os instrumentos para efetivá-la, o fenômeno da judicialização da saúde tem se destacado. No Brasil, os tribunais se deparam cada vez mais com a tarefa de julgar processos relacionadas ao direito à saúde. Atualmente, os juízes têm que lidar com questões sobre políticas de saúde, incorporação de tecnologias, fornecimento de medicamentos, autonomia, genética, biotecnologias, entre outros. As sentenças judiciais devem ser construídas com base também na resolução de questões éticas, legais e filosóficas. A bioética apresenta-se como instrumento e método para auxiliar na resolução de casos jurídicos envolvendo o direito à saúde. Este trabalho pretende mostrar que a bioética pode ser aplicada no julgamento de ações judiciais relativas ao direito à saúde no Brasil. Destaca que a bioética pode ser considerada fonte do direito por sua dimensão normativa, bem como método hermenêutico. Este ensaio também visa mostrar o papel da bioética para ajudar a interpretar a lei e resolver casos difíceis dentro do direito sanitário e do direito à saúde. Por fim, visa justificar a presença da bioética como fundamentação jurídica a ser utilizada pelos magistrados na fundamentação de suas sentenças em ações que envolvam o direito à saúde.

Palavras-chave: direito à saúde, judicialização da saúde, decisões judiciais, bioética

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Introduction

Scientific advances have provided new possibilities for economic, human, and social development. The evolution of humanity towards an information society has been marked by the emergence and improvement of technologies in all sciences, including health. It has increased quality of life, but also brought new concerns about the consequences of scientific improvement. It is also natural for developments arising from scientific progress to be incorporated into human society. The advancement of science aims at the advancement of humanity.

Even though not all scientific advancements in healthcare are accessible, many individuals share the belief that the right to health means delivering everything available. In this context, it is expected that many people consider their rights disrespected when they are unable to gain access to certain health goods. And people litigate when they believe their rights have been violated.

In Brazil, courts are increasingly faced with the task of rendering verdicts concerning matters related to health. The scope of these issues is wide-ranging and includes areas such as individual autonomy and access to healthcare through various means including biotechnology, medical policies, genetics, pharmacology etc. Due to the covid-19, pandemic new legal and ethical dilemmas have arisen. balancing public obligation towards vaccination in contrast with individual choices; allocation of resources for experimental or relatively untested treatments using public funds; creating prioritization criteria when facing exhaustion of available resource among other topics which have been extensively litigated.

Furthermore, it is crucial to acknowledge that traditional legal methods of interpreting a legal dispute through an existing normative criterion are insufficient in resolving moral-legal dilemmas. Litigation surrounding access to healthcare during the covid-19 pandemic has emphasized the need for novel adjudication strategies that can merge scientific, legal and ethical aspects. In these contexts, bioethics presents itself as a feasible forum by serving as an intermediary conduit between law, ethics, and morality.

This essay intends to highlight the legal validity of judicial decisions reasoned in bioethics in lawsuits involving the issue of the right to health. To this purpose, this study intends to demonstrate the impact of bioethics on normative frameworks and the possibility of bioethics to act both as a source of law but and as a hermeneutic instrument.

Right to health in courts

The right to health is an undeniable aspect of human existence that is inexorably intertwined with the concepts of life, dignity, and freedom*(1-3)*. It encompasses an array of complex individual rights as well as social entitlements that facilitate access to essential services for preventing illness, promoting wellness, safeguarding against harm, and facilitating recovery from sickness*(2,4-6)*.

Its definition remains multi-dimensional, even though this concept has been acknowledged in various global agreements, including the Constitution of the World Health Organization, Universal Declaration of Human Rights, International Covenant on Economic, Social, and Cultural Rights, Convention on Human Rights, and Biomedicine of the Council of Europe, among others.

The definition of access to healthcare encompasses various aspects such as availability, accessibility, acceptability and resolution. The provision of guaranteed access to healthcare is pivotal in achieving equitable outcomes*(4,5,7-9)*. In this regard, bioethics and health law assume a critical role in enabling universal access to quality healthcare services for all individuals.

For the purposes of this article, the term right to health will be used, encompassing the term right of access to health.

Litigating the right to health emerged in the second half of the 20th century(*2,10-12)*. Recourse to courts to ensure access to medicines, and technologies or to determine the provision of healthcare has become increasingly common in several countries*(6,7,12)*. The right to pursue legal action is a fundamental aspect of any society that values democracy and the rule of law. It not only upholds dignity, autonomy and sovereignty but also guarantees access to justice*(13-16)*.

Legal disputes concerning health-related issues are extensive in nature. They range from contractual disagreements and lawsuits about errors or misconducts, all the way to complex matters dealing with conflicting principles as well as ethical and legal assessments*(6,7,11*).

In Brazil, right to health litigation currently refers to litigation aimed at seeking healthcare services or resources and using legal channels to make claims related to the right of access to healthcare. It encompasses seeking access to medical care and medication, fighting discrimination in healthcare policies, advocating for marginalized communities' health rights and demanding accountability when failing to meet health goals.

As health litigation gained momentum in Brazil, the post-legal positivism and the normative value of principles became a key legal theory and led to the institutional ascent of judiciary. This also allowed judges and courts to play a crucial political role alongside legislative and executive branches, altering society's relationship with judicial institutions. Consequently, there was an increase in health litigation as courts began deciding matters concerning social rights including the right to health.

Healthcare litigation in Brazil has raised concerns from a bioethical perspective. Its consequences have affected both public healthcare and private supplementary health systems, leading to budgetary pressures and resource constraints. This impacts the ability of the public healthcare system to address all claims being made against it, thus raising ethical questions related to distributive justice regarding changes in health priority-setting. Moreover, intervention by healthcare litigation extends into the supplementary health system through incorporating technologies that are devoid of scientific evidence. All this contrasts with the focus on universal principles of human rights and bioethics.

Litigation has had an impact on improving access to some health goods and services, but it has not led to a sustainable transformation in healthcare accessibility*(5-7,13,17).* The overuse of litigation has resulted in imbalances and injustices that undermine distributive justice*(12,13)*. Brazil's reliance on individual lawsuits further exacerbates this issue by prioritizing individual interests above the collective good*(13).* Additionally, there is a lack of consideration for how judicial decisions might affect the larger healthcare system which calls for ethical discussions*(11-13,18,19).*

Judges must make decisions based on fairness and justice, taking into account ethical principles*(4,9,11,19-21)* and relevant factors such as scientific evidence, cost-effectiveness, indications and contraindications of therapeutics*(15,18,22).* The use of bioethics provides a valuable methodology for judges to ensure their decisions are legally sound and ethically appropriate*(1,8,17,23,24).*

Bioethics as a source of law

The term 'source of law' is used to describe how rules are created and enforced*(14,16,25,26)*. It ensures that these rules are valid and effective within the legal system, producing regulations that must be followed*(16,25,26).* The study of sources of law looks at ethical or economic factors affecting rule-making decisions.

Traditionally, the law itself (or legislation in a broader sense), the customs and principles are understood as primary sources law. Brazilian legal framework also admit literature (the so called doctrine) as a possible source of law.

Law and Bioethics work together each one fulfilling their role. Bioethics in the field of moral obligation and law acting to apply ethics in the regulation of human actions. Bioethics has a normative dimension and has become a source of human rights. Human rights are linked to ethics and express a set of values that inspire the development of society*(1,2,8,10,27).*

Brazil has included universal human rights and ethics concepts in its legal structure. It ensures the balance between societal welfare and individual accomplishments through fundamental rights listed in the Constitution. Brazilian legal system legal system also adopts the legal post-positivism and the theory of normative value of principles. These theories make an effort to reconstruct a relationship between law and ethics by restoring the relationship between values, principles, rules and the

theory of fundamental rights. It acknowledges the normativity of principles in a legal system.

Since Bioethics is already present in Brazilian legal system, it might as well be used by judges to take their legal decisions and wright sentences.

Bioethics also serves as a significant source of law through the axiology of principles*(2,8,17,24,25).* Particularly when faced with complex cases involving issues like the right to health, these principles and their connection to human rights become even more crucial. The idea of ethical principles has developed over time, where post-positivism reintroduced moral assessment into normative realms by linking law and ethics together*(15,22,26).*

Bioethics upholds ethical principles as mandatory norms with moral obligations to follow. It was originally created for moral assessment in biomedicine sciences, but has since integrated legal concepts to improve decision-making on health-related matters, particularly regarding an individual's right to access healthcare services.

In Brazil, judicial decisions are typically personalized. Yet, cases related to healthcare access can affect the community at large--particularly those concerning medications and technologies availability. The sum of individual sentences can become excessively heavy to the health system and undermine solidarity*(8,12,28)*. Therefore, judges must consider the wider ramifications of their decisions when dealing with healthcare issues. Equality and equity must be balanced when making decisions regarding access to health.

A judge's verdict must assess the entire issue being litigated. And its rationale must explain the reasons that led to that decision. The sentence is not legitimized only by the legal provision of its existence. Above all, the sentence is a construction that must balance the established law and the ethics that underpin that law*(18,29,30).*

In the modern legal landscape, bioethics holds a significant position as an essential source of normative or principle-based law*(11,17).* It serves as an instrument for judicial reasoning by providing a comprehensive evaluative dimension that is directly linked to moral valuation in resolving complex judicial disputes.

Moreover, bioethics can be used as a powerful method of consideration that seeks to safeguard individuals' interests while also ensuring systematic protection for collective welfare. Its inherent focus on maximum individual protection makes it indispensable in guaranteeing that every person can avail themselves of their rights equally without any form of discrimination or prejudice.

Furthermore, bioethics is already part of the Brazilian legal system. So it is just a matter of using bioethics to approach and solve disputes related to health access. The use of bioethical principles can provide a more holistic and fair understanding of the broader societal implications of judicial decisions. Using principles of bioethics as a source of law can provide judges with a framework for making decisions regarding the right to health.

Therefore, it is imperative to recognize and incorporate the valuable contributions made by bioethics into Brazilian judicial system to ensure fair and just outcomes in all cases involving ethical considerations. By doing so, we take necessary steps toward building equitable societies where justice prevails over narrow self-interests and ultimately creating healthier communities built upon mutual respect and dignity for all people.

Bioethics as legal hermeneutics

It is well known that law and ethics permeate healthcare. So much so that Western countries use the law to resolve ethical cases and ethical dilemmas in healthcare. Essentially, the moral values of society are expressed through legislation and legal regulations. In healthcare specifically, questions about ethical conduct are addressed through the law.

Although the law sets minimum ethical standards, it may not cover all possible areas of ethics. Overdepending on legal resolutions for intricate concerns related to health rights can divert our focus from their basic moral roots. Therefore, we must explore these essential values to achieve ideal results while dealing with such situations.

Bioethics is a complex field that intersects with

legal frameworks. Not only does it aid healthcare professionals in solving ethical dilemmas but also acts as guidance for legal cases related to human rights and right to health issues. As such, bioethics demands fluidity across diverse domains since its workings require interdisciplinary knowledge from varied fields including philosophy, law and healthcare alike.

It is known that principles and ethics lack absoluteness, which raises questions about how to establish boundaries. According to the literature, the normative structure of a principle has a nucleus and a weighting area. The nucleus is inviolable and defines the principle. The weighting area sets limits on principle's interpretation. This interpretation must follow proportionality criteria based on hermeneutic studies' methods. In this essay, we suggest bioethics' input in hermeneutics concerning cases related to right to health.

Hermeneutics is a field of study that aims to improve interpretive methods for normative statements*(21,31,32)*. In law, hermeneutical analysis provides meaning and logical coherence to legal systems while supporting valuation processes*(14,18,26,32)*. Oversight of ethical values is crucial to the foundational architecture of any functional legal system since it cannot exist without such values*(18,26,31-34).*

Applying the law involves interpreting its intended meaning and translating ethical principles into applicable societal norms. This involves analyzing legal statutes to uncover their underlying connotations and different elements*(15,26,32)*. There are various interpretive methodologies available for this complex task*(18,22,26,32).* Interpreting the law requires using integrated and dynamic methods that consider each case's distinct characteristics. There is no fixed formula for its application*(22,26,32,35)*.

Judges are responsible for interpreting legal principles, especially in cases where conflicting principles must be considered. This is particularly relevant when dealing with healthcare rights, which need ethical considerations alongside fundamental legal principles. Societal conflicts regarding right to health have become a significant concern in Brazil. Analyzing challenging scenarios helps connect ethics and law, thereby offering possible solutions to address these disputes in a simpler way academically.

So, how can bioethics act in this context? What is the role of bioethics in interpreting principles and weighting their values?

One of the goals of bioethics is precise to interpret the scientific knowledge produced to support moral valuations and obtain normative statements that provide guidance, both for science and for society. Therefore, bioethics also acts in the resolution of philosophical dilemmas that involve the conversion of descriptive statements into guidelines and norms followed by science *(27,35-38)*.

Bioethics is a field that helps balance individual needs with those of the community. It promotes communal well-being while upholding each person's rights and preserving their freedom. In this way, bioethics provides guidance for complex ethical decisions at both micro-individual and macro-community levels, making it an important resource in our interconnected world*(8,23,24,27,36,37).* Since ethics underlies the application of law, bioethics plays an essential role in interpreting and guiding principles in legal cases. Specifically regarding healthcare access and rights, bioethical considerations can help interpret principles within the framework of intersectionality*(2,8,9,20,39)*.

Legal cases about the right to health often involve conflicts pertaining to values. Therefore, it is important to analyze not only arguments for or against each side but also examine individual and collective responsibilities held by all parties involved. These reflections should primarily consider underlying values in order to support fair conclusions reached through thoughtful considerations. Such an approach can help address complex scenarios impartially without any bias towards one party over another.

Judges not only have to solve legal disputes. They also must ensure their verdicts are valid and justified*(14,19,22,26,32)*. This promotes transparency and understanding of legal cases through interpretation. Reviewing the justification of a judgment allows for confirmation that it was made on logical grounds. Furthermore, it provides an opportunity

for reevaluation if shortcomings in decision-making become evident*(18,21,22,26,32)*.

Judges can use bioethics moral reasoning methods with high proficiency. Bioethics has a normative aspect that helps provide rationale and justification for Judges verdicts.

When conflicting ethical-normative values arise, especially regarding legal and bioethical concerns surrounding the right to health, we can simplify by using common decision-making tools. Both law and bioethics can integrate into deliberation processes to find a shared ground for resolution. To enhance their ability while adjudicating matters related to this issue, judges may implement ethical valuation techniques used by bioethicists during these proceedings. This approach will lead us towards more comprehensive solutions that consider fundamental human values along with legal precedent for creating better outcomes.

Should judges study bioethics?

The question raised is similar to another already much debated between law and philosophy. Ronald Dworkin, in a well-known lecture*(34)*, asked whether judges should be philosophers or whether they could be philosophers. The discussion focused on a significant point: judges decide complex issues that involve philosophical questions, so they require knowledge of philosophy.

The discussion proposed by Dworkin was related to the so-called hard cases, which involve conflicts between principles and moral values. This is the reason he addressed the question to constitutional judges. However, the premises that generated Dworkin's question can be extrapolated to the present discussion.

Judges must navigate complex philosophical and legal questions when adjudicating cases related to the right of health. Balancing the interests of society as a whole while simultaneously protecting individual liberties requires sensitivity, nuance, and an appreciation for academic rigor. Oversimplification of moral or legal precepts should be avoided. We should also not accept the idea that anything related to health requires legal approval without proper scientific, ethical, and legal justification.

To deal with these matters, it is vital to consider pertinent principles and the repercussions of choices on healthcare and communities. It's not adequate for science or law alone to resolve controversies. The cooperation between legal professionals and bioethicists enables better comprehension of social values as well as ethical standards regarding the right to health. This partnership should continue inside courtrooms where judges can apply insights from both fields while deliberating their decisions. Judges don't have to restrict themselves to bioethical perspectives; instead they must recognize them also as an academic discipline similar to economics, philosophy, or medical literature.

Judges must not rely solely on the law for philosophical, ethical, or bioethical answers because varying opinions exist even among scholars in these areas. Nevertheless, judges cannot completely ignore the relevance of philosophy and ethics studies such as bioethics. These subjects may benefit from legal normative discussions and debates about conflicts of law to be easily understood academically.

Conclusion

The present paper intended to point out the possibility of applying bioethics in legal cases regarding the right to health in Brazilian health litigation. Bioethics is already considered an instrument that gives rise to pacts, conventions and legal rules. Therefore, assuming normative role in international law. Brazilian legal system adopts the legal post-positivism theory, which brings law and verdicts closer to ethics. So one can say that bioethics is already part of the Brazilian legal system. But that is not all that it is. Bioethics has a principled essence through which deals with conflict of principles and values balancing reasonability and proportionality to effect equity. Considering that the theory of principles occupies a prominent position in Brazilian law, bioethics can contribute to legal dilemmas involving the right to health.

The objective of this paper is to highlight the applicability and significance of utilizing bioethics in judicial cases concerning the right to health. Bioethics can serve as a helpful tool both to reason a legal decision, and as a normative foundation for judges' verdicts. Bioethics functions not only as an instrument that establishes legal regulations, but

also possesses a principled core by which it addresses conflicts between values while balancing reasonableness and proportionality to achieve fairness.

Moreover, bioethics operates directly through the systematic application of ethical-normative evaluations during moral deliberation processes. Therefore, bioethics has the potential to serve as a source of law in health-related cases. This approach has already been taken by superior courts in Brazil in some lawsuits.

This paper does not intend to end the discussion on the role of bioethics in legal proceedings involving the right to health. However, it can be the starting point for future research, both in law and in bioethics and philosophy, not only in Brazil but in international law and in other countries legal systems. After all, bioethics is related to moral, ethical, political and legal conceptions, and it is even possible to build an ethical-legal-political theory based on bioethics that balances diffuse, collective and individual rights, helping to ensure the effectiveness of the human right to health still so debated and far from being fully effective.

Declarations

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