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# The Right to the Pursuit of Happiness and the Right to Access Medical Treatment: Recent Developments in Brazilian Jurisprudence

*Lais Kondo Claus and Luciana Romano Morilas\**

## Abstract

Derived from North American regulation, the pursuit of happiness has been incorporated in Brazilian legislation through the interpretation of the fundamental rights that are included in the 1988 Constitution. In 2012, the General Assembly of the United Nations declared the 20<sup>th</sup> March as International Happiness Day (Resolution 66/281), highlighting an international concern for happiness. This research aims to describe the evolution of the application of the pursuit of happiness in the Brazilian law, through academic writings, on the basis of webometrics and jurisprudential research. The paper highlights the lack of academic articles on the subject and the use of the pursuit of happiness that was initially restricted to family law, but as observed through the jurisprudence analysis from São Paulo state, the use of the pursuit of happiness on cases concerning medical care has been increasing since 2015. Although there are few scholars that study the pursuit of happiness in Brazil, most of them understand and the jurisprudence confirms that the pursuit of happiness is an extension of the dignity of the human person principle, and it can be incorporated by the interpretation of that principle. Thereby, we noticed that the pursuit of happiness as a human right has had a major importance on health policies, mostly for helping people to have access to new treatments. In several cases, the petitioner got the right to receive an experimental cancer treatment drug for free, not granted by the government. But final decisions so far defined the state cannot be forced to deliver any drug that could possibly harm citizens' health also as way to protect their human dignity.

**Keywords:** *Pursuit of Happiness, Human Right, health policies, Brazilian legislation*

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## Introduction

We have been studying the pursuit of happiness as a right for a while now and whenever we read it deeper, we come across a different possibility of applying it. That is the origin of this study. Looking for how Tribunals have been employing it, we found a very significant application in health. The pursuit of happiness as a right has been interpreted as a way to guarantee the Right to Health of Brazilian population throughout judicial decisions that determine public administration to deliver certain health treatments that are not regularly assured in the common public system that is constitutionally designed to be free, universal and general.

Therefore, we study in this article the origins of the pursuit of happiness as a right, its historical and current application. Then we look deeper at how it has been applied in Brazil, even if it is not positively established in any legal text. We finally analyse the bond between the pursuit of happiness and Health, by studying the judicial decisions that have been issued.

The methods used in this paper are literature review and jurisprudential research. The jurisprudential research was conducted on the 11<sup>th</sup> September 2017 on the website of the Court of Appeals of the State of São Paulo<sup>1</sup>. We chose the State of São Paulo because it is the most populous and richest state in the country, involving, then, majority of the population and, because of the economic power, the highest possibility of discussing rights in judicial courts. On the other hand, the case of the synthetic phosphoethalonamine – iconic and media famous – happened in the city of São Carlos, in the state of Sao Paulo. The case will be explained in details ahead, on item 5. Therefore, we knew beforehand its developments would follow in the Court of Appeals of the State. Thenceforth, we got interested in studying the outcomes of the torrent of requests that came up to Courts after the denial of supplying population with the pills they wished. And when we came up to the reasons of decisions we found out they were based on our object of study, the right to the pursuit of happiness.

We then focused to verify the answer to the question ‘What are the evidences of the pursuit of happiness and the right to health in the Appeal Court of the State of São Paulo?’. The words ‘right to the pursuit of happiness’, in Portuguese, were searched in the field ‘free search’<sup>2</sup> and 58 cases were found. 56 of them referred to the specific case of the synthetic phosphoethanolamine. The 2 other cases involve requests for medication and a surgery that the State refused to offer.

<sup>1</sup> <https://esaj.tjsp.jus.br/cjsg/consultaCompleta.do>.

<sup>2</sup> Respectively: ‘direito à busca da felicidade’ and ‘pesquisa livre’.

## 1. Pursuit of Happiness as a Right

The pursuit of happiness is a desire that occupies the life of man from the earliest days: countless philosophers, such as Aristotle, St. Thomas Aquinas, Robert Darnton, among others, devoted their studies to the theme of happiness.

Happiness is such an important concern in the life of mankind that it has become the subject of legal discussion. The first mention of the pursuit of happiness in a legal document dates from 1776, first in the Virginia Declaration and shortly after in the Declaration of Independence of the United States of America: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.'

Drafted by Thomas Jefferson, we recognize many of the terms used in this document are explained by studying the founding father. There are three main theories that explain why Jefferson inserted the term 'pursuit of happiness'.

The first of them takes into high account Locke's ideals, once in the 17th and 18th centuries the principles he stated were very dominant for scholars. Those principles were 'life, liberty and property'. In the Second Treaty on Government, Locke (1978) states that:

Man being born, as has been proved, with a title to perfect freedom, and an uncontrolled enjoyment of all the rights and privileges of the law of nature, equally with any other man, or number of men in the world, hath by nature a power, not only to preserve his property, that is, his life, liberty and estate, against the injuries and attempts of other men; but to judge of, and punish the breaches of that law in others, as he is persuaded the offence deserves, even with death itself, in crimes where the heinousness of the fact, in his opinion, requires it. (Locke 1978, 3)

Locke claims the rights to life, liberty and property are natural rights of every man. Many scholars claim that this motto would have had a great influence in the creation of the Declaration of Independence of the United States of America. Though all the other founding documents (the Petition of Rights and the Declaration of Rights connected with the English revolutions of 1640 and 1688; the declarations of the American Stamp Act Congress of 1765; the First Continental Congress of 1774) follow Locke's ideas (Darnton 1995), the Declaration of Independence replaces 'property' by 'the pursuit of Happiness', considering all of them as inalienable rights.

It is evident that the term was not inserted in the document by mere chance. As highlighted by Charles (2011), in the essay 'The Rationality of Christianity', Locke claims that mankind should be allowed to pursue their happiness and must not be stopped from doing so. The pursuit of happiness would be, then, 'the chief end' of mankind and it consists of the 'enjoyments of this life'. When Locke includes 'Lives, Liberties and Estates' under the general term 'property', it is likely to understand he makes a direct connection within pursuit of happiness and property.

The inclusion of 'the pursuit of happiness' into the text can be explained in another sense as well. Although Locke was a prevailing author, the founding generation had an infinite of other sources and the other theory places too much weight in his influence to American Constitution (Charles 2011). It does not discard his influence in the understanding of happiness to decode the Declaration of Independence. The idea of the pursuit of happiness as a synonym of property is only one of the theories about the meaning of this term.

Conklin (2015) states that definitions of the pursuit of happiness as a synonym of property and right to property has some theoretical problems, given that in the 18th century theorists used the terms property and pursuit of happiness with different meanings than we use today. 'The idea of happiness as public virtue, while more in keeping with eighteenth-century understandings of happiness, omits the placement of the phrase in the Declaration not as a public duty, but as an individual and unalienable right' (Conklin 2015, 196).

The standards from the 18th century outline a state more worried with the welfare of the individuals and as a result the meaning of happiness when the Declaration was written is obviously different from its meaning nowadays. Individuals should be considered inside the community, therefore, when Jefferson wrote happiness, he meant happiness as a way of government, as a way of guiding the government to make its best to the highest amount of people.

Charles (2011) points out that the idea of happiness represented by the democracy is frequent in the American constitutionalism. American jurists, especially late eighteenth-century writers, advocate that 'liberty' and 'happiness' were intimately linked to the function of a republican government. The preservation of 'life, liberty, and the pursuit of happiness' was a well-established political, constitutional, and legal idea that government is established for the public or common good. The phrase symbolizes the idea of a greater degree of happiness for as many people as possible.

The third theory affirms that the term was a mere flourish of Thomas Jefferson that chose happiness to make the text grammatically richer, sustains

Rufus Choate (1856), cited by Becker (1922). But Becker argues suggesting Jefferson can't be said 'passionate' in his writings and that if the Declaration glitters, it is surely in substance, not in form.

It is in fact impossible to actually know what Jefferson meant when he wrote this document; by checking how it has been applied in jurisprudence it is possible to comprehend how this right was incorporated in the American's interpretation.

The first case when the pursuit of happiness was mentioned occurred in 1823, in the US Supreme Court. In the *Green v. Biddle* case, Mr. John Green's heirs sued Lieutenant Richard Biddle in order to recover some lands they claimed to be theirs in the state of Kentucky. In 1792, the State of Kentucky had been emancipated from the State of Virginia; therefore, both sides claimed the lands belonging to the new state. However, this trial was discussing in fact the constitutionality of the acts of the Kentucky State legislature of 27<sup>th</sup> February 1797, and 31<sup>st</sup> January 1812, concerning those claiming land tenure, since both sides claimed the title of the land that formerly belonged to the State of Virginia. Kentucky, the new independent state, assumed the validity of the titles of lands belonging to it would be determined by existing laws of the previous state, Virginia. The new law issued by the new state, however, determined that if the land occupants on their territory were removed from their land, they would be entitled to restitution of improvements made on the place. Such provision violated the pact between both states (*Bill Providing for Kentucky Statehood*, 15 December 1786). It was, in fact, a discussion of intertemporal law. The American Supreme Court ruled that even though the State of Kentucky might have freedom to legislate, this freedom could not be satisfied by violating the rights of other states, as we read textually:

As to the objections made on the other side to our interpretation of the compact, that it impugns the right to the pursuit of happiness, which is inherent in every society of men, and is incompatible with these unalienable rights of sovereignty and of self-government, which every independent State must possess, the answer is obvious: that no people has a right to pursue its own happiness to the injury of others, for whose protection solemn compacts, like the present, have been made. It is a trite maxim, that man gives up a part of his natural liberty when he enters into civil society, as the price of the blessings of that state: and it may be said, with truth, this liberty is well exchanged for the advantages which flow from law and justice. (highlighted).

The judges take into consideration the individual right to happiness cannot be claimed while it harms the exercise of the rights of any other individual. It means that living in society involves respecting someone else's right. Conklin (2015) notes that after 1823 the pursuit of happiness

appeared in ninety-four cases of the Supreme Court of the United States of America, which are not going to be deeply analysed here but only used as an illustration. The interpretations vary from using the pursuit of happiness as a way to assure the enforcement of public law (*Green v. Biddle*<sup>3</sup>, 1823). Then they follow to focusing on individual rights application, like deciding a professor could teach German to his students (– in *Meyer v. Nebraska*, 1923). And more recently guarantee ‘new rights’, as the right to marriage within same-sex persons (in *Obergefell v. Hodges*, 2015).

The Declaration of Independence of the United States of America is considered to be the first document where the right to pursuit of happiness was taken into consideration. However other countries have included this right in their Constitutions as well. We can cite France, Japan, South Korea and the famous case of Bhutan. The last has taken this idea to a different extent, as to change the way to look into the wealthy of a country. They created a special Bureau of Happiness, responsible for implementing wellbeing policies that could be measured by a new index, so called Gross Happiness Index. The United Nations has been measuring the wellbeing of countries through this index and, since 2012, has determined March 20th as the World Happiness Day as a way to recognize the importance of happiness in the lives of people around the world, according to the United Nations website. In the words of the former UN Secretary General, Ban Ki-moon, the world ‘needs a new economic paradigm that recognizes the parity between the three pillars of sustainable development. Social, economic and environmental well-being are indivisible. Together they define gross global happiness’.

This right has shown to be so important it has been elevated to the category of public policy around the world. In Brazil, it has been used to sustain different kinds of rights, including the rights to same-sex marriage and right to health, our main interest here.

### ***1.1. Pursuit of Happiness in Brazil***

Although, the pursuit of happiness has been stated for a long time in the United States legislation, in Brazil the discussion about this right is very recent. In 2010, a legislative proposal was made to include it in the Constitution. Senator Cristovam Buarque presented the proposal number 19 for a constitutional amendment (PEC 19/2010) to include the pursuit of happiness among the social rights in article 6 of the Federal Constitution.

<sup>3</sup> UNITED STATES. Supreme Court. Case *Green V. Biddle*, decided in 182, retrieved from: <http://caselaw.findlaw.com/us-supreme-court/21/1.html> (accessed: 15/10/2016).

However, this proposal was archived at the end of the legislature without even being voted.

Even though Brazil adopts the Roman law system, the pursuit of happiness has been applied in the Brazilian legal order through precedents. In fact, a reform in 2004 gave more space to precedents in the system, which some scholars criticize as a deviancy of the system. One of the most notable decisions regarding the pursuit of happiness was the judgment on ADPF<sup>4</sup> 132<sup>5</sup>, where same-sex marriages were recognized legal. The decision mentions that the pursuit of happiness as a right is an implicit constitutional postulate, as an expression of the essence of the principle of human dignity.

The Supreme Court also stated that because Brazilian National Congress is conservative, it didn't provide protection to the fundamental rights of the minorities. In this situation, the pursuit of happiness was seriously compromised.

The judgment that recognized the same-sex marriage in Brazil was very important as a precedent for other cases concerning the pursuit of happiness, mostly the cases of pursuit of happiness and the right to health, where ADPF 132 is frequently referred as a precedent.

## 2. The Right to Health

The right to health is declared on the article 25 of the Universal Declaration of Human Rights:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Moreover, in the preamble of the World Health Organization (WHO) Constitution, the member States declared that, in accordance with the UN Charter, several principles are fundamental to the happiness of individuals, their harmonious relationships and their safety.

The concept of rights grows out of a perception of the inherent dignity of every human being. This viewpoint is emphasized in the Preamble to

<sup>4</sup> Allegation of Disobedience of Fundamental Precept, according to the official translation in the Brazilian Supreme Court website [[http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte\\_en\\_us&idConteudo=120199](http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte_en_us&idConteudo=120199)].

<sup>5</sup> BRAZIL. Supremo Tribunal Federal. ADI 4277 julgamento conjunto com ADPF 132, AYRES BRITTO, STF; Judgement: 05/05/2011, retrieved from: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628633> (accessed: 18/11/2017).

the Universal Declaration of Human Rights, 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. Thus, the combination of human rights and health emphasizes that the dignity of each person must be central in all aspects of health, including health care, medical experimentation, and limitations on freedom in the name of health. The focus must be on the dignity of the individual rather than the good of the collectivity. The greater good of the greater number may not override individual dignity (Leary 1994).

The right to health not only encompasses the right to be healthy but to be entitled to services, goods and conditions that are conducive to the realization of the highest attainable standard of physical and mental health (Hunt and Mesquita 2006).

In 2001, the UN Committee on Economic, Social and Cultural Rights issued the General Recommendation No. 14, which deals with the right to the highest attainable standards of physical and mental health. Its objective is to assist the States that are linked to the International Pact on Economic, Social and Cultural Rights in implementing Article 12, which stipulates: States Parties of the present Pact recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Oliveira 2010). The General Recommendation takes a broad normative interpretation of the right to health bringing an examination of its scope and meaning. Thus, the right to the highest attainable standard of health covers public health, health care and the underlying determinants necessary for a healthy life, including access to clean water, sanitation, adequate and safe housing, healthy working conditions and environment, access to education and health information. The content of the right to health also extends certain freedoms, in addition to the rights. Freedoms are protections essentially inserted in the context of civil and political rights: the right to have control over their own health and body, the right to sexual and reproductive freedom, and interference-free, which includes the right to be free from torture and participation on medical experiments without consent (Hunt and Mesquita 2006; Gable and Gostin 2009; Oliveira 2010).

The International Covenant on Economic, Social and Cultural Rights also declares in article 15 that the enjoyment of the benefits of scientific progress and its applications is a universal right, which means that the individuals should be able to have access to the new medicines or treatments that are being developed.

It is important to clarify that the Brazilian Federal Constitution provides access to universal and equal health to all its citizens in article 196. It states literally that 'Health is a right of all and a duty of the State and shall be

guaranteed by means of social and economic policies aimed at reducing the risk of illness and other hazards and at the universal and equal access to actions and services for its promotion, protection and recovery’.

Since the promulgation of the Federal Constitution of 1988 and the consolidation of health as a social right, it must be fully and universally guaranteed by the State. Alongside, the same Constitution guarantees the universal, general and unrestricted access to justice. It means all Brazilian citizens have the prerogative to claim any right in court, legitimately triggering the State to guarantee their health claims. As no injury or threat to law can be excluded from the Judiciary’s appreciation, issues involving conflicts related to the social right to health can be brought to court and may be subject to judicial review. And, once triggered, the Judiciary has a duty to give a response (Delduque et al. 2013).

According to Leary (1994) quoting Professor Ruth Roemer (1993) the main function of a constitutional provision for the right to health care is usually symbolic, setting the intention of the government to protect its citizen’s health. But the statement of a national policy itself is not enough to assure entitlement to health care, for that reason, it is important to establish specific statutes, programs and services.

Because of that a universal system of healthcare was established, in order to provide medical assistance to all Brazilian citizens. We should point out that there are problems, but, as a rule, people have good access to health care and cancer treatments are very effective, being remarkable the cases where people prefer to use the public system instead of the private sector. Nonetheless, sometimes the system fails, and it is not able to offer medication or treatment to the people, and for that reason, people started to file petitions demanding the State to provide the medication or treatment they needed. Therefore, judicialization has become an alternative for people to get the access to healthcare when administrative mechanisms fail.

Health judicialization has become a public policy problem that will be addressed in future papers, once it is a very complicated issue. It includes, on one side, problems on government health care, but, on the other, problems on prescribing specific medications, not included in the system, that do not prove to be more effective, i.e. the motivation for the prescriptions may be from different orders – including pharmacy industry manipulation. Therefore, we may not discuss here the pros and cons of judicialization. As we are interested specifically in addressing how the right to the pursuit of happiness has been used to guarantee the right to health, it should be sufficient, for this while, to understand this is a possibility assured by Brazilian system.

### **3. The Pursuit of Happiness as a Means to Guarantee the Right to Health: the Case of Synthetic Phosphoethanolamine**

As stated in the previous item, Brazilians have the right to access the judicial system to claim any kind of fundamental right. As here we analyse the right to health, we come across the issue of judicialization of health that has been growing over the years. This is the aim of this research: to understand how the pursuit of happiness can be applied as a means to guarantee the right to health.

Throughout our researches about the application of the pursuit of happiness in Brazil, we have come across a group of decisions, pointing at the same direction, which drew our attention. In the Court of Appeals of the State of Sao Paulo (the largest state of the federation), responsible for reviewing the appeals on the trial court sentences, 58 cases mentioning ‘the pursuit of happiness’ were found, and 56 of them referred to a specific case: The synthetic phosphoethanolamine. The 2 other cases involve requests for medication and a surgery that the State refused to offer.

We will analyse these two specific cases first and then we will focus on the phosphoethanolamine.

One of the cases, decided in June 2014<sup>6</sup>, involves the petition of a medication for the treatment of right orchiectomy in bilateral testicular prosthesis implantation refused by the government. The trial court denied to provide him with the medication under the claim that the concession of such medicine would violate the right to health that is exercised by equal access to actions and services provided by the State, and that the right to health should consider the wellbeing of all members of the community and not just one individual by himself.

The petitioner appealed and the Court of Appeals decided that the medication was essential for the fulfilment of the petitioner’s right to health, dignity and happiness. In the reasons of judgment, the principle of human dignity is considered the base of the Democratic State of Law, from which emerges the pursuit of happiness, materialized in the welfare state of the individual or of the society as a whole when its basic rights are respected and fulfilled. The Court considers the pursuit of happiness as an implicit right, once it is not yet established in the legal system but has been reiteratedly

<sup>6</sup> Appealing 0002711-35.2013.8.26.0547, 7th Chamber of Public Right from the Courts of Appeal of São Paulo. BRAZIL. Tribunal de Justiça de São Paulo; Apelação 0002711-35.2013.8.26.0547; Relator (a): Magalhães Coelho; Órgão Julgador: 7ª Câmara de Direito Público; Foro de Santa Rita do Passa Quatro - Vara Única; Data do Julgamento: 23/06/2014; Data de Registro: 27/06/2014). Retrieved from: <https://esaj.tjsp.jus.br/cjsg/getArquivo.do?conversationId=&cdAcordao=7658681&cdForo=0> (accessed: 18/11/2017).

applied by the Federal Supreme Court in different rulings, some of them of great relevance and social and legal repercussion. This pursuit of happiness always seeks to emphasize and reaffirm other rights and basic principles of protection that lead to the state of well-being by which individual and collective happiness is achieved.

The second case, finished in 2017, decided that a carpenter could get another surgery for the reconstitution of his hand, injured in an accident with a circular electrical saw. Although the petitioner had been submitted to the treatments offered by the State, which were surgery and physiotherapy, it wasn't enough for him to fully recover his movements and return to his job. Because of that, he filed a petition asking the State to provide a new reconstructive surgery that can allow him to return to work. The Court of Trials denied the petition but the Court of Appeals reformed the judgment to guarantee the new surgery to the petitioner. The abstract of the ruling mention the 'guarantee of respect to the fundamental right to life and to happiness'. There is a pending appeal to the Superior Court, concerning the application of federal law that can still change the final resolution.

From these two judgments, we can conclude the pursuit of happiness has helped individuals to gain access to treatments that are not regularly available in the public health system, which is by itself a remarkable result to our study. Nevertheless, there is the iconic case of the phosphoethanolamine, responsible for 56 mentions of the pursuit of happiness, which deserves a special attention.

Out of the 56 cases regarding the synthetic phosphoethanolamine, 53 were from the city of São Carlos, 1 from the city of Cabreúva, 1 from the city of São Paulo and 1 from the city of Barretos. The high number of petitions coming from one single city is justified because it is where the drug has been first manipulated and then delivered to public, even without scientific proof of its efficiency.

The synthetic phosphoethanolamine was developed in the Institute of Chemistry of USP in São Carlos, by the chemist Professor Gilberto Chierice. He began the studies in the early 1990 and produced the tablets in the university laboratory. He distributed the drug free of charge to anyone who would ask him, without the authorization or knowledge of the university. Despite the human body produces the component naturally, the synthetic phosphoethanolamine had not been scientifically tested on humans, showing some results only in the experiments with rats. The substance became increasingly known by word of mouth and the demand increased substantially. The professor retired and the university stopped providing the public with the pills in 2014, after an ordinance that determined the need of registry of all experimental substances before being delivered to the public.

The act of the university generated a series of lawsuits against itself. On October 2015, the Federal Supreme Court authorized the use of this drug to a terminally ill patient in Rio de Janeiro. Population then, with basis in the right of health and the access to justice, wished the university continued providing the pills, even though there was not an evidence of its efficiency. The complaint of those who wanted to use it made the subject gain importance in social networks and the press, transforming the approval of phosphoethanolamine into a matter of national scope.

The discussion ended up at the Congress House. The chemist was heard, defending the drug should be provided to anyone free of charge, and the Council of Medicine opposed to it. Even though, the federal law n° 13.269 was issued on April 13<sup>th</sup>, 2016 authorizing the use of the drug even without the proper verifications of the responsible body for the licensing of medicines, which caused a lot of criticism from scientists. It is remarkable that the chemist has the patent of the drug and decided he wouldn't allow any pharmacy industry to sell it. He was clear he wanted the drug to be delivered free of charge. The drug was mad legal despite it had not been clinically tested or registered with the Brazilian Health Surveillance Agency. Apart from patient testimonials and a few preliminary studies in tumor cell lines and in mice, critics say there is no evidence of the safety or efficacy of the compound, popularly known as the 'cancer pill' or 'fosfo'. Several thousands of patients are estimated to have taken it (Escobar 2016).

After that, the Brazilian Medical Association issued a Direct Action of Unconstitutionality (ADI 5501) against the law before the Supreme Court of Justice, the Court responsible for the abstract constitutional control, deciding a dispute about the constitutional character of an act of the public power. In May 2016, the Federal Supreme Court decided to preliminary suspend the federal law n° 13.269 and, as a consequence of that, the right to use synthetic phosphoethanolamine as well. The final judgment is still to be issued.

Along with that, in 2015, the Ministry of Science, Technology and Innovation announced the investment of \$10 million reais (circa 3.03 million dollars) in the research on synthetic phosphoethanolamine, to find out if the substance was effective. Nonetheless, in 2017 researches concluded that the drug does not present effective results when applied in cancer patients, according to several articles indexed in the international database PubMed<sup>7</sup>. Studies were then suspended.

Even after the publication of the studies that show that the synthetic phosphoethanolamine isn't effective for cancer treatment, people still go to court to claim such a medicine.

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<sup>7</sup> <https://www.ncbi.nlm.nih.gov/pubmed/?term=%27Synthetic+phosphoethanolamine%27>.

Although different judges have decided the lawsuits, all the 58 cases mention the leading case, the ADPF 132 as the fundamental precedent that introduces the right to the pursuit of happiness in the Brazilian legal order. The main reasons of judgment include the connection among human dignity principle, freedom, self-determination, equality, pluralism, intimacy and the pursuit of happiness. The right to the pursuit of happiness is qualified with a teleological function, as a factor of neutralization of harmful practices or omissions, whose occurrence may compromise, affect or even sterilize individual rights and individual guarantees.

Although the subject that was under discussion on the ADPF 132 was the legal recognition of homosexual relationships, it also brought up the discussion of the dignity of the human person and happiness as well. But because of this link with the human rights, the pursuit of happiness is being used on different areas and has been essential on the defence of human rights.

Another important judgment reason refers to the right to the pursuit of happiness relating it with the last hope. In a systemic reading of the case, the judge highlights the right to hope as an aspect of the right to pursuit of happiness. Human beings are entitled to have the hope of being happy. The judge still says the access to the substance is connected with the higher commitment of the state to guarantee everyone the right to the pursuit of happiness.

Despite the brilliant argumentation, at the end, the right to access the substance had been denied based on other justifications: the new orientation of the Court and the illegitimacy of the university to be part in the suit. After the Supreme Court decided for the suspension of the issued law, and after the researches confirmed the drug is not efficient, the Courts decided not to implement the right to have the pill, even with they recognize it would be an implementation of the human dignity principle.

## **Conclusions**

Although the right to the pursuit of happiness is not expressed in Brazilian legal system, Courts have been applying it as a means to guarantee the implementation of the principle of human dignity, stated as one of the fundamentals of Brazilian State.

A legislative attempt to include this specific right into Brazilian Constitution as a social and economic right has occurred, but it has not been implemented. The right to the pursuit of happiness is undoubtedly a corollary of the principle of human dignity. As the principle is declared in Brazilian Constitution as one of its fundamentals, guaranteeing the right to the pursuit of happiness is a way to assure the citizens wellbeing.

The ADPF 132 has an important role as a leading case to guarantee the implementation of fundamental rights through the right to the pursuit of happiness. It has been used not only in same-sex relationships issues but also as a foundation to implement the right to health.

We must consider that without health no one can be happy, once both life and health are considered natural rights. Health is one of the most basic human rights and the state is responsible for providing it to the citizens. Once Brazilian Constitution promises health is universal and general, the government must employ all the efforts to implement that. It means public health policies are a duty of the state and if it fails to execute it, it can be called before justice to be forced to do it. That is exactly the case studied here.

We can see Courts have been playing an interesting role in providing citizens with specific treatments initially not provided by the public system. This can also be a problem, once budget planning may not be executed as scheduled, but this will be addressed in another paper. The point here is to discuss the role of the right to pursuit of happiness in securing the right to health in a way the citizen wants it and not in a way the state has planned to provide it.

Citizens in search of a cure for cancer have the right to pursue the treatment they think is more suitable for them. They are also entitled to have all the available information about their treatment. The problem in the specific case studied that must be taken into consideration is that synthetic phosphoethalonamine has not proved to be effective by researches and, even so, citizens decide they want to have that treatment because they heard their friend thinks he got better. The question to be answered is: must the state be responsible for addressing people's beliefs even if it is already scientifically proved that it does not work? We don't think so.

The state has the obligation 1) to provide the health treatment, but 2) to supervise the safety of the treatments. It means even if the citizens have the right to health, the right to choose their treatment and the right to be happy as a corollary of the principle of human dignity, in the same sense the state cannot be forced to deliver any drug that could possibly harm citizens' health also a way to protect their human dignity.

Answering to the posed question in the previous paragraph, we may argue that the right to the pursuit of happiness is really important as a means to implement the right to health and to promote adequate access to medical treatment. It is an important way of interpreting the Constitution to guarantee fundamental rights.

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