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Judicialisation of the right to health in Brazil

Across Brazil, patients are turning to courts to access prescribed drugs. Brazil is one of at least 115 countries that recognise a constitutional right to health.[1] An important part of this right is access to pharmaceutical drugs.[2] Although Brazil has the developing world's most advanced HIV/AIDS programme, many of its citizens still go to local pharmacies only to find that essential medicines are out of stock. Brazil is also one of the fastest growing pharmaceutical markets in the world. Doctors increasingly prescribe and patients demand new drugs, some of questionable benefit. Faced with high cost or no availability, many individuals are suing the government to obtain drugs.[3] Although lawsuits secure access for thousands of people, this judicialisation of the right to health generates enormous administrative and fiscal burdens and has the potential to widen inequalities in healthcare delivery.

Even though such lawsuits draw public attention,[4,5] countrywide statistics remain unavailable. However, 6800 medical–judicial claims reached the Attorney General's Office of the State of Rio Grande do Sul in 2006, an increase from 1126 in 2002.[6] By 2008, an average of 1200 new cases were reaching the Office per month.[7] In 2008, US$30·2 million was spent by this state of 11 million people on court-attained drugs for about 19 000 patients. This expense represents 22% of the total amount spent on pharmaceutical drugs that year and 4% of the state's annual projected health budget (Terra C, Secretaria Estadual da Saúde do Estado do Rio Grande do Sul; personal communication). About a third of current claims are for high-cost drugs not provided through the public health-care system. These claims surely account for a large proportion of state expenses.

The Brazilian Constitution of 1988 granted the right to health to all citizens and mandated the creation of a national health-care system. To enhance the system's management, the Health Ministry later divided responsibilities for pharmaceutical distribution between three levels of government as part of a broader process of decentralisation. These actions delegated responsibility but did not ensure sustainable funding and technical capacity at local levels.

In 1996, groundbreaking legislation guaranteed universal access to antiretroviral treatments.[8] This policy arose as a result of potent rights-based social mobilisation and novel public–private partnerships, and has shaped substantially the politics of pharmaceutical access.[9] The recent swell of access-oriented and rights-based judicial demands could be understood as the maturation of a broad movement to realise the right to health in Brazil. Whether this goal can be attained through individual claims, however, is contested. Certainly, the judiciary's ability to adjudicate fairly thousands of medical claims per month and to ensure an equitable system of universal pharmaceutical access is limited.[10]

Our recent interviews indicate conflicting views. Many judges and public defenders working on right-to-health cases feel they are responding to state failures to provide needed drugs, and some judges admit a lack of expertise to make informed decisions consistently. Administrators contend that the judiciary is overstepping its role, although some acknowledge that, because of these legal cases, distribution of several drugs has risen. Patients' associations have a highly contested role. Officials claim that at least some organisations are funded by drug companies eager to sell to the government high-cost drugs. Patients are encountering a bewildering and overburdened legal system in which injunctions granting access to life-saving drugs must be periodically renewed, typically resulting in interrupted treatment and medical complications. Moreover, individual decisions on access to medicines do not establish precedents. This prioritisation of demands of sole plaintiffs over collective needs probably exacerbates inequalities in treatment access.[11]

The judicialisation of the right to health represents a new chapter in the pioneering history of

pharmaceutical access in Brazil, and we are charting its full importance for human rights, policy, and market practices. Clearly, to realise progressively the right to health, Brazil must raise funding for essential medicines and increase the transparency and efficiency with which new drugs are adopted. Local governments should track court cases and use them to inform efforts to remedy administrative failures. Rather than merely responding to individual cases, the judiciary must foster health as a collective right and pursue strategies to ensure universal availability of medicines that the government has a legal responsibility to provide. When drugs outside the public system are the focus, the courts and judges should recognise the executive's authority to license and incorporate medicines according to best available evidence for safety and effectiveness. Brazil, which has innovated in access to treatment as a human right, must define and implement more fully a right to health that transcends medicines and individual demands, and ensure that primary health care and prevention are sufficiently robust to reduce vulnerability to disease.

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