Inappropriate Diagnosis, Ineffective and Hazardous Treatment
The STF needs to correct the course of health judicialization in Brazil
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Something is not right, of course, when hundreds of thousands of lawsuits come to justice claiming the right to health every year, generating expenses of several billions a year.¹ But the so-called judicialization of health in Brazil, relying on a simplistic diagnosis of the problem, has not produced adequate responses to it. Twenty years of this model, which I call the 'Brazilian model of health litigation', have not contributed much to the improvement of the system. In many cases, the effect has been the opposite. The Federal Supreme Court has a valuable opportunity to correct this misguided model with the judgment of the three leading cases ('general repercussion' cases) that return to the plenary today. It is hoped that the opportunity will not be wasted.

The Diagnosis

The first step, as always, is an adequate diagnosis. Why so many lawsuits claiming the right to health in Brazil? The received wisdom, especially in the legal world, is that judicialization is a simple reaction of citizens against the evident negligence of the State in fulfilling its constitutional duty; a natural response to the 'intolerable omission' of the public authorities in 'respecting the constitutional order, arbitrarily frustrating social effectiveness', to use Minister Celso de Mello's formulation. In this narrative, the judiciary simply administers the appropriate treatment for this type of disease: to force the state to respect the Constitution.

An empirical and dispassionate analysis of the causes and effects of the judicialization in the last twenty years does not corroborate this narrative. There is no doubt that the Brazilian state is far from fulfilling the constitutional promise of the right to health. It is true that the important advances of the last three decades have not been sufficient to raise the health conditions of the Brazilian population to the levels one could expect from a country with our economic capacity. Countries with per capita income similar to Brazil, such as Costa Rica, for example, have health levels that are much higher than ours.

Public health experts (an area in which Brazil can be proud of its tradition of quality and competence) point to a multiplicity of factors as causes of our undeniable underperformance in health. We can organize them into four major areas: insufficient investment of resources, unequal distribution of resources among the population, prioritization failures in the use of these resources, and various management problems, including corruption. But this is not the question. What is important to know is whether judicialization (in the

¹ According to official estimates, more than a million cases reached the courts in the past five years generating a cost of R$7.5 billion (about US$2 billion). See the databases of the project Justiça em Números [Justice in Numbers] from the Brazilian National Council of Justice, available at http://www.cnj.jus.br/pesquisas-judiciarias/justicaemnumeros/2016-10-21-13-13-04/pj-justica-em-numeros
way it is practiced in Brazil), is (i) a genuine reaction to these known problems of the health system and (ii) can realistically contribute to their solution. There are serious doubts, to say the least, that the judicialization of health in Brazil has any of these two attributes.

The Real World of the Judicialization of Health

As the increasingly more comprehensive data of the CNJ [Brazilian National Council] and several other studies show, judicialization is disproportionately concentrated in the most developed states, cities, and neighborhoods of Brazil. The predominant object of the claims are medicines and hospital treatments and not priority measures of public health and primary care that are not yet universalized and that affect mainly the poorest. Most of the drugs and treatments claimed in courts are not only deliberately excluded from the policies of Brazilian public system (the SUS) for lack of evidence of safety, efficacy and cost effectiveness, but have also been rejected by experts at the World Health Organization and systems of several more developed countries than Brazil.

The case of analog insulins is just one example among many others. For years they have been awarded in thousands of judicial claims across Brazil despite being much more expensive and not presenting scientifically proven advantages of safety and efficacy in relation to the regular insulins, offered in the SUS. The increasing budgetary impact of this type of claim is of course borne by the system as a whole, creating a perverse situation of distributive justice in reverse, or rather distributive injustice.

This scenario does not fit very well, therefore, the narrative of judicialization as a natural and effective response to the state’s ‘intolerable omission’ in the fulfillment of its constitutional duties. The judicialization of the real world is not motivated by the main problems of the health system. It does not address under-financing, under-performance, and persistent inequalities in primary care, essential medicines, and social determinants of health, felt mainly by the poorest. On the contrary, it focuses disproportionately on high-cost drugs and treatments of comparatively lesser priority, many of them deliberately excluded from the public system for with fully valid justifications.

It is increasingly evident, therefore, that the model of health judicialization presently prevailing in Brazil urgently needs reform. It is salutary that the problem is being increasingly recognized by members of the judiciary and that initiatives are being taken in an attempt to address it. The recent contributions of the CNJ’s National Health Forum, such as the publication of statements and the creation of tools to assist judges in their decisions (e-NatJus and State Committees) deserve special attention.

But they do not yet effectively attack, it must be said, the main problem and great motivator of the model of judicialization described above, namely the problematic interpretation of the right to health that prevails today in the Brazilian judiciary.

The Right to Health is not Absolute

The Brazilian model of health litigation and its negative consequences derive mainly from a mistaken interpretation of the Constitution. Most Brazilian judges have interpreted the
right to health as an absolute right to any medicine or treatment prescribed by a claimant’s doctor (I call it a ‘right to everything’). Since the real world is characterized by an inescapable limitation of resources, the main effect of this interpretation is to transfer part of the resources of the health budget from the policies chosen by the administrators of the public system to the treatments and drugs prescribed by claimants’ physicians.

While this interpretation lasts, those with the capacity to hire a private lawyer or to access the limited services of public prosecutors and defenders (both minorities in the population) will continue to bring to the Judiciary claims for drugs and treatments that the public system decides, for valid reasons, not to offer. It is natural that they should.

Only a firm and unequivocal decision of the Supreme Federal Tribunal (“STF”) clarifying that the ‘right to everything’ is not a valid interpretation of article 196 of the Constitution can reorient the judicialization of health towards a more promising course than that of the last two decades. Some STF decisions in the wake of the 2009 public hearing, several CNJ statements and the recent decision of the Superior Court of Justice have taken important steps in the right direction. But they need to be strengthened and improved, which can be done by the STF in the judgements of today. As correctly noted in an STF decision of 2010 by Justice Gilmar Mendes:

"Compelling the public system to finance any and all existing health actions and services would create serious damage to the administrative order and would lead to the collapse of the SUS [public system], harming further the care of the portion of the population most in need. Therefore, we can conclude that, in general, the treatment provided by the SUS should be privileged instead of a different option chosen by the patient, ..." (my emphasis)

The problem lies in the qualification of the general rule by the following condition that complements the passage quoted: *whenever the ineffectiveness or the impropriety of the existing health policy is not proven*. The condition opens the possibility for the absolutist interpretation of the right to health to return through the back door (i.e. for the general rule to be practically swallowed by the exception). For that to happen, all it takes is for judges to interpret ‘inefficiency’ or ‘impropriety’ of the existing public policy as a mere synonym of non-incorporation by the public system of treatments and medicines available in the market that may somehow benefit the claimant according to the opinion of her or his doctor. This was precisely what happened in the case just quoted, as Mendes ended up granting the unincorporated drug Mglustat to the claimant on the basis of the ‘exception’ to the general rule (the drug has been recently rejected by the Brazilian incorporation agency, Conitec, for lack of evidence of efficacy). The votes already delivered in the case that resumes today, by justices Marco Aurélio, Luís Roberto Barroso and Edson Fachin, seem unfortunately to go in the same direction.

If the State has an obligation to offer in the public health system any treatment or medicine available in the market that may in any way benefit the patient in the opinion of her doctor, we are once again in the realm of the absolute right to everything (or almost everything, as only those treatments proven to be ineffective or with a perfect substitute in the public system may be denied). No health system in the world, not even the most well-resourced, can operate under this absolutist interpretation of the right to health, let alone the Brazilian, severely under-funded one.
The negative effects associated with the Brazilian model of health litigation will not subside, let alone disappear without a strong and unequivocal decision by the Supreme Court that the right to health is not absolute and that, as a consequence, even effective treatments and medicines can be validly excluded from the system under appropriate principles of equitable resource allocation. There is no other solution in the real world of judicialization and limited resources. The consequences of turning a blind eye to this inescapable reality have been demonstrated to exhaustion in the last twenty years of health judicialization in Brazil. It’s time to change course.