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Constitutional guarantees generate negative externalities for the brazilian health system

As garantias constitucionais geram externalidades negativas para o sistema de saúde brasileiro

Las garantías constitucionales generan externalidades negativas para el sistema de salud brasileño

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ABSTRACT: The research was conducted in 27 Brazilian courts of law. We aimed to know the legal demands on health and the arguments made by the patient, the defense, and the judge in judicial hearings. For this, we used the method of case law research. The research unit was Brazilian judicial processes with the material object of health demands, decided between 2012 and 2013. The results showed reliance on constitutional arguments for both the request and the decision, while the defense was based on diverse and obsolete legal points. It was concluded that judges have decided questions about health using purely legal arguments and reproducing points made by the patient. The defense of the Brazilian health system is fragile due to the lack of an adequate legal rationale.
Keywords: Court decision arguments. Public health. Judicial arguments.

RESUMO: A pesquisa foi realizada nos tribunais de justiça brasileiros e teve como objetivo conhecer as demandas judiciais sobre saúde e discursos do paciente, da defesa e do juiz da causa. Para isso utilizou-se o método da pesquisa jurisprudencial, levantando-se nos 27 tribunais brasileiros os processos cujo objeto material fosse demandas sobre saúde, decididos em 2012 e 2013. Os resultados demonstraram uma manutenção nos argumentos constitucionais para a solicitação e para a decisão, enquanto que a defesa do sistema de saúde tem elegido a teses jurídicas dispersas e obsoletas. Concluiu-se que os juízes têm decidido questões sobre saúde utilizando-se de argumentos meramente jurídicos e repetidos do paciente. A defesa do sistema de saúde brasileiro é frágil em função dos inócuos argumentos trazidos para os autos.
Palavras-chave: Judicialização. Decisão judicial. Saúde pública. Argumentos juridicos

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RESUMEN: La investigación ha sido realizada en los tribunales de justicia y en el juicio de la causa. Para este tipo de uso de la investigación de jurisprudencia, fueran consultados nos 27 tribunales brasileiros los procesos sobre salud, con sentencia en los años 2012 y 2013. Los resultados demuestran los argumentos constitucionales para las solicitudes de pacientes. Para una decisión, han elegido las teses jurídicas dispersas y ultrapasadas. Los juicios han decidido sobre la salud utilizándose de argumentos judiciales y repetidos del paciente. La defensa del sistema de salud brasileño es frágil en la función de los argumentos de los abogados públicos.
Palabras-llave: Judicialización. Decision Judicial. Salud publica. Argumentos judiciales

Introduction

Twenty years ago, the XXX World Health Assembly decided that, by the year 2000, people should have universal access to health worldwide. This decision reflected the certainty that the means to achieve this goal were available to most countries. Over the years, many countries have implemented far-reaching reforms in their health systems, following World Health Organization (WHO) guidelines, that have reached the intended target, although each with its own characteristics and pace.

A similar process has taken place in Brazil. In 1988, the country began to allocate more attention to health, and the government took a central role in making health the right of every citizen and a State duty. However, while on the one hand this political and social ideal was gradually taking shape as a constitutional right, it generated negative externalities that put at risk the very system (the Single Health System or SUS) created to universalize access to health. Collective health needs permeate the guarantee of this complex right. However, individual needs backed by the Constitution generate conflicts that ultimately find their way to the judiciary. This process, known as “judicialization of public health policies" lies at the heart of the negative externalities mentioned above.

This phenomenon has exponentially increased the number of judicial decisions that require the State to provide the most diverse goods and services requested in court by citizens. Each of these requests is based on individual needs, attested by the opinion of a medical practitioner. Such needs clash with health public policies established to meet the therapeutic needs of the entire Brazilian society, and based on reasonable data and priorities for choosing the best therapeutic alternatives for those who need them. The growing number of lawsuits demanding access to medicines, health products, and surgical and ICU beds, among others, creates a point of tension between the State and citizens

whose right to health is guaranteed in the Constitution and in national laws. Although this judicialization pattern is known, there are no studies that quantify judicial demands of the public at the national level and qualify the discourse of the parties to this conflict.

In this context, the present study was developed to answer the question: what are the judicial demands of citizens regarding health in Brazil, and what are the arguments of the procedural triad formed by the patient, the defense, and the judge in their individual roles?

Methodology

A retrospective study was undertaken with analytical description, with the analytical unit being the judicial health process, considering judgments issued in the entire country in the years 2012 and 2013.

The sample calculation shows simple random sampling, with a reliance level of about 95% and an error margin of 5%. B is the sampling error and Z is the reliance level.

$$n = \frac{N}{4(N-1)D+1}, \text{ where } D = \frac{B^2}{Z_\alpha^2}$$

The criteria for inclusion in the sample were legal proceedings that contained claims for health services against the public health system—the Unified Health System (SUS). Exclusion criteria were processes with applications for health services against private health insurance. The sample was delimited to 996 cases. The total number of judicial documents analyzed was 2,988, considering the application by the patient, the defense arguments, and the judge's final decision. Exploratory analysis of quantitative data was done using descriptive statistics, by generating frequency tables. For this analysis we used the Predictive Analytics Software (PASW), version 17.0.

Also, participant observation gave rise to numerous field report notes of observable detail in processes such as notes on the bottom of the page, single sheets and comments collected during the months of living with the file sectors of the legal proceedings in different courts state surveyed.

For qualitative analysis the Laurence Bardin (1) method was initially used. To conduct lexical and syntactic analysis of the text of the discourse in our sample, we analyzed the total number of words and occurrences present in the studied documents, enabling ordinary

frequencies according to the sense and syntactic aspects of sentence organization, revealing the discourse characteristics.

The arguments were analyzed using Atienza's (2) Argumentation Theory.

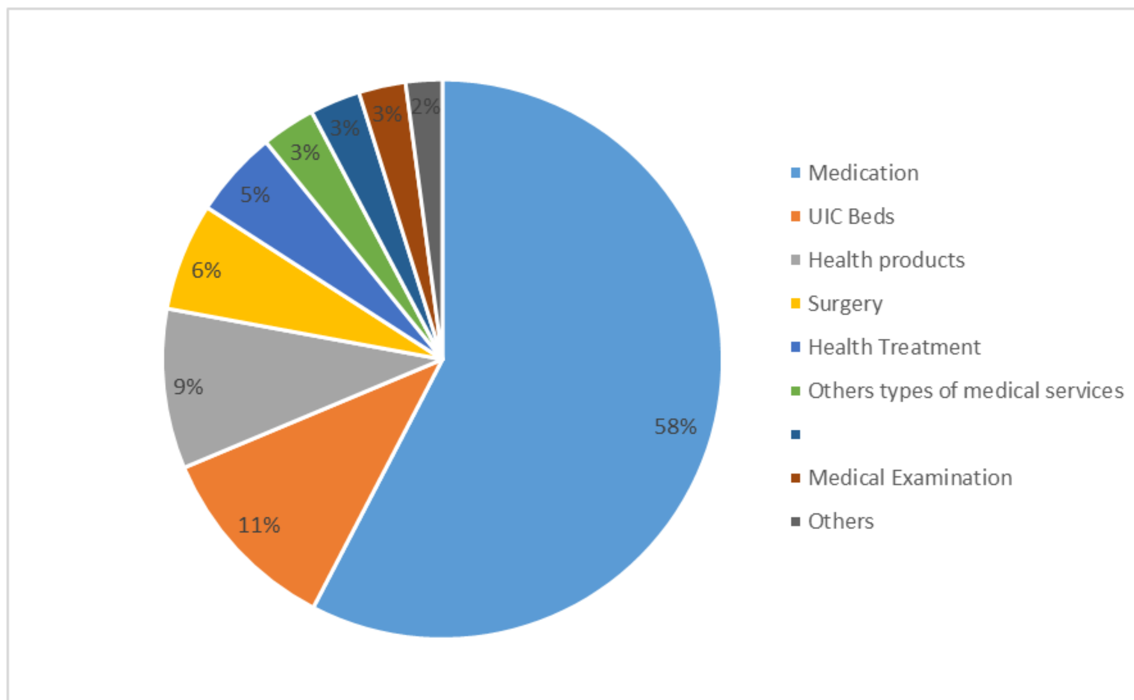
RESULTS

Patient demands regarding health

Patient health needs are reflected in judicial proceedings. Judicial requests for medications had significant predominance over other health inputs, accounting for 574 (58%) of 996 cases analyzed (Figure 1). Among other demands, the most frequently expressed are ICU beds (11% of cases), health products (9%), and surgery (6%) (Figure 1).

Figure 1 – Material content of the processes on health in Brazilian courts in 2012–2013

100% = 996



Patient arguments used in lawsuits

The arguments used by the patient can be divided into three main types: legal, personal, and administrative (Table 1). The legal arguments represent almost 45% of the total, and among these, the most frequent were those that made direct reference to the

Federal Constitution (679, 18.6%). Other legal arguments included federal law 8080/90, state guidelines, and constitutional provisions. Personal arguments represented approximately 30% of the total, and usually included economic aspects and potential harm to the health of patients. Finally, administrative arguments represented approximately 17% of the total and included aspects regarding failure by the State in managing the assets of the public health sector.

Table 1 – Arguments used by patients in health lawsuits, 2012–2013

Description of Patient´s arguments	Nature of argument	Quantity	%
Total		3,647	100
Articles of the Federal Constitution	Legal	679	18.6%
Poverty of patient	Personal	626	17.2%
Law 8080/90	Legal	368	10.1%
Risk of worsening the patient's situation	Personal	279	7.7%
Principle of human dignity	Legal	266	7.3%
Articles of the State Constitution	Legal	248	6.8%
Negative for supply channels	Administrative	219	6.0%
Risk of patient death	Personal	208	5.7%
Jurisprudence	Legal	180	4.9%
Medication/input/treatment costs too much	Administrative	179	4.9%
Right to health must be fully guaranteed	Legal	109	3.0%
Medication/input/treatment unavailable	Administrative	81	2.2%
Lack of beds in the ICU	Administrative	64	1.8%
Ineffectiveness of the drug/input/standardized treatment	Administrative	54	1.5%
Limited budget	Administrative	51	1.4%
Exhausted administrative channels	Administrative	36	1.0%

Defense arguments

We were also able to divide the defense arguments into 3 types, including those related to judicial doctrine, to administrative rules, and to the law itself (Table 2). However, the largest single proportion of arguments (25.1%) came under the definition of "principle of human dignity," a category that included highly fragmented theses developed by the defense in their representation (data not shown). Judicial doctrine arguments represented 37.5% of the total and included principles of law and legal dogma. The administrative

arguments constituted 33.8% of the total, including economic theses, and logistical and procedural aspects. Finally, only one type of argument (3.5% of the total) was of a legal nature and called for jurisprudence.

Table 2 – Arguments of the defense used in health lawsuits, 2012–2013

Description of defense arguments	Nature of argument	Quantity	%
Total		2,123	100
Law	Legal	533	25.1%
Passive illegitimacy of the State	Legal	233	11.0%
Drug/input/treatment must be replaced by others	Administrative	210	9.9%
Drug/input/treatment nonstardardized by SUS	Administrative	209	9.8%
Principle of completeness	Legal	154	7.3%
Theory of Reserve for Contingencies*	Legal	134	6.3%
No reason for the action	Legal	125	5.9%
Drug/input/treatment standardized by SUS	Administrative	122	5.7%
Default	Legal	115	5.4%
Budget	Administrative	89	4.2%
Jurisprudence	Legal	75	3.5%
Federal Government has the responsibility to reimburse oncology drugs	Administrative	49	2.3%
Drug/input/treatment requested is provided by SUS	Administrative	39	1.8%
Serious injury to the social and economic order	Legal	36	1.7%

*The theory of Reserve for Contingencies was developed by the German Constitutional Court in the year 1970, affirming that citizens can only require of the State what could reasonably be expected.

Arguments applied by the judge

Judges often resorted to judicial doctrine and the letter of the law (87%) as the basis for their decisions (Table 3). Among these arguments, the most frequent made reference to the Brazilian Federal Constitution (23.7%), followed by jurisprudence, and Federal Law 8080/90, representing 10% of the total.

Table 3 – Arguments made by the judge in deciding health lawsuits, 2012–2013

Description of judge´s argument	Nature of argument	Quantity	%
Total		2.555	100
Articles of the Federal Constitution	Legal	606	23.7%
Jurisprudence	Legal	272	10.6%
Trials extinction without the verdict	Legal	266	10.4%
Organic Law on Health 8080/90	Legal	262	10.3%
Evidence of the necessity for the application	Legal	224	8.8%
Health is everyone's right	Legal	168	6.6%
Default	Legal	141	5.5%
Joint responsibility of the federal entities	Legal	123	4.8%
Articles of the State Constitution	Legal	122	4.8%
Principle of completeness	Legal	102	4.0%
Patient death	Personal	74	2.9%
Legal literature	Legal	63	2.5%
Right to health must be fully guaranteed	Legal	62	2.4%
No reason for action object	Legal	41	1.6%
Protocols and official lists	Administrative	21	0.8%
Theory of Reserve for Contingencies	Legal	8	0.3%

Discussion

In this nationwide assessment of legal demands regarding public health, we found that patients frequently focus their demands on the right to free medicine, ICU beds, medical examinations, and other procedures. Requests for drugs were more frequent than all other requests together. Some local studies (3), (4), (5), (6) also found a higher concentration of legal demands for drugs. Medication should be offered for free to the public, in this understanding of the Constitution, and when the health system fails to do so, lawsuits ensue.

Patient demands often offer arguments such as the risk of worsening patient health, economic poverty, as well as legal and constitutional aspects that guarantee the universal right to health. A personal medical doctor always lends support to personal and disease-related arguments with reports and prescriptions (data not shown). In none of the cases evaluated did the defense request an expert opinion on the validity of these reports and prescriptions (data not shown). Economic arguments tried to demonstrate an individual's

lack of resources for the purchase of medication or treatment. This finding indicates that a contingent of poor people have been going to court to plead for health services. The fact that the public first resorted to arguments regarding the law or judicial doctrine suggests that for citizens the law carries a political and moral force in favor of their demands.

Defense arguments were often fragile and fragmented. Without a strong central thesis to convince the judges, the State almost never wins cases against patients. In support of the idea that state defenders fail to promote effective points, judges frequently resort to the Constitution, reproducing the plaintiffs' arguments and ignoring the defense. Only a small percentage of judges demonstrated concern about the potential death of the patient. Other studies also show that the judge's decision is based on the legal text without considering aspects of public health (7), (8), (9), (10).

The right to social benefits, notably to universal health, guaranteed in the Constitution and federal laws, has generated the negative externality called judicialization of health public policies. Brazilian ideals of social justice and the right to health have created incentives for the individual citizen to go to court, putting at risk the viability of the very system established to help citizens in the first place. It is advisable that countries moving towards a reformulation of their health system look to the Brazilian model for potential hidden costs. On the other hand, it is paramount that the public defense system develops a more coordinated response to the increasing instances of legal demands against the Brazilian State.

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