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Theoretical analysis on how the right to health claims could ameliorate healthcare systems:

dos and don'ts of justiciability of the right to health

Winner

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LIST OF ABBREVIATIONS

ICESCR	International Covenant on Economic, Social and Cultural Rights
SER	Socio-Economic Rights
SACC	South African Constitutional Court
CCC	Colombian Constitutional Court
PIL	Public Interest Litigation

SUMMARY

I. Introduction. II. Theoretical analysis. III. From the Theory to the Real World. IV. Conclusion.

I. Introduction

Countries that accepted the justiciability of the right to health have done so with the goal of progressively improving health care systems. However, it is important to realize that healthcare claims not always lead to positive changes. We cannot deny that deviations of what is, in theory, a good way of strengthening the right to health, could provoke in practice situations of illegitimacy or inequality and stain the good purpose of the principle of justiciability of socio-economic rights, especially in developing countries. Hence, the debate today is not on whether the right to health is justiciable (since it certainly is in several countries), but rather on how judicial and quasi-judicial bodies should enforce it to gradually build a powerful, legitimate and policy-influential network able to attain the desired objectives.

How will these claims modify healthcare systems is a question that cannot be answered today due to its broadness and complexity, and obviously, because it is not possible to predict the future. The answer will depend on numerous variables such as the country in question, the performance of the courts in such countries and the willingness of the Governments to comply with the obligations. In order to explain the most important of such variables, I shall put forward what I consider the archetypal healthcare model, draw conclusions from it and compare it to some present countries' approaches.

II. Theoretical analysis

Let us imagine first the scenario of a country, Country X, in which the right to health is not justiciable. In there, the healthcare system only reaches a part of the health issues suffered by the population of the country, putting aside a greater or lesser number of health problems that affect society. The system does not embrace these latter issues as a result of

several variables. Of course one of these variables is the budgetary limitations resulting from the Government's health policies. Nonetheless, it is not the only one: the executive branch could lack information on the actual needs of the citizens and, because of this, wrongly allocate the resources. That is, sometimes the healthcare system does not reach some basic needs not because of the budgetary limitations themselves, but as a result of misguided State budget policies. In fact, this happens all the time in every country: the Government passes State budget, implements the policies, and after a short period of time citizens and the political branch realize that they squandered public money in what they first thought could be a good investment. In this model, there is a sole actor – the Government of Country X– that has to deal with all the health-related needs of the population whom legitimately represents.

States parties to the ICESCR, one of the most important covenants regarding SER, have to comply with the obligation of "*achieving progressively the full realization of the rights recognized*" in such Covenant, including the right to health. This obligation entails undertaking a series of measures to reach those problems that the State could not reach in the past. In the model above, where Country X is the sole decider and policy-maker, the principal measures to achieve such obligation is to increase the budget to take on more health issues and to focus on attaining the optimal allocation of the resources. The former measure is unquestionably restrained and it is naive to believe the contrary. Thus the State has to direct its endeavors to erect a system that could fit in with the actual demand, irrespective of the long-term gradual increase of the public resources assigned to healthcare projects due to the development and wealth creation of the country's economy.

We can think in various ways for the States to strive to succeed in optimizing the allocation of the public resources. A solution could be, for instance, to employ Government dependent entities to gather statistical information from the past months and try to correct their policies and adjust them to the real demand. However, this is a static approach that can be improved in several aspects by introducing another actor in the healthcare system. In effect, if an independent body such as the judiciary intervenes in the healthcare systems, it will theoretically bring about – under certain conditions – more legitimacy, more effectiveness and more stability in the system, as I detail below.

- Why justiciability of the right to health makes the healthcare system more legitimate

It has been said that assigning to the courts the task of deciding on SER, such as the right to health, seriously harms democracies and violate the separation of powers.[1] Since the judiciary is a non-democratically elected body, all its decisions that could affect policy-making would be thus illegitimate.[2] We have to mention first that this is not necessarily true provided that the courts show the due deference to the other powers and take part in the policy-making process in a collaborative way, as we shall explain infra. Moreover, I consider that in order to discuss the legitimacy of these bodies to adjudicate rights, it is convenient not stop at the abstract constitutional theories and take a step forward and cast our attention to what is actually happening in a system that decides to adjudicate the right to health:

In Country X, where the healthcare system is exclusively administered by the political branch, the only way with which the citizens can actively "communicate" with the policy maker is to vote for its electoral program in the general elections every three to seven years – depending on the State electoral system (which is the essence of the so-called representative mandate). That is, they can only elect one party out of a reduced number of parties with a fixed health program (and in the great majority of cases, the voters not only base their choice on the health-related policies, as it is obvious). Once the electorate made its choice, in the event that the citizens are not satisfied with the changes or the program or the administration of it (or especially if they are victims of a deficient service which the Government committed to provide) they have no effective ways to demand solutions and remedies.

By accepting the justiciability of the right to health, the State provides the citizens with a powerful instrument to express their wishes as to the healthcare system. In this situation in which the State accepts to hear health-related cases, not only does it empower the courts and other quasi-adjudicating bodies to participate in this matter, but it also – and most importantly – offers an effective vehicle to effectively reveal the needs of the population.

[1] Sellin, at 542, citing Wiles, at 42-43.
[2] Motta, at 1648.

Therefore, in this triangular network we should understand that the legitimacy of the courts to hear health cases springs from the citizens, who voluntarily go to court. At the same time, the legitimacy to adjudicate stems from the fact that the legislator, democratically elected, enables tribunals to make decisions in this matter (authorizing justiciability by enacting a law, i.e. actively) or simply permitting them to do so (by not prohibiting such practice, i.e. by omission).

In brief, the justiciability of the right to health could involve a plus of legitimacy in the health care systems by permitting the electorate to freely go to court and place their trust in these adjudicating bodies. This has to be seen as an inclusion of check and balances in the construction of a new model of healthcare systems, which does not collide with the theory of representative mandate or with the principle of separation of powers. Nevertheless, for this model to work, it would logically satisfy certain guidelines that I shall put forward later.

- Why justiciability of the right to health makes the healthcare system more effective

The model above defined also permits a dynamic and thus more realistic construction of the healthcare system, contrary to the previous unidirectional model of Country X. In effect in this new approach the courts will be continuously obtaining information on what is really happening to society and on which are the actual worries of the population. As a matter of fact, the prediction and projects of the State in a certain moment do not always fit in with future events. One way to solve this problem is to leave some discretion to the adjudicating bodies to perceive these situations – that could not be predicted – and act to better them. A possible way to address this, financially speaking, would be to leave a percentage of the resources assigned to healthcare in the State Budget to be administer or affected to the court's resolutions on this matter (namely, it could be a budget item to cover such provision).

It could be argued that Country X could equip itself with Government-dependant entities that gather information arising from the individual or collective situations of the victims. However, this can be criticized on the grounds that Government dependant bodies are generally not as objective and impartial as the independent professional bodies. At the end of the day, the system would be administered again by one sole actor and most of the complaints of the patients would not been taken as seriously as if they were heard by an

independent adjudicating body. Furthermore, it is also assertable that these governmental bodies are not incompatible in a system where the right to health is justiciable and enforceable, and they could perfectly operate together in a collaborative manner to improve the healthcare system.

In short, the inclusion in the healthcare system of an independent body that hears health cases could make it more effective, since it could be more adjusted to the actual population's demand.

- Why justiciability of the right to health makes the healthcare system more stable

Since the courts are permanent professional bodies and do not depend on the possible personal changes in the government, this could also provide more stability to the healthcare systems. In addition to having the solid reference of the constitutional texts, the politicians shall respect the health-related jurisprudence as another factor of stability. However, as distinct from the judicial precedent regarding the rest of the legal issues, I advocate that in this matter the jurisprudence should not be formed exclusively by the tribunals: these must let the Government experts advise them, working both powers together. In this way, the jurisprudence would be gradually built with attention to the up-to-date achievements reached and to the present trends of national and international law, always respecting the limitations of the budgetary resources. Leaving this task in its entirety to the courts would not be a good idea given that the healthcare system is financed by the Government and it is the main supplier of the public health services.

Therefore, even though the process of restructuring the healthcare system would be a dynamic one, it would also have new consistent guidelines to respect in the future, which would be invariable – at least to a certain extent – to the changes that could be in the government structure.

III. From the Theory to the Real World

We have seen why in the ideal model above the justiciability of the right to health could make the system more legitimate, more effective and more stable. However this is just, in effect, a theoretical model that may or may not be applied in the future, but that anyway it is far distant from the way some countries are incipiently redesigning healthcare systems by allowing courts to intervene. In analyzing the future perspective of these countries regarding their healthcare methods, it is necessary to point out its possible dangers and be cautious about certain issues. These dangers are related with the deviation of some principles that I put forward in the previous section. For the purpose of indicating those possible dangers, I shall mention what I consider the two most important suggestions that I can think of to avoid undesired situations, as the ones we will see below. However, due to constraints of space, other proposals and countries' situations I would like analyze shall not be addressed in this work.

- The judiciary and the political branch should tend to work jointly

The optimal – and maybe the only long-term feasible – way to improve the healthcare systems is in the case that both the political branches and the adjudicating bodies work together. If not, there would be sooner or later inevitable conflicts between the different democratic powers that could seriously harm the democratic system. For instance, in the event that the judiciary prevails over the legislator, it could be hardly criticized and accused it of being an authoritarian institution and upset the balance of democracy. Thus accepting justiciability should not be about a fight between the state branches, which must maintain the balance

This idea is similar to what has been referred to as 'dialogic activism', which is defined as "an intermediate path between judicial restraint and juristocracy,"[3] which not only enforces SER, including the right to health, but also promotes deliberation on relevant public issues.[4] An example[5] of this doctrine is the renowned case *Government of the Republic of South Africa v. Grootboom (2000)* of the SACC,[6] which is considered to be known and does not

[3] Rodríguez-Garavito, at 1688.
[4] Id.
[5] Id.
[6] Constitutional Court of South Africa, *Government of the Republic of South Africa v. Grootboom*, Case CCT 11/00 (4 October 2000).

need further explanation. Some authors rely on the effects of some relevant Colombian cases to support this thesis, but state that an analysis of further case law is still needed to prove this unequivocally.[7] Such analysis is clearly applicable to this work and fits in with what has been defended. Following the theory developed in the previous section we should repeat that a cooperated work between judiciary and the other powers will show more positive results than unidirectional or 'monologic' systems.

As a result of what said above, I should cast doubt on the legitimacy and long-term effectiveness of the Indian PIL movement, which according to this analysis could be labeled as authoritarian because has been 'less cautious' as to the separation of powers in the some famous cases.[8] However, it seems that in recent cases it tended to adjudicate rights in a more 'dialogic' approach,[9] which would be certainly wiser if this trends continues. Some authors condemn the Brazilian situation, where the BSFC completely disregarded the provisions of the Brazilian Constitution,[10] exceeding its authority. In the opinion of these authors, lead to a more unequal and undemocratic healthcare system and even claim that the justiciability of the right to health should be prohibited in order to protect the poor.[11]

In a nutshell, this guideline would avoid illegitimate forms of judicial activism in which the courts dominate the executive and legislative branches.

- Expressly enshrine the right to health as a not absolute right.

The issue of the so-called 'minimum core' is too vast to be addressed in this work properly. It is sufficient to mention here that in the case that courts define the right to health as an absolute right this could cause terrible inequalities and provoke the corruption of the healthcare system. For instance, the BSFT enshrined the right to health as an absolute

[7] Rodríguez-Garavito, at 1693-5 (where the results of three CCC cases are compared on the basis of its impact on the fulfillment of SER).
[8] See Sellin, at 463.
[9] Abhinav Chandrachud.
[10] Motta at 1654.
[11] Motta, at 1658. Da Silva and Vargas, at 848.

right[12] which resulted in the fact that many of the healthcare-related lawsuits came from wealthy people, and given the conditions of the poorest citizens, they could not even afford to access the courts. Since the right to health is "absolute" under this jurisprudence, any claim could succeed, which could distort tremendously any healthcare system with permits the justiciability of SER and would violate the principle of coordination between the different state branches as it has been addressed in the previous point.

This is something systems should clearly avoid. As many authors state that legislators and constitution makers should define SER's neither in a too broadly nor too specifically,[13] but what has to be clear is that the right to health cannot be an absolute right.

IV. Conclusion

It is not possible to know how the health claims would affect the healthcare systems, due to the complexity of this question and given that the diverse circumstances of each country could lead them to totally different paths. However, it is possible to imagine the archetypal healthcare system, draw conclusions from it and try to apply it to the recent case law to see whether the different countries approach to that model and determine what should be the correct way to solve their issues.

In conclusion, the amelioration of the healthcare systems is a logical consequence of admitting the theoretical model proposed in this work. Nevertheless, if the deviation in the practice of this model could be harmful to a great number of citizens and could originate situations of illegitimacy and inequality.

[12] Motta, at 1659. In his work, he explains that this policy has contributed that most of the health-related lawsuits filed

[13] Steiner and others, at 353, *citing* Cécile Fabre, *Social Rights in European Constitution*, G. de Búrca and B. de Witte (eds.), Social Rights in Europe (2005).

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