

Advancing a Human Rights-Based Approach to Access to Medicines: Lessons Learned from the Constitutional Court of Peru

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Abstract

Access to medicines and the right to health continues to be widely discussed in academic literature. United Nations human rights bodies have done much work to elaborate on the normative content of the right to health and the obligations of states to uphold this right, although translating this into tangible benefits to the public at national level remains a challenge. This paper explores the case of Peru to evaluate prominent decisions of the Constitutional Court that have been instructive in clarifying the state's obligations in relation to health. I argue that the court's rights-based approach offers lessons that other states can draw on to meet their obligations to ensure the right to health by securing access to essential medicines.

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Introduction

The close link between the right to health in article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and access to medicines is widely acknowledged in academic literature. United Nations human rights bodies have produced guidance on the normative content of the right and the obligations of states, establishing that access to essential medicines is a core component of the right to health.¹ It is clear that states have human rights obligations with regard to access to medicines, although the access to medicines agenda is less precise with regard to how this should translate into national law. The obligations of states to progressively realize the right to health raises the question of how this right might be realized for patients struggling to access—or being denied access to—medicines. Exploring a rights-based approach to securing access to medicines at the national level can provide greater understanding to states seeking to meet their international human rights obligations to ensure the right to health, including access to essential medicines. In addition to their obligations under the ICESCR, states have committed to the 2030 Agenda for Sustainable Development, which includes achieving the goal of healthy lives.² Providing access to essential medicines is central to this goal.

This paper explores right to health litigation in Peru and evaluates the extent to which the Peruvian state has complied with its human rights obligations in relation to the right to health and access to medicines. Peru has adopted a range of measures to give effect to the right to health at the national level, including by enshrining the right to health in its Constitution.³ By examining several prominent decisions of the Constitutional Court concerning the right to health, this paper reflects on whether Peru offers examples of good practice that other states can model in meeting their obligations to ensure the right to health by securing access to essential medicines.

Background

Peru is a lower-middle-income South American country with a population of approximately 33

million.⁴ The country has established democratic institutions, although in recent years the democratic process has been undermined by several high-profile corruption allegations.⁵ Health expenditure was 5.2% of the gross domestic product in 2018, which was among the lowest in Latin America, and 29.15% of health expenditures were out-of-pocket expenditures.⁶ Life expectancy in Peru is 76 years, one of the highest in Latin America, and the country's Human Development Index score is 0.777 (79th in the world), which increased from 0.613 in 1990, reflecting improvements in overall standards of living, including health.⁷

Peru ratified the ICESCR in 1978 and therefore has international obligations to realize the right to health as enshrined in article 12. Peru's health system is segmented, with the Ministry of Health providing health services for approximately 60% of the population, and EsSalud (the social security system) serving approximately 30% of the population.⁸ The military and police have their own health services, which, together with private sector entities, provide health services to the remaining population.⁹ This fragmented system has led to some inefficiencies in the provision of health care and to the inequitable distribution of services in remote regions.¹⁰

Since the turn of the century, the state has been making efforts to expand health coverage, including by introducing comprehensive health insurance and mandatory health insurance coverage for the population.¹¹ However, problems still exist in relation to the quality of services, as well as access to health care for the country's significant Indigenous population.¹² Moreover, problems in the provision of health care services is a key barrier to access to medicines for many people in the country; although there are publicly funded health services and health insurance coverage available, underfunding has led to many patients purchasing medicines themselves.¹³

National constitutional measures affecting access to medicines

The Constitution of Peru and its interpretation by

the Constitutional Court provides an important example of the state's political commitment to enhancing access to medicines and its engagement in measures to promote this.¹⁴ The current Constitution came into force in 1993 and sets out the rights and duties of citizens. The right to the protection of health is recognized in article 7, which states:

*Everyone has the right to protection of his health, his family environment, and his community, just as it is his duty to contribute to their development and defense. Any individual unable to care for himself due to physical or mental disability has the right to respect for his dignity and to a regime of protection, care, rehabilitation, and security.*¹⁵

A literal interpretation of this provision indicates that the right does not amount to a right to good health but a right to achieve the highest level of health possible and to have access to the appropriate services to do so. This is comparable with the guidance on the normative content of article 12 of the ICESCR, set out in General Comment 14, indicating that the Peruvian state has understood the nature and content of the right to health under the ICESCR and has reflected such an understanding in its Constitution.¹⁶ Therefore, the national right to health is in line with international standards. Article 9 of the Constitution provides that the state is responsible for determining national health policy to provide equal access to all health services, and article 11 provides that free access to health benefits is guaranteed by the state through public, private, or mixed entities.¹⁷ These articles do not explicitly include a reference to medicines, although they do refer to health services, which include the provision of medicines.

The state has constitutional obligations to ensure that the right to health of the population is fulfilled. María Sánchez-Moreno argues that the rights within the Constitution have not been embedded into public practices and that due to the unstable political landscape of the state, the Constitution does not occupy a stable and authoritative position.¹⁸ Meanwhile, Clara Sandoval and Carlos F. Cáceres argue that the right to health is treated as a national aspiration rather than an entitlement

that can be enforced vis-à-vis the state.¹⁹ The right to health is contained not in the first chapter (on fundamental rights) but in the second chapter (on social and economic rights), which highlights that the status of the right to health within the Constitution does not amount to a fundamental right.²⁰ Therefore, this suggests that this principle is not legally enforceable but is instead a directive principle of state policy. However, the manner in which these provisions have been interpreted by the national courts provides authoritative guidance on the status of the right to health, including access to medicines, in the country. The Constitutional Court has a duty to hear writs of unconstitutionality.²¹ Several key decisions of this court in relation to the right to health have been instructive in clarifying the state's constitutional obligations concerning the health of the population.

*Azanca Alhelí Meza García*²²

In *Azanca Alhelí Meza García*, the Constitutional Court considered whether the state had an obligation under articles 7 and 9 of the Constitution to provide comprehensive medical care for the protection of health.²³ The case involved a patient diagnosed with HIV in 1996 who argued that since being diagnosed, she had not received comprehensive medical care, including medicines. She could not afford the necessary medicines for her treatment and sought protection of her constitutional rights to life and health, claiming that the Ministry of Health was obligated to provide comprehensive medical care—including a permanent supply of antiretroviral medicines—in accordance with article 7. The Ministry of Health, in its defense, argued that the right to health is a social right that is programmatic in nature, representing only an action plan of the state rather than a concrete right, and that the petitioner did not fall within the category of patients eligible to receive comprehensive medical treatment for HIV/AIDS under national health policy.²⁴

The significance of this case lies in the court's discussion of the nature of social rights and its evaluation of the reasonableness of the state's measures

to maximize available resources.²⁵ The Constitutional Court took the approach of protecting the right to health by way of its connection to the fundamental right to life. In reaching its decision, the court stated that although the right to health is not a fundamental right, when the violation of the right to health compromises other fundamental rights, such as the right to life, it acquires the character of a fundamental right.²⁶ The court stated that the right to health has an inseparable relationship with the right to life and that the state must protect this right by strengthening health services; moreover, it noted that the right to health as enshrined in article 7 includes medical assistance to the level allowed by public resources.²⁷ Therefore, the court accepted that treating life-limiting or serious diseases such as HIV and AIDS, including through the provision of antiretroviral drugs, is an example of the situations where it will consider that an infringement of the non-fundamental right to health provides an indicator that a fundamental right has been breached.

The court also set out the parameters of the state's obligations under the right to health. It emphasized that the economic and social rights included in the Constitution are not to be considered merely a declaration of good intentions but rather a commitment to clear and realistic goals.²⁸ Therefore, although the right to health, including access to medicines, is not enforceable as a fundamental right under the Constitution, it is not enough to treat it as a mere aspiration—the state must set genuine and achievable objectives for the fulfillment of this right. This is consistent with states' obligations under international law; although social rights are to be progressively realized, states are required to take concrete and quantifiable steps to implement public policies that ensure their realization.²⁹ The court explained that social and economic rights are how individuals can achieve full self-determination and that the realization of socioeconomic rights and civil and political rights are interrelated and interdependent.³⁰ Therefore, the court noted, the state must establish basic public services as a minimum of action.³¹ Further, social rights must be interpreted as genuine claims of the citizen against

the state if the legal effectiveness of the constitutional mandates, and therefore the validity of the Constitution, is to be recognized.³²

The court went further to illustrate how courts should implement social rights, explaining that a judicial claim of a social right will depend on the “severity and reasonableness of the case, its link or effects on other rights, and the available state budget, provided that concrete actions can be proven for the implementation of social policies.”³³ The court recognized that social rights cannot be demanded in the same way in all cases due to budget constraints. It recognized the difficulty of Peru—as a developing country—enacting immediate policies for the benefit of the whole population, given that social rights depend on the means and resources available to the state.³⁴ However, it also noted that this is a valid justification only when the state takes positive actions to fulfill these rights as much as possible and that prolonged inaction cannot be justified and would result in a constitutional omission.³⁵

The Constitutional Court recommended that the state take tangible, concrete actions to achieve the petitioner's right to health and ordered that the petitioner be considered part of the group of patients receiving comprehensive HIV/AIDS treatment, including essential medicines. It also required that the treating hospital report back every six months on the petitioner's treatment.³⁶ Following this ruling, Peru adjusted its public health spending.³⁷ In addition, in 2004, the state obtained financial support to scale up the provision of free antiretroviral medicines for those who need them.³⁸ Illari Noriega argues that *Azanca* is a significant ruling because the court protected the right to health by linking it to other fundamental rights and, in doing so, established an important precedent for the legal protection of the right to health.³⁹ The decision also clarified that the right to health includes the provision of essential medicines, meaning that it opened the door for the legal enforceability of access to essential medicines as part of the constitutional right to health.

*RJSA Vda. de R.*⁴⁰

In *RJSA Vda. de R.*, the parent of a patient diagnosed with paranoid schizophrenia filed an *amparo* lawsuit against EsSalud, Peru's social security program, requesting that an order for the patient's discharge from the hospital be canceled because the patient was not sufficiently recovered to leave hospital care. EsSalud argued that the medical criteria for discharge had been met. The petitioner's claim related to the protection of the mental health of her daughter. In its ruling, the court stated that the constitutional right to health does not amount to a right to be healthy but does guarantee access to adequate, quality health services to the extent that public resources allow.⁴¹ This interpretation is consistent with the court's interpretation in *Azanca*. Furthermore, as in *Azanca*, the court highlighted that the right to health deserved protection because of its intrinsic connection with the right to life in the situation at hand.⁴² It is important to appreciate that the right to life is distinct from a patient's quality of life, which, although important to the patient, is a subjective standard of well-being and cannot be described as a fundamental right. Therefore, since the right to health is not interpreted as fundamental in Peru, it can be protected only in specific cases that have a strong right to life element, underlining the fragility of the protection of the right to health determined by the court.

A notable outcome of this case is how the court evolved its assessment of the enforceability of social rights to a three-step test. The court stated that enforceability depends on three factors: the seriousness and reasonableness of the case; its connection with other fundamental rights; and budget availability.⁴³ This suggests that there are qualifications to the framing of the right to health as a fundamental right and that the seriousness of each particular case would have to be demonstrated in order to be able to enforce the right to health. This test stemmed from the *Azanca* case, outlined above.

Felipe Florian is critical of this approach, arguing that there are ambiguities regarding the determination of how social rights can be claimed in judicial proceedings.⁴⁴ Florian argues that

challenges could arise where there is no specific protection of a social right, or where such a right has not been recognized in any budget.⁴⁵ These cases did not elaborate on how this test should be applied, and the court in *RJSA* also did not elaborate on its reasoning for adopting the factors set out in *Azanca* as a legal test.⁴⁶ Therefore, it could be said that the Constitutional Court has not addressed all of the issues that could arise when applying this test. However, these cases do show that the court has taken positive steps toward embracing more comprehensive protection of health challenges, including those relating to access to medicines and cases where vulnerable individuals are affected.

In addition to outlining the state's responsibilities under the right to health, the court's *RJSA* ruling undertook an evaluation of state actions to maximize available resources. It noted that Ministry of Health Resolution 0943-2006-MINSA identifies people's limited access to health services and medicines as one of the main problems affecting mental health care.⁴⁷ The court stated that the Ministry of Health should consider an expansion to the free delivery of medicines to ensure equitable access to medicines, while taking into account the state's limited resources.⁴⁸ It also stated that the Ministry of Health must develop a policy that ensures access to affordable medicines for low-income individuals, as well as sufficient regulation of medicines to guarantee effective and quality medicines.⁴⁹ The court's assessment that the delivery of medicines should be a priority in the national budget provides an example of how the court applied the third factor of the enforceability test outlined above—budget availability—in relation to medicines.

The outcome of *RJSA* was that the patient was granted indefinite medical care, including the provision of necessary medication for the treatment of her mental health condition. This is a significant decision, as the patient's constitutional right to health was enforced against the state, requiring the state to take positive measures to fulfill its obligations to her. Also, the court held that the patient, as part of her constitutional right to health, had a right to access medicines necessary to her care. Her medication, clozapine, was not on the World

Health Organization's essential medicines list in 2007 (although it has since been added), and so it did not fall within the definition of an "essential" medicine outlined in General Comment 14.⁵⁰ Therefore, in this case the state was not precluded from citing progressive realization as justification for not providing the medication necessary to the patient.⁵¹ The court's interpretation of the principle of progressive realization acknowledged that the state may experience difficulties due to resource availability but that this justification is acceptable only where the state can demonstrate ongoing and concrete actions to fulfill the patient's rights. The court's interpretation assists our understanding of states' duties in relation to progressive realization, although the issue of resource constraints, particularly in relation to medicines that are high priced, means it is conceivable to make such assessments in individual cases but less certain whether this would increase or decrease equality of access on a collective basis.

Although the wider impacts of this decision are less clear, the decision provides helpful insights on the enforceability of the right to health as a social right. It also demonstrates the tangible patient-level benefits of Peru's approach to interpreting the right to health. The decision resulted in the necessary medicines being secured for the patient's care, and the test for enforceability of a social right applied by the court was therefore effective in enhancing access to medicines. Therefore, this test could be a useful tool for courts in other jurisdictions to utilize when adjudicating on access to medicines and the competing obligations of the state with regard to the right to health.

Other related decisions of the Constitutional Court

Subsequent cases of the Constitutional Court have also emphasized the significance of the link between the right to health and other fundamental rights. In *Teofanes Ronquillo Cornelio*, where the appellant was not transferred to the favored hospital to receive the optimum treatment for his diagnosed condition, the court referred to *Azanca*, highlighting that

the right to health is inseparable from the right to life and is thus a fundamental right.⁵² The court also held that the state has a duty to guarantee the right to health, including by taking positive actions to promote the right.⁵³ This position was also stated in *Carlos Gonzales La Torre*, a case where—although relating to the hospitalization of a prisoner and not presenting a direct right to life or right to health issue—the court outlined that the right to health is necessary for the exercise of the right to life and has an inherent connection to the right to life, right to personal integrity, and other fundamental rights.⁵⁴ These decisions emphasize the importance of the right to health in terms of fulfilling the right to life and indicate that the close connection between the two rights elevates the right to health to the status of a fundamental right. This interpretation is also consistent with the *Azanca* ruling, suggesting that a body of jurisprudence on this issue has emerged in relation to the content of the state's obligations regarding the constitutional right to health.⁵⁵ This indicates that citizens can enforce their right to health against the state in circumstances where they can show that there is a risk to their right to life if their right to health is not fulfilled.

The Constitutional Court has sought to ensure the close alignment of national constitutional rights with international human rights norms in cases involving human rights arguments. This has been observed by the Committee on Economic, Social and Cultural Rights, which has noted that Peru has "made huge advances in the constitutional interpretation of human rights."⁵⁶ The committee's concluding observations from 2012 note that the Constitutional Court has issued several innovative judgements enriching constitutional law and recognizing that international human rights treaties are of immediate application.⁵⁷ The concluding observations further note that the Constitutional Court has on several occasions applied an expanded interpretation of the right to health set out in General Comment 14.⁵⁸ This is evident in several of the cases discussed above, and it highlights that the Constitutional Court is engaging with the guidance of United Nations human rights bodies on the state's obligation in relation to the right to health,

including access to medicines.

Implications for health care systems

The above cases raise the question of whether health rights litigation upholding the right to medicines leads to more fairness in access. As noted above, Peru's expenditure on health is low compared to other Latin American countries, and there are concerns over inequitable health provision for the poor. An individual approach to access to essential medicines, such as antiretrovirals in the *Azanca* case, is inadequate where others who also have the same right to those medicines continue to face barriers to access.⁵⁹ Thus, while the cases have produced some success in relation to access to medicines, their wider impact in terms of inducing health policy changes to enhance accessibility for the population in general is less evident. This presents the question of whether collective action would be more effective in ensuring equitable access to essential medicines, as it would help overcome inequality for those who cannot afford to litigate. The effect of collective lawsuits in other Latin American jurisdictions has produced some success, although it has not been without problems. For example, such actions in Argentina have had a limited impact on changing systemic problems in medicines access, while in Costa Rica the most successful cases have concerned low-priority, non-essential medicines.⁶⁰ Meanwhile, collective action in Colombia has led to problems relating to the availability of medicines, cost burdens on the health system, and priority setting.⁶¹

It cannot be said conclusively that collective action is more effective than individual action, although it is important to recognize that not all courts are the same, and single case studies cannot produce concrete conclusions for all.⁶² The judicialization of health rights in Latin America has opened health policy decision-making to public scrutiny and stimulated public debate on health care.⁶³ However, judicialization can also have a disruptive impact on health systems, including on which medicines are available and accessible.⁶⁴ A related concern is the additional pressure generated

on national health care systems if access to medicines is awarded regardless of the cost.⁶⁵ Increased burdens on health budgets could have a detrimental impact on the provision of other health services, which could also undermine health equity.

It must be appreciated that the courts can go only so far before impinging on public policy decisions regarding health and the principle of separation of powers. However, Amy Kapczynski argues that judicial decisions upholding the right to health and granting access to medicines have had important indirect effects, including the triggering of responses from other government departments that have improved health care systems, such as stronger price control measures.⁶⁶ Such litigation can also promote a dialogic approach between the courts and the government on finding solutions to the issue of protecting human rights in cases of limited state resources, as seen in *Azanca*, where the Peruvian Constitutional Court invited the government to consider utilizing tools such as compulsory licensing.⁶⁷

Peru's Constitutional Court has contributed useful jurisprudence in relation to the enforceability of the right to health, and the test outlined in *Azanca* and developed in *RJSA* offers a framework to evaluate the country's measures to protect the right to health in line with its national and international obligations.⁶⁸ The court's approach reflects the value of using a human rights framework to enhance access to medicines, and it could be a useful example for other states that are seeking to meet their human rights obligations under article 12 of the ICESCR.

Conclusion

The jurisprudence of the Peruvian Constitutional Court shows that the court is taking full account of the right to health under the Constitution in cases relating to access to medicines and that its interpretation of the right is in line with the state's obligations under article 12 of the ICESCR. The value of a human rights approach is evident in the cases discussed in this paper, as it strengthened individual patients' access to medicines. However, it

is less clear whether the judicialization of the right to health in Peru has improved health outcomes for the wider population. It is thus difficult to assess whether the inclusion of the right to health in the Constitution has strengthened the country's protection of the right to health. That said, some have argued that the constitutionalization of the right to health in Latin American countries provides an avenue for citizens to enforce their rights at the national level and therefore offers an important motivation for states to comply with their obligations.⁶⁹

These key decisions in Peru have been instructive in clarifying the state's obligations in relation to the right to health, as well as navigating challenges such as resource constraints. Strengthening health provision is connected to resources, and the decisions make clear that the Constitutional Court acknowledges the progressive nature of health as a social right. However, the court has also explained that the state must take immediate and concrete steps to realize the right. The three-part test developed in *Azanca* provides an example of good practice that can be used by other states. This test can be applied to evaluate states' actions to progressively realize the right to health. It also provides flexibility in terms of enforcing a social right to help patients requiring access to medicines, while also taking into account the arguments relating to resource constraints. While this approach will not resolve all of the challenges arising from a highly complex issue, it could be a potentially useful tool to consider as part of the continually evolving discourse on how states' obligations in relation to access to medicines can be effectively upheld.

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