

Access to essential medicines in national constitutions

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Access to essential medicines is well founded in international law as part of the right to the highest attainable standard of health (“the right to health”). The International Covenant on Economic, Social and Cultural Rights adopted in 1966 calls for States Parties to take steps to ensure access to medical services for all. General Comment 14, added in the year 2000, applies the principles of accessibility, availability, appropriateness and assured quality to goods and services, including essential medicines as defined by the World Health Organization’s (WHO’s) Action Programme on Essential Drugs.

One important success factor for the legal enforcement of access to essential medicines is the incorporation of right-to-health principles into national constitutions. In one study, in 11 out of 12 middle-income countries in which successful court cases in support of access took place there was supportive constitutional language and, in the twelfth country, international treaties ratified by the State acquire the status of national law. Constitutional recognition of the right to access to medical products and technologies has therefore become a country progress indicator in WHO's Medium-term strategic plan for 2008–2013. WHO recently published a first baseline study for this indicator, including a database and analysis of all health-related texts in national constitutions.

The study reports that 135 (73%) of 186 national constitutions include provisions on health or the right to health. Of these, 95 (51%) constitutions mention the right to access health facilities, goods and services, 62 (45%) include in-text reference to equity and non-discrimination and 111 (82%) include one or more article(s) mandating the right to be treated equally or freedom from discrimination.

Four national constitutions (2%) specifically mention universal access to medicines. In Mexico, “(women) are entitled to medical and obstetrical attention, medicines, nursing aid and infant care services. Members of a worker's family shall be entitled to medical attention and medicines, in those cases and in the proportions specified by law”. In Panama, “the State is primarily obligated to (...) supply medicines to all the people”. In the Philippines, “the State shall (...) endeavour to make essential goods, health and other social services available to all people at affordable cost”. In the Syrian Arab Republic, “the State protects the citizens’ health and provides them with the means of protection, treatment and medication”.

Some constitutions, such as those of Cuba, Nicaragua and South Africa, use very clear text to describe access to health care, goods and services in more general terms, using words like “without

exclusions”, “everyone” and “all citizens regardless of ...”. Some texts focus on poor and disadvantaged groups, e.g. those of Nicaragua, the Philippines and Viet Nam. The constitutions of Ecuador and Panama specify that national medicine policies shall be established and implemented to achieve the constitutional obligations.

There are at least three different routes through which the right to health can be recognized in national legal frameworks. The strongest government commitment is created by including the right to essential goods and services in the national constitution. The second approach is constitutional recognition that international treaties ratified by the State override or acquire the status of national law. This option is available to 31 countries and was already used in a landmark court decision in Argentina. The third option, inclusion of health rights in other national legislation, is easier to create but also easier to change or cancel. This is the subject of another study currently under way.

The full range of strategies to promote universal access to essential medicines through rational selection, affordable prices, sustainable financing and reliable health systems is described in many other documents. Constitutional recognition of the right to access essential medicines is an important sign of national values and commitment, but is neither a guarantee nor an essential step – as shown by those countries that have failing health systems despite good constitutional language, and those that have good access without it. Yet the many court cases in the Americas have shown that constitutional recognition creates an important supportive environment, especially in middle-income countries where health insurance systems are being created and patients are becoming more aware of their rights and are more vocal in demanding them. More recent constitutional texts seem to include stronger commitments, possibly reflecting the positive influence of the global development of the right to health in the past 50 years.

Political opportunities to update a country’s constitution present a chance to align national values and aspirations with international human rights standards. The new constitutional texts should then consider key human rights principles, and specifically the right to health and equitable access to essential medical goods and services. Constitutional frameworks can thus become valuable aspirational statements on which to base other legislation and policies. The examples identified in the recent WHO study could serve as a model.