

**JUDICIALIZATION FOR SUPPLY OF THE
DRUG TACROLIMUS TO PATIENTS WITH
LUPUS BY THE BRAZILIAN STATE****OLÍVIA DANIELLE
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Tacrolimus. Lupus. Right to life.

ABSTRACT

The aim of this article is to analyze the (un)necessity of judicializing the supply of the drug Tacrolimus to patients with Lupus, who have the constitution alright to full health, just like any other citizen. Medical studies indicate the use of Tacrolimus in cases where conventional treatments are no longer effective, especially when Lupus causes kidney impairment. Despite its proven efficacy and the drug's registration with the National Health Surveillance Agency (ANVISA), Tacrolimus is not standardized by the Unified Health System (SUS) for the treatment of the disease, constituting an obstacle to access. This scenario forces patients to go to court to obtain the drug, which can delay the start of treatment, worsening the clinical condition and leading, in some cases, to the loss of kidney function. The 1988 Federal Constitution guarantees the right to life as the primary basis for the exercise of all other rights. Therefore, it is argued that the supply of Tacrolimus should be guaranteed immediately by the State, eliminating the need for legal action, especially for patients with kidney complications associated with Lupus, thus ensuring the right to life in its entirety.

I. INTRODUCTION

This article aims to analyze, in an accessible way and without pretending to exhaust the subject, access to the supply of the drug Tacrolimus for patients with lupus nephritis and the state's responsibility to ensure the right to health, in accordance with legal and constitutional precepts, without the need to go to court to guarantee access to adequate treatment, since the state is aware of the effectiveness of the use of medication for the most advanced stage of the disease.

Lupus nephritis, a renal manifestation of systemic lupus erythematosus (SLE), is a serious autoimmune condition that mainly affects the kidneys and can lead to irreversible renal failure, requiring highly complex treatments. It is a clinical condition resulting from the progression of lupus.

The treatment of lupus nephritis presents significant challenges, especially when conventional therapies do not show sufficient efficacy. Tacrolimus, although not formally approved for this condition, has been shown to be effective in several clinical studies and in medical practice, and is therefore prescribed off-label.

However, the supply of medicines outside the formal package leaflet indications faces substantial barriers in the Brazilian public health system. In the context of chronic lupus nephritis, patients can be victims of the state's refusal to supply Tacrolimus, even in the face of a clear medical recommendation.

This scenario not only puts the patient's health at risk, but also raises crucial questions about the fundamental rights to life and health guaranteed by the 1988 Federal Constitution. The refusal to provide the medicine needed for adequate treatment goes against the principles constitutional guarantees of the right to universal health care and the state's responsibility to provide medical care.

Health is an essential right for the exercise of other rights, and the lack of access to adequate and timely treatment directly affects the quality of life of the population, especially patients with complex diseases such as lupus.

Refusing to supply Tacrolimus can result in serious consequences, such as progression to kidney failure, requiring hemodialysis or a kidney transplant, and putting the patient's life at risk. These outcomes, often avoidable with the right treatment, can result in irreversible damage and, in more serious cases, early death.

The right to health in Brazil is constantly debated, mainly due to the precariousness of the public health system, which often does not offer the necessary resources to guarantee adequate treatment.

The lack of medicines and efficient health services highlights the inequality in access to health, affecting the most vulnerable population. The refusal to supply essential medicines, such as Tacrolimus, reflects the failure of the public health system to fulfill its obligation to guarantee the necessary assistance and respect for citizens' fundamental rights.

Brief Considerations on Lupus Disease

Lupus is a chronic autoimmune disease in which the patient's immune system mistakenly attacks the body's own healthy tissues, resulting in inflammation and damage to various organs. Among the organs most affected are the kidneys and skin. It is important to note that lupus is not a contagious disease.

Because it is chronic and has no cure, Lupus requires continuous treatment to control the disease and allow the patient to lead a healthy life, as long as specific care is taken. The medical literature classifies systemic lupus erythematosus as a multisystem, autoimmune disease, which affects several organs and systems of the body and up to 50% of patients with the disease may develop renal impairment.

In the event of renal inflammation in patients with Lupus, the medical literature defines this condition as lupus nephritis in the following terms:

Lupus Nephritis (LN) is a severe manifestation of Systemic Lupus Erythematosus (SLE), a prototype autoimmune disease in which autoantibodies mark the tissues themselves and cause an inflammatory response to form against the organs themselves, including the kidneys. It can affect more than 60% of patients with this diagnosis. It encompasses various patterns of renal involvement, including glomerular, vascular and tubulointerstitial pathology (IMRANetal.,2016). NL is more frequent and severe in young patients when compared to adults, causing greater morbidity and mortality (PINHEIROetal, 2018;PARIKHetal.,2020).

NL causes an inflammatory process in the kidneys, destroying nephrons and impairing the ability of the renal system to properly remove slags from the blood, protect against the loss of important proteins, maintain the correct amount of body fluids, systemic blood pressure, regulate the hormone levels of the renin-angiotensin- aldosterone system, adjust the production of vitamin D and erythropoietin.

Although lupus and its kidney complications, such as lupus nephritis, are considered rare diseases, the situation has gained some visibility with the approval of Law No. 14,624/20234 which amends the Statute for People with Disabilities5 (Law No. 13,146/2015 and institutes the use of a ribbon with sunflower designs to identify people with hidden disabilities, with lúpus also being considered a hidden disease.

On October 31, 2024, the Social Affairs Committee of the Federal Senate, together with health professionals and patients, held a meeting to discuss proposals currently before the Senate aimed at granting benefits to patients with Lupus. This meeting highlights the growing concern about the insufficient conditions of care in the Unified Health System (SUS), which often fail to offer adequate support for the treatment of the disease.

Recognizing the seriousness of lupus and lupus nephritis, especially when not treated effectively, requires more effective action from the state. Lupus patients need continuous and specialized care to prevent the disease from progressing to its most aggressive forms, which can lead to loss of kidney function and, in extreme cases, death.

It is therefore imperative that the state commits itself to public policies that guarantee adequate treatment and the necessary support to improve patients' quality of life.

Right to Life

Life begins when a human being is conceived, marking the start of continuous protection that extends from pregnancy to the natural end of existence. With the discovery of pregnancy comes the need for comprehensive care for the pregnant woman and her baby, emphasizing the importance of health and well-being as fundamental pillars for full human development.

At birth, the individual acquires a series of rights guaranteed by legislation, the most essential of which is the right to life. This is the foundation for the exercise of all other rights, because without life, there is no way to enjoy the other guarantees provided for in the legal system.

The Federal Constitution of 1988 guarantees the inviolability of the right to life in the caput of Article 5, which proclaims:

Art. 5 All are equal before the law, without distinction of any kind, and Brazilians and foreigners residing in the country are guaranteed the inviolability of the right to life, liberty, equality, security and property, under the following terms: (...)

In a complementary way, the Brazilian Civil Code (Law No. 10.406/2002)⁹ also protects the right to life, including safeguarding the rights of the unborn: "Art. 2 The civil personality of the person begins from birth with life; but the law safeguards, from conception, the rights of the unborn."

In this context, Rothenburg¹⁰ points out that:

Consequently, the right to life is projected onto society as a whole, giving rise to legal duties arising from the right to life: respect for life (duty to abstain), protection of life (duty to protect) and promotion of life (ensuring adequate conditions) - which is a positive projection of the right to life. It is up to everyone - and the state in particular - to adopt measures that ensure the right to life, such as those related to traffic safety and environmental precaution and prevention.

This protection demonstrates the legal recognition of life from the uterine stage until death, consolidating the right to life as an absolute and inviolable value, which allows citizens to enjoy other rights guaranteed to them.

Right to Health

The 1988 Federal Constitution¹¹ guarantees all citizens the full right to health, in the following terms:

Art. 6 Social rights are education, health, food, work, housing, transportation, leisure, security, social security, maternity and childhood protection, and assistance to the helpless, in the form of this Constitution.

Art. 196. Health is everyone's right and the duty of the State, guaranteed through social and economic policies aimed at reducing the risk of disease and other illnesses and universal and equal access to actions and services for its promotion, protection and recovery.

Art. 197. Health actions and services are of public relevance, and it is up to the Public Power to decide, under the terms of the law, on their regulation, supervision and control, and their execution must be carried out directly or through third parties and also by individuals or legal entities governed by private law.

Art. 198. Public health actions and services are part of a regionalized and hierarchical network and constitute a single system, organized according to the following guidelines:

In line with the Federal Constitution, the Organic Law of the Federal District¹², in art. 204¹³, for example, reaffirms the right to health, including the guarantee of the supply of medicines, both low-cost and high-cost, necessary for the recovery of the citizen's health and to prevent the evolution of the disease to irreversible stages.

The Brazilian government has public policies aimed at providing high-cost drugs for chronic and rare diseases, including lupus, through the Unified Health System (SUS). These policies are based on Ordinance No. 1555/2013, which establishes the National Policy of Medicines, and the 1988 Federal Constitution, which guarantees the right to health as a duty of the State.

However, despite the existence of these mechanisms, there are significant gaps in the inclusion of innovative drugs, such as Tacrolimus, for the treatment of Lupus, especially in cases with renal impairment, which highlights the need to improve the implementation of these policies to ensure comprehensive care and universal access to appropriate treatments.

The Principle of Human Dignity

The principle of the dignity of the human person is widely acclaimed, both in the Brazilian legal system and in the international legal system, so that its claim is not restricted to legal operators,

but to society as a whole. This principle reinforces the need for the state to provide conditions for citizens so that they can have at least the minimum dignity to lead their lives, reinforcing the premises of the Democratic Rule of Law.

In the Federal Constitution of the Federative Republic of Brazil, i.e. in the Magna Carta of 1988¹⁶, the principle of the dignity of the human person is presented in art. 1, item III, not restricted to a merely moral value, but which brings spiritual comfort to the citizen.

The Universal Declaration of Human Rights also contains this principle in Article 1: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." These are fundamental rights guaranteed to citizens so that respect for the life, freedom and equality of every human being can be realized, which must be observed by the state and by society itself.

The jurist Sarlet masterfully defines the dignity of the human person in the following terms:

The dignity of the human person is the intrinsic and distinctive quality of each human being that makes them deserving of the same respect and consideration by the state and the community, implying, in this sense, a complex of fundamental rights and duties that ensure the person against any and all degrading and inhuman acts, as well as guaranteeing them the minimum existential conditions for a healthy life, in addition to providing and promoting their active co-responsible participation in the destinies of their own existence and life in communion with other human beings.

Thus, the dignity of the human person is the fundamental foundation of society, the state and the law, serving as a guiding principle for the formulation of public policies, the guarantee of fundamental rights and the promotion of social justice.

Judicialization for the Supply of the Drug Tacrolimus

It is known that every individual has the right to health, and in order to fully exercise this right, access to life is essential. Patients diagnosed with lupus, especially those with renal impairment due to the disease (lupus nephritis), need continuous medical treatment.

It is essential to emphasize that, regardless of the therapeutic modality, the patient is naturally in a vulnerable physical and emotional situation. The use of essential medicines for treatment can be a challenge, especially for individuals in precarious financial situations. The high cost of the drugs needed to control the disease and the possibility of remission can make treatment unaffordable for many people.

In this context, the patient needs to turn to the state to guarantee the supply of medication, such as Tacrolimus, through legal action. It is worth emphasizing that, before Tacrolimus is prescribed, the patient must have used other drugs considered standard for the treatment of lupus nephritis, according to the medical guidelines.

These drugs include corticosteroids, hydroxychloroquine, azathioprine, mycophenolate mofetil, cyclosporine, methylprednisolone (pulse therapy) and cyclophosphamide (pulse therapy). These drugs are regulated by the National Health Surveillance Agency (ANVISA) and incorporated into the Unified Health System (SUS).

Although Tacrolimus is registered by ANVISA under the number 1003301601, it is not standardized by SUS for the treatment of Lupus or lupus nephritis, a condition in which kidney function is affected and the use of other drugs proves ineffective. However, scientific studies in the field of medicine prove the efficacy of Tacrolimus in the treatment of lupus nephritis:

TAC acts in the same way as cyclosporine A, but pharmacological studies have shown that TAC is approximately 25 times more potent. It forms a complex with the binding protein FKBP-12 (FK506 immunophilin 12), which inhibits the activity of calcineurin phosphatase and, as a result, reduces the transcription of interleukin 2 (IL-2) and other cytokines such as tumor necrosis factor alpha, interferon gamma, IL-6 and IL-10, as well as reducing T-cell activation. In addition, the drug is metabolized in the liver by CYP3A.

TAC was superior to corticosteroids alone (most commonly prednisone or prednisolone) in achieving renal remission/response (a result obtained on the basis of a review involving 37 studies and 2,697 patients). These findings provide sufficient support for the Judiciary to order the compulsory supply of the drug by the State. The judicial decision is supported by scientific proof of the drug's efficacy and the urgency of the treatment, which gives judges greater certainty when analyzing cases.

The supply of medicines not incorporated into the normative acts of the SUS must follow the criteria defined by Theme 106 of the General Repercussion of the Superior Court of Justice (Special Appeal 1.657.156/RJ)²³, by the Suspension of Anticipatory Guardianship 175 of the Federal Supreme Court²⁴ and by Extraordinary Appeals 566.471 and 657.718 of the Federal Supreme Court.

According to STJ Theme 106, the supply of medicines not incorporated into the SUS is mandatory on an exceptional basis, provided that the cumulative requirements established are met. The supply of off-label drugs is only prohibited when the drug has not been registered with ANVISA.

In the Supreme Court case of Suspension of Anticipatory Guardianship 17526, Justice Gilmar Mendes points out that:

The fact is that the judicialization of the right to health has gained such theoretical and practical importance that it involves not only legal operators, but also public managers, health professionals and civil society as a whole. If, on the one hand, the actions of the judiciary are fundamental for the effective exercise of citizenship and for the realization of the right to health, on the other hand, judicial decisions have meant a strong point of tension for the makers and executors of public policies, who are compelled to guarantee the provision of the most diverse social rights, often in contrast to the policy established by governments for the health area and beyond budgetary possibilities. (...) Judicial intervention does not occur due to an absolute omission in public policies aimed at protecting the right to health, but in view of a matter of public policies aimed at protecting the right to health, but in view of a necessary judicial determination to comply with policies already established.

These rulings emphasize that in exceptional cases, when conventional treatment fails the state has an obligation to provide drugs such as Tacrolimus, especially when the patient cannot afford them. Ideally, the supply should take place without the need for judicial intervention²⁷, but in urgent situations, such as the progression of lupus nephritis to renal failure, the speed with which the drug is made available is crucial. Otherwise, the patient may need dialysis or a kidney transplant, which could result in death if not treated in time. The exceptional nature of the medicine's supply is therefore justified.

Tacrolimus is usually prescribed by rheumatologists and nephrologists, who specialize in the treatment of lupus and kidney disease respectively. These professionals recommend the use of the drug to prevent the loss of kidney function and promote improvement in the clinical picture. In Brazil, the average monthly cost of Tacrolimus is approximately R\$2.489,84 (two thousand, four hundred and eighty-nine real and eighty-four cents), considering pharmacy discounts. This implies an annual cost of around R\$29.878,08 (twenty-nine thousand, eight hundred and seventy-eight real and eight cents), which makes the drug unaffordable for low-and middle- income patients. Compared to the minimum wage of 2024, which is R\$1.412,00 (one thousand four hundred and twelve real) the cost of the drug represents an unsustainable financial burden²⁸.

Below is a comparative table of drug prices for a better understanding, taking into account the discounts applied by the pharmacies surveyed:

Pharmacy	Tacrolimus 1mg	Tacrolimus 5mg
OncoExpress Special Medicines	R\$658,00	R\$1.890,00
4Bio	R\$517,57	R\$1.523,29
FarmaVisa	R\$646,70	R\$1.454,70
Average cost:	R\$2.489,84	

Tacrolimus is considered an "off-label" treatment, i.e. it is not indicated in its package leaflet for the disease being treated, but it has scientific proof of efficacy.

The Technical Support Center for the Judiciary (NATJUS) of the Court of Justice of the Federal District and Territories³⁰ has issued opinions in favor of supplying the drug in court cases, such as 0726136-07.2022.8.07.001631 and 0716047-90.2020.8.07.001632, with the conclusion that

the demand is justified, considering the refractoriness of lupus nephritis to conventional treatments and the need to avoid definitive loss of kidney function.

Note the conclusion of the opinion contained in case 0716047- 90.2020.8.07.001633:

The aim of treating lupus nephritis is to prevent or correct the deterioration of kidney function, reduce proteinuria and hematuria and thus prevent progression to definitive kidney damage. The aim of immunosuppressive therapy is to achieve complete remission of nephritis, i.e. normalization of renal function associated with a reduction in proteinuria to less than 500mg in 24 hours.

When lupus nephritis is refractory to one of the aforementioned therapeutic regimens, the immunosuppressants the patient is using should be changed for others that they have not used before.

The Consensus of the Brazilian Society of Rheumatology for the diagnosis, management and treatment of lupus nephritis recommends that cases of lupus nephritis that have been refractory to induction therapy regimens with cyclophosphamide and mycophenolate mofetil should be treated with rituximab or tacrolimus (either alone or in combination with mycophenolate mofetil).

Considering that the patient has lupus nephritis that is refractory to all the therapies available on the SUS indicated for her treatment; Considering that there is solid scientific evidence on the efficacy of tacrolimus in the treatment of lupus nephritis;

Considering that there is a significant risk of definitive loss of kidney function if lupus nephritis remains active;

NATJUS concludes that the demand is considered JUSTIFIED.

(emphasis in original)

Based on the opinions of NATJUS, judges have a better basis for deciding in favor of supplying Tacrolimus, and can even impose a fine if the state fails to comply with the court order to supply the drug.

This means that the Brazilian state is aware of the technical recommendations that indicate the use of the drug by patients with Lupus and renal impairment, even in off-label treatment. However, the supply of the medication is subject to judicialization, which ends up delaying the start of treatment for those who need it.

I. CONCLUSION

This paper looked at the supply of the drug Tacrolimus for patients with Lupus, especially those who develop lupus nephritis, a kidney complication associated with this chronic autoimmune disease. Lupus can severely compromise kidney function, and lupus nephritis, if not treated properly, can lead to irreversible consequences such as kidney failure and the need for transplantation.

In order to present the topic, we briefly discussed the concept of Lupus (according to studies in the medical field that deal with the subject), as well as addressing in a simple way what the right to life and health are, and finally, we discussed the judicialization for the supply of important medication for the treatment of the disease. Medications such as corticosteroids and others are indicated for treatment. However, if the medications previously used by the patient are ineffective, medical specialists may recommend the use of the drug Tacrolimus, which is used in patients who have undergone kidney transplantation.

This study found that access to the drug Tacrolimus for patients with lupus nephritis reveals not only the challenges faced by individuals diagnosed with this autoimmune condition, but also highlights the fragility of the Brazilian public health system.

Although Tacrolimus has no formal approval for the treatment of lupus nephritis, several studies and clinical practices have demonstrated its efficacy, leading doctors to prescribe this drug "off-label". However, access to this treatment in the public health system faces bureaucratic barriers, with the state refusing to provide the drug immediately, even in the face of a well-founded medical recommendation and favorable court decisions. This refusal jeopardizes patients' health and quality of life, highlighting flaws in the Brazilian health system.

The state's refusal or even delay in providing the medication prescribed by the Lupus patient's treating doctor violates the constitutional right to life and health, since it is a question of universal and equal access to medical care. The right to health is fundamental not only for the preservation of life, but also for the full exercise of citizenship and for people's well-being, so much so

that it is the dignity of the human person, which is also guaranteed by the Universal Declaration of Human Rights to which Brazil is a signatory.

Therefore, the state's responsibility to ensure access to medical treatment must be reaffirmed, especially in the case of complex diseases such as lupus, which can have more serious consequences, such as lupus nephritis. Refusing or delaying the supply of essential medicines not only worsens the clinical condition of patients, but also highlights the failings of a health system that often fails to meet the needs of the population effectively and efficiently.

Judicializing this demand can delay the quality and effectiveness of the treatment, as it is bureaucratic and a real obstacle to exercising the right to life and health. The Judiciary should not be responsible for guaranteeing the supply of medication. It is therefore imperative that public health managers and policymakers commit to guaranteeing immediate access to the medicines needed to treat serious diseases such as Lupus, and that the health system is strengthened to fulfill its function of protecting the health and dignity of citizens efficiently and without bureaucratic obstacles.

Based on the court rulings in favor of patients, it is clear that the state should have already implemented measures to ensure the adequate supply of Tacrolimus, facilitating access to this essential drug without having to go to court. This would not only guarantee faster and more effective treatment, but would also avoid the strain on an overburdened judicial system and promote respect for the right to health in a full and uninterrupted manner.

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