

The Right to Health, Judicialization, and Equity in SUS

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(FERRAZ, Octavio L. M. *Health as a Human Right: The Politics and Judicialisation of Health in Brazil*. Cambridge: Cambridge University Press, 2021)

The three principles of the Unified Health System (Sistema Único de Saúde - SUS) – universality, integrality, and equity – underlie most analyses of the Brazilian public health system. How these three elements combine to guarantee the right to health is a question that allows different interpretations. One possibility is through the lens of judicialization, a theme treated very competently by Octávio Ferraz (2021), based on consistent data and a meticulous theoretical discussion.

The universal public system signified an enormous advance in guaranteeing the right to health in Brazil, giving previously excluded populations access to public health services in their distinct levels of complexity. With it, Brazil managed to create a universal system, accessible to all - something that is unquestionable. Data from 2019 demonstrate that 74% of the population depend on the public system for health care (the 'SUS-dependent' population), while 26% have some sort of private health plan (IBGE, 2020).

The principle of integrality signifies both an inclusive view of individuals, in relation to their specific necessities and their relationship with the social context in which they are inserted, and comprehensive health care itself, involving a set of actions ranging from prevention to more complex care services. Integrality has been sought through policies, programs, and protocols and the incorporation of medicine and treatments in SUS, expanding the list of services and treatments provided by the

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public system – despite the budgetary limitations that any government faces and with which health systems from all over the world have to deal.

However, equity has been the least debated principle of SUS, both administratively and politically. Related to the concepts of equality and justice, it assumes that equality of access to the system has not eliminated health inequalities, arising out of other social inequalities which affect the chances of individuals from different groups getting sick or dying. Health inequalities will always exist, but the system has to fight ‘unjust inequalities’, which involves equity in the distribution of resources in favor of individuals in situations of greater vulnerability (DUARTE, 2000).

Although it does not present a discussion of the three principles of SUS, Ferraz’s analysis (2021) focuses on equity and how this combines with universality and integrality. His study analyzes how equity is neglected in the responses given by the Brazilian judicial system to the process of judicialization. According to him, judicialization increases inequalities in access to the right to health in Brazil, since it guarantees access to medicines and treatments “to a minority of people who are capable to litigate” (FERRAZ, 2021, p. 03), transferring resources from the underfunded public system to those who already have financial and informational resources. It thus involves a process which reinforces the persistent inequalities in Brazilian society. This is Ferraz’s central argument (2021).

To demonstrate his argument, Ferraz (2021) mobilizes the knowledge which he had accumulated over two decades of studies on the topic¹. He uses primary data collected between 2009 and 2010 (FERRAZ, 2011), secondary data from the report of the National Council of Justice for 2014 to 2019 (CNJ, 2019a), as well as secondary data from different regional realities and periods, presented by an enormous range of articles and research reports. Much data and many articles were analyzed, in a careful effort to aggregate the available information.

He opens the book with a synthesis of the historical process of the creation and structuration of the Brazilian Unified Health System, emphasizing the political

¹Octávio Ferraz is one of the main specialists in judicialization of the right to health in Brazil. His book, the subject of this review, was also reviewed by another important researcher and specialist of the theme, Natália Pires de Vasconcelos, who dialogues with the field of Law in the journal *Modern Law Review* (VASCONCELOS, 2021). Here, I focus on the debate in the field of public policies, especially on the question of equity in SUS.

struggle waged by the '*sanitarista* movement' for the approval of a universal public health system in the 1988 Constituent Assembly. The emphasis on the political aspect of this process is relevant for the argument developed. According to Ferraz (2021), the actions of the Judiciary in recent years, assuming the definition of health policy contours, should instead be left to political actors from the Executive and Legislative branches, in their interactions with social actors – as occurred in the fight to guarantee the right to health in redemocratization.

The victory in the constituent assembly ensured the inclusion of thousands of Brazilians in the health system, improving various important indicators, such as the infant mortality rate, which dropped from more than 60 child births per thousand in the 1990s to around 15 in 2016, taking into account the national average rate. Life expectancy has increased, child immunization has advanced enormously, maternal mortality has also fallen, as well as a series of avoidable deaths. The coverage of the system has expanded rapidly, and primary health care services have reached populations all over the country. However, regional inequalities in health have remained. This is due to the fact that Brazil spends relatively little, in per capita terms and in relation to GDP, when compared to countries with a similar level of economic development. Furthermore, much more is spent in the South and Southeast regions of the country, which concentrate a large part of resources and health services, especially the most complex ones. As a consequence, the main health indicators are very distinct in the different regions of the country, which demonstrates the persistence of health inequalities, along with other social inequalities that characterize Brazilian society.

This scenario, summarized in the chapters of the first part of the book (The Politics of the Right to Health), reinforces the importance of the central argument, developed in parts II and III, dealing with the 'right to health in the courts'. The public system has evolved and strengthened over time, but it now faces the challenge of equity, strongly impacted by judicialization.

In presenting the data about judicialization in Brazil, Ferraz (2021) demonstrates both its exponential growth in numerical terms and in relation to public expenditure. Using estimates calculated through secondary data, he states that around 3% of total public health expenditure is spent on judicialization. Considering the tendency for growth presented by the historical data, this figure is

concerning. Above all because, as the book demonstrates, this judicialization has provided access to medicine and services to the economically most favored part of the Brazilian population.

What the author calls the ‘right to everything’ has guaranteed: medications that does not appear on the SUS list (they are not offered to the population through the public health system); high cost, experimental, or for ‘off label’ usage (for treatment not listed in the drug note); extremely expensive treatment, which benefits few to the detriment of many – more specifically the so-called ‘A class’, which covers around 7% of the population. In short, the ‘right to everything’ has benefited the wealthy, especially because very few individuals from the lower classes have the informational and financial resources to use the justice system – as data on access to justice demonstrate.

This picture of unequal access to justice has been altered over the years with the dissemination of the judicial path, increasingly used by the less privileged social groups through the Public Defender’s Office or the Public Prosecutor’s Office (CNJ, 2019b), judicially and extrajudicially². However, the regressive profile of judicialization has remained, for which reason Ferraz (2021) is correct to affirm that judicialization benefits the better off in a context of inequality of access to justice, further increasing health inequalities.

Nevertheless, his criticism of studies which praise the judicial path as a way of access to the right to health sounds excessive. These cited studies do not defend the ‘right to everything’, but rather the Judiciary as a path to guarantee a right. It is the Judiciary itself which actually defends the ‘right to everything’ through its judicial decisions. By focusing its criticism on the academic debate, the book opts not to discuss the institutional role of the Judiciary in confronting judicialization – and its failures. For example, National Council of Justice Recommendation N^o 31 instructs magistrates to avoid authorization for medicine not registered by Anvisa, but this has repeatedly been ignored by judges. This recommendation became law (Federal Law N^o 12.401/2011), vetoing payment for or reimbursement of experimental medicine or procedures, or whose use has not been authorized by

²Rayane Vieira Rodrigues’ master’s thesis demonstrates that the Public Prosecutor’s Office of São Paulo has worked intensely in health, especially through extra-judicial procedures. This is an agenda that needs to be incorporated in the debate on judicialization, as she has argued (RODRIGUES, 2020).

the National Public Health Agency (Agência Nacional de Vigilância Sanitária – Anvisa), as well as medicine and products, whether Brazilian or imported, which have not been registered by Anvisa. This law continues to be persistently ignored by the Judiciary. It and various other recommendations³ and decisions from the higher courts, capable of reducing the problems caused by judicialization, are disregarded by the lower courts. Furthermore, the technical reports prepared by the Judicial Technical Support Groups (Núcleos de Apoio Técnico do Judiciário - NATs)⁴, which serve to provide a technical basis for decisions, have been scarcely used to reject health related lawsuits (CNJ, 2019b). These are situations which demonstrate how the judicial actors reinforce the ‘right to everything’, notwithstanding institutional attempts to tackle the problem. Finally, there are many nuances to be taken into account in the polarization between those who defend judicial action to guarantee the right to health and those who reject it, as I discussed some time ago in an article published in the Brazilian Political Science Review (OLIVEIRA and NORONHA, 2011).

The aforementioned criticisms do not diminish the importance of the book for advancing the debate on judicialization in Brazil because, aside from analyzing the phenomenon itself (who judicializes and what is demanded), it empirically analyzes its effects. The data is convincing in its demonstration of the regressiveness imposed by judicialization. This is the principal contribution of this work, which complexifies the academic discussions and, most importantly, adds scientifically based elements to the public debate. However, as the author himself emphasizes, the availability of information is still limited and therefore future studies, with more data than currently available, can expand our knowledge about the phenomenon he describes: the regressiveness of judicialization and how it has behaved over time.

Another important contribution of the book is the argument that the problem is located in the courts, but the solution will not come from there – on the contrary, it must come from politics. In a context in which there are no politically

³I present the list of institutional measures and recommendations adopted by the judiciary to deal with judicialization in the chapter ‘Caminhos da judicialização do direito à saúde no Brasil’, published in the book ‘Judicialização de Políticas Públicas no Brasil’, edited by me and published by Editora Fiocruz (OLIVEIRA, 2019).

⁴In 2011 CNJ recommended the creation of the NATs and in 2016 it enforced their compulsoriness in all states (Resolução CNJ Nº 238/2016).

defined criteria regarding what the right to health guarantees, it is up to each judge to decide, based on their own convictions and constitutional interpretations. We will only escape from this trap when the political world clearly defines ‘how’ equity should be achieved, which is an infra-constitutional question that is (re)defined on a daily basis through politics and the process of public policy implementation. Therefore, politics gains centrality and can either increase or undermine the equity of the public health system. It is important that a book written by a Law researcher highlights this issue.

Ultimately, the last question which the book raises is: how to achieve a political consensus about ‘what’ should be guaranteed by SUS, especially in a context in which universality and integrality are important conquests of redemocratization? As the book demonstrates, judicialization has the impact of interfering in equity, but in a negative way. Debating politically how to achieve equity in/through the public health system is now a central question, which also includes defining what the courts may or may not allow in order to undermine health inequalities. It will be a hard task to reach a ‘minimum core’ definition of what the right to health should encompass. Thus, what the courts can best do is to avoid the adoption of what Ferraz calls a “more interfering form of right to health adjudication” (FERRAZ, 2021, p. 299).

Judicialization in Brazil is intrinsically related to inequalities, negatively affecting the equity of the system: it results from unequal access to the justice system, which is more accessible to those who pay private lawyers and ensure the acceptance of their demands by the justice system; and it generates health inequalities in a public system that suffers from lack of resources, which ends up expanding existing social inequalities even further. For this reason, Octávio Ferraz’s book (2021) is a fruitful resource for the debate on the expansion of access to social rights in Brazil. And, as he concludes, this is a debate to be based not on the courts or judicial actors; it is necessary for political institutions to address this issue, keeping actors in the judicial system away from this process. Politics is capable of guaranteeing rights, as demonstrated in the struggle for health care in the 1988 Constitution. Thus, “if politics is not that bad, and litigation is not that great, it seems inapposite to transfer powers of substantive decision-making from the former to the latter” (FERRAZ, 2021, p. 305).

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