



# Ferraz OLM. Health as a human right: The politics and judicialisation of health in Brazil

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**THE BOOK 'HEALTH AS A HUMAN RIGHT:** The politics and judicialisation of health in Brazil<sup>1</sup>, by Octávio Luiz M. Ferraz, presents the theme of the right to health from the perspective of judicialization in Brazil and discusses the challenges of implementing the universal access system through the inscription of the right to health in the national Constitution<sup>2</sup>. The central focus of the work is to address the right to health in Brazil as a “fundamental human right”<sup>1(5)</sup>. According to the author, the breadth of this constitutional concept favored the intervention of the Judiciary in imposing the ‘policy of the right to health’.

To explain the Brazilian experience, Ferraz carries out a comprehensive and insightful review of the intellectual production and the results of the judicialization of the right to health over two decades. The book’s project is – paradoxically – to demonstrate the negative effects of judicialization: a large part of health litigation takes place in social bubbles supported by private lawyers and the territorial availability of public defenders, with demand concentrated on hospital care and high-cost medicines. The favoring of higher-income social strata and of the biomedical agenda authorizes the author to state that the litigation of the right to health distorts sectoral public policy and widens inequalities, producing more harm than social benefit.

In this sense, one of the points to be highlighted in the book is the questioning of the role of the Judiciary as a political actor in the social field and in public health. The author considers that, in the Brazilian experience, it’s possible to observe the “justiciability”<sup>1(277)</sup> of social rights, that is, the granting by the judiciary of the “right to everything”<sup>1(19)</sup> that is requested. Thus, when the Judiciary institutes the standard of indiscriminate granting, the principle of equity is harmed, especially by the fact that only the socially privileged segment has access to justice in the country. For Ferraz, the interpretation of the right to health as an absolute right is responsible for the significant growth of health litigation in Brazil and for the very high success rates in such proceedings, forcing the State to provide virtually any health benefit that litigants claim. The author qualifies the Judiciary’s decisions as a disregard for health policies, as they obscure the nature of constitutional obligations in the right to health, taking them as absolute and precise obligations when they are, in fact, vague.

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For the author, the recognition of health (and other similar complex goods) as a constitutional right creates a dilemma for the decision-making process: if health is a constitutional right, the courts should hold the political powers accountable when they do not respect, protect and fulfill it; however, as the precise content of the right to health is not clearly established by the Constitution, the courts have no clear constitutional standard for holding the State accountable and little technical competence to develop such standards. In this scenario, when the Judiciary assumes the task of correcting the failure of government, it usurps the powers of the Executive and Legislative branches and violates the principle of separation of powers. Ferraz also claims that the courts are neither willing nor able to incite the Brazilian State to improve the minimum core of the right to health.

The very harsh conclusions of the publication are supported by data from multiple studies on health litigation in Brazil, which do not authorize the narrative of the rights revolution: according to the author, few lawsuits contemplated the most pressing health priorities of the poor, such as access to primary care. Most of the lawsuits were very far from any plausible conception of a minimum core of priority rights for the Unified Health System (SUS). Furthermore, the costs of judicial decisions have been equally increasing, reaching 3% of the aggregate budget of the public health sector in the country.

The author thus argues that the less interfering forms of the Judiciary may be more attractive than the proactive ones. If the design of the SUS policy is not so bad, he argues that it is not up to the Judiciary to usurp the decision-making power of the Executive. In the author's words, the right to health added significant contributions in order to improve the well-being of the Brazilian population; however, the main driver of such improvements was not litigation, and its main actors were not lawyers and judges.

In summary, those interested in further improving the right to health, in Brazil and elsewhere where similar conditions exist, must look away from the courts and focus resources on the political sphere. With this conclusion, the book 'Health as a human right' opens the door to the necessary understanding of the complexity of the processes of formation of public policies that involve the interaction, in national contexts, of interests organized in decision-making arenas and in the social pact<sup>3</sup>. Despite this opening to the complexity of the policy formation process, Ferraz still believes in the possibility of improving social and health rights through the action of the Judiciary if defending the approach of the *minimum core* of rights. In addition, he states that constitutional guidelines must have specific guidelines on what national States must do in the social field.

The indetermination of state duties promotes the phenomenon of justiciability observed in Brazil. The definition of a minimum core would provide an intuitive threshold for solving the problem of judicial activism. If it is possible, he argues, to carve out a precise subset of social rights, States would be under a duty to respect, protect and fulfill them, allowing national courts (as well as international human rights courts) greater legitimacy and accountability in the exercise of judicialization.

In the field of health, the implementation of a basic package of services was unsuccessfully encouraged by the World Bank in the 1980s and 1990s. The controversial proposal reduced the functions of the public health sector in Brazil to the provision of primary care and public health essential actions for the poor<sup>4</sup>. It is known that health needs, in all social strata, demand the availability of hospital interventions and access to high-cost medicines that undergo an accelerated innovation process. Therefore, establishing the minimum core of health rights by constitutional rule has been unsustainable in a democratic society.

A less severe look at the constitutionalization of the right to health in Brazil can

recognize that it makes a difference in the lives of millions of people, even though the country remains one of the champions of inequity in the sector due to public underfunding and territorial inequality. In the Brazilian scenario, judicialization may be assuming the function of an alert instance for the access barriers that the current arrangement of the SUS cannot overcome, demanding a new reformist impulse of the functions of the public sphere. For the rest, it is worth saluting the remarkable

intellectual effort of Octávio Ferraz and recommending the publication to professionals and students of collective health and law.

## Collaborators

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