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RESPONSE TO *LETTER TO THE EDITOR*

On the Heterogeneity and Politics of the Judicialization of Health in Brazil

JOÃO BIEHL, MARIANA P. SOCAL, AND JOSEPH J. AMON

In response to our article, “The judicialization of health and the quest for state accountability,” in which we examine a systematic sample of 1,262 lawsuits seeking access to medicines in the southern Brazilian state of Rio Grande do Sul, Octavio Luiz Motta Ferraz raises three concerns:

1. that our use of the term “myth” to describe the popular narrative in Brazil about the “judicialization of health” is inaccurate;
2. that our data has limitations, and particularly that our claim that judicialization “largely serves the disadvantaged” in Rio Grande do Sul is not fully warranted; and
3. that our findings “reaffirm” his view of what he calls “the Brazilian model of right to health litigation.”¹

These are curious points.

Rather than simply “widely held and false beliefs,” a myth, and more specifically, a political myth, can be understood as “an ideologically marked narrative which purports to give a true account of...political events and which is accepted as valid in its essentials by a social group.”² Our use of the term “myth” was in this sense, an understanding that Ferraz seems to endorse in the first sentence of his letter, stating that the debate on the judicialization of the right to health has not been grounded in evidence but “beset” by polarization and a “lack of empirical data.” The objective of our study was to expand the empirical base and to challenge—provocatively—polarized positions and the idea that there is a single countrywide “truth” about this complex and heterogeneous phenomenon.

Our article is one of the many outcomes of a larger multi-methods research effort.³ The study examines a representative sample of all medicine-related lawsuits in Rio Grande do Sul, the state that accounts for

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about half of all cases of health litigation in Brazil.⁴ Information on patient-litigant demographics, their legal representation, medical diagnoses, the type and frequency of medicines requested, the legal arguments employed, and the immediate ruling of judges were collected directly from the lawsuits and reviewed and excerpted by research assistants trained in law and pharmacy. While a more detailed understanding of patient-litigants' socioeconomic status would be desirable, we stand by our finding, based upon multiple variables, that in Rio Grande do Sul, "the majority of patient-litigants are in fact poor and older individuals who do not live in major metropolitan areas and who depend on the state to provide their legal representation."

Our finding stands in marked contrast to politicians' statements that judicialization is "Robin Hood in reverse" and a "triumph" of the "haves over the have-nots," and to Ferraz's own claim that "a majority of right-to-health litigants come from social groups that are already considerably advantaged in terms of all socioeconomic indicators, including health conditions."⁵ This claim, based upon a small number of studies circumscribed to a few geographic areas, has been generalized by many public officials and scholars and taken to represent a nationwide pattern.

We struggle to understand how Ferraz can approvingly acknowledge our explicit recognition of the geographic limits of our study, quoting from our discussion that the "judicialization of the right to health in Brazil is not a single phenomenon," while he speaks of a singular "Brazilian model" that "needs to change." Although there may be characteristics of the phenomenon that are similar across geographic areas in Brazil, we do not believe that there is a single "Brazilian model" of judicialization, nor that it is helpful to the scholarly discussion and political debate—in Brazil, or globally—to create a caricature of "positive" versus "pernicious" forms of judicialization.⁶

Moreover, we find problematic Ferraz's call "to develop criteria to assess ... [which] goods and services ought to be part of the coverage in the public health system." While it was not the focus of our article, it is fair to say that we support a right to health

that covers all Brazilians and the principles of participation and equity—in terms of both access to health and access to justice. By contrast, Ferraz seems to be advocating for a technocratic and top-down approach that could circumscribe the object and scope of the country's constitutional right to health.

Just as our findings demonstrate that judicialization in Rio Grande do Sul is a widespread mechanism accessible even to the poor, they also indicate that patients are using the judiciary to obtain treatments that should be available through existing governmental policies.⁷ From this perspective, judicialization exposes the precariousness of public infrastructures while also being a mechanism for state accountability and a potential driver of advancements towards quality universal health coverage and transparent and participatory priority-setting.

In the last paragraph of our discussion, we state: "At the very least, the heterogeneity of right-to-health litigation across the Brazilian states indicates the need for a more nuanced and in-depth analysis of its drivers and implications at local levels." While Ferraz, in his conclusion, seems to fold our results seamlessly into his pre-determined model, we hope that our systematic and comprehensive examination of the judicialization of health in Rio Grande do Sul contributes to less mythologizing and encourages others to more objectively assess the impacts of judicialization on both individuals and policies, as well as its possible role in driving social and political change at local, regional, and national levels. We welcome the attention of Ferraz and other scholars, policy-makers and activists to this task and look forward to further debate and discussion.

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