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Introduction

Does the Right to Health Matter?

> Health is a right of all and a duty of the state . . .
>
> Article 196, Brazilian Constitution of 1988

What is the point of recognising health as a human right in the constitution? Does it make any difference to the actual health of the people these rights are supposed to benefit? If so, through what precise mechanisms? Can they be improved? It is of course a truism that writing things on a piece of paper, even if we call it a constitution, does not automatically change things on the ground. But whether it does change anything, and if so by how much, and how, are difficult and contentious matters over which debate has raged for a long time.

This book aims to contribute to this debate through a comprehensive and detailed investigation of these questions in the context of Brazil, perhaps the largest country in the world to expressly guarantee the right to health as a constitutional human right. Article 196 of the Brazilian Constitution of 1988 states, solemnly, that 'Health is a right of everyone and a duty of the state'. But what has this actually meant to the approximately 210 million people who live in Brazil? Has it improved the historically frail health conditions of the majority of the Brazilian population?

For a country not particularly known for taking human rights very seriously, one may be tempted to assume that the constitutionalisation of the right to health has changed little on the ground. Such a conclusion would be in line, moreover, with two widespread narratives on the status of social rights across the world.

One more radically sceptical view sees social rights as by and large incapable of producing significant social change; the other sees these rights as currently neglected by governments yet capable of being made effective by lawyers and judges through strong legal accountability, in particular, through litigation. The former questions the whole project of social transformation through rights; the latter believes in the project yet sees it as effective only when its purported guardians (lawyers and

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judges) take an assertive stance, forcing the recalcitrant political branches of the state into compliance.[1]

My analysis of three decades of the right to health in Brazil reveals a very different picture from both of these narratives. As this book argues, the inclusion of the right to health in the Brazilian 1988 Constitution has been far from futile. On the contrary, it has played an important role in the considerable improvements of the population's health conditions witnessed during the same period and, in this process, has helped to reduce health inequalities. Yet, as this book also shows, most of these positive effects had little (if anything) to do with the work of lawyers and judges through litigation. They were rather the result of social policies formulated and implemented by legislative and executive bodies, either out of a sense of constitutional duty or through pressure from civil society. Litigation in the field of health, in contrast, has on balance produced regressive effects, a conclusion I had already reached in my earlier work and have confirmed here based on more extensive empirical evidence. It has by and large diverted an increasingly larger amount of

[1] As representatives of the first sceptical view I have in mind are opinions such as those of Cass Sunstein, though his arguments seemed to be restricted to eastern European countries transitioning from communist regimes, C. Sunstein, 'Against Positive Rights: Why Social and Economic Rights *Don't* Belong in the New Constitutions of Post-Communist Europe', (1993) 2(1) *E. Eur. Const. Rev.*, 35–38, at 37; S. Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, MA: Harvard University Press, 2018) and, for a shorter version, his piece 'Human Rights and the Age of Inequality', where he claims that 'the chief tools of the human rights movement . . . are simply not fit for use in the socio-economic domain', www.opendemocracy.net/en/openglobalrights-openpage/human-rights-and-age-of-inequality/, accessed 18 June 2019. For an excellent comprehensive review of the sceptical literature, see C. Rodríguez-Garavito, S. L. McAdams, *A Human Rights Crisis? Unpacking the Debate on the Future of the Human Rights Field*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2919703, accessed 17 July 2019. The second type of view is common among supporters of social rights in the legal community, such as Phillip Alston, seeing 'a situation in which the majority of states avoids proper recognition of these rights and fails also to hold anyone to account when they are routinely ignored . . . even in countries whose constitutions deem economic and social rights to be justiciable the courts resist or reject proposals to implement them'. P. Alston, 'Phantom Rights: The Systemic Marginalization of Economic and Social Rights', Open Global Rights, 6 August 2016, www.openglobalrights.org/phantom-rights-systemic-marginalization-of-economic-and-social-rights/, accessed 17 June 2019. See also David Bilchitz, arguing that social rights are 'systematically marginalized across the world, *more honoured in the breach than in the observance*', D. Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socioeconomic Rights* (Oxford University Press, 2007), at 1, and Sandra Fredman, calling social rights 'the Cinderella of the . . . human rights corpus'. S. Fredman, *Human Rights Transformed, Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008), at 2.

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the already severely limited health budget to health treatments of dubious effectiveness and priority (mostly expensive new medicines) to a minority of people who are capable to litigate.

Why do my conclusions diverge so much from those popular narratives on social rights? Is the right to health in Brazil an outlier? Am I perhaps too generous in my assessment of government compliance with the right to health in Brazil and too harsh on courts? Readers of this book will be able to judge for themselves, but I suspect that the discrepancy between my conclusions and those popular narratives has more to do with differences in the analytical framework that we apply to the question.

In my view, the effectiveness of human rights law is in great part an empirical question and, as such, requires the analysis of wide-ranging empirical data.[2] How are we to know if the right to health, or any other right for that matter, has made a difference in the lives of the people that these rights are supposed to benefit if we do not look at the facts of the real world where they live? It also requires, for the proper understanding and analysis of that data, engagement with the corresponding social policy literature of the area of the particular right in question. How can we assess if the state has complied or not with its constitutional duties without discussing the policies it has implemented (and failed to implement) in the relevant area?

Yet most of the legal commentary on these rights often proceeds without any reference, let alone systematic analysis, of empirical data and social policies. Most discussions within the legal literature relies almost exclusively on legal materials, such as international treaties, constitutions, legal doctrine and adjudicative bodies (mostly courts) decisions.[3] This may explain not only why so many legal commentators have

[2] I say ‘in great part’ because it is also, of course, a normative and theoretical one, in the sense that what human rights law actually require in terms of the precise content of the duties they generate is often a matter of reasonable disagreement among people. See, for a good discussion, M. M. Feeley, ‘The Concept of Laws in Social Science: A Critique and Notes on an Expanded View’, (1976) 10 *Law & Soc’y Rev.*, at 501.

[3] For notable exceptions, see D. S. Law, M. Versteeg, ‘The Evolution and Ideology of Global Constitutionalism’, (2011) 99 *California Law Review*, at 101; J. King, *Judging Social Rights*, 1st ed. (Cambridge: Cambridge University Press, 2012). For a similar argument, see R. Hirschl, E. Rosevear, ‘Constitutional Law Meets Comparative Politics: Socio-Economic Rights and Political Realities’, in Campbell, T., Ewing, K. D. and Tomkins, A. (eds.), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: Oxford University Press, 2011), at 208, arguing that: ‘To truly “rescue” socio- economic rights, a more realist approach is required, one that goes beyond idealist normative accounts or

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an overly pessimistic view of the political branches of the state but also why they put so much faith in lawyers and courts (through litigation) as crucial tools for making rights effective.

My conclusions in this book rely on analysis of extensive empirical data on the performance of executive and legislative bodies, as well as courts, related to the right to health in the past three decades. I look at the trajectory of several important health indicators during this period and at the leading policies formulated and implemented by the legislature and health administrators. As regards the performance of courts, I look at the number of health cases adjudicated, their geographical distribution across the country, the socioeconomic profile of claimants and the object of litigation and their impact on the health budget. In order to assess the performance of both courts and the political bodies in advancing the right to health, I engage with the expert literature on public health policy.

If this empirical and interdisciplinary approach is correct and my analysis of the Brazilian case is sound, those of us interested in improving further the right to health, in Brazil and elsewhere where similar conditions obtain, are well advised to look away from courts and focus our limited resources on the political sphere.

1.1 Outline of the Book

The Right to Health in Politics

In Part I (Chapters 2–4), 'The Politics of the Right to Health', I focus on the performance of the political branches in advancing the right to health, that is, on the legislative and executive initiatives related to that right that may have had an impact on the health conditions of the population.

This is a topic largely neglected by the literature, which tends to focus almost exclusively on litigation when it discusses the impact of the right to health. Yet courts are by no means the only – nor usually the primary, or most important as this book will show – arena in which the right to health (and other rights) produces impact.[4] The right to health can also

insular constitutional discourse to understand these rights as part of a larger matrix of public policy, economics, and politics.'

[4] My own previous work has also been mostly focused on courts. This book is therefore an effort to expand the focus and carry out a more comprehensive analysis. For interesting studies but mostly focused on courts, see A. Yamin, S. Gloppen (eds.), *Litigating Health*

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influence *directly* the adoption of policies by the legislature and executive, that is, without any input from lawyers and courts. If we focus exclusively on courts, we miss therefore a large and important area where a lot, if not most, of the action on the right to health is.[5]

The very recognition of the right to health in the Brazilian Constitution of 1988 is perhaps the best example of legislative activity to advance the right to health. As we will see in Chapter 2, it was the upshot of an unrelenting and ultimately successful campaign of the so-called Sanitary Movement, a political group of public health activists from academia, government and civil society whose purpose was to entrench, in the new post-authoritarian constitution, their long-standing moral and political claim that the state has a duty to protect and promote the health of its citizens. It counted, as far as I could establish, no lawyer or judge among its members. No one in the movement seems to have thought either, at the time, of litigation as an important or even complementary tool in their fight to guarantee the right to health of the Brazilian population.[6]

Securing a place in the new Constitution for health as a fundamental human right was, thus, a *political* strategy, a way of empowering the members of the Sanitary Movement and society more generally to keep fighting, politically, that is, in their demands for legislative and executive health policies aimed at improving the health conditions of the population. The very wording of the constitutional clause that the movement managed to approve in the constituent assembly reflects this primarily political character of the right to health.

Rights: Can Courts Bring More Justice to Health? (Cambridge, MA: Harvard University Press, 2011); R. Gargarella, P. Domingo, T. Roux, *Courts and Social Transformation: A New Institutional Voice for the Poor?* (Aldershot: Ashgate, 2009); V. Gauri, D. M. Brinks (eds.), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: Cambridge University Press, 2008).

5 For a good, yet more theoretical critique of this court-centric tendency, see G. Webber, P. Yowell, R. Ekins et al., *Legislated Rights: Securing Human Rights through Legislation* (Cambridge: Cambridge University Press, 2018).

6 This is perhaps explained by the fact that courts then, at the twilight of the military regime, were not exactly bastions of rights. A sustained attempt to improve that aspect of the rule of law was made also through the new Constitution but the record is so far mixed. See, for an insightful account, O. V. Vilhena, *A Batalha dos Poderes, Da transição democrática ao mal-estar constitucional* (São Paulo: Cia das Letras, 2018).

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> Article 196. Health is a right of all and a duty of the state and shall be guaranteed by means of *social and economic policies* aimed at reducing the risk of illness and other hazards and at the universal and egalitarian access to actions and services for its promotion, protection and recovery.[7] (my emphasis)

Chapter 2, 'Health Becomes a Right', recounts in some detail the fascinating story of the largely successful campaign of the Sanitary Movement to have health recognised as a right in the new Constitution. But there was no guarantee, of course, as there never is, that anything would change after the Constitution. It was certainly possible that neither the legislature nor the executive would pay much attention to the constitutional clause just cited. Chapters 3 and 4 carry out an assessment of the changes spurred by the Constitution and of their magnitude, that is, what has been achieved and what remains to be done. Chapter 3, 'The Constitution Works', discusses the significant improvements of the health conditions of the Brazilian population in the past three decades and argues that the inclusion of the right to health in the Constitution has played an important role in those improvements. It shows how a national health system funded through taxes and accessible to all (the 'Sistema Único de Saúde', the SUS) was created where previously only employment-linked medical insurance, private services and a limited network of public and charitable hospitals operated. The creation of SUS, which was expressly mandated by Article 198 of the Constitution, expanded access to health actions and services to tens of millions of Brazilians, from primary care to complex surgical procedures, from immunisation programmes to access to a comprehensive list of medicines. These policies, which I argue would not have been adopted (at least not with the same intensity and urgency) without the strong backing of the right to health in the Constitution, have helped to improve health and reduce some of the historically high health inequalities prevalent in the Brazilian population, as some key indicators such as infant mortality and child mortality show (see Figure 1.1). It provides strong evidence, I argue, of the positive impact of the constitutionalisation of the right to health and of the importance of legislative and executive bodies as key protagonists in advancing that right.

Yet all these important initiatives have clearly not yet been able to deliver the ambitious constitutional aim of guaranteeing equitable access

[7] My direct translation from the Portuguese: 'Art. 196. A saúde é direito de todos e dever do Estado, garantido mediante políticas sociais e econômicas que visem à redução do risco de doença e de outros agravos e ao acesso universal e igualitário às ações e serviços para sua promoção, proteção e recuperação.'

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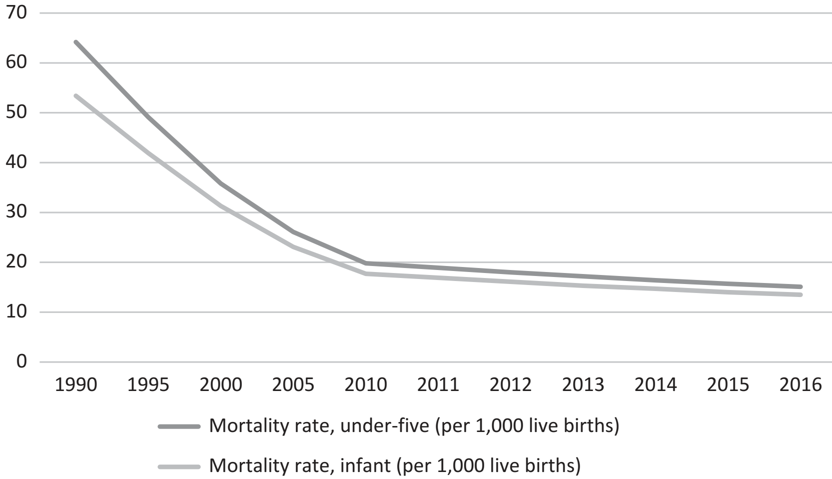

Figure 1.1 Infant and child mortality in Brazil.
Source: United Nations Development Programme, Human Development Reports

to a comprehensive package of health actions and services universally, that is, to the whole of the Brazilian population. Chapter 4, 'Two Brazils', is dedicated to an in-depth analysis of the long road ahead towards that aim. Most significant in the view of public health experts has been the failure of the Brazilian state, so far, to reduce to acceptable levels the inequalities in health that have been a shameful historical mark of Brazil and one of the main impetuses for the Sanitary Movement's right to health campaign. One of the greatest obstacles, as we will see, is the persistent insufficiency of resources devoted to public health by successive Brazilian legislatures and governments and their unequal distribution among the population, which helps to explain why some regions of Brazil still display health indicators, such as life expectancy, infant and maternal mortality, most commonly found in the poorest countries (see Figure 1.2).

The conclusions of Part I are therefore mixed. On the one hand, legislative and executive action to advance the right to health has clearly had a non-trivial positive impact in the improvement of the health conditions of the Brazilian population. The right to health has certainly not been futile, nor a 'phantom right', completely marginalised and neglected by Brazilian politics as the popular narratives on social rights mentioned earlier would lead us to expect. On the other hand, there is still a lot to be done and some persistent political obstacles, such as underfunding and unequal distribution of health resources, which clearly prevent (or slow down) the full realisation of the right to health.

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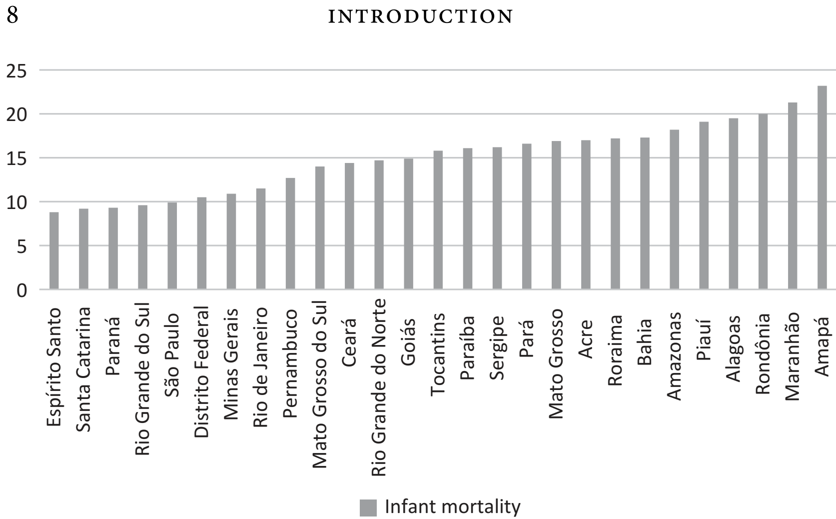

Figure 1.2 Infant mortality in Brazil by state.
Source: IBGE

Can lawyers and courts come to the rescue? This is the main topic of Part II of the book, 'The Judicialisation of Health in Brazil'.

The Right to Health in the Courts

Although no one seems to advocate that litigation is the primary means of guaranteeing the right to health, that is, above legislation and executive action, the strong focus of the legal literature on litigation reflects a widespread belief that lawyers and courts are very important actors in that enterprise. The idea is that, once health and other interests are recognised as legal rights, individuals can resort to a stronger form of accountability, that is, judicial enforcement, when the state fails to guarantee the right to health enshrined in the constitution. Alicia Yamin captures that well in the following passage:

> perhaps what a rights-based approach to health uniquely adds to other work in medicine and public health focused on social justice lies precisely in the definition of relationships between rights-holders and duty-bearers, which permits the creation of a framework for and mechanisms of accountability, including effective recourse in the event of violations.[8]

[8] A. Yamin, 'Will We Take Suffering Seriously? Reflections on What Applying a Human Rights Framework to Health Means and Why We Should Care', (2008) 10(1) *Health and Human Rights*, 45–63, at 49.

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This seems in principle correct, but one should guard against the strong tendency among lawyers, as mentioned earlier, of overestimating the delinquency of the political branches while underestimating the willingness and capacity of judges, through litigation, to make things better. This is in great part a result, as I said earlier, of lack of analysis of empirical data and engagement with social policy literature. The best way to proceed, in my view, is to scrutinise the impact of all branches of the state based on their *actual performance* and not *on idealised roles*. Part I of this book does that in relation to the political branches and finds the delinquency narrative to be far removed from the reality on the ground. Part II focuses on the performance of legal actors through litigation and also encounters important problems in the popular narrative of litigation as an effective accountability tool to advance the right to health.

Part II is divided into four chapters. Chapter 5, 'The Judicialisation of Health in Numbers', provides as comprehensive a picture as possible of some of the main characteristics of the right to health litigation in Brazil. What is the scale of the judicialisation of health in Brazil? How is it geographically distributed in such a large and diverse country? What kinds of health interventions are mostly claimed in the courts? Who are its main actors? How much does it cost the public coffers? With the strengthening not only of legal rights but also of legal remedies and the justice system as a whole in the 1988 Constitution, resort to the courts through litigation has been growing steadily in the past three decades in all areas of life in Brazil.[9] The area of health rights, although not one of the first to be judicialised, nor one of the leading areas in terms of volume of cases (labour law–related suits are by far the champions of judicialisation in Brazil), have experienced significant and growing litigation. According to the latest available data, the aggregate number of cases between 2014 and 2019 ranges between 702,739 (the most conservative estimate) and 1,293,625 (the least conservative estimate), an average of between 117,123 and 215,604 a year.[10] Its costs are also mounting quickly and have now reached sizeable proportions of the health budget. From 2009 to 2016, the aggregate costs of health litigation against all spheres of government (municipalities, states and the federal government) are estimated to have grown 126 per cent, from around R$2 billion in 2009

[9] L. W. Vianna et al., *A judicialização da política e das relações sociais no Brasil* (Rio de Janeiro: Revan, 1999).

[10] See Chapter 5 for full references and the method of calculating these figures.

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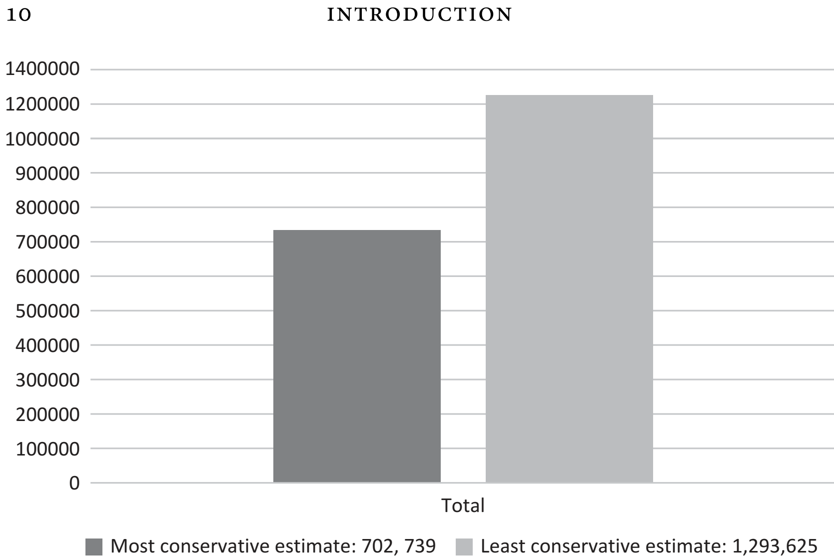

Figure 1.3 Number of health lawsuits, 2014 to 2019.
Source: Own formulation with data from CNJ

(US$1.545 billion), approximately 0.4 per cent of the total health budget then to R$7 billion in 2016 (roughly US$3.5 billion), approximately 3 per cent of the total health budget.[11]

The picture that emerges from Chapter 5 is not yet fine-grained enough, but it is sufficient to give us a good general idea and to dispel some common misconceptions about health litigation in Brazil. Despite the large *absolute* number of claims, the *relative* numbers are not that high, given Brazil's large population (circa 210 million people). We are talking, thus, of approximately 0.1 per cent of the population reaching the, courts every year to litigate the right to health, but likely fewer as part of those claims are likely from repeat litigants. Moreover, health litigation is not evenly dispersed across the whole country, but rather is highly concentrated in some states – about 80 per cent of health litigation originates in the seven (out of twenty-seven) states of the South and Southeast, see Figures 5.3 and 5.4 in Chapter 5 – and further

[11] See Chapter 5, Section 5.5 for full references. I have used exchange rates at purchase power parity to calculate those figures in US dollars.

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