



Article

The battle for access to ICU in the state of Rio de Janeiro: an example of an international structural process

A luta por acesso a leitos de UTI no estado do Rio de Janeiro: um exemplo de processo estrutural internacional

La lucha por el acceso a UCI en el estado de Río de Janeiro: un ejemplo de proceso estructural internacional

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Abstract

Objective: to analyze the use of the Inter-American Human Rights System by the Public Defender's Office of the state of Rio de Janeiro as a response to the historical problem of insufficient Intensive Care Unit beds in the public health system. **Methodology:** descriptive method, case study, with a qualitative approach. Data from monitoring reports conducted by the Public Defender's Office of Rio de Janeiro were used, covering the period from 2013-2021. **Results:** the analyzed reports evidenced the insufficiency of intensive care unit beds and the slowness of the judicial system, symptoms of a serious structural problem and state omission. The systematization of these data in a historical series was crucial to empirically substantiate the transition from repetitive individual litigation to a structural approach at the international level, through a complaint before the International Court. **Conclusion:** the action of the Public Defender's Office of Rio de Janeiro with the International Court of Human Rights proved to be an important strategy to overcome the slowness and insufficient protection of the Brazilian judicial system in guaranteeing the right to health.

Keywords: Right to Health; Public Defender Services; Judicialization of Health; Hospital Beds; Intensive Care Units.

Resumo

Objetivo: analisar a utilização do Sistema Interamericano de Direitos Humanos pela Defensoria Pública do estado do Rio de Janeiro como resposta ao problema histórico de insuficiência de leitos de Unidade de Terapia Intensiva na rede pública de saúde. **Metodologia:** método descritivo, de estudo de caso, com abordagem qualitativa. Utilizou-se dados dos relatórios de monitoramento realizado pela

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Defensoria Pública do Rio de Janeiro, abrangendo o período de 2013-2021. **Resultados:** os relatórios analisados evidenciaram a insuficiência de leitos de unidades de terapia intensiva e a morosidade do sistema judicial, sintomas de um problema estrutural grave e omissão estatal. A sistematização desses dados em uma série histórica foram cruciais para fundamentar empiricamente a transição de uma litigância individual repetitiva para uma abordagem estrutural no plano internacional, por meio de denúncia perante a Corte Internacional de Direitos Humanos. **Conclusão:** a atuação da Defensoria Pública do Rio de Janeiro junto à Corte Internacional de Direitos Humanos revelou-se uma importante estratégia para superar a morosidade e insuficiência de proteção do sistema judicial brasileiro em garantir o direito à saúde.

Palavras-chave: Direito à saúde; Defensoria Pública; Judicialização da Saúde; Leitos Hospitalares; Unidades de Terapia Intensiva.

Resumen

Objetivo: analizar el uso del Sistema Interamericano de Derechos Humanos por parte de la Defensoría Pública del estado de Río de Janeiro como respuesta al problema histórico de la insuficiencia de camas en las unidades de terapia intensiva de la red pública de salud. **Metodología:** método descriptivo, estudio de caso, con enfoque cualitativo. Se utilizaron datos de los informes de seguimiento realizados por la Defensoría Pública de Río de Janeiro, que abarcan el período 2013-2021. **Resultados:** los informes analizados pusieron de manifiesto la insuficiencia de camas en las unidades de terapia intensiva y la lentitud del sistema judicial, síntomas de un grave problema estructural y de omisión estatal. La sistematización de estos datos en una serie histórica fue crucial para fundamentar empíricamente la transición de un litigio individual repetitivo a un enfoque estructural a nivel internacional, mediante una denuncia ante la Corte Internacional. **Conclusión:** la actuación de la Defensoría Pública de Río de Janeiro ante la Corte Internacional de Derechos Humanos resultó ser una estrategia importante para superar la lentitud y la insuficiencia de protección del sistema judicial brasileño a la hora de garantizar el derecho a la salud.

Palabras clave: Derecho a la Salud; Defensoría Pública; Judicialización de la Salud; Camas Hospitalarias; Unidades de Cuidados Intensivos.

Introduction

This article stems from debates within the Human Rights Observatory at Cândido Mendes University about the justiciability of the right to health in the inter-American protection system as a strategy to guarantee access to Intensive Care Unit (ICU) beds in the state of Rio de Janeiro.

In the Unified Health System (SUS), ICU beds are called highly complex, part of the Urgency and Emergency Care Network (RUE), and are intended for critically ill patients who require intensive care and constant monitoring to ensure their stabilization, recovery and life itself (art.20, §1, II, a, 9, of Annex III, of Consolidation Ordinance No. 3, of September 28, 2017)⁽¹⁾.

According to the reports by the Rio de Janeiro State Public Defender's Office, cited below, lawsuits for access to such beds are the institution's main activity in the Night Judicial Duty of the Rio de Janeiro Court of Justice.

According to the Constitution of the Republic⁽²⁾ (art. 134), the Public Defender's Office has the function of defending and promoting human rights. The article analyzes the use of the Inter-American Human Rights System (materialized in complaint P-1002-18) by the Public Defender's Office of the State of Rio de Janeiro as a response to the historical problem of insufficient ICU beds and an important strategy in the fight for effective structural measures that transcend the individual sphere of the victims.

A brief overview of the right to health in the International Human Rights System: instruments of protection, interpretation and application by the courts

Despite its essentiality, the right to health was only elevated to a human right after the Second World War, through the Universal Declaration of Human Rights⁽³⁾ the WHO Constitution⁽⁴⁾ (1948) and the Covenants on Civil and Political Rights⁽⁵⁾ (ICCPR), and Economic, Social and Cultural Rights⁽⁶⁾ (ICESCR), which led to the internationalization of human rights, later reproduced in regional systems.

Even with the resistance of national states to recognizing the effectiveness of economic and social rights, including the right to health, because they provide services, human rights, in all their dimensions or generations, whether of abstention, provision or solidarity, were consolidated as indivisible, complementary, interdependent and progressive. However, at regional level, economic and social rights were only mentioned generically in Article 26 of the American Convention on Human Rights⁽⁷⁾ (or Pact of San José da Costa Rica), with a progressive nature of implementation.

Only the Additional Protocol to the Convention⁽⁸⁾ (Protocol of San Salvador) requires States Parties to adopt measures to achieve, progressively and in accordance with domestic legislation, the full effectiveness of social, economic and cultural rights, including the right to health. However, it apparently restricted direct petitioning to the Inter-American Commission to cases of violations of the right to education (art. 13) and trade union rights (art. 8).

This apparent limitation justified questions about the direct justiciability of the right to health. Even the Inter-American Court, when faced with violations of this right, based the accountability of states on related rights, such as the right to life and physical integrity. In the case of *Ximenes Lopes vs. Brazil*⁽⁹⁾ for example, the international responsibility of the Brazilian state was recognized for the death and mistreatment suffered by Mr. Damião Ximenes Lopes, in a mental health unit affiliated with SUS, through the violation of the rights to life and personal integrity.

The Inter-American Court only began to recognize the autonomous violation of the right to health in the case of *Lagos del Campo vs. Peru*⁽¹⁰⁾ based on the interdependence and indivisibility of human rights and the *pro personae* principle (Article 29b, c and d of the Convention)⁽⁷⁾. Guerra⁽¹¹⁾ points out that, also in *Advisory Opinion OC-23/17*⁽¹²⁾ the Court expressed itself clearly and autonomously on the matter for the first time.

In the cases that followed, the Court maintained its understanding of the direct enforceability of the right to health, as in the case of *Poblete Vilches v. Chile*⁽¹³⁾ which concerned the international responsibility of the State of Chile for the actions and omissions of the medical staff of a public hospital and structural deficiencies that affected the health, life and personal integrity of Mr. Poblete Vilches. Since then, the thesis that the enforceability of social rights is conditional on a process of progressive implementation no longer holds.

Repetitive individual judicialization for access to intensive care in the state and municipality of Rio de Janeiro: a serious structural problem of systematic and institutional violation of the human right to health

The crisis in access to ICU beds in the state and municipality of Rio de Janeiro transcends the sphere of mere occasional failures in the public health system. The repetitive and massive filing of individual lawsuits on the night shift of the Rio de Janeiro judiciary, seeking access to ICU beds by patients in the public network, for more than 10 years, reveals that the problem lies in the absence or ineffectiveness of the public health policy itself, a chronic and structural pathology in public health

management. Even the implementation of unified regulation of these beds in the public network depended on a court agreement⁽¹⁴⁾ entered into in the records of Sentence Compliance Action No. 013311385.2017.4.02.5101.

During the pandemic, data collected by Fagundes, Freire, Machado and Ximenes Neto⁽¹⁵⁾ indicated that the majority of ICU beds in the state of Rio belonged to the private/philanthropic sector (not SUS): 2,761 non-SUS beds against 1,247 SUS beds; and that there was a discrepancy in mortality between patients admitted to COVID ICUs in public and private hospitals. There was almost twice as much mortality (38.5%) for patients in public hospitals than in private hospitals (19.5%), which could indicate delayed care. Even when restricted to SUS beds, i.e. services covered by public health policy, judicialization in Brazil has been widely debated.

Authors such as Wang⁽¹⁶⁾ advocate the institutional limitation of the Judiciary to make allocative choices in health, under penalty of violating isonomy. According to the author, individual judicialization would selectively benefit only those who seek the courts, usually wealthier people, strengthening social inequality. At the same time, it affects the interests of the community, as it diverts resources from a public policy planned for society as a whole to meet the needs of one individual.

On the other hand, it is alleged that there is no empirical basis for these criticisms, which are often based on theoretical assertions, untested hypotheses, suggested speculations or ideological opinions⁽¹⁷⁾. It is argued that judicialization, when based on reliable empirical evidence, is neither excessive nor central to health management, and that judges can and should protect the fundamental right to health.

Despite the validity and necessity of this debate, there is no doubt that the atomization of individual health actions demonstrates the limitation of the classic procedural model to deal with structural problems.

In this context, the massification of lawsuits for ICU beds highlights the state's omission in the face of a serious structural crisis. The picture of systematic violations served as the empirical basis for the strategy of transitioning from repetitive individual litigation to a structural approach at the domestic (class actions) and international (complaint before the IACHR) levels.

It is at this point that the structural process presents itself as a superior instrument, in response to the insufficiency of the classic, static and bipolar procedural model for transforming social and institutional reality⁽¹⁸⁾. While individual actions seek to provide a specific benefit for a patient, structural actions aim to reorganize public policy, seeking permanent changes in the management and execution of the system.

The focus of these lawsuits is on resolving "polycentric disputes", whose causes are multiple and require a judicial action that focuses on structural failures, ongoing actions or omissions and not on an isolated fact. For this reason, it goes beyond a simple condemnation or declaration, aiming to reform organizations and public policies⁽¹⁹⁾. Its aim is to transform an unconstitutional state of affairs⁽¹⁸⁾.

The process does not end with the sentence, but develops in a "cycle of decisions" (or "cascading decisions"), requiring monitoring and complementary decisions for effective institutional reform⁽²⁰⁾.

The effective protection of health, therefore, will require the coordinated action of the internal bodies and the expansion of institutional dialog between the Powers, seeking long-term cooperative solutions that guarantee access to health for the community⁽²¹⁾.

Methodology

Type of study and approach

The object of the study is to analyze the strategic action of the Rio de Janeiro State Public Defender's Office in structural litigation for the right to health, culminating in the complaint before the Inter-American Human Rights System. It uses the descriptive method, with a qualitative approach.

Despite the qualitative focus, the analysis is empirically based on reports that contain quantitative data. The strategic operation analyzed here used reports containing statistical data on its daily operations to prove the seriousness and repetition of the problem. In other words, the quantitative data cited here served as probative evidence to support the thesis of the systematic and institutional violation of the right to health and life.

Content of the reports

As explained above, the data used in this article is of a secondary nature, coming from the monitoring reports carried out by the Rio de Janeiro Public Defender's Office in its strategic action for structural advocacy at both domestic (Public Civil Action⁽²²⁾) and international levels (complaint P-1002-18).

It was noted in the reports that the institution collected quantitative data to map the universe of demands for ICU beds (pediatric and adult) filed during the night shift of the Rio de Janeiro judiciary.

The period of the survey and analysis contained in the reports initially covered July 2013 to June 2014 (to instruct the institution's filing of public civil action no. 0283688-82.2011.8.19.0001)⁽²²⁾. It was then supplemented with reports covering the years 2015, 2016, 2019, 2020 and 2021. During this period, it was noted that the institution compiled data on the following critical variables: a) date of service, with the scope of mapping the entry into the health unit; b) the patient's unit of origin; c) the patient's diagnosis, with the classification of the main clinical conditions that prompted the requests for emergency ICU beds; d) the total number of lawsuits filed by the Public Defender's Office seeking access to ICU beds during the night shift; e) the average time elapsed between the favorable court decision and the actual transfer (in hours/days); f) the number of patient deaths while waiting for the bed to be transferred via court decision.

The cross-referencing of this statistical data, consolidated in the institution's reports and with the documentary analysis of the class action lawsuit and the proceedings of the complaint before the IACHR, allowed the construction of the study's narrative, demonstrating the insufficiency of the internal state response to the health crisis.

Ethical considerations

Bearing in mind that this research is based exclusively on the analysis of secondary data (public judicial proceedings and functional reports from the justice system) and does not involve direct intervention with human beings, nor does it involve the collection of primary data that alters the physical, mental, moral or social state of the participants, submission to the Research Ethics Committee (CEP) and the use of the Free and Informed Consent Form (TCLE) are waived, in line with the relevant Brazilian standards.

Results and discussion

The data from the Public Defender's Office functional monitoring reports⁽²²⁾ revealed that more than half of the patients had already been waiting for transfer to ICU beds for at least 3 days in the emergency units before seeking the night judicial duty; that transfers to ICU beds were quicker (within 24 hours) when the plaintiff was resident in the capital (over 60%), largely due to the difficulty in summoning municipalities in the interior, notably due to the lack of 24-hour professionals in the Internal Regulation Centers (NIR); that the largest number of transfers were carried out within 24 hours (over 50%); a high number of deaths in patients who were not transferred; in addition to the deficit and mismanagement of beds in the emergency network and the serious omission of the government in adopting effective measures.

The reports⁽²²⁾ reveal that, even taking into account the agreement signed for the unified regulation of ICU beds, the State Public Defender's Office has filed more than 70 lawsuits a month at the Night Judicial Duty of the Capital District alone, requesting the transfer of SUS users, who are in 24-hour UPAs or public hospital emergency rooms, for hospitalization in an intensive care bed. These figures are compatible with a reduction in beds found by Santos⁽²³⁾ between 2012 and 2016 in the municipality of Rio.

The death rate of the plaintiffs in the lawsuits ranged from 50% to 70%, reaching 100% in the most critical period of the Covid-19 pandemic, and ratified the late care mentioned by Fagundes, Freire, Machado and Ximenes Neto⁽¹⁵⁾ demonstrating insufficient beds demonstrating the lack of intensive care beds in the state of Rio de Janeiro.

Thus, the long time spent awaiting transfer without receiving adequate medical treatment in public health units, the existence of hospitalizations carried out outside and without the knowledge of the regulatory systems⁽²²⁾ and the high mortality rate (over 60%) prove that: (i) the omission of public entities (state of Rio de Janeiro and municipalities) is serious; (ii) the supply of SUS ICU beds in the state of Rio de Janeiro is insufficient^(15,22); (iii) there are deficiencies in the regulatory actions for access to these beds; (iv) individual legal actions, in many cases, are not being effective, as non-compliance with decisions by the public authorities is recurrent; (v) the coercive measures imposed by the magistrate to force transfers (fines and orders for hospitalization in the private network, at the expense of the public authorities) are having no effect; and (vi) the omission of the public authorities, as well as being serious, is systemic,

and will only be effectively overcome by expanding the number of intensive care beds and organizing access regulation actions once and for all.

The reports, especially regarding the number of demands and the death rate, were crucial in supporting the Public Defender's request to join public civil action no. 0283688-82.2011.8.19.000⁽²²⁾ launched by the Public Prosecutor's Office years earlier.

The exhaustion of domestic remedies and the Brazilian state's delay in providing effective responses to stop the cycle of violence

The public civil action filed by the Public Prosecutor's Office of the State of Rio de Janeiro against the state and municipality of Rio de Janeiro⁽²²⁾ sought to compel the defendants to (i) expand ICU beds in the public health network; (ii) implement a single central for regulating access and the entire logistics of occupying and attracting these beds, avoiding unofficial regulation and inappropriate requests; (iii) compensate the community as a result of the lack of health services. It was initially fed

by sending copies of the initial petitions of the lawsuits filed on duty, to demonstrate the persistent unlawful conduct of the government.

Once the Public Defender's Office joined as a litigant, the systematic violations of human rights were exposed in the monitoring reports. Despite the seriousness of the problem (the percentage of deaths only grew over time), there was a delay in passing sentence.

It was only in 2019, eight (8) years after the lawsuit was filed, that the state and municipality of Rio de Janeiro were ordered to expand the supply of ICU beds and back-up clinical beds throughout the Metropolitan Region (I and II).

On appeal, the Court of Justice, alleging violation of the principle of separation of powers and undue interference in the administrative sphere, as well as the complexity of the case and the Judiciary's lack of expertise in the matter, reformed the sentence and granted the appeals of the public entities to dismiss the claims, consolidating the state's default.

A few days after the judgment was published, the Federal Supreme Court ruled on Theme No. 698⁽²⁴⁾ establishing the legitimacy of the Judiciary's intervention in public health policies when there is a serious violation of fundamental rights, in an exceptional way, not to replace the managers, but to point out the ends to be achieved and ensure fundamental rights when the public service is non-existent or deficient.

The Extraordinary and Special Appeals filed with the higher courts alleging violation of STF Theme No. 698 are still pending judgment.

The complaint to the Inter-American Human Rights System

Based on Brazil's conviction in the Ximenes Lopes case⁽⁹⁾ and the request, then being examined for admissibility, by the relatives of Mr. Poblete Vilches⁽¹³⁾ against Chile, a petition was submitted to the Inter-American Commission in 2018 on behalf of relatives of patients who died while waiting and patients who were waiting, at risk to their lives, for access to ICU beds in the state of Rio de Janeiro.

Violations were alleged of arts. 1.1 (obligation to respect rights), 2 (duty to adopt provisions of domestic law), 4.1 (right to life), 5 (right to personal integrity), 25 (judicial protection), 26 (progressive development), all of the American Convention on Human Rights⁽⁷⁾, and art. 10 (right to liberty) Article 10 (right to health) of the Protocol of San Salvador⁽⁸⁾.

Furthermore, considering the immediate risk of death of some of the petitioners who were awaiting access to ICU beds, the complaint, which was given the number P-1002-18 (Liolita and others)⁽²⁵⁾ requested, as a precautionary measure, the immediate provision of treatment, the implementation of measures for the effective and immediate expansion of the supply of ICU beds (pediatric and adult), the formulation and implementation of appropriate mechanisms for the regulation, supervision and inspection of SUS health units, and regulation.

On the merits, in addition to the opening of the case against the Brazilian state and the confirmation of the precautionary measures, with national extension, compensation was sought for the victims and their families, as well as recommendations to the Brazilian government to adapt the conditions of the public health units and adopt all the necessary measures to prevent a repetition of the violations, as well as to investigate the violations suffered and those responsible, and to train all the operators of the Rights Guarantee System on the Right to Health.

Two years after the complaint was lodged, the world was taken by surprise by the Covid-19 pandemic, during which time a specific survey was required, forwarded to the complaint⁽²⁵⁾.

It analyzed information sent by 111 public health units, both basic and pre-hospital, over a 90-day period from April to August 2020. The report found that: (i) 20% of the health units notified did not have access to the State Regulation System (SER); (ii) in 44.5% of the cases that required transfer to a bed for severe acute respiratory syndrome, the patients died in the pre-hospital or basic unit while waiting for the transfer or during transportation; and (iii) in almost 3% of the cases, the death occurred before the patient was even entered into the SER.

The Covid-19 pandemic has exacerbated the ICU bed crisis, increasing the number of avoidable deaths. Analysis of the data collected during the pandemic also revealed that vulnerable groups, especially black and poor women, were the most affected by the lack of timely access to beds, proving the deep social inequalities and structural racism that runs through the health system.

In response⁽²⁵⁾ the Brazilian state limited itself to invoking the inadmissibility of the petition due to the lack of regular proof of prior exhaustion of domestic remedies (Article 46 of the American Convention on Human Rights) and the incompetence *ratione materiae* of the IACHR due to violation of the principle of subsidiarity of the inter-American human rights system. On the merits, it was unable to support the provision of care to all patients waiting for transfers to ICU beds and attributed the problem to structural incapacity, which leaves citizens at the mercy of poor quality service. The request has been awaiting admissibility by the Commission since 2018.

The strategy of the complaint to the Commission seeks, as in the judgment in the case of *Poblete Vilches v. Chile*⁽¹³⁾ to obtain structural measures that go beyond the individual sphere of the victims, for the benefit of the entire community, reinforcing the commitment of the Public Defender's Office in the fight for justice and equality.

Final considerations

The right to health, enshrined in the constitution and recognized as a fundamental human right, faces serious barriers in Brazil, especially in the state of Rio de Janeiro. The Public Defender's Office plays a strategic role in protecting human rights, especially for vulnerable patients in the public health system who are looking for ICU beds.

Monitoring reports carried out by the institution between 2013 and 2021 on the number of lawsuits filed seeking access to these beds, the time taken to transfer them and the percentage of patient deaths, were crucial in supporting the Public Defender's Office's filing of the class action lawsuit filed by the Public Prosecutor's Office years earlier. They highlighted the structural precariousness of public management, marked by administrative disorganization, deficiencies in unified regulation and underfunding of the SUS, showing a systemic problem that transcends the legal and administrative spheres.

Domestically, in addition to the delay, the judgment by the Court of Justice represented a step backwards, as it ignored the state's responsibility to guarantee fundamental rights through effective intervention, when necessary, an understanding already ratified by the STF in Theme No. 698.

The shortage of ICU beds and the slowness of the judicial system are symptoms of a structural problem, which requires integrated actions and the strategic use of international human rights protection mechanisms.

Acting with the IACHR has emerged as a strategy to overcome the slowness and insufficient protection of the Brazilian judicial system in guaranteeing the right to health. The Public Defender's

Office seeks to expand the possibilities of holding the state accountable, pressing for effective changes, in an uncompromising defense of human rights.

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Author contributions

T.G. Souza: conception/design of the article, data analysis and interpretation, writing of the article, critical revision of its content and approval of the final version.

S.M. Oliveira: conception/design of the article, data analysis and interpretation, writing of the article, critical revision of its content and approval of the final version.

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