

COURTS INTERVENTION IN HEALTH CARE POLICY: THE CASE OF
BRAZIL

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Judicial decisions questioning healthcare policy are extremely common in Brazil, estimated at over 40,000 lawsuits per year¹. Most cases consist of individual claims requesting specific medicine and treatments that are not covered by the Brazilian universal healthcare policy follow cost/benefit analysis. Courts usually rule in favor of claimants and order the state to provide such requests within short deadlines and under the threat of strong sanctions. The large majority of these decisions are given by state-level courts and are based only on the constitutional right to healthcare.

This massive judicialization of healthcare has growing effects on budgetary planning. Recent reports show that complying with judicial decisions on health has led to a growing expenditure of almost 2 billion reais (around 600 million dollars) in 2015-2016. However, increasing costs are not the sole issue. Since judicial decisions require compliance from any and all levels of government, policy organization and division of responsibilities between different federal levels is largely compromised². Although these impacts have been well documented, comprehensive researches describing the way policy makers react to Courts decisions are still rare. The assumption that compliance follows naturally from a court order prevents legal scholars from assessing the full variety of responses and policies put in place by policy makers to dampen the impact of such decisions.

In order to study these damage control policies, it is crucial to look at the factors that can influence and determine compliance. My research undertakes this task by focusing on policy formulation and implementation. Bureaucrats are perceived not only as reactive actors. Besides responding to each judicial decision individually, they also develop policy strategies to lessen or prevent the different effects over budget and policy organization brought by intense judicialization. In the case of Brazil, different bureaucratic structures have been created in order to provide quicker and more efficient responses to judicial decisions. Through such structures public officials establish channels of communication and dialogue with once isolated sectors within the health care policy, while also creating formal and informal connections with officials outside the administrative branch, especially the judicial system. The overall result is a more transparent and accountable pool of decisions on what should or should not be part of the healthcare benefits package.

1. Changing legal research approach towards compliance.

Courts have been acting as politically relevant actors all over the world, from evaluating the constitutionality of statutes and decrees to creating and implementing public policy. Courts from the Global South, for example, especially from Latin America, South Africa, and India have been extremely active when it comes to

¹ Ferraz, O. L. M. (2011). Health inequalities, rights, and courts: the social impact of the judicialization of health. In Yamin, A. E., & Gloppen, S. (2011). *Litigating health rights: Can courts bring more justice to health?* (Vol. 3). Harvard University Press.

² Ferraz, O. L. M. (2011). Health inequalities, rights, and courts: the social impact of the judicialization of health. In Yamin, A. E., & Gloppen, S. (2011). *Litigating health rights: Can courts bring more justice to health?* (Vol. 3). Harvard University Press.

enforcing social rights that were constitutionalized in the 1980s and 1990s³, but remained only written provisions or were insufficiently implemented, as these countries still face extreme levels of poverty and inequality. Most studies on the matter, however, are concerned with describing and evaluating the moments prior to the judicial decision or the judicial decision itself. Their direct and indirect effect on society and the political process, are rarely considered⁴. My research offers a contribution to the debate assessing precisely policy officials' strategies when complying with courts' decisions on social rights, departing from the case of Court's intervention in health care in Brazil.

2. Initial results and policy implications

I argue that compliance can vary in different levels and throughout time, dependent on institutional and non-institutional factors⁵. In order to comply, policy officials can obey the judicial order and at the same time put in place a set of different strategies to reduce the effects of each judicial decision or prevent the effect of similar decisions in the future. Policy officials can choose short term or long term strategies, adopt formal or informal action and can either act by themselves or in cooperation with judicial system officials. These options vary depending on the content of the judicial order, the expected time for compliance, the strength of the sanctions involved in the case of non-compliance, and the kind of remedy ruled by the Courts.

Assessing four Brazilian States' responses to the intense judicialization of healthcare (Sao Paulo, Rio de Janeiro, Santa Catarina and Rio Grande do Sul), my research recognizes a general strategy adopted by healthcare policy officials: the creation of institutionalized policy channels for communication and dialogue with different organs within the Executive and the judicial system. Each State puts in place a particular set of policies as a response to the specific patterns of judicialization they face. Each policy includes certain strategic actors from different organs in an effort to technically improve the State defense on judicial cases, establish consistent responses to similar cases and prevent litigation on benefits that should already be provided by the healthcare system. Such actors come from different organs inside the administrative

³ Gauri, V., & Brinks, D. M. (Eds.). (2008). *Courting social justice: Judicial enforcement of social and economic rights in the developing world*. Cambridge University Press; Langford, M. (2008). *Social rights jurisprudence: Emerging trends in international and comparative law*. Cambridge University Press; Yamin, A. E., & Gloppen, S. (2011). *Litigating health rights: Can courts bring more justice to health?* (Vol. 3). Harvard University Press.

⁴ Kapiszewski, D. and Taylor, M. M. (2013), Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings. *Law Soc Inq*, 38: 803–835.

⁵ Canon, B.C., Johnson, C.A. (1998). *Judicial Policies: Implementation and Impact*. 2nd ed. Washington, D.C.: CQ Press; Rosenberg, G. (2008), *The Hollow Hope. Can Courts Bring About Social Change?* 2nd ed., Chicago: Chicago University Press; Judicial review and bureaucratic impact in future research. / Hertogh, M.L.M.; Halliday, S.; Hertogh, M.L.M.; Halliday, Simon (Eds.) (2004). *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives*. Cambridge, United Kingdom; Rodríguez-Garavito, C. (2010). Beyond the courtroom: The impact of judicial activism on socioeconomic rights in Latin America. *Tex. L. Rev.*, 89, 1669; Kapiszewski, D. and Taylor, M. M. (2013), Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings. *Law Soc Inq*, 38: 803–835.

bureaucracy and, more importantly, from the Judicial system, involving different policy officials, public defenders, public prosecutors, judges and Courts of Appeal.

These institutionalized possibilities of dialogue and communication seem to have important policy implications. The first one is finding bottlenecks and points of inefficiency inside the policy, especially when the treatment involves multiples sectors inside the agency or within agencies, or in the case of constant failure in delivering benefits that are already part of the policy basket. Another policy implication is the potential to change judges and Courts' positions and bias against the State. When policy officials engage in a closer and detailed defense of their policy choices, establishing mechanisms of dialogue with judges, they tend to change judicial positions on a case by case basis. That does not mean that they successfully stop the lawsuit, since claimants can appeal to multiple levels before obtaining a final decision, and Brazilian Courts are not obliged to follow precedents. Nevertheless, these efforts indicate that procedures to increase dialogue and communication have a certain impact and can put the policy, and not only the constitutional right to healthcare, under the judge's consideration.

The third policy implication is related to the gains on transparency and accountability. In order to justify policy choices before different actors and points of view, policy officials are constantly forced to discuss the priority setting rationale⁶ that leads to the incorporation of certain benefits and not others. Including different actors into the discussion of what consists a priority subjects once highly technical and insulated policy choices to society's scrutiny. Decisions get through such scrutiny gain legitimacy, while decisions rejected can hold the healthcare organ accountable and represent stronger grounds to judicial review⁷.

To summarize, it is relatively difficult to see positive effects of the judicialization of healthcare if research design mainly regards the general aspects of judicial decisions and its aggregated impact over policy funding and organization. But assessing micro level responses can shed some light on the possible destabilization⁸ effects judicial decisions may have over the normal functioning of bureaucracies. What the four cases in Brazil suggest is that even though judicialization impairs the general equality and structure of the healthcare policy in Brazil, it can also lead to unintended consequences.

⁶ Dittrich, R., Cubillos, L., Gostin, L., Chalkidou, K., Li, R. (2016) The International Right to Health: What Does It Mean in Leagl Practice and How Can It Affect Priority Setting for Universal Health Coverage?, *Health Systems & Reform*, 2:1, 23-31.

⁷ Dittrich, R., Cubillos, L., Gostin, L., Chalkidou, K., Li, R. (2016) The International Right to Health: What Does It Mean in Leagl Practice and How Can It Affect Priority Setting for Universal Health Coverage?, *Health Systems & Reform*, 2:1, 23-31.

⁸ Sabel, C.; Simon, W. (2004). Destabilization Rights: How Public Law Litigation Succeeds. *Harvard Law Review* 117(4), 1016-1101.