

Sanitation Rights, Public Law Litigation, and Inequality: A Case Study from Brazil

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Abstract

Public law litigation has been used in many places to advance human rights related to health. In Brazil, such lawsuits usually request that the government pay for pharmaceuticals to individuals. But could litigation play a role in shaping public health policies to benefit communities? To explore this question, this paper focuses on lawsuits involving determinants of health, namely water and sanitation public policies. This paper discusses the results of an empirical study of 258 Brazilian court orders, issued in a 10-year period, that address requests for sewage collection and treatment. The data show that the Brazilian judiciary is willing to improve access to sanitation services. However, litigation has addressed fewer than 177 out of the 2,495 Brazilian municipalities that lack both sewage collection and treatment systems, and lawsuits are concentrated in the richer cities, not in the poorest ones. This paper suggests that public law litigation can be used to foster public health policies similar to the way in which structural reform litigation and the experimentalism approach between courts and defendants have influenced public policies and achieved institutional reform in schools and prisons. However, greater effort is needed to target initiatives that would reach the most disenfranchised communities.

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Introduction

PUBLIC LAW LITIGATION has been used strategically throughout the world to advance human rights. However, I contend that when it comes to health rights, such litigation has been less strategic and has focused primarily on access to pharmaceuticals and medical procedures in hospitals.¹ Important as this approach may be for plaintiffs and for the right to health from an individual perspective, there is a risk that it may weaken health systems as a whole by concentrating health resources into pharmaceuticals and hospitals. More than half of the Brazilian Unified Health Care System (SUS) budget in 2010 was spent on pharmaceuticals and hospital procedures. SUS is the Brazilian national health system, a unified, public, and tax-funded health system, that is in charge of providing health care on a universal basis and free of charge. SUS spending on pharmaceuticals has increased every year since 1998; between 2003 and 2007, expenditure on medicines “for exceptional use,”—and usually expensive—increased 252%.²

Health litigation cases have also been increasing in Brazil. In 2002, there was only one health-related purchase made as a result of a judicial decision. In 2011, there were 8,549 purchases, mostly of pharmaceuticals.³ There is an estimated 90% success rate for individual lawsuits that request medicines and medical treatment in Brazilian lower courts.⁴ In 2014, the Brazilian Federal Court of Accounts reported that litigation was contributing to the concentration of public health expenditure on pharmaceuticals and medical procedures over other priorities.⁵ It can also be argued that successful plaintiffs benefit and receive more from the health system than those who are unwilling or unable to go through the courts, which promotes inequality in a tax-funded and universal health system like the SUS. Furthermore, evidence suggests that plaintiffs are not from the most disadvantaged sectors in the population. I discuss this more fully in the Results and Discussion sections.

Sanitation is a challenging issue in Brazil. While

the government recognizes it as a key public health service, it is unlikely that Brazil will meet the MDG targets for sanitation.⁶ Brazilian law requires the government (usually municipalities) to provide universal sanitation services, with funding assistance from the federal government. Despite this, sewage collection takes place in only 55.15% of municipalities and sewage treatment occurs in just 28.52% of municipalities. In 2008, the most recent year for which data are available, 2,495 municipalities did not have sewage collection systems and 3,977 did not have any sewage treatment system. Moreover, even in the cities with sanitation services, the services did not reach the whole population and were less available to the poorest communities.⁷ Brazilian federal expenditure on sanitation makes up a consistently low percentage of the GDP.⁸

International human rights law has regarded access to sanitation as part of the human right to health at least since the 1989 Convention of the Rights of the Child. In 2010, UN Resolution 64/292 recognized that access to water and sanitation is a human right essential to the realization of all human rights.⁹ The Brazilian Constitution expressly provides for the right to health, and domestic law describes sanitation as a determinant of health. This shows coherence between health care and sanitation policies.¹⁰

The right to health therefore has an enforceable dimension, and health rights litigation can and should seek to make underlying determinants of health available and accessible to all people in Brazil. Health rights litigation should also promote public policies that guarantee clean water and the collection and treatment of sewage.¹¹

However, compared with an order to provide a plaintiff with a medicine or a clinical procedure, public health litigation can be more complex within judicial systems. The implementation of a court order to provide permanent clean water or a sanitation system in a municipality requires technical expertise, planning, and budgeting. This raises

practical and philosophical questions regarding the court's capacity and role in dealing with such complexities, including whether judicial intervention in public health policy is appropriate in democracies. Drawing on international literature, and documentation from the courts in Brazil, this paper makes two main claims. First, public law litigation can help foster public health policies by intervening in the political process in which public health priorities are set, and then monitoring policy implementation through public health services. Second, public law litigation can and should be used strategically to target initiatives that reach the most disenfranchised communities in the municipalities. This is consistent with a rights-based approach to health: it begins with the development of plans to ensure people's rights to health are fulfilled, and then strategically meets the rights of the most vulnerable and disadvantaged people first.

The Brazilian legal system and sanitation

Brazil, population 190,732,694 (2010), is a federal state comprising 26 states and the Federal District, which contains the country's capital. There are appellate courts of all 26 states, the District Capital Superior Court, and five federal regional courts. The databases of these 32 courts were researched for this paper as explained below.

The Brazilian legal system allows public civil action and popular action, which are both class actions to protect the public interest and defend diffuse and collective rights. Associations, public prosecutors, and other public institutions can file public civil actions, and any citizen can file a popular action. In a popular action, the plaintiff is said to be acting on behalf of society, and the court decisions in these cases are expected to benefit society.

Public prosecutors in Brazil are public officials in charge of protecting the public interest, mostly through litigation, which makes them the main public law litigator. The Brazilian Constitution provides safeguards to guarantee their independence, so much so that it is commonplace for them to bring actions against the government, both federal and state, which also pays them. The activity of

other public interest litigators (for example, NGOs and neighborhood associations) is still incipient in relation to sanitation rights.

Brazilian law has defined sanitation as a compulsory public service since 1978 (Law 6528/78).¹² In 1988, the new Brazilian Constitution mandated all levels of government to improve sanitation conditions (Article 23, IX). Municipalities are in charge of delivering the services on a universal basis, although not necessarily free of charge for customers (Article 30,V); in addition, states may be involved with service delivery (Article 25, paragraph 3).¹³ Many municipalities have agreements with state-owned water and sanitation companies for them to provide the services.¹⁴ The federal government is responsible for funding the system and establishing national guidelines for sanitation (Article 21, XX) under the 2007 Federal Law 11445. This law includes clean water, sewage collection, treatment and adequate discharge, waste collection and adequate disposal, as well as water management, under the term 'sanitation.' Municipalities and states are legally required to have a sanitation plan and to execute it. Federal Decree 7217/2010 determined that municipalities and states would not receive federal funds for sanitation after 2014 if their sanitation plans had not been finalized, but Federal Decree 8211/2014 extended this to December 31, 2015.

Despite the legislated requirement for sanitation services to be provided, public funding has remained inadequate to meet the obligation. Federal Law 11445 provides for technical support from federal government and agencies to cities and states in the preparation of their sanitation plans, so the failure to complete plans cannot be attributed to a lack of technical support. Rather, governments are not prioritizing sanitation policies and services, which in turn has led to the use of courts to seek provision of the services.

Brazilian law does not describe sanitation services directly as a right, but this has not prevented the courts from considering the human rights duty imposed upon the government as enforceable. Court decisions frequently refer to a right to sanitation services as a social and economic right, relying on an understanding of health rights (Articles 6

and 196), environmental rights (Article 225) and, in some cases, housing rights (Article 6) explicitly inscribed in the Brazilian Constitution. Brazilian courts refer to social and economic rights that are enshrined in the Constitution, usually framed as domestic obligations, not international ones.¹⁵

Methodology

A review was undertaken of all the decisions made available in the online databases of the 32 Brazilian courts mentioned above from January 2003 to March 2013. The keywords in the initial search were “sewage” (*esgoto*), “public civil action” (*acao civil publica*) and “popular action” (*acao popular*), producing 5,512 results. These court decisions were further refined to select decisions that had adjudicated requests for the provision of sanitation services—collection and/or treatment of sewage—made against government, public agencies, or publicly controlled companies responsible for providing them.

Cases were excluded if they requested only damages (torts) against the government, since such cases would have extremely indirect impact on the delivery of public services. Although judgements mandating damages can sometimes create incentives for change in a market environment, it was decided that, for the purposes of this research, this incentive mechanism is too dilute to measure when applied to the government. In Brazil, the government generally pays damages several years after the initial judicial decision, often under a different administration than the one responsible for the judicial action in the first place. Additionally, data are not available to compare the costs of providing sanitation services versus the damages the government was ordered to pay, making it impossible to determine whether it would have been more cost effective for the government to provide the services in the first instance.¹⁶

No differentiation was made between judicial decisions resulting from appeals against preliminary injunctions or final decisions. The decisions were not necessarily final (*res judicata*), because further appeals to the Superior Court of Justice and to the

Brazilian Supreme Court can take several years before a decision is reached.

The Superior Court and Supreme Court websites were also searched using the same keywords for the same 10-year period. No judgement was found that overruled a court decision to grant a plaintiff collective goods requests for sanitation services. Moreover, some decisions were found in which the Brazilian Supreme Court praised judicial interventions in public policies.¹⁷

There were some limitations in the databases; for example, the Court of Appeals for the state of Bahia had no decisions prior to 2012, and the Court of Appeals for the state of Mato Grosso do Sul had no decisions after July 2012. The Brazilian Federal Agency in charge of local sanitation projects (FUNASA) estimates large, complex sanitation plants can take up to 20 years to be planned, designed, and built before they start functioning. The 10-year time frame of the research may not have captured the enforcement of the decisions on schemes of this size.¹⁸

Results

The review identified 258 cases that were relevant to this study. Courts granted the plaintiffs’ requests, to some extent, in 76% of these cases. In four out of five cases where plaintiffs’ petitions were partially granted (79.69%), this meant setting a deadline (with an associated fine for non-compliance) for defendants to implement the sanitation service, or presenting a plan describing how it would be implemented over time. In those cases, therefore, courts did not get involved in technical issues about how the service would be delivered. The original deadlines, however, were not met in any of the cases: courts usually accept the government’s requests for postponements following much communication and negotiation on the issue.

The records show that 4% of the courts’ decisions granting plaintiffs’ requests were fully implemented. The timing of the review meant that there were cases where implementation was still under way. In some decisions, it was shown that, in the context of the lawsuits, municipalities developed agreements

with federal agencies to obtain resources and technical support to provide sanitation services to the population, thus impacting local public policy and implementation.¹⁹ Examples of the impact of court decisions were identified. The implementation of a court order rendered in 2008 was reported, in 2010, to have resulted in the water filtration plan being fixed and in making water available to everyone in Parecis, a municipality of almost 5,000 people in the northern Brazilian state of Rondonia.²⁰ In 2011, the Federal Regional Court for the 4th Circuit ordered the water and sanitation company of the state of Santa Catarina and other defendants to prepare and implement a plan to provide sewage collection and treatment for Barra do Sul (8,500 people), a city in the southern state of Santa Catarina. In 2014, the plan had already been presented and implementation begun.²¹

Public prosecutors filed 87% of the 258 cases. Of the court decisions examined, 47% dealt with requests for sanitation services for communities (community cases), 7% involved lack of sanitary infrastructure in public buildings (for instance, public hospitals and prisons), and 46% adjudicated claims that could be described as environmental cases, mainly dealing with pollution of water from the discharge of untreated sewage. The line between community cases and environmental cases can be indistinct; for example, cases involving public

buildings can directly impact nearby communities and pollute community water sources.

All court decisions examined for this paper related to areas in 177 municipalities. Even if these 177 municipalities belong to the 2,495 that completely lack both sewage collection and treatment systems, this would mean that litigation has reached, so far, only 7% of municipalities in need of sanitation systems.

Most lawsuits affected areas within cities with the same or higher Human Development Index (HDI – 2000) than the regional average. There is more updated data on HDI (2010) but I decided to use the 2000 numbers as it may describe more accurately the reality of the cities when the lawsuits were filed. In the country's North Region, 70% of lawsuits were filed in cities with the same or higher HDIs than the regional average, as were 61% of lawsuits in Northeast Region, 71.43% in Center-West Region, 69.50% in South Region, and 50% in Southeast Region.²² The Southeast and South Regions, followed by Center-West, are the more affluent areas, while the Northeast and North Regions are the poorest ones (see Table 1).²³

	Brazil	North	Northeast	Center-West	Southeast	South
Population (2011)	195,243,000	16,499,000	54,226,000	14,576,000	82,067,000	27,875,000
Life expectancy (2009)	73.1	72.2	70.4	74.3	74.6	75.2
Percentage of national GDP (2010)	-	5.3%	13.5%	9.3%	55.4%	16.5%
GDP per capita (R\$) (2010)	19,766.33	12,701.05	9,561.41	24,952.88	25,987.86	22,722.62
Child mortality (per 1,000 live births – estimates for 1996) ⁴³	60.7	-	96.4	41.1	36.7	35.2
Maternal mortality rate (per 100,000 live births – estimates for capitals/2002) ⁴⁴	54	60.5	67.7	49.4	47.9	41.9

TABLE 1 Regional Inequality in Brazil: Some Indicators

Discussion

The courts' role in improving sanitation

The first claim of this paper is that public law litigation can contribute to public health policies, sanitation in particular. Public policy development is complex, its implementation even more so, and neither can occur exclusively in the courtroom. However, this paper argues that the courts can and should play an important role in public health policy and implementation.

The numbers of court cases addressing sanitation issues in Brazil is evidence that the courts are helping to improve access to sanitation services. In 2011, the Chief Justice of the Brazilian Superior Court of Justice commented on a case where a court had denied a request to suspend construction of a sewage treatment system: "In a country where there are no sewage systems because it is an invisible service that, therefore, does not pay with votes, we cannot lose the opportunity of avoiding damage to public health and environment."²⁴

Court orders are not always carried out as directed, and therefore, it may be suggested they have limited ability to engender social change and shape public policies.²⁵ It is true that processes leading to social change are frequently long-term and complex, with multiple factors, some unpredictable, at play.²⁶ But evidence is now available showing concrete results from the examined court decisions.

Resorting to litigation does not exclude other means of bringing about social change, and can indeed promote alternative action.²⁷ A favorable court decision can launch social change processes, and media and social mobilization, for instance, are important to the implementation of judicial decisions.²⁸ Thus, courts, politics, and other social means should be used to promote access to sanitation services. Considering the need for sanitation services in Brazil and many other places, it would be unjustifiable not to employ a useful resource (litigation), along with other traditional means of social mobilization.

Litigation has had an impact on local public policy choices and on the political decisions made by some Brazilian municipalities to privatize san-

itation services through public bidding.²⁹ Despite political criticism about this option, the fact remains that institutions in charge of providing the services become defendants in a court of law, and must formally explain their reasons and actions.

Brazilian courts have demonstrated a commitment to the promotion of social and economic rights.³⁰ Just as courts have been amenable to private goods requests of social and economic rights—that is, goods that will be consumed solely by the plaintiff—this research has found that courts are also amenable to collective goods requests, as public policies, notwithstanding their complexity.

Health systems around the world, even in more developed countries, have been struggling with priority-setting processes.³¹ Just as decisions about public health systems are shaped in part by ethical, technical, and political criteria, so too are decisions about sanitation policies and services. The benefits of sanitation systems may take some years to be realized, whereas decisions to fund medicines can reap benefits immediately, which means sanitation projects may not be prioritized by usual electoral and political incentives.³² And, as mentioned before, sanitation services are not evenly distributed among the population: the poor suffer more without sanitation services than do the better off.³³

The Brazilian government has been legally obligated to provide sanitation services for decades. It was democratically determined that sanitation services should be available to everyone. Despite this, basic sanitation services are still not provided to 68% of the population.³⁴ This research has found no evidence that a court decision results in sanitation services being provided any faster than they would have been without the judgment, and judicial intervention has limited itself to the negotiation of deadlines requiring that sanitation services are prioritized by the Executive branch. Therefore, asking the courts to support sanitation rights can be seen as another mechanism to support democratically determined policies, and should not be seen as a means of bypassing the political branches of government.

Technical and democratic options in adjudication

One could argue that courts need to demonstrate a range of technical competence and democratic legitimacy to adjudicate requests that ask for implementation of public policies. Courts are likely ill-equipped to decide, for example, which kind of sewage collection system is best suited to a specific area. However, courts may simply ask defendants to prepare and present a plan of action to provide sanitation services, or establish reasonable deadlines for the services to be delivered, in which case the court itself does not require specialist knowledge. Courts may also employ a newer public law litigation model, sometimes called experimentalism, which asks defendants to propose how they will comply with a broad order. The court may then need to negotiate and monitor the defendant's subsequent performance.³⁵ This approach has been used, for instance, in the structural reform cases of schools, prisons, and mental health facilities in the US.³⁶

The results reveal that almost 80% of all the court decisions granting plaintiffs' requests did not provide direction on technical or service delivery issues, deferring to the Executive branch to make those decisions, as happens in other areas of public law litigation. The issue more frequently discussed in the cases is that of timing. Defendants do not deny they must provide the services, but they do not want to commit to specific deadlines. To decide when to implement a public policy is, of course, a political decision, as it requires the prioritization of resources. At the same time, though, if public officials do not implement a public policy set by law for years or decades, what does the rule of law mean? And what should courts do?

The Brazilian courts' answer to these questions is to negotiate deadlines and impose fines for non-compliance. This process was used in 79.69% of the cases in which the plaintiff's request was granted to some extent. Courts deferred universally to government requests for extensions, and, in fact, all the originally imposed deadlines were unmet. The conclusion from this research is that courts are aware of their technical limits, and they adjudicate requests for sanitation services in ways that do not go beyond their competence and legitimacy.

Public law litigation on sanitation in Brazil: The poor and the worse-off

Lawsuits demanding pharmaceuticals and medical procedures for individuals have been criticized for promoting inequality because they concentrate resources in a small number of plaintiffs, and because plaintiffs usually do not come from the more disenfranchised groups within the population.³⁷ Critics argue that plaintiffs in these lawsuits get more from the health system than the rest of the population, and that the worse-off are disproportionately carrying the costs.³⁸

In 2010, Brazil's federal expenditure on pharmaceuticals was US\$24.29 per person. In the same year, the Brazilian federal government and eight Brazilian states combined spent US\$2,074.86 in drugs per lawsuit in 240,980 lawsuits.³⁹ In 2006, the Brazilian state of São Paulo spent US\$32,400,000 to comply with court orders to deliver pharmaceuticals for 3,600 plaintiffs in the city of São Paulo, producing a cost of US\$9,000 per plaintiff. In the same year, São Paulo spent US\$1,100 per person to fund its program for special and high-cost drugs, improving the lives of 380,000 people. There is also evidence that most plaintiffs in the state of São Paulo, for example, were represented by private lawyers, obtained a drug prescription from private doctors (not from SUS), and lived in the wealthiest parts of the city.⁴⁰

Lawsuits asking for sanitation services (collective goods) relate very differently to the inequality issue, when compared with lawsuits requesting pharmaceuticals (private goods). Granting medicines free of charge to a single plaintiff will only benefit that patient and his or her family, unless the patient has an infectious disease. On the other hand, treating sewage, whether discharged in wealthier or poorer areas, has a positive impact on people's environmental and health rights, irrespective of whether they are wealthy or poor.

Despite this collective positive effect, some groups may benefit disproportionately depending on the scope of the lawsuit. Resolving a sanitation problem in one community and its environs will not directly impact sanitation deficiencies in a community geographically distant from the first one. If

public law litigation is concerned with inequality, it is important to know what has been, and what should be, its focus.

The courts' data pertaining to environmental cases or sanitation infrastructure in public buildings did not enable an analysis of the socio-economic status of the communities that would benefit. However, in environmental cases, the plaintiffs were usually seeking a sewage treatment system, meaning that sewage collection was present. In community cases, both collection and treatment systems may be missing. Assuming that the lack of sanitation systems may be used as a proxy for the social condition of the neighborhood, and that the lack of both systems (collection and treatment of sewage) indicates a worse situation than the lack of just one (treatment), this suggests that the potential beneficiaries of community cases are in a worse situation than those in environmental cases. Therefore, it seems plausible to assume that community cases (47.40% of total) are dealing with poor communities, poorer than the ones that may eventually benefit from environmental cases.

The research identified that the courts considered sanitation cases in only 177 municipalities. These municipalities include areas in state capitals, which do not completely lack sanitation systems.⁴¹ Therefore, there are many people living in the 2,495 Brazilian municipalities who lack sewage systems completely, and who are not seeking their entitlements to sanitation systems from the courts. Also, public interest litigators are not seeking judicial intervention on their behalf. As shown in the results, the court cases are predominantly in the regions of Brazil that have a higher than average HDI. People without sewage systems and who are not accessing courts would appear to be among Brazil's most disenfranchised.

The study findings, therefore, indicate that public law litigation, although aspiring to reach the poor, has addressed so far only a very small portion of the country's sanitation needs. The reasons for this inequity in access to the judicial system require further investigation.

These results reflect the inverse equity hypothesis, which theorizes that a non-targeted initiative in

public policy tends to initially increase inequality, only helping to reduce it after some time.⁴² Although public law litigation cannot be described entirely as an initiative in public policy, the data supports the first part of the hypothesis: lawsuits are concentrated in the wealthier cities in each region, although it is not known whether they may be benefiting poorer areas of those municipalities. The poorest cities have not yet benefited from litigation addressing the need for sanitation. The second part of the phenomenon is yet to be observed; the oldest lawsuits were filed in the 1990s and, up to 2013, no change in this trend was observed.

Some of the factors that may explain these results could include the following. Public law litigators (who filed most cases) probably live in the wealthier cities and are more aware of local problems. People from remote and poorer cities, after failing to resolve the problem with local authorities, might not have the resources, financial and otherwise, to further explore legal options. In such instances, the costs involved in going to another city to search for a sympathetic ear for their complaints is a hurdle that should not be underestimated. People in poorer cities are less likely to be educated and less aware of their rights than people in more developed and wealthier cities. This leads to a scenario where even in the face of an opportunity to complain, people in poorer cities are less likely to do so.

Conclusions

This study has found that public law litigation has promoted sanitation public policies and services in Brazil. Courts have been favorable to 76% of claims on public health policies, granting sanitation services. There is also evidence that court decisions can help make sanitation a political priority. However, litigation has addressed only a small part of the nation's need.

This research has identified the potential of courts to improve public health conditions, not only in Brazil, but in any country where the law demands that public policies are developed to address public health issues. Courts in Brazil have been willing to improve access to social and economic rights;

however, the scale must be increased. Hence, it is suggested that public interest litigators frame access to public health services as a human right and focus on securing collective goods claims. Broader public health policy outreach has the potential to improve the general conditions of health, particularly for poorer people, and is likely to eventually counterbalance any apparent short-term increase in inequality.

Public law litigation should also plan targeted initiatives to reach out to the most disenfranchised, so at least the basic dimensions of human rights are fulfilled. As found in this research, the worse-off communities remain the least represented in the court cases. Thus, it is important that public interest litigators map needs across the country, so that specific initiatives to help those communities can be planned.

Brazilian courts have not ordered specific behavior of defendants, but similar to structural reform cases, they have asked defendants to provide deadlines and plans, which the courts then monitor. The monitoring is pivotal so that a positive court order promotes change and increases access to sanitation services for poor communities. This is particularly complex when the instigators of the litigation are third parties with legal expertise (NGOs, law school clinics, and public prosecutors), not the interested community itself. In this context, there is the risk that litigators will perceive the court decision—the legal outcome—as the ultimate goal of their work, while the next step—executing the decision—receives less attention.

This research found some evidence, although not conclusive, that this phenomenon was happening. In some cases, plaintiffs had abandoned a lawsuit after a positive decision was rendered, and sought implementation only after a court inquiry. Furthermore, initial decisions were not usually put into practice if there were appeals pending, even if the appeal did not prevent implementation. Special and extraordinary appeals before the Superior Court of Justice or the Supreme Court were filed against approximately 50% of court decisions that granted the plaintiffs' requests. As the appeal process is known to take many years, it resulted in execution of the

judicial decree being seriously delayed in more than 50% of cases.

Public law litigators need to remain focused on having the court decisions implemented throughout this long time frame. They also need to coordinate with other social players, for example, social movements, political parties, media, and public officials, to draw attention to sanitation needs and make sanitation a public health priority. A long process takes place after a court order is rendered. A political environment sensitive to sanitation rights will make the implementation of court orders easier.

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