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

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Abstract

Public law litigation has been used as a strategy to advance civil rights for decades and in Brazil, since the 1990’s, such litigation has also been employed in the advancement of rights related to health. Such bids are usually accomplished through requests that the government pay for pharmaceuticals and medical procedures to individuals. This kind of litigation ends up concentrating resources on pharmaceuticals, instead of other public health needs, and literature has been pointing out the inequity effect it may also produce by particularly benefiting successful plaintiffs, who will receive goods usually not available for the rest of the population. But could litigation play any role in what concerns public health policies? To deal with this question this paper focuses on lawsuits dealing with water and sanitation public policies, widely considered as vital for public health, and particularly with requests for the provision of sewage collection and treatment services. This paper presents and analyzes the results of an empirical study of 258 Brazilian court orders addressing those requests, issued between January 2003 and March 2013, and the data shows that, on the one hand, the Brazilian Judiciary is willing to improve access to sanitation services. However, litigation has only dealt with fewer than 7.09% 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 in a similar way structural reform litigation and the experimentalism approach between courts and defendants have been used to try to restructure other public policies (schools, prisons, mental health, etc.) and to achieve broad institutional reforms. I also suggest that public law litigation should plan targeted initiatives that attempt to reach the most disenfranchised.

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Introduction

Public law litigation has been used as a strategy to advance human rights around the globe, but, when it comes to health rights, litigation has, up to this point, 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, from a collective point of view, and considering health systems as a whole, litigation reinforces the concentration of resources in pharmaceuticals and hospitals. Official data in Brazil reveals that more than 50% of the Brazilian Unified Health Care System (SUS) budget in 2010 was spent with pharmaceuticals and hospital procedures\(^2\). SUS spending with pharmaceuticals has been growing every year at least since 1998 and from 2003 to 2007 expenses with drugs considered of the exceptional use, usually of high cost, increased 252%\(^3\).

Health litigation has followed a similar path. The Brazilian Ministry of Health reports that while in 2002, only a single purchase was made as a result of a judicial decision, in 2011, the number skyrocketed to 8,549 purchases, mostly of pharmaceuticals\(^4\). Moreover, studies have estimated a 90% success rate for individual lawsuits that request medicines and medical treatment in Brazilian lower courts\(^5\). A report published in 2014 by the Brazilian Federal Court of Accounts on health policies points out, as a worry, how litigation is helping concentrate public expenses on pharmaceuticals and medical procedures over other priorities.\(^6\) Besides that, successful plaintiffs benefit and receive more from the health system than the rest of the population that is unwilling or unable to utilize the courts, enhancing inequality in access to health, particularly within a tax-funded and universal health system, as SUS. Moreover, there is some evidence showing that plaintiffs in some cities are not from the worst-off groups in the population\(^7\). I will return to this discussion later, in Results and Discussion – part 3.

At the same time, Brazilian public health policies face serious challenges, such as the ones concerning sanitation, notwithstanding the global recognition of sanitation as a key service for public health\(^8\). Other countries follow a similar pattern and this contributes to the prediction that it is unlikely for the UN Millennium Development Goal for sanitation to be accomplished by 2015\(^9\). Though Brazilian Law requires the government (usually municipalities) to universally provide sanitation services, and the Federal Government to help fund them, only 28.52% of Brazilian cities have some kind of sewage treatment system and sewage collection is available to only 55.15% of them. The poorest have even less access to those services\(^10\). The table below shows how Brazilian federal expense on sanitation has been a very low percentage of GDP (and the main destinations of the resources).

Table 1 - Brazilian Federal Expenses on Sanitation X GDP\(^{11}\)

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<td><strong>Total</strong></td>
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From a legal perspective, the right to health has a collective enforceable dimension, and health rights litigation can and should seek collective goods, as, for instance, public policies needed to guarantee clean water provision and the collection and treatment of sewage. However, compared with an order to buy and deliver a medicine, this kind of litigation can be even more problematic considering courts traditional skills. The implementation of a court order to provide clean water in a permanent basis to a city or an order to plan, build and maintain a sewage collection and/or treatment systems for a community involve a variety of questions: technical expertise, planning, and certainly reviewing and adapting plans over time, budgeting, building, etc. How could courts deal with such complexities? Could litigation play, after all, any role in this environment? Besides, would it be legitimate, in democracies, this sort of judicial intervention on public policies? Some of these issues have been discussed in the context of the structural reform cases in the US and this approximation can be useful.

To address these questions, I searched the digital databases from all 26 Brazilian State Courts of Appeals, the Court of Appeals for the Federal District of Brasilia (the country’s Capital) and the five Regional Federal Appellate Courts, for a ten-year period, finally selecting 258 relevant judicial decisions. In the 258 selected cases, state or federal public prosecutors filed 87% of them, and courts granted, at least to some extent, the plaintiff’s requests in 76.35% of the cases. In Brazil, public prosecutors are independent public officials in charge of furthering public interest demands, and are the most important public interest litigators in the country. Furthermore, besides courts’ willingness to grant those requests, evidence already shows some concrete results in regards to sanitation policies that can be associated with related litigation. However, litigation has dealt so far with less than 7.09% of the 2,495 Brazilian municipalities that lack both sewage collection and treatment systems and lawsuits tend to be concentrated in the richer cities, not in the poorest ones.

This paper makes two main claims. Firstly, public law litigation can help foster public health policies, particularly through a model in which courts induce political priority and monitor the public policy implementation, but do not make all decisions. Meanwhile, public law litigators and courts will need to create monitoring structures once sanitation services may require many years to be in place. Secondly, public law litigation should plan targeted initiatives to try to reach the most disenfranchised.
Search Methodology and sample selection

Brazil is a federal State and, besides Federal Courts, each State and also the Federal District comprising the country’s Capital have its own Judiciary system, with judges and appellate Courts. To develop this paper, I searched all the decisions made available in the official online databases of 32 Brazilian Courts (Appellate Courts of all 26 States, the District Capital Superior Court and five Federal Regional Courts) and rendered from January 2003 till March 2013. The key words used to make the initial selection were “sewage” (esgoto), “public civil action” (acao civil publica) and “popular action” (acao popular), producing 5512 results. Public civil action and popular action are class actions provided for the Brazilian legal system to protect the public interest and defend, mainly, diffuse and collective rights, but with different scopes and effects. Associations, public prosecutors and other public institutions can file public civil actions, and any citizen can file a popular action. The effects of a court decision in these kind of lawsuits are broad and do not benefit only the plaintiff who actually can be said to be acting on behalf of society.

Some limitations must be reported. The Court of Appeals for the State of Bahia’s database do not keep records of decisions older than 2012 and the Court of Appeals for the State of Mato Grosso do Sul had records only up to July 2012. Also, my assessments on public law litigation were made indirectly, through the courts’ decisions, which means existing lawsuits might not have been captured because a decision has yet to be issued. I choose this indirect method because there are no databases encompassing the lawsuits themselves, apart from the general database in which the courts’ decisions are listed. In any case, the limitation does not seem particularly important in relation to the findings. It is common for plaintiffs in Brazil to ask for preliminary injunctions and for parties to immediately appeal the lower court decision to the State Court of Appeals or the Regional Federal Court. Thus, usually some court decision already exists within the first 18 months after the lawsuit is filed. Finally, although the search sought to reveal public interest litigators’ choices in the matter, its main focus was on courts’ responses.

5512 court decisions abstracts were reviewed and 258 selected to have the full text of their judgment examined. I selected decisions that had adjudicated requests for the provision of some kind of sanitation services (connected to the collection and/or treatment of sewage) made against some level of government, public agency or publicly controlled companies in charge of providing them. The requests relate to different areas (public buildings, streets, neighborhoods, cities, bodies of water, etc.), which means the dimension of each request (in costs, time to implementation and impact over population) is diverse. I excluded cases requesting only damages (torts) against the government once their impact on the delivery of public services would be extremely indirect. It is true that sometimes damages can work out as incentives to changes in a market environment but, when it comes to government, this incentive mechanism is not that clear. In Brazil, in particular, according to the applicable legislation and practice, the government will finally pay damages several years after the initial judicial decision, probably under other administration. As well, data on the costs of lacking sanitation services in Brazil, useful for determining whether actually providing such a service would be cheaper than paying damages, was unavailable16.

Finally, I did not differentiate judicial decisions resulting from appeals against preliminary
injunctions from those reviewing final decisions on the merits. The courts’ decisions examined are not necessarily final (*res iudicata*), as further appeals to Superior Court of Justice and to the Brazilian Supreme Court are sometimes possible and it can take several years before a decision on its adjudication or not by these courts is achieved. To check the trend about the subject in those two courts, I also searched their websites using the same search words mentioned before and for the same ten-year period. No judgment was found overruling a court decision that granted to some extent the plaintiffs’ collective goods requests for sanitation services. Moreover, some decisions were found in which the Brazilian Supreme Court praised this kind of judicial intervention in public policies, although not adjudicating on their merits.17

Results and Discussion

1. The Legal Framework for Sanitation in Brazil

Brazilian Law qualifies sanitation as a public service at least since 1978 (Law 6528/78)18. In 1988, it was elevated to constitutional status, as the new Brazilian Constitution enumerated a duty for all levels of government to improve sanitation conditions (article 23, IX). According to the practical application of these provisions, 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 par. 3)19. Many municipalities have agreements with state-owned water and sanitation companies for them to render the services locally20. The federal government, in turn, is in charge of funding the system and establishing national guidelines for sanitation (article 21, XX) and the 2007 Federal Law 11445 was enacted for this purpose. Law 11445/07 describes provisions for sanitation services as encompassing clean water, sewage collection, treatment and adequate discharge, waste collection and adequate disposal, as well as water management. According to the Law 11445/07, municipalities (and states) that still didn’t have a sanitation plan should immediately prepare one and start executing it. Federal Decree 7217/2010 had established that municipalities and states wouldn’t receive federal funds for sanitation after 2014 if, by then, they still didn’t have their plans ready. Federal Decree 8211/2014 postponed this deadline to December 31, 2015.

Brazilian Law does not describe sanitation services directly as a right, but this circumstance has not prevented the courts from considering the 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, from housing rights (article 6), all of them explicitly inscribed in the Brazilian Constitution. Interestingly, however, none of the Brazilian Court decisions mentioned the 2010 UN Resolution’s enumeration of the human right to water and sanitation21. In any case, the Brazilian Courts’ approaches in those cases are the same as are usually associated with the enforcement of social and economic rights22.
2. Public Law Litigation on Sanitation in Brazil: Helping foster Public Health Policies

The first claim of this paper is that public law litigation can help foster public health policies, sanitation in particular. A clarification must be made at this point. I do not mean to imply that litigation alone will be able to foster and implement those public policies nor that litigation should be the main player in charge of doing so. I am aware successful public policies are complex endeavors. Even the implementation of courts' orders require much more than the willingness of the court to render them. In any case, my point is that courts may and should play an important role to help fostering public health policies in countries like Brazil. The reasons supporting this claim are presented below.

As already pointed out, there are at least 258 decided lawsuits in Brazil seeking sanitation services, with 76.35 % of Court’s decisions granting, to some extent, the plaintiff’s requests. Granting plaintiff’s requests has meant, in 79.69% of the cases, to establish a deadline (associated with a fine) for defendants to implement the service or to present a plan describing how it would be implemented over time. It seems fair to conclude from those numbers that Brazilian courts are willing to foster access to sanitation services. Along with the numbers, this willingness can be illustrated by a quote from the Chief Justice of the Brazilian Superior Court of Justice in a decision rendered in 2011, in another context. In the case, the court denied a request for the suspension of a public bid for the construction of a sewage treatment system, and the Chief Justice observed: “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”23.

I must face the criticism that court orders sometimes are simply not implemented and, so, they alone cannot be described as fostering any changes in reality. The underlying dimension of this criticism is the more traditional debate around courts’ real ability to foster social change and shape public policies24. First, I do not agree with the critique. I would argue that it is simply not possible, from an empirical point of view, to make this general claim disqualifying the role courts perform in social change processes. The processes that lead to social change are complex, frequently long-term, and multiple factors, some unpredictable, play a role in them25. In any case, some evidence of concrete results of the court decisions examined is already available. It is relevant to note, though, that more complex and/or bigger sanitation plants can take up to 20 years to be built and start functioning, so that the 10 years frame of the research would not be able to capture this information26.

Even so, some examples of real impact of court decisions can be presented. The implementation of a court order rendered in 2008 was reported, in 2010, to have resulted in the fixing of the water filtration plan and in the normalization of the water distribution at Parecis, a city of almost 5,000 people in the northern Brazilian state of Rondonia27. 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 a plan to provide sewage collection and treatment for the population of the City of Barra do Sul (8,500 people), in the southern State of Santa Catarina, and implement it. The available data from the court shows that, in 2014, the plan had already been presented and its implementation has started28.
Considering the sample examined in this paper as a whole, 4.16% of the Courts’ decisions granting plaintiffs’ requests were fully implemented, according to the Courts’ records. Unfortunately, there is little information about cases still undergoing implementation. Some Courts’ decisions pointed out 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. Even though I would not make a causal claim that the cities seek federal support solely because of the lawsuits, it is clear that litigation has had an impact on local public policy choices. Literature has also identified the role of litigation in the political discussion that led some Brazilian municipalities to choose the privatization of sanitation services through a public bidding. Despite political criticism about this option, the point here is to show that litigation triggered the debate that led government to some sort of action towards the implementation of sanitation public policies. The fact that institutions in charge of providing the services are turned into defendants before a court of law, and must formally articulate their reasons and arguments, should not be considered irrelevant. This very movement triggers some debate within these institutions, as they need to assess what is really going on in order to decide what kind of argument is going to be presented in court.

Finally, the attitude of Brazilian courts seems to encompass the same general commitment of many developing countries’ courts for the promotion of social and economic rights. Based on the data presented in this paper, my argument is that, 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 –, courts are also amenable to collective goods requests, as public policies, notwithstanding their complexity.

Also, public law litigation on the subject has still much room to grow in Brazil, considering that only one group of public law litigators – public prosecutors – filed 87.20% of those cases. It is worthy mentioning a limitation for this statement: as this paper presents data from Appellate Courts and Federal Regional Courts’ decisions only, I don’t have information about possible activities of public law litigators which are not reflected in this specific environment (as, for instance, political pressure outside a lawsuit or even lawsuits in which no decision from those courts have been rendered.). Anyway, and as explained above, public prosecutors are Brazilian public officials in charge of the protection of public interest, mostly through litigation, which as a consequence makes them the main public law litigator in Brazil. The Brazilian Constitution provides for safeguards that guarantee their independence, so much so that it is commonplace for them to bring actions against the government, be it Federal or State, which also pays them. In any case, the activity of other public interest litigators (for example, NGOs and neighborhood associations) is still incipient in relation to sanitation rights, and can eventually expand.

**Why do we need Courts to help improve sanitation?**

The most immediate criticism against my claim that courts can help foster public policies on sanitation might be why, in the first place, courts should do that. Why can’t these goals be accomplished through ordinary political means, such as, for example, media and social movements?
My argument in this paper does not imply that ordinary means of putting pressure on public officials and of vindicating public policies should be abandoned, and in fact resorting to courts does not exclude those other means, much on the contrary. A favorable court decision is only a limited launching point to any sort of social change process, and media and social mobilization, for instance, will be very important to the implementation of judicial decisions. Thus, both paths – courts and ordinary politics – should be used to try to promote access to sanitation services and should feed off each other. In any case, considering the need for sanitation services in Brazil and in many other places, it would be unjustifiable not to employ a useful resource (litigation), along with others (traditional means of social mobilization), to help push it forward.

Another reason supports my argument. Health systems around the world, even in more developed countries, have been struggling with priority-setting discussions, while the literature details several different criteria to guide them. Besides ethical, technical and rational criteria, when it comes to public health systems, it is only natural that decisions about where to invest these limited resources will consider also, and sometimes mainly, a political criteria based on the return each option may yield to public officials in an electoral dispute. Sanitation policies, although very cost-effective in the long run, are more associated with prevention – not with the treatment of an actual disease –, and require a long-term and continuous investment to be implemented, in such a way that the benefits they create are traditionally not as clearly perceived by the population as the ones associated with pharmaceuticals. It should be noted, also, that lack of sanitation services is not evenly distributed among the population: the poor suffer more without sanitation services than the better off.

In Brazil’s case, as reported, since the 70’s there is legislation commanding for sanitation services to be provided, but public investment has been low through time. The 2007 Law 11445 describes in more detailed terms the duties of cities and states and Federal Decree 7217/2010 has created a sort of incentive, conditioning transfers of federal funds for sanitation to the existence of an organized public policy (the sanitation plans) after 2014. As reported, this deadline was postponed to December 31, 2015, signaling that most cities and states, almost 8 years after the law was enacted, still didn’t have their plan ready. The same Law 11445 provides for technical support from Federal government and agencies to cities and states in the preparation of their sanitation plans and, therefore, an eventual lack of technical skills to prepare them is not the main reason for the delay. In other words, there are low political incentives for governments to prioritize sanitation policies, justifying the role of courts in this scenario.

**What about social demobilization?**

A second critique is anticipated in regards to the social demobilization effect litigation could produce. In fact, if going to court becomes a faster, cheaper and easier way to get whatever a social group wants, engaging in political activities may seem unattractive, and social demobilization can take place. However, the real problem associated with social demobilization is not the decision to go to court, but the risk of undermining democracy, as groups could bypass the political debate and avoid democratic scrutiny over their claims to get them directly from the courts.
Literature has been discussing for decades the relationship between courts and democracy, along with the debate around what democracy means and requires. Among many controversies, one idea shared by authors is that courts play a role within the democratic system – not from the outside –, even if there is no consensus about what that role is. My first answer to the demobilization critique, thus, comes from a very broad and theoretical perspective: it would be a mistake to assume that going to court, per se, is an activity that undermines democracy. This evaluation depends on the particular legal system and on the specific content of the judicial decision: courts may guarantee basic conditions for democracy itself, and they may also try to usurp competences of the elected branches. In any case, the point here is that one cannot make a general claim that seeking relief from the courts undermines democracy.

Setting aside the theoretical discussion and becoming more specific, the demobilization objection does not seem applicable to very traditional public health policies, like sanitation. In Brazil, as well as in other developing countries, laws have compelled the government to provide sanitation services for decades. It was democratically decided that sanitation services should be widely offered but, for several reasons, they were not equally carried out in regards to different social groups, or are taking too long to be implemented in certain communities. Also, there is no evidence that a Court decision will make sanitation services to be provided faster. And, in the model currently being followed by most court decisions, the judicial intervention is limited to force sanitation into the political priority list, but the decisions on how the services are going to be organized and rendered continue to be made by the Administrative branch. There is even some negotiation about the deadlines, as courts tend to accept defendants’ arguments when they ask for postponements. I will return to this aspect of the question below. Therefore, asking the courts to support sanitation rights will not undermine democracy and cannot be described as a bypass mechanism used by interested groups as an alternative to entering into the political arena.

What about the technical and democratic limits for adjudication?

Another possible critique might be to claim that courts lack both the technical competence and democratic legitimacy to adjudicate requests that, at the end of the day, ask for the implementation of public policies. The critique is important but its strength depends on what is really being adjudicated. If courts, for instance, ask defendants to prepare and present a plan of action to provide sanitation services, or establish reasonable deadlines for the services to be delivered, the criticism loses much of its power. This debate has been made by literature confronting the traditional public law litigation, structured along a “command-and-control bureaucracy” model with a new public law litigation, which leaves room for defendants to propose how to comply with a broad order and focuses on negotiation and monitoring performance over time. This approach has been used, for instance, in the structural reform cases of schools, prisons and mental health facilities in the US. In the first model, court orders usually convey a fixed and detailed command, allowing little or no space for dialogue, in a way the technical and the democratic criticism can show all their relevance. However, considering this second model of public law litigation, the lack of technical competence and democratic legitimacy argument is useful as a warning – a wise one, I agree – about how courts must deal
with their own limitations when adjudicating some demands, but it does not weaken my claim that public law litigation can help foster sanitation public policy.

Nevertheless, the technical competence part of the criticism is worth exploring. Courts are likely ill equipped to decide, for example, which kind of sewage collection system is best suited to a specific area. In addition, when it comes to the democratic legitimacy part of the argument, some distinctions should also be made. Public officials in charge of delivering sanitation services will need to make many political and discretionary decisions, besides the more technical ones, on how to carry out their task. However, as law has already decided that these services must be delivered to the population, not to provide them should not be an option for the Executive branch, even if many decisions must be made and time is needed to implement and revise them over time.

The judicial decisions examined reveal that courts usually do not deal with technical issues and do not get involved in how or by whom the services will be delivered, deferring to the defendants to decide those issues, much in line with the second model of public law litigation referred to above. Rather, the issue more frequently discussed in the cases is a “when” problem. Defendants do not deny they must provide the services, but they do not want to commit to specific deadlines. To decide when exactly 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 (even decades), what does the rule of law mean? And what should courts do?

The answer Brazilian Courts offer to these questions is to fix deadlines after some negotiation and associate them with fines for non-compliance. Courts did that in 79.69% of the cases in which the plaintiff’s request was granted to some extent. The negotiation aspect reveals itself because, when it comes to real implementation, Courts are deferential to defendants’ requests for extensions, and, in fact, the original deadlines were frequently unmet. The conclusion we can reach is that, although Courts must be aware of their own limits, they can adjudicate requests for sanitation services in ways that do not go beyond their competence and legitimacy. And Courts are, in fact, doing so.

3. Public Law Litigation on Sanitation in Brazil: The Poor and the Worse-Off

An important counterargument that opposes those lawsuits demanding pharmaceuticals and medical procedures on an individual basis – the conventional health rights litigation – is that they promote inequality, both because they concentrate resources in a small number of plaintiffs (or the ones benefited by public law litigation) and because plaintiffs usually do not come from the more disenfranchised groups within the population. This means not only that the plaintiffs in these lawsuits get more from the health system than the rest of the population, but also that the worse-off are, after all, paying that bill.

In fact, in 2010, Brazilian federal expenses with pharmaceuticals for all users of the Brazilian Unified Health Care System (SUS) – that is, 142 million people – amounted to $24.29 per person. In the same year, the Brazilian federal government and eight Brazilian states combined
spent almost $2,074.86 in drugs per lawsuit. In 2006, the Brazilian State of São Paulo spent $9,000 per resident to comply with court decisions for the benefit of 3,600 plaintiffs in the city of São Paulo. In the same year, São Paulo spent $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 SUS41), and lived in the wealthiest parts of the city42.

Could the same critique be made about lawsuits asking for sanitation services? Are these lawsuits able to reach poorer communities or are the better off the main beneficiaries of those cases? How do these lawsuits deal with equality and distribution of resources among people?

A first answer to these questions is that 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 him and his family (unless it is an infectious disease). On the other hand, treating the sewage discharged in the vicinities of a fancy neighborhood by the sea, although directly advantageous to the wealthy people who live in the area, also has a broader positive impact on other people’s environmental and health rights, including those in poorer communities. One of the features of sewage treatment, therefore, is precisely the broader effect that stems from its connection with environmental and public health rights. The inequality criticism is weaker in this setting when compared to the criticism developed towards the traditional health rights litigation.

Despite this collective positive effect, it continues to be true that some groups will benefit disproportionally more than others depending on the scope of the lawsuit. And, avoiding the discharge of untreated sewage in the sea, although extremely important, will not have any impact, for instance, on the problem of communities that lack sanitation services in their area and have to deal with sewage in their doorsteps on a daily basis. If public law litigation is concerned with inequality, it is important to know what has been, and what should be, its focus. Some limitations of the conclusions discussed below should be pointed out upfront. As reported before, this paper presents data from Appellate Courts and Federal Regional Courts’ decisions. This means I could not capture any information from activities outside courts and also from lawsuits that may well exist but in which a decision from these Courts had not been granted yet. Also, the conclusions presented in this paper cannot be properly applied to the Brazilian State of Bahia, due to the specific limitation of its database.

Litigation on sanitation: helping poor communities

Within the court decisions examined, 47.40% dealt with requests for sanitation services for communities (community cases), 7.03% involved lack of sanitary infrastructure in public buildings (for instance, public hospitals and prisons), and 45.55% adjudicated claims that could be described as environmental cases, mainly dealing with pollution of bodies of water by discharge of untreated sewage. As well, the line between community cases and environmental cases is blurry, and cases involving public buildings can directly impact nearby communities and also some bodies of water. In any case, the distinction is useful to identify the main focus of the request and to facilitate the assessment of who will be the potential beneficiary of any court
orders.

From the data collected, which communities could directly benefit from environmental or from the cases demanding sanitation infrastructure in public buildings cases are indistinguishable. But we do know that, in environmental cases, usually there is a sewage collection system, while sewage treatment does not normally exist. Conversely, 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 worst situation than the lack of just one (treatment), this suggests that the potential beneficiaries of community cases are in a situation that is worse 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.

*Litigation on sanitation: helping poor communities, but few of them*

Assuming that poor communities are really the potential beneficiaries of an important fraction of the cases, one could ask the following: but what does this information mean in the context of all the poor communities that lack sanitation services in Brazil?

The first approach to answer this question is quantitative. According to Brazilian official data, as of 2008, 2,495 Brazilian municipalities do not have sewage collection systems and 3,977 do not have any sewage treatment system. Moreover, even the cities reported to have one or two of those services, usually did not provide them for all of the city’s population. However, all court decisions examined for this paper related to areas in only 177 municipalities. Even if all 177 cities that could potentially benefit from the lawsuits belong to the group that completely lacks both sewage collection and treatment systems, this would mean that litigation has reached, so far, only 7.09% of the total of those cities.

However, we know that 7.09% could be an over-estimation. Many lawsuits involve areas in state capitals, and capitals are not in the group of cities that completely lack sanitation services. Also, as mentioned before, the areas that can benefit from environmental cases usually already have sewage collection systems, but are lacking treatment systems. In other words, an important fraction of the lawsuits are not dealing with those, likely comparatively disenfranchised, 2,495 Brazilian cities that lack both sewage collection and treatment systems.

The conclusion, therefore, from a quantitative perspective, is that public law litigation, although aspiring to reach the poor, has accounted so far for a very small portion of the sanitation needs in Brazil. This paper does not address the possible causes for such a reality. Are public interest litigators not aware of sanitation needs? Or do they have other priorities? Which ones and why? These are certainly important questions that require further research. For the purpose of this study, however, it is enough to demonstrate the gap between litigation and sanitation needs.

*Litigation on sanitation: helping poor communities, but not the worse-off*
Another approach to assess the potential beneficiaries of the court orders is to compare their social status to the rest of the country. I think we can assume that at least 47.40% of the lawsuits demanding the provision of sanitation services involve a motivation to benefit disenfranchised communities (or, at least, are not focused primarily on the wealthiest), but would these communities be the worse-off? The answer to this question is likely negative.

Comparing the Human Development Index (HDI) of the cities to which the potential benefited community belongs (there is no HDI data for communities) with the average HDI for its Region, we find that most lawsuits (except those from Southeast Region) have been focused on areas within cities with same or higher HDIs than the regional average. In fact, for the North Region, 70% of lawsuits were filed in cities with the same or higher HDIs than the regional average. The same is true in 61% of lawsuits for Northeast Region, 71.43% for Center-West Region, and 69.50% for South Region and 50% in Southeast Region.45

<table>
<thead>
<tr>
<th>Cities' HDI x Regional HDI and lawsuits distribution by Brazilian Regions</th>
</tr>
</thead>
<tbody>
<tr>
<td><img src="image" alt="Cities' HDI distribution by Brazilian Regions" /></td>
</tr>
</tbody>
</table>

In order to better understand the inequality dimension from a national perspective, it is important to place it in the context of the more structural inequality that exists among Brazilian regions.46 The Southeast and South Regions, followed by the Center-West, are the better-off areas, while the Northeast and North Regions are the poorest ones. The table below shows some indicators, which can illustrate this reality:

<table>
<thead>
<tr>
<th></th>
<th>Brazil</th>
<th>North</th>
<th>Northeast</th>
<th>Center-West</th>
<th>Southeast</th>
<th>South</th>
</tr>
</thead>
<tbody>
<tr>
<td>Population (2011)</td>
<td>195,243,000</td>
<td>16,499,000</td>
<td>54,226,000</td>
<td>14,576,000</td>
<td>82,067,000</td>
<td>27,875,000</td>
</tr>
<tr>
<td>Life expectancy (2009)</td>
<td>73.1</td>
<td>72.2</td>
<td>70.4</td>
<td>74.3</td>
<td>74.6</td>
<td>75.2</td>
</tr>
<tr>
<td>% of the national GDP</td>
<td>-</td>
<td>5.3%</td>
<td>13.5%</td>
<td>9.3%</td>
<td>55.4%</td>
<td>16.5%</td>
</tr>
</tbody>
</table>
The regional inequality is also reflected in the variation of the HDI: South Region, for instance, has an average HDI of 0.8 while the Northeast Region scores only 0.6757. The chart below shows both the national and the regional HDIs.

These results seem to indicate a phenomenon similar to that already observed in other settings and discussed by the related literature: the inverse equity hypothesis. To summarize, the inverse equity hypothesis theorizes that a non-target initiative in public policy tends to increase inequality first, and only after some time will help to reduce it. Put another way, groups not within the worse-off population are benefitted first, essentially increasing inequality, and only after some time the benefit will reach the worse-off. Although public law litigation cannot be described properly as an initiative in public policy, the data supports precisely the first part of the hypothesis: lawsuits are concentrated in the richer cities in each Region (though perhaps in the poorer areas of those municipalities). At the same time, however, the poorest cities are not
benefitted. The second part of the phenomenon is yet to be observed; the oldest lawsuits were filed in the 1990’s and, up to the present, no change in this trend can be shown.

There are many factors that may explain these results, and further research is needed to probe the issue. Public law litigators probably live in the richer cities and are more aware of the problems nearby. People from remote and poor cities, after attempting to solve the problem without success with local authorities, might not have the resources, financial and otherwise, to further explore their options. In such instances, the personal costs involved in going to another city to search for a sympathetic ear for their complaints is a hurdle that should not be underestimated. Likewise, people in poorer cities may be less aware of their rights than people in more developed and wealthier cities, generally with more access to education, and, even in the face of an opportunity to complain, may be less likely to do so. The historical and political background of each city can also be part of the explanation for the inequity of results.

In any case, whatever the reasons for the concentration of lawsuits, it can be concluded that the poorest cities in Brazil are not being targeted for public law litigation related to sanitation services.

Conclusions

The idea that public law litigation can be used to foster sanitation public policies is established through the analysis of the related judicial decisions and their results. Courts have been favorable to claims on public health policies granting, to some extent, 76.35 % of them and there is some evidence that court decisions can help introduce sanitation in the list of political priorities. However, litigation has accounted for only a small part of the nation’s need so far. This seems to be a window of opportunity for the advancement of public health conditions, not only in Brazil, but also possibly in other developing countries where the law commands that public policies be developed to address the issue. Courts have shown willingness to improve access to social and economic rights; however, the scale of such willingness must be increased. Hence, it is suggested that public interest litigators 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 likely to controvert any apparent immediate increase in inequality.

Secondly, public law litigation should, principally, plan targeted initiatives to reach out to the most disenfranchised. As reported, although it seems plausible to assume that almost 50% of the lawsuits are trying to benefit less wealthy communities, the worse-off communities remain significantly out of reach. Thus, it is important for public interest litigators to map needs across the country so that specific initiatives to help those communities can be planned.

Brazilian courts have been using a model to interact with defendants similar to the one observed in some structural reform cases. That is to say: courts do not command specific behaviors but ask for deadlines and plans and monitor their implementation. In this context, monitoring is central so that a positive court order can really be able to change reality and promote real access to sanitation services for poor communities. This is particularly complicated when the instigators of
the litigation are third parties with legal expertise (NGOs, law school clinics and, in the Brazilian case, public prosecutors), not the interested community itself. In this context, there is a risk for litigators to perceive the court decision – the legal outcome – as the ultimate goal of their work, while the next step – the actual monitoring of the execution of the decision – receives less attention.

Some evidence from the sample examined, although not conclusive, suggests that this phenomenon is happening among plaintiffs. It is not uncommon for plaintiffs to abandon a lawsuit after a positive decision is rendered, and ask for real implementation only after receiving a notification from the court inquiring about the plaintiff’s actual interest in the case. Also, there is usually no request that the decision be put into practice while there are appeals pending, even if an appeal does not prevent implementation. It may seem simply cautious for plaintiffs to wait, but it turns out that 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 plaintiff’s requests. Special and extraordinary appeals do not bar the decision from being carried out; however, it can take many years before those courts even decide whether they will hear or not the appeals. The point being that, during all that time, execution of the judicial decree is not begun in more than 50% of cases.

Besides staying focused on the implementation process within the lawsuit, public law litigators need to coordinate more efficiently with other social players (social movements, political parties, media, public officials, etc.), in order to generate public debate around sanitation needs and to turn them into a public priority. A long process must take place after a court order is rendered: resources need to be allocated (usually in opposition to other interests), planning, contracting, and building will need to take place, and all those activities are accomplished by players other than the court or the plaintiff. A political environment sensitive to sanitation rights will make the implementation of court orders easier and also will foster a wider debate around the issue.

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4 Advocacia Geral da União/Consultoria Jurídica/Ministério da Saúde/Brasil (Federal Public Attorney’s Office/Legal Department/Ministry of Health/Brazil), Intervenção judicial na saúde pública. Panorama no âmbito da Justiça Federal e apontamentos na seara das Justiças estaduais (Court’s intervention on public health. Overview from Federal Courts and notes on
7 See note 42.
8 For a summary on the subject, see http://www.who.int/features/factfiles/sanitation/en/.
11 http://tabnet.datasus.gov.br/tabdata/livroidb/2ed/CapituloE.pdf. For data on sanitation expenses, see pp. 258-263.
12 FGTS is a federal fund, formed by mandatory contributions from employers and employees that finances, among others, housing projects which may include sanitation infrastructure.
17 Ministério Público do Estado de São Paulo v. Município de Sorocaba (Brazilian Supreme Court, RE 254764/SP, August 24, 2010); and Companhia Estadual de Águas e Esgotos –
CEDAE v. Ministério Público Federal (Brazilian Supreme Court, RE 417408 AgR / RJ, March 20, 2012).

18 Rezende and Heller, O saneamento no Brasil. Políticas e interfaces (Sanitation in Brazil. Public policies and interfaces) (Belo Horizonte, MG: Editora UFMG, 2002).

19 Brazilian Supreme Court, Adin 2340, Adin 2077 and Adin 1842.


23 SETEP construções S.A. v. Companhia Catarinense de Águas e Saneamento – CASAN (Brazilian Superior Court of Justice, AgReg na SS 2418, March 16, 2011).


25 See note 1 for real impacts of litigation. I agree with Jacobson and Soliman’s (P. Jacobson, and S. Soliman, “Litigation as public health policy. Theory or reality?,” Journal of Law, Medicine and Ethics 30 (2002), pp. 224-238.) conclusion about the issue: “We should not underestimate the ability of litigation to captivate public attention and force an issue onto the policy agenda. At the same time, we must be careful not to overestimate the ability of litigation to result in desirable policy changes”

26 The Brazilian Federal Agency in charge of local sanitation projects (FUNASA) estimates that medium-term projects in sanitation can take from 9 to 12 years and long-term ones can take 13 to 20 years. See Ministério da Saúde. Fundação Nacional de Saúde. Termo de Referência para elaboração de planos municipais de saneamento básico. Procedimentos relativos ao convênio de cooperação técnica e financeira da Fundação Nacional de Saúde – FUNASA/MS, Brasília, 2012, p. 44.


29 Some examples are the Cities of Propriá and Moita Bonita (State of Sergipe), Barra Velha and Penha (State of Santa Catarina) and Pilar and São Miguel de Taipu (State of Paraíba).

30 F. Ferreira, Regulação por contrato no setor de saneamento: o caso de Ribeirão Preto (Contract regulation of sanitation services: Ribeirão Preto’s case) (São Paulo, SP: FGV, 2005), available at http://bibliotecadigital.fgv.br/dspace/handle/10438/2379.

31 V. Gauri, and D. Brinks (see note 1), R. Sieder, L. Schjolden, and A. Angell (eds), The judicialization of politics in Latin America (New York, NY: Palgrave Macmillian, 2009); R. Gargarella, P. Domingo, and T. Roux (eds), Courts ans social transformation in new


38 For an interesting discussion about the transition of private troubles into public issues and political issues and the possible role of courts, see M. Reich, Toxic politics. Responding to chemical disasters (Ithaca and London: Cornell University Press, 1991).


41 SUS is the Brazilian national health system, an unified, public, and tax-funded health system, that is in charge of providing health care in an universal basis and free of charge.


46 Although considered one of the ten economies in the World, Brazil continues to be a country of great contrasts and inequality. The last available Gini Index for Brazil is 54.7 (http://data.worldbank.org/indicator/SI.POV.GINI/countries/1W?display=default), which means distribution of income in Brazil is worst, compared to other Latin American countries, than in Paraguay, Panama, Chile, Costa Rica and Equador.

47 Data for the table: IBGE, 2011 (see note 3); Instituto Brasileiro de Geografia e Estatística - IBGE/Brasil (Brazilian Institute of Geography and Statistics/Brazil), *Síntese dos indicadores* (Summary of social indicators) (Rio de Janeiro, RJ: IBGE, 2010); and Instituto Brasileiro de Geografia e Estatística - IBGE/Brasil (Brazilian Institute of Geography and Statistics/Brazil), *Contas regionais do Brasil* (Regional accounts for Brazil) (Rio de Janeiro, RJ: IBGE, 2010).

48 The assessment of maternal mortality is a challenge worldwide and particularly in Brazil. The data used in the table comes from C. Luizaga, S. Gotlieb, M. Jorge and R. Laurenti, “Maternal deaths: reviewing the adjustment factor for official data,” *Epidemiologia e serviços de saúde* 19/1 (2010), available at