

STATE COURTS AND COVID-19 POLICIES IN BRAZIL

How Did the Constitutional Review Take Place in the Lower-Level Judiciary?

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ABSTRACT

How do state courts in Brazil participate in the debate about Covid-19 policies? I argue that state courts had a role in making decisions on key policies when political actors couldn't agree on how to handle the crisis. This paper compares its findings to what previous research has found on the role of the STF at the federal level. The results show that subnational institutions tried to use state courts to halt such policies in a similar way to what happened in the STF.

KEYWORDS: *Brazil; judicialization; subnational courts; Covid-19*

Tribunais estaduais e políticas públicas de Covid-19 no Brasil: como se desenrolou a revisão constitucional no Judiciário estadual?

RESUMO

Como os tribunais estaduais no Brasil participam do debate sobre as políticas da Covid-19? Os tribunais estaduais tiveram um papel nas decisões sobre políticas-chave quando atores políticos não concordaram sobre como lidar com a crise. Este artigo compara suas descobertas com pesquisas anteriores sobre o papel do STF no nível federal. Instituições subnacionais tentaram usar tribunais estaduais para cancelar políticas, de modo similar ao ocorrido no STF.

PALAVRAS-CHAVE: *Brasil; judicialização; tribunais estaduais; Covid-19*

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INTRODUCTION

The pandemic's impact on health systems and economies worldwide is well-known. Many scholars continue to explore the various facets of the social impact of Covid-19. In terms of judicial studies, the existing literature examines the judicialization of Covid-19 policies at the Supreme Court level, the role of courts in ensuring optimal policies, and the politicization of courts (Oliveira; Madeira, 2021; Wang, 2021; Ginsburg; Versteeg, 2020; Gomes; Carvalho; Barbosa, 2020). This paper focuses on certain aspects of the judicialization of

Covid-19 policies within the subnational Judiciary system in Brazil, in contrast to similar policies' judicialization at the federal level.

More precisely, the paper scrutinizes constitutional actions at state-level courts, comparing them to constitutional actions presented to the Brazilian Supreme Court (STF) by investigating the plaintiffs, defendants, contested policies, and outcomes. This analysis aims to clarify which aspects of health policies related to this novel disease have been prosecuted in Brazil's state-level courts since the disease's emergence in 2020.

In a significant decision in the Direct Action of Unconstitutionality (ADI)¹ 6341, the STF granted autonomy to subnational entities to establish measures against the pandemic, complementing federal policies. By recognizing the shared competency of states, municipalities, and the Federal Government to implement restrictive measures and regulate the extent of the quarantine, the STF effectively ruled that states and municipalities were not required to strictly adhere to the Bolsonaro government's approach.

ADI 6341 exemplifies the judicialization of Covid-19 related policies at the highest level of the Brazilian Judiciary. Numerous studies have examined the conflict between the Executive and the Judiciary during the Covid-19 era at the federal level (Oliveira; Madeira, 2021; Biehl et al., 2021; Ginsburg; Versteeg, 2020; Gomes; Carvalho; Barbosa, 2020; Oliveira, 2020). Given the STF's stance that states and municipalities should also have competence to decide and plan public policies related to Covid-19, it is now pertinent to focus on the subnational level of judicialization of Covid-19 policies. During the pandemic, were state courts required to arbitrate constitutional debates over Covid-19 policies, such as the STF? Furthermore, how were actions distributed across each state? What were the primary subjects of judicialization? And, lastly, how did the courts respond to each major subject? Answers to these inquiries will provide a comprehensive understanding of the subnational judicialization of policies associated with the pandemic in Brazil.

In order to answer the above questions, this paper is going to examine constitutional actions related to Covid-19 policies, reviewed by 27 state courts in Brazil from March 2020 to December 2021, contrasting them with the matters the STF had to consider during the same period. This exhaustive search was initiated with the aim of collating all the ADIs distributed to the state courts in Brazil during the specified period.

Since state courts do not possess a database as comprehensive as that of the STF, the search required different strategies. First, invoking the Access to Information Law (Law No. 12,527/2011), I requested details about every lawsuit filed during the specified period under

[1] The most common type of lawsuit used to contest the constitutionality of a law in Brazil is called "Ação Direta de Inconstitucionalidade", or ADI. In this paper, we will use the Portuguese acronym.

[2] This was possible because the National Council of Justice (CNJ) has designated that all courts should instruct lawyers to inform the court if the case is related to the new disease when registering it (Portaria No. 57/2020).

the “code 12612” (High complexity, large impact and repercussion issues — Covid-19).² Following this, I utilized each court’s jurisprudence search tool to locate and download the decisions. Ultimately, I collected 255 decisions, which are the focus of this paper’s analysis.

The paper is divided into three chapters. The first chapter explains the context in Brazil during the initial two years of the pandemic and provides a brief overview of how state courts exercise judicial review. The subsequent section reviews literature on judicialization, focusing on federal issues and Covid-19 related policies. The examined literature presents a federal scenario comparable to our research. The following section elucidates the methodology, presenting content analysis and descriptive statistics in order to understand the details of the state’s constitutional control of pandemic-related policies across Brazil. Ultimately, this paper aims to comprehend the extent to which the subnational judicial debate over the pandemic response mirrors the federal scenario, not only identifying the main actors, but also outlining the types of judicialized policies.

THE BRAZILIAN CONTEXT: CRISIS AND THE AVAILABLE LEGAL VENUES ON THE SUBNATIONAL LEVEL

The mishandling of the Covid-19 pandemic in Brazil raised global concern. Under the guidance of Bolsonaro government, the consequences were not limited to Brazilian population, but also extended to the global community, as uncontrolled spread in one country affects others. Brazilian policies primarily downplayed the severity of the virus, asserting that the country could not afford to halt its economic growth. By the end of 2022, the disease had claimed almost 700 thousand lives in Brazil.

The first documented case of Covid-19 infection in Brazil occurred on February 25, 2020. Within a mere three-month span, the Federal Government fired two Health Ministers who did not align with the denialist narrative propagated by the president and his allies. Concurrently, Brazil had a high transmission rate and, when confronted about the issue on TV, the president responded dismissively, saying, “So what? What do you want me to do?” (Prado, 2020).

As Ferigato and collaborators later summarized,

The Federal Government’s denial of science and, consequently, of the seriousness of the pandemic to the health and wellbeing of Brazilians has led to a failure to coordinate, promote, and finance internationally sanctioned public health measures. The Ministry of Health has not developed a national plan to combat the pandemic, nor has any other Federal Government agency. States and municipalities continue to be neglected and receive

insufficient assistance. Influenced by political interests, the Federal Government has disrupted the flow of financial transfers and slowed the deliveries of essential supplies to certain regions. (Ferigato et al, 2020, p. 1936)

Because of this scenario, the health crisis, intensified by a political crisis, eventually resulted in economic instability. Brazilian families saw their income disappear and, for several months, received no form of governmental aid, such as money transfers, extra credit, or emergency checks.

According to a report by the United Nations Conference on Trade and Development (2022), the Covid-19 crisis underscored the critical role of states. However, they outline three pillars needed to effectively guide countries towards recovery and increase resilience: the availability of resources and state capacity; social contract and trust; and international cooperation and solidarity.

Though considered an emerging market economy, Brazil has fewer resources compared to advanced economies. On a positive note, Brazil already had a public health system that “is accessible nationwide and provides community-based primary health care to more than 70% of the population” (Ferigato et al., p. 1.636). It had the tools and capacity to establish an emergency plan based on the best available evidence, but governmental ineffectiveness and a narrative that fostered an environment of mistrust led Brazil to this disaster.

States and municipalities were forced to adopt a “whatever it takes” approach to combat the pandemic. In spite of the Federal Government’s misleading policies, the states of Northeast Brazil, through their consortium, decided to establish a scientific committee to devise strategies and procure medical supplies. The Northeast is Brazil’s second most populous region and exhibits significant inequality. In the two most recent presidential elections, voters overwhelmingly favored the leftist Workers’ Party (PT), showing little support for Bolsonaro (Kirby, 2022).

The region’s investment in evidence-based policies resulted in the lowest rates of disease incidence and mortality per 100,000 inhabitants in the country as of December 2022. In contrast, the Center-West region had the highest mortality rate (Conass, 2022). The states in this region were aligned with the Federal Government and their population voted for Bolsonaro in large numbers during the 2022 election (Bloomberg, 2022). The Table I shows the accumulated cases, mortality rate, and accumulated deaths per region up until December 2022.

In the absence of cohesive leadership from the Federal Executive, subnational entities, especially governors and mayors, were forced to improvise with available resources. Measures such as stay-at-home mandates, mandatory mask wearing, stimulus checks or other forms of monetary transfers, and the opening and closure of services were implemented in various ways, depending on the state and city.

TABLE I
Covid-19 Panel per region (December 2022)

Regions	Acumulated cases	Mortality rate*	Acumulated deaths
Center West	4,099,287	401	65,371
Northeast	7,133,346	234	133,368
North	2,819,731	278	51,313
Southeast	14,229,146	376	332,268
South	7,588,016	365	109,490

Source: (Conass, 2022). *Mortality rate per 100,000 inhabitants. The Southeast is the most populous region of Brazil.

The climate of uncertainty and distrust in Brazil facilitated conditions conducive to judicialization, as the justice system could serve as the last resort to solve the multiple crises. The STF was summoned to decide on various cases in a short time span. The court acted to block some of the Executive’s policies and strengthen subnational entities. As indicated by Oliveira and Madeira (2021), political parties and governors petitioned the STF to declare several of Bolsonaro’s Executive Orders unconstitutional during the initial nine months of the pandemic. The court curtailed the Executive’s power when its decrees failed to adhere to the best emergency practices, as recommended by the World Health Organization (WHO). However, the STF preferred not to interfere with issues related to tax, labor and social programs. In the next section, I review some of the research on the role the STF played during the Covid-19 era in Brazil.

BRAZIL’S RESEARCH ON THE JUDICIALIZATION OF POLICIES DURING COVID-19 TIMES

Research into the judicialization of policies falls under what Da Ros and Ingram (2018) refer to as the “activation of justice institutions”. They assert that “Brazil’s robust justice institutions are relatively accessible and can be activated in several ways” (2018, p. 347). While there are indeed numerous approaches to analyzing the Judiciary as a political actor, this paper focuses specifically on the judicialization of policies. This concept refers to:

The increasing use of the justice system, not for the resolution of political conflicts (politics), but for the questioning of failures or omissions in the production of public policies by the Executive, or inaction or failures of the

Legislative in relation to the production of legal norms. The justice system [then] responds by interfering with public policies in its different phases. (Oliveira, 2019, p. 18)

Consequently, strong institutions, access to the justice system, and constitutional social and individual rights form the foundation of Brazil's scenario of policy judicialization (Oliveira, 2019). This allowed political actors to use the Supreme Court as a tool to counteract Bolsonaro's erratic agenda regarding the pandemic.

To illustrate this, I cite Ginsburg and Versteeg (2020, p. 1), who conducted a global survey with over 100 countries that captured "the legal basis for the country's pandemic response as well as the extent to which there has been judicial or legislative oversight, and whether the central pandemic response has encountered pushback from subnational units". Oliveira (2020); Gomes, Carvalho, and Barbosa (2020); Oliveira and Madeira (2021); Wang (2021); Biehl and collaborators (2021) focused on the role of the STF during the process of implementation of Covid-19 related policies in Bolsonaro's government. A conflict arose between the states and the Federal Government as many governors resisted following Bolsonaro's recommendations, especially as his administration attempted to prevent states and municipalities from implementing mask wearing requirements and stay-at-home mandates.

According to Oliveira and Madeira (2021), the STF stood in opposition to the pandemic-related policies of Bolsonaro's government. Their study showed that, between March and November 2020, 101 ADIs, 25 ADPFs (Arguição de Descumprimento de Preceito Fundamental [Argument of Breach of Fundamental Precept]) and 2 ADOs (Ação Direta de Inconstitucionalidade por Omissão [Direct Action of Unconstitutionality by Omission]) were filed with the STF, either challenging a law or urging the court to compel the government to take action. The ADI 6341 is the most notable case that limited the government's power, as it reaffirmed that Federal Government, states, and municipalities share the responsibilities to provide for health policies.

Some interpret this as a reinforcement of the power of governors (Gomes; Carvalho; Barbosa, 2020). However, this is neither new — as the Constitution clearly assigns shared responsibilities between the federal entities — nor constant, as Oliveira and Madeira (2021) found that this was an isolated case that is unlikely to alter STF's tendency to centralize power at the Federal Government level. Nonetheless, the decision provided Bolsonaro with material for his rhetoric that his hands were tied "because the STF had taken away his power to act against the pandemic" (UOL, 2021). In fact,

the STF sought to preserve a space for managers to work by defending the need to evaluate their performance considering the difficulties, urgencies, and uncertainties they face in a context as particular as the pandemic. On the other hand, the STF, once again, highlighted the duty of managers to follow the scientific evidence, especially that coming from the WHO. (Wang, 2021, p. 105)

Wang (2021) examined constitutional actions brought to the STF that requested the court's intervention in Covid-19 related policies. The author identified two complex issues, typically subjects of substantial controversy in law, that were likely to escalate in a pandemic context: conflicts of competence among federative entities and judicial oversight over administrative discretion. In the cases he analyzed, Wang observed that the court

sought (i) to preserve the autonomy of subnational entities, especially states, to respond to the pandemic; (ii) to respect the decision-making space of managers, avoiding imposing administrative measures or reassessing discretionary decisions, and understanding that the practical difficulties faced by them need to be considered in any attempt at legal accountability; but (iii) they obliged managers to observe the scientific evidence and technical knowledge produced by the scientific community and international bodies. (Wang, 2021, p. 105)

This issue can be explained, in part, by the fragmentation hypothesis (Ferejohn, 2002; Ríos-Figueroa, 2007). Without the support of Congress and the governors, president Bolsonaro endured losses on the Court battlefield. As Ríos-Figueroa (2007, p. 34) affirms: “with regards to policymaking by the courts, fragmentation hypothesis states that the higher the degree of fragmentation the more the courts will be involved in the policymaking”.

Notwithstanding the important role of STF during this chaotic moment, Biehl and collaborators (2021) remind us that the court also contributed to it by sending different messages depending on the lawsuit. They empowered states and municipalities, and protected indigenous rights, but “when it comes to ruling on unpopular causes, such as the rights of prisoners to health and life, the court is cautious” (Biehl et al., 2021, p. 156).

It is important to assess whether state courts have replicated the same disputes observed on the federal level. The process of reviewing cases at the state level in Brazil shares similarities with the federal level, but also exhibits some notable differences. Explaining these distinctions and the process of judicial review at the subnational level in Brazil becomes crucial in order to understand how

certain local institutions can leverage state courts to impose setbacks on policy makers.

AVAILABLE LEGAL VENUES BEYOND HIGH COURTS

Generally, Brazil's judicial system is divided into three types of courts: federal courts, state courts, and special courts. The federal court system includes two higher courts (not including the special courts), five regional courts, and a host of lower-level federal judges. On the other hand, the state court system comprises 27 state courts along with lower-level state judges.

State courts handle any cases that do not fall under the jurisdiction of other courts. Due to this, as Da Ros and Ingram noted in 2018, "even though the federal courts are important and salient, state institutions are responsible for most of the workload and resources". Beyond dealing with civil, criminal, and family issues, state courts also have the capability to review laws at the state level. This is because Brazil's 1988 Constitution granted states and municipalities wide powers over certain tax and spending functions (Shah, 1990). As a result, state courts also bear the load of discontent with lower-level policies.

The structure of institutional procedures for judicial review in Brazil, as noted by Carvalho (2009), inherently promotes the judicialization of politics. The Constitution outlines the kinds of cases that each court is competent to rule on. However, over time, the STF has extended its authority to cover numerous situations in which the competent court was not explicitly defined. This has resulted in a consistent expansion of the power of the judicial system, and particularly that of the STF, since 1988. The national level of Brazil's Judiciary tends to monopolize most matters of significance.

State constitutions grant their respective courts the authority to oversee a particular category of lawsuit for constitutional review at the state level. While the Federal Constitution permits states to employ a mechanism commonly referred to as "representation of unconstitutionality", most states refer to it as ADI just like the Federal Supreme Court.

The possible plaintiffs on states' ADIs are (1) the state's governor; (2) the Legislative Assembly, (3) the state's general prosecutor of justice; (4) mayors and towns council chambers; (5) the OAB's³ sectional council; (6) federations of unions, state and cities class entities; (7) legally established regional professional representation councils; and finally (8) political parties with representation, in the Legislative Assembly or, when applicable, in the Municipal Council Chambers.

[3] Ordem dos Advogados do Brasil (OAB) is the Association of Attorneys-at-Law in Brazil.

A special chamber within a state court presides over representations of unconstitutionality. Each case is assigned to a specific judge, known as the *rapporteur*. This judge handles all matters related to the lawsuit before it advances to the final, collective judgement. If the *rapporteur* deems the action invalid or lacking an essential element, they have the authority to dismiss the lawsuit entirely. Additionally, the *rapporteur* can suspend the law under scrutiny before the case's conclusion if they believe the case is sufficiently robust and the damage resulting from the law may be irreparable.

In sum, the process of a state ADI (or representation) is similar to the process of a federal ADI. This fact allows us to compare the judicialization on both levels without large discrepancies. The consequence of winning a case of a state ADI is having the law suspended by the Judiciary in the requested terms. The court can also partially defer the request or rule the law constitutional. Next, I am going to analyze who are the plaintiff and defendant of each case, what was the request and what was the result of the constitutional review.

RESULTS: THE BIG QUESTION IS “WHO HAS THE POWER TO DECIDE ON HEALTH POLICIES?”

Distribution of ADIs throughout the country

The initial phase of this study entailed requesting all litigation registered under the code 12612 for Covid-19 related actions⁴ across the 27 state courts, utilizing the Access to Information Law (Law No. 12,527/2011) through each court's web platform. My initial objective was to locate and compile as many legal cases as reasonably possible that were instigated by municipalities or their affiliated representatives against states or state agencies. The requested data encompassed details such as tracking number, parties involved, date of distribution, presiding judge, involvement of the prosecutor's office, a summary of the claim, and the current status or outcome of the case (if it had not yet been concluded). At this stage, my goal was to understand the different types of plaintiffs and defendants I would encounter, so that the search would not be limited to a specific type of state/municipal agent.

The courts from Bahia, Ceará, Brasília, Espírito Santo, Mato Grosso do Sul, Pará, Rio Grande do Sul and São Paulo either denied or did not respond at all. The reasons for denying varied. Bahia's court responded that it would require extra work from its employees, so it could not be done. The state courts of Pará and Rio Grande do Sul demanded documents to prove I was a researcher and, even after I sent them over, they did not fulfill the request. São Paulo's court declared that researchers need to use their jurisprudence search on their website.

[4] In 2020, CNJ created a code to track Covid-19 related lawsuits. The Portaria No. 57/2020 clearly had the objective to analyze in the future the judicialization of health cases brought by the pandemic. The article 3 implements the use of the code 12612 to register a Covid-19 related case in every court system. The next article of the Portaria, however, says that the case should still specify the main health subject, such as medication requests or health treatments. As explained before, lawyers use a digitized system to file a lawsuit. They must enter much information, including codes that specify the type of subject they want to address in that complain. They can look for the subject in a list provided by the court's system.

Thus, in order to complete the data, as well as confirm the selected cases, I used the jurisprudence search tool of each one of these court's website. After a first comprehension of what type of lawsuits I would be able to find, I could narrow down my research. I searched for keywords such as "Covid", "pandemic", "quarantine", and "SARS-CoV-2". The search criteria were unconstitutionality direct actions class, from March 15, 2020, to December 31, 2021. Finally, after analyzing the summary of each case I was able to locate, I downloaded 255 state ADIs' decisions for further analysis. Table 2 displays a breakdown per state.

FIGURE I
Proportion of Covid-19 related ADIs over the total of ADIs per state

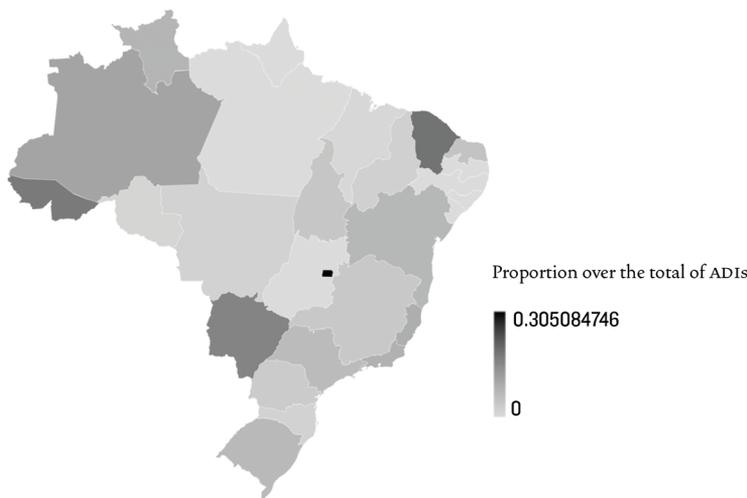


Chart designed by the author. Source: Courts' jurisprudence search tools (see references at the end of paper).

This research revealed a total of 255 ADI decisions; however, not all courts had corresponding cases. The distribution of ADIs across Brazil is heterogeneous. According to the Nacional Council of Justice (CNJ) panel of data on Brazil's judiciary system, some states registered only a handful or even no ADIs in 2020 and 2021 (not exclusively pertaining to Covid-19 cases). When comparing the Covid-19 related ADIs with the total number of ADIs per state, Distrito Federal emerged with the highest proportion of pandemic-related litigation (31%), succeeded by Ceará (19%), Acre (18%), Mato Grosso do Sul (16%), and Amazonas (11%). While São Paulo recorded the highest

number of ADIs that met the criteria (109), this state court regularly processes a staggering number of such lawsuits in general (1,741 in total in 2020/2021 according to CNJ), resulting in a relatively lower proportion. In Figure 1, the map of Brazil depicts the proportion of cases in relation to the total number of ADIs per state.

Alagoas, Amapá, Goiás, Pará, Paraíba, Pernambuco, and Sergipe had no Covid-19 state ADIs. It may mean that either ADI is not the best choice to impose vetoes to a policy in these states and/or they did not have to use this legal avenue. Political actors will first use political solutions to impose victories over their opposition. It is possible that the scenario in these states was more coherent as well.

Northeastern states of Brazil created a committee to establish policies based on the best science available at that time, and to acquire equipment, materials, and vaccines. This committee may or may not have played an important role due to the fact that we do not find an important judicialization of Covid-19 related policies on the region. However, to answer this question, it is necessary to investigate further and use a different method of analysis which could be the object of a future work.

The selected methodology for assessing the ADIs is content analysis (Bardin, 1977). This approach offers an exploratory insight into the cases and should pave the way for future research inquiries and hypotheses. For the content analysis, I established codes for the plaintiffs, defendants, the constitutional grounds for challenging the law, the law's subject matter, and the court's decision. I also recorded the time the court took to respond to the request and whether the law had been previously vetoed by the executive branch. The forthcoming section will outline the discoveries derived from this analysis.

CONTENT ANALYSIS

The research on the judicialization of policies regarding Covid-19 on the federal level (STF) showed that the focus was to battle against the president's policies. Different players acted to either bar the Executive from imposing their denialism on states and municipalities, or they used the court to gain autonomy to act despite the Federal Executive (Oliveira; Madeira, 2021). The content analysis of the subnational judicialization, on the other hand, has shown at least three types of common requests. First one, (1) the mayor as plaintiff would ask the court to rule unconstitutional the laws written and approved by the municipality's Legislative, disregarding previous veto of the Executive.

The second most frequent type of petition (2) involved the state's General Prosecutor of Justice as the plaintiff, aiming to ensure mu-

TABLE 2
Covid-19 related ADIs per state

Courts	States	Cases	Cases over Total of ADIs (proportion)
TJAC	Acre	3	18%
TJAL	Alagoas	0	0%
TJAM	Amazonas	2	11%
TJAP	Amapá	0	0%
TJBA	Bahia	3	7%
TJCE	Ceará	3	19%
TJDFT	Distrito Federal	18	31%
TJES	Espírito Santo	15	9%
TJGO	Goiás	0	0%
TJMA	Maranhão	1	1%
TJMG	Minas Gerais	17	4%
TJMS	Mato Grosso do Sul	6	16%
TJMT	Mato Grosso	9	2%
TJPA	Pará	0	0%
TJPB	Paraíba	0	0%
TJPE	Pernambuco	0	0%
TJPI	Piauí	1	2%
TJPR	Paraná	4	3%
TJRJ	Rio de Janeiro	31	8%
TJRN	Rio Grande do Norte	6	5%
TJRO	Rondônia	2	1%
TJRR	Roraima	2	8%
TJRS	Rio Grande do Sul	17	7%
TJSC	Santa Catarina	5	2%
TJSE	Sergipe	0	0%
TJSP	São Paulo	109	6%
TJTO	Tocantins	1	4%
Total		255	5%

Table designed by the author. Source: Courts' jurisprudence search tools (see references at the end of paper).

municipalities adhered to the state’s pandemic guidelines. In these cases, the prosecutor’s office performed its function as the custodian of the law. This became so commonplace that São Paulo’s court decreed that every municipality in the state must comply with the state’s guidelines. Local authorities could introduce additional rules to cater to local needs but were obliged to follow the baseline established by the state law. This ruling, however, did not achieve unanimous agreement in the court. In some cases, the presiding judges would remark along the lines of: “In my personal view, the municipality has the autonomy to set its own rules, but in the spirit of upholding the principle of collegiality, I will align my decision with the majority”.⁵

[5] e.g.: ADI 2096423-90.2020. Rap. Jacob Valentej, 02/12/2020. The “Colegiality Principle” was applied in multiple cases.

Finally, (3) associations and unions also used the court system to demonstrate their discontentment to the preventive measures established by the different governments (municipal and state). Usually, they argued that policies should not be applied to their category for being an essential service or they would say that the state or municipality did not have the power to limit their activity.

In the context of plaintiffs, subnational judicialization was not dominated by political parties, unlike federal judicialization (Oliveira; Madeira, 2021). As illustrated in Figure 2, the primary actors resorting to state courts were mayors, followed by state prosecutors. The third largest category, class entities, includes associations, unions, and other representative groups. Class entities were much more active at the federal level. In fact, these groups, referred to as “class entities” in this paper, were the second most prominent plaintiffs at the STF, second only to political parties in terms of the number of ADIs.

FIGURE 2
Plaintiffs, subnational judicialization

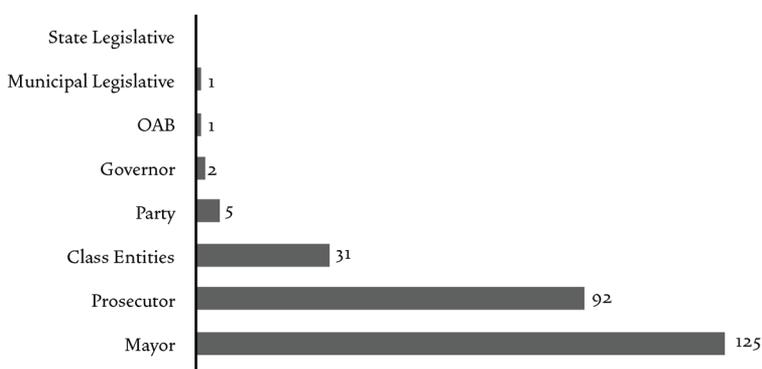


Chart designed by the author. Source: Courts’ jurisprudence search tools (see references at the end of paper).

TIME TO ANSWER

The Brazilian Judiciary is known for being slow. The length of judicial procedures is not a new concern. Judicial reforms have been implemented to address the issue. The CNJ has established goals for courts giving them a minimum of cases that they had to finalize by the end of a period. They have created alternative forms of dispute resolution as well. All to try to overcome the increasing workload and the consequent slowness of the Brazilian courts.

The salience of Covid-19 policies, however, demanded that decisions be made quickly. Between the promulgation of a law and the court's review, a lot could happen. For instance, a law that determined that the municipal Executive had to hire more medical doctors to address an emergence caused by a new wave of contamination is only valid for the duration of that wave. If the mayors wanted to avoid any consequences because of such law, they would need an immediate answer from courts.

I conducted an analysis to measure the duration between the enactment of a law and the court's subsequent decision in each case. The longest period a plaintiff had to endure the consequences of an unwanted law before having a judicial decision on it was 27 months. However, on average, courts responded within the timeframe of eight months, which was also the most frequently observed duration. I selected the enactment date of the law for this calculation due to the critical nature of these cases, despite understanding that courts typically cannot take action without being prompted. The intent was to ascertain how long the law remained in force before the judiciary intervened to suspend it.

Probably because of the length of the lawsuit, a part of the cases lost its object before a decision was made. At least 48 cases were dismissed because the law had been suspended or changed by the time of the court's decision. In those cases, it is possible to affirm that the court did not play a direct role in the policy-making process. They either chose not to interfere or they did not have the chance to interfere because of other factors, such as the workload.

CNJ's statistics (CNJ, 2022) calculates that a non-criminal case, that originates in a state appellate court (as the ones that judge state ADIs) takes 88 days from the day of distribution to the day to the first decision in average. In fact, Brazilian courts are overwhelmed with lawsuits. The state appellate courts received the sum of 4,760,380 new litigations (of every type) in the years of 2020 and 2021 only (CNJ, 2022). We can only conclude that the overload of work impacts the length of the procedures and, consequently, the delivery of justice.

LAW SUBJECT

The definition of essential worker and/or activity, demands for higher salaries for essential workers, food vouchers for families, free transportation and parking for essential workers, stimulus checks for certain categories of workers, re-opening of some activities, the end of lockdown. These are some examples of the most common subjects that were questioned before state courts. Some laws could be considered unusual, for instance the one that demands the constructions of sinks in public areas of the city, but I have categorized all of them into one of each of these codes: Restrictive/Health Measures; Tax/Tariff; Social Assistance; Regulation; Public Administration; Budget; Social Right; Criminal; Flexibilization; and Omission.

The “Restrictive/Health Measures” category includes every law that established rules to limit circulation of people, identified essential activities, and any other measure to fight the pandemic. On the other hand, “Flexibilization” of norms did the opposite. “Tax/Tariff” laws tried to suspend taxes or tariffs during the time of emergence. Whereas social assistance laws created money transfer programs or vouchers to vulnerable people. Laws that regulated activities, such as schools and hospitals, were included in the “Regulation” category. Public administration norms are the ones that imposed obligations to the Executive regarding civil servants and contracts. “Budget” norms specifically determine what to do or not with the public budget. “Social Right”, “Criminal” and “Omission” are categories that include specific cases that would not fit in the above mentioned codes. For social right, we have laws that protect a constitutional social right. I also encountered laws that created a new type of crime; therefore, I coded those Criminal. Finally, Omission is a code to include the lack of a law.

Figure 3 shows that restrictive/health measures were the subject of almost half of the lawsuits. There is a myriad of initiatives inside this category, but all of them are attempts to control the spread of the virus. I found two main arguments from the plaintiffs to ask for the constitutional review. One of them I will translate as “initiative defect”,⁶ which means that the law was initiated by the wrong institution. If only the Executive of either municipalities or states can propose health policies, when the Legislative takes the initiative on this type of policy this law may be considered unconstitutional in its form.

The second common argument is that the law in case has attacked a constitutional principle, and type of principle can vary a lot. For example, São Paulo’s General Prosecutor of Justice has used the state court to take down every municipal law that created a contingency plan different from the state’s one. They used the argument that these

[6] In Portuguese, “vício de iniciativa”.

FIGURE 3
Frequency of law subjects

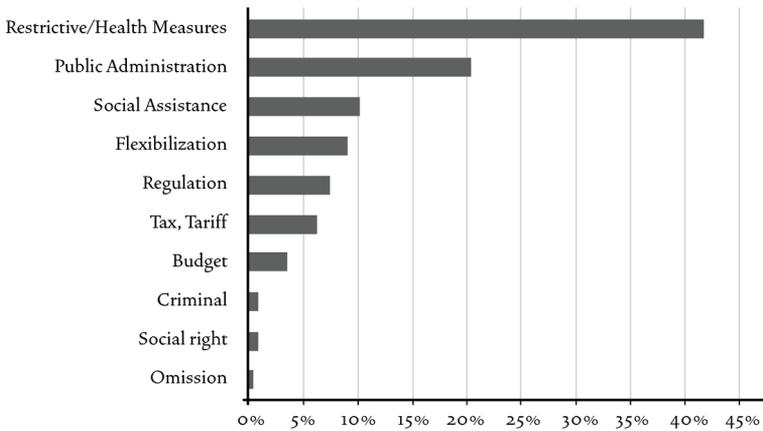


Chart designed by the author. Source: Courts' jurisprudence search tools (see references at the end of paper).

laws attacked the constitutional principal of reasonableness, precaution, prevention, and the right to life and health.

Finally, I found a couple of cases that are examples of how far the narratives surrounding the pandemic went. They are so odd that they deserve a note. The first one is a law that demands that public hospitals must provide Covid-19 “preventive” medications. It is clearly a result of Bolsonaro’s investment on medications that were proven not to be effective against the new disease. At the beginning of the research, I believed that I would find more cases like this given the Brazilian society being divided between supporters of chloroquine and supporters of vaccine (or stay-at-home measures). Surprisingly or not, I was only able to find this one case from the city of Santa Maria in the state of Rio Grande do Sul.

The second law worth noting has asked the population of Ladário, in the state of Mato Grosso, to pray and fast during that time of emergency so that the pandemic could reach an end. The plaintiff, OAB, argued that this law broke the principle of the secular state, however the judges of that state court decided in favor of the defendants to say that the law only “asks, it does not demand”. Thus, people are free to follow it or not. Hopefully, the people of Ladário preferred not to fast for too long.

SUCCESS DEPENDS ON THE PLAINTIFF

In the case of ADI, success means to have the law ruled as unconstitutional. This study chose to use a binary variable, thus every time the court declared the unconstitutionality of a law (partially or totally) it

would be considered a win. However, if the plaintiff did not achieve their goal, it would be considered a loss. For this research, a loss includes three types of decisions: (1) law is constitutional; (2) lawsuit could not be accepted for formality issues; (3) lawsuit lost its object because the law is not valid anymore.

As observed in the subsequent Figure, mayors emerged as the primary victors. Most of the cases they presented were the result of conflicts they lost against the city’s council chambers. The policy-making process would typically commence within these Legislative chambers and receive approval from their members. However, once the proposed law was sent for mayoral approval, it often encountered a full or partial veto.

However, under the Brazilian system, a proposal can still be ratified by the chamber even if it has been vetoed by the Executive. In such instances, the proposals were indeed approved by the chamber members. Consequently, the mayors’ sole option was to take the matter to court if they really wanted it overruled.

This situation bears similarity to the phenomenon Wang (2021) observed at the federal level, which he referred to as “conflicts of competence between federative entities.” In the case of municipalities, these conflicts represent a power struggle between the Executive and Legislative branches, and mayors mainly used as argument the fact that the subject of the law is unconstitutional in its form, since only the Executive branch had the power to rule about that issue.

FIGURE 4
Success rate by plaintiff

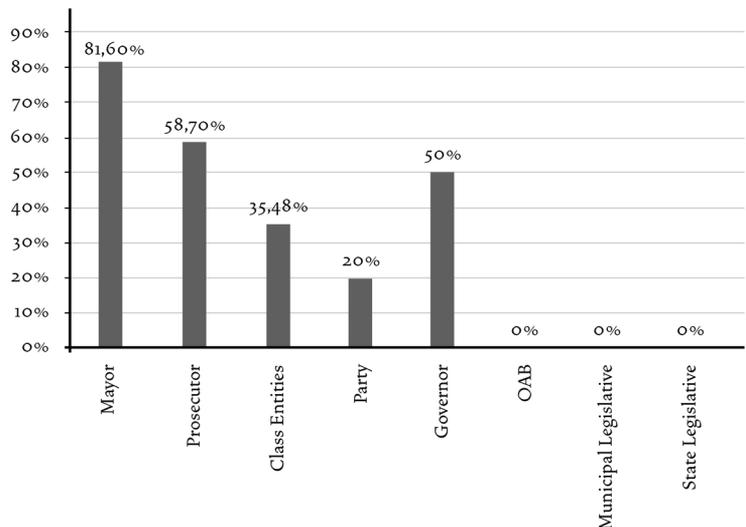


Chart designed by the author. Source: Courts’ jurisprudence search tools (see references at the end of paper).

The following successful plaintiff is the General Prosecutor of Justice. The leader of the states Prosecutors' office is historically the main plaintiff on ADIs. Before the 1988 Constitution, this type of control of constitutionality could only be used by them. It is part of their role as "fiscal of the law" to guarantee that Legislatives and Executives respect both Federal and states Constitution when making policies. The analysis of the cases showed that São Paulo's office did work more than any other to protect the state's plan against Covid-19. Most of the cases brought to court asked to rule unconstitutional municipal laws that disagreed with São Paulo's plan against the pandemic. This is an example of judicial control over administrative discretion, as seen on STF's cases (Wang, 2021), but this time at the subnational level, between state and municipal Executives.

CONCLUSIONS

State courts served as critical checkpoints in the process of implementing public health policies related to Covid-19, particularly when local actors (municipal and state ones) held differing views on managing the virus's spread. Yet, this pattern did not hold universally across all state courts in Brazil. Certain courts did not process any ADIs whatsoever.

This study focused on the judicialization of ADIs challenging Covid-19 policies in Brazilian state courts. These were initiated by municipal and state agents spanning from March 2020 to December 2021. While the judicialization process is an essential feature of the Brazilian legal system, its manifestation varies considerably across different state jurisdictions.

The study showed that there were 255 cases that had a Covid-19 related policy as object of an ADI on state courts during the above mentioned period. This is around 5% of total state ADIs reported by CNJ during 2020 and 2021. Nonetheless, the first comprehensive analysis on the data was enough to begin to understand how the subnational judicialization of Covid-19 policies happened in comparison to the federal level during the same time. The disparity in cases amongst states suggests that factors such as political alignment, regional health conditions, and local administrative decisions all play a role in the litigation dynamics observed.

State ADIs were mainly a tool used by mayors to cast a victory against municipal legislatures. Mayors used the argument that only the municipal Executive branch has the power to design health policies and, most of times, they were able to have that law ruled unconstitutional. This is representative of judicialization as consequence of political fragmentation, I believe. These cases mirror the role of STF when it had to rule on conflicts of competence between differ-

ent federative entities (Wang, 2021). The focus on mayoral victories highlighted a power struggle within municipalities, emphasizing the key role of judicial review in mediating such conflicts.

Subnational prosecutors' offices and courts also tried to impose judicial control over administrative discretion (Wang, 2021) when they wanted to force municipalities to follow states' plans against the pandemic. The literature affirms that federal prosecutors usually tend to have a higher rate of winning cases (i.e., Vianna, 1999; Carvalho, 2004). In the case of this research, the rate of success was not as high as the mayors', probably because the municipalities did have some autonomy on implementation of health policies, but mainly because of the higher number of cases judicialized by mayors. Nonetheless, São Paulo proved to be an interest example in which the General Prosecutor of Justice acted as an important player to reinforce the state's law on municipalities.

Notwithstanding the effort of plaintiffs to use courts as veto points, the time worked in their disfavor. Brazilian courts are overwhelmed with lawsuits. During a pandemic emergency, decisions must be taken in a timely manner. Thus, sometimes it was probably impossible for state courts to answer in the necessary time. In average, they spent eight months between the promulgation of the law and the decision. It includes the preparation of the case, submission and then, the analysis and decision. In eight months, we went from the first case in Brazil (February 25, 2020) to the first vaccines being tried. I intentionally chose to measure time from the enactment of the law to ascertain how long the legislation remained in force before the judiciary intervened to suspend it.

Among 255 cases, the most common subject of the laws had to be restrictive/health measures against Covid-19. During 2020, especially, states and municipalities were trying to figure out how to best answer to that emergency. They took the "whatever it takes" approach, thus we have laws that are considered unconstitutional for different reasons. The most common being what they call "initiative defect", when a branch of power presents a project of law on a matter that are not their responsibility. In Brazil, and in all levels of the Federation, Legislatives are not allowed to create health policies without the guide of the Executive for instance.

In conclusion, as this paper is being written, the Covid-19 pandemic still poses as a challenge to governments around the world. It is interesting to look back and analyze the judicialization of such policies on the subnational level because we can see how little political agents knew about the virus or how to deal with it. All branches of power were called into action to try to figure out the best way possible to overcome the social, economic and health crisis that many

countries, including Brazil, were in. This paper presented a first look on who asked for the action of the subnational Judiciary in Brazil, what was their request and what was the overall answer they received, comparing it to the Federal Court's response. Future works will investigate details of law subjects, probably breaking down the cases by region and observing causation between variables. In conclusion, I assert that state courts in Brazil endeavored to uphold the role of the municipal and states' Executives as the branch of power responsible for creating public policies and to support evidence-based measures to counter the pandemic. Unless the two different executives were in opposite sides, then state courts understand that state Executives were the ones responsible for establishing the basic guidelines against the advancement of the virus.

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