

[Unpublished articles]

## **The World Health Organization's normative authority in Member States: An Empirical Study of the Brazilian Judicial Branch**

*A autoridade normativa da Organização Mundial da Saúde nos Estados-membros: um estudo empírico do Poder Judiciário Brasileiro*

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### Resumo

O artigo tem como objetivo analisar e descrever como os tribunais brasileiros adotam a produção normativa da Organização Mundial da Saúde (OMS) no âmbito interno, por meio de um estudo empírico sobre como o Superior Tribunal de Justiça e o Supremo Tribunal Federal implementam as normas da OMS, tanto *hard laws* quanto *soft laws*. Para identificar se a autoridade normativa da OMS foi referenciada em uma decisão, emprega uma metodologia que identifica referências diretas e precisas às normas da OMS. Os resultados são apresentados por Tribunais, juízes, questões de saúde, documentos e a natureza vinculativa dos documentos da OMS. Em conclusão, o artigo destaca o uso limitado da autoridade normativa da OMS pelos tribunais brasileiros.

**Palavras-chave:** Organização Mundial de Saúde; Autoridade Normativa; Estudo Empírico.

### Abstract

The article aims to describe how Brazilian courts adopt World Health Organization's (WHO) normative production domestically, conducting an empirical study on how the *Superior Tribunal de Justiça* and the *Supremo Tribunal Federal* implement the WHO's norms, both hard and soft law. To identify whether the normative authority of the WHO has been referenced in a decision, it employs a methodology that identifies direct and precise references to WHO standards. The results are presented by courts, Judges, health issues, documents and the binding nature of WHO documents. In conclusion, the article highlights the limited use of WHO normative authority by Brazilian courts.

**Keywords:** World Health Organization; Normative Authority; Empirical Study.



## Introduction<sup>1</sup>

The World Health Organization (WHO or the Organization) is the United Nations agency connecting nations, partners and people to promote health, keep the world safe and serve the vulnerable for everyone everywhere to attain the highest level of health. Leading global efforts to expand universal health coverage, the Organization coordinates the world's response to health emergencies and promotes healthier lives. WHO does so not only with the collaboration of governments, civil society and other organisations, but also by implementing norms in Member States and civil society (Almeida, Araújo, Oliveira, 2022, p. 1616-1617).

The capacity of an international organisation to achieve its objectives has been a long-standing concern in international law (Burci, Cassels, 2017, p. 447). Health as an issue of global governance<sup>2</sup> is subject to multiple, often overlapping legal and political regimes developed and executed by various actors in intricate patterns of interaction (Reulens, Wouters, 2021). The complex relationship between these regimes and international actors calls for international governance, as the choice of regulatory approaches can significantly impact the health sector, either positively or negatively. In these terms, the existence of overlapping norms should consider both binding and non-binding instruments as constructive to a "global health regulation" (ILA, 2018, p. 341).

The objective of global health regulation models is to create an integrated system of various regulatory instruments, competent institutions and processes (Burci, Cassels, 2017, p. 447; Fidler, 2010). In this context, the WHO's role as a coordinating authority agent is crucial. This discussion has gained prominence due to the worldwide spread of infectious epidemics across countries, such as the COVID-19 crisis, wherein multiple courts have referenced WHO's normative instruments in their decisions (Villareal, 2016; Taylor, Habibi, Burci, 2020, p. 82-83; Behrendt, Müller, 2022; Burci, Strobeyko, Morich, 2024).<sup>3</sup>

<sup>1</sup> The authors would like to thank the researchers Vitor Boaventura Xavier and Lucas da Cunha Vollers for their revisions (review).

<sup>2</sup> Global Governance can be defined as "the exercise of authority beyond national borders, as well as norms and rules consented to beyond the nation-state, both justified with reference to common goods or transnational problems". (Zürn, 2018, p. 141-142). Despite having served as a paradigm for cooperation and expansion of institutional organisations since the 1990s, its existence has been questioned given its inherent complexity and current challenges, such as the ability of an international organisation to achieve its objectives. (ILA, 2022). In this article, we use the Global Governance as a theoretical framework to construct a deeper view on Global Health Regulation and its actors.

<sup>3</sup> Until June 2022, according to Elastic-Search proxy, WHO was referred to 668 times by Brazilian national courts.



According to article 2 of WHO's Constitution, the Organization must act as a directing and coordinating authority on international health work (WHO, 1946). According to Bogdandy and others, any kind of governance activity by international institutions, administrative or intergovernmental, should be considered as an exercise of international public authority<sup>4</sup> if it determines individuals, private associations, enterprises, states, or other public institutions (Von Bogdandy, Dann, Goldman, 2010, p. 5). The international public authority may or not be legally binding. Therefore, the authoritative effects do not only emanate from binding legal documents (Peel, 2010, p. 5; Villareal, 2016, p. 95-99; Höflinger, 2020).

Although the word "normative" is not used by the WHO's Constitution, the Organization adopts and approves normative instruments based on their legitimacy and technical authority. To characterise this function, the WHO defined:

"The phrase "norms, standards and conventions" is used to denote a wide range of WHO's work that is informed by country needs, but that benefits countries and partner organisations collectively rather than individually. This range includes producing global health trend assessments, prequalification of medicines and vaccines, treatment protocols and legal instruments such as the WHO Framework Convention on Tobacco Control. These elements are not all "normative" in the strict sense of the word, but the term is used here as a shorthand to describe these aspects of WHO's work. The activities concerned are, for the most part, consistent with the economic definition of global or regional public goods" (WHO, 2012, p. 8).

The definition above adopts a combined perspective, which differentiates between "core normative instruments" and "supportive normative functions". WHO's normative production comprises both binding and non-binding instruments, divided into two groups: (i) the normative products endorsed by the World Health Assembly (WHA) or adopted by an equivalent body (e.g., Codex Alimentarius Commission); and (ii) normative guidelines prepared by the Secretariat (WHO, 2017, p. i).

WHO's normative instruments, comprising conventions, regulations, and recommendations, derive their authority from the Organization's Constitution. The first two normative instruments are legally binding instruments, known as "hard law", while the third

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<sup>4</sup> The concept of "International Public Authority" (IPA) is inherently intertwined with that of Global Governance. Since the latter includes the exercise of authority across national borders to address common goods and transnational problems, the existence of an IPA indicates that there is an authority that coordinates and directs this exercise. (Von Bogdandy, Dann, Goldman, 2010).



is considered “soft law”, as they are negotiated as semi-legal agreements, without a binding force (Ibid, p. 10-13).

The Report on Evaluation of WHO’s Normative Function concluded that “Normative instruments include “products” encapsulating normative content in a written document, and functions, i.e., steps and activities in a normative process, or in policy-making in general” (Ibid, p. i). As only three documents are classified as “hard law” (Ibid, p. 12-13), the majority of WHO’s normative instruments are soft law (TIP, 2021).<sup>5</sup>

Determining the normative authority behind a particular WHO “norm, standard, or convention” is not a straightforward task. For instance, although the WHO’s Declaration of COVID-19 as a Pandemic exercised an influence on Member States’ behaviour, the Organization did so without issuing any official written statement. The direction came in the form of a Declaration of WHO’s Director-General, Dr. Tedros Ghebreyesus, at a media briefing on March 11, 2020 (WHO, 2020).

Despite its significance, the study of the WHO’s normative and coordination roles within the global health regulatory framework remains relatively unexplored.<sup>6</sup> This research identified a gap in literature on how the normative authority of the WHO reaches its Member States. Without engaging in empirical analysis, previous studies indicate that the WHO’s non-binding norms have greater adherence in domestic ordinances than the so-called binding norms, which challenges the expected legal formalism (Gostin, Sridhar, Hougendobler, 2015; Fidler, 1998).

Such a gap in the literature implies that scholarship could pay closer attention to the applicability of WHO norms in the domestic legal order.<sup>7</sup> Studies proposing to fill this gap

<sup>5</sup> The three hard law documents are “Framework Convention on Tobacco Control (2005)”; “The International Health Regulations (1956)”; and the “International Classification of Diseases”. All other documents, such as regulatory recommendations, scientific and technical normative products and health trends assessments are considered “soft law”, thus non-binding.

<sup>6</sup> A search in the “Scientific Electronic Library Online” using the filters “World Health Organization” and “normative” reached 25 results. When filtering these results into non-scientific cases, only two works relate to the topic. The first, entitled “The proposal of an international convention on response to pandemics: in defence of a human rights treaty for the field of global health” argues that the international instrument on the response to pandemics should be a human rights treaty, capable of preventing new pandemics and improving the efficiency of the global health response (Viegas, Ventura, Silva, 2022). The second, entitled “The Challenges of the Global Health Governance System in the Covid-19 Pandemic: Current Limitations and Possibilities for Reform” urges the international community to advantage from existing mechanisms in the global health governance system, as well as to consider new proposal arising from a normative and institutional reform of the WHO (Almeida, Araújo, Gouvêa, 2022).

<sup>7</sup> Zhou made an interesting approach to how the WHO Framework Convention on Tobacco Control is used by domestic legal frameworks. She cites how Costa Rica, Sri Lanka, Kenya and Australia use it as a binding legal obligation to empower certain actors or strengthen potential defences against legal challenges. ZHOU, Suzanne.



would start by questioning how countries: (i) implement WHO's norms via their Executive and Legislative powers; and (ii) apply and interpret those norms by the Judiciary branch.

By unveiling relevant aspects of the international public normative authority exercised by the WHO in Brazilian national Courts, this research seeks to answer the following research question: Whether and how Brazilian Superior national courts apply norms issued by the WHO, regardless of their binding character?

The research employs a pluralistic methodology, integrating traditional doctrinal approaches, legal theory techniques, descriptive quantitative analysis, and qualitative analysis. This mixed-methods approach combines quantitative and qualitative techniques, allowing one method to validate findings from the other or address its limitations. Quantitative methods enable precise measurement and analysis, while qualitative methods excel at capturing complex social phenomena and uncovering patterns.

The research can contribute to reveal (i) which norms are applied by Brazilian Courts; (ii) which Judges mostly apply them; (iii) the reasons for their application (i.e., the major health issue discussed); (iv) which documents are mentioned, and; (v) whether the distinction between "binding" and "non-binding" norms are relevant to them.

The article is divided in three sections. The first section presents the research methodology. The second and third show the data, analysing the application of the WHO normative instruments, respectively, in the *Superior Tribunal de Justiça* (STJ)<sup>8</sup> and the *Supremo Tribunal Federal* (STF).<sup>9</sup>

## 1. Methodology

To determine whether the WHO's normative authority has been referenced by national courts, the research applies a sequential eclectic mixed-methods design, according to Malcom Langford's classification (Langford, 2023). This approach entails the successive use

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What difference would a binding international legal instrument on alcohol control make? Lessons from the WHO FCTC's impact on domestic litigation. **European Journal of Risk Regulation**. V. 12, 2021, p. 514-529.

<sup>8</sup> The *Superior Tribunal de Justiça* is the body of the Brazilian Judiciary that guarantees uniformity in the interpretation of federal legislation. The court is responsible for judging cases involving infra-constitutional matters and guaranteeing the correct application of federal law throughout the national territory.

<sup>9</sup> The *Supremo Tribunal Federal* is Brazil's highest judicial body. The court is responsible for upholding the Federal Constitution and Judges cases that involve the constitutionality of laws and normative acts, as well as other duties laid down in Brazilian legislation.



of qualitative and quantitative methods in a flexible manner, where the integration stage involves theoretical concepts with empirical data and analysis. The process begins with data collection, followed by an empirical method and concludes with data processing and modelling for quantitative analysis (Squatrito, 2018, p. 65, 76).

Data collection involved gathering court decisions from the Brazilian Supreme Federal Court (*Supremo Tribunal Federal* - STF) and Superior Court of Justice (*Superior Tribunal de Justiça* - STJ) that referenced the WHO (in Portuguese, “*Organização Mundial de/da Saúde*”; “OMS”). The Elastic-Search program was used to gather all the data until June 2022.

After collecting the data from the decisions, the research team built a spreadsheet with the identification of: (i) each decision; (ii) the court (STF or STJ); (iii) type of decision; (iv) name of the judge rapporteur ; and (v) the URL of the decision. From this spreadsheet, the researchers manually collected excerpts that mentioned the WHO and extracted data in order to verify how that mention was made. The following categories of analysis were created: (i) WHO document cited; (ii) form of mention; (iii) type of mention; and (iv) classification of the WHO document cited (hard or soft).

As a result, the final dataset contained the following variables: (i) Court (STF or STJ); (ii) type of decision-making (unanimous or majority); (iii) name of the WHO document cited; (iv) classification of the WHO document (hard or soft); (v) name of the judge rapporteur for the court decision; (vi) name of the judge who cited the document; (vii) form of mention (direct or indirect); (viii) type of mention (precise or generic/imprecise); (ix) major health issue; and (x) excerpt of the citation. At the end of completion, three research assistants carried out a double-blind review of 30 per cent of the documents.

To determine whether a Court had relied on the "normative authority" of the WHO, data was filtered for “direct” and “precise” references to a WHO document in a courts’ decision.<sup>10</sup> A “direct” form of mention is defined as when the tribunal explicitly cited or referred to WHO, while an “indirect” form of mention is defined as when WHO was referenced indirectly through another document cited by the tribunal (such as judicial precedents, doctrine, laws and internal regulations). After filtering for direct mentions, the

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<sup>10</sup> Nicolette Butler when investigating *amicus curiae* influence also used this methodology. However, the author defines direct effects as where the tribunal cited or made explicit reference to the object, while the indirect effect is identified when the court makes no explicit mention, but an analysis of the object and the judgement reveals its influence on the decision (Butler, 2019, p. 150). Hereby, to investigate the normative authority, the article will use the same definition to “direct effects”.

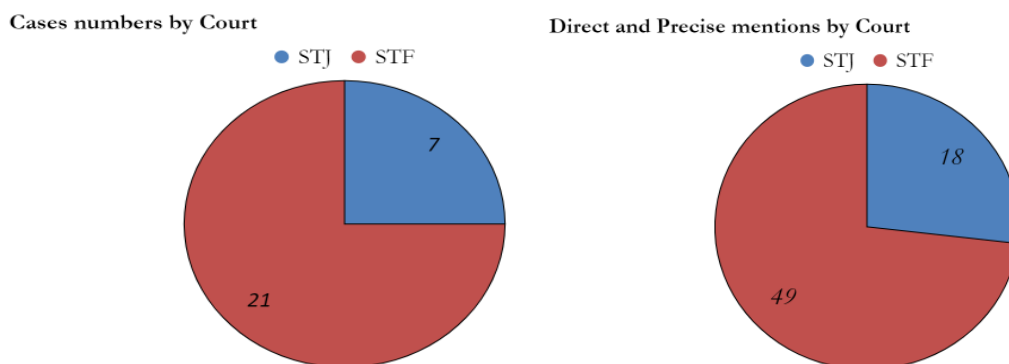


analysis focused on precise types of mentions. A “precise” form of mention occurs when the tribunal cites or makes explicit reference to a WHO’s norm. An “imprecise” or “generic” happens when the tribunal quotes data, speeches or declarations from the Organization. With this filter, it became possible to identify which decisions used a WHO standard as a decision parameter, that is, used the WHO’s normative authority as an argument.

The filtered data underwent processing. One researcher analysed the collected data from STF and STJ, conducting a review to rectify any earlier errors. Subsequently, the judgements were classified by species (variable xi), and descriptions were prepared for further analysis and modelling.

Using this filter (“direct” and “precise”), 28 cases were identified: 21 decided by the STF and 7 by the STJ (see Figure 1). Regarding the references, STF cited WHO documents 49 times, while STJ made 18 mentions (see Figure 2).

**Figures 1 and 2: Cases numbers by Court and Direct and Precise mentions by Court**



Considering a scenario of excessive judicialization (Barroso, 2012), the small number of cases identified represents limited use of WHO’s instruments by the Courts. During the judicial year of 2023, STJ ruled 426.000 cases (Brazil, STJ, 2023) and STF ruled 101.970 cases (Brazil, STF, 2023). Even when flexibilizing the research criteria, thereby not applying the research filter, only a small number of cases mentioning the Organization were identified.

To better understand how the normative authority of the WHO is applied, the analysis will be divided by the ruling court: STJ and STF. This division aims to provide a clearer view of how Brazilian superior courts apply WHO’s normative instruments in their decisions, exploring which Judges mostly apply the norms, why they apply (i.e., the major health issue



discussed), which documents are mentioned and if the distinction of binding and non-binding norms are relevant to them.

## 2. WHO's citation in *Superior Tribunal de Justiça* (STJ)

STJ is the body of the Brazilian Judiciary branch that guarantees uniformity in the interpretation of federal legislation. Judging cases involving infra-constitutional law, such as Law 9.656/98<sup>11</sup>, guarantees the correct application of federal law throughout the other courts.

### 2.1. Empirical Data

A total of 110 cases referencing the Organization were identified during the first triage in the STJ. After applying the filters described in the methodology section, seven (7) cases<sup>12</sup> were identified that directly cite a WHO norm, i.e., that use the WHO's normative authority as an argument for the decision.

Six of these cases were "*Recurso Especial*" (REsp), the primary appeal type in the Court. The seventh case was a motion to clarify one *Recurso Especial* (known as "*Embargos de Declaração*"). Among these cases, four were decided unanimously, while the remaining three were decided by majority vote. The eighteen references were transcribed in Appendix 1.

The first analysis comprehends the actors involved in the process. It is important to notice that the judge rapporteur is not necessarily the Judge who cited the WHO. For example, in 2021, Judge Marco Buzzi has reported REsps 1.822.420 and 1.822.818, which were about infertility and sterility. While the majority held a different view, Judge Moura Ribeiro, in his dissenting vote, cited a WHO document eight times. He contended that

<sup>11</sup> BRAZIL. Lei nº 9.656, de 3 de junho de 1998. Dispõe sobre os planos e seguros privados de assistência à saúde. Disponível em: [https://www.planalto.gov.br/ccivil\\_03/leis/l9656.htm](https://www.planalto.gov.br/ccivil_03/leis/l9656.htm). Acesso em 13 dez. 2024.

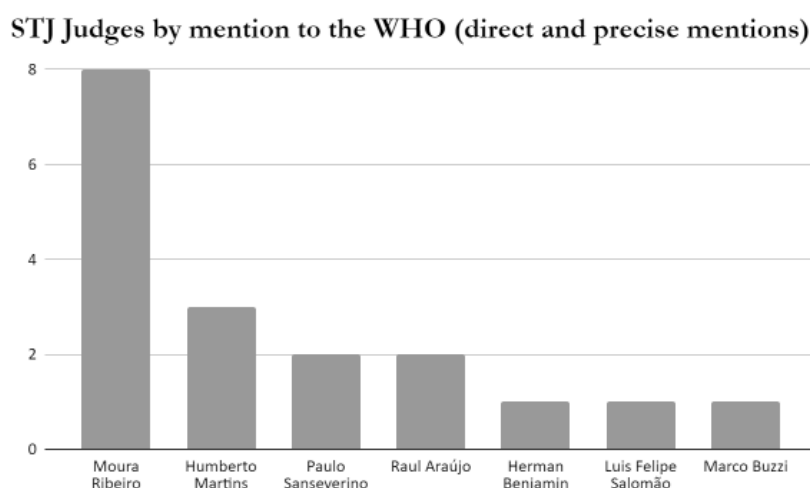
<sup>12</sup> REsp 1.822.420/2021; REsp 1.822.818/2021; EDcl REsp 1.733.013/2020; REsp 1.509.055/2017; REsp 1.115.916/2009; REsp 1.196.500/2010; and REsp 1.279.241/2014.



infertility and sterility, both recognized as diseases in the ICD, should be treated with in vitro fertilization, a treatment that health insurance companies cannot lawfully deny.<sup>13</sup>

Therefore, Judge Moura Ribeiro stands out as the most frequent citer of WHO documents due to the infertility cases. Despite this, there are few mentions to WHO norms. For the record, using all the collected data, it was found that Judge Reynaldo Soares da Fonseca had cited the WHO's 106 times. In almost all cases, he mentioned the "Declaration of Pandemic Status". Figure 3 summarises the Judges that mentioned the WHO the most, considering that a Judge can cite more than once in each case.

**Figure 3: STJ Judges that mentioned the WHO (direct and precise)**



Judge Luis Felipe Salomão also quotes the WHO several times, due to the precedent expressed in the *Embargos de Declaração* no REsp 1.733.013, where he was judge rapporteur. In this case, the Court ruled that the art. 10, § 4º and the art. 4, III of Law 9.656/98 commissioned the National Health Agency (ANS) the attribution to draw up the list of health procedures and events that constitute a basic reference for healthcare plans coverage (STJ, 2020). This interpretation serves as a precedent for numerous other cases, counted as indirect mentions. Judges Luis Felipe Salomão and Reynaldo Soares da Fonseca correspond to more than 60% of all the data analysed (disregarding direct and precise mentions).

This analysis indicates that although STJ is composed of thirty-three Judges, only seven of them use the normative authority as described, applying the WHO's normative authority directly and precisely.

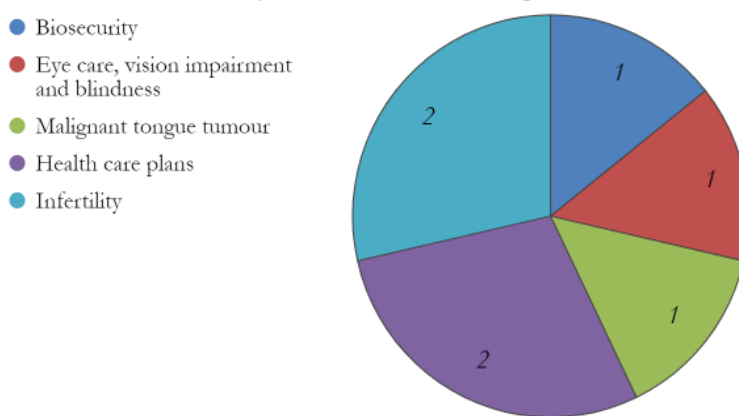
<sup>13</sup> The Judge recalled that art. 10 of Law 9.656/98 established a standard health care contract, which includes the treatment of all diseases listed in the ICD. BRAZIL. Superior Tribunal de Justiça (STJ), 2021; Id., 2021.



As far as major health issues are concerned, the topic related to biosecurity (2) and health care plans (2) were the most referred to in STJ cases. As health governance is primarily treated by infraconstitutional law as the Consumer Code (Law 8.078/90) and health care law (Law 9.656/98), STJ often discusses health issues to guarantee the uniformity of the interpretation of infra-constitutional law. Figure 4 indicates the major health issue in the analysed cases.

**Figure 4: Major Health Issues in Direct and Precise Cases**

**Major Health Issues by STJ Cases (direct and precise cases)**



## 2.2. WHO's citation behaviour in the *Superior Tribunal de Justiça*

These seven cases illustrate how the *Superior Tribunal de Justiça* implements the WHO's norms. It is now noteworthy to understand this behaviour by two main aspects: (1) the norm (WHO's document) and its binding nature for the Brazilian state and (2) the object of the case (health issue).

### 2.2.1. The WHO norms cited and their binding effects: the use of International Classification of Diseases (ICD) for stabilising health care plans standards

The Court uses the International Classification of Diseases (ICD) as a main document for observation. Of the eighteen references to the World Health Organization (WHO), fifteen pertain to this specific document. As the International Classification of Diseases (ICD) is a



regulation that falls under articles 21 and 22 in WHO's Constitution, it is a legally binding instrument (hard law) (WHO, 2017, p. 12).

However, STJ uses the ICD to classify a disease as one to be covered by a health care system according to Law 9.656/98, which regulates private healthcare plans. The law guarantees the prevention, diagnosis, treatment, recovery and rehabilitation of all the diseases that make up the ICD by healthcare plans. In the REsp 1.509.055 the Court reinforced the requirement for health insurance companies to indicate the ICD codes as a condition for performing tests and reimbursing medical expenses (STJ, 2017). According to the Court, health service operators are obligated to provide procedures, categorized by plan, for the treatment of diseases catalogued by the WHO.

It is noteworthy that Article 10 of Law 9.656/98 directly references the ICD to mandate coverage of all listed diseases by health plans.

Art. 10 - The health care reference plan is hereby established, with medical, outpatient and hospital care coverage, including births and treatments, carried out exclusively in Brazil, with a standard ward, intensive care centre, or similar, when hospitalisation is necessary, for the diseases listed in the International Statistical Classification of Diseases and Related Health Problems of the World Health Organization, respecting the minimum requirements established in art. 12 of this Law, except: (Brazil, 1998).

The other three mentions were in the REsp 1.115.916, which discussed the sacrifice of stray animals by administrative agents to prevent zoonoses, quoting the sixth and eighth Technical Report of WHO (STJ, 2009). These reports, as a scientific and technical normative recommendation, are classified as soft laws and draw credibility from the WHO.

It is relevant to highlight that declarations such as the pandemic status, although non binding, are used by the Court to clarify its position. Precedents are also relevant to state the importance of the WHO's authority in Brazil. However, the normative authority (i.e., direct and precise mentions) is limited to seven cases and a mere three norms. Although the ICD is classified as a binding norm, it is applicable because there is an internal law that determines that it must be followed. Therefore, the distinction between binding and non-binding norms is not relevant to the court.

It is noteworthy that the Court uses hard law (ICD) as a reinforcement to the application of domestic legislation. In other words, when the STJ applies WHO norms, it does so because there is an internal act that determines that it must be followed.



In six cases (as shown in Figure 4), the court ruled on health governance, i.e., the coverage of health care plans. Two of them discussed the application of ICD as a standard to health care plan contracts. Infertility appears in two repetitive cases. Finally, the court stated that blindness of one eye (STJ, 2010) and a malignant tongue tumour (STJ, 2014) should be covered by health care plan, as they are listed in the ICD. The unrelated case is about the sacrifice of stray animals.

The analysis leads to four conclusions. First, few STJ Judges apply WHO's norms. Second, ICD is the most cited WHO norm. Since ICD is a hard law, STJ applies more hard law instruments, with little emphasis on the binding nature of it because there is an internal act that determines that it must be followed. Finally, STJ mostly discusses health government issues, particularly if a disease should be or not be covered by a health plan contract.

### 3. WHO's citation in *Supremo Tribunal Federal (STF)*

The STF is Brazil's highest judicial body, responsible for upholding the Federal Constitution and judging cases involving the constitutionality of laws and normative acts, among other duties laid down in Brazilian legislation. Through judicial review, the STF can declare a norm unconstitutional.

#### 3.1. Empirical Data

In the initial triage, 135 cases were identified that cited the WHO on STF. Applying the filters described in the methodology section, cases directly referencing WHO norms, i.e., that use the WHO's normative authority as an argument for the decision were narrowed down to twenty-one (21).<sup>14</sup>

Among these, eleven (11) were "*Ação Direta de Inconstitucionalidade*" (ADI), the main action of concentrated judicial review.<sup>15</sup> Three were injunctions on ADI (MC ADI);

<sup>14</sup> ADPF 54/2012; RE 627.189/2017; ADI 4.066/2018 (a); ADI 3.937/2018 (b); ADI 3.356/2018 (c); ADI 4.874/2019 (a); ADPF 109/2019 (b); ADO 3.357/2019 (c); ADI 4.275/2019 (d); MC-ADI 6.341/2020 (a); MC-ADI 6.343/2020 (b); MC-ADI 6.387/2020 (c); ADI 5.592/2020 (d); RE 657.718/2020 (e); ADI 5.037/2020 (f); ADO 6.586/2021 (a); ADPF 690/2021 (b); MC-ACO 3.451/2021 (c); ADI 5.631/2021 (d); ADI 4.017/2022 (a); and RE 1.224.374/2022 (b).

<sup>15</sup> Brazil adopts a hybrid system of constitutionality control. Since 1891, it has adopted diffuse control of constitutionality, inspired by the US model of judicial review. Since 1965, it has officially adopted concentrated control of constitutionality, inspired by the model of Hans Kelsen and the Austrian court. The current 1988 constitution enshrines both models.

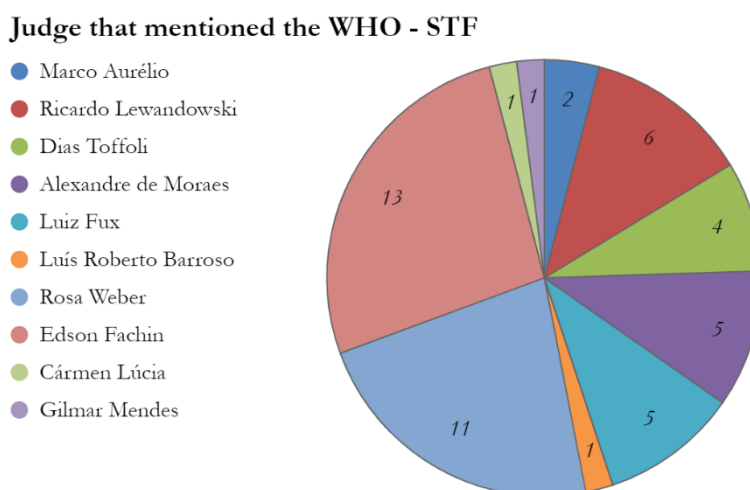


another three were “*Recurso Extraordinário*” (RE), the main appeal of the Court; and three were “*Arguição de Descumprimento de Preceito Fundamental*” (ADPF), another action of concentrated judicial review. The remaining case involved an injunction within a civil action (“*medida cautelar na Ação Cível Originária*” - MC-ACO). Of these cases, fifteen (15) were decided by a majority, while the remaining six were unanimous decisions. The forty-nine mentions were transcribed in the Appendix 2.

### 3.1.1. STF Judges that mentioned the WHO

The first analysis comprises the actors involved in the process. Despite having fewer Judges than the STJ, a greater number of distinct Judges on the STF cited WHO-issued norms directly and precisely. Judge Edson Fachin most frequently utilizes WHO's normative authority, citing it thirteen times across five different cases. Figure 5 presents the distribution of votes.

**Figure 5: STF Judge that mentioned the WHO**



Judge Rosa Weber appears in the second position, with eleven mentions. Five of them were in ADI 4.874, which concerns banning the import and commercialisation of smoking products derived from tobacco containing additives. In this case, the Judge cited the WHO's “Global report on trends in tobacco smoking prevalence” to argue that tobacco was responsible for six million annual deaths. She also mentions the Framework Convention on



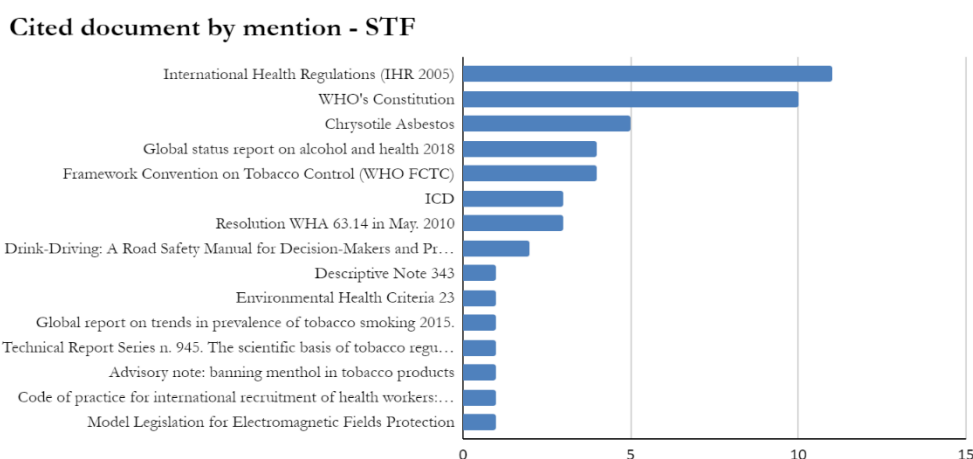
Tobacco Control (FCTC) to argue that Brazil, as a state party, should adopt and implement measures to prevent and reduce tobacco consumption, addiction and exposure. Although the FCTC does not bind the state to adopt a specific regulatory matrix, Brazil's adherence encourages the adoption of the measures by domestic authorities. In the same case, Judge Edson Fachin quoted a WHO report to ensure that the use of flavourings stimulate young people to smoke (ADI 4.874/2019).

It is noteworthy that towards the end of the analyzed period, nearly all STF Judges applied WHO norms. Only Judges Nunes Marques and André Mendonça, who took office in November 2020 and in December 2021, respectively, have not applied the WHO's norms directly and precisely. It indicates a greater inclination among STF Judges to apply the WHO's norms.

### 3.1.2. The WHO norms cited and their binding effects

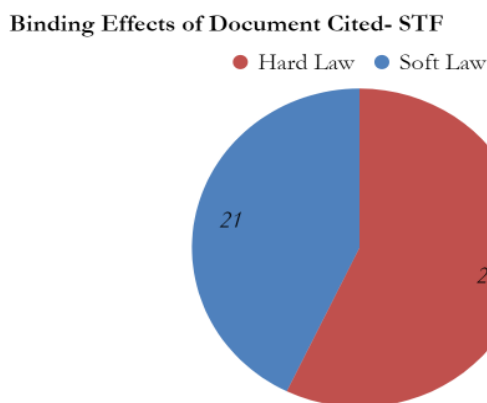
The diversification is also observed in the documents cited. In the STF, as in the STJ, hard laws are also more frequently applied. The International Health Regulations (IHR 2005) and the WHO's Constitution are most mentioned by the Court. The Framework Convention on Tobacco Control (FCTC), another hard law, is also highly cited due to ADI 4.874, by the judge rapporteur Rosa Weber. The Figure 6 shows the most cited documents by mention in the STF.

**Figure 6: Most cited documents by mention in STF**



It is relevant to observe the prevalence of hard law on the documents mentioned. This evidence contradicts the trend observed in previous studies, which indicate the prevalence of soft law norms in domestic ordinances (Gostin, Sridhar, Hougendobler, 2015; Fidler, 1998). Figure 7 illustrates the binding effects of these mentions.

**Figure 7: Binding Effects of Documents Cited**



Declarations and precedents are also frequently referred to by the Court to clarify its position. However, the normative authority (i.e., direct and precise mentions) is limited to these twenty-one mentioned cases. It is also relevant to notice that fourteen of these mentions are followed by the Brazilian promulgation decree<sup>16</sup>, emphasising how the norm is applied internally.

The diversification is observed in the health issues discussed in these cases. Coronavirus was discussed in six cases (ADPF 690, MC-ADI 6.341, MC-ADI 6.343, MC-ADI 6.387, ADI 6.586, MC-ACO 3.451). Asbestos-related diseases were the subject of five cases (ADI 4.066, ADPF 109, ADI 3.397, ADI 3.356, ADI 3.357). Alcohol and road traffic injuries were discussed in two cases (ADI 4.017 and RE 1.224.374). Besides the aforementioned abortion (ADPF 54) and tobacco (ADI 4.874) cases, other issues were discussed by the court. To summarize the data, figure 8 illustrates the major health issues discussed in each case studied.

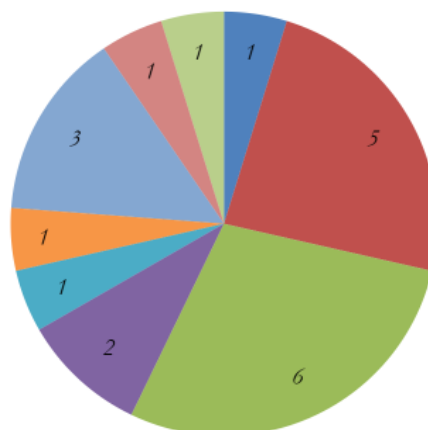
<sup>16</sup> The WHO's Constitution was promulgated by Decree n.º 26.042/1948. Available at <https://www2.camara.leg.br/legin/fed/decret/1940-1949/decreto-26042-17-dezembro-1948-455751-publicacaooriginal-1-pe.html>. Accessed on 15 July 2024. The IHR 2005 was promulgated by Decree n. 10.212/2020. Available at [https://www.planalto.gov.br/ccivil\\_03/\\_ato2019-2022/2020/decreto/d10212.htm](https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/decreto/d10212.htm). Accessed on 15 July 2024. THE FCTC was promulgated by Decree n.º 5.658. Available at: [https://www.planalto.gov.br/ccivil\\_03/\\_ato2004-2006/2006/decreto/d5658.htm](https://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/decreto/d5658.htm). Accessed on 15 July 2024.



**Figure 8: Major Health Issues discussed by STF in direct and precise cases**

**Major Health Issue - STF**

- Abortion
- Occupational hazard Asbestos; cancer
- Coronavirus disease (COVID-19)
- Alcohol and Road traffic injuries
- Inclusive health services and policies
- Tobacco
- Health governance
- Child Health
- Occupational hazard Biosecurity



### 3.2. WHO's citation behaviour in the *Supremo Tribunal Federal*

These twenty-one cases illustrate how the *Supremo Tribunal Federal* implements the WHO's norms. Three primary aspects are essential for comprehending this behavior: (1) the actors (Judges); (2) the norm (WHO's document) and its binding nature for the Brazilian state; and (3) the object of the case (health issue).

#### a. The applicability of WHO binding norms to the coronavirus disease

The IHR 2005 was frequently cited in addressing the coronavirus disease, appearing eleven times across five cases and being referenced by multiple Judges. In these cases, the Court ruled on the authority (ADI 6341/2020) and distribution of competences (ADI 6343/2020) of federal entities to legislate and implement sanitary measures addressing the global pandemic, such as compulsory vaccination (ADI 6586/2021), sharing of personal data (ADI 6387/2020) and dissemination of epidemiological data (ADPF 690/2021).

Judge Edson Fachin argued that member states should adhere to the WHO's guidelines not only because they are binding according to the art. 22 of its Constitution, but also because they are developed with expertise. He also mentioned that the art. 18 of IHR



describes various possible measures to be adopted in pandemic contexts. Judge Rosa Weber highlighted that although not necessary, the IHR 2005 was promulgated in Brazil through a decree. Judge Luiz Fux underlined that the WHO's guidelines are obligatory to member states and that the IHR emphasises that unnecessary and incompatible data should not be sought for the purpose of assessing and managing a risk to public health. Judge Alexandre de Moraes emphasized that Brazil, as a signatory to the IHR, is obligated to disclose epidemiological data.

The Constitution of the WHO was mentioned ten times. Although it is not mentioned in the Report on Evaluation of WHO's Normative Function, the Constitution is here considered a hard law since all norms derive their validity from it. However, it is noteworthy that four mentions are to its preamble, which contains the definition of health.

The cases ruled about public health, such as the constitutionality of the termination of pregnancy of an anencephalic foetus (ADPF 54/2012)<sup>17</sup> and containment measures for *Aedes Aegypti*, such as aircraft disposals (ADI 5.592/2020). The articles 2 and 21 were also mentioned to emphasise the WHO's functions while discussing whether the state could be compelled to supply medicines not registered in the National Health Surveillance Agency (ANVISA), under penalty of committing an act of embezzlement (RE 657.718/2020).

The WHO's Constitution was also mentioned while discussing the vaccination of coronavirus. While the aforementioned ADI 6.586 discussed the compulsory vaccination, the Judges decided, in the MC-ACO 3.451, that the State of Maranhão could distribute vaccines previously approved by the government to its population or, if the authorization was not issued within 72 hours, it could import and distribute vaccines registered by at least one foreign health authority and approved for commercial distribution in the respective countries.

Finally, Judge Edson Fachin highlighted Article 22, stating that WHO's directives are binding, while discussing the authority (ADI 6341/2020) and distribution of competences (ADI 6343/2020) of federal entities to legislate and implement sanitary measures to address the global pandemic.

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<sup>17</sup> In this case, in a divergent vote, Judge Ricardo Lewandowski mentioned the ICD to state that according to it, dozens of foetal pathologies have a nil or very small chance of survival. STF, 2012.



## **b. The applicability of WHO soft instruments to reinforce legal arguments**

Some documents are mentioned to reinforce the Judges' arguments with technical data, such as the Report on Chrysotile Asbestos. In these cases, the Court examined the extraction, industrialisation, use, marketing and transport of asbestos and asbestos-containing products.

In ADI 4.066, Judge Rosa Weber referred to the WHO's Technical Document to highlight asbestos as one of the most significant occupational carcinogens, responsible for approximately half of the world's occupational cancer deaths. Judge Edson Fachin used the report to argue that the tolerance level for asbestos regulated by Brazilian legislation was one of the highest in the world and that alternative technologies were fully viable. Judge Ricardo Lewansdowski mentioned the WHO's Descriptive Note 343 and Environmental Health Criteria 23 to argue that all varieties of asbestos are highly carcinogenic and that it is impossible to control its dispersion, with no safe tolerance limit for human exposure.

In the ADI 4.066, ADPF 109, ADI 3.937, ADI 3.356 and ADI 3.357, Judge Dias Toffoli mentioned the same argument to uphold the ban on chrysotile asbestos mining in Brazil.

In two cases (ADI 4.017/2022 and RE 1.224.374/2022), the Court analysed the constitutionality of prohibitions and administrative sanctions to drivers who refuse to take tests, clinical examinations or expertise aimed at detecting the influence of alcohol or other psychoactive substances. While relying on the Global Status Report on Alcohol and Health, a soft law, the Court focused solely on the WHO's technical authority, neglecting to mention the report's non-binding nature. Reports were used to highlight alcohol consumption patterns, the effectiveness of Brazilian legislation and the link between traffic accidents and drivers under the influence of alcohol.

Health governance, which includes vaccines and health programs, appears in three cases. In the ADI 5.037, Judge Marco Aurélio argued that the agreement signed between the Pan American Health Organization (PAHO) and the treatment given to Cuban health professionals are not in line with the provisions of the WHO's Global Code of Practice for International Recruitment of Health Professionals. The other cases ruled on aircraft disposals as a countermeasure for *Aedes Aegypti* (ADI 5.592/2020) and whether the state could be compelled to supply medicines not registered in the ANVISA, under penalty of committing an act of embezzlement (RE 657.718).



The last three cases ruled on: (i) restrictions on advertising products with low nutritional value aimed at children in schools (ADI 5.631), (ii) the possibility of changing the surname and sex on the civil registry (ADI 4.275); and, (iii) the occupational and general population exposure to electric, magnetic and electromagnetic fields generated by power systems (RE 627.189).

In the child health case, Judge Edson Fachin used WHO's Resolution 63.14 to note that WHO recommends that places where children gather should be free of all forms of advertising for foods rich in fat and sugar, because it exerts a negative influence on them. In the second case, Judge Rosa Weber and Judge Alexandre de Moraes argued that although the ICD defines transsexualism as a sexual identity disorder, the WHO was considering changing the classification. In the last case, Judge Dias Toffoli used the WHO's model legislation for effective protection against electromagnetic fields to assevere that there is no convincing scientific evidence that human exposure to these fields cause adverse health effects. In all the cases, the WHO document was cited as a technical element to support the Judge's opinion.

The analysis leads to four conclusions. First, in the STF's composition during the latter stages of the observed period, almost all STF Judges have applied WHO's norms. Second, COVID-19 was a turning point for the application of WHO's norms. It is relevant that the Asbestos Technical Report was highly mentioned in different actions judged together. Third, the STF uses a more complex set of documents than the STJ. Finally, the majority of references fall within the category of hard law, with the WHO Constitution being classified as a hard law instrument. Therefore, the STF employs a more diverse range of sources, primarily relying on hard law norms, compared to the STJ, without explicitly acknowledging the legally binding nature of these internal documents. The analysis demonstrates that the Supreme Tribunal acknowledges the WHO's normative authority in multiple ways. Nearly all Judges have applied the norms directly and precisely at least once.

## Conclusion

The article analysed whether and how Brazilian superior courts adopt WHO's normative production domestically. To uncover significant aspects of the international public authority



exercised by WHO in Brazilian Superior Courts, this research provided an empirical study on how the *Superior Tribunal de Justiça* and the *Supremo Tribunal Federal* apply WHO's norms.

The primary goal of these results is not merely to describe how WHO norms are applied in Brazil, but also to provide a methodological framework capable of indicating the use of the normative authority of an international organization in domestic bodies. To verify whether the normative authority of the WHO has been recognized by a decision, a methodology identifying direct and precise references to WHO's norms was employed.

By filtering the data, the research identified twenty-eight cases that mentioned a norm emanating from the WHO directly and precisely. Therefore, as a first step, it concluded that national courts use the WHO's normative authority. To answer the second research question and provide an overview on how the normative authority is referenced, the study focused on the sixty-seven mentions. The results were analysed into five variables: Courts, Judges, health issues, documents and the binding nature of the WHO's documents.

In STJ, the key findings were that only seven STJ Judges applied WHO's normative authority directly and precisely. The STJ mostly discussed whether a disease should be covered by a health plan contract, addressing the ICD as a main norm due to an internal act that mandates its use. Since the ICD is considered hard law, the STJ applies more hard law instruments, with little emphasis on the binding nature of the norms.

Thus, the analysis shows that the Superior Court recognizes WHO's normative authority to classify a disease as one to be covered by a health care plan according to national law (Law 9.656/98). This finding is relevant to verify how little influence the WHO has on the Superior Court's decisions. Even though it decides on health insurance contracts, the STJ is not very responsive to WHO standards.

A key finding within the STF was that nearly all Judges serving on the bench during the latter part of the analyzed period applied WHO norms directly and precisely in their judgments. COVID-19 was a turning point for mentions to the WHO and the application of its norms. Despite employing a broader spectrum of documents than the STJ, the STF's primary reliance lies in hard law, even considering the WHO Constitution as a foundational hard law instrument. It is noteworthy that as hard law norms must be ratified by the government, the internal promulgation of the norm is relevant.

Therefore, the Supreme Tribunal recognized WHO's normative authority in several ways. Although the STF exhibits a higher frequency of WHO citations compared to the STJ,



the number of cases within the STF that reference WHO norms remains relatively limited, totaling twenty-one. This means that the WHO, as a global health agent regulator, has little influence on the Court's decisions.

This article employs a descriptive approach to lay the groundwork for future research by developing a model for analyzing the influence of WHO's normative authority among countries. The mixed-methods design, hereby applied, can be extended to other institutions. The cases hereby mentioned should be considered for analysis that aims to investigate the degree of influence of the WHO's normative authority in Brazil, and more broadly, the degree of influence of international organization's norms in the domestic legal order.

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