Impacts of Courts on Policy Implementation in a Federal State: Evidence from Disability Insurance in Switzerland

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Swiss cantons have extensive autonomy in implementing federal laws. This leads to heterogeneity in cantonal practices and policy outputs. This article explores the extent to which courts contribute to the convergence of cantonal outputs. It focuses on the disability insurance benefits granted by cantonal administrations, and on the related judicial rulings by cantonal courts and the Federal Supreme Court. The findings suggest that judgments of the Federal Supreme Court have a limited but positive impact on the harmonization of cantonal outputs when a major policy change is implemented.

Keywords: Courts, Disability Insurance, Federalism, Implementation.

1 Introduction

To what extent do court rulings harmonize policy implementation by subnational entities? To address this question, the article combines insights from the judicial implementation and executive federalism literatures. Empirically, it focuses on disability insurance policy in Switzerland during the period 1999-2011. A quantitative approach is applied to measure the provision of disability insurance benefits of the 26 Swiss cantons, and furthermore to assess how court decisions affect the convergence of cantonal policy outputs.

Litigation and court rulings are believed to play an increasingly important role in the policy-making process (Stone, 1992; Tate, 1995). The notion of judicial implementation (Burke, 2004) refers to the impact of litigation and court rulings on policy implementation. This phenomenon is particularly relevant in federal systems.

Under the principle of executive federalism, the Swiss federal government and parliament formulate laws that are implemented by cantonal authorities. The cantons have extensive autonomy when applying federal laws. Consequently, considerable differences across cantonal implementation outputs have been frequently observed (Kissling-Naf and Wälti, 2006). The Swiss judicial system is likewise organized on a federal structure, with 26 cantonal courts and the Federal Supreme Court (FSC) as appellate body. Despite policy implementation and judicial review being strongly federalized, empirical studies investigating the impact of court rulings on policy outputs remain surprisingly rare in Switzerland, with the notable exception of pioneering work by Rothmayr (1999, 2001), Bolliger et
al. (2007) and Ferreira (2011). This article fills this research gap by addressing the following question: what role do cantonal and federal courts play in harmonizing policy outputs regarding disability insurance benefits across the 26 cantons? It investigates the extent to which horizontal venue shifts (i.e., the decisions of cantonal executive agencies revised by cantonal courts) and vertical venue shifts (i.e., the decisions of cantonal courts revised by the FSC) reduce disparities between cantonal policy outputs (i.e., granting disability benefits).

2 Disability Insurance

Within the welfare system, disability policy falls under the competence of the federal authority. As with many other areas, it is implemented through a multilevel mechanism: the federal state relies on cantonal executive agencies for policy implementation. Previous studies on Swiss welfare policies have reported important cantonal disparities when it comes to policy outputs (Battaglini and Giraud, 2003; Curti and Meins, 1999). Furthermore, disparities in cantonal implementation outputs may be more pronounced in disability insurance compared to other social policies. The Federal Law on Disability Insurance (FLDI) has experienced important reforms over the past ten years. On the one hand, the FLDI’s policy design provides reintegration programs to support the professional reintegration of disabled people into the labor market. On the other hand, this insertion strategy is accompanied by control measures to prevent the “abuse” of disability benefits. Cantonal administrations have some room for interpretation when balancing these two objectives (i.e., reintegration versus control) during the FLDI implementation. First, some cantons may implement the law in a stricter fashion than others. Second, some cantons may privilege the reintegration of disabled persons into the labor market and/or emphasize the prevention of abuses.

Disability insurance is well suited to explore the impacts of courts’ decisions on policy implementation. Indeed, more than 50 percent of all claims filed with the FSC between 1990 and 2008 concerned the “social security” domain (Tanque-rel et al., 2011: 41). Within claims regarding social insurances, disability insurance represents by far the largest category (34 percent). Finally, claims concerning disability benefits filed with the FSC have increased strongly during recent decades. Disability insurance represents a critical case for finding empirical evidence of the impact of courts on policy implementation. If we find that courts do not considerably impact policy outputs in this “most likely case”, then we might conclude that judicial actors are not the driving force harmonizing policy outputs in Switzerland.

Among social insurances, disability insurance is the only social security program with a vast negative difference between annual revenues and expenditures. In 1990, the disability insurance fund had a ‘surplus’ of 278 million Swiss francs (see Figure 1). Starting in 1991, however, the yearly negative balance in
its accounts drove the accumulated debt to almost 15 billion Swiss francs by
the end of 2007, while the number of claimants for disability insurance benefits
(DIB) jumped by more than 120 percent between 1990 and 2011.\(^1\) Claims for DIB
in relation to the labor force increased by more than 50 percent between 1999
and 2011. After 40 years of little change in disability policy and in response to
the continuing deterioration of the disability insurance accounts, the parliament
adopted two policy reforms in 2004 and 2008. They aimed to substantially reduce
the inflow of new beneficiaries and curb expenditure growth through austerity
measures. Figure 1 shows that, following the 2004 reform, the number of claims
for DIB dropped while the annual negative balance continued to increase. In 2007,
the negative trend was reversed and the annual deficit dropped.

Figure 1: Annual claims for disability insurance benefits filed with the cantonal agencies
and disability insurance deficit (1990-2011)
Note: The vertical lines correspond to the two FLDI revisions in 2004 and 2008.

The fourth FLDI revision, which came into force in 2004, was concerned with
the financial consolidation of disability insurance through restricting the granting
of benefits and tighter oversight of medical exams. This represents an intermediate
policy change in the settings of disability insurance policy. Adopted in 2008,
the fifth FLDI revision went further in the trend toward a more restrictive disability
policy. Notably, rehabilitation and workforce reintegration became the main
policy objective. Benefits would be granted once rehabilitation attempts failed or
were proved impossible. The aims of this legislative reform were to cut disability
benefits by about 500 million Swiss francs and to reduce the number of new
beneficiaries by 20 percent each year (OECD, 2010: 80). The fifth FLDI revision thus
represents a major policy change.

\(^{1}\) Statistics on disability insurance were provided by the Swiss Federal Social Insurance Office and
the Swiss Federal Statistical Office (T13.3.4.1).
In order to analyze disability policy over time, we employ the notion of “policy regimes”, referring to the time periods during which legal frameworks remain in place for a given policy domain. It is crucial to take the stability of legal frameworks into account, since these set the boundaries, opportunities, and constraints under which policy actors operate. Three policy regimes can be identified for the time frame of our analysis. The first regime (1999-2003) corresponds to the period foregoing the fourth FLDI revision. Under the second regime (2004-2007), the actors concerned by disability policy operated under the rules defined by the fourth FLDI revision. Finally, the third regime (2008-2011) comprises the period during which the legal framework was established by the fifth FLDI revision. Our longitudinal analysis captures a period that witnessed the most dramatic changes in disability insurance.

3 Implementation of Disability Policy: Actors and Outputs

The 26 cantonal executive agencies are usually responsible for implementing federal laws and for enforcing cantonal and federal court decisions. Various empirical studies on executive federalism in Switzerland confirm that important differences can be observed in the cantons’ application of federal law (Delley, 1984; Linder, 1987; Linder and Vatter, 2001; Knoepfel, 2002; Balthasar, 2003; Braun, 2003). This has been explained by different political cultures (Battaglini and Giraud, 2003), interventionist traditions (Balthasar, 2003), or the degree of consent or refusal of federal laws within cantons (Linder and Vatter, 2001; Linder, 2007). A homogenous implementation of federal laws is almost never found (Kriesi, 1998). On the contrary, implementation powers are “frequently used and contribute to a continuing heterogeneity in political structures, administrative practices and policy outputs in multi-level governance” (Braun, 2010: 175).

Convergence means the development of policy similarity over time (Bennet, 1991; Unger and van Waarden, 1995). Therefore, convergence is a process and time is the decisive reference point, besides space (Knill, 2005). To capture the convergence of cantonal disability policy outputs over time, we focus on the variation of the disability-granting benefits (DIB) rate by the implementation agencies and by the cantonal courts and the FSC. A reduction of disparities in DIB rate (i.e. percentage of DIB granted in comparison to DIB requested) among cantons indicates convergence.

In the case of disability insurance, each canton is responsible for the organization of its own implementation agency (Cantonal Disability Insurance Office, CDO). Furthermore, each canton has a cantonal court that is responsible for overseeing the application of federal legislation by CDO. All decisions of this cantonal court are appealable to the FSC. Figure 2 summarizes the procedure of granting or refusing disability insurance benefits to claimants and shows how the award of DIB depends upon three successive decisions: the administrative decisions of the
CDO as direct implementers of the federal legislation, the rulings of the cantonal courts as judicial instances for appeal against the CDO decisions, and the rulings of the FSC as ultimate judicial instance for appeal (either by the assured person or by CDO) against the cantonal courts’ rulings.

![Figure 2: Administrative and judicial procedure in disability insurance (in 2008)](image)

To illustrate how the administrative and judicial procedures are organized, we examine the three successive decisions on which the award of DIB depends: the overall number of claims filed with the cantonal disability offices, the cantonal courts, and the FSC (per year). Consider, for instance, the year 2008 (see Figure 2): (1) 325,073 assured persons (AP) applied for disability insurance benefits to the CDO in the 26 cantons. (2) The same year, the CDOs granted 249,040 claims (77 percent) and denied 76,033 claims (23 percent). (3) Subsequently, the AP filed 4,708 claims with the 26 cantonal courts (i.e., 6 percent of all denied claims by the CDOs). From these claims judged by the 26 cantonal courts, 688 (21 percent) were eventually granted and 2,547 (79 percent) were denied. (4) From the 2,547 claims

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2 A time lag of one year and two years, respectively, at the level of the cantonal courts and the FSC takes into account the period between the decision of the CDO (t; 2008) and the cantonal court’s sentence (t+1; 2009), and between the decision of the CDO (2008) and the FSC’s sentence (t+2; 2010).

3 The gap between the 4,708 claims filed with the cantonal courts and the 3,235 claims judged by the cantonal courts (688 + 2,547) results from inadmissible claims that have been eliminated from the judicial procedure.
denied by the 26 cantonal courts, the AP filed 824 claims (32 percent) with the FSC. From the 824 claims filed by the AP, the FSC granted 158 claims (26 percent) and denied 443 claims (74 percent). (5) The CDOs, as claimants, submitted 148 claims (22 percent) to the FSC against the 688 DIB granting decisions by the 26 cantonal courts. (6) The FSC granted 80 claims (61 percent) submitted by the CDOs (i.e., refused the award of DIB) and denied 51 claims (39 percent) submitted by the CDOs (i.e., granted the award of DIB). Altogether, the FSC granted 209 claims for DIB that were initially denied by the CDOs or 0.3 percent of the initial 76,033 claims. To sum up, the litigation game is rarely “played” by assured persons. Only a few whose claims for DIB were denied by the CDOs go to court to obtain a review and reversal of the CDOs’ decision.

4 Theoretical Framework

Divergence in the implementation of federal laws by subnational units is well documented in several countries and policy domains. Moreover, it is not unexpected that implementation differences between subnational units fluctuate over time, depending on the scope of policy changes. The important question is, however, if and to what extent the courts affect these implementation disparities and how far they contribute to the harmonization of policy outputs across subnational units.

4.1 Horizontal venue shift: impacts of cantonal courts?

One possible explanation for judiciary-induced convergence of policy outputs can be called horizontal venue shift. While cantonal executive authorities have considerable autonomy in implementing federal programs, cantonal courts have a constitutional obligation to enforce federal law. Cantonal courts are required to enforce federal rules during the cantonal implementation of a federal policy (e.g., disability insurance programs). They become involved with policy implementation when individuals contest decisions made by cantonal executive agencies (e.g., refusal of DIB by a cantonal disability office). In doing so, cantonal courts directly oversee the implementation practices of the cantonal executives and may overturn administrative decisions. However, a ruling interpreting federal law in one canton does not have any direct binding effect on the interpretation of the same law in other cantons. By anticipating future appeals on the same issue in their own jurisdiction, cantonal implementers may nonetheless take into account the rulings of other cantonal courts. Therefore, we expect that the horizontal shift (of benefits requests) from the administrative branch to the judicial branch increases the convergence of policy outputs across cantons. The fact that the individual rights to DIB are reviewed by a judicial authority, acting under the premise of respecting federal law, is likely to contribute to a more coherent application of federal law and should increase the convergence of policy outputs (e.g. the granting
of DIB) across cantons. Our first hypothesis postulates that the cantonal courts’ decisions increase convergence in policy outputs across cantons. To empirically validate this hypothesis, one should observe more uniformity on policy outputs across cantons following the shift from the administrative to the judiciary venue at the cantonal level.

4.2 Vertical venue shift: impacts of the Federal Supreme Court?

As the final appellate national body, the FSC ensures that cantonal courts apply federal law correctly. FSC rulings affect a wider set of actors than those involved in specific lawsuits. Furthermore, when cases are referred to the FSC, individuals who contest cantonal executive decisions are no longer the sole initiators of the “litigation game”. Cantonal disability offices may also contest a decision taken by the cantonal court before the FSC. The FSC is the final stage of the judicial implementation procedure, since its decisions are legally binding to all the parties involved, including both judicial and executive cantonal authorities. We expect that the vertical shift of policy implementation from a cantonal judicial authority to the federal judicial authority is likely to decrease implementation differences across cantons: the FSC’s decisions increase convergence in policy output across cantons. Disparities between cantonal policy outputs should diminish following the shift from the cantonal courts to the FSC.

4.3 Scope of legislative changes: deterrence and learning effects?

Increased divergence in the application of federal laws by cantonal executive agencies may also be linked to the scope of policy reforms and to the related increased divergence in policy interests between federal and cantons authorities. When a major change to a federal program is adopted (e.g. a move towards a more restrictive disability policy), some cantons may face increasing incompatibility between the new policy direction and their previous practices (e.g. cantons with a generous grant of DIB). These cantons may be thus put under ‘adaptational pressure’. A major legislative change is likely to represent an additional (and temporary) source of divergence across subnational units in charge of implementing federal programs. In such situations, the FSC’s rulings could have a high impact on convergence across cantonal outputs. Such a theoretical expectation relies on the well-known “misfit” approach developed in the Europeanization literature (e.g. Risse et al., 2001; Börzel, 2003). It is plausible that the bigger the legislative change, the larger the policy misfit and thus the more adaptational pressure exerted on cantonal implementers. In such periods of uncertainty, the FSC’s rulings have potentially greater „deterrence across the borders” effect (Kim and Sikkink, 2010: 945). The FSC’s ruling might have spillover effects beyond the individual case at hand. Precedential reasoning by both cantonal executive agencies and
cantonal courts is probably an important driver for the convergence of cantonal outputs. We expect that deterrence and learning effects induced by FSC’s rulings are more important after a major legislative change than after an incremental reform: the impact of FSC’s ruling on the convergence in policy outputs across cantons is higher after a major policy change. One should observe more uniformity across cantons after a major legislative change compared to after a moderate reform.

5 Empirical analysis

To explore whether courts reduce cantonal disparities in policy implementation, we rely on DIB granting rate by the cantonal and the federal courts, across cantons. A decrease in the variation of policy outputs by CDOs and after courts’ rulings can be measured by sigma-convergence (Sala-i-Martin, 1996; Heichel et al. 2005): a decreasing coefficient of variance indicates convergence or a reduction of disparities among cantons over time. The most frequently used measure of sigma-convergence is the standard deviation (s.d.). In this case, convergence increases if the s.d. of the DIB granting rate across cantons declines with venue shifts. A low s.d. shows that the data points tend to be close to the mean. A high s.d. indicates that data points are spread out over a large range of values. Boxplots, as an extension of the sigma-convergence measurement, present graphically the variance of policy outputs.

Figure 3 presents the evolution and variance of the DIB granting rate across the 26 cantons for each regime. The boxplot shows the median cantonal value of the DIB granting rate (the horizontal line in the box), the third and second quartiles of the cantonal distribution (the edges of each box), and the extreme values (the two whiskers extending from the box). Dots identify outlier observations (i.e., the canton of Valais in the second regime and Neuchâtel in the third regime).
In line with the aims of the two mentioned FLDI reforms, Figure 3 shows the general trend of a decrease in granting disability pensions over time. On average, the implementation by CDOs has become more restrictive in all cantons. However, an increasing heterogeneity across cantons is observable during the third regime. While the second regime brought cantons closer, the third regime spread them out over a larger range of values. In other words, differences in CDOs outputs become more important after the fifth FLDI reform.

To measure the impact of horizontal venue shift, the DIB granting rate by the CDOs was completed with the additional claims accepted by cantonal courts. A time lag of one year at the level of the courts takes into account the period between the decision of the cantonal executive agencies (t) and the cantonal courts sentence (t + 1).

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4 Claims for DIB accepted by CDOs, as a percentage of all claims for DIB filed with the CDOs, per canton and year (1999–2011).
5 Claims for DIB accepted by CDOs, per year (t) and canton, and claims for DIB that were accepted by cantonal courts (t + 1) and canton, as a percentage of all claims for DIB filed with the CDOs, per canton and year (t). The data on cantonal courts were provided by the Swiss Federal Social Insurance Office.
6 A sampling of disability insurance cases has shown that cantonal courts deliver judgments on average within one year after the refusal of DIB by the CDOs and that the FSC comes to its verdict on average two years after the initial refusal by the CDO.
In a similar vein, the DIB granting rate by the CDOs was completed with additional claims accepted by cantonal courts and by the FSC to measure the impact of vertical venue shift. A time lag of two years at the federal level takes into account the period between the CDO decisions \((t)\) and the FSC’s sentences \((t + 2)\).

The trend highlighted in Figure 3 is also explicit in Table 1, which shows a smaller s.d. for policy outputs at the administrative level (CDOs) for the second regime (s.d.=0.0283) than for the third regime (s.d.=0.0526). These findings support the idea that, following a major policy change (fifth FLDI revision), a large “misfit” with the previous situation increases disparity in policy outputs.

To assess the extent to which there has been increasing convergence in policy outputs, we calculate the cross-cantonal standard deviation for the DIB granting rate for the 26 cantons. Table 1 shows the cross-cantonal s.d. for the DIB granting rate per policy regime. The next to last column reports the distribution of granting disability benefits for CDOs, cantonal courts, and the FSC. The last column reports the variation of the standard deviation from one level to another.

<table>
<thead>
<tr>
<th>Policy Regime</th>
<th>N</th>
<th>Minimum</th>
<th>Maximum</th>
<th>Mean</th>
<th>Std. Deviation</th>
<th>Var. %</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 CDO</td>
<td>26</td>
<td>.812</td>
<td>.920</td>
<td>.865</td>
<td>.0295</td>
<td></td>
</tr>
<tr>
<td>Cantonal courts</td>
<td>26</td>
<td>.813</td>
<td>.921</td>
<td>.866</td>
<td>.0293</td>
<td>-.686</td>
</tr>
<tr>
<td>FSC</td>
<td>26</td>
<td>.813</td>
<td>.923</td>
<td>.867</td>
<td>.0294</td>
<td>.337</td>
</tr>
<tr>
<td>2 CDO</td>
<td>26</td>
<td>.716</td>
<td>.868</td>
<td>.821</td>
<td>.0283</td>
<td></td>
</tr>
<tr>
<td>Cantonal courts</td>
<td>26</td>
<td>.716</td>
<td>.870</td>
<td>.823</td>
<td>.0286</td>
<td>1.06</td>
</tr>
<tr>
<td>FSC</td>
<td>26</td>
<td>.717</td>
<td>.870</td>
<td>.823</td>
<td>.0284</td>
<td>-.7</td>
</tr>
<tr>
<td>3 CDO</td>
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<td>.626</td>
<td>.825</td>
<td>.750</td>
<td>.0526</td>
<td></td>
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<tr>
<td>Cantonal courts</td>
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<td>.839</td>
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<td>.0509</td>
<td>-3.23</td>
</tr>
<tr>
<td>FSC</td>
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<td>.657</td>
<td>.857</td>
<td>.772</td>
<td>.0473</td>
<td>-7.07</td>
</tr>
</tbody>
</table>

*Table 1: DIB granting rates at three levels (CDO, cantonal courts, FSC) per policy regime*

Table 1 shows that for the first and second regimes, the dispersion of granting benefits across cantons is smaller than for the third regime. The small standard deviation characterizing both policy regimes indicates that policy outputs are clustered closely around the mean (s.d. equals 0.029 in the first regime and 0.028 in the second regime). Within the first and the second regimes, we can see subs-
tantial variation for the cross-cantonal dispersion of the DIB granting rate neither in the horizontal shift from an executive to a judicial authority nor in the vertical shift from the cantonal judicial authority to the federal judicial authority. For the first and second regimes, the s.d. remains stable after venue shifts and hypotheses 1 and 2 are therefore not validated.

However, for the third policy regime, the cross-cantonal dispersion declined from CDO decisions (s.d. of 0.053) to the FSC rulings (s.d. of 0.047). The vertical passage from the cantonal courts to the FSC appears to be more important (-7 percent) than the horizontal passage from the administrative venue to the judiciary venue (-3 percent). During the third regime, and in accordance with our second hypothesis, the variation between the DIB granting rate across cantons decreases with the vertical venue shift. Our first hypothesis, evaluating the impact of cantonal courts’ decisions on the convergence across cantons, is not supported here.

Finally, the impacts of the FSC rulings are higher during the third policy regime (after the fifth FLDI reform) than during the previous regime. This empirical evidence supports our third hypothesis. In sum, the findings show that the FSC has a minor but positive impact on policy outputs convergence across cantons when a major policy change is implemented.

6 Conclusion

This article contributes to a better understanding of the interplay between executive federalism and judicial implementation, a process by which federal legislation is implemented by subnational administrations and shaped by courts’ rulings. Investigating variation in terms of policy outputs when the judiciary is “activated” is a relevant topic for both policy and legal scholars. In federal systems where policy implementation is delegated to decentralized authorities (such as in Switzerland, Germany or the United States) these questions acquire a special meaning: do courts balance implementation differences between subnational units?

In order to address this question, we have investigated the role of courts in the implementation of Swiss disability insurance policy across time. We have learned that, in quantitative terms, the “litigation game” is scarcely opened. Very few of the policy outputs produced by executive agencies are contested and translate into litigation. Individuals go to courts in only six percent of cases. This gives the judiciary limited opportunity to affect policy outputs through the revision of the implementers’ decisions.

Furthermore, we have found that courts have a modest effect on the harmonization of policy implementation across cantons. The FSC plays in relative terms a more important role than its cantonal counterparts. However, this effect is observable particularly when implementation disparities across cantons increase following a major policy change. The extent to which these findings hold across policy sectors and countries is a question open to future research. Nevertheless, whether policies are undergoing a period of major change seems an important factor to control for when assessing the impact of courts.
This study should be complemented with further analyses. In particular, the role played by leading cases of the FSC and their impacts on cantonal policy implementation have yet to be defined. Qualitative methods may be appropriate to shed light on these aspects. Moreover, interviews with cantonal executive agencies may help to develop a more subtle explanation of (the absence of) policy outputs convergence. Such a qualitative research design would be useful to investigate the mechanisms underlying our research hypotheses (i.e., deterrence and spillover effects, learning effects).

Finally, we clearly need to compare the disability insurance policy with other policy domains, since sector-specific characteristics (e.g., the distributive character of social policy as opposed to regulative policy fields such as environmental policy) might come to play in the level and degree of policy convergence.

**Zusammenfassung**


**Schlagworte:** Gerichte, Invalidenversicherung, Föderalismus, Vollzug

**Résumé**


**Mots-Clé:** Tribunaux, Assurance-invalidité, Fédéralisme, Mise en œuvre
References


