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Beyond minimalism and usurpation: Designing judicial review to control the *mis*-enforcement of socioeconomic rights[1]

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Abstract

This work critically evaluates the judicial enforcement of socioeconomic rights and its associate discourses. Drawing on the findings of an empirical research study on the health care-related litigation in Brazil, I argue that none of the two main arguments that drive this constitutional law debate —judicial minimalism and judicial usurpation— offer a complete account as to what I call the *mis*-enforcement of rights: a scenario with a deficit of inequality resulting from non-justified distributive and aggregate effects due to the judicial protection of a target group. I present evidence that two overlooked structural factors are actually in the roots of the *mis*-enforcement: the right-based legal reasoning and the litigation system focused on individualized lawsuits. Thus, in order to reorient the debate, I propose a *design approach*, according to which judicial enforcement of socioeconomic rights in dysfunctional democracies is legitimate as long as it focuses on (i) improving social change through a distribution of goods that guarantee basic needs to disadvantaged groups, under the counter-majoritarian principle, and on (ii) providing the institutions with incentives to effectively take political issues back to the democratic process. Achieving this purpose requires the adjudicatory practice (i) to regard issues more likely to arise in socioeconomic rights-related litigation —such as needs and recipients; (ii) to address background rules that interfere in the dynamics of enforcement— such as the distributive and aggregate effects; and (iii) to observe a procedure that promotes democratic values, such as political engagement, institutional accountability, representativeness, and openness.

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Sumário

Introduction

In September 2015, as the administration of São Paulo State University —the most prominent public academic institution in Latin America— moved to prohibit the distribution of unregistered chemical substances, a few cancer patients had their access to *phosphoethanolamine* interrupted. The university had produced and freely distributed the substance —claimed to kill tumor cells— to a small number of patients as part of some tests, although there was then no scientific evidence of its efficacy in humans. However, in October 2015, the Brazilian Supreme Court reestablished a single plaintiff access to the substance. It relied on two arguments: the fundamental social right to health care and the judicial role of enforcing rights. The court's decision called nationwide attention to the alleged benefits of the then unknown *phosphoethanolamine.*

Unexpectedly, in February 2016, the university claimed to be in a state of chaos, as more than 8,000 decisions from federal and state courts had ordered it to produce and to distribute the compound in favor of single plaintiffs. In order to comply with the numerous rulings, the university canceled on-going research, redirected the activities of the staff, and reallocated resources to transform labs into a small factory so that high quantities of the compound could be manufactured and distributed.[3]

This case is just a short chapter in one of the most extensively discussed topics in developing countries since the third wave of democracy: the judicial enforcement of social and economic rights[4] through mechanisms of judicial review. The state inefficiency in providing universal access to a set of progressive entitlements —internationally recognized as positive human rights, and then domestically entrenched in national constitutions as socioeconomic rights— has been the starting point of complex dynamics of

[3] See Heidi Ledford, *Brazilian Courts Tussle over Unproven Cancer Treatment*, Natural Journal of Science. I also express gratitude to Judge Ana Cruvinel for providing insightful comments about this case.

[4] For the purpose of this work, I adopt the distinction between socioeconomic rights and individual & civil rights. The former includes the rights to health, to education, to culture, to legal aid, to work under just and favorable conditions, among others ensured by the International Covenant on Economic, Social and Cultural Rights (1966).

enforcement and compliance within which the Judiciary has become an active player.

This issue has emerged worldwide. Since the 1990s, the Constitutional Court of South Africa has released remarkable decisions about the right to housing (*Government of the Republic of South Africa v. Grootboom*, 2000), the right to health care and access to HIV/Aids treatment (*Minister of Health v. Treatment Action Campaign*, 2002) and the right of access to social security by permanent residents (*Khosa v. Minister of Social Development*, 2004)[5]. In 1996, after seven government hospitals in Calcutta refused to admit a patient as they did not have any vacant beds (*Paschim Banga Khet Majoor Samity v. State of West Bengal*, in 1996), the Indian Supreme Court ordered the Government of West Bengal "to formulate a blueprint for primary health care with particular reference to treatment of patients during an emergency". In 1998, "noticing that long years of exposure to the harmful substance [asbestos] could result in debilitating asbestosis, the Court mandated the provision of compulsory health insurance for every worker as enforcement of the worker's fundamental right to health".

This paper will critically evaluate the involvement of the courts in enforcing socioeconomic rights and the associate discourses in Brazil, where lawsuits accusing the government of ignoring the 1988 Constitution's socioeconomic rights have greatly increased over the last two decades. Enrollment in housing policies, construction of schools in poor communities, and improvement of labor conditions are a few examples of the vast variety of claims being brought. I will adopt as a case study the enforcement of the right to health care, which currently represents the most problematic field of public law litigation in Brazil. In 2014, lower courts reported 392,921 in-progress lawsuits[6] against the state. Drawing data collected by the Human Rights Clinic at Harvard Law School[7], the Brazilian National Council of Justice, the Brazilian Ministry of Health, and the State of São Paulo, as well as decisions of the Brazilian courts, I will provide an overall picture of the health-related litigation and its social impacts.

I will then connect the statistical picture with the institutional context that informs courts' behavior. The objective is to identify the sources of what I call *mis-enforcement* of rights: a scenario in which the judicial protection of a socioeconomic right in favor of an individual or a target group causes non-justified distributive and aggregate effects that worsen overall inequality. Those undesirable outcomes challenge courts' general argument that enforcement of social rights enhances equality.

I will argue that, of a number of causes that explain the phenomenon of *mis-enforcement*, two structural factors stand out: the court's traditional legal reasoning, which focuses on a right-based discourse (a pathology that Daryl Levinson calls "rights es-

[5] These judgments are listed as landmark cases handed down by the Court and are available at http://www.constitutionalcourt.org.za/site/thecourt/history.htm#cases (Last visited on October 12, 2015).

[6] National Council of Justice, *National Forum of Health-related Litigation Report*.

[7] This data is available in a report released by the International Human Rights Clinic at Harvard Law School's Human Rights Program, which was published in 2011.

sentialism"[8]), and the litigation system, which privileges individualized claims over collective actions, even though both have been designed to address individual rights. These factors form an amalgam that restrains judges from properly reflecting on the issues that are especially likely to arise with respect to socioeconomic rights-related claims, such as (i) the background rules that influence the judicial intervention (distributive and the aggregate effects), and (ii) the needs and the beneficiaries that deserve priority given budgetary constraints. This amalgam imposes social costs that affect the legitimacy and the efficiency of the judicial system.

This hypothesis contradicts the mainstream scholarly discussion of Brazilian constitutional doctrine, which has overlooked those two structural factors and has criticized judicial enforcement using a formalist approach. This line of argument limits discussion to the level of judicial review that a constitution may entrench. Drawing on American judicial review scholarship, it regards judicial practice as a usurpation of administrative and legislative functions. It thus recommends that courts adopt a minimalist approach to avoid enforcement.

Two arguments support this mainstream critical perspective. The first argument is the social and financial costs of judicial intervention. Asking the government to pay for cancer treatment for an individual plaintiff, to universalize access to a new drug, or to expand the number of beds in the public system entails demands on the budget[9]. Judges do not (and must not) create new budgetary resources, so that compliance with courts' decisions requires reallocating of the existing budget, which negatively affects established policies. The second argument is that courts have violated the limits of judicial review imposed by the separation of powers clause, since non-elected judges lack democratic legitimacy to interfere with on-going programs.

These critics have developed a large amount of literature on the political role of courts in democracies, and their writings have encouraged scholars' and judges' to take a stance either against or in favor of judicial review[10]. Even those in favor have drawn

[8] Daryl Levinson defines rights essentialism as the conventional way of understanding constitutional law, in which rights and remedies have an absolute dependence: "Judicially recognized rights are legitimated by their special relationship to constitutionally-enshrined values, while judicially mandated remedies are only provisionally warranted by their master-servant relationship with the rights they are designed to enforce. While it is meaningless to speak of remedies apart from their instrumental value in operationalizing some right, rights can be talked about and understood —indeed, can be best understood— in complete isolation from (merely) remedial concerns. In a phrase, rights and remedies are made of different stuff —and the rights stuff is better". Levinson challenges this conventional perspective, by saying that "rights-essentialism depends on an oversimplified picture of the relationship between rights and remedies, which are both less separate and more equal than this picture suggests". (Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, University of Virginia Law School, Legal Studies Working Paper No. 99-5. Available at SSRN: , last visited on April 9th, 2016). *See also* Charles F. Sabel, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1054.

[9] I take *cost of rights* from the perspective adopted by Cass Sunstein and Stephen Holmes, according to which all rights are positive and demand material and affirmative services provided by the government.

[10] Professors Jeremy Waldron, Richard Fallon, and Mark Tushnet had a prominent debate on judicial review. Against judicial review, *see* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346 (2006); in favor of judicial review, *see* Richard Fallon, *The Core Of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2008); for a critique against both scholars, *see* Mark Tushnet, *How Different are Waldron's and Fallon's Core Cases for and Against Judicial Review?*. 30 OXFORD JOURNAL OF LEGAL STUDIES 49 (2010).

a contrast between two basic models: under *strong review*, courts strike down and redefine statutes and impose structural injunctions on the government[11]; under *weak review*, courts "can signal their concerns that statutes violate rights but cannot decline to enforce statutes on that ground"[12]. Most of the scholars follow Mark Tushnet and Cass Sunstein, who have long advocated for the weak form of judicial review[13] as a dialogical mechanism that reduces "the tension between judicial review and self-governance"[14].

However, I argue that in the Brazilian institutional context, whose characteristics are shared by other developing countries, mis-enforcement of rights has no necessary connection with their over-enforcement or their under-enforcement¬, although in some situations these phenomena may be contingently related. Two elements drive this hypothesis. On the one hand, situations of mis-enforcement may arise as a result of both strong review and weak review. For example, under the Brazilian institutional arrangements, weak judicial review may reduce the government's incentives to implement socioeconomic rights, so that the violation of fundamental rights persists and no social change is achieved. Additionally, as David Landau concludes under the Colombian case, "courts can aggressively enforce these rights and yet do little to affect social transformation"[15]. On the other hand, efficacious interventions may derive from both situations of strong review and weak review. Empirical data from Brazil provide lots of positive examples that do not necessarily fit with the idea of weak judicial review. For instance, courts massively imposed structural injunctions to oblige the state to furnish HIV/AIDS drugs to single plaintiffs during the late 1990s. This litigation gave government an incentive to develop a universal policy to address this issue, which was later internationally recognized as a model to other countries.

Furthermore, the jurisprudence of the Brazilian Supreme Court shows how a court can move from a deferential dialogical performance towards an interventionist behavior when it notices that the other branches have systematically ignored its rulings. This movement reinforces doubts about whether a system of weak review would be feasible in dysfunctional democracies. Despite scholars' criticism, judicial enforcement of socioeconomic rights functions as a check on government, by incentivizing the executive and the legislative branches to improve public policies and make political institutions increasingly responsive to public demands. Although a number of situations of mis-enforcement have arisen in Brazil, evidence also shows

[11] Richard Fallon, *The Core Of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1706 (2008).

[12] *Id.*

[13] According to Mark Tushnet, "weak-form of judicial review provides mechanisms for the people to respond to decisions that they reasonably believe mistaken that can be deployed more rapidly than the constitutional amendment or judicial appointment processes", Mark Tushnet, *Weak Courts, Strong Rights*, 23 (Princeton University Press ed., 2008). *See also* Cass R. Sunstein, *One Case At A Time: Judicial Minimalism on the Supreme Court* (Harvard University Press 1999); Mark Tushnet, *Abolishing Judicial Review*, 27 *Constitutional Commentary* 581 (2011); Mark Tushnet, *The Rise of Weak Form Judicial Review*, in *Comparative Constitutional Law* 321 (Tom Ginsburg & Rosalind Dixon eds., Edward Elgar Publishing, 2011). Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825 (2008).

[14] Mark Tushnet, *Weak Courts, Strong Rights*, 23 (Princeton University Press ed., 2008).

[15] David Landau, *The Reality of Social Rights Enforcement*, 53 HARVARD INTERNATIONAL LAW JOURNAL, 2012, 191.

that interventions have contributed to making rights real.

In sum, the level of review does not offer a complete account of the problem of mis-enforcement. As both over- and under-enforcement- may lead to mis-enforcement and to efficacious interventions, the discussions should include more dimensions. The substance of the injunction matters, not just the intensity, as long as it takes into account three points: a commitment with a conception of enforcement that recognizes substantive issues more likely to arise in socioeconomic rights-related litigation, such as needs and the types of beneficiaries; the capacity to address background rules that interfere with the dynamics of enforcement, such as the distributive and aggregate effects; and the scope to embody a procedure that promotes democratic values, institutional accountability, representativeness, and openness.

To address those points, this paper adopts a *design approach*. According to Richard Fallon, "if judicial review is reasonably designed to improve the substantive justice of a society's political decisions by safeguarding against violations of fundamental rights, then it is not unfair, nor is it necessarily politically illegitimate". He further notes that "the fairness and political legitimacy of procedural mechanisms depend on the ends that they serve"[16]. I argue that the enforcement of socioeconomic rights through judicial review is legitimate, as long as it focuses on (i) enhancing equality and improving the distribution of goods in favor of disadvantaged groups, under a counter-majoritarian principle, and (ii) providing the other branches of the government with incentives to address the issue effectively in developing their policies. These conditions require an exercise in institutional rethinking in order to decide how judicial review shall be designed to achieve these appropriate goals[17].

Two basic premises borrowed from Roberto Unger orient this enterprise. One is that law is an open system defined as "the institutional form of a people viewed in the relation to the interests and ideals that make sense of such a regime"[18]. The other is that both law and legal thought potentially inform "the self-construction of society under democracy". In practical terms, this paper attempts to go beyond the debate over the enforcement of socioeconomic rights by moving away from framing the issues in binary terms, such as usurpation/abdication, strong review/weak review, intervention/non-intervention, minimalism/activism[19]. I build on the work of Richard Fallon, who argues that there is no need for a single choice, because "rights may be more or less entrenched, as may the guarantee of judicial review as a mechanism to enforce fundamental rights". Expanding the spectrum of choices will allow courts to navigate the vast range of combinations of procedures, remedies, interpretations of rights, level of scrutiny[20], and their possible outcomes.

[16] Richard Fallon, *The Core Of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1735 (2008).

[17] *See* Matthew Stephenson, *Does Separation of Powers Promote Stability and Moderation?*, 42 Journal of Legal Studies, 331 (2013).

[18] Roberto Mangabeira Unger, The Critical Legal Studies Movement: Another Time, a Great Task, 45 (Verso, 2015).

[19] Richard Fallon. The Core of an Uneasy Case for Judicial Review, 121 HARV. L. REV. 1693, 1733 (2008).

[20] Katharine G. Young, Constituting Economic and Social Rights, 137 (Oxford University Press, 2012).

This enterprise takes for granted that socioeconomic rights are justiciable. In the Brazilian institutional context, there is no space to consider that these rights constitute a program to be implemented at the discretion of the executive and the legislature without any role for courts. Such a position would be unacceptable, as the normative and transformative character of the 1988 Constitution supports the judicial enforcement. If the state does not observe a right granted by the Constitution, the courts must not overlook the violation. The question is not *whether* courts may intervene, but *how* courts may intervene according to constitutional parameters.

This project also assumes that, although courts are unelected bodies, they assume an important role of check on the other branches of government, by enhancing democracy under the counter-majoritarian principle[21]. Despite some fair criticisms, this has been a global movement whose roots include the rise of judicial independence in liberal democracies. Descriptively, strong courts are usually present in strong democracies: India, South Africa, United States of America, since they "have clearly become part of the social and economic policy setting and enforcement across the world"[22]. For this reason, I will not discuss *whether* courts have the legitimacy to enforce rights, but *how* they construct their legitimacy.

Neither of these assumptions implies that courts should be the main arena of enforcement, or that they should exercise an unlimited power. By emphasizing their importance as the last resort of enforcement, my purpose is to draw guidelines to improve the quality of judicial intervention, when circumstances make it indispensable, in order to address the causes of *mis-enforcement*.

This work is structured in three parts. Part one provides an overall picture of health-related litigation in Brazil and its social impacts. I present empirical data that help to build the case for the concept of *mis*-enforcement of rights. Part two links the health-related litigation to current Brazilian institutional arrangements, in order to analyze the roles that the judicial branch assumes within a dysfunctional political system, and to show how political conditions affect the debate over judicial review. Part three develops some theoretical premises that I use to articulate a *design approach* to judicial review. This approach takes concrete form in a set of proposals for structural reforms of the Brazilian litigation system.

1. Judicial enforcement of socioeconomic rights: a critique of the critique

1.1. Case study: objectives and justification

In this section, I draw on the findings of empirical research undertaken by the

[21] *See* Matthew Stephenson & Justin Fox, *Judicial Review as a Response to Political Posturing*, 105 AMERICAN POLITICAL SCIENCE REVIEW 397 (2011); *see also* Matthew Stephenson, *The Welfare Effects of Minority-Protective Judicial Review*, 24 JOURNAL OF THEORETICAL POLITICS (2014).

[22] Nick Robinson, Expanding Judiciaries: India and the Rise of the Good Governance Court, 8 WASH. U. GLOBAL STUD. L. REV. 1 (2009), 66.

Human Rights Clinic at Harvard Law School on judicial enforcement of the right to health in Brazil from 2009 to 2011[23]. I supplement these findings with data updated in 2015 from the Brazilian Justice National Council, the Ministry of Health, and the State of São Paulo.

I provide a macro-systemic picture of the enforcement of the right to health in Brazil, over which I draw some conclusions, as a methodological basis for the next steps of this enterprise.

Two reasons support the decision for a case study on the right to health in Brazil. The first reason is the magnitude of this kind of litigation. There is no accurate data on the lawsuits involving other socioeconomic rights, whereas the numbers of health-related lawsuits are available and staggering: almost 400,000 in-progress as of June 2014[24]. A shared sense prevails among legal professionals —judges, public attorneys, lawyers, and others— that litigation on no other socioeconomic right outweighs health-related litigation in Brazil. Its impacts have raised institutional concerns: in 2009 the Brazilian Supreme Court (STF) held a public hearing to discuss the issue. Players from the executive, legislative, and judicial branches; NGOs; academics; and medical professionals participated. As a result of this event, the National Council of Justice (CNJ) set up a working group to propose practical lines to guide courts in dealing with health-related adjudication. In 2010, this working group was converted into the Judicial National Forum on Health Care Litigation, whose ambitious plans included the monitoring of law suits, data collection, diagnosis of issues related to compliance, and support for court administration[25].

The second reason for this choice is pragmatic. There is surprisingly little empirical research on the enforcement of socioeconomic rights in Brazil. The most complete available data concerns the right to health. Political institutions have never given much attention to the impact of this litigation on other socioeconomic rights.

1.2. Case study: the judicial enforcement of the right to health in Brazil and associate discourses

Discussions of health-related litigation discloses a conflict between two arguments. The first argument considers that courts positively enforce constitutional rights; they fill the gap left by the executive and legislative branches. *Judicial enforcement reduces inequality, improves the distribution of goods, and thus enhances democracy*. The sec-

[23] This data is available in a report developed by the International Human Rights Clinic at Harvard Law School's Human Rights Program, which was published in 2011. See Octavio L. Motta Ferraz, *Brazil, Health Inequalities, Rights, and Courts: The Social Impact of the Judicialization of Health*, in LITIGATING HEALTH RIGHTS, CAN COURTS BRING MORE JUSTICE TO HEALTH 76, 83 (Alicia Ely Yamin et al. eds., 2008).

[24] National Counsil of Justice, *National Forum of Health-related Litigation Report*, at (Last visited on January 9, 2016).

[25] *See* National Counsil of Justice, *National Forum of Health-related Litigation*, available at (Last visited on April 9th, 2016).

ond argument considers that courts negatively interfere with established public policies, and that courts also lack the data and legitimacy to intervene successfully in the formulation and the execution of those policies. *Judicial enforcement worsens overall inequality instead of enhancing the distribution of goods, and thus weakens democracy.*

My hypothesis is that both arguments are partially wrong. Scholars usually embrace either the first or the second argument, as if they were completely independent packages, and as if one argument falsified the other. However, judicial enforcement of socioeconomic rights can only be properly addressed if both arguments are taken as complementary, since they are interdependent. Instead of negating each other, one balances the other, since they describe different aspects of the same complex social phenomenon.

General information. In June 2014, Brazilian courts informed the National Council of Justice that there were 392,921 health-related lawsuits in-progress (62,291 lawsuits in the federal courts and 330,630 in the state courts)[26]. The figure has been progressively increasing every year. The State of São Paulo informed the NCJ that 11,647 new claims were registered in 2011, 12,069 in 2012, 14,217 in 2013, 15,294 in 2014, and 14,461 through September of 2015. Each of those cases were filed against the government (the federal union, the states, and/or municipalities). The research did not include claims against private health insurers or other private players.

Most health-related lawsuits are individualized. A single plaintiff brings a lawsuit against the state and requests a provision that will benefit him exclusively. The International Human Rights Clinic found that during the years 2005-2009 97 percent of the claims in the federal courts were individual; only 3 percent were collective actions[27]. According to the State of São Paulo, collective claims amounted to 7 percent of the actions in 2010[28].

The claims are diverse, but most of them ask for the provision of medicines. The State of São Paulo reported that 66.1 percent of the lawsuits in 2010 involved access to drugs, whereas 30.5 percent involved medical services, such as surgeries and beds in hospitals.

The costs of compliance is also impressive. It is difficult to measure exactly how much the public institutions have spent on funding all the medical treatments and services ordered by courts, but some fragmented statistics furnish evidence of their impact on the health-care budget. In 2009, the: federal union, states, and munici-

[26] National Counsil of Justice, *National Forum of Health-related Litigation Report*, at (Last visited on January 9, 2016).

[27] Octavio L. Motta Ferraz, *Brazil, Health Inequalities, Rights, and Courts: The Social Impact of the Judicialization of Health*, in LITIGATING HEALTH RIGHTS, CAN COURTS BRING MORE JUSTICE TO HEALTH 76, 87 (Alicia Ely Yamin et al. eds., 2008).

[28] Michel Naffah Filho, Ana Luisa Chieffi e Maria Cecília M. M. A. Correa, *S-Codes: a new system of information on lawsuits of the State Department of Health of São Paulo*, 7(84) BOLETIM EPIDEMIOLÓGICO PAULISTA 18, 22 (2010). Available at (Last visited on January 19, 2015).

palities spent a total of R$2 billion (US$1 billion) to comply with judicial decisions[29]. The Harvard International Human Rights Clinic found that in 2008, health-related litigation consumed R$400 million (US$200 million) of the state of São Paulo's budget, R$78 million (US$20 million) of the state of Minas Gerais' budget, and R$84 million (US$42 million) of the federal government's budget. In São Paulo, those numbers increased to R$547 million in 2014, and to R$1 billion in 2015[30].

Verifying the social impact. This part confronts that data with distributive standards. I assume that, if courts adopt the argument that enforcing socioeconomic rights is a matter of equality and distribution of goods under the counter-majoritarian principle, any reasonable evaluation should look at the group of benefited people, the types of services that courts have ordered, and their equivalent costs.

The Constitution provides the right to health for all citizens. Article 196 states that health care is a universal right and imposes a duty to the state to furnish equitable access to social policies. However, rights have costs, and budgetary resources are limited[31]. Health care is a social right whose implementation requires the design of costly public policies. When enforcing rights and asking for the provision of drugs or treatments, courts do not create new budgetary resources. Complying with judicial decisions requires the government to reallocate budget from established policies. The inclusion of a claimant (individual or determined group of people) can lead to the exclusion of third parties in the public programs. From this perspective, enforcing a socioeconomic right can in fact mean reallocating budgetary resources and deciding the needs and the beneficiaries that deserve priority.

Traditionally, courts judge claims only by inquiring as to *whom is entitled to the right*. A rights-based approach entails that all citizens have the same constitutional right to health. This reasoning explains why around 80 percent of the claims receive an affirmative judgment[32]. However, if courts are actually deciding which groups and/or needs have priority under a limited budget, their holdings actually establish which groups or needs deserve priority. This approach would be adequate if, and only if, resources were unlimited.

Thus, troubling situations arise when an abstract universal entitlement meets the concrete limits of the available material resources. The formalist criterion *who is*

[29] Octavio L. Motta Ferraz, *Brazil, Health Inequalities, Rights, and Courts: The Social Impact of the Judicialization of Health*, in LITIGATING HEALTH RIGHTS, CAN COURTS BRING MORE JUSTICE TO HEALTH 76, 83 (Alicia Ely Yamin et al. eds., 2008).

[30] State of São Paulo, *Perfil da Judicialização em Saúde no Estado de São Paulo*, available at and . (Last visited on January 20, 2016).

[31] *See* Cass Sunstein and Stephen Holmes, *The Cost of Rights: Why Your Liberty Depends on Taxes* (Norton & Company ed., 2000.

[32] Octavio L. Motta Ferraz, *Brazil, Health Inequalities, Rights, and Courts: The Social Impact of the Judicialization of Health*, in LITIGATING HEALTH RIGHTS, CAN COURTS BRING MORE JUSTICE TO HEALTH 76, 87 (Alicia Ely Yamin et al. eds., 2008).

entitled to the right, that is extracted from the constitutional text, is insufficient to evaluate the social phenomenon at issue. Any judicial intervention in policies will cause distributive and aggregate effects that impact all players. No legal rule controls those outcomes, since their character is informal. They take place in the "shadows of the law"[33], as part of an invisible bargaining process that involves a tradeoff between plaintiffs and third parties. I'll call those effects as background rules, or second code of norms.

Aggregate effects represent the sum of similar judicial interventions. Ruling that the state must provide a claimant with a drug that costs $1,000 seems to entail no significant impact on the state budget and third parties. However, thousands of similar rulings strongly affect the health care budget.

Distributive effects concern the way judicial intervention alters the allocation of goods and affects third parties. Courts enforce rights without addressing whether a portion of the budget will have to be reallocated. Even the government does not produce accurate data of this movement of funds. Nevertheless, it asserts that compliance interferes with on-going policies by defeating some groups who would otherwise benefit.

Thus, aggregate and distributive effects define whether judicial intervention satisfies the counter-majoritarian principle in each case, since they influence which groups will actually benefit from the services provided by health-care policies and which needs will actually be attended. For this reason, the criterion of *who is entitled to the right* provides an incomplete evaluation of the courts' intervention. New standards are required for this task. The issue concerns not only rights, since all citizens are entitled to the same right, but it also concerns *needs* and *beneficiaries*. If the budget has limits, and if the inclusion of claimants causes the exclusion of third parties (the original benefited groups of the public programs), courts are more likely to enhance equality when they attend to demands that benefit the most disadvantaged groups in order to satisfy the most basic needs.

The empirical data on the distribution of goods are disturbing. For the period between 2007 and 2009, the Harvard International Human Rights Clinics detected an "extremely high concentration of lawsuits (85 percent) in the most developed states of the south and the southeast, even though their population represents just 56.8 percent of the country's total population"[34]. However, "the north and the northeast together, with 36 percent of the Brazilian population, accounted for only 7.5 percent of the total". In the federal courts, "the ten states with the highest HDI (above 0.8) together have generated 93.3% of lawsuits [...], whereas

[33] For a more comprehensive picture of the expression *shadows of tha law*, see Lewis Kornhauser and Robert Mnookin, *Bargaining in the Shadows of the Law: The Case of Divorce*, 88 YALE L. J. 954 (1979).

[34] Octavio L. Motta Ferraz, *Brazil, Health Inequalities, Rights, and Courts: The Social Impact of the Judicialization of Health*, in LITIGATING HEALTH RIGHTS, CAN COURTS BRING MORE JUSTICE TO HEALTH 76, 87 (Alicia Ely Yamin et al. eds., 2008).

the other seventeen states with the lowest HDI (below 0.8) together have originated a meager 6.7 percent of lawsuits". In conclusion, the researchers noticed that "the higher a region's level of socioeconomic development, the more likely it is to have a high volume of health litigation".

This pattern has worsened. According to official data released by the National Council of Justice, in 2015 the southern and the southeastern state courts have concentrated 302,065 out of a total of 330,630 lawsuits. This means that for every hundred claims brought before state courts, ninety-one are in progress before the courts of the richest regions of the country[35]. The concentration increased from 85 percent in the period of 2007-2009 to 91 percent in 2015.

Although this data suggests that judicial enforcement has mostly benefited the two richest regions of the country, this macro picture must be read critically. Even though the south and the southeast are the most developed areas in Brazil, they also concentrate considerable levels of poverty. A concentration of claims in the richest states does not necessarily imply *mis*-enforcement, because disadvantaged groups in the richest states may have benefited. There is no evidence that disadvantaged groups from the poorest states have more needs than those from the richest ones, and even if this were true, state courts could not address this problem, since they exercise power locally due to their limited jurisdictions. The claims are brought to the courts, which cannot control the number of cases in each region. Those statistics alone are inconclusive if they are not coupled with some data about who actually benefits from this litigation. The inquiry must go deeper, as a macro-geographic picture of the distribution of claims does not offer strong evidence about the success of the courts' intervention.

In order to achieve more accurate conclusions, I collected specific data released by the state of São Paulo. In 2015, the litigation-related expenses on health reached more than R$1 billion, but only 0.01 percent of the population benefited. In 2014, 60,45 percent of the claimants presented medical prescriptions signed by private doctors as evidence before courts. This finding supports the argument that the majority of plaintiffs do not normally use the public system[36], and thus may not belong to a disadvantaged group.

The State of São Paulo also reported that its 2015 health-care budget amounted to R$21 billion. The costs of compliance with the courts' rulings consumed R$1 billion. This figure would cover the budget of 200 outpatient departments. Comparatively, all of the public hospitals consumed R$3 billion in the same year, among them the *Hospital das Clínicas*, the most prominent Brazilian public hospital, whose budget amounted to R$1.5 billion.

Another dimension of the disparities of distribution: in 2006, the State of São Pau-

[35] National Counsil of Justice, *National Forum of Health-related Litigation Report*, at (Last visited on January 9, 2016).

[36] State of São Paulo, *Perfil da Judicialização em Saúde no Estado de São Paulo*, available at available online at and (2015). (Last visited on January 20, 2016).

lo spent R$65 million on compliance with drug-related claims that benefited approximately 3,600 claimants. In the same year, the state allocated R$838 million to provide 380,000 individuals with basic medication. This means that each judicial plaintiff cost R$18,000, whereas each patient benefited through the in-progress public policy cost R$2,200[37].

In order to implement the health care policies, the government of São Paulo divided the state into seventeen administrative regions. Between 2011 and 2014, the more developed regions such as Barretos and São José do Rio Preto had the highest litigation index (29.34 and 13.51 claims per 10,000 inhabitants). The more poor region of Registro had the lowest litigation index (0.25 claims per 10,000 inhabitants)[38].

Within the municipality of São Paulo, research undertaken in 2006 found that 73% of the cases that involved drugs were "patients from the three wealthiest areas in the city"[39]. This finding suggests that the judicial enforcement on health privileged "individuals with higher purchasing power and more access to information", who lived in areas with little to no social vulnerability. The issue of proper representation is as important as the distributive issue.

A dive into the content of the claims also reveals intriguing information. A number of lawsuits ask for drugs not provided by the public system, experimental treatments, newly developed drugs, and expensive medical supplies. The researchers reported that "[a]t the federal level, judicial orders forcing the government to provide thirty-five drugs not available in the Brazilian market represented as much as 78.4 percent of the costs of all right-to-health litigation in 2009"[40]. In addition, according to the Ministry of Health Care, the cost of compliance involving the forty most expensive drugs amounted to $431 million in 2013, which represented 54 percent of the whole state budget for exceptional medications[41]. The most common medicines requested were not related to the more neglected diseases, such as *chagas*, *dengue*, or leprosy; which primarily affect economically disadvantaged groups.

There is also evidence that the Brazilian pharmaceutical industry may have been using the litigation system as a strategy to introduce new drugs to the market by paying for patients' lawsuits. Researchers from the state of São Paulo identified the existence of a *market for lawsuits* by assessing "the distribution of lawsuits

[37] *See* Ana Luiza Chieffi, and Rita Barradas Barata, *Legal suits: pharmaceutical industry strategies to introduce new drugs in the Brazilian public healthcare system*. 44 REV SAUDE PUBLICA 421 (2010).

[38] State of São Paulo, *Perfil da Judicialização em Saúde no Estado de São Paulo*, available at available online at and. (Last visited on January 20, 2016).

[39] Ana Luiza Chieffi and Rita Barradas Barata, *Judicialização Da Política Pública De Assistência Farmacêutica e Equidade*, 25 CAD. SAÚDE PÚBLICA 1839-1849 (2009), available at (Last visited on April 9th, 2016).

[40] Octavio L. Motta Ferraz, *Brazil, Health Inequalities, Rights, and Courts: The Social Impact of the Judicialization of Health*, in LITIGATING HEALTH RIGHTS, CAN COURTS BRING MORE JUSTICE TO HEALTH 76, 92 (Alicia Ely Yamin et al. eds., 2008).

[41] Tribunal de Contas da União, *Relatório Sistêmico de Fiscalização da Saúde*, available at (Last visited on April 9th, 2016).

aiming at identifying the dispersion or concentration of the legal professionals filing these suits"[42]. They detected that, in 2006, a considerable number of the cases in the state were "aimed at obtaining expensive, sophisticated and newly marketed drugs and, therefore, aimed at drugs that have not accumulated a lot of experience in terms of usage". They also verified that "a small number of lawyers are associated with a large number of lawsuits suggesting they specialize in this kind of lawsuit". For instance, "only 36 lawyers were responsible for filing 76 percent of the cases". The same research was undertaken in the state of Minas Gerais and the researchers found the same unusual association between doctors and law firms on judicial requests of drugs[43]. These findings do not conclusively establish that pharmaceutical companies are subsidizing lawsuits as a strategy to market their products, but the collected evidence makes the hypothesis plausible.

All of the evidence supports the following conclusions: (1) there is a remarkable amount of litigation against the state on the right to health; (2) more than 90 percent of the cases are individual claims, and they benefit individuals or small groups; (3) a considerable number of the claims involve the provision of drugs and medical treatments; a considerable part of this subset consists of non-basic services; (4) the costs of compliance requires a reallocation of existing budgetary resources designated for established public policies; (5) the number of benefited claimants tends to be smaller than the number of citizens who would have been benefited if the same amount of money were applied to the existing programs;

[42] Ana Luiza Chieffi, and Rita Barradas Barata, *Legal suits: pharmaceutical industry strategies to introduce new drugs in the Brazilian public healthcare system*. 44 REV SAUDE PUBLICA 421 (2010). The research was described as follows: "OBJECTIVE: To assess the distribution rate of legal suits according to drug (manufacturer), prescribing physician, and attorney filing the lawsuit. METHODS: A descriptive study was carried out to assess the lawsuits in the São Paulo State (Southeastern Brazil) courts registry in 2006, and amounts spent in complying with these lawsuits, and total costs with medication thus resulting.
RESULTS: In 2006, the São Paulo State Administration spent 65 million Brazilian reais in compliance with court decisions to provide medication to approximately 3,600 individuals. The total cost of the medication was 1.2 billion Brazilian reais. In the period studied, 2,927 lawsuits were examined. These lawsuits were filed by 565 legal professionals, among which 549 were attorneys engaged by private individuals (97.17% of the total legal professionals). The drugs scope of the lawsuits had been prescribed by 878 different physicians. By assessing the number of lawsuits filed per attorney, it was found that 35% of the lawsuits were brought before the courts by 1% of the attorneys. CONCLUSIONS: The data related to the lawsuits and to the medication classified according to manufacturer shows that a small number of attorneys are responsible for the largest number of lawsuits filed to obtain these drugs. The finding that more than 70% of the lawsuits filed for certain drugs are the responsibility of one single attorney may suggest a close connection between this professional and the manufacturer.

[43] This research analyzed empirical data from 1999 to 2009 and was described as follows:
"**METHODS:** Retrospective descriptive study based on data from administrative files, relating to lawsuits involving medicine demands, in the state of Minas Gerais, Southeastern Brazil, from October 1999 to October 2009; **RESULTS:** A total of 2,412 lawsuits were analyzed with 2,880 medicine requests, including 18 different drugs, 12 of them provided through Pharmaceutical Policies of the Brazilian National Health System (SUS). The most frequent medicines requested were adalimumab, etanercept, infliximab, insulin glargine and tiotropium bromide. The main diseases were rheumatoid arthritis, ankylosing spondylitis, diabetes mellitus, and chronic obstructive pulmonary disease. Private lawyers and doctors were predominant. The results revealed the association between doctors and law offices on drug requests. Among the lawsuits filed by the office A, 43.6% had a single prescriber to adalimumab, while 29 doctors were responsible for 40.2% of the same drug prescriptions. A single doctor was responsible for 16.5% of the adalimumab prescriptions being requested through lawsuits filed by a single private law office in 44.8% of legal proceedings". See Campos Neto OH, *Doctors, Lawyers, and Pharmaceutical Industry on Health Lawsuits in Minas Gerais, Southeastern Brazil*, 46 REV. SAÚDE PÚBLICA. 784 (2012).

and (6) many of the judgments benefit people who are not economically disadvantaged and who do not rely on public health service.

The next subsection draws on these conclusions to develop the concept of *mis-enforcement* of rights and to explain how informal rules undermine the courts' general discourse that enforcing socioeconomic rights enhances equality.

1.3 The concept of mis-enforcement of rights

The last section provided evidence that the judicial enforcement of social and economic rights involves a complex dynamic among players that transcends the relationships among claimants, courts and state officials, and the discourse of rights and legal interests. Evaluating this social phenomenon from a formalist perspective based on the language of rights, impersonal principles, and legal interests gives a limited picture of a claimant seeking the enforcement of a constitutional right, followed by a court ordering the state to implement a public service.

Excluded by this formalist frame are the background rules that discipline this dynamic. Far from being an isolated action that will only impact the litigation parties (claimants and the state), every judicial intervention produces aggregate and distributive impacts, which function as informal social norms that influence the enforcement's outcomes.

The existence of informal norms is revealed in the incoherence of the Brazilian jurisprudence concerning the right to health: for similar claims, the rate of success of individualized claims is considerably higher than the rate of success of the collective ones. According to Hoffman and Bentes, "courts have been very open to these individual claims and much less willing to accept collective claims"[44]. The arguments made in judicial decisions show that courts generally address aggregate and distributive effects when deciding collective claims. The same considerations do not appear in most of the individual claims, which rely solely on a rights-based discourse. This difference indicates that collective actions induce courts to go beyond their formalist analysis of rights and legal interests to visualize the claim and its impacts on third parties, in epistemic terms.

By putting together informal and formal norms, it is possible to achieve a comprehensive picture of the phenomenon. Legislators, official agents, courts, claimants, and third parties comprise a complex network of players whose behaviors dictate the dynamics of the distribution of resources.

At this point, it is important to distinguish the enforcement of individual and political rights from the enforcement of social and economic rights. It is taken for

[44] Florian F. Hoffman and Fernando R. N. Bentes, *Accountability for Social and Economic Rights in Brazil*, in Varun Gauri and Daniel Brinks (editors), COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD 100, 101 (Cambridge University Press, 2008).

granted that both impose budgetary constraints, as the traditional distinction between negative and positive rights have proved to not be true[45]. For instance, granting the right to vote requires a budget to maintain the electoral system. Any kind of liberty requires a regulatory and supervisory system.

One may argue that second-generation rights are always more expensive than first-generation rights. In Brazil, the Ministry of Health Care has the third highest budget in the federal government, and the second highest social security system, followed in close succession by: the programs of education, social labor, and social assistance[46]. However, the cost of enforcement does not serve as a criterion of distinction. There is no guarantee that this pattern will always repeat itself, or that it is a general rule in most of the welfare states. Mark Tushnet notes that distinct contexts may result in different costs, so that political and individual rights may be more expensive in some situations[47].

He further suggests that the costs of first-generation rights are "generally invisible because they are diffused across the society as a whole without openly figuring in government budgets"[48]. In contrast, second-generation rights are described very precisely in budget statements, with the result that the impact caused by rulings is directly noticed by the government.

It is possible to develop these reservations further. Compared to individual rights, socioeconomic rights are, to a greater extent, progressively and asymmetrically implementable, along with the possible combinations of three axes: needs (the services covered), beneficiaries (the population covered), and costs (the proportion of costs covered)[49].

Progressive implementation means that even though second-generation rights are as justiciable as first-generation rights, the lack of universal coverage may be tolerated as a temporary status. The normative structure of these types of rights may be split into degrees of enforcement. States follow steps to universal and equal coverage under reasonable justification based on those three axes. For instance, the World Health Organization proposes a plan towards universal health

[45] *See* Cass Sunstein and Stephen Holmes, *The Cost of Rights: Why Your Liberty Depends on Taxes* (Norton & Company ed., 2000.

[46] *See* Tribunal de Contas da União, *Relatório Sistêmico de Fiscalização da Saúde* (2015), available at (Last visited on April 9th, 2016).

[47] Mark Tushnet, *Reflections on Judicial Enforcement of Social and Economic Rights in the Twenty-First Century*, 4 NUJS L. REV. 177, 180 (2011). *See also* Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford Press, 2008).

[48] Mark Tushnet, *Reflections on Judicial Enforcement of Social and Economic Rights in the Twenty-First Century*, 4 NUJS L. REV. 177, 180 (2011). *See also* Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford Press, 2008).

[49] *See* M. J. Roberts, W. C. Hsiao and M. R. Reich, *Disaggregating the Universal Coverage Cube: Putting Equity in the Picture*, 1 HEALTH SYSTEMS & REFORM 22, 27 (2015). It discusses the World Health Organization's "Cube Diagram", a globally recognized visual representation of health system reform choices, and proposes accommodations in order to properly address equality.

coverage that recommends the following steps: first, to classify services into priority classes according to their cost-effectiveness, giving priority to those who are worse off, as well as the financial risk protection; second, to universalize high-priority services-related coverage; third, to expand low- or medium-priority services-related coverage[50].

Oriented asymmetrical implementation means that second-generation rights are constitutionally protected to address social and economic inequality and redistribution of goods to a greater extent than that of the first-generation rights. Unlike freedom of speech, the right to vote, and property rights, socioeconomic rights allow for different levels of protection; taking into account the economic status of the targeted group and the cost of the service. The state is allowed to prioritize specific services and groups.

Asymmetry is grounded in budget constraints, which are more visible in second-generation than in first-generation rights. This point leads to another argument: aggregate and distributive economic impacts are likely to be stronger with respect to the enforcement of socioeconomic rights than political rights. The difference is one of relative sensitivity. Any recognition and enforcement of a need and of a beneficiary theoretically implies the exclusion at a certain point in time of other needs and beneficiaries.

Courts argue that the judicial review that enhances equality is more likely to be true if they orient state efforts to benefit disadvantaged groups in order to provide basic needs. It is not a decision concerning socioeconomic rights; it is a decision concerning needs and beneficiaries.

The empirical data indicates that this premise has not been confirmed in a number of the cases which have benefited upper and middle class groups. Courts have ordered the state to pay for medical treatments and drugs that are not classified by the state as basic needs, and/or the number of beneficiaries is relatively small. This means that budgetary resources have been reoriented to benefit non-disadvantaged people in order to provide them with non-basic needs. There is no specific data as to how this reallocation occurs and what programs are undermined to comply with the rulings. However, since the government designs public services of health care in Brazil to prioritize the basic needs of disadvantaged groups, the evidence supports the conclusion that judicial enforcement shifts budget priorities from the bottom towards upper levels, and concentrates resources instead of redistributing them. This is the reality behind the rhetoric of the courts' general discourse of enhancing equality. In the name of justice, courts may worsen inequality.

In fact, those groups of cases seem to benefit middle and upper class patients who want to have access to medical treatments and drugs not yet provided by the public

[50] *See* World Health Organization, *Making Fair Choices On The Path To Universal Health Coverage* (World Health Organization, 2014).

service. In general, they do not regularly use the public system, but want the state to pay for treatments and drugs that they seek to receive without personally paying.

There is a counterargument that confronts that data with the taxpayers' profile[51]. Taxation aggressively affects the low-income rather than the high-income population. This argument claims that since the lower and middle class pay for much of the state budget, there is no mistake in enforcing socioeconomic rights in their favor.

However, this idea does not take into account that even in this situation, the courts' general discourse of enhancing equality remains rhetorical, since the core of the problem is not only that they may benefit from the state budget, but that courts redistribute resources that were originally supposed to assist the most disadvantaged. This redistribution breaks a chain of enforcement that follows a reasoned path towards equal and universal coverage previously defined by the governmental programs.

All those circumstances draw a scenario in which the judicial protection of a socioeconomic right in favor of an individual or a target group causes non-justified distributive and aggregate effects that worsen overall inequality. As a deficit of justified inclusiveness, this figure, which I call *mis-enforcement* of rights, undermines the counter-majoritarian role.

Three brief notes should be added. First, the criticism captured in my concept of mis-enforcement does not allow the conclusion that courts must not benefit non-disadvantaged groups or enforce services (non-basic) at all. The point is rather that, if courts intend to keep the equality-based argument backing their reasoning, they should address distributive and aggregate rules and other informal norms that impact enforcement of socioeconomic rights. Limiting the discourse of equality to talk about *rights* may produce a pattern of incoherent decisions. If all the norms (formal and informal) and their linkage to types of axes were acknowledged, the likelihood of constructing a jurisprudence that positively impacts equality would increase.

Second, the idea of mis-enforcement seems to support the second argument of the previous section: *judicial enforcement worsens overall inequality instead of enhancing the distribution of goods, and thus weakens democracy*. Scholars who are against judicial enforcement share this opinion. The research undertaken by the International Human Rights Clinic at Harvard Law School concluded that "the model's overall social impact is negative"[52]. It also asserted that "rather than enhancing the provision of health benefits that are badly needed by the most disadvantaged [...] this model diverts essential resources of the health budget to the funding of mostly high cost drugs claimed by individuals who are already privileged in terms of health conditions and services".

[51] I am grateful to Professor Duncan Kennedy for providing great insights on this argument.

[52] Octavio L. Motta Ferraz, *Brazil, Health Inequalities, Rights, and Courts: The Social Impact of the Judicialization of Health*, in LITIGATING HEALTH RIGHTS, CAN COURTS BRING MORE JUSTICE TO HEALTH 76, 100 (Alicia Ely Yamin et al. eds., 2008).

I would not be so conclusive. The data suggests that the concept of the mis-enforcement of rights is applicable to some, but not all of the rulings. Some of the interventions achieved their stated goal and thereby presented a positive social outcome, including incentivizing the government to improve the public healthcare system. The same evidence that discloses situations of *mis*-enforcement also shows that a significant number of disadvantaged people who had been illegally denied a basic health care service benefited from litigation by getting a bed in an emergency room, basic medication, or even a simple radiological examination.

For instance, though 60 percent of the drug-related cases in São Paulo relied on prescriptions signed by private doctors, 40 percent of the cases relied on prescriptions signed by doctors from the public system. Furthermore, part of the group of the presumed *private system users* may have been denied an appointment with a doctor in the public system, although they were part of a lower-class group. As a matter of fact, a lot of reasonable hypotheses could be developed to contradict the presumptions of some critical scholars. Despite substantial justified criticisms, the evidence also supports the first argument that *judicial enforcement reduces inequality, improves the distribution of goods, and thus enhances democracy*. The two claims are not mutually exclusive, but rather highlight different aspects of the same social phenomenon.

The complex picture painted by the Brazilian data explains why I am critiquing the study on the judicial enforcement of socioeconomic rights: to conclude that courts can induce the mis-enforcement of socioeconomic rights cannot be the end of the inquiry, but rather its starting point. If social impact is the criterion for evaluating courts' performance, there is no definitive evidence that situations of mis-enforcement are the general rule, and that judicial intervention should be avoided as the primary answer.

The next step is identifying the roots of the *mis*-enforcement of rights. The next section will move beyond the traditional discourse about judicial review and look more closely at the judiciary. It will link the conclusions of this section to the institutional arrangements that influence the enforcement of rights and the relationship between courts and other political institutions.

2. Institutional architecture, political arrangements and courts: playing the judicial role

2.1. A critique of the critique again: turning to constitutional law

The debate over the enforcement of socioeconomic rights in Brazil seems as endless as it is repetitive. The literature is extensive, but it usually disregards structural and genealogical issues. Constitutional scholars have typically narrowed the discussion down to two basic questions: first, whether courts may enforce socioeconomic rights (Or in a broader sense, whether courts may intervene in the executive and legislative acts); and second, how courts must interpret socioeconomic rights. Although both are important, the data discussed in the last sections show that the debate should move beyond these issues.

The first question is related to the debate over how constitution makers should design their system of judicial review. The discussion in Brazil has focused a rather binary answer: one embraces either the *minimalism* or the *activism*, as if there were no relevant possibilities between these extremes, and more importantly, as if a choice of one of these two options would solve problems of *mis*-enforcement. This formulation sounds like a broader restatement of the arguments disarmed in part one of the institutional form. On one side, the argument is that *courts must intervene in the government and in Congress as much as necessary to provide the basic rights guaranteed by the Constitution*. On the other hand, the argument is that *courts must not intervene at all, or at most play a deferential role*. The first argument has been the usual language of the courts, which have granted 80 percent of the health-related claims. The second argument has been advanced by the majority of scholars who argue that courts negatively impact public policies; therefore, their powers should be controlled and judges must exercise self-restraint. The other branches should decide the appropriate allocation of resources and the timing for instituting granted but extensively ignored rights.

Both approaches mistakenly reduce the issue to a formalist discussion of institutional design and the ideal allocation of powers. In fact, they lack any problem-solving commitment, and undervalue the actual arrangements of Brazilian political institutions. Those models were transplanted from American legal scholarship without any reflection on the differences in the constitutional orders and political cultures. This operation overlooked the fact that even the American godfathers of weak judicial review did not treat it as a binary discussion[53], but emphasized that different levels of scrutiny, remedies, and power may be combined. The binary approach adopted in Brazil hides important issues: the political and institutional circumstances that influence the judicial enforcement of rights, the genealogy of the jurisprudence, and its complex outcomes.

The second question is related to the content of the legal reasoning followed by courts to enforce socioeconomic rights. As Roberto Unger denounces, the twentieth century legal discourse is spelled through the language of policies and impersonal principles[54]. This motif is systematically reproduced in the decisions delivered by courts. Both concessive and negative decisions adopt the categories of *rights* and *interests*

[53] *See* Mark Tushnet, *Weak Courts, Strong Rights*, 23 (Princeton University Press, 2008).

[54] Roberto Unger on the *method of reasoned elaboration*, the dominant legal practice of the 20th century: "The practice of legal analysis that the movement found in command of legal thought represented law as a repository of impersonal principles of right and of policies responsive to the public interest. It interpreted each fragment of the law by attributing purposes to it. It described those purposes on the idealizing language of policy and principle. Call this approach, as it was called of its theoreticians, the method of reasoned elaboration. According to this method, law was to be interpreted in the best possible light – that is to say, the light least tainted by the powerful interests that were likely to have exerted the predominant influence in the political contest over the content of law, especially through legislation. By putting the best light on the law, the professional interpreters of law, within or outside adjudication, could, according to this view, improve the law. They could become the agents through whose efforts the law works itself pure, even in an age in which legislation had long become to overshadow law made by jurists, whether holding judicial office or not". *See* Roberto Mangabeira Unger, *The Critical Legal Studies Movement: Another Time, A greater Task*, 5 (Verso, 2015). *See also* Roberto Mangabeira Unger, *What Should Legal Analysis Become* (Verso, 1996).

as keywords. Mainstream debate has focused mainly on the correct interpretation to be given to rights and interests. However, limited attention has also been given to analyze the constraints that this mode of reasoning imposes on the judgments that courts deliver and even to institutional innovation. Cases of *mis-enforcement* of rights are taken as a deviation of the preconceived legislative purpose, rather than as an invitation for rethinking legal analysis. A rights-based approach to the constitution that generates undesirable outcomes seems to result from the courts' power to decide on the issue. Other considerations should be added. Are the remedies adequate for a desirable enforcement? What is the desirable pattern of enforcement of socioeconomic rights? Is the procedure efficient toward the ends that the judicial system seeks? How are distributive and aggregative effects measured, and how should they be assessed? How do those effects impact the degree of enforcement?

The first step in amplifying this debate over the enforcement of socioeconomic rights requires an understanding of the genealogy of the judicial role under the 1988 Constitution. Scholars have mostly criticized the current state of affairs, but it is important to understand the circumstances that influenced its construction in light of the actual arrangements of Brazilian institutions.

2.2. A transformative constitution within a dysfunctional political system

The most significant symbol of change in the judicial role after the promulgation of the 1988 Brazilian Constitution appeared in a statement by the Federal Court of Appeals for the 1st Circuit, case 0028464-45.1995.4.01.0000, 1998, subsequently repeated in other judicial opinions, that "[t]he 1988 Constitution transformed the health care from a simple benefit into a justiciable right".

Previous Brazilian constitutions had already entrenched social rights, but in narrower terms. The 1988 Constitution not only raised social rights to the category of fundamental rights, but it also created a whole section to discipline the health care system, which was defined by the constituent power as a set of "social and economic policies aimed at reducing the risk of diseases and other health problems, and the universal and equal access to actions and services for its promotion, protection and recovery"[55]. The Constitution also designed a hierarchal system of public policies concerning heath care that relied on shared responsibilities among the Union, the states, and the municipalities[56].

Brazilian constitutional scholars argue that the entrenchment of socioeconomic rights in the 1988 Constitution implied a legal framework that favored the judicial enforcement of socioeconomic rights. They agree that including those rights in the Constitution induced a shift in jurisprudence in the 1990s, since mere pro-

[55] Brazilian Constitution, Art. 196. Original text: "A saúde é direito de todos e dever do Estado, garantido mediante políticas sociais e econômicas que visem à redução do risco de doença e de outros agravos e ao acesso universal e igualitário às ações e serviços para sua promoção, proteção e recuperação".

[56] *See* Brazilian Constitution, art. 198.

grams were erected to justiciable entitlements. However, it is important to link this circumstance to a broader constitutional and institutional context.

From a constitutional perspective, the 1988 Constitution assumed a transformative role[57]. After a traumatic two-decade military dictatorship, the drafters implemented a liberal democracy. The change in regime resulted from a slow political process with massive popular engagement. Until the 1980s, constitutional texts had only limited importance in the Brazilian legal culture; they were considered as mere political texts that set off the power structures but lacked normative strength. The political elites historically had no commitment to maintaining values that reflected the actual aspirations of the constituent power. Successive changes of political control were coupled with successive constitutions (in 1824, 1891, 1934, 1937, 1946, and 1967). Every new group that controlled the government built its own discipline of power to support its own political convenience.

In context, a very specific ambition governed the process of drafting the 1988 Constitution: the new regime would break this pattern. Re-implementing a democratic regime represented a symbol of a set of hopes from the constituent power. The promulgated text articulated the model that "we the people" intended to become: a strong regime of liberties and social rights focused on enhancing equality and reducing poverty, and grounded on a liberal market economy. Raising the Constitution to an aspirational project of the people themselves was the perfect strategy to engage society in supporting the new regime, and thus to enhance its legitimacy. The result was a 250-article text that touched almost every aspect of the political, social, and economic spheres, in order to target Brazil's entire multicultural population, and to guarantee that they were truly represented.

Therefore, the Brazilian legal thought faced a transition: since society recognized the promulgated text as a picture of their highest aspirations, it accepted the constitution as a prior source of normativity and a guide for interpreting its political morality. Constitutional Law then arouse as a central field among legal topics: no single legal rule and principle could violate the constitutional norms. Under those circumstances, the American and the German doctrine of constitutional supremacy became very influential in Brazil. All the legal microsystems (civil law, criminal law, taxation, etc.) were "constitutionalized", meaning their traditional canons – based on the roman system – were reviewed under the new premises of the aspirational democratic project (welfare state, protection of fundamental rights, democratic government, and dignity of the human being as foundational values of the state).

Linking this legal framework to the institutional arrangements reveals a paradox: the transformative constitution was followed neither by a change of the controlling political groups nor by the structural reforms that the aspirational project demanded.

[57] *See* Vicki Jackson and Mark Tushnet, *Comparative Constitutional Law*, 297 (Foundation Press, 2014). *See also* Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146 (1998).

On one hand, the new regime strengthened the fundamental rights —civil liberties and socioeconomic rights. The Constitution raised the human dignity to a foundational principle, and announced that the reduction of inequality and poverty was the central focus of the government. A clear movement to benefit the most disadvantaged through redistributive policies fed a hope for structural reforms.

On the other hand, unlike other Latin American transitions to democracy, no consistent political rupture between the former and the new regime took place in Brazil. As Frances Hagopian recalls in an essay on the prospects of this new format of government, the first civil President Sarney and other prominent politicians had served the authoritarian regime[58]. The same elites continued to command the political institutions under democracy and strongly resisted to more progressive social policies. The new democratic frame of government was filled with traditional non-democratic political practices and arrangements on behalf of so-called *stability of the country*. This structure has been consolidated behind the scenes and the rhetorical discourses of change, and "impede[d] the transformation of institutions necessary for a consolidated democracy, discourage[d] popular participation in politics, and thwart[ed] policy changes that might upset an extremely inegalitarian social order".

Additionally, political parties failed to canalize and to represent popular aspirations and ideals. This led to Congress' political fragility that has vigorously persisted since 1988. Professor Frances Hagopian denounces the use of governing parties by traditional political elites to maintain the local power. Local elites have commanded political parties and systematically neglected society's needs. Popular support has been obtained through small-scale political favors and bargains, the so omnipresent *clientelism*[59].

Professor Frances Hagopian offered a precise diagnosis: "in the first two years of democratic government, there has been no indication that Brazil's parties are becoming effective instruments for formulating policy democratically or representing nonelite interests". Although this was written in 1987, it could accurately describe the political context from then until now.

David Landau reached a similar conclusion in describing the Colombian political context. A dysfunctional legislative branch, a fragmented party system, and a strong executive branch —with decree power[60]— formed an amalgam that favored the Colombian Congress to abdicate its power of both designing policy programs and checking on the executive policies. This same description is suited for the Brazilian case. In 2015, thirty-five parties had been officially registered in the Superior Electoral Court; twenty-five of them had elected representatives in Congress[61]. Parties

[58] Hagopian, Frances, and Scott Mainwaring, *Democracy in Brazil: Problems and Prospects*, 4.3 WORLD POLICY JOURNAL, 485, 486 (1987).

[60] *See* David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARVARD INTERNATIONAL LAW JOURNAL 319 (2010).

[61] Superior Electoral Court, Registered Political Parties (2015), available at (Last visited on April 10th, 2016).

have been identified according to their respective controlling groups rather than to their programs, since their number has undermined any reasonable correlation between political ideologies and party platforms. As a result of this weak legislature, the executive branch has proposed the most important bills and constitutional amendments passed by the Congress during the democratic period.

All these legal and institutional arrangements are vital for understanding the role that the Brazilian courts assumed under the democratic system. Brazilian scholars have generally taken a legal perspective in analyzing the expansion of judicial power in liberal democracies. However, an inquiry into the interaction of the political players presents deeper evidence to explain how the context favored certain behaviors and how they can be addressed.

Constitutions alone do not produce constitutional culture. Legal norms are only an arm of the sociological framework that defines institutional patterns and players' interactions. The achitecture of the actual allocation of power, the social norms, and even the market are also points that produce incentives and desincentives that influence players[62].

In the Brazilian case, the general argument that entrenching socioeconomic rights in the 1988 Constitution induced their strong judicial enforcement is true but incomplete, for two reasons. First, not only the entrenchment of rights, but also the voluntary entrenchment of strong power of courts helped to build this legal framework. Second, the activist judicial behavior seems to be a response to an institutional context formed by a huge gap between the transformative constitution and the failure of the political system in solidifying its whole aspirational project[63]. Courts had to learn how to handle those adverse factors as a matter of balancing the asymmetric correlation of powers. The next subsection will deepen those two arguments.

2.3. Reconnecting the dots: the judicial role under institutional arrangements

The mainstream analyses of the Brazilian judicial role are usually disconnected from any context-based explanation and from comparisons with developing countries' experiences. This section attempts to draw some lines to reconnect these dots, under a genealogical approach.

Brazilian courts played a deferential role in the early years after adopting the 1988 Constitution. This attitude is noticeable not only regarding socioeconomic rights, but also regarding most claims for interventions in the legislative and the executive branches. Courts took great care not to intervene in the other powers; judges practiced a neutral role, by relying on the separation of powers clause.

[62] I thank professor Lawrence Lessig for helping me to refine this argument.

[63] *See* David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARVARD INTERNATIONAL LAW JOURNAL 319 (2010).

The history of the *writ of injunction* is a clear example of the movement from a deferential towards an activist role. The 1988 Brazilian Constitution instituted a specific action for cases in which the absence of regulating law prevented citizens from exercising constitutional rights regarding nationality, sovereignty and citizenship[64]. The first opinions delivered by the Supreme Court in such actions remained deferential and dialogic. Albeit recognizing constitutional violations due to the absence of regulation of a specific right, it reiteratively denied to fill the normative gap. It merely notified the competent branch to adopt the measures to address the issue.

In 1991, the case *Alfredo Ribeiro Daudt v. Federal Union and National Congress* (Case number 283) consisted in the first movement towards an incisive behavior. The Supreme Court, for the first time, established a sixty-day period for the Congress to pass a bill regulating a monetary compensation granted by the Constitution. A constitutional special provision had specified a one-year deadline following its promulgation to the Congress to pass a bill establishing its payment. However, two years had passed without the Legislative branch having accomplished its task. The Supreme Court decided to adopt a stronger measure to protect the normative character of the Constitution. The Justices designed the so-called *normative remedies*, by which the courts could command the inactive branch to pass the required regulation, instead of simply notifying it.

The court followed this pattern until the case *Education Workers Union v. National Congress* (Case 708, 2007), when it strengthened this paradigm within a political context of recurrent legislative omission. The issue was the lack of regulation of the social right to strike granted to civil servants. The 1988 Constitution stated that civil servants had the same social rights as the private sector workers, among which is the right to strike. The text also attributed to Congress the competence of regulating it. However, twenty years had passed without Congress having accomplishing its duty, and this prevented workers from lawfully exercising a fundamental social right. The Supreme Court had judged the same issue four times: once in 1996 (case 20), and three times in 2002 (cases 485, 585 and 631), and had adopted deferential behaviors by merely recognizing the lack of regulation and asking Congress to pass the required bill.

However, in 2007, arguing that Congress had ignored all of its holdings and recognizing the importance to enforce a prominent social right, the Supreme Court decided that the regulation for private sector workers had to be exceptionally applied to civil servants until Congress had accomplished its task. This new remedy inaugurated a new paradigm of the *writ of injunction* and inspired the solution of other cases. This new remedy did not become a general rule, though. The court continues to adopt a deferential pattern or intermediate remedies whenever it is convenient.

[64] Brazilian Constitution, article 5, 71. Original text: "Conceder-se-á mandado de injunção sempre que a falta de norma regulamentadora torne inviável o exercício dos direitos e liberdades constitucionais e das prerrogativas inerentes à nacionalidade, à soberania e à cidadania".

Those examples provide a comprehensive picture of the political context that induced courts to abandon a deferential and dialogic role that was common until the early 1990s, in order to develop strong remedies to address reiterate omissions of the other branches. One may list several other reasons to support this movement: the profile of the Justices and judges appointed during the 90s, the rise of the Public Ministry and the Public Defense as independent institutions, the recognition of the collective rights and the implementation of class actions, and the prominence achieved by the Constitutional doctrine, among others. It is a very complex phenomenon that would not be explained by only one reason, but it must not be disregarded that decades of widespread public demand coupled with the state recalcitrant failure galvanized judges to undertake more ardent measures to address socioeconomic rights. This means that a weak Congress – that could not accomplish its constitutional duties –, a fragile party system, and a fragmented political system constituted an environment that favored an atypical interaction among those institutions and courts. Eventually, like in the Colombian case, Brazilian courts assumed a legislative role and built strong remedies as a matter of preserving the normativity of the Constitution and of their own decisions.

The earliest massive cases on the right to health after the 1988 Constitution asked for injunctions of adequate treatment and drugs for HIV/AIDS patients. The first claims were brought in 1996. The high percentage of concessive decisions, as well as the support of NGOs, social movements, and the press pressured the government to design a broad policy covering free treatments for HIV/AIDS-patients. The success of the HIV/AIDS-related litigation had a side effect though: other health-related claims started to arise at courts in the early 2000s. Hoffman informs that at the Rio de Janeiro State Court, "up to 1998, HIV/AIDS-related drugs amounted to more than 90 percent of actions, a figure that has dropped to just less than 15 percent by 2000"[65]. Scholars interpret the success of the HIV/AIDS-related claims in the late 1990s as an incentive to health-care-related litigation: patients noticed that courts would be an effective shortcut to enforce rights.

The necessity of guaranteeing the transformative constitutional project, coupled with the state's failure to universalize public policies, replaced the previous discourse of the programmatic character of social rights. Since then, a broad range of rulings all over the country ordered the government to materialize constitutional promises, not only on the right to health, but on all other socioeconomic rights: construction of schools and hospitals in poor villages, instatement of social security benefits, and installation of electricity in rural areas, among others. All of those examples are in fact symptoms of a deep change of the judicial role after the 1988 Constitution.

Ran Hirschl lists the four traditional theories that explain the expansion of the judicial power in liberal democracies[66]. The *democratic proliferation thesis* links the

[65] Florian F. Hoffman and Fernando R. N. Bentes, *Accountability for Social and Economic Rights in Brazil*, in Varun Gauri and Daniel Brinks (editors), COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD, 101 (Cambridge University Press, 2008).

[66] Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 IND. J. GLOBAL LEGAL STUD. 71 (2004).

entrenchment of rights and strong forms of judicial review in constitutions, and the development of relatively independent judiciaries to the strengthening of democratic regimes. Powerful constitutional courts have arisen in new democracies in Southern Europe (1970s), Latin America (1980s), and in Central and Eastern Europe (1990s). The *evolutionist theory* relies on the counter-majoritarian character of the judicial activity – as an advanced stage of the democracy – to justify the increasing power of the courts. The *functionalist explanation* states that powerful courts are an organic reaction to dysfunctional political systems. The *institutional economics model* "sees the development of constitutions and judicial review as mechanisms to mitigate systemic collective actions concerns such as commitment, enforcement, and information problems". Then, Hirschl proposes a new explanation, the so-called *strategic approach thesis*, which suggests that "power holders may profit from an expansion of the judicial power", since "delegating policy-making authority to the courts may be an effective mean of reducing the decision-making costs, as well as shifting responsibility and thereby reducing the risks to themselves and to the institutional apparatus within which they operate". Therefore, from his perspective, the deferential role played by the executive and the legislative branches in favor of the courts is self-conscious and actor-oriented, rather than a mere result of a random, organic malfunctioning of institutional arrangements.

Instead, he recalls that transitions to democracy are commonly linked to the entrenchment of rights and judicial empowerment. In moments of political uncertainty —such as regime changes— threatened political elites strategically entrench their policy preferences in legal norms and expand the power of the courts "against the changing fortunes of the democratic politics". Since their political status is uncertain under the regime about to start, (i) entrenching rights in the constitution preserves their political, social, and economic agenda, and (ii) giving power to unelected and impartial bodies locks in their project in the long term, as well as reduces the power of future governments, which might be controlled by other political elites.

It is important to reread the Brazilian case under Hirschl. The 1998 Constitution, beyond introducing a strong bill of rights, unprecedentedly expanded judicial power by reinforcing the already strong judicial review of previous constitutions. Subsequent amendments in 1992 and in 2004 enlarged the judicial power even more by introducing new forms of review and more flexible remedies as well as by introducing a system of precedents. This perfect legal framework, which was an oriented choice of both the constituent and the constituted power, matched an environment of courts seeking for legitimacy and power.

Institutional arrangements disclosed a context within which political actors repeatedly bring political issues to courts as a shortcut to reduce political opportunity costs and decision-making process frictions, which also happens in the case of socioeconomic rights. Brazilian scholars denounce that judges have guided the health care programs; however, from time to time, the government expands the list of services and drugs provided by the public system regarding the contents of the rulings delivered by courts, such as in the HIV/AIDS case. Thus, medical services and

medicines that became common in the claims are then universalized in the public system, as if the litigation on health care were the perfect picture of the current demands and the perfect guide of the expansion that state programs shall take.

However, this attitude of the government seems to be conscious rather than random. Adopting the content of the lawsuits as a picture of the current demands for services is a shortcut that actually reduces the costs and the risks of the decision-making process that the executive officials would have to adopt in order to define the goals of the public programs.

Therefore, the deferential behavior played by state officials matches the interest of courts "seeking to increase its symbolic power and international prestige, by fostering its alignment with a growth community of liberal democratic nations engaged in judicial review and right-based discourses". Institutions naturally engage in their tasks by trying to accomplish their job in the best possible way regarding their own perspectives. As Foucault says, power has purposes and aims[67]. For this reason, appealing to judges' self-constraint sounds like a problematic idea: under liberal democracies, non-elected officials seek legitimacy and act strategically to achieve it. This point will be developed in the next sections.

In sum, addressing the *mis-enforcement* of socioeconomic rights requires struggling with actual institutional arrangements. Debiting the judicial activism solely from the account of the courts does not provide a complete account of how political, social and economic forces and counter-forces work to impact courts and their decisions, and how issues that arise from this interaction should be fixed.

2.4. Democracy through the courts?

In the last section, a short genealogy of the enforcement of socioeconomic rights in Brazil found evidence that links the democratic political context to the activist judicial role gradually assumed by courts. The analysis concluded that an actor-oriented process of constitutionalization of rights and of strong judicial review created the perfect conditions for a feedback process in which a strategic deference by the executive and the legislative branches matched courts' openness to expand their own power. In order to fill the deficit of constitutional normativity caused by other political institutions' malfunction, courts have increasingly assumed the role of other players. This was a dysfunctional solution for a dysfunctional context. There is no emptiness of power. This movement has changed the courts' perspectives about their duties and powers. The way that socioeconomic rights have been enforced is just a sharp symptom of this whole phenomenon. Eventually, the actual interaction of the political institutions within the context of forces and counter-forces disputing spaces of power must not be disregarded.

This work sheds light on the general arguments on judicial enforcement of socioeco-

[67] Michel Foucault, *The History of Sexuality, Volume 1: An Introduction*, 95 (Vintage Books, 1990).

nomic rights on which I have been giving since the first section. The evidence doubted the hegemony of both: *judicial enforcement may reduce and worsen inequality, may improve or defeat the distribution of goods, and thus enhance or weaken democracy*[68].

In this section, I argue that there is no necessary connection between the level of review and mis-enforcement, although sometimes they may be contingently related. This means that, under the current institutional arrangements, strong judicial review does not necessarily lead to mis-enforcement, and weak review may lead to mis-enforcement in some situations.

Within an abstract and ideal frame of separation of powers in a democratic regime, weak judicial review seems an appropriate model of judicial role. The elected branches are backed by a well-functioning political system. Courts play a lateral counter-majoritarian role, which constitutes their proper democratic duty. Judicial enforcement of rights is deferential and exceptional. Executive and legislative institutions immediately and substantially respond to courts' requests. If a court recognizes a violation of rights and notifies an agency, officials undertake the measures to fix the issue. Congress assumes a high degree of representativeness and influences the design of public policies. This ideal picture covers what Kim Lane Scheppele calls the standard *proceduralist* assumption, according to which "institutions are democratic in content if they are democratic in form"[69].

A comparison between this ideal model and any other real case would lead to the conclusion that the latter sounds undemocratic and under-inclusive. Any design distinct from the ideal model would be taken as a mistake rather than an invitation to rethink and to understand this frame. However, comparisons among real models under actual institutional arrangements would lead to different conclusions. Instead of blaming the deviation model and putting it aside, this work attempts to understand and unveil the real structures that create it. If the deviation model does not produce the same outputs, that the ideal model does and takes a different —and irreconcilable path—, it is important to understand why such a gap exists. Before reforming the system under the purpose of achieving the ideal frame, the inquiry would ask whether the actual institutional arrangements make it feasible to undertake traditional solutions. In other words, the question is whether cutting off the system of review, in order to refrain courts from adopting strong remedies, would really enhance democracy.

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[68] I emphasize the concept of *democracy* according to Amartya Sen, developed in *The Idea of Justice*, which goes beyond the idea of *public reasoning*: "Democracy is assessed in terms of public reasoning [...], which leads to an understanding of democracy as government by discussion [...]. But democracy must also be seen more generally in terms of capacity to enrich reasoned engagement through enhancing informational availability and the feasibility of interactive discussions. Democracy has to be judged not just by the institutions that formally exist but by the extent to which different voices from diverse sections of the people can actually be heard", Amartya Sen, *The Idea of Justice*, XIII (Harvard Press, 2014).

[69] Kim Lane Scheppele, *Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic Than Parliaments)*, Conference on Constitutional Courts, Washington University, page 7, available at (Last visited on April 10th, 2016). *See also* William N. Eskridge Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279 (2006).

The answer is negative. Under the Brazilian pattern, weak remedies are not always an efficient feature for courts to satisfy their main role in a democratic regime, that is, check on the government. Weak judicial review as a general rule would incentivize a lack of enforcement, since executive and legislative branches have proven to not adequately respond the commands of the courts. Non-justified aggregate and distributive impacts that may worsen inequality would also arise.

For instance, we could assume that the rulings enforcing the right to health had been replaced by deferential remedies. In this situation, the court would merely notify the state that a violation of the right to health had been noticed. An exercise of prediction leads to the conclusion that the state would likely ignore those commands. Inertia as a response to violation of rights is perverse. On the one hand, the sum of the similar rulings would constitute an aggregate effect consisting in a sum of violations. On the other hand, as the court would not exercise the counter-majoritarian task before a violation of rights, the maintenance of a status of inequality would constitute an indirect distributive effect.

Therefore, whenever the political institutions do not function properly due to structural obstacles, a situation of oriented under-enforcement may also cause a deficit of democracy and a violation of the counter-majoritarian principle. Professor Richard Fallon's argument, that "it is morally more troublesome for fundamental rights to be under-enforced than over-enforced"[70], reinforces this idea.

This does not mean that a deferential role may not be adopted in any case at all. There is no necessity of choosing between two extremes. Under a system of strong review, remedies that are weak, intermediate, or strong are available to courts to enforce rights. Judges will consult these options and pick the most appropriate remedy regarding the arrangements of players involved in the case. Judicial intervention must be as low as possible to achieve its purposes, but not necessarily either deferential or interventional.

Additionally, it is not true that strong remedies weaken democracy in all situations. Kim Lane Scheppele challenges this proceduralist approach by analyzing the Hungary case[71]. In the 1990s, the Hungary Constitutional Court adopted strong remedies intervening in the other two branches by declaring laws unconstitutional and by guiding the state policies. Although when regarding the proceduralist

[70] Richard Fallon, *The Core Of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1743 (2008).

[71] Kim Sheppele states: "I would like to argue that in many ways the Hungarian Constitutional Court turned out to be a more democratic institution than the Hungarian Parliament was for a number of structural and historical reasons. To see how this process worked, I will take up in more detail the most pressing and controversial set of cases that arose for both the Parliament and the Constitutional Court in the mid-1990s because it is in the interplay between Parliament and the Constitutional Court in specific cases that one can see why the Court was arguably more democratic than the Parliament. In the example I will discuss, the "Bokros package cases," the Constitutional Court's decisions were critically important because the shape of the transition hung on the answer".
Kim Lane Scheppele, *Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic Than Parliaments)*, Conference on Constitutional Courts, Washington University, page 7, available at (Last visited on April 10th, 2016).

approach this case would be taken as a grave deviation, Scheppele considers that the court's behavior enhanced democracy. According to him, "the standard democratic story presumes standard democratic institutions and a certain set of pre-existing basically guaranteed democratic values, which Hungary didn't have". He then describes the conditions of the Hungarian political system, mainly the weak party system and the misalignment between voters' expectations and governmental achievements. The Constitutional Court, rather than the Parliament, assumed the duty to protect rights and thus ensured a "set of substantive commitments directed to policy". For this reason, Scheppele argues that the Constitutional Court enhanced the Hungarian democracy.

India has faced similar issues. Its Supreme Court has developed a jurisprudence of strong and innovative remedies, and has gained the deference of the executive and the legislative branches. Professor Mansfield cites the epistolary jurisdiction[72], the expanded rules of standing[73], the sociolegal commissions[74], and the monitoring[75] as examples of features that the court adopted under the public interest litigation. It achieved high levels of judicial activism, but is nationally recognized as a protector of rights. According to professor Sathe, "the general population and political players believe that in matters involving conflict between various competing interests, the courts are better arbiters than politicians"[76].

Regarding the Colombia case, David Landau also reaches similar conclusions: "because Colombian parties are unstable and poorly tied to civil society, the Colombian Congress has difficulty initiating policy, monitoring the enforcement of policy, and checking presidential power"[77]. This political environment favored courts to take executive and legislative functions. Therefore, he claims that any evaluation of the Courts' outputs should be "based on whether it is helping to achieve constitutional transformation, moving Colombian politics and society closer to the order envisioned in 1991". Under this criterion, the court has been relatively successful in handling a dysfunctional political system in order to achieve the constitutional goals.

Therefore, I rely on those examples to argue that any proceduralist approach alone

[72] "Epistolary jurisdiction, according to which the Supreme Court of India (as well as other courts) could convert a letter from a member of the public into a writ petition", Vicki Jackson and Mark Tushnet, *Comparative Constitutional Law*, 751 (Foundation Press, 2014). *See also*: Charles R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago Press, 1998); Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attepempting the Impossible?*, 37 AM. J. COM. L. 495 (1989).

[73] "Expanded rules of standing, under which any member of the public or social action group acting bona fide can file a request for relief on behalf of others who do not have the ability to do so for themselves", Vicki Jackson and Mark Tushnet, *Comparative Constitutional Law*, 751 (Foundation Press, 2014).

[74] "Judicial appointment of outsiders as court commissioners or sociolegal commissions to investigate facts and make recommendations, *Id.*

[75] "In cases involving prison conditions, bonded laborers, pavement dwellers [...], rickshaw pullers and dalits, members of the so called untouchable castes or of other backward classes, or advasis", *Id.*

[76] S. P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J. L. & POLICY 29, 103 (2001).

[77] David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARVARD INTERNATIONAL LAW JOURNAL 319 (2010).

should be rejected to address the Brazilian case. *Mis-enforcement* of rights has no necessary connection with either *over-enforcement* or *under-enforcement* of rights, although in some situations they may be contingently related. As both *over-* and *under-enforcement* may lead to *mis-enforcement* of rights, the discussion should be re-oriented, since the causes of the blamed negative effects of the judicial enforcement do not necessarily derive from the level of enforcement. Thus, discussing judicial enforcement of socioeconomic rights cannot be narrowed to deciding between weak and strong review. Under the Brazilian institutional arrangements – and it is reproduced in other developing countries such as Colombia, South Africa and India – there is no feasibility to adopt weak review as a unique and general constitutional choice.

Achieving constitutional transformation through judicial review requires accepting the idea that courts may assume different forms of engagement —not only the American model of judicial activism or minimalism[78]— and still substantially enhance democracy. It also requires adding new vectors beyond the level of review. Besides the strength of the injunction, its own substance matters, as long as it is framed regarding three points: first, a commitment with a conception of enforcement that considers substantive issues more likely to erupt in socioeconomic rights —such as needs and the needy; second, its capacity to address background rules that also interfere in the dynamics of enforcement —such as the distributive and aggregate effects; third, its scope to embody a procedure that enhances democracy. This issue will be explored in the next section.

3. A design approach: some guidelines for development

3.1. Justification of a design approach

This third part is an invitation to institutional reflection. It stems from a defiance that professor Richard Fallon presented in his *The Core of an Uneasy Case for Judicial Review*. According to him, liberal political theory does accomodate judicial review. The idea that political legitimacy may have derive from substantive moral ends defeats the argument that unelected independent bodies are unable to work democraticaly. This outcome-based premise proposes that "a system of judicial review can be designed in a manner that allows for the total moral costs of the over-enforcement of rights that judicial review would likely produce, become lower than the moral costs that would result from the under-enforcement that would occur in the absence of judicial review"[79].

[78] I call attention to the fact that, although for different reasons, Brazilian courts have ended up adopting the model of judicial activism that American judges have been developing since the 1950s. The supremacy of the American legal thought that since that time, induced courts around the world to perceive and to incorporate a judicial behavior that relied on more intervention in the other branches' activities, a strong pattern of judicial review, and law-making activity. Regarding the three globalizations of the law, see Duncan Kennedy, "Three Globalization of Law and Legal Thought", in *The New Economic Development: A Critical Appraisal*, ed. David Trubek & Alvaro Santos, 19–73 (Cambridge, 2003).

[79] Richard Fallon, *The Core Of an Uneasy Case for Judicial Review*, 121 Harv. L. Rev. 1693, 1756 (2008).

This paper accepts Fallon's challenge and proposes the design approach. The previous sections sustained that the dualism *minimalism versus usurpation* furnishes an incomplete —but still necessary— account of the *mis*-enforcement of socioeconomic rights. In this section, I work on this conclusion to propose some theoretical and practical guidelines that could refine the debate.

Most Brazilian scholars take the health-related litigation as a deviation that courts should abolish. As the traditional litigation model seems to not accommodate the issues that arise from those cases, or seems to produce undesirable results, a feeling of rejection emerges. Instead of trying to understand the actual structures of those issues, scholars repudiate the whole enterprise and attempt to find solutions through a retrospective exercise by looking at past contexts —even when the problem has not yet been set— in order to see how structures worked previously[80]. However, regressions are useful if one of the eyes simultaneously looks prospectively. Sustaining law as a closed, gapless, and dead system produces no transformation: anomalies tend to persist, legal thinkers overlook and misunderstand the structures of the litigation system, and eventually institutions lose legitimacy[81].

Judicial review aims to not only maintain the established fundamental values entrenched in the constitution, but to build the transformation that constitutions have desired regarding the powers and the constraints imposed by the constituent power. In the Brazilian case, the transformative 1988 Constitution mostly infused a sense of ambition in democracy, which may be enhanced by judges as long as they demonstrate commitment to this project under a counter-majoritarian principle. The ultimate purpose of the Brazilian judicial review system is to enhance democracy.

Therefore, I argue that enforcement of socioeconomic rights through mechanisms of judicial review is legitimate as long as it has a commitment to protect rights as well as to enhance equality. It includes not only providing services, but also effectively making political institutions adhere to their constitutional duties[82]. It requires courts to inquiry beyond rights and legal interests: when legal norms and principles do not provide a unique choice – and the judge encounters the normative penumbra – social outcomes and background rules become an important source of criteria to define how rights should be framed and enforced. The counter-majoritarian judicial role and the equality-based purpose provide an additional task of improving the distribution of basic goods in favor of disadvantaged groups. It does not mean that judicial review shall be reduced to this standard. Nevertheless, such a substantive commitment would reinforce the project of the 1988 Constitution beyond all the formalist requirements of judicial intervention. Achieving all of these objectives demands a reflection on the general conceptions of (i) public law litiga-

[80] *See* Roberto Mangabeira Unger, *The Critical Legal Studies Movement: Another Time, A greater Task*, 5 (Verso, 2015). *See also* Roberto Mangabeira Unger, *What Should Legal Analysis Become* (Verso, 1996).

[81] *See* Roberto Mangabeira Unger, *The Universal History of the Legal Thought* (2015), available at (Last visited on April 10th, 2016).

[82] *See* David Landau, *A Dynamic Theory of Judicial Role*, 55 Boston College Law Review, 1501 (2014).

tion, and of (ii) democratic judicial role, whose aspects I describe in the next section.

3.2. Theoretical background for a design approach

The general question that a *design approach* proposes is how courts may produce more justice in socioeconomic rights-related litigation. Narrowing this question to a concrete level means to ask how the components of the judicial review system – procedures, remedies, levels of scrutiny, litigation system, among others – will be designed to ensure that their substantive moral outcomes will reflect the values of the transformative constitution.

It is possible to address those questions in two different manners. On one hand, a Rawlsian perspective aims at imagining perfect just social arrangements as a basic social structure designed under the reflective interaction of a set of principles of fairness[83]. This model demands —and presupposes— integral adherence of the people to this operating structure, as if there were no deviation from the prescribed plan. On the other hand, my choice lies on Amartya Sen's approach of "making evaluative comparisons over distinct social realizations"[84]. Although both perspectives are analytically linked with one another in important topics, I adhere to Sen's proposal, in the sense that (i) obtaining concrete diagnosis of injustice, (ii) identifying remediable injustices, and (iii) verifying whether a specific social change is capable to bring more justice constitute a feasible plan to address the mis-enforcement of rights and its vicissitudes. The mis-enforcement itself is a deviation from the formalist plan of a perfect judicial review system within a perfect liberal democracy. Thus, it could never be fixed under the former perspective[85]. Eventually, this work's objective focuses on "*advancing* — rather than *perfecting* — global democracy and global justice".

This central idea leads to the following nine background premises that support the enterprise of designing structures to improve the case of judicial enforcement concerning socioeconomic rights. They derive from the empirical and analytical enterprise on which this work relied, as well as from the scholarship of other constitutionalists

[83] John Rawls's general idea of justice: "My aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant. In order to do this we are not to think of the original contract as one to enter a particular society or to set up a particular form of government. Rather, the guiding idea is that the principles of justice for the basic structure of society are object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association", John Rawls, *A Theory of Justice*, 10 (Harvard University Press, 1999).

[84] Amartya Sen, *The Idea of Justice*, 410 (Harvard University Press, 2009).

[85] Sen's refusal to follow the *transcendental institutionalism* approach: "Indeed, the theory of justice, as formulated under the currently dominant transcendental institutionalism, reduces many of the most relevant issues of justice into empty – even if acknowledged to be well-meant – rhetoric. When people across the world agitate to get more global justice – and I emphasize here the comparative word 'more' – they are not clamoring for some kind of minimal humanitarianism. Nor are they agitating for a perfectly just world society, but merely to enhance global justice, as Adam Smith, or Condorcet or Mary Wollstonecraft did in their own time, and on which agreements can be generated through public discussion, despite a continuing divergence of views on others matters", Amartya Sen, *The Idea of Justice*, 26 (Harvard University Press, 2009)

that have already been trying to reorient the debate of judicial review —especially those who have been sensitive to the dysfunctional democracy-related issues[86].

First, judicial role is contextual. Rather than arenas, courts are non-central players that interact with other institutions within relations of power and reason, "two elements that have ongoing tension with each other"[87]. Descriptively, both institutional arrangements and normative commitments form an architecture that constrains judges' outputs. The former induces courts seeking for legitimacy to strategically predict, calculate, anticipate, and reduce their impact against other players. The latter consists of a structure that delimits procedures and judgments, and imposes the duty of justification under specific rational criteria and internal coherence. Judicial review can be reduced neither to power nor to reason alone[88].

Second, achieving substantive ends imposes courts and parties to consider the context —power and structure— within which they interact, and thus to explicitly address informal rules (or background rules). For instance, aggregate and distributive effects in the health-related litigation are examples of the second code of norms – I consider the formal norms as the first code – that directly impact the substantive results of the rulings, either in enhancing or weakening equality and democracy. Other types of informal rules may arise and should be recognized as elements that influence the interaction and the results of the operative institutions. Legal norms are only one part of a broad range of sources that impact social phenomena. Economic, social, political, and psychological elements, among others, become important circumstances of reasoning when players encounter the penumbra of open-textured legal norms[89]. All of the political bodies and parties involved in the process should consider them to obtain a very comprehensive picture of the issue at stake.

Third, the judiciary is not a unique and uniform body, but a sum of individual and

[86] *See* Charles F. Sabel, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004); David Landau, *The Reality of Social Rights Enforcement*, 53 HARVARD INTERNATIONAL LAW JOURNAL, 191 (2012); Katharine G. Young, *Constituting Economic and Social Rights*, 137 (Oxford University Press, 2012); Mark Tushnet, *Reflections on Judicial Enforcement of Social and Economic Rights in the Twenty-First Century*, 4 NUJS L. REV. 177 (2011).

[87] Victoria Nourse and Gregory Shaffer, E*mpiricism, Experimentalism, and Conditional Theory,* 40 LEGAL STUDIES RESEARCH PAPER SERIES, 101, 111 (2014).

[88] *See also* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard Press, 1980); Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (Yale Press, 2004).

[89] The idea of penumbra and open-textured norms is borrowed from Hart: "Not only are the judges' power subject to many constraints narrowing his choice from which a legislature may be quite free, but since the judges' power are exercised only to dispose of particular instant cases he cannot use these to introduce large-scale reforms or new codes. So his powers are interstitial as well as subject to many substantive constraints. None the less there will be points where the existing law fails to dictate any decision as the correct one, and to decide cases where this is so the judge must exercise his law-making powers. But he must not do thus arbitrarily [...]. But if he satisfies these conditions he is entitled to follow standards or reasons for decisions which are not dictated by the law and may differ from those followed by other judges faced with similar hard cases", H. L. A. Hart, *The Concept of Law*, 273 (Oxford Press, 2012).

collective minds[90]. It means that this work does not intend to prescribe a particular path of correct interpretation and approach for enforcement of socioeconomic rights. Absolute judicial coordination is unfeasible and undesirable. Asking courts to address informal rules, context-based arguments, and distinct languages does not guarantee that judges' interpretations and outputs will always coincide, or even that the desirable result of enhancing equality will always be achieved. Judicial practice comprises widespread disagreement and instability. The purpose is to design a framework that would constrain, expand, and guide legal reasoning. Note that the concept of *mis*-enforcement of rights adopts the term "*non-justified* distributive and aggregative effects". This detail evidences the concern with the epistemological coherence of each judicial output alone, rather than a desire to achieve a unified body of rulings. A logically articulated set of clear premises and conclusions allows for appropriate understanding and control by other players and institutions, a circumstance that reinforces accountability.

Fourth, courts are not protagonists of the enforcement of rights. Judges do enhance democracy through substantive commitments, but it does not imply that they are central players. Judicial review must remain the last resort for any conflict. Political bodies and society must exhaust all of the available non-judicial features to incentivize the government to improve socioeconomic programs. However, since courts must not discretionarily dismiss cases, their structure should be prepared to process the claims that eventually are brought forth, since an abdicative role is not an option before a violation of rights.

Fifth, the adversary private litigation[91] no longer fits in the public law adjudication profile, especially in the complex arena of socioeconomic rights, where norms are open-textured, principled, non-sanctioned, and less definitive. In most of the cases, citizens claiming for health care are not interested in a sanction-based output, but

[90] Adrian Vermeule, *The Judiciary Is A They, Not An It: Interpretive Theory and the Fallacy of Division*, 14 J. OF CONTEMP. LEG. ISS. 549, 553 (2005).

[91] I take "traditional private litigation" as Scott defines: "According to the traditional view, law is about rule elaboration and enforcement. The judiciary bears a distinctive institutional responsibility for elaborating and enforcing public norms, and applying those norms to facts filtered through formal adjudicative process. Normative and factual activities from other domains operate as inputs to be processed and then outcomes to be judged. A legal norm thus operates under this view as a code of conduct that gives rise to clear obligations to address well-understood problems with clear normative implications. Such a rule must be sufficiently clear, concise, and general to justify attaching coercive consequences to the rule's violation. Courts use analogy, logic, and moral intuition to define the problem at the core of the relevant authoritative principle, to formulate or apply a standard or rule to address that problem, and then to construct a hierarchical relationship between the judiciary and other public bodies to implement those specified rules. Legal pronouncements should settle disagreements or uncertainties about the nature and scope of problematic activity and its relationship to the generally articulated constitutional or statutory principles calling for judicial interpretation." Joanne Scott and Susan P. Sturm, *Courts as Catalysts: Rethinking the Judicial Role in New Governance*, 13 COLUMBIA JOURNAL OF EUROPEAN LAW, 4 (2007). *See also* Kathleen G. Noonan, Charles Sabel, and William H. Simon, *The Rule of Law in the Experimentalist Welfare State: Lessons from Child Welfare Reform*, 34(3) LAW & SOCIAL INQUIRY 523 (2009).

indeed in a judicial intervention that operates structural improvements in an ongoing public policy. The received litigation model is retrospective. It imposes liability on a determined agent or institution due to a recognized past act. However, health care-based litigation is a crucial example of a prospective intervention. Rather than fact-finding, it is fact evaluating[92]. For this reason, outcomes and impacts of judicial intervention matter. As Chayes suggests, "the elaboration of a decree is largely a discretionary process within which the trial judge is called upon to access and appraise the consequences of alternative programs that might correct the substantive fault".

This new profile requires redefining the relationship between rights and remedies. Under traditional litigation, remedies derive directly from rights determination. The courts' primary role is to protect rights and legal interests. Therefore, recognizing a violation of a right leads to prescribing a correspondent remedy, whose content is narrowed to and derived from the content of the right. It results in a binary approach —"the court either accepts the outputs of the community institutions or directs a different outcome"[93]— that takes distance from the problem-solving approach sought by public law litigation and hampers court's purposes of enhancing equality and shaping their legitimacy. Amid those extreme answers, there is a broad range of legal outputs that courts may explore, since "remedial design requires a different type of decision-making from rights determination"[94], and "involves more technical, strategic, and contextual forms of thought" rather than merely analyzing legal principles and rules, and treating rights as trumps[95].

Under those assumptions, the language of impersonal rights and principles also become limited to address the complex trade off involving the enforcement of socioeconomic rights. Amid legal parameters, courts must exercise creativity and institutional innovation in order to verify the kind of social intervention and the standards required to obtain positive impacts according to the transformative constitutional plan. Health care-related litigation proved that producing evidence of needs, beneficiaries, and social impacts is an essential step of the legal analysis. Investing in remedial design requires reshaping the relation between rights, remedies, and outputs in a way where remedies become interdependent —rather than dependent— of the rights determination[96].

Sixth, as Joanne Scott and Susan Sturm argue, courts exercise a catalyst function, by which they are "poised to act as arbiters of interaction across different levels of governance and institutional roles"[97] regarding three main tasks: first, ensuring the

[92] Abram Chayes. *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1297 (1976).

[93] Joanne Scott and Susan P. Sturm, *Courts as Catalysts: Rethinking the Judicial Role in New Governance*, 13 COLUMBIA JOURNAL OF EUROPEAN LAW, 4, 5 (2007).

[94] Charles F. Sabel, *Destabilization Rights: How Public Law Litigation Succeeds,* 117 HARV. L. REV. 1015, 1054.

[95] *See* Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977).

[96] *See* Charles F. Sabel, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

[97] Joanne Scott and Susan P. Sturm, *Courts as Catalysts: Rethinking the Judicial Role in New Governance*, 13 COLUMBIA JOURNAL OF EUROPEAN LAW, 1, 2 (2007).

participation and the interaction of all players involved in the processes; second, monitoring "the adequacy of the epistemic or information base for decision-making within new governance"; and third, imposing transparency and accountability to procedures as a source of reasoned decision-making. Katharine Young builds on this conception to suggest that courts act "to lower the political energy that is required to change the protection of economic and social rights, or at least the way in which the government responds to the protection of economic and social rights"[98].

All of these assumptions are part of what David Landau calls the *dynamic judicial role*. He identifies this as a reasonable variation of the judicial role in dysfunctional democracies, whose courts sometimes are more concerned with improving the democratic character of the functioning institutions rather than exercising a counter-majoritarian behavior. Courts also "aim to improve the performance of political institutions over time"[99].

Therefore, this new role assumed by courts reshapes the structure of litigation. As a social institution, litigation has two sides: "it is at once a process for authoritative adjudication of legal disputes and a vehicle for partisan manipulation of bargaining advantage"[100]. Judicial practice has traditionally focused on the former, but the stakes we are building requires also enriching the latter, since litigation assumes that dispute resolution in some kinds of cases – especially public law litigation – demands systemic organizational change. Therefore, as soon as judges realize their influence on the allocation of the parties' bargaining power, *experimentalist interventions* tend to replace *command-and-control* injunctions, along with the impact of courts' choices over the participants, the procedure, the remedies, the level of scrutiny, and the outcomes, among other characteristics of the lawsuit.

Seventh, new governance doctrine provides an appropriate approach regarding the notion of courts as catalysts as a path to reconcile economic efficiency, political legitimacy, and social democracy. The fact that new governance has emerged within the administrative activities, by "challenging the traditional focus on formal regulation as the dominant locus of change"[101], does not mean that judicial practice shall not embody some of its premises. In fact, the whole change that administrative bodies have faced necessarily requires a change on litigation in order to accommodate this new architecture of power practice.

Eighth, as Katharine Young claims, judicial review comprises at least five major

[98] Katharine G. Young, *Constituting Economic and Social Rights*, 172 (Oxford University Press, 2012).

[99] David landau, *A Dynamic Theory of Judicial Role*, 55 BOSTON COLLEGE LAW REVIEW, 1501,1503 (2014).

[100] Colin Diver, *The Judge as Political Powerbroker*, 65 VIRGINIA LAW REVIEW, 43, 106 (1979).

[101] Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 Minnesota Law Review, 262, 264 (2004).

forms. Rather than a scale from the weaker up to the stronger review, they result from a mix between different forms of interpretation, remedies, and power dynamics, since courts' power is multidimensional[102].

In the *deferential view*, "courts give credence to the democratic authority and epistemic superiority of, and textual conferral of tasks to, the legislative and executive branches". In the *conversational view*, the dialogical interaction between the courts and the other political institutions drives a conjoint process in which all of the actors construct a feasible interpretation of the right, as well as the appropriate model of enforcement. Canada provides an accurate example of this perspective. In the *experimentalism view*, the courts "engage in a vigorous assessment of the reasonableness of policy or legislation, involving a contextualized investigation against the commitments of the constitution". Remedies take a "limited structural form" (intermediate level of intervention), but are capable of achieving strong structural reforms. In the *managerial review*, structural injunctions are combined with managerial remedies, by which courts engage in higher levels of intervention, commanding substantive interferences on public functions, by either upholding/striking a legislation or imposing the state's concrete measures to achieve normative goals. In the *peremptory review*, judges assume the highest level of interference. For instance, rather than upholding or striking down a legislation, courts define the meaning of the legislation to be passed or amended, regardless of the potential response of the other branches.

There is no need for picking one of the models; each of them presents benefits and burdens that courts must balance when deciding the appropriate remedy. For example, David Landau recognizes that each kind of remedy benefits specific social profiles, and creates different incentives and disincentives to the government, as potential responses to courts' rulings[103]. This approach focuses on interpreting the models as a catalog of non-definite alternatives that influence subsequent players' behavior, rather than a multiple-choice test with only one correct option. In so doing, it defines the substantive outcomes of judicial intervention, namely, the social and moral benefits along with its costs. Under certain institutional arrangements, judges must conduct a process of gathering information and engaging affected bodies' participation in order to verify the appropriate model to address the right-violation covered by a problem-solving approach.

However, leaving open the model of judicial review does not refrain judges from committing with the lowest possible level of intervention regarding the separation of powers clause. In this case, courts will have to find the optimal level of judicial enforcement of socioeconomic rights. This scenario would consist of a

[102] Katharine G. Young, *Constituting Economic and Social Rights*, 143 (Oxford University Press, 2012).

[103] David Landau, *The Reality of Social Rights Enforcement*, 53 HARVARD INTERNATIONAL LAW JOURNAL, 191, 202 (2012).

situation that simultaneously ensures as many benefits as possible to the target group while reducing the costs of other actors involved. Judges should seek to improve social welfare and equality, both in an objective perspective —in asking what are the benefits and costs— and in a subjective perspective —in asking who bears the costs and who receives the benefits—; ensuring benefits and costs affect or relieve each of them as fairly as possible.

The next section will propose some practical guidelines to the Brazilian model of enforcement, taking the aforementioned stakes into account.

3.3. Imagining it differently: some practical guidelines

In the last section, we built some theoretical stakes that could lead judges to a commitment with a conception of enforcement that (1) considers substantive issues more likely to erupt in socioeconomic rights —such as needs and the needy; (2) has the capacity to address background rules that also interfere with the dynamics of enforcement —such as the distributive and aggregative effects; (3) embodies a transparent procedure that provides substantive scrutiny in public policies, engages affected players in the process, gathers the necessary information to build a comprehensive picture of the social phenomena in discussion, and promotes accountability of the public institutions, including the courts; (4) induces players to look retro- and prospectively, which means that outputs are also designed according to the desirable impact that is necessary to reach dispute resolution; (5) does not disregard other procedural constraints on judicial review, such as the separations of power clause.

The following question summarizes those points: within all of the constitutional constraints on judicial review, how is it possible to reach concrete, sustainable and democratic structural changes by adopting the lowest level of intervention possible?

Under those theoretical parameters, this section will propose some practical methods to address the mis-enforcement of rights in the Brazilian case. It is beyond the scope of this work to offer a definite blueprint of structural reforms. The following proposals are only an initial list of feasible ways to address the issue. Some of these methods align with the already on-going experiences at the local level, which should be improved and expanded on.

Taking the conflicts out of the courts. All of the methods proposed regarding the desirable design of judicial review and the possibility of courts to enhance democracy by enforcing socioeconomic rights do not shift the ideal that executive and legislative branches still remain the appropriate place for developing, implanting, and improving public policies. The judicial intervention is the most traumatic and the most politically costly type of solution regarding enforcement of rights. Its risk justifies the following constitutional premise: courts' enforcement is the last resort, although sometimes necessary.

Therefore, non-judicial dispute resolution methods should be utilized whenever possible. The National Council of Justice set up state-level committees, whose purpose is to develop programs of alternative dispute resolutions on health care-related litigation. Some of them have developed profitable experiences. Since 2013, the Federal District committee —which joined judges, public defenders, public attorneys, doctors, and state officials— has tested different strategies to incentivize mediation between claimants and the government on questions regarding medicines and non-emergency medical services. The committee follows the case until the state performs the agreement in order to ensure its entire compliance. After three years of experience, the National Council of Justice stated that although there has been no reduction of new claims (no incentive to reduce litigation), the program had provided and faster and more effective tools for enforcement of the right to health care through a dialogical interaction between claimants and institutional players[104].

Another sensitive circumstance is the lack of legal norms disciplining details of public policies. For instance, the 1988 Constitution defined a group of principles and standards that states the "universal right to health". Stating a universal right without specifically defining the services, recipients, priorities, and requirements of access unreasonably enlarges the area of normative uncertainty. By doing so, the executive and legislative branches voluntarily transfer these topics to be defined by courts.

A comparison with the social security system exemplifies this controversy. The constitution and the statutes concertedly define all of the benefits (such as pensions, retirements, disabilities, and incarceration), their requirements, and beneficiaries covered by the social security system. Its area of normative uncertainty is smaller than the health care-related legislation. This normative structure influences the litigation profile: the claims, the claimants, the level of scrutiny, and the remedies. In social security-related litigation, most of the claims are brought against a formal denial of a benefit due to the alleged lack of a legal requirement. Thus, there is no space for courts to redefine what services will be provided by the government, since the room for discretion is reduced.

Structuring a new health care system —or even suggesting how it should be structured— is far beyond the scope of this work. However, since our purpose includes finding the roots of the mis-enforcement of socioeconomic rights, the lack of legal rules proves to be an important issue. This conclusion does not contradict the style of soft and broad rules adopted by the new governance doctrine, since those characteristics do not exempt legislative from assuming a duty of defining norms that provide objective standards to guide the other branches. In the Brazilian health care system, more than uncertain normativity, there is a vacuum of legal norms. Most of the rules defining the health system are expressed in resolutions enacted by the Ministry of Health Care. However, these resolutions do not necessarily bind the courts, thus caus-

[104] National Council of Justice, *Judicialização da Saúde no Brasil*, 45 (National Council of Justice, 2015).

ing the courts to overlook their terms. In addition, the lack of a definitive division of competences between the three federal levels —the federal union, the states, and the municipalities— induces overlapping claims (the same claim brought against different defendants in different lawsuits), or claims that are simultaneously brought against the federal union, the state, and the municipality. This disrupts compliance in general and reduces the effectiveness of the litigation system.

Reshaping the profile of the litigation system. More than 90% of the claims involving health care-related litigation are individualized. Although a number of reasons could justify this scenario, a massive culture of litigation and a weak system of collective actions are part of its structural roots.

Endless and ineffective collective actions in Brazil make them an unattractive tool for the enforcement of socioeconomic rights. Their procedure basically reproduces the same pattern of the individual claims without presenting any strategy for providing a faster and more effective result. In addition, norms of compliance, territorial reach, and legal representation of parties is confusing. Courts are more likely to deliver a negative answer under collective actions, so claimants end up choosing an individualized lawsuit as a shortcut to grant their rights.

David Landau's description of the effects of socioeconomic rights remedies also reveals two important factors. First, likely beneficiaries of the individualized enforcement are middle and upper class groups instead of the lower-class groups, who are benefited under structural enforcement. Second, unlike individualized enforcement, structural enforcement may alter bureaucratic behavior[105].

I would disagree with Landau's second conclusion. Although individualized enforcement seems to produce no incentive for change of bureaucratic behavior, under the Brazilian context the aggregative effect due to the massive litigation transforms an apparent inoffensive individual claim into a huge group of similar lawsuits compromising a considerable part of the budget. The empirical data of the second section suggested that the profile of the claims influences the course of the health care public policies. For instance, state officials tend to expand the public services for the general public by including the most enforced medical services and medicines. The case of HIV/AIDS drugs is the most powerful example.

Therefore, I would say that aggregate individualized enforcement does alter bureaucratic behavior. However, it probably does so with a higher marginal cost than what would be necessary to achieve the same result under structural enforcement. For this reason, this kind of litigation should receive disincentives.

The Brazilian data fits Landau's classification, in the sense that achieving structural enforcement seems to be the most effective way to incentivize government to im-

[105] David Landau, *The Reality of Social Rights Enforcement*, 53 HARVARD INTERNATIONAL LAW JOURNAL, 191, 202 (2012).

prove services and to target low-income groups. Eventually, institutional innovation should be set to reduce individualized claims and increase the collective claims.

Redefining collective actions. Redefining the system of collective actions is mandatory. As the evidence proved, judges are more likely to address background rules in collective actions rather than in individualized claims. This accomplishment would also address the question of representation. I recall that scholars suggest that the most disadvantaged groups in Brazil do not have appropriate access to information. This factor disrupts their access to courts and causes situations of *mis*-enforcement, by which judicial enforcement ends up benefiting upper and middle classes. Since a number of private and public institutions may propose collective actions on behalf of other groups (such as the Public Defense Office), it seems that strengthening that kind of litigation would also reduce the question of representation.

However, collective actions in the Brazilian litigation system are slow; it is necessary to make them more attractive and effective, so that individuals would have more incentives to abandon individualized claims.

The role of the precedents. It would be naïve to ask lawyers and public defenders to choose collective instead of individualized claims. The structure with which they deal favors the latter, and thus, some structural changes may change those incentives. It is beyond the scope of this work to exhaust all of the tools that should be used to achieve this goal, but I argue that the precedent system could embody an important strategy of creating incentives to reduce individualized claims.

The lack of precedents about health care-related litigation is a troubling aspect. Brazil does not adopt the *stare decisis* principle, but the Brazilian Constitution allows the Supreme Court to establish a binding effect over some rulings, especially in repetitive and highly controversial cases[106]. Surprisingly, there are no binding rulings on health-related litigation, and thus lower courts do not dispose of safe standards to decide cases.

Precedents would assume an ancillary purpose on judicial enforcement of socioeconomic rights. Defining exactly what the public services must cover – in other terms, specifically defining the core of the needs, the beneficiaries, and the priorities that the state should provide – is not a constitutionally appropriate function for the judicial branch. Otherwise, judges would replace the state officials' discre-

[106] Original text: Article 103-A: "Art. 103-A. O Supremo Tribunal Federal poderá, de ofício ou por provocação, mediante decisão de dois terços dos seus membros, após reiteradas decisões sobre matéria constitucional, aprovar súmula que, a partir de sua publicação na imprensa oficial, terá efeito vinculante em relação aos demais órgãos do Poder Judiciário e à administração pública direta e indireta, nas esferas federal, estadual e municipal, bem como proceder à sua revisão ou cancelamento, na forma estabelecida em lei.

§ 1º A súmula terá por objetivo a validade, a interpretação e a eficácia de normas determinadas, acerca das quais haja controvérsia atual entre órgãos judiciários ou entre esses e a administração pública que acarrete grave insegurança jurídica e relevante multiplicação de processos sobre questão idêntica".

tion, least the separations of powers clause. However, under the idea of "evaluative comparisons over distinct social realizations"[107], the precedents may define what courts *should not* enforce, regarding the principles defined by the executive and the legislative branches (in general, basic needs for disadvantaged groups). They may state what kind of medical services and medicines cannot be enforced, such as experimental treatments, unproven drugs, and expensive experimental drugs; the profile of claimants cannot benefit from enforcement, such as non-users of the public health care system. According to this approach, courts would not define *exactly* who the beneficiaries should be, what services should be provided, and what priorities should be adopted. Judicial intervention would rather focus on excluding borderline claims —those claims that are clearly out of the constitutional protection of the public health care system, such as unproven drugs, expensive drugs, and experimental treatments. Precedents may provide objective standards and tests to guide judges to verify aggregative and distributive effects.

It is noteworthy that even when courts assume an exclusionary role, they also are defining what the state should cover. However, in those cases, judges reach the periphery areas of those axes in order to remove the excess of litigation. They reduce the worst effects of the individualized enforcement, such as targeting middle and upper class groups, since these kind of claims are mostly brought by those groups. A decrease of these borderline claims leads to a reduction of mis-enforcement, since it will narrow judicial intervention to favor mostly lower-income groups, whose claims are generally related with the most basic needs.

Overall, precedents would function as a uniform message from courts that would produce disincentives to a specific group of individualized claims that do not benefit the constitutionally targeted groups.

Gathering information and engaging players. Establishing a legal reasoning that explores the language of needs, priorities, and beneficiaries – and also addresses social impacts due to background rules (such as aggregative and distributive effects) – requires courts to go beyond right-based arguments. In practice, this means that the procedure should bring evidence about those issues in order to permit courts to build a decision more likely to produce substantial positive impacts on equality and democracy.

This evidence should take as many forms as the procedure permits. A recent experience of the District Court of Brasilia shows how simple procedural innovations may improve the enforcement of rights. Repetitive claims asking for expensive treatments and medicines – especially for rare diseases – called the attention of the district court judges. Concessive rulings basically relied on medical prescriptions presented by the claimants. Costs of compliance reached R$900 million in 2015 only in

[107] Amartya Sen, *The Idea of Justice*, 410 (Harvard University Press, 2009).

the Federal District. Judges' concern about the huge aggregative effects of that kind of solidifying litigation turned to request expert evidence to double check the efficacy of such drugs. There is still no definite empirical study about this experience, but the first report released in March 2016[108] introduced surprising results: 80% of the expert evidence have contradicted the medical prescriptions presented by the claimants, by either attesting that the requested treatment/drug is not effective for the specific case, or providing cheaper, alternative solutions. As a consequence, (i) costs of compliance have been reduced, due to the alternative measures of enforcement in the group of concessive decisions and the increase of non-concessive decisions, and (ii) the amount of new individualized claims asking for expensive medicines decreased by 40% in that District Court from 2015 to 2016. Two hypothesis explain this second result: (i) the procedural innovation created a disincentive for patients to seek more sophisticated treatments that are still not available in the public system rather than to receive the already available cheaper alternatives in the public system; (ii) pharmaceutical industries lost incentive to use the health care-related litigation as a tool for introducing new drugs in the market[109]. The National Council of Justice is planning to expand this experience to other courts and to develop an information sharing platform for judges.

Bringing supporting information about public policies and the government choices also helps courts to understand the steps that the state took to implement each socioeconomic right. This also gives a more realistic account of the outcomes of any intervention. It is important to involve the players that any judicial decision could affect, so that they can bring distinct perspectives of the social issue at stake. It seems arbitrary to decide an intervention on an on-going policy without any inquiry of the reasons why the executive and legislative branches have prioritized one need over another; or what are the measures that the state has already adopted to address a specific conflict. The judicial procedure matches this purpose exactly, since its dialectical approach allows the parties to engage in a constructive interlocution that would end up improving the quality of the enforcement.

Public engagement may also be improved. The Brazilian Supreme Court introduced the *public hearings*[110] in 2007, whereby Justices hear the testimony of scientists and authorities when necessary to clarify issues or factual circumstances with general

[108] Brazilian Federal Judiciary, Relatório de Perícias de Doenças Raras, 2015. I express gratitude to Judge Diana Wanderley for providing a draft of this report before its publication.

[109] See section 1.3

[110] Professor Mark Tushnet distinguishes the Brazilian *public hearings* from the U.S. amicus curiae practice: "Public hearings do resemble the amicus curiae practice because they allow interested parties to present their views to the court. They differ, though, because in the amicus curiae practice the presentations are almost entirely in writing; rarely the Court will allow one amicus curiae to participate in the oral argument, and never more than one or two. In contrast, the Brazilian public hearings involve in-person presentations by a large number of interested participants", Mark Tushnet, New Institutional Mechanisms for Making Constitutional Law, 15 Harvard Public Law Working Paper, 15 (2015).

implications and relevant public interest regarding on-going cases before the Court. Its regulation determines an open application process, by which any person or institution – not only parties or special guests – may qualify for the event, which is also broadcast on public TV and on the internet. Of sixteen public hearings held until 2015, eight explored judicial enforcement of socioeconomic rights: the health care public system (2009, 2013, and 2014), regulation of alcoholic beverages on the roads (2012), asbestos ban (2012), affirmative actions (2012), fire-sticking in sugarcane farming (2013), and imprisonment (2013)[111]. According to Mark Tushnet, these hearings "can be understood as blending political and judicial constitutionalism"[112], since their discussions accommodate both legal and policy arguments relying on the constitutional interpretation of a varied range of state and non-state institutions.

Those *public hearings* have also been adopted in collective actions; however, trial judges have resisted to engage in this experience. A few *public hearings* have taken place around the country. Judges have been skeptical about participants using these events as political platforms. Others have expressed concerns regarding the appropriate way to handle the desirable community engagement, in order to translate those moments into a productive constitutional discussion. Judges usually do not feel comfortable in assuming roles that go out of the traditional track, but this idea could be reinforced and improved through more structured programs.

Eventually, taking the process as a locus of dialectical competition among players affected by the social conflicts at stake is an essential feature of broadening the language of the courts and of improving the scrutiny that they engage through judicial review mechanisms. Gathering information neither directly reduces misenforcement, nor functions as a guarantee of substantially enhancing equality. It even determines the concessive or non-concessive answer to the claim, since they do not seek to confirm a preconceived result. However, it is a feature that expands and qualifies the constitutional discussion taken by courts in preventing them from overlooking data that influence the result of their intervention in policies. In the end, this exercise may turn to improve the democratic side of the judicial outputs.

Disentangling remedies from rights. Insufficient attention has been given to the relation between remedies and enforcement of socioeconomic rights. Scholars' recommendations to address the issues that emerge from the judicial intervention focus on the right-based argument. For example, after an extensive empirical analysis, Octavio Ferraz concludes that "judges would need to be more restrictive in their interpretation of the right to health"[113]. Gauri and Brinks follow the same

[111] Brazilian Supreme Court of Justice, Public Hearings Report, available at (Last visited on April 10th, 2016).

[112] Mark Tushnet, New Institutional Mechanisms for Making Constitutional Law, 15 Harvard Public Law Working Paper, 17 (2015).

[113] Octavio L. Motta Ferraz, *Brazil, Health Inequalities, Rights, and Courts: The Social Impact of the Judicialization of Health*, in LITIGATING HEALTH RIGHTS, CAN COURTS BRING MORE JUSTICE TO HEALTH 76, 100 (Alicia Ely Yamin et al. eds., 2008).

pattern[114]. Remedies have been taken as a mere liable consequence of the right's violation. Once a judge recognizes the violation of the universal right to health, he applies a remedy to compensate that specific situation, regardless the way it affects the parties and indirect players.

The last section stated that the relation between rights and remedies should be transformed in the Brazilian system. Breaking the absolute dependence between the two and taking remedies as a bridge between the right determination and the right enforcement would be a powerful innovation to reduce mis-enforcement. Therefore, they would function as an equalizer between the abstract analysis of legal rules and impersonal principles, and the concrete analysis of impacts and trade off regarding background rules that influence the enforcement. In this model, remedies must not only serve the right violation, but also the concrete impact of the judicial decision.

A recent movement undertaken by the Brazilian Supreme Court in 2015 seems to be an example of this idea's feasibility. Repetitive individualized claims brought by prisoners against the government asked for damages due to the inhuman environment in prisons. The Brazilian incarceration policy has undeniably caused systemic violations of fundamental rights. Overcrowded cells, poor sanitary conditions, and lack of policies to reengage inmates in social life are part of a severe context that led the Inter-American Court of Human Rights to prosecute Brazil (the process is on-going). Lower courts in general condemned the government to pay individual damages. Once again, the point of aggregate impacts of the individualized litigation arose with an additional aggravating element. Payment of individual damages is costly and does not directly improve the penitentiary system at all, since the state will reallocate the budget not to reform the imprisonment system, but to compensate a damage without fixing the social problem. Under the perspective of mis-enforcement, this seems the worst of both worlds. Indeed, the government ends up spending a considerable amount of money that causes a huge aggregate effect, while no social right is enforced.

This case exposed a long controversy before the Supreme Court. In 2015, Justice Teori Zavascki voted for upholding a lower court's decision approving the damages. However, Justice Roberto Barroso argued that this payment would not address the grounds of the structural and systemic human rights violation. He argued that, since the court was deciding individualized claims, individualized answers should be given. Thus, he suggested an innovative remedy, that is, partial remissions of sentence, which would function better than monetary payment[115], since

[114] Florian F. Hoffman and Fernando R. N. Bentes, *Accountability for Social and Economic Rights in Brazil*, in Varun Gauri and Daniel Brinks (editors), COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD 100 (Cambridge University Press, 2008).

[115] Brazilian Supreme Court, Extraordinary appeal 580252.

it would be more desirable to compel the state to spend its already limited budget on reforming prisons rather than on paying individual damages. The court suspended the judgment for ulterior discussion, and there is still no definite result.

In the same year, the court judged another case on the prison system and recognized that executive and legislative branches have not been undertaking appropriate measures to improve prisons. On the contrary, the court found that executive branch had not entirely spent its budget for the penitentiary system. As a consequence, it issued a structural injunction relied on the Colombian doctrine of *unconstitutional state of affairs*. The court ordered (i) the executive to release the budget of National Penitentiary Fund to its actual purposes, and (ii) judicial authorities to hear prisoners up to 24 hours after the arrest, in order to verify the legal requirements and prevent torture by the police[116].

Note that the court issued structural injunctions without redefining the public policy. This is a case of strong judicial review of administrative acts, in which the judges were sensitive to design a remedy that minimally impacted the state activity, but set up an effective incentive to address the social problem. Sabel adverts that "the message that the new public law sends to prospective defendants is not that they will suffer any specific set of consequences in the event of default, but that they will suffer loss of independence and increased uncertainty"[117]. This is the key to understand the purpose of the structural injunctions. They should serve not to replace the discretion of the public institutions, but to fix specific issues during their typical processes, such as the representativeness and the deliberative quality in the case of the legislative decisions, and the adherence of the bureaucracy to the political process in the case of administrative decisions[118].

Those two cases, more than being a mere departure from the traditional model of litigation, show that the court is open to endeavor to a remedial design approach. It is possible to go further. A procedural mechanism that allowed superior courts to cluster a group of repetitive individualized claims and then to convert them into a single structural *tutela* would definitely change the shape of the socioeconomic rights-related litigation. Courts could address the issue at stake as a collective action and thus target not only the individual parties, but all of the groups in the same situation. In the foregoing case of damages for prisoners, the court —by recognizing a social issue that impacted a huge group— could convert a bunch of individualized cases into one collective claim and could impose structural injunctions according information gathered during the process in order to adopt a problem-solving perspective that would be more effective under constitutional parameters.

[116] Brazilian Supreme Court, Case ADPF 347.

[117] Charles F. Sabel, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1055 (2004).

[118] *See* Guillermo Otalora Lozano, *Commandeering the Institutions: The Legitimacy of Structural Judicial Remedies in Comparative Perspective*, Harvard Law School Thesis (2014).

This new mechanism would incentivize judges to have a broad and systemic comprehensive picture of the enforcement of a specific right, as well as to undertake remedies as a bridge between legal and informal norms. In the long run, individualized actions would be discouraged in favor of collective actions. This would also fix the representation issue. A fair criticism against enforcement of rights in individualized claims is that they only benefit parties who have access to bring a claim before courts. This point is more problematic in a country of huge inequalities such as Brazil, since disadvantaged groups face barriers against their engagement in defending their rights.

Eventually, this separation between rights and remedies serves not only to improve structural injunctions, but also to reinforce the idea of remedial design. For instance, courts could add a monitoring task to a dialogical remedy through inspiration by the Indian model[119]. Instead of merely communicating to the executive branch the necessity of promoting a new medical treatment, judges could follow this process in order to make sure that officials are complying with the ruling. This could include assigning deadlines, asking for a plan of implementation, etc.

Conclusion: new constitutional approaches for dysfunctional democracies

In April 2016, the Brazilian Supreme Court overruled its previous decision and liberated the University of São Paulo from producing and furnishing *phosphoethanolamine* to a single plaintiff. Justice Lewandowski's opinion recognized that the judicial intervention in that case caused perverse aggregate and distributive impacts. Regarding the fact that the efficacy of the substance had still been unproven, he also requested that the court set a *public hearing* to receive testimonies of experts and third parties about its scientific efficacy. This decision is provisory and was not set as a precedent, but rather the court may do so after the hearings. Although this precedent does not bind lower courts, some of them have already followed the same reasoning and turned to denying new claims.

Meanwhile, due to the national repercussion of the *phosphoethanolamine*-related litigation, Congress deflagrated a legislative process to discuss whether the state shall liberate pharmaceutical industries to produce this compound. The National Health Surveillance Agency also instituted an administrative process to analyze on-going research in order to decide whether the public system should include this substance in the existing programs.

Beyond all of the criticism from the mainstream constitutional scholars, judicial enforcement of socioeconomic rights does cause positive social change and political

[119] *See* Vicki Jackson and Mark Tushnet, *Comparative Constitutional Law*, 751 (Foundation Press, 2014).

engagement. Regarding the institutional arrangements, situations of mis-enforcement —which have not been shown to make up the majority of the cases— do not constitute grounds for requiring courts to abdicate their role of supporting the transformative ideals of the 1988 Constitution[120].

However, regarding some perverse outputs that courts have been producing, two question guided this work: how could this process of social change be less traumatic and more effective, and how may courts improve necessary interventions? Answering these questions demanded us to go beyond the discourses of minimalism and usurpation in order to understand the actual role of courts in the governance of dysfunctional democracies.

This enterprise offered two main contributions. The first was to introduce a case study about Brazil in the comparative constitutional law field. The Comparative Constitutional Law doctrine presents a broad range of analyses from the U.S., many European countries, India, Colombia, and South Africa, but there are few studies on the Brazilian judicial system. Filling this gap is an important step in putting this country on track for the most prominent academic analyses. It also relies on the acknowledgement that the Brazilian constitutional history has interesting experiences and particularities that should be shared.

Although the case study focused on the Brazilian litigation, most of this discussion applies to other developing countries. An interesting forthcoming task would be to expand this analysis in order to double check to what extent its conclusions qualify for: South Africa, Mexico, Argentina, Colombia, and India, and others. If those countries' experiences directly inspired this work, it certainly reflects some of their constitutional challenges.

This point leads to the second contribution, which involved the engagement in an emerging and urgent debate on constitutional law: judicial role in dysfunctional democracies. The mainstream American discourses of minimalism and usurpation focus on healthy democracies with strong constitutional culture. For this reason, they do not offer a complete account of what happens in countries like Brazil, Hungary, and India, where a dysfunctional political system induces atypical institutional arrangements that influence how courts adjudicate and impact social life.

Brazilian courts —as non-elected and independent bodies— have assumed an unassigned task: the enhancement of democracy through commanding other political institutions to adhere to their duties under the transformative constitutional project. This task is not evident to the traditional constitutional mainstream in Brazil and elsewhere, especially when it involves a strong review and structural injunctions. However, I offered a critique of the critique for this adjudicative pattern: this unfamiliar role does fit the institutional arrangement of unhealthy democracies, but must not be taken without limits.

[120] *See* Keith E. Whittington, *Political Foundations of Judicial Supremacy* (Princenton University Press ed., 2007); See also Diana Kapiszewski, Gordon Silverstein, and Robert Kagan (editors), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge Press, 2013).

The concept of mis-enforcement motivates a project that simultaneously (i) accepts that courts hold an important role in fixing democratic asymmetries within atypical political environments —such as in the case of the right to health—, but also (ii) denounces that they may end up assuming a populist approach if they overlook their counter-majoritarian task and the institutional arrangements within which they interact. Therefore, accommodating representativeness and counter-majoritarianism, under a problem-solving perspective, requires rethinking the way that courts (i) address social reality and legal norms, and (ii) choose and design their outputs. The health care-related litigation case brought evidence of how courts may significantly contribute to enhance democracy, but also of how courts may cause disasters if they don't have eyes wide open regarding *how institutions and structures of power really operate, how agents really interact, and what kind of trade off any choice implies*. An accurate diagnosis of the mis-enforcement phenomenon —and its uncertainties, complexities, and imperfections— invites structural redesign by departing from the current problematic stage through a multi-step process of reasoned and ranked interventions. This will make it possible to gradually remove or reshape dysfunctional elements of the litigation system towards a more effective operation.

This work proposed a few practical guidelines to address and to qualify this experience of judicial practice that has been long misrepresented: disincentives for individualized claims, reform of the collective action system, enhancement of the dialogical capacity of the courts, and reshaping of the ties between rights and remedies. These guidelines are far from enough; more structural changes are imperative. The permanent question should be how the components of the judicial review system —procedures, remedies, and levels of scrutiny, among others— should be improved to ensure that their substantive moral outcomes would reflect the constitutional values. A procedure designed for private law litigation can no longer accommodate complex public law issues, as well as a closed conception of law does not fit in a fast-changing reality. Transformative constitutional projects do not coexist with fossilized legal structures.

It is time to look at this prospectively and assume some challenges. Developing countries with dysfunctional democracies demand specific theoretical constructions that consider their own political issues and constitutional experiences. Transplants of doctrines and norms without minimal contextual check have been a pervasive and perverse practice undertaken by developing countries' scholars. Those new approaches should also bridge constitutional law to other sciences, especially political science and social theories, without implying an abduction of legal concepts —as it has already occurred in the past— but rather a transparent compromise of bringing data to courts while bringing data to evaluate how courts work.

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