Washington University
Global Studies Law Review

VOLUME 18 NUMBER 3 2019

BEYOND MINIMALISM AND USURPATION: DESIGNING JUDICIAL REVIEW TO CONTROL THE MIS-ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS

PEDRO FELIPE DE OLIVEIRA SANTOS *

ABSTRACT

Two opposing arguments–judicial restraint and judicial activism–have polarized the constitutional law debate on the judicial enforcement of socio-economic rights in developing countries. The former argues that judicial under-enforcement would be preferable to judicial over-enforcement of rights, so that courts should adopt weak remedies when implementing policies and legislation. The latter argues the contrary, prescribing strong review as an efficient mechanism of enforcement. Drawing on empirical research on the right to health care-related litigation in Brazil, this work presents evidence that constitutional law has fallen into a false dichotomy. Neither of these two arguments offers a complete account of the core of the case of the judicial implementation of socio-economic rights: the mis-enforcement of rights, a scenario in which the protection of a target group causes unintended distributive and aggregate effects that increase overall inequality. As the empirical findings demonstrate, under the Brazilian institutional arrangements, with characteristics shared by other developing countries, mis-enforcement may arise from both under- and over-enforcement of rights. For this reason, the level of review alone is an insufficient criterion to build a

* Federal Judge, Brazil. PhD in Law candidate, University of Oxford, Mansfield College. LL.M., Harvard Law School. LL.B., University of Brasilia. Professor of the Judicial School of the Brazilian Federal Court for the 1st Circuit.

universal formula of judicial decision-making in socio-economic rights-related litigation. Besides, two overlooked structural factors may be the root of the mis-enforcement issue: a litigation system focused on individualized lawsuits, as well as a formalist rights-based legal reasoning adopted by courts, which disregards institutional arrangements and costs of compliance with rulings. In order to reorient the debate, this paper argues that judicial enforcement of socio-economic rights is legitimate as long as it commits to 1) enriching the political process, mainly by pushing issues back to political players with correct incentives of action and institutional adherence, and 2) fixing minor counter-majoritarian issues related to the distribution of limited public resources, mainly by guaranteeing basic needs to the most disadvantaged groups. Instead of adopting a universal formula of judicial review, this dual purpose requires courts dealing with socio-economic rights implementation to enhance their actual institutional capacities in order to build case-by-case remedies that 1) take into account issues more likely to arise in this kind of litigation, such as types of needs and recipients, and distributive and aggregate impacts of rulings; as well as 2) promote political engagement, institutional accountability, and democratic representativeness.

INTRODUCTION

In September 2015, access to phosphoethanolamine was interrupted for cancer patients taking part in drug trials at the São Paulo State University.[1] Administrators at this prominent public institution acted to prohibit researchers from distributing unregistered substances. Despite a lack of scientific evidence of phosphoethanolamine's efficacy when used in humans, the Department of Chemistry had been producing and distributing it free of charge, claiming an ability to kill tumor cells.[2]

In October 2015, the Brazilian Supreme Court agreed with a claim brought by an individual plaintiff, and reestablished her access to phosphoethanolamine.[3] Justice Fachin issued a provisional ruling stating that the São Paulo State University was to allow the plaintiff, a terminal cancer patient, to continue receiving the phosphoethanolamine.[4] This ruling called nationwide attention to the alleged benefits of the then-unknown phosphoethanolamine, leading other patients to request access to the same treatment. Subsequently, in February 2016, the university claimed it faced a state of chaos, as more than 8,000 rulings from federal and state courts had ordered its Department of Chemistry to produce and distribute the compound for a multitude of plaintiffs. In order to comply with the numerous rulings, the university canceled ongoing research, reallocating resources and budgets to transform research labs into pharmaceutical production facilities. This creation of a small pharmaceutical industry was necessary to produce and distribute adequate quantities of needed phosphoethanolamine.[5]

This case is just a short chapter in one of the most discussed topics in developing countries since the third wave of democracy: the judicial enforcement of socio-economic rights.[6] Most of the national constitutions enacted in the last century have entrenched socio-economic rights, as a

---

1 Heidi Ledford, *Brazilian Courts Tussle Over Unproven Cancer Treatment*, 527 NATURE 420, 420-21.

2 *Id*.

3 S.T.F., Pet. 5.828 / SP, Relator: Min. Edson Fachin, 07.10.2015, SUPREMO TRIBUNAL FEDERAL JURISPRUDENCIA [S.T.F.J.], 20.10.2015 (Braz), http://portal.stf.jus.br/processos/detalhe.asp?incidente=4862001.

4 *Id*.

5 *See* Ledford, *supra* note 1, at 421. I also express gratitude to Judge Ana Cruvinel for providing insightful comments about this case.

6 For the purpose of this work, I make a distinction between socio-economic 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. *See* International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

movement to transform a set of basic social needs into enforceable entitlements: 144 constitutions have included the right to free education;[7] 142 constitutions have recognized the right to health care,[8] and 138 constitutions have recognized the right to work.[9]

However, the inefficiency of some states in designing policies that guarantee access to socio-economic rights has created complex dynamics of enforcement within which the judiciary plays the protagonist. Perceiving a shortcut to policy implementation, political actors have strategically brought lawsuits against the states asking for rights enforcement. Enrollment in housing policies, construction of schools and hospitals in poor communities, and improvement of labor conditions exemplify the typical claims being brought. In response, courts of developing countries have massively reviewed policies and legislation in favor of plaintiffs. For instance, since the 1990s, the Constitutional Court of South Africa has released remarkable decisions enforcing the right to housing,[10] the right to health care and access to HIV/AIDS treatment,[11] and the right to social security.[12] In the same fashion, the Indian Supreme Court ordered the Government of West Bengal to design a plan guaranteeing adequate medical facilities for dealing with health emergency cases, after eight hospitals in Calcutta had refused to admit a patient, as vacant beds were not available.[13] Significant cases may also be found in Brazil, Pakistan, Colombia, and Hungary, among other countries.[14]

This Article evaluates the involvement of courts in the implementation of socio-economic rights, in order to confront the two main arguments formulated by constitutional law scholars to address this topic. Scholars have split into two lines–minimalism versus activism–as if they were mutually exclusive packages, leading to an endless discussion regarding the ideal level of judicial enforcement of socio-economic rights. Both lines have been inspired by the American literature on the political roles of

---

7 CONSTITUTE PROJECT, https://www.constituteproject.org/search?lang=en&key=edfree&status=in_force&status=is_draft (last visited Feb. 23, 2019).

8 *Id*.

9 *Id*.

10 *South Africa v. Grootboom* (11) BCLR 1169 (CC).

11 *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.).

12 *Khosa v. Minister of Soc. Dev., Mahlaule v. Minister of Soc. Dev*. 2004 (6) SA 505 (CC) (S. Afr.).

13 *Paschim Banga Khet Mazdoor Samity v. West Bengal*, AIR 1996 SC 2426 (India).

14 *See* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW (Malcolm Langford ed., 2008).

courts and on the legitimacy of the judicial review.[15]

The first line generally regards judicial enforcement of socio-economic rights as a usurpation of administrative and legislative functions. Thus, judges are prescribed a minimalist, restrained behavior, due to their alleged lack of democratic legitimacy to interfere in other branches, as well as their asserted lack of institutional capacity in dealing with costly rights.[16] For this reason, courts should neither redefine social interests solidified by democratic institutions nor indirectly reallocate the state budget, allowing the executive and legislative branches to formulate policies at their discretion and pace. In this view, judicial under-enforcement would be preferable to the over-enforcement of rights.

Conversely, the second line has depicted the enforcement of socio-economic rights as a plausible legitimate task constitutionally assigned to courts, especially given the other branches' reiterate procrastination in delivering the social benefits recognized by the constitution. Positive social change resulting from the realization of a right helps preserve the constitutional normativity and justifies court intervention in policies and legislation. Under these assumptions, judicial over-enforcement would be preferable to the under-enforcement of rights.

In sum, the first line adopts a deontological perspective, since an abstract, previously asserted lack of democratic legitimacy is taken as sufficient criterion to limit court action. By contrast, the second approach takes a consequentialist perspective, since the social, moral and normative impacts of rulings are taken as concrete sources of judicial legitimacy, and thus sufficient criteria to encourage court action.

In following the same pattern, and also inspired by the American scholarship on judicial review, constitutional law scholars have moreover contrasted between two strengths of remedies to address the issue. Under *strong review*, courts may strike down and redefine statutes, as well as impose structural injunctions on the government.[17] Under *weak review*, courts recognize a rights violation, but may not enforce the constitution on

---

15 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 J. LEGAL STUD. 49 (2010).

16 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. *See* CASS SUNSTEIN & STEPHEN HOLMES, THE COST OF RIGHTS: WHY YOUR LIBERTY DEPENDS ON TAXES (2000).

17 Fallon, *supra* note 15, at 1706.

the same ground,[18] thus engaging in dialogical mechanisms to reduce tensions between courts and self-governance.[19] Mark Tushnet and Cass Sunstein have long advocated for the weak form of judicial review.[20]

This Article adopts as a case study the judicial enforcement of the right to health care in Brazil, which currently represents the most problematic field of public law litigation in this country, with 392,921 in-progress lawsuits in 2014 accusing the state of ignoring this constitutional right.[21] Drawing on data collected by the Human Rights Clinic at Harvard Law School,[22] the Brazilian National Council of Justice, the Brazilian Ministry of Health, and the State of São Paulo, as well as opinions of the Brazilian courts, it will provide an overall picture of the health-related litigation and its social impacts.

The empirical findings support the hypothesis that the constitutional law debate on judicial enforcement of socio-economic rights has fallen into a false dichotomy. Neither of the mainstream models–judicial restraint and judicial activism–offers a complete account of the topic at stake. The focus of the debate on the ideal level of judicial intervention in policies and legislation hides the core of the issue: the mis-enforcement of rights, a scenario in which the protection of a target group causes unintended, unjustified distributive and aggregate impacts that increase overall inequality.

This scenario, at first glance, seems to weigh against the activist perception that judicial enforcement of socio-economic rights favors disadvantaged groups and enhances equality, which would lead arguments prescribing judicial minimalism or absenteeism to prevail. Indeed, in a

---

18 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 (2008) [hereinafter TUSHNET, WEAK COURTS]. *See also* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); Mark Tushnet, *Abolishing Judicial Review*, 27 CONST. COMMENT. 581 (2011); Mark Tushnet, *The Rise of Weak Form Judicial Review*, *in* COMPARATIVE CONSTITUTIONAL LAW 321 (Tom Ginsburg & Rosalind Dixon eds., 2011) [hereinafter Tushnet, *Rise of Weak Form*]; Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825 (2008).

19 *See* Tushnet, *Rise of Weak Form*, *supra* note 18, at 321.

20 *See generally* sources cited *supra* note 18.

21 CONSELHO NACIONAL DE JUSTIÇA, RELATÓRIOS DE CUMPRIMENTO DA RESOLUÇÃO CNJ N. 107 (National Forum of Health-related Litigation Report), http://www.cnj.jus.br/images/programas/forumdasaude/demandasnostribunais.forumSaude.pdf (last visited Jan. 9, 2016).

22 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 & Siri Gloppen eds., 2011). This data was released by the International Human Rights Clinic at Harvard Law School's Human Rights Program.

number of cases, courts have issued strong remedies to provide middle class individuals with non-basic services, negatively affecting the most disadvantaged people, who would otherwise have benefited through regular policies.[23] However, evidence also demonstrates that, under the Brazilian institutional arrangements, with characteristics shared by other developing countries, weak and dialogical remedies have not induced real policy implementation in a number of other cases.[24] When political institutions are not keen to dialogue with courts, or when the political process seems obstructed, weak remedies have contributed to preserve a status of rights violation. In practice, this scenario has left untouched a distribution of limited resources that may have adversely damaged disadvantaged individuals who would otherwise have benefited if protection had not been denied.

On the contrary, successful cases of both under- and over- enforcement scenarios have also been found. For instance, in the late 1990s, many courts imposed structural injunctions to provide individual plaintiffs with HIV/AIDS drugs. The aggregate impact of the rulings incentivized the government to formulate a policy of universal access to HIV/AIDS treatment.[25] On the other side, dialogical remedies imposed to provide hospital beds to patients with health emergencies have proved successful in the Federal Court for the First Circuit.[26] In sum, in dysfunctional political environments, as in Brazil, both strong and weak review have led to both successful and tragic outcomes.

Overall, the evidence allows us to conclude that the scenario of mis-enforcement has no necessary connection with either under- or over-enforcement of socio-economic rights, as mis-enforcement may arise from both. Indeed, causality between under- and mis-enforcement, or between over- and mis-enforcement, has been contingent. Therefore, the strength of review alone is an insufficient criterion to build a formula of judicial decision-making in socio-economic rights-related litigation. The constitutional law dichotomy *minimalism versus activism* fails exactly because it uses the strength of review as the main criteria for defining an ideal picture of court behavior.

Beyond the level of judicial intervention in policies and legislation, two

---

23 *See infra* Section 1.2.

24 *See infra* Section 1.2.

25 Florian F. Hoffman & Fernando R. N. Bentes, *Accountability for Social and Economic Rights in Brazil*, *in* COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD 100, 101, 113-25, 122 (Varun Gauri & Daniel Brinks eds., 2008).

26 *See infra* Section 3.3.

structural circumstances stand out to explain the mis-enforcement phenomenon. The first is the formalist, rights-based legal reasoning adopted by courts (a pathology that Daryl Levinson calls "rights essentialism").[27] The second is the structure of the litigation system, which privileges individualized claims over collective actions, even though both may address individual rights. Both structural factors restrain judges from addressing not only issues regarding institutional arrangements, but also issues more likely to arise in socio-economic rights-related claims, such as the costs of implementing rights, the distributive and aggregate impacts of the rulings, and the types of needs and the groups of beneficiaries that deserve priority given budgetary constraints. This amalgam imposes social costs that affect the legitimacy and the efficiency of the judicial intervention in socio-economic issues.

According to Richard Fallon, "[i]f 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."[28] He further notes that "[t]he fairness and political legitimacy of procedural mechanisms depend on the ends that they serve."[29] Taking these insights as premises to be applied to reorient this debate, this Article argues that judicial enforcement of socio-economic rights is legitimate as long as it commits to two aspects. First is enriching the democratic process, especially by pushing issues back to political players with correct incentives to act and institutional adherence wherever possible. Very basic claims on health care have been brought before courts because the enforcement of rights through regular political mechanisms has failed. In these circumstances, courts may function as catalysts, by fixing obstructed political channels

---

27 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.

Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 857-58 (1999). 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." *Id*. at 858. *See also* Charles F. Sabel, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1054.

28 Fallon, *supra* note 15, at 1735.

29 *Id*.

and inducing positive social impact with reduced risk of mis-enforcement. Second is fixing minor counter-majoritarian issues related to the distribution of limited public resources, especially by guaranteeing basic needs to the most disadvantaged groups.[30]

Achieving this dual purpose requires courts to abandon the exclusive choice between weak and strong review, because "rights may be more or less entrenched, as may the guarantee of judicial review as a mechanism to enforce fundamental rights."[31] The binary discussion does not fit the complexity of rights enforcement in dysfunctional political environments. Expanding the spectrum of choices allows courts to navigate the vast range of combinations of procedures, remedies, interpretations of rights, level of scrutiny,[32] and their possible outcomes. In some situations, courts may find that weak remedies would be sufficient, while other cases may require stronger incentives of state action.

In doing so, courts should enhance their institutional capacities in order to build case-by-case remedies linked to institutional arrangements. This calls for a *design approach*: constitutional law should focus on supplying courts with expertise in building procedures and remedies that minimize mis-enforcement and promote institutional accountability, political engagement and democratic representativeness with the lowest possible level of intervention.

This enterprise takes for granted that socio-economic rights are justiciable. In the Brazilian institutional context, with characters also shared by other developing countries, there is no room 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 judicial enforcement. If the state does not observe a right granted by the Constitution, the courts should 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 as a check on the other branches of government, by enhancing democracy under the counter-majoritarian task.[33] Despite some fair criticism, there has been a global movement in

---

30 *See* Matthew Stephenson, *Does Separation of Powers Promote Stability and Moderation?*, 42 J. LEGAL STUD. 331, 333-37 (2013).

31 Fallon, *supra* note 15, at 1733.

32 KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS 137 (2012).

33 *See* Matthew Stephenson & Justin Fox, *Judicial Review as a Response to Political Posturing*,

which courts "have clearly become part of the social and economic policy setting and enforcement across the world."[34] For this reason, this Article does 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 unlimited power. By emphasizing their importance as the last resort of enforcement, this work's purpose is to draw guidelines to improve judicial intervention in order to undermine the issue 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. It presents empirical data that support 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 environment, and to show how political conditions affect the debate over judicial review. Part three develops some theoretical premises adopted 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, which also could be applied to other countries.

1. JUDICIAL ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS: A CRITIQUE OF THE CRITIQUE

1.1. The case study: purposes and justification

In this section, I draw on the findings of empirical research undertaken by the Human Rights Clinic at Harvard Law School on judicial enforcement of the right to health in Brazil from 2009 to 2011.[35] These findings are supplemented with data provided in 2015 by the Brazilian Justice National Council, the Ministry of Health, and the State of São Paulo. This information is used to provide a high-level picture of the enforcement of the right to health in Brazil, over which some conclusions are drawn, 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

---

105 AM. POL. SCI. REV. 397 (2011); *see also* Matthew Stephenson, *The Welfare Effects of Minority-Protective Judicial Review*, 27 J. THEORETICAL POL. 499 (2015).

34 Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1, 63 (2009).

35 *See* Ferraz, *supra* note 22, at 83.

in Brazil. The first reason is the magnitude of this litigation. There is no accurate data on the lawsuits involving other socio-economic rights, whereas the numbers of health-related lawsuits are available and staggering: almost 400,000 in progress as of June 2014.[36] A shared common sense prevails among legal professionals–judges, public attorneys, lawyers, and others–that health-related litigation outweighs litigation on any other socio-economic right in Brazil. Its impacts have raised institutional concerns: in 2009 the Brazilian Supreme Court (STF) held a public hearing to discuss the issue.[37] Players from the executive, legislative, and judicial branches, NGOs, academics, and medical professionals participated.[38] 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.[39] 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.[40]

The second reason for this case study is pragmatic. There is surprisingly little empirical research on the enforcement of socio-economic rights in Brazil. Thus, health data is doubly useful. Not only is the enforcement of the right to health available, there is much more comprehensive data available than for the few other socio-economic rights that are researched. Political institutions have never given much attention to the impact of this litigation on other socio-economic rights, which jeopardizes any attempt at accurate analysis.

1.2. The case study: the judicial enforcement of the right to health care in Brazil and its associate discourses

Discussions of health-related litigation disclose a conflict between two arguments. The first argument is that courts positively enforce constitutional rights, filling the gap left by the executive and legislative

36 CONSELHO NACIONAL DE JUSTIÇA, *supra* note 21.

37 *Public Hearing on the Right to Health Care*, SUPREMO TRIBUNAL FEDERAL, http://www.stf.jus.br/portal/cms/verTexto.asp?servico=processoAudienciaPublicaSaude (last visited Feb. 25, 2019).

38 *Attendees*, SUPREMO TRIBUNAL FEDERAL, http://www.stf.jus.br/portal/cms/verTexto.asp?servico=processoAudienciaPublicaSaude&pagina=Cronograma (last visited Feb. 25, 2019).

39 *Fórum da Saúde*, CONSELHO NACIONAL DE JUSTIÇA, http://www.cnj.jus.br/programas-e-acoes/forum-da-saude (last visited Mar. 28, 2019).

40 *Id.*

branches: *judicial enforcement reduces inequality, improves the distribution of goods, and thus enhances democracy*. The second argument is that courts negatively interfere with established public policies, and that courts also lack capacity 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 neither argument is accurate. Scholars usually embrace either the first or the second argument, as if they were mutually exclusive packages, where the validity of one necessitates the invalidity of the other. However, judicial enforcement of socio-economic 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).[41] The figure has been progressively increasing every year. The State of São Paulo informed the NCJ that 11,633 new claims were registered in 2011, 12,031 in 2012, 14,080 in 2013, 14,383 in 2014, and 18,045 in 2015.[42] Each of those cases was filed against the government (the federal union, the states, and/or municipalities).[43] The research did not include claims against private health insurers or other private players.

Most health-related lawsuits are individualized. An individual 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% of the claims in the federal courts were individual; only 3% were collective actions.[44] According to the State of São Paulo, collective claims amounted to 7% of the actions in 2010.[45]

The claims are diverse, but most of them ask for the provision of

---

41 CONSELHO NACIONAL DE JUSTIÇA, *supra* note 21.

42 CONSELHO ESTADUAL DE SAÚDE DE SÃO PAULO, JUDICIALIZAÇÃO–SP 10 (2016), http://www.saude.sp.gov.br/resources/ces/homepage/imagens-noticias/judicializacao_-_sp_-_braganca.pdf.

43 *Id*. at 17.

44 *See* Ferraz, *supra* note 22, at 87.

45 Michel Naffah Filho, Ana Luisa Chieffi & 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), http://periodicos.ses.sp.bvs.br/scielo.php?script=sci_arttext&pid=S1806-42722010001200003&lng=es&nrm=iso&tlng=pt (last visited Mar. 27, 2019).

medicines. The State of São Paulo reported that 66.1% of the lawsuits in 2010 involved access to drugs, whereas 30.5% involved medical services, such as surgeries and beds in hospitals.[46]

The costs of compliance are 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 municipalities spent a total of R$2 billion (US$1 billion) to comply with judicial decisions.[47] 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.[48] In São Paulo, those numbers increased to R$547 million in 2014, and to R$1 billion in 2015.[49]

Verifying the social impact. This part confronts the general data with distributive standards. This Article assumes that, if courts adopt the argument that enforcing socio-economic rights is a matter of distribution of goods, any reasonable evaluation should look at the group of persons benefited, the types of services that courts have ordered, and the services' equivalent costs.

The 1988 Constitution provides the right to health for all citizens. Articles 196 and 197 state that health care is a universal right and imposes a duty to the state to furnish equitable access to social policies:

> Article 196. Health is the right of all and the duty of the National Government and shall be guaranteed by social and economic policies aimed at reducing the risk of illness and other maladies and by universal and equal access to all activities and services for its promotion, protection and recovery.[50]
>
> Article 197. Health activities and services are of public importance, and it is the Government's responsibility to provide, in accordance with the law, for their regulation, supervision and control. Such

---

46 *Id*. at 27.

47 *See* Ferraz, *supra* note 22, at 83.

48 *Id*.

49 CONSELHO ESTADUAL DE SAÚDE DE SÃO PAULO, *supra* note 42; *see also SP cria ofensiva para combater 'judicialização' da Saúde*, SECRETARIA DE ESTADO DA SAÚDE, http://www.saude.sp.gov.br/ses/noticias/2016/abril/sp-cria-ofensiva-para-combater-judicializacao-da-saude (last visited Mar. 27, 2019).

50 CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 196 (Braz.) (transl. by author).

> activities and services shall be carried out directly or through third parties and also by individuals or legal entities of private law.[51]

However, rights have costs, and budgetary resources are limited.[52] 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 from public programs. From this perspective, enforcing a socio-economic right in fact means 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 all citizens having the same constitutional right to health. This reasoning explains why approximately 80% of the claims receive an affirmative judgment.[53] 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 entitled to the right*, which 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,"[54] as part of an invisible bargaining process that involves a tradeoff between plaintiffs and third parties. I'll refer to those effects as background rules, or a second code of norms.

Aggregate effects represent the sum of similar judicial interventions or abstentions. Ruling that the state must provide one 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

---

51 CONSTITUIÇÃO FEDERAL [C.F.] art. 197 (Braz.) (transl. by author).

52 *See generally* SUNSTEIN & HOLMES, *supra* note 16.

53 *See* Ferraz, *supra* note 22, at 87.

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

health care budget.

Distributive effects concern how judicial intervention or judicial abstention alters the allocation of budget in favor of some individuals and affects third parties. Courts generally 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 ongoing policies by excluding some groups who would otherwise benefit.

Thus, aggregate and distributive effects define whether judicial intervention or judicial abstention satisfies the constitutional counter-majoritarian task 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."[55] However, "the north and the northeast together, with 36 percent of the Brazilian population, accounted for only 7.5 percent of the total."[56] In the federal courts, "the ten states with the highest HDI (above 0.8) together have generated 93.3% of lawsuits . . . , whereas the other seventeen states with the lowest HDI (below 0.8) together have originated a meager 6.7 percent of lawsuits."[57] In conclusion, the researchers noticed that "the higher a region's level of socio-economic development, the more likely it is to have a high volume of health litigation."[58]

This pattern has worsened. According to official data released by the National Council of Justice, in 2015, 302,065 out of a total of 330,630

55 *See* Ferraz, *supra* note 22, at 88.
56 *Id*.
57 *Id*.
58 *Id*. at 88.

lawsuits were concentrated in the southern and southeastern state courts.[59] 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. The concentration increased from 85% in the period of 2007-2009 to 91% in 2015.[60]

Although this data suggests that judicial enforcement has mostly benefited the two richest regions of the country, this macro-level picture must be examined critically. Even though the south and the southeast are the most developed areas in Brazil, they are also home to 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-level 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, specific data released by the state of São Paulo was collected. In 2015, the litigation-related expenses on health reached more than R$1 billion, but only 0.01% of the population benefited.[61] In 2014, 60.45% of the claimants presented medical prescriptions signed by private doctors as evidence before courts.[62] This finding supports the argument that the majority of plaintiffs do not normally use the public system, 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$20 billion. The costs of compliance with the courts'

---

59 CONSELHO NACIONAL DE JUSTIÇA, *supra* note 21. The Brazilian southern courts are TJRS (Rio Grande do Sul State Court), TJSC (Santa Catarina State Court), and TJPR (Paraná State Court). The southeastern courts are TJMG (Minas Gerais State Court), TJRJ (Rio de Janeiro State Court), TJSP (São Paulo State Court), and TJES (Espírito Santo State Court).

60 *Id*.

61 *SP cria ofensiva para combater 'judicialização' da Saúde*, *supra* note 49; *see also Judicialização da saúde em São Paulo aumenta 92% em cinco anos*, ANAHP (Sept. 13, 2016), https://www.anahp.com.br/noticias/noticias-do-mercado/judicializacao-da-saude-em-sao-paulo-aumenta-92-em-cinco-anos/.

62 CONSELHO ESTADUAL DE SAÚDE DE SÃO PAULO, *supra* note 42.

rulings consumed R$1 billion. Comparatively, all of the state public hospitals consumed around R$3 billion in 2014, among them the *Hospital das Clínicas*, the biggest Brazilian public hospital, whose budget amounted to R$1.5 billion in the same period.[63]

Another dimension of the disparities of distribution: in 2006, the State of São Paulo 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 the average judicial plaintiff cost R$18,000, whereas the average patient benefited through the policy cost R$2,200.[64]

In order to implement the health care policies, the government of São Paulo divided the state into seventeen administrative regions.[65] 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 poorest region, Registro, had the lowest litigation index (0.25 claims per 10,000 inhabitants).[66]

Within the municipality of São Paulo, research undertaken in 2006 found that plaintiffs in 73% of the cases that involved drugs were "patients from the three wealthiest areas in the city."[67] This finding suggests that the judicial enforcement on health privileged "individuals with higher purchasing power and more access to information,"[68] 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

---

63 ORÇAMENTOS FISCAL, DA SEGURIDADE SOCIALE DE INVESTIMENTOS DAS EMPRESAS, GOVERNO DO ESTADO DE SÃO PAOLO, ORÇAMENTO DO ESTADO 2015, 181 (2015), https://www.al.sp.gov.br/repositorio/legislacao/lei/2014/lei-15646-23.12.2014.pdf; *see also* GOVERNO DO ESTADO DE SÃO PAOLO, RELATORIA 1O QUADRIMESTRE 17 (2014), http://www.saude.sp.gov.br/resources/ces/homepage/imagens-noticias/relatorio_1_quad_2014_20_05_5.pdf.

64 *See* Ana Luiza Chieffi & Rita Barradas Barata, *Ações Judiciais: Estratégia da Indústria Farmacêutica para Introdução de Novos Medicamentos*, 44 REV. SAÚDE PÚBLICA 421, 427 (2010).

65 *See* CONSELHO ESTADUAL DE SAÚDE DE SÃO PAULO, *supra* note 42, at 11.

66 *Id.* at 14.

67 Ana Luiza Chieffi & Rita Barradas Barata, *Judicialização Da Política Pública De Assistência Farmacêutica e Eqüidade*, 25 CAD. SAÚDE PÚBLICA 1839, 1839 (2009).

68 *Id.*

of the costs of all right-to-health litigation in 2009."[69] In addition, according to the Ministry of Health, the cost of compliance involving the forty most expensive drugs amounted to $431 million in 2013, which represented 54% of the whole state budget for exceptional medications.[70] The most common medicines requested were not related to the more neglected diseases, such as Chagas, dengue, or leprosy, diseases 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 into the market, by funding patients' litigation costs. Researchers from the state of São Paulo identified the existence of a market for lawsuits by assessing "the distribution of lawsuits aiming at identifying the dispersion or concentration of the legal professionals filing these suits."[71] They found 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

---

69 Ferraz, *supra* note 22, at 92.

70 TRIBUNAL DE CONTAS DA UNIÃO, RELATÓRIO SISTE^MICO DE FISCALIZAC¸ÃO DA SAÚDE 24 (2015), https://portal.tcu.gov.br/lumis/portal/file/fileDownload.jsp?fileId=8A8182A253234F6C015351CDC9B51A70&inline=.

71 Chieffi & Barata, *supra* note 64, at 421-22. 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.

Id. (Translation at http://www.scielo.br/pdf/rsp/v44n3/en_05.pdf).

terms of usage."[72] 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."[73] For instance, "only 36 lawyers were responsible for filing 76 percent of the cases."[74] The same research was undertaken in the state of Minas Gerais and found the same unusual association between doctors and law firms on judicial requests for drugs.[75] These findings do not conclusively establish that pharmaceutical companies are subsidizing lawsuits as a strategy to market their products, but the body of 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% 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, of which a considerable part consists of non-basic services; 4) the cost 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 benefited if the same amount of money had been applied to the existing programs; 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

---

72 *Id*. at 424.
73 *Id*. at 425.
74 *Id*.
75 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.

Campos Neto OH, *Doctors, Lawyers, and Pharmaceutical Industry on Health Lawsuits in Minas Gerais, Southeastern Brazil*, 46 REV. SAÚDE PÚBLICA 784, 785 (2012).

of mis-enforcement of rights and to explain how informal rules undermine the courts' general discourse that enforcing socio-economic rights enhances equality.

1.3. The concept of mis-enforcement of rights

The last section provided evidence that the judicial enforcement of socio-economic rights involves a complex dynamic among players that transcends the relationships between 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 framing are the background rules that structure these dynamics. 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, ruled by 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."[76] 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–also referred to as negative rights and first-

76 Hoffman & Bentes, *supra* note 25, at 101.

generation rights–from the enforcement of socio-economic rights–also referred to as positive rights and second-generation rights. It is taken for granted that both impose budgetary constraints, as the traditional distinction between negative and positive rights has proved false.[77] For instance, granting the right to vote requires a budget to maintain the electoral system. In the same way, the enforcement of the right to property demands regulatory and security mechanisms, which entail costs. In sum, even negative rights presuppose a regulatory, or at least a supervisory system.

One may argue that second-generation rights are always more expensive than first-generation rights. In Brazil, the Ministry of Health has the third highest budget in the federal government, the second highest of which is the social security system, followed in close succession by the programs of education, social labor, and social assistance.[78] 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. Tushnet notes that distinct contexts may result in different costs, so that political and individual rights may be more expensive in some situations.[79]

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."[80] In contrast, second-generation rights are described very precisely in budget statements, with the result that the government directly notices the impact caused by rulings.

It is possible to develop these reservations further. Compared to individual rights, socio-economic rights are, to a greater extent, progressively and asymmetrically implementable, with the possible combination of three axes: needs (the services covered), beneficiaries (the population covered), and costs (the proportion of costs covered).[81]

Progressive implementation means that even though second-generation

---

77 *See* SUNSTEIN & HOLMES, *supra* note 16, at 37-48.

78 TRIBUNAL DE CONTAS DA UNIÃO, *supra* note 70, at 3.

79 Mark Tushnet, *Reflections on Judicial Enforcement of Social and Economic Rights in the Twenty-First Century*, 4 NUJS L. REV. 177, 180 (2011). For an investigation into the obligations imposed by positive rights, see SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES (2008).

80 *See* Tushnet, *supra* note 79, at 180.

81 *See* M. J. Roberts, W. C. Hsiao & M. R. Reich, *Disaggregating the Universal Coverage Cube: Putting Equity in the Picture*, 1 HEALTH SYS. & REFORM 22, 27 (2015). This article 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.

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 towards universal and equal coverage under reasonable justification based on the three axes. For instance, the World Health Organization proposes a plan towards universal health 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.[82]

Oriented asymmetrical implementation means that second-generation rights are constitutionally protected in order to address social and economic inequality and redistribution of goods to a greater extent than the first-generation rights. Unlike freedom of speech, the right to vote, and property rights, socio-economic 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 socio-economic 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 judicial review is more likely to enhance equality if it orients state efforts towards benefitting disadvantaged groups in order to provide basic needs. It is not a decision concerning socio-economic rights; it is a decision concerning needs and beneficiaries.

The empirical data indicate that this premise has been found false in a number of 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

82 *See* WORLD HEALTH ORG., MAKING FAIR CHOICES ON THE PATH TO UNIVERSAL HEALTH COVERAGE (2014).

them with non-basic needs. There is no specific data as to how often 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 service. In general, if these groups do not regularly use the public system, one interpretation is that they are seeking to "get out" of the system what they "put in"; i.e., they are not getting the services most taxpayers pay for–they are only seeking a narrow band, albeit an expensive band.

There is a counterargument that confronts that data with the taxpayers' profile.[83] 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 socio-economic rights in their favor.

However, this idea does not take into account that even in this situation, 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 socio-economic 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 points should be noted. First, the criticism captured in my concept of mis-enforcement does not require the conclusion that courts must not benefit non-disadvantaged groups or enforce (non-basic) services at all. The point is rather that, if courts intend the equality-based argument to justify their reasoning, they should address distributive and aggregate

83 I am grateful to professor Duncan Kennedy for providing great insights on this argument.

impact and informal norms that influence enforcement of socio-economic 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."[84] 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."[85]

I would not be so conclusive. The data suggest that the concept of the mis-enforcement of rights is applicable to some, but not all of the rulings. In fact, a number of judicial interventions achieved positive social outcomes, including incentivizing the government to improve the public health care system. Additionally, the empirical findings also allow the conclusion that a significant amount of disadvantaged people benefited from litigation.[86] On the one hand, the Government of São Paulo affirms that 60% of plaintiffs of drug-related suits relied on prescriptions signed by private doctors. According to state officials, these claimants are likely private systems users, and, for this reason, not disadvantaged individuals. On the other hand, up to 40% of the claimants relied on prescriptions signed by doctors of the public system, which would be evidence of being economically disadvantaged. This percentage is not insignificant.[87] 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. In the same way, many reasonable hypotheses could be developed to contradict the presumptions of some state officials. In fact, the evidence also supports the first argument that *judicial enforcement reduces inequality, improves the*

84 *See* Ferraz, *supra* note 22, at 100.
85 *Id*.
86 *See supra* Section 1.2.
87 CONSELHO ESTADUAL DE SAÚDE DE SÃO PAULO, *supra* note 42; *see also supra* Section 1.2.

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 socio-economic rights: to conclude that courts can induce the mis-enforcement of socio-economic 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 socio-economic 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 socio-economic rights (or, in a broader sense, whether courts may intervene in the executive and legislative acts); and second, how courts must interpret socio-economic 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 on a 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 addressed in the first section. On the 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 side, 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% 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, 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.[88] This operation overlooked the fact that even the American godfathers of weak judicial review did not treat it as a binary discussion,[89] 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 socio-economic rights. As Roberto Unger states, the twentieth century legal discourse is spelled through the language of policies and impersonal principles.[90] This motif is systematically reproduced in the decisions delivered by courts. Both

---

88 For discussion of the American legal scholarship, see sources cited *supra* note 15.

89 *See* TUSHNET, WEAK COURTS, *supra* note 18, at 263-64.

90 Roberto Unger, on the *method of reasoned elaboration*, the dominant legal practice of the twentieth century, stated that

> [t]he 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.

ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK 5 (2015); *see also* ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME (1996).

concessive and restrictive decisions adopt the categories of *rights* and *interests* as keywords. The mainstream debate has focused mainly on the correct interpretation to be given to rights and interests.[91] However, limited attention has also been given to analyzing the constraints that this mode of reasoning imposes on the judgments that courts deliver, and even on institutional innovation. Cases of mis-enforcement of rights are taken as a deviation from 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 included. Are the remedies adequate for a desirable enforcement? What is the desirable pattern of enforcement of socio-economic 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 resolving the debate over the enforcement of socio-economic 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 repeatedly cited statement by the Federal Court of Appeals for the First Circuit that "[t]he 1988 Constitution transformed the health care from a simple benefit into a justiciable right."[92]

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 govern 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

---

91 *See* Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 86 (Sujit Choudhry ed., 2006).

92 TRF-1, 0028464-45.1995.4.01.0000, Relator: Juiz Leite Soares, 30.11.1995, https://arquivo.trf1.jus.br/PesquisaMenuArquivo.asp?p1=9501326675&pA=9501326675&pN=284644519954010000.

diseases and other health problems, and the universal and equal access to actions and services for its promotion, protection and recovery."[93] The Constitution also designed a hierarchical system of public policies concerning heath care that relied on shared responsibilities among the Union, the states, and the municipalities.[94]

Brazilian constitutional scholars argue that the entrenchment of socio-economic rights in the 1988 Constitution built a legal framework that favored the judicial enforcement of socio-economic rights.[95] They agree that including those rights in the Constitution induced a shift in jurisprudence in the 1990s, since mere programs were elevated to justiciable entitlements.[96] However, it is important to link this circumstance to a broader constitutional and institutional context.

The 1988 Constitution assumed a transformative role.[97] 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.[98] Until the 1980s, constitutional texts had limited importance in the Brazilian legal culture; they were considered as mere political texts that set off the power structures but lacked normative strength.[99] 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.[100]

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 the Brazilian society intended to become: a strong regime of liberties and social rights focused on enhancing equality and reducing poverty, grounded on a liberal market economy. Raising the Constitution to an

93 CONSTITUIÇÃO FEDERAL [C.F.] art. 196 (Braz.) (transl. by author).

94 *See* CONSTITUIÇÃO FEDERAL [C.F.] art. 198 (Braz.).

95 *See* Hoffman & Bentes, *supra* note 25, at 101-04.

96 *Id*. at 108, 111-23.

97 For a discussion of the transformative nature of constitutions, see Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146 (1998).

98 *See* Frances Hagopian & Scott Mainwaring, *Democracy in Brazil: Problems and Prospects*, 4.3 WORLD POL'Y J. 485, 485-86 (1987).

99 *See* LUIS ROBERTO BARROSO, CURSO DE DIREITO CONSTITUCIONAL CONTEMPORÂNEO 100 (7th ed. 2018).

100 *See* Hagopian & Mainwaring, *supra* note 98.

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 to target Brazil's entire multicultural population, and to guarantee that its members were truly represented.

Therefore, 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 arose as a central field among legal topics: no single legal rule and principle could violate the constitutional norms.[101] 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.

On the one hand, the new regime strengthened the fundamental rights–civil liberties and socio-economic rights. The Constitution raised 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.[102] The same elites continued to command the political institutions

---

101 *See* LUIS ROBERTO BARROSO, NEOCONSTITUCIONALISMO E CONSTITUCIONALIZAÇÃO DO DIREITO (O TRIUNFO TARDIO DO DIREITO CONSTITUCIONAL NO BRASIL) 7 (2017), http://www.luisrobertobarroso.com.br/wp-content/uploads/2017/09/neoconstitucionalismo_e_constitucionalizacao_do_direito_pt.pdf.

102 Hagopian & Mainwaring, *supra* note 98, at 485.

under democracy and strongly resisted a transition to more progressive social policies.[103] 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, consolidated behind the scenes and shielded by the rhetorical discourses of change, "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."[104]

Additionally, political parties failed to represent popular aspirations and ideals, which led to Congress' political fragility that has vigorously persisted since 1988. Hagopian denounces the use of governing parties by traditional political elites to maintain the local power, as local elites have commanded political parties and systematically neglected society's needs.[105] Popular support has been obtained through small-scale political favors and bargains, the so omnipresent *clientelism*.[106]

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."[107] 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[108]–formed an amalgam that favored the Colombian Congress to abdicate its power of both designing policy programs and checking executive policies. This same description applies to Brazil. In 2015, thirty-five parties were officially registered in the Superior Electoral Court, many with elected representatives in Congress.[109] Parties 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.[110] As a result

---

103 *Id*. at 485-86.
104 *Id*. at 486.
105 *Id*. at 495.
106 *Id*.
107 *Id*.
108 *See* David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L L.J. 319, 337 (2010).
109 *Partidos políticos registrados no TSE*, TRIBUNAL SUPERIOR ELEITORAL, http://www.tse.jus.br/partidos/partidos-politicos/registrados-no-tselast visited Mar. 28, 2019).
110 *See* Landau, *surpa* note 109, at 330-31.

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 allocation of power, social norms, and even the market are also focal points that emit incentives and disincentives that influence players.[111]

In the Brazilian case, the general argument that entrenching socio-economic 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 powerful courts helped to build this legal framework. Second, judicial activism 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.[112] Courts had to learn how to handle those adverse factors as a matter of balancing the asymmetric correlation of powers. The next subsection will delve deeper into 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, using a genealogical approach.

Brazilian courts played a deferential role in the early years after the 1988 Constitution. This attitude is noticeable not only regarding socio-economic rights, but also regarding most claims for interventions in the

111 I thank Professor Lawrence Lessig for helping me to refine this argument.

112 *See* Landau, *supra* note 108.

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.

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 regulation prevents citizens from exercising constitutional rights regarding nationality, sovereignty and citizenship.[113] The first opinions delivered by the Supreme Court in such actions remained deferential and dialogic. Albeit recognizing constitutional violations due to the absence of rights regulation, the court merely notified the competent agency to address the issue.

In 1991, the case of *Alfredo Ribeiro Daudt v. Federal Union and National Congress* was the first movement towards an incisive behavior.[114] Article 8 of the Provisional Norms of the 1988 Constitution (an appendix of the constitution) recognized a right to receive compensation for damages due to some specific restrictions imposed by the Air Force during the military dictatorship. The norm also stipulated a one-year deadline for the Congress to regulate this right.[115] However, two years passed without Congress having accomplished its task. The Supreme Court then decided to adopt a stronger remedy to protect the normativity of the constitutional norms, and imposed a sixty-day deadline to Congress to approve the necessary regulation.[116] The Justices designed the so-called *normative remedies*, by which courts could command the inactive branch to pass the required regulation, instead of simply notifying it.[117]

The court varied between notifications and normative remedies until the 2007 case of *Education Workers Union v. National Congress*, in which it adopted a stronger remedy under a political context of recurrent legislative omission.[118] In this case, the issue was the lack of regulation of

---

113 *See* CONSTITUIÇÃO FEDERAL [C.F.] art. 5 § LXXI (Braz.).

114 S.T.F., MI 283, Relator: Sepulveda Pertence, 20.03.1991, SUPREMO TRIBUNAL FEDERAL JURISPRUDENCIA [S.T.F.J.], 14.11.1991 (Braz.), http://stf.jus.br/portal/jurisprudencia/listarConsolidada.asp?classe=MI&numero=283&origem=AP.

115 *See* CONSTITUIÇÃO FEDERAL [C.F.] Ato das Disposições Constitucionais Transitórias art. 8 § 3 (Braz.).

116 S.T.F., MI 283, Relator: Sepulveda Pertence, 20.03.1991, SUPREMO TRIBUNAL FEDERAL JURISPRUDENCIA [S.T.F.J.], 14.11.1991, 46 (Braz.), http://stf.jus.br/portal/jurisprudencia/listarConsolidada.asp?classe=MI&numero=283&origem=AP.

117 *See generally id.*

118 *See* S.T.F., MI 708, Relator: Min. Gilmar Mendes, 25.10.2007, SUPREMO TRIBUNAL FEDERAL JURISPRUDENCIA [S.T.F.J.], 30.10.2008 (Braz.), http://stf.jus.br/portal/jurisprudencia/listarConsolidada.asp?classe=MI&numero=708&origem=AP.

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, including the right to strike,[119] and attributed to Congress the duty of regulating the right. However, twenty years passed without Congress having accomplished its duty, preventing workers from lawfully exercising a fundamental social right. The Supreme Court had judged the same issue four times: once in 1996 (case 20),[120] and three times in 2002 (cases 485, 585 and 631).[121] In all these occasions, it had acted deferentially by merely recognizing the lack of regulation and asking Congress to pass the required bill.

However, in 2007, the Supreme Court had grown frustrated with Congress ignoring the Court's holdings. The Supreme Court, recognizing the importance of enforcing social rights, decided that regulations for private sector workers had to be exceptionally applied to civil servants until Congress accomplished its task.[122] This new remedy inaugurated a paradigm of the *writ of injunction* and inspired resolution for other cases.

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. The change was made in order to develop strong remedies to address recurring omissions by the other branches. One may list several other reasons to support this movement: the profile of the Justices and judges appointed during the 1990s; the rise of the Public Prosecution Office and the Public Defense as independent institutions; the recognition of collective rights and the implementation of class actions; and the prominence achieved by the Constitutional doctrine, among others. One cause cannot explain such a very complex phenomenon. However, one must not disregard that decades of widespread

---

119 *See* CONSTITUIÇÃO FEDERAL [C.F.] art. 37 §§ VI, VII (Braz.).

120 *See* S.T.F., MI 20, Relator: Celso de Mello, 19.05.1994, SUPREMO TRIBUNAL FEDERAL JURISPRUDENCIA [S.T.F.J.], 22.11.1996 (Braz.), http://stf.jus.br/portal/jurisprudencia/listarConsolidada.asp?classe=MI&numero=20&origem=AP.

121 *See* S.T.F., MI 485, Relator: Mauricio Correa, 25.04.2002, SUPREMO TRIBUNAL FEDERAL JURISPRUDENCIA [S.T.F.J.], 23.08.2002 (Braz.), http://stf.jus.br/portal/jurisprudencia/listarConsolidada.asp?classe=MI&numero=485&origem=AP; S.T.F., MI 585, Relator: Ilmar Galvao, 15.05.2002, SUPREMO TRIBUNAL FEDERAL JURISPRUDENCIA [S.T.F.J.], 02.08.2002 (Braz.), http://stf.jus.br/portal/jurisprudencia/listarConsolidada.asp?classe=MI&numero=585&origem=AP; S.T.F., MI 631, Relator: Ilmar Galvao, 16.08.2000, SUPREMO TRIBUNAL FEDERAL JURISPRUDENCIA [S.T.F.J.], 22.08.2000 (Braz.), http://stf.jus.br/portal/jurisprudencia/listarConsolidada.asp?classe=MI&numero=631&origem=AP.

122 *See* S.T.F., MI 708, Relator: Min. Gilmar Mendes, 25.10.2007, SUPREMO TRIBUNAL FEDERAL JURISPRUDENCIA [S.T.F.J.], 30.10.2008 (Braz.), http://stf.jus.br/portal/jurisprudencia/listarConsolidada.asp?classe=MI&numero=708&origem=AP.

public demand coupled with the state's recalcitrant failure galvanized judges to undertake more ardent measures to address socio-economic rights. Thus, 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 between those institutions and courts. Eventually, as in Colombia, 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 significant 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.[123] The high percentage of concessive decisions and the support of NGOs pressured the government to design a universal 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 arose in the early 2000s. Hoffman explains 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 . . . dropped to just less than 15 percent by 2000."[124] 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.[125]

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 socio-economic 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.[126] The *democratic proliferation thesis* links the entrenchment of rights and strong forms of judicial review

123 Hoffman & Bentes, *supra* note 25, at 122 (citing MARIO SCHEFFER, ANDEA LAZZARINI SALAZAR, & KARINA BOZOLA GRAU, O REMÉDIO VIA JUSTIÇA: UM ESTUDO SOBRE O ACESSO A NOVOS MEDICAMENTOS E EXAMES EM HIV/AIDS NO BRASIL POR AEIO DE AÇÕES JUDICIAIS (2005)).

124 *See* Hoffman & Bentes, *supra* note 25, at 122.

125 *See id*.

126 Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 IND. J. GLOBAL LEGAL STUD. 71, 73 (2004).

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).[127] 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."[128] 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,"[129] since "delegating policy-making authority to the courts may be an effective means 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."[130] 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.

To this end Hirschl 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."[131] Since their political status is uncertain under the regime about to start, 1) entrenching rights in the constitution preserves their political, social, and economic agenda, and 2) 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.[132]

It is important to reevaluate Brazil's evolution under Hirschl. The 1998 Constitution, beyond introducing a strong bill of rights, unprecedentedly

---

127 *Id*.
128 *Id*. at 82.
129 *Id*. at 84.
130 *Id*. at 84-85.
131 *Id*. at 98.
132 *Id*. at 89.

expanded judicial power to unprecedented levels 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 legal framework, which was an oriented objective of both the constituent and the constituted power, matched an environment of courts seeking 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 socio-economic rights. Brazilian scholars denounce the fact 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 cases. Thus, medical services and medicines that became commonly awarded as 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 exhibited by state officials matches the interest of courts "seeking to increase [their] symbolic power and international prestige, by fostering [their] alignment with a growth community of liberal democratic nations engaged in judicial review and right-based discourses."[133] Institutions naturally engage in their tasks by trying to accomplish their job in the best possible way regarding their own perspectives. As Foucault said, power has purposes and aims.[134] For this reason, appealing to judges' self-constraint sounds like a problematic idea: under liberal democracy, 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 socio-economic rights

133 *Id*. at 97.

134 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME 1: AN INTRODUCTION 95 (Robert Hurley trans., Vintage Books ed., 1990) (1976).

requires struggling with actual institutional arrangements. Debiting the judicial activism solely from the account of the courts does not provide a complete picture 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 socio-economic 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 oriented process of constitutionalizing rights and of strong judicial review created the perfect conditions for a feedback process in which strategic deference by the executive and the legislative branches matched courts' openness to expand their own power. In order to fill the deficit of the 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 socio-economic 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 be considered.

This Article sheds light on the general arguments on judicial enforcement of socio-economic rights. The evidence doubted the hegemony of both: *judicial enforcement may reduce and worsen inequality, may improve or defeat the distribution of goods, and thus may enhance or weaken democracy.*[135]

In this section, this Article argues that there is no necessary connection between the level of review and mis-enforcement, although sometimes

---

135 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 the 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 (2014).

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 a number of situations.

Within an abstract and ideal frame of separation of powers in a democratic regime, weak judicial review seems an appropriate model for the 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.[136]

A comparison between this ideal model and any other real cases 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 in actual institutional arrangements would lead to different conclusions. Instead of blaming a 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 to achieve the ideal frame, the inquiry would be 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 restrain courts from adopting strong remedies would really enhance democracy.

The answer is negative. Under the Brazilian pattern, weak remedies are not always an efficient feature through which courts can satisfy their main role in a democratic regime, i.e., to serve as a check on the government.

---

136 Kim Lane Scheppele, *Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic Than Parliaments)*, *in* RETHINKING *THE RULE OF LAW* AFTER COMMUNISM 25, 30 (Adam Czarnota et al. eds., 2005); *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, 1294-95 (2006). https://law.wustl.edu/harris/conferences/constitutionalconf/ScheppelePaper.pdf.

Weak judicial review as a general rule would incentivize a lack of enforcement, since executive and legislative branches have proven not to adequately respond to the commands of the courts. Unjustified 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 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. Fallon's argument, that "it is morally more troublesome for fundamental rights to be underenforced than overenforced," reinforces this idea.[137]

This does not mean that a deferential role may not be adopted in any case whatsoever. Choosing between two extremes is not required. 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 given 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. Scheppele challenges this proceduralist approach by analyzing the Hungary case.[138] In the 1990s, the Hungary Constitutional

---

137 Fallon, *supra* note 15, at 1735.

138 Kim Scheppele states:

> 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

Court adopted strong remedies when intervening in the other branches by declaring laws unconstitutional and by guiding state policies. Although this case would be taken as a grave deviation under the proceduralist approach, Scheppele finds that the court's behavior enhanced democracy. According to her, "[t]he standard democratic story presumes standard democratic institutions and a certain set of pre-existing democratic values guaranteed by prior political struggles among the relevant sources of power, neither of which Hungary had."[139] She then describes the conditions of the Hungarian political system, mainly the weak party system and the misalignment between voters' expectations and governmental achievements.[140] The Constitutional Court, rather than Parliament, assumed the duty to protect rights and thus attempted to ensure a set of substantive commitments directed to policy.[141] For this reason, Scheppele argues that the Constitutional Court enhanced 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,[142] the expanded rules of standing,[143] the socio-legal commissions,[144] and monitoring[145] 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."[146]

---

answer.

Scheppele, *supra* note 136, at 45.

139 *Id*. at 51.

140 *Id*.

141 *Id*. at 41-45.

142 "'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 & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 751 (3d ed. 2014). *See also* Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?,* 37 AM. J. COM. L. 495, 513 (1989).

143 "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." JACKSON & TUSHNET, *supra* note 142, at 751.

144 "Judicial appointment of outsiders as 'Court Commissioners' or 'sociolegal commissions' to investigate facts and make recommendations." *Id*.

145 "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*.

146 S. P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J.L. & POL'Y 29, 89

Regarding the Colombia case, 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."[147] 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 the 1991 text."[148] 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 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 reoriented, 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 socio-economic rights cannot be narrowed to deciding between weak and strong review. Under the Brazilian institutional arrangements–which are 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 models of judicial activism or minimalism[149]–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 with

---

(2001).

147 *See* Landau, *supra* note 108.

148 *Id*. at 376.

149 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 American legal thought since that time has 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 Globalizations of Law and Legal Thought*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19-73 (David Trubek & Alvaro Santos eds., 2006).

reference to three points. The first is the commitment to a conception of enforcement that takes into account substantive issues more likely to erupt in socio-economic rights–such as needs and the beneficiaries. The second is a capacity to address background rules that also interfere with the dynamics of enforcement–such as the distributive and aggregate effects. The third is whether its scope embodies 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

The third section of this Article an invitation to institutional reflection. It stems from a challenge that Fallon presented in his article, *The Core of an Uneasy Case for Judicial Review*. According to him, liberal political theory does accommodate judicial review. The idea that political legitimacy may derive from substantive moral ends defeats the argument that unelected independent bodies are unable to work democratically. This outcome-based premise proposes

> that a system of judicial review can be so designed in a manner that allows for the total moral costs of the overenforcement of rights that judicial review would likely produce will be become lower than the moral costs that would result from the underenforcement of rights that would likely occur in the absence of judicial review.[150]

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 socio-economic rights. In this section, I build on this argument to propose some theoretical and practical guidelines that may reorient the debate.

Most Brazilian scholars take the health-related litigation as a deviation that courts should abolish. As the traditional litigation model seems not to 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

150 Fallon, *supra* note 15, at 1713-1714.

been set–in order to see how structures worked previously.[151] However, regressions are useful if one eye 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.[152]

Judicial review aims not only to maintain fundamental values entrenched in the constitution, but also 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 the counter-majoritarian principle. The ultimate purpose of the Brazilian judicial review system is to enhance democracy.

Therefore, this Article argues that enforcement of socio-economic 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 necessarily providing claimants with services, but effectively making political institutions adhere to their constitutional duties.[153] It requires courts to inquire 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 1) public law litigation, and of 2) democratic judicial roles, which aspects I describe in the next section.

3.2. Theoretical background for a design approach

---

151 *See* sources cited *supra* note 92.

152 *See* ROBERTO MANGABEIRA UNGER, THE UNIVERSAL HISTORY OF THE LEGAL THOUGHT (2015), http://www.robertounger.com/en/wp-content/uploads/2017/01/the-universal-history-of-legal-thought.pdf.

153 *See* David Landau, *A Dynamic Theory of Judicial Role*, 55 B.C. L. REV. 1501, 1512-13 (2014).

The general question that a *design approach* proposes is how courts may produce more justice in socio-economic-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.[154] 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 in Sen's approach of "making evaluative comparisons over distinct social realizations."[155] Although both perspectives are analytically linked with one another in important topics, this article adheres to Sen's proposal, in the sense that 1) obtaining concrete diagnosis of injustice, 2) identifying remediable injustices, and 3) verifying whether a specific social change is capable of bringing more justice constitute a feasible plan to address the mis-enforcement of rights and its vicissitudes.[156] 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.[157] Eventually, this work's

---

154 John Rawls, in discussing his general idea of justice, provides that

> [m]y 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 (Harv. Univ. Press 1999) (1971).

155 SEN, *supra* note 135, at 410.

156 *Id*. at ix.

157 Sen, refusing to follow the *transcendental institutionalism* approach, stated that

> [i]ndeed, 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.

objective focuses on "*advancing* – rather than *perfecting* – both global democracy and global justice."[158]

This central idea leads to the following eight background premises that support the enterprise of designing structures to improve the case of judicial enforcement concerning socio-economic rights. They derive from the empirical and analytical enterprise on which this work relied, as well as from the scholarship of other constitutionalists that have already been trying to reorient the debate of judicial review–especially those who have been sensitive to the dysfunctional democracy-related issues.[159]

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 in ongoing and dynamic tension with each other."[160] 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.[161]

Second, achieving substantive ends requires 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 health-related litigation are outcomes from a second code of norms (formal norms are the first code) that directly impact the substantive results of the rulings, either enhancing or weakening equality. Different 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-

---

Id. at 26.

158 *Id*. at xii.

159 *See e.g*., David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L. L.J. 191, 246 (2012); Sabel, *supra* note 27, at 1016; YOUNG, *supra* note 32, at 137; Tushnet, *supra* note 79, at 187.

160 Victoria Nourse & Gregory Shaffer, *Empiricism, Experimentalism, and Conditional Theory*, 67 SMU L. REV. 141, 151 (2014).

161 *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

textured legal norms.[162] All of the political bodies and parties involved in the process should consider them to obtain a comprehensive picture of the issue at stake.

Third, the judiciary is not a unique and uniform body, but a sum of individual and collective minds.[163] It means that this work does not intend to prescribe a particular path of correct interpretation nor an approach for enforcement of socio-economic 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 characteristic 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 this 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 socio-economic programs. However, since courts must not discretionarily dismiss cases, their structure should be prepared to process the claims that eventually are brought forth; an abdicative role is not an option before a violation of rights.

---

162 The idea of penumbra and open-textured norms is borrowed from Hart:

> [n]ot 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 (3d ed. 2012) (emphasis removed).

163 Adrian Vermeule, *The Judiciary Is A They, Not An It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 553 (2005).

Fifth, adversarial private litigation no longer fits public law adjudication, especially in the arena of socio-economic rights, where norms are open-textured, principled, and non-sanctioning.[164] In most cases, citizens pursuing claims for health care are not interested in a sanction-based output, but indeed in a judicial intervention that imposes 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, healthcare-based litigation is a crucial example of a prospective intervention. Rather than fact-finding, it is fact evaluating.[165] For this reason, outcomes and impacts of judicial intervention matter. As Chayes suggests, "[t]he 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."[166]

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 corresponding 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

---

164 I take "traditional private litigation" as Scott defines it:

> 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 & Susan P. Sturm, *Courts as Catalysts: Rethinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565, 568 (2007). *See also* Kathleen G. Noonan, Charles Sabel, & William H. Simon, *The Rule of Law in the Experimentalist Welfare State: Lessons from Child Welfare Reform*, 34 L. & SOC. INQUIRY 523 (2009).

165 Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1297 (1976).

166 *Id*. at 1296.

outcome"[167]–that creates distance from the problem-solving approach sought by public law litigation and hampers courts' 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,"[168] and "involves more technical, strategic, and contextual forms of thought"[169] rather than merely analyzing legal principles and rules and treating rights as trump cards.[170]

Under those assumptions, the language of impersonal rights and principles also becomes limited to addressing the complex tradeoff involving the enforcement of socio-economic 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 more interdependent – rather than dependent – of the rights determination.[171]

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"[172] regarding three main tasks: first, ensuring the 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";[173] 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."[174]

All of these assumptions are part of what Landau calls the *dynamic judicial role*. He identifies this as a reasonable variation of the judicial role

---

167 Scott & Sturm, *supra* note 164, at 569.
168 Sabel, *supra* note 27, at 1054.
169 *Id*.
170 *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).
171 *See* Sabel, *supra* note 27.
172 Scott & Sturm, *supra* note 164, at 567.
173 *Id*.
174 YOUNG, *supra* note 32, at 172.

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."[175]

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."[176] Judicial practice has traditionally focused on the former, but the stakes we are building also requires enriching the latter, since litigation assumes that dispute resolution in some kinds of cases–especially public law litigation–demands systemic organizational change.[177] 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,"[178] 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 to litigation in order to accommodate this new architecture of power practice.

Eighth, as Young claims, judicial review comprises at least five major 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.[179]

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."[180] In the *conversational view,* the

175 Landau, *supra* note 153, at 1503.

176 Colin Diver, *The Judge as Political Powerbroker*, 65 VA. L. REV. 43, 106 (1979).

177 *Id*.

178 Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344 (2004).

179 YOUNG, *supra* note 32, at 143.

180 *Id*.

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."[181] Remedies take a limited 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 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 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 to pick just one of the models; each of them presents benefits and burdens that courts must balance when deciding the appropriate remedy. For example, 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.[182] 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 rights violation covered by a problem-solving approach.

However, leaving open the model of judicial review does not refrain judges from committing to 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 socio-economic rights. This scenario would consist of a situation that simultaneously ensures as many benefits as possible to the target group while reducing the costs

181 *Id*. at 150.
182 Landau, *supra* note 159, at 202.

imposed on other involved actors. Judges should seek to improve social welfare and equality, both in an objective perspective–in asking what the benefits and costs are–and in a subjective perspective–in asking who bears the costs and who receives the benefits–thus ensuring benefits and costs affect or relieve each of them as fairly as possible.

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

3.3. Imagining it differently: Some practical guidelines

In the last section, this work built theoretical stakes that could incentivize judges to commit with a conception of enforcement that meets five criteria. First, it considers substantive issues more likely to erupt in socio-economic rights, such as needs and the needy. Second, it addresses background rules that also interfere with the dynamics of enforcement, such as the distributive and aggregative effects. Third, it 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. Fourth, it 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. Finally, it takes into account other 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 ongoing 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 socio-economic rights do not shift the ideal that executive and legislative branches still remain the appropriate place for developing, implanting, and improving public

policies. Judicial intervention is the most traumatic and the most politically costly solution regarding enforcement of rights. The risk it poses justifies the following constitutional premise: court 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 unites 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.[183] 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 had been no reduction of new claims (no incentive to reduce litigation), the program has provided faster and more effective tools for enforcement of the right to health care through dialogical interactions between claimants and institutional players.[184]

Another sensitive circumstance is the lack of regulation disciplining details of public policies. For instance, as noted in the previous sections, Article 196 of the 1988 Constitution defined 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 delegate these topics to be defined by courts.

A comparison with the social security system exemplifies this controversy. The constitution and the statutes define the services (such as temporary and permanent pensions due to retirements, disabilities, and incarceration) and their requirements, as well as the beneficiaries covered by the social security system. The area of normative uncertainty is smaller than that of health care-related legislation, directly influencing the related litigation. 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: the room for judicial

183 *See* CONSELHO NACIONAL DE JUSTIÇA, JUDICIALIZAÇÃO DA SAÚDE NO BRASIL: DADOS E EXPERIÊNCIA 41-53 (2015).

184 *Id*. at 45.

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 socio-economic rights, the lack of regulation 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 the legislative branch 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 regulation. Most of the rules defining the health system are expressed in resolutions enacted by the Ministry of Health. However, these resolutions are not legal primary resources and are not always binding, thus leading to courts' tendencies to ignore 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 socio-economic rights. The procedure basically reproduces the same pattern as 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 are 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.

Landau's description of the effects of socio-economic 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.[185]

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. As shown in the previous sections, the massive individual litigation also influences health care public policies, as the Executive tends in long turn to universalize treatments and medicines that are frequently enforced by courts. The case of the HIV/AIDS drugs-related litigation 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 be disincentivized.

The Brazilian data fit Landau's classification, in the sense that achieving structural enforcement seems to be the most effective way to incentivize government to improve 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 provided evidence demonstrates, judges are more likely to address background rules and aggregative and distributive impacts in collective actions rather than in individualized claims. Strengthening collective actions would also address the issue of the lack of representativeness of disadvantaged groups in courts. The most disadvantaged groups in Brazil are likely to not have appropriate information regarding rights and access to courts. This factor may lead to situations of mis-enforcement, since the upper and middle classes, which are more empowered to bring issues before courts, benefit from the litigation instead of the lower class. In Brazil, collective actions may be proposed by selected private and public institutions, such as the Public Defense Office, on behalf of third parties. Thus, a strong system of collective actions could be designed to compensate the difficulties of disadvantaged groups in accessing courts.

However, issues of execution and compliance, among others, make collective actions in Brazil unattractive, which consists in incentives for

185 Landau, *supra* note 159, at 202.

individualized claims. It is beyond the scope of this paper to propose a detailed project of how to fix these issues, but improving the collective actions system would be desirable to reduce the mis-enforcement of social rights.

The role of precedent. The Brazilian litigation system favors individualized instead of collective claims, and thus, realigning incentives in order to favor the latter is mandatory. Beyond procedural reforms, establishing precedent on the issue could embody an important strategy of creating incentives to reduce individualized claims.

The lack of precedent about health care-related litigation is a troubling aspect. Even though Brazil does not adopt the *stare decisis* principle, the Constitution allows the Supreme Court and other Superior Courts to establish a binding effect over some rulings, especially in repetitive and highly controversial cases.[186] Surprisingly, although it has agreed to hear some cases involving the right to health-care, the Supreme Court has not yet issued binding rulings on this topic. Some of these cases have been suspended due to requests of Justices who intend to take more time analyze the issue. For this reason, the lower courts do not dispose of safe standards to follow.

Precedent can play a central role in the judicial enforcement of socio-economic rights. Defining exactly what the public services must cover–in other words, specifically defining the core of the needs, the beneficiaries, and the priorities that the state should provide–is not the constitutionally appropriate function of the judicial branch. Judges would subsume the state officials' discretion, much less the separations of powers clause. However, under the idea of "evaluative comparisons over distinct social realizations,"[187] precedent can resolve not only borderline cases, but also can define what kind of claims fall outside the constitutional protection, in concert with general clauses defined by the executive and the legislative branches (in general, basic needs for disadvantaged groups). For instance, the Supreme Court and the Superior Court could state what kind of medical services and medicines cannot be enforced, such as experimental treatments, unproven drugs, and expensive experimental drugs; they may also determine which claimants cannot benefit from enforcement, such as non-users of the public health care system. According to this approach, Superior Courts would not define *exactly* who the beneficiaries should be, what services should be provided, and what priorities should be adopted.

186 CONSTITUIÇÃO FEDERAL [C.F.] art. 103-A § 1 (Braz.).
187 SEN, *supra* note 135, at 410.

By analyzing concrete situations that are not clearly resolved by regulation, precedent would play an exclusionary role, focusing on defining which claims are outside the constitutional protection of the right to health care. In addition, precedent can also provide objective standards and tests to guide judges to verify aggregative and distributive effects.

Overall, this strategy may induce a reduction in litigation, as well as a decrease in the negative effects of individualized enforcement, as most of the borderline claims are brought by middle- and upper-classes. Thus, a detailed definition of the claims that do not receive constitutional protection would disincentivize repetitive suits that fall out the category "basic needs for the most disadvantaged individuals" and mostly benefit advantaged groups. In the long term, this would lead judicial enforcement to benefit lower-income groups, whose claims are generally related with the most basic needs, reducing the likelihood of situations of mis-enforcement.

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.

The evidence should take as many forms as the civil 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. Since costs of compliance reached R$900 million in 2015 in the Federal District alone, Judges' concern about the aggregative effects of these rulings led them to agree with a claim of the Union, in order to determine an official expert to double check the efficacy of the requested drug in each case.[188] There is still no definite empirical study about this

188 *See Projeto de juízes da Justiça Federal do DF sobre doenças raras tem o seu primeiro levantamento*, JUSTIÇA FEDERAL (July 20, 2016), https://portal.trf1.jus.br/sjdf/comunicacao-social/imprensa/noticias/projeto-de-juizes-da-justica-federal-do-df-sobre-doencas-raras-tem-o-seu-primeiro-levantamento.htm; *see also Varas cíveis da Justiça Federal-DF inauguram sala de perícias para as demandas de medicamentos de doenças raras*, JUSTIÇA FEDERAL (Oct. 13, 2015), https://portal.trf1.jus.br/sjdf/comunicacao-social/imprensa/noticias/varas-civeis-da-justica-federal-df-

experience, but surprising results came out: in a number of cases, the expert testimony has 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 options.[189] As a consequence, costs of compliance reduced.[190] In sum, this simple procedural innovation creates a disincentive for patients to seek before courts more expansive treatments not available in the public system, when there are available, cheaper alternatives already provided by the state.

Bringing supporting information about public policies and government choices also helps courts understand the steps that the state took to implement each socio-economic right. This gives a more realistic account of the outcomes of any intervention. It is important to involve the players that any judicial decisions could affect, so that they can bring distinct perspectives of the social issue at stake. It seems arbitrary to decide an intervention on an ongoing policy without any inquiry into the reasons why the executive and legislative branches have prioritized one need over another, or what measures 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*[191] in 2007, whereby the justices hear the testimony of scientists and authorities when necessary to clarify issues or factual circumstances with general 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 through the end of 2014, eight explored judicial enforcement

---

inauguram-sala-de-pericias-para-as-demandas-de-medicamentos-de-doencas-raras.htm.

189 *Projeto de juízes da Justiça Federal do DF sobre doenças raras tem o seu primeiro levantamento*, *supra* note 188.

190 *Id*.

191 Professor Mark Tushnet distinguishes 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*, *in* DEMOCRATIZING CONSTITUTIONAL LAW 167, 180 (Thomas Bustamante & Bernardo Gonçalves Fernandes eds., 2016).

of socio-economic rights: the health care public system (2009, 2013, and 2014), regulation of alcoholic beverages on the roads (2012), an asbestos ban (2012), affirmative actions (2012), fire-sticking in sugarcane farming (2013), and imprisonment (2013).[192] According to Tushnet, these hearings "can be understood as blending political and judicial constitutionalism,"[193] 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 engaging in this experience. A few *public hearings* have taken place around the country. Some 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 mis-enforcement, 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 socio-economic rights. Scholars' recommendations to address the issues that emerge from the judicial intervention focus on the rights-based arguments. For example, after an extensive empirical analysis, Octavio Ferraz concludes that "judges would need to be more restrictive in their

192 *Realizadas*, SUPREMO TRIBUNAL FEDERAL, http://www.stf.jus.br/portal/audienciaPublica/audienciaPublica.asp?tipo=realizada (last visited Mar. 28, 2019).

193 Tushnet, *supra* note 191, at 181.

interpretation of the right to health."[194] Hoffman and Bentes hold similar views.[195] 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 dependency 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.

The ruling of the Extraordinary Appeal 580252 to compensate prisoners for prison conditions is a recent move, undertaken by the Brazilian Supreme Court in 2015, that can be taken as an example of this idea's feasibility.[196] Plaintiffs claimed that repetitive individualized claims brought by prisoners against the government asked for damages due to the inhumane environment in prisons. They also stated that incarceration under inhumane conditions had caused undeniable systemic violations of fundamental rights, since overcrowded cells, poor sanitary conditions, and a lack of policies to reengage inmates in social life have been part of a severe context that led the Inter-American Court of Human Rights to prosecute Brazil.[197] Lower courts in general ordered the government to pay individual damages. Once again, the point of aggregate impacts of the individualized litigation arose with an additional aggravating element, according to the plaintiffs. The 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 situation is described as critical: in aggregate terms, the government spends high amount of money paying

194 *See* Ferraz, *supra* note 22, at 100.

195 *See* Hoffman & Bentes, *supra* note 25, at 127-32, 138-40.

196 *See* S.T.F., RE 580.252, Relator: Min. Alexandre de Moraes, 16.02.2017, SUPREMO TRIBUNAL FEDERAL JURISPRUDENCIA [S.T.F.J.], 16.12.2017 (Braz.), http://portal.stf.jus.br/processos/detalhe.asp?incidente=2600961.

197 *Id*.

damages, while no social right is enforced.

This case exposed a lengthy controversy before the Supreme Court. In 2015, Justice Teori Zavascki voted for upholding a lower court's decision approving the damages. Although his opinion had been majoritarian, the dissent led by Justice Roberto Barroso, Justice Luis Fux, and Justice Celso de Mello raised an important discussion on the disaggregation between rights and remedies.[198] They argued that this payment would not address the grounds of the structural and systemic human rights violation. Moreover, since the court was deciding individualized claims, individualized answers should be given. Thus, they suggested an innovative remedy. Instead of damages, prisoners should be given reductions in their sentence length, which would function better than monetary payment according to them,[199] since it is more desirable to allow the state to spend its limited budget on reforming prisons rather than on paying individual damages.

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.[200] On the contrary, the court found that the Executive had not entirely spent its budget for the penitentiary system, and that prisons were overcrowded and under inhumane conditions, with several reports of police abuse.[201] As a consequence, it issued a structural injunction relying on the Colombian doctrine of *unconstitutional state of affairs*.[202] The court ordered 1) that the executive utilize the budget of the National Penitentiary Fund for its legal purposes, and 2) that judicial authorities hear individuals within twenty-four hours after their arrest by the police, in order to verify whether the police followed the legal requirements and treated the individual adequately, as well as whether imprisonment should continue.[203]

This is a case of strong judicial review of administrative acts, in which the judges were sensitive to the need to design a remedy that minimally impacted policies, but set up an effective incentive to address the social problem. Charles Sabel explains 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

198 *Id*. at 39-80.

199 *Id*. at 80-97.

200 *See generally* S.T.F., APDF 347, Relator: Min. Marco Aurelio, 09.09.2015, SUPREMO TRIBUNAL FEDERAL JURISPRUDENCIA [S.T.F.J.], 11.09.2017 (Braz.), http://stf.jus.br/portal/jurisprudencia/listarConsolidada.asp?classe=ADPF&numero=347&origem=AP.

201 *Id*. at 4-5, 8-14.

202 *Id*. at 12, 178.

203 *Id*. at 4-5.

independence and increased uncertainty."[204] This is the key to understanding the purpose of 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 legislative decisions, and the adherence of the bureaucracy to the political process in the case of administrative decisions.[205]

Those two cases, more than being a mere departure from the traditional model of litigation, show that the court is open to seeking a remedial design approach. It is possible to go further, though. 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 socio-economic 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 to information gathered during the process in order to adopt a problem-solving perspective that would be more effective under constitutional parameters.

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.[206] Instead of merely

---

204 Sabel, *supra* note 27, at 1055.

205 *See* Guillermo Otalora Lozano, *Commandeering the Institutions: The Legitimacy of Structural Judicial Remedies in Comparative Perspective*, 12 VIENNA J. INT'L CONST. L 387, 425, 428-29 (2018).

206 *See* JACKSON & TUSHNET, *supra* note 142, at 751.

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 the provisional ruling and liberated the University of São Paulo from the duty of furnishing phosphoethanolamine to a single plaintiff.[207] Justice Lewandowski's opinion for the court recognized that the judicial intervention in that case caused perverse aggregate and distributive impacts, due to the massive litigation that followed the ruling delivered by the court.[208] 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 testimony from experts and third parties about its scientific efficacy.[209] This decision has not been set as a precedent, though 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, the Congress, after intense legislative debate on the issue, passed in 2016 a bill to allow pharmaceutical industries to produce this compound.[210] In the same fashion, the National Health Surveillance Agency started an official procedure to review ongoing research on phosphoethanolamine, in order to decide whether this substance should be included in cancer treatments provided by state hospitals. However, in 2017, this agency decided to suspend phosphoethanolamine-related ads, in an important move to disincentivize the use of this substance.[211]

---

207 S.T.F., STA 828, Relator: Min. Presidente, 04.04.2018, SUPREMO TRIBUNAL FEDERAL JURISPRUDENCIA [S.T.F.J.], 11.04.2018 (Braz.), http://stf.jus.br/portal/jurisprudencia/listarConsolidada.asp?classe=STA&numero=828&origem=AP.

208 *Id*.

209 *Id*.

210 Comissão de Seguridade Social e Família, *Grupo de Trabalho da Fosfoetalonamina Retoma os Trabalhos*, CÂMARA DOS DEPUTADOS, https://www2.camara.leg.br/atividade-legislativa/comissoes/comissoes-permanentes/cssf/noticias/noticias-2016-1/grupo-de-trabalho-da-fosfoetanolamina-retoma-os-trabalhos (last visited Mar. 28, 2019).

211 Natalia Cancian, *Anvisa Suspende Propaganda de Suplemento com Fosfoetanolamina*, FOLHA DE SÃO PAULO (Feb. 21, 2017),

Beyond all of the criticism from the mainstream constitutional scholars, judicial enforcement of socio-economic rights may cause positive social change and political 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.[212]

However, regarding some perverse outputs that courts have been producing, two questions 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 demands we go beyond the discourses of minimalism and usurpation in order to understand the actual role of courts in the governance of dysfunctional democracies.

This Article offered two main contributions. The first is found by introducing 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

---

https://www1.folha.uol.com.br/equilibrioesaude/2017/02/1860652-anvisa-suspende-propaganda-de-suplemento-com-fosfoetanolamina.shtml.

212 *See generally* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY (Ira Katznelson et al. eds., 2007); *see also* CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE (Diana Kapiszewski et al. eds., 2013).

with strong constitutional cultures.[213] 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.

The concept of mis-enforcement motivates a project that simultaneously 1) 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 2) 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 1) address social reality and legal norms, and 2) 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.[214] This will make it possible to gradually remove or reshape dysfunctional elements of the litigation system towards a more effective operation.[215]

This work proposes 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

213 *See* Landau, *supra* note 153, at 1501; *see also* Fallon, *supra* note 15; Waldron, *supra* note 15; JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

214 *See* SEN, *supra* note 135.

215 *Id*.

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,[216] and 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.[217] Those new approaches should also bridge constitutional law to other social sciences, especially political science, through a transparent compromise of bringing data to courts while bringing data to evaluate how courts work.

216 *See generally* Diver, *supra* note 176.
217 *See* Landau, *supra* note 159, at 191.