

Social Rights Against the Poor¹

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Abstract: The main argument of this work is that the discourse of social and economic rights in Brazil has been appropriated by privileged economic groups with the result that the constitutional protection of those rights is no longer carrying out its function to reduce economic inequality. This article will be divided into three parts. The first is a discussion of the historic context of patrimonialism in Brazil as well as the origins of economic inequality in the country. The second part is devoted to the theoretical debate surrounding the constitutional protection of social and economic rights in light of what is often referred to as 'new constitutionalism', along with an interpretation of the structure for protecting social and economic rights that is present in the Brazilian constitution. The third part consists of a case study of the current state of the judicialization of the right to health in Brazil, with special attention to free concession of medicine and the new legislation on the subject. In conclusion, the paper argues that judicial decisions on the right to health, in particular, and social and economic rights, in general, have been formalistic, with little regard to their (often negative) distributive impact. The solution is then not to move from individual litigation to collective litigation (eg class actions), but to move from an 'individual rights' approach to a 'distributive' approach, which takes into account the effects of court decisions not only with respect to the parties involved but also to the rights of the poorest of the poor.

Keywords: Social Rights, New Constitutionalism, Right to Health, Social Transformation

I. Introduction

The main argument of this work is that the discourse of social and economic rights in Brazil has been appropriated by privileged economic groups with the result that the constitutional protection of those rights is no longer carrying out its function to reduce economic inequality.

This results from a combination of factors related to the historic development of the Brazilian legal and constitutional system. The first factor is the patrimonialism that is entrenched in the legal culture and the institutions in Brazil. In this piece, patrimonialism is conceptually employed to describe the lack of institutional separation between public and private resources and the concomitant concentration of economic and political power in the hands of relatively few people.

1 I am grateful to the comments received from the participants of the SELA 2011 (Seminário em Latinoamérica de Teoría Constitucional y Política) organized by Yale Law School and held in San José, Costa Rica, on June 2011, particularly from Alberto Amaral Júnior, Ana Maria Nusdeo, Ana Paula de Barcellos, Caio Mário da Silva Pereira Neto, Diego Werneck Arguelhes, and Owen Fiss. I am also grateful to the participants of the IGLP Workshop, organized by the Harvard Law School Institute for Global Law and Policy, at Cambridge, United States, on June 2011, where an earlier version of this paper was also presented. I am also grateful to Calixto Salomão Filho, for introducing the debated regarding the right to health at the Law and Poverty Group at the University of São Paulo. I also acknowledge the detailed and generous comments received from Mariana Pargendler to the various versions of this paper. Finally, I am grateful to Caio Yoshikawa for the revision and comments provided.

The second factor is structural and is present in every society where effort is made to use the Judiciary as a tool for social transformation and in which the distribution of the legal resources for the protection of rights in courts is unequal. Because of the inequalities, those who have greater access to legal resources obtain greater protection of their rights. By consequence, judicial protection of social and economic rights tends to favor individuals who are better off, thus contradicting the very aim of the constitutional protection of these rights, which is reducing social and economic inequality.

The argument advanced in this piece has both a local and a universal character. The goal is to dispute the validity of protecting social and economic rights as if they were individual rights. While the argument presented is valid for and applicable to any society, the extreme conditions of inequality prevalent in Brazil make it all the more pertinent.

This is because the principal mechanism for the protection of individual rights in modern society is filing claims before the Judiciary or, in some cases, the execution of previously established administrative procedures. In every case, the protection of these rights requires significant legal acumen and resources. It means there is a very large probability that the poorest will not have access to the necessary resources for the protection of their social and economic rights, so that the resources only end up benefitting those who least need them. Hence, the protection of social and economic rights considered as individual rights has a negative distributive effect in society by failing to privilege the poorest and reinforcing economic inequality.

One topic that has recently garnered much attention from social scientists and legal scholars in Brazil, not to mention superior courts, is the judicialization of the right to health, particularly with regards the right to free distribution of medication. Recourse to the Judiciary to enforce the supposed right to free distribution of medication and in fact, as will be examined in greater detail, any medication at all, has become nearly pathological in character, escalating so much in recent years that there is a potential institutional crisis brewing that pits the Judiciary against various levels of the Executive. According to the Department of Pharmaceutical Assistance in the Ministry of Health of Brazil (*Departamento de Assistência Farmacêutica do Ministério da Saúde*), the amount of resources allocated by the federal government to high-cost medicaments because of court decisions has risen from 2.25 million Brazilian Reais in 2005 to 132.58 million (in today's terms, around US\$ 82 million) in 2010.² In other words, in just five years there has been an absolute increase of 5,918.75%. This has generated a conflict leading to, in the first instance, a public hearing before Brazil's Supreme Federal Court (STF) on the matter and, subsequently, the drafting of new legislation to restrict judicial action.

Reflecting the presentation of the problem described above, this article will be divided into three parts. The first is a discussion of the historic context of patrimonialism in Brazil as well as the origins of economic inequality there. The second part will be devoted to the theoretical debate surrounding constitutional protection of social and economic rights, principally in the light of what is often referred to as 'new constitutionalism', along with an interpretation of the structure for protecting social and economic rights that is present in the Brazilian constitution. The third part consists of a case study of the current state of the judicialization of the right to health in Brazil, with special

2 Agência Estado, 'Sobe 5.000% gasto do governo com remédio via Justiça' *Agência Estado* (Brasília, 28 April 2011) <<http://www.estadao.com.br/noticias/geral,sobe-5000-gasto-do-governo-com-remedio-via-justica,711958,0.htm>> accessed 15 November 2013.

attention to free concession of medicine and the new legislation on the subject. In conclusion, the paper will discuss the parameter that is the most adequate for deciding individual lawsuits related to social and economic rights, as well as certain conclusions stemming from the case study that can be applied to constitutional theory as a whole.

II. Democracy and Inequality

This piece should be situated in the context of a traditional theme in constitutional theory, that of the capacity of the Judiciary to carry out social reform, particularly with regards the economic structure of society. It is a universal theme, yet one that can be observed in stark colors in Brazil because of the immense social inequality there.

Social inequality in Brazil cannot be historically explained without giving special attention to government structure. Traditionally, the debate over social inequality points to the private sector as the cause of such asymmetry. In the Brazilian case, however, it is also necessary to look at the State as a source of inequality, precisely because that society was, and continues to be, marked by the phenomenon known as patrimonialism. The concept of patrimonialism was originally developed by Weber, which he used to characterize the lack in medieval societies of separation between private and state property.³ State property belonged to the ruling prince and all public services were privately financed by that prince, to such a point that the private property of the prince's subjects was restricted. One of the primary elements of the transition to modern society, then, was the creation of a bureaucratic system and organization of the State that would use its own resources, resources that would be separated from the private property of citizens. This separation is seen as satisfying modern capitalism's need for an efficient government whose actions are predictable in order to provide a solid foundation for the development of private enterprise that was initially mercantile and later industrial.

For Weber, the system of electoral democracy evolved naturally from the bureaucratic system, which demanded a measure of alternation in public offices. The electoral system fulfills this role by opening up some space for competition for those positions. In this way, modern capitalism, and the attendant rise of large companies and a middle consumer class, compelled the government to modernize, leading to the emergence of a state bureaucracy controlled by a competitive democratic system. This would lead to a greater distribution of both political and economic power.

This description, by virtue of its simplicity and adequacy in explaining the development of capitalism and the modern European state, took on the appearance of universal truth. The Brazilian case, to a large degree, poses a challenge to that universality, or at least to the interpretation that holds the process of modernization so described as the only possible course. In Brazil, social inequality and patrimonialism were preserved when its society and economy were modernized.

Raymundo Faoro, one of Brazil's greatest scholars, has offered an explanation based on the country's colonial history of the process by which patrimonialism was preserved despite the development of a bureaucracy and industrialized economy. He argues that a hybrid social structure was created in Brazil combining elements of feudal structures and modern capitalist society. According to Faoro, Brazilian colonial society was not struc-

3 M Weber, *Economy and Society* (University of California Press 1978) 231.

tured in the same terms of social class as European medieval society, but instead involved a more fluid separation between the uppermost stratus and the rest of society.⁴ The division between the upper class and the subaltern social group was not absolute, and membership in the highest circles did not follow strict hereditary rules as was the case of medieval nobility. The most notable characteristic of this particular form of social organization was the disproportional concentration of political and economic power in the hands of one social group who shared common values.

Continuing with Faoro's argument, the formation of this hybrid structure made it possible for patrimonialism to persist in spite of the process of industrialization that occurred in Brazil during the 20th century and other social transformations, such as the consolidation of electoral systems and economic industrialization. It is even possible to draw the conclusion that this structure was responsible for the preservation of extreme inequality in Brazil, even more so than the modernization of the economy, since economic modernization led to greater economic equality in other countries through the creation of a large market of consumers for industrial products.

This argument represents an attempt to provide an historical explanation for a genuine intellectual challenge for understanding Brazilian society, the challenge of identifying a reason that can explain why significant legal transformations whose effect in other countries was quasi-revolutionary – take the abolition of slavery or the organization of a welfare state for example – did not have any meaningful impact on the reduction of social and economic inequality in Brazil.

Economic inequality in Brazil was at the end of the 20th century the same as at the beginning of the century, and remains among the highest in the world today. This despite the fact that, in the 1930s, a series of state protections for workers' rights was implemented, as well as a national system for social security. These instruments, though considered efficient mechanisms for anti-cyclical economic control and the reduction of economic inequality, had no appreciable positive effect on income distribution in Brazil.

The question that arises, then, is whether the transformations of recent decades, particularly the implementation of constitutional guarantees for social and economic rights, are genuinely transformational or whether they are simply the newest chapter in the history of social transformations that fail to affect income redistribution and eliminate the patrimonialist elements of Brazilian society.

The process of democratization in Brazil, in fact, displayed one characteristic that suggests that certain elements in this process were dependent on the continuity of patrimonialism. The main political theory that takes this stance in explaining the path followed by events in Brazil and several other Latin American countries is the so-called 'theory of pacts among elites', which explains the transition to democratic civilian regimes from military dictatorships in terms of a series of pacts between the military, political, and economic elites of the countries in transition.

According to this theoretical model, transition to democracy involves three moments: (i) a military moment; (ii) a political moment; and (iii) an economic moment.⁵ The military moment takes place when dictators adopt a more moderate stance after some sort of pact is made between the military and political elites. These pacts are not theoretic-

4 R Faoro, *Os Donos do Poder: A Formação do Patronato Político Brasileiro* (Globo 1975).

5 G O'Donnell and P Schmitter, *Transitions From Authoritarian Rule* (The John Hopkins University Press 1986) 37–47.

cally sustainable for the long-term, creating the opportunity for new pacts to be reached between political elites that do not include the military. In this second moment, the political moment, the theory holds, another pact must be made with regards the future organization of the political system, things such as electoral rules, party finances, the boundaries of electoral districts, a mechanism for the allocation of public appointments and budget, as well as a mechanism for resolving the conflicts that arise from the pact itself. In a third moment, then, we would witness actual political transformations, thus fulfilling the promise that such pacts would make possible 'gradual, marginal transformation of profound social and economic inequality.'⁶

Thus, this theoretical explanation for the most recent transition to democracy itself appears to imply or even require the continuation of the long-standing patrimonialist elite. In fact, in the case of Brazil, several elements of the military regime were maintained intact during the process of democratization. To mention a few, the electoral system, the division and structure of the Executive, Legislative, and Judicial branches, the police and penal system, and the organization of the Judiciary did not undergo any significant changes. In other words, certain fundamental aspects of the distribution of power in the Brazilian State were maintained without any substantive alteration whatsoever.

Might it be possible to say the same with regards social and economic rights? Happily, the answer is, in many cases, no. The Brazilian Constitution of 1988 did in fact implement some innovations whose worth has yet to be duly appreciated by Brazilian constitutional scholars, particularly with regards the protection of social and economic rights. In the areas of education, health, and land reform, the drafting process was subjected to intense social pressure which led to a legal text that moved profoundly away from the traditional emphasis on protecting individual rights, adopting instead an attitude in favor of public policies. This will be the subject of the next section.

III. The New Constitutionalism: The Judiciary as Means of Social Transformation?

Over the past decade, many authors have started displaying great enthusiasm for the constitutionalization of basic rights in several countries. When this occurs in developing countries, the enthusiasm seems even greater. In particular, South Africa has been the subject of countless analyses, the majority of which form a constant source of praise for the quality and creativity of the decisions of that country's highest court regarding important matters for the consolidation of democracy following the end of apartheid.⁷ Some Latin American countries have also given cause for similar hopes, such as Colombia, Argentina, and Chile.

That international discussion has left out Brazil, in large part because the Brazilian Supreme Federal Court (STF) has traditionally shown deference to the Executive branch decisions. Otherwise, the Federal Constitution of 1988 has a broad list of basic rights in its Article 5, to which were added the social and economic rights provided in the Article 6. With such broad provision of rights, the debate has not focused on whether or not such

⁶ *ibid* 44.

⁷ FI Michelman, 'The Rule of Law, Legality and the Supremacy of the Constitution' in M Chaskalson and others (eds), *Constitutional Law of South Africa* (Juta 2005) 11–14.

rights should be incorporated into the constitutional text, but rather on the most adequate way in order to those rights produce effects in a developing country, as well as the proper role of the Judiciary in this process.

Nevertheless, it turns out to be extremely interesting to compare the Brazilian national debate with the way the movement towards the constitutionalization of basic rights is portrayed in international discussions, often associated with the term 'new constitutionalism'. There appears to be great hope in the rise of this 'new constitutionalism', which is taken as a sign of global expansion of democracy that features greater protection of basic rights in societies that have only recently reestablished constitutional regimes with competitive elections. A different explanation holds that just the opposite is true: that in fact what is occurring is a purposeful transfer of decision-making power from the Legislative to the Judiciary for certain complex questions.⁸ Put another way, this new constitutionalism would actually represent a movement across the globe to restrict the degree of control citizens wield through competitive elections.

In the Brazilian context, neither of these explanations seems adequate. Both are strongly based on the experience of United States of America. On one side are those who believe deeply in the capacity of the Judiciary to transform society, exemplified by the experience subsequent to the US Supreme Court precedent *Brown v Board of Education*, the decision that banned racial segregation in the United States of America.⁹ This positive experience is somewhat tainted by the incapacity of the Warren Court to carry out the social transformation to include social and economic rights and also, as some writers have proposed,¹⁰ by the fact that removing racial segregation's legal basis failed to eliminate economic segregation in the North American society, which for skeptics aptly demonstrates the limits of the transformative power of the Judiciary.¹¹

The identification, thus, of a global phenomenon of constitutionalization of individual rights that is independent of the specific movements underway in each society, movements that are more significant from the point of view of the democratic and constitutional lives of those countries, seems tenuous. Praising the work of a particular court overlooks the fact that for every constitutional court that grows stronger, there are others that are losing prestige and power. Prior to the South African court, the Supreme Court of Zimbabwe was considered the most sophisticated in the southern part of Africa. No one speaks of the Zimbabwe court in those terms any longer and, without doubt, it was not the change in the judges' capacity that led to its decline. It was the very end of apartheid that brought it about, for many of the businesses and investments that had been temporarily diverted to Zimbabwe by trade embargoes levied on neighbouring South Africa returned there when these were lifted, causing an economic crisis in Zimbabwe the consequences of which are relatively well-known, primary among them the complete dismantling of governmental institutions, including the formerly renowned

8 R Hirschl, *Toward Juristocracy: The Origins And Consequences Of The New Constitutionalism* (Harvard, 2007) 213 ('I have advanced here a strategic notion of judicial empowerment through constitutionalization as driven primarily by political interest to insulate certain policy preferences from popular pressures').

9 *Brown v Board of Education*, 347 US 483 (1954).

10 FI Michelman, 'Foreword: On Protecting the Poor Through the Fourteenth Amendment' (1969) 83 Harvard Law Review 7.

11 FI Michelman, 'Symposium: "Brown" at Fifty – Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa' (2004) 117 Harvard Law Review 1378.

Supreme Court. Similar occurrences take place in Latin America. For every court that is strengthened, such as in Colombia, there are others that grow weaker. The conclusion that can be drawn is that courts follow the constitutional destiny of their country, and not the other way around. The 'new constitutionalism' is not any newer than the fresh dictatorships springing up around the world.

IV. Social and Economic Rights and Economic Inequality

The question facing us now is whether constitutional protection for social and economic rights constitutes an effective means for reducing economic inequality. The hypothesis I would like to test here is that the answer to this question is necessarily negative in cases where this protection is solely based on the protection of individual rights; that is, when the principal mechanism used to guarantee them is the bringing of individual claims before the Judiciary by individuals who, one by one, seek redress for the violation of their 'own' social or economic rights.

This type of recourse for the protection of social and economic rights will surely fail in terms of the larger objective to reduce economic inequality for two reasons: (i) this mechanism benefits those individuals who possess greater access to financial and, consequently, legal resources, and (ii) the mechanism cannot by character be anything other than compensatory, and does not address the social structures that generate social inequality.

The argument that constitutional protection for social and economic rights is an efficient mechanism for reducing inequality must first of all accomplish the challenging task of contradicting practical experience. For one, since the promulgation of the Federal Constitution of 1988 in Brazil, which provides broad protections for social and economic rights, inequality has remained practically unchanged, except for a small reduction in recent years that cannot be attributed to any legal mechanism for the protection of social and economic rights, but rather to redistributive policies and an increase in the income of the poorest groups.¹² For another, the increased protection of social and economic rights in the United States fostered by the Supreme Court of the United States during the tenure of Earl Warren as Chief Justice from 1953 to 1969 was followed by a systematic increase in economic inequality over the next decades, an increase which was caused, again, by public policies. In fact, not even the much discussed actions of the Supreme Court in South Africa to protect social and economic rights, for all the praise its decisions have garnered, have managed to bring about any appreciable reduction in the level of economic inequality, since the economic performance of the country in recent years has diminished the capacity of the State to effectively implement policies to improve the standard of living of the greater part of the population.

To compensate for the lack of 'success stories' with regards the protection of social and economic rights by the judicial branch, it could be argued that the protection of such rights is not meant to reduce social inequality, but instead to offer guarantees for a series of rights that are in essence universal. To advance this argument, however, three other questions must be addressed, three points that raise issues of considerable complexity:

¹² R Barros and others, 'Queda Recente da Desigualdade de Renda no Brasil' (2007) Instituto de Pesquisa Econômica Aplicada Research Paper 1258/2007 <http://www.ipc-undp.org/publications/cct/td_1258.pdf> accessed 14 November 2013.

(i) the preservation of democracy in countries characterized by inequality hinges on an effective reduction in economic inequality; (ii) in consideration of the limited resources at each society's disposal to combat economic inequality and the resulting violation of rights, those resources must be invested in the most redistributive manner possible to avoid the perpetuation of privileges; and (iii) protecting social and economic rights in a way that inadvertently results in greater benefits for the wealthy instead of the poor obviously delegitimizes both the democratic system and the very discourse of basic rights, which could lead to institutional crisis.

The conclusion, until these points are no longer valid, must be that the protection of social and economic rights cannot be justified in terms of each one's value considered individually as universal, but rather by their effectiveness in distributing resources, as the preponderant argument is that the implementation of each of these rights must result in a reduction of social and economic inequality.

In the case of the Brazilian constitutional system, there cannot be any doubt that the purpose of the protective system for social and economic rights is reducing inequality. First of all, in the very preamble of the Federal Constitution of 1988 it is clearly established that one of the primary functions of the Brazilian government involves equality, in the sense of the word defined in the third clause in Article 3, which sets as one of the four fundamental objectives of the Federal Republic of Brazil, 'to eradicate poverty and substandard living conditions and to reduce social and regional inequalities.'¹³ This principle surfaces again in Article 170, clause 7, of the Federal Constitution, which establishes as one of the principles for Brazilian economic order once again as 'reduction of regional and social differences.'

Clearly, social and economic rights, as per their incorporation into the Federal Constitution of 1988, are not individual rights. As will be seen in greater detail when taking up the case of the protection of the right to health in Brazil by the Judiciary, the mistaken interpretation of social and economic rights as individual rights by the Judiciary results in the violation of the governing principle of the Brazilian constitutional system, which calls for the implementation of social and economic rights to be done with the objective of reducing social inequality and eliminating extreme poverty.

Granted, the drafters of the constitutional text did write several rights into the Federal Constitution of 1988 that are difficult to implement. They are not, however, as disconnected from the reality of the country as one might at first imagine. Some critics might call it an attempt to implement a Scandinavian constitution in a poor country, yet this is too superficial a reading.

If, on the one hand, it is true that the objective of creating a symbolic constitution to mark the transition from dictatorship to democracy in many instances led to grandiose rhetoric and even poetry, on the other hand, in the case of social and economic rights, the Federal Constitution is particularly straightforward.

¹³ Article 3 of the Brazilian Federal Constitution of 1988 provides the following: 'The fundamental objectives of the Federal Republic of Brazil are: (i) to build a free, just and solidary society; (ii) to guarantee national development; (iii) to eradicate poverty and substandard living conditions and to reduce social and regional inequalities; and (iv) promote the welfare of all, without prejudice of origin, race, gender, color, age or any other forms of discrimination.' Such objectives should serve as guides to actions by the Executive and Legislative powers and shall also provide sources of the interpretation of the Constitution as a whole to the Judiciary and are not formally linked to any particular rules in the Constitution.

Reading the constitutional text, it becomes obvious that the drafters realized that Brazil was a highly unequal country with low income per capita and a state apparatus still under construction. Hence no attempt to create a social welfare State following the Scandinavian was made, one in which the government would monopolize certain basic services. What was created was a model suited for the country at its particular stage of development in light of its specific social problems, one which often devised innovative rules to formulate both private and government initiatives to provide basic services such as healthcare, education, or the development of the infrastructure for housing.

There is no provision declaring that any of the social or economic rights listed in Article 6 of the 1988 Federal Constitution shall be exclusively served by the government. These are: (i) education, (ii) health, (iii) food, (iv) work, (v) habitation, (vi) leisure, (vii) security, (viii) social security, (ix) protection of motherhood and childhood, and (x) assistance to the destitute. They are all part of the construction of a system in which the government articulates public policies to be implemented in conjunction with private initiatives and non-governmental organizations that provide social assistance.

These rights were purposely left out of the preceding article of the Federal Constitution of 1988, Article 5, which specifically lists the individual rights that are constitutionally guaranteed. The reason is obvious, and well-grounded in Brazil's institutional history. The Brazilian State, structured at its base upon patrimonial relationships, can only break down those structures and cure the deep causes for social inequality by treating social and economic rights differently from traditional individual rights. Were the treatment of the two kinds of rights the same, social and economic rights would be used in practice as a means to maintain inequality and the concentration of privileges for the benefit of a small minority. Unlike civic and political rights, implementing social and economic rights requires the administration of very significant volumes of resources that must be spent quickly for the direct benefit of determined groups. The effectuation of these rights requires an extremely well-organized and efficient administrative apparatus, one characteristic of modern states.

That the Brazilian Judiciary has begun interpreting the social and economic rights of the 1988 Federal Constitution as individual rights thus represents, in large measure, a step backwards in the struggle to reduce inequality, as it affords greater protection to those who are already in a privileged position and have access to financial and legal resources.

In a classic study of this problem in the United States, the model involving legal mechanisms for redress on an individual bases under judicial control was deemed insufficient, for those who have greater access to economic and legal resources are those who in the end benefit most from the system.¹⁴

The greatest element of the benefit that better-off citizens can make of the traditional rights system lies in the advantage that they obtain through constant participation in the system over those who only participate in the system incidentally. Regular participants have the following advantages: (i) planning their behavior and collecting useful information in anticipation of potential litigation; (ii) recourse to specialists; (iii) developing close relationships with government officials; (iv) calling on credibility acquired in previous lawsuits; (v) making strategic use of the probability of losing certain types of

14 M Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law And Society Review 95.

motions; (vi) lobbying; and obviously (vii) using procedural tactics to avoid questions of merit.

It could be said that such arguments do not apply to the present case, for such advantages are more pronounced in confrontations between individuals who rarely use the legal system and organizations that constantly use it, that is, in conflicts between consumers and businesses, whereas in the case of individual protections of social and economic rights, individuals with little experience normally go up against the government. In this situation the immediate effect of the inequality in terms of access to legal resources stems from the fact that the government is usually the constant user of the justice system and thus holds an advantage over isolated individuals.

The most significant danger, however, lies where intuitively one would expect the solution. Lawyers for individuals, because of their specialized experience, should cancel out the benefits organizations gain through constant use of the Judiciary, thus ensuring equal footing for claimants against the government. In the scenario where citizens challenge the government, it is even possible to imagine that competent, specialized lawyers would have an advantage over the government, an advantage that would be transferred to the citizens. This could be a solution for the asymmetry, but instead is precisely where the problem lies.

The fact that good lawyers can transfer the advantage of their specialized experience of confronting the government to citizens in the end succumbs, once again, to the problem of social inequality. Such specialization has enormous value, as well as a price proportional to its value, a price that only citizens with considerable wealth can afford.

A poor citizen, or better yet, one among the poorest of the poor, does not, in the first place, even have the basic knowledge about such rights that can be defended in courts. We are talking here of people found in isolated pockets of utter poverty that are concentrated, for the most part, in the interior of Brazil, far from any resources, both public and private. The asymmetry of information is of such a scale that reliable comparison is not even possible, for the first scarce legal resource is the very awareness of the rights through which the constitutional system seeks to protect them – the poorest of the poor – most of all. The first problem is thus clear: the system of individual protections excludes the people whom the constitutional system should protect most, that is, the poorest of the poor, the illiterate, those who are so truly destitute of resources that they have no conception of the rights they hold that could reduce the effects of the extreme inequality.

Now, let us take a hypothetical situation in which the rights of a poor citizen are violated by the State, a citizen who knows his or her rights and wants to defend them. His or her disadvantage in comparison to a rich citizen is evident. Imagine two identical cases, one affecting a rich citizen and the other involving a poor citizen. Let us say that, the case being uncomplicated, both are in a position to contract a lawyer with the necessary level of experience. The cost, proportionate to income, will be much greater for the poor citizen than for the rich one. In more complicated cases, it is easy to imagine that only citizens of significant economic wealth would be able to contract the necessary services for competent defense of their rights. The poorer citizen would either desist because of the cost or would contract the services of a lawyer lacking adequate experience, which would put them at a distinct disadvantage compared to the wealthier citizen.

An attempt must be made to find an alternative that does not produce asymmetries so extreme that it makes the system for the individual protection of social and economic

rights appear farcical. One such alternative would be the provision of legal services for the poorest sectors by lawyers paid by the State, and in fact in Brazil the Federal Constitution provides that the States and the Federal Government shall maintain Public Legal Defense bodies (*Defensorias Públicas*). The capacity, however, of the public defenders in Brazil is minimal, far too feeble to restore the balance. In a recent report, a total of 4,515 active state public defenders were found in Brazil.¹⁵ If only for the purposes of comparison, according to the Brazilian Bar Association (*Ordem dos Advogados do Brasil*), the number of duly registered and licensed lawyers corresponds to 656,968.¹⁶ In other words, it can be said with confidence that less than 1% of practicing Brazilian lawyers are public defenders, meaning the lawyers who attend to the people in Brazil whose standard of living is beneath the line denoting absolute misery. It so happens that, according to recent data published by the World Bank, 9.9% of the total Brazilian population lived under the poverty line in 2009.¹⁷ Little effort is necessary to grasp the disproportion in available legal resources, especially when considering that those public defenders that do exist are primarily concentrated in urban areas that are often quite far from the communities that are in effect the poorest.

One would expect, then, that relying on the individual protection of social and economic rights in courts tends to favor individuals who have sufficient resources to contract the most expensive and experienced lawyers. The system risks becoming perverse, furthermore, when the benefit that can be obtained through litigation is much superior to the investment needed to contract a lawyer. It creates an incentive for the middle classes to take advantage of the system in ways that are unavailable to the most unprivileged groups, who lack the knowledge or the resources to contract specialized lawyers.

For this reason, the Brazilian constitutional system clearly set social and economic rights as rights derived from the application of public policy and the Judiciary was given the responsibility for verifying that these policies are correctly implemented. Public policies are the only means for social and economic rights to be implemented in a way that mainly benefits the poorest of the poor, that is, those for whom direct state action has the most potential to effect a reduction in the abysmal social inequality that characterizes Brazilian society. The debasement of this conception represents nothing less than the recurrence of patrimonialism in actions of apparent charity that use government resources in ways that do not benefit the people who need them most.

V. The Case of the Right to Health and the Risks of Individualizing Public Policies

In the case of Brazil, the treatment of the right to health has become the most serious example of this dysfunction. On one hand, high healthcare costs and restrictions in private health insurance policies drive a significant number of middle-class people to

15 Ministério da Justiça, 'III Diagnóstico da Defensoria Pública no Brasil' (Brasília 2009) 104 <<http://www.defensoria.sp.gov.br/dpesp/repositorio/0/III%20Diagn%C3%B3stico%20Defensoria%20P%C3%BAblica%20no%20Brasil.pdf>> accessed 14 November 2013 (the research does not include data on public defenders from the following states: Amapá, Paraná, and Rio Grande do Norte).

16 Available at <<http://www.oab.org.br/relatorioAdvOAB.asp>> accessed 14 November 2013.

17 Data regarding the percentage of the population living on under US\$2 per day, in terms of the purchasing power of the dollar in 2009 for the year 2009, according to World Development Indicators, are available at <<http://data.worldbank.org/indicator/SI.POV.2DAY>> accessed 24 November 2013.

seek state-subsidized health services or medication by bringing claims based on the universal right to health before the courts. On the other hand, certain health issues exert considerable pressure on judges, who are at times confronted with the argument that failure to concede an injunction granting a prescription will lead to the death of the plaintiff. The result of the systematic use of the Judiciary to guarantee on an individual basis the supposed individual right to state-subsidized medications could lead to the debasement of the entire constitutional system of social and economic rights. Before briefly addressing some of the points in the current debate surrounding the Brazilian jurisprudence in this matter, the relevant constitutional articles should be revisited. The most relevant of these, whose text in fact summarizes the argument of this section of the paper, is Article 196 of the Federal Constitution, which provides the following: 'Health is a right of all and a duty of the State and shall be guaranteed by means of social and economic policies aimed at reducing the risk of illness and other hazards and at the universal and equal access to actions and services for its promotion, protection and recovery.'

It should be sufficient that the article specifically states that the right to health is to be protected by means of public policies for it to be clear that it differs from an individual right. Yet the drafters of the constitutional text went to greater efforts to make this explicit, specifying in the next article, Article 197, that: 'Health actions and services are of public importance, and it is incumbent upon the Government to provide, in accordance with the law, for their regulation, supervision and control, and they shall be carried out directly or by third parties and also by individuals or private legal entities.'

The composition of the constitutional text concerning health was subjected to great debate in civil society and led to the formation of a unified system that not only integrates various levels and entities of the federal government, but also private healthcare networks. In a continental country marked by enormous economic and regional inequality, there can be no doubt that such an integrated system could afford a crucial tool for reducing those inequalities. The constitutionalization of this system may well be the greatest achievement of the 1988 Federal Constitution in terms of social and economic rights understood as a means for reducing social inequalities.¹⁸

Running counter to this major social achievement, since 1988 there has been a massive increase in the number of legal claims demanding the concession of medication or types of special medical treatments from the government on an utterly indiscriminate basis. These claims are based solely on Article 196 of the Federal Constitution and the supposition that the right to health provides legal grounds for such individual claims. The number has grown so large that the Superior Federal Court of Brazil (STF) decided to hold a public hearing on the issue, the result of which will be analyzed at the end of this section.

Many of these claims were initiated immediately after the 1988 Federal Constitution was promulgated and primarily focused on requests for concessions of medication to treat HIV/AIDS. A detailed study of the evolution of the jurisprudence regarding the

18 Studies have shown that the national public healthcare system primarily serves the poorest segments of the population. They reveal, furthermore, that instances where care is refused affect, among the poorest, those of Afro-Brazilian descent when it is unlikely that such neglect will result in a lawsuit. For more details, consult: MCSA Ribeiro and others, 'Perfil sociodemográfico e padrão de utilização de serviços de saúde para usuários e não-usuários do SUS – PNAD 2003' (2006) 11 *Ciência & Saúde Coletiva* 1011.

concession of medication in such cases by the São Paulo State Court (*Tribunal de Justiça do Estado de São Paulo*) revealed that in every single case analyzed, a court order was issued for the concession of the medications, that in almost every case the right to health was interpreted as an individual right, and that, furthermore, in less than a quarter of the favorable decisions was any aspect of public healthcare policies taken into consideration.¹⁹ In other words, basic factors such as the level of resources at the claimant's disposal, the government policies in place, and the distributive consequences of these decisions were, in general, ignored.

This use of legal recourse follows precisely the opposite path that the 1988 Federal Constitution's drafters intended. The growing pressure of concessions for medication from the Judiciary led the Executive to develop a specific policy for the universal distribution of drugs to treat HIV/AIDS. The policy culminated in Law 9.313, passed on 13 November 1996, which created a legal framework for such universal access and pushed the government to negotiate large scale purchases of medicine at reduced prices from pharmaceutical companies. The results of the program were very positive, and it became an international reference.

The case of the Brazilian HIV/AIDS program is quite emblematic of the issue at hand. In the first place, this is because it could be considered, at least at first glance, a success. After all, it concerns an internationally recognized public policy that originated in legal claims. In what could come as a surprise, however, deeper analysis casts doubt over the wisdom of making a national policy for HIV/AIDS a national priority without any consideration for its costs.

Consider the following figures. In the 2007 federal budget, around 1.3 billion Reais were allocated to the National HIV/AIDS Program, whereas only 1.5 billion were allocated for the distribution of all of the other medications to the general population, and projects for the improvement of basic sanitary conditions received just 1.6 billion.²⁰ Considering that the overarching objective of the right to health is securing the highest standard of living possible for the general population with a finite quantity of resources, it is not unreasonable to question whether those resources could save more lives and raise average life expectancy if used differently. It is therefore necessary to determine what decision-making mechanisms should be employed to ensure that the limited resources available are allocated with the greatest distributive efficiency possible and, as a consequence, as democratically as possible. It seems rather clear that the Judiciary on its own does not possess the necessary technical resources to perform this type of analysis, be it through individual claims or collective actions.

19 In a recent study of 144 judgments by the São Paulo state court, it was found that the trial judge conceded anticipated concession (following administrative review) in every case. On appeal, 85% of the motions for concession on merit were granted. In only 28.5% of the decisions conceding free distribution of the medication was the necessity of a public policy to implement the right to health considered. Moreover, in 93% of the cases, the right to health was considered an individual right, not a collective one. See C Ferreira and others, 'O Judiciário e as Políticas Públicas de Saúde no Brasil: o Caso AIDS' in IPEA (eds), *Prêmio Ipea 40 Anos - IPEA Caixa 2004: Monografias Premiadas* (IPEA 2005).

20 This represents 3.2% of the total budget for the Ministry of Health in Brazil and is greater than the total budget of the Ministry of the Environment, of Culture, of Communication, or Mines and Energy. See Senado Federal, 'Os Caminhos do Dinheiro Público' *Jornal do Senado* (Brasília, 26 December 2006) <<http://www12.senado.gov.br/noticias/jornal/edicoes/2006/12/26>> accessed 14 November 2013.

In the case of the HIV/AIDS policy, there is a clear discrepancy in the expenditures of the program, which alone absorbs greater amounts of resources than all of the other federal programs of medication distribution. This is curious for a country that is still besieged by tropical diseases that cause a significant number of deaths, such as malaria, dengue, and schistosomiasis, all of which have a lower cost of prevention. The explanation for the paradox is easily found, as the claims filed for the concession of HIV/AIDS medication originated in the major urban centers and middle class groups, where people were aware of advanced medical treatments available abroad and used the Judiciary to pressure the government for the acquisition of medications whose costs rose continuously.

Intriguingly, the success of the Brazilian campaign against HIV/AIDS did not lie in the free distribution of drugs to treat it, but rather in the preventive educative policy, which resulted in a significant increase of control over the spread of the disease. As regards the element of the program that involved free distribution of medication, the action of the Brazilian government can best be described as faltering. There was one, and only one, truly exemplary act – when the government issued a compulsory license in May 2007 for the antiretroviral drug Efavirenz²¹ – yet it was only in 2009 that generic production in a Brazilian laboratory of the medicament started, which translates into substantial savings for the Brazilian government, but only after nearly 8 years of negotiations with the drug's manufacturer.

One possible conclusion is that, had the Judiciary been stricter in its interpretation of the Federal Constitution of 1988, demonstrating more fidelity to the constitutional text, the organized groups behind the successive waves of demands for new medications would then have had to duly seek the compulsory licensing of those drugs, which would have significantly reduced public spending. In a different sense, the interest of the pharmaceutical companies in maintaining the present system is understandable. According to the current state of affairs, courts become, so to speak, regular customers that purchase high cost medications, and even experimental medicines, at full price, rather than having to negotiate directly with the government. The government, unlike judges, wields great bargaining power and its actions do not benefit one single citizen at a time, but millions of them based on its public policies.

Instead the practice that began with isolated demands for the concession of drugs to treat HIV/AIDS became generalized, as claimants insisted on medications for a host of diseases, free of charge, remedies that cost more and more, that were often experimental, unauthorized for sale in Brazil, and often even against specific policy guidelines published by the Ministry of Health for certain illnesses.

The most detailed studies of the subject indicate that such claims tend to benefit the wealthiest, as was argued earlier. In the broadest study of the judicialization of the right to health in Brazil, 3,007 lawsuits from 2006 were analyzed.²² The cases studied involved suits filed against the Health Department of the State of São Paulo (*Secretaria de Saúde do Estado de São Paulo*) in which the court granted the plaintiff medical concessions free of charge. The results are quite revealing. In 74% of the cases studied, the plaintiffs

21 Executive Order No 6.108, 4 May 2007.

22 See AL Chieffi and RB Barata, 'Judicialização da política pública de assistência farmacêutica e equidade' (2009) *Cadernos de Saúde Pública* 1839, 1847.

were represented by a private attorney, compared to 26% in which representation was provided by public interest and service organizations.

77% of the medications solicited did not figure on the list of those provided by the Ministry of Health's public healthcare system and 3% were not even commercially licensed for Brazil. These statistics reveal how the concession of those medications violates two important principles of good public administration.

With regards the 77% of drugs that were not covered by the list of the Ministry of Health, their concession by court order, besides contradicting a prior decision of the Executive, also results in a violation of bidding and government spending rules. It is important to emphasize this point, for if such purchases had not been mandated by court order, they would represent a serious breach of the law, especially considering that in some cases these court orders stipulated that the acquisition of the medication be handled directly by the beneficiary. In other words, the court order itself, in and of itself, represents a violation of the law. In the case of medicaments whose commercialization was not permitted in Brazil, such disregard for standing legal principles is even more blatant, since the commercialization of those medications through other channels would constitute illicit, irregular commerce of the drug.

Yet the most telling statistic in the study being discussed concerns the economic capacity of the patients, measured by the degree of social vulnerability that corresponded to the location of their residence. The study showed that 51% of the claims were brought by individuals who lived in areas free of any social vulnerability, areas that only include 22% of the population of the state of São Paulo. The other 49% of the cases involved individuals who lived in areas of low to high levels of social vulnerability, which correspond to the conditions that a majority representing 78% of the population in São Paulo of lower incomes endures. Based on the results of this in-depth study, there can be no doubt that the wealthier sectors of the population benefited more from individual protection of the right to health. But that is not all. The wealthiest sectors also sought the highest priced drugs, further aggravating the inequality of resource allocation.²³

Lastly, there are other studies that also show that the lack of technical competence of the Judiciary to make this kind of decision results, purely and simply, in a waste of resources.²⁴ Most of the treatments demanded, especially among the most expensive ones, are of dubious efficacy.²⁵ It is still surprising to see that judges end up not only obliging the State to purchase medications whose effectiveness is uncertain, but also, in

23 Patients from the least vulnerable levels accounted for 75% of the requests for cancer treatments unavailable in Brazil and 52% of the cancer drugs in general. Requests from the most vulnerable groups mainly involved medication available through the public healthcare system. The reason is obvious. The poorest citizens use the public healthcare system, where the doctors prescribe medicine from the recommended list, hence the poorest only use recourse to the courts when those drugs are out of stock. The wealthiest citizens consult private doctors who prescribe medications that are not on the public healthcare's list and that are occasionally experimental drugs only available abroad. AL Chieffi and RB Barata (n 22) 1847.

24 V Afonso da Silva and FV Terrazas, 'Claiming the Right to Health in Brazilian Courts: The Exclusion of the Already Excluded', *Law and Social Inquiry*, Forthcoming. Available at SSRN <<http://ssrn.com/abstract=1133620> or <http://dx.doi.org/10.2139/ssrn.1133620>> (posted on May 16, 2008 and last revised on November 6, 2010) accessed 14 November 2013.

25 In a study of lawsuits from 2005 filed against the Secretary of Health for the Municipality of São Paulo, it was found that 75% of the total resulting expense of those lawsuits went for antineoplastic cancer drugs. Of the 10 antineoplastic drugs identified in the lawsuits, 4 had not been proved effective and another 5 were of limited effectiveness, 3 of which had not been approved for commercialization

some cases, obliging it to purchase drugs whose commercialization in Brazil is technically illegal. Put another way, if a public administrator had done the same thing, it would constitute a grave infraction for which the administrator could be held personally responsible.

Several pertinent themes have been brought up so far: (i) the conflict implicit between the individualization of the right to health and the text of the Federal Constitution of 1988, (ii) the iniquity inherent in using legal recourse to obtain concessions and the possible inefficiency of this means, and (iii) the possibility that resources are squandered by conceding ineffective medication or, worse yet, that could lead to negative health effects because of their experimental nature. These points, together with the rising number of claims for the free concession of medicine, were the justification for the convocation of a public hearing on the subject by the Brazilian Supreme Federal Court (STF). This hearing was carried out on 27 to 29 April, and then 4 to 7 May 2009. Lamentably, the results of the hearing, both in terms of the debate that took place and its impact on the jurisprudence, were disappointing.

To begin, it must be pointed out that it became clear during the public hearing that there lacks sufficient information on the subject. Since the legal claims are sometimes brought against the federal government, and other times against state or municipal governments almost haphazardly, there lacks a conclusive analysis of the distortions the claims produce in the operation of the public healthcare system. The issues raised by the studies mentioned above were all expressed by the representatives of the federal government who were present at the hearing, mainly by the then-Attorney General who now sits on the STF, Justice José Antônio Dias Toffoli, who mainly emphasized the limitations on the resources of the federal government and the discrepancy between the medications demanded and those available through the national healthcare program.²⁶ Along the same lines, the representative of the Ministry of Health made it clear that a complete picture of the system is necessary for the choices in terms of which medications to adopt and how much to invest in each illness and in each region of the country to be based on strategic planning instead of on a case-by-case *ad hoc* approach.²⁷ In any case, during the hearing the lack of statistical justification or any empirical survey of the issue was felt keenly, which provides a clear indication that Brazilian courts are going to continue decide such cases in the dark, without any knowledge of the consequences their decisions will collectively have on the national budget or generally for the protection of health.

Just as the discussion in the public hearing specially called to discuss the matter was superficial, so was its impact on the jurisprudence. The first case decided after the hear-

in Brazil. FS Vieira and P Zucchi, 'As distorções causadas pelas ações judiciais à política de medicamentos no Brasil' (2007) 41 *Revista de Saúde Pública* 214, 217.

26 STF, Pronunciamento de Dias Toffoli na Audiência Pública referente aos Agravos Regimentais nas Suspensões de Liminares nºs 47 e 64, nas Suspensões de Tutela Antecipada nºs 36, 185, 211 e 278, e nas Suspensões de Segurança nºs 2361, 2944, 3345 e 3355 <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaSaude/anexo/Sr._Min._Jose_Antonio_Dias_Toffoli__Advogado_Geral_da_Uniao_.pdf> accessed 14 November 2013.

27 STF, Pronunciamento de Alberto Beltrami na Audiência Pública referente aos Agravos Regimentais nas Suspensões de Liminares nºs 47 e 64, nas Suspensões de Tutela Antecipada nºs 36, 185, 211 e 278, e nas Suspensões de Segurança nºs 2361, 2944, 3345 e 3355 <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaSaude/anexo/Sr._Alberto_Beltrami__Secretario_de_Atencao_a_Saude_.pdf> accessed 14 November 2013.

ing was held involved a motion for special review (*Agravo Regimental*) to reverse a decision of the President of the STF that refused a request to suspend regulatory administrative proceedings and grant immediate concession of a medication called Zanesca for a patient suffering from a rare neurodegenerative disease.²⁸ In that judgment, there was a glaring lack of any clear criteria for the concession of such medicaments by the Judiciary. One notable development in the case involves the opinion of Justice Gilmar Mendes that held the concession of medications whose commercialization is prohibited in Brazil to be a flagrant violation of the law that could no longer be permitted, this despite the fact that this particular point was not part of the decision under review.

In a different sense, however, in focusing on drugs lacking commercial licenses, the opinion of the Justice only confirms the understanding that the fact of a drug's exclusion from the list of the national public healthcare system's (*Unified Health System*) recommended medications does not constitute a sufficient argument for courts to deny free concession of it. In truth it operates an absolutely irrational inversion of the burden of proof, forcing the government to prove a drug is absolutely ineffective before it can refuse concession, whereas logically one would think that the claimant would have to prove the relevance of the treatment for the exception to be granted. In the actual case, the STF justified its decision to grant the concession solely on the basis of the appraisal of a single hospital, which stated that the medication would increase the patient's chances for survival. No other sort of confirmation or specialized opinion was requested, and the opinion of the Minister of Health himself, who had approved the decision not to include the medication on his list of prescribed medicines for lack of proof of effectiveness, was disqualified as insufficient.

In other words, the STF completely rejected the argument that the decisions regarding the formulation of public health policies fall to the Executive, deputing to themselves the authority to decide matters as technical as whether a drug is or is not effective in the treatment of rare diseases, a question that would certainly even be difficult for specialized researchers to answer. On this point, the STF did not offer any directive regarding the limits on judicial authority to reformulate public health policies concerning the distribution of medications.

In this respect, the court also missed an opportunity to address more clearly matters related to the separation of powers in respect to health care in particular. The Federal Constitution of 1988 does not provide a general guideline with regards to the division of competences among powers. Article 2 of the Constitution only provides that the Union is formed by the three powers, Legislative, Executive and Judiciary, and that such powers are 'independent and harmonic' among themselves. The actual balance between such powers, and the content of their independence and harmony, depends on the more detailed constitutional provisions regarding competence and on statutory and case law applicable to each particular case. As mentioned above, in the case of the right to health, Article 196 of the Federal Constitution of 1988 provides clearly that such right depends on public policy. Hence, it was also an opportunity for the court to create general criteria with regards to review by the Judiciary of public policies drafted by the legislative and executive to protect social and economic rights in general. However, it was an opportunity that was missed.

28 STF, STA 175, Min Rel Gilmar Mendes, j 17.03.2010.

As for the redistributive consequences of such decisions, rather than including elements to enable the Judiciary to incorporate distributive analysis into its jurisdictional activity, the STF chose to ignore the question completely. And the use of the word 'ignore' is not used in the sense of 'overlook,' but rather in the sense that the court expressly stated that the issue was not relevant. According to the opinion of Justice Gilmar Mendes,

'[W]ith regards social rights, what must be taken into consideration is that the service owed by the State varies according to the specific needs of each citizen. Hence, while the State must dispose of a certain sum before it can afford a system that universally guarantees the freedom of all citizens, in the case of the right to health, however, it must dispense different quantities depending on the individual needs of each citizen. Allocating more resources to one citizen than another, therefore, implies adopting distributive criteria for those resources.'²⁹

In other words, rather than require such decisions to adhere to some distributive criterion, or that the Judiciary accept the distributive determinations made by the Executive, it is understood that attending to social and economic rights is necessarily unequal, since different people have different needs. The Judiciary, then, is justified in obliging the Executive to purchase high cost medications of dubious effectiveness for individuals who might be able to pay for the medication themselves on the basis of the idea that affirming social and economic rights is inherently unequal. Curiously, a bad habit that has a long history in Brazilian legal practice is repeated in this case. It is the practice of using foreign arguments and debates to find answers for local problems. In the case at hand, the doctrine on which the opinion was based was almost wholly German, justly shaped by the logic of a rich, egalitarian State. Once 'tropicalized' and removed from its proper context, the argument becomes fit for theatre of the absurd. In countries that possess healthcare systems that are exclusively public, it would be unthinkable for an individual to make a demand before the courts for treatment that was not prescribed in the public health policy of that country. It would imply total contempt for the system, which envisages and is accordingly set up to provide services tailored to the needs of the entire population. Inserted into the Brazilian context, a country that is still developing and is extremely unequal, the result of applying this doctrine of social and economic rights, in spite of the rhetoric of protecting the poorest, turns out to be patently conservative: the right to health is an individual right, which can be demanded from the government by those who have the best lawyers and the best medical evaluations, independently of (i) the effectiveness of the treatment requested, (ii) the government policy in place for such treatment, (iii) the impact of the benefit on public coffers, and (iv) the economic capacity of the beneficiary and the potential injustice from the perspective of equity implicit in the decision.

In its ruling dated as of 17 March 2010, on the Motion to Suspend Preliminary Injunction (*Suspensão de Tutela Antecipada*) No 175, the STF, based on the vote of Justice Gilmar Mendes, made an attempt to provide a general standard to be applied to cases related to the right to health. The standard is based on a two-step test. The first step is

29 STF, STA 175, Min Rel Gilmar Mendes, j 17.03.2010.

to identify if there is or not a public policy that responds to the demand of the individual requesting the health services or drugs. The second step is to identify if such policy is lacking due to (i) legislative or administrative inaction; (ii) an administrative decision not to provide such services or drugs; or (iii) the existence of any legal restriction to the provision of such health services or drugs.³⁰ As mentioned above, this is not a standard for judicial decisions. This is just a fact-finding guide to determine certain basic facts and formal restrictions applicable to a case. At the end of the day, there is no clear guidance in case that a judge is faced with a claim for a drug that is not illegal, but is not part of the list of drugs to be distributed by the Unified Health System based on an administrative decision. Again, the lack of concern for any distributive consequences of such decision is striking.

To a certain extent, the decision of the STF mentioned above departed from the previous understanding of the court, which made clear that the Judiciary could not grant drugs in individual cases if such drugs were not in the list of approved medicines to be distributed by the Unified Health System. Luís Roberto Barroso, a constitutional law scholar recently appointed to be a justice at the STF, mentioned in an article³¹ published prior to the public hearings on the matter at the STF that the court set such a standard on its ruling on Motion for Suspension of Mandamus (*Suspensão de Segurança*) No 3.073³². Barroso agreed with such standard, and provided a clear separation between individual claims, which would be subject to such formal restrictions, and collective claims, which could then challenge administrative decisions. However, even in such case Barroso provided 'the right to live' as the final substantive standard for court decisions on this matter. This is not an easy criterion, since such debate never arises in cases in which it is clear-cut if a drug or special treatment will save the life of a person. Such cases are brought to the Judiciary when there is, on the one hand, doubt if such resources will be able to save lives, or, at least, a substantial number of lives from a distributive perspective, and, on the other hand, hope from claimants that the lives of loved ones will be saved. Differently from the current dominant case law on the matter in Brazil and the relevant scholarship reviewed, the conclusion of this paper is that the standard to rule on such cases shall be necessarily distributive. The critique is that case law has proved to adopt only formal standards, which are inherently contrary to the principles behind social and economic rights. In this regard, the problem is not if the lawsuits brought before the courts are, from a formal perspective, individual or collective (eg class actions). The problem is if the ruling is based on formal or distributive standards. If it is based on formal standards, the result might be regressive, in the sense that all problems mentioned above would come into play. So, the problem will be the same if some rich and well educated people were to constitute a non-profit association and to bring a class action against the Federal government to include an extremely expensive drug or treatment to the list of the Unified Health System that will benefit only a few people but drain very substantial resources from the government that could otherwise be invested in the cure of the disease of the poor, with drugs that are known and cheap, saving a much greater number of lives. However, as repeatedly stated above, the story

30 STF, STA 175, Min Rel Gilmar Mendes, j 17.03.2010.

31 LA Barroso, 'Da falta de efetividade à judicialização excessiva: direito à saúde, fornecimento gratuito de medicamentos e parâmetros para a atuação judicial' (2008) revista Jurídica Unijus 13.

32 STF, SS 3.073, Min Rel Ellen Gracie, j 9.2.2007.

of the poor would not be heard, because they would not have resources to hire sophisticated lawyers to bring such lawsuits before courts requiring the government to, for example, invest to eradicate esquistosomiasis, which requires only a basic investment on sanitation.

What is lacking in case law regarding free distribution of drugs is a distributive analysis, which would balance the benefits of conceding the benefit in the case at hand with the costs of withdrawing resources from other areas. Such cost might represent a much greater risk of death for a more significant number of people, who are most probably poorer and lack voice to express their suffering. As mentioned earlier, this extraction of resources will inevitably affect the poorest of the poor. The public healthcare system is as yet incapable of meeting all the demand for its services, and studies discussed above indicates that the majority of people who do not receive attention when it is solicited live below the poverty line.

Perhaps surprisingly, the Executive's response to the hearing at the STF and the ruling on the Motion to Suspend Preliminary Injunction (*Suspensão de Tutela Antecipada*) No 175 was rapid. On 28 April 2011 Law 12.401 was approved, altering the parts of the legal foundation for the national healthcare system that concerned the distribution of medication to the population.³³ The changes basically created a much more dynamic mechanism for updating the list of recommended medicaments, as well as mechanisms for the division of attributions between the various federal entities. Symbolically, the law expressly prohibited the distribution of medicaments or indemnification for expenses that involve experimental procedures or are not approved by the national health agency that oversees these issues. It also expressly prohibited the distribution of domestic or imported medications that are not registered with that agency.³⁴ In other words, it made explicit what had already been explicit, but in a way that constrains the Judiciary either to respect the mandate or to declare it unconstitutional.

Demonstrating its diligence, the Executive vetoed certain provisions of that legislation that could be considered clear evidence of the pharmaceutical industry's lobbying efforts, such as a clause meant to prohibit the Executive from carrying out cost-benefit analysis when determining whether to include medications on the list of drugs distributed through the public healthcare system. In fact, such cost-benefit analysis, when discussing social and economic rights, is, in fact, a distributive analysis, since the utmost criterion is not if lives will be saved, but how many lives. It is utterly unacceptable that poor people continue to die because of diseases that have very simple solutions, based, for example, in the free distribution of vaccines, but that are not related to the interests of large pharmaceutical companies because such vaccines are no longer protected by patents.

The question with which this section closes, then, is the following: Will the Brazilian 'new constitutionalism' reveal itself sufficiently democratic to recognize the initiative of the Legislature and Executive to limit the decision-making power of the Judiciary, and, in so doing, acknowledge the authority of the Executive to formulate public policy, or will Law 12.401 be declared unconstitutional?

33 Law nº 8.080, 19 September 1990.

34 The *Agência Nacional de Vigilância Sanitária*.

VI. Conclusion

The question posed at the outset of this paper was whether the increasing 'judicialization' of social and economic rights represented a wave of 'new constitutionalism' in Brazil, understood as social transformation in terms of greater democratization instigated principally by the judicial branch. The conclusion, necessarily, appears to be no. What can be identified is the recurrence of patrimonial dynamics, by which government serves the best-off classes, the privileged who are well aware of their 'individual rights' and who have access to the lawyers capable of making the most of them.

The influence of legal doctrine from foreign sources, another aspect of this 'new constitutionalism' that has global aspirations, is also more allegorical than effective. Patrimonialism has long since mastered the practice of 'cannibalizing' foreign doctrine, using it as a purely rhetorical device to dress up local interests in universal terms.

The discussion of the judicialization of the right to health illustrates this well.³⁵ First of all, we should wonder how the Brazilian courts came to unanimously recognize an individual right to health in a way that flagrantly contradicts the constitutional text. Secondly, the most thorough studies of the matter clearly reveal that the practice has a regressive effect and reinforces social inequality, favoring the middle classes, not the poorest of the poor, again in defiance of the constitutional text, once the objective of social and economic rights is recognized as the reduction of inequality.

The question that remains is the following: For what reason did case law only come together so neatly when interpreting the right to health as the right to the free concession of medication, rather than in consideration of the right to work, to education, or to adequate housing? The answer is simple. Judges, members of the same middle class, defend their interests as a class, and can identify with someone who is seeking free concession of medicine. Judges, confronted with the possibility that the person imploring concession might die, prefer performing charitable acts with government money over assuming the burden of such difficult decisions. Behind these decisions is not any 'new', modern, cosmopolitan, and democratic constitutionalism, but instead the same remarkable patrimonialism of Brazilian society for whom government is not considered the principal instrument for resource redistribution, but rather as the primary motor to preserve social inequality.

The poorest of the poor are excluded from the debate, indeed they are strangers to the very existence of certain constitutional rights. They would be so lucky to have drugs prescribed for their ailments; they die in the corridors of public hospitals before their illnesses are even diagnosed. These rights go unexercised because the poorest people do not know they exist. They are suited for people who have more wealth, people who can privatize them into individual rights, transforming them from 'our' rights into 'mine'.

Faced with tragic choices, the judges choose the life that is closest to them because they do not know, or do not have the means for knowing, that their choice might jeop-

³⁵ The applicability of such arguments to the protection of other social and economic rights would depend on closer studies of each specific right. In the case of the right to health, particularly with regards to litigation for the distribution of free medicine, this study benefited from a great array of empirical work. Such empirical work is lacking, at least in Brazil, with regards to, for example, litigation of the right to education, housing, and land reform, for example. It remains, though, as a relevant hypothesis for further research.

ardize a much greater number of lives that are far from them, far both in terms of physical and spiritual distance.

Thinking in individualistic terms is how countries remain eternally in the developing phase and permanently unequal. What is most provocative about the Brazilian situation is that the text of the constitution indicates the correct direction to take, which is to analyze the distributive effects of each decision, since social and economic rights shall always have a positive distributive effect. Moreover, in this specific case, the public health policy implemented is nothing short of exemplary and extremely well-suited for the reality of Brazil, and serves as a reference for many developed and developing countries. Before seeking new conquests, one must learn to appreciate the achievements of the past, the ones that only became possible after great effort and social mobilization. This must be done for genuine victories to be distinguished from false promises, and as far as reducing inequality in Brazil goes, the excuses for continuing to believe in false promises ran out centuries ago. Discovering the truth about social inequality in Brazil requires deep, perhaps painful, self-evaluation, and unless that self-evaluation is conducted by those who have not suffered the full injustice of inequality, it will never become the source of a deep, genuine transformation in society.

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References

- Barros R and others, 'Queda Recente da Desigualdade de Renda no Brasil' (2007) Instituto de Pesquisa Econômica Aplicada Research Paper 1258/2007 <http://www.ipc-undp.org/publications/cct/td_1258.pdf> accessed 14 November 2013.
- Chieffi AL and Barata RB, 'Judicialização da política pública de assistência farmacêutica e equidade' (2009) Cadernos de Saúde Pública 1839.
- Faoro R, *Os Donos do Poder: A Formação do Patronato Político Brasileiro* (Globo 1975).
- Ferreira C and others, 'O Judiciário e as Políticas Públicas de Saúde no Brasil: o Caso AIDS' in IPEA (eds), *Prêmio Ipea 40 Anos – IPEA Caixa 2004: Monografias Premiadas* (IPEA 2005).
- Galanter M, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law And Society Review 95.
- Hirschl R, *Toward Juristocracy: The Origins And Consequences Of The New Constitutionalism* (Harvard, 2007) 213.
- Michelman FI, 'Foreword: On Protecting the Poor Through the Fourteenth Amendment' (1969) 83 Harvard Law Review 7.
- Michelman FI, 'Symposium: "Brown" at Fifty – Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa' (2004) 117 Harvard Law Review 1378.
- Michelman FI, 'The Rule of Law, Legality and the Supremacy of the Constitution' in M Chaskalson and others (eds), *Constitutional Law of South Africa* (Juta 2005).
- O'Donnell G and Schmitter P, *Transitions From Authoritarian Rule* (The John Hopkins University Press 1986).
- Ribeiro MCSA and others, 'Perfil sociodemográfico e padrão de utilização de serviços de saúde para usuários e não-usuários do SUS – PNAD 2003' (2006) 11 Ciência & Saúde Coletiva 1011.
- Vieira FS and Zucchi P, 'As distorções causadas pelas ações judiciais à política de medicamentos no Brasil' (2007) 41 Revista de Saúde Pública 214.
- Weber M, *Economy and Society* (University of California Press 1978).