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3 Accountability for Social and Economic Rights in Brazil

FLORIAN F. HOFFMANN AND
FERNANDO R. N. M. BENTES

> The Brazilian AIDS movement has succeeded in extracting the judiciary's transformative potential, giving momentum to widespread structural reforms on the basis of the strategic use of domestic legislation within a wider human rights perspective.
>
> Miriam Ventura[1]

> It is not within the competence of the judicial branch[. . .]to act as a legislator of positive law, whereby it would impose its own criteria upon matters which can only be legitimately defined by the legislature . . .
>
> Justice Celso de Mello[2]

This chapter examines the origins and impact of litigation for health and education rights in Brazil. The first section examines the demand- and supply-side factors that are related to the decision to legalize demands. The second section analyzes the reasons for judicial support, or denial, of these claims. A third section studies the bureaucratic and political response to court-ordered remedies for violations of constitutional rights to health care and education. Finally, a conclusion summarizes the discussion and presents four models of litigation for health and education rights in Brazil.

[1] See Relatório Consultoria Projeto 914BRA59 (PNDST/AIDS) 2003. *Proposta de um Plano de trabalho para as Assesorias Jurídicas das ONG/AIDS*, March (revised version), p. 12; also cited in Mário Scheffer, Andrea Lazzarini Salazar, and Karina Bozola Grou, 2005. *O Remédio via Justiça: um estudo sobre o acesso a novos medicamentos e exames em HIV/AIDS no Brasil por meio de ações judiciais.* Brasília: Ministério da Saúde.

[2] In RE 322348 AgR/SC.

The research team included, during different periods, Guilherme Peres de Oliveira, Gustavo Proença, Mariana Fittipaldi, Pedro Henrique Batista Barbosa, Priscila Madalozzo Pivato, Renata Monteiro, and Teresa Robichez; in addition, Teresa Robichez and Renata Monteiro worked on the qualitative follow-up study, and Teresa Robichez and Ivanilda Figueredo provided overviews of the secondary literature and newspaper reports; Helen C. C. Ferreira helped with the consolidation of the quantitative data, and Ediomar Fernandes Estock with footnotes. Finally, Márcia N. Bernardes provided valuable input and logistical assistance in the early phase of the project. And, of course, the editors of the present volume, Varun Gauri and Daniel Brinks, were at all times present in the back – and occasionally in the foreground. This study would, evidently, not have been possible without these collaborators, and we are profoundly grateful to them for having joined us in this effort; no responsibility for any defects in this study falls, however, on them.

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The overall conclusion from the information presented is that Brazil has experienced exponential growth in the rate of litigation over health rights, with a much more modest increase in education rights litigation. Most of the demands are individual demands, for specific health-care-related goods and services and are concentrated in the more developed states, such as Rio de Janeiro and Rio Grande do Sul. The courts have been very open to these individual claims and much less willing to accept collective claims. As a result, the prosecutor's office, which is the primary user of collective causes of action in Brazil, has come increasingly to rely on negotiation under the threat of litigation to shape and motivate policy development in rights-protected areas in Brazil. We conclude that litigation is having a strong impact, with mixed consequences for democracy and distributive justice in Brazil, and that a backlash on the part of policy makers and bureaucrats may be on the mid-term horizon.

The chapter is based on a quantitative and qualitative survey of health and education rights litigation in five Brazilian states, namely, Bahia (BA), Goiás (GO), Pernambuco (PE), Rio de Janeiro (RJ), and Rio Grande do Sul (RS), and the two superior tribunals, namely, the Federal Supreme Court (*Supremo Tribunal Federal* – STF) and Superior Court of Justice (*Superior Tribunal de Justiça* – STJ). On the state level, only the state appellate courts (*Tribunais de Justiças* – TJs) were examined, as case records at lower level courts are not electronically searchable. Federal courts were not included in the survey, as they only account for a small number of the relevant jurisprudence, though some federal cases came up in the literature and press review, especially in relation to access to HIV/AIDS drugs cases, over which federal courts exercise partial jurisdiction.[3]

THE MOMENT OF LEGALIZATION: SUPPLY- AND DEMAND-SIDE FACTORS OF SOCIAL RIGHTS LITIGATION

The Supply Side: Legal System and Social Rights Infrastructure

The Brazilian legal system is a hybrid of the (north) American and the continental European (Roman-Germanic civil) legal systems. Whereas Brazilian constitutional law and, to some extent, its judicial institutions show considerable American influence, private law, as well as the general judicial *mentalité* are firmly grounded in the civil law tradition.[4] The main reference point is the 1988 Federal Constitution (*Constituição Federal*), which is the seventh constitution since Brazil became an independent country in 1822. It marks the transition to democracy after twenty-one years of military rule. The transition was gradual, running from the institution of the first civilian president in 1984 to the first free and direct presidential election in 1989, with the apex being the promulgation of the new Constitution in 1988.[5] Drafted by a Federal Congress that doubled as Constituent Assembly – an arrangement imposed by the remnants of the outgoing regime and, hence, typical

[3] Insofar as the HIV/AIDS program is federally co-administered.
[4] Eduardo C. B. Bittar, 2003. História do Direito Brasileiro.São Paulo: Editora Atlas.
[5] José Afonso da Silva, 2007. *Comentário contextual à Constituição.* São Paulo: Malheiros.

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for the top-down nature of the transition – it took two years, from 1985 to 1987, to be elaborated.[6] It is a lengthy and heterodox document, strongly reflective of different corporate interests, and more of a grand compromise than a master plan for a newly democratic Brazil. Yet, it is the most democratic basic law Brazil has ever had, and it has given rise to a vibrant constitutional culture that has been playing an important part in subsequent social and political developments.

The system of government established by the Constitution is presidentialist, though with parliamentarist undertones, notably in the form of the executive's need to rely on more or less stable multiparty coalitions in the Congress. The judiciary is entirely independent and fiercely safeguards its supervisory competences over governmental conduct. Being a federation, Brazil is comprised of three administrative levels, notably, the Union (*União*), the States (*Estados*), and Municipalities (*Município*s). Although in some issue areas, such as education, each federal entity's competences are clearly set out in the Constitution, in others, such as health care, the so-called principle of federal solidarity prevails,[7] giving the three entities concurrent and competing competences and obligations. The courts, as guardians of the Constitution, exercise supervisory jurisdiction over these competences, but they have traditionally refrained from meddling with the administrative division of labor that has emerged among the three levels.[8]

Judicial review is mixed, combining the American-inspired diffuse-concrete form with the continental European centralized-abstract one. The former allows all ordinary tribunals to pronounce on the constitutionality of legislation in concrete cases and is applicable only *inter partes* (between the parties) whereas the latter is reserved to specialized constitutional tribunals adjudging the constitutionality of laws in the abstract, and has an *erga omnes* (toward all) effect.[9] Within this mixed scheme of constitutional judicial review, the *Supremo Tribunal Federal* (STF) is both the equivalent of the U.S. Supreme Court, that is, the highest court of appeal in constitutional matters, as well as a specialized constitutional court for abstract review of legislation, actionable by a clearly delimited range of public actors, such as the president, the House and Senate, and a number of other entities.[10] Diffuse-concrete control of constitutionality remains the more common form of judicial review, especially as STF decisions within this ambit are not binding beyond the decision in question. Hence, in theory at least, there are no precedent-setting cases, and each judge is free to interpret the law afresh even for very similar factual situations. Indeed, the absence of formal binding precedent (*stare decisis*) means

[6] Luiz Roberto Barroso, 1999. "Dez anos da Constituição de 1988." In Ingo Sarlet (ed.), *O Direito Público em tempos de crise: Estudos em homenagem a Ruy Ruben Ruschel* (pp. 190–196). Porto Alegre: Livraria do Advogado.

[7] José Afonso da Silva, 2007. *Curso de direito constituciona lpositivo*, 28th ed. São Paulo: Malheiros.

[8] Gilberto Bercovici, 2003. *Desigualdades regionais, estado e Constituição.* São Paulo: Max Limonad, pp. 156–7.

[9] José Adércio Leite Sampaio, 2002. *A Constituição Reinventada pela Jurisdição Constitucional.* Belo Horizonte: Del Rey, pp. 41–43.

[10] See Art. 103, which specifies the Direct Action of Unconstitutionality (*Ação Direta de Inconstitucionalidade*) and the Direct Action of Constitutionality (*Ação Direta de Constitucionalidade*).

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that case loads are very high.[11] Moreover, with the exception of a few lead cases,[12] jurisprudence will not be cited. These formal rules, are, however, tempered in practice. As we observe in the cases we examine, the spectrum of arguments used by plaintiffs, defendants, and judges will, over time, consolidate into a fairly fixed list of standard arguments for similar factual situations, and the limited and widely recognized set of reasons on which claims or decisions can be based, as well as informed intuition about the decision habits of the courts, will, de facto, create a considerable degree of legal certainty.

Below the STF are the four federal superior courts, with the *Superior Tribunal de Justiça* (STJ) being the most important.[13] The STJ is the final court of appeals for all infra-constitutional matters, whether on the federal or the state level. Then there are the ordinary courts on the federal and state level: the Federal Courts of Justice (*Justiça Federal* – JF) of the first instance, and the Regional Federal Tribunals (*Tribunais Regionais Federais* – TRFs) of the second instance, the jurisdiction of which comprises federal legislation. On the state level, there are the *Tribunais de Justiça* (TJs), which are divided into single judge first-instance chambers and second-instance appellate chambers comprised of three to five senior judges (*desembragadores*). Although the Brazilian legal system contains specialized courts for labor, military, and electoral matters, there are, unlike in most European civil law systems, no separate administrative tribunals, with most disputes concerning public administration being dealt with in the ordinary tribunals. That said, the TJs, as well as the JF, are organizationally divided into thematically specialized benches; most health-rights actions are, thus, dealt with by the TJ's public administration bench (*Fazenda Pública*), whereas most education cases fall within the ambit of the children and adolescents division (*Criança e Juventude*).

In addition to the tribunals, there are a number of other relevant judicial actors, namely, the (State and Federal) Prosecutor's Office (*Ministério Público*), the Public Defender's Office (*Defensoria Pública*), and the (Municipal, State or Federal) Solicitor's Office (*Procuradoria do Município* [PM]/*Procuradoria do Estado* [PE]/*Advogacia Geral da União* [AGU]). The *Ministério Público* (MP) is an independent judicial body present at both the state and the federal level and charged, in the text of Article 127 of the Constitution, with the general "guardianship of the legal order, the democratic system of government, and inviolable social or

[11] The STF alone decided more than 110,000 cases in 2006 only; see http://www.stf.gov.br/portal/cms/verTexto.asp?servico=estatistica&pagina=movimentoProcessual In 2004, however, a constitutional amendment created the *súmula vinculante* by which the STF, by a two-thirds majority of its judges, can declare the bindingness of a certain precedent – a competence it has, so far, only used sparingly and the ultimate effect of which is no yet discernible; see Alfredo Canellas, 2006. *Constituição interpretada pelo STF.* Rio de Janeiro: Freitas Bastos. Available at http://www.stf.gov.br/institucional/regimento/p2t1c4.asp (accessed on December 8, 2007).

[12] See Gilmar Ferreira Mendes, "O efeito vinculante das decisões do Supremo Tribunal Federal nos processos de controle abstrato de normas." *Jus Navigandi, 43.* Available at http://www1.jus.com.br/doutrina/texto.asp?id=108 (accessed on December 17, 2007); and Carlos Aurélio Mota de Souza, 1996. *Segurança Jurídica e Jurisprudência: um enfoque filosófico jurídico.* São Paulo: LTr.

[13] The others are the Superior Electoral Court (*Tribunal Superior Eleitoral*), the Superior Military Court (*Tribunal Superior Militar*), and the Superior Labor Court (*Tribunal Superior de Trabalho*).

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individual interests". It has a wide range of competences, enumerated in Article 129, that include the supervision of compliance by public authorities on all levels with the rights guaranteed in the Constitution and the initiation of a particular type of (abstract-collective) suit, the so called public class action, or, literally, "civil public action" (*ação civil pública*) on virtually all issues of public interest.[14] Similarly, the MP enjoys a number of administrative control competences, the two most relevant of which are the administrative inquest (*inquérito administrativo*) and the adjustment of conduct injunction (*termo de compromisso de ajustamento de conduta*).[15] Moreover, it has wide-ranging investigatory powers, and, most important, may act entirely on its own initiative, though it may receive and consider complaints from the general public. The *Defensoria Pública*, in turn, is, like the MP, a public body of civil servant lawyers. These lawyers work as defense counsel in criminal matters, but, it is important to note, also as general counsel in certain civil actions for indigent defendants or plaintiffs. For the purposes of the Defensoria Pública, indigence is determined via a means test, the nature of which varies, however, across states – in some it is strictly tied to specific income limits, in others it is assessed relative to the value of the claim brought.[16] Last, the PM/PE and the AGU, are roughly equivalent to government solicitors in the United States, and argue their respective public authority's case before the courts.

With regard to legal process, the overwhelming majority of health and education rights cases are comprised of just two types of civil action: individual and public. Individual actions (*ações individuais*) are brought by individual plaintiffs represented by private attorneys or the Defensoria Pública against public authorities claiming the provision of a specific good or service *inter partes*. Public class actions, in turn, belong, as was seen, mainly to the toolkit of the MP. They concern the "structural" noncompliance by public authorities with their legal obligations, such as the constitutional minimum spending threshold for health and education. Public class actions apply *erga omnes* (toward all) and have, thus, a much more far reaching impact than individual ones. They are, however, not to be confused with class actions under U.S. law, which involve an aggregate of individual plaintiffs; the equivalent action in Brazilian legal process, the so called collective action (*ação coletiva*) is virtually absent from the kinds of cases examined in this study.[17]

When sued in health or education matters, public authorities often avail themselves of a vouching in procedure (the *denúncia da lide*) to bring any other potentially responsible entities – usually on a different federal level – into the trial as co-defendants. In addition, most public authorities are legally obliged to appeal adverse first-instance decisions at least once. Remedies usually consist of the provision of the good or service claimed, though the latter may, occasionally, be

[14] The MP is not formally the only judicial organ competent to propose *ações civis públicas*, but it is the most prolific user. See art. 5 of *Lei 7347/85*.

[15] See Eduardo Appio, 2006. *Controle judicial das políticas públicas no Brasil.* Curitiba: Editora Juruá; Hely Lopes Meirelles, 1998. *Direito Administrativo Brasileiro.* São Paulo: Malheiros Editores; and Marcos Maselli Gouvêa, 2003. *O controle judicial das omissões administrativas.* Rio de Janeiro: Editora Forense.

[16] See *infra* n. 46.

[17] See Sandra Lengruber da Silva, 2004. Elementos das Ações Coletivas. São Paulo: Editora Método.

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converted into a monetary value to be paid out to the claimant where this is considered more effective or viable.[18] On some occasions, courts have also accorded compensatory damages, such as when the impugned authority is found to have withheld medicines previously provided to the claimant on a regular basis.[19]

Finally, to understand the dynamic of social rights litigation in Brazil, general legal culture needs to be taken into account: the Brazilian legal profession is, on the whole, still deeply imbued in the formalist tradition it absorbed from the continental European systems.[20] As such it is marked by legal positivism and professional corporativism.[21] It perceives itself as a closely-knit elite community with strict entry criteria (notably the Bar exam, as well as the difficult entrance exams to all first-level public legal offices), and fiercely guards its independence.[22] Political and social attitudes range from conservative and paternalistic among the older and more senior legal actors, to progressive and human rights-oriented among the younger ones. Because law, as in most late-modern societies, has become the predominant mode of public interaction, the legal profession has been elevated to a central (perhaps the most central role in public matters) vanguard position of which it is keenly aware.[23] Perceptions by the general public of the law and the legal profession, in turn, are, as would be expected, stratified: knowledge of legal remedies and awareness of constitutional rights are highly dependent on social class, and most important on the level of education, even if the work of a well-organized civil society is beginning to diminish the class gap in legal and rights consciousness.[24] However, there remains a widespread lack of confidence in the integrity of the legal profession and the efficacy of fundamental rights, that is only slowly dispelled as younger and more progressive individuals are joining the profession.[25]

[18] See interview with Mauro Luís Silva de Souza, Promotor de Justiça and Coordenador do Centro de Apoio dos Direitos Humanos of the Ministério Público of Rio Grande do Sul, June 9, 2005.

[19] See, for instance, Civil Action No. 2001.001.09980 (TJ Rio de Janeiro).

[20] See, *inter alia*, Antonio Caros Wolkmer, 2000. *História do Direito no Basil*, 2nd ed. Rio de Janeiro: Forense; Giselle Cardoso Andrade,2006. "Formação do Bacharel em Direito no século XIX." Available at http://www.direitonet.com.br/artigos/x/29/67/2967/ (accessed on February 24, 2007); see also the separate (concurring) opinion by Judge Antonio Cançado-Trindade in the first-ever case against Brazil before the Inter-American Court of Human Rights, Ximenes-Lopes v. Brazil, available at http://www.corteidh.or.cr/docs/casos/articulos/Seriec_149_esp.pdf (accessed on December 4, 2007).

[21] See, in particular, Eliane Botelho Junqueira, 1999. *Faculdades de direito ou fábricas de ilusões?* Rio de Janeiro: LetraCapital/IDES; and Eliane Botelho Junqueira, Josè Ribas Vieira, and and M. G. P Fonseca, *Juízes: retrato em preto e branco.* Rio de Janeiro: Editora Letra Capital.

[22] Américo Bedê Freire Jr., 2005. *O controle judicial de políticas públicas.* São Paulo: Revista dos Tribunais, pp. 51–53.

[23] Luiz Werneck Viana, et al., 1999. *A judicialiazação da política e das relações sociais no Brasil.* Rio de Janeiro: Revan, pp. 21–23.

[24] See Eliane Botelho Junqueira, 2003. Brazil: The road of conflict bound for total justice. In Lawrence M. Friedman and Rogelio Pérez-Perdomo (eds.), *Legal culture in the age of globalization: Latin America and Latin Europe* (pp. 64–107). Palo Alto, CA: Stanford University Press.

[25] See Centro de Pesquisa de Opinão Pública (DATAUnB), Consultoria para Construçcao do Sistema Integrado de Informações do Poder Judiciário, "14. Relatório: A Imagem do Judiciário Junto à População Brasileira." Available at http://pyxis.cnj.gov.br/pages/downloads.jsp (accessed on December 4, 2007).

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As far as legal doctrine is concerned, the overall consensus on (constitutional) social rights is that they are non-derogable and inviolable, that is, that nothing relieves public authorities of their duty to provide for the object of the rights in question. This strong statement requires some qualification, however, and two distinct strands are observable in Brazilian rights jurisprudence. One strand, the traditional one dominant among the older judiciary, is more cautious. These judges make a strong distinction between directly justiciable rights and so-called programmatic rights. The latter are considered too abstract to be directly justiciable[26] and are taken to merely set general policy objectives. In this view, rights are understood to give rise to negative claims regarding nonfulfillment but not to positive ones regarding the particular way in which the policy in question should be shaped. This jurisprudentially conservative view has increasingly given way among a new generation of judges and commentators to the idea that even programmatic norms impose a duty on the government to take affirmative public policy steps toward their implementation. This is perhaps the product of an increasing sense of social responsibility among judges, exemplified in the statute of the São Paulo-based Association of Judges for Democracy, which speaks of the judiciary's role in "the defense of the rights of children, the poor, and minorities, from the perspective of the general emancipation of the disadvantaged."[27] Moreover, some courts have made use of a remedy akin to a preliminary injunction, the *mandado de segurança*, to allow individuals to claim for the positive fulfillment of a right even in the absence of governmental policy or regulation.

In general, however, the courts are most willing to grant claims that look most like traditional forms of action: individual claims for specific violations of clear rights, that prompt individual remedies. Indeed, the STF has ruled that the judiciary is not competent to decide on the shape of public policy,[28] and in many of the decisions we see explicit references to the separation of powers. In collective cases and higher courts in particular, we find the claim that the courts will not presume to craft public policy, and in almost all cases only such norms as have a clearly defined object will be considered directly justiciable.[29] Although some have argued that the lack of a serious effort on the part of the government to produce such implementing legislation might itself amount to actionable negligence, most programmatic norms are considered to require implementing legislation.[30] Judicial enforcement of social and economic rights is further tempered by the Brazilian equivalent of what in international social rights discourse is known as

[26] Jorge Miranda,1990. *Manual de direito constitucional*, 4th ed. (Coimbra: Coimbra Editora, p. 218.
[27] See Estatuto da Associação Juízes para a Democracia, Art. 2 & 4; Lúcia Barros Freitas de Alvarenga, 1998. *Direitos humanos, dignidade e erradicação da pobreza: Uma dimensão hermenêutica para a realização constitucional.* Brasília: Brasília Jurídica, p. 194f.
[28] Arno Arnoldo Keller, 2001. *O descumprimento dos direitos sociais: Razões políticas, econômicas e jurídicas.* São Paulo: LT_r, p. 108.
[29] Luís Roberto Barroso, 2003. *Interpretação e aplicação da Constituição: Fundamentos de uma dogmática constitucional transformadora.* São Paulo: Saraiva; and Mauro Cappelletti, 1999. *Juízes Legisladores?* Porto Alegre: Fabris: p. 96.
[30] Barroso (2003), passim.

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the *progressive realization precept*:[31] the courts apply a viability reservation (*reserva do possível*), which holds that the applicability of fundamental rights must be seen in the context of existing economic and political realities.[32] This reservation has little purchase at the trial court level on the thousands of individual claims to medication, but plays a stronger restraining role at the appellate and apex court level and in collective cases. The judicial context is, therefore, cautiously propitious to claims grounded in economic and social rights, especially those that seek individual remedies. We will return to the specifics of judicial pronouncements and litigant argumentation later.

The constitutional and legislative framework is, if anything, even more positive. Both of the rights studied here, the right to health and education, are first identified as "social rights" in Article 6 of the Constitution. In relation to health, both the fundamental right to health, as well as the organization of health care are elaborated in Arts. 196 and 200. The main constitutional instrument of the health-care regime is the Unified Health System (*Sistema Único de Saúde – SUS*), the cornerstones of which are the universalization of health care, the pluralization of health-care financing, and the decentralization of health-care provision based on the already mentioned principle of federal solidarity. Municipalities are responsible for primary care delivery in the country, with higher levels of health-care facilities primarily under the management of states, though the federal government and the more well-endowed municipalities do manage a number of hospitals and other centers. The pooled federal, state, and municipal financing is used to reimburse public and privately contracted providers through more than seventy different payment modalities. This staggering number testifies to the extreme complexity of the SUS' internal governance regime that is taken to be one of the main causes for its suboptimal performance.[33] Hence, as is shown in the present study, the system is frequently unable to react to unforeseen deficits in the health infrastructure, so that affected patients are driven either to seek to privately substitute the service in question, or to turn to the courts in order to force the system to accommodate a particular demand. This confusion about who is responsible for delivering goods and dissatisfaction with actual service delivery and with the range of options offered are what drive the overwhelming majority of cases filed.

The constitutional provision that health care is a "right of all and a duty of the state" has been interpreted to mean that SUS services must be provided free of charge to the entire population. Constitutional Amendment 29, passed in 2000, sets the minimum percentages of budget resources the federal, state, and municipal

[31] This concept plays, of course, a central, if much discussed role in the International Covenant on Eonomic, Social, and Cultural Rights; see Philip Alston and James Heenan, 2007. *Economic, social and cultural rights: A bibliography.* Leiden, The Netherlands: Martinus Nijhoff.

[32] *Id.*, p. 107. See decision by Judge-Rapporteur Celso Mello in Recurso Especial No. 271286 of September 12, 2000.

[33] See, *inter alia,* "Governance in Brazil's unified health care system." World Bank Report No. 36601-BR, February 15, 2007. Available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/03/06/000090341_20070306085417/Rendered/PDF/366010BR.pdf (accessed on December 10, 2007).

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governments are required to spend on health. Nevertheless, some 25 percent of the Brazilian population purchases private health insurance or receives it as a benefit from their employers. Most use this insurance to obtain care from private providers not affiliated with the SUS. Still, many private insurance plans do not cover a variety of expensive medications and procedures or do not cover certain patients, with the result that even wealthy patients seek care in the public sector for certain conditions. These exceptions to coverage by private insurers are the second most important subject of litigation based on the right to health care.

Like health care, the general cornerstones of education policy are also constitutionally mandated, including a determination that 25 percent of state and municipal budgets, and 18 percent of the federal budget must be earmarked for education. Of the states' and municipalities' 25 percent, 15 percent is specifically to be allocated to primary education. Historically, primary and, to some extent, secondary education have been marred by comparatively low enrollment rates and poor student performance, with the system generally having tended to disproportionately favor tertiary education.[34] States and municipalities are primarily responsible for the management of primary and secondary education, which is the focus of the present analysis. Nevertheless, federal involvement increased in the 1990s, primarily in efforts to mitigate disparities in municipal and state resources for education.[35]

The main such reform was implemented in 1996, when the Fund for the Maintenance and Development of Primary Education (*Fundo de Manutenção e Desenvolvimento do Ensino Fundamental* (FUNDEF)) was created. The objective was to bring primary education closer to the particular needs of different communities and to, thereby, increase school attendance and decrease drop-out rates. The Federal Education Ministry retains, however, a crucial role in the definition of overall standards. In general, civil society had little involvement in negotiations regarding the FUNDEF, which was primarily conceived of by the bureaucracy of the (Federal) Ministry of Education, in conjunction with state and municipal governments. As of 2007 the FUNDEF is being replaced by the Fund for the Maintenance and Development of Basic Education and for the Valorization of Education Professionals (*Fundo de Manutenção e Desenvolvimento da Educação Básica e de Valorização dos Profissionais da Educação* [FUNDEB]). The latter is meant to build on the experience – and critiques – of FUNDEF, first by broadening its range to include, in addition to primary education, also child care and secondary education; second, by adjusting state and municipal tax revenue and the allocation formula; and, third, by significantly increasing federal top-up spending, from

[34] Louis de Mello and Mompert Hoppe, 2005. Education attainment in Brazil: The experience with the FUNDEF. Economics Department Working Paper No. 424, OECD ECO/WKP(2005)11 of April 4, 2005; the authors of this report point out that tertiary education consists of no more than one fifth of total education spending, but that per capita spending on each student in tertiary education is more than three times the average of countries in the Organisation for Economic Co-operation and Development (OECD).

[35] Ação Educativa, 2006. "Quadro Comparativo das Mudanças na Constituição Federal Promovidas pela Emenda n° 53/2006/" Available at http://nsae.acaoeducativa.org.br/portal/index.php?option=com_ultimas&task=category&id=1&Itemid=216 (accessed on December 4, 2007).

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FUNDEF's around 400 million reais to nearly five billion reais over a fourteen-year period.

Both health and education administrative regimes are complemented by Federal, State, and Municipal Health and Education Councils (*Conselhos de Saúde*/*Conselhos de Educação*) in which government administrators, professionals, patients, and parents are represented. These have formal supervisory functions within the SUS and the FUNDEF/FUNDEB, with the state and municipal councils, in particular, monitoring local policy implementation.[36]

In summary, health policy is administered by a complex, intricate network of entities, spanning all three levels of government. The policy structure and coverage is comprehensive and complex, though it frequently suffers from mismanagement and inefficiency. Patients sometimes have a difficult time securing what the policy promises and navigating the various layers of bureaucracy. Educational policy, in contrast, although similarly comprehensive, is not as complex. Responsibility across levels of government is more clear cut, and the location and source of services, although not necessarily of optimum quality, is at least clearly identifiable. In both cases, there has been some provision for local community involvement, through Health and Education Councils, in monitoring local policy implementation. Litigation, as we will see next, tends to concentrate on the more complex policy areas.

The Demand Side: Socioeconomic Makeup and Litigiousness

Even if the supply side of social and economic rights in large part structures the demand for litigation, there are, nonetheless, factors exogenous to this (legal) supply that need to be considered in order to understand the impact of such litigation in Brazil. The most relevant of these is clearly the overall socioeconomic makeup of the examined states and, as a derivative of that, the levels of litigiousness present in them. These data appear especially important to explain the considerable regional differences in litigation patterns, although we cannot control for the more difficult to measure supply side factors, such as the institutional infrastructure or the local legal culture. In general, the five states have been chosen as more or less representative of the different regional development patterns in Brazil, so that some general inferences as to the factors that positively or negatively contribute to both litigiousness and to the impact of litigation may be (cautiously) drawn.

In relation to basic social indicators, the pattern that emerges reveals Rio de Janeiro and Rio Grande do Sul at the top end and clearly above the Brazilian average, Goiás somewhat in between, and Pernambuco and Bahia on the lower end and below average.

As far as litigation rates are concerned, a recent study by the University of Brasília[37] shows that the rates of first-instance state court cases per 100,000

[36] See Lei 9424/96.

[37] See *Relatório Final* and *Annexes* of the World Bank-funded study by DataUnB on the establishment of an integrated judicial information system; available at http://www.stf.gov.br/seminario/ (accessed on March 24).

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Table 3.1. *Basic social indicators, 2000*

	Brazil	Pernambuco	Bahia	Rio de Janeiro	Rio Grande do Sul	Goiás
Population* (absolute and percent of national)	169,799,170	7,918,344 (2.2%)	13,070,250 (7.7%)	14,391,282 (8.5%)	10,187,798 (6.0%)	5,003,228 (2.9%)
GDP/per capita (R$)*	5.740	3.279	3.206	7.946	7.389	3.603
Income Inequality* (ratio of income of top 20% over bottom 20%)	26.2	24.4	20.7	18.2	21.0	18.5
Poverty Rate* (population with household below half of minimum salary [about US$ 84])*	25.6%	40.9%	45.5%	11.8%	16.6%	22.9%
Illiteracy Rate* (for population above age of 15)	13.6%	24.5%	23.2%	6.6%	6.7%	11.9%
Infant mortality rate**	31.8	58.2	45.4	21.3	15.1	25

* *Source: IBGE (Instituto Brasileiro de Geografia e Estatística).*
** *Source: Ministério de Saúde/Fundação Nacional de Saúde.*

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inhabitants follow the same pattern as general socioeconomic makeup: Rio Grande do Sul leads by a high margin over Rio de Janeiro, which is followed by Goiás, and then by Pernambuco and Bahia. Indeed, Rio Grande do Sul's population resorts to the courts more than three times as often as that of Pernambuco or Bahia, and just under that multiplier in relation to Rio de Janeiro. Generally speaking, there seems to be a strong correlation between overall affluence, levels of education, and litigiousness. To be sure, many other factors impact on education levels, and these, in turn, do not automatically translate into higher levels of litigation, but would require complementary factors such as adequate access to justice. But given the relative institutional uniformity across Brazil and the fact that access to justice is generally positively correlated with wealth, regional variation is, as would be expected, clearly explainable by differentials in wealth and education. The wealthier and more educated populations generate more litigation. The mere existence of a legal framework, or, conversely, the inadequacy of basic services, is not enough to bring about a social rights litigation revolution.

The Intersection of Supply and Demand: Access to Justice and the Role of Organized Civil Society

Formally, access to justice is to a significant degree dependent on the specific judicial regime in place in each state. Generally, where there is a Defensoria Pública attending to the indigent population, the MP is likely to focus on its original functions of attending to larger, public class action-type issues. Middle-class claimants, in turn, will, by and large, resort to private lawyers. Where no Defensoria Pública is in place, the MP or sometimes state-specific legal aid bodies, such as the *Procuradorias de Assistência Jurídica* (PAJs), tend to assume the former's functions as much as their jurisdiction permits. Whereas that jurisdiction is all-encompassing with regard to the MP, it is limited with regard to PAJs, which, for instance, are precluded from bringing actions against state governments or are not procedurally competent to request required information from respondent public authorities.[38] The result of these formal limitations is the informal transfer of jurisdiction to the MP, which, in effect, comes to assume the functions of the Defensoria Pública where the latter is absent or weak.

This is problematic from an access to justice perspective, because the MP is not formally actionable by individual plaintiffs, but exclusively acts on its own initiative. This means that its decision to take up individual actions is discretionary and will vary across states, issues, and social class of the beneficiaries, as well as according to the specific narrow legal culture of its members. The general impression is that the *Ministério Público* tends to especially pick up headline-grabbing cases that are amply reflected in the media.[39] However, media attention is more frequently obtained by those claimants who voice their complaints loudly and eloquently, which, in turn, is more often the case with well-represented middle class claimants than with indigent ones. Hence, the MP's "aura of efficacy," and its self-assumed

[38] See Lei Complementar n° 51 do Estado de Goiás, April 19, 2005.
[39] José Reinaldo de Lima Lopes, 2006. *Direitos sociais – Teoria e prática*. São Paulo: Editora Método.

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role as a (progressive) judicial vanguard have created a centripetal effect by which cases normally outside of its functional jurisdiction are drawn toward it. This drawing force may be the result of an expansive MP deliberately pulling in cases, as happens in Rio Grande do Sul, or other judicial or nonjudicial actors pushing cases toward it. In São Paulo, for example, the MP has complained that many NGOs prefer to lobby the MP to take up certain causes than to provide legal assistance and litigation services themselves.[40] Thus, although, on the one hand, the MP may be crucial in putting previously underexposed issues onto the judicial and, potentially, also the political agenda, it may, on the other hand, inadvertently weaken judicial empowerment of individual claimants and the bottom-up mechanisms designed to attend to them.

Another factor that affects access to justice is the relative scarcity of public or private providers of such access. Pro bono services, university legal clinics, and clinically oriented NGOs are still comparatively underdeveloped.[41] Likewise, in Pernambuco, the TJPE itself has established a statewide network of Integrated Citizenship Centers (*Centros Integrados de Cidadania* – CIC) that offer a wide range of basic judicial and prejudicial services, including dispute mediation and rights education.[42] The overall number of lawyers working within these contexts, however, is small and insufficient to fill the gap between costly private attorneys and either nonexistent or institutionally weakened or overburdened Defensorias Públicas.

Another way to think about access to justice is to ask whether those most in need of basic services enjoy preferential access to courts. This would be substantive, rather than formal, equality in access to courts, and would involve some form of means-testing in the provision of pro bono legal services. Here the picture in the sampled states is mixed. In Rio Grande do Sul and Goiás, a relatively stringent means test is applied by the Defensoria Pública and the PAJ, respectively, whereas in the other states the idea of relative indigence prevails, according to which indigence has to be judged by the Defensoria Pública – or, eventually, the courts – on a case-by-case basis and in relation to what percentage of income is or would be spent on the realization of the right in question.[43] There is, hence, neither a uniform policy

[40] See interview with Westey Conde y Martin Júnior, Promotor de Justiça, Coordenador do Centro de Apoio Operacional às Promotorias de Justiça de Defesa da Cidadania, of the *Ministério Público* of Pernambuco, August, 25, 2005.

[41] Unlike in the United States, pro bono work has not traditionally been promoted by the profession, with pro bono initiatives having, in fact, encountered initially fierce opposition from the Brazilian Bar Association; see, for instance, Raquel Souza, 2002. "OAB cria polêmica sobre prestação de advocacia gratuita." In *Folha de São Paulo* (Tempo Real) of January 9, 2002. Also available at http://www1.folha.uol.com.br/folha/dimenstein/temporeal/gd090102.htm (accessed on December 4, 2007); see, however, the pioneering work of the Instituto ProBono in São Paulo, at http://www.institutoprobono.org.br/ (accessed on December 4, 2007).

[42] See interview with Westey Conde y Martin Júnior (n. 40).

[43] In Goiás, the Defensoria tends to reject middle class plaintiffs, except in cases of high cost medicines not covered by private insrance; interview with Carla Queiroz, Procuradora do Estado, Coordenadora da Área Cível da Procuradoria de Assistência Judiciária do Estado de Goiás, June 6, 2005; in Rio Grande do Sul, in turn, an "objective" means test is applied in that only plaintiffs earning up to three minimum salaries may avail themselves of the Defensoria, although this criterion is adjusted by the number of dependents, augmenting the threshold by half a minimum salary for

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on means-testing across states, nor is there a common attitude by judicial actors on class differentiation.

Whether this has a negative impact on access to justice by indigent plaintiffs is difficult to measure because there is no clear evidence for a crowding out of the latter by middle class claimants.[44] The latter do not generally turn to the Defensoria Pública or equivalents anyway, but rather will engage a private attorney. For as long as the budgetary impact of granting individual actions is, by and large, not taken into account by the judiciary, no overall litigation limit is in place, and no action, regardless of where it originates, is a priori refused. Rather, what constrains access to justice by the indigent population seems to be a general lack of rights consciousness and trust in the judiciary, combined with institutional deficiencies on the part of the Defensoria Pública or its respective substitutes, such as insufficient staff, lack of in loco presence, or the perception of inefficacy on part of potential plaintiffs.

In Salvador (BA), for instance, the Defensoria Pública is located in a middle class borough not serviced by public transport.[45] In Pernambuco, in turn, the relatively scarce use of the Defensoria Pública by the indigent population was taken to be a reason for why the latter also attended to (lower) middle class claimants.[46] Similarly, in Goiás, the PAJ has been used by lower middle class claimants to obtain court orders for the admission or retention of their children to private schools.[47] Another take on this has been offered by a Rio Grande do Sul prosecutor who argued that the judiciary, by tending to grant individual (private) actions but not MP-brought public class actions, discriminated against indigent plaintiffs, depriving them of the indirect access to justice they are accorded through MP action.[48]

In relation to organized civil society a distinction has to be drawn among general civil society, organized civil society (notably NGOs), and other nonstate actors, such as pharmaceutical companies. NGO activism on health issues originated in Brazil's highly influential and highly successful HIV/AIDS policy mobilization.[49] HIV/AIDS NGOs often became partners of public authorities in the implementation of basic health services, and even today, they receive significant financing

each dependent, as well as overall costs, including rent payments; interview with Adriana Burger, Coordenadora da Área Cível da Defensoria Pública do Rio Grande do Sul.

[44] See for this thesis, inter alia, interview with Antonio Gelis Filho, Fundação Getúlio Vargas (São Paulo), May 9, 2005; as well as ibid. 2004, "O Poder Judiciário e as Políticas Públicas de Saúde: uma Análise Empírica de Decisões do Supremo Tribunal Federal e do Superior Tribunal de Justiça," in I EnAPG, *Resumo dos Trabalhos – I EnAPG*. Rio de Janeiro: ANPAD.

[45] Collective interview with Paulo Emílio Nadier Lisbôa, Procurador do Estado, Antônio Moisés, Assessor do Secretário Estadual de Saúde, and Roberto Lima Figuêredo, Procurador do Estado. September 1, 2005.

[46] Interview with Leônidas Siqueira Filho, Procurador do Estado, Chefe-adjunto do Setor Contencioso, August 26, 2005.

[47] Collective interview with Carla Queiroz (Coordenadora da Área cível da Procuradoria de Assistência Judiciária do Estado de Goiás), and with two (non-examined) PAJ *procuradores*, Antônio Carlos Ferreira Braga and Darcy Gomes, June 6, 2005.

[48] See *supra* n. 21.

[49] See Richard Parker, 2003. "Construindo os alicerces para a resposta ao HIV/AIDS no Brasil: o desenvolvimento de políticas sobre o HIV/AIDS, 1982–1996." *Divulgação em Saúde Para Debate*, *27*(August), pp. 8–49.

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from all three federal levels of government.[50] They have, thus, assumed the double roles of social service providers and interest groups, with legal action frequently representing a point of convergence between the two. Evidence suggests that NGO litigation strategies will focus on the federal level closest to the locality of the plaintiff as well as the one with which the best relations are enjoyed. There is a widespread conviction that individual actions are by far the most successful way to proceed, as public class actions, which could, in theory, be initiated by a registered civil society organization, receive much higher judicial scrutiny, are less likely to be successful, and may even risk a backlash from a judiciary otherwise sympathetic to individual actions.[51] Although most HIV/AIDS NGOs do not exclude middle class clients, many end up primarily representing indigent claimants, which gives them an additional important "access to justice" function. Often, NGOs have a semi-institutionalized relationship with the MP that includes information sharing and mutual "litigation encouragement."

The question that arises is, of course, why this NGO litigiousness is absent in virtually all other health and education areas. To be sure, there are now a number of civil society organizations linked to specific chronic diseases and conditions that attempt to emulate the example of HIV/AIDS NGOs, yet, by and large, all other access to medicines and treatment, as well as education rights cases, are brought either by private attorneys, by the Defensoria Pública, or by the MP, with NGOs playing an altogether minor role. One way to answer the question is to see the present period as one of transition from a legislation-oriented to a litigation-oriented strategy that will eventually lead to the widespread recognition in civil society that the courts may be the more effective way to implement social rights.[52] Another possible response lies in the combination of institutional setting and legal culture that could be taken to favor the MP, rather than NGOs, as the principal agent of society's interests. This "crowding out" thesis, already touched on earlier, is not without plausibility. Yet, if one combines the first with the second answer, the future may yet see the ascent of a large-scale, NGO-driven litigation wave that may, once again, change the legal–political landscape.

With regard to other nonstate actors, the most relevant are, of course, private corporations, that is, pharmaceutical companies. These are certainly implicated in the generation of health-rights litigation, though their influence is, as would be expected, mostly indirect. It is only direct in those relatively rare cases where a lawyer with ties to the industry encourages potential patients to sue for a specific medicine.[53] Indirectly, however, pharmaceutical companies are able to push litigation for medicines in their portfolio via their ordinary relationship with physicians who prescribe their products or confirm such prescriptions as expert witnesses, as well as via induced media coverage.[54] Even NGOs are not always immune to

[50] See Scheffer et al., *supra* n. 1, p. 71ff.
[51] See interview with Karina Gueiros, GESTOS (Pernambucco), August 26, 2005; and collective interview with Juliana Paiva Costa, Carolina Rezendo, Juliane Messias, and Jucarlos Alves, all of *Gapa – Grupo de Apoio e Prevenção da Aids* (Bahia), ??
[52] See n.1.
[53] See Scheffer et al (2005), n. 1.
[54] *Id.*

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overtures from the pharmaceutical industry, and some openly admit that they are co-sponsored by private sector health companies.[55]

In short, then, state-funded legal services are problematic for many underprivileged communities, especially in Bahia, or in rural areas. NGOs have, by and large, not undertaken direct public class action litigation, except in the area of HIV/AIDS and on behalf of a few other rather narrowly drawn categories of medical patients. Much of the slack is taken up by the Ministério Público, which does not, however, have a clear mechanism for public input or accountability. Middle class groups, however, have ready access to legal professionals to pursue individual claims.

Survey Method and Challenges of Data Collection

The quantitative survey consisted of an Internet search and the coding of thirty-five variables in a standard template. In all, more than 10,000 cases were examined. The qualitative survey consisted of in loco interviews with judicial and other relevant actors in each of the five states, as well as in São Paulo; a review of relevant literature and press cuttings; and an in-depth examination of a number of illustrative cases, with a view to gauging both the context and the enforcement dimension of the litigation in question. In terms of the types of action examined, only the two most common types were looked at in the qualitative study: notably, individual actions brought both by individual plaintiffs through private counsel or the Defensoria Pública on behalf of indigent plaintiffs; and public class actions brought by the MP. Substantively, the main health rights litigated were access to medicines and treatment, and the main education rights were access to school places and school fee issues. There are two issue areas that were only considered tangentially, namely, civil actions against private health insurance companies and cases concerning affirmative action. The former has been appreciated to some extent in both the quantitative and qualitative study on account of the causal link that exists between health-rights actions against public authorities emanating from privately insured, that is, middle class, plaintiffs and deficiencies in private health insurance coverage, which is ultimately regulated by the public sector. With regard to affirmative action, it is currently one of the most keenly debated issues in Brazilian public discourse, in particular because mandatory affirmative action policies have been introduced in several public educational facilities.[56] However, cases concerning affirmative action have not been considered in the survey, as they, arguably, primarily concern a classic civil, rather than social, right and have, thus, to be seen in a different context.

[55] *Id.*, at 61ff.

[56] The issue has, however, generated so much controversy that legislation concerning federal institutions has been stalled in the Congress; several state governments have implemented university quota systems for Afro-Brazilian and public school candidates, though several of these have been legally challenged. See, *inter alia*, A.S.A. Guimarães, 2000. *Tirando as Máscaras: ensaios sobre racismo no Brasil.* São Paulo: Paz e Terra; for a recent and controversial statement against certain types of affirmative action policies, see Peter Fry, Yvonne Maggie, Marcos Chor Maio, Simone Monteiro, and Ricardo Ventura Santod, 2007. *Divisões Perigosas: Políticas raciais no Brasil contemporâneo.* São Paulo: Editora Civilização Brasileira.

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However, the mentioned characteristics of the legal system – orientation toward legislation, not cases; absence of binding precedent; diffuse control of constitutionality – and the large case loads it generates represent a considerable challenge to any quantitative appreciation of social rights litigation in Brazil. The main difficulty has been in data gathering: first, completeness of data varies across states because of decentralized data processing and different standards of archiving, so that not all the required information could be obtained in some of the states. Second, because of the very large number of cases in Rio Grande do Sul and Rio de Janeiro, and because only brief summaries of the opinions (*ementas*) and not full judgments (*acordões*) are searchable, a shortened template was applied to these two states, narrowing the range of data available. In addition, neither the Defensoria Pública nor the MP maintain case files open after the decision, unless specific enforcement (legal) action is taken. Individual Defensores may, in many cases, be involved in de facto enforcement, but this largely remains beneath the radar and can only be gauged through anecdotal evidence from the actors involved. Similarly, data on the fate of formally successful (private) individual actions can only be obtained directly from the plaintiffs or their lawyers. In many instances, no contact information for plaintiffs is provided in case files, and where contact can be established, information is not always volunteered. Likewise, many private attorneys refuse to give out information on cases or plaintiffs.

The quantitative analysis covers the period of 1994 to 2004 and includes only state tribunals (TJs). At the federal level, the focus was limited to the apex courts – the STJ and the STF.

It should be emphasized that focusing on this level likely excludes the large majority of cases from the quantitative analysis because they occur and are resolved at lower level courts of first instance. There are anecdotal reports, for instance, that a middle-sized municipality in the state of Rio of Janeiro can receive two or three dozen cases related to the right to medication in a single month. Summed over all municipalities in Rio, this rate of litigation would easily exceed the three thousand cases identified in this study for the entire state from the period 1994 to 2004.

Although these limitations somewhat diminish the study's comprehensiveness, they do not, arguably, distort the overall findings and the conclusions drawn from them. The reason is that, as was pointed out earlier, despite the large number of cases, the portfolio of legal argument is limited, judicial attitudes are well known, and case outcomes are relatively predictable.

Statistical Patterns, Legal Argument, and Illustrative Cases

The patterns that emerge across the five states and the two apex tribunals reveal two overall trends. The first is a striking asymmetry between a large number of health and a comparatively small number of education rights cases: our database includes more than 7,400 health cases and just less than 300 education cases. The second, conversely, suggests that the fewer education cases might have greater impact, as there is a predominance of individual actions in health rights and of public class actions in education rights cases. Only 2 percent of the health cases are collective cases, whereas 81 percent of the education cases make collective claims.

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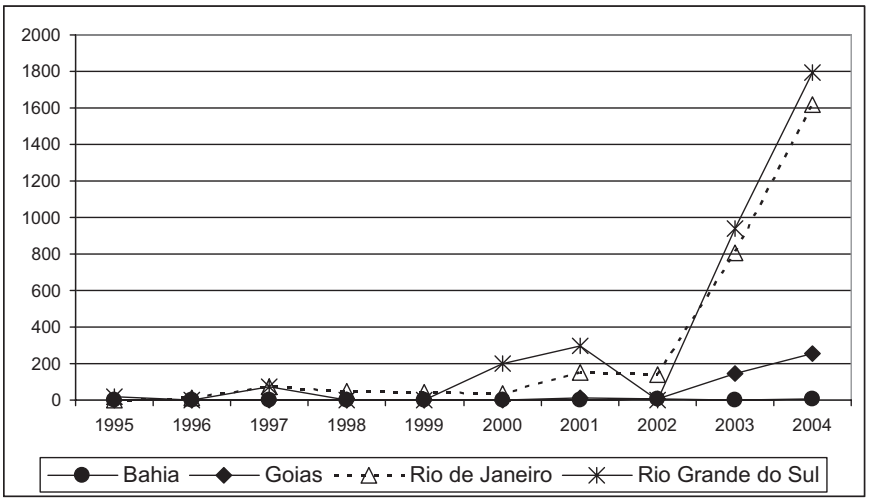

Figure 3.1. Health cases in 4 state tribunals, by date of filing.

With regard to health-rights cases, Rio Grande do Sul is, as would be expected given that state's socioeconomic profile and its overall litigiousness, the champion of health-rights litigation, closely followed by Rio de Janeiro. The Rio Grande do Sul data is even more impressive when calculated per capita, which shows that, within the examined period, there has been an average of one legal health-rights action for every 2,848 inhabitants, compared to Rio de Janeiro, where this figure is 5,298 inhabitants per each such action. The figures for Goiás, in turn, have to be qualified by the specificities of that state: as was already explained, the MP there essentially holds a monopoly on filing social rights cases in general and health-rights cases in particular. According to interview data, the rise in health-rights cases between 2003 and 2004 is coincidental with one particular *Promotor* (prosecutor), Issac Benchimol, at the *Promotoria da Saúde do Centro de Apoio Operacional dos Direitos do Cidadão*, responsible for health-rights litigation within the Goiás MP. Bahia, in turn, is, in many ways the odd state out in the examined sample because, in contrast to all other states, it does not have any expressive litigation figures at all.

The predominant type of action is direct provision claims by individuals against the state. These cases account for 85 percent of all cases. Obligation claims, mostly by individuals against private health insurance companies, represent another 13 percent, leaving less than 1 percent for regulation cases. At the apex court level, the STF (the primary constitutional court) has consistently decided very few cases in this area, although it has modestly increased its health-rights jurisprudence since 1998. The STJ (the highest ordinary court of appeals), in turn, seems to better reflect the general trend of a steep rise in health-rights cases since 1998 (see Figure 3.2).

In education, no clear trend is discernible apart from the lack of individual cases, and the prevalence of public class actions. Education rights litigation oscillates across time in Rio de Janeiro and Rio Grande do Sul, with clear and larger spikes

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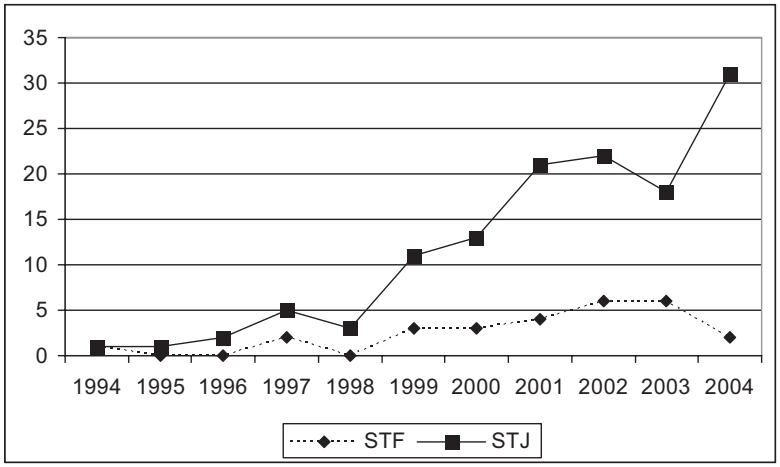

Figure 3.2. Health cases in the highest federal courts.

later in the period but without establishing a consistent trend (see Figure 3.3). In Bahia and Goiás during this period we find fourteen and ninety-two education cases, respectively, but the reports do not include date of filing information, so we cannot say what the trend has been.

As noted, there are a great deal more collective cases in the education arena than in health. Provision cases still dominate, comprising 64 percent of the total, but regulation and obligation cases comprise 26 and 11 percent, respectively, compared to 0.07 percent and 13 percent in the health area.

A claim frequently, if informally, articulated by both academics and practitioners is that the lower courts were more supportive of these claims than the apex courts. To test this claim, we tracked the fate of all the cases in our dataset that were

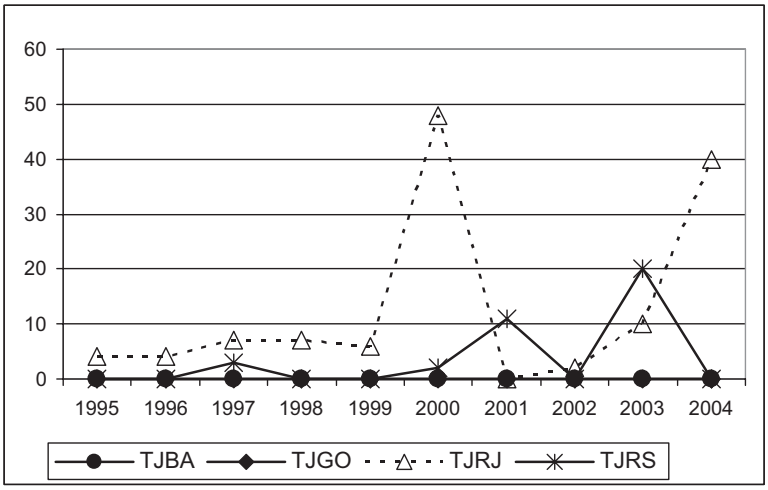

Figure 3.3. Education cases in four state tribunals, by date of filing.

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Table 3.2. *Plaintiffs' success rates across three judicial levels*

	All trial court decisions		Decisions that initially favor Plaintiffs		Decisions that initially favor Defendants		Decisions that partially favor Plaintiffs	
	84 100%		54 64%		25 30%		5 6%	
	All appellate court decisions		For P	For D	For P	For D	For P	For D
	for P: 51 (61%)	for D: 33 (39%)	41 76%	13 24%	8 32%	17 68%	2 40%	3 60%
All apex court decision	for Plantiff TOTAL: 69 (82%)		36 88%	12 92%	4 50%	12 71%	2 100%	3 100%
	for Defendant TOTAL: 15 (18%)		5 12%	1 8%	4 50%	5 29%	0 0%	0 0%

Note: Each column tracks the progress of a set of cases from the trial courts to the apex courts, noting the percentage that favors plaintiffs or defendants at each stage.

considered by all three levels of the judicial system – from trial courts, through the intermediate appellate courts, to the highest courts. What we found, presented in Table 3.2, was surprising. Plaintiffs begin, as expected, with a success rate of about 70 percent, if we count partial successes. At the appellate level, the conventional wisdom holds, though without as much force as one might imagine: the courts of appeals reverse 24 percent of the cases that favored the plaintiffs, but they also reverse 32 percent of the cases that favored the defendants, and give the defendants three of the partial wins, so that the overall plaintiffs' success rate drops to just more than 60 percent (fifty-one out of eighty-four cases) at the intermediate appellate level. But the apex courts reverse this trend. Of the twenty-five cases that initially favored the defendants, sixteen are reversed in favor of the plaintiffs, and all the partial cases go back to the plaintiffs. Perhaps most telling is the fate of the cases in which the courts of appeal reversed a pro-plaintiff decision – in twelve of these thirteen cases the apex courts returned the case to the plaintiffs' ledger. The result is that, at the end of the day, the plaintiffs end up with an 82 percent success rate, higher even than their initial rate in the trial courts.

THE MOMENT OF DECISION: JUDICIAL SUPPORT FOR HEALTH AND EDUCATION RIGHTS CLAIMS

In terms of the specific legal arguments used by plaintiffs, respondents, and courts, the following picture emerges for individual health-rights cases, which, as was seen, represent an overwhelming majority of the examined case load: plaintiffs tend to rely alternatively on the right to health care, as guaranteed in Articles 6 and 196, or

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the right to life, as enshrined in Article 5 of the Constitution, in conjunction with a showing of their inability to pay for the requested good (e.g., medicines or school places) or service (e.g., medical treatment or school logistics). HIV/AIDS patients additionally rely on Law No. 9.313 of 1996 that sets out the free distribution of the HAART (Art. 1) and establishes the principle of federal solidarity as to cost sharing and provision of the medicines in question.

Public authorities, in turn, attempt to rebut plaintiffs' claims by pointing to the lack of budgeted funds, in conjunction with a reference to Article 315 of the Penal Code (*Código Penal*) that makes the "irregular use of public funds," including expenditures with no prior legal basis, an offense punishable with one to three months imprisonment and a fine; Article 167 of the Constitution, prohibiting the commencement of programs or projects not included in the annual budget law; Article 37 of the Constitution, obliging public authorities to comply with good administrative practices, which would not be the case if, for example, lengthy public bidding procedures, such as for the purchase of specific medicines, were not observed.[57] On a more general level, public authority defendants often allege that a court order against them constitutes a violation of the separation of powers, as enshrined in Article 2 of the Constitution, as well as an infringement of the principle of equality, as set out in Article 5 of the Constitution, on account of the differential treatment afforded to successful plaintiffs.

The courts, in turn, tend to decide health-rights cases on the basis of the right to life (Art. 5 CF88) or, less frequently, the right to health (Arts. 6 and 196 CF88), as well as the guarantee of personal dignity as set out in Article 1, Section III of the Constitution. In addition, courts have founded their decisions, inter alia, on a range of complementary arguments, such as that fundamental rights and human dignity prevail over administrative or budgetary norms, that certain fundamental social rights are an essential part of the "humane democracy" (*democracia humanizada*) that the constitution establishes, that fundamental social rights are both justiciable in ordinary tribunals, and their realization by means of legal action does not infringe the separation of powers.

Legal argument in education rights actions has a less clearly delimited portfolio, though a few broad lines can be discerned: in particular, in the more numerous public class actions, the MP has tended to argue on the basis of the constitutional right to education as a plainly justiciable claim, coupled with the affirmation that it – the MP – has a legitimate and, in principle, enforceable interest in monitoring public authorities' fullfillment of their corresponding duty. This line of argument has to be seen in the context of the two main objections education-related public class actions have faced from both the impugned public authorities, as well as from the majority of courts: notably, that education rights are programmatic and that public authorities enjoy administrative discretion in their implementation.[58] Indeed, the frequent use of the programmatic norm argument to justify nonfullfillment of a particular education rights claim might be taken to imply that

[57] Penal Code art. 315 Decreto-Lei No. 2.848, December 7, 1940.
[58] See Romualdo P. de Oliveira, Theresa Adrião (eds.) 2001. *Gestão, financiamento e direito à educação: Análise da LDB e da constituição federal.* São Paulo: Xamã.

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education rights, in general, are considered by the courts as less directly justiciable than health rights. However, that conclusion has to be qualified by the difference in judicial attitude with regard to individual and public class actions. As was seen, the former dominate in health-rights litigation, whereas the latter do so in education rights actions.

In addition to these two (counter) arguments, public authorities have also attempted to differentiate their obligations according to education level. They have contended that alleged failures to provide preschool (*creche*) places do not constitute a present injury to any unenrolled child, only an abstract obligation to provide in the future.[59] This defense has generally been accepted by the courts, even in cases where the latter have admitted that a *creche* place shortage is "public and notorious." One way the MP has devised to circumvent this procedural blockage is to collaborate with an area's Legal Guardianship Council (*Conselho Tutelar*), an independent supervisory body that often has access to precise figures of children waiting for creche or preschool places.[60] Although most judges have considered the MP's request to be generic and, hence, *unsubstantiated*, a minority has gone as far as conceding that social rights actions must, by their very nature, be generic. This group of judges has also tended to disallow the administrative discretion defense, holding that discretion did not apply to the provision, as such, of a service related to a fundamental right, but merely to the way it was provided. Similarly, courts following this line of argument have held that budgetary limitations could not be used as a defense for nonfulfillment of a fundamental right when it was demonstrable that the public authority's overall budget exceeded the amount required. In one decision, the court additionally contended that a lower degree of administrative discretion applied to rights related to children and adolescents.[61] In another, the court came close to positivizing the right to education by declaring that public authorities had to organize themselves in such way as to aid the educational progress of its citizens.[62] In yet another noteworthy decision on an individual claim, the court explicitly compared education – here concerning creche places – to health rights when it declared that "the normative substance of the present question is the same as in access to medicines actions – what is sought is the preservation and concretization of values dear to society, such as that of life, which implicates human dignity and, consequently, health and education."[63]

In general, the courts' reasoning in the examined cases can be divided into four distinct perspectives. The first sees health and education rights as essentially

[59] See Ação Educativa, Ação na Justica, Obstáculos e Possibilidades de Acesso, No. 10, June 16–29, 2005. Also available at http://www.acaoeducativa.org.br/base.php?t=nger_0275&y=base&x=lnger_0001&z=03 (accessed December 17, 2007).

[60] Created, in each state, by the Statute for Children and Adolescents (*Estatuto da Criança e Adolescente*), see Title V.

[61] See Ação Educativa, Ação na Justica, Obstáculos e Possibilidades de Acesso, No. 18, October 6–19, 2005 & No. 20, November 3–16, 2005. Also available at http://www.acaoeducativa.org.br/base.php?t=nger_0275&y=base&x=lnger_0001&z=03 (accessed December 17, 2007).

[62] See Ação Educativa, Ação na Justica, Obstáculos e Possibilidades de Acesso, No. 20, November 3–16, 2005. Also available at http://www.acaoeducativa.org.br/base.php?t=nger_0275&y=base&x=lnger_0001&z=03 (accessed December 17, 2007).

[63] See Ação Educativa, *supra.*

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derivative of a set of individual civil rights. The second sees them as collective social rights that are largely programmatic in nature, though they may still be negatively actionable in case of nonfulfillment. The third sees them as concretized within regulatory frameworks such as the SUS or the FUNDEF that are based on principles of good administration such as budgetary propriety and public procurement. The fourth, in turn, sees them as public goods subject to scarce economic resources to be allocated by democratically legitimated decision makers and not by unelected judges. The first two perspectives can be broadly categorized as rights-granting, the latter as rights-restrictive, with the first pair prevailing in winning and the second pair in losing individual and public class actions.

With regard to the social rights case typology that structures the empirical studies in the present volume, the great majority of health cases in Brazil concern individual provision or financing claims, notably access to medicines and, less frequently, access to treatment. These concern, in the older social rights terminology, essentially fulfillment obligations.[64] On an abstract level, the nature of the fulfillment of social rights by governmental actors has been dealt with in "grand" decisions such as the notorious declaration of unconstitutionality of the provisional act adjusting the minimum wage, in which the STF declared that by providing for an amount that was objectively not sufficient for subsistence, the federal government had committed an act of omission by not attending to its obligations under Article 7 of the Constitution – setting out the purposes of the minimum wage.[65] On a more concrete level, the great majority of actions have concerned governmental failure to fulfill specific demands for medicines and treatment. The pioneer cases here were, of course, on access to HIV/AIDS drugs, with the first such action brought in 1996.[66] Since then, access to medicines cases have skyrocketed and have become a real concern for public authorities, not least as the claimed medicines now range from diapers to Viagra and include many high-cost items for rare disease. A recent study by Ana Márcia Messeder, Claudia G.S. Osorio-de-Castro and Vera Lucia Luíza[67] that examined 389 (qualitatively weighed) individual actions against the state of Rio de Janeiro in the period from 1991 to 2001 showed that up to 1998, HIV/AIDS-related drugs amounted to more than 90 percent of actions, a figure that had dropped to just less than 15 percent by 2000. The reason was the slow start that the universal free HAART-drug dispersion program had in Rio de Janeiro. From 2000 onwards, the picture of claims for medicines diversifies, but still clusters around a number of medicines classified as 'exceptional' by the SUS and linked

[64] George Marmelstein Lima, "*Efetivação do Direito Fundamental à Saúde Pelo Poder Judiciário*," unpublished master's thesis submitted at the Department of Law at the Universidade de Brasília. Available at http://www.georgemlima.hpg.ig.com.br/saude.htm

[65] Art. 7(1) stipulates that "[workers have the right to a] minimum wage nationwide, established by law, capable of satisfying their basic living needs and those of their families with housing, food, education, health, leisure, clothing, hygiene, transportation, and social security"; for an English version of the Brazilian constitution, see the International Constitutional Law (ICL) site at http://www.oefre.unibe.ch/law/icl/br00000_.html (last visited on February 24, 2007).

[66] Scheffer et al (2005), supra n. 1.

[67] Ana Márcia Messeder, Claudia Garcia Serpa Osorio-de-Castro, and Vera Lucia Luiza, 2005. "Mandados Judiciais como Ferramenta para Garantia do Acesso a Medicamentos no Setor Público: a experiência do Estado de Rio de Janeiro." *Cadernos de Saúde Pública*, *21*(2) pp. 525–534.

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to chronic conditions such as Crohn's disease, chronic viral hepatitis C, severe kidney disease, hypertension, and heart disease.[68] The authors also point out that the medical foundations of at least 10 percent of the prescriptions underlying the examined actions were doubtful, a fact that, despite the (theoretical) availability of expert witnesses, is generally not considered by the courts.[69] Treatment claimed for in the courts, in turn, has included hearing aids, ultrasound and encephalogram examinations, prostheses, publicly funded hospitalization in a private facility because of lack of room or lack of required equipment in the public system, psychological or psychiatric treatment of indigent adolescents, bone-marrow transplants, pacemakers, and transport to medical facilities, to name but a few.

Although many access to medicines cases involve relatively inexpensive drugs, there are some hard cases of rare diseases requiring very costly medication. In a recent preliminary injunction granted by the TJ-Bahia, the state was ordered to supply four doses of *erbitux* (*cetubimax*) per week to a cancer patient, with each dose of the imported medicine costing approximately US$1.500.[70] In another recent case, the TJ-Rio de Janeiro granted a public class action by the MP mandating the state to supply more than one hundred medicines for such diseases as Alzheimer's, gastric ulcer, inflammatory intestinal disease, diabetes, asthma, severe bronchitis, lung emphysema, or epilepsy. In this case, the MP had decided to act after more than 2,800 individual actions for medicines for any of these conditions had been brought between January and July of 2006 only.[71]

Yet, not all cases are granted, in part because some are genuine hard cases that involve rare diseases and high-cost medicines. In one such case, four children with Gaucher disease claimed life-long provision with the only currently available medicine, *cerezyne*, which, at the time, cost roughly one million U.S. dollars (total) per annum.[72] The (state of) *Distrito Federal* alleged that it only had roughly one third of that sum available, and that the legal requirement of budgetary propriety prohibited it from making unapproved ad hoc expenditures. It also argued that the medication in question was not, in fact, therapeutic, but merely mitigated the symptoms, and that this kind of expense on four individuals, even if children, would put at risk the provision of a host of other medicines and treatments. The claimants won in the first instance, but lost on appeal, with the presiding judge balancing the individual's irreducible right to life with the legal requirements of good administration. Similarly, in a case involving a new type of *interferon* for treatment of hepatitis C, at the time up to thirty times more costly than the regular *interferon* commonly used, the STJ reversed an earlier decision by the TJ-São Paulo mandating the state to provide the medicine, arguing that there was as yet no medical consensus on its efficacy.[73] It is interesting to note that the STJ, however, left the door open for patients with a different form of

[68] *Id.*, p. 528.
[69] *Id.*, p. 531.
[70] See Luiz Francisco, 2006. "Justiça Obriga Bahia a Fornecer Remédio a Paciente com Câncer." *Folha de São Paulo* (May 11).
[71] See O Globo Online (August 18, 2006).
[72] As related in Marmelstein Lima, *supra* n.64, p. 30.
[73] *Id.*, p. 32.

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hepatitis C for which the new *interferon* was thought to be effective. Federal tribunals have decided in a similar way in treatment cases, for example, in relation to experimental treatment of *retinitis pigmentosa* in Cuba,[74] HIV/AIDS therapy in the United States,[75] or even gender reassignment surgery of a transsexual, the refusal of which was considered by the court not to amount to irreparable damage.[76] Yet, in the TJ-São Paulo, an action on prosthetic penis surgery abroad was, nonetheless, granted.[77] Closely related to the access of medicines and treatment cases are those concerning allegations of the nonfullfillment of health rights in the maintenance of public hospitals. Here, the courts have generally held that although there is no positive right to a particular infrastructure, there is a negative one with regard to maintenance.[78]

The other two duty classes are much less frequent. Regulatory issues are occasionally taken up in individual or public class actions, such as a case brought by a middle class patient asking the authorities for changes in the regulation of fees charged by private health facilities cooperating with the public health system. This case eventually reached the STF, which emphasized the equality before the law clause, and granted the claim.[79] Similarly, there are several cases in which health regulation was considered to be insufficiently protective of the right to health, such as when when tax regulation or social security legislation insufficiently differentiated categories of especially vulnerable persons, such as the handicapped, the elderly, or children.[80] There also exist a number of cases primarily involving private obligations; the large majority of these entail claims against private insurers.[81]

Education rights, in turn, by and large concern the provision by the responsible public authority of basic infrastructural elements, such as an adequate number of student places and teachers, school endowment, student transportation, or, indeed, special schemes for handicapped or otherwise disadvantaged students. Frequently, these issues are linked up with broader claims as to public authority compliance with minimum education spending requirements. The majority of these claims are, by their very nature, public class actions brought by the MP, and they frequently concern highly technical administrative disputes. As in health-rights claims, the state or municipality would rarely dispute the existence or applicability of the right as such, but rather the particular obligations pertaining to its realization. Hence, in São Paulo, for instance, the MP has been actively monitoring education spending by the state and municipal governments, using preliminary injunctions to require either authority to provide a detailed spending balance to enable supervision of its

74 _____
75 _____
76 _____
77 _____
78 *Id.*, p. 27.
79 RE 226.835, of December 14, 1999; see also, Flávia Piovesan, 2006. "Justiciabilidade dos direitos sociais e econômicos no Brasil: Desafios e perspectivas." *Araucaria – Revista Iberoamericana de Filosofia Política y Humanidades*, *15*(April): 128–146.??.
80 For a list of specific infra-constitutional regulation of these categories, see Marmelstein Lima, *supra* n. 64, p. 22.
81 See Antonio Joaquim Fernandes Neto, 2002. *Plano de Saúde e o direito do consumidor.* Belo Horizonte: Del Rey.

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compliance with the minimum spending floor.[82] Similarly, it initiated proceedings as to the unconstitutionality of a municipal by-law allowing for the incremental payment of the required sum. In other cases, the MP has directly requested state or municipal governments to contract more teachers to ensure adequate provision and quality of education.[83] In Rio de Janeiro, for example, it successfully challenged the state government to contract mathematics, geography, and history teachers for schools in the *Duque de Caxias* municipality, where teachers in these disciplines were entirely lacking. The success of this public class action was probably also due to the aggravating fact that a public entrance examination (*concurso público*) for teaching staff in these disciplines had been implemented, but no incumbents were subsequently nominated by the state government. Here, a daily fine of approximately $280 was imposed on the state, pending the nomination and contracting in of the required teachers.[84] One problem with this type of action has been that in order to minimize the fines incurred, public authorities will simply hire temporary teaching staff without setting up a public entrance examination. Besides causing potential concern about teaching quality, this form of remedying the lack of teaching staff is, of course, hardly sustainable in the long-term. Another frequent object of MP action is student transport, both for general students and for those with special needs. There are a number of successful public class actions requiring state or municipal governments to provide free transportation to primary and secondary schools[85] or to set up specific transportation schemes for individual special needs students.[86] Similarly, it has been through public class actions that particular schools have been required to install special access facilities for students with handicaps.[87] It is interesting to note that in these special needs students' cases the MP has, de facto, acted on behalf of individual plaintiffs on the assumption that only a public class action will result in the required remedy. Claims concerning the provider–recipient relationship, such as tuition and matriculation fee disputes, or state–provider regulatory issues concerning entrance exams, teaching quality, or different forms of discrimination, are altogether much rarer and apply to a much greater degree to private educational establishments with a predominantly middle class clientele.

Especially with regard to health rights, the current situation has to be seen in light of the significant precedent set by the successful campaign for the universalization of the provision of HAART drugs in the 1990s. It is generally agreed that civil society, and especially NGOs working with HIV/AIDS patients and high

[82] See Ação Educativa, Ação na Justica, 2005. Obstáculos e possibilidades de acesso, 18(October): 6–19. Also available at http://www.acaoeducativa.org.br/base.php?t=nger_0275&y=base&x=lnger_0001&z=03 (acccessed December 17, 2007).

[83] *Id.*

[84] Processo 200300217751, TJRJ, Ação Civil Pública.

[85] Processo 70000676015, TJRS, Ação Civil Pública.

[86] See, *inter alia*, cases examined in Ela Wiecko Volkmer de Castilho, "Direito à Educação e o Ministério Público," (conference presentation at the I. Congresso Interamericano de Educação e Direitos Humanos, Brasília, 2006). Available at http://www.acaoeducativa.org.br/downloads/EST1.pdf (accessed December 17, 2007).

[87] *Id.*

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risk communities are primarily responsible for educating the general public and governmental actors to move from a view of the infection as a "gay cancer" when the first cases were reported in Brazil in the early 1980s toward an aggressive stance on combating the epidemic in the 1990s.[88]

Because of the delimited subject matter, the existence of a well-functioning public policy, as well as, and unusually, the high-profile involvement of NGOs, the case of HIV/AIDS almost functions like a controlled laboratory experience of health-rights litigation in Brazil. Consequently, it has received a much higher degree of analytical scrutiny than any other area within social and economic rights, with the possible exception of issues related to affirmative action in education.[89] Two recent studies, in particular, provide some valuable insights on the HIV/AIDS litigation universe. In a 2005 Ministry of Health survey, *Remédio via Justiça*,[90] undertaken by Mário Scheffer, Andrea Lazzarini Salazar, and Karina Boyola Grou, the authors examined judicial argument in more than 400 cases stemming from the STF, STJ, the five federal tribunals, and state courts in Rio Grande do Sul, Santa Catarina, São Paulo, Rio de Janeiro, Ceará, and the Distrito Federal. Their findings are complemented by a more or less contemporaneous study by Camila Duran Ferreira, published, so far, in two separate pieces, *O Judiciário e as Políticas de Saúde no Brasil: o caso de AIDS* and *A Atuação do Judiciário na Concretização dos Direitos Sociais*.[91] This survey is based on a quantitative and qualitative analysis of 144 HIV/AIDS-related access to medicines and treatment cases in the TJ-São Paulo. The overall picture that emerges from these studies is one in which judges will by an overwhelming majority look at the right to health from a purely individual civil rights perspective, with economic or social impact considered secondary and subordinate. Likewise, insofar as the right to health is considered to be collective, rather than individual, economic and social impact arguments are used to justify nonconcession. Furthermore, in medicine-granting cases, procedural arguments by public authority defendants based on the negative impact of ad hoc judicial concessions on administrative due process were generally discarded as being of lesser importance than fundamental civil rights. Hence, the courts are broadly favorable to the concession of medicines to HIV/AIDS patients regardless

[88] Indeed, Brazilian pharmaceutical companies have been legally producing such generics since 1995, in relation to medicines not yet falling under the 1996 Patent Law that implemented the patent protection obligations of the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Ever since, federal health authorities have had to negotiate prices with multinational drug companies, occasionally threatening to initiate compulsory licensing procedures, as in the case of *Nelfinavir* in 2001, when that announcement resulted in a deal with the patent-holder Roche. In 2005, the House of Deputies passed a draft bill on compulsory licensing for HIV/AIDS medicines which is currently awaiting approval in the senate. The stakes involved in this are high, as patented drugs amount to a good eighty percent of the government's expense on HAART drugs.

[89] Which, as was stated earlier, was not examined in the present survey.

[90] Scheffer et al. (2005), *supra, n. 1.*

[91] Camila Duran Ferreira et al, 2004. "Atuação do Judiciário da Concretização dos Direitos Sociais: um estudo empírico do reconhecimento do direito à saúde como direito fundamental", unpublished manuscript based on "O judiciário e as Políticas de Saúde no Brasil: a caso AIDS," Prêmio IPEA 40 anos, IPEA-Caixa.

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of financial impact or correlative (due process) rights. Without attempting, in the majority of cases, to appreciate the medical arguments provided by public authorities, judges tend to consider the prescribing physician to be the relevant authority to determine objective need. Indeed, the authors include a number of decisions in which judges interpreted Lei 9.313, the 1996 law that directed the Ministry of Health to provide HIV/AIDS patients free access to "all medication necessary for their treatment," as granting universal free access to any medication or treatment that a competent physician prescribes.[92] The *Consenso*, or list of approved medications and procedures, is here (re-)interpreted as merely an administrative guideline aimed at facilitating the dispensing of the most common medicines.[93] As is the case with virtually all access to medicines decisions, no appreciation of the merit of the prescription is undertaken, as long as the prescribing physician is duly accredited. Similarly, with regard to the very frequent intragovernmental quarrel as to which level of government would be responsible for paying for the requested medicine, the authors find that the courts have generally abstained from analyzing relevant SUS or state and municipal-level implementation legislation to determine objective responsibility. Instead, they generally emphasize the principle of federal solidarity in their reasoning, but nonetheless decide against the public authority impugned in each particular case, which tend to be states and municipalities.

The Role of the Different Judicial Actors in Social Rights Litigation

As for the courts, there are, as discussed earlier, essentially two competing views on administrative judicial review: a rights-granting and a rights-restrictive one. The former is prevalent in individual, the latter in collective actions. In neither case, however, will courts engage in substantive review of public policy, as can, inter alia, be derived from the relative difficulty the MP has in winning high impact collective action suits. Within the rights-granting perspective, two basic attitudes can be discerned: one essentially aims to "civilize" constitutional social rights by substituting the right to health with the right to life, human dignity, and so forth; the other sees (individual) health-rights litigation in the context of a more proactive judicial role in the implementation of (human) rights. In this latter case, however, the emphasis is on judicial activism and the judicialization of rights, rather than on a substantive theory of social rights. In individual actions, courts will usually not seek to establish individual culpability or negligence on the part of a public authority, but will tend to concede the right based on the authority's "objective responsibility," which is in line with the overall tendency toward formal and not substantive review. The rights-restrictive perspective, in turn, is, as was already seen, pervasive in public class actions. It is, hence, much rarer, and arguments are not as settled as in the rights-granting perspective. Its basic notion is simply that courts ought not to force the executive branch to do things it cannot responsibly do. Its underlying

[92] Scheffer et al. (2005), *supra* n. 1, p. 99ff. The text of Lei 9.313 is available here: http://bvsms.saude.gov.br/bvs/aids/legis/leg_fed/lein9313.html

[93] See, for example, *Acórdão 20000110749342APC*, or *Acórdão 2001.02.01.028752–8/Rio de Janeiro* (Tribunal Regional da 2a Região).

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premise is, of course, the separation of powers and the implied assumption that neither branch of government should unduly encroach on the other. This line of argument still finds a wide echo among the judiciary who continue to be wary of being seen as political, or as encroaching on policy makers. A similar take on this "viability reservation" has been the argument, first articulated by the STF, that public authorities are merely required to do what is administratively possible, and that it is not the judiciary's task to engage in cost–benefit analysis, but merely to enforce the constitution.[94] Another factor that potentially influences judicial attitudes to social rights is the enormous heterogeneity of age and experience among the judiciary. Judges can be in their early twenties or nearing seventy, with experience levels ranging from none to pre-military rule. In a fast-changing social environment such as Brazil, these age differentials necessarily account for very different types of judicial logics among the relevant actors. Judges are also exposed to significant social pressure as in Brazil's still largely personalistic culture, no real distinction is made between the judge as office-holder and as private person.[95]

As far as the MP is concerned, its role varies considerably across states. Whereas, in Goiás the courts have accepted the MP's action on behalf of individual claimants by means of public class actions as a substitute for individual actions sponsored by the Defensoria Pública, their counterparts in Rio Grande do Sul have tended to strictly limit the MP's role. As a result, the Rio Grande do Sul MP has focused much more on its pre-judicial, investigative competences and has directly interacted with state and municipal administrations. It has, thereby, been both bypassing formal court proceedings and acting as a de facto co-administrator. An example is a recent family planning scheme implemented in primary schools that the MP developed together with the Porto Alegre municipality.[96] This initiative came about as a result of the MP's concern over the high pregnancy rate and related medical problems of indigent minors, and it was brought about by purely administrative action. A similar "joint" MP–municipality project, the school flight (*vôo escolar)* program, was developed for children with handicaps in order to enable them to go to regular schools.[97] This prosecutorial activism does not go unchallenged, though, with many public authorities alleging that the MP is neither competent not qualified to design public policy. They, nonetheless, tend to comply with the terms set by the prosecutors rather than challenge them in court. In part, this tension may simply be due to the common aversion policy makers and administrators have to robust judicial checks and balances. However, as will be taken up again later,

[94] See, *inter alia*, José Eduardo Farias, 2005. *Direitos Humanos, Direitos Sociais e Justiça.* São Paulo: Catavento.

[95] Junqueira et al. (1995), *supra* n. 21.

[96] See *supra* n. 21.

[97] See Lei de Diretrizes e Bases da Educação Nacional – Lei n° 9.394/1996, art. 4°; and Estatuto da Criança e do Adolescente – Lei do Adolescente n° 8.069/90, art. 54, which establish the obligation to provide complementary transportation, on the basis of which the "school flight" scheme was established; see collective interview with Joyce Pernigoiástti (Secretária de Educação Adjunta), Roberto Adornes (Gestor Administrativo-Financeiro), Ramiro Tarragô (Assessor Financeiro da Secretaria de Educação), and Letícia Albuquerque (Assessora Jurídica da Secretaria de Educação), all of the Porto Alegre Municipality, June 10, 2005.

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the proactive role the MP has been playing in some states is not unambivalent. After all, an unelected organ with far-reaching prerogatives purporting to act in the public interest, and especially on behalf of the disenfranchised and excluded, fits well with the partly paternalistic, partly authoritarian tradition that has played such a dominant role in Brazilian history.[98]

The Defensoria Pública, in turn, plays a significant role in places like Rio de Janeiro, though in others, like Pernambuco, the Defensores are underpaid and not publicly examined (*concursados*); here, most are recycled *Procuradores da Assistência Judiciária Estadual*, an equivalent of the PAJ that preceded the establishment of a Defensoria Pública proper. In Rio Grande do Sul, in turn, the Defensoria Pública disposes of functional, but not of budgetary autonomy vis-à-vis the state government, which has limited its size and, hence, effectiveness. In Goiás, for its part, the Defensoria Pública was formally created by State Law 9785/85, but has not been established yet. In its absence, the State Attorney's Office created a PAJ that attends citizens in the capital Goiânia, but that is considered highly ineffectual. With the exception of the PAJ's area coordinators, who are civil servants proper, the majority of PAJ staff are merely underpaid and underendowed appointees of the state government.[99] However, where, like in Rio de Janeiro, the Defensoria Pública is fully functional, it may come to play a crucial role not just in bringing (and winning) individual actions on behalf of indigent plaintiffs, but, perhaps even more important, as an enforcement agency. Interview data suggests that compliance by public authorities can be a considerable problem in Rio de Janeiro.[100] With regard to indigent plaintiffs, for instance, it is essentially left to the individual Defensores to bring a case to supervise compliance. Frequently, the latter does not merely consist in bringing enforcement action in case of noncompliance, but in organizing compliance from the moment of the judicial decision onward. However, the more active a role the Defensoria plays, the more obstacles it will face from public authorities. Indeed, anecdotal evidence suggests that in some cases, public authorities will directly attempt to hinder the Defensoria's work. Hence, in one municipality in Rio de Janeiro, for instance, the mayor withdrew municipal office space and logistics originally ceded to the Defensoria on account of it bringing too many access-to-medicines actions against it.[101]

Last, with regard to the public authorities and their respective legal divisions, their overall attitude seems, by and large, to be pragmatic. By law, most are obliged to appeal negative first-instance decisions, but depending on the particular claim, they may pursue appeals only pro forma and only up to the second instance, though in some cases an appeal is launched simply to buy time and adjourn any payments to be made. More important, in many case types, such as access to

[98] See interview with Raul Martins, Coordenador de Planejamento da Secretaria Municipal de Saúde do Município de Porto Alegre, June 10, 2005.

[99] See, again, collective interview with Carla Queiroz (Coordenadora da Área cível da Procuradoria de Assistência Judiciária do Estado de Goiás), and with two (non-examined) PAJ *procuradores*, Antônio Carlos Ferreira Braga and Darcy Gomes, of June 6, 2005, supra n. 48.

[100] See interview with Denis de Oliveira Praça, Director-General of the Rio de Janeiro Association of Public Defenders, October 11, 2007.

[101] *Id.*

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medicines or school infrastructure, only a judicial determination can dispense a public authority from the normally required public bidding process.[102] Hence, already in individual actions, but especially in public class action suits, it is plainly in the public authority's interest to litigate, and thereby win the right to purchase the goods in question for the cheapest market price. Evidence from Rio de Janeiro and Pernambuco suggests that in health-rights cases, a distinction is usually made between medicines included in the Union's or states' official buying list,[103] and those not on any list, as well as access to treatment and any public class action suit brought by the MP. In the first case, the PM/PEs will generally only appeal once, whereas in the second case, a proper defense, potentially up to the STF, is mounted. Despite these overall trends, most PEs do not seem to have an explicit litigation strategy in place but, rather, will act on the basis of experience and a certain cost–benefit assessment. Moreover, and as was already pointed out, in most cases, the PM/PE will not dispute the applicability of the particular right in question; instead, they tend to challenge any determination of their particular compliance responsibility on good administration grounds and attempt to shift the onus of compliance onto a different federal level. In some states, such as Rio Grande do Sul, collaboration among the different judicial actors is encouraged through joint technical committees, though the judiciary has, so far, not cooperated enthusiastically with these.[104] However, ad hoc collaboration between the judge, the MP, the impugned public authority, and sometimes also the Defensoria Pública does occur.[105]

The logic of that collaboration has been shown in a recent study by Luiz Werneck Vianna and Marcelo Baumann Burgos,[106] in which the authors reconstruct in detail the way four public class actions and one pre-judicial settlement were brought, decided, and implemented. One of these concerned access to medicines in the state of Rio de Janeiro. The authors show how the initial momentum for the *ação* emerged through a dialogue among a number of concerned actors: notably, several NGOs representing patients suffering from chronic diseases such as kidney failure, the Defensoria Pública, and the state health council, as well as the MP's own intuition that individual actions for access to certain medicines were on the surge. As a result of this pooling of information, the MP felt on firm enough ground to initiate formal proceedings against the state and the municipality by means of a public class action, in order to structurally remedy the problem and, therefore, eliminate the cause of the mounting number of individual actions.

[102] Lei 8.666 of June 21, 1993, Art. 24.

[103] These lists are, of course, in part the product of earlier litigation, by which a particular medicine came to be included. The general procedure is for the state health authority to react to large-scale litigation on a particular medicine by, within the SUS, negotiating with the Union on which level of government will bear the cost of providing it. It will then eventually be included on a buying list.

[104] See *supra* n. 21.

[105] See interview with Adriana Burio Grande do Suler (Defensora Pública – Coordenadora da Área Cível da Defensoria Pública), June 9, 2005.

[106] L. Werneck Vianna, and M. Baumann Burgos. 2005. Entre Princípios e Regras: Cinco estudos de caso da ação civil pública (Between Principles and Rules: A Study of Five Public Class Actions). *DADOS – Revista de Ciências Sociais* 48(4): 777–843.

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The MP grounded its case in the typical fashion, relying on the fundamental character of the right to health, its association to human dignity, and its status as self-executing. It cited a previous STF decision holding that the programmatic character of the right to health only refers to the organization of the public health system, but not to the right's core content, which is derivative of the right to life and, hence, non-derrogable.[107]

The trial judge thereupon convened the MP, the Defensoria Pública, and the municipal and state health secretariats to negotiate an amicable solution. This resulted in a blueprint for a new institution, a unified medicines dispensation counter that was aimed at raising efficiency in the dispensation of medications and, thus, reducing the need for litigation on this count. Several of the actors who participated in the negotiation later affirmed that no party had brought along a ready blueprint, but that the idea of the unified counter actually emerged in the discussion. Moreover, the judge stated that during the entire process, he was continuously beleaguered by individuals in need of particular medicines, as well as by some specialized NGOs; he admitted to feeling personally pressured, a fact that contributed to his decision to admit the *ação* and to invite the parties to construct from it a real and viable solution of the problem.

In the end, however, although the counter was subsequently created and all parties declared themselves satisfied with the process, its stocking with medicines was delayed and insufficient. The consequence of this was, in turn, the massive concession of (individual) preliminary injunctions granting access to medicines supposedly available at the counter. As a result, the new counter became entirely absorbed by the administration of injunctions, and was unable to provide the general efficiency-enhancing service for which it was created.

This exemplary case demonstrates well the logic behind social rights litigation in Brazil. Although it deals with the relatively rare instance of a sucessful public class action on access to medicines, it nonetheless contains the typical features of such litigation in general: formalistic rights-oriented legal argument, the individualization of the legal issue through the presence of the victims in the trial and the personalization of the decision in relation to the judge, the absence of any viability or cost–benefit analysis, or, indeed, of medical expert evidence, a rights-conceding decision, and compliance problems in the aftermath. What is, of course, different from the standard (successful) individual access-to-medicines decision is the joint judicial–administrative decision-making process that aims to create a real remedy to the problem at hand. Yet, its spirit is, arguably, no different from the judicial paternalism that informs most of the standard decisions, nor has it been able to overcome the compliance problem any more effectively.

Finally, a recurrent issue raised by public authorities is the nonappreciation of technical evidence and, generally, the lack of technical expertise on the part of the judiciary. Although expert witness services (*peritos técnicos*) are available in the tribunals and within the MP, they are frequently not used to evaluate the sustainability of technical argument brought by the claimants. As early as 2001, the national HIV/AIDS program, overwhelmed by the large number of actions

[107] See decision of Justice Moreira Alves, in RE No. 264.269–0/24/11/2000.

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for access to *Kaletra* urged patients and judges to refrain from respectively claiming for and conceding such actions without evaluating the prescription and the patient's particular diagnosis.[108] It further pointed to a consensus in the international medical community that the initiation or substitution of HAARTs did not constitute a medical emergency, as claimed in most of the actions requesting, inter alia, *Kaletra*.[109] Uninformed judges facing inadequate prescriptions couched in the rhetoric of a life and death emergency would, in the view of the federal HIV/AIDS administrator, all too easily fall prey to scientifically (and economically) unsound "fashion prescriptions."[110] A somewhat extreme case on the same line concerned a United States-based Chinese physiologist, Peter Law, offering, in partnership with three renowned São Paulo physicians, so-called myoplast transfer treatment against Duchenne's Muscular Dystrophy. Controversial from the beginning, and eventually disqualified by the U.S. Food and Drug Administration (FDA) in 2000 and by the Brazilian Federal Medical Council (*Conselho Federal de Medicina*) in 2002, Law and his partners nonetheless had set up shop in São Paulo in 1996 and attracted several Brazilian children and adolescents suffering from the disease, as well as a number of patients from abroad, to submit themselves to the US$150,000 treatment. In nine cases the (Brazilian) patients won full or partial financing for the treatment from the TJs in São Paulo and Santa Catarina, as well as in one federal court, amounting to a total of approximately $220 million. Indeed, as was later shown by an investigative journalist, Law's Brazilian partners encouraged potential patients to sue for access to the treatment and even directed the children's parents to a lawyer of their confidence.[111] Once the scam was uncovered, the São Paulo and Santa Catarina PEs affirmed that they were looking into ways to recoup the money potentially through proceedings in the United States. Although probably an extreme case, it nonetheless shows the potential precariousness of decisions based merely on formal, rights-fulfillment-oriented argument and not on a substantive appreciation of the merits of each action.

THE MOMENT OF COMPLIANCE: EFFECT AND ENFORCEMENT OF JUDICIAL DECISIONS ON HEALTH AND EDUCATION RIGHTS

Aggregate Direct and Third-Party Effects

The direct impact of litigation on the provision of health and education goods and services is influenced by two factors: success of litigation and compliance

[108] Document issued by the Programa Nacional de DST/AIDS on 14/08/2001; see also Scheffer et al. (2005), *supra* n. 1, p. 28.

[109] Medical emergency and AIDS medicines; on December 1, 2005, however, the Federal MP and a number of HIV/AIDS NGOs initiated a public (class) action against the Federal Health Ministry in order to oblige it to initiate compulsory licensing proceedings against Kaletra's patent-holder, Abbott Laboratories; see press clipping, available at http://www.cptech.org/ip/health/c/brazil/abia11302005.html (accessed on February 25, 2007).

[110] See a letter to the editor by Paulo Roberto Teixeira, in the "Painel do Leitor," *Folha de São Paulo,* April 2, 2003; cited also in Scheffer et al. (2005), *supra* n. 1, p. 30.

[111] Conceição Lemes, 2002. "Médicos tornam Doença em Caso de Polícia." *No Mínimo*. Also available at http://www.distrofiamuscular.net/mioblastos.htm.

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with the (succesful) decisions. As for the former, the picture that has emerged in the previous section clearly shows the great majority of individual health-rights actions to be successful, followed by public class actions in education with a much lower absolute frequency but reasonably high success rates, and public class actions on health rights with low frequency and success rates. Hence, in all, individuals pursuing the most common health-rights claims to access to medicines and to treatment, and regardless of whether they are brought by private attorneys or the Defensoria Pública, currently stand a high chance of obtaining a formal judicial remedy. By contrast, "structural" remedies, whether related to education or health, are less frequent, less sucessful, and, generally, less predictable. However, if litigation success is a necessary condition for direct effect, it is only through compliance with judicial remedies that this effect becomes, in fact, effective by providing the claimant with the good or service claimed. Yet, as was already variously hinted at, in some states such as Rio de Janeiro (but much less so in others, such as Rio Grande do Sul), there is a considerable compliance problem. One reason is the formalistic style of rights-conceding decisions which, by and large, do not contain specific implementation instructions to the public authority in question. This essentially leaves it up to the plaintiff or to the Defensoria Pública to see to the implementation of decisions and to take enforcement action if necessary. The Defensoria, however, will usually only gain cognizance of compliance problems if the indigent plaintiffs report these, which, interview data suggests, is often not the case. Indeed, there appears to be considerable attrition on the part of plaintiffs who are continuously told that some or all of the required and judicially ordered medicines are not available. The usual pattern is not that the public pharmacy in question will deny outright the provision of the medicine, but that it will either promise delivery in the future or dispense the medicine but later discontinue dispensation; in both cases, logistical difficulties will be cited. As a result, many indigent plaintiffs become persuaded that even enforcement action through the Defensoria Pública is not going to make any difference.[112]

Indeed, enforcement action brought by the claimant or the Defensoria Pública, and ocasionally also by the MP, is not always effective. Even daily fines of approximately US$550 to $1,100 – for individual access-to-medicine cases – for non-compliance with a preliminary injunction (*mandado de segurança*) are often not enough to induce compliance, nor is the issue of a prison mandate for a state or municipal health secretary for criminal contempt, which is hardly ever enforced, although there are cases where, for instance, a school director was temporarily detained at a police station for not having complied with court orders mandating the admission of pupils.[113] This is, however, an exception, so that enforcement action frequently takes an informal route by, for example, personalizing their case vis-à-vis the public authority in question. Hence, in one exemplary case, the claimant stated she eventually succeeded in obtaining her medicine only because she personally knew a civil servant in the state health secretariat who sped up her

[112] See, for instance, the proceedings of a recent seminar in Rio Grande do Sul, Seminário Medicamentos: políticas públicas e medicamentos, available at http://www.ajuris.org.br/sem_med/sem_med.htm (accessed December 17, 2007).

[113] _____

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process.[114] Alternatively, Defensores Públicos often end up being the only enforcement agents of their cases, despite being insufficienty equipped for this task. One interviewed Defensora, for instance, recounted a case in which she brought and won an action concerning the setting up of a home care unit for a cancer patient and subsequently had to organize its installation herself, as no other organ was formally charged with acting on the decision.[115] Significantly, the perception that compliance was, in effect, left to a non-expert acting out of goodwill led her to resolve not to bring similar actions in the future. This state of affairs is additionally aggravated by the general lack of compliance with enforcement action, that is, of secondary compliance action. As was already noted, the Defensoria Pública may formally bring compliance actions that may result in personal fines or even prison mandates for the responsible public administrator, most commonly the municipal or state health or education secretary. However, such prison mandates are virtually never enforced, and the fines frequently end up being discounted later on. It is only through being extraordinarily insistent that a Defensor will be able to force compliance, a stance he or she will not be able to take with most cases. For this reason, the Defensoria has, like the MP, taken to work directly with public health providers and general civil society on the extra-judicial settlement of potential disputes.

Yet another alternative form of ensuring implementation pursued in some cases in Rio de Janeiro has been for the courts to order the public authority in question to deposit the cost of the required medicine into the plaintiff's account, rather than to have the former provide it directly to the plaintiff. This is used, for instance, in cases where state or municipal pharmacies do not stock the medicine and allege that obtaining it would not be doable; the plaintiff can then demand that the sum be transferred to him directly. This has, however, attracted criticism from the MP that alleges that the courts do not exercise any supervisory jurisdiction over the actual use of such funds.

In sum, it is difficult to specify the magnitude of the real impact of litigation. Insofar as compliance with decisions is at least partial or temporary, resort to the courts will certainly have made a difference to the plaintiffs in question. In addition, the fact that the judiciary is, increasingly, an intermediary in the provision of basic health and education services in itself conditions the conduct of public authorities and improves their compliance record. Yet, the way judicial access to health and education works precludes it from functioning as a straightforward distribution mechanism generating an output symetric to its input.

Indirect Effects Internal to the Legal System: The Impact of Threatened and of Settled Litigation

With regard to the impact of threatened litigation, the two types of action examined so far have to be distinguished. As for individual actions, with the exception of the

[114] Information taken from qualitative (interview-based) data on sample cases.
[115] Interview with Denis de Oliveira Praça, Director-General of the Rio de Janeiro Association of Public Defenders, October 11, 2007.

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very few formally precedent-setting (*súmula*) decisions, no individual case would be able to exert any influence beyond its immediate object. However, informally, judicial actors will, of course, tend to develop a hunch about the decision habit of specific tribunals or, indeed, sometimes of individual judges, in relation to specific types of action, and they may base their litigation behavior on this informal knowledge. This judicial hunch may, in turn, lead to attempts to reach a friendly settlement rather than to initiate formal proceedings, and certainly the Defensoria Pública may use this tool in relation to common types of actions, but it is difficult to measure the absolute importance of this practice as it usually lies below the radar of case and judicial news reporting, and can, if at all, only be traced through anecdotal evidence by the involved actors. Nevertheless, given the well-known problems with compliance in some states, the Defensoria is increasingly engaged in the attempt to construct enforceable solutions in conjunction with public authorities in lieu of legal action. This, however, would work mostly with common types of medicines where distribution is impaired by purely logistical problems and not where new types of medicines requiring extra budgetary allocations are concerned.

The situation is very different, however, with regard to the MP and public class actions. As explained earlier, formal public class actions face a much higher degree of judicial scrutiny, and are less successful than individual actions, largely on account of the judiciary's reticence to underwrite what often amounts to fairly detailed public policy proposals on part of the MP. Hence, in some states, the MP has taken to avoiding direct judicial confrontation with public authorities, and has, instead, taken an administrative legal route by means of the threat to initiate an administrative inquest against a public authority with a view to forcing it to agree to terms of settlement without going to court. This practice is, however, similarly under the radar, because it only enters the screen if either side resolves to take the judicial road, for example in case of contestation by or noncompliance with the settlement (*termo*) by the public authority. Yet, its impact cannot be underestimated, because it is probably the most direct form in which a branch of the judiciary influences public administration. There are innumerable schemes in which the MP de facto acts as a partner of public authorities, proposing and supervising the implementation of specific policies. This partnership is, of course, not always voluntary on the part of public authorities, and the latter tend to see it as undue intervention, but, frequently they still prefer to comply with it rather than face court proceedings. Indeed, because the terms of the agreement are negotiated with the MP, the degree of influence the public authority has over the outcome, including the budgetary impact, is significantly higher than in a court decision.[116]

The indirect legal impact of settled litigation, in turn, appears to be largely insignificant because of the absence of any precedent. Although, as was already pointed out, the STF now has a procedural means to make some of its decisions

[116] Luciana Aboim Machado Gonçalves da Silva, 2004. *Termo de Ajuste de Conduta*. São Paulo: ltr; Ricardo Augusto Soares Leite, 2003. "Reflexões Acerca do Termo de Compromisso de Ajustamento de Conduta." Available at http://www.escola.agu.gov.br/revista/Ano_III_junho_2003/Ricardo-Descumprimento%20do%20Termo%20de%20Compromisso.PDF (accessed on December 10, 2007).

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effectively binding in the form of the *súmula vinculante*, it still only covers a small minority of subject matters. That said, the aggregate of similar decisions on standard cases does generate a degree of predictability of which all judicial actors will be aware, and which, de facto, functions as a form of judicial common wisdom or, indeed, informal *stare decisis*.

Indirect Effects External to the Legal System: The Impact on Policy Creation, Administration, and Budget

Apart from the direct and the indirect internal effects litigation has on the distribution of basic health and education services, the crucial question is, of course, whether and to what extent judicial output generates repercussions in the political system, notably in the form of new or changed policies. An answer to this question must, in the Brazilian case, distinguish between the impact litigation has on policy creation or policy change, on the one hand, and on policy administration, on the other. With regard to the former, there has been a significant time lag between the clamor produced by the steep increase in litigation since at least 2002, and the political echo it has occasioned. Indeed, in education, there is no measurable direct policy impact to speak of, though the turn to litigation has, arguably, begun much more recently than with regard to health rights. In the latter's case, HIV/AIDS litigation is, again, the area in which litigation has had the most impact, though its main impact has, arguably, been on policy administration, rather than on policy creation.

There is no evidence that the 1996 *Lei* that extends HIV/AIDS treatment and services to all who need it was brought about by litigation. Rather, it was an NGO-led media campaign and congressional and state governmental lobbying,[117] driven by the worldwide introduction of HAART at that time and the immediate demand by the Brazilian HIV/AIDS community for it to be made available publicly, that led to the policy's creation.[118] In fact, as the study by Scheffer, Salazar, and Grou shows, 'access to HAART-drugs litigation began more or less parallel to the creation of the policy, and only reached its numerical apex as of 1999, as a result of initially inefficient distribution patterns and also on account of concerns that governmental attitudes vis-à-vis universal access might be changing. If access to HAART litigation is, as will be discussed later, still the main driving force of health-rights litigation, it has grown to be so only in close relation to an already existing legislated policy. The same goes, *a fortiori*, for other types of access to medicines litigation as it will necessarily concern the SUS, which is itself a preexisting policy framework that has not significantly changed through litigation.

However, the political system is beginning to respond to this increasing judicial input. Discontent with the growing budgetary impact of health-rights litigation, as well as the de facto judicial administration of a number of health and education policies has been mounting among executive agencies on all federal levels for some time. This has crystallized into some initial steps aimed at curbing litigation and its

[117] Scheffer et al. (2005), *supra* n. 1, p. 22ff.
[118] *Id.*, p. 81ff.

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effects. Hence, in March 2007, the Federal Health Ministry created a Commission for the Rational Use of Medicines (*Comissão para o Uso Racional de Medicamentos*) comprised of different public health administrators and aimed at elaborating guidelines for the use of SUS-included medicines, to be used, among others, by public authorities in access-to-medicines cases. In parallel, the Federal Health Minister has openly criticized the "indiscriminate" judicial concession of medicines sometimes not even certified in Brazil, alleging that Brazil was, with help from the judiciary, becoming a "luxury guinea pig."[119] Among others, the health minister recently met with the govenors of the most (health) litigious states – Rio Grande do Sul, Paraná, Santa Catarina and Mato Grosso do Sul – to discuss strategies to curb excessive litigation and has called for new legislation to that end. It is important to note, however, that these measures do not expand on the content or distribution of basic services, but, on the contrary, aim to limit the judicial concession of such services in the context of existing policies. Significantly, this political push back received initial support from the highest judiciary when the current president of the STF, in a recent decision, declared that only medicines included in Health Ministry administrative guidelines were to be considered justiciable.[120] However, important as that declaration is, it does not formally set binding precedent and is, so far, only an indication of a potential change in judicial attitudes. The extent to which courts down the line will follow this reasoning or will be effectively disciplined by new legislation remains to be seen.

The picture is different, however, when it comes to policy administration or implementation. Here the pioneering HAART cases show that litigation can work as a signalling mechanism for demand in new medicines, and, hence, for the expansion of an existing public policy. Once a certain litigation density has been reached, public authorities tend to seek cover by including the medicine in the SUS list or the *Consenso Terapeûtico*. An example from Rio de Janeiro concerns four leukemia cases brought by a private attorney on behalf of three paying (i.e., middle class) and one pro bono indigent patient in relation to unlisted leukemia medication.[121] All plaintiffs won their cases, and medicines were initially distributed, though, in one case, distribution was subsequently discontinued. Renewed legal action then resulted in a prison mandate for the municipal health secretary in case of continued noncompliance. Eventually, the medicine was included in the SUS list and distribution regularized. In this context, administration and implementation have to be distinguished. The former relates to the administrative decision to include a new item in the list of medicines to be distributed by public pharmacies. Implementation relates to the de facto carrying out of that policy so that the medicine is actually available in the public pharmacy in sufficient quantity. The early "access to HAART drugs" actions clearly fall into this latter category

[119] See Rudolfo Lago, interview with Federal Health Minister José Gomes Temporão, "Médicos Não Devem Fazer Greve", *Isto É*, June 21, 2007. Available at http://www.terra.com.br/istoe/edicoes/1965/artigo53460–1.htm (accessed on December 8, 2007).

[120] See Suspensão de Tutela Antecipada nr. 91, Judge Rapporteur Ellen Gracie.

[121] See collective interview with Renan Aguiar (FIOCRUZ) and Edson Schueler (Ivan Nunes Ferreira Advogados), May 11, 2005.

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because, despite legislation requiring it, it took considerable time for ART cocktails to be made widely available. The same is true for most other medicines. In part the reasons for non- or insufficient implementation are legitimately linked to time-consuming public procurement, price negotiation, and registration issues. Hence, in one case, for example, the state of Rio Grande do Sul had, after the contract with the provider of an antidepressant (*Topiramato*) drug had expired, initiated a competitive bidding process that resulted in the award of a new contract to the same provider; the state was then successfully sued by a competitor, which resulted in the annulation of the bidding process, with the collateral effect being the temporary non-provision of the medicine.[122] Yet, in other circumstances, various forms of maladministration, including inertia, incompetence, haggling between authorities, or political impasse are the reason for the failure to distribute medications. In this latter case, litigation serves as a corrective of negligence on the part of public authorities. Although this can be said to have a positive effect on policy implementation, it may also have the flipside of making public authorities more or less deliberately wait for judicial mandates until they implement the policy in an incremental way. Given the overall scarcity of resources and lack of consensus on how to best spend them among policy makers, the latter attitude may be quite frequent.

Indeed, some public authorities allege that current judicial practice leads to administration by judicial order, rather than by a democratically legitimate executive.[123] The state of Pernambuco, for instance, has felt obliged to open a representation in Brasília for the sole task of appealing state or federal court decisions to the STF and STJ.[124] In Goiás, in turn, most citizen complaints concerning the Goiánia municipality – which shoulders the largest share of public health provision – are settled prior to judicial decision by means of negotiations between the MP's *Promotoria da Saúde* and the Municipal Health Secretariat.[125] In Rio Grande do Sul, for its part, there are two distinct and, indeed, starkly contrasting views on the interface between judicial institutions and public health administration. The first is held by the MP, which has considered it its task to proactively enforce the constitutionally mandated minimum spending on health.[126] To that end it has recently proposed a scheme whereby the state would be obliged to use any leftovers from the previous budget, as well as projections on the subsequent budget to fill any gaps; in relation to municipalities, the MP has established terms of settlement including mandatory deadlines (*termos de ajustamento*) to compel the

[122] *Zero Hora*, September 19, 2006. Available at http://zerohora.clicrbs.com.br/zerohora/jsp/default.jsp?uf=1&local=1&section=capa_online

[123] See *supra* n. 98.

[124] See interview with Leônidas Siqueira Filho, Chefe-adjunto do Setor Contencioso. August 26, 2005.

[125] See interview with Antônio Guise (Diretor do Departamento de Conrole e Avaliação da Secretaria Municipal de Saúde), June 7, 2005.

[126] The precise legal provisions are as follows: municipalities need, according to art. 198, para. 20 of the Constitution, and art. 77 of the Transitional Constitutional Provisions Act (*Ato das Disposições Constitucionais Transitórias*), to spend 15 percent of their annual budget on health; according to the same provisions, states need to spend a minimum of 12 percent; both states and municipalities must spend a minimum of 25 percent on education, as mandated in art. 212 of the Constitution.

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required minimum spending.[127] One of the problems of such relatively advanced programs is that their costs often exceed the mandated minimum spending, leading to intra-administration disputes over allocation of extra funds. Projects such as the *vôo escolar* show that with a well-functioning inter-institutional partnership between the relevant public authority and the MP, potential problems can be administratively preempted, so that formal judicial process is limited to cases of extreme noncompliance with constitutional and infraconstitutional norms. Such public policy partnerships represent, in the MP's view, a real step toward social inclusion.[128]

The contrasting view, in turn, is held by the relevant public authorities. A case in point is the Porto Alegre municipality where, in the view of municipal officials there is now a continuous attempt on part of the MP to "invade" the health-related competences of the municipality. The MP's actions, they claim, are highly prejudicial to public finances and to the quality of health care, require three reports to the Ministerio Publico daily, and require the Health Secretary to operate under (as yet unenforced) arrest warrants.[129] A recent example were twenty-five separate individual judicial orders requiring the municipality to provide free transport for plaintiffs with special needs, even if the provision of transport clearly fell outside the health brief, and even if a transportation scheme organized rationally by the municipality might have required fewer vehicles.[130] In the Secretariat's view, this undesirable state of affairs could be remedied if the MP took steps to incorporate the technical – in this case medical – expertise necessary to assess health-rights cases. Indeed, this would help to resolve unnecessary lawsuits before they even started.[131]

In all this, the core point of controversy is, as would be expected, the budgetary impact the aggregate of litigation is beginning to have. Yet, for all its importance, precise figures on the impact of decisions are difficult to come by, as there is no central monitoring of litigation costs by public authorities, and the legal-administrative process is complex, especially when it comes to the frequent ad hoc deals between different federal levels in relation to the shifting of funds from one to another.[132] In addition, as was already seen, judges by and large do not engage in any form of substantive cost or economic impact analysis of their decisions, and, in fact, frequently counter cost-based arguments by public authority defendants with references to the absolute character of the fundamental right in question. Data are, hence, largely anecdotal, but may, nonetheless, be indicative of the general trend. In health, the driving force of judicially enforced health rights continues to be the HIV/AIDS program; indeed, as will be discussed in greater detail in the following, litigation for inclusion of new HAART drugs and also for the often unlisted

[127] Whether on account of MP actions or of other factors, the numbers on the municipal level are impressive: In 2003, of 497 municipalities, only 8 did not comply with the mandated minimum spending; in 2004, this figure rose to 45, prompting the MP to supervise health spending even more vigorously.
[128] See *supra* n. 18.
[129] See *supra* n. 21.
[130] See *supra* n. 98
[131] See interview with Raul Martins, *supra* n. 98.
[132] See again "Governance in Brazil's Unified Health Care System," *supra* n. 33.

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drugs against opportunistic infections has become a semi-institutionalized form of expanding and refining the universal access scheme adopted by the government. This, together with the increasing cost of individual medications, has been increasing the cost of the HIV/AIDS program to more than one billion reais per annum in 2006. In all, the Federal Health Ministry's extra spending on judicially granted medicines for all types of disease rose from 188,000 reais in 2003 to around R$26 million in the first half of 2007 alone.[133] This trend is also reflected on the state level. In Paraná, for example, the extra cost for judicially granted medicines skyrocketed from roughly R$200,000 in 2002 to R$14 million during the first half of 2007 only. In São Paulo, in turn, the state spent R$48 million on litigated medication in 2004, out of a total medical budget of R$480 million – or roughly 10 percent of the medication budget.[134] The Federal Health Ministry estimates that in all states, litigation-related extra spending will amount to R$1 billion in 2007 alone.[135]

Moreover, it is not just the quantitative rise of litigation costs that is considered to be problematic, but also the particular quality of the granted medicines or treatments. A good part of the latter fall into the high-cost category of exceptional medicines concerning rare diseases and long-term treatment of the chronically ill. According to Ministry of Health data, the total cost for this category of medicines had already risen from R$680 million in 2002 to R$1.7 billion in 2005, with a tendency to grow even further. It could, hence, be argued that the increasing share litigated medicines and treatments have of the overall health budget favors individualized high-cost medicines and treatments over low-cost collective benefits such as vaccines or primary care medicines.

The overall data clearly suggests that the exponentially mounting litigation costs have put public health administrators on a collision course with current judicial practice concerning health and education rights. That said, overall costs are not fully reflective (yet) of litigation numbers because of the already-mentioned compliance problem in some of the examined states. However, although it is true that permanent or temporary noncompliance is a way for public authorities to (illegally) control costs, the number of litigants eventually successful not only in winning their cases but also in then obtaining the required medicines is still higher than the number of those who fail to concretize their judicial mandates.

CONCLUSION: FOUR MODELS OF LITIGATION

What, then, can be concluded from the complex multicolored and multitextured picture of social rights litigation in Brazil that has emerged in the preceding sections? Has a "rights revolution" occurred at least within the ambit of health and education? Has litigation caused these basic services to be distributed more widely, especially among the poorer layers of society? Have the courts empowered

[133] See data of Federal Ministry of Health – HIV/AIDS Program, at http://www.aids.gov.br/data/Pages/LUMIS16BA7E58PTBRIE.htm (accessed on December 17, 2007).
[134] Interview with Oscar Vilhena Vieira, Conectas/SUR and Fundação Getulio Vargas, May 10, 2005.
[135] *Supra* n. 133

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Brazilians and made good on the constitutional promise to make them true stakeholders in the health and education system? The first part of an ultimately inconclusive answer has to point to the sheer numbers: on the basis of the new constitution, a revamped health and education system, and progressive legislation such as the Lei 9.313, there clearly has been an explosive aggregate increase of health and education cases as of around 2002. Hence, if Brazilians initially staked their hopes for a (social) rights revolution essentially on lobbying, namely, in the form of crafting a rights-heavy constitution and pushing for implementing legislation, the focus has, in the past five years or so, shifted from Congress to the courts. It is here that citizens have found formal remedies to the inefficiencies of the health and education system, and they have started using these remedies at a breathtaking rate. This, of course, testifies to an overall increase in rights consciousness and litigiousness, and, thus, to a greater de facto accountability of public health and education authorities. Indeed, the fact that judicial actors are playing an increasing role in the administration of health and education policies has led to a slow but perceptible change in the attitudes and practices of public administrators, more oriented toward preventing litigation in the first place by generating effective outputs.

However, the follow-up question about whether these changes have also led to a wider and more even distribution of health and education goods is more difficult to answer and not immediately apparent from the numbers. What is still clearly shown in the quantitative study is the great numerical divide between both individual and public class actions, and between health and education rights litigation. Hence, by a vast margin, individual health-rights actions, most notably access-to-medicine and access-to-treatment cases, account for the observed litigation explosion; whereas public class actions, which are the main instrument of litigation in education, linger on at a low level. To be sure, one successful public class action may, because of its collective effect, count for many hundred or thousand individual actions on the same subject matter. Yet, as is also still evident from the quantitative study, the courts have applied two levels of scrutiny for either type of action. Whereas in individual (access to medicine and treatment) actions the mere showing of *prima facie* evidence of medical need is usually accepted as sufficient for a claim to stand, courts are very reticent to appear to directly influence executive policy administration by conceding *erga omnes* claims. As a result, the litigation "success story" really only applies to individual access to medicines and treatment, and, thus, largely bypasses education. That said, there is a slight difference as between health and education public class actions, with the latter being granted at a higher rate than the former. Yet, even in successful individual access to medicines and health actions, the number of claimants who actually obtain the granted remedy for the required period is lower than the winning case count implies. In some of the sampled states, such as Rio de Janeiro, there is a considerable compliance problem, and enforcement action tends to depend on the personal initiative either of the individual claimant or a particular Defensor Público who is then transformed into a compliance agent. And even enforcement action does not always lead to the remedy actually being provided. In this sense, the de facto hurdles for obtaining medication or treatment through the courts are relatively high and require a considerable investment of time and money, even for nominally indigent claimants.

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In addition, the judicialization of public health generates a number of collateral effects that qualify the direct benefits obtained from successful litigation. The main one consists of the queue-jumping phenomenon that results from the massive concession of preliminary injunctions granting medicines or treatment on pain of heavy daily fines for noncompliance. This evidently scrambles established priorities, such as for specially vulnerable groups, and cross-cuts legitimate policy objectives. Given overall scarcity of funds and stringent administrative rules on extra-budgetary expenditure, the effect of this injunction flood is generally not any fundamental change in health policy, but rather the ad hoc shifting of funds toward litigant patients. This phenomenon is aggravated by the prevailing judicial formalism and the resulting reticence on the part of the courts to engage in substantive determinations of need, adequacy, or proportionality. In this sense, the relation between the judge's and the administrator's logic is scant, with there not being, as yet, any institutional mechanism or cultural construct to bring both logics together. Another side effect of the current judicial decision practice relates to public class actions and the MP. In response to the reticence on the part of the courts to grant these structural remedies, the MP has, in at least some of the examined states, shifted from litigation to pre-judicial administrative control. The MP thereby assumes the role of co-administrator or, indeed, policy maker, a role as potentially beneficent for the categories of individuals contemplated by a particular measure as it is problematic in relation to democratic legitimacy and rational public administration.

Two other factors further complicate a straightforward conclusion with regard to the impact of litigation on the availability of health and education goods. First is the question of the distribution of litigation benefits across social class. Here, a clear picture is difficult to draw, for the main indicator of legal indigence, notably cases filed by the Defensoria Pública, is skewed by the divergent definitions of indigence applied by different Defensorias in the sampled states. Although the majority of Defensoria clients certainly belong to the poorer layers of society, middle class claimants are also increasingly driven to the Defensoria on account of their growing relative indigence in relation to medicine prices and insufficient coverage from private health insurers. What is clear, though, is that individual actions filed by private attorneys emanate from middle class plaintiffs who tend to turn to the courts immediately after being rejected at a public health authority and will, consequently, have a comparatively speedy trial. By contrast, indigent plaintiff's cases usually only come to court after an odyssey in public health institutions, the Defensoria Pública, and possibly the MP, all of which imply considerable waiting periods. Even if the end result may be the same, namely, the concession of the requested medicine or treatment, the indigent plaintiff is much less in control of his or her process and usually has to wait considerably longer for a positive outcome. There is, hence, an appreciable difference in access to justice between middle class and indigent plaintiffs.

Whether this implies that health rights are being "captured" by the middle class is a different question. If the capture thesis is to imply that middle class plaintiffs are effectively taking away social rights from indigent plaintiffs, then the figures are inconclusive. There is no evidence whatsoever that the courts are favoring middle

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class over indigent plaintiffs. Nor is the greater difficulty of indigent plaintiffs to bring a case in itself evidence for a transfer of health services to the middle class and away from indigent plaintiffs. For as long as courts show little interest in the aggregate impact their individual decisions are having on municipal and state budgets, there is no overall cap on how much is being spent on court-ordered compliance with rights and, therefore, no a priori limitation on how many plaintiffs are granted their rights. Where the middle class capture thesis may have some currency is, of course, in relation to the injunction flood mentioned earlier. Here, the queue-jumping of litigant patients, many of whom are middle class, at public pharmacies does have a direct impact on nonlitigant patients, the majority of whom are, quite likely, indigent.[136]

The second cross-cutting factor concerns the considerable regional differences in litigation behavior. As is evident from the quantitative study, the number of people treading the judicial road differs starkly with, as a general trend, litigiousness decreasing from south to north, from comparatively wealthier to poorer regions. Yet, it is not merely relative affluence and its expected impact on such factors as education and rights consciousness, but also differences of local cultures, legal and political, and the resulting institutional framework that account for this difference. It is only where the MP is vibrant, where the Defensoria Pública is empowered, and where judges are reasonably rights-oriented that litigation numbers skyrocket. Nevertheless, it should be noted that with the exception of Bahia, all other states within the sample display a similar overall trend, even if in different magnitudes.

What, then, explains the seemingly ambivalent outcomes of health and education litigation? The present study could only so much as scratch at the surface of an answer to this question, which would require a much deeper analysis of the life of the law in Brazil. Preliminarily, the reasons that can be derived from this analysis have to do with a certain Janus-like quality of the different judicial actors that makes their role and influence on litigation outcomes ambivalent. Judges, for their part, see themselves as guardians of the constitutional order and the fundamental rights implied in it, but their formalist style and corporativist disposition distances their decision practice, regardless of whether in successful individual or unsuccessful public class actions, from the realities of health and education administration.

The MP, in turn, acts as a powerful vanguard of judicial transformation and, in health and education, effectively fulfills the functions of a citizens' ombudsperson. Its institutional setup, however, makes it not fully accountable in relation to which causes it adopts and how widespread its impact will be, and its proactive stance may crowd out more representative civil society actors. The Defensoria Pública, for its part, is the key to access to justice for indigent claimants, unmatched by any civil society alternative such as legal clinics or legal aid NGOs, but it still suffers from considerable logistical limitations and is overburdened by its double role as public litigant and de facto enforcement agent. Last, civil society and, indeed, individual claimants are not unambivalent either. On the one hand, more and more people are aware of their constitutional rights and unafraid of entering the judicial

[136] This statement derives from informed intuition, as the survey data does not directly reveal the social class of nonlitigant users of public pharmacies.

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process to make good on them. On the other hand, there are clearly distorting effects that work on (some) claimants, notably the pharmaceutical lobby in health rights which, with physicians and, to a certain degree, organized civil society as intermediaries, stimulates and, thus, inflates certain types of access to medicines or treatment litigation. In addition, the extent to which organized civil society has adopted a judicial strategy in relation to health rights varies greatly, with HIV/AIDS still by far the most litigation-oriented movement, even though, as noted, more and more NGOs are beginning to look to the courts as a crucial field of action.

In all, four distinct models of social rights litigation can be identified in the Brazilian context. The first model is the individual action for access to medicines and treatment, in which individuals, both middle class and indigent, successfully litigate for health services though they may subsequently face compliance problems that tend to be overcome to a greater degree by attorney-aided middle class claimants. Because of its numerical importance and success rate, this model has the largest financial and, therefore, potentially, policy-changing impact. The second is the public class action model in both health and education, in which demands for structural remedies[137] brought by the MP are frequently rejected by courts unwilling to interfere with executive competences, even though there is a greater willingness to concede structural education actions than their health equivalents. The third is the HAART litigation model in which the organized HIV/AIDS movement acts as a semi-institutionalized feedback mechanism into the HAART therapeutic consensus by filing demands for new HAART drugs as soon as they are released anywhere and sometimes even before they are certified in Brazil. As this model is based on individual actions, it is highly successful, with litigants not only winning but also generally not facing the compliance problems other litigant classes face because of the federalized and extraordinary nature of the Brazilian HIV/AIDS program. Although in that sense *sui generis*, this model is at least in part adaptable to other causes, including in relation to education.

The fourth is the emerging negotiated settlement model in which primarily the MP, but also increasingly the Defensoria Pública and the courts themselves, will seek to avoid formal judicial proceedings and will directly negotiate solutions with public authorities and the other involved judicial actors. This model, when successful, effectively introduces *erga omnes* solutions through the back door and, being joint judicial–executive action, has the greatest direct and immediate impact on policy formation. It may still not always generate the desired results, but it clearly marks a break with what could be termed the responsibility gap that normally stands between the judiciary and the executive and that obfuscates the attribution of responsibility for tangible end results. This last model, which to some extent must be backed by the credible threat of litigation, also comes closest to what Charles Sabel and William Simon have recently described as the judicial experimentalist model,[138] in contrast to the traditional command and control model of judicial control of administrative practice. It is clear that with regard to social rights

[137] See Charles F. Sabel and William H. Simon, 2004. "Destabilization rights: How public law litigation succeeds." 117 *Harvard Law Review:* 1015.
[138] *Id.*

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litigation in Brazil, that traditional model is, at least in part, dysfunctional, even if it may still generate aggregate effects that will over time affect policy. However, it is as yet too early to tell whether judicial–executive co-administration is capable of making an overall difference in relation to health and education policies and, more important, on the number of people effectively benefited by them.

In all, social rights litigation is currently in a process of transition and may change considerably over the next couple of years. The reasons are that, on the one hand, the litigation explosion is likely to continue and further increase, with HAART litigation serving as the model; and on the other hand, there are the first signs of a concerted executive backlash against this litigation explosion on account of the growing financial burden it is causing. The mentioned initial measures now taken on the federal level are likely to be broadened, and it is even conceivable that an STF motivated by concerns expressed by the executive will begin to more proactively roll back the current decision practice. In the best of cases, this backlash will be accompanied by a lessons learned exercise by which health and education policies are gradually adapted and budgeted to avoid litigation in the first place, but this is by no means a certain outcome. Conversely, however, any legislation or even a STF-driven curb on litigation cannot in itself hold back demand. Certainly, experimentalist "friendly settlement" practice is going to be further encouraged by formal limitations to litigating, and, perhaps, there will be a shift away from individual and toward public class actions as the more rational way of administrative control. In any case, even facing a transitional moment, social rights litigation will continue to play an at once transformative and destabilizing role, true to the syncretism that characterizes so much of Brazil.