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Enforcing Socio-economic Rights Through Immediate Efficacy: A Case Study of Rio De Janeiro's Right to Housing

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The enforcement of human rights by the judiciary is a widespread option, translated into different constitutional clauses. From the progressive realization to the immediate application, many alternatives combine the urge in turning those moral commitments into reality without losing the authority legal clauses should retain. The Brazilian experience, despite the formal allusion to intermediate application, was turned into the assertion of immediate efficacy through interpretation. This Article concludes that adding efficacy as a constitutional feature of the human rights system to be scrutinized by the Judiciary does not enhance enforcement—in fact, it contributes to increased inequality. The hypothesis is demonstrated through a case study in the right to housing in Rio de Janeiro, and the judicial solution that was created in order to give flesh to a right without any statutory delimitation. Despite the urgency inherent in many human rights, a constitutional interpretation transfers to the Judiciary the definition of socio-economic rights content, which call for democratic distributive decisions that belong to the political realm.

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I. INTRODUCTION

Transforming human rights from moral claims into legal entitlements is a strategy spread worldwide by human rights advocates. Despite an ongoing debate on the effects of that same tactic over social movements as a relevant source of human rights legitimacy,[1] its comprehensiveness is increasing around the world, with human dignity as a central concern.[2] Constitutions drafted from the late 1980s on are now including human rights as a steady feature required by modern constitutional theory. The lingering question is how to deal with the challenging enforcement of those same human rights, especially in the socio-economic realm.[3]

In the legal field, transposing human rights to the constitutional text is a useful strategy that might allow judicial control, opening a new enforcement arena aside from ordinary politics. That result is usually pursued by applicability clauses that are a practical solution based on the immediate application and progressive realization of the given rights.

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1. *See* David Kennedy, *The International Human Rights Movement: Part of the Problem*?, 15 HARV. HUM. RTS. J. 101 (2002) (listing criticisms arguing the human rights movement might be part of the problem of achieving results geared by that same enterprise); *see also* Marius Pieterse, *Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited*, 29 HUM. RTS. Q. 796, 797 (2007) (claiming that rights discourse enables the status quo to assimilate and defeat social movements, qualifying socio-economic rights as accomplices to, rather than victims of, the sidelining of the needs they represent, despite their transformative potential).

2. Michael A. Elliott, *Human Rights and the Triumph of the Individual in World Culture*, 1 CULTURAL SOC. 343, 344 (2007) (claiming that the explanation to human rights triumph has a strength relation with the individual being increasingly regarded as sacred and inviolable).

3. For a comprehensive analysis about the presence and enforceability of socio-economic rights in constitutions worldwide, see Courtney Jung et al., *Economic and Social Rights in National Constitutions*, 62 AM. J. COMP. L. 1043, 1044 (2014).

This Article examines the Brazilian experience extrapolating the literality of the constitutional text that alludes to "immediate application"[4] of fundamental rights,[5] forging a doctrinaire[6] and jurisprudential concept of immediate efficacy[7] to that same human rights system. The analytical perspective is whether that same formulation, requiring efficacy as a human rights feature, positively affects its enforcement, and might be a model in considering efforts to increase human rights compliance.

Expanding the boundaries of constitutional clauses related to human rights enforcement is not a unique experience in the international scene. In India, overcoming the denial of enforceability of social and economic rights, the Supreme Court adopted a broader understanding of the guaranteed entitlement to the protection of a right to life and personal liberty.[8] The Colombian Constitutional Court, through the "connectivity"

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4. "The provisions defining fundamental rights and guarantees are immediately applicable." CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5, ¶ 1 (Braz.).

5. *Id.* arts. 5, 6. The expression "fundamental rights" in the Brazilian system is used as a broader concept, understood as a particular set of rights related with a high valued social interest, and intrinsically associated with liberty and the protection of human dignity. The expression is expressly listed in at least two constitutional clauses (art. 5, in liberty rights, and art. 6, in socio-economic rights), sprinkled throughout the constitutional text, and might be incorporated into the national legal framework through the subscription of international treaties. *Id.* For a synthetic description of the Brazilian constitutional fundamental rights, see Augusto Zimmermann, *Constitutional Rights in Brazil: A Legal Fiction*, 14 ELAW J. 28 (2007).

6. Aligned with the efficacy proposition among the Brazilian scholars, see INGO WOLFGANG SARLET, A EFICÁCIA DOS DIREITOS FUNDAMENTAIS [THE EFFICACY OF FUNDAMENTAL RIGHTS] (Livraria do Advogado ed., 11th ed. 2012) (Braz.); Virgílio Afonso da Silva, *O Conteúdo Essencial dos Direitos Fundamentais e a Eficácia das Normas Constitucionais* [*The Essential Content of Fundamental Rights and the Efficacy of the Constitutional Norms*], 4 REVISTA DE DIREITO DO ESTADO 23, 23-51 (2006) (Braz.); Clèmerson Merlin Clève, *A Eficácia dos Direitos Fundamentais Sociais* [*The Efficacy of the Fundamental Social Rights*], 22 REVISTA CRÍTICA JURÍDICA 17 (2003) (Braz.).

7. The Supreme Federal Court has already alluded to the immediate efficacy of the constitutional clauses expressing fundamental rights. S.T.F., Ext 986/República de Bolívia, Relator: Min. Eros Grau, 15.08.2007, 117, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e.], 05.10.2007, 21 (Braz.) ("Fundamental rights and guarantees must have immediate efficacy (art. 5º, § 1º); State departments direct link to those rights should compel the State to keep strict observance on them."). *See also* S.T.F., RE 201.819/RJ, Relator: Min. Ellen Gracie, 11.10.2005, DIÁRIO DA JUSTIÇIA [D.J.], 27.10.2006, 577 (Braz.) ("Will's autonomy does not give private parties, in the domain of their own acting, the power to transgress or ignore restrictions posed by the constitution itself, whose efficacy and normative force is also imposed to private parties, in their own private relations, when it comes to fundamental liberties.").

8. The Constitution of India encompasses a vast list of classic human rights related to freedom (Part III), fully enforceable through judicial control and social and directive principles of state policy, geared to protect socio-economic rights (Part IV—these, nonenforceable through judicial intervention, according to article 37 ("The provisions contained in this Part shall not be enforceable by any court . . ."). INDIA CONST. art. 37. Despite the express enforceability denial in article 37, the Constitutional Court, construing through article 21, which protects a right to life and personal liberty, overcame the initial restrictions in a well-known progressive jurisprudence in the right to health, food, housing, and other domains of social protection. *Cf.* Burt Neuborne,

doctrine, held a similar practice.[9] These experiences demonstrate that all around the world, courts are engaged in the human rights enforceability project.

The understanding of the Brazilian constitutional clause translated into immediate efficacy[10] is two-fold: rights are invested with validity and force as a legal norm; therefore, they are immediately justiciable. Also, those rights should be promoted and protected in its broadest possible content.[11] That protection might be implemented through the enactment of legislation or public policies, and it will encompass negative and positive duties, mainly geared to the state—but also eventually reaching private parties. Eventual malfunctions in the performance of those public and private parties should be solved by judicial intervention. This constitutional interpretative framework led to a high level of litigation, which might appear to be a positive indication of the real enforcement of those rights. The question is still whether the judicial outcome really enhances social rights enforcement, or merely enforces an individualistic approach in the enterprise of promoting socio-economic rights.

The main thesis of this Article is that the Brazilian immediate efficacy understanding of its original constitutional clause provides a power transfer to the Judiciary, pressuring the judicial system into delivering instant answers to claims of fundamental rights violation even when the rights content is uncertain—not already expressed in a statute

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The Supreme Court of India, 1 INT'L J. CONST. L. 476, 477 (2003) (presenting a brief description of the Indian constitutional system and its evolutionary process).

9. The Colombian Constitution, although presenting a wide list of social rights, has an express clause that specifies the rights that are immediately applicable. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] [The Political Constitution of Colombia] art. 85 (Col.). Despite that differentiation, the Constitutional Court developed the "connection" doctrine in T-406/92, according to which immediate application should be recognized, even to a right nor formally invested of it, whenever that same right is connected with another one granted immediate application. Corte Constitucional [C.C.] [Constitutional Court], junio 5, 1992, M.P.: J. M. Rodríguez R., Sentencia T-406/92, Gaceta de la Corte Constitucional [G.C.C.] (vol. 2, p. 190) (Colom.). Housing—for instance—is not provided with immediate application, according to article 85 of the Colombian Constitution. Nevertheless, its connection with a right to life leads to the extension of the immediate application clause. Vanice Regina Lírio do Valle, *Judicial Adjudication in Housing Rights in Brazil and Colombia: A Comparative Perspective*, 1 REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS 67 (2014); Natalia Angel-Cabo & Domingo Lovera Parmo, *Latin American Social Constitutionalism*, *in* SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES 85 (Helena Alviar Garcia et al. eds., 2014).

10. From now on, despite the literality of the Brazilian constitutional clause transcript in footnote 4, this Article will allude to immediate efficacy as the prevailing understanding of the already mentioned precept.

11. "In that context, it was correctly sustained that the norm contemplated in article 5, § 1 of the Constitution impose to state departments to maximize the efficacy of fundamental rights." SARLET, *supra* note 6, at 286.

or administrative regulation. Those fast answers may in fact undermine the transformative project, and contribute to inequality and regression in human rights protection.

Assessing the Brazilian experience is relevant to expand the comparative analysis of the possible normative frameworks used to incorporate socio-economic rights protection. The progressive realization clause that presides over the South African constitutional design is seen as weak and insufficient,[12] adopting a mainly procedural perspective, rather than a substantive one. Ingenious expansive interpretations of the constitutional text, like the Colombian "connectivity" doctrine, or the Indian understanding about the right to life encompassing socio-economic rights, are also seen as positive when it comes to increasing the enforceability index. The concept of "minimum content," at its non-negotiable core[13] is presented as a tool to enhance enforceability of rights. All those interpretative tools and doctrinal categories relate to the same concerns that the Brazilian interpretation of the constitutional "immediate application" clause intends to address. None of them provide a proper response to the threat of overlooking a potential clash between distinct components of that same legal system in pursuing a highly enforceable system of human rights protection. Aside from that, human rights protection involves allocative and distributive choices that surely constrain their realization, which might turn immediate efficacy of all the concurring socio-economic rights into a practical impossibility.

Generalizing immediate efficacy to all fundamental rights through interpretation might seem like a desirable solution, but almost thirty years of applying this framework demonstrates it is not a perfect response to the challenge of promoting social transformation through human rights. In a field where indeterminacy of rights' content and inherent interdependent relationships among rights is a premise, the immediate efficacy assertion stands in contradiction. It claims a certainty and absoluteness in the legal realm that is incompatible with the very idea of

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12. David Bilchitz, *Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance*, 119 S. AFR. L. J. 484 (2002) (criticizing the reasonableness test as insufficient to grant approval to governmental policies when it comes to fulfilling constitutional commitments in the socio-economic realm); Sandra Liebenberg, *Needs, Rights and Transformation: Adjudicating Social Rights*, 17 STELLENBOSCH L. REV. 5 (2006) (pointing to the necessity to overcome the formal discourse when it comes to understanding socio-economic rights, in order to achieve social justice).

13. For a comprehensive systematization of the developed theories about minimum core establishment, see Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113 (2008).

human rights promotion. Trade-offs and balancing are an important aspect of human rights enforcement, and this equilibrium search is preliminarily undermined by the immediate efficacy clause.

The difficulties proposed by the immediate efficacy understanding increase, despite the rhetorical appeal, when it comes to guaranteeing social rights deeply affected by limitations in the available goods, or other components of that same right. Housing is a perfect example. Providing effective protection to a right to housing involves available physical space, a component subject to natural limitations. There is always the risk that a peremptory assertion, like the one made by the Brazilian Constitution, provides a false sense of enforceability—even in systems that abridge broad judicial review of such rights' violation.

The Article is developed as follows. Part 1 presents the problems of possible regressive effects in social rights enforcement coming from an immediate efficacy constitutional clause. Part 2 provides a brief overview of the National Constitutional Assembly and the political components of that process that led to the 1988 Brazilian Constitution. This Part clarifies the necessary role of socio-economic rights in a broader transformational process and constitutional framework in order to bring the rights into practice. This Part also serves to inform on the institutional framework designed to control eventual ineffectiveness when it comes to fundamental rights in general. Part 3 provides a description of how socio-economic rights are translated into the Brazilian legal system, from constitutional clauses up to legislation and administrative regulation. The vagueness of the rights provision, associated with a lack of legal framework, creates a problematic atmosphere for judicial intervention in a civil law system. Part 3 further discusses rights' indetermination. Here, the association of rights indeterminacy and immediate efficacy in a civil law system is the main difficulty—namely, how to provide an adequate solution to a judicial claim about a right with uncertain content.

The abstract exercise of constitutional modeling based on granting indeterminate rights was already tested in Brazil through almost three decades throughout day-to-day constitutional application. This experience is reported in Part 4, which presents an empirical illustration of the legal effects of the immediate efficacy interpretation under an extremely underdeveloped social right—housing—according to the way it is claimed especially in Rio de Janeiro.[14] A brief description of the

14. All the references in this Article to Rio de Janeiro allude to the city and to the municipal government. The distinction should be made, due to the fact that litigation in the right to housing happens also at the state level—but that is not the focus of this Article.

ongoing public policies is necessary for a better understanding of the judicial claims and rulings. Judicial reasoning and remedy defining strategies applied in those claims will help to understand the practical implications of the immediate efficacy interpretation. This Article will also present a critique to that reasoning matrix usually applied in Rio de Janeiro's lawsuits, extrapolating the effects of those empirical flaws to the major issue of enforcing the whole human rights system. Finally, Part 5 is dedicated to a critical evaluation of the Brazilian experience in crafting an immediate efficacy understanding from its original constitutional clause. Departing from Rio de Janeiro's case law on the right to housing, this immediate efficacy feature is shown as an alternative that leads to depoliticization, social demobilization, inequality, and regression.

Although this Article deals with the right to housing in its empirical observation in Rio de Janeiro, the final criticisms still apply to the entire Brazilian fundamental rights system. The immediate efficacy clause rises from a very legalistic tradition held in Brazil,[15] which relies on the presumptive power of law to transform social and political reality. Aside from the flaw of the presumption itself,[16] the fact is that efficacy *per se* is an undetermined concept, which undermines significantly the transformative potential of the referred interpretation. Political scientists report that the elite's most common strategy to avoid substantive social transformation is not preventing legislation, but delaying its implementation.[17] The immediate efficacy proclamation, despite good intentions, may be instrumental to that same postponing of any substantial change in the social reality.

The immediate efficacy understanding cannot guarantee enforcement of socio-economic rights, as long as its definition and the implementation stage of those same rights is still undeveloped, uncontrolled and un-evaluated. Constitutional models that assume clear enforcement of socio-economic rights as an ongoing project benefit from keeping that political struggle visible. A still open political debate requires detailed justification, which enhances deliberation legitimacy—

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15. Keith S. Rosenn, *The Jeito: Brazil's Institutional Bypass of the Formal Legal System and Its Developmental Implications*, 19 AM. J. COMP. L. 514, 528 (1971) (describing the emphasis in the Brazilian system in regulating most of the social relations by comprehensive legislation).

16. "Rights-and-remedies is primarily a test of wills and resources between the parties to suits, and it is not directly assimilable to a program of social action." STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 5 (1974).

17. The legalistic mentality will usually bring a tendency to regard as done what is enacted into law. That perception would be a powerful tool in preventing the advancement of real structural change. *Cf.* Rosenn, *supra* note 15, at 528, 533.

and this can hardly be obtained through a ruling. The immediate efficacy model is not a success case among the constitutionally available tools—this is the main lesson that the Brazilian experience might offer.

II. UNDERSTANDING THE BRAZILIAN CONSTITUTIONAL FRAMEWORK IN SOCIO-ECONOMIC RIGHTS

The Brazilian Constitution of 1988 is the result of a long and highly negotiated political process[18] that led to the end of almost three decades of military dictatorship. The 1967 Constitution, severely altered by the military through amendments and the so-called "Institutional Acts,"[19] imposed severe limitations on the federal organization of the country, as well as the political and civil liberties of the population.[20] The National Constituent Assembly (NCA) was summoned, strongly polarized with conservative and progressive representation.[21] On February 1, 1987, the NCA was installed with fourteen different parties represented. Internal regiment adopted thematic commissions to start the constitutional drafting and agreed upon the number twenty-four. Assembling those partial deliberations in a single and coherent document was the task, and led to highly contentious disputes over constitutional impasses. Internal political disputes blocked the deliberation, which urged the deliberation process to result in an agreement between the conservative forces (Centrao), granting them greater power in the second part of the discussion in the constitutional process.

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18. For a brief description of the political ambience before and during the Brazilian Constituent Assembly, see Jorge Zaverucha, *The 1988 Brazilian Constitution and Its Authoritarian Legacy: Formalizing Democracy While Gutting Its Essence*, 15 J. THIRD WORLD STUD. 105, 105-07 (1998).

19. The "institutional acts" partially reformulate the constitutional text without observing the formal procedure required to the approval of a constitutional amendment. They were enacted at the time on grounds of a supposed special power granted to the Executive due to the special conditions associated to the revolutionary state of affairs. During the dictatorship, seventeen "institutional acts" were enacted, mostly to cease individual liberties, reduce legislative power and prerogatives, and to centralize power in the Executive branch.

20. Roberto Gargarella, *Latin American Constitutionalism: Social Rights and the "Engine Room" of the Constitution*, 4 NOTRE DAME J. INT'L COMP. L. 9, 10-16 (2013) (reporting the historical process through which social rights were included in Latin America constitutions—without the necessary adaptation in the institutional dimension of those same countries).

21. The negotiating ambience in which the political transition was happening did not exclude from the constitutional drafting any member of the conservative forces that sustained the military dictatorship. The National Assembly happened to split into these two opposed tendencies. Negotiation became the name of the game during the constitutional debate. *Cf.* Gary M. Reich, *The 1988 Constitution a Decade Later: Ugly Compromises Reconsidered*, 40 J. INTERAM. STUD. WORLD AFF. 5, 6 (1998) (reporting some of the dynamics that happened between the political forces during the Brazilian Constituent Assembly).

Another distinctive aspect of the Brazilian National Constituent Assembly was a significant level of popular engagement even in the formal deliberative process. Reacting to a very strong social mobilization around the re-democratization process,[22] the Assembly's Internal Regulation required public hearings and allowed the opportunity for popular amendments to be presented.[23] The provision was effectively applied, with 122 popular amendments formulated, nineteen of which were approved and incorporated into the final constitutional text.

All these concurrent forces and inputs resulted in an extended constitutional text that tried to reconcile many political tendencies. Due to internal partisan disputes, negotiation happened almost clause-by-clause, with trade-off agreements happening in a very parochial practice. The huge economic crisis around the world during the late 1980s, and the foreseen victory of the progressive parties in the municipal elections also affected the NCA. Those elements are reflected in the balance of forces relevant to the final constitutional text.[24] The outcome is a constitution that lacks internal coherence,[25] a flaw intensified by ninety-three constitutional amendments already enacted.[26] Socio-economic rights were included from the beginning in the constitutional text.

A. Bringing Socio-economic Rights to the Constitution

In the heterogeneous ambience of the Brazilian NCA, the strategy applied by progressive forces to promote a transformative agenda was to include a long list of fundamental rights[27] in the normative framework to come. Aside from those expressly referred to in the text, the Brazilian Constitution also admitted the possibility of implicit rights and the prospective incorporation of new ones through the subscription of

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22. The constitutional assembly summon was preceded by a national movement in favor of direct elections to Presidency. That popular mobilization continued after the failure in restoring direct elections and was redirected to the new constitution-drafting proposal.

23. Keith S. Rosenn, *Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society*, 38 AM. J. COMP. L. 773, 777 (1990) [hereinafter Rosenn, *New Constitution*].

24. *See* Reich, *supra* note 21, at 6.

25. *Id.*

26. Since the writing of this Article, the Brazilian Constitution has been amended ninety-three times in twenty-seven years. *Constituição de República Federative do Brasil [Constitution of the Federal Republic of Brazil]*, SENADO.GOV.BR, http://www.senado.gov.br/atividade/const/constituicao-federal.asp (last visited Nov. 4, 2016).

27. It should be clarified that the analytical character of constitutions turned out to be a trend not only in Latin America but also in other continents. The Colombian constitution enacted in 1991 has 380 articles; the South Africa constitution enacted in 1996 contains 243 articles; the Venezuelan constitution enacted in 1999 has 350 precepts.

international treaties.[28] The idea was to attach a political agenda to future Congress, which would provide, through the ordinary political process, the legal development of a fundamental rights system.[29]

Fundamental rights were also entrenched, and qualified as irrevocable clauses. The expression usually used in Brazilian scholarship is "stone clause."[30] This precludes the formal explicit or implicit exclusion of those rights from the constitutional text through amendments.[31] The inclusion of fundamental rights as a transformational tool was empowered with the aforementioned constitutional clause providing immediate efficacy's application to the rights themselves. Legal development and concrete implementation of fundamental rights are still a concern of the legislative and the executive;[32] but if that task is neglected through inertia or underdevelopment, the violated right can be judicially claimed, despite the vagueness of the constitutional clause.[33]

Progressive forces in the NCA were also very aware of the fact that the advancement of the transformational agenda was uncertain. The dilatory commitments the constitutional text was assuming, transferring enforcement of the fundamental rights to the legislative and the executive could fail. Elites' capture of the democratic process is a well-known phenomenon, and such a maneuver could undermine entirely the transformational project brought by the 1988 Constitution.

At the organizational level, the Constitution created a system of strong institutions geared to provide power control. The Judiciary has

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28. "The rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party." CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5, ¶ 2 (Braz.).

29. The Brazilian constitutional modeling was highly inspired by the Portuguese proposal known as *constitutional dirigisme*, where the constitution rigidly preordains goals, objectives, and even means geared specifically to the legislative branch, and reducing discretionary choices about what aspects of the constitution might be left to future parliamentary deliberation. *Dirigisme*, both in Portugal and in Brazil, was a response to a previous theoretical conception according to which constitutional clauses might be classified as mere directives, resting undeveloped or under-enforced forever. Manoel Gonçalves Ferreira Filho, *Fundamental Aspects of the 1988 Constitution*, *in* PANORAMA OF BRAZILIAN LAW 11 (Jacob Dolinger & Keith S. Rosenn eds., 1992).

30. "No proposal of amendment shall be considered which is aimed at abolishing . . . IV—individual rights and guarantees." CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 60, ¶ 4 (Braz.).

31. It should be clarified that the Brazilian system encompasses the possibility of judicial review of constitutional amendments; this will be the mechanism through which the observance of those "stone clauses" will be monitored.

32. The Brazilian Constitution, in turning concrete its general provisions, required in its original text the enactment of 285 ordinary statutes and 41 complimentary laws. *See* Rosenn, *New Constitution*, *supra* note 23, at 778.

33. *See* Ferreira Filho, *supra* note 29, at 13.

increased its own institutional guarantees. Aside from judge's selection through public competition, in a very depoliticized process, tribunal composition is mainly a selection among the constituents of that same public career, in a process designed by the Constitution. This method prevents vertical interference throughout the Judiciary. The Brazilian judiciary also has financial autonomy, invested with competency to propose its own budget.[34] These two features provide the Brazilian judiciary autonomy from eventual power-holders, strengthening the checks and balances system.[35]

The Brazilian Constitution also contemplates the Public Prosecutor's Office,[36] with officials selected through public competition and, like the judges, invested in a lifetime position. That Office not only provides criminal prosecution, but also representation of society's interests through class actions.[37] The aim is to provide the legal system with a powerful accountability agent[38] with the ability to develop judicial and non-judicial efforts addressing civil or criminal liability of public or particular parties, in order to enforce constitutional determinations.

Concerning the poor and vulnerable, the Constitution also defines a fundamental right granting access to justice.[39] This right allows an indigent to file a complaint without paying any fee. Legal representation of the needy is provided by another public institution, the Public

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34. Keith S. Rosenn, *A Comparison of the Protection of Individual Rights in the New Constitutions of Colombia and Brazil*, 23 U. MIAMI INTER-AM. L. REV. 659, 689 (1992).

35. There is always controversy involving the developed role of the judiciary, and Brazil is no exception. For a discussion of the of the judiciary's alignment, not with contingent power-holders, but with the regime in a broader sense, see Daniel M. Brinks, *"Faithful Servants of the Regime"—The Brazilian Constitutional Court's Role Under the 1988 Constitution*, *in* COURTS IN LATIN AMERICA 130-135 (Gretchen Helmke & Julio Rios eds., 2011).

36. "The Public Prosecution is a permanent institution, essential to the jurisdictional function of the State, and it is its duty to defend the juridical order, the democratic regime and the inalienable social and individual interests." CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 127, ¶ 10 (Braz.).

37. For a description of the Brazilian litigation scenery in socio-economic rights, and some information about the role of each different judicial actor, including the Public Prosecutor's Office, see Florian Hoffmann & Fernando R. N. M. Bentes, *Accountability for Social and Economic Rights in Brazil*, *in* COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD 100 (Varun Gauri & Daniel M. Brinks eds., 2008).

38. Maria Tereza Sadek & Rosângela Batista Cavalcanti, *The New Brazilian Public Prosecution: An Agent of Accountability*, *in* DEMOCRATIC ACCOUNTABILITY IN LATIN AMERICA 201-227 (Scott Mainwaring & Christoper Welna eds., 2003) (detailing the institutional role of the Public Prosecutor's Office in the Brazilian constitutional system, with an emphasis on its power control functions).

39. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 134 (Braz.).

Defender's Office.[40] Again, the institutional role is held by members of the profession selected by public competition, with tenure and administrative independence. Recently, through Amendment 80, the institutional role of the Public Defender's Office was officially attached to the defense of human rights.[41]

Public Defenders are allowed to file lawsuits against any level of government—including the one from which they receive their paycheck. Representation can be provided in individual lawsuits, but also in class actions. The vulnerability of the plaintiffs is usually asserted by their own declaration of that same condition. In states where the Public Defender's Office is well organized and structured, lawsuits grounded in socio-economic rights issues will be largely handled by that office.[42]

It should be clarified that, despite the applicability of that constitutional framework in the whole country, there may be factual differences between states, leading to possible discrepancies. Decentralization of the Judiciary in an extensive territory like Brazil happens at differentiated levels around the country. Institutional strength of accountability agents, like the Public Prosecutor's Office and the Public Defender's Office, can also vary among states.[43] Despite that, the strengthening of those same agents is an ongoing trend, and they are socially perceived as relevant to power control. Access to justice can hardly be seen as a privilege of the rich.[44] Power-holders can also find

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40. A well explored issue in the literature of socio-economic rights enforcement is the objection that justiciability will not be a relevant feature when access to the judiciary is not granted due to costs, absence of proper legal representation, centralization of the judicial structures available, or even lack of awareness that filing a lawsuit is even a possibility. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 140-41 (1974). When it comes to that specific concern, the Brazilian solution seems to be effective, associating gratuity in judicial access with the provision of legal representation through a stable public institution.

41. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 134 (Braz.) ("The Public Legal Defense is an essential institution to the jurisdictional function of the State and is responsible for the judicial guidance and the defense, in all levels, of the needy, under the terms of article 5, LXXIV.").

42. *See* Hoffmann & Bentes, *supra* note 37, at 129. This is clearly the case in Rio de Janeiro state, where the Public Defender's Office has existed for a long time (even before the constitutional obligation to providing such a service) and has a very aggressive approach in socio-economic rights lawsuits.

43. The strong institutional framework developed by the 1988 Constitution helped to ameliorate the critique that facilitating adjudication will not have a relevant impact in transforming societies fundamental rights, because normally, access to justice is easier for the wealthy. The Brazilian solution is a step forward, but it would still depend on the real enforcement of those same institutional structures.

44. Despite an initial understanding that judicial enforcement of socio-economic rights was benefiting mainly the wealthy, newer research points to an increase in the access to justice by the needy due to the good performance of the described institutional set. *See* Octavio

those superintendence agents sometimes troublesome, with past attempts to undermine their independence—which indicates that somehow, the constitutional original design is working. The combination of all these factors made litigation in Brazil accessible,[45] and a perceived violation of fundamental rights can easily lead to judicial intervention through individual or collective lawsuits. In fact, presenting the Judiciary as a final protector of those fundamental rights was a clear intention of the framers,[46] and that original intent was clearly reinforced by the immediate efficacy understanding, which turns justiciable any violation of fundamental rights.

B. Normative Structure of the Fundamental Rights in the Brazilian Constitution

The historical process according to which fundamental rights were included in the Brazilian Constitution might prompt the impression that all the constitutional clauses are built according to the same normative structure. That will be an equivocal conclusion. The right to housing was included in the constitutional text synthetically; the same concise formulation was adopted with the right to food and transportation.[47] Some other human rights were brought to the Constitution in a more elaborated way. For example, the right to health is considerably detailed in the Brazilian Constitution due to an extensive discussion of the issue in the health reform movement,[48] which preceded the NCA. Aside from

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Luiz Motta Ferraz, *The Right to Health in the Courts of Brazil: Worsening Health Inequities?,* 11 HEALTH HUM. RTS. 33, 43 (2009); *see also* José Reinaldo de Lima Lopes, *Brazilian Courts and Social Rights: A Case Study Revisited*, *in* COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? 185 (Roberto Gargarella et al. eds., 2006).

45. In September 2015, Brazil reached 100 million active lawsuits in a population of 206 million. According to the National Council of Justice report, in 2014 expenditure in the Judicial branch reached R$68.4 billion (approximately US$25.3 billion). This represents 1.2% of the same years GDP and 2.3% of the public expenditure (encompassing federal and state government). NAT'L COUNCIL OF JUSTICE, EXECUTIVE SUMMARY—COURTS IN FIGURES (2015), http://www.cnj.jus.br/files/conteudo/arquivo/2015/11/491328c33144833370f375278683f955.pdf.

46. The Brazilian Constitution clearly presents the judiciary as a last resort to those blockages in the ordinary deliberation system, potentially leaving the question of relevant social claims unanswered. That feature is prominent throughout Latin America. *See* Natalia Angel-Cabo & Domingo Lovera Parmo, *Latin American Social Constitutionalism: Courts and Popular Participation*, *in* SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES 86 (Helena Alviar García et al. eds., 2015).

47. "Education, health, work, leisure, security, social welfare, protection of motherhood and childhood, and assistance to the destitute, are social rights, set forth by this Constitution." CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 6 (Braz.).

48. The institutional design of a public health system was proposed in 1986 in the 8th National Health Conference, which reunited most of the proponents of the health reform

the express assertion of such a right[49] and its purpose, the Constitution clarifies it should be offered and regulated by government—although it can also be provided by private parties.[50] The institutional framework is likewise set in the Constitution, adopting a single system that reunites all federation entities, according to the express directives of decentralization and full service. Constitutional Amendment no. 29/00 established a minimum expenditure level, granting funding to those same actions.[51]

The right to education is also detailed in the Brazilian Constitution. Here, similarly to the right of health, the constitution expresses: (1) the right's general provision; (2) general principles that should apply to the offering of education throughout the country; (3) a rough definition of state's main obligations in providing education as a public service; and (4) the establishment of minimal levels of public expenditure in providing education.[52] One can also find an express constitutional clause with a clear definition of the children who are granted public education, and which level of government should be responsible for the task.[53] Health and education are also largely regulated through legislative and administrative rules.[54] Therefore, the intended complementary activity of the legislative and executive had already supplanted any original indeterminacy in the constitutional language.

In the middle of the determinacy spectrum, one can find, for instance, the right to culture. Granted expressly through Article 215, its enforcement is committed to the State, through a national system that

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movement. Aside from labeling health as a citizen's right, the conference laid out the foundations of the future public health system, proposing strategies involving coordination, integration, and resource transfers between federal governments and states. Jairnilson Paim et al., *The Brazilian Health System: History, Advances, and Challenges*, 377 LANCET 1778, 1786 (2011). Therefore, when the Constituent Assembly was summoned, the health issue had already been debated and a very concrete proposal was presented right from the beginning.

49. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 196 (Braz.) ("Health is a right of all and a duty of the State and shall be guaranteed by means of social and economic policies aimed at reducing the risk of illness and other hazards and at the universal and equal access to actions and services for its promotion, protection and recovery.").

50. *Id.* art. 197.

51. *Id.* art. 198.

52. *Id.* arts. 205, 206, 208, 212.

53. *Id.* art. 211.

54. The legislative set will encompass institutional design (regulating health services), guidelines to the development of the public service (establishing directives in the education system), a national plan with goals and measurement criteria, etc. Lei No. 8.080, de 19 de Setembro de 1990, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 20.09.1990 (Braz.) (institutional design); Lei No. 9.394, de 20 de Dezembro de 1996, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 23.12.1996 (Braz.) (guidelines developing public service); Lei No. 13.005, de 25 de Junho de 2014, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 26.06.2014 (Braz.) (national plan).

should provide coordination of the public policies in the matter. Culture does not have a minimum expenditure clause in the Brazilian Constitution.[55] Despite the different structures presented by fundamental rights, each one is provided with equal immediate efficacy, meaning that non-observance of those rights will be a constitutional violation, correctible through judicial review.[56] That interpretation should be understood in a historical perspective.

The enactment of the 1988 Constitution occurred in a very unstable political environment, and non-compliance with its own text was a feared possibility. In the past, constitutional theory in Brazil admitted—aside from the validity concern—distinct levels of efficacy in constitutional precepts.[57] According to a widely disseminated classification at the time, constitutional norms could be seen as fully effective, with a containable effectiveness or of limited effectiveness. During the whole dictatorship period, fundamental rights contained in the 1967 text were classified as of limited effectiveness and, therefore, were merely programmatic. The subsistence of such an understanding into the new constitutional order was a clear threat to the entire transformational process—especially considering the express reference, in many clauses, to a requirement of further statutory development.

During the NCA, the constitutional disposition that finally was enacted as Article 5 § 1 referred to immediate efficacy to be granted to fundamental rights. That same formulation was present in two draft

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55. *Id.* arts. 215-216.

56. The Brazilian Constitutional Court already proclaimed that direct effect of a constitutional clause for a socio-economic right many times. Here is a partial transcription of a ruling, which states:

> [Principle of reserve for contingencies] Impossibility of its calling in order to legitimize the unfair non-fulfillment of states duties in providing goods or services constitutionally imposed to Public Powers. . . . Cogent and bindingness of constitutional norms, including programmatic ones, who express public policies and guidelines to public policies, especially the ones in the health realm. [Constituição Federal [C.F.] [Constitution] art. 60, ¶¶ 196-97 (Braz.)]. The tragic choices issue. Overcoming unconstitutional inertia as an institutional necessity grounded in an affirmative behavior from judges and Courts, resulting in a positive jurisdictional law creation.

S.T.F., ARE 745.745/MG Belo Horizante, Relator: Min. Celsso De Mello, 02.12.2014, Diário do Judiciário Eletrônico [D.J.e.], 18.12.2014, 250 (Braz.).

57. The classic textbook in that subject was *Aplicabilidade das Normas Constitucionais*, in which the author claimed that constitutional clauses of limited effectiveness were able at least to prevent legislative deliberation that goes against that same constitutional goal. JOSÉ AFONSO DA SILVA, APLICABILIDADE DAS NORMAS CONSTITUCIONAIS [APPLICABILITY OF CONSTITUTIONAL NORMS] (8th ed. 2012). That understanding at the time (Brazil was still under a dictatorship when that book was published) was an attempt to, towards those same constitutional clauses labeled as merely programmatic, at least constrain new attacks to the debilitated, but still existing constitutional order.

projects along the debate. The precept was altered, and the "application" formula adopted in the systematization phase of the deliberation.[58]

Deprived of the textual reference to efficacy, in order to grant effectiveness to the constitutional project as a whole, the legal community's enforcement of the constitutional system was one necessary transformation in the legal culture in the quest for constitutional effectiveness.[59] The immediate application, referred to in the Constitution, can only be understood as effectiveness.[60] Constitutional supremacy as a basic feature will require effectiveness of the whole document, leading to a less formalistic approach. A strict commitment to human dignity as a core value will require greater justification in constitutional interpretation.[61] Therefore, human rights cannot be understood as mere directives—they are power constraints that should operate without delay. Constitutional promises aim for the future, but they are required to be somehow enforceable from the beginning.

The Brazilian judicial system combines an abstract and concentrated model of judicial review with a decentralized one. The former will find some limitations related to justiciability, but the latter is broadly authorized and can be concretely exercised throughout the country by any judge. Rulings in the abstract form of judicial review are

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58. An interesting historical observation to be added is that this precise second phase of the constitutional drafting in the NCA was dominated by an informal coalition called "Big Center," which reunited conservative forces present in the Assembly.

59. The classic textbook in the quest for the effectiveness of the Brazilian Constitution is *O Direito Constitucional e a Efetividade de suas Normas*. LUIZ ROBERTO BARROSO, O DIREITO CONSTITUCIONAL E A EFETIVIDADE DE SUAS NORMAS: LIMITES E POSSIBILIDADES DA CONSTITUIÇÃO BRASILEIRA [CONSTITUTIONAL LAW AND THE EFFECTIVENESS OF ITS NORMS: LIMITS AND POSSIBILITIES OF THE BRAZILIAN CONSTITUTION] 108-11 (7th ed. 2003). The author has been a member of the Brazilian Constitutional Court—Supreme Federal Court—since 2014.

60. EROS ROBERTO GRAU, A ORDEM ECONÔMICA NA CONSTITUIÇÃO DE 1988: INTERPRETAÇÃO E CRÍTICA [THE ECONOMIC ORDER IN THE CONSTITUTION OF 1988: INTERPRETATION AND CRITIQUE] 313-14 (13th ed. 2008) ("To apply the law is to turn it effective. To say that a right is immediately applicable is to assert that the precept through which it is expressed is self-suficient; that same precept do not require—because do not depend on it—any legislative or administrative act that precedes a decision that consummates its own effectiveness.").

61. Here, the Brazilian experience approaches the South African one, where a change in the legal culture, from a formalistic point of view to a justification perspective, was also proclaimed as essential to enhance the transformational potential of the new constitutional order. Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146, 150 (1998). For a criticism of the view that such a transformation could be held exclusively or mainly by law, see Karin van Marle, *Transformative Constitutionalism as/and Critique*, 20 STELLENBOSCH L. R. 286, 288 (2009).

binding, but the same will not happen in the rulings of incidental control.[62]

Civil law systems provide the impression that inconsistency among different rulings would be prevented by the certainty emanating from statutes. This is not the case in Brazil. Refusing to abide by a judicial hearing leads to repetitive ruling on the same matter, facilitating conflicting interpretations of the same constitutional provision.[63] Judges in a civil law system do not have their rationality influenced by the possible reflex of their own decisions in current and future cases; the approach is that a solution is required, and that a solution can only apply to one single case in hand.

Dealing with socio-economic rights, the required homogeneity in ruling might also be under threat by the lack of objective normative criteria to use as grounds for the judge's decision. The more the litigation rate increases, the greater the possibility of inconsistency between rulings. Another relevant component is judges' internal independence.[64] If non-compliance with prior higher court decisions does not impact lower courts nor their members, personal interpretations will likely prevail.

The Brazilian procedural system does not contemplate a mechanism allowing direct submission of an ordinary claim to the Constitutional Court. Justiciability in socio-economic rights will only be open directly by the Supreme Court in cases involving abstract judicial review.[65] A lawsuit might reach the Supreme Court through

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62. The Brazilian system in now migrating to a binding system, a transition that started with Amendment 45/04 and continues with the approval of a new Procedural Code in 2015. Lei No. 13.105, de 16 de Março de 2015, Diário Oficial Da União [D.O.U.] de 17.03.2015, (Braz.).

63. Keith S. Rosenn, *Judicial Review in Brazil: Developments Under the 1998 Constitution*, 7 SW. J. L. & TRADE AM. 291, 292 (2000).

64. "'Internal independence' refers to the extent to which lower courts judges can make decisions without taking into account the preferences of their hierarchical superiors." Julio A. Ríos-Figueroa & Matthew M. Taylor, *Institutional Determinants of the Judicialisation of Policy in Brazil and Mexico*, 38 J. LAT. AM. STUD. 739, 746 (2006). That feature might come from the procedural rules themselves, but also from a legal regime of guarantees favoring the judges and from the way that lower courts are composed. In the Brazilian scenery, legal guarantees in favor of the judges are established in law and are therefore immune to any kind of restriction coming from the higher courts. Lower courts' composition is indicated in the Constitution—once again, the choice is immune to any higher courts' interference.

65. Abstract control of constitutionality will be decided by the Supreme Court when the statute becomes federal or is edited by states—if the analysis of its implementation is in contrast with the Federal Constitution, naturally. The Brazilian Constitution also contemplates a procedure gearing abstract control of the legislative omission towards regulating issues in which enacted law is required by the Constitution itself. Finally, a subsidiary procedure allows abstract control of constitutionality whenever a fundamental precept is violated. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 102, ¶ 1 (Braz.).

"extraordinary appeal," but that appeal is subject to very strict justiciability requirements.[66] Rulings would multiply in the legal system, until some "extraordinary appeal" is found justiciable. Even then, the Supreme Court's ruling will not be binding.[67]

The combination of those rights' indeterminacy and broad access to justice creates an expressive level of inconsistency in adjudication, which may happen without the desired homogeneity in the solution of similar claims—a contradiction in terms of human rights protection. Indeterminacy seems to be at the root of the problem, as the lack of rights content allows different judicial responses. Is indeterminacy a flaw in the system, especially considering its civil law affiliation?

III. LEGAL INDETERMINACY AND RIGHTS-TALK

Legal indeterminacy is a long-known issue.[68] Law's ability to shape social coexistence is a point in reason, either to narrow detailing or to vagueness in legal documents. The former strategy enhances predictability, but can force undesired rigidity in the legal system. The latter alternative allows legal development as time goes by, but raises issues about the legitimacy of the official deliberation of rules' meaning.[69] The higher the indeterminacy in a normative provision, the broader the realm of choices held by those official interpreters of the rule

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66. Among the justiciability requirements of the extraordinary appeal is the non-consideration of factual aspects. The Supreme Court, as an extraordinary level of jurisdiction, is not supposed to develop reviewing functions—this is why examining facts, a typical task of ordinary jurisdiction, is not possible in examining an "extraordinary appeal."

67. The Brazilian procedural system is in transition to a partially binding one. It started with the constitutional Amendment no. 45, which created a "binding summula"—an abstract enunciation of a legal thesis repeatedly adopted by the Court:

> By decision of two-thirds of its members, after reiterated decision on constitutional matters, the Supreme Federal Tribunal may, *ex-officio* or upon demand, approve a precedent (*súmula*) which, upon publication in the official press, shall have binding effects on the other organs of the Judiciary and the federal, state and country public administration, both direct and indirect. The Supreme Federal Tribunal may also revise or cancel [its precedents] in the manner established by the law.

CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 103-A (Braz.).

Those enunciations would be binding to all the judiciary and to the executive branch. Despite the apparent utility of the "binding summula," the Supreme Court is being very cautious in its approval, due to the difficulty in translating a legal reasoning into a single abstract phrase.

68. Radical indeterminacy is allegedly a feature of law and adjudication in general, according to the critical legal studies movement. The recognition of such an indeterminacy deprives judicial legitimacy of one possible source (the exact application of the precept), but does not doom judicial intervention to illegitimacy. *See* Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989).

69. Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 877 (2003).

of law, including the three power branches, which brings serious democratic implications. On the other hand, indeterminacy allows social re-evaluation of previous political choices, preserving the rule of law's responsiveness when it comes to social changes. Vagueness, as a strategy to reconcile conflicting interests, is admitted even in constitutional drafting, implicated (certainly) in postponing sensible decisions to the further deliberation taken through the ordinary political deliberation process.[70] Legal indeterminacy is an inevitable result of law's abstraction. Inscribing a right in the constitution might overcome justification issues, but it still leaves unanswered questions about how it will be recognized or implemented.[71] It is an intrinsic aspect of the law itself, which makes applicability more complex, but does not undermine its utility as a tool for ordering social interactions.[72]

Indeterminacy potentially brings a power transfer when it comes to determining law's content and results. Deprived of legislative definition of rights content, judicialization allows judges to fulfill that gap in order to grant immediate efficacy. When that power transfer ends up in unelected agents like judges, democratic concerns about arbitrariness and potential concealment of a broader political project of reinforcing relations of domination[73] will inevitably rise.

Indeterminacy is feasible in common law systems, where the openness of a legal clause is supposed to be delimited by judicial construction. In those systems, vagueness in legal clauses allows a permanent meaning's development and updating through judicial activity. The perception will not be the same in civil law systems, where determinacy is still perceived as a useful feature, as long as it enhances predictability and stability. In the democratic sphere of the debate, people might see determinacy as a safeguard of compliance by public

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70. Cass R. Sunstein, *Constitutional Agreements Without Constitutional Theories*, 13 RATIO JURIS 117, 128 (2000) (asserting that incomplete theorized agreements—agreements on abstract formulations and on particular practices, amidst disagreement about the largest issues in social life—help make constitutions and constitutional law possible, even within nations whose citizens cannot concur on the most fundamental matters).

71. Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 738 (1992) (establishing rights indeterminacy as a premise to the author's theory that courts should take into account popular will during the process of remediation and enforcement as a way to assess tolerance with the right as announced in a ruling).

72. Despite indeterminacy, laws can still allow some level of objective predictability and still carry on its ordering purpose when it comes to social interactions. Anthony D'Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148, 180 (1990).

73. *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 463 (1987) (offering a report and criticism about the critical legal studies position of law's indeterminacy as a tool of the "mystification thesis," according to which legal discourse reinforces relations of domination).

officials with choices that originate from the legitimate political process. It can also be seen as a way to limit undesired judicial interference in previously made political choices.

A. Indeterminacy in Human Rights

In the human rights realm, uncertainty is usually present, from reasons for its own justification, to the real claims synthesized in the enunciation of a specific new human right, such as for instance, a right to development. That indeterminacy is not a flaw; it is a feature that preserves openness to a permanent critical scrutiny, reinforcing the justification and the expansive tendency of the right itself.[74] Indeterminacy will deprive human rights of a guiding strategy for its own practice or realization;[75] but on the other hand, indeterminacy allows for the continued translation of pre-existing moral claims into an effective moral entitlement.[76] Despite the debate over social construction's role in the human rights justification, it is beyond doubt that at least the right's application in certain contexts will be socially constructed.[77] Human rights are, therefore, open to disagreement when it comes to content.[78] This characteristic will last even if they are transposed to express constitutional provisions as "fundamental rights."[79]

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74. "[T]he subject of human rights is a dynamic one, fluid, always open to new rights-mechanisms for the expansion of human flourishing, and less hidebound by the finite rights-lists and institutional structures of the past." *See* Conor Gearty, *Against Judicial Enforcement*, *in* DEBATING SOCIAL RIGHTS 18 (Conor Gearty & Virginia Mantouvalou eds.,2011).

75. MICHAEL K ADDO, THE LEGAL NATURE OF INTERNATIONAL HUMAN RIGHTS 20 (2010).

76. Brian Orend, *Justifying Socio-economic Rights*, *in* ECONOMIC RIGHTS IN CANADA AND THE UNITED STATES 26 (Rhoda E. Howard-Hassmann & Claude E. Welch, Jr. eds., 2006).

77. Suzanne Fitzpatrick et al., *Rights to Housing: Reviewing the Terrain and Exploring a Way Forward*, 31 HOUSING, THEORY & SOC'Y. 447, 448-49 (2014).

78. Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315, 323 (2004) ("What is being argued here is that the possibility of such debates—without losing the basic recognition of the importance of human rights—is not just a feature of what can be called human rights *practice*, they are actually part of the general *discipline* of human rights, including the underlying theory (rather than being an embarrassment to that discipline).").

79. The expression "fundamental rights" in the Brazilian system is used as a much broader concept than in the United States. In Brazil, fundamentality is a rights feature that is related to a high valued social interest, intrinsically associating liberty with the protection of human dignity. They are expressly listed in at least two constitutional clauses (article 5, in liberty rights and article 6, in socio-economic rights). Beside those two articles, "fundamental rights" are sprinkled throughout the constitutional text, and might be incorporated into the national legal framework through the subscription of international treaties. Therefore, the "fundamental rights" status can come merely from the circumstance that the constitution labeled a certain right so. This will excuse a ruling from a deep investigation of the essentiality of the right in question—if the classifications derives from an express constitutional clause. For a synthetic description of the Brazilian constitutional fundamental rights, see Zimmermann, *supra* note 5, at 28.

Indeterminacy will turn into ambivalence in aspirational constitutions, as long as elusiveness about rights content can undermine the enforcement of those clauses. Aspirational constitutions are committed to a transformational ideal,[80] gravitating around human dignity as a core value to be broadly protected and enhanced. Nevertheless, constitutional aspirations were designed to reach effectiveness in the real world, which requires going down to grassroots details. Preserving the aspirational potential and the concrete emancipatory results they intend to achieve will be the permanent challenge posed to those constitutions.[81]

Rights' indeterminacy will open space regarding distinct rights' components, when it comes to application. The first component is entitlement. This definition should be drafted in an abstract perspective (who are the rights-owners); but deciding about rights ownership can also happen whenever a conflict takes place. Entitlement is a political decision that will take into account economic efficiency, distributional preferences (of wealth or of certain specific goods) and other justice considerations.[82] A second decision relates to the manner in which recognized entitlement is protected—a very contentious matter, regardless of the right at stake. Associated with the protection of the right is the question about whether an individual is allowed to trade or sell any aspect of that same right.[83]

Whenever those questions are transferred to the judiciary, the answers should be found through interpretation in the context of concrete cases.[84] Reasoned argument and justification—common features in the judicial analysis of any claim—are supposed to help overcome indeterminacy, strengthening a culture of justification.[85] This area is where the lure of judicial protection of human rights resides. Legal

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80. According to Klare, transformative constitutionalism is a "long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction." *See* Klare, *supra* note 61, at 150.

81. Mauricio García-Villegas, *Law as Hope: Constitutions and Social Change in Latin America*, 20 WIS. INT'L L. J. 353 (2002) (pointing out that usually, the more social crises there are in the country, the more aspirational the constitution tends to be, at least in Latin America).

82. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093 (1972). Those propositions are made in the light of property and liability, but they can certainly be extrapolated to any right.

83. *Id.* at 1092.

84. Sandra Liebenberg, *The Value of Human Dignity in Interpreting Socio-Economic Rights*, 21 S. AFR. J. HUM. RTS. 1, 3 (2005).

85. *See* Klare, *supra* note 61, at 147.

reasoning and justification supposedly can armor the human rights regime against the passions and constraints so common in the realm of politics.[86] The remaining question is if legal and judicial justification can really provide that protective effect, in a neutral ambience, immune to political influences.

B. Indeterminacy in the Socio-economic Rights

Socio-economic rights will face the difficulty of openness at its extreme. Entering the realm of law as a result of political struggle, they usually express an ideal of protection and human development—and not a sharp definition of entitlement, either in an objective or subjective perspective. Besides that, socio-economic rights are intended to promote social inclusion, and therefore consequentialism is a sensitive feature,[87] which would require openness in order to accommodate the ever-changing factual constraints that might be at stake. If law itself is called to mediate, by balancing idealized behavior and goals with the practical constraints of ordinary life, socio-economic rights will also be summoning to that same mediation exercise.[88]

Socio-economic rights are geared to the achievement of inclusion and equality, which calls for some sort of ideal of justice as guidance and inspiration to the definition of components as entitlement and positive obligations associated to those rights. That same conception will inspire the manners through which such rights will be protected—the scope of a social right is essential to defining the best tools for its own enforcement. Entitlement and scope are intrinsically related aspects, and adjudication should preserve a very narrow relationship between them—otherwise, there will be no real rights protection. Aligning those two aspects is never easy, especially in a legal system in which there is a sum of undetermined socio-economic rights to protect and develop, all at the same time. Social rights also compete among themselves, which leads back to the previously mentioned choices about entitlement and strategy in order to maximize their application as a system, and not just as individual components. That approach is clearly required by the

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86. The overpromise of justice inherent in translating human rights into a legal vocabulary is pointed out by Kennedy, referring to a function of the judge as someone who is an instrument of the law, rather than as a political actor—something that is simply not possible, "given the porous legal vocabulary with which judges must work and the likely political context within which judges are asked to act." *See* Kennedy, *supra* note 1, at 116-17.

87. Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 901 (2001) (asserting that the consequentialist characteristic of positive rights will require indeterminacy).

88. Margaux J. Hall & David C. Weiss, *Human Rights and Remedial Equilibration: Equilibrating Socio-Economic Rights*, 36 BROOK. J. INT'L L. 453, 458 (2011).

interdependence, interrelation, and indivisibility of human rights, a characteristic that is certainly transported to socio-economic rights.[89]

Another manifestation of indeterminacy related specifically to socio-economic rights is the fact that unless their content is defined in a very strict sense related mainly to survival, the achievement of a certain legal guarantee will simply lead to recalibrated expectations at a higher level. As asserted by Young, "economic and social rights are better conceived in contestable terms, as incomplete, dynamic and revisable."[90]

This is one reason why the progressive realization clause is associated with those rights in the International Covenant of Social, Economic and Cultural Rights,[91] that grant the opportunity for conciliation between the aspirations of such a right and the real constraints imposed by a specific country's reality. The more you improve a terrain of protective measures of social rights, the broader the entitlement can be, and this should be left open to adjustment as long as the effectiveness level of a particular social right increases.

In the Brazilian Constitution, fundamental rights are grounded in the protection of human dignity, expressly declared as a fundamental objective of the Republic.[92] Nevertheless, that value reference is not the only one. Mentioned explicitly in the Constitution, socio-economic rights in the Brazilian system are understood as legal entitlements, subject to judicial scrutiny, easing the burden of providing a theoretical justification.[93]

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89. For a brief description of international assertions of the same interdependence, inter-relation, and indivisibility of human rights in international law, see Craig Scott, *Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, 27 OSGOODE HALL L.J. 769, 779 (1989).

90. Katharine G. Young, *Freedom, Want, and Economic and Social Rights: Frame and Law*, 24 MD. J. INT'L L. 182, 184 (2009) (proposing that economic and social rights should be taken not only as a method of exerting legal pressure on decision-makers, but also as a frame of discourse within the political contestations of distributive justice).

91. International Covenant on Economic, Social and Cultural Rights art. 2, Dec. 14. 1966, 993 U.N.T.S. 3 ("Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.").

92. "The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on . . . the dignity of the human person[.]" CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 1 (Braz.).

93. *See* Sen, *supra* note 78, at 323 (underlining the decrease in the justification burden of judicial protection of human rights when they are transposed to the constitutional text as fundamental rights; that easiness, nevertheless, will not allow a complete discard on the debate about their also moral foundation, as long as that justification might enlighten the application task).

A paradox will emerge from the fact that, according exactly to the transformational intent that inspired the inclusion of socio-economic rights in constitutions, they will be granted some level of efficacy and enforceability. That is what happened in the Brazilian Constitution, as described in Part 2. After all, despite their openness, as a concept, rights set out a protected domain of especially important interests required to preserve fundamental values. This is where the judiciary might be called to overcome alleged violations of an especially protected set of rights. Even in a progressive realization scenery, state action is required, as asserted in International Covenant on Economic , Social, and Cultural Rights (ICESCR) General Comment 3,[94] meaning that non-compliance with such a responsibility might be subject to judicial control.

Judicial claims about a particular right invested with efficacy might happen when the previously mentioned political choices are not already made. Legislation might not have been enacted, or public policies not designed. The core distributive aspect of socio-economic rights many times turns the required political decision difficult, and is usually the main cause for litigation. The conflict should be solved by the judiciary without entitlement definition, and with no indication about which possible or desirable protective measures should apply. Sometimes, at least one of these components might be addressed in an existent public policy, but the claim might be that even that partial definition is unlawful. That situation, in a civil law system, will be highly challenging, as long as it requires ruling without clear normative criteria previously established. Despite the possible use of analogy and other interpretative tools, sometimes the vagueness of the claimed constitutional clause poses strong obstacles to adjudication. This is where an empirical approach might clarify the theoretical question: how can judges face that challenge? What kind of judicial response can really grant rights enforcement? Is granting social rights enforcement really a task for the judiciary?

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94. Comm. on Econ., Soc. & Cultural Rts., General Comment 3, The Nature of States Parties' Obligations (Fifth Session, 1990), U.N. Doc. E/1991/23. Annex III at 83 (1991).

> The other is the undertaking in article 2 (1) "to take steps," which in itself, is not qualified or limited by other considerations. The full meaning of the phrase can also be gauged by noting some of the different language versions. In English the undertaking is "to take steps," in French it is "to act" ("s'engage à agir") and in Spanish it is "to adopt measures" ("a adoptar medidas"). Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.

IV. RULING ABOUT A RIGHT TO HOUSING IN RIO DE JANEIRO

The right to housing was not granted in the original text of the Brazilian Constitution, despite a persistent housing deficit, especially in the major urban centers. Twelve years later, Amendment no. 26/00 brought the express allusion to a right to housing in the already existent Article 6, but omitted details. Competency, a core issue in federal systems, was not addressed by Amendment no. 26/00;[95] neither were entitlement or funding. Surely, the right to housing ought to be interpreted in accordance with other constitutional guarantees, such as the social function of the city[96] and the right to an ecologically balanced environment,[97] as an essential asset of a healthy quality of life. Nevertheless, those necessary associations simply aggravate the indeterminacy problem when it comes to a judicial claim about a right to housing.

Even though fifteen years has passed since the enactment of the Amendment no. 26/00, there is barely a statutory development of such a right. Sensible issues like eligibility conditions or priorities, and which kind of good or service should be provided in order to fulfill such a right are not disciplined, even in administrative regulation. The federal government has a broader public program ongoing, called "My House, My Life," in which popular houses are built in a joint initiative with state and municipal governments. That program has a legal framework,[98] but it does not regulate the already mentioned components of a general right to housing. The lack of statutory criteria allows state and municipal governments to maintain their own programs, responding to priorities according to strategies as they see fit.

Claims for protection of a right to housing in Brazil are grounded in positive obligations addressed to the state because of its qualification as a fundamental right. Here again, the immediate efficacy understanding

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95. As to competency between the federative levels, the only reference in the constitutional text will be Article 23(IX) alluding to a common role (not exactly in enforcing the right to housing) in "promot[ing] housing construction programs." CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 23, ¶ 9 (Braz.).

96. "The urban development policy carried out by the municipal government, according to general guidelines set forth in the law, is aimed at ordaining the full development of the social functions of the city and ensuring the well-being of its inhabitants." CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 182 (Braz.).

97. "All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations." CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225 (Braz.).

98. Lei No. 11.977, de 7 de Julho de 2009, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 08.07.2009 (Braz.).

has a major role in turning admissible the idea that positive obligations might be extracted from such a vague enunciation. The possible factual background behind bringing a lawsuit encompasses a wide variety of situations. A first category involves governmental intervention that leads, in the end, to eviction, regardless of whether public officials pursue that specific result.[99] A second category encompasses homelessness caused by public work: highways, erecting new public buildings or equipment, etc. A third category anticipates natural phenomena like landslip, fire or flood.[100] Finally, a fourth category will incorporate many different situations—eviction promoted by private parties, children endangered by residency in unsafe areas, etc. Such alternatives might involve intentional and unintentional public action, or even the absence of public action in the housing loss. The whole spectrum of controversy is present in the cases filed against Rio de Janeiro.

A. Ongoing Policies in the Right to Housing

In the right to housing regulatory scenery, Rio de Janeiro has two main public policies. There are public programs—"My House, My Life," in a partnership with the federal government, and other local programs like "Living Carioca."[101] Both are available to anyone who meets eligibility conditions. They require waiting in a queue for an available housing unit. There is no specific timeframe to the deliverance of the new house, it will depend on availability.

The second policy is addressed to people affected by public work that is being carried out by the city government. In those situations, people are granted either financial compensation for the lost house, or a new habitation unit. Here, there will be no queue—those right-owners have priority in their settlement. Typically, the housing units granted to those right-owners are not available at the precise moment that they will be evicted. In that situation, local administrative regulation states that those right-owners should be granted monthly financial assistance, called "social rent." That financial aid will last until the effective deliverance of the housing unit. Any other situation, despite homelessness, falls outside

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99. The classic hypothesis of intentional eviction is the recovery of public areas irregularly occupied. The nonintentional eviction would usually happen when public officials engage in policy power activities, controlling impairment on edifications, or preventing building in risky areas.

100. One should take into account the natural conditions in Rio de Janeiro—a city surrounded by mountains, and like any other urban center, irregular occupation of land and of ruined buildings is a common phenomenon.

101. This particular program aims to provide minimal infrastructure and public equipment to popular settlements already consolidated in the urban area.

of the regulatory framework in Rio de Janeiro—which leaves an eventual judicial claim without objective ruling criteria.

Practical effects of the right to housing indeterminacy are clearly perceived here. Is the general public policy that provides housing units to eligible citizens in due time, no matter the personal conditions requiring urgency in attending to those right-owners, enough to meet constitutional standards? Does the right to housing contain an implicit distributive concern, requiring priorities in delivering those same units? Does the simple inclusion in a program, without a specific timeframe to the deliverance of the house meet the constitutional goal? Does the right to housing require, as the only possible solution, the provision of a housing unit? Could public policies contemplate other mechanisms geared to facilitate shelter? If the right to housing does not necessarily imply the provision of a house itself, who chooses a proper remedy for the rights violation?

If the scope of such a right is unconditional protection against homelessness in any situation, the immediate efficacy understanding would require public policies that respond promptly to that occurrence, no matter the reasons that led to homelessness. On the other hand, if distributive concerns are underlying the right to housing, selectivity and priority setting would be intrinsic components of such a right, and judicial intervention discarding those same criteria will in fact undermine the effectiveness of the right to housing, which would not be taken as absolute and unconditional. The absence of answers to these relevant concerns rising from the indeterminacy of the rights does not prevent judicial control in the Brazilian system. Lawsuits will fill the docket, claiming protection of a right to housing affected in ways not considered in the ongoing policies. Those claims arise in individual lawsuits, or even in class actions. They might be the primary claim in the lawsuit—or they may come in association with other required interventions.[102] There are no normative criteria to solve those claims; nevertheless, a ruling should happen according to the literal interpretation of the constitutional clause that grants access to justice.

B. Judicial Reasoning in the Absence of Normative Criteria

The immediate efficacy understanding, as already mentioned, creates the urge to provide a concrete solution to the fundamental rights'

102. In Rio de Janeiro, class actions that gear environmental recovery of an area affected by an irregular occupation usually will require as a secondary pledge the resettlement of the occupants.

violation among judges in Brazil. Adding to the scenery the *non liquet* principle,[103] the Judiciary faces a positive determination to promote the transformation intended by the framers' decision.[104] Despite legislative or executive inertia in the definition of rights content, a ruling must be delivered.

The need to provide that same sort of palpable response certainly will benefit from a detailed normative framework, as in the right to health or to education. Such a framework in the right to housing does not exist, therefore, lawsuits in the matter will present as grounds, mainly the human dignity directive, the constitutional (vague) clause about a right to housing and its immediate efficacy, pushing interpretation not only to allow judicial scrutiny, but to grant even positive obligations opposable to the Public Administration. In the factual component, the claim will usually involve an objective assertion of the actual or imminent absence of a house, regardless of whether it was caused by a public official's actions.

The causes for already occurred or a predictable loss of residence may not even be discussed in the lawsuit, as long as the interpretation is that the causes are not relevant to the state's liability. Immediate efficacy justifies positive obligation by itself. Even taking the immediate efficacy interpretation as correct, entitlement and content of such a right remains debatable, requiring judicial reasoning. In the lack of a legal framework, the first interpretative tool will be human dignity, as the force idea from which every human right arises. Despite the recognition of the subjective and objective dimensions of such human dignity, which empowers individuals with certain rights and imposes affirmative obligation on the state,[105] those parameters do not help properly to overcome the lack of content in the right to housing. Legal reasoning will frequently refer to human dignity to reinforce a conclusion that recognizes entitlement. As to a right's definition itself—what kind of good or services a right to

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103. The *non liquet* principle is applicable in the Brazilian procedure system, in the sense that it prevents judicial agents of leaving a case undecided on grounds of absence or lack of clarity of the legal framework in the matter. Decreto-Lei No. 4.657, de 4 de Setembro de 1942, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 09.09.1942 (Braz.).

104. The urgency component, according to Gearty, is in fact reason and result to the usage of the language of human rights itself, as long as the needs protected by them cannot wait. *See* Gearty, *supra* note 74, at 21.

105. For a comprehensive report on the previous and current literature in the subject, and a systematization of the concept of human dignity, see Luís Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT'L & COMP. L. REV. 331, 337-38 (2012).

housing would assure—judges will not step into that debate.[106] In the absence of a systemized concept of a right to housing, judges will simply jump directly to the remedy design, and in doing so, extending the limits of ongoing public policies as the preferred strategy in designing remedies.

If the factual description of the claim meets either of the two ongoing public policies in Rio de Janeiro, the solution is easy—reappoint public administration to follow the strategy to which it is bound by its own decision when drawing the public policy. The problem arises when the claim involves a situation that is not contemplated in the existing administrative regulatory framework. Here, the proposed solution is to apply, analogically, the existing regulatory framework, despite the fact that it does not encompass the factual background of the dispute. The ordinary policy (which involves enrollment and waiting) will not help, as long as it does not contemplate any kind of anticipatory provision that might face an immediate necessity. The second public policy—the one regulating legal consequences of evictions promoted by Public Administration in order to undertake public work—is the one judges are applying. The provisional measure Rio de Janeiro provides in that situation is the payment of a monthly financial aid (social rent) until the substitutive house is available. Rulings will, therefore, order Rio de Janeiro to pay social rent and to enlist the plaintiffs in the ordinary housing program. Social rent payments last until the house deliverance, but no timeframe is required.

Social rent is paid unconditionally, and requires no proof of the real destination of the money, or of the housing situation of the plaintiff. This means that the essential human need of shelter may be protected, or not,

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106. Rigorously, abstracting that rights content debate in the ruling might be seen as a breach to the constitutional clause that requires express motivation in every judicial decision. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 93(IX) (Braz.).

The resistance in fulfilling that same constitutional requirement is classical in the Brazilian judicial system, as one can see through the following transcription—coming from an article written by a Brazilian judge:

> In practice, opinions are frequently unsatisfactory. Judges do not always do a good job in attempting to justify their weighing of the evidence. Where the precarious nature of the justification for the decision is most apparent, however, is in judicial value judgments that imply political options in the broadest sense of the expression. This can be seen when courts try to make concrete vague legal concepts, such as public interest good morals, or little value, or when they exercise discretionary powers conferred by law. Nevertheless, it is precisely here, given the judge's breadth of choice, that the requirement that his decision be reasoned has the greatest significance as a guarantee for the parties.

José Carlos Barbosa Moreira, *Brazilian Civil Procedure: An Overview*, *in* PANORAMA OF BRAZILIAN LAW 189 (Jacob Dolinger & Keith S. Rosenn eds., 1992).

as long as the money might be spent on other things. There is no further judicial follow-up of the plaintiff's situation, and a remedy that was supposed to be provisional can become definitive, merely through inertia or misinformation. The constitutional framework of fundamental rights protection is leading to mass litigation in Brazil. Mass litigation itself leads to a non-differentiation tendency in ruling. Details about the factual framework tend to be lost, and judges would usually develop a certain decisional matrix that would be mechanically applied. This is what happened with the housing litigation. Since the allegedly analogical application of a pre-existent public policy strategy was conceived, that decree has been seen as the optimal solution and is being repeated on and on, without any consideration of its implementation, and of the effective result in promoting what was really intended by the constitutional clause—protection against homelessness.

C. Immediate Efficacy in Rio de Janeiro's Rulings in the Right to Housing: Stripping Human Rights of its Main Purpose

It is beyond doubt that immediate efficacy calls for a higher judicial level of protection of the right at stake. Even though the deliverance of a proper house as a response to a right to housing claim might be the goal, it will not always be possible, at least in a reasonable period of time. Still, judges will be driven by the necessity to bring plaintiffs close to having such a right protected.

International experiences in the matter in countries without the immediate efficacy clause involved the drafting of a national plan or a specific public policy that addresses the issue on a permanent and incremental basis.[107] This is an approach that favors structural provisions of that same human need. That kind of solution is seen as inadequate by the rights-owners according to the immediate efficacy understanding, as long as the results won't be instantly obtained.

The analogical application of a pre-existent public policy reveals an imaginative solution, as long as it aims for some real immediate deliverance to each plaintiff that might present his claim. A second possible positive effect of that approach is cautiously bypassing the

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107. The most reported experience is the jurisprudence developed by the South African Constitutional Court in that same matter. The tools used to overcome a rights-breach in housing will encompass a reasonableness test of the ongoing public policy, as established in *Government of the Republic of South Africa and Others v. Grootboom*. *See Government of the Republic of South Africa et al. v. Grootboom and Others* 2001 (1) SA 46 (CC). The call for meaningful engagement in the search for a negotiated solution to major evictions, as decided in *Occupiers of 51 Olivia Road v. City of Johannesburg*. *See Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v. City of Johannesburg and Others* 2008 (3) SA 208 (CC).

opposing argument to judicial scrutiny based on separation of powers. After all, the executive, who is primarily responsible exactly for the development of the rights content, conceived the design of the original policy applied through the ruling. Extending the limits of that same policy can be understood as a mere reproduction of an already tested public response to that same fundamental right. That analogical application of a pre-existent public policy can also be perceived as an implicit invitation to a further dialogue, with many possible outcomes. The executive can review its own public policy, and incorporate the situation contemplated in the ruling. It can also present its opposition to the usage of that same policy to situations that are not expressly included in its scope.

The relevant point here is that those decisions, searching for normative criteria in the already existing framework, try to overcome the indeterminacy problem associated with that specific right to housing. Legal cultures, especially in civil law countries, find uncomfortable—or even threatening—the idea of adjudication that relies on subjective or ideological preferences. A way to avoid that risk would be to relate with a preexistent standard; but, in so doing, the ruling effaces the distributive effect that it is enforcing.[108]

The transposition of a pre-existing public policy seems appealing—but it could bring inconsistencies when addressed to a different factual frame. Subjective approaches by the ruler, to the real content of the right at stake are still there, hidden by the alleged analogical application of a pre-existent policy, which will supposedly exempt the ruling of a stronger justification burden. The possibility of such a deviance is illustrated as follows.

The first aspect in which the transposition of a previous public policy through judicial analogy did not really happen was entitlement. Discarding the administrative regulatory criteria regulating general enrollment in the current housing programs, the rulings also discarded the eligibility conditions defined in them.[109] Those eligibility

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108. The instinctive reaction of human rights advocates to portray their conclusions as legally necessary, without resort to contestable, extra-legal value judgments or intuitions, will many times lead to denying the indeterminacy of those rights. *See* Karl Klare, *Critical Perspectives on Social and Economic Rights, Democracy and Separation of Powers*, *in* SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES 19 (Helena Alviar García et al. eds., 2015) [hereinafter Klare, *Critical Perspectives*]. Judges are not immune to that same tendency, and strong statements about the necessary enforcement of fundamental rights, rebuking Parliament and public officials, will commonly be found in the reasoning.

109. In the "My House, My Life" program, eligibility conditions are listed in Law no. 11.977 and goes to presumed vulnerability, not only according to a financial perspective, but also

requirements, if incorporated into the rulings, would preserve coherence in public actions in the matter, leading both power branches to apply the same entitlement understanding.

Even the public policy applicable to intended eviction promoted by Public Administration has an eligibility criterion. It is subtle, but it is there: only people affected by an intentional direct eviction promoted by Rio de Janeiro as a condition to the development of public works are entitled to the financial aid (social rent), along with at the end, to a housing unit. This criterion is also discarded by the rulings, as long as social rent is being granted for people affected by private evictions, by natural disasters, by structural impairment of the housing unit in which they reside, and a number of other causes that do not involve that intentional driven action of the Public Administration.

Both eligibility conditions express justice concerns. The prior fixes a normatively delimited vulnerability as a precondition to a distributive justice decision that will grant not only the housing unit itself, but a specific position in a queue, meaning, an accountable sort of priority. The second reveals a compensatory duty addressed to the state, in a retributive justice sense. Both justice promoting criteria were discarded in the solution engendered by Rio de Janeiro's Judiciary—and the abstract question about rights entitlement remains unsolved.

Taking back the association of a right to housing to human dignity, one might try to sustain that it goes exactly to overcoming entitlement issues: only situations in which human dignity will be effectively compromised by the loss of a house should be entitled to a protective positive action by the Public Administration. That might be a feasible understanding—but once again, it is not reflected in the case law in Rio de Janeiro's municipality. If the violation of human dignity caused by homelessness is the condition that assures entitlement, this would lead to an evaluation in each lawsuit of the real consequences of the housing loss, and if they do in fact compromise human dignity. Sharing a house with family, for instance, as a result of a loss due to flood is regrettable—but it is not necessarily a violation of human dignity. Once again, the rulings do not reflect results in which the Judiciary reveal a tendency to identify a right to housing with the potential ownership of a residence. And this brings back the question about the scope of a right to housing, and even its implications with a right to property. Associating housing protection to an entitlement of a residence unit, courts are flirting with an

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considering family profile, existence of single mothers, infants, etc. *See* Lei No. 11.977, de 7 de Julho de 2009, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 08.07.2009 (Braz.).

equalization between the right to housing and the right to property—which will have serious consequences in the entire rights protection system.

One should not confuse an abstract perception of vulnerability with a general entitlement to socio-economic rights protection. Vulnerability will be a sensible indication of the need of social rights protection—but this is not the only component, especially in a right that is by nature, scarce. Scarcity will lead to tragic choices,[110] and this is why eligibility criteria matters in defining the content of socio-economic rights. It should also be added that vulnerability—or poverty—as a single category that identifies a homogenous group is a misleading perspective. Vulnerability is a group disadvantage, but when seen as a generic category, it can conceal distinct experiences of injustice and socio-economic needs.[111]

The second failure of the examined ingenious solution applied in judicial decrees is the removal of the administrative limitations imposed through regulation. As mentioned in 4.2 above, the regulatory framework of social rent involves a temporary situation in which someone has been evicted in the course of public work, and will be provided with a residential unit that is not yet available. However, there is a temporal conditionality—the financial aid is paid until the deliverance of the housing unit. As to the definitive fulfillment of the right, housing provisions in those specific cases is prioritized, due to the circumstance that the Public Administration is directly responsible for the homelessness, so the provisional remedy (social rent) will not be converted in the final response to the need.

The sensitive point here is that providing financial aid as a substitute for a specific good or service granted by the Constitution as a human right should always be a provisional solution. The real human need protected by a socio-economic right relates to access to a certain good or service, which sometimes cannot be achieved merely through

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110. The right to housing will involve a double choice: the primary choice about how many of the goods will be produced, and the secondary choice of who is going to be the beneficiary of those same produced goods. GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 18-19 (1978).

111. *See* Sandra Liebenberg & Beth Goldblatt, *The Interrelationship Between Equality and Socio-Economic Rights Under South Africa's Transformative Constitution*, 23 S. AFR. J. HUM. RTS. 335, 351 (2007) (examining the relevance of equality in the jurisprudence of South Africa's Constitutional Court as a way to make its rulings more responsive to material disadvantage and the values protected by socio-economic rights).

money. Human rights are not supposed to be traded for money, especially when it comes to its prospective protection.[112]

Rulings in Rio de Janeiro promote an illogical combination. They order the enrollment of the plaintiff in the ordinary public policy, which originally would not require judicial intervention. Those rulings also grant provisional payment of social rent until the plaintiff is contemplated with the unit coming from the ordinary policy. The solution ends up as an incentive to litigation—as long as the result of the lawsuit will always lead to the same, or even a better situation before the Public Administration.[113] Aside from that, with no conditionality to the real expenditure of the financial aid, or in the deliverance of the house, a predictable result is that the real scope of the right might not be protected.[114] In practice, the Judiciary detached itself from the original proposition of an analogical application of a previous administrative decision—and in doing so, lost the potential benefit of avoiding separation of power issues.[115] Worse, the allegedly analogical application works as a smoke-screen to the non-fulfillment of the needed justification, all this in the name of immediate efficacy.

As to the pedagogical relationship that the Judiciary might maintain with the other political branches,[116] the general outcome can hardly be labeled as positive. Contradiction among judicial decisions certainly does not help political branches in understanding the criticism exercised by judges, weakening dialogical possibilities that might concretely

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112. On the deviational effect of substituting real rights granting financial compensation, see Vanice Lírio do Valle, Judicialization of Socio-Economic Rights in Brazil: Mercantilization of the Fundamental Rights as a Deviance in Rights Protection (April 2014) (unpublished paper presented at the third annual Youth Comparativists Committee Conference, American Society of Comparative Law) (on file with author).

113. In normal conditions, by simply enrolling in the ordinary public policy, one would wait until a housing unit is available—but without any financial aid.

114. Scarcity of housing units may relate to concrete limitations—financial, time, free space in the city's perimeter, etc.—or to the priority established by the local government. If the reason is material constraints, the provisional order to pay social rent will not change the limited reality. If the nonoffering of the housing units is due to political priorities, the provisional order to pay social rent may not represent a strong incentive to the government to resettle those same priorities.

115. Rio de Janeiro's experience with a right to housing illustrates the assertion made by Hoffmann and Bentes, according to which that kind of decision emphasize judicial activism and judicalization of rights, rather than a substantive theory of social rights. *See* Hoffmann & Bentes, *supra* note 37, at 137.

116. Michael J. Klarman, *What's So Great About Constitutionalism*, 93 NW. U. L. REV. 145, 176-79 (1998) (referring—in a critical perspective—to scholars who endorse the pedagogical role Courts should develop).

improve enforcement of those same rights.[117] Even if there is no contradiction, but the rights content issue is not properly addressed by the Court in the ruling, the state still would be left with no concrete standard in order to assess its own present and future conduct.[118]

Transformative constitutionalism assumes an enlarged role for the judicial branch in monitoring the intended social change—either by overcoming rights violations through ruling, or by compelling political branches to fulfill their constitutional commitments. This enhanced role is justified on the grounds that judicial power would be able to develop a relevant accountability function,[119] and be able to establish guidelines to the other power branches when it comes to constitutional duties. This will surely require knowing and understanding the current program held by Public Administration in the matter, and a clearer announcement of what kind of public policy is required by the Constitution, if the existent one is found undue.

This whole picture of Rio de Janeiro's scenery evidences that urgency in providing judicial orders brought by the immediate efficacy understanding can, at the end, betray the intended protection of the real scope of the right itself. Socio-economic rights defense is a difficult task, and those are not well served by rush. In fact, the practical results of those lawsuits re-pose the question of how effective adjudication can be in socio-economic rights enforcement. Proclaiming immediate efficacy of a right, turning the right justiciable in order to promote enforcement, is a sound proclamation in abstract—but the real development of such an activity requires readdressing the right's scope as guidance to determine real efficacy. Protection in principle should turn into protection in practice and in policy[120]—this is the object of judicial scrutiny.

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117. Octavio Luiz Motta Ferraz, *Between Activism and Deference, Social Rights Adjudication in the Brazilian Supreme Tribunal*, *in* SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES 121-22 (Helena Alviar Garcia et al. eds., 2015).

118. According to David Bilchitz, even in a nonbinding judicial system, despite the individual basis of a lawsuit, the result of judicial scrutiny is something that should contribute to states broader evaluation of the adequacy of its own public policy. *See* David Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence*, 19 S. AFR. J. HUM. RTS. 1, 10 (2003).

119. Virginia Mantouvalou, *In Support of Legalization*, *in* DEBATING SOCIAL RIGHTS 114-17 (2011).

120. There is growing literature facing the challenge of measuring human rights as a tool to advance policy prescription and political dialogue. For a broader report on those efforts, see TODD LANDMAN & EDZIA CARVALHO, MEASURING HUMAN RIGHTS 1-8 (2010).

V. A CRITIQUE OF THE IMMEDIATE EFFICACY UNDERSTANDING AS A WAY TO ENHANCE RIGHT ENFORCEABILITY

The immediate efficacy interpretation was brought to the Brazilian constitutional text as a means to prevent the blockage of the transformational process geared by the fundamental rights proclaimed in the 1988 Constitution. Opening the door of judicial control, not only to negative obligations associated with socio-economic rights, but also to positive ones—even in the absence of a normative framework—is an interpretation coherent with the promise formulated by the human rights movement, according to which law would be able to resolve conflicts and ambiguities in societies.[121] This is a highly debatable premise, that myth of rights;[122] especially when it operates in a stereotyped perspective, according to which when it comes to human rights threats, there are victims (the needy) that should be aided by saviors in their quest against the savages, usually identified as the state.[123]

The Brazilian understanding of immediate efficacy on human rights deepens the option of pro-judicial realization as a useful short-cut to the thorny political debate. The question relies on evaluating if that sort of constitutional interpretation, proclaiming broader immediate efficacy, really enhances human rights enforcement whenever the two other most politicized power branches fail in their task.

A. Ambiguity of the Immediate Efficacy Understanding in the Constitutional System

The endorsement of "efficacy" as a desirable feature of a constitutional system in human rights will require clarification of two premises: what it is to be effective when it comes to a legal rule; and what are the results the correspondent public policy aims to achieve.

As already mentioned in this Article, the Colombian Constitution, in a similar constitutional clause,[124] refers to "application" to liberty rights, and its interpretational effort was to bring socio-economic rights

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121. *See* Kennedy, *supra* note 1, at 116.

122. *See* SCHEINGOLD, *supra* note 16, at 5.

123. Makau W. Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L. J. 201, 202-04 (2001) (deconstructing the stereotyped approach that society as a whole does not have any par in undermining human rights, and presenting an interesting approach according to which legal entitlement, transferring to States the role of main guarantor of human rights, is not enough to overcome a cultural deviation from that same human rights protection goal).

124. "The rights mentioned in Articles 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 26, 27, 28, 29, 30, 31, 33, 34, 37 and 40 are applicable immediately." CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] [THE POLITICAL CONSTITUTION OF COLOMBIA] art. 85 (COL.).

to that same logic. Departing from a standpoint according to which social rights could only find application through convexity with liberty rights, the Colombian Constitutional Court internalized a lack of determination of such rights and dedicated itself to designing, through judicial reasoning, its outlines. South Africa's constitution refers to "realization,"[125] which in their system should be progressive, depending on the right. The South Africa Constitutional Court opted for "reasonableness" as the criterion for scrutiny of those same public actions' fulfillment of constitutional commitments. Here again, judicial activity will provide some kind of guidance about the real content of the right at stake. Progression as a principle was also the option in the Venezuelan Constitution of 1999.[126] Both words (application and realization) refer to a factual dimension required by a constitution about the rights it is regulating. Application and its synonym, realization, relate to a factual and objective phenomena—the real transposition to the real world, of a particular constitutional clause. Efficacy, on the other hand, has an unequivocal relational and evaluative implication, as long as it involves the ability to produce a desired or intended result. It is not only about doing something; it is about doing something in a specific manner, to achieve a specific result.

The proposition that "efficacy"—more than mere application—should be a feature of the human rights constitutional system itself can be persuasive. Efficacy as a feature of a legal system can be related to: (1) ability of the law as a social control technique to bind individual and collective behavior, and (2) real application of those same laws to the law's addressee's behavior.[127] It is according to that second manifestation of efficacy that the Brazilian understanding about socio-economic rights will enable the pursuit of positive obligations from the State, even in the lack of a normative content definition. Both effects of the constitutional framework are desirable in the transformational process in which Brazil engaged.

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125. "2—The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right." CONST. OF THE REPUBLIC OF S. AFR., 1996, art. 26 (Housing).

126. "The State will guarantee to every individual, in accordance with the progressive principle and without discrimination of any kind, the enjoyment and exercise of inalienable, indivisible and interdependent human rights." CONSTITUCIÓN DE LA REPÚLICA BOLIVARIANA DE VENEZUELA [C.R.B.V.] [CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUALA] art. 19 (Venez.).

127. Pablo Eugenio Navarro, *Normas, Sistemas Jurídicos y Eficacia*, 22 CRÍTICA 41 (1990).

The problem arises in a more pragmatic sense when application is translated into positive obligations. Binding behavior as a general effect of a ruling requires definition of those same obligations, and this is where the immediate efficacy proposition starts to lose its appeal, as long as vagueness in rights content will still contaminate the understanding of the required positive obligations. The openness of the right's contents not addressed by a definitional statute or regulatory act leaves the concept of efficacy without one of its components—the desired end or result. Judicial control, especially in a civil law system, requires a firm normative frame in order to keep ruling equal and impersonal. The formula opens opportunity for the usage of undesirable subjective approaches, a result dissonant from the human rights project.

Difficulties also arise when it comes to the understanding about what should be found effective—the human rights system engraved in the constitution, or the right at stake in an eventual lawsuit? If the constitution grants a wide list of fundamental rights that might engage in concurrence, or even collide, what should be foreseen in adjudication when it comes to the immediate efficacy analysis? Some constitutional texts, according to the international recognition of human rights interdependency, would state that feature as a relevant component of their own legal framework, just like the Venezuelan and Ecuadorian constitutions. In that kind of constitutional order, which recognizes the relevancy of interdependency between rights, what should courts analyze to assess compliance with constitutional duties? The claimed right and governmental actions geared to its granting, or a broader landscape, in which interdependent rights are also considered?[128] After all, different levels in providing a specific socio-economic right might simply express the possible solution at the time, reconciling other equally compelling interests that are frequently also labeled as fundamental rights. The administrative or legislative choice may appear insufficient because that same strategy is being evaluated from the perspective of a specific claimed fundamental right—but may be justifiable in a broader perspective.

Efficacy of public actions in the human rights field will always be a contextualized and a dynamic concept—and this brings a new strain of difficulties to adjudication, which is ordinarily opposed to those two

128. In the right to housing, there will frequently be intersections between the former and the right to an adequate, natural or even artificial environment. Providing housing as shelter sometimes requires intervening in the urban ambience, thereby enhancing occupancy indexes. Even classic property rights might be affected by public strategies oriented towards the provision of popular houses.

features.[129] The only way to incorporate context and dynamics to adjudication will involve the use of balancing, a common technique in the field.[130] Balancing will allow considering multiple and sometimes conflicting factors present in socio-economic rights litigation, encompassing trade-off as a possible justification to public policies.[131] Balancing might be the way to reconcile conflicts between individual claims and communal interest in human rights.

The problem with the incorporation of balance in a system that opted for an immediate efficacy clause in fundamental rights is that the consequence will be the admittance of different grades of efficacy—in the same right, or between different rights—a differentiation that should be justifiable according to a proportionality test. Still, the difference will be there, which appears to be incoherent with the immediate efficacy proposition, again, due to its intent to transcend application, pursuing an optimal result.

One can also find efficacious the norm that is used or invoked to ground a legal decision, maintaining a logical relation with that same legal decision.[132] Fundamental rights, because they are invested with efficacy, would guide the operational decisions of the political branches. Even if the understanding of efficacy is as an attribute of law, the usage of that same concept by the Brazilian constitutional interpretation will still make sense. Immediate efficacy would mean the indispensable argumentative relationship between the rights entrenched in the constitutional text, and the legal decision geared to that same right concretization held by any of its interpreters in the different power branches. Fundamental rights, according to this understanding, would constrain the decisional possibilities of any public agent, the main objective of the human rights project. All of this is very true when

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129. That aversion to conceptual dynamics, is a sensible matter in civil law systems, where stability of legal concepts and their content appear as a requirement of the rule of law itself to promote compliance.

130. *See* Başak Çali, *Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions*, 29 HUM. RTS. Q. 251 (2007) (describing how balancing is a technique of solving human rights conflict, not only in national jurisdictions, but also in the international scenery, including the European Court of Human Rights). It should be clarified that the author is skeptical about the adequacy of the usage of balancing and proportionality in the human rights realm, even by the ECHR. *Id.*

131. A balancing solution in socio-economic rights litigation is criticized because of its possible implications with the separation of powers principle. Nevertheless, Klare clarifies that balancing did not begin with socio-economic rights but rather in the initial decisions in judicial review that "held that legislative action intruded impermissibly on fundamental rights." Klare, *Critical Perspectives*, *supra* note 108, at 119.

132. Eugenio Bulygin, *The Concept of Efficacy*, *in* ESSAYS IN LEGAL PHILOSOPHY 46-47 (Carlos Bernal et al. eds., 2015).

speaking about negative obligations. When it comes to positive duties, the assessment of effectiveness depends on the further legal or regulatory development of that constitutional precept. In this case, immediate efficacy will be a contradiction in terms, a proclamation that simply does not overcome the blockage brought by political inertia in a macro perspective.

All the objections presented to the immediate efficacy interpretation path involve its inaptitude to generate a more positive result when it comes to human rights enforcement. But this is not the only criticism that should be presented to that understanding. Its major flaw resides in its hidden potential to aggravate—instead of ameliorate—social inequality.

B. Immediate Efficacy and Structural Social Injustice

Human rights provisions in constitutions are not a novelty. In Latin America, especially, since the beginning of the 20th century, human rights appeared in constitutions as a response to political, economic and social crises spread all around the continent.[133] Despite that innovative trend, those rights were not implemented by the political branch due to a clear resistance to changing the liberal-conservative model found in the country. The new wave in constitution-making that reached Latin America after the late eighties repeated that same intention to change, assuming the aspirational constitutionalism model.[134] Once again, faith in the constitution as a starting point to promote social change was reaffirmed—but now, benefitting from the previous lesson that legalism by itself will not be enough to reach that transformational result. Legal development of the constitutional project is a necessary condition, but it is not sufficient. External sources of support outside of the state bureaucracy will be required, as: (1) a permanent commitment from the political forces that brought them about, and (2) a new legal culture of protection of rights.[135]

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133. *See* Roberto Gargarella, *Grafting Social Rights onto Hostile Constitutions*, 89 TEX. L. REV. 1537, 1545-47 (2011) (describing the difficulty in an enterprise of including human rights protection in constitutional texts based in an institutional design that is opposite to public participation and democratic debate). That same previous experience on legal protection of human rights towards constitutional design determine an influential participation of its delegates on the design of the UN Charter, and even of the Universal Declaration of Human Rights. *See* Mary Ann Glendon, *The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea*, 16 HARV. HUM. RTS. J. 27, 28-29 (2003).

134. That specific trend is not exclusively noted in Latin America. Aspirational constitutions are also found in Africa and the former soviet republics in Eastern Europe.

135. *See* García-Villegas, *supra* note 81, at 358.

The immediate efficacy understanding in the Brazilian domain can be understood in that same context. It is surely an express assertion that the commitment to promoting human dignity and the transformation cannot be postponed or turned into a programmatic precept. It also intends to establish a new culture of protection, striving not only for application, but also for efficacy; not only for formal validity, but for specific results. The problem still remains in the institutional dimension, which might continue to be a hostile ambiance to that same transformational project.

A clear manifestation of the insufficiency of the immediate efficacy clause to overcome institutional resistance to the proposal held by socio-economic rights is legislative omission—and the right to housing is a clear illustration of that malfunction in the political system.[136] Despite the appeal of the immediate efficacy clause as a solution to institutional blockage, the lack of legislative and regulatory development in socio-economic rights remains. The absence of that democratic deliberation left unanswered relevant questions about scope and content. The lure of the immediate efficacy interpretation resides in the idea that bypassing the political system and the legislative or administrative unwillingness to address such thorny subjects, justice will be had through the judiciary. Therefore, the proposition expresses a clear power transfer that raises democratic concerns already explored by literature.[137]

There is also much to be said about the regressive potential in judicial decisions forged under a sign of urgency, brought by an artificial

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136. In fact, in 2015, at least two new statutes were enacted with implications in the right to housing in Brazil, one at the municipal level in Rio de Janeiro, and another one at the national level. In the municipal level, Law 5991/15 requires full disclosure of the citizens already enrolled in habitational programs in Rio de Janeiro and their position in the queue. Lei No. 5.991, de 16 de Outubro de 2015, DIÁRIO OFICIAL DO MUNICIPIO DO RIO DE JANEIRO [D.O.E.R.] de 19.10.2015 (Braz.). According to that same statute, government should also inform the list of citizens already served by those same programs. In the deferral government, a "Provisional Measure" (a statute, enacted originally by the President, and subject to Congressional approval) was enacted in early December (Provisional Measure 700/15), modifying a previous statute that regulates expropriation. Medida Provisoria No. 700, de 8 de Dezembro de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 9.12.2015 (Braz.). Those new clauses require, whenever expropriation is going to happen in an area previously occupied by long established settlements, compensatory measures in favor of the evicted. Among the compensatory measures are financial compensation, the deliverance of a housing unit by the expropriator, or funding for the acquisition, by the affected citizen, of a new residence.

137. *See* Roberto Gargarella, *Dialogic Justice in the Enforcement of Social Rights: Some Initial Arguments*, *in* LITIGATING HEALTH RIGHTS: CAN COURTS BRING MORE JUSTICE TO HEALTH? 238-39 (Alicia Ely Yamin & Siri Gloppen eds., 2011) (arguing that Courts could overcome the usual opposition against adjudication in the socio-economic rights realm applying a decision model that encompasses deliberative democracy tools, turning themselves in a forum to public debate, giving voice to the poor and excluded).

effectiveness proclamation of an underdeveloped constitutional clause. Aside from the alienation of the right-owners through the depoliticization of the debate, adjudication can reinforce negative cultural stereotypes concerning claimant groups, even when courts engage in a supposedly protective approach.[138] Judicial decisions about socio-economic rights might vouch for ongoing public policies creating a comfort zone in favor of the Public Administration that undermines the continuous debate that should happen when it comes to human dignity protection.[139]

Providing by decree a political decision that was originally addressed to Parliament reinforces legislative inertia in sensitive matters, as long as it spares legislators from the burden of choosing.[140] Worse, the distributive or retributive reasoning presiding over one judicial ruling will not be necessarily reproduced in another lawsuit. Social injustice will prevail through its well-known face of inequality, but now, at the hands of the judiciary. However, this is not the main lesson to be learned from the Brazilian experience.

The understanding that socio-economic rights are invested of immediate efficacy, and that they discard any kind of complementary normative framework—even one traced by the rulings themselves—is an approach that renounces treating social injustice and exclusion as a structural failure that requires equally structural solutions. Judicialization itself is pointed to by some, as a path that will reinforce that individualistic approach, considering that judicial resolution of disputes has a built-in adversarial perspective, that pits victims and human rights violators against each other.[141]

Threats to a minimum level of human dignity usually do not come from an incidental or individual situation. Social exclusion is a structural problem, and should be faced in that same manner, if state policies intend to be efficient. This is the point at which the immediate efficacy clause, favoring individual, contingent, provisional solutions, results in a betrayal

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138. SANDRA LIEBENBERG, SOCIO-ECONOMIC RIGHTS: ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION 41 (2010).

139. "Human rights talk can be useless if it is simply talk, and worse than useless if all it does is rubber stamp unfairness and inequality with the seal of (human rights) legitimacy." *See* Gearty, *supra* note 74, at 22.

140. The burden of inertia is presented as one possible reason for legislative inaction in the realm of socio-economic rights. Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L. J. CONST. L. 391, 402-03 (2007). It is very symptomatic in the Brazilian experience, the fact that Congress is able to reach a super-majority to approve a constitutional amendment, including housing, for instance, as a fundamental right; but cannot reach a simple majority to approve a statute providing definition of that same right's components.

141. *See* Gearty, *supra* note 74, at 34-35.

of its original intention of promoting social change, at least in the Brazilian experience.

The transposition to the rights language, of an instinctive perception that some aspect of our humanity or individuality should be preserved, to rights language involves a necessary exercise of reason and argumentation. Through that reasoning dialectic, society can synthesize values and translate them into principles, up to the flourishing of human rights. Those values and principles to which society is committed bring consistency to the legal system, and guidance to the possible balance whenever those rights clash. Without those parameters, the simple legal enunciation of immediate efficacy is a formal proclamation, with no result. When it comes to remediating an alleged rights violation, legal reasoning should never be exempted from going back to those values and principles, exploring from them and through them, the possible solutions. A supposed progressive declaration that rights are already settled and defined—therefore, prompt to immediate efficacy—will never substitute the potential increase in clarity and precision that might be brought by continuous engagement with the content of these same rights.[142]

VI. CONCLUSION

Constitution-making is a moment of hope, bringing to that fundamental text an ideal of solidarity and well-living that every human collectively aspires to. Turning those hopes into reality is the challenge. The language of law as the formal expression of our reciprocal commitments is a civilizing achievement, and should not be diminished—but its limitations should also be understood. The enforcement of socio-economic rights is necessarily the result of a collective commitment with our fellow human beings that is intended to transcend the hard limits of law.

The immediate efficacy understanding of the Brazilian constitutional clause was at the time, a political strategy to combat the palpable threat of a conservative application of that same constitution. It should be understood in its historical context, as a valuable tactic at the time. Nevertheless, the result of that same proclamation, almost thirty years passed of constitutional force, shows a big deviation from its original intent and increases the risk of social regression. Detaching social rights from its contentious character to proclaim a legal (non-existent) certitude is to formulate a promise in bypassing the political system that even constitutional law will not be able to sustain.

142. *See* Mantouvalou, *supra* note 119, at 114.

Acknowledging fragilities in the immediate efficacy understanding of Brazilian fundamental rights is not a step backward; it is the acknowledgment that the results the proposition intended to achieve will not be possible as a benefit to all, in the limits of adjudication. Resigning the political debate favoring the judicial path might still be applicable in extreme conditions—but is not a solution to be generalized. The commitments expressed in a constitution which encompasses socio-economic rights should be solidified through the indispensable democratic discussion about the real values and principles that should preside the distributive choices that will define right-owners and content. This is why the Brazilian experience in such a powerful—but also controversial—assertion of immediate efficacy should not be presented as a successful case. The main lesson one can extract from that experience is that when it comes to human rights, there are no short-cuts.