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JUDICIALIZATION OF SOCIO-ECONOMIC RIGHTS IN BRAZIL: THE SUBVERSION OF AN EGALITARIAN DISCOURSE

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JUDICIALIZATION OF SOCIO-ECONOMIC RIGHTS IN BRAZIL: 
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Vanice Regina Lírio do Valle*

ABSTRACT

This article describes the historical origins of the Brazilian constitutional frame of socio-economic rights, and the political context that lead to their enforcement through the Judiciary. Based in a particular constitutional text that asserts socioeconomic rights’ immediate enforceability, the present theoretical comprehension is that they establish the State’s obligation to provide goods and services. The consequence is an intense judicialization of rights such as health, education and housing, which results in a wide exercise of judicial activism in controlling public policies – with the Judiciary renouncing to the objective rational criteria consubstantiated in the law, and to an approach that may consider the collective dimension in which such rights should be assured. The major result is the egalitarian ideal inherent to socioeconomic rights being defeated by a chaotic adjudication of rights in a non-discriminating basis.

KEY WORDS: fundamental rights – socio-economic rights – judicialization – equality

1. SOCIO-ECONOMIC RIGHTS IN THE BRAZILIAN CONSTITUTION: A BET IN THE TRANSFORMATIVE POWER OF THE FUNDAMENTAL TEXT

More than twenty years have gone by since the approval of the Brazilian constitution – and it should be said that these years have brought all kinds of surprises. Even the ability to lead society to a democratic practice was stronger than the general expectation – and this could be demonstrated by the impeachment of President Collor¹, a unique event even considering the international perspective, that took place in an ambience of absolute institutional equilibrium². The surprise may be credited to the fact that the Brazilian political

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¹ Brazil’s President Fernando Collor de Mello was impeached in 1992, due to a public accusation held by his own brother related to a large corruption scheme spread in the whole government, lead by the President’s campaign chief, Paulo Cesar Farias. The political process to impeach the President – voting was already taking place in the National Congress – was interrupted by his renunciation, intended to avoid ineligibility.

² Listing political crises that were overcome with the strict observation of the 1988’s Constitution, BARROSO, Luis Roberto. Vinte anos da constituição brasileira: o Estado a que chegamos. [on line], available at <http://www.migalhas.com.br/arquivo_artigo/art20081127-03.pdf> , acess in January 7th, 2010). Asserting that capability shown by the Brazilian constitution as a sign of it’s success in promoting redemocratization, REICH, Gary M. The 1988 Constitution a Decade
transition which resulted in the 1988’s Constitution was built by political elites inserted in the state’s institutional body at the end of the authoritarian period. That particular circumstance shaped the political process as a much negotiated one, conducted without rupture, but based in agreements and trade-offs.

Another feature that characterizes the application of the Brazilian constitution, especially by judicial review, is a very significant judicialization of politics and policies, primarily when it comes to matters of guaranteeing socio-economic rights. Although the phenomenon of judicialization of politics is not constrained to the Brazilian reality, the emphasis in social-economic rights is for sure a peculiarity of this particular scenery, and it’s a natural consequence of a strategy that, by assuming commitments with the social transition, intends to remove these themes from the ordinary politics and direct them to judiciary scrutiny.

That same assumption – in which constitutional provisions related to socio-economic rights allow each and every citizen to demand a judicial order guarantying these rights – has been reinforced by the Brazilian Constitutional Court (STF), proclaiming the effectiveness of those rights when it comes to limiting legislative deliberation, but also in order to assure citizens a right to pre-school and children daycare; or to public and free transportation to school, and even to medication, medical exams and other procedures related with health preservation or restoration, no regardless of the social-economic condition of the plaintiff.

That understanding of socio-economic rights combined with a large institutional space granted to the judiciary’s review lead to the controlling of
public policies\(^9\) as an ordinary practice in Brazilian courts, in a path that is for sure, at least, atypical. To the ones who claim that this is an activist behavior, the Supreme Court answers that yes – it is really activism – but a necessary and desirable activism whenever the Court is faced with a constitutional violation, especially by the insidious omission of the political powers\(^{10}\).

The premise in which relies that assertion, associates activism and overcoming inertia of political branches; and it also signals to a decision-making strategy that reveals in general, low deference to political decisions that took place in the Executive and Legislative branches. In those decisions, the deliberative choices formulated by those political branches are usually characterized by judges as inexistent, insufficient, or flawed. Any of these pathologies allows the Judiciary to develop a substitutive course of action.

Obviously, if the Supreme Court – to whom the guard of the Constitution is delegated (CRFB, art. 102, \textit{caput}) – asserts that judicial activism may present itself as a legitimate path of decision when it comes to preserving the 1988 Constitution, the result is that, in a judicial system as the Brazilian one, where each and every judge can perform judicial review, activism and enforcement of social-economic rights as subjective ones, a judicial control of public policies is enabled. This leads to a daily appreciation, in every Court in the country, of alleged violations of the 1988 Constitution through the denial of socio-economic rights – which leads to judicial orders, in individual and class actions, condemning public administration to provide all sort of goods and services, with serious reflections in public planning, public budget, not to mention the democratic risk in politicizing justice\(^{11}\).

Before engaging in any value judgment related with that institutional behavior of a Judiciary that justifies itself with the alleged search for the

\(^9\) The Brazilian Supreme Court has affirmed its competency to – in exceptional cases – even formulate public policies, whenever other political power branches rest still when it comes to enforcing constitutional provisions related with socio-economic rights. Deciding in this exact sense in a case about access to pre-school in favor of infants, BRAZIL. SUPREME FEDERAL COURT. ARE 639337 AgR, Justice Celso de Mello, 2\(^{nd}\) Turma, rulled in August 23\(^{rd}\), 2011.

\(^{10}\) “One should not criticize eventual activism that may take place in that Supreme Court, especially because, beyond the innumerous causes that might justify that affirmative behavior from the Judiciary, resulting in a positive jurisprudential creation of the Law, we should include the imperative of our Republic’s Constitution prevailing, in spite of transgression and disrespect by simple and collusive inertia of public powers.”. (CELSO DE MELLO, Speech delivered in the inauguration of the former Supreme Court’s President, Justice Gilmar Mendes, on April 23\(^{rd}\), 2008; available in <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/annex/discursoCMposseGM.pdf> acess in January 16\(^{th}\) 2011). That same point of view was reaffirmed by Justice Celso de Mello in a recent interview to the Court’s news site, available in <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=165752>, acess February, 17\(^{th}\), 2012).

\(^{11}\) BARROSO, Luís Roberto. \textit{Judicialização, ativismo judicial e legitimidade democrática.} [on line], disponível em <http://www.direitofranca.br/direitonovo/FKCEimagens/file/ArtigoBarroso_para_Selecao.pdf>, acesso em 17 de fevereiro de 2012.
effectiveness of the constitutional commitments, one needs to understand the particular juridical-political context that determines that same option – without which, understanding Brazil’s present moment of judicial protagonism may cover up it’s real complexity.

2. BRAZILIAN`S NATIONAL CONSTITUENT ASSEMBLY – AMBIENCE, AND IT`S EFFECT IN THE 1988 CONSTITUTION

Once more, detachment gained by the course of two decades allows a clearer comprehension of the strategical arrangements that took place during the National Constituent Assembly – and their effects in Brazil’s constitutional model.

Planned in the political system that was collapsing by the mid-eighties, the democratic transition completed by the approval of a new constitution took place in a political environment that includes a newly flourished partisan pluralism\(^\text{12}\). Also, a reassembled socio-political arena acquires gradual dynamism, vocalizing new expectations. This is the scenery during the National Constituent Assembly, in which representation of conservative and progressive forces rejoin, without a hegemonic block controlling the political process – therefore, every decision would be preceded by intense negotiation, not without episodes of true political clinches.

On the other hand, the multidimensional crises in which Brazil was emerged – concerning political regime, power relationships in society itself, economic model – bring to the scene, a large spectrum of subjects that were intended to be, somehow, addressed in this foundational moment.

As a matter of fact, the Brazilian Constituent Assembly materialized a quest for reformulating juridical order, in a transformational moment that took place not by rupture, but through a pacific and sustained process\(^\text{13}\). At the moment, this meant that at that same opportunity, the new constitutional agreement which was being built was supposed to deal with a large reform agenda designed to restore a democratic State, but also with the claims of

\(^\text{12}\) During the dictatorship, Brazilian laws allowed only two political parties – in those days, ARENA (National Renewing Alliance), who supported the current military government, and MDB (Brazilian Democratic Movement) that sheltered the progressive forces. The pluripartidarism was only reestablished by “Lei Federal n° 6.767, de 20 de dezembro de 1979” (Federal Law n° 6.767, December 20th., 1979), as a component of the political process that put an end to the authoritarian period.

\(^\text{13}\) For a brief description of the political process held before and during the Constituent Assembly, ROSENN, Keith Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society. The American Journal of Comparative Law, Vol. 38, No. 4 (Autumn, 1990), pp. 773-802
social justice toward a massive portion of citizens that were not included among the beneficiaries of the so-called Brazilian miracle. As urgent as the political change was, so was the need of social rescue in benefit of the excluded – at least, that was the progressive forces’ point of view. This is why commitment with fundamental rights emerges as an important result that should be formally expressed in the constitution.

This is the context in which the 1988 Constitution was developed, with the required elements that should consolidate democratic transition, particularly in the political organization; but also with the presence of a new mechanism that should steer the transformation presented by the progressive forces: a large list of fundamental rights, in a range that starts with the known civil rights and rights to freedom of all sorts, but also contemplates socio-economic rights, and even those qualified as third-dimension rights, such as healthy environment, access to culture and sports, etc..

Two more remarks should be made to understand the uniqueness of the Brazilian choice in its constitutional drafting. The first singularity, is the express assertion that constitutional clauses defining fundamental rights are provided with immediate efficacy (art. 5º, § 1º CRFB) – from which the Judiciary extracts the idea that each and every fundamental right may be enforced in a court of law.

The second particularity is an openness of the fundamental rights protection system, prescribed by art. 5º, § 2º CRFB, in which it is established that the express constitutional enunciation of fundamental rights does not exclude other human rights that could be inferred from principles contained in the Constitution itself, or recognized in international treaties subscribed by Brazil. This means that the original cast of fundamental rights is still growing as a result of constitutional interpretation and of Brazilians endorsement to international treaties such as San Jose da Costa Rica’s Pact, and many others.

14 A compelling parallel could be established with the nowadays called transitional constitutionalism, generated also in a non-rupture environment, with deep concern for a constitution’s ability to promote social transformation (YEH JIUNN-RONG e CHANG WEN-CHEN, The Changing Landscape of Modern Constitutionalism: Transitional Perspective (March 31, 2009). National Taiwan University Law Review, Vol. 4, No. 1, pp.145-183, 2009, available in <http://ssrn.com/abstract=1482863>, access February 3rd, 2012). Nevertheless, in 1987/1988, when the Brazilian Constituent Assembly was took place, that theoretical category had not yet been drawn – and the general commonsense perception was that transformation should be achieved immediately.

15 During the seventies, supported by international loans, Brazil was immersed in public works – which brought momentarily, employment and capital circulating, enabling what seemed like a fast economic growth that was called the Brazilian miracle. By the end of the decade, the loans were to be paid, and the international oil crisis was established – and that was where the miracle ended.

16 This bears significant difference from other experiences such as South Africa’s – in which the central idea of gradual implementation leads to different rulings, where the judicial scrutiny takes into account the general parameters that justify public choices in the provision of services and goods to its citizens.
The general idea which guided the progressive political forces represented in the National Constituent Assembly was to fixate in the constitutional text also an agenda to ordinary politics, in which these fundamental rights would be developed and social transformation achieved in a progressive pace.

The safeguard to that transformative model was also a robust arch of institutions, included in the constitution, dedicated to controlling political powers and reinforcing these constitutional promises relating to fundamental rights and social inclusion. That institutional framework contains not only an independent Judiciary\textsuperscript{17}, but also the “Ministério Público”\textsuperscript{18}, audit courts in every level of government\textsuperscript{19}, the “Defensoria Pública”\textsuperscript{20}, and finally, the “Advocacia de Estado” that should be organized in each and every member state of the Brazilian federation\textsuperscript{21}, designed to promote, by legal counseling and representation, legality control.

It’s pivotal to understand that all these institutions, nevertheless public – meaning, financed by public money – are entitled to sue the government in order to promote legality and legitimacy control of public choices, and specially fundamental rights enforcement. They are entitled to do so – and they do it a lot!

It’s also important to keep in mind that at the time of the Constituent Assembly, the drawing of the new political, social and economic order was not entirely done. A significant sign revealing a level of hesitation concerning to the choices that were made, is the provision that the constitution should be revised after 5 years. On the other hand, even if a subject was not entirely developed during constituent’s debates, it would be included in the Constitution\textsuperscript{22}, with or

\textsuperscript{17} Judiciary independence in Brazil is assured by – among other guarantees – judge’s life tenure and immovability, selection by public contest and financial autonomy.

\textsuperscript{18} “Ministério Público” is an independent institution whose main mission is the protection of the legal system and society’s interests. It should not be taken as the American district’s attorney office – because their competences go far beyond the former. In Brazil, “Ministério Público” promotes penal prosecution – but it could also file class actions related to the defense of fundamental rights of any kind, representing the collective interest.

\textsuperscript{19} Those audit courts, integrating the legislative branch, are responsible for examining public expenditures - regarding not only formal legality, but also its results.

\textsuperscript{20} The “Defensoria Pública” is an institution whose role is to represent the impoverished that wishes to access the Judiciary – that is also enunciated as a fundamental right in Brazilian constitution. So, if someone wants to go to Court, and does not have money to pay for an attorney, he may direct himself to the public Defender’s Office, that will represent him for free – and his lawsuit will also be carried out without any expenses.

\textsuperscript{21} The “Advocacia de Estado” represents the interests of the Union, States and Municipalities. It is said in the Brazilian system that their role is to defend the State – and not the government. The Constitution also proclaims that this career is essential to guarantee justice is held, since they provide legal control in public offices, and from a privileged perspective – from inside.

\textsuperscript{22} It’s from Sunstein the advice that including themes in the constitutional text without deepening enough their frontiers might be a legitimate strategy, allowing the development of their comprehension to be formed as soon as the people can build a theoretical agreement in the
without deepening – as, again, a bet in the ability to transfer the debate to the political ordinary arena.23

Last, but not least; all that change proposed to take place through the Constitution was submitted to some sort of delay, related with two main causes. The promulgation of the 1998 Constitution was followed by an aggravation in the Brazilian economic crisis – and all the attention was brought to that matter.24 Only in 1994, with the edition of the economic model carried by the “Plano Real”, the progressive agenda was taken back, and the fundamental rights and their real provision were brought back to the table. Another factor that explains that sort of delay in the judicialization of fundamental rights was the Supreme Court’s composition.

The National Constituent Assembly opted to maintain a Supreme Court, with its former competences but also new tasks – specially the already mentioned guard of the Constitution materialized by a broad system of judicial review.25 Nevertheless, its previous composition has been preserved, and that group of eleven Justices included mainly justices whose professional experience was not Public Law. Once again, the Supreme Court was not designed in the previous constitutional system, properly as a constitutional court; also, experts in public law usually are not welcome to the judiciary in a military dictatorship. So, even though judicial review was highly expanded as a possibility by the 1988 Constitution, it simply didn’t happen until the mid-90’s, because the Court would rather adopt a defensive jurisprudence related with the acceptance of lawsuits in order to avoid judicial review in its docket.26

Given the right time, the composition of the Court changed; and finally it became the ultimate arena to fundamental rights litigation.27 On the other hand

subject (SUNSTEIN, Cass. Constitutional agreements without constitutional theories. Ratio Juris, Vol. 13, Issue 1, March 2000). If one could accept the validity of that path of deliberation, it is not less true that it is doomed to increase tension in the ordinary political process, responsible for the development of a constitutional promise.

23 A meaningful example of behavior is the proclamation that property right is subordinated to its social function (art. 5º, XXIII CRFB). That general clause was later detailed in Brazilians Civil Code, in which it is Said that property right should be exercised in order to preserve social and economic finalities, in order to preserve the flora and fauna, the ecologic balance, historical and cultural heritage, avoiding air and water pollution.

24 The inflation index in Brazil in June, 1994 – the last month before full implementation of the Plano Real – reached 46.58%; surely with that kind of economic scenery, the only transformation that everybody was concerned about was arrest inflation.

25 The Brazilian system of judicial review before the 1988 Constitution was very restrictive, with very few possibilities to request the Supreme Court to engage in such an analysis. This frame was completely reversed by the 1988 Constitution, that allowed judicial review to be provoked a large list of agents, and also contemplates distinct procedures, taking in account the phenomenon that is pointed as the unconstitutionality cause.

26 It’s important to understand that the Brazilian Supreme Court is not allowed to refuse examining lawsuits without declining a specific procedure reason that disqualifies the litigation.

– as it’s already been said – once the Supreme Court enforced fundamental rights as subjective rights, that interpretation was widely spread through all the Judiciary causing it to be called upon to condemn Public Administration to provide various goods and services.

3. JUDICIALIZING THE RIGHT TO HEALTH IN THE BRAZILIAN SYSTEM

The debate about flaws and needs related to the guaranty of health presented itself during the Constituent Assembly in a kind of systematized way, due to the 8th National Health Conference, that was held in March 1986, in which the main topic was exactly designing a model that should be applied to public health service.

As a result, art. 196 CRFB predicates that health is a right entitled to anyone and an obligation of the State that should be fulfilled through social economic politics orientated to reduce risks of sickness and other threatening events, providing universal and egalitarian access to goods and services focused in its promotion, protection and restoration.

At the same time, the 1988 Constitution commands that health should be offered by a public system composed of all the federation entities, working together in cooperation, sharing responsibilities, institutionalized by “Sistema Unico de Saúde – SUS” (single health system). The implementation of such a system was – and still is – a challenge. The Constitution also refers to decentralization as a desirable characteristic of the health public service – and this addresses a lot of the direct attendance of patients to municipalities, that in many cases were not prepared for such a task. Since the public system had failed, the discussion related to the possibility of judicial guarantee of health as a social-economic right was brought about.

The initial lawsuits dealt with situations where a real life threat was present. Surgery was being denied or indefinitely postponed by the public system; drugs as antiretroviral or insulin couldn’t be found in public hospitals – patients were in a real risk of dying, or living in an undignified condition. Therefore, it was not difficult for the Judiciary to decide in favor of the plaintiffs, ordering the medication to be offered, or the surgery to be performed. All the questions that pervade the complex theme about judicial enforcement of socio-economic rights seemed unimportant when one’s life was at stake. So they decided – and ordered the government to abide. When procedures were guaranteed and this could not possibly be held in public hospitals, judges ordered surgery to take place in private ones – and the government to repay them. Patients were sent abroad when the treatment they needed was not available in Brazil. Lives were being saved, and judges were excited: “here we are, fulfilling the Constitution’s promises”!!!
But health is a very tricky concept, and the frontier between real and imaginary needs; between necessity and comfort may be blurred. Medicalization of life is also a contemporary phenomenon\textsuperscript{28} that identifies as pathological something that in the past was considered a part of ordinary life. All that complexity, for sure, was brought to the judicialization of health – and judges are being called to rule whether the State should provide for experimental treatments\textsuperscript{29}, cosmetic surgeries, breast implants, sex reassignment surgery and follow-through psychological therapy\textsuperscript{30}, all sorts of procedures and drugs that could enhance the perceived welfare of an individual. After all, if health is a universal right established in the constitution – without any explicit exclusion one is allowed to require from the State whatever they think would enhance their physical or psychological condition\textsuperscript{31}, or at least, that is what the current plaintiffs and their demands would have us believe.

Based on the constitutional provision that establishes a health system in which all federal entities should be included, the duties related to guaranteeing health were classified as mutual – meaning that a citizen could ask for medication to anyone of them, the Federal Union, the State or the Municipality; the choice is his\textsuperscript{32}.

Litigation related to assuring the right to health reached such an intensity that it caused the Supreme Court to call a public audience\textsuperscript{33}, where the Court’s former President intended on being clarified by the people in questions that he formulated: should experimental drugs be delivered by the State? Should the State be compelled to deliver a citizen a specific medication – if it could offer another cheaper one, but distinct from the one his physician has prescribed? Should the federation entities be held indistinctively responsible for guaranteeing such a right, or are they allowed to share obligations? That public audience

\textsuperscript{29} BRAZIL. SUPREME FEDERAL COURT. SS 4316, Justice President, Cezar Peluso, ruled in June, 7th., 2011.
\textsuperscript{30} BRAZIL. SUPREME FEDERAL COURT. RE 575.179, Justice Dias Toffoli, ruled in October 21st., 2011.
\textsuperscript{31} In a border line between a fundamental right to health – and also one to happiness – is the State’s provision of artificial insemination. The first precedents analyzed by Supreme Court repealed the idea that the inability to beget may be characterized as a health problem, and fertilization treatment was denied. This type of litigation was later readdressed, now as a plea to face endometrioses – a pathological condition that is usually associated with infertility, and which treatment enhances pregnancy’s chances.
\textsuperscript{32} BRAZIL. SUPREME FEDERAL COURT. RE 586.995 AgR Justice Carmen Lucia, 1st. Turma, ruled in June, 28th, 2011; BRAZIL. SUPREME FEDERAL COURT. AI 808059 AgR Justice Ricardo Lewandowsky, 1\textsuperscript{a} Turma, ruled in December, 2\textsuperscript{nd}. 2010; BRAZIL. SUPREME FEDERAL COURT. SL 47 AgR, Justice Gilmar Mendes, Tribunal Pleno, ruled in March, 17\textsuperscript{th}. 2010.
\textsuperscript{33} The Brazilian Supreme Court could convene – according to its internal regiment – public audiences, related to a specific case, or even without that link, always to hear specialists, professors, public agents, civil societies representatives; anyone that could enrich the debate – just like the most known amicus curiae.
provided information and parameters to rule – but the Supreme Court itself estates that these criteria could be set aside according to the particularities of the case\textsuperscript{34}.

The last development in the judicialization of the fundamental right to health is the lawsuits that requires public services – not provided, or badly provided – that may be related to health assuring. Providing sewage, increasing the quality of the water that is delivered – these are the so called new frontiers in the pursuit of the right to health. The theoretical debate that this path of interpretation defies is if there’s a limit to the content of a fundamental right to health – that should be provided by the State (meaning, by taxpayers money), but certainly is not the only one delegated to Public Administration.

One should take into account that in the Brazilian legal system one could file a lawsuit as an individual case, or as a class action – but the Judiciary could not convert an individual lawsuit into a collective one. The result is that most of the debate related with the effectiveness of the right to health takes place in individual lawsuits – therefore, benefits only the plaintiff, and no one else. This means that the public policy is not readdressed or reshaped; and if its really incompatible with the constitutional commitment to health, it would stay this way, with the sole exception of those who got their day at the Court. A very wrongful result is that usually, in spite of the institutional architecture drawn to enforce those rights as a path to equality, a day at the Court would most frequently be assured to the ones who have access at least to the knowledge that health is something that you can require from State even in Judiciary.

4. JUDICIALIZING THE RIGHT TO EDUCATION IN THE BRAZILIAN SYSTEM

Comparing the profile of the judicialization of health and education is a very clarifying initiative. The proclamation of a right to education in 1988’s Constitution was not such a novelty – State had his duties in education before, and basically, the original text does not modify the previous picture.

It should be said that also in education, the tendency was to direct the so called “fundamental cycle”\textsuperscript{35} mainly to Municipalities – choice that could have caused the same collapse that was pointed in the health system. But that orientation was changed by a constitutional amendment in 1996, sharing responsibilities between States and Municipalities – and the system’s balance was reached, with big cities dealing with their own education system in the

\textsuperscript{34} BRAZIL. SUPREME FEDERAL COURT. STA 175, AgR Justice Gilmar Mendes, Tribunal Pleno, ruled in March, 17th., 2010.

\textsuperscript{35} In Brazil, the obligatory education that constitutes the State’s duty is divided in: 1) infantile education that goes up to 5 years old (art. 208, IV CRFB); 2) fundamental cycle – that goes from 6 to 14 years old, and it’s mainly provided by Municipalities (211, § 2º CRFB) and 3) medium cycle, that goes from 15 to 17 years old and it’s held mainly by States.
fundamental cycle, and small cities relying on the State’s support in order to assist their children. Therefore, the crises that drove citizenry toward the Judiciary in order to achieve the fulfillment of a right to health didn’t happen in the education system.

The leading problem in the educational field relates to the constitutional provision that expresses something really new – and this was the inclusion of preschool childcare as a component of a right to education. Naturally, that was the subject that provided lawsuits – which resulted in the proclamation by the Supreme Court that childcare was also a demandable fundamental right.

The particular addendum that was brought in the debate related to childcare and preschool was that such a public policy may not be formulated at all in some Municipalities – so, one could not require admission to a child daycare if Public Administration has not yet decided how it would offer such a service. To that blocking argument – that would postpone the provision of the requested public service – the Supreme Court answers that it could even formulate public policies so to assure it’s due submission to the people’s will expressed in the Constitution when it comes to protecting these provisions from violations brought by the Administration.

5. JUDICIALIZING THE RIGHT TO HOUSING IN THE BRAZILIAN SYSTEM

A fundamental right to housing is a provision that was not in the original 1988’s Constitution. It was brought to the text by the Constitutional Amendment n° 26, promulgated in February, 14th, 2000. It should be said that, unlike the provision in South Africa’s Constitution, that requires from the State “reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right”; the Brazilian Constitution, art. 6º estates that: “education, health, nourishment, work, housing, leisure, security, welfare, maternity and infant protection and social assistance are social rights”.

The first juridical question related to the exercise of such a right is whether it is immediately applicable – but this is easily solved by art. 5º, §§ 1º e 2º CRFB, already examined, that proclaims immediate efficacy of all fundamental rights, including the ones that may be inferred from principles.

The second issue suggested by a fundamental right to housing is how should it be understood? Should it be recognized as a universal one – therefore, guaranteed, no matter the social condition of the one who requests

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36 The States duty with education shall be carry out through guarantying infant education, in childcare and preschool, to children up to 5 years old (art. 208, IV CRFB).
37 BRAZIL. SUPREME FEDERAL COURT. RE 410.715 AgR Justice Celso de Mello, 2ª Turma, ruled in November, 22nd., 2005.
38 Constitution of the Republic of South Africa, Chapter 2, Section 26.2.
it? What sort of housing should be provided, and to whom? Are we talking about a house – literally – or about money, or building material? If a family of 8 – father, mother, two daughters and married son with his wife and their 2 kids - lives in a shack, what is the extent of the State’s duty? Offer one house – maintaining all the 8 people under the same roof, as they were before – or should the State provide more houses; one for each family unit (understood as a couple and their kids) at least?

Another particular problem that is commonly presented in housing conflicts, is that one who is homeless, may provide himself with shelter by illegal behavior – invasion of private or public property; building in prohibited areas (such as preservation or risk areas); etc.. That behavior raises another challenge – if shacks are built in forbidden sites, the Public Administration has to remove them, in order to preserve property, or the environment, or even life and safety of the very own invaders.

Finally, you’ll have also the deprived of housing that are still waiting to have a chance to reach their own home through public programs. Those are the silent ones – but no less in need then the invaders.

Usually, states and municipalities in which the housing deficit is a significant social problem, public policies are being held, offering houses or financial aid so as to provide shelter for those in need. As a matter of fact, even the Federal Government is committed with that initiative and provides financing to local governments through a national program called “Minha Casa, Minha Vida” (My House, My Life)39. Surely, despite the combined efforts, the problem is still far from being solved – as happens in most metropolises. And the difficulties go beyond housing itself – because one who is settled in certain site, won’t usually appreciate being redirected to another place, frequently far from his job, school, church and relatives. Distance becomes a problem – which gives rise to the need to provide for transportation and other public services, that would also require funding, competing with the housing programs.

Even in that much more complicated scenery, the idea that constitutional proclamation of a fundamental right means the recognition of a subjective right that may be exercised against the State still applies – and litigation multiplies, in the most disordered way. Here again, just like it happened in the judicialization of health rights, the result is that the ones that reach the Judiciary first are granted priority – and this might not coincide with the priority of the public policy that is in progress. Surely, that differentiation does not mean that the Judiciary’s choice is not a valid one, considering that its premise is to enforce the fundamental right to housing. The problem is that individual decisions do not

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39 This is a formal program held by federal government, which is designed by Lei nº 11.977, July 7th, 2009, meant to create mechanisms to induce building and acquisition of habitation units, or even to renovate the ones already existent.
take into account their effects in the public policy as a whole – therefore, do not face the housing problem looking at the big picture.

Exponential increase of judicialization of socio-economic rights is a phenomenon that is not yet sufficiently analyzed to allow a conclusion that it may be a direct result of a continued State’s inertia, or of a disregard for the constitutional commitments in the field of fundamental rights by the other power branches. After all, the existence of a demand for some good or public service means solely that the citizen that sues doesn’t have what he intend to gain. The main question is whether that unavailability is due to unconstitutional State’s inertia or flaw, or if it’s a legitimate result of a public choice that does not prioritize the attendance of that specific need or social group and therefore, does not defy judicial righteousness.

It is true that the speech in which the Leviathan-State is always insensible to its own duties in protecting human’s dignity is always easy – but it surely avoids facing stormy questions about tragic choices that must be made by a society in which resources are scarce.

6. MAXIMUM EFFECTIVENESS: THE FUNDAMENTAL RIGHTS DISCOURSE TURNING AGAINST ITSELF

The historic context in which 1988’s Constitution was written substantiated an enchantment with the transformation fabric of its own commitment to fundamental rights; and a bet in the Judiciary’s ability to enforce that project. That same belief is at stake today, with a progressive transfer to Courts of the expectations in turning into reality that transformational ideal that was enunciated in the Constitution.

In spite of the still running debate related to the legitimacy of the judicial review, one should consider with a critical perspective, if it is real the transformational ability said to result from judicial scrutiny of public policies.

In a first approach, the warning provided by Goyard-Fabre about the risks that are brought by an excessively protective State’s behavior will always stand against that assertion – took in contrast with the autonomy of the parties’ will: “the fact that the human being declines its personal responsibility in favor of a so called collective responsibility engenders irresponsibility. Meaning that an

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effort to assure an emancipative liberty may, in reverse, determinate a loss of the individual capability to intervene and perfect the process of conquering a preservation of its own freedom.

Regardless of this matter, if the comprehension that the role of fundamental rights contemplated in the Constitution enables the exercise of subjective rights is in the root of the judicialization of public policies, on the other hand it results in a preferential use of individual claims of rights. Therefore, the main portion of lawsuits is of individual cases – which for that same characteristic, are not really significant when it comes to the potentiality of really promoting the desired social transformation.

Still, that strategy presents itself to the Judiciary as a seductive one, granting him an important role as the guardian of the constitutional promises. The risks in the assumption of such a role are pointed by Garapon\textsuperscript{42} – specially, the populist temptation: “judicial activism in the bureaucratic systems revealed a new risk, one of a pulverization of justice. The Judiciary ends up looking not like an institutionalized power, but a summation of individualities”.

In the Brazilian experience, the exponential growth of litigation – and superposition of competences in exercising judicial review – enables room for voluntarism in Judiciary’s real role in controlling public policies. Each and every judge considers himself entitled to define what the content and intensity of state’s duties may be when it comes to the enforcement of fundamental rights.

The addition of these new elements in constitutional order and adjudication – interpretative openness, judicialization of public choices, large spectrum of judicial controlling – proceeds to generating a new selectivity; one that does not depend on a formal legislative criteria expressed in the legal system; but that comes from an individual perception of a judge that does not feel attached to a so-called restrictive criteria of a formal rationality that ignores the core idea of human dignity. The assertion is that adjudication may rely in a “material rationality”, built in an intern comprehension process held by each judge, which allows him to overcome any argument opposed to what he believes is necessary to guaranteeing fundamental rights.

Two objections may be made to that strategic approach held by a Judiciary that was invited to the center of the debate about the State’s duties with human dignity.

First, disaggregation of justice raises dealing with socio-economic rights in an individual perspective, bringing the already referred selectivity that is incompatible with the very own fundamental rights theory, even when it comes

to socio-economic rights. The recent phenomenon that is taking place regarding to housing is a good example. Homelessness is a deplorable condition, and should be faced in a justifiable, non discriminatory based way. Judicialization of such a plea, in individual lawsuits, leads to a solution that – even though can be justifiable in a micro-justice perspective; enlarges inequality in a macro-view, for it creates preferences without reasonable criteria.

The second objection – closely related with the first one – involves also inequality and differentiation criteria. The legitimating of judicial interference in public policies relies on the State’s absence, flaw or inadequacy in promoting socio-economic rights. All these phenomena represent a formulated public choice whose results are being ruled unconstitutional – meaning, they express a selectivity criteria that is incompatible with constitutional guarantees. A judicial decision in that same field, ruled in an individual lawsuit vehicle itself possibly two differential criteria – unknown, unrevealed. The first one is the selectivity that permits that dispute to be submitted to Judiciary – this is the most uncontrollable of them all, as long as it’s related with personal conditions of the plaintiff such as access to legal information in general and to judiciary in particular. A second level of selectivity comes from the already mentioned material rationality, which may result in the providing or denying of goods and services because the judge’s own sense of justice so recommends – and not as the result of a logic application of the objective rationality expressed in a legal criteria.

The core question here is how and excessive judicialization of public choices related to public policies in socio-economic rights may lead to democratic risks. And the argument here is not the counter-majoritarian difficulty, or the legitimacy of judicial review; the main concern is related with the accountability of these judicial reformulation of public choices and policies. After all, nevertheless the undeniable appeal of the fundamental rights protection speech; the single reference to that central idea in order to serve individual interests does not guarantee homogeneity in the interpretation process that is held in the Judiciary.

Approaching the conclusion, one should readdress the assertive that the 1988 Constitution presents itself as a true manifestation of what today is called transitional constitutionalism. More than materialize political transition, the Constitution intended to build a path to revert a perverse reality brought not by barbaric practices like genocide or ethnic segregation; but by social exclusion of the poor and the needy. Transition and transformation, nevertheless, are in essence, processes; a goal that is reached through the summing of various components – and that won’t be achieved by a few judicial rulings.

In the National Constituent Assembly, the idea was that the reform agenda established by its commitment with fundamental rights was to be
developed in the ordinary politics; therefore bringing public policies to the constitutional text, and judicialization of that same public policies seemed like a pathology. Therefore, to assure fundamental rights through a way that was draw as a last resource to solve a dead end in constitutional enforcement appears to be, itself, also a subversion of the redemocratization project.

Constitutional valorization of fundamental rights – especially the socio-economic ones – can’t be dissociated from its historical origins as a collective achievement, even facing the challenge that may be brought by its implementation in that same perspective. On the contrary; solution will not be found in an unclear selectivity, that enhances privileges even though a egalitarianism discourse.

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