Justice and Experimentalism: Judicial Remedies in Public Law Litigation in Argentina

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Since the 1994 reform of the Argentine Constitution, a group of lawyers, public defenders and civic organizations have turned to the courts in search of new participatory channels for the promotion of social change. To this end, they have increasingly pursued public law litigation,[1] understood as individual or collective claims seeking the structural transformation of state institutions for the respect of rights and democratic values enshrined in the Constitution.

Despite its embryonic development,[2] public law litigation provides an interesting framework for the discussion of some of the questions posed by the organizers of the panel regarding the instrumentality of the law in the advancement of a reform agenda. In particular, I want to explore a defining characteristic of such litigation often overlooked in domestic debates: the model of judicial remedies used in the struggle for structural reform, and the role of such remedies in the definition of the objectives and styles of the model of public law litigation we wish to promote.

I argue that it is necessary to refocus existing discussions about the legitimacy and institutional capacity of judicial activism in public law litigation in order to include the debate

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[1] En Argentina es usual referirse a esta nueva estrategia como litigio de "derecho de interés público." En este trabajo, sin embargo, he preferido utilizar la expresión "litigio de derecho público" para acotar la discusión a la variante del litigio de impacto frente a instituciones de la administración pública con las características descriptas en el clásico trabajo de Abram Chayes, "The Role of the Judge in Public Law Litigation," 89 *Harvard Law Review* 1281 (1976). La definición y el alcance de la práctica de litigio de interés público han sido objeto de varias discusiones prácticas y teóricas. *Véase* por ejemplo, Volúmenes 7, 8, y 9 de los *Cuadernos de Análisis Jurídico* de la Universidad Diego Portales (1998, 1999, 2000); Martín Bohmer, "Sobre la Inexistencia del Derecho de Interés Público en la Argentina," *Revista Jurídica de la Universidad de Palermo*, V. 3:1 (1997); Mary McClymont & Stephen Golub (ed.), *Many Roads to Justice*, The Ford Foundation, 2000; o Mark Ungar, *Elusive Reform: Democracy and the Rule of Law in Latin America*, Boulder: Lynne Rienner Publishers, 2002. Sobre la producción más reciente, *véanse* las publicaciones en *Conecta Sur*, disponibles en http://www.conectasur.org/es/item3a.php.

about the role and types of remedies that the judiciary could or should promote to contribute to the country's process of democratic transition, the strengthening of its institutions and the fight against poverty.

With this goal in mind, after a brief terminological clarification of the use I propose to make of the concept of "judicial remedies" (Part I), I present a broad picture of the main axes of local debates about public law litigation. The purpose of this schematic presentation is to highlight some of the limitations in the framing of our current discussions and to show the need for its reformulation to include in them the remedial function of courts (Part II). I then proceed to explore some ideas that might guide our debates about judicial remedies. I begin with an illustration of the remedial style displayed by our courts in current public law litigation. To this end, I review a set of judicial remedies ordered in the context of what constitutes a preliminary body of court interventions in cases over the right to health in circumstances of poverty (Part III).

As successful claims suggest, judicial orders against public hospitals and state officials in charge of the health care system rudimentarily exemplify the traditional *"command and control"* model of intervention in administrative agencies. This type of intervention has positive aspects and has proven to be successful at certain stages of the history of impact litigation in jurisdictions as the US. However, in the rest of the paper I argue that the *experimentalist litigation* model for *rights destabilization*, recently proposed by Sabel & Simon,[3] might be a more functional model in the particular developmental circumstances and institutional precariousness of Argentine players (Part IV). Apart from being better suited to the local institutional context in Argentina,

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[2] For a comprehensive study of the development of public law litigation in the form of collective procedures, *see* Gustavo Maurino, Ezequiel Nino & Martín Sigal, *Acciones Colectivas: Análisis Conceptual, Constitucional, Jurisprudencial, Procesal y Comparado*, Editorial Lexis Nexis, Buenos Aires, 2005 (*forthcoming*).
[3] Charles Sabel & William H. Simon, "Destabilizing Rights: How Public Law Litigation Succeeds," 117 *Harvard Law Review* 1015 (2004).

this model could offer more effective counterarguments to objections to public law litigation based on the lack of legitimacy or institutional capacity of the courts.

I conclude the essay with some suggestions for the debate over the remedial function of the judiciary, if courts are to more effectively use their ability to control administrative agencies as an instrument in the fight against structural inequality.

I. A Terminological Clarification

The Argentine legal tradition contains no equivalent to the U.S. notion of "remedies." In the U.S. legal system, the concept of "remedy" refers to the "various kinds of relief a court may order after being persuaded of the merits of the plaintiff's claims."[4] Judicial remedies[5] can consist of: (a) a determination of *damages*, compensatory or punitive; (b) a declaration of parties' rights and duties; and (c) a variety of orders called "*injunctions*" [6] that direct the defendant to stop the harmful conduct or to start new conduct as required by law.[7] Injunctions require the existence of irreparable damages and the absence of other adequate remedies. Several types of injunctions have been identified by scholars. Among possible taxonomies, some differentiate: (a) *preventative injunctions* aimed at avoiding future harms; (b) *reparatory injunctions*, reserved for the reparation of past harms; and (c) *structural injunctions*, coined in the context of civil rights litigation, and deployed with the goal of reorganizing public

[4] Subrin, Minow, Brodin & Main, *Civil Procedure,* Aspen Publishers, 2nd. ed., 2004, p. 5

[5] El desarrollo de este sub-tema del derecho procesal es tan amplio y complejo que suele estudiarse en cursos específicos y referirse como el "derecho de los remedios." Entre los materiales didácticos clásicos sobre el derecho remedial, *véanse* por ejemplo, Dan B. Dobbs, *Law of Remedies: Damages, Equity, Restitution,* Hornbook Series Student Edition, West Publishing Company; 2nd. ed, 1993; y Owen Fiss & Doug Rendleman, *Injunctions,* University Casebook Series, The Foundation Press, Inc., 2nd. Ed., 1984.

[6] Owen Fiss & Judith Resnik, *Adjudication and its Alternatives: An Introduction to Procedure,* Foundation Press, New York: NY, 2003, p. 29.

[7] Fiss & Resnik, *op. cit.*, p. 5. La distinción fundamental entre los dos tipos principales de remedios, la compensación por daños y las *injunctions,* se remonta a la diferencia jurisdiccional entre los tribunales del *common law* y las *equity courts* existentes en Inglaterra desde la Edad Media y unificados en la primera mitad del Siglo XX en Estados Unidos. Fiss & Resnik, *op. cit.*, p. 26.

institutions. All of these categories of injunctions can further be classified as either temporary or definitive.

In Argentine law, the provisions of the Civil Code and procedural regulations provide for a majority of the judicial remedies found in the U.S. legal system and, in practice, judgments contain determination of damages, recognitions of rights, and orders to do or omit doing similar to US *injunctions*. Our *"medidas precautorias"* are also similar to the temporary or provisional injunctions of the common law. However, in Argentine law there is no conceptual equivalent to the U.S. legal notion of a remedy[8]; nor does there exist a comprehensive or specific body of procedural or substantive law devoted to the remedial function of courts, much less literature or theoretical discussions on remedies or socio-legal inquiries about the remedies granted by Argentine courts, the obstacles and of the degree of effectiveness of their implementation.[9] As a result, the study of the courts' remedial function —when present— takes place in fragmented ways within different areas of the law and with no contextualization of its procedural aspects. Moreover, in debates about public law litigation, remedies are addressed in the vocabulary of the implementation of judicial decisions, procedures for the execution of court decisions, contempt, court monetary sanctions (*astreintes*), and other sanctions available in cases of noncompliance with court judgments.[10] The lack of empirical studies of the remedial designs implemented by

[8] La expresión "remedio" se utiliza en general en Argentina para referirse a procedimientos abreviados como el amparo o a los recursos de apelación y en especial, al recurso extraordinario al que se apela como "remedio federal."
[9] En Estados Unidos el desarrollo doctrinario, teórico y sociológico sobre la función remedial de los tribunales se remonta a la relevancia que les asignaran Holmes y luego el Realismo. Según Holmes, lo importante es "what courts will do in fact, and nothing more pretentious." "The Path of the Law," 10 *Harvard Law Review* 457, 461 (1897).
[10] En general, son quienes promueven el litigio de impacto quienes han demostrado preocupación por las dificultades para implementar decisiones judiciales ordenando a la administración determinadas conductas. En el caso de la implementación de las sentencias sobre derechos sociales, económicos y culturales, por ejemplo, Víctor Abramovich & Christian Courtis se han referido al tema bajo el rótulo de "emplazamiento del Estado a realizar la conducta debida" revisando jurisprudencia exitosa nacional e internacional y asumiendo que "la constatación de la obligación incumplida debe ser seguida por la manifestación circunstanciada de qué conducta o conductas debe realizar el Estado para garantizar o satisfacer el derecho violado." *Véase, Los Derechos Sociales como Derechos Exigibles*, Editorial Trotta, Madrid, 2002, p. 136. Sin embargo, estos autores no han discutido modalidades alternativas de la intervención remedial judicial más que la propuesta de la "manifestación circunstanciada"

the courts and of administrative compliance with them is persistent in the scarce opportunities in which remedial matters are considered.

These theoretical and empirical absences, as well as the lack of conceptualization of "structural" remedies[11] and other remedies in the new plurilateral, amorphous, fluid, and provisional context of public law litigation,[12] become especially acute when confronting arguments about the legitimacy and institutional capacity of judicial intervention in the operation of public administration. For this reason, and because I do not believe it forces Argentine conceptual framework, in what follows I take license to transplant the concept of judicial remedies to refer to the orders granted by our courts in the context of successful impact litigation.

II. Reshaping the Debate: The Incorporation of the Remedial Function of Courts.

To date, problems of implementation of judicial decisions in public law litigation and, more concretely, the function and style of remedies that the court shall apply, have been relegated to local discussions[13] surrounding the legitimacy of judicial activism and the

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mencionada, y han preferido ofrecer además modalidades alternativas de formulación del reclamo jurídico como las que describen bajo la idea de "estrategias de exigibilidad indirecta." Abramovich & Courtis, *op.cit.*, p. 168.

[11] El litigio desarrollado por el movimiento por los derechos civiles revalorizó los remedios al estilo de las *injunctions* y dio forma a lo que se dio en llamar *"structural injunctions"* o la *"civil rights injunction."* Según Fiss, "las órdenes estructurales reconocen la naturaleza burocrática del Estado moderno. Buscan proteger valores constitucionales frente a los riesgos planteados por las organizaciones burocráticas. (…) Estas órdenes son los medios que utiliza el juez para dirigir o administrar la reconstrucción de la organización burocrática." (la traducción es mía) Cfr. Owen Fiss, *The Civil Rights Injunction*, Indiana University Press, Bloomington & London, 1978. Entre los trabajos seminales que contribuyeron a la discusión de esta nueva figura remedial pueden citarse por ejemplo: Donald Horowitz, *The Courts and Social Policy*, The Brookings Institution, Washington, DC, 1977; , Owen Fiss, "The Forms of Justice," 93 *Harvard Law Review* 1 (1979); Theodore Eisenberg and Stephen Yeazell, "The Ordinary and the Extraordinary in Institutional Litigation," 93 *Harvard Law Review* 465 (1980); Alan Gewirtz, "Remedies and Resistance," 92 *Yale Law Journal* 585 (1983); Robert F. Nagel, "Separation of Powers and the Scope of Federal Equitable Remedies," 30 *Stanford Law Review* 661 (1978); Peter Schuck, *Suing Government*, Yale University Press, New Haven, CT, (1983).

[12] Chayes, *supra* nota 1, p. 1284.

[13] El lector argentino familiarizado con la precariedad de los intercambios académicos y los debates públicos locales considerará exagerada mi referencia a las "discusiones locales." En diversos sentidos estas no existen realmente, por la falta de foros escritos y académicos en los que desarrollar los intercambios, por la ausencia de actores con dedicación suficiente, la precariedad institucional del marco en el que se dan los diálogos cuando existen, etcétera. Utilizo la expresión, en cambio, en referencia a una serie de trabajos que constituyen la escasa producción sobre el

implications of court enforcement of socioeconomic rights, on the one hand, and to the debate over the procedural tools necessary to implement the new litigation, on the other hand.

Like in classic U.S. debates about the counter-majoritarian nature of judicial review, grounded on the supposedly anti-democratic character of judicial intervention *vis à vis* the democratic and representative branches of government, some have resisted judicial activism and court intervention in areas they consider of the jurisdiction of the legislative and executive powers.[14] The lack of legitimacy of judicial intervention lies, according to different positions, in the violation of the principle of the separation of powers[15], and to others in the value of self-government.[16]

Another aspect of our debates over the role of the courts in the realization of constitutional rights has revolved around the interpretation of the egalitarian principles enshrined in the Constitution and the judicial enforcement of social, economic and cultural rights.[17] Arguing against those who object to judicial activism, the participants in these discussions have generally advocated for active judicial intervention in the protection of socio-economic rights, justifying the enforcement of rights traditionally considered "programmatic" or "aspirational" and, as such, devoid of judicial protection. For those who advocate for this active judicial role in the protection of all constitutional rights without differentiating between categories of rights, the moral implications of the principle of equality in the definition of the substantive content of

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tema localmente y que, en general, son partícipes de diálogos transnacionales con fuentes y actores estadounidenses, europeos y, en ciertas ocasiones, latinoamericanos.

[14] Roberto Gargarella, *La Justicia frente al Gobierno*, Ariel, Barcelona, 1996.

[15] Los argumentos deferentes al Congreso o la administración pública basados en la separación de poderes suelen preponderar en las decisiones judiciales.

[16] Roberto Gargarella, *op. cit.*, *supra* nota 14.

[17] Varios autores se han manifestado contra argumentos conservadores que niegan la exigibilidad de derechos sociales. *Véase* por ejemplo, Carlos S. Nino, *Fundamentos de Derecho Constitucional*, Astrea, Buenos Aries, 1992; Carlos S. Nino, "Los Derechos Sociales," en *Derecho y Sociedad*, Buenos Aires, 1993; Marcelo Alegre, "Democracia, Igualitarismo y Activismo Judicial," en *Los Derechos Fundamentales*, SELA 2001, Editorial del

rights, or the conditions of positivization of social, economic and cultural rights, justify judicial activism.

Finally, it is also possible to identify another group of local discussions relevant to the definition of the role of courts as a space for social transformation. Such discussions concern the development of the procedural tools necessary to facilitate courts intervention in the protection of rights, and to prompt the institutional reforms necessary to contribute to the strengthening of the country's democratic transition process. Since the 1994 constitutional reform, both court precedents and scholarly exchanges have emphasized the interpretation of the constitutional principle that established a collective proceeding known as *amparo colectivo*, a summary procedural tool for the protection of collective rights.[18] These exchanges have considered diverse criteria for the definition of standing requirements by the *amparo colectivo* and its eventual regulation, with special attention to the rights of unrepresented parties, the collective effects of court decisions, the regulation of attorneys' and court fees, and the creation of mechanisms promoting compliance with judgments.[19] These discussions have also dealt with the need to develop ordinary procedural mechanisms such as class actions[20] in order for collective proceedings to move forward in a more fair and efficient fashion.

However, the three lines of argument mentioned above presume three unviable separations that would impoverish and constrain the practical implications of the debate over the

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Puerto, Buenos Aires, 2002; Christian Courtis, "Los Derechos Sociales como Derechos," en *Los Derechos Fundamentales*, *op. cit.*; y Abramovich & Courtis, *op. cit.*

[18] Sobre las discusiones locales sobre el tema, *véase*, Néstor P. Sagues, *Elementos de Derecho Constitucional*, Astrea, Buenos Aires, 1999, tomo 2; Daniel A. Sabsay, "El amparo como garantía para la defensa de los derechos fundamentales," Rev. Jur. del Centro de Estudiantes, Facultad de Derecho, Universidad de Buenos Aires. No 6., 1996; y los capítulos de Raquel Asensio, Mariela Belski y Mariela Puga en *Documentos de Trabajo sobre Derecho de Interés Público*, Programa de Derecho de Interés Público, Universidad de Palermo, 2001-2003.

[19] Abramovich & Courtis, *supra* nota 10.

[20] Ezequiel Nino, *Informe sobre Acciones de Clase*, Documento de Trabajo sobre Derecho de Interés Público, Programa de Derecho de Interés Público, Centro de Estudios de Postgrado, Universidad de Palermo. Agosto 2002.

role of the judiciary.[21] The first positions identified suppose that the discussion about the legitimacy of a judge's intervention in the administration can be separated from the analysis of what judges can or should do to control administrative behavior. They assume a rigid allocation of constitutional functions to each of the three branches of government and then present the judiciary as interfering with the competences clearly attributed to the other branches. Often, these arguments overlook the complexity of inter-branch relationships in their daily operation and underestimate the advantages of a dialogical interaction that requires the blurring of strict allocation of functions among the three branches, which is conducive to practices that promote dialogue and interdepartmental deliberation. Furthermore, those who point to the costs of judicial intervention in terms of affecting self-governance seem to reject *a priori* the inclusive and deliberative possibilities of collective judicial proceedings and of various participative remedies that could contribute to reinforce the democratic legitimacy of court decisions.

The second type of arguments, centered on rights definition, also assumes the possibility of determining the content of these rights without addressing their remedial implications. They presume a qualitative separation between rights and remedies and neglect the bidirectional relationship between the two concepts -a relationship that is necessary to keep in mind in order to delimit rights reach.[22] Or as Levinson has suggested, [23] this argument conveys a form of "rights essentialism" neglecting the need to understand the symbiosis of the right-remedy pair to define

[21] En esta sección sólo expongo brevemente el problema de presuponer esta separación entre derechos y remedios ya que mi intención aquí es señalar lo incompleto de los tres ejes de debate mencionados hasta aquí. Para más detalles sobre las relevancias de la consideración de la interrelación entre derechos y remedios en cada uno de estos tres niveles de argumentación, *véase* la bibliografía citada en la nota 11.

[22] Para un desarrollo más completo de la crítica a diversas visiones de la interpretación judicial de derechos que ignoran o minimizan el rol remedial de los tribunales, *véase*, Daryl J. Levinson, "Rights Essentialism and Remedial Equilibration," 99 *Columbia Law Review* 857 (1999). La propuesta de Levinson frente a las teorías que amplifican las distancias y diferencias entre derechos y remedios es la del "equilibrio remedial." Este equilibrio comienza por reconocer que los derechos y los remedios están inextricablemente relacionados al igual que lo están en otras áreas del derecho como el derecho de propiedad, la responsabilidad extracontractual o el derecho contractual, en las que la

the reach and the forms of judicial adjudication of rights. This omission is all the more striking in public interest cases in which parties pursue structural reforms for which the courts' remedial function is central to the very definition of the violated rights. If rights have been designed to function in the real world, their content should be inextricably linked to pragmatic considerations about their enforcement and operation.

Lastly, the third group of debates, those concerned with the best design of complex civil procedure tools, presupposes the plausibility of designing complex, multifaceted judicial proceedings —proceedings far removed from the traditional bipolar litigation model— without evaluating the judicial remedies that could be required within the framework of new procedural methods.[24] When addressed, procedural alternatives are discussed with little or no consideration for the type of remedies that are better and more effectively accommodated to the characteristics of the new collective and, generally, summary processes. As a result, the role of the parties tends to be overshadowed by a judge-centered approach when it comes to the formulation of proposed remedies. Similarly, aspects of the provisionality, urgency and transparency of remedies are also marginalized.

The limitations pointed out so far are only some of the many that justify the need to refocus debates about the role of the judiciary in public law litigation on the remedial aspects of the judicial function in this litigation.

III. An Exploration of Current Remedial Practices.

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relación es reconocida hace tiempo según los términos de Calabresi y Melamed en su renombrado "Property Rules, Liability Rules and Inalienability: One View of the Catedral," 85 *Harvard Law Review* 1089 (1972).

[23] Daryl J. Levinson, *op. cit.*, p. 861 et al.

[24] La diferenciación en el derecho estadounidense de las acciones de clase de la Regla 23 según el tipo remedial que algunas alternativas requieren ilustra la centralidad del aspecto remedial en el litigio colectivo. *Véanse,* la distinción entre acciones de clase de los puntos b.2. y b.3 de la Regla 23 de las Normas Federales de Procedimiento Civil.

A debate that incorporates this remedial dimension should be informed by empirical data on the remedial practices developed so far in Argentina and in other jurisdictions. As a first step towards such empirical exploration, let us consider for instance certain features of remedial solutions implemented in right to health claims in Argentine courts.

(a) ***Public law litigation involving the Right to Health.*** Faced with growing public law litigation brought by ombudspersons, civic organizations and public interest lawyers,[25] judges have reacted by using various innovative remedies including, for instance, orders to redesign a gender-based quota system in a teachers college,[26] orders instructing the provision of daycare services to female police employees,[27] or orders to reform the penitentiary system.[28]

There is neither socio-legal research nor officially generated data that depicts the spectrum of the remedial measures applied by the courts, the compliance statutes of administrative agencies, or the practical implications of such remedial solutions on the transformation of administrative agencies and the behavior of public officers, and the effective exercise of plaintiffs' rights. Although such an inquiry is beyond the scope of this paper, a preliminary exploration of the remedies ordered in cases alleging violations of the right to health illustrate public law litigation's preliminary transformation of the judiciary's traditional remedial function.

The federal and state public health systems in Argentina have progressively deteriorated over the last few decades. This deterioration accelerated in the nineties, and the health system reached its lowest point during the months that followed the December 2001 crisis.[29] The

[25] Gustavo Maurino et al., *op. cit., supra* nota 2.
[26] *Fundación Mujeres en Igualdad v. Gobierno de C.A.B.A.* [cita]
[27] [completar cita]
[28] [completar cita]
[29] Julieta Rossi, "El Colapso del Sistema de Salud," en *Derechos Humanos en la Argentina, Informe 2002-2003*, Centro de Estudios Legales y Sociales (CELS), Siglo Veintiuno Editores, Argentina, 2003, p. 377.

situation in public hospitals and the absence of provision of medical treatments and drugs to the poorest and most marginalized sectors of the population evidence the crude effects of a State that has relinquished its duties as guarantor of the constitutional right to health.[30] In the context of these events, various actors resorted to the federal and local courts to demand remedies against exclusionary actions or omissions on the part of state bureaucracies and public hospitals. Furthermore, the new litigation shows the incremental phenomenon of civic society's mobilization around the health system,[31] and the incorporation of public law litigation strategies among other participatory devices.[32] On the other hand, from the remedial perspective, the decisions published in legal periodicals[33] exemplify a variety of injunctive orders with various degrees of judicial interference in the management of public administrative agencies.

(i) Supply of Medical Treatments and Drugs. [34] On some occasions, judges have ordered state agencies to deliver or to avoid interruptions in the delivery of drugs and medical treatments. For instance, in *Asociación Benghalensis*[35] a majority of the Supreme Court, faced with a claim of a group of organizations dedicated to the defense of AIDS and HIV-positive patients, upheld the orders of the National Ministry of Health and Social Action (NMHSA) to "duly fulfill its obligation to assist, treat, and, especially, supply drugs—in a regular, timely, and continuous

[30] Rossi, *op. cit.*, p. 378.
[31] Los reclamos alcanzan también a las prestadoras privadas del servicio de salud. Sin embargo, no me referiré aquí a ese ámbito del litigio que también ha alcanzado proporciones significativas en los últimos anos.
[32] Para una descripción más completa de varios de estos casos, *véase*, en general, el "Informe sobre la Situación de los Derechos Económicos Sociales y Culturales en la Argentina" E. Contarini, C. Fairstein, J. Kweitel, D. Morales, J. Rossi, en *Los Derechos Económicos Sociales y Culturales: Un Desafío Impostergable*, IIDH, Costa Rica, 1999, p. 25-176; y Abramovich & Courtis, *op. cit.*, *supra* nota 10, p. 139 y siguientes. *Véanse* asimismo, los capítulos sobre derechos económicos, sociales y culturales en informes anuales del CELS, 2000 y 2001.
[33] Dadas las limitaciones en la publicidad de las sentencias judiciales de tribunales locales y federales inferiores a la Corte, considero sólo los casos difundidos en revistas jurídicas como La Ley y Jurisprudencia Argentina, o citados en los informes mencionados del CELS.
[34] No revisaré aquí las decisiones en cuestiones de salud sexual y reproductiva como por ejemplo, *Portal de Belén* (declarando inconstitucional la aprobación administrativa de una variedad de anticonceptivo de emergencia) ya que los remedios desplegados no se relacionen a la provisión de tratamientos o medicamentos o la infraestructura hospitalaria. Sin embargo, en investigaciones futuras será importante contemplar el rol del género en el litigio de derecho público y en aquel sobre la salud, en particular.

way—to [AIDS and HIV] patients registered in public hospitals and health clinics."[36] Likewise, in *Campodónico de Beviacqua*,[37] the majority of the Supreme Court ratified the national government's instruction to continue, "in an urgent and a timely fashion as required in the case," the delivery of the treatment for Kostman's Syndrome through the National Antineoplastic Drugs Bank—a delivery that had been suspended by the NMHSA.[38] In another case brought by the Multiple Sclerosis Association,[39] the Court ordered the NMHSA to reinstate coverage under the Obligatory Medical Plan (OMP) of the treatment for multiple sclerosis patients and those suffering from a rare demyelization syndrome that does not produce symptoms or exacerbations for two years.[40]

In the final decisions of lower courts, it is also possible to observe injunctive relief orders mandating public agencies to remedy prejudicial practices or omissions in the supply of drugs and treatments. By 1997, the Bahía Blanca Court of Appeals had ordered the provincial government to continue the provision of treatments and drugs for 34 AIDS patients in two local hospitals.[41] Similarly, in *A., C.B. v. MSAS*,[42] the courts ordered that the national government supply AIDS treatment and drugs in "regular, timely, and continuous fashion."

Furthermore, in the renowned decision *Viceconte*,[43] the appeals court: (a) ordered the federal government to comply "strictly and without delay" with the legal stages of the production

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[35] *Asociación Benghalensis y otros v. Estado Nacional,* C.S.J.N., 1/6/2000, Fallos 323:1323.
[36] Considerando 4º.
[37] *Campodónico de Beviacqua, Ana v. Estado Nacional,* C.S.J.N., 24/10/2000, JA 2001-I-464.
[38] Esta vez, la Corte rechazó los argumentos del Estado apuntando a la responsabilidad primaria de la obra social a la que pertenecía el demandado y la provincia de su residencia, ya que la obra social no se encontraba "en condiciones de asumir la regular cobertura de la medicación necesaria para el tratamiento del niño," la situación de precariedad laboral y económica de la familia y el estado de extrema urgencia.
[39] *Asociación de Esclerosis Múltiple v. MSASN*, C.S.J.N., 18/12/2003, Sup. Const. 2004, 30 – JA 12/04/2004.
[40] Este tratamiento había sido excluido del PMO por una resolución ministerial del 2001.
[41] *C., C. y otros v. Ministerio de Salud de la Pcia. de Buenos Aires*, Cám.Civ.yCom.BahíaBlanca, Sala II, 2/9/1997, LLBA-1997-1122.
[42] Cám.Nac.Cont.Adm.Fed., Sala IV, 9/3/1998, LL 1999-C-86.
[43] *Viceconte, M. v. Estado Nacional,* C.Nac.Cont.Adm.Fed., Sala 4, 2/6/1998, JA 1999-I-485.

schedule of the vaccine for the *mal de los rastrojos*,[44] under the threat of making the Ministers of Health, Economy and Labor, and Public Services personally responsible; (b) notified the President of the judgment; (c) charged the National Ombudsperson with oversight and control of the fixed schedule; and (d) finally, required that the plaintiff inform the court about compliance with the production schedule. Similar orders were granted by the courts when reviewing preliminary injunctions in cases such as the Supreme Court's decision in *Barría*.[45]

During the critical months of the end of 2001 and the beginning of 2002, there were various interruptions in governmental programs for the delivery of drugs due to administrative problems in the purchase and importation of drugs, and due to the precarious management of a public administration that followed the abrupt changes in the Presidency. Consequently, during 2002, the increase in lawsuits regarding drugs supply was exponential.[46] In the preliminary injunction issued in the *A.V. y otros c. MSASN* case,[47] for example, a judge ordered the Ministry of Health to implement "immediate provision" of the drugs used in the AIDS Program and the adoption of a two-day plan of measures necessary to "regularize and maintain the successive supply" of drugs. Upon reviewing the delays after the issuance of his order, this same judge applied economic sanctions to exact compliance. A similar order was granted in a case involving the provision of drugs for the treatment of tuberculosis.[48] In another set of cases, the courts ordered the supply of drugs to treat epileptic patients.[49]

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[44] Enfermedad endémica de una zona del sur de la provincia de Buenos Aires.
[45] *Barría, Mercedes y otro v. Pcia. de Chubut*, C.S.J.N., 18/12/2003, La Ley 7/4/2004, (medida cautelar ordenando la continuación de un servicio de diálisis).
[46] Según informes de la Cámara Civil y Comercial Federal, entre diciembre de 2001 y marzo del 2002 se presentaron en la Capital Federal más de 200 amparos por interrupciones de suministro de medicamentos. Julieta Rossi & Carolina Varsky, "La salud bajo la ley del mercado," en *Informe de Derechos Humanos 2002*, CELS, Siglo Veintiuno Editores, 2003, p.346.
[47] Juz.Civ.Com.Fed. No. 7, citado en Rossi, *supra* nota 30, p. 398.
[48] Juz.Civ.Com.Fed. No. 7, 21/10/2002, citado en Rossi, *supra* nota 30, p. 401.
[49] *Defensora del Pueblo de la Ciudad de Buenos Aires v. GCBA*, 17/7/2002, citado en Rossi, *supra* nota 30, p. 402.

(ii) *The Organization of Hospitals and Health Clinics*: In another series of decisions from various jurisdictions throughout the country, judges have intervened remedially in the administration of hospitals and other health services. In *Defensoría de Menores Nro. 3*,[50] for example, a court of appeals in Neuquén confirmed an injunction ordering the provincial government to create and permanently pay for three nursing positions when hiring personnel for a pediatric intensive care unit in the local hospital. Similarly, in *Colegio de Médicos de la Pcia. de Buenos Aires*,[51] a judge in Mar del Plata required the provincial government to: (a) fulfill the legal mandate to decentralize local hospitals within 180 days of being notified of the judicial decision, (b) notify the officials designated by the executive branch to implement judicial decisions, (c) prepare budget estimates within the rubric of decentralized entities for the next fiscal year, (d) provide in a constant and immediate manner hospital supplies, medicine, medical personnel, and assistants necessary for the normal functioning of hospitals, and (e) insure that $20,000 remain in each hospital's operating account for the purchase of supplies and medicine.

Also in *Asociación de Médicos Municipales de Buenos Aires v. Gobierno de la Ciudad*,[52] a court of appeals in Buenos Aires upheld part of a trial court's judgment instructing the local government to hire medical personnel to resume the normal functioning of the histopathology unit of the Hospital General de Agudos, which had seen its personnel reduced from three to one, resulting in delays in securing diagnoses. To this end, the judges required the government to "marshal the funds conducive to maintaining the normal functioning of the histopathology unit…[and] provide the necessary specialized personnel needed to perform tests…in a timely and prompt fashion for the treatment of the disease."[53]

[50] Cám.Civil de Neuquén, Sala I, 10-/3/1998, Expte. 77/ca 1998, citado en CELS *supra* nota 33.
[51] Trib.Crim. Nro. 3 de Mar del Plata, 4/6/2002.
[52] C.Cont. Adm.y Trib.Cdad.Bs.As., Sala 2, 22/8/2002, JA 2003-I-611.
[53] Considerando 13.

Finally, in a preliminary injunction granted in the *N. H. Tarrio y otros*[54]case, a judge ordered the regular delivery of supplies and drugs, and the repair of the hospital building and urgent instrumental material of certain units of the Hospital Interzonal de Agudos Eva Perón. The measure was subsequently confirmed in judgments entered against the provincial Minister of Health and the governor.[55]

(iii) Environmental Conditions for Exercising the Right to Health. On other occasions the courts have adopted remedial measures consisting of orders to act when the right to health of ill children and adults living in unhealthy conditions has been at stake. In the *Menores Comunidad Paynemil*[56] case, for instance, a court of appeals in Neuquén ordered the provincial executive branch to: (a) provide a daily supply of 250 liters of water to each inhabitant, (b) ensure that affected inhabitants would have their potable water within forty-five days, (c) within seven days, commence proceedings for the determination of the damages caused by the contamination of the water supply, and (d) adopt pertinent measures if damages were sustained, and necessary measures to ensure environmental preservation. More recently, in the same jurisdiction, a trial court judge[57] instructed the provincial government to improve the environmental conditions of the home of a family with a girl who suffered from a grave illness. The judge also ordered the government to ensure that the neighborhood had potable water, heating, electricity, and a septic tank. The decision was appealed to the Neuquén court of appeals,[58] which accepted the provincial government's temporary solution of transferring the minor and her family to a hotel until a home with the services required by the trial court's judgment could be secured through the Provincial Housing Department.

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[54] Juz.de Gtías., San Martín, No. 2, Causa 5992. Citado en Rossi, *supra* nota 30, p. 383.
[55] Sentencia, 23 de agosto de 2002, citado en Rossi, *supra* nota 30, p. 383.
[56] Cám.Apel.Civ.Neuquén, Sala II, Expte. 311-CA-1997, citado en CELS *supra* nota 33.
[57] *Defensor de los Derechos del Niño y Adolescente v. Pcia. de Neuquén.*

This type of claim, however, has encountered negative responses on other occasions. Two decisions worth mentioning were made during the critical circumstances of 2002 when judges rejected right to health claims on the ground that their resolution was beyond judicial competence.

In the *Ramos, Marta y otros v. Pcia. de Buenos Aires*[59]case the majority of the Supreme Court denied the claim of a mother living in extreme poverty with her eight children for a subsidy and necessary assistance for, among other things, the transfer of one of her daughters to the Hospital Garrahan, where she was to undergo surgery for a congenital heart disease and to where her mother could not transfer her because she (the mother) lacked a job, resources, and a caretaker for her other children. In the case, a majority of the court found that the claim was "manifestly inadmissible" because impediments imposed by the defendants to frustrate access to the free and public hospital had not been accredited.[60] The court also rejected its jurisdiction to evaluate "the control of the wisdom with which the administration carries out the functions that the law validly charged it with, or the reasonableness with which it exercises its own powers."[61]

Toward the end of that same year, a court in Chubut let stand a trial court judgment[62] that ordered the provincial government to furnish a health center with budgetary, human and organizational resources. According to the trial court judge, the health clinic lacked the necessary resources to provide milk to wet nurses and malnourished children, basic medicines and personnel to attend to patients. However, through various formulations of the lack-of-judicial-competence argument, the Court of Appeals determined that the trial court's judgment

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[58] Cám.Apel.Civ.Neuquén, Sala II, 3/9/2002, LL 2002-F-477.
[59] C.S.J.N., 12/3/2002, JA 2002-IV-466.
[60] El Ministerio de Desarrollo Social de la Nación, la Pcia. de Buenos Aires y el Hospital de Pediatría Garrahan.
[61] Considerando 8º. Curiosamente, esta decisión se dio en los mismos días de las decisiones de la misma Corte en defensa del derecho de propiedad de ahorristas en dólares invalidando drásticas medidas financieras de emergencia.
[62] *Martínez, Celmira y otros v. Chubut*, Cám.Apels.NOEChubut, Sala B, 18/11/2002, JA 2003-III-510.

unjustifiably interfered with health care policy design and the health care policy of the province, and that these matters were "technical and scientific material alien to the capabilities of the judiciary."

(b) Preliminary Characterization of the Current Remedial Model. The cases reviewed in which claims were successful are similar in structure to the morphology of public law litigation classically defined by Chayes.[63] In contrast to traditional bipolar litigation, the parties who bring these claims are plural and amorphous, and include combinations of individuals, ombudspersons, and a variety of civic organizations that represent the "affected" parties in various degrees. In addition, the cases involve judicial interference in the organization and operation of public administrative agencies in charge of subsidies and plans for the delivery of medicine and the management of hospitals. From the remedial perspective, the new type of litigation does not pursue compensation for past damages, but rather a transformation of future institutional practices through the *ad hoc* design of solutions the consequences of which will exceed, in the majority of situations, the impact on the parties before a judge.[64]

The preeminence of remedial interventions in the form of injunctions instead of damages, and the multiple forms of interventions that judges seem to adopt, constitute one of the specific characteristics of this new type of judicial involvement in public administration affairs.

Even if the cases seeking the transformation of the health care system set forth modest objectives as compared to those of education and housing desegregation litigation in the U.S., one can discern in the injunctive measures features shared with U.S. "structural injunctions." These remedies seek "the reorganization of social institutions"[65] and through this organizational

[63] Chayes, *op. cit.*, p. 1284.
[64] Chayes. *op. cit.*, p. 1284-1315.
[65] Owen Fiss, *The Civil Rights Injunction*, *supra* nota 11, p. 9.

reform they seek to repair the harm that public agencies' structure can produce when violating certain constitutional rights.[66]

Judicial interference with the hiring of hospital personnel,[67] the definition of the reach of a treatment and instructions for the provision of medicines,[68] the residential relocation of families[69] or the decentralization of public hospitals, for example, can be reinterpreted as incipient forms—and more limited than their U.S. equivalent—of judicial orders that seek the adjustment of administrative and hospital agencies to comply with the constitutional mandate of providing adequate health services.

In the United States, where structural injunctions are more developed, their evolution has undergone various stages over the last forty years. According to Fiss, during the first decade of civil rights litigation (1954-1964) structural injunctions consisted of two parts: a broad prohibition ("end racial discrimination," "end a dual/segregated educational system") and a requirement that school officials present a plan to transform the dual educational system into a racially unified one.[70] In the litigation mentioned earlier, on the other hand, Argentine judges seem to have preferred, for the preliminary developmental stage of these injunctions, a remedial intervention model with a slightly higher degree of specificity. This degree of intervention is more similar to the model of the more detailed decrees adopted by U.S. courts in the decades

[66] Ejemplos de estos remedios estructurales incluyen, entre varios otros, el diseño de un sistema de traslados en autobús de estudiantes de una jurisdicción a otra para la promoción de la integración racial y la redefinición de jurisdicciones residenciales; la instrucción de reformas en las condiciones de internación de pacientes con enfermedades mentales; la exigencia de cursos de entrenamiento para la educación de policías; y el desarrollo de códigos sobre la administración de prisiones con indicaciones sobre la infraestructura residencial, alimentación, vestimenta, bibliotecas, y las condiciones de trabajo, educación y servicios de salud de cárceles.

[67] *Defensoría de Menores Nro. 3*, *supra* nota 51; *Colegio de Médicos de la Pcia. de Buenos Aires*, *supra* nota 52, *Asociación de Médicos Municipales de Buenos Aires v. Gobierno de la Ciudad*, *supra* nota 54.

[68] *Asociación Benghalensis*, supra nota 37.

[69] *Defensor de los Derechos del Niño y Adolescente v. Pcia. de Neuquén*, *supra* nota 58.

[70] Cfr. Owen Fiss, *The Civil Rights Injunction*, *supra* nota 11, p. 14:"La técnica de presentación de un plan al tribunal era un intento de lograr que los demandados –en lugar de los demandantes o el tribunal – especificaran los pasos remediales. Reflejaba la incertidumbre doctrinaria, (…); consideraciones estratégicas (…), y el deseo de capitalizar la experiencia del organismo a cargo de la administración de las escuelas (…)."

following 1964.[71] In this way, and although less disaggregated and complex than the U.S. structural injunctions of this second stage, Argentine injunctions also exemplify the "command and control" style of vertical regulation in which a central authority dictates specific instructions to administrative bureaucracies.[72]

IV. Toward a New Remedial Paradigm.

(a) The Experimentalist Litigation Model. According to Sabel & Simon, the last decade of U.S. public law litigation has seen a turn from this last type of remedy toward experimentalist solutions that combine more flexible and provisional forms of regulation in which parties have more discretion and collaborate in an educational and reconstructive process.[73]

The observation of the transformation of remedial practices towards experimentalism within traditional areas of public law litigation like the mental health system, schools, prisons, housing policy, and police abuse[74] has led these authors to look to a new model of this type of litigation that operates as "destabilization rights." Following Mangabeira Unger in *False Necessity*, Sabel & Simon consider that this new version of public law litigation has a destabilizing effect that "protect[s] the citizen's interest in breaking open the large-scale organizations or the extended areas of social practice that remain closed to the destabilizing effects of ordinary conflict and thereby sustain insulated hierarchies of power and advantage.""[75]

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[71] Owen Fiss, *op. cit.*, p. 14.
[72] Sabel & Simon, *op. cit.* supra *nota* 3, p. 1019.
[73] Sabel & Simon, *op. cit.*, p. 1019.
[74] Para los autores, esta transformación ha adoptado formas variadas en las cinco áreas de litigio señaladas. Por ejemplo, en el litigio reciente en cuestiones de educación se han aprobado planes desarrollados por las partes especificando resultados y procedimientos para la medición del progreso hacia los mismos (*Vaughn G. v. Mayor and City Council of Baltimore*, citado por Sabel & Simon, p. 1026). Asimismo, en los casos de litigio en cuestiones de salud mental se han abandonado los decretos detallados de las primeras épocas por procedimientos en los que "las partes y expertos que ellas recomiendan, tienen la oportunidad real de hacer propuestas a las políticas sugeridas e iniciativas de entrenamiento antes de la adopción de las mismas, (…) y los demandados tienen que considerar seriamente tales propuestas." (*Evans v. Williams*, 139 F. Supp. 2d. 7, 85, DDC 2001).
[75] Mangabeira Unger, Roberto, *False Necessity: Anty-Necessitarian Social Theory in the Service of Radical Democracy*, 1987, p. 530.

The "destabilizing effect" of the new public law litigation is observed in two stages: the determination of liability or of a rights violation, and the definition of experimentalist remedies. In the ideal reconstruction of the experimentalist remedies model, Sabel & Simon review its three central features: (a) negotiation among stakeholders, (b) the continuous, provisional, and fluid character of remedial intervention, and (c) transparency.[76]

The negotiations between parties and other interested actors –broadly defined- are a central aspect of this new model. These negotiations also may include the participation of extrajudicial agents such as special masters and mediators appointed by a judge to coordinate the deliberations until the establishment of an agenda and of rules for dialogue between the parties.[77] Deliberations between the parties are based on the presentation of good faith reasons, and have the goal of reaching a consensus that benefit all those involved. Even when such a consensus cannot be reached, the established standards of dialogue constitute a fundamental contribution to the design of a better remedial solution, both between the different parties and, ultimately, between the parties and the mediators, extrajudicial officials, and the judge.[78] Secondly, the flexibility and provisional nature of the remedies function as tools to fight both the restrictions on available information in the remedial design stage and the subsequent articulation problems in the agency's implementation of the remedies.[79] Thirdly, the experimentalist remedies model is characterized by its transparency; that is to say, the provisional terms negotiated by the parties should be explicit and public, and ideally should be accompanied by an agreement about the means available to the public to evaluate their fulfillment.[80]

[76] Sabel & Simon, *op. cit.*, p. 1067-1072.
[77] Se observa entonces una redefinición del rol de los clásicos *special masters* y funcionarios extrajudiciales que actúan como árbitros de la deliberación entre partes más que como ejecutores de instrucciones judiciales.
[78] Sabel & Simon, *op. cit.*, p. 1068.
[79] Sabel & Simon, *op. cit.*, p. 1070.
[80] Sabel & Simon, *op. cit.*, p. 1072.

(b) A Model to be explored in Argentina? For Sabel & Simon, this new model of public law litigation and the type of remedies it presupposes is more effective in fostering state compliance with legal obligations and more consistent with the structure of U.S. government. But is this model worth exploring for Argentina? Is it possible to find arguments in favor of extrapolating the speculations of these scholars to a context as different as ours?

I believe that the experimentalist model, and particularly the underlying remedial style, provides an innovative framework that allows us to expand our understanding of the quality and efficacy of public law litigation. This could be the case in spite of the speculative and provisional tone of our reflections due to the rudimentary development of public law litigation in Argentina, and the absence of an empirical understanding about the successes and limitations of the remedies used to date.

Even with these limitations in mind, it is possible that the remedial experimentalist model may offer more effective answers to the debate about the judiciary's lack of legitimacy and institutional capacity to issue structural injunctions in Argentina. Likewise, it is probable that this model will be useful in completing currently proposed procedural reforms.

(i) Lack of Legitimacy. Judicial control over public administration has traditionally been justified by the failure of administrative agencies to meet performance standards, and by the violation of the procedural and substantive rights of citizens by state agents and agencies.[81] In public law litigation, the classic justification of judicial review of administrative agencies' performance is supplemented with arguments highlighting the inexistence of democratic mechanisms to access the administrative bureaucracy, or by the blocking of avenues of redress for disadvantaged groups in the political game of reaching the government. It is this justification

[81] Martin Shapiro, *Who Guards the Guardians? Judicial Control of Administration*, The University of Georgia Press, Athens and London, 1988, p. 55.

that has been controversial for those who question the legitimacy of judicial interference in the spaces reserved for politics and the majoritarian game.

The experimentalist model of structural orders responds to these objections by proposing a deliberative model in which the plaintiffs and public administrative officials negotiate the best possible solution under conditions of provisionality and transparency, and under the arbitration of a judge or her official appointees. This way, judges do not need to have the last word in the design of remedies. In exchange, parties and government officers have the opportunity to shape the remedies and participate with voice and vote, reinforcing the democratic legitimacy of judicial intervention in suits against the administration that originated within the framework of public law litigation. To the extent that this deliberation is possible, the experimentalist model also recognizes the complex interactions between the powers and the limits of their legitimacy, characteristics that the objectors to the legitimacy of judicial interference tend to avoid.

On the other hand, as Sabel & Simon note about the U.S. case, the transparency promoted by the experimentalist remedies model paves the way for the generation of mechanisms that hold accountable plaintiffs, defendants and their lawyers, other representatives of affected individuals involved in the judicial process, and the judges themselves.[82] In this way, a crucial component of the democratic legitimacy of other governmental branches that not usually present in the work of courts or litigants is incorporated into the sphere of litigation: the phenomenon of settling accounts with the public or, at the very least, the potential of such a settlement. At the same time, the model rejects the simplified, formalist vision that presumes that the public administrative bureaucracy operates at all of its organizational levels with the same degrees of public accountability and, therefore, the same legitimacy enjoyed by political officials and by the President.

In the Argentine case, two specific aspects linked to the democratic legitimacy deficits of local institutions can be added to the advantages identified so far. On the one hand, in the context of the institutional weakness that characterizes the three branches of Argentine democracy, assuming the democratic legitimacy of the legislative and executive branches over that of the judiciary on the basis of an idealized functioning of the majoritarian principle and the representative system would be at least naive.[83] The country's hyper-presidentialist tradition, with components like the personalization of power, scarce transparency, and political instability—added to the distortions of the representative system—advise caution with respect to the presumption of irreproachable legitimacy of the political branches. If to this we add the political system's current conditions—over which a single hegemonic party rules and, with the exception of a brief period, has had monolithic control over all the branches during the last fifteen years[84]—that presumption of absolute legitimacy seems to crumble quickly.

Clearly the judiciary also suffers from serious deficits of legitimacy, lack of independence,[85] the public's perception of a high degree of corruption and incompetence,[86] lack of diversity[87] and the obvious limitations in access to justice for wide sectors of the population.[88]

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[82] Sabel & Simon, *op. cit.*, p. 1093.
[83] Guillermo O'Donnell, "Delegative Democracy," 5 *Journal of Democracy* 55 (1994); "Horizontal Accountability in New Democracies, en *The Self-Restraining State: Power and Accountability in New Democracies*, Andreas Schedler, Larry Diamond, y Marc F. Plattner, p. 29-51, Boulder: Lynne Rienner, 1999.
[84] Rebecca Bill Chavez, *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina*, Stanford University Press, Stanford, 2004, p. 53.
[85] Bill Chavez, *op. cit.*, p. 26. Según Bill Chávez son indicadores de falta de independencia los oscuros procesos de designación de jueces del pasado, la violación de las garantías de inamovilidad e intangibilidad de salarios, la ampliación del número de jueces de la Corte, y la resistencia de los jueces a fallar contra el poder ejecutivo. Cfr. Bill Chávez, *op. cit.*, p. 26. *Véase* también, Gabriel Negretto & Mark Ungar, "Independencia del poder judicial y estado de derecho en América Latina: Los casos de Argentina y Venezuela," 4 *Política y Gobierno* 81 (1997).
[86] *Véanse*, estudios de opinión citados C. Nobini, *Informe sobre Argentina*, Vance Center, NY, Marzo 2004; Gallup Argentina, *Estudio de Opinión acerca de la Administración de Justicia*, La Ley, Buenos Aires, 1994.
[87] Me refiero aquí a la homogeneidad de su demografía, y, especialmente, a su composición sociocultural. Sobre este punto, *véase* respecto de los jueces de la Corte Suprema, por ejemplo, Ana Kunz, "Los magistrados de la Corte Suprema de Justicia en la Argentina (1930-1990).
[88] *Véase*, *Obstáculos y Limites al Acceso a la Justicia en la Ciudad de Buenos Aires. Servicios de Asesoramiento y Patrocinio Jurídico Gratuito en la Ciudad de Buenos Aires*, Defensoría del Pueblo y CELS, disponible en http://www.cels.org.ar/Site_cels/documentos/patrocinio_gratuito.pdf.

Against this background, a model of remedial intervention that supposes a dialogue between branches whose democratic legitimacy is not presumed appears as a better alternative to one that values the legitimacy of one branch over that of another, as does the "command and control" model that privileges a stricter, vertical judicial intervention. The creation within the judicial process of a space for inter-branch deliberation in which affected parties also participate can supplant the imposition of orders by a de-legitimated branch with orders issued by a fragile one that intends to strengthen and re-legitimate itself.

In addition, the role of transparency in the experimentalist model has additional value in the Argentine context where mechanisms to access information and the channels for societal participation in the proceedings against the three branches of government are often weak, or even nonexistent.[89]

(ii) Lack of Institutional Capacity. Critiques of the courts' institutional capacity and their efficacy in public law litigation and the issuance of structural injunctions have taken on many forms since the dawn of the development of the civil rights movement.[90]

In a possible categorization of the basic obstacles confronted by courts while designing and implementing remedies, Shuck has identified, for example, the problems of information, power of communication, incentives, and the difficulty of obtaining political and public support

[89] [completar cita]

[90] Según algunas formulaciones de las objeciones basadas en la inefectividad del poder judicial: "[l]os tribunales saben bastante más sobre declarar derechos de lo que saben respecto de diseñar remedios, por lo cual deben dedicar mucho más tiempo para adivinar lo que podría servir para alcanzar los objetivos de los jueces. Los tribunales se ponen impacientes con esta etapa del caso. Quieren resolver las cosas de una vez y para siempre, incluso cuando han advertido que el caso les retornará de un momento a otro." Donald Horowitz, *op. cit.,* y en Robert Wood (ed.), *Remedial Law: When Courts Become Administrators*, the University of Massachusetts Press, Amherst, (1990), p. 34. Asimismo, para Robert Katzmann: "Para la mayoría de los jueces la dificultad reside en que, por su entrenamiento, su preocupación no es la forma en la que operan las organizaciones. Muchos de ellos tienen sus experiencias en estudios jurídicos. La mayoría no tiene experiencia en la administración de burocracias." Wood, *op. cit.*, p. 35. Para una presentación de las limitaciones de la acción judicial con más matices y sustento empírico, *véase*, Rosenberg, Gerald, *The Hollow Hope: Can Courts Bring about Social Change?*, The Univ. of Chicago Press, Chicago, 1991.

for the proposed measures.[91] In the litigation involving the right to health presented in Part III of this paper, these objections tend to take the form of health officials and hospital administrators questioning the ability of the courts to assess and to manage the impact of the parties' demands[92] and the effects of the unjust distribution of scarce resources in which the Argentine state and its agencies operate.[93] Within the judicial discourse, these arguments appear forcefully in the *Ramos* and *Martínez*[94]cases in which the judges seem to fearfully reverse course because of the perceived breadth of the task demanded.

It is probable that empirical studies of judicial remedies reviewed in Part III illustrate the existence of many of these limitations in the effective implementation of judicial remedies. To overcome them, the negotiation, provisionality and transparency proposed by the experimentalist remedies model offer some particularly attractive answers in our context.[95] This is so because, first, our public administration generates very little information for public policy design and, at the same time, judicial employees and judges tend to lack the tools and the preparation to process

[91] Peter Schuck, *Suing Government, supra* nota 11, p. 154-169. Según Schuck, en primer lugar, las limitaciones en la información disponible para el juez al momento de dar forma a los remedios necesarios pueden implicar una restricción indudable en el diseño informado de un remedio adecuado. Muchas veces, además, la selección de casos testigos que asume el litigio de derecho público supone también la baja representatividad de los casos que llegan al tribunal. Por otra parte, cuando la etapa de implementación de un determinado remedio se extiende en el tiempo, es probable que las transformaciones sociales redunden en la modificación sustantiva de la información con la que cuentan los tribunales, a menudo, poco flexibles en la adecuación frente al paso del tiempo de sus propuestas remediales. Las restricciones en materia de información también se materializan en las dificultades de los tribunales para generar y procesar información sobre costos, beneficios, etcétera. Schuck, *op. cit.*, p. 158.

[92] *Véase* por ejemplo, *Asociación Benghalensis, Campodónico de Beviacqua, Colegio de Médicos de la Pcia. De Buenos Aires*, citados en el punto III *supra.*

[93] Así, por ejemplo afirma el gobierno en *Campodónico de Beviacqua*, "la carga impuesta por el a quo compromete los recursos económicos disponibles para organizar los planes de salud, de acuerdo con lo previsto en la ley 24.156 en detrimento de la población desprovista de cobertura medica que el ministerio tiene que proteger." (Considerando 8, Dictamen Procurador General de la Nación). también en *Asociación Benghalensis*, el Ministerio de la Nación alegó el riesgo de una intervención que afectara "la política de salud que compete al ministerio en el marco de la ley específica y en la organización de la distribución del crédito asignado por el Presupuesto Nacional. Máxime, por las proyecciones que para el futuro pueda tener la decisión que en definitiva recaiga y su incidencia en los legítimos intereses de la economía nacional." (Considerando 6, Dictamen Procurador General de la Nación).

[94] *Véase*, *supra* notas 60 y 63.

[95] Estas características del modelo remedial experimentalist pueden también servir para repensar aquellos casos en los que los jueces han rechazado la competencia judicial arguyendo dogmáticamente la imposibilidad de intervenir en el control del acierto o la razonabilidad de la actuación administrativa.

the information produced by administrative agents. The experimentalist proposal can be a strong option in the face of the caution of the institutional framework in which administrative public policy is implemented.[96] In a similar manner, the possibility of revision of the remedies initially negotiated also appears as an interesting recourse against the rigidity of "command and control" remedies, which assume access to information and technocratic abilities that our judiciary is far from managing because of, among other reasons, a lack of understanding of the administrative bureaucracy's internal workings.

Secondly, the experimentalist remedies style appears as a possible means of surmounting the restrictions on communication[97] of judicial intervention through the involvement of these same administrative agents in the negotiations of a better judicial remedy. This would be so to the extent that a judge or a judge's agent is not made an additional negotiator of public officials that can question her ability to understand the problem in question and propose viable solutions.

Third, the experimentalist remedies model could favor better administrative compliance with the result of the litigation. Since measures such as contempt of court or the imposition of monetary fines on public officials are rarely used by Argentine courts, the possibilities of inducing the compliance that judges rely on are reduced. Partly because courts recognize the precariousness in which the public administration operates and partly because they lack the

[96] Pablo T. Spiller y Mariano Tomassi ilustran algunos de los problemas de rigidez, incoherencia, volatilidad y baja calidad de las políticas públicas en cuestiones sociales, regulatorias y fiscales en los ejemplos presentados en "The institucional Foundations of Public Policy: a Transactions Approach with Applications to Argentina," [cita] Señalan además los problemas estructurales que determinan la inexistencia de incentivos para la generación de una burocracia fuerte y entrenada. Por último, consideran también la ausencia de un control legislativo de la burocracia administrativa dada la baja calidad y falta de incentivos para invertir en formación y entrenamiento de muchos de los integrantes del legislativo.

[97] Al identificar las limitaciones del poder judicial para la emisión de órdenes estructurales, Schuck alerta sobre la incorporación de nuevos actores sin poder comunicacional a los numerosos rangos ya existentes dentro de la administración pública. Así, la incorporación del juez, o funcionarios por él designados, para supervisar la implementación de determinados remedios judiciales frente al accionar de la administración pública, tiene la potencialidad de agregar una o más capas y ejes de poder a un aparato estatal por demás estratificado y complejo. Schuck, *op. cit.*, p. 161. Por otra parte, estos nuevos ejes de poder se caracterizan, según Schuck, por encontrarse

legitimacy and power to exact compliance, the remedial model that involves administrative agents at the design stage could have the potential of elevating these agents' compliance levels with orders generated within the litigation framework.

Lastly, it is also probable that the dialogue generated between the parties and public officials in a remedial process in the style of the experimentalist model will prompt a participative process that will strengthen the relations between civic organizations and public officials, which in turn could eventually result in stronger political support and more social mobilization for the causes that public law litigation tries to promote.

These preliminary speculations demonstrate how the theoretical and empirical explanations of the experimentalist remedies model could offer a positive framework for the study of the legitimacy of the judiciary and its institutional capacity to intervene with structural injunctions in public law litigation.

V. A Few Proposals.

Many of those who work in the development of Argentina's public law litigation are conscious of the numerous difficulties in the embraced strategy. They view it as just another tool to deploy along with coordinated action in other spaces of public participation, such as politics or education. They know of the limits of "rights discourse" and of its operation in the context of structural inequality, anomy, informalism and the precariousness of Argentine democracy and institutions. They also do not ignore that, in these contexts, the law tends to operate as an instrument of oppression, and few cases in a de-legitimated forum like the judiciary can have little more than a marginal impact on the centers of power targeted for transformation. However, without being naïve about the limits of tools like public law litigation, they believe that the

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alejados de su audiencia, estar a menudo deslegitimados frente a ella, y por ser pobres comunicadores en el mundo de canales y vericuetos de la administración pública.

courts can be one more space from which to promote the construction of the rule of law and contribute to democratic deliberation, gradually and without giving rise to unattainable expectations.

It would be useful if future dialogues about the necessary conditions for a better deployment of public law litigation strategies incorporated an assessment of the alternative remedies available. Such an inquiry, in addition to a continued exploration of new models, it is necessary to produce more empirical analyses (both quantitative and qualitative) about the remedies used to date, and the relative efficacy of their impact on public administration. The litigation involving health issues can be a starting point, but areas such as prison administration or the control of public services might also provide interesting fields of exploration.

Empirical research should, in turn, serve to inform theoretical discussions and, eventually, legislative procedural reform proposals that improve the various existing remedies. The presence of legislators, lawyers, administrative and judicial officials, and civil society in these dialogues is crucial. In addition, spaces for legal education can play a fundamental role in fostering these discussions and promoting legal and curricular changes that inform lawyers and judicial officials about the functioning of the administrative bureaucracy and vice versa, and about the possible interactions between the administration, the judiciary and civil society.

The experimentalist remedies model presents a number of characteristics that recommend its inclusion as a possible alternative considered in those debates, especially because of the cooperation and deliberation that it demands of parties within the framework of a mechanism directed by the courts. But it will also be important to consider possible objections to this model, like the objection that, to a certain extent, the model presupposes the blurring of the judicial function, or that requires confidence in all parties' technical, negotiation, and dialogical

capacity—and good faith—that cannot necessarily be assumed. Whichever the conclusion we arrive at, incorporating the remedial dimension in those discussions will enrich our understanding of public law litigation.