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Justice and Experimentalism: The Judiciary's Remedial Function in Public Interest Litigation in Argentina

Paola Bergallo*

Since the 1994 constitutional reform, a group of lawyers, public defenders and societal organizations have turned to the courts in search of new spaces for participation in the pursuit of social change. To this end, they have increasingly promoted public interest litigation,¹ defined as a judicial claim in the form of an individual or collective lawsuit that seeks the structural transformation of state institutions to promote the respect of rights and democratic values established in the Constitution.

Even if the employment of this strategy of suing the state and its agents is still at an embryonic stage,² its development provides an interesting framework to discuss a few of the issues set forth by this panel's organizers relating to the possible contributions law could make to a reformist agenda. In particular, I want to explore an aspect of the new public interest litigation embedded within the domestic sphere: the model of judicial remedies crafted against state bodies in the struggle for structural reforms, and the role of these remedies in the definition of the objectives and styles of judicial intervention in public administration.

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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 descritas 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>.

I will argue here that it is necessary to reorient existing discussions about the legitimacy and institutional capacity of judicial activism in public interest litigation toward the deliberation about the role and type of remedies that the judiciary could or should orchestrate to contribute to the democratization process, the strengthening of institutions, and the fight against poverty.

With this objective, after a brief clarification of the concept of “judicial remedies” (Part I), I will present in a systematic fashion a few axes of the local debate about public interest litigation and law to point out its limitations and the necessity of reformulating it to include the remedial dimension of the lawsuit (Part II).

I will then explore a few ideas to situate the discussion about judicial remedies within the local plane. I will begin with an illustration of the remedial style displayed by our courts in public interest litigation to date. To this end, I will review the judicial remedies ordered within the body of incipient judicial interventions in cases involving the right to health in circumstances of poverty (Part III).

As the cases in which claimants were successful suggest, judicial remedies against public hospitals and state officials in charge of the health care system exemplify rudimentarily the traditional “command and control” model of intervention in public administration. Even though this type of intervention has positive aspects and has been successful at certain stages of impact litigation in jurisdictions like the United States, I will suggest throughout the rest of this paper that the particular developmental circumstances and institutional precariousness of Argentinean actors could be better suited to the use of judicial remedies of the *experimentalist litigation*

² Para un estudio del desarrollo del litigio en la forma de acciones colectivas, véase, Gustavo Maurino, Ezequiel Nino & Martín Sigal, *Acciones Colectivas: Análisis Conceptual, Constitucional, Jurisprudencial, Procesal y Comparado*, Editorial Lexis Nexis, Buenos Aires, 2005 (*en prensa*).

model for the *destabilization of rights*, as it was recently set forth by Sabel and Simon³ (Part IV). In addition to being better suited to the local institutional context, this model could offer more appropriate answers to the objections to impact litigation that are based on the lack of legitimacy or the judiciary's institutional incapacity. The paper concludes with a few contributory suggestions to the debate over the judiciary's remedial function, if it is to play a more effective role in the control of the administration in relation to structural inequality.

I. A Terminological Clarification

The Argentinean legal tradition does not have an equivalent to the U.S. legal system's notion of "remedies." Within the U.S. system, the concept of "remedy" refers to "the various types of instructions that courts order after being persuaded of the merits of a litigant's claims."⁴ Judicial remedies⁵ include: (a) the determination of damages, be they monetary compensation or punitive damages; (b) the declaration of parties' rights and obligations; and (c) a variety of orders denominated "injunctions"⁶ that instruct the defendant to cease her damaging conduct or begin conduct required by law.⁷ In particular, this last type of order requires the existence of irreparable damages and the absence of other adequate remedies. Various types of injunctions have been identified. Within the possible taxonomies, some differentiate among injunctions: (a) preventative, geared toward avoiding future harms; (b) reparatory, reserved for the reparation of

³ Charles Sabel & William H. Simon, "Destabilizing Rights: How Public Law Litigation Succeeds," 117 *Harvard Law Review* 1015 (2004).

⁴ Subrin, Minow, Brodin & Main, *Civil Procedure*, Aspen Publishers, 2nd. ed., 2004, p. 5 (la traducción es mía).

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.

past harms; and (c) structural, a term coined by public interest litigation, and deployed to reorganize social institutions. All of these may be temporary or permanent.

In our law, the principles of the Civil Code and procedural law contemplate the majority of the various remedies found in U.S. law and, in practice, judgments contain a determination of indemnification for damages, a recognition of rights and instructions to do or fail to do similar to the injunction. *Medidas precautorias* are also similar to the temporary or provisional orders featured in the common law. However, there is no conceptual equivalent to the U.S. legal notion of a remedy⁸; no comprehensive or specific body of procedural law, substantive law, literature or theoretical discussion about remedies; and of course no sociological studies of the remedies issued by Argentinean courts, their obstacles and their degree of effectiveness.⁹ Consequently, the treatment of issues linked to the courts' remedial function—when they are addressed—is performed in a fragmented way within the various areas of the law and without contextualizing their procedural aspects. Within the sphere of public interest litigation, the issue is addressed in the vocabulary of the implementation of judicial decisions and the processes of judgment execution or the instruments of contempt, daily monetary sanctions (*astreintes*), and other sanctions available in cases involving the failure to comply with judgments.¹⁰ The lack of

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” 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.

empirical studies of the remedial designs used by the courts and of compliance with their components is a constant in the opportunities for inquiry that this issue presents.

These conceptual and empirical omissions and, in particular, the lack of conceptualization of “structural” remedies¹¹ and others that are usable in the new plurilateral, amorphous, fluid, and provisional context of public interest litigation,¹² become especially relevant at the moment of confronting arguments about the legitimacy and institutional capacity of judicial interference in lawsuits against public administrative entities.

Because of this and because I believe that Argentinean law’s conceptual background does not suffice, throughout the rest of this work I take license to transplant the concept of judicial remedies to refer to the orders our courts give when plaintiffs’ claims are successful.

II. Redefining the Debate: The Incorporation of the Discussion over the Judiciary’s Remedial Function.

For the moment, the problem of implementing judicial decisions in public interest litigation and, more concretely, the problem of the function and style of remedies, has been relegated within the local discussions¹³ to the legitimacy of judicial activism and the implications

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

of judicial resolution of socioeconomic rights cases on the one hand, and to the debate over the procedural tools used to implement the new litigation itself on the other.

Like in the classic U.S. debates concerning the counter-majoritarian objection to judicial review that are based on the supposedly anti-democratic character of judicial intervention in lawsuits against branches of government constitutionally imbued with representativeness and a popular mandate, some have resisted *a priori* judicial intervention and the judicialization of claims that they consider should be resolved by Congress or by public administrative bodies.¹⁴ The lack of legitimacy of judicial intervention lies, according to various positions, in the violation of principles like the separation of powers¹⁵ or of values like self-governance.¹⁶

Another aspect of our debates over the role of judicial power in the realization of constitutional rights has revolved around the interpretation of an egalitarian principle of constitutional roots and the status of social, economic and cultural rights, centering on the role that constitutionalization of these principles imposes on courts.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 social rights, justifying the justiciability of rights traditionally considered “programmatically” 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 among categories, the moral implications of the

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 Aires, 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

equality principle in the definition of the substantive content of rights, or the terms of postulation of social, economic and cultural rights, support the judicial obligation to intervene.

Finally, it is possible to identify another group of local discussions relevant to the definition of the courts' role as a space of social transformation. These have considered the development of procedural tools necessary to the stimulation of judicial action in the protection of rights, and of institutional reforms that contribute to the strengthening of the country's democratic transition process. Since the 1994 constitutional reform, both judicial decisions and doctrinal exchanges have emphasized the interpretation of the constitutional principle that established the class action lawsuit (*amparo colectivo*) as the new summary procedural mechanism for the protection of collective rights.¹⁸ These exchanges have considered diverse criteria for the definition of active legitimization required by the *amparo colectivo* and its eventual regimentation, with special attention to the rights of those unrepresented in the process, to the collective effects of judgments, to the regulation of attorneys' fees and costs, and to the creation of mechanisms that incentivize respect for judicial decisions.¹⁹ These discussions have also incorporated the need to develop ordinary procedural resources in the style of class actions²⁰ to manage collective processes in a more just and efficient way.

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.

However, the three lines of argument set forth assume three types of unviable separations that impoverish and constrain the practical implications of the debate over the judiciary's role.²¹ First, the positions identified assume that the discussion about the legitimacy of judges' control over suits against the state can be separated from the analysis of what judges can or should do to control administrative conduct. These positions assume a rigid attribution of constitutional functions to the three branches and then present the judicial power as interfering with the powers clearly attributed to the other branches, instead of recognizing the complexity of inter-branch relations in their daily operation and the advantages of a dialogical interaction that assumes the blurring of strict functions that is conducive to practices that promote dialogue and interdepartmental deliberation. On another front, 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 contribute to the democratic legitimacy of judicial decisions.

The second type of argument, based on the problem of interpreting rights, also assumes the possibility of discussing the definition of the content of these rights without addressing its implications for remedies. That is to say, it presumes a qualitative separation between the idea of rights and the idea of remedies, instead of the bidirectionality between the two concepts that is necessary to keep in mind in order to reciprocally delimit their reach.²² Or likewise, as Levinson

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

has suggested,²³ this argument is guilty of an “an essentialist attitude toward rights”²⁴ resulting in the negation of the need to understand the symbiosis of the right-remedy pair to define the reach and the forms of judicial adjudication of rights themselves. 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 right. If rights have been designed to function in the real world, their content is inextricably linked to pragmatic considerations about their justiciability and operation.

Lastly, the third camp, those concerned about better procedural design, presupposes the plausibility of designing complex judicial proceedings—proceedings far removed from the traditional litigation model as a forum for the resolution of bipolar controversies—without evaluating the judicial remedies that could be required within the framework of new procedural methods.²⁵ 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 parties, like the role of judges, tends to be omitted in the formulation of proposed remedies, as do aspects of their provisionality, urgency and transparency, among others.

The limitations pointed out are only a few of the reasons that justify the need to refocus debates about the judiciary’s role in public interest litigation on the remedial aspects of the judicial function in this litigation.

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 Cathedral,” 85 *Harvard Law Review* 1089 (1972).

²³ Daryl J. Levinson, *op. cit.*, p. 861 y siguientes.

²⁴ “*Rights essentialism*,” en inglés.

²⁵ 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.

III. An Exploration of Actual Remedial Practices

A debate that incorporates this remedial dimension should nourish itself from the experiences that have developed to date in Argentina and other jurisdictions. To this end, let us turn to certain features of existing remedial practice in the area of the right to health.

(a) **Public Interest Litigation involving the Right to Health.** Faced with growing public interest litigation brought by ombudsmen, societal organizations and individuals,²⁶ judges have reacted by using various innovative remedies that include, for example, orders to redesign gender-segregated living arrangements in a public teachers college,²⁷ provision of daycare services to female police employees,²⁸ or penitentiary administrative reform.²⁹

Neither a sociological study nor official information exists that describes the spectrum of measures ordered by the courts, compliance with them, or the practical effect that these new remedial solutions have had on the modification of lawsuits against the state and its agents, and on the effective exercise of plaintiffs' rights. Even though this sort of inquiry is beyond the scope of this paper, a preliminary exploration of the remedies ordered in cases alleging a violation of the right to health illustrates public interest litigation's preliminary transformation of the judiciary's traditional remedial function.

As is known, the national and local public health systems have suffered a progressive deterioration over the last few decades. This deterioration accelerated in the nineties and reached a high point during the months that followed the December 2001 crisis.³⁰ The situation in public hospitals and the provision of treatments and medicine to the poorest and marginalized sectors of

²⁶ Gustavo Maurino et al., *op. cit.*, *supra* nota 2.

²⁷ *Fundación Mujeres en Igualdad v. Gobierno de C.A.B.A.* [cita]

²⁸ [completar cita]

²⁹ [completar cita]

³⁰ 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.

the population have for years made clear the crude effects of the state's reversal in its fulfillment of its function as the guarantor of the constitutional right to health.³¹ In the context of this process, various actors have resorted to the federal and local courts to demand remedies against omissions or exclusionary actions on the part of state bureaucracies and public hospitals. The judicial decisions that were generated called attention to the incremental phenomenon of society's organized effort against the health problem,³² and to the incorporation of the lawsuit into the mobilization toolkit.³³ On the other hand, from the perspective of remedies, the judgments presented in legal publications³⁴ show a variety of judicial orders of action or omission with various degrees of judicial interference in the management of public administrative agencies.

(i) *Medical Treatments and Medicine.*³⁵ On some occasions, judges have ordered state agencies to deliver or avoid interruptions in the delivery of medicine and medical treatments. For instance, in *Asociación Benghalensis*³⁶ a majority of the 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 medicine—in a regular, timely, and continuous way—to

³¹ Rossi, *op. cit.*, p. 378.

³² 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 años.

³³ 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.

³⁴ 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.

³⁵ 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.

[AIDS and HIV] patients that find themselves registered in the nation's hospitals and health clinics."³⁷ Likewise, in *Campodónico de Beviacqua*,³⁸ a majority of the Court ratified the national government's instruction to continue, "with the urgency and the timeliness that the case demands," the delivery of the treatment for Kostman's Syndrome through the National Antineoplastic Drugs Bank—a delivery that had been suspended by the NMHSA.³⁹ In another case brought by the Multiple Sclerosis Association,⁴⁰ the Court ordered the NMHSA to reincorporate coverage under the Obligatory Medical Plan (OMP) of the treatment for multiple sclerosis patients and those suffering from a rare demyelination syndrome that does not produce symptoms or exacerbations for two years.⁴¹

In lower courts' final decisions we also observe the emission of orders that obligate public agencies to remedy prejudicial practices or omissions in the delivery of medicines and treatments. By 1997, the Bahía Blanca Civil Chamber had ratified the provincial government's requirement that the necessary treatments for 34 AIDS patients in two local hospitals be continually delivered.⁴² Likewise, in *A., C.B. v. MSAS*,⁴³ the national government's order to supply medicine to extend an AIDS treatment in "regular, timely, and continuous fashion" was upheld.

³⁶ *Asociación Benghalensis y otros v. Estado Nacional*, C.S.J.N., 1/6/2000, Fallos 323:1323.

³⁷ Considerando 4°.

³⁸ *Campodónico de Beviacqua, Ana v. Estado Nacional*, C.S.J.N., 24/10/2000, JA 2001-I-464.

³⁹ 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.

⁴⁰ *Asociación de Esclerosis Múltiple v. MSASN*, C.S.J.N., 18/12/2003, Sup. Const. 2004, 30 – JA 12/04/2004.

⁴¹ Este tratamiento había sido excluido del PMO por una resolución ministerial del 2001.

⁴² *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.

⁴³ Cám.Nac.Cont.Adm.Fed., Sala IV, 9/3/1998, LL 1999-C-86.

Also in the renowned *Viceconte*⁴⁴ case the appeals court: (a) ordered the federal government to comply “strictly and without delay” with the legal stages of the production schedule of the vaccine for the *mal de los rastrojos*,⁴⁵ 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 Ombudsman 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 given by the courts when reviewing preliminary injunctions in cases like the Supreme Court’s *Barría*.⁴⁶

During the hectic months at the end of 2001 and the beginning of 2002, there were various interruptions in government programs’ delivery of medicine that were linked to administrative problems with the purchase and importation of drugs, and to the precarious management of a public administrative apparatus that mirrored the abrupt changes in the Presidency. During 2002, the increase in lawsuits demanding medicine was exponential.⁴⁷ In the preliminary injunction issued in the *A.V. y otros c. MSASN* case,⁴⁸ for example, a judge ordered the Ministry of Health to implement “immediate provision” of the medicine used in the AIDS Program and the adoption of a two-day plan of measures necessary to “regularize and maintain the successive supply” of medicine. Upon reviewing the delays after the issuance of his order, this same judge applied economic sanctions to exact compliance. A similar order was given in a

⁴⁴ *Viceconte, M. v. Estado Nacional*, C.Nac.Cont.Adm.Fed., Sala 4, 2/6/1998, JA 1999-I-485.

⁴⁵ Enfermedad endémica de una zona del sur de la provincia de Buenos Aires.

⁴⁶ *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).

⁴⁷ 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.

⁴⁸ Juz.Civ.Com.Fed. No. 7, citado en Rossi, *supra* nota 30, p. 398.

case involving the provision of medicine used to treat tuberculosis,⁴⁹ and in other cases courts ordered the delivery of medicine to epileptic patients.⁵⁰

(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*,⁵¹ for example, a Neuquén appeals court confirmed a provincial government order to create or 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*,⁵² 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 cycle, (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 safe for the purchase of supplies and medicine.

Also in *Asociación de Médicos Municipales de Buenos Aires v. Gobierno de la Ciudad*,⁵³ the Buenos Aires appellate court upheld part of a trial court's judgment that instructed the local government to hire medical personnel to resume the normal functioning of the histopathology unit of the General Hospital for the Acutely Ill, 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

⁴⁹ Juz.Civ.Com.Fed. No. 7, 21/10/2002, citado en Rossi, *supra* nota 30, p. 401.

⁵⁰ *Defensora del Pueblo de la Ciudad de Buenos Aires v. GCBA*, 17/7/2002, citado en Rossi, *supra* nota 30, p. 402.

⁵¹ Cám.Civil de Neuquén, Sala I, 10-/3/1998, Expte. 77/ca 1998, citado en CELS *supra* nota 33.

⁵² Trib.Crim. Nro. 3 de Mar del Plata, 4/6/2002.

unit...[and] provide the necessary specialized personnel needed to conduct exams...in a timely and quick fashion for the treatment of disease.”⁵⁴

Finally, in a preliminary injunction granted in the *N. H. Tarrío y otros*⁵⁵ case, a judge ordered the regular delivery of supplies and medicine, and the repair of buildings and urgent instrumental material of certain units of the Eva Perón Interzonal Hospital for the Acutely Ill. The measure was subsequently confirmed in judgments entered against the provincial Minister of Health and the provincial governor.⁵⁶

(iii) *Environmental Conditions for the Exercise of the Right to Health.* On other occasions the courts have adopted remedial measures consistent with orders to act when the right to health of ill children and adults living in unhealthy conditions has been at play. For example, in the *Menores Comunidad Paynemil*⁵⁷ case, the Neuquén Civil Chamber 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 judge⁵⁸ instructed the provincial government to air-condition 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 Civil Chamber,⁵⁹ which accepted the provincial

⁵³ C.Cont. Adm.y Trib.Cdad.Bs.As., Sala 2, 22/8/2002, JA 2003-I-611.

⁵⁴ Considerando 13.

⁵⁵ Juz.de Gtías., San Martín, No. 2, Causa 5992. Citado en Rossi, *supra* nota 30, p. 383.

⁵⁶ Sentencia, 23 de agosto de 2002, citado en Rossi, *supra* nota 30, p. 383.

⁵⁷ Cám.Apel.Civ.Neuquén, Sala II, Expte. 311-CA-1997, citado en CELS *supra* nota 33.

⁵⁸ *Defensor de los Derechos del Niño y Adolescente v. Pcia. de Neuquén.*

⁵⁹ Cám.Apel.Civ.Neuquén, Sala II, 3/9/2002, LL 2002-F-477.

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.

This type of claim, however, has encountered negative responses on other occasions. Worth mentioning are two decisions 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*⁶⁰ case the majority of the 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 Garrahan Hospital, where she was to undergo surgery for congenital heart disease and to where her mother could not transfer her because she (the mother) lacked a job, resources, and a sitter 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.⁶¹ 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."⁶²

Toward the end of that same year, a court in Chubut let stand a trial court judgment⁶³ 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

⁶⁰ C.S.J.N., 12/3/2002, JA 2002-IV-466.

⁶¹ El Ministerio de Desarrollo Social de la Nación, la Pcia. de Buenos Aires y el Hospital de Pediatría Garrahan.

⁶² Considerando 8°. 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.

personnel to attend to users of the service. However, through various formulations of the lack-of-judicial-competence argument, the Chamber determined that the trial court's judgment unjustifiably interfered with health care policy design and the province's health care policy, and that these matters were "technical and scientific material alien to the capabilities of the judiciary."

(b) Preliminary Characterization of the Actual Remedial Model. The cases reviewed in which claims were successful are similar in structure to the morphology of public interest litigation classically defined by Chayes.⁶⁴ In contrast to traditional bipolar litigation, the parties who bring these claims are plural and amorphous and include combinations of individuals, ombudsmen, and a variety of societal organizations that represent the "affected" in various degrees. In addition, the cases involve judicial interference in questions of 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 presume compensation for past limited harms, but rather a transformation of the future of 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.⁶⁵

The preeminence of remedial interventions in the form of orders to act or refrain from acting instead of an instruction to compensate for damages, and the multiple forms of interventions that judges seem to adopt, constitute one of the specific characteristics of this new type of judicial control over lawsuits against the government.

Even if the cases involving the transformation of the health care system set forth modest objectives as compared to those of education and housing desegregation cases in the U.S., one

⁶³ *Martínez, Celmira y otros v. Chubut*, Cám.Apels.NOEChubut, Sala B, 18/11/2002, JA 2003-III-510.

⁶⁴ Chayes, *op. cit.*, p. 1284.

can discern within judicial orders features shared with the “structural injunctions” or “structural orders” of U.S. law. These remedial structures “seek to concretize the reorganization of a social institution”⁶⁶ and through this organizational reform repair the harm that public agencies’ structure can produce when violating certain constitutional rights.⁶⁷

Judicial interference with the hiring of hospital personnel,⁶⁸ the definition of the reach of a treatment and instructions for the provision of medicine,⁶⁹ the residential relocations of families⁷⁰ 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 these structural orders are more developed, their evolution over the last forty years has undergone various stages. According to Fiss, during the first decade of civil rights litigation (1954-1964) the structural orders consisted of two parts: a broad prohibition (“no racial discrimination,” “no maintenance of 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.⁷¹ In the litigation mentioned earlier, on the other hand,

⁶⁵ Chayes. *op. cit.*, p. 1284-1315.

⁶⁶ Owen Fiss, *The Civil Rights Injunction*, *supra* nota 11, p. 9.

⁶⁷ 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.

⁶⁸ *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.

⁶⁹ *Asociación Benghalensis*, *supra* nota 37.

⁷⁰ *Defensor de los Derechos del Niño y Adolescente v. Pcia. de Neuquén*, *supra* nota 58.

⁷¹ 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 (...).”

Argentinean judges seem to have preferred for the preliminary developmental stage of these orders 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 following 1964.⁷² In this way, and although less disaggregated and complex than the structural injunctions of this second stage, Argentinean judicial orders also exemplify a type of judicial intervention styled after the vertical regulation practice of “command and control”; that is to say, similar to administrative bureaucracies’ traditional forms of intervention when, from a central authority, they establish more delimited instructions.⁷³

IV. Toward a New Remedial Paradigm.

(a) *The Experimentalist Litigation Model.* According to Sabel and Simon, the last decade of U.S. public interest 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.⁷⁴

The observation of the transformation of remedial practices towards experimentalism within traditional areas of public interest litigation like the mental health system, schools, prisons, housing policy, and police abuse⁷⁵ has led these authors to look to a new model of this type of litigation that operates as a “destabilizer of rights.” Following the Mangaberia Unger of

⁷² Owen Fiss, *op. cit.*, p. 14.

⁷³ Sabel & Simon, *op. cit.* supra nota 3, p. 1019.

⁷⁴ Sabel & Simon, *op. cit.*, p. 1019.

⁷⁵ 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).

False Necessity, Sabel and Simon consider that this new version of public interest litigation has a destabilizing effect that “protects citizens’ interests in penetrating and opening large scale organizations or broad areas of social activity that remain closed to the destabilizing effects of ordinary conflict and that maintain the hierarchies of power and privilege intact.”⁷⁶

The “destabilizing effect” of the new public interest litigation is observed in two stages: the determination of responsibility or of a rights violation, and the definition of experimentalist remedies. In the ideal reconstruction of the experimentalist remedies model, Simon and Sabel review its three central features: (a) negotiation among stakeholders, (b) the continuous, provisional, and fluid character of remedial intervention, and (c) transparency.⁷⁷

Defined liberally, the negotiation among parties and other interested actors is a central aspect of this new model. This negotiation can also include the participation of extrajudicial agents like special masters and mediators designated by a judge to coordinate deliberation until the establishment of an agenda and of dialogue rules between the parties.⁷⁸ The deliberation between parties founded on the presentation of good faith reasons has the goal of reaching a consensus that renders a benefit to all those involved. Moreover, when this consensus cannot be reached, the established standards of dialogue constitute a fundamental contribution to the elaboration of a better remedial solution between the parties and, ultimately, between them and the mediators, extrajudicial officials, and the judge.⁷⁹ Secondly, the flexibility and provisionality of remedial decisions appear as tools to fight the restrictions on available information in the design stage and the subsequent articulation problems of official lawsuits at the moment of

⁷⁶ Mangabeira Unger, Roberto, *False Necessity: Anty-Necessitarian Social Theory in the Service of Radical Democracy*, 1987, p. 530.

⁷⁷ Sabel & Simon, *op. cit.*, p. 1067-1072.

⁷⁸ 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.

⁷⁹ Sabel & Simon, *op. cit.*, p. 1068.

implementing remedial decisions.⁸⁰ Thirdly, the experimentalist remedies model is characterized by its transparency; that is to say, the provisional terms negotiated by parties should be explicit and public, and ideally should be accompanied by an agreement about the measures and proceedings accessible to the public to evaluate their fulfillment.⁸¹

(b) *A Model to be explored in Argentina?* For Sabel and Simon, the new model of public interest litigation, and the type of remedial practice it presupposes, can be more effective in the induction of state compliance with legal obligations and more consistent with the structure of U.S. government. But is this model worth exploring for Argentina? It is possible to find arguments in favor of extrapolating these authors' speculations to a context as different as ours?

I think that the experimentalist model, and particularly the underlying remedial style, can provide an innovative framework to expand our reflections over the quality and efficacy of public interest litigation. All of this, of course, while keeping in mind the speculative and provisional tone of our reflections, given the rudimentary development of the judicialization strategy of rights enforcement via lawsuits against the government, and the absence of an empirical understanding about the successes and limitations of the remedies used to date.

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

(i) *Lack of Legitimacy.* The justification of judicial control over public administration has been traditionally based on the failure to meet performance standards and on the violation of

⁸⁰ Sabel & Simon, *op. cit.*, p. 1070.

⁸¹ Sabel & Simon, *op. cit.*, p. 1072.

citizens' procedural and substantive rights by state agents and bodies.⁸² In public interest litigation this classic justification of judicial review of administrative acts is joined by 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 these agencies. It is this justification 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 his official delegates. This way, judges do not need to have the last word in the design of remedies. In exchange, parties and agents of the administration have the opportunity to participate with voice and vote, reinforcing the democratic legitimacy of judicial intervention in suits against the administration that originated within the framework of public interest litigation. To the extent that this deliberation is possible, the experimentalist model also recognizes the complex interaction between the powers and the patterns of its legitimacy, characteristics that the objectors to the legitimacy of judicial interference tend to avoid.

On the other hand, as Sabel and Simon note about the U.S. case, the transparency promoted by the experimentalist remedies model can pave the way for the generation of mechanisms that hold accountable plaintiffs and their lawyers, other representatives of affected individuals involved in the judicial process, and the judges themselves.⁸³ In this way, a key component of the democratic legitimacy of other governmental branches that does not exist in the actions of judges or parties is incorporated into the sphere of litigation: the phenomenon of

⁸² Martin Shapiro, *Who Guards the Guardians? Judicial Control of Administration*, The University of Georgia Press, Athens and London, 1988, p. 55.

settling accounts with the public or, at the very least, the potential of such a settling. At the same time, the model rejects the simplifying and formalist vision that presumes that the public administrative bureaucracy operates at all its organizational levels with the same levels of public accountability and therefore the same legitimacy enjoyed by political officials and by the president.

In the Argentinean case, the advantages identified could be aggregated into two particular aspects linked to the democratic legitimacy deficits of local institutions. On the one hand, in the context of institutional weakness that characterizes the three branches of Argentinean democracy, assuming that the democratic legitimacy of the legislative and executive branches over that of the judiciary are based on the idealized functioning of the majoritarian principle and the representative system would be naive.⁸⁴ The hyperpresidentialist 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 actual conditions—over which a single hegemonic party rules and that, with the exception of a brief period, has had monolithic control over all the branches during the last fifteen years⁸⁵—that presumption of absolute legitimacy seems to crumble quickly.

Clearly the judiciary also suffers from serious deficits of legitimacy, lack of independence,⁸⁶ the public's perception of a high degree of corruption and incompetence,⁸⁷ lack

⁸³ Sabel & Simon, *op. cit.*, p. 1093.

⁸⁴ 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.

⁸⁵ Rebecca Bill Chavez, *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina*, Stanford University Press, Stanford, 2004, p. 53.

⁸⁶ 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

of diversity⁸⁸ and the obvious limitations in the access to justice for wide sectors of the population.⁸⁹ Against this background, a model of remedial intervention that supposes a dialogue between parties 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 type of vertical, stricter 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 an Argentinean context where mechanisms to access information and the channels for societal participation in the proceedings against the three branches of government are often inexistent or weak.⁹⁰

(ii) *Lack of Institutional Capacity.* The questioning of the judiciary’s institutional capacity and efficacy in public interest litigation and of judicial participation in the issuance of structural reform orders has taken on many forms since the dawn of the development of these practices.⁹¹

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).

⁸⁷ 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.

⁸⁸ 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).

⁸⁹ Véase, *Obstáculos y Límites 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.

⁹⁰ [completar cita]

⁹¹ Según algunas formulaciones de las objeciones basadas en la ineffectividad 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

In a possible disaggregation of the basic obstacles confronted by judges at the moment of designing and efficaciously imposing remedial structures, Shuck has identified, for example, the problems of information, power of communication, incentives, and the difficulty of obtaining political and public support for the proposed measures.⁹² In the litigation involving the right to health presented in Part III, these objections tend to take the form of health officials and hospital administrators questioning judges' ability to know and manage the proposed impact of the parties' demands⁹³ and the effect of the unjust distribution of scarce resources in which the Argentinean state and its agencies operates.⁹⁴ Within the judicial discourse, these arguments appear forcefully in the *Ramos* and *Martínez*⁹⁵ cases in which the judges seem to fearfully reverse course because of the perceived breadth of the task demanded.

It is probable that the empirical studies of judicial orders reviewed in Part III illustrate the existence of many of these limitations for the effective implementation of the remedies ordered by the judiciary. To overcome them, the negotiation, provisionality and transparency proposed

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.

⁹² 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.

⁹³ Véase por ejemplo, *Asociación Benghalensis, Campodónico de Beviacqua, Colegio de Médicos de la Pcia. De Buenos Aires*, citados en el punto III *supra*.

⁹⁴ 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).

⁹⁵ Véase, *supra* notas 60 y 63.

by the experimentalist remedies model offer some particularly attractive answers in our context.⁹⁶ 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 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.⁹⁷ 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 to be a possible means of surmounting the communication restrictions⁹⁸ of judicial intervention through the involvement of these same administrative agents in the negotiation 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

⁹⁶ 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.

⁹⁷ 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 institutional 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.

⁹⁸ 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 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.

officials that can question his ability to ultimately understand the problem in question and propose viable solutions.

Third, the experimentalist remedies design could favor better administrative compliance with the result of the litigation. Because measures like contempt of court or the imposition of monetary fines on public officials are rarely used by Argentinean 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 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 generate a participative process that will strengthen the relations between societal organizations and public officials, which in turn could eventually result in more political support and social mobilization for the causes that public interest litigation tries to promote.

These preliminary speculations lead us to believe that the theoretical and empirical explanation of the experimentalist remedies model could offer a positive framework for the study of the judiciary's legitimacy and institutional capacity to intervene with structural orders in lawsuits against the government.

V. A Few Proposals.

Many of those who work in the development of the country's public interest litigation are conscious of the numerous difficulties in the embraced strategy. They think of 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 talk” and of its operation in the context of structural inequality, anomia, informalism and the precariousness of Argentinean 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 more than a marginal impact on the centers of power targeted for transformation. However, without being naïve about the limits of tools like public interest litigation, they believe that the 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 the public interest litigation strategy would incorporate a consideration of the alternative remedies available. To do so, in addition to continue exploring possible models, it is necessary to produce more empirical quantitative and qualitative analyses 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 like prison administration or the control of public services can 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 key. In addition, spaces for legal education can play a fundamental role in accommodating 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 few characteristics that recommend including it as a possible alternative in those debates, especially because of the cooperation and deliberation that it demands of parties within the framework of a mechanism directed by the judiciary. But it will also be important to consider possible objections to it, like the one that, to a certain extent, 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 without more. Whatever the conclusion we arrive at, incorporating the remedial dimension to those discussions will make enriching our understanding of public interest litigation probable.