

From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law

Edited by
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20 Social Rights and the Courts

JOSÉ REINALDO DE LIMA LOPES

This paper assesses one form of public law litigation in Brazilian Courts. It begins by describing the institutional setting of courts and contrasting the general number of cases adjudicated by them with the number of cases dealing with social rights (education and health care). It goes on to enquire about their originality in the legal culture and the role of litigation in defining social rights in legal reasoning.

Education and health care rights are especially meaningful. Not only are they the most traditional social rights (Schmitt, 1966; Marshall, 1968), but they have also given rise to large public service sectors, they include the regulation of private business in these sectors, and are a traditional element believed to increase social mobility. Recent democratisation in Brazil has been undertaken with the help of social movements, some of which directly organise poor urban populations to reclaim their rights to health and educational services.

This enquiry has been restricted to court decisions. We recognise that many cases do not reach the courts: they are the object of some compromise instigated by the P.M. (Public Ministry, *District Attorney*) in the course of a civil investigation (*inquérito civil*), which is a preliminary procedure.

1. The Courts and Their Caseload

1.1 The Selection of the Courts

Our study includes cases decided by the *Supremo Tribunal Federal - STF* (*Federal Supreme Court*), the *Superior Tribunal de Justiça - STJ* (*Higher Justice Court*) and the *Tribunal de Justiça do Estado de São Paulo - TJSP* (*São Paulo State Justice Court*). The STF has *extraordinary appellate jurisdiction* (the *recurso extraordinário*, art. 102, III, Federal Constitution - FC) in constitutional cases. The STJ has *special jurisdiction* (*recurso especial*) to ensure uniform enforcement of federal statutes (art. 105, III,

FC), and it is natural that some cases reach the STJ for these matters. The STJ is also entrusted with jurisdiction to issue injunctions against certain federal authorities (art. 105, I, h).

States have concurrent power to legislate over matters of health care and education and have the primary responsibility for providing these public services. Thus, the TJSP can be important in these cases. State courts are also the ordinary courts of the legal system, since federal courts are only involved in cases where one of the parties is either the Federal government, a federal agency or a federal authority. State courts deal with most regular court business.

1.2 The Dockets

We obtained the following figures directly from the statistical bureaus of courts.

Table 1 Supremo Tribunal Federal – STF (docket)

Total cases filed:	164,402
Total cases decided (disposed):	146,355
Total <i>recursos extraordinários</i> filed:	86,278
Total <i>recursos extraordinários</i> decided (disposed):	77,705

From October 1988 (date of the Federal Constitution enactment) to August 1996 (date of our request).

The *Superior Tribunal de Justiça* did not make its general table of cases available, although its *Regimento Interno*, a sort of organisational ruling, provides that its statistical working records be published monthly (art. 67, art. 117). The *Departamento de Processamento de 2a. instância* (appellate process department) of the Tribunal de Justiça de São Paulo shows that the court had 87,504 new cases filed in 1995 alone and decided (disposed of) 74,965 cases. Statistics are also kept according to procedural aspect or format of cases (classe processual). The number of *ações civis públicas* (the Brazilian class action) filed in 1995 rose to 652, in the Civil Pleas chambers of Private and Public Law Sections, and 5,337 writs of mandamus were filed. In contrast to the numbers of the STF, these refer only to one year (1995).

1.3 Public Litigation: the Numbers

We have selected cases using two criteria. The first criterion was formal *procedure*, restricting our research to *class actions* (*ações civis públicas*)¹ and to *injunctions* (*mandados de injunção*). The second was *subject matter*, restricting our search to cases dealing with education and health care. Since class actions can only be filed by organised groups or organisations representing some sort of public-collective or diffuse interest, or by District Attorneys or Attorney-generals, they may serve to indicate the extent to which social rights are claimed as collective goods. Individual litigation does not present a great legal problem to professionals, as they would tend to consider it in terms of traditional individual rights language (contracts, torts or property). Therefore, this research does not include individual claims of citizens concerning these matters. Education and health care were chosen because they are both the most traditional social rights and because they probably represent a very clear economic and class distinction. They correspond to the older system of providing the lower classes with services that they could not afford on an individual basis and services believed to be instrumental to social mobility. They also refer to collective goods that can not easily be provided to people on an individual basis (parents, at least until now, have not required private preceptors for their children). We also restricted our search to the case reports (*Revistas*) issued by the courts themselves. The result is shown in tables 2 and 3.

¹ Civil class action was introduced in Brazil in 1985 (Lei n. 7.347). Previously the Brazilian legal system included an 'ação popular' (a sort of 'qui tam action'), since 1946, to defend public property and a few other examples of collective claims, such as in labour relations and liability suits against bankers in bankruptcy cases. Injunction, as a '*mandado de injunção*', is a creation of the 1988 Constitution. One can consider both class actions and injunctions as rather new and innovative remedies. It is clear that we are in a period of building precedents and doctrines around these two instruments. Reference must be made to the works of Ada P. Grinover (1992), Kazuo Watanabe (1992) and Rodolfo Mancuso (1991) concerning class actions in Brazil.

Table 2 Mandados de injunção (writs of injunction)

Courts	Filed	Decided 1988-96	Published 1988-96	% of caseload
STF ^a	502	446	N/A	0.003%
STJ ^b	102	97	20	-
TJSP ^c	N/A	N/A	14	-

^a 5 Oct. 1988 - 9 Aug. 1996 - source: STF - *Sistema de Informações Processuais*.

^b 7 April 1989 - 31 July 1996 - source: STJ - *Secretaria Geral Judiciária*.

^c The TJ-SP has not included any injunction in its statistical report for 1995 (source: *DEPRO-Departamento de Processamento de Segunda Instância* para 1995). Personal informants have guaranteed that this was the only report of its kind ever made by the TJ-SP. It includes some comparative data for the period 1992-1995.

Table 3 Ação civil pública (class action)

Court	decided	published	health or education ^a	% health/education of total case load
STJ	N/A	17	7	-
TJSP ^b	552 ^c	118	25	0.00008% ^d
total		135	32	-

^a Within published decisions.

^b 5 cases dealing with education, 17 with environmental protection (indirectly with public health) and 3 with health care (including group health insurance).

^c Between 1992-95.

^d Of total cases filed in 1995 only.

Figures show that writs of injunction are only 0.003% of all cases filed with the STF. With respect to health care and education we could not find any writ of injunction (*mandado de injunção*). Class actions dealing with health care or education services in the state of São Paulo are immaterial in ordinary court business.

Tables 4 and 5 show the results of the published decisions in health care and educational class action. It is clear that only a very restricted number of decisions ever reach the relevant public (the legal profession) by standard means (court reports). In 3 out of 6 cases (50%) - as seen in Table 5 - the decisions did not concern the merits: the cases were dismissed on procedural terms (lack of standing or mootness of the case).

Table 4 Ação civil pública (class action) - Health

Court	decided	Published
STJ ^a	not available	6
TJSP ^b	not available	20
Total		26

^a Cases dealing with environmental protection. Environmental protection brings back some old issues of public health and a parallel can be drawn with epidemic or endemic disease controls.

^b As with the STJ, there were no cases dealing directly with health issues, if we consider health issues as those directly affecting the personal well-being of people. One of the cases (JTJ-138/28) involves a private health insurance plan and was disposed of as a matter of consumers' rights. Another regards workers' health protection. A third made a direct connection between environmental issues and public health. All the 17 cases left in the table refer to environmental protection. What first drew our attention to these cases was that in many of them the dispute was centred on the treatment or disposal of industrial waste by private firms and city authorities.

Table 5 Ação civil pública (class action) - Education

Court	Published	mootness	lack of standing
STJ	1	-	1
TJSP	5	2	-
total	6	2	1

2. Nature of Social Rights Litigation - Distributive Disputes

The military rule (1964-1985) curtailed the legislative process and interrupted the traditional means of obtaining social benefits, namely through legislation and public policies. This has led social movements to force their demands through the use of court procedures. Public law litigation, in this sense, is a by-product of the military rule.

The most striking difference between public law litigation and ordinary litigation lies in the multi-polar or pluri-lateral structure of the former and the bi-polar design of the latter. Traditional lawsuits can be compared to a zero-sum game: *the winner takes all*. Traditional adjudication consists of deciding who is right or wrong on some given act or matter and who will pay (bear responsibility) for some past event: in

short, retributive justice. Some distributive matters may end up being treated as retributive conflicts once the law provides certain institutional structures. Budgetary provisions and statutory acts may assign each citizen a certain claim to given amounts of wealth in the form of pensions, health care, minimum family income, etc. In many respects public law litigation has evolved to empower each citizen and groups of citizens to claim, as individual rights, what is owed to them as a matter of *distributive justice*. Public law litigation is about public policy, even if it takes the shape of a bilateral dispute.

(1) Distributive disputes can be settled by *compromise*, especially when the issue that brought the parties together is an on-going subject. In such a case, splitting the group and giving each one his/her due is no solution, either because it is not feasible, or because it is not what the parties want. It is not feasible to terminate an aggregate or *national* society (Brazilian society, American society) in order to apportion the shares among the different groups or classes. The same is true in smaller groups (public hospitals in a given city or district, the production of medicine, provision of health insurance...). Collective goods can only be provided collectively. Courts are not institutionally designed to mediate; they do so under the pressure of circumstances and are hopefully clever enough to know that the sort of conflict at their door is not in need of actual adjudication. Examples of the Brazilian courts' lack of perception have occurred in land reform conflicts. When farms were occupied by the landless (*sem-terras*), injunctions were immediately issued in favour of the presumptive owners and, in trying to enforce eviction, *sem-terras* were killed or injured. The cases were not just a matter of protection of private vested rights, but a protest against land policies.

Compromise should not to be understood as a second-best choice. If adjudication means a zero-sum decision, and if bi-polar adjudication is perfectly fit for 'oppositional contracts' (one-shot businesses, in which parties have opposing interests, such as a *sale*, in which no 'common good or purpose' binds them in a lasting relationship), it is not so for 'cooperational contracts', such as partnerships. No wonder that the partners in a conflict work out some compromise, as the only business left to a judge would be to preside over a *fair* dissolution of the partnership. The latter option, of course, is not open to citizens (they could, however become immigrants or refugees at best, or engage in civil war, at worst).

(2) Distributive disputes sometimes need *mediation*, while retributive disputes usually only need adjudication. Mediators do not decide the case

but lead the parties to bargain over a solution. Mediators may be needed before the parties enter into any sort of business; they can be compared to brokers, i.e. people who carry back and forth the offers made by the parties in order to accomplish some mutually advantageous business. Mediation is a *rule-building* procedure. If a mediation procedure is successful, the parties will accept the rules and behave accordingly. Adjudication (or arbitration) is a *rule-applying* procedure. If the parties already know what is owed to them (what their *right* is), they will claim the enforcement of that right in the adjudication. If they are not strong enough to enforce their right, they may have (be forced) to accept less than what they are due, but this is not a case of mediation (*transaction*). Mediation is future-oriented, while adjudication is past-oriented.

(3) Social rights legislation is not a means of preserving vested interests; quite the contrary. It is passed in order to put an end to a 'caste system' (Sunstein 1993, 139-143). This is probably its greatest theoretical challenge to traditional legal (adjudicational) reasoning. Social rights at the Constitutional level are written in the words of principles (Canotilho 1991, Silva 1992, Alexy 1993). They refer to those ends, which are to be achieved in the future, not the preservation of the *status quo*; they are instruments of social reform. Are courts equipped to conduct social reform programmes? Brazilian law does not have an equivalent to equity, and courts do not elaborate on equitable remedies; and in only a few instances are they expressly allowed to appoint administrators for on-going businesses.² Traditional thinking and lack of familiarity with equitable remedies will push judges towards a *non-compromise* solution.³ Cases in which the only feasible 'de facto' solution is a compromise or a long-term compliance with the ruling will tend to finish with threats of

² One such case is the collection of debt against a corporate debtor; other provisions are in the bankruptcy statute and some in the anti-trust legislation. They have had no significant impact in legal practice and are completely ignored by the majority of lawyers and judges.

³ Other factors play a decisive role in this matter. This paper is primarily concerned with the institutional problems involved in law and distributive justice. It seems clear, however, that social background, the selection of judges, political commitments, professional socialisation, class structure and its influence on the profile of the legal profession also play decisive roles in this process. They all conform to the judges' thinking, their self-image, the symbolism of the judiciary function, the public debate on the matter, etc.

criminal prosecution against civil servants or the death of people (as in the case of land reform).

The Brazilian courts are not familiar with the drafting of mutually agreed injunctive relief. They tend to issue orders and impose them on an 'all-or-nothing basis' and public officers are also bound by a general prohibition on negotiating decisions. The courts under the doctrine of 'public service strict morality' will paradoxically prohibit such negotiation. Courts can also issue orders and create immediate new expenses, directly challenging the 'appropriation clause' of the constitution. The issue at stake in some cases is the design of the public budget. The justifications of a few court decisions invoke the protection of property rights regardless of the public expenditure required for the case. In some cases they clearly state that the use of public money for less 'relevant' matters is unconstitutional. By doing so, some federal courts have actually imposed the issuance of money in specific cases.

(4) Distributive conflicts require decisions on what to do in the future and such decisions are not adjudication by their nature. It is not a decision between what is right or wrong, but what is better or worse in the long run. It is not a choice between two opposing qualifications of past actions, but a choice between an indeterminate number of courses of action possible to attain fair and efficient results.⁴ Distributive conflicts may use the language of results to be achieved, while retributive (commutative) conflicts will use the language of rules to be applied. These are two different starting points for any normative thinking: the prudential reasoning and the principled reasoning. Are courts allowed to use both? Are they prepared to make use of prudential thought?

(5) One must acknowledge that there are at least apparently conflicting principles in the Constitution and be aware that they apply to different

⁴ It is tempting to remember Kant's classification of *rules*: moral rules (applying to decisions/judgments of what is right or wrong, what is one's duty); prudential rules (applying to what is better or worse in one's own life to reach happiness); technical rules (guiding decisions on the means-ends relationship). One is tempted to say that traditional law (or liberal private law reasoning) has been built on the moral-rules model, whereas the welfare state requires legal systems with prudential rules (one can substitute *welfare* for *happiness* in the phrasing). From a contemporary point of view within political science, reference may be made to the work of Giovanni Sartori (1994, 286:336) concerning decision-making processes.

spheres (Walzer, 1983).⁵ The easiest – and probably the worst – way to decide cases is to interpret the Constitution from a point of view where one single principle is paramount. Throughout many jurisdictions in Brazil, this predominant point has been private property and freedom of contract. Many courts have given an individualistic approach to the Constitution.

(6) Social rights usually consist of provision of *collective and indivisible goods*. The collective goods to be provided in Brazil were not only welfare but *development* as well. For a considerable period of time, development in Brazil meant industrialisation. So public policies were mostly regulation and legislation sponsoring industrialisation, concentration of capital resources and minimum social welfare (Fiori 1995). Public policies translated into mandatory insurance and savings (welfare, health care, FGTS-Workers' Compensation Fund, etc), regulation of economic activities (regulated industries – banking, transportation, insurance, nuclear, chemical and pharmaceutical industries, etc) and statutory limitation of contractual freedom (*e.g.*, urban lease agreements).

Collective goods may have to be created or improved. This can be achieved through budgetary devices and regulation. The provider of the public good must have both material and the authority to enforce compliance or to avoid the free-rider problem. Brazilian courts have been reluctant to convey either to other branches of government. Increasing restrictions on police powers and on tax collection play an important role in the legal discourse of courts. The *laissez-faire* doctrine seems to have gained an historical stronghold in the minds and hearts of Brazilian courts since the early years of the Republic (Rodrigues 1991). This may have the effect of freeing the *haves* from contributing to the *have-nots*. Thus distributive policies have suffered strict scrutiny in courts, mainly being challenged by corporations over cases of private property and limits on taxation policies.

These features of public interest litigation may lead to a criticism of judicial involvement in distributive justice, which can take different approaches. Some will refer to the institutional deficiency of courts in

⁵ This has been a sort of *crux* for legal thinkers. Canotilho and Alexy (*op. cit.*) provide some important insights in the discussion. Conflicting principles may actually embrace different sorts of rules: some of them are 'maximisation' commands, which cannot be applied to existing situations. On the other hand, there may be a necessity of finding a hierarchy of constitutional provisions, so that they can coexist.

dealing with complex cases. This is a predominantly American 'New Deal' point of view. In Brazil, this point has been made, in general, by Oliveira Vianna in the 1930s (Vianna 1938) and insisted upon by a few legal scholars today. Scholars have not advanced the thesis that courts should be left out of the question; the trend has been to create *specialised jurisdictions*. The most important example is that of *labour courts*, which eventually became an independent judicial structure. Notwithstanding their importance, this solution misses the point: specialised courts may have greater knowledge of certain cases and a smaller caseload, but their effectiveness depends upon processing the cases as bilateral conflicts, which most frequently they are not.

Americans like Rosenberg (1991), Sunstein (1993), Chayes (1976), Fuller (1981) have different views. Rosenberg stresses that courts do not have the resources to do this for a number of reasons: (1) judges tend to accept mainstream public opinion; (2) distributive conflicts advance social reforms, not simple adjudication; (3) courts lack the institutional means (an administrative apparatus) to implement and monitor decisions that imply some continuous programme or public policy; (4) lack of initiative (*ne procedat iudex sine auctore* - *judisdictional inertia*) assigns the judiciary to a passive position, unable to control its own agenda of reforms (public policies); (5) courts cannot appropriate resources, levy taxes nor finance their own decisions on large policy reforms. In the case of civil law countries, one may add that courts also lack the general 'equitable jurisdiction' which has been widely used by American courts in the racial conflicts of recent decades.⁶ This sort of critique has not had any real significance in Brazil as yet, mostly because, as we shall see, welfare rights cases have been decided according to *consumer protection law*. In this respect, they have not actually been involved in any large reform action: the traditional principles of litigation have served well enough in general. Even if Brazilian Constitutional Law has been influenced by American institutions (judicial review was introduced in 1891), the civil law tradition is the major root of legal culture and European legal scholars are an important source of ideas and ideals.

⁶ Note that procedural changes have recently been introduced in Brazil giving larger authority to courts to create specific remedies. This has been done in the name of the principle of greater activity of the state in the process, strongly opposing the adversarial model of litigation which, after all, had not been so strong.

However, familiarity with important names does not mean familiarity with their political, social or legal backgrounds.

On the other hand, social rights litigation gives rise to great hopes and some will try to figure out what is necessary to make courts more responsive to public needs. Some will advocate judicial reforms, calling for greater autonomy for the judicial branch (Dallari, 1996; Herkenhoff, 1994). Courts enjoy considerable institutional autonomy in Brazil: they manage their own budget (although the Congress decides budgetary funds); they select their own members through independent public examinations; and they settle their own administrative rules and business. There is no binding precedent, so lower courts and single-judge trial courts are free to decide cases and exercise judicial review of all administrative and legislative acts. A traditional evaluation tends to stress the courts' lack of financial and human resources (which is true), resulting in little or no attention being given to the nature of cases. A different group which advocates judicial reforms comprises those who stress the judicial inability to deal with 'collective' conflicts. For them, it is mainly a cultural change that is required: a greater responsiveness on the part of judges and courts to the social struggles that are brought before them in the form of litigation. They all acknowledge that the new litigation has a social character, but they do not seem to give full recognition to the structure of 'multilateral' litigation.

Public litigation has been a major arena for civil lawyers. Great legislative effort has been dedicated to legal reform, finally resulting in the creation of the Brazilian class action (*ação civil pública*) in 1985,⁷ the injunction (*mandado de injunção*) in 1988, as well as some 'equitable' powers to courts (in 1994-5) by enlarging judicial authority to issue preliminary injunctions (art. 273, art. 461 CPC) and other injunctive relief (art. 1102a CPC). These changes have not altered the general design of the judicial branch. Courts have tended to issue orders that require immediate compliance and have not created any place for long-term reform devices.

⁷ Class actions existed before in the Brazilian system: workers' collective conflict (*dissídio coletivo do trabalho*) since the '40s, and creditors of banking corporations (Lei n. 6.024, since 1974 at least).

3. The Court Decisions

3.1 Class Actions

Class actions are a much more popular device when compared with writs of injunction. The incentive to litigate is greater: by winning a case the plaintiff may apparently recover what he or she actually wants, either in specific performance or in financial compensation.

3.1.1 *STJ* - class actions - education Table 3 (above) shows that of all the 17 class action cases whose decisions were fully published by the *STJ*, only one (see Table 5) dealt directly with education, i.e., only 5.8% of all class action cases.

This case was filed by a District Attorney in Minas Gerais. The purpose of the suit was to prevent a private school from raising its fees by incorporating the wage increase it had given its employees (teachers) (*Revista do STJ* 54/306). The claim rested on the *Consumer's Defense Code* (Lei n. 8.078/90) and on special legislation regarding school fees. The case was disposed of by the *STJ* on the basis that the District Attorney lacked standing to sue as representative of the students or their parents. According to the Court, D.A.s have standing, both constitutionally and legally, to sue in cases of *diffuse* or *collective* interests (or rights). But the Court found that the interests of a defined group of students (such as the students of a single private school) did not qualify as 'diffuse' or 'collective'. It is rather a case of 'homogeneous individual interests', for which the D.A. has no representation. The only constitutional reference made in the decision is to art. 129, II of the Federal Constitution. The article gives the *Ministério Público* power to 'watch over the effective protection of the rights granted in the Constitution, on the part of public power and the relevant public services, taking the necessary action for their guarantee'.

3.1.2 *TJSP* - class actions - education When compared with the total class action cases of the court (Table 3) educational cases made up only 0.9 %.

Of all five cases decided by the court (see Table 5) regarding education, only three (3) make reference to the Constitution in order to reach a decision. Of these three, two make reference to art. 129, i.e. the constitutional provisions concerning the powers of the *Ministério Público*.

The third case (*RJ/TJSP* 147/210) refers to art. 5, XXXII, i.e. *consumer protection* is a duty for the state. There is a meaningful absence of reference to art. 6 of the Constitution (which gives a list of social rights, including education) in all cases throughout all important phases of the suit; it has neither been invoked by the plaintiff, the defendant, nor the court. In short, in all cases the issue was disposed of without any reference to constitutional social rights.

Of all five cases, only one was disposed of on its merits. Four were decided on (procedural) preliminary grounds, that is, questions of standing. In three of the cases the Court acknowledged standing of the *Ministério Público*.

Finally, all five cases have one common trace: they all deal with payment of monthly or yearly school fees (in private schools). In this respect, they all share a contractual relationship between the school and the students (their parents). In all cases the question was also discussed in terms of consumer rights; fee increases were discussed as an abusive unilateral increase in the price of a service.

3.1.3 *Class actions* - health care We could find only one decision (within the limits of the publications mentioned before) directly concerning the right to health care decided by the *TJSP* (Table 4, note 2). It was disposed of as a matter of consumers' rights, and not as an issue of social constitutional rights. Some cases discussed environmental issues, such as waste disposal by cities and industrial plants. We have also had access to cases dealing with private health insurance and health care cases outside the reviews we had chosen.

3.2 General Remarks on the Cases

3.2.1 *Lack of constitutional arguments (foundations of social rights)* In the majority of cases, issues have not been put into a constitutional framework. Two opposing views of this fact are possible: first, one might stress the lack of importance given to constitutional matters in the Brazilian legal culture; second, one might argue that asserting one's claim directly on constitutional grounds could complicate bringing the cases to court, as it could be considered a strictly legal matter, reducing disclosure and evidence seeking. The symbolic role played by the 1988 Constitution has generally been large: its fundamental character is usually reassured by those in the legal profession. The variety of apparently conflicting prin-

ciples of the Constitution (a trace it shares with most social-democratic or liberal-welfarist counterparts throughout the world) makes it a sort of 'delayed compromise charter' (Neves 1994, 92, following Kinderman), allowing different groups to read in their own preferences. Note, however, that this sort of public law litigation is fairly new in Brazil. There is a long tradition of constitutional litigation judicially defending private citizens and private business from governmental interference, most notably in matters of business regulation, taxation, personal freedom, vested interests, etc. But social rights litigation is in its infancy.

In that sense, the litigation we have found clearly shows *part* of the middle class trying to assert their consumer rights instead of calling for the protection of welfare policies. Recent research has showed that 80% of all children and teenagers attend state schools, and only 20% go to private schools. Class actions concerning school fees regard parts of the latter group. This could mean that, for these litigants, social rights *qua* welfare programmes are *irrelevant* (either because there is a specific statute or because they do not recognise themselves as recipients of welfare benefits who can interfere in public policies).

3.2.2 Arguments are made in terms of consumer protection If social rights do not appear *qua* social rights in civil litigation (class action) what other explanation could we have? The cases evidently show that it seems to be a question of contractual rights, or more specifically consumer rights. They are not the object of litigation in their feature of *public* rights.

They also show that the question is one of defending vested interests (contractual interests: parents claiming the application of certain statutory rules and schools trying to justify the principles of free business and private property). They do not, at this stage, ask for any change in public policies and do not demand active participation of the state.⁸ The part that government must take is twofold: they must provide for the enactment of legislation and provide for the services of the *Ministério Público*. Of course, calling for substantial reforms in the educational system would

considerably increase the cost of litigation, mainly because it would have to accept medium- or long-term results, which would not directly and immediately benefit the litigating parents and their children. One might say that the cases recorded in courts so far show a typical free-rider problem: if anyone would litigate to obtain deeper reforms, the costs would increase for him or her alone. Even if the Class Action Act provides for some incentives (exemption from court expenses and attorneys' fees and other compensatory expenses), only organised groups with a steady capacity to endure long procedures would be able to carry out a successful litigation. Small groups, with an eye on the results of the specific case, do not have the incentives to act: their children will grow and will need a school immediately, regulation will change from year to year, agreements may be made, or they may eventually look for a different school (including a state school).

The nature of the cases also shows the gap between public and private services. In the absence of high quality state schools, parents (who can afford it) have fled to private schools. No incentive was given to seek reforms in the public system. In poorer areas of São Paulo, a 'welfare society' (Walzer 1988, 25) was organised, mainly around neighbourhoods and parochial communities, to serve the needs of the working classes for nurseries and child daycare centres. These were funded by a mixture of government funds, donations, and inexpensive labour provided by volunteers. This, however, was not available at higher levels of education, because it would have required more investments and professionally skilled labour. This sort of question has not been judicialised.

3.2.3 Standing of the D.A. and the public good - matters of representation The majority of the cases we have analysed and selected were not decided on their merits (80% of the cases for the TJ-SP). Most of them (60%) have resulted in a decision on the standing of the Public Ministry to act in favour of certain groups; the decision has a procedural character (it decides a procedural issue) but is actually a decision on a political question, namely the question of representation. The *Public Ministry* (D.A.) is not an organ of political representation according to the classic division of power within the democratic state. However, if it gains standing in a broad sense to file class actions whenever 'collective' or 'diffuse' interests are at stake, it may turn into a sort of judicial-political representative. If it gains such standing, classic problems related to political representation may arise in litigation, which is exactly what most

⁸ Only 20% of all children between 7 and 14 years of age study in private schools in the state of São Paulo. 80% of all children are enrolled either in city or state (free) schools, according to data provided by the Fundação Instituto de Administração da Faculdade de Economia e Administração da USP (*Folha de São Paulo*, March 17, 1997, III, p. 10).

of the cases have been dealing with. It has been commonplace in the discourse of the Public Ministry to define themselves as representatives of the 'civil society'. Civil society is not a group in itself. Apart from the various meanings of 'civil society', if the PM wishes to be the representative of civil society, they may be accused of defending private interests instead of the general good (common good).

The discussion of standing by the PM poses another important question: if they were to count as defenders of fundamental rights, it would be understandable that they should not be subject to any sort of electoral process (this is the case in Brazil). In that case, their 'representational' role would mean that they are in charge of sustaining the basic rules of democratic institutions, apart from majority rule in the electoral process. Once they start to litigate, the question of their standing necessarily has to be judged from a political point of view. That is why, in the case of the right to education, the decision to file a suit against one particular school becomes questionable: if what is at stake is the right of children to education, should the suit be developed into wider terms? Should it not consider education as an indivisible social right? Should it not be aimed at providing a larger number of children with state education? Who sets the policy for the litigating priorities of the PM? As things now stand, each PM representative is an independent authority. Once a law school graduate has been approved in the qualifying exams (*concurso público*) he or she will be appointed to one of several judicial districts (*comarca*) in the state and start acting as District Attorney. There are no formal policy goals. And considering that PM staff move frequently from smaller to larger *comarcas* – as they are in a career that encourages advancing to higher positions in larger cities – there is little chance that public scrutiny will be able to force them to be accountable. No electoral process would submit their personal priorities to public debate.

A final aspect of class action litigation by the PM is the complete absence of any discussion of the definition of a 'public good'. The Brazilian Consumers' Defense Code (CDC) is frequently mentioned in class action cases, as it provides for a classification of interests as follows: a) *diffuse* interests and rights: *indivisible* interests of *indeterminate* subjects put together by 'de facto' circumstances; b) *collective* rights and interests: *indivisible* interests of a *definite group* put together by one legal relation; c) *homogeneous individual* rights: those with a common origin. The right to clean air is typically classified under 'a', group health

insurance or private pension plans are classified under 'b', and rights arising from defective products are classified under 'c' (Zavaski 1995).⁹ For anyone familiar with the development of political economy, political science, political philosophy or even some traditional legal reasoning, it is impossible to understand the very sophisticated classification of the Brazilian CDC unless stress is put on the 'indivisible' character of the goods in groups 'a' and 'b'. It is surprising then to find that this is never mentioned in any of the cases.

3.2.4 No address of distributive questions Another striking feature of the cases is that we cannot find any reference to the distributive aspects of the conflict. In this respect it is much more a result of the very structural and institutional limitations of the judicial branch itself. It cannot replace a policy-making organ, but it can correct specific 'wrongs'. To put it in classical terms, it cannot bring about distributive justice, but it can bring about corrective justice. If the claim in the class action were a complete re-design of the educational system, it would most certainly fail. The only available remedy is to cut it into a modest, piecemeal sort of correction: to correct one wrong at a time.

Take the case of consumer protection. It is mentioned in several provisions of the Constitution. The two most important are art. 5, XXXII (*The state shall provide for the consumers' protection, according to the law*) and art. 170, V (*the economic order, founded on the value of human labour and freedom of business, is aimed at assuring a decent life to everyone, in accordance with the rules of social justice and taking into account the following principles: (...) V- consumers' protection*). From these provisions one might suspect that consumer protection is a political principle, after all. That part of the 'corrective' activity of courts is to grant that 'distributive principles' be fairly weighed. It is not uncommon to find 'obiter dicta' in the decisions, considering these principles and these distributive purposes. But the fashioning of remedies is mostly traditional; that is, remedies claimed and eventually granted are normally of a contractual nature. From a political question of public policy,

⁹ Zavaski's account of collective and diffuse interests/rights is generally accurate, except that collective rights do not necessarily need representative standing. All parties may act jointly in court, as in the case of bankruptcy and consortia, even if the appointment of one representative (administrator, trustee, etc.) is usual and convenient.

education becomes a private matter between private schools and parents who cannot afford their price increases.

Finally, the suit also robs the issue from its distributive aspect: no discussion of proportionality is ever made. Distributive rights, as social rights, need a proportional rule, by which simultaneous access can be granted. It also means that those rights are to be distributed according to different rules (Walzer 1983, 17-30). Education should be distributed according to a mix of need and talent (merit); those who need it most and those who have more talent should be simultaneously considered. Social rights also depend on the visibility of differences: the needy have a *right* just because they need it. Of course, social rights when left to the powers of the market, as has been the case in Brazil in recent years, will not be provided unless there are incentives to do so, since the most important incentive in a market system (price/profit) cannot be afforded by those who need it most.

If what is at stake in social litigation are distributive disputes, ordinary court procedures and legal reasoning do not suffice. Even when the cases bring some light to the conflicts in courts, the results so far have not been what one might expect. Thomas Wilhelmsson has already written on the potential tensions between the distributive and the corrective aspects of consumer law (Wilhelmsson 1996) and lawyers should be aware of them.

4. Concluding Remarks (in Search of Further Investigation)

4.1 Institutional Problems

The rise of social rights litigation is putting pressure on the judicial branch. Using class action to advance consumer rights is a far from ambiguous strategy; it may have a concentrating effect and leave a large numbers of non-consumers out of the social benefits order. The issue of a 'common good' may be absent in judicial decisions. Multi-polarity of the issues may be left out of the legal field (cf. Moran 1996).

4.2 Social and Political Problems

The number of issues regarding social rights is very limited when compared with total court dockets. Courts still deal with individual cases, retributive justice, as institutionally provided. Writs of injunction come to

only 0.35% of the total docket of the STF. Class Actions are only 0.74% of the docket of the *Tribunal de Justiça de São Paulo*. When compared with the total number of class actions decided, those directly dealing with education and indirectly with health care make up only 3.10%. These numbers are compatible with the findings of others that courts are loaded with low intensity conflicts, requiring little time to evaluate evidence, interpret the law, and draft a decision (Santos et al. 1996, 125-127, 157). Public litigation of polygonal conflicts (Damaska 1986, 87) may have a symbolic effect but, at least so far, they are practically immaterial in terms of the administration of justice.

4.3 Legal Culture

Social rights are not considered an actual constitutional matter. Appeals have reached the courts mostly based on procedural matters. No substantial arguments based on constitution ground the decisions. This may be due to the relatively recent enactment of civil procedure legislation on class actions (first created in 1985). At the constitutional level, *Mandado de injunção* has not been used frequently for social rights on a large scale. Is it because its potential free-rider problem puts excessive burdens on the active plaintiffs? Is it suitable to claim social rights at all? Does the lack of budgetary rule have an adequate remedy for citizens? How can litigation advance public participation in policy-making?

4.4 Less-Developed Countries

In less-developed countries, such as Brazil, public law litigation finds a particular social setting. Great differences in wealth and income distribution or great wealth concentration distort some of the devices invented by other normative systems. Thus, wealthier groups may pervert social litigation into forms of appropriation of public resources. As we have seen, the Public Ministry has dedicated its energies to defend the interests of a group of less than 20% of school children, leaving 80% of them with a poorly organised public school system. By deciding the cases on consumer protection grounds, courts may be ready to give the 'haves' their due, but are not easily drawn into distributive policies.

In less-developed countries, two different questions seem to be of great importance. First, in recently democratised countries, the re-

establishment of the rule of law plays an important role. This may lead courts to give a largely individualistic and *laissez-faire* interpretation of the law, equating democracy and freedom of contract. There is no doubt, however, that recent democratisation has brought a new hope in the role (and rule) of law and the courts: when people go to court for a solution to their conflicts they show that they want a more legalised and less authoritarian society. The second question relates to social rights: in less-developed countries a large middle class may not yet constitute the largest part of the population. Even if this middle class has grown considerably in industrialised areas, social welfare rights have not been truly effective. In Brazil, the middle class has fled the state school system and the public health care system. This leaves the way open to decrease the quality of these two sectors, as the poor have less political power and less chance to organise and litigate. In a time of shrinking employment and growing informal economies, where will they look for decent health care and education? The problem here may not be one of privatising the services, but of giving equal and general access to these services. Public litigation might be important for establishing these distributions. But will it? Or will it, more likely, become the privileged domain of the higher ranks? Denying the middle class access to state schools and hospitals is a short road to leaving the poor to their own destiny. Public law litigation in Brazil, at least so far, has been vague on this question.

Public litigation through collective suits is not traditional enough and some of its disappointing results may derive from this. However, it is also possible to imagine other reasons. It is clear that law and legal theory in the last two centuries has been one of the main devices for building an individualistic social order. This individualism implies individual freedom and privacy. It also implies, at a different level, social exclusion. The law has been working chiefly as an instrument of protecting vested interests, which include private property and freedom of contract. Courts, being designed to operate as enforcers of private interests, have played this role fairly well. They have created obstacles to several social reform programmes: slavery, in 19th century Brazil (and also in the United States) was fairly well accommodated into a liberal constitutional framework, as courts would resort to the legitimately acquired property doctrine or to the 'vested interests' clauses of the 1824 Constitution. Later, they had great difficulty in incorporating workers' rights. Has this actually changed in recent years? Yes, one might say, as the cases concerning school fees cases may show, when the Supreme Court

recognises that a price limit may be put on a public good (such as education), even against the will of school owners. However, in less-developed countries this is only a half step towards what is needed. For this means basically that courts have accepted some limits to their traditional *laissez-faire* legal doctrines and will interpret contracts and property cases in a different light. But this will only work for those who are legally and juridically 'included', that is, those who already have something to lose. The problem in less-developed countries is also one of social inclusion, and this makes public litigation – as it has been conducted so far – only a half step. Are courts and lawyers (including the *public ministry*) ready to decide and litigate over the cases of the outsiders, such as the landless, the homeless, the street children, the non-consumers, etc?

A second set of questions may be raised about the willingness to litigate over distributive conflicts against private sector organisations and corporate business. Traditional legal thought associates public policies and the state. Suing the government in Brazil is a fairly easy business in some respects. Government agencies and officials do not pay bribes to court clerks and marshals so that they do not profit from the endless delays a wealthy plaintiff usually gains from small (or large) advantages provided to court personnel. They can neither hide nor refuse court notices. Government has not benefited from any sovereign immunity and court rulings against the Treasury are both an everyday occurrence and big business for some law firms. Of course, government does not pay immediately: budgetary provisions have to be made for some of the payments and they may take one or two years to reach the plaintiff. After all, it may prove a lot less costly than suing private corporations (cf. Galanter 1974). The fact is that private corporations (and private citizens) may also be involved in distributive disputes. That is the case in environmental issues and consumers' rights issues, but it is also the case in land reform cases, in financial and monetary law, and in many other fields. It is not very easy to convince courts and lawyers that some of these cases are actually social issues and public law (social) litigation matters in these cases as well.

The purpose of this research was to find out how collective remedies have been used to reclaim social rights in Brazil. Individual claims have been filed in larger numbers than previously especially with reference to health care contracts (health insurance and others), but they are easily framed into contractual or consumer law. The fact is that social rights

have not been clearly established by the courts. Most of the cases were concerned with private school fees and tuition. No collective suits dealt with health care rights. Between 1982 and 1994 Brazil has experienced rising inflation (monthly rates of inflation reached a peak of 84% in March 1990) and statutes tried to curb rising prices by fixing criteria and/or price limits. Most of the law suits concerning education were based on these statutes. The last 20-25 years have also shown a constant decrease in quality of the state (free) school system. As a result, part of the middle class has fled the state system and registered their children in private schools. The lower-income class has been alone with broken and ineffective public education.¹⁰ So far, no class action or other collective remedy has been used to claim education as a social right for these lower-income families. It is clear that the high hopes put into the constitutional provisions of social rights and their remedies have been frustrated.

Courts and lawyers refuse to shape procedures and conflicts into a multi-polar fashion and to obey an on-going performance plan. In other words, bipolar, commutative justice is still the paramount litigating model even when distributive and social rights are at stake. This may change, as a growing number of cases and claimants will go to courts and make their way through the judicial system. Maybe this is a result of the lack of responsiveness on the part of traditional state bodies (legislative and executive branches); maybe it is evidence of a more pluralistic and democratic society. Maybe this will shape the future, as an alternative means of designing public policies, as has been suggested by Wilhelmsson (1997). Maybe this will prove unsatisfactory, as suggested by Barbara Hocking (1997). In either case, these claims and suits will force legal scholars and lawyers to turn to an important issue, which used to be part of legal reasoning, that is, the fundamental question of distributive justice.

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¹⁰ Higher education (colleges and universities) show the opposite picture: the state system is by far the system with the highest level of academic excellency and performance, while private higher education, with a few exceptions, is well-known for its poor quality.

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Part IX

Epilogue