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Future Directions for Human Rights Praxis in Health : The Imperative of (Re)Claiming the Public [1]

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« The gap between what our economic and political systems are supposed to do-what we were told they did do-and what they actually do became too large to be ignored. » [2]

Joseph Stiglitz

Introduction

1 - The world will not be the same after this global pandemic. Just as with past plagues, the designs of our cities, our health systems, our social contracts, and even our personal relations are likely to be significantly altered. Before the pandemic, we already lived in a context of growing distrust of democratic institutions and multilateralism, impending climate cataclysm, and mass migration and displacement. We already faced the consequences for health and human dignity of hyper-globalization and hyper-concentration of private wealth, and the ensuing ravaging inequalities within and between nations, together with toxic synergies between ethno-nationalism, racism, and misogyny. COVID-19 has the potential to significantly exacerbate the underlying drivers of health and other rights violations enormously, both within and between countries. [3] Nevertheless, this pandemic and the radical upheaval it represents provide an opportunity, and an urgent imperative, to reflect on the profound structural injustices in the world we inhabited pre-pandemic, and on the directions for human rights praxis in health in a post-pandemic future.

Elsewhere I have argued that even as the formal enshrinement of economic, social, and cultural (ESC) rights, including the right to health, has progressed rapidly at both domestic constitutional and international levels, as has the normative understanding of the effective enjoyment of rights by diverse populations, there was an unfortunate synergy created between autocratic governments and increasing restrictions imposed upon fiscal and policy spaces by neoliberal policies at global levels. [4] COVID-19 struck a world in which economic and political institutions had been hollowed out ; many countries were shackled by debt, health and social protection had been largely privatized, and racialized inequalities in wealth had grown exponentially almost everywhere.

Since the 1970s and in particular the 1980s, the growing influence of neoliberal legality and governance, in areas from financial deregulation to intellectual property to taxation, evolved in ways that systematically increased private capital, shrank public resources and capacities, and made governments seem increasingly impotent or irrelevant. [5] As the possibilities for progressive intentional transformation through politics became ever smaller over these decades, national politics become increasingly stagnant and performative. In turn, these developments fueled a self-fulfilling narrative of the need for the private sector, and for market-based solutions to social problems.

No region of the world presents both sides of this narrative more acutely than Latin America ; no region has seen a greater evolution of ESC rights norms, including with respect to health and women's health. At the same.time, no region has greater social inequality. For example, just before the pandemic, 71% of Latin America's wealth was held by just 10% of its population. [6] Economists predict the pandemic will only exacerbate inequality in the region and across the world, as the world's richest ten people increased their wealth by a whopping $540 billion this year. [7]

There is, of course, no single response to the accelerating and inter-connected crises the world faces, and we should eschew facile formulas. Nonetheless, focusing on Latin America, I argue here that making human rights norms and principles relevant to claims of human emancipation in a post-pandemic future requires reclaiming the public sphere, and using public institutional capacity (« *reivindicar lo público* » in Spanish). Re-claiming the public is essential to enabling human rights tools and principles to be deployed effectively to advance health and social equality. In line with Nancy Fraser, I take the public arena

1. This article draws heavily on previous writing, especially A. E. Yamin, *When Misfortune Becomes Injustice : Evolving Human Rights Struggles for Health and Social Equality*, Stanford University Press, 2020.
2. J. E. Stiglitz, *The price of inequality : How today's divided society endangers our future*, WW Norton & Company, 2012.
3. E. Berkhout et al., *The Inequality Virus : Bringing together a world torn apart by coronavirus through a fair, just and sustainable economy*, Oxfam, 2021, [https://www.oxfam.org/en/research/inequality-virus].
4. S. v. Baloyi et al. (Dec. 3, 1999) S. Afr. (1) BCLR 12, obs. Sachs, J.
5. *Ibid*.
6. World Economic Forum, *Latin America is the world's most unequal region. Here's how to fix it*, January 17, 2016, [https://www.weforum.org/agenda/2016/01/inequality-is-getting-worse-in-latin-america-here-s-how-to-fix-it/].
7. Oxfam, *The Inequality Virus*, January 24, 2021, [https://www.oxfamamerica.org/explore/research-publications/inequality-virus/].

to be « a site for the production and circulation of discourses that can in principle be critical of the state [and which] is not an arena of market relations but rather one of discursive relations, a theater for debating and deliberating rather than for buying and selling. » [8] In turn, I take public institutional capacity to implicate both questions of *resources* (e.g., human, financial, technical) and *remits* of public institutions regarding the provision and oversight of health and related rights. Reclaiming both public deliberative space and public institutional capacity is essential for rebuilding and sustaining democratic political economies.

This article proceeds as follows. In Part 1, I discuss how feminist advocacy in human rights that has eroded dichotomies between public policy and private morality that impaired the realization of women's health and other rights. In many ways, the evolution of ESC rights can be read as a narrative of enlarging our imaginations to reconceptualize state obligations in a democratic state of law. [9] As is well-known, historically *rights* and the development of human rights under international law for decades were tied to the traditional liberal state, and to the understanding of how rights regulate power in that state. The subjects of rights were assumed to be equal, autonomous individuals, who were free to pursue their own notions of « the good » in private, to be distinguished from protections *from the state* for the limited set of « negative » rights in the public sphere, such as freedom from arbitrary detention, and interference with speech and religion. As women and other disadvantaged groups clamored for inclusion in society, increasing attention was paid to the conditions necessary for diversely situated populations to exercise rights and the spaces in which rights protections were needed. Over the last few decades, Latin American women's health rights activists (as well as others) have sought to incorporate state obligations to protect rights in the private domestic realm, and at the same time to move private taboo subjects, such as abortion, to the public realm of democratic deliberation. This advocacy aimed at nothing less than en-gendering democratic political arrangements, which achieved tremendous success but was limited by increasingly undemocratic economic structures.

In part 2, I turn to the phenomenon of judicial enforcement of health rights, which has been most pronounced in Latin America. As transformative and social constitutionalism gained traction across the globe, and particularly in Latin America, concepts of a democratic state of law (or social state of law) superseded the more limited notion of the traditional liberal state. [10] The Colombian Constitutional Court eloquently captures the changed conception of the state under its Constitution of 1991 : « the realization of freedom and equality requires measures, actions, entitlements and services that a person by himself cannot achieve. The social state of law thus evolved from a liberal state of law, animated by the purpose of ensuring that the material prerequisites of freedom and equality are effectively guaranteed. » [11] Thus, while still grounded in a liberal view of rights, these new constitutions reflected a much more egalitarian nation-building project that required the state to use its power to level the playing field with regard to effective enjoyment of health and other rights. Here I suggest that experience from the region calls for strategies that go beyond grafting norms onto neoliberal political economies to center the infrastructures necessary to provide for health and social rights.

I conclude that as over these decades we have seen democratic institutions increasingly enfeebled, we cannot expect that human rights strategies focused on making appeals to governments to implement « human-rights based approaches to health » or denouncing violations, or both in combination, to create transformative change. Rather, re-energizing aspirations of social and international orders in which diverse persons and groups can enjoy their rights calls for deploying rights tools and principles in ways expressly aimed at reclaiming public capacity and public civic space, and in turn permit meaningful public accountability to citizens.

1. En-gendering Democracy : Women's Health and Rights

2 - From the beginning, the challenges faced in struggles for gender equality, women's health, and sexual and reproductive health and rights (SRHR) required creative paradigmatic change in both the fields of clinical medicine/public health and human rights law. In international law, women's health rights were marginalized by an understanding of the liberal state that viewed the purview of rights as extending only to a narrowly defined and masculinized public realm, while many of their struggles are faced in the « private » domestic sphere. Thus, re-conceptualizing both the subjects of rights and the responsibilities of the state were inherently part of expanding *human* rights, to include half of humanity's lived realities, including but not limited to health. Indeed, Latin America has been at the center of this rights-based advocacy in matters related to women's health, as evidenced by among other things the adoption of the regional Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), and the more recent mobilizing Campaign for an Inter-American Convention on Sexual Rights.

The Latin American women's health and rights movement has often been explicit about the connections between enjoyment of autonomy and access to material endowments. The groundbreaking 2013 Montevideo Consensus document leading up to the ICPD +20 process affirmed « that freedom, capacities and the right to take informed decisions, empower persons to develop their potential and participate fully in the economic and social spheres. » [12]

The porousness of the public and private is highlighted by the inextricable connections between the sexual division of labor and the sexual division of power. [13] For example, in countries across the region, rates of domestic violence are closely associated with financial independence, and women's access to employment outside the home. [14]

On the one hand, over the last fifty years, huge progress has been achieved in eroding false distinctions in both national and international law between the public and private in relation to

8. N. Fraser, *Rethinking the Public Sphere : A Contribution to the Critique of Actually Existing Democracy*, 25/26 Social Text 1990, at 57.
9. *Cf.* C. Bittner, *Casenote--Human Dignity as a Matter of Legislative Consistency in an Ideal World : The Fundamental Right to Guarantee a Subsistence Minimum in the German Federal Constitutional Court's Judgment of 9 February 2010*, 12 German Law Journal 1941, 1960 (2011) ; ESC Committee, General Comment 3, The Nature of States Parties Obligations, UN Doc. No. E/1991/23, 1990.
10. R. Gargarella, *Latin American Constitutionalism, 1810-2010 : The Engine Room of the Constitution*, Oxford University Press, 2013.
11. Corte Constitucional, Judgment C-1064 (Oct. 10, 2001).
12. Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women : Convention of Belém do Pará, 1994 ; V. Pandjiarjian, *CLADEM and the Inter-American Convention on Sexual and Reproductive Rights*, Oxfam International, 2008 ; Montevideo Consensus on Population and Development, 2013 (Aug. 12-15).
13. R. Connell, *Gender and power : Society, the Person and Sexual Politics*, John Wiley & Sons, 2013.
14. D. Anderberg, *Unemployment And Domestic Violence : Theory And Evidence*, 126 The Economic Journal 1947, 1979 (2016).

gender-based violence. [15] The masculinized conception that limited « torture » to acts by state agents in the public sphere, as opposed to domestic and intimate partner violence that disproportionately affect women, has been significantly modified in terms of legal standards. For example, by 2017, violence against women, wherever it occurred, was declared an issue of *jus cogens* by the CEDAW Committee. [16] In so doing, the CEDAW Committee expressly noted the connections between violence in the private sphere and its political effects : « The Committee considers that gender-based violence against women is one of the fundamental social, political and economic means by which the subordinate position of women with respect to men and their stereotyped roles are perpetuated. » [17]

At the same time, articulating what institutional arrangements (including budgets, programs, and the like) would be required to take the health and other social rights of women, and other vulnerable persons, seriously inevitably highlights severe problems in implementation across the countries of the region, as well as elsewhere. [18] For example, the « shadow pandemic » of gender-based violence during the COVID-19 pandemic underscores among many other factors, how the neoliberal organization of our economies, at micro-, meso– and macro-levels intersects with women's health and other rights across the public and private spheres. [19] We have seen during the pandemic that the social infrastructures necessary to protect women from domestic violence, and to provide them with sanctuaries, have been reduced or shuttered due both to the pandemic, and to reduced social spending caused by waves of austerity over years. [20]

Likewise, even before the pandemic, there was an evident crisis of care and social reproduction across the region, as well as much of the world. For example, women in Latin America and the Caribbean spend three times as many hours on unremunerated care work than men in a given day, a burden greatly exacerbated during this pandemic. [21] The pandemic has starkly shown the dimensions of these unpaid care burdens and their gendered impacts, especially when safety net programs require formal participation in the labor force. [22] Women who are employed outside the home are disproportionately employed in informal service sectors as opposed to the formal economy. For example, 77.5% of women in Latin America are employed in the informal economy, in part of course due to their unpaid care work burdens. [23] This status gives them few rights associated with formal employment and they are far more likely to be left without health insurance and social protection when they lose employment [24]

COVID-19 has laid bare that it is radically insufficient to seek caregiver parity between the sexes to address the gendered dimensions of neoliberal austerity. Diane Elson, Radhika Balakrishnan and others have argued that in this post-industrial age, unremunerated care work needs to be *recognized* (made visible in its scope and impact), *reduced* (through institutional change), and *redistributed* (not just within families but through broader societal change). [25] Likewise, Nancy Fraser proposes a « universal care-giver model, » where all people share breadwinner and care-giving responsibilities, but the strain of doing so is eased by public institutional arrangements.

Some countries (in the region, and globally) are far ahead of others in addressing the privatization of these caregiving burdens and offer comparative models of how to restructure our institutional arrangements in line with moving toward gender equality and social justice. Costa Rica for example is providing credit and reduced interest rates to businesses and projects directed at building women's economic power and leadership. [26] Further, the pandemic has forced many countries to address these issues. For example, in Argentina, in 2020, the government created an « exceptional non-contributory monetary benefit [...] established to compensate for the loss or serious decrease in income of people affected by the health emergency situation. » [27] Benefits are provided to unemployed workers, including those in informal work and workers in private homes (registered or not). According to data from the Argentine Ministry of Economy, as of June 2020, 57% of those who receive the Emergency Family Income are women. [28] Looking ahead, a principal focus of human rights advocacy should focus expressly on more permanent solutions that recognize that unpaid work is actual work-work which sustains the functioning of entire economies, and therefore requires *public* financing and institutional support. [29]

Similarly, sexual and reproductive health bridges endowments and freedoms across the public and private domains. For example, the decision to seek an abortion is never in truth a

15. H. Charlesworth and C. Chinkin, *The Boundaries of International Law : A Feminist Analysis*, Manchester University Press, 2000.
16. Committee on Elimination of Discrimination Against Women, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, July 14, 2017, [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf].
17. *Ibid.*
18. Cf. CEDAW, Concluding observations on the ninth periodic report of Colombia, CEDAW/C/COL/CO/9, January 27, 2020 ; Economic Commission for Latin America and the Caribbean, *40 Years of the Regional Gender Agenda*, September 2016, [https://www.cepal.org/en/publications/40334-40-years-regional-gender-agenda] ; Economic Commission for Latin America and the Caribbean, *Equality and women's autonomy in the sustainable development agenda*, December 2016, [https://www.cepal.org/en/publications/40675-equality-and-womens-autonomy-sustainable-development-agenda].
19. UN Women, *COVID-19 and its economic toll on women : the story behind the numbers*, September 16, 2020, [https://www.reuters.com/video/watch/biden-invokes-cold-war-era-law-in-search-idRCV009CXR] ; P. Cohen, *Recession With a Difference : Women Face Special Burden*, New York Times, November 17, 2020, [https://www.nytimes.com/2020/11/17/business/economy/women-jobs-economy-recession.html].
20. World Health Organization, *Devastatingly pervasive : 1 in 3 women globally experience violence*, March 9, 2021, [https://www.who.int/news/item/09-03-2021-devastatingly-pervasive-1-in-3-women-globally-experience-violence].
21. Economic Commission for Latin America and the Caribbean, *The COVID-19 pandemic is exacerbating the care crisis in Latin America and the Caribbean*, April 2020, [https://www.cepal.org/en/publications/45352-covid-19-pandemic-exacerbating-care-crisis-latin-america-and-caribbean].
22. UN Women, *Policy Brief : The Impact of COVID-19 on Women*, April 9, 2020, [https://www.unwomen.org/en/digital-library/publications/2020/04/policy-brief-the-impact-of-covid-19-on-women#view].
23. Economic Commission for Latin America and the Caribbean, *supra* note 21.
24. For a discussion of the complexity of addressing gender inequalities across the multiple public and private domains, see N. Fraser, R*ethinking the Public Sphere : A Contribution to the Critique of Actually Existing Democracy*, 25/26 Social Text 56, 80 1990.
25. *Cf.* R. Balakrishnan, J. Heintz, and D. Elson, *Rethinking Economic Policy for Social Justice : The Radical Potential of Human Rights*, Routledge, 2016.
26. *Ibid.*
27. Argentina Presidencia, Boletin Oficial de la Republica Argentina : Legislation and Official Notes : Health Emergency Decree 310/2020, March 23, 2020, art. 2, [https://www.boletinoficial.gob.ar/detalleAviso/primera/227113/20200324 ?busqueda=1].
28. COVID-19 Observatory in Latin America and the Caribbean, *Follow Up on the Evolution of COVID-19 Measures*, March 20, 2021, [https://cepalstat-prod.cepal.org/forms/covid-countrysheet/index.html ?country=ARG&theme=8 citing https://www.argentina.gob.ar/sites/default/files/dneig-ingresofamiliardeemergencia-analisisydesafios.pdf].
29. United Nations Secretary General, *Message to the Opening of the 46th Regular Session of the Human Rights Council*, February 22, 2021, [https://www.un.org/sg/en/content/sg/speeches/2021-02-22/message-opening-of-46th-regular-session-of-human-rights-council%C2%A0].

« private » decision but is deeply connected to a web of relationships and socially constructed factors in a woman's life. [30] The ability of diverse women (and other persons who gestate) from different classes and social stratifications to access abortions in practice depends upon an array of legal entitlements that are embedded in the design of social institutions including health systems

For example, in a 2019 decision, the first chamber of the Mexican Supreme Court held that, where a woman was denied a medically necessary abortion due to severe threats to her health, which was guaranteed as an indication under the General Health Law, her right to health under both the Mexican Constitution and international law was violated. [31] The Court not only phrased the violation in specifically gendered terms-that the plaintiff « was prevented from having prompt and timely access to a health service that only women need. » [32] It further underscored that ensuring women's right to health requires changes in health systems as social institutions « to avoid the historical disadvantage due to sex or gender from adversely affecting legitimate claims of justice. » [33] Because of their biological and socially-constructed reproductive roles, women are disproportionately impacted and feel their inclusion or exclusion from being fully equal members of the polity through health systems. Thus, the design and regulation of health systems is a key step to engendering democratic institutional arrangements.

Argentina represents a particularly interesting example of deploying rights strategies in ways that en-gender civic space, as well as institutional arrangements regarding health. On 30 December 2020, Law 27.610 legalizing abortion up to fourteen weeks (and under certain indications after that) was passed. [34] The passage of the law would not have been possible but for iterative steps taken in previous years, including the passage of gender identity, marriage equality and political parity laws, and the synergies built across different social, legal and political strategies. [35] Ruibal and Anderson argue that : « the interaction between the different strategies created a powerful synergy that strengthened the movement and made the recent legislative debate possible, even under the leadership of an anti-choice president. » [36]

However, what may be the most striking about the Argentine case is the role played by public debates – in particular when a previous iteration of the law was considered in Congress in 2018, which definitively removed the topic from being an issue of private religious conviction and morality to one openly discussed and debated across Argentine society : [37] « By opening a new space for public discussion and exerting pressure on the political system, the National Campaign has created the conditions for the advancement of the legal strategies regarding the implementation of the current abortion law. » [38] Moreover, the issue of abortion was debated beyond the formal institutions of state, from family dinner tables to school rooms. These public but informal deliberative spaces allowed social values to be slowly clarified, and assumptions about Argentine law and health provision to be reframed. [39] Indeed, the Argentina case reveals the importance of enlarging our conceptions of democratic deliberation relating to health rights more broadly beyond the legal institutions of the state, to include the spaces that allow disadvantaged and sub-altern communities to appropriate a sense of themselves as subjects of rights who are entitled to fully equal membership in society. [40]

Nonetheless the implementation of the abortion law and the translation of normative standards into public policies and institutional programs in practice will not just face steep opposition from the usual anti-abortion sectors. These victories need to be placed against a backdrop of severe economic crisis exacerbated by decades of adjustment and debt. The Argentine economy is expected to contract 11-12% in 2021 due to the pandemic related economic crisis. [41] If we take seriously that neither abortion nor reproductive justice more broadly can be divorced from the structural conditions that are necessary to enable women to make decisions about their life plans, advocacy for women's health rights in the post-pandemic future requires linkages to the ongoing debates about tens of billions of dollars in outstanding IMF credits, and economic volatility. [42] In light of how much of the management of the economy, in Argentina and across the global South, has been progressively exiled to technical discussions among economists, bankers and lawyers, reclaiming democratic control over the political economy is essential to a solid agenda for gender and social justice.

In short, the women's rights movement in Latin America has made enormous strides in eroding formalistic distinctions between the public deliberative space and the private domestic sphere. Indeed, in large measure as a result of human rights struggles, gender norms and family forms have become more diverse, suggesting different kinds of arrangements necessary to protect equality of women and LGBTQ persons across the private and public spheres in a modern democratic state of law. Yet we have also seen that advancing normative understandings that erode the public-private boundary between domestic and deliberative space is insufficient without also addressing the boundary between the power of private economic actors –in the domestic economy and transnational space. Just as the double standard between private morality in the domestic sphere and justice subject to public reason had to be challenged for women to advance their health rights, so too does the neoliberal deference of public institutions to market logic and private economic power.

30. *Cf.* Roe v. Wade, 40 U.S. 113, Jan. 22, 1973 ; Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, June 29, 1992.
31. Suprema Corte de Justicia de la Nación, Primera Sala [Supreme Court] 2019, Amparo en Revisión 1388/2015 at 51-64 ; 105 (2019) (Mex.).
32. *Ibid.* at 92.
33. *Ibid.* at 22.
34. Argentina, Law 27.610, January 14, 2021.
35. Argentina Gender Identity Law, May 8, 2012 ; Argentina Marriage for People of the Same Sex Bill, July 15, 2010.
36. A. Ruibal and C. F. Anderson, *Legal obstacles and social change : strategies of the abortion rights movement in Argentina* in Politics, Groups, and Identities 698, 2018.
37. REDAAS, *From Clandestinity to Congress : An Analysis of the Voluntary Termination of Pregnancy Legislative Debate in Argentina*, 2019 ; Argentine Law 16H, Sesion Publica Especial, December 29, 2020.
38. A. Ruibal and C. F. Anderson, *supra* note 36, at 710.
39. *Cf.* BBC, *Argentina Abortion : Crowds Gather to Back Pro-Choice Bill*, May 29, 2019, [https://www.bbc.com/news/world-latin-america-4844488] ; BBC, *Timeline : Ireland and Abortion*, May 26, 2018, [https://www.bbc.com/news/world-europe-43962738].
40. N. Fraser, *Scales of Justice : Reimagining Political Space in a Globalizing World*, Columbia University Press, 2009 ; S. Benhabib et al., *The Democratic Disconnect : Citizenship and Accountability in the Transatlantic Community*, Transatlantic Academy, 2013.
41. E. Raszewski and R. Campos, *Argentina's economic scorecard after wild-ride first year*, Reuters, December 14, 2020, [https://www.reuters.com/article/us-argentina-economy-scorecard-graphic/argentinas-economic-scorecard-after-wild-ride-first-year-idUSKBN28O14Q].
42. S. Pérez, *Argentine Government, Wary of Spending Cuts, Drags Feet on Deal With IMF*, Wall Street Journal, February 25, 2021, [https://www.wsj.com/articles/argentine-government-wary-of-spending-cuts-drags-feet-on-deal-with-imf-11614263676].

2. Courts and Health Justice : The Need to Catalyze Political Change for Effective Enjoyment of Health Rights in Practice

3 - In the late 1980's and 1990's, in the wake of the return to democratic rule or in particular social inflection points, many countries in the region adopted new social constitutions with robust enumerations of ESC rights, including health, directly and/or through constitutional blocs. This « new constitutionalism » seemed to promise social transformation through rights and the rule of law, and through courts taking seriously the deprivations of dignity to which the political branches of government seemed indifferent. However, as Roberto Gargarella aptly notes, the « grafting » of social rights into constitutions in Latin America has produced complicated results. [43]

Further, Latin American constitutions generally favor strong executive branches. Donning what Thomas Friedman refers to as the « Golden Straightjacket » – « the defining political-economic garment » of globalization required « making the private sector the primary engine of [a country's] economic growth, maintaining a low rate of inflation... [and]shrinking the size of its bureaucracy. » [44] Doing so further restricts political options, and empowers the executive even more in relation to the legislature. For example, it is not surprising that from Carlos Salinas de Gortari (Mexico) to Alberto Fujimori (Peru) to Carlos Menem (Argentina), major health-related reforms were enacted across the region beginning in the 1990's, with virtually no public debate, and often through decree. [45]

Thus, just as health and other social rights were being formulated and incorporated through constitutional blocs in these constitutions, state capacity to deliver on legal promises was constrained in precisely those areas of law structuring economic and social life, including health systems. For example, in Argentina, Laura Pautassi and Gustavo Gamallo note that in the 1990s, just as social rights were being incorporated into the amended Argentine Constitution of 1994, the Keynesian state apparatus was being dismantled. [46]

Apex court judges, and judges overseeing new constitutional jurisdictions, often cast themselves implicitly if not explicitly as the guardians of the egalitarian aspirations enshrined in new constitutions, which were being threatened by neoliberal tendencies. [47] Ciro Angarita, a Justice on the iconic first Constitutional Court of Colombia, created through the 1991 Constitution, stated this view powerfully :

The Constitutional Court guarantees the coherence and wisdom of rights interpretation and enforcement. This new relation between fundamental rights and judges is a sharp departure from the previous constitution ; a change that can be defined as a new strategy for rights enforcement that consists in granting to judges, and not to the administration or to legislators, the responsibility of promoting the development of fundamental rights. In the previous system rights only had symbolic force. Today, with the new constitution, rights are what judges say they are [and can be enforced]. [48]

Since these new Constitutions were adopted, chronic democratic dysfunction and an ensuing lack of capacity to effectively implement the health rights enshrined in them combined with easy individual access to courts through protection writs (e.g., *amparos, tutelas*), have increasingly created extraordinarily high demand for health goods and services through judicial enforcement. In some countries, such as Colombia and Brazil, health rights claims brought through protection writs run into the tens and even hundreds of thousands per year. [49]

One way to conceptualize the judicialization of health rights in the region is as filling the gap between supply and demand for health goods and services However, this argument disregards a principal implication of construing health, including health care, as a right, which is to understand the health system not as a marketplace, but as a core social institution in a modern democracy, where claims for health protection are assets of legal and social citizenship. [50] As noted above, the role of health systems in mitigating social exclusion and inequality, or exacerbating them is particularly important for women due to their reproductive capacities and socially constructed care-giving roles.

Historically, in a region of staggering social inequalities that have historically been and continue to be reflected in social determinants of health, as well as health outcomes, health systems have often been sites of social contestation over democratic inclusion, from the incorporation of health and social protections for workers in the wake of enormous immigration, to the extraordinary Chilean movement for social medicine. [51] Moreover, since colonial times, when health was generally conceived of as charity organized by religious institutions, there has remained a deeply embedded discourse of health conditions as divine punishment for « sin, » which is most acutely evidenced in relation to sexual and reproductive health. [52] Thus the conquest of health rights as *real* legal rights, as opposed to programmatic aspirations, relates not just to the resolution of specific claims, but the reimagining of health systems as spaces through which to promote and reflect democratic commitments.

43. Gargarella, *supra* note 10..
44. T. Friedman, *The Lexus and the Olive Tree : Understanding Globalization*, Picador, 2012, at 104-105.
45. J. Arroyo, La Reforma Silenciosa : La Reforma del Sector Salud en el Perú. En busca de nuevos modelos de políticas sociales, 2010 ; L. B. D. Göttems and M. de Lourdes Rollemberg Mollo, *Neoliberalism in Latin America : effects on health system reforms*, 54 Revista de saude publica 2020, 74 ; N. Homedes and A. Ugalde, *Neoliberal reforms in health services in Latin America : a critical view from two case studies*, 17 Revista panamericana de salud publica, 2005, at 210-220.
46. G. Gamallo and L. Pautassi, *¿Más derechos, menos marginaciones ? Políticas sociales y bienestar en la Argentina*, Editorial Biblos, 2012.
47. Gargarella, *supra* note 10.
48. Corte Constitucional, Judgment T-406, June 5, 1992.
49. O. Ferraz, *Health as a Human Right : The Politics and Judicialisation of Health in Brazil*, Cambridge University Press, 2020 ; A. E. Yamin, *The right to health in Latin America : the challenges of constructing fair limits* : 40 U. Pa. J. Int'l L. 695, 2019 ; Defensoría del Pueblo Colombia, *La tutela y los derechos a la salud y a la seguridad social*, 2019, [https://www.defensoria.gov.co/public/pdf/Tutela-los-derechos-de-la-salud-2018.pdf].
50. L. P. Freedman, *Achieving the MDGs : Health Systems as core social institutions*, 48 Development, 2005 ; A. E. Yamin and T. Boghosian, *Democracy and Health : Situating Health Rights within a Republic of Reasons*, 19 Yale Journal of Health Policy, Law, and Ethics, 2020, at 3.
51. The WHO's Committee on the Social Determinants of health describes the social determinants of health as constructed causes of bad health outcomes, noting : « The poor health of the poor, the social gradient in health within countries, and the marked health inequities between countries are caused by the unequal distribution of power, income, goods, and services, globally and nationally, the consequent unfairness in the immediate, visible circumstances of peoples lives – their access to health care, schools, and education, their conditions of work and leisure, their homes, communities, towns, or cities – and their chances of leading a flourishing life. » World Health Organization Committee on Social Determinants of Health, *Closing the Gap in a Generation*, August 27, 2008, [https://www.who.int/publications/i/item/WHO-IER-CSDH-08.1], at 1. See also A.-E. Birn and L. Nervi, *Political roots of the struggle for health justice in Latin America*, 385 The Lancet, 1174, 1175, 2015 ; H. Waitzkin, *Commentary : Salvador Allende and the birth of Latin American social medicine* : 34 International Journal of Epidemiology, 739, 741, 2005.
52. A.-E. Birn, *Philanthrocapitalism, past and present : The Rockefeller Foundation, the Gates Foundation, and the setting(s) of the international/global health agenda*, 12 Hypothesis, 2014 ; A.-E. Birn and L. Nervi, *supra* note 50.

Understood in this light, health systems embed normative decisions, from macro-levels, such as solidarity in financing and fairness in priority-setting processes, to the most micro-level, regarding treatment of patients. Further, courts have a democratically legitimate role to play in ensuring that the decisions taken in health systems are justified and reflect equal concern and respect for all members of society. [53]

Judiciaries do and have tried to play this role in multiple countries in the region. A large number of health rights cases in the region evaluate the reasonableness of laws and regulations, seek to fill regulatory and compliance gaps, and address the needs of collective groups, such as indigenous communities or populations facing a common health threat. [54] These cases are not necessarily « judicial activism » ; rather they can be understood as playing an important corrective function in the blind spots of institutional arrangements and policies, and in turn creating greater legitimacy. Further, we have learned from experiences across the region that it is fallacious to make claims about the equity effects of judicialization de-coupled from consideration of priority-setting processes and regulation of private actors, including pharmaceutical companies. [55]

Moreover, apex courts in the region – notably the Argentine Supreme Court and the Colombian Constitutional Court – have used a « weak » form of judicial review, in Mark Tushnet's words, to create dialogue with the political organs of government and catalyze action with respect to structural issues involving environmental health and the health system, respectively. [56] These remedies, which employ models of experimentalist regulation, are particularly well-suited to the invariably complex and multi-valent policy and budgetary implications involved in decisions regarding health. As Tushnet asserts, this iterative process « places into question the assumption that judicial review must involve coercive orders » and can be used effectively to enforce social and economic rights through courts in a way that is still democratically legitimate. [57]

Thus, the real question for health rights advocacy moving forward is not whether democratically legitimate remedies can be crafted ; rather, it is whether judicialization can effectively catalyze political action that brings greater equity to health and health systems.

Experience from the region suggests that the critical factors in advancing health equity lie in the alignment of health rights norms with the institutional architecture and regulation of the health system specifically, as well as the conditions necessary to catalyze a democratic political economy more broadly. Thus, for legal enforcement of health rights to produce more health and social equality, there is a need not just for refining adjudicatory approaches but also for greater attention to the factors that limit the capacity and responsiveness of the legislative and executive branches. Invariably human rights strategies will need to focus on the conditions necessary to provide fair infrastructure of public health and service provision at local, national and global levels that have been impaired by neoliberal legal regimes. [58]

53. K. Syrett, *Law, Legitimacy and the Rationing of Healthcare : A Contextual and Comparative Perspective*, Cambridge University Press, 2007.
54. A. E. Yamin, *supra* note 46.
55. D. M. Brinks and V. Gauri, *The Law's Majestic Equality ? The Distributive Impact of Judicializing Social and Economic Rights*, 12 Perspectives on Politics, July 14, 2014.
56. Decision T-760, Colombia, July 31, 2008 ; Mendoza v. Argentina, Report No. 172/10, November 2, 2010.
57. M. Tushnet, *Weak Courts, Strong Rights*, Princeton University Press, 2008, at 228, 249.
58. J. Britton-Purdy et al., Building a Law-and-Political-Economy Framework : Beyond the Twentieth-Century Synthesis, 129 Yale L.J. 1784, April 2020.

Conclusions

4 - As early as the 1970s, Jürgen Habermas was pointing to a legitimation crisis in modern democracies because of the opaque decision-making processes behind the administrative state that precluded people from having their voices represented, holding the state accountable, and meaningfully governing themselves. [59] But over these years, that legitimation crisis has grown profoundly deeper as political and economic institutions could not deliver on the legal promises that were made in international human rights treaties and national constitutions. Perhaps nowhere is this more evident than in Latin America.

Based on examples from the region, I have argued here that a fundamental pillar in efforts to reenergize human rights praxis for the post-pandemic should include *'reivindicando lo público'* – reclaiming the public – to build democratic political economies. The tools and language that human rights offer through which to hold governments accountable for laws, policies and practices depend on people having a voice and a say over the economic arrangements as well as over the political norms that shape their lives. In turn, such deep democracy requires both meaningful public deliberation and functioning public institutions that act not as gap fillers, but as guarantors of equity across gender, race, class, and other axes of identity.

Of course, it will be a momentous struggle to convert these ideas into meaningful change ; but after the ravages of lives and livelihoods wrought by this pandemic bold ideas and action are no longer out of bounds. History provides both insights and hope. We have seen similarly « impossible » battles successfully waged for women's equality and sexual and reproductive health and rights (SHRH), in the region and elsewhere, along with struggles for labor and land rights, and ultimately in struggles for democratization after conflict and dictatorship.

Further, past pandemics, from cholera to yellow fever to HIV/AIDS, have led to far broader recognitions of the connections between public health, democracy and the need for functioning public institutions. Indeed, we learned from HIV/AIDS, that there is a window of opportunity to radically re-shape global governance institutions and forces that flow in a transnational space. [60]

The sweeping devastation revealed and exacerbated by this pandemic creates similarly subversive opportunities for transformative action that we must seize. [61] The sheer contrast between the enhancement of extreme private wealth for some during this pandemic and the deprivations of basic services, vaccines, and other goods the great majority are expected to accept due to public incapacity, incompetence and indifference, [62] generates epistemic disobedience to the knowledge structures that sustain the *status quo* in health and beyond, including fundamental tenets of market ideology. Such resistance has already given rise to some progressive political alternatives in the region and beyond, which would have seemed impossible just a few years ago-from a universal basic income to wealth taxes (Argentina)

59. J. Habermas, *Legitimation Crisis*, Polity Press, 1976.
60. W. E. Forbath et al., *Cultural Transformation, Deep Institutional Reform, and ESR Practice*, in L. White and J. Perelman, *Stones of Hope*, Stanford University Press, 2020, at 51-90 ; Z. Achmat, *The Treatment Action Campaign, HIV/AIDS and the government*, 54 Transformation : Critical Perspectives on Southern Africa 76, 84 (2004) ; J. G. Biehl, *The Activist State : Global Pharmaceuticals, AIDS, and Citizenship in Brazil*, 22 Social Text 105,132, 2004.
61. J. P. Bohoslavsky and A. E. Yamin, *Hay Alternativa : Agendas transformadoras*, in J. P. Bohoslavsky, *La Pandemia de la Desigualdad*, Editorial Biblos, 2020, at 593-612.
62. Berkhout *supra* note 3.

and more progressive schemes for universal health coverage and pension plans. [63]

In short, this pandemic has swept away some of the false necessity [64] of our current social arrangements at national, regional, and global levels. In human rights, we must combat the inevitable efforts to re-normalize such rules as soon as the pandemic is over, uniting with progressive social movements to find democratizing and progressive alternatives that include strengthening democratic practices and institutional arrangements.

By contrast, proposals for business as usual, which involve implementing human rights in health through top-down bureaucratic schemes, undermine the commitment to democratic processes that we most urgently need today. [65] The power of human rights has always come from the energy of real human beings, struggling for the seemingly impossible, and acting collectively to make it possible. As Eduardo Galeano writes, « the process is anything but spectacular and it mostly happens at the local level, where across the world a thousand and one new forces are emerging. They emerge from the bottom up and the inside out... they shoulder the task of reconceiving democracy, nourishing it with popular participation and reviving it with the battered traditions of tolerance, mutual assistance, and communion with nature. » [66]

63. BBC, *Covid : Argentina passes tax on wealthy to pay for virus measures*, December 5, 2020, [https://www.bbc.com/news/world-latin-america-55199058# :~ :text=Argentina%20has%20passed%20a%20new,votes%20to%2026%20on%20Friday] ; A. Lang, N. A. Ramos Mirada, *Chilean lawmakers help pensions withdrawal plan over first hurdle*, Reuters, November 10, 2020, [https://www.reuters.com/article/chile-politics-pensions/chilean-lawmakers-help-pensions-withdrawal-plan-over-first-hurdle-idUSL1N2HW2R7].
64. R. M. Unger, *False Necessity*, Verso, 2011 ; R. M. Unger, *Democracy Realized : The Progressive Alternative*, Verso, 1998.
65. *Cf*. B. M. Meier and L. O. Gostin, *Introduction*, in *Human Rights in Global Health : Rights Based on Governance for a Globalizing World*, Oxford University Press, 2018, at 1-3.
66. E. Galeano, *Upside down : a primer for the looking-glass world*, Metropolitan Books, 2000, at 321.