


Transformative Constitutionalism and the Right to Health in Latin America

*Constitucionalismo transformador e o direito à saúde na
América Latina*

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ABSTRACT

The most important objective of transformative constitutionalism is to transform society by fostering democracy, protecting human rights, and seeking to eliminate poverty and reduce inequality. From this perspective, courts always guarantee this transformation through judicial activism. In order to achieve this objective, courts in the Latin American region are expanding their involvement in the health sector in particular. The objective of this article was to analyse the consequences of transformative constitutionalism in the health sector in Brazil, Argentina, Mexico and Colombia. The methodology applied was descriptive. Comparative, qualitative and literature review and 37 semi-structured interviews with judges, academics and public servants were carried out. Despite the progress made, the transformation achieved by the intervention of courts in the protection of the right to health has been only moderate. Transformative constitutionalism is generating internal and external transformations in the health sector of Latin America including direct material, symbolic and indirect transformations; however, there are still concerns about the negative consequences of transformative constitutionalism. Therefore, the promises of transformative constitutionalism remain very far to reach. In conclusion, courts should consider more the structural causes that are affecting health systems and strive more towards equilibrium.

Keywords: Courts; Latin America; Right to Health; Transformative Constitutionalism.

RESUMO

O objetivo mais importante do constitucionalismo transformador é mudar a sociedade por meio da promoção da democracia, proteção dos direitos humanos e busca da eliminação da pobreza e redução da desigualdade. Nessa perspectiva, os tribunais sempre garantiram essa transformação por meio do ativismo judicial. Nesse sentido, as cortes latino-americanas estão promovendo a expansão de seu envolvimento no setor da saúde em particular. O objetivo deste artigo foi analisar as consequências do constitucionalismo transformador no setor da saúde no Brasil, Argentina, México e Colômbia. A metodologia aplicada foi descritiva. Foram realizadas revisão comparativa, qualitativa e bibliográfica e 37 entrevistas semiestruturadas com juízes, acadêmicos e servidores públicos. Apesar dos avanços, a transformação alcançada pela intervenção dos tribunais para a proteção do direito à saúde não passa de moderada. O constitucionalismo transformador está gerando mudanças internas e externas no setor de saúde da América Latina, incluindo alterações diretas materiais, simbólicas e indiretas. No entanto, ainda há preocupações sobre as consequências negativas do constitucionalismo transformador e, portanto, suas promessas permanecem muito distantes. Em conclusão, as cortes devem prestar mais atenção às causas estruturais que afetam os sistemas de saúde e se esforçar mais para atingir o equilíbrio.

Palavras-chave: Tribunais; América Latina; Direito à Saúde; Constitucionalismo Transformador.

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Introduction

Many Constitutional Courts around the world have been attempting to protect the Right to Health while looking to generate structural transformations. This particular phenomenon is taking place in an increasing number of countries such as India, Colombia, South Africa, and Argentina. Indeed, Courts have been interpreting the countries' constitutions and ordering structural remedies in order to transform society by fostering democracy, protecting human rights, and seeking to eliminate poverty while reducing the high levels of inequality. From this perspective, Courts often play a pivotal role in facilitating this transformation through judicial activism. However, it is important to note that the degree and nature of this activism can vary considerably depending on the specific legal, political, and cultural context of each court. Transformative constitutionalism has its origins in South Africa where "the constitutional project is termed a 'transformative' or 'transformation-oriented one'" (Pieterse, 2005, p. 155) and it could be defined as "an enterprise of inducing large-scale social change through nonviolent political processes grounded in law" (Klare, 1998, p. 150). The transformation process entails several types of changes at the macro and micro levels; however, its main objective is to promote a balance of equality and freedom through "transformative strategies [that] seek to redress the underlying structures which generate patterns of material deprivation and status hierarchies" (Liebenberg, 2015, p. 446).

In Latin America, the debate about transformative constitutionalism has been adopted under different names, for instance, "neoconstitutionalism" and "new Latin American constitutionalism". In effect, the neoconstitutionalism project has been interpreted as a project of transformation through minimal pacts that materialize in the new post-war constitutions including Italy (1947), Germany (1969), France (1958), Greece (1975), Portugal (1976) and Spain (1978). In this type of legal jurisdiction, the constitution is interpreted as rigid with binding force and it is certainly difficult to reform. The constitution is also interpreted as a context where values and principles converge and are protected not only by constitutional courts but also by other branches of government such as Supreme Courts, executive powers, and legislative bodies, each within their respective capacities and roles. Under this particular perspective, principles take precedence over rules and the main objective of courts is to guarantee social rights by limiting state power while maintaining a balance that ultimately strengthens democracy. Neoconstitutionalism and transformative constitutionalism take into account the general context, including the high levels of inequality and poverty in the region. Broadly speaking, these perspectives seek to promote social change and equality. Similarly, authors such as Pastor & Dalmau (2011) have been advocating for a new Latin American constitutionalism. The new Latin American constitutionalism is related to the recent processes and constitutional reforms in countries such as Bolivia, Ecuador, Colombia and Venezuela (Schilling-Vacaflor; Nolte, 2012; Baldí, 2012). Rather than following Eurocentric parameters, the new constitutionalism in Bolivia and Ecuador, for example, challenges these norms by recognizing and valuing indigenous peoples' struggles and decolonization efforts in these constitutions. Indeed, this type of constitutionalism – more focused on the Latin American context – has introduced even principles and values of different indigenous cultures such as the right to a "good living" (Fajardo Sánchez, 2021). In sum, "[t]he new Latin American constitutionalism promises to resolve the democratic deficit in traditional constitutional theory by institutionalizing spaces for citizen-led constitutional changes" (Hughes, 2018, p. 1). Although these perspectives bring some progress to the discussion of this subject, they have led many academics¹ to question the impact of judgments in terms of transformation. In addition to that, activist courts, such as the Colombian Constitutional Court, are increasingly using strategies such as structural cases and new methods of legal interpretation, including the unconstitutional state of affairs.

Indeed, the literature on this topic has increased in the last years and discussions about transformative constitutionalism have been contested, and “[y]et, it remains unclear what transformative constitutionalism entails” (Hailbronner, 2017). In addition to that, there are few publications concerned with the impact and consequences of transformative constitutionalism on the protection of the right to health. Therefore, the objective of this article is to analyse the consequences of transformative constitutionalism in the health sector in Brazil, Argentina, Mexico and Colombia. This study is important and necessary since the level of inequality and poverty in those countries is very high. The methodology used for this research is descriptive. Comparative and qualitative literature review and 37 semi-structured interviews with judges, academics and public servants were carried out. Those countries were chosen due to their robust judicial systems and global influence. Particularly, the Colombian Court has been perceived as more activist due to several factors such as combating structural inequalities, its support for human rights, and its progressive interpretation of its constitution. Cases were also selected in relation to their level of impact and relevance to current landscape in the last 10 years. The structure of this article starts by describing the context of transformative constitutionalism in the protection of economic, social and cultural rights (ESCR), then it analyses the consequences of transformative constitutionalism in the health sector in Latin America. Finally, this article will focus on examining the different challenges confronting courts as they strive to foster effective transformative constitutionalism within the health sector in the Latin American region.

I Transformative constitutionalism. The intervention of judges in the protection of economic, social and cultural rights

The intervention of judges that seek transformative constitutionalism is intensifying at the global level; currently, there are many challenges in relation to its operationalization. Such intervention has been an object of criticism in the literature and there are also many gaps in the state of the art. Broadly speaking, transformative constitutionalism seeks structural social change by using nonviolent political processes grounded in law (Klare, 1998). Its objective strongly resonates with the theory of the capabilities approach² (Berg, 2017) since it seeks primarily to generate processes of strong transformation by fostering democracy, guaranteeing the fulfilment of human rights and reducing the high levels of poverty and inequality. Its purpose is to ensure the fulfilment of the fundamental constitutional guarantees, especially concerning human rights, democracy, and the Rule of Law. At the structural level, transformative constitutionalism seeks to transform the relations of power and generate a change in the practices, policies, and law, while at the individual level it seeks to generate changes, particularly, in the attitude, processes of interpretation, knowledge, and competencies. It is very important to mention that transformative constitutionalism has been built based on different types and designs of constitutionalism in recent years (Bogdandy, 2015). Transformative constitutionalism is currently understood in relation to a practice of interpretation. Indeed, according to von Bogdandy & Urueña (2020), it refers to the method of interpreting and applying constitutional rules to facilitate social transformation. It is a theoretical framework that places a premium on achieving lasting change in order to create a more equitable or democratic society (Bogdandy & Urueña, 2020). A redistribution of resources throughout society would be implied by such a process, and this redistribution would alter existing social structures. It is a way of interpreting the constitution that centres on the idea that law should adapt to the needs of society rather than being static and unchanging (Bogdandy & Urueña, 2020). It seeks to achieve the objectives of the constitution, which requires transforming different structures. According to this approach, public law is used to encourage social change based on a vision of a decent and just society

(Arguelhes, 2019). In literature, transformative constitutionalism has been discussed in different contexts such as South Africa, Kenya (Mwenda, 2015), the Philippines (Chopra, 2017) and India. It is a worldwide phenomenon (Bogdandy *et al.*, 2016, p. 6). Transformation is interpreted as economic transformation, a change of legal culture and a permanent ideal; its main challenges are access to equal justice, legal education and legal culture while maintaining the separation of powers (Langa, 2006). South Africa has an advanced constitution but its jurists continue to deploy traditional methods of legal analysis (Davis; Klare, 2010). Extreme inequality is one of the greatest obstacles to transformative constitutionalism (Correa Henao, 2019). The project of transformative constitutionalism should not be closed off to anyone who wants to take part in it, but rather open to anyone who respects the core values of peaceful, democratic, law-based social change (Roux, 2009).

In a context of imbalances – lack of fulfilment of the constitutional obligations caused by action and omissions of states as well as abusive constitutionalism³ that is affecting democracy –, the transformative constitutionalism proposes that “[...] judges intervene to advance – within their competencies and with all their limitations – a project that brings people’s daily lives closer to the world that has been promised to them by their constitutions” (Roa Roa, 2021, p. 46, our translation). In Latin America, transformative constitutionalism has made some progress in recent years with courts issuing judgments in relation to the protection of Indigenous rights, while offering tools for others in a position of disadvantage to access justice, the protection of reproductive rights and ESCR, thus generating changes to the politics of the region, as well as producing symbolic changes.

Several commentators have started to propose different perspectives about the development of a new vision of constitutional justice in terms of the new role of judges, the type of constitutionalism as well as the institutional design in order to achieve the objective of transformation. For instance, according to Rosalind Dixon (Conferencia, 2020), in order to enforce rights and deliver transformations, courts should respond to three different challenges or democratic blockages, namely, democratic blindspots (application, accommodation, and perspective), democratic burdens of inertia (coalition-driven, priority-driven, and compound) (Dixon, 2007) and threats of democratic backsliding⁴. By proposing a theory of cooperative constitutionalism through dialogue as the best model of cooperation, Dixon also suggests that courts should be mindful of what it calls reverse burdens of inertia (legislative inertia) and democratic backlash (negative reactions by society) against a court and its decisions. In a similar vein, other authors, such as Jorge Roa, suggest that transformative constitutionalism for Latin America requires strong and coordinated constitutionalism where judges have the last word in order to unlock their countries’ respective constitutions and advance the protection of rights. The role of judges should be to promote transformations (as long as the courts have allies such as parliaments, governments or civil society), defend against abusive constitutionalism, and preserve or generate a balance of the new and old projects (El Rol, 2020). At the same time, according to Roa (2020) “[...] the design of judicial systems must include mechanisms to extend the standing before the courts for the judges to appear closer to the citizen’s claims” (our translation). This approach is certainly very relevant today since the new threats facing different countries are related to abusive or authoritative constitutionalism. Therefore, in the context of transformative constitutionalism, courts must react proactively to generate social transformations, while fostering collaborative actions with legislative and executive bodies.

On the other hand, Rodríguez Garavito (2011) might suggest that the promise of socio-economic rights, has not taken into account the impact of rulings. Therefore, he proposes an analytical and methodological framework that takes into account not only the direct material effects but also indirect and symbolic effects. At the same time,

it is important to note that transformative constitutionalism depends not only on dialogic rulings characterized by strong rights, moderate remedies, and strong monitoring to deliver strong change in people's lives, but also on a well-designed structural architecture that enables such dialogues. This is not merely about conversation; it requires an established structure facilitating meaningful interaction between people and public powers. This is because dialogic judgments promote democratic deliberation (through public hearings, commissions, and the participation of civil society) while at the same time generating more impact and transformations. According to this author "[...] dialogic rulings set broad goals and clear implementation paths through deadlines and progress reports while leaving substantive decisions and detailed outcomes to government agencies" (Rodríguez Garavito, 2011, p. 1676).

II Transformative constitutionalism in the health sector in Latin America

The judicialization process has increased dramatically worldwide (Gutiérrez Silva, 2019). Courts in Latin America have been increasingly seeking to guarantee the protection and fulfilment of the highest attainable health standard. Many factors might be prompting a reaction from courts in order to protect the right to health in Latin American countries, including high levels of inequality, structural causes such as corruption, and pharmaceuticalization (Lamprea Montealegre, 2022) (Andia; Lamprea, 2019), in addition to institutional arrangements, including management failures and dysfunctions (Freitas; Fonseca; Queluz, 2020), a culture of privatization, as well as a high level of immaturity of the health systems and a lack of fulfilment by States in their obligations. In Latin America, courts have been issuing judgements in relation to access to services and medicaments incorporated into the health system as well as exclusions. Those exclusions are related to low-cost or high-cost health services and medicaments that might be experimental, without a registry or not incorporated by health technology assessment agencies. In addition to that, health policies have been questioned, leading to intervention not just by courts, but also by various stakeholders. Indeed, courts also have intervened in issues related to the autonomy of the individual, including reproductive rights, abortion and euthanasia. Courts have also issued judgements in relation to damages and adverse events or medical errors (Delduque *et al.*, 2022; Albuquerque; Regis, 2020), and it has also protected the right to health in connection with other rights such environment (Pellegrini *et al.*, 2020), the right to work, etc. Finally, very lately, courts have been revising cases in relation to the consumption of drugs for therapeutic or recreative purposes.

The characteristics of health litigation in Latin America remain very routinised and individual. Judgements are also characterized by a downstream approach that does not take into account the structural factors that are triggering it as well as new limits and conditions in the recognition of rights because courts are increasingly taking into account the consequences of the judicialization process, such as the separation of powers, financial sustainability and democratic legitimacy (Gutiérrez Silva, 2024). Courts are also issuing more individual rather than structural remedies, and the monitoring process still lack effectiveness since most judgements are not enforced. Therefore, the development of transformative constitutionalism in the region is still characterized by moderate effects and many commentators are starting to question the intervention of courts.

The literature has documented that in some countries, such as Chile, litigation is "related to unjustified increases in the insurance premiums" (Vargas Pelaez *et al.*, 2019, p. 1, our translation), while in Costa Rica the causes of litigation seem to be associated with high-cost medicaments with low benefits (Norheim; Wilson, 2014). In Colombia, on the other hand, most litigation is related to benefits included in health plans (Freiberg; Espin, 2022), and courts in Brazil have been mainly handling claims about

medicaments not incorporated into the *Sistema Unico de Saúde* (SUS) (Wang *et al.*, 2020); (Oliveira *et al.*, 2021). Despite these differences, there are similarities in the causes, nature and repercussions in this region of the world (Reveiz *et al.*, 2013). However, the causes of litigation remain very complex to analyse. Despite the global recognition of the right to health as a fundamental right, litigation has persisted in countries such as Brazil (Ferraz, 2009), Costa Rica, Mexico (Daniels *et al.*, 2015) and Colombia (Andia; Lamprea, 2019). In a similar vein, “[...] jurisprudence on the right to health has shifted from an inviolable minimum core to a core that is subject to the state’s available resources under certain conditions” (Perehudoff; Forman, 2019, p. 17). The global coronavirus pandemic (COVID-19) has also revealed that the countries’ health systems were not prepared to confront this threat. The lack of fulfilment of human rights principles and rights not only is leading to the death of many people worldwide but also, is currently the main cause of a substantial reduction in economic growth. In Colombia, judicial activism “was the unexpected outcome of purposeful political choices made by proponents of neoliberal economics” (Nunes, 2010, p. 67), while in Brazil, the presence of the Public Defender’s Office has increased the judicialization process (Socal; Amon; Biehl, 2020).

In Brazil, despite the creation of new structures and agencies such as technical support centres (NATJUS)⁵ in 2015 and e-NATJUS⁶, as well as Conitec⁷ that seek to reduce the litigation process, for some commentators the effect has been negative (Wang *et al.*, 2020), since courts continue disrupting budgetary allocations (Ribeiro; Hartmann, 2016), by funding expensive treatments (Ivama Brummell *et al.*, 2022) while increasing budgets (Almeida; Nicoletti, 2020). Judgements have also favoured municipalities with better socioeconomic profiles (Lopes *et al.*, 2019; Finatto *et al.*, 2021) and generated death and adverse events (Lopes *et al.*, 2019) while access to medicaments continues to be a privilege for those with more resources (Ferraz, 2009). The general perception is that the judicialization process is a threat to the SUS (Chieffi; Barradas; Goldbaum, 2017). On the other hand, according to Biehl, Socal and Amon (2016), judicialization does not expand inequities or weakens the health system; instead it “[...] may serve as a grassroots instrument for the poor to hold the state accountable”. Judicialization is not a phenomenon of the elites (Diniz; Machado; Penalva, 2014, p. 209) and for Chagas *et al.* (2020) “[t]he institutional strategies deployed were important tools to reduce the high costs of the medicines in the lawsuits”. Similarly, some consider that while it creates access to health services it also generates socio-medical challenges (Martins; Allen, 2020, p. 1).

In Colombia, judgement T-760 of 2008 has achieved a medium impact; in effect, the judicialization process has delivered policies and structural reforms (D’Ávila; Andrade; Aith, 2020), for instance, by recognizing health as a right or creating new policies for controlling prices (Vargas Pelaez *et al.*, 2019). However, different studies suggest a problem with barriers in access and financial sustainability (Restrepo Zea *et al.*, 2020) as well as fragmentation, weak governance, lack of coordination and poor incentives and information systems (Bernal; Barbosa, 2015). In addition to that, there are many challenges with the implementation of monitoring of judgements (Gómez Ceballos; Craveiro; Gonçalves, 2019). It has also strengthened the deliberative process. Although it is too early to analyse the impact of transformative constitutionalism in Mexico, authors such as Cobo & Charvel (2020) suggest that the Supreme Court should promote more structural reforms. In the case of Argentina, according to Gotlieb, Yavich and Báscolo (2016, p. 1) litigation in health has failed to actively promote either health equity, the right to health, or inter-institutional dialogue.

Attempting to measure the consequences of transformative constitutionalism in the right to health is a complex task. Therefore, it is necessary to build a methodological and analytical framework in the form of a heuristic device to analyze different aspects of the consequences of transformative constitutionalism and the right to health. This

analytical framework combines the theory of Rodríguez Garavito (2011) and its subsequent application to the Colombian context, as discussed by Tatiana Andía in her presentation at the XII Meeting of Constitutional Jurisdiction. In addition, it includes a new category of “internal transformation at the level of courts” to understand how courts themselves have evolved in response to these issues. For the measurement of direct, material, and symbolic effects, it is also necessary to specify subcategories such as constitutional transformations, transformation in structural causes, right to health, participation, interpretation and opinion. Finally, it is also important to analyse whether the perception of minimal and negative transformation is still adopted. Overall, such framework is multidimensional, encompassing both external and internal transformations, and it is also substantiated by the findings of the literature review and semi-structured interviews.

As Figure 1 illustrates, generally speaking, transformative constitutionalism exhibits a tendency towards moderate transformation in the four countries. This even includes Mexico, which although is a country that is still in its early stages of the judicialization process and where impact could be minimal, where judgements are currently generating indirect and symbolic transformations by generating some debate and a change in interpretation and opinion. In most of the cases studied, the advancement of governmental commitments to fulfil the maximum possible standard of health was shown in some circumstances where litigation helped boost the quality of life, while in other cases, litigation seems to be perceived as putting a strain on health systems.

Internal Transformation		● High Transformation
- External Transformation		
- Direct Transformation		
Transformation in Constitution	↑	
Transformation in Structural Causes		
Transformation in Law, Policy and Practices	Colombia, Argentina and Brazil	● Moderate Transformation
Transformation in the Right to Health	↓	
- Indirect Transformation		
Transformation in Participation	↑	
- Symbolic Transformation	Mexico	
Transformation in Interpretation		
Transformation in Opinion		
Minimal Transformation		● Minimal Transformation
Non Existing Transformation		
Negative Transformation		● Minimal Transformation
Judgments non-enforced		

Figure 1. Consequences of transformative constitutionalism in the health sector in Brazil, Argentina, Mexico and Colombia

Source: Elaborated by the author.

Indeed, following the work by Rodríguez Garavito (2011), the debate on the consequences is currently being perceived from a perspective that includes new categories used to evaluate the impact of judgements such as direct, indirect, material and symbolic transformation at the internal and external levels. At the external level, transformative constitutionalism has had consequences on the health systems⁸. In the case of Colombia, for instance, it has generated direct material transformations. The country has introduced a new system of exclusions through Statutory Law 1751 of 2015 (Colombia, 2015). This law was reviewed by the court through judgement C-313/14 (Colombia, 2014), which in turn led the court to transform their interpretation of the right to health by acknowledging that “everything is included unless it is explicitly excluded”. Indeed, during the XII Meeting of Constitutional Jurisdiction, Tatiana Andía, who was leading the panel on social security, argued that health litigation could have symbolic effects since the right to health is now a topic discussed by every Colombian. It is no longer seen as a favour or a public good, but rather a basic human entitlement. In addition

to that, the right to health has become the framework within which public policy is managed. In terms of material effects, the first effect would be related to the impact on all public health policies and the second is related to the impact it has had on equality or inequality (Eje, 2017). In the case of Argentina, it might have forced the government to implement structural reforms (Vargas Peláez *et al.*, 2019) that include a revision of the list of drugs covered and improved control. As previously mentioned, the intervention of judges in Brazil is leading to many transformations, such as changes in policy as well as changes through the creation of new mechanisms such as technical chambers and departments and a new institution in charge of evaluating technologies known as Conitec, while in Mexico, despite it being difficult to assess the consequences since it is relatively new, it has been acknowledged that the intervention of courts is putting strong pressure on different actors.

As it was previously analysed, most judgements are individual and routinised, looking to grant a particular treatment or medicament. In practice, courts in the four countries issue concrete remedies asking different actors to fulfil their positive obligation in relation to a concrete case; for instance, again, to allow access to medical treatment, authorise a medicament or enroll a health user in the health system. Since its inception, the Colombian Court has been keen on promoting structural remedies; however, due to many criticisms, the court is recently reviewing the impact of such judgments. This type of judgement “[...] instructs various government agencies to take coordinated actions to protect the entire affected population and not just the specific complainants of the case” (Rodríguez Garavito, 2011, p. 1671). Therefore, adopting a neorealist perspective to the evaluation of the impact of judgements, the judicialization process has generated at the external level of the courts a direct and material impact since in many countries it has generated changes and transformation of laws, policies and practices while unlocking the inertia of public institutions and parliaments and prompting the state to take action. Unfortunately, the lack of coordination still is a challenge, and many judgements have asked States to design new policies. At the same time, it has generated indirect transformations since it has inspired many movements in the health sector to protect the right to health, especially of the most vulnerable, at the same time transforming the opinion of the public about the critical situation that the health sector is facing in their respective countries. Finally, most of the transformations have been symbolic since they have transformed the way individuals interpret and perceive this particular challenge. Health users are transforming their opinions and interpretations in relation to the judicialization process; additionally, the experience of urban patients in relation to the health services received is being perceived as very different from the experience of users who lives in rural areas, where the lack of availability, accessibility, adaptability and quality of services is higher.

The litigation process has also affected the internal level of courts since it has transformed courts to deal with this challenge by, for instance, strengthening different mechanisms such as chambers of monitoring and new methodologies to measure the impact of judgements. It has also triggered many technical exchanges among judges who are currently participating in different events, throughout the year, aimed at analysing relevant topics in relation to health litigation. Moreover, it has started to introduce new systems based on artificial intelligence to reduce the high level of judicialization.

There are still concerns about the negative consequences of the intervention of judges in politics in the four countries studied. Indeed, the traditional concern regarding the judicialization of health related to the fact that judges lack the technical expertise, capacities, and knowledge necessary to decide cases is still recurrent in the literature. Despite the efforts of the courts in improving their practices, however, many judges in Latin America continue to be criticised for ordering medicines without security and efficacy (Vargas-Peláez *et al.*, 2019). Even though, in general terms, most courts in

the four countries studied are not recognizing access to experimental medicines, the debate that insists that judges should not intervene because of the lack of medical expertise is still present. A growing number of studies have even raised awareness, particularly because some medicaments that have been imported have led not only to death but also to different adverse effects (Silva et al., 2020 quoted by Freiberg, 2021, p. 4). In some cases, such as in Mexico, courts are deferring the orders to the executive in order to not affect the principle of the separation of powers. This type of structural consequence raises many challenges, particularly in relation to the need to strengthen public agencies for health technology assessment. Alternatively, in some jurisdictions, such as Colombia, characterised by a massive amount of litigation and where the judiciary has been keen on ordering structural remedies to deal with systematic violations, judges are starting to question the impact of structural cases due to a myriad of challenges⁹. Many judgements also remain not enforced¹⁰, which has generated new debates in terms of how to supervise the implementation of judgements and the monitoring process by courts.

III Transformative constitutionalism equilibrated: reflexive and strategic

Studies conducted in the four countries reveal some patterns as to why transformative constitutionalism has failed to produce changes at the external and internal levels. Transformative constitutionalism could deliver substantial changes provided that courts strive more towards equilibrium. This entails not only shifting their focus more towards strengthening the monitoring and evaluation process of judgments, but also, that Transformative constitutionalism is more strategic. Such strategic thinking involves more creativity, adaptability and flexibility. In other words, the intensity of judicial activism in terms of remedies must be inversely proportional to the level of maturity of a country. Transformative constitutionalism also demands a strong monitoring and evaluation process by more reflexive courts that take rights and democracy seriously. This means a strong monitoring and evaluation process of structural judgments that considers not only change at the external and internal level and growth of excellence, principles, values, potential, capabilities, contribution and legitimacy through formal deliberation, but also contextual factors that limit the enjoyment of the rights, as well as the state's constraints. These elements are crucial and will offer an opportunity for the objectives of transformative constitutionalism to be achieved. Indeed, the evaluation process must also consider structural dysfunctions and conduct of third parties through corruption, which will help courts to further understand the challenges and limitations that may hinder the effectiveness of transformative constitutional changes. These findings are consistent with the position of the Center for Economic and Social Rights (CESR), which suggests that "poor human rights outcomes are usually connected to dysfunctions in institutions, social structure, or lack of political will. Understanding these dysfunctions is essential for identifying actionable recommendations" (CESR, 2012a, p. 23).

Understanding a State's constraints involve identifying "[...] how the acts or omissions of third parties or structural dysfunctions impact on the state's ability to fulfil the right" (CESR, 2012b, p. 27); therefore, courts should aim to strengthen the monitoring and evaluation process by taking advantage of new technologies such as artificial intelligence (AI). Many countries have moved in this direction. Brazil is using a system called "Victor", Argentina is using a system called "Prometea". In the case of Colombia, for instance, the Constitutional Court very recently started to use an AI system called "Pretoria" in order to review tutelas (Rivadeneira, 2019) and in Mexico Courts are using a system called "Expertius". The objective here would be not only to evaluate direct, indirect, material, and symbolic transformation, but also, socio-economic one. Transformative constitutionalism must be more equilibrated and "[...] the Constitutional Court needs to exercise 'a high level of scrutiny' to see

how the current health reforms are implemented” (Tsai, 2010, p. 110). The use of AI in the monitoring and evaluation processes of transformative constitutionalism may improve efficiency and speed, evaluate the effectiveness of constitutional measures, and by also including large amount of data such as socio-economic indicators this will help to gain a better understanding of constitutional measures and their effects on the most vulnerable.

Conclusion

Transformative constitutionalism is generating internal and external transformations in the health sector in Latin America, including direct material, symbolic and indirect transformations. There are still concerns about the negative consequences of transformative constitutionalism and many judgements remain unenforced. Not only courts but also government agencies, policy makers, civil society organisations, and affected communities should take into account the structural causes to find effective solutions that are affecting the health systems. The main challenge of transformative constitutionalism is to be more equilibrated. There is also a tendency of courts of establishing more limits on the protection of the right to health which might jeopardise its objective of transformation. Therefore, the capacities of courts to generate transformative change needs to be strengthened. This implies that courts should promote a transformative constitutionalism that is both more reflexive and strategic in order to fulfil the right to health. The debate about transformative constitutionalism has focused on the new role of judges, the type of constitutionalism as well as the institutional design in order to achieve the objective of transformation. Transformative constitutionalism could be achieved if courts shift their focus more towards the monitoring and evaluation process of judgments. A strong evaluation process of structural judgments that takes into account the variations of change and growth of principles, values, excellence, potential and capabilities through formal deliberation by constitutional courts will offer an opportunity to achieve the objectives of transformative constitutionalism since it will allow them to review whether the State is fulfilling its obligations of results, conduct, and resources and will permit to issue new remedies to ensure the realization of the right to health.

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Notas

- ¹ During the intervention of the Magistrate of the Colombian Constitutional Court, Gloria Stella Ortiz Delgado, it is mentioned that, in the Court, there are pessimistic views in relation to the transformation achieved by their case law (Diálogos, 2019, min. 48).
- ² Rather than focusing only on resources or subjective categories like happiness, this theory focuses on what people can do and being as well as the substantial freedoms they have to achieve their potential actions and state of being (Stanford Encyclopedia of Philosophy, 2020).
- ³ According to Landau (2013), abusive constitutionalism occurs when autocratic leaders use constitutional amendments to subvert democratic norms and institutions.
- ⁴ Dixon suggest that democratic backsliding occurs when elected governments or presidents use legal means to manipulate the rules and institutions allowing them to remain in power (Choudhry, 2017).
- ⁵ NatJus provides technical support to courts in relation to the supply of medicines.
- ⁶ E-Natjust is a database that contains technical reports about health technologies commonly litigated.
- ⁷ The National Commission for the incorporation of technologies or Conitec provide advice to the Ministry of Health of Brazil in relation to the inclusion and exclusion of technologies in the health system of Brazil (SUS).
- ⁸ For instance, according to Vargas Pelaez *et al.* (2019, p. 1), “[t]he interviewees highlighted the pressure on health system managers to fulfil their responsibilities as a positive impact of litigation.”
- ⁹ This is a particular type of constitutionalism that could be named as pessimistic constitutionalism. See the intervention of Judge Gloria Stella Ortiz Delgado (Diálogos, 2019, minute 48:00).
- ¹⁰ According to a Magistrate from the Colombian Court almost half (44%) of the judgements remain non implemented (Los fallos, 2021).