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CONTENTS

PRESENTATION

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With the aim of seeking out different perspectives and dealing with subjects of a specialized nature, Conectas Human Rights has been creating partnerships with non-governmental human rights organizations in diverse parts of the world. In this issue of Sur – International Human Rights Journal, which is principally focused on access to medicines, a new cooperative partnership was formed with the Brazilian Interdisciplinary AIDS Association – ABIA.

Founded in 1987, it is the mission of ABIA to promote access to treatment and assistance to persons living with HIV and AIDS. Along these lines, ABIA has been monitoring public policies and developing projects regarding education, prevention, and access to information about HIV/AIDS. ABIA has also been coordinating the Working Group on Intellectual Property of the Brazilian Network for the Integration of Peoples – GTPI – REBRIP, in order to enrich and enlarge the debate over the harmful impacts of the rigid rules regarding intellectual property in the area of access to essential medicines, in addition to contributing to the construction of alternatives to the present model.

This eighth issue of the Sur Journal is divided into two parts: the first specifically examines access to medicines, while the second deals with questions that evaluate the present state of human rights in general.

Beginning with the discussion over access to medicines, the main problems related to the often conflicting interaction between human rights and international trade are debated. Those questions deal with the conflict between the human right to health and the protection of pharmaceutical innovations; efforts at making businesses responsible and breaking away from the protective framework initially confined to the sphere of the State; and the developing of the public debate over the political use of judicial power.

In the article by Chaves, Vieira and Reis the system for the protection of intellectual property is discussed, taking as a starting point the situation in Brazil. The relevance of the Brazilian case is based on Brazil's adoption of a policy of universal access to medicines for the treatment of AIDS as well as its recent adoption of a compulsory license for the supply of antiretroviral medicines. The model of universal access and the adoption of a compulsory license represent important benchmarks for the recognition of the preference of human rights over economic interests. The article also presents the main action strategies adopted by a Brazilian group of activists that has had a profound effect on the area. The description of these strategies is important because it enhances the possibility of exchanging experiences with other activist groups in the South.

In the article by Pogge, the author discusses the argument that patents stimulate pharmaceutical innovation. For the author, this system strengthens monopolies and the

concentration of research on the symptoms, and not the causes, of chronic illnesses. At the same time the treatment of specific illnesses of poorer populations is relegated to a secondary position because it is less profitable, thus increasing the rate of avoidable deaths. The author goes beyond simply spelling out the problem. He presents a proposal that would complement the patent system: a Health Impact Fund, financed by governments. This Fund would stimulate the development of new medicines with the promise of re-compensating successful innovators in proportion to the impact of the medicine on the global burden of illness.

The article by Hunt and Khosla deals with the responsibility of pharmaceutical businesses, along with the presentation of normative guidelines for health rights. In this sense, the article written by the Rapporteur of the United Nations on the right to health could be interpreted almost as "soft law", assisting in the structuring of this right in regard to the access to medicines.

In the last article of this first part of the Journal, which was authored by Contesse and Lovera, the question of access to medicines is analyzed beginning with individual cases that depict the perspective of those that lack access to medicines in Chile. The authors show how the litigation process can be used politically to create a public debate to sensitize the executive and legislative branches of the government to enact new public policies.

In the second part of this issue of the Sur Journal, the following issues are discussed: the justiciability of economic, social, and cultural rights (Cavallaro and Brewer); the growing consolidation of sexual rights as autonomous rights (Mattar); the participatory preparation and adoption of a new international treaty on rights of persons with disabilities (Dhanda); and the challenges that have to be overcome by non-governmental human rights organizations (Abregu).

We would like to thank the following professors and partners for their contribution in the selection of articles for this issue: Alejandro Garro, Bernardo Sorj, Carlos Correa, Denise Hirao, Frans Viljoen, J. Paul Martin, Jeremy Julian Sarkin, Juan Amaya, Julieta Rossi, Mustapha Al-Sayyed, Richard Pierre Claude, Roberto Garretón, Roger Raupp Rios, and Vinodh Jaichand.

Finally, we would like to announce that the next edition of Sur Journal will be a special issue in commemoration of the sixtieth anniversary of the Universal Declaration of Human Rights. The next issue will be published in partnership with the *International Service for Human Rights*.

The Editors

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ABSTRACT

This paper presents some ideas about the impact that court rulings can have on the political system. Unlike what is usually written about the role of the Judiciary on the subject of human rights, when the emphasis is placed on the patterns and methods the courts devise to respond to claims for the justiciability of these rights, the authors – who focus on the Chilean case – illustrate how strategic litigation can, even with adverse judicial outcomes, have a positive impact on the satisfaction of social rights. The paper will also show how this impact depends more on the sensibility of the political system to respond to the desperate situation in which many of its citizens find themselves, and on the fear of political pressure, than on the possibilities opened up by major court rulings.

Original in Spanish. Translated by Barney Whiteoak.

KEYWORDS

Courts – Social rights – Right to health – HIV/AIDS – Public interest litigation – Chile

ACCESS TO MEDICAL TREATMENT FOR PEOPLE LIVING WITH HIV/AIDS: SUCCESS WITHOUT VICTORY IN CHILE

Jorge Contesse and Domingo Lovera Parmo

1. Introduction

Access to health and courts of law have been frequent bedfellows. Experiences from around the world, of which those from South Africa and India are best known, illustrate how courts of law have been instrumental in enforcing the legal protection of social rights. Civil society organizations have learned to use the Judiciary to secure the satisfaction of their rights, something that the political system simply neglected to do, in spite of what had been established in the international treaties that their governments had signed up to.[1] Generally speaking, it has been minority groups from a political point of view – that is, groups that encounter formidable obstacles for the satisfaction of their claims to be satisfied through the "political process" – that have opted to turn their backs on this process and apply instead to the courts. But there are also cases of groups of people who, while not necessarily being minorities (many of these groups are, in fact, highly organized), have not had their social rights satisfied. This is the focus of our paper.

Among these groups are people living with HIV/AIDS and their claims for access to and coverage by adequate medical treatment. A significant part of these claims has been pursued through public interest litigation strategies, perhaps emboldened by the case in the United States brought by the NAACP.[2] In *Brown v. Board of Education*, of 1954, for example, the United States Supreme Court declared school segregation to be unconstitutional. These strategies are obviously designed to defend in court the claims that the political

Notes to this text start on page 156.

process simply (and often intentionally) ignores; or otherwise claims that the political process has never before addressed.

This strategy is not free of criticism. As has been observed repeatedly, turning to the courts, brandishing the Constitution over all other legal provisions, to secure satisfaction for the claims of marginalized sectors or claims that are not considered justiciable, and which are normally related to the allocation and reallocation of financial resources, poses an enormous challenge for our forms of government. The discussion of these litigation strategies has focused on the correspondence that should exist between courts and democracy. Therefore, countries where the courts have been more actively engaged in satisfying social rights have provided a fertile ground for discussion on the role of the courts in this type of conflict. The question that most frequently crops up is: what role should the courts play in resolving these claims? And if they do indeed have a role to play – as we have assumed in this paper – to what extent should they exercise their jurisdiction? Is it enough for them to declare welfare laws and programs unconstitutional when they violate the Constitution, or should they force lawmakers to pass welfare plans (with the subsequent rearrangement of fiscal resources)? And should the latter be the case, should the courts interfere in the development of these plans, for instance by monitoring the work of ministries and parliaments? These are questions that receive a lot of attention in the comparative literature and that, it must be noted, are also a major digression from the purpose of this paper. Our intention in these pages is more precise: we are interested in showing how it is possible to achieve success even when losing the cases judicially. Through litigation, it is possible to "incentivate" the political process to accept and respond to the claims of marginalized groups, and to respond and discuss how to satisfy the demands that, analyzed in a specific legal context, cannot always simply be claimed in court.

Such is the context of the Chilean case: with a Constitution rewritten by specialists appointed by the government's Military Junta and reviewed, ultimately, by Pinochet himself, Chile – a model student on the subject of free trade – delegates the satisfaction of social rights, such as health and education, to a system in which the private sector plays the primary role, while the State is assigned a merely subsidiary role, just as Pinochet and his associates wanted.[3] The HIV/AIDS cases illustrate how a political system that is resistant to attending to certain demands can be forced by judicial decisions that do not even recognize the existence of rights, to address these claims, collaborating, even without knowing it, to strengthening the regime of rights and, in doing so, making the democracy more robust and inclusive.

This article is structured as follows. In the first section, we shall make a brief analysis of the treatment of social rights by the Chilean legal and

constitutional system (2). Although these rights are recognized in the Constitution, their satisfaction hinges on the so-called *constitutional protection action* (equivalent to *amparo* in other Latin American countries). We shall then report the cases brought before Chilean courts by people living with HIV/AIDS, the judicial rulings on these cases, and the political impact that years of litigation have finally produced (3). This includes a detailed account of the litigation strategies used, and the judicial response to them – as we have said, rejecting these cases. Together with the judicial response, we shall also analyze the political impact of these cases and how they eventually prompted the Chilean government to petition the United Nations Global Fund, together with the very same organizations that, on a local level, had held the State accountable for its omissions. Finally, we shall present some conclusions (4).

2. Social rights in Chile: privatizing social protection

Chapter III of the Chilean Constitution, entitled "Constitutional Rights and Obligations", embraces civil and political rights and also economic, social and cultural rights.[4] While the former are protected by a specific judicial action called in Chilean constitutional jargon a "writ of protection",[5] social rights are not included.[6] The "writ of protection" enables people who suffer "deprivation, disturbance or threat" in the legitimate exercise of their rights (civil and political), regardless of the source (from the State or from other individuals) and regardless of whether it involves an action or an omission that caused the abuse, to turn to the courts to seek judicial remedy.[7]

There are many reasons explaining why social rights, in spite of their recognition by the Constitution, find themselves excluded from this emergency protection remedy.[8] First, the commission entrusted with rewriting the draft of the Constitution of 1980 – known as the Commission for the Study of the New Constitution (CENC) – interpreted social rights according to their most traditional sense, that is, as positive rights. It subscribed to the idea that this was a category of rights contrasting with so-called negative rights – civil and political – and whose implementation required exclusively government intervention through the allocation of resources.[9] And this was precisely what it wanted to erase from the Chilean constitutional map: a State provider of social services. In this vein, a renowned Chilean constitutionalist and member of the CENC, while discussing the scope and range of the "writ of protection" noted that for a right to deserve protection "it should be a guarantee to which one has access

in virtue of the simple fact of living in this territory and that does not depend on provisions that the State must furnish".[10]

As many authors have asserted, there is a false dichotomy between negative rights – civil and political – and positive rights – social. In practically all rights it is possible to find the need for social provisions, regardless of whether they are for a so-called civil or political right or for a social right. For example, the right to property, which is usually presented as a model of civil and political rights, necessarily requires positive action by the State, as it is guaranteed through the establishment of property registration; the same can be said about the right to due legal process, which, were it not for a legal structure consisting of certain characteristics, could not be considered properly satisfied.[11] Nevertheless, in Chilean constitutional doctrine and, as we shall see further ahead, also in its jurisprudence, the idea that social rights are entirely different from "genuine" rights still persists, consequently they cannot be the subject of judicial protection.

The second reason explaining the lack of recognition for social rights is the moment in history in which the CENC was working on the preliminary version of the Constitution. At the time, its members, especially the final reviewers of the draft – the Military Junta, with Pinochet at the helm – mistrusted citizenship and politics. As far as they were concerned, "excessive democracy" in the early 1970s had been responsible for the failure of the grassroots program of Salvador Allende. In this context, a citizenry that is too active and too aware of how public policy is planned and implemented constituted a threat.[12] Pinochet saw Congress, which he had closed after taking power, as a body that was open to demagoguery and populism,[13] a reason why he would later set up his own particular version of "checks and balances": a "protected" democracy, which would include appointed senators, lifelong senators, a Security Council with broad participation of the Armed Forces and – no doubt the hardest legacy to undo – an electoral system that undermines the will of the people, forcing the formation of two political coalitions and leaving minority voices without representation.[14] It is no surprise, then, that social rights have been and continue to be interpreted, demonstrating the endurance of the constitutional conceptions of the dictatorship, as aspirations instead of rights.

If, in the view of the founders of Chile's "protected democracy", social rights were manifestations of State policy, any involvement by the citizenry in their discussion and implementation would clearly be best avoided. And this was achieved, in part, by preventing these rights from being endowed with justiciability through the *constitutional protection act*.

The constitutional practice, once democracy had been restored, did little to improve the situation. The return of democracy has prompted a

"technocratic" vision of social rights, whose satisfaction is assigned to programs run centrally by the State Administration, which, while in some cases it has embraced the notion of rights to explain these initiatives, in practice it has not managed to "empower" the people these programs were designed to help.[15] As a result, social rights have remained relegated to a secondary position in the constitutional spectrum, with a dominant role played by the private sector, which handles health and social welfare provisions, and a state that, as the United Nations Committee on Economic, Social and Cultural Rights has observed, does not appear to have fully understood what the realization of social rights means.[16] Nevertheless, there have been some examples in this context that contradict the underlying norm that public policies are planned and implemented "from above", without any dialogue with institutional and social actors. Litigation and the subsequent alliance between civil society and the State to provide universal coverage for people living with HIV/AIDS is perhaps the most notable of these examples, one that illustrates that you often need to do more than just knock on the door to generate this kind of dialogue.

3. The Chilean case: success without victory?

During the 1980s, Chilean civil society put its individual claims aside and rallied behind the common and urgent goal of overthrowing the Pinochet dictatorship. When this objective was finally achieved, the specific demands of civil society groups began to appear in the public arena.[17] By the mid-1990s, various civil society organizations had begun to draw up their own thematic agendas for discriminated minorities. One of the more organized sectors that participated in this process was the group of people living with HIV/AIDS, which claimed (and still claims) greater attention from the State. The ignorance of the population, caused among other reasons by the lack of educational campaigns and information about the disease, transformed people living with the human immunodeficiency virus into a group of disadvantaged citizens that were calling for more visibility. Part of the strategy developed by this minority group to force the State to concede to its demands, and that helped the State formulate public policies for HIV/AIDS, were the legal cases brought before the courts that challenged the prevailing constitutional conceptions.

What follows is an account of these cases. In the first section, we shall review the legal and constitutional arguments for their claims, namely that by not providing medical treatment for all individuals, the Chilean government was violating their constitutional rights.[18] In the second section, we shall illustrate the impact that these cases have had on the political process.

A. The HIV/AIDS cases in the courts

Between 1999 and 2001, there were several cases of low-income citizens claiming free drugs from the State to treat the disease.[19] Given the silence of the political powers – Legislative and Executive – these citizens decided to try their luck with the Judiciary. At the time, treatment cost approximately US$1,000 per month and added to this unaffordability was the social cost that often came with no longer being an anonymous carrier of the virus, through exposure to the stigma and to the discrimination that exists against people living with HIV/AIDS.

Over three years of legal battles, all the cases brought before the Judiciary were "writs of protection". In 1999, three cases were filed requesting the courts to find the State guilty of maladministration by not providing medication.[20] In addition to this, they also claimed a violation of the right to life that the Constitution guarantees all people in Chile.[21] According to the way the "writ of protection" is configured, and as we have already seen, the right to health is not protected by the Constitution. The Court of Appeals, the tribunal that first hears these cases, through a *sui generis* procedure of admissibility created by the Supreme Court in the 1990s, judged the case to be groundless.[22] Without examining the issue in depth, the court declared the writ inadmissible since it dealt with a subject "that exceeds the bounds of the protection procedure".[23] As a result, unable to overturn this ruling of inadmissibility, the claimants saw their chances of staying alive go up in smoke. In fact, it was necessary for the Inter-American Commission on Human Rights to intervene, by applying precautionary measures,[24] for the Chilean State to agree to provide anti-retroviral drugs to the claimants. But in spite of this, the drugs did not arrive with the necessary urgency and one of the claimants died, while another, in despair, committed suicide. Only one of them was able to control the progression of the disease and relieve the acute situation he was in.

A year later, 24 people sought legal recognition for their right to receive free and full treatment for HIV/AIDS. This second group of cases was filed drawing on the "jurisprudence" of Chilean courts.[25] By ruling on a series of cases involving the right to life, the courts had signaled that this right was "absolute".[26] Within this context, the claimants argued that, just as the courts themselves had recognized, the right to life was absolute and, consequently, generates responsibilities for the State that are not only negative, but also positive. Furthermore, they included an argument based on a little known supreme decree, passed by the military government of General Pinochet in 1984, which explicitly compelled all health services to provide full and free treatment to patients with sexually transmitted diseases, including HIV/

AIDS.[27] In a highly formalistic culture, it was believed that now, faced with a clear and precise rule, the courts would accept the petition. Added to this was the wide press coverage given the cases in 1999, which led more people to take their cases to court and, subsequently, raised social awareness of the problem.

Nevertheless, the courts once again rejected the cause of the claimants. According to the court that first examined the case, what was involved was not the protection of human life, but instead the protection of health; and since the right to health it not covered by the writ of protection, the petition should be refused. Since it had interpreted the case as involving the right to health, the court invoked a context of limited economic resources – as the State had argued – which, in its opinion, justified denying the admissibility of the case to avoid interfering in the decisions of the government's technical agencies (when to invest, what to invest in and how to go about it). But together with this argument that, while debatable, does not refute the rationality that is expected from the Judiciary, the court also remarked that the threat to the lives of the claimants did not originate from the State or from the limited access to medical treatment, but "from the disease that, lamentably, afflicts [the claimants] […] not being able to deem as [arbitrary and illegal] the omissions they attribute to the Health Services and the respective Ministry".[28] In this ruling, the court stated the obvious: the threat to life is posed by the disease that afflicts the claimants, but when called upon to set the institutional wheels in motion to protect these people, it preferred to look the other way. It was the job of the Executive, not of the Judiciary, to decide on the best way to allocate funds for this problem that, as the ruling appeared to imply, the claimants had brought on themselves. Moreover, and placing a limitation on the validity of these cases to defend groups of people, the court ruled that writs of protection could not be filed as class actions, on behalf of an indeterminate number of people for the protection of common interests.[29] The Supreme Court confirmed this decision and, once more, the claimants had to turn to the Inter-American Commission on Human Rights. One year after appealing to this international body, five of the 24 claimants had already died.

In 2001, a new writ of protection was filed on behalf of three people in advanced stages of the disease. It argued, once again, that the lack of provision of medication by the health services posed a risk of death to the claimants and that it was the constitutional and legal duty of the State to provide them due protection. The role played by the media in these campaigns was also extremely important: they gave coverage to the facts, enabling Chilean society to grow acquainted with the human drama of people living with HIV/AIDS and, in consequence, with the social duty owed them by the State and the

community. This was the context behind the first (and only) judicial victory. The Court of Appeals of Santiago, the same court that had rejected two such cases in as many years, although on this occasion the ruling came from a different panel, interpreted the case as dealing with the right to life, not to health, and that the allegations of the State, that the allocation of tax resources cannot be made by courts of law, were groundless, since the human right to life, just as other courts had established beforehand, "is an absolute right that may not be subject to any economic considerations".[30] For the first time, the courts stood behind people for whom all institutional doors had been shut, paving the way for groups of disadvantaged citizens who are marginalized from the political process to aspire to have their neglected claims submitted for recognition and protection.

The high spirits, however, did not last long. The Supreme Court, sitting as a court of appeals, overturned the decision, claiming that the case dealt with the right to health, not the right to life, and therefore did not qualify for the protection remedy. In spite of the imminent risk of death to the claimants, confirmed by medical certificates, the Court stuck to the position that these cases were "outside the bounds of the writ of protection". This being the case, the Court went on to say, it dealt with a subject that "corresponds to the health authorities [assigned with] putting into practice the health policies planned and implemented by the State Administration, in accordance with the means at their disposal, and with other criteria that it is not our role to elaborate on".[31] The Supreme Court, therefore, in the central doctrine of the ruling, declared, first, that there was a clear dichotomy (and even a tension) between the right to life and the right to health, and, second, that it was not in its jurisdiction to examine how the Executive plans and implements its policies – in this case, referring to the prevention and protection of HIV/AIDS. And so, the judicial channel for the claimants was once again extinguished: public policy and the law, said the Supreme Court, run on two different tracks.

This was an elegant way of dismissing the case. However, it also prompted a growing suspicion of the true reasons governing the decisions of the Supreme Court when it comes to ruling on cases that clearly involve the public interest.

B. The cases in politics

The case transcended the courts and, in spite of this legal defeat, the cause of people living with HIV/AIDS became ingrained in the public debate and made it impossible for the government to keep on refusing their claims. Civil society organizations kept up their pressure and, with the help of the media and the academic community, which were closely following the

conduct of various institutional actors, they succeeded to persuade the government to adopt policies to redress the shortfalls in the public health system. An agenda on HIV/AIDS was agreed on between the social and institutional actors, enabling Chile to gather the momentum to adopt a more aggressive approach to combat this pandemic. The state, together with non-governmental organizations,[32] applied for funding from the United Nations to finance universal access to anti-retroviral drugs, as the law, the Constitution and, so it appeared, social morality dictated. This was when, "[in] the third quarter of 2001, there began a new process of improvement [and increase of coverage] that permitted the incorporation of new people to the triple therapy policy".[33]

This increase [in anti-retroviral drugs coverage] was obtained through a process of negotiations with pharmaceutical companies that secured an average discount of 50% in the price of drugs and an increase in the national budget for [people living with HIV/AIDS] of 33% for the year 2002.[34] However, this is only part of the story. Because, in addition to this, the number of claims brought before the courts, the media exposure given the human situations behind the cases that in court received nothing more than a docket or cause number, and the negotiations that occurred between interest groups and the state authorities would not permit the public policies for the area to take any other course.

Vivo Positivo, for example, an NGO sponsored by the Human Rights Clinic of the Diego Portales University, in the writs of protection that were filed, assumed an important role in the planning and implementation of the (new) state policies for people living with HIV/AIDS. The legal cases created a whole new set of circumstances in which "we [a group of people living with HIV/AIDS] were placed at the table with our [then] most immediate counterparts associated with the Ministry of Health, that is to say, CONASIDA, directors of hospitals, officials in charge of HIV programs. [...]Beforehand, we were not sitting at the same table, in fact we were not even sitting".[35]

This NGO, therefore, was in charge of one of the sections of the Chilean project submitted to the Global Fund: the section on capacity building and development of the necessary conditions for the social integration of groups of people living with HIV/AIDS.[36] Moreover, it is interesting to note that Vivo Positivo played a key role in the "social control" of the execution of the Chilean Global Fund project. Through technical consultations, Vivo Positivo installed itself in hospitals for the purpose of promoting the participation of women and, during a drug supply shortage, it got together with "all the relevant actors involved in the acquisition, distribution and monitoring of treatment" [37] to work on the public policy project.

It was not only the Administration that felt the blow. Parliament also acted, approving late in 2001 a law on HIV/AIDS[38] that established as the duty of the Ministry of Health "the direction and technical orientation of public policies on the subject", that is, "to develop, execute and evaluate" these policies, with special emphasis on preventing discrimination and controlling the "spread of this pandemic".[39] Article 6 of the law assigns to the state the responsibility of "ensuring treatment for people infected or sick with the virus" and creating adequate public policies.

The origin of this regulation is open to at least two interpretations. First, it is possible to claim that the law's excessive emphasis on the Executive (through the Ministry of Health) as "the" promoter and programmer of public policies will prevent the courts, in the future, from once again trying to dictate how the state spends its limited tax revenues. This implies an interest in restricting the scope of action of the courts in favor of the political decisions of Congress and the technical decisions of the Administration. The second possible interpretation is that the law originated from the impact that the legal cases had on the political system, and that lawmakers genuinely decided to resolve an issue that they had previously preferred (at the very least) to overlook.[40] Although some lawmakers had for years been trying to push legislation for the prevention and protection of HIV/AIDS, the opportunity presented by these new circumstances – of broad social awareness – was what finally prompted Parliament to pass a specific law on the subject.[41]

Perhaps there is a little of both these interpretations. Nonetheless, a more careful examination may tip the balance (slightly) towards the second explanation. That is to say, there is good reason to believe that the approval of the HIV/AIDS law did indeed represent a genuine willingness to tackle a "problem" that Congress had previously, as a passive bystander, left in the hands of the courts and of the Executive. For example, the law establishes, for public health institutions, the obligation to provide beneficiaries of the system "the healthcare they require",[42] adding, in its transitory provisions, that people living with HIV/AIDS will benefit from a tax credit equivalent to the amount they have paid in taxes and duties on the import of expensive medicines.[43] Although it does not establish the free provision of drugs (which is covered by the Chilean petition to the Global Fund), it is without doubt a step forward that – and we would like to emphasize this – would perhaps never have happened were it not for the years of litigation.

In this section, it was our intention to demonstrate the impact of litigation by people living with HIV/AIDS both on the State Administration and on Parliament. This had a dual purpose. On the one hand, in descriptive terms, the idea was to illustrate that it is possible for a public interest litigation strategy to have an impact on the political process. On the other, we also

wanted to draw attention to the fact that the political regimes and governments of Latin America, characterized by what Carlos Nino has called "hyperpresidentialism", tend to make it more complicated to defend the claims that have been cast to the sidelines of public debate. The "blow" that litigation has dealt, or has attempted to deal, should convince two more actors (Congress and the Judicial branch) – actors that are very often unwilling to engage in institutional dialogue.[44]

4. Conclusions: three lessons on the political impact of litigation

There are many lessons that can be drawn from litigation and the subsequent political negotiation concerning cases of access to medication for people living with HIV/AIDS. In these final pages, and in conclusion, we shall reconstruct some of the history of these cases: what interests us most is to emphasize the importance of the strategy of submitting cases that equate *prima facie* the protection of the right to health with protection of the right to life; the decisive influence that organized civil society can exert on the political and social process; and how these organized efforts can rouse the political system out of its lethargy.

First, it is worth noting the persistent strategy of litigators to present their cases in different ways: while the claimants have insisted that cases involving access to anti-retroviral drugs were cases in which the (right to) life of the plaintiffs was at stake, the government and the courts have always alleged that they are cases that concern the right to health. The reason for choosing one right or the other, as we have explained, has to do with the potential for judicial success inferred by one or other interpretation of the cases. By presenting cases as involving the right to life, they qualify for constitutional protection and, moreover, can draw on other earlier rulings by courts that have promptly afforded full protection for this right. However, when presented as dealing with the right to health, courts could quickly dismiss the cases based on a justification that has accompanied Chile's recent constitutional history, that is, when dealing with a right whose satisfaction requires the allocation of tax revenues, it is the responsibility of the Administration, not the Judiciary, to decide on how these (scarce) resources shall be redistributed.

For sure, these approaches that appear conflicting represent litigation strategies far more than they do any correct interpretation of what fundamental rights require. We have already said that the sharp division between civil and political rights and economic, social and cultural rights is considered to have been surmounted in human rights theory. And this is not only the result of

academic exercises: it seems like common sense to conclude that if the state is negligent in protecting the health of its citizens, sooner or later the situation is going to arise when their lives are at risk. As we have seen, the response of the Chilean courts (and also the actions of the litigators) has been extremely formalist: what the Constitution, the law and in particular that little-known supreme decree had to say about the obligations of the state mattered far more than the underlying arguments, which involved the desperate claim of a group of people with HIV/AIDS who were fighting for their lives. In retrospect, it does seem rather nonsensical to argue inadmissibilities, or the absence of legal resources to protect common interests, for the purpose of closing the door on the complaints lodged against the state by its organized citizenry.

The best evidence that the Judiciary can do something, when it wants to, is the sentence pronounced months earlier to ban the morning-after birth-control pill: the arguments used in this case were entirely admissible in the HIV/AIDS cases, but this latter situation, for reasons beyond the speculations of this paper, but which are not difficult to imagine, seem less deserving attention. The same common sense, only this time amplified owing to the attention that the cases received in the Chilean press, was more than sufficient for the state to conclude that it was not a real option to be satisfied with the rulings that had been handed down. It had to do more. In this sense, although the judges have no reason to go against what is provided for in the law or in the Constitution, these cases illustrate how reality far supersedes the law, making the division between the right to life and the right to health an obsolete classification. Instead of helping to understand things better, this division only complicates them, and, in doing so, makes the lives of the claimants worse than they already were. In some cases, this distinction only served to end the lives of the people that saw in the Judiciary a possibility of recovering their neglected and distressful existence.

The second lesson to be drawn from Chile's HIV/AIDS cases is related to the potential that civil society can have when it organizes and, more importantly, when it partners with institutional actors. To begin with, the non-governmental organization that filed the cases took a position "against" the state, eventually denouncing it before the Inter-American Commission on Human Rights for omitting to address the situation faced by its citizens who, in spite of being protected by constitutional rights and administrative regulations, were dying as a result of the state's negligence. The three years that followed the litigation saw dialogue, albeit with limited results, between the various powers of the state and civil society, from which arose a variety of political, legal and constitutional proposals. All this resulted in something unprecedented: the Chilean State, in conjunction with a civil society organization, petitioning the United Nations for funds to tackle the problem of the lack of access to medicines.

What is most notable is that the shift in strategy, from confrontation to direct collaboration, suggests, in principle, that it may be better to attempt to build bridges with the state. However, we do not deem it possible to draw this conclusion without looking more closely at the context of the case and its particular characteristics. In other words, it is difficult to say with any certainty what the result would have been had the Chilean State not consistently adopted the attitude of delivering unfavourable rulings, clearly not recognizing the violation of the claimant's fundamental rights. This would certainly have weakened the negotiating position of the plaintiffs.

Finally, it is interesting to recall that one of the main points raised when criticizing courts that "take rights seriously" is that they should not interfere in matters concerning the authorities that have representation and legitimacy which, it is argued, the courts lack.[45] Ultimately, the administration of medicine for people living with HIV/AIDS involves considerable amounts of financial resources that, we assume, should only be spent after intense and often lengthy political discussion. First, Parliament and the Administration are in the best technical position to plan these policies and, second, it is in them, and nowhere else, that the authority has been vested to discuss how and when the (always scarce) resources should be spent. Although the scope of this paper precludes a detailed consideration of these criticisms,[46] it seems necessary to emphasize how organized public interest litigation can impact the "political process" that years earlier either paid no attention to the claims or preferred to deem them simply "not justiciable".

This impact, both desirable and morally justified for those whose claims are ignored, such as in the case of the claims of people living with HIV/AIDS, requires more than just an organized civil society. It also needs a political system that is sensible and sensitive enough to realize that it has a problem to resolve, which, in this case, is the fact that members of its community are dying as a result of an inappropriate state action.[47]

Years of litigation in Chile's national courts prompted the Administration to petition the United Nations Global Fund and the Parliament to pass a special law for people living with HIV/AIDS, causing the state to rouse from its lethargy and, eventually, provide a response, although in many cases one that came too late for the people it was constitutionally bound to protect but whose claims it consistently blocked. The struggle to secure access to medication for people with a terminal illness, which began in the judicial sphere, would attempt several other approaches until finally emerging gracefully through the action, very often not deliberate, of institutional and social actors that, while playing to their own agendas, ended up pursuing a common objective that was impossible to ignore: providing social protection for people who are marginalized from the political and legal debate.

NOTES

1. Such as, for example, the International Covenant on Economic, Social and Cultural Rights, which stipulates in its article 2.1 that "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

2. National Association for the Advancement of Colored People.

3. This is the interpretation that Chilean constitutional doctrine makes of article 4, item 3, of the Constitution, which stipulates that: "the state recognizes and protects the intermediate groups through which society organizes and structures itself and guarantees them the adequate autonomy to fulfill their own specific purposes".

4. CHILE. *Political Constitution of the Republic of Chile*, Santiago, 1980, Chapter III.

5. The writ of protection, or *recurso de proteção*, is equivalent to *amparo* in Argentina, Mexico and Peru, to *tutela* in Colombia and to *mandato de segurança* in Brazil.

6. CHILE. *Political Constitution of the Republic of Chile*, Santiago, 1980, article 20 (establishing which rights are protected and which are not). Although social rights fall outside the scope of the writ of protection, this judicial action does permit certain aspects of these rights to be claimable in the judicial sphere, namely, the freedom to send one's children to the educational establishments of one's choice, the freedom to work in the area of one's choice and equal access to services for the promotion, protection and recovery of health of the individual: but, it is understood, only to the extent that these services are available.

7. There is another constitutional motion called "writ of inapplicability due to unconstitutionality". Through this motion, the Constitutional Court may declare that a law is inapplicable for the specific case it is ruling on. Once the inapplicability has been declared, the same court, ex officio or at the request of any person, will declare the unconstitutionality of the law, excluding it from the legal system.

8. Some of these ideas were presented in LOVERA PARMO, D. *El Informe de Chile ante el Comité de Derechos Económicos, Sociales y Culturales: el Papel del Derecho*. Anuario de Derechos Humanos, Universidad de Chile, Santiago, no. 1, 2005, p. 168-69.

9. On the discussion about social rights in constitutions, see HARE, I. Social rights as fundamental rights. In: HEPPLE, B. (ed.). *Social and labour rights in a global context*. Cambridge: Cambridge University Press, 2002, p. 153; DAVIS, D. M. The case against the inclusion of socio-economic demands in a Bill of Rights except as directive principles. *South African Journal of Human Rights*, Johannesburg, v. 8, 1992, p. 475- 490.

10. CHILE. Actas de Sesiones Comisión Constituyente, reprinted in SOTO, E. *El Recurso de Protección*. Santiago: Editorial Jurídica de Chile, 1982, p. 508.

11. HOLMES, S. & SUNSTEIN, C. R. *The Cost of Rights: Why Liberty Depends on Taxes*. New York: W. W. Norton & Co., 255 p., 1999, p.15.

12. Pinochet had "recommended" to the commission drafting the constitution that they diminish the role of political parties. MOULIAN, T. *Chile: Anatomía de un Mito*. Santiago: Lom Ediciones, 386 p., 1997, p. 242.

13. Ibid, p. 243.

14. On this subject, see CONTESSE SINGH, J. *Dos Reflexiones sobre 17 Años de Democracia*. Buenos Aires: Nueva Doctrina Penal, n. 2, 2007, p. 615-631

15. See CONTESSE, J. & DELAMAZA, G. *Pobreza y Derechos Humanos: análisis de dos programas sociales*. Documento de Trabajo, Programa Ciudadanía y Gestión Pública, no. 15, Univ. de Los Lagos, Santiago, 2005.

16. UNITED NATIONS. *Economic and Social Council, Concluding Observations of the Committee on Economic, Social and Cultural Rights*. Chile, 26 Nov. 2004, E/C.12/1/Add.105, par. 12, 19, 25, 26 and 28.

17. CONTESSE, op. cit.

18. The cases claim the violation of their right to equality (there was no clear procedure on how people would have access to treatment. In some hospitals, the procedure was simply "first come first serve when a place is available") and their right to life (the right to life implies both negative obligations – not to kill – and positive duties – to provide the health conditions that enable people to enjoy life).

19. The cases presented here were sponsored by the Public Interest and Human Rights Clinic of the Diego Portales University and represented by the organization Vivo Positivo. What the claimants were requesting was for the public health service to provide *tritherapy*. This is a combination of three drugs that blocks the progression of HIV, mainly through protease inhibition. As one report from Chile's AIDS Advisory Committee points out, "the simultaneous and sustained action of tritherapy prevents the development of resistance, increases the organism's defenses and stops the virus from reproducing until it become almost undetectable, which means that patients can stay healthy for longer and lead a practically normal life, without the risk of imminent death". AIDS ADVISORY COMMITTEE. *Revista Chilena de Infectologia*, 1998, p. 183, cited in ZÚÑIGA, A. El interés público del derecho a la vida. In: GONZÁLEZ, F. (ed.). *Litigio y Políticas Públicas en Derechos Humanos*. Santiago: Universidad Diego Portales, 2002.

20. In some cases, the health services had run out of the medication and for this reason the claimants alleged that the state had not acted diligently, properly organizing the delivery of the drugs.

21. According to article 19, no. 1, item 1 of the Political Constitution of the Republic of Chile: "The Constitution guarantees all people: 1. The right to life and to the physical and psychic well-being of the individual".

22. The "writ of protection" was originally conceived as an informal action. Its purpose was to permit any person to have access to the courts to demand protection for their fundamental rights. The Supreme Court, however, without there having been a constitutional delegation in this respect, under pressure from the quantity of writs being filed, decided to establish an admissibility procedure; a prior declaration by means of which the appeals courts could, without making any kind of substantive ruling, determine whether the petition had any plausible justification. CHILE. *Auto Acordado sobre Tramitación del Recurso de Protección de Garantías Constitucionales*. Supreme Court, 24 June 1992.

23. ZÚÑIGA, op. cit., p. 108.

24. In cases of "extreme gravity and urgency", a person may appear before the Inter-American Commission on Human Rights and request that it adopt measures to protect their fundamental rights when the state of which they are a national does not offer such protection. As this case clearly shows, the risk was life threatening. ORGANIZATION OF AMERICAN STATES (OAE). *American Convention on Human Rights*. Pact of San José, Costa Rica, 7-22 Nov. 1969, article 48.2.

25. The term "jurisprudence" has been placed between inverted commas because there is no system of precedents (*stare decisis*) in Chile. The arguments contained in judicial decisions, either from the same court or from higher courts, have only force of rhetoric, which is why, to be used, they depend on the court's receptiveness to what was presented in these previous rulings. In cases specifically related to the right to life, as we have said, it has been possible to detect an underlying rationality in previous rulings handed down by Chilean courts that shared similar characteristics (these cases are addressed in the following footnote).

26. CHILE. *Court of Appeals of Santiago*, Docket No 167-84 ("[...] it is natural law that the right to life is what we have for nobody to commit an offense against ours, but under no circumstances does it give us dominion over our own lives, so as we could destroy it if we wanted to, but instead the faculty to demand from others its inviability."); CHILE. *Court of Appeals of Santiago*, 30 Oct. 1991, Docket No. 17.956 ("it is the imperative duty of the public authorities to safeguard the health and life of the people that form its society. This does not only imply that the state should abstain from disturbing the life of the members of its community; it also implies the duty to adopt positive protection measures. These principles have been embodied in legislation that is lower in hierarchy than constitutional legislation and, therefore, it is sufficient to cite the Criminal Code whose article 494 no. 14 sanctions as an offense the situation of not relieving or assisting a person who is hurt, wounded or in danger of dying, and in circumstances when this occurs in a deserted place."); CHILE. *Court of Appeals of Copiapó*, 24 Mar. 1992, Docket No. 3.569 and *Supreme Court*, 27 May 1992, Docket No. 18.640 ("[...] life is guaranteed by the Constitution to the extent that the individual could be deprived of it by agents unknown to them, by an offense by third parties, being clear that the defendant's attitude was a serious threat to the patient, concerning their right to life and physical and psychic well-being, given that persisting with their attitude could result in the progressive deterioration of the patient's health and a possible fatal outcome if the treatment advised by their doctor was not provided, unnecessarily putting the life of the patient at risk"); CHILE. *Court of Appeals of Santiago*, 20 Oct. 1999, Docket No. 3.618 (" [...] the parental denial to replace the blood that was lost puts the life [of the child] in grave danger and is illegal because it deprives a person of their physical well-being and their life, which is guaranteed in article 19, no. 1 of the Constitution", and going on to order "that the doctors in whose care in minor has been placed and who conducted the necessary surgical procedure to restore the child's health may perform the transfusion of blood and/or hemoderivatives that they deem necessary"). For an analysis of these rulings, see GÓMEZ, G. *Derechos Fundamentales y Recurso de Protección*. Santiago: Ediciones Universidad Diego Portales, 2005.

27. CHILE. Supreme Decree No. 362. *Regulation on sexually transmitted diseases*. Ministry of Health, 7 May 1984.

28. CHILE. *Court of Appeals of Santiago*, 6 Nov. 2000, Docket No. 1.705, 1.825 and 1.905.

29. Although the lawsuit had a potential to embrace more people, it did not represent an indeterminate number of people, but was instead filed on behalf of 24 fully individualized people. Again, the Court, to deny the case, responded to arguments not expressed by the parties.

30. The court added that "establishing an order of priority for human immunodeficiency [virus] (HIV) carriers to have access to pharmacological treatment that will enable them to live, based on technical reasons, but determined ultimately by economic reasons, is legally and morally unacceptable, since it necessarily establishes an arbitrary discrimination between people who find themselves in an identical situation". CHILE, *Court of Appeals of Santiago*, 28 Aug. 2001, Docket No. 3.025.

31. CHILE. *Supreme Court*, 9 Oct. 2001, Docket No. 2.186.

32. The project presented by Chile was developed "by the *Comité País*, comprised of representatives of Vivo Positivo, Conasida, the Pan American Health Organization and the University of Chile, which oversees the Global Fund-Chile project". Proyecto Fondo Global, componente fortalecimiento Sociedad Civil. *Revista Vivopositivo,* Santiago, year 3, no. 9, 2003, p. 16.

33. CHILE. National AIDS Commission/Ministry of Health. *Estrategia de Atención Integral a Personas que Viven con VIH/SIDA*. Santiago, p.6. Available at: <http://www.conasida.cl/docs/conasida/adinteg.pdf>. Last access on 1 Dec. 2007.

34. Ibid.

35. Haciendo Historia. *Revista Vivopositivo*, Santiago, no. 13, 2005, p. 17. For an account of the legal cases undertaken by the NGO, see La Historia Juzgada (Movimiento de Personas Viviendo con VIH/SIDA). *Revista Vivopositivo*, Santiago, no. 13, 2005, p. 19.

36. El Proyecto Chileno. *Revista Vivopositivo*, Santiago, year 3, no. 8, 2003, p. 20.

37. "Haciendo Historia", op. cit.

38. CHILE. *Law 19.779*, that sets rules in relation to the human immunodeficiency virus and establishes a tax credit for terminal illnesses, 14 Dec. 2001.

39. *Law 19.779*, op. cit., articles 1 & 2.

40. This kind of impact, we would like to stress, is not so uncommon. The same occurred with the case of the families of people who were detained or who disappeared under the Pinochet dictatorship. After years of campaigning and battling in court, the families managed to "impact" the politicians, who decided to revisit this issue that had for many years been relegated. As a result, for example, government lawmakers – with the backing of those from the opposition – declared that the sentences, one in particular pronounced in early 2007, constituted "a stimulus for the Executive and the Legislative to resolve the issue of amnesty in Chile once and for all [...] we cannot fall back on the criteria of the judges on the matter of amnesty and *prescripción* (statute of limitations) for crimes against humanity. Now it is up to us and to the government". Fallo que rechazó la amnistía insta a parlamentarios a zanjar discusión. *La Nación*, Santiago, 15 Mar. 2007, p. 5.

41. Vivo Positivo also participated in the process to formulate and promulgate this law. La historia Juzgada, op. cit.

42. *Law 19.779*, op. cit., article 6, item 2. CHILE. *Law 18.469*, which regulates the exercise of

the constitutional right to the protection of health and creates a regime of healthcare services, 23 Nov. 1985.

43. Transitory articles 1 & 3 (the latter establishing the tax revenues to be used to pay these benefits).

44. Some idea of this on the topic of social rights was suggested by ABRAMOVICH, V. Courses of action in economic, social and cultural rights: instruments and allies. *Sur – International Journal on Human Rights*, São Paulo, year 2, no. 2, p. 180-216, 2005, p. 197 ("When, in public policy planning, the constitutional or legal precepts determine agendas on which the validity of economic, social and cultural rights depend, and the appropriate authorities have not adopted the necessary measures, it is the job of the Judiciary to chasten this omission and send the matter back to the authorities so that appropriate measures are taken. This aspect of judicial action can be regarded as participation in a "dialogue" between the various branches of the state to observe the legal and political program established by the Constitution or by human rights conventions"). For an analysis of this "dialogue" in Chile's case, and on the subject of litigation on the so-called "morning-after pill", see CONTESSE SINGH, J. 'Las instituciones funcionan': sobre la ausencia de diálogo constitucional en Chile. *Revista Derechos y Humanidades*, Santiago, v. 12, 2007 (in press).

45. DAVIS, D. M., *supra* footnote 9 and PEREIRA-MENAUT, A. Against Positive Rights. *Valparaiso University Law Review*, Valparaiso, no. 22, p. 359-383, 1987-1988, p. 368. José Cea explains, in the Chilean case, the reasons the CENC had to not configure a democracy "centered in the state". CEA, J. L. *Derecho Constitucional Chileno*. Santiago: Ediciones Pontificia Universidad Católica de Chile, tomo 2, 2003, p. 55.

46. On this subject, see LOVERA PARMO, D. Implosive Courts, Law and Social Transformation: the Chilean Case. *Cambridge Student Law Review*. Cambridge, no. 3, 2007, p. 30-43.

47. As Jeremy Waldron suggests, in what he calls the core of the case against judicial review – and, therefore, assuming that institutions *ought* to function like this – a community should be able to display "democratic institutions", basically a large deliberative body of representatives accustomed to dealing with difficult issues, and where the main constitutional and legal topics are decided through a process that connects "both formally (through public hearings and consultation procedures) and informally with wider debates in society". Only a community displaying these types of institutions is in a position to start to remove the courts from the decision-making that *ought* to be resolved by the "political process". WALDRON, J. The Core of the Case against Judicial Review. *Yale Law Journal*, New Haven, no. 115, Apr. 2006, p. 1346-1406, p. 1361.

RESUMO

Este trabalho apresenta algumas idéias relativas ao impacto que as decisões judiciais causam no sistema político. Diferentemente do que se costuma destacar do trabalho dos tribunais em matéria de direitos sociais, quando se põem em relevo os padrões e formas em que os tribunais os concebem para satisfazer as demandas de justiciabilidade desses direitos, os autores – que se centram no caso chileno – mostram como o litígio estratégico pode causar, apesar de resultados judiciais adversos, um impacto positivo na satisfação dos direitos sociais. Esse impacto depende mais da sensatez do sistema político para levar em conta a situação desesperada em que se encontram muitos de seus cidadãos, ou o temor da pressão política, do que das possibilidades que oferecem as grandes declarações provenientes dos tribunais.

PALAVRAS-CHAVE
Tribunais – Direitos sociais – Direito à saúde – HIV/AIDS –
Litígio de interesse público – Chile

RESUMEN

El presente trabajo avanza algunas ideas relativas al impacto que las decisiones judiciales tienen en el sistema político. A diferencia de lo que suele destacarse del trabajo de las cortes en materia de derechos sociales, donde se pone de relieve los estándares y formas en que las cortes se las ingenian para satisfacer las demandas de justiciabilidad de estos derechos, los autores—que se centran en el caso chileno—muestran cómo el litigo estratégico puede causar de todas formas, y a pesar de resultados judiciales adversos, un positivo impacto en la satisfacción de los derechos sociales. Ese impacto depende más de la sensatez del sistema político para caer en cuenta de la situación desesperada en que se encuentran muchos de sus ciudadanos o del temor a la presión política, antes que en las posibilidades que ofrecen las grandes declaraciones provenientes de las cortes.

PALABRAS CLAVES
Cortes – Derechos sociales – Derecho a la salud – VIH/SIDA –
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