In search of the missing piece: advancing social rights through administrative law reform

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Abstract

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This dissertation discusses ways to advance social rights, considering the significant gap between their ambitious normative recognition and their poor implementation in practice. It presents some of the challenges that social rights typically face and explores ways to overcome them, noting the role that courts can play in triggering solutions. The project zooms into the connection between social rights and administrative institutions to argue that, while often under-discussed, social rights' fulfillment is largely dependent on administrative law and administrative action. The dissertation further claims that "canonical" administrative law, however, is unfit to facilitate the fulfillment of social rights and discusses possible ways to rethink discrete administrative institutions. While the dissertation focuses on Latin America, its arguments are of relevance for other parts of the world.

The project is structured around two case studies of social rights litigation in Argentina (Chapter 2) and Colombia (Chapter 3), which triggered relevant innovations that can help respond to frequent challenges around social rights. Both cases involve similar circumstances of historical unfulfillment of human rights, particularly the rights to a healthy environment, health, and housing.

They also illustrate similar capacity constraints in relevant administrative institutions (such as norms and staff volatility and bureaucratic fragmentation). Both cases represent what has been often called "structural litigation[1]" and were decided in similar legal backgrounds.

The case studies are as detailed as possible, in an effort to supplement long standing theoretical debates on social rights with a nuanced analysis of the results of cases on the ground (as even though recent research has focused on empirical assessments, most relevant scholarship uses normative and doctrinal approaches[2]). The research conducted for this project therefore involved reviewing judicial records, legislation, press coverage and other secondary sources; and for the Argentine case, talking to public officials, judicial employees, non-governmental organizations, and other key actors, visiting the river basin and courts' offices, and filing freedom of information requests. My research perspective is also informed by my previous work with different non-governmental organizations devoted to advancing social rights. I therefore came to this project with practical knowledge of how relevant institutions, mainly in Argentina, function in practice, with the consequent subjectivity of a practitioner from the Global South.

The dissertation connects to existing literature on social rights and on the reform of administrative law. It also speaks, more indirectly, to ongoing conversations on effective government, State capacity, the growth of the administrative state, and structural litigation. Throughout the

[1] In structural litigation, "…courts issue complex equitable remedies, and then remain seized of the matter until the remedies are implemented, with judges guiding and monitoring (…) the creation or transformation of state bureaucracies". Alexandra Huneeus, Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts, 40 Yale J. Int'l L. 1 (2015). Overall, structural litigation affects numerous people, implicates several government agencies requiring coordinated action, and involves structural injunctive remedies. Related notions, with slight differences, include "public law litigation", "public interest litigation", "strategic litigation", or "collective cases". *See generally* Maurino, Gustavo, LAS ACCIONES COLECTIVAS: ANÁLISIS CONCEPTUAL, CONSTITUCIONAL, PROCESAL, JURISPRUDENCIAL Y COMPARADO (Lexis Nexis, 2005).

[2] Paola Bergallo, Courts and Social Change: Lessons from the Struggle to Universalize Access to HIV/aids Treatment in Argentina, 89 Tex. L. Rev. 1611 (2011).

dissertation, I use a common analytical framework: experimentalism. I describe this framework in detail in the Introduction to this dissertation.

When confronted with existing scholarship, the dissertation shows that many concerns around social rights in general, and social rights' litigation in particular, do not necessarily play out in practice as traditional literature would anticipate. For example, the case studies prove that litigation does not necessarily exclude more confrontational alternatives for rights-claiming, and that middle class plaintiffs are not always prioritized in courts' work.

Both cases essentially show a decision-making model that is court-led but places responsibilities for policy making on local administrations. Under this model, courts set goals that administrations then need to pursue by themselves, with strong court oversight. As such, the model moves beyond the dichotomy between judicial abdication and judicial usurpation that traditional literature routinely describes. Traditional models of social rights adjudication also suggest a stark division between approaches based on the substance of rights and other based on procedures that the dissertation proves to be more nuanced, as in the case studies courts define some substance of rights, but also set strong procedures directed precisely at further defining rights' substance.

Importantly, this alternative model shows how courts intervention can lead to improved institutional capacities (directed mainly at increasing transparency and coordination) in responsible administrative entities. The cases finally show the barriers that traditional administrative law can create for the innovations needed to advance social rights. The last Chapter of the dissertation consequently explores ways to reimagine administrative law, to promote principles and institutions which are more aligned with the demands of social rights, such as recognizing informal administrative action and promoting administrative coordination.

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Dedication

To Irene.

You are the perfect companion on all journeys, including this project. Here's my attempt to make the world a better place than I found, where you can live in happiness and fairness.

Introduction

This dissertation explores ways to advance social rights —the subset of human rights that seek that every person can meet her basic needs and have minimum dignity—, specifically through court-triggered administrative reform.

The need to advance discussions on how to ensure adequate living conditions for all could not be more urgent. Governments across the globe have been unable to secure a decent standard of living —in many cases, in its most essential levels— and basic social rights for a significant part of the world's population. In Latin America, for example, the enormous gap between social rights' normative recognition and their realization in practice currently mingles with widespread and open dissatisfaction with democracy, recurrent social unrest, and constrained State capacity. The scenario is dramatic and urges us to rethink traditional notions on how public decisions are made, and how public officers account for their actions.

The need to advance social rights has long interested legal scholars, with some literature discussing extensively concerns over these rights. Some scholars, for example, stress social rights' complexity, as they involve a myriad of institutions and actions, and point to their generality and open texture as traits that male their realization difficult. A detailed discussion of doctrinal debates on social rights and their limitations is presented in Chapter 1.

Judicial engagement with social rights, which has been significant in many counties across the globe, has been a source of additional concern for some scholars, challenging judges' capacity to engage in complex policy issues and make decisions that involve distributional judgements, due to their limited democratic legitimacy. However, courts have played an important role in shaping social rights, at least in Latin America. They have adjudicated cases on a wide range of matters

and set varied remedies and monitoring mechanisms in an effort to achieve a better implementation of ambitious normative commitments. Approaches to social rights litigation have varied. In the assortment of models, some judicial cases have shown promising ways of responding to common objections to social rights. Importantly, in some cases litigation has also proven to have the potential to trigger institutional reform in a context of institutional inertia, as courts can give incentives, attention, and resources to institutions that have remained resistant to public scrutiny.

The dissertation is structured around two case studies of environmental litigation in the region which show how courts can trigger much needed capacity building and administrative reform to advance social rights, without exceeding their constitutional roles. The cases illustrate instances of historical unfulfillment of rights' commitments, how they connect to underlying problems in public administrations, and promising forms of institutional innovation to enhance social rights' discharge. The cases have significant similarities that facilitate their comparison, as they refer to almost identical environmental problems and the constitutional and administrative legal framework from the two countries involved (Argentina and Colombia) is similar. They are also prototypical of structural, social rights litigation, because of the long-standing and complex nature of the problems that gave rise to the case, the myriad of actors involved, the vindication of constitutional rights through public policy, the number of people affected, and the existence of structural injunctive remedies.

The first of the two case studies is discussed in Chapter two. This is the "Mendoza" case, where seventeen plaintiffs sued the Argentine Federal government, two state governments, fourteen municipalities and forty-four private companies seeking the cleanup of the Matanza-Riachuelo basin. The basin is a highly populated and polluted area that affects the lives of more than five million people. Centuries of abandonment enabled the irresponsible discharge of

dangerous substances and waste to the river. Massive population growth without planning worsened pollution. As a result, the Riachuelo river became one of the most contaminated in the planet.

Relevant litigation took place before the Supreme Court of Argentina. When issuing its decision on the merits, the Court ordered public authorities to clean-up the basin, prevent further environmental damage, and enhance the population's wellbeing. Since the task was massive, it delegated in a lower court the power to supervise the implementation of the decision. This court triggered important innovations in decision-making procedures in the realm of housing rights controversies that arose in connection with environmental discussions, by convening relevant local authorities and concerned citizens to articulate solutions to the problem of relocation of the communities that lived in the polluted riverbanks. These innovations have proven promising in addressing the challenges of complexity and generality of social rights.

The second case study, presented in Chapter 3, discusses Colombia's State Council decision on the "environmental catastrophe" of the Bogotá River basin. The basin, which hosts twenty percent of Colombia's population and constitutes an area of strategic importance for the country, has suffered severe environmental damage from untreated industrial and domestic wastewater, tanneries and slaughterhouses, poorly managed solid waste, mining activities and other industries. People resorted to courts seeking the environmental redress of the river and the protection of other collective rights. After decades of litigation, the State Council issued a unified decision in different backlogged cases, which includes several orders aimed at cleaning up the river and preventing further damage. Many of these orders led to relevant improvements in procedures for administrative decision making, centered in enhancing coordination among public entities and increasing public participation.

Both cases are good examples of court-triggered institutional reform, after decades of institutional inertia. They also helped identify the type of instruments that are needed to secure the right to a healthy environment and other related rights such as the right to housing, and speak to the need for flexible institutions in environmental regulation. The cases show the interdependence of social rights in practice and the need to tailor them to specific contexts. The cases also illustrate common challenges in social rights' discharge, such as the divergent institutional capacities of municipalities, the difficulties of producing adequate information on complex problems (which was enhanced in both cases after litigation, with better results in the Colombian case), and the importance of adequately designing basin authorities.

Importantly, the cases illustrate a point I consider to be under-discussed in specialized literature and yet of enormous importance: how social rights are closely related to administrative law. Social rights' fulfillment depends largely on action from public administrations, due to their open-ended nature (the general language under which they are typically recognized in norms), which requires a lot of gap-filling and contextualization after relevant statutes are passed. Indeed, in social rights litigation courts routinely engage with administrative and regulatory procedures to review their compliance with fundamental rights and revise administrative decisions.

However, as discussed in detail in Chapter 4, canonical or mainstream administrative law (at least in Latin America) is typically unfit to facilitate fulfillment of social rights. Because of its origin, mainstream administrative law does not facilitate the active, complex, and context-specific activities that social rights require from governments, as it centrally seeks to control and limit the action of the administrations. To conclude the dissertation, I use the learnings provided by the case studies to try to translate them into initial attempts to rethink discrete administrative law institutions.

The dissertation is premised on the "democratic experimentalism" framework. Democratic experimentalism, a term coined by Michael Dorf and Charles Sabel[3], describes a specific form of democratic governance that has flourished in different policy areas[4]. Experimentalism rejects top-down, strict definitions of rules as those contained in sweeping, detailed judicial decrees[5]. It promotes instead the setting of general goals against which to evaluate performance of decentralized units that can independently experiment around the best ways to achieve those goals in their own contexts.

Overall, experimentalism is based on decentralization and local deliberation coordinated by a center, in which both local units and the center set general goals and means to achieving them in an iterative manner[6]. Local units are given discretion to pursue agreed upon goals provided that they report progress on framework goals or otherwise adjust their actions[7]. Centralized structures distribute resources, solve problems that local units cannot, diffuse knowledge, and rectify faulty decisions[8]. Therefore, experimentalism promotes networks (rather than the hierarchies advanced by traditional administrative law, as will be discussed in Chapter 4). Experimentalism relies on

[3] See Michael C. Dorf & Charles F. Sabel, A Constitution of Democratic Experimentalism, 98 Colum. L. Rev. 267 (1998).

[4] Experimentalist experiences have been documented both in the public and the private sectors, in areas as varied as the automobile industry aviation or nuclear power regulation. *See, e.g.*, Ward, Allen, et al., The second Toyota paradox: How delaying decisions can make better cars faster, Sloan Management Review 36 (1995), 43; Mills, Russell W., and Dorit Rubinstein Reiss, Secondary Learning and the Unintended Benefits of Collaborative Mechanisms: The Federal Aviation Administration's Voluntary Disclosure Programs, Regulation & Governance 8.4 (2014), 437–454; Rees, Joseph V. HOSTAGES OF EACH OTHER: THE TRANSFORMATION OF NUCLEAR SAFETY SINCE THREE MILE ISLAND (Chicago: University of Chicago Press, 2009); Sabel, Charles F., and William H. Simon, Contextualizing Regimes: Institutionalization as a Response to the Limits of Interpretation and Policy Engineering, Columbia Public Law & Legal Theory Working Papers 110 (2012); Sabel, Charles, Gary Herrigel, and Peer Hull Kristensen, Regulation Under Uncertainty: The Coevolution of Industry and Regulation, Regulation & Governance (2016); Noonan, Kathleen G., Charles F. Sabel, and William H. Simon, Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform, Law & Social Inquiry 34.3 (2009), 523–568.

[5] See Dorf & Sabel, *supra* note 3.

[6] Democratic experimentalism is premised on John Dewey's ideas on practical reasoning, which stressed the "interdependence of means and ends and the provisional nature of any plan, goal, or rule. *See* Charles F. Sabel, William H. Simon, Minimalism and Experimentalism in the Administrative State, 100 Geo. L.J. 53 (2011).

[7] *Id*.

[8] Fung, Archon & Wright, Erik, Deepening Democracy: Innovations in Empowered Participatory Governance, Politics & Society 29. 5-41 (2001).

local knowledge, making induced[9] participation of affected people essential[10], either for investigation, information sharing or deliberations[11].

Therefore, experimentalism calls for open procedures, disfavoring closed, isolated organizations. Rules that emerge from experimentalist regimes are largely provisional and can be reassessed and revised by participants on an ongoing basis and in light of experience. In the absence of knowledge on how to respond to a phenomenon, flexible and provisional guidance appears more appropriate than the fixed, *ex-ante* rules that canonical law-making favors[12]. Experimentalism stresses the sensitivity of problems to context-specific conditions, noting that general and *ex-ante* rules appear inadequate to respond to local realities.

Because of these characteristics, experimentalism advances alternative organizational principles to those favored by traditional administrative law which, this dissertation argues, are in tension with the needs of social rights. Experimentalism can in turn provide auspicious responses to common concerts around social rights. For instance, it can facilitate coordination of the wide range of actors needed to implement interdependent and complex social rights; it can help contextualize the broad standards under which social rights are typically recognized; and it can provide answers to objections around social rights' judicial enforceability by advancing a more

[9] Induced participation can be achieved either with incentives or potential sanctions, even though engaged parties should anticipate more severe responses if they fail to be transparent than if they fail to comply with strict rules despite well-intended efforts.
[10] Joshua Cohen and Charles Sabel, Directly-Deliberative Polyarchy, 3 European Law Journal, 4, 313–342 (2002)
[11] Sabel & Simon, Minimalism, *supra* note 6.
[12] Charles F. Sabel &William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 Harv. L. Rev. 1015 (2004). Ongoing negotiation does not mean, however, that there are no external mandatory boundaries that define the "negotiable" realm, derived either from the constitution, relevant statutes, or judicial decisions. In Latin America, where statutes and constitutions recognize social rights in robust and occasionally detailed ways, external constraints are thicker. Courts are particularly concerned with substantive constraints. *See* J.B. Ruhl & Robert L. Fischman, Adaptive Management in the Courts, 95 Minn. L. Rev. 424 (2010). *See also* César Rodríguez-Garavito & Amartya Sen, *Empowered Participatory Jurisprudence: Experimentation, Deliberation and Norms in Socioeconomic Rights Adjudication*, *in* THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 233–258 (Katharine G. Young ed., Cambridge University Press, 2019).

dialogical and accountable role of courts. Chapters 2, 3 and 4 apply the experimentalist model to each of the issues they discuss.

Chapter 1: Current challenges to social rights vindication

Economic, social, cultural, and environmental rights (hereinafter, social rights) are the subset of human rights that seek to secure an adequate standard of living and dignity for all, such as the right to school, health, housing, or water[13]. Social rights were recognized systematically at the international level in 1966[14] and have since then been a source of legal mobilization and of increasing normative protection[15]. Social rights are now widely enshrined at the international level and in national constitutions, legislation, and policies, as many countries have made ambitious constitutional commitments towards these rights[16].

Latin American countries are frontrunners in the constitutional protection of social rights. Virtually all Latin American constitutions recognize a broad range of social rights, often in robust and ambitious ways[17]. In fact, they were the first constitutions to systematically incorporate social rights, which are more commonly found and more often enforceable in constitutions of Latin America than in other parts of the world[18]. Indeed, the inclusion of these rights in national

[13] In Latin America environmental rights have been recognized as human rights at the regional level at least since 2017. See Inter American Court of Human Rights, Advisory Opinion OC 23-17 (November 5th, 2017). Social and environmental rights are often grouped together in the region (for instance, in the work of the Special Rapporteurs of the Inter American Commission on Human Rights).

[14] In the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR), United Nations General Assembly, 16 December 1966, G.A. Resolution 2200A (XXI).

[15] *See, e.g.*, Whelan, Daniel J., and Jack Donnelly, The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight, Human Rights Quarterly 29, no. 4 (2007): 908–49.

[16] With the United States, at the federal level, being probably the biggest exception in this process.

[17] *See* Evan Rosevear et al., *Justiciable and Aspirational Economic and Social Rights in National Constitutions*, *in* THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 37–65 (Katharine G. Young ed., Cambridge University Press. 2019). The incorporation of long lists of human rights into constitutions (leading to the "new Latin American constitutionalism") took place in the end of the twentieth century, after a first wave of "social constitutionalism" reforms starting in 1917 in Mexico.

[18] Helena Alviar García, Karl Klare & Lucy A. Williams (eds), SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE, 105 (Rutledge, 2015). *See also* Rosevear et al., *supr*a note 17. Notably, recognition of social rights in normative instruments is commonly promoted by a wide range of relevant stakeholders. Indeed, United Nations' human right mechanisms and rights activists often urge States to recognize rights in domestic norms. Constitutional recognition of rights is deemed relevant to enable their judicial enforcement, legitimize political arguments that push for rights, and modify the cultural understanding and social norms around them. *See* Schiel, Rebecca, Malcolm Langford and Bruce Wilson, Does it Matter: Constitutionalisation, Democratic Governance, and the Human Right to Water, (Water, 2020).

constitutions —which is at the heart of the region's democratic project[19]— is now so widespread that authors refer to a "social rule of law" in Latin America[20].

Furthermore, constitutions across Latin America often include provisions on rights' judicial enforcement, incorporating mechanisms for their protection before courts. In many countries of the region judges have played an important role in defining the scope of rights and in requesting the other branches of government to implement a wide range of actions to fulfill them, using various techniques and issuing creative decisions.

Increasing normative and judicial recognition of social rights have led to intense scholarly debates. Initial debates focused on the convenience of including social rights in constitutions, their characteristics, and the possibility of courts enforcing them[21]. Judicial enforcement of social rights has specifically led to extensive discussions pointing to judges' lack of technical capacities and democratic legitimacy to decide issues that often entail making discretional judgements and engaging in complex policy choices. Debates have covered a wide spectrum of opinions, including positions that admit social rights' complete enforceability and views that deny social rights' full normative status, deeming them only partially or not enforceable[22]. Critics have pointed to judges' limited capacities and competences to engage in the policy issues that often underlie social rights' claims and, more fundamentally, to courts' lack of democratic legitimacy to make the

[19] *Id*.
[20] *See generally*, Rodrigo Uprimny, The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges, 89 Tex. L. Rev. 1587 (2011). Arguably, a similar argument could be made for other regions, after the constitutional developments that followed the Second World War, which have led to the growth of administrative powers in all constitutions, in the understanding that "...it is the duty of government to provide remedies for social and economic evils of many kinds". Forsyth, Reconciling the protection of human rights with the principles of administrative law, Venice Commission, https://www.venice.coe.int/SACJF/2009_08_BTW_Kasane/speeches/Forsyth_Administrative%20Law%20and%20Human%20Rights.pdf (accessed November 25, 2023).
[21] *See, generally*, Victor Abramovich and Christian Courtis, Apuntes sobre la exigibilidad judicial de los derechos sociales, Jura Gentium (2005), https://www.juragentium.org/topics/latina/es/courtis.htm.
[22] *Id*.

distributional decisions that social rights' cases may call for, alleging separation of powers concerns[23]. According to these views, when deciding complex social rights cases courts would be replacing elected powers in their roles[24]. Some scholars have noted the potentially regressive nature of a big part of this litigation (particularly that related to the right to health[25]), while others have argued that decisions, even after years, do not lead to significant material results[26].

On the other hand, prominent and varied responses to these critiques have noted how it is inevitable, and sometimes desirable, for judges to engage in policy issues[27]. Others have stressed that any judicial decision —not only those related to social rights— can have distributional effects, while others have suggested measures to compensate for judges' capacity constraints to engage in complex cases[28].

More recent literature has focused on assessing *how* courts should intervene in social rights' cases in democratically acceptable manners, rather than on *whether* they should intervene at all[29], noting that some approaches can provide promising responses to critiques[30]. As sufficiently discussed in specialized literature, the different judicial approaches towards social rights' litigation have been largely summarized in two models (even though, this dissertation shows, judicial

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[23] *See, e.g.*, David M. Beatty, *The Last Generation: When Rights Lose Their Meaning*, *in* HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE 321, 326 (David M. Beatty ed., 1994).
[24] Interestingly, "in practice, courts are likely to enforce social rights either by issuing negative injunctions or by giving individualized remedies to individual plaintiffs". David Landau, The Reality of Social Rights Enforcement, 53 Harv. Int'l L.J. 189 (2012).
[25] *See, e.g.*, Octávio Luiz Motta Ferraz, HEALTH AS A HUMAN RIGHT: THE POLITICS AND JUDICIALISATION OF HEALTH IN BRAZIL (Cambridge University Press, 2020).
[26] *See generally* Malcolm Langford, César Rodríguez-Garavito, & Julieta Rossi (eds.), SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK (Cambridge University Press, 2017).
[27] *See, e.g.*, Loughlin, Martin, Rights, *Democracy, and Law*, in SKEPTICAL ESSAYS ON HUMAN RIGHTS (Oxford, 2001; online edn, Oxford Academic, 1 Jan. 2010).
[28] *See, e.g.*, Abramovich, Víctor and Christian Courtis, Los derechos sociales como derechos exigibles, (Ed.Trotta, Buenos Aires, 2002); Syrett, Keith, Courts, Expertise and Resource Allocation: Is There a Judicial 'Legitimacy Problem'?, Public Health Ethics 7, no. 2 (2014).
[29] *See* Brian Ray, *The justiciability debate and the 1996 Constitution*, *in* ENGAGING WITH SOCIAL RIGHTS: PROCEDURE, PARTICIPATION AND DEMOCRACY IN SOUTH AFRICA'S SECOND WAVE 15–44 (Cambridge University Press, 2016).
[30] *Id.*

interventions in practice are much less binary[31]). One model is focused on determining whether administrative action aimed at securing social rights has been reasonable or not, and on assessing the *procedures* put in place by elected powers to fulfil social rights. Another one is centered on judges analyzing *substantively* if the very basic, minimum core content of social rights has been secured[32].

These alternative models are often illustrated by reference to the two "waves" of social rights' decisions from the South African Constitutional Court[33] —comprising two strings of cases, decided respectively in the early and late 2000s—. The second wave (comprising a set of cases from the late 2000s, partially focused on urban housing), authors argue, marked the departure from imposing substantive rights' interpretations to prioritizing procedural mechanisms, largely under the doctrine of "meaningful engagement"[34]. While this procedural turn was seen by some as a promising response to questions of separation of powers, others raised concerns about the weakening of litigation as a tool to enforce rights, especially for the most marginalized who often are badly positioned to "meaningfully engage" with the governments that under delivered in the first place[35].

The traditional story, however, does not fully reflect the reality of social rights on the ground, nor assesses all relevant elements for social rights' vindication. Indeed, regardless of the

[31] On the more complex nature of social rights' adjudication in practice, *see* Young, Katharine, The New Managerialism: Courts, Positive Duties, and Economic and Social Rights, Boston College Law School Legal Studies Research Paper No. 554 (2021).
[32] For an overview of the models, *see* Sabel, Charles, El Nuevo Derecho De interés Público: Una Mirada Hacia atrás a La situación En Estados Unidos Y Hacia Adelante a Su Futuro Brillante En Otras Partes, Revista De Interés Público nº 2 (2018), https://revistas.unlp.edu.ar/ReDIP/article/view/6351.
[33] *See, e.g.*, Pieterse, Marius, Socio-Economic Rights Adjudication and Democratic Urban Governance: Reassessing the 'Second Wave' Jurisprudence of the South African Constitutional Court, Law and Politics in Africa, Asia and Latin America 51, no. 1 (2018).
[34] *See generally* Stuart Wilson & Jackie Dugard, *Constitutional Jurisprudence: The First and Second Waves*, *in* SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: SYMBOLS OR SUBSTANCE? 35–62 (Malcolm Langford et al. eds., 2013).
[35] For an overview of these positions, *see* Danie Brand, Judicial deference and democracy in socio-economic rights cases in South Africa, Stellenbosch Law Review 22 (2011), pp. 614, 623-625.

model used, when engaging in social rights, high courts and scholars generally focus on interpreting the normative provisions that recognize rights and on declaring their scope, rather than on the details of the remedies needed to materialize rights[36]. By focusing on the scope of courts' decisions[37] and on judicial interpretation of norms, literature has placed less attention to the functioning of the institutions tasked with implementing rights: public administrations. In this scenario, traditional debates have largely missed an essential piece for the pursuit of social rights: a comprehensive understanding of the institutional, administrative machinery needed for their realization.

Still the archetypal constitutional design envisions public administrations and legislatures —not courts— as the branches of government charged with fulfilling constitutional rights[38]. This is intuitive as social rights demand an active role from public institutions, and mediating policies and institutional frameworks which are conducive to rights' fulfillment[39]. It is public administrations who are especially well positioned to perform these tasks, as a starting point due to the general concepts under which they are typically recognized (with norms referring to notions such as "affordable" education, "adequate" housing, or "highest attainable standard" of health). Social rightd content varies according to context and requires a lot of gap-filling after relevant statutes are passed. Social rights are also indivisible and interdependent, which means that one right cannot be adequately enjoyed without the other. In consequence, the task of discharging

[36] David Landau, *supra* note 24.
[37] In light with views on the nature of rights that see "…liability determination as the core judicial function and remedial formulation as derivative and secondary". Sabel & Simon, *supra* note 12. These views, however, risk ignoring the practical dimensions of litigation; judges may consider implementation of their decisions as a relevant factor when deciding, and parties would find the concrete responses of the defendants much more relevant than the formal outcome of the case. *See* Justice Richard J. Goldstone, *Foreword*, *in* COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (Varun Gauri & Daniel M. Brinks eds., Cambridge University Press, 2008).
[38] Abramovich & Christian Courtis, *supra* note 21.
[39] Schiel, Langford & Wilson *supra* note 18.

social rights is characterized by high degrees of complexity which call for active and responsive administrations with efficient coordination mechanisms, as legislatures cannot respond adequately to such high levels of contextualization and coordination.

In sum, the aims of the norms that recognize social rights cannot be effectively met without contextualized actions from administrations to implement relevant provisions[40]. As the United Nations' Committee on Economic, Social and Cultural Rights has noted, administrative —and not only legislative— measures are of essence to discharge social rights[41]. Social rights are in a constant need for administrative measures, such as building schools, setting requirements for social programs, or managing public hospitals[42]. In other words, the norms that recognize social rights cannot be put in practice without targeted, constant, and complex actions from administrations[43]. In Latin America, where constitutional and statutory recognition of rights is generally robust, the key to their fulfillment is quite clearly the work of different institutional actors, including policymakers, administrators, and officials in the bureaucratic machinery[44].

Indeed, courts adjudicating social rights cases are regularly asked to assess the conduct of administrative actors to decide if rights are being complied with or not[45]. Social rights litigation in Latin America often targets administrative —instead of legislative or private— action[46], with courts analyzing administrative activity to scrutinize its compliance with fundamental rights,

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[40] Michael A. Livermore, Richard L. Revesz, Regulatory Review, Capture, and Agency Inaction, 101 Geo. L.J. 1337 (2013).
[41] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23.
[42] See Richard Stacey, Dynamic Regulatory Constitutionalism: Taking Legislation Seriously in the Judicial Enforcement of Economic and Social Rights, 31 Notre Dame J.L. Ethics & Pub. Pol'y 85 (2017), noting the importance for social rights' implementation of "policymakers at high levels of the executive, administrators and officials in the bureaucratic machinery of a regulatory system".
[43] Livermore & Revesz, *supra* note 40. Notably, however, social rights are not the only rights that require positive actions from public powers. For an expansion of this argument, *see, e.g.*, Stephen Holmes & Cass R. Sunstein, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (Norton eds., 1999).
[44] Stacey, *supra* note 42.
[45] *Id.*
[46] Abram Chayes, The role of the judge in public law litigation, 89 Harv. L. Rev. 1281 (1976).

revising administrative decisions, and indirectly impacting administrations in their capacities, resources, and structure[47].

All over the world, administrative agencies adjudicate pensions and other social security claims, build schools, operate the public healthcare system, and design food programs, just to mention a few examples of actions that are necessary to secure social rights. When they do so, they operate guided by administrative law, which indicates how to purchase goods and provide services, how to engage with private parties, how to select contractors, etc. Even when private actors are direct providers of social rights (say, through private schools or hospitals), they are always subject to administrative law's regulations[48]. Furthermore, most of the decision making around social rights does not happen in judicial courts or legislatures, but rather in the sphere of administrative justice (which on a daily basis decides on issues such as housing, employment, and social protection), which is more accessible than judicial courts to most people[49].

There is, of course, important literature that shows how social rights and administrations connect. For example, in a context of increasing efforts to evaluate social rights litigation's effectiveness and to understand its effects—both within judicial procedures and beyond the courtroom[50]— scholars have argued that courts can impact administrative entities, often the defendants in social rights cases. Judicial rulings can affect administrative bodies' capacities,

[47] Raeesa Vakil, Constitutionalizing administrative law in the Indian Supreme Court: Natural justice and fundamental rights, International Journal of Constitutional Law, Volume 16, Issue 2 (2018).
[48] Varun Gauri & Daniel M. Brinks, COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (Cambridge University Press, 2008).
[49] Sossin, Lorne & Hill, Andrea, Social Rights and Administrative Justice, Articles & Book Chapters, 1748 (2014); available at https://digitalcommons.osgoode.yorku.ca/scholarly_works/1748 (accessed November 25, 2023).
[50] For instance, important literature showed how judicial interventions can have many positive —though indirect— impacts such as building communities and giving visibility to problems that are under debated in the public agenda. *See* César A. Rodríguez Garavito and Diana Rodríguez Franco, CORTES Y CAMBIO SOCIAL: CÓMO LA CORTE CONSTITUCIONAL TRANSFORMÓ EL DESPLAZAMIENTO FORZADO EN COLOMBIA (Colección Dejusticia, 2010).

processes, resources, or structures and, overall, function as catalyzers of institutional change[51]. However, at least in Latin America there is still much room to assess the relationship between social rights, courts, and administrations[52]. The systematic assessment of the administrative institutions tasked with implementing social rights, and the potential reforms needed in administrative law to facilitate this task is still a missing piece in most social rights debates.

As a result, there is a gap in understanding how to operationalize social rights within public administrations. It is common that constitutions in Latin America, for example, say very little on how to claim rights before administrations[53]. Overall, constitutions across the planet have been considered to say "relatively little about the administrative state", focusing only on regulating the structure of the administrations rather than the rules under which they function[54].

Because of this conceptual gap, administrative law —the discipline that regulates the functioning of public administrations—has remained alien to social rights. In fact, it is often unconducive to the particularities of social rights, which systematically call for complex,

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[51] *See, e.g.*, Sabel & Simon, *supra* note 12; Pieterse, *supra* note 33; Madhav Khosla & Mark Tushnet, Courts, Constitutionalism, and State Capacity: A Preliminary Inquiry, 70 Am. J. Comp. L. 95 (2022); Joanne Scott & Susan Sturm, Courts As Catalysts: Re-Thinking the Judicial Role in New Governance, 13 Colum. J. Eur. L. 565 (2007); Ray, *supra* note 29.

[52] Even acknowledging the difficulties of evaluation impact, as implementation and compliance in particular are often hard to measure. *See generally*, Martín Sigal, Julieta Rossi & Diego Morales, *Argentina: Implementation of Collective Cases*, *in* SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK 140–176 (Malcolm Langford, César Rodríguez-Garavito, & Julieta Rossi eds., Cambridge University Press, 2017). These efforts sometimes indicate that results are uncertain and at times poor. It became a frequent account, for example, to claim that in one country known for courts' intervention in the social rights sphere non-implementation is the norm and court orders are unenforced or only paid "lip service". *See* Malcolm Langford & Steve Kahanovitz, *South Africa: Rethinking Enforcement Narratives*, *in* SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK 315–350 (Malcolm Langford, César Rodríguez-Garavito, & Julieta Rossi eds., Cambridge University Press, 2017). On the impact of courts on institutions, *see, e.g.*, Sabel and Simon, *supra* note 12.

[53] In the case of Colombia, for example, the constitutional chapter on the "protection and application of rights" states lavishly that public entities must act in "good faith" and refrain from applying extra-normative requirements for exercising rights, to then include brief rules on sanctions for non-compliant authorities (in contrast with the robust chapter on judicial protection of constitutional rights). Overall, at the constitutional level the organization of powers has remained basically unchanged despite the incorporation during the last two centuries of several "new" rights to constitutions across Latin America. *See* Gargarella, Roberto, *Latin America: Constitutions in Trouble*, *in* Graber, M. et al. (ed.), CONSTITUTIONAL DEMOCRACY IN CRISIS? (New York: Oxford University Press, 2018).

[54] Tom Ginsburg, *Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law*; *in* COMPARATIVE ADMINISTRATIVE LAW (Second Edition, Ed. Susan Rose-Ackerman et al).

coordinated, participatory and reviewable policy interventions that traditional administrative law (at least across Latin America) disfavors[55]. In fact, some aspects of canonical or traditional administrative law in the region can act as a barrier to efforts oriented at realizing rights[56].

Furthermore, administrative institutions' capacity is crucial for discharging social rights. Scholars have found, for instance, relevant differences in the implementation of social rights' judicial decisions depending on the institutional strength of defendant states[57]; and argued that, overall, the protection of rights is dependent on some "minimal level of effective government"[58]. More recent scholarship has shown, in turn, how courts deciding social rights' cases can help build state capacity[59].

If one accepts that the realization of social rights is dependent on the functioning of administrative institutions, it becomes clear that this set of rights will be hard to vindicate in context of constrained institutional capacity and outdated administrative law rules. As a matter of fact, it has been recently argued that we live in an era of generalized ineffectiveness in government, where "basic governmental functions and services, such as ensuring education, health care, and a strong economy, are deeply compromised"[60].

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[55] As I explore in detail in Chapter 4, mainstream or "canonical" administrative law in many Latin American countries may hinder the realization of social rights. Mainstream administrative law was largely modeled to contain and control governmental power and protect "negative" rights (centrally property rights) rather than to promote "positive" social rights. While there have been relevant adaptations and innovations in discrete areas of administrative action, the canon of administrative law still reflects the views on public administrations that prevailed in previous centuries, which sought to contain "out of control" administrations who could interfere with negative rights rather than to energize dormant administrations who would not provide social rights.

[56] I call "canonical", "mainstream" or "traditional" administrative law the discipline that emerged as such systematically in many countries of the region in the early 20th century, and that is still largely reflected in core administrative law statutes, caselaw and mainstream law teaching and legal scholarship. I expand on this notion in Chapter 4.

[57] Sigal, Morales & Rossi, *supra* note 52.

[58] Dawood, Yasmin, *Effective Government and the Two Faces of Constitutionalism, in* CONSTITUTIONALISM AND A RIGHT TO EFFECTIVE GOVERNMENT? (Vicki C. Jackson & Yasmin Dawood, eds., Cambridge University Press, 2022).

[59] Khosla & Tushnet, *supra* note 51.

[60] Dawood, supra *note* 58.

Across Latin America the mismatch between robust recognition of social rights and constrained institutional capacity to discharge them is particularly dramatic[61]. Existing analyses suggest that Latin American institutions are characterized by their extreme weakness, with them either failing to achieve their goals or being set out to never accomplish anything from the outset[62]. Common institutional problems include fragmented bureaucracies; dramatically high-rates of volatility in rules and actors[63]; inconsistent results in decision making[64]; problems in evidence gathering, assessment and monitoring; public mistrust towards public officers; low wages and lack of incentives for advancing a career in public office; state capture by interest groups; and a disproportionate concern over rules' compliance that trumps substantive considerations and often leads to institutional paralysis[65]. It should come as no surprise then that Latin American nations have failed so extraordinarily in implementing their ambitious constitutional promises towards social rights.

In this dramatic scenario, there is an urgent need to connect debates on social rights more systematically to the functioning of the administrative institutions tasked with implementing them, and to discuss reforms needed in those institutions to better discharge rights-related commitments.

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[61] See Helena Alviar García, Karl Klare, Lucy A. Williams (eds), SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE, 105 (Rutledge, 2015). The fact that virtually all Latin American countries have strong Presidential regimes brings more relevance to assessing institutions in charge of securing social rights, as administrations are given substantial discretion and power to pursue rights' fulfilment.

[62] Brinks, D., Levitsky, S., & Murillo, M. (Eds.), THE POLITICS OF INSTITUTIONAL WEAKNESS IN LATIN AMERICA (Cambridge: Cambridge University Press, 2020). Institutions can deliberately be adopted to be weak. In some cases, rules that are unlikely to be complied with at present may be adopted in the hope that they will be implemented in the future. This may explain wide recognition of social rights with low levels of implementation. "Future activation" may be driven by courts, as in some opportunities has been the case with social rights.

[63] *Id*. Sources of instability are manyfold. One of them can be economic instability and economic crisis, which are especially common in a region that highly depends on natural resources. The coalitions underlying an institution may also be unstable: people who design a rule are soon replaced by others with different preferences.

[64] This is not exclusive of Latin American administrations. For varied and dramatic examples of inconsistency in adjudication in the United States, *see* Daniel E. Ho, Does Peer Review Work? An Experiment of Experimentalism, 69 Stan. L. Rev. 1 (2017).

[65]The compliance-oriented style in turns creates a "paralyzing effect" in case of doubts on what action to take, a tendency to deny petitions, and a prioritization of forms over the results and efficacy of administrative actions. *See* Mata, Ismael, La Administración Pública frente a los nuevos paradigmas, Revista RAP N° 408 (2012), p. 328.

With this aim, the next two chapters discuss in detail two cases in which courts, even in contexts of constrained administrative capacity, managed to trigger promising innovations and build institutional capacity to advance the vindication of social rights.

Chapter 2: Argentina: advancing social rights through court-triggered institutional innovations

2.1 Chapter overview

The "Mendoza" case decided by the Supreme Court of Argentina in 2006 is arguably one of the landmarks of social rights' litigation in Latin America[66]. In Mendoza, the Court ordered the clean-up of the eponymous river basin, polluted over centuries and today home to five million people, and the re-location of the marginalized communities living on the highly contaminated soil of the river's banks. The situation of the basin not only reflected dramatic and structural violations of social rights, but also many of the institutional challenges characteristic of countries in the region discussed in Chapter 1, such as extreme instability and volatility[67] and institutional unresponsiveness to societal norms[68].

The decision led to a wide range of actions, including the relocation of the people who lived in informal settlements in the contaminated riverbanks. Although improvement in the river's water quality has been halting —with the delays and reverses periodically taken to indicate the

[66] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], CSJN, "Mendoza, Beatriz y otros", case M.1569.XL.

[67] The agency in charge of the basin's cleanup, ACUMAR, presents a very dramatic case of volatility. Emergency decrees have periodically changed the way in which the agency's head is appointed. The agency has had more than twelve directors in seventeen years, has changed its bylaws several times to reflect modifications to its structure, and has a massive rotation of personnel. Notably, since courts tend to have much more stable personnel, the intervening court in "Mendoza" helps ACUMAR build an "institutional memory" and does some of the experience-based learning that the agency should make itself.

[68] For example, as part of the basin cleanup, "open-air dumps" were prohibited, and relevant authorities started an aggressive program to close them. While authorities were successful in eliminating massive open-air dumps, they failed dramatically in closing smaller ones. Micro-open-air dumps are the result of very entrenched practices of disposing trash in very low-income communities and activities that people carry out to make a living (collecting trash from areas that governmental services do not reach).

failure of the judicial intervention as a whole[69], in line with the broader critiques to this form of litigation[70]—, the efforts at re-location of the extremely vulnerably communities have led to significant progress and institutional innovations (even when they represent one of the most complex issues derived from the case).

Under the aegis of the Mendoza decision, innovative participatory processes have emerged in which relocated communities, together with non-governmental organizations and other institutional actors, help give concrete and contextualized meaning to the vague constitutional right to "adequate housing". Participatory processes have helped specify, for example, the culturally appropriate type of construction for each relocation, ensuring that the housing is easily maintained, compatible with the economic activities carried out by the communities, and convenient to access schools and health care. Related innovations have led to increased transparency and much improved coordination among national, provincial, and municipal authorities, as they build their institutional capacities to better discharge their social rights' commitments in systematic interactions with affected communities.

The case provides promising responses to some of the common objections to social rights. It shows how some of the dichotomies emerging from the literature discussed in Chapter 1 can prove much more nuanced —and auspicious— in practice than often suggested. For example, the case proves that a stark division between process and substance can be misleading, as robust procedures enabled the definition of the concrete, contextualized content of the right to housing in the case, well beyond the general standards applied directly by courts. Importantly, these procedures systematically engage marginalized communities facing relocations, providing a

[69] Outside of the promising innovations in the right to housing discussed in this Chapter, the case has been a source of skepticism, particularly around the environmental impact of the case on water quality.
[70] *See, e.g.*, Verbic, Francisco, La Causa 'Mendoza' y Algunos De Los Serios Problemas Evidenciados En La Sentencia Del 7 De Junio De 2018, Classactionsargentina.com (2018).

practical response to concerns over the exclusionary nature of judicial interventions focused on procedural remedies. The aspects of the case analyzed below further show an exceptional model by which courts can facilitate the building of institutional capacity in relevant administrative entities —even in a context of significant constraints— and adjudicate social rights' cases with active engagement but without replacing administrations in their roles and responsibilities[71].

Overall, the Supreme Court and the district criminal court to which it delegated responsibility for the day-to-day supervision of the case avoid imposing detailed substantive outcomes directly on relevant administrative institutions. Rather, the courts use their authority to obligate responsible officials to meet regularly with one another, and with concerned citizens, to make and revise plans, evaluate progress, and respond to problems within the normative boundaries of constitutional rights. The courts further use strong monitoring mechanisms and sometimes rely on the threat of sanctions to incentivize engagement of institutional actors in periodic meetings. In doing so, Mendoza's courts provide a model of judicial engagement in social rights' that is respectful of judges' constitutional and technical limitations and at the same time effective in advancing rights.

These characteristics mark Mendoza as an instance of experimentalist judicial review (and related experimentalist-like administrative interventions), as discussed in the Introduction to this dissertation. Under this model, courts encourage the parties, broadly understood, to elaborate mutually agreeable remedies within the framework set by an initial judgment of constitutional or statutory obligations. By using the deliberative exchanges among the stakeholders to reveal information about institutional problems and possibilities otherwise unavailable to courts, these

[71] It has been argued that the impact of this type of litigation on governance is "fundamentally an empirical matter, not a doctrinal one", as this dissertation confirms. *See* Varun Gauri, Public Interest Litigation in India Overreaching or Underachieving?, World Bank Policy Research Working Paper 5109.

remedies uncover unsuspected opportunities for institutional reform and capacity building. Mendoza is distinctive as a case of experimentalist remedies because it demonstrates that, at least under some circumstances, such measures can be effective even in a context of social and economic deprivations and using a strong rights framing (sometimes deemed in tension with experimentalism).

2.2 The Mendoza case

Mendoza is Argentina's biggest structural litigation, and arguably one of the landmarks of social rights' litigation in Latin America. The case centrally involves a massive environmental effort to clean up the Matanza-Riachuelo basin, which covers 2200 km² in an area that affects fourteen municipalities of Argentina's most populated province (the Province of Buenos Aires) and its neighboring City of Buenos Aires (the seat of the federal government). This means that four different jurisdictions intervene in the area: municipalities, the provincial government, the government of the City of Buenos Aires, and the national government. More than twenty-two public agencies from those jurisdictions have direct authority over the basin, speaking to its importance and complexity[72].

The area corresponds to some of the poorest, most densely populated and institutionally weakest districts of the country. Many problems of capacity constraint referred to earlier are evident in the institutions of the basin: volatility in rules and staff; significant problems of coordination; opacity; and poor policy planning. Some of them, as will be discussed later, became evident to courts, who explicitly or implicitly tried to address them.

[72] Official website of the Instituto de Vivienda de la Ciudad, at https://vivienda.buenosaires.gob.ar/integracion/camino-sirga#top (last accessed November 17th, 2023).

The basin affects over five million people who live in its area of influence and hosts a wide range of agricultural and industrial activities, ranging from pharmaceuticals, chemical, metal and petrochemical to meatpacking and tannery. For centuries, companies and households have thrown their waste into the river with virtually no control. In fact, already in 1887, the Supreme Court issued a decision discussing the river pollution and asserting that more stringent regulations were necessary in the basin[73]. Massive population growth over the centuries without development of basic infrastructure —for example, no appropriate sewage or water systems were built in years— or urban planning has worsened the environmental situation since then. All these factors paired with the natural characteristics of the river —which has virtually no slope and shallow waters— transformed Riachuelo into one of the most polluted rivers of the planet[74].

Contamination not only affected the environment itself (impacting air, soil, and water), but also the health of people living in the area. Problems derived from pollution ranged from disgusting smells to unusually high levels of lead in blood among the inhabitants of the basin, including children[75]. As apparent from these facts, the Mendoza litigation —unlike other examples of the so called structural or "public interest litigation"[76]— gave an opportunity to benefit extremely marginalized communities, which was particularly relevant since previous, non-judicial strategies to address the situation had failed in the past[77].

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[73] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/05/1887, "Saladeristas de Barracas", Fallos 51:274.

[74] See La Voz de Galicia, El río Matanza, un lugar inhabitable para cinco millones de argentinos, December 27, 2019, available at https://www.lavozdegalicia.es/noticia/sociedad/2019/12/26/rio-matanza-lugar-inabitable-cinco-millones-argentinos/00031577370845628922369.htm#:~:text=Est%C3%A1%20considerado%20como%20uno%20de,lugares%20m%C3%A1s%20contaminados%20del%20mundo (last accessed July 19th 2023).

[75] *See generally* Office of the Ombudsman of Argentina, Informe especial del Cuerpo Colegiado, coordinado por la Defensoría del Pueblo de la Nación, a seis años del fallo de la Corte Suprema de Justicia de la Nación, available at https://www.dpn.gob.ar/documentos/20160304_30775_556677.pdf

[76] For a description of this type of litigation *see generally* Chayes, *supra* note 46, see also *supra* note 1.

[77] Importantly, these circumstances mitigate common critiques to "public law litigation", which among other things point to the regressive nature cases may often have, as, allegedly, it would tend to favor middle-class plaintiffs with

Indeed, despite governmental announcements, individual complaints, international loans, and social mobilization directed at enhancing the conditions of the area, consistent and deliberate actions toward the cleanup of the basin did not take place until a collective judicial complaint was presented before the federal Supreme Court in 2004[78]. Mendoza is therefore, from the outset, a good example of how courts' intervention can trigger institutional change by indicating in the first place that the status-quo cannot remain as it is and bringing additional resources and attention to an institution[79]. Interestingly, in Mendoza this happened even before the Supreme Court issued a decision on the merits (probably because of the attention the case received, and the many public hearings the Court conveyed, discussed below).

In fact, it was only after the lawsuit in the case was filed that Congress passed a law to create an inter-jurisdictional authority to regulate and control activities and allocated budgetary resources to it: the ACUMAR (*Autoridad de la Cuenca Matanza Riachuelo*)[80]. ACUMAR has the mandate to regulate and monitor activities that can potentially have an environmental impact on the basin. Its interjurisdictional membership includes representatives of the national, provincial

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better access to lawyers and courts. *See, e.g.*, João Biehl, Mariana P. Socal and Joseph J. Amon, The Judicialization of Health and the Quest for State Accountability: Evidence from 1,262 Lawsuits for Access to Medicines in Southern Brazil, Health and Human Rights 18/1 (2016). The fact that alternative strategies for change were attempted both before and after the Mendoza lawsuit similarly mitigates another common critique to this litigation, which notes how it can diminish more confrontational, political strategies. For an overview of these critiques, *see* Sandra Liebenberg & Katharine G. Young, *Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?*, *in* SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES (Helena Alviar Garcia et al. Eds., Routledge, 2015).

[78] *See, e.g.*, ACUMAR's institutional website, claiming its law of creation was "the result" of the complaint, at https://www.acumar.gob.ar/institucional/ (Last accessed on November 17th, 2023).

[79] Sabel and Simon, *supra* note 12.

[80] Through Law Nª 26.168, Nov. 15, 2006, B.O. Dec., 5, 2006. Relocation processes in the City of Buenos Aires akin to Mendoza relocations similarly show the connection between triggering judicial decisions and institutional interventions. For example, in the urbanization process of different areas of the city, a relevant law was passed after the filling of a judicial complaint (for the "Barrio 20", see Juzgado N° 4 del Fuero Contencioso Administrativo y Tributario de la Ciudad de Buenos Aires (administrative and tax court nª 4 of the City of Buenos Aires), "Asesoria Tutelar c/GCBA S/procesos incidentales", case N° 12975/5; for the "Barrio Rodrigo Bueno", see Juzgado N° 4 del Fuero Contencioso Administrativo y Tributario de la Ciudad de Buenos Aires (administrative and tax court nª 4 of the City of Buenos Aires), "Zárate Villalba, Juan Ramón y otros c/ GCABA s/ amparo (art. 14 CCABA) s/ recurso de inconstitucionalidad concedido" , case N° 12315/15).

and city governments. The role of ACUMAR in the case will be further discussed in the following sections.

In the Mendoza complaint, seventeen plaintiffs (including Beatriz Mendoza, the leading plaintiff) sued the fourteen involved municipalities, the province of Buenos Aires, the City of Buenos Aires, and the federal government demanding a solution for the environmental crisis of the basin[81]. Because of the inter-jurisdictional nature of the dispute, this was a case of original jurisdiction of the federal Supreme Court[82], what helped the case gain massive public attention.

In 2008, after several hearings and written presentations, the Court issued its decision on the merits. The final decree marked the beginning of active —and ongoing— judicial engagement around the basin. The decision on the merits ordered ACUMAR to implement a comprehensive set of orders, many reflecting the contents of a plan that the parties themselves had presented during the trial. The plan covered different points such as control of industries and remediation of soil, paired with some detailed instructions for the relevant authorities (for example, inspecting all existing factories in the basin within thirty days). The decision made the national, provincial and city governments responsible for the implementation of the plan.

In addition to those mandates, the court required that authorities secured public participation and set three overarching, substantive goals that should guide all relevant governmental action: (1) to improve life quality of the inhabitants of the basin; (2) to pursue the environmental redress of water, air, and soil; and (3) to prevent "reasonably predictable" environmental damages. The Court was clear in that it envisioned its role as setting outcomes and

[81] They also requested a monetary compensation for the impact of pollution on their health, though the Supreme Court decided that individual, monetary damages should be discussed before a different court. The complaint claimed as well that forty-four private companies were responsible for the environmental disaster, although this claimed received less attention and is not the focus on this work.
[82] Art.117, CONSTITUCIÓN NACIONAL [CONST. NAC.].

goals that administrations should then pursue with the tools of their choice. These overarching goals would also eventually steer the work of the courts later tasked with monitoring the implementation of the Supreme Court decision, as discussed in the following sections[83]. Therefore, the Supreme Court decision set the framework needed to trigger the institutional innovations required to advance the right to housing in the basin.

It is not atypical of federal courts in Argentina to largely review governmental omissions, and issue decisions that entail positive duties for public administrations. In fact, three years before Mendoza the Supreme Court had decided a similarly structural case against the government (entailing prison reform in the largest district of the country[84]). However, the ambition of the orders (and of related innovations discussed in the next section) of Mendoza was probably facilitated by the legitimacy that the Supreme Court had at that moment. Most of the intervening judges had been recently appointed through what was a new, participatory procedure, largely regarded as auspicious (and promoted by a government that also enjoyed positive public perception). Furthermore, the President of the Supreme Court at the time specialized in environmental law and was largely committed to environmental issues. These conditions, paired with the public attention the case had received, the broad engagement it triggered, and the visibility of the problems of the basin certainly facilitated the innovations discussed in the following section.

2.3 Innovations led by the Supreme Court

Mendoza became one of the landmarks of social rights' litigation in Latin America. However, while the case is repeatedly examined in specialized literature, in line with the literature summarized in Chapter 1 analyses typically focus on the scope and constitutional implications of

[83] For an interesting analysis of the impact of stated goals in guiding courts' behavior and approaches to their work, see Jessica K. Steinberg, A Theory of Civil Problem-Solving Courts, 93 N.Y.U. L. Rev. 1579 (2018).
[84] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "Verbitsky, Horacio s/ habeas corpus", May 3, 2005, Fallos 328:1146.

the decision of the Supreme Court, and on its environmental impacts. While the judgment itself was important because of its scale and the nature of the issues underlying the case, the decision on the merits was not necessarily transformative for social rights litigation. Indeed, neither the complaint nor the decision relied on a robust analysis of social rights' standards, nor did the decision discuss human rights' norms more generally or applied a clear standard of judicial review. As a result, the Mendoza decision does not fit squarely under the traditional models of social rights' adjudication summarized in previous sections, as it is not centered in defining the minimum content of the rights claimed in the case, nor exclusively on assessing the procedures in place either before the decision or needed at the remedial phase. Indeed, while the Court did set some procedural mechanisms to ensure the remediation of the rights infringed in the case, it also ordered some substantive measures and goals (although largely based on information facilitated by the parties during procedures, rather than on a systematic interpretation of its own of the rights vindicated in the case).

However, while the judgment was not particularly novel —especially for a court that had adjudicated complex cases in the past—, Mendoza did show important innovations both in the way the Supreme Court handled the case —aimed at increasing transparency and participation— and in the monitoring mechanisms it set for the implementation of its decision. Overall, these innovations were rooted in the Court's concerns over the complexity of the problems of the basin, and the uncertainty around their causes and on the best ways to address them.

The following sections discuss those two sets of innovations, noting which were more successful, deliberate, or accidental. All the new mechanisms indicate that the Supreme Court was actively looking for alternatives to traditional procedural and administrative law which could facilitate the complex task it was taking on. The alternatives explored by the Supreme Court laid

the groundwork for further innovations that have helped address the challenges of social rights' vindication in promising ways.

2.3.1. Promoting transparency and participation

Lack of information and uncertainty around the scope of the basin problems and the extent of rights' violations were recurrent concerns of the Supreme Court since the beginning of the case. The Court noted how insufficient data led to increased problems in institutional planning and decision making. Consequently, the Court periodically requested authorities, experts, and other interested parties to attend public hearings and produce information engaging a wide range of stakeholders well beyond the requirements of procedural laws. Indeed, one of the first decisions of the Court entailed ordering the defendant institutions to come up with a remediation plan which contemplated public participation, which would end up being the plan that the decree on the merits used to craft its orders[85].

The numerous decisions of the Court around transparency and participation led to a set of general principles that would guide the way the case was managed later. These principles include the need to ensure participation around "fundamental decisions on development" and to create "environmental information programs"[86]; the incorporation of several non-governmental organizations to the case beyond the original plaintiffs[87]; the need to proactively publish a wide range of environmental information in accessible formats[88]; and the creation of appropriate indicators and measurement systems to assess progress in implementing the Court decision[89]. Importantly, all these standards show how a procedural approach to social rights adjudication can

[85] CSJN, *supra* note 66, decision of June 20, 2006.
[86] *Id*.
[87] CSJN *supra* note 66, decision of August 2006.
[88] CSJN, *supra* note 66, decision of 22 August 2007, and decision of July 8, 2008
[89] CSJN, *supra* note 66, decision of August 10, 2010.

take shape in robust ways in practice (even within courts that, as a rule and in addition, are willing to find substantive violations to social rights).

In its decision on the merits, the Supreme Court further stated the need to ensure public participation in monitoring the implementation of its decision (later stressing specifically the right to participate around the relocation processes discussed in the following section[90]). To strengthen civil society engagement, it took a measure with little precedent in the Court's records: it created a new, ad hoc civil society oversight body within the Office of the Ombudsman, called the *Cuerpo Colegiado*. The *Cuerpo Colegiado* is a collegiate body that gathers the six non-governmental organizations admitted to the litigation after the complaint, which have relevant expertise in environmental issues. This body has the mandate of gathering information, monitoring ACUMAR, and making administrative and judicial complaints[91].

Furthermore, the Court created an ad-hoc procedure to handle the case, which was more flexible than traditional civil procedure law indicates. Increased flexibility included a reduction of the terms in which defendants had to make presentations and a more widespread use of oral arguments and hearings than the law on the books allows.

All these measures were groundbreaking for a high court of a civil law jurisdiction, as they were not anchored in any specific or detailed legal provision. Instead, the Supreme Court explained its decisions based on the complex and uncertain nature of the problems of the basin and to the right to participation. It also relied on broad principles of environmental law, condensed in

[90] CSJN, *supra* note 66, decision of December 19, 2012.
[91] However, for reasons not addressed in this article centrally connected to the failure of the National Congress to appoint an Ombudsman, the Curerpo Colegiado lost its relevance throughout the procedures. *See* María Eugenia Gago & Tistán Gomez Zavaglia, *El Defensor del Pueblo de la Nación: entre el olvido, la intención y la desidia*, *in* CONSTITUCIÓN DE LA NACIÓN ARGENTINA A 25 AÑOS DE LA REFORMA DE 1994 (Editorial Hammurabi, 2020).

environmental "framework laws", which give flexibility to judges intervening in environmental issues[92] and recognize the need for strengthened access to information and public participation[93].

2.3.2. New monitoring arrangements

Because of the size of the relevant area, the number of people affected, the structural, long-lasting, and interconnected problems of the basin, and the number of public entities involved, the implementation of the Mendoza decision was obviously challenging. Therefore, the Supreme Court tried innovative monitoring arrangements that could facilitate the complex task. Understanding how these arrangements work in practice is of special relevance in a context of contested impact of social rights litigation. Importantly, literature has found that strong monitoring mechanisms of the sorts discussed in this section can enhance the enforcement of judicial decisions[94]. Furthermore, strong monitoring processes can help address critiques pointing to judges' lack of democratic legitimacy, as they provide room for increased social mobilization and deliberation[95], acknowledging the limitations in courts' capacities to handle structural problems.[96]

Initially, the Supreme Court delegated in a federal district court the power to oversee the implementation of the decree, to ensure closer contact with the case[97]. This arrangement was novel, as applicable procedural laws envision that, as a rule, the court that issues a decision is the one responsible for its implementation[98]. It is possible that the Supreme Court, however, identified the

[92]Law No 25.675, 6 Nov 2002, B.O., Nov. 28, 2002, art. 32, 57.
[93]Law No 25.675, 6 Nov 2002, B.O., Nov. 28, 2002, art. 19, 20. CONSTITUCIÓN DE LA CIUDAD DE BUENOS AIRES, art. 30.
[94] See, e.g., Mihika Poddar & Bhavya Nahar, 'Continuing Mandamus' – A Judicial Innovation to Bridge the Right-Remedy Gap, 10 NUJS L. Rev. 554 (2017); *see also* Poorvi Chitalkar & Varun Gauri, *India: Compliance with Orders on the Right to Food*, *in* SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK 288–314 (Malcolm Langford, César Rodríguez-Garavito, & Julieta Rossi eds., 2017).
[95] See Chitalkar & Gauri, *supra* note 94.
[96] Rodríguez Garavito, Cesar, Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America, 89 Tex. L. Rev. 1669.
[97] CSJN, *supra* note 66, decision of July 8th, 2008.
[98] CODIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN (Civil and Commercial Procedure Code), art. 50.

need for a new monitoring model after seeing the difficulties in implementing a similarly complex decision it had issued some years earlier, in which monitoring powers were assigned to the Supreme Court of Buenos Aires without clear mechanisms indicating how the arrangements would work in practice[99].

The stated goal of this ad hoc arrangement was therefore to ensure that the district court could have an "immediate" contact with the basin problems and therefore effectively control the implementation of the decision. The Supreme Court assigned the task specifically to the federal court of Quilmes, giving additional reasons for this choice. First, the Quilmes court had territorial competence over a significant area of the river basin. Second, Quilmes was the newest federal district court, which would allow it to devote sufficient resources to handle the case (which the Supreme Court claimed was "decisive")[100].

However, due to critiques to the work of the Quilmes court —many of them based on alleged corruption—, in 2012 the Supreme Court decided to re-assign supervisory powers to other federal district courts[101]. Acknowledging the need to try new solutions given the difficulties registered under the original scheme, the Supreme Court decided to temporarily assign supervisory powers to two different courts. One, based in the City of Buenos Aires, would oversee relevant budgetary and public utilities and procurement issues (works related to the water supply network, garbage-collection, etc.)[102]. The other one, based in Moron (in the territory of the province of Buenos Aires), would engage in all other matters related to the case. The remaining sections of

[99] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "Verbitsky, Horacio s/ habeas corpus", Fallos 328:1146.
[100] CSJN, *supra* note 66, Decision of July 8th, 2008.
[101] CSJN, *supra* note 66, Decision of December19, 2012.
[102] Judicial control of budgets is paired with another institutional mechanisms designed by the Supreme Court: the auditing accounts and budgetary execution, in charge of an oversight body in the sphere of Congress (the Auditoria General de la Nación).

this Chapter focus on the work of the Moron court, as it is the one more directly engaged with issues of recognition of social rights of inhabitants of the basin.

Notably, departing from the reasoning of its initial decision, the Supreme Court did not consider the newness of the courts, nor their territorial connection to the basin. Instead, it chose the two mentioned courts only claiming that the problems in implementing the decision called for such a solution, without providing a clear rationale for the choice. Still one thing remains certain: the Supreme Court was committed to trying new alternatives.

The new allocation of monitoring powers led to an additional and very significant innovation in the case, as both supervising courts are criminal courts, despite the case's non-criminal nature[103]. This particularity provides interesting insights to compare Mendoza to other social rights' cases not handled by criminal courts and therefore more prone to using traditional approaches to social rights' adjudication.

The Moron court being a criminal court impacted the case in different ways. First, the original court's staff did not have a background in administrative law, despite Mendoza being a typical administrative law case, what may have made it more willing to explore alternative understandings of traditional administrative law. While after being assigned the case, the Moron court created an ad hoc unit (keeping the core criminal law functions of the court assigned to its other teams), it was organized in a hybrid way with administrative, civil, and criminal law specialists. Indeed, the Supreme Court authorized the appointment of a group of six people specifically dedicated to work on Mendoza to provide the criminal court with adequate human

[103] Argentina organizes its federal Judiciary by dividing courts according to territory and subject matter jurisdiction so that federal courts can have civil, commercial, criminal, or administrative law competence. Occasionally, one court can have two or more of these competences, although usually criminal proceedings are always held by a specific criminal court. Mendoza is classic administrative law case; in a nutshell, litigation discussing the exercise of public administration's duties that impact fundamental rights.

resources to deal with a non-criminal case, who diversified the existing expertise of the court's staff[104].

Second, because of the particularities of criminal procedure codes in Argentina, federal criminal courts tend to perform tasks which are alien to courts with other subject matter competences. Criminal courts engage in evidence gathering, interact often with a wide range of actors, and conduct hearings frequently. As such, their style and competences are quite distinctive. Criminal courts are more active, informal, and prone to oral rather than written procedures, and less bound by what parties present to them than other courts[105]. In the case of the court of Moron, as will be discussed in further detail below, informality and orality led for example to direct and frequent interactions between the court's personnel and different public officers engaged in housing policy that facilitated the innovations triggered in that realm. These interactions were further facilitated in Mendoza since, unlike traditional criminal procedures, the case requires the constant assessment of present and future administrative action.

Furthermore, the change in supervising courts led to a stark change in styles of judicial management. The original Quilmes court relied on written procedures, with little interaction with authorities, let alone with relocated people. In the realm of housing discussions, in the most extreme cases it ended up issuing orders to "remove" people from the riverbanks in extremely short periods (such as forty eight hours), with no concerns over listening to either interested parties or the authorities in charge of the short-notice procedures. It imposed heavy fines on public officers and openly confronted them due to their failure to meet the court's detailed orders. This example

[104] Through temporary contracts, however, as the allocation of monitoring powers to these courts was also supposed to be temporary, as discussed earlier.
[105] For example, relevant judicial records in Mendoza are full of references to verbal conversations that public authorities and court personnel have, which are then registered informally in the official files. Similarly, the court is much more prone to calling for hearings and conducting them actively than an administrative law court would.

shows how a de-prioritization of procedures can lead to results that deny rights, not only by neglecting the agency of rights holders but also by ordering measures which are virtually impossible to implement in practice, given the lack of familiarity of courts with actions needed at the administrative level.

The Moron court approached housing issues differently. It opened spaces for public engagement and set less stringent orders. Moron largely used the threat of sanctions as incentives to encourage participation of state actors. Unlike the Quilmes court, the Moron court relies almost fully on the threat of sanctions, without actually applying them. However, the potential sanction is quite serious: the initiation of criminal proceedings[106]. The possibility of the sanction being applied is also very realistic, as the threat comes from a criminal court.

The Moron court has some particularities that contribute to the model working. First, it is a federal court which is usually regarded as more powerful than a state court. Second, it has the support of the Supreme Court, which monitors the proceedings of Mendoza, granted Moron special powers, and implicitly embraces Moron's practices as it very rarely intervenes to overrule its decisions. Finally, Moron does not interact periodically with public officers engaged in housing policy outside the Mendoza case, being a criminal law court. On the contrary, administrative law courts tend to interact daily with the same lawyers who represent the government[107]. Constant interaction may contribute, even in very intangible manners, to building rapport in a way that debilitates the perceived power of courts to apply sanctions, making threats weaker.

The Supreme Court set up additional institutional arrangements to facilitate its engagement in the monitoring process, departing again from civil procedural rules (in ways that are hardly seen

[106] As intentionally disobeying a judicial order is a crime in Argentina, in the form of disobedience or contempt.
[107] This is particularly the case in the City and the Province of Buenos Aires, where legal representation of the state in trial is concentrated in a specific office, which means that the same team of lawyers appears before the same courts periodically.

in other cases). First, the Supreme Court decided it would itself review the decisions of the two district courts directly, creating an ad hoc appellate procedure where the circuit courts' intervention which would proceed as rule is omitted. Furthermore, it established that in the case of competence conflicts, it would itself decide on the competent court, creating again an ad hoc review procedure. While the reasons for many of these changes are unclear, it is probable that relevant judicial actors were eager to innovate to enhance the implementation of the Supreme Court decision. Regardless of their causes, this bundle of innovations created the institutional conditions needed to enable advances in the vindication of housing rights before the court of Moron.

2.4 Institutional innovations led by the district court

This section focuses on one aspect of the Mendoza case that triggered additional, unprecedented innovations for social rights' vindication and which is often underexplored: decisions around the right to housing. Contributing to the analysis of how courts can create appropriate models to fulfill the right to housing is particularly relevant given the strong focus that legal scholarship discussed on Chapter 1 has placed on the South African experience, which has partially revolved around cases pertaining to urban housing (and, particularly, since some accounts consider the results of such litigation insubstantial[108]).

Housing issues derived from the core environmental claims of the case, even though they were not expressly a part of the original complaint. Because the river was highly polluted and since laws require that rivers have a towpath —a trail that is left unoccupied at the sides of the river—, extremely poor people who lived in precarious housing in the contaminated riverbanks had to be relocated. Relocation procedures triggered controversies framed by intervening actors as part of their right to "adequate housing" and relevant to the goal of "improving life quality" that the

[108] See Malcolm & Kahanovitz, *supra* note 52.

Supreme Court had set, showing how general, overarching aims established by courts can have a significant impact in guiding policy if adequately monitored.

Housing issues in Mendoza are handled by the court of Moron, although they are monitored and validated by the Supreme Court itself[109]. Discussions in the realm of housing rights led to several innovations in decision making instances which can help address the longstanding challenges around social rights presented in Chapter 1 and illustrate that judges' choices when adjudicating social rights can be more nuanced than traditional literature suggests. Indeed, the Moron court managed to create an ecosystem of institutions that systematically engage in participatory procedures with affected communities and other relevant actors to define, contextualize and materialize in democratically accountable manners the vague constitutional right to adequate housing that the Argentine constitution recognizes[110].

The innovative procedures systematized in Mendoza depart from the norm by focusing on promoting coordination among fragmented entities, acknowledging the need to review and adapt flexible rules in light of experience, and engaging affected communities in decision making procedures. In other terms, these new procedures focus on addressing some of the institutional problems discussed in Chapter 1, rather than on reinstating the content of the right to housing in the abstract as recognized by norms (though respecting the boundaries set by those norms). On top of increasing the capacity of local institutions, procedural innovations led to detailed definitions of the contents of the right to housing as applied in the specific circumstances of the basin, giving more precision to the general standards recognized in norms and judicial decisions.

[109] The court not only has a supervisory role by directly deciding the appellations from the Moron court (with are decided with low revocation rate), both also through direct reporting from Moron to the Supreme Court.
[110] Art. 14 bis; 75.22, CONSTITUCIÓN NACIONAL (incorporating the International Covenant on Economic and Social Rights).

Interestingly, these advances emerged in a context of weak institutional capacity, high social vulnerability, and significant complexity —housing issues, for instance, require coordination among four levels of government—, further speaking to the promising prospects of the innovations. The following sections discuss each of them in detail.

2.4.1 An ecosystem of adapting institutions

As discussed in section 2.3.2, the characteristics of the Moron court enabled it to systematically engage with and assess the functioning of several administrative institutions that intervene in housing policy. This section aims to briefly describe those institutions, to then discuss how they contributed to advancing the right to housing.

Court engagement with administrative institutions would have been impracticable had the Supreme Court retained supervisory powers or decided to end its jurisdiction after issuing a decree on the merits[111]. Furthermore, the hybrid criminal-administrative nature of the Moron court enabled it to overcome a typical barrier that administrative law courts in Argentina face when supervising policy issues. In many administrative law cases the government is represented by State attorneys, and not by the agents who intervene in the policy area discussed in litigation (who, in turn, communicate scarcely among themselves). Because the Moron court led procedures informally and orally, it managed to convene to the case a wide range of public authorities connected to housing problems on the ground, well beyond the attorneys of the case. In doing so, it facilitated the creation of an ecosystem in which relevant institutions adapted to better respond to existing problems.

One of the key actors in this ecosystem is the local Housing Institute of the City of Buenos Aires (*Instituto de la Vivienda*, or IVC). The Institute is the entity charged with conducting public

[111] On the exercise of jurisdiction beyond a decision on the merits, see generally Poddar & Nahar, *supra* note 94.

policies on housing at the local level. It is designed as a traditional administrative agency that can function with relative levels of autonomy from the central executive branch. Importantly, the Institute was not envisioned as an agency specifically dedicated to relocations (let alone to Mendoza's relocations). It instead has a broad mandate around housing policy, dealing for example with issues like rent price regulation or access to credit. However, after Mendoza the IVC created a specific unit for Riachuelo, with a high hierarchy in the agency's structure, which has extended dialogue with other relevant institutional actors such as Public Defenders.

Public Defenders, both from the Federal and the City governments, are also essential institutions that evolved with the case. In Argentina, Public Defenders are independent entities who engage in judicial proceedings in which the public interest is involved. Public defenders were not the original attorneys of the case. However, as the participation instances discussed in the next section started to emerge, their role as the informal attorneys of the relocated communities became essential. The resulting adaptations were many. First, the Supreme Court admitted presentations by the Public Defenders regarding claims of people forced to relocate, even when they were not formally a party to the case. Furthermore, the two Defenders' offices created specific, interdisciplinary units to work in the Riachuelo[112]. Third, they signed an agreement to cooperate in the Mendoza case and provide coordinated legal aid to the relocated neighbors, in consideration of their converging interests and goals and the need to share their experiences.

By acting as the lawyers of the relocated neighbors, Defenders help their organizing and act as their nexus with the Moron court. Notably, these functions on the ground are not necessarily the ones that constitutional and statutory norms envision for Public Defenders, which are supposed to be concerned with more procedural actions. In Mendoza, however, Defenders analyze how

[112] At the National Public Defenders office, the Riachuelo unit was created ad hoc and has a high position in the organization, with the general goal of securing access to justice and coordinate actions with other areas.

relocated communities can present claims, whether they are legally sound, etc. Such claims are often channeled directly before the Housing Institute —rather than before the court—, which is essential not individualize the case in a way that lifts the burdens from defendant public administrations, one of the common concerns around social rights' litigation[113]. Interestingly, similar offices have been found to play equally important roles in social rights' litigation in other countries of the region[114].

These institutions interact often with ACUMAR, the river basin authority created by Congress, generating an ecosystem of institutions from various levels of government that coordinate their actions to advance the right to adequate housing. The way in which this process functions is discussed in the next section.

2.4.2 Institutionalizing participation through roundtables

2.4.2.1 Aims of the roundtables

The most transforming measure that the court of Moron took was to systematize instances of public engagement around the relocations decided in the case. The instances of public engagement described below illustrate a model that can help address many concerns expressed in traditional literature on social rights. First, they provide a real-world response to objections of judicial appropriation of administrative functions, as they foster a decision-making model that is court-led but places responsibilities for policy making on local administrations. Furthermore, they show that some concerns around procedural approaches to social rights' adjudication (such as

[113] *See, e.g.*, Octavio Luiz Motta Ferraz, *Brazil: Are Collective Suits Harder to Enforce?*, *in* SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK 177–200 (Malcolm Langford, César Rodríguez-Garavito, & Julieta Rossi eds., 2017).

[114] While the reasons for this are unclear, they may include the capacity of attorney's officers to compensate for the high levels of volatility in public institutions, given the slower turnover of their staff; the different structures of oversight bodies, which typically have larger staffs than individual courts; and the perception that they are independent entities.

those expressed around the meaningful engagement of the South African Constitutional Court), may not play out in practice as expected. They specifically demonstrate that, with adequate institutional support, marginalized communities can sustain engagement in participatory processes. Finally, they signal that a stark separation between substance and process in judicial approaches to social rights can be misleading. In Mendoza, strong procedures for public engagement where, in the end, the mechanisms needed to define the scope and substance of the right to housing in democratically acceptable manners.

Participatory roundtables emerged in Mendoza at least in part from lack of information around the situation of the basin, and the Moron court used the general participation principles set by the Supreme Court to initiate the procedures. Participation instances, which are not court-centric but strongly court-guided, allow people forced to relocate and institutional actors to discuss in detail the procedure for the moves and, in many cases, make collaborative decisions. I will call these spaces participatory roundtables.

The general goal of the roundtables is to discuss the process by which the moves will happen, under the right to adequate housing framing. Roundtables vary from decisional instances where determinations are made collaboratively, to more limited, information-sharing spaces. In general, issues discussed are collective, pertaining to the whole community and not to specific individuals, and include debates on how to survey appropriately the people who shall be relocated, which land is adequate for a relocation, or the timeline of relocations and advances in relevant processes.

The promising results of the roundtables —which of course are not perfect[115]— seem to be confirmed by their sustained expansion. Participation roundtables moved from covering 16% of

[115] For example, some people have identified delays in the moves as a problem that de-legitimizes governmental interventions and worsen the terms of dialogue.

the affected neighborhoods in September 2016, to 45% in 2017[116]. In 2022, participation spaces were being held in twenty-nine of the basin neighborhoods[117]. Participation instances also expanded beyond Mendoza. According to some accounts, participation became the rule for policymaking at the Housing Institute, even when there is no order to do so (indeed, without a court order participation becomes crucial in building legitimacy around the decision to relocate[118]). Roundtables are commonplace in relocations and other related procedures —such as urbanizations— that take place in the City of Buenos Aires[119]. Laws passed by the local legislature regarding these processes invariably include roundtables as the key policy tool. Similarly, ACUMAR's protocol for relocations and urbanizations in the Matanza-Riachuelo basin recognizes and regulates roundtables (even when they are not required by any norm[120]).

The aspects of the case discussed here are naturally not exempt from critiques, including questions on how effective relocations have been. Surveys conducted in two of the relocated

[116] ACUMAR's report before the Supreme Court, December 2017, available at https://www.cij.gov.ar/adj/expedientes_riachuelo/27.pdf. The exact cause that triggered the systematization of mesas is not clear. They may have emerged from the particularities of relocation processes (which according to the Housing Institute of the City of Buenos Aires include being planned, mandatory, with power imbalances, they create a "multidimensional" stress, and they break a persons' "social tissue"); as a backlash to the opaque decision making style of the Quilmes court; after Supreme Court's concerns over transparency; from social mobilization; or out of the experience of relocations in other informal settlements outside the Riachuelo basin.

[117] *See* ACUMAR, public consultation document, Villas y asentamientos: Hacia un cambio de paradigma (2022), at https://www.acumar.gob.ar/wp-content/uploads/2016/12/Documento-Audiencia-Publica-julio-2022-9-06-17hs_V4_Final.pdf

[118] Similar considerations have been made by ACUMAR. See ACUMAR, *supra* note 116.

[119] It is not totally clear where similar roundtables first started. Some people consulted for this research point to a leading case in 2008, involving litigation around a different neighborhood (Villa Cartón). Some literature points to very old forms of participation in the housing context during the 1970's and 1990's. *See* Abduca, Leila, Sociogénesis de las villas de la ciudad de Buenos Aires (December 10, 2008) (Academic memorie of the V Sociology Conference of the University of La Plata, available at http://www.memoria.fahce.unlp.edu.ar/trab_eventos/ev.5822/ev.5822.pdf).

[120] ACUMAR, public consultation document "Protocolo para el abordaje de procesos de relocalización y reurbanización de villas y asentamientos precarios en la cuenta Matanza Riachuelo" (September 2017), http://www.acumar.gob.ar/wp-content/uploads/2016/12/Protocolo-para-el-abordaje-de-procesos-de-relocalizaci%C3%B3n-y-reurbanizaci%C3%B3n-de-villas-y-asentamiento-precarios-en-la-CMR.pdf.

neighborhoods indicate positive assessments from relocated families[121]. This is intuitive since extended participation helped address previous, faulty experiences which had led to problems in building methods, materials used, and managing cohabitation issues among new neighbors. Some quantitative indicators, however, are less straightforward, as they show significant progress in some regards[122], but delays in others[123].

2.4.2.2 Roundtables' participants

Every person concerned with a relocation can participate in a roundtable, with no standing restrictions. Roundtables are therefore a way to increase public engagement —and therefore, democratic legitimacy— in judicial proceedings. In this way, they diminish the risks of participation turning into a largely technocratic exercise where court-appointed experts displace more democratic decision making[124].

[121] Daniel Ryan et al., Relocalizaciones Urbanas y Riesgos Ambientales: Un análisis de los casos de Magaldi y Villa 26 en la cuenca Matanza Riachuelo (Argentina), Lincoln Institute for Land Policy, Working Paper WP19DR1SP. Surveyed families coming from Magaldi and Villa 26 relocated to "Portela" and "Luzuriaga" complexes, expressed in 90% of the cases that their life quality had improved after relocations. Improvement was explained by better building conditions, dramatically enhanced access to services (including utilities, transportation, and trash collection), legal tenure of the property, and, to a lesser extent, by the enhancement in environmental conditions. Lack of tenure appeared to be a major barrier to exercising rights before relocations, as people living in informal settlements often did not even have an address to provide when asked to do so.

[122] The clearing of towpath of the riverbanks was the initial trigger for relocations, and moveouts of communities living in the riverbanks were the priority of the programs. Available data for the first semester of 2019 shows that almost 90% of the whole path was cleared, roughly 8% was "partially obstructed", and a tiny fraction was still "obstructed". The baseline in 2008 was that 40% of the path was fully obstructed, and 5% partially obstructed. *See* ACUMAR "Construcción del Camino de Sirga" (January 20, 2022), http://www.acumar.gob.ar/indicadores/construccion-del-camino-sirga/ (last accessed November 17th, 2023).

[123] ACUMAR also publishes information on the number of people who needed some "housing solution" in 2010 and the number of people who received a solution already. Figures show that while there is a sustained overall increase in the number of "finished housing solutions", the level of compliance with the 2010 target is still low. Out of 17.771 solutions needed, only 5806 are finished (33%); 2172 are being currently built (12%); 4337 are already funded for and the projects are being considered (24%), and 5456 don't have a planned solution yet (31%). ACUMAR, "Soluciones habitacionales en relación al Plan de Viviendas 2010" (January 20, 2022), http://www.acumar.gob.ar/indicadores/soluciones-habitacionales-relacion-al-plan-viviendas-2010/ (last accessed November 17th, 2023). These averages hide differences among areas; while many neighborhoods have been completely relocated, a few others account for the bulk of the pending solutions.

[124] As critiques to procedural approaches to social rights' adjudication have warned. *See, e.g.*, Brand, *supra* note 35.

Furthermore, the flexible rules to engage in roundtables open the procedure well beyond the initial seventeen plaintiffs. As such, the model differs from certain readings of the South African "meaningful engagement" doctrine discussed in Chapter 1, where authors have found that deliberation was largely limited to institutions and the parties of the case[125]. Interestingly, in Mendoza the original plaintiffs of the case —represented by high-profile lawyers— were not the people subject to relocations, but mainly middle-class persons who worked in the basin and claimed tort-like compensations for the impact on their health of the environmental conditions of the river. The relocated communities —coming from much more marginalized populations and informally represented by public attorneys— decided to join ongoing procedures by engaging in the roundtables. In this fashion, roundtables became crucial in a poly-centric dispute, addressing critiques that argue that such disputes would necessarily lead to judges making decisions that impact the lives of people not represented before them[126].

Affected communities organize in different manners to participate. For example, they elect delegates for the neighborhood, representatives for each block, put together grass-root organizations, etc. Together with affected communities, several institutional actors intervene in the roundtables, including attorneys, members of local civil society organizations, and of course ACUMAR, who usually performs a secretariat role (facilitating the dialogue, composing minutes, reporting back to the court, etc.).

In the case of the City of Buenos Aires, the IVC plays a key role. The Institute usually employs a specific social intervention team that carries out negotiations, and often high-ranking officers engage in roundtables (interestingly, people consulted for this research indicated that it is

[125]Liebenberg, Sandra, *The Participatory Democratic Turn in South Africa's Social Rights Jurisprudence*, *in* THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS, 187-211 (Cambridge: Cambridge University Press, 2019).
[126] *See generally* Aparna Chandra, Courting the People: Public Interest Litigation in Post-Emergency India, International Journal of Constitutional Law, Volume 16, Issue 2 (2018).

key to have non-lawyers in the team to facilitate dialogue, even if discussions are framed using rights' language[127]). Other participants of the city's roundtables are representatives of the local Ombudsman Office, and attorneys from the Guardian's Office representing the interest of children and people with mental health conditions. Laws that regulate relocations in specific neighborhoods can provide for the participation in roundtables of other actors, including members of the local legislature[128].

Public Defenders, both from the Federal and the City governments, also participate in roundtables, and provide neighbors with tools to make participation meaningful. Defenders would gather with neighbors before they meet with housing authorities to plan for strategies, discuss information, and survey their needs and problems. They also participate in roundtables and, if necessary, file complaints about their functioning to the court. In doing so, Public Defenders provide a practical response to a common concern over procedural approaches to social rights: that marginalized communities are not on equal footing to engage in participatory mechanisms (and mitigate the risk of participation being taken over by professionalized organizations or more informed citizens)[129].

In the case of the roundtables of the Province of Buenos Aires, usually representatives of the relevant municipalities intervene, together with neighbors, their supporting organizations, and national Public Defenders. However, in the province roundtables seem less active and developed

[127] On the style of lawyers' interventions, *see* Thomas Burri, Do Lawyers Knead the Dough? – How Law, Chaos, and Uncertainty Interact, European Journal of Risk Regulation, Volume 1, Issue 4 (2010); *see also* Avishai Benish & Asa Maron, Infusing Public Law into Privatized Welfare: Lawyers, Economists, and the Competing Logics of Administrative Reform, Law & Society Review, Vol. 50, No. 4 (2016).

[128] It is common in the City of Buenos Aires for neighbors of different settlements to get laws passed by the local Legislature to establish rules for either relocations or re-urbanizations in their specific areas, as will be discussed in further detail below. The statute for the "Playón de Chacarita" (Law 5799 of the City of Buenos Aires, March 23, 2017), for example, states that the President and Vice president of the Housing Committee of the Legislature may participate in the local mesa.

[129] For an overview of this criticism *see, e.g.*, Pieterse, *supra* note 33.

than in the city. While the reasons for this difference are manyfold, the difference surely speaks to the importance of building institutional capacity for social rights' discharge, as institutions in the province tend to be weaker than in the City of Buenos Aires[130].

2.4.2.3 The role of the court in monitoring roundtables

Unlike what has been written regarding participation triggered by well-known cases from other jurisdictions, in Mendoza the court articulates clear standards to be observed in roundtables, and routinely conducts ex-post overview of their functioning[131]. As a rule, the court of Moron would give participants of the roundtables discretion to pursue their business as they see fit. Roundtables therefore function with high levels of decentralization, both because they take place outside the courtroom, in each of the neighborhoods where a relocation will occur, and because they work independently from each other, as they need to respond to the particularities of each context.

However, the court performs two key roles that constrain absolute discretion. First, it initially sets the need to constitute a roundtable, its goals, and basic procedural rules, as these mechanisms are not explicitly regulated in applicable statutes. By doing so, the court understands that a right has been infringed and decides that therefore the status quo cannot remain as it is, forcing relevant stakeholders to work together to find solutions[132]. It then fixes a tentative periodicity for roundtables, which is adjusted depending on the circumstances of the case, varying from virtually weekly meetings in the City of Buenos Aires to occasional roundtables in some municipalities of the province. It also defines who should participate in deliberations, and their

[130] It has been argued that the key to a roundtable success lies in the details of its functioning. *See* Ministry of Production of Peru, MESAS EJECUTIVAS: NUEVA HERRAMIENTA PARA LA DIVERSIFCACIÓN PRODCUTIVA EN EL PERÚ (2016).
[131] On the role of courts in the South African context, see Pieterse, *supra* note 33.
[132] On this role of courts, *see* Sabel and Simon, *supra* note 12.

general goals. Interestingly, the level of court engagement differs depending on the type of issue being discussed. In the case of very complex, long-term goals —for example, building massive infrastructure projects to provide sewing services funded by international institutions—, judicial involvement tends to be milder, as stakeholders seem to have more tools for adequate planning and monitoring. It appears that where plans are less clear and uncertainty more pervasive, the need for monitoring increases.

Secondly, the court puts in place mechanisms to monitor the functioning of the roundtables. It requires participants to present a minute, after each roundtable, stating who participated, the topics discussed, and decisions taken. This reporting mechanism was identified by people engaged in the roundtables as essential. Similarly, neighbors who participate in roundtables can denounce to the court different problems (such as non-attendance of key authorities or inadequacy of the information presented) triggering a monitoring mechanism on demand.

When the court receives a complaint, it starts an informal procedure during which its rules get increasingly stringent, officers' discretion is reduced gradually, and judicial scrutiny is expanded. The court begins by requesting the relevant authorities' information and explanations about the problem. Sometimes, this is enough for the authorities to react. If requesting reasons is insufficient and authorities appear reluctant to collaborate, the court would set more precise rules for the roundtables. For example, it would name which officers need to attend personally; request more precise information to be discussed; define the anticipation needed for calling roundtables and their exact periodicity; threat particularly uncooperative public officers with starting criminal procedures for disobedience and contempt; and, eventually, send the court's personnel to attend the roundtable and supervise it on the ground. The doctrinal implications of these monitoring tools will be discussed below.

2.4.3 Defining and contextualizing the open-ended right to housing

One of the most impactful effects of the participatory roundtables, which illustrates how procedure and substance are intertwined, was addressing a problem that has long challenged social rights: their open-ended nature. As discussed in Chapter 1, social rights are typically recognized at the normative level using undetermined terms such as "adequate" or "progressive". Open-ended language is a recognition that details vary according to context and are contingent to local particularities; and that social rights have non-fixed contents that develop over time with changing circumstances and according to evolving democratic agreements[133]. As also discussed in Chapter 1, for many, indeterminacy makes judicial enforcement of social rights problematic, as it creates the danger of replacing democratic debates to define details with rigid courts' commands and arbitrary judicial interventions. The learnings of Mendoza's participatory roundtables show otherwise.

General legal norms did not anticipate what housing entailed in the specific context of the Mendoza litigation. And context was crucial. Mendoza relocations involved extremely poor communities from informal settlements that often lived in housing made of precarious materials such as sheet, with no floors, nor any legal connections to public utilities[134]. Neighbors usually did not have property ownership over the lands they inhabited, which were very inaccessible, with no clearly demarcated roads, no paving, no public transportation, and dysfunctional services for trash-collection. Besides, each of the involved neighborhoods presented particularities, for example

[133] See Young, Katharine G., CONSTITUTING ECONOMIC AND SOCIAL RIGHTS, 4 (Oxford, 2012; online edn, Oxford Academic, 2012).

[134] However, the conditions can vary substantially among areas. See the information published by the Housing Institute City of Buenos Aires on the "Camino de Sirga", at https://www.buenosaires.gob.ar/institutodevivienda/integracion-de-los-barrios/camino-de-sirga (last accessed November 17th, 2023). Overall, there are difficulties in accessing houses due to lack of proper streets demarcations and low percentages of houses connected to public utilities.

around the type of construction that was culturally appropriate and the kinds of economic and other activities that the population was engaged in. In this scenario, participation was key to define in democratically accountable manners, case by case, the details to make the right to housing real, in a way that general norms could not do.

Article 14 bis of the Argentine constitution recognizes a right to "dignified housing". Article 11 of the International Covenant on Economic, Social and Cultural Rights —incorporated to Argentina's constitution[135]— further recognizes the right to "adequate housing". The United Nations Committee on Economic, Social and Cultural Rights defined adequate housing as "…the right to live somewhere in security, peace and dignity…" in accordance with specific social, economic, cultural, climatic, and ecological factors[136]. States shall in accordance ensure legal security of tenure; availability of services, materials, facilities, and infrastructure; affordability; and habitability[137].

Mendoza's roundtables helped navigate the difficulty of defining in democratic ways what these very general standards meant for marginalized communities living in urban, informal settings. For example, according to general standards, governments must ensure "affordability" of housing, meaning that "…costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised.[138]" In Mendoza this meant that governments should avoid building complex structures with common areas that are costly to maintain. Relevant institutions learned this after building what turned out to be unaffordable housing. Poor families who did not live in buildings before relocations could

[135] Art. 75.22, CONSTITUCIÓN NACIONAL (Arg).
[136] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23, available at: https://www.refworld.org/docid/47a7079a1.html [accessed 17 November 2023].
[137] *Id*.
[138] *Id*.

not foresee the necessity to budget for expenditures now needed (including maintenance of common areas such as elevators, halls, or stairs), which became significant considering their limited income. Beyond costly maintenance, large buildings had the additional problem of not being prone to modifications to enlarge units if new members of the family joined a household[139].

Two different learnings emerged from the maintenance problem. One, when possible, in-height construction that requires elevators and complex structures shall be avoided. Second, in some neighborhoods, creative alternatives for the administration of new buildings' common areas emerged. Neighbors elected administrators organized by subject matter in commissions, such as "technical commissions" in charge of building repairs conformed by people who work in the construction sector.[140]

Affordability also meant that in some cases the government would have to subsidize the costs of electricity for households with high demands of energy (for example, those that make a living out of cooking). Indeed, after learnings from practice and relevant decisions of the Moron court, ACUMAR issued a resolution to automatically assign relocated families the benefit of reduced rates for public utilities, showing how some of the innovations from the case started to ramify beyond the decisions of Moron[141].

International standards also recognize accessibility as a component of the right to adequate housing. Accessibility means that "disadvantaged groups (…) should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into

[139] This is relevant considering that extremely poor people have few possibilities to move out to new housing whenever they need more space. Often, relocated families also commit to not leave the assigned housing unit for a fixed period.
[140] Commissions were originally created with the support of the Public Defense Office and of IVC. *See* Daniel Ryan et al., *supra* note 121.
[141] Resolution 71/2022, from May 5, 2022.

account the special housing needs of these groups[142]". The roundtables enabled a collaborative definition between authorities and neighbors of which groups shall have priority in receiving new housing units. These priority groups, such as women suffering gender violence, were not always contemplated in international standards, so the housing institute adapted its criteria after experience. Similarly, property acquisition alternatives varied according to beneficiary groups. Practice showed that, in some cases, it would be acceptable for the government to offer low-rate loans for people to find their own units, or to buy in very favorable conditions the houses from the government. In other cases that would not be viable due to the extreme vulnerability of the population. Neighbors often vote at roundtables among such alternatives presented by IVC.

General standards similarly recognize "cultural adequacy" as part of the right to adequate housing, which requires that "the way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing[143]". In the specific context of Mendoza, this meant, for example, that people coming from different neighborhoods should not live together in some cases, due to cultural differences.

Finally, participation helped define the meaning of "availability of services, materials, facilities and infrastructure[144]". Roundtables taught how to contemplate the economic activities that communities conduct and require specific infrastructure. For example, many relocated people make a living out of collecting and recycling materials such as cans and cardboard. In their original houses, people had specific spaces devoted to gathering and storing these materials, which new units did not contemplate. IVC started to work with neighbors to create facilities to store materials

[142] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23, available at: https://www.refworld.org/docid/47a7079a1.html [accessed 17 November 2023].
[143] *Id*.
[144] *Id*.

with appropriate security conditions. Other people made a living out of cooking and selling food in the neighborhoods, which requires relatively high levels of electricity consumption. Because in their original homes neighbors had informal connections for energy supply, electricity bills were not a problem. New housing units are instead formally connected to the official energy supply network, what made bills skyrocket and the activity unsustainable. Furthermore, the neighborhoods to which people were reallocated were originally designed as a "group of houses" rather than actual neighborhoods, and therefore not planned in a way that facilitated the selling of food or the opening of commercial areas[145].

These contextualized forms of affordability, accessibility, cultural adequacy, and availability did not come out of substantive judgements of the courts, but out of learnings of administrative agencies after their interactions with relocated communities in procedures facilitated by courts, based on broad normative standards. These practices show that the objection that social rights are difficult to enforce because of their generality can be addressed democratically in the context of litigation by ensuring that the inputs of local actors are adequately embedded in policymaking. They similarly fade the division that literature has found between judicial interventions that prioritize procedure over substance, as the very goal of the procedures directed by courts, in Mendoza, was the definition and materialization of not only minimum, but detailed and robust contents of the right to housing.

2.4.4 Revising rules to facilitate the definition of the right to housing

Housing controversies in Mendoza have led to understanding key policies around housing as intrinsically reviewable. This is an important innovation to address concerns over social rights'

[145] Further examples of experience-based learnings include how to most effectively survey the population that will be relocated, or the time needed for a relocation to be completed as well as the best time to sign ownership deeds (to avoid, for instance, illegal sales of the documents).

generality, as it shows that norms can feasibly be adapted in light of experience with the aim of contextualizing broad normative commitments. The innovations that promote flexibility in administrative regulations —otherwise characterizes by their rigidity— also show that standard-setting can be re-imagined in the field of social rights to better account for the needs of specific groups of rights holders.

The key policy instrument of the Housing Institute of the City of Buenos Aires, its *operatorias*, are the ultimate example of flexibility and ongoing revision required by fluid, complex problems such as the relocation of vulnerable communities[146]. *Operatorias* are basically the Institute's soft regulations that define the standards and procedures for relocations and other relevant interventions. The IVC adapts *operatorias* to reflect the inputs received through participation, as they are explicitly built after learnings from roundtables[147]. In some cases, they even state that plans need to be further discussed in future roundtables[148]. They are also highly contextualized to local particularities. Indeed, the IVC board passes individual *operatorias* for each relevant neighborhood, and there are often different ones tailored to specific interventions within one neighborhood (improvement of existing constructions, relocations within or outside the neighborhood, mortgaged credits, etc.).

Operatorias often set formal requirements and prioritization criteria and then defer to local intervention units for the definition of more concrete details, showing again a departure from the

[146] Typically, *operatorias* illustrate one aspect of the relocations that is intrinsically provisional: the counting of the people who are entitled to a housing solution in a neighborhood. While the IVC originally conducts a census in each area, it typically needs to update the counting at the moment of starting interventions (with a new counting typically approved once an *operatoria* is approved); at the same time the *operatorias* give flexibility to add new people under certain conditions.

[147] *See, e.g.*, Instituto de la Vivienda de Buenos Aires, "Operatoria de Canje de Vivienda dentro del Barrio en el marco del Proyecto Integral de Reurbanización del Barrio Playón Chacarita", IF-2019-32811397-GCABA-IVC (Nov. 4, 2019). One *operatoria* defines roundtables as meetings to discuss technical and housing aspects in which the IVC works by consensus with delegates of the area, other neighbors, institutions and non-governmental organizations.

[148] *See, e.g.*, Instituto de la Vivienda de Buenos Aires, "Operatoria para Relocalizaciones Internas y Rehabilitación de Viviendas Existentes - Camino De Sirga de la Villa 21-24", IF-2019-10438593-GCABA-IVC, (May 23, 2019).

traditional model of rigid, detailed rules that traditional law-making promotes. Some *operatorias* provide more detail on what "adequate housing" means (including the issue of socio-productive activities) and set the technical criteria that should guide the provision of housing solutions. In the case that IVC could not meet the general standards, they indicate that the Institute shall provide reasons and eventually call an ad hoc roundtable to assess alternative solutions, reinforcing the idea of ongoing revision of plans.

The use of flexible, general guidance as an alternative to traditional rigid, detailed, and binding administrative regulations has expanded beyond *operatorias*. For instance, ACUMAR has a protocol (not a regulation) on relocations and re-urbanizations in informal settings[149], which among other things acknowledges the importance of addressing the "singularity" of each context[150]. Furthermore, IVC developed a protocol for relocations which provides basic definitions and guidelines and is, according to its text, a product of the learnings from Mendoza[151]. Recent documents of ACUMAR further speak to policy reassessment in relocation procedures, something atypically as mainstream administrative law prioritizes stable rules hardly revised over time[152].

2.4.5 Enhancing institutional capacities by coordinating fragmented authorities

As discussed in earlier sections of this dissertation, bureaucracies in Latin America are characterized by significant fragmentation. Problems in inter-agency coordination were apparent

[149] ACUMAR, Resolution 420-E/2017 (December 15, 2017), B.O. December 2022, 2017.
[150] *See, e.g.*, Instituto de la Vivienda de Buenos Aires, "Operatoria de vivienda nueva para el Camino de Sirga de la Villa 21-24, plan integral de reurbanización de familias de la cuenca Matanza Riachuelo", IF-2018-29286776-IVC (Oct. 30, 2018).
[151] Intituto de la Vivienda de la Ciudad de Buenos Aires, Annex to the Board of Directors meeting minute, 3602/IVC/15 (March 3, 3016), B.O. CABA 4833 3/3/2016, available at https://documentosboletinoficial.buenosaires.gob.ar/publico/PE-ACT-IVC-IVC-3602-15-ANX.pdf. The province has a somewhat similar document, also foreseeing participation. *See* Ministerio de Infraestructura y Servicios Públicos, Resolution 22/2016, May 27, 2016 (B.O. of the Province of Buenos Aires nª 27799).
[152] Which stress the differences between general judicial orders and their deployment in practice after learnings from participatory procedures. See ACUMAR, *supra* note 117.

in Mendoza, for various reasons that probably include the number of entities involved, the lack of formal spaces for coordination, and legal rules that promote a siloed approach to policy, as will be discussed below. Lack of systematic coordination among entities is particularly problematic for social rights, which are naturally interdependent and complex, involving actions from a wide range of public and private entities[153]. For scholars more critical of social rights, complexity creates a danger of burdening public entities, especially courts who intervene in social rights litigation and run the risk of being transformed into policymakers[154].

Mendoza illustrates how courts can address the complexity objection in auspicious manners. Modeling participatory roundtables, the Moron court created what I will call "technical roundtables" to promote coordination among different authorities to come up with solutions to particularly complex problems[155].

Technical roundtables emerged after the court detected dramatic coordination failures in what can be described as a process of trial and error. For example, when court personnel inspected an almost fully finished housing project, they realized that there were problems with the supply of electricity and public lighting. Authorities in charge of building housing units claimed they were not responsible for services such as street lighting. Similarly, in one opportunity the court noted that there were not sufficient elementary schools in the area where a whole neighborhood was going to be relocated, although buildings themselves were virtually finished[156]. The municipality

[153] *See, e.g.,* Gauri Varun & Daniel M. Brinks, *Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights, in* COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD 1–37 (Varun Gauri & Daniel M. Brinks eds., 2008), identifying the numerous "providers" involved in social rights' fulfilment, and how they trigger the application of different bodies of law.
[154] For a synthesis of the vast literature on this objection, *see* Abramovich and Courtis, *supra* note 28.
[155] On the pervasiveness of complex problems, *see* Edward P. Weber and Anne M. Khademian, Wicked Problems, Knowledge Challenges, and Collaborative Capacity Builders in Network Settings, Public Administration Review, Vol. 68, No. 2 (2008), pp. 334-349.
[156] The right to education example also illustrates the relevance of context for social rights. When planning for necessary school slots, governments had to consider the particularities of the relocated households. For example,

in charge of building houses claimed that school building was a responsibility of the province, and therefore could do nothing about it.

Many reasons explain such dramatic —and quite embarrassing— examples in a context of institutional weakness. In many cases, different levels of government provide funding and are responsible for different dimensions involved in a relocation process. In the examples just mentioned, municipalities oversee the building of housing units; the federal government funds the projects and regulates electricity provision; and the provincial government is responsible for finding lands for relocations and for school building. Now, after learning from experience, when the national government funds a relocation project, in the same single act it agrees upon strictly housing issues and all related infrastructure actions. The assumption behind these broader agreements is that adequate housing cannot be limited to building houses but is a wider and more comprehensive notion, speaking to social rights' interdependence.

In Mendoza, some authorities have also occasionally alleged that problems were too complex to be solved by themselves. This was the assertion, for example, regarding a problem of electricity supply. Existing regulations did not foresee the mix of privately-publicly owned property that the relocation had created, and therefore the relevant municipality needed an exception from the regulations of the relevant federal agency. However, administrative law in Argentina generally prohibits making individual exceptions for regulations of general applicability, so the need to get a waiver from the rule held up the procedures[157].

relocated families tend to have more children than the general average from the City of Buenos Aires. They rely more on public schools than the average of the Buenos Aires population does. They tend to have higher dropout rates in secondary education, requiring for stronger support programs than other districts.

[157] For an analysis of other environmental litigation where flexibility and orality were used, and exceptions to regulations were indispensable, *see* Alejandro Bérgamo & Facundo Cattaneo, *Recomposición ambiental en el marco de un proceso colectivo, basado en oralidad e inmediación*, in DIÁLOGO SOBRE LA PROTECCIÓN JURISDICCIONAL DE LOS DERECHOS A LA SALUD, EDUCACIÓN, TRABAJO, SEGURIDAD SOCIAL Y MEDIO AMBIENTE SANO EN PAÍSES DE AMÉRICA LATINA (CEJA Américas, 2019), 65.

In this scenario, technical roundtables enable different authorities to gather, discuss technical issues, coordinate their actions, and figure out solutions to complex problems that affect the fulfillment of rights. These roundtables are ordered by the court but take place outside the courtroom. They do not seek to promote participation from private parties, but to gather public actors who would otherwise not communicate. In these cases, the court would identify which agencies need to participate in the roundtable and the points on which they need to reach an agreement. The rest is up to the parties' deliberation. Participants need to report back to the court both on substantive developments and on attendance at roundtables.

The court also makes an active use of judicial hearings to monitor public authorities' implementation of the commitments they make in the technical roundtables. Hearings take place in the courtroom, with active engagement of the court's personnel[158]. While this is not necessarily an innovative practice per se, the court does use hearings well beyond the situations for which they are required by the law on the books. Procedure rules indicate that hearings shall basically be held for evidence-related purposes, although the court uses them as decisional instances and a monitoring tool. In hearings, participants follow up on compromises previously assumed, assume new ones, or reframe previous commitments, when necessary, if they give valid reasons for changes[159].

2.4.6 Enhancing institutional capacities by increasing transparency

Litigation can facilitate change in an institution by bringing new attention and resources to it. In fact, public officials may welcome litigation, seeing it as an opportunity to remove obstacles

[158] For example, by guiding discussions, scrutinizing the explanations provided by authorities, and encouraging participants to assume tangible commitments.
[159] Interestingly, the officers who participate in these hearings are not necessarily those who technically have competence or authority for making decisions if they were made in writing after a formal administrative-law procedure.

that impede change[160]. In Mendoza, some measures taken by the courts have helped enhance institutional capacities within concerned administrative entities by increasing the availability of information and transparency (a key element through which courts can contribute to improving governance[161]).

Intervening courts in Mendoza have made information —crucial to improve decision-making and facilitate participation— one of their key concerns. In this context, the Quilmes court started a specific file regarding access to information in ACUMAR[162] which involved an overall assessment of the agency's system to respond to access to information petitions, and a broader evaluation of how it produces and actively publishes information on the basin. When the Moron court received the case, it incorporated the Ombudsman to the procedure, who would respond to ACUMAR's presentations, make suggestions, and identify new problems[163]. The intervention of the Ombudsman was also a way of encouraging public participation, as the civil society organizations of its *Cuerpo Colegiado* started to express their opinions on informational deficits and to propose solutions. Eventually, cross-presentations by the parties mutated to periodic hearings, where participants would discuss improvements, identify concerns, and advance solutions. In hearings, parties discussed a wide range of issues such as the accessibility of ACUMAR's website or the efficacy of the system to respond to access to information petitions. Hearings were also used to assess compliance with commitments assumed by ACUMAR in

[160]Jonathan Berger, *Litigating for Social Justice in Post-Apartheid South Africa: A Focus on Health and Education*, *in* COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (Cambridge: Cambridge University Press, 2008).
[161] See Gauri, *supra* note 71.
[162] Juzgado Federal N° 2 de Morón, "ACUMAR s/Información pública s/contencioso administrativo", Case number 052000201/2013.
[163] Strictly speaking, in this file the are no plaintiff and defendants, since the parties that intervene (the Ombudsman and ACUMAR) are not exactly the parties to the case (who are the original seventeen plaintiffs and the governments).

previous hearings, and to assume new ones[164]. As a result, the rate of information petitions that receive a formal response in ACUMAR escalated to 99.5% in 2023 (from a lowest of 20% in the last quarter of 2013 and the first quarter 2014). The average delay in responding petitions has reduced substantially, from (the incredible figure of) 474 days in 2012 to 27 in 2017[165].

Furthermore, in its decision on the merits, the Supreme Court ordered ACUMAR to produce a set of trustworthy indicators that would allow an accurate monitoring of the situation of the basin and the implementation of the judicial decree. The Moron court engaged with ACUMAR to improve the system of indicators, and the agency changed the system different times, even though indicators have been subject to critiques and still may not to reflect all relevant considerations[166]. The last review of the indicators system was triggered by a court decision in 2020, which mandated a revisiting of indicators through a participatory procedure (an innovation in traditional rule making procedures under administrative law). This led to roundtables and public hearings that ended in the issuance of a resolution that approved the current system of indicators[167], available online[168].

2.5 Medoza innovations as an instance of democratic experimentalism

The aspects of Mendoza discussed in this Chapter can easily be assessed as an instance of experimentalist judicial review —and related administrative decision making—, in which courts induce the parties, broadly understood, to elaborate mutually agreeable remedies within the

[164] In hand with better responses rates, the number of petitions filed increased. *See* ACUMAR, Responses to access to information requests, at https://www.acumar.gob.ar/indicadores/respuesta-requerimientos-informacion-publica-publica/ (accessed November 17th, 2023).
[165] Information available at ACUMAR's website. ACUMAR, Respuesta a solicitudes de información pública (April, 2023), http://www.acumar.gob.ar/indicadores/respuesta-requerimientos-informacion-publica-ambiental/.
[166] In the context of Congress' monitoring through the *Auditoria General de la Nación*, earlier indicators have been found to be not pertinent to portray the actual conditions of the basin. *See, e,g,* Auditoria General de la Nación, "Estudio Especial Sistema de Indicadores Informe anual 2014 ACUMAR", available at https://www.agn.gob.ar/sites/default/files/informes/informe_197_2016.pdf.
[167] ACUMAR, Resolution 281/2021 (Dec. 29, 2021), B.O. January 3rd, 2022.
[168] ACUMAR, Sistema de Indicadores, https://www.acumar.gob.ar/indicadores/.

framework set by an initial judgment of constitutional or statutory obligations. While scholarship has already assessed –with a wide range of opinions— the use of experimentalist approaches in social policy and in social rights litigation in particular[169], as discussed in the Introduction to this dissertation, Mendoza presents two distinctive characteristics. First, the experimentalist approach was used in a context that illustrates many of the challenges faced by institutions in the Global South, unlike many other assessments of experimentalism that focus on experiences from the Global North[170]. Furthermore, in Mendoza experimentalism happened in a context of strong normative recognition of rights (as discussed in Chapter 1 on "social constitutionalism" in Latin America). Rights provide thick "boundaries" to experimentalist deliberations, leading to what Rodriguez Garavito has termed "bounded experimentalism"[171].

Following the experimentalist model, Mendoza's intervening courts function as a coordinating center, with institutions engaged in roundtables working as the independent units. Courts generally avoid imposing substantive judgements on local administrative institutions. In its place, they set framework goals (originally the overarching goals set by the Supreme Court, and later more specific ones for each roundtable set by Moron). Then, they deliberately open up procedures to authorities and concerned citizens for them to come up with plans to achieve those goals, which courts then monitor. The Moron court's approach to the case is generally focused on encouraging administrations to find solutions to policy problems by themselves, rather than lifting their burden by deciding fixed judicial solutions, or appointing ad-hoc persons to direct

[169] *See, e.g.*, Liebenberg & Young, supra *note* 77.
[170] See all the examples cited *supra*, note 4.
[171] Rodríguez Garavito coined this term to name a situation in which there are relatively precise *limits* to the possibilities to define rights context in an experimentalist manner. See César Rodríguez-Garavito & Amartya Sen, *Empowered Participatory Jurisprudence: Experimentation, Deliberation and Norms in Socioeconomic Rights Adjudication, in* THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 233–258 (Katharine G. Young ed., 2019). See also *supra* note 12.

administrative procedures (as would be the case with special masters or similar institutions, suggested by some as a solution for complex litigation[172]).

At the same time, however, experimentalism rejects giving local actors unchecked freedom: their performance must be continuously monitored, assessed and, if needed, readjusted periodically, after learnings from practice and feedback[173]. The adaptation of plans in light of experience is apparent in the case of the *operatorias* of the Housing Institute. Furthermore, in Mendoza, courts set up monitoring instances to ensure systematic accountability, including by reporting back on progress on goals agreed upon in roundtables, producing impact indicators and other relevant information, or by retaining review powers by the Supreme Court[174].

While the Moron court is hesitant to impose its own detailed substantive judgements, under its monitoring mechanisms it engages in increasing scrutiny of administrative action when relevant authorities fail to act. As discussed earlier, and in line with experimentalist standards, sanctions are aimed at incentivizing engagement rather than at penalizing incompliance with strict rules, unless incompliance stems from an open lack of commitment. Indeed, the Moron court centrally relies on the threat of sanctions when parties fail to engage. As such, the threat functions as an experimentalist "penalty default": a warning that something sufficiently severe may happen (the initiation of criminal proceedings) that incentivizes parties to deliberate. In turn, in Mendoza the threat of sanctions gets increasingly precise if parties remain reluctant to engage. In roundtables, Moron would start by asking for explanations; and only afterwards, if needed, set more stringent procedural requirements for engagement. In the event these mechanisms fail, the court would attend meetings by itself and resort to the threat of sanctions. Threats start with high levels of

[172] On the benefits of special masters for complex litigation, see Mark A. Fellows & Roger S. Haydock, Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation, 31 Wm. Mitchell L. Rev. 1269 (2005)
[173] See David Thacher, The Learning Model of Use-of-Force Reviews, 45 Law & Social Inquiry 755–786 (2020).
[174] CSJN, *supra* note 66, decision of July 8th, 2008.

generality, and only when those fail will the court threaten an officer personally, with a specific sanction. This form of strengthened scrutiny is highly dependent on the parties of the case and other stakeholders triggering the court's intervention, which ensures a constitutionally adequate role for the judiciary.

Democratic experimentalism also advocates for deliberation of a wide range of actors — including those most affected by decisions—, stressing the importance of mainstreaming local, experience-based, and contextualized knowledge into procedures[175]. The wide range of actors who routinely engage in the participatory roundtables discussed in section 2.4.2 illustrates how experimentalist deliberation can be rolled out in practice in sustainable manners, and even in a context of structural rights' incompliance and social marginalization. Collaborating, these actors have managed to find solutions to problems arising from relocations that they had failed to address on their own previously, when participatory roundtables were not extended.

Finally, the exchanges that take place in the roundtables have led to entities such as the Housing Institute to periodically revise and adjust their key policy instruments. Ongoing revision of plans is in line with experimentalist concerns that note the provisional nature of any plan, goal, or rule, especially under conditions of pervasive uncertainty such as those that characterize the Riachuelo basin[176]. Interestingly, it was precisely uncertainty around the situation of the basin which explained the initial innovations of the Supreme Court, which in turn were the building blocks of the cascade of institutional innovations that followed.

Overall, Mendoza's experimentalist model of judicial review points in a direction in which judges are less imperious than imagined by some of the critiques to social rights' litigation. Yet, under this model judges are actively engaged in overseeing that the rights' infringements they find

[175] *See* Cohen and Sabel, *supra* note 10.
[176] Thacher, *supra* note 173.

are remedied within the boundaries defined for social rights in national constitutions and other norms.

Framing Mendoza's innovations as an instance of experimentalism can facilitate extracting learnings and inspiring innovations in other contexts, as well as comparing the case with other like the one discussed on the following Chapter. With that aim, I assess the factors that made an experimentalist approach possible. First, the issues discussed in Mendoza are at the core of affected communities' lives, providing high incentives for them to participate in deliberations. Furthermore, the action of Public Defenders in helping community organizing and the multidisciplinary nature of the different Riachuelo teams intervening in relocations has been crucial to ensure that people can participate in sustainable manners, even in a context of significant material deprivations.

The structural nature of rights' infringements behind the litigation means that there is a myriad of public institutions engaged in the case, facilitating the creation of a network of collaborating institutions. This network approach in turn enhances institutions' capacity to work on the ground and constantly interact with affected parties, a precondition for meaningful participation.

In addition, a tradition of strong courts and related institutions (such as the Defenders Offices) has also facilitated the well-functioning of the monitoring role that courts perform in Mendoza. The role of the coordinating center that the Moron court plays in the model has been described as crucial by consulted stakeholders, and reinforces the idea that discretion needs to be subject to robust checks under experimentalism. Interestingly, in Mendoza strong courts work in a context of robust recognition of rights at the constitutional and statutory level, which further limits experimentalist discretion in ways that may be absent in other examples of experimentalist

judicial review. While rights are recognized in broad terms in norms, such recognition sets non-negotiable substantive limits that impose mandatory, if minimalistic, understandings of what rights mean and shape deliberations. Normative recognition of rights also enhances neighbors' positions in deliberations, as it allows them denounce incompliance to courts, reinforcing the virtuous cycle that can explain why the model worked[177].

Under the rights framing, for example, Mendoza courts established that the right to housing requires States to provide alternatives to people being forced to relocate, regardless of the legal status under which they occupied lands. They also assumed that the provision of services such as education or health was part of the right to adequate housing, and that such rights were only met by ensuring physical availability of those services in the proximity of new housing units. These general, though significant, interpretations of the scope of the right to housing provide much more substance than those used, for example, by the South African Court in the case law that has taken a large part of the attention of social rights' literature. Indeed, the South African Court has understood that parties —and not courts— should meaningfully engage to determine, among other things "what the consequences of the eviction might be", "whether the city could help in alleviating those dire consequences", or "whether the city had any obligations to the occupiers[178]". Yet in Mendoza the precise, contextualized contents of the right to adequate housing, and the tools needed to bring it to practice were defined by competent authorities in cooperation with affected communities in procedures that largely reflect the goals of the meaningful engagement doctrine.

[177] *See* Rodríguez-Garavito & Amartya, *supra* note 171. This "thicker" view of rights typical of many Latin American Constitution could mean that the Mendoza shows a version of "constrained" experimentalism, in which deliberations are more constrain than the model originally envisions. Even under that understanding, similar conclusions emerge from the case.

[178] Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) (19 February 2008)

Interestingly, these factors are likely present in other countries of the Global South (or at least of Latin America). Other reasons that may explain why experimentalism functioned in Mendoza, however, may be more idiosyncratic and therefore harder to replicate. First, many of the institutions engaged in the relocations —especially those coming from the national and city governments— already had at least *some* institutional capacity and were reasonably resourced by the time they entered the litigation. Indeed, the differences in performance between roundtables at the City and Province of Buenos Aires can very likely be attributed to the weaker institutional capacity of the actors of the province and its municipalities[179]. Mendoza would be therefore less replicable in contexts of State failure or extremely weak institutions.

The hybrid characteristics of the Moron court, presenting both criminal and administrative law traits, facilitated the functioning of the model in ways that may be hard to imitate in more conventional settings where courts by default apply traditional administrative and procedural law as it is written on the books. Finally, the fact that the Federal Supreme Court itself oversees and validates the mechanisms used by the district court may also provide incentives to engage in experimentalist deliberations that would be hard to create in cases where higher courts are not so clearly involved.

[179] Problems in the rollout of housing programs show very significant differences among municipalities, stressing the need to work on administrations' capacities and their stances on decision-making procedures. *See, e.g.*, ACUMAR, *supra* note 117.

Chapter 3: Colombia: a new administrative law approach to social rights

3.1 Chapter overview

This Chapter presents and analyzes the decision of the State Council of Colombia in the Bogota river case. The case shows how a court can trigger relevant institutional innovations to realize social rights. The State Council did so by not relying mainly on the interpretation of norms that recognize rights. Instead, it focused on understanding and enhancing the institutional machinery responsible for implementing already existing norms. The case illustrates how, unlike what many scholarly debates over social rights discussed in Chapter 1 imply, courts can enhance the capacities of administrations to define and implement social rights by themselves, without replacing them in making judgements for which they are unfit. The case not only provides promising responses to conceptual discussions on the appropriate roles of courts, but also practical examples of how administrations and administrative law in Latin America can be modernized to better adapt to social rights' requirements, further discussed in Chapter 4.

The Bogota river basin is an area of strategic importance for Colombia that is home to more than a fifth of its population. While relevant norms and policy instruments had been put in place throughout the decades to protect the environment, the Bogota River still became one of the most polluted in the planet. River pollution led to litigation requesting relevant authorities to adopt a variety of measures. The State Council of Colombia issued a decision on the Bogota River in March 2014 after backlogging the different cases directed at addressing the environmental crisis of the river[180].

[180] Consejo de Estado [C.E.] [State Council], Administrative Chamber, Section 1, March 28, 2014, exp. AP-25000-23-27-000-2001-904.

The case made evident institutional problems —such as lack of coordination and volatility in rules and staff— that acted as barriers to the enforcement of environmental protections. To shift the state of institutional inertia that had led to the "environmental catastrophe" of the river, the State Council triggered promising institutional innovations with three key outcomes: it enhanced coordination among public authorities, increased meaningful participation and transparency in administrative bodies, and placed attention on monitoring activities to assess administrative action. Considering the complex and long-standing problems involved, the Council created innovative tools and ordered the reform of several policy instruments in over forty municipalities.

By acting in this way, the State council modeled a form of judicial intervention that, at least under the circumstances discussed below, can help modernize responsible public administrations and better position them to discharge their social rights' commitments without replacing their judgment with sweeping judicial orders. Indeed, I argue that the case illustrates an underexplored approach to social rights' assessment and adjudication that reflects what I call in this Chapter a "new administrative law model to social rights"[181]: one in which, in a context of strong normative recognition of rights, courts and other relevant stakeholders focus on analyzing the administrative institutions needed for their materialization. The case also demonstrates how traditional administrative law rules can function as a barrier for dully discharging social rights' commitments.

When acting in this fashion, courts avoid replacing administrations in the task of defining the precise contours of the rights that laws recognize in vague terms[182]. Instead, they can catalyze reforms to enhance the capacities of administrations to do so by themselves, for example, by

[181] Sunstein, Cass R., Social and Economic Rights? Lessons from South Africa (May 2001). Available at SSRN: https://ssrn.com/abstract=269657 or http://dx.doi.org/10.2139/ssrn.269657.

[182] Doctrines of judicial review in traditional administrative law often reflect the concern of judges not replacing administrations in their judgments, but rather request them to exercise their decision-making powers in better or different ways. Many of these forms of judicial review entail giving deference to administrations interpretations, requesting more reasons from them, or ordering a new decision on their part. In social rights' litigation in Latin America, however, this general framing is often absent.

producing and using more information in their decision making. In consequence, the model can help address concerns over judges' limited capacities and competences in complex cases, in ways that do not overburden courts. The detailed analysis of the case similarly shows that the dichotomy found in traditional social rights' literature —discussed in Chapter 1— posing that judges need to either abdicate their roles or to subrogate other powers, is much more nuanced and less binary in practice than traditional literature would anticipate.

The last sections of this Chapter discuss how and why the State Council was able to act in this way. I claim that a broad set of constitutional and legal norms that granted judges in Colombia flexibility to take measures "as needed" to repair rights' infringement was key to enable the bold measures taken by the Council. It was also the Council's nature as an administrative —rather than a constitutional— court which can further explain the peculiar concerns of the tribunal. Finally, the Chapter frames Bogota's innovations as an instance of democratic experimentalism.

3.2 The Bogota river case

3.2.1 Legal and political background

The State Council decision in the Bogota River case was possible, among other reasons, due to a set of norms that facilitated the measures analyzed in this Chapter. To fully comprehend this legal setting, one needs to understand the general ethos of the 1991 constitution of Colombia, currently in force. First, the political consensus to draft a constitution (replacing the previous one from 1886) emerged from the state of violence that characterized Colombia in the previous years, to which the new constitution would have to respond. Second, due to different contextual factors, the membership of the elected Constituent Assembly chosen to draft the new constitution was more plural than other political bodies in the country. Third, given the political context and its

membership, the Constituent Assembly largely mistrusted existing institutions[183]. As a result, overall, the 1991 constitution expressed a concern to promote public monitoring of institutions and created new ones —including the worldwide renown Constitutional Court— in the hope to increase the legitimacy of public entities[184].

Many of the characteristics of the Constitution that emerged from this process were essential to enable the legal actions that later happened around the Bogota river. First, the 1991 Constitution is a flagship example of "social constitutionalism" in the region, as discussed in Chapter 1. It states that there is a "social rule of law" in Colombia, and that the general wellbeing of the population and the provision of efficient, universal public services is part of the "social function" of the State[185]. The Colombian constitution further contains a full chapter recognizing a comprehensive catalog of economic, social, and cultural rights, including social security, labor rights, and the right to education. It also has a specific chapter on environmental rights, which among other things recognizes the right to enjoy a healthy environment and to participate in decisions that may affect it. The Colombian constitution, therefore, solves the debates on whether to constitutionalize social rights in favor of their normative recognition at the constitutional level.

Furthermore, the constitution recognizes the two most relevant courses of action in domestic social rights' litigation: *acciones de tutela*, which protect constitutional rights —initially civil and political, though expanded through court's decisions— through a preferential and expedited procedure; and *acciones populares*, which protect collective rights by allowing any person to file petitions (it was precisely this course of action that was used in litigation around the Bogota basin). The constitution therefore recognized social rights' judicial enforceability. While

[183] See Landau, *supra* note 24.
[184] *Id*.
[185] CONSTITUCION POLÍTICA DE COLOMBIA (C.P.), arts. 1, 365 and 366.

the provisions of the relevant statutes on *tutelas* and *acciones populares* are generally broad and of discretionary use, they do give intervening judges relevant and flexible powers to set innovative remedies, adopt various measures, and monitor them accordingly, and judges have used them creatively. Indeed, these courses of action gave rise to innovations in social rights' litigation, leading among other things to pioneering mechanisms to monitor the implementation of judicial decrees with great potential to promote scrutiny of administrative action (which, as we will see, were used in the Bogota river case).

Furthermore, mainly through the progressive decisions of its Constitutional Court (CCC), Colombia has gone through a process of active judicial engagement in shaping the contours of social rights, and of encouraging the public entities responsible for discharging rights to do so. The Court often used the provisions of the *acciones de tutela* regulations for this aim, which state that once a decision on the merits is issued, the intervening judge will retain its jurisdiction "until the right is fully repaired"[186]. Based on such provision, the CCC has created different follow up mechanisms, specifically for the cases in which it found an "unconstitutional state of affairs[187]". Akin to cases of structural litigation, unconstitutional state of affairs cases provide a diagnosis of repeated violations to fundamental rights and encourage participation of affected people and collaboration among public entities to remedy the infringement. Because of their structural focus,

[186] Decree 2591 of 1991, November 1991, Diario Oficial 40165, November 19, 1991, available at https://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=5304, article 27.

[187] According to the Constitutional Court, some of the elements that lead to a declaration of unconstitutional state of affairs include the generalized violation of a right that affects several people, a longstanding omission of public authorities in addressing such violation, and the existence of a social problem that requires the intervention of several public entities and the adoption of coordinated actions. Follow up mechanisms in these cases include assigning competence to either district judges or to itself to monitor compliance with a decision; requiring support from "technical" and oversight and auditing entities such as the Ombudsman office and other oversight mechanisms; mandating the design of indicators to measure compliance; ordering the submission of implementation reports; conducting "technical sessions" and public hearings for monitoring purposes; conducting periodic assessments of the degree of compliance with its decisions; mandating the participation of representatives of the affected communities during implementation; or prompting the criminal investigation of incoming public officers. CCC, decision T-774/15, December 18, 2015.

these cases provide good opportunities to assess the functioning of a myriad of administrative entities implicated in litigation.

In such cases the CCC has issued decrees mandating a wide range of measures, which can be characterized both as substantive and procedural in the terminology used by traditional literature mostly concerned with the South African jurisprudence, discussed in Chapter 1 (showing, as Mendoza, that a stark division between process and substance can be fictional). Orders include the urgent satisfaction of minimum levels of rights, the duty to ensure participation of affected people in the implementation of the decision, and the need to design plans for implementation with short, medium, and long-term measures.[188] The CCC would create, in some cases, follow up task forces to conduct monitoring activities among subgroups of judges[189]. It is within this tradition of active judicial engagement in social rights' adjudication that the State Council issued the decision on the Bogota river basin.

In parallel, *acciones populares* became a common tool to seek the protection of the environment[190]. A key instrument in these cases have been follow-up or verification committees, *ad hoc,* multistakeholder bodies created by intervening judges to verify compliance with their decisions on the merits[191].

All these tools, paired with others that promote public participation and monitoring of public activity outside litigation, gave the normative infrastructure needed for legal mobilization

[188] *Id*.
[189] The creation of follow up chambers has been deemed the more intense way of monitoring from the CCC. *See* Rodriguez, Michael, Structural Injunctive Remedies and Judicial Monitoring in Colombia, Revista Española de Derecho Constitucional, no. 117 (2019): 167–202.
[190] For example, in the case of the right to water, between 1998 -the year in which the relevant statute was passed- and 2007, around 390 actions were filed, of which 56% received a favorable resolution. *See* Leonardo Guiza Suarez, Beatriz Londoño Toro & Cristhian David Rodriguez Barajas, La judicialización de los conflictos ambientales: un estudio del caso de la cuenca hidrográfica del río bogotá (chrb), Rev. Int. Contam. Ambient vol.31 n. 2 (2015).
[191]According to the law, the Committee should be composed of the judge, the parties, the responsible public entity, the General Attorney, and a non-governmental organization with a mandate that corresponds with the objective of the case.

around the Bogota basin. They also set the basis for the administrative law approach used by the State Council in the case.

3.2.2 The facts of the case

The Bogota River basin is located in the central part of Colombia and its area of influence impacts over forty municipalities, in which more than eight million people live and develop a wide range of activities[192]. The basin is one of Colombia's most populated and strategic areas. Indeed, the whole Bogota River basin is home to twenty percent of the population of the country, largely concentrated in the middle section of the basin. The area also gathers a relevant part of the countries' productive activities.

The river receives waters from several smaller rivers, as well as discharges from a wide range of activities. While the whole basin has suffered severe environmental damage, the problems of the high, mid, and low areas are somewhat different[193]. In some municipalities, the river receives untreated industrial and domestic wastewater, as well as discharges from tanneries and slaughterhouses. In others, poorly managed solid waste, and mining and other industries affect the river. Untreated sewage waters, however, are the main problem throughout the area[194]. In turn, different municipalities have varied institutional and administrative capacities. These particularities speak to the need to ensure contextualizing regimes within a systemic approach to river management, as will be discussed in further detail below.

[192] The river originates in the "del Valle" lagoon in Colombia, 3200 meters above sea level in the municipality of Villapinzón, and ends in the Magdalena River, at 600 meters above sea level.
[193] Luis Felipe Guzmán Jiménez, Las aguas residuales en la jurisprudencia del Consejo de Estado: periodo 2003-2014, Universidad Externado de Colombia (2015), https://publicaciones.uexternado.edu.co/gpd-las-aguas-residuales-en-la-jurisprudencia-del-consejo-de-estado-periodo-2003-2014-9789587724264.html
[194] Corporación Autónoma Regional de Cundinamarca, Management plan of the Bogota River basin, Executive Summary (2006), available at https://www.orarbo.gov.co/es/el-observatorio-y-los-municipios/plan-de-ordenacion-y-manejo-de-la-cuenca-hidrografica-del-rio-bogota (accessed November 19, 2023).

Population and economic growth worsened long-standing problems in the basin, as they translated into more demands on the waters. Socioeconomic vulnerability of the basin inhabitants led them to further contribute to pollution, with little alternatives for them to find environmentally responsible ways of making a living[195]. As a result, the river became one of the most polluted of the region and the world, and in a state of social and environmental catastrophe[196].

Debates around how to enhance the environmental quality of the water have taken place for decades. Indeed, different norms and entities have been created —with little efficacy, however— over the years, seeking to address the dramatic situation of the river. Already in 1990, an "Interinstitutional Committee for the Bogota River" was launched, aimed at defining a strategy to clean up the river[197]. The Committee led to several meetings and new documents for the basin management, among other relevant instruments. However, it did not endure for reasons that are unclear[198]. In 1995 the Bogota town hall created a special fund for the treatment of the wastewaters of the Bogota river[199].

In the early 2000s, Colombia's flagship advisory body for the Executive Branch issued a strategy document for the management of the basin[200]. Based on that strategy, two years later the independent environmental authority of the region—the *Corporación Autónoma Regional de*

[195] *See* Guiza Suarez, Londoño Toro & Rodriguez Barajas, *supra* note 190.
[196] Guzmán Jiménez, *supra* note 193.
[197] Integrated by the Townhall of Bogotá, the National Planning department, the CAR, the governorship of Cundinamarca, and the Sewage Company of Bogotá. The same year, the World Bank supported an evaluation of the cleanup measures taken around the river, concluding in the need for infrastructure works and national policies for sewage water treatment.
[198] *See* Banco Cultural de la República, Riesgos y Amenazas del rio bogota, blogpost, available at https://enciclopedia.banrepcultural.org/index.php/Riesgos_y_amenazas_del_r%C3%ADo_Bogot%C3%A1
[199] Through Decree of the district 748/1995, November 24, 1995.
[200] The National Council for Economic and Social Policy or "CONPES", for its Spanish acronym, established in 1958. CONPES working document number 3320 (December 6, 2004) is the "Strategy for the management of the Bogota river", available at https://colaboracion.dnp.gov.co/CDT/Conpes/Econ%C3%B3micos/3320.pdf (accessed November 19th, 2023).

Cundinamarca, CAR[201]— issued the first basin management plan, known as POMCA[202]. The Bogotá river basin was also considered a priority in the national development plans for 2006-2010 and 2010-2014[203], and subject to a special auditing of the General Comptroller of the country in 2013[204]. Moreover, ad hoc agreements were signed to enhance coordination among authorities with competence over the river[205].

On top of the numerous normative instruments specific to the Bogota river, the general environmental legal and constitutional frameworks in Colombia further provide relevant protections. These include plans at the municipal, departmental, and national levels[206]; environmental policies; constitutional provisions[207]; several laws and decrees that relate to the environment in general[208], and to river basins and land use[209], management of water resources, protected areas, biological diversity, and waste management in particular, to mention some examples. To illustrate the magnitude of normative protections, the 2006 POMCA listed at least

[201] CAR has the mandate to execute all relevant environmental programs in the region and follow the National Ministry of Environment directives. For a description of its institutional mandate, see CAR's website at https://www.car.gov.co/vercontenido/3. The overall mandate of environmental "corporations" is established in the Environment Law, L. 99 of 1993, December 12, 1993, Diario Oficial No. 41.146.

[202] The original plan was approved by Resolution 3194 of 2006 (CAR, November 23, 2006) and updated in 2019 after the State Council decision discussed in next section. The plan originally sought to pursue the cleanup of the basin to reach a set of "quality" goals; foster socio-economic sustainable development; and re-establish the environmental equilibrium in the area. The plan further set a number of "strategic components", including agricultural planning, education of the basin inhabitants around the use of natural resources, and the strengthening and coordination of relevant institutions. The original plan is available at https://repositorio.gestiondelriesgo.gov.co/handle/20.500.11762/22595. Details of the plan are summarized in the Townhall of Bogota, report "Aproximación a las implicaciones del Fallo del Consejo de Estado sobre el Río Bogotá" (2014), available at https://www.sdp.gov.co/gestion-socioeconomica/integracion-regional-y-nacional/publicaciones/aproximacion-a-las-implicaciones-del-fallo-del-consejo-de-estado-sobre-rio-bogota (Accessed November 19, 2023), page 60.

[203] Departamento Nacional de Planeación, Plan Nacional de Desarrollo- Históricos, at, https://www.dnp.gov.co/plan-nacional-desarrollo

[204] CONSTITUCION POLÍTICA DE COLOMBIA (C.P.), art. 119.

[205] Including an agreement among CAR, the capital district, and the sewage services company in 2007 to gather efforts for the river cleanup; a cooperation agreement to build a water treatment plant; and an inter-administrative cooperation agreement among the national Ministry of Housing, the capital district and the sewage company to build different public works for water treatment.

[206] See references included at the 2006 POMCA, *supra* note 202, figure 4.2/1.

[207] Articles 8, 58, 78 to 82, 313 and 332.

[208] Such as L. 99 of 1993, December 12, 1993, Diario Oficial No. 41.146; or codes on natural resources.

[209] L. 388/97, julio 18, 1997, Diario Oficial No. 43.127, September 12, 1997.

eighty norms as relevant to the basin, covering issues such as planning, regulation, preservation, economic instruments, and information[210].

3.2.3 Initial litigation

The numerous efforts described in the previous section were insufficient to trigger change in the Bogota river (as was the case in the Riachuelo basin). In this context, litigation came in as a strategy that did not exclude, but rather supplemented others (mitigating in this way critiques that claim that judicializing conflicts can undermine more radical courses of action[211]). While the reasons for the failure of other efforts are surely manifold, arguably they include institutional problems in relevant administrations, such as difficulties in coordination among competent entities and lack of contextualization of some of the normative tools to the particularities of the basin and its sub-areas, as will be discussed below.

Basin problems gained increasing attention of the public when the electricity company of the area started using waters from the river and discharged them with no previous treatment in the late 1970's[212]. The procedure evidenced the poor quality of the water. The storage and pumping of untreated sewage and industrial waters from the river created further social and environmental damage and negatively impacted the health of the basin inhabitants.

As a result, different groups started organizing to demand responses[213]. Some resorted to courts seeking environmental redress of the river and the protection of other collective rights. They used *acciones populares*, confirming the relevance that protecting social rights at the constitutional

[210] *See* Angélica Rangel Amado, La Problemática del Río Bogotá, presentation for the Universidad del Externado de Colombia (2015), available at https://medioambiente.uexternado.edu.co/wp-content/uploads/sites/19/2015/09/Ang%C3%A9lica-Rangel.pdf (accessed November 19, 2023).
[211] For an overview of these critiques *see, e.g.*, Liebenberg & Young, supra *note* 77.
[212] Guzmán Jiménez, *supra* note 193. *See also* Avendaño, Tatiana Roa and David Llistar i Bosch, El caso del embalse del Muña: inversión pestilente en manos de ENDESA, Ecología política Nº 30 (2005).
[213] Avendaño & Llistar, *supra* note 212.

level and recognizing a legal tool for their judicial enforcement can have. One of the first relevant actions was filed in 1992, claiming that the activities of the electricity company affected collective rights such as the right to a healthy environment, to security, to health, and to public services, and demanded the construction of adequate public works for the treatment of waters. Further *acciones populares* were filed in 1999, 2000 and 2001 by individual plaintiffs. Each case sought different responsibilities from a wide range of private and public entities. Overall, the different cases sought to find seventy-two defendants responsible for affecting a range of collective rights, showing the breath of the network of administrative entities with (poorly exercised) authority over the basin[214].

Cases were handled by the administrative tribunal of Cundinamarca, as per the jurisdiction rules of the *acciones populares* law, which indicates that if a governmental entity is involved in the case, administrative tribunals should intervene. Administrative tribunals in Colombia have subject matter jurisdiction to resolve controversies between private parties and the State or around internal State issues and therefore apply, as a rule, administrative law.

The intervening tribunal backlogged the different actions and issued a unified decision on the merits in 2004 (twelve years after the first action was filed). The decision found an "environmental catastrophe" in the basin, for which responsibility lied in the action of the basin inhabitants and of industries —for discharging untreated waters to the river—, and in the omission of several governmental entities, for failing to exercise their legal duties.

The first instance decision was largely based on previous "compliance pacts" entered by the different parties of the case during proceedings[215]. These pacts are enabled by the *acciones populares* law, which allows judges to instate an agreement among the parties after a hearing in

[214] The seventy-two entities are listed in the State Council Decision.
[215]After different roundtables, parties were given the opportunity to present proposals of compliance pacts, which were later discussed in hearings with all relevant parties. Adjustments were done in accordance, led by the intervening judge. After further roundtables and hearings, the parties approved the pacts.

which the Office of the Attorney General must participate (an independent oversight body created by the Colombian constitution to investigate and prevent irregular administrative action, promote human rights, and seek compliance with norms[216]). Pacts are an interesting tool to address traditional concerns over social rights litigation discussed in Chapter 1 as they force the parties, and not judges, to come up with technical solutions for rights' fulfillment. This tool shows how judges can take varied measures that fall somewhere in between completely abdicating their roles and taking over elected powers responsibilities, as some scholarly debates would seem to suggest.

On top of approving previous compliance pacts, the decision ordered several measures directed at enhancing the environmental situation of the river. Orders were based on previous measures such as *in locu* visits of the leading judge and several work roundtables that gathered experts and other stakeholders such as unionists of relevant industries.

3.3 The State Council decision

Many of the defendants of the case challenged the first instance decision, opening proceedings before the State Council, the appellate instance for administrative law tribunals. This section discusses the resulting decision of the State Council, noting how one of its key concerns was describing and assessing the administrative machinery responsible for the fulfillment of the rights claimed in the case, using what I am calling a new administrative law approach to social rights.

To fully understand and interpret the decision of the State Council, it is crucial to keep in mind that the Council is an administrative law tribunal. Established in 1817, it functions as the highest court in the administrative law jurisdiction (the subset of courts that engage with administrative law controversies in the country). The State Council is recognized by the

[216] CONSTITUCION POLÍTICA DE COLOMBIA (C.P.), art. 118.

constitution, and its members enjoy similar protections to those of the Supreme Court and the Constitutional Court. It has thirty-one members —chosen for eight-year terms by the Council itself from a list made by the judicial Council— and works in plenary and in specific chambers whit different subject matter competences. Importantly, the Council has both jurisdictional and advisory functions on administrative issues, which means that it has a good understanding of the daily business and functioning of administrations.

The relevance of this court in the judicial landscape of Colombia is evident. However, while the State Council is an entity of similar hierarchy to the Constitutional Court, its decisions have not received as much attention from the social rights' community[217]. Indeed, it is typically the decisions of the Constitutional Court and not of the State Council that are prominently discussed in literature on social and environmental rights, confirming that administrative law is typically overlooked in social rights' debates[218]. This is probably the reason why, while the Bogota

[217] The limited public attention that the State Council receives when compared with the Constitutional Court may mitigate the critique that this sort of ·public interest litigation" has received, which claims that courts that routinely decide public interest cases prioritize them to gain popularity and refrain from accountability (deprioritizing the cases they should be deciding for a real administration of justice).

[218] For an interesting perspective comparing the Council's and the Constitutional Court's roles in protecting constitutional rights *see* Ángela M. Páez Murcia, Cortes En Desacuerdo, Un Caso De Protección De Derechos En Colombia, 25 ILSA J. Int'l & Comp. L. 491 (2019).

river issue has gained the interest of the public[219], there has been comparatively less examination of the case in legal scholarship[220].

When reviewing the first-instance decision, the State Council gathered further evidence and conducted several meetings and hearings to discuss the problems of the basin and possible solutions, involving different oversight bodies. In March 2014, more than twenty years after the initial case was filed —and by the time the leading plaintiff had passed away—, the Council issued a final decision on the merits[221].

The decree is a unified decision considering the records of all the different backlogged individual cases, and includes several orders aimed at cleaning up the river and preventing further damage. The State Council briefly asserts its power to adopt these measures by referring to the general provisions of the *acciones populares* legislation, which, as already discussed, enables

[219] With the press periodically covering a wide range of topics around the basin, such as the importance of working in the river cleanup, some of the structural problems of the basin, and relevant advances, *see* Ana Puentes, Comienza la década decisiva para salvar el río Bogotá, May 24, 2020, at https://www.eltiempo.com/bogota/rio-bogota-como-recuperarlo-para-2030-498818; how the case can be a model for similar ones, *see* José Luis Barragán Duarte, Recuperación del río Bogotá, un modelo en el manejo del ordenamiento territorial, January 28, 2021, https://www.semana.com/medio-ambiente/articulo/como-es-el-proyecto-de-recuperacion-y-descontaminacion-del-rio-bogota/58977/; advances in implementation of the decision; see Grupo río Bogotá, ¿Cómo va el cumplimiento de la sentencia de saneamiento del río Bogotá?, December 22, 2020, https://www.semana.com/medio-ambiente/articulo/rio-bogota-como-va-el-cumplimiento-de-la-sentencia-de-su-descontaminacion/58380/; the factors that explain poor institutional coordination (such as continuously changing norms and projects); *see* José Luis Barragán Duarte, ¿Cómo articular a los actores involucrados en el saneamiento del río Bogotá?, February 17, 2021, https://www.semana.com/actualidad/articulo/quienes-estan-involucrados-en-la-descontaminacion-del-rio-bogota/59430/ ; the economic implications of some of the specific public works, see William Zualaga Muñoz, Río Bogotá: el reto de conseguir un 'activo Ambiental, https://www.hannacolombia.com/blog/post/511/rio-bogota-el-reto-conseguir-activo-ambiental; and critical analysis of the State Council decision (see Celemencia Lopez Pinilla, Fuerte cuestionamiento a resultados de acción popular instaurada para salvar el Río Bogotá, May 25, 2014, https://periodismopublico.com/accion-popular-instaurada-para-salvar-el-rio-bogota-y-toda-su-cuenca), including issues not covered in the decree, see Luis Fernando Vásquez, Salvar el río Bogotá: algo se ha hecho pero queda mucho por hacer, April 13, 2014 https://razonpublica.com/salvar-el-rio-bogota-algo-se-ha-hecho-pero-queda-mucho-por-hacer/).

[220] Important exceptions are cited throughout this Chapter.

[221] Many of the parties of the case filed presentations after the decision, and the Council issued an additional "explanatory" decision on July 17th (Available at https://www.car.gov.co/uploads/files/5af06dae1b585.pdf) in which it rejected the request of new people and organizations to become parties to the case, and further précised the scope of some of March orders. *See generally* Guiza Suarez, Londoño Toro & Rodriguez Barajas, *supra* note 190.

judges to demand any action needed to remedy the collective right infringed in the case, and to ensure that rights are effectively operationalized.

The decision is structured around three overarching goals or components: i) the environmental and social enhancement of the basin; ii) the coordination and articulation of intervening public institutions; and iii) the enhancement of civic participation and education procedures. For each component, the Council sets "elements" and "objectives" that further explain the types of actions that need to be taken to achieve the general goals[222]. The Council therefore gives equal importance to substantive (goal i), procedural (goal iii) and *institutional* (goal ii) goals.

This three-fold framing demonstrates, first, how courts can take a less binary approach in their interventions than traditional literature would suggest. It also shows how the Council incorporated a third dimension (regarding competent institutions) to the traditional concerns over substance and procedures in social rights. This dimension is the basis of the administrative law approach used by the Council, focused on understanding the authority, capacities, and coordination mechanisms of administrative entities, what makes the decision of the State council distinctive and atypical in social rights comparative literature. For instance, the Council assessed the authority and competence of each of the entities involved in the basin and consequently did not direct orders at "the defendants" or "the State" —as would be common in similar cases from other jurisdictions, but to very specific agencies and tailored to their precise mandates.

[222] For the first component, the elements include measures to protect and preserve the ecosystem; a river management plan; basic cleanup measures; the implementation and update of instruments for land use; the strengthening of economic instruments; the definition and implementation of environmental auditing instruments; the generation of new environmental knowledge; the implementation of an "environmental observatory"; and the implementation of an environmental information system for the basin, with different indicators and monitoring tools. For the second component, the Council identifies the following elements: establishing a basin authority for a systemic management and direction of the basin; establishing a specific Fund; and a financial strategy for gathering, managing and monitoring resources for the river. The last component requires, largely, the dissemination of knowledge and information.

The Council relied on the constitutional provisions that protect a wide range of rights. It considered those rights enforceable and found them infringed in the case. However, it did not engage in significant interpretative efforts to define the specific contents of such rights (in the same vein the Argentine Supreme Court did in Mendoza). Instead, based on broad constitutional standards and principles of environmental law, the baseline of the Council's reasoning was that water is a right and not an isolated element subject to the regulation of uncommunicated authorities. Therefore, a central concern of the State Council was the need for authorities to coordinate their decision-making to manage the river in a comprehensive manner, while at the same time accounting for the specificities of each of the sub-areas of the basin.

In delving into the coordination issue, the Council identified the numerous authorities with responsibility for the basin cleanup, which had overlapping functions. To illustrate the complexity of the institutional framework of the case, the Council found that at least four national Ministries —of the environment, mines, education, and housing—, the City of Bogota with its different Secretaries, the sewage company of Bogota, CAR, and around forty-five municipalities had direct authority over the area of influence of the river. The Council stressed the need for agile and efficient coordination of operations among these numerous entities, as well as the complexity of the measures that needed to be taken, which exceeded the capacities of any of the authorities individually. Interestingly, the Council noted that these challenges existed despite the numerous mechanisms for inter-institutional coordination that had been created in the past, which were unfortunately ineffective.

While acknowledging the importance of coordination, the State Council also highlighted that the particularities of local realities were paramount, stressing the relevance of contextualization for successful basin management. Overall, it claimed that each of the sub-areas

of the river has specific biological and socioeconomic characteristics, which need to be tackled accordingly, but under an integrated approach for the whole basin.

Over these premises, the Council set guiding principles for the basin's planning and management, which included the need to base national and regional decisions on local realities, with a bottom-up logic; the need for ongoing participation, concertation, planning, execution, monitoring and consequent adjustment of decisions; the importance of building information and knowledge in an articulate and transparent manner; and the need to articulate local plans for urban planning, development, and sectorial industries, among others, with the basin management plan. As will be discussed later, many of these principles are in tension with those favored —at least implicitly— by traditional administrative law.

The dispositive part of the decision includes a long catalog of orders. Overall, the Council issued eighty-seven orders that involve the capital district, nineteen national entities, and forty-five municipalities, divided between immediate and midterm orders[223]. While orders include substantive —though very general— declarations on which rights are protected[224] and who is responsible for their violations[225], most of them are in fact institutional and procedural in nature. This is, they focus on the need to pursue certain goals or create institutions and policy instruments according to some procedural criteria (participation and coordination), without indicating their

[223] See Townhall of Bogota, report "Aproximación a las implicaciones del Fallo del Consejo de Estado sobre el Río Bogotá" (2014), available at https://www.sdp.gov.co/gestion-socioeconomica/integracion-regional-y-nacional/publicaciones/aproximacion-a-las-implicaciones-del-fallo-del-consejo-de-estado-sobre-rio-bogota (Accessed November 19, 2023).

[224] The right to water, to a healthy environment, to a rational use of natural resources, species, areas of ecological importance and ecosystems protection; to public spaces and goods; to public health and security; to efficient public services; consumer protection rights; among others.

[225] In line with the first instance decision, the Council finds responsible for the "economic, social and environmental catastrophe" of the basin all inhabitants and industries, for their action (discharges to the river, poor agricultural and waste disposal practices); and the national government, the Department of Cundinamarca, the Capital District of Bogotá, and all the basin municipalities, for their omissions.

contents or defining the substantive components of relevant rights[226]. For instance, orders entail reviewing plans (for urban planning, solid waste management, or water discharge), demarcating or identifying relevant areas, or creating inventories, and rely on general prioritization criteria rather than on detailed orders in which judges.

3.4 The administrative changes triggered by the decision

The administrative law approach used by the State Council made evident the institutional problems that acted as barriers to discharge existing environmental commitments in the basin. Problems —common to many countries across Latin America, as discussed in Chapter 1— included lack of dialogue and coordination among different bodies with overlapping mandates; volatility and instability in norms and staff and the consequent absence of long-term policies[227]; and lack of evidence gathering and mechanisms for planning, assessing, monitoring, and reporting on policy issues[228]. Against this backdrop, the State Council decision shifted the state of institutional inertia and helped advance concrete administrative changes in the entities tasked with implementing its orders in ways that, I argue, are more conducive to realizing social rights.

The measures taken and changes triggered by the State Council decision are in line with ongoing regulatory innovations in the environmental field[229]. Responses to environmental

[226] Some of the procedural mandates are paired with additional substantive orders, however. For example, the order to demarcate areas where mining activities are prohibited (which I see as largely procedural, as it centrally calls the administration to start a procedure it is legally requested to carry) is paired with an order to review existing permits, and to incorporate the people who will not be able to continue mining to new socioeconomic project. Furthermore, some orders are fully substantive. They relate specifically to the need to conduct certain public works, in particular, water treatment plans: or to build "tanneries park" where such activity can be conducted in an environmentally friendly way. Some of the orders related to the education component are also substantive (as they include contents in educational plans, sensitize public officers, etc.).

[227] Instability is the high rate of change in rules due to the preferences of changing actors that impedes developing stable expectations or clear strategies. Instability is self-reinforcing, as rapid change prevents institutions from "taking roots" and creates further expectations of change. Latin America has "extreme" institutional instability. *See* Brinks, Levitsky, & Murillo, *supra* note 62.

[228] On institutional problems commonly encountered in Latin America s*ee generally*, Mata, *supra* note 65.

[229] These regulatory innovations have not only taken place in Latin America, but also in countries like the United States, under frameworks such as "adaptive management", with changes both at the statutory and regulatory levels.

challenges are fast-changing, and conflicts are often inter-jurisdictional and highly sensible to context[230]. For example, in the case of rights to water scholars have noted the need for cooperating, flexible, participatory, and adaptable institutions among relevant entities considering the complexity of the issue[231]. These characteristics (which arguably apply to an increasing number of public problems) have translated into tailored legal institutions. Environmental law accepts more decentralized and participatory decision-making processes than traditional administrative law does, and many environmental institutions are flexible, open, and cooperative[232].

The reforms triggered directly and indirectly by the State Council decision, with similar characteristics, included the creation of new institutions, procedures, and information. The decision also enhanced administrations' capacities, and facilitated the better roll-out or functioning of institutions that existed formally before the Council's intervention but were inactive in practice. In doing so, the decision generated innovations in the way in which administrations typically function in Latin America, in at least three respects: (1) it enhanced coordination among numerous institutions; (2) it made participation and information more widespread; and (3) it placed overdue attention on monitoring of public decisions, rather than on pre-decisional activity.

Importantly, these three strands of innovations pursue similar goals, and often one institution promotes coordination, participation, and monitoring at the same time. Furthermore, in

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See, e.g., Rosie Cooney & Andrew T.F. Lang, Taking Uncertainty Seriously: Adaptive Governance and International Trade, The European Journal of International Law Vol. 18 no. 3 (2007).

[230] *See* Guiza Suarez, Londoño Toro & Rodriguez Barajas, *supra* note 190.

[231] *See* Guiza Suarez, Leonardo; Roja Moreno, Yuly Catherine; Morales Rozo, Diana, Tecnologías de la información y las comunicaciones aplicadas a la gestión del agua: el caso del río Bogotá, Ciencias Ambientales v. 54, n. 1, p. 76-94, (2020) Available at http://www.scielo.sa.cr/scielo.php?script=sci_arttext&pid=S2215389620200001000076&lng=en&nrm=iso (accessed on November 19, 2023).

[232] Erika Castro Buitrago, DERECHO AMBIENTAL Y GOBERNANZA. LA CONCERTACIÓN COMO ACTUACIÓN INFORMAL A LA ADMINISTRACIÓN (Ed. Universidad de Medellín, 2017). *See also* Leonardo Güiza Suárez, Beatriz Londoño Toro, Cristhian David Rodríguez Barajas & Juliana Zuluaga, Las agendas interinstitucionales ambientales: un instrumento para la resolución de conflictos ambientales, Revista de Estudios Sociales [on line], 53 (2015), available at http://journals.openedition.org/revestudsoc/9220 (accessed November 19, 2023).

all cases the same elements appear to be crucial for successfully rolling out innovations and show, in line with findings from related experiences, that the key to the sustainability of similar efforts lies in their details[233]. The following sections delve into each of the innovations, briefly commenting on how they entail a departure from traditional administrative law.

3.4.1 Enhancing inter-agency coordination

The most central concern of the State Council decision was how scattered and uncoordinated the work of numerous entities with authority on the Bogota river was. In Colombia, lack of administrative coordination has been documented as a major problem in the environmental field[234]. Efforts to explain institutional failure in the Bogota basin, in fact, point to the lack of fruitful communication among relevant entities and to the absence of a coordinating entity with real capacity to manage the river with an integral perspective[235].

The challenges of poor inter-agency coordination are significant for issues that are polycentric in nature, as is the case for social rights (as discussed in Chapter 3 in the Mendoza case). In fact, the polycentric nature of social rights has been considered by some as a barrier for their judicial enforcement, as discussed at other points of this dissertation[236]. Understanding how the State Council recognized and addressed this challenge is therefore critical.

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[233] Such as who integrates a space, the reporting mechanisms in place and the existence of external controls, the importance of context specific tools and of a leading authority, and the periodicity of meetings, to mention some examples. *See* Ministry of Production of Peru, MESAS EJECUTIVAS: NUEVA HERRAMIENTA PARA LA DIVERSIFCACIÓN PRODCUTIVA EN EL PERÚ (2016).

[234] The National Panning Department identified lack of coordination among entities that comprise the National Environmental System as one of the main weaknesses in the environmental field. *See* Güiza Suárez, Londoño Toro, Rodríguez Barajas & Zuluaga, *supra* note 232.

[235] As the dispersion of norms and action plans confirms. *See* Erika Gisseth Álvarez Carreño & Juan Carlos Murillo Coba, Creación del estado del arte para la cuenca media del rió Bogota, como mecanismo de apropiación social, Universidad Santo Tomás. Bogotá, Colombia (2019). Available at https://repository.usta.edu.co/bitstream/handle/11634/16550/2019murillojuancarlos.pdf?sequence=1&isAllowed=y (November 20, 2023).

[236] For an analysis of the limitations of courts to address poly-centric issues, see Allison, J. W. F., Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication, The Cambridge Law Journal 53, no. 2 (1994).

Some legal notions of traditional administrative law widely used in Latin America reinforce the problem of uncommunicated public interventions. These include the idea of "competence", according to which each office within the administration is assigned either explicitly or implicitly a specific authority and would not engage in others realms of decision making[237]. Furthermore, administrative procedures are usually defined as a chain of individual acts for which different offices make subsequent interventions, instead of coming together in a unique instance to deliberate and deliver consensual opinions or decisions. The effects of these legal rules are reinforced by political incentives not to cooperate, such as distrust among agents and a perceived need to protect thematic niches or budgetary allocations. The implications of these legal institutions are further discussed in Chapter 4.

This manner of organizing authority collides with the nature of socio-environmental problems, which require the cooperative intervention of different areas and levels of government. As in Mendoza, the Bogota case illustrates how environmental issues, for example, lead to problems related to the right to health and to work, in connection to environmentally harmful economic activities carried out around the river; and called from actions from municipal, departmental, and national authorities.

As the unfitness of siloed administrative work became apparent, scattered efforts to enhance coordination emerged[238]. Administrative procedure statutes in some countries in Latin America, for example, allow for agreements and consultations to promote coordinated decision-

[237] In traditional administrative law, the attribution of authority should be made explicitly in an authorizing norm, assuming again that all details of administrative action can be anticipated. While this strict view on assigning authority has been challenged for several years now, its basic assumptions are still very much in place.
[238] In the United States, for example, efforts have been made to better coordinate the work of the Executive Branch, for instance through the creation of offices with increasing power to direct different areas of the administration. *See, e.g.*, West, William F., Presidential Leadership and Administrative Coordination: Examining the Theory of a Unified Executive, Presidential Studies Quarterly 36, no. 3 (2006).

making[239]. Other norms create interjurisdictional bodies, coordination units, and mechanisms for exchanging information among entities. In the case of environmental legislation in Colombia, Law 99 of 1993 —the country's core environmental statute— designs different coordination instruments[240]. More examples of these increasing efforts are presented in Chapter 4.

Over similar concerns, the State Council took a central measure to address coordination problems: it ordered the Ministry of the Environment to present to Congress a bill creating a basin management authority. Until the law was passed, the Council created the "Strategic Council of the Rio Bogotá Basin" or "CECH", for its Spanish acronym. According to the State Council, CECH, as the basin interjurisdictional authority, shall direct, manage and coordinate the basin with a systemic approach.

The creation of a new entity is certainly a structural and atypical measure to be taken by a judicial court (remember that in Mendoza it was Congress that created the basin authority), and fully assessing the appropriateness of the Council acting in this fashion exceeds the scope of this dissertation. Interestingly, the Council did not invoke any specific provision enabling it to adopt such a measure. Instead, it made general references to the broad powers that the *acciones populares* law gives judges to ensure rights' infringements are adequately redressed; and to the importance of a coordinating authority for the achievement of the overarching goals that it had set. The Council, however, envisioned the measure as provisional (until Congress creates a definite basin

[239] *See, e.g.,* Lei No 9784 (administrative procedure act), 29 January 1999, art. 35, 49 (Bra.). Peruvian legislation admits that entities can "assign" an activity to another entity for "efficacy reasons, or whenever the requested entity has adequate means to perform the activity" (L. 27444, abril 1, 2001 (Peru). Brazilian law, for example, further requires the elaboration, by each intervening entity, of a document discussing issues relevant for its competence, rules for engagement (e.g., the need to provide reasons for dissents and the "burden" to suggest alternative solutions in that case), and the need to draft a public document with basic information. The Peruvian law also accepts "stable" instances of interinstitutional collaboration, by creating "conferences of entities", agreements or any other legally admissible means, oriented at facilitating entities with a "common problem area" exchanges to solve problems and foster collaboration. These institutions are further discussed in Chapter 4.

[240] Such as the National Environmental Council. Coordination instances are further developed by Decree 1640 of 2012 (August 2, 2012), on the premises of Law 99/1993, as discussed in earlier sections of this document.

authority), and did not in fact create a whole new entity, as CECH functions as a new coordination space among already existing entities.

CECH was operationalized shortly after the State Council decision and is regulated by a set of agreements[241]. The mandate of CECH is to manage, articulate, coordinate, and integrate actions around the river basin. The agreements assign CECH a broad list of competences and determine that the Council must meet monthly[242]. The Council has a 2020-2023 action plan in place, which assumes that CECH will still be functioning almost ten years after the State Council decision, even though it was originally envisioned as temporary.

CECH has seven formal members which include entities from three levels of government[243]. Each entity must be represented by hierarchical officers with decisional power. There are also permanent attendants, who can participate in the Council but not vote in its decisions[244]. Furthermore, according to CECH's action plan, the Council has several support entities, which need to comply specific State Council orders and provide technical assistance to CECH as needed[245].

The number and variety of entities engaged with CECH show the feasibility of sustaining coordinated work, even in a context of constrained institutional capacity and through an entity

[241] Including agreement 1 of 2014 which functions as the new Council's bylaws.
[242] Which include coordinating and cooperating with different entities and authorities on their implementation of environmental policy; increase inter-institutional coordination; set guidelines; solve technical, administrative, and financial problems; conduct monitoring and assessment activities.
[243] The National Ministry of the Environment (acting as Secretariat of the Council), the governor of Cundinamarca - the relevant "department" or province-, the Director of the environmental authority of the area -CAR-, two representatives of municipalities; the environment Secretariat of the Capital District of Bogotá; and the President of the sewage company of Bogotá.
[244] The General Attorney's Office, through two of its offices; the General Comptroller, two of its offices, and the National Planning Department.
[245] Including the meteorology Institute, the Ministry of Science, and the Statistics Department, as well as "any other public or private entity" whose action is needed to comply with the State Council decision. The legal ground for this wide scope is article 34 of Law 472 of 1998 (Diario Oficial No. 43.357, August 6, 1998), which states that the intervening judge in an *acción popular* retains jurisdiction to seek compliance of its decision and oversees compliance with her orders.

created as merely provisional. Having stable coordination spaces that include entities of all levels of government, with varied capacities and different competences (all of which make CECH's specially challenging and promising) is essential when dealing with problems as complex as pollution in the Bogota basin. Such spaces reduce the incentives that entities may have not to cooperate, facilitate the enhancement of capacities and the exchange of information, and make decisions more agile, streamlined and less burdensome.

This promising —though unusual— model of coordinated public intervention expanded from CECH's central structure to its different units, speaking to the promise of the model. For a start, CECH has a technical roundtable to conduct its everyday business, constituted by two representatives of each of the member entities who must report to the plenary on progress in the implementation of its action plan. Therefore, CECH does not have one manager, as would be the standard practice, but a collective space to handle its daily actions. These features are relevant to distinguish CECH from other coordination efforts which rely on increasing the directive capacities of high-ranking offices, rather than on promoting horizontal cooperation.

Furthermore, CECH has thematic roundtables or working groups with specific mandates to intervene when more than one authority is responsible for executing an action, which must also report back to the plenary[246]. For example, a roundtable was created to come up with the already discussed information observatory[247]. CECH's action plan, which in turn was built through roundtables[248], states that different thematic roundtables, guided by the principle of collaboration, must execute CECH's mandate and support activities needed to implement the action plan[249].

[246] There are eight thematic roundtables for the existing plan.
[247] Conformed by the National Planning Department, the Ministry of the Environment, the governorship of Cundinamarca, the Secretary of Environment of Bogota, the Sewage company of Bogota, among others.
[248] CECH's current action plan was also developed through roundtables. See the Action plan at approved through Agreement 7 of 2020, June 25, 2020.
[249] *Id*.

The approach to coordinated, collaborative policy making further expanded outside CECH, reinforcing the idea that the model works. Similar coordination spaces emerged at the local level, even when not formally required by the State Council. For example, two months after the State Council issued its decision the Municipality of Bogota created the "Intersectoral Commission of the Bogota River", building among other things on previous efforts of the district to enhance administrative coordination. The Commission gathers district-level administrative entities with relevant competencies to implement the State Council decision[250]. It seeks to monitor, enhance coordination, recommend actions to implement the decision and create reports, among other things[251]. With similar goals and at the local level as well, the Municipality of Chia created a local "Monitoring, Control and Participation Committee"[252].

3.4.2 Increasing participation and transparency

Across Latin America, traditional administrative law indicates that administrations are largely supposed to conduct their business without involvement of private parties, under the assumption that law is sufficiently clear and administrations sufficiently knowledgeable to apply law to the facts with no further input[253]. Notably, this traditional view, inconducive to public participation, has been increasingly challenged, especially in the field of environmental law, for reasons that range from legal to ethical and practical[254]. The Constitution of Colombia, as

[250] Decree 156/2021 (Alcaldía Mayor de Bogotá, April 23, 2021, Registro Distrital No. 7113), defined the current integration of the commission.
[251]The Commission, presided by the Secretary of the Environment and under the "technical secretariat" of the Legal Secretary of Bogota, must meet on a bimonthly basis. Within the Commission, different entities have responsibilities for the implementation of concrete aspects of the State Council decision. See Decree 238/2017 (Alcaldía Mayor de Bogotá, May 10, 2017, Registro Distrital No. 6074), amending decree 198.
[252] The Committee, which must meet monthly, similarly gathers different authorities who cannot delegate their duties, except in the case of the mayor. See Resolution 14 of 2005 of the Municipality of Chia, January 2, 2015.
[253] As seen, for example, in strict standing rules for administrative procedures and lack of participation instances. This argument is expanded in Chapter 4.
[254] For example, article 79 of the Constitution of Colombia states that laws will guarantee people's participation in environmental decisions. On practical reasons for participation, *see* Amy Widman, Inclusive Agency Design, 74

discussed earlier, is an example of a pro-participation norm. These rules and their exceptions are further discussed in Chapter 4.

While the recognition of general participation standards is in growth, the details on how to institute participatory spaces in practice is less clear. The instances of participation that emerged around the Bogota case are therefore important as they provide real-world learnings on the functioning of such spaces in a context of extended deprivation of rights and institutional weakness. Considering that part of social rights' literature has cautioned about the risks of procedural approaches to social rights, as they commonly seek the participation of those neglected by elected powers in the first place, understanding whether and how these risks play out in practice is also relevant[255].

I call "participatory spaces" those that gather a variety of stakeholders to either share information or make decisions in horizontal, nonhierarchical ways, and include at least one non-governmental actor. In the context of the Bogota river, such spaces often function under the name of "roundtables", as in the Mendoza case discussed in Chapter 2.

Roundtable and roundtable-like spaces have been used for different purposes in the context of the Bogota river. First, participatory instances were used within judicial procedures, both before and after final decisions, to gather information and hear a wide range of parties. Participation in judicial procedures is relevant to address critiques that argue that in public interest litigation judges who have limited technical knowledge can impact people well beyond the parties of the case[256], as

Admin. L. Rev. 23 (2022); and Guiza Suarez, Roja Moreno, & Morales Rozo, *supra* note 231 (accessed on November 19, 2023). Respecting the dignity of individuals, enhancing reasoned decisions, or serving an educational function have also been argued as reasons for promoting participation. *See* Susan P. Sturm, A Normative Theory of Public Law Remedies, 79 GEO. L.J. 1355, 1397 (1991).

[255] *See generally* Brand, *supra* note 35.

[256] For concerns over limiting engagement to parties of the case see, e.g., Liebenberg, *supra* note 125.

participation facilitates the engagement of various stakeholders and the gathering of information to compensate for judges' constrained capacities.

Participation instances in the case are in line with *acciones populares* law, which enables judges to create mechanisms to open procedures to actors beyond the parties[257]. For example, the district court engaged interested persons in roundtables and convened a variety of stakeholders before issuing its decision on the merits to elaborate the aforementioned "compliance pacts", including representatives of the dairy, meatpacking, tannery, and mining sectors. The State Council similarly created participatory spaces after issuing its decision on the merits under the figure of "verification committees", which will be further discussed below.

Participatory spaces also emerged outside judicial proceedings in administrative entities, for both general and specific purposes[258]. Administrative participation helps opening administrative institutions for scrutiny and incorporating in decision making the lived experiences of those with better knowledge of the basin, therefore enhancing the functioning of the administrative apparatus.

Centrally, the State Council ordered the creation of three Basin Councils, for each of the broad three subsections of the basin, as consultative and representative spaces of people who live in each area. Councils have representation of peasants, indigenous and afro descendant communities, unions, and consumer protection organizations, among others, and should gather periodically to present reports to the district court supervising the implementation of the decision.

Legislation recognized councils before the Bogota river decision but had not led to significant results until then. Indeed, Decree 1640 of 2012 created basin councils indicating their

[257] Articles 27 and 34, Law 472 of 1998 (Diario Oficial No. 43.357, August 6, 1998).
[258] For example, there are roundtables to discuss progress in specific public works. From 2017 to 2019, eighteen roundtables were conducted to assess treatment plan and for broad coordination purposes.

basic functions, which include providing information, generating recommendations, engaging in the process of developing management plans, contributing to problem solving, and disseminating information to the relevant communities. To finally bring these provisions to practice, the State Council tasked the Ministry of the Environment with further precising the functioning of the councils in the Bogota basin. The Ministry did so through resolution 509 of 2013[259].

As a result, three basin councils were inaugurated for each of the basin sub-areas. There are currently councils in place with elected members for the 2021-2025 period. Overall, councils provide an opportunity for a better understanding of the lived experiences of basin inhabitants, for dialogue, and for engagement around concrete tools such as the drafting of the basin management plan[260]. Indeed, the 2019 update of the river management plan engaged the three basin councils as well as other stakeholders through workshops, roundtable discussions, and meetings in governmental offices[261]. Notably, however, in the selection process for the current members of the councils only higher education institutions and municipalities (and not other groups represented, such as peasants or indigenous communities) presented more than three candidates. This signals the risk of certain actors, such as professionalized and large organizations, appropriating discussions on conflicts that impact others more directly.

[259] Which indicates the groups that can be members of the Councils, each of which can have up to three representatives, with mandates of four years. Once members are elected, they dictate their own internal rules.
[260] *See generally* Belkys Gerardina Gomez Camacho, Seguimiento de Consejos de Cuenca (Ministerio de Ambiente de Colombia, 2018), https://www.minambiente.gov.co/wp-content/uploads/2021/10/Anexo-65.-Seguimiento-Consejos-de-Cuenca-a-2018.pdf.
[261] On participation around the 2019 POMCA update, *see* Angelica Gloria Teresa Castellanos Rocha, Apoyo al Seguimiento y Gestión de la Ejecución de Actividades del Programa Gobernanza y Gestión del Agua Del Componente Programático del POMCA Río Bogotá, Universidad Distrital Francisco José de Caldas (2020), available at https://repository.udistrital.edu.co/bitstream/handle/11349/26150/CastellanosRochaAngelicaGloriaTeresa2020.pdf?sequence=1&isAllowed=y(accessed November 20, 2023).

There are also different social oversight mechanisms that work around the Bogota river, regulated in Law 850 of 2003[262]. The law allows citizens (directly or through social organizations) to constitute *veedurias ciudadanas* or ad hoc oversight mechanisms to monitor discrete areas of administrative action[263]. There are different mechanisms registered to work around the Bogota river, which conduct on the ground-monitoring, request information, and hold meetings with relevant authorities[264]. These mechanisms generally work at the municipal level, although there are some coordination instances[265].

Participatory mechanisms are of essence for the vindication of social rights. Because social rights are typically recognized in broad, vague terms at the normative level, they need to be further defined, contextualized, and adjusted to the particularity of a given context. The engagement of different stakeholders, particularly of rightsholders, becomes crucial for that task. In the context of social rights litigation, participation can provide additional benefits as it can help respond to common concerns such as judges limited information, capacities, and legitimacy[266]. In a process as complex as this one, participation can open the process beyond the original plaintiffs, who typically cannot sustain an active engagement in all aspects of the case through the many years that processes usually take and under changing circumstances.

Notably, the court is concerned with understanding who, how and under which conditions participatory procedures would take place. The Council also envisioned the judiciary as the

[262] Law 850 of 2003, Diario Oficial No. 43.357, August 6, 1998.
[263] On social oversight mechanisms in general, *see* John Sebastián Castañeda Flores, Veedurías ciudadanas ambientales: herramienta de control de las políticas de gestión ambiental del Estado colombiano, Universidad del Rosario, Repositorio institucional (2022).
[264] The list of oversight mechanisms can be consulted at the National Registry of companies and social organizations, at https://www.rues.org.co/Veedurias/DetalleVeedurias?CodigoDpto=25 (accessed November 21, 2023).
[265] *See* Procuraduría General de la Nación of Colombia, Red Institucional de apoyo a las veedurías ciudadanas"(2011), available at: https://www.procuraduria.gov.co/portal/media/docs/110311redinstitucional.pdf (accessed November 21, 2023).
[266] For a summary of these arguments *see, e.g*., Liebenberg & Young, *supra* note 77.

institution charged with actively monitoring the development of the participatory procedures it mandated, departing from other procedural approaches in which judicial oversight is less stringent[267].

Participatory spaces in the Bogota case also led to improved institutional capacities in relevant entities, as they conduced to increased information and transparency, a common benchmark for enhanced governance[268]. Information is not only a precondition for meaningful participation, both to inform debates and build trust among actors[269], but also key to enhance administrations' capacities to engage in policy making.

Following the Council decision, the basin authority that emerged from the case created an environmental observatory[270]. The observatory functions as a virtual platform that condenses information to monitor implementation of the State Council decision and to enhance decision making through the publication of relevant data[271]. The platform provides a wide selection of information, including abundant documents, a set of compliance indicators[272], and a space to gather good practices on the basin governance[273]. The State Council also mandated the creation of an "information system to manage information related to the basin.[274]

[267] In particular, of the South African experience. See Pieterse, *supra* note 33.
[268] Gauri, *supra* note 71.
[269] *See* Guiza Suarez, Roja Moreno, & Morales Rozo, *supra* note 231.
[270] Adopted by agreement 6/2020 of CECH.
[271] Accessible at http://www.orarbo.gov.co/es/inicio
[272] The 617 indicators can be browsed by responsible entity, municipality, or component of the State Council decision. Detailed information is provided for each indicator. The periodicity of each indicator varies, with some not being updated since the benchmark or goal was already met, and others providing information updated to the moment of writing this memo.
[273] *See, e.g.*, ORARBO, Red de Reservas de la Sociedad Civil de la Laguna de Pedro Palo, at http://www.orarbo.gov.co/es/buenas-practicas-de-gobernanza/red-de-reservas-de-la-sociedad-civil-de-la-laguna-de-pedro-palo/matriz-dofa-de-buenas-practicas (accessed November 24, 2023).
[274] Since November 2017 CAR was assigned the leading role in developing the information system. The management of SIRíoBogotá is done by CECH. Members of CECH must upload relevant information, according to the guidelines set by the relevant thematic roundtable. If entities that are not part of CECH need to submit information, they should also abide by the standards set in agreement 6/2020, which include "accessibility", "reliability", "timeliness", "effectiveness", and "integrity".

The basin authority tasked two of its members to develop the platform, considering their significant prior experience with other observatories[275]. The observatory was developed through the cooperation of the intervening public entities, a university, and a non-governmental organization, showing another example of collaborative decision-making. The process of coming up with the indicators now available in the observatory was also collaborative and engaged a relevant number of actors, illustrating how participation and transparency can work in mutually reinforcing manners[276].

3.4.3 Promoting monitoring activities

The importance of monitoring became a common theme in social rights' literature, as anticipated in Chapter 2. Courts and parties frustrated with the marginal impact of some judicial decrees have tried to come up with solutions for courts to conduct post-decree supervision of administrative action of defendant administrations, including the Colombian Constitutional Court, as discussed in section 3.2.1[277]. As discussed in Chapter 2, scholarship has argued that strong monitoring processes can enhance enforcement as they provide room for increased social mobilization[278]. Monitoring tools that gather a variety of stakeholders also address the need to constantly evaluate and revise policy around fluid matters, such as social and environmental issues. Literature has found that in litigation in Colombia the strongest a monitoring mechanism is and the greatest the participation it allows, the greatest are the prospects of a decision being

[275] *See* Guiza Suarez, Roja Moreno, & Morales Rozo, *supra* note 231.
[276] To build the indicators included in the observatory, the State Council decision (which indicated relevant indicators) functioned as a baseline. After that, responsible entities worked with the actors involved to understand the information they had. The University of Rosario started by drafting conceptual notions on indicators, to identify responsible entities and existing information. This process triggered the generation of new indicators, focused on economic and financial dimensions. Later stages engaged municipalities and provided them with trainings on the relevant systems and platforms. *See* Guiza Suarez, Roja Moreno, & Morales Rozo, *supra* note 231.
[277] *See, e.g.,* and generally, Langford & Kahanovitz, *supra* note 52*;* Rodríguez Garavito & Rodríguez Franco, *supra* note 50.
[278] Chitalkar & Gauri, *supra* note 94.

implemented[279]. These findings show the importance of relying on strong procedures (in this case, for monitoring purposes) even in the cases in which courts *are* willing to substantively define and interpret the content of social rights, as the Colombian Constitutional Court does; and reinforce the argument that a stark division between substance and procedure can be fictional in practice.

However, monitoring and evaluation are not common practices in traditional administrations in Latin America, as will be further detailed in Chapter 4. In canonical administrative law, there is a distance between rule makers and rule implementers that makes information about the effects of rules reach late and insufficiently those who put rules in place[280]. Furthermore, mainstream administrative and procedural law statutes typically do not include provisions to monitor the impact or effects of final decisions. In the cases in which administrations do carry out monitoring activities, there is little information on how these activities work. In short, legal rules are mostly focused on what happens *before* a decision is made and remain largely silent about post-decisional action, as if decisions were self-executing and required no revisiting.

Building on the norms that enable judicial monitoring in Colombia, the Bogota River case gave rise to important tools to scrutinize the impact of the decision. First, when discussing the importance of assessment, indicators, analysis of results, and consequent adjustment of actions, the State Council gave itself the capacity to request reports to assess compliance with its decision. The State Council further stressed the relevance of generating and disseminating information on several aspects of the basin, and suggested a catalog of relevant indicators, as discussed previously.

The first instance court also exercises relevant monitoring powers, as the court originally intervening in the case and in the understanding that judges retain jurisdiction until rights are fully

[279] See Rodriguez, *supra* note 189.
[280] William H. Simon, The Organizational Premises of Administrative Law, 78 Law & Contemp. Probs. 61 (2015).

repaired[281]. In this capacity, the leading judge of the court, often described as an active and committed judge, issues follow-up decisions, receives presentations from different stakeholders, holds hearings to report on progress towards the implementation of the decree, orders and conducts inspections, and determines noncompliance with different court orders[282]. In fact, according to CECH's action plan, CECH must "constantly engage" with the district court judge[283].

The State Council decision led to the creation of several reports about the basin, including periodic ones assessing progress and compliance with the decision. Now, many entities including CECH and the Attorney General's Office receive and issue reports to assess compliance, based on the inputs of the defendants of the case.

Another key monitoring tool triggered by the State Council decision was the formation of verification committees, the ad hoc bodies that judges can create to verify compliance with their decisions in *acciones populares*[284]. Verification committees have generally been assessed favorably in specialized literature on social rights litigation in Colombia[285], and deemed fundamental to enhance their efficacy[286]. Notably, since committees include several private organizations, they also contribute to enhancing participation as discussed previously.

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[281] Since the State Council only intervened in the case as an appellate instance, the case went back to the administrative law court that intervened in the first instance.
[282] Through the "incidentes de desacato", procedures started in the case to determine if public agents are in contempt.
[283] *See also*, Consejo estratégico de la Cuencia hidrigráfica del río Bogotá's Action plan at approved in Agreement 7 of 2020, June 25, 2020.
[284] According to the law, the Committee should be composed of the judge, the parties, the responsible public entity, the General Attorney, and a non-governmental organization with a mandate that corresponds with the objective of the case. For an example of the work of a Committee, see Ministry of the Environment of Colombia, "Verification Committee in accion popular 150012333000-2014-00223", at https://pisba.minambiente.gov.co/index.php/seguimiento-y-verificacion (accessed November 19, 2023).
[285] *See, e.g.*, Universidad del Rosario, Grupo de Investigación en Derechos Humanos, 20 años de la ley de acciones populares en Colombia. Balance y desafíos 1998-2018 (2018), available at https://repository.urosario.edu.co/bitstream/handle/10336/18975/Ley_acciones_populares.pdf?sequence=1&isAllowed=y (accessed November 20, 2023).
[286] See Anamaría Bonilla Prieto, Retos y alcances de los mecanismos de seguimiento a las decisiones proferidas en los procesos de acción popular, Revista Temas Socio Jurídicos, Vol. 36 N° 72 (2017). However, the Committees

According to the State Council, committees should function under the coordination of CECH and include several non-governmental organizations, representatives of the General Attorney's office and of the Ombudsperson Office. Committees must report every three months to the district court and to CECH, or whenever circumstances make it necessary. In 2016 CECH established the general guidelines for the work of verification committees, following the standards provided by the State Council[287].

There are different verification committees in place, with some having broader mandates and a more general approach[288], and others focused on the local level, in specific municipalities[289]. The district court judge further assigned different non-governmental organizations to relevant committees through a lottery procedure and ordered municipalities to provide participating organizations with reasonable resources for transportation and other items needed to engage meaningfully, to mitigate the risks typically associated with participatory instances (such as people not having the capacity to engage, or spaces being coopted by better-resourced entities)[290]. At

have "limited" institutionality, as their creation is discretionary to the intervening judge, they are temporary and unstructured in nature, and their role is limited to collaborating with the judge in assessing compliance by producing reports and recommendations, with no capacity to make decisions by themselves.

[287] CECH, Agreement 2 of 2016.

[288] There is a "general verification" committee, to supervise implementation of the decision based on reports filed by the three subcommittees described below. It has 89 members, including all municipalities, CECH members, the district court judge, NGOs, all relevant national ministries, unions, and universities, who must meet at least twice a year, plus on extraordinary basis as needed. It is convened by the district court, which acts as the Secretariat of the Committee. There is also an "inter-institutional verification committee" that must monitor the implementation of the judicial decision by national, departmental and district authorities, or any other authority not covered by the subcommittees. It is integrated by several national authorities, CAR, the department of Cundinamarca, the Capital district, a number of state-owned companies, public prosecutors, the Attorney General office, the General Comptroller Office, the ombudsman office, and representatives of NGOs. The Ministry of the Environment leads this committee and must convene its meetings, at least on a quarterly basis.

[289] Each committee is composed of the relevant municipalities, the Attorney General delegate, a representative of the Ombudsman Office of Cundinamarca, the General Comptroller, CAR, the Ministry of Environment, the Cundinamarca Department and civil society representatives. The Attorney General is in charge of convening meetings (at least quarterly) and leading the committee (for instance, it must moderate meetings and can request reports).

[290] An example of an administrative act facilitating the payment of relevant expenses to an NGO can be seen at Resolution 299 of 2020 of the Municipality of Sibaté, September 24, 2020, at https://www.sibate-cundinamarca.gov.co/Transparencia/Normatividad/RESOLUCION%20No299%20DE%202020.pdf

present, the judge periodically asks members of verification committees to support her assessment of compliance with different orders, for example, by monitoring the advancement of public works. Similarly, committee members are active in reporting back to the court and asking for measures to promote compliance with judicial orders, speaking to the positive synergy that can happen among varied stakeholders to advance the vindication of social rights.

Though more discreetly, monitoring also became an important policy aspect in areas not directly supervised by the judiciary. CECH's action plan, for instance, considers "follow up actions" as a cross-cutting theme of its work, aimed at analyzing information and assessing compliance with the State Council decision[291] Indeed, according to its bylaws, one of CECH's functions is to "monitor, assess and follow up" with actions taken for the cleanup and sustainability of the Bogota River[292]. Similarly, the basin management plan is also subject to ongoing monitoring and annual monitoring actions can lead to the adjustment of the management plan[293].

3.5 Impacts of the innovations

The distinctive form of judicial intervention made by the State Council helped stimulate and energize institutions that had long failed to meet their legal obligations. As apparent from the description provided in the previous sections, while environmental problems had existed for decades and several normative and political attempts at tackling them were made, deliberate, and sustained institutional efforts to address the Bogota river issue systematically only happened after judicial action[294].

[291] Consejo estratégico de la Cuencia hidrigráfica del río Bogotá, Agreement 7 of 2020, June 25, 2020.
[292] Consejo estratégico de la Cuencia hidrigráfica del río Bogotá, Agreement 3 of 2017, article 8.h.
[293] For an example of monitoring relevant aspectos of POMCA, *see* Castellanos Rocha, *supra* note 261.
[294] *See* Álvarez Carreño & Murillo Coba, *supra* note 235, arguing that since the implementation of a National Environmental System ordered by Law 99 of 1993, discoordination among environmental institutions became apparent; and arguing that the persistence of environmental problems in the Bogota River is due to lack of communication among relevant agencies.

As discussed in earlier Chapters of this dissertation, the capacity of courts to trigger institutional change has been discussed and conceptualized in prominent scholarship. Katharine Young, for example, has described courts in social rights cases as having a "catalytic" role, through which they "lower the political energy" needed to change the governmental response to social rights[295]. As a result, actors like legislatures and bureaucracies are changed, and forced to interact with other stakeholders[296]. Charles Sabel and William Simon similarly described court decisions as having a "destabilization" effect on the defendant institutions[297], as was the case in the Mendoza litigation with the complaint leading to Congress creating an interjurisdictional entity. Under Sabel and Simon's framework, when courts find a violation of rights by a public entity that has systematically failed to meet its obligations, they rebut the general presumption in favor of the status quo. Courts therefore create conditions for deliberation of alternative solutions, bring public scrutiny to a problem, and increase stakeholder engagement with the defendant institution[298]. In this way, they can help "disentrench" noncompliant administrative entities[299].

The State Council decision had such "destabilization" effect on the administrative entities with competences around the Bogotá river. Indeed, relevant policy instruments and media articles about the basin routinely refer to the State Council decision, showing how closely connected the Council intervention and institutional responses are. Even research around the Bogota river

[295] Young, Katharine, A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review, International Journal of Constitutional Law (ICON), 2010.
[296] *Id*.
[297] Sabel & Simon, *supra* note 12.
[298] The idea of courts having "destabilization" effects can provide answers to concerns over judges' limited capacities to engage in social rights cases without foregoing their powers. As under this framing courts do not necessarily make distributional judgments themselves but rather facilitate procedural venues for defendant entities to make those decisions in accordance to law. As the authors put it, the framework "... suggests a role for the courts, which might be called accountability-reinforcing, that fits well with familiar notions of the separation of powers." See Sabel & Simon, *supra* note 12.
[299] *Id*.

increased significantly around the time that the State Council issued its decision[300]. The case therefore had an additional indirect, symbolic effect, by "transforming public opinion about the problem's urgency and gravity[301]".

Beyond the initial destabilization effect of the decision, preliminary assessments of other effects of the case indicate that, even though many problems remain urgent[302], the judicial decision enabled relevant progress in enhancing the situation of the basin[303]. There are analyses that claim that the implementation of the State Council decision has been significant, and anecdotal evidence noting perceivable improvements such as the possibility of navigating the river waters[304]. The progression of some of the relevant indicators shows important achievements, though some still lag in progress[305]. Importantly, challenges have particularly been identified in connection to certain municipalities, which find significant barriers to institutional change and therefore to overall progress towards enhancing their environmental and social circumstances[306]. Differences among municipalities further speak to the importance of strong, modern administrations to materialize

[300] *See* Álvarez Carreño & Murillo Coba, *supra* note 235.
[301] Rodríguez-Garavito, *supra* note 96.
[302] In financial terms, competent oversight bodies at the local level have found irregularities, on top of water quality not improving. *See* Ivon Andrea Galeano Yepes, Análisis sobre el cumplimiento de la sentencia 2001-90479 del 29 de marzo de 2014 en los municipios de la cuenca baja para descontaminar el Río Bogotá, Repositorio de la Universidad de Cundinamarca (2020).
[303] For a simple, overall assessment, *see* Néstor Guillermo Franco González et. al, ¿Qué tanto se ha cumplido la sentencia para salvar el río Bogotá?, Semana, Apr. 5, 2019, https://www.semana.com/impacto/multimedia/que-tanto-se-ha-cumplido-la-sentencia-para-salvar-el-rio-bogota/43717/.
[304] *See, e.g.*, Grupo Río Bogotá, ¿Cómo va el cumplimiento de la sentencia de saneamiento del río Bogotá?, December 22, 2020, available at https://www.semana.com/medio-ambiente/articulo/rio-bogota-como-va-el-cumplimiento-de-la-sentencia-de-su-descontaminacion/58380/ (accessed November 20, 2023)
[305] The goals of some indicators are deemed "fully met", such as that of water infrastructure "adaptation"; there are improvements in other, such as those related to protected areas in some municipalities; or mining projects that have environmental instruments; or solid waste suspended in waters. Other indicators are less promising; and in other cases, there is not sufficient information for assessment. *See generally*, the indicators available at the official information observatory website, at shttp://www.orarbo.gov.co/es/indicadores?id=1397&v=l
[306] See Galeano Yepes, *supra* note 302, concluding that there are very significant differences among municipalities in their compliance with action plans, ranging from 82.3% of compliance in some cases, to 5,9% in others. For an empirical analysis of state capacities at the municipal level in Colombia and spillover effects of neighboring municipalities, *see* Daron Acemoglu, Camilo García-Jimeno and James A. Robinson, State Capacity and Economic Development: A Network Approach, The American Economic Review, Vol. 105, No. 8 (2015).

social rights on top of rights-protecting norms (as, allegedly, lower implementation correlates with lower institutional capacities, as was the case in Mendoza).

Overall, while it is difficult if not simply impossible to fully assess in categorical terms the success of a case as complex as the Bogota's litigation (and it may even be too early to make a final judgment on the results of a decision that tackled problems that had existed for over a century), the results of the case seem sufficiently promising.

Needless to say, courts scrutinizing and triggering reforms in administrative entities connects to two of the perennial dilemmas of social rights litigation[307]. First, over-reliance on judicial engagement can create a risk of judges with limited capacities "micro-managing" policy issues for which they are poorly equipped. For example, it appears that some judicial micro-management is happening at the district court level regarding the building of large infrastructure projects (one of the substantive orders of the State Council decision[308]). Micro-management can lead to overburdening courts institutionally and judges personally in unsustainable ways[309]. Second, judicial procedures often provide delayed responses to pressing public problems, in ways that many times lead to the judicial expropriation of the conflict presented by a party. The fact the plaintiff who started the Bogota litigation had passed away by the time a final decision was made cruelly illustrates this problem.

Notably, however, some of the tools used in the Bogota river litigation can help address these concerns. The administrative law approach of the Bogota decision, focused on encouraging

[307] For an overview of the early critiques of this type of litigation *see, generally*, Rosenberg, Gerald, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (Chicago: Univ. of Chicago Press,1991).
[308] Around which different stakeholders often recur to the district court judge to denounce noncompliance with committed public works and ask for sanctions for judicial contempt, as shown in press coverage of the case and relevant judicial records.
[309] *See, e.g.*, El Espectador, Magistrada Nelly Villamizar renunciaría a ser garante de sentencia del río Bogotá, July 27, 2022, available at https://www.elespectador.com/bogota/magistrada-nelly-villamizar-renunciaria-a-ser-garante-de-la-sentencia-del-rio-bogota/?outputType=amp (accessed November 20th, 2023).

administrations to better discharge rights' commitments and building their capacities is relevant to mitigate judicial micromanagement, and to allow problems to be addressed by the administration, which is better equipped for immediate, agile public responses.

3.6 Conditions that facilitated innovations

Bogota innovations happened in a context of constrained institutional capacities, what could at first sight seem puzzling. Understanding the reasons that made innovations and the administrative law approach used by the State Council feasible and successful is therefore crucial, especially to assess the possibility of replicating the Bogota model in other cases (even without seeking to claim causality between these factors and the outcomes of the case), and to compare the case with related experiences such as the ones discussed in Chapter 2.

The initial conditions that enabled change include the scope of the case, the nature of the deciding court, and the legal framework discussed in section 3.2. The scope of the case enabled the engagement of numerous stakeholders and the collaboration among them in ways that can facilitate crossed capacity building and the possibility to work on the ground more effectively (as was the case in Mendoza). The nature of the problems of the basin, which connect to the daily lives of its inhabitants in tangible ways but also to the interests of civil society entities (such as universities, think tanks and the press) can further explain why sustained participation was viable throughout the years. Of course, this is only possible with a vibrant, active group of organizations in place, as is the case in Colombia.

The fact that the State Council is an administrative law tribunal obviously facilitated the administrative approach taken in the decision. Unlike constitutional courts, the State Council has a very clear understanding of how administrations work, as its core mandate is to assess their functioning both in its adversarial and advisory capacities. The expertise that the State Council

would have in the practicalities of implementing rights by administrative institutions, rather than merely in declaring rights, further facilitated a model which looks atypical in comparative literature on social rights.

The existing normative architecture was also relevant in facilitating innovations for at least three reasons. First, the strong normative recognition of collective rights enabled the intervention of courts and the framing of conflicts as rights-infringements, what functioned as the starting point of a process of institutional destabilization and change. Second, flexible procedural tools, which recognized social rights as enforceable, allowed intervening courts to be creative and tailor their responses to the specific circumstances of the case. Third, the very spirit of the 1991 Constitution incentivized public engagement in governmental decision making, which facilitated the multiplicity of participation instances that exist around the basin.

Beyond these enabling conditions, additional factors made innovations practicable and sustainable. First, the State Council paid special attention to responding to local particularities, within overarching support structures, confirming the importance of contextualizing institutions. For example, while institutions aimed at participation were created in legal norms in Colombia well before the decision, they did not lead to concrete outcomes. A possible reason for this lies in their lack of specificity (as they were designed to function across the country, and not tailored to the basin). The State Council took a different, contextualizing approach. The existence of different basin councils for each subarea of the basin is an example of this, as their membership includes local actors to address local agendas (the same is truth for local verification committees).

Other learnings from the procedures triggered by the Bogota case include the importance of setting clear, though flexible, procedural rules to facilitate participation and monitoring. Broad rules for engagement can initially be set by a third party (the judge, a legislature, or the executive)

and then be further detailed by the institution itself (in CECH's agreement, or basin Council's functioning rules, for example). Rules tend to have similar content: they anticipate the periodicity of meetings; assign responsibilities for basic leading roles, such as convening meetings; and set basic transparency rules, such as the creation of minutes or reports. Another key element is the adequate membership of institutions. Institutions created around the case engage all relevant stakeholders —at different levels of government, with adequate subject matter competences[310]— (e.g., including "the Ministry of Mines", rather than "the national government", or prohibiting the delegation of participation in lower ranking officers).

Finally, the work of the Attorney General's Office has proven crucial in sustaining institutional change (as was the case with Public Defenders offices in Mendoza). The Attorney General was appointed to integrate different bodies that emerged with the State Council decision, after its interventions in judicial procedures. In this role, the Attorney General convenes periodic meetings, special hearings, and different roundtables; produces and requests reports, including follow up reports to assess the level of compliance with the State Council decision; facilitates participation instances; pursues sanctions for different administrative actors; and generally, urges compliance with the State Council decision. Public authorities have expressed that the participation of representatives of the Attorney General's Office reassures them, and its follow up activities encourage compliance[311].

Exploring the reasons why the Attorney General's Office plays such an important role exceeds the scope of this dissertation. However, several factors can contribute to the effectiveness

[310] Notably, spaces can have a core membership but also allow for the ad hoc intervention of a myriad of other entities to support their work in different forms.

[311] *See* Gómez Lee, Martha, García Pachón, María, *Construcción de la PTAR Canoas. La lucha contra la contaminación del río Bogotá. Aspectos jurídicos y políticos*, *in* TRATADO DE DERECHO DE AGUAS (Universidad Externado de Colombia, 2018). *See also* El nuevo siglo, Descontaminación del río Bogotá sería real en 2025, October 7, 2017 at https://www.elnuevosiglo.com.co/articulos/10-2017-descontaminacion-del-rio-bogota-seria-real-en-2025 (accessed November 23, 2023).

of the Attorney General's actions in this and similar litigation. First, it has been argued that oversight institutions —which would similarly include Ombudsperson and human rights commissions—would be better placed than courts to address social rights' enforcement[312]. These institutions have different structures from courts that can facilitate engaging in policy issues, as they tend to have larger and multidisciplinary teams. Furthermore, the Attorney General has some capacity to make binding decisions if rights are infringed, highlighting again the relevance of a strong rights, normative framing of social issues. Finally, the fact that the Attorney General is envisioned as an independent entity can help build trust among stakeholders in ways that enable participation.

3.7 Bogota litigation as an instance of democratic experimentalism

The atypical characteristics of both the State Council decision and of the administrative reforms it triggered characterize Bogota's innovations as another instance of experimentalist decision making. Indeed, the guiding principles for the basin's planning and management defined by the State Council replicate experimentalist concerns over flexible rules that are effectively assessed periodically, the relevance of stakeholder engagement and transparency, and the need to respond to local particularities within overarching support structures discussed as core features of experimentalism in the Introduction to this dissertation. The State Council, accordingly, refrained from making detailed and sweeping substantive judgements on how to define and remedy the rights at stake in the case. Instead, it set three overarching, guiding goals, and issued a number of orders directed at putting in place the institutions needed for administrations (the "local units") themselves achieving those goals.

[312] Landau, *supra* note 24.

The experimentalist model fosters reasoned collaboration among different actors, both from the public and private sectors, and coordination efforts from a variety of parties[313]. These concerns are largely reflected in the three key innovations triggered by the Bogota case. The Bogota River case illustrates the importance of engaging all relevant stakeholders (at different levels of government, with adequate subject matter competences, etc). At the same time, it shows the need to nuance the integration of participatory spaces to local particularities (e.g., by including "the Ministry of Mines", rather than "the national government", or prohibiting the delegation of participation in lower ranking officers)[314]. Bogota innovations also illustrate the importance of setting clear, though flexible, procedural rules to facilitate participation and monitoring. Learnings from the case show that broad rules for engagement can initially be set by a third party (the judge, a legislature, or the executive) and then further detailed by the institution itself (in CECH's agreement, or basin Council's functioning rules, for example). Rules tend to have similar content: they anticipate the periodicity of meetings; assign responsibilities for basic leading roles, such as convening meetings; and set basic transparency rules, such as the creation of minutes or reports.

Experimentalism also stresses the importance of contextualizing regimes to local realities. In the same vein, the Bogota case confirms the importance of contextualizing institutions. As anticipated, institutions aimed at enabling participation were created in legal norms in Colombia well before the Bogota river decision but did not lead to concrete outcomes. Allegedly, a reason for this lies in the fact that the State Council provided guidelines that responded to the

[313] *See* Cohen and Sabel, *supra* note 10.

[314] Some participation spaces pose the risk of certain actors, such as Universities and professionalized and large non-governmental organizations, taking over spaces and "appropriating" discussions on conflicts that impact more directly other actors. For example, in the election for the current confirmation of the current basin council, only two sets of actors had enough candidates (more than three) to require a selection process: higher education institutions and municipalities.

particularities of the basin, rather than being aimed at working across the country (such as basin councils for each subarea of the basin).

Chapter 4: Reimagining administrative law for social rights

The last decades have witnessed a significant increase in the tasks that public administrations around the world perform, which now rank from protecting the environment and consumers of a wide range of products and services, to dealing with pandemics and managing complex social security systems[315]. In some cases, administrations are constitutionally or legally required to perform various activities that have gradually increased their areas of authority. Others do so motivated by political considerations, but surely all of them engage in profuse and multifaceted actions due to the complex and rapidly changing nature of many modern public problems[316].

Legal scholars have puzzled about how the new roles of administrations fit into traditional constitutional theory, as constitutional law has typically been silent about administrations as such and presented the Executive as the branch of government merely tasked with executing the law[317]. Some have raised significant concerns about administrations taking over competences that do not belong to them and for which they have limited democratic legitimacy, triggering vehement debates on the proper limits of administrations' functions and of executive branches' roles[318].

[315] *See* Bignami, Francesca, From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law, American Journal of Comparative Law, Vol. 59 (2011) (arguing that "The trend has been for government administration to amass substantial powers, in the face of both increasing scientific and social complexity and the internationalization of policymaking").

[316] The reasons behind the consistent growth of the administrative state are manifold and lie in the eye of the beholder. For discussions on possible reasons, *see, e.g*., Kagan, Elena, Presidential Administration, 114 Harv. L. Rev. 2246 2000-2001 (noting Congress limitations of knowledge and capacity, incapacities to reach agreements, and willing to pass politically difficult decisions to other bodies).

[317] *See* Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 Geo. L.J. 217 (1994), discussing the capacity of the Executive power to also interpret the laws it executes.

[318] For an overview of critiques to the administrative state (and sharp responses to them), *see* Gillian E. Metzger, Foreword: 1930s Redux: The Administrative State Under Siege, 131 Harv. L. Rev. 1 (2017); On the scope of the notion of "administrative state", *see* Anne Joseph O'Connell, Bureaucracy at the Boundary, 162 U. Pa. L. Rev. 841 (2014).

In Latin America, the expansion relates —among other things— to the ambitious recognition of social and economic rights at the constitutional and statutory level, which require a wide range of administrative measures for their fulfillment, as discussed in Chapter 1. Notably, however, the implications of enlarged social rights' mandates for administrations for administrative law are often under-discussed. As a result, even though administrations' goals have changed significantly, traditional administrative law has not. This creates a mismatch between the goals administrations need to pursue, and the tools they have in place to do so[319].

As the case studies from Chapters 2 and 3 show, in fact, the "canon" of administrative law in Latin America can often hinder the realization of social rights, making evident the need to better connect administrative law to existing constitutional commitments. Indeed, traditional administrative law may be a barrier to facilitate some of the innovations discussed in previous Chapters. As a person engaged in the Mendoza litigation put it, if traditional administrative law rules were to be applied strictly in the case, they would make relevant innovations frankly impossible.

Because of social rights' characteristics —such as the open-ended language through which they are recognized in norms and their interdependence—, they call for ongoing administrative action to be adequately realized. Social rights need to be contextualized through mediating administrative policies and actions that only administrations —unlike courts and legislatures— can perform effectively, as discussed in more detail in Chapter 1[320]. However, while traditional administrative law rules indicate that administrations shall be organized in hierarchical ways, segmented by thematic clusters, and work through typically linear, formal, and closed procedures,

[319] *See, e.g.,* Jaime Rodríguez-Arana Muñoz, Derecho administrativo y derechos sociales fundamentales (Administrative law and fundamental social rights), Revista de Derecho. Vol. 6 (2017), pp. 95-105.
[320] Even though legislatures and courts do play a very important role in the vindication of social rights.

social rights call for administrations that are energized, well-coordinated, open to external inputs, and engaged in ongoing adjustment of their actions (as Chapter 2 and 3 show).

This Chapter is devoted to discussing the implications of tasking administrations with securing a bundle of social rights for administrative law. It specifically suggests reforms in canonical administrative law in Latin America that could better align this area of law with administrations' current constitutional mandates. For that end, it sketches five principles that could guide a new thinking on administrative law, all of which, I argue, are pre-conditions for successful social rights' fulfillment: acknowledging informal administrative action; enhancing administrative coordination; combating administrative inertia; facilitating monitoring and assessment; and increasing transparency and participation in decision making procedures.

The Chapter provides concrete examples of institutions that could be reshaped to facilitate social rights' fulfillment, extracted from discrete though promising innovations. I draw from real world examples taken mainly from the Mendoza case discussed in Chapter 2, which herald in subtle yet important ways the path through which administrative law could be reimagined to make it better fit for the fulfillment of complex and context-dependent rights.

As in previous sections of this dissertation, while this Chapter focuses on Latin America —for reasons that make countries in the region highly comparable, discussed below— its core arguments are likely relevant for other parts of the world as well. The disconnection between administrative practice and administrative law has been argued about other jurisdictions[321]. It has also been claimed that the effectiveness of governments and their capacity to provide basic services such as education or health care are deeply compromised at the global level, as anticipated in

[321] On the disconnection between administrative and actual administration in the United States, *see* Gillian E. Metzger, Administrative Law, Public Administration, and the Administrative Conference of the United States, 83 Geo. Wash. L. Rev. 1517 (2015).

Chapter 1[322]. Furthermore, many of the concepts of administrative law on which this piece builds are the ones that have been routinely used in comparative administrative law for decades —stemming, centrally, from the organization of administrations and the judicial review of their actions—, what facilitates the replication of my arguments for other contexts[323].

4.1 Canonical administrative law in Latin America

4.1.1 The canon of administrative law

There are many ways in which administrative law can be defined. I will use a broad definition according to which administrative law refers to a set of rules, doctrines, procedures, and practices that govern the functioning of administrative entities in their interaction with private parties[324]. Administrative law varies in different legal systems, even though issues of administrative organization, procedures and judicial review of administrative action are key concerns across systems[325].

I call "canonical", "mainstream" or "traditional" administrative law in particular the discipline that emerged as such systematically in many countries of Latin America in the early 20th century to regulate the way in which administrations were organized and their interactions with private parties. Importantly, following the French tradition and departing from common law conceptions of this area of law, administrative law in Latin America is a distinctive discipline with its own principles —different from those of private law—, which grant special prerogatives to the

[322] Dawood, *supra* note 58.
[323] "This intellectual framework is rooted in the historical origins of the field, which was characterized by a spectacular confidence in the ability of a professional bureaucracy to fulfill the purposes of society. Administrative law was cast as a set of rules and procedures designed to promote effective administrative action and a series of remedies, afforded by the courts, should public administration exceed the limits of these rules and procedures", Bignami, *supra* note 315.
[324] Coglianese, Cary, Administrative Law: Governing Economic and Social Governance, U of Penn Law School, Public Law Research Paper No. 22-05 (2022).
[325] See Bignami, *supra* note 315.

State (such as the capacity to modify contracts[326]). In Latin America, administrative law is applied in strongly presidentialist regimes, and generally with the availability of judicial review of administrative action[327]. Even though administrative law is a local discipline (particular to each country, and to each local state in federal countries), canonical administrative law shares relevant characteristics and common sources in countries across the region[328].

The systematic emergence of administrative law led to the passing of several statutes and to specialized scholarship and law teaching[329]. The canon of administrative law was originally envisioned as a set of rules mainly focused on organizing power and ensuring that administrations did not exceed their roles and where expert-led, containing potential abuses of political agents[330]. I will discuss the principles and institutions of the canon of administrative law below.

Canonical administrative law was designed and put in place decades before the systematic and widespread recognition of social rights at the constitutional level across Latin America, which took place mostly in the late 20th century[331]. While canonical administrative law was subject to several modifications throughout the years, its main characteristics are still largely reflected in

[326] *Id*.
[327] *See* Alegre, Marcelo, and Nahuel Maisley, *Presidentialism and Hyper-Presidentialism in Latin America*, *in* Conrado Hübner Mendes, Roberto Gargarella, and Sebastián Guidi (eds), THE OXFORD HANDBOOK OF CONSTITUTIONAL LAW IN LATIN AMERICA (online edn, Oxford Academic, 2022).
[328] Even though, it has been argued, one can anticipate less convergence (due to local cultural, practical and political considerations) in administrative law than in constitutional law, where courts and constitutional drafters often borrow from other systems. See Ginsburg, *supra* note 54.
[329] Statutes refer both to procedural and substantive areas of administrative law, such as procurement, eminent domain, torts responsibility, public employment, public services (akin to public utilities), which are usually part of the canon of administrative law in Latin America.
[330] *See* Zimmermann, Eduardo, *Circulation des savoirs juridiques: le droit administratif et l'État en Argentine, 1880-1930*, *in* LES SAVOIRS-MONDES: MOBILITÉS ET CIRCULATION DES SAVOIRS DEPUIS LE MOYEN ÂGE (Rennes: Presses universitaires de Rennes, 2015).
[331] From a historical point of view, it has been argued with regards to the origins of administrative law, some that there is a continuity between pre-modern and modern regimes. Others, instead, see a turning point in the end of the old regime in France after the French revolution. *See* Bernardo Sort, *Revolution, Rechtsstaat and the Rule of Law: Historical Reflections on the Emergence and Development of Administrative Law*, *in* COMPARATIVE ADMINISTRATIVE LAW (Second Edition, Susan Rose-Ackerman et al, Edward Elgar Publishing, 2019).

core statutes, caselaw and in mainstream law teaching and legal scholarship[332]. As a result, canonical administrative law in Latin America is generally poorly placed to facilitate administrations' current commitments to fulfill social rights. The following sections discuss those limitations and how they relate to the origins of canonical administrative law.

4.1.2 Sources and origins

While many sources influenced administrative law in Latin America (and there are relevant differences among countries[333]), the most significant ones came from European law of the late 18th and early 19th centuries. More specifically, many Latin American countries "imported" either directly or indirectly their central administrative law institutions from the ideas of the French *Council d'Etat* (State Council). In comparative administrative law the French tradition represents one of the models that have strongly influenced the discipline and related scholarship in the Western world (and is often compared —or contrasted— with the traditions coming from England and Germany and, later, from the United States[334]).

The French State Council is a special body created in 1799 by Napoleon Bonaparte to advise the administration and then for the administration to judge itself, stemming from the then existing distrust towards the judicial power and under the idea that judging the administration was administrative —and not judicial— action[335]. The State Council sought both to create a special body of law that would justify why the administration was subject to its jurisdiction and not to ordinary courts' oversight, and to control and limit the action of the administration to protect

[332] For constitutions' institutional design remaining unchanged despite the incorporation of social rights, *see* Gargarella, *supra* note 53.
[333] See Libardo Rodriguez Rodriguez, La explicación histórica del derecho administrativo, Universidad Nacional Autónoma de México (2005), available at https://archivos.juridicas.unam.mx/www/bjv/libros/4/1594/16.pdf (accessed November 25, 2023).
[334] See Sort, *supra* note 331.
[335] See Rafael Ballén, El Consejo de Estado Francés después de la revolución; Revista Diálogos de Saberes No. 27 (2007).

individual rights[336]. These aims are line with the reigning view of the 18th and early 19th centuries that held that the essential role of government was to secure freedoms in the form of "negative" civil rights (centrally, property rights), and not to actively fulfill "positive" rights[337]. Therefore, since its birth canonical administrative law in Latin America mirrored a model centered in containing, rather than incentivizing, governmental power.

While there is consensus among scholars that French administrative law was the biggest influence in the formative period of administrative law in Latin America[338], tracking how the French influence traveled through continents is a murky exercise. Legal borrowing was not always the result of a deliberate and systematic effort to introduce institutions aligned with the goals of the then emerging nations of the region. Attempts to account for the influence of French administrative law in Argentina, for example, show how the incorporation of European doctrines was at least partially explained by personal relationships of law professors, and by the cultural references of certain small, highly educated groups that did not necessarily represent the views of those leading the new nations' political goals[339]. Indeed, scholarship in Argentina often notices the mismatch between the country's constitutional text and tradition, which originally mimicked the American constitution, and its administrative institutions, which mimic the European continental tradition, further speaking to the incoherence of the legal system.

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[336] *Id*.

[337] Similar arguments have been made for "the formative period of American law", until the end of the nineteenth century. "[T]he chief problem of the formative period of American law was to discover and lay down rules; to develop a system of certain and detailed rules which, on the one hand, would meet the requirements of American life, and, on the other hand, would tie down the magistrate by leaving as little to his personal judgment and discretion as possible, would leave as much as possible to the initiative of the individual, and would keep down all governmental and official action to the minimum required for the harmonious coexistence of the individual and the whole. This problem determined the whole course of our legal development until the last quarter of the nineteenth century", Pound, The Administration of Justice in the Modern City, 26 Harv. L. Rev. 302, 306 (1913).

[338] With notions such as those of "public service", "administrative jurisdiction", the "principle of legality", or the "dual nature" of contracts, goods and relationships of the administration mimicked in Latin American countries.

[339] Zimmermann, *supra* note 330.

Furthermore, the incorporation of the State Council doctrines sometimes took place indirectly, through the work of Spanish scholars influenced by the French tradition who translated French texts to Spanish, making borrowing even less systematic. The influence of Spanish administrative law was in turn prevalent in later stages of the development of administrative law, when core administrative procedures statutes were passed in the mid-twentieth century, adding a layer of complexity[340].

The inarticulate nature of the legal borrowing from which traditional institutions emerged may explain why the State Council's influence was so pervasive despite the clear mismatch between the underlying goals of French administrative law in the late 18th and early 19th centuries and those of Latin American nations in the early 20th century. By the time Latin American countries started to formally build their administrative law institutions in the early 1900s, the more stringent view on limited and minimal government that prevailed in the early 1800s had changed. Indeed, by the beginning of the twentieth century, governments were expected to engage in railroad and commerce regulation, exercise some sort of "police power", and increasingly respond to labor concerns and other social issues.

However, the core ideas of the French State Council remained largely unaltered and reached Latin America to eventually shape local institutions. While administrative law institutions did go through adaptations in different Latin American countries, those adaptations did not necessarily respond to the new goals that administrations were supposed to pursue[341]. Overall, the

[340] Overall, these laws followed the abrogated Spanish Statutes on the legal regime of the administration (1957) and of Administrative procedures (1958), See Brewer-Carías, A, La regulación del procedimiento administrativo en América Latina con ocasión de la primera década (2001-2011) de la Ley de Procedimiento Administrativo General del Perú (ley 27444) (Administrative procedure regulation in Latin America, first decade of General Administrative Procedure Law in Peru (Law No. 27444, 2001-2011)), Derecho PUCP 67 (2011), 47-76.

[341] Indeed, the two biggest adaptations were allowing for a system of judicial review of administrative action (forbidden in France), and a stronger reliance on written statues than was typical in French administrative law. *See* Rodriguez Rodriguez, *supra* note 333.

reigning model of administrative law still reflects even to date, to a large extent, the old view of public administrations, inattentive to states' positive duties and to the characteristics of most modern public challenges, such as their complexity, uncertainty, fluidity, or interdisciplinary nature.

4.1.3 Characteristics

Based on the French influences described in the previous section, Latin American countries developed their administrative law institutions and doctrines through special statutes, case law, and influential scholarly commentary. In the region, administrative law typically covers issues such as administrative procedure regulation, plus norms on public procurement, public services, and State responsibility.

This section presents some of the main traits that the law that emerges from these sources typically shares across countries. The description is general as it tries to capture commonly observed characteristics present across jurisdictions, although the contours of an institution would obviously vary from case to case. Furthermore, the description only responds to some basic traits of the canon of administrative law, which do not represent the entirety of the discipline, including emerging innovations I will discuss later (which largely challenge the idea of hierarchies and seek to increase transparency and participation in administrative decision making)[342].

Overall, canonical administrative law sees public administrations as *bureaucratic organizations*, as described by Max Weber[343]. These are hierarchical organizations, with widespread use of rules, impersonal procedures, reliance on specialists, and a dual flow in communications: information flows upwards, while instructions and commands flow

[342] *See, e.g.,* Francesca Bignami, *supra* note 315, who also argues that comparative administrative law in particular "...has failed to keep abreast of this transformation of the administrative landscape."
[343] Simon, *supra* note 280.

downwards[344]. A bureaucratic organization assumes that the legitimacy of its decisions relies mainly on previous authorization (a backward-looking or *ex-ante* conception); that rules (detailed, fixed, and discretion-liming) are the most important type of norm, trumping principles, plans, etc.; and that errors are circumstantial and can be addressed by individual challenges and complaints[345]. The reigning bureaucratic model translates a concern over making administrations technical and expert-led, due to the perceived problem of politicization. Under this model, law-creation and law-application are seen as two distinct and easily separable activities, with administrations merely applying or executing the law under the belief that formal rules are clear and detailed enough to be applied with minimal discretion[346].

In traditional bureaucracies, the regulatory approach applied by default is "command and control". The model assumes that there is a chain of command that enables rules to travel from officials at the top of the hierarchy who design them to front line officials who apply them with minimal discretion. The assumption is that needs can be anticipated and resolved through general rules that are set before being confronted with experience. Responsibility is measured by compliance with such rules, rather than by meeting their underlying, substantive goals, and managed through the application of sanctions[347].

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[344] *Id*.
[345] *Id*. For example, the regulation of legal avenues to challenge administrative decisions assumes that errors are circumstantial and would only be reviewed on an individual basis if a private party questions them. It also assumed that solutions can be found through the intervention of a hierarchically superior authority.
[346] The idea that administrations can simply apply law to the facts of a case in a straightforward manner is largely a fiction. In the United States, statistics showing dramatic inconsistency in adjudication of individual cases across a wide range of agencies illustrate how idiosyncratic administrative action is, and how applying law to the facts is far from being a mechanic, non-discretional exercise, making openness and oversight of utmost relevance. See Ho, *supra* note 61.
[347] Simon, *supra* note 280.

The following sections describe in more detail some core principles that canonical administrative law promotes, which largely reflect the concerns of bureaucratic organizations. They also anticipate how these principles can be limiting for social rights' discharge.

4.1.3.1 A large focus on forms and formal administrative action

Canonical administrative law is largely built around the way in which administrations act formally. Formal action usually refers to written expressions derived from detailed, ruled, and previous procedures. Such action typically takes two forms: (i) individual acts issued either as a response to an initial petition of a private party or spontaneously by the administration, usually called "administrative acts" (*actos administrativos*); and (ii) general, mandatory rules, seeking to apply to an undetermined number of persons (regulations or *reglamentos*). Statutes generally set detailed formal requirements for administrative acts to be valid, deeming acts that do not comply with such requirements void.

The rationale behind this view is probably the assumption that governments centrally act to limit "negative" rights (rather than to actively provide services). Therefore, authorities should only limit rights through formal procedures, to ensure that affected parties have an opportunity to be served, challenge decisions, etc. This view also assumes that the legitimacy of administrative action depends centrally on previous authorization, with legal rules needing to anticipate precisely how administrators shall act and minimize discretion.

While these are understandable and relevant concerns, an excessive focus on formal administrative action has unintended negative consequences. For a start, it equates the tasks of administrations with those of judges (adjudicating individual controversies by issuing a formal, individual decision) and legislatures (issuing general, mandatory rules), diminishing the more

idiosyncratic tasks that administrations perform[348]. It therefore ignores that the bulk of what administrations currently do does not take the form of either an act or a regulation[349]. Indeed, administrations organize and provide services, meet with private parties and other governmental bodies, gather information, negotiate, set priorities, provide guidance and advice, prepare budgets, engage in reforms, communicate their activities to the public, hold consultations, plan, engage in training, supervision, implement formal decisions, etc.[350]

By neglecting informal action, a deeper understanding of the works of administrations is therefore lost. This is particularly problematic in the case of social rights, which rely heavily on informal action to be materialized, as will be discussed below. Lack of attention to informal activities may even convey the impression that non-formal action is somehow illegal, which is often not the case. Legal silence about such activities misses the opportunity to set minimum standards for informal action (for example, those related to transparency) and to promote accountability over a relevant part of administrative action. It also detaches administrative law from reality, making it partly fictional.

4.1.3.2 A linear view of procedures and decision making

Under canonical administrative law, formal decisions are expected to result from a formal, previous procedure. Procedures are aimed at promoting different goals: making accurate decisions, gathering evidence, protecting private parties' rights (for instance, by granting a hearing, making serving mandatory, or giving time to challenge decisions); or enabling future judicial review.

[348] See, in general, Edward Rubin, It's Time to Make the Administrative Procedure Act Administrative, 89 Cornell L. Rev. 95 (2003).
[349] In the U.S., it has been argued that stating that "[t]he Administrative Procedure Act (APA) has been out of date from the day it was written because it fails to address the administrative character of the modern state". By focusing on rulemaking and adjudication -activities that obviously resemble legislation and judicial decision making, the argument goes, APA fails to account for most of administrative action, and therefore a new statute should be drafter. Rubin, *supra* note 348.
[350] Barnes, Javier, Tres generaciones del procedimiento administrativo, Derecho PUCP 67, pp. 77-108 (2011).

Therefore, the premise of mainstream administrative law is that the bulk of what administrations should do is to formally decide after a procedure directed at providing relevant information[351]. Together with substantive decisions, other actions such as producing information or putting previous decisions into practice shall also be preceded by formal procedures.

Decisions are deemed the main goal of administrative action, and often described as final, exhausting administrative intervention[352]. Indeed, as a rule, there are no regulated routine post-decision procedures in core administrative law statutes, except for an individual's right to challenge a decision directed to her, during a limited time. For instance, it is rare that general statutes mandate administrations to monitor the impact of their decisions, or to assess the need to review them in light of experience (which may happen as a result of discretionary policy choices, but typically not because of a default mandate of mainstream legislation)[353].

The assumption is that administrations can anticipate all the relevant information they need to decide, usually with no external input. Indeed, administrative law statutes often give administrative acts strong traits of finality, modeled after judicial decrees, such as *res iudicata*. General rules established by administrations are also supposed to be stable over time[354].

Procedures, in this sense, are linear as opposed to circular, with continuous monitoring and revisiting. Indeed, scholars usually define the administrative procedure as a "chain" of individual acts that are chronologically organized together and function as the cause and effect of one

[351] Instead of, for instance, engaging in less-procedural action such as defining priorities, providing services, supervising, or modifying decisions, etc., as they often do. See Barnes, *supra* note 350.
[352] See, e.g., Halperon, David A., *El Principio de Estabilidad del Acto Administrativo*, *in* TAWIL, Guido S. (Dir.), ACTO ADMINISTRATIVO (Abeledo-Perrot, Buenos Aires, 2014).
[353] An example will illustrate. In countries like Argentina, environmental Impact Assessments are determinations about the potential environmentally harmful impact of an activity which are required before the activity starts taking place. However, it is hard -if not impossible- to anticipate in the abstract the effect that an action will have in a particular context. Follow-up procedures after an EIA is issued are typically not required.
[354] Simon, *supra* note 280.

another[355]. In a traditional administrative procedure, interventions are written and happen linearly, with different offices making subsequent interventions instead of coming together in a unique instance to deliberate and deliver a consensual opinion or decision. As will be discussed in detail below, the linear view of procedures collides with social rights need for ongoing adjustment to varying contexts and changing circumstances.

4.1.3.3 The notion of hierarchy as the backbone of the system

The idea of hierarchy is deeply embedded in traditional administrative law. Administrations as organizations are defined by this principle and envisioned as pyramids with a downstream chain of command. Different canonical institutions reflect the principle of hierarchy. For example, in some jurisdictions while delegation of power to lower-ranking officers is prohibited as a rule, higher authorities can take over decision-making power from lower-ranking officials[356]. In Colombia, even the constitution regulates delegation of power from the president "downwards", stating that laws need to fix the conditions under which delegation is admissible, but higher authorities can always change, or revoke delegated acts[357]. Similarly, if a private party challenges an administrative decision, it is the immediate superior of the officer who issued the original decision who can eventually decide the challenge, even if not fully informed of the circumstances relevant to the case.

The President is considered the head of the pyramid and is largely able to direct every agent's conduct either by appointing and removing officers, or simply by "commanding" them formally or informally. Modern constitutions still generally concentrate authority in the hands of

[355] See, for example, L. 27444, abril 1, 2001 (Peru), art. 29.
[356] See, e.g., Law No. 19549, apr. 3, 1972, Adla, XXXII-B, 1752 (Arg.)
[357] CONSTITUCION POLÍTICA DE COLOMBIA (C.P.), art. 211.

the executive[358]. Indeed, virtually all Latin American countries have strong presidential regimes[359]. Many countries give substantial discretion and power to presidents and have been defined as "delegative democracies": systems where presidents can largely govern as they see fit[360]. Presidents define and custody the interest of the country, do not need to meet their campaign promises, and are hardly constrained by other institutions, as accountability is perceived as an impediment to their full authority[361].

Strongly hierarchical organizations have limited capacity to deal effectively with complex problems —such as implementing social rights— that require constant interaction with issues on the ground. Hierarchies tend to neglect the value of the hands-on knowledge that front-line administrators have. Neglecting the relevance of their roles and their responsibilities can also reduce their incentives to take tasks seriously and with agency, creating problems of inertia that can be at the core of social rights' unfulfillment[362].

4.1.3.4 The idea of centralized and segmented administrations

As anticipated in Chapters 2 and 3, canonical administrative law envisions a centralized administration, separated from the private sector, from international entities, and from other public administrations[363]. Organizationally, as a rule, all units (agencies, ministries, etc.) are considered parts of the very same central structure[364]. In theory, only occasionally certain units are granted additional autonomy or independence, considering traits such as nuanced technical capacity in the

[358] Despite having gone through significant reforms in other areas during the last decades. See Gargarella, *supra* note 19.
[359] Richard Albert, The Fusion of Presidentialism and Parliamentarism, 57 Am. J. Comp. L. 531 (2009) (claiming that "The conventional narrative holds that presidential regimes separate governmental powers and disperse public power across autonomous branches of government, typically the executive, legislature, and the judiciary").
[360] See O'Donell, Guillermo A. "Delegative Democracy." Journal of Democracy, vol. 5 no. 1, 1994.
[361] *Id*.
[362] Maybe for these and other reasons, the depiction of public administrations as hierarchical organizations that single-handedly implement clear legislation is increasingly challenged. See Bignami, *supra* note 315.
[363] See Barnes, *supra* note 350.
[364] Forsthoff, Emst, TRATADO DE DERECHO ADMINISTRATIVO (Madrid, Instituto de Estudios Polîticos, 1958).

case of central banks. In practice, however, independent entities have proliferated, speaking to the complexity of modern public problems and to the need for more adaptable rules than the canon envisions.

Centralized administrations are internally organized according to segmented subject matters, designed in general as non-communicative clusters or silos (Ministries of education, health, justice). Each cluster, specialized in a particular area of public intervention, is supposed to perform a task (and only that task), and usually reports upward in the organization, but generally does not coordinate horizontally with other clusters performing different tasks. In the canon, cooperation and coordination are more commonly seen at the upper part of the hierarchy, for example through cabinet meetings.

Indeed, a problem that has been extensively documented in different regions of the world is that of lack of coordination among different authorities who need to intervene in a particular issue, as the case studies from Chapters 2 and 3 show[365]. The numerous attempts outside of the canon to enhance coordination among authorities further speak to how pervasive the problem is. For example, scattered statutes in different countries often create interjurisdictional bodies, coordination units or roundtables, as well as mechanisms for exchange of information among entities, often on ad hoc basis[366]. However, many of these attempts seek to sort out coordination problems by strengthening hierarchies rather than by rethinking how authority is assigned in a way that is more consistent with the interdisciplinary nature of real-world problems.

The legal backbone of centralized administrations is the idea of "competence": the authority an agent or office is assigned. Under canonical administrative law, each office within the

[365] *See, e.g.*, B. Guy Peters, The challenge of policy coordination, Policy Design and Practice, 1:1, 1-11, (2018).
[366] See *supra* note 238.

administration is assigned a specific competence, either explicitly or implicitly, to do something[367]. As such, each office is supposed to do what it is instructed to do by a mandatory law. If an officer issues an act or regulation that is not within its competence, the resulting act is deemed void[368]. Considering the virtual impossibility of anticipating all actions an entity would have to engage with, the interpretation of such provisions has often evolved to become more flexible, assuming that administrations would typically need to engage in exercising authority beyond what is either explicitly or implicitly anticipated in an enabling norm[369]. However, strict views on competence are still in place, at least in paper.

4.1.3.5 Closed procedures

In the reigning model of administrative law, administrations are largely supposed to conduct their business without involvement of private parties[370]. Overall, administrative procedures tend to be closed, with very few opportunities for input, learning or collaboration from third parties. In general, the procedural rights of private parties have developed in connection to

[367] In traditional administrative law theory, the attribution of authority should be made explicitly in an "authorizing norm", assuming again that all details of administrative action can be anticipated.
[368] *See, e.g.*, Ley Federal de Procedimiento Administrativo (Federal Administrative Procedure Act), LFPA, Diario Oficial de la Federación (DOF), 04-08-1994, Última reforma publicada DOF 18-05-2018 (Mex.), arts. 3 and 5.
[369] For example, under framings such as "specialty principles", which argues that administrations shall be enabled to do all that is necessary to meet their specific mandates.
[370] Some scholars argue that Latin American institutions have traditionally given preference to internal governmental controls (under the idea of checks and balances among branches of the state), rather than external ones in charge of civil society. *See* Gargarella, Roberto, *Deliberative Democracy, Dialogic Justice and the Promise of Social and Economic Rights*, *in* Helena Alviar García, Karl Klare, Lucy A. Williams (eds), SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE, 105 (Rutledge, 2015). Many constitutions in Latin America still organize power in a way that reflects mid-nineteenth century's views, with a narrow approach to democracy. These constitutions tend to limit instead of encouraging political participation. *See* Gargarella, *supra* note 19. Recurrent dictatorships during the 20th century have further discouraged popular engagement in public affairs. However, more modern constitutions in the region tend to incorporate different forms of public participation and semi-direct representation. In fact, some claim that the region made an open constitutional move towards more participation in the last decades. A clear pro-participation example is the 1991 Constitution of Colombia, which has been described as a change in paradigm from a representative democracy to a participatory one.

individual adjudication procedures, although such rights are much less clear in a rulemaking or other standard-setting process, let alone in the informal action context[371].

While both at the normative and scholarly levels the importance of public participation is gaining increasing recognition[372], traditional standing rules for administrative procedures often still reflect the traditional conception which is not enabling to open administrations to the views of external parties. Canonical laws require an injury in fact and a direct personal interest for someone to be admitted as a party in an administrative procedure (much like in judicial proceedings, which administrative procedures largely mimic).

Once a person or entity is considered a party to a procedure, they have a rather passive role, even though they are granted procedural rights such as offering evidence or challenging formal decisions. Procedures can be triggered on demand, but communications between the administration and citizens are narrow. Parties have a distant bond with the administration and very seldom interact with it. It is generally the administration that instructs procedures, and private parties have passive access to records[373].

Procedures generally lack participation instances, except for mandatory hearings in a few cases, usually when the procedure entails applying some sort of penalty to an individualized party[374]. There are generally no openness rules for rulemaking, such as notice and comment instances under the Administrative Procedure Act in the United States[375]. When laws regulate

[371] *See* Paul Craig, 10, ADMINISTRATIVE LAW (6th edition, Thomson, 2008), arguing that a possible explanation for this is that "in the model of the Dicey unitary democracy and ultra vires principal model, the foundational principles is that public participation functions "indirectly" by voting.
[372] *See, e.g.*, Widman, *supra* note 254.
[373] *See* Law No 19880, 29 de mayo de 2023 (Chile), art. 33; L. 27444, abril 1, 2001 (Peru), art. 159; Law No. 19549, apr. 3, 1972, Adla, XXXII-B, 1752, (Arg.), art. 1.
[374] *But see* L. 27444, abril 1, 2001 (Peru), art. 182, regulating hearings.
[375] *See* Susan Rose-Ackerman, Edgar Andrés Melgar, Hyper-Presidential Administration: Executive Policymaking in Latin America, 64 Ariz. L. Rev. 1097 (2022).

participation during the process of developing regulations, they often only provide weak forms of participation[376].

4.2 Departing from the canon: the evolution of public administrations' roles

The core characteristics of canonical administrative law in Latin America reflect the concerns that prevailed at the time of its origin and the narrow role assigned to public administrations two centuries ago. Indeed, traditional constitutional theory envisioned a leading role for legislatures and a more limited one for administrations in matters related to constitutional rights. In this framework, legislatures are seen the most direct form of democratic representation in a three-branch government and are therefore deemed the most legitimate body to regulate constitutional rights, under the assumption that governments are more concerned with restricting rights within boundaries than with actively providing services to secure positive rights[377].

However, since the early twentieth century a constant growth of the role of public administrations has been taking place, starting with railroad and mailing services, land management, statistics generation, commerce and police power regulations, and moving to the management of complex welfare schemes and environmental protection, to mention some examples. This process naturally led to increased executive powers' authority and activities[378], considering legislatures' unfitness to respond to fluid, rapidly changing, complex and context-

[376] *See, e.g.*, Decree 1023 of 2022 of the Argentine President, which gives discretion the President to convene participation instances, and gives no legal relevance to the considerations made in participatory procedures.
[377] *See generally* Stephen Gardbaum, Limiting Constitutional Rights, 54 UCLA L. Rev. 789 (2007).
[378] In the U.S., it's common to refer to this phenomenon as the growth of "the administrative state" (although the term often carries very different meanings). *See* Metzger, *supra* note 318. The growth of administrative functions and power is not only a federal phenomenon in the United States, but also occurs at the state level. *See* J. Harvie Wilkinson III, Assessing the Administrative State, 32 J.L. & Pol. 239, 239–40 (2017).

sensitive issues[379]. In Latin America, a very significant aspect of the varied activities that administrations are now expected to perform relates to bringing to practice social rights.

As discussed in extension in Chapter 1, introducing social rights as mandatory in a legal system has multiple and clear consequences for public administrations, and therefore for administrative law. However, the connection between social rights and administrative law remains under-debated. Scholarship often overlooks administrative law's implications for social rights and vice versa. Indeed, while public administrations' design and regulations are essential for securing a bundle of social rights, it is not fully discussed in human rights' law and scholarship.[380] Similarly, administrative law discussions (not only in Latin America) often revolve around procedural issues without analyzing how administrations can best pursue some of the substantive goals currently assigned to them, such as securing fundamental rights[381].

As anticipated in Chapter 1 and demonstrated here, the disconnection has led to a mismatch between the current goals of public administrations in Latin America (set often in national constitutions) and the means they have in place to pursue them (set by default in core administrative law statutes still guided by the canon). It is easy to anticipate that the institutions and doctrines originated in the 18th century would not facilitate compliance with the tasks that administrations are expected to perform in the 21st century in the realm of social rights, a goal

[379] Legislatures have been characterized as having blind spots, for example, when failing "…to anticipate the impact of laws on rights because they do not appreciate, adequately, the perspective of rights claimants with very different life experiences and viewpoints". Rosalind Dixon, Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited, International Journal of Constitutional Law, Volume 5, Issue 3, July 2007, Pages 391–418, https://doi.org/10.1093/icon/mom021. Legislative bodies' structure and time-consuming procedures make them unfit to deal with certain problems. *See* Craig, s*upra* note 58. Some authors have a different narrative, though, stating that Congress has "ceded" its power, as courts have done when being too deferential to the Executive. J. Harvie Wilkinson III, Assessing the Administrative State, 32 J.L. & Pol. 239, 240–41 (2017).

[380] See Ignacio Boulin, Human Rights Law Should Meet the Administrative State, OxHRH Blog, August 2020, available at http://ohrh.law.ox.ac.uk/human-rights-law-should-meet-the-administrative-state/>

[381] See, Forsyth, *supra* note 20, arguing that "Throughout its history, administrative law in the UK has generally been concerned with procedure rather than substance".

already difficult in a context of limited institutional capacities. Social rights do not require the limitation and isolation of administrations. Instead, they call for administrations that are energized and open to the inputs of rights-bearers and other interested parties[382]. Because of their open-ended and interdependent nature, they also call for adaptability and coordination in decision making which a model focused on containing power does not facilitate. Moreover, administrative law's focus on *controlling* administrations assumes that a central challenge is *out of control* administrations, neglecting the problems of inertia and lack of direction and energy that can explain —at least in part— current failures to discharge social rights[383].

While canonical administrative law is focused on formal action, social rights' realization depends very heavily on informal action, such as planning and gathering information. The canonical view on linear procedures is also problematic for discharging social rights, which call for actions that are hard to anticipate and require instead ongoing monitoring of their impact. Organizing administrations as segmented and centralized hierarchies, as the canon suggests, is also challenging. Social rights' materialization calls for systematically incorporating the perspective of officers who interact with rights holders, and constant coordination among a wide range of entities, given their interdependence and multidisciplinary nature. The closed, unilateral procedures prioritized by the canon are also inadequate, as social rights' fulfillment requires information and knowledge from a wide range of stakeholders to be accurately contextualized[384].

[382] *See* Jorge Agudo González, Actuación material e informalidad. El ejemplo de la concertación con la Administración, Revista Aragonesa de Administración Pública Nº 41-42 (2013).
[383] Kagan, supra *note* 316.
[384] It is also problematic considering current concerns around the fact that, in practice, administrations are not mere executors of the law, but rather make substantive policy decisions and delineate the contour of rights. Such concerns point to the fact that administrative agents lack the democratic legitimacy to make substantive definitions on the scopes of rights, which is formally an attribution of Legislatures. Including relevant stakeholders, and in particular rights-holders, in the decision-making processes which are more open, can partially address these objections, at the time that it can enhance the quality of decisions.

The relocations of the Mendoza case in Argentina provide again very tangible examples of the limitations of the canon. The participation instances of the case largely consisted of informal action about which applicable laws remained silent, as they entail negotiating, planning, and sharing information, but almost never issuing formal acts. The first relocations of the case, for which participation was absent, led to significant problems such as faulty buildings and errors in counting the households that had to be relocated. However, existing laws did not explicitly provide for public participation, nor requested administrative entities to monitor the effects of these initial interventions to correct them accordingly.

The case similarly showed the importance of interdisciplinary teams who worked on the ground, and therefore of the front-line officers who hold the knowledge needed to inform policy decisions. Different authorities gather frequently to debate verbally how to sort out problems, monitor advances, and adjust interventions according to real-world rollout of their policies, with the most important policy interventions coming from the teams that work in the neighborhoods and include lawyers, architects, and social workers. Finally, the case made evident the limitations of canonical law to ensure coordination. Initial relocations led to full housing projects being built in areas with insufficient access to schools, health facilities or energy supply, as the provision of each of these services depends on different authorities. The intervening court had to take ad hoc measures to address coordination problems, as applicable laws did not regulate adequate coordination mechanisms.

It is clear from this example —other discussed in Chapters 2 and 3, and many others that could be replicated— that canonical administrative law is not only detached from social rights but can actually hinder their realization. The mismatch is serious for different reasons. First, there should be a correlation between the rules that control administrative behavior, the underlying goals

of those rules, and the more general mandates of modern administrations[385]. Otherwise, rules would be unreasonable as observing them could lead to undermining administrations' ultimate objectives. Second, the disconnection between means and goals can derive in administrative officers not understanding the ultimate normative basis of their roles and of the organization they integrate, leading to intransigence, incompetence, or inattentiveness[386]. In fact, many administrative agents may not even be conscious that, when they act, they are "enforcing rights" and should be bringing into action the constitutional commitments of a given State (at least in Latin America, where constitutions often lay the general basis for governmental action), what has led to some scholars arguing for the need to develop "a rights-based culture" in administrative entities[387]. This inadvertence may facilitate resistance to changing practices that are inconsistent with social rights and can create a clash between the framework used by judges when reviewing administrative action and the interpretation of administrative officers of their own behavior, with administrative resistance persisting despite judicial intervention[388]. The mismatch between goals and tools can also be a barrier for public officers seeking to ensure social rights in effective ways, as I discuss elsewhere[389].

The disconnection between goals and means creates a vicious cycle where poor performance is hard to overcome, even after litigation addressing it. Detailed judicial orders, focused on setting fixed rules by judges rather than on encouraging administrations to find solutions on their own (which have been sought as a common response in Latin America[390]) can

[385] Stacey, *supra* note 76.
[386] *Id*.
[387] Sossin, *supra*, note 81.
[388] Stacey, *supra* note 76.
[389] See the discussion on administrative law being a barrier in the Mendoza case, in Chapter 2.
[390] *See generally* Malcolm Langford, César Rodríguez Garavito and Julieta Rossi (eds), LA LUCHA POR LOS DERECHOS SOCIALES. LOS FALLOS JUDICIALES Y LA DISPUTA POLÍTICA POR SU CUMPLIMIENTO (Colección Dejusticia, Bogotá, 2017).

aggravate the issue. Furthermore, the increasing mismatch between the assumptions of administrative law and reality can lead to a fixation on legal fictions that further incapacitates administrations to respond to all sorts of current problems[391].

While the canon of administrative law has remained unaltered at its core, increasing administrative functions have led to some changes in administrative practice and, occasionally, in discrete areas of administrative law[392]. Indeed, despite natural barriers to reforms, *post-bureaucratic* institutions are emerging. Post-bureaucratic institutions are more open than traditional bureaucracies, with legitimacy being less dependent on prior authorization; more based on looser and more flexible norms than rules —such as plans—; and tend to incorporate monitoring, auditing and change in more systematic, and less-circumstantial ways[393].

Post-bureaucratic organizations can take many different shapes. For example, in the 1990's some countries in Latin America underwent a series of debates —and in some cases, reforms— to revise traditional bureaucracies, advocating for post-bureaucratic models oriented to the application of market-based alternatives[394]. Other post-bureaucratic models, instead of mimicking the market, seek to account for problems of information gathering, uncertainty, and fluidity, which characterize many modern challenges such as discharging social rights, recurring to different framings. Democratic experimentalism, the framework discussed in the Introduction to this dissertation, is one such model.

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[391] Daniel A. Farber & Anne Joseph O'Connell, The Lost World of Administrative Law, 92 Tex. L. Rev. 1137 (2014), claiming for the context of the U.S. that administrative law "…has not meaningfully confronted the contemporary realities of the administrative state", including the fact that "formal administrative procedures, official records, and judicial review are only part of the dynamics of administrative governance"; and therefore "...risks becoming irrelevant to the quality of governance".

[392] See Jack M. Beermann, The Never-Ending Assault on the Administrative State, 93 Notre Dame L. Rev. 1599, 1608 (2018)

[393] Simon, *supra* note 280.

[394] María Fernanda Ramírez Brouchou, Las reformas del Estado y la administración pública en América Latina y los intentos de aplicación del New Public Management, Estudios Políticos, no. 34 (2009).

As anticipated in previous sections there are different areas in which experimentalist-like reforms to mainstream administrative law have taken place. The ultimate example is environmental legislation and regulation[395]. Less systematic but equally relevant transformations are taking place across the spectrum of administrative action, shaping more collaborative and less imperative administrations[396]. In fact, experimentalist experiences can be seen both the public and the private sectors —sometimes under alternative though similarly structured frameworks[397]—, in areas such as the automobile industry[398], nuclear power regulation[399], aviation[400], and child welfare[401], among others[402]. Experimentalist experiences have also been documented in the sphere of social rights[403].

These experiences signal that canonical administrative law may not only be ill-suited for social rights' discharge, but possibly for other current problems as well. Furthermore, existing experimentalist efforts give hints on how reshaped, post-bureaucratic administrative law institutions could look like to facilitate social rights' fulfillment. The following section builds on these experiences.

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[395] For an account of the particularities of environmental regulation in the United States, see the literature on "adaptive management", discussing how the nature of environmental problems lead to more decentralized and provisional approach in policy. *See, e.g.,* Jonathan H. Adler, Dynamic Environmentalism and Adaptive Management: Legal Obstacles and Opportunities, 11 J.L. Econ. & Pol'y 133 (2015).

[396] See Barnes, *supra* note 350.

[397] Experimentalism is one among many theories that emerged in constitutional scholarship to promote deliberation and enhance democracies' health, concerned with problems in legitimacy, information and representation (such as "dialogic constitutionalism", "deliberative democracy", departmentalism, constitutional conversationalism, or democratic minimalism, among other forms of cooperative constitutionalism). Experimentalism also relates to different approaches to public policies that stress decentralization and participation, including "new governance" or "responsive regulation", "meta-regulation", "adaptive environmental management", or "participatory governance".

[398] *See, e.g.,* Ward, Allen, et al., *supra* note 4.

[399] Rees, *supra* note 4.

[400] Mills & Rubinstein Reiss, *supra* note 4.

[401] Noonan, *supra* note 4.

[402] *See, e.g.,* Sabel & Simon, *supra* note 4; Sabel, Herrigel, & Peer Hull, *supra* note 4.

[403] For example, some scholarship has found that in certain complex social rights judicial cases, levels of compliance were higher when remedies were more reflexive, experimental, and dialogical. On social rights and experimentalism, *see generally,* Sandra Liebenberg & Katharine, *supra* note 77.

4.3 Principles to rethink canonical administrative law

While efforts are emerging to respond to the need of active and coordinated public interventions, and scholars are increasingly arguing for related reforms, canonical administrative law in Latin America has failed yet to reflect systematic changes to make administrations more accountable, horizontal, and open. To facilitate social rights' fulfillment, reshaped administrative law institutions should ensure genuine and horizontal accountability mechanisms; promote collaboration and coordination —both among public bodies and between private and public parties—; respond to uncertainty about how to put in practice the very general standards that recognize social rights in paper; and promote the consequent re-assessment and monitoring of administrative activity.

This section attempts to go into further detail analyzing in systematic ways how pro-social rights administrative law could look like. In doing so, I keep two limitations in mind. First, many realms of administrative intervention can work fine under the traditional model of bureaucratic hierarchies. Literature has claimed, for instance, that models such as experimentalism are particularly useful for large-scale plans, and when there is a need to contextualize overarching actions defined in larger, general levels[404]. I therefore focus here on tools that shall be useful for administrations seeking to facilitate the execution of social rights' commitments, and do not argue for more sweeping reforms.

Secondly, I am aware that reshaping legal institutions in post-bureaucratic manners can face different conceptual barriers (on top of the expected practical ones). Probably the biggest one is that many values traditionally associated with administrative law, such as finality and *ex ante*

[404] See Ruhl & Fischman, *supra* note 12.

legitimation, would be less prominent under a new framing[405]. However, the absolute relevance of such values often emerges from long-held false dichotomies, such that only *ex-ante* rules that limit discretion can secure governmental accountability. This has proven false both by alternative systems where error report and correction has been successful, but also —and especially— by rule-bound systems where accountability has patently failed.

Keeping these limitations in mind, below I sketch some general principles that can guide a post-bureaucratic, pro-social rights redesign of mainstream administrative law in Latin America. The aim of this effort is not to suggest specific language to redraft statutes, nor to cover all issues that a reform could address[406]. Instead, I only seek to identify guiding principles and illustrate with examples of discrete institutions how change can look like in practice[407]. The selection of institutions responds to the learnings from the Mendoza case presented in Chapter 2.

4.3.1 Acknowledging informal administrative action

Reshaped administrative law should acknowledge and give legal relevance to informal actions on which social rights' fulfillment depends, such as planning, assessing, negotiating, budgeting, and coordinating. With this aim in mind, the following institutions or standards could be reimagined.

[405] This has been identified as a challenge for "adaptive management", but both framings are analogous for these purposes. *See* Robin Kundis Craig & J.B. Ruhl, Designing Administrative Law for Adaptive Management, 67 Vand. L. Rev. 1 (2014). That scholarship also finds a tension between adaptive management and two other values of administrative law: public participation and judicial review.

[406] For an exercise of rewriting administrative law statutes in a similar fashion, see Craig & Ruhl, *supra* note 405; Kenta Tsuda, Making Bureaucracies Think Distributively: Reforming the Administrative State with Action-Forcing Distributional Review, 7 Mich. J. Envtl. & Admin. L. 131 (2017).

[407] Because Latin American countries are civil law countries with written codified rules, many of the suggestions that follow illustrate by making references to the text of existing statutes of the countries covered by my research.

4.3.1.1 Recognizing informal action and setting basic conditions for its legitimacy

Core administrative law statutes could introduce clauses that acknowledge material, informal administrative action and set basic conditions for it to be legitimate. Typically, in Latin America the most relevant administrative law statutes are administrative *procedure* acts[408]. As such, these laws are mostly focused on regulating the different steps that take place in a formal procedure, remaining silent about a wide array of non-procedural actions. In the future, it may be worth changing the framing and goals of core administrative laws for them to be "administrative action" acts, instead of administrative "procedure" acts, as most of administrations' life takes place outside procedures.

Laws focused on administrative activity more generally could include clauses that acknowledge informal activity as a legitimate form of administrative action, instead of being silent about it, and exemplify what is understood as informal action (planning, negotiating, providing advice, etc.[409]). Similarly, when statutes attribute authority or competence, they could explicitly include an authorization to carry out all the material and informal actions that are needed to pursue the mandate of an entity. For example, the administrative procedure law of Peru states that all entities have authority to carry out the "material, internal tasks" they need to "efficiently achieve their mission and goals[410].

[408] *See, e.g.*, administrative procedures statutes in Argentina (Law No. 19549, apr. 3, 1972, Adla, XXXII-B, 1752), Brazil (Lei No 9784, 29 January 1999), Chile (Law 19880, 29 de mayo de 2023, Mexico (Ley Federal de Procedimiento Administrativo (Federal Administrative Procedure Act), LFPA, Diario Oficial de la Federación (DOF), 04-08-1994, Última reforma publicada DOF 18-05-2018), and Peru (L. 27444, abril 1, 2001).
[409] In the United States for instance, the Administrative Procedure Act recognized informal adjudication and rulemaking. While this is not a full acknowledgement of a wide range of informal activities administration can carry out (but rather a "relaxed" way of engaging in the two stereotypical types of formal administrative action), it is a valuable tool that has led to relevant practices that are becoming widespread, such as the issuance of guidance, discussed in the next section.
[410] L. 27444, abril 1, 2001 (Peru), art. 61.2.

I understand that acknowledging informal action can be challenging. Indeed, a detailed regulation of said activity, aimed at fully controlling it, would be impractical. For a start, the breath of informal action is such that it is even hard to define what is meant by informal or material activity – which is more easily understood by exclusion, i.e., action that is not formal—, let alone to regulate it. Furthermore, informal action needs flexibility.

However, general standards could be put in place to guide informal action. For instance, statutes could state that principles such equality, good faith, and transparency —often listed in administrative procedure statutes— also apply to informal action, understood as the one that falls outside acts, regulations, and contracts. Laws could also state that, when acting informally, administrations must respect private parties' rights, allow for the involvement of all interested parties, and be guided by the fulfillment of their mandates. Laws could similarly request entities to publicly explain their informal action, and to base it on adequate goals and appropriate information and evidence. In other words, laws could request reason-giving not only for administrative acts, but also for other forms of administrative action. For example, administrative agents could be required to explain in transparent ways how they interpret norms or exercise their discretion.

Law could also ask administrations to proactively inform on informal activity and set other publicity requirements; and explicitly allow people to request administrations to engage in informal action. For example, laws could openly entitle people to request advice, on top of requesting the issuance of a formal administrative act. Furthermore, access to information regulations could include information on informal activity, on top of allowing access to formal records and documents. These general standards would require administrations to keep adequate registers of their material activities, and ideally to assess their efficacy. Laws could also clarify the

binding or non-binding nature of informal action, for example, seeking a middle ground where informal action can create good faith commitments for administrations, or duties to explain when previous action is disregarded, but no legal obligations for private parties.

The participation instances of the Mendoza case discussed earlier are a good example that could inform this sort of reform. First, as already explained, the participatory mechanisms of the case entail, centrally, informal activities (debating, providing information, negotiating, etc.). Furthermore, the supervising court has found a way to give participatory spaces flexibility while at the same time setting basic standards for their functioning. These include, for example, the need to document the informal actions that take place in these spaces and publicly report on them. They similarly show how public authorities engaging in informal action can voluntarily assume concrete commitments in these interactions, about which interested parties can then follow up. As informal actions are recorded in minutes and summarized in court documents, they function as a relevant input for the court when making decisions, showing how they can be of legal relevance even if not recognized formally as a source of law.

4.3.1.2 Promoting the issuance of guidance

Within the wide range of informal administrative action, an activity that has been receiving special attention from the legal community and becoming increasingly widespread is the issuance of guidance. Guidance can be understood as formally non-binding statements that explain how an entity understands the norms it applies or plans to exercise its authority, to "guide" either the public or its own agents[411]. Guidance is usually seen as more provisional and easier to review than traditional regulations —as it is formally non-binding—, providing a good illustration of everyday informal administrative activity.

[411] *See generally*, Parrillo, Nicholas R., Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries, Yale Journal on Regulation, Vol. 36, No. 1, pp. 165-271 (2019).

Redesigned laws could support the issuance of guidance and other forms of practice-oriented norms. Mainstream administrative law statutes in Latin America typically remain silent about it, even though its use in practice is undeniable. There are very discrete exceptions to this rule in the region, with Colombia's State Council recognizing in 2014, for example, that transformations in administrative action had led to an increasingly common use of soft instruments akin to guidance[412]. In the case, the Council changed its traditional doctrine to allow judicial review of acts that were only "orientative, instructive or informative", arguing that no governmental activity should be left out of controls to assess compliance with constitutional principles[413].

In countries from other regions guidance has received more systematic attention from the legal community and can serve as valuable references for discussion in Latin America. This is the case of the United States, where guidance is considered an umbrella term that refers to two forms of administrative action that are exempted from the Administrative Procedure Act's rulemaking requirements and have an advisory function. Guidance includes general statements of policy (general, non-binding statements "issued to advise the public prospectively of the way in which the agency proposes to exercise a discretionary power[414]") and interpretative rules ("statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers[415]). Overall, while these instruments —issued with different levels of formality and shapes— are not formally binding on third parties, they are commonly followed in

[412] Consejo de Estado [C.E.], [State Council], decision nº 05001-23-33-000-2012-00533-01, November 2014, available at: https://vlex.com.co/vid/558882926.
[413] Considering that if the administration's sphere of action had widened, then the scope of judicial control shall expand too. The opposite, traditional doctrine, under which this type of intervention is not subject to control as it is either not binding or does not have formal legal effects on third parties remains however the rule in many countries of the region.
[414] Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947).
[415] *Id.*

practice, and have gained relevance in a context of uncertainty and complexity, in which advise-provision and reviewability are of essence[416].

There are also countries that have explicit regulations of guidance in their administrative law statutes, such as South Korea[417] or Japan[418]. These regulations basically recognize the act of rendering guidance and set some basic principles, including that: 1) guidance shall only be provided to the minimum extent required ; 2) no party shall be treated adversely for not following guidance; 3) the person rendering guidance must disclose its purposes and contents; 4) guidance can be rendered verbally —in which case there is a right to request it also in writing—, or in writing; and guidance directed to two or more persons shall be published, unless there is a compelling interest not to do so; 5) the other party may submit opinions on the methods, contents, etc., of the administrative guidance.

In a re-shaped administrative law, core statutes in Latina America could similarly recognize and acknowledge guidance or guidance-like instruments and set basic requirements for it to be legitimate including forms to issue guidance, opportunities for departing from guidance, or mechanisms available to review guidance. Indeed, in the Mendoza case, for example, non-binding, flexible tools are already being used to provide guidance on housing policy. For instance, and a discussed in detail in section 2.4.4., there are guiding protocols on relocations and re-urbanizations in informal settlements which provide basic definitions and broad policy criteria and are then

[416] Accordingly, the Administrative Conference of the United States (ACUS) has issued recommendations both for policy statements and interpretative rules. See ACUS, Recommendation 2017-5, Guidance Through Policy Statements, December 14, 2017, available at: https://www.acus.gov/sites/default/files/documents/Recommendation%202017-5%20%28Agency%20Guidance%20Through%20Policy%20Statements%29_2.pdf (accessed November 25, 2023); and ACUS Recommendation 2019-1, Agency Guidance Through Interpretive Rules, June 13, 2019, available at https://www.acus.gov/sites/default/files/documents/Agency%20Guidance%20Through%20Interpretive%20Rules%20CLEAN%20FINAL%20POSTED.pdf (accessed November 25, 2023).
[417] Administrative Procedures Act (Act No. 5241 of December 31, 1996).
[418] 行政手続法, Gyōsei tetsuzuki-hō (Administrative Procedure Act), Law 88 of 1993.

adapted to the particularities of different areas. Protocols are more flexible than traditional regulations, as they seek to provide broad guidance (instead of mandatory, detailed rules) and target largely administrative agents (rather than third parties).

4.3.2 Energizing and incentivizing administrations to perform their mandates

With social rights being typically considered "positive" rights and calling for a wide range of actions from public administrations as discussed in previous section of this dissertation, reshaped administrative law should include provisions that incentivize administrative action and address problems of inertia. To pursue this goal, the following reforms could be considered.

4.3.2.1 Reshaping disciplinary regimes

First, the regime of sanctions and responsibilities of administrative agents could be reshaped. Under canonical administrative law, errors are seen as deliberate behaviors of persons who would occasionally not comply with the law, and only circumstantial[419]. Therefore, the regime for responding to errors relies heavily on behaviors being denounced, investigated in criminal-like procedures, and eventually sanctioned, with punishment finalizing relevant procedures[420].

The model focused on sanctions as a response to administrations' inability to fulfill a mandate is not fully fit to solve the problems that underlie social rights' unfulfillment, as experimentalism literature has discussed extensively. First, since people in the position to denounce and investigate administrative behavior are also typically administrative agents who may be subject to similar sanctions, they have very high incentives to hide errors and avoid sanctioning

[419]Simon, *supra* note 280.
[420] *Id*.

procedures. In practice, in countries such as Argentina, procedures are only seldom carried out, and sanctions are only very occasionally applied[421].

Furthermore, mechanisms focused on imposing sanctions create very high incentives to avoid action and could have a paralyzing effect, in the absence of regulations that incentivize proactive, energetic behavior from administrations (discussed below). In the mind of many administrative agents, the possibility of committing errors when acting and being subject to sanctions (potentially coming from political opponents) could be much more tangible than the consequences of failing to act. These assumptions run contrary to the need to energize administrations that social rights entail.

In a reshaped model of administrative law, regimes for administrative responsibility should stop incentivizing error-hiding, induce error reporting, and focus on learning from failing experiences rather than solely on sanctioning. There are interesting examples of regulatory models that seek such error reporting from regulated private entities (such as in the aviation[422] and nuclear[423] industries in the United States), in which potential sanctions can be reduced or avoided if errors are voluntarily reported, and the consequences of errors are more focused on learning and fixing problems than on sanctioning the guilty person, among other measures.

Once again, the Mendoza case provides a real-world example of how the new model could look like in practice. As explained in Chapter 2, the intervening court uses increasing threats of sanctions when administrative officials fail to engage in participatory spaces (rather than when they fail to meet a specific target). The threat of sanctions gets increasingly precise if parties remain

[421] The *Sindicatura General de la Nación*, an oversight institution for the federal Executive Branch in Argentina gathers (but does not publish) the proportion of disciplinary procedures that lead to sanctions at the national level. Information provided informally by agents of the *Sindicatura* indicates that it is often less than 1%.
[422] See Mills & Rubinstein Reiss, *supra* note 4.
[423] See Rees, *supra* note 4.

reluctant to engage. The court will start by asking for explanations for non-engagement. Only if this measure fails it would set more stringent procedural requirements for engagement (such as would naming which officers need to attend personally; requesting more precise information to be discussed; or defining the anticipation needed for calling roundtables and their exact periodicity). If these mechanisms fail, the court will attend meetings by itself. If all these measures are insufficient, then the court would resort to the threat of sanctions. Threats start with high levels of generality, and only when those fail, the court would threaten a specific officer personally, with a specific sanction to be applied.

4.3.2.2 Adapting the role of courts when reviewing administrative action

In a reimagined administrative law, there could be a shift in the role of courts when reviewing administrative action. Administrative law scholarship and doctrine in Latin America typically cover issues of judicial review of administrative action. Some core administrative procedures statutes also contain some provisions on judicial review, which are typically complemented with codes of judicial proceedings in administrative law matters.

Describing and assessing the wide array of doctrines that have emerged from judicial control of administrations largely exceeds the scope of this dissertation. Still, traditional forms of judicial review of administrative action in Latin America include making administrative acts void, and issuing detailed decrees that force administrations to implement specific actions designed by judges, especially in the case of complex litigation.

Unfortunately, in cases of generalized social rights unfulfillment, this model of judicial intervention focused on depriving administrative action of effects or substituting administrative by judicial criteria gives administrations little to learn from the reviewing process. Put briefly, administrations are often not required to find solutions, craft plans, solve coordination issues, or

to take any measure that can help address the reasons that lead to litigation in the first place, or increase their capacities to fulfil social rights.

In the understanding that it is primarily administrations who need to figure out solutions for the situations of social rights noncompliance, and that the problems that explain noncompliance are complex, core administrative law statutes and process codes could be reformed to include specific mechanisms for judicial control in social rights' cases. Building on learnings from experimentalism, these mechanisms should be directed to cooperation and dialogue, where goals are set to administrations by courts, but administrations are accountable for finding best solutions for themselves, with involvement of different stakeholders (even though with active court oversight). Courts could more often engage in the practice of requesting administrations further explanation for their behavior or making its reasoning more explicit. Courts could review administrations' actions with stricter scrutiny when explanations lack or are weak. Including third parties in the monitoring of the implementation of judicial decisions should also be used as a common tool.

This is, in fact, the model used by the State Council in the Bogota case, and the Moron court in Mendoza where, in a nutshell, courts refrain from imposing substantive outcomes to administrative entities and is instead determined to induce productive exchanges among various stakeholders to define and contextualize rights. Chapter 2 and 3 provide detailed examples of how the model can look like in practice.

Furthermore, in many jurisdictions representation of States in trial is assigned to an office specifically created for that purpose, with authority to engage in legal analysis and interpretation (such as offices of legal affairs or counsel). These entities are, by definition, disengaged from public policy, and detached from the realities involved in the cases they represent. This is

particularly problematic in social rights matters, which require many actions well beyond the interpretation of general legal norms. Consequently, in those jurisdictions a common problem is that States' representatives do not have the knowledge or the authority to make the decisions needed to discuss possible solutions, to implement a judicial decision, or even to provide relevant information[424]. Written and linear procedures already discussed further complicate the communication and coordination needed to engage in judicial procedures effectively. In the future, rules for States' representation in trial in such cases could be reshaped to decentralize representation, so that authorities with hands-on knowledge and decision-making authority intervene in judicial proceedings. Furthermore, courts should be given the power to routinely convene different authorities to foster coordination and cooperation.

4.3.2.3 Addressing executive omissions

Chapters 2 and 3 show the importance of combating administrative inertia, and the role that adequate institutions can play in triggering changes. Administrative law could address executive omissions in an intentional and serious manner. In canonical procedural statutes in Latin America, there are scarce provisions that seek to encourage administrations to play an active role in their areas of intervention, creating incentives to underperform which reinforce existing political incentives to do the same[425]. Indeed, administrative law typically concentrates on administrations acting, rather than failing to act.

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[424] The same argument has been made for cases litigated at the international level. *See* Rodríguez Garavito, César MAKING SOCIAL RIGHTS REAL: IMPLEMENTATION STRATEGIES FOR COURTS, DECISION MAKERS AND CIVIL SOCIETY (Bogotá, Dejusticia, 2014), arguing that "At the regional level, an obstacle to the implementation of regional court decisions is the lack of adequate coordination mechanisms between those responsible for litigating international cases (who often belong to ministries who deal exclusively with foreign matters), and the domestic institutions whose policies or actions led to violations and are capable of remedying those violations".

[425] See David E. Pozen & Kim Lane Scheppele, Executive Underreach, in Pandemics and Otherwise, 114 Am. J. Int'l L. 608 (2020), listing several reasons for inaction, including "procedural and bureaucratic barriers to implementing their preferred policies, to a desire to shift blame and avoid responsibility, to a fear of alienating key supporters who would prefer passivity, to a political time horizon that leads them to discount future consequences of

Of course, there are relevant exceptions to this rule, including the recognition of tort-like damages for State omissions under limited circumstances, and of courses of action specifically directed at getting an express response to petitions presented to unresponsive administrations[426]. Importantly, laws generally include provisions to address the fact that often, when private parties present formal petitions before public administrations, entities do not provide any answer and simply remain "silent". The most traditional statutes establish that, when administrations remain silent, the law presumes that a given petition was denied (under the framing of "negative silence", *silencio negativo*). These fictional denials typically enable judicial review of the allegedly negative response. Some statutes, such as the Administrative Procedure Act from Peru or Chile, also admit the opposite rule —assuming that silence amounts to a positive response to a petition— for a subset of cases[427].

Reformed administrative statutes could give legal entity to deliberate omissions in conducting administrative action, as a first step for incentivizing an active and responsive performance of administrative action beyond the letter of the law[428]. Ideally, omissions would not only include incompliance with detailed duties, but more generally the inability to fulfill goals and broader mandates. For example, in the United States Professors Pozen and Scheppele argue for assessing executive's failure to act under the idea of "executive underreach", which refers to the

inaction, to a political program that disparages "big government" and promises to shrink it, to collective action difficulties that raise the expected cost or reduce the expected benefit of assertive action by a single state".

[426] Law No. 19549, apr. 3, 1972, Adla, XXXII-B, 1752, (Arg.), art. 28.

[427] Law No 19880, 29 de mayo de 2023 (Chile), art. 64; L. 27444, abril 1, 2001 (Peru), art. 33.

[428] For an attempt to incentivize compliance with social rights obligations through administrative law reforms, *see* Wunder Hachem, Daniel, Derechos fundamentales económicos y sociales y la responsabilidad del Estado por omission, Estudios constitucionales 12(1), 285-328 (2014), available at https://dx.doi.org/10.4067/S0718-52002014000100007 (accessed on November 25, 2023), arguing that in the context of Brazil administrative responsibility for social rights related omissions should not require proof of an agents "fault", but should rather be objective.

executive branch's willful omission in addressing a significant public problem that it is capable of addressing (even though not necessarily legally required to)[429].

Statutes could also create stronger incentives for administrations to respond to petitions, building on existing regulations on positive and negative silence. For example, they could establish that if administrations remain silent after a petition, then the legal interpretation of norms advanced by petitioners would prevail or receive preference under certain circumstances (e.g., if it refers to norms or programs that are already being implemented), or that evidence offered in their petitions must be accepted by the administration.

4.3.3 Encouraging coordination, cooperation and cohesion

The interdependent nature of social rights is in open tension with the compartmentalized nature of current administrations' design. The vague standards under which social rights are typically recognized also make the role of front-line officers who deal with rolling out social rights' policies of essence, even though canonical administrative law typically gives more relevance to the role of officers high up in the hierarchical organization. Reshaped administrative law should therefore encourage more cohesion among areas of the administration. In rethinking administrative law, systematic cohesion tools should be incorporated, and administrations should be envisioned as networks rather than hierarchies[430] (although flexibility is important considering the idiosyncratic nature of any given collaboration).

There is abundant literature noting the importance of cohesion both among different administrations and within centralized administrations; with examples of increased cohesion based

[429] *See* Pozen & Scheppele, *supra* note 425.
[430] Coordination should also expand to administrations' interactions with private parties. Systematizing existing mechanisms where private parties engage with only one administrative interlocutor for a variety of proceedings, could be of use, so that people can engage with one office, and coordination happens in the "backend". For the European Union *see, e.g.*, directive 2006/123/CE (December 12, 2006).

on both voluntary and mandatory tools; and relying both on vertical and horizontal coordination mechanisms. In jurisdictions such as Spain the issue of coordination and cooperation has been treated thoroughly at the statutory level[431]. In Latin America, there are numerous examples of ad-hoc responses to these problems such as the creation in scattered norms of roundtables or councils with representation of different areas of government[432].

If administrative law was to be reshaped to better suit social rights' fulfillment, more systematic changes could be put in place in core administrative statutes across Latin America. These changes could initially entail stating coordination as a general, guiding principle of administrative action, with the goal of adequately discharging administrative duties. The Constitution of Colombia, for instance, states that administrative authorities must coordinate their actions to meet the goals of the government. This principle could be further unpacked to describe what coordination among entities would entail in practice, such as facilitating information and evidence, or providing assistance[433].

Furthermore, mainstream administrative law statutes could be reformed to include concrete institutions for coordinated decision-making. For example, laws could envision ad-hoc coordination instances such as hearings. Simple requirements for hearings, such as the need to document interventions and decisions, could also be defined at the statutory level[434]. Core administrative procedure acts could also follow the Peruvian legislation in admitting that entities

[431] *See* Law 40 of 2015 of Spain, Legal regime for the public sector, BOE núm. 236, October 2, 2015.
[432] In Argentina, for example, during the 1940's the expansion of the bureaucracy with the increasing protection of social rights led to the creation of several "National Councils" (for statistics, commerce, etc.).
[433] *See, e.g.*, L. 27444, abril 1, 2001 (Peru), art. 76.
[434] *See, e.g.*, Lei No 9784, 29 January 1999, art. 35 (Bra.).

can assign an activity to another entity for efficacy reasons, whenever the requested entity has adequate means to perform the activity[435].

The Mendoza case provides other real-world examples where entities from three levels of government gather in ad hoc instances to come up with solutions to particularly complex problems and cooperate to deliver services that are interconnected. In the case, for example, ad hoc coordination roundtables have led to promising solutions to ensure access to schools and education for communities being relocated, where municipalities build housing units; the federal government funds projects, and the provincial government is responsible for finding lands for relocations and for school building. Overall, and as detailed in Chapter 2, Mendoza-inspired forms of administrative coordination include the creation of interjurisdictional bodies, and of coordination units within one institution; the celebration of agreements aimed at enhancing coordination; and the establishment of new instances where different entities can routinely coordinate decision making (none of which are reflected in Argentina's core administrative procedure acts).

More systematic instances of coordinated decision making could also be foreseen in a reshaped administrative law, beyond ad hoc arrangements. There could be a non-exhaustive listing of cases where such coordination is necessary (e.g., around social rights decisions or to ensure speedy solutions to problems that involve fundamental rights). In these cases, the authority to decide would be formally shared by more than one entity, acting simultaneously, and having equal responsibility. Statutes may provide general standards for coordinated decision making, including on how to trigger the procedure, the general principles to which it is subject, policy areas in which

[435] L. 27444, abril 1, 2001 (Peru), art. 71. In these cases, the law requires an agreement to be made, which should specify which activities are assigned, noting that the requesting entity remains responsible and needs to oversee the requested entity.

it is not allowed, or the participation of interested, as accepted in Brazilian legislation[436]. Peruvian law also accepts stable instances of interinstitutional collaboration, by envisioning "conferences of entities", agreements or any other legally admissible means, aimed at facilitating entities with a common problem the tools to foster collaboration[437].

Legal reforms could be paired with policy and organizational decisions to enhance coordination, such as rethinking the infrastructure and physical location of administrative offices. Infrastructure in general and the geographic location of administrative offices in particular can impact the way in which organizations function and interact with the public[438]. Currently, it is common that different Ministries and departments of government work in separate buildings scattered through cities, often far from each other, making coordination and dialogue difficult. A related problem is that offices are often located far from the areas in which the policies they design must be applied[439]. In the future, administrative infrastructure could be redesigned to facilitate both coordination among administrative entities on the one hand, and information gathering and interaction with policy recipients on the other[440].

Similarly, some issues related to the management and allocation of budgetary resources for administrative entities could be reshaped to enhance coordination. Currently, each entity in the administration typically receives a budget for itself. While there are obvious accounting and

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[436] *See, e.g.,* Lei No 9784, 29 January 1999, art. 49 (Bra.). Brazilian law, for example, further requires the elaboration, by each intervening entity, of a document discussing issues relevant for its competence, rules for engagement (e.g., the need to provide reasons for dissents and the "burden" to suggest alternative solutions in that case), and the need to draft a public document with basic information.

[437] L. 27444, abril 1, 2001 (Peru), art. 77.

[438] On the impact of architectural choices on people's perception of public functions, see Judith Resnik and Dennis Curtis, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN THE CITY-STATES AND DEMOCRATIC COURTROOMS (New Haven, London: Yale University Press, 2011). The connections between infrastructure and service delivery have been more commonly documented for courts and access to justice, at least in Latin America, but the basic rationale of the argument applies to public administrations as well.

[439] *See generally*, Widman, *supra* note 254.

[440] For example, higher ranking authorities could be placed together in one governmental building to encourage dialogue, with periodic interaction in those spaces with front line officers as well. There could also be decentralized units that are readily accessible for the population to whom the relevant public services are directed to.

financial reasons to allocate a specific budget to a given sector within an organization, this rule can prove problematic to address complex problems that require intense cooperation, such as securing social rights. In the first place, it can create unproductive competition to protect one office's budgetary allocation that can lead to entities not wanting to cooperate in fear of another office detracting resources. It can further create tensions on which authority is responsible for financing a given policy. In the future, it could be worth assigning or systematizing the allocation of budgets to more than one office at a time, for them to execute in a coordinated manner.

4.3.4 Promoting ongoing review and learning

The complexity and open-ended nature of social rights is naturally in tension with the idea that administrative interventions are bound to end once a formal decision is issued, and that decisions must be given strong traits of finality. Instead, social rights call for ongoing assessment of the adequacy of public interventions, and for their consequent adaptation when needed. The COVID-19 response shows in a very illustrative manner how administrative law may need to change fast and significantly to protect the right to health[441]. Indeed, while countries took diverse measures and stances as a response to the pandemic, one of the few commonly observed patterns across jurisdictions is the constant issuance of new norms and modifications of existing ones[442]. Legal dynamism is not only a response to the nature of the underlying problems (the virus, in the example, though less extraordinary circumstances similarly call for adaptation to changing circumstances and knowledge[443]), but also to the variance in the behavior of rights' holders, a key

[441] Cary Coglianese & Neysun A. Mahboubi, Administrative Law in A Time of Crisis: Comparing National Responses to Covid-19, 73 Admin. L. Rev. 1 (2021).
[442] *Id*.
[443] Cary Coglianese, Obligation Alleviation During the COVID-19 Crisis, REGUL. REV (April 20, 2020).

component of social rights' fulfillment[444]. In this scenario, the following reforms could be considered.

4.3.4.1 Standardizing monitoring mechanisms

To pursue dynamism and adaptation, canonical statutes could first standardize monitoring mechanisms to function after decisions are made in administrative procedures. As a rule, mainstream administrative law statutes in Latin America do not include provisions to monitor the impact or effects of administrative decisions[445]. In the cases in which administrations do carry out monitoring activities, there is little information on how these activities work, or rules to engage relevant stakeholders, publicize relevant information, etc.

Overall, beyond the work of specialized oversight entities and formal hierarchical control, traditional administrative law implicitly assumes that error detection in administrative action is circumstantial and dependent on action from private parties affected by those errors (mainly pursuing judicial review and administrative complaints). This model therefore misses the relevance of building internal knowledge[446].

The need for monitoring has become evident in many fields where the ineffectiveness of administrative action has received careful attention and triggered ad hoc responses. For example, in social rights litigation courts and parties frustrated with the marginal impact of judicial decrees directed at public administrations have come up with alternatives for courts to conduct robust post-

[444] Coglianese & Mahboubi, *supra* note 441.
[445] Even though efforts have been made to strengthen monitoring and assessment beyond the provisions of administrative statutes. *See, e.g.*, Interamerican Development Bank, Los sistemas de monitoreo y evaluación: hacia la mejora continua de la planificación estratégica y la gestión pública, Claudia M. Pasquetti y Carmen Salas, (eds.) (2016).
[446] Rubin, *supra* note 348.

decree supervision of administrative action[447]. The same happened in the two case studies covered in this dissertation, in which monitoring became a central concern.

In the future, core administrative law statutes should include clauses that indicate that, in social rights related public policies, administration should by default engage in routinely post-decision monitoring. Of course, core administrative law statutes cannot fully detail how monitoring should be carried out, what must be defined by each relevant entity considering the particularities of a given context; but they can certainly set general standards. For example, statutes could define which parties should engage in monitoring (providing opportunities for third parties to interact with administrations); specify the general goals of monitoring and the need for periodicity; set transparency requirements; require monitoring to include a careful review of concrete, complex cases, that can speak to the need for adjustments; and set a rule under which monitoring becomes stricter if progress is not reported for long, relevant indicators are too poor, etc.

4.3.4.2 Encouraging evaluations and adjustments

Reshaped administrative law could encourage ongoing assessments and adjustments of administrative action, so administrations evaluate their actions, modify them when necessary, and incentivize information acquisition. Administrative procedures involving the rollout of social rights policies could be reshaped to incentivize a continuous learning process that allows for information coming from on the ground policy application to be more systemically gathered and integrated into the policy cycle.

[447] For example, in Colombia Law 472 (Diario Oficial No. 43.357, August 6, 1998) on "acciones populares" (course of action seeking to protect group rights) gives intervening judges broad powers as to what they can order defendants to do, expressly provides judges with the authority to take necessary measures to ensure the implementation of their decisions, and allows them to establish, in their final decrees Committees to "verify compliance with the decision".

In the case of Mendoza, for example, the protocols that indicate how to conduct relocations at the local level (the *operatorias* discussed extensively in section 2.4.4) are not only built after the learnings from the participatory mechanisms, but also adjusted after their approval considering learnings from new participatory instances. Notably, Mendoza's goals-oriented and reviewable instruments, such as *operatorias* and related protocols, are a novelty in Argentine administrative law, which remains strangely silent about these soft instruments despite their obvious importance.

To allow for this, administrative law statutes could promote the use of horizontal spaces that enable the tracking of repeated problems, acknowledging that such problems are expectable under conditions of complexity and uncertainty. Those spaces could rely on peer review mechanisms, seek to create repositories of best practices[448], and focus on case-specific analysis, in particular of complex cases[449]. It would be relevant for administrative law statutes to include clauses that require that information obtained from these mechanisms is used periodically to reassess and adjust policies accordingly.

Not all administrative decisions should receive the same level of finality as they currently do. Instead, some decisions could be routinely evaluated or modified under certain circumstances (e.g., if there is evidence of the negative or null effects of a decision[450]). The Colombian administrative procedure law, for instance, claims that administrative acts must be revoked under different general circumstances, such as the act being in open contradiction with the Constitution or the law, the act not being in conformity with the public interest, or the act unduly causing harm to a person[451].

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[448] See, e.g., Charles F. Sabel & William H. Simon, The Duty of Responsible Administration and the Problem of Police Accountability, 33 Yale J. on Reg. 165 (2016); Ho, *supra* note 64 (discussing details such as inspections in pair, comparisons of separate assessments, deliberation of differences, weekly huddles, trainings, etc.).
[449] See Charles F. Sabel, Jonathan Zeitlin & Jan-Kees Helderman, Transforming the Welfare State, One Case at a Time: How Utrecht Makes Customized Social Care Work, Pol. & Soc'y (2023).
[450] Clean Air Act en USA, 42 U.S.C. § 7409(d)(1)
[451] Law 1437 of 2011, enero 18, 2011, art. 93.

Furthermore, administrative law could make wider use of sunset clauses or other forms of mandatory review, which deprive an act from effect after a certain period with the purpose of facilitating evaluation and revisitations. Indeed, because of increasing uncertainty and complexity in modern public problems, review clauses are becoming more common in some regulatory spaces[452].

Finally, for administrations and third parties to be able to fully assess administrative activity, the traditional understanding of the "motivation" of administrative acts could be revisited. Canonical administrative law sets requirements or elements that administrative acts must meet to be valid, which include their motivation[453]. However, motivation only requires authorities issuing an act to explicitly justify their decision according to a narrative of the facts behind the act, and the legal provisions that underlie the decision. While this exhibition of factual and legal records allows affected parties to challenge decisions and the judiciary to control administrative action, it does not give room for serious reflection or assessment of administrative action. In a reshaped administrative law, the focus could be placed on explaining a decision to the public and giving reasons, rather than merely citing facts and norms[454].

[452] For example, in the European Union "out of 225 legislative acts adopted through the ordinary legislative procedure during the current eighth parliamentary term, as many as 147 contained provisions for a review, an evaluation, or an implementation report". *See* Ivana Kiendl Krišto & Vagia Poutouroudi, Review Clauses in EU Legislation, European Parliamentary Research Service (2018).

[453] *See, e.g.*, L. 27444, abril 1, 2001 (Peru), art. 3; Ley Federal de Procedimiento Administrativo (Federal Administrative Procedure Act), LFPA, Diario Oficial de la Federación (DOF), 04-08-1994, Última reforma publicada DOF 18-05-2018 (Mex.), art. 3; Law No 19880, 29 de mayo de 2023 (Chile), art. 37 bis; Law No. 19549, apr. 3, 1972, Adla, XXXII-B, 1752, (Arg.), art. 7 inc. e.

[454] A hint on the difference between one way of providing reasons and the other can be found in decisions of the Constitutional Court of Colombia which, in reference to Congress deliberation, indicate that, under certain circumstances that affect fundamental rights, the government does not only need to provide reasons for a course of action, but also to explain why it is pursuing or not pursuing different policy alternatives. *See, e.g.*, Corte Constitucional (C.C.) (Constitutional Court), Noviembre 14, 2018, sentencia C-117/18.

4.3.5 Ensuring collaborative and open procedures

4.3.5.1 Reviewing standing rules

Opaque procedures that are heavily reliant on a narrow view of standing requirements are in tension with the collective nature of many social rights problems, which call for engagement of multiple parties. Generally, however, canonical administrative law requires people to have a special interest to be considered a party to a procedure, and generally only allows for a person or entity to start a procedure to defend a personal right. This is problematic as the notion of "interest" can be read quite narrowly for problems in the realm of social rights, which affect groups as a whole and are more fluid.

In the future, reforms to administrative law statutes could follow the example of some environmental regulations, which recognize standing to any person for certain subject matters[455]; admit class or collective standing in line with what is already widely accepted before judicial courts[456]; and recognize standing to a number of institutional actors[457].

In the Mendoza case, for instance, while administrative law would generally indicate that housing authorities shall decide where, how, and when to relocate displaced populations through closed, written, and individual procedures, the intervening court has crafted ad-hoc procedures where affected parties and institutional actors (such as attorney general representatives) participate in open procedures, to co-decide with or inform relevant authorities about the details of the relocation processes. The systematic engagement of communities in decision making procedures facilitated in Mendoza's participatory roundtables can therefore model ways to open up traditional

[455] In Colombia, for example, regarding "environmental" administrative acts, "any person" can intervene. L. 99 of 1993, December 12, 1993, Diario Oficial No. 41.146, art. 69.
[456] José Ovalle Favela, Jose, Legitimación en las acciones colectivas. Bol. Mex. Der. Comp., vol.46, n.138 (2013).
[457] Institutional actors that, while not really affected parties, have proven essential in defending social rights of marginalized communities in different countries in Latin America. In consequence, Ombusdpersons Offices and General Attorney's Offices, for example, should be able to easily engage in administrative procedures.

procedures to a wide range of stakeholders. Indeed, while relocated people don't formally have standing to file petitions in the case, they can freely engage in collective deliberation and decision-making before administrative bodies. Deliberations show that participation can be put in practice with reasonable success without overburdening or flooding administrative offices with petitions. Instead, reasoned deliberations facilitated by institutional actors can help administrations learn from practice to avoid inefficient interventions.

Notably, some administrative procedure acts have started following this path. In Colombia, for example, laws in force allow persons to file petitions "in their own interest", but also "in the general interest of the group"[458]. The law recognizes that standing includes the right not only to challenge formal administrative acts, but also to formulate general inquiries. More open standing rules shall also include the capacity to request that administrations consider reviewing general guidance or regulations, and not only individual decisions, in line with the Colombian example.

4.3.5.2 Rethinking transparency

Last but not least, existing views on transparency and participation could be reshaped in a reimagined administrative law. Under canonical administrative law, participation and transparency are often seen as static instances of one-time interactions between private parties and public administrations. For example, laws would grant opportunities for hearings, allow parties to access records, allow participation instances before the issuance of regulations or one-time consultations prior to policy implementation.

Under a new framing of administrative law, transparency should be seen instead as the prerequisite for ongoing collaboration among different stakeholders, and therefore needs to be more permanent. Regarding public information, laws could state that governments may not only

[458] Law 1437 of 2011, enero 18, 2011, arts. 106 and 108.

need to provide, but in many cases produce new information to adequately comply with their duties; and ensure that information is received by interested parties and oriented to enabling deliberation.

Of course, given that participation is resource-intensive, administrative entities should be granted discretion to evaluate which cases require a more participatory approach. However, general statutes could set general standards on the type of policy interventions that would call for participation with more priority, including complex social rights issues.[459]

[459] For example, prioritization criteria could include: "1) the extent to which the public intervention would be of interest of third parties and impact their rights; 2) the potential increase in information derived from participation; and 3) the likely increase in policy acceptance that could result from participation", Administrative Conference of the United States, Administrative Conference Recommendation 2017-5 Agency Guidance Through Policy Statements, December 14, 2017.

Conclusion

Social rights are at the heart of constitutional commitments in countries across the globe and are particularly relevant in Latin American constitutions. However, institutions tasked with fulfilling rights in many countries often face constraints —frequently exacerbated by outdated administrative law rules— that interfere with the full realization of constitutional commitments. Traditional literature on social rights, mainly focused on assessing and creating typologies of judicial interventions, often misses the potential of court-triggered institutional innovation to promote rights' realization. In this context, social rights' advocates seem to face the complex dilemma of celebrating court orders affirming social rights which are later found to have negligible impacts. This dissertation confirms that there is an evident and urgent need to modernize debates around social rights, with the goal of enhancing their realization in a global context that puts social rights' promise of dignity and a minimum wellbeing for all at risk. The process of rethinking key concerns over social rights should include a systematic assessment and adjustment of the way in which public administrations act regarding social rights.

The case studies of this dissertation (which signal that litigation does not necessarily exclude more confrontational alternatives for rights claiming, and that middle class plaintiffs are not always prioritized in courts' work) show that the claim that social rights are unworkable to vindicate, since they are too complex, too vague, and too hard to enforce by courts, especially in a context of institutional weakness, should be taken with caution. Indeed, the cases show otherwise. They prove that, even in a context of structural rights' infringement and constrained institutional capacity, innovations can emerge to respond to common concerns over social rights. Intervening courts managed to successfully put in place the institutional architecture necessary to allow

competent authorities and concerned citizens to define and contextualize, in democratically accountable manners, their constitutional rights (this exercise was particularly clear in the Mendoza case, regarding the right to adequate housing).

The courts used a model that can be considered a form of (constrained, one could say) experimentalist judicial review, after having an initial "destabilization" effect (in the case of Mendoza, after receiving the complaint; and in the case of Bogota, after issuing a decree on the merits). The experimentalist model used in the cases proves in promising ways that courts can find tactics to incentivize weak institutions to better align with their constitutional commitments to social rights. Indeed, supporting deliberative exchanges among the stakeholders and the creation of new information about institutional problems, this model of intervention can give rise to unexpected opportunities for institutional reform, capacity building, and transformations in administrative law. The approach used by intervening courts helps address longstanding concerns over judges' capacities and proper roles in adjudicating cases that relate to complex policy issues, showing how traditional discussions over social rights' vindication often pose a false dilemma between judicial usurpation and judicial abdication that does not accurately reflect all realities in a courtroom[460].

Both cases essentially show a decision-making model that is court-led but places responsibilities for policy making on local administrations. Under this model, courts set goals that administrations then need to pursue by themselves, with strong court oversight. As such, the model moves beyond the dichotomy between judicial abdication and judicial usurpation that traditional

[460] "Judicial usurpation occurs when the judiciary interprets and applies rights in such a manner that it assumes control of the political system, crowding out or crabbing the democratically elected branches. Abdication occurs when the judiciary declines to protect constitutional rights, risking (it is said) debasement of all fundamental rights (…) the apparent opposition of these prescription loses force when balanced against the variety of ways in which constitutional courts actually respond to the complaints of economic and social rights infringements…". Young, *supra* note 133, page 134.

literature describes. Traditional models of social rights adjudication also suggest a stark division between approaches based on the substance of rights and other based on procedures that the dissertation proves to be more nuanced, as in the case studies courts define some substance of rights, but also set strong procedures directed precisely at further defining rights' substance.

The conclusions reached through the dissertation indicate that the intervention of courts other than constitutional courts (which are typically assessed in comparative law), such as criminal and administrative courts, is crucial in promoting innovations. The role of courts as goal-setters and monitoring entities, under a rights' framing, is also essential to enable and sustain the innovative models to social rights discussed in this dissertation. While the rights' framing was crucial in setting non-negotiable boundaries and enabling the accountability mechanisms in place in the cases, flexibility in applicable norms, particularly regarding those pertaining judges' powers, was essential.

Furthermore, the structural nature of the problems behind the case studies, which in turn connected to the daily lives of affected communities in very tangible ways, also emerged as a key factor in facilitating innovations, particularly those connected to meaningful participation. The structural nature of the problems also enabled the functioning of centralizing and decentralizing forces in the cases, which helped account for local realities while at the same time ensuring policy coherence, coordination, and respect for centralized normative standards. Regarding participation, the role of "intermediary" institutions between the parties and the court, such as Attorney Generals, Public Defenders, Universities, and non-governmental organizations, was identified as key.

Interestingly, while in both jurisdictions the legal framework incorporated a strong commitment to human rights, including to social rights, intervening courts only relied in human rights standards marginally, and instead made a stronger use of general environmental norms

which provided judges with great flexibility. The innovations documented in the case therefore show that new, more nuanced models may be needed to fully account for the real scope and impacts of social rights' litigation.

The dissertation further demonstrates that even though committing to ensure a bundle of positive, complex rights has obvious implications for public administrations, who are the entities mainly responsible for discharging those commitments, administrative law has remained alien to the particularities of social rights. Indeed, as the dissertation shows the rules that typically govern administrations, under the "canon" of administrative law are intrinsically unfit to facilitate their current duties to execute social rights.

In the future, efforts to progress in the realization of social rights could look at the cases to draw lessons on how to enhance institutional capacity for rights' fulfillment. While innovations have been largely court-led, instead of plaintiff led, the cases can inspire future litigators, for example, to place more energy to monitoring decisions, with the cases providing a useful model of how this could look like in practice.

Consequently, new approaches to social rights, this dissertation shows, should place the attention on understanding how the administrative entities tasked with implementing social rights function, and encouraging the reforms needed for them to better discharge their mandates. The institutional implication of the case can incentivize more discussions on the role of administrative capacity and administrative law in ensuring social rights, providing hints on how much-needed policy and normative reforms could look like in the future. Importantly, some of these innovations ramified beyond the cases, showing in early yet important ways that administrative institutions and law can be reimagined.

The dissertation finally provides hints on how administrations could be reshaped, build on the reforms triggered by the cases (which are innovative for traditional administrative law, as they support coordination rather than siloed work among public entities, incorporate different stakeholders to decision making procedures, and focus on post-decisional monitoring). These changes build on existing regulatory innovations in the field of environmental law and other areas, signaling a network of scattered though clear changes that can guide the way towards a new model of administrative law, more responsive to the needs of modern complex problems.

This dissertation sought to imagine systematic reforms that could better position administrations in the region to discharge their social rights mandates and end the fictional and formalistic character that canonical administrative law has acquired. Principles that can guide future reforms in the field of administrative law include acknowledging the importance of informal and material administrative action, combating administrative inertia and omissions, enhancing coordination among administrative agencies, promoting monitoring, learning and consequent adjustment of administrative action, and fostering a more open and participatory model of public decision making.