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'Overcoming a clash of absolutes: the conflicting ethical demands posed by access to medicines litigation confronted by Latin American judges'

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ABSTRACT
This article analyses the conflicting professional ethical demands imposed on judges to, on the one hand, faithfully apply the existing law of the land and, on the other hand, do justice in the face of urgent global challenges such as ensuring an equal access to life-saving medicines. After establishing the precise nature of the professional ethical duties of judges (as opposed to those of lawyers) and noting the tensions they face when the duty of applying the law prevents them from complying with the duty of delivering material justice in the domain of access to medicines, the article then analyses the way this issue plays out in Latin America, a región where judicially-mandated access to medicines has been common. The article concludes by arguing that the Latin American experience suggests that judges around the world should take seriously the need to find a balance between their duty of deference towards public health authorities in this domain (when this is mandated by legislation), and the duty to do justice to individuals who cannot afford live-saving medicines.

KEYWORDS
Judicial ethics; access to medicines; Latin America; judicial activism

Introduction

As the editors of this volume highlight, we live in an era when humanity faces critical (and urgent) global challenges, that seem to call for new professional ethical approximations. More specifically, traditional professional ethics in the domain of law and public policy appears to be either obsolete or otherwise inadequate to provide proper guidance for lawyers, judges, and policy-makers in the face of such daunting challenges as a climate change and equal access to life-saving medicines. In line with this diagnosis, the editors of this volume ask how can lawyers, judges and policy-makers develop the ethical judgement skills necessary to adequately address the aforementioned tasks. Given this context it seems reasonable to ask what demands do current conditions impose on lawyers, judges, and policy-makers in terms of adapting their professional ethical judgements to deal in a better way with urgent global challenges. The answer, the editors submit, is that the said professionals should work on the establishment of a clear and explicit new frame of reference for their professional ethical judgments.

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In this piece, I address this issue as it concerns a particular legal actor (judges), inquiring what adjustments, if any, shall be done in the professional ethics that governs their work when facing the dilemmas posed by court mandated access to life-saving medicines, an increasingly common global practice triggered by desperate individuals and families asking for judicial relief when extraordinary expensive medicines are needed to save a life. In order to anchor this inquiry in a specific context, I'll analyse how does this issue play out in Latin America, a region where –in recent decades— there has been an extensive judicial involvement in the domain of equal access to life-saving medicines. Thus, a key contribution of this piece is to link the existing literature on the role of law in furthering equity in public health[1] with the one dealing with professional ethics of judges, an important exercise that it, nonetheless, rare.

The structure of the piece is the following. After identifying the precise nature of the current professional ethical norms that govern the conduct of judges –as distinct from that of lawyers—, I'll describe the rise of court-mandated access to life-saving medicines in Latin America by focusing on a set of countries (Costa Rica, Colombia and Argentina) that have led the rest of the region in this trend, in order to then address the tensions between, on the one hand, the ethical imperative of ensuring equal access to life-saving medicines, and, on the other, the duty to exercise judicial deference towards public health authorities, so other life-saving treatments do not become unsustainable, due to lack of funds.

Part one

Before analysing the prescription imposed on judges by the professional ethics that governs their work when facing the dilemmas posed by court mandated access to life-saving medicines, it is important to, first, distinguish between the professional ethics of judges from that of lawyers in general and, second, to ascertain the precise nature of the professional ethics of the former. Given that both the Code of Conduct for United States Judges and the Iberoamerican Code of Judicial Ethics are both influential in the Latin American region, the essay draws from these two, in order to develop a plausible professional ethical standard providing guidance for judges facing the dilemma stated in the Introduction to this piece.[2]

As stated above, the first question to address when it comes to ascertaining the professional ethics of judges, is whether theirs is the same as that of lawyers. While at first sight it might be thought that, given that judges and lawyers are often said to be part of the same profession (i.e. '*the legal profession*'), they share the same ethical demands, a closer look reveals that judges and lawyers should be regarded as belonging to different professions which, in turn, have quite distinct ethical obligations. A key factor explaining the different nature of these two professions is that, *while judges are by necessity public officials, lawyers are not.*[3] This feature is often overlooked, due to

[1] L.O. Gostin, and others, 'The Legal Determinants of Health: Harnessing the Power of Law for Global Health and Sustainable Development' (2019) 393(10183) *The Lancet* 1857–910.

[2] In the case of the Code of Conduct for United States Judges, its influence springs from the fact that it was one of the first to be adopted in the world. And, in the case of the Iberoamerican Code of Judicial Ethics, due to the fact that the latter was a regional effort involving almost all Latin American countries (I thank the anonymous reviewer for pointing out the first clarification above).

[3] There are, of course, quite many lawyers who work as public employees, but this is a contingent fact, not a necessary one (as it happens with judges, who are always public officials).

the fact that both judges and lawyers start their professional training together (at law schools) and, in some countries, because judges are recruited from the ranks of practicing lawyers.[4] But their common educational background, or the fact that in some jurisdictions judges come from the ranks of practicing lawyers, should not distract us from the –crucial– fact that while the stereotypical lawyer is a professional making a living out of defending the interests of their clients, a judge is always an official who exercises public authority. And this difference, I submit, imposes distinct ethical requirements on each of these professionals.

In addition to the distinction just noted, the role of judges in legal disputes differs markedly with that of lawyers because, while the former adjudicate legal conflicts, the latter advocate the interests of the parties involved in such disputes, exercising what Simon calls '*an ideology of advocacy.*'[5] Furthermore, as this author also notes, lawyers –in stark contrast to judges— typically conduct themselves with a logic of '*partisanship*' towards their clients. In Simon's words:

> The second conduct (of lawyers) is partisanship. This principle prescribes that the lawyer work aggressively to advance his client's ends. The lawyer will employ means on behalf of his client which he would not consider proper in a non-professional context even to advance his own ends. These means may involve deception, obfuscation, or delay.[6]

Of course, as Simon admits, the partisanship that the professional ethics of lawyers impose upon them has an important limit, that is, to respect the rules of the legal system itself.[7] The partisanship demanded from lawyers by the ideology of advocacy that governs their conduct stands in sharp contrast with the duties of impartiality and objectivity imposed upon judges by their specific professional ethics. This is apparent in the Code of Conduct for United States Judges,[8] which includes as its first canon that:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.[9]

The distinct ethical duties of judges –as opposed to that of lawyers— established in the Code of Conduct for United States' Judges, is echoed by the one governing the ethics of Latin American Judges, the so-called 'Iberoamerican Code of Judicial Ethics', whose latest version was adopted in 2014 in the XVII Plenary Meeting of the Iberoamerican Judicial Summit.[10] After stating the duties of judicial independence and impartiality, art. 35 of the abovementioned Code of Judicial Ethics states the key role that judges

[4]M. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press 1986); J.H. Merryman an R. Pérez-Perdomo, *The Civil Law Tradition* (Stanford University Press 2020).
[5]W. Simon, 'The Ideology of Advocacy: Procedural Justice and Professional Ethics' [1978] *Wisconsin Law Review* 29, 30.
[6]ibid. 36.
[7]ibid. 41–42.
[8]As stated by the web site of the United States's federal judicial system: '*The Code of Conduct for United States Judges includes the ethical canons that apply to federal judges and provides guidance on their performance of official duties and engagement in a variety of outside activities*'. See 'Code of Conduct for United States Judges' (*uscourts.gov*, 12 March 2019) <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges> accessed 27 October 2022.
[9]ibid.
[10]The text of the Iberoamerican Code of Judicial Ethics can be found in this website: https://www.oas.org/juridico/PDFs/mesicic5_mex_ane_57.pdf

ought to play in the structure of government in the following way: '*The ultimate purpose of the judicial activity is to achieve justice by means of the Law*.' The crucial qualification stated by this norm (that is, that the search for justice by judges has to be done by means of the law), is further stressed by art. 37, which states that:

> The equitable judge is the one who, without transgressing the law in force, takes into account the peculiarities of the case and resolves it based on criteria that are consistent with the values of the legal system and that can be extended to all cases that are substantially similar.[11]

As it can be appreciated, the duty imposed upon judges by the Iberoamerican Code of Ethics to take into account the peculiarities of a case and resolve it based on criteria coherent with the values of the legal system have a clear limit: this cannot be done by transgressing the law in force, something which relates to the duty of judicial integrity imposed by the US's Code of Judicial Conduct, and that -it is worth insisting— its aligned with recognition of the crucial fact that –as opposed to lawyers— judges they are public officials at the service of enforcing the law of the land.

At this point, it should be clear that the professional ethical rules of lawyers differs sharply from that of judges, due to the different positions they occupy in a prototypical legal dispute. Thus, it is worth insisting, while both groups share a common basic training in law, they play radically different roles in the legal arena. In laymen's terms, while judges are similar to referees, lawyers are akin to the players of a game.

Considering the above, why is it that we have to remind ourselves of this basic fact when it comes to dealing with the ethics of these two distinct professions? The explanation, I think, is that the professional ethics of lawyers was developed earlier than that of judges, so much so that, while the American Bar Association's Code of Ethics for lawyers was introduced in 1908,[12] the ethical regulation of judges would have to wait until 1924 to be introduced, an then as a complement from that of lawyers.[13]

Once established that there are important reasons to regard judges and lawyers as members of two distinct professions that –consequently— have different professional ethics, the question arises of what, exactly, are the demands imposed by the professional ethics of judges. There are, of course, some common obligations imposed on both lawyers and judges, but what's relevant for the purposes of this essay is to ascertain what are the distinct professional ethical demands imposed on judges as such.[14] Aside from the –already mentioned— duties of impartiality, objectivity, and independence, the Code of Conduct for United States Judges demands from the latter to be competent,

[11] ibid.

[12] M. Davis, 'What can We Learn by Looking for the First Code of Professional Ethics?' [2003] *Theoretical Medicine* 24, 433, provides an interesting account of the emergence of the American Bar Association's first code of ethics, stating that: '*The American Bar Association (ABA) adopted its first code of ethics in 1908. The title of that code –"Canons of Professional Ethics"– suggests that the ABA may have followed the American Medical Association (AMA) in choosing a title for its code that would avoid confusion with ordinary law making ("code and penalties"). But the ABA did not follow the 1903 AMA in passing on to its state associations the problem of making the code binding (or the AMA of 1847 in understanding the code as "legal deontology"). Instead, the ABA enacted a set of rules (and explanations of purpose) going beyond what law, market, and morality would otherwise require. The Canons apply to all (American) lawyers and (apparently) only to them. The ABA's code there- fore meets all our criteria of adequacy four years ahead of the AMA code*', page 28.

[13] J.M. Shaman, 'The Impartial Judge: Detachment or Passion?' [1996] 45 *DePaul Law Review* 605.

[14] As we did for distinguishing between the ethical duties of judges and lawyers, in this piece we shall continue to rely on the United States' regulations to analyse the ethical duties of judges.

to have personal integrity, and to exhibit a willingness to interpret and apply the law. This crucial duty is set in Canon 3 of the Code, which states:

> (A) Adjudicative Responsibilities. (1) A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.[15]

Furthermore, the professional ethics of judges assigns them 'a central role in preserving the principles of justice and the rule of law', as well as the duty to '*respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system*.' Finally, it is worth mentioning the obligation to 'maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives.'

As it can be appreciated from the ethical duties of judges just mentioned, among them are some which they share with lawyers (such as the duty of competence, integrity and so on), a fact that should come as no surprise, considering that such ethical obligations are common to most professions. But what's important for the purpose of this essay is the duty –imposed on judges alone— of interpreting and applying the law, and to maintain and enhance the confidence in the legal system. Within these judge-specific professional ethical obligations, that of applying the law is particularly significant, so much so, that in many jurisdictions this professional duty this is also a legal obligation.

At this point, the issue arises of a possible collision between the professional ethical obligation of judges to '*be faithful to the law*' with that of '*doing justice*'. Of course, underlying this –possibly— contradictory ethical demands is the never-ending controversy between legal positivist and natural law approaches to law.[16] Thus, while a judge endorsing the former approach would say that she is obliged to apply even a law that she deems unjust because of her professional ethical duty to honour the law of the land, a judge that support a natural law approach would say that the duty to apply the law does not include the application of unjust laws.

Aside from the –still ongoing— debates between different versions of legal positivism and natural law, the possible collision between the traditional ethical duty of judges to apply the law with the ethical demands arising from new global challenges such as climate change has been recently posed by Lininger's call to amend the American Code of Judicial Conduct, so that it includes an '*ethical duty to protect the environment.*'[17] While the eventual inclusion of this new professional ethical obligation on judges does not necessarily imply a contradiction with their traditional duty of '*complying with the law*', Lininger's proposal can easily lead to a situation in which a judge feels that the two ethical demands mentioned above are in conflict with each other. Indeed, what if a law that a judge is required to apply does not protect –or does not protect enough— the environment? ¿Which ethical responsibility should prevail in such a case? Posed with this possibility, Lininger does not hesitate in siding with the ethical duty of

[15]Code of Conduct for United States Judges, 2.

[16]For an analysis of the ongoing debates between legal positivism and natural law see J.L. Coleman and B. Leiter, 'Legal positivism' in Dennis Patterson (ed.), *A companion to philosophy of law and legal theory* (2nd ed., Blackwell Publishing Ltd 2010); T. Brooks, 'Between natural law and legal positivism: Dworkin and Hegel on legal theory' [2006] *Georgia State University Law Review* 23, 513; B. Bix, 'On the dividing line between natural law theory and legal positivism' [1999] *Notre Dame Law Review* 75, 1613.

[17]T. Lininger, 'Green Ethics for Judges' (2018) 86 *George Washington Law Review* 3, 711.

protecting the environment, factually adopting a natural law position. In his own words: '*Perhaps the most compelling reason to incorporate environmental ethics into the ABA Model Code of Judicial Conduct is the paramount objective of the legal system: to achieve justice*'.[18]

As it can be appreciated, at least in the case of this author, clashes between the different professional ethical obligations of judges mentioned above should be resolved by opting for what Lininger takes to be the paramount moral obligation of judges, that is, to deliver justice. This way of solving the moral dilemma that judges might face should this new professional ethical obligation be adopted, strongly suggests a natural law-like (or a Dworkinean interpretivist) approach that would encourage judges to disregard their duty to apply the law if it comes in contradiction with their duty of protecting the environment. If we apply the same rationale used by Lininger to the domain of access to life-saving medicines, it seems clear that a clash between the duty to apply a law that denies immediate access to medicines and the moral obligation of saving the life of a human being by ordering the State to deliver medicines, would lead judges to do disregard such laws and do justice.[19]

Part two

I) The Evolution from Deferential Formalism to Judicial Activism in Latin America.

After devoting the first part of this essay to distinguish the specific mandates of the professional ethical demands of judges –as opposed to that of lawyers—, and posing the ethical dilemma faced by the former in cases where law contradicts material justice, in this section I shall scrutinise this problem by looking at the evolving understanding of the professional ethics demands of judges in the domain of access to live-saving medicines in Latin America. This exercise will reveal that in this domain there is a growing trend towards what Lininger advocates in the United States in the environmental arena.

To start with the analysis, it is worth noting that Latin America includes twenty countries that, ever since the emancipation from the Spanish and Portuguese empires (in the XIX century) have struggled to consolidate a working rule of law and political liberalism.[20] After a difficult period of national organisation, by the early XX century most of the new Latin American states managed to establish legal systems that that fit rather squarely with the so-called '*hierarchical model*' developed by Damaska.[21] Accordingly, judges of the region are typically recruited right after law school into a pyramid-like judicial structure that historically encouraged a bureaucratic legal culture which promoted a formalist application of the law, inhibiting legal creativity and judicial activism.[22] One

[18]ibid. 730.

[19]To shed light on this point it might be useful to analyse Atiyah and Summers distinction between substantive and formal legal reasoning: P.S. Atiyah and R.S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning. Legal Theory and Legal Institutions* (Clarendon Press 1987).

[20]J. Adelman and M.A. Centeno, 'Between Liberalism and Neoliberalism: Law's Dilemma in Latin America' in B.G. Garth and Y. Dezalay (eds.), *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (University of Michigan Press 2005).

[21]Damaska (n 2).

[22]R. Pérez-Perdomo, *Los abogados de América Latina: una introducción histórica*. (Universidad Externado de Colombia 2004).

important consequence for public policy of this judicial culture was the traditional indifference exhibited by Latin American's judges towards the deep socio-economic injustices that have plagued the region for centuries. Furthermore, the passive role of judges promoted by this legal culture made them largely marginal from a public policy perspective.[23]

The judicial panorama just sketched gradually started to change in recent decades, due to the growing influence among Latin American judges of what Stone-Sweet calls '*rights-based constitutionalism*' (which he thinks represents a form of natural law thinking),[24] and by the growing impact of International Human Rights in most countries of the region, backed by the significant role played by the Inter-American Human Rights System.[25] Due to these factors, the formalist attitude towards adjudication traditionally exhibited by the judges of the region has been shifting towards a more justice-oriented approach.[26] This transformation, which has been promoted by scholars advocating '*neo-constitutionalism*' is still developing news,[27] with some countries where is largely consolidated, and others where it is yet to become hegemonic.

In the countries where neo-constitutionalism is dominant,[28] there is a marked decline of the legal positivist outlook that used to characterise the work of most judges (understood as the mechanical application of legislation).[29] Instead of this conception, judges of the region increasingly conceived themselves as having a professional duty to do justice, instead of simply upholding the law as it is. This shift away from the traditional deference to legislation has translated into a growing willingness to step-in and do justice in the absence of legislation providing for it and, in some cases, to go against explicit legislation in order to address social injustice.

One of the domains in which Latin America's judiciaries shifted from a formalist attitude –largely indifferent to social injustice— to one that conceives its role as carriers of material justice, is precisely that of access to life-saving medicines. Perhaps due to the life or death drama involved when a patient comes before a court asking for a medicine that can save her life, combined with the changes in the internal legal culture noted above, in recent decades judges of the region have tended to abandon their previous deference to legislative and administrative regulations in this arena, and starting to mandate governments to provide medicines to people without the economic means to acquire them. While, initially, their decisions were premised on the right to life (arguing that

[23]P. Domingo, 'Judicialization of Politics or Politicization of the Judiciary? Recent Trends in Latin America' (2004) 11 *Democratization*, 1, 104.

[24]A.S. Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe' (2012) 1 *Global Constitutionalism* 1, 53.

[25]A. Huneeus, 'Constitutional Lawyers and the Inter-American Court's Varies Authority' [2016] *Law & Contemp. Probs*. 79, 179.

[26]J. Couso, 'The Transformation of Constitutional Discourse and the Judicialization of Politics in Latin America' in J. Couso, A. Huneeus, and R. Sieder, *Cultures of legality: Judicialization and Political Activism in Latin America* (Cambridge University Press 2010); D.E.L. Medina, *Teoría impura del derecho: la transformación de la cultura jurídica latinoamericana* (Legis 2004).

[27]A. von Bogdandy, E.F. Mac-Gregor, M.M. Antoniazzi, F. Piovesan, and X. Soley (eds.), *Transformative Constitutionalism in Latin America: The Emergence of a New ius commune* (Oxford University Press 2017).

[28]J. Couso, 'Latin American New Constitutionalism: A Tale of Two Cities' in Hübner Mendes et al. (eds.), *The Oxford Handbook of Constitutional Law in Latin America* (Oxford University Press 2022).

[29]The shift in the legal culture –or legal ideology—of many judges in the Latin American region has contributed to this, see Couso et al., 2010, but this can also be a consequence in the sea-change that is apparent in the discredit of 'legal formalism' in the region, see J. Roa, *The Role of Constitutional Courts in Latin American Transformative Constitutionalism* (Max Planck Institute for Comparative Public Law & International Law Research Paper, 2020-11).

without those medicines the patients involved would most likely die), in recent years they have gradually based their decisions on the right to health as a free-standing one. Since it is impossible to do justice in this piece to judicially-mandated access to medicines in the entire Latin American region, in what follows I shall concentrate in a group of countries were this type of jurisprudence is most developed, paying attention to the rationale that the courts offer to rule the way they do; the public policy impact of this type judicial activism; and, finally, the ethical dilemmas that this trend poses for judges.

II) The Jurisprudential Development of a Right to Equal Access to Medicines in Latin America.

As anticipated above, the constitutional basis for court-mandated access to medicines in the Latin American region started with the right to life, but it was later construed through a combination of the latter and the rights to equal protection and to social security. Furthermore, in those countries where there was no constitutional recognition of the right to health, it was often based on the obligations imposed by human rights treaties ratified by most countries of the region.

Starting with the first country we shall be analysing, Costa Rica, Norheim and Wilson start their meticulous study of judicially-mandated access to medicines in this country by highlighting the role that litigation on access to HIV/AIDS drugs played in this development.[30] After a careful analysis of the way the Constitutional Chamber of Costa Rica's Supreme Court (also known as the '*Sala IV*') they conclude that, after some decisions of the latter that rejected petitions for ordering the expensive –but highly effective— antiretroviral (ARV) therapy for HIV/AIDS, the Sala IV eventually changed its jurisprudence, on the grounds that access to that treatment was warranted by a fundamental right to health that was implicit in Costa Rica's constitution. In the words of Norheim and Wilson:

> The Sala IV's health rights jurisprudence began to change in 1997, when three HIV/AIDS patients filed a similar case to the failed 1992 ARV case. In 1997, highly effective triple combination ARV therapy had been developed and was in use in the US and other countries. (…) This time, though, the Sala IV's health rights jurisprudence had developed to the point where the right to health was considered to be a justiciable constitutional right. The Sala IV's 1997 decision reversed its 1992 ruling, deciding in favor of the plaintiffs and ordering the CCSS to supply and pay for the necessary medications. The court argued, 'What good are the rest of the rights and guarantees … [or] the advantages and benefits of our system of liberties, if a person cannot count on the right to life and health assured?[31]

What's interesting about Costa Rica's Supreme Court introduction of an autonomous right to health is the characterisation of it as a *precondition* for the enjoyment of other constitutional rights and liberties.[32]After taking this –crucial— doctrinal stand regarding the right to health care, the Sala IV went on to conclude that the recognition of a free-

[30]O. Norheim and B.M. Wilson, 'Health Rights Litigation and Access to Medicines: Priority Classification of Successful Cases from Costa Rica's Constitutional Chamber of the Supreme Court' (2014) 16 *Health and Human Rights Journal* 2, 47.
[31]ibid. 49.
[32]In the opinion of the Constitutional Court, '*if the right to life is especially protected in every modern rule of law, and consequently the right to health, any economic criterion that seeks to nullify the exercise of such rights must yield in importance because, as already indicated, without the right to life the other rights would be useless*', page. 21. Román Forastelli, M. (2014). Judicialización de la salud: revisión de los recursos de amparo relacionados con medicamentos.

standing right to health not only translated into court-mandated provision of medications on an individual basis, but, as significantly, declared that administrative body dealing with the provision of medicines to the Costa Rican population (the CCSS) cannot deny the provision of medicines based on '*eminently economic reasons*'. As the authors mentioned above put it:

> The justification for the Court's ruling in this case became the foundation stone of all health rights jurisprudence and has been expanded and clarified in subsequent rulings. In 2003, for example, the Sala IV deliberated for just one hour before ruling against the CCSS's medical experts and forcing it to pay for Cerezyme, at an annual cost of $175,000, for a young girl with Gaucher disease. The court's jurisprudence relating to the provision of high-cost medications is clearly stated in a 2007 decision when the court argued that the CCSS cannot decline to fill prescriptions prescribed by a patient's treating physician for 'eminently economic reasons.' Instead, the court argued, the CCSS is 'under the undeniable obligation' to supply them, even if they are not on the CCSS's official list. This increasingly expansive definition of the right to health has been frequently cited in many subsequent cases and (…) lit a slow-burning jurisprudential fuse that eventually resulted in an explosion of health rights cases. [33]

The peremptory language of Costa Rica's Supreme Court concerning what it called the '*undeniable obligation*' of governmental agencies to supply medicines to people in need (even if they are not in the official list of medicines), suggests a material justice approach to this issue that is a far cry from the long tradition of deference to both law and public health authorities, and that, furthermore, affirms that, when what's at stake are matters of health and life, budgetary constraints are to be put aside. This last point is also apparent in the following passage of a landmark decision by the Constitutional Chamber of Costa Rica's Supreme Court:

> On multiple occasions it has been pointed out that health and life must prevail as supreme values of the people (…). The Administration must procure the budgetary resources required for its operation, and implement mechanisms and strategies to maximize efficiency in the use of the human and technical resources necessary to provide a public service within the canons of efficiency and speed that public health requires. This problem cannot fall into the reductionism of the budgetary argument. We are dealing with a superior value of the Constitution, positivized in articles 21 and 73 of the Fundamental Charter. Both the fundamental right to life and the very creation of the Costa Rican Social Security Fund oblige the appealed institution to satisfy the health needs of the population, but in particular it must offer a solution when life is at stake; to understand otherwise is to weaken one of the pillars of our social peace.[34]

As it can be appreciated, Costa Rica's Supreme Court position eventually evolved to the point of subordinating budgetary considerations to the '*superior values*' of health and life, a strong stand in dealing with the tension between access to life-saving medicines and the inevitable financial constraints faced by all governments. In consonance with the latter, the Sala IV then issued a series of decisions giving treating physician a paramount role in determining the drugs to be administered to patients, as it is apparent in this passage:

[33]Norheim & Wilson (n 28) 50.

[34]Resolution No. 543-2008 of the Sala IV of Costa Rica's Supreme Court, quoted by K.V. López, 'Principales líneas jurisprudenciales en materia de derecho a la salud en Costa Rica' (2014) 3 *Cadernos Ibero-Americanos de Direito Sanitário* 1, 94, 104-105.

> (…) the Court takes note that the patient suffers from breast cancer, with a high rate of recurrence, and that the treating physician considers that the drug trastuzumab would benefit the patient in accordance with the clinical picture she presents. In other similar cases, this Court has already ordered to respect the criterion of the treating physician, since he knows with greater precision the conditions of the patient, and the convenience of the treatment to be provided[35]

After taking the step of giving treating physicians an almost complete control over the drugs that patients are entitled to be provided by the state to treat severe medical pathologies, court-mandated provision of even experimental medicines was a natural step that followed, as it was rule in a more recent decision by the Sala IV:

> The Magistrates explain what is the application of the use of medicines in experimental phase contained in the Health Law in articles 25,64,65,66,67,68 and 108. They indicate that when a person suffers from a disease that has no cure, and the medical treatments, surgical procedures or authorized drugs are ineffective, and people deteriorate day by day until they die, the experimental phase drugs constitute a hope for the person who is living with the disease. Therefore, if the medicines or treatments comply with articles 64 to 68 of the Health Law, there is no reason for the State to prevent the use of these medicines, since they will be the last resort to avoid death or the deterioration of the quality of life.[36]

The jurisprudential construction of a robust right to access to life-saving medicines by Costa Rica's Supreme Court was echoed by the Constitutional Court of Colombia, as we shall see now. Like in Costa Rica, the latter also started to develop a jurisprudence recognising a constitutional right to access to medicines in the context of the HIV/AIDS pandemic. As Cepeda has reported,[37] the Colombian Constitutional Court invoked the rights to life, health, equality and dignity, when it ruled against a series of both public and private health care providers that had denied AIDS patients access to expensive medicines to treat their conditions (aside from what the National Compulsory Health Plan contemplated).[38] While at first making the right to access to medicines and the right to health care dependent on the right to life, in time the Colombian Court fused these two rights, without taking the step of considering the right to health an autonomous one:

> Although constitutional jurisprudence has stated on multiple occasions that the right to health is not in itself a fundamental right, it has also recognized it as a right to protection by virtue of its connection with the right to life and the integrity of the person, in events in which it is impossible to separate health and life and it is necessary to ensure and protect man and his dignity. For this reason, the right to health cannot be considered in itself as an autonomous and fundamental right, but derives its immediate protection from the inseparable link with the right to life. (…)[39]

Eventually, however, the Colombian Constitutional Court declared that the right to health was an autonomous fundamental right, that it is neither fused nor dependent on the right to life, in a similar vein than what the Costa Rican Supreme Court had done years before. As Pérez Fuentes et al. put it:

[35]See Constitutional Chamber of the Supreme Court of Justice. Resolution N° 05024 (2006). Quoted in (2007).
[36]See Resolution N° 005970 (2012), cited in Lopez (n 32) 135-136.
[37]M.J. Cepeda Espinosa, 'The Judicialization of Politics in Colombia: The Old and the New' in Rachel Sieder, Line Schjolden, and Alan Angell (eds.), *The judicialization of politics in Latin America* (Palgrave Macmillan 2005).
[38]ibid.
[39]See Decision T-395 (1998), cited in Cepeda (n 35).

> (…) the Court in Ruling T-1081 of 2001 understood the right to health as fundamental and autonomous in subjects of special constitutional protection and later, in Ruling T-016 of 2017 expanded the thesis by establishing that fundamental rights are coated with values and principles of the Social State of Law (…).[40]

The consolidation of a jurisprudence recognising a free-standing right to health in the constitutional law of Colombia was significant, since it opened the road for court-mandated access to drugs even in cases of patients suffering from pathologies that are not life-threatening, as this passage from a decision of Colombian Court makes clear:

> (…) The nature of the right to health as a fundamental right (…) implies that in the case of the denial of a service, medicine or procedure established in the POS, a violation of a fundamental right would be involved. It is not necessary, in this scenario, that there be a threat to life or another fundamental right, in order to satisfy the first element of admissibility of tutela: violation or threat of a fundamental right. [41]

Once the status of the right to health as an autonomous right was firmly established in the Court's jurisprudence, access to medicine litigation got momentum, with patients seeking that drugs that were not included in the list prepared by the experts of the Ministry of Health were nonetheless provided to them, as the following passage of an important sentence makes apparent:

> (…) when it does not appear on the list of medicines that the Ministry of Health or the corresponding entity prepares, the affiliating entity must provide it anyway.[42]

To finish this brief review of the way the constitutional jurisprudence of some Latin American countries construed a fundamental right to health that later served as a basis for court-mandated provisions of medicines, the case of Argentina is of interest. As reported by Yamin, the Supreme Court of this country has recognised the right to health as deriving from the so-called '*constitutional bloc*', that is, from the interplay between domestic constitutional law and the human rights treaties signed by Argentina.[43] As Yamin puts it:

> The Argentine Supreme Court has recognized the constitutional status of the right to health as a result of the constitutional bloc. The Court has cited international norms in support of protecting against unilateral termination of health services by different health insurers, including private ones, in enforcing obligations to guarantee access to treatment and holding that the federal government is a subsidiary guarantor in various cases against provincial public contributory insurers. The Court has also addressed the protection of the right to health in relation to vulnerable groups, such as children, persons with disabilities, people with severe diseases, and socially marginalized communities.[44]

[40]See C.A. Pérez Fuentes, F.A. Hernández Peñaloza, K. Leal Castañeda, and D.F. Castillo Calderón, 'Análisis jurisprudencial del derecho a la salud en Colombia' (2019) 10 *Revista Academia & Derecho* 19, 87.
[41]Constitutional Court of Colombia, 7 Sentencia T-859 de 2003, quoted in Defensoría del Pueblo de Colombia, *Derecho a la salud en la Constitución, La Jurisprudencia y los Instrumentos Internacionales* (2003), 46.
[42]See Resolution N° SU-480 (1997), cited by Cepeda (n 35) 46.
[43]Alicia Yamin, 'The Right to Health: The Potential and Limits of Catalysing Systemic Change through the Courts' in C. Hübner Mendes, R. Gargarella and S. Guidi (eds.), *The Oxford Handbook of Constitutional Law in Latin America* (Oxford University Press 2022).
[44]ibid. 763.

The doctrine defending the existence of a 'constitutional bloc' made up of the national charter of rights and the human rights treaties signed by the that country was possible due to the 1994 amendment of the Argentinean Constitution, which granted a constitutional status to a large set of international human rights treaties.[45] The doctrinal introduction of the 'constitutional bloc', combined with the straightforward recognition of the right to health by some of the human rights treaties given constitutional status by the aforementioned amendment provided a firm constitutional basis to claim that the constitutional order of Argentina includes a free-standing right to health. Thus, as Bracamonte and Cassinerio report, while before 1994 health care litigation in Argentina '*was isolated and ad hoc*',[46] with the passing of the amendment to the Constitution '*Argentina (…) granted constitutional hierarchy to the international treaties that enshrine this right*,' a development which, in turn, led to more litigation in this domain.[47]

Once the recognition of the right to health in Argentina's constitutional law was indisputable, in time the Argentinean Supreme Court started to order access to life-saving medicines, through a combination of the right to health and the right to equal protection. With regard to the latter, the Court declared that the fact that drugs for the treatment of multiple sclerosis were not covered by public health policies of the national and provincial governments, could not translate into a discrimination of the exercise of the right to health of the patient, since:

> (…) it would be tolerating an inequality with respect to other persons in a similar situation, but suffering from diseases contemplated by the mentioned organism, in conflict with the constitutional and legal provisions in force.[48]

After proclaiming that the right to health involved court-mandated access to medicines not covered by national or provincial public health policies, the Argentinean courts followed the jurisprudential trend of Costa Rica, when they declared that the

[45]Article 75, number 22, of the Argentinean Constitution states that: '*The following [international instruments], under the conditions under which they are in force, stand on the same level as the Constitution, [but] do not repeal any article in the First Part of this Constitution, and must be understood as complementary of the rights and guarantees recognized therein: The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights and its Optional Protocol; the [International] Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment; and the Convention on the Rights of the Child. They may only be denounced, if such is to be the case, by the National Executive Power, after prior approval by two thirds of the totality of the members of each Chamber.*'

See 'Argentina 1853 (reinst. 1983, rev. 1994)', (*Constitute*) <https://www.constituteproject.org/constitution/Argentina_1994?lang=en> accessed 27 October 2022.

[46]See Bracamonte and Cassinerio (2020), p. 4.

[47]ibid. 4.

[48]ibid..11; Finally, in relation to the decision of the Supreme Court of Justice of the Nation -in a case of original competence- where the National State and the Province of Buenos Aires were sued, in order to grant 100% coverage of a high-cost medicine that the plaintiff claimed was necessary for the multiple sclerosis she suffered and lacked economic resources, the Court admitted the action arguing that it was applicable the reiterated doctrine regarding the right to health, the international commitments assumed by the National State, the provisions of the laws 23. 661 and 24.901, the obligations arising from the Compulsory Medical Program, the responsibility of the provincial jurisdictions in this matter, detailing in particular the responsibility of the Province of Buenos Aires, by virtue of its disability regulations and its Constitution. There it was emphasised that the criterion put forward by the defendant province, related to the fact that it is not a pathology covered by the Dirección de Política del Medicamento and therefore it is not a drug provided by the local authorities, cannot result in a direct damage to the affected person, since it would be tolerating an inequality with respect to other persons in a similar situation, but suffering from diseases contemplated by the mentioned organism, in conflict with the constitutional and legal provisions in force.

right to access to medicines included even experimental drugs, if they were deemed necessary by the attending physicians:

> In this order of ideas, as far as the experimental nature was not enough to hinder the plaintiff's right to hope for an improvement in his state of health, merit was also given to the prescription made by a physician specialized in the matter, with respect to whom it was considered that it could be presumed that he had a more complete knowledge of the specific case and of what was most appropriate for the patient.[49]

III) The Ethical Dilemmas Posed by Court-Mandated Access to Medicines.

A key feature of the jurisprudence on access to medicines in Latin America is the subordination of budget considerations to this fundamental right. This can be noted in the following statement by a former President of Colombia's Constitutional Court, who has argued that: '*The Constitutional Court, like any other court, is not mandated to consider the source of fiscal resources that will finance the compliance with a given decision.*'[50] The same rationale has been more recently displayed by an influential justice of Chile's Supreme Court, who, after a number of sentences ordering the Ministry of Health to provide petitioners of expensive drugs for rare conditions, defended the Court from accusations by public health experts and government officials that such jurisprudence was putting undue pressure on the Ministry's budget (thus interfering with public health policies), by stating that:

> The Constitution says that the most important thing is the dignity of the person and that the State is at the service of the person, not the person at the service of the State. That is what the Constitution tells us, that among the most important guarantees -unless someone says otherwise – is the right to life, and we are here to apply the constitutional guarantees. If not, they should repeal the guarantee of the right to life, and say that the most important thing is balancing the public finances.[51]

The notion that the right to access to medicines trumps public finances can also be found in the jurisprudence of the Constitutional Chamber of the Supreme Court of Costa Rica which, providing a justification for mandating the government to provide even high-cost medications, declared that the executive branch '*cannot decline to fill prescriptions prescribed by a patient*'s *treating physician for "eminently economic reasons"*.'

As it can be appreciated, once access to medicines became consolidated as a fundamental human right in Latin America, the Dworkinean notion of rights that trump considerations of public policy started to be applied rather mechanically in this domain,[52] subordinating budgetary considerations to the aforementioned right. While it is easy to understand that, faced with a person who desperately needs a medicine she cannot afford to save her life, a court will be inclined to order the government to provide it, judicially-mandated access to medicines have

[49]Bracamonte and Cassinerio (2020), op.cit., p. 14.
[50]Cepeda (n 35) 99.
[51]"'Si no, que deroguen la garantía al derecho a la vida y pongan que lo más importante son las finanzas públicas"' (*Colegio De Abogados De Chili*, 17 December 2018) <https://colegioabogados.cl/si-no-que-deroguen-la-garantia-al-derecho-a-la-vida-y-pongan-que-lo-mas-importante-son-las-finanzas-publicas/> accessed 27 October 2022.
[52]J. Greene, 'Foreword: Rights as Trumps?' [2018] *Harvard Law Review* 132, 28.

significant problems that judges do not always realise, but that pose important ethical dilemmas.

The consolidation of a jurisprudence that combined a freestanding right to health care with the doctrine that economic reasons cannot prevent the court-mandated provision of (even highly expensive) medicines eventually led to an explosive rise in access to medicines litigation in Latin America. Indeed, as Kapczynski notes:

> Each year in Brazil, tens of thousands of people 'judicialize,' asking courts to order the government to provide them with one or more specific medicines. They almost always win. In Colombia, from 1999–2014, an estimated 1.3 million right-to-health cases were litigated, many targeting medicines, with patients prevailing about 80 per cent of the time. The trend is most prominent in these two countries, but not limited to them (…). Here the attitude seems to be quite simply that, given the right to health in the Constitution, if a person's doctor prescribes a particular medication, then the State must supply it. Indeed, many of the lower courts in Brazil have stated, in these cases, that it is no concern of theirs where the money will come from to pay for the medication in question or what the impact might be on the public health budget, the right to life (which the right to health supports) is absolute, and financial considerations cannot trump it. Similarly, the Costa Rican Supreme Court's Constitutional Chamber has issued quite peremptory orders to supply medications, even heeding demands for name brand over generic medications, without much concern for the financial impact of its decisions. Lower courts in Colombia have done much the same (…) But this behaviour has raised important questions about the aggregate impact of a large number of individual decisions taken without regard for the broader regulatory and bureaucratic environment in which they arise. Researchers have shown that judicially mandated drugs may not be cost effective according to standard criteria for evaluating public health offerings, suggesting a policy-blind approach to enforcement could harm public health funding. Similarly, others have argued that the overall effect of medications litigation in Brazil is to shift money away from those who need it most. Although the evidence on this is somewhat mixed, it seems clear that these decisions carry the highest risk of producing a regressive impact.[53]

After noting the steep rise in access to medicines litigation in Costa Rica, Colombia and Brazil, Kapczynski also mentions Argentina and Uruguay as countries where the courts play a role in ordering access to medicine, although she claims that the judicialization is '*less extensive*' there. Aside from the fiscal burden sustained in the countries where this type of litigation is used (which, in turn, leaves governments with less resources to finance other important public health needs),[54] Kapczynski highlights that in the Latin American countries where resort to the courts in the domain of access to medicines is highest, this has translated into regressive outcomes, since those who actually go to the courts are not the most disadvantaged, but mostly middle income groups:

> Critics like Octavio L. Motta Ferraz contend that right to medicines cases in Brazil 'almost inevitabl[y]' undermine health equity because courts demand that medicines be provided regardless of their cost, but health budgets are necessarily limited. The lion's share of the benefits of these cases, he sustains, will accrue to those who litigate —who are unlikely to

[53]See A. Kapczynski, 'The Right to Medicines in an Age of Neoliberalism' (2019) 10 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 1, 79, 6.

[54]This last point is also noted by Kapczynski, who notes that, in spite of the social-justice aims behind, the move towards judicially mandated access to medicines may be actually regressive: '*A right to medicines imbricated into this regime is plausibly regressive: it places significant strain on healthcare budgets, redistributes upwards, and provides medicines on terms largely dictated by one of the most profitable industries in the world. This right to medicines, in short, reflects and even intensifies a neoliberal approach to medicines. It mandates discrete individual relief, but rarely sees, much less disrupts, the underlying legal logics and structures that help produce radical health inequities.*' Kapczynski (n 51) 83.

> be the very poorest. Similar arguments have been made about the Colombian cases. This critique echoes a broader one made by Daniel M. Brinks and Varun Gauri: social rights litigation in general, they contend, benefits those in the 'middle of the social spectrum' because the poor have less access to courts.[55]

The fact that judicially-mandated access to medicines does not generally benefit the poor in the Latin American should not come as a surprise to those familiar with socio-legal approaches, that have long emphasised that those with more cultural and social capital are more likely to, first, know their rights, and second, mobilise the judicial process in their benefit.[56] This leaves the most economically disadvantaged in society doubly excluded, because they are, first, mostly left out of court-mandated access to medicines and, second, in a policy environment in which governments have less resources to distribute.

The problematic consequences of judicially-mandated, '*first comes, first served*,' access to medicines has been confirmed by a recent cross-country research performed in Argentina, Brazil, Chile and Colombia by Vargas-Pelaez et al.[57] According to this study, crucial actors of the public health arena in the aforementioned countries consider that the judicialization of access to medicines have created a number of negative consequences, such as: a) '*the pharmaceuticalization of the right to health*'; b) the '*inappropriate interpretation of the right to health as an unlimited and individual right*'; c) the fact that '*some lawsuits favour the public financing of medicines without evidence of efficacy, safety or cost-effectiveness*' and; d) the excessive focus of the health system resources' '*on financing expensive medicines with poor therapeutic value versus the medicines covered by the health system (and that) lawsuits favour the treatment of a limited number of patients (e.g. rare diseases) at the expense of access to essential medicines for the rest of the population.*'[58]

Furthermore, due to the distortions generated by judicially-mandated access to medicines, Vargas-Pelaez et al. note that the stakeholders of the countries they studied think that the judicialization of strategy '*may compromise the long-term sustainability of the health systems*' because '*the diversion of resources for financing the medicines covered by the health system to the financing of uncovered medicines accessed through litigation compromises their liquidity*'. Most critically, the study found that '*representatives from Colombia and Brazil mentioned that "the health policies design is highly influenced by the health needs of few patients who are able to access the Judiciary, at the expense of the rest of the population*'s *health needs (…) litigation jeopardizes the health system sustainability*".'[59]

A final crucial finding of Vargas-Pelaez et al.'s study, is the limited technical knowledge of the region's judges about the medicines they order to be given to individuals that come before them, and the radical unconsciousness that judges engaged in court-mandated access to medicine exhibit regarding the aggregate impact of their rulings for the access to the health care needs of the general population. In their own words:

[55]ibid. 90.
[56]M. Galanter, 'Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Society Review* 1, 95.
[57]C.M. Vargas-Pelaez, M.R.M. Rover, L. Soares et al., 'Judicialization of access to medicines in four Latin American countries: a comparative qualitative analysis' [2019] *International Journal of Equity Health* 18, 68.
[58]ibid.
[59]ibid. 7.

> In general, representatives of all stakeholders, except the patient organizations, mentioned causes of judicialization related to the Judiciary. In this sense, the respondents called attention to the judges' limited technical knowledge about medicines and their vision favouring the supply of the required medicine as always the best alternative for the patient (…) Brazilian and Colombian representatives also attributed this to the judges' wide interpretation of the right to health, considering it as an unlimited right and that any measure aiming to limit it constitutes a violation. This perception might be a consequence of the judges' unconsciousness of the impact of their decisions on access to health services by the general population.[60]

The important shortcoming of judicially-mandated access to medicines found by Vargas-Pelaez et al.'s study of Argentina, Brazil, Chile and Colombia, expanded the findings of research conducted in Costa Rica some years before by Norheim and Wilson,[61] who, using a different methodology,[62] demonstrated that court-ordered provision of drugs had only marginal health benefits, in spite of its important budget impact. In the words of the authors of this study:

> Does health rights litigation that seeks access to medications not covered by an official medications list lead to more fairness in access to medicines and distribution of health benefits? For the case of Costa Rica, we have shown that of the 37 cases evaluated, about 70% could be classified as either low priority or experimental and can be described as providing 'marginal' health benefits for very severe conditions at a high cost to the health care system.[63]

Based on these findings, Norheim and Wilson argued that '*we cannot conclude that litigation leads to more fairness in access to medications*.' The reasons behind the poor performance of Costa Rica's Constitutional Chamber in the domain to access to medicine, the authors of this study continue, is that this court makes '*poorly informed medical decisions (that) plac(es) an untenable financial burden*' on the government. Given this context, the fact that the Supreme Court signed in 2014 a technical cooperation plan with different actors of the Costa Rican health care system aimed at '*facilitate(ing) an ongoing dialogue between interested health specialists on important questions of 'equity, efficiency, design and implementation of public policies concerned with prioritization, law, and the judicialization of health"* seemed appropriate, but since there are no follow up studies analysing what has been the impact of the said cooperation, it is impossible to know whether or not such input would improve the socially regressive nature of judicially-mandated access to medicine in Costa Rica.[64]

The individualistic nature of the most common type of access to medicines constitutional litigation in Latin America over the last two to three decades has been the object of criticism in a recent piece by Yamin,[65] who argues that it often fosters

[60]ibid. 9.
[61]Norheim and Wilson (n 28).
[62]Vargas-Pelaez et al. (n 55) 10.
[63]Norheim and Wilson (n 28); In our material of 37 randomly selected cases which concerned access to medicines and were brought to the Constitutional Chamber of the Supreme Court, we found that 2.7% fell into priority group 1 (highest priority), 27% in group II, 48.6% in group III, and 21.6% in group IV (see Table 2). Only three of the drugs are already on the official WHO essential drugs list.
[64]ibid. 4. This agreement Norheim and Wilson hope, should allow the Constitutional Chamber to '*make better-informed health rights decisions that benefit from previously unavailable technical medical information and input from relevant stakeholders. To include all stakeholders in mechanisms for systematic and impartial consideration of the medical evidence, the costs, and the distributional impact of introducing new medications is an important first step toward making the priority-setting process fairer.*'
[65]Yamin (n 42).

queue-jumping for expensive medicines by groups with better access to justice, thus distorting health care systems. In her words:

> Individual exploitation of opportunities within systems has exploded, using constitutional litigation as an avenue, while broader collective efforts to reform the health systems through litigation are far less frequent. Such individual litigation for entitlements, while often better understood as regulatory gap problems, can challenge principles of formal equality by fostering queue-jumping for expensive medications and treatments by those with better access to justice. It also may distort health systems towards curative care, rather than investing in long-term structural infrastructure for the health system and in preconditions for health, which have wider benefits for the disadvantaged.[66]

The problematic effects of judicialization of access to medicines in Latin America described above should, however, be balanced with a number of positive impacts of this phenomenon. Thus, for example, some authors have argued that the sheer existence of judicially-mandated access to medicines have prompted governments to act swifter than they would have otherwise do in anticipation of such judicial actions, thus improving the healthcare system.[67] This point is also highlighted by Vargas-Pelaez et al., who argue that: '*In all the studied countries, litigation was considered positive when lawsuits involved covered medicines that for some reason were not supplied to the patient, because it forces the health system managers to carry out their duties.*'[68] Other defenders of this judicial practice point out that court-enhanced access to medicines has raised awareness of the right to health in some countries of the region.[69]

Conclusion

In this essay, I have analysed the conflicting professional ethical demands imposed on judges to, on the one hand, faithfully apply the existing law of the land and, on the other hand, to do justice in the face of urgent global challenges such as ensuring an equal access to life-saving medicines. After establishing the precise nature of the professional ethical duties of judges (as opposed to those of lawyers) and noting the tensions they face when the duty of applying the law prevents them from complying with the duty of delivering material justice in the domain of access to medicines, I turned to the actual experience of many Latin American countries where judicially-mandated access to medicines have been most common, describing the consequences of this judicial practice.

If the Latin American experience in this domain is projected to other areas of the world –and nothing suggests that it cannot—, judges around the globe should take seriously the need to find a balance between their duty of deference towards public-health authorities in this domain (when this is mandated by legislation), and the duty to do justice to individuals who cannot afford live-saving medicines. One possible way to deal with this conflict is give priority to one of the two professional ethical duties. Another, to recognise that there

[66]ibid.
[67]D. Brinks and Varun Gauri, 'The Law's Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights' (2014) 12 *Perspectives on Politics* 2.
[68]Vargas-Pelaez et al. (n 55) 9.
[69]A.I. Arrieta-Gomez, 'Realizing the Fundamental Right to Health through Litigation: The Colombian Case' (2018) 20 *Health and Human Rights* 1, 133, 136.

might be a clash of absolutes here. This last stand seems to be defended by Vargas-Pelaez, who frames the moral dilemma in a compelling way:

> (…) the Judiciary's representatives argued that it is ethically unacceptable to sacrifice the individual right to health in order to protect the collective right to health. This evidenced the conflict of this view with the Executive' and health system managers' perspective that consider that what is actually unethical is to sacrifice the collective right to health in order to protect the individual right to health. In addition, they argued that the exposure of the patient to unsafe or unnecessary medicines, indeed, constitutes a violation of the right to health.[70]

Note how, as it often the case when there is a clash of absolutes, both defenders of judicially-mandated access to medicines and public health authorities that advocate for a centralised distribution of such medicines claim to have ethics on their side. In this context, there is the temptation to solve this puzzle by favouring one group or the other. But it might be another, more nuanced, way to deal with this moral dilemma. This will be to allow judges facing life or death decisions in this domain to disregard a law that fails to provide for life-saving medicines to disadvantaged groups but, immediately after ordering the delivery of the required medications, recognise that they have a professional ethical duty to thoroughly analyse the fiscal/budgetary impact of their judgements, and do something about it, so that other life-saving treatments do not become unsustainable due to lack of funds. This course of action would entail that judges openly acknowledge that they have to take stock of the budget impact of their decisions in this domain, and, consequently, trained themselves in the intricacies of public finances, so they can make more informed judgements. In this scenario, judges facing these difficult decisions would be open to –and capable of— analysing expert reports and other policy-making documents before issuing their decisions. By following this path, judges will not fall in the –ethically unacceptable— attitude of '*fiat iustitia, et pereat mundus.*'

Disclosure statement

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[70]See Vargas-Pelaez et al. (n 55) 11.