

# LAW, DEVELOPMENT AND ACCESS TO EDUCATION: A BRAZILIAN CASE STUDY OF CLASS ACTIONS

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## INTRODUCTION

In determining its development agenda, to be implemented between 2016 and 2030, the United Nations established the 17 Sustainable Development Goals (SDGs).<sup>1</sup> This article uses a case study on access to education to demonstrate the close relationship between some of these core development goals, notably SDG 4 (“Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all”),<sup>2</sup> SDG 5 (“Achieve gender equality and empower all women and girls”),<sup>3</sup> and SDG 16 (“Promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable, and inclusive institutions at all levels”).<sup>4</sup>

The benefits of judicial intervention in public policy on early-childhood education may have substantial redistributive consequences, impacting both issues of class, since educating poor children is one obvious way to reduce inequalities, and issues of gender, which are deeply implicated by Brazilian cultural traditions. For example, Brazilian women, so often their households’ main care-providers, shoulder almost all of the responsibility for their children’s education.<sup>5</sup> Nevertheless, achieving the laudable goal of implementing SDG 16 in countries marked by severe wealth inequality such as Brazil, is a Herculean challenge.<sup>6</sup>

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1. G.A. Res. 70/1, Transforming Our World: the 2030 Agenda for Sustainable Development (Sept. 25, 2015) [hereinafter “2030 Agenda”].

2. *Id.* at 14.

3. *Id.*

4. *Id.*

5. INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA (IBGE), PESQUISA NACIONAL POR AMOSTRA DE DOMICÍLIOS CONTÍNUA [Continuous National Household Survey], (2018). According to the IBGE, expectations of traditional gender roles with regard to care of family members (children, elderly and disabled) and household chores are an important factor in gender inequality. Expanding the supply of childcare impacts both educational issues (focus on children) and gender issues, enabling women to work outside the home. One method of surveying this impact is to assess the proportion of women with one or more children attending daycare who are employed versus those who are unemployed. Available data shows that the level of occupation of women aged sixteen or older with children aged zero to three years who attend day care (65.4%) is much higher than those whose children do not attend (41.2%) or where only one of multiple children attends day care (40.3%). See ESTATÍSTICAS DE GÊNERO: UMA ANÁLISE DOS RESULTADOS DO CENSO DEMOGRÁFICO 2010 (Instituto Brasileiro de Geografia e Estatística ed., 2014).

6. The severity of income inequality in Brazil can be seen by the Brazilian Gini coefficient of 53.9, which shows that Brazil is one of the most unequal countries

An enhancement in the design of class actions could decisively contribute to institutional development of public policy on early-childhood education by (i) benefiting all parties interested in a dispute's outcome (including groups traditionally excluded socially and economically); (ii) discouraging unfair access to scarce resources ("queue jumping," as David Kennedy has put it);<sup>7</sup> and (iii) helping both to deter illicit conduct and to curb the "appearance of naturalness, necessity, and relative justice of the status quo," which may enable elite factions to perpetuate the existing state of affairs.<sup>8</sup> Additionally, by presenting demands in one voice, the class action tool saves public resources and stimulates faster judgments.<sup>9</sup> Thus, as Marc Galanter has argued, it contributes to a level playing field for plaintiffs and defendants.<sup>10</sup>

Brazil's class action system is regrettably weaker than its U.S. counterpart.<sup>11</sup> Importantly, as currently designed, it can only give the

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in the world. See GINI INDEX, THE WORLD BANK, <https://data.worldbank.org/indicator/SI.POV.GINI?view=map> [<https://perma.cc/Q729-3J8J>].

7. David W. Kennedy, *The International Human Rights Regime: Still Part of the Problem?*, in EXAMINING CRITICAL PERSPECTIVES ON HUMAN RIGHTS 19, 24 (Rob Dickinson et al. eds., 2012). In the access to education context discussed herein, individual litigation enables some parents to dodge waiting lists and to crowd their children into overburdened public schools. See *infra* Part III.

8. According to Duncan Kennedy, "the diffusion of law-making power reduces the power of ideologically organized majorities, whether liberal or conservative, to bring about significant change in any subject-matter area heavily governed by law. It empowers the legal fractions of intelligentsias to decide the outcomes of ideological conflict among themselves, outside the legislative process. And it increases the appearance of naturalness, necessity, and relative justice of the status quo, whatever it may be, over what would prevail under a more transparent regime. In each case, adjudication functions to secure both particular ideological and general class interests of the intelligentsia in the social and economic status quo." DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: *FIN DE SIÈCLE 2* (Harvard Univ. Press, photo. reprt. 1998) (1942).

9. HELENA C. REFOSCO, AÇÃO COLETIVA E DEMOCRATIZAÇÃO DO ACESSO À JUSTIÇA 95–96 (2018).

10. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 143–44 (1974).

11. For a comparative perspective on Brazilian class actions, see Antonio Gidi, *Class Actions in Brazil – A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311 (2003); Carlos Alberto de Salles, *Class actions: algumas premissas para comparação* [Class Actions: Some Assumptions for Comparison], in PROCESSO COLETIVO: DO SURGIMENTO À ATUALIDADE 17, 17–33 (Ada Pellegrini Grinover et al. eds., 2014); Carlos Portugal Gouvêa & Helena C. Refosco, *Class Action in Brazil: Overview, Current Trends, and Case Studies*, in THE CAMBRIDGE HANDBOOK OF

poor *some voice* in the country's social, economic, and political struggles.<sup>12</sup> Furthermore, within the judiciary, there is cultural resistance to class actions and to the challenges inherent to this kind of litigation, especially in conflicts entailing the executive and legislative branches.<sup>13</sup> However, there is still room for legislative improvement that could strengthen class actions as an emergent progressive force and truly help the inclusion of marginalized groups.<sup>14</sup> For this to happen, the reformed system must be designed in such a way that recognizes and overcomes disadvantages stemming from Brazil's profound socioeconomic and gender inequalities, which impair the country's development and condemn the poor, and especially poor women, to a substandard quality of life.

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CLASS ACTIONS 129, 149 (Brian Fitzpatrick & Randall Thomas, eds., forthcoming 2020).

12. José Reinaldo Lima Lopes, *Brazilian Courts and Social Rights: A Case Study Revisited*, in *COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR?* 185, 206 (Roberto Gargarella, Pilar Domingo & Theunis Roux eds., 2006). Generally, the study of class actions in Brazil confirms Gerald Rosenberg's findings that the courts depend on a series of favorable conditions to succeed in the structural reform endeavor, such as the existence of consolidated case law on the matters, mainstay in the legislative and executive branches, and popular support (or, at least, absence of relevant popular opposition). For Rosenberg, as the coexistence of all these favorable factors is uncommon, there would be more productive ways of using scarce public resources than in lawsuits. However, if there is political and popular support for change, the judiciary can serve as a lever in the process of social change. Rosenberg warns, however, that the support of the elites, more than the popular, can be important for the success of the litigation strategy. And he observes that, even if there is approval of the judicial decision by the government and the elites, this does not imply immediate and full support for compliance with the injunction. *See generally* GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2nd ed. 2008).

13. The Brazilian judiciary, as well as its counterparts in other countries, would rather resort to the "safe area" of individual rights jurisprudence and avoid federalism issues or separation of powers disputes. Ran Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 *FORDHAM L. REV.* 721, 751 (2006).

14. For Siri Gloppen, some institutional conditions are favorable for the courts to act as agents of social transformation and inclusion of marginalized groups, such as the ability of these groups to transmit their complaints, the willingness of courts to respond to these complaints, the ability of judges to enforce social rights in order to improve the situation of marginalized groups and respect for the political authority of judgments by other actors. Siri Gloppen, *Courts and Social Transformation: An Analytical Framework*, in *COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR* 35, 35–59 (Roberto Gargarella, Pilar Domingo & Theunis Roux eds., 2006).

Using a case study, this Article will examine a legal controversy surrounding the São Paulo city government's failure to provide legally mandated universal daycare and preschool education. In comparing the results of the ensuing individual lawsuits filed against City Hall with the results of class actions filed against the same entity and for the same purpose, this Article pays special attention to the innovations adopted in one specific class action, Ação Civil Pública 0150735-64.2008.8.26.0002 [hereinafter "ACP"],<sup>15</sup> a class action focused on public services that illustrates the class action's potential for creating equitable remedies.

This Article intends to highlight the strengths inherent in the use of the legal tool known as the class action lawsuit in the struggle to increase access to justice<sup>16</sup> and enhance the quality of the rule of law in Brazil. In doing so, it compares the possible successes of class action litigation with the results of individual litigation, and focuses especially on the inclusiveness of the remedies, since the rule of law is better measured in terms of levels of inclusiveness rather than in terms of its existence or non-existence.<sup>17</sup>

## I. RIGHT TO EDUCATION ACCORDING TO THE BRAZILIAN COURTS

Brazil's 1988 Federal Constitution guarantees the right to education.<sup>18</sup> Individual and class litigation has forced the country's judiciary to determine the breadth and extent of this right, specifically as it applies to early-childhood education, access to which has not yet

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15. T.J.S.P., Ap. Civ. No. 0150735-64.2008.8.26.0002 São Paulo, Relator: Des. Walter de Almeida Guilherme, 16.12.2013, Diário da Justiça Eletrônico [D.J.e.], 14.02.2014, 1593 (Braz.) [hereinafter "ACP"].

16. Like other countries, Brazil has to some extent witnessed the transformation of access to justice into a "non-issue," replaced by a so-called "litigation explosion"—a problem highlighted by Ugo Mattei in *Access to Justice. A Renewed Global Issue?*, 11.3 ELEC. J. COMP. L. 1 (2007). For a timely analysis of the state of access to justice issues in Brazil, see generally Maria Tereza Aina Sadek, *Acesso à justiça: um direito e seus obstáculos* [Access to Justice: A Right and its Obstacles], 101 REVISTA USP 55 (2014); Maria Cecília de Araujo Asperti et al., *Why Do the "Haves" Come Out Ahead in Brazil? Revisiting Speculations Concerning Repeat Players and One-Shotters in the Brazilian Litigation Setting*, 16 REVISTA DIREITO PÚBLICO 88 (2019).

17. Oscar Vilhena Vieira, *Inequality and the Subversion of the Rule of Law*, 6 SUR-INT'L J. ON HUM. RTS. 27, 36 (2007).

18. CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 208, IV (Braz.) ("[t]he State's duty regarding education shall be carried out by guaranteeing . . . early-childhood education, in daycare and pre-school, for children up to five (5) years of age").

been universalized.<sup>19</sup> Since at least 2005, individual disputes seeking to redress a lack of vacancies in schools<sup>20</sup> have generally resulted in plaintiffs' victories.<sup>21</sup> The success of these individual litigations mirrors the leading case established by the Federal Supreme Court (STF).<sup>22</sup>

On the other hand, over the years, the results of collective litigation have been unpredictable, with courts often dismissing as generic and unenforceable class action vacancies claims that, except for their larger scale, are in fact no different from those presented in the individual disputes.<sup>23</sup> Historically, educational class actions brought by the Public Prosecutors' Office were either dismissed for offending the separation of powers principle<sup>24</sup> or for the belief that they

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19. See *Monitoramento e avaliação dos planos subnacionais de educação*, PLANO NACIONAL DE EDUCAÇÃO, <http://pne.mec.gov.br/18-planos-subnacionais-de-educacao/37-monitoramento-e-avaliacao-dos-planos-subnacionais-de-educacao> [<https://perma.cc/Z6UX-92ZP>].

20. Because of the lack of vacancies, students who live in a school district are turned away for lack of space.

21. See Ester Rizzi & Salomão Ximenes, *Litigância estratégica para a promoção de políticas públicas: as ações em defesa do direito à educação infantil em São Paulo* [Strategic Litigation for the Promotion of Public Policies: Actions in Defense of the Right to Early Childhood Education in São Paulo], in JUSTIÇA E DIREITOS HUMANOS: EXPERIÊNCIAS DE ASSESSORIA JURÍDICA POPULAR 105, 105–208 (Laura Bregenski Schühli ed., 2010); Adriana A. A. D. Silveira, *O direito à educação de crianças e adolescentes: análise da atuação do Tribunal de Justiça de São Paulo* [The Right to Education for Children and Adolescents: Não Analysis of the Performance of the São Paulo Court of Justice] (2010) (P.h.D. dissertation, University of São Paulo), <https://www.teses.usp.br/teses/7isponiveis/48/48134/tde-26012011-144259/pt-br.php> [<https://perma.cc/PK75-UU9Z>].

22. In the leading case, the STF ruled that children are entitled to early childhood education in daycare and preschool. This right can be enforced by the judiciary because it is a public policy instituted by the Constitution itself. S.T.F., Re. Ext. No. 436.996 São Paulo, Relator: Min. Celso de Mello, *Diário da Justiça Eletrônico* [D.J.e.], 07.11.2005, 37 (Braz.), <http://portal.stf.jus.br/processos/detalhe.asp?incidente=2254591> [<https://perma.cc/9CVS-JJ2A>].

23. For more analysis of 75 examples of educational class actions that, with few exceptions, confirms the assertion, see Carolina M. Marinho, *Justiciabilidade dos direitos sociais: análise de julgados do direito à educação sob o enfoque da capacidade institucional* [Litigating Social Rights: A Judicial District Analysis of the Right to Education vis-à-vis Institutional Capacity] (Apr. 30, 2009) (L.L.M. dissertation, University of São Paulo), [https://www.teses.usp.br/teses/7isponiveis/2/2139/tde-03052010-131241/publico/Carolina\\_Martins\\_Marinho\\_final.pdf](https://www.teses.usp.br/teses/7isponiveis/2/2139/tde-03052010-131241/publico/Carolina_Martins_Marinho_final.pdf) [<https://perma.cc/DR9R-9C3U>].

24. A critique of the Brazilian Judiciary's reluctance to deal with the principle of the separation of powers can be seen in: Jean-Paul Veiga da Rocha, *A capacidade normativa de conjuntura no direito econômico: o déficit democrático da regulação financeira* [The Democratic Deficit of Financial Regulation: the Rule-Making Powers of Brazil's Central Bank and Monetary Council] (Mar. 11, 2015)

would unduly strain the public budget.<sup>25</sup> Moreover, even when the Court ruled in the collective plaintiffs' favor, the wording was often generic, *e.g.*, merely reaffirming every child's legal entitlement to public daycare, that no practical change could result.<sup>26</sup>

The city of São Paulo has always been responsible for a significant portion of the national litigation on the right to education.<sup>27</sup> In spite of the city's relatively high Municipal Human Development Index (MHDI) of 0.783,<sup>28</sup> few enjoy its wealth,<sup>29</sup> which has become known worldwide for photos showing luxurious balconies in the Morumbi neighborhood side-by-side with communities lacking even

(Ph.D. dissertation, University of Não Paulo), <http://www.teses.usp.br/teses/7isponiveis/2/2133/tde-12022015-204835/pt-br.php> [<https://perma.cc/X22W-FF4F>]; Jean-Paul Veiga da Rocha, *Quem tem medo da delegação legislativa?* [Who's Afraid of the Delegation of Legislative Powers?], 271 REVISTA DE DIREITO ADMINISTRATIVO, 193, 193–221 (2016).

25. For illustrative purposes, see T.J.S.P., Ap. Civ. No. 0008686-37.2009.8.26.0625 São Paulo, Relator: Des. Roberto Solimene, 5.7.2012, Diário da Justiça Eletrônico [D.J.e.], 5.14.2012, 1182 (Braz.) (stating that, to avoid infringing the separation of powers, the Judiciary can only grant child-education vacancies in individual lawsuits, not in class actions).

26. For instance, in the city of São Paulo, in the Pinheiros, Santana, Lapa, and Penha jurisdictions, four class action rulings guaranteed universal access to early-childhood education. Nevertheless, while these decisions do not obviate litigations, certain procedural differences now govern the actions that now may take place. See Alessandra Gotti & Salomão Barros Ximenes, *Proposta de litígio estrutural para solucionar o déficit de vagas em educação infantil*. [A Structural Litigation Proposal to Solve the Deficit of Vacancies in Early-Childhood Education], in DIREITO À EDUCAÇÃO E DIREITOS NA EDUCAÇÃO EM PERSPECTIVA INTERDISCIPLINAR 365, 373 (Nina Beatriz Stocco Ranieri & Angela Limongi Alvarenga Alves eds., 2018).

27. See Susana H. da Costa, *Acesso à justiça: promessa ou realidade? Uma análise do litígio sobre creche e pré-escola no município de São Paulo* [Access to Justice: Promise or Reality? Não Analysis of the Litigation on Nursery and Preschool in the Municipality of São Paulo], in DIREITO PROCESSUAL CONSTITUCIONAL 264, 264–65 (2016); Luiza A. Correa, *Judicialização da política pública de educação infantil no Tribunal de Justiça de São Paulo* [Judicialization of Public Policy on Early Childhood Education at the São Paulo Court of Justice] 105 (Mar. 11, 2015) (L.L.M. dissertation, University of Não Paulo), [https://www.teses.usp.br/teses/8isponiveis/2/2134/tde-02122015-074746/publico/Dissertacao\\_Luiza\\_Andrade\\_Correa\\_USP.pdf](https://www.teses.usp.br/teses/8isponiveis/2/2134/tde-02122015-074746/publico/Dissertacao_Luiza_Andrade_Correa_USP.pdf) [<https://perma.cc/48NK-HN3F>].

28. MUNICIPAL HUMAN DEVELOPMENT INDEX, SÃO PAULO STATE, <https://cidades.ibge.gov.br/brasil/sp/panorama> [<https://perma.cc/83J3-63Y5>].

29. Educação falha não colabora para ampliar o IDH do município de São Paulo, SECRETARIA MUNICIPAL DE DESENVOLVIMENTO URBANO, PREFEITURA DA CIDADE DE SÃO PAULO, <https://www.prefeitura.sp.gov.br/cidade/secretarias/urbanismo/noticias/?p=248759> [<https://perma.cc/C4TK-EAEG>].



basic sanitation.<sup>30</sup> It is precisely in the south of São Paulo, where the MHDI is at its lowest,<sup>31</sup> that the Movement Daycare for All (Movimento Creche para Todos, [hereinafter “The Movement”]), a civil society movement made up of entities fighting to guarantee universal access to quality child education, mapped the existence of 823 children denied their right to early-childhood education for the lack of facilities near their houses.<sup>32</sup> The Movement filed administrative petitions before City Hall and scheduled an audience with the regional director of education on the day, place, and time suggested by him.<sup>33</sup> The hearing, however, was not held because the director did not attend.<sup>34</sup> A month later, The Movement received a letter stating that the children would be placed on a waiting list.<sup>35</sup> In September 2008, the Movement filed the ACP case discussed in this article.

The ACP class action relied on the Court of Auditors’ financial reports, which denounced São Paulo’s City Hall for failing to make full and appropriate use of financial resources available through a federal education-equalization fund (FUNDEB).<sup>36</sup> The complaint argued that City Hall had deprived the municipal education system of the obligatory minimum investment stipulated in the Federal Constitution.<sup>37</sup> Additionally, the class action provided evidence that the government underestimated the demand for daycare centers

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30. See Leonardo Leomil & Ananda Apple, *Dois milhões de pessoas não têm coleta de esgoto na Região Metropolitana de SP, diz estudo*, G1 (Oct. 29, 2019) <https://g1.globo.com/sp/não-paulo/noticia/2019/10/29/dois-milhoes-de-pessoas-nao-tem-coleta-de-esgoto-na-regiao-metropolitana-de-sp-diz-estudo.ghtml> [<https://perma.cc/46AB-HMBA>] (last visited Jul 16, 2020); see also Jacqueline Falcão, *Moradores do Morumbi, em SP, pedem unidade pacificadora na favela de Paraisópolis*, O GLOBO (Aug. 31, 2011), <https://oglobo.globo.com/brasil/moradores-do-morumbi-em-sp-pedem-unidade-pacificadora-na-favela-de-paraisopolis-2685164> [<https://perma.cc/X826-6YZL>]; Naiara Galarraga Gortázar, *Coronavírus chega às favelas brasileiras com impacto mais incerto que nas grandes cidades*, EL PAÍS (Apr. 5, 2020), <https://brasil.elpais.com/sociedade/2020-04-05/coronavirus-chega-as-favelas-brasileiras-com-impacto-mais-incerto-que-nas-grandes-cidades.html> [<https://perma.cc/8L29-LG8K>].

31. See *supra* note 27.

32. ACP, *supra* note 15 at 4.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 37–39. Regarding FUNDEB, see also Lindsey Carson, Joanna V. Noronha & Michael J. Trebilcock, *Held Back: Explaining the Sluggish Pace of Improvement to Basic Education in Developing Democracies—The Cases of India and Brazil*, 6 J. POVERTY ALLEVIATION & INT’L DEV. 2, 34 (2015) (discussing FUNDEB and financial inputs to the education system).

37. ACP, *supra* note 15, at 38.

because poor people living far from the available kindergartens were unable to register their children, an error that had led to a distortion in public policy calculation and planning.<sup>38</sup>

The class action demanded that vacancies be created for all children aged zero-to-five-years-old in the city of São Paulo.<sup>39</sup> The court of first instance dismissed the lawsuit, declaring that it violated the separation of powers.<sup>40</sup> The plaintiffs appealed and, in the second instance, the trial was postponed to allow for a settlement discussion, which, at the plaintiffs' request and in view of the case's social relevance, was converted into a public hearing held on November 4, 2013.<sup>41</sup> This was the first public hearing in the history of the São Paulo State Court of Justice, and a major victory for the plaintiffs, who claim that it brought media visibility to the problem in addition to providing greater space for dialogue as well as for a more transparent presentation of information and alternatives.<sup>42</sup>

The newly formed Inter-Institutional Working Group on Early Childhood Education (GTIEI) brought together private entities, as well as government entities such as the São Paulo State Public Defenders' Office and the São Paulo State Public Prosecutors' Office, to participate in this public hearing.<sup>43</sup> No settlement was reached and the appellate court handed down a ruling that City Hall could not shirk its constitutional duty to provide education for all child citizens residing within the city limits.<sup>44</sup> Highly critical of what it considered municipal mismanagement in the implementation of the right to early-childhood education, the ruling lambasted City Hall's blatant noncompliance with the minimum level of attendance as required by the National Education Plan and pointed out that the new mayor had, in his Goals Program, promised to create 150,000 early-childhood vacancies in the municipal school network.<sup>45</sup>

Even so, the ruling conceded that since individual lawsuits frequently led to queue jumping<sup>46</sup> and the overcrowding of educational

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38. *Id.* at 4. Therefore, the plaintiffs insisted on the importance of the so-called "active search" for children whose parents fail to register in the administrative queues for vacancies. *Id.*

39. *Id.* at 44.

40. *Id.* at 1439–52.

41. *Id.* at 1850–55.

42. *See* Correa, *supra* note 26.

43. ACP, *supra* note 15, at 1815, 1918–2013.

44. *Id.* at 2023–65.

45. *Id.* at 2051.

46. *See infra* Part III.

facilities, the problem at hand needed a collective solution.<sup>47</sup> Thus, the court decided that City Hall must create, between 2014 and 2016, a minimum of 150,000 new placements in kindergartens and pre-schools for children up to five years of age, providing with quality assurance, at least 50% of the placements within eighteen months from the date of the order.<sup>48</sup> Also, it demanded that City Hall must earmark funds for the expansion of the education system related to daycare centers and preschools in its budget proposal.<sup>49</sup> In addition, it was required to present a plan for the expansion of vacancies and the construction of children's education units within sixty days. Finally, City Hall was obligated to submit full progress reports every six months.<sup>50</sup> These reports would then be evaluated by the Court Office of Children and Youth, which would liaise with civil society and relevant juridical organs, including the State Public Defenders' Office and the State Public Prosecutors' Office.<sup>51</sup>

City Hall filed appeals to the Brazilian constitutional court and to the highest federal court,<sup>52</sup> which are still pending.<sup>53</sup> Furthermore, almost at the deadline for attaining full compliance with the judicial order, the Municipality presented in court the data portrayed in Chart 1 below in an attempt to demonstrate the relevant and historical progress made by municipal management. The chart shows a dramatic spike in the number of spots available in daycare centers and kindergartens in the city of São Paulo.

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47. ACP, *supra* note 15, at 2056.

48. *Id.* at 2063–65.

49. *Id.*

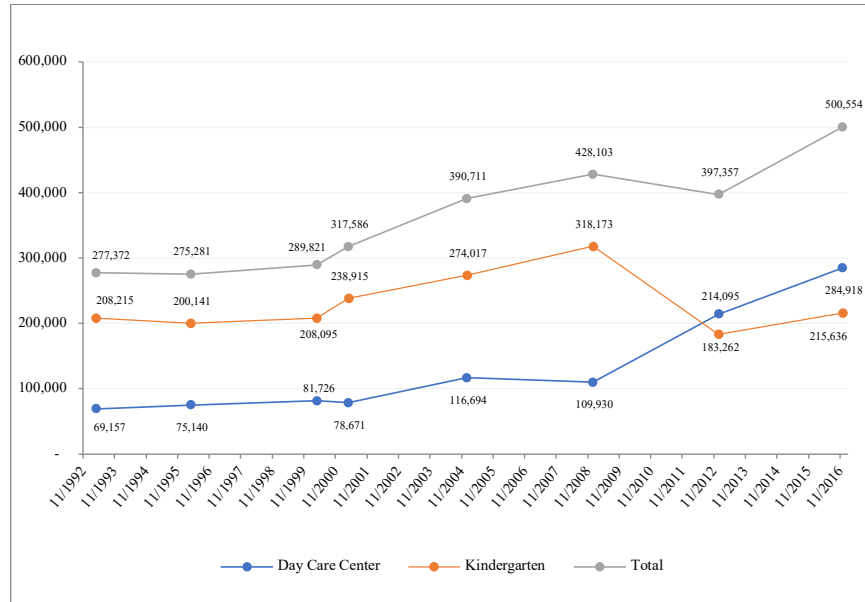
50. *Id.*

51. *Id.* at 2064.

52. Brazil is a federal state in which federal and state court systems coexist with specialized bodies. Lawsuits are generally filed in courts of first instance (the equivalent to trial courts), where single judges hand down decisions. Appeals go to courts of second instance (appeal courts) in which panels of judges review the initial decision. After the initial appeal, some cases may go to the Superior Court of Justice (STJ), whose primary responsibility is reviewing legal reasoning regarding federal legislation. Lastly, the STF, whose main role is to interpret the Constitution, serves the dual purposes of court of final review, reached by means of the Extraordinary Appeals, and constitutional court.

53. ACP, *supra* note 15, at 3034–39.

**Chart 1 – Enrollment in Early Childhood Education in the City of São Paulo (1993–2016)<sup>54</sup>**



Source: Census School of the Ministry of Education and Online School System (EOL). Data presented in the monitoring process 2014/00015960.

Relying on the above figures, City Hall announced that it had achieved “approximately 80% of the target for the zero-to-three-year segment and essentially universal service for the four-and-five-year segment.”<sup>55</sup> The plaintiffs argued in response that the numbers resulted from City Hall’s use of misguided criteria.<sup>56</sup> The judicial Advisory Committee came up with an intermediate figure, asserting that 72,814 daycare center vacancies and 16,435 kindergarten vacancies had in fact been created in the period covered by the court

54. ACP, *supra* note 15, Report on Compliance with the Judgment of the Appeal 0150735-64.2008.8.26.0002, at 2–3 gráfico 1.

55. Relatório de Cumprimento do Acórdão da Apelação [Appeal Judgment Compliance Report] 1050735-64.2008.8.26.0002, 2.

56. ACP, *supra* note 15, minutes of the public hearing held on June 1, 2017 at 2–9. The misguided criteria, according to the plaintiffs, was based on enrollment rather than vacancy numbers, a procedure that violated the spirit of the ACP ruling and the São Paulo Municipality Goals Program for 2013–2016.

decision.<sup>57</sup> It is worth noting, however, that while the combined 89,249 new vacancies represented only around 60% of the total number demanded originally by the court, they also represented a substantive advance in the universalization of the right to early childhood education in the city.<sup>58</sup>

The Municipality also emphasized in the motion presenting the chart that, just after the ACP judgment was handed down, two legislative milestones were enacted and, in accordance with the provisions of both new statutes, it had so far not defaulted on its constitutional obligations regarding child education.<sup>59</sup>

Even so, as the court-ordered number of vacancies certainly had not been reached, the monitoring procedures continued. In June 2017, the court set a new public hearing, in which the plaintiffs accused City Hall of both quantitative and qualitative non-compliance; the latter resulted, according to the plaintiffs, from impressive growth in classroom size as well as from the exaggerated expansion of mediocre charter schools.<sup>60</sup> While the Municipality agreed in part with these criticisms, it nonetheless defended its commitment to creating new early-childhood education placements as set forth in the Municipal Education Plan.<sup>61</sup>

Finally, in September 2017, the parties agreed to a settlement in which City Hall promised: (1) to register at least 85,5000 new enrollments in day-care centers for children up to the age of three between December 31, 2016 and December 31, 2020; (2) to act in good faith to meet specific quality parameters—*e.g.*, the number of clusters per classroom, the number of students per teacher, adequate external areas for students, and adequate teacher training; (3) to consider the main relevant indicators and present a detailed study and evaluation by region of early-childhood education in the Municipal Education

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57. See Alessandra Gotti & Salomão Barros Ximenes, *Proposta de litigio estrutural para solucionar o déficit de vagas em educação infantil* [Structural litigation proposal to solve the deficit of vacancies in early childhood education], in *DIREITO À EDUCAÇÃO E DIREITOS NA EDUCAÇÃO EM PERSPECTIVA INTERDISCIPLINAR* 365, 399 (Nina Beatriz Stocco Ranieri & Angela Limongi Alvarenga Alves eds., 2018).

58. *Id.*

59. See Federal Statute 13.005/2014, which established the 2014–2024 National Education Plan, and Municipal Statute 16.271/2015, which regulated the 2015–2025 Municipal Education Plan.

60. ACP, *supra* note 15, minutes of the public hearing held on June 1, 2017 at 2–9.

61. *Id.* at 18–35.

Network no later than December 31, 2016;<sup>62</sup> and, (4) to carry out regional diagnoses and submit continual reports on the effectiveness of public policies designed to ensure compliance with the above-mentioned settlement to the Child and Youth Office of the São Paulo State Court of Justice, and make public all data and information relevant to the permanent monitoring.<sup>63</sup>

Despite the triumphs cited above and the overall success of the claim, ACP itself neither brought the plaintiffs any economic reward nor created any precedent strong enough to firmly guide Brazilian courts.<sup>64</sup> Furthermore, Congress has so far remained indifferent to ACP's potential to galvanize public action: no law has been passed to render the class-action mechanism more effective or to enhance the system of class-action incentives.<sup>65</sup>

## II. INSTITUTIONAL DESIGN OF THE BRAZILIAN CLASS ACTION: IMPROVEMENTS AND SETBACKS

The United Nations' commitment to promoting the rule of law is important from a law-and-development point of view.<sup>66</sup> As seen above, the judiciary can be provoked to intervene in a variety of ways and can produce substantially varied results, which can directly impact sustainable development. In examining the contrasting forms by which the judiciary can enhance the status quo, Owen Fiss argued that efforts are best carried out through "structural reform," a term he designates one of the forms of justice.<sup>67</sup> In this model, the judge acknowledges the bureaucratic character of the modern state, demands that state bureaucracies, such as prisons, comply with values of constitutional dimension, like human dignity, and undertakes the ongoing

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62. ACP, *supra* note 15, minutes of the settlement hearing held on September 14, 2017 at 1–4.

63. ACP, *supra* note 15, at 3308.

64. *Id.* at 1452, 2063–65.

65. In this sense, three important bills designed to improve class action (Bills 5.139/2009, 8.039/2010 and 8.058/2014), one of which is in the area of public education (Bill 8.039/2010), have been stagnant for years in Congress without any further discussion on their merits. See REFOSCO, *supra* note 9, at 103–109.

66. See 2030 Agenda, *supra* note 1.

67. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979). According to Fiss, while structural reform counterbalances the individual with the strength of the bureaucracies that govern the modern state, the dispute resolution model reflects the individualism found in classical liberalism. Owen M. Fiss, *Two Models of Adjudication*, in TEORIA DO PROCESSO: PANORAMA DOUTRINÁRIO MUNDIAL 762, 763 (Eduardo F. Jordão & Fredie S. Didier Jr. eds., 2007).

reconstruction of social institutions to eliminate threats the present institutional arrangements pose to those values.<sup>68</sup>

In order to be efficient developmental instruments in Brazil specifically, “structural reform” and “dispute resolution” lawsuits must be designed to not inadvertently serve the centuries-old inequality that permeates Brazilian culture and is skillfully maintained by local elites and oligarchies.<sup>69</sup> Thus, by comparing the circumstances and results of individual lawsuits with those of class actions, the case study leads us to a disheartening yet salutary conclusion: despite the egalitarian discourse that surrounds both kinds of litigation, each may end up facilitating the systematic repetition of practices that increase rather than reduce inequality.

Inequality in any country serves a relatively small group of special interests. In Brazil, it is deeply entrenched in social, political, and economic structures and remains almost unquestioned.<sup>70</sup> In such an environment, rights and instruments that clearly should be used to lessen inequality, such as access to justice, can be misinterpreted and distorted to reinforce it.

In Brazil, do all roads lead to inequality? Of course not. But this case study does suggest the repetition of a subtle yet consistent pattern that had already been observed in the implementation of other social rights, such as the right to health: the manipulation of the discourse on social and economic rights in Brazil in favor of the elites through individual litigation and the consequent difficulty in bringing effective collective litigation.<sup>71</sup> These phenomena contribute to Brazil’s oft-decried persistent inequality.<sup>72</sup>

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68. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

69. See Helena C. Refosco, *Access-to-Justice Reforms: A Brazilian Case Study of Bank Litigation Related to Heterodox Economic Plans*, GLOBAL JURIST (2020), <https://www.degruyter.com/view/journals/gj/ahead-of-print/article-10.1515-gj-2020-0018/article-10.1515-gj-2020-0018.xml> [<https://perma.cc/8EC5-XRDN>].

70. See Oscar Vilhena Vieira, *Inequality and the Subversion of the Rule of Law*, 6 SUR-INT’L J. ON HUM. RTS. 27, 36 (2007).

71. See Carlos Portugal Gouvêa, *Social Rights Against the Poor*, 7 VIENNA ONLINE J. OF INT’L L. 454, 474–75 (2013); Virgilio Afonso da Silva & Fernanda Vargas Terrazas, *Claiming the Right to Health in Brazilian Courts: The Exclusion of the Already Excluded?*, 36 LAW & SOC. INQUIRY 825, 848–49 (2011) (discussing the claim that justiciability of social rights could be a means of rendering certain public services more democratic and accessible).

72. Marcelo Medeiros et al., *A estabilidade da desigualdade de renda no Brasil, 2006 a 2012: estimativa com dados do imposto de renda e pesquisas*

On the other hand, the case study does reveal a progressive pathway: in the ACP, court rulings (in line with experimentalist decision-making) became the locus of destabilization rights<sup>73</sup> that fortify democracy and enforce public accountability regarding early-childhood education. In a heartening and unprecedented response to valid concerns about the Judicial Branch's legitimacy and effectiveness, a heretofore-stable pattern of uniquely fragmented judgments—a pattern notorious for repressing social change and entrenching the status quo<sup>74</sup>—has been upset and, perhaps partially, overcome.

It is critical to reflect on the best path forward using the data provided by the case study. It has already been noted that a lack of budgetary data, convincing legal arguments, and solid figures related to current and future school demand resulted in inadequately constructed class actions that failed to promote the in-depth analysis required for a successful suit.<sup>75</sup> Class actions weakened by such flaws tend to leave the status quo untouched.

By contrast, the ACP plaintiffs' breadth of experience in the education sector enabled them to attack City Hall's policies and statistics concerning the unsatisfied demand for public early-education vacancies.<sup>76</sup> Essentially, according to the ACP litigants, the mere number of children (and parents) deprived of this right failed to illuminate the real situation, since some far-off São Paulo neighborhoods are so lacking in public amenities of any kind—in this

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*domiciliares* [The Stability of Income Inequality in Brazil, 2006 to 2012: An Estimate Using Income Tax and Household Survey Data.], 20 CIÊNCIA & SAÚDE COLETIVA 971, 986 (2015).

73. Charles F. Sabel & William H. Simon argue that public interest litigation can promote democratic accountability by destabilizing institutions that are otherwise immune to democratic controls. Destabilization rights are “claims to unsettle and open public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability.” See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1020 (2004).

74. KENNEDY, *supra* note 8, at 2.

75. See, e.g., T.J.S.P., Ap. Civ. No. 0100044-13.2012.8.26.0000 São Paulo, Relator: Des. Silveira Paulilo, 10.22.2012, Diário da Justiça Eletrônico [D.J.e.], 10.22.2012, 1291 (Braz.) (stating that class actions cannot be granted whenever the request of the plaintiff is too generic and too lacking in well-researched evidence to back the claims).

76. See Correa, *supra* note 26.



case, early-education infrastructure—that parents did not apply for the vacancies.<sup>77</sup>

That this lamentable situation was made public with such eloquence is owed to the special nature of class actions: unlike the majority of plaintiffs in individual actions (and even in some class actions), the plaintiffs in ACP were equipped with the knowledge and educational resources necessary to research and develop a sophisticated, convincing, and amply documented argument.<sup>78</sup> This not only helps explain the immense value of class action as one of the few public spaces in which quality reasoning can be presented to a municipal body, but also demonstrates the incredible potential of class actions to enhance democratic participation in judicial processes.<sup>79</sup>

So, what does the ACP lawsuit indicate about how the institutional design of class actions could be improved in order to avoid the fate of so many previous class actions? In the Brazilian model for litigating collective interests, the Public Prosecutors' Office has been the main source of class action claims.<sup>80</sup> This institutional design, however, does not guarantee the best protection of shared constitutional ideals. In effect, the ACP case study highlights the institutional advantages of private oversight and class action litigation and the importance of developing incentives to attract qualified lawyers to public interest litigation. Therefore, it is essential from the outset to grant broader standing in class actions so that victims or directly interested parties can contribute to a successful action.<sup>81</sup> For

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77. ACP, *supra* note 15, at 5.

78. See REFOSCO, *supra* note 9, at 339.

79. *Id.*

80. There are both public and private models of enforcement, which can be contrasted in terms of comparative institutional competence. See Matthew Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 106–119 (2005). The system adopted in Brazil is mixed, with prevalent public entities, such as the Public Prosecutors' Office. See SOCIEDADE BRASILEIRA DE DIREITO PÚBLICO, *AÇÕES COLETIVAS NO BRASIL: TEMAS, ATORES E DESAFIOS DA TUTELA COLETIVA* [Collective Actions in Brazil: Themes, Actors and Challenges of Collective Guardianship] 11 (Conrado Hubner Mendes, Vanessa Elias de Oliveira & Rogério Bastos Arantes eds., 2017).

81. As long as they meet certain requirements, civil organizations are entitled to filing class actions in Brazil. Individuals, however, do not have standing. The excessive restriction with regard to standing has contributed to the lack of access to justice in Brazil. Accordingly, some issues are only belatedly brought to the judiciary, or even are not brought at all. Procedural legislation should, in addition to granting a broader standing, offer robust and specific institutional incentives for individuals, as well as to civil organizations, to file class actions. See

this allocation of broader standing to achieve its intended purpose, the law should require proof of the lawyer's capacity to properly represent the class (class certification). This reform would properly value the role of the lawyers in building fair, efficient and effective solutions for major cases in the country.<sup>82</sup> Brazil has large law firms with the financial and human resources to engage in complex litigation.<sup>83</sup> For this model to work, attorneys' fees must be attractive and reflect, in the event of an agreement or conviction, a payment amount that accounts for the savings that resulted from avoiding repetitive litigation and the cost of specialized attorneys. In order to make it possible for lawyers to obtain attorneys' fees compatible with the demands of class action litigation, one could adopt contingency fees as a payment method (which is not currently allowed in Brazilian class action procedural law).<sup>84</sup> Additionally, a vast pool of qualified, well-rewarded lawyers is essential for robust oversight of public policy and for the success of the class action system.<sup>85</sup>

While these legislative steps are critical, other legal reforms could be implemented by the courts themselves. For instance, the creation of specialized jurisdictions, well-trained to deal both with new participatory instruments in the context of legal proceedings, such as public hearings, and with the dilemmas inherent in this type of lawsuit—notably with regard to the principle of separation of powers—could be a paramount step towards a new mentality in the judiciary.<sup>86</sup> Relying on tools such as public hearings, traditionally linked to the exercise of representative democracy, the new decision-making techniques tested in the ACP proved useful in shaking up institutions and practices otherwise immune to traditional political controls in representative bodies.<sup>87</sup> However, the ACPs' multiple setbacks reveal the courts' hesitance to address the issue of the separation of powers: especially in class actions there is a deference to the administrator,

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Natalia Langenegger, *Legitimidade ativa de pessoas físicas em ações coletivas: incentivos e desincentivos institucionais* 142 (2014) (L.L.M. dissertation, Escola de Direito de São Paulo da Fundação Getúlio Vargas), [http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/11753/Disserta%E7%E3o\\_-\\_Natalia\\_Langenegger\\_rev\\_p%F3s\\_banca\\_v2.pdf;jsessionid=DC80D37A1CCB6C0F63BDF5F918FBE56D?sequence=1](http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/11753/Disserta%E7%E3o_-_Natalia_Langenegger_rev_p%F3s_banca_v2.pdf;jsessionid=DC80D37A1CCB6C0F63BDF5F918FBE56D?sequence=1) [https://perma.cc/4PCC-AZU9].

82. See REFOSCO, *supra* note 9, at 294–301.

83. *Id.*

84. *Id.*

85. See CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 7 (Deborah R. Hensler et. al. eds., 2000).

86. See REFOSCO, *supra* note 9, at 392–94.

87. *Id.*

even in cases of omission, that is not seen in individual litigation.<sup>88</sup> This is so because of the scale of the repercussions that may result from judgments in class litigation. For the judicial implementation of social rights to be possible, a new posture is required, which envisions in social rights actionable, fundamental, and demandable rights, that “must be claimed as rights and not charity, generosity or compassion.”<sup>89</sup> Class actions can be an effective remedy for state inaction and the consequent disenfranchisement of vulnerable populations, especially when such groups’ rights are threatened by unconstitutional omissions.<sup>90</sup>

When it comes to justifying judicial decisions on social rights that connect with the promotion of democratic values, Roberto Gargarella argues that under the theory of deliberative democracy—understood as one in which public decisions should be preceded by a collective debate qualified by the participation of all those potentially affected by the decision—the role of the judge is akin to a promoter of public debate who receives the complaints of those who are marginalized in the political process and accordingly orders the

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88. *Id.*

89. Flávia Piovesan, *Proteção internacional dos direitos econômicos, sociais e culturais* [International Protection of Economic, Social and Cultural Rights], in DIREITOS FUNDAMENTAIS SOCIAIS: ESTUDOS DE DIREITO CONSTITUCIONAL, INTERNACIONAL E COMPARADO 233, 240 (Ingo Wolfgang Sarlet ed., 2003).

90. Although prudential reasons justify the separation of powers, when the political isolation of the judiciary generates institutional advantages over other government branches, it must act in favor of great national objectives, namely the fundamental rights and rules of protection inherent to any truly democratic regime. See Enrique Ricardo Lewandowski, *A formação da doutrina dos direitos fundamentais* [The Formation of the Fundamental-Rights Doctrine], in TRATADO LUSO-BRASILEIRO DA DIGNIDADE HUMANA 411, 422 (Quartier Latin do Brasil ed., 2009); Oscar Vilhena Vieira, *A moralidade da constituição e os limites da empreitada interpretativa, ou entre Beethoven e Bernstein* [The Morality of the Constitution and the Limits of the Interpretative Contract, or Between Beethoven and Bernstein], in INTERPRETAÇÃO CONSTITUCIONAL 217, 245 (Malheiros ed., 2005); Enrique Ricardo Lewandowski, *O protagonismo do poder judiciário na era dos direitos* [The Protagonism of the Judiciary in the Age of Rights] 251 REVISTA DE DIREITO ADMINISTRATIVO 77, 77–85 (2009). Elected officials have responsibilities to their constituents and are more easily held accountable for an act committed than for one omitted. See Oscar Vilhena Vieira, *Estado de direito e advocacia de interesse público* [Rule of Law and Public Interest Advocacy], in ESTADO DE DIREITO E O DESAFIO DO DESENVOLVIMENTO 370 (Dimitri Dimoulis & Oscar Vilhena Vieira eds., 2011). Litigation can contribute to the political agenda by increasing the public visibility of rights violations, especially because the judiciary is a more accessible forum for public action than the other government branches. *Id.* at 370.

executive and legislative branches to act.<sup>91</sup> Therefore, the judge's legitimacy derives from the relationship between fundamental rights, democratic process, political participation, and constitutional provision of social rights.

The public hearings successfully convinced judges that the public education policy was indeed flawed. It also convinced them that the judicial branch's individualized interventions in this regard were ineffective.<sup>92</sup> Additionally, the resultant visibility, strength, and public image of the class action also led to a vigorous institutional dialogue among the interested parties.<sup>93</sup> As César Rodríguez-Garavito has put it, such a dialogue tends to increase the impact of structural decisions.<sup>94</sup>

Although judicial decisions should not replace politics in the struggle for societal improvement, when Government—either deliberately or unwittingly—acts unlawfully, class actions can force its agents and representatives to abide by the traditional mechanisms of accountability.<sup>95</sup> By calling on the State to explain its choices and priorities and by providing a dynamic political debate that, regrettably, is not always within the reach of the less-favored members of the Brazilian polity, collective legal action can be used to break State inertia or to free it from the grip of special interests. Therefore, it is necessary to innovate in order to create spaces for the judicial branch to deal with public power omissions, as it did so tellingly in the ACP litigation.

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91. Roberto Gargarella, *Theories of Democracy, the Judiciary and Social Rights*, in *COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR?* 13, 33–35 (Roberto Gargarella, Theunis Roux & Pilar Domingo eds., 2006).

92. See Correa, *supra* note 26.

93. In addition to setting up six court-ordered, semi-annual meetings with City Hall, the stakeholders also enhanced their shared inter-organizational dialogue by creating the aforementioned GTIEI. See Salomão Barros Ximenes et al., *Judicialização da educação infantil: efeitos da interação entre o sistema de justiça e a administração pública* [Litigation on Early Childhood Education: Effects of the Interaction Between the Justice System and Public Administration], *REVISTA BRASILEIRA DE CIÊNCIA POLÍTICA* 155, 155–188 (2019).

94. Cesar Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 *TEX. L. REV.* 1669, 1669–76 (2010).

95. See REFOSCO, *supra* note 9, at 182.

### III. COLLECTIVE *VERSUS* INDIVIDUAL LITIGATION OF EARLY-CHILDHOOD EDUCATION RIGHTS

In general, successful litigation aimed at expanding early-childhood education guarantees the inclusion of groups historically excluded from the multiple benefits of early-childhood education.<sup>96</sup> Authors such as James Heckman have established that, in order to enrich family environments and promote success in life—in short, to generate significant personal, social and economic returns—early interventions are more effective than late interventions.<sup>97</sup> Especially for groups systematically excluded from rights, early-childhood education is an essential pedagogical step in the educational process that equips children to grow into free adults.<sup>98</sup>

The implementation of early childhood education demonstrates a real commitment not only to constitutional rights, but also to the ideals enshrined in the Constitution to guide Brazilian democracy, such as social solidarity, poverty reduction and promotion of development.<sup>99</sup> In fact, it is hard to imagine any kind of positive social transformation taking place without a positive impact from effective, universal early-childhood education.<sup>100</sup>

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96. Indeed, “[a]ccess reforms are in large part efforts to bring to relatively weak groups rights that have been embodied in welfare state legislation. The concern here is as much with the results of access as with access itself. Justice implies here some effort to support what might be called the redistribution of rights implied in the modern welfare state.” Mauro Cappelletti, Bryant Garth & Nicolo Trocker, *Access to Justice Variations and Continuity of a World-Wide Movement*, 54 REVISTA JURÍDICA DE LA UNIVERSIDAD DE PUERTO RICO 221, 223 (1985).

97. See generally JAMES J. HECKMAN, *GIVING KIDS A FAIR CHANCE* (MIT Press 2013) (recommending public policy focused on early interventions). Regarding the neurological importance of early childhood education, see generally CHARLES A. NELSON, NATHAN A. FOX & CHARLES H. ZEANA, *ROMANIA’S ABANDONED CHILDREN: DEPRIVATION, BRAIN DEVELOPMENT, AND THE STRUGGLE FOR RECOVERY* (2014).

98. The terms “capacity” and “freedom” are used at the recommendation of Amartya Sen. See AMARTYA SEN, *DESENVOLVIMENTO COMO LIBERDADE* 34 (Companhia das Letras 2000).

99. CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 3 (Braz.).

100. By social transformation, this Articles means the “altering of structured inequalities and power relations in society that reduce the weight of morally irrelevant circumstances, such as socio-economic status, class, gender, race, religion, or social orientation.” ROBERTO GARGARELLA, PILAR DOMINGO & THEUNIS ROUX, *COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR?* 2 (2006). Regarding education as a fundamental component of development, see JAMES M. CYPHER & JAMES L. DIETZ, *THE PROCESS OF ECONOMIC DEVELOPMENT* 351 (2d ed. 2004).

According to the first analytical report on the main challenges facing SDG implementation, a significant percentage of three- and four-year-old children—especially in developing countries—have little opportunity to develop their physical, intellectual, and psycho-social well-being.<sup>101</sup> Thus, litigation that contributes to the quality of early-childhood education also promotes the success of SDG 4 (ensuring inclusive and equitable quality education).

Early-childhood education benefits the family in that it allows parents to work outside the home and become active members of the labor market.<sup>102</sup> Notably, a lack of widespread availability of infantile education especially affects mothers: in developing countries, women may spend up to 73% more hours per day in unpaid (i.e., household) work than men do.<sup>103</sup>

In Brazil, by arguing that, in many cases, unaided child rearing essentially blocks mothers from gainful employment until their children enter elementary school, feminist and other grassroots movements have spurred the creation of more public daycare centers.<sup>104</sup> In this respect, and given the traditional construction of gender-roles, early-childhood education public policy takes on an important gender dimension as a redistributive policy, one that directly promotes the implementation of SDG 5 (achieving gender equality and empowering all women and girls).<sup>105</sup>

Yet, despite all the advantages inherent in guaranteeing the right to early-childhood education and despite all the suits filed to

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101. U.N. DEPT OF ECON. & SOC. AFFAIRS, THE SUSTAINABLE DEVELOPMENT GOALS REPORT 19 (2016).

102. ACP, *supra* note 15, minutes of the public hearing held on November 4, 2013 at 137–38.

103. INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATISTICA, PESQUISA NACIONAL POR AMOSTRA DE DOMICÍLIOS CONTÍNUA [Continuous National Household Survey] (2018).

104. MARIA DE ALMEIDA TELES, BREVE HISTÓRIA DO FEMINISMO NO BRASIL [A Brief History of Feminism in Brazil] 103–04 (Brasiliense ed. 1999); José Reinaldo Lima Lopes, *Brazilian Courts and Social Rights: A Case Study Revisited*, in COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? 185, 186 (Roberto Gargarella, Pilar Domingo & Theunis Roux eds., 2006).

105. 2030 Agenda, *supra* note 1. As Helena Alviar Garcia puts it, “a more complex understanding of law includes studying the interaction between private arrangements within the family and the welfare state in terms of the social provision of services structured around ideas about the role of women within the household.” Helena Alviar Garcia, *Legal Reform, Social Policy, and Gendered Redistribution in Colombia: The Role of the Family*, 19 AM. U.J. GENDER, SOC. POL’Y & L. 576, 585 (2011).

effectuate that right, the city of São Paulo's actual responses leave much to be desired. Ironically, one villain is individual litigation. Rather than increasing citywide access to early-childhood education, individual litigation enables some parents to dodge waiting lists and to crowd their children into overburdened public schools.<sup>106</sup>

Thus, either by favoring some children over others or by impairing the quality of early-childhood education in public daycare centers and schools, individual litigation does not promote real inclusion of the poorest.<sup>107</sup> Actually, one may reasonably suppose that the poorest families are the most prone to discouragement<sup>108</sup> and the least likely to know that their children's right to early education can be litigated.<sup>109</sup> As a result, they tend to lose their opportunities as well as their place in the administrative queue.

Empirical evidence suggests that individual lawsuits related to early-childhood education rarely involve wide-reaching questions regarding public policy or necessitate the exercise of institutional creativity.<sup>110</sup> Among the several factors that may contribute to this lapse, two stand out: first, the difficulty of analyzing, in individual actions, the overall situation of early-childhood education in a given locality; and second, the greater ease with which judicial decisions are enforced in individual cases, albeit at the expense of subverting the administrative waiting list or simply by crowding more children into classrooms and thus lowering pedagogical standards.<sup>111</sup>

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106. ACP, *supra* note 15, at 2023–65.

107. See REFOSCO, *supra* note 9, at 342.

108. By “discouragement,” this Article refers to the belief that it makes no sense to seek a resolution even for serious conflicts. Potential explanations for “discouragement” in Brazil relate to socioeconomic and educational conditions, on one hand, and mobilization capacity, on the other, and include ignorance about the law and individual rights as well as objective impediments such as the cost and distance involved in pursuing legal actions that many find impossible to overcome. Moreover, notable failures in state action are another likely reason why many people do not consider the judiciary a dependable ally in the defense of their rights. See CONSELHO NACIONAL DE JUSTIÇA, PANORAMA DE ACESSO À JUSTIÇA NO BRASIL, 2004 A 2009 [“Overview of Access to Justice in Brazil, 2004 to 2009,”] 15 (2011), <https://www.cnj.jus.br/wp-content/uploads/2011/02/69f08fa6be2b411e6566b84bdc1d4b5a.pdf> [<https://perma.cc/L64F-8L8X>].

109. In addition, since the São Paulo City Council has authorized the use of priority quotas for children whose families are in extreme poverty, queue jumping harms precisely those children in a situation of greater social vulnerability. See ACP, *supra* note 15, minutes of the public hearing held on June 1, 2017 at 2–9.

110. In fact, individual lawsuits are generally limited to the remedy of securing a vacancy for a certain child. See Silveira, *supra* note 20.

111. See REFOSCO, *supra* note 9, at 337.

Moreover, with their potential to disperse the collective power of social groups and institutions, individual lawsuits may tend to perpetuate rather than diminish the economic and social inequalities of the *status quo*.<sup>112</sup> Parceling out collective social needs as individual rights to be granted only to a few is one mechanism by which people normally excluded can be channeled into an even more passive and isolated position.<sup>113</sup> The law, in rewarding individual rather than collective litigation, thus neutralizes a potentially broad movement for significant social change. Ironically, then, the satisfaction of individual rights may act as a co-opting agent that allows a purely legal discourse to crowd out the political and economic analyses necessary to effect lasting change.<sup>114</sup> This results in little pragmatism in the implementation of rights, and exacerbates issues of distributive justice.

#### CONCLUSION

In Brazil, the widespread lack of public daycare center vacancies causes grave socio-economic and gender inequalities and must be resolved. This case study shows that, in Brazilian judicialized structural situations, individual litigation has been ineffective, whereas class action—especially in the “structural reform” model<sup>115</sup>—may very likely provide a way to contribute to sustainable development and to concretize the democratic ideals of Brazil’s Federal Constitution.

The United Nations’ SDGs are interconnected. This interconnectedness is especially relevant when the object of analysis is the implementation of SDG 16 (access to justice for all and building effective, accountable and inclusive institutions) since, as this Article shows, it can directly impact other SDGs. SDG 16’s directives forge a dynamic link between the rule of law, access to justice, and the legitimate interests of collectivities that have rarely, if ever, enjoyed

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112. See Carlos Portugal Gouvêa, *supra* note 71, at 474–75.

113. David W. Kennedy, *The International Human Rights Regime: Still Part of the Problem?*, 3 EUR. L. REV. 245, 267 (2001), reprinted in 14 HARV. HUM. RTS. J. 101, 125 (2002) (“[A]rticulating social welfare as individual ‘rights’ makes people everywhere more passive and isolated.”).

114. See, e.g., David W. Kennedy, *The “Rule of Law,” Political Choices, and Development Common Sense*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 95, 95 (David Trubek & Alvaro Santos eds., 2006) (claiming that, in other words, the individual-rights focus is an example of political choices presented “in vocabularies of economic and legal expertise that obscure the political stakes of development policy making”).

115. See Fiss, *supra* note 67, at 2.



full or even partial constitutional rights. Consequently, it is crucial to create legal infrastructure that will foster well-founded, well-directed class action suits, under the banners of access to justice and rule of law, to compel the judicial branch to reduce—and never again to exacerbate—Brazil’s serious, deeply rooted, and culturally reinforced inequalities.