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# Redrafting imperfect legislation: Structural judgments and judicial supervision of administrative enforcement in Latin America

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## Abstract

Structural judgments regarding socioeconomic rights and the judicial oversight of their enforcement are two phenomena that have recently characterized Latin American public law. This paper examines how these phenomena of judicial behaviour respond to certain deficiencies in legislation (e.g., incomplete law and legislative stalemate). Suboptimal legislation usually indicates that political actors cannot impose their preferences or reach satisfactory agreements due to high transaction costs, thus presenting an opportunity for judicial intervention. However, the same suboptimal legislation can also expose a degree of political reluctance or lack of state institutional capacity to implement appropriate policies. Although it does not intend to establish a comprehensive theory, this paper explores how structural judgments and the creation of judicial monitoring systems deal with these different aspects of imperfect legislation. The paper briefly provides an analytical framework and takes a new approach to examining three well-known case studies from Colombia, Argentina, and Peru.

## Key words

Imperfect legislation; socioeconomic rights; structural judgments; judicial monitoring; Latin American public law

## Resumen

Las sentencias estructurales sobre derechos socioeconómicos y el control judicial de su cumplimiento son dos fenómenos que han caracterizado recientemente al derecho público latinoamericano. Este artículo examina cómo estos fenómenos responden a ciertas deficiencias en la legislación (por ejemplo, ley incompleta y estancamiento legislativo). Una legislación subóptima suele indicar que los actores políticos no pueden

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imponer sus preferencias o llegar a acuerdos satisfactorios debido a los altos costos de transacción legislativa, lo que presenta una oportunidad para la intervención judicial. Sin embargo, la misma legislación subóptima también puede exponer cierto grado de renuencia política o falta de capacidad institucional estatal para implementar políticas públicas adecuadas. Sin pretender establecer una teoría integral sobre la intervención de los jueces en políticas públicas, este artículo explora cómo las sentencias estructurales y la creación de sistemas de monitoreo judicial abordan estos diferentes aspectos de una legislación imperfecta. El artículo proporciona brevemente un marco analítico y adopta un nuevo enfoque para examinar tres casos de estudios bien conocidos situados en Colombia, Argentina y Perú.

**Palabras clave**

Legislación imperfecta; derechos socioeconómicos; juicios estructurales; seguimiento judicial; derecho público latinoamericano

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## 1. Introduction

For about the past twenty-five years, Latin American judges have issued structural judgments to intervene in public policy, thus determining large-scale policy outcomes. The cases appear in different topical areas, particularly socioeconomic rights. For instance, in 2008, a lower Brazilian court granted a collective injunction ordering the municipality of São Paulo to provide needed diabetes medications to residents who could not afford them (Ferraz 2021, p. 188). In 2010, the Colombian Constitutional Court opined that the state should provide free, on-demand public education at the preschool, primary, and secondary levels (C 376-2010). In 2020, the Chilean Supreme Court decided that a municipality should ensure the supply of one hundred litres of drinking water to each of its inhabitants (CS 72.198-2020). Courts have occasionally included judicial procedures to monitor administrative enforcement, such as in the Colombian Constitutional Court's renowned 2004 decision on internally and forcibly displaced persons (T 025-2004).

Structural judgments regarding socioeconomic rights and the judicial oversight of their administrative compliance are two phenomena that have characterized the recent development of Latin American public law. While this style of judicial decision first appeared about eighty years ago with *Brown* and the racial desegregation of schools in the United States (Klarman 2007),[1] these types of decisions have slowly emerged in the last decades in some countries of the Global South, such as South Africa and India (Rodríguez-Garavito and Rodríguez-Franco 2015). Latin America has followed a similar pattern as a region affected by endemic state failures, limited public capacity, and a broad outreach of fundamental rights. Seemingly, the possibility of obtaining structural judicial injunctions is appealing in terms of overcoming the deficits of an unresponsive lawmaking process that is increasingly polarized and fragmented (Barroso 2016). Today, several courts in the region have followed in the footsteps of the Colombian Constitutional Court, the first Latin American court to deploy these judicial strategies (Cruz Rodríguez 2019).

Even when these strategies are still exceptional since the bulk of socioeconomic rights-related judicial decisions respond to individual rights litigation, structural judgments and mechanisms for monitoring enforcement drawn the attention of political and legal debates (e.g., Bergallo *et al.* 2011, Sigal *et al.* 2017, Ferraz 2021, p. 124). To some degree, these phenomena are disruptive when compared to the earlier passivity of Latin American courts, which are anchored in positivist methods of interpretation, individual scope adjudication, and deferential behaviour during the twentieth century (Couso *et al.* 2010). However, beyond some descriptive accounts, there is little known about these phenomena. Scholars are divided between those who criticize them as manifestations of judicial activism and those who underscore them in a celebratory context. Indeed, there are few attempts to consider these phenomena from a theoretically grounded or comparative perspective (e.g., Landau 2012, Rodríguez-Garavito and Rodríguez-Franco 2015).

Although it does not intend to establish a comprehensive theory, this paper proposes that, in some cases, structural judgments and judicial supervision of administrative

[1] On the reform to the penitentiary system, see also Feeley and Rubin 2000.

compliance can subtly respond to certain deficiencies in legislation, such as incomplete law, statutory ambiguity, and legislative stalemate. On the one hand, suboptimal legislation can signal the absence of political actors capable of imposing their preferences or reaching satisfactory agreements due to high transaction costs, thus presenting an opportunity for judicial intervention. By tackling pressing matters that elected officials have not adequately addressed, strategically minded higher courts can leverage their authority by appearing to be responsive institutions and detecting areas where a political regime cannot exert a successful backlash (Villalonga 2024). On the other hand, the same suboptimal legislation can also expose a degree of political reluctance or lack of state institutional capacity to deploy appropriate policies, thereby denoting further obstacles to compliance. If judges underestimate this last dimension, they will put their policy outcomes at risk. Accordingly, courts cannot impact public policy unless effectively monitoring compliance with those policies is concentrated in one or very few institutions. By tackling this issue, the paper contributes to the literature on judicial policymaking from the perspective of interbranch relations, a specific subtopic within the broader field of judicial politics.

To explore the aforesaid analytical proposal, the paper draws attention, from a new angle, to three case studies that are well known and are often discussed in the literature: a) the structural decision on the broadening of health coverage in Colombia (T 760-2004); b) the judicial plan ordering the cleanup of the Riachuelo-Matanza basin in Argentina (*Mendoza, Beatriz y otros,* M. 1569 XL, 2006); and c) the structural decision to end air pollution in La Oroya, Perú (*Pablo Fabían y otros*, 02002-2006-PC). Although these instances occurred in countries pursuing different paths in implementing social rights agendas, their comparability is justified by the relatively common underlying legal culture and the structural rulings addressing prior deficiencies in legislation.

The paper unfolds as follows. First, it explains the theoretical framework in order to understand the dual nature of imperfect legislation from the perspective of courts' political incentives. Second, the paper briefly describes how structural judgments and the mechanisms of judicial surveillance of administrative compliance can respond to the challenges presented by imperfect statutes. Third, the paper explores the proposed analytical framework in light of the abovementioned case studies. Finally, the paper discusses the evidence, drawing several conclusions.

## 2. Scrutinizing the Two Sides of Imperfect Legislation: Opportunities and Obstacles for Judicial Policymaking

In this section, the paper first proposes that imperfect legislation constitutes a dual nature from the perspective of political incentives for judicial behavior. In concrete terms, it focuses on how this sort of regulation concurrently presents opportunities for judicial action and simultaneously serves as an indicator of the obstacles to implementing judicially selected policy. Next, the section addresses how imperfect legislation particularly influences structural rulings and judicial monitoring.

Before continuing, however, it is convenient to establish the appropriate scope of the theoretical claim. The article does not suggest that imperfect legislation inherently causes judges to intervene in public policies. This phenomenon may have multifaceted roots, ranging from a new perception of the courts' own role within democratic regimes to the

emergence of new constitutional remedies and political fragmentation (e.g. Epp 1998, Stone Sweet 2000). Nor does the article assert that judicial policymaking occurs solely in the face of imperfect legislation. The article only states that imperfect legislation often presents an opportunity for judges to intervene in public policies due to the political incentives they offer. Thus, the theoretical framework is compatible with much of the existing literature on judicial behaviour theories related to the factors leading to increased judicialization and judges' political preferences (e.g., Hirschl 2008). It is also compatible with standard approaches developed by the literature on judicial activism in the region, which draws its attention to the social impact of adjudication (e.g., Rodríguez-Garavito and Rodríguez-Franco 2015).

There is a longstanding debate, initiated at least since legal realism and subsequently by the critical legal studies movement, among others, about the inherent imperfection of statutes and the ambiguity of language in legal practice (Frank 1930/1970, Kennedy 1997). Without delving into that theoretical discussion, I assume a different standpoint, asserting that lawmakers may enact statutes that comprehensively address the main contingencies of public policy at the legislative level. In such a vein, this article looks at a scenario that would only occasionally occur: when legislation is transparently defective. In those situations, political parties occasionally can't endorse complete agreements to deal with a specific societal issue, which may manifest as an inability to encompass all relevant contingencies or a resort to vague provisions. In the same light, legislative stalemates occur when the parties involved cannot reach a minimal level of consensus to alter the existing status quo, even though they acknowledge the existence of faulty policies (Villalonga 2024). All the impediments that hinder the achievement of a comprehensive agreement on a policy issue can be categorized as transaction costs. These include competing priorities on the political agenda, insufficient support from constituencies, limited information on the regulated subject matter, a lack of confidence in public authority, and others (Allen 1991).

The ability to achieve complete legislation and the underlying management of transaction costs is not irrelevant in terms of political incentives for judicial behavior. Legislation can serve as a proxy for the state of the political process vis-à-vis a policy issue, orientating court action. The correlation between lawmaking and its impact on judicial discretion has long been a subject of inquiry in legal and judicial studies (e.g., Cooter and Ginsburg 1996). By and large, the enactment of legislation serves as a barometer of the effectiveness of politically organized actors in advancing their policy preferences. This fundamental premise gives rise to two significant assumptions regarding judicial behavior that are relevant to the present inquiry. The first assumption is that courts often align themselves with enduring dominant alliances characteristic of stable democracies, thereby reflecting the ascendancy of specific political regimes (Dahl 1957; cfr. Casper 1976). The premise mentioned above also has significant implications regarding the role of courts when legislatures can't comprehensively address a policy issue. When parties can't enact their desired policy preferences through the legislative process, or they fail to reach a minimal legislative agreement that satisfies Pareto-optimal conditions (even when they collectively recognize the imperative need for legal reform), they create an opening for judicial discretion. In the context of U.S. political literature, it is argued that, in such circumstances, lawmakers are consciously inviting the judiciary to address an issue that they can't resolve (Graber 1993, p. 36). Taking a similar stance,

it can be argued that no matter lawmakers' intent, imperfect legislation can incentivize judicial policymaking as an unintended consequence.

Imperfect legislation presents an opportunity for strategically minded higher court justices to engage in policymaking (Villalonga 2024).[2] First, stalemate, ambiguity, and incomplete law signify that a particular policy domain remains partially unresolved (e.g., Binder 2003, Pistor and Xu 2003, Lanius 2019, pp. 216–83). By addressing these pressing issues that elected officials have failed to tackle adequately, higher courts can wield their authority as responsive institutions and introduce their policy preferences (Kapiszewski *et al.* 2013, p. 406). Second, imperfect legislation enables judges to identify areas where the political regime can't retaliate effectively against intervening judges. This last factor possesses enormous sway in higher Latin American courts, where formal or informal backlash has been a common feature of local politics (Helmke 2022).

Imperfect legislation, however, doesn't only present opportunities for the judicial crafting of public policy. Inasmuch as it mirrors the inability of elected officials to set a policy issue due to high transaction costs in lawmaking, it may also indicate that there are significant barriers to policy design and implementation. Faulty policies are rarely a matter of lawmakers' mere political will; they are likely associated with obstacles such as a lack of institutional or financial capacity, political disagreements, or conflicts of competence among state actors. Although usually possessing only superficial knowledge, a judge attentive to the political environment hardly ignores such hindrances. Thus, when a court decides to take the opportunity to craft public policy, pondering an inadequately regulated policy matter, it usually reflects on how to handle those transaction costs while enforcing judicial rulings (Brinks 2017, pp. 478–91).

Indeed, we could also find a situation where a court sets a judicial standard that reframes imperfect legislation, without the means to overcome systemic institutional gaps that previously spawned flawed policies. There are several reasons for this type of choice. Sometimes, judges expect to merely move the wheels of Congress with the weight of their authoritative judgment, intending to provide symbolic legitimacy for further political mobilization or believing that dialogical interplay with elected officials is enough to assure enforcement. Other times, they render a decision but lack legal tools to follow up on compliance, or they suffer through their own stalemates inside judicial panels (Langford *et al.* 2017, pp. 25–28). In any event, if courts choose to craft policy but underestimate those institutional gaps, they put relevant institutional assets at stake. At the very least, judges could jeopardize the enforcement of their policy preferences incorporated in a ruling. If they face ill-fated development, courts can even endanger their own authority within the political process in the long run.

### *2.1. Imperfect Legislation, Institutional Weaknesses, and Structural Remedies in Latin America*

The implications of imperfect legislation for judicial behavior theoretically extend to any jurisdiction. However, they have a particular bearing on Latin America, where specific conditions leverage transaction costs within the process of lawmaking bargaining. An

[2] For a strategic approach to judicial behavior (attitudinal and rational choices models), see Segal and Spaeth 2002, 87-110.

extensive body of scholarly literature has characterized the region as an area of state failures, reduced institutional capacity, and distrust in formal institutions. These difficulties have arisen from such diverse factors as limited financial resources in low- and middle-income countries, high rates of corruption, and low bureaucratic resourcefulness. At the same time, Latin American countries have developed constitutional scaffoldings containing a wide-ranging outreach of fundamental rights, which usually define socioeconomic entitlements in broad terms. This is to say that constitutions firmly recognize socioeconomic rights as fundamental rights above any other consideration, thus stimulating high social expectations. Socioeconomic rights are both provisions to be judicially enforced, and they concurrently represent a sort of aspirational law aimed at producing social change afterwards (Brinks *et al.* 2020). Institutional weaknesses and the broad scope of constitutional socioeconomic rights both involve high transaction costs in lawmaking, thereby creating fewer chances to reach comprehensive legislative agreements and successful law enforcement.

The institutional obstacles described above have been intensified by high levels of political fragmentation and polarization in recent decades. Since the late twentieth century, after the end of bureaucratic-authoritarian governments and the revival of the rule of law, Latin America has experienced a new wave of expanding social rights standards. Responding to the inclusion of new political groups in democratic competition by the early 2000s, regional governments financed such incremental expansion with resources emanating from a raw materials boom. Nevertheless, the different models to expand social rights within this new scenario and the conditions of economic liberalization caused significant contention within local politics. In the same light, after the decline of the raw materials boom, the political dynamic moved faster than the financial possibilities for adequate welfare provision. Today, Latin American countries struggle to satisfy high educational, health, labour, and environmental justice demands, but their institutional structures and economic capacities barely respond to those expectations (Brinks and Forbath 2014). Before public opinion exhibited some degree of frustration regarding the promise of socioeconomic development, political parties began to engage in a polarizing dynamic, adversely impacting the chances of reaching satisfactory public policies (Moraes and Béjar 2022).

To face legislative deficits in socioeconomic rights, litigation and courts have explored different remedial paths, such as individual case judgments, negative injunctions, and structural enforcement (Landau 2012, p. 413). In the first place, individual injunctions address the bulk of litigation on socioeconomic rights. Although legal scholars in the region often conceptualize socioeconomic rights from their social dimension, litigants resort to individual remedies as long as they prevent some degree of judicial reluctance to issue large-scale judgments. In the second place, there are negative injunctions—usually known through procedures of judicial review—which comprise the annulment of legislation and government measures that seek the non-regression of the enjoyment of social rights. In the third place, and what is most important for this paper, there are different structural remedies that impact a large sector of the population whose boundaries are difficult to determine. The latter exceeds the mere collective nature of litigants and additionally addresses "systemic gaps in the design and implementation of public policies or the sheer lack of public policy," which encompass the enforcement of

a complex set of judicial orders on allocating resources and coordinating administrative action (Sigal *et al.* 2017, p. 153).

There are different trade-offs when litigants and courts choose one of these remedial paths. Individual injunctions offer fewer political risks for judges since they likely prompt a lower amount of political resistance in enforcement, matching the most traditional forms of adjudication akin to classical understandings of the principle of the separation of powers. However, at the same time, individual injunctions barely tackle systemic institutional gaps in social welfare and favour middle- and upper-class claimants who can access justice. In the same vein, negative injunctions result in reactive judicial responses. As such, they are hardly the preferred channel for the political mobilization of litigation and cause lawyering. It is not coincidental that, in Latin America, most of the judicial interventions in public policy have advanced through mechanisms of protection and the safeguarding of fundamental rights, which impose positive obligations on states. These actions are preferable to judicial review, where courts operate as a negative legislator. Meanwhile, structural remedies can tackle systemic gaps in institutional design, seeking to provide long-term solutions in socioeconomic rights delivery (Landau 2012, pp. 230–36). Nevertheless, these remedies usually require judicial innovation, such as class actions and multiparty procedures, which have been less common in Latin American legal practice (e.g., Gidi and Ferrer 2003).

Looking at the broader canvas, the use of structural rulings amplifies the incentives posed by imperfect legislation. Structural injunctions allow courts to address large-scale state failures in providing socioeconomic rights, offering systematic answers to faulty policies. By addressing such institutional gaps, courts can harvest a large amount of social legitimacy, mainly when Congress and administrative agencies are seen as ineffective institutions, sometimes corraled by inertia and private interests. In other words, assertive structural rulings can offer perspectives of high stature for courts in a diminished institutional landscape (Barroso 2016). Structural rulings also imply greater political risks, however. Lawmakers and the executive branch traditionally view judges as law-finding agents who should merely apply statutes. Thus, they will easily look at structural injunctions as a sort of usurpation of the sovereign will, leveraging the risks of a political backlash against intervening courts.

### *2.2. Structural Remedies, Judicial Monitoring, and the Costs of Non-compliance*

As explained above, imperfect legislation presents an opportunity for judicial policymaking and offers a look at the hindrances to policy design and implementation. Usually, the latter obstacles to reaching comprehensive policy go beyond lawmakers' political preferences and embody other types of transaction costs, such as a lack of information and economic resources and, more generally, a deficient state institutional capacity. Accordingly, when courts grant structural injunctions addressing these policy gaps, they also usually choose to address these costs upfront (Brinks 2017, pp. 478–91). In practice, structural decisions imply a real redrafting of regulatory provisions, and, as such, they often require a mechanism to assure compliance.

The literature has already demonstrated that judges are attentive to the complexities of policy gaps and are sometimes averse to grappling with them. The well-documented

reluctance of Brazilian courts to emit structural rulings in health rights litigation is an illustrative example of that attitude (Ferraz 2021, p. 188). Several scholarly studies reveal that judges are aware of these difficulties and are less deferential in individual injunction cases than in structural ones. In individual injunction cases, courts tend to disregard several factors, including the repercussions of their rulings on public health budgets, the fiscal burdens placed on other beneficiaries of the public health system, the authority of healthcare agencies in determining priorities among healthcare expenditures, and the courts' legitimacy when allocating. Such a tendency to ignore the general effects of individual injunctions is often only a matter of false perceptions as long as the aggregated impact of the myriad of individual lawsuits can engender substantial economic costs and have large-scale policy implications (Landau 2012). In contrast, when handling collective claims, Brazilian courts typically adopt a more restrained approach, considering all these factors to justify their deference to decisions made by lawmakers and healthcare agencies (Wang 2013, pp. 25–6). Their different approaches to individual and structural injunctions provide an interesting look at a judicial take on policy gaps.

After overcoming the reluctance to issue a structural remedy, judges need to make a second decision—that is, how to follow up with enforcement. Such a matter is not trivial insofar as judges grant structural injunctions mostly in actions aimed at protecting constitutional rights, thereby exceeding the logic of classic dispute resolution in private law terms. In this regard, they again identify the problem of transaction costs, but this time as one of the factors that can make compliance difficult. Some factors could have an institutional origin, like the remedies' complexity and the courts' relationships with the rest of the political system (Brinks 2017). Other factors have a more general scope, such as eventual public support. The judicial assessment of them, usually informally positioned beneath judicial reasoning, is critical to enforce structural rulings.

Overall, the literature identifies two paths to enforce structural rulings. On the one hand, there are weak means for enforcement like the basic set of social rights standards and the establishment of deadlines for compliance. These do not require courts to invest so much of their legitimacy, and they place the follow-up on compliance squarely on the parties' shoulders, along with their ability to translate judicial rulings into open political deliberation. On the other hand, courts can also establish more robust mechanisms of enforcement, such as supplementary judicial decisions, the designation of special masters, the supervision of benchmark achievements through periodic reports and public hearings, the pursuit of administrative or criminal liability for noncompliance, and the establishment of committees of coordination for state action, among others. As ideal-type models, however, there are different degrees of the strength and intrusiveness of these measures (Landau 2012, pp. 235–37).

Beyond legal technicalities, the features of a policy issue are a critical factor in selecting mechanisms to enforce structural injunctions and determining if the injunctions have succeeded. At first glance, robust enforcement tools offer better ways to achieve the policy goals contained in judicial mandates, particularly considering that compliance and noncompliance are mostly matters of cost for judicial orders to address (Brinks 2017). So, more intrusive mechanisms to survey compliance have a greater chance of enforcement as long as those judicial means can transparently reveal the costs of non-

compliance. However, strong judicial mechanisms to monitor compliance are only effective when judicial orders point to one or a few addressees. In this way, courts handle policy issues with concentrated costs (i.e., administrative and legal responsibilities and budgetary assignments) (Taylor 2008, pp. 48–50). In those cases, judicial monitoring can determine who or what may assume the costs of noncompliance through legal and political sanctions. Meanwhile, even robust mechanisms of judicial surveillance can fail when public policy gaps have coordination problems in allocating resources for several addressees since the gaps imply difficulties for courts in transferring the costs of non-compliance.

In summary, a nuanced analysis shows imperfect legislation can exert a double impact on higher court policymaking. First, it can signal areas where political parties cannot enforce their desired policies or reach satisfactory agreements, primarily due to high transaction costs. Accordingly, courts can foresee a low risk of effective political backlash against their decisions while allowing them to appear as responsive institutions. Due to different factors associated with the institutional weaknesses and rights discourse in Latin America, imperfect legislation significantly affects the region, opening opportunities for strategically-minded judges to intervene within this realm, mainly through structural judgments. Second, imperfect legislation may also reveal a hesitancy or a lack of state capacity within the government to implement effective policies. When courts choose to tackle those situations through structural judgements, such a form of intervention is effective mostly when courts select intrusive enforcement mechanisms directed at one or a few addresses, as long as they allow monitoring non-compliance.

## 3. Three Case Studies

Case-specific analysis can show the soundness of the analytical proposal described above. Three case studies are presented here in which structural injunctions on socioeconomic rights are teamed with administrative authorities' compliance. Indeed, there are variations in how the three countries involved in the case studies deal with social policy. However, the intervention before similar normative scenarios and addressees provides some degree of comparison among the cases.

### *3.1. Seeking Universal Healthcare Coverage: Colombia*

The Colombian Constitution of 1991 bestowed a vital place for socioeconomic rights, including the protection of health and the state's duty to ensure healthcare access (article 49). In the years immediately following the promulgation of the new constitution, César Gaviria's government promoted an ambitious healthcare reform aimed at restructuring healthcare delivery by integrating the ideal of social rights with the incorporation of private actors (Law 100 of 1993). Applying the World Bank's recommendations with respect to the reform, the project supported a system of regulated competition that would gradually achieve universal health coverage over a period of about ten years. Although identified as a neoliberal policy by its detractors, its drafters managed to promote the project under the promise of achieving financial sustainability and universal healthcare in just over a decade (Agueldo *et al.* 2011).

In concrete terms, Law 100 established a mandatory healthcare plan structured on a dual financing system. On the one hand, those workers who earned at least double the

minimum household income had access to a contributory regime with a broad benefits package. On the other, those who had lower incomes had a subsidized regime with lower payroll deductions and public financial support but with about half the benefits. In both the contributory and subsidized regimes, funds flowed to private insurance companies that managed healthcare delivery by dispersing providers and controlling access to treatments. Meanwhile, public hospitals supplemented access for those without healthcare plans or when the illness was excluded from patients' healthcare packages. It was expected that both regimes would converge into one unified package of benefits by the early 2000s (Yamin *et al.* 2011, pp. 108–11).

After a decade of Law 100, Colombian society began to assess the legislation's original promises. Around 2004, the first studies about Law 100 were published, which contained bleak reports. These criticisms went beyond the traditional questions of a supposed neoliberal healthcare policy that were posed beginning in the mid-1990s (e.g., Cardona *et al.* 2005, Homedes and Ugalde 2005). Regarding economic policy, some of the original assumptions about the legislation were not met since low economic development, unemployment, and the persistence of high labour informality contributed to low affiliation with mandatory healthcare programs and their dependence on the always-scarce public resources. This meant that the healthcare benefits packages were not unified and that universal healthcare coverage was only an illusion. The insurance companies' management seriously limited access and a significant proportion of the population depended on long wait lists at public hospitals. Systematic failures in oversight amplified such difficulties (Lamprea 2011). The results were not only poor from an economic policy perspective but also from a healthcare one, definitively pointing to a healthcare crisis. Studies underscored low vaccination rates, high infant and maternal mortality rates, the disappearance of structures to care for mental health illnesses, the proliferation of contagious pathologies like yellow fever and HIV, and an increase in cardiovascular disease (Guerrero *et al.* 2011). Indeed, the original promise of Law 100 had not been fulfilled.

Within the Colombian legal system, there were two answers to the problems inherent to poor healthcare delivery. First, the population resorted to litigation through *tutela* writs—a special procedure to protect constitutional rights—attempting to reverse the denial of medical treatments. Litigation seeking individual injunctions gradually grew over the years. Thus, while litigants filed about 21,000 healthcare *tutelas* in 1999, about 143,000 were filed in 2008 (Chilton and Versteeg 2020, p. 199). Initially, the Colombian Constitutional Court granted *tutelas* when the case involved members of a vulnerable population; it implied access to the subsidized mandatory healthcare plan; or when it was connected to the right to life. By 2008, courts found for claimants in 86% of the *tutelas* (Yamin *et al.* 2011, p. 113).

Despite the apparent success of individual injunctions, their aggregated results were not so optimistic. Indeed, *tutelas* allowed access to medications and life-saving treatments for many citizens, but a relevant proportion of such decisions favoured upper- and middle-class litigants who sometimes required expensive therapies and could access the judicial system. Moreover, judicial orders regularly outweighed private insurers' processes of reimbursement, deepening the inefficiency of the entire healthcare system. Although the *tutelas* flagged the relevance of healthcare rights and systemic healthcare

delivery problems, they hindered political mobilization by providing an alternative path (Chilton and Versteeg 2020, pp. 199–201).

The healthcare crisis visible in 2004 prompted legislators to present bills to modify Law 100. As Figure 1 shows, legislators from across the entire Colombian political spectrum introduced sixteen bills in 2004 alone, maintaining their interest in promoting legislative reforms in the immediately following years.[3] Some of these projects directly pursued exempting from payroll payments or copayments some groups in lower-income strata, education workers, public service employees, and retired elders. In other instances, the projects sought to include reproductive or mental health pathologies. Some even sought to adjust specific aspects of healthcare delivery, such as the criminal classification of healthcare denial. There was no systemic reform to the entire healthcare system, however. With the exception of two bills that dealt with minor adjustments to oversight bodies, all these projects faced legislative gridlock without being passed.

FIGURE 1

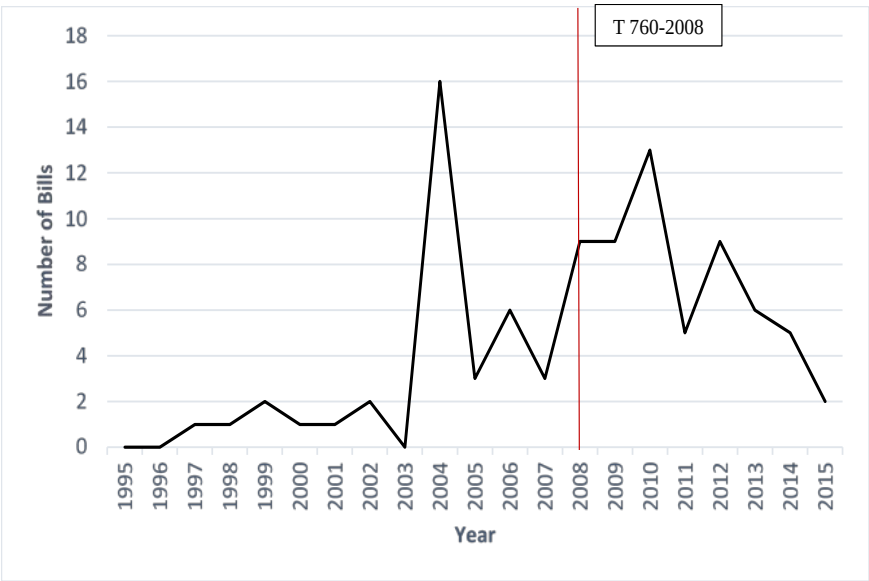


**Figure 1. Bills to reform Law 100 introduced in the Colombian Congress.**

In July 2008, the Constitutional Court decided on twenty-two accumulated healthcare *tutelas*, issuing a structural decision that overhauled the entire healthcare delivery scheme (*T 760-2008*), explicitly addressing legislative inaction before a transparent, suboptimal policy. Thus, after reviewing the state's general infringements in this area, the Court asserted, "The responsible entities in charge of what could be broadly described as the healthcare system's regulation have not adopted the decisions that ensure individuals' access to their right to health, without the need for resorting to tutela claims" (*T 760-2008*). In concrete terms, the ruling tackled policy gaps in areas like financial sustainability, the unification of benefits packages, and the universalization of coverage, among other matters. In doing so, the decision included several general orders, such as clearly outlining the contents of the mandatory healthcare plan, performing institutional audits to inform users about the performances of different service providers and insurers, enhancing supervision of healthcare delivery entities, simplifying the

[3] Source: https://leyes.senado.gov.co/proyectos/

process for addressing *tutela* claims, creating a backup plan for ensuring prompt and adequate reimbursements in cases where healthcare costs were not covered by mandatory health plans, and conducting a thorough review of capitation rates that had remained largely unchanged for many years. To follow up on the enforcement of this blockbuster decision, a monitoring chamber of the Court issued about fifty new judicial orders of implementation and organized two public hearings addressing the allocation of resources and the unification of mandatory healthcare plans in 2010 and 2012. Most of these implementing decisions were aimed at the National Commission of Health Regulation (Yamin *et al.* 2011, pp. 117–123).

The Court dealt with regulatory inaction, the improper allocation of resources, and the reduction of administrative oversight, establishing clear responsibilities in the judgment for implementation. Under different parameters, this landmark ruling and its enforcement mechanisms mirror a relatively successful attempt to redress structural gaps. The Court resisted government backlash and has achieved the implementation of several of its judicial orders since 2010. Álvaro Uribe's government initially issued several unpopular emergency decrees under the veil of fulfilling judicial mandates (e.g., banning doctors from prescribing uncovered treatments and levying taxes on unhealthy activities), expecting to produce social disapproval of the Court. However, most of the population publicly mobilized in the streets in favour of the judgments. Juan Manuel Santos's new administration then passed a tax law to finance the healthcare system and gradually began to unify the healthcare packages, providing full coverage to children and improving the oversight of health insurers. A new 2015 statute, Law 1715, incorporated several of the abovementioned judicial mandates, citing the Constitutional Court's related jurisprudence as a stepping stone (Chilton and Versteeg 2020, pp. 203–06).

### *3.2. Cleaning the Riachuelo-Matanza Basin, Argentina*

In 1994, the Argentine Constitution was amended to include the right to live in a healthy environment (article 41) and a special *tutela* procedure to protect environmental rights (article 42), which together comprise one of the most significant innovations of Argentina's Constitution, which dates back to the mid-nineteenth century. Despite the ambitious character of the reform, some of the challenges in this area seemed insurmountable for a country with weak institutional capacity. Although the Argentine Congress had passed several statutes on critical environmental matters in the early 2000s, including general environmental legislation and laws on industrial residuals and water management (Cafferatta 2004), those regulations remained ineffective. Beyond law reforms, low levels of enforcement, limited financial resources, and endemic coordination problems between federal and state authorities were the clearest barriers to environmental justice. Within this context, structural decisions establishing a judicially monitored cleanup plan for the Riachuelo-Matanza River in Buenos Aires are some of the most remarkable cases in Argentine constitutional jurisprudence.

Since colonial times, the Riachuelo-Matanza basin, an area almost eighty kilometres long covering about 2,200 square kilometres, had served as a drain for meat-curing plants, ships, and more recently, petrochemical industries, becoming a sort of open sewer. By the late nineteenth century, judicial authorities had already rendered a famous decision, ordering authorities to stop the meat-butchering pollution to safeguard area residents'

health (*Saladería Podestá* (1887)). In the early 1990s, the national government tackled the challenge of ending the river's pollution, conducting several studies financed with loans from the Inter-American Development Bank (IDB). After the 1994 constitutional reform, federal authorities deployed a campaign to clean the river in one thousand days under the Secretary of Natural Resources and Sustainable Development's supervision, but with minimal results. By the turn of the twenty-first century, this hub of pollution, which chronically exposed more than three million people living in shantytowns to toxic pollutants like arsenic, lead, and mercury, emerged as Argentina's most urgent environmental problem (Raimundo 2018, pp. 2–3).

In 2004, seventeen residents dwelling in the basin initiated a legal complaint against the national government, the Province of Buenos Aires, the Autonomous City of Buenos Aires, and forty-four corporate entities. The lead plaintiff was Beatriz Mendoza, a psychologist who worked in *Villa Inflamable*, one of the area's most marginalized slums, and whose health had deteriorated due to the absorption of petrochemical substances. In concrete terms, the litigants sought reparation for environmental harm, the cessation of further pollution, and environmental rehabilitation measures. The case drew public attention in the press and snowballed, prompting social mobilization in *Villa Inflamable*, *La Boca* (*Avellaneda*), and other squatter enclaves whose populations usually suffered from illnesses ranging from diarrhoea and respiratory difficulties to cancer. The Argentine Ombudsman's Office, various NGOs, and local residents had attempted earlier to push for a systematic solution to the environmental situation, and this case appeared to be an opportunity for redress. Meanwhile, from an external perspective, a small group of neighbours and health workers seemed to view the case as a long-awaited test of Argentina's patchwork of environmental regulations that had gradually emerged during the last decade (Staveland-Sæter 2011, pp. 23–26).

In June 2006, the Argentine Supreme Court issued a preliminary decision (*resolución interlocutoria*), which declined to recognize the patrimonial individual compensation demanded by the claimants, asserting the federal court's lack of original jurisdiction. However, the Court agreed to deliver a judgment on the collective dimension of environmental protection as part of the safeguarding of the public good. At the same time, the Court mandated the development of a governmental strategy to address pollution, including aspects similar to an environmental organization of the area involved, a study about the industries' impact on the basin, and a plan for environmental education. The ruling also required the private industries to inform the disposal of residuals and whether they counted for insurance purposes. In the following months, other Supreme Court preliminary decisions were released to ensure the continuity of the collective process, which aimed at identifying the environmental rehabilitation of the basin (Cafferata 2013, *Mendoza, Beatriz y otros, M.* 1569 XL, 2006). In so doing, the Court granted standing to intervene to the Ombudsman's Office and to several NGOs (e.g., Centro de Estudios Legales and Greenpeace Argentina). The Court also required the scientific collaboration of the University of Buenos Aires. Furthermore, it delineated a multiparty process, including public hearings, to enhance citizen engagement.[4]

The case shows how the Court interacted with the political process to solve systemic gaps in legislative scaffolding. All the evidence points to vast coordination problems

[4] Ruling August 30th, 2006. See also, *Acordada CSJN* 30/2007.

among the different authorities in charge of environmental oversight. The general environmental regulation in Law 25,675 of 2002, established several principles to tackle coordination among municipalities, states, and federal bodies. These included such guidelines as cooperation, subsidiarity, and solidarity when dealing with shared ecosystems (article 5). Moreover, the law created a basic structure for a supervisory body in the form of the Federal Council on the Environment. However, the legal principles and institutional mechanisms were highly ineffective. The attributions were loose, the possibility of sanctions weak, and the supervisory body never carried out a proper package of environmental measures with inter-jurisdictional purposes as the law mandated (articles 9 and 10). NGOs, the Ombudsman's Office, and the Riachuelo squatters had already attempted to steer lawmakers towards enhancing the institutional capacity in this area, but their efforts had also been unsuccessful (Staveland-Sæter 2011, p. 25).

Intervening judges at the Supreme Court already knew about the regulatory difficulties when receiving the claim. Perhaps the account of Ricardo Lorenzetti, the drafter of the associated judicial decisions, and by then Chief Justice of the Court, is illustrative of this point. In retrospect, he explained that when the Court received the claim, the clerk that communicated its reception advised the justices not to accept it. Nevertheless, the justices believed that they should take this difficult case since the pollution in the area was outrageous, "and too many broken promises had been made" (Lorenzetti 2014, p. 205). At the same time, his memoir recognizes the evident problems of legislative inaction and the lack of administrative coordination:

> The political-institutional framework that conditions the management of the basin could not be more complicated. (…) It includes fourteen municipalities of the Province of Buenos Aires, three jurisdictions (Nation, Province of Buenos Aires, and Autonomous City of Buenos Aires) and more than twenty competent organizations in the area (…). This causes the overlapping of competent authorities, concurrent jurisdictions and applicable regulations. This conspires against the water resource management system's effectiveness while supervising activities on the margins of the basin inoperative. (Lorenzetti 2014, pp. 211–12)

The preliminary order and the subsequent collective process, which received remarkable coverage in the media, produced what Rodriguez-Garavito and Rodriguez-Franco (2015, pp. 21–22) labelled as symbolic and unlocked effects of structural judgments. First, the organization of public hearings and their judicial regulation implied an adjustment of how courts organized judicial administration in landmark collective cases. For the intervenient litigants, the public judicial ritual was undeniable proof of the relevance of the case (Barrera 2012, pp. 141–42). Second, the preliminary decision of June 2006 incited executive and congressional action. In August of that year, President Néstor Kirchner and the other respondent public entities in the case agreed to support a bill to be introduced in Congress by the executive and to advance the enactment of its normative implementation in each of the affected jurisdictions. Accordingly, in December of 2006, the Argentine Congress passed Law 26,168, which established the Matanza–Riachuelo Basin Authority (ACUMAR, its Spanish acronym), a collegial public entity coordinating environmental monitoring and rehabilitation of the basin. This agency participated actively in the public hearings before the Supreme Court, proposing the basis for an environmental management program and supplementing evidence of its advancement.

In terms of public opinion, it was evident that the Court's preliminary decision had responded to the exaggerated passivity of the other government branches, which could have prevented an environmental catastrophe if they had acted at the right time (Barbieri 2006).

In July 2008, the Court rendered its final judgment, instructing the defendants to develop a program for rehabilitating the environment and protecting the basin residents' quality of life. Although the ruling established that the intervention program rested under the jurisdiction of ACUMAR, it also recognized the co-responsibilities of the federal government and the Province and City of Buenos Aires. The mandated program undertook the dissemination of public information, industrial pollution, landfill sanitation, riverbank cleanup, the expansion of potable water networks, stormwater drainage, sewage treatment, and a health emergency plan. The judgment designated the first-instance court in the city of Quilmes to follow up on the implementation measures and established a collective body comprised of the Ombudsman's Office and NGOs to promote public involvement in the execution of the judgment and to monitor compliance. Meanwhile, the ruling assigned the project's budgetary control to the National Audit Office (Raimundo 2018, pp. 8–10).

Between 2008 and 2012, the implementation process worked adequately, overcoming the overlap of jurisdictions, authorities, and regulations. Although pollution is still an ongoing problem in the basin, implementing the judicial rulings enhanced the regulatory governance concerning polluting activities and allowed societal involvement in the shaping of policy. In some cases, the process was also able to detect non-compliance with court directives, and the collective body supervising implementation requested the imposition of fines on the accountable public authorities, which were not applied by the courts. After 2012, however, several obstacles emerged to the administrative coordination and institutional capacity. That year, several denunciations of corruption and a National Audit Office's report led to the removal of the judge in Quilmes who was supervising the implementation. Accordingly, the Supreme Court placed the oversight responsibility in the hands of two different trial courts (Juzgado Nacional de Primera Instancia en lo Criminal y Correccional Federal N° 12 and Juzgado Federal de Primera Instancia en lo Criminal y Correccional N° 2, Morón). Further, the position of the Ombudsman Chair's Officer, who was in charge of the judicially established collective body to monitor compliance, was vacant for several years. ACUMAR, in the meantime, gradually became inoperative and passive without achieving its institutional goals. Industries located on the basin have not been condemned yet. In 2018, the Supreme Court released new implementing decisions, organizing public monitoring hearings. The latter concluded that there were some structural deficiencies in the ACUMAR operation, and there was a lack of suitable compliance measurements (Raimundo 2018, pp. 19–23). Despite initial advancements, pollution in the basin remains an enduring problem.

### *3.3. Failing to End Air Pollution: La Oroya, Perú*

The city of La Oroya, located in the high Sierra of Peru, is a town that sprouted in the 1920s from the metallurgical exploitation of copper, zinc, and lead, among other metals. Its history matches that of the regular development of many centers for exploiting raw materials in Latin America. Established as an industry of North American-owned Cerro

Pasco Corporation, Juan Velasco Alvarado's dictatorship nationalized the industrial center in 1974, handing over its administration to the Empresa Minera del Centro del Perú (CENTROMIN Perú). During the economic liberalization of the mid-1990s, Alberto Fujimori's government privatized the Oroya metallurgical complex, which the Doe Run Company, another North American corporation, acquired. Currently, the city has about 30,000 inhabitants living in low-income urban sectors located in the area immediately adjacent to the mining deposits and foundry (Cederstav and Baradarián 2002, pp. 19–27). However, the similitudes with other settings of industrial mining do not end with historical development; they also extend to environmental consequences.

The Peruvian Constitution of 1993 explicitly includes the right to live in an appropriate environment that favours life development (article 2). At the time of the constitution's promulgation, there were already coherent statutes in force covering environmental matters, such as the Natural Resources and Environment Code (1990). Nevertheless, the Peruvian state suffered from diminished institutional capacity and overlapping regulations and authorities, all of which constituted an obstacle to environmental governance. The Ministry of Energy and Mining had already developed a program for adequation and environmental management (PAMA), which looked to the mining industry to comply with new environmental regulations. The law designated the National Direction of Environmental Health (DIGESA) under the Ministry of Health to safeguard the environment. However, the new owner of La Oroya (Doe Run) did not comply with CENTROMIN's program for environmental management, which the company had previously accepted during the acquisition of the mining deposit. Instead, Doe Run made successive modifications to the program that did not address all the issues associated with air pollution (Spieler 2010). Likewise, the Direction of Environmental Health failed to take the proper environmental measures for remediation and rehabilitation. All of the abovementioned actors operated under some degree of opacity and with a lack of oversight (Orihuela 2014, p. 232).

There is evidence of relevant environmental harm to La Oroya since the first years of the mining exploitation. A report elaborated some years after the commencement of operations found that the foundry funnels expelled fumes and smoke containing several heavy metals and that the industry did not rely on the proper technology to control the emissions. Likewise, clinical studies conducted during the 1960s had already warned of the perils of such chemicals for the local population (Bravo Alarcón 2015, pp. 35–36), but the nationalization of the complex in the 1970s quelled those criticisms. By the turn of the twenty-first century, a new political agenda pointed to environmental harm as a manifest problem.

In 1999, a study conducted by the Direction of Environmental Health found that children from La Oroya had high percentages of lead in their bodies due to contamination at the metallurgical complex. Through blood tests, the study concluded that more than 99% of samples surpassed the percentages of lead and other heavy metals that the World Health Organization (WHO) considered acceptable. The children in the study required medical evaluation and immediate treatment. Those findings were consistent with other studies conducted later on broader population samples. Overall, the air and soil's chronic exposure to high levels of lead, cadmium, and arsenic indicated that there was a higher risk of respiratory diseases and cancer, among other severe pathologies, for the local

population. Although there was debate on the causal impact of air pollution on La Oroya residents' health over the years, the environmental conditions indeed posed an extreme risk to human development (Cederstav and Barandiarán 2002).

Since the late 1990s, diverse social and legislative initiatives have emerged to fight environmental harm in the area. By and large, they have been reactive measures with limited impact (Orihuela 2014, p. 232). After the publication of the clinical studies on children's health in 1999, NGOs, groups of La Oroya's neighbours, the Catholic Church, and public institutions organized several gatherings to tackle air pollution. Yet the groups were highly divided between those who wanted a profound environmental intervention and those who prioritized the continuity of the foundry that hired local workers. Between 2002 and 2005, lawmakers presented six bills to Congress to declare a health emergency in the area and establish multisectoral commissions. Congress passed only one of them, mandating the coordination of local governments and environmental authorities to assess pollution, explore viable solutions, and propose an environmental management program and needed regulatory reforms (Law 28,082, 2003). Under this institutional umbrella, in 2006, social society and public entities agreed on an environmental program with some concrete measures. However, the lack of robust regulation and institutional capacity was not resolved (Bravo Alarcón 2015, pp. 113–67).

With legislative and administrative unresponsiveness, a group of La Oroya's residents filed an enforcement action (*acción de cumplimiento*) against health authorities in 2002. They received a favourable decision after the trial in the court of first instance in Lima, where the court decided that authorities had not complied with health regulations (Supreme Decree 074-2001-PCM). In 2005, however, the appellate court annulled that judgment, stating that invoked legal orders lacked enforceable character and that the court should analyze the pertinence of the health authorities' concrete measures. Claimants filed a tutela action against the appellate court verdict (*agravio constitucional)*, invoking their right to health (File 02002-2006-PC, case *Pablo Fabián and others*).

Peru's Constitutional Court delivered a structural decision in May 2006, asserting that the state's inaction implied a massive violation of health rights, originating an environmental problem. Accordingly, the ruling ordered: a) that the Ministry of Health, within thirty days, implement an emergency system to care for the health of people contaminated by lead; b) that the National Direction of Environmental Health issue a baseline determination to implement an action plan for the improvement of air quality (Supreme Decree 074-2001-PCM); and c) that the National Direction of Environmental Health declares a state of emergency in La Oroya (Supreme Decree 074-2001-PCM, and Law 26,842). Further, the judgment urged the regional government of Junín, the municipality of Yauli-La Oroya, the Ministry of Energy and Mines, the National Council of the Environment, and the private companies involved in local mining activity to participate in decisive actions to protect the health of La Oroya's residents. Nevertheless, the ruling established weak instruments for monitoring compliance with the court's orders since it barely established a mechanism for the Ministry of Health to submit reports. To date, the defendant entities have not complied with all the associated court orders (Sánchez Gómez 2020, p. 153).

After the Constitutional Court rendered this structural decision, the Peruvian state has been slow to comply by developing proper activities for environmental restoration

(Barriga 2017). Some executive decrees established a technical commission to build a sulfuric acid plant to process copper, but this has only been a partial contribution to ecological rehabilitation. Although the local community and authorities agreed on a management program in 2006, its implementation has been deficient as long as the economic and political ambit has faced new challenges. During the decade of the 2010s, the metallurgic complex entered into a restructuring settlement without complying with its environmental commitments, ceasing its operations under the shadow of violent protests. Recently, the management of the complex was assigned to Metalúrgica Business Perú, a worker-owned corporation.

Along with ineffective state action, La Oroya's neighbours filed a complaint before the Inter-American Commission of Human Rights (Spieler 2010), which concluded that the Peruvian state did not comply with its duties to regulate and supervise the mining companies according to due diligence standards. At the same time, the commission stated that there were no clear environmental responsibilities (e.g., air pollution limits different than the WHO's) and that the state did not deploy a regulation that adequately safeguarded compliance (IACHR. *Community of La Oroya v. Peru.* Petition 1473-06 (2022)). In 2024, the Inter-American Court of Human Rights rendered a decision for the claimants, asserting La Oroya's environmental damage severely violated its inhabitants' human right to health. Among its considerations, the decision claims in passing that, in cases of "regulatory gaps" or interpretative doubts, the principle of in dubio pro natura compels the administrative or judicial authority to choose the solution most protective of the environment, subtly echoing prior inconsistencies in legislation and the state inability to regulate the issue properly, quoted above (IACtHR, *Community of La Oroya. v. Peru* (Con. N° 175) (2024)). Accordingly, the ruling condemned the Peruvian State to compensate the victims, rehabilitate the ecosystem, and strictly enforce environmental standards.

## 4. Analyzing Evidence

Although the three case studies presented in this paper have been previously discussed in the literature, a new examination angle allows us to understand the fine-grained mechanisms behind structural judgements. In concrete terms, the evidence offered here presents three critical questions in this regard, linking them to judicial action before imperfect legislation: a) when judges tend to tackle institutional gaps in public policy, primarily through structural judgments; b) how imperfect legislation spots hindrances that the rulings need to deal with for its enforcement; and c) what tools to oversight enforcement are more effective to overcome prior institutional gaps. As long as the case studies happened within the same region and legal culture, this discrete sample eschews the interference of confounding factors like a dissimilar understanding of fundamental rights or divergent state capacities, providing some comparative insights to attempt an answer to those inquiries.

In the first place, the three cases show situations where judicial policymaking faced imperfect legislative regulation of public policy, either ambiguity, normative vacuums, or stalemate before the unsatisfactory status quo. The Colombian Constitutional Court's decision on health coverage addressed a law that had been broadly contested and was almost unanimously considered a suboptimal policy by political actors, health experts, and technocrats (e.g., Lamprea 2011). Only in 2004, lawmakers introduced 16 proposals

to change health delivery regulations. However, although it was considered a faulty policy, nobody in Congress paid transaction costs to reach a comprehensive reform. Meanwhile, the Argentine Supreme Court's judgment on the Richauelo-Matanza basin indicates that environmental statutes lacked inter-jurisdictional coordination tools among federal, state, and municipal authorities. Such an absence was a well-known matter within the political and legal system in the years, or even decades, before the rulings (e.g., Lorenzetti 2014, pp. 205–12). Finally, the verdict on La Oroya's air pollution attempted to overhaul environmental governance in the face of incomplete and ambiguous laws that worsened the endemic lack of institutional capacity. In the years immediately before such a structural ruling, Peruvian lawmakers had tried to streamline regulations several times (2002–2005), but they failed in their attempts (e.g., Bravo Alarcón 2015, pp. 113–150). As Table 1 indicates, these cases of judicial intervention illustrate how structural rulings responded to different types of imperfect legislation. It is hard to rank them in terms of their particular weight to leverage court action as long as this latter one is also connected to the specificity of each policy issue. Nevertheless, these cases confirm that imperfect legislation frequently offers opportunities for judicial policymaking.

TABLE 1

| Case | Imperfect Legislation | Public Policy Problem |
|---|---|---|
| Health coverage, Colombia | Legislative stalemate | Low institutional and financial capacity; Political contestation |
| Riachuelo, Argentina | Incomplete law | Lack of inter-jurisdictional coordination; State inaction; Low institutional capacity |
| La Oroya, Peru | Legislative stalemate; Incomplete law | Ambiguous standards; State inaction; Lack of institutional capacity |

**Table 1. Structural Judgments as a Response to Imperfect Legislation.**

In the second place, the three case studies also show that imperfect legislation also serves as a proxy for more general policy obstacles. Defective regulation is not merely normative but usually represents severe institutional difficulties in solving policy issues. For example, behind legislative stalemate, we can find high levels of political contestation about how to solve low institutional capacity, as in the case of Colombian health reform. Table 1 illustrates how imperfect legislation in each case study related to specific barriers in policy design and implementation. Such a proxy is not irrelevant for courts, which consider them for crafting structural injunctions. At last, what lawmakers observe as transaction costs preventing them from agreeing on more robust policies, judges view as obstacles to deriving implementation details and ensuring compliance. In this light, how courts tackle previous obstacles significantly affects how a judgment bears on policy outcomes.

Finally, the three cases on structural judgements provide evidence to assess what tools for oversight enforcement are more effective in overcoming prior institutional gaps. Considering both imperfect legislation and policy difficulties they represent, structural rulings are used to impose specific guidelines for governmental action. Yet, structural remedies' impact doesn't depend only on the public policy's complexity. This discrete number of case studies poses relatively comparable challenges in coping with large-scale

institutional gaps. However, they present differences regarding other variables that could explain divergent levels of impact—like the strength of compliance mechanisms, the depth of judicial intervention, and the number of addressees (see Table 2).

TABLE 2

| Case | Monitoring Compliance | Structural Decisions (Depth) | Addressees |
|---|---|---|---|
| Health coverage, Colombia | Strong mechanisms (highly effective) | - Mandatory measures tackling specific areas to broaden health coverage | One main entity |
| Riachuelo, Argentina | Strong mechanisms (intermediate level of effectiveness) | - Preliminary environmental program<br>- Mandatory program to develop specific measures of environmental rehabilitation | One primary agency coordinating several entities; Several entities involved in overseeing |
| La Oroya, Peru | Weak mechanisms (ineffective) | - Mandate to develop an emergency plan for environmental care (core problem handed over to regular statutory entities)<br>- Development of baseline for action<br>- Declaration of state of emergency | Two main entities and several others as non-bound addressees |

**Table 2. Variables intervening with the compliance of structural rulings.**

Besides the commonalities, these case studies also have differences regarding their specificity in enforcement mechanisms that can serve to assess the lessons of the analytic framework. First, the structural decision to broaden healthcare coverage in Colombia exemplifies robust enforcement mechanisms, with only one primary addressee complying with judicial orders. Second, the judicial plan to clean the Riachuelo-Matanza basin in Buenos Aires illustrates a case where the court designed robust enforcement tools but ordered multiple parties to satisfy judicial mandates. Finally, the structural decision to end air pollution in La Oroya, Perú, serves as a counterfactual example of a structural judgment with weak mechanisms of judicial monitoring and multiple addressees. Unsurprisingly, we can observe different levels of accomplishment in implementing judicially selected policy outcomes.

Indeed, more robust compliance mechanisms, like those involved in the Colombian case on health coverage and the Richachuelo-Matanza basin case, were more likely to succeed as long as they monitored compliance through measures like follow-up hearings. Nonetheless, they did not have similar success due to the different number of addressees to which courts could transfer non-compliance costs (e.g., Brinks 2017). Thus, the Colombian Constitutional Court assigned compliance to one public agency (i.e., the National Commission of Health Regulation), achieving government-implemented judicial standards and resisting political backlash. Without considering the pertinence and effectiveness of the judicially selected outcome, that judgement comprises the best example of attainment in assuring compliance. In the Riachuelo-Matanza ruling, however, the impact was more limited. In that case, there was only one primary addressee (ACUMAR), but several other public entities were involved in implementation and oversight. Overall, the Court did not order the payment of fines for non-compliance, several public entities experienced difficulties with their interventions

(e.g., vacancies of their chairs), and private corporations were not censured, thus hampering the effectiveness of the policy outcome. Meanwhile, the case of La Oroya met all the conditions for failure: it had weak mechanisms to monitor compliance, its judicial intervention was less intrusive as long as its mandates were loose, and the ruling identified several bound and non-bound addressees.

## 5. Concluding Remarks

This paper elucidates how structural judgments involving socioeconomic rights and the judicial oversight of their compliance have recently operated in the context of Latin American public law. While it does not present an exhaustive and definitive theory, the analysis offers some insights into the interbranch dynamics underlying this model of judicial behavior. By and large, the paper proposes that the court's selection of the matters in which to craft public policy and structural judgments scope are associated with the court's approach to the prior imperfect legislation. Since Latin American politics suffers from several features leading to legislative unresponsiveness (Brinks *et al.* 2020), such as weak institutional capacity and increasing political fragmentation, the analysis sheds light on a relevant matter for the region.

This paper's theoretical framework and evidence delve into the connection between legislative deficits and structural judgments. Although the article does not propose a sort of casual explanation, the evidence shows that transparently imperfect legislation often constitutes an opportunity for policy-oriented judges to advance their preferred policy outcomes. The three cases analyzed here openly uncover situations where we can observe judicial intervention before legislative stalemate and incompleteness. At the same time, the article explains that the impact of those structural rulings is closely associated with how a court can manage the hindrances mirrored by prior imperfect legislation and their ability to transfer non-compliance costs to its decision's addressees. In so doing, the research expounds on the subtle interplay between normative scenarios, interbranch politics, and judicial policymaking.

By now, the provisional conclusions of the paper address structural judgement in the Latin American context, where there are similar regulatory dynamics. By and large, the three cases happen under relatively similar conditions, like an expansive outreach of fundamental and social rights, institutional weaknesses, and a culture of relatively centralized lawmaking and policy implementation. Thus, the same reasons that allow comparability between the three case studies constituted limitations to extending this study's findings to other latitudes. Theoretically, at least, the interplay between imperfect legislation and judicial policymaking could have a comprehensive extension (Villalonga 2024). From the empirical point of view, however, it is necessary to discard idiosyncratic factors from a broader comparative analysis. Further research is required.

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