



Revista Derecho del Estado

ISSN: 0122-9893

ISSN: 2346-2051

Universidad Externado de Colombia

LANDAU, DAVID

Socioeconomic Rights in Latin America: Closing the Gap between Aspiration and Reality**

Revista Derecho del Estado, no. 57, 2023, May-August, pp. 7-40

Universidad Externado de Colombia

DOI: <https://doi.org/10.18601/01229893.n57.02>

Available in: <https://www.redalyc.org/articulo.oa?id=337676348002>

- How to cite
- Complete issue
- More information about this article
- Journal's webpage in redalyc.org

UDEM redalyc.org

Scientific Information System Redalyc

Network of Scientific Journals from Latin America and the Caribbean, Spain and Portugal

Project academic non-profit, developed under the open access initiative

Socioeconomic Rights in Latin America: Closing the Gap between Aspiration and Reality**

Derechos socioeconómicos en América Latina: cerrando la brecha entre aspiración y realidad

ABSTRACT

Latin America is the region where constitutional socioeconomic rights have been taken most seriously. There is a high level of convergence around the idea that socioeconomic rights belong in constitutions. Moreover, there is a growing regional consensus that socioeconomic rights are fully justiciable. The empirical record of judicial enforcement, on the other hand, shows more variance and is less transformative than this consensus would suggest. Courts most commonly follow models of enforcement that place relatively low levels of strain on conceptions of judicial role but are also less likely to have transformative effects. For example, many courts seem to prefer to give petitioners an individual remedy rather than issuing a structural or collective remedy. Even in countries where courts have issued an aggressive program to enforce socioeconomic rights, such as Colombia, critics have argued that courts have not achieved enough. After surveying the gap between constitutionalization and on-the-ground enforcement, this essay considers solutions. I conclude that the best response is holistic: it would seek to redesign other institutions, such as ombudspersons and political parties, so that these institutions are more responsive to socioeconomic rights, while maintaining an important role for courts in catalyzing and coordinating attention to socioeconomic issues.

* Mason Ladd Professor and Associate Dean for International Programs, Florida State University College of Law, USA. Email: dlandau@law.fsu.edu. ORCID ID: 0000-0002-4990-0400.

** Received on June 26th, 2022, approved on June 27th, 2023.

To quote the article: Landau, D. *Socioeconomic Rights in Latin America: Closing the Gap between Aspiration and Reality*. In *Revista Derecho del Estado*, Universidad Externado de Colombia. No. 57, September - December, 2023, 7-40.

DOI: <https://doi.org/10.18601/01229893.N57.02>

KEYWORDS

Socioeconomic rights, right to health, judicial role, transformative constitutionalism, Latin American constitutionalism, Colombian Constitutional Court, Brazilian Supreme Federal Tribunal.

RESUMEN

América Latina es la región donde los derechos socioeconómicos constitucionales se han tomado más en serio. Existe un alto nivel de convergencia en torno a la idea de que los derechos socioeconómicos pertenecen a las constituciones. Además, existe un creciente consenso regional de que los derechos socioeconómicos son plenamente justiciables. El registro empírico de ejecución judicial, por otro lado, muestra más variación y es menos transformador de lo que sugeriría este consenso. Los tribunales suelen seguir modelos de ejecución que imponen niveles relativamente bajos de tensión en las concepciones del papel judicial, pero también es menos probable que tengan efectos transformadores. Por ejemplo, muchos tribunales parecen preferir otorgar a los peticionarios un recurso individual en lugar de emitir un recurso estructural o colectivo. Incluso en países donde los tribunales han emitido un programa agresivo para hacer cumplir los derechos socioeconómicos, como Colombia, los críticos han argumentado que los tribunales no han logrado lo suficiente. Después de examinar la brecha entre la constitucionalización y la aplicación en el terreno, este ensayo considera soluciones. Concluyo que la mejor respuesta es holística: buscaría rediseñar otras instituciones, como defensores del pueblo y partidos políticos, para que estas instituciones respondan mejor a los derechos socioeconómicos, manteniendo al mismo tiempo un papel importante para los tribunales en la catalización y coordinación de la atención a los problemas socioeconómicos.

PALABRAS CLAVE

Derechos socioeconómicos, derecho a la salud, función judicial, constitucionalismo transformador, constitucionalismo latinoamericano, Corte Constitucional de Colombia, Supremo Tribunal Federal de Brasil.

SUMMARY

Introduction. 1. Near Universal Recognition and Widespread Enforcement. 2. Judicial Enforcement on the Ground: A Disappointment? 2.1. Individual Remedies. 2.2. Defensive Social Rights. 2.3. Structural Enforcement. 3. Rethinking the Role of Courts. 3.1. Improving Courts. 3.2. Reframing Judicial Enforcement of Socioeconomic Rights. 4. Thinking beyond Courts. 4.1. Party

Systems and Socioeconomic Rights. 4.2. Independent Accountability Institutions and Socioeconomic Rights. 4.3. Courts and Other Institutions in the Enforcement of Socioeconomic Rights. Conclusion: Socioeconomic Rights and Liberal Democracy in Latin America. References.

INTRODUCTION

Latin America is almost certainly the region of the world where socioeconomic rights have been taken most seriously. In a region where human rights have become a common discourse, and where economic inequality and poverty are immediate issues in popular consciousness, legal scholars, constitutional designers, and judges have increasingly made socioeconomic rights central to constitutional projects. As demonstrated below, there is a high level of convergence around the idea that socioeconomic rights belong in constitutions; every major constitution in the region, regardless of underlying political tendency, now includes them. Moreover, there is a growing regional consensus that socioeconomic rights are not just mission statements for political guidance: they are fully justiciable.

The empirical record of judicial enforcement, on the other hand, shows much more variance and is, on balance, less transformative than this consensus would suggest. In some countries in the region, courts remain quite reluctant to enforce socioeconomic rights, despite affirming that they are justiciable. In countries where socioeconomic rights have been enforced aggressively, courts most commonly follow models of enforcement that place relatively low levels of strain on conceptions of judicial role but are also less likely to have transformative effects. For example, many courts seem to prefer to give petitioners an individual remedy rather than issuing a structural or collective remedy. Even in countries where courts have issued an aggressive program to enforce socioeconomic rights, such as Colombia, critics have argued that courts have not achieved enough, and have been outweighed by other parts of the constitutional order with contradictory agendas.

These patterns and results of judicialization pose a challenge to scholars that view Latin American constitutions as (at least sometimes) embarked on transformative forms of constitutionalism.¹ And, since Latin America is the region with the highest level of judicialization of socioeconomic rights in the world, they also pose a challenge to those scholars and policymakers seeking the inclusion and enforcement of socioeconomic rights. The prevailing tone

1 Von Bogdandy, A. 'Ius Constitutionale Commune in America Latina: Observations on Transformative Constitutionalism' in Von Bogdandy, A. et al. (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune*, OUP, 2017, 27.

of recent work on the region has become more pessimistic about the ability of socioeconomic rights to achieve social transformation.

In Parts I and II of this essay, I survey the literature and caselaw on Latin American social rights in order to demonstrate this gap between the regional consensus that exists at a high level about the importance of socioeconomic rights, and the practical realities of judicial enforcement, where less seems to have been achieved. Parts III and IV in turn develop two types of solutions to this problem. Part III focuses on the possibility of improving or reframing patterns of judicial enforcement, while Part IV follows an important modern line of critique in thinking beyond courts to other kinds of institutional change. Ultimately, I conclude, the best form of response is holistic: it would seek to redesign other institutions, such as ombudspersons and political parties, so that these institutions are more responsive to socioeconomic rights, while maintaining an important role for courts in catalyzing and coordinating attention to socioeconomic issues. Part V concludes by suggesting that the success of liberal democracy, in Latin America if not elsewhere around the world, may hinge partly on the ability of scholars, judges, and constitutional designers to resolve the dilemma of social rights enforcement. Recent challenges to liberal democracy in the region, especially the “neo-Bolivarian” model most fully represented by the Venezuelan constitutional order, have been fueled in part by the perceived failure of liberal democracy to deal adequately with socioeconomic issues.

1. NEAR UNIVERSAL RECOGNITION AND WIDESPREAD ENFORCEMENT

Socioeconomic rights are recognized in nearly all Latin American countries, the product of a long period of development since the early 20th century.² Indeed, the region has been an important pioneer in the recognition of these rights. For example, the Mexican constitution of 1917, written in the aftermath of the Mexican revolution, became one of the first constitutions in the world to include them.³ The rights themselves were an important marker of the originality and symbolic importance of the Mexican constitution. They were included along with a broadly statist tradition that included clauses related to the social function of property and a significant role for the state

2 Jung, C.; Hirschl, R. & Rosevear, E. ‘Economic and Social Rights in National Constitutions’, 2014, 62 Am J Comp L 1043 (noting that Latin American constitutions contain more economic and social rights, and more justiciable economic and social rights, than any other region); Bernal Pulido, C. ‘The Constitutional Protection of Economic and Social Rights in Latin America’ in Rosalind Dixon and Tom Ginsburg (eds), *Comparative Constitutional Law in Latin America* (Edward Elgar 2017) (asserting that every country in the region enshrines such rights).

3 Andrew, N. & Cleven N., ‘Some Social Aspects of the Mexican Constitution of 1917’ (1921) 4 Hispanic Am Hist Rev 474.

in regulating the economy. The constitution for example included provisions limiting property rights and calling for the distribution of large landed estates, protecting the rights of workers and trade unions on a wide range of issues, and social security.⁴ Some recent work has argued that the social rights in the Mexican constitutions, like those found in the Weimar and Irish constitutions of roughly the same time period, were attempts to contain and cabin popular demands by giving alternatives to social revolution.⁵

However, the social rights included in the Mexican constitution were essentially non-justiciable. During the long, one-party dictatorship that ruled Mexico between the 1930s and the 1990s, the Court did not adopt doctrines allowing the enforcement of socioeconomic rights. Instead, standing principles and related ideas about the “programmatic” nature of the socioeconomic rights limited their enforcement. Likewise, because the country was ruled by the Institutionalized Revolutionary Party (PRI) that was seen as heir to the Mexican revolution, the Court generally deferred to the interpretations of rights and programs given by the party.⁶ The fact that the rights were non-justiciable, of course, is not an assertion that they had no meaning. The imprint of the Mexican constitution plausibly affected state policy; moreover, it created new institutions such as specialized labor boards that had an impact.⁷

Mexico is generally recognized as the regional pioneer in the inclusion of socioeconomic rights. But it was at the leading edge of a regional trend that has led all the major countries in Latin America to include these rights. As Gargarella has recently documented, regional constitutions throughout the 20th century moved towards recognition of these rights.⁸ Moreover, they have been included in constitutions that followed different constitutional and political traditions. In some constitutions such as those of Guatemala (1945), Costa Rica (1949), and Colombia (1936 amendments to the 1886 constitution), the inclusion of socioeconomic rights was based on liberal reformist movements.⁹ In others such as Brazil (1934) and Argentina (1949), social rights were included as part of a populist economic program under Getulio Vargas and Juan Peron, respectively.¹⁰

The same basic convergence on social rights, despite variance on overall constitutional project, is present in modern constitutions. Take some

4 Ibid.

5 Murray, T. ‘Socio-Economic Rights Versus Social Revolution? Constitution Making in Germany, Mexico and Ireland, 1917–1923,’ *Social and Legal Studies*, Dec. 2015, 1.

6 Cossio Díaz, J. R. *Cambio social y cambio jurídico*, Porrúa, 2008.

7 Suarez-Potts, W. J., *The Making of Law: The Supreme Court and Labor Legislation in Mexico*, Stanford UP 2012, 325, 327.

8 Gargarella, R. *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution*, OUP 2013, 139-40.

9 Ibid. 111-15.

10 Ibid. 115-21.

examples. First, the Chilean constitution of 1980, which was written by the authoritarian regime, nonetheless contains a significant list of socioeconomic rights influenced by a Conservative Catholic ideology.¹¹ Second, the Brazilian constitution, which was written in a pluralist constitutional assembly as part of a transition from authoritarian rule, contains an extensive set of socioeconomic rights.¹² Third, the Colombian constitution of 1991, which was written by an equally pluralist assembly during a deep political crisis, and which paired a substantial list of socioeconomic rights with neoliberal reforms that reduced the imprint of the state.¹³ Fourth, the neo-Bolivarian constitutions found in Venezuela (1999), Ecuador (2008), and Bolivia (2009), which despite substantial internal differences, all contain extensive catalogues of socioeconomic rights.¹⁴ These constitutions generally combine continued recognition of socioeconomic rights with the inclusion of other new rights (such as environmental and indigenous rights) and institutional changes.¹⁵ For our purposes, what is striking is that all of these constitutional projects, for all of their contextual and political differences, included socioeconomic rights. This shows the relatively high consensus within Latin American constitutionalism on the issue.

Trends in the region have also moved towards the justiciability of socioeconomic rights. In most countries in the region, socioeconomic rights now seem to be judicially enforceable at least to some degree. In some countries, the enforceability of socioeconomic rights through individual complaint mechanisms or other means is explicit in the text.¹⁶ It is also helpful that in many Latin American countries, individual complaints can be brought not only against the state, but also against private companies or individuals in certain circumstances.¹⁷ As Mark Tushnet has noted, the relaxation or elimination of the state action doctrine is related to the ability of a court to enforce positive rights or rights that impact the social welfare state.¹⁸ In some countries in the region, the text of the constitution is ambiguous on the enforcement of

11 Chile's Constitution, 1980, art.19 (containing rights to health, a clean environment, education, to work, to social security, and to unionize).

12 Rosenn, K. 'Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society', 38, *Am J Comp L* 773, 1990, 791-93.

13 Couso, J. 'The "Economic Constitutions" of Latin America: Between Free Markets and Socioeconomic Rights' in Rosalind Dixon and Tom Ginsburg (eds), *Comparative Constitutional Law in Latin America*, Edward Elgar, 2017, 343 and 354-55.

14 King, P. 'Neo-Bolivarian Constitutional Design' in Tom Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions*, CUP, 2013, 366.

15 Ibid.

16 Brewer-Carías, A. R. *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings*, OUP, 2009, 240-43.

17 Ibid. 295 (noting that in Latin America, "with some exceptions," individual complaint actions can be brought against private as well as state actors, in some circumstances).

18 Tushnet, M. 'State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations', 3, *Chi J Intl L* 435, 2002.

socioeconomic rights, but courts have found them enforceable anyway. An interesting example is the 1991 Constitution of Colombia, which is silent on whether the individual complaint mechanism can be used to enforce socioeconomic rights.¹⁹ Nonetheless, the Court very quickly moved towards a position of justiciability, first using a doctrine of connectivity that enforced those rights whenever they were connected to “fundamental rights” like the right to life or human dignity,²⁰ and later by holding that some aspects of these rights were themselves fundamental.²¹ On this basis, the Court has built a jurisprudence on socioeconomic rights that is probably the most robust and creative in the region.

There are notable laggards on the question of justiciability. Two prominent examples come to mind – Mexico and Chile. In the former country, as noted above, the Court has historically used several means to hold socioeconomic rights non-justiciable; in the latter, the constitution’s socioeconomic rights are expressly excluded from the scope of the individual complaint mechanism.²² Nonetheless, there are signs of movement even in these two countries. In Mexico, the Supreme Court and lower courts seem to be slowly beginning to recognize some socioeconomic rights claims, particularly following constitutional reforms in 2011 (and legal reforms in 2013) that raised the status of international law in domestic jurisprudence and broadened and modernized the historic individual rights instrument, the *amparo*.²³ There has also been slow movement in Chile. For example, a landmark 2008 decision of the Chilean Constitutional Court held unconstitutional a legal system for price hikes in the private healthcare market, in part based on the right to health.²⁴ Likewise, the country’s Supreme Court has begun issuing decisions on individual complaints requiring insurers to cover treatments even in cases where those treatments are left out of contracts, where the failure

19 The relevant article limits the individual complaint, called a *tutela*, to “fundamental rights” without defining what those rights are. See Colombia’s Constitution, 1991, art. 86. However, one article of the constitution defines certain rights as being of “immediate application,” and this article generally excludes the socioeconomic rights from the list. See Colombia’s Constitution, 1991, art. 85.

20 Decision T-426 of 1992, translated in Cepeda Espinosa, M. J. & Landau, L. *Colombian Constitutional Law: Leading Cases*, OUP 2017, 150. The connectivity doctrine is similar to a doctrine of the Indian Supreme Court whereby rights such as the right to health, placed in a non-justiciable part of the constitution called the directive principles of state policy, were nonetheless enforced because of their connection with the right to life. Justice S. Muralidhar, ‘India: The Expectations and Challenges of Judicial Enforcement of Social Rights’ in Malcolm Langford (ed) *Social Rights Enforcement: Emerging Trends in International and Comparative Law*, CUP 2008, 102–103.

21 Decision T-760 of 2008, in *Ibid.* at 172–173.

22 Chile’s Constitution, 1980, art. 20.

23 Herrera García, A. ‘El objeto de protección del nuevo juicio de amparo mexicano’. In *Revista Derecho del Estado*, 34, 2015, 153 and 155–57.

24 Tribunal Constitucional. Rol 976-07-INA. Sentencia de 26 de junio de 2008.

to recognize the treatment implicates fundamental rights.²⁵ Moreover, the breadth and justiciability of socioeconomic rights has been a significant issue during Chile's ongoing constitution-making process, and expansions seem likely on both fronts.

In general, the trend towards enforcement of socioeconomic rights is related to broader shifts in Latin American constitutional law. As Couso has argued, over the past several decades the region has experienced a set of jurisprudential changes sometimes called the "new constitutionalism" in fields such as legal education, judicial role, and scholarship.²⁶ The manifestation of these trends has varied within different countries. In general, they involve a shift in the hierarchy of constitutional law vis-à-vis other fields of law, and changes in constitutional law itself. The field of constitutional law has gained more status as compared to other fields such as private, commercial, and criminal law, and constitutional law has begun influencing and reshaping those fields.²⁷ Furthermore, constitutional law itself has changed, for example to emphasize basic principles like human dignity and to stress enforcement of rights provisions.²⁸ These kinds of changes have pushed judges and other actors towards justiciability.

One can note aspects of the same kind of movement at the regional level in the jurisprudence of the Inter-American Court of Human Rights. The original American Convention on Human Rights (1969) contains only one provision, Article 26, dealing directly with economic, social, and cultural rights, and this provision creates a general duty of "progressive realization" of such rights.²⁹ The first protocol of the Convention, the Protocol of San Salvador of 1988, contains a much more extensive and detailed list of socioeconomic rights.³⁰ However, the text of the Protocol gives the Commission and Court the ability to hear claims over only two of its articles, the rights to unionize and the right to education, which has greatly impacted its justiciability.³¹ In

25 'Corte Suprema ordena a isapre costear fármaco no regulado en Fonasa,' 24 Horas (Dec. 11, 2018), at <https://www.24horas.cl/nacional/corte-suprema-ordena-a-isapre-costear-farmaco-no-regulado-en-fonasa-2927340>.

26 Couso, J. 'The Transformation of Constitutional Discourse and the Judicialization of Politics in Latin America' in Couso, J.; Huneeus, A. & Sieder, R. (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America*, CUP 2010, 141.

27 Ibid. 148.

28 Ibid. 149.

29 American Convention on Human Rights, OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969), art.26 ("The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.").

30 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador), OAS Treaty Series No. 69 (1988).

31 Ibid. art. 19, sec. 6.

other words, the protection of socioeconomic rights in the Inter-American system has been marked by the same kinds of differences between civil and political rights on the one hand, and economic, social, and cultural rights on the other, that have marked other areas of international law.³²

Nonetheless, the Court has issued increasingly bold decisions on the justiciability of socioeconomic rights. Some of the Court's earlier decisions, for example, ground the protection of benefits such as pensions on social rights such as the right to property and to judicial protection.³³ The right to health, relatedly, was sometimes protected through violation of rights to personal integrity.³⁴ Since 2017, the Court's position has evolved, so that socioeconomic rights can now be protected directly through Article 26 of the American Convention, and not merely in connection with other rights.³⁵ In a 2018 decision, the Court found that Article 26 had been violated because Guatemala had failed to progressively develop the right to health with respect to people living with HIV.³⁶ The Court has not been a regional leader in the enforcement of socioeconomic rights – some of the domestic courts, such as those of Colombia, Brazil, Costa Rica, and Argentina, have been enforcing those rights both for longer and more forcefully. But it has helped to consolidate the regional consensus that has moved towards justiciability, and this will likely put additional pressure on those domestic tribunals that continue to hold socioeconomic rights to be non-justiciable.

2. JUDICIAL ENFORCEMENT ON THE GROUND: A DISAPPOINTMENT?

The actual record of judicial enforcement of socioeconomic rights in Latin America presents a rather different picture than simply looking at the inclusion of the rights themselves. First, there is much less convergence in the way rights are enforced by courts than in inclusion of the rights – while most countries in the region will now enforce socioeconomic rights, there is great variance in the degree and nature of how they do so. Second, all the major models of judicial enforcement have been heavily critiqued, particularly from the standpoint of achieving social transformation. In short, while the region now largely agrees on the importance and justiciability of socioeconomic rights, it has yet to settle on a way to enforce those rights that has a major impact on either poverty or inequality.

32 For a more general version of this historical critique, see Moyn, S. *Not Enough: Human Rights in an Unequal World*, Harvard UP, 2018.

33 *Case of the "Five Pensioners" v. Peru*, Inter-American Court of Human Rights, Feb. 28, 2003.

34 *Case of Suarez Peralta v Ecuador*, Inter-American Court of Human Rights, May 21, 2013.

35 *Case of Lagos del Campo v Peru*, Inter-American Court of Human Rights, Aug. 31, 2017.

36 *Case of Cuscal Pivaral and Others v Guatemala*, Inter-American Court of Human Rights, Aug. 23, 2018.

Of course, whether this means that enforcement of socioeconomic rights has been a disappointment depends in part on what we think the purposes of socioeconomic rights are. And there is relatively little consensus on this point either. Elsewhere, I have suggested that socioeconomic rights may play a variety of functions.³⁷ They might stabilize and legitimize states that feature weak system of social provision, by allowing claimants to seek entitlements within sometimes dysfunctional bureaucratic and political systems. Socioeconomic rights may be able to play such a role even if they are not particularly transformative, for example by creating a judicial outlet for higher-income plaintiffs to receive health care and pensions when bureaucracies function poorly. But most scholarship seems to assume that socioeconomic rights have at least some kind of transformative purpose, or in other words a goal of improving the situation of the poorest and most marginalized members of society.

Another important caveat is that the relationship between the direct beneficiaries of a judicial order and the order's more indirect effects may be complex.³⁸ For example, a decision that directly benefits relatively affluent groups by defending their existing entitlements (say, by preventing foreclosures during a housing crisis) may end up benefitting a poorer subset of the population as well, by preventing an unsustainable expansion of existing systems of social provision that would have led to steep benefit cuts.³⁹

With those caveats out of the way, courts in Latin America vary quite widely in terms of *how* they are willing to enforce socioeconomic rights. This is not, of course, a question that necessarily remains static within a given country, since conceptions of judicial role and political space can change over time.⁴⁰ Nor is it a question that needs to be answered the same for all rights. Courts in the region are often more aggressive, for example, in enforcing the right to health as compared to other socioeconomic rights. In broad terms, one can identify several different models of enforcement that have been important within the region.

37 Landau, D. 'Socioeconomic Rights and Majoritarian Courts in Latin America' in Bonilla Maldonado, D. (ed.), *Constitutionalism in the Americas* (Edward Elgar 2018) 188; Dixon, R. and Landau, D. 'Constitutional Non-Transformation? Socioeconomic Rights Beyond the Poor' in Young, K. E. (ed.), *The Future of Social and Economic Rights*, OUP, 2019, 110.

38 For the distinction between direct and indirect effects, see Rodríguez-Garavito, C. 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America', Texas LR 1669, 89, 2011.

39 I am grateful to an anonymous reviewer for this point.

40 Landau, D. 'Judicial Role and the Limits of Constitutional Convergence in Latin America' in Dixon, R. and Ginsburg, T. (eds.) *Comparative Constitutional Law in Latin America*, Edward Elgar, 2017, 227 and 242.

2.1. Individual Remedies

First, and most commonly, a number of courts have been willing to give a petitioner an individual or simple remedy in some cases. Within Latin America, this is most common with respect to the right to health, where courts in some countries like Brazil, Colombia, and Costa Rica routinely give petitioners access to a treatment or a medicine if they bring suit.⁴¹ But one also sees it with other rights such as the right to social security or to a pension.⁴² The provision of a simple, individual remedy to a petitioner is one of the easiest ways to enforce socioeconomic rights because it fits comfortably within traditional conceptions of judicial role. Courts often issue this remedy after an analysis that focuses only on the individual situation in the case (for example, whether the deprivation will affect the life or dignity of the petitioner), and the remedy itself is one that does not require continued monitoring by the court. That said, some empirical work has found that state compliance with individual orders may still be relatively low, and petitioners are often forced to wait a long time, follow up, or return to the judiciary in order to get relief.⁴³

Some work also questions the impact of this model of enforcement on the overall system of social provision with which the Court is interacting. An individual decision ordering provision of a treatment – or even a large number of identical decisions – does not always change bureaucratic practices. From a legal perspective, of course, Latin American countries adhere to a range of positions on the precedential value of judicial decisions, so in some countries in the region prior decisions do not bind other courts, let alone bureaucratic actors. A classic regional model is the Mexican Otero formula, where victories in individual complaint or amparo cases only benefitted the petitioner, and not others in the same legal situation.⁴⁴

41 On Colombia, see Landau, D. ‘The Reality of Social Rights Enforcement’, Harvard Intl LJ, 53, 2012, 189 and 209. On Brazil, see Hoffmann, F. F. & Fernando R.N.M. Bentes, ‘Accountability for Social and Economic Rights in Brazil’ in Gauri, V. & Brinks, D.M. (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, CUP, 2008 100. On Costa Rica, see Wilson, B. M. & Rodriguez, O. A. ‘Costa Rica: Understanding Variations in Compliance’ in Langford, M.; Rodriguez-Garavito, C. & Rossi, J. (eds), *Social Rights Judgments and the Politics of Compliance: Making it Stick*, CUP, 2017, 111 and 114-115.

42 Hoffmann & Bentes, ‘Accountability for Social and Economic Rights in Brazil’, *cit.*; Landau, ‘Reality of Social Rights Enforcement’, *cit.*

43 Wilson & Rodriguez, ‘Costa Rica: Understanding Variations in Compliance’, *cit.*, 122 (finding a generally low level of compliance with Costa Rican Constitutional Court *amparo* decisions).

44 Baker, R. *Judicial Review in Mexico: A Study of the Amparo Suit*, Texas UP, 1971, 41.

In addition, regardless of the formal legal rule, courts in the region often face bureaucracies that have degrees of dysfunction. Bureaucracies that provide social programs, or oversee private actors that do so, may fail in key respects. Dysfunctional bureaucracies may not change their practices in response to adverse legal decisions. Instead, they may keep deficient practices intact, effectively requiring petitioners to sue to vindicate their rights. To be sure, this will depend on the context. There are important cases – for example involving HIV treatment in Costa Rica, Brazil, and elsewhere – where bureaucracies have made widespread policy changes in response to a series of individual orders.⁴⁵ These cases seem to involve organized campaigns by civil society groups in addition to judicial decisions. But in other cases, even a large number of individual orders do not necessarily result in systemic bureaucratic changes.

This in turn creates several potential issues. One is a problem of equity – only those who go to Court will be able to vindicate their constitutional rights, leaving others unprotected. The judiciary essentially makes itself a required step in the program of social provision, partially stepping in for a failed state bureaucracy. Also, a large number of individual orders that do not lead to systemic change may have problematic or even perverse effects on the overall system. They may, for example, take resources away from more basic treatments and lead it to be used instead on very expensive treatments ordered for particular petitioners, without a rational analysis of costs and benefits for different treatments.⁴⁶ Of course, this kind of critique is commonly raised by state officials in countries with a very active individual jurisprudence on the right to health, such as Brazil and Colombia. It may not always be a wholly fair critique, since it treats the allocation of resources to the right to health

45 Wilson & Rodriguez, ‘Costa Rica: Understanding Variations in Compliance’, *cit.* 133 (Costa Rica); Leite Borges, D. d C. ‘Individual Health Care Litigation in Brazil Through a Different Lens: Strengthening Health Technology Assessment and New Models of Health Care Governance’, *Health and Hum. Rts J.* 20, 2018, 147 and 149-50 (Brazil). Elsewhere, as in Argentina, the judiciary issued collective relief. *Asociacion Benghalensis y otros v. Estado Nacional*, Corte Suprema de Justicia de la Nacion, June 1, 2000.

46 Motta Ferraz, O. L. ‘Harming the Poor Through Social Rights Litigation: Lessons from Brazil’, *Texas Law Review* 1643, 89, 2011, 1667 (arguing that Brazilian enforcement of the right to health has “force[d] the state to provide expensive treatment that the public health system should not provide under any plausible interpretation of the constitutional right to health”); Berro Pizzarossa, L.; Perehudoff, K. and Castela Forte, J. ‘How the Uruguayan Judiciary Shapes Access to High-Priced Medicines: A Critique through the Right to Health Lens’, *Health and Hum Rts J.* 20, 2018, 93 (finding that litigation by Uruguayan courts on high-priced medication was “inconsistent,” poorly tied to international standards, and “fail[ed] to address the structural problems behind high medicines price”). Note that this was also an argument accepted by the South African Constitutional Court in refusing to issue an individual order for dialysis to a petitioner suffering from chronic, incurable kidney failure. *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997).

as a fixed pot of money, rather than one that should expand as needed. But the core point is a legitimate one – courts issuing individual orders to single or small groups of petitioners may not be in a good position to evaluate the overall impact of their orders on the system. Of course, courts are not powerless to ameliorate this problem; the methodology they use to reach decisions may have a significant influence on it. Recent research on Costa Rica, for example, found that the orders granted by the Supreme Court shifted more towards higher-priority medications, and away from costly, experimental drugs, after the Court changed its decision-making process to incorporate expert medical evaluations.⁴⁷

Some empirical research suggests that the problem of equity may be compounded by a distributive bias impacting those who are able to reach court. The focal point of the argument is that those likely to access the Court are relatively affluent, because “middle class” or “affluent” petitioners are more likely than the very poor to have both the resources and knowledge to sue.⁴⁸ Empirical evidence has shown some support for this hypothesis in both Brazil and Colombia with respect to the right to health.⁴⁹ This is a noteworthy finding because the individual complaint instruments found in Brazil and Colombia are quite different: the Brazilian process is costly and difficult to navigate, while the Colombian *tutela* is one of the most informal and rapid in the region.⁵⁰ The fact that a distributive skew towards the relatively affluent would exist in both systems thus suggests that factors beyond the design of the instrument itself, such as civic education and legal support structures, have a major impact on who is able to bring these cases. The size of the distributive skew remains hotly contested in recent work, with some studies arguing that it is much smaller than is commonly thought or has not been adequately demonstrated with empirical data.⁵¹ Much work remains to be done.

47 Rodríguez Loaiza, O. *et. al.* ‘Revisiting Health Rights Litigation and Access to Medications in Costa Rica: Preliminary Evidence from the Cochrane Collaboration Reform’, *Health and Hum Rts J*, 20, 2018, 79.

48 Landau, ‘Reality of Social Rights Enforcement’, *cit.*, 200.

49 Motta Ferraz *et. al.*, ‘Harming the Poor’, *cit.*, 1661-1662 (presenting indirect evidence on the socioeconomic profile of litigants); Motta Ferraz, O.L. ‘The Right to Health in the Courts of Brazil: Worsening Health Inequities?’, *Health and Hum Rts J*, 11, 2009, 33 (same); Silva, Virgílio Afonso da, and Fernanda Vargas Terrazas. “Claiming the Right to Health in Brazilian Courts: The Exclusion of the Already Excluded.” *Law & Social Inquiry* 36(4), 2011, 825 (examining the socioeconomic profile of health litigants in Sao Paolo); Landau, ‘Reality of Social Rights Enforcement’, *cit.* 214 (presenting evidence compiled by the National Attorney General on the profile of litigants).

50 Landau, ‘Reality of Social Rights Enforcement’, *cit.* 205.

51 Brinks, D.M. & Gauri, V. ‘The Law’s Majestic Equality? The Distributive Impact of Litigating Social and Economic Rights’, *Perspect on Pol*, 12, 2014, 375 (arguing that the data on Brazil did not adequately account for the indirect effect of individual decisions on bureaucratic behavior); Andia, T. S. & Lamprea, E. ‘Is the Judicialization of Health Care Bad for Equity? A

At any rate, a distributive skew towards the relatively affluent would worsen the equity problem noted above. If the benefits of individual cases accrue mainly to those who bring them, and those bringing cases are disproportionately not the poorest members of society, then the transformative impact of social rights jurisprudence will be dampened. In the extreme, judicial enforcement of social rights could actually “harm[] the poor” by redistributing resources that would go to the marginalized to wealthier petitioners instead.⁵² Motta Ferraz has argued that this may be the case in Brazil, although it is a difficult argument to pin down empirically. More plausibly, the distributive skew in the identity of petitioners at least lessens the progressive nature of this jurisprudence, and focuses much judicial time and attention into granting benefits to less marginalized groups rather than those who need the most help.

2.2. *Defensive Social Rights*

A second, relatively common judicial model of enforcement of social rights involves the turning of these rights into “defensive” or negative rights.⁵³ There are many ways in which this may be done in comparative jurisprudence, but in Latin America, the most common usage has been to strike down or limit austerity measures, particularly during economic crises. To give a few examples: in Brazil, the Court issued important decisions that struck down some austerity measures during economic crises in 1990 and 1998. During the first period, for example, the Court struck down a plan to readjust pension benefits; during the second, it struck down a new tax on those benefits.⁵⁴ In Argentina, during a deep economic crisis in 2001, the government froze withdrawal of most bank deposits – the Supreme Court never issued a blanket decision striking down the policy, but it did issue individual decisions requiring that funds for petitioners be unfrozen.⁵⁵ In Colombia, during an economic recession in the late 1990s, the Court struck down budgets that did not at least keep the real value of public sector salaries constant.⁵⁶

Scoping Review’, *Intl J Equity Health*, 18, 2019, 61 (finding that existing studies reach contradictory conclusions and rely on generally “weak” evidence to reach conclusions).

52 Motta Ferraz, ‘Harming the Poor’, *cit.*

53 For an overview, see Dixon, R. & Landau, D. ‘Defensive Social Rights’ in Langford, M. & Young, K. (eds) *The Oxford Handbook of Economic and Social Rights*, OUP (forthcoming).

54 Brinks, D. “Faithful Servants of the Regime:” The Brazilian Constitutional Court’s Role under the 1988, Constitution’ in Gretchen Helmke & Julio Rios-Figueroa (eds.) *Courts in Latin America*, CUP, 2014.

55 Catalina Smulovitz, ‘Judicialization of Protest in Argentina: The Case of Corralito’ in Enrique Peruzzotti & Catalina Smulovitz (eds), *Enforcing the Rule of Law: Social Accountability in New Latin American Democracies* (Pitt UP) 55.

56 Decision C-1433 of 2000, translated in Cepeda and Landau, *Colombian Constitutional Law* (n. 21) 159-60. The Court later adjusted this jurisprudence so that the right only applied in

These kinds of decisions too may be common because they are relatively familiar to courts. They do not require that judges act to build new social programs; instead, they simply need to strike down legislation, leaving the prior *status quo* intact. Moreover, decisions of this type can be, and often are, built on jurisprudential foundations other than, or in addition to, socioeconomic rights. The right to property, and concepts like the protection of legitimate expectations, may be used to ground these cases.⁵⁷ However, the great diversity of doctrinal approaches used when socioeconomic rights are wielded defensively also raises risks. International and comparative doctrine on the core concept of “non-retrogression”, which holds that measures reducing the enjoyment of protected socioeconomic rights are *prima facie* illegitimate and require special justification, is ample and sophisticated. But the other kinds of rights and doctrines on which courts sometimes rely in this area may lead to a less careful balancing.

The main limitation to defensive social rights enforcement in Latin America emerges in context. The impact of defensive rights to strike down austerity measures may vary significantly by level of development. Thus the use by European courts such as the Constitutional Court of Portugal after the 2008 global financial crisis, where social safety nets are more comprehensive, is a different case from the situation in much of Latin America.⁵⁸ In Latin America, safety nets such as pensions and healthcare have historically been patchy and have largely benefited privileged, formal sector workers, while partially excluding the large share of the population working in the informal sector. The risk, in such a situation, is that judicial decisions of this type may simply reify this *status quo*. Rather than expanding social welfare states, they may simply protect the privileges of relatively privileged workers without doing much for the poor.

Indeed, some research suggests that courts may be especially willing to issue these kinds of decisions because they identify with the “middle class” or “public sector” strata from which cases are drawn or have incentives to respond to those groups. In Brazil, for example, work by Brinks argues that the Supreme Court has been willing to intervene in these kinds of cases because of their impact on the “corporatist” interests of the professional civil service, of which the judiciary is a part.⁵⁹ In Colombia, decisions made in the late 1990s, through which the Court protected public sector salaries (and also bailed out thousands of “middle-class” homeowners), came at a moment

an absolute way to public sector workers making less than 2 minimum salaries. Decision C-1064 of 2001, translated in Cepeda and Landau, *Colombian Constitutional Law* (n 21) 161-66.

57 Versteeg, M. ‘Can Rights Combat Economic Inequality?’, *Harv L Rev* 2017, 133, 2020; Dixon & Landau, ‘Defensive Social Rights’, *cit*.

58 Engelhardt, A. ‘Judicial Crisis in Portugal: The Constitution in relation to the State, Social and Labor Movements’, *Revista direito y praxis*, 18, 2017, 670.

59 Brinks, ‘Faithful Servants of the Regime’, *cit*.

at which the Court was at its most “populist,” with justices responding in a quite open way to majoritarian political interests. The justice who authored many of these decisions – and was vocal in defending them in the press, quoting Colombia’s most famous populist politician – ran unsuccessfully for vice-president on the Liberal political ticket after his term ended in 2001 and became known as the “housing justice.”⁶⁰

2.3. *Structural Enforcement*

The limits of these two models on achieving social transformation has led some scholars and courts to explore a third model, where courts adopt structural remedies for widespread social rights violations. These kinds of remedies, though, are still not very common in the region. Some courts appear to be hostile to collective litigation or collective remedies, even when they are otherwise open to social rights litigation. The best-documented case is the Brazilian judiciary, which as noted above has issued a large number of cases giving individual remedies on the right to health, and a smaller number of (nonetheless dramatic) cases blocking or altering austerity measures and other provisions retrenching the existing welfare state.⁶¹ Despite this, the Court had traditionally been hostile to adjudicating collective claims or issuing complex remedies.⁶² Scholars argue that this is due to a conservative or traditional sense of judicial role, where judges perceive these kinds of remedies to be outside of their competence.⁶³ Thus, while the success rate of individual claims on the right to health is quite high, the success rate of collective claims involving the same right is very low.⁶⁴ A similar sense of role – as well as political constraints – are likely reasons why structural remedies are quite rare throughout most of Latin America (and indeed, the rest of the world).

Some other courts in the region have been somewhat more willing to issue collective remedies. The most famous example is the Constitutional Court of Colombia. In a 2004 case involving the rights of Colombia’s very large (perhaps 4-5 million) internally displaced population, the Court issued what it called a “state of unconstitutional affairs”, holding that the problems were

60 Landau, ‘Reality of Social Rights Enforcement *cit.*’, 219.

61 Hoffmann & Bentes, ‘Accountability for Social and Economic Rights in Brazil’, *cit.*

62 Ibid. (finding that courts are much less likely to rule for petitioners in collective cases); Motta Ferraz, O. L. ‘Brazil: Are Collective Suits Harder to Enforce’ in Langford, M. Rodriguez-Garavito, C. and Rossi, J. (eds), *Social Rights Judgments and the Politics of Compliance: Making it Stick*, CUP, 2017, 177 and 198 (noting the “fierce reluctance” on the part of judges to accept collective cases dealing with the right to health).

63 Ibid.

64 Ibid.

so massive that they required a collective remedy.⁶⁵ The Court proceeded to issue a range of structural orders; perhaps more importantly, it maintained jurisdiction over the case and created a complex monitoring system, issuing regular follow-up orders.⁶⁶ The Court issued a similar structural remedy in a 2008 case involving the right to health, again with the aid of a monitoring mechanism.⁶⁷ The Court in fact routinely issues structural orders, although it often does so without a robust monitoring mechanism, and it has not replicated the complex (and costly) monitoring mechanism found in the IDP and health cases in other decisions.⁶⁸

In Argentina, as well, the judiciary has sometimes issued structural remedies. In 2008, for example, the Court issued such a sweeping structural remedy in a case involving massive contamination of the Riachuelo river basin.⁶⁹ Like the Colombian Court, its orders had an innovative monitoring mechanism, in this case relying on a detailed timeline and oversight by a monitoring board appointed by the Court.⁷⁰ The Court also created an inter-jurisdictional committee composed of different state agencies, thus centralizing and coordinating enforcement of a complex problem that dealt with many areas of state policy.⁷¹ The Court also issued a complex structural remedy in a 2005 case involving prison conditions in Buenos Aires province.⁷² The Court this time required the creation of a “dialogue table” that would include various stakeholders.⁷³ Furthermore, the lower courts have, from time to time, issued structural orders on a range of issues on educational rights, evictions, nutritional standards, and access to water.⁷⁴

The model of enforcing social rights through complex structural remedies is heterogenous – there are many different ways in which to issue and monitor these remedies, and courts can modulate their response to be more or less deferential to state authorities. That said, the model shows real promise

65 Decision T-025 of 2004, translated in Cepeda & Landau, *Colombian Constitutional Law*, cit. 179.

66 Rodríguez-Garavito, C. ‘Beyond the Courtroom’, cit., 1694; Rodríguez-Garavito, C. & Rodríguez-Franco, D. *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South*, CUP, 2015.

67 Decision T-760 of 2008, translated in Cepeda and Landau, *Colombian Constitutional Law*, cit., 174.

68 Rodríguez-Garavito, ‘Beyond the Courtroom’, cit., 1694.

69 *Mendoza, Beatriz y otros v. Estado Nacional y otros*, Supreme Court of Justice of the Nation, July 8, 2008.

70 Sigal, M.; Rossi, J. and Morales, D. ‘Argentina: Implementation of Collective Cases’ in Langford, M.; Rodríguez-Garavito, C. and Rossi, J. (eds), *Social Rights Judgments and the Politics of Compliance: Making it Stick*, CUP 2017) 140, 155-157.

71 Ibid. 160.

72 *Verbitsky v. Sistema Penitenciario de la Provincia de Buenos Aires*, Supreme Court of Justice of the Nation, May 3, 2005.

73 Sigal, Rossi, and Morales, ‘Argentina: Implementation of Collective Cases’, cit. 158.

74 Ibid. 145-52 tbl. 5.1.

in responding to the limitations found in the other models of enforcement. Comparative empirical research has suggested that collective remedies will often reach much larger groups of people, and more marginalized actors, than individual remedies.⁷⁵ Collective remedies also aim to ameliorate the structural deficiencies in the bureaucracy, and not simply to aid a single petitioner. Given the pervasive failings in social safety nets across most countries of the region, a structural judicial response has obvious appeal.

Structural remedies can work. The Colombian experience across the two major cases mentioned above – the IDP case and health case – shows real progress, albeit sometimes at a frustratingly slow pace and with key problems. The definitive analysis of the IDP case shows that the judicial decision focused public and state attention on the problem, leading to a number of effects including increased budgetary resources, greater bureaucratic coordination, and eventually slow improvement across a range of variables affecting the fundamental rights of IDPs.⁷⁶ In the health case, the Court crafted the remedy with the limitations of individual orders in mind. In the years leading up to its 2008 decision, the Court issued a huge number of individual decisions, but these did not fix the flaws in the country’s healthcare system, and to some degree actually exacerbated problems.⁷⁷ Some of the Court’s structural orders aimed to benefit those whom the individual orders had not been able to reach, such as informal sector workers who did not bring suit as often and who were generally forced to rely on a badly underfunded, “subsidized” system of healthcare.⁷⁸ The Court’s orders initially received more active resistance than in the IDP case. Over time, however, progress was made on many of the orders, although the Court recently found only “medium” or “low” compliance in many areas.⁷⁹

Structural orders are nonetheless not a cure all. The Argentine experience with these remedies, for example, has been less happy than the Colombian one. In both the Riachuelo and prisons cases, many of the goals of the litigation were not achieved even after long periods of time. In the Riachuelo case, results have been “mixed” – some of the core orders received eventual compliance, but others have proven more problematic.⁸⁰ For example, the housing and health rights of those living near the affected areas of the basin

75 Brinks and Gauri, ‘The Law’s Majestic Equality?’, *cit.*

76 The definitive account is Rodríguez-Garavito and Rodríguez-Franco, *Radical Deprivation on Trial*, *cit.*

77 Yamin, A. & Parra-Vera, O. ‘Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates’, *Hastings Intl Comp L Rev*, 33, 2010, 101 and 114-15.

78 *Ibid.* 116-20.

79 Auto 668 of 2018.

80 Sigal, Rossi, and Morales, ‘Argentina: Implementation of Collective Cases’, *cit.*, 156-57.

still have substantial problems, and the clean-up itself has been uneven. More generally, the state has not yet developed a comprehensive plan for dealing with the polycentric problem. Some academic work also has found concerns of corruption in the monitoring process.⁸¹ In the prisons case, a report found “little substantial improvement in detention conditions,” although some legal and institutional changes have occurred.⁸²

Even in the best case, compliance with complex structural orders in institutional reform cases will be a frustrating and costly process. The literature on this form of litigation in the United States is quite clear on this point, a rare point of agreement between those who favor and oppose this form of judicial intervention.⁸³ In Colombia, the two major cases have required a complex monitoring process; where such a process has not existed and the Court has tried to issue structural orders, it has generally been much less successful.⁸⁴ Without a process that puts steady pressure on the state and brings in allies such as civil society groups, it is less likely that the bureaucracy will reform. In both cases, the Court had to hire a significant number of new staff and redirect resources. Both cases have lasted a long time – over 15 years for the IDP case, and over 10 for the health case. Some work suggests that there is little will for further interventions of this type, largely because the Court does not feel that it has the resources.⁸⁵ The Court has experimented with other, less costly ways of carrying out monitoring, but it has largely turned away from undertaking large-scale structural reform litigation in recent years.

In short, the limited experience with structural remedies in Latin America suggests that they may overcome some of the limitations found in other forms of social rights enforcement. But their cost and demands on judicial role may suggest that the potential for widespread adoption in the region is still limited. The overall panorama of judicial enforcement of social rights enforcement in Latin America thus remains somewhat disappointing, despite widespread inclusion of those rights in constitutional texts, and pressures towards justiciability.

81 Gargarella, R. ‘Deliberative Democracy, Dialogic Justice and the Promise of Social and Economic Rights’ in Alvear García, H.; Klare, K. and Williams, L.A. (eds), *Social and Economic Rights in Theory and Practice: Critical Inquiries*, Routledge, 2015, 105, 116-17.

82 Sigal, Rossi, and Morales, ‘Argentina: Implementation of Collective Cases’, *cit.* 157.

83 For examples of this vast literature, see Horowitz, D. L. *The Courts and Social Policy*, Brookings, 1977; Malcolm M. Feeley & Rubin, E. L. *Judicial Policymaking and the Modern State: How the Courts Reformed America’s Prisons*, OUP, 2000.

84 Rodríguez-Garavito, ‘Beyond the Courtroom’, *cit.* 1694.

85 Angel Cabo, N. and Lovera Parmo, D. ‘Latin American Social Constitutionalism: Courts and Popular Participation’ in Alvear García, H.; Klare, K. and Williams, L. A. (eds), *Social and Economic Rights in Theory and Practice: Critical Inquiries*, Routledge, 2015, 85 and 95 (noting that newer justices are “skeptical” of the monitoring process).

3. RETHINKING THE ROLE OF COURTS

How might one respond to the challenges faced by social rights enforcement on the ground in Latin America? A first set of responses would entail rethinking courts, since most work has focused on judicial enforcement. Here I suggest two (not necessarily incompatible) responses: the first seeks to improve courts by pushing them towards more potentially effective, structural models of enforcement; the second draws on regional experience to reframe judicial enforcement of socioeconomic rights as being about more than just social transformation.

3.1. *Improving Courts*

Perhaps the most obvious implication of the Latin American cases is that even a commitment to the justiciability of socioeconomic rights does not in and of itself guarantee transformative effect. Instead, it matters how courts enforce socioeconomic rights. Here, the central challenge is that the methods of enforcement that are likely to be easiest for courts, and put the least strain on judicial role, are also ones that may be the least likely to have transformative impact. Thus, many courts in the region are comfortable giving individuals access to a medical treatment, or blocking a bill changing the rules for collecting pensions. But these kinds of orders, especially in contexts of an incomplete social safety net, may do little to fix structural problems or to reach the truly marginalized. More effective approaches may require higher levels of judicial creativity and effort. As Katharine Young has argued, they may require that courts seek out “catalytic” approaches that spur changes in public policy,⁸⁶ or as Dixon has urged, they may need to embark on a project of “responsive judicial review.”⁸⁷

Many courts in the region seem to be uneasy with the kinds of approaches, such as structural orders, that may be more likely to have a transformative impact. The Brazilian judiciary, for example, as noted above, seems to respond very differently to individual versus collective litigation. In cases dealing with the right to health, the courts routinely grant relief to individual petitioners, but tend to be far more reluctant in cases raising collective or structural dimensions. Scholars have linked this reluctance to a conception of judicial role.⁸⁸ Collective cases involving socioeconomic rights tend to foreground questions of policymaking and budgetary priorities with which courts may be uncomfortable. Moreover, many courts do not have any tradition of a managerial or structural approach to litigation.

86 Young, K. G. *Constituting Economic and Social Rights*, OUP, 2012.

87 Dixon, R. *Responsive Judicial Review*, OUP, 2023).

88 Hoffmann & Bentes, ‘Accountability for Social and Economic Rights in Brazil’, *cit.*

However, conceptions of judicial role are not static, and ideas can and do spread across contexts over time.⁸⁹ The Brazilian Supreme Court in 2015 imported (from the Colombian context) and applied the concept of an “un-constitutional state of affairs,” in a case involving prison conditions.⁹⁰ The importation of a doctrinal device designed to facilitate structural relief was striking in a context that has historically been hostile to that form of relief. However, the importation of the doctrinal label has not necessarily been accompanied by any of the monitoring mechanisms – civil society commissions, follow-up orders, and public audiences – that have made the Colombian approach relatively successful.⁹¹ The use of these devices would require a greater commitment, and a bigger departure from traditional approaches, on the part of the Brazilian Supreme Court.

Thus, one important plan of action is to encourage dialogue on the enforcement of social rights violations, in order to provide judges with models that they can follow when they are confronted with widespread problems. Such a dialogue would explore the costs and benefits of different kinds of remedial approaches and the possibilities of structural forms of relief. It would also, I think, encourage a realistic appraisal of complex remedies, sensitizing judges to the challenges they are likely to face, and giving them the knowledge that a limited, tempered degree of success – inevitable with the kind of remedy – is very different from a failure. One ultimate goal would be to normalize complex and creative remedies as a response to social rights violations.

This kind of learning is necessary not only in countries that are less familiar with using more complex remedies, but also in those that already have a tradition of them. The reason is because there is no single formula for success, and different kinds of problems require new approaches. The Colombian Court, for example, has become much more cautious in developing complex remedies for socioeconomic rights violations after its large-scale forays in the IDP and health cases, largely because of the costs of issuing them. It has experimented some in recent cases. For example, in a 2017 case involving the rights of children from a particular indigenous group, it issued a structural remedy and created a monitoring structure, but delegated enforcement to a local judge rather than carrying it out directly.⁹² In another case involving chronic delays in the government agency responsible for processing and

89 For an overview of judicial creativity on socioeconomic rights and other issues in the “Global South”, see Bonilla Maldonado, D. (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (CUP 2013).

90 Santos Sombra, T. L. ‘ADPF 347 and the “Unconstitutional State of Affairs” of Brazil’s Prison System’, Joacaba, 17, 2015, 649.

91 Vanice Regina Lirio do Valle, ‘An Unconstitutional State of Affairs in the Brazilian Prison System,’ Int’l J Const L Blog (Sept. 25, 2015), at <http://www.icconnectblog.com/2015/09/an-unconstitutional-state-of-affairs-in-the-brazilian-prison-system/>.

92 Decision T-302 of 2017.

paying pensions, the Court suspended the issuance of individual contempt orders, but only for a limited period of time, thus demonstrating the ways in which the threat of individual remedies can be used to leverage progress on structural orders.⁹³ A thicker regional dialogue would encourage the kinds of experimentation and learning that need to occur.

Beyond encouraging structural approaches to litigation, there are surely other ways in which judicial enforcement could be improved. For example, there may be ways for individual forms of enforcement, so pervasive in the region, to have more systemic effects. Recent work, for example, suggests that courts in Brazil and Costa Rica improved litigation outcomes on the right to health by incorporating scientific input into their decision-making, which helped them focus on higher-priority medicines.⁹⁴ These same types of innovations may also improve judicial consistency across cases by providing clearer standards for judges to use. There may also be ways that courts can increase the likelihood that their decisions change bureaucratic behavior, for example through creative deployment of contempt sanctions to include actions that create repetitive claims, or the extension of systems of precedent to non-judicial actors.

There is surely also room for learning on doctrines dealing with the interpretation of socioeconomic rights, in addition to remedies. Take as a brief example the doctrine of non-retrogression, which generally scrutinizes changes that reduce current levels of enjoyment of socioeconomic rights. If applied too rigidly, the doctrine might reify privileges already enjoyed by relatively affluent actors, such as public sector or formal sector workers, and prevent the state from responding to economic crises. This is especially true in the Latin American context, where existing social safety nets may be patchy and enjoyed largely by a privileged subset of workers, excluding most clearly those working in the informal sector. But if applied in a less rigid way that prioritizes the interests of the poorest, the doctrine may be a useful tool to protect and expand social welfare rights for the poorest.⁹⁵

However, a strategy that focuses on spreading knowledge of effective forms of judicial enforcement understates the challenge. Judicial role conceptions

93 Auto 110 of 2013.

94 Borges, 'Individual Health Care Litigation in Brazil', *cit.*; Loaiza, Morales, Norheim, and Wilson, 'Revisiting Health Rights Litigation and Access to Medications in Costa Rica', *cit.*

95 For two perspectives on approaches to non-retrogression from Colombia, see Uprimny, R. & Guarnizo, D. '¿Es posible una dogmática adecuada sobre la prohibición de regresividad? Un enfoque desde la jurisprudencia constitucional colombiana' (July 30, 2006), available at http://www.dejusticia.org/interna.php?id_tipo_publicacion= 2&id_publicacion=180; Landau, D. 'The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures' in Nolan, A. (ed), *Economic and Social Rights after the Global Financial Crisis*, CUP, 2014, 267.

are sticky and may take a long time to change.⁹⁶ Also, the political context within which judges work, and the incentives that they have, have also played a major role in shaping regional patterns of enforcement. First, many courts in the region, as elsewhere around the world, continue to operate in contexts where they have little judicial independence. Some of these courts may carve out space to issue individual remedies requiring the provision of benefits, but the issuance of more aggressive structural orders is less likely in those contexts.

Second, judges in the region often seem to issue socioeconomic rights decisions that benefit more affluent groups because they identify with those groups, or because they seek support from them. In Brazil, for example, judges have protected civil service pension benefits and similar goods in part because they identify with civil servants as a class and may share in the benefits of those decisions.⁹⁷ A similar dynamic may have been at work in Argentina after the *corralito* that froze bank deposits.⁹⁸ Judges may also see political benefits to protecting politically-powerful, middle class interests, especially given the fact that they may seek subsequent political careers or feel a need to protect the court as an institution. This may have been the case in Colombia in the late 1990s, where, as noted above, one of the key judges ran for vice-president shortly after issuing a series of decisions protecting middle-class housing and civil-servant salaries. In short, judges in Latin America may use less transformative forms of social rights enforcement not only by default or because of a conception of judicial role, but also because they sometimes have incentives to do so.

3.2. Reframing Judicial Enforcement of Socioeconomic Rights

This brings us to a second important lesson of the Latin American experience with judicial enforcement of social rights: scholars and international policymakers may be missing some aspects of the phenomenon by focusing only on social transformation. As noted above in Part II, this is not the only major purpose that socioeconomic rights enforcement plays within the region, although it is surely still a significant one. A fair amount of the judicial enforcement of social rights in the region benefits groups other than the most marginalized, such as formal sector and public sector workers sometimes categorized as “middle class” (although that term is problematic in a Latin American or underdeveloped context).⁹⁹

96 Landau, D. ‘Judicial Role and the Limits of Constitutional Convergence in Latin America’ in Dixon, R. and Ginsburg, T. (eds), *Comparative Constitutional Law in Latin America*, Edward Elgar, 2017, 217.

97 Brinks, ‘Faithful Servants of the Regime’, cit.

98 Smulovitz, ‘Judicialization of Protest in Argentina’, cit.

99 For a generalization of this point, see Rosalind Dixon and David Landau, ‘Constitutional Non-Transformation? Socioeconomic Rights Beyond the Poor’, cit.

Rather than treating existing patterns of enforcement as pathological, we might instead seek to identify their logic. One alternative conception of role suggested by this pattern of enforcement would focus on the problem of state failure. Courts sometimes step in in cases where bureaucracies dealing with social provision are not working well. This kind of dysfunctionality is often endemic in the region. Bureaucracies may routinely deny access to benefits that are guaranteed under the constitution and laws, they may have long and unpredictable delays in processing benefits, or they may not respond to requests at all. These kinds of problems of state failure are caused by a wide range of problems including a lack of resources or state capacity, poorly motivated or undertrained bureaucrats, and corruption. The problem of state failure is not unique to Latin America, or to the “global south.” Poorly functioning bureaucracies exist at least in pockets in virtually all systems.¹⁰⁰ But the scale of the problem in Latin America is significant across virtually all countries, even though there is wide variation in state capacity.

Where courts are available to provide relief from a dysfunctional bureaucracy, citizens will turn to the them. And in the Latin American context where social safety nets are patchy and often poorly-functioning, these petitioners will include not only the poor, but also those one might call “middle class.” In Latin America (as well as elsewhere in the world), very few citizens can afford to pay their own healthcare costs, or to live without their pensions, so those deprived of these benefits often turn to the judiciary.

In issuing even individual relief in those cases, courts are responding to state failure, by giving citizens relief from a poorly functioning bureaucracy. Such a perspective raises questions that are at the intersection of several strands of constitutional theory. It works within the tradition of “political process” theory, which justifies judicial action as a response to durable state failure, but the original formulation of that theory, by John Hart Ely, conceptualized state failure as exceptional and as impacting minority groups who were structurally excluded from the political process.¹⁰¹ The Latin American experience with socioeconomic rights challenges this vision by showing how state failure can be pervasive and majoritarian in nature. Thus, this perspective also dovetails with recent work suggesting that judicial review is often, from an empirical perspective, fundamentally majoritarian rather than counter-majoritarian, and suggesting ways in which such majoritarian exercises of review might be normatively justified.¹⁰² Fundamental systems of social provision that routinely fail not just the poorest, but broader swaths

100 Hailbronner, M. ‘Transformative Constitutionalism: Not Only in the Global South’, 65, 2017, 527.

101 Hart Ely, J. *Democracy and Distrust: A Theory of Judicial Review*, Harvard UP, 1980.

102 Friedman, B. ‘The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship’, NW U L Rev, 95, 2001, 933.

of society, may of course offer a potential justification for aggressive judicial enforcement of socioeconomic rights.

A perspective focusing on state failure also offers a critical framework for analyzing judicial action. If the purpose of judicial interventions is to respond to widespread failures by political institutions to realize constitutional goals, then one must ask how courts are impacting these failures. This requires a perspective that looks beyond a single case and asks how judicial interventions are impacting the system as a whole. Seemingly, a reasonable minimal criterion would be that courts should not generally make the system in which they are intervening function worse. Some patterns of individual jurisprudence may not satisfy even this minimal criterion. Courts can introduce new distortions. Large numbers of individual cases involving healthcare, pensions, or other socioeconomic rights may actually reduce pressures for reform, especially if they offer a plausible avenue for relief for politically powerful groups, which would otherwise lobby the state. Thus, litigation, rather than helping to fix the system, may become a *de facto* hurdle that must be surmounted for citizens to receive the right. Jurisprudential rules constructed by courts may also introduce new dysfunctions into a system, for example by causing misallocations of resources or by creating perverse incentives for key actors.¹⁰³

A more stringent criterion would be that courts should ameliorate the causes of state failure over time. It is unclear to me whether judicial interventions need always meet such a burden of justification – it may be sufficient if a court is not actively making the system function worse, while creating an outlet through which at least some petitioners can receive relief. But surely systemic improvement is a desirable goal for judicial intervention. We know that in some cases, patterns of individual litigation have led to systemic changes in state policy or bureaucratic practice. Across several Latin American countries, for example, individual orders requiring provision of HIV medication caused widespread changes in practices. Recent work on Brazil suggests that the judiciary's right to health jurisprudence caused broader changes over a long period of time, for example through the creation of new bureaucratic structures charged with determining when new technologies and treatments

103 In Colombia, for example, the Court created a rule holding that treatments outside the standard package of benefits required to be provided by private insurers must be covered where necessary to protect the life or dignity of petitioners. However, these treatments would be paid for by the state rather than private insurers. Some work has argued that in creating this rule, the Court created a strong incentive for insurers to deny coverage on the ground that a given treatment was outside the package of benefits, forcing patients to sue in order to get treatment. If the petitioner was successful, the insurer could provide the service and be reimbursed by the state. Young, K. G. & Lemaitre, J. 'The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa', *Harv Hum Rts J*, 26, 2013, 179 and 189-90.

should be incorporated into the healthcare system in response to individual litigation.¹⁰⁴

What is unclear at this stage of research is why widespread individual litigation causes structural changes in some contexts but not in others. The answers may have something to do with the strength of civil society across different issue areas: strong civil society groups can complement judicial action by pressuring the bureaucracy. In the case of HIV litigation in Latin America, litigants were generally backed by strategic litigation campaigns supported by relatively well-organized groups. Additionally, courts themselves may have some control over whether their decisions encourage broader changes: as noted above, judicial construction or expansion of systems of precedent or creative deployment of contempt sanctions may both be useful for this purpose. A focus on state failure thus offers a somewhat different set of questions that should be asked regarding judicial enforcement of socioeconomic rights.

4. THINKING BEYOND COURTS

A more radical critique of socioeconomic rights enforcement in the region argues that the goal should not be to fix judicial enforcement, but to move beyond it. This argument has been made most forcefully by Roberto Gargarella, in a recent – and comprehensive – history of Latin American constitutionalism.¹⁰⁵ Gargarella notes, as pointed out above, that socioeconomic rights became important to Latin American constitutionalism during the 20th century, and in a number of different constitutional tendencies and traditions. But he argues that these rights were effectively “grafted onto hostile constitutions.”¹⁰⁶ In other words, they were added as ideological statements, but without constitutional designers undertaking broader changes to realize the rights. Most importantly, he argues, no changes were made to the “engine room” or organic parts of constitutions.¹⁰⁷ Thus, socioeconomic rights were added onto constitutional orders that were otherwise controlled by actors and groups who did not support them, and indeed were a part of historical projects that supported the region’s history of vast socioeconomic inequality.

There is ample support for Gargarella’s broad point that socioeconomic rights in Latin America have often been included in constitutions with contradictory tendencies or institutions. For example, the new constitutions (or constitutional reforms) of the 1980s and 1990s in Latin America often

104 Borges notes that the individual healthcare lawsuits were the stated reason for these changes, which created a bureaucratic structure that was more efficient, participatory, and transparent than the one it replaced. See Borges, ‘Individual Health Care Litigation in Brazil’, *cit.*, 152-53.

105 Gargarella, *Latin American Constitutionalism*, *cit.*

106 *Ibid.* 132.

107 *Ibid.* 172.

paired recognition of socioeconomic rights with institutional designs that pushed neoliberal goals.¹⁰⁸ The former responded to popular demands in a re-democratizing region, as well as to a rising discourse of human rights. The latter, however, responded to the dominant transnational ethos of the moment, which called for smaller, more efficient states. The Chilean constitution of 1988 and the Colombian constitution of 1991 both show a strong form of this tension, as do the Mexican and Argentine constitutions after significant reforms in the 1980 and 1990s.

Implicit in Gargarella's story is a critique of courts as enforcers of social rights. This is partly a narrative about judicial willingness, as noted in Part III.A above. Latin American courts have often been deeply conservative institutions, not institutions where one would expect much sympathy for distributive justice. Furthermore, this is partly a narrative about judicial *capacity* of those courts that are willing to make substantial changes to the social order. In particular, where courts are competing with other institutions with different goals, it may be unlikely that judiciaries will be able to achieve very much. Gargarella notes that some Latin American courts have recently undertaken creative interpretations of socioeconomic rights, but argues that their achievements have been limited without additional changes in the "engine room."¹⁰⁹ One critical take on the record of the Colombian Constitutional Court in the 1990s, for example, notes that even as the Court embarked on an aggressive campaign to enforce socioeconomic rights like the rights to health, housing, and social security, poverty rates and inequality increased.¹¹⁰ The work of the Court may have been, at times, outweighed by other institutions that were cutting back on social spending, and the Court's role may have been mostly in cushioning the size and speed of these shocks.

Gargarella's core argument is to call for changes to the "engine room" of the constitution – in other words, to the structure of the state. Unfortunately, the main regional experiment along these lines has attained only very limited success, at too high a price. The radical Andean model of constitutionalism, which started with the Venezuelan constitution in 1999 and expanded to the Ecuadorian constitution of 2008 and the Bolivian constitution of 2009, is clearly an attempt to make socioeconomic justice (as well as other goals) more central to the constitutional project.¹¹¹ These constitutions themselves are heterogenous in key ways, as they correspond to distinctive national

108 For an exploration of this logic focusing on the Colombian case, see Couso, 'The "Economic Constitutions" of Latin America', *cit.*

109 Gargarella, R. 'Latin American Constitutionalism: Social Rights and the "Engine Room" of the Constitution', *Notre Dame J Intl Comp L*, 4, 2013-2014, 9, 16.

110 Couso, 'The "Economic Constitutions" of Latin America', *cit.*

111 King, 'Neo-Bolivarian Constitutional Design', *cit.*

political projects within each of the three countries. Yet, they all share an aim of altering the machinery of the state, in part for socioeconomic reasons.

The constitutions are not distinctive in their inclusion or enunciation of socioeconomic rights; as noted above, they share this feature with most modern regional constitutions. They are interesting and innovative in their inclusion of related rights, however, especially the Ecuadorian and Bolivian constitutions. The former contains one of the most expansive lists of environmental rights in the world, while the latter includes a plurinational definition of the state and a correspondingly groundbreaking set of rights for indigenous groups. Furthermore, they are full of “mission statement” provisions that highlight socioeconomic justice and an aggressive role for the state in dealing with it.¹¹²

As relevant for our purposes are innovations in state structure. The constitutions contain new elements allowing for popular participation in the direction and composition of the state.¹¹³ For example, all three constitutions greatly expand rights of popular referendum and popular involvement in constitutional change. The Venezuelan constitution allows for popular recall of officials, including the president – a procedure that was unsuccessfully used during Hugo Chavez’s presidency, in 2004.¹¹⁴ Both the Venezuelan and Bolivian constitutions allow for popular involvement in the selection of judges – in Venezuela, through a civil society commission involved in nominations;¹¹⁵ in Bolivia, through popular election of Supreme Court justices themselves.¹¹⁶ Finally, all three constitutions explicitly reject the classical three-branch model of the state. Each contains a fourth, electoral branch, and the Ecuadorian and Venezuelan constitutions contain a fifth branch, called the transparency/ social control and citizens’ branch, respectively, which contains institutions designed to check and control the main branches of government.

These constitutions do not flatly reject the liberal democratic constitutional model. But they do suggest that it has been historically defective as practiced in their respective countries, which is surely a widely shared view within each country. The inclusion of new rights suggests that the catalogues of rights traditionally found in national constitutions was insufficient. The changes in institutional design – especially those increasing levels of popular participation – suggest changes to the constitutional architecture in order to route power in new ways, and to reduce the influence of elite groups which had historically blocked reforms.

112 Ibid. 367.

113 Ibid. 383.

114 Venezuela’s Constitution, 1999, art. 72.

115 Ibid. art. 264.

116 Bolivia’s Constitution, 2009, art. 198.

However, as Gargarella notes, each of these constitutional projects also greatly increased the power of the respective presidents – Hugo Chavez in Venezuela, Rafael Correa in Ecuador, and Evo Morales in Bolivia – who spearheaded the constitutional replacement projects.¹¹⁷ Beneath the new constitutional architecture is a more basic argument in which the embodiment of the constitutional project is the incumbent president, hence centralizing and personalizing power. Each of these countries reached the culmination of this when each of the incumbents sought to loosen or remove presidential term limits found in their own constitutions so they could remain in power indefinitely. This was framed as a regrettable necessity, because the transformative projects had not been completed.¹¹⁸ Critics have noted moves towards authoritarianism in each of these three countries, to varying degrees, and to a considerable extent this corrupted the innovative elements of constitutional design. The civil society judicial commission in Venezuela, for example, was at first evaded through a temporary provision and then coopted by the regime,¹¹⁹ while the judicial election scheme in Bolivia has also been controlled by the ruling party, mainly through the nomination process.¹²⁰ Courts in each country have become full-fledged instruments of the regime, unwilling to check moves towards authoritarianism and indeed, often actively helping to carry out authoritarian projects.

It is more difficult to assess the record of these regimes on socioeconomic issues. The Venezuelan system has been by far the most studied in existing work. The Chavez administration created some innovative programs that had genuine success in combating poverty.¹²¹ It was able to fund these programs because of the oil money that Venezuela enjoys, and which was constricted later on as both prices and capacity fell. At the same time, studies have shown that this social spending suffered from some of the common patterns of clientelism and populist rule; programs were targeted towards regime allies and the lack of spending was often used to punish regions, individuals, and politicians who were opposed to Chavez.¹²² Levels of corruption have also been extremely high. And all this was before Chavez was succeeded by

117 Gargarella, *Latin American Constitutionalism*, cit. 175 (noting that the participatory features in the Venezuelan constitution of 1999 were “contradicted by the significant expansions in the presidential powers”).

118 Landau, D. ‘Populist Constitutions’, *U Chi L Rev*, 85, 2018, 521 and 539.

119 Brewer-Carias, A. R. *Dismantling Democracy in Venezuela: The Chavez Authoritarian Experiment*, CUP, 2011, 128.

120 Driscoll, A. and Nelson, M. J. ‘Chronicle of an Election Foretold: The 2017 Bolivian Judicial Elections’, *Politica y gobierno*, 26, 2019, 41 and 44-45.

121 Ellner, S. ‘Class Strategies in Chavista Venezuela: Pragmatic and Populist Policies in a Broader Context’, *Latin American Perspectives*, 46, 2019, 167 and 178; Kirk A. Hawkins, *Venezuela’s Chavismo and Populism in Comparative Perspective*, CUP, 2010, 195.

122 Hawkins, K. A. *Venezuela’s Chavismo and Populism*, 227-28 (finding mixed evidence on targeting, depending on the program).

Maduro, who has presided over a sharp turn towards authoritarianism and a catastrophic economic crisis.

The disappointing experience of the radical Andean model does not cast any doubt on Gargarella's point that those interested in social rights should focus on the "engine rooms" of constitutions. But it does suggest skepticism that the pursuit of socioeconomic justice justifies rejection of the liberal democratic constitutional model, or at least the restraints on power that are its core feature. It also re-teaches the old lesson that constitutional design is often designed to serve the interests of the powerful, even when it is disguised as something else.

What would a holistic constitutional model focused on socioeconomic rights look like? In my view, it would likely have at least three distinct components. The first is to recognize the overriding importance of issues that are normally left outside of constitutional design.

4.1. Party Systems and Socioeconomic Rights

For example, scholars are beginning to rediscover the importance of parties and party systems for the functioning of democratic constitutionalism. The presence of strong and stable left-wing parties may help to achieve goals related to socioeconomic justice while protecting the stability of the constitutional system from the threat of left-wing populism. In Brazil, for example, the Worker's Party (PT) became the best-organized party in a traditionally deinstitutionalized party system and used that strength to win four consecutive presidential elections. PT governments, especially under President Luis Inacio Lula da Silva (2003-2010), made meaningful advancements in the provision of social programs. Most important here was the program called the Bolsa Familia, which gives direct cash transfers to low-income families, conditional on their children attending school.¹²³ The program bypasses traditional political patronage networks (which are rife with corruption) and is linked to a host of positive outcomes, including the reduction of poverty.

Lula's successor, President Dilma Rousseff, was impeached and removed from office towards the beginning of her second term, in 2016. The key allegation against Rousseff involved her supposed use of social spending without adequate authorization in the budget.¹²⁴ Lula himself was sentenced to prison for his alleged involvement in a massive political corruption scandal, preventing him from running for a potential third term, although his convic-

123 Tepperman, J. 'Brazil's Antipoverty Breakthrough: The Surprising Success of Bolsa Familia,' *Foreign Affairs* (Dec 14, 2015).

124 Zaiden Benvindo, J. 'Abusive Impeachment? Brazilian Political Turmoil and the Judicialization of Mega-Politics', *Int'l J. Const. L. Blog* (Apr 23, 2016), at <http://www.iconnectblog.com/2016/04/abusive-impeachment-brazilian-political-turmoil-and-the-judicialization-of-mega-politics/>.

tion was later overturned. Regardless of the merits of the charges, the PT was gravely weakened by this turn of events, and power swung decisively in favor of more right-wing and traditional political actors. Rousseff's interim successor, her vice-president Michel Temer, was a member of a traditional political party, and the winner in 2018 was a right-wing populist, Jair Bolsonaro, in an election in which the PT also lost a considerable number of seats. Following the removal of President Rousseff, in 2016 the Congress passed a constitutional amendment capping the growth of government spending to the rate of inflation for twenty years, which critics argued would do considerable harm to social spending.¹²⁵

The broad point is that the configuration of political parties has an enormous impact on socioeconomic issues, almost certainly much larger than the impact of a court. The existence of institutionalized, left-wing parties within a liberal democratic system may be a key factor. There are of course a set of well-known constitutional and legal factors that impact the number of parties and their level of institutionalization.¹²⁶ But these issues are still relatively rarely treated as concerns for constitutional lawyers and are almost never discussed by those studying socioeconomic rights. The constitutional and electoral design of electoral law should be a core part of the discussion.

4.2. Independent Accountability Institutions and Socioeconomic Rights

The second level is institutional. The question is what institutions are best suited to enforcing social rights. In his influential paper on the new separation of powers, Bruce Ackerman called for liberal democratic constitutions to include a distributive justice branch that would be focused on socioeconomic issues.¹²⁷ But despite the stress that Latin American constitutionalism has put on socioeconomic rights, it has not – as Gargarella has stressed – put much emphasis on institutional innovation in this area. Regional constitutions do not have major constitutional institutions dedicated to socioeconomic rights or issues. Many, however, have accountability institutions such as human rights commissions and ombudspersons that have socioeconomic rights enforcement as part of their mandates. The role and capacity of these institutions varies widely between countries, and little systemic research on these institutions

125 Mendonça Bertotti, B. '(Un)Constitutional Amendment No. 95/2016 and the Limit for Public Expenses in Brazil: Amendment or Dismemberment?' *Int'l J. Const. L. Blog* (Aug. 24, 2018), at <http://www.iconnectblog.com/2018/08/unconstitutional-amendment-no-95-2016-and-the-limit-for-public-expenses-in-brazil-amendment-or-dismemberment>.

126 For an overview of this literature, see Landau, D. 'Can Constitutions Fix Party System Breakdowns? A Skeptical View' in Vicki C. Jackson & Yasmin Dawood (eds), *Constitutionalism and a Right to Effective Government*, CUP, 2022, 122.

127 Ackerman, B. 'The New Separation of Powers', *Harv L Rev*, 113, 2000, 633 and 720-23.

and socioeconomic rights has been done.¹²⁸ Some have played a significant role in drawing attention to socioeconomic rights issues or in aiding courts in the enforcement of those rights. But a common problem seems to be that enforcement or oversight of “first generation” rights may crowd out institutional work on socioeconomic rights. The question is whether regional constitutional orders should have accountability institutions dedicated solely or primarily to socioeconomic rights issues. At this stage, I would merely say that this would likely be a useful innovation for the region.

4.3. Courts and Other Institutions in the Enforcement of Socioeconomic Rights

At a third level we get to the role of courts, about which much has been said already. The point here is that thinking about courts in the context of other political and constitutional institutions enriches our understanding of what they should do. As argued by Young, one of the main tasks of courts should be to spark political actors to change public policies, a function that she calls “catalytic”.¹²⁹ The ideal way to do this will depend heavily on the nature of the political and party systems. A court operating in a system of weak political parties, such as the Colombian and Brazilian systems, for example, may need to take a more aggressive role in enforcing socioeconomic rights than one operating in a system with a strong and stable party system, as for example in Chile. More subtly, the way they respond to state failure may be different: in weak party systems, courts may need to take a more direct hand in constructing social programs, through structural remedies and similar devices; where parties are stronger, courts may instead be able to prompt political institutions to take action.

Also, courts should understand their limitations, and rely on other institutions to aid the enforcement of socioeconomic rights. Other institutions may be able to ameliorate some of the well-known weaknesses of courts, such as their reactive nature, limits on budgets, capacity, and investigatory power, and restrictions on remedies. Institutions such as ombudspersons may have superior fact-finding capacity with respect to widespread social problems and may be able to devise and enforce different and more creative remedies. Some courts, such as those in Colombia and Brazil, have a practice of relying in part on other institutions to help monitor compliance.¹³⁰ Courts may be

128 For one impressive comparative study of human rights institutions, see Linos, K. and Pegram, T. ‘What Works in Human Rights Institutions?’, *Am J Intl L*, 112, 2017, 1.

129 Young, *Constituting Economic and Social Rights*, *cit.*

130 See, for example, Decisions T-025 of 2004, and T-706 of 2008, as examples of Colombian decisions that give orders to the National Attorney General and the National ombudsperson.

able to improve their effectiveness by viewing themselves as one of a set of institutions charged with enforcing socioeconomic rights.

Thus, taking a broader vision of social rights enforcement that is less court-centric does not make courts irrelevant – on the contrary, it gives them a better-defined sense of their role. For one thing, it highlights the weakness of other political and constitutional institutions in working on socioeconomic issues within many Latin American countries. In these contexts, judicial enforcement may have a kind of primacy by default. Even with its limitations, it may be the only realistic way to make progress on socioeconomic rights. Also, even if other institutions existed and were effective, judges would continue to play a key role in catalyzing action.

CONCLUSION: SOCIOECONOMIC RIGHTS AND LIBERAL DEMOCRACY IN LATIN AMERICA

The convergence around the inclusion of justiciable socioeconomic rights in Latin America suggests the centrality of these issues to popular consciousness. In this sense, the limitations on the ability of courts to deliver is a potentially serious problem, not just for those interested in socioeconomic rights but more broadly for the survival of liberal democratic constitutionalism.¹³¹ As noted above, the populist, authoritarian-leaning “neo-Bolivarian” model of constitutionalism is in large part a reaction to disappointment with the experience of liberal democracy as practiced in the region, particularly (although not exclusively) on socioeconomic issues.¹³² In this sense too, the task of finding better ways to enforce socioeconomic rights is truly an urgent one.

REFERENCES

- Alfonso da Silva, Virgilio & Fernando Vargas Terrazas, ‘*Claiming the Right to Health in Brazilian Courts: The Exclusion of the Already Excluded?*’, 36 L & Soc Inq. 2011, 825.
- Alvear Garcia, Helena, Karl Klare, and Lucy A. Williams (eds), *Social and Economic Rights in Theory and Practice: Critical Inquiries*. Routledge, 2015.
- Angel Cabo, Natalia & Domingo Lovera Parmo, ‘*Latin American Social Constitutionalism: Courts and Popular Participation*’ in Helena Alvear Garcia, Karl Klare, and Lucy A. Williams (eds), *Social and Economic Rights in Theory and Practice: Critical Inquiries*. Routledge, 2015, 85.
- Bonilla Maldonado, Daniel (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*. CUP, 2013.

131 For a generalization of a similar point focusing on populism and economic inequality, see Dixon, R. and Suk, J. ‘*Liberal Constitutionalism and Economic Inequality*’, U Chi L Rev, 85, 2018, 369.

132 Landau, ‘*Populist Constitutions*’, cit. 529-30.

- Brinks, Daniel M. & Varun Gauri, '*The Law's Majestic Equality? The Distributive Impact of Litigating Social and Economic Rights*'. 12 *Perspect on Pol.* 2014, 375.
- Dixon, Rosalind, *Responsive Judicial Review*. OUP, 2023.
- Dixon, Rosalind & David Landau, '*Defensive Social Rights*' in Malcolm Langford & Katharine Young (eds), *The Oxford Handbook of Economic and Social Rights*. OUP, forthcoming.
- Gargarella, Roberto, *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution*. OUP, 2013.
- Landau, David, '*The Reality of Social Rights Enforcement*'. 53 *Harvard Intl LJ*. 2012, 189.
- Landau, David, '*Socioeconomic Rights and Majoritarian Courts in Latin America*' in Daniel Bonilla Maldonado (ed), *Constitutionalism in the Americas*. Edward Elgar. 2018, 188.
- Langford, Malcolm, Cesar Rodriguez-Garavito, and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance: Making it Stick*. CUP, 2017.
- Langford, Malcolm & Katharine Young (eds), *The Oxford Handbook of Economic and Social Rights*. OUP, forthcoming.
- Motta Ferraz, Octavio Luiz. '*Harming the Poor Through Social Rights Litigation: Lessons from Brazil*'. 89 *Texas Law Review*. 2011, 1643.
- Rodriguez-Garavito, Cesar. '*Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*'. 89 *Texas LR*. 2011, 1669.
- Rodriguez-Garavito, Cesar & Diana Rodriguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South*. CUP, 2015.
- Young, Katharine G. (ed.), *The Future of Social and Economic Rights*. OUP, 2019.