Commentary: Social and Economic Rights in Latin America: Constitutional Courts and the Prospects for Pro-poor Interventions

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I. Introduction

Barely more than a decade old, the jurisprudence of social rights across Latin America has inspired a rich debate among judges, scholars, and advocates about the impact of judicial enforcement of social and economic rights (SER) upon the distribution of social goods like health care and education, about what effects the involvement of courts has upon the politics and practices of social provision, and about how to assess them. These articles are important contributions to those debates.

Martin Luther King described the rights-bearing provisions of the Civil War Amendments of the U.S. Constitution as “promissory notes”;¹ that is not a bad way to consider the SER provisions of the many new (as well as the several older but profoundly modified) constitutions of Latin America that were crafted from the late 1980s through the 1990s. Forged after long struggles against violent and authoritarian regimes, these constitutions aimed to consolidate democracy. But the constitutions arose in the context of economic as well as political transformations. Alongside democratization, Latin America in the late twentieth century was also witness to the demise of mid-century models of economic development and social provision. The “developmental state,” the “planning state” as well as the traditional “welfare state” were assailed in the name of free markets and neoliberal reform. Privatization of industry, cut backs in social services, an easing of import restrictions, and scores of other political–economic changes threatened the already precarious lot of the poor and working classes, even as they were being newly outfitted as democratic citizens.

The impulse behind the SER provisions of the new constitutions was somehow to match the democratic promise of participation in public life with a promise of participation in the material opportunities, public goods and social wealth that neoliberal reforms were thought to promote. Against the neoliberal grain of the times, the SER provisions echoed older socialist,

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social democratic, or social Catholic ideals. Their drafters and proponents may have seen them as promissory notes to be redeemed in the form of protection against the harshness and widening inequalities of new market-based political economies. The new constitutions reflect the old social democratic insight that civil and political rights, separation of powers, and other political and institutional arrangements cannot do all the work of vouchsafing stable liberal democratic regimes. But what kinds of legal initiatives might begin to redeem the promises of SER was up for grabs.

Two decades later, we can begin to take stock of what has emerged. If we are right about the kinds of hopes and burdens borne by the new SER provisions, it should be no surprise that disagreements abound. The empirical complexities are compounded by normative ones. Just what kind of social provision do constitutional SER promise? What should count as progress toward redeeming them? And what are the appropriate baselines for measuring that progress? It is a mark of their richness that these articles help us think about all these questions.

II. State of the Art

There is a notable silence in these three articles, one which highlights the state of both theory and practice relating to the judicial enforcement of SER in Latin America. All three focus on the impact and effects of this practice—they argue about how to measure the impact and about how to depict and characterize the different kinds of effects litigation might have, and they question the wisdom of various approaches to litigation and judicial intervention. None of the articles spends much time at all on what might be considered threshold questions—of separation of powers, for example, and whether SER are or should be justiciable. Even the most critical article, Ferraz’s article on health rights litigation in Brazil, argues that judicial interventions should be evaluated not a priori, but rather based on the strength of their effects: Do judicial attempts to enforce SER improve conditions for the marginalized or do they actually make things worse? This set of concerns reflects the fact that the courts of the region are well past discussing whether they should enforce SER, and are now fully engaged in exploring how and to what effect they can and should enforce them.


3. Ferraz, supra note 2, at 1645 (“In my view, there is no a priori legitimate role for courts in a democracy with respect to the adjudication of social and economic rights . . . . Courts’ legitimate role hinges strongly, in my view, on whether they can do a good job . . . .”).
Like the court he examines, Rodríguez-Garavito is interested chiefly in broad, structural reform litigation.  He begins by discussing the multiple effects of rulings by the Colombian Constitutional Court that have addressed conditions in domains as disparate as prisons, internally displaced persons (IDPs, in the parlance of international humanitarian law) and the public health care system. In these cases and others, the court found that existing conditions violated fundamental constitutional commitments, issued a finding of an “unconstitutional state of affairs,” and began efforts to change this state of affairs. The court orders typically involve a large number of governmental and nongovernmental actors, complex public policy issues, high ranking government officials and vastly expensive undertakings. The IDPs in question, for instance, amount to five million people living in precarious conditions, with limited or no access to adequate housing, education, health care, and other basic services. The health care decision aims to unify the public noncontributory health care system with the contributory system in order to offer the same care to those who pay for health care and those who do not. It aims to transform the entire public health care system in Colombia.

Bergallo also describes litigation over health care, but this time in Argentina, focusing on how litigation has affected access to HIV/AIDS treatment. According to her chronicle, courts and legal activists began collaborating in about 1990, when HIV-positive people were routinely denied access to basic services. At the time, the Catholic Church hierarchy opposed public health service efforts against the spread of HIV/AIDS, and politicians and political appointees were more concerned with winning Church support than with effectively addressing HIV/AIDS. As in South Africa during that nation’s era of official AIDS “denialism,” it was during this period of greatest political resistance that litigation based on the social right to health had its most important, transformative effects. Bergallo shows how court orders “destabilized” the status quo, opening the way for the creation and growth of comprehensive programs to address the HIV/AIDS epidemic in Argentina. Later litigation, in a more favorable policy environment, was limited to extending individualized remedies to individual litigants.

4. Rodríguez-Garavito, supra note 2, at 1669.
5. Id. at 1670.
6. Id. at 1669–71.
7. Bergallo, supra note 2, at 1611.
Ferraz sharply questions these more optimistic accounts of SER litigation, on the basis of the Brazilian experience with right to health litigation. He focuses on the vast number of individual claims to medications not being provided by the public health system—at least 40,000 such cases per year, Ferraz estimates—and he argues that the cumulative effect of this litigation is likely to be a deeply regressive one.10 Relatively well-off claimants, with access to lawyers and courts, are bound to secure an ever greater proportion of the public health budget, leaving less and less for the have-nots, who have more limited access to the courts. Moreover, Ferraz argues, now that Brazilian courts have embarked down this path, this regressive effect can only grow. Confronted with gripping, often life-or-death, individual claims, courts are unlikely to resist granting relief regardless of the broader distributional consequences. Therefore, Ferraz concludes that, at least in the case of individual claims to medication, SER litigation cannot be fixed, and judges should be barred from adjudicating these claims.11

All together, then, these three articles offer a quick and ranging overview of the experience and the literature on SER in Latin America. Bergallo provides the most richly contextualized account of the political and institutional circumstances within which SER litigation unfolds, assessing how, in light of the constraints and opportunities such contexts create, advocates’ litigation strategies can shape judicial outputs and affect the social and political impact of SER litigation. Rodríguez-Garavito offers a more systematic typology of effects arising from litigation—direct and indirect, material and symbolic. And he examines the ways that different kinds of judicial remedies—“strong” versus “weak” judicially-pronounced rights, detailed, managerial or juristocratic decrees versus open-ended and “dialogical” or collaborative ones, and extended versus modest or non-existent periods of judicial monitoring of the implementation of decrees—may account for the magnitude of such effects. Finally, Ferraz raises in a very pointed way what is in some ways the ultimate question for advocates and academics alike: what is the overall effect of this activity on the distribution of the social goods that SER are supposed to guarantee?

III. Broader Contexts and Challenges

The articles pose theoretical and methodological challenges to one another. Ferraz’s article challenges the others to be critical and rigorous in their evaluation of the regressive potential of SER litigation. Bergallo’s article invites reflection on what the other two articles, particularly Ferraz’s, miss by dint of abstracting away from political and institutional contexts.

10. Ferraz, supra note 2, at 1652.
11. Id. at 1658–62.
Finally, Rodriguez-Garavito may be read to prod his colleagues to be comprehensive and precise about the sorts of effects one might attribute to judicial interventions, and to be clear about what is being left out of the analysis. In what follows, we will first place the articles in a more global context, then draw out some of the challenges the articles offer each other, and finally offer some challenges of our own to the common enterprise on which they are embarked.

The subject matter of the three articles—SER litigation and the judicial enforcement of SER—is a relatively new activity, the consequences of which we are only beginning to understand. One thing is already quite clear, however. This is a massive and widespread phenomenon, which has already grown beyond the expectations of the theorists who first engaged the question of the enforceability of SER in national constitutions. A global survey of SER decisions includes judicial opinions resting on the right to housing, work, health, a clean environment, a minimum level of subsistence, a dignified existence and much more. A study of the scope, causes, and effects of SER litigation in Brazil, India, Indonesia, Nigeria and South Africa reveals that courts are making decisions that purport to allocate vast amounts of resources, and change or create policy in all kinds of areas—from clean air to hot school lunches to national education budgets. These decisions affect the lives of hundreds of thousands, probably millions of people. The phenomenon has swept the more progressive courts in Latin America, filling the dockets of courts in Costa Rica, Colombia, Brazil, Argentina, Venezuela, and others. Indeed, whereas fifteen years ago scholars and commentators decried the weakness of the Latin American judiciary,
current work and commentary tend to emphasize courts’ outsize influence on politics and policies. In particular, they underscore that influence in respect of SER.\(^{21}\)

Perhaps this is not so surprising. As we noted at the outset, since the 1970s, Latin America has undergone three separate but related transformations. First came the wave of democratization. During the late 1970s, all but three of the countries of the region were authoritarian, and many suffered under the most brutal and violent regimes of their history; thirty years later, nearly all the countries are democratic, and the region is experiencing the most stable and sustained period of democracy in its history.\(^{22}\) Occasionally before, but usually shortly after this political transformation came an economic transition—not as harsh, perhaps, as that experienced in Eastern Europe but roughly similar. Most of the countries of the region embraced the so-called Washington consensus, enacting, to a greater or lesser degree, neoliberal market reforms that cut back on social services, eased import restrictions, and moved the region away from the traditional welfare state model.\(^{23}\) Finally, almost as a bridge between the greater participation in public life implied by democratization, and the diminished participation in public goods implied by neoliberal reform, the countries of the region adopted new constitutions or modified existing ones to incorporate a lengthy list of social and economic rights into their fundamental laws.\(^{24}\)

Many of the drafters of these new constitutions and amendments undoubtedly thought that a robust SER regime was a way to mitigate the harshness of a market-based economy. Often enough, drafters and negotiators were concerned to bring left-wing movements on board the new democratic constitutional settlements; an unqualified embrace of the neoliberal political-economic settlement was probably too much for the left to stomach. The poor masses, who were the left’s real or imagined constituents, could not remain dispossessed of everything but the ballot. Often enough, too, drafters included social democrats or social Catholics or simply moderates who understood that a stable constitutional democracy demanded


improving the material fortunes of those masses. They hitched their hopes to the idea that neoliberal, market-based reforms would bring growth; and growth would underwrite redistribution—and enable government to redeem the promises of SER.

Indeed, many of the people most actively promoting the judicial enforcement of SER will explain that this is exactly their agenda: to shield the most vulnerable from the uncertainties and harshness of a pure market model, and to extend the benefits of public services and public goods to the most vulnerable.25 If SER advocacy and adjudication are going to do this work, however, the articles in this section suggest, a number of things have to be true.

First, as Bergallo emphasizes, it is important to consider the context within which rights claims are made.26 Key questions here relate to several aspects of the socio-political environment. One is the broad institutional context—How much state capacity is there? How do coordination problems across levels and units of government impede the ability of courts to address problems? And are courts potential sources of coordination? Do public or private actors provide the services? And what are the material, institutional, and ideological interests of these actors? Are key policy makers and bureaucrats actively opposed to the claims in question, or is the litigation a potential source of leverage or “cover” for some state actors who may benefit from judicial intervention? Other issues relate to the organizational capacity and goals of the litigants: Who is bringing these claims? What is their experience with rights-based litigation? How well linked are they to potential allies and collaborators in social movement, policy making, and professional networks? How sophisticated are they in crafting litigation strategies that exploit or forge such links? What vision of lawyering animates their work? What kind of impact are they after? Is it merely delivering the goods to individual clients? Is it drawing attention to neglected failures of social provision? Or is it empowering and gaining bargaining leverage or a “seat at the table” for movements and representatives of marginalized constituencies? As Bergallo points out, all these factors strongly mark the character and effect of SER claims.

Even taking account of all these matters, so Rodríguez-Garavito’s article implies, there remains some question about whether judicial interventions in these broad problems of social provision can have any effect at all. Taking as the null hypothesis the argument that courts are largely


26. Bergallo, supra note 2, at 1625.
ineffective in producing large-scale social change, he argues we must not fall into a facile reductionism in evaluating the impact of the cases. His article thus presents a framework for classifying effects as direct or indirect, symbolic or material. Using this framework, and resting on extensive fieldwork, he maps the impact of the structural cases decided by the Columbian Constitutional Court described earlier. Whether and to what extent courts have this impact, he argues, depends in large part on the courts’ approach—do they announce strong rights, do they employ strong remedies, do they adopt monitoring mechanisms, do they adopt a dialogic approach that enlists all sides to the litigation and beyond—civil society organizations, state bureaucrats and social movement actors—in fashioning and refashioning potential solutions? Can they prod and cajole all these parties into negotiating and collaborating with one another? Thus it appears that, if judicial interventions on behalf of SER are to have any impact at all, courts and advocates alike will have to be sophisticated in ways that go far beyond traditional roles.

But Ferraz, as we saw, mounts an even stronger critique. If SER are to cushion the harshness of the market on behalf of the underprivileged, they cannot be a mechanism to extend and reinforce privilege.27 Intuitively, his argument has considerable appeal: if he is right that courts are, in these cases, allocating scarce resources in a more or less zero sum environment, and that the litigants are predominantly from the middle class or higher, then in every individual case involving medications there are a million unrepresented—and underprivileged—interested parties. In a system that relies heavily on litigation to determine the allocation of resources, the interests of these less privileged nonlitigants are bound to be undervalued. Over time, we would expect the provision of public health goods to shift in favor of the litigant classes and against the poor. If Ferraz’s critiques are on target, this could undermine the entire SER project—SER litigation has effectively become a Trojan horse for bringing the inequalities of the market back into the allocation of the very goods SER were to place beyond the logic of the market.

Ferraz makes a strong case for this position. But the other two articles caution against too swift an embrace of his view that SER and their judicial enforcement are yet another mechanism to preserve and enhance existing inequalities.28 Ferraz focuses strictly on individual rather than collective cases, and, in Rodríguez-Garavito’s language, on the direct, material effects of these cases. But, as he acknowledges, these are the most likely cases, and the most likely effects, to show a regressive impact. Direct effects of suits on

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27. Ferraz, supra note 2, at 1663.
28. See Bergallo, supra note 2, at 1612 (describing the results of studies on the effectiveness of judicial decisions to effect social change and determining that a concise conclusion is difficult); Rodríguez-Garavito, supra note 2, at 1689 (arguing that judicial decisions can impact SER and describing how that impact can be increased).
behalf of individuals are, of course, closely tied to litigant resources—by definition, those individuals who cannot litigate cannot enjoy the direct, material effects of individual litigation. But the more we consider indirect (and symbolic) effects, and the more we consider group litigation and suits seeking programmatic change and structural reforms, the more these cases can benefit those who have never set foot in a courtroom. And if we expand our view further to what Bergallo calls political effects—the kinds of leverage litigation produces for state actors promoting programmatic change, or what Rodríguez-Garavito describes as the reframing of public discourse and policy initiatives by dint of rights advocacy—we again find that the benefits of litigation—even of individual cases—flow to people far removed from the centers of litigation, as Bergallo illustrates in the case of HIV/AIDS programs in Argentina, and their spread from the capital to outlying areas.

Perhaps more importantly, before we can reach a conclusive evaluation of the net effect of SER litigation—whether positive or negative—we must reach for a much more comprehensive evaluation than is present in any of the three articles that follow, or any of the research to date. Before we go further, we hasten to say that this does not diminish the value of any of the three contributions. A comprehensive evaluation of the kind we are suggesting here may well be beyond the reach of empirical scholarship altogether, and in any event need not be the goal of every contribution in this area. What we are proposing is, then, more of a cautionary note about how to read the conclusions than a critique of the contributions.

All of the articles focus fairly narrowly on what the courts have or have not accomplished in particular cases, in response to particular claims, for the people who made the claims in question, in order to evaluate the positive, negative or null effects of that intervention. A more comprehensive understanding of the reach and limitations of SER might lead to a more cautious assessment of the (positive and negative) impact of particular cases. As Ferraz would argue, we should take into account not only what the court gives to the claimants before it, but how that affects the millions of others who are dependent on the public health system, or the social budget more generally. On the other hand, as Rodríguez-Garavito and Bergallo might argue, we must also consider the transformative effect of even individual cases on everything from the discourse around a public policy issue, to the relative balance of power between health providers and patients, citizens and bureaucrats, the internally displaced and the public. And it may be that the judicial recognition of rights in one area transforms the law and politics of rights in an entirely different area—as the South African housing rights case, Groothboom, did for a wide range of entirely unrelated SER.

The articles already suggest an ambitious research agenda for those interested in the real world effect of SER. But we would go further, at least in reflecting on the likely impact of SER litigation. Fully exploring the cumulative, net effect of SER on the living conditions of poor citizens living
under these new, rights-rich constitutions requires a powerful counterfactual imagination. Stated in the broadest possible terms, we must imagine what the world would look like without judicial oversight of these fundamental commitments, and compare that to what the world looks like with these judicial interventions. Ferraz points out that the middle class appears to benefit disproportionately from medications litigation in Brazil. But if there is one thing we know about Brazil it is that public goods have always been disproportionately directed toward the middle and upper classes. Brazil’s taxing system, education system, urban spending policies, policing approach—and health care system—are virtually all regressive, and were all designed by legislators, and operated by the executive, with little or no judicial intervention. In that context, it is neither surprising nor definitive to show that litigation also fails to disproportionately benefit the very poor. Recent public policy efforts—most notably the Bolsa Família program, which has benefited millions of poor families—run somewhat counter to this trend, but have not managed to reverse all the structural inequalities present in Brazilian public policy.

The question then really is will the poor, over the long run, derive more benefits from a public health system in which the possibility of litigation exists than from one in which it does not? Indeed, the question may be broader still: Will the poor live better in a society in which SER are officially acknowledged and judicially enforceable, than in one where they either do not exist as constitutional commitments, or exist only as programmatic directives addressed to the legislature and executive? The answer to that question is not obvious from evidence that the direct effect of individualized litigation is regressive. Surely, Ferraz is right that poor Brazilians might benefit were the nation’s SER jurisprudence more akin to South Africa’s—with its emphasis on assessing social policies and programs to ensure that they take adequate account of the needs and circumstances of the most disadvantaged, its readiness to prod government to implement such changes, and its chariness toward individual claims for direct relief. But it may be that such a jurisprudence would prove still-born in the Brazilian context; or it may be that claims for such relief can only be brought by state actors in Brazil, who, in turn, may find leverage in virtue of the individual litigation Ferraz decries.

It may be that, for all its faults and inequalities, SER litigation still provides a measurable benefit for the poor of Latin America. Maybe the rich (or at least the middle class) get more out of litigation; but we do know that the poor and marginalized are also litigating social and economic rights, as

29. Ferraz, supra note 2, at 1661–62.
30. See Forbath, supra note 8.
Bergallo, Rodríguez-Garavito, and others\textsuperscript{31} show, and sometimes this means that some marginalized individuals can litigate to get what they were promised in their constitutions, when they would otherwise be sent away empty handed by legislators and bureaucrats. The traditional method, in Brazil, for dealing with bureaucratic indifference was the use of influence and personal connections—the traditional \textit{jeitinho} or personal favor. A shift to the courts implies a recognition that these state services are a matter of right, not largesse, and are bestowed on the basis of universalistic criteria, not personalism. It is a step toward recognizing the value of universal citizenship over the traditional personalized view of state-citizen relations.\textsuperscript{32} This seems a step forward for both the middle class and for the poor who manage to litigate—even if the forum is weighted toward the former.

Rodríguez-Garavito and Bergallo might go further, though. Both articles argue that there are ways to use SER litigation to craft structural responses to structural problems—that there are ways, in other words, to include Ferraz’s unrepresented millions in the litigation.\textsuperscript{33} And, when this happens, the courts can stir the emergence of new social movements and the creation of new civil society organizations; transform decision-making processes to make them more inclusive and transparent; empower government, by resolving coordination problems; empower state bureaucrats who actually want to help bring SER to earth. From these articles, we know that SER cases can generate information about the scope and nature of a problem; give a voice to otherwise silenced interested actors; provide a forum for devising solutions to complex problems—on a deadline; transform social understandings of a problem; prompt the transformation of public policy; trigger media coverage, in explicitly rights-based terms, of a massive social problem; reallocate resources to care for politically disadvantaged groups, like HIV/AIDS patients; and more. It may be that the net effect of all these transformations is to create a politics and a state that is more attuned to the basic needs of the poor.

On the other hand, deriving the net effect of all this on the welfare of the weakest in society is still not an easy task, which is exactly why it is so important to take seriously Ferraz’s challenge. The three articles usefully tell us who some of the winners are, in the game of SER litigation, and Ferraz


\textsuperscript{32} Roberto da Matta, \textit{The Quest for Citizenship in a Relational Universe}, in \textit{State and Society in Brazil: Continuity and Change} 307 (John Wirth et al. eds., 1987).

\textsuperscript{33} See Bergallo, \textit{supra} note 2, at 1639–40 (arguing that there is sufficient evidence demonstrating the impact of structural cases in right-to-health litigation); Rodríguez-Garavito, \textit{supra} note 2, at 1671 (describing structural cases and their impact on SER litigation).
suggests that the middle class wins more often than the poor. But even if we grant that this is a zero-sum game, the articles still do not provide evidence on who the losers are, and they cannot answer whether the poor would be better off still trusting to more conventional politics. It is obvious that conventional politics have failed the poor in Latin America for some two hundred years now. But there is some indication that the politics of the region have—finally—begun to respond to the numerical advantage the poor inevitably have in such an unequal context. We have witnessed a “turn to the left” in many of the countries of the region, the resurrection of “twenty-first century socialism,” the appearance of constitutions, as in Ecuador and Bolivia, dedicated to recognizing and addressing the needs of marginalized indigenous communities, and so on.

Perhaps it is no coincidence that rights litigation makes such a forceful appearance exactly when electoral swings appear to threaten, or at least call into question the dominant, market-based economic model. Perhaps the poor should trust their fortunes to demonstrations and elections, and view with suspicion a device that, prima facie at least, appears to overturn the resource allocation decisions of elected officials. Our own sense, as is probably clear, is that courts can work hand in hand, or in antagonistic cooperation, with elected officials, and legal strategies based on SER can complement more traditional political ones for extending benefits to the poor. But for that to happen—and here we fully concur with Ferraz—courts will have to be exceptionally sensitive to the distributive, structural impact of their decisions, and advocates will have to be canny and resourceful in the ways they craft claims.

Paradoxically, the old model of the “restrained” judge, who applies the law syllogistically and narrowly to the facts of the case, without raising his or her gaze to the broader policy implications of the decision, appears most likely to do harm over the long run. In a recent decision, Gilmar Mendes of the Brazilian Constitutional Court quoted Sunstein and Holmes: “Taking rights seriously means taking scarcity seriously.” We take this to be true, and like Ferraz, we have some doubts whether Brazilian judges have yet taken this insight to heart. But we see, in the behavior of the Colombian Constitutional Court, in the more enlightened decisions of courts in Argentina and elsewhere, reason to hope that judges ultimately will grasp this lesson. If so, they may well turn out to be, in some cases, under some

34. Ferraz, supra note 2, at 1661–62.
35. Others have made similar claims with respect to constitutionalism and judicial review more broadly. See, e.g., Ran Hirsch, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).
circumstances, a part of a process that leads to the greater realization of social and economic rights for the poor.