

SOCIAL RIGHTS, JUDICIAL REMEDIES AND THE POOR

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I. INTRODUCTION

The increasing legal recognition of rights to health, education, and housing, often referred collectively as “welfare rights,” “social and economic rights,” or simply “social rights” as I shall refer to them in this piece, has generated heated debates on several interrelated questions. Are these rights of the same nature as other human rights such as freedom of speech, freedom of religion, freedom from torture, and fair trial, often collectively named “civil and political rights?” Should social rights be judicially enforced in exactly the same manner as civil and political rights? Who actually benefits when courts decide to enforce social rights assertively, the poor or the better-off?

To repeat, these are interrelated questions. The nature of a right will influence the manner in which courts should enforce it or if they should enforce it at all. And the manner in which a court enforces a particular right, i.e., the type of remedy it chooses, may in turn have a significant bearing on who actually benefits from the right.

To illustrate, those who believe that social rights are different in nature from civil and political rights tend to defend a less assertive role for courts when adjudicating them, or no role at all.¹ This may in part be explained by a belief that, should courts use traditional rights protecting remedies, such as individualized injunctions, they might end up benefiting the “wrong” individuals, i.e., the better-off.² On the other hand, those who believe that social rights and civil and political rights are identical in nature often, though not always, also believe that courts should therefore make no difference among them regarding enforcement.³

These debates are far from being purely academic, as they once were when social rights had been recognized in only a handful of constitutions

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1 See, e.g., CASS SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 221 (2001); MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 227, 264 (2008).

2 David Landau, *The Reality of Social Rights Enforcement*, 53 *HARV. INT’L L.J.* 189, 191, 202 (2012).

3 See, e.g., David Bilchitz, *Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance*, 119 *S. AFR. L.J.* 484 (2002).

and the United Nations International Covenant on Economic, Social and Cultural Rights (“ICESCR”)⁴ had been ratified by a dozen or so countries.⁵ With the increasing ratification of the ICESCR and other international law instruments that include social rights⁶ and the explosion in the number of national constitutions that include these rights,⁷ these debates have become more prominent and consequential. The debates left the constraints of academic circles and became the daily preoccupation of constitutional courts across the world, and, though less often, of international adjudicative bodies at the UN and regional human rights’ systems, such as those of Europe and Inter-America.⁸

My aim in this short commentary piece is not to describe and engage in detail with the several complex aspects of the important debates that flow from each of the questions above.⁹ Rather, I will focus on a specific aspect that has been the subject of renewed attention more recently: the issue of the *distributive impact* of judicial enforcement of social rights and its relationship with the *type of remedy* employed by courts when enforcing these rights.

It has become increasingly clear in the experience of some countries that social rights’ judicial enforcement can often disproportionately benefit middle and upper classes rather than the poor. Some authors, such as

4 International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

5 See e.g., E.W. Vierdag, *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, 9 NETH. Y.B. INT’L L. 69 (1978).

6 See e.g., United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

7 As a comprehensive empirical study has found “[n]early all new democracies, and several established ones, have included some form of ESRs in their constitution” Courtney Jung, Ran Hirschl & Evan Rosevear, *Economic and Social Rights in National Constitutions*, 62 AM. J. COMP. L. 1043, 1045 (2014).

8 One good example among many others of the concerns raised for judges by social rights’ adjudication was the inclusion of a whole panel dedicated to these rights in the annual conference of the Colombian Constitutional Court held on January 24 2019. See *XIII Encuentro de la Jurisdicción Constitucional, la Corte Constitucional en perspectiva global*, CORTE CONSTITUCIONAL, <http://www.corteconstitucional.gov.co/noticia.php?XIII-Encuentro-de-la-Jurisdiccion-Constitucional,-la-Corte-Constitucional-en-perspectiva-global-8684> (last visited Feb. 21, 2019).

9 I have discussed some of these issues in more detail elsewhere. See e.g., Octavio Luiz Motta Ferraz, *Harming the Poor Through Social Rights Litigation: Lessons from Brazil*, 89 TEX. L. REV. 1643, 1661 (2011); Octavio Luiz Motta Ferraz, *Health Inequalities, Rights, and Courts: The Social Impact of the “Judicialization of Health” in Brazil*, in LITIGATING HEALTH RIGHTS: CAN COURTS BRING MORE JUSTICE TO HEALTH? 76, 87–88 (Alicia Ely Yamin & Siri Gløppen eds., 2011); Octavio Luiz Motta Ferraz, *The Right to Health in the Courts of Brazil: Worsening Health Inequities?*, 11 HEALTH & HUM. RTS. J. 33 (2009).

David Landau¹⁰ and Pedro Felipe de Oliveira Santos¹¹ have suggested that this is determined, in great part, by the *type of remedies* used by courts.

If this is true, and assuming this is even a problem,¹² the solution would logically lie at the remedial stage; that is, courts should adopt whatever remedies are most suited to achieve the desired result of benefiting the poor rather than the middle and upper classes. I want to suggest in this piece that the regressive effects of social rights litigation seem to me less related to the type of remedy than to the *interpretation* of social rights adopted by courts.

II. THE ARGUMENT ABOUT REMEDIES

As I mentioned in the previous section, the perceived problem we are focusing on here is the finding of a mounting number of empirical studies that social rights litigation often does not benefit those whom they are supposed to benefit, i.e., the poor. Here is how David Landau aptly describes it:

there is a basic disconnect between the theoretical claims being made about the enforcement of social rights and the empirical realities of their enforcement. In the theoretical literature, scholars equate a robust enforcement of social rights with the advancement of the prospects of marginalized groups—by ensuring that citizens have minimum levels of things like food and shelter, the courts will improve the lot of the poorest members of society. Yet much of social rights enforcement is aimed not at the poor, but instead at middle- and upper-class groups. When courts in the developing world prevent pension reforms or salary cuts that would affect civil

¹⁰ Landau, *supra* note 2.

¹¹ Pedro Felipe de Oliveira Santos, *Beyond Minimalism and Usurpation: Designing Judicial Review to Control the Mis-Enforcement of Socio-economic Rights*, 18 WASH. U. GLOBAL STUD. L. REV. 593 (2019).

¹² It should be stressed that not everyone believes this is a problem. Many believe that social rights, as universal human rights, should benefit everyone, including the rich. For them, the problem is not that middle and upper classes are overrepresented in successful social rights litigation, but rather that the poor are underrepresented. For them, the solution is therefore not to limit access to litigation to the middle and upper classes, but rather to expand access to litigation to the poor. For reasons I cannot develop in much detail here I believe this position is problematic. Its main flaw is to overlook that social rights, and many civil and political rights as well, are dependent on finite resources and require, therefore, the prioritization of certain groups. In my view the poor, who are often the most deprived of social rights, should receive priority in the allocation of scarce state resources, especially in less developed and unequal societies. See Octavio Luiz Motta Ferraz, *The Right to Health in the Courts of Brazil: Worsening Health Inequities?*, *supra* note 10.

servants, when they order the state to give an expensive medical treatment or pay a pension to a middle-class professional, or when they force the state to raise subsidies for homeownership, they are deciding cases that help mainstream rather than marginalized groups.¹³

There is, of course, disagreement about these findings.¹⁴ Some reject them altogether;¹⁵ others claim more plausibly that a relatively small number of the poor do *benefit directly* from judicial intervention and may also benefit *indirectly* from litigation driven by the middle and upper classes if and when—and these are important conditions—the government decides to change its policy and universalize the benefits granted by courts.¹⁶

Again, this is a large debate which I will not be able to engage with any further here. Following Landau, I will simply focus on the less controversial point that, in many places, it seems clear from empirical studies that social rights litigation is *not* having the transformative impact on the lives of the poor it is supposed to have. The important questions, once this is acknowledged, are *why* and *how could this be changed?*

For Landau, and Santos who seems to agree with him, both answers are to be found, in great part, in the remedies used by courts. To cite Landau again, “courts are likely to choose certain remedies [individualized remedies and negative injunctions] because of ideology and resource constraints and these remedies are particularly ineffective at targeting lower class groups.”¹⁷ As a consequence, he argues, we are in need of “remedial innovation,” i.e., “more aggressive, unconventional enforcement strategies—especially the judicious use of structural injunctions [which] can more effectively target social rights’ interventions towards the poor.”¹⁸

13 Landau, *supra* note 2, at 191.

14 Santos himself in this volume, although seemingly in agreement that some social rights litigation does not benefit the most disadvantaged (what he calls mis-enforcement), claims that “a broad range of rulings all over the country ordered the government to materialize constitutional promises, not only on the right to health, but on all other socio-economic rights: construction of schools and hospitals in poor villages, instatement of social security benefits, and installation of electricity in rural areas, among others.” Santos, *supra* note 12, at 526. It is unfortunate he does not provide any supporting empirical evidence and references of this type of “progressive litigation” so it can be contrasted in terms of volume and impact to the empirical evidence of “regressive litigation.”

15 This is not a view supported by the available empirical data in my opinion.

16 See generally Daniel Brinks & William Forbath, *Commentary: Social and Economic Rights in Latin America: Constitutional Courts and the Prospects for Pro-Poor Interventions*, 89 TEX. L. REV. 1943, 1952-53 (2011).

17 Landau, *supra* note 2, at 191.

18 *Id.* at 192.

Santos seems to follow Landau in his piece in this volume: “The Brazilian data fit Landau’s classification, in the sense that achieving structural enforcement seems to be the most effective way to incentivize government to improve services and to target low-income groups. Eventually, institutional innovation should be set to reduce individualized claims and increase the collective claims.”¹⁹

I disagree with Landau and Santos and will explain why in the next section of this piece, using the example of right to health litigation in Brazil that both authors also use in their articles.

III. THE REAL PROBLEM: INTERPRETATION

My argument can be summarized as follows. Although the form of legal remedies may have implications on the types of people ultimately benefited, this is not a very important, let alone the most important, determinant of what we may call “regressive judicialization,” i.e., judicialization that disproportionately serves the interests of the middle and upper classes vis-à-vis the poor.

To develop the argument in a more concrete manner, I will use the example of right to health litigation in Brazil, which has been one of my main areas of research in the past decade. Take *drugs for diabetes*, the current “champion” of health judicialization in the state of São Paulo, the largest state in terms of population, with more than 40 million inhabitants, and one of the richest in Brazil.

Diabetes is a very debilitating disease, affecting millions in the population and correctly identified as a priority of the Ministry of Health in Brazil. Although it presents a socio-economic gradient as most health issues do, it is a condition that affects individuals from all socio-economic classes. Comprehensive and detailed data on the judicialization of health in the state of São Paulo show that there are tens of thousands of successful individualized lawsuits against that state every year claiming diabetes drugs, and also that a large portion of these lawsuits do not benefit the poor.²⁰ This scenario seems to provide the perfect example of

19 Santos, *supra* note 12, at 546.

20 See Fabiola Sulpino Vieira & Paola Zucchi, *Distorções causadas pelas ações judiciais à política de medicamentos no Brasil* [*Distortions to National Drug Policy Caused by Lawsuits in Brazil*], 41 REVISTA DE SAÚDE PÚBLICA 214 (2007); Ana Luiza Chieffi & Rita Barradas Barata, *Judicialização da política pública de assistência farmacêutica e equidade* [*Judicialization of Public Health Policy for Distribution of Medicines*], 25 CADERNOS DE SAÚDE PÚBLICA 1839 (2009); Daniel W. Liang Wang & Octavio Luiz Motta Ferraz, *Reaching Out to the Needy? Access to Justice and Public Attorneys’ Role in Right to Health Litigation in the City of São Paulo*, 10 SUR INT’L J. HUM.

what Landau calls the “empirical realities” of social rights enforcement and what Santos terms “mis-enforcement,” a reality that may be corrected, according to their arguments, by a change in the type of remedy used by courts, i.e., by a reliance on structural (collective) remedies rather than the current individualized remedies prevalent in health litigation in São Paulo.

This is far from plausible in my view. It not only overstates the potential capacity of structural litigation to succeed in the aim of benefiting the poor in social rights litigation, which is actually to some extent admitted by Landau from the outset of his article,²¹ it also incorrectly assumes that a strong relationship exists between the type of remedy (individualized or structural), potential beneficiaries (poor, middle, or upper classes) and social rights implementation that does not actually obtain. I will focus on these latter problems as, unlike the former, they seem to be overlooked by both Landau and Santos.

Let me start with the first relationship assumed in the argument. Individualized claims tend to benefit the middle and upper classes and structural injunctions tend to benefit the poor.²² It is true that under certain conditions that seem to prevail in many countries individualized litigation tends to favor mostly better-off people, who have the resources, both material (i.e., money to pay lawyers and costs) and intellectual (knowledge of rights and confidence to litigate), that are required to pursue the judicial strategy.²³ Some initiatives aimed at widening access to justice may help diminish the material barriers (for example, legal aid, public defenders, “epistolary jurisdiction,” etc.) but none of them seems to be sufficient to completely bridge the gap between rich and poor in their relative ability to use litigation as a tool to further their interests. Given such barriers, it seems plausible that the poor are more likely to benefit from litigation that

RTS. 159 (2013).

21 “The conclusion is not that structural injunctions are the right answer to all social rights problems; they will fail in many political contexts, and the resource costs that they will place on courts may be too high to pay in many circumstances. It is that there is a desperate need to innovate with aggressive remedies if social rights are to live up to their transformative promise.” Landau, *supra* note 2, at 192.

22 “I use a case study to test my two major hypotheses: (a) that much of social rights enforcement is majoritarian and benefits middle and upper class groups, and (b) that there is a strong relationship between the type of remedy used by courts and the identity of the beneficiaries from the intervention.” Landau, *supra* note 2, at 202.

23 In the social sciences literature this is often discussed in terms of the “support structure” or structural opportunity for litigation. *See e.g.*, CHARLES EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 3 (1998); Siri Gloppen, *Courts and Social Transformation: An Analytical Framework*, in COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? 35 (Roberto Gargarella, Pilar Domingo, & Theunis Roux eds., 2006).

they are not required to initiate but that still targets the advancement of their interests. This conclusion, however, does not necessarily point towards structural litigation. Both individualized and structural litigation, and other forms of remedies,²⁴ may benefit the poor so long as they *target*, as I have just mentioned, *the poor's interests*. This targeting of the poor's interests, not the type of remedy, is in my view the most important necessary condition. The type of remedy is not even a necessary condition; it is a contingent factor that may or may not favor the poor. What disadvantages the poor in comparison to the rich is their much lower opportunity to use litigation –to start and sustain it–as a strategy to pursue their interests. They have to rely on others to litigate on their behalf, either better-off individuals with identical interests who litigate individually,²⁵ or actors with standing to bring collective-structural suits on issues that affect the poor.²⁶

The likelihood of the latter happening is perhaps higher in certain contexts, but this is a contingent and contextual factor which is difficult to establish in the abstract. Landau uses two Colombian examples of structural litigation that have targeted interests of the poor (the displaced persons and the healthcare cases), another case from India on the right to food, and the classic school desegregation and prison reform cases in the USA.²⁷ But this is perhaps too small a sample from which to derive broader conclusions. We can surely imagine structural litigation that focuses on issues that do not primarily affect the poor. An interesting study carried out in Brazil about the structural/collective remedies available in the legal system (The Civil Public Action, The Popular Action, and the Collective Security Injunction) found that a large portion of cases involved social security benefits and salary increments for civil servants, which are not exactly the interests of the poor.²⁸ I do not disagree with Landau that structural-collective remedies have perhaps a greater

24 It is important to clarify that I am not inadvertently (and incorrectly) assuming that there are only two types of remedies, individualized and structural claims. This is a simplification to make the argument more manageable in the limited space of this short piece.

25 In this case a further condition needs to obtain, namely that the system is one where individualized remedies have erga omnes effects (as in most common law jurisdictions).

26 For example, NGOs, public prosecutors, public defenders, etc.

27 Landau, *supra* note 2, at 236. In the India case, *People's Union for Civil Liberties v. Union of India*, (2003) 2 SCR 1136, an Indian NGO challenged the federal government's grain distribution policy, arguing it violated the constitutional right to be free from hunger.

28 Landau also talks about these types of suits in Colombia, but, as they were negative injunctions, he places them alongside individualized claims that tend to benefit the better-off. The fact that they were negative injunctions is in my view contingent. They could easily have been collective/structural actions, as was the case in Brazil.

potential when judiciously used (an important but also too broad a caveat) to benefit the poor. But this contingent connection between structural-collective litigation and the poor seems much weaker than that between individualized litigation and the middle and upper classes.

The diabetes treatment case mentioned above also illustrates the other problematic assumption in Landau and Santos' argument. In addition to the tens of thousands of successful individualized lawsuits claiming diabetes drugs, a structural lawsuit that claims exactly the same benefits (diabetes treatment), but through a structural remedy (a Public Civil Action) brought against the state, is also pending.²⁹ If successful, the treatment requested, currently accessible only to the tens of thousands better-off litigants who have brought individualized claims against the state, would in principle be extended to everyone, rich and poor, who suffers from diabetes. Again, this seems to be the exact solution that Landau and Santos are arguing for and, at first sight, seems intuitively correct. If social rights are supposed to benefit everyone equally, and primarily the poor who tend to be in worse health conditions than the better-off, this structural action seems to be the solution, given that diabetes affects hundreds of thousands of poor people who find it harder to use individualized litigation to pursue their interests.

On reflection, however, it is not that simple. The intuition implies that the right to health of article 196 of the 1988 Brazilian Constitution³⁰ and of article 12 of the ICESCR,³¹ which Brazil ratified in 1991,³² should include the treatment for diabetes claimed in the structural action of the Public Defensory. Yet this is far from obvious. That the right to health imposes a duty on the state of São Paulo to have a public policy to deal with diabetes seems very plausible. What exact policy it should have and what precise

29 Press Release, Rede Nacional de Pessoas com Diabetes [National Network of People with Diabetes], Ação Civil Pública - Defensoria Pública [Public Civil Action - Public Defender's Office], <http://www.rnpd.org.br/site/internas.asp?area=61&id=75> (last visited Feb. 20, 2019). The number of the case provided is Processo nº 83/053.05.001305-2 13ª Vara da Fazenda Pública de São Paulo, Brazil. *Id.* Unfortunately, the decision and petitions of this structural injunction cannot be accessed via court websites.

30 CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 196 ("Health is the right of all and the duty of the National Government and shall be guaranteed by social and economic policies aimed at reducing the risk of illness and other maladies and by universal and equal access to all activities and services for its promotion, protection and recovery.").

31 International Covenant on Economic, Social and Cultural Rights, *supra* note 4, art. 12(1) ("The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.").

32 See *Depositary: Status of Treaties*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en (last visited Mar. 8, 2019).

treatment it should offer is another question which, many reasonably argue, courts should not in principle determine themselves.³³

Moreover, things are even more complicated as the choice is not a simple one between *treatment* and *no treatment*, as one may automatically assume any right to health litigation is about. In many right to health cases, including those regarding diabetes, the dispute is rather about *what treatment, among several options*, the state ought to provide to citizens in light of its constitutional duty to implement the right to health. In this case, as in many others, the state of São Paulo had a policy in place to provide the standard diabetes treatment, accepted as effective worldwide, which includes the administration to the patient of the *standard kind of insulin* (human or animal). However, a new kind of insulin, called *analogue insulin*, was developed by giant pharmaceutical companies like Ely Lilly, Novo Nordisk, and Sanofi-Aventis, who marketed it aggressively to the public as providing much better and easier control of diabetes than the standard treatment.³⁴ The cost of the drug, however, is unsurprisingly far higher than the standard treatment.

The vast majority of the tens of thousands individualized right to health lawsuits claiming diabetes treatment against the state of São Paulo seeks this newer, more expensive type of insulin instead of the standard treatment already offered by the state. It is even more doubtful, I would suggest, that the right to health requires the state to provide any specific treatment available in the market for any health condition, irrespective of its costs and independent of whether alternative, effective, and cheaper options exist. In this particular case of analogue insulins, the World Health Organization's 18th Expert Committee on the Selection and Use of Essential Medicines had this to say in their Review of the Evidence Comparing Insulin (Human or Animal) with Analogue Insulins:

The new data did not alter the conclusions of the Singh et al (2009) review, which indicated that analogue insulins had little advantage over conventional insulins in terms of glycaemic control or reduced hypoglycaemia. Statistically significant advantages associated with analogues are generally less than clinically important minimal differences, and advantages for occurrence of hypoglycaemia are

33 Santos himself seems to agree with this position: "Defining exactly what the public services must cover—in other terms, specifically defining the core of the needs, the beneficiaries, and the priorities that the state should provide—is not the constitutionally appropriate function of the judicial branch." Santos, *supra* note 12, at 548.

34 See C. Girish et al., *Newer Insulin Analogues and Inhaled Insulin*, 60 INDIAN J. MED. SCI. 117 (2006).

not consistent across comparisons. Recent health technology assessments in the UK and Germany indicated no advantage for long-acting analogue insulins in Type 1 and 2 diabetes. . . . Reviews of analogue use and cancer risk indicate increased cancer risk in some analyses and no difference with human insulins in other analyses³⁵

It is beyond the scope of this piece to develop any further the argument on why the interpretation of the right to health by Brazilian courts in this individualized diabetes litigation is incorrect and produces pernicious effects.³⁶ But the discussion above seems sufficient for the point I want to make here, namely that *the type of remedy—individualized or structural claims—is not the most relevant determinant of whether social rights litigation will lead to positive and progressive effects*. As my example of diabetes litigation in São Paulo, Brazil, shows (and I believe it can be extrapolated beyond that particular case), the mere transformation of those individualized remedies into a structural one would not have the progressive impact that Landau and Santos claim that structural remedies tend to have. Such a transformation would rather exponentially multiply the pernicious effects of those misguided individualized claims.

What really matters, therefore, is not the type of remedy, but whether the courts interpret the right correctly, i.e., in a manner that imposes on the state a duty to provide citizens with access to healthcare that is equitable and cost-effective within the state's available resources.

IV. CONCLUSION

In this short commentary piece my modest aim was to caution against the view that the increasingly recognized problem that social rights

35 WORLD HEALTH ORG. 18TH EXPERT COMM. ON THE SELECTION & USE OF ESSENTIAL MEDS., REVIEW OF THE EVIDENCE COMPARING INSULIN (HUMAN OR ANIMAL) WITH ANALOGUE INSULINS 4 (2011), https://www.who.int/selection_medicines/committees/expert/18/applications/Insulin_review.pdf. It is also important to note that the CONITEC, the Brazilian agency linked to the Ministry of Health that assesses all new technologies and makes recommendations about their incorporation in the public health system, has carried out no less than three assessments in the past few years and recommended that analogue insulins should *not* be incorporated on the same grounds as the WHO review. *See generally Recomendações sobre as tecnologias avaliadas–2019* [Recommendations on Technologies Evaluated–2019], CONITEC (June 24, 2014), <http://conitec.gov.br/decisoes-sobre-incorporacoes> (last updated Mar. 7, 2019).

36 For the full argument, see my work cited *supra*, note 10, and also Benedict Rumbold, Rachel Baker, Octavio Ferraz et al., *Universal Health Coverage, Priority Setting, and the Human Right to Health*, 390 THE LANCET 712 (2017), [https://doi.org/10.1016/S0140-6736\(17\)30931-5](https://doi.org/10.1016/S0140-6736(17)30931-5).

litigation often does not help the poor may be addressed, or minimized, by remedial solutions, namely by encouraging courts to use innovative remedies such as structural injunctions.

I made two main claims. Firstly, I argued that the causal link between structural injunctions and poor beneficiaries is not as strong as the link between individualized claims and middle- and upper-class ones. Structural injunctions have perhaps a greater potential to benefit the poor than individualized remedies, yet concrete results depend not only on defeating several important obstacles related to costs, implementation, etc., but also on the willingness of those with standing to bring structural injunctions to focus on issues that really affect the poor. As the example of Brazil shows, structural injunctions are often used to protect the interests of the middle and upper classes, such as civil servants' social security benefits and salary increments. As the standing to bring structural cases is often restricted to a few actors, this is a limited resource that, when used in favor of the better-off, automatically diminishes the amount left to potentially benefit the poor. Secondly, and equally importantly but sometimes overlooked by those betting on structural injunctions, such injunctions can also be used to make misguided social rights claims as the example of diabetes treatment in the State of São Paulo shows. When this is the case, rather than leading to the positive and progressive effects desired by those betting on this remedial solution, structural injunctions would augment exponentially the negative (and often regressive) effects of individualized litigation.

In my view, focusing on remedies, though important, will not be sufficient to address the problem of the negative and often regressive effects of social rights litigation. As is the case in medicine, if we do not first get the correct diagnosis, the remedy will likely be inefficient or even pernicious to the patient. Getting the correct diagnosis in social rights means interpreting these rights correctly, something that is still a difficult challenge for many courts around the world.