

# Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America

César Rodríguez-Garavito\*

At 9:00 a.m. on Friday, July 12, 2009, Nilson Pinilla, then president of the Colombian Constitutional Court,<sup>1</sup> stepped onto the platform of the tribunal's courtroom in the heart of Bogotá. Flanked by two other justices, he took the floor before the nearly 300 of us who were packed into the room—lawyers, activists, grassroots leaders, journalists, government officials, and academics—and opened a hearing that had no precedent in Colombian or Latin American constitutionalism.

Throughout the entire day, Luis Alfonso Hoyos, the director of the agency in charge of attending to the approximately five million internally displaced persons (IDPs) by Colombia's armed conflict,<sup>2</sup> was on the stand publicly testifying about what the government had done and failed to do for the displaced population. While Hoyos fired off statistics and PowerPoint slides in response to questions posed by the court and the nongovernmental organizations (NGOs) in attendance, from inside the courtroom we could hear the shouts of displaced persons in the contiguous Bolívar Plaza protesting the lack of state attention to their cause.

The path that led up to the hearing started five years earlier when, in January 2004, the Colombian Constitutional Court (CCC) aggregated the constitutional complaints (*tutelas*) of 1,150 displaced families and handed

---

\* Associate Professor of Law and Director of the Program on Global Justice and Human Rights, University of the Andes (Colombia); Hauser Global Fellow, New York University Law School; Founding member, Center for Law, Justice, and Society (DeJuSticia). I am grateful to Camila Soto and Carolina Bernal for superb research assistance. For comments on earlier drafts of this Article, I would like to thank Daniel Brinks, Jackie Dugard, Siri Gloppen, Malcolm Langford, and Rodrigo Uprimny. I am particularly indebted to my colleague Diana Rodríguez-Franco for her decisive contribution to the co-authored case study that laid the empirical foundation for the broader research project presented in this Article. All translations in this Article are the author's unless otherwise indicated.

1. Nilson Elías Pinilla Pinilla, CORTE CONSTITUCIONAL DE COLOMBIA [CONSTITUTIONAL COURT OF COLOMBIA], <http://www.corteconstitucional.gov.co/lacorte/pinilla.php>.

2. See CONSULTORÍA PARA LOS DERECHOS HUMANOS Y EL DESPLAZAMIENTO (CODHES) [CONSULTANCY FIRM FOR HUMAN RIGHTS AND DISPLACEMENT], ¿CONSOLIDACIÓN DE QUÉ? INFORME SOBRE DESPLAZAMIENTO, CONFLICTO ARMADO Y DERECHOS HUMANOS EN COLOMBIA EN 2010 [CONSOLIDATION OF WHAT? REPORT ON DISPLACEMENT, CONFLICT AND HUMAN RIGHTS IN COLOMBIA IN 2010] 8 (2011) (stating that over five million Colombians were internally displaced over the past twenty-five years); *Gobierno cumple meta de 40 mil hectáreas de coca erradicadas* [Government Meets Target of 40,000 Hectares of Eradicated Coca], ACCIÓN SOCIAL: AGENCIA PRESIDENCIAL PARA LA ACCIÓN SOCIAL Y LA COOPERACIÓN INTERNACIONAL [ACCIÓN SOCIAL: PRESIDENTIAL AGENCY FOR SOCIAL ACTION AND INTERNATIONAL COOPERATION], <http://www.accionsocial.gov.co/contenido/contenido.aspx?catID=127&conID=1081> (describing Luis Alfonso Hoyos as the director of the *Acción Social* agency in Colombia).

down its most ambitious ruling in its two decades of existence: Judgment T-025 of 2004.<sup>3</sup> In this decision, the CCC declared that the humanitarian emergency caused by forced displacement constituted an “unconstitutional state of affairs;” that is, a massive human rights violation associated with systemic failures in state action.<sup>4</sup> As the complaints that reached the court from all corners of the country showed, there was no serious and coordinated state policy for offering emergency aid to IDPs,<sup>5</sup> nor was there reliable information on the number of IDPs or the conditions they were facing.<sup>6</sup> Moreover, the budget allocated to the issue was clearly insufficient.<sup>7</sup> To eradicate the root causes behind this state of affairs, the court ordered a series of structural measures that as we will see, spawned a lengthy implementation and follow-up process that continues today.<sup>8</sup>

Judgment T-025 was not the CCC’s first structural decision declaring an unconstitutional state of affairs.<sup>9</sup> Since 1997, the court has handed down seven decisions of this kind, in greatly varying circumstances including non-compliance with the state’s obligation to affiliate numerous public officials to the social security system,<sup>10</sup> massive prison overcrowding,<sup>11</sup> lack of protection for human rights defenders,<sup>12</sup> and failure to announce an open call for public notary nominations.<sup>13</sup> In other decisions, the CCC has aggregated different *tutela* actions and has ordered long-term structural remedies without

---

3. Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04 (slip op. at 1), available at <http://www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm>.

4. *Id.* at 80–81.

5. *Id.* at 67–68.

6. *Id.* at 67, 73.

7. *Id.* at 75–80.

8. *Id.*

9. For an analysis of the CCC’s doctrine of “unconstitutional states of affairs,” see generally César Rodríguez Garavito, *Más Allá del Desplazamiento, o Cómo Superar un Estado de Cosas Inconstitucional* [Beyond Displacement, or How to Overcome an Unconstitutional State of Affairs], in *MÁS ALLÁ DEL DESPLAZAMIENTO: POLÍTICAS, DERECHOS Y SUPERACIÓN DEL DESPLAZAMIENTO FORZADO EN COLOMBIA* [BEYOND DISPLACEMENT: POLICIES, RIGHTS AND OVERCOMING DISPLACEMENT IN COLOMBIA] 434 (César Rodríguez Garavito ed., 2009). This work discusses the court’s criteria for declaring the existence of an unconstitutional state of affairs and suggests judicial guidelines for assessing governmental responses to such situations and eventually declaring that they have been overcome. *Id.*

10. C.C., febrero 2, 2000, Sentencia SU-090/00 (slip op. at 1), available at <http://www.corteconstitucional.gov.co/relatoria/2000/SU090-00.htm>; C.C., julio 27, 1999, Sentencia T-535/99 (slip op. at 5), available at <http://www.corteconstitucional.gov.co/relatoria/1999/T-535-99.htm>; C.C., marzo 5, 1998, Sentencia T-068/98 (slip op. at 1–2), available at <http://www.corteconstitucional.gov.co/relatoria/1998/T-068-98.htm>; C.C., noviembre 6, 1997, Sentencia SU-559/97, (slip op. at 1–2), available at <http://www.corteconstitucional.gov.co/relatoria/1997/SU559-97.htm>.

11. C.C., abril 28, 1998, Sentencia T-153/98 (slip op. at 1), available at <http://www.corteconstitucional.gov.co/relatoria/1998/T-153-98.htm>.

12. C.C., octubre 20, 1998, Sentencia T-590/98 (slip op. at 4), available at <http://www.corteconstitucional.gov.co/relatoria/1998/T-590-98.htm>.

13. C.C., mayo 26, 1998, Sentencia SU-250/98 (slip op. at 3), available at <http://www.corteconstitucional.gov.co/relatoria/1998/SU250-98.htm>.

formally declaring an unconstitutional state of affairs. It did so most recently in Judgment T-760<sup>14</sup> of 2008, which resolved twenty-two complaints about systemic failures in the health care system.<sup>15</sup>

In this Article, I focus on the CCC's decisions in these situations, which I dub "structural cases." I characterize these cases as judicial proceedings that (1) affect a large number of people who allege a violation of their rights, either directly or through organizations that litigate the cause; (2) implicate multiple government agencies found to be responsible for pervasive public policy failures that contribute to such rights violations; and (3) involve structural injunctive remedies, i.e., enforcement orders whereby courts instruct various government agencies to take coordinated actions to protect the entire affected population and not just the specific complainants in the case.<sup>16</sup>

I posit that this variety of judicial activism, although particularly visible in the CCC's jurisprudence, is part of an emerging trend in Latin America and other regions of the global south. Embodied most clearly by judicial intervention in structural cases that address widespread violations of socioeconomic rights, this type of progressive neoconstitutionalism has unfolded with different names and features in different parts of the global south.<sup>17</sup> Among the best-known examples is the jurisprudence of the Supreme Court of India, which has addressed such fundamental social problems as hunger and illiteracy; these judgments have been accompanied by the creation of judicial consulting commissions that monitor the

---

14. C.C., julio 31, 2008, Sentencia T-760/08 (slip op.), available at <http://www.corteconstitucional.gov.co/relatoria/2008/T-760-08.htm>.

15. *Id.* at 9–10.

16. Although the CCC has not explicitly drawn on comparative constitutional law to develop its jurisprudence on unconstitutional states of affairs, there are similarities between the jurisprudence of the CCC and the doctrines of structural injunctive remedies in common-law jurisdictions such as India, South Africa, and the United States. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281 (1976) ("[P]ublic law litigation will often, at least as a practical matter, affect the interests of many people. Much significant public law litigation is therefore carried out through the class action mechanism . . ."); Danielle Elyce Hirsch, *A Defense of Structural Injunctive Remedies in South African Law*, 9 OR. REV. INT'L L. 1, 3–4 (2007) (discussing the use of structural injunctions as remedies in South Africa); S. Muralidhar, *India: The Expectations and Challenges of Judicial Enforcement of Social Rights*, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 102, 109 (Malcolm Langford ed., 2008) (discussing the "continuing mandamus" approach of the Indian supreme court "where the Court keeps the case on board over a length of time for ensuring the implementation of its directions"); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1019 (2004) (discussing public law relief in the United States, which has moved toward "experimentalist intervention" that "combines more flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability").

17. See César Rodríguez-Garavito, *Toward a Sociology of the Global Rule of Law Field: Neoliberalism, Neoconstitutionalism, and the Contest over Judicial Reform in Latin America*, in LAWYERS AND THE RULE OF LAW IN AN ERA OF GLOBALIZATION 156, 164–65 (Yves Dezalay & Bryant G. Garth eds., 2011) (noting the rise of progressive neoconstitutionalism and its impact on judicial activism and institutional reform in Latin America).

implementation of the judgment.<sup>18</sup> Similarly, the South African Constitutional Court has become a central institutional forum for promoting rights such as housing and health, and for obligating the state to take actions against the economic and social legacy of apartheid.<sup>19</sup> The South African Constitutional Court has also elicited international attention in judicial and scholarly circles, as demonstrated by the interest in the court by U.S. and European scholars and the reliance on its jurisprudence in U.S. and European constitutional theory.<sup>20</sup>

In Latin America, judicial activism on socioeconomic rights (SERs) has become increasingly prominent over the last two decades under different rubrics, including “strategic litigation,”<sup>21</sup> “collective cases,”<sup>22</sup> and American-style “public interest law.”<sup>23</sup> In countries as different as Brazil and Costa

18. See Muralidhar, *supra* note 16, at 109–10 (asserting that the Supreme Court of India’s remedies are creative in the public interest litigation context because the court is concerned with the importance of causes to the public at large); Shylashri Shankar & Pratap Bhanu Mehta, *Courts and Socioeconomic Rights in India*, in *COURTING SOCIAL JUSTICE* 146, 146 (Varun Gauri & Daniel M. Brinks eds., 2008) (“In the last two decades, the higher judiciary in India transformed non-justiciable economic and social rights such as basic education, health, food, shelter, speedy trial, privacy, anti-child labor, and equal wages for equal work into legally enforceable rights.”).

19. See SANDRA LIEBENBERG, *SOCIO-ECONOMIC RIGHTS: ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION* 45, 80–81 (2010) (describing the role of the South African courts in enforcing socioeconomic rights in the 1996 South African constitution); Jonathan Berger, *Litigating for Social Justice in Post-Apartheid South Africa: A Focus on Health and Education*, in *COURTING SOCIAL JUSTICE*, *supra* note 18, at 38, 39 (focusing on instances where “poor people” in South Africa have brought litigation under their rights of access to health care services and education); Sandra Liebenberg, *South Africa: Adjudicating Social Rights Under a Transformative Constitution*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW*, *supra* note 16, at 75, 81–96 (discussing significant South African socioeconomic-rights cases addressing “rights to land and housing, health care services, and social security”).

20. See, e.g., SANDRA FREDMAN, *HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES* 169–70 (2008) (discussing the court’s *Grootboom* decision as it relates to the synergistic approach to activism); CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS* 219 (2004) (discussing an opinion by the South African Constitutional Court holding that social and economic rights are “at least to some extent” justiciable); Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 *INT’L J. CONST. L.* 391, 391–93 (2007) (analyzing the *Grootboom* decision).

21. See, e.g., *Strategic Litigation as a Tool for the Enforceability of the Right to Education: Possibilities and Obstacles*, ASOCIACIÓN POR LOS DERECHOS CIVILES [ASSOCIATION FOR CIVIL RIGHTS], 1 (May 20, 2008), [http://www.redligare.org/IMG/pdf/litigio\\_estrategico\\_educacion-ingles.pdf](http://www.redligare.org/IMG/pdf/litigio_estrategico_educacion-ingles.pdf) (noting that the Association for Civil Rights has been using strategic litigation as a tool for social change for over a decade).

22. See generally GUSTAVO MAURINO ET AL., *LAS ACCIONES COLECTIVAS: ANÁLISIS CONCEPTUAL, CONSTITUCIONAL, PROCESAL, JURISPRUDENCIAL Y COMPARADO* [CLASS ACTIONS: ANALYSIS CONCEPTUALLY, CONSTITUTIONALLY, PROCEDURALLY, JURISPRUDENTIALLY AND COMPARATIVELY] (2005) (offering a strategic overview of legal mechanisms for collective legal suits, with an emphasis on Brazil, Colombia, and the United States).

23. See, e.g., Felipe González Morales, *El trabajo clínico en materia de derechos humanos e interés público en América Latina* [The Clinical Work Concerning Human Rights and Public Interest in Latin America], in *ENSEÑANZA CLÍNICA DEL DERECHO: UNA ALTERNATIVA A LOS MÉTODOS TRADICIONALES DE FORMACIÓN DE ABOGADOS* [THE CLINICAL EDUCATION OF RIGHTS: AN ALTERNATIVE TO THE TRADITIONAL METHODS OF LEGAL TRAINING] 175, 176 (Marta

Rica, courts have decisively shaped the provision of fundamental social services such as health care.<sup>24</sup> In Argentina, some courts have undertaken structural cases and experimented with public mechanisms to monitor the implementation of activist judgments such as *Verbitsky*,<sup>25</sup> on prison overcrowding, and *Riachuelo*,<sup>26</sup> on environmental degradation.<sup>27</sup>

The literature on the justiciability of SERs has multiplied in proportion to the proliferation of activist rulings, both in Latin America and elsewhere.<sup>28</sup> Two angles of analysis have dominated this scholarship. First, some key contributions have concentrated on making a theoretical case for the justiciability of SERs in light of the demands of democratic theory and the reality of social contexts marked by deep economic and political inequalities.<sup>29</sup>

Villarreal & Christian Courtis eds., 2007) (discussing the achievements of legal clinics focusing on human rights and public interest law); Stephen Meili, *Staying Alive: Public Interest Law in Contemporary Latin America* 5 (Univ. Minn. Law Sch. Legal Studies Research Paper Series Paper No. 09-48, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1518002](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1518002) (“One of the most striking aspects of . . . public interest lawyering in Latin America is the way in which it has grown in both size and scope in the past 15 years.”).

24. See Bruce M. Wilson, *Changing Dynamics: The Political Impact of Costa Rica’s Constitutional Court*, in *THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA* 47, 59 (Rachel Sieder et al. eds., 2005) (noting that state coverage for AIDS drugs became readily available after Costa Rica’s Constitutional Court recognized a constitutional right to state-funded medical care in the 1990s); Octavio Luiz Motta Ferraz, *The Right to Health in the Courts of Brazil: Worsening Health Inequities?*, 11 *HEALTH & HUM. RTS. J.*, no. 2, 2009 at 33, 35 (discussing the “epidemics of litigation” on the right to health in Brazil).

25. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 3/5/2005, “Verbitsky, Horacio / hábeas corpus,” Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2005-328-1146), slip op., available at [http://www.csjn.gov.ar/cfal/fallos/cfal3/ver\\_fallos.jsp?id=222651&fori=RHV00856-381](http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=222651&fori=RHV00856-381).

26. CSJN, 8/7/2008, “Mendoza, Beatriz Silvia y otros c. Estado Nacional y otros / daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza – Riachuelo),” Fallos (2008-331-1622) (Arg.), slip op., available at [http://www.csjn.gov.ar/cfal/fallos/cfal3/ver\\_fallos.jsp?id=289823&fori=ORM01569-40B](http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=289823&fori=ORM01569-40B).

27. See CENTRO DE ESTUDIOS LEGALES Y SOCIALES, *LITIGIO ESTRATÉGICO Y DERECHOS HUMANOS: LA LUCHA POR EL DERECHO* [STRATEGIC LITIGATION AND HUMAN RIGHTS: THE FIGHT FOR RIGHTS] 191, 193–94, 194 n.225 (2008) (referencing the enactment of legal reforms in response to *Verbitsky*); Carolina Farstein, Gabriela Kletzel & Paola García Rey, *En Busca de un Remedio Judicial Efectivo: Nuevos Desafíos para la Justiciabilidad de los Derechos Sociales* [Searching for Effective Judicial Remedies: New Challenges to the Justiciability of Socioeconomic Rights], in *DERECHOS SOCIALES: JUSTICIA, POLÍTICA Y ECONOMÍA EN AMÉRICA LATINA* [SOCIAL RIGHTS: JUSTICE, POLITICS, AND ECONOMICS IN LATIN AMERICA] 27, 55 (Pilar Arcidiácono, Nicolás Espejo Yaksic & César Rodríguez-Garavito eds., 2010) (discussing (1) the court’s order in *Mendoza* directing federal, provincial, and local officials to design and implement a plan to cleanup the Riachuelo River, and (2) the creation of a basin authority to implement the plan).

28. For a global survey of the practice and literature on SER litigation, see generally *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW*, *supra* note 16, which compiles essays providing critical analysis of some two thousand judgments and decisions from twenty-nine national and international jurisdictions.

29. See, e.g., Rodolfo Arango, *La justiciabilidad de los derechos sociales fundamentales* [The Justiciability of Fundamental Social Rights], 12 *REVISTA DE DERECHO PÚBLICO* [J. PUB. L.] 185, 186 (2001) (Colom.) (reconstructing the conceptual foundations of SER on the basis of a theory of subjective rights that takes into account the material conditions that are necessary for the effective enjoyment of rights); DAVID BILCHITZ, *POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION*

Second, a number of works have entered into the discussion from the perspective of human rights doctrine, which has given greater precision to judicial standards for upholding SERs and boosted the utilization of these rights with judicial organs and supervisory bodies at both the national and international level.<sup>30</sup>

These perspectives have considerably advanced the conceptual clarity and the justiciability of SERs. Nevertheless, the almost exclusive emphasis on the production phase of judgments has created an analytical and practical blind spot: the implementation stage of rulings. For this reason, we do not have systematic studies on the fate of activist decisions after they are issued.<sup>31</sup> What happens to the orders contained in these judgments once they leave the courtroom? To what extent do public officials follow the judgments and adopt new courses of conduct in order to protect SERs? What impact do the rulings have on the state, civil society, social movements, and public opinion? Ultimately, do they contribute to the realization of SERs?

I will consider these questions in this Article. To help unpack the black box of the implementation of SER rulings, I will proceed in two steps. I will begin by laying out an analytical framework for understanding the effects of such decisions. Thus, in Part I, I offer a typology of effects and discuss the methodological implications for sociolegal studies on judicial impact.

Against this analytical background, in Part II, I turn to an explanatory question: what accounts for the different levels of impact of SER rulings? Why do some decisions have deep and multifarious effects, while others remain on paper? Since the fate of judicial decisions hinges on responses from a wide array of actors—e.g., the postjudgment strategies of activists and litigators, governmental reactions to court orders, and the role of the courts in

---

AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS 115–17 (2007) (describing a “thin” rights-based theory of judicial review, under which the principle of the “equal importance” of individuals would sometimes require courts to provide welfare support to indigent individuals, even where the democratic majority would have preferred not to do so).

30. VÍCTOR ABRAMOVICH & CHRISTIAN COURTS, LOS DERECHOS SOCIALES COMO DERECHOS EXIGIBLES [SOCIAL RIGHTS AS ENFORCEABLE RIGHTS] 37–47 (2002) (offering a systematic overview of legal sources and doctrines supporting the justiciability of socioeconomic rights); Malcolm Langford, *The Justiciability of Social Rights: From Practice to Theory*, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW, *supra* note 16, at 3, 6–9 (narrating the historical development of economic and social rights in conjunction with the human rights movement).

31. There are at least two notable exceptions regarding the implementation of activist rulings. See Daniel M. Brinks & Varun Gauri, *A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World*, in COURTING SOCIAL JUSTICE, *supra* note 18, at 303, 320–34 (studying a host of factors in the implementation of rulings on social and economic rights, including what factors cause the targets of litigation to comply and the direct and indirect beneficiaries of activist rulings); Rodrigo Uprimny & Mauricio García-Villegas, *Corte Constitucional y emancipación social en Colombia* [Constitutional Court and Social Emancipation in Colombia], in EMANCIPACIÓN SOCIAL Y VIOLENCIA EN COLOMBIA [SOCIAL EMANCIPATION AND VIOLENCE IN COLOMBIA] 463, 491–509 (Boaventura Santos & Mauricio García eds., 2004) (detailing a study of the practical effectiveness of Colombian Constitutional Court decisions vindicating social rights and their impact on social movements).

the implementation phase—multicausality makes these questions intractable unless the analysis is restricted to a specific set of variables. I thus focus on the factors that are within the court's purview. All other things being equal, there is a question of concern: what types of judicial decisions are more likely to have a broader impact on the fulfillment of SERs? Or, in prescriptive terms, what can courts do to enhance the impact of their rulings on SERs?

To empirically ground my analysis, I draw on evidence from a comparative study of the impact of the CCC's rulings in structural cases. The pivotal case study resulted from a collaborative project with Diana Rodríguez-Franco, which examined in detail the first six years of the implementation of Judgment T-025.<sup>32</sup> I contrast the relatively high impact of T-025 with the more modest effects of two other structural rulings: T-153<sup>33</sup> and T-760. T-153 was the 1998 decision wherein the CCC declared that the dire situation of detainees in overcrowded prisons amounted to an unconstitutional state of affairs.<sup>34</sup> Although the court issued a number of short-term orders aimed at addressing the gravest administrative and budgetary flaws underlying prison overcrowding, it stopped short of establishing any meaningful monitoring mechanism. This omission helps explain the decision's overall low impact. To show contrast with T-153, I also analyze T-760, a more recent ruling on the right to health. Albeit not formally using the doctrine of unconstitutional states of affairs, the T-760 court issued a set of structural injunctive remedies and launched an ambitious monitoring process not unlike that of T-025.<sup>35</sup> These actions were taken in order to nudge the government to address long-standing administrative and legislative bottlenecks that crippled the health-care system and overwhelmed courts with thousands of patients' petitions for basic medications and treatment.<sup>36</sup> Nevertheless, the monitoring quickly lost steam, and the decision has had only a moderate impact, one which ranks in between those of T-025 and T-153.

In line with the structure of this Article, my argument is twofold. First, I claim that in order to capture the full range of effects of court decisions, impact studies need to enlarge the conventional theoretical and methodological fields of vision. In addition to the direct material effects of court orders—those effects that follow immediately from the *enforcement* of the

---

32. CÉSAR RODRÍGUEZ GARAVITO & DIANA RODRÍGUEZ FRANCO, *CORTES Y CAMBIO SOCIAL: CÓMO LA CORTE CONSTITUCIONAL TRANSFORMÓ EL DESPLAZAMIENTO FORZADO EN COLOMBIA* [COURTS AND SOCIAL CHANGE: HOW THE CONSTITUTIONAL COURT TRANSFORMED FORCED DISPLACEMENT IN COLOMBIA] (2010).

33. C.C., abril 28, 1998, Sentencia T-153/98 (slip op.), available at <http://www.corteconstitucional.gov.co/relatoria/1998/T-153-98.htm>.

34. *Id.* at 74–75.

35. C.C., julio 31, 2008, Sentencia T-760/08 (slip op. at 200–03), available at <http://www.corteconstitucional.gov.co/relatoria/2008/T-760-08.htm>.

36. *Id.* at 195–200.

court order—attention should be paid to the broader impact, which includes equally important indirect and symbolic effects. Based on case study evidence, I posit that the potential range of relevant effects includes—in addition to governmental action specifically mandated by the court—the reframing of socioeconomic issues as human rights problems, the strengthening of state institutional capacities to deal with such problems, the forming of advocacy coalitions to participate in the implementation process, and the promoting of public deliberation and a collective search for solutions on the complex distributional issues underlying structural cases on SERs.

Second, with regard to court-controlled factors that may enhance a given ruling's overall impact, two important factors are (1) the type of orders and (2) the existence and nature of the court's monitoring. I argue that impact is likely to be higher when courts engage in "dialogic activism"<sup>37</sup> through two institutional mechanisms. First, dialogic rulings set broad goals and clear implementation paths through deadlines and progress reports, while leaving substantive decisions and detailed outcomes to government agencies. Orders of this nature are not only compatible with the separation of powers principle but also can bolster the overall efficacy of a given decision. Second, a dialogic approach to SER cases encourages participatory follow-up mechanisms—public hearings, court-appointed monitoring commissions, and invitations to civil society and government agencies to submit relevant information and participate in court-sponsored discussions—which both deepen democratic deliberation and enhance the impact of court interventions.

## I. The Blind Spot in the Debate over the Justiciability of Economic and Social Rights: The Impact of Rulings

### A. *The Effects of SER Rulings: An Analytical Framework*

Well-established interdisciplinary literature on courts and social transformation offers a useful conceptual and methodological framework to assess the effects of the recent wave of litigation and judicial activism on SERs. The literature has explored the impact of prominent judicial decisions on a variety of topics, including gender equality in the job market,<sup>38</sup> racial discrimination,<sup>39</sup> and prison overcrowding.<sup>40</sup> From different perspectives,

---

37. See Dixon, *supra* note 20, at 393 (describing the dialogic model of enforcing socioeconomic rights).

38. See, e.g., MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 1–2 (1994) (discussing the Supreme Court's decision in *County of Washington, Oregon v. Gunther*, 452 U.S. 161 (1981), which allowed women who alleged sexual discrimination through disparities in wages between different positions to sue under Title VII, but asserting that the decision had little direct impact on gender-based pay equity).

39. See, e.g., GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 39 (1991) (discussing several different authors' views on how *Brown v. Board of Education*, 347 U.S. 483 (1954), affected the Civil Rights Movement and race relations in the U.S.).

these studies have theorized and empirically evaluated the outcomes of the “rights revolution”<sup>41</sup> and the corresponding “juristocracy”<sup>42</sup> embodied by judges’ growing intervention in fundamental political and social questions.

Judicial-impact studies can be classified into two groups, depending on the type of effects on which the studies focus. On the one hand, some authors concentrate their attention on judicial decisions’ direct and palpable effects. Adopting a neorealist perspective, which views law as a set of norms that shapes human conduct, they apply a strict causality test to measure the impact of judicial interventions: a judgment is effective if it has produced an observable change in the conduct of those it directly targets.<sup>43</sup> For example, the question of determining Judgment T-025’s effects would be resolved by analyzing its impact on the conduct of government authorities in charge of public policy on forced displacement and, ultimately, by evaluating its consequences for IDPs.

The seminal work of this approach is that of Rosenberg on the effects of the *Brown v. Board of Education*<sup>44</sup> decision from the U.S. Supreme Court.<sup>45</sup> Contrary to the conventional view on *Brown*, which saw the decision as revolutionizing race relations in the U.S. and contributing to the birth of the civil rights movement in the 1960s, Rosenberg’s empirical study concluded that the judgment had little effect and that the faith placed in courts as mechanisms for social change was a “hollow hope.”<sup>46</sup> In his view, it was the political mobilization of the 1960s and the resulting antidiscrimination legislation (and not the structural judicial decision) that achieved racial desegregation.<sup>47</sup>

40. See, e.g., MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* 4 (1998) (using the prison reform cases as an illustration to construct a theory of judicial policy making).

41. CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 1–2 (1998). Epp defines the time period of the “rights revolution” as lasting from 1961, when the Supreme Court decided *Monroe v. Pape*, 365 U.S. 167 (1961)—which allowed civil lawsuits against state officers—to the late 1960s, when the Court became “the guardian of . . . individual rights.” *Id.*

42. RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 1 (2004). Hirschl defines “juristocracy” as the expansive judicial power that resulted from constitutional reforms shifting power from representative institutions to the judiciaries. *Id.*

43. See MCCANN, *supra* note 38, at 290 (explaining that in neorealist social science, “[c]ausality is presumed to initiate with discrete judicial agents and is assessed by the degree to which it imposes coercive or moral force on the general citizenry”).

44. 347 U.S. 483 (1954).

45. ROSENBERG, *supra* note 39, at 39.

46. See *id.* at 156 (“While it must be the case that Court action influenced some people, I have found no evidence that this influence was widespread or of much importance to the battle for civil rights.”).

47. See *id.* at 52 (comparing the extent of school desegregation following *Brown* to that following the enactment of the 1964 Civil Rights Act, and concluding that “[t]he actions of the Supreme Court appear irrelevant to desegregation . . . . Only after [Congress passed civil rights legislation] was there any desegregation of public schools in the South.”).

On the other hand, authors inspired by a constructivist conception of the relationship between law and society<sup>48</sup> have criticized Rosenberg and the neorealists for focusing only on judgments' direct, material effects. According to these critics, law and judicial decisions generate social transformation not only when they induce changes in the conduct of the groups and individuals directly involved in the case, but also when they produce indirect transformations in social relations or when they alter social actors' perceptions and legitimize the litigants' worldview.<sup>49</sup> Returning to the example of Judgment T-025, beyond its direct, material effects, it is possible that the decision has generated equally important indirect or symbolic effects. For example, it may have contributed to changing public perception of the urgency and gravity of forced displacement in Colombia, or it may have legitimized the claims and reinforced the negotiating power of human rights NGOs and international human rights agencies that had been pressuring the Colombian government to do more for the IDPs.

The preeminent work employing the constructivist approach is McCann's study on the effects of the legal strategies used by the feminist movement in fighting for wage equality in the United States.<sup>50</sup> McCann's findings suggest that litigation and judicial activism's indirect effects may be more important than the direct effects that neorealists focus on.<sup>51</sup> Thus, "[a]lthough judicial victories often do not translate automatically into desired social change, they can help to redefine the terms of both immediate and long-term struggles among social groups."<sup>52</sup>

These conceptual differences go hand in hand with methodological disagreements. Neorealists' epistemological positivism implies a nearly exclusive emphasis on quantitative research techniques that allow measurement of direct material effects. This is evident in impact studies inspired by the law and economics movement, whose conclusions tend to share Rosenberg's skepticism, as illustrated by the economic literature on the CCC's activism.<sup>53</sup>

48. See, e.g., Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 815–16 (1987) (formulating a constructivist theory of the legal field that views laws as a set of mutually constitutive set of institutions and symbols).

49. See *id.* at 837–39, 848 (characterizing the law as an “‘active’ discourse” capable of receiving universal recognition and thus is the “quintessential form of the symbolic power of naming that creates the things named, and creates social groups in particular”).

50. See MCCANN, *supra* note 38, at 48 (describing the feminist movement's legal mobilization, which consisted of general legal action that led to effective political organization).

51. See *id.* at 90–91 (“While lawyers, litigation, and legal discourse were hardly the sole or even the primary ‘causes’ of pay equity movement development, they did provide a very fundamental catalyzing force in the evolution of active struggle.”).

52. *Id.* at 285.

53. See, e.g., SERGIO CLAVIJO, FALLOS Y FALLAS DE LA CORTE CONSTITUCIONAL: EL CASO DE COLOMBIA 1991–2001 [FAULTS AND FAILURES OF THE CONSTITUTIONAL COURT: THE CASE OF COLOMBIA 1991–2001], at 19–44 (2001) (lambasting the CCC for its intervention in financial markets and the economy in general); SALOMÓN KALMANOVITZ, LAS INSTITUCIONES Y EL DESARROLLO ECONÓMICO EN COLOMBIA [INSTITUTIONS AND ECONOMIC DEVELOPMENT IN

In contrast, the constructivist approach widens the range of research strategies to include qualitative techniques that capture a given decision's indirect and symbolic effects; these are placed on equal footing with such quantitative techniques as analyses of social indicators and measurement of press coverage before and after the decision. One such technique is the use of in-depth interviews with public officials, activists, and members of the beneficiary population. These interviews examine the decision's impact on those individuals' perceptions of their situations and the strategies used to affect their situations.

To clarify and highlight the difference between these two perspectives, I have constructed a typology of the effects under consideration, which is illustrated in Table 1.

Table 1. Types and Examples of Effects of Judicial Decisions

	Direct	Indirect
Material	Designing public policy, as ordered by the ruling	Forming coalitions of activists to influence the issue under consideration
Symbolic	Defining and perceiving the problem as a rights violation	Transforming public opinion about the problem's urgency and gravity

On the one hand, as shown by the table's horizontal axis, rulings can have direct or indirect effects. Direct effects include court-mandated actions that affect participants in the case, be they the litigants, the beneficiaries, or the state agencies that are the targets of the court's orders. In the cases under consideration, the direct effects of the CCC's structural rulings included the government's decision to declare a state of economic emergency in late

---

COLOMBIA] 153–69 (2001) (criticizing the CCC for favoring public-service users, debtors, and trade unions during times of economic crisis). I have previously analyzed the confrontation between economists and constitutional lawyers over judicial activism in Colombia. *See generally* César Rodríguez-Garavito, *Toward a Sociology of the Global Rule of Law Field: Neoliberalism, Neoconstitutionalism, and the Contest over Judicial Reform in Latin America*, in *LAWYERS AND THE RULE OF LAW IN AN ERA OF GLOBALIZATION* 156 (Yzes Dezalay & Bryant G. Garth eds., 2011).

2009, which allowed it to issue a series of decrees ostensibly aimed at repairing the crisis of the health care system and complying with some of the court's orders in Judgment T-760.<sup>54</sup> Similarly, to comply with T-153's main order, the government's planning council issued a document laying out a policy strategy for dealing with prison overcrowding.<sup>55</sup>

Indirect effects include all kinds of consequences that, without being stipulated for in the court's orders, nonetheless derive from the decision. They affect not only the parties to the case but also other social actors. For instance, structural injunctive remedies often prompt sympathetic state agencies and NGOs to seize the opportunity opened up by the decision and to become involved in the follow-up process above and beyond what the court had initially contemplated. For instance, a proactive Ombudsman's Office in Colombia put pressure on the government to undertake prison reform in the aftermath of the decision on prison overcrowding,<sup>56</sup> while several NGO coalitions formed to advocate health care reform under the example of T-760.<sup>57</sup>

On the other hand, as represented by the table's vertical axis, judicial decisions can generate material or symbolic effects.<sup>58</sup> The former category entails tangible changes in the conduct of groups or individuals. Symbolic effects consist of changes in ideas, perceptions, and collective social constructs relating to the litigation's subject matter. In sociological terms, they imply cultural or ideological alterations with respect to the problem posed by the case.<sup>59</sup>

For instance, when judicial interventions attract media coverage, the interventions may shape the understanding that both the media and the public have of the issue under consideration. This was the case with T-760, which

---

54. Interestingly, the government's decree declaring the emergency (and the resulting decrees that reformed key components of the health care system) were subsequently struck down by the CCC on grounds that the administration could not resort to state-of-emergency legislation to fix policy failures caused by its own negligence, including its inaction vis-à-vis the structural injunctions of Judgment T-760. C.C., abril 21, 2010, Sentencia C-252/10 (slip op. at 164–65, 189), available at <http://www.corteconstitucional.gov.co/relatoria/2010/C-252-10.htm>.

55. Interview with Patricia Ramo, Ombudsman's Office Delegate for Criminal and Prison Policy, in Bogotá, Colom. (Oct. 22, 2010).

56. *Id.*

57. For an example of such a coalition, consider *Así Vamos en Salud. Seguimiento al cumplimiento de las órdenes impartidas en la Sentencia T-760 de 2008* [Monitoring the Compliance with the Orders Issued in Judgment T-760 of 2008], ASÍ VAMOS EN SALUD, [http://www.asivamosensalud.org/index.php?option=com\\_content&view=article&id=224%3ASentencia+T-+760+de+2008&catid=36%3ALecturas+sugeridas&Itemid=1](http://www.asivamosensalud.org/index.php?option=com_content&view=article&id=224%3ASentencia+T-+760+de+2008&catid=36%3ALecturas+sugeridas&Itemid=1) (last updated Sept. 11, 2009) (recognizing the organization's interest in monitoring compliance with Sentencia T-760/08).

58. MAURICIO GARCÍA VILLEGAS, *LA EFICACIA SIMBÓLICA DEL DERECHO* [THE SYMBOLIC EFFECTIVENESS OF LAW] 237–61 (1993) (expounding upon various degrees of symbolism in the law, spanning from expressive acts (mostly symbolic) to substantive acts (mostly material)).

59. See Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AM. SOC. REV. 273, 273 (1986) (offering “an image of culture as a ‘tool kit’ of symbols, stories, rituals, and world-views, which people may use in varying configurations to solve different kinds of problems”).

prompted the reframing of the health care issue in Colombia.<sup>60</sup> My content analysis of news and opinion pieces published in the country's two main press outlets indicates that before the CCC's decision, the most frequent frame for speaking about the issue was one of "institutional crisis" (which was dominant in 60% of the pieces published between 2004 and mid-2008). The reframing process can be clearly seen at work in the press coverage following the decision: between mid-2008 and late 2010, the press framed the large majority (72%) of the pieces in terms of the "right to health."<sup>61</sup>

As the table portrays, the intersection of these two classifications gives rise to four types of effects: direct material effects (formulation of a policy ordered by the court); indirect material effects (intervention of new actors in the debate); direct symbolic effects (reframing of media coverage); and indirect symbolic effects (the transformation of public opinion on the matter).

With this typology in mind, let us return to the contrast between the neorealist and constructivist approaches. While neorealists center on direct material effects, i.e., on the ruling's *enforcement*,<sup>62</sup> constructivists consider all four types.<sup>63</sup> This explains why a judgment can be seen as ineffective by the neorealists and as effective by the constructivists, to the extent that what is seen as impact for the latter group includes a broader set of effects.

In this vein, a neorealist analysis would conclude that virtually all landmark cases in SER jurisprudence have had little impact. Consider, for instance, the well-known South African Constitutional Court ruling on the right to housing in the *Grootboom* case.<sup>64</sup> The fact that the plaintiff, Irene Grootboom, died in a shack while waiting for a decent house eight years after winning the case would suggest that the ruling was in vain, as its expected direct material effects failed to materialize.<sup>65</sup> This conclusion, however, ignores important outcomes of the case. For instance, it misses the multiple indirect material and symbolic effects produced by the *Grootboom* ruling, from the flood of similar litigation whereby communities in different parts of South Africa managed to fend off eviction to the creation of emergency housing policies.<sup>66</sup>

---

60. See Thomas C. Tsai, *Second Chance for Health Reform in Colombia*, 375 LANCET 109, 109 (2010) ("[T]he spirit of T-760 . . . advocates for a re-examination of how health resources in Colombia have been traditionally allocated to provide for an equitable and effective health insurance system . . .").

61. The two media outlets included in the study were the daily *El Tiempo* and the weekly *Semana*.

62. See *supra* notes 43–47 and accompanying text.

63. See *supra* notes 48–52 and accompanying text.

64. See *Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) at 79 (finding that the housing rights of people living in informal settlements in Cape Town had been violated).

65. Pearlie Joubert, *Grootboom Dies Homeless and Penniless*, MAIL & GUARDIAN ONLINE (Aug. 8, 2008), <http://www.mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless>.

66. See Elisabeth Wickeri, *Grootboom's Legacy: Securing the Right to Access to Adequate Housing in South Africa?* iii (N.Y. Univ. Sch. Law Ctr. for Human Rights & Global Justice, Econ., Soc. & Cultural Rights Series, Working Paper No. 5, 2004), available at <http://>

My study of the impact of the CCC's structural decisions finds empirical support for the constructivist approach. Indeed, my case studies suggest that indirect and symbolic effects may have legal and social consequences that are just as profound as the decision's direct material effects. These various forms of judicial impact have been most visible in the seven-year monitoring process of Judgment T-025, which illustrates the above-mentioned typology.

*B. The Effects of SER Rulings: The Case of Judgment T-025*

In T-025, the CCC laid down three main orders. First, it mandated that the government formulate a coherent plan of action to tackle the IDPs' humanitarian emergency and to overcome the unconstitutional state of affairs.<sup>67</sup> Second, it ordered the administration to calculate the budget that was needed to implement such a plan of action and to explore all possible avenues to actually invest the amount calculated on programs for IDPs.<sup>68</sup> Third, it instructed the government to guarantee the protection of at least the survival-level content ("essential core") of the most basic rights—food, education, health care, land, and housing.<sup>69</sup> All of these orders were directed to all relevant public agencies, including national governmental entities and local authorities.<sup>70</sup>

After seven years, what effects have these and subsequent orders had? Interviews with key actors, content analysis of press coverage, participatory observation of court-sponsored meetings and hearings, and data from the extensive paper trail left by this case substantiate the existence of six major effects, as represented in Table 2.

---

[www.chrgj.org/publications/docs/wp/Wickeri%20Grootboom%27s%20Legacy.pdf](http://www.chrgj.org/publications/docs/wp/Wickeri%20Grootboom%27s%20Legacy.pdf) ("[D]espite the absence of sweeping change for South Africans . . . *Grootboom* provided a powerful tool for communities").

67. C.C., enero 22, 2004, Sentencia T-025/04 (slip op. at 96), available at <http://www.corteconstitucional.gov.co/relatoria/2004/T-025-04.htm>.

68. *Id.*

69. *Id.* at 99–108.

70. *Id.*

Table 2. Effects of Judgment T-025

	Direct	Indirect
Material	Unlocking	Policy Coordination Participatory
Symbolic	Sectoral	Reframing

*Source:* Adapted from CÉSAR RODRÍGUEZ GARAVITO & DIANA RODRÍGUEZ FRANCO, *CORTES Y CAMBIO SOCIAL: CÓMO LA CORTE CONSTITUCIONAL TRANSFORMÓ EL DESPLAZAMIENTO FORZADO EN COLOMBIA [COURTS AND SOCIAL CHANGE: HOW THE CONSTITUTIONAL COURT TRANSFORMED FORCED DISPLACEMENT IN COLOMBIA]* (2010).

1. *Unlocking effect.*—T-025’s immediate effect was to shake up state bureaucracies in charge of attending to the displaced population.<sup>71</sup> By ordering the government to draft a coherent policy to protect the rights of IDPs and by setting deadlines for progress, the CCC used SERs as “destabilization rights,”<sup>72</sup>—leverage points for breaking institutional inertia and prompting the government into action. Thus, in terms of the above typology, this was a direct material impact of the ruling.

Several interviewees highlighted this effect. For instance, the attorney in charge of IDP issues at the Ombudsman’s Office explained how the lingering deadlines to report back to the court served as an effective nudge for the relevant government agencies. He recalled that “in interagency preparatory meetings prior to follow-up meetings with the court, national and local law enforcement officials would state that they had to hurry because they were going before the court or because they would miss the court’s

71. *Id.* at 50–52.

72. See ROBERTO MANGABEIRA UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* 530–35 (1987) (outlining the theory of “destabilization rights”).

deadline.”<sup>73</sup> As we will see, the court kept the pressure on the government through follow-up orders and meetings, which further nudged the government into action.<sup>74</sup> Thus, as a newspaper editorial put it in 2007, the judgment

was key in energizing the attitude of the government. Periodic orders from the court, which opened the process for contempt complaints against government officials—as well as critical reports from the Attorney General, the Comptroller, and the Ombudsman on the failures of implementation—have kept the pressure on the government to fulfill its obligations.<sup>75</sup>

2. *Coordination effect.*—The structural policy failures underlying the IDPs’ humanitarian emergency stemmed not only from the inaction of relevant institutions but also from the lack of coordination among them.<sup>76</sup> In instructing those institutions to collaborate on the design, financing, and implementation of a unified policy on IDPs, the CCC promoted this type of coordination, both among agencies directly targeted by the decision and among agencies indirectly related to the case. Hence, as represented in Table 2, this was a material effect with direct and indirect manifestations.

In the words of a Ministry of Education official, “the ruling told us to put our own house in order. And it allowed us in government to solve who does what, and to determine which tasks need to be carried out collaboratively by everyone.”<sup>77</sup> Although far from perfect, the result is a functioning interagency coordination committee that meets regularly and reports back to the court.<sup>78</sup>

3. *Policy effect.*—Judgment T-025 has had a sizable impact on the design of a long-term national policy on IDPs, as well as on the establishment of mechanisms to implement, fund, and monitor the program. Indeed, one year after the judgment, in direct response to the court’s first order, the government issued the National Plan for Comprehensive Care for People Displaced by Violence.<sup>79</sup> Interestingly, although this development

---

73. Interview with Hernando Toro, Coordinator, Ombudsman’s Office of Attention to Displacement, in Bogotá, Colom. (Jan. 22, 2009).

74. See RODRÍGUEZ GARAVITO & RODRÍGUEZ FRANCO, *supra* note 32, at 84–90 (detailing the court’s mechanisms for holding the government accountable for the requirements of T-025).

75. Editorial, *El año de los desplazados* [The Year of the Displaced], EL TIEMPO, May 21, 2008, <http://www.eltiempo.com/archivo/documento/CMS-4200986>.

76. See generally RODRÍGUEZ GARAVITO & RODRÍGUEZ FRANCO, *supra* note 32, at 142–68 (describing the lack of coordination at the national level, within local authorities, and between central and local authorities).

77. Interview with Janeth Guevara Triana, Coordinator of Well-Being and Soc. Sec. of Teachers and Dirs., Ministry of Educ., in Bogotá, Colom. (Feb. 5, 2009).

78. Interview with Luis Domingo Gómez, Coordinating Committee Member, Ministry of the Environment, in Bogotá, Colom. (Jan. 11, 2009).

79. L. 250, febrero 7, 2005, DIARIO OFICIAL [D.O.] 45816 (Colom.).

is significant on its face, it also reveals the symbolic consequences of the ruling, as the government explicitly adopted the language and the legal framework of the court's "rights approach" (*enfoque de derechos*) in this and subsequent policy documents and regulations<sup>80</sup>—hence the intermediate location of this effect in Table 2.

Moreover, T-025 had a direct impact on the government's allocation of funds for programs for IDPs, due to the court's second order. Indeed, the ruling prompted the administration to triple the budget allocated to these programs in 2004 and has had a steady upward effect on the budget since that time.<sup>81</sup> The 2010 national budget for IDP programs, albeit still insufficient, was more than ten times that of 2003.<sup>82</sup>

4. *Participatory effect.*—The follow-up process to T-025 has opened up judicial proceedings and policy making to a broad range of governmental and nongovernmental actors. This key material effect has been partly the direct product of the ruling and partly an indirect, unexpected consequence of it. From the beginning, the CCC's orders directly involved not only the core government agencies responsible for IDPs—the Ministry of the Interior and *Acción Social* (the agency in charge of antipoverty programs)—but also all others with related responsibilities at the international, national, and local levels.<sup>83</sup>

Interestingly, an indirect outcome of the judgment was the formation of civil-society organizations and coalitions to participate in the monitoring process. NGOs such as *CODHES*, *DeJuSticia*, and *Viva la Ciudadanía* joined efforts with grassroots organizations, sectors of the Catholic Church, and academia to found a coalition specifically geared to contribute to the implementation of T-025: the Monitoring Commission on Public Policy on Forced Displacement.<sup>84</sup> In a striking boomerang effect, the CCC subsequently acknowledged the commission as party to the follow-up procedures and relied heavily on the data and recommendations that the commission submitted.<sup>85</sup> Thus, although it was not officially appointed as such by the

80. *See id.* at 2 (listing *enfoque de derechos* as one of the guiding principles of the National Plan).

81. ACCIÓN SOCIAL, DESPLAZAMIENTO FORZADO EN COLOMBIA [FORCED DISPLACEMENT IN COLOMBIA] 7 (2011), available at <http://www.accionsocial.gov.co/documentos/Retornos/CIDH%20Desplazamiento%20Forzado%20en%20Colombia%20Marzo%202010%20para%20Canciller%3%ADa1.pdf>.

82. *See id.* (identifying the budget allocations for IDPs in Colombia from 1999 through 2010).

83. *See, e.g.*, C.C., enero 22, 2004, Sentencia T-025/04 (slip op. at 108–33), available at <http://www.corteconstitucional.gov.co/relatoria/2004/T-025-04.htm> (directing a variety of agencies to take steps to comply with the goals of the order).

84. RODRÍGUEZ GARAVITO & RODRÍGUEZ FRANCO, *supra* note 32, at 119–20.

85. Although the court has not issued an official declaration making the commission a party, it has effectively acknowledged it as a party. *See, e.g.*, C.C., mayo 4, 2007, Auto 109/07 (slip op. at 64–69), available at <http://www.corteconstitucional.gov.co/relatoria/Autos/2007/A109-07.htm> (adopting indicators proposed by the commission to measure governmental progress in the

CCC, the commission has, in practice, played a role similar to that of the monitoring committees set up by the Indian supreme court to oversee the implementation of its decision.<sup>86</sup>

As explained below, the CCC has encouraged engagement by, and dialogue among, state agencies and civil-society organizations through hearings and periodic petitions for information, thus promoting the type of dialogic judicial activism that I argue can enhance the impact of SER rulings.

5. *Sectoral effect.*—Every SER ruling targets specific sectors of the population as beneficiaries, be it homeless citizens vindicating their right to decent housing, as in *Grootboom*; disgruntled patients asking courts to make their right to health real, as in T-760; or detainees in overcrowded prisons going to court to demand decent conditions of incarceration. A key question, therefore, is what effects a given ruling has on the conditions of that specific social sector. In this case, has T-025 contributed to the amelioration of the socioeconomic situation of the Colombian IDPs?

There is no definitive answer to this question, as attempts to answer are riddled with methodological difficulties. Specifically, one of the defining traits of systemic policy failures is the lack of reliable data on the conditions of the victimized population. Indeed, this was one of the reasons why the CCC declared an unconstitutional state of affairs in T-025.<sup>87</sup> Thus, we lack a baseline for making comparisons with the IDPs' socioeconomic situation after the decision.

However, because the above-mentioned civil society, the Monitoring Commission on Public Policy on Forced Displacement, collects quality survey data, it is at least possible to have a sense of the evolution of the conditions of the IDPs after the judgment. The latest figures show that the situation has changed little: although access to education and health care has dramatically improved, benefitting nearly 80% of IDPs,<sup>88</sup> conditions with

---

fulfillment of IDP rights); C.C., enero 26, 2009, Auto 008/09 (slip op. at 67–74), available at <http://www.corteconstitucional.gov.co/RELATORIA/Autos/2009/A008-09.htm> (notifying the commission of the court's decision to maintain the declaration of an unconstitutional state of affairs in light of insufficient progress in governmental compliance with T-025).

86. See Muralidhar, *supra* note 16, at 110 (stating that the Indian supreme court has enlisted the help of such institutions as the National Environment Engineering Research Institute to submit reports and recommendations).

87. See C.C., enero 22, 2004, Sentencia T-025/04 (slip op. at 58), available at <http://www.corteconstitucional.gov.co/relatoria/2004/T-025-04.htm> (noting that the lack of adequate information about zones that are fit for housing construction has frustrated the objectives of the program and generated resentment in some neighborhoods, and ordering the government agencies to provide the necessary information about existing measures so that the government could weigh the correct balance between security and economic assistance in order to provide adequate living conditions for IDPs).

88. COMISIÓN DE SEGUIMIENTO A LA POLÍTICA PÚBLICA SOBRE EL DESPLAZAMIENTO FORZADO [MONITORING COMMISSION ON PUBLIC POLICY ON FORCED DISPLACEMENT], SEPTIMO INFORME DE VERIFICACIÓN SOBRE EL CUMPLIMIENTO DE DERECHOS DE LA POBLACIÓN EN

regards to all other SERs continue to be unsatisfactory. To illustrate, 98% of IDPs live in poverty, only 5.5% have adequate housing, and only 0.2% of displaced families received the legally mandated emergency humanitarian assistance in the months immediately following their forced displacement.<sup>89</sup> Moreover, forced displacement continues at exorbitant levels: 280,000 people were uprooted in 2010, bringing the total number of persons displaced in Colombia in the past twenty-five years to over five million, the largest forcibly displaced population in the world.<sup>90</sup>

As suggested by the location of this type of impact in Table 2, court decisions can also have symbolic effects on the beneficiary social sector, as their members and organizations adopt the language of the law to frame their future claims. This was evident in interviews and participant observation with leaders of the IDP population, whose discourse was peppered with allusions to the technical language of the court. Terms such as *tutela* (constitutional action), *auto* (follow-up injunction), or *audiencia* (hearing) often become intertwined with personal stories of uprooting and radical deprivation.<sup>91</sup>

6. *Reframing effect.*—Symbolic reshaping extends beyond the right holders targeted by the ruling. Through T-025 and the follow-up process, the CCC has helped to reframe the issue of forced displacement—once considered a side effect of armed conflict—as a human rights problem requiring an immediate reaction. This is an indirect consequence of the ruling, in that it concerns a group of actors much broader than the IDPs, from the media to international human rights agencies to the public at large.

Content analysis of press coverage on forced displacement offers a hint about the operation of this effect. Whereas in the period prior to the judgment (2000–2003), the press covered displacement mostly through the frame of “armed conflict,” in the subsequent period (2004–2010), legal categories have come to dominate press coverage of the issue. Indeed, forced displacement is discussed mostly in pieces whose dominant frame is “human rights violations” or “lack of compliance with the law.”<sup>92</sup>

In sum, beyond the specifics of T-025, the empirical analysis of its effects illustrates a general point: judicial activism with regard to SERs may

---

SITUACIÓN DE DESPLAZAMIENTO [SEVENTH VERIFICATION REPORT ON COMPLIANCE WITH THE RIGHTS OF DISPLACED POPULATIONS] 87 (2008).

89. *Id.* at 55, 133, 150.

90. CODHES, *supra* note 2, at 8.

91. Interview with Anonymous, ADACHO [Association of Displaced Afro-Colombians of the Chocó Province], in Quibdó, Colom. (July 24, 2008); Interview with Eusebio Mosquera, Founder, AFRODES [National Association of Displaced Afro-Colombians], in Geneva, Switz. (Aug. 9, 2009).

92. Lisa J. Laplante & Kimberly Theidon, *Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz*, 28 MICH. J. INT'L L. 49, 56 (2006) (observing the “human rights violations,” including “forced displacements,” resulting from armed conflict in Colombia).

have consequential impacts that go well beyond the direct and material consequences following from the court orders. And these impacts become visible with the aid of an expanded analytical and methodological toolkit.

This is not to suggest, of course, that structural rulings on SERs in general, and T-025 in particular, produce the whole range of effects, nor that when they do have an impact, the impact is substantial. Indeed, the results of T-025 have been mixed. While some of its effects (such as the unlocking and reframing effects) have been profound, others (such as the sectoral and coordination effects) have been moderate.

Nonetheless, the breadth and depth of T-025's effects remain striking when compared to those of other structural rulings by the CCC and other tribunals. What accounts for this variation? Why have decisions like T-025 had greater impact than others, like T-153 or T-760? In the following Part, I argue that institutional mechanisms associated with dialogic judicial activism provide useful clues to answer these questions.

## II. Judicial Impact and Dialogic Activism

### A. *An Empirical Case for Dialogic Activism*

Inspired by decisions like T-025 and *Grootboom*, a growing literature in comparative constitutionalism has extolled rulings that, in addition to protecting SERs, promote democratic deliberation. Proponents of this type of dialogic activism aim for an intermediate path between judicial restraint and juristocracy.<sup>93</sup> While defending the justiciability of SERs, they criticize rulings that, by imposing detailed policies and programs, encroach upon the purview of the executive and legislative branches and close off opportunities for public debate on the underlying socioeconomic issues.<sup>94</sup>

Thus far, the case for dialogic activism has rested on democratic theory and constitutional law. In response to the classic objection against judicial activism—that it allegedly lacks democratic legitimacy and violates the separation-of-powers principle—constitutional scholars and theorists of deliberative democracy have cogently demonstrated the democratic credentials of judicial interventions that elicit collaboration among the different branches of power and promote deliberation on public issues.<sup>95</sup> On the other

---

93. See, e.g., Dixon, *supra* note 20, at 393 (arguing for “a commitment to constitutional ‘dialogue’ as the most desirable model of cooperation between courts and legislatures in the enforcement of socioeconomic rights”).

94. See *id.* at 407 (positing that where courts uphold rights-based claims with sweeping effects without employing the dialogic approach “the relationship between judicial review and democracy will tend to become far less certain”).

95. See, e.g., Víctor Abramovich, *Courses of Action in Economic, Social and Cultural Rights: Instruments and Allies*, 2 SUR - INT'L J. ON HUM. RTS. 181, 196–205 (2005) (characterizing typical ways in which the judiciary oversees compliance with legal standards and thus participates in a dialogue of sorts with other branches of government); Roberto Gargarella, *Should Deliberative Democrats Defend the Judicial Enforcement of Social Rights?*, in DELIBERATIVE DEMOCRACY AND

hand, in critical engagement with overly expansive understandings of the role of courts, scholars have pointed out the shortcomings of court-imposed policies that circumvent the channels of democratic representation and deliberation.<sup>96</sup> Together, these and other contributions have made a case for dialogic activism on grounds that it deepens democratic legitimacy in constitutional regimes committed to decent standards of economic well-being.<sup>97</sup>

Here I want to make a different yet complementary case for dialogic activism's ability to enhance courts' impact on the fulfillment of SERs. This argument addresses the other classical objection against activism—that courts lack the requisite institutional capacity to deal with complex socio-economic issues and enforce their rulings.<sup>98</sup>

Upon close examination, it becomes clear that this line of critique identifies judicial activism with a specific variety of court interventions. In terms of Tushnet's criteria for distinguishing "strong" judicial remedies from "weak" ones<sup>99</sup>—that is, the breadth of orders and the extent to which orders are compulsory and preemptory—the critique assumes that activist courts opt for strong remedies that not only set a course for addressing policy failures but also determine the minutiae of the new policies.<sup>100</sup> What the critics have in mind is the kind of activism that marked American jurisprudence from the 1950s through the 1980s, characterized by rulings ordering particular policy and institutional reforms. As exemplified by many judicial interventions seeking to reform the dysfunctional U.S. prison system, judges

---

ITS DISCONTENTS 233, 244–48 (Samantha Besson & José Luis Martí eds., 2006) (discussing examples of ways in which courts can intervene to implement social rights that are "fully respectful of the authority of the legislature" and "honor . . . their commitment to democracy"); Rodrigo Uprimny Yepes, *Should Courts Enforce Social Rights? The Experience of the Colombian Constitutional Court*, in JUSTICIABILITY OF ECONOMIC AND SOCIAL RIGHTS: EXPERIENCES FROM DOMESTIC SYSTEMS 355, 386 (Fons Coomans ed., 2006) (observing that the implementation of judicial decisions on SERs depends, among other factors, on "judicial mechanisms to guarantee their effective compliance, put forth in consensual contexts, which social movements . . . can politically appropriate and include in a legal strategy that forms part of their wider political struggle").

96. See, e.g., Gargarella, *supra* note 95, at 237–39 (collecting authorities by authors and judges who argue for reduced participation of the judiciary in enforcing social rights); Rodríguez-Garavito, *supra* note 17, at 175–78 (describing the clash and ultimate stalemate between the supporters of progressive neoconstitutionalism, notably the Colombian Constitutional Court, and supporters of neoliberal economics); Sabel & Simon, *supra* note 16, at 1017 (noting the criticism that in SER cases in which the remedy entails institutional restructuring, courts may lack the information necessary to supervise such restructuring).

97. See, e.g., Dixon, *supra* note 20, at 394 (celebrating "the potential for a constitutional judiciary to enhance the overall inclusiveness and responsiveness of a constitutional democracy").

98. See ROSENBERG, *supra* note 39, at 21 ("Courts lack the tools to readily develop appropriate policies and implement decisions ordering significant social reform.").

99. MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 21 (2008) ("Courts exercise strong-form judicial review when their interpretive judgments are final and unreviewable.").

100. See DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 4–7 (1977) (criticizing decisions of United States federal courts that imposed complex or highly specific remedies in a deviation from the courts' traditional judicial role).

not only declared the existence of a structural violation of prisoners' rights, they also sought to address the violation through detailed orders on matters as specific as the number of guards that should be hired and details about the designs of prison facilities.<sup>101</sup> This is the same variety of activism seen in some of the CCC's rulings of the 1990s. For instance, in a 1999 decision, the CCC not only declared unconstitutional the national system of housing finance but also set detailed parameters of new legislation, which the court ordered congress to produce in order to replace the extant system.<sup>102</sup>

Further, critics tend to take for granted the process of implementation that is predominant in these rulings. It is a closed and top-down process, which tends to feature courts imposing specific policy alternatives on impermeable bureaucracies and interest groups resistant to change. Under these conditions, it is unsurprising that the courts' institutional capacities are insufficient to enforce their judgments, as is demonstrated by empirical studies on this type of monologic activism.<sup>103</sup>

In practice, detailed top-down orders generate transformations much less ambitious than those envisioned by the courts, largely because of resistance from vested interests and because of the legal and technical limitations on courts' abilities to deal with structural social problems. A telling case is the above-mentioned CCC ruling, C-700/99,<sup>104</sup> which sought to replace the national system of housing finance with a court-designed one.<sup>105</sup> Although the Colombian congress complied with the court's order to pass a bill establishing a new mortgage system, the myriad technical complexities of implementation, coupled with organized resistance from the financial sector, diluted the ruling into thousands of individual suits that mortgage debtors have fruitlessly brought before civil courts to have debts refinanced as ordered by the CCC.<sup>106</sup> In light of this, the CCC itself has backtracked in its more recent jurisprudence on housing finance, which has further eroded the implementation of its original decision.<sup>107</sup>

Evidence of the limited effects of monologic activism and concerns about democratic credentials do not undermine judicial activism per se, as defenders of judicial restraint would have it. Nor do these effects call into question the justiciability of SERs at large. However, these effects do call

---

101. See FEELEY & RUBIN, *supra* note 40, at 13–14 (detailing the rise of prison-reform cases and the extent of court intervention).

102. C.C., septiembre 16, 1999, Sentencia C-700/99 (slip op. at 67), available at <http://www.corteconstitucional.gov.co/relatoria/1999/C-700-99.htm>.

103. See, e.g., ROSENBERG, *supra* note 39, at 52 (noting the lack of progress in desegregating southern schools in the years following *Brown*).

104. C.C., septiembre 16, 1999, Sentencia C-700/99 (slip op.), available at <http://www.corteconstitucional.gov.co/relatoria/1999/C-700-99.htm>.

105. *Id.* at 67.

106. Interview with William Jiménez, Attorney, in Bogotá, Colom. (Oct. 14, 2010). Mr. Jiménez represents banks in mortgage-collection suits.

107. *Id.*

for a reconstruction of the theory and practice of court interventions in structural socioeconomic issues, in order to address the above-mentioned objections through dialogic activism.

*B. The Workings of Dialogic Activism*

Whether a given SER judgment is more or less dialogic depends on the court's choices with regards to three components of the ruling: substantive content, remedies, and monitoring mechanisms. The decision's substantive content relates to whether and to what extent the court declares that there has been a violation of a justiciable SER. As explained, this declaratory stage is the focus of most of the jurisprudence and literature on the justiciability of SERs. In terms of Tushnet's typology of judicial approaches to SERs, the choice that a court faces at this juncture is whether to affirm the justiciability of an SER in the case at hand, and, if it finds for the plaintiff, how strongly to interpret the scope of the plaintiff's rights. Thus, activist rulings, of both the monologic and dialogic varieties, entail the affirmation of "strong rights."

With regard to remedies, whereas monologic judgments involve precise, outcome-oriented orders, dialogic judgments tend to outline procedures and broad goals and, in line with the principle of separation of powers, place the burden on government agencies to design and implement policies. In terms of Tushnet's criteria to distinguish "strong" judicial remedies from "weak" ones—that is, the breadth of orders and the extent to which orders are compulsory and peremptory—dialogic remedies tend to be weaker.<sup>108</sup>

Missing from Tushnet's typology is a third component, monitoring, which is factually and analytically distinct from remedies. Regardless of the strength of their decisions' rights and remedies, courts face the choice of whether to retain supervisory jurisdiction over the implementation of those decisions. Dialogic decisions tend to open a monitoring process that encourages discussion of policy alternatives to solve the structural problem detected in the ruling. Unlike monologic judicial proceedings, the minutiae of the policies arise during the course of the monitoring process, not in the judgment itself. Dialogic courts often issue new decisions in light of progress and setbacks in the process and encourage discussion among actors in the case through deliberative public hearings.<sup>109</sup> As noted, this constitutional dialogue involves a broader spectrum of stakeholders in the

---

108. Given my focus on structural rulings that mandate positive actions by the executive or the legislature, I do not dwell on negative remedies here, i.e., those that order elected authorities to abstain from a given course of action found to violate an SER, such as disproportionately taxing the poor. A deeper discussion of the topic is provided by Rodrigo Uprimny. *See* Uprimny, *supra*, note 95, at 381 (discussing types of judicial decisions, and clarifying that "negative remedies are judicial enforcements of prohibitions").

109. The T-025 decision itself provides a prime example of this process. *See supra* subpart I(B).

monitoring process. In addition to the court and state agencies directly affected by the judgment, implementation involves victims whose rights have been violated, relevant civil-society organizations, international human rights agencies, and other actors whose participation is useful for the protection of the rights at issue, including grassroots organizations and academics.

This threefold characterization allows for an assessment of the monologic or dialogic character of a given ruling or court. The most dialogic decisions in structural cases involve a clear affirmation of the justiciability of the right in question (strong rights); leave policy decisions to the elected branches of power while laying out a clear roadmap for measuring progress (moderate remedies); and actively monitor the implementation of the court's orders through participatory mechanisms like public hearings, progress reports, and follow-up decisions (strong monitoring).

There are stark differences among activist courts (and among decisions of the same court) on each of the three dimensions. For example, the South African Constitutional Court has tended to adopt a combination of strong rights, weak remedies, and no monitoring. In iconic cases such as *Grootboom* and *Treatment Action Campaign*,<sup>110</sup> it has chosen not to set deadlines or follow-up proceedings for enforcement.<sup>111</sup> In contrast, the Indian supreme court has traditionally resorted to a mixture of strong rights, strong remedies, and strong monitoring mechanisms;<sup>112</sup> however, its recent, more dialogic jurisprudence can be better characterized as a combination of strong rights, moderate remedies, and strong monitoring.<sup>113</sup> In the middle are decisions such as *Riachuelo*, which concerned river basin pollution in Argentina and had a mix of strong rights, weak remedies, and weak monitoring.<sup>114</sup>

---

110. *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC).

111. *See id.* at 750, 763 (declaring a violation of the right to health of HIV and AIDS patients because of access barriers to antiretroviral medication but declining to set forth a blanket approach for enforcement or a deadline for compliance); *Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) at 86–87 (requiring the government to implement and supervise measures to provide shelter but declining to set a timetable for such implementation).

112. *See* Muralidhar, *supra* note 16, at 109 (summarizing jurisprudence that recognizes explicit rights, including a right of education flowing from the right to life; that requires compliance on a timetable; and that allows the court to exercise a “continuing mandamus” whereby it keeps the case active to ensure implementation of its directives).

113. *See* Abhinav Chandrachud, *Dialogic Judicial Activism in India*, THE HINDU (July 18, 2009), <http://hindu.com/2009/07/18/stories/2009071852820800.htm> (observing that the court's rights jurisprudence has extended from the rights of the impoverished to public administration and that its opinions have become foundations for dialogue and transparency, although this development may undermine enforceability).

114. *See* Farstein, Kletzel & García Rey, *supra* note 27, at 59–60 (recognizing the success of the *amparo* process in compelling the cleanup of the Riachuelo basin and the delegation of authority to implement the cleanup plan to an authority created by congress).

Do these differences have a bearing on judicial impact? Evidence from the comparative case study of the CCC's rulings suggests that they do. I turn to this evidence in the next subpart.

### *C. The Impact of Dialogic Activism*

The three key structural rulings of the CCC share a strong rights approach. The foundational decision, T-153/98, was a strong condemnation of prison overcrowding for violating detainees' basic rights; the court also decisively affirmed the justiciability of these rights.<sup>115</sup> Similarly painstaking accounts and condemnation of massive SER violations can be found in the subsequent rulings on IDPs (T-025/04) and health care (T-760/08).<sup>116</sup>

With regard to remedies, however, a sharp break is evident between earlier rulings and more recent jurisprudence. In T-153, the CCC adopted the strong-remedies approach by handing down detailed orders for the government to (1) immediately suspend a contract for the renovation of one of the largest prisons in Bogotá; (2) formulate, in three months, a comprehensive plan for the renovation of existing prisons and the construction of new ones, which was to be executed within a four-year period; and (3) put an end, in four years, to the confinement of detainees under trial in the same prisons as convicted detainees.<sup>117</sup>

As noted, the T-025 court adopted a more procedural, dialogic approach by leaving it to the government to decide the content of IDP programs and the requisite funding for carrying them out.<sup>118</sup> At the same time, however, it set stringent deadlines and handed down an outcome-oriented order requiring the government to begin protecting the most basic rights of IDPs in the short term (within six months).<sup>119</sup> Thus, in terms of the above classification, this decision entailed moderate remedies.

A similarly moderate, intermediate approach to remedies is evident in the more recent decision on health care. Most of the decision's orders are means-oriented, mandating that the government formulate a contingency plan to deal with the impending bankruptcy of the health care system,

---

115. See C.C., abril 28, 1998, Sentencia T-153/98 (slip op. at 77), available at <http://www.corteconstitucional.gov.co/relatoria/1998/T-153-98.htm> (describing the Colombian prisons as contributing to a "systematic [violation] of the most fundamental human rights").

116. See C.C., julio 31, 2008, Sentencia T-760/08 (slip op. at 172-76), available at <http://www.corteconstitucional.gov.co/relatoria/2008/T-760-08.htm> (discussing issues with access to service when patients cannot afford to pay and recognizing a fundamental right to health); C.C., enero 22, 2004, Sentencia T-025/04 (slip op. at 59-62), available at <http://www.corteconstitucional.gov.co/relatoria/2004/T-025-04.htm> (recounting, among other things, the lack of human rights protections and the 80% poverty rate among IDPs, and finding that the situation violated constitutional rights).

117. C.C., Sentencia T-153/98 (slip op. at 83).

118. See C.C., enero 22, 2004, Sentencia T-025/04 (slip op. at 100), available at <http://www.corteconstitucional.gov.co/relatoria/2004/T-025-04.htm> (affirming the competency of a domestic institution for designing and implementing a plan to improve the condition of IDPs).

119. *Id.* at 102.

create administrative protocols for resolving patients' complaints, and establish mechanisms to efficiently oversee private healthcare providers.<sup>120</sup> The relative weakness of these orders is offset by stringent deadlines and a strong injunction ordering the government to unify the basic coverage for patients in the private and the public health care systems, as mandated by a 1993 law that has not been implemented.<sup>121</sup>

Finally, with regard to monitoring, T-025 stands apart from the other rulings. Over the course of seven years, it has engendered twenty-one follow-up public hearings involving a wide array of governmental and nongovernmental actors, as well as nearly 100 follow-up decisions whereby the CCC has fine-tuned its orders in light of progress reports.<sup>122</sup> The CCC has thus put in place a remarkably strong monitoring process.

In contrast, the earlier approach of T-153 did not include any court-sponsored monitoring mechanisms. Instead, the court limited itself to asking the Ombudsman's Office and the Inspector General's Office to oversee the decision's enforcement.<sup>123</sup> Likewise, the T-760 court, despite having outlined in the decision a monitoring mechanism akin to that of T-025, has largely remained passive: it has not held public hearings, has failed to promote meaningful citizen participation, and has limited its follow-up injunctions to petitions for information from the government.<sup>124</sup> Weak monitoring, therefore, has characterized these two cases.

Table 3 sums up the comparison among the three cases, as well as the results of above-mentioned impact analysis.

---

120. C.C., Sentencia T-760/08 (slip op. at 60–61).

121. *Id.* at 195, 200–03 (citing L. 100/93, diciembre 23, 1993, D.O. (Colom.)).

122. See David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L L.J. 319, 360 (2010) (recounting the "legislative-style hearings" conducted with NGOs and the court's "numerous" orders as to funding and other issues concerning implementation of T-025).

123. C.C., abril 28, 1998, Sentencia T-153/98 (slip op. at 78), available at <http://www.corteconstitucional.gov.co/relatoria/1998/T-153-98.htm>.

124. See Alicia Ely Yamin & Oscar Parra-Vera, *Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates*, 33 HASTINGS INT'L & COMP. L. REV. 431, 459 (2010) (recognizing that the success of implementation will depend on the court's ability—to date unexercised—to conduct public hearings and to engage the citizenry). One exception to the court's passivity is a follow-up decision that ordered the government to immediately comply with the court's previous order to unify coverage for underage patients in the public and the private health care systems. C.C., diciembre 15, 2009, Auto 342A/09 (slip op. at 18–19), available at <http://www.corteconstitucional.gov.co/relatoria/Autos/2009/A342A-09.htm>.

Table 3. Comparison of CCC's Structural Rulings

	<b>Rights</b>	<b>Remedies</b>	<b>Monitoring</b>	<b>Impact</b>
<b>T-025/2004</b>	Strong	Moderate	Strong	High
<b>T-760/2008</b>	Strong	Moderate	Weak	Moderate
<b>T-153/1998</b>	Strong	Strong	Weak	Low

Although a larger sample of cases is needed to extract firm conclusions, this comparison offers useful hints on the relationship between dialogic activism and judicial impact. The results suggest that dialogic rulings such as T-025 hold out the prospect for greater overall impact on the fulfillment of SERs,<sup>125</sup> whereas monologic rulings such as T-153 are likely to have lower impact. In between these two extremes are different combinations of rights, remedies, and monitoring that are likely to have a moderate impact.

Additional research is also needed to unpack the specific mechanisms underlying the judicial impact of dialogic rulings. I hypothesize that dialogic rulings have greater impact because they address the two key practical obstacles to the implementation of structural decisions: political resistance and institutional capacity. As for the former, structural injunctions on SERs naturally elicit resistance from powerful sectors with vested interests in the status quo. In the cases under consideration, these sectors included private health care providers and pharmaceutical companies reaping huge profits from thousands of lower court rulings ordering the government to pay for brand-name medicines,<sup>126</sup> indifferent public officials in sclerotic bureaucracies responsible for programs on IDPs,<sup>127</sup> and negligent or corrupt personnel in the overcrowded prison system.<sup>128</sup>

By empowering a broader range of stakeholders to participate in monitoring, courts unleash direct and indirect effects that may help the

125. I use here a synthetic assessment of the rulings' impact, which aggregates the four types of effects—direct, indirect, material, and symbolic—discussed above.

126. See Yamin & Parra-Vera, *supra* note 124, at 442 (“[C]ritics pointed to a perverse alliance between pharmaceutical companies, doctors, and judges in judicially-stimulated corruption that led to expensive pharmaceuticals being conceded to patients” (footnote and internal quotation marks omitted)).

127. See RODRÍGUEZ GARAVITO & RODRIGUEZ FRANCO, *supra* note 32, at 81 & nn.12–13 (naming some of the institutions and officials responsible for the deficiencies, and listing various common excuses they had given to IDPs who sought help and were denied).

128. C.C., abril 28, 1998, Sentencia T-153/98 (slip op. at 74–75), available at <http://www.corteconstitucional.gov.co/relatoria/1998/T-153-98.htm> (noting that when the negligence of prison administration officials violates fundamental rights, or where there are serious and continuous violations of the law by authorities, those affected have a right to protection).

courts overcome political resistance. The main effect is the direct involvement of political actors, such as human rights NGOs, reform-oriented public agencies, and grassroots organizations that are likely to adopt the ruling's implementation as part of their own agenda and thus become a source of countervailing power against the status quo. Moreover, orders of this nature may prompt the formation of political coalitions in support of the court or elicit media coverage that magnifies the material and symbolic effects of the case. As noted, this was the case after T-025, the decision that prompted the foundation of a civil-society monitoring commission that has turned into a key ally of the court as well as a provider of valuable information and recommendations.

Second, the mechanisms of dialogic activism may help courts address institutional shortcomings in dealing with complex socioeconomic issues. One does not have to be a legal formalist to concede that courts lack the technical knowledge, personnel, and resources (let alone the legitimacy) to find and implement solutions to problems as complicated as forceful displacement or lack of access to essential medicines.

This does not mean, however, that courts cannot provoke and moderate a dialogue among public authorities and civil-society actors on these issues in the face of massive policy failures and violations of SERs. By calling on not only government officials but also a wide variety of actors with relevant knowledge—e.g., leaders and members of the beneficiary population, academic experts, and international human rights agencies—dialogic courts may promote a collaborative search for solutions, or at least a public discussion on alternative courses of action.<sup>129</sup> Direct and indirect effects potentially stemming from this dialogue include unlocking policy processes, improving coordination among disconnected state agencies, and creating public policies framed in the language of rights.

T-025 provides an interesting illustration of these effects. A particularly useful feature of the monitoring process has been the collaborative formulation of progress indicators on the fulfillment of the IDPs' rights. Through an iterative, multiyear process that has included numerous follow-up court orders and proposals by governmental and non-governmental agencies, the CCC adopted a list of twenty quantitative, rights-based indicators to assess progress.<sup>130</sup> These indicators have provided a shared monitoring framework for all the stakeholders, as well as a tool for the court to fine-tune its follow-up injunctions in response to evidence on the evolution of policies and the situation of IDPs.

In sum, by combining the rights, remedies, and monitoring mechanisms of dialogic activism, courts may offset some of the political

---

129. See Sabel & Simon, *supra* note 16, at 1025 (recounting the involvement of a broad group of community stakeholders in a dialogic approach to improving public school financing after lawsuits were filed in Kentucky and Texas).

130. See Rodríguez Garavito, *supra* note 9, at 460–73 chart 3.

and institutional shortcomings that render their interventions ineffectual in complex distributional issues and enhance the courts' overall impact on the fulfillment of SERs.

### III. Conclusion

Over the last two decades, Latin American courts, activists, and scholars have developed legal theories, strategies, and doctrines aimed at fulfilling the promise of socioeconomic rights in contexts marked by massive deprivation and unacceptable inequalities. Together with similar developments in other regions of the global south, those legal innovations have been fundamental contributions to comparative constitutionalism and international human rights.

Missing from the literature and the jurisprudence in Latin America and elsewhere is a systematic reflection on the actual impact of SER rulings. In this Article, I have contributed to addressing this question by tackling the question of impact from two angles. First, I offered an analytical and methodological framework aimed at capturing the full range of effects of court rulings. I argued that, in addition to the direct material outcomes that courts and analysts tend to focus on, judicial impact includes a broader array of indirect and symbolic effects that can be as consequential for the fulfillment of SERs as those directly stemming from court orders. I illustrated this broader typology of effects with evidence on the multifarious impacts of the most ambitious structural ruling of the Colombian Constitutional Court: T-025 of 2004.

Second, I inquired into the features of courts' decisions that can have bearing on the overall impact of the decisions. I singled out the strength of the judgments' (1) declaration of rights, (2) remedies, and (3) monitoring. I further hypothesized that dialogic rulings—characterized by strong rights, moderate remedies, and strong monitoring—are likely to have the greatest overall impact on the fulfillment of SERs. I illustrated this hypothesis with findings from a comparative study of the impact of the Colombian Constitutional Court's three key structural decisions on SERs.

Additional research is needed to test these findings and hypotheses. Promising avenues are studies with a larger sample of cases as well as cross-national comparisons. These and other research strategies hold out the promise of opening the black box of the postjudgment phase of SER cases.

The need for this type of analysis is particularly pressing because the issue of impact ranks high on the minds of litigators and judges alike. After all, having a concrete impact on improved access and quality of goods and services—such as decent housing or health care—is what drives litigators and activists to resort to the courts in the first place. Similarly, if their rulings had no practical consequences, courts would be ill-advised to incur the considerable institutional costs associated with their activist rulings on SERs, especially in structural cases that entail protracted negotiations and tensions

with the government agencies responsible for implementing them. Once the dust has settled from a case, the question lingering on everyone's mind is this: was it worth the effort?