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978-1-107-07888-8 - Radical Deprivation on Trial: The Impact of Judicial Activism on
Socioeconomic Rights in the Global South

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Excerpt

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PART I

**STUDYING IMPACT: ACTIVIST COURTS
ADDRESSING RADICAL DEPRIVATION**

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The Impact of Judicial Activism on Socioeconomic Rights in the Global South: An Analytical Framework

Shortly after 3:00 P.M. on Monday, July 28, 2014, Danelly Estupiñán, a leading figure in the Afro-Colombian social movement, stepped onto the platform of the Colombian Constitutional Court's courtroom in the heart of Bogotá. Flanked by ten other representatives of victims of forced displacement, she addressed the three Court justices presiding over the hearing, as well as the nearly 100 of us who were packed into the room – journalists, state officials, activists, scholars, and lawyers.

“The Court's ruling gave us a voice,” she said, referring to the 2004 judgment on internally displaced persons (IDPs), the tenth anniversary of which was the occasion for the Court hearing. “It has been the type of validation and support that black communities had been waiting for” in the face of the massive forced displacement spurred by the worsening of Colombia's five-decade internal armed conflict in the early 2000s. We had met Ms. Estupiñán five years earlier in the city of Buenaventura and knew well what she was referring to: the gruesome killings, the daily intimidation, and the massive dispossession caused by right-wing paramilitary squads, leftist guerrillas, the Colombian armed forces, and drug-trafficking mafias as they fought over the control of land and resources in her city, the main Colombian port on the Pacific coast and one of the most dangerous places in the world (Human Rights Watch 2014).

Ms. Estupiñán herself is a member of the population of more than five million IDPs, the second largest in the world after Syria's (UNCHR 2013: 24). As she recounted the plight of her community, she recalled how the Court's ruling, as well as the numerous follow-up decisions and public hearings organized by the Court, had been a catalyst for important (albeit insufficient) improvements in state policies and the situation of IDPs over the last decade.

The path that led up to the hearing started in January 2004 when the Colombian Constitutional Court (CCC) aggregated the constitutional writs

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of protection (*tutelas*)¹ filed by 1,150 displaced families and handed down its most ambitious ruling in its two decades of existence: Judgment T-025 of 2004 (hereafter, T25). In this decision, the CCC declared that the humanitarian emergency embodied by massive forced displacement of millions of people constituted an “unconstitutional state of affairs.” In other words, the Court ruled that IDPs’ dramatic circumstances conformed to a generalized state of human rights violations associated with systemic failures in state action.

As the complaints that reached the Court from all corners of Colombia showed, the state lacked a serious and coordinated policy for offering emergency aid to IDPs. Nor was there reliable information on the number of IDPs or the situations they were facing. Moreover, the budget allocated to the issue was clearly insufficient. To address the root causes behind this state of affairs, the Court mandated a series of structural measures that, as we will see, spawned a lengthy implementation and follow-up process that continues today.

T25 was not the CCC’s first structural decision declaring an unconstitutional state of affairs (Rodríguez-Garavito 2009b). Since 1997, the Court has handed down seven decisions of this kind, in greatly varying circumstances including massive prison overcrowding (Judgment T-153 of 1998), government’s non compliance with its obligation to register public officials in the social security system (Judgment SU-090 of 2000), and lack of protection for human rights defenders (Judgment T-590 of 1998). In other decisions, the CCC has aggregated different *tutela* actions and has ordered long-term structural remedies without formally declaring an unconstitutional state of affairs. It did so most recently in Judgment T-760 of 2008, which mandated that the government institute public policies aimed at addressing the fundamental flaws of the health care system. These failures had led to more than 100,000 *tutela* actions per year, whereby patients would demand that courts fulfill their right to health by ordering public and private providers to grant them services or medicines that the providers had refused (Rodríguez-Garavito 2013; Lamprea 2015).

Partly because of its intervention in these cases, and partly because of its progressive rulings in more than 22,000 constitutional actions since its establishment in 1992,² scholars frequently include the work of the CCC in contemporary comparative constitutional studies (Coomans 2006; Gargarella 2006; International Commission of Jurists 2008; Langford 2009; Young 2012).

¹ Tutela actions are judicial mechanisms established by the 1991 Constitution to process complaints regarding the violation of constitutional rights. The Constitutional Court has discretionary power to pick tutela decisions for review among those handed down by lower courts.

² The exact figure (22,199 rulings between 1992 and 2013) includes decisions on writs of protection (*tutelas*) and decisions on constitutional challenges brought by citizens against acts of Congress (abstract review of constitutionality). See www.corteconstitucional.gov.co/relatoria/estadisticas.php (last viewed on October 31, 2014).

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In a paradoxical turn in comparative legal history, one of the countries with the gravest human rights violations has become a net exporter of constitutional jurisprudence and of innovative institutional approaches to ensure the fulfillment of human rights at the domestic level.

1.1. RADICAL DEPRIVATION ON TRIAL

Although the CCC has not explicitly drawn on comparative constitutional law to develop its doctrine of unconstitutional states of affairs,³ there are clear similarities between its jurisprudence and the doctrine of structural injunctive remedies in public interest litigation in jurisdictions such as India and the United States (Chitalkar and Gauri forthcoming; Sabel and Simon 2004). The study of the CCC's jurisprudence, therefore, affords a privileged vantage point on current scholarly and policy debates about judicial activism in general and about the impact of activist court rulings in particular. It also provides fertile ground for theoretical and empirical reflection on constitutional innovations in the Global South, which have received much less scholarly attention in comparative constitutional studies than have developments in North America and Europe.

We posit that this variety of activism, although particularly visible in the CCC's jurisprudence, forms part of an emerging trend in Latin America and other regions of the Global South (Rodríguez-Garavito 2011a). Embodied most clearly by court rulings in structural cases that address widespread violations of socioeconomic rights (SERs), this type of progressive neoconstitutionalism has unfolded with different names and features in different parts of the Global South (Bilchitz 2013; Bonilla 2013; Rodríguez-Garavito 2011b; Villhena, Baxi, and Viljoen 2013). Together with the incorporation of SERs in national constitutions, these judicial interventions constitute key institutional innovations aimed at redressing fundamental socioeconomic injustices embodied by the deprivation of basic material conditions of a dignified life suffered, among others, by millions of slum dwellers, members of racial and ethnic minorities, malnourished children, victims of gender discrimination and sexual violence, refugees and IDPs, the chronically underemployed, legions of workers in the informal economy, disenfranchised migrants, and people without access to quality education, healthcare, and sanitation. Compounded by mounting inequality in the Global South and the North, as well as the uneven effects of climate change, these are the forms of radical deprivation that we allude to in the title to this book.

³ Interview with former justice Manuel José Cepeda (author of the T25 opinion), May 27, 2014.

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As Walzer has noted, “the problem is that inequality commonly translates into domination and radical deprivation. But the verb ‘translates’ here describes a socially mediated process, which is fostered or inhibited by the structure of its mediations” (1995: 19). We claim that courts are increasingly central characters in this mediation process, and can act as inhibitors of such a translation. We borrow from the title of a pioneer book on transitional justice by Argentine constitutional scholar Carlos Nino – *Radical Evil on Trial* (1998) – to argue that, just as many courts took on an important role in dealing with mass atrocities in transitions from authoritarian governments and armed conflicts starting in the 1980s, they are increasingly involved in dealing with mass violations of SERs.

We thus focus on particularly visible and ambitious court interventions. In stepping into the fray of core distributional debates, courts contribute not only to defining the contours of legal and economic systems, but also to the fate of literally millions of citizens whose basic material conditions of life are at stake. It is through this type of structural cases that radical deprivation is brought to trial.

Borrowing from the literature on structural remedies in U.S. public interest litigation, we define structural cases as those 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 (Chayes 1976; Sabel and Simon 2004).⁴

We focus on structural cases for two additional reasons. First, in the face of increasing judicialization of SERs, structural rulings offer a procedural alternative to the case-by-case adjudication of thousands of individual cases that risk overwhelming the capacity of courts and yielding contradictory outcomes, especially in civil law legal systems where apex courts’ rulings are not binding on lower courts. They thus provide a potentially useful option for the effective judicial enforcement of SERs by focusing on systemic causes of

⁴ By focusing on these macro-cases we do not mean to suggest that they are the only or the most important cases for guaranteeing SERs. In fact, as several scholars have shown, the fate of SERs’ fulfillment depends equally on a multitude of individual and common everyday cases (that may never get to court), from the payment of an adequate pension to a retiree to the provision of a public service without discrimination based on gender, race, national origin, or other reasons (see Abramovich 2005; International Commission of Jurists 2008).

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rights violations and promoting corresponding structural institutional remedies. Second, especially when courts retain supervisory jurisdiction over the case and monitor implementation of their ruling through follow-up decisions and monitoring mechanisms (as the CCC did in T25), structural cases can foster meaningful dialogue and collaboration among state and civil society actors around complex distributional problems, which in turn hold better prospects for sustainable improvements in SERs protection.

Among the best-known examples of structural cases on SERs is the jurisprudence of the Supreme Court of India, which has addressed massive socioeconomic problems such as hunger and malnutrition (Baxi 2013; Muralidhar 2008; Shankar and Mehta 2008). Particularly relevant for our purposes is the fact that the Indian Supreme Court has sought to deepen the impact of its jurisprudence by appointing commissioners in charge of promoting the implementation of its rulings (Shankar 2013). Similarly, the South African Constitutional Court has become a central institutional forum for promoting rights such as housing and health, and for nudging the state to take actions against the economic and social legacy of apartheid (Berger 2008; Liebenberg 2010). The South African Constitutional Court has also elicited international attention in judicial and scholarly circles, as demonstrated by the reliance of its jurisprudence on U.S. and European constitutional theory (Dixon 2007; Fredman 2008; Sunstein 2004).

In Latin America, judicial activism on SERs has become increasingly prominent over the last two decades (Gargarella 2015; Rodríguez-Garavito 2015; Uprimny 2015). In countries as different as Brazil and Costa Rica, courts have decisively shaped the provision of fundamental social services such as health care (Brinks and Forbath 2013; Ferraz 2009; Lamprea 2014; Wilson 2005). In Argentina, some courts have undertaken structural cases and experimented with public mechanisms to monitor the implementation of activist judgments such as *Verbisky*, on prison overcrowding, and *Riachuelo*, on environmental degradation (CELS 2008; Farstein et al. 2010; Bergallo 2005).

1.2. THE BOOK'S QUESTIONS AND STRUCTURE

The international literature on the justiciability of SERs has multiplied in proportion to the proliferation of activist rulings (Langford 2009). Two angles of analysis have dominated this scholarship. First, some 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 (Arango 2003; Bilchitz 2007).

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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 encouraged the utilization of these rights by judicial organs and supervisory bodies at both the national and international levels (Abramovich and Courtis 2002; International Commission of Jurists 2008).

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, there is a paucity of studies on the fate of activist decisions after they are issued (Langford, Rodríguez-Garavito, and Rossi forthcoming).⁵ 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 realizing SERs and addressing radical deprivation?

These are the questions we consider in this book. Therefore, as Tushnet (2012) has noted, our study goes “past the question which U.S. scholars typically focus on – *whether* courts should enforce second-generation rights – to consider *how* to do so.” We thus seek to contribute to the growing sub-field of comparative constitutional studies by applying the tools of social science research to analyze the impact of constitutional adjudication. This type of study sheds new light on questions “[o]ften excluded from the canonical discourse . . . such as the real-life impact of constitutional jurisprudence and its efficacy in planting the seeds of social change; . . . the actors and factors involved in demanding or bringing about constitutional transformation; . . . its impact on the legitimacy of the courts” (Hirschl 2013). Departing from a law- or court-centered approach, the following chapters explore multiple actors beyond the court, such as public officials, activists, policymakers, and leaders of the IDP population targeted by the ruling.

To help unpack the black box of the implementation and impact of structural rulings, we will proceed in three steps. In Part I, we begin by laying out our analytical framework (this chapter) and our case study (Chapter 2). In dialogue with socio-legal and comparative constitutional literature on judicial activism, we offer a typology of effects of judicial rulings and illustrate it with evidence from T25.

⁵ Some exceptions are Gauri and Brinks (2008), Uprimny and García Villegas (2004), and the studies in Langford et al. (forthcoming).

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In Part II (Chapters 3–7), we present the detailed empirical evidence of our study about the impact of the decade-long implementation of T25. Based on our analytical framework, we document its direct, indirect, material, and symbolic effects. The sequence of the chapters is organized in such a way that we move from direct to indirect effects; in analyzing each effect, we comment on its material and symbolic dimensions.

In Part III, we draw lessons from our case study for the broader comparative debate on judicial activism on SERs. In Chapter 8, we turn to an explanatory question: what accounts for the different levels of impact of SER rulings? Why do some decisions – like T25 – have deep and multifarious effects, while others remain on paper? In order to strengthen the explanatory leverage and generalizability of the findings of our case study, we compare the implementation process and effects of T25 with those of other structural rulings of the CCC (i.e., T-153 of 1998 on prison overcrowding, and T-760 of 2008 on health care), as well as those of comparable rulings by the Indian Supreme Court and the South African Constitutional Court (i.e., the *PUCL* case on the right to food in India,⁶ and the *Grootboom* case on the right to housing in South Africa⁷). Based on this comparative analysis, we make an empirical case for a specific variety of court intervention (which we call “dialogic judicial activism”), which we argue can satisfactorily address criticisms against courts’ legitimacy and capacity to enforce SERs.

In Chapter 9, we close by recapping our conclusions and drawing their implications for future judicial interventions aiming to solve structural socioeconomic problems. We point toward both the potential of judicial activism and the political and institutional conundrums that activist courts in the Global South are likely to encounter as they nudge other branches of power to effectively realize SERs.

This is the analytical and geographic terrain on which our inquiry is inscribed. However, since the terms “judicial activism” and “Global South” can take different meanings, before proceeding it is important to specify how we use them in this book.

1.3. JUDICIAL ACTIVISM IN THE GLOBAL SOUTH

Judicial activism as a concept is doubly equivocal. Descriptively, it has been widely used, both in academic literature and public discourse, to refer to very different levels and forms of judicial intervention (Shankar 2013: 98).

⁶ *PUCL v. Union of India* (writ petition No. 196 of 2001).

⁷ *Government of the Republic of South Africa v. Grootboom*, 2001 (1) SA 46 (CC).

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The normative implications the term usually carries further complicate this diversity of meaning, where describing a court as “activist” could constitute either praise or criticism depending on the moment, place, or issue addressed in its ruling.

In order to render this term useful it must be analytically and empirically bounded in accordance to its object of study. As we have explained, we focus on structural court rulings dealing with SERs. In this specific context, we can evaluate the level of judicial activism by using Tushnet’s (2009) useful distinction between the rights’ content as recognized by the courts and the remedies that courts hand down to fulfill those rights.

On one hand, the courts can adopt strong or weak interpretations of SERs’ content. A “strong rights” approach recognizes SERs as justiciable, on par with civil and political rights. In contrast, a court that adopts a “weak rights” approach tends to deny the justiciability of these rights. In the middle we find courts that accept SERs’ justiciability but subject them to considerable procedural or substantive restrictions. We thus add an intermediate category – “moderate rights” approach – to Tushnet’s dyad.

On the other hand, courts can adopt different types of remedies in light of SERs violations. In Tushnet’s typology, the criteria to distinguish between the strong and weak remedies are the breadth of judicial orders and the extent to which orders are compulsory and peremptory. Whereas strong remedies involve precise, outcome-oriented orders, weak remedies tend to leave implementation entirely in the hands of government agencies. Moderate remedies, in turn, outline procedures and broad goals, as well as criteria and deadlines for assessing progress, but leave decisions on means and policies to government.

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 their implementation. We thus add this dimension to our conceptualization of judicial activism, and distinguish between strong, moderate, and weak monitoring. Strong monitoring can take different forms, from the appointment of commissioners to supervise in detail the implementation of a structural ruling over several years and report back to the Court (as in the above-mentioned landmark right to food case in India), to the creation of a special monitoring chamber within the Court responsible for supervising enforcement (as in the T25 case). What these and other variants of strong monitoring have in common is the Court’s willingness to actively engage in the implementation process to foster government compliance based on specific deadlines and benchmarks, oftentimes issuing