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### Introduction

On the morning of October 11, 2012, the Supreme Court of Argentina held a public hearing to follow up on the implementation of its ruling in the *Causa Mendoza* case. The case, which the court took up in 2006, was an ambitious environmental rights ruling ordering the national government, the government of the province of Buenos Aires, and that of the city of Buenos Aires to work together toward the recovery and preservation of the Matanza-Riachuelo River basin. The Matanza-Riachuelo is one of the world's most polluted rivers – 40 miles long, traversing Argentina's most densely populated zone before flowing into the Rio de la Plata in the heart of Buenos Aires.

This public hearing was not a routine fact-finding one geared at informing the court's decision. In fact, the ruling had already been handed down four years ago, but the Court had stayed involved since, and would continue to be. Like similar hearings on this case held before and after 2012, it was part of a larger collaborative effort that engaged the court, government agents, and civil society actors in monitoring progress of the ruling's implementation. In the main hall where the audience was held sat members of the court, government officials, journalists, and court staffers. The area outside it was set up as an alternative public viewing space with over seventy seats and two large video monitors live-streaming the hearing. The area was already at capacity well before the hearing started at 10 a.m. More lawyers, rights activists, NGO staffers, university students, journalists, and citizens – especially inhabitants of some of the neighborhoods closer to the river's mouth, *vecinos* – crowded the adjacent viewing area. Over the course of the next few days, those present at the hearing as well as those following it (outside or through social media) watched as the Supreme Court heard reports from, and asked questions of, federal and local government officials, representatives of private companies, NGOs, and individuals involved with the implementation of *Causa Mendoza*. Based on these interventions and reports from different social and government organizations, the court wanted to ascertain what progress had been made. Anyone following the

hearing could not miss the peaceful protests from *vecinos* against some of the measures taken in the context of the implementation of the ruling. They sought to be heard by government officials and the court.

The scene at Palacio de Tribunales that day exemplified two developments: the judicialization of rights enforcement and a tribunal actively following up on compliance with its own decisions. This ruling is part and parcel of a decades-old worldwide trend observable in both young and established democracies whereby courts have become central players and important sites for political battles over the enforcement of rights. In many countries in the Global South, socioeconomic rights are part of democratically enacted legal and constitutional frameworks. Efforts to enforce the right to food, housing, or a clean environment, just to name a few, entail charged political battles about their implementation and about the content of the rights themselves. These battles strike at the heart of democratic quality and involve consequential disputes over power across branches. When deciding on socioeconomic rights, like the Argentine court did in *Causa Mendoza*, courts often face important public policy decisions that pit them against the status quo and can have significant consequences.

Just to name a few examples of similar cases: The Colombian Constitutional court ruled<sup>1</sup> safeguarding the rights to health, water, and food for children of the Wayuu community in the department of La Guajira, asking multiple administrative agencies and the national and local governments to act in coordination to protect this group. The Colombian court, along with the Costa Rican Constitutional Chamber, has jurisprudences in favor of the rights of sexual minorities, including (among many topics) same-sex marriage and decisions requiring access to health and other services for same-sex partners.<sup>2</sup> The Costa Rican court has also ruled protecting aquifers and access to potable water.<sup>3</sup> The Colombian, Indian, and Argentinean tribunals have also ruled favorably for the environmental preservation of rivers and other specially protected areas, which has sometimes meant halting major private and/or governmental development projects or holding governments accountable for redressing complex and long-standing problems. In 2014 the Supreme Court of India – which has an impressive track record as a steward of environmental rights – ordered the national government to create a National Environmental Regulator, with offices in every state, charged with appraising and approving projects for environmental clearances. Climate change has also become judicialized, with tribunals across the Global South increasingly faced with innovative legal challenges that involve governments, private actors, and communities (Rodríguez Garavito 2022).

<sup>1</sup> Colombia, Corte Constitucional (2017). T-302 2017. M.P. Aquiles Arrieta.

<sup>2</sup> See Albarracín (2022) and López Sánchez (2021).

<sup>3</sup> For an overview of the rulings and the judicialization of water disputes in Costa Rica, see Villareal and Wilson (2022).

The hearing I described is also exemplary of a specific development within that broad framework of judicialization: court-promoted monitoring of implementation. Like its counterparts in Colombia, Costa Rica, and India, the Supreme Court of Argentina stayed involved in this and other cases. It did so through the use of a series of institutional tools that I refer to as monitoring mechanisms. Chief among these tools are periodic, multi-actor public hearings (like the one described above) and establishing follow-up committees with the participation of civil society organizations. These committees inform the court on their assessment of implementation and issue periodic information requests to the parties involved, to experts, and to other stakeholders. When embarking on this long process of promoting follow-up, the Supreme Court of Argentina was doing something that challenges traditional notions of what high tribunals do, since we tend to think of them as deciding a case and then stepping back. Through court-promoted monitoring, tribunals attempt to open political spaces for engagement with multiple actors on complex policy issues.

Throughout the Americas, Europe, Africa, and Asia, other courts are facing and deciding major socioeconomic rights cases similar to the ones described above. Are these rulings merely aspirational? Under what conditions can courts in the Global South produce political and social change? More specifically, why do some rulings have higher impact than others? This book tackles these questions, examining the actual results of new court-ordered or court-modified policies as well as other effects of judicial intervention in the aftermath of socioeconomic rights rulings by the Colombian and Argentine highest courts. I highlight the role of two elements in influencing judicial impact: on the one hand, the oversight mechanisms that some high courts deploy to monitor compliance with their structural rulings.<sup>4</sup> And, on the other, the role of organized constituencies in civil society, that is, legally empowered individuals and NGOs doing advocacy work. On their own, both monitoring by the court and civil society engagement can enhance impact. Together, they can produce a particular synergy: the presence of a dense legal constituency that can engage with court-promoted oversight mechanisms can create institutional spaces, which I refer to as collaborative oversight arenas, where the court, elected leaders, private actors, and civil society agents converge to address issues.

I develop this argument through comparative case studies of eight selected structural cases on socioeconomic rights, particularly environmental, health, and social welfare issues. These landmark rulings had the potential to deeply influence public policy, politics, and the lives of many in Colombia and Argentina: Some have been widely studied, which provides us with a wealth of secondary information on

<sup>4</sup> Structural rulings are those decisions on public policy of large scope that set forth broad solutions and generally implicate more than one institution in their implementation (Sabel and Simon 2004).

them, and others are less explored. All were decided at least a decade ago, which allows me to track their impact over time. I show that courts are not the silver bullet, rather, they can be coordinating devices that allow for the convergence and the activation of multiple actors. While the primary empirical focus is on these two Latin American countries, the argument can shed light on the experiences of other countries with assertive high courts and a track record of jurisprudence in socio-economic rights. To illustrate this, the book includes shadow case studies of two landmark rulings decided by the Supreme Court of India, the highest court that first deployed oversight mechanisms and that has the most extensive experience with these tools.

### 1.1 THE ARGUMENT IN BRIEF

This book shows that post-decision politics are crucial, in complex cases, for producing important impacts. I focus on the relevance of two elements in explaining levels of judicial impact in structural cases: monitoring mechanisms and legally empowered civil society organizations. Monitoring mechanisms impose costs on the target(s) of the ruling and they also generate resources so that the court can offset informational and power asymmetries. By requiring reports and information on implementation, court-promoted oversight can promote accountability. Public, institutionalized venues for discussion draw the attention of key related actors to the issue as well the attention of actors beyond those involved originally in the case: the public, other key players, and the media. This monitoring can expose policy and implementation gaps, contributing to what Rodríguez Garavito (2010) calls putting “political pressure” on the targets.

Further, monitoring also helps the court alleviate informational and power asymmetries. Oversight generates public information, which provides the court with expertise – and the authority that comes with it – on specific technical topics. Oversight also produces input to inform the ongoing modification of court-mandated reforms to facilitate compliance and maximize rights effectiveness. These mechanisms offer courts the chance to hear multiple actors and become aware of the broader policy arena as they monitor implementation. Beyond gaining more knowledge of the issue, monitoring also shifts the distribution of power among the relevant actors. The court’s presence empowers new players (external oversight agencies, civil society organizations, etc.) by making them part of monitoring venues and giving them a new voice. In so doing, it creates space for the voices of actors that are often excluded from institutional venues.

Importantly, the tools directly under the control of the courts are only part of the story. As previous research on rights litigation shows, courts do not operate in a social or political vacuum. Organized civil society activity can play a significant role in the impact of the ruling before, during, and following the decision (Albisa and Shanor 2017; Epp 1998; Sigal, Rossi, and Morales 2017; Wilson 2009). The question is

how? Legal constituencies (the rights advocacy organizations and legal representatives who have a stake in the issue) are crucial in two ways: they are the agents that can exercise follow-up through legal as well as social mobilization, and they are central to the diffusion of rights-based discourse.

On the mobilization side, civil society organizations can work to extend the benefits granted on a given decision to other individuals or groups by filing legal challenges, thus precipitating a judicial cascade of related cases. They also mobilize in other spaces and produce information. Such actions generate media attention and exert pressure on implementing agencies and other governmental powers. On the ideational level, as previous research has shown, legal mobilization by civil society organizations can facilitate the spread of rights rhetoric among activists (McCann 1994), key officials, and other actors. The density of a legal constituency is important to these processes: the denser, the greater its ability to magnify effects and engage with the court. As I discuss in Chapter 2, I characterize the density of the different legal constituencies by looking at the number of active organizations that make up the structure, whether they are connected by preexisting ties (networks), and their funding.

On their own, the presence of court-promoted oversight mechanisms or of legal constituencies can promote some effects. My argument is that together, these two elements can create institutional spaces, which I refer to as collaborative oversight arenas, where the court, elected leaders, private actors, and civil society agents converge to address issues. The participation of external actors in such venues, particularly of legally empowered civil society organizations, is crucial. Where civil society organizations can engage in these institutional spaces we can see greater information flows, and the creation of mechanisms and spaces for accountability, policy updating, and ideational change among bureaucrats and key actors. In short, via the creation of collaborative oversight arenas, courts can become facilitators, focal points, that actors in society can use to coordinate and generate change.

This argument builds on the insights of prior research on judicial impact; some have emphasized the role of tribunals (Rodríguez Garavito and Rodríguez Franco 2010), others that of litigants (Epp 1998) or that of political elites (Rosenberg 2008). I propose an explanation that is aware of the political context but underscores the importance of understanding courts as one of many actors that are all an integral part of ongoing processes of change. Other scholars also study how courts interact with legal advocacy organizations and other branches of government to effect socio-political change (Gauri and Brinks 2008; Gloppen 2011). This book contributes to specifying the mechanisms through which judicial intervention produces change. I advance efforts to open up the black box of what happens after litigation (in this case, after a victory in court) by specifying the causal pathways through which court-promoted oversight mechanisms and legal constituencies contribute to impact on their own, and in combination with each other.

## 1.2 CONTRIBUTIONS

This book makes three main contributions. First, it speaks directly to a long-standing debate that has occupied socio-legal scholars, comparative courts and politics specialists, as well as policymakers and activists worldwide: Can courts effectively advance rights? In line with Rosenberg's (2008) cautious view of the null potential of courts to advance change in the United States, some argue that turning to courts to seek the enforcement of rights is at best ineffectual. For these scholars, judicial intervention can go so far as to exacerbate preexisting inequalities by producing backlash after the decisions or by favoring individualistic, piecemeal, and irrational approaches to public policy (Ferraz 2011; Klarman 2004). Others have a more optimistic assessment of the role for courts in these arenas, claiming that courts can contribute to mobilization (McCann 1994) to spurring negotiations and actions (Cavanagh and Sarat 1980) – and, under certain conditions, to the advancement of the rights in question (Rodríguez Garavito 2010). This book shows that advancing this debate requires thinking about impact in a comprehensive manner and that the answer necessarily involves actors and institutions beyond the judiciary.

I am not alone in emphasizing the importance of a comprehensive understanding of judicial impact beyond strict compliance (see Gloppen 2011; Langford 2021; Rodríguez Garavito and Rodríguez Franco 2015; Rodríguez Peñaranda 2021; Rosenberg, Krishnaswamy, and Bail 2019). As Kapiszewski and Taylor note, impact is broader, neighboring, but distinct from compliance in that it “concerns the effect of court rulings beyond the actions or policy changes that directly result from them” (2013, 5). Efforts to simplify impact often paint partial pictures, as reducing it to rule abidance and policy changes sets aside discursive and symbolic effects that are central to what makes courts powerful: their ability to shift political and social dynamics (Howse and Teitel 2010). With this in mind, I define judicial impact as the changes in the ideational, discursive, legal, organizational, and material realm that are attributable to the court ruling, and the transformation in life outcomes that follow upon these changes. This study shows that observed influence can be varied and often hinges crucially on the ability of the court to work alongside other actors, creating political spaces for discussion, accountability, and change.

Thus, we need to think about impact broadly and we also need to look beyond courts themselves in the production of impact. Courts can be most consequential, broadly speaking, when they act in concert with other actors to create political spaces for ongoing discussion and engagement with regard to rights. Post-decision politics are crucial, in complex cases, for producing important impacts (Botero and Brinks 2023; Langford, Rodríguez Garavito, and Rossi 2017). Seminal work on this subject, like Rosenberg's, tends to assume politics are static – his framework takes for granted that the preferences of political elites will remain unchanged by the processes following judicial victories, for example. Comparative scholars have qualified this view, highlighting the importance of publicity and information after the

rulings in fostering accountability and compliance (Gauri, Staton, and Vargas Cullell 2015; Vanberg 2001). My work uncovers the mechanisms that make greater visibility and information work, suggesting that greater impact stems from greater visibility accompanied by more information, resources, and access to the state. It also indicates that the preferences of legal and political elites can be changed through their participation in commonly shared political spaces in the aftermath of the ruling.

Second, by focusing on court-promoted oversight, relatively new and understudied institutions, this research also advances our understanding of the new role for courts in the Global South. Most of our theories assume courts have a fixed set of areas of concern and a fixed set of capabilities. In places like Colombia, Costa Rica, South Africa, and India, courts have been entrusted with new areas of concern, and they have developed (and continue to develop) other capabilities to handle their new responsibilities, in cooperation with civil society and governments. Court-promoted oversight is part of that process, though such tools remain rare among high courts in many of the most studied Global North democracies. I provide an empirical classification scheme for these mechanisms and offer the first systematic small-n comparison of their effects. My research suggests we need to move beyond a view of all courts as holding “neither the purse nor the sword”: In the Global South, courts are bringing the purse, the sword, and the sovereign (the people) together to draw attention to long-standing problems and find solutions. In doing so, they do not displace politics, or elected policymakers, they create new political spaces devoted to special problems.

The use of monitoring mechanisms when deciding structural cases at the highest level has implications for how judicial power is constructed and exercised. Theoretically, judicial power has two sides: the capacity for action conferred by institutional design – that is, potential power – and observed influence – or active power (Kapiszewski and Taylor 2013). Studying the impact of judicial rulings, their actual, multifaceted influence, means inquiring into the process by which active power is exercised and enhanced. Court-promoted monitoring is part of a series of tools associated with a dialogical approach to judicial review which tries to foster a different kind of relationship between the judiciary, other branches, and (at times) civil society (Bonilla Maldonado 2013; Gargarella 2014b). Collaborative oversight engages the court, government actors, and civil society in a shared enterprise over a prolonged period of time. In that process, the court works with those involved to craft programs, set deadlines, and produce information. In doing so, these courts are acting as facilitators, without necessarily assuming that they have all the answers. They do not demonize politics or attack the Executive: Even if they do not always get it right, they try to foster exchange in areas that are crucial to public policy.

These courts play what Kureshi (2022) would call a *representation reinforcement role* – creating new avenues for engagement and enhancing existing ones – in

contrast to a *representation replacement role*, in which assertive constitutional courts impose their voice as the only truly representative one, thus fueling confrontation between branches. Such conflict is what Huq (2018) refers to as “abrasive contact,” a tension between the judiciary and elected branches that has proven instrumental in recent episodes of democratic erosion. The experience of high courts like that of Argentina and Colombia suggests that not all judicial assertiveness must lead to the deterioration of the regime. The way in which these courts exercise judicial power (halfway between passivity in one extreme, and countermajoritarianism in the other) may, in the long run, strengthen democracy and the rule of law. In that sense, the empirical study of monitoring – with its potential, as well as its imperfections – can be particularly useful in the current juncture of democratic backsliding, in which courts are often important players.

Third, and relatedly, the study of the effects of this type of judicial intervention adds an important empirical dimension to a crucial normative debate. Critics often express unease at the idea that a minoritarian non-elected institution decides on and defines the content of and realization of rights, a task usually associated with (and better left to) a representative institution like the legislature (see Tushnet 2008). To Waldron (2005), for example, judicial review on matters of rights tramples on principles like representation and participation and is therefore democratically illegitimate. As others have noted (Brinks and Forbath 2014; Rodríguez Garavito and Rodríguez Franco 2015), this normative discussion benefits greatly from an empirical perspective. As mentioned above, my findings show courts can act as facilitators, catalysts for change, without necessarily imposing their slanted vision or a final answer. Promoting dialogue and cooperation among many and diverse actors, amid institutional weakness, is fraught with difficulties and entails risks (Liebenberg 2014).

Generating and sustaining participative forums for discussion and policy reform exposes the process and the court to political pressures that can derail the original claimants and result in delays that can lead to roadblocks and fatigue, as some cases in this book show. Understanding these dynamics in their full complexity is essential, precisely because courts are being placed in these positions with increasing frequency. Despite the difficulties, what my research suggests is that these courts do not displace democratic politics, or elected policymakers; instead, they can create new political spaces devoted to special problems.

This mode of judicial intervention should alleviate the concerns of those that see judicial decision-making on economic, social, and cultural rights as evidence of a juristocracy bent on advancing the strategic interests of a minoritarian elite (Hirschl 2004) or as faulty enterprise (Gutiérrez Beltrán 2018; Puga 2012). Working with other political and social actors, courts cannot solve all problems or satisfy everyone involved, but they can create change, enhance accountability, and increase responsiveness.



## 1.3 PLAN AHEAD

I explore these issues in the context of eight rulings (see Table 1.1) handed down by the highest courts in Argentina and Colombia, two tribunals with a history of assertive rights-based jurisprudence. The focus is on major socioeconomic rights cases that address complex public policy questions. This is an area where scholars and practitioners often doubt meaningful change can be made – as such, these cases are great venues to study the politics of impact. The eight rulings cover a range of issues: health, environmental rights, social welfare, and prior consultation. I combine within-case process tracing with cross-case comparisons to enrich the theory-building and the theory-testing exercises. Cross-case comparisons are not risk-free, but when theoretically informed, they can provide rich insights. Each pair of cases (one case from each country) has a different combination of the two elements under study: In the first pair both court-promoted oversight and a dense legal constituency are present, in the second and third pairs only one of them is, and in the fourth pair neither. This case selection strategy, explained in more detail in Chapter 2, allows me to study the particular synergy that court-promoted oversight and dense legal constituencies can produce when together, as well as isolate the effects of monitoring and civil society on their own. Some of these rulings have been widely studied (like *Causa Mendoza*, Verbitsky, and T-760), as they are truly landmark decisions that these two courts have worked with for decades. This allows me to build on rich existing information from a new perspective while comparing these to more understudied rulings (for example, T-231, T-547).

Chapter 2 develops a theory of how court-promoted monitoring and organized legal constituencies in civil society influence impact. Higher levels of impact in particular hinge on the presence of a dense legal constituency that can engage with the institutional spaces that the court creates, crafting “collaborative oversight arenas”: spaces in which multiple actors converge in a larger and lengthy process of change. This chapter also introduces the two high courts that are the main focus of this study (the Colombian Constitutional Court and the Supreme Court of Argentina) and the logic that informed the selection of the eight structural rulings I delve into. Chapter 2 looks at the cases with the highest impact of my sample:

TABLE 1.1 *Cases under study and expectations*

	No monitoring	Monitoring
Denser legal constituency	Medium impact [ <i>Causa Verbitsky</i> and C-383]	Higher impact [ <i>Causa Mendoza</i> and T-760]
Less dense legal constituency	Lower impact [ <i>Causa Chaco</i> and T-231]	Medium impact [ <i>Causa Badaro</i> and T-547]

ruling *T-760*<sup>5</sup> (COL), safeguarding the right to health and calling for a restructuring of the national health system, and *Causa Mendoza*<sup>6</sup> (ARG), safeguarding the right to a clean environment and ordering the government to clean up and preserve the Matanza-Riachuelo River basin. In Chapter 3 I reconstruct and compare the process whereby the actors involved in each of these two rulings crafted a collaborative oversight arena and how their interactions influenced impact. Chapter 4 presents four case studies: two of them have court-promoted monitoring, but no dense legal constituency, and the other two have a dense legal constituency, but no monitoring mechanisms. The aim is to explore in more detail what and how each of the two elements distinctly influences impact. The two cases with legal constituencies are *C-383*<sup>7</sup> (COL), safeguarding the right to housing through a call to restructure the mortgage credit system in Colombia, and *Causa Verbitsky*<sup>8</sup> (ARG), which sought to safeguard the rights of prisoners in the Buenos Aires Province. In contrast, the two cases with monitoring mechanisms are *T-547*<sup>9</sup> (COL), safeguarding the right to prior consultation in the case of the Puerto Brisa project, and *Causa Badaro*<sup>10</sup> (ARG), safeguarding elderly Argentines' right to a pension.

In Chapter 5 I compare the (seemingly) negative cases: those where no oversight was deployed and where the legal constituency was not dense. These are *T-231*<sup>11</sup> (COL), safeguarding the right to a healthy environment in Cúcuta by ordering the cleanup of the Bogotá Canal, and *Causa Chaco*,<sup>12</sup> a ruling safeguarding the right to life and health of the Qom Indigenous group, in the Argentinean Chaco. Table 1.1 synthesizes the logic of the comparisons outlined above as well as my initial expectations regarding the impact of each pair of rulings.

Chapter 6 takes the theoretical framework developed in the Latin American context and applies it to two cases decided by the Supreme Court of India: the Right to Food Case and the Delhi Vehicular Pollution Case.<sup>13</sup> Chapter 7 concludes with a comparative overview of the cases, including a discussion of refinements to

<sup>5</sup> Colombia, Corte Constitucional (2008, July), “Sentencia T-760,” M. P. Cepeda, Manuel José, Bogotá.

<sup>6</sup> Argentina, CSJN, M. 1569.XL. “Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/ daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza – Riachuelo),” 20-6-06; 8-7-08.

<sup>7</sup> Colombia, Corte Constitucional (1999, May), “Sentencia C-383,” M. P. Beltrán Sierra, Alfredo, Bogotá.

<sup>8</sup> Argentina, CSJN, V.856.XXXVIII. “Verbitsky, Horacio s/habeas corpus.” 3-6-05.

<sup>9</sup> Colombia, Corte Constitucional (2010, July), “Sentencia T-547,” M. P. Mendoza Martelo, Gabriel Eduardo, Bogotá.

<sup>10</sup> Argentina, CSJN, B.675.XLI. “Badaro, Adolfo Valentín c/ANSeS s/ reajustes varios,” 8-8-06; 11-26-07.

<sup>11</sup> Colombia, Corte Constitucional (1993, June), “Sentencia T-231,” M. P. Martínez Caballero, Alejandro, Bogotá.

<sup>12</sup> Argentina, CSJN, D.587.XLIII. “Defensor del Pueblo de la Nación c/Estado Nacional y otra (Provincia del Chaco) s/proceso de conocimiento.” 9-18-07.

<sup>13</sup> India, M.C. Mehta v. Union of India, WP 13029/1985 and India, People's Union for Civil Liberties v. Union of India & Others (PUCL) 2001.