

COURTS THAT MATTER

In Courts that Matter, Sandra Botero tackles a crucial question: Can courts advance socioeconomic rights? Using a rigorous comparative study of the impact of socioeconomic rights rulings in Colombia and Argentina, Botero argues that such decisions can be significantly impactful when courts deploy certain monitoring mechanisms and when legally empowered organizations in civil society are engaged in the outcome. The book includes case studies of landmark rulings on environmental, health, housing, and other socioeconomic rights and charts pathways for broader applicability through comparison with rulings by the Supreme Court of India. The book demonstrates how Colombian and Argentine highest tribunals have, at times, successfully configured important new political spaces for the effective pursuit of public policy goals, in conjunction and dialogue with other social and political actors. This title is part of the Flip it Open programme and may also be available Open Access. Check our website Cambridge Core for details.

SANDRA BOTERO is Associate Professor of Political Science at Universidad del Rosario (Bogotá, Colombia). She is the coeditor of *The Limits of Judicialization: From Progress to Backlash in Latin America* (2022).



COMPARATIVE CONSTITUTIONAL LAW AND POLICY

Series Editors

Tom Ginsburg University of Chicago Zachary Elkins University of Texas at Austin Ran Hirschl University of Texas at Austin

Comparative constitutional law is an intellectually vibrant field that encompasses an increasingly broad array of approaches and methodologies. This series collects analytically innovative and empirically grounded work from scholars of comparative constitutionalism across academic disciplines. Books in the series include theoretically informed studies of single constitutional jurisdictions, comparative studies of constitutional law and institutions, and edited collections of original essays that respond to challenging theoretical and empirical questions in the field.

Books in the Series

The Story of Constitutions: Discovering the We in Us Wim Voermans

Democracy Under God: Constitutions, Islam and Human Rights in the Muslim World Dawood Ahmed and Muhammad Zubair Abbasi

Buddhism and Comparative Constitutional Law Edited by Tom Ginsburg and Ben Schonthal

Amending America's Unwritten Constitution Edited by Richard Albert, Ryan C. Williams, and Yaniv Roznai

Constitutionalism and a Right to Effective Government? Edited by Vicki C. Jackson and Yasmin Dawood

The Fall of the Arab Spring: Democracy's Challenges and Efforts to Reconstitute the Middle East Tofigh Maboudi

Filtering Populist Claims to Fight Populism: The Italian Case in a Comparative Perspective Giuseppe Martinico

Constitutionalism in Context David S. Law

The New Fourth Branch: Institutions for Protecting Constitutional Democracy Mark Tushnet

The Veil of Participation: Citizens and Political Parties in Constitution-Making Processes Alexander Hudson

Towering Judges: A Comparative Study of Constitutional Judges Edited by Rehan Abeyratne and Iddo Porat

The Constitution of Arbitration Victor Ferreres Comella

Redrafting Constitutions in Democratic Orders: Theoretical and Comparative Perspectives Edited by Gabriel L. Negretto

From Parchment to Practice: Implementing New Constitutions Edited by Tom Ginsburg and Aziz Z. Huq

The Failure of Popular Constitution Making in Turkey: Regressing Towards Constitutional Autocracy Edited by Felix Petersen and Zeynep Yanaşmayan



A Qualified Hope: The Indian Supreme Court and Progressive Social Change Edited by Gerald N. Rosenberg, Sudhir Krishnaswamy, and Shishir Bail

Reconstructing Rights: Courts, Parties, and Equality Rights in India, South Africa, and the United States Stephan Stohler

Constitutions in Times of Financial Crisis Edited by Tom Ginsburg, Mark D. Rosen, and Georg Vanberg

Hybrid Constitutionalism: The Politics of Constitutional Review in the Chinese Special Administrative Regions Eric C. Ip

Constitution-Making and Transnational Legal Order Edited by Tom Ginsburg, Terence C. Halliday, and Gregory Shaffer

The Invisible Constitution in Comparative Perspective Edited by Rosalind Dixon and Adrienne Stone

The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis Theunis Roux

Constitutional Courts in Asia: A Comparative Perspective Edited by Albert H. Y. Chen and Andrew Harding

Judicial Review in Norway: A Bicentennial Debate Anine Kierulf

Constituent Assemblies Edited by Jon Elster, Roberto Gargarella, Vatsal Naresh, and Bjorn Erik Rasch

The DNA of Constitutional Justice in Latin America: Politics, Governance, and Judicial Design Daniel M. Brinks and Abby Blass

The Adventures of the Constituent Power: Beyond Revolutions? Andrew Arato

Canada in the World: Comparative Perspectives on the Canadian Constitution Edited by Richard Albert and David R. Cameron

Constitutions, Religion and Politics in Asia: Indonesia, Malaysia and Sri Lanka Dian A. H. Shah

Courts and Democracies in Asia Po Jen Yap

Proportionality: New Frontiers, New Challenges Edited by Vicki C. Jackson and Mark Tushnet

Constituents before Assembly: Participation, Deliberation, and Representation in the Crafting of New Constitutions Todd A. Eisenstadt, A. Carl LeVan, and Tofigh Maboudi

Assessing Constitutional Performance Edited by Tom Ginsburg and Aziz Huq

Buddhism, Politics and the Limits of Law: The Pyrrhic Constitutionalism of Sri Lanka Benjamin Schonthal

Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave Brian Ray

Constitutional Courts as Mediators: Armed Conflict, Civil-Military Relations, and the Rule of Law in Latin America Julio Ríos-Figueroa

Perils of Judicial Self-Government in Transitional Societies David Kosař



Making We the People: Democratic Constitutional Founding in Postwar Japan and South Korea Chaihark Hahm and Sung Ho Kim

Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South César Rodríguez-Garavito and Diana Rodríguez-Franco

Unstable Constitutionalism: Law and Politics in South Asia Edited by Mark Tushnet and Madhav Khosla

Magna Carta and Its Modern Legacy Edited by Robert Hazell and James Melton

Constitutions and Religious Freedom Frank B. Cross

International Courts and the Performance of International Agreements: A General Theory with Evidence from the European Union Clifford J. Carrubba and Matthew J. Gabel

Reputation and Judicial Tactics: A Theory of National and International Courts Shai Dothan

Social Difference and Constitutionalism in Pan-Asia Edited by Susan H. Williams

Constitutionalism in Asia in the Early Twenty-First Century Edited by Albert H. Y. Chen

Constitutions in Authoritarian Regimes Edited by Tom Ginsburg and Alberto Simpser

Presidential Legislation in India: The Law and Practice of Ordinances Shubhankar Dam

Social and Political Foundations of Constitutions Edited by Denis J. Galligan and Mila Versteeg

Consequential Courts: Judicial Roles in Global Perspective Edited by Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan

Comparative Constitutional Design Edited by Tom Ginsburg



Courts that Matter

ACTIVISTS, JUDGES, AND THE POLITICS OF RIGHTS ENFORCEMENT

SANDRA BOTERO

Universidad del Rosario







Shaftesbury Road, Cambridge CB2 8EA, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment, a department of the University of Cambridge.

We share the University's mission to contribute to society through the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org Information on this title: www.cambridge.org/9781009281997

> DOI: 10.1017/9781009281973 © Sandra Botero 2024

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press & Assessment.

First published 2024

A catalogue record for this publication is available from the British Library.

A Cataloging-in-Publication data record for this book is available from the Library of Congress

ISBN 978-1-009-28199-7 Hardback

Cambridge University Press & Assessment has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.



Contents

List of Figures		page ix
Lis	t of Tables	xi
Acknowledgments		xiii
1	Introduction	1
	1.1 The Argument in Brief	4
	1.2 Contributions	6
	1.3 Plan Ahead	9
2	Coproducing Judicial Impact	12
	2.1 Conceptualizing and Measuring Judicial Impact	12
	2.2 Causation	18
	2.3 Beyond Direct and Indirect Effects	19
	2.4 Explaining Judicial Impact	20
	2.5 The Argument	22
	2.6 Research Strategy	31
3	Collaborative Oversight Arenas	44
	3.1 Introduction	44
	3.2 Environmental Rights: Causa Mendoza (Argentina)	47
	3.3 Right to Health: T-760 (Colombia)	61
	3.4 Alternative Explanations	79
	3.5 Conclusions	82



viii Contents

4	Assessing the Effects of Monitoring Mechanisms and Legal Constituencies 4.1 Introduction	85
	4.2 Cases with Dense Legal Constituencies and No	85
	Monitoring Mechanisms	86
	4.3 Cases with Monitoring Mechanisms	107
	4.4 Conclusions: The Four Cases in Comparative Perspective	127
5	Low Impact Cases	129
	5.1 Introduction	129
	5.2 Rights to Food and Health: Causa Chaco (Argentina)	130
	5.3 Environmental Rights: T-231 (Colombia)	137
	5.4 Conclusions: Learning from Chaco and T-231	142
6	Collaborative Monitoring in India	145
	6.1 Right to Food Case	147
	6.2 Delhi Vehicular Pollution Case	154
	6.3 Conclusions	163
7	Conclusions	168
	7.1 Can Courts Advance Rights?	168
	7.2 Cross-Regional Lessons	176
	7.3 Refinements to My Theory	177
	7.4 Crafting Impact through Collaboration	178
	7.5 Responding to the Critics of Judicial Intervention in SER	181
	7.6 Judicial Power	183
Арţ	pendices	187
Ref	References	
Index		207



Figures

Conceptual scheme for judicial impact	раде 13
Court-promoted monitoring	24
Authority and independence in the Argentine and Colombian	
high courts	36
Scope of challenge	39
Scope of challenge for rulings under study	39
Monthly printed news coverage of El Riachuelo	61
Total number of health tutelas in Colombia	69
Growth rate for all tutelas and for health tutelas	70
Detainees in police stations (Buenos Aires Province)	92
Rulings on UPAC by the constitutional court	100
Mortgage loans 1995–2005	103
Puerto Brisa, Colombia	117
Map of Chaco and El Impenetrable, Argentina	131
Cúcuta, Colombia	138
	Authority and independence in the Argentine and Colombian high courts Scope of challenge Scope of challenge for rulings under study Monthly printed news coverage of El Riachuelo Total number of health tutelas in Colombia Growth rate for all tutelas and for health tutelas Detainees in police stations (Buenos Aires Province) Rulings on UPAC by the constitutional court Mortgage loans 1995–2005 Puerto Brisa, Colombia Map of Chaco and El Impenetrable, Argentina



Tables

1.1	Cases under study and expectations	page 9
2.1	Characterizing legal constituencies	27
2.2	Main cases under study	32
3.1	Summary of impact for Causa Mendoza	48
3.2	Characteristics of the legal constituency for Causa Mendoza	56
3.3	Summary of impact for T-760	62
3.4	Legal constituency for T-760	71
4.1	Summary of impact dimensions for Causa Verbitsky	89
4.2	Summary of impact dimensions for C-383	99
4.3	Summary of impact dimensions for Badaro	110
4.4	Summary of impact dimensions for T-547	118
5.1	Summary of impact dimensions for Chaco	133
5.2	Summary of impact dimensions for T-231	139
7.1	Cases and observed impact	170



Acknowledgments

This book was made possible by the generosity and support of my family, loved ones, friends, colleagues, interviewees, activists, lawyers, judges, politicians, several institutions, and strangers who went the extra mile. Though all errors and omissions are my own, I am immensely grateful for the many small and big ways in which people, and forces beyond my control – like health scares, international moves, and professional challenges – contributed to making this volume a reality. Writing it was a humbling experience that left me with even more questions, and with the certainty that it is merely the starting point for more conversations.

Courts That Matter started out as my doctoral dissertation at the Department of Political Science, University of Notre Dame. I am grateful to the National Science Foundation (NSF) and the Social Science Research Council (SSRC) for funding the research. I was fortunate to receive a Doctoral Dissertation Research Improvement Grant and an SSRC Mellon International Dissertation Research Fellowship, which allowed me to conduct exactly the kind of fieldwork I had envisioned. The Kellogg Institute for International Studies at Notre Dame was my academic home throughout graduate school: The Kellogg and its amazing staff nourished a vibrant scholarly community and supported me in countless ways. The Center for Asian Studies at Willamette University generously provided a grant to fund a trip to New Delhi, India. The trip was crucial for expanding my horizons and my thinking about the role of courts in rights enforcement beyond Latin America. Thanks to all the people in Colombia, Argentina, and India who patiently or hurriedly put up with my questions, helped me find information, allowed me to observe and learn from their lives and work, and shared their insights and experiences with me. I am especially grateful to Paola Bergallo, Julio Gaitán, and Mario Hernández for opening many doors as I was trying to navigate unfamiliar territories. Anuj Bhuwania, Varun Gauri, and Jinee Lokaneeta were very helpful as I was planning to visit India. I cannot begin to do justice to India or its judiciary in the pages that I dedicate to it here, but as a Latin American, I was astounded by the



xiv

Acknowledgments

many parallels and the divergences I glimpsed. Visiting New Delhi, meeting some of its people, and having the opportunity to learn about India touched me deeply.

My dissertation committee – Daniel Brinks, Scott Mainwaring, and Michael Coppedge – provided unwavering support and incisive comments that pushed me beyond my limits. The book took shape slowly over several years and was forged by many exchanges with two scholars who have had a huge influence on my work: Daniel Brinks and Ezequiel Gonzalez-Ocantos. I am grateful to Dan for his generosity and his guidance, and to Ezequiel for his patience and his willingness to help me dig myself out of academic holes. Others provided very useful feedback at different points of the writing process: Thanks to my colleagues at Notre Dame who read different versions, fellow panelists at the Law and Society Association and Latin American Studies Association congresses over the years, constructive reviewers, as well as Juan Diego Prieto, Silvia Otero Bahamón, Nathalia Sandoval, and Benjamín García Holgado.

This book will appear as part of a Cambridge University Press series, inclusion in which I thought I could only dream about. Thanks to the editors, and particularly Ran Hirschl, for welcoming this book. Ran's encouragement and input helped me get unstuck and see my work in a different way at a crucial moment. Matt Gallaway and Jadyn Fauconier-Herry at Cambridge University Press were a pleasure to work with throughout the editorial process. Vicky De Negri saved the day with her expertise and kindness. Thanks to David Goves for helping me map.

I have crossed paths with dear friends whose example and companionship have challenged, inspired, and sustained me at different points in this journey: Juan Albarracín, Nestor Castañeda, Manuela Fernández, Laura Gamboa, Victor Hernández, Allison Hobgood, Álvaro Hofflinger, Esteban Manteca, Michael Niño, Silvia Otero Bahamón, Nara Pavão, Jason Ruiz, Cayla Skillin-Brauchle, Lucia Tiscornia, and, most definitively, the WOL.

This book and the project from which it emerged developed as I moved several times across the United States and then back home to Bogotá, Colombia. Throughout this voyage, whether near or far, my family was always there. My parents Maria Eugenia and Hector, my sisters Carolina and Andrea, my nieces, and my other close relatives are the light that never goes out. I am deeply grateful to and for Santi, for bringing laughter, love, lentils, and joy into my life – and for his undying belief that I can and I will, even when I fear in my bones I cannot.