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978-1-009-36776-9 — The Social Constitution
Embedding Social Rights Through Legal Mobilization
Whitney K. Taylor
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CHAPTER ONE

INTRODUCTION

The Social Constitution

A man said to the universe:
"Sir, I exist!"
"However," replied the universe,
"The fact has not created in me
A sense of obligation."

Stephen Crane

This is a book about how new constitutional rights provisions become meaningful in everyday life, moving from parchment promises to constraining institutions. It focuses on the embedding of "social constitutionalism," by which I mean the constitutional recognition of rights to social goods, like health, housing, and social security, and the empowerment of courts to hear claims to those rights. Around the world, written constitutions have become ubiquitous. In fact, Canada, Israel, New Zealand, San Marino, Saudi Arabia, and the United Kingdom are the only states that do not have such a document.[1] Written constitutions set out the parameters of the contemporary nation-state: who belongs to the nation and who does not, the organization and commitments of the state, and the rights and duties of citizens. While the number of rights – especially social rights (see Figure 1.1) – included in constitutional texts has increased steadily over time, rights realizations in practice have lagged behind those promises, particularly when they involve already marginalized individuals and groups.

[1] These countries all have some sort of "basic law," set of customs, and/or collection of constitutional statutes rather than a single, unifying document.

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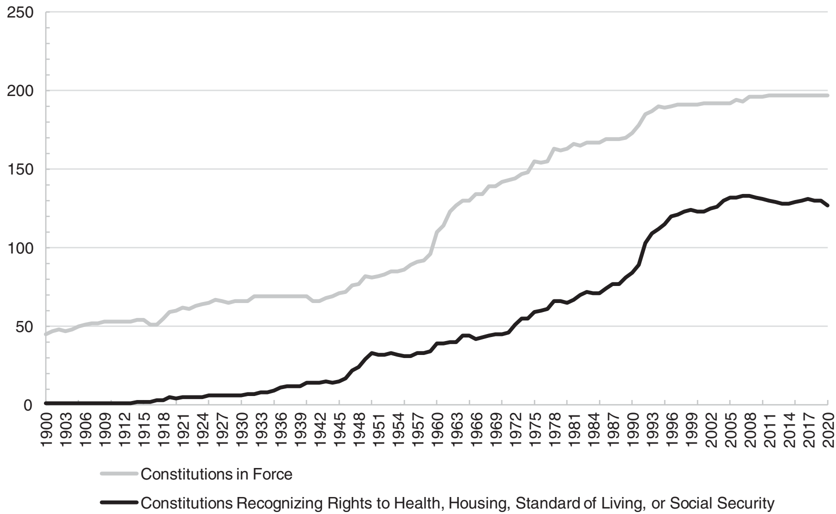

Figure 1.1 Constitutions and social rights over time (Elkins and Ginsburg 2021). Importantly, these data include unwritten or uncodified constitutions, as well as written constitutions.

The transition from an unequal society to one based on a sense of obligation regarding the needs of all citizens is not a natural or inevitable one, and powerful actors often try to thwart this process. Yet, this seemingly impossible situation has been met time and time again with obstinate contestation, with people who refuse to accept this lack of recognition, with people who imagine better futures and work toward those futures tirelessly. Though the story involves macrohistorical institutional change by way of significant revisions to the core documents that outline the parameters of the state, it begins and ends with individuals. Individuals – both those who advance rights claims and the judges who respond to them – together construct and reconstruct notions of obligation, specifically the conditions under which the state has a duty to provide for the social needs of its citizens. In this book, I present a detailed study of the Colombian experiment with social constitutionalism, uncovering how new written constitutions and constitutional rights can come to be more than simply words on paper and instead fundamentally shape both social and legal life. The adoption and embedding of social constitutionalism account for the expansion of access to social goods throughout much of the world. And in a global climate defined by democratic backsliding and backlash

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against progressive constitutional provisions,[2] understanding the conditions under which the justiciability of social rights becomes a taken for granted aspect of political life and a widely accepted "rule of the game" becomes even more important.

Before moving forward, however, I want to offer an example of how social constitutionalism plays out in people's lives. One Sunday afternoon in April 2017, a woman named Teresa[3] told me about her life in Agua Blanca, a densely populated district on the outskirts of Cali, Colombia. Teresa operated an informal sewing business out of her living room, and weathered as best she could the interrelated threats of violence, drugs, and economic insecurity that swirled around her. Social service provision in Agua Blanca is sorely lacking, and accessing doctors and hospitals is particularly difficult. The state's presence appears to be limited to police officers, who – according to residents of the neighborhood – punch, kick, and shoot first, asking questions later, if at all. Teresa told me about how, after she developed a problem with her trachea that made it difficult for her to breathe, she attempted but failed to attain what she deemed to be adequate medical attention. In the midst of this difficult situation, what did she do? She turned to the courts, filing a claim to the constitutional right to health through a legal procedure called the *acción de tutela*, because, as she put it, "everything happens through the tutela."[4]

Teresa's assessment is only a slight exaggeration. In fact, Colombians have filed almost eight million legal claims to their constitutional rights through tutelas since 1992, the year the tutela was introduced (see Figure 1.2). The *acción de tutela* is a legal procedure that allows individuals to make immediate claims to their "fundamental" constitutional rights before any judge in the country and does not require the service of a lawyer.[5] This has occurred in a country in which the majority of citizens routinely express little to no confidence in judges (on average just over two-thirds of Colombians, according

[2] See, e.g., Bermeo (2016) and Levitsky and Ziblatt (2018).

[3] A note on names: I refer to those who I interviewed in whatever way they felt most comfortable with – for most of those who I met in their professional capacity, this means using their full names; for those interviewees who I describe as "everyday Colombians" (i.e., people like Teresa who do not work in the formal legal sphere or academia), this entailed using a placeholder first name to protect their anonymity.

[4] Interview conducted April 9, 2017 in Cali, Colombia. "Todo funciona a medida de tutelas."

[5] This legal mechanism is comparable to the *amparo* found throughout Latin America (Brewer-Carías 2009).

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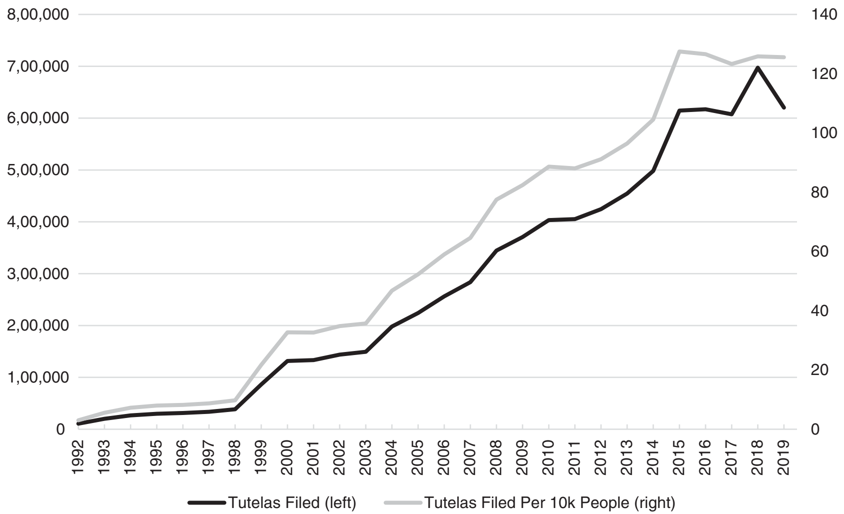

Figure 1.2 Tutela claims filed, 1992–2019.
Interview conducted April 9, 2017 in Cali, Colombia. "Todo funciona a medida de tutelas."

to surveys fielded between 1996 and 2020).[6] Even more surprisingly, actors generally not associated with constitutional rights talk, such as doctors, pharmaceutical companies, and insurance companies, openly encouraged citizens to file these claims. Far from simply being words on paper, the 1991 Constitution has come to be an important part of the social fabric of everyday life in Colombia.

How exactly did this occur? How did shifts in ideas about the law translate into substantive tools that allow citizens to make claims on the state, reshaping access to social goods in Colombia and elsewhere? More generally, how do constitutional rights provisions become embedded in social and legal life? These are the questions that this book tackles.

1.1 THE GLOBAL EMERGENCE OF SOCIAL CONSTITUTIONALISM

According to conventional wisdom, citizens pursue social welfare claims by voting, lobbying, and pressuring elected officials. The story

[6] Latinobarometro surveys show that, on average, 68.7 percent of Colombians expressed "no confidence at all" or "little confidence" in the judiciary (compared to "a lot of confidence" and "some confidence") between 1996 and 2020.

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goes that judiciaries are conservative bastions of the old order, perhaps valuable for advancing elite interests, but hardly useful for defending individual or group rights to social needs like healthcare, housing, and education. Further complicating the turn to law to advance access to social welfare goods, the content of social rights is often underspecified and subject to progressive realization and available resources at both the national and international levels. Yet, against the backdrop of expanding constitutional recognition of social rights, progressive and pro-status quo actors alike have engaged the law and courts in pursuit of their social and political goals. At times, social rights protections have even come to have binding influence, fundamentally reshaping the relationship between citizens and their state.

Historical accounts trace the development of legal systems and constitutional law to the changing nature of relationships within groups. Formalized law derives from informal rules fashioned to create or maintain social relationships, and this formalized law governs not just horizontal relationships between equals but also vertical relationships between rulers and those they rule. In other words, law emerged to regulate the behavior of members of a political community, limiting the relative power of leaders through a system that exchanges protection (from internal repression and external threat) for resources in the form of taxes (e.g., Tilly 1990), and developing standards to support economic growth (e.g., North and Weingast 1989). Others argue that those in power consent to constitutional regulation in order to avoid revolutionary overthrow (e.g., Acemoglu and Robinson 2006) or as a response to specific electoral pressure (e.g., Ginsburg 2003; Hirschl 2004). None of these accounts entail a need for the state to ensure, through universal legal principles or "rights," the basic welfare of its citizens. However, over time, understandings about the appropriate relationship between state and citizen have changed.

Specifically, the fourth wave of constitutionalism (Van Cott 2000) marks a significant change in the thinking underlying the relationship between the law, the state, and the citizenry. This form of constitutionalism, which was prominent in the 1980s, 1990s, and early 2000s, includes an expansive set of rights recognition, particularly social and economic rights, and, often, broad review powers for the judiciary.[7] Scholars have variously termed this model "new," "social,"

[7] None of this is to say that the recognition of social rights or declarations of state attention to citizen needs were necessarily absent before this period.

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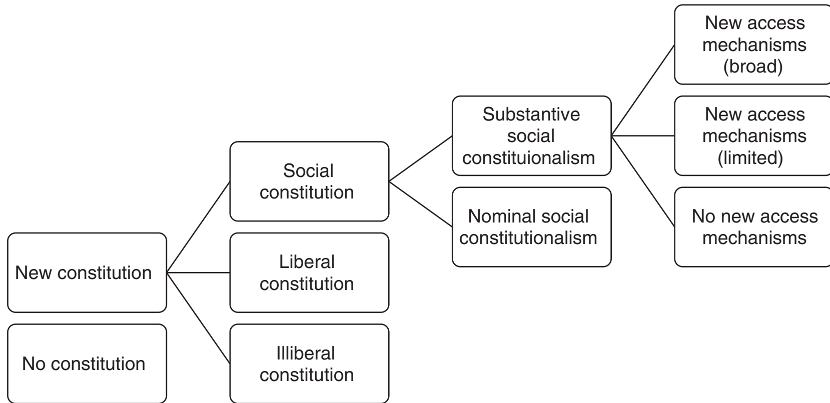

Figure 1.3 Differentiating types of constitutions and constitutionalism.

and "social rights" constitutionalism (Hilbink 2008; Angel-Cabo and Lovera 2014; Brinks and Forbath 2014; Brinks, Gauri, and Shen 2015). Throughout this book, I refer to this model of constitutionalism as "social constitutionalism."

Features of the social constitutionalist model had been around for decades – for instance, the Mexican Constitution of 1917 recognized a limited set of social rights and the International Covenant on Economic, Social, and Cultural Rights was drafted in 1966 – but these features only became commonplace in the 1980s and 1990s. In the social constitutionalist model, law is understood as an appropriate tool to address social ills, at least under certain conditions. At times, this shift in the function of constitutional law has been accompanied by the creation of mechanisms to allow citizens to claim their rights with relative ease.

Yet, this move to a more responsive vision of constitutional law was neither uniform nor inevitable. Between 1980 and 2000, seventy-nine countries – primarily in eastern Europe, Latin America, and sub-Saharan Africa – adopted new constitutions. While many of the resulting constitutions fit the social constitutionalist model, not all do. Figure 1.3 represents the set of choices related to the drafting of a constitution available in the context of a transition. In the midst of an effort to refound the state (whether substantively or simply rhetorically), the initial choice is whether or not to draft a new constitution at all. The resulting constitution – if drafted – could take a variety of forms, grouped broadly as social, liberal, or illiberal.

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As described earlier, social constitutions recognize a wide range of rights that indicate state obligations to the needs of citizens and allow for the "judicialization of political disputes under the social rights rubric" (Brinks et al. 2015: 290). In contrast, liberal constitutions – the most common constitutional design choice in Europe and North America following the end of World War II – feature a circumscribed set of individual rights protections, offer few opportunities for contestation over social goods through the formal legal system, and tend to limit the ability of racial and ethnic minority groups to fully participate in political life (Ginsburg, Huq, and Versteeg 2018). Importantly, however, liberal constitutions do set out a vision of state–society relations in which the state is obligated to serve citizens' interests. The core differences lie in whose interests count and what those interests are understood to include. Illiberal constitutions even more narrowly serve to protect the interests of an elite class and refrain from setting out a view of state obligations to the broader citizenry.

Even after constitution drafters select the social constitutionalist model, they still have a variety of choices at hand. For one, they must decide whether to recognize social rights as guiding principles (sometimes described as directives for state action) or to recognize them as justiciable, as actively claimable and contestable. Figure 1.3 distinguishes between these two forms, referring to the former as "nominal" social constitutionalism and the latter as "substantive" social constitutionalism. If a constitution includes substantive social rights protections, then the resulting question is how easy or difficult is it for citizens to make claims to those rights? We can set off additional types of substantive social constitutionalism: ones that include new mechanisms that effectively reduce the barriers to accessing the judiciary and making legal claims in a broad or in a more limited sense, and one that relies on more longstanding or general mechanisms for legal claim-making. This book presents a detailed investigation of the 1991 Colombian Constitution, which is a substantive social constitution that includes newly created access mechanisms like the *acción de tutela*. While the tutela procedure was initially limited in scope, over time that scope broadened significantly.

1.2 COUNTERVAILING FORCES IN THE EARLY 1990S

In addition to there being distinct models of constitutionalism in play at this particular historical moment, rendering the adoption and

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embedding of social constitutionalism far from guaranteed, the dominant emergent economic model – understood variably as neoliberalism, market fundamentalism, or the Washington Consensus – seemed to imply an oppositional set of political and legal institutions to those implied by social constitutionalism. In both scholarly and popular usage, the term neoliberalism refers to "an overlapping set of arguments and premises that are not always entirely mutually consistent" (Singh Grewal and Purdy 2014: 2). Broadly, the neoliberal economic model as understood in the early 1990s emphasized a substantial reduction of the size of the state, the privatization of industries, and limits on economic and social rights protections. The Washington Consensus formally involved ten policy prescriptions (Williamson 2004), with the underlying idea being "to cut overall social spending in order to cut budget deficits, increase the targeting of spending by increasing means testing, decentralize spending and administration to regions/states/provinces or municipalities, and privatize the pension system" (Huber and Stephens 2012: 206). Thus, the prevailing beliefs about the most appropriate and effective economic arrangement during this time period seems to have directly cut against the social constitutionalist idea of how to organize the state and how (or whether) to moderate state–society relations. Further, this period of the early 1990s featured dramatic changes to the international system. The fall of the Soviet Union inspired a reordering of connections and alliances between countries. Neoliberalism, if only momentarily, was seen as one of the last models of political and economic life standing.

The dominant version of neoliberalism envisioned an important, but limited, role of law and courts in political and economic life. At a basic level, neoliberalism requires the protection of property rights and individual freedoms that would allow for participation in the economy. David Singh Grewal and Jedidiah Purdy (2014: 9) go a step further, arguing that "neoliberalism is always mediated through law," with respect to "the scope and nature of property rights (including intellectual property), the constitutional extent of the government's power to regulate, the appropriate aims and techniques of administrative agencies, and the nature of the personal liberty and equality that basic constitutional protections enshrine." While law and neoliberalism may be intimately intertwined, it is clear that social constitutionalism involves the recognition and advancement of a different kind of citizenship, a different kind of citizen–state relationship than does neoliberalism. In the neoliberal view, the law protects citizens so that they can

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pursue their economic interests, while social constitutionalism makes no necessary claim about the economic pursuits of citizens. In fact, under the social constitutionalist model, the law is meant to step in to protect even those, or perhaps especially those, citizens who have not succeeded economically.

In practice, however, the choice turned out not to be neoliberalism or social constitutionalism – one or the other – but how exactly these two seemingly incongruous models might come to coexist in one country. We might think of the combination of these two models as the result of an uneasy compromise between different sets of actors. Another possible interpretation is that of a bait and switch, wherein elites offer empty promises of social equality and democracy, in keeping with the overarching scripts of the time, but with no intention of making good on those promises. Yet another possibility is that of unrecognized tension between these models. This is perhaps most likely where constitution-drafting procedures are fragmented across distinct working groups. Finally, it could be that these models are not, in fact, incongruous. To the extent that both rights-based constitutionalism and neoliberalism result in the individualization of social problems and obligations, there may be less of a disjuncture between these models than originally appears. Regardless of the exact dynamics at play, what we see is that these two models did come to the fore at roughly the same historical moment, with countries at once adopting neoliberal economic policies and new constitutions that recognized social rights. Whether or not these legal visions provided any substantive protections for the individual depends on the extent to which both social constitutionalism and neoliberalism became embedded. This book tracks these processes in Colombia, and provides insights for understanding the tensions between social constitutionalism and neoliberalism elsewhere in the world.

1.3 THE ARGUMENT IN BRIEF: CONSTITUTIONAL EMBEDDING THROUGH LEGAL MOBILIZATION

The Social Constitution introduces the concept of embedding constitutional law and documents how legal mobilization can propel constitutional embedding. Turning to the concept of embedding helps us to understand how constitutional rights become “real,” or how the promises written into constitutions come to have social and legal meaning, thus shaping the behavior of both everyday citizens and judicial system actors. Table 1.1 breaks down the argument of this book.

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TABLE 1.1 Argument: constitutional embedding through legal mobilization

Constitutional embeddedness refers to the degree to which constitutional law shapes everyday expectations and behavior
Constitutions will meaningfully impact everyday life only to the extent that they are embedded socially and legally
Social and legal embedding can develop independently of one another, but they can also serve to reinforce one another
When the social and legal components of constitutional embedding reinforce one another, a constitution will be resistant to efforts to dislodge it
Legal mobilization can serve as a mechanism of constitutional embedding

What exactly does constitutional embedding look like? Following the adoption of new constitutions that recognized a wide set of rights, citizens gradually come to learn about these rights, and they begin to take some of the problems in their lives to the formal legal system, experimentally. Some of the time, this experimental claim-making solidifies into general patterns in claim-making, as citizens begin to view particular issues as amenable to a legal solution and as societal actors encourage further claim-making. Simultaneously, judges' beliefs about their own role and whether and how the law applies to social issues change, in part because of the way that legal claims and daily life combine to expose them to these social issues. As judges continue to decide cases, opportunities for further claim-making shift. In this way, legal mobilization can serve as a mechanism of constitutional embedding, with the iterative process of legal claim-making shaping how both everyday citizens and legal actors understand what the law is and does – or what the law ought to be and what it ought to do.

There are two distinct, but related, components of constitutional embedding: social and legal embedding. Social embedding refers to the degree to which ordinary people know about rights, talk about rights, and, at times, make legal claims to their rights.[8] Beliefs about constitutional law – whether technically accurate or inaccurate – set out

[8] It is important to note that even in the absence of robust social embedding, some social movement organizations or NGOs may engage in legal claim-making. Social embedding refers to the notion that beliefs about the possibilities of the constitution and ensuing practices are widespread throughout society.

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