

Assessing the Impact and Promoting the Implementation of Structural Judgments: A Comparative Case Study of ESCR Rulings in Colombia

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Economic, social and cultural rights (ESCR) have received much attention in NGO and academic circles over the last decade. Most of the literature on the matter, however, focuses either on the theoretical underpinnings of ESCR or the legal technicalities of their enforcement. Thus, existing studies largely concentrate on adjudication phase of ESCR cases, while leaving unexamined the actual impact and implementation of court rulings.

My paper will seek to unpack the post-judgment phase of the legalization process. To that end, it combines theoretical analysis and empirical scrutiny. Theoretically, it outlines a conceptual framework that distinguishes between the impact and the implementation of ESCR rulings, and proposes a typology of the effects of such rulings. Empirically, it offers a comparative case study of two highly visible, structural cases decided by the Colombian Constitutional Court (T-025 of 2004, on the rights of forcefully displaced people, and T-760 of 2008, on structural reforms to the national health care system). By analyzing the Court's innovative approach to implementation and explaining the contrasting effects and levels of implementation of the two rulings, the paper seeks to shed new light on the explanatory and practical challenges of enforcing structural decisions on ESCR.

This think piece briefly lays out the theoretical framework and the methodological approach of the paper, on the basis of the findings of one of the case studies –on the impact of the Constitutional Court's ruling T-025 of 2004, a structural ruling through which the Court has attempted to protect the rights of the approximately 4 million internally displaced people in Colombia. The six-year implementation process has included 84 follow-up decisions and 15 public hearings, and has involved the participation of a myriad governmental agencies and non-governmental organizations (NGOs) to which the Court has recognized standing in the case. A detailed empirical analysis of the implementation and impact of this case can be found in Rodríguez Garavito and Rodríguez Franco (2010), from which the following pages are partially taken.

This think piece deliberately sketches a broader typology of judicial *impact* that includes, but is not limited to, the sorts of direct, material effects that the scholarly and NGO literature on *implementation* tends to focus. My argument in the final paper will be that strategies to promote the implementation of rulings that focus on direct, material effects should be a central part of socio-legal analysis and activist work, but should also be combined with an analytical and strategic discussion on how to promote other socially beneficial effects of ESCR jurisprudence (e.g., indirect and symbolic effects as explained below).

Broadening the Discussion on Impact and Implementation of ESCR rulings

Based on a broader work (Rodríguez Garavito 2011), this text engages socio-legal studies that have explored the impact of prominent, activist court rulings, which address a variety of topics, including gender equality in the job market (McCann 1994), racial discrimination (Rosenberg 1991; Klarman 2007) and prison overcrowding (Feeley and Rubin 1998). From different perspectives, these studies have theorized and empirically evaluated the effects of the “rights revolution” (Epp 1998) precipitated by judges’ growing intervention in the management of structural social problems.

The question that most often arises in this bibliography is: How do we evaluate the impact of a judicial decision? More broadly speaking, how do we determine the effects of judicializing social problems? How do we measure the impact of transforming a political, economic or moral controversy into litigation?

The responses to these questions can be classified into two groups, depending on the type of effects on which they are focused. On the one hand, some authors focus their attention on judicial decisions’ direct and palpable effects. Adopting a neorealist perspective—which views law as a set of norms that shapes human conduct—these authors apply a strict causality test to measure the impact of judicial interventions: a judgment is effective if it has produced an observable change in the conduct of those it directly targets, that is, the individuals, groups or institutions that the litigants and judges hope to influence with their strategies and decisions. For example, the question of determining the effects of the Colombian Constitutional Court’s Judgment T-025 (on the rights of internally displaced people) would be resolved by analyzing its impact on the conduct of government authorities and institutions in charge of public policy on forced displacement and, ultimately, by evaluating its consequences for the situation of the forcibly displaced population.

The seminal work employing this methodology is that of Gerald Rosenberg (1991), on the effects of the United States Supreme Court’s decision in *Brown vs. Board of Education*. This 1954 decision triggered a wave of judicial interventions to dismantle racial segregation in schools, public establishments and other places. However, contrary to the dominant view of the *Brown* decision—which sees the decision as revolutionizing race relations in the United States and as contributing to the birth of the civil rights movement in the 1960s—Rosenberg’s empirical study concluded that the judgment had had little effect, and that the faith placed in courts as mechanisms for social change was an “empty hope.” According to Rosenberg, public authorities in the southern states resisted compliance with the decision. Thus, in fact it was the political mobilization of the 60’s and its resulting anti-discrimination legislation (and not the judicial decision) that achieved racial desegregation. The author arrives at the same conclusion in studying the impact of litigation efforts to decriminalize abortion in the United States at the beginning of the 1960’s (in the case of *Roe vs. Wade*) and, more recently, in analyzing the effects of cases and judgments supporting same-sex couples’ rights (Rosenberg 2008).

On the other hand, authors inspired by an interpretive vision of the relationship between law and society have criticized Rosenberg and the neorealists for focusing only on the material and direct effects produced by judgments and human rights litigation. According to these critics, law and judicial decisions generate social transformation not only when they induce changes in the conduct of groups and individuals directly involved in the case, but also when they produce indirect transformations in social relations, or when they alter social actors' perceptions and legitimate worldviews promoted by the activists and litigants who go to court (see Bourdieu 2000). Returning to the example of Judgment T-025, beyond its direct, material effects (that is, effective compliance with its orders), it is possible that the decision has generated equally important indirect or symbolic effects. For example, it may have contributed to changing public perception of the urgency and gravity of forced displacement in Colombia, or it may have legitimated claims and reinforced the negotiating power of human rights NGOs and international entities that have been pressuring the Colombian government to do more for the displaced population.

The key work employing the interpretive approach is Michael McCann's study (1994) on the effects of legal strategies used by the feminist movement in fighting for salary equality in the United States. Contrary to Rosenberg, McCann argues that litigation and judicial activism's indirect effects sometimes are more important than the direct effects focused on by neorealists. In this regard, "although judicial victories frequently do not translate automatically into the social change desired, they can help redefine the terms of the dispute among social groups, both in the short-term and the long-term" (McCann 1994: 283). Additionally, they may have profound symbolic effects by altering perceptions held by different social actors (public authorities, victims of the rights violation in question, public opinion, etc.) regarding the problem and its possible solutions. All of this implies that, even when judges' holdings are contrary to the positions of those promoting social change, judicial processes can nonetheless generate transformative effects by increasing visibility of the problem in the media or by creating lasting bonds between activist organizations. These alliances can outlast the decision and lead to collective political actions that promote the same cause in contexts other than the courtroom (for example, in Congress, in the streets, or before international human rights bodies).

To clarify and highlight the difference between these two perspectives, it is useful to make a typology of the types of effects under consideration (Table 1).

Table 1. Types and examples of effects of judicial decisions

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

Source: Rodríguez Garavito (2011).

On the one hand, as shown by the table's horizontal axis, decisions can have both direct and indirect effects. The former consist of court-mandated actions and affect the actors in the case, be they the litigants, the beneficiaries or the target of the court's orders. For example, in the case of Judgment T-025, some direct effects have included the formulation and implementation of new norms and public policies by authorities who were the target of the judgment's orders, the inclusion of NGO litigants in the hearings and follow-up process to the case, and improvements in the funding and provision of social services to the displaced population, who are the judgment's ultimate beneficiaries.

The decision's indirect effects include all kinds of consequences that, without being stipulated for in the judicial orders, nonetheless derive from the decision. They affect not only the actors in the case, but also any other social actor. As will be shown subsequently, some indirect effects of Judgment T-025 include the emergence of new coalitions of civil society organizations in order to participate in the decision's follow-up process, as well as transformation of the way in which media report on the subject.

On the other hand, as represented by the table's vertical axis, judicial decisions can generate material or symbolic effects. The former category implies material changes in the conduct of groups or individuals. In the case of Judgment T-025, some effects of this type include the creation of programs to attend to the displaced population, international entities' participation in the follow-up process as funders or supervisors, and the formation of organizations of displaced persons seeking to intervene in the process.

The symbolic effects consist of changes in ideas, perceptions and collective social constructs relating to the litigation's subject matter. In sociological terms, they imply cultural or ideological alterations with respect to the problem posed by the case.¹ For instance, Judgment T-025's symbolic effects include transformation of

¹ For the definition of the concepts and the distinction between culture and ideology, see Swidler (1986).

public perception of forced displacement (it now tends to be seen in the first instance as a human rights violation, more so than a consequence of the armed conflict), as well as judicialization of the discourse of displaced persons' organizations to the extent that they have appropriated the Constitutional Court's rights language.

As the table portrays, the intersection of these two classifications gives rise to the four model types of effects: i) direct material effects (for example, promulgation of a norm, formulation of policy or execution of a public work ordered by the judge); ii) indirect material effects (for example, the emergence in public debate of new social actors—such as NGOs, donors, and public entities—who are drawn in by advocacy opportunities created by the decision); iii) direct symbolic effects (for example, altering public perception of the problem, so that it is then conceived in the human rights framework used by the courts); and iv) indirect symbolic effects (for example, legitimizing the litigants' view of the social problem or transforming public opinion about the problem's gravity or urgency).

Our case study of Judgment T-025 adopts the interpretive criticism of neorealist theory of law and society as its starting point, and its findings offer empirical and methodological support for that criticism. From an empirical standpoint, interviews with actors in the case, analysis of documents and observation of the judgment's implementation process demonstrate that, as McCann suggests, indirect and symbolic effects may have juridical and social consequences that are just as profound as the decision's direct, material effects. In fact, the displaced population's situation has not changed substantially since 2004, and authorities have complied only partially with measures ordered by the Court. In this connection, a neorealist, such as Rosenberg, might conclude that the hope placed in the Court by activists and displaced persons has been in vain.

This conclusion, however, ignores important consequences produced by the decision, which were repeatedly mentioned by interviewees: the appearance of the problem of forced displacement on the public agenda, social mobilization in support of displaced persons' rights, change in the way public opinion perceived forced displacement's urgency and gravity, and gradual transformation of the state machinery for attending the displaced population, among other consequences.

Methodological Implications

From the perspective of methodology, neorealists' positivist epistemology implies a nearly exclusive emphasis on quantitative research techniques that allow measurement of direct material effects that are the focus of the neorealist vision. This is evident in impact studies inspired by economic analysis of the law, whose conclusions tend to be as narrow and pessimistic as Rosenberg's. This is likewise the case for economic analyses of Colombian judicial activism. In fact, such analyses have been the source of some of the most persistent criticisms of the

Constitutional Court.²

In contrast to this one-dimensional methodology, the constructivist focus that we adopt in this work widens the realm of investigative possibilities to include qualitative techniques that capture the decision's indirect and symbolic effects (for example, in-depth interviews with public officials, activists and displaced persons to examine the judgment's impact on their perception of forced displacement and strategies to address it), on an equal footing with quantitative techniques (for example, analysis of social indicators for the displaced population, measurement of press coverage before and after the decision, etc.).

This explains the combination of methods used in our case study. First, the analysis is based on forty semi-structured interviews with key actors in the case, lasting one hour on average. Second, our fieldwork included participation in and observation of various fora for following up on the decision. These include public hearings held in the Constitution Court, expert commissions established to produce technical information for the Court, and meetings of coalitions of civil society organizations who follow and/or participate in the case. Third, our case study required the systematic analysis of copious documentation produced by the Court in following-up on the case, as well as numerous reports and publications produced by state entities and civil society organizations responding to requests for information made by the Court during the six years of follow-up subsequent to the judgment. Fourth, we analyzed statistics and indicators generated by different actors in the case to measure evolution of the displaced population's situation, in light of the parameters established by the Court in Judgment T-025 and its subsequent related decisions (*autos*).

Finally, given our interest in examining the judgment's symbolic and indirect effects equally and as well as its instrumental and direct effects, our study included systematically counting and analyzing the content of news articles about forced displacement published between 2000 and 2008, in the two most widely-circulated national print media sources (the *El Tiempo* newspaper and *Semana* magazine). The period of observation was chosen so that the decision was handed down in the middle of that period, thereby allowing comparison of the volume and content of press coverage before and after the decision and thus permitting evaluation of the decision's possible impact on the way in which media and those who shape public opinion address the issue of displacement.

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² Among other economists' criticisms of the Court, see Carrasquilla (2009), Clavijo (2001) and Kalmanovitz (2001). For an analysis of the confrontation between economists and constitutionalists around the issue of judicial activism in Colombia, see Rodríguez Garavito (2009a).

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