

INTERNATIONAL BOOK ESSAY

The Policy Impact of Court Decisions in Latin America and South Asia

Lydia Brashear Tiede

Department of Political Science, University of Houston, Houston, TX, USA
Email: lbtiiede@uh.edu

SANDRA BOTERO. *Courts that Matter: Activists, Judges, and the Politics of Rights Enforcement*. Cambridge: Cambridge University Press, 2024.
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Courts that Matter addresses whether courts can influence policy change. As indicated by Botero's title, she answers affirmatively under certain conditions. The book presents a well-developed theory and evidence from eight court cases in Argentina and Colombia as well as additional cases from India. Unlike other studies that only analyze court impact by whether courts' decisions are enacted and enforced, she goes further by defining impact in novel and important ways. Her insights into assessing impact and broadening its scope to include how court decisions influence the mechanisms for lasting policy change are a refreshing addition to the narrower literature on compliance with judicial decisions. The book adds much to the broader fields of law and society and comparative judicial studies.

As noted by Botero, most scholars limit their analysis of courts' impact to whether a decision was complied with or if there was a policy change in the direction posited by a court. As Botero points out, measuring impact in this way misses the manner in which court decisions can provide needed information to policymakers, interest groups, and citizens, as well as spur debate and innovation fostered through interactions among these entities. She describes a variety of mechanisms adopted after court rulings to increase their impact that not only solve problems related to the case before the court but also solve future problems in unique ways. This essay provides a summary of Botero's key points related to defining the impact of court decisions and factors that determine their impact and applying the theory to specific cases. I discuss alternative explanations and future areas of research. The book provides rich and important details related to the theory and cases which readers should read closely to discover the intricacies of Botero's area of inquiry.

Defining the Impact of Court Decisions

Botero defines impact along two dimensions: Immediate effects and outcomes. Immediate effects are “the actions taken as a result of a ruling and the changes in ideas and discourse that a ruling may trigger” (13). Immediate effects include the fostering of ideas and discourse that may be observed through changes in formal norms, changes in activist coalitions and citizen organizations, and changes in the amount of resources allocated to solving the policy issue with which the court has engaged. The immediate ideational and discursive effects include how the decision itself influences individuals’ underlying beliefs and understandings as well as political discourse affecting not only the parties to the litigation but also other key decision-makers. These influences of courts’ rulings are often overlooked but are crucial to understanding how courts may effectuate change in the first place. Botero makes clear that the decisions, the debates, and the discussions they elucidate are important. In other words, Botero’s approach shows that court rulings create a unique forum for sharing information and learning among all relevant actors.

Another immediate effect of a ruling relates to changes in formal norms promoted by a court case that come about through subsequent legislation, regulations, and jurisprudence. It should be noted that Botero takes a very different approach than Rosenberg’s highly cited *Hollow Hope* in that Botero sees legislation to implement court decisions as an immediate impact of the decision itself, while Rosenberg argues that courts themselves may be ineffectual in leading to social change because they do not have the power to enact laws to implement the decisions themselves. Despite the divergence in these two scholars’ perspectives, the extent of the dependence of courts on other political branches to activate their decisions is an area worth additional inquiry. Besides the above effects, an additional immediate effect is organizational changes related to the creation of new civil society organizations or the work of existing organizations and coalitions of activism related to the issue that features prominently in the ruling. The final immediate effect mentioned by Botero is the creation of financial, human, and informational resources that are generated by a ruling.

The second dimension for assessing courts’ impact, “outcomes,” refers to the rulings’ effects “on the conditions of the target population.” As the author focuses on socio-economic rights, outcomes are those tangible items that allow the targeted population to enjoy the realization of such rights. This two-dimensional approach to assessing immediate effects and outcomes allows scholars to analyze the impact of court decisions over time and allows for a more fluid conception of legal change.

The Determinants of Impact

Botero effectively argues that court monitoring mechanisms as well as a “legally empowered legal constituency” together make court rulings more impactful. Botero’s categorization of court monitoring mechanisms shows the variety of tools available to courts outside the widely cited example of the U.S. Supreme Court. Indeed, Botero provides a typology of court-based monitoring mechanisms of which scholars may have been previously unaware. Besides general court monitoring through 1) requiring reports and 2) requiring and processing reports, Botero discusses how courts further monitor through public hearings, the creation of follow-up commissions, and

collaborative oversight arenas. This latter monitoring method is a space whereby “civil society organizations, government control agencies, the court and the targets of the decision participate in the oversight process over an extended period of time.” While Botero argues the importance of these monitoring mechanisms, she carefully states that they are more effective with the presence of dense legal constituencies, which are advocacy and legal groups that have an interest in the court decision. In essence, Botero analyzes the importance of an interaction effect between these two determinants, which makes policy change emanating from a court ruling possible.

Botero is clear about the scope conditions of her study, which are limited to landmark socio-economics rights cases decided by the Argentina Supreme Court and the Colombian Constitutional Court, although she does provide additional evidence from two cases heard by the Supreme Court of India. From these scope conditions, she then chooses eight court cases to analyze that vary by the two major determinants for impact presented in her theory. These cases were chosen by reviewing the literature, the cases themselves, and consulting experts in the field as to the varied presence of the two main independent variables. The cases are chosen for the existence of four combinations of court monitoring and legal constituencies which clearly show the interactive effect of these two determinants. The two cases that have court oversight *and* a dense legal constituency are *Salud* (also known as T-760) (2008), related to restructuring the health system in Colombia and *Mendoza* (2008) related to the Riachuelo River basin clean-up in Argentina. The two cases with court monitoring but lacking a dense legal constituency are *Consulta Previa* (also known as T-547) (2010), which is related to the right to prior consultation regarding the Puerto Brisa project in Colombia, and *Badaro* (2006) concerning the recalculation of retirement pensions.

The remaining four cases are those where there was little or no court oversight or monitoring. The first, UPAC or C-383 (1999), was about restructuring Colombia’s mortgage system. The second, Verbitsky (2005), was about prisoners’ rights in the Buenos Aires province. Both cases had dense legal constituencies. The *Cúcata* or T-231 (1993) on the Bogotá Canal Clean up and *Chaco* (2003) were related to food health in Argentina’s Chaco province and had less dense or no significant legal constituencies.

To establish causation between the eight court rulings and the immediate effects and outcomes, the author uses within-case causal inference to trace how the rulings influence the courts’ impact. Indeed, the individual chapters identifying which determinants influence immediate impacts and outcomes provide a rich mechanistic account of how cases can be used to transform policy.

Theory Applied to Case Evidence

The author applies her theory to the cases by collecting an impressive amount of evidence, which traces what happened after each of the eight court rulings and how the existence of various combinations of court monitoring and dense legal constituencies or a lack thereof influence their impact. The descriptions of what occurred after the courts publicized their rulings provide readers with a detailed and convincing view of how court cases lead to significant policy changes. Botero’s attention to detail in this regard might be used as a template by other scholars who similarly want to trace the influence of important cases over time.

The case studies convincingly support Botero's theory. She shows that court decisions that required post-decision monitoring and the existence of dense legal constituencies (that is, the cases of *Salud* and *Mendoza*) are the most impactful compared to the other six cases analyzed with different combinations of the two independent variables. For both of these cases, Botero shows how court monitoring "over time generated resources for the tribunals to offset information asymmetries" (82). In both cases, the court monitoring and dense legal organizations allowed the courts to gather more information from the government and other civil society actors. This also allowed for innovations and new ideas to enable the court to tailor their decisions after they had been issued to respond to complicated social and policy arenas.

Despite the success of the combination of monitoring and dense legal constituencies, Botero notes some challenges. First, the joint and ongoing work of courts and civil society is experimental. As a result, it may be too early to tell whether these methods will be employed more widely. Second, the work engaged in by the courts and civil society is extremely time-consuming and resource-intensive. Because the cases that Botero selects grapple with significant policy issues, it is unclear whether judges, civil society, and other political actors would employ such strategies for less important cases.

The other combinations of court monitoring and civil society density in the remaining cases had less influence on impact as defined by the author, although Botero concedes that this was not always as clear-cut as she had presented in the theory. For example, in *Chaco*, which was hypothesized to have low impact due to a lack of sustained court monitoring and weak legal constituency support, indeed did result in some improvements to structural inequality and living conditions (173).

Botero bolsters her evidence with an analysis of two important cases from the Supreme Court of India, the Right to Food case and the Delhi Vehicular Pollution case. They show evidence of Botero's theory outside of Latin America and show that the "creation of collaborative monitoring spaces in India can enhance accountability" with a potential shift in the "balance of power between a reluctant government and the litigants" (146).

Alternative Explanations

In chapter 3, which deals with the two cases which best represent the theory at play as monitoring and dense legal constituencies are present in both, Botero suggests and then dismisses two alternative explanations for these decisions' impacts: favorable political conditions and changes in a country's economy allowing for more resources to be allocated for the issue the court decided. In the *Mendoza* case, Botero argues that a political explanation is not warranted as there were no national political forces who favored the environmental cleanup advocated in this case and that, due to party politics, the government could not coordinate any political action. She does, however, claim that lower-level local governmental officials used the decision ex-post for their own political benefit. As to the Colombia Court's T-760 case, Botero suggests that the political context was more favorable to implementing this decision, but not determinative. For both cases, she argues that the decision to allocate more economic resources to the problems at the center of the cases was also not determinative. In the

subsequent discussion of the six other cases analyzed for Colombia and Argentina, as well as for the cases related to the Indian Supreme Court, these same alternative explanations are not discussed in detail, but some of the analyses, as well as the theoretical motivation for collaborative arenas, suggest that politics may have more of a role in the determining the impact of the court's decisions. For example, in the conclusion, Botero notes that the work of other state actors, such as the national ombudsman, may have influenced the *Causa Choco* case (an example of no monitoring and low or no legal constituencies), which was predicted to have less impact than cases with these two determinants. As national ombudsmen are political actors, their work negotiating sensitive political contexts is worth further analysis. Additionally, although well beyond the scope of this book, the local and political context within which the courts operate might be explored further as the passage of legislation and regulations, described as an important immediate effect, depends on the exact configuration of the political actors in the relevant legislative bodies. Additionally, the way that court decisions are made and crafted, which influences their impact, may depend greatly on the political biases of the two courts, which in turn depends on who selected judges and the exact selection mechanism used. As to economic explanations, additional inquiry might focus not only on whether economic resources were provided to enforce a court decision but also to what extent the decision itself influences local and national economic interests. Economic considerations may play a larger role in cases that positively influence business or other vested interests.

Areas for Future Research

Botero's book is recommended for those who want to truly understand how court cases can lead to social change in the area of socio-economic rights in Argentina and Colombia and those who seek a framework for analyzing the impact of court rulings more generally. Unlike some large-N statistical studies that note the average treatment effects of explanatory variables, Botero shows us the mechanisms that render the courts effective through a close analysis of actions undertaken after a ruling is issued, bolstered by her archival research and interviews.

Interestingly, three of Botero's four cases from Colombia are *tutelas* rather than cases of abstract constitutional review, perhaps suggesting that *tutelas*, which allow more citizen access to courts, are a feature of the socio-economic cases she seeks to study. Although *tutelas* have often been viewed as a legal innovation, they also signal a breakdown of traditional vertical accountability mechanisms that hold politicians accountable through elections (See, Moreno et al. 2003; Tiede and Achury 2019). Botero's inclusion of three *tutelas* out of four cases reviewed for Colombia bolsters the importance of Botero's study as courts and novel processes are increasingly a locus of policy innovation. As Argentina and many Latin American countries also use *tutelas*, an area of further interesting research would determine whether certain case types or judicial review mechanisms allow courts' rulings to have more impact.

Additional studies could provide more scholarly purchase to Botero's analysis if they were replicated and extended to analyze more countries and court rulings. Furthermore, the influence of rulings on other rights and issues may lead to other important areas of inquiry and findings. For instance, how should the impact of rulings be assessed in countries with weak civil societies or in cases that don't

implicate individual rights? How do the impacts of court rulings co-vary with the political context? These questions illustrate how Botero's book provides the basis for new directions in comparative judicial politics research. Unlike many statistical studies, Botero's considered work suggests that scholars can gain considerable insight from the analysis of details and mechanisms that ensure that court rulings have lasting and significant impacts which go beyond the four corners of a court's decision.

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Lydia Tiede is a professor in the Department of Political Science at the University of Houston. Her current research focuses on studying high courts comparatively, predominantly in Latin America and Eastern Europe, as well as comparative research on the rule of law and democratic backsliding in developing countries. Cambridge University Press published her book, *Judicial Vetoes: Decision-Making on Mixed Selection Constitutional Courts* (2022).