

## Book Review

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*The Social Constitution: Embedding Social Rights through Legal Mobilization*, by Whitney K. Taylor, Cambridge and New York, Cambridge University Press, 2023. Tables, figures, appendix, bibliography, index, 254 pp., hardcover \$125.00.

The 1991 Colombian Constitution and one of its main creations, the Constitutional Court, became icons of social constitutionalism in Latin America and worldwide. In *The Social Constitution: Embedding Social Rights through Legal Mobilization*, Whitney K. Taylor tells the story of how new constitutional rights and mechanisms for their defense, in particular the eminent *tutela* procedure, permeated the Colombian judicial system and society at large and became part of the lived experience of lay citizens and legal actors. The book's central argument is that constitutional embedding, or "the degree to which constitutional law shapes everyday expectations and behavior" (p. 10), is necessary for constitutional rights to have effective meaning, and it shows the pathways through which this process took place in Colombia. This work has the extraordinary value of offering, through an ambitious country-study, an analysis of a whole process of establishing a new Constitution and Constitutional Court, with a focus on their role in the field of social rights, as well as a theoretical perspective for the study of this process.

From a theoretical point of view, it provides an original conceptualization of constitutional embedding, comprising a legal and a social dimension. Social embedding refers to "the degree to which individuals and groups come to understand and relate to the Constitution in an intimate and everyday way" (p. 182), and legal embedding refers to "the degree to which actors in the formal legal field accept and share a particular vision of constitutional law" (p. 182). A process of strong embedding of social constitutionalism requires both conditions, as well as positive feedback and reinforcement between them, with legal mobilization playing a key role in these dynamics. In such cases, a constitutional order is likely to endure and be difficult to destabilize. In this sense, the book advances an important theoretical and analytical approach for the study of the implementation of new institutions and legal frameworks in the region and beyond.

From the empirical perspective, it makes a fundamental contribution to our understanding of one of the most notable processes of social constitutionalism. It shows how the Colombian Constitutional Court built its own institutional role as a

protector of social rights, expanding its originally intended competences, and it argues that legal mobilization, particularly in the field of the right to health and mostly by individual citizens, motorized this process. The focus is on the use of the *tutela*, which is arguably the most progressive instrument in the world for the legal defense of rights, in terms of access, gratuity, lack of legal standing requirements, and speed of the process. The study draws from a multi-faceted research approach and impressive fieldwork, including nearly 200 interviews with actors in the legal field, non-governmental organizations, and citizens between 2016 and 2017, in Bogotá, Medellín, and Cali, as well as nearly 300 surveys with people who filed *tutelas*, and direct observation of work in the courts. It incorporates the voices of elite legal actors, as well as of citizens across social classes, including persons in highly marginalized communities. It is not an ethnographic work aimed at the reconstruction of life stories, or to find out how legal consciousness is constructed at the level of individual trajectories. The analysis is situated at a different position, which attempts to describe processes at the level of broader populations or groups, and the country in general.

The book analyzes in depth a notable aspect of the Colombian case, concerning the classic problem of the passage from law on the books to law in action. This problem does not refer only to the effectiveness and degree of implementation of a new norm or institution, but also to the form and the meaning that the law adopts in the process of incorporation and use by relevant actors. Originally, the *tutela* procedure was intended for claims about civil and political rights (included in the “Fundamental Rights” chapter of the 1991 Constitution). However, citizens started to use it to demand social rights, particularly in the field of the right to health, and judges and magistrates supported this expansion. The book offers a detailed account of the rapid enlargement of the scope of the *tutela*, and how it contributed to change the role of the Constitutional Court and the landscape of rights protection in Colombia. In this regard, it is in line with works that analyze similar processes of transformation of the original intent of norms and institutions, such as Cichowski (2007) showing how the European Court of Justice, created to arbitrate commercial disputes and regulate competition in the European Community, was transformed through litigation into a significant venue for the protection of social rights.

While its general tone is laudatory of the Colombian process, the book also analyses different types of obstacles and problems that challenged constitutional embedding. In the first place, drawing from extensive fieldwork in Agua Blanca, Cali, it points out the feeling of frustration and exclusion in marginalized communities who are aware of legal promises and instruments, but see that their problems are not addressed through these means. In fact, the study suggests that at times this can act even reinforcing perceived systematic exclusions of the poor and marginalized. This problem speaks of enduring inequality in access to justice, and the limits of legal change to confront structural inequalities (Galanter 1974), even when dealing with an instrument as favorable as the *tutela*. Second, power struggles and opposition on the part of the Executive and the Legislature challenged the expanding attributions of the Constitutional Court and its use of the *tutela* (the Court’s Magistrates successfully

opposed these attempts to limit their powers). Third, the processing of *tutelas* caused workload issues in the entire judicial system, as these types of claims must receive a quick response and have priority over other cases. The book offers an in-depth analysis of these problems, and concludes that they reinforce the idea that the Constitution is well rooted in the Colombian social and legal fields, since these challenges did not destabilize the embedding of the Constitutional Court and the *tutela* in the country's social and legal fields.

The book shows that in the field of the right to health, legal mobilization and judicial rulings took place with neither the specific intervention of a support structure for legal mobilization, nor activism in general by social movements. It was a process of rights awareness, litigation, and social embedding by individuals, rather than social actors, favored by extraordinary access rules that allow any person to submit *tutelas* without legal representation. One of the main questions in this regard is whether this type of legal mobilization can be said to characterize social rights litigation in general in Colombia. In fact, in other areas of rights there has been legal mobilization by social actors, and feminist and LGBTQ+ organizations, indigenous peoples, human rights organizations, legal clinics, and in general the field of public interest law in Colombia has contributed to litigation and Constitutional Court's jurisprudence on social rights. An assessment of the role of these actions in the process of constitutional embedding could be a matter of future research.

Finally, although the central purpose of this book is not to assess the impact of judicialization on social rights, the story it tells inevitably touches on this problem, and it shows the enormous limitations of the Colombian State, including the court system, to guarantee the right to health, in a context of rising neoliberalism. As expressed by one interviewee, "unfortunately in Colombia, to access health services, you have to present *tutelas*" (p. 87), and frequently one presentation is not enough, but several *tutelas* are necessary to gain access. Of course, in a system that does not provide universal access to health, the alternative to the role of courts can be the complete neglect of rights. In fact, the problems pointed out in the book speak more of the disastrous social consequences of the neoliberal project than of the limitations of courts. But such a successful case of constitutional embedding, with such modest results in terms of effective access calls attention to the aspirations of realizing social rights through judicialization in neoliberal contexts, in contrast to the universal coverage granted by social welfare policies. The case of South Africa, to which the last chapter of the book is dedicated as a counterpoint to the Colombian process, and is also an emblematic case of social constitutionalism, presents similar findings in terms of social justice results. This observation is not meant to restate, in a different context, the discussion about the effectiveness of seeking social change through the courts. In contrast with theoretical positions that a priori deny the transformative role of courts, the recent experience with legal mobilization in different areas of rights in Latin America confirms McCann's (1992) position that these are empirical questions that cannot be answered beforehand. This book approaches these questions in the best possible way, through a monumental empirical study.

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