Los derechos más allá del Tribunal:

un estudio comparado entre Brasil y Colombia

Rights beyond the courtroom
a case study compared between Brazil and Colombia

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Abstract: The judicial litigation on socio-economic rights has assumed greater importance in the last two decades. This tendency to seek social change through the courts generated a long tradition of research on the role of political and institutional actors and legal mobilization in the enforcement of rights in US, some European countries and recently in the Global South. However, a significant portion of the Brazilian constitutional doctrine remains oblivious to investigate the phenomenon of constitutional judicial litigation of socio-economic rights, in a practical and empirical look, from the functioning of democratic institutions. The lack of empirical studies in Law in order to verify this hypothesis justified the adoption of the case study as an interdisciplinary methodological strategy between Law and Political Science. As a result, the Supreme Court had not been identified as an autonomous agent capable of implementing a relevant social change and ensure the protection of social rights, because there were few measures that impacted directly on the behavior of other institutional political actors and should therefore be considered just another actor within a complex institutional arrangement.

Keywords: The role of Constitutional Courts; Raposa Serra do Sol Case; Rights enforcement.

Resumen: El litigio judicial sobre derechos socio-económicos ha asumido una gran importancia en las últimas dos décadas. Esta tendencia a buscar un cambio social a través de los tribunales generó una larga tradición de búsqueda sobre el rol de los actores políticos institucionales y una movilización legal en la aplicación de los derechos en Estados Unidos, algunos países europeos y recientemente en el sur global. Sin embargo, una porción significante de la doctrina constitucional brasileña sigue ajena a investigar el fenómeno del litigio judicial constitucional sobre derechos socio-

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económicos, con una mirada práctica y empírica, desde el funcionamiento de las instituciones democráticas. La ausencia de estudios empíricos de Derecho en orden a verificar esta hipótesis justifica la adopción del estudio de caso como una estrategia interdisciplinaria metodológica entre el Derecho y la Ciencia Política. Como resultado, el Supremo Tribunal no ha sido identificado como un agente autónomo capaz de implementar un cambio social relevante y asegurar una protección de los derechos sociales, porque eran pocas las medidas que impactaban directamente en el comportamiento de otros actores políticos institucionales y, por lo tanto, debería ser considerado un actor más dentro del complejo acuerdo institucional.

Palabras claves: El rol de los Tribunales Constitucionales; Caso Raposa Serra do Sol; Aplicación de derechos.

Introduction

Can court decisions promote *relevant social changes*? What is the role of the Constitutional Courts in the enforcement of socio-economic rights (SERs)?

The conventional literature about global evolution of constitutionalism has contributed significantly to the understanding of the role of the Judiciary in the enforcement of rights. However, the analysis of constitutional phenomena such as the globalization of constitutional law, the global expansion of the Judicial Power, and the judicialization of politics and social relations have predominantly been based on the normative character of constitutional interpretation. This perspective, as a rule, has not captured beyond a juricentric view the *institutional activity* of the Constitutional Court in guaranteeing and promoting fundamental rights.

In a context of increasing institutional centrality of the Judiciary as a space for political debate for civil society actors, the legal phenomenon of judicial litigation has become more important in the last two decades, with a growing proliferation of judicial decisions aimed at the enforcement of socio-economic rights (SERs).

The quest for political and social change through the courts has a long tradition of research in the United States and in some European countries. However, there are few academic papers within the scope of Constitutional Law that are concerned with investigating the phenomenon of the judicial litigation of socio-economic rights from a practical and empirical perspective on the functioning of democratic institutions in Latin America, Asia and Africa.

In this way, to question the role of the Constitutional Courts in the implementation of fundamental rights, from a perspective *beyond the courtroom*, seems to be far from the academic agenda of the mainstream of Brazilian constitutional doctrine, often leaving in the background the importance of this debate in the understanding and improvement of the institutional modeling necessary for the intended implementation of public policies that lead to the enforcement of fundamental rights.

In this context, the lack of empirical studies in law that examine recent emerging global trends, that is, the recognition of the potential role of the Constitutional Courts as an effective institutional agent of social change, served as an inspiring source for the present paper, that seeks to investigate the effects and impacts of collective litigation for the enforcement of socio-economic rights in the Raposa Serra do Sol case (PET No. 3.388/RR), specifically with regard to the clauses conditioning the demarcation of Indigenous lands established by the Brazilian Supreme Court (STF).

For this purpose, the typology of the effects of judicial decisions for the examination of social litigation cases developed by César Rodríguez Garavito and Diana Rodríguez Franco (2010;2015), were used.

Furthermore, a comparative analysis was carried out between the effects of the judgment T-025 (2004) - conceived as the most ambitious of the Constitutional Court of

Colombia (CCC), for having protected the right to housing of approximately 1150 families (5 million people) in a forced displacement situation in a coca plantation area, resulting from a serious Colombian armed conflict that lasted 25 years - and the judgment of Petition No. 3.388/RR, better known as the Raposa Serra do Sol case, which challenged the administrative demarcation of Indigenous Land, located in the state of Roraima, Brazil.

In this sense, the course of the analysis seeks to answer the following research questions:
1) The judgment of a particular strategic demand by the Brazilian Supreme Court - Raposa Serra do Sol - enabled the production of contributory effects and had a significant impact on the realization of fundamental rights of the indigenous peoples concerned?
2) Was the Brazilian Constitutional Court - STF an institutional actor able to implement a relevant social change and ensure the protection of social rights of the so-called "indigenous people of Raposa"?
3) What is(are) the causal explanation(s) for the effects verified by the implementation of judgment T-025 not having the same incidence in the judgment of the Raposa Serra do Sol case?

1. Why use a case study as a methodological strategy?

According to Schramm (1971 *apud* Yin, 2010), the purpose of the case study is to try to clarify a decision or a set of decisions, stating why they were taken, how they were implemented and with what results. In this perspective, the case study will be presented as an empirical research modality that seeks to analyze a contemporary phenomenon in depth and in its real context, especially when the boundaries between the phenomenon and the context are not clearly defined.
In general, case studies are used for: a) explaining complex causal connections about real-life phenomena, which comprehension requires an analysis that encompasses not only the case itself but also important contextual conditions pertinent to the phenomena studied here; b) describing the scenario in which a particular intervention occurred; c) promoting an evaluation of the intervention performed, even if descriptive; and d) exploring the situations in which the interventions evaluated have a specific set of results (Yin, 2014).
Therefore, it is possible to use the case study method when there is the purpose of dealing with contextual conditions, believing that these may be highly relevant to the phenomenon under study (Yin, 2014). In this sense, it is considered appropriate to adopt it for the analysis of the Raposa Serra do Sol case, considering the need to approach the

contextual conditions related to the case in order to evaluate the effects and impacts of judicial action on the implementation of fundamental rights.

Despite its epistemological limitations - in addition to those typical of any other research method - the case study can also be considered as a relevant methodological tool for the test of theories, presenting as a "strong test" modality, in comparison to other large-n methods (surveys and experiments).

Two strong points underlie this diagnosis: a) its theoretical propositions are stronger because they are, in general, original; that is, other already known theories did not elaborate on them and; b) the ease of inferring and testing explanations that define how an independent variable causes a dependent variable (Van Evera, 1997).

Another important advantage obtained from the use of this method stems from the intensive analysis of individual cases (small-n), which allows the researcher to probe a particular issue or phenomenon in depth. Such an examination enables the researcher to acquire a degree of knowledge about the case that is often impossible to achieve through the analysis of a larger sample (large-n), contributing to an advanced theoretical reflection (Campbell, 1975 *apud* Orum, 2001; Rueschmeyer, 2003 *apud* Silva e Cunha, 2014).

Indeed, according to the types of case study projects indicated by Yin (2010), there are four types of projects: a) single case (holistic); b) single case (integrated); c) multiple cases (holistic) and; d) multiple cases (integrated).

Among the types of case study projects listed here, we chose to conduct a single holistic case study with an explanatory purpose, because the method allows for the (i) better explanation the case, that is, the court decision, by collecting data from multiple sources of evidence; (ii) testing of the hypotheses formulated for the purposes of the research; (iii) contribution to the formulation of the explanatory hypothesis for the results achieved in the investigation, detailing its operation.

1.1 Building Research Design

For the structuring of the research design, it is important to register the relationship between the object of the present study and the design adopted. In this sense, it is possible to point out that the considerations of Rodríguez Garavito (2011), when investigating the effects of Sentence T-025 (2004), impelled the accomplishment of a case study, in a comparative approach, of the performance of the Brazilian and Colombian Constitutional Courts in the enforcement of socio-economic rights (SERs), in particular, based on the analysis of the aforementioned judicial decision and the judgment of Petition no. 3.388/RR, better known as Raposa Serra do Sol case.

Furthermore, as a way of explaining and justifying the application of the typology of effects of the judicial decisions developed by Rodríguez Garavito (2011), the fact that both decisions are part of the global trend of judicial protagonism in the enforcement

of social rights, as well as falling within the *macrosentence* and *structural case* classifications proposed by the Colombian author when sketching his analytical and methodological perspective to examine the implementation of the judicial decisions of the Constitutional Court of Colombia – CCC (Rodríguez Garavito y Rodríguez Franco , 2010, p. 16).

The Judgment T-025 (2004) was classified as macro-insensitive, considering among other aspects: 1) its scope, by the size of the beneficiary population; 2) the seriousness of human rights violations that it has sought to resolve; 3) the numerous state and social actors involved; 4) the pretension and duration of the process of implementation of the judicial orders of the decision, which took more than six years for its effectiveness (Rodríguez Garavito, 2010, p. 14).

The author still denominates *case* or *structural litigation* judicial processes that:

1) affect a large number of people who claim violations of their rights, either directly or through litigating organizations; 2) imply the performance of several government agencies responsible for failures of public policies, which contribute to rights violations; and 3) involve structural precautionary measures, in other words, orders of execution whereby courts instruct various government agencies to take coordinated action to protect the entire affected population and not just the specific complainants in the case (Rodríguez Garavito, 2011, p. 3).

It is understood that the Raposa Serra do Sol case approaches the above features, since: 1) currently, in Brazil, according to IBGE 2010 Census data, the indigenous population is 817,963 people[2]. Specifically, the indigenous peoples Ingaricó, Macuxi, Patamona, Taurepang and Wapichana, known as "indigenous peoples of the Raposa", represent a combined population of 18,000 Indians, organized in 167 communities (Brazil, 2010); 2) the limitation of the right to land, considered a true fundamental right for the original peoples, represents a violation of indigenous constitutional rights, particularly indigenous socio-economic and cultural rights; 3) it encompasses the involvement of various state and social agents in the matter, and 4) brought judicial orders, specifically, the 19 conditioning clauses indicated in the votes of the ministers of the Federal Supreme Court, which would serve as a parameter to discipline any demarcation of indigenous land in Brazil.

Conscious of the academic context of meaningful discussions about the limits and possibilities of the case study methodology to produce satisfactory causal inferences for the understanding of a legal phenomenon, it is shared with the understanding that the

[2] According to data from the Economic Commission for Latin America and the Caribbean - ECLAC (2010), the five countries with the greatest number of indigenous peoples are: Brazil, Colombia, Peru, Mexico and Bolivia. Still, according to the report, in 2010, 45 million people lived in Latin Indigenous peoples, of whom approximately 900,000 lived in Brazil, representing 0.5% of the Brazilian population.

development of an appropriate research project is essential for the realization of valid and reliable studies that should aim to connect with relevant problems of the empirical reality, on the one hand, and, on the other hand, allow a contribution to the academic literature, expanding the stock of explanations about the reality studied (Rezende, 2011).

In this context, the literature on the subject highlights the need to adopt analytical strategies and techniques to adequately examine the data collected, as well as to define the priorities of the topics to be addressed and why (Yin, 2010, p. 40 and 154).

Thus, as an analytical strategy for the present exploratory study, the verification, in the cases mentioned above, of the dynamics of the institutional activity of the Constitutional Courts in the realization of socioeconomic rights, as well as the mapping of the designs and the institutional mechanisms that these actors have implement relevant social change, and ensure the protection of social rights.

In contemporary political science, the methodological requirements for producing more refined theories, backed by empirical (rather than abstract) evidence, have driven the production of analytical strategies focused on understanding the causal processes involved in certain social phenomena (Rezende, 2011).

Consequently, the use of the case study method as a research strategy gains importance in the attempt to explain social phenomena from the construction of explanations by causal mechanisms, aiming at: a) an understanding of how they operate; b) its processes of interaction with the specific context conditions in which they occur and; c) the sign of a plausible connection between the independent variables - causes considered relevant - and the dependent variable - observed effects (Van Evera, 1997; Rezende, 2011).

In effect, Hedstrom (2005 *apud* Rezende, 2011) points out three basic reasons for the use of explanation by mechanisms in the social sciences: 1) a detailed understanding of the causal mechanisms that operate in a given phenomenon and the consequent elaboration of more precise and intelligible explanations from cases; 2) the possibility of reducing theoretical-typical fragmentation of social sciences - from the focus on the structural similarities between different causal processes involving social phenomena, thus avoiding the unnecessary proliferation of theoretical concepts and, finally, 3) the understanding of the logic of causation, from the understanding of causal mechanisms, going beyond the mere specification of correlations between causes and effects.

In the quest for internal validity[3], the construction of causal explanation was used in the process-tracing technique, adopting the most used modality of the Social Sciences, that is, *explaining outcomes process-tracing*, which aims to construct an explanation regarding a result obtained in a specific case, which points to a recurring research design

[3] Yin (2010, p. 63) lists four logical tests as a way of assessing the quality of any empirical social research project: a) *validity of the construct*: identification of the correct operational measures for the concepts to be studied; b) *internal validity*: (only for explanatory or causal studies and not for descriptive or exploratory studies): search for the establishment of the causal relation by which certain conditions are believed to lead to other conditions, different from spurious relations; c) *external validity*: define the domain for which the findings of the study can be generalized and; d) *reliability*: demonstration that the operations of a study - such as procedures for data collection - can be repeated with the same results.

that combines dialectically deduction and induction, until the researcher feels satisfied with the explanations produced on specific results (Pedersen e Beach, 2013 *apud* Silva e Cunha, 2014).

Synthetically, Silva and Cunha (2014), citing Bennett (2008), define process-tracing as "the careful assembling, through hypothesis testing, of a causal chain that leads to some specific result, producing an explanation from an individual case, unique".

According to Rezende (2011), causal mechanisms can be understood as the causal processes that produce a given phenomenon. Such mechanisms show how the processes of causation occur between the independent variables X and the dependent variable Y. The explanation by mechanisms suggests a hypothesis about how a set of causes articulates for the occurrence of a given phenomenon.

Given the relevance of the concept of a causal mechanism for the use of the process-tracing technique, its greater detail may be appropriate. Thus, according to Waldner (2012 *apud* Silva and Cunha, 2014):

a causal mechanism is constituted by a set of interacting parts, each composed of 'agents or entities that have the capacity to change their environment because it has an invariant property, which, in a specific context, transmits physical force or information that influences the behavior of other agents or entities'.

It is important to emphasize Mahoney and Terrie's observation (2008 *apud* Rezende, 2011) that, in the *small-n* historical-qualitative research, in which the case study fits, one usually seeks to understand how the causes that produce certain effects are articulated (*causes-of-effects*), while in quantitative analyzes the focus is on understanding the effects produced by the causes (*effects-of-causes*).

In these circumstances, the integrated use of the case study method and the process tracing technique is adequate for the production of causal inferences, given the proper use to allow with greater analytical power the understanding of the causal processes in action in a given context (George and Bennet, 2005; Rezende, 2011), as well as an aid in tracking institutional behavior of a particular political actor, at a given moment of its historical escalation (George and Bennett, 2005; Rezende, 2011).

Lastly, the adopted research design can be synthetically divided into three stages: 1) comparative analysis between Judgment T-025 and Raposa Serra do Sol case; 2) joint application of the typology of effects of judicial decisions developed by Rodríguez Garavito (2011) to analyze what effects and impacts arose from the cases on screen and; 3) use of the *process-tracing* technique, in *explaining outcomes* mode, in order to sketch *explanations for causal mechanisms* for the results obtained.

3. CCC and STF: similarities and differences in the regulatory effectiveness of the plan of SERs

As observed by Uprimny (2011), since the late 1980s Latin America has experienced an intense period of constitutional changes[4], starting as a starting point for this broad constituent or reformist process, the Brazilian Constitution of 1988. Despite the relevant differences and national specificities of each of the countries of the Region, there are significant similarities arising from this wave of constitutional reforms, especially in relation to the Brazilian and Colombian constitutions.

In this context, it is understood that in addition to the geographical proximity and the colonial past there are other significant approaches between Brazil and Colombia neglected purposively or not by the mainstream of Brazilian constitutionalism, regarding the political, economic, social and cultural context, etc.: 1) the provision of an extensive list of fundamental rights in the constitutional text, including the so-called economic, social and cultural rights - SER; 2) the alarming levels of social inequality[5]; 3) the crisis of representation of the political class and 4) the weakness of social movements and opposition parties (Uprimny e García-Villegas, 2002; Valle e Gouvêa, 2014).

These characteristics in common have materialized in the constitutional reforms experienced throughout Latin America in the last three decades, particularly in the case of the respective countries in the years 1988 and 1991. As a result, these recent constituent processes reverberated and continued to influence national institutional designs, as well as enabled an activist stance by the Federal Supreme Court and the Colombian Constitutional Court (Vieira e Bezerra, 2015).

Valle and Gouvêa (2014) pointed out that they both incorporated an extensive list of fundamental rights, including the so-called economic, social and cultural rights - SERs, however, they emphasize that they diverged in relation to relevant aspects for the realization of social rights, especially in what concerns the plan of the effectiveness.

In addition to the considerations about the effectiveness plan aimed at the realization of social rights, as well as the verification or not of the practice of entrenchment of SERs in the respective constitutions, the authors point to another pertinent perspective almost always neglected by the Brazilian constitutional doctrine: prediction or not of adequate mechanisms of guardianship for a judicial action capable of realizing economic, social and cultural rights.

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[4] For a systematization of the common trends and significant differences of the recent constitutionalist process in the region, see UPRIMNY (2011). According to the author, almost all Latin American countries during the last twenty-five years have adopted new constitutions - Brazil (1988), Paraguay (1992), Ecuador (1998 and 2008), Peru (1993), Venezuela , Bolivia (2009), etc. - or promoted considerable reforms in their existing constitutions - Argentina (1994), Mexico (1992), Costa Rica (1989), among others.

[5] According to data from the National Human Development Report 2013, Colombia and Brazil are, respectively, the 3rd and 4th place among the most income inequality in Latin America, behind only Honduras and Bolivia and ahead of Chile. Available at: <http://exame.abril.com.br/brasil/noticias/brasil-e-4o-pais-mais-desigual-da-america-latina-points-onu>. Accessed on: 10 Jul. 2015.

Valle and Gouvêa (2014) point out that, unlike the Brazilian reality, the institutional design that exists in the Colombian Charter is provided with a comprehensive institutional system programmed to be activated in case of "constitutional infidelity", resulting from the institutional inertia of the Constitutional Branches, attributing to the Judiciary a role of "mediator" between them and Civil Society in promoting the effectiveness of socioeconomic rights.

In fact, they emphasize the existence of a range of mechanisms for the protection and application of fundamental rights in the respective constitutional text, such as the *Acción de Tutela* (Article 86), an informal legal mechanism, a summary rite, and whose proceedings is a priority, which can be presented directly by the citizen to the judge, although without an attorney, making it possible to reach CCC in a relatively short time.

Another important difference between the respective constitutions can be seen from the critical assessment of the Colombian Constitution of 1991 proposed by Peñaranda (2016) after twenty-five years of its enactment, in which the author asserts that the CCC, experimental and gradually, opted strategically for the action focused on the protection of rights in guaranteeing them greater effectiveness, expressly renouncing the possibility of promoting equality policies through decisions with a universalizing bias.

This time, two legal tools were developed in its analysis resulting from a clause expressed in the Colombian Constitution (article 13): the concepts of *Sujetos de Especial Protección* - SEP (subjects of special protection) and of *Enfoques Diferencias* – ED (differential approaches), which state priority in the protection of fundamental rights of the discriminated and marginalized, reduced to the condition of manifest vulnerability (Peñaranda, 2016).

On the other hand, the STF´s actions in the protection of fundamental rights, in face of the Brazilian institutional design, diverges frontally from the Colombian dynamic. Regardless of the activist behavior when judging relevant counter-criminal cases, the filing of the respective actions did not result from the direct initiative of the minorities themselves, given the required Constitutional and legal status of *legitimados ativos*[6] (legitimized active) for the filing of the *Ação Direta de Inconstitucionalidade - ADI* (Direct Action of Unconstitutionality) and of the *Ação Declaratória de Constitucionalidade – ADC* (Declaratory Action of Constitutionality).

Standing out among others judgements, the recognition of stable homosexual marriage (ADI 4277 and ADPF 132/2011); the policy of institution of racial quotas by the University of Brasília – UnB (ADPF 186/2012) and the permission of the interruption of the pregnancy of the anencephalic fetus (ADPF 54/2012), all of them carried out by various institutional actors and even contrary to the interests of minorities: the governor of the State of Rio de Janeiro and the Attorney General's Office - PGR; the political party

[6] The *legitimados ativos* are the institutional actors capable of proposing ADI and ADC, according to Article 103 of the Federal Constitution and Article 2 of Federal Law 9.868/99.

Democrats - DEM and the National Confederation of Health Workers - CNTS, respectively.

The Raposa Serra do Sol case reproduced the aforementioned procedural logic, since procedural access to the STF was also initially carried out by illegal occupants of indigenous lands and the governor of the State of Roraima.

Another substantive differentiation between the Colombian and Brazilian jurisdictional practices is worth mentioning, which is the judicial instruction of factual matters, involving the protection of fundamental rights.

Contrary to the Brazilian higher courts, in particular the STF, which preferentially does not examine matters of fact, the CCC instituted and began to promote - from the judgment of Decision T-025 and the declaration of the *Unconstitutional State of Affair* - an approximation in relation to the litigation, in addition to the petitioner's unilateral report (Valle e Gouvêa, 2014).

On this track, the performance of the STF in the Raposa Serra do Sol is illustrative of the Brazilian legal practice in relation to the protection of socio-economic rights. Regarding the judicial investigation of the factual matter, it has been that, despite the analysis of memorials brought to the proceedings by the parties involved, it was restricted to the timely official visit of the ministers Gilmar Mendes - at the time exercising the presidency of the Court-, Minister Carlos Ayres Britto - Rapporteur of the case - and the Minister Carmen Lucia to the village Serra do Sol, in a helicopter provided by the Air Force.

These scholars add another important feature of the Colombian jurisdiction that stands out when compared with the Supreme Court's strategy for the analysis of litigation SERs: the possibility of meeting various demands for the development of structural decision. In this sense, although the *Acción de Tutela* can be considered as true individual action, as verified in the Brazilian courts, it is common practice in the Colombian Constitutional Court to bring diverse demands, sometimes hundreds, into one decision.

Such a judicial strategy, even though it appears a priori as counterproductive, enables the Court, in the opinion of the Constitutionalists, to analyze the multiple aspects of complex judicial litigation such as the demand for SER, thus allowing for a progressive densification of the issues involved, and, consequently, a judicial decision with greater adherence to the factual reality that it affects.

It should be added, however, that the aforementioned constitutional jurisdiction exercised by the STF evidences its twofold stance, due to the excess of pending cases, which suggests a certain institutional paradox: the STF that innovated by using as strategic dynamics the process of massification based on meta-decisions, via “Recurso Extraordinário” with “Repercussão Geral”, as a way to deal with procedural delays and the low effectiveness of its decisions, is one that ignores the adoption of new instruments in Legal systems for the solution of cases that deal with SERs, which have been classified by the Brazilian Constitutional Court as deserving of casuistic jurisdiction that guarantees them a pretensive criteria, when analyzed.

However, returning to the Colombian constitutional system, even the express provision of its protection mechanisms and implementation of fundamental rights in the Colombian Constitution of 1991 proved to be insufficient, given the historical context of systemic violations of SERs and chronic institutional ineptitude in the implementation of public policies associated with the promotion of these rights.

In response to this tragic factual reality, which demanded a new resolutive dynamic, and in the search to find legal mechanisms to guarantee fundamental rights, the Colombian Constitutional Court exercised an interesting judicial experimentalism in idealizing and implementing a decision-making mechanism to deal with situations of flagrant offense to fundamental rights and systematic violations of the Constitution (Aguilar Castillo; Bohorquez & Santamaria, 2006; Campos, 2015).

In this context, the CCC has adopted an innovative strategy of self-empowerment to verify and declare the so-called *Unconstitutional State of Affair*. This mechanism had already been used at least twelve times, related to six types of situations, the first one being in the form of the Unification Judgment SU-559, of 1997 (Aguilar Castillo; Bohorquez & Santamaria, 2006; Rodríguez Garavito & Franco, 2010; 2015).

From then on, as Rodríguez Garavito and Rodríguez Franco (2015) point out, Colombia, in a paradoxical turn in the comparative history of law, has gone from one of the countries with the most serious violations of human rights to a born exporter of constitutional jurisprudence and approaches institutional frameworks to ensure compliance.

However, as much of the Colombian constitutional doctrine emphasizes, the CCC is not the only nor was it the first Constitutional Court to make judicial decisions of a structural nature based on demands of public interest. Noting the influence of American constitutional doctrine on the institutional design adopted in Colombia, Rodríguez Garavito (2009 *apud* Feeley & Rubin, 1999; Rosenberg,1991; Sabel & Simon, 2004) points out that US courts have already used jurisprudential figures similar to ECI's for more than 50 years, given the structural reforms promoted in the context of public policies related to the prison system, to the educational system and to the social housing program.

In fact, Rodríguez Garavito and Rodríguez Franco (2015) point out that the institutional behavior of the CCC in declaring that a set of situations violates the Constitution and, consequently, undermines constitutional supremacy, is part of the international tendency of constitutional judges to perform Rights in structural cases, notably the cases People Union for Civil Liberties (India); *Grootboom* (South Africa) and *Verbitsky* and *Riachuelo* (Argentina).

Under these circumstances, the figure of the *Unconstitutional State of Affair* can be defined as a legal mechanism or technique created by the Colombian Constitutional Court, which declares that a certain factual reality is in contradiction with the Constitution, given the occurrence of a massive violation of the rights and principles

enshrined therein. It deals with exceptional situations of collective breach of fundamental rights, in which individual resolution, on a case-by-case basis, would be insufficient to resolve a problem requiring a structuring solution, as well as entailing the accumulation of serious cases pending within the jurisdiction of the Court.

With its declaration, the CCC is empowered to accumulate several guardianship actions related to the violation of constitutionally guaranteed rights, seeking the structuring resolution of the cases in a single trial, from the formulation of general orders addressed to the competent authorities pertinent to the litigation so that, within their institutional assignments spectrum and within a reasonable time, they can adopt the necessary measures to solve or overcome the *Unconstitutional State of Affair*.

Thus, despite the fact that it is a controversial mechanism, it has as a relevant legal innovation, considering the following elements favorable to its adoption: a) the establishment of precise conditions for compliance with the decision; b) the requirement to monitor and monitor the effective enforcement of the decision by control agencies; c) the exhortation to the Legislative so that, within its faculties, it promotes the elaboration of norms that allow it to overcome the ECI and; d) the establishment of requirements for the entities directly responsible that by action or omission violate rights (Aguilar Castillo; Bohorquez e Santamaria, 2006 e Quintero Lyons; Navarro Monterroza e Irina Meza, 2011).

3.1 Effects and Impacts of Judgment T-025

A retrospective analysis of the CCC´s jurisdiction regarding forced displacement points to the progressive expansion of its scope and its object of action, in a notable change in its institutional behavior, suggesting the occurrence of a sensitive jurisprudential turn.

While in the first trial on the subject, the effects of the decision were directed at the specific public officials and institutions, whose focus of possible solutions was directed at the individual rights violations of the plaintiffs. In the judgment of SU-1150, of 2000, the CCC proposed to: a) develop jurisdiction based on the logic of collective litigation; b) exercise the role of evaluator of public policies, indicating the lack of coordination among governmental institutions; c) point out the deficient development of public policy aimed at solving the social phenomenon of forced displacement due to the non-compliance with Law 387 of 1997, and its disagreement with international human rights standards and d) expressly urge the President of the Republic to comply with his constitutional obligations to the PIDs (Rodríguez Garavito & Kaufffman, 2014).

In fact, according to the authors, in the last decision on forced displacement before Judgment T-025, of 2004 – *T-602*, of 2003 – the CCC began to establish the State's duty to promote affirmative action and to give special attention to the PIDs, from the definition of fundamental concepts such as: cessation of displacement, reparation, vulnerability and the principle of non-retrogression.

However, it was undoubtedly from Judgment T-025 that there was an innovative and systematic exercise of jurisdiction in this matter. In that decision, the CCC accumulated 108 constitutional actions denouncing alleged violations of the rights of 1,150 internally displaced families due to the failure of state authorities to adequately address social demand (Uprimny & Sánchez, 2010; Rodríguez Garavito & Kaufffman, 2014; Rodríguez Garavito & Rodríguez Franco, 2015).

Consequently, the CCC, through an analysis of its own jurisprudence on forced displacement, presented, in the vein of Judgment T-025, the following diagnosis about the causes of the institutional blockade that caused the social vulnerability of the petitioners: a) the dispersion of responsibility on the problem; b) lack of coordination among the bodies responsible for assisting IDPs; c) the inactivity of state entities (Rodríguez Garavito & Rodríguez Franco, 2015).

Based on these elements, the Colombian Court declared the so-called *Unconstitutional State of Affair*, through which various institutions and public agents were sued at the national and local levels, and for the first time it was established that displaced people, for having been victims of serious human rights violations, held the rights to truth, justice and reparation, and ordered the government to take measures to solve the problems faced by the displaced.

As emphasized by Rodríguez Garavito and Rodríguez Franco (2015), the ECI statement had a double meaning: it stated that displaced people were in a precarious situation as a consequence of a structural problem derived from the repeated institutional omission and exposed the insufficiency of legislative, administrative and budgetary instruments to avoid the occurrence of violations of rights.

Thus, there remains a consensus in Colombian constitutional doctrine that the initiative to maintain the jurisdiction to supervise the execution of its decisions constituted a true jurisprudential turn point for the CCC. Unlike the usual institutional stance of the Constitutional Courts to limit themselves to deliberating on constitutional issues and delegating the supervision of their decisions to first instance judges, the CCC retained its jurisdiction over the case, initiating a process of regular monitoring of implementation of their decisions, allied to popular participation (Uprimny & Sánchez, 2010; Rodríguez Garavito & Rodríguez Franco, 2015).

As such, the CCC began to exercise an interesting judicial experiment by supervising the implementation of its decisions by adopting the following monitoring mechanisms: a) public hearings; b) thematic, regional, and informal sessions, c) *Sala Especial de Seguimiento* (special monitoring room) and; d) *autos* (files).

After a year of the delivery of Judgment T-025, the CCC requested reporting to state institutions, PIDs organizations and international organizations defending human rights, such as the United Nations High Commissioner for Refugees - UNHCR. Based on this information, the first public hearing was convened in of June 2005 with the purpose of

compiling the data collected and evaluating the possibility of the implementation of the orders issued (Uprimny & Sánchez, 2010; Rodríguez Garavito & Rodríguez Franco, 2015). In fact, in view of the satisfactory results observed from the development of the aforementioned monitoring mechanism, the CCC began to incorporate it into its institutional dynamics, and until April 2014, twenty public hearings were opened to the public in the Court's own premises.

The so-called regional and informal technical sessions, instituted in 2010, although similar to public hearings, differ from these because they are carried out not in the Court's premises, but in towns and cities within the country, that is, *in loco*. Still, according to Rodríguez Garavito and Rodríguez Franco (2015), until April 2014, twelve sessions were held, which convocations presupposed the need to discuss in particular a specific issue pending clarification, admitting the presence of public officials and groups involved, at the express invitation to the CCC.

3.2 Effects and impacts of the Raposa Serra do Sol case

For the purpose of analysis, the typology of effects of judicial decisions developed by Rodríguez Garavito (2011) will be used, which conceives an analytical framework for observing the effects of judicial decisions, divided into four planes: a) direct; b) indirect; c) material and; d) symbolic, as shown in Table 1 below.

Table 1. Types of effects of judicial decisions

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

Source: Rodríguez Garavito (2011, p. 1679).

Initially, a synthetic understanding of the data indicates that the analysis of the horizontal axis can be considered the effects of judicial decisions through the direct-indirect dichotomy. Thus, according to the author, while the direct effects would include the actions ordered by the court that immediately affect the participants in the case - whether the parties to the court orders the litigants, the beneficiaries or the state

organisms - the indirect effects would concern all the consequences which, without being stipulated in the orders of the court, derive from the sentence, thus affecting not only the parts of the case, but also other social subjects indirectly involved (Rodríguez Garavito, 2013, p.10).

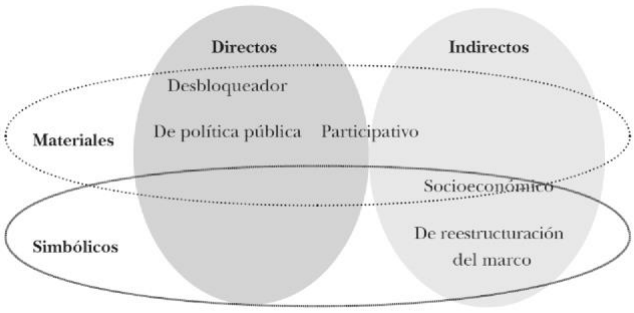
On the other hand, on the vertical axis of the symbolic-material dichotomy, one can deduce that material effects refer to tangible changes in the conduct of groups or individuals. While symbolic effects relate to changes in collective ideas, perceptions, and social conceptions about the subject in dispute.

The central argument presented from this typology is that for an analytical study on the effectiveness and impact of court decisions *beyond the courtroom* it is necessary to approach the four types of effects resulting from the cross-classification: *direct-material effect* (formulation of a public policy ordered by the Court*); indirect material effect* (participation and influence of new actors in the public debate); *direct symbolic effect* (redefining media coverage) a *symbolic-indirect effect* (transformation of public opinion on the subject).

In this way, Rodríguez Garavito and Rodríguez Franco (2015), after ten years of the delivery of Judgment T-025, 2004, analyzed, among others, the three main orders issued by CCC, which are: 1) to the Government, the formulation of a plan of action to overcome the humanitarian emergency of the IDPs, which led to the ECI declaration; 2) the guarantee to the IDPs of protection to the vital minimum (essential core) - right to food, education, land and dwelling and; 3) to the Public Administration, the preparation of the necessary budget calculation to implement said plan of action, as well as indicating the actions necessary to enable the effective investment of these resources in social programs to benefit this population.

Based on interviews with the main social and institutional actors involved, coverage and repercussion of the case in the media, observation-participant in meetings and hearings promoted by the Colombian Court and examination of vast documentation produced, the researchers verified the incidence of five relevant Effects of the judicial decision: a) unlocking; b) public policy; c) participatory; d) socioeconomic and; e) reframing.

Table 2. Effects of the judicial decision - Judgment T-025



Source: Rodríguez Garavito & Rodríguez Franco (2015, p. 43).

On the other hand, from the analysis of the Raposa Serra do Sol case, using the same typology, it was possible to observe only two effects resulting from the respective judicial decision: the unblocking and the restructuring of the framework, as shown in *Table 3*.

Table 3. Effects of the judicial decision - PET n° 3.388/RR

Unlocking	
	reframing

Source: Rodríguez Garavito (2011, p. 1683, modified).

The institutional unblocking effect is conceived as arising from the Court's performance in situations of structural stagnation of the state's functioning, in which, given institutional inertia and lack of coordination of the relevant institutional actors, there is frustration with the realization of fundamental rights.

This circumstance would justify judicial intervention in structural matters of public policy, as well as reinforce the Court's role as the most appropriate body for promoting institutional unblocking and the consequent protection of rights (Rodríguez Garavito & Rodríguez Franco, 2010).

In this sense, according to the researchers, the aforementioned material-direct effect of Judgment T-025 materialized through the order issued by the CCC for the government to elaborate an adequate public policy for the protection and promotion of the rights of the IDPs, the establishment of deadlines to evaluate its implementation and monitoring process through the issuance of *autos* and the holding of meetings of the Monitoring Commission, a fact that provoked the action of the Executive, in order to comply with its constitutional obligations (Rodríguez Garavito & Rodríguez Franco, 2015).

When compared with the Brazilian case in question, it should be noted that the unlocking effect could be located, due to the long history of the administrative procedure for demarcation of the Raposa Serra do Sol Indigenous Land, synthesized in the Report No. 125/10, prepared by the Inter-American Commission on Human Rights – IACHR (OAS, 2010).

In this context, the institutional inertia of the Executive, Legislative and Judicial Branches, due to the unjustified delay of 32 years (1977-2009) in the resolution of the administrative procedure for the demarcation of the indigenous territory, lack of legal

provisions subsequent to the Federal Constitution of 1988 that would guarantee the proper regulation of indigenous territorial rights and the numerous actions in progress related to the demarcation of the Raposa Serra do Sol Indigenous Land in the most diverse jurisdictions, including in the STF (Joaquim, 2013).

In fact, through a synthetic mapping of the institutional activity of the agents involved, one could observe the absence of the other effects listed by Rodríguez Garavito and Rodríguez Franco (2015), such as participatory, public policy and socioeconomic effects. First, the participatory effect was conceived as the result of the court's institutional efforts to foster and/or create institutional coordination mechanisms aimed at promoting the rationalization of public policy through coordinated action among relevant institutions, thus avoiding disarticulation and duplication of efforts.

As such, the CCC fostered institutional dialogue between public agencies and civil society organizations through public hearings; of the institution of the process of monitoring its own decisions, through the promotion of a dialogical judicial activism that, in the words of the researchers, evidenced the incidence of a direct material effect, since they enabled the deepening of the democratic deliberation not only between the main responsible public bodies, as well as other institutional and social actors involved at the international, national and local levels.

When analyzing the Brazilian reality, it is observed that, despite the judgment of PET No. 3.388/RR, it intends to explain basic guidelines for the establishment of demarcations of indigenous lands in Brazil, the exercise of indigenous usufruct and the consequent realization of their rights, any efforts of the Court were made for the promotion and/or creation of institutional coordination mechanisms, evidencing the absence of collaboration between the interested parties.

Still with regard to the participatory or deliberative effect, it is observed that the participation of indigenous communities in the deliberations that affected their interests and rights has been disregarded or considered by the STF as of a purely opinionated nature, in flagrant offense to Convention No. 169 on Indigenous and Tribal Peoples of the International Labor Organization (ILO) - the so-called *Convention on Indigenous and Tribal Peoples in Independent Countries* - and that, despite their great repercussion for the institutions related to the indigenous question, no such possibility was allowed to manifest themselves in order to discuss or interfere in their elaboration.

Concerning the so-called socioeconomic or social effect, data compiled by the *Comisión de Seguimiento* (follow-up commission) based on opinion polls showed a low improvement in socioeconomic indicators, a fact that reveals relevant social change in an insufficient degree for the PIDs. Although access to education and health has improved enormously, benefiting 80% of the internally displaced population, the conditions of other SERs remained unsatisfactory (Rodríguez Garavito & Rodríguez Franco, 2010, p. 248-249; 2015, p. 47).

Therefore, despite the analytical and methodological difficulties of measuring this effect in the material scope, which require the necessary comparison between the material reality of the population in question before and after the judicial decision, especially in the face of a lack of reliable data on the conditions of population, the researchers conclude that the changes in the situation of Internally Displaced Persons did not stem directly from judicial orders but were mediated by the implementation and functioning of the institutional reforms ordered by the CCC.

In this context, taking up the analysis of the Brazilian reality, it is observed that the indigenous population, the target social segment of the aforementioned judicial decision on SERs from the Raposa Serra do Sol trial, continues, even after the respective STF judgment, in an unfavorable socioeconomic situation, and there have been no significant changes in this social reality.

According to the United Nations (UN) report entitled *State of the World's Indigenous Peoples* (2010), produced by the Secretariat of the Permanent Forum on Indigenous Issues of the United Nations, some 750,000 indigenous peoples live in extreme poverty in Brazil. According to the scenario presented, they face considerable extinction, highlighting the alarming infant mortality rate in indigenous communities in Latin American countries, 70% higher than global average.

In addition to the worsening socioeconomic situation of indigenous people in various aspects, between 1985 and 2015, 947 Indians were murdered in Brazil, half of them concentrated in the state of Mato Grosso do Sul (CIMI, 2012).

Finally, there is the effect of public policy, conceived as the impact of a judicial decision on the design, implementation and monitoring of the action plan of a given public policy, resulting from the adoption of a position by the Court in order to diagnose structural failures of the Public Administration in its implementation and boost the design, execution and evaluation of public policy, from the construction of indicators of possible advances or setbacks.

Regarding this, Judgment T-025 represented a notable change in the design of the national public policy for the PIDs, as well as in the establishment of mechanisms for their implementation, financing and supervision.

Only one year after the judicial decision, the Colombian government approved the National Plan for the Integral Care of the Population Displaced by Violence (PNAIPD), modifying the public policy in force until then. Indeed, it was found that the public budget for social programs of assistance to the PIDs tripled, as well as a year-on-year increase in resources, which, although insufficient, according to Rodríguez Garavito and Rodríguez Franco (2015), made a significant increase, given that the budget for 2014 was almost ten times higher than forecast for 2004, before the CCC's activities. Thus, it is seen that this institutional output has materialized a direct, material response to the Court's first order.

On the other hand, as far as the Raposa Serra do Sol case is concerned, it is observed that despite the decision on the scene, it was based on the practice of judicial control of public policies as a way to make feasible the realization of social rights, in keeping with recent jurisprudence STF activism, this does not seem to have driven the development of a long-term national policy for the assurance and protection of the sustainable usufruct of indigenous lands, nor even outlined the establishment of any institutional mechanisms for their design, execution, financing and monitoring.

Continuing the analysis of the impact of the judicial decision in question, a search was made of the historical series of the quantity of the indigenous lands declared and homologated in the country. Official statistical data updated from 1985 to April 2015 indicate that 345 and 441 indigenous lands, respectively, were declared and ratified.

It was also observed that, in relation to the extent of indigenous lands, there was a marked decrease in the extent of demarcated indigenous lands in both modalities - declared and approved - especially during the time lapse between 2006, the initial time frame of the Raposa Serra do Sol case, and 2015.

Thus, it seems reasonable to revisit some of the research questions previously formulated: 1) Did the judgment of a certain strategic demand by the Federal Supreme Court - Raposa Serra do Sol case - make it possible to produce taxable effects and significant impacts for the realization of fundamental rights? And; 2) Is the STF an institutional actor capable of implementing relevant social change and ensuring the protection of social rights?

From a critical analysis of the data collected, it is pointed out that the STF was not able to implement a relevant social change and ensure the full protection of the economic, social and cultural rights of the indigenous population, specifically in the case in hand, given that the effects and impacts of outputs, were unsatisfactory or, at best, partial.

4. Process-tracing: a possible explanation for causal mechanisms

Following the previous stages of reconstruction of the narrative of the Raposa Serra do Sol case in a comparative perspective, the present section will use the process-tracing technique, in explaining outcomes in process-tracing mode, with the purpose of sketching explanations by causal mechanisms to the last and central question: 3) What is the causal explanation so that the effects verified by the implementation of Judgment T-025 by the Constitutional Court of Colombia - CCC did not have the same incidence in the trial of the Raposa case Serra do Sol by STF?

In addition to the reflections already presented and understanding the theoretical and methodological scope used to approximate the object of the research, the following mechanism and the respective causal hypotheses are indicated as possible explanations for the judicial action of the STF having been able to implement any social security rights,

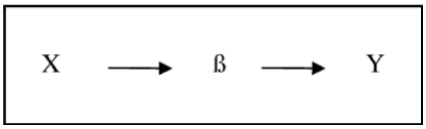
especially in relation to the process of demarcation of indigenous land in the Raposa Serra do Sol case (Table 4):

Table 4. Mechanism and Causal Hypotheses - Raposa Serra do Sol case

Independent variables (causes considered relevant)	**Causal processes** (Variables involved)	**Dependent variable** (Observed effects)
X	ß	Y
The non-implementation of institutional mechanisms that allow the articulated decision-making between the Constitutional Branches in complex and structural cases. The lack of monitoring mechanisms and indicators to assess the impact of judicial decisions on SERs.	The abstractivization of the Concentrated Control of Constitutionality The lack of dialogical-institutional interaction between the Constitutional Branches and the social actors involved in strategic litigation	Insufficient impacts on the implementation of socio-economic rights (SERs), until even its restriction.

Source: Costa Júnior, 2007, p. 111, modified.

This mechanism can be summarized in the diagram below:



Therefore, it is possible to consider that the non-implementation of institutional mechanisms that allow the articulated decision-making among the Constitutional Branches, as well as the lack of monitoring mechanisms and indicators to assess the impact of judicial decisions on SER, in complex and structural cases, as evidenced in the Raposa Serra do Sol case, behave as independent variables (X), determinants for the occurrence of insufficient outputs in the implementation of socioeconomic rights, even their restriction, considered here as a dependent variable (Y).

In fact, it is pointed out that among the multiple intervening causal processes (ß) that operate in the connection between the respective variables now listed, those that seem best to fit and have a higher theoretical adherence are: 1) the abstraction of the Concentrated Control of Constitutionality and 2) the lack of dialogical-institutional interaction between the Constitutional Branches and the social actors involved in the strategic litigation.

Thus, from the above considerations, it seems plausible to understand that in the Raposa Serra do Sol case, the STF acted more as a referee of political conflicts in a conflictive scenario of redesign of the federative pact than as an active defender of indigenous rights.

Its positioning is based on the institutional behavior of the STF in conceiving that "strategic interests" and "environmental protection", also protected by the Constitution, may exclude or limit, under certain conditions, the prior consultation procedure, overseeing the Judiciary, the exercise of balancing of certain constitutional principles in the event of an eventual conflict (Ríos-Figueroa, 2009).

Regarding the second intervening causal process suggested, that is, the lack of dialogical-institutional interaction between the Constitutional Branches, it is observed that although it involves a range of institutional actors in the attempt to consolidate a new design for the constitutional regime of usufruct of Brazilian indigenous lands, no attempt was made to construct a deliberative-dialogical process involved by the Federal Supreme Court, which could certainly propitiate the construction of uniformed institutional decisions, integrated with a greater possibility of effectiveness on the indigenous theme.

Table 5 below presents a summary of the analysis of the design and institutional behavior of the Constitutional Court of Colombia and the Federal Supreme Court, at the time of Judgment T-025 and PET No. 3,388 / RR, respectively.

Table 5. Comparative synthesis of design and institutional behavior of the CCC and of the STF Sentence T-025 and PET No. 3.388 / RR

	Access	Interface with the Inter-American Court	Deliberation	Judicial intervention	Rights	Remedies	Monitoring	Indicators	Impact
***Sentencia* T-025**	Direct proposal by the citizen (*Acción de Tutela*)	Yes	Dialogical	Structuring (Macro justice)	Strong	moderate	Strong	Strong	High
PET n° 3.388 /RR	Active Letigimates (ADI, ADC) And ADPF)	No	Monological	Individualized (Micro justice)	Strong	Strong	nonexistent	nonexistent	Low

In fact, it is understood that Constitutional Courts that propose the institutional role of guaranteeing and protecting SERs need to promote a redesign in their design and a change in their institutional behavior in order to:

1) adopt the understanding that cases that deal with this kind of law, given the recognition of the complexity of the demand, should be considered as structural cases;
2) In order to achieve a greater impact in its decisions, the Court must retain jurisdiction and establish outcome indicators to measure the effective enjoyment of the rights sought, since judicial monitoring, together with the social control exercised by the parties involved, is in public hearings, or in thematic sessions, with the broad participation of civil society, enables the Court to follow up on the implementation

phase of its own decisions, as well as on the evolution of the impact of judicial action beyond the courtroom.

Conclusions

In the theory of fundamental rights and constitutional theory, the Judiciary no doubt presents itself as a prominent actor in the defense and guarantee of fundamental rights. However, in complex and pluralistic societies, it's not possible to statically attribute to only one Constitutional Branch the definition of the meaning of the constitution, as well as disregarding the practical dimension of the functioning and behavior of political institutions, their decision-making processes and their repercussions on other spheres of interest.

On the other hand, there remains in a parcel of the Brazilian constitutional doctrine a blindness as regards to the problems of implementation of judicial decisions in public law disputes over socio-economic rights (SERs), presisting in what is an exhausted focus on a counter majority objection to judicial review of constitutionality and violation of the principle of separation of powers.

These academic positions presuppose a rigid attribution of constitutional functions, conceiving the Judiciary as an intervening agent in the competences of other Constitutional Branches, as well as rejecting, a priori, the adoption of deliberative institutional arrangements, collective judicial procedures and mechanisms of social participation that would improve the democratic legitimacy and the outputs resulting from judicial decisions.

The continuity of this understanding may lead to an undesirable side effect: the manifest incapacity of the Federal Supreme Court to respond to social demands by the DESC, generating what in Political Science is classified as "ungovernability of overload" of the Court.

In this sense, like Carvalho (2004), it is suggested the constitution of a new institutional architecture that has as a background the redimensioning of the Brazilian institutional design, assuming no more the centrality of theoretical-practical debauchery in but rather the recognition that none of the constitutional subjects of power is in itself capable of solving the profound dissent presented in this scenario.

Particularly, based on the analysis of the Raposa Serra do Sol case, one can conclude from the lack of relevant impact of the Brazilian Supreme Court's behavior on the behavior of other institutional political actors, as well as on the effectiveness of indigenous fundamental rights.

Such a statement, although evidencing that the STF should be considered only as an actor within a complex institutional arrangement, and not as the "epicenter of producing effects that guarantee the effectiveness of the DESC", as some Brazilian constitutionalists argue, does not invalidate it as promoting the progress achieved in the normative-constitutional effectiveness of fundamental rights.

Indeed, it is considered that the role of relevance attributed to the Brazilian Court would be further enriched if there were practices of institutional dialogue that promoted an intense interaction between the Powers, other institutional agents and the parties directly involved in complex and structural cases, the example of the Raposa Serra do Sol case.

In the current court of Brazilian constitutionalism, where the construction of a contemporary perspective is sought in alignment with practices developed in Constitutional Courts of global relevance, it does not seem salutary to have as a parameter a decisional approach focused on the simple questioning "who decides?" (Parliaments or cuts), typical of "last word theories". It is possible to reflect on the need for an "epistemological turn" in the study of the effectiveness of judicial decisions: moving from the theoretical-normative focus of the consecration of rights to the practical-institutional plan, in an interdisciplinary approach.

In this context, it is possible to observe the existence of a parallel between the importance of dialogue at the institutional level and the importance of interaction between the Law and other social sciences in order to shed light on the incipient discussion in constitutional doctrine analysis of the impacts of judicial activism.

Therefore, it is necessary to discuss a new arrangement in the institutional relations between the Powers and a greater participation of Civil Society in the political-decision-making process, as well as the consideration that incremental changes in small-scale institutional mechanisms, such as the inclusion of supervisory mechanisms and monitoring of judicial decisions in structural and complex cases, as verified in Judgment T-025, may have more satisfactory effects on the realization of fundamental rights (Silva et al., 2010).

However, it should not be forgotten that, regardless of origin, the incorporation of new ideas and legal mechanisms requires preliminary social and institutional support to ensure their operability and effectiveness (Vieira and Bezerra, 2015).

In the same sense, warn Gargarella and Curtis (2009, 24): Regardless of their place of origin, some grafts tend to be harmless and others do not, depending on the kinship ties

(the "genetic links") between the grafted material - the grafted institutions, and the constitutional "body" that receives them.

The observation of the mandatory and monological perspective of the STF, in direct contrast with the institutional behavior of the CCC, reveals a deep estrangement from crucial points for a "constitutional learning", namely:

a) the necessary establishment of requirements for the declaration of the *Unconstitutional State of Affair*;
b) the construction of structuring sentences that allow the Judiciary to play the role of "mediator" between the Constitutional Powers and Civil Society in promoting the effectiveness of socio-economic rights;
(c) the exercise of a supervisory jurisdiction which enables monitoring of its own decisions and
d) compliance with the jurisprudence of the Inter-American Court of Human Rights on SERs.

In spite of recognizing the limits and political-institutional challenges of the proper incorporation of the judicial initiative to effect fundamental rights based on the recognition of the *Unconstitutional State of Affair* by the STF, in view of the current Brazilian institutional arrangement, the validity of the is betting on this judicial experimentalism, with reason in view of Colombian doctrine and jurisprudence, reinforcing that said institute contributes to the necessary strengthening of deliberative democracy in the praxis of the Justice System, as well as to the effective implementation of fundamental rights historically evaded by state inertia.

On the contrary, it hopes to stimulate the elaboration of new empirical researches, especially through the adoption of the study. This research is not intended to generalize to other cases of collective judicial litigation, especially when supported by small-n analysis. in order to collaborate in the (re) construction of medium-range theories that penetrate more acutely in the identification of specific mechanisms pertinent to constitutional phenomena.

It should be stressed that explanations for causal mechanisms presented here do not encompass all the complexity of the phenomenon, since in addition to several other mechanisms acting together, a given mechanism may have a higher density in one case than in another. However, the purpose of this study to outline them is to contribute to the reflection and understanding of the institutional activity of the Constitutional Powers, given the current institutional design.

Careful not to reproduce the gap between judicial practice and social demands, the study aims to pave the way for a greater vocalization of indigenous peoples and other vulnerable peoples in the Brazilian political agenda, based on the demand for the re-dimensioning of the institutional design that to ensure the effective realization of fundamental rights beyond the courtroom.

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