



# DOCUMENTOS DE TRABAJO

Facultad de Derecho y Ciencias Políticas

**Experimental Constitutionalism.  
Implementation of jurisprudence on access to water in Colombia\***



\*Documento elaborado a partir de la tesis doctoral de la autora "Constitucionalismo experimental y protección judicial del derecho al agua en Colombia". Universidad de los Andes, 2017.

Medellín, noviembre 22 de 2021

# Experimental Constitutionalism.

## Implementation of jurisprudence on access to water in Colombia

Elaborado por:  
Luisa Fernanda Cano Blandón<sup>1</sup>

Constitutional Courts have become relevant institutions in social rights adjudication in the Global South. The Colombian Constitutional Court is one of the most progressive Courts in this area. It has designed innovative remedies for the structural guarantee of social rights in its rulings.

Recently, structural and collective cases have been the main challenge to the Constitutional Court.<sup>2</sup> In those cases, there is no definitive solution and the government is not the only one responsible for it. For that reason, instead of giving hierarchical orders, the Colombian Constitutional Court has tried to solve structural and complex cases through *experimental rulings*.

My approach focuses on experimental rulings characterized by 1) transparent, flexible and accountable solutions and 2) interaction between stakeholders while the courts take the role of facilitator.

According to Klein (2007), “over the years, courts employing injunctive relief in institutional reform litigation have, at least on some accounts and in some instances, moved away from command-and-control structural relief to more deferential remedial approaches that seek to attenuate capacity and legitimacy concerns” (p. 393).

---

<sup>1</sup> Profesora de la Facultad de Derecho y Ciencias Políticas de la Universidad de Antioquia, adscrita al grupo de investigación *Gobierno y Asuntos Públicos*. Abogada, Universidad de Antioquia. Magíster en Gobierno y Asuntos Públicos, FLACSO (México). Doctora en Derecho, Universidad de los Andes. Correo electrónico: luisa.cano@udea.edu.co.

<sup>2</sup> According to Sigal, Morales and Rossi (2015) "Among the individual cases and structural collective cases, there are other cases where collective damages are discussed and by which seeks to remedy problems overlooked by public policies, but have lower structurality notes that the so-called structural collective cases. We understand collective case one in which the involvement of a social right involves a relatively large number of people is easily determinable, involvement is limited to a specific geographical area and although public policy is questioned, its scope or level of generality is lower than in structural cases."

However, the role of the court as a *sounding board* is not deferential nor a role outside observer watching the dialogue between the parties:

A court in an experimentalist system thus does not come up with once-and-for-all solutions to threats against individual rights. Instead, courts superintend an experimentalist procedure by detecting potential threats to constitutional values, and by assessing whether the state is engaging in the appropriate deliberative process (Klein, 2007, p. 396).

According to Young (2012) in experimentalist judicial review, “the court seeks to involve the relevant stakeholders —government, parties, and other interested groups— in solving the problem which obstructs a provisional benchmark of the right” (p. 242).

Although experimental rulings are common in the Colombian constitutional jurisprudence, aside from recognized cases about displaced people and health, little is known about other cases and about the factors which favor the fulfillment of experimental rulings. Indeed, “the almost exclusive emphasis on the production phase of judgments has created an analytical and practical blind spot: the implementation stage of rulings” (Rodríguez, 2011, p. 1674).

My purpose is to analyze how this experimental jurisprudence finds solutions for violations of rights. Specifically, I investigate the set of variables that lead to the successful implementation of experimental rulings on access to water. To this end, I analyzed the implementation process of five rulings of the Colombian Constitutional Court related to access to water. Each ruling’s implementation process is a case in my research. I worked with three groups of variables in those five cases: 1) Design variables, 2) Procedural variables, and 3) Implementation variables. All the variables are dichotomous.

Via fieldwork, I explored what are the variables affecting the successful implementation of the experimental judgments. I understand success as the fulfillment of the judgment and the protection of rights, in this case, the water right. Three of my cases are successful and two are not.

I am going to talk about one successful case called *Cantagallo*. Cantagallo is a rural place that is located in Córdoba (Colombia). In Cantagallo lives a Zenú indigenous community that was affected by the construction of a sanitary landfill that contaminated its water sources.

As a methodological framework, I used multimethod research (MMR), which combines two or more methods in the same research. One combination that has been particularly attractive to political science is using qualitative comparative analysis (QCA) with process tracing. This approach allows to compare cases without losing sight of the particularities of each case. QCA is a method to analyze the set of causal conditions that lead to a certain outcome (Ragin, 1987). I used the QCA software to find the causal conditions leading to a successful implementation. Therefore, it does not explain the weight of each variable in the result.

In fact, cross-case comparisons are stronger in assessing whether and how independent variable matters for the outcome than in assessing the extent to which it matters (Alexander & Bennett, 2004). In other words, QCA is not interested in variables individually considered but in conjunction with others.

So, although QCA allows me to know the macro-relationship between causal conditions and the successful outcome, it does not say much about the details of this relationship or why a causal condition is relevant to the successful outcome. For this reason, once the configurations of the causal conditions have been obtained through the QCA software, I use some process tracing tools to carry out the analysis within cases. In addition, I formulate causal hypotheses about how a combination of causal conditions leads to a successful implementation of experimental jurisprudence.

Finally, I want to tell you about the findings of my research in Cantagallo. I found that the design variables are not relevant to the outcome. In other words, the design of the judgment is neither necessary nor sufficient to get a successful implementation. In fact, successful and unsuccessful cases have a similar design.

Regarding the procedural variables, I found two important variables: the ***stakeholder intervention*** and the ***previous claim of right***.

First, “social movements can become a pivotal force in constituting economic and social rights” (Young, 2012, p. 424). Indeed, media and social movements are stakeholders and key players in the implementation process. Second, the previous claim of right is important to empower claimants in their collective action.

Regarding the implementation variables, I found three paths that lead to a successful implementation. The first is a ***social way***. When there are social organizations, media intervention and social pressure, the local government attends the Constitutional Court order and the water right is guaranteed.

The second way to success is the way of the control and ***oversight agencies***. When an agency is active in controlling the process of implementing the judicial decision, the defendant is forced to respond to their requirements and this drives towards the protection of rights.

The third way leading to a successful implementation is called ***programmatic affinity*** because there is a coincidence between the court’s orders and the local government. For that reason, the authorities will not oppose the judgment. If the local government opposes it would have a high political cost.

Using process tracing, I formulated some hypotheses about how the relationship between these three paths and the result work. I am just going to talk about a causal mechanism that I have called ***collective action***.

Collective action connects the variables with the successful result in the Cantagallo case. The hypothesis is: ***social organizations and media intervention boost collective action in order to unblock the status quo***.

In fact, the intervention of media and social organizations was important for the successful implementation of the experimental judgment. In Cantagallo the orders of the ruling were visible because of news. A local television program pressured the government to comply with the judicial orders. Thus, collective action triggers an institutional unblocking.

In conclusion, the Court's decision is not enough to protect the water right. It is necessary the participation of other people and institutions, such as control and oversight entities, stakeholders, media, among others.

My research has identified key variables for the effective implementation of experimental injunction. In Cantagallo the local community fought together for their right to water. This means that the judgment was one more tool of a fight that had already begun many years before.

In the absence of social pressure and media intervention, the experimental proposal may have problems protecting rights. For that reason, we should not devalue the role of hierarchical orders or overestimate the experimental: "where the conditions for command-and-control intervention are not satisfied, experimentalist approaches will not always be promising" (Sabel & Simon, 2004, p. 1053).

In fact, an experimental court is not a deferential one. An experimental court must guarantee the conditions for the fulfillment of its orders

In experimentalist review, a court is not deferential; rather, it is ready to engage in a vigorous assessment of the reasonableness of policy or legislation, involving a contextualized investigation against the commitments of the constitution. A court is further prepared to order remedies that may take on a limited structural form. This political project is achieved, not by prescribing the immediate steps toward a solution, but by "nudging," "linking," and "destabilizing" public institutions. These effects are borrowed from the observations of successful institutional interactions in the fields of behavioral law and economics, and from the economic sociology underlying new governance (Young, 2012, p. 253).

Thus, experimental constitutionalism understands that a combination of command and control and experimental orders is the best solution to complex problems. Specifically in scenarios where uncertainty prevails but also the entrenchment of local clientelistic practices that insist on maintaining the *status quo*.

In such context, it might be better to keep command-and-control solutions as an alternative to the failure of experimentalism<sup>3</sup>. In some cases, command-and-control orders are imperative to the court retain its judicial role protecting fundamental rights. Moreover, monitoring mechanisms and tracking control agencies seems to be relevant to lead to a successful outcome.

These research findings could help to understand the necessary and sufficient conditions to guarantee social rights adjudication through experimental jurisprudence. The judicial decision is the first domino that, when falling, triggers the successful implementation process.

## References

Alexander, G., & Bennett, A. (2004). *Case Studies and Theory Development in the Social Sciences*. Harvard.

Klein, A. (2007). Judging as nudging: new governance approaches for the enforcement of constitutional social and economic rights. *Columbia Human Rights Law Review*(39), 351-420.

Ragin, C. (1987). *Comparative Method: Moving Beyond Qualitative and Quantitative Strategies, With an Updated Introduction*. EU: University of California Press.

---

<sup>3</sup> According to Klein (2007) "Where experimentalism does not produce optimal SER outcomes, judges will face the familiar choice between declaring the system a failure and articulating their own vision of the content of SERs or withdrawing from the field due to institutional incapacity" (p. 356).

Rodríguez, C. (2011). Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America, *Texas Law Review* (89), 1669-1698.

Sabel, C., & Simon, W. (2004). Destabilization rights: how public law litigation succeeds. *Harvard Law Review*, 117, 1016-1102.

Young, K. (2012). *Constituting economic and social rights*. United States: Oxford University Press.