Event: Diana Rodriguez-Franco, “The Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South,” November 14, 2018

Reflection:

Last month, I attended Dr. Rodriguez-Franco’s talk on what she called “institutional imagination.” Her talk reframed judicial activism, a term that takes on polarizing meanings, and instead placed the concept in an almost evolutionary context. The role of the judiciary should change, and it should change through precise and forward-thinking applications of case law. Most significantly, Dr. Rodriguez emphasizes, is that judicial activism allows for socioeconomic rights to be justiciable. Given this, what should the role of the courts be in creating social change? How can a progressive court have the most impact by allowing follow up, all while avoiding the disruption of checks and balances? Before introducing the specifics of the case, Dr. Rodriguez went through a brief literature review from Gerald Rosenberg’s criticism of the Warren court and its judicial rulings against segregation to Michael McCann’s scholarship on connecting the feminist movement and the courts.

Dr. Rodriguez focused her talk on case from the Colombian Supreme Court that attempted to define the government’s civic responsibilities to four million internally displaced people (IDP) as a result of Colombia’s long-term civil war. As of 2002, there were 400,000 internally displaced persons in Colombia with consistent access to housing, food, and education. The government did not formally document the existence of IDP or their conditions; data came primarily from Catholic churches that provided services demanded and not received from the government. Over 1,000 families filed petitions invoking the socioeconomic protections enshrined in the Colombian Constitution.

The Supreme Court declared an unconstitutional state of affairs. They had previously claimed this in a case on prison overcrowding, but the Court has not been able to successively implement the ruling to build more prisons in that instance. The difference with the IDP ruling lay in the difference in the types of conditions that the Court imposed on the government while maintaining other channels of communication with the IDP. Keeping the case open and active, it was a “ruling in motion” and it created a monitoring process with public hearings, technical sessions, a special monitoring chamber, and follow-up decisions.

The Supreme Court gave the legislative and executive branches strict timelines to come up with generally-guided solutions, such as a definite budget and the beginnings of data on IDP in Colombia. But they did not proscribe exact remedies as it had done by deciding as a judicial body on the exact number of prisons needed in the prison overcrowding case. Dr. Rodriguez holds this ruling as a success, as it allows public a continued check on government inaction without the Court writing specific policy.

The conversation that followed complicated Rodriguez’s stance. One law student asked how the cause of displacement played into participation. Did people displaced by agrobusiness in Colombia count as IDP? If the government chose to do nothing, what army would the court use to enforce its decision against the executive branch? These questions related directly to the measurable impact of this particular case, especially given the recent reversal of the Colombian Supreme Court’s political leanings. Even more disheartening, Rodriguez talked later about how recently the conservative movement in Colombia has started co-opting progressive tactics to roll back more radical rulings on socioeconomic and reproduction rights.
When considering whether or not to address the socioeconomic rights of IDP and access to abortion, where do we draw the line with justiciability? Allowing a Court the ability to rule on policy creates the opportunity a human rights abuse to be furthered by the court. How do we distinguish in scholarship precedent that can be undone without putting at risk all of the contested victories human rights organizations and individuals have won so far? I believe in the power of institutional imagination and agreed with Rodriguez’s structure of material and symbolic wins shifting policy and culture. But the talk further challenged me to separate legally the interpretations that I felt were enshrined and those that I felt needed to be challenged as soon as possible. This challenge felt especially pressing given the American constitution, which does not explicitly protect many rights, such as socioeconomic and reproductive rights, and our current life-tenured Supreme Court, which becomes more conservative with every passing year.