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**Paper Title:** *Reconciling Structural Change and Judicial Competence in Canada and Colombia*

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In Colombia, courts rely regularly on structural injunctions and supervisory orders, two constitutional law remedies which involve judges in an ongoing review of government responses to systemic rights violations. These remedies imagine a robust role for courts in promoting structural change, a vision that stands in stark contrast with Canadian jurisprudence. Drawing on a variety of comparative law methodologies, this paper aims to bring these contrasting visions of judicial competence into closer dialogue.

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In Canada, structural injunctions and supervisory orders are rare and highly controversial. Canadian judges have expressed concerns about their competence to review complex policy responses, about reducing courts to mere forums of political accountability, and about maintaining jurisdiction even after jurisdiction has been exhausted, contrary to *functus officio*. These concerns have been voiced in recent cases concerning minority education rights and in response to alleged constitutional rights to shelter.

By contrast, in Colombia, these remedies are relied on regularly when courts confront “unconstitutional state of affairs”. This remedial approach has prodded state actors to address systemic failures in the healthcare sector and to meet the vital needs of Colombians displaced by political violence.

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Canadian jurists are badly in need of this comparative perspective. Faced with the need to promote structural changes, Canadian judges gravitate towards conventional remedies that avoid the need for ongoing judicial supervision, but that result in altogether *worse* outcomes for the political branches and the broader public.

For instance, where a law has been found to be unconstitutional, Canadian courts regularly issue suspended declarations of invalidity in order to give the legislature time to enact new law. This practice, however, is problematic. Judges are poorly placed to decide how much time legislatures need to enact new law and if the legislature’s new law continues to infringe constitutional rights – as has occurred recently for assisted dying legislation and the regulation of sex work – litigants are forced to initiate a fresh constitutional challenge while their rights continue to be violated.

In a more recent case, the Supreme Court of Canada took drastic measures to address systemic delays in the criminal justice system. The Court pursued structural change not through the use of supervisory orders, but rather by imposing a default ceiling on what amount of delay is permissible, thereby making it easier for accused persons to establish a violation of their right to be tried within a reasonable time. Without involving any state actors in any form of dialogue, the Court effectively put governments on notice that they would have to either invest massively in criminal justice or risk seeing thousands of criminal charges stayed. In essence, the Court prompted structural change by holding thousands of future prosecutions hostage.

The Constitutional Court of Colombia’s reliance on supervisory orders shows another path. It is one where judges help prod the political branches to overcome the bureaucratic blockages and policy inertia that can lead to systemic governance failures, all while respecting some of the limits of courts’ institutional competence. For the two cases mentioned above, Colombia’s brand of “dialogic activism” may have actually produced results preferable for both the political branches and the broader public.

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On the other hand, the Canadian aversion to supervisory orders also has something to offer. Much of the existing scholarship on Colombian jurisprudence is overly congratulatory. Scholars like César Rodríguez-Garavito have celebrated the “dialogic” enforcement of socio-economic rights while glossing over the powers which courts controversially assume – and sometimes abuse – during this process of ongoing judicial supervision.

In particular, the Colombian Constitutional Court often fails to articulate clear goals during the enforcement stage. It has also failed to identify the terms on which judicial supervision will end, leading to a seemingly endless process of judicial review. The Court has also failed to provide reasons for many of its impactful orders. Finally, the Court has failed to articulate what standards of review are being applied to government proposals during this process of review. Canadian jurisprudence helps articulate why these are problems that deserve being addressed.

The resulting work should be of interest to those studying new boundaries of judicial power and the contribution courts can make to structural change. This paper should also be of interest to comparativists who prefer to reconcile functionalist approaches to comparative law with an appreciation of each legal order’s underlying history and normative framework.