

**POLITICAL INSTITUTIONS AND JUDICIAL ROLE:  
AN APPROACH IN CONTEXT, THE CASE OF  
THE COLOMBIAN CONSTITUTIONAL COURT\***

**INSTITUCIONES POLÍTICAS Y EL PAPEL  
DE LOS JUECES: APROXIMACIÓN  
EN CONTEXTO. EL CASO DE LA CORTE  
CONSTITUCIONAL COLOMBIANA**

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## **ABSTRACT**

Comparative constitutional law scholarship has largely ignored political institutions. It has therefore failed to realize that radical differences in the configuration of political institutions should bear upon the way courts do their jobs. Parting from a case study of the Colombian Constitutional Court, this paper develops a theory of judicial role focused on political context, and particularly on party systems. Colombian parties are unstable and poorly tied to civil society, therefore Congress has difficulty initiating and monitoring the enforcement of policy, as well as checking presidential power. For that reason, the Constitutional Court has responded by taking many of these functions into its own hands. We argue that the Colombian Court's actions are sensible given the country's institutional context, even though virtually all existing theories of judicial role in comparative public law would find this kind of legislative-substitution inappropriate. Those theories rest upon assumptions about political institutions that do not hold true in many of the developing countries.

**Key words:** political parties, judicial role, comparative public law, Colombian Constitutional Court, legislative-substitution.

## **RESUMEN**

Las metodologías en derecho constitucional comparado han ignorado ampliamente las instituciones políticas. Esto ha tenido como consecuencia que fallen al momento de identificar qué diferencias radicales en la configuración política tienen incidencia en la forma como las Cortes cumplen su trabajo. Partiendo de un análisis de caso —de la Corte Constitucional colombiana—, este artículo desarrolla una tesis sobre el papel de los jueces, dependiendo de su contexto político, en particular, de la organización de los partidos políticos. Los partidos políticos colombianos son muy inestables y tienen un vínculo muy pobre con la sociedad; en consecuencia, el Congreso difícilmente ha tenido iniciativa en la preparación y en la evaluación del cumplimiento de las políticas públicas y en el control del poder presidencial. Por ello, la Corte ha respondido asumiendo varias de esas funciones. Nosotros sostenemos que la acción de la Corte ha sido apropiada, dado el contexto institucional colombiano, aunque en el derecho público comparado casi la totalidad de las teorías sobre el papel de los jueces encontrarían inapropiada esta sustitución del legislador. Dichas teorías se basan en supuestos relacionados con las instituciones políticas, que no corresponden con la realidad de una parte importante de los países en desarrollo.

**Palabras clave:** partidos políticos, papel de los jueces, derecho público comparado, Corte Constitucional colombiana, sustitución del legislador.

## INTRODUCTION

The core of this paper is a case study of the Colombian Constitutional Court. Colombia offers a classic example of a developing country that is democratic (in fact, it has been democratic for a very long time<sup>1</sup>), but that suffers from poorly functioning political institutions. In particular, the party system is quite weak – the system is fragmented, parties tend to have short life-spans and/or are internally fractionalized, and parties have only weak roots in society. As a result, the legislature has never been able to play a constructive policymaking role in Colombia, and presidents have unilaterally dominated the policymaking process.

As we will show below, the Colombian Constitutional Court (hereinafter “ccc”) has viewed these political conditions as a warrant for becoming perhaps the most activist court in the world. Most importantly here, the ccc has acted as a replacement for the legislature on various issues and at various times, by injecting policy into the system, by managing highly complex, polycentric policy issues, and by developing a thick construct of constitutional rights that it uses to check executive power. We argue it makes sense and has been productive under Colombia’s institutional conditions. The Court’s extraordinary institutional popularity suggests that the Court enjoys much of the democratic legitimacy ordinarily associated with legislative institutions, and helps to explain why other actors have generally complied with its edicts. Further, the Court has proven able to accrete some of the information-gathering and monitoring capacities that we usually associate with legislatures.

The economic theory of the second best is critical for understanding and justifying the court’s actions. A well-functioning legislature is probably the best option for formulating policy and checking executive action, because of its superior information-gathering capabilities and democratic legitimacy. In these optimal conditions, an overly activist judiciary may be detrimental to the system’s development. But where, as in Colombia, a very weak party system and other problems push the transactions costs of legislative action to prohibitive levels, a well-functioning legislature does not exist. In its absence, a judiciary equipped with fairly strong information-gathering capabilities and a reasonable modicum of democratic legitimacy may be the institution best-equipped to take on certain legislative functions. A very active judiciary, in other words, may be perverse under optimal conditions of legislative behavior but desirable as a second-best where, as in Colombia, the legislature does not function well. On the other hand, taking into account the passivity of the legislator, it is also necessary to defend the ccc judicial

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1 David Bushnell, *The Making of Modern Colombia*, 201-48 (University of California Press, Los Angeles, 1993).

activism as a way of avoiding international responsibility in the sense it will allow an analysis of the fulfillment of Colombian human rights obligations and commitments as a whole<sup>2</sup>.

This paper is organized as follows: in Part I, we argue that existing academic work is ill-equipped to build a theory of judicial role that is appropriate for all kind of democracies because it does not begin with an analysis of their own political institutions. Part II explains the Colombian context, focusing on the incoherence of legislative politics in the country, while Part III describes and assesses both the failed and successful strategies used by the CCC as reactions to that context. Finally, we suggest a theory of judicial role that might work where, as in Colombia, legislatures function badly.

## **1. CONSTITUTIONAL THEORY AND COMPARATIVE COURTS**

### **1.1. American constitutional theory rests on the wrong institutional foundations**

A core assumption in American constitutional thought is that constitutional issues are only a relatively small subset of all political issues. This is undergirded by an institutional story about judicial role – congresses are given ample room in which to make ordinary policy, and only exceptionally, when they surpass certain limits – say, by attacking the political system itself or by undoing certain foundational bargains – should courts step in<sup>3</sup>.

This assumption does not mesh well with most new constitutions, and particularly those in developing countries. As Kim Lane Scheppele has noted, citizens of these countries tend to adopt “thick” constitutions, with large amounts of material – socio-economic provisions, group rights, etc – that are normally left to ordinary legislation in the United States<sup>4</sup>. They also tend to regulate certain items in great detail<sup>5</sup>. Finally, they often expressly or implicitly construct a hierarchy of constitutional norms, with certain vague

2 See Julián Daniel López-Murcia & Gabriela Maldonado-Colmenares, *La protección de la propiedad de la tierra en la jurisprudencia de la Corte Interamericana de Derechos Humanos y su aplicación al caso de las comunidades campesinas en Colombia*, in 14 *International Law. Revista Colombiana de Derecho Internacional*, 71-105 (2009).

3 See, e. g., Stephen Holmes, *Passions & Constraints: On the theory of Liberal Democracy* 134 (The University of Chicago Press, Chicago, 1995); Bruce Ackerman, *We the people: Foundations* 6-7 (Harvard University Press, Cambridge, 1991); John Hart Ely, *Democracy & Distrust*, 87 (Harvard University Press, Cambridge, 1980).

4 See Kim Lane Scheppele, *Democracy by Judiciary: Or, Why Courts Can be More Democratic than Parliaments*, in *Rethinking the Rule of Law After Communism* 25, 37-38 (Adam Czarnota et al., eds., Central European University Press, Budapest, 2005).

5 See *id.* at 38; Keith Rosenn, *Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society*, in, 38, *Am. J. Comp. L.*, 773 (1990).

formulations, particularly human dignity, acting as super-norms within the system<sup>6</sup>. The result of these three characteristics acting together is that it is almost impossible to think of an issue that does not potentially raise constitutional problems.

Scholars tend to decry the thick constitutions phenomenon as bizarre or at least very unwise, suggesting that these countries will choke on an excess of constitutional law and/or do not understand what a constitution is supposed to do<sup>7</sup>. But there is logic behind the thickness of many constitutions in the developing and post-authoritarian world. Constitutions in developing countries are thoroughly transformative documents by necessity; no developing country wants to stay as it is<sup>8</sup>. And there is a need to transform not merely society and the economy, but politics as well. The ordinary political order is generally viewed as seriously flawed. And here's the rub: if ordinary politics cannot be trusted now, there is no reason to believe that it can help to achieve a better social or economic order. Thick constitutionalization is thus a signal that ordinary politics will not do as a solution to a country's problems<sup>9</sup>. Hence the high volume of bodies (courts, ombudsmen, human rights commissions, etc.) given constitutional control power in many new constitutions<sup>10</sup>. Thick constitutions do not necessarily give constitutional courts a mandate to step in for weak ordinary institutions; it could be, as many in the United States have argued, that the elected institutions and not the court are the best interpreters of the constitutional text. But they offer at least the opportunity for vigorous judicial intervention.

Any case for non-judicial interpretation of constitutional texts is much weaker where political actors are unlikely to be attuned to the constitution. And here as well, U.S. constitutional theory is not very useful for developing countries. The most important recent strain of American constitutional theory, popular constitutionalism, suggests that there is and always has been a vibrant culture of constitutional interpretation outside the courts in the United States,

6 See, e. g., Rodrigo Uprimny Yepes, *The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates*, in *Courts and Social Transformation in new Democracies* 128-31 (Roberto Gargarella et al., eds., Ashgate, England, 2006); Catherine Dupre, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Hart publishing, Oxford, 2003); Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* 164-65 (Cambridge University Press, Cambridge 2000).

7 See, e. g., Maurice Kugler & Howard Rosenthal, *Checks and Balances: An Assessment of the Institutional Separation of Political Powers in Colombia*, in *Institutional Reforms: The Case of Colombia* 75, 75-76 (Alberto Alesina, ed., The MIT Press, Cambridge, 2005).

8 See Cass Sunstein, *Deesigning Democracy: What Constitutions Do*, 68 (Oxford University Press, New York, 2001).

9 See Scheppele, *supra* note 4, at 37-38.

10 See, e. g., Christopher S. Elmendorf, *Advisory Counterparts to Constitutional Courts*, 56 *DUKE L.J.* 953 (2007); see also Thomas Pegrum, *Accountability in Hostile Times: The Case of the Peruvian Human Rights Ombudsman 1996-2001*, in, 40, *J. Lat. Am. Stud.*, 51 (2008).

both within elected institutions and outside them<sup>11</sup>. This tradition would be even more vibrant, they claim, if the Supreme Court did not attempt to monopolize constitutional interpretation via claims of judicial supremacy<sup>12</sup>. Since elected institutions like Congress are also attuned to constitutional values and have more democratic legitimacy, they should take over some of the judiciary's constitutional review functions<sup>13</sup>.

There is some empirical evidence that, in the United States, Congress does care about the constitution -committees fairly routinely debate constitutional issues, for example, and historically the legislature and the executive have settled many issues of constitutional law without the help of the courts<sup>14</sup>. Further, non-elected actors, like civil society groups, the media, and the general public, seem to put many of their arguments in constitutional terms<sup>15</sup>. And it is plausible (although contestable) that these actors would take constitutional interpretation even more seriously if the courts did not claim to monopolize the task.

American constitutional theory has longed viewed the democratic credentials of the legislature as a reason to constrain judicial power<sup>16</sup>. Indeed, this notion underlies Bickel's "counter-majoritarian" difficulty - judicial review can be "undemocratic" because it "thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it"<sup>17</sup>. Another line of thought stresses the potentially superior institutional capacities of courts to formulate policy and to check executive power<sup>18</sup>. Empirical work finds that the U.S. congress has considerable

11 See, e. g., Larry Kramer, *The People Themselves* (Oxford University Press, New York, 2004); Keith E Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, in, 80 *N.C. L. REV.* 773 (2002); Mark Tushnet, *Taking the Constitution Away the Courts* (Princeton University Press, Princeton, 1999).

12 See Mark Tushnet, *Taking the Constitution Away the Courts*, 57-65 (Princeton University Press, Princeton, 1999).

13 See *id.*; Larry Kramer, *The People Themselves*, 252-53 (Oxford University Press, New York, 2004); Keith E Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, in, 80 *N.C. L. REV.* 773, 848- 849 (2002).

14 See, e. g., Keith E. Whittington et al., *The Constitution and Congressional Committees: 1971-2000*, in *The Least Examined Branch* 396 (Richard W. Bauman & Tsvi Kahana, eds., Cambridge University Press, New York, 2006); Keith E. Whittington, *Constitutional Construction* (Harvard University Press, Cambridge, 1999).

15 See, e. g., Tushnet, *supra* note 12, at 135-41.

16 See Jeremy Waldron, *The Core of the Case Against Judicial Review*, in, 115, *Yale L.J.* 1346, 1406 (2006); Tushnet, *supra* note 12; Alexander Bickel, *The Least Dangerous Branch* (2d ed., Yale University Press, New Haven, 1986); John Hart Ely, *Democracy & Distrust* 87 (Harvard University Press, Cambridge, 1980); James Bradley Thayer, *The Origin and Scope of the American Doctrine of Judicial Review*, in, 7, *Harvard L. Rev.*, 129 (1993).

17 See Bickel, *supra* note 16, at 16-17.

18 See Andrian Vermeule, *Judging Under Uncertainty* 230 (Harvard University Press, Cambridge, 2006); Gerald R. Rosenberg, *The Hollow Hope* 15-21 (The University of Chicago Press, Chicago, 1991); Neil Devins & Alan Meese, *Judicial Review and Non-Generalizable Cases*, in, 32, *Fla. St. L. Rev.*, 323, 327 (2005) (noting that American courts, unlike legislatures, do not usually hold hearings);

capacity to gather and evaluate information, mostly through the committee system, which allows it to formulate complex policy initiatives and to evaluate and control the performance of executive and other actors<sup>19</sup>.

Both the democratic legitimacy argument and the capacity argument are problematic in the developing world. Sometimes, problems with democratic legitimacy are caused by outright electoral fraud, which bedevils a lot of nominal democracies and obviously weakens the link between legislator and populace<sup>20</sup>. Also, many legislatures in the developing world have few resources, limiting their effectiveness as policymakers and as checks on the executive<sup>21</sup>. But the most important source of problems with poorly-functioning legislatures is rooted in their party systems. As Daryl Levinson and Rick Pildes suggest, party systems are the key to understanding legislative behavior<sup>22</sup>. Scholars familiar with American political behavior are accustomed to a system with two fairly strong parties, each of which possesses a relatively clear ideological identity and relatively high party discipline (that is, most party members tend to vote together most of the time). The two parties compete for votes and tend to rotate in power fairly regularly. But the portrait of party systems in the developing world is often much bleaker; these parties are commonly plagued by two major classes of dysfunctions. In the first variety, seen for example in South Africa today and in the past in India and México, one dominant party controls the system, rarely if ever losing its majority status. Contrary to what one might expect, strong and independent constitutional courts do appear to be possible (although fairly rare) within these systems, as both the Indian and South African examples show<sup>23</sup>. A court in this kind of system may see itself as engaged in the representation-reinforcing described

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Alexander Bickel, *The Supreme Court and The Idea of Progress* 175 (Yale University Press, New Haven, 1978) (arguing that courts are often poor policymakers because of their procedural rules); Lon Fuller, *The Forms and Limits of Adjudication*, in 92, *Harv. L. Rev.*, 353, 394-95 (1978) (arguing that courts are poorly suited to deal with complex, polycentric problems because of constraints on their institutional capacities).

- 19 See, e. g., Keith Krehbiel, *Information and Legislative Organization* (The University of Michigan Press, Ann Arbor, 1991); Gary W. Cox & Matthew D. Mc Cubbins, *Legislative Leviathan* (University of California Press, Los Angeles, 1993); Cubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, in 75, *VA. L. REV.* 31 (1978).
- 20 See Andreas Schedler, *The Menu of Manipulation*, in *Journal of Democracy*, Vol. 13, No. 2, 36-50, 36 (Apr. 2002).
- 21 See, e. g., Scott Morgenstern, *Towards a Model of Latin American Legislatures*, in *Legislative Politics in Latin America*, 1-19 (Scott Morgenstern & Benito Nacif, eds., Cambridge University Press, New York, 2002).
- 22 See Daryl Levinson & Richard Pildes, *Separation of Parties, Not Powers*, in 119, *Harv. L. Rev.*, 2311 (2006).
- 23 See, e. g., Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, in 7 *Int'l J. Const. L.* 106 (2008); Carl Baar, *Social Action Litigation in India*, in 19 *Pol. Stud. J.*, 140 (1990); see also Jennifer A. Winder, *Building the Rule of Law* (Cambridge University Press, New York, 2001).

by John Hart Ely in *Democracy and Distrust*<sup>24</sup>, but kicked up several notches because of the severe democratic dysfunctions brought on by a single-party system.

A bigger problem occurs where parties are extremely weak entities, rendering the legislature a largely incoherent body. The key concept is one that Mainwaring and Scully call “party system institutionalization,” which measures the depth of the roots that parties have in society<sup>25</sup>. Parties in non-institutionalized systems tend to have loose or non-existent ideological platforms; they are chiefly vehicles of convenience for individual candidates seeking office rather than collections of individuals with similar policy viewpoints<sup>26</sup>. These parties also lack ties to civil society groups (labor unions, employer organizations, interest groups, etc.)<sup>27</sup>. Internally, these parties are usually undisciplined, and they commonly suffer defections from sitting politicians (called “shirt-changing”)<sup>28</sup>. The systems as a whole are volatile; parties can rise to prominence and then disintegrate within the span of a few years; older parties are constantly dying and new ones constantly springing up<sup>29</sup>. And finally, these party systems are often highly fragmented – there tend to be a lot of parties in these systems, many of them so small that they have been called “taxi parties” because their national party conventions could be held in a taxi-cab<sup>30</sup>. Where parties lack clear ideological platforms and do not last very long, voters will usually be unable to use party identification as a tool for assessing the views of prospective legislators. But party label is a necessary short-cut for voters; without it, they will usually be unable to make an informed choice<sup>31</sup>. And where the ideological meaning of a party label is malleable, voters will not get what they think they are getting even if they do try to put weight on party label<sup>32</sup>. Coalitions will be unstable, and will be formed because personal favors are handed out to individual legislators, and not because a coherent policy compromise has been reached<sup>33</sup>. Outcomes in

24 See ELY, *supra* note 3, at 102.

25 See Scott Mainwaring and Timothy R. Scully, *Introduction: Party Systems in Latin America*, in *Building Democratic Institutions: Party Systems in Latin America* 1,1 (Scott Mainwaring & Timothy R. Scully, eds., Stanford University Press, Stanford, 1996).

26 See *id.*

27 See *id.*

28 See *id.* at 16; see also Catherine M. Conaghan, *Loose Parties, ‘Floating’ Politicians, and Institutional Stress: Presidentialism in Ecuador, 1979-1988*, in *The Failure of Presidential Democracy* 254, 273 (Juan J. Linz & Arturo Valenzuela, eds., The Johns Hopkins University Press, Baltimore, 1994).

29 See *id.* at 13-15.

30 See Eduardo A. Gamarra & James M. Malloy, *The Patrimonial Dynamics of Party Politics in Bolivia*, in *Building Democratic Institutions: Party Systems in Latin America* 399, 412 (Scott Mainwaring & Timothy R. Scully, eds., Stanford University Press, Stanford, 1996).

31 See Mainwaring & Scully, *supra* note 25, at 25.

32 See *id.* at 22-23; Susan C. Stokes, *Mandates & Democracy: Neoliberalism by Surprise in Latin America* (Cambridge University Press, Cambridge, 2001).

33 See Cindy Skach, *Rethinking Judicial Review*, in *Rethinking the Rule of Law After Communism* 61, 65 (Adam Czarnota et al., eds., Central European University Press, Budapest, 2005), at 65-66.

such a body are unlikely to represent the views of a clear majority, or indeed of any large, identifiable social group<sup>34</sup>.

The capacity of legislatures in non-institutionalized party systems is also generally low; they usually suffer from weak committee systems and an inability to formulate important policy initiatives. Basically, this is because leaders of strong parties with long-term interests have the interest and ability to build up legislative power<sup>35</sup>. Individual legislators in systems with non-institutionalized parties generally have no such interest; their main interest is in procuring particularistic benefits (money, jobs, etc.) for themselves and their allies, rather than in making broad policy or monitoring the executive<sup>36</sup>. Also, party platforms and partisan think-tanks form a major source of serious policy ideas in modern politics<sup>37</sup>. Thus where parties are weak and platforms vague, fewer important policy ideas will enter the system. High fragmentation and low party discipline mean that these legislatures have difficulty passing even legislation that enjoys high support<sup>38</sup>. And finally, the substantial instability in coalitions and in electoral outcomes helps ensure the legislators will be unable to accumulate the expertise necessary to manage policy initiatives<sup>39</sup>.

## **1.2. Comparative Constitutional Law does not rest on any institutional foundations**

As Mark Tushnet points out, existing studies in the comparative constitutional law have tended to come in two varieties, neither of which seems quite right as the basis for comparative constitutional theory. In the first variety, which Tushnet labels “expressivism,” the underlying assumption is that constitu-

34 See, e. g., Kim Lane Scheppele, *Democracy by Judiciary*, in *Rethinking the Rule of Law After Communism* 25, 34 (Adam Czarnota et al., eds., Central European University Press, Budapest, 2005); Scott Mainwaring et al., *The Crisis of Democratic Representation in the Andes: An Overview*, in *The Crisis of Democratic Representation in the Andes* 1, 17 tbl.1.3 (Scott Mainwaring et al., eds., Stanford university Press, Stanford, 2006).

35 See Gary W. Cox & Matthew D. Cubbins, *Legislative Leviathan*, 275-278 (University of California Press, Los Angeles, 1993), at 275-78 (arguing that the power of American legislatures is due to party strength). We should modify this statement a bit – strong parties might not create well-developed committee systems, but this would be because, as in some parliamentary systems (like the UK), these party leaders choose to centralize policy expertise in the executive. See John R. Hibbing, *Legislative Careers: Why and How We Should Study Them*, in *Legislatures*, 25, 34-35 (Gerhard Loewenberg, eds., The University Of Michigan Press, Ann Arbor, 2002). In contrast, where parties are non-institutionalized, pockets of policy expertise will not exist anywhere in the system.

36 See Mainwaring & Scully, *supra* note 25, at 27; Gary W. Cox & Scott Morgenstern, *Epilogue: Latin America's Reactive Assemblies and Proactive Presidents*, in *Legislative Politics in Latin America* 446, 454 (Scott Morgenstern, eds., Cambridge University Press, Cambridge, 2002).

37 See, e. g., Hans Dieter Klingemann et al., *Parties, Policies, and Democracy* (Westview Press, Boulder, 1994).

38 See Mainwaring & Scully, *supra* note 25, at 26.

39 See John R. Hibbing, *Legislative Careers: Why and How We Should Study Them*, in *Legislatures*, 25, 34-35 (Gerhard Loewenberg, eds., The University Of Michigan Press, Ann Arbor, 2002), at 30-34.

tional doctrine is deeply bound up in, and reflective of, the rich texture of a country's underlying traditions and culture<sup>40</sup>. The problem with this kind of approach is that it makes any kind of structured comparison between countries quite difficult; the jurisprudence of each individual country rests on its own unique historical factors, rather than depending on factors that might vary in predictable ways across countries. Theorizing therefore becomes nearly impossible and even evaluating or critiquing a court's work is quite hard, again because most aspects of judicial work could be justified using some aspect of a country's culture or traditions.

The other approach, which Tushnet calls "functionalism,"<sup>41</sup> sees constitutional law as something that migrates easily across national boundaries. Functionalists start by seeking to explain how groups of countries deal with common problems, and tend towards finding similarity across systems. A recent example of a largely functionalist debate is the comparative literature on the judicial enforcement of socio-economic rights. One of the main conclusions of this work is that, contrary to some earlier writings by American scholars, there is a plausible way to enforce socio-economic rights. That approach is one we might call the "dialogical" model. Under the "dialogical" model, which takes much of its inspiration from the prominent South African case *Government of the Republic of South Africa v. Grootboom*<sup>42</sup>, courts attempt to give content to rights, but in a way that gives due deference to the expertise and democratic legitimacy of the elected branches<sup>43</sup>. Roughly speaking, this means courts tell the other branches that a socio-economic right has been infringed and give them an idea of why the right has been infringed, but then leave the plan for how to remedy the violation up to the elected branches. This approach tries to make socio-economic rights effective while holding at bay concerns about judicial capacity and legitimacy<sup>44</sup>.

40 See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, in 108, *Yale L.J.* 1225, 1261-85 (1999). See *id.* at 1287-1305.

41 See *id.* at 1238-69. In some ways, the debate between functionalism and expressivism maps onto a fundamental debate in comparative law between those who think that law is (and should be) easily transplanted across systems and those who see law as instead fundamentally non-transplantable and rooted in fundamental aspects of a country's history and culture. See, e. g., Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2d ed., University of Georgia Press, Georgia, 1993); Carlos Rosenkrantz, *Against Borrowings and Other Non-Authoritative Uses of Foreign Law*, in 1, *Int'l J. Const. L.*, 269 (2003); Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* (3d ed., Tony Weir, trans. Oxford University Press, Oxford, 1998).

42 2001(1) SA 46.

43 See, e. g., Mark Tushnet, *Weak Courts, Strong Rights* 242-44 (Princeton University Press, Princeton, 2008); Cass Sunstein, *Designing Democracy What Constitution Do* 227-35 (Oxford University Press, New York, 2001); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, in 98, *Colum. L. Rev.* 267 (1998).

44 See, e. g., Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, in 108 *YALE L.J.* 1225, 1261-85 (1999), at 264; Kim Lane Scheppele, *Democracy by Judiciary: Or, Why Courts Can be More Democratic than Parliaments*, in *Rethinking the Rule of Law After Communism* 25, 37-38 (Adam Czarnota et al., eds., Central European University Press, Budapest, 2005), at 237.

This literature around Grootboom makes an important contribution in highlighting a potentially important doctrinal tool for enforcement of socio-economic rights. But it is a tool that depends on political context, a point that has not been fully appreciated in existing work. The “dialogical” strategy was created in South Africa, a country that is ruled by a fairly coherent dominant party that is quite close to the court, and which shares the overarching constitutional vision<sup>45</sup>. Whether such an approach to socio-economic rights enforcement would work in other institutional contexts is questionable. For example, in a country with a non-institutionalized party system, it would seem more-or-less impossible to adopt the South African approach to rights enforcement. The “dialogical” approach seems to depend, at a minimum, on the presence of coherent political actors who will be interested in and capable of developing the right that th

## **2. THE DYSFUNCTIONS OF COLOMBIAN DEMOCRACY AND THE DESIGN OF THE COURT**

### **2.1. The Political Context - Weak Parties and an Abdicating Legislature**

The country’s two traditional parties, the Liberals and Conservatives, were originally separated by different stances on certain ideological issues, particularly religion, but more importantly by intense personal dislikes and factional conflicts. The personal hatreds between them bubbled over into civil war from 1899 to 1902 named “La Guerra de los Mil Días” (“The War of Thousand Days”) and later in the 30s and 40s. The parties only managed to settle this conflict by setting up a power-sharing system enshrined in the Constitution, the “Frente Nacional” (the “National Front”).

During the “Frente Nacional”, which lasted in some form from the 1950s until the 1980s, the two parties agreed to render the election returns irrelevant: they would rotate the presidency, divide up cabinet posts equally between the two parties, and split the Supreme Court between their supporters<sup>46</sup>. The

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45 The situation in South African politics is not the existence of weak, incoherent parties, but rather the existence of a dominant party, the African National Congress (ANC), which has been in power continuously since the end of apartheid. This group had a huge hand in writing the country’s post-apartheid constitution, and shares the general mission of social transformation that underlies the document. Thus the Constitutional Court has in the political branches what is basically a partner in constitutional development, rather than being confronted with incoherent political forces who ignore the document. For works on the South African political context, see, for example, Kimberly Lanegran, *South Africa’s 1999 Election: Consolidating a Dominant Party System*, in 48, *Africa Today*, 81 (2002); Hermann Giliomee et al., *Dominant Party Rule, Opposition Parties and Minorities in South Africa*, in 8, *Democratization*, 161 (2001); Hermann Giliomee, *South Africa’s Emerging Dominant-Party Regime*, in 9, *J. Democracy*, 128 (1998).

46 For a more thorough accounting of the civil war and “Frente Nacional” periods, see, for example,

pact did end the conflict between the parties, but at a high price: First, social groups left outside the closed two-party system turned to armed conflict – the insurgent movements that have plagued modern Colombia grew rapidly during the “Frente Nacional” period<sup>47</sup>. Second, as inter-party competition became meaningless, intra-party competition gained in importance. The parties lost most of the coherent ideological identities they originally had; instead they became battlegrounds for rival factions, all organized around prominent families or individuals, to fight for positions of prominence within their own party<sup>48</sup>. These trends were bolstered by sets of electoral rules that were considered “the most personalistic in the world,”<sup>49</sup> giving party leaders little leverage over backbencher members of congress. Further, the rules seriously overrepresented the importance of rural districts, particularly in the lower house; in a country like Colombia, this further increased the importance of clientelism and decreased the importance of partisan ideology<sup>50</sup>.

The Colombian Congress was a classic example of a legislature that, to use Levinson and Pildes’s terminology, preferred to “abdicate” its power rather than to “empire build.”<sup>51</sup> Major policy proposals did not originate in the legislature; virtually everything important was crafted by the president and his team of technocrats. Moreover, the legislature did not usually engage the president’s bills in an ideological way<sup>52</sup>. Still, it is important to stress that passing bills was not easy, because it required that the president shower individual legislators with sufficient amounts of pork and other particularistic benefits to buy their support. When, as commonly happened with important policy measures, presidents were unable to cobble together a sufficiently large coalition of legislators because of unwillingness or lack of resources, their proposals were blocked<sup>53</sup>. The president often used his sweeping emergency powers to legislate directly, bypassing congress altogether: between 1970 and 1991, the country existed under some kind of a state of emergency 82 percent

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David Bushnell, *The Making of Modern Colombia* 201-248 (University of California Press, Los Angeles, 1993).

47 See *id.* at 244-48.

48 See Eduardo Pizarro, *Giants with Feet of Clay: Political Parties in Colombia*, in *The Crisis of Democratic Representation in The Andes*, 78 (Scott Mainwaring et al., eds., Stanford university Press, Stanford, 2006).

49 John M. Carey & Matthew Soberg Shugart, *Incentives to Cultivate a Personal Vote: A Rank Ordering of Electoral Formulas*, in 14, *Elec. Stud.* 417 (1995). See Ronald R. Archer & Matthew Shugart, *The Unrealized Potential of Presidential Dominance in Colombia*, in *Presidentialism and Democracy in Latin America*, 110, 133-6 (Scott Mainwaring & Matthew Soberg Shugart, eds., Cambridge University Press, Cambridge, 1997).

50 See Archer & Shugart, *supra* note 49, at 140.

51 See Daryl Levinson, *Empire-Building Government in Constitutional Law*, in 118, *Harv. L. Rev.*, 915 (2005).

52 See Archer & Shugart, *supra* note 49, at 144.

53 See *id.* at 116.

of the time<sup>54</sup>. Often, these states of emergency were not called to deal with genuine security crises, but rather to push through important economic or social reforms that were being blocked by congress<sup>55</sup>. Likewise, congress routinely abdicated huge swaths of its power to the president, delegating lawmaking over virtually unbounded policy areas to the executive<sup>56</sup>.

The problems with the Colombian Congress, then, were multifaceted, but all of the issues were ultimately rooted in the weakness of its party system. First, its approval of a bill said little about the bill's compatibility with real social forces in Colombia, because Congress represented few of these groups other than rural bosses. Second, while the legislature could not initiate policy or participate in important policy debates, it could and did block lots of important pieces of legislation on dubious grounds (basically because a sufficiently large coalition could not be bought by the president). In essence, it was a veto point in Colombian politics, but a low quality veto point, because its disapproval of the bill was unlikely to represent a clear social consensus against it<sup>57</sup>.

## 2.2. Responses to Institutional Weakness

Politically the 1991 Constitutional Assembly marked a strange moment in Colombian history where old political lines appeared to be breaking down: the Liberals sent a fairly large contingent to the convention, but the Conservatives won only a few seats. Most of the remaining seats were won by the "Alianza Democrática M-19" ("Democratic Alliance M-19"), a political party created by former guerrilla group M-19 after the peace process, and the "Movimiento Salvación Nacional" ("National Salvation Movement"), a breakaway faction of the Conservatives<sup>58</sup>.

At an overarching level, the convention was torn between two impulses that have since proven to be in considerable tension: constructing new institu-

54 See Rodrigo Uprimny, *The Constitutional Court and Control of Presidential Emergency Powers in Colombia*, in *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* 46, 65 tbl.3 (Siri Gloppen et al., eds., Frank Cass Publishers, London, 2004).

55 There were actually two distinct types of emergencies under the old constitution, the "State of Siege" for security crises and the "State of Economic Emergency" for economic crises. See Archer & Shugart, *supra* note 49, at 126-30. Both powers were often used by presidents to make an end-run around congressional blocking. See *id.* at 127, 129.

56 See *id.* at 121-22; see also *id.* at 117. See also Hernando Valencia Villa, *Es posible vivir sin Estado de Excepción*, in 4, *Revista de Derecho Público*, Universidad de los Andes (1993).

57 See George Tsebelis, *Veto Players, How Political Institutions Work* (Princeton University Press, Princeton, 2002). For our purposes, though, what matters is not simply whether an institution has the ability to veto policy, but also the quality of that veto point – does the veto represent the disapproval of some significant social group that democratic theorists ought to care about, or is it essentially random or based on the disapproval of groups that are unimportant from the standpoint of democratic theory.

58 See, e. g., Archer & Shugart, *supra* note 49, at 148-52 & tbl.3.3.

tions and devices that would in some sense make an end run around the old ones, versus reforming old institutions to make them work better. The first impulse was reflected in the assembly's writing of an extraordinarily extensive bill of rights, including many socio-economic rights and its creation of new institutions to enforce those rights, based on a suspicion that existing structures may not adequately enforce the constitution and transform Colombian society<sup>59</sup>. The assembly created a new "Defensor del Pueblo" ("Defender of the People") or ombudsman charged with protecting constitutional rights by investigating wrongdoing, mobilizing public opinion, and filing judicial actions and strengthened the "Procuraduría General de la Nación" ("Attorney General"), which was given wide-ranging powers to investigate and root out constitutional violations by state officials<sup>60</sup>. As we will see below, the CCC has at times enlisted these actors as allies in its efforts.

Most importantly, the Constitutional Assembly created the CCC itself, and gave this body exceptional powers – indeed, the Colombian Court must be by any measure one of the strongest courts in the world. The CCC has the power to hear abstract review petitions initiated at any time by any single citizen, rather than, as in México, solely at the conclusion of the legislative process by a minority of political actors<sup>61</sup>. Further, the CCC has the power to hear appeals from lower court dispositions of an individual complaint procedure called "acción de tutela." "Tutelas" are inexpensive to bring, are heard very quickly, and can be used to enforce any of the "fundamental" rights in the constitution against any public actor and, in many situations, private actors as well<sup>62</sup>. The assembly constructed the CCC to ensure that the constitution would have force even if the traditional political actors were not reformed. Furthermore, in article 93 the Constitution states that international treaties on human rights are legally binding for national authorities and constitute relevant criteria for interpreting constitutional rights, the "bloque de constitucionalidad" ("constitutionality block").

The other motivation, reforming existing political institutions to make them work better, is also reflected at various points in the convention's work. It shows in the assembly's efforts to establish clearer rules for the president's invocation and use of emergency powers and its efforts to give the congress an enlarged role in supervising and checking the president's use of emergency powers, as well as in naming certain officials<sup>63</sup>. But the convention did not focus on the

59 See Manuel José Cepeda, *Introducción a la Constitución de 1991: hacia un nuevo constitucionalismo colombiano*, 147-70 (Presidencia de la República, Bogotá, 1993).

60 See *id.* at 101-02. See, e. g., Christopher S. Elmendorf, *Advisory Counterparts to Constitutional Courts*, in 56, *DUKE L.J.*, 953, 961-64 (2007).

61 See Manuel José Cepeda, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, in 3 *Wash. U. Global Studies L. Rev.* 529, 554- 557 (2004).

62 See *id.* at 552-554.

63 See Const. Col., arts. 212-15; See Cepeda *supra* note 62, at 296. See Archer & Shugart, *supra* note 58, at 128, 130.

underlying causes of congressional dysfunction<sup>64</sup>. It made some superficial efforts to “clean up” congress,<sup>65</sup> but its changes to electoral rules actually made problems of legislative behavior worse, not better. The new rules maintained the open-list structure that gave parties little control over their candidates and allowed multiple lists from the same party<sup>66</sup>; moreover, the rules actually made it easier for transient movements, rather than established parties, to gain representation<sup>67</sup>.

### **2.3. Political institutions since 1991 – continued deterioration of the party system**

Unsurprisingly, then, parties have become significantly less institutionalized since 1991, and the behavior of the legislature has actually worsened significantly over the past fifteen years. The two traditional parties, although highly factionalized, at least occasionally operated as coherent entities, and gave some structure to Colombian politics. In the post-1991 period, the Colombian party system has become increasingly deinstitutionalized (although also significantly more open to new interests)<sup>68</sup>. This process perhaps reached its apogee in 2002, when a former member of Liberal Party, as an outsider to the party system, Álvaro Uribe, was elected president. The two traditional parties have been in a long decline – neither is now a powerful entity. Two types of new political forces have filled this vacuum, but neither type bodes well for legislative performance.

First, there are off-shoots and factions of the traditional rural, patronage-based parties, now repackaged with new labels. These parties are personalistic

64 See Rodrigo Uprimny, *Constitución de 1991, Estado Social y Derechos Humanos: promesas incumplidas, diagnóstico y perspectivas*, in *El Debate de la Constitución*, 71 (Universidad Nacional de Colombia, Instituto Latinoamericano de Servicios Legales Alternativos, Bogotá, 2002).

65 For example, it outlawed one of the devices used by the president to “buy” individual legislators, the notorious auxilios parlamentarios or discretionary funds given to legislators for whatever project they desired. See Const. Col., art. 136, cl. 4. Despite the bar, funds of this kind continue to exist under different names. See Leongomez, *supra* note 48, at 78, 96 n. 25.

66 See Leongomez, *supra* note 48, at 84 & n. 17 (noting that a 1994 law technically gave party lists control over the party label but that, in fact, “the traditional parties, as well as many new parties, make indiscriminate endorsements.”); see also Brian F. Crisp, “*The Nature of Representation in Andean Legislatures and Attempts at Institutional Reengineering*, in *The Crisis of Democratic Representation in The Andes*, 78 (Scott Mainwaring et al., eds., Stanford university Press, Stanford, 2006). (Listing the failure to eliminate intra-party lists as a failing of the 1991 convention). A law that took effect in 2006 mandated one list per party per district, see *id.* at 219 n. 4, but it is unclear how much of an impact this law will have, given that factions can run as separate parties. Up to now, one study has found that the reform significantly reduced the number of lists in the 2006 election. See Matthew Soberg Shugart, Erika Moreno, & Luis Fajardo, *Deepening Democracy by Renovating Political Practices: The Struggle for Electoral Reform in Colombia* (March 2006) (unpublished manuscript, on file with author).

67 See Const. Col., art. 108.

68 See Leongomez, *supra* note 48, at 88 & tbl. 3.3

and led by the same types of politicians who would have led factions in the Liberal or Conservative party<sup>69</sup>. The difference is that they are even less tied to a coherent party label than before. As in the pre-1991 period, these legislators have little interest in making national-level policy. As a whole, their parties tend to be fairly small (because they are linked around individual actors who generally have support in only one region of the country), and they tend to appear and disappear fairly frequently, showing little longevity. Further, empirical evidence suggests that party discipline remains quite low within these kinds of parties, so they are not capable of voting as a coherent block<sup>70</sup>.

The second kind of legislator in the new congress belongs to what various authors have called the “electoral micro-enterprise.”<sup>71</sup> These are very small bands of political figures with predominantly urban support; they tend to be led by a celebrity-turned politician, like famous journalists or human rights advocates. These actors, on the surface, have considerable promise for making broad policy decisions; many of them were elected precisely because of their views on important questions. However, isolated figures interested in broad political questions cannot by themselves create a functioning legislature, at least on most issues. Without parties to tie them together and forge coalitions, these micro-enterprise legislators have great difficulty getting anything done at the institutional level. Moreover, the lack of a real party label in these micro-enterprises weakens the link between elected representatives and their constituents; it is hard for people to know what they are getting when they cast a vote.

Several studies, then, have indicated that the behavior of the legislature as a body is worse than before 1991. Most proposals initiated by legislators are either symbolic measures or pork-barrel measures targeted at a particular geographic constituency; virtually all important national policy proposals continue to be initiated by the executive<sup>72</sup>; and it is evident that Congress does not care about the Constitution because it wants to avoid the political costs involved in monitoring legislation for constitutionality. Thus, partially because of incomplete reforms and partially because of durable elements of political culture, the congress has maintained its traditional role as a blocker of presidential policy<sup>73</sup> rather than as an initiator or dialoguer on national

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69 *See id.* at 90-91.

70 *See Crisp, supra* note 66, at 218.

71 *See id.* at 90-91.

72 *See Pizarro Leongomez, supra* note 48, at 92 (citing a study which showed that 78 percent of bills proposed by legislators between July 1998 and July 1999 had a strictly local or regional focus, while only 22 percent addressed national issues at all); *see also* Erika Moreno, *Whither the Colombian two-party system? An assessment of political reforms and their limits*, in, 24, *Electoral Studies*, 485 (2005) (finding via a study of bill initiation patterns that the new parties behaved like the old ones).

73 *See id.* at 91 (noting that fragmentation and legislative indiscipline combine to force “constant negotiation between the government and individual members of congress,” which “drastically increases the transaction costs of moving legislation forward”).

policy initiatives, and as a body willing to abdicate national power to the executive in exchange for particularistic payoffs.

### **3. THE CCC'S RESPONSES TO THE INSTITUTIONAL CONTEXT**

#### **3.1. The CCC in front of the institutional context**

The CCC often complains that the legislature is not acting like a deliberative body. An example is an important case in 2003 where the CCC on abstract review struck down reforms to the country's value-added tax that would have broadened the base to include certain everyday items (like milk) that had previously been exempt. The CCC criticized the legislature harshly for simply accepting a last-minute executive proposal without debating it substantively. Indeed, the CCC stated that the reform "was the result of an indiscriminate decision to tax a great quantity of completely different goods and services that was not accompanied by even a minimum of legislative deliberation, raising the principle of 'no taxation without representation'..."<sup>74</sup>.

Second, the Court's discourse shows an awareness that legislative bargaining is about pork and not policy. In a decision upholding the constitutionality of what were essentially payoffs from the executive into funds that individual legislators could use for whatever they wished, the CCC noted the "reasonableness" and "empirical rationality" of the following argument presented by an intervener, although it claimed to balk somewhat at accepting all of its normative implications<sup>75</sup>.

The CCC and its supporters have drawn from this a new theory of separation of powers that focuses on the Court's role as a check on the executive branch and even as a direct setter of policies based on substantive values derived from the constitutional text. In a famous case from 1992<sup>76</sup> where the CCC announced it would enforce socio-economic rights using the "Acción de tutela" under certain conditions, it stated:

The difficulties deriving from the overflowing power of the executive in our modern state and the loss of political leadership of the legislature should be compensated, in a constitutional democracy, with the strengthening of the judicial power, which is perfectly placed to control and defend the constitutional order.

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74 C-776/03, Justice Manuel José Cepeda Espinosa.

75 C-1168/01, Justice Eduardo Montealegre Lynett.

76 T-406/92, Justice Ciro Angarita Barón.

This is the only way to construct a true equilibrium and collaboration between the powers; otherwise, the executive will dominate.

In other words, in an institutional order where the legislature was structurally incapable of checking the executive, a strengthened judiciary was the best hope to do so. Further, in the absence of “legislative action,” the CCC must “give force” to constitutional principles, developing and directly enforcing even socio-economic rights: “It’s clear that in principle in all of these cases the judge decides something that corresponds to the legislature. However ... the lack of a solution from the organ that has the faculty to decide, makes it possible for another body, in this case the judiciary, to decide.”<sup>77</sup>

Thus, the CCC has held that although separation of powers is an important principle in Colombian constitutional law, it is a flexible doctrine – the CCC tends to emphasize the duty of the branches to “harmoniously collaborate” in achieving constitutional goals, rather than their rigid separation<sup>78</sup>. The forefront of the Court’s consciousness, as “guardian of the supremacy of the Constitution,”<sup>79</sup> is whether society and the state are coming closer to the constitutional vision established in 1991; separation of powers is merely a tool for approaching that constitutional vision. As we will see repeatedly below, the judiciary will step in to re-establish the constitutional vision when the other branches fail to act or act improperly. Ensuring any particular conception of judicial role is subordinated to the overriding goal of ensuring that constitutional change occurs.

### **3.2. The CCC’s failed attempts to “fix” legislative dysfunctionality**

The basis for the CCC’s doctrines is the idea of deliberation: the Colombian Congress “should be ... a space of public reason,” even if the legislature’s actual behavior is wildly divergent from that end<sup>80</sup>. In other words, decisions should be made on the floor, not in back-room deals or party-based pacts: “the validity of a majority decision does not reside solely in the fact that it has

77 *Id.* Major supporters of the Court have echoed this analysis. For example, Manuel Jose Cepeda, former Court’s president, noted that two major sources of the Court’s power were (1) the “central position that the President had traditionally exercised ... over the Congress, which diminishes – and in many cases distorts – the system of checks and balances between the political branches,” and (2) “the perception that [politics] is clientelistic and beneficial for the politicians and not for ordinary people. .... Citizens rarely think that laws represent the consensus of society or of a solid political majority.” See. Manuel José Cepeda Espinosa, *Polémicas Constitucionales*, 241- 242 (Legis Editores, Bogotá, 2007).

78 See, e. g., *T-068/98*, Justice Alejandro Martínez Caballero; *T-025/04*, Justice Manuel José Cepeda Espinosa.

79 See *T-068/98*, Justice Alejandro Martínez Caballero.

80 *C-816/04*, Justice Jaime Córdoba Triviño & Rodrigo Uprimny Yepes.

been adopted by a majority, but also in that it has been publicly deliberated and discussed”<sup>81</sup>. Two lines of doctrine spring from these principles. In the first, narrower line, the CCC focuses on preventing executive manipulation of the legislative process. The second line is aimed at the lack of legislative deliberation even in the absence of executive interference.

The court will strike down legislative enactments because chamber leadership did not offer time for debate; for example, where the chair formally opens debate but then immediately closes it and proceeds to a vote before any statements have been made<sup>82</sup>. Also, the CCC will strike down bills where the chamber leadership has failed to read into the record, print in the legislative journal, or otherwise publicize the content of bills to be voted on, on the grounds that this precludes informed debate and voting<sup>83</sup>. Finally, the CCC will strike down amendments to a bill made on the floor if it appears that a committee declined to debate the provisions at issue, but instead was trying to pass the buck to a later stage of the legislative process<sup>84</sup>.

These doctrines have blocked a lot of important policy measures<sup>85</sup>; little has been achieved in return. The CCC is faced with the obvious difficulty of using a weak instrument – legislative procedure – to fix a deep structural problem, rooted in the party system and political culture. As noted by one Colombian legal scholar, the main problem with legislative debate is not that it fails to occur, but rather that it is “disorganized and ineffective” because of the weakness of the country’s parties and thus the legislature’s failure to coalesce into coherent ideological bands<sup>86</sup>. The CCC cannot radically strengthen parties via judicial decision<sup>87</sup>. The doctrine aimed at executive interference is equally ineffectual because of problems of detection.

81 *Id.* at § VII.137; *see also id.* at § VII.138; *id.* at § 127 (quoting C-222/97).

82 *See C-754/04*, Justice Álvaro Tafur Galvis; *C-668/04*, Justice Alfredo Beltrán Sierra.

83 *See, e. g., C-760/01*, Justice Marco Gerardo Monroy Cabra & Manuel José Cepeda Espinosa. (Araujo Rentería, J., concurring in the judgment).

84 *See C-801/03* Justice Jaime Córdoba Triviño. *See C-370/04*, Justice Jaime Córdoba Triviño & Álvaro Tafur Galvis (Cepeda Espinosa, J., dissenting), (explaining the doctrinal evolution). Justice Manuel José Cepeda Espinosa, one of the founders of this doctrine, argued that it has become too broad, and now has the effect of “punishing parliamentary creativity and petrifying legislative projects to what was decided in the first debate.” *Id.*

85 *See, e. g., C-332/05*, Justice Manuel José Cepeda Espinosa; *C-754/04*, Justice Álvaro Tafur Galvis (striking down key parts of a law aimed at reducing pension payouts); *C-668/04*, Justice Alfredo Beltrán Sierra (constitutional rules for structuring elected local government institutions); *C-372/04*, Justice Clara Inés Vargas Hernández (constitutional amendment changing congressional powers); *C-370/04*, Justice Jaime Córdoba Triviño & Álvaro Tafur Galvis (VAT tax exemptions for agricultural products); *C-1147/03*, Justice Rodrigo Escobar Gil (VAT tax on gambling products); *C-801/03*, Justice Jaime Córdoba Triviño (parts of a bill aimed at making labor laws more flexible); *C-760/01*, Justice Rodrigo Escobar Gil (July 18, 2001) (amendments to the criminal code).

86 Faiber Eucario Falla Casanova, *Algunas consideraciones sobre el principio democrático y la función legislativa parlamentaria en Colombia*, in *Primeras Jornadas de Derecho Constitucional y Administrativo* 201, 216, 221 (Universidad Externado de Colombia, Bogotá, 2001).

87 We do not argue that judicial doctrine has no impact on the party system. For example, much of the edifice of electoral law in the United States is based on the assumption that they can. Nor do

The CCC has also developed doctrines that have sharply cut down on the president's ability to make policy autonomously (ie. without going through the legislative process), either via delegated power<sup>88</sup> or via emergency decree. The CCC has held that legislative delegations of extraordinary power are disfavored and must be read "restrictively" in all contexts<sup>89</sup>; it has held that its goal is to "reduce the capacity of the government to exercise legislative functions through congressional delegation."<sup>90</sup> Thus, the CCC has developed powerful doctrines voiding delegations as insufficiently precise (a Colombian version of the non-delegation doctrine)<sup>91</sup> and limiting their scope<sup>92</sup>.

In the emergency powers area, the raw statistics amply demonstrate judicial activism: of twelve presidential declarations of states of emergency since 1991, the CCC has completely struck down three and partially struck down three more. Moreover, even when the CCC has upheld a declaration of a state of emergency, it has often struck down substantive decrees issued while the declaration was in effect<sup>93</sup>. Further, most of the judicial approvals of decree powers occurred in the early years of the Court's existence: it completely upheld five of six decrees between 1992 and 1994, but has since struck down, at least partially, five of six declarations of emergency<sup>94</sup>. The country spent 82 percent of the time under some kind of presidential state of emergency

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we mean to imply that judicial control of legislative procedure is always futile – it may be, as Cass Sunstein has argued, that judges can and should force legislators to deliberate certain issues. *See, e. g.*, Cass Sunstein, *Nondelegation Canons*, in 67, U. Chi. L. Rev., 315 (2000). Our point here is simpler: where the problems in legislative performance are rooted in deep problems with the party system like those found in Colombia, judicial improvement of legislative performance is almost impossible.

88 Colombian presidents have several types of delegated decree power: they can make decrees that are equal in rank to statutes after being delegated extraordinary powers by the legislature, or they can create administrative decrees with a rank that is lesser than congressional statutes by elaborating or regulating those statutes themselves. *See* Alexi Julio Estrada, *Las ramas ejecutiva y judicial del Poder público en la Constitución colombiana de 1991*, 75-88 (Universidad Externado de Colombia, Bogotá, 2003). We are discussing the first type of delegated power here; use of the second power is reviewed by a different body, the "Consejo de Estado" ("Council of State"- Colombia's high administrative court), and so we do not treat it.

89 *See, e. g.*, C-1152/05, Justice Clara Inés Vargas Hernández; C-702/99, Justice Fabio Morón Díaz.

90 C-702/99, Justice Fabio Morón Díaz, § VI.4.1, ¶ 20.

91 Like other Courts who have tried to enforce a non-delegation doctrine, *see* David P. Currie, *The Constitution of The Federal Republic of Germany*, 133 (The University Chicago Press, Chicago, 1994). For Colombian cases, *see*, for example, C-097/03, Justice Manuel José Cepeda; C-1493/00, Justice Carlos Gaviria Díaz; C-1374/00, Justice José Gregorio Hernández.

92 *See, e. g.*, C-1152/05, Justice Clara Inés Vargas Hernández; C-734/05, Justice Rodrigo Escobar Gil; *see also* Manuel José Cepeda Espinosa, *supra* note 63, at 636 n. 299 (listing cases).

93 *See, e. g.*, Miguel Revenga Sánchez & Emilia Girón Reguera, *La Corte Constitucional colombiana ante las medidas de seguridad y defensa nacional del gobierno de Uribe*, in 6, *Revista de Estudios Socio-Jurídicos*, 29, 40-49 (2004).

94 Rodrigo Uprimny, *The Constitutional Court and Control of Executive Emergency Powers in Colombia*, in *Democratization and The Judiciary: The Accountability Function of Courts in New Democracies*, 46, 57 tbl. 1 (Siri Gloppen et al., eds., Frank Cass Publishers, London, 2004).

in the 1980s, but it has spent only 17.5 percent of the time under such a state between 1991 and 2002<sup>95</sup>.

Commentators have hailed the Court's emergency powers jurisprudence as "one of [its] most important and original interventions."<sup>96</sup> But this kind of structural jurisprudence – which aims to push all policymaking through the legislature – ignores the problem of legislative weakness. Like executive manipulation of the policy process, autonomous executive policymaking has historically been a coping mechanism because of serious problems in legislative performance. So long as the legislature remains dysfunctional, forcing all policy through the legislature simply adds a low quality veto point to the policymaking process, and is likely to block a significant number of bills without achieving positive results<sup>97</sup>. Historically, Colombian governments have used emergency decrees to deal with severe economic crises; the congress functioned so poorly that the president would often pass these bills alone. Understanding this need, the framers of the 1991 constitution created a "social and economic emergency," which was meant to deal with socio-economic (rather than security) crises<sup>98</sup>. The CCC has severely limited this device by confining it to situations where there has been a significant exogenous shock to the system, like a natural disaster. For example, in 1997, the CCC struck down the government's attempt to declare a state of economic emergency in order to deal with serious balance of payments problems, largely caused by an increasing fiscal deficit, which threatened the economy<sup>99</sup>. The CCC emphasized that the problem was a "structural" one, with a "prolonged duration," and held that "the expansive use of exceptional powers to resolve structural or chronic problems" was constitutionally prohibited. Structural problems were

95 *See id.* at 65 tbl. 3.

96 *Id.* at 47.

97 The Court's emergency powers jurisprudence is not devoid of merit. As Tushnet argues, there are two ways for a court to control emergency power: it can independently review executive action for substantive rights concerns, or it can attempt to place structural controls on executive action, telling the executive that he must go to congress to get what he wants. *See* Mark Tushnet, *The Political Constitution of Emergency Powers*, in 91, *Minn. L. REV.*, 1451 (2007). Much of the Colombian jurisprudence is purely structural, and this is inappropriate given legislative dysfunctionality. But some of the cases, particularly those where the president has invoked the "state of internal commotion" meant to deal with the ongoing insurgency, are really about rights. The Court is telling the political branches that what they want to do is unconstitutional, regardless of source. *See, e.g., C-300/94*, Justice Eduardo Cifuentes Muñoz. In our view, this kind of judicial supervision suits the institutional context well and is part of the legislative substitution strategy outlined below, because the Court is conducting its own substantive review of the measures rather than deferring to congressional controls.

98 Const. Col., art. 215. The assembly also provided for two other states of emergency – the state of internal commotion and the state of external war. The first was meant to deal with serious internal unrest related to things like Colombia's ongoing guerrilla insurgency, while the second, which has never been used, was meant to deal with states of emergency during wartime. *See* Const. Col., arts. 213-14.

99 *See C-122/97*, Justice Antonio Barrera Carbonell & Eduardo Cifuentes Muñoz.

generally meant to be dealt with via the constitutionally “privileged” route of ordinary democratic debate in the congress, which was the “natural forum for discussing and resolving critical [economScholars have found evidence for a link in Colombia between the post-1991 jurisprudence, which gives the president little ability to act unilaterally in economic matters, and worsening fiscal deficits<sup>100</sup>. The economic crisis of the late 1990s did not pass quickly, but rather threw Colombia into one of the worst recessions in its history; further, many key economic reforms could not be pushed through congress until President Álvaro Uribe took office in 2002<sup>101</sup>.

### **3.3. The ccc as a Partial Replacement for the Legislature**

#### **3.3.1. Policy Initiation**

The ccc commonly steps in when it feels that other branches of government are not initiating policy in key areas. Most famously, it decided a series of cases in the 1999-2000 period that forced an overhaul of the mortgage system. The background here is a crisis in that system, due both to rising interest rates and declining real wages (the underlying causes were the same fiscal and financial crises that spurred the presidential decrees discussed above). A large number of mortgagees (perhaps 200,000<sup>102</sup>) had either gone into default or were in danger of defaulting in the previous several years, and the elected branches had not formulated any response – the president was preoccupied with the macroeconomic and mortgage crises from the standpoint of the state, the international financial agencies, and the financial sector, while Congress was too dysfunctional to swing into motion. An important component of the system was a formula, UPAC, which re-equilibrated mortgage contracts annually given inflation rates in the previous year. In a historically moderate to high inflation environment like Colombia, this adjustment formula was necessary to permit a market for long-term financing; in its absence, uncertainty around future inflation might prevent most mortgage contracts from existing. The Central Bank had discretion, in accordance with guidelines set by a 1993 delegated decree, to determine these adjustments.

The ccc acted immediately to reduce overall interest rates by attacking aspects of the UPAC formula. In its first decision, it held unconstitutional a pro-

100 See Mauricio Cárdenas et al., *Political Institutions and Policy Outcomes in Colombia: The Effects of the 1991 Constitution*, in *Policymaking in Latin America*, 199, 228 (Ernesto Stein & Mariano Tommasi, eds., Harvard University Press, Cambridge, 2008).

101 See Juan José Echaverría et al., *Recent Economic History of Colombia*, in *Institutional Reforms: The Case of Colombia*, 33, 34-35 (Alberto Alesina, ed., The MIT Press, Cambridge, 2005).

102 See Rodrigo Uprimny Yepes, *The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates*, in *Courts and Social Transformation in New Democracies*, 127, 136 (Roberto Gargarella et al., eds., Ashgate Pub Co., England, 2006).

vision that required the Central Bank to set UPAC adjustments in accordance with the interest rates found in the economy<sup>103</sup>. There was a difference, the CCC noted, between the inflation rate (which measured the purchasing power of money) and the interest rate (which measured returns to money) – the latter was typically higher because of returns to capital and risk. Thus, the interest rate measure “destroyed” the balance between debtor and creditor, and ran contrary to the promotion of housing, a constitutionally protected value. In other substantive decisions, the CCC also banned the capitalization of interest in mortgages and prepayment penalties in mortgages, holding that these too overburdened homeowners<sup>104</sup>.

In yet another decision from September 1999, the CCC stretched existing doctrines<sup>105</sup> to find that the existing UPAC regulations had been improperly promulgated by the president when a statute was required. It thus held the entire set of existing regulations unconstitutional, but delayed erasing them from the legal order until the end of the then-current legislative term (in 2000)<sup>106</sup>. As several dissenters pointed out, it was evident that the Court’s real motivation was to force legal changes to the entire structure, including some provisions that would have been difficult to strike down substantively<sup>107</sup>. Also, the CCC ordered that its prior substantive jurisprudence on calculating the UPAC formulas be given immediate effect, and that debtors receive refunds on any excessive interest they might have paid in the past; thus debtors were given some immediate relief from the crisis<sup>108</sup>.

The president presented a new law to the Congress in about one month, in October 1999, which was passed in the early part of 2000. The law incorporated the Court’s earlier substantive jurisprudence – it banned capitalization, pre-payment penalties, and required that the new UPAC system reflect only changes in the rate of inflation – and made all of these changes retroactive, thus reimbursing debtors for overpayments<sup>109</sup>. It also incorporated a myriad

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103 See *C-383/99*, Justice Alfredo Beltrán Sierra.

104 See *C-747/99*, Justice Alfredo Beltrán Sierra (capitalization); *C-252/98*, Justice Carmenza Isaza de Gómez (prepayment).

105 As the dissenters pointed out, the Court easily could have come to the opposite conclusion. The majority held that the basic financial regulations, including the UPAC guidelines, constitutionally constituted a *ley marco* that under the 1991 constitution had to be established by the legislature. Thus, the president’s legislation of the rules via delegated decree powers was void. See *C-700/99*, Justice José Gregorio Hernández Galindo (Sept. 16, 1999), § VII.3. The trouble with the holding is that the 1993 decree merely integrated existing statutory material from several sources and renumbered it; nothing new was added to the system. See *id.* (Cifuentes Muñoz & Naranjo Mesa, dissenting). The Court had held previously, with respect to this very same statute, that such a power is not an attempt to create a *ley marco*, because it involves no substantive power or discretion. See *id.*

106 See *C-700/99*, Justice José Gregorio Hernández Galindo § VII.5.

107 See *id.* (Cifuentes Muñoz & Naranjo Mesa, dissenting).

108 See *C-700/99*, Justice José Gregorio Hernández Galindo.

109 See *C-955/00*, Justice José Gregorio Hernández Galindo (July 26, 2000) (citing Law 546 of 1999, §§ 3, 17).

of other provisions that the CCC had not explicitly required but which it liked, such as an infusion of state money to help cash-strapped debtors. Still, in the end the CCC made extensive and creative use of the conditional decision doctrine – which allows the court to condition the constitutionality of a bill on the grounds that it be interpreted a certain way – in order to effectively re-write large portions of the statute. Most importantly, it imposed specific caps on interest rates in housing, requiring that they be no higher than the lowest real interest rate being charged in the financial system. It also required that the bailouts for debtors who were already late on payments be the same as those for debtors who were not.

The end product of the Court's work was fairly successful: it succeeded in forcing a far-reaching reform to the housing finance system that was more favorable to debtors, and it protected many of the existing debtors. Yet the decision was criticized on several grounds. Dissenters in these cases, as well as others, argued that the CCC was trying to solve social problems, rather than acting much like a Constitutional Court. The dissenters admitted that the UPAC system had become a disaster and that the political branches were not fixing the problem, but they argued that the CCC would ultimately weaken its own legitimacy if it started acting like a legislature<sup>110</sup>.

That the CCC is indeed taking on such a role was made clear by some of its procedural innovations in the case. In July 1999, it held a public hearing in the style of a legislative committee or an administrative agency, in which it heard from about 25 leaders or officials, including the ombudsman, the Minister of Housing, the Head of the Colombian Central Bank, several deputies and senators, the heads of various trade groups, and the head of a labor union association<sup>111</sup>. In addition, throughout the process the CCC requested – and received – written comments on the problem at issue from a extraordinary number of figures, including economists, academics, public officials, and civil society groups<sup>112</sup>. Finally, the CCC received a lot of information about the mortgage crisis from the high number of “tutelas” it received on the topic. These mechanisms probably solved, at least partially, informational deficits the CCC faced.

The CCC was also criticized for using its housing jurisprudence to primarily benefit the middle class, rather than the very poor<sup>113</sup>. Again, this is true – only

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110 *C-383/99*, Justice Alfredo Beltrán Sierra (Beltrán Sierra, J., dissenting).

111 *See C-700/99*, Justice José Gregorio Hernández; Salomon Kalmanovitz, *La Corte Constitucional y la capitalización de intereses*, 2 (unpublished manuscript, on file with author) (“The public audience replaced the Congress in convoking presumably all the involved interests, but the problem is that it did not allow for proportional representation based on universal suffrage, but rather the positions with which the Court agrees.”)

112 *See C-955/00*, Justice José Gregorio Hernández; *C-700/99*, Justice José Gregorio Hernández.

113 *See* Kalmanovitz, *supra* note 111, at 8 (“The poorest people who have access to their own homes via loan sharks outside the official system ..., and which are charged 4 or 5 times the interest rate within the system because of high risks of non-payment, did not benefit at all from these sentences.”)

the middle class, and not the poor, had mortgages, at least within the formal sector. It is also a fairly general feature of the Court's work: while the CCC does protect extremely marginalized groups and has developed some representation-reinforcing constitutional theory to justify its work, many of its most important interventions have been on behalf of more middle class groups<sup>114</sup>. Yet in a political system that functions as poorly as the Colombian system, this is not necessarily an indictment of the Court's work. When the CCC protects middle-class groups from mortgage defaults and salary reductions, it is protecting groups that should have had recourse within the political process, had that process functioned well. But the fact is that the Colombian system often does not function well<sup>115</sup>.

A final point is that the Court's work here is different than the "dialogical" model of socio-economic rights-enforcement used, for example, in South Africa and described by Tushnet and others<sup>116</sup>. The CCC's strategy involved some cooperation from the other branches, particularly the president, but its primary goal was not to catalyze democratic processes, but rather to take whatever action it deemed necessary to solve the policy problem. Thus the CCC was not afraid to issue precise directives from early on in the process or to extensively revise the bill that came out of the legislature. Again, this kind of approach seems more reasonable where the legislature's ability to substantively engage the bill was limited by the weaknesses of its parties.

### 3.3.2. Supervision of Major Policy Initiatives

The CCC has not been content to simply push new policy ideas into the system; it has also spent considerable effort on supervising the enforcement of these policies. Its chief tool in this respect has been the "state of unconstitutional conditions" doctrine. When the CCC declares a state of unconstitutional conditions, it holds that the treatment of a broad class of people, who are impacted by a range of institutions, is unconstitutional<sup>117</sup>. The state of unconstitutional

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The still poorer who live in the slums ... were also left unprotected." Even defenders of the Court's socio-economic work have noted that the housing decisions mainly benefited middle-class groups. See Uprimny, *supra* note 102, at 136 (noting that "[t]he debtors were largely from the middle class").

114 See, e. g., C-1433/00, Justice Antonio Barrera Carbonell.

115 Scheppele, using the Hungarian example, offers a reason why domestic political actors often ignore middle-class groups in the developing world. See Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, in 82, *Tex. L. Rev.*, 1921 (2004). Executives are heavily pressured by international organizations, which want them to cut costs and are often hostile to social spending targeting the middle class. Other domestic institutions, like legislatures, should stand up for these groups; but problems of representation are often serious enough to prevent them from doing so. Thus the Court acts as the catalyst for a broad set of domestic interests that is wholly excluded from the rest of the process.

116 See, e. g., Mark Thushnet, *Weak Courts, Strong Rights*, 227-64 (2008); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, in 98, *Colum. L. Rev.*, 267 (1998).

117 See, e. g., T-025/04, Justice Manuel José Cepeda Espinosa (Jan. 22, 2004), § III.7 (explaining the

conditions jurisprudence bears great resemblance to the American structural injunction, but on a bigger scale and in a more centralized manner. While American structural injunctions are typically supervised by individual district courts and typically involve institutions in one locality, the CCC itself supervises states of unconstitutional conditions, and often declares them over the reach of the entire country and for a nation-wide class<sup>118</sup>. Also, while states of unconstitutional conditions have sometimes been called to deal with problems involving groups that might be poorly represented in a well-functioning system, like prisoners and refugees displaced by civil conflict<sup>119</sup>, it has also been used to deal with groups that should be politically powerful, like pension recipients and lawyers trying to become notaries<sup>120</sup>. The CCC views the state of unconstitutional conditions doctrine less in terms of remedies for particular parties, and more in terms of an entire state of affairs being out of compliance with the constitution. The doctrine is thus consistent with the Court's vision of the constitution as a transformative document and with its role as the chief mechanism for ensuring that constitutional aspiration and reality move towards lining up. It is also consistent with a conception of judicial role that relies on the "harmonious cooperation" between the branches, rather than a pre-defined set of roles.

The case of the internally displaced persons is perhaps the most illustrative. It is estimated that there are perhaps three million people living in Colombia who are currently displaced from their homes due to the country's civil conflict<sup>121</sup>. The Colombian state has typically done very little for these people, despite the myriad of problems they face – they have trouble receiving food, shelter, or medical care, their children are often left uneducated, they face serious safety problems, they generally have trouble reestablishing rights to land that they have been forced to abandon, and they are often pressured to go back to their homes well before it is safe to do so<sup>122</sup>. So, the problem is classically polycentric; hardly the stuff we would expect a court to be willing or able to take on. But in 2005, the CCC declared a state of unconstitutional conditions with respect to all internally displaced persons in the country, holding after a statistical review that the problems that population faced were massive and that the state response, in terms of capacity and budget, was "gravely deficient."<sup>123</sup>

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doctrine's roots and applicability).

118 See, e.g., *T-025/04*, Justice Manuel José Cepeda Espinosa (displaced persons); *T-153/98* (prisoners).

119 See *T-025/04*, Justice Manuel José Cepeda Espinosa (refugees); *T-153/98* (prisoners).

120 See *SU-090/00*, Justice Eduardo Cifuentes Muñoz (pensions); *T-1650/00*, Justice Fabio Morón Díaz (notaries).

121 See Jennifer Easterday, *Litigation or Legislation: Protecting the Rights of Internally Displaced Persons in Colombia*, 5 (2008) (unpublished manuscript, on file with author).

122 See *id.* at 6-7; Julián Daniel López-Murcia & Juana Inés Acosta López, *Asistencia estatal a los desplazados y reparaciones en el Sistema Interamericano de Derechos Humanos*, 8 *International Law. Revista Colombiana de Derecho Internacional*, 161-194 (2006).

123 See *T-025/04*, Justice Manuel José Cepeda Espinosa §§ III.6.2-6.3. Article 2 of the Colombian Consti-

The CCC declared the state only after receiving a flood of “*tutelas*” dealing with a particular issue over a sustained period of time<sup>124</sup>. Thus, as in the housing cases, the CCC has been able to leverage its easily-accessible individual complaint mechanism to get good information about widespread problems raised by Colombian society. Since declaring the state, the CCC has used a variety of techniques to get reasonable policy-relevant information. It has issued numerous orders in the case subsequently; most of these orders have requested information from the various agencies, particularly about how much money they are spending on the problem and how they are spending it<sup>125</sup>. The CCC has also relied heavily on a set of friendly national and transnational NGO’s and on allied institutions created by the 1991 constitution, especially the “Procuraduría General de la Nación” and the “Defensor del Pueblo”, to monitor the performance of the agencies and to write reports, excerpts of which it has often appended to its subsequent orders<sup>126</sup>. And, as in the housing case, it has held several legislative-style hearing involving these groups and the administrative agencies<sup>127</sup>. Finally, the CCC has loosened standing rules to allow third-parties (particularly NGO’s) to bring “*tutelas*” on behalf of groups of displaced people<sup>128</sup>. The result, then, is that the CCC has placed itself at the head of a coalition of allied governmental and non-governmental institutions to amass and systematize huge amounts of information and to put itself in a position to issue more specific orders where action has been delayed.

Remedially, the CCC has gone well beyond merely pointing out the constitutional principles at issue. It has issued detailed guidelines for how other branches should implement the right. Thus, as with the mortgage cases, the CCC here has interacted significantly with other government actors, but its work does not fit the classic “dialogic” model where the CCC points out the

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tution holds that “guaranteeing the effectiveness of the principles, duties, and rights consecrated in the Constitution” is an “essential duty of the state”; the Court held that this created a positive duty on the state to do something about the displaced persons problem, even if it did not bear primary responsibility for creating the problem. *See id.* § III.8.

124 *See id.* § III. 7.

125 *See, e. g.*, auto 337/06 (requesting information on actual and proposed statistical indicators to measure the scope of the problem); auto 218/06 (ordering the agencies to produce reports on compliance with prior Court orders in the case); auto 176/05, app. (summarizing prior reports required by the Court from various governmental organizations). An Auto is a decision that the Court issues on its own accord, exercising its inherent administrative powers or its jurisdiction over an open case.

126 *See, e. g.*, auto 178/05, app. (summarizing reports or testimony that the Court had received from the “Procuraduría General de la Nación”, the “Defensor del Pueblo”, several bar associations, and myriad civil society groups).

127 *See* auto 236/07 (calling such a hearing); auto 178/05 (describing the contents of a prior hearing). The Court has also tried to mandate that civil society groups have a hand in drafting new programs. *See, e. g.*, auto 92/08 (ordering agencies to create new programs, and requiring that they “adopt a public participatory hearing” before they begin planning the program, that they subsequently write a report to the Court explaining how civil society groups participated in the planning, and that they ensure these groups are designed in implementing the programs as well).

128 *See* Easterday, *supra* note 121, at 45.

right violated and leaves most of the implementation to the political branches, and particularly the legislature. Instead, the CCC is acting as a manager of the relevant agencies over a long period of time, using allied institutions and civil society groups as sources of information and policy. Moreover, the CCC has not viewed the legislature as a key figure in its interactions; the CCC stressed that it was not calling for any new legislation, and instead has focused on issuing orders to a group of agencies with jurisdiction over the topic<sup>129</sup>. The overall conception of the “unconstitutional state of conditions” doctrine is in harmony with the Court’s general view that separation of powers in Colombia must be flexible, and should be subordinated to the more important goal of constitutional enforcement.

It is difficult, and really too soon, to evaluate the work of the CCC in this area, but based on the views of commentators it seems to have achieved some real – albeit limited – results. There have been substantial increases in funding spent on the problem, and increases in other statistical areas, like the percent of displaced children attending school and receiving medical care<sup>130</sup>. Better statistics are now being kept on the size of the population and its characteristics and needs. Progress has, of course, been fairly slow, and the CCC has been reluctant to utilize contempt mechanisms, recognizing the complexity of the problem<sup>131</sup>. But the Court’s approach has had an impact.

### 3.3.3. Checking the Executive

Given that the legislature does not act as a productive, substantive check on executive decision-making, the CCC itself has had to shoulder much of this burden. The Court’s development of an extremely thick rights jurisprudence has allowed it to review executive proposals, whether passed by the legislature or promulgated using autonomous executive powers, quite aggressively. But our interest here is not in re-hashing the Court’s general activism and willingness to rethink executive policy decisions, which is a task others have undertaken<sup>132</sup>. Instead, we show how the CCC has linked its aggressive rights jurisprudence to the institutional context.

The CCC uses weak legislative performance as a justification for judicial activism when considering executive-created proposals. One of the basic tools used by courts in comparative constitutional law is proportionality

129 See *T-025/04*, Manuel José Cepeda Espinosa § III.10.1 (noting that the Court is not “modifying the policy designed by the legislature”).

130 See Rodrigo Uprimny & María Paula Saffon, *Desplazamiento forzado y justicia transicional en Colombia*, 8 (2008) (unpublished manuscript, on file with author); Manuel José Cepeda Espinosa, *How Far May Colombia’s Constitutional Court go to Protect IDP Rights*, available at <http://www.fmreview.org/text/FMR/BrookingsSpecial/13.htm> (last visited May 19, 2008).

131 See Cepeda Espinosa, *supra* note 61.

132 For an overview of the Court’s activism on rights questions, see, e. g., Cepeda, *supra* note 61.

or balancing. Basically, this kind of tool measures the interests served by a piece of legislation against those constitutional rights and values infringed by it. One of the keys to any proportionality or balancing test is the level of deference with which the legislation is reviewed: how hard does the ccc look at the political branches' assessment of the interests served by a particular piece of legislation? The question is particularly important in a country with a thick constitution, because virtually all pieces of legislation potentially place burdens on some constitutional rights. The ccc has stated its balancing test in an unusual way, with an eye on institutional considerations: "the measures must be proportional to the objectives pursued, to the care taken in the democratic debates, and to the sacrifices eventually imposed on [affected groups]".<sup>133</sup> In other words, if the legislature does its job of vetting a bill properly, the ccc will defer to the political branches. Where it does not, the ccc will exercise a more independent review of the executive's proposal.

An important application of this principle occurred in a major executive-led tax reform bill in 2003. The executive sought to broaden the base of the country's value-added-tax, its biggest source of revenue, by getting rid of a bunch of traditionally exempted products. The fiscal crisis grew as the bill sat before Congress, and thus the president greatly expanded the bill by proposing to tax a group of products that had historically not been taxed because they were "necessities." The main challenge to the law rested on the argument that it unconstitutionally infringed the rights to life and to adequate sustenance, because it raised the price on necessary goods for people who could not afford the increase<sup>134</sup>.

The ccc began by noting that, in principle, Congress was entitled to a "broad margin of configuration" in making tax decisions. The trouble here was the quality of debate on the provisions at issue, which would have expanded the tax base to include many necessities traditionally exempted from the vat. The ccc stressed that the provisions were not the object of even a "minimal public deliberation in the Congress in which [their] implication[s] for equity and progressiveness were explored." The ccc emphasized that the vat tax expansion was not in the original bill, but instead represented a last minute presidential addition, driven by a deteriorating fiscal situation during the year. And it found, reviewing the congressional record, that Congress had not engaged this part of the bill, and thus had never discussed the consequences of the provision for middle class and poor groups, but instead had merely rubber-stamped the presidential proposal. Moreover, the bill itself showed an "indiscriminate" widening of the base to include many disparate items, thus offering evidence of a lack of deliberation.

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133 *C-038/04*, Justice Eduardo Montealegre Lynett.

134 *See C-776/03*, Justice Manuel José Cepeda Espinosa.

Given these facts, the CCC found that the legislature had not played its role properly and would not be given any “margin of configuration.” Instead the CCC independently reviewed, and struck down, the law in light of the constitutional right to life, particularly given the context of declining welfare spending, high tax evasion by the rich, and the fact that most of the new spending would go to national defense and not welfare. This doctrinal line is a better way for the CCC to vindicate the interests it has identified in its line of jurisprudence on legislative procedure. Like in those cases, its concern is that the legislature often acts in an insufficiently “deliberative” manner and that “congressional autonomy” is often breached by presidential strong-arm tactics during the legislative process<sup>135</sup>. But the approach is less formalistic; the CCC is able to look more at the substance of debate, and not just at whether certain stages of debate occurred<sup>136</sup>. And its remedy, where it finds problems, is to take an independent look at executive policy, not to automatically strike down the bill on procedural grounds. Finally, the policy is flexible; on those (rare) occasions where Congress does a thorough job engaging a presidential bill, the CCC has exercised greater deference to the policy choice<sup>137</sup>. Thus, the CCC keeps open the Congress’s ability to develop a legislative constitutionalism and gives it incentive.

135 *C-776/03*, Justice Manuel José Cepeda Espinosa § 4.5.6; *see also id.* § 4.5.3.2.1 (“[D]eliberation makes effective the principle of political representation, by making known the position of the representatives of the people, expressed in public reasons known, or at least identifiable, by everyone.”).

136 In this sense, the Court’s work resembles American theorists who recommend taking a harder look at legislative deliberations to ensure that they are sufficiently rational and do not rest on prohibited grounds. *See, e. g.*, Cass Sunstein, *Interest Groups in American Public Law*, in 38, *Stan. L. Rev.*, 29, 69-73 (1985) (calling for a heightened rationality review that would look to see whether Congress actually considered a public justification for its project, and a more probing analysis of the congressional record that would make sure laws did not actually rest on bias against disadvantaged groups).

137 A 2004 case involving deep reforms aimed at making the labor laws more flexible shows the flip side of the doctrine, on those rare occasions where the Court finds that the legislature has conducted itself well. Under the Court’s own prior case law, these steps (making firing easier, reducing pensions, allowing pay reductions) were problematic, because they reduced the economic security of the middle and lower classes. Generally, under the Court’s “progressiveness” principle in the socio-economic area, the state cannot make poorer social groups worse off via policy change. *See* Rodrigo Uprimmy & Diana Guarnizo, *¿Es posible una dogmática adecuada sobre la prohibición de regresividad? Un enfoque desde la jurisprudencia constitucional colombiana*, 7-11, 14 (unpublished manuscript, on file with author). Thus, the Court found that there was a *prima facie* case for unconstitutionality. But the Court found, unusually, that the legislature had “carefully studied and justified” the measures, and thus deferred to the legislative judgment. *See C-038/04*, Justice Manuel José Cepeda Espinosa.

## **CONCLUSION: TOWARDS AN ANALYSIS OF JUDICIAL ROLE “IN CONTEXT”**

Unlike the United States, where popular constitutionalists argue that judicial claims to supremacy in constitutional interpretation act as an obstacle to the development of constitutionalism by the Congress and by the people, in Colombia the ccc itself appears to do the best job of reflecting popular visions of constitutional transformation<sup>138</sup>. In contrast, the Colombian Congress's willingness and ability to carry out constitutional transformation is quite limited.

This suggests that the concept of judicial independence in comparative constitutional politics and law may need to be reframed. Rather than looking only at whether a court is insulated from other actors, we may be better served by focusing on exactly who the court views as its constituency and how these ties affect the functioning and legitimacy of the court.

The goal here, at any rate, is not to give a definitive assessment of the ccc's work; that task is well beyond the scope of this paper. The point instead is that the legitimacy of judicial review and constitutional jurisprudence deserves to be debated on its own institutional conditions. Building up a comparative theory of judicial role is not easy, and will not lead to clear answers, but it can help guide our assessments of constitutional design and the tasks of constitutional courts in developing countries.

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138 However, now there are factors that may constrain this possibility, such as an important increment of political pressure towards the conservatism of judicial decisions, as well as the reintegration of the Court with conservative Justices.

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