

Agents of neoliberalism? High courts and rights in Latin America

Sandra Botero
Political Science Department
University of Notre Dame
sbotero1@nd.edu

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Constitutional courts, like independent central banks, were seen by the international financial institutions and aid agencies fueling judicial reform in Latin America in the late 1980s and early 1990s as crucial to neoliberal economic development. Safe from the vicissitudes of representative democracy by virtue of their design, high courts were deemed ideally located to provide much-needed guarantees of legal predictability. Strengthening courts and the judicial system in general was deemed vital to promoting legal stability, access to justice for investors, effectiveness and to safeguarding the neoliberal model (Carothers 2001; Domingo and Sieder 2001; Rodríguez Garavito 2011). In the years that followed, several high courts in Latin America became assertive tribunals—courts in Costa Rica, Colombia, Argentina and Brazil became, to different extents, checks on their executives but also, enforcers of recently constitutionalized rights (Kapiszewski 2012; Wilson 2009; Nunes 2010; among others.). Their interventions safeguarded individual rights, often put a brake on the retrenchment of welfare benefits, sometimes expanded rights and even resulted in greater involvement from the state in certain areas. Their rights activism was controversial and stood partly at odds with a strict neoliberal project. Following the breakdown of the Washington consensus in the early 2000s, as Latin American countries continue to navigate the currents of democracy, these assertive high courts are entering a new stage. They remain important points for social policy and accountability discussions around rights, but the boundaries of their activism are being redefined. What is the contribution of courts to making effective new constitutional rights in Latin America and what are their limits?

In this paper I suggest constitutional courts have a complicated and evolving relationship with neoliberal reforms and neoconstitutionalism—that is, the wave of constitutional reforms also known as social constitutionalism, which swept the region just as market reforms did.

Courts disappointed both neoliberal technocrats and progressive activists: they are neither perfect agents of neoliberalism nor perfect tools for social change. Assertive courts helped safeguard new constitutional orders and became central to economic governance, but they also, to the surprise of many, became central to the politics of rights in the region. In accordance with what second generation neoliberal reforms wanted, high courts expanded and protected basic individual autonomy rights (*negative* rights). Simultaneously, they challenged neoliberalism when they protected some aspects of social provision and pushed back on the free market through the enforcement of newly constitutionalized economic and social rights (ESR, also associated with *positive* rights). Judicial leadership was central to both their activation as well as to the present and future of Latin American rights revolutions.

Older, more mature courts, continue being central to the politics of rights in Latin America. As a response to their own rights activism, however, they have become a politically prized booty and now enjoy less degrees of freedom than their younger selves. The political backlash to their activism has taken two forms: first, political efforts to reform them and shape the profile of the justices through the appointment process; and second, the activation of constituencies across the ideological spectrum mobilizing against the judicial enforcement of new rights. This backlash is shaping courts' activism today and going forward. Changes to the profile of the justices in the region's rights assertive courts have implications in terms of how the courts approach rights. We also need to have a better grasp of how courts are embedded in the larger efforts and political calculus of groups of diverse ideological bents, since mobilization around constitutional rights is no longer the sole purview of leftist movements.

The growing importance of courts as checks and balances mechanisms and as sites for the political struggle around rights has been one of the most significant shifts in Latin American

politics following the third wave of democratization. Assertive high courts in the region are playing key, new political roles. Those that are rights activists, in particular, are challenging our traditional conceptions of the role of courts and justices in democracy. We know a great deal about the early activation of courts and the determinants of judicial independence (Kapiszewski and Taylor 2008) but we stand to benefit greatly from taking stock of where these courts are today and what that may teach us about their future.

In the first part of this paper I discuss why some high courts in the region, challenging the expectations of those who saw them strictly as neoliberal agents, became assertive enforcers of rights. Building on previous arguments I show that judicial leadership and more specifically, the legal preferences of justices, are crucial not only to the activation of courts, but also to the sustainment of rights revolutions. Drawing on examples from different courts around the region, I describe the early trajectories of young assertive courts and explain how the political consequences of their activism can shape them going forward. In the second part of this paper, I rely on fieldwork in Colombia and secondary literature to illustrate this argument through a case study of its constitutional court. One of the first courts born out of the reform wave—and the most rights activist in the region—the Colombian high court is ideal to study these trends.

Rights and young high courts in Latin America: Neither perfect agents of neoliberalism nor perfect instruments of (progressive) social change

During the 1980s and 1990s, neoliberal reforms unfolded in Latin American countries in two successive waves: the first brought with it the push for structural adjustment policies as a new free market economic model was implanted (Weyland 2002). Initial reforms broke with the ISI economic model and redefined the political and structural foundations of the region. The second neoliberal wave emphasized the slower process of institutionalizing reforms as “it became evident that merely rewriting key economic laws was of little use if the legal system was

incapable of actually implementing and enforcing them” (Carothers 2001, 6). Hence, judicial reform, the rule of law and the performance of national judiciaries became part of the agenda of organizations like the World Bank and the IADB. The World Bank, for example, emphasized the importance of institutional reform within judiciaries, favoring the enlargement of legal bodies to better deal with a growing caseload, speaking in favor of the redefinition of the jurisdiction of high courts and the creation of judicial councils as well as advocating for the need to finance efforts to make national judiciaries more efficient (Buscaglia and Dakolias 1996). Courts played two key roles in the push to deepen market reforms (Rodríguez Garavito 2011): on the one hand, more efficient civil and commercial courts that abstained from redistributive judicial activism contributed to maintaining the predictability of the norms regulating the economic market. On the other, efficient criminal courts were central to guaranteeing peace and order. From this perspective, high courts appear as the agents of neoliberalism.

Importantly, a parallel reform current with a different view of the role for judicial reform and judicial review was also making its way through the region in the 1990s and early 2000s.¹ As Latin American countries embraced the free market, a wave of constitutional reforms with a strong social component, often referred to as neoconstitutionalism or social constitutionalism, also made the rounds. This reform current had facilitating access to justice, rights and (also) stronger provisions for judicial review at the center of its agenda.

Nine Latin American countries drafted new charters between 1988, when Brazil inaugurated the series, and 2009, when Bolivia’s constitution was approved.² Although not all countries promulgated new charters, several of those that did not do so, still passed significant

¹ There were several reform currents in the air, or multiple ways to skin the cat (and by that I mean: deal with the twin transitions): rule of law reform, democracy aid, and neoliberalism among others. For an overview, see Domingo and Sieder (2001).

² Other reforms include: Colombia, Venezuela, Ecuador, Perú, Paraguay, Dominican Republic

amendments to their constitutions—like Argentina and Costa Rica. Despite national specificities, the majority of these constitutions share some common themes (Uprimny 2011): the recognition of multiethnic and multicultural nations, inclusion of diversity and religious equality, protection of minorities (indigenous and other ethnic minorities in particular), a redefinition of the role of the state in the national economy, and the entrenchment of generous bills of rights—including economic and social rights.

Some saw these two currents as a single unified neoliberal project. Hirschl (2004) famously argued that judicial review was the brainchild of self-serving elites that promoted it to protect their interests. Courts were a specialized, minority institution they could access easily, but insulated by design from the vicissitudes of the majorities—constitutional rights were mere lip service. Critical law approaches, from a different corner, suggested similarly cynical views. Critics argued that the rights discourse was a diversion. Rights rhetoric was formalism that embodied yet another globalizing and hegemonic push—the judge was a central figure that conveniently took social conflicts out of the political realm and safely relocated them in the domain of legal expertise, unresolved (Kennedy 2006).

In hindsight and upon closer inspection of the empirical track record, however, we can see that rights assertive courts have a more complicated and nuanced relationship to neoliberal reforms and to neoconstitutionalism than any of the above suggest. First, there was no single monolithic neoliberal view of the role of judicial systems and judicial review shared by all relevant actors on the ground in the region; different actors had different agendas and emphasized different objectives for judicial reforms (Carothers 2001). Financial institutions were just one of many international and domestic actors with a stake in the process—overlapping, complex and multi-actor currents advocating for certain reforms from a neoliberal angle or from

a rights based perspectives developed in permanent tension (Rodríguez Garavito 2011). What proved decisive was the fact that the two reform currents converged in the region and became closely related.

Indeed, the track record of these courts suggests they were not perfect agents of neoliberalism or of neoconstitutionalism either. Over the years, as both the neoliberal and neoconstitutional currents waxed and waned in Latin American countries, the crossing of their paths generated tensions in and around high courts. Reforms helped make these tribunals tools for protecting new institutional frameworks and economic governance, just as neoliberal reforms had intended. For example, Kapiszewski (2012) shows that the Argentine and Brazilian high courts both became pivotal actors in the critical realm of economic policy—though each developed a particular character and distinct patterns of interaction with the executive. Yet, at the same time, the strong social rights component of the constitutions also made assertive courts central to rights, and this generated significant tensions. They often played key roles in augmenting the sphere of classic and new individual autonomy rights. These rights were in consonance with the cosmopolitan neoliberal project (Hirschl 2004), but their active enforcement still upset the status quo. Notably, rights assertive courts also went beyond what neoliberal reformers foresaw and became active defenders of newly constitutionalized ESR. In safeguarding and defending ESR, they seemed to be going against the purely neoliberal project.

The experiences of Costa Rica and Colombia illustrate the early trajectory of rights assertive courts well. In both countries, constitutional reforms entrenched generous bills of rights and drastically lowered the barriers for accessing newly created high courts, the *Sala Cuarta* and *Corte Constitucional*, respectively. Citizens gained standing to challenge the constitutionality of laws directly and a quick legal mechanism was created (*tutela/amparo*) to seek redress when a

right is violated. In Costa Rica, diverse groups and individuals (labor unions, private companies, citizens, students) used the growing accessibility of the tribunal to take the government to task with its social welfare constitutional commitments, thus constraining its ability to fully implement market reforms (Wilson, Rodríguez Cordero, and Handberg 2004). At the same time, the court began playing a noteworthy role in safeguarding the rights of sexual minorities. The Colombian Constitutional Court also quickly developed a notable rights track record, defending the civil and social rights of individuals (Cepeda 2005) but also expanding and safeguarding the right to health (Yamin, Parra Vera, and Giannella 2011) and the rights of indigenous minorities (Orduz Salinas 2014), among others.

Civil society organizations and individuals found in assertive high courts across the region allies in their efforts to protect their constitutional rights and resist the retrenchment of the welfare state (Brinks and Forbath 2014). In Costa Rica, gay rights activists, AIDS patients and labor unions have used the court to gain access to policy making spaces and thus made important strides in guaranteeing their constitutional rights (Wilson and Rodríguez Cordero 2006). In Colombia, gay rights activists (Albarracín 2011), the indigenous movement (Uprimny and García Villegas 2004), women's rights organizations and victims of the decades long conflict (Sandoval Rojas forthcoming) have also turned to the court over and over in the last two decades. Rights activists, minorities and social movements in these two countries and across the region engaged high courts as part of larger mobilization strategies that included legislative efforts, political mobilization, community organizing, lobbying etc. In short, the trajectory of judicial rights activism in the region is closely intertwined with and cannot be fully understood without the actors in civil society who have relied on them over the last two decades.

Although there is still a lot of variation in the region (and within countries) in terms of how assertive Latin American courts are, in a region where the norm was judiciaries that were dormant if not subservient, several are now active. Their interventions have given them prominent roles in ongoing national debates regarding the limits, definition and implementation of rights around the region. They altered legal and regulatory frameworks, helped redefine the boundaries of mobilization, infusing it with rights-based discourse, raised awareness and created visibility around rights issues and, occasionally, contributed directly to their effective enjoyment. The judicialization of rights continued and received a boost as the Washington Consensus broke down and the region turned away from rigid free market economics and into a new neodevelopmentalist approach (Brinks and Forbath 2014).

Although several factors facilitated the activation of once dormant tribunals across the region,³ the legal preferences of these justices were a particularly important piece of why courts became active enforcers of rights. In both Costa Rica (Wilson 2007) and Colombia (Nunes 2010), for instance, justices played a key role in the matter. Some justices were imbued in less formalist approaches to the law and took the new rights provisions in the constitution seriously. It is worth dwelling briefly on the importance of justices because they remain central to grasping how judicial rights activism is being redefined in the region as the courts mature.

Why judges and legal preferences matter to triggering and sustaining rights activism

In his seminal piece on rights revolutions in the US, India and Canada, Epp (1998) argues that support structures in civil society (rights advocacy organized groups), and not justices, are crucial to bringing about and sustaining rights revolutions. Indeed, the alliances between courts and civil society mattered in Latin America too. However, the legal preferences of justices

³ Not all Latin American courts have a rights activist profile; for overviews of some the key arguments explaining judicial assertiveness and rights activism see: (Wilson 2009; Kapiszewski and Taylor 2008; Nunes 2010).

themselves are central to understanding the present and future of political battles over constitutional rights in the region not only because it was them who took the new rights seriously, and in enforcing them, activated the courts and went on to forge alliances with organized groups in civil society. As courts became central actors in social policy, doing so has challenged traditional judicial roles and prompted new responses from these tribunals. Their development and sustainability over time depends in no small part on who sits in the courts.

Existing research shows that the preferences of justices are an important part of explaining why some courts develop an activist profile while others do not (Woods and Hilbink 2009). We know that the Latin American judiciaries that remain wedded to formalist perspectives are less friendly to rights-based approaches, in general (Gonzalez Ocantos 2012; Hilbink 2007). We also know, more specifically, that justices who were imbued in neoconstitutional, less formalist and more rights-friendly approaches to the law were crucial to explaining the activation of courts in favor of ESR (Nunes 2010; Wilson, Rodríguez Cordero, and Handberg 2004; Uprimny and García Villegas 2004). Legal preferences matter not only for judges to favor ESR, but also in terms of how they conceive of their role more generally (Cifuentes 1995; Hilbink 2007; Gillman 1999). Dealing with the sustained judicialization of social policy faces judges with challenges that are redefining their functions. Their outlook on rights, their willingness to redefine the boundaries of their role and go beyond the formalist prescription, or not, are crucial to the future of some procedural and institutional innovations they have devised to handle ESR cases.

Handling ESR cases faces judges with social policy issues courts are deemed ill-equipped to deal with. Conventional wisdom on the intervention of courts on social policy claims that they cannot effectively intervene in this area due to a lack of institutional capacity for oversight, a lack of information and lack of tools to understand and consider the consequences of their

decisions (Horowitz 1977). This view, however, is largely based on the US experience. More recently, high courts in Africa and Latin America have taken new, more creative and experimental approaches to how they intervene. Some assertive high courts are handing down rulings that are more sensitive to the complexities of social policy, financial constraints and political dynamics of their realities (Brinks and Forbath 2014). They call attention to rights violations and redirect the matter to the government for it to determine how best to address the situation, trying to foster dialogue across different responsible parties (Abramovich 2005). They have also generated new institutional mechanisms so that courts themselves can monitor compliance with the implementation of these rulings, for example.

These cases take justices outside of the traditional boundaries of their role as defined by more formalist approaches: they put justices and courts at the center of complex public policy issues that involve many actors and often require their engagement, ideally as coordinating devices, over time (Botero 2014). A good example is *Causa Mendoza*, a landmark environmental ruling handed down by the Argentine Supreme Court in 2008. In it, the court ordered the federal, provincial and local governments to work towards the environmental protection and recovery of the Argentina's severely polluted primary fluvial artery, the Matanza-Riachuelo. The decision put the court at the center of an ambitious and controversial multiyear and multi-institutional effort to monitor the improvement of environmental and living conditions in the river basin (Merlinsky 2009; Napoli and Garcia Espil 2011). Initially, the court outlined some actions and general objectives that should be pursued to clean and protect the river basin, but it left the drafting of a clean-up plan and the specifics of defining tasks and implementation to the authorities. The court highlighted six priority areas (public information, industrial contamination, open-air dump cleanups, river margin cleanups, infrastructure and the creation of an emergency

sanitary plan), laid out a series of deadlines for the government and actively monitored compliance through a combination of different institutional mechanisms: yearly public hearings in which the involved parties report and answer questions on progress; working with delegate lower courts and the creation of a follow-up commission, including civil society organizations, which actively participates in monitoring. The Colombian constitutional court has relied on similar structural approaches to ESR issues with its decisions safeguarding the rights of internally displaced populations (Rodríguez Garavito and Rodríguez Franco 2010) and reforming the national health system (Yamin, Parra Vera, and Giannella 2011).

These new approaches require a certain kind of judge that is willing to rethink her role. Monitoring implementation over time, promoting inter-institutional coordination, or dialogue across government agencies and civil society actors along with engaging in inclusive dialogue with and across minorities are not the things that more readily come to mind when we think of describing justices, but they are what they are being called to do when dealing with making rights effective. Judges who lack the inclinations and interest to engage in inter-cultural dialogue and reduce the distance between themselves and those whose rights are being violated, often marginalized minorities, can seriously hamper already difficult processes (Gargarella 2015). This is why their profile was and remains crucial.

Windows of opportunity for rights activism

The rights activism that these justices engaged in through young high courts was unexpected. Actors' lack of experience with the new institutions put in place by constitutional reforms gave assertive young courts in democratic contexts significant room for maneuver—when young courts first flexed their muscles they took many in their political systems by surprise. Their initial and ongoing activism have had political consequences: elites in Latin America are now

watching courts closely and are increasingly aware of the importance of the legal preferences of the justices. As a result, somewhat counter-intuitively, young assertive courts enjoyed more degrees of freedom than do present-day older assertive courts. Let me explain.

Two characteristics of the early years of assertive courts help understand the leniency these young courts were given: First, following reforms, all actors have to adapt to new institutions and frameworks with which they often have virtually no direct experience. Comprehensive constitutional reforms of the kind Latin America experienced, which tend to touch upon several aspects of the national political architecture or at least entail major overhauls of one branch, alter the status quo of the entire political system. Although previous experience with judicial review probably gave some polities a better sense of what was coming, it was difficult for all involved to have foreseen all the consequences of the new institutional structures put in place.

Second, from early on, these courts were very responsive to societal demands as part of a strategy to build much needed legitimacy. Although some theories predict that young courts will not overstep the tolerance boundaries of other political institutions during these crucial early years for fear of retaliation (Epstein, Knight, and Shvetsova 2001), there are alternative routes to building legitimacy. Justices can choose to challenge other political powers in certain areas and also respond more directly to demands from citizens and organized civil society in others. A clerk in the Argentine Supreme Court, for example, recalls that in the early days of the new court following Kirchner's key reforms in mid 2000s, the new chief Justice instructed the clerks precisely in this direction:

“When Lorenzetti arrived in the court he gathered all the clerks and told us ‘people, we are going to identify [and take on] cases with social impact, *causas sociales*, in five key

topics, including consumer rights, environmental rights and crimes against humanity. And we are going to hold public hearings on them.”⁴

In contexts with significant political fragmentation and where courts are more easily accessible, like in Latin America after the reforms, ‘going social’ is not only viable, but may also be sustainable in the long run.⁵ This mixed strategy can make courts politically relevant while they build public support and make allies of organized groups in civil society. The basic requirement for courts to act—namely, that there be cases they can decide on—is not difficult to come by in this scenario. Citizens and social organizations flocked to more easily accessible courts, particularly where justices gave early signals of being rights oriented and more open.

Early bursts of rights activism were not only unexpected, they were also controversial. Decisions on individual autonomy and civil rights, often associated with more “negative” rights that require less action from the state—and were quite often countermajoritarian—upset the political status quo and certain groups specifically, like social conservatives. ESR activism in particular, often associated with positive rights (which require action to be made effective) were also controversial. Additionally ESR unearthed a deeper tension between neoliberalism and social constitutionalism: the simultaneous pull towards the retrenchment of the state, on the one hand, and the defense of social provisions along with the expansion of ESR rights on the other. This was the case in Brazil, to name but one example, where the growing judicialization of health raised numerous questions regarding its fiscal sustainability and effectiveness (Ferraz 2011).

These tensions not only pulled courts and politics in opposite directions, they had important political consequences. In other words: the window of opportunity for courts is not eternal. As

⁴ Author’s interview with former clerk of the Argentine Supreme Court. Buenos Aires, March 3, 2013.

⁵ The Egyptian court followed a mixed strategy, giving to the government in some areas and taking from it (to give to civil society, in the form of rights) in others. Eventually, the authoritarian ruler clamped down on the court when it went too far (see Moustafa 2003). A democratic setting makes the former ending (more) unlikely.

assertive courts mature into a new stage in their trajectories in which rights continue to be an important part of their agenda, they find they have to deal with the backlash from their own progressive activism. From seeing rights activist courts in action in the years following their empowerment, democratic political elites and groups across the political spectrum learned of the potential of these tribunals and the importance of their institutional design and the people who were appointed to them. Courts upset political elites, economists and social conservative constituencies, which made them prized political booties and mobilized very diverse constituencies around rights. The sustained judicialization of rights has led to a political backlash that increasingly shapes the prospects of judicial activism around rights in the region in the years to come.

Learning from experience: the political consequences of rights activism and what lies ahead for mature courts

Political elites have developed two types of responses in their efforts to shape assertive high courts: On the one hand, occasional impulses to reform them or, conversely, to craft political alliances that protect them. On the other, they have a keen interest in controlling the preferences of the courts via the appointment process, steering the profiles of appointed justices away from neoconstitutionalism. As the judicialization of politics has made clear, courts are an important part of the political process in Latin American democracies. Early on in the path towards greater judicialization, Smulovitz insightfully observed "... this phenomenon has turned traditional and relatively silent conflicts for control over the judicial apparatus into public and highly politicized ones. The current intensification of political conflicts for control over the judicial apparatus is a consequence not only of the need to legally ratify government policies, but also of the recent "discovery" of its potential by some other actors" (Smulovitz 1995, 73).

Twenty years later, even more is riding on courts, particularly high courts, which makes them a prized political booty.

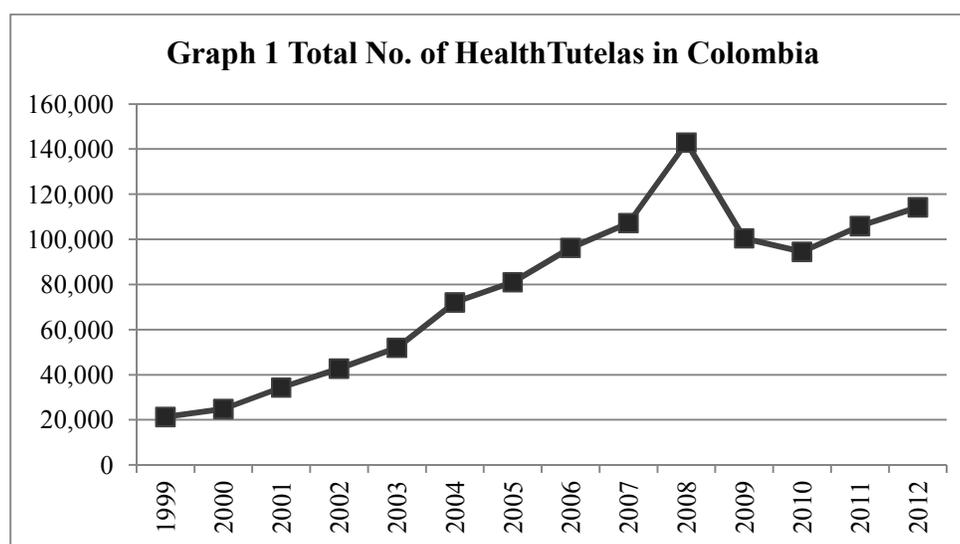
A second consequence of court's rights activism is the backlash to the gains that have been made in terms of rights and the accompanying shift towards rights-based mobilization strategies and its discourse increasingly permeating groups of all political leanings, not only those associated with progressive stances. Research on the aftermath of the US rights revolution has suggested that the legal victories on civil rights and minority rights gave way to severe political backlash that ultimately took away more than was gained (Rosenberg 2008; Klarman 2004). This backlash consists of the policy reaction and the political reaction (in terms of mobilization and public opinion) that can follow judicial decisions advancing rights. More recent approaches temper these negative conclusions (Keck 2009), and instead highlight the importance of understanding mobilization from both the left and right to get a full sense how courts are used to advance strategies of change (Keck 2014). This is what we are beginning to see in Latin America and need to study and understand to get a full sense of the politics of constitutional rights in 21st century. In what follows I illustrate my argument through a close look at the trajectory and prospects of the Colombian Constitutional Court.

Colombia

The Colombian constitutional court is a good case in which to explore the trajectory of activist tribunals in the region because it was one of the first to be created in the wave of reforms and because of its activist profile. As the court enters its third decade of existence, what are the forces shaping its role in the political struggle around constitutional rights?

The creation of a constitutional court in the context of the new 1991 constitution was supported by a president who saw in open access to the legal system and strong negatives rights

protection a precondition for the successful establishment of the free market (Nunes 2010). The newly created Colombian court quickly developed an assertive profile, both as a strong check on the executive power and through a sustained interest on rights (Cepeda 2005). It is difficult to summarize in this short space the full breadth of the court's interventions advancing both rights (negative and positive) along with their impact. The court has been particularly active in defending the right to health (Rodríguez Garavito 2012), an area in which it has not only handed down broad collective decisions but also dealt with a tidal wave of individuals cases in the last decades, as Graph 1 shows.



Source: Defensoría del Pueblo

Health is but one of the areas in which the court has been active. Throughout the years the court has relied on judicial review to strike down the entire national mortgage system (Clavijo 2004; Barreto Valderrama 2012) and it has also handed down broad sweeping collective decisions favoring pensioners. Via tutela, it has played an important role in safeguarding the right to education, a clean environment (Uprimny and García Villegas 2004) as well as the rights of women, children, LGBT and indigenous minorities.

The court has established itself squarely at the center of political dynamics in Colombia. Its justices, particularly those that infused it with novel less formalist legal perspectives, are paramount to this story (Nunes 2010; Uprimny and García Villegas 2004). Rights, and ESR specially, are central to their understanding of the court's role in the Colombian context. In the words of one of the former justices who sat on the bench during the court's early years:

“The Constitutional Court understood from the beginning that the most novel aspect of the [1991] constitution lay in the need to foster the effectiveness of the transformative norms within it: the idea that Colombia is a *Estado Social de Derecho*, the norm of social equality and ESR rights. In selecting tutelas [to rule on] the court privileged those that allowed it to develop the *estado social de derecho*. (...) One has to bear in mind that these issues [inequality, social exclusion, ESR rights] are topics that are central to constitutionalism in Latin America. These concerns are not valid everywhere.”⁶

Similar themes came up in interviews with justices who sat on the court at a later stage:

This constitutionalism is different, more inclusive. It's a constitutionalism that is looking for real equality. The protection of those who are less well-off is an explicit objective. (...) What is the function of a judge [in Colombia, in Latin America]? The search for true equality and real democracy.⁷

The Colombian constitutional court is known for the approach to rights and the progressive jurisprudence that resonate in the two quotes above. More recently it has developed a novel approach to collective ESR cases through a series of rulings in which, like the Argentine court in the Causa Mendoza example cited earlier, it seeks to safeguard rights by involving different institutions in long-term dialogue, planning and monitoring efforts around a broad social policy issue. For former Justice Juan Carlos Henao (2011), sitting on a constitutional court in countries with profound inequalities demands different things of justices: “taking on the monitoring [of compliance with] structural rulings is proof of an alternative way of thinking about the role of judges.” One of his former colleagues was more specific in describing the challenges that

⁶ Author's interview (105) with former Justice of the Colombian Constitutional Court. Bogotá. August 14 2012

⁷ Author's interview (107) with former Justice of the Colombian Constitutional Court. Bogotá. August 15 2012

implementing these new approaches entail for judges: “When does the job end? [structural rulings that require monitoring make it clear] this is not only about producing rulings. There's now a concern with the effective enjoyment of the right. The judge becomes accountable; there's greater responsibility. Also, the judge must tread into public policy. That is complex. It is a challenge to creativity.”⁸

Not all justices share the same legal philosophy, but, interestingly, the concern for rights and the awareness that the Constitution's provisions on ESR and its own trajectory has led the court to play what can be perceived as a non-traditional role, also came up in interviews with justices who are usually described as more ideologically conservative:

“It is somewhat exotic that a tribunal turns to these issues. This is very questioned and the court is censured for taking on these tasks. We are told the court is co-administering and invading areas that belong to the executive or congress. What happens is that when you get to issues of such a magnitude that the court has to conclude there is an unconstitutional state of affairs it is because its not only this right, that right, or Maria, Pedro and Pablo's rights. No. It is the rights of many. Like in the case of the internally displaced. Millions! (...) These are grave circumstances. It requires justices take it upon themselves to alleviate the infringement of fundamental rights.”⁹

As Uprimny suggests, there is an institutional culture within the court that fosters the concern for rights and the sense of a specific institutional mission. The justices' legal preferences were crucial to shaping its activation and trajectory. The court's assertiveness would have its own political consequences, which I now turn to.

Reining in the court

The court's activism generated fierce controversies and made it a political target. Today, somewhat paradoxically, the mature court has less degrees of freedom than the younger tribunal. As the next pages will show, politicians and mobilized groups learned from the young court's intense activism. Its assertiveness and its interventionism in matters of rights prompted efforts to

⁸ Author's interview (108) with former Justice of the Colombian Constitutional Court. Bogotá. August 21 2012

⁹ Author's interview (101) with former Justice of the Colombian Constitutional Court. Bogotá. July 24 2012

rein it in (via threatening reform) and to shape its profile away from a focus on rights through the appointment process. Additionally, it triggered backlash to its own interventions and thus mobilized social conservative constituencies into the judicial arena of rights.

Although Colombia had previous experience with judicial review,¹⁰ the extent of the court's early activism and the areas it touched on took president Gaviria, the public and political actors by surprise. Its rulings limiting the use of extraordinary presidential powers, which had been abused by presidents since the mid 20th century (Uprimny 2003), and early decisions defending individual rights unleashed political storms. A perfect example was the decision to decriminalize "personal use", a ruling in early 1994 in which the court legalized the personal possession of a minimum amount of narcotics. This move generated strong reactions across the political spectrum including a public exchange of letters between the executive and the president of the court. The tense exchange followed a statement by the minister of government warning that the court "was not infallible", to which the court responded demanding respect for its independence.¹¹

The first president who lived the court, César Gaviria, did not publicly attack it, but economists, activists and politicians engaged in fierce debates about the court's actions which were completely new in Colombia.¹² ESR rights were also often at the center of the controversies. In 1999, for example, just eight years after being created and in the midst of an economic crisis, the Court handed down a series of rulings that found unconstitutional and eventually dismantled the national mortgage system (known as UPAC). Defending debtors' right

¹⁰ More limited judicial review used to be in the hands of the Supreme Court of Justice. After the 1991 reform, the SCJ is dedicated exclusively to criminal matters.

¹¹ The ruling was C-221 1994. See: "Nueva fricción Gobierno-Corte" *El Tiempo*. May 24 1994. "Justicia pide respeto a su independencia" *El Tiempo*. May 28 1994

¹² For a description of these early controversies and an excellent overview of Court-Executive relations in Colombia between 1994-2009, see Rubiano Galvis (2009). The next paragraphs rely on his account to identify key threats to reform the court.

to housing, the court ordered the executive and congress to create a new mortgage financing system which had to follow certain specifications. The political storm that ensued was fierce as criticisms poured on the court, with the situation being described as a “judicial dictatorship” and justices as “donkeys”.¹³ Whatever side of the early controversies politicians found themselves on they became acutely aware of the centrality of the Court and started paying attention.

Over the next few years, different executives attempted reforms to curtail the powers of the Court. In parallel, a shift in the profile of the justices appointed to the court indicates an interest in moving away from the kind of justices (rights-friendly) appointed initially. Although the threats against the institutional integrity of the court did not result in concrete reforms—the fragmentation of the political spectrum and the support of organized civil society actors prevented these attempts from moving forward—it is worth mentioning them briefly to get a sense of the environment in which the court operated. President Samper’s administration (1994-1998) was the first that officially threatened to curtail the Court’s powers in reaction to the court’s activism: in 1996 and 1997 there were reform attempts that threatened to limit the court’s powers or do away with the tribunal. In both cases, according to Rubiano (2009), NGOs, academics and political parties closed ranks in support of the court and neither bill progressed.

Threats were made again and escalated during Alvaro Uribe’s first presidency (2002-2006). Uribe made it clear since before his election that he had intentions of modifying the constitution and specially the judicial branch. Indicative of this approach was his choice for Minister of Interior and Justice, Fernando Londoño, a conservative politician who had publicly expressed his disdain for the 1991 constitution. Londoño considered the charter flawed in its emphasis on the establishment of an *Estado Social de Derecho* and the inclusion of fundamental rights:

¹³ “La Dictadura de la Corte” *Semana*. Julio 5 de 1999. Hommes, Rudolf. “Dictadura Constitucional” *El Tiempo*. Julio 7 de 1999.

When someone decides to do something serious about rescuing Colombia from the abyss is has been thrown into, he cannot ignore the unavoidable challenge of breaking in a thousand pieces that joker costume that inept tailors put together in the early months of 1991.¹⁴

Londoño filed a legislative project that proposed to cut back severely on the powers of the court in late 2002 and a second attempt was made in 2004. Again, neither of these proposals made it past early debates, but they indicate the extremely high stakes. Although certain constituencies failed to formally reform the court, an alternative strategy seems to have gained traction in more recent years: crafting a court that is decisively less activist and rights friendly.

A very brief qualitative overview of the profiles of the Court’s justices is helpful in identifying an important trend: the shift away from appointing¹⁵ lawyers with academic profiles and an ideational commitment to the defense of rights. Nunes (2010), who focused on the young constitutional court, showed that the ideational character of individual justices determined their responses to rights claims; more specifically, appointees with a more academic profile had a common characteristic: “their commitment to human rights and to a proactive judicial role in protecting them, a commitment that was heavily influenced by their legal education” (p.80). This was in contrast to the justices whose legal careers had been shaped by the traditional legal system, who sought to limit judicial involvement in rights issues.

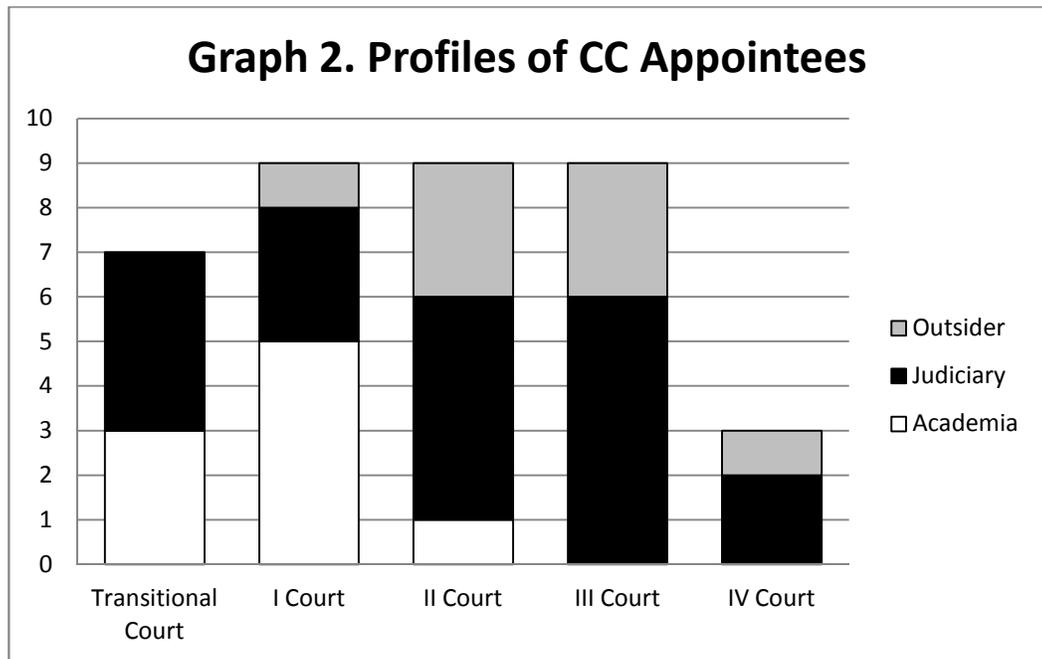
Graph 2 summarizes key characteristics of appointees to the constitutional court, including a broad characterization of their background—a rough indicator of their “rights-friendliness” as measured by Nunes (see Appendix 1 for the data used to construct this graph).

The justices with academic backgrounds and neoconstitutional legal philosophies were

¹⁴ Fernando Londoño quoted in Hernandez (2013).

¹⁵ Nine justices serve non-renewable, non-staggered eight year terms, after which they are banned from accepting any public appointments for one year. Members of the Court are elected by the Senate with a 2/3 majority from lists of three candidates presented by the president (nominates 3 justices), the Supreme Court of Justice (nominates 3 justices) and the Consejo de Estado (nominates 3 justices) alternatively. Because the Senate exerts some control over all appointments and the president nominates some of the members, this procedure corresponds to what are known as “mixed” appointment mechanisms.

absolutely central to the development of the ESR jurisprudence of the court. Manuel José Cepeda, who wrote several of the landmark decisions on ESR (T-760 on the national health system and T-025 on the internationally displaced, among others) was the last justice with an academic background to be appointed, in 2001. Efforts to appoint a similar academic figure in 2008 failed and look increasingly unlikely. It is also interesting to note that starting in the 2000s (II Court), as academic appointees stop, there is a rise in the appointment of “outsider” justices. I use this term to identify appointees with more explicitly partisan profiles as well as those who came from the private practice and usually had no background within the judiciary or in constitutional law. “Outsider” appointees tend to be less prestigious legal figures. Because the tenure of justices in the court is only eight years, the absence of incoming justices who share rights-friendly ideational preferences is likely to have a great impact on its orientation.



Transitional Court: Seven-member court 1992-1993

I Court: 1993-2001 approx

II Court: 2001- 2009 approx

III Court: 2008/2009 – 2016 approx

IV Court: 2012-16-

The classification of the court into 8-year periods is a rough approximation, following the original constitutional design. The resignation of some justices before their 8yr term expired has resulted in staggered appointments. See Appendix 1 for more details.

The second phenomenon that is redefining the boundaries of judicial rights activism in Colombia is the backlash that it has generated. To illustrate what are some of the patterns that we are observing (particularly, how rights discourse and legal mobilization are becoming the tool of groups across the ideological spectrum), in this last section I will focus on the backlash to recent legal victories with regards to women's reproductive and sexual rights and LGBT rights.

Women's Reproductive and Sexual Rights

In 2006 the court declared unconstitutional the criminalization of abortion in Colombia under three specific circumstances: when the pregnancy endangers the physical or emotional health of the mother; when it is the result of rape or incest or when grave fetal malformations make life outside the uterus non-viable. The ruling was in response to a constitutionality challenge filed by Women's Link (a women's rights NGO) and three other similar challenges. In it, the court deemed the voluntary interruption of pregnancy as a fundamental right of women, part of their sexual and reproductive rights—as such, this ruling also creates obligations for the State, who must provide access to it for the women who need it. In a series of follow-up decisions¹⁶, the court has provided further guidelines and reaffirmed the right.

The original victory in 2006 and those that followed generated strong political backlash in the form of political reaction, that is political and social mobilization against the right to abortion, as well as policy impact (the reversion or detraction from the gains in terms of policy). A number of organizations have been formed, or are now working together, to mobilize against abortion and the implementation of this ruling. Efforts from newly created antiabortion groups and key political actors galvanized by the court's intervention succeeded in stalling and complicating the implementation of the ruling.

¹⁶ C-355 de 2006, T-988 de 2007, T-946 y T-209 de 2008, T-388 y T-009 de 2009, T-585 de 2010, T-841 de 2011 y T-627 de 2012.

The court's ruling in 2006 brought together existing social conservative organizations (under newly created umbrella organizations like *Unidos por la Vida*) for a new purpose. At the same time, it also spurred the creation of smaller explicitly prolife organizations across the country like Red Futuro Colombia, Comité Antioquia ProVida, among others. These organizations have engaged in social, legal and political mobilization geared at reinstating the status quo or stalling the implementation of C-355. *Unidos por la Vida* focuses its activities on legal and social mobilization: shortly after its inception in 2006, following the court's ruling, it led a two-year national effort promoting a referendum on abortion. The National Registrar cancelled the referendum for procedural reasons,¹⁷ but the work of the organization is ongoing. Along with other NGOs, it promoted and participated in national pro-life marches held annually with the explicit "objective of voicing our rejection of the ruling that the constitutional court handed down in 2006 decriminalizing abortion".¹⁸

Red Futuro Colombia (RFC) and other social conservative groups, including the Catholic Church and its affiliated NGOs, have focused their efforts on filing legal challenges to the government's efforts at implementing the ruling. RFC successfully challenged the executive decree that regulated the provision of abortion services.¹⁹ Other legal challenges included tutelas, like the one against misoprostol (a drug that has several different reproductive health uses,

¹⁷ The Colombian Constitution provides for a two-step process for national referenda to go before voters. Unidos por la Vida gathered the required signatures to constitute itself as an organization promoting a referendum. After this first threshold, the organization needed to collect a minimum number of valid signatures (5% of the current electoral census) for the referendum to be approved by the National Registrar. In 2008, the Registrar deemed that the organizers had fallen short of this second requirement (only 47% of the signatures collected were certified as valid) and the referendum could not move forward.

¹⁸ From the press release put out by the Conferencia Episcopal de Colombia promoting the 2013 pro life march and available online on their website. http://www.cec.org.co/index.php?option=com_content&view=article&id=1280:grupos-pro-vida-convocan-a-la-septima-version-de-la-marcha-por-la-vida&catid=25:evangelizacion-de-lo-social&Itemid=301 Last Accessed: April 1 2015.

¹⁹ Decree 444 of 2006 was challenged before the Council of State who first suspended it and declared it null in 2013.

including abortive) on the national health plan.²⁰ More recently, a lawsuit was filed in 2013 against efforts by the National Health Superintendent to provide guidelines for health providers on the provision of abortion services.²¹ In its original ruling the court clarified that regulation was not necessary for abortion to stop being criminalized or for the service to be provided. Hence Colombian women who fall under one of the three criteria should still, in theory, have access to these services if they require them. In practice, however, the lack of regulation makes access difficult, exacerbating the confusion regarding obligations, rights and what are the correct procedures (Dalen 2013).

Part of the political reaction against C-355 also included the mobilization of key elite figures, some of them high-profile government officials. The national Procurador, Alejandro Ordóñez, a social conservative, and one of the key figures in the Conservative Party has publicly declared his personal opposition to the court rulings on abortion and gay rights. Since he was appointed in 2009, Ordoñez has also used his office and its resources to restrict the right in question and openly challenge the court's jurisprudence on the matter.²² Ordoñez's high profile political moves to generate controversy around the topic together with the work of these groups not only indicate a strong political reaction—they also had an important policy impact.²³ Overall, they succeeded in stalling the creation of a legal framework that clarifies the rights, procedures and obligations of those involved in the provision of abortion services in Colombia.

²⁰ The tutela was filed in 2011 by one of the organizations linked to Antioquia's Red Provida.

²¹ One of biggest private catholic hospitals in Bogotá, Hospital San Ignacio, filed the lawsuit against the Circular 03 de 2013.

²² Dalen (2013) provides a broad overview of the actions of the Procuraduría in the contexts of the implementation of C-355. For journalistic accounts see Leon, Juanita "La Procuraduría mintió para evitar la inclusión del Misoprostol en el POS" La Silla Vacía, April 7 2011 and "Procurador insiste en nulidad de sentencia que insta a cátedra del aborto" El Espectador. Oct. 29, 2009.

²³ A case study that exemplifies how mobilization by the Procuraduría and pro-life organizations on the topic can work in tandem was the controversy surrounding the project to build a women's clinic in Medellín in 2009. Catholic, prolife and social conservative organizations successfully framed the mayor's project exclusively as an "abortion clinic" while the Procuraduría threatened with an investigation. Together, they put enough political pressure on the mayor's office to trigger a cabinet crisis and, eventually, to the exclusion of the provision of authorized abortion services from the clinic.

LGBT rights (same-sex marriage and adoption)

In recent years the constitutional court has been handing down a series of decisions in the road towards equalizing the rights of heterosexual and homosexual couples. In 2007 the court started by recognizing patrimonial rights to same-sex couples and has since ruled favorably on social welfare benefits, health and alimony obligations among others, until most rights and obligations have been equalized via a piecemeal approach. Many of the key tutelas that reached the court were (and still are) the work of Colombia Diversa, an LGBT advocacy NGO that was created in 2007 to explore legal and political mobilization strategies following a failed attempt to pass a same sex marriage bill in Congress (Albarracín 2011). In the last five years gay rights activists throughout Colombia, and specially Colombia Diversa, have escalated efforts to get the court to rule on rights to adoption and same-sex marriage.

A leading case on adoption slowly began making its way through the legal system in 2009 and lingered in the court for years, undecided, as pressure and controversy mounted.²⁴ When the decision was finally handed down in early 2015, instead of the ruling granting full adoption rights to gay couples which activists had hoped for, a split court gave adoption rights only to couples in which one of the two is the biological parent of the child. 2011 was an important breaking point for same-sex marriage. That year a unanimous court ruled that it was not within its purview to change the laws that defined marriage as the union between a man and a woman, but that this could not be understood against homosexuals right to form a family. The Court gave Congress a two year window to legislate on the issue; if the deadline was not observed, same-sex couples could go before a judge or notary to formalize their unions. In April 2013, as the deadline fast approached, a bill allowing for same-sex unions died in the Senate.

²⁴ The favorable and quick decision that activists initially expected did not come through due to turnover in the court. Justice Juan Carlos Henao, who had written a favorable decision, resigned due to unforeseen circumstances and the drafting of the decision had to be re-assigned.

Amidst huge national controversy, in July the first same-sex marriage was celebrated. These legal victories have generated a political backlash from increasingly organized and active constituencies that explicitly oppose the actions of the court in this direction and have taken an active stance against gay rights.

Two initiatives stand out: First, the legal and political mobilization of social conservative civil society organizations in opposition to same-sex marriage and adoption rights as well as a ballot initiative on same-sex adoption rights. The NGO *Fundacion Marido y Mujer* is the prime example of the organizations that are cropping up in strong opposition to the recognition of same-sex marriage. This NGO was created shortly after the court's deadline to Congress passed in 2013 devoted to legally challenging gay marriages. In 2013 it initiated legal battles in different cities against marriages that had already taken place or were about to in efforts to deem them invalid. More recently, the director of the Fundacion (a former congressional candidate for the Conservative party) has spoken out against the possibility that the court will decide in favor of same-sex adoption.²⁵

On the other hand, the ballot initiative on same-sex adoption is spearheaded by Viviane Morales, a high-profile senator of the Liberal Party and also a member of an evangelical church. According to Morales, the decision to promote a referendum was taken in late 2014 when the Court decided in favor of a lesbian couple: “at that point we knew there was (another) constitutional challenge before the court and we concluded that the only thing that could counter this is a popular decision. That’s why we opted for a referendum and began gathering the required signatures in October.”²⁶ The first requirement (of two) for the ballot initiative to go before voters was fulfilled last February, and the gathering of signatures is currently underway.

²⁵ “Fundacion Marido y Mujer pide al papa intervenir en adopción gay” *El Colombiano*. Jan 26 2015.

²⁶ “Adoptar no es un derecho: Viviane Morales” *Semana*. Feb 17 2015.

Conclusions

In the wake of neoliberal and constitutional revolutions in Latin America, some newly created constitutional courts quickly developed an assertive profile. These high courts have a complex and evolving relationship to neoliberalism and social constitutionalism: they were pivotal tools in maintaining new institutional orders, yet they also became active defenders of both negative and positive rights. Thirty years later, several Latin American high courts are still key players in their political systems and they remain important focal points for discussions of rights and social policy. As these tribunals enter a more mature stage, they are grappling with the backlash from their own actions. Closely watched by elites and now at the center of rights activism from across the political spectrum, the boundaries of judicial rights activism are being redefined.

In contrast to the perspectives that overemphasize support structures to understand rights revolutions (Epp 1998), the Latin American experience suggests we also need to look at justices, and their legal preferences, to understand how rights revolutions are sustained and evolve over time. Part of the backlash to courts' rights activism in the region involves a growing interest on the part of the elites in shaping the profile of these tribunals. Since judicial leadership was such a big part of the activation of young courts, the change in judicial profiles should have a big impact on their continued role. As the case of Colombia suggests, if trends to shift the profile of the justices away from rights friendly approaches continues, in the future high courts are likely to provide less leadership in realizing constitutional rights.

A second dimension of the backlash to courts' rights activism has been the activation of constituencies across the political spectrum, particularly social conservatives, in response. Going forward, we need more research on the politics of rights-based mobilization across the

ideological spectrum: both the newly mobilized groups who are reacting to leftist mobilization and also the continued efforts of those who have a longer tradition of engaging courts. In choosing to "go social", young assertive courts appealed to citizens and organized groups in civil society as part of a strategy to build legitimacy. Legal mobilization before courts became an important tool—along with political mobilization and sustained interest in the legislative avenue—that (mostly) progressive rights advocacy groups could rely on as part of a larger strategy for social and political change. Courts forged alliances with these organized groups, and in the process, created constituencies that are invested in them. Political elites and very diverse organized actors are now paying close attention. The struggle around the definition and the enforcement of constitutional rights is far from over.

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Appendix 1. Justices of the Colombian Constitutional Court				
Judge	Nominated by	Background	Background Aggregate	Term
Simon Rodriguez	Consejo de Estado	Consejo de Estado	Judiciary	(1992)
Jaime Sanin	Supreme Court	Supreme Court	Judiciary	(1992)
Ciro Angarita	President Gaviria	Academia	Academia	(1992)
José Gregorio Hernandez	Supreme Court	Supreme Court	Judiciary	(1992) 1993-2001
Fabio Morón	Supreme Court	Supreme Court	Judiciary	(1992) 1993-2001
Alejandro Martinez	President Gaviria	Academia and M-19	Academia	(1992) 1993-2001
Eduardo Cifuentes	President Gaviria	Academia	Academica	(1992) 1993-2000
Hernando Herrera Vergara	President Gaviria	Academia and Judiciary	Academia	1993-1999
Jorge Arango Mejía	Supreme Court	Judiciary and Politics	Outsider	1993-1998
Carlos Gaviria	Consejo de Estado	Academia	Academia	1993-2001
Vladimiro Naranjo	Consejo de Estado	Academia	Academia	1993-2000
Antonio Barrera	Consejo de Estado	Judiciary and Practicing Lawyer	Judiciary	1993-2000
Manuel José Cepeda	President Pastrana	Academia	Academia	2001-2009
Alvaro Tafur	President Pastrana	Supreme Court	Judiciary	1999 – 2007
Marco Gerardo Monroy Cabra	President Pastrana	Supreme Court	Judiciary	2001-2009
Alfredo Beltrán Sierra	Supreme Court	Supreme Court	Judiciary	1998-2006
Clara Inés Vargas	Supreme Court	Judiciary	Judiciary	2001-2009
Jaime Cordoba Triviño	Supreme Court	Judiciary, Politics	Judiciary	2001-2009
Eduardo Montealegre	Consejo de Estado	Practicing Lawyer, Politics, Criminal Law	Outsider	2001-2004
Rodrigo Escobar Gil	Consejo de Estado	Private practice, Administrative Law	Outsider	2001-2009
Jaime Araujo Rentería	Consejo de Estado	Politics and Judiciary	Outsider	2001-2009
Maria Victoria Calle	President Uribe	Private practice (insurance).	Outsider	2009-2016

Mauricio Gonzalez	President Uribe	Political profile	Outsider	2008-2015
Jorge Pretelt	President Uribe	Political profile	Outsider	2009-2016
Nilson Pinilla	Supreme Court	Supreme Court	Judiciary	2006-2014
Jorge Iván Palacio	Supreme Court	Supreme Court	Judiciary	2008-2016
Luis Ernesto Vargas	Supreme Court	Judiciary	Judiciary	2008-2016
Humberto Sierra Porto	Consejo de Estado	Consejo de Estado	Judiciary	2004-2012
Gabriel Eduardo Mendoza	Consejo de Estado	Consejo de Estado	Judiciary	2008-2016
Juan Carlos Henao	Consejo de Estado	Consejo de Estado	Judiciary	2008-2012
Luis Guillermo Guerrero	Consejo de Estado	Judiciary, Constitutional Court	Judiciary	2012-2020
Alberto Rojas	Consejo de Estado	Political profile. Private practice.	Outsider	2013-2014
Gloria Stella Ortiz	Consejo de Estado	Judiciary	Judiciary	2012-2020

Based on data presented in Nunes (2010) and Rubiano Galvis (2009), with author's additions.