

Between Democratic Security and Democratic Legality: Discursive
Institutionalism and Colombia's Constitutional Court

by

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Abstract

This dissertation seeks to explain why the Colombian Constitutional Court disallowed a referendum to extend presidential terms in 2010, when it allowed a similar reform in 2005. There are three elements to this decision that make it remarkable for institutional theory and comparative politics: 1) The sitting president, Álvaro Uribe, was an extremely popular and powerful president, who used his transformative capacities to initiate a far-reaching reform agenda; 2) the Court's authority appreciably increased between 2005 and 2010; 3) the jurisprudence of the Court involved a doctrine that is not explicitly mentioned in the Constitution, but a re-interpretation of the norms outlining judicial review of constitutional reforms.

This dissertation inserts the 2010 decision in the historical and political context and asks three questions that guide each chapter: 1) Does the 1991 Constitution amount to a critical juncture in Colombia's political history? 2) Does the post-genesis evolution of Colombia's constitutional jurisprudence follow a path-dependent logic? 3) Did judges follow strategic incentives when they developed and applied the substitution doctrine, which struck down Uribe's reform to extent the number of terms in the presidential office?

Building on the Colliers' critical juncture framework, I show that the 1991 constituent process was a contingent event marked by genuine communicative action that incorporated sections from society previously marginalized, negotiated with important public input, and entirely restructured the meaning of the organizational imperatives of the polity. Contrary to expectations from the discontinuous change model, post-genesis development cannot be fully captured by path dependence, but involves incremental changes of institutional learning inside the judiciary. The investigation into the re-election decisions will show that institutional learning depends on carefully administered spaces of deliberation inside the Court that buttress the cohesion of legal reasoning. Altogether, this leads me to view institutions not as structured expectations in a game between rational actors or regularized patterns of conducts, but discursive structures, in which actors negotiate the meaning and significance of norms with reference to a constitutional text and the intention of the constituents that drafted the charter in the first place. The constitutional judge is a deliberative judge.

Preface

This dissertation is original, unpublished, individual work by Jan Boesten. UBC Ethics Certificate number H12-00631 covered the fieldwork and conduction of elite interviews in the course of the research.

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Dedication

For Oma and Opa, who did not live to see the end of this, and Mama und Papa, who always gave a helping hand!

1. Introduction: Ethical discourse in delegative democracies

1.1. Democratic Legality triumphs over Democratic Security

The Colombian state is a social state of law (*estado social de derecho*), defined thusly in the first Article of the 1991 Constitution. In general terms, the social state of law combines the liberal state and its focus on individualism and diversity as requirements for democracy with the *materialization* of human rights as benchmarks of justice (Eslava, 2009).¹ The question of constitutional reform to allow presidential re-election, benefiting an extremely popular and powerful President, Álvaro Uribe, put the meaning of this clause to the test. Colombia's Constitutional Court had to decide how far the legislature can go in amending the political charter before its basic principles are unrecognizably altered. In 2005, the Constitutional Court affirmed a law that sought to change the Constitution and allow *one* consecutive presidential re-election.² In 2010, the Court defected and disallowed a law that called upon Congress to ask Colombians in a referendum to change the Constitution to allow a potential second and consecutive re-election of the President.³ The Court found that a third term fundamentally changed the institutionalization of the separation of powers, which, as the Court argued, was an axiomatic principle implicit in the social state of law and consecrated in the articles outlining the organic structure of the Colombian state (Art. 113).

¹ The term itself invokes the heritage of the 1948 German Basic Law and the Spanish Constitution from 1978, which stood as models to the constituent assembly that deliberated on the Constitution. Borrowing and further developing the concept of a social state that is based on the rule of law, Colombia's new Constitution embraced five defining traits of Latin America's turn towards neo-constitutionalism: 1) a Kelsenian system of constitutional review; 2) an expansive rights catalogue including private, social, and collective rights; 3) introducing international law – specifically human rights treaties – as constitutionally binding; 4) incorporating new and independent ombudsman institutions as well as specific mechanisms (the writ of injunction or *tutela*) to enforce human rights; 5) addressing governmental corruption through better functioning judicial institutions (Lee Van Cott, 2000).

² Republic of Colombia. Constitutional Court of Colombia. C-1040/05. M.P. Manuel Jose Cepeda Espinosa, Rodrigo Escobar Gil, Marco Gerardo Monroy Cabra, Humberto Antonio Sierra Porto, Álvaro Tafur Galvis, Clara Inés Vargas Hernández. The denotation of Constitutional Court decisions follows a specific pattern: the letter specifies the type of case (C= *Accion de Constitucionalidad*; T= *Tutela* by a revision chamber; SU= Unification decision of *tutelas* by the *Sala Plena*; A=Auto), the middle number its chronological position of the year, and the number after the dash the year. M.P. indicates the magistrate(s) penning the initial study and decision (Magistrado Ponente; see Chapter 4).

³ Republic of Colombia. Constitutional Court of Colombia. C-141/10. M.P. Humberto Antonio Sierra Porto.

The Constitutional Court in Colombia through its decision not to grant the seal of constitutionality to that reform asserted its judicial power by drawing on a “substitution doctrine.” This doctrine increased the Court’s authority by means of a re-interpretation of constitutional norms enshrined in the 1991 Constitution. In the same period between 2005 and 2010, Colombia’s Supreme Court also disclosed scandals and revealed a web of nefarious relations between corrupt Members of Congress (from the President’s bench) and paramilitaries associated with the international narcotics trade. Together, the courts essentially stopped a corrupt and abusive executive in its tracks—an assertion of judicial power unprecedented in Colombia and perhaps in Latin America. Since many constitutional reform efforts elsewhere in the Latin American region before and since have resulted in the erosion of constitutionalism and judicial independence, the surprising outcome in Colombia has profound implications for our understanding of the potential of constitutional reform to reinforce the rule of law. This dissertation seeks to explain why the Court decided differently in 2010 from 2005, countered very evidently delegative trends in Colombia’s democracy, and reinforced the separation of powers and rule of law by buttressing horizontal accountability functions of a constitutional democracy. In the end, President Álvaro Uribe, who enjoyed significant formal powers assigned to the executive in the Constitution, and could count on extremely high levels of popularity throughout his entire time in the presidency, complied with the verdict.

This is not a narrative of institutional consolidation through interest alignment as is the explanation given in neo-institutionalist accounts of the consolidation of the separation of powers (North, 1990; North & Weingast, 1989; Helmcke 2005; Finkel 2008; for Colombia see Hartlyn 1989), nor does it follow a path dependent logic of institution building (Pierson, 2000; Mahoney, 2000; Page, 2006; Ackermann, 1991). The consolidation of the separation of powers in Colombia as a consequence of the empowerment of the courts in general, and the Constitutional Court in particular, followed a deliberative and communicative logic that evolved around discursive patterns.

Central for the significance of this case is the so-called substitution doctrine, which weighs if a constitutional reform exceeds the actors’ competence to implement such a reform. It is judge made law, giving dogmatic expression to the principle of proportionality in constitutional adjudication. It is not only judge made law that does not

appear in the written text of the 1991 Constitution, some argue that it explicitly contradicts the stipulation that the Constitutional Court can review constitutional reforms for procedural defects only (Article 241, 1-3) by introducing substantive parameters for the review of constitutional reforms. For these reasons, this doctrine is central for understanding the importance of this case for institutional theory, because by virtue of its creation and evolution it defies a strategic account of institutional development. It is therefore only prudent to quickly review the two decisions central to this dissertation before explaining the contributions and designing the structure of this analysis.

1.1.1. Legislative Act 02 of 2004 “by which some articles of the Constitution are reformed and other dispositions are introduced” (C-1040/05)

The 1991 Constitution only allowed one term in the highest office of the Republic. Álvaro Uribe, contrary to most of his predecessors, was hugely popular in Colombia, and had achieved considerable successes with his *Democratic Security* policy, which, as the name suggests, rested on the notion that good democratic governance arises in a secure environment. Due to the perceived fragility of these successes, and the key role that Uribe was said to play in implementing his policy, calls for amending the Constitution started surfacing early into his first term; in September 2003, Congress discussed the issue for the first time in plenum. The Colombian Constitution provides three ways for amending the charter and its norms: by legislative initiative through Congress, a popular referendum (that passes through Congress), and a constituent assembly. In 2004, Congress initiated the re-election reform with law 02 of 2004 via the ordinary procedure through Congress. The reform project to allow a second immediate term in the presidential office encompassed four different articles: Article 1, legislating the provisions for the incumbent in order to level the playing field; Article 2, altering Article 197 of the charter to the wording that any individual cannot be president for more than *two* consecutive terms; Article 3, specifying the role of the vice-president; Article 4, guaranteeing the rights of the opposition in a statutory law. The last Article included a transitory clause, which gave the State Council measures to legislate in case the law did

not pass Congress prior to expiration of the legislative term or the Constitutional Court declared parts of the legislation unconstitutional.⁴

Article 241 of the Constitution stipulates that the Constitutional Court has the mandate to review constitutional reform projects. The norm differentiates between the ordinary way through Congress, in which case the Constitutional Court reviews those complaints submitted by citizens, and the call of a referendum or constituent assembly, in which case the review by the Constitutional Court is not limited to the individual complaints by citizens, but is all-encompassing. Regardless of the way the constitutional reform is initiated, the Court's review is *procedural* only, and not substantive or material (“*solo por vicios de procedimiento en su formación*”). The constituents in the assembly in 1990 wanted a flexible constitution that is open to reform.

In the case of the ordinary route, plaintiffs submit demands (*demandas*) against a law or reform. In 2005, citizens presented ten complaints against the constitutionality of Uribe's reform, arguing that it incurred procedural defects in the formation of the legislative act and exceeded the competence of the actors that introduced the reform ('substitution doctrine').⁵ To begin with the formal complaints, plaintiffs lamented that the authors of the reform disowned the principle of the separation of powers by having the executive assist in legislative debates; the required first reading in the first committee of the Senate did not meet constitutional standards due to the absence of the Vice-President of the Senate; an open debate in Congress was suppressed when the President of the Chamber of Representatives ordered the vote to go forward June 17th, 2004, when opposition members were not present out of protest; the exact text of the reform was not published 24 hours prior to debate in the Congressional Gazette as is demanded by the Constitution nor were citizens interventions in the debates published in the Gazette; and complaints by fellow representative Germán Navas Talero against Yidis Medina against

⁴ Republic of Colombia. Congress of Colombia. *Acto Legislativo 02 de 2004*. December 27, 2004; Last accessed on: January 7, 2015. <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=15519>.

⁵ The case was the first hard case test for the theory of competence that the Court established in its 2003 decision (C-551/03) on Uribe's first political reform of the Constitution (see Chapter 4). For the first time, a member of the Court dissented on the parameters of the substitution doctrine, but the doctrine was nevertheless applied and utilized to strike parts of the law down.

her last minute change were not given sufficient voice in the process.⁶

The most contentious part of the submissions argued that the reform constituted a substitution of the Constitution. They held that Congress did not have the competence to perform such a reform – only the primary constituent, namely the sovereign people, could invoke original constituent power to draft a reform of such substantial degree. They argued that Law 02 violated this doctrine, because of the absolute prohibition of re-election in Article 197 of the Constitution. In addition, they viewed the principle of equality violated by granting the President the possibility of re-election without according governors and mayors the same prerogative. Finally, plaintiffs argued against a statutory law that empowered the *Consejo del Estado* (State Council) to expedite norms in a transitory and supplementary way. The complainants held that Congress holds that power and cannot confer these powers to any other institution – much less a juridical institution without powers to legislate. They submitted that this, too, constituted a violation of the doctrine of competence and constituted a substitution of the political charter for which Congress lacked authority.⁷

The Constitutional Court followed the plaintiffs only on the point that the statutory law authorizing the *Consejo del Estado* with new powers amounted to a partial substitution of the Constitution, while the law enabling a second re-election in itself did not amount to such overreach of competence under the condition that the equality of chances for other candidates would be addressed in a statutory law. The Constitutional Court wanted to have the unfair advantage of a sitting president over his/her opponents minimized. In its entirety, the Court argued:

The essential elements that define a social and democratic system based on the rule of law, [and] on human dignity, were not replaced in this reform. The sovereign people will decide whom to elect to the presidency, the institutions with supervisory or overseer roles in electoral matters completely preserve their powers, the checks and balances system is still operating, the independence of the government branches is granted, the executive branch does not receive new powers, the reform contains rules to reduce the inequality in the electoral competition, which will be enforced by independent entities, and their decisions will continue to be subject to judicial review to protect the rule of law. It is not enough to make historical references suggesting that

⁶ Republic of Colombia. Constitutional Court of Colombia. C-1040/05. M.P. Manuel Jose Cepeda Espinosa, Rodrigo Escobar Gil, Marco Gerardo Monroy Cabra, Humberto Antonio Sierra Porto, Álvaro Tafur Galvis, Clara Inés Vargas Hernández.

⁷ *Revista Semana*. “Estas son las demandas” 14 February, 2005. Last accessed: 2 August, 2014. <http://www.semana.com/portada/articulo/estas-demandas/70872-3>.

the drafters of the Constitution had the intention to limit presidential powers, and that therefore an amendment that contradicts that purpose is unacceptable. It is not enough to remark that the reason that may have inspired the drafters of the constitution to prohibit a presidential reelection is today a valid standard, by which to conclude that the elimination of such a prohibition amounts to a substitution of the Constitution. The historical analysis takes us to the exact opposite conclusion. The Constitution has clauses [and] mechanisms to update the institutional design when the social and political reality requires it. Some people could argue that there is not enough political maturity in Colombia to adopt an immediate reelection scheme; that the reform could take us to scenarios of violent confrontation or institutional instability; or that the powers of the presidency could be used in the reelection project. Such opinions, to the extent that they are not an expression of an objective substitution or destruction of the institutional design, belong to the sphere of political assessments, of timing and convenience, and cannot be a matter to the constitutional judge (C-1040/05).

The reform went ahead and Álvaro Uribe was re-elected President in a landslide victory. In addition, in the legislative elections held two months prior to the presidential elections, Uribe's coalition increased its representative share in both houses of Congress, while the Liberal Party witnessed a quenching defeat in the elections to the Senate of the Republic. Uribe's "coalition" in the Senate now controlled 61 out of 100 seats.

1.1.2. Review of constitutionality of law "by which to convey a referendum and submit a constitutional reform to the people" (C-141/10).

Uribe's second term in office was a turbulent one. The President remained popular throughout the term and enjoyed spectacular approval ratings of up to 85 %; not least due to equally spectacular military successes against the FARC (*Fuerzas Armadas Revolucionarias de Colombia*; Revolutionary Armed Forces of Colombia) such as the hollywoodesque liberation of Ingrid Betancourt and the killing of some of its members of the high secretariat. However, at the same time, the second administration was repeatedly embroiled in different political and human rights scandals, tainting the successes of the military campaign against the guerrilla. Most damaging for the executive was the *parapolítica* scandal befalling Congress and threatening Uribe's majorities in both chambers. This scandal, involving legislators (most from Uribe's camp) and armed groups at the margin of legality, not only displayed that Colombia's democratic regime was in real danger by the *parainstitutionalization* of its representative institutions (the co-optation by non-state armed groups), Uribe's response and confrontation with the investigating court openly showed the dangers of excessive (and delegative)

presidentialism. As a consequence, even though Uribe's personal popularity remained unaffected and high, the situation had shifted somewhat when the Court deliberated on the second constitutional reform to alter the norm guiding the election of the executive. Arguably, in 2005 denying a popular president another term carried a higher risk for the institutional stability of the country, in 2009, however, excessive presidentialism very evidently posed a greater risk to Colombia's democratic institutions.

The law only included one article that included the referendum question of whether an individual, who had already been elected to the presidency should be able to be elected once more. Congress had to pass the law that would place that question to the people. Even though the referendum route differed from the constitutional reform in 2005, the juridical questions posed to the Constitutional Court were the same: did legislators violate formal aspects of procedure in the creation of the reform and did the constitutional reform exceed legislators' competence? If a constitutional reform takes the referendum route, the charter subjects it to an all-encompassing constitutionality test that must examine the reform against all precedence set in its jurisprudence. In this particular case, it again entailed that the Court had to investigate whether procedural violations had taken place as well as a substitution of axiomatic principles implicit in the political charter of the nation.

The Court first affirmed its competence, arguing that its jurisdictional reach covered all procedures leading to a constitutional reform that pass through Congress, even when they originate outside the formal institutions and are plebiscitary in nature. It then moved to address the five complaints litigators had submitted to the Court in the litigation period. When a referendum for constitutional reform is convened, its committee of promoters and supporters must inscribe with the National Register of the Civil State (*Registraduría Nacional del Estado Civil*), and receive the support of five percent of legible voters (C-141/10; p. 11). The promoters raised the funds necessary, but did so with little respect to rules governing such campaigns. As Botero et al. write "the referendum records [were] murky and plagued with irregularities, such as self-loans between organizers that deliberately attempted to obscure the way in which the referendum was financed. Promoters spent six times more than the spending cap permitted", with contributions by individual donors sometimes thirty times as high as

allowed (Botero, Hoskin, Pachón, 2010). In addition, Congress violated the requirement to have the votes of support confirmed by the National Registrar prior to vote on the bill and went ahead without approval. The next violation concerned the wording of the referendum. The text placed before the electorate actually read that Uribe would run again in 2014. Promoters of the law assuaged this when the bill was already in Congress. The Court argued that Congress extra-limited itself by changing the wording this late in the process (Botero, Hoskin, Pachón, 2010).

The final two procedural flaws involved the domiciliary right - or house right - of the Colombian Congress. The majority backing reform in Congress had five *Congresistas* (Members of Congress) amongst their ranks, who had joined Uribe's coalition from a party that parted with Uribe (*Cambio Radical*). However, the laws against *transfuguismo*, the practice of changing party affiliation, disallowed such maneuvering between party caucuses and *Cambio Radical* had sanctioned them, essentially invalidating their votes. Without their votes, the reform coalition did not have the required majority in Congress. Finally, the bill was struck down, because it was not passed within the time limit of the ordinary session that expired December 16th, 2008, at 24:00. At that time, Uribe's coalition had called-in an extra-ordinary session that began at 00:05 of December 17. However, since extra-ordinary sessions had to be published in the *Diario Oficial* 24 hours before, the session, too, was invalid and the ordinary session long expired (Botero, Hoskin, Pachón, 2010).

These formal violations sufficed to end Uribe's aspiration for another term in 2010. The magistrate voted 7:2 to declare the law for a referendum unconstitutional on procedural grounds. The Court went further, though, and barred Uribe from the presidency as long as this Constitution is valid, and closed the path through Congress for constitutional reforms of such magnitude. Five magistrates on the Court insisted during the deliberation with their colleagues that the Court had to apply the substitution test, because the Constitution stipulated that judicial review is all encompassing for constitutional reforms taking the referendum route. The substitution test requires the Court to investigate whether the proposed reform introduces a new element or whether it replaces an element from the original text. If it finds that the proposition contradicts the

original norm, it must declare the reform unconstitutional for extra-limiting the competence of its author.

The Court argued that the separation of powers is an axiomatic principle of the social state of law that is inscribed in the first Article of the Constitution as well as in the democratic principle of the Colombian Constitution (Article 137). In addition, it specified that the separation of powers in the 1991 Constitution is institutionalized in what is referred to as the periodization of offices. Since presidents in Colombia's constitutional design wield a large amount of power, constituents sought to constrain their authority by limiting the overlap of their time in office with appointees in offices that have accountability functions. For example, the president can present the short-list of candidates for three positions (out of nine) on the Constitutional Court. Under the original scheme, only every second President, towards the end of his term, had the opportunity to get three of his choices elected by the Senate. With one re-election this changed so that *every* President could have the opportunity to affect the composition of the Court, and enjoy a much longer time in office with a faction on the bench that he himself selected. The five magistrates argued that another term would further dilute these checks and balances (*pesos y contrapesos*), not only modifying an axiomatic principle of the Constitution, but substituting it for another. For that, Congress and the President lacked the competence, because only a constituent assembly wields original constituent power legitimating it to draft reforms of such degree. Thus, in a closer vote (5-4), those five magistrates voted the reform down on competence grounds (C-141/10).

When President Uribe received the decision, he declared that the *estado de opinión* (state of opinion), the ideological figure in his rhetoric justifying the constitutional reform, was not a contradiction to the *estado de derecho* (state of law or rule of law), but an expression thereof; an assertion that he had not made unequivocally clear prior to the Court's decision. Now he exclaimed that the *estado de opinión* must respect the law, because citizens' participation, its key element, cannot function without confidence in the law and the Constitution. Therefore, he complied with the Constitutional Court's decision and conceded that there are limits to constitutional

reform.⁸ The importance of this decision arises not least because it is illustrative of an evolution of institutional robustness of the Colombian judiciary in general, and the Constitutional Court in particular. In various fields of constitutional rights jurisprudence, the Court enforced a progressive and “*guaranteerist*” portfolio that encompassed private, social, and collective cultural rights. What is more, the decision and adherence by President Uribe and his followers to the verdict showed that Colombia was a constitutional democracy, in which the verdict of the guardian of the Constitution in situations where political ambitions and pre-conceptualizations clash, is respected as a guarantee for the “happiness of some and the tranquility of the rest”.⁹

1.1.3. The question of judicial power in Colombia

Judicial power has two conceptual components. On the one hand, it is defined as the degree of judges’ institutional independence and, on the other hand, as the authority they command in their exercise of judicial review. Courts’ authority breaks down into vertical control involving rights adjudication, and horizontal control involving inter-branch adjudication (Helmke & Ríos-Figueroa, 2011; Ríos-Figueroa, 2011; Kneip, 2011). To *fully* appreciate the significance of this event for comparative politics, we need to emphasize three key observations: 1) President Álvaro Uribe was an extremely popular and powerful president, who had few scruples to utilize his transformative capacities to initiate a far-reaching reform agenda that served his own political agenda; 2) the Court’s authority appreciably increased between 2005 and 2010; 3) the jurisprudence of the Court involved a doctrine that is not explicitly mentioned in the Constitution, but a re-interpretation of the norms outlining judicial review of constitutional reforms. Consequently, an answer to the question that asks why the Court decided differently in 2010 from 2005 must account for the three caveats of this case.

Institutionalist inquiries study the development of structures and agency therein sequentially (Sanders, 2006), and I intend to do the same. In order to appreciate Uribe’s peculiar position in Colombia’s history – he commanded popular power like no other

⁸ Revista Semana. “Declaración de Uribe respecto al fallo de la Corte”. 26 February, 2010. Last accessed: 9 February, 2015. <http://www.semana.com/politica/multimedia/declaracion-uribe-respecto-fallo-corte/143458-3>.

⁹ Interview subject no. 30 (with a Constitutional Court judge), 20 November, 2012.

president before him – and the novelty of the 1991 Constitution that established the Constitutional Court, we need to pay close attention to macro historical processes of institutional development. Furthermore, the Constitutional Court's increase of judicial power must be viewed in the context of its twenty-year existence making a structured post-genesis investigation of Colombia's institutions indispensable. This will provide valuable insights for institutional development and theories of institution building. Finally, a close inspection of the processes taking place in the chambers of the Court during the deliberation of the specific re-election cases will help to understand the discursive nature of decision-making processes in constitutional courts. Applying the vocabulary of comparative politics to these caveats, we are left with three research questions that will guide each chapter:

- Does the 1991 Constitution amount to a critical juncture in Colombia's political history?
- What did the post-genesis evolution of Colombia's constitutional jurisprudence look like?
- What motivated judges to develop and apply the substitution doctrine, which struck down Uribe's reform to extend the number of terms in the presidential office?

This analysis seeks to demonstrate the relevance and importance of the Constitutional Court's decisions for institutional theory by proposing a three-level inquiry that moves from macro to micro processes. Firstly, the Constitutional Court's moment of genesis is atypical in Colombia's political history, because the constituent process that drafted the 1991 Constitution fundamentally differed from previous instances of institutional engineering: new actors participated and procedures were much more transparent, public and inclusive than before. Secondly, post-genesis evolution is difficult to grasp with the conventional or classical interpretation of path dependence that traces outcomes to early decisions from which they linearly develop, because legal decisions remain open to contestation. In Colombia, incremental change evolved from within the institution and implied course corrections. Thirdly, the institutionalization of deliberation inside the

Constitutional Court centered on the differentiation between political and legal reasoning. Embracing the latter, deliberation inside the Court constrained magistrates' individual preferences (be they ideological or material) and imposed an ethics of reason upheld by formal and informal rules governing deliberation. In sum, this analysis will show an instance, in which institutions ought not to be understood as structured expectations in a utility maximizing game or regularized patterns of conduct, but as discursive structures.

1.2. The peculiar case of Álvaro Uribe

There are two aspects that make this case important for comparative politics: 1) Colombia sets itself apart from its Southern Cone neighbors, having a long history of democratic rule paired with high levels of violence; 2) Álvaro Uribe was an atypical leader in the nation's presidential office, who commanded far-reaching *de jure* and *de facto* (popular) power that he used to move his agenda forward. It is this aspect of his style of governance that makes the 2010 decision so unique and important for our understanding of institutional development. His distinctiveness in Colombia's history, in turn, can only be intelligibly explained in the context of the broader history of Colombia's democratic institutions and their susceptibility for violent confrontation. As a consequence, both of these aspects require at least a brief *a priori* grounding in order to fully grasp the contributions of this dissertation.

Democracy in Colombia has its roots in the immediate aftermath of independence, but it evolved with a factionalism that planted the seed for violent confrontations throughout the 19th century and later in the 20th century. The main factions of the independence armies under Simón Bolívar and Francisco de Paula Santander already fought over the direction of the newly formed republics. Both were deeply influenced by the Republican thought of the French and American Revolution and argued over how centralist or federalist the republic were to be, what position the Catholic Church were to be given, and what powers presidents were to receive (Bushnell, 1993; Valencia Villa 2012).¹⁰ Factionalism became more deeply ingrained in the course of the wars that

¹⁰ Bolívar is the liberator of the region from the Spanish Crown and is most often dubbed as the man of the arms, who favored a more authoritarian and centralistic orientation of the new polity. Santander was Bolívar's general and his "man of the laws". The name is program in that he tended to a much higher

separated Colombia from the Spanish colonial power. The trajectory of the Wars of Independence left the field open for regional strong men to consolidate their control over the local population and resources. These power clusters are the nucleus for Colombia's party system as well as the factionalism befalling the republic ever since.

In the aftermath of the Wars of Independence, *caudillos* and other leaders within Colombia fought each other in up to fourteen national civil conflicts and fifty regional conflicts (Deas, 1997; Bushnell, 1993). In the 20th century, factional warfare was again a prevalent feature in Colombia. After a period of peace that lasted from 1903 until 1948, Colombians fought each other in the continent's most violent internal war that is eponymously known as *La Violencia* (the Violence). The National Front reforms could not entirely appease the country and by 1964 the FARC formed as the first of a number of guerrilla groups, commencing the revolutionary and counterinsurgency war. This conflict greatly intensified with the prospering of the drug trade in the late 1960s and early 1970s, creating powerful right-wing paramilitary groups that fought in a coalition between drug lords, landowners, and the armed forces of the state (Bergquist, Peñaranda, Sánchez, 1992 & 2001).

The most remarkable trait of Colombian politics is, of course, that despite the tendency for violent conflict, democratic institutions continued to operate. Arguably, 1849 was the most critical watershed year in the 19th century political history, because both traditional parties, the Liberal and Conservative Party, formed in the course of a public debate on normative ideals. From that moment until Uribe's election in 2002, Colombian public politics were structured through the affiliation to one of the two political parties, making it one of the longest lasting and most institutionalized party systems of the hemisphere. The party system survived prolonged internal conflicts as well as brief periods of military rule. Above all, the institutionalization of two-party politics meant that relatively competitive elections with a fairly generalized electorate

formalism and valued characteristics that were more liberal in origin: decentralization, federalism, and formalism. His epigraph, "the sword has given you the independence, the laws will give you your liberty", is imprinted on the Justice Palace in Bogota.

became a feature of Colombian politics at a time when European countries were still governed by kings and emperors.¹¹

In its more than two-hundred-year history, only twice was Colombia ruled by military men. Contrary to military rulers in the Southern Cone, though, General Rafael Reyes (in power from 1904 until 1909) and General Rojas Pinilla (1953-1957) did not acclaim the presidency in a coup nor did they install regimes akin to the bureaucratic authoritarian dictatorships in Argentina and elsewhere in South America (O'Donnell, 1968). Rather, these brief intermezzos with military regimes helped civilian elites in either party to strike power-sharing deals to overcome impasses that had resulted in violent bloodshed: the re-accomodational reforms of General Reyes (and the Post-Reyes period), and the National Front Agreement. Thus, rather than destroying the stable two-party system, these periods had the effect of further embedding them and creating a legacy of bi-partisan consociationalism (Hartlyn, 1988 & 1989).

The secret to the party-system's success may well lie in the peculiar way it connects with foundational socio-political relations in Colombia's society. Above all, the long trajectory of the party system is rooted in its formidable capability to absorb social cleavages without actually addressing the grievances at the root of social polarization - an ability that clearly showed during both reform processes consolidated under military tutelage. Beneath the apparently stable and democratic party-system lies a web of symbiotic relations between patron and clients (Archer 1989; Eaton, 2006). Clientelistic relations are defined by three basic parameters:

two parties unequal in status, wealth, and influence, 2) the formation and maintenance of the relationship depends on reciprocity in the exchange of [non-comparable] goods and services; 3) the development and maintenance of a patron-client relationship rests heavily on face-to-face context between the two parties (Archer 1989).¹²

¹¹ Already the 1853 reforms to the 1851 Constitution introduced universal male suffrage, which was then limited to literate men above 21 years of age in the 1886 Constitution. This was repealed in the 1936 reforms and women gained suffrage in the National Front reforms of the 1950s (Fergusson & Vargas, 2013).

¹² The definition is derived from John Duncan Powell's seminal study "Peasant society and clientelistic politics" (1970). Mainwaring derived a similar definition by identifying four features in clientelistic relations: 1) unequal character; 2) uneven reciprocity; 3) non-institutionalized nature; 4) their face-to-face character (1991). See also Dix, 1980 & 1987; Leal Buitrago 1980; Schmidt, 1974; Martz, 1997.

These basic parameters of clientelists relations help us to differentiate between socio-political patterns in Colombia's history and establish three periods of clientelism: traditional clientelism stretching from independence until the 1930s, broker or modern clientelism extending from 1950s until the 1980s, market clientelism combined with armed clientelism from 1991 until today.¹³

The traditional form of patronage is rooted in the absence of a strong centralizing institution after independence in the beginning of the 19th century. When the liberating armies left, regional strongmen became natural leaders, *Caciques*, who tied the local population through affectionate relations to their *domus*. Little economic penetration of the hinterland left them largely to themselves, enabling them to deal with collective action problems violently. When violence between factions became too costly, these warlords noted that the party label was a convenient means to establish co-coordinating points without relinquishing their hegemony in the territory under their control. This had the consequence that the discourse of either party – as progressive as it might have appeared – hardly ever matched the political realities: unequal social relations and access to political power remained intact for the entire 19th century. Nation building and national institutions only went so far as they left traditional power relations in Colombia's regions untouched. The party system is therefore a direct consequence of the absence of the state and at the same time perpetuated its debility, because rather than modernize social relations, archaic relations were conserved through the party label. Importantly, the dissection of national institutions with particularized interests in the party system undermined the provision of public goods, resulting in a high number of internal conflicts between different regional factions that never resulted in a definite victor, again perpetuating the underlying social relations (see Chapter 2).

The consociational deals struck under military guidance, and the economic development associated with the more peaceful situation that followed these deals, helped transform traditional relations of dependence to broker forms of clientelism. These functioned around the original clusters of dependence, but enabled each cluster to negotiate political support and economic development with each other. Thus, these

¹³ See Buitrago, 1980; Archer, 1989; Peñate, 1998; Gutierrez Sanín & Dávila, 2001; Dávila & Delgado, 2001; Eaton, 2006; García Villegas & Revelo Rebolledo, 2010.

various clusters resolved the most pressing issues concerning the exercise of power with, but did not establish institutions that created upward mobility for lower classes. To illustrate: the Thousand-Day-War as well as the collapse of internal security prior to *La Violencia* essentially consisted of infighting between the Conservative and Liberal Party, which eventually escalated to civil war proportions. The occurrence of neither instance of violence was definitely rooted in a deep social or cultural cleavages, but rather resulted because of the inability of elites to compromise and strike deals that satisfied the entire range of either party's membership and leadership. Both deals then essentially addressed these issue of factional infighting and served to conserve the socio-political relations by placing them on a more stable *formal* institutional setting. After the Reyes reforms Liberals enjoyed minority representation and Conservatives controlled most political offices. After the National Front reforms, both parties interchangeably occupied the highest offices in the country and shared representation in the legislature. Both agreements and subsequent socio-political regimes quelled violence, but above all, ensured that traditional elites remained at the pedestal of social power and continued to control the political and economic agenda. Clientelistic relations adapted to the new institutional context, but in their essence remained unchanged and excluded a large section of Colombia society from the benefits of economic development.

The restrictive nature of the National Front agreement and exclusion of legal political contestation eventually opened the path to internal fragmentation of the party system by shifting inter-party competition to intra-party competition. Elections, even though held regularly, could not contain political discontent to peaceful means and created opportunity structures for violent actors to exploit. The arrival of the Cocaine trade aggravated the challenges to the regime and helped armed actors to consolidate huge resources and political influence at the regional level outside of direct state control. These groups – guerrilla groups on the left and paramilitary groups on the right – expanded and controlled pockets of territory, becoming “aspiring state makers” (Bejarano & Pizarro, p. 252). Sociologists call this phenomenon armed clientelism. With the help of their coercive resources, groups could extort control from local politicians and thereby siphon off financial and political resources. In the end, it provides them an inroad to legal politics.

In the last three decades, the Colombian conundrum must be viewed in the context of armed clientelism, which pitted various guerrilla groups, paramilitary groups, and the state's armed forces against one-another. In the course of this conflict, the state's already tenuous capacities further contracted, because it could not eliminate or neutralize its internal enemies and thereby fulfill the four state building tasks.¹⁴ As a consequence, Colombia suffered severe deficiencies in one of the central playing fields of democratic governance. Bejarano and Pizarro contend that it is "true, elections are held on a regular basis – but candidates and elected politicians are also regularly assassinated. The press is free from state censorship, but journalists and academics are systematically murdered" (2005, p. 236). Since "Colombia's regime is a democracy whose faults are not to be located at the level of the typical dimensions of polyarchy (i.e. participation and opposition)", its weakness must be situated on the extra-institutional playing field that is populated by armed entrepreneurs. Colombian history in the last decades has shown that when the state recedes and leaves the space open for violence entrepreneurs, these groups establish alternative systems of governance in the territory under their control that have little in common with democratic rule and the rule of law. Therefore, Colombia constituted a "besieged democracy", that separates into the electoral field, the rules of which are largely respected by legally recognized actors, and the extra-institutional field, where the rules of war apply rather than the rules of democracy (Bejarano & Pizarro, p. 237).

It is in this context of a highly contested monopoly of violence and unequal social relations beneath the formal institutional level that Álvaro Uribe appeared on the political scene in Colombia. He came from a landowning family and his ranchero father had been assassinated by the FARC. Prior to 2002, he had gained some political recognition as Governor of his home Department of Antioquia for defending a tough-hand internal security policy approach, which often appeared close to the landed interest that gave rise to the paramilitary project. In the run-up to the presidential election to replace Andres Pastrana, his security record – however ambivalent it in reality might have been – turned out to be a valuable talking point. In 2002, after peace negotiations with the FARC had

¹⁴ These are: 1) "war making" to eliminate foreign rivals, 2) "state making" to eliminate internal rivals, 3) "protection" to eliminate the rivals of their clients, and 4) "extraction" to acquire the resources to fulfill the previous tasks. All of these are contingent on exercising the monopoly of violence (Tilly, 1985).

failed, and the AUC paramilitaries exercised a tremendous amount of power, some believed Colombia to be at brink of becoming a failed state (McLean, 2002).¹⁵ It was this fact that helped Uribe generate a victory in the first run of the 2002 elections.

With his heritage as a landowning rancher, Uribe could hardly claim to represent the popular masses, yet, his tough hand security approach (and successes), enabled him to amass popular support. In addition, he ran outside the two traditional parties and could thereby posit himself outside of traditional politics, although he benefitted from his links with the Liberal Party. He used his cloud of popularity and maverick posture to cultivate a strong following, which in addition to internal security focused on creating natural bonds between rulers and ruled as part of a Democratic Security. It is the second point, creating tightly knit bonds between rulers and ruled, that later gave rise to observations that Colombia also exhibited signs of a delegative democracy. It is unusual in Colombia, because despite the far reaching *de jure* powers accorded to the executive, the President could never make use of them since he relied on informal networks in the party system that essentially functioned like horizontal controls on his power (Archer & Shugart, 1997). Uribe's popularity, sense of mission, and capability to utilize both to expand his power fundamentally altered that and by 2007 the Council of Hemispheric Affairs criticized Uribe for political practices associated with delegative democracy (Kline, 2009).¹⁶

So what precisely was delegative about Uribe's style of rule? O'Donnell made the observation that Latin American democracies constitute something akin to a new animal in 1994. The newly democratized nations matched Dahl's definition of polyarchy, but were not on the way to becoming fully institutionalized democracies nor were they really

¹⁵ As Appendix D makes readily apparent, the security situation was indeed dire: intentional homicides had almost reached all-time highs again, and the number of kidnappings climaxed to unprecedented heights.

¹⁶ Kline, in his optimistically called book *Showing teeth to the dragons*, rejected the hypothesis that Colombia during the Uribe administration showed worrying signs of a delegative democracy. According to him, Uribe only successfully defined the greater good of the nation with his hard line against the guerrilla (otherwise he was constrained by Congress and the judiciary), he fulfilled his campaign promise of ending the insurgency, he had the support of a party and had no intention to form his own movement, and even though he considered Congress and the judiciary a nuisance, he did follow courts' verdicts (2009, p. 182). Kline's verdict might have been a little too optimistic, given that he developed the book two years prior to the end of Uribe's term. His second term in office was mired in scandals, which together do indeed paint the picture of a president that thought himself to be equipped with delegative powers.

in danger of reverting to authoritarian rule (O'Donnell, 1994, p. 56). Most importantly, he noticed that presidents seemed to govern as they saw fit.

O'Donnell understood that in ideal democracies each institution fulfills a crucial role in mediating between structural factors and the aggregation of individual interests and identities (p. 59). However, the research on presidential regimes has suggested that “the president is a one-person executive, [in which] the members of presidential cabinets are mere advisers and subordinates of the president” (Lijphart 1994, p. 93). Linz and Valenzuela, too, argued that presidential democracies almost inevitably place the president above the pragmatic politics of mediation between interests. They held that the framework of being directly elected for fixed terms seems to suggest to presidents that they have a personal mandate (1994). O'Donnell coalesced these observations into his model of delegative democracy that essentially evolves around the notion that “whoever wins (reasonably free and fair) elections to the presidency is thereby entitled to govern as he or she sees fit, constrained only by the hard facts of existing power relations and by constitutionally limited term of office” (1994, p. 59-60).

A critical component of delegative democracies is its plebiscitary features that are instrumentally utilized to push aside key horizontal control institutions. As O'Donnell explains, strategies often involve directly appealing to the people and bypassing the legislatures, parties as well as organized civil society groups (O'Donnell, 1994). He explains that representation may exist alongside delegation, but never achieves the degree of fixedness as in constituted representative democracies due to the lack of horizontal accountability. In systems of separation of powers, the legislature and judiciary enforce horizontal accountability. When these are pushed aside as nuisances to the rebirth of the nation, the republican dimension of democracy that enforces the differentiation between the private and public exercise of power is also pushed aside, undermining the effective exercise of the rule of law. As Cameron, Blararu, and Burns showed: if presidentialism tends to erode regime stability, due to its rigidity, immobilism, and aggressive majoritarianism, coalesced into a one-man executive, it also tends to result in a vicious circle in which electoral outcomes maybe respected, but legal norms are treated with disdain (2006).

When originally conceived, O'Donnell's construction of delegative democracy was the result of inductive reasoning, which, given his rich experience in comparative politics, was certainly empirically informed. Over the years, it not only proved to be an appealing theoretical concept, but was also more explicitly applied to empirical cases in an effort to refine its conceptual elements. After twenty years of experience in studying the evolution of "uneven democracies" (Brinks, Leiras, Mainwaring, 2014), the fruits of this collective research effort have specified the meaning of delegative democracy and resulted in an index of eight testable elements. According to González (2014), these are:

- The president is taken to be the embodiment of the nation.
- The policies of his government need bear no resemblance to the promises of his campaign.
- The president's political base is a political movement; the president herself as above both political parties and organized interest.
- Other institutions, courts and legislatures, are considered impediments to the exercise of power.
- Exercise of power is non-institutionalized.
- The president nominates isolated and shielded *técnicos* to office.
- There is extremely weak or non-existent horizontal accountability.
- There is swift policy making leading to the possibility of gross mistakes and hazardous implementation.

González used this break down of delegative traits into eight variables to create an index of "delegativeness". He then plugged in the data from various countries in order to trace the evolution in various countries. To conclude this brief discussion and visualize Uribe's effects on Colombia's institutions it is useful to reproduce his results together with the scores from other democracy and freedom measurement indices (table 1.3). Freedom House measures civil and political rights on a scale from one to seven, while polity measures the state of national elections for competitiveness and openness, the nature of political participation in general, and the extent of checks on executive authority. The Delegative Democracy Indicator measure the abovementioned traits and gives a score for each of those features present (eight in total).

Table 1.1: Democracy measurements for Colombia 1985-2011

Year	Freedom House Scores (1-7; 1 being most free)			Polity IV (Out of 10)	Delegative Democracy Indicator (out of 8 features)
	Freedom Rating	Civil Liberties	Political Rights		
1985	2,50	3,00	2,00	8	2
1986	2,50	3,00	2,00	8	5
1987	2,50	3,00	2,00	8	0
1988	2,50	3,00	2,00	8	0
1989	2,50	3,00	2,00	8	1
1990	3,50	4,00	3,00	8	4
1991	3,50	4,00	3,00	9	1
1992	3,00	4,00	2,00	9	0
1993	3,00	4,00	2,00	9	0
1994	3,00	4,00	2,00	9	1
1995	3,50	4,00	3,00	7	5
1996	4,00	4,00	4,00	7	4
1997	4,00	4,00	4,00	7	5
1998	3,50	4,00	3,00	7	5
1999	4,00	4,00	4,00	7	2
2000	4,00	4,00	4,00	7	1
2001	4,00	4,00	4,00	7	3
2002	4,00	4,00	4,00	7	4
2003	4,00	4,00	4,00	7	1
2004	4,00	4,00	4,00	7	1
2005	4,00	4,00	4,00	7	3
2006	3,00	3,00	3,00	7	4
2007	3,00	3,00	3,00	7	5
2008	3,00	3,00	3,00	7	4
2009	3,50	4,00	3,00	7	6
2010	3,50	4,00	3,00	7	6
2011	3,50	4,00	3,00	7	

Source: Freedom House (the freedom score consists of the average between political and civic rights); Polity IV; González, 2014, p. 244.

The values in the delegative column make readily apparent that Colombian democracy – or more precisely its democratic institutions – came under pressure beginning in 2006. It was the year that Uribe was re-elected and the *parapolítica* scandal involving nefarious relations between Members of Congress and paramilitaries were earnestly investigated

and prosecuted by the Supreme Court. Senators and Representatives from the *uribista* coalition – including Uribe’s cousin, Mario Uribe – were particularly prominent amongst the indicted *congresistas*. As a consequence, Uribe and his advisors commenced a campaign against the Supreme Court that did not shy away from personal attacks. Also noteworthy is that the delegative trends climaxed in the last two years of Uribe’s presidency (2009 and 2010). This was the period when the *uribista* camp prepared the campaign for another constitutional reform process to extend periods in the presidential office. Both these processes combined made evident that there was indeed a very obvious trend towards pushing aside horizontal control institutions as nuisances.

In the end, it should not come as a surprise that the Uribe presidency turned more delegative than previous presidencies in Colombia. His ideal of social cohesion between rulers and ruled is built around notions of natural leadership, communitarian ideals of citizenship, and authoritarian trust in political leadership. His sense of mission and agenda to reform the constitutional order not only emulates these ideals, but further developed them into practical doctrines. In the first term, he mostly spoke of the communitarian state and in the second he used the figure of the *estado de opinión* (state of opinion). It builds on Rousseauesque notions of the General Will, claims for itself to precede constituted power, and thereby defies any control other than public opinion (hence: *estado de opinión*). Neither is it surprising that the “maximalist” interpretation of the *estado de opinión* can be used as a means to treat horizontal controls with contempt.¹⁷ What is surprising is that both, the Supreme Court and the Constitutional Court of Colombia, withstood these pressures and earnestly followed their tasks to independently and autonomously apply the law of the land, regardless of the popularity and power of the President and the means utilized by the executive against their mandate. These characteristics of Colombian politics, the uniqueness of Uribe as well as the audacity of Colombia’s courts signify the importance of this case for the study of comparative politics. I will approach the study by internally disaggregating the Colombian case and thereby increase the comparative leverage of this study. Above all, this will provide new insights for our understandings of institutional development.

¹⁷ Uprimny, Rodrigo. 2009. “¿Estado de Opinión o de Derecho?” In *El Tiempo*. 17 August, 2009. Last accessed 25 June, 2015. <http://www.elespectador.com/columna156600-estado-de-opinion-o-de-derecho>.

1.3. The Primacy of Democratic Legality over Democratic Security and its significance for discursive institutionalism

The Constitutional Court's decision to prevent a potential third Uribe term in the presidential office essentially meant that Democratic Legality, the *legal* authorization of political power, prevailed over the imperatives of Democratic Security and Uribe's communitarian and plebiscitary appeal to circumvent horizontal control institutions. This analysis will show that this outcome has profound ramifications for our understanding of institutions and the way that they evolve. It is true that the three chapters take a broad view at Colombian history, going as far back as the 19th century, but it is not only the palpable fact that they all deal with Colombian history that ties them together. Rather, each chapter will bring an underappreciated variable to the surface: the formidable force of agency. Neo-institutionalism has had two deficiencies: 1) a bias for structure rooted in conceptualizations of institutional developments as striving for equilibria; 2) limiting human agency to rather simplistic (namely utility maximizing) microfoundations of human motivation (Hall & Taylor, p. 950). The analysis will show that human agency matters; whether it involves macro social processes of constitution-making, or micro processes of legal decision-making.

Political philosophy has long moved away from conceptualizing the individual as naively and affectively paying respect to authorities in favor of an understanding of authority as emanating from communicatively shared validity claims that arise and are tested in deliberative processes (Habermas, 1996; March & Olsen, p. 15). Yet, when historical institutionalism turned against the behaviorist accounts of the 1950s and 1960s that took the institutional structure for granted, they, ironically, also rediscovered "the momentous agency of 'state managers'"; exactly at a time when historians started rejecting the study of "powerful white men" for the histories of the people (Sanders, 2006, p. 45). The analysis of the 1991 constituent process to some degree serves as a correction of this trend to only identify the agency of state makers as important, because it identifies the centrality of communicative action for the selections of topics and processes to negotiate and deliberate the new political charter. Communicative action, reflected in the actors involved in the drafting the Constitution as well as the processes

followed to organize debates, is what set it apart from earlier experiences of institution making in Colombia.

My analysis will utilize the Colliers' critical juncture approach to the study of institutional genesis. This will show that the 1991 Constitution by virtue of the events and processes that triggered the collective movement calling for a constitutional renewal, and the implementation of procedures to negotiate the norms of the political charter differed from previous instances of institutional engineering – namely the reforms associated with General Rafael Reyes and the National Front. At the beginning stood a student movement that spontaneously formed after the traumatic assassinations of promising political leaders (Luis Carlos Galán). It then morphed into a genuine, cross-sectional, and multi ideological social movement that engaged in communicative action to draft suggestions for a new constitution. The procedures to discuss norms were public and gave citizens the opportunity to submit points that had to become the subject of debates in the constituent assembly. Finally, the composition of the assembly itself included various new and formerly marginalized political actors. It therefore shows two important caveats of deliberative democracy: the appearance of communicative power to create ideal speech situations. Given the institutionalization of this public constituent process, it is not surprising that the result – the 1991 Constitution – was very different from previous constitutions, and, above all, included an expansive rights catalogue and mechanisms to enforce these rights. After all, it was a neo-constitutionalist moment that valued rights, because they correspond well with the authorization of political power in publically shared validity claims.

The next chapter concerns post-genesis evolution. Historical institutionalists provided comparative politics with one of the most powerful tool to conceptualize institutional development by borrowing from economics and hold that institutions reproduce themselves in path-dependent logic (Pierson, 2000). The logic implies that once a decision is taken, lock-in, increasing returns, and other equilibrium-based mechanisms ensure that further institutional development follows the direction of the early decision.

This analysis will test if the path-dependent logic holds for the post 1991 evolution of central legal institutions. After the implementation of the new Constitution,

Colombian jurisprudence evolved, resulting in a valuation of earlier decisions over later ones. Together with the origin in a moment of contingency that could not be predicted on existing institutional patterns, two central conditions for path dependent development were fulfilled. This chapter will develop an ideal-type reading of path dependence rooted in classical conceptualizations. It will then apply that reading to the post-genesis evolution of legal institutions. Legal institutions were most fundamentally restructured in the 1991 Constitution – not least because of the abhorrent human rights situation that motivated the student movement and later the constituents to redraft the political charter in the first place.

Since the inclusion of rights is the most important merit of the new Constitution, a meaningful post-genesis analysis of institutional development must pay credit to the centrality of rights in the constitutional framework. The *tutela* – a writ of protection any Colombian citizen can file against rights abuses by public institutions – is evidently concerned with human rights, and also creates tensions between actors that can give rise to distributive dynamics that was often identified as the source of path dependent developments. The Constitution subjects decisions by all public institutions to rights based judicial review, but also states that the Supreme Court is the highest instance of the ordinary justice. This created a clash over jurisdiction – the so-called *choque de trenes* (train crash), which evolved around the question of whether the Constitutional Court can review decisions of the other high courts. The potential for distributive dynamics becomes amplified by the absence of parliamentary immunity in the new political charter. The 1991 Constitution invested the Supreme Court with the task to investigate and judge criminal allegations against Members of Congress, who in turn exercise the same task vis-à-vis the President.

Together, this sets up a configuration of actors and rules that is valuable for our understanding of institutions and their trajectory, because 1) various courts with different jurisdictions and contradictory normative principles results in a distributive conflict over the application of those norms; 2) these tensions are amplified by the absence of parliamentary immunity (further adding distributive dynamics to the equation); 3) the connection to rights and rights defense introduces ideational variables that involve the meaning of foundational constitutional principles.

In a longitudinal study of two political scandals involving the criminalization of Congress and the strategies used by Members of Congress to avoid prosecution, I will show that in the course of the *proceso 8000* (Process 8000) only few Members of Congress were prosecuted while in the *parapolítica* (parapolitics) scandal 102 were investigated between 2006 and 2010 making Uribe's second term a much contentious term in office. Three key observations conclude that chapter: the continuous production of legal facts – “facts” resultant from judicial processes – is what set the *parapolítica* apart from the *proceso 8000*, which showed, not least, in the extensive response that Uribe and his administration orchestrated against the Supreme Court and its individual judges. Furthermore, the continued production of legal facts was to a decisive part the result of an agreement between the Supreme and Constitutional Court in *tutela* decision implicating the role, privileges and duties of legislators. Finally, the trajectory of jurisprudential development in the question of the *tutela* and the *tutela contra sentencias* does not become more intelligible with a classical understanding of path dependence. The shifts and differing outcomes were the result from endogenous changes that occurred within the institutions.

The contrasting of the *choque de trenes* with an ideal type reading of path dependence reinforces the call by some historical institutionalists to better incorporate agency into their reading. As March and Olsen remind us, actors re-interpret institutional ideals in a given context so that change evolves within institutions from “both intra- and inter-institutional dynamics and sources” (March & Olsen, p. 12). Here it is the interpretation of norms and how they apply to criminal processes that have political significance. Thelen and Mahoney, too, call attention to the incremental changes that occur as a consequence of actors debating compliance with institutional imperatives (2010, p. 10-11). The indeterminacy of behavior in the *choque de trenes* and the *tutela contra sentencias* appeals to the notion that change evolves from argumentation itself. In the end, it was simply not argumentatively feasible to defend parliamentary immunity as a bulwark for free deliberation, when Members of Congress utilized the norm for impunity. Knight and Epstein exclaimed that new research ought to look at the argumentation of judicial decisions to understand what drives judges in their reasoning (2013). I follow this call not only in the analysis of the *choque de trenes*, but take the cue

and investigate the practice of coming to legal decisions – the deliberation inside the court – as an important variable.

The last substantive chapter will turn to the re-election decisions. The separation of powers model of judicial behavior borrows the modulation of agency adopted in rational choice models and presumes a utility maximizing and forward-looking judge. The strength of these models is their precise conceptualization of the interaction between behaviour and institutions that are amenable to generalization, theory building, and falsification. The weakness lies in the image of human nature that misses important facets of human motivation (Hall & Taylor, p. 950). The fourth chapter of this dissertation will explicitly deal with the re-election reforms and embed the analysis 1) in the tensions between majoritarian and constitutionalist ideals of democracy, and 2) in the contrasting understanding of the constitutional judge as a strategic actor and a discursive actor. The first tension contributes to the importance of this analysis and the second signals its contribution. In other words, the decision to disallow further re-elections is particularly surprising in face of Uribe's popularity/power while the creation of the doctrine at the centre of said decision is illustrative, because it followed a discursive and not a strategic logic.

We already saw that the substitution doctrine was the critical doctrine to disallow a third presidential term. The substitution doctrine essentially is a dogmatic expression of the proportionality principle in constitutional adjudication. It submits constitutional reforms to a test that inquires whether the new norms contradict the original norms to the degree that it substitutes them and not simply reforms them. The critical step in this test requires the judge to establish axiomatic principles in the constitution and the relation of the reform to those principles. Here, the judge exercises a form of public reasoning that weighs between positions. The analysis will explain these essential steps in much more detail. At this point it is important to note that this evident expansion of judicial authority cannot be explained with reference to a strategizing judge, who has fixed preferences. Investigations of Colombia's Constitutional Court have argued that it builds its jurisprudence prudently by acting carefully in politically important cases. Here, the most essential steps were taken in cases of immense political importance.

Thus, contrary to the imperatives of rational choice theory, I found that the careful management of deliberation inside the court helps to explain the outcome and not strategy. The insistence of the majority in 2010 to apply the substitution test was justified with the imperative to properly follow the procedures of constitutional adjudication. These procedures – involving formal and informal rules of conduct – have three basic goals: (1) prevent a rationally unmotivated termination of argumentation, (2) secure both freedom in the choice of topics and inclusion of the best information and reasons through universal and equal access to, as well as equal and symmetrical participation in, argumentation, and (3) exclude every kind of coercion—whether originating outside the process of reaching understanding or within it – other than that of the better argument, so that all motives except that of the cooperative search for truth are neutralized (Alexy, 1979). By preventing coercion – in all its forms – to affect legal debates inside the court, magistrates protect their duty to contest the acts of public authorities and test their reasonability.

Institutions, Douglas North argues, are the “humanly constructed constraints that shape human interaction”. They are at the root of historical change by devising the incentive structure in human exchange, be it “political, social or economic” (1990, p.3). O’Donnell defines institutions as “regularized patterns of interaction that are known, practiced, and regularly accepted (if not necessarily normatively approved) by given social agents” (1994, p. 5). In the processes assessed in this dissertation we will come across institutional frameworks that do not simply function as the rules of the games that structure the expectations of strategic actors. Neither are they cultural norms that discipline actors into subjection. Rather, we will see that institutions are discursive structures, in which actors negotiate the meaning and significance of norms – rules in other words – with reference to a constitutional text and the intention of the constituents that drafted the charter in the first place. The text as basis for negotiation ensured at critical moments that the negotiating process is not simply an expression of the “survival of the fittest” that benefits the actor with the most profound resources. Texts and intention of constituents entail that this process often is an interpretive process that requires actors to make arguments as to how text and intention applies to the given context. This introduces a logic of public reasoning that forces even strategic actors with

fixed interests (such as lawyers and prosecution in a court room), who engage in rhetorical action, to convince and persuade an audience with *argumentative* rationality (Risse, 2002; Habermas, 1996).

1.4. Case selection and data collection

Methodologically, this study faces particular caveats, because of its case study design (highlighting validity issues of causal inferences) and focus on judicial processes (emphasizing data validity issues). Any social science research involves trade-offs regarding its validity and generalizability. Case studies in particular are good in showing some things while very weak in disclosing others. Therefore, we need to be fully aware and self-conscious what this case of Colombia can in fact tell us about (judicial) institutions without making too sweeping generalizations. Case studies can be very useful for closely analyzing the applicability of specific theories in special cases and generating new hypotheses. The data validity issues in this inquiry arises for two reasons: 1) the focus of this dissertation is on judicial institutions and reasoning, 2) dissatisfied with the explanations from the neo institutionalist views, this dissertation looks at the importance of discursive *practices* to develop explanations for the outcome. Judicial decision-making is particularly challenging to study for social scientists, because, as a general rule, it takes place behind closed doors. Colombia's high courts, and the Constitutional Court in particular, are no exception to that. On the contrary, one of the specific features of the Colombian Constitutional Court that this dissertation will analyze and include in the explanation of the outcome, is that it went to great length to shield the deliberation from public pressure and influence. Discourse in the Schmidtean framework, however, implies that policy makers communicate between actors, and justify their ideas against a background of overarching philosophies. How then can a discourse that specifically shields itself from being too public be a form of public reasoning? Here I will try to provide satisfactory answers to these methodological admonitions and thereby highlight the value of this analysis for broader social science research.

The value of studying the outcome of the 2010 constitutional decisions derives, first, from the fact that Colombia constitutes a special case within Latin America's political history that did not make substantial experiences with authoritarian rule, but

lived through long periods of internal violence, and a peculiar form of presidentialism, in which the executive enjoys expansive formal powers, but is constrained in its exercise of power by informal clientele networks organizing the distribution of political and material rewards. Secondly, President Uribe is unusual for Colombia's history, because, armed with personal charisma, he was able to amass great popular support, dominate legislative politics, and discipline a factionalized and decentralized Congress. Thirdly, even though a quick glance at Colombia's history shows that judicial independence has had precedents in Colombia's, the 2010 Constitutional Court decision is deserving of explanation, because it ventured into uncharted, legal territory by invalidating a constitutional reform based on the distinction between reforming and replacing a constitution. It was, as explained at the outset, a decision that re-interpreted constitutional norms in a novel way and it did so in a context inauspicious for the growth of judicial power and independence. All of these features provide credible hints that the Colombian case veils new hypotheses for explaining the growth of judicial power that we need to recover to sharpen our understanding of institutional development.

The case study is defined as the "intensive study of a single case for the purpose of understanding a larger class of cases (a population)" (Gerring, 2007, p. 95). Therefore, a properly, and self-consciously, applied case-study method is always involved in the broader context of a universe of cases and does not stand on its own analysis. As McKeown put it, social scientists, even those employing "standard quantitative methods, are 'interactive processors' [and intuitively] move back and forth between theory and data" (2004, p. 159). They are folk Bayesians. The case study does exactly that and carefully treads between theory and new data. The first imperative to take away for this inquiry then is to understand the existing literature and theory in order to place the original work in the context of the state of the art. This inquiry therefore begins each chapter with a conceptual discussion on the critical juncture (Chapter 2), path dependence (Chapter 3), and the strategic judge (Chapter 4) to properly place the Colombian case within the literature and eventually be able to explain the contributions of this inquiry.

The most important advantage of a case study lies in its capacity to generate new hypotheses that imply causal relationship. A shared observation amongst theorists of social science research is that the "relationships discovered among different elements of a

single case have prima facie causal connection” (Gerring, 2007, p. 100; see also McKeown, 2004; Ragin, 2004). This prima facie causal connection helps to explain the advantages of case studies as well as the context traits more amenable to case study approaches. A case study generates new hypotheses rather than testing them, provides internal validity, discloses causal mechanisms (and not effects), and provides a deep scope to the proposed hypotheses (2007, p. 97). The empirical characteristics of cases mean that case studies are better suited for heterogeneous cases, for cases when strong causal relationships are to be expected (since weak causal relationships are particularly opaque), for cases with rare variation, and limited data availability.

The value of the Colombian case then hinges on what makes it special in a universe of cases and what is the specific goal of this dissertation. Rather than test hypotheses from comparative politics, this study envisions to understand the constitutional judge in a novel way: as a discursive actor. To my knowledge, there has not been a discursive explanation for why a court’s authority increases. This dissertation closely looks at the interaction in specifically arranged discursive places, which I hypothesize to have had an impact on the outcome. Colombia belongs into the category of a least likely case to experience the growth of judicial independence. Gerring refers to such a case as a case that “on all dimensions except the dimension of theoretical interest, is predicted not to achieve a certain outcome, and yet does so, [providing] the strongest sort of evidence possible in a non-experimental, single case setting” (2008, p. 659). Critical for the effectiveness of this method are the facts of the case and the predictive capacity of the theory at hand. Colombia under Uribe’s charismatic leadership is a highly unlikely case for judicial independence not solely due to the background conditions of a long history of violence and clientelism, but also because his governance style created a unusual situation for Colombia itself: he was capable of dominating public policies to the degree that a fractioned Congress united in a strong and disciplined coalition, supporting his leadership. Despite these parameters, judicial independence did materialize and the Constitutional Court’s powers grew appreciatively. The close inspection of the development of the substitution doctrine in the fourth chapter will further show that the outcome was not only surprising in a generic sense, but inexplicable for conventional theory. Strategic accounts of the constitutional judge have the advantage of providing

testable, or in the Popperian sense, risky predictions (Gerring, 2008, p. 660). In this chapter we will see that the most common predictions of the strategic account that test the conditions for the creation of judicial independence do not hold in this instance. It is thus a very good case to develop new theories and hypotheses.

The third chapter begins with the notion that the institutions, from the historical institutionalist perspective, ought to be conducive to path-dependent analysis. I hypothesize, however, that this might be different for judicial institutions, since they involve claims to rights and justice, which carry foundational normative innuendos. To test the application, I disaggregate the Colombian case into two sub-cases with differing outcomes. In short, I engage the most similar research design. The most similar research design can do two things: it can be used as an exploratory or confirmatory tool of analysis (Gerring, 2008, p. 668). Here we use it as a hypothesis testing device and then move to thick analysis to propose that the dynamic of judicial institutions must be placed in the discursive context, in which apparently settled questions remain open to contestation, and change can develop from within the institution.

Finally, the second, and thereby first substantive, chapter (after this introduction) investigates the 1991 Constitution in historical perspective. It, too, incorporates the most similar research design and takes three instances of constitutional amendments and replacement that share the basic characteristic that they fundamentally alter the way the political interaction was organized in Colombia. There is of course a legal distinction between constitutional replacement and amendment, in that the former disrupts the validity of the existing charter, while the latter preserves the legality of the existing constitution. As Negretto explains, however, “both modify the constitution by introducing textual changes, and these formal alterations are sometimes comparable in scope and importance” (2014, p. 19). This was indeed the case for the three sub-cases: in each instance, electoral, legislative, executive, and judicial institutions were altered. In addition, even the amendment processes had plebiscitary components and were submitted to popular confirmation in referenda. Yet, the outcome in the 1991 Constitution differed on most of these parameters. Furthermore, these amendments and replacements warrant selection for closer inspection, because they were the only amendments that

fundamentally altered judicial institutions (see next two sections on the specific contributions and set up in each chapter).

Thus, the analytical set-up of this dissertation provides us with a narrative that moves from historical comparisons through comparisons of the 20-year-period since the new Constitution's existence, to a close inspection of processes within the chambers of the Constitutional Court. As seen, each chapter is internally divided up to provide analytical leverage and increase the study's value for comparative politics.

From case selection, we can then move to data collection. Data collection for judicial processes and reasoning poses heightened methodological problems, because they are said to be particularly disagreeable to public exposure. The analysis in the fourth chapter will reveal in detail that Colombian constitutional judges deliberately curtailed exposure to the public spotlight. Thus, without active participation in public debates, how can we discern the impact of discourse and ideas on decision-making processes inside the Court? The simple answer to that challenge is to go and ask the participants of these processes to describe them to the researcher. This brings us to the centrality of elite-interviews in this dissertation. At least since King, Keohane, and Verba, elite interviews have somewhat become the bad apple of social scientist research. They warn the researcher against letting the interviewee "do our work for us" and establish causal inferences with references to motivation. We ought to take them as statements of facts at best, but certainly not draw causal inferences with only that data (1994, p.112n).

Of course, King, Keohane, and Verba are right to warn against simply believing answers given in interviews—not least by politicians, whose job description entails hiding actual intentions behind a smokescreen of rhetorical devices. However, these warnings gloss over the incredible value that elite interviews can provide when used in conjunction with proper triangulating data. The first contention then is to establish the factual correctness. Most research that engages with elite interviews faces the problem that interviewees might not answer truthfully or in some way manipulate their role in specific decisions or processes. The only advantage researchers who interview politicians have over those who speak with judges is that the former subjects are more likely to be on the public record.

There are remedies to procure the accuracy of interview data. The first important effort is to secure a safe environment for the subject. The ethics requirements for this dissertation were adamant about protecting the integrity of the subject and were particularly high in the case of my research due to the violent history in Colombia. I therefore went to great lengths of assuring the privacy and anonymity of contestants, explaining that the protection of subjects was a contractual obligation for my research. If you interview subjects that are lawyers by training and are engaged in legal work, presenting contracts that *legally* secure their anonymity is of course a highly valued assurance. Additionally, being an outsider and researcher rather than a journalist from Colombia provided extra assurance that the interviews were not compromised by short-term interest to create a good story, but were indeed intended to provide long-term insights. Judges in particular felt compelled to help with social scientific research, because, as one interviewee said, this work was important, since “the country had suffered tremendously.”¹⁸ The sincerity of sharing the interest was confirmed, not least, by the fact that no interview lasted shorter than an hour and often developed into discussions that lasted over 90 minutes or even 150 minutes.

The most important tool for confirming the validity of interview, without a doubt, is the triangulation with external or otherwise independent data. This dissertation builds on two sources for triangulating data. The tables of interview data presented in Appendix C and the fourth chapter present the responses according to first second and third order observation. This distinction pays tribute to the fact that subject face different validity concerns. The first order observers are actors actually inside the processes under investigation – namely judges – while the second order observers are close participants in the process with little personal stakes – namely clerks. Their positions nor reputations are at danger by the decisions taken, since they neither enjoy the fortunes of being publically celebrated for a particularly well reasoned decision, nor will they loose their jobs or receive scorn if the decision does not meet the appreciation and endorsement reputational actors seek. Thus, the first step of triangulation for me was to compare and contrast first and second order observations in order to establish the validity of reported facts.

¹⁸ Interview subject no. 33 (with a Constitutional Court judge), 8 April, 2013.

The next important, and extremely valuable, sources to triangulate the flow of deliberation inside the Court are the *Actas* compiled by the General Secretary of the Constitutional Court. She is the only other person present during deliberation inside the plenary chamber and reports the minutes of the discussion in a document that remains sealed for five years. I could collect the most important *Actas* for four essential decisions by the Constitutional Court. These include, for example, deliberations over why the Court chose to abandon public hearing in favor of being solely provided with written statements by concerned parties. As we will see in the fourth chapter, public hearings were cut from the process, since they provided a context that could benefit rhetorical action over actual reasoning.

The reasoned decisions themselves, too, are a critical source for triangulating the processes under investigation. The importance of discourse shows, not least, in the ability to change opinions and perform changes in position. These do in fact appear on the public record, even though judges do not engage in public debate. Colombia's Constitutional Court decisions are published and include a lengthy and detailed discussion on the various arguments put forward by the different actors involved in a decision. For example, the first re-election decision was over 800 pages in length, and the second was over 500 pages in length. Moreover, constitutionality verdicts include dissents by the individual judge on a specific merit of the case (not solely the entire decision). The decision to allow a second re-election included a dissent by magistrate Humberto Sierra Porto. He did not disagree on the constitutionality of the law, but explained his disagreement with the substitution doctrine that was applied in that decision (the Court applied the doctrine but found that the reform did not violate inherent principles of the Constitution). In the *choque de trenes*, too, Eduardo Cifuentes published an extensive dissent in 1999 that outlined his disagreement with the Court's *tutela* decision explaining that it constituted decisionistic act. Thus, we see discursive dynamics appear on the public record in the reasoned decisions published.

The most important evidence for the fluidity of decision-making inside the Court is the ability to change opinions when the force of the better argument compels individual judges to do so. There are indeed critical instances, in which individual judges voted against their previous stances on particular doctrines (we will see this occurring in

regards to the substitution doctrine) as well as apparent ideological preferences on generic social issues. Magistrate Nilson Pinilla has voted against the substitution doctrine in the 2010 decision, but two years later pens a decision that argues *with* the substitution doctrine. Furthermore, he is known as a small-c conservative with stringent social values, but affirmed gay rights in a constitutionality decisions. All of this, I contend, provides credible evidence to show that reasoning and, above all, the *process* of reasoning is central for judicial independence and a properly institutionalized separation of powers.

1.5. Structure of the analysis

The structure of this inquiry follows a logic that runs from macro to micro processes. The first substantive chapter, Chapter 2, places the 1991 Constitution in historical context and develops a comparison with the other instances of profound institutional engineering. It commences with a conceptual discussion of Collier and Collier's framework of the critical juncture and then plugs in a comparative base line through a brief discussion on the origin of Colombia's weak state institutions and inequitable social relations. The chapter then moves to a structured comparison of the Reyes reforms, the National Front agreement, and the 1991 constituent process. In the end, it argues that the 1991 Constitution can indeed be understood as a critical juncture that shows characteristics of an instance in Colombia's history that shuffles actors and institutions fundamentally anew.

Chapter 3 inspects the post-genesis institutional development and investigates if it followed a path-dependent logic. The chapter is divided into four parts. The first will outline the conceptual stipulations of path-dependent and its application to the Colombian post-1991 context. In addition to the conceptual specifications of the path-dependence framework, it focuses on the normative connotations of the *tutela*. From this follows a longitudinal division of sub-cases that inspects the jurisprudential evolution of the *tutela contra sentencias* (legal junctures against legal decisions) in the course of the *proceso 8000* and *parapolítica* scandals. The analysis devotes one part to each episode and contrasts the political and normative evolutions. The final part concludes the findings and ties the analyses of each political scandal together to develop a conclusion on the

suitability of path-dependence to describe the institutional behavior when it involves normative values. This chapter will show that the rather static vocabulary of path dependence has difficulties to account for the openness of legal decisions, depending on the justification and argumentation as well as the specific legal context.

Chapter 4 will explicitly deal with the re-election reforms and embed the analysis 1) in the tensions between majoritarian and constitutionalist ideals of democracy, and 2) the contrasting understanding of the constitutional judge as a strategic actor and a discursive actor. It will first outline the contours of each tension and then move to contrasting both decisions in a reconstructing of the evolution of the substitution doctrine. This chapter will counter the understanding of the constitutional judge as a forward-looking utility maximizing actor and insist on the deliberative capacities of magistrates that act in carefully designed discursive spaces that aim at the protection of deliberative patterns.

The final chapter, Chapter 5, will conclude the findings and tie them together in a comprehensive analysis. It will revisit the results from each chapter and argue that the discursive judge, which made an appearance in the *choque de trenes* as well as in the constitutional decisions concerning reform to allow re-election, is an important new caveat to the study of judicial behavior.

2. The Novelty of the 1991 Constitution: A critical juncture in Colombia's history.

2.1. Introduction

As promised in the introduction, this chapter asks: What is it that makes the 1991 Constitution (and the Constitutional Court created with that Constitution) peculiar in Colombia's history? More specifically, can we deduce that the process leading to the implementation of the 1991 Constitution, as well as the immediate marks this left on the resultant institutional framework, reflect the characteristics of a critical juncture? Critical junctures are those instances in political history that place the patterns of political life on a distinctly new and consequent path. For the purposes of my investigation, I will follow the historical institutionalist advice, articulated by Elizabeth Sanders, and study the institutional patterns not through a snap shot, but sequentially, looking at various instances of institutional engineering (2006, p. 39). Placing the political charter in the context of Colombia's political history in institution building will help us identify if its creation constitutes a moment of genesis that, arising from social or other cleavages, re-structured actors and arenas in a novel way, so that subsequent institutional patterns can be traced to the choices made by constituents at the moment of genesis (Sanders, 2006; Hay, 2006).

While studies analyzing and identifying critical junctures are designed to ask about processes in several different cases, this inquiry here turns inward into the history of Colombia to evaluate, longitudinally, the significance of the constituent process in 1990-1991, and contrast it with prior experiences of institutional engineering. All of these processes have in common that they were the political response to profound regime crises that had existentially destabilized the country and plunged Colombia into violent conflict. The 1991 Constitution distinguishes itself from the 1905-1910 and the National Front reforms (1953-1957) in its origin, traceable to a profound normative and discursive cleavage, the process of installing the constituent assembly, the procedure of deliberation/negotiations, and also in its resultant institutional framework. While the two

earlier experiences of institution building responded to intra-elite disagreements and the incapacity of Colombia's party system to incorporate the mobilized working class, the 1990 constituent process has its origin in a genuine discursive cleavage: political reality in the 1980s made evidently clear that the democratic regime could not live up to its normative claims and promises of a liberal democracy. The drug economy had pushed the country into a human rights crisis, resulting in thousands of deaths. At the same time, political elites, sectors of the army, and landowners used the turmoil to systematically eliminate an entire political party (the *Unión Patriótica*, UP). This laid open the flawed, restrictive and exclusionary political framework inherited from the (officially terminated) National Front that had made meaningful political participation a virtual impossibility.

Furthermore, the 1905-1910 and National Front reforms in the 1950s were instigated by party elites, facilitated with the help of the armed forces, and negotiated behind closed doors to only be ratified post-factum by the populace. The 1991 Constitution has its roots in a genuine student movement, involved a wide civic front and public support, was deliberated in public debates with important citizen input and the inclusion of previously marginalized groups from demobilized guerrilla groups, indigenous groups, and independent civil society groups. Thus, in contrast to 1905-1910 and the National Front in 1953-1957, the 1991 Constitution was created in a communicative process genuinely placing collective human agency at the nexus between word and deed (Arendt, 1958).

In terms of the immediate consequences of each case investigated here, there are also notable differences in the immediate post-genesis evolution of institutions, economic development and trajectory of the bureaucracy. In 1905-1910 and 1953-1957, violence diminished, economic development ensued, but patronage systems reconstituted themselves within the two-party system. In 1991, violence continued and in some instances even expanded, creating new actors, while patronage systems reconstituted themselves outside the traditional party system, slowly but surely eroding said party system. Furthermore, in 1991 the constitutional text went the furthest in overhauling the judicial branch, not only stipulating an expansive human rights catalogue, but also incorporating new organizations (the Constitutional Court and the Superior Council of the Judiciary) and mechanisms to enforce human rights claims. The choices made by

constituents showed in the genesis of a new judicial discourse accompanying the creation and implementation of the new Constitution, which espoused human rights principles and the importance of neo-constitutionalist public reasoning in the exercise of constitutional interpretation. This form of interpreting the Constitution became known as *Nuevo Derecho* (New Law) and clashed with the formalism implicit in *Viejo Derecho* (Old Law) associated with the old Constitution from 1886. At this point, we can sum up that the constraints placed upon the constituent processes differed between the first two cases and the last case and as a consequence, the resulting institutional framework also differed. Therefore, it is perfectly sensible to infer that the 1991 Constitution amounts to a critical juncture.¹⁹

This chapter begins by first outlining the methodological structure of the investigation, which relies on the Colliers' framework of the critical juncture (2002). To make the case for the novelty and peculiarity of the 1991 Constitution in Colombia in this chapter, I will first look at the institutional foundations of Colombia's weak institutions that have a trajectory that reaches back into the 19th century: most importantly, the weak state and the creation of patronage systems that are intrinsically linked with each other through the party system. This serves to methodologically lay a base line against which to compare and contrast the process during the junctures in the 20th century and argue that the 1991 Constitution is a critical one (Collier & Collier, 2002, p. 30). After this brief exploration, I will move to the cases of institutional engineering preceding the 1991 Constitution and explain how they have re-invented clientele relations under new formal institutional frameworks. Lastly, this chapter will explain in detail how the constituent process of the 1991 Charter fundamentally differed from those cases.

¹⁹ In addition, Colombia's moment of constitution-building that deepened and fostered a new, more participatory kind of democracy, coincided with profound transformations in Eastern Europe and authoritarian South America that Huntington summarized as the third wave of democratization. It was therefore a moment of democratic deepening that occurred in other places as well – albeit in categorically different political contexts (Kline, 1996; Huntington, 1991).

2.2. Critical junctures and the study of Colombia's history

The critical juncture framework harbors the danger of being used as a fancy way of saying “important point in history”. The meaning goes much further than that and involves a number of defining traits that are indispensable for a methodologically sound inquiry. The Colliers begin their seminal study with a widely-shared sentiment, described in the analogy of the bifurcating path in Robert Frost’s “The Road Not Taken”: the importance of certain decisions at specific points in time that have long-lasting consequences (2002, p. 27). As Frost himself versified, taking the one road and not the other “made all the difference”, which leads to the Colliers’ own rendering, that describes these instances as “periods of significant change, which typically occur in distinct ways in different countries or in other units of analysis” and result in long(er) lasting, distinct legacies (2002, p. 29). Moreover, critical junctures do not appear out of the blue nor are their consequences random. On the contrary, critical junctures distinguish themselves from other important periods in the history of political life of a country (or other units of analysis) by three components: their preceding conditions, the moment of crisis, and the legacies left by the decisions taken during the critical juncture to overcome the crisis.

Two of these components are important for the analysis of this chapter: the preceding conditions and the moment of crisis giving rise to specific institutional decisions (including the context, in which these decisions are taken). Legacies involve the mechanisms of production and reproduction and are most often captured by path-dependent development, which will be more closely investigated in the next chapter. Here I will discuss a number of concerns regarding the cleavages and crisis moments occurring in critical junctures, and only briefly touch on issues concerning the legacies of critical junctures. In the discussions of the specific cases in this chapter, I will contrast immediate post-genesis trajectories to highlight specific institutional changes of the 1991 Constitution that under the critical juncture framework should result in more predictable and stable patterns. The constancy of these patterns is then put to test in the next chapter.

One pertinent problem of the critical juncture framework that receives repeated criticism from scholars is its supposed incapability to make occurrences more intelligible or predictable (March & Olsen, 2006; Sanders, 2006; Hay, 2006). There is indeed a

problem with the predictability of critical junctures, but that has more to do with human agency than with the concept itself. The criticism that critical junctures are unintelligible is not entirely fair, because the most important works do indeed propose explanations and conceptualizations for what is behind profound moments of change (Rokkan & Lipset, 1967; Collier & Collier, 2002). In these and other works analyzing historical processes, moments of profound social change – from revolutionary change through cyclical interactions to political incorporation – were preceded by social and cultural cleavages. Such cleavages create tensions and crises that cannot be contained with existing political mechanisms of conflict resolution and require a reconfiguration of the rules governing socio-political interaction.

Related to the unintelligibility critique is the assertion that the contingent characteristic of critical junctures essentially means that they appear randomly. This is misleading, too, since “to argue that an event is contingent is not the same thing as arguing that the event is truly random and without antecedent causes” (Mahoney, 2000, p. 513). As we have already seen, there are antecedent conditions to be identified by the researcher, and there is more: the significant change alluded to in the definition is placed in contrast to the predictions from classical economics, which have difficulties accounting for drastic turns in development and potential inefficient consequences. As Mahoney eloquently states, “without the assumption of initial contingency, path-dependent processes cannot be linked to ‘unpredictability’ and ‘inefficiency’” (2000, p. 515). Crucially, the potential inefficiencies of the outcome do not signal the absence of rationality, but rather signal the presence of a *political* rationality that is contingent on the interests and resources of the actors involved in the process that we identified as a critical juncture.

From this follows that it is not entirely reasonable to dismiss the study of critical junctures as akin to identifying important moments post-hoc with little intelligible data to recognize the causes behind the change. Rather, it requires the researcher to identify cleavages that carry transformative potential. These cleavages become intelligible if contrasted with a “base line” of conditions that form the antecedent conditions. If additionally compounded by external shock, these cleavages result in a moment of crisis that triggers the critical juncture (Collier & Collier, p. 30). In all of this, it is indispensable

to remember that agency is not lost in the moment of profound decision taking. A juncture, as the cross road in *The Road not Taken*, provides options, from which the agent, however she will be defined and in whatever way she is constrained, can choose one. The juncture becomes critical, if the eventual choice and its consequence could not be predicted by existing patterns of behavior, but reflects the presence of new actors, interacting under specific constraints, giving rise to new institutional frameworks that structure (more predictably) future interaction (see Mahoney, 2000, p. 514).

Together this provides a framework for the rest of this chapter, through which we can evaluate the significance of specific instances of institutional engineering in Colombia's history. Again Collier and Collier conveniently provide a concise package of characteristics of a critical juncture, from which this chapter chooses three as the guiding analytical principles: 1) antecedent conditions representing a baseline against which the critical juncture and the legacy are assessed, 2) the cleavage or crisis emerging out of the antecedent conditions, 3) rival explanations involving constant causes (p. 30-31).²⁰ From this follows that in the next sections, I will need to identify a base line against which to identify cleavages potent enough to result in a transformative crisis, discover the appearance of a critical juncture and, finally, analyze the resources and behavior of actors involved in the juncture that result in choices structuring future interaction, which then increasingly reproduces itself.

The research design of this dissertation poses some difficulties for the analysis of critical junctures. As alluded to above, critical junctures are said to appear in more than one unit of analysis, which usually implies that the researcher investigates more than one case. This dissertation, though, focuses in on one case: Colombia. I therefore have to increase the observational data points by turning inward and longitudinally analyze instances in Colombia's history to help me establish a base line and identify the

²⁰ As explained there are three components of the legacy that are more closely examined in the next chapter, when I turn to path-dependent logic of post-genesis evolution. These are: a. mechanism of production, since the legacy is shaped by a series of intervening steps, b. a mechanism of reproduction, because the legacy is not an automatic outcome, but perpetuated by processes, c. the stability of core attributes of the legacy. In addition, the Colliers argue that any legacy must come to an end. This is arguably the weakest point in their conceptualization, since, as they admit, some legacies are stable and even re-appear, while others are self-destructive and therefore do come to an end. This leaves the space wide-open for analytical ambiguities, which are not readily conducive for this analysis. I therefore focus on the appearance of critical junctures and the mechanisms of reproduction (2002, p. 33-34).

variations in outcomes. I therefore need to place the 1991 Constitution in historical context, which enables us to utilize a most similar research design in order to discover different causal mechanisms at different periods in time (Skocpol & Somers, 1980). Moreover, the critical juncture design requires cross-sectional data points, which this study will contribute by observing the effects in different subunits – namely, the legislature, executive and bureaucracy, and judiciary.

First I will have to establish a base line that explains the fundamental structure of political interaction in Colombia. This trajectory reaches back to the 19th century and the post-independence era. Historical monographs of Colombia's history show that 19th century post-independence evolution was marked by two co-related developments: the creation of a weak state infrastructure and the evolution of patronage systems through the two-party-system. Explaining these developments will serve as a baseline against which to compare 20th century institutional engineering processes.

From there I can move to elaborating potential junctures with the capacity to switch Colombia's history to new paths, resulting in novel structures of political interaction. From my interviews, as well as secondary literature, I have identified three cases of institution building in Colombia (1905-1910; 1953-1957, and 1991)²¹ that share a basic, ideal-type, trajectory:

Political Crisis/Violence → Institutional Engineering → (New) Institutional Framework

According to the critical juncture framework, the question becomes whether these periods of institutional change, which provide identifiable time horizons, were preceded by social, cultural or other cleavages. If we can recognize cleavages, we must also be able to see an aggravating crisis that transforms the cleavage into an institutional crisis, from where we can move to the most interesting part: the action during the juncture. It is here where decisions are taken that have transformative potential. Consequently, the analysis will look closely at the institutional context in the original political crisis, the actors involved in the institutional engineering process, the constraints they faced during the

²¹ See Appendix C and in particular the data provided by interview subject no. 8 (Constitutional Court judge), May 17, 2013; Interview subject no. 3 (Supreme Court judge), April 18, 2013.

juncture as well as the resources at their disposal, the arenas and procedures to negotiate the institutional restructuring, and, finally, present the results of each process in terms of the institutional set-up as well as the immediate socio-political development.

This comparison will highlight a fundamental difference in outcome: judicial institutions after 1991 were most fundamentally transformed. Without going too far ahead of myself, this outcome is related to an identifiable cleavage that existed prior to the 1991 constituent process. This type of cleavage, however, was different from the ones theorized by Rokkan and Lipset as well as the Colliers. As will be shown in more detail further below, the 1980s was a decade when violence associated with the drug wars made it painfully obvious that Colombia's political system lagged behind the promises of a liberal democracy that it claimed to espouse. Death squads repeatedly assassinated several presidential candidates as well as activists from a political party. It was a normative between the normative claim of a democracy and the political reality of a most violent country. This cleavage left a mark on the process that restructured the political arena in the constituent process, since a heterogeneous student movement pegged their demand for an overhaul of the constitutional regime to Colombia's abhorrent human rights situation and the inability of the state to provide even miniscule channels of meaningful political participation. In addition, the student movement's agency was instrumental in the course of the negotiations as well, since students' framing of the issue centrally affected the outcome, namely the 1991 Constituent Assembly, as well as important features of the document it produced. This analysis will show that the 1991 constituent process "cannot be explained on the basis of prior historical conditions," but must take into account the occurrences during the juncture itself (Mahoney, 2000, p. 507). In other words, it is my assessment that this does indeed constitute a critical juncture in Colombia's political history.

2.3. Identifying a base line: violence, parties, and the structuration of a fragile state.

The critical juncture framework forces the researcher to be disciplined. In order to understand the variation between continuity and discontinuity, Collier and Collier

adamantly iterate that the identification of any legacy is essentially contingent on an explicit comparison “with the antecedent system” (p. 34). It is what forms the base line of their conceptual framework. When we turn to Colombian history, the most apparent constant condition of the Colombian state in the 19th century was its virtual absence.²² If the state, as Max Weber famously defined it, is the human organization that monopolizes the means of violence (1968), Colombia’s central governments repeatedly and consistently fell short of that benchmark, and throughout the 19th century looked more like a dystopia incapable of providing even the most basic public goods. In the words of Antonio Nariño:

Three years have passed, but, nevertheless, none of the provinces have a treasury, armed forces, canons, powder, schools, streets, nor banks; only a few have a number of considered functionaries that consume what little rents have been left, and they defend with all force the new system that benefits them (Nariño cited in Valencia Villa, 2012, p. 79).²³

The central governments of Gran Colombia, New Granada, and then the Republic of Colombia, not only failed to fully control the entire territory that was nominally under their control. The historical weakness of the Colombian state additionally showed in its generic weakness to generate taxes and generalize the provision of public goods. At the same time, it established relatively democratic political parties that competed in elections (although power between the parties did not shift as a consequence of elections, but of violent conflict). These two phenomena, peculiarly related, are the focus of the analysis in this section and form the base line of the critical juncture framework utilized here.

Scholars have traced the historical weakness of the Colombian state to technical as well as political causes, ranging from Colombia’s intractable topography to the

²² Even more so, this condition of a weak infrastructure and feeble provision of public goods characterized Colombia for the most part of the 20th century as well (at least until President Álvaro Uribe was elected President in 2002; see below).

²³ Antonio Nariño was one of the most important ideologues of Colombian independence. He was the most progressive of the three figures towering over Colombia’s immediate post-independence era: Simon Bolívar, Francisco de Paula Santander, and Antonio Nariño. Having translated, and then reprinted, the Declaration of the Rights of Man from French into Spanish, Nariño is considered the man of rights. His discourse before the Congress of Cucuta, which outlined a constitutional project that was way ahead of his time and involved not only basic rights, but also a declaration of rights of people and a special tribune to guard the constitution. In the end, it was squarely rejected and really only finds its way into Colombian constitutionalism with the promulgation of the Constitution from 1991. The Presidential Palace in Bogotá is named after him.

creation and purpose of the two-party system. Additionally, the generic pattern of state building consolidating in Colombia's first century of existence brought socio-economic and political factors together, making it supremely difficult to identify the source of its contentious politics. As Bergquist notes, Colombia's political system was "dysfunctional in its capacity to contain civil violence [while] supremely functional in shielding the elite from the full political consequences of social conflict" (Bergquist 1992, p. 5).²⁴ By incorporating explanations for state weakness from the comparative politics canon, this brief excursion into the 19th century will show that at the root of these phenomena are clientelistic patronage-systems that tie together soaring inequalities between the social classes, inequitable access to political power, stable and deeply entrenched political parties, as well as a high tendency for civil violence. This arrangement "continually obscured, distorted, and channeled the discontent" of social struggles into fluid political relations between patrons and clients, resulting in a disencounter with liberalism: a very weak notion of citizenship and incomplete differentiation between the private and public utilization of political power (Bergquist, 1992, p.5; Palacios, 2006). Above all, it resulted in a party system, consisting of two traditional parties (the Conservative and Liberal Party of Colombia) that were cross-sectional in their fan-base and mostly elitist/oligarchic in their leadership. Both parties engaged highly normative discourses around different constitutional and legal values, but never consistently applied their principles in political practice, thereby protecting the socio-political status quo.

To begin, comparative politics suggests two arguments for the lack of an effective and efficient central government capable of exercising a clear monopoly of violence that fit the scope conditions of 19th century Colombia: 1) the state was incapable of projecting its authority given the geographical conditions and sparse population of the territory (Herbst, 2000); 2) due to the lack of external warfare, Colombians never rallied behind a unifying cause, which, as a side-product, would have modernized the bureaucracy (Centeno, 2002). Both have merits, but miss the peculiarities of the two-party system that

²⁴ Bergquist is not the only historian of rank and file that makes this observation. Bushnell, too, notes, "the relative immunity of Colombian presidents to violent overthrow, despite a political culture marked by a fairly high levels of violence, is often overlooked amid the emphasis placed on the violence itself" (Bushnell, 1992, p. 18). Similarly, Malcom Deas noted that conflicts usually commenced as political conflicts and then "much else entered in: robbery, banditry, land-grabs, acts of private vengeance, even Marxist revolution" (Deas, 1997, p. 366).

not only lasted until the 1990s, but also had crucial effects on the institutionalization of the Colombian state in the 19th century.

The various names of the political entities preceding the Republic of Colombia already indicate its tumultuous political history in the 19th century. Colombians celebrate July 20th, 1810, the day of the so-called Vases Affair, as their day of independence. Yet, proper and complete independence was only achieved in 1822 (López-Alves, 2000, p. 96). In between, during the *Patria Boba* (“Foolish Fatherland”) from 1810 until 1816, the liberators fought amongst themselves and failed to confront Spain in a united front, leading to a Spanish reconquest from 1816-1819. From 1819 until 1830, Bolívar’s vision of a united New Granada became reality under the Constitution of Cúcuta and the name Gran Colombia. It lasted until 1830, when the various regions dissolved and formed autonomous nation states. One of them was the Republic of New Granada. In 1858, the nominally centralist republic, under the pressure of political realities, decentralized into the Granadine Confederation, and in 1863 formed the ultra-federalist republic of the United States of Colombia. Its constitution was the Constitution of Rionegro. Conservatives reacted to the liberal republic and established what is known as *La Regeneración* (regeneration). They imposed the 1886 Constitution that aimed at more centralization and founded the Republic of Colombia. Despite the centralization in its norms, *La Regeneración* could not effectively appease the country: small scale conflicts continued until end of the century and ended with the most dreadful internal bloodshed, the so-called War of Thousand Days and the secession of Panama. Peace and then prosperity only came with the reforms associated with General Rafael Reyes treated in the next section.

Not only the nomenclature of the various political entities is an indication of the imperfect monopolization of violence. During the 19th century, violent conflict was a constant throughout. For that time, Deas counts nine civil wars that “could claim to be national” (1830-1, 1839-42, 1851, 1854, 1860-2, 1876-7, 1885, 1895, 1899-1902) and another fifty local conflicts spread around the country (1997, p. 352 & p. 391). Bushnell combines civil conflict and coups as examples of acts of violence aimed at changing power at the national level and comes to a number of fourteen of such acts and events for

the 19th century (1993).²⁵ Regardless of the exact number of conflicts, the military of the central government remained very weak. In fact, only in the 1920s, was a general draft introduced in Colombia. As Tilly showed (1985; 1992), a weak military is directly related to the incapacity to tax citizens and Colombia was no exception to that rule. In 1871 Colombia's tax revenues remained at only half of what Mexico could raise at the same time. Moreover, post-independence was also marked by fiscal disequilibria between the different regions. Bushnell showed that some regions made use of their autonomy, but most "lacked the resources to do very much for either good or ill", since the central government kept the customs, the most lucrative resource, to itself (Bushnell, 1993, p. 126). For the most part, there existed numerous and confusing tax codes that resembled the interests of landowners and caudillos (López-Alvez, 2000, p. 102). To sum up, in the 19th century, Colombia's central government only exercised a very deficient monopoly of violence with a non-existent proliferation of public goods. Regions developed unequally and there was no generalized effort to increment development in the entire nation state. Development remained contingent on local politics.

As mentioned, explaining these deficiencies in state structure can take two routes: geography (Herbst, 2000) or the lack of external warfare negatively affected state building (Centeno, 2002; Tilly, 1985). Evidently, state building is much more difficult – in particular under the technological conditions of the 19th century – in a broken-up territory that stretches across multiple climate and ecological zones. 6000-meter high mountains and tropical rain forests made effective recruitment of armed men, raising taxes, and constructing ways of communication to build effective institutions difficult from its inception (Bushnell, 1993, p. 74). Another fact supporting Herbst's argument is that the Colombian territory was sparsely populated in the 19th century, thereby increasing the marginal costs of extending authority to frontier territory. In 1870 (sixty years after independence) only 2.6 million people populated the territory that is now Colombia. The major urban centers also accounted for a minuscule proportion of the general population. Bogotá and Medellín made up 2.5 percent of the population, while the figures in other primary urban centers around the same time (Cuba in 1877 stood at

²⁵ Osterling counts twenty-eight wars and sixty-three mini or regional civil wars. While the numbers may vary, the resulting analyses are in agreement that the abundance of internal conflict is testament of a weak institutionalization of the nation state (Osterling, 1989, p. 46-47).

21 percent, Chile in 1875 at 11 percent, and Venezuela at 7 percent) were much higher (Palacios, 2006, p. 2).

Despite the relative convenience of integrating Colombia with Herbst's argument, one facet of the geographical dimension of 19th century Colombia already points to more complex relations between geography and politics. The topography affected state building not only in that it made transportation and communication difficult. It gave, "each of the main population clusters of the interior a complete range of ecological zones" (Bushnell, 1993, p. 76-77). A complete range of ecological zones implies that each population cluster lived close to a complete range of crops and basic foodstuffs, providing incentives for autarchy and disincentives for trade amongst the clusters. This was a crucial asset for the autonomy each of these clusters exercised under the domination of a traditional leader. These traditional leaders are the nucleus of the party system that evolved soon after independence and dominated politics for the next hundred-and-fifty years.

Turning to the second line of reasoning. Centeno's explanation for state weakness in South America rests on the Tillian notion that states make wars and wars make states. In the South American context, the absence of external warfare meant that rulers were never forced to modernize the bureaucracy and social relations under their control. His arguments have many merits and provide several valuable insights. For example, an important observation he makes is that for Colombia and Chile the relation between internal and external warfare was exactly reverse: Chile has endured external pressure (and war) but enjoyed domestic tranquility, while Colombia has enjoyed international peace for more than hundred years, but "endured murderous domestic conflict" (2002, p. 67). What remains unclear is what came first: did archaic social relations mean that nascent states could not go to war with external enemies or did the absence of external war mean that archaic social relations survived undermining the effective centralization of authority?

Insights from Colombia's 19th century help unpack the argument. The only conflict that resembled an external war was the War of Independence with Spain. Its trajectory carried some of the seeds from which political instability followed, because the evolution towards the end leveled the playing field for other violent, private, actors to

consolidate their coercive capacities. As James L. Payne explains, the armed forces in Colombia lost in stamina at the conclusion of the Wars of Independence (1968). What became Colombia was liberated first resulting in the armed forces around Simon Bolívar to move on to other parts in Nueva Granada. Colombia was thus essentially demilitarized without a clear authority backed with coercive forces (p. 121; see also Centeno, p. 232). López-Alvez, too, reports that “mercenary troops could not find available employment on the payroll of the central government” with the consequence that those men fighting for a unified force “were absorbed by landlord party militias”. Thus, already in 1830, the central army was smaller than in Ecuador or Peru and by 1842 consisted of only five thousand men (Lopez-Alvez, 2000, p. 135; see also Maingot, 1969). In addition, demilitarization was accompanied by a burgeoning anti-militarism. The poor remuneration only attracted personal from the lower classes and contributed to banditry amongst those armed forces, making not only the career undesirable, but also tarnishing their reputation (Lopez-Alvez, 2000, p. 135; Maingot 1969; Centeno, 2002).

Topography and the absence of external war go a long way for explaining Colombia’s historical state weakness. Nevertheless, 19th century history has more explanations in store that help us understand the abundance of internal conflict. Buried in Centeno’s argumentation hides an explanation that provides additional insights into why neither centralization nor the projection of effective state authority materialized. He explains that internal wars never resulted in a clear victor and thereby always left the seed for the next conflict embedded. Most importantly, they did not produce solid or robust institutions, because most of the conflicts were resolved by exhaustion and compromise, resulting in frail equilibriums (p. 67). All of this begs the question: if no one ever won, who and what did Colombians fight for? The answer might seem perplexing, but most often Colombians fought over the party label. Hatred for followers of the other party became so ingrained that Colombian sociologist Eduardo Santa spoke of the party identity being attached to the umbilical cord (1964; Centeno, p. 67). A closer examination of the genesis and evolution of the party system shows that they performed crucial roles in a context of absent state structures and go a long way in explaining not only the violence, but also the extent of un-democratic socio-economic structures that uphold the party system. Most importantly, it shows that neither political nor social

cleavages can explain the creation of the party system, but rather the functional necessities of exercising political power.

Colombia's parties and their relation to the weak state can be best explained by clearing up some historical anachronisms. The first concerns the role of the liberators in Colombia. The separation into a Liberal and Conservative Party of Colombia is regularly attributed to the split in the liberation movement between Simón Bolívar and Francisco de Paula Santander. However, by the time either party formed in 1848, Bolívar and his followers had long disappeared from Colombia's political scene. Essentially after the failed Urdaneta dictatorship in 1830-31, they were pushed aside by Santander's triumphant return to power as president of the Republic of New Granada. Subsequently, Bolívar's influence lived on in discourse only. He died in 1830 and loyal followers of his never attained important positions in power. Also, constitutional designs for the most part followed the *Santanderista* imperatives of decentralization, federalism, and legal formalism. Valencia Villa, Colombia's most ardent critique of its historical constitutional legacy, argued that the old constitutionalist style was *Santanderista* and not Bolivarian (Bushnell p. 22; Valencia Villa, 2012, p. 112).²⁶ Crucially, the role each liberator played did not suffice to create deep partisan cleavages.

If the creation of the party system is central for understanding state weakness in Colombia, it is evidently prudent to turn to the theorists of party system genesis in Europe. As seen above, Lipset and Rokkan's (1967) articulation of the critical juncture framework was central in the Colliers' own design, which guides this analysis. The problem: the foundation of either party was not resultant from a social or particularly potent cultural cleavage, nor did either party reflect the socio-economic distinctions existent in 19th century Colombian society. Socially, the background of party leaders was not fundamentally different. On the contrary, they came from upper and middle-upper class families (Dix, 1989). Similarly, urban and rural masses as well as the whole range of social classes could be found amongst the *aficionados* of each party. In essence, both parties were cross-sectional in their support base and oligarchic in their leadership. The only point of distinction was the role each "party program" assigned to the Catholic

²⁶ Amongst the founding fathers of the Conservative Party were leaders such as Márquez and Mariano Ospina Rodríguez, who had supported Santander after his break from Bolívar and even took part in the foiled plot to assassinate Bolívar (Bushnell, 1992, p. 22-24).

Church, yet, all Colombians *were* Catholic, thereby also diffusing the cleavage potential of religion (Bushnell, 1993; Dix, 1989). It is thus not surprising that despite a relatively progressive, and normatively imbued discourse each party professed at times, they never implemented progressive policies. Whenever, the discourse became too subversive, elites changed their party allegiance and moved to the other side of the aisle without breaking off personal relations with the elites of the other party. Parties were essentially “mouthpieces of an order which accepts the principles of citizenship but is incapable [and unwilling] of applying them” (Palacios, 1999, p. 38-40; Valencia Villa, 2012 [1986]).

Rather than reflecting socio-political cleavages, parties fulfilled functional imperatives in a territory that lacked a clear generalized authority. Co-ordination amongst violent actors that have built their support on relations of dependence in a society marked by grave social inequalities becomes an imperative for dealing with collective action problems arising out of the exercise of political power. Already during the *Patria Boba*, factionalism split the territory up into different *Juntas* in the cities that were to become Colombia’s major urban center – Bogotá, Medellín, Calí, Barranquilla/Cartagena. There was not one central authority that was delegating, let alone dominating, these different centers of power. Rather, the country parceled off into different regions under the control of local regional militias and their corresponding strong men (Deas 1999; Palacios 1999 & 2006).

Without established central power, or a state in other words, these warlords had to rely on their own confines to resolve property rights and power issues amongst themselves. It was here, where the political parties played an important role, or more precisely the party label. Party affiliation helped to assuage the problems associated with the lack of a neutral force to resolve conflicts. Elites formed interregional alliances under labels – either the Conservative or Liberal Party of Colombia. As López-Alvez explains, “in the context of a weak army and a weak state, small-town and rural elites often sought the support of neighboring caudillos and their militias” (López-Alvez, 2000, p. 98). Rural Caudillos and urban politicians then began to understand that if they pooled their capacities together for electoral purposes and control of the territory in the rural regions, they could all benefit by “controlling and later dividing the spoils without really

threatening the stability of the system they came to dominate” (López-Alvez, 2000, p. 98).

The evidence for systems of patronage underlying the creation and evolution of the two-party system in 19th century Colombia is fairly robust. Qualitative historical studies (Payne, 1968, p. 123-129) as well as quantitative analyses of voter turnouts strongly indicate pre-modern patterns of electoral mobilization behind relatively high voter turnouts. Bushnell analyzed extra-ordinary high levels of voter turnout after universal male suffrage was introduced in 1856, ranging from forty percent in the first democratic presidential elections in 1856 up to hundred percent in some districts. He argues that such high turnouts are not only unlikely for any first democratic election, they are particularly uncharacteristic for a country with a very high illiteracy rate as Colombia had at that time. In addition, the turnout varied from region to region that shared topographical and socio-economic indicators (Bushnell, 1971; Bushnell, 1993, p. 115-116). All of this indicates that patrons mobilized their clients to go the poles and cast their vote based on their affection, not socio-political or even cultural interest.

There is more evidence that ties the party system and weak state structures together, because both evolved co-equally, in an inverse relation. As parties grew in importance, state structures became weaker and less independent from social forces (Buitrago, 1984). In the 19th century, parties were the main forces tying the loose nation together, but at the same time also responsible for political chaos and material destruction, because the Liberal and Conservative Party “were partly electoral and partly military organizations, with proportions fluctuating over time” (Mazzuca & Robinson, 2009, p. 287). As a consequence, when government power changed from one party to another, military superiority played the crucial role and not public policy or popularity. Parties fought out politics and never established institutions that would constrain them from retreating to the trenches to attempt to impose their interest over the other party.

Lastly, the legal discourse that evolved from the wreckages of 19th century inter-party warfare is also reflective of the socio-political interaction lying dormant beneath the propensity for conflict. It functionally served the stabilization of clientele relations rather than providing normative yard sticks for substantive claims of justice. When party factions fought each other in violent conflicts, they considered organizing the resulting

polity according to their own principles – usually differing on the issue of centralization or decentralization – the legitimate booty of those wars. The results of civil strifes in 19th century Colombia were that the victorious party imposed its constitutional project on the loosing side, such that the normative project brought along was the resolution to the previous conflict and at the same time the cause of the next. This becomes evident in the high number of constitutions in effect in the 19th century that often coincided with violent altercations (fifteen national constitutions between 1811 and 1886; Valencia Villa, 2012, p. 30). Thus, the discourse evolving from these *Cartas de Batalla* (battle charters; Valencia Villa, 2012) had to fulfill two functions in order to stabilize clientele relations: press factionalism below the constitutional level by providing remedies in the face of normative disappointments and assuage the tension resulting from high inequality paired with nominal, albeit highly fragile, democracy that never could provide a satisfactory level of public goods.

The resulting discourse became enshrined in the 1886 Constitution and is holistically known as the aforementioned *Viejo Derecho*. The first, and partially positive, consequence of its stipulations is the importance, and even supremacy, of legal arguments over political arguments. To this day, positions in public arguments must be supplemented with references to legal values and imperatives. Crucially, this is discursive and does not necessarily entail that the speaker must live up to her own utterances. It solely mandates that argumentation, even if driven by particularistic interests, has to be “dressed” juridically. In other words, legitimate arguments must take the *form* of legal arguments. Its downside is an overconfidence in the transformative capacity of law without addressing foundational socio-political grievances and practices, which often showed in a tendency to “change everything, so nothing changes”.

The second, and most central, ingredient of *Viejo Derecho* is its strict legalism and adherence to forms in interpreting constitutional norms. This is carried over from the liberators Bolivar and Santander (less so Nariño), who both were hugely influenced by French legal-political thought. The French legal tradition places a lot of importance on administrative law and the structural organization of the state resulting in the supremacy of questions of procedure and competence over substantive concerns involving rights of individuals or groups. The 1886 Constitution consecrated the supremacy of procedure

over substance by delegating rights to a subservient position within the civil code rather than giving them constitutional rank. Moreover, the formalism of the old Constitution made the principle of legality (“public actors are only allowed to do what the laws says they can do”) the central interpretive principle for solving legal questions, resulting in a legal immobilism (see below).

Together, these legalistic parameters of the *Viejo Derecho* were not only amenable to the exercise of social and political power, but directly contributed to the stabilization of socio-political inequality. Couching substance in the imperatives of legal discourse and the supremacy of formal aspects of legal interpretation splendidly serves the interests of those in power shielding them from claims of justice and equality. It consecrated a cult of order that Colombian colloquially describe in the idiom: “*La ley es para los de la ruana!*” (“the law is for those with the poncho”). The *ruana* is a Colombian poncho worn by the *campesinos*, meaning that the law is only applied to those of the lower classes and managed by the ones from the upper.

From this brief discussion on the genesis of institutions in 19th century Colombia, follow a number of observations that form the base line against which the subsequent sections will analyze the continuities and discontinuities of socio-political interaction in periods of institution building in the 20th century. As seen, public goods and their generalized distribution, above all security in the form of the monopolized means of violence, remained a rarity throughout the 19th century. Partisan caudillos and their accompanying militias, tied to their *domus* through patronage systems, fought each other over property claims and the nomenclature of the constitutional order. Resultant was an ineffective institutionalization of linkages between the centre and the peripheral regions in the Andean nation.

The process of nation building in the 19th century giving rise to these conditions is marked by three noteworthy and telling elements: 1) The created state bore faint resemblance to the colonial administration before independence. Under the colonial state, the central authority operated a considerable degree of autonomy and controlled the exploitation of export industries and tied important sectors of the upper class to its bureaucracy. After independence, the state did not exercise those functions, and the military played a significantly weaker role in binding the elite to the bureaucracy (López-

Alvez, 2000, p. 118); 2) While in Europe of the 18th century armed forces and the bureaucracy functioned as the levers to reach into rural areas, in Colombia, parties fulfilled this role. The party system constituted itself prior to the nation state with the result that said nation state never established a clear autonomy from the social forces dominating either party. The territory, for the most part of the 19th century, consisted in the conglomeration of pockets of regional rulers (who hardly differentiated between the private and public utilization of power), who in turn were tied together by party affiliation (López-Alvez, p. 101); 3) Patterns of nation building consisted in finding equilibriums between elites and their interest, thereby hollowing the hierarchical and impartial ordering of institutions. The result was a polity, in which elites sung the songs of liberalism and republicanism, but did very little to actually implement their normative imperatives as public policy. This is behind what Palacios termed the genuine “disencounter” with liberalism in New Granada (1999, p. 24).

For the purposes of this analysis, these observations result in the following features of the methodological baseline against which subsequent sections inquire the profundity of change at important institutional junctures. The genesis of the “two-party state” coincided with the establishment of what Colombian sociologists and historian termed the period of traditional clientelism, in which webs of patronage formed around natural leaders, who extended their interest into and parasitically lived off the formal political institutions. As explained above, clientelism involves the exchange of non-comparable goods or services in affectionate relations between unequals. As a consequence of the underlying, archaic, and un-democratic social relations, Colombia’s political system suffered from a discrepancy between appearance and being. While formal institutions, on the surface, took on a very progressive arrangement and were coupled with a fairly progressive and liberal discourse, the socio-economic reality was different and never lived up to the promises of party ideologues. Two features reflect the clientelistic disposition of the Colombian polity. Firstly, parties were cross-sectional in leadership and following. Socio-economic elites dominated the leadership in both parties, while lower classes populated the followers, reflecting the membership of their patron. Secondly, the normative expectations, which in the context of political institutions that left very little space for meaningful socio-political change must result in disappointment,

are restrained through a specific legal discourse. It became known as *Viejo Derecho* and is most centrally focused on legalism and formalism in the interpretation of constitutional stipulations at the expense of rights protection. Such legal discourse was amenable to the exercise of socio-political power in a context marked by high social inequality, because actors with access to power legitimized their position with reference to the supremacy of the legal order. It effectively and discursively shielded elites from the force of social conflict.

2.4. The interregna of Gen. Rafael Reyes and Gen. Gustavo Rojas Pinilla: consociationalism and institution building under military tutelage

With the base line in place and the methodological framework of the critical juncture fine-tuned to accommodate an N=1 case study, this section turns to potential junctures inside of Colombia's history. This proposes to counteract the "analytical equivalence problem" of comparative-historical research that often surfaces when comparisons are made between cases that differ to such a degree "as to undermine the idea that it really involves the *same* critical juncture" (Collier & Collier, p. 31; original italics). Evidently, we reduce the problem to compare apples with oranges, when contrasting specific periods within Colombian history that are marked by similar processes of institution building. However, this raises the issue of not satisfying the imperative to observe the critical juncture in "different ways in different cases" (Collier & Collier, p. 31). These cross-sectional observations required in the critical juncture framework are served by contrasting the continuities and discontinuities in specific sub-systems. I will therefore hold the subsystems constant in the analysis of each case to warrant intelligible comparative data. Section 2.4 will look at the reforms associated with General Rafael Reyes and the reforms that established the National Front governments, analyze the appearance of cleavages prior to institutional engineering, detail the political interaction during the juncture, and contrast the outcomes to evaluate the profundity of change induced during the juncture.

The analysis of both reform periods will show that reformers responded to crises that essentially consisted of infighting between the Conservative and Liberal Party, which

eventually escalated to civil war proportions. Neither violence was definitely rooted in a deep social or cultural cleavages, but rather followed because of the inability of elites to compromise and strike deals that satisfied the entire range of either party's membership and leadership. In both instances, high levels of internal violence signaled to elites that the original political arrangement was insufficient for containing the clashes of interest and identity between them. This resulted, in both cases, in an elite-driven and controlled process of institutional reform, which eventually established a new arrangement, giving each party significant say in the path future politics were to take. Eventually, these arrangements, too, were insufficient in containing pressures on the political regime, opening a new round of violence and, eventually, institutional engineering. Most importantly, reforms in 1910 and 1957 conserved forms of clientelism by placing them on a more stable *formal* institutional setting without fundamentally altering the underlying socio-political interaction. They followed a very similar trajectory of creation, evolution, and eventual collapse, and stand in sharp contrast to the constituent process in 1990-1992, when social movements and constituents strayed off the beaten path of institution building in Colombia. First, though, I will lay out aforementioned trajectories in more detail. It is noteworthy that judicial institutions, which were implemented to provide guarantees in an uncertain future – thus following an elite logic – had somewhat contradictory results, because they opened up small paths of contestations to every citizen.²⁷

²⁷ My interviewees suggested these reforms as the most important predecessors of the 1991 Constitution in regards to judicial independence and autonomy. This includes first, second, and third order observers. See Appendix C for explanation of this distinction. For example, subject no. 8 (Constitutional Court judge) argued that the reform from “1910 created the *acción de inconstitucionalidad*. [It] gave the Supreme Court the competence to examine the constitutionality of the laws and if they had the legitimation of the Constitution. This was a very important step”. Additionally, he argued that “the implementation *cooptación* in the selection of the judges of the Supreme Court by the Consejo del Estado in 1957 resulted in a higher degree of autonomy of the judicial body. These two actions, the control of constitutionality, and the relative autonomy of the judiciary, were very important antecedents of the Constitution from 1991” (Interview, May 17, 2013). I will explain the details of co-optation and the *acción popular de inconstitucionalidad* in this section, but it appears that subjecting the legislature to judicial review potentially initiated by every citizen induced certain degree of *publicness*. As such, while institutional analysis of the reforms and their consequences regarding the executive and the legislature permit formal modeling methods, the publicness induced by judicial institutions is much more intelligible with theories akin to chaos theory than the Nash-equilibrium. Most importantly, the judicial reforms in 1910 implemented a right to contestation and justification that every citizen could exercise against any law passed by Congress.

2.4.1. Cleavages and crisis: the political origin of the Thousand-Day-War and *La Violencia*

As the first section detailing the historical context taken over from the 19th century made readily apparent, identifying the origins of conflicts in Colombia is a difficult task, because socio-economic grievances constantly interacted with political contentions, blurring the lines between them (Bergquist, 1992). The instances of institution building analyzed here are no exception to that. In either case, socio-economic relations were strained by either the sharp decline in coffee prices prior to the Thousand Days War (Bergquist, 1986) or the disappointment of the mobilized working class before the breakdown of order in 1948 (Collier & Collier, 2002). At the same time, political interactions between elites in both cases reached impasses that could not be assuaged by the existing institutional set-up and eventually resulted in violent escalation. Given the constancy of social inequality beneath the political arrangements that reaches back to the 19th century, I argue that these junctures were not reflective of particularly crisis prone cleavages, but the failure of intra-elite interaction. This becomes even more apparent, once we turn to the changes in the 1980s, when we see signs of a very profound cleavage crevassing to the surface.

Amongst the numerous violent, internal conflicts that pave Colombia's history, the Thousand-Day-War (1899-1902) and the period simply known as *La Violencia* (The Violence; 1948-1953) take the ranks as the bloodiest. In the end, the Thousand-Day-War is estimated to have cost 100,000 lives and *La Violencia* 170,000 (Hartlyn, 1988, p. 20 & p. 44; this is a conservative estimate, others go as high as 400,000, Sánchez & Meertens, 2002). The Thousand-Day-War had another debacle in store for Colombians with the secession of Panama, when the United States took advantage of the internal turmoil within Colombia and protected a secessionist movement in Panama in order to get the Panama Canal built under favorable conditions.

Conventional Colombian historiography viewed the origin of this conflict in the alterations of demand for Colombian products. In the case of the Thousand-Day-War, the fall of coffee prices resulted in a deep depression that lasted from 1898-1910 (Bergquist, 1986 & 1992). Additionally, fighting always broke out in areas of the country that were

most deeply affected by the fluctuations in international demand for its products. Together this seems to suggest that socio-economic strain resulted in conflict (Safford & Palacios, 2002). However, there is more to the story that makes the picture more complicated and suggests that economic strain itself resulted from politicking between factions of both parties.

Colombia's most violent conflict in the 19th century was not only preceded by socio-economic pressures resulting from the fluctuations in commodity prices and straining of rents collected from exports. The breakout of fighting in October 1899 also "confirmed the saying that war is the continuation of politics by other means", because factions in each party produced dynamics that moved the country irreversibly down the road to war (Safford & Palacios, p. 249-250). Mazzuca and Robinson found that the beginning of the violent clashes can be traced to a dysfunctional political framework that permanently excluded Liberals from power and representation, and aggravated the economic crisis by using public funds for the suppression of opposition contestation, rather than assuaging its effects and allocate funds for productive investments. "Economic turmoil was" therefore "an indication of the impact of political conflict on the growing fiscal crisis and the associated monetary expansion of the 1890s" (p. 307). In other words, socio-economic tensions always persisted and were compounded to crisis proportion by the failure of political institutions to coordinate between factions and utilize public funds to countercyclically soften the effects of fluctuating world prices in key export commodities.

During the 1890s, both parties split into more and less radical factions. On the conservative side, Nationalists and Historical Conservatives disagreed on the rigidity of centralization and importance of foreign trade, while the liberals divided into two factions around the old Radical oligarchy (more radical in name only) and a younger more bellicose faction, called the *Nuevos*. Nationalists and young Liberals vehemently opposed one another, while Historical Conservatives and the Radical oligarchy of the Liberal Party were more peace oriented due to their shared commitment to foreign trade (Safford & Palacios, p. 250). On top of the factionalism existing in each party, the institutional framework additionally aggravated the political situation by strengthening the more radical faction on each side. Mazzuca and Robinson detail two specific innovations after

the Conservative victory in 1885 and the passing of the 1886 Constitution that essentially sidelined Liberals to political obscurity. Firstly, they depleted Liberal influence at the regional level by implementing appointment of Governors as a recentralization mechanism and, secondly, utilized extra-ordinary powers granted through Law 61 of 1888 to “unilaterally ban or repress political activities that the president himself considered ‘offensive of public order’” (2009, p. 293). Increasingly frustrated by the delegation to political irrelevance, Liberals issued appeals for more equality before the law as thinly veiled demands for a better and more equitable access to power. They even succeeded to convince the Historical faction of Conservatives, but to no avail. Nationals dominated the Senate and quashed all hopes for electoral reform that would have allowed Liberal minority representation in Congress (a point that will later be picked up as a mechanism to ensure peace; Mazzuca & Robinson, 2009, p. 295-296). As a consequence, the younger Liberals rebelled in October 1899 setting in motion a familiar escalation pattern: the central government issued civil and military authority with the power to decree loans to governors, who used that power to force affluent Liberals to contribute funds. This reinforced party identity and “divided Colombian along party lines more than along those of socio-economic classes” (Safford & Palacios, p. 250). For the next three years, Colombians fought each other along those party lines, resulting in the most ensanguined internal conflict Latin America had seen yet.

As in the prelude to the Thousand-Day-War, the years prior to the period that Colombians simply term *The Violence* (*La Violencia*) were also marked by socio-economic tensions that surfaced with the mobilization of the working class. At the same, however, political institutions were not only inept to incorporate lower class demands, but contributed to the radicalizing dynamic by pushing party factions towards conflict with one another. Furthermore, the surfacing of socio-economic tensions to the formal institutional level was resultant of political reforms that were initiated from within the established political parties. The incorporation period that the Colliers trace to evolving linkages between organized labor and the Liberal party in the late 1920s received a catalyst through the introduction of proportional representation in 1929. Liberals around Senator Luis de Greiff campaigned for its introduction and succeeded in their endeavor by providing support to a Conservative candidate, Alfredo Vásquez Cobo. Vásquez

presided over a faction within the Conservative Party that had split into two opposing blocs prior to Presidential elections in 1930 (Mazzuca & Robinson, 2009, p. 307-308). The concession by the Vásquez Conservatives to Liberals angered the rest of the Conservative bench, who decided to run a candidate on their own. As a result, the Conservative vote in the 1930 election was split between the two candidates, Guillermo Valencia and Alfredo Vásquez Cobo, giving Liberals the opportunity to retake the presidency with 44.9 percent of the national vote (the Conservative candidates received 29.2 and 25.9 percent respectively). The Colliers, too, argue that the incorporation period began with this electoral victory that propelled Liberals to power for the first time in half a century (2002).

Late in comparison to other countries, the incorporation of labor came “early in relation to the development of the Colombian labor movement” (Collier & Collier, p.271). As a result, workers were neither essential for winning the majority of votes (but rather an asset), nor did they exercise crucial electoral control. Additionally, the Liberal Party, in contrast to other incorporating parties the Collier studied in *Shaping the political arena*, was not specifically founded by workers to bring labor into the formal political system, but was itself an old traditional party with roots in the 19th century. These two factors combined to produce the crisis that resulted in the bloodshed of *La Violencia* by developing a dynamic that split the Liberals into two factions. The core of the incorporation period consisted in the *Revolución en marcha* (Revolution on the March); the relatively modest New Deal type policies of President Alfonso López Pumarejo (Collier & Collier, 2002, p. 305). The radical wing, which would eventually turn to labor lawyer Jorge Eliécer Gaitán as their leader, wanted to continue on the path and push for farther reaching reforms, while the more moderate wing, backed by the landowning oligarchy amongst the Liberal ranks, already considered the López reforms as too extreme.

At the end of the 1930s and the early 1940s, the internal divide inside the Liberal Party escalated and provided the Conservatives with an opening to regain power. While Gaitán was capable of coalescing wide public support behind his leadership, the moderate wing moved towards the Conservative Party. The Conservative Party had not run candidates since the 1934 elections, but, motivated by the Liberal split, returned to the

polls. Moreover, goaded by the populism of the Gaítan wing, former President López moved to support the moderate Conservative candidate Ospina, who was elected to the presidency in 1946. The proclaimed unity government between moderate Conservatives and Liberals could not prevent the Gaítan wing from controlling the Liberal bench in Congress, which announced him as their candidate for the 1950 presidential elections. As the Liberal split deepened, Conservatives began to violently retake control of the state at the regional level, transforming the intra-party conflict into an inter-party collusion. As a consequence, the coalition between moderates on both sides of the aisle collapsed, and after Gaítan's assassination in April 1948, order broke down entirely: first in Bogotá and then in the entire country. In November 1949 the Conservative Gómez was elected president unopposed and "with the exclusion of Liberals from all areas of government, both national and regional, the institutional breakdown was complete" (Collier & Collier, 2002, p. 312). As in 1899, elite politics as conversation among gentlemen failed, resulting in a drastic escalation of violent conflict.

Together, the preludes to the descents into lawlessness and infighting in Colombia in the 1890s and 1930/1940s show remarkable similarities. While it is true that socio-economic tensions – as always in Colombia – bubbled beneath the formal institutional level, it was political intransigence that resulted in the crises that could no longer be contained by the political framework. The majoritarian electoral system of the 1886 Constitution propelled Conservatives to power and ensured their dominance in national politics. They utilized their position to further marginalize Liberals from the exercise of power – including at the regional level – and set the incentives of the political system to confrontation. As Bushnell explains, "in a two-party system, in which parties have existed long enough for their followers to develop strong attachments to them, the strength of party loyalties when added to the natural advantages of incumbency makes a government almost impossible to dislodge unless the ruling party itself becomes irrevocably divided" (Bushnell, p. 18). Prior to the institutional juncture that followed the Thousand-Day-War, the situation escalated not as a consequence of external pressure – even if the economy felt the strain placed upon by falling commodity prices – but rather as a consequence of an escalating dynamic that evolved from within.

Contrasted with cross-sectional cases, the Colombian political evolution in the 1930s and early 1940s displays a crisis and critical juncture that is rooted in macro processes of incorporation in the world economy, creation of an urban working class, and mobilization of a labor movement. If placed in the context of its own history, the process in the 1930s reveals familiar patterns that have previously destabilized the country beyond the brink of civil war. Underlying social relations, attached to formal institutions, stood in the way of creating avenues to properly change the political interaction and giving voice to lower class demands. This resulted in a dynamic, in which political elites meandered between factions and coalitions, effectively destabilizing the formal political system to the degree that war as other means of politics became the only way out. It is difficult to assess that in either case a particularly potent crisis evolved from the antecedent conditions, brought about by an external catalyst. Rather, internal, political maneuvering creating unintended consequences that paved the way for civil war.

2.4.2. Political junctures: institutional engineering under and after General Rafael Reyes and the National Front pact

Since the ineptitude of the political system to facilitate interaction amongst elites and incorporate conflict resolution mechanisms to make the voices of subaltern classes heard stood at the beginning of the Thousand-Day-War and *La Violencia*, institutional engineering to overcome the tensions between the two traditional parties was sought as the panacea to the bloodshed ravaging Colombia. Moreover, when looking at the specific junctures of institutional building, we will quickly face the peculiar role the military played at important intersections of Colombia's history. While in the rest of the continent, generals violently placed themselves on the pedestal of power resulting in years of authoritarian rule, Colombia's armed forces refrained from taking over the government for prolonged periods and only in these instances, for brief periods, gained the seat of the presidency. These periods of military rule were very different from the authoritarian bureaucratic regimes elsewhere and involved a number of reforms that assuaged problems of civilian rule that had become evident in prolonged periods of violence. In the end, the generals returned power – not entirely voluntarily, but without the use of violence or widespread civic activism – to civilians, and civilian rule continued

on its path. The analysis will reinforce that the appearances of the crises was reflective of political impasses rather than profound social or cultural cleavages. New intra-elite pacts, facilitated by military rule, mended fences and stabilized the informal system of clientelistic relations conjoined to Colombia's formal political institutions. All of these processes reflected an elite-driven logic and the implemented frameworks satisfied elite exigencies, rather than bowing to genuine civic activism and popular demand.

The governments of General Rafael Reyes, in power from 1904 until 1909, and General Rojas Pinilla, in power from 1953 until 1957, were the closest cases of dictatorial rule in Colombia. Yet, their ascendance to power as well as their demise from rule was anything like the rise and fall of other military dictators in the bureaucratic-authoritarian regimes in the Southern Cone. General Reyes had built up his prestige in the civil wars of the late 19th century and was nominated for the presidency by the Conservative Party. Rojas Pinilla was “essentially thrust into power in the midst of *La Violencia* by a segment of the Conservative Party and elements of the military” (Hartlyn, 1988, p. 48). Neither General utilized the armed forces to push himself into the seat of the presidency against the will of civilian politicians, but were invited by forces within the formal political establishment, who reckoned putting an end to fighting required a neutral arbitrator. Even though both developed a taste for what Latin Americanists term *continuismo*, trying to overstay their welcome, the same forces of the political elite facilitated peaceful exits from power. General Rafael Reyes stayed in power until 1909, when he was dislodged by a coalition of partisans from both parties (Solaún, 1980, p. 3; Esguerra Portocarrero, 2012, p. 84). Favoritism and corruption was eroding Rojas' position in power in May 1957. His last attempts to hold on to power and arrest the parties' presidential candidate, Valencia, resulted in wide spread demonstrations by students, bankers, and industrialists. To be sure, the demonstrators did not come from the popular classes as for example in 1948. Rather, they were instigated by industrialists and banks, which later assured labor support. In addition, support amongst the military for General Rojas was also waning, in part due to the corruption and for fear of their own role if they were to position the armed forces against a “civic front” (Hartlyn, 1988, p. 58-59). He then nationalized banks, disallowed interest and convened a constituent assembly to approve his re-election, but all in vain: a five man military junta was placed in charge and Rojas fled into exile, while

representatives of each party negotiated the terms of the National Front. Rojas later returned to Colombia, formed the populist ANAPO movement, and ran in the 1970 presidential election. Supporters of Rojas claimed that only electoral fraud ensured the National Front candidate, Misael Pastrana, to win the competition, and dubbed it the “theft of the elections”. The M-19 guerrilla movement traces its origin to this episode.

The way that institutional reforms were instigated also bore surprising similarities that reflected elite control of the processes. The bi-partisan movement to dispose of Reyes in 1909, the *Partido Republicano*, never consolidated the idea of establishing a new party. It did, however, institute a constituent assembly to overcome the partisan and factionalist tensions that had fuelled internal conflicts and civil wars. Crucially, the republican movement did not root its support in a mass movement, but sought its support from merchants and industrialists, and as Hartlyn asserts, largely “foreshadowed the National Front” (1988, p. 27). The disposition of General Rojas in 1957 opened the door for bi-partisan negotiations. While the military junta took over the daily affairs in Colombia, representatives from both parties came together and finalized negotiations that had commenced in 1956 in the city of Benidorm. The final pact was signed in Sitges in July 1957 and it contained the most important parts of the National Front, under which Colombia was governed until 1974 (officially). One minor difference between the constitutional reforms of 1910 and the National Front reforms was that the latter were placed to the people for ratification (post-factum) in a plebiscite. Nevertheless, in neither case the popular classes nor civil society were involved in the negotiations that set up the institutional arrangement. As will be shown below, this is a crucial difference to the origin *and* negotiations of the constituent assembly that wrote the 1991 Constitution.

As explained at the outset of this investigation, the critical juncture framework necessitates cross-sectional comparisons, which this inquiry will satisfy by focusing on sub-systems within the Colombian case. The institutional changes implemented in each instance of institutional engineering involved the legislature, judiciary, and, in the case of the National Front, also the executive and bureaucracy. As both are examples of consociational agreements, they aimed at securing the representation of each party in the most important national institutions, with the National Front going further than the 1910 reforms. General Reyes had already embraced a form of minority representation in the

armed forces, encouraging Liberal families to send their children to the armed forces (Bushnell, 1993, p. 156). The national assembly incorporated the principle of minority representation for the electoral system and replaced the majoritarian vote of the legislature with the incomplete vote, thereby assuaging the antagonizing effects of the old electoral regime. The caveats of the incomplete vote is that the first and second position in a given election are still at stake, but the relative institutional power that results from those elections is pre-established. It assigns fixed portions to the winner and the follower up, not conditioned by the actual popular vote (Mazzuca & Robinson 2009, p. 289). This guaranteed the Liberals a greater share of representation in Congress, even when the Conservative retained control of the executive until 1930.

In terms of mutual guarantees, the National Front agreement went further than the bipartisan reforms at the beginning of the century. It contained compromises such as the acceptance by the Liberals that the Catholic Church is centrally mentioned in the documents detailing the agreement. Of more practical and political importance was the institutionalization of parity and alternation in Colombia's bureaucracy and political institutions. Previously elected offices were depoliticized and alternated between the two parties. Congressional elections were constrained and depoliticized: neither party was allowed to attain a majority in either of the two chambers.²⁸ Parties in Congress would then agree on a candidate to be elected as President, alternating between each party. Finally, equal share of representation was extended to most public offices save for the military. In the civil service, restrictions on political activities of government officials were imposed as well as prohibitions against political discriminations in hiring practices.

In both instances, during the Reyes Reforms and the National Front agreement, judicial institutions also underwent significant reform. In this case, the 1910 reforms introduced much more fundamental and consequential institutions. While the Supreme Court had existed prior to the reforms, the 1886 Constitution did not place a lot of value on the question of constitutionality of laws and heavily involved both, the executive and the legislature, in investigating claims of such nature. The 1910 reforms were to change that dramatically and introduce an unprecedented *novum*. While the US had seen the principle of judicial review implemented in the famed *Madison vs. Malbury* decision, the

²⁸ See Article 2 of the pact of Sitges, cited in Mauricio A. Plazas Vega. 2012.

Colombian reforms made it a quintessential citizens' right to have the Supreme Court test the constitutionality of laws. The aptly called *acción popular de inconstitucionalidad* (popular action of unconstitutionality) anticipated Hans Kelsen's introduction of a similar *acción* in the Austrian Constitution after the conclusion of World War I, which marked the beginning of constitutional control by an independent court in Europe (Esguerra Portocarrero, 2012, p. 107; see also Cepeda Espinosa, 2007, p. 17; Mendieta González, 2010, p. 72).

The *National Front* reformed the selection of the Supreme Court magistrates. The crucial caveat was contained in Article 12. It stipulated that judges of the State Council select the replacements of vacant positions on the Court, fully depoliticizing the selection process. In Colombia, this is referred to as *cooptación*. While it has been lamented that this has resulted in a form of institutional corporatism undermining meritocracy in the legal career, it is without a doubt true that it significantly increased the independence of the judges and the corporate body itself.²⁹ In comparison to the reforms at the beginning of the century, these reforms increased the independence of the judges, while those at the beginning propped up the authority of the Court and eased the access to that institution. It is important to note, however, that establishing independent judicial institutions does not contradict the elite driven logic of the processes. On the contrary, as Finkel showed, they can serve as a political insurance mechanism in times of uncertainty (2008). This holds also true in this case (Hartlyn, 1988). Conspicuously, rights and the protection thereof did not play a more significant role in either instance, but would feature very prominently in the 1990 constituent process, reflecting the popular origin of the movement instigating the reform process.

2.4.3. Consociationalism and its discontent: political stability at the cost of democratic quality

To gauge some of the legacy effects of each reform period, it is useful to incorporate the immediate trajectory following each pact into our analysis. There are some evident

²⁹ Notably, it was from this moment on that the Supreme Court, which later incorporated a *Sala* specifically tasked with review of constitutional reform and the constitutionality of laws (*Sala Constitucional*), played an increasing role in preventing constitutional reform (for better or ill; see Cajas Sarria & López Medina, 2010).

accomplishments that institutional designers could flaunt as their successes. Particularly the absence of violence and the creation of economic growth and development count as the most central achievements. Eventually, however, in line with the elite logic of each process, development expired and the problems of lower class disenfranchisement, political exclusion and immobility resurfaced. The processes dealt with specific, political contentions, and the solutions imposed reflected the actors present at the negotiation table. As a consequence, the implemented institutional remedies could solve the issue of intra-elite intransigence, but did not provide deeper resolutions to issues pertaining to fundamental citizen rights and their participation in democracy.

The most important successes of both reforms were the noticeable decline of violence. After the reforms of 1910, internal violence all but disappeared from Colombia and the reason is causally linked to those reforms. Politics in the independent republic had favored power monopolization and thus “forced the opposition into revolutionary tactics and the government into violent repression”. Not least, this was epitomized in the electoral system, which had favored power monopolization. The assurances implicit in the incomplete vote sufficed to switch the incentives from confrontation to accommodation (Mazzuca and Robinson 2009, 286-289; see also Maya Chaves, 2012). The statistics regarding violent deaths after the conclusion of the National Front make readily apparent that the consociationalism in that instance achieved its primary goal of appeasement, too. From the average of 25,000 deaths per year during *La Violencia*, deaths per year for the first years of the *National Front* (1957-1961) reduced to 3,600, 5,243, 3,243, 2,631, and 2,868, respectively (Garcia Villegas, 2001, p. 318). The last vestiges of violence were contained to the countryside, where the first guerrilla movements started to form and then consolidate.

Not only did both consociational agreements consolidate a more peaceful national environment, they also provided a context conducive for economic and administrative development and even selective modernization. The epoch commencing with the Reyes reforms is opportunely termed the Coffee Republic (Safford & Palacios, 2002, p. 266). At the time, Colombia’s economy experienced an unprecedented boom through its incorporation into the world coffee economy and challenged Brazil’s uncontested position at the realm of world trade (Bergquist, 1978; 1992). The numbers are indeed

impressive. The export economy grew between 1910 and 1920 by a rate of more than ten percent a year. In 1898, before the disruptions of the Thousand Day War, coffee stood at almost half the country's foreign trade. By 1924, it constituted 80 percent of exports and, in total numbers, grew six-fold from 1896. Not only coffee production grew in Colombia. Other industries that sprung up and consolidated growth were the textile industry in Medellín, beer brewing in Bogotá, petroleum industry in the Magdalena Valley and Barrancabermeja, and fruit plantations in the Santa Marta region of the Atlantic. Infrastructure, too, developed, and, although not matching the *Porfiriato* in Mexico, state builders could flaunt a significantly expanded railway and highway system (Bushnell, 1993, p. 170-180).

As with the Reyes reforms, the *National Front* arrangement also provided a context, in which economic development could flourish. Notably, this occurred even though the coffee bonanza was coming to its conclusion following the decline of world prices (Hartlyn, 1988, p. 111; Palacios & Safford, 2002, p. 276). Despite relatively negative external conditions, Colombia experienced an average GDP growth of 5.15 percent per year from 1957 until 1981. In contrast to most other South American countries, it did so by following “moderate” and “eclectic” economic policies, refraining from “pendular” patterns followed by Argentina, Chile, and Peru at the time (Hartlyn, 1988, p. 103). The regime focused on key macro-economic variables and abstained from populist politics at the national level.

The state and its bureaucracy also underwent some modernization and capacity increases under the *National Front* arrangement. By eliminating struggles for control of the state, consociationalism permitted both parties to benefit from the spoils of a more functioning state, thereby allowing its capacity to develop. Crucially, though, this strengthening was selective, because it was contingent on the support of key elites – most notably the President. If he made it his prime focus to develop state capacity, advances could be made in the area of state planning and executing developmental strategies. The most important political figure associated with such policies was Carlos Lleras Restrepo, in power from 1966 until 1970. From 1960 until 1970 public spending as part of the GDP grew from 16% to 31% (Hartlyn, 1988, p. 127; see also Bejarano & Segura, 1996). Despite these progresses, the selective nature of this development already indicates the

constraints imposed by the nature of the regime; namely its embeddedness in patronage-systems.

When we take a more long-term perspective on these consociational deals, one pertinent deficiency, evident in both cases, becomes readily apparent: the new institutional set-ups never addressed socio-economic inequities and uneven access to power. On the contrary, both arrangements conserved the socio-economic status quo and shielded it from radical transformations. In comparison to other South-American states, which degenerated into bureaucratic-authoritarian regimes, Colombia might have appeared as a viable, and relatively democratic, alternative between radical revolution and reactionary authoritarianism. Yet, its underlying informal institutions were far from supremely democratic. They built on what Acemoglu and Robinson termed “extractive institutions” and as a consequence never created sustainable conflict mechanisms to contend with collective action problems. Extractive institutions, in contrast to inclusive institutions³⁰, prevent what they dub “creative destruction”, by shielding political elites from change. Consequently, economic development that rests on extractive institutions must inevitably expire (Acemoglu & Robinson, 2012, p. 76, p. 377). The trajectories of Colombia’s political regime from the beginning of the 20th century until 1948 and then again after the National Front seem to confirm Acemoglu and Robinson’s institutionalist hypothesis.

The reforms of 1910 and 1911 did not aim at establishing democracy, but at institutional re-accommodation. Conservatives at that point simply traded more political power for political stability, or, as Martz observed, the system ensured some “patronage and material benefits” for the Liberals, “while the Conservatives retained for themselves the lion’s share of power and privilege” (Martz, 1997, p. 48). Minority representation was not pushed upon elites by the masses, but rather developed as a “means for elites to share power among themselves in a way that would avoid infighting” (Robinson 2013). Above all, the constitutional arrangements were based on, and intended to prolong, the

³⁰ They argue that inclusive institutions allow and encourage participation by the great masses of people in economic activities in order to make use of their talents for the good of society. To be inclusive, institutions must feature private property, an unbiased system of law, and a provision of public services providing a level playing field. It must also permit the entry of new business. In their account, in particular the latter carries the potential for creative destruction, which in turn poses an inherent risk for elites of the status quo (Acemoglu & Robinson, 2012, p. 75).

“exclusion of the majority from political life”, delegating the masses not only in politics to a subservient role, but also in terms of social, economic, and cultural leadership (Dix, 1967, p. 78). The coffee economy, too, played its part in prolonging elite rule. It had a very “conserving effect on society”, in that rural masses were more willing to accept elite leadership. This included the capitalist order as well as the Liberal-Conservative control of politics (Bushnell, 1993, p. 174). Conversely, sinking prices resulting from the world depression created a regime-antagonizing dynamic.

As we have seen, Colombia’s consociational arrangement showed signs of friction and fracture in the 1920s when “issues of class conflict and the new ideological positions posed by the emergence of an organized working class” emerged (Collier & Collier, 2002, p. 313). During the coffee bonanza, peasants had taken up loans to invest. As prices decreased during the Great Depression, they were increasingly exposed forcing them from their lands. Intense urbanization meant that economic depression would be felt in city centers and not far away in the periphery (Dix, 1967, p. 79-80). Liberals wanted to exploit this and build ties with the urban working class. They gained power, however, not because of greater electoral sway, but because of a political schism within the Conservative Party. It gave the Liberals the executive the first time in over fifty years, inaugurating the incorporation period. Despite rather modest New Deal type policies, integration eventually failed due to the cross-sectional nature of the incorporating party, the Liberals. Its regional bosses had tight control over rural peasants and when policies were becoming increasingly progressive in the 1930s (to satisfy workers in urban areas), it alienated exactly those regional bosses, creating a rift within its own rows, which the Conservatives benefited from to regain power in 1946. The oligarchic nature of political elites, the anchoring of political parties in the regions, and most importantly, the cross-sectional composition of both parties, meant that neither party could develop functional ties with the working class movement (particular unions), without offending an important part of their constituent and party elite (Collier & Collier, 2002, p. 300-313).

The Consociationalism of the National Front, too, eventually succumbed to crisis, resulting from immobilism, lack of popular responsiveness, and policy incoherence. At the root: patronage systems in the periphery. From its very beginning, the political set-up of the National Front had contradictory effects. Political leaders pursued three principle

goals: generate popular support for the agreement, defuse interparty conflict and prevent political alternatives outside the initial agreements from taking root (Hartlyn, 1988, p. 148). However, parity and alternation in power were in fact disincentives for generating high voter turnouts, but the existence of factions within the two parties that were opposed to the agreements as well as alternatives outside of it (for example Rojas Pinilla's ANAPO movement) meant that every election was essentially a plebiscite on the legitimacy of the agreement itself.

The dreaded immobilism and policy incoherence would surface as a consequence of party leaders' peddling to both sides: they "continued to collaborate in government and simultaneously attempted to serve as political opposition" (Hartlyn, p. 148). Caught in this constant limbo, national elites increasingly relied on patron-client and brokerage ties to consolidate their electoral position. This gave regional power brokers in the party an additional boost in political significance. Thus, the National Front could never address the grievances that were at the root of political instability in the first place: social inequality (particularly in rural areas). Failure of land reform under the agreement illustrates this well. Both parties had peasants amongst their followers, but also landowners amongst their bosses. When Lleras Restrepo attempted only minor land reforms, power brokers from the Caribbean coast prevented it, because landowners made up the most part of the party elite there (Gutiérrez Sanín, Acevedo, Viatela, 2007, p. 20).

In the end, the pacted return to democracy ensured "greater consolidation and unification of Colombia's ruling elite in comparison to the 1940s". However, by depoliticizing and demobilizing society,³¹ it also left "the way open for the potential emergence of competing, anti-regime forces" (Collier & Collier, p. 667; Hartlyn, 1988, p. 84 & p. 156). As long as Colombia travelled in relatively safe waters, these anti-regime and anti-state forces could be contained to small skirmishes in the countryside. Once the

³¹ Active opposition outside the two parties was mostly outlawed and often addressed with coercion. Participation in presidential elections reduced from 56 percent of eligible voters in 1946 to 36 in 1966 (Dix, 1967, p. 162). Even when it rebounded somewhat in the 1970 and 1974 elections (Losada, 1980, p. 87), this was mostly due to the two parties regaining their capacity to mobilize their clientele (Hoskin, 1980, p. 109). As Dix states, "most opposition conformed to the traditional patterns of Colombian oppositions in their essentially factional nature and in their tendency to reintegrate" (1980, p. 164).

international drug trade started to infect Colombia's society, the situation began to dramatically unravel.

2.4.4. Pacted democracy in Colombia: building institutions shielded from public pressure

The review of important junctures in Colombia's political prior to the creation and implementation of the 1991 Constitution has revealed a number of valuable insights. Building on the investigation into the preceding conditions inherited from the post-independence epoch in Colombia, the analysis showed that political institutions are conjoined in an unhappy marriage with highly unequal socio-economic relations. In either case, these informal relations survived institutional engineering, only to be modified according to the demands of a slightly attuned formal set up. The analysis provided more evidence that these periods of institutional change were important political junctures, but in contrast to the 1991 Constitution not as critical. The crises in each instance evolved from within the political establishment rather than being induced by an external shock, neither did the crises fundamentally reshuffle the structuration of actors and constraints placed upon them. Rather, the resultant situations allowed elite actors to realign and mend the conflictual potential of the political set-up prior to the crisis with the result that they could continue on a more or less similar path that guaranteed elites' position at the top of the pyramid of social power.

As seen, both instances of institutional reform, prior to the 1991 Constitution, had a very evident consociational character. They served a specific purpose: to appease and end internal civil conflict. Said violence arose out of partisan confrontations between regional caudillos that associated with one another through party labels. As a result, formal institutions were reformed in order to assuage the instability arising from the underlying informal institutions. Implementation of institutional modifications followed an elite dynamic and could assuage the symptoms of social inequality and peculiarly connected social classes only for some time. In the long run, however, both resulting regimes, which resisted fundamental change, were insufficient to contain arising challenges. Most importantly, they did not modernize and rationalize the rather archaic

patronage systems and thus did not produce what Acemoglu and Robinson term the force of creative destruction essential for sustainable growth and conflict resolutions (2012).

The Reyes reforms put the traditional forms of clientelism inherited from the 19th century on formal footings, thereby erasing conflict prone tendencies. Yet, this was not sufficient to integrate the working-class into the party-system, which maintained its bi-partisan and oligarchical characteristic. The National Front reformed patronage-system and induced some modernity by creating brokerage systems around which patron-client relations clustered; hence the term broker clientelism. It appeased conflict, but the resultant restrictive democracy could not conceal the underlying socio-economic tensions. On the contrary, by outlawing legitimate political contestation it opened the way for new forms of violence: revolutionary and reactionary violence, resulting in the conflation of both with criminal violence once the international drug trade started to affect Colombia's socio-political interaction (see below).

Finally, both instances of institutional reform share the fact that reforms were not imposed upon elites by an activated citizenry, but designed amongst elites. In both instances, a truly civic front was neither included in negotiations nor exerted pressure during negotiations. Citizens were only given a say of confirmation, once elite consultations had concluded. Thus, in all of the constituent processes, citizens had very little agency in the proceedings and lacked a genuine right to justification and contestation. In short, they were consociational pacts to allow a return to non-violent, democratic politics.

2.5. The 1991 Constituent Assembly: Students movements and the implementation of public reason.

The processes around the 1991 Constitution fundamentally differed from the Reyes and National Front reforms. Already the institutional crisis leading up to the juncture signals a much deeper predicament that, fuelled by internal institutional short-comings such as the immobility incurred from the National Front regime, and combined with the aggravations imposed by the blooming and booming international narcotics trade led into a much profounder regime crisis. The anchoring of the cocaine trade in Colombia induced a

dynamic of criminalization that Colombia's political regime despite its democratic surface posture was incapable of processing. It served as an external catalyst to a regime crisis that was bubbling beneath the apparently stable two-party, pacted, democracy. The result was a profound cleavage between the normative claim of a democratic regime and the political reality of a regime incapable of upholding basic human rights and keeping open even minimum channels of political participation. As such, I am inclined to call it a normative cleavage between normative claim of a democracy and the political reality of a country besieged by violence.

This cleavage had immediate effects on the resulting crisis. Even during the 1970 and 1980s, progressively inclined political leaders attempted to renew the political system from within, yet failed either in Congress or in the *Sala Constitucional* (constitutional plenum) of the Supreme Court. Now, however, the path taken did not originate in Colombia's formal institutions. In 1989, the assassination of Luis Carlos Galán prompted 20,000 students to take to the street in a silent march. From this protest, a smaller group of activists formed the nucleus of a movement to call for an all-encompassing institutional reform. Their contention was that the violence and ubiquitous terror were symptoms of a much deeper crisis. Colombia still had not shed the shackles of the constraining National Front regime and the violence was a sign of the excluding and restrictive nature of that regime. It required a new constitution, they argued. This nucleus of an elite student organization was later joined by a broader student coalition that could legitimately claim to represent Colombia's students. While distinct from the original student organizers, they shared their demands and justification for those demands (Dugas, 2001). It was students and their movement that gave the project of reform an unmistakably democratic legitimacy and drove the process until a national plebiscite was held alongside the presidential elections in 1990. Thus, it is difficult to argue that the origin of the constituent assembly is not genuinely civic and associational.

The path in Colombia's formal political institutions, too, was distinct. Traditional politicians had made their own attempts of constitutional reform, always failed, and essentially jumped on the bandwagon, once the students' initiative gained popular traction. After the plebiscite to implement a constituent body, president elect Gaviria and traditional politicians somewhat dominated the process again. However, the basic

prescriptions and demands the student made, did not disappear and crucial links between civic society and politicians in the constituents assembly were maintained. Finally, the composition of the assembly and its decisions making process – public and mostly by consensus – fundamentally differed from the previous constitutional reforms following regime crisis in the 20th century.

Succinctly stated, the subsequent discussion will show that a heterogeneous student movement consisting of two different organizations is the nucleus of the push for foundational constitutional reform. They were sidelined as the reform process was making its way through the formal institutions. However, political elites could never fully co-opt the process, nor exclude civic involvement entirely. Finally, the actors that debated and negotiated the exact wording of the new Constitution in the assembly involved groups that had been historically excluded. These debates differed from other negotiations by their *publicness*. The result was a very progressive political charter, which, amongst other things, had deep effects on the normative orientation of the new Constitutional Court that links up with the original grievance students protested: Colombia's abhorrent human rights situation.

2.5.1. The aftermath of National Front: hyper-fragmentation of a regime in crisis

The late Gabriel García Márquez characterized the period from the second part of the 1970s through the 1980s as a crisis of biblical proportions; “un holocausto bíblico” (cited in Valencia Villa, p. 206). Some of Colombia's most talented politicians, investigative journalists, lawyers and civil activists fell victim to the violence inflicted by the drug cartels, new paramilitary groups, and guerrilla groups. Its institutions, too, suffered tremendously from the brutality inflicted upon by Escobar and the newly forming paramilitaries. Its criminal justice system came to an almost complete collapse. As such, the violence besieging Colombia at this point was a new violence markedly different from the partisan violence of the previous century and mid-20th century. The actors differed and so did their potential to exert damage on Colombia's national institutions.

As alluded to, the National Front, by delegitimizing and criminalizing all political contestation outside of the two-parties, opened the door for revolutionary violence and

reactionary vigilantism to take root in Colombia. The first revolutionary group formed out of Liberal armed groups that fought in rural areas and continued to fight for autonomous republics after the conclusion of the political pacts. They looked with admiration to the Cuban Revolution, and constituted themselves in 1964 as the Revolutionary Armed Forces of Colombia, known by the Spanish acronym FARC (*Fuerzas Armadas Revolucionarias de Colombia*). The ELN (*Ejercito de Liberación Nacional*; National Liberation Army) quickly followed the FARC in 1964 and the M-19 declared April 19, 1970, their date of inception.

Most of the clashes involving guerrilla groups occurred in Colombia's rural areas. Landlords reacted to guerrilla incursions onto their territory by establishing their own armed defense forces. In 1968, the state formalized decree 3398 into law 48, coding the legal basis for civilian intelligence networks that combined forces with agricultural cooperatives, essentially privatizing the provision of security inside its legal territory. From this moment on, the Colombian conflict was essentially separated into three distinct parties: left-wing guerrilla groups, right-wing "self-defense" groups, and the armed forces. Not least due to the original law from 1968 (but also further evolutions described below), the latter two parties are uncomfortably related. The vigilantes' legal entrenchment turned them into the state's bastard child or parasite that undermines its own monopolization from within (Gutiérrez Sanín & Baron, 2005; Acemoglu, Robinson, Santos, 2012).

The conflict received its crucial, and external, catalyst in the 1970s, when the international narcotics trade took root in Colombia; in part due to the political flaws of the National Front regime. Francisco Thoumi, foremost expert in the political economy of the drug trade in the Andes, explains: "The point is simple: illegal drug production and trafficking are associated with institutional and behavioral factors of the societies where they flourish" (2003, p.10). Consequently, the clustering of centers for the production of specific illicit products (cocaine in Colombia, heroin in Afghanistan and Laos) is not coincidental, but causal. For Colombia, the causal links are closely related to the disenfranchisement of the popular classes as a consequence of the National Front, and the resultant empowerment of regional forces. Evidently, the production of cocaine relies on the growth of coca, which is limited to the Andean region, but Colombia's "competitive

advantage” for the production of illicit drugs was that, contrary to its neighbors, it experienced a profound regime crisis exactly at the moment when the demand for cocaine soared in North America. As we have seen, the National Front’s development model brought some economic growth, but its *political* economy opened the windows of opportunity for certain groups only, and had little to offer for the lower and lower middle class that had achieved access to education and as a consequence did not automatically subject to subordination (Duncan, 2006, p. 214).

Socio-economic disappointment was coupled with an increasing fragmentation of the parties. The above-described depoliticization reinforced the anchoring of the political parties in the regions, inflating the value of the vote of regional party bosses and thereby strengthening their position vis-à-vis the national party authority. Their positions were particularly vulnerable to the effects of the drug trade, because “at both levels – smuggling and cultivating – the nexus with well connected politicians played a key role”. Illegal merchants trying to establish political links to protect their business, were entering the scene exactly at a moment “when the independence of electoral barons from the center boomed“. In particular the Liberal Party appeared receptive to the overtures by Escobar and the Rodriguez brothers. In the end, the drug trade might have affected Colombia regardless of the political transformations taking place at the same time, but “it would probably have taken a much less virulent modality” (Gutiérrez Sanín, Acevedo, Viabela 2007, p. 22; Thoumi, 1995, 2003; see also Duncan, p. 237).

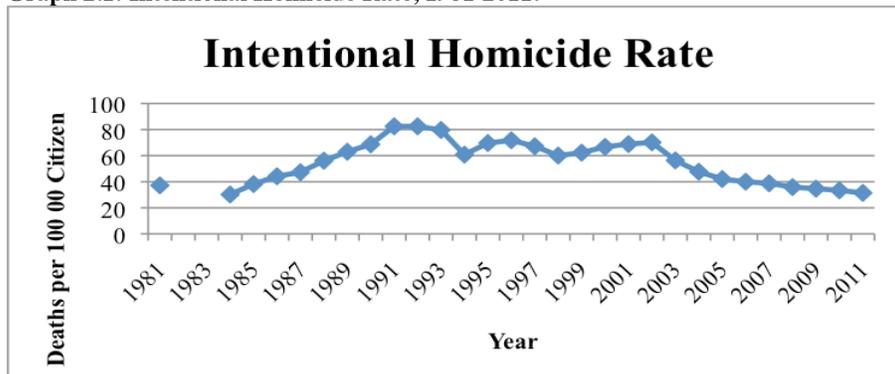
The cocaine bonanza took hold of Colombia in the late 1970s and fully unleashed its violent potential in the 1980s, to the degree that cocaine and Colombia became synonymous. Of the two eponymous cartels, based in Cali and Medellin, the Medellin’s flamboyant head, Pablo Escobar, made head lines around the world with his lavish life style and the incredible sums of dollars he was controlling, earning him a seat on the Forbes list of the 10 wealthiest men in 1987. More important, though, is his aborted attempt to enter political life in Colombia. The origin of his riches was unbeknownst to the public when he was elected to Congress in 1982. This changed quickly once he entered the public and was subjected to scrutiny. Justice Minister Lara Bonilla publically decried Escobar’s involvement in the drug trade and relations to *congresistas* in 1984.

Escobar had to resign from politics and the experience of public humiliation left deep marks. Almost immediately after that episode, he launched his terror war against any individual or institution standing in his way costing thousands of innocent lives. His public exposure as a drug kingpin initiated a slow and painful death for his empire, as the violence he administered was not a sign of strength, but an indication of his incapacity to influence public policy in his interest (above all the prohibition of extradition).³² Lara Bonilla was the first of many politicians to be assassinated by the king pin in 1984. The peace negotiations between the FARC guerrillas and the government were the next victim of the escalating drug violence in the country. Drug lords, paramilitaries, and even section of the armed forces continued to assassinate politicians of the political party forming in the course of negotiations, the *Unión Patriótica* (Patriotic Union; UP) until it was virtually annihilated. Then drug barons turned against extradition. It was one of the last resorts of the Colombian state to exert pressure on them and Escobar and his associates fought it with teeth and nails. In 1985, the M-19 guerrilla movement took the Palace of Justice in Bogota. The military's attempt to retake the building killed twelve Supreme Court justices, numerous guerrillas and civilians.³³ The final tipping point was the 1990 presidential campaign, in the course of which Escobar and his men assassinated three candidates; among them the favorite to win, Luis Carlos Galán, who had condemned the drugs traffickers' influence in Colombian society and wanted them extradited.

³² In a recent documentary, his son explained that life fundamentally changed after the Lara Bonilla episode. The Escobars were constantly on the move and would not feel save again until some time after Pablo's death in 1994. See "Sins of my father" by filmmaker Nicolas Entel.

³³ It is still unclear if this assault was financed by Escobar.

Graph 2.1: Intentional Homicide Rate, 1981-2011.



Source: World Bank.

Statistics tracing intentional homicide rates for Colombia essentially confirm this narrative (see graph 2.1). They begin to soar exactly at the time when Lara Bonilla exposes Escobar, and when the kingpin responds with terror against state and society. From a low of just above 30 deaths per 100,000 people in 1984, average murder rates more than doubled to a figure of over 80 per 100,000 in 1991. At this point, Colombia's legal system is all but overwhelmed and brought to the brink of collapse. Impunity reigned high and meaningful political participation became impossible as was evident in the fate of the UP and its presidential candidates (three were murdered in the second half of the 1980s as were a number of its Members of Congress. Usually, proto-paramilitary groups around Carlos Castaño were the guilty parties; see below). It was against this background that the student movement launched its activism to implement a new constitution.

2.5.2. The extra-institutional path: the communicative action in the student movement

The assassination of Galán was the decisive catalyst that brought students to the streets. In August 1989, 20,000 students from universities in the nation's capital marched silently to the Liberal presidential candidate's grave, and concluded the protest with a declaration, disavowing all violence and demanding respect for human rights. The protest note culminated in a call for a general purification of the armed forces, the police, the government and the political parties by convening the people to redress the institutional

inhabitations at the root of the current political crisis. Almost a year later, Colombians overwhelmingly voted in favor of the students' proposal to hold a constituent assembly. 86.6 percent affirmed their proposal in a plebiscite held together with the presidential elections in May 1990 sending a strong message of public opinion to incoming President Gaviria to implement such a convention (the vote was not legally binding; Dugas, 2001, p. 810).

The plebiscite was the movement's greatest success and by the time the assembly actually convened for deliberation, the movement had fractioned. Be that as it may, the point of their activism was not to control the agenda and implement a specific framework, but rather to introduce a new "process that could lead to making this Constitution" (cited in Dugas, p. 826). The students proposed, "a 'political pact' among representatives of all Colombians, rather than a document imposed by a limited set of victors", as was the case with the historical constitutions of the 19th century (Dugas, 2001, p. 830; Valencia Villa, 2012). The logic of their demands was that a truly democratic and inclusive constituent assembly would open up new avenues of citizen participation and recoup the legitimacy lost by the patronage infested institutions of the old republic. The reformed institutional structure would then provide the functional basis on which to address Colombia's other problems (Dugas, 2001, p. 830).

The student movement itself was not monolithic, but consisted of two student organizations that each had a distinct organizational structure and represented different constituents within the student body. As a consequence of their distinct configuration and composition, each part contributed resources that complemented one another, and crucially played a part in the overall success of the movement. The first, *Todavía Podemos Salvar a Colombia* ("We can still save Colombia") evolved out of the immediate aftermath of the silent march, which was followed by discussion groups in Bogotá. In these debates, participants analyzed the entire spectrum of socio-political problems menacing Colombia. The tedious discussions that continued for weeks thinned the numbers of students involved, and resulted in a group of highly motivated and well-trained students from the most prestigious law schools of the country. They received crucial logistical assistance from those universities, and political support from prestigious professors. In addition, one of the professors, Marcela Monroy, was married to *El Tiempo*

columnist Roberto Posada (Colombia's most important daily newspaper), opening the opportunity to use public debate as a way framing their contentions (a strategy often and successfully utilized).

The first manifesto calling for purification and reform published in *El Tiempo* in October of 1989 (under the name that lent the movement its name) coincided with the failure of President Barco's own initiative of constitutional reform, providing opportunity structures to further the cause with key elite allies. They now decided to press for a more general reform project. In long debates and discussions, they developed a frame of seven basic fields that needed to be reformed in order to democratize Colombia's informal institutions that undermine its formal democratic framework: 1) Congress; 2) civil rights and social guarantees; 3) the judicial system; 4) the state of siege measures; 5) economic planning mechanisms; 6) administrative decentralization; and 7) the introduction of the referendum and the plebiscite as future mechanisms for reforming the constitution (Dugas, 2001, 831). This framework is not very original, echoing the work of sociologists, political scientists, and legal scholars (see Buitrago Leal, 1980; Valencia Villa, 2012 [1987]). Even so, since it stood after long debates, "students were convinced of its validity" and it became the basic set of demands for the entire student movement that spawned another more grass roots and national movement (Dugas, 2001, p. 832).

The second organization of the student movement entered the scene after the *Save Colombia* group had paved the way. Its ambition, though, was not only to have a constituent assembly, but to generate a long-lasting and somewhat institutionalized student movement (the latter eventually collapsed). *Movimiento Estudiantil por la Constituyente* (Student Movement for a Constituent) complemented the *Save Colombia* movement almost perfectly: while the latter was somewhat elitist (middle and middle-upper class), limited to a small groups of law students from a few universities in Bogota, the *Movimiento Estudiantil* was grass roots, bringing several hundreds students from universities throughout the country together. In addition, it was much more representative, including students from large public universities and small private institutions. Students in this organization did not come from only one field of studies, but the entire spectrum. Most importantly, they came from all ideological backgrounds, ranging from anarchists, the Communist Youth, and militants of the former M-19

guerrilla movement on the left, to political independents and traditional party members on the right. Consequently, far more than its rival, the *Movimiento Estudiantil por la Constituyente* could boost national, representative legitimacy, and organize meetings that drew thousands of students (Dugas, 2001, p. 832).

These contrasting resources helped the students to get their constitutional initiative on the political agenda, gain the backing of key elite allies, and rally broad public support for it. Leadership within the student movement was the result of a genuine communicative process. The two poles within the group fractioned, when strategic and substantive differences fissured, but just as much reproached when the fundamental goal was at stake, proving to be able to act strategically if the context required (Dugas, 2001, p. 821 & 827). They decided together to urge Colombians to cast an extra ballot in favor of a national constituent assembly during the congressional elections in March 1990, known as the 'seventh ballot' (*septimapapeleta*). An unofficial count of those votes cast was allowed and a staggering two millions voted in favor. After failed attempts to initiate constitutional reform himself (see below), the Barco administration agreed to put the initiative on the ballot with the presidential election in 1990. Although the vote was not legally binding, the results were a loud and clear sign of public opinion regarding constitutional reform. 5,236,863 Colombians voted in favor of the students' propositions, representing 86.6 percent of the votes cast (Dugas, 2001, p.810).

What explains the success of the movement? Turning to the political opportunity structures, we have seen in the previous section that the Colombian regime can at best be described as democratic but restricted or, at worst, as benignly authoritarian. Given that the country returned to more competitive elections and that basic rights such as the freedom of the press and of association existed, Colombia properly fits into the category of restricted polyarchy, in which power is invested in multiple people, but political opportunity structures are only partially open. The last point in particular provides a necessary condition for the emergence of movements (Tarrow, 1998, p. 71-105). In this case, however, it is not a sufficient causal explanation for the emergence of the movement, because Colombia did not experience a significant political opening at the time. In addition, traditional parties reinforced their dominance over electoral politics in the congressional elections, consolidating 90 and 96 percents of the seats in the House of

Representatives and Senate, respectively. The little political insecurity amongst political actors (from the appearance of the M-19 in electoral politics) disappeared once the first elections were held (Dugas, 2001, p. 817).

The single most important structural indicator of political opportunity was the availability of elite allies. This does not mean, though, that students' agency was co-opted by those elite allies. Certainly Barco's commitment to constitutional reform helped after his own failure to implement it. In addition, the stamp of approval given by former presidents and statesmen to their project also helped to increase the aura of legitimacy. Most important, though, was that it opened the doors to the mass media. Here, the students could publicize their *own* reasoning and argumentation of the framing and the solutions that they suggested. It provided a decisively *public* forum. In the end, Barco himself accepted the framing of the students and not the other way around.

In sum, is fair to say that the student movement was the result of a genuine communicative process, rooted in a heterogeneous base, from which leadership resulted organically. Initial leadership arose not from foregone indicators such as class or race – even if the original nucleus came from upper-class echelons – but from long-lasting substantive debates. Hannah Arendt noted in her writings on the student movements in the United States that leadership amongst the students crystallized from communicative processes (1972). Here, too, we see that students came together around ideas and programmatic positions and then proceeded to take action. Deed followed word. Crucially, their program stood as the valid framework of reference for the debates in the constituent assembly. Thus, even though their influence diminished after the plebiscite, their action was not in vain. In addition, citizens were not entirely without voice in the Constituent Assembly. Their suggestions and concern, elaborated in workshops in the entire country, had to be submitted for debate in the assembly (see below).

2.5.3. The institutional path: breaking the Conservative-Liberal hegemony

Politicians' attempts to change the Constitution go back to the 1960s, when reform minded presidents, such as Restrepo and López Michelsen wanted to alter the restrictiveness of the National Front framework, and open the political system. Their attempts as well as Turbay's reforms in the late 1970s failed – not least due to the veto of

the Supreme Court and the excessive formalism of the 1886 Constitution.³⁴ In the 1980s, the first attempts of fundamental constitutional reform date back to Barco. In 1988, he first tried to sign a pact with Conservative leader Misael Pastrana to call for a referendum to reform the Constitution by popular vote. The State Council declared the *Casa de Nariño Agreement*, named after the president's seat in Bogotá, unconstitutional. Following this defeat, Minister of Government and Communications (and later President), César Gaviria, reckoned the best way to reform the Constitution was by constituent assembly, which the government introduced in Congress. This proposal eventually died in Congress, because the government tied it to stipulations of the peace process with the M-19, viewed by some as too lenient on the guerrilla group. It did not receive the necessary majorities. In essence, by the time the Barco administration in May 1990 took up the path for constitutional reform proposed by the student movements, the formal institutional path involving traditional politicians had failed and was essentially dead (Cajas Sarria, 2010, p. 86).

Following these upsets, Barco put his support behind the student movement. As seen, it paved the way and provided a complete normative framework for the *process* of constitutional reform. After the successful “seventh ballot” initiative, Barco took a controversial decision to implement the plebiscite: he utilized extra-judicial, decree powers to initiate the constitution-making process. Invoking the special powers granted to the executive by the state of siege in Art. 121 of the 1886 Constitution, he issued a decree that a plebiscite would be held along the presidential elections (Decree 927 of 1990). Resistance came from the Attorney General of the Nation, Alfonso Gómez Méndez, who contended the lack of limitation of powers placed upon a potential constituent assembly. Gómez Méndez warned that it gave too few people too many powers to decide on fundamental issues concerning the organization of law in Colombia. Even Carlos Lleras Restrepo, who himself attempted constitutional reform under his presidency and had supported the students, warned against the extra-judicial origin of the new Constitution. For Humberto de la Calle, it had the taste of a constitutional coup (Ahumada, 1995, p. 3-

³⁴ My interviewees almost unequivocally reject the notion that the current Constitution is simply a rebirth of the old constitutionalism. They argue that the old constitutionalism was entrenched in a strict legalism and formalism that made constitutional reform almost impossible. As examples they noted the attempts by various presidents cited here and the Supreme Court's decision of unconstitutionality in 1979 and 1982 (see also Cajas Sarria & López Medina, 2010).

5). Yet, to most observers' surprise, the Supreme Court affirmed the decree in a split decision, arguing that the re-establishment of public order (which justifies the state of siege in the Constitution) does not solely rely on repressive measures. If reforms have the explicit and objective goal of assuaging the problems underlying the situation of internal commotion, they are also covered by the clauses of the state of emergency (the vote in the Court was 14-12; see also Cajas Sarria, p. 88)³⁵.

After the successful plebiscite, president elect César Gaviria invited the two bosses of the Conservative party and leaders from the M-19 group to decide on the continuity of the process. They selected December 9, 1990 as the date of the election for the constituent assembly. In addition, they agreed upon a number of issues that the assembly should consider for reform. These were Congress, the judiciary, the Attorney General's Office, public administration, human rights, political parties and opposition rights, departmental and municipal regimes, mechanisms of participation, state of siege and economic matters.

In August 1990, President Gaviria issued decree 1926 with stipulations of the date of the elections and the number of constituents elected. It also attempted to impose the thematic restrictions on the deliberation in constituent assembly. As with the previous decree, the Supreme Court subjected the merits of the clauses to judicial review. It affirmed its jurisprudence that extra-judicial measures need not be repressive but also affirmative to establish internal peace. Crucially, though, it denied the constitutionality of the clause placing limitations upon the constituent assembly; a national constituent assembly could not have restrictions concerning its agenda and regulations of deliberation, since its mandate comes from the sovereign people. It thereby transformed the constitution-making body into a true constituent body that is not submitted to the powers of the current constitutional order, including its parties and presidents (Echeverri Uruburu, 2012, p. 457; Cajas Sarria, 2010, p. 90).³⁶

The Supreme Court's decision was the final say before the vote for the constituent assembly and its rejection of elite control of the agenda is important, because citizens'

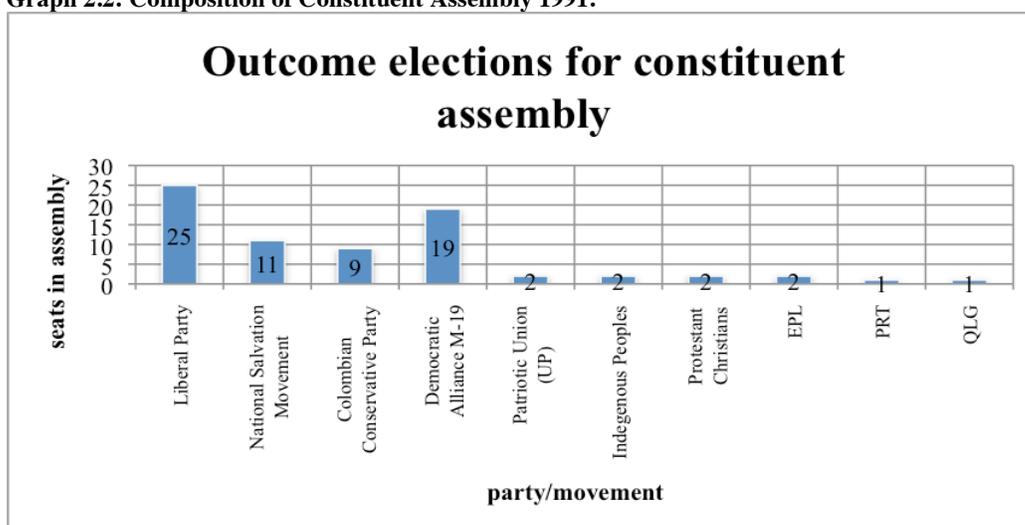
³⁵ Republic of Colombia. Supreme Court of Colombia. Sentencia No. 59 of 1990.

³⁶ Republic of Colombia. Supreme Court of Colombia. Sentencia No. 138 of 1990. This decision contains some aspects that the Constitutional Court later takes on when it develops the substitution doctrine. See Chapter IV.

control of the agenda was not limited to the act of voting for the assembly. Prior to the elections, workshops were held in more than 1,500 locations in the entire country. These workshops, open to all citizens, produced 350,000 projects of considerations. Importantly, constituents in the assembly were obligated to debate these submissions and could not simply ignore them.

The election for the constituent assembly had a very poor turnout: 84 percent abstained from their right to vote. However, in the past, relatively high turnouts in national elections was not necessarily a sign of democratic alertness but of the capacity of the parties to generate votes with the help of patronage systems. Therefore, the lower turnout does not necessarily signal a lesser acceptance of the process, but might as well reflect the diminished importance the two traditional parties assigned to the election of the assembly. This showed in the results. While still the strongest, they were by far not as dominant as for example in Congress that was elected earlier that year, where their combined vote share was 94 percent (when over 50 percent of eligible voters went to the poles). Now only 45 of the 70 delegates came from the two traditional parties (70 percent) and, most notably, 19 came from the demobilized M-19 guerrilla (see graph 2.2). Looking with suspicion at the constituent process, traditional political parties did not invest as heavily and with the same resources (cliente election promises) in the elections for the assembly (Echeverri Urubura, 2012, p. 458).

Graph 2.2: Composition of Constituent Assembly 1991.



Source: Uprimny, 2003, p. 53.

In its result, the assembly united traditional politicians, representatives of ex-guerrillas, Christians, intellectuals, and indigenous peoples for the first time in Colombia's history. In addition, none of the forces represented had a majority in the assembly, which induced a collegial atmosphere (Negretto, 2014). The presidency over the assembly rotated between the Liberal faction, the Conservative faction, and the M-19 faction. The minority representatives received presidencies and vice-presidencies of the five commissions that studied the topics of debates: 1) fundamental rights; 2) territorial organization, 3) the organization of the legislative, executive and international relations, 4) the organization of justice; 5) socio-economic issues. Notably, the presidency over the fourth commissions was given to Fernando Carrillo Flórez of the student movement and the vice-presidency to Jaime Fajrado Landaeta of the demobilized guerrilla, EPL. The decisions eventually taken by the assembly also reflected the collegial character of the constituent body. 74 percent of the norms approved in the Constitution were decided unanimously. Of those decided by majority vote, either an alliance between M-19 and the Liberals, together with indigenous representatives and the UP, or an alliance consisting of the M-19 and Conservatives, did not decisively affected the outcome. In any event, the traditional bench of Liberal-Conservative dominance was no longer effective (Echeverri Urubur, 2012, p. 461). The next section will show that incorporating new actors, opening the procedure and making debate more transparent, as well as incorporating citizens' opinions showed in the resultant constitutional charter.

2.5.4. Institutional novelties of the 1991 Constitution

Constituent power, or *poder constituyente primario* as it is referred to in Colombia (Valencia Villa, 2012, p. 205), summoned in the constituent assembly and produced a far reaching document, writing the Constitution entirely anew. The Constitution's norms created an entirely novel institutional structure embedded in a strong normative framework, which, for the first time in Colombia's history, included a vast catalogue of rights at the ranks of constitutional norms. Even the most ardent critics of historical constitutionalism in Colombia noted that the emerging Constitution is reflective of the democratic moment at its origin, not adhering to a coherent worldview and normative

ideology imposed by the victor, but rather a document of compromise and reconciliation that embraces liberal, conservative, nationalistic, internationalistic, and, above all, social democratic ideas (Valencia Villa, 2012, p. 205-212). In short, it was markedly different from the *Cartas de Batalla* of the 19th century, reflective of the clientelistic conflicts of that era. The Constitution embraced the values and principles that had first appeared in the Basic Law in Germany after World War II, and later in Spain's democratic Constitution of 1979. In line with the organization of changes in the reform processes in 1905-1910 and 1953-1957, I will quickly outline the most important formal changes to the institutional framework involving the executive, legislature, and judiciary.

The three powers of the state, executive, legislature, and judiciary are defined as public powers, and in addition, the Constitution acknowledges two powers independent and autonomous of those three: the *Procuraduría* (Inspector General) overseeing the conduct in the exercise of public offices, and the *Controlería* (Controller General) overseeing the management of public fiscal resources. These two are not judicial institutions, but are essentially administrative powers.

The legislature maintained its traditional bicameral organization, divided into the House of Representatives and the Senate, but each was elected with a different electoral system: the House by regional circumscription and the Senate by national circumscription and the D'Hondt method. The latter norm was incorporated in order to set incentives for national campaigns rather than regionally concentrated campaigns that had benefited the utilization of local patronage systems. The role of the legislator in the law making process remained similar. The laws to be passed by Congress were divided into a tripartite typology/taxonomy: ordinary laws, organic laws, and statutory laws. The first concern fiscal matters, must be approved in both houses, and find the approval of the government (giving the executive a veto power). Organic laws concern procedural regulations in Congress and territorial competences in the country. They require the absolute majority of both chambers. Finally, statutory laws involve fundamental rights of persons, the administration of justice, organization of political parties as well as electoral functions, citizens' participatory mechanisms, and states of exceptions. They also require the absolute majority of Congress, but are then automatically submitted to constitutional review by the Constitutional Court.

Novel in the 1991 Constitution was the disciplinary code imposed on Members of Congress. Due to the widely felt corruption in Congress, legislators were submitted to an extensive code of proscriptions that could cost them their investiture by a verdict of the State Council, while the Supreme Court conducted criminal investigations against legislators. Crucially, the loss of investiture was not handled by the legislative institution itself, nor by the parties or executive, but by the judicial branch. In other words, Congress did not enjoy legislative immunity, which becomes central in the *choque de trenes* and *parapolítica* investigations analyzed in Chapter 3 (Echeverri Uruburu, p. 478-481).

The executive in the new Constitution remained in the President's hands and there were never earnest debates of switching to a parliamentary system (possibly due to the role of President Gaviria in the process leading up to the constituent assembly). Its powers were to some extent limited by new norms, but still vast. The executive lost the power to nominate governors and control over monetary policy in Colombia, which was given to an independent body, the *Junta del Banco de la República*. Additionally, executive prerogatives were most substantially circumscribed on issues concerning extraordinary powers of the state. Declaration of states of exception had to follow very specific rules, could only last 90 days, and, above all, required the confirmation by the Senate and the Constitutional Court. During a state of emergency, no permanent legislation could be passed and the exception, even in the case of war, could not suspend the law of war (Article 212-215). Finally, the new Constitution disallowed re-election of a president once he has taken office, contrary to the previous Constitution, which only disallowed *immediate* re-election. This had effectively given ex-presidents a lot of power after their term ended, because they could threaten to run again. Evidently, Uribe's reform in 2004 to allow one immediate re-election changed this, altering the periodization of offices that involve the executive in the selection process (Echeverri Uruburu, p. 482).³⁷ In terms of executive-legislative relations, the presidency retained its powers to nominate the government, delegate funds for socio-economic programs, initiate and close each session of Congress, promulgate laws, and present to Congress, at the

³⁷ This periodization is crucial for understanding the conflicts in the Uribe years between the president and the courts. I will closely examine these in the next two chapters.

beginning of each session administrative, acts for development planned for the entire session of the legislative year (Article 188-199).

The most central complaint in the student call for action was the human rights situation. It is therefore not surprising that the judiciary received the most far-reaching overhaul. The 1991 Constitution created new courts (the High Council of the Judiciary, the Constitutional Court), a new attorney general office inside the judiciary (*Fiscalía General*), and new mechanisms (*Tutela*) to enforce rights. The Constitutional Court became the final instance of abstract review of constitutionality of laws and concrete rights review. Finally, the Constitution included three mechanisms for its reform (legislative act, referendum, and constituent assembly) and delegated the review of reform projects to the Constitutional Court, under the condition that it was limited to procedural review, not substantive review (Article 241, 1-3). The last norm was the point of contention in the substitution theory analyzed below. The Supreme Court remained the highest court in the ordinary justice system and the State Council the highest court of the contentious administrative jurisdiction (adjudicating complaints against public servants). The High Council of the Judiciary pertained to administrative and disciplinary tasks within the judiciary. As we will see in the next chapter the multitude of different courts, their selection processes, and tasks are crucial factors in the struggles for authority and jurisdiction between them and the other branches of government. In the end, it will have fundamental, and unpredictable effects on the discursive strategies actors utilize in their public interactions. To provide a quick overview, the table below lists all high courts of the 1991 Constitution, their respective compositions, functions, and number of chambers.

Table 2.1: Colombia’s high courts in the new constitutional regime.

Constitutional Court	Supreme Court	State Council (<i>Consejo del Estado</i>)	Superior Council of the Judiciary (<i>Consejo Superior de la Judicatura</i>)
Nine judges	23 judges	31 judges	13 judges
3 chambers: Plenary chamber (<i>Sala Plena</i>) for constitutionality review (all nine judges); <i>Tutela</i> selection chamber (three judges); <i>Tutela</i> review chamber (three judges)	Three chambers: criminal law (nine judges), civil law matter (seven judges), labor law (seven judges)	Two chambers: Contentious administrative chamber (27 judges) Consulting chamber (4)	Two chambers: Administrative chamber (six judges); Disciplinary chamber (seven judges)

Constitutional Court	Supreme Court	State Council (<i>Consejo del Estado</i>)	Superior Council of the Judiciary (<i>Consejo Superior de la Judicatura</i>)
Abstract and concrete constitutional review; Constitutional review of constitutional reforms	Highest appellate court in criminal, civil, labor law Investigates Members of Congress	Highest court concerning the contentious administrative jurisdiction; Consulting chamber for the government	Administration of the judiciary and disciplinary actions against functionaries of the judiciary.

Source: compiled by the author.

After the conclusion of debates, Gaviria signed an agreement with the head of the Liberal Party and former President, Alfonso López Michelsen, as well as the three heads of the Constituent Assembly, to dissolve the current Congress and hold new elections in October of 1991. For the interregnum, it delegated advisory powers to the “Little Congress” (*Congresito*) that commissioned laws with the president until the new Congress commenced its work in December of 1991 (Ahumada, 1995).

2.5.5. Normative changes: interpreting rights

The results of civic activism – above all by the student movement – were not only identifiable in the new formal political structure and overhaul of Colombia’s judicial institutions, but also readily apparent in the strong normative connotations. The 1991 Constitution defined Colombia as a social state of law and stipulated a vast rights catalogue at the level of constitutional norms. The inclusion of rights and the shift to the definition of Colombia as social state of law manifested itself in the shift away from the Old Law (*Viejo Derecho*) of the 1886 Constitution to the New Law (*Nuevo Derecho*) of the 1991 Constitution. This distinction plays out in the institutional development after the implementation of the 1991 and the so-called *choque de trenes* and substitution doctrine, which take central roles in the analyses of the third and fourth chapter respectively. It is therefore only prudent to explain the most central transformations.³⁸

³⁸ This section builds entirely on the interviews conducted in Bogotá from September 2012 until May 2013. For a quick overview of interview results, see Appendix C.

As we have seen, historical constitutionalism in Colombia evolved out of the political thought of the two most important figures of the independence wars, Simón Bolívar and Francisco Paula de Santander, who were followers of the French tradition of constitutional thought with its focus on administrative law and the structural organization of the state. It is consequently not surprising that under Old Law, the judge's role in interpreting the law was akin to Montesquieu's vision of the judge as the mouth of the law. This has three interdependent consequences: 1) the most important principle by which judges interpreted the constitutionality of laws was the principle of legality; 2) precedence, if any, has only an extremely miniscule role in the jurisprudence of the Supreme Court; 3) rights are subsumed under the civil code and have no constitutional standing on their own.

The principle of legality holds that “public forces are only allowed to what the law allows them to do”.³⁹ If public officials are only limited by the written text, interpreting constitutional texts becomes a positivistic and textual exercise, giving supreme authority to the written word of the constitution and law. A direct result of the centrality of the principle of legality in Old Law is its most important legacy: a strict formalism in legal questions. Formalism in constitutional interpretation means that legal arguments evolve around questions of procedure and competence and not about substantive contentions.

The “clinging to forms”, adherence to order, and subjection of rights to legality in Colombia's historical constitutionalism are reflective of the generic ambiguity in Colombia's history, which, as we have seen, always (even simultaneously) displayed a bipolarity between legality and illegality, democracy and clientelism, peace and violence. Colombia's legalism also had a bipolar aura and is itself a consequence of the political debility in its history.⁴⁰ It was for the most part situated at the discursive level, which means that valid public arguments had to emulate legal vocabulary, even if actors were motivated by strategic interest. This focus on legal forms and vocabulary fuelled a high confidence in the transformative capacity of law, but at the same time created a veil of ignorance for real socio-political grievances. Traditional constitutionalism in Colombia,

³⁹ Interview, subject no. 5 (auxiliary judge), May 15, 2013.

⁴⁰ Interview subject no. 35 (professor of law), May 7, 2013.

thus, was always an exercise in “changing everything, so nothing changes.” Students in the movement to reform the Constitution not only lamented the corruption of Congress, but also the immobilism of the Constitution itself. In their analysis, both of which was at the root of what had caused Colombia’s intractable position at the end of that decade and required change.⁴¹

The novelty of the 1991 Constitution becomes readily apparent in the first Article. While the 1886 Constitution proclaimed a unitary character that arises out of the sovereignty of the nation (Article 1 and 2), without stipulating what this nation consists of, the 1991 Constitution principally defined Colombia as a social state of law that rests in the human dignity of its pluralistic society, that comes together to work in solidarity for the general good (Article 1). As we will see in the decision concerning re-election, pluralism, solidarity, and human dignity are not just fashionable phrases, but concepts that the Constitutional Court, filled with meaning in its jurisprudence.

The next most fundamental novelty of the 1991 Constitution concerns the inclusion of rights. The diversity of the constituent assembly as well as the dismal human rights situation in Colombia resulted in rights being taken much more seriously. After all, this was one of the central rallying calls of the student movement. To that end, the first 90 articles of the 1991 Constitution concern norms, principles and rights.⁴² Moreover, the new Constitution impresses with the inclusion of an expansive catalogue of rights that encompasses first (private rights), second (social rights), and third (collective cultural rights) generational rights. Particularly, the inclusion of cultural rights, paying debt to its indigenous and Afro-Colombian heritage, foreshadows developments in other South American states by more than ten years. Again, this can be traced to the plurality of the constituent assembly, which gave observer status to an indigenous guerrilla group: the Movimiento Armado Quintin Lame. As my interviewees confirmed, the new Constitution contributed a great deal towards making those previously marginalized groups visible in the Colombian public, giving them a voice of their own.

Evidently, rights are fairly meaningless if they lack a mechanism for their enforcement. The new Constitution added the *acción popular de tutela* (Article 86) to the

⁴¹ This is also the reason why the new Constitution has relatively flexible reform mechanisms and lacks anything resembling eternity clauses.

⁴² Interview subject no. 38 (Supreme Court judge), April 17, 2013.

already existing *acción popular de inconstitucionalidad* (Article 241). The *tutela* gives every citizen the right to submit a complaint against violations of their rights with any judge in the country (essentially turning every judge regardless of her specialization into a constitutionalist). These complaints have to be decided within ten days and will eventually reach the Constitutional Court, who selects around 150 from 40,000 sent in every month for review. For the most part, *tutelas* are *inter-alia* decision only concerning the concrete case at hand, but, as they accumulate, sometimes take on an *erga omnes* characteristic defining jurisprudence. The politics of the *tutela* will be examined in more detail in Chapter 3. Here it suffices to point out that they are part of the Court's jurisprudence to *directly* interpret rights.⁴³

The centrality of rights and pluralism in the identity of the new Constitution also affects Old Law's most central principle: the principle of legality. The constitutionalism of *Nuevo Derecho* does not delegate it to futility. For example, Article 230 holds that judges are exclusively accountable to the empire of law, upholding the importance and centrality of the written text of the Constitution. Nevertheless, it nuances the strictness in its jurisprudence by also weighing the proportionality, rationality, and efficacy of reforms and laws. Efficacy implies that everything must be interpreted and cannot leave out jurisprudential questions for the sake of rationality. Thus, rationality only comes into play as long as it does not violate the efficacy of the rights review.⁴⁴ The most important neo-constitutionalist principle, without a doubt, is the principle of proportionality. It is central for modern constitutionalism, which has to cope with the proliferation of rights, on the one hand, and an increasing number of functions taken over by the state, on the other hand. As such, rights and valid state interest often juxtapose one another in constitutional questions (Kumm, 2010 & 2007). When judges test the proportionality of a law or legal mechanisms, they ask if the infringement is proportional to the interest that competes with it.⁴⁵

Pluralism, rights, and new principles of interpretation transformed the Constitution from a "written Constitution to a living Constitution".⁴⁶ This means that the

⁴³ Interview subject no. 10 (Constitutional Court judge), March 8, 2013.

⁴⁴ Interview subject no. 8 (Constitutional Court judge), May 17, 2013.

⁴⁵ Interview subject no. 8 (Constitutional Court judge), May 17, 2013

⁴⁶ Interview subject no. 10 (Constitutional Court judge), March 8, 2013.

new Constitution values rights not as functioning outside of the legal context, but identifies them in the circumstances of human existence. Living constitutions, of course, take precedence much more serious than static written constitutions. In addition, the new constitutionalism in Colombia also holds that *derecho substantial* (substantial law) has precedence over *derecho formal* (formal law). In sum, it deviates decisively from the textualism of the old constitutionalism. One interviewee puts it nicely:

The interpretation of law has to be an interpretation that is teleological and takes into account the value of justice, equality, and the value of due process. In the Constitution, the norm acts in an integral manner. It is much more intended as a way to resolve problems.⁴⁷

The new Constitution shifts the role of the constitutional judge from a dogmatic interpreter of laws and norms to a pragmatic problem solver mediating between norms that exist on paper and actors that function in real life. This is arguably the farthest-reaching consequence of the 1991 Constitution, because it fits into a generic shift towards neo-constitutionalism apparent in other places at the same time (for example South Africa). If constitutionalism entails the control of the exercise of political power, neo-constitutionalism generically, entails that political power is additionally constrained by *rights* based constitutional adjudication.

2.5.6. The 1991 political juncture: the atomization of the nation

The prior discussions on the legacy trajectories of the National Front and the reforms at the beginning of the 19th century showed that the new institutional framework had immediate effects. Most notably, violence subsided almost entirely, but clientelistic relations also stabilized within the formal two-party system. The aftermath of the 1991 Constitution is more complex and displays contradictory developments resultant from the institutional juncture and the effects of the still burgeoning drug economy. Violence did not subside immediately, but, fuelled by the drug economy, continued unabated. It created new violent actors (the paramilitaries of the *Autodefensas Unitarias de Colombia*; United Self-Defense Forces of Colombia, hereafter AUC) and strengthened existing ones (FARC). Arguably, the state's capacities further contracted resulting in a situation, in

⁴⁷ Interview subject no. 10 (Constitutional Court judge), March 8, 2013. See also Cifuentes, 1995.

which Colombia's democracy was more open and inclusive, but also besieged by violent, non-democratic forces in the periphery of the country that extended their reach into the national political institutions (Bejarano & Pizarro, 2005). Patronage systems, which prior to the 1991 Constitution functioned from within the traditional party system, now slowly morphed into informal relations that function from outside of that system. This created a new, even more vicious and cynical form of clientelism, armed clientelism, which built on the internal fragmentation and eventual collapse of the traditional party system. This process was related to decisions taken in the constituent assembly. The probably well-intended national circumscription of the Senate vote provided incentives for regional politicians to seek alliances with actors, who could generate the votes in exchange for legislative support. Politicians essentially became electoral entrepreneurs selling their services to the highest bidder. It turned out that regional warlords from the AUC, who had evolved from lower rank enforcers of the drug cartels, were quite capable and willing to generate the votes by "violent campaigning". As a consequence, large parts of the legislature were co-opted by groups at the margin of legality. These evolutions not only form the backdrop of the conflicts between President Uribe and the courts that unfolded in the early 2000s, but also reinforce that decisions taken in the 1991 juncture had longer lasting, albeit contradictory, legacy effects.

The political evolutions following the implementation of the new Constitution must be viewed with consideration to changes in the political economy of the drug trade. The quintessential lesson from the end of the big cartels was that they could finance campaigns, influence decisions and elections, co-opt the bureaucracy in their favor, only as long as their ascendance stopped short of replacing the traditional social structure of power. Crucially, "this infiltration did not result in an unconditional subordination by national politicians to those illegal merchants" (Duncan, 2006, p. 236-237; Gutiérrez Sanín, 2007, p. 497). When the origin of Escobar's riches became public knowledge, his career as a politician was terminated and the social space available for him severely limited. The terror war that ensued is simply the long and painful death of the political economy that enabled big cartels to run and control the drug business. It culminated in the chase after him and his death on a rooftop in Medellín. This chase is an important turning point, since it propelled different actors from within the drug industry to the

summit of the business, and made them independent of the big capos. The eventual heads of the AUC came from the lower ranks of the cartels. They were enforcers and groups of *sicarios* (hired assassins), who worked for the cartels to make contracts obligatory and eliminate rivals (Gutiérrez Sanín, Acevedo, Viatela, 2007; Duncan, 2006). Their expertise in the application of violence became the critical asset once the epoch of the big cartels was coming to an end and additionally provided them with a competitive advantage once the effects of the new Constitution started applying to the electoral and party system.

Their arrival at the helm of the narco-paramilitary project was preceded by important socio-political evolutions behind the trenches of the terror war in the 1980s. Equipped with new riches from the drug trade, these *narcos* had moved into the countryside and bought land. Initially, landowners, peasants and drug traffickers paid *vacunas* (protection rackets) to the FARC. When the FARC itself initiated an aggressive expansion campaign in the 1980s, it tried to squeeze more funds to finance the military campaign, alienating all of the above. The first to feel the brunt of the FARC's strategy were cattle ranchers and landowners, who since the 1960s financed their own armed protection bands. Unable to foot the bill, they now looked to the arriving drug traffickers, who had the necessary funds.⁴⁸ The inability of landowners to pay for the security of their estates and drug traffickers' movement into the real estate market in order to launder money and gain status brought them together into a heterogeneous group of interest (Gutiérrez Sanín & Barón 2005, p. 44). Most important of the convergence between narco-traffickers and rural self-defense forces was that narcos could now utilize structures that conveyed the aura of legitimacy. Firstly, self-defense forces had been legal from 1968 until 1987, and, secondly, they did not simply control the trade in the area, but began to hold actual territory, creating codes of conduct for the territory under their control (Duncan, 2006). For example, in the Norte de Valle de Cauca, a group subordinated to the Cali Cartel grew tremendously in strength, and in Antioquia, the Castaño brothers together with Diego Murillo Bejerana, alias "Don Berna", had built effective coercive apparatuses.

⁴⁸ A demobilized paramilitary reported that "the cattle rancher can not maintain let's say 500 people, medicines for combatants, uniforms, clothes, he simply does not have the capacity" (cited in Gutiérrez Sanín & Barón, 2005, p. 13).

When the state started to turn on the capos – first Escobar and then the Rodriguez brothers of the Cali Cartel in the course of the *proceso 8000* (see Chapter 3) – the remaining bosses increasingly looked to the heads of these far right paramilitaries for protection from the state. This commenced a process referred to as *traquetización*. *Traquetos* received their name from the sound of machine guns: “trr trr trr”. Their job was to co-ordinate the killings necessary to run the drug business. They were above the assassins, but below the actual drug lord. *Traquetización* then is the process when the utilization of violence becomes the central competitive advantage in the drug business to not only enforce its rules, but also protect it politically. When the capos looked to the paramilitary groups for help and protection from the state, they had no choice, but to relinquish control over the business. Their source of power – resources from the drug trade were in jeopardy – while paramilitaries yielded power because of territorial control. Consequently, these deals of protection trapped them in contractual obligations where the other side had no incentives to comply, turning the capos into dependents of the warlords (Duncan, 2006, p. 234; Ávila Martínez, 2010, p. 109ff).

Another important element of the Escobar hunt was that it deepened informal webs of co-operation already existent between sections of the armed forces and the internal security apparatus with emerging armed groups on the extreme right.⁴⁹ The Colombian state had formed the Search Bloc (*Bloque de búsqueda*) to hunt down Escobar. During that chase, a vigilante group consisting of the aforementioned Castaños financed by the Cali Cartel assassinated members of Escobar’s closest circle and brutally left their bodies on display: *Los Pepes* (Spanish acronym for Persons persecuted by Pablo Escobar). The evident collaboration between the police and brutal assassins forced President Gaviria to denounce their action, but the co-operation would continue nevertheless, only under different names.

⁴⁹ “Don Berna” in a recent autobiography confirms the importance of the Escobar chase. In fact, he states it was his brother that killed “El Patron”. Importantly, this is what Carlos Castaño purportedly said upon hearing the news of Escobar’s death: “Now that Pablo is dead, we must begin a new struggle. It will be against the guerrilla. We must build a political-military organization. With the resources, weapons and contacts that remain in the war against Escobar, we can begin. Berna and Seemilla, from this moment, you are part of this new organization as subversive members of the *Estado Mayor*.” *Revista Semana*. “Mi hermano mató a Pablo Escobar: ‘Don Berna’”. 27 July, 2014; Last accessed on: 15 March, 2015. <http://www.semana.com/nacion/articulo/mi-hermano-mato-pablo-escobar-don-berna/397197-3>.

Following the advances of the FARC in rural Colombia in the beginning of the 1990s, the Gaviria and Samper administrations legalized private security co-operatives that functioned under the name CONVIVIR (*Cooperativas de Vigilancia y Seguridad Privada*; Vigilante Cooperatives and Private Security). Governors of Colombia's departments pressed the national government for this move. One of the most vocal supporters was the Governor of Antioquia: Álvaro Uribe Vélez. The state conceded to these vested interests; not least because the Samper administration was embroiled in the *proceso 8000* scandal, spent all its political capital on survival and relied on the votes of regional powerbrokers in Congress in order to defeat prosecution by Congress (Ávila Martínez, 2010, p. 112; Pérez-Liñan, 2003; see Chapter 3). For the paramilitaries, CONVIVIR was the perfect vehicle to expand systematically into Córdoba, Antioquia, and the South of Santander, and push back the FARC from important drug trafficking zones in Colombia. This big offensive, which lasted until 1997, was plastered with massacres, displacement, and other gross human rights violations.⁵⁰

By 1997, the signs that known paramilitaries were amongst the CONVIVIR groups became overwhelming. Human Rights Watch had reported transgressions by the armed forces together with CONVIVIR groups thereby evading accountability. The Interamerican Commission for Human Rights alleged that CONVIVIR blurred the already tenuous distinction between combatants and non-combatants in Colombia to the degree of virtual non-existence.⁵¹ The result was that Samper outlawed CONVIVIR, but this did not stop the evolution of the paramilitaries, because shortly thereafter, the new Pastrana government began the peace process in Caguán with the FARC in 1998. The FARC had become so powerful that it could hand the victory in the elections for Samper's successor to the Conservative Party by agreeing to peace negotiations. As a consequence of this rapprochement between *national* political elites and the leadership of

⁵⁰ In 1991, a total of 193 massacres were registered in Colombia. Antioquia was the hardest hit with 75 massacres, followed by Cesar (19), Magdalena (15), Bolivar (13). Several human rights organization and the Interamerican Court for Human Rights have condemned the close co-operation between armed forces and the CONVIVIR paramilitary groups in those crimes (see Human Rights Watch Annual Report, 1997 & 1998; Ávila Martínez, 2010, p. 113; Inter-American Court of Human Rights. *Massacres de Ituango vs. Colombia 2006*).

⁵¹ Organization of American State, 1998. Essentially all of these accusations have been confirmed by paramilitaries' renditions before the Justice and Peace Commissions. In fact, most of these accusations at the time were rather conservative and cautious, as paramilitary alias "H.H." stated: *all* CONVIVIR groups were paramilitaries (Ávila Martínez, p. 115).

the FARC, *regional* political elites felt deeply betrayed. After all a powerful and legitimized guerrilla group like the FARC could endanger their assets and power that was based on the control of land in their regions. They wanted to continue the counterinsurgency policy, but with CONVIVIR terminated, this project required a new legitimizing mechanism (Ávila Martínez, p. 118; Duncan, p. 261; Romero, 2000).

Already prior to the illegalization of the CONVIVIR groups, Carlos Castaño and other heads of paramilitary groups in the country, such as Salvatore Mancuso and Rodrigo Tovar Pupo, alias “Jorge 40”, had commenced the process of uniting the various paramilitary groups under an umbrella organization. This was the beginning of the AUC (*Autodefensas Unidas de Colombia*; United Self-Defense Forces of Colombia). The Castaños’ ACCU (*Autodefensas Campesinas de Córdoba*; Peasant Self-Defense Forces of Córdoba) as the largest group assumed the natural leadership role within the AUC, but every other group within this confederation retained its coercive capacities. There are three important and distinct changes between the AUC and the various predecessor organizations: first, for the first time the AUC proposed a coordinated expansion plan that aimed at the entire national territory; second, it introduced internal organization statutes, including different military fronts; third, Carlos Castaño forcefully pushed the AUC discourse in public, appearing on television and giving newspaper interviews to legitimate their violence as a response to the absence of the state and the presence of the guerrilla. Significantly, in their entire public relations campaign, they positioned themselves on the side of the state and democracy. Constituted as the AUC, the paramilitaries and their political allies in Colombia’s regions wanted to complete the political project. In 2001, they sat down in Santa Fe de Ralito and signed a contract to “refound the nation” (López Hernández, 2010).⁵² These contracts – further were signed on other occasions – are the basis of the *parapolítica* scandal and are synonymous with the *parainstitutionalization* of Colombia’s political regime. They constituted the preliminary conclusion of the paramilitary project.

From the *Pepes* episode until the formation of the AUC, the paramilitary project “united a good sector of Colombian society: *ganaderos* (agro industrialists),

⁵² The original contract can be found here: “Texto original del “Acuerdo de Ralito” Accessed on: April 5, 2015. <http://www.derechos.org/nizkor/corru/doc/ralito1.html>.

industrialists, narco-traffickers, militaries, some national politicians, and the entire regions and locales where they had dominated before” (Ávila Martínez, 2010, p. 120). Each side followed their own interest in this concoction of actors, and to understand the socio-political elites’ vantage points, two developments are crucial. First, despite the end of the Cold War, the FARC (after all a communist guerrilla group) not only survived, but, in fact, grew in capability and capacity – no doubt a consequence of their 1982 strategic decision to expand into drug trafficking territories. The second essential development was the 1991 Constitution, and the national circumscription for the election of the Senate. It threatened elites’ regionally clustered power base by potentially opening the doors for policy alternatives in those regions. Traditional elites wanted to prevent that at all cost.⁵³ Paramilitaries for their part, pursued a strategy of counter-agrarian reform, and systematically displaced large populations from frontier lands. They robbed the peasants’ lands, and repopulated it with their own clientele. For them, a central goal of the *political* paramilitary project was the legalization of agrarian counter-reform (López, Hernández, 2010).

The solution to each side’s problem was “armed political campaigning”: it provided paramilitaries with key political allies to protect their riches and create a more legitimate aura for their project. They could claim to be on the side of the state and thereby on the side of democracy – a truly preposterous claim. Political elites benefitted in that they could fend off other political adversaries and protect themselves from the FARC. To be sure, narco-paramilitarism in that era became counter-insurgency not because of ideological convictions, but because this was “the basic point of agreement with the elites and state agents that supported their expansion” (Ávila Martínez, 2010, p. 117). The politicians-paramilitary coalition was a functional coalition, but one with profound consequences. In essence, it shielded political elites from the electoral changes of the 1991 Constitution (Rodríguez-Raga, 2002, p. 222-225).

In light of this ambiguous relation with the state, Duncan defined the paramilitary groups at their height as *Señores de la Guerra*. These Colombian warlords united the

⁵³ This is essentially a prolongation of regional elites’ approach to the electoral threat posed by the UP. As seen drug merchants, proto-paramilitaries and sectors of the security apparatus initiated an assassination campaign against activists of the UP, essentially eliminating its entire leadership, because it started to chip away at traditional politicians’ electoral strongholds.

superior capacity (in comparison with the democratic state) to coerce in certain regions and the ability to extract resources to finance coercive capabilities (from illicit sources) with political-military hegemony. The last involved the production and regulation of the social norms that govern the interaction and administration of “justice” in the life of “their groups and citizens” (Duncan 2006, 40-46).⁵⁴ Their hegemony and administration of justice were not intended to be a replacement for the state, but rather a way to compensate for its absence. The self-declared claim to legitimacy of the paramilitaries even went so far as to suggest that they were fighters for democracy. Yet, the strategy utilized to enforce political hegemony (massacres and selective assassinations) is anything but democratic. In areas controlled by the paramilitaries there is little room for contestation and accountability—let alone something resembling the rule of law.

Paramilitary expansion tells us more still. The paramilitary strategy of refounding the nation and legalizing land grabs through counter agrarian reform (López Hernández 2010), in fact runs counter to the state making logic of Tilly’s paradigm of the state as organized crime. In this paradigm rules are homogenized and rackets turned into taxes (1985). In Colombia, paramilitarism drove a wedge between territorial expansion and policing. As Gutiérrez Sanín and Barón explain with the example of paramilitaries in Puerto Boyaca, in a “system [based on] territorial delegation, each commander [gave] a zone to a subcommander, who has latitude to impose his own rules” (2005, p. 24). Acemoglu, Santos and Robinson corroborate this claim and found that a deficient monopoly of violence in “peripheral areas, can be an equilibrium outcome which ‘modernization’ need not automatically change” (2010, 2). They show that with the control of citizens’ voting behavior, paramilitaries can delegate votes to their preferred candidates reducing “the incentives of the politicians they favor to eliminate them”. The result is that “in non-paramilitary areas policies are targeted to citizens while in paramilitary areas they cater to the preferences of paramilitaries” thereby providing citizens in those areas with fewer public goods (2010, p. 2). This suboptimal outcome is locked-in with relative stability, because “paramilitaries deliver votes to politicians with

⁵⁴ Romero (2000) was amongst the first to note that paramilitaries play a crucial role in the identity formation in the territories under their control. The Group and Center for Historical Memory, implemented after the Justice and Peace Law, confirmed the overlaying of various identities in areas affected by the conflict. See in particular the 2012 reports *Justicia y Paz: ¿Verdad judicial o verdad histórica?* and *Justicia y Paz, Tierras y Territorios en las versiones de los paramilitares*.

preferences relatively close to theirs, while politicians they helped elect leave them alone” (2010, p. 2).

In sum, there are two coinciding evolutions to note following the implementation of the 1991 Constitution. It marked the commencement of the third wave of paramilitarism in Colombia. The legal sanctioning of landowners’s self-defense forces in 1968 constituted the first, and the creation of drug lords’ own private armies the second wave. The third wave essentially consisted in the merging of the two and their active engagement in the counter-insurgency war. In addition, it brought politicians (of all levels) and groups at the margin of legality closer and closer. Paramilitaries’ political clout grew as they morphed from CONVIVIR groups to the formation of the AUC. The evolution of the third wave of paramilitarism functioned in tandem with the atomization of Colombia parties and complete fragmentization of the two-party system into electoral entrepreneurs. These entrepreneurs did not rely on the party label and formed their small political movements that garnered regionally concentrated votes. More often than not, however, the political economy of generating votes was infected by the influence of groups at the margin of legality. Paramilitaries created alliances with politicians to facilitate their elections and receive legislative support as well as more effective shelters from criminal prosecution. As Gutiérrez Sanín documented, the collapse of the traditional party system was paramount for the criminalization of Colombian politics. Under the stability of the old, albeit fragmented, two-party system, criminal influence was contained to the regions, now it could extend its tentacles, via Congress, to the national level (Gutiérrez Sanín, 2007). The dependencies between both, electoral entrepreneurs and illegal armed groups, created an equilibrium disadvantageous to the proliferation of public good (in particular security) and the rule of law (Boesten, 2014). When Álvaro Uribe was elected to the presidency in 2002, the internal fragmentation of the traditional party became openly evident as the congressional election propelled 45 different parties into Congress (Pachón, Hoskin, 2011).

2.6. Conclusion: the 1991 Constitution as a critical juncture in Colombia's history

This chapter set out to investigate if the 1991 constitutional moment constitutes one of those instances in political history that places the patterns of political life on a distinctly new and consequent path: does it indeed constitute a critical juncture in Colombia's political history? The discussion on conceptual questions pertaining to the critical juncture framework focused on the Colliers' work on labor integration in Latin America. From them this analysis borrowed the definition of critical junctures as "periods of significant change, which typically occur in distinct ways in different countries or in other units of analysis" and result in long(er) lasting, distinct legacies (2002, p. 29). Sequentially, these junctures are distinguished from other important historical periods by three components: their preceding conditions, the moment of crisis, and the legacies left by the decisions taken during the critical juncture to overcome the crisis.

Since this inquiry concentrated on one specific case, Colombia, and a constitutional decision that was taken in a specific constitutional and political context, I had to increase the observational data points by turning inward and longitudinally analyze instances of institution building in Colombia's history to identify variations in the outcomes. This served to compare and contrast the 1991 Constitution with other instances of institutional engineering, which forms the political context of the 2005 and 2010 Court decisions. As explained, all of them shared a basic, ideal type, trajectory:

Political Crisis/Violence → Institutional Engineering → (New) Institutional Framework

The Thousand-Day-War (1899-1902) ushered in the Reyes Reforms, *La Violencia* (1948-1957) in the National Front Pacts, and the drug violence of the 1980s in the 1991 Constitution. In order to gage the effects of each juncture on Colombia's political system, I differentiated between several sub-systems and held them constant in the analysis of each observational point. The result is that the 1991 Constitution does indeed constitute a critical juncture in Colombia's history that has resulted in more profound institutional change, and resulted in identifiable legacies.

To recap, this chapter first detailed the base line conditions by exploring the fundamentals of Colombian institutionalism that are rooted in the 19th century post-independence epoch. Historically, the state exercised only a very deficient monopoly of violence. The weak distribution of public goods – above all security – was rooted in the intertwinement of state infrastructure with patronage systems during the genesis of the “two-party-state”. Regional caudillos built local power strongholds by tying a following to their *domus* and co-coordinated with each other through the party labels of Colombia’s traditional parties. Two features reflect the clientelistic disposition of the Colombian polity. Firstly, parties were cross-sectional in leadership and following. Socio-economic elites dominated the leadership in both parties, while lower classes populated the followers, reflecting the membership of their patron. Secondly, the normative expectations, which in the context of political institutions that left very little space for meaningful socio-political change must result in disappointment, are restrained through a specific legal discourse. It became known as *Viejo Derecho* and is most centrally focused on a legalistic formalism in the interpretation of constitutional stipulations at the expense of rights protection.

Against these base line conditions, this chapter revealed that reformers in the first two instances responded to crises that were not rooted in deep social or cultural cleavages, but evolved from within the political elite. The crises, in their essence, consisted in the inability of elites to compromise and strike deals that satisfied the entire range of either party’s membership and leadership. In both instances, high levels of internal violence signaled to elites that the original political arrangement was insufficient in containing the clashes of interest and identity between them. This resulted, in both cases, in an elite-driven and controlled process of institutional reform, which eventually established a new arrangement, giving each party significant say in the path future politics were to take. Eventually, these arrangements, too, were insufficient in containing pressures on the political regime, opening a new round of violence and, eventually, institutional engineering. Most importantly, reforms in 1910 and 1957 conserved forms of clientelism by placing them on a more stable *formal* institutional setting without fundamentally altering the underlying socio-political interaction. What was lacking was an institutional reform that opened egalitarian paths for participation, socio-economic and

socio-political involvement, which could have resulted in sustainable growth and development.

The implemented changes of the 1991 Constitution do not only go, by far, the furthest in altering the formal political framework, the crisis preceding the juncture resulted from profound insecurity that laid open what I call a discursive cleavage between the normative claim of a democracy and the political reality of a system besieged by violence and incapable of providing channels for political participation. The crisis resulted in a moment that would transform the foundations of political interaction. Importantly, it could neither be predicted nor explained on the basis of prior conditions, but resulted from students spontaneously coming together for a silent march to mark the assassination of a political leader. This initiated a process of communicative action, during which students first debated in small settings in Bogotá's universities, then joined ranks with students from the entire country, and then started to publically and forcefully organize a push for foundational constitutional reform. Thus, to continue with Robert Frost's crossroad analogy, the movement to implement the constitutional reform took the extra-institutional path rather than the road through Colombia's formal institutions.

The unprecedented trajectory from cleavage and crisis continued through to the actual juncture: the constituent assembly that convened in 1991. Its composition featured a number of actors that had been historically excluded from politics: the leftist party movement founded amongst survivors of the M-19 guerrillas and representatives of indigenous groups. In contrast to negotiations during the previous instances of institutional engineering, the Conservative-Liberal hegemony of formal public affairs was broken. This much more diverse spectrum of actors involved in the public negotiations had a clear impact on the final product: the text of the 1991 Constitution. The assembly produced a very progressive Constitution that impressed with a number of novelties.

Gauging the immediate legacy effects of the constitutional transformations in the charter revealed that the decisions taken in the assembly indeed resulted in very profound transformations. The clientelistic relations engulfing Colombia's formal institutions slowly moved from the inside to the outside of the traditional two parties taken the party-system as it was known down with it. Politicians became electoral entrepreneurs, who (particularly in rural areas) deliberately aligned with forces at the margin of legality in

order to reap electoral triumphs. Those armed groups at margin of legality benefitted by gaining the aura legitimacy required to shield them from legal prosecution. In the middle of these transformations stands the shift towards an electoral system that was intended to boost the national circumscription of the Senate and the D'Hondt system. Contrary to expectations, regional politicians succeeded in pooling regional votes and sought support from armed campaigners that organized the sufficient electoral threshold in areas under their control.

The most profound changes, without a doubt, concerned the judicial system. Two new formal bodies were introduced – the Constitutional Court and the Superior Council of the Judiciary – three different types of rights introduced to the level of constitutional norm, and a novel mechanism implemented to enforce rights. All of these novelties reflected original student original demands and grievances on the human rights situation in Colombia. From the abundance of extrajudicial killings perpetrated against political actors, human rights activists, and union leaders, it follows naturally to situate rights more centrally in the constitutional framework and implement mechanisms that aim at their protection and affirmation. In short, the implemented changes best reflect the movement's agency.

The next question then is how these formal institutional novelties translated into trajectories after the implementation of the Constitution. As explained in the methodological discussion of this chapter, critical junctures are intrinsically tied up with path-dependent development that, as is theorized by historical institutionalist accounts, follows as post-genesis mechanisms of reproduction. Since rights violations stood at the beginning of the juncture, constituted the most important grievance the student movement based its call for renewal on, judicial institutions received the most comprehensive overhaul, and we could already identify a shift in interpretive principles for constitutional litigation, path-dependent development should be most visible in exactly that area of rights adjudication. As shown, the *tutela* was the central mechanism to enforce rights and give them practical significance. The *tutela* jurisprudence of the Constitutional Court therefore provides a most valuable opportunity to test the path-dependent logic of institutional development. This is the task of the next chapter.

3. The *Choque de Trenes* between Colombia's high courts: path dependence and legal argumentation.

3.1. Introduction

All three major schools of institutional analysis – historical institutionalism, rational choice institutionalism, and sociological institutionalism – have difficulties accounting for change, because they treat institutions as the enduring features that connect the present political and social life to the past. They are relatively inert (Mahoney & Thelen, 2010, p. 4; North, 1990). In many readings, only events and processes like the 1991 Constitution open up space for agency and fundamental change, which subsequently again develops towards an equilibrium (Hall & Taylor, 1996, p. 942; Collier & Collier, 2002; Katznelson, 2003; Capoccia & Kelemen, 2007; for a review see Mahoney & Thelen, 2010, p. 3-10.). In this discontinuous change model, path dependence implies that initial decisions in one direction induce further movements in that same direction later on (Pierson, 2000, p. 252). This chapter intends to test whether this understanding of institutional development holds true in the Colombian post-1991 evolution. I apply the concept to the struggle between the high courts in Colombia over the application of the *tutela* vis-à-vis judicial decisions. The development of jurisprudence involves precedent setting and therefore implies a natural tendency to value earlier decisions over later ones. Moreover, since the courts fought over jurisdictional matters that affect the distribution of power, we can expect distributional effects taking place that under path-dependent conditions ought to result in the reproduction of initial decisions. Despite these context conditions, we will see that earlier decisions are *not* automatically reproduced, requiring us to incorporate incremental change models to explain this institutional trajectory.

The 1991 Constitution, in a moment of contingency, most fundamentally redesigned the judicial branch of Colombia's separation of powers system and introduced new institutions (Constitutional Court, Superior Council of the Judiciary), new rights, and mechanisms to enforce rights (*tutela*). As a central novelty of the 1991 Constitution, the *tutela* provides an extra-ordinary good case to study the path dependence of normative

evolution, because it brings together the ideals and promises of the new Constitution that invests every citizen with human dignity and rights with the reality of political interaction that evolves around the conflict-ridden distribution of resources and identities that bring distributional effects to the surface.

The 1991 Constitution included contradictory norms outlining the duties of the various judicial bodies. In its core, the confrontation that was colloquially termed the *choque de trenes* (train crash), conveniently iterating an analogy close to that of path dependence, evolved around the question of whether judicial decisions by other high courts – namely the Supreme Court and the State Council, who wield the highest legal authority in the ordinary and administrative field of justice, respectively – are open to rights review by the Constitutional Court. This prosaic question over legal authority and jurisdiction becomes a much more explosive altercation that goes to the core of the separation of power because of the absence of legal immunity for lawmakers in the 1991 Constitution. Colombia's separation of powers models tasks the Supreme Court with investigating criminal allegations against legislators, who, in turn, fulfill the same function vis-à-vis the executive. Since *public* institutions exercise all of these tasks, their decisions can be subjected to rights review through the *tutela*, inserting the norms that were implemented to better hold legislators accountable into the clash over jurisdiction between the Supreme and Constitutional Court. In the end, we are left with three elements that make the *choque de trenes* an important case for the study of institutional evolution: 1) the proliferation of new courts and contradictions between normative principles in the new Constitution result in a contest over jurisdiction between the Constitutional and Supreme Court; 2) the legal functions assigned to each branch of government in Colombia's checks and balances system turns the fight over jurisdiction between the high courts into a *political* question that involves majoritarian institutions; 3) the affixture of rights to the standing of *tutela* complaints adds a layer to the analysis that implicates the meaning of foundational norms of the new Constitution and their affects on constitutional adjudication.

The appearance of new actors that vie for authority and jurisdiction over legal matters introduces distributive dynamics into the post-genesis evolutions of institutions. As has been theorized, these are amenable to path-dependent analysis. However, the third

layer indicated here complicates the matter substantively. While the question of jurisdiction between courts and the legal functions of branches of governments may be captured by the conventional application of path dependence analyses involving the distribution of power and/or material rewards, the third aspect involves the *significance* actors assign to norms and how they apply them in factual situations that go to the core of the separation of powers. In the context of constitutional adjudication, this opens up the possibility that certain questions can be re-opened again under the condition that the legal and political context has changed. In order to properly understand these concerns for our conceptualization of institutional development, this chapter contrasts sub-cases in Colombia's post-1991 evolution that involve the criminalization of its representative institutions.

There are two episodes in Colombia's recent legislative history that display the effects of the drug economy on Congress and the Presidency. The first case is the so-called *proceso 8000* affair. In the 1990s, the Cali Cartel funneled funds into the presidential campaign of Ernesto Samper, who won the electoral contest in 1994. The origin of funds became public after his election and all but condemned Samper to fight off accusations for the entire term. He eventually survived the entire time in office, because legislators cleared him from wrongdoing (despite fairly conclusive evidence to the contrary). Citizens wanted to sue Members of Congress in the Supreme Court for breach of duty, but legislators succeeded in stopping these investigations through *tutela* complaints they submitted with the Constitutional Court. The Court followed their argumentation and stopped the Supreme Court's criminal investigations. The second case is the *parapolítica* scandal. In the 2000s, during the Uribe years, Members of Congress were accused of having cultivated close relations with paramilitaries associated with the drug trade for electoral purposes. In the course of these investigations, legislators used the same tool to fight off investigations, submitting *tutelas* against Supreme Court investigations, yet, in the end (2010), 102 either faced investigations or were already indicted for conspiring to commit a crime by collaborating with paramilitaries. The intention of this chapter is to explain this outcome and see how the explanation fits into the conceptualization of the discontinued change model of path dependence.

At the end of then analysis stand three key observation: 1) the continuous production of legal facts is what set the *parapolítica* apart from the *proceso 8000*. In the *proceso 8000*, legislators could utilize the *tutela* mechanism to swart off criminal investigations, while in the *parapolítica*, this strategy eventually failed to protect them from criminal liability. As a consequence, courts continued their investigations, produced “legal facts” – facts that are probed in juridical processes and thereby assume a higher degree of officialdom. This forced President Uribe to invest a lot of political capital in order to delegitimize the court’s claims (these campaigns eventually transgressed into illegality); 2) The continued production of legal facts was to a decisive part the result of an agreement between the Supreme and Constitutional Court in *tutela* decisions implicating the role, privileges and duties of legislators; 3) the trajectory of jurisprudential development in the question of the *tutela* and the *tutela contra sentencias* does not become more intelligible with a classical understanding of path dependence. The shifts and differing outcomes were the result from endogenous changes that occurred within the institutions.

As a consequence of these conclusions, an intelligible reading of path dependence must be able to incorporate the following points:

- Once a decision is taken, the cost of reversal increases, but not exponentially so. Rather, reversals require good explanations rooted in precedent and change of context.
- Earlier decisions do matter more than latter decisions, since discourse (in particular legal discourse) builds on logical coherence. However, earlier decisions might also open new questions further down the road that can significantly alter the path.
- There cannot be a practical point of no return, because all decisions are theoretically forever open to contestation.

In particular, the notion that legal questions can be re-opened under specific conditions proves difficult for path dependence and gives merit to incremental change models of institutional development. As will be shown, rather than closing down options

permanently, legal questions (and their answers) can be re-opened discursively under certain conditions. Moreover, earlier decisions can help to provide the argumentative context to revisit these precedents, restructure their normative meaning and apply them anew to a new empirical context. Therefore, earlier decisions do not accumulatively reduce options, but discursively open new paths and options as well. We will see this logic play out in the jurisprudential trajectory in the *tutela contra sentencias* (*tutela* against judicial decisions)⁵⁵ that is at the root of the *choque de trenes* and how it affected constitutional adjudication in cases that weighed legislative autonomy against criminal accountability of legislators.

From these considerations follows a four-part organization of the chapter. The first section develops an ideal type rendition of path dependence and explains the specifics of Colombian constitutionalism after the implementation of the 1991 Constitution. The first part will detail the specific institutional design of the three branches of government with a particular focus on appointment powers and investigative functions, before concluding by highlighting the normative connotations of the *tutela* and the *choque de trenes*, which evolve around the legal figures of the *cosa juzgada* (“the judged case”; in legal terms referred to as *res judicata*) and the *via de hecho* (“by way of fact”, which entails that a judge creates her own law that diverges from the Constitution). The second and third part of this analysis focus on the specific empirical cases, the *proceso 8000* (Process 8000) and *parapolítica* (parapolitics), and analyse their respective political and normative evolutions. The examination of the political developments attempts to construct a reading of each scandal that separates the trajectory into different phases. The discussion of the normative evolution closely inspects key court decisions and how they affected the evolution in each political scandal. The fourth part will conclude the findings and connect the empirical analysis with the theoretical considerations.

⁵⁵ The official term for the subject of the *choque de trenes* between the high courts is *tutela contra providencias judiciales*. The slightly abbreviated form is *tutela contra sentencias*.

3.2. Part I: Path dependence and Colombia's new institutions.

The strength of path dependence as a concept is that it fulfills what Popper called a risky theory that “forbids certain things to happen”, while expecting other things to take place (Gerring, 2008; see Popper 1968). Risky predictions are those that feature precision and determinacy so as to exclude factors that are outside of the applied theory's scope. In this sense, good theory is said to be not only falsifiable, but also include specific causal mechanisms that result in the predicted outcomes (Gerring, 2008, p. 660). Path dependence is such a well-defined concept that has made quite the career in the social sciences, travelling from studies in sociology, to economics, political economy, and finally political science.

Path dependence is a concept that borrowed from economics and shares a lot of characteristics with how economists conceptualize equilibrium (Page, 2006). First popularized by David's study of the “QWERTY” keyboard layout, the theory behind it argued that sub-par outcomes could persist over time, because of the legacy they have built up (David, 1985). The Colliers' (2002) study of party system transformations and labor integration in Latin America was another benchmark for the concept's entry into the social sciences in general and comparative political science in particular. In their words, path dependence arises from the mechanisms of reproduction, “a type of constant cause” that embodies the distinct legacy of the critical juncture and helps it endure over time (p.35). Therefore, it conjoined characteristics of institutional resistance identified in earlier studies, such as the rule of oligarchy (Michels 1915), the creation of vested interest (Stinchcombe 1968) as well as the role of sunk cost that perpetuate institutional frameworks (Krasner 1984).

A common reading of path dependence is that a “small initial advantage or a few minor random shocks along the way could alter the course of history” (Page, 2006; David, 1985). More concretely, as Mahoney argued in a very useful study, “path dependence characterizes specifically those historical sequences in which contingent events set into motion institutional patterns or event chains that have *deterministic* properties” (2000, p. 507; italics added). In his reading, the task of the researcher is to identify an outcome and trace its origin to a particular set of historical events, and show

the contingency of those events. Interestingly, Mahoney addresses the notion of legitimation in path-dependent development. He argues that it requires the incorporation of an actor's subjective orientations about what is morally correct. Increasing legitimation results in a positive feedback cycle of self-reinforcement, because initial precedent about what is appropriate "forms a basis for making future decisions about what is appropriate" (p. 523). Thus, despite the explicit mentioning of subjectivity and complex components such as the evaluation of what is morally correct, the legitimation explanation, too, retains its bias towards inertia and reproduction of initial decisions.

Mahoney goes on to distinguish between two types of path dependent developments: self-reinforcing sequences and reactive sequences. In the case of the former, the contingent historical event triggers an evolution that corresponds with the initial adoption and results in the stable reproduction of that institution over time. In reactive sequences, the contingent period reflects a key breaking point and the deterministic pattern corresponds with a logically following pattern (Mahoney, 2000, p. 535). Mahoney then makes three crucial observations on the nature of path dependence for the purposes of this analysis: Firstly, the contingency of the initial juncture that sets the subsequent development on its path, defies deterministic explanation that are based on the initial conditions. Rather, these are stochastically related to the recurrent patterns of development. Secondly, earlier events in the pattern matter more than later ones, even if the latter ones hold the *potential* to make deeper effects (Mahoney, 2000, p. 510). In other words, path dependence describes a sequence of events, whose order matters, because when things happen they affect how things continue to happen. Thirdly, the patterns of reproduction display a high degree of "inertia" and resistance to abrupt change. In sum, the original moment of the creation of a path-dependent pattern defies theoretical explanation (theory did not predict this event), but its recreation by reinforcing mechanisms follows standard explanations (see also Pierson, 2000, p. 263).

Finally, there are at least four causal mechanisms for path-dependent sequences: increasing returns, self-reinforcement, positive feedbacks, and lock-in. Increasing returns entail that benefits increase as one makes the same decision. Self-reinforcement means that a choice involves a set of forces or institutions that encourage the same choice in the future. Positive feedbacks involve other people, in that an action creates positive

externalities if other people make the same decisions. Lock-in entails that one choice becomes better than other choices because a sufficient amount of people have already made that decision (Page, 2006, p. 88).

This brief review of the conceptualization of path dependence provide a number of generic observable implications:

- Once a decision is taken, the cost of reversal increases exponentially, moving institutional development in a path of (mechanical) reproduction (Levi, 1997; Thelen, 1999; Pierson, 2000; Mahoney, 2000)
- Earlier decisions matter more than latter decisions (Mahoney, 2000);
- The point of reversal becomes a practical impossibility, once costs have incurred beyond a certain point (although the theory of path dependence does not predict this point in any theoretical way); only another drastic punctuated equilibrium can reverse the initial decisions.

Applying these conceptual parameters of path dependence to the study of institutional development evidently begs questions regarding the ontological suitability. Is path dependence really helpful for understanding how decisions are made in judicial institutions or is it a too deterministic conceptualization of political interaction? The first question can be addressed quicker, while the second part is focus of the remainder of this chapter. As the previous chapter detailed, the creation of the 1991 Constitution showed characteristics resembling the definitional traits of a critical juncture. Historical institutionalist theory holds that these instances are prone to produce ruptures in equilibrium-based evolutions and move the trajectory onto new paths. Consequently, the basic condition that path dependence is hypothesized to follow critical junctures applies in the Colombian case. Moreover, if path dependence has applicability to the study of institutional development, there is no obvious contention – at least not from a political science point of view – that *a priori* disqualifies the concept from being utilized to further our understanding of judicial institutions. In the study of judicial behavior, political scientists have consistently applied tools from behavioral studies to understand how judges decide and produced important insights – even when these models could not

account for the entire range of complexities involved in judicial decision-making. After all, scientific models all serve the purpose to simplify real world experiences to make them intelligible.

We will see, however, that the point of too much determinism built into the concept is a valid one. Thelen already lamented in 1999 that path dependence is too contingent, in that the initial junctures that produce path dependence is unrealistic, resembling a blank slate, rarely present in political interaction, and too deterministic in that the reproduction becomes too mechanical (1999, p. 385). Despite these critiques, which this study will actually corroborate, path dependence still retains its utility as an *epistemological* tool. It is, as stated at the outset, a risky theory that implies fairly specific predictions. Moreover, the point of ideal type formulations for the study of human action is not that we assume interaction to follow these predictions consistently, but to use them as epistemological tools to open up analytical space. Joseph Conrad wrote in his *magnus opus*, *Heart of Darkness*: “And I saw something restraining, one of those human secrets that baffle probability, had come into play here” (p. 51). The point of good Weberian ideal type sociology is to understand these human secrets by devising epistemological predictions and compare these with the real-world outcomes. Here, the advantage and benefit of devising a strict and potentially overly deterministic reading of post-genesis evolution, helps to identify the period, when institutional development moved off the beaten path, enabling us to identify the critical moments in the institutional developments to then specify mechanisms that help us explain what was behind that shift.

The proposed case is the jurisprudential evolution of the *tutela* and its role in cases concerning the criminal liability of legislators. Struggles over its interpretation and application can have two potential sources that can bring distributive dynamics to the surface. The new Constitution enabled each citizen to sue *any public* institution for violation of her rights through an injunction (*tutela*), and stipulated that the Constitutional Court could select every *tutela* submitted in the country (Article 86). Regulating judicial functions, the new Constitution stipulated that the Supreme Court, which was the highest court under the old one (including constitutional adjudication), remained the final instance of the ordinary justice system (involving criminal, labor, and civil law; Article 234). This then set up a clash over the jurisdiction between the high courts over who

would have the final word in criminal law cases: is the Supreme Court the final instance of the appellation process in the ordinary justice system or does rights based constitutional protection extend to criminal law cases? The second source for distributive dynamics arises from the Supreme Court's role to hold legislators criminally liable. The 1991 Constitution denied legislative immunity and submitted Members of Congress to the jurisdiction of the Supreme Court. This "special privilege" was therefore also susceptible to the rights review of the *tutela*.

Finally, the *tutela* presents itself as a good case, because it links up with the student movement and constituents involved in the making of the Constitution. After all, it was Colombia's abhorrent human rights situation in the 1980s that drove students to action and eventually resulted in the creation of the Constitution. Human rights were the central grievance of constituents and the *tutela* the most important institutional remedy to protect Colombian citizens' rights implemented in the document they produced. In the final result and debates surrounding the application of the *tutela*, we will see that the affixture to rights that gives complaints legal standing means that questions over jurisdiction have to be placed in the context of constitutional identity, implicating the ontological and existential meaning actors assign to the entire constitutional order. As will be shown in more detail below, the discussion was not solely about whether one institution within the constitutional set-up had jurisdiction, but whether the Constitution as a whole still has validity if the jurisdiction of the *tutela* were to be curtailed.

This preceding discussion then results in four questions that guide the discussion in this chapter:

- Did the jurisprudence regarding the *tutela* follow a mechanical and linear line from its inception in the 1991 Constitution?
- Did earlier decisions matter more than later decisions, and if so, did it forego the possibility to decide differently in later questions on the same merit or do earlier decisions open new possibilities for later decisions on the same merit?
- If the Constitutional Court changed or modified its jurisprudence, did the modification follow mechanically from earlier decisions or did it base its change

in principled explanation engaging a legal argumentation evolving around legal values and shifts in legal context?

- If there was a clear break, did that break in turn result in a logically following pattern, indicating reactive path dependence?

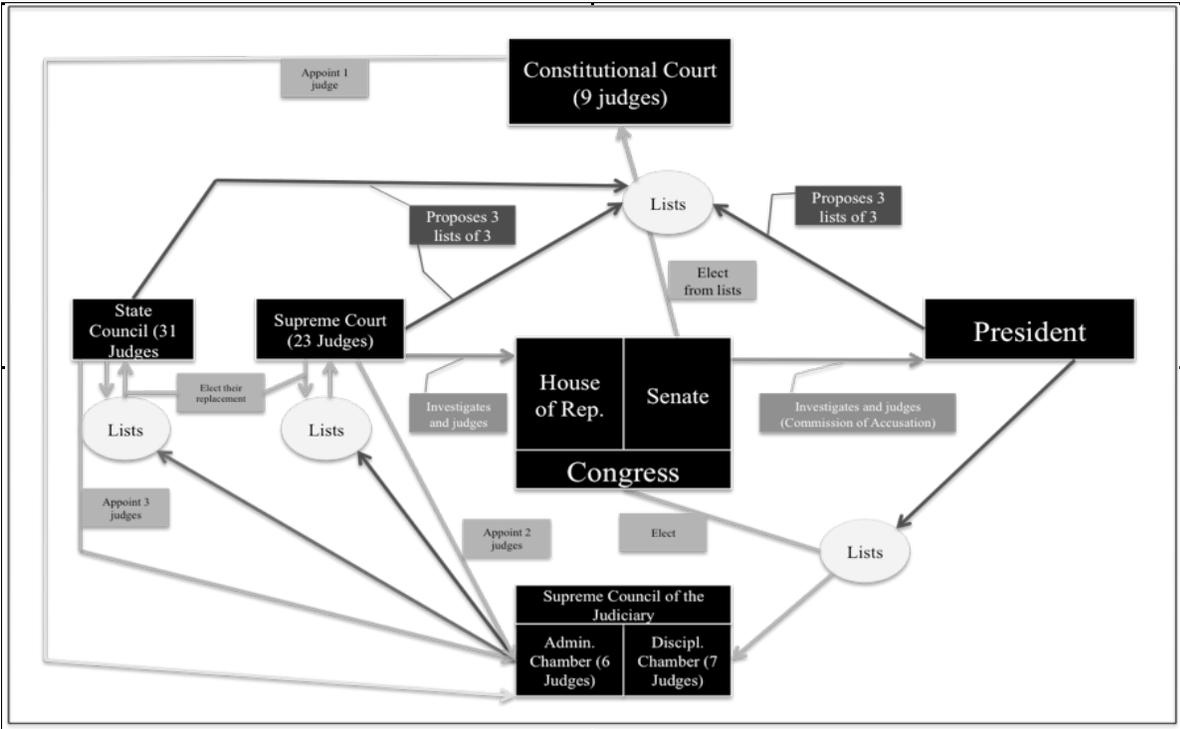
Engaging the path dependence framework and modifying it for the purpose of analyzing legal argumentation will yield important results. Without getting too far ahead of myself, we can posit that contrary to the mechanical predictions of the path dependence logic judicial decisions are open to course corrections. Such a path dependence of legal argumentation shares features with the incremental change model, Streeck and Thelen (2005) and Mahoney and Thelen proposed (2010). The contention I have with their conceptualization is that the incremental change model endogenizes the most important and intricate part of institutional development as it played out in this affair: compliance. In the 1990s, at the end of the era of the big drug cartels, the Constitutional Court upheld legislators' autonomy against criminal investigations by the Supreme Court. In the early 2000s, during the Uribe years, the Constitutional Court shifted its weighing from legislative autonomy and protection of Members of Congress's immunity in favor of a stricter application of the Supreme Court's privilege to hold them criminally accountable in the face of wide-spread criminalization of Congress by paramilitary groups. The result was that numerous Members of Congress were prosecuted for their illicit relations and received lengthy prison sentences, purging Uribe of his support in both chambers of the legislature. Given the argumentative procedures within a court, the internal shift was more a response to the disclosures of the Supreme Court and the legal facts it produced, resulting in something akin to institutional learning. In the end, it was simply not argumentatively feasible to defend parliamentary immunity as a bulwark for free deliberation, when Members of Congress utilized the right to freely deliberate and vote in Congress as a smoke screen to cover up their implication in gross human rights crimes (including mass atrocities such as massacres and extra judicial killings).

3.2.1. Courts and the new constitutional regime: selection, jurisdiction, and interdependence of branches of government

At least since Hamilton's Federalist Papers, the importance of the judiciary and independent institutionalization of its judges is a well-articulated feature of a system of separation of powers (Vanberg, 2008, p. 101). In paper number 78, he famously argued that the general liberty of the people could never be endangered from that quarter as long as it remains "truly distinct from both the legislature and the executive" (1788). The Colombian case is no exception to this, as Acemoglu, Robinson, and Santos remind us (2010). They explained that in order to understand the dynamics of paramilitary involvement, it is important to appreciate the institutional independence of the Supreme and Constitutional Court. As will be shown below, those two courts were central in the confrontations between President Uribe, Congress, and the judiciary during *parapolítica*, and they did indeed prove their institutional independence. However, to fully comprehend the dynamics of the conflict as well as the institutional independence exercised by the courts' magistrates, it is critical to paint a holistic picture that incorporates all four high courts in Colombia's judicial system. Thus, the first step towards providing a more complete picture of Colombia's courts and then set the evolutions of the *proceso 8000* and *parapolítica* scandals in context is to provide more details of the institutional design and specify the functions each court exercises. In addition, an important factor for magistrates' independence was the selection method, which differed for each court. In fact, the evolution of the *parapolítica* scandal is testament to the relation between judicial independence and appointment procedure, as will become clear in the prosecution of Members of Congress described below. Therefore, it is only prudent to include procedures of appointment in preliminary explanations of institutional design.

It will become evident quickly that the intricacies and interdependencies of the various branches of government through appointment procedures and investigative functions create a very convoluted and complex picture. Figure 3.1 below shows what court and what chamber of a particular court, is related to what part of another branch of government in what specific capacity.

Figure 3.1: The courts and the branches of government in Colombia's 1991 constitutional regime.



Source: Compiled by the author.

With the institutional complexity now visually laid bare, we can begin disentangling the various relations existing between the branches of government. It is this complexity in the institutional set-up between courts, legislature, and executive, that made the *choque de trenes* not only central for the clash over jurisdiction between the courts, but also for the interplay between courts and other branches of government.

The shift from the “American Model” of constitutional adjudication (with one Supreme Court to review legislative and administrative acts as well as criminal sentences) to the Kelsenian model with a specialized court at the helm of constitutional jurisdiction, without a doubt, represents one of the most fundamental institutional changes imposed by the 1991 Constitution (Kelsen, 1945). The Colombian Constitutional Court exercises abstract, *erga omnes*, and constitutional review through the *acción popular de inconstitucionalidad*. An important facet of this power in the Colombian context is that the Court can impose conditions for declaring a law or constitutional reform constitutional, as happened for example in the first re-election decision. It required a statutory law to even the electoral playing field between the incumbent and competitors in the election before the law to allow one consecutive re-election could pass.⁵⁶ In its decision on the Justice and Peace Law, the Court imposed conditions upholding victims’ rights to truth (García Villegas, Revelo Rebolledo, Uprimny Yepes, 2010, 324-325).⁵⁷ In addition, the Court has the authority to ultimately decide concrete rights complaints through the *acción de tutela*. While these are nominally *inter alia* only concerning the parties involved in the dispute, *tutela* decisions can, over time, have *erga omnes* effects, applying to everyone; in particular if they involve unification decisions (Cepeda Espinosa, 2007, p. 31 & p. 103; see below). Ordinarily, review of *tutelas* are exercised by a plenum consisting of three randomly selected magistrates, while abstract constitutionality review is exercised by the entire plenum in the *Sala Plena* (plenary chamber). In the course of the *choque de trenes*, one important concession made by the

⁵⁶ Interview subject no. 5 (auxiliary judge), May 13, 2013.

⁵⁷ The Constitution also provided means to contextualize decisions. To that end, the Court can, prior to deliberation, call on experts as well as cabinet ministers to address concerns it might have. In addition, it can also summon public hearings – a practice that it terminated, however, because it undermined what one interviewee called the tranquility of process by increasing the public exposure. See interview subject no 29, 10 May, 2013, and Chapter 4.

Constitutional Court to the other courts was that high court decisions, by principle, should always be reviewed by the entire plenum.

The 1991 Constitution implemented the mixed method for selecting constitutional judges, which has the advantage, as one interviewee suggested, of not being fully politicized and thereby jeopardizing the Court's institutional independence nor did it pack the Court with technocrats purging the institution of all democratic legitimacy. In the eyes of the constituents in 1991, the selection of constitutional judges by *co-optación* (the self-selection of vacant positions on the court by the court itself) proved too opaque.⁵⁸ Under the new regime, the Senate elects all magistrates on the Constitutional Court, yet, the short-lists are prepared by three different bodies: the Supreme Court, the President, and the State Council. Each body presents a list of three candidates for a total of three positions on the Court. Thus, of the nine magistrates sitting on the bench, a maximum of three could have come from lists presented by the executive. Prior to the re-election reform in 2005, only every second president at the end of his term could have had the chance to nominate short-lists for the bench (assuming that all judges stay for their entire term of eight years). This is referred to as the periodization of offices, which had the intention to curtail executive influence on horizontal oversight offices. Evidently, re-election affected that, giving *every* president, if re-elected, the chance to nominate short-lists for the bench, but nevertheless did not affect that presidents could ever influence the selection of more than three judges concurrently serving on the Court (Pérez-Liñan & Castagnola, 2009, p.93).⁵⁹

Under the new Constitution, the Supreme Court consists of three chambers: one responsible for criminal law (nine magistrates), one for civil and agrarian law (seven magistrates), and one for labor law (seven magistrates, for a total of 23 magistrates in the entire Court). As stipulated in Article 234, the Supreme Court is the highest court of the ordinary justice system and each chamber decides independently on cases under its jurisdiction. Furthermore, as the highest court of the ordinary justice system, it also investigates and sentences members from either chamber of Congress (Article 235, 2). Magistrates on the court are selected for a period of eight years, by the full chamber from

⁵⁸ Interview subject no. 31 (professor of sociology), May 13, 2013.

⁵⁹ Most interviewees from the Court stressed this point. See Appendix C, Table C.1.

lists prepared by the administrative chamber of the Superior Council of the Judiciary. As described in Chapter 2, this is referred to as the method of *co-optación* (co-optation). Additionally, an important administrative task the Constitution bestows on the Supreme Court is to elect the attorney general from a short-list provided by the President (Article 189-19). At the end of Uribe's second term, the election of the Attorney General became the last confrontation between the Supreme Court and the President, because the Supreme Court repeatedly (and in the end successfully) turned down all candidates the President put forward.

The State Council is also an institution taken over from the old Constitution. It is the highest court in the administrative jurisdiction and consists of 31 magistrates subdivided into two chambers. They are also elected by the co-optation method, meaning that the full chamber elects positions for upcoming vacancies from lists prepared by the administrative chamber of the Superior Council of the Judiciary (Articles 236 – 238).

Finally, the Superior Council of the Judiciary is probably the most peculiar high court. It is divided into two chambers, the administrative and disciplinary section. Corresponding to their names, the functions of the court are administrative and disciplinary (for internal affairs of the judiciary in Colombia). As described, the administrative chamber compiles the lists from which the State Council as well as the Supreme Court select the replacements for vacancies on their respective courts. The chamber itself consists of six magistrates, who are appointed by the Constitutional court (1 judge), Supreme Court (2 judges), and the State Council (3 judges), thereby ensuring that the co-optation method for selecting judges on the Supreme Court and the State Council is free from legislative and executive interference. The story is very different, though, for the disciplinary chamber. Congress elects the seven magistrates on this body from lists sent from the executive (Articles 254-257). It is a completely politicized selection process, which, as will be shown below, had a huge impact on the independence of the judges. It became, in the words of Constitutional Court magistrate Pinilla Pinilla, a "decomposed and politicized body" acting in the interest of discredited Members of Congress.⁶⁰

⁶⁰ *Revista Semana*. "Los parias de la justicia", 2 February 09. Last accessed: 23 October 14, <http://www.semana.com/nacion/articulo/los-parias-justicia/100371-3>.

The specifications so far provide us with analytical tools to examine the distribution of power in Colombia's separation of powers model. The institutional setup draws a complex picture of dependencies and safe guards between the various branches intended to impose independent accountability and bestow democratic legitimacy at the same time. The selection of the Constitutional Court's magistrates is particularly informative of these two imperatives: on the one hand, they are elected by one of Colombia's representative body, the Senate, on the other hand, two thirds of the positions are filled from lists prepared by autonomous legal bodies, who in turn are kept at arms length from both the executive and the legislature. The functional arrangement between the Supreme Court and Congress in regard to criminal procedures is another lever intended to impose accountability on legislators. Criminal investigations without institutional immunity can be a potent tool to deter politicians from forming illicit linkages with criminal elements associated with the international narcotics trade. It is here where the institutional setup colludes with broader normative connotations of the Constitution. As we will see, the *tutela* can be a wedge driven into the Supreme Court's accountability function vis-à-vis Congress, if representatives from the latter claim that their legal guarantees were infringed upon by the Court's criminal investigations. After all, legislators' free and uncoerced deliberation is a valuable good for the constitutional order. At the same time, legislators' criminal deeds were exactly those rights abuses constituents had in mind when they first conceived of the *tutela* mechanism as a way to improve Colombia's abhorrent human rights situation.

Together, this creates a situation, in which competing claims of rights bearers and constitutional values cannot be easily solved with reference to the universality of rights, but require a careful weighing of the validity of the specific claims in the specific contexts. Weighing competing rights claims is intrinsically bound up with the exercise of public reasoning that requires the judge to make validity claims herself to evaluate the superiority of a specific rights claim over another. Not least, such an evaluation involves the significance and meaning actors assign to the constitutional order as a whole, its specific organizations therein, and how particular norms reflect the meaning of the constitutional order. In order to better understand this normative layer, we need to recall the neo-constitutionalist connotations of human rights and explain their normative

grounding in the 1991 Constitution. This then provides us with tools to understand how apparently settled normative questions can be re-opened again and reshuffle the institutional and strategic framework of the constitutional order in the issue of criminal liability of legislators.

3.2.2. *The choque de trenes and Nuevo Derecho*

When constitutionalism is the exercise of political power limited by constitutional rules, neo-constitutionalism involves further limitation placed upon the exercise of power through the invocation of rights and human dignity (Sartori, 1962; Kumm 2007 & 2010). It is not a coincidence that the *tutela* epitomizes the promises of the 1991 Constitution. Not only does it best reflect the students' quintessential demand in 1991 to address the human rights situation in Colombia, it is also reflective of the deliberative origin of the movement and Constitution, as well as the latter's vestment with neo-constitutionalist principles. Firstly, it has a very evident precedent in the German *Verfassungsbeschwerde* and the Spanish *Recurso de Amparo*. Students as well as constituents in the assembly took note of the neo-constitutionalist experiences of Germany with its Basic Law and Spain and its Constitution from 1978 and therefore included the *tutela* to give the rights catalogue some teeth to be effective (Martínez).⁶¹ Secondly, the *tutela* is intrinsically bound up with the Constitution's promise to protect the human dignity of all Colombian citizens echoing the general call for the respect of human rights. In order to comprehend the unfolding and evolving confrontation between the Constitutional Court and the Supreme Court over the jurisdiction of the new mechanism, it is therefore indispensable to understand not only its formal aspects, but also the normative imperative that justified its incorporation into the Constitution. It is the teleological rationalization of the *tutela* that discursively anchors the evolution of the *proceso 8000* and the *parapolítica* investigations in the exercise of public reasoning. It will become clear that opinions and positions in a dispute over its applications, regardless of the strategic motivation that may

⁶¹ See also interview subject no 36 (professor of philosophy), May 7, 2013. Since its inception into the constitutional framework, the *tutela* has become the most widely praised success story of the charter, extensively utilized by Colombians. The *tutela* is widely credited for generating the Constitution's legitimacy, despite the relatively low turn out for the constituent assembly (see Appendix C, table C.1). Almost fifty percent of the interviewees asked about the importance and changes in the new Constitution, freely noted the *tutela* as the most important novelty (see Appendix C).

have driven actors, always must account for the inclusion of rights and human dignity in the definition of the Colombian subject in the 1991 Constitution.

Article 86 of the 1991 Constitution states:

Every person has the right to file a writ of protection before a judge, at any time or place [...] for the immediate protection of his/her fundamental constitutional rights when that person fears the latter may be violated by the action or omission of any public authority. The protection will consist of an order issued by a judge enjoining others to act or refrain from acting. The order, which must be complied with immediately, may be challenged before a superior court judge, and in any case the latter may send it to the Constitutional Court for possible revision.

Of these attributes outlining the norm of the *tutela* in the 1991 Constitution, the immediacy and ubiquity of its jurisdiction are the most central neo-constitutionalist qualities. It connects the empirical life world of the subject in the Constitution with the legal entitlements outlined under Chapter 1 and 2 of the charter. Moreover, this protection of rights is purposely bound up with the promise to uphold human dignity, defined not only in Article 1 of the Constitution, but also in conjunction with the stipulation of socio-economic rights (Article 42, 2; Article 51), and cultural rights (Article 70). Arango and Cepeda – the former a highly influential Colombian legal scholar and the latter a magistrate and president of the Constitutional Court – both stress that the protection of basic rights offers the possibility, “in objective situations of urgency, to preserve human dignity” (see Cepeda 1993, p. 199; Arango, 2003, p. 147; see also Aponte, 1994; Cifuentes, 1995, p. 76-77). The preservation of human dignity – a concept recurrently introduced in various constitutions since it was included in the Universal Declaration of Human Rights in 1946, yet scarcely defined in a meaningful way – is best understood as a procedural and gradual exercise to achieve substantive results.⁶²

⁶² There is a wide-ranging debate on the exact definition of human dignity in legal philosophy. Of course, Kant’s formula that humans should be treated as ends rather than means is probably the most prominent rendition of definitional traits, but not the sole contribution. This is hardly the space to survey the entire literature on human dignity, let alone further develop it. It is worthwhile noting, however, that a more recent contribution, articulated by Jeremy Waldron, situates human dignity in the exercise of democratic politics. He showed that the term *dignitas* is associated with social phenomenon of honor. Dignitaries used to be persons of rank, whose special treatment was grounded in a birthright. As a consequence of democratization this birthright was extended to everyone. As Waldron writes, “once associated with hierarchical differentiations of rank and status, ‘dignity’ now conveys the idea that all human persons belong to the same [high] rank” (2007, o. 201). This situatedness in democratic politics is interesting for the purposes of this investigation, because the *tutela* does not hold the promise to automatically solve all

Human dignity and the principle of urgency serve as the interlocutor between a constitution and human relationships. As Arango explains, the reservation against the realization of material social rights – one of the most important fields of application of the *tutela* (Rodríguez Garavito & Rodríguez Franco, 2010) – usually takes the route of inferring a type of judicial decisionism, which legislates the transfer of funds from the haves to the have-nots. Arango responds that such a voluntarist view of the state and materialist understanding of social relations “is both reductionist and incompatible with the Constitution” of 1991 and constitutionalism in general (2003, p. 147).⁶³ Rather, the neo-constitutionalist framework of the 1991 Constitution relies on an affirmative view of human dignity and consequentialist theory of rights. Its central validity claim concerning rights is that “a right is a normative position based on valid and sufficient claims, whose unjustified non-recognition imminently harms the right-bearer” (Arango, 2003, p. 144). A critical point to note here is that the non-recognition must be justified, which plants the seed for a discursive understanding of the validity and enforcement of rights and constitutional values, rooted in public reasoning.

Of course, legal and political philosophy has long grappled with the recognition of rights in a post-metaphysical world. For neo-Kantian thinkers ala Habermas, the recognition of rights must be bound up in such communicative processes in order to avoid falling in the trap of transcending into metaphysics and neglecting validity in human life worlds, without at the same time becoming a victim of post-modern moral relativism. In his discursive conceptualization on the origin of rights and law, the self-legislating citizen must be able to understand herself as the addressee *and* author of the law. To that end, “we cannot meet this requirement simply by conceiving the right to equal liberties as a morally grounded right that the political legislator merely has to enact” (Habermas, 1996, p. 120). Rather, everyone is involved in disclosing the meaning of rights in specific social and political contexts. Such a contextualization of constitutional adjudication is also evident in the jurisprudence of Colombia’s

human rights problems, but to gradually improve the situation so that undignified treatments of humans disappears.

⁶³ It is noteworthy that voluntarist views of human dignity and human rights are most often developed for well-ordered societies and therefore lack even more immediate dismissal in developing countries such as Colombia. However, even in well-ordered society, the attribute “well-ordered” implies the inclusion of some form as the guarantee of basic social rights, as Rawls and Habermas argued about (1993; 1996).

Constitutional Court. As we have seen, the new constitutionalism of the 1991 Constitution invokes not only formal principles of interpretation, but also deliberative ones such as the principle of proportionality or the principle of efficacy. Both result in a process of legal argumentation that takes statutes and norms as given, but weighs the legal consequences of each party in a constitutional dispute (Cifuentes, 1995, p. 66).

The downside of placing rights within a communicative space, which balances infraction against potential benefits from a public perspective, is that it undermines the very idea of rights as a protection that imposes deontological restrictions (such as the provision of torture) against popular demands. Worse still: it might open the gates of moral relativism placing the entire system of rights protection in limbo. However, as Kumm and Walen showed, human dignity understood as humans being treated as ends and not means is always at stake – even in such simple contractual obligations as buying an apple, when we use the fruit seller as a means to satisfy a desire for fruit. It is the condition of consent that makes that transaction compatible with human dignity. They showed furthermore that proportionality testing can indeed capture more important deontological restrictions such as long-term-preventive detention, because it requires the decision maker to refrain from mechanical reproduction of statutes. Rather, it engages the judge in a balancing moral reasoning that “is thoroughly deontological and always grounded in human dignity” (Kumm & Walen, 2013, p. 22).⁶⁴

The apparent logic implicit in such a conceptualization of rights is to gradually improve the human rights situation if the urgency requires. It avoids seeing natural or social disadvantages as objective limitations to the recognition and enjoyment of rights, but relies on human realization to open up a space for differences of capacities (Arango, 2003, p. 144). Rights protection thus is not an automatic panacea, but rather a mechanism to gradually improve the situation of the rights bearer. The *tutela* is a case in point. It combines seven traits of rights based constitutionalism: 1) it is minimalist not maximalist; 2) it is constitutional not legal; 3) it is objective and not ad hoc; 4) it arises from precedence and not from legislation; 5) it is diffused and not centralized (meaning *tutelas*

⁶⁴ Jürgen Habermas (1974) and Robert Alexy (1989) both have shown that the rationality rules of discourse and the pragmatics of legal reasoning exclude certain outcomes as impossibilities. For example, it is impossible to sell oneself, even consensual, into slavery. Alexy has shown that legal discourse never fully sheds its dependencies on general practical reasoning (and thereby incorporates its weaknesses), yet the structuration of legal reasoning mitigates some of those weakness (p. 292).

can be submitted with any judge in the country and then be selected by the Constitutional Court); 6) it prioritizes equity and not legality; 7) it is gradual and not absolutist (Arango, 2009, p. 302). It is exactly these traits that make the *tutela* such a good candidate to test the institutionalist hypothesis. Its normativity as well as its formal application provides credence to the assumption that it procedurally augments and builds a thick jurisprudence, which is, over time, less and less susceptible to reversal, introducing precedent into a civil law system (López Medina, 2000; Aponte, 1994; Cifuentes, 1995). On the other hand, it is fully deliberative. The development of rights constitutionalism is not a foregone process that evolves along deterministic patterns, but relies on argumentative constraints. In regard to the institutionalist hypothesis of path dependence, the question then becomes whether precedent in norm creation and evolution builds as lineally in one direction as occurred, for example in the incorporation of the labor class by either the state or political party (Collier & Collier, 2002), or conversely, if earlier legal decisions do not set a deterministic paths in motion, but are rather open to rights based contestation and therefore also to change of course.

3.2.3. “Via de Hecho”: legal vs. constitutional certainty

The constituents of the 1991 Constitution identified the bifurcation of constitutional jurisdiction between the State Council and the Supreme Court under the 1886 Constitution as a barrier to effective constitutional rights protection. The logical remedy was to unify the constitutional jurisdiction under one high court. Therefore, the Kelsenian framework with a sole, specific institution at the judicial helm to ensure observance of the constitutional hierarchy was a natural result of the desire to unify constitutional jurisprudence (Cepeda Espinosa, 2007, p. 95). The *choque de trenes* has its origin in this desire of the constituents for unification and efficacy of constitutional rights enforcement, which had to clash with the institutional interest of the other high courts to decide without the interference from the Constitutional Court. The basic normative contours of the *choque de trenes* were laid very early in the history of the new Constitution. It first appeared on the public scene in the intermission period between the implementation of the new Constitution and the election of the first proper Constitutional Court. In the dissent of the intermediary Court’s decision C-543/92, Eduardo Cifuentes penned the

doctrine of the *via de hecho* (way of fact), which lies at the root of the *tutela contra sentencias* (*tutela* against legal sentences; Aponte, 1994). Explaining this doctrine further corroborates the normative connotation of the *choque de trenes* as well as the importance of precedent in Colombia's new constitutional order. As explained at the outset, it is the centrality of precedent that enables us to look at this process through the lens of path dependence.

The *via de hecho* is a legal figure that intends to achieve two points: 1) uphold the Constitutional Court as the highest court in the constitutional order and thereby the guardian of the integrity of the Constitution, and 2) impose the centrality of precedent for the jurisprudence of the 1991 Constitution. Therefore, it is a quintessential expression of the novel orientation of the Court to widen its interpretative perspective and become the unifier of constitutional jurisprudence (Cepeda Espinosa, 2007, p. 97; López Medina, 2000, p. 116). The figure of the *via de hecho* originates in the question of what constitutes a *cosa juzgada* (judged case) in the new Constitution, and is central for legal certainty, because it stipulates that legal questions already settled in a completed legal process cannot be reopened. Under the rule of law and the centrality of *habeas corpus* only legal processes establish "legal truths". From the same premise follows the principle, "*non bis in idem*", which provides legal security to the individual by imposing that an individual cannot be prosecuted and judged twice for the same crime. In the Anglo-Saxon realm this is referred to as the prohibition of double jeopardy. The majority in C-543/92 argued with this principle against the *tutela contra sentencias*, stating that the principle "*non bis in idem*" was incompatible with the opening of *tutelas* against executed judicial decision, because it constituted the reopening of a finalized process.⁶⁵

The dissent in the decision disputed the interpretation of the *cosa juzgada* and its application to the procedure of the *tutela*. Magistrates Cifuentes, Angarita, and Martínez contended that the imposition of a time limit in judicial processes, implicit in the principle of *cosa juzgada*, is in no way disputed in the application of the *tutela* against judicial decisions. Rather, the *tutela contra sentencias* simply means that in the case of fundamental rights violations the Constitutional Court suspends this time limit until after

⁶⁵ Republic of Colombia. Constitutional Court of Colombia. C-543/92, M.P. Jose Gregorios, Hernandez Galindo, p. 2.

the conclusion of the *tutela* review. Since there cannot be *tutelas* against *tutelas*, it does not constitute a prolongation of the legal process *ad infinitum*. Crucially, in the case of the *tutela*, the litigated issue is not the concern of the deliberation in the Court, but rather whether a fundamental right of the plaintiff was violated by a court's decision. Therefore, the constitutional judge who revises the accused judge's legal decision does not undermine the autonomy of the latter in taking her decision. After all, the application of the *tutela* is conditioned on the premise that it is the *ultima ratio* to protect one's rights. Only if all ways in the ordinary legal system are exploited, can a plaintiff submit a *tutela* against a legal decision.

In this argumentation, the doctrine of the *cosa juzgada* does not disappear resulting in a chaos beset with legal uncertainties. Rather, the *tutela contra sentencias* imposes that substance has primacy over procedure. The primacy of the Constitution implies that its most axiomatic principles override any other principle that is lower in its hierarchy. The competence of the Constitutional Court in its function to revise the *tutela* is reflective of its position as the top interpreter of the Constitution. As a consequence, the Court must fulfill the task of unifying the national jurisprudence over questions concerning fundamental rights. Logically, the minority then argued, its authority extends to all other jurisdictions, if the question of rights is involved.

Critical for the dissent was the contention that the *tutela* is said to redress factual situations that contradict rights in the Constitution. Situations of facts (*de hecho*) occur, most prominently, in the course of ordinary procedure and forms (Cifuentes, 1998, p. 171). The *tutela* was perceived exactly to redress these situations of facts, where the ordinary procedure is not just insufficient to uphold rights, but also complicit in their violation. A simple example is when a plaintiff's pleas of innocence in a criminal investigation cannot be upheld in a legal process, which makes its way through the entire criminal system, but who is then exonerated by new evidence after the highest appellation instance has upheld the initial guilty verdict. A formal interpretation of the *cosa juzgada* excluding the *tutela contra sentencias* cannot redress the plaintiff's rights violation – being in prison despite being innocent – because it insists on the completion of the appeal

process as the termination of all judicial processes, but a *tutela* can, because as a tool for rights litigation it better appreciates a potential shift in legal context.⁶⁶

The election of the first proper Constitutional Court in February 1992 added Carlos Gaviria, Antonio Barrera, and Hernando Herrera to the early dissenters Cifuentes and Martínez (Angarita left the Court). All of these magistrates favored substance over form when interpreting the constitutionality of *tutelas* and fully developed the doctrine of *via de hecho* in T-079/93. Building on the dissent of C-543/92, which explained the substance of a factual judicial situation, they argued that an erroneous judicial decision, which diverts in such magnitude from the constitutional order, does not, properly speaking, constitute a judicial providence. Rather, by not applying the stipulations of the constitutional order and violating its most fundamental guarantees, the judge establishes her own judicial fact, a *via de hecho* (Cifuentes, 1998, p. 171 & 174). Therefore, a *via de hecho* can violate two basic principles of rights based constitutionalism: 1) it undermines the hierarchical ordering of norms and principles when it places form over substance, and 2) in some particularly grievous cases creates its own legal order that diverts substantively from the valid constitutional order.

These very early cases set the tone for the dispute over the application of the *tutela*. In the public – and sometimes polemical – discussion, the question of whether the novel mechanism applies to judicial decisions was not simply a matter of political authority and power, but involved fundamental, ontological, constitutional concerns that were reflective of the normative shift towards neo-constitutionalist principles in the 1991 Constitution. Opponents and supporters of the *tutela contra sentencias* aligned along opinions that either favored substantive constitutional claims or that valued the formal application of legal rules. In other words, it became a dispute between the supremacy of substance or form. Magistrate’s Alejandro Martínez argued that it was reflective of the gap between a literal interpretation of the words of the Constitution and real justice to be found in the meaning of those words (Uprimny, 2007, p. 59).⁶⁷ Opponents of the *tutela contra sentencia* argued that it would create legal uncertainty by emasculating the procedural soundness of constitutional adjudication, whereas proponents of the *tutela*

⁶⁶ Interview subject no. 4 (auxiliary judge), April 12, 2013.

⁶⁷ *El Tiempo*, “Quieren acabar con la acción de tutela”, 1 October, 1992; Last Accessed: 29 October, 2014. <http://www.eltiempo.com/archivo/documento/MAM-214170>.

contra sentencias held that their denial resulted in an uncertainty of the Constitution itself by devaluing its most basic guarantees.

To conclude the first part of this chapter; the analysis commenced by laying out conceptual considerations. Beginning with the manifestation that the creation of the 1991 Constitution was a critical juncture in Colombia's history, this part explained the basic definitional traits of path dependence that follows short periods of contingent change. Central to path dependence is that early institutional decisions reproduce themselves and thereby create institutional stability, or even inertia. This last section dealt with the legal figure of the *via de hecho* that introduces the centrality of precedent into a civil law system to unify the constitutional jurisdiction. Precedent setting has the characteristic that it evolves akin to path dependence, because earlier decision also have an inflated importance for later ones, which have to address the argumentation set out in the precedent. It is therefore valid to hypothesize that jurisprudence evolves in a path dependent logic. The second important feature in the opening discussion was that already these early decisions that invoked the *via de hecho* centered around the importance of rights for the constitutional order in general and the *tutela* particular. As seen, the centrality of rights in the argumentation reflects the normative claims that underlie the implementation of the *tutela* in the constitutional order in the first place. It is what connects the practice of rights-based adjudication in Colombia with constituents' grievances and intentions for drafting the Constitution.

With these stipulations in place, the next two sections will analyze empirical cases and focus on how the application of the *tutela* featured in cases that involved the criminalization of Congress; in other words high stake cases. Figure 3.1 showed the peculiarity of Colombia's separation of powers models that does not grant parliamentary immunity to Members of Congress. It will enable us to see if the jurisprudential evolution does indeed follow path dependent sequencing or if we need to broaden our horizon to properly understand what drives court decisions that have institutional ramifications.

3.3.Part II: Setting an irreversible precedent? The *proceso 8000* and the inviolability of the vote in Congress.

This investigation will now turn to scandals that involve the apparent or evident criminalization of Congress and relate the normative contention of the *tutela contra sentencias* with institutional conflicts that make the relevance for the separation of powers readily visible. The *proceso 8000* was the first, open and clear political scandal evident of the increasing criminalization of Colombia's political institutions. Critically, it was now the *national* institutions that were infiltrated by "hot money" from the drug trade. Even in Pablo Escobar's heydays, it appeared that corruption was largely contained to the countryside and only to an infinitesimal part involved national politics. López Hernández iterates that in the cartel times the vote accumulated by Escobar amounted to only 0.2 percent. During the *proceso 8000*, Senators eventually sentenced for accepting drug money had obtained 8 percent of the vote. Later in the *parapolítica* scandal, Members of Congress indicted and sentenced accumulated around 25 percent of the votes that resulted in 35 percent of seats in Congress (López Hernández, 2010, p. 31). All of this suggests then that the co-optation of the legislative institution existentially undermined the fair and democratic representation of citizens' voices in Colombia's Congress.

The *proceso 8000* essentially involved drug money from the Cali Cartel infiltrating the presidential campaign of the eventual winner of the 1994 contest, Ernesto Samper. The *parapolítica* scandal is the epitome of the co-optation of Congress and other political institutions. Both episodes differ slightly in that politicians indicted in the course of the *proceso 8000* directly benefitted from drug money, while Members of Congress sentenced for their collusion with paramilitaries did not simply benefit from illicit money, but were propped up and elected with the decisive help of paramilitary coercion, in what is described as "armed campaigning." Despite the apparent differences, the two cases warrant comparison, because the continuing criminalization of Congress continued through the 1990s until the early 2000s, not least, because Members of Congress were not held accountable for their transgressions. The argument is that the fact that this did not occur was a consequence of the evolution of the *choque de trenes* in this period. Judicial

processes were stopped, because the Constitutional Court upheld legislative autonomy against encroachments from the Supreme Court to investigate their behavior in the vote to absolve Samper.

This part will proceed by first explaining the political evolution of events that commenced in 1994 after the election of Ernesto Samper. Utilizing secondary literature, this analysis will retrace the processes that resulted in Samper's absolution in Congress with a focus on Samper's strategy to survive in office without governing. Pérez-Liñan (2007) as well as Hinojosa and Pérez-Liñan (2003) traced his success to hold on to power to building a legislative shield against impeachment and strategically distributing earmarked funds to tie opposition Members of Congress to his government, essentially pulling the teeth from the impeachment process. This analysis will disclose a field of strategic interaction that involved the executive, legislators, regional governors, and illicit actors.

In the second section of this part, I will retrace the normative evolution of the *proceso 8000*, focusing on the jurisprudence of illicit enrichment and the inviolability of the Members of Congress's votes. The contention of this analysis is that the narratives laid out by Hinojosa and Pérez-Liñan (2003) and Pérez-Liñan (2007) require an amendment with the judicial story that spans beyond the vote to absolve Samper in Congress. The legal convulsions only effectively terminated when the Constitutional Court's in a *tutela* decision, submitted by representative Viviane Morales, blocked Supreme Court investigations into potential breaches of duty for Samper's absolution. This decision to uphold Members of Congress immunity for the votes they have cast in Congress is an important precedent of the *choque de trenes*. In the reasoned decision, the Constitutional Court ventured deep into the normative realm of *Nuevo Derecho*, espousing a theory of a prospective *via de hecho* implicit in the opening of investigation against Members of Congress. The majority on the court held that the free and autonomous deliberation and decision-making of legislators is such a central good of the democratic order that it must be shielded against criminal investigations. The trajectory that ended with this decision is intriguing in its own right, because in two prior decisions, the Constitutional Court upheld the criminal liability of Members of Congress when exercising their judicial duties vis-à-vis the executive. This decision appeared as a turn on

that precedent and was accordingly criticized – not least by magistrate and president of the Court at the time, Eduardo Cifuentes, who penned a scathing dissent. It is difficult to construe a straight line of argumentation from the earliest decision outlining the *via de hecho* to the decision clearing Members of Congress of criminal liability.

To foreshadow the next part that will deal with the *parapolítica* scandal, path dependence is even more difficult to bring in line with the Court's argumentation in the most critical decisions that backed the Supreme Court interpretations in those instances. Magistrates on that Court were aware that protecting legislative autonomy in the face of widespread criminalization would undermine the very transformative claims the Constitution intends to protect. The co-optation by illegal elements associated with the drug trade directly affected the inclusiveness and participatory quality of Congress. Therefore, they opted for more formalistic interpretations in order to uphold criminal accountability. The later shift of the Constitutional Court to uphold criminal accountability and the jurisdiction of the Supreme Court vis-à-vis Members of Congress must be understood as a consequence of institutional learning and deliberative processes. The Court did not re-open all aspects of its 1999 *tutela* decision, but specified the jurisprudence of what it actually entails to exercise the rights of a legislator. The earlier decision provided the context to ask new questions later on in the jurisprudential trajectory. This development provides credence for the view that institutional evolution is more deliberative, because the Supreme Court produced legal facts as a consequence of its investigations that eventually had their effect on deliberation for the decision to withhold a potential third term.

3.3.1. Surviving without governing – Samper's strategy and the increasing atomization of the party system

Arguably, the *proceso 8000* has its origin in the constitutional changes from 1991. The Constitution stipulated that the winner in a presidential election required an absolute majority and dictated a run-off election in the case the first one did not result in a clear victor. The 1994 presidential election was the first instance when such an event in fact materialized, and required an extra three weeks of campaigning. The Samper campaign was caught off-guard and short of funds for this over time. Thus, to assuage their

financial situation, they turned to illicit money from the coffers of the Cali Cartel, which had been involved in developing social capital with the political elites of the country in order to protect their business from criminal prosecution (see Chapter 2). Essentially, as Hinojosa and Pérez-Liñan explain (2003, p. 6), the entire scandal evolved around the accusation that Samper and his team turned to drug money to fill that gap, and is therefore closely related to the creation of linkages between political elites and the drug business.

Information of the illicit nature of campaign finances surfaced with the so-called “narco-cassettes” immediately after Samper’s election in June 1994. The details of that coup are still somewhat murky. *Semana* wrote in 2013 that police cornel Carlos Barragán provided the tapes to the Pastrana camp, who then took the matter to outgoing President Gaviria and the U.S. Embassy.⁶⁸ In these tapes, journalist Alberto Giraldo and members of the Cali Cartel appeared to be discussing the influx of drug money into the Samper campaign. Publically, these revelations were received as the attempt to take revenge for a lost election (Restrepo, 1996 p. 47). It was therefore not an impossible task for Samper to distance himself from the accusations. Throughout 1994 and the early part of 1995, pressure was only mounting from the United States, with former DEA director Joseph Toft characterizing Colombia as a *Narco-Democracy*. The Senate in the U.S. and the Clinton administration began the process of decertification of Colombia as punishment for unsatisfactorily co-operating in the war of drugs.⁶⁹

This period of the scandal, in which various actors were unable to put effective pressure on the Samper administration is commonly referred to as the first phase of the scandal. The revelations did not even impinge on Samper’s approval ratings in opinion polls. As Pérez-Liñán reports, they remained at 79 percent until the end of 1994 (2007, p. 105; Hinojosa & Pérez-Liñan, 2003, p. 68). There are a number of reasons for why Samper was not immediately affected by the revelations. For once, there was no direct relation drawn between the alleged drug money and him, and, secondly, he successfully

⁶⁸ *Revista Semana*, “Este es el hombre que entregó los narcocasetes a Pastrana” 29 November 2013; Last accessed: 28 November 2014. <http://www.semana.com/nacion/articulo/andres-pastrana-recibio-los-narcocasetes-de-manos-de-carlos-barragan/366430-3>; See also Hinojosa & Pérez-Liñan, 2003, p. 66; Pérez-Liñan 2005, p. 22.

⁶⁹ *Revista Semana*, “El 8000. Día a Día.” 16 January, 1996; Last accessed: 7 November, 2014. <http://www.semana.com/nacion/articulo/el-8000-dia-dia/27509-3>.

posited himself as an anti-establishment candidate, opposed to the neo-liberal agenda of his predecessor César Gaviria (who came from the same party, but a different faction within that party; Pérez-Liñán, 2007, p. 104).⁷⁰ This enabled him, while not riding on a huge wave of public support, to enjoy a “presidential honeymoon” and even pass his “Social Leap” program (a government investment program aimed at increasing health care benefits, housing, and education for Colombia’s poor and improve their economic situation by strategically strengthening small businesses and the export sector; Hinojosa and Pérez-Liñán, 2003, p. 72 & 74). In addition, Samper utilized two strategies to counteract international pressure leveled at the President by the United States; firstly, he went on the offensive and initiated the capture of several members of the Cali Cartel, including its bosses, the Rodríguez Orejuelas brothers; secondly, he protected his own position by calling on nationalistic sentiments against impositions of U.S. imperialism and portrayed himself as a victim thereof (Gutiérrez Sanín, 2007, p. 343-411).

Samper’s luck changed when the new Attorney General, Alfonso Valdivieso, opened investigations and remitted the names of Alvaro Benedetti, Jaime Lara, José Guerra de la Espriella, Alberto Santofimio, Armando Holguín Sarria, Ana de Petchal, Rodrigo Garavito, Yolima Espinosa and María Izquierdo to the Supreme Court (under the number 8000, giving the scandal its name “process 8000”). Liberals suspended their investiture in Congress, but, most importantly, Valdivieso began to incriminate individuals close to Samper. When his campaign treasurer, Santiago Medina, was implicated in preliminary investigations in April 1995, the domestic situation began to unravel for Samper. In July of that same year, Medina admitted that Samper’s campaign had accepted money from the Cali Cartel, resulting in his indictment and detainment for illicit enrichment as well as false testimony. In prison, Medina accused not only Minister of Defense Fernando Zea Botero (campaign manager during the presidential race), but also the President himself of being well aware of the origin of the money in his campaign. Samper reacted by denying the claims and called on the Commission of Accusations and Investigations in Congress to look into the allegations against him.

⁷⁰ For the clash between the Constitution’s principles and the neo-liberal *Zeitgeist* at the time, see Orjuela Escobar, 2005.

Medina's narrations initiated the second phase of the scandal. Once official (even only preliminary) investigations commenced, accusations and public rumors acquired *legal* meaning, increasing the political cost for the accused dramatically. As a consequence, his personal exposure to scandal increased considerably and his approval ratings fell to 45 percent. Clearly, any type of presidential honeymoon was over (Pérez-Liñán, 2007, p. 207). In August 1995, the attorney's office detained minister Botero and a month later Samper responded to the accusations in the Commission of Accusations. Representative Heine Mogollón, who himself had admitted to the utilization of conspicuous funds during a campaign for Congress, was the head of the Commission. Not surprisingly, Mogollón suggested closing the investigations against Samper for lack of criminal evidence. However, this was not the end of the story.⁷¹

The worst period for Samper began after Botero announced on television that Samper knew about the presence of drug money in his campaign, prompting Samper to call on Congress to reopen the investigations. The US pressure also intensified and relations between the two nations arrived at their worst in decades. The US decertified Colombia and revoked Samper's travel visa. As a consequence of the increasing pressure on Samper coming from inside and outside of Colombia, his approval ratings further dropped to 36 percent (Pérez-Liñán, 2007, p. 105). On February 27th, 1996, the Commission of Accusation opened formal proceedings against Samper and suggested on May 23rd, 1996, that the accusations against Samper did not merit opening criminal investigations. The Commission, however, did not have the final say and passed its suggestions on to the full Chamber of Representatives (the result in the Commission was 10:3).⁷² The full chamber convened June 12th in 1996 and voted with an overwhelming majority (111:43) against opening criminal investigation for lack of incriminating evidence.

⁷¹ There is later a testimony by the son of Cali Cartel head, William Rodríguez Abadía, that the cartel bought Samper absolution in the Commission. Mogollón denied these. *El Espectador*. "Heyne Mogollón dijo que no recibió dinero por absolver a Samper." August 15, 2013; Last accessed: 6 November 2014. <http://www.elespectador.com/noticias/politica/heyne-mogollon-dijo-no-recibio-dinero-absolver-samper-articulo-440268>.

⁷² *El Tiempo*, 1996. "Comisión pide no acusar a Samper". May 24, 1996; Last accessed: 6 November 2014. <http://www.eltiempo.com/archivo/documento/MAM-302134>.

With these two votes, the worst was over for Samper. Impeachment was off the table, and even though the United States maintained its position vis-à-vis Colombia and Samper for the duration of his time in office, he did not face more significant threats to his position. Therefore, Hinojosa and Pérez-Liñan term the time between the impeachment votes and Samper's exit from power as the fourth phase of the scandal characterized by the fizzling away of pressure for Samper. In light of these events, it is not surprising that the Commission received a not so flattering nickname: the Commission of Absolution. In over forty years, it only implicated one individual, General Rojas Pinilla, for abuses of power in 1959. Otherwise, indicted individuals always exited unscathed (at least officially, for they might have been found guilty in the court of public opinion).⁷³ It is therefore equally as unsurprising that Colombians were not only feeling weary but satiated by the unwillingness of Members of Congress to fulfill their duty as judges of the President. They went to the Supreme Court to prosecute them for this breach of duty, which, in my interpretation, prolongs the *proceso 8000* final phase until January 1999, when the Constitutional Court rejected their complaints.

This analysis of the most important events of the *proceso 8000* together with the macro-processes explained in the previous chapter can help us make Samper's resilience in office intelligible. The evidence presented here suggests that Colombian politics was in a process of rebalancing in order to reestablish an equilibrium between different poles of socio-political power, after the implementation of the new Constitution put in place some obstacles to the way politics used to function under the old Constitution (see Chapter 2). The party system was in a process of implosion, bringing the previously latent atomization of Colombian political society to the surface. This fact helped Samper to build a coalition in Congress protecting him in the decisive impeachment votes, because he could count on legislators from other caucuses, which in turn sustained the process of political atomization. We also already saw that this period in the mid-1990s was a crucial juncture in the evolution of the drug trade, shifting from being dominated by centralized cartels to more decentralized armed groups that actually controlled the means of violence in peripheral regions of the country. Samper's reliance on legislators in Congress

⁷³ *El Tiempo*. "En 40 años, la Comisión de Acusación sólo ha castigado a una persona" 12 February, 2012; Last accessed: 6 November 2014, <http://www.eltiempo.com/archivo/documento/CMS-11117386>.

essentially tied his hands, meaning that, even if he had wanted to, he could not have opposed the calls by regional governors, amongst them none other than Álvaro Uribe, to pursue their interest in the reorganization of the anti-insurgency war. This took the route of essentially privatizing security through the CONVIVIR program.

Instrumental for his survival in office was Samper's ability to construct a "legislative shield" by coalescing several factions within the increasingly fragmented two-party system behind his leadership. In Congress, Samper successfully exploited the factionalism to convince not only the majority of his own, Liberal, caucus (divided into a Gavirista and Samperista faction), but also a majority from the other caucuses. In the vote in the House of Representatives, which was divided amongst 59 % Liberals, 31 % Conservatives, and 10 % from other parties (89 % of Liberals, 43.8 % of Conservatives, and 63.5 % from third parties voted against impeachment). The evidently surprising fact is that Samper convinced a large degree of opposition representatives to turn down legal investigations.

The *Comisión Ciudadana* and Hinojosa and Pérez-Liñán have discovered that, above all, pork-barrel spending from the co-finances fund earmarked for pet project best explains the unlikely alliance between executive and legislature. They found that the average member of Congress received 3.9 billion pesos in co-financing funds for the period between 1995 and 1998, with 4.5 billion, on average, going to Liberal members of Congress, and 3.4 billion to Conservative members. The average for those, who ultimately voted against impeachment was 4.1 billion, and for those, who voted in favor was 3.4 billion. While not critical for building support amongst his own party, they conclude, that these "funds were ultimately instrumental in building support among opposition members" (Hinojosa and Pérez-Liñán, 2003, p. 76-77).

From a more macro-institutional perspective – incorporating formal and informal institutions – the utilization of clientele politics and pork barrel spending also fed into the dynamic unfolding in Colombia's peripheral regions. The end of the big cartels signaled the rise of the paramilitaries to prominence in Colombia's regions. During the *proceso 8000*, Samper relied heavily on regional power brokers in order to build the alliance protecting him from two impeachment votes, and left them a lot of autonomy to manage the counterinsurgency strategy in Colombia's periphery. Their strategy was to essentially

privatize security by legalizing the CONVIVIR groups. While harmful to the state's monopoly of violence, and not in Samper's interest as the head of state, he was in no position to press for hard concessions from regional power brokers. For political elites in the regions, on the other hand, this arrangement had the additional benefit of opening paths to circumvent the national circumscription of the vote for the Senate inscribed in the 1991 Constitution. They wanted a free hand to utilize armed campaigning in order to secure majorities in elections. With the help of said armed campaigning, politicians could still regionally concentrate votes and be elected to Congress. Therefore, and not atypical for Colombia, its formal institutions linked up with informal institutions resulting in a heterogeneous and functional symbiosis between legal and illegal forces (Acemoglu, Robinson & Santos, 2012; Ávila Martínez, 2010; Gutiérrez Sanín, 2007, p. 112; Duncan, 2006). Together this then shows that the political evolution recalibrated towards a new equilibrium between the forces that interact in Colombia's polity. Consequently, this does provide credible evidence that politics followed a pattern amenable to the vocabulary of positivistic social science – above all the path-dependent logic of institutional evolution. However, this is not the entire story.

As figure 3.1 above showed, the 1991 Constitution was designed so that in case of criminal allegations against the executive, Congress exercises a legal oversight function that can result in the impeachment of the President. As Pérez-Liñan observed, presidential crises in Latin American democracies were a sign of enduring but unstable regimes, which were “willing to punish presidential corruption but unable to prevent it” (2007, p. xiv). In Colombia, the institutions were unable to punish transgressions, *because* they were *unwilling* to hold the President accountable despite the abundance of evidence that, at least, indicated criminal negligence. This then begs the question of why legislators were not held accountable for their unwillingness to withdraw their support from an evidently corrupt President. Within the majoritarian institutions, Samper could reduce his exposure through the reallocation of funds and political concessions. This, however, does not explain the behavior of legal institutions. In order to elucidate the judicial politics during the course of the *proceso 8000* we must now turn to normative evolution of the *choque de trenes*.

In Congress, the convulsions of the scandal essentially ended with the vote in the Chamber of Representatives. However, this was, in fact, the beginning of another round of important investigations into potential breaches of duty by those representatives when they absolved Samper despite plausible evidence of his culpability. Eventually, the Supreme Court investigated only a relatively small number of Members of Congress for their involvement in receiving money from illicit sources and legal processes against Samper himself all but collapsed. Responsible for this outcome is a unification decision by the Constitutional Court regarding the inviolability of Members of Congress's vote in their office that bundled several *tutelas* together (SU-047/99). Senators and representatives enforced their right by petitioning the Constitutional Court in a *tutela* against criminal investigations that the Supreme Court had commenced against them for the vote to absolve Samper. It is here where Samper's resilience in office also relates to the *choque de trenes* and the *tutela contra sentencias*.

3.3.2. The normative issues – illicit enrichment and the inviolability of parliamentary votes

The tension between the Supreme Court and the Constitutional Court over the application of the *tutela* crossed path with the *proceso 8000* in the normative specification of the constitutional meaning of illicit enrichment (*enricimiento ilicito*) and the inviolability of Members of Congress's votes in the legislature (*inviolabilidad parlamentaria*). The publication of the *narco-cassettes* with journalist Alberto Giraldo resulted in the process to jurisprudentially specify illicit enrichment. The vote in the Commission of Accusation and Investigation absolving Samper of any wrong-doing opened the question regarding the jurisprudential status of parliamentarians' criminal liability while exercising constitutionally delegated duties and functions. In regard to illicit enrichment, the jurisprudential issue concerned whether a prior conviction of those distributing the fund was necessary to prove that those receiving the funds *illicitly* enriched themselves. In other words, this asked whether illicit enrichment was an autonomous crime. Pertaining to the inviolability of Members of Congress, Members of Congress disputed the constitutionality of criminal investigations by the Supreme Court that sought to investigate them for prevarication of their judicial duties when they absolved Samper.

They saw the inviolability of their votes, inscribed in Article 185 of the Constitution, compromised. Critically, the jurisprudential evolution and contention turned on the question of when the Court identified a *via de hecho* or fabricated a *cosa juzgada*. The decision to block criminal investigations against Members of Congress is particularly telling for judicial behavior and the question of institutionalism. A split majority on the Constitutional Court protected Members of Congress from prosecution for the votes given in the Chamber and terminated further criminal investigation. Interestingly, the minority in that decision, who argued that it constituted a *cosa juzgada* in contradiction to two earlier decisions by the Constitutional Court, included Eduardo Cifuentes, who had a central role in developing the constitutional doctrine of the *via de hecho* in the first place. He thought that such a shift in opinion was not only unwarranted, but actually undermined the legitimacy of the Constitutional Court itself.

For analytical purposes, the two legal issues, illicit enrichment and inviolability of votes in Congress, separate the normative discussion during the *proceso 8000* in two different chronological and thematic phases. The first commences with the official investigations. Valdivieso's opening of the case is not only significant for the political ramifications, but also because it introduced a particular and novel interpretation of the felony of illicit enrichment (Rodrigo Uprimny, 1996, p. 102). The question was: is illicit enrichment an autonomous crime or does it require a previous condemnation of the second party to which the felony of *illicit* enrichment must be related. In other words: does it require a legal sentence by a criminal court on the illegality of the Cali Cartel's activities in order to prove the illicitness of the enrichment by politicians? The Constitutional Court in its final decision agreed with the Supreme Court and the Attorney General's office that illicit enrichment can be prosecuted autonomously.⁷⁴

The second normative phase of the *choque de trenes* between the high courts evolved around the norm of the inviolability of Members of Congress's votes in the legislature. Immediately after Congress' decision to absolve Samper, citizens filed criminal complaints against the 111 representatives that voted in favor of absolution. A year later, in April 1997, Colombia's highest criminal court opened preliminary

⁷⁴ Uprimny stressed the importance of legal investigations and observed that without an independent prosecution, there would not have been "*a proceso 8000*, nor a trial against the president, nor a political crisis" (1996, p. 120).

investigations against the *Congresistas* and in June of 1998 decided to officially open investigations. Viviane Morales and other Members of Congress submitted a *tutela* complaint against the prosecution, arguing that it contradicted the norm in the Constitution guaranteeing legislators a free choice of conscience in the exercise and expression of votes and opinions in Congress (Article 185). The Constitutional Court upheld their argumentation and thereby shut down investigations (SU-47/99).

The very first revelations of the *proceso 8000*, the narco-cassettes with a recording of a conversation between journalist Alberto Giraldo López and Cali Cartel capo, Gilberto Rodríguez Orejuela, boasting that they had bought the presidency with with 3.7 million US dollars also raised the issue of illicit enrichment (Serrill, 1994). After remaining clandestine, Giraldo turned himself in and admitted that he had accepted money from the Calí Cartel. He explained that his task was to forward the money to both presidential campaigns, essentially making him the middleman between the illicit world of the drug trade and the licit world of Colombia's political system. The question then became if and how the laws against illicit enrichment in Colombia's Penal Code (*Código Penal de Colombia*, CPC) apply to his case.⁷⁵

The law contains two important clauses that determine the illicit and undue nature of the enrichment. It defines the enrichment as an unjustified, direct or indirect equity increase (*incremento patrimonial no justificado*), and as illicit, if the enrichment derives in one or another form from criminal activities (Art. 148 CPC). The defendants (Medina and Botero) argued that, strictly speaking, there was no equity increase, since the entire funds were spent in the campaign and did not end in their own coffers. In addition, the clause "derive" in the law requires that the origin of the money must be, in legal terms, tied to a sentenced crime. In other words, B and C, who have received money from A that they spend in a political campaign, can only be guilty of illicit enrichment, if A has been

⁷⁵ *Revista Semana*, "El relato de una vida". 25. September, 2005; Last accessed: 30 November 2014. <http://www.semana.com/nacion/articulo/el-relato-vida/75036-3>. His testimony actually provides credence to the suspicion that the net between illegal money from the drug trade and Colombia's political society was much more expansive than reckoned. Giraldo López was a long time friend of the Rodríguez Orejuela brothers from their time in the early 1980s as militants in the Liberal party and the *Nuevo Liberalismo* movement. He was also close to various politicians and former presidents from Colombia's Liberal Party and stressed that Samper was not the outlier case, but rather the norm. For instance, he indicated that the Barco government also received help from the Orejuelas. *El Tiempo*, "El diario oculto de Alberto Giraldo" 4. June, 1995. Last accessed: 30 November 2014. <http://www.eltiempo.com/archivo/documento/MAM-339247>.

sentenced for a crime – even if the origin of the funds is relatively clear. The *Fiscalía* argued against this interpretation. Electoral triumph helped by “hot money” is an augmentation of status and power, and therefore an equity increase. In addition, Attorney General Valdivieso posited that illicit enrichment is an autonomous crime that does not require a previous legal decision determining the illicit origin of the funds. A reasonable and documented certainty of the illicitness behind the funds would suffice. In other words, B and C can be prosecuted without A having been legally sentenced for the activity (Uprimny, 1996, p.103). The Supreme Court legitimized the prosecution’s doctrine when it detained various Members of Congress – among them prominent Liberal politicians Rodrigo Garavito, Alvaro Benedetti, and Alberto Santofimio (Uprimny, 1996, p. 104).⁷⁶

Congress then attempted to evade prosecution in a sudden flip in their sentiment vis-à-vis the Constitutional Court. The Constitutional Court’s activist posture displayed in its first years had not been well received amongst Colombia’s traditional politicians in the legislature. They detested the Court as arrogant and usurping, contesting the appropriation of their functions as legislators (Uprimny, 1996, p. 108). Nevertheless, in December 1995, first the Senate, and then the House of Representatives, passed legislation that made the Constitutional Court’s decisions obligatory for all other courts in the country – apparently taking side with the Constitutional Court in the debate over the application of the *tutela* (Law 190 of 1995). This change of sentiment had an evidently strategic motivation. In a previous decision – C-127/93 – the Court had upheld that illicit enrichment is a contingent felony. Making the Constitutional Court’s doctrine obligatory for all other courts, Congress essentially debilitated the illicit enrichment clause, barring it from application in the *proceso 8000*. The press fittingly termed this episode in Congress *narcomico*, for trying to off-load the political cost for non-prosecution onto the Constitutional Court.⁷⁷

⁷⁶ *El Tiempo*, “Colombia esta semana”. 2 June, 1996. <http://www.eltiempo.com/archivo/documento/MAM-307493>. Garavito later confessed to having received illicit funds. He was sentenced to 94 months in prison. *El Tiempo*, “Niegan libertad a Rodrigo Garavito.” 11 December, 1998; Last accessed: 14 December 2014. <http://www.eltiempo.com/archivo/documento/MAM-834911>; *El Tiempo*. “A Juicio Rodrigo Garavito.” 13 June, 1996; Last accessed: 10 December 2014. <http://www.eltiempo.com/archivo/documento/MAM-314385>

⁷⁷ Jorge González and Ernesto Corté, “Cámara enterró el Narcomico”, in *El Tiempo*, 15. December 1995; Last accessed: 14 November, 2014. <http://www.eltiempo.com/archivo/documento/MAM-483894>.

The Constitutional Court for its part understood that the legislation aimed at granting Members of Congress impunity from prosecution. Following the passage of legislation in Congress, Giraldo submitted a *tutela* against his incarceration on the grounds that there has not been a conviction against the Rodriguez brothers for drug trafficking. Without this conviction there were no grounds to uphold his incarceration for illicit enrichment, which, he argued, unduly violated his due process rights. The Constitutional Court had to respond to the issue, because of a request to test the constitutionality of the decrees and laws defining the felony of illicit enrichment. In a split decision, the Court differentiated between "criminal activity" and "criminal record" and held that Article 248 – which carries due process implications – applied to the latter. Furthermore, the Court argued that illicit enrichment was considered to be autonomous because of its particularly injurious influence on public morale. For its particularly damaging impact, it has autonomous standing requiring only one judge to decide on the illicit nature of the enrichment and on its undue purpose of the transaction. It thereby upheld the Fiscalía's and Supreme Court decisions (Constitutional Court, C-319/96; see also T-820/99).⁷⁸

The much more important normative debate concerned the legal position of Members of Congress's immunity from criminal prosecution. As mentioned, Congress' vote of absolution triggered this debate. The tenaciousness of this debate lies in part in the new Constitution as well. Under the old Constitution, legislators were inviolable and could not be prosecuted without consent of their chamber. Given the collegiality amongst *congresistas* in the 1980s and the resulting unwillingness to prosecute, citizens considered the framework a passageway to impunity and had it studied in the constituent assembly in 1991. Constituents followed delegate María Teresa Garcés' suggestions and

⁷⁸ In another contentious issue, the Constitutional Court had to decide on a statutory law that would have terminated Attorney General Valdivieso's term in April 1996. Valdivieso was selected as a replacement for Gustavo de Greiff. De Greiff had alienated the United States and criticized the one-sided approach in the war on drugs that solely consisted in militarily constraining the supply side and neglected the demand structure in the overseas market. The legal question was whether Valdivieso would only terminate de Greiff's term or serve an entire term of four more years. Some of the *congresistas*, who voted on the legislation evidently tried to avoid prosecution. The Constitutional Court, however, sided with the Consejo de Estado and annulled the statutory provision limiting the term of the Attorney General (Uprimny, 1996, p. 108; *El Tiempo*, "Período del Fiscal es cosa juzgada: Corte" November 1995; Last accessed on: 14 December 2014. <http://www.eltiempo.com/archivo/documento/MAM-469452>; *EL Tiempo*, "Corte Suprema apoya sentencia del Consejo de Estado" November 1995; Last accessed on: 9 December 2014. <http://www.eltiempo.com/archivo/documento/MAM-467606>).

replaced congressional immunity from criminal prosecution with the special privilege: the highest court of the ordinary justice system investigates and judges *congresistas* (Article 234; see also Pinilla Pinilla, 2012, p. 818).

The specific claims arose because of the double function legislators exercised in Congress. First, of course, they make laws, but as already shown and displayed in figure 3.1, they also fulfill legal functions vis-à-vis the executive and investigate criminal allegations made against the President (Article 174). This double function results in a tension between the rights of a parliamentarian and the duties of public servant in Colombia's legal system. In the legislature, Members of Congress have the freedom to freely deliberate, vote and decide. The Constitution consecrates this right in Article 185. Public servants in Colombia's judiciary, however, have the duty to duly investigate criminal claims. Colombia Criminal Code penalizes breaches as "prevarication" of public duty (Article 413 CPC and Article 414 CPC).

The Supreme Court began to bundle all the claims made against the Members of Congress under the auspices of Judge Jorge Anibal Gómez Gallego. He opened preliminary investigations in February, April, and August of 1997. These investigations became formal in June of 1998, and prompted Senator Viviane Morales Hoyos to file a *tutela* against the Supreme Court and its interpretation. She based her constitutional complaint on two arguments: firstly, her due process rights were violated, because the preliminary investigations were not announced to her, and secondly, and more importantly, the inviolability of her votes as a Member of Congress were infringed upon by the investigations. In the end, the Constitutional Court diverged from argumentation of the Supreme Court and the Attorney General, and ordered the termination of investigations against Members of Congress for their votes to absolve Samper.⁷⁹

How did the Court diverge in its assessment of the case not only from the Supreme Court's and Attorney General's interpretation, but also, in fact, from its own interpretation laid out in previous decisions? The reconstruction of the decision reveals peculiar turns in the interpretation of rights and duties of occupants of congressional offices. The Constitutional Court argued (in a unanimous decision) that the 1991

⁷⁹ The Court unified the jurisprudence regarding the inviolability and criminal liability of Members of Congress in a *sentencia de unificación*. For a chronology of these events see Republic of Colombia. Constitutional Court of Colombia. SU-47/99. M.P. Carlos Gaviria Díaz, Alejandro Martínez Caballero.

Constitution built on a long tradition of delegating legal powers to Congress for the accusation and indictment of the highest offices in the country; most prominently, of course, the President. The only new component was that Congress now also had the task of investigating magistrates of the *Consejo Superior de la Judicatura*.⁸⁰ It cited decision C-037/96, which further stressed the importance of legislative and judicial functions combined in the congressional office. In that decision, magistrate Vladimiro Naranjo Mesa affirmed Congress' double function and affirmed a statutory law that established the Commission of Investigation and Accusation in Congress, the commission that probed Samper.⁸¹

In the same year, the Court articulated the liability that comes with this function. Magistrate Naranjo Mesa determined that legislators are never entirely free from obligations. On the contrary, the very same Constitution that delegates representatives' autonomy also imposes parliamentary obligations. This begins with the political responsibility to their constituents that elected them to Congress (Article 133); it includes a regime preventing conflict of interests, the misappropriation of public funds and the peddling of influences (Article 183). Thus, in a system of separation of powers, each branch of government has authorities that are filled with certain powers and privileges. These powers and privileges, however, cannot be limitless, because the purpose of a constitutional system is to limit and control the exercise of public power. As a consequence, power and privilege must be balanced with obligations. These obligations differ amongst the different branches, because of the different functions each branch exercises in a system of separation of powers. As legislators, they are held to faithfully represent the interest of their constituents, and as prosecutors they are held to dutifully investigate. It follows logically then that if breaches of duties in their functions as legislators can incur penalties, so can breaches to their duties as prosecutors.⁸²

From this rather clear and unequivocal position, the majority in SU-47/99 shifted to a different weighing of privileges and duties. Already the selection of Viviane

⁸⁰ See Republic of Colombia. Constitutional Court of Colombia. C-198/94; M.P. Vladimiro Naranjo Mesa.

⁸¹ See Republic of Colombia. Constitutional Court of Colombia. C-037/96; M.P. Vladimiro Naranjo Mesa.

⁸² Rights and duties are formulated in Articles 174, 175, 178-3, 178 - 4 and 199 of the 1991 Constitution. For the Constitutional Court's early interpretation see Republic of Colombia. Constitutional Court of Colombia. C-245/96. M.P. Vladimiro Naranjo Mesa, and Republic of Colombia. Constitutional Court of Colombia. C-222/96. M.P. Fabio Moron Diaz.

Morales' *tutela* for review became a contentious issue. First, magistrates Vladimiro Naranjo and Fabio Morón could not agree on whether or not the Court should review that *tutela*. As a consequence, the entire *Sala Plena* decided to move that decision to judges Antonio Barrera and Alfredo Beltrán, who did select it for review. Then the Court became embroiled in accusations of favoritism, because Viviane Morales, the plaintiff in the case, selected former magistrate and president of the Court, Jorge Arango Mejia (from 1993 – 1998), as her legal council. In the previous decision (C-245/96), Arango Mejia sided with the majority and only dissented on the questions of the secrecy of the vote. As lawyer for Morales, he recanted his reasoning in that decision in a public note and admitted a consistency error. He argued that he had undervalued the double sanctioning of Congress through the disciplinary and penal code and noted that this was inconsistent with the inviolability of votes inscribed in Article 185. This entire affair heightened the tensions with the Supreme Court, whose President, José Fernando Ramírez, lambasted the Constitutional Court for selecting the *tutela* out of political reasons and convenience, paying favors to its former member and president.⁸³

The process of the Morales *tutela* continued to be tumultuous after the selection episode. Magistrates Jose Gregorio Hernández and Vladimiro Naranjo, who had voted against the selection of Morales' *tutela*, had to declare themselves impeded, because they had held public forums, in which the debate turned to questions of parliamentary inviolability. Even though they argued that these had mere educational purposes and did not reflect their own specific opinions, they accepted the self-impediment in order to protect the transparency and integrity of the Court. Alfredo Beltran, who voted in favor of selecting the *tutela*, also impeded himself for publically speaking on the issue.⁸⁴

When it came to the decision, the majority opinion began its reasoning by addressing the precedence established in C-222/96 and C-245/96, arguing it required more clarifications. The magistrates maintained that it was permissible to diverge from a previous path, and that the *tutelas* was, in fact, the most suitable mechanism. After all, they reckoned, *tutelas* can have *inter partes* or *erga omnes* effects and therefore require

⁸³ *El Tiempo*, "Arango hace mea culpe ante la Corte", 21 October 1998; Last accessed on: 14 December 2014. <http://www.eltiempo.com/archivo/documento/MAM-830358>.

⁸⁴ Gomez, Luis Carlos. "Se afianza division en Corte Constitucional" In *El Tiempo*, 16. November 1998; Last accessed on: 16 November, 2014. <http://www.eltiempo.com/archivo/documento/MAM-821247>.

specification after having accumulated a varieties of meaning. Unification tutelas were designed precisely to serve that purpose allowing for the possibility to modify previous positions in a decision – be they *obiter dicta* or *ratio*. They readily admitted that the interpretation put forward in SU-047/99 diverged from the path taken in C-222/96 and C-245/96, but contended that those cases left essential values of the Constitution in danger. Explicitly, this concerned the issue of parliamentary inviolability, which is a central pillar of the social state of law and separation of powers therein, because it embraces the free and democratic debate. The Court then reckoned that the Supreme Court investigations constituted a *vía de hecho prospectiva* (a prospective judicial decision that is contrary to the law and Constitution), because the course of action itself would constitute a *res judicada*. They affirmed Morales’s complaints and ordered the Supreme Court to halt all other investigations into Members of Congress’s votes (SU-047/99 § 64).

Given the high stakes and prominent personnel involved in the indictments, it was not surprising that the decisions caused some uproar in Colombia’s public. The Supreme Court for its part uttered bewilderment that a *tutela* had precedence over decisions of constitutionality and, referring to C-222 and C-245 of 1996, could diverge this fundamentally from earlier interpretations on the same issue. To the president of the criminal chamber of the Supreme Court, Jorge Aníbal Gómez Gallego, it confirmed the legal insecurity arising from the *tutela contra sentencias*.⁸⁵

More remarkable, however, was that it caused a rift inside the Court with the most outspoken critic being the President at the time, Eduardo Cifuentes Muñoz. Cifuentes was a driving force on the Court behind the evolution of the doctrine of *via de hecho*, and came to the Court from the academic field. In his 93-page dissent, he argued that the majority in the Constitutional Court had declared a *cosa juzgada* by shifting away from the jurisprudence outlined in C-222 and C-245 of 1996. Above all, he was skeptical of the figure “*via de hecho prospectiva*” (a prospective factual act). He stated that in Colombia’s constitutional jurisprudence a “*via de hecho*” is an illegal act *performed* by a public administration, and the *tutela* the mechanism against such illegal acts by public authorities. Furthermore, the Court’s jurisprudence regarding the *tutela*, thus far, implied

⁸⁵ *El Tiempo*, “Es un golpe para la justicia: Corte” 2 February 1999; Last accessed on: 1 December 2014. <http://www.eltiempo.com/archivo/documento/MAM-876667>.

that the *tutela* is not against a judicial decision per se, but against the arbitrariness of a legal decision. As such, the legal decision must above all incur *factual*, organic, or procedural defects of intolerable dimensions to the rule of law. By definition, a “*via de hecho prospectiva*” cannot attain these qualities for its lack of factuality, since it penalizes a potential violation occurring in the future. The Court’s president then warned that such unwarranted changes in the jurisprudence can fundamentally harm the legitimacy of Court, because it allowed Congress to slip behind the veil of inviolability of votes and enjoy an undue amount of impunity.⁸⁶

There are two concluding notes to be taken from the analysis of the *proceso 8000*. The first observation must be that without legal investigations and independent prosecutions there would not have been “*a proceso 8000*, nor a trial against the president, nor a political crisis” (Uprimny, 1996, p. 120). The discussion on the political evolution made readily apparent that benchmarks in the investigations also constituted benchmarks in the political crisis facing Samper. Every time, the judicial process moved forward against Samper or one of his close advisors in the campaign, pressure started to mount. Since he could fairly easily brush off international pressure from the United States, it meant that these were the more significant pressures that forced Samper to go on the offensive and spend valuable political capital in the public and in Congress. The production of legal facts should not be underestimated, since it plays a central role in the unfolding of the *parapolítica* scandal during the Uribe years and eventually in the decision to withhold a potential third term.

The second observation concerns the question of how the trajectory fits into our understanding of path dependence set out in the first part of this chapter. There is a normative claim, which connects the SU-047/99 *tutela* decision with the normatively substantiated calls for more participation that forms one of the central pillars of the 1991 Constitution. Deliberative democracy – in particular the Habermasian version – holds that the technocratic and proceduralist working of law is not permeable to the transformative claims of democracy (Hübner Mendes, 2013). It values the free deliberation inside the legislature as the epitome of democracy over the more elitist construction of courts of law

⁸⁶ Cifuentes Muños. *Salvamiento de voto*. Republic of Colombia. Constitutional Court of Colombia. SU-047/99. M.P. Carlos Gaviria Díaz, Alejandro Martínez Caballero.

(Habermas, 1996, p. 238). It is therefore feasible to construct an argument that holds free and uncoerced liberation to be deserving of constitutional protection against criminal investigation by a body of law. This is the argument that buttresses legislative immunity, and in 1999 a majority on the Constitutional Court evidently followed this normative weighing.

The problem with this interpretation, however, is that it goes entirely contrary to constituents' intention in drafting the Constitution, who purposely curtailed legislative immunity. Moreover, given the weighing between the powers and privileges with the legislators' duties in two previous constitutionality decisions, it is difficult to construct a line – let alone a straight line – that runs from the creation of the Constitution to the case in 1999. These observations already cast doubt over a path dependent reading that understands the jurisprudential trajectory following the implementation of the Constitution and the Constitutional Court as increasingly thickening and moving toward equilibrium. As a preliminary conclusion, this episode suggests that we need to understand institutional development as more open to change than path dependence suggests.

With these findings we can turn to the defining scandal of Uribe's times in office: the *parapolítica* scandal. After Members of Congress exited the contest over the inviolability of parliamentarians' votes as victors, the new president in the Casa Nariño, Andres Pastrana, commenced the ill-fated peace process with the FARC in San Vicente de Caguán. The attempt to re-incorporate the guerrillas into civic life through peace negotiations at the end of the 1990s infuriated regional elites, who feared the erosion of their social power, should the FARC legalize its official status. They opted to deepen the ties with groups at the margin of legality, which extended the paramilitaries reach from the regions into national institutions (Congress) and ended in what is known as the *parainstitutionalization* of Colombia's democratic institutions. The next section will focus on this process and the political scandal associated with that evolution. In the end, the analysis will show that the Constitutional Court again addressed the question of parliamentary inviolability and this time provided coverage for the Supreme Court's investigations against implicated Members of Congress. To arrive at conclusions that allowed the Supreme Court to maintain its inquisitive posture, the Constitutional Court

did not altogether change its previous conclusions in jurisprudential decisions, but readdressed its findings in light of a new empirical and legal context, which helped it to jurisprudentially specify the terms of the norms outlining legislative autonomy.

3.4. Part III: *Parapolítica*, the crisis of representation, and the struggle with the courts: holding Congress accountable and restraining executive power

The *parapolítica* scandal is almost synonymous with the *parainstitutionalization* of Colombia's political institutions; the co-optation of its democratic institutions – above all the national Congress (but not limited to it) – by illegal armed groups at the margins of legality (López Hernández, 2010; Garay Salamanca, Salcedo Albarám, León Beltrán, 2010). AUC paramilitarism represented the conclusion of a process that united drug traffickers with vigilante groups under the umbrella of a political project that arose and grew very powerful in the absence of the state. Eventually, they formed functional and voluntarist coalitions with legal politicians in the territories that they dominated, which, in the end, benefited both sides and were signed into quasi-formal pacts. *Parapolítica* essentially evolves around these pacts, but projects a meaning that goes beyond the signed deals. It denoted a particular form of domination and exercise of power: armed clientelism. Traditional, regional elites circumvented the formal rules of the democratic game in order to ensure their position of dominance by utilizing the groups' coercive capacities (García Villegas & Revelo Rebolledo, 2010; Keaton, 2006; Dávila & Delgado, 2001; Peñate, 1999). With that it constitutes not only a peripheral grievance, but is at the root of the crisis of representation in Colombia (Mainwaring, Bejarano, Pizarro Leongómez, 2006; Bejarano & Pizarro Leongomez, 2005). In addition, *parapolítica* has been closely associated with *Uribismo*, because of the high number of *congresistas* from the Uribe bench that ended up being indicted by the Supreme Court (López Hernández, 2010; Gutiérrez Sanín, 2010).

From the evolution of the scandal, its unfolding in the second Uribe term, and its conclusion with numerous Members of Congress jailed, we can draw a number of inferences and findings: first, the evolution of the scandal is a strong example of how judicial activism can protect the quality of democracy by holding Members of Congress criminally accountable and redress issues of governance and representation; second, the

jurisprudential path, corroborates the evidence that developments are not linear, but responsive to changes in the legal context; third, the Supreme Court’s investigations produced *legal facts* about these nefarious relationships that were not only dangerous for Uribe’s political interest, but also helped in the creation of constitutional meaning, when the Constitutional Court deliberated a potential third term. Legal facts are those “facts” that are resultant from a legal process and therefore constitute legal truths. It is for this reason that the production of *legal facts* is part of a process of meaning making.

To provide an overview, the table below (Table 3.1) shows a five-part periodization of the scandal that is based on interview data from members of the investigating court at the time.⁸⁷ The table identifies the time bracket of each phase, and a condensed list of the most important events during that defined phase. The first phase produced no legal facts as negotiations between the government and the AUC were commencing and informal evidence presented in the media, which would eventually result in an official complain. Official investigations during the second phase produced the first legal facts, when investigations were opened and the first Members of Congress indicted for their nefarious relations. The third phase was characterized by Uribe’s fierce attacks against the Supreme Court that resulted when the Court opened investigations Senators Uribe and Araujo. The fourth phase entailed the period when the Supreme Court stopped investigations of *congresistas*, who had resigned their legislative privileges. The final phase coincided with the recommencement of investigations in September 2009.

Table 3.1: Phases of the Parapolítica scandal.

Phase I	Phase II	Phase III	Phase IV	Phase V
Before March 2006	March 2006 – January 2007	January 2007 – September 2008	September 2008-March 2009	March 2009 - 2010
<ul style="list-style-type: none"> - AUC peace process - Infiltration of DAS by AUC - Atypical voting in the regions - Report filed with Supreme Court 	<ul style="list-style-type: none"> - Auxiliary Court investigates <i>parapolítica</i> 	<ul style="list-style-type: none"> - Salvatore Mancuso incriminates Mario Uribe 	<ul style="list-style-type: none"> - Supreme Court stops investigations of <i>Congresistas</i> who have resigned their investiture 	<ul style="list-style-type: none"> - <i>Semana</i> reveals the DAS wiretap scandal Members of Congress

⁸⁷ Interview subject no. 3 (Supreme Court judge), 18 April, 2013; Interview subject no. 11 (Supreme Court judge), 22 April, 2013.

Phase I	Phase II	Phase III	Phase IV	Phase V
Before March 2006	March 2006 – January 2007	January 2007 – September 2008	September 2008-March 2009	March 2009 - 2010
- Constitutionality of Justice and Peace	- First indictments of Members of Congress	Supreme Court investigates Senators M. Uribe and Araujo - Uribe begins public attack against S. Court - Extradition of paramilitaries		- Resumption of Supreme Court investigations against resigned

Source: compiled by the author from interviews.

This part of the chapter proceeds similarly to the discussion on the *proceso 8000* by first explaining the political evolutions in each Uribe term and then moves to explaining the normative evolutions that evolved around the *tutela*, the *cosa juzgada*, and the *via de hecho*. I will explain how the Constitutional Court confirmed the Supreme Court’s position in the most important *tutelas* and investigations against Members of Congress continued as a consequence thereof.

3.4.1. The political evolution of *parapolítica*

For Uribe, the two terms in office evolved very differently. While the first one appeared as an unmitigated success story resulting in the constitutional change to allow his second term (which he secured in a landslide electoral victory), the second term was marred in scandals that ranged from embezzlement of funds and forms of relatively benign corruption to gross human rights violations such as the false positives.⁸⁸ These scandals tarnished Uribe’s and his government’s reputation, even though he still commanded extremely high approval ratings. Public discourse in his second term was mostly negative (Appendix A). Uribe’s first term covers the first phase of my periodization, while phases two through four evolved in the second term.

⁸⁸ According to most indicators, Uribe held his promises to reduce insecurity and boost the authority of the state. Most noteworthy, police representation in the country increased and kidnapping decreased substantially in the first two years. However, even in these areas of strength, the picture becomes a little more mixed after the initial first two years (see Appendix D, graph D.2 and graph D.3).

The scandal arose complementarily to the peace process with the paramilitaries that commenced once Uribe took office. While it never threatened Uribe's personal position in power, it forced him to spend a lot political capital in order to fight off accusations, defend his majorities in Congress, and prepare the ground for the second constitutional reform process to prolong his time in office. This part will proceed by first highlighting some preliminary evolutions in his first term that will show that the peace process with the AUC, which was a *public* process (with the help of the Courts), destabilized equilibrium relations between paramilitaries and politicians. It then turns to the convulsions of the second term, which inflamed relations between the President and the Supreme Court.

3.4.1.1. Uribe I – The unfolding of Democratic Security

Uribe rose to political stardom from virtual (national) obscurity prior to 2002 on a “tough hand, open hearts” ticket. His aggressive posture against the guerrilla partly stemmed from personal experience (his father had been assassinated by the FARC) and partly from structural vestment (his family belongs to the wealthy cattle ranching class). In Antioquia he had built a reputation for focusing on security and calling for the privatization of security through the CONVIVIR groups, but outside he was barely known. He summarized his policies in the three elements of *Democratic Security* that he made the prime imperatives of his presidency: 1) establishing the clear authority of the state by amplifying its monopoly of violence against internal enemies; 2) fostering a direct relation between rulers and ruled to assuage social cleavages and create a strong bond of social cohesion; 3) buttressing of capitalistic institutions to invite foreign direct investment (Botero Campuzano, 2008; Gaviria Vélez, 2004). During the campaign, a particularly potent move was to focus on his bellicose position vis-à-vis the FARC. In early 2002, the FARC had let the peace negotiations in Caguán fail and kidnapped presidential candidates Ingrid Betancourt and Clara Rojas, providing credence to Uribe's constant critique of said peace process.⁸⁹ The notion that “peace is the daughter of

⁸⁹ Pedro Viveros, *Revista Semana*, “Uribe: ¿Estratega o político?” 5 August, 2002; Last accessed: 12 November 2014. <http://www.semana.com/opinion/articulo/uribe-estratega-politico/53400-3>. As the *parapolítica* revelations uncovered, there was a more sinister side to Uribe's fantastic rise. Several

authority” (Uribe in Botero Campuzano, 2008) became an incredibly valuable talking point during the presidential campaign, propelling him from a mere 9% in the polls to a 53% victory within four months.⁹⁰

Once in office, Uribe followed up on his promise to bring peace to the nation with two contrasting strategies for the state’s enemy on the left and on the right. While he favored a militaristic strategy vis-à-vis the FARC and other guerrilla groups, he wanted to involve the paramilitaries in a negotiated settlement. Already in 2002, preliminary conversations commenced, and shortly thereafter Luis Carlos Restrepo was appointed High Commissioner for Peace in order to facilitate formal negotiations. The Santa Fe de Ralito I agreement from July 15th, 2003, marked the beginning of said negotiations, and the Santa Fe de Ralito II agreement from May 13th, 2004, marked the first benchmark. It set up a ‘concentration zone’ (*zona de ubicación*) in Tierralta for the purposes of suspending arrest warrants for AUC members, verify a ceasefire, and prepare the demobilization and disarmament process under the auspices of the OAS. Finally, the peace process between the Colombian Government and the AUC culminated in the Justice and Peace Law (Law 975 of 2005) passed by Congress 22 July 2005, which provided the legal framework for the demobilization and the subsequent transitional justice process (Theidon, 2007, p. 72-73; before becoming law the Constitutional Court reviewed the legislation and imposed important and critical conditions, above all victims’ rights to truth; see below).

All of these negotiations did not proceed without quarrels and conflicts. On the contrary, indiscretions and public pronouncements with conflict potential surfaced regularly. Already in 2002, Salvatore Mancuso, one of the most powerful commanders of the AUC, publically declared, without going into further detail, that around 35 percent of the recently elected Members of Congress were “friends” of paramilitaries.⁹¹ Also as

paramilitaries have given evidence that stated they “campaign” for Uribe in 2002 as well as in other elections. See also interview subject, no 11 (Supreme Court judge), 22 April, 2013.

⁹⁰ See also interview subject no. 20 (Member of Congress of the Republic of Colombia), March 12, 13; interview subject no. 6 (Member of Congress of the Republic of Colombia), April 16, 2013; interview subject no. 17 (Member of Congress of the Republic of Colombia), March 13, 2013.

⁹¹ See Lopez, Claudia, Oscar Seviallano. 2008. *Balance político de la parapolítica*. <http://cronicon.net/paginas/juicioauribe/img/Balance%20de%20la%20Parapol%EDtica.pdf>. *Revista Semana*. “Votas a punta de fusil”. 19. February. 2002; Last accessed: July 22, 2014. <http://www.semana.com/nacion/articulo/votos-punta-fusil/49357-3>.

early as 2002 and 2003, left-wing opposition Senator Gustavo Petro denounced the influence of the *paras* in Congress as well as in the bureaucracy. As these stories were gaining traction in the national and international media, the closing of the Santa Fe de Ralito II agreement was followed by one of the most controversial episodes of the Justice and Peace Process: the paramilitary visit to Congress in Bogota. In July 2004, Salvatore Mancuso held a speech outlining the AUC's interests in producing a stable peace. Not only was it very audacious for a certified terror organization culpable of war crimes, crimes against humanity, and narco-trafficking to visit the center of Colombia's democratic institutions, the "state visit" also disclosed some very obnoxiously friendly relations between commanders of the group and certain politicians. For example, representatives Rocío Arias (from Cauca) and Eleonora Pineda (from Tierralta) not only awaited Mancuso et al. at El Dorado Airport, and organized the transport to the Plaza Bolívar in downtown Bogotá, they also arranged suits and shoes the commanders wore on stage in the legislature.⁹²

The courting not only caused anger amongst the victims of paramilitary violence, but also raised more suspicions about the exact nature of relations between paramilitarism and politics. The public began to wonder how Arias and Pineda could become such central political figures. Prior to their election in 2002, they had only managed to win in small municipal elections and effectively increased their vote share by over 1000 percent in the 2002 congressional election. In 2005, Claudia López found more such "atypical" election results, where majorities apparently shifted over night and bordering electoral districts had contradictory results even though the socio-political composition was virtually identical. Finally, Vicente Castaño, in an interview with *Semana*, confirmed Salvatore Mancuso's claim that 35 percent of Congress were elected with paramilitary help.⁹³

⁹² See *Verdad Abierta*. "Parapolítica: Rocío Arias Hoyos". August 20, 2013; Last accessed on: 15 November, 2014. <http://www.verdadabierta.com/politica-ilegal/parapoliticos/4771-parapolitica-rocio-arias-hoyos>.

⁹³ *Revista Semana*. "Hablar Vicente Castaño" June 5, 2005; Last accessed on: 15 November, 2014. <http://www.semana.com/portada/articulo/habla-vicente-castano/72964-3>; López, Claudia. 2005. "Votaciones atípicas en las elecciones de congreso de 2002". In *Revista Semana*. 11 September, 2005; Last accessed on: 18 November, 2014. <http://www.semana.com/on-line/articulo/votaciones-atipicas-elecciones-congreso-del-2002/74746-3>.

As the indiscretions and peculiar publicity stunts were shoring up public wariness about the synergies between politicians and paramilitaries, the internal structure of the AUC, too, was shaken by the increasing public exposure. As described, the AUC only constituted an umbrella organization of various self-defense groups and warlords. It left the regional command structures under the control of those local warlords, who therefore had every opportunity to pursue their own interests. This fragmented structure became readily apparent in the early 2000s, when various factions within the AUC were fighting an internal war over the role of narco-profits in the financial structure of their organization. Carlos Castaño and Carlos Mauricio García (alias “Doblecerero”) were both founding members of the vigilante project, and had started their vigilantism as part of the *Pepes*. In addition, they were driving forces behind the political evolution of the paramilitaries, with Castaño speaking on national television in order to legitimate their aspirations. In the early 2000s, as the first negotiations between the government and the AUC had commenced, “Doblecerero” publically decried the influence of narco-traffickers on the paramilitary project and Carlos Castaño was said to have been negotiating with the government and the DEA to exit from the mountains to save exile. The fellow commanders of the various blocs turned against them in the fear of becoming the price for their exit from the vigilante business. Wars erupted in the remote regions of the country and members of the organization they helped to create assassinated both of them – Castaño by the order of his brother, Vicente, no less.⁹⁴ Their deaths made evident that not even the lives of two of the most prominent members were safe when irreconcilable interests clashed. This clash of interests became explosive exactly at the moment of increased public exposure and when the AUC was seeking public approval for their organization. Clearly, the internal structure of the AUC – above all its financial structure – was irreconcilable with public communicative action.⁹⁵

As Uribe’s first term came to a close and his government’s attention rested on the faith of the Justice and Peace legislation as well as the re-election reform legislation in the courts, a number of events unfolded, which would prove to be very explosive in the

⁹⁴ *Revista Semana*. “La Cacería de “Doblecerero”, September 29, 2003.

⁹⁵ Already in September 2004, *Semana* publicized reports that a number of narco-traffickers were at the negotiating table and questioned whether they should receive clemency for political crimes, when their endeavor was clearly motivated by plain criminal aspirations. *Revista Semana*. “Revelaciones explosivas”, 27 September, 2004.

second Uribe term. Above all, Claudia López Obregon's official complaint with the Supreme Court to investigate the rumors and establish whether they amount to indictable offenses in June 2005 became the catalyst of *parapolítica* (Gómez Quintero, 2007, p. 40). The official investigations would result in very hard evidence that paramilitary-Members of Congress relations had long crossed the line of legality. The official complain led investigators to uncover the infiltration of DAS by elements associated with paramilitary forces. DAS is the internal security agency – similar to the FBI in the US – directly responding to the President's office. Rafael Garcia, who was the information technology chief, had become the focus of investigators because he had been caught erasing the criminal records of paramilitaries. In December 2005, he started to talk about the close collaboration between the DAS and the AUC, which amounted to a full infiltration and co-optation of the security agency by the paramilitaries. Even more, he confessed that paramilitaries campaigned with Uribe's allies in the region.⁹⁶ This put the spotlight on the agency's director, Jorge Noguera, who organized Uribe's election on the Caribbean Coast in 2002, which in turn secured him the directorship of DAS. Noguera became one of the closest political allies of Uribe indicted and sentenced for collaboration with paramilitaries. In 2011, the Supreme Court sentenced him to 25 years in prison.

Finally, in April 2006 the Constitutional Court declared the Justice and Peace Law constitutional for the most part, but imposed critical conditions; above all victims' rights to the truth. Furthermore, it excluded for procedural reasons the felony of "conspiracy to commit a crime" from the list of crimes falling under the Justice and Peace jurisdiction (C-370/06). The effects of these decisions would only fully surface in the second term, because already in March 2006 congressional elections provided Uribe with an even stronger majority in both chambers and two months later, he himself was reelected with 62 percent of the vote.

In sum, the peace negotiations between the government and the AUC were characterized by internal fragmentations inside the paramilitary organization, and, potentially planted, indiscretions by paramilitaries against the political class. To make sense of this creeping escalation of the scandal we need to recall that Acemoglu,

⁹⁶ In further episodes of the *parapolítica*, the DAS is the access point for illegal forces to infiltrate Colombia's legal system. See *Revista Semana*. "Cómo se hizo fraude". April 6, 2006; Last accessed on: 15 November, 2014. <http://www.semana.com/nacion/articulo/como-hizo-fraude/78258-3>.

Robinson, and Santos, analyzing the data from *parapolítica* and Supreme Court investigations, discovered equilibrium relations between paramilitaries and politicians that existed prior to the Justice and Peace negotiations (2010). They convincingly argue that each side benefitted from this arrangement to the detriment of the wider population and the proliferation of public goods (above all the monopoly of violence and security). Not as explicitly stated, however, is that all of this existed in the dark sphere of the paramilitary world that the peace process, regardless of its deficiencies, dragged into the public light. Paramilitaries gave interviews and spoke in Congress, the media started to question unusual election results, and politicians found themselves increasingly pushed against the wall. For example, Arias and Pineda were purged from their caucus lists for the 2006 elections and ostracized by all other lists in Congress for fear of the contagion they would bring with them (see below). It is this *publicness* that destabilized the equilibrium between the paramilitaries and the politicians, because it created a dynamic that could not be contained through interest alignment, but forced actors to make appeals to reason bound values and principles. Moreover, such public speech acts carry interlocutory obligations that forced actors – even criminal ones such as paramilitaries – to comply with their promise to create peace. In this specific case, peace included the conditions to tell victims’ the truth of crimes committed and disclose all facts relevant to their role in the armed struggle. The latter point involved their political links.

We can illustrate the importance of *publicness* in the social science language of interest alignment and misalignment. The key competitive advantage of the paramilitary warlords over potential rivals from drug trafficking and mafia groups was their coercive capacity. It was this capacity that brought them in those relationships with legal politicians in the first place. The demobilization process, evidently, would rob them of this advantage, putting them in a situation where their contractual partner (the politician) has no incentive to follow through with their commitments. Thus, they had all reasons to fear that they would get short-changed by the politicians that they helped to prop up. These pressures, which in their core highlight the principle-agent problem of contracts existing outside the context of functioning state institutions, only increased in December 2004, when Uribe had a powerful hand to play in negotiations with paramilitaries: extradition. The Supreme Court allowed the extradition of Salvatore Mancuso in

November 2004.⁹⁷ Evidently, AUC commanders wanted to avoid the faith of the heads of the Cali Cartel (who, incidentally, were extradited to the US exactly at this point, where they now serve long prison sentences). Yet, they had all reasons to fear that politicians would cheat them on their previous arrangements. The only credible threat *paras* had left was to make the arrangement between them public in order to equalize the pressure on the political class. The logical strategy then was to slowly let allegations and indiscretions permeate through to the public to put pressure on their negotiating partners. This is exactly what materialized in the course of peace negotiations and set the stage for the second term and shows even in the context of strategic actors that publicness induces a dynamic that destabilizes previously equilibrated relations (see also Duncan, 2006; Gutiérrez Sanín & Barón, 2005; Gutiérrez Sanín, 2007; López Hernandez, 2010).

In Uribe's second term, the courts' activism ensured that these insecurities persisted. Critical was the Constitutional Court decision from April 2006, which declared the key legislation of the demobilization process, the Justice and Peace Law, constitutional under the condition that victims' rights to the complete truth were upheld (Ramírez Bastidas & Socha Salamanca, 2007, p. 53-54; García Villegas, Revelo Rebolledo, Uprimny, 2010, p. 324-325).⁹⁸ This clause entailed that non-compliance would result in foregoing the possibility of being sentenced under the Justice and Peace jurisdiction, almost certainly leading to long prison sentences given the atrocities committed by paramilitaries. Accordingly, the incentive structure for AUC commanders was tilted towards revealing the nature of the secret arrangements with politicians. As this analysis will show, their testimonies in Justice and Peace Courts together with anonymous allegations filed by citizens were critical in helping the Supreme Court in its investigations and eventually indictments of Members of Congress.⁹⁹ These are the legal facts that had important institutional ramifications and lead me to understand the next developments as different phases of the *parapolítica* affair.

⁹⁷ *Revista Semana*. "Corte Suprema autorizó la extradición de Salvatore Mancuso y 'Simón Trinidad'" 21 November, 04; Last accessed on: 13 November 2014. <http://www.semana.com/noticias/articulo/corte-suprema-autorizo-extradicion-salvatore-mancuso-simon-trinidad/69469-3>.

⁹⁸ See also Republic of Colombia. Constitutional Court of Colombia. C-370/06. M.P. Manuel Jose Cepeda Espinosa, Jaime Córdoba Triviño, Rodrigo Escobar Gil, Marco Gerardo Monroy Cabra, Álvaro Tafur Galvis, Clara Inés Vargas Hernández and Republic of Colombia. Constitutional Court of Colombia. C-454/06. M.P. Jaime Córdoba Triviño.

⁹⁹ Subject no. 11 (Supreme Court judge), 22. April, 2013.

3.4.1.2. Uribe II – Courts in the defense of Democratic Legality

The celebration of the fifteenth anniversary of the 1991 Constitution in 2006, following Uribe's re-election, sent foreboding messages of developments to come in the second term. Uribe used the opportunity to announce a slight but important change of position. During his first term – specifically when Fernando Londoño Hoyos was Superminister of Justice and the Interior (see below) – Uribe's government fairly openly sided with the Supreme Court in the debate over the *tutela contra sentencias*. Now he declared that he only intended to clarify the application of the *tutela* by ordinary legislation, and not eliminate its application to judicial decisions by a constitutional amendment, apparently shifting to the Constitutional Court's position.¹⁰⁰ Some have argued that the anger this provoked amongst the ranks of the Supreme Court¹⁰¹ is the origin of the fierce confrontation between the Court and the executive.¹⁰² It fits the picture of a politically motivated court acting in its own interest that utilized the *parapolítica* scandal to take revenge on the executive.¹⁰³

This analysis will show that the evolution of the *parapolítica* scandal is more complicated than this quid pro quo narrative suggests. While it is true that the Supreme Court was not thrilled by the apparent change of mind, the previous section already outlined that the origin of inquiries into illegal relations between Members of Congress and the AUC preceded the Constitution's anniversary by over a year and were outside of the Supreme Court's control. As will be further elaborated, the two main sources providing the fuel for the Supreme Court's curiosity about para-political relations were paramilitaries' testimonies in Justice and Peace Courts, which the Constitutional Court imposed as a condition for the constitutionality of the Justice and Peace Law, and anonymous accusations submitted by citizens to the Supreme Court. In addition, it is now

¹⁰⁰ *El Tiempo*, "Presidente cambia de idea con *tutela*." July 5th, 2006; Last accessed on: 4 December 2014. <http://www.eltiempo.com/archivo/documento/MAM-2090706>.

¹⁰¹ The Supreme Court's President, Yesid Ramirez, accused the president and the Constitutional Court of trading favors for granting re-election.

¹⁰² Subject no. 30 (Constitutional Court judge), 20 November 2012; Subject no. 17 (Member of Congress of the Republic of Colombia), 13 March 2013.

¹⁰³ See also interview with Senator Mario Uribe. *Verdad Abierta*. "Álvaro Uribe me dejó solo". 18. October 2010; Last accessed on: 25 November 2014. <http://www.verdadabierta.com/despojo-de-tierras/2797-galvaro-uribe-me-dejo-solo>.

readily apparent that Uribe and his administration intentionally escalated the confrontation with the Supreme Court following the indictments of Senators Álvaro Araújo Castro and Mario Uribe (the President's first cousin) by publicly attacking the Court and covertly designing intimidation campaigns threatening magistrates in their personal lives. In the end, the scandals of the second term resulted in a public discourse that was by far not as positive about the Uribe administration, despite the personal popularity of the President. Moreover, the reports and coverage of political scandals provided important insights for the Constitutional Court when it decided on the constitutionality of a second immediate presidential re-election.

The two critical events occurring at the end of Uribe's first term were 1) Claudia López Obregon's official complaint with the Supreme Court, and 2) the Constitutional Court's conditionality imposed on the Justice and Peace Law (Law 975 from 2005). As we will see, the Supreme Court justified its proceedings against Members of Congress exactly on the clauses containing victims' right to truth in C-370/06 and C-454/06 (Ramírez Bastidas & Socha Salamanca, 2007). These two events are the catalyst for the production of legal fact through Supreme Court investigations. When the Court established the Auxiliary Court specifically tasked with investigating *parapolíticos* in September 2006, it did so as a response to the public revelations and the Constitutional Court's affirmation of the imperative to know the truth (Gómez Quintero, 2007, p. 41). It invited citizens to submit anonymous accusations. These submitted allegations provided numerous leads to prosecute.¹⁰⁴ Thus, a month later, the first Members of Congress – Jose Enrique, Eric Norris, and Alvaro Garcia – received subpoenas to report before the Court. With these official accusations, the scandal turned into a legal affair resulting in the second phase of the scandal.

The prospects of official prosecutions and the Court's activism caused a very apparent franticness in Congress. Aforementioned Representatives Rocio Arias and Eleonora Pineda were purged from all lists in Congress and failed to gain entrance to other lists of the *Uribista* bench in the legislature. Their obscure movement “Dejen jugar al Moreno” (let the monkey play) and its proximity to the leaders of the AUC had

¹⁰⁴ Subject no. 11 (Supreme Court judge), 22. April, 2013; subject no. 3 (Supreme Court judge), April 18, 2013; subject no. 38 (Supreme Court judge), April 17, 2013.

become such a source of insecurity that no other political movement wanted them amongst their ranks. Most prominently, Mario Uribe and his *Partido Colombia Demócrata* refused them entry.

In this period of general public frantiness over potential revelations emerged the secrets contained in a computer belonging to paramilitary leader “Jorge 40”, which the Attorney General’s Office had recovered in a raid in March of 2006 in connection with the allegations made by Rafael Garcia. After finally breaking the sophisticated encryption code in September, the hard disc became one of the central pieces of evidence that incriminated the AUC leader in crimes against humanity, detailed his violations of Justice and Peace provisions, and exposed the scope of relations between politicians and illegal armed groups. Most importantly, the files mentioned a number of strategic meetings between the leadership of the AUC and regional and national politicians that took place in and around the city of Santa Fe de Ralito.¹⁰⁵

These strategic meetings are the critical element of *parapolítica*, because they reflect the scope of the symbiotic relations between armed groups and politicians, making the *parainstitutionalization* of Colombia’s democratic institutions readily apparent. The content of negotiations that took place in Cordova were revealed soon after the discovery of “Jorge 40’s” computer. The way it surfaced speaks to the almost comical dimension of Colombian politics at the time. In a meeting with the President, Senators Miguel de la Espriella and Juan Manuel Lopez Cabrales (from Salvatore Mancuso’s home province Cordova) accused each other in slapstick-like-manner of being paramilitary friends. Somehow, the minutes of this event were leaked to the press, resulting in the Supreme Court to ask further questions about their respective relations with the AUC.¹⁰⁶ Being exposed in public, Senator de la Esperriella confessed to the media that the meetings had explicit strategic purposes that served the interests of both sides: politicians wanted to be elected and paramilitaries wanted to build a national strategy to avoid extradition in the

¹⁰⁵ *Revista Semana*, “El Computador de ‘Jorge 40’”. September 2, 2006; Last accessed on: 15. November 2014. <http://www.semana.com/nacion/articulo/el-computador-de-jorge-40/80765-3>. *El Semana*. “El imperio de ‘Jorge 40’”. 30 September, 2014; Last accessed on: 15 November, 2014. <http://www.semana.com/nacion/articulo/el-imperio-jorge-40/81239-3>. *Revista Semana*. “El computador de ‘Jorge 40’ puede ser el inicio de un nuevo proceso 8.000”. 8 October, 2006; Last accessed on: 15 November, 2014. <http://www.semana.com/on-line/articulo/el-computador-jorge-40-puede-inicio-nuevo-proceso-8000/81379-3>.

¹⁰⁶ See subject no. 11 (Supreme Court judge), 22 April, 2013.

course of the demobilization processes. Even more, he implicated that Uribe's first election to the presidency in 2002 resulted as a consequence of those relations.¹⁰⁷ Finally, in January 2007, Salvatore Mancuso in his testimony before the Attorney General's office filled in the missing details and incriminated a number of high-ranking politicians in an accord signed between them and the leadership of the AUC. This became known as the Pact of Ralito, wherein the AUC leadership and politicians proclaimed the intention to *refound* the nation (López Hernández, 2010).¹⁰⁸

As the data presented in Appendix B (Graphs B.1 – B.6) show, the numbers of official investigations augmented dramatically in the second quarter of 2007. At the same time, the number of preliminary investigations, resulting in official investigations, also kept on snowballing in this period. Furthermore, as Appendix A shows, the public discourse turned notably sour. While negative and positive reports were essentially even in 2006, in 2007 almost twice as many articles in *Semana* reported negatively about Uribe and his coalition in Congress.

Up until this point, Uribe was relatively reserved in regard to the ongoing developments, but two investigations initiated by the Supreme Court in this period triggered a very concerted response by the executive, which involved public and legal means, as well as taking up methods to put pressure on the Supreme Court that crossed the line of legality. In February 2007, the Supreme Court opened an official inquiry against Alvaro Araújo, brother of the Chancellor in his administration María Consuelo Araújo. The DAS technician Rafael Garcia incriminated him and laid open his relations to “Jorge 40”.

The second case, incriminating Senator Mario Uribe, head of the *Partido Colombia Demócrata* in Congress and one of the most powerful leaders of the President's *Uribista* bench in Congress, appeared on investigators' lists after Salvatore Mancuso's testimony in the Justice and Peace chambers of the Supreme Court. He reported on a number of political allies, paramilitaries helped to prop up. Concretely, he

¹⁰⁷ *Revista Semana*. “La exitosa estrategia política de Ralito”. 28 November 2006; Last accessed on: 16 November, 2014. <http://www.semana.com/on-line/articulo/la-exitosa-estrategia-politica-ralito/82332-3>.

¹⁰⁸ *Verdad Abierta*. 2012. “De la Espriella: “Fui puente entre Uribe y Auc para negociación de Ralito” <http://www.verdadabierta.com/component/content/article/-/4232-de-la-espriella-y-pineda-eran-el-enlace-de-los-paras-con-uribe-mancuso>. *Revista Semana*. “Pacto con el diablo”. 20 January 2007; Last accessed on: 21 November, 2014. <http://www.semana.com/nacion/articulo/pacto-diablo/83048-3>.

implicated the President's cousin in two meetings with him prior to the 2002 election that were held to facilitate co-operation before and after Election Day.

From this moment on, the government's approach shifted towards aggression, intimidation and evasion, and essentially employed five different strategies to avoid or thwart the ongoing investigations: 1) he repeatedly launched public and personal attacks against the Supreme Court and its members, which Human Rights Watch described as a "concerted campaign to smear and discredit the Court"; 2) he proposed constitutional reforms with the intention to remove *parapolítica* investigations from the jurisdictions of the Supreme Court (none of these attempts succeeded); 3) he blocked and opposed meaningful efforts to reform Congress in the so-called "silla vacia" affair (empty seat); 4) he extradited the main AUC leaders; 5) he secretly kept tabs on several institutions, including the Supreme and Constitutional Court, and harassed judges of the Supreme Court with the help of obscure forces from within the bureaucracy (DAS) and outside (Human Rights Watch, 2008, p. 5). The concerted effort by the executive to deligitimize the Supreme Court is the qualitative difference that characterizes the third phase of the *parapolítica* affair.

1) Personal attacks

When the Supreme Court officially opened Mario Uribe's case in September 2007, the President personally started to get involved and take action.¹⁰⁹ He first inquired about a paramilitary named "Tasmania", whose area of action was in the Southeast of Antioquia – the home province of the Uribe family. On October 8th, 2007, only a few days after the Senator's official summons, President Uribe accused the primary investigator of the *parapolítica*, Iván Velásquez, of having paid Tasmania to smear the Senator in an orchestrated campaign that eventually was supposed to hit the President himself. In other words, the President attempted to paint the accusations as politically and economically motivated and reliant on obscure sources.¹¹⁰ The attacks against the Supreme Court and

¹⁰⁹ *Revista Semana*. "Mancuos vincula mas politicos." 16 May, 2007; Last accessed on: 15. November 2014. <http://www.semana.com/on-line/articulo/salvatore-mancuso-vincula-mas-politicos-autodefensas/85941-3>. See also interview subject no. 11 (Supreme Court judge), 22. April, 2013.

¹¹⁰ *Revista Semana*. "Uribe contra el mundo". Last accessed on: 14 November, 2012. <http://www.semana.com/nacion/uribe-contra-mundo/106879-3.aspx>. *Revista Semana*. "Asedio a la Corte

its auxiliary unit tasked with the *parapolítica* investigations followed this patterned screenplay. First, the President, often personally, attempted to taint the evidence as a result of bribes and irregularities, which most often involved individuals related to paramilitaries and/or the drug trade. Secondly, the President attempted to portray the Court as acting politically against his administration, being motivated by interests that have their roots in institutional clientele networks aimed at guaranteeing jobs for friends within the judiciary. The Supreme Court reacted by backing its magistrates and asking the Attorney General to investigate the claims. The Attorney General cleared the magistrates of wrongdoing and the accusers themselves admitted to having orchestrated the accusations. Furthermore, the witnesses also testified that Uribe's advisor, José Obdulio Gaviria, and Mario Uribe were behind the smear campaigns against magistrates.¹¹¹

2) Judicial Reform

In July 2008, Minister of Justice and the Interior, Fabio Valencia, proposed a judicial reform, which amongst other items, would have transferred the authority to conduct criminal investigations of legislators to the Attorney General's office, making the Superior Tribunal Court in Bogota the trial court and the Supreme Court's criminal chamber the appellate court. The government justified the initiative with the attempt to depoliticize the courts and address the lack of an appeal instance for Members of Congress (see below). Critically, the reform proposal included a norm imposing that its stipulation would apply retroactively, affecting the ongoing *parapolítica* investigations. It was sugar coated with proposals to increase magistrates' payments and pensions. However, the judiciary unequivocally opposed the reform and formed a united front

Suprema". 28 February 2009; Last accessed on: 16 November 2014. <http://www.semana.com/nacion/articulo/asedio-corte-suprema/100578-3>. See subject no. 11 (Supreme Court judge), 22 April 2013; subject no. 38 (Supreme Court judge), April 17 2013. See also Human Rights Watch, 2008, p. 15-16. "Tasmania" himself revealed that he received money from the president's advisors to plant these accusations. See Daniell Coronell, *Revista Semana*. "Los secretos de Tasmania". 15 January 2011; Last accessed on: 20 November 2014. <http://www.semana.com/opinion/articulo/los-secretos-tasmania/234098-3>.

¹¹¹ Brownfield, William R. (2008-08-15). "No end in sight to Uribe-Supreme Court power struggle". Wikileaks. Wikileaksable; 08BOGOTA3007_a. https://www.wikileaks.org/plusd/cables/08BOGOTA3007_a.html.

against the government. Observers as well as former politicians also described it as an effort by the government to offer its coalition in Congress impunity (Human Rights Watch, 2008). Finally, the remaining Members of Congress in the legislature feared that aligning with the government's proposal would aggravate the Supreme Court and place them in danger of being investigated. Thus, the proposal eventually died in Congress, because Uribe and his minister had underestimated the strong opposition of the entire judiciary and "cowardice" of Congress (Uribe's words).¹¹²

3) Reform of Congress and the empty seat (*La Silla Vacía*).

Reform of Congress acquired the discernible name "*La silla vacía*" (the empty seat) for the vacuum indicted Members of Congress left in the caucuses of affected parties and movements. Thus, the question became, what to do with those empty seats. The question has deep political and normative connotations. Normatively, because it touches on fundamental democratic principles, since punishing the parties and Members of Congress for their misgivings and leaving the seats empty would also punish the electorate, and inhibit, post factum, their voting right. Allowing caucuses to fill the seats at gusto would strengthen incentives to run the ethical risk of aligning with criminal forces. For the executive, the issue was critical, because Uribe relied on his majorities in Congress for passing legislation (in particular for another re-election reform), but to boldly push through his interest was dangerous considering that he himself was increasingly pressed on his relations to illegal forces in the country.¹¹³ His government undertook an attempt in 2008 to press through reform with some penalties for the parties of indicted Members of Congress, but with stipulations on the empty seat norms that would carry him through that legislative period. The reform died in the Senate, because of the self-impediment of its members in the first committee that decreased the majority below the threshold required for it to move to the second stage. The Supreme Court's investigations, which resulted in Members of Congress to resign their investiture (see below), effectively killed

¹¹² Brownfield, William R. (2008-08-05). "High courts oppose GOC judicial reform proposal affecting parapolitician investigations." Wikileaks. Wikileaksable; 08BOGOTA2891_a. http://www.wikileaks.org/plusd/cables/08BOGOTA2891_a.html.

¹¹³ *Revista Semana*. "Para-política y reelección". April 19, 2008; Last accessed on: 16 November 2014. <http://www.semana.com/nacion/articulo/para-politica-reeleccion/92233-3>.

the bill in Congress.¹¹⁴ Eventually, Congress passed reform in 2009, which not only included the empty seat legislation, but also a number of provisions regulating the appointment practice in public offices. Most notably, the selection of family members was drastically curtailed.¹¹⁵

4) Extradition of Paramilitaries

In all of this it must have dawned upon Uribe and his administration that the paramilitaries were a profound source of insecurity. Salvatore Mancuso and “H.H.” were the most willing AUC members to reveal their knowledge before courts. In the beginning of 2008, “Don Berna” and “Jorge 40” signaled that they also might be willing to talk to investigators about their relations with politicians. Evidently, the executive and legislators had a profound interest in cutting this supply line of constant revelations. Extradition to the US proved to be the solution to their problems and drug trafficking charges provided the suitable pretext and justification. Thus, in May 2008, Uribe’s government decided to transfer almost the entire AUC leadership to the United States (Human Rights Watch, 2008, p. 6). This proved to be the most successful move to slow down revelations, because even though some paramilitary leaders provided further details from US prisons, their admissions never acquired legal meaning. Mancuso, for example, stated that he and his armed men helped Uribe’s elections on various occasions, but declined to submit his testimony officially in court for fear of retribution against his family and lawyers that were still in Colombia.

5) DAS-Gate II and the harassment of judges

When the Supreme Court took Araújo into custody, the executive initiated a program later revealed under the name “*chuzadas*” (wiretaps). It employed the DAS to install tabs on judges of the Supreme Court and begin its infiltration of the rooms where the plenary

¹¹⁴ *Revista Semana*. “Se murió la reforma política”. June 10, 2008; Last accessed on: 30 July, 2014. <http://www.semana.com/on-line/articulo/se-murio-reforma-politica/93233-3>.

¹¹⁵ *Radio Caracol*. “Aprobada la Reforma Política con la “silla vacía””. June 17, 2009; Last accessed on: July 30, 2014. <http://www.caracol.com.co/noticias/actualidad/aprobada-la-reforma-politica-con-la-silla-vacia/20090617/nota/830745.aspx>.

chamber met to discuss matters concerning the court as a whole.¹¹⁶ This was the beginning of DAS-Gate II. In March 2009, *Semana* revealed that DAS kept wiretaps on seven of the nine judges in the criminal chamber of the Supreme Court. Their families were also subjected to pressures and insidious threats from more obscure sources. Judges reported that their family and friends informed them that they were followed by obscure persons and approached by individuals with questions about their activities (later revealed as DAS agents). Furthermore, *Semana* disclosed that DAS listened to over 1,900 phone calls made by Iván Velásquez, the auxiliary judge responsible of the *parapolítica* inquiry, following his every step.¹¹⁷ Over the next months, the DAS wiretapping scandal exposed a network of relations that reached all the way up to the Presidency, implicating former DAS director Jorge Noguera, and his successor María del Pilar Hurtado.¹¹⁸ The heads of the security agency are directly subjected to the President's office and in the trials against former DAS agents, witnesses have repeatedly incriminated Uribe's former chief of staff Bernardo Moreno and José Obdulio Gaviria (the President's closest political advisor) as the masterminds behind the wiretaps. The apparent goal was to stay informed on actors that inhibited Uribe's exercise of power. US sources, revealed in wikileaks cables, confirmed the plot behind the campaign to intimidate and observe judges.¹¹⁹

The shifts to the fourth and fifth phase of the *parapolítica* are caused by the Supreme Court's reaction to the strategies employed by Members of Congress to avoid

¹¹⁶ See subject no. 11 (Supreme Court judge), 22 April 2013. The evidence comes from Alba Luz Flórez, who was the servant in the Court passing on information to DAS and installing the bugs to listen into conversations. See *El Espectador*. "'Mata Hari' pide a María del Pilar Hurtado contar la verdad de las chuzadas" 7 July 2014; Last accessed on: 20 November 2014. <http://www.elespectador.com/noticias/judicial/mata-hari-pide-maria-del-pilar-hurtado-contar-verdad-de-articulo-502799>.

¹¹⁷ *Revista Semana*. "Asedio a la Corte". 2 March 2009; Last accessed on: 17 November 2014. <http://www.semana.com/nacion/articulo/asedio-corte-suprema/100578-3>.

¹¹⁸ The DAS installed wiretaps on the political opposition (Cesar Gaviria, Gustavo Petro), members of the government coalition itself (Francisco Santos), several Supreme Court judges (Alfredo Gómez Quitnero, Sigrifredo de Jesús Espinosa, César Julio Valencia, Mauro Solarte, Camilo Humberto Tarquino) as well as Constitutional Court judges (Clara Inés Vargas, Rodrigo Escobar). See *Revista Semana*. "El espionaje era peor". 25 April 2009; Last accessed on: 16 November 2014. <http://www.semana.com/nacion/articulo/el-espionaje-peor/102429-3>.

¹¹⁹ *Colombiareports*. "Reports on illegal wiretaps were meant to inform Uribe: Witness". 11 June 2013; Last accessed on: 16 November 2014. <http://colombiareports.co/reports-on-illegal-wiretaps-were-meant-to-inform-uribe-witness/>. *Colombiareports*. "Former intel official insists Uribe's former chief of staff ordered wiretaps". 1 March 2012; Last accessed on: 16 November 2014. <http://colombiareports.co/colombias-former-chief-of-staff-accused-of-spying>.

prosecution. The next section will specify the details and legal decisions by the courts. Here it suffices to quickly summarize the tactics employed. First, they attempted the strategy utilized in the course of the *proceso 8000*: submitting *tutelas* on the grounds that criminal prosecution violates their parliamentary prerogatives. Secondly, they complained – also via *tutelas* – that the lack of an appeal instance violates their due process rights. As explained above, the Constitution replaced parliamentary immunity with the special privilege to face accusations in the Supreme Court rather than the lower courts. Finally, when the Constitutional Court dismissed this argumentation as well, the *parapolíticos* attempted to protect themselves by resigning their investiture in order to move to the ordinary justice system. This resulted in the fourth phase, between 2008 and 2009, when the Supreme Court refrained from sentencing Members of Congress who had resigned their investiture. When it altered its jurisprudence and re-assumed the cases of resigned members of Congress the scandal entered the fifth and final phase.¹²⁰ Tellingly, Members of Congress submitted their rights appeals with the disciplinary chamber of the Superior Council of the Judiciary, whose members are elected in a highly politicized way (by representatives from lists put forward by the President; see figure 3.1). Not surprisingly, they followed their argumentation, but, again, to no avail. The Constitutional Court turned down arguments by the disciplinary chamber of the Superior Council of the Judiciary and reinstated Supreme Court sentences (Revelo Rebolledo, 2009; García Villegas & Revelo Rebolledo, 2010a; see below).

In the end, from initially thirty Members of Congress investigated at the beginning of *parapolítica*, the number grew to 83 in June 2008, and 102 by 2010. According to the Justice and Peace Unit of the Attorney General’s office, one third of all mayors, governors, and Members of Congress were promoted to office with the help of “narco-paramilitarism”. All of this essentially validated the number provided by Mancuso and Vicente Castaño at the beginning of the *parapolítica* saga that around 35 percent of Congress were friends of the paramilitaries. Revealingly, eight of ten *parapolíticos* investigated were part of Uribe’s bench in Congress, providing evidence for the

¹²⁰ *Revista Semana*. “La Corte no juzgará los casos de congresistas que renunciaron al fuero”. 17. September 2008; Last accessed on: 16 November 2014. <http://www.semana.com/on-line/articulo/la-corte-no-juzgara-casos-congresistas-renunciaron-fuero/95316-3>.

assumption that paramilitarism and *uribismo* were two closely related phenomena and movements (López Hernández, 2010, p. 30-33; Sanín Gutiérrez, 2010).¹²¹

Parapolítica was not the only source of profound hostility between the Supreme Court and the executive. Deeply damaging for his legitimacy, and therefore particularly toxic for inter-branch relations, was what would become known as *Yidispolítica*, which evolved around former representative Yidis Medina's role in the first re-election legislation. Medina had gained notoriety in her role as a replacement for Representative Díaz Mateus from Santander in 2004. Together with Teodolindo Avendaño, who had replaced Arcila Córdoba, she cast the decisive vote at the congressional committee stage to pass the first re-election reform. Already in 2004, the vote caused public suspicions, because only a few days before the vote, they both appeared to be on the side of opposition and could only cite frivolous arguments such as divine intervention for their impulsive change of mind. Regardless of the reservations that arose amongst magistrates on the Constitutional Court from these events, the majority held that without *legal* confirmation of the illicitness of the vote it did not amount to a procedural violation of constitutionality.¹²²

In April 2008, however, journalist Daniell Coronell published Medina's confessions in his column for the weekly *Revista Semana*.¹²³ She admitted to having accepted bribes from Uribe and his minister Sabas Pretelt for her vote (López & Sevillano, 2008, p. 78). Later that month, the Supreme Court issued an arrest warrant for Medina, who then officially confessed in the Court, and incriminated Avendaño as well. In May, Avendaño was arrested and made similar confessions, which resulted in the final arrest of Iván Díaz Mateus. In June of that year, the Supreme Court ruled that Medina did in fact act illicitly by selling her vote to the government, effectively putting into doubt the entire reform process that ended with Uribe's re-election. Uribe responded with

¹²¹ Gutiérrez Sanín explains that there was a clear relationship between *Uribismo* and paramilitarism. He argues that of the entire cohort of Senators (100) elected to the upper chamber in 2006, 42 ended up being investigated for paramilitary, FARC, or ELN relations. Of those 42, 35 were part of the *Uribista* coalition in Congress (all investigated for relations with paramilitaries). The entire cohort belonging to Uribe's coalition consisted of 70 Senators. Thus, the likelihood of an *Uribista* Senator to have relations with paramilitaries was at 50% percent, whereas amongst non-*Uribista* Senator that correlation was only ~23% (Gutiérrez Sanín, 2010, p. 12; López 2010).

¹²² See interview subject no. 13 (Constitutional Court judge), 3 May 2014.

¹²³ Daniel Coronell. *Revista Semana*. "La historia no contada". 5 April 2008; Last accessed on: 17 November 2014. <http://www.semana.com/opinion/articulo/la-historia-no-contada/91968-3>.

according fury and accused the Court of meddling in political affairs. In order to protect the legitimacy of his second term, he intended to take the plebiscitary route and re-submit the election to a referendum by the people, knowing full well that his term would be approved given his extremely high popularity rating at his point, when the military had just liberated Ingrid Betancourt.

His plans eventually became superfluous, because the Constitutional Court decided in July of 2008 that it could not re-open a case without committing a *cosa juzgada*. New evidence did not suffice; the context needed to have substantially changed.¹²⁴ Nevertheless, this affair made the importance of legal facts not only for public policy readily apparent, since Uribe had to spend a lot political capital against the decision by the Supreme Court, but also for institutional developments. My interviewees confirmed that had the Supreme Court produced this decision prior to the constitutionality decision that enabled the first re-election, the Court would have decided differently. As an interviewee exclaimed, “what mattered is if they were sanctioned or not”. Had Yidis Medina been sentenced prior to Constitutional Court’s decision, it would have sufficed to declare the law unconstitutional for not fulfilling the procedural requirements stipulated for amendment processes.¹²⁵

The final confrontation between the Supreme Court and Uribe evolved around the nomination of the Attorney General (*Fiscalía General*). In his last year in office, Uribe repeatedly put forward names to replace the Attorney General only to see his candidates fall through in the vote in the Supreme Court. Only when Juan Manuel Santos was elected to the presidency did executive-judicial relations return to normal. This was not unimportant, particularly for the DAS-Gate II investigations that were ongoing at the time of the replacement of the Attorney General. As an internal State Department cable disclosed through wikileaks explains, Attorney General Mario Iguaran’s promise to get to the bottom of the revelations could have been fruitless, because “the GOC (Government of Colombia) may use the selection of his replacement—Iguaran departs in July—to limit

¹²⁴ See interview subject no. 10 (Constitutional Court judge), 8 March 2013; Interview subject no. 26 (auxiliary judge), 15 March 2014; importantly, interviewees explained that had Medina misgiving legally sanctioned prior to the Constitutional Court’s decision in 2005, it would have merited a procedural violation of the reform process.

¹²⁵ Interview subject No. 10 (Constitutional Court judge), 8 March, 2013.

the investigation's scope".¹²⁶ It did not get that far and the DAS inquiry continued until after Uribe left office, because the Supreme Court blocked the attempt by Uribe to pack the Attorney General's office with a candidate of his liking.

This analysis would not be complete without at least briefly mentioning the other scandals that tainted Uribe's second term in office, which are not directly related to *parapolítica*. They provided further fodder for the negative discourse that essentially engulfed Uribe for the entire second term, save two brief episodes in 2008: aforementioned liberation of Betancourt and the crisis with Ecuador over the armed attack against a FARC camp on its territory. These scandals involved gross human rights violations and the embezzlement of public funds. Particularly insidious were the *falsos positivos* (false positives), "unlawful killings of civilians, staged by the security forces to look like lawful killings in combat of guerrillas or criminals" that served the purpose of shoring up promotions and bonuses for the militaries involved (United Nations, 2010). Between September 2008 and 2009, Colombia's Attorney General was investigating over 2000 cases and even called the UN rapporteur on the plan, who identified the violations as systemic – albeit not as orchestrated by the national government.¹²⁷

The two major stories concerning the embezzlement of public funds involved the *Zona Franca* and the *Agro Ingreso Seguro* (AIS) programs. The former implicated Uribe's two sons, Jeronimo and Tomas, in benefitting economically from political decisions of their father's administration. They had bought land in Mosquera (Cundinamarca). Two years after their purchase, the land was part of a zone assigned as a *Zona Franca Permanente* for industrial development, and the value of the land appreciated accordingly. AIS was an investment program, launched by President Uribe in 2006, designed to develop and modernize the agricultural sector with subsidies. In September 2009, the magazine *Cambio* revealed that millions of subsidies intended to

¹²⁶ Brownfield, William R. (2009-09-04). "DAS domestic spying scandal deepens." Wikileaks. Wikileaksable; 09BOGOTA1412_a. http://www.wikileaks.org/plusd/cables/09BOGOTA1412_a.html.

¹²⁷ United Nations Human Rights Council. Mission to Colombia. "Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston". 31 March 2010; Last accessed on: 16 November 2014. <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>. In addition see Appendix C: many interviewees explained, when asked, that the false positives scandal, in humanitarian terms, was the most egregious and terrifying scandal of the second Uribe term. See interview subject no. 9 (Constitutional Court judge), 26 November, 2012, and interview subject no. 1 (auxiliary judge), 15 April, 2013.

increase peasants' productivity filled the coffers of rich and powerful families in the Magdalena region on the Caribbean Coast and the Valle de Cauca region on the Pacific Coast, who had supported the President.¹²⁸ More cynical still, the funds, intended to benefit the victims of the conflict, enriched known drug traffickers.¹²⁹ Altogether, these scandals completed a picture of a country that was not in good shape, despite the undeniably successful efforts made against the FARC.

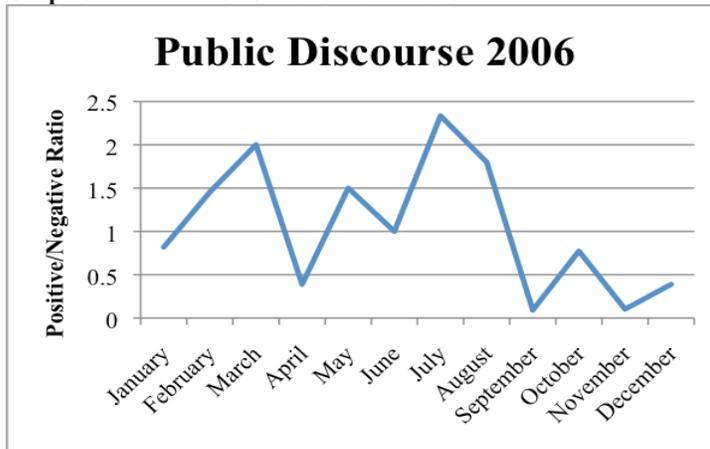
To conclude this section on *parapolítica* and Uribe's two terms in office, we can say that the Supreme Court's perseverance did affect Uribe's ability to govern, even though his own personal popularity was never properly in danger. First, the Supreme Court's activism was instrumental in controlling the excesses of nepotism in the legislature. Its perseverance in the prosecution of corrupted politicians seriously undermined the promises of success for "armed campaigns". It remains to be seen whether this existentially terminated the paramilitary project – some of the former paramilitaries recycled back into the conflict and now firm under the name of criminal bands – but there is reason for cautious optimism that structures have altered for the better of Colombians. In addition to debilitating legislators themselves, the Supreme Court also undermined Uribe's control in the law making process as could be seen in the empty seat episode.

Secondly, *parapolítica* revelations created an incredibly negative public discourse, which discredited almost the entire political system. As the graph below shows (Graph 3.1), once *parapolítica* investigations acquired *legal* meaning – i.e. when the Supreme Court officially indicted Members of Congress in September 2006 – the discourse turned noticeable negative and it never recovered until the end of his presidency. Pages devoted to negative reports of Uribe's policy exceeded those that had a positive tone (for the operationalization, see Appendix A).

¹²⁸ In the Caribbean Coast, amongst the beneficiaries were Vives Lacoture, Lacoture Dangond and Lacoture Pinedo families. In the Valle del Norte de Cauca, an ex-minister's cousin, María Mercedes Sardi de Holguín received funds intended for peasants. See Daniel Coronell. "Familias en acción". In *Revista Semana*. September 26, 2009; Last Accessed: August 5, 2014. <http://www.semana.com/opinion/articulo/familias-accion/107932-3>.

¹²⁹ *El Espectador*. "Agro Ingreso Seguro habría favorecido a narcos". October 8, 2009; Last accessed on: August 5, 2014. <http://web.archive.org/web/20120318140146/http://www.elespectador.com/noticias/politica/articulo165592-agro-ingreso-seguro-habria-favorecido-narcos>.

Graph 3.1: Evaluation of discourse in 2006.



Source: Compiled by the author; Revista Semana.

As Appendix A shows this trend continued until the end of his presidency with the two big successes of his security policy in 2008 (the attacks against the FARC in March and the liberation of Ingrid Betancourt in July of that year) as the only outliers. Specifically in 2009 negative reports of the administrations and his coalition in Congress dominated the public discourse, forcing Uribe to spend a lot political capital to fight off accusations, which in turn fuelled critical reports about his style of governance, accusing him and his government of abusing the powers bestowed on the presidency. This creation of a negative discourse was duly noted in the Judicial Palace.¹³⁰ In the final analysis of the constitutional decision regarding presidential re-election, we will see that the substitution doctrine, instrumental for denying a potential third term in office, builds on the real world conditions of excessive presidentialism. It is for this reason that the production of legal facts not only affects the public debate about Uribe, but also has an effect on creating constitutional meaning to specific clauses. In the end, US ambassador to Colombia, Brownfield, is correct to conclude that the ongoing persistence by the Supreme Court to investigate Members of Congress close to the government shows “the strength of Colombia’s democratic institutions” and posed serious problems “for a

¹³⁰ Interview subject no. 9 (Constitutional Court judge), 26 November, 2012.

possible third Uribe term”.¹³¹ A key ingredient to this institutional strength was how the courts in general, and the Supreme and Constitutional Court in particular, coordinated during their divisions over the *tutela contra sentencias* during the *parapolítica* affair. The final section of this part will be devoted to analyzing the normative development. This will show that the Constitutional Court in its jurisprudential decision concerning criminal investigations did not insist on a dogmatically *Nuevo Derecho* interpretation, but also opted for fairly formalistic decisions.

3.4.2. Parapolítica and the courts: the Uribe years and the *tutela contra sentencias*

As a reminder, the relations between the courts were aggravated by the discontent over the Viviane Morales *tutela* upholding her special privileges as a Senator. Two important decisions marked the *choque de trenes* in the time Andres Pastrana was in the President’s office. Immediately after the notorious SU-047/99 decision acquitting Members of Congress, the Constitutional Court decided a *tutela* submitted by Jairo José Ruiz Medina, complaining that Supreme Court investigations for embezzlement of funds violated his parliamentary privileges. The Constitutional Court rejected the claims, because criminal procedures against embezzlement and corruption do not fall under the terms of the constitutional protection granted, since they are not functionally related to the task of voting and opining in either chamber of Congress.¹³² Then, in 2000, President Pastrana issued Decree 1382, which specified the institutions that would review *tutela contra sentencias*, giving the institutions that were indicted by a *tutela* more say in resolving the appeal. Pastrana decreed that *tutelas* against legal corporations were to be remitted to a higher authority within that specific corporation, and *tutelas* submitted against the high courts were to be remitted to a specific board to review within that corporation.¹³³

¹³¹ Brownfield, William R. (2008-07-28). “Arrest of U Party leader president for paramilitary ties shows continued Supreme Court commitment to parapolitical investigations.” Wikileaks. Wikileaksable; 08BOGOTA2702_a. http://www.wikileaks.org/plusd/cables/08BOGOTA2702_a.html.

¹³² Republic of Colombia. Constitutional Court of Colombia. SU-786/99. M.P. Hernández Galindo.

¹³³ *El Tiempo*, “Reglamentan el reparto de las tutelas.” 14 July, 2000. Last accessed on: 3 November 2014. <http://www.eltiempo.com/archivo/documento/MAM-1304429>.

3.4.2.1. Uribe I – Confronting the Constitutional Court’s prerogatives

The analysis of the political evolution of the *parapolítica* scandal argued that the most important developments and decisions fall into Uribe’s second term in office. In the differentiation between the phases of scandal’s trajectory, the first phase eclipsed the entire initial term in office, but we also saw that towards the end of said term, critical revelations resulted in dynamics that created an increasingly contentious public atmosphere. Above all, the demobilization process with the paramilitaries and the resulting revelations about conspicuous connections between some Members of Congress and AUC paramilitaries eventually resulted in the official complain by Claudia López Obregon.

In this period, the relations between courts and the executive were most affected by Uribe’s unprecedented sense of mission, which showed, not least, in an expansive reform agenda of the constitutional regime that had the explicit goal to impose his vision of a communitarian state. Eventually, this will result in the reform to extend the presidential terms (Valencia Villa, 2012, p. 24-25). In the first two years, Uribe explicitly marked the Constitutional Court for reform, while in the second two years of his first term he laid off these plans in order to somewhat conciliate with the Constitutional Court and not endanger its support for his two most important political projects – Justice and Peace and the re-election reform. In this time, relations between the Supreme and Constitutional Court were not particularly conciliatory with the trenches drawn by their respective positions on the *tutela contra sentencias*.

The two men, who served as Ministers of Justice in his first term, personify Uribe’s differing strategy vis-à-vis the judiciary. Fernando Londoño Hoyos, who became the first super minister in a unified the Ministry of the Interior and Justice, was an outspoken critique of the Constitutional Court, had defended Fernando Botero’s lawyer in the *proceso 8000* (see above), and wasted little time to propose judicial reform to curtail the Constitutional Court’s powers. His successor, Sabas Preteld de la Vega, was more moderate in his approach with the Constitutional Court, as showed in more moderate proposals for judicial reform (neither Minister’s projects materialized).

In the beginning of his tenure in office, it was readily apparent that the judiciary in general, and the Constitutional Court in particular, were not excluded from that reform agenda. His first appointment to the Ministry of Justice, Fernando Londoño Hoyos, decried the effects of the *tutela* and vowed to reform the Constitution, because the country had become ungovernable (Londoño, 2001). His reform project entailed that the jurisdiction of the *tutela* would only extend to violations of fundamental rights and explicitly excluded social, economic and collective rights as well as judicial decisions by other courts.¹³⁴

Naturally, the Supreme Court fervently supported the reform project, while the Constitutional Court, just as naturally, opposed it vehemently. The President of the Constitutional Court, magistrate Eduardo Montealegre, discredited it as the most open attack against the integrity of the Constitution and the social state of law, akin to Fujimori's assault on democracy in Peru. He reiterated that Congress has limits in reforming the Constitution, implicit in the term itself: it can reform, but not replace the Constitution through an ordinary act of legislation.¹³⁵ Colombians supported the Constitutional Court's position and took to the streets in defense of the Court's jurisdiction and the *tutela* in general. They gathered in demonstrations before the Palacio de Justicia in Bogotá.¹³⁶ Eventually, the reform project collapsed, because Londoño had involuntarily exit politics in November of 2003 as a consequence of a political scandal involving embezzlement and corruption allegations against him in connection with a public company, Ecopetrol. This would later result in a verdict that barred him from public office for fifteen years.

The new Minister of the Interior and Justice, Sabas Preteld de la Vega, took on a much more conciliatory position and wanted to bring all actors to the table before

¹³⁴ *El Tiempo*, "No a tutelas contra sentencias." September 25th, 2002; Last accessed on: 22 November 2014. <http://www.eltiempo.com/archivo/documento/MAM-1331741>. Critically, the minister adamantly iterated that the Constitutional Court's ability to review reform is limited to procedure in a very evident effort to push back the Court's activism, as it was developing the substitution doctrine (see Chapter 4).

¹³⁵ *El Tiempo*. "Londoño quiere un estado monárquico y sin controles." 3 August 2003; Last accessed on: 22 November, 2014. <http://www.eltiempo.com/archivo/documento/MAM-1038668>. See also *El Tiempo*, "Reform agita congreso". 1 August 2003. Last accessed on: 22 November 2014. <http://www.eltiempo.com/archivo/documento/MAM-1034549>

¹³⁶ Interview subject no 37 (auxiliary judge), 24 April, 2013; Interview subject no 33, 8 April, 2013. Interviewees noted that Colombians greatly valued the *tutela* and the Constitution, and thereby the Constitutional Court, for its social jurisprudence, which in many instances had given them access to otherwise untenable health care. See also Rodríguez Garavito & Rodríguez Franco, 2010.

initiating judicial reform. At this point, however, judicial reform had diminished in importance. The peace process with the paramilitaries entered its most important phase and eventually would require the approval of the Constitutional Court. In addition, a potential reform to extend the term limits to *two* consecutive terms also appeared on the agenda, also necessitating approval from the highest Court.

The executive's strategic withdrawal from the dispute over the *tutela contra sentencias* did not result in a cease-fire between the Supreme Court and the Constitutional Court. On the contrary, their relations became most toxic between 2004 and 2006. The Supreme Court defied the Constitutional Court and refused to apply fifty *tutelas* the Court had issued; neither did the Supreme Court remit them for review provoking a response from the Constitutional Court. In February 2004, the Constitutional Court responded by issuing an Auto 004/04, which stipulated that *tutelas* could now be submitted to *any* judge of *any* institution, and *any* hierarchy, opening the path for lower courts to potentially review decisions of courts higher in the hierarchy (Oliver Ortiz, 2012, p. 8). This caused the Supreme Court to tread more cautiously in order to evade embarrassing revisions of its decisions by lower courts.

To sum up, relations between the Constitutional Court and Supreme Court were fairly aggravated by the time, Uribe's first term in office ended. The executive for its part took on an active role in the first two years of the Uribe presidency, when Londoño was the minister overseeing judicial affairs. This changed as a consequence of his departure from office, resulting in a more moderating role in the debate that better served the government's reformist agenda, for which it eventually needed Constitutional Court approval.

3.4.2.2. Uribe II – facing a united judicial front of solidarity

Uribe's re-election and beginning of the second term coincided with the commencement of phase II of the parapolítica scandal. Official investigations started to produce first legal facts that resulted in the first indictments of Members of Congress (Muriel Benito Rebollo, Erick Morris, Alvaro Garcia) in September 2006 shortly after his re-election. AUC commander Mancuso's evidence given in a Justice and Peace Court turned the

Supreme Court's attention to the President's cousin, Mario Uribe. This resulted in the third phase of the scandal, in which the President openly attacked the Court for meddling in political affairs. The Court's decision to not further prosecute legislators that have revoked their constitutional privileges led to phase IV of the scandal, while the final phase began with the recommencement by the Court to take on those cases. In the course of these events, relations between the Supreme and Constitutional Court became very conciliatory. In the most important decisions, the Constitutional Court backed the Supreme Court in its interpretation, and the Supreme Court, in turn, built on verdicts the Constitutional Court emitted – in particular its Justice and Peace decision.

Uribistas tend to argue that the Supreme Court's beef with the President and his supporters in Congress was an attempt to get back at Uribe for changing his position in the *tutela contra sentencias* dispute and leave the constitutional prerogative to review judicial decisions intact. More compelling is, however, that the Supreme Court reacted to citizens' unanimous complaints about illicit relations of their representatives after López Obregon filed her official report. As one interviewee exclaimed, the reports kept coming in, so we continued our investigations until it became clear that they required a special unit for coordinating the investigative efforts.¹³⁷ Additionally, the revelations from the "Jorge 40" computer forced the Court to centralize efforts and submit all investigations against Members of Congress to Auxiliary Magistrate's Ivan Velazquez' office. In short, it was the publicity of accusations that created the initial dynamic not a vendetta against the President.

The dramatic escalation of the *parapolítica* scandal in 2007 had not occurred without the Constitutional Court's stipulation in its review of Law no. 975 from 2005 (Justice and Peace Law), which imposed that paramilitaries had to tell the entire truth of their past crimes to enjoy the benefits of the transitional justice regime (C-370/06). My research confirmed that Mancuso's revelations about Mario Uribe led the Supreme Court to investigate and issue a subpoena to the Senator. My subjects furthermore explained that it was these investigations that created an incredibly tense situation, in which some

¹³⁷ Interview subject no. 3 (Supreme Court judge), 18 April, 2013. Interview subject no. 11 (Supreme Court judge), 22 April, 2013.

even feared that the President would issue a state of emergency to terminate the Court's investigation.¹³⁸

The first normative clash that occurred in what I term the third phase of the *parapolítica* scandal evolved around the issue of sedition and conspiracy to commit a crime. In July 2007, José Roberto Páez Varón had submitted a *tutela* against a lower court decision that sentenced him to forty years (later reduced to twenty five) in prison for aggravated homicide. The *tutela* argued against either sentence stating that it violated the stipulation of the Justice and Peace Law that imposed reduced sentences for crimes committed in association with the paramilitaries. In its decision, the Supreme Court countered that sedition and the conspiracy to commit a crime can be resolved under one clause, arguing that the Constitutional Court, when it decided the Justice and Peace Law, had excluded the subsection on sedition and conspiracy to commit a crime on procedural grounds. It can therefore not be subsumed under the Justice and Peace administration and serve as a justification to reduce criminal sentences. In addition, the Court held that Article 71 of Law 975 from 2005 (Justice and Peace Law) amounted to a material violation of the Constitution, because it unduly assimilates ordinary crimes with political ones, resulting in a *via de hecho* (Ramírez Bastidas & Socha Salamanca, 2007, p. 48-49).¹³⁹

Uribe's reaction to the Supreme Court's verdict was to attack the Court for threatening the peace process in Colombia by undermining the legal framework for demobilization of paramilitaries. Moreover, accusing the Court of political interference, Uribe identified a double standard in the Supreme Court's jurisprudence when it came to judging crimes committed by guerrillas and paramilitaries, which the facts of each group's crime did not merit. They were involved in identical activities and therefore ought to be treated equally in Colombia's penal courts, he argued. Critically, the President invoked the jurisprudence of the Constitutional Court and accused the Supreme

¹³⁸ Interview subject no. 11 (Supreme Court judge), 22 April, 2013.

¹³⁹ Republic of Colombia. Supreme Court of Colombia. Sala Casación Penal. Sala de Decision de Tutelas. "Decisión: Resolver la acción de tutela promovida por José Roberto Páez Varón" 26 July 2007. See also: Republic of Colombia. Supreme Court of Colombia. Expediente No. 26945 (against Orlando César Caballero Montalvo), 11 July 2007.

Court of enacting a *via de hecho* by diverging from the Constitutional Court's interpretation.¹⁴⁰

The implication of this dispute should not be underestimated, because such speech acts evidently carry the price of accepting the Constitutional Court's authority. There is a direct line of reasoning that ties the President's argumentation put forward here with his own words following the verdict not to allow a potential third term, when he accepted that the Constitutional Court has authority to impose limits on reforms of the Constitution. At this point, it is important to stress that Uribe's public positioning with the Constitutional Court might have very well been strategically motivated, but the Constitutional Court did not repay the favor. It sided with the Supreme Court's interpretation on formalistic grounds. In 2008, the Court issued an *Auto*, which affirmed the Supreme Court's interpretation that sedition does not fall under Justice and Peace jurisdiction and cannot receive transitional justice benefits. It argued that it had decided on the issue in its decision on the Justice and Peace Law and declared that it could not reopen the case without deciding a *cosa juzgada* (*Auto* 089/08). It therefore deferred to the Supreme Court's position with the result that investigations continued.

Turning to legislators' own approaches, the first attempt to avoid prosecution was to copy the strategy employed in the *proceso 8000* and claim immunity as parliamentarians in the exercise of their votes and opinions in Congress. This, however, was intrinsically problematic, because the Constitutional Court, as seen above, had already refined the clause "exercise of votes and opinions" in the immediate aftermath of the *proceso 8000*. In 1999, Jairo José Ruiz Medina protested investigations for the embezzlement of funds on the aforementioned grounds, but the Constitutional Court did not follow his argumentation, maintaining that it did not relate to an opinion or vote submitted in Congress (SU-786/99). The Constitutional Court upheld the correctness of criminal investigations for relations with paramilitaries on the same grounds: they are not related to their exercise of legislative functions, but arose from potentially illicit activities outside of Congress (see also C-1174/04).¹⁴¹

¹⁴⁰ *El Tiempo*, "Se calienta pulso por sedición". 28 July 2007; Last accessed on: 25 November 2014. <http://www.eltiempo.com/archivo/documento/MAM-2591024>.

¹⁴¹ Republic of Colombia. Constitutional Court of Colombia. C-1174/04. M.P. Álvaro Tafur Galvis.

Despite the apparent clarification in SU-786/99 and C-1174/04, Members of Congress nevertheless tried to avoid prosecution through filing *tutela* complaints by directly attacking the constitutional privilege imposed on them. They objected that the imperative to hear their cases with the highest court in the country deprived them of an appeal instance and thereby violated their due process rights. The Supreme Court rejected the claims and insisted that Members of Congress are investigated in the nation's capital in Bogotá, either by the attorney general or the special division of the Supreme Court. The President of the Supreme Court, César Julio Valencia, explained the reasoning in an interview with *El Espectador* and argued that if Members of Congress were to be investigated in their regions of origin, they might have an easy way to manipulate the outcome for the domination they exercise over public institutions in the regions.¹⁴² The Constitutional Court upheld the constitutionality of the Supreme Court's interpretation of the special privilege in C-545/08, in which it reviewed Article 5333 of law 906 from 2004. The opinion, penned by magistrate Pinilla Pinilla, only imposes the condition that the investigating judge cannot be the same as the judge handing down the verdict, but otherwise upholds the constitutional privilege. Similarly in 2009, a unifying *tutela* (SU-811/09), also written by Pinilla Pinilla, reiterated the prior opinion, and added that constituents in the assembly in 1991 specifically designed the special regime of criminal accountability for Congress to avoid its criminalization at the hands of the drug business. Judges on both courts valued the constituents' intention to impose particular accountability measures on legislators as legitimate given the context of the drug economy that had befallen Colombia.

As explained, the investigation into the criminal deeds of Senators Álvaro Araujo and Mario Uribe caused Uribe to retaliate against the Supreme Court, creating the conflict that characterized phase III. The same Senators were also the first to resign from their investiture to avoid prosecution from the Supreme Court, which resulted in the fourth phase of *parapolítica*, when investigations slowed down significantly (Appendix B, Graph B.3). The investigations were then handed to the general prosecution. There were three considerations behind this shift: (1) the ordinary justice system offered them additional appeal instances; (2) in the ordinary justice system, they could delay the

¹⁴² *El Espectador*. "Sería un pésimo ejemplo que primara la impunidad". 28 July 2007.

prosecution through *tutelas* and hope for estoppels to terminate the prosecution; (3) it allowed them to plead guilty for reduced sentences. In September 2008, the Supreme Court agreed and refrained from investigating allegations against Members of Congress that had resigned their position in Congress and left the inquiries with the attorney's office.¹⁴³ As shown, this decision had an impact on the progress of *parapolítica* investigations, reducing new preliminary investigations to zero in the fourth quarter of 2008.

This situation, however, was only temporary. After *Semana* produced reports that showed that DAS had infiltrated the judicial palace, installing bugs to listen on their deliberation, the Supreme Court continued with investigating and indicting Senators and Representatives. In March 2009, the Court argued in its proceedings against Senator Edgar Eulises Torres that the constitutional privilege requires a functional relation between the criminal deed and the purposes of Members of Congress. The signing of pacts with paramilitaries with the evident intention to be elected to Congress fulfills this functionality. Therefore, *parapolíticos*, who benefitted from the armed campaigns paramilitaries orchestrated on their behalf, could be indicted under the constitutional provisions accorded to legislators. Furthermore, the Supreme Court differentiated between the office in Congress and the privileges associated with those offices. The former can be simply relinquished with resignation, but the latter are more difficult to discard, because they are connected with the constitutional system of the separation of powers. Thus, they have a certain stickiness that retains until after the resignation from the post. Together, this justified the Court to follow through with investigations against Members of Congress, who had resigned their seats. One of the most prominent was Senator Mario Uribe, whose case was once again taken up and eventually concluded with a prison sentence of seven years in February 2011. The Constitutional Court confirmed this interpretation in SU-198/13.

The *yidispolitica* affair, while not associated with the *parapolítica* investigation, had a particular standing in Uribe's second term, because it directly affected the legality of his second term in power. In the analysis of the legal convulsions of the second term,

¹⁴³ *Revista Semana*. "La Corte no juzgará los casos de congresistas que renunciaron al fuero". 17. September 2008; Last accessed on: 16 November 2014. <http://www.semana.com/on-line/articulo/la-corte-no-juzgara-casos-congresistas-renunciaron-fuero/95316-3>.

the affair merits special attention, because the peculiar position of the disciplinary chamber of the Superior Council of the Judiciary in the constitutional design of the courts became evident in this affair and aggravated the other courts – not least the Constitutional Court itself. As figure 3.1 shows, representatives elect magistrates to the chamber, who then have an evident incentive to pay back the favor to their electors. In fact, several magistrates on this chamber “campaign” in Congress prior to their election that they would defend the double instance for Members of Congress. As a result, many “parapolíticos” submitted *tutelas* in the course of legal proceedings with the judges of this chamber. The predictable result: the disciplinary chamber largely followed the argumentation put forward by Members of Congress (Revelo Rebolledo, 2009, p.270-275).¹⁴⁴ Of course, the Constitutional Court was somewhat complicit in this result, because its decision in 2004 (Auto 004/04) to enable citizens to submit *tutelas* with any judge in the country opened this path.

In the *yidispolítica* scandal, Medina and Avendaño, as well as Senator Iván Díaz Mateus, whom Medina replaced in the period when the vote transpired in the committee stages, had to face criminal proceedings for their role. Díaz Mateus appealed against the investigations, submitted a *tutela* in August 2009, and the disciplinary chamber of the Superior Council of the Judiciary ordered his liberation on the grounds that the Court did not have jurisdiction to investigate resigned Members of Congress. The Supreme Court, in turn, ordered Díaz’ recapture on the ground that its decisions were not open to *tutela* revision, reiterating its contentious argumentation at the core of the *choque de trenes*.¹⁴⁵ When the case came to the Constitutional Court for revision, it reversed the disciplinary chamber’s resolution and sided with the Supreme Court, stressing that it did have competence over Members of Congress, who had resigned their seats.¹⁴⁶ In its argumentation, the Constitutional Court reiterated that the Supreme Court was the highest court of the ordinary justice system, reviewed the jurisprudence on Congress’

¹⁴⁴ Other cases, which the disciplinary chamber decided evidently political were those of Senator Miguel de la Espriella and Minister Diego Palacio – the former in connection to *parapolítica* and the latter in relation to *yidispolítica*. The chamber’s judges made statements in their appointment proceeding in Congress that iterated congress’ interests, namely that double instance marks high in their priority lists (2009, p. 264).

¹⁴⁵ *El Espectador*. “Corte Suprema ratifica orden de captura a Iván Díaz Mateus”. 1 September 2009; Last accessed on: 26 November 2014. <http://www.elespectador.com/noticias/judicial/articulo159092-corte-suprema-ratifica-orden-de-captura-ivan-diaz-mateus>.

¹⁴⁶ Republic of Colombia. Constitutional Court of Colombia. T-965/09. M.P. Calle Correa.

constitutional privilege, and refused to intervene in the criminal court's jurisprudence. This led to three concluding points, based on which, the Constitutional Court denied that the Supreme Court had committed a *via de hecho*: (1) Article 186 manifests that the Supreme Court has the duty to investigate any Member of Congress, (2) the temporal separation from the functions of the Member of Congress does not undo the Member of Congress's investiture, (3) even if the objective accusations had nothing to do with the debate on re-election, they were still rooted in the abuse of his investiture. With its justification, the Constitutional Court further legitimized the Supreme Court's position in the dispute of whether it can investigate Members of Congress, who had resigned from their seats. Additionally, the case gained notoriety not only for the substance of the argumentation and reasoning, but also for the complicity of the disciplinary chamber of the Superior Council of the Judiciary with Members of Congress that became readily apparent. It was the president of the Constitutional Court, magistrate Pinilla Pinilla, who accused it of mixing "political aspirations with judicial decisions" and as consequence having turned into a "decomposed organ of the judiciary".¹⁴⁷

To conclude this section on the normative development during Uribe's second term and the evolving *parapolítica* affair, we can identify four strategies that criminal Members of Congress tried to utilize to evade prosecution: 1) invoke the transitional justice jurisdiction of the Justice and Peace legislation; 2) submit *tutelas* on the grounds of their special rights of parliamentarians to freely opine without the threat of coercion; 3) claim due process rights violations resultant from the constitutional "privilege" to be criminally investigated by the highest court without the chance of appeal; 4) resign from their seat and thereby also renounce the congressional investiture that involves that investigations are directly passed to the Supreme Court (hereby hoping to not only avoid the reach of the Supreme Court, but also be submitted to the jurisdiction of regional courts where they could more easily exert influence). In contrast to the *proceso 8000*, the Constitutional Court confirmed the Supreme Court's interpretation in *tutela* cases foiling these strategies to evade justice.

¹⁴⁷ *El Espectador*. "'Sala Disciplinaria de la Judicatura es un órgano descompuesto: Nilson Pinilla". 12 January, 2010; Last accessed on: 25 November 2014. <http://www.elespectador.com/noticias/judicial/articulo181553-sala-disciplinaria-de-judicatura-un-organo-descompuesto-nilson-pini>.

The results were twofold: Firstly, it enabled the Supreme Court to continue the production of legal facts about relations Members of Congress had cultivated with illegal armed groups for electoral benefit. Secondly, as these *congresistas* were, for a large part, supporters of Uribe in Congress or other political allies (and in one case, a member of his family), it forced Uribe to invest a lot of political capital and weight in a campaign to delegitimize the Court and its investigations. As seen, this campaign eventually transgressed into illegality, when the President's office orchestrated the DAS wiretapping of the Supreme and Constitutional Court. Together, this not only held criminal accountable and therefore improved the rule of law, but also improved a situation that scholars identified as a crisis of representation.

One outfall of the DAS infiltration of the Judicial Palace in Bogota and the illegal wiretapping of judges on the Supreme and Constitutional Court is telling of the different nature between these two judicial bodies. While during the *proceso 8000*, the Presidents of each court attacked decisions and actions by the other body, they now joined together to condemn the actions by the President. In a joint *comunicado*, signed by all high courts and the *Fiscalía*, the judicial bodies of Colombia called on Uribe to terminate the DAS infiltration, called for respect of the ongoing investigations, most emphatically rejected the invasion of privacy of members of the Supreme Court, and called on Colombia's society as well as international human rights bodies to protect the Supreme Court's integrity. This was a powerful, and unprecedented, act of public solidarity.¹⁴⁸

3.5. Part IV: The question of path dependence and the production of legal facts: *proceso 8000* and *parapolítica* in comparison

The chapter commenced with the question that if the 1991 Constitution is a critical juncture, does the post-genesis evolution follow a path-dependent logic as hypothesized by historical institutionalist theory? Generically, path dependence is defined as the idea that initial decisions in one direction induce further movements in that same direction later on. The question then became if the same distributive dynamic that develops

¹⁴⁸ *El Tiempo*. "Un pronunciamiento directo al presidente Uribe por el caso de las chuzadas, pidieron las Cortes". 5 May, 2009. Last accessed on: 22 September, 2015. <http://www.eltiempo.com/archivo/documento/CMS-5141428>.

towards equilibrium over time can be identified in the evolution of judicial institutions. There were two reasons to consider path dependence to be applicable to post-1991 development in Colombia's judicial institutions. Firstly, the inquiry into the creation process of the 1991 Constitution showed that the new charter was the product of a moment of contingency, and most fundamentally redesigned the judicial branch of Colombia's separation of powers system, introducing new institutions (Constitutional Court, Superior Council of the Judiciary), new rights, and mechanisms to enforce rights (*tutela*). Secondly, after its creation, the Constitutional Court jurisprudential involved precedent setting and therefore implies a *natural* tendency to value earlier decisions over later ones.

Since the judicial branch was the branch that exited the 1991 constituent process most profoundly refurbished, and included contradictory norms concerning the application of the *tutela* to legal decisions of high courts, the *tutela* constituted an extraordinarily good case to study institutional development. It unites the ideals and promises of the new Constitution that invests every citizen with human dignity and rights, while at the same time implying conflictual potential and distributive dynamics. The Constitution submits decisions by all public institutions to rights based judicial review, but also states that the Supreme Court is the highest instance of the ordinary justice. The potential for distributive dynamics becomes amplified by the absence of parliamentary immunity in the new political charter. The 1991 Constitution invested the Supreme Court with the task to investigate and judge criminal allegations against Members of Congress, who in turn exercise the same task vis-à-vis the President. Thus, the so-called *choque de trenes* between the high courts over the jurisdiction of the *tutela* also touched on the Supreme Court's imperative to investigate Members of Congress.

These preliminary considerations left us with three elements that outlined the value of the analysis in this chapter: 1) the proliferation of new courts and contradictions between normative principles in the new Constitution result in a contest over jurisdiction between the Constitutional and Supreme Court; 2) the legal functions assigned to each branch of government in Colombia's checks and balances system turns the fight over jurisdiction between the high courts into a *political* question that involves majoritarian institutions; 3) the affixture of rights to the standing of *tutela* complaints adds a layer to

the analysis that implicates the meaning of foundational norms of the new Constitution and their affects on constitutional adjudication. These elements not only indicate the importance of this study, but also create a conceptual tension. While the appearance of new actors, vying for authority and jurisdiction implies distributive dynamics, the third aspect involves the *significance* actors assign to norms and how they apply them in factual situations that go to the core of the separation of powers. This is problematic for the logic of path dependence, because meaning and significance can remain open to contestation and therefore defy a strict path dependent logic.

To comprehend these conceptual considerations, this chapter designed the inquiry as a longitudinal study that focused on two political scandals evolving around the criminalization of Colombia's Congress and how the courts interacted as the political evolution played out. In the 1990s, the Cali Cartel funneled funds into the presidential campaign of Ernesto Samper, who won the electoral contest in 1994. The origin of funds became public after his election and all but condemned Samper to fight off accusations for the entire term. He eventually survived the entire time in office, because legislators cleared him from wrongdoing (despite fairly conclusive evidence to the contrary). Citizens sued legislators for breach of duty on the account of this vote of confidence, who in turn submitted *tutela* complaints arguing that criminal investigations infringed on their constitutional prerogative to opine and vote free from coercion. During the Uribe years (2002-2010), Members of Congress were accused of having cultivated close relations with paramilitaries associated with the drug trade for electoral purposes. In a process that essentially commenced with the peace negotiations between the AUC and the government soon after Uribe's election, and dramatically escalated in Uribe's second term, the Supreme Court investigated and concluded numerous leads against Members of Congress. They attempted to evade justice by again filing *tutela* complaints.

Building on a conceptual discussion of path dependence, this chapter developed four questions that guided the analysis:

- Did the jurisprudence regarding the *tutela* follow a mechanical and linear line from its inception in the 1991 Constitution?

- Did earlier decisions matter more than later decisions, and if so, did it forego the possibility to decide differently in later questions on the same merit or do earlier decisions open new possibilities for later decisions on the same merit?
- If the Constitutional Court changed or modified its jurisprudence, did the modification follow mechanically from earlier decisions or did it base its change in principled explanation engaging a legal argumentation evolving around legal values and shifts in legal context?
- If there was a clear break, did that break in turn result in a logically following pattern, indicating reactive path dependence?

Answers to these questions provided us with intriguing details on the institutional development in Colombia's democracy after the new Constitution was implemented. First, it is important to point out that the basic disagreement between the Supreme Court and the Constitutional Court over the application of the *tutela* to judicial decisions remained constant throughout the *proceso 8000* and *parapolítica* scandal. As seen in the contentious Díaz Mateus decision, the Supreme Court continued to argue that its decisions were not open to rights review. Conversely, the Constitutional Court always reiterated its own jurisprudence vis-à-vis the review of judicial decisions, insisting that any factual decision by any public institution is subject to rights reviews. Furthermore, the institutional framework did not alter the functions of courts, nor was the *tutela* itself regulated by legislation. The only decree issued in 2000 minimally specified the order of review. The fact that the broad parameters of the institutional clash over the application of the *tutela* remained the same for the entire period, suggests that we cannot identify fundamental shifts that decisively turned the path into one direction. Rather, the institutional development occurred more subtly and incrementally in this instance.

The second major finding of this discussion is that in both affairs the production of legal facts was of utmost importance. Legal facts are those "facts" produced in a legal process and have deeper institutional impact than other socially produced "facts". On the *proceso 8000*, Uprimny remarked that without legal investigations and independent prosecutions there would not have been "*a proceso 8000*, nor a trial against the president, nor a political crisis" (Uprimny, 1996, p. 120). The increasingly hostile public debate was

consistently pushed forward by new revelations that resulted from the legal processes against Samper's campaign managers and eventually the processes against Members of Congress. Similarly, the most potent revelations of the *parapolítica* scandal were those revealed or affirmed by judicial investigations. While the initial revelations about potential paramilitary infiltrations of the political class – above all the declarations by the AUC commanders themselves – are significant, the scandal received a much more explosive dynamic, once these facts were confirmed and further investigated by judicial bodies.

Even though the macro institutional configurations about the application of the *tutela* remained the same, the outcome in each affair differed. This becomes evident in the number of investigations each affair produced and the political outfall of each scandal. This inquiry showed that despite the similar context conditions, the trajectory of criminal prosecutions and their political implication varied significantly. In the *proceso 8000* only few Members of Congress were eventually sentenced for their collusion with drug traffickers, while during the *parapolítica* 102 Members of Congress were investigated between 2006 and 2010. Consequently, the political fallout of the scandal was also much more significant and severe than in the *proceso 8000* saga.

My interviewees repeatedly argued that the 1991 *tutela* decision in favor of Viviane Morales fundamentally obstructed the Supreme Court's work to further investigate criminal behavior. Similarly, the same subjects held that during the *parapolítica* affair, the Constitutional Court did not interfere with the Supreme Court's investigation and often backed their interpretation of normative clauses. As seen, during the *parapolítica* scandal, Members of Congress repeatedly attempted to avoid investigations and utilized four strategies: 1) invoke the transitional justice jurisdiction of the Justice and Peace legislation; 2) submit *tutelas* on the grounds of their special rights of parliamentarians to freely opine without the threat of coercion; 3) claim due process rights violations resultant from the constitutional "privilege" to be criminally investigated by the highest court without the chance of appeal; 4) resign from their seat and thereby also renounce the congressional investiture that involves that investigations are directly passed to the Supreme Court (hereby hoping to not only avoid the reach of the Supreme Court, but also be submitted to the jurisdiction of regional courts where they could more

easily exert influence). Only the fourth tactic listed here was successful in slowing down the penal process against incriminated legislators, because the Supreme Court itself decided to refrain from investigations. Once it changed its jurisprudence, the Constitutional Court also supported that interpretation.¹⁴⁹

This “united front” between the Supreme Court and the Constitutional Court is the most important factor that explains the prolongation of the *parapolítica* affair. Firstly, it enabled the Supreme Court to continue the production of legal facts about relations Members of Congress had cultivated with illegal armed groups for electoral benefit. The deepening and broadening of investigations showed the big picture of the network of relations between Members of Congress and illegal elements associated with the internal conflict and drug trade. It made the governance issues that scholar have identified as the crisis of representation in Colombia readily apparent. Secondly, as these *congresistas* were, for a large part, supporters of Uribe in Congress or other political allies (and in one case, a member of his family), it forced Uribe to invest a lot of political capital and weight in a campaign to delegitimize the Court and its investigations. The strategies employed went as far as to orchestrate illegal and intrusive smearing campaigns against individual magistrates from the Supreme Court and thereby revealed the poisonous combination of a powerful executive with a co-opted legislature. As seen, this campaign eventually transgressed into illegality, when the President’s office orchestrated the DAS wiretapping of the Supreme and Constitutional Court.

Since the production of legal facts was instrumental for the severity of each scandal, a close inspection of the *tutela* decisions was not only important but essential for fully understanding the institutional movement in the *choque de trenes*. In the discussion on the most important *tutelas* of the *proceso 8000*, we saw that the substance of SU-047/99 can be connected to normative claims that value parliamentary debate as the essence of participatory, deliberative democracy. As explained, the new constitutional regime of the 1991 Constitution does indeed embrace such values in the articulation of its core principles. Viewed through this lens, criminal investigations against legislators then do appear as an infringement against legislators’ prerogatives to freely deliberate. We

¹⁴⁹ Interview subject no. 3 (Supreme Court judge), 18 April, 2013; Interview subject no. 11 (Supreme Court judge), 22 April, 2013; Interview subject no. 33 (Constitutional Court judge), 8 April, 2013.

have seen, however, that constituents intentionally included a special liability regime for legislators in order to protect the legislative bodies from the criminal elements in the country. Moreover, we also saw that prior to the SU-047/99 decision, the Constitutional Court confirmed these special liabilities as paramount elements of the institutionalization of the separation of powers. In C-222/96 and C-245/96, the Court argued that each branch of government fulfills specific functions that imply specific powers as well as obligations. According to those decisions, breaches in the fulfillment of duties that arise from their constitutional function do indeed carry the possibility of criminal liability. Together, these observations already indicated that post-genesis development in judicial institutions remains open to change and did not lock-in a specific configuration.

The picture becomes even more complicated after the *parapolítica* affair. There is no clear recognizable line of argumentation that connects the earlier decisions with the later ones. Rather, judges in both courts appeared to incorporate the context into their decision-making when they deliberated on individual cases. In the end, the decisions by either court moved much more in the opposite direction from the weighing in SU-047/99 that interpreted the legislative prerogative so expansively that it curtailed the Supreme Court's abilities to investigate Members of Congress. In 1999, the Constitutional Court held that embezzlement does not fall under the legislative prerogative to freely opine and vote (SU-786/99). When Members of Congress wanted to be judged under the sedition clause of the Justice and Peace legislation, the Constitutional Court excluded the conspiracy to commit a crime from the "political crime" clause of Justice and Peace. When *Congresistas* claimed their due process rights violated by the constitutional privilege, the Constitutional Court upheld the Supreme Court's interpretation that the office and the constitutional privileges associated with that office have varying half-lives. The office can be resigned, but the privileges are connected with the constitutional system of separations of powers and therefore remain in tact. Finally, when the Constitutional Court specified the special privilege, as it did in C-545/08 and SU-811/09 (designating that the investigating and deciding judge cannot be the same individual in criminal cases of Members of Congress), it explicitly argued with constituents' intentions to hold legislators accountable to higher standard of criminal liability. In sum, the interpretation of the constitutional imperatives that outlined implications for legislators'

criminal liability were much more textual and originalist than in the infamous 1999 decision that expanded the legislative prerogative.

When we contrast these findings with the queries outlined in the beginning of this chapter that defined path dependence along the lines of the punctuated equilibrium model there are some evident incongruities between the predictions of that model and the discussion of case decisions in this chapter. Attuning path dependence to the trajectory of legal argumentation, the first thesis must be:

- Once a decision is taken, the cost of reversal increases, but not exponentially so. Rather, reversals require good explanations rooted in precedent and change of context.

As seen, the Constitutional Court addressed the prior decisions (C-222/96 and C-245/96) concerning the legislator's powers and duties in the infamous SU-047/99. Later on, the Constitutional Court responded in its unification decisions to the parameters set in SU-047/99, but confirmed the Supreme Court's jurisdiction in criminal cases against Members of Congress (SU-811/09).

The second finding is:

- Earlier decisions do matter more than latter decisions, since discourse (in particular legal discourse) builds on logical coherence. However, earlier decisions might also open new questions further down the road that can significantly alter the path.

The first decision on the rights and duties of parliamentary immunity interpreted the prerogatives very far, but at the same time postulated new question that had to be addressed in the future. Above all, the next *tutelas* and constitutionality decisions had to clarify what counts as the exercise of parliamentary duties and what does not. Moreover, the consecutive decisions also had to clarify the parameters of the constitutional prerogative.

Finally, we cannot infer a point of no return. The deliberative nature of judicial decision-making retains the possibility that all decisions are open to contestation and reversal if judicially relevant arguments can be put forward against the conventional interpretation. The final element of a path dependence of legal argumentation therefore must be:

- There cannot be a practical point of no return, because all decisions are theoretically forever open to contestation.

This then makes readily apparent that path dependence, mechanically applied does not apply to the jurisprudential development in post-1991 Colombia. Fortunately, in recent years historical institutionalists have more deliberately and conspicuously re-addressed the problem of change within their models of institutional (re)-production. Beginning with a critique of all neo-institutionalist schools, Mahoney and Thelen criticize that the focus on inertia and stability has created a blind spot for the gradual shifts in institutional development that is not the result of exogenous, punctuating shocks. Above all, viewing institutions as stabilizing expectations about other actors' behavior, theorists have endogenized enforcement "in the sense that the expected costs and extent of noncompliance are factored into the strategic behavior of the actors" (Mahoney & Thelen, 2010, p. 10). Compliance, however, is one of the most important institutional spheres, where actors bring their resources to bear.

Mahoney and Thelen argue that written norms can never be attuned to cover the full range of possibilities of real life situations and always require interpretation. They write that "the need to enforce institutions carries its own dynamic of potential change", because "of the interpretation and implementation of these rules" (p. 10). Institutional ambiguity and objective interest by actors to continue to benefit from specific institutional applications means that actors will continue to bring their resources to the table to resolve ambiguities in their own favor. They call for a renewal of thinking since these more subtle forms of change are greatly significant in their own right (2010, p. 3). As this reading of the *proceso 8000* and *parapolítica* scandals suggest, the question of compliance with relatively stable written norms, is indeed a sphere that involves political

action. Legislators incriminated by the courts continuously attempted to affect their faith in the hands of prosecutors by appealing to constitutional norms and applying the *tutela* as a last resort to retain their freedom. Thus, I am sympathetic to the reading of historical institutionalist that compliance with institutional norms is an important sphere that engages political actors and results in small-scale change.

Inserting compliance as a critical variable for institutional development, leads Mahoney and Thelen, as well as Streeck and Thelen, to outline four different paths of incremental, endogenous change occurring in institutions: layering, conversion, drift, and replacement. Layering involves the planting of new institutions on top of existing ones, conversion the changed enactment of existing rules due to their strategic deployment, drift the changed impact of institutions due to changes in the environment, and replacement the removal of existing institutions and replacement with new ones (Mahoney & Thelen, 2010, p. 15; Streeck & Thelen, 2005). In the institutional trajectory explained above, we could identify some forms of drift changes from shifts in the institutional environment as well as processes akin to layering. However, if we incorporate some answers from my interviews that provided explanation for why the Constitutional Court supported the Supreme Court, there is a more dialectical interpretation possible.

In that reading, the SU-047/99 decision is an outlier case that resulted in an inner-branch backlash from the Supreme Court. When the Constitutional Court faced a similar situation of criminal elements within the legislative institutions and those involved appeared to be using the *tutela* as a vehicle towards evading the Supreme Court's reach, the Constitutional Court treaded more carefully and largely followed the Supreme Court's interpretation. This does explain why the *proceso 8000* resulted in an expansive interpretation of parliamentary immunity – even though precedents argued contrary to that – yet, the Court interpreted it much more restrictively during the *parapolítica* affair. In my research, one subject explained that to change and alter these decisions via the *tutela* would have meant “judicial suicide” for Constitutional Court judges. The judge would have lost her prestige in the eyes of the other judges within the judiciary. The interviewee argued that the relations between some Members of Congress and the obscure forces of paramilitarism were fairly obvious. As a consequence, the Court

selected only very few of those *tutelas* that complained about a decision by the Supreme Court, and more of those that arrived from the disciplinary chamber of the Superior Council of the Judiciary. Thus, reputation seeking amongst peers, which does not contradict institutional solidarity, could have been a powerful reason to refrain from an expansive interpretation of legislators' rights.¹⁵⁰ In the end, the indeterminacy of behavior in the *choque de trenes* and the *tutela contra sentencias* appeals to the notion that change evolves from argumentation itself. It was simply not argumentatively feasible to defend parliamentary immunity as a bulwark for free deliberation, when Members of Congress utilized the norm for impunity. Given the argumentative procedures within a court and the continuous production of legal facts about nefarious relations *congresistas* entertained, we can term this process institutional learning, in which norms are applied differently in order to result in a normatively more appealing outcome.

To conclude this chapter of this dissertation, we must first manifest that the continuous production of legal facts is what set the *parapolítica* apart from the *proceso 8000*, which showed, not least, in the extensive response that Uribe and his administration orchestrated against the Supreme Court and its individual judges. Furthermore, the continued production of legal facts was to a decisive part the result of an agreement between the Supreme and Constitutional Court in *tutela* decision implicating the role, privileges and duties of legislators. Finally, the trajectory of jurisprudential development in the question of the *tutela* and the *tutela contra sentencias* does not become more intelligible with a classical understanding of path dependence. The shifts and differing outcomes were the result from endogenous changes that occurred within the institutions. The allusion made to the internal prestige suggests that the decision-making processes inside a court are critical for understanding outcome of judicial behavior. The next chapter turns to the re-election reforms and the decisions by the Constitutional Court.

¹⁵⁰ Interview subject no. 1 (auxiliary judge), 15 April, 2013

4. Discursive institutionalism: the deliberative judge, the institutionalization of deliberation, and norm creation in a deliberative context

4.1. Introduction

The most recent developments in the research on judicial behavior have shown that the *strategic* judge can advance judicial independence and authority in specific situations and under certain conditions. The question for this chapter therefore is whether the *discursive* judge is also capable of buttressing judicial authority and can thereby improve the separation of powers, which is central for a functioning rule of law. In order to make the case, this chapter has to show two things: 1) the decision to withhold a potential third term does indeed represent an augmentation of judicial power and independence; 2) the processes leading up to the decision itself cannot be explained with reference to a strategizing, forward-looking actor, but requires an understanding of a judge that discursively engages in some form of communicative reasoning and deliberation. The discursive judge comes to conclusions not because of strategic considerations, but because of convictions of the correctness of her interpretation. Moreover, these convictions themselves are not preordained and given, but resultant of the process of deliberation itself.

The answer to the first question was the reason for commencing with this analysis in the first place: the decision to bar Uribe from another potential term in office constituted an objective increase in judicial power and restrained an otherwise powerful, popular, and often abusive executive. In its argumentation, the Constitutional Court asserted its judicial power by drawing on the “substitution doctrine.” This doctrine increased the Court’s authority to review constitutional reforms by means of a re-interpretation of norms enshrined in the 1991 Constitution. In the 1991 Constitution, the norms that attribute review powers to the Constitutional Court in regard to constitutional reforms limit these powers to “errors of procedure” only (Article 241, 1-3). The substitution test involves determining axiomatic principles (which are not explicitly

stated in the Constitution) and comparing these with the parameters of the constitutional reform. This can be construed as a form of substantive review that goes beyond written text of the Constitution, but it most certainly constitutes an increase in judicial power.

This analysis will now show in detail that the importance of this decision not only lies in the fact that it constituted an objective increase of power but also because it took place in a context of very evident majoritarian tendencies in the Uribe administrations. Uribe's unique position in Colombian history shows in his capability to amass popular *and* institutional power. Conventionally, presidents in Colombia were capable power brokers skilled in forming coalitions between elites through backroom deals and repaying electoral favors with earmarked funds from the national coffers. The Antioquian rancher-turned-politician not only commanded the game of government as conversation amongst gentleman, but enjoyed broad popular support for his national security policy. He put his popularity to work by combining it with communitarian notions of citizenship and embarked on a very broad reformist agenda that aimed, above all, at increasing his own power and curtailing the powers of horizontal control institutions. Therefore, the increase in judicial power and the Court's confirmation of its independence must also be viewed in the context of a confrontation between majoritarian and constitutionalist claims of legitimacy.

Against this context, this chapter will answer the second contention with an analysis that shows the evolution of the substitution doctrine jurisprudence together with data on Uribe's popularity, his majorities in Congress, and the specific votes for the legislative projects in both chambers of Congress. This will show that the Constitutional Court deliberately and deliberatively planted and developed the substitution doctrine against the excessive reformism of the Uribe administration. While there are aspects of a strategizing court in the evolution of the doctrine, at critical moments – not least in February 2010 – its application relied on clear deliberative procedures inside the Court and was less the result of a court that has struck strategic accords with other actors. More than potential retaliation or the lack thereof, the cohesiveness of the discourse and coherence of argumentation affected opinions (and changes) amongst judges. Conjoined with an analysis of the deliberation inside the Court, this chapter will then show that the constitutional magistrate must be understood as a discursive judge, who has to justify her

opinions to colleagues that only accept judicial reasoning. The implementation of this deliberation plays an important role in the exercise of independent and autonomous decision making.

This chapter will proceed by first explaining the theoretical and conceptual connotations of the strategic approach to the study of judicial behavior of courts and then move to the specific majoritarian/constitutionalist contention that surfaced in the re-election debate (and eventual decisions). This inquiry will outline the meaning of either side to the discussion, first more generally, and then focus on the Colombian context by more specifically explaining Uribe's notion of the communitarian state and the state of opinion (*estado de opinión*). Against the majoritarian and delegative traits that crystallized in Uribe's policies, this chapter will reconstruct the jurisprudence of the substitution doctrine. This doctrine centers on the question of how far Colombia's majoritarian institutions can go in reforming constitutional norms without changing the central characteristics of the Constitution. We will see that the strategic paradigm cannot properly account for its creation and evolution, and that any intelligible explanation requires a deliberative understanding of the judge, who incorporates legal context and evaluates decisions according to their discursive coherence. The analysis will close by carefully examining the deliberative process in that decision. It will show that the decision reflected the careful implementation of deliberation, which aims at guaranteeing the tranquility of the process so that in the final conclusion it is the law that matters (*la ley cuenta*) and not personal preferences nor strategic considerations.

4.2. Rational choice institutionalism and judicial behavior

The research of judicial behavior has come a long way. Arguably, studying the impact of institutional designs and constitutions on political interaction is one of the oldest topics of academic inquiry. Already Aristotle looked at the legal frameworks of the ancient Greek city-states to develop his differentiation between various political regimes based on particular practices of politics (1984, p. 167; Cameron, 2013, p. 1-10). Modern political science, too, has its origin in the study of constitutional designs and, in APSA's first years of existence, was often subsumed under the study of public law. Only at the

margins of the profession, did professors start to introduce political behavior, actors, and social conditions to the equation for understanding political development, which was previously populated solely with principles and beliefs (Whittington, Keleman, Caldeira, 2008, p. 5). From there, judicial politics has developed its own standing within political science that is distinct from legal studies and other fields in comparative politics. Its focal point is the question: “What do judges do and why do they do it?” (Segal, 2008, p. 20) This sets up the inherent boundary problem between law and politics central to the study of legal politics (Shapiro, 2008), because “judicial politics can be law or politics, but frequently it is both” (Segal, 2008, p. 20). There are at least three ways of approaching the boundary contention between law and politics, but most recently researchers have most productively applied the separation of power models, gaining important insights into the behavior of judicial institutions. This research approach, which belongs into the rational choice institutionalism camp, has been particularly conducive for contexts outside the United States – not least Latin America. Since the central question of this chapter asks whether judges acted strategically in 2010, when they closed the doors on a potential third term in the President’s office (or if something else was at work), it is only prudent to quickly introduce the basic tenants of the separation of powers model.

The separation of powers model evolves around the assumption that judges, too, act strategically when they take decisions, and presumes an actor with a sophisticated knowledge of the institutional context and legislative process. It then inserts the judge in a game with other forward-looking actors, who behave purposively on the merits of well-defined preferences (Spiller & Gely, 2008, p. 35). In its empirical application, the model would predict that a court maneuvers between the positions and interests of the legislative and executive branch that fall under the “contract curve” between their policy preferences. As an actor that reacts to incentives and constraints, the median judge has a strong inducement to decide in a manner that is unlikely to be overturned by either the legislature or executive. One of its most important contributions is that judicial independence often arises in times of political instability. For example, Ginsburg has shown that political uncertainty favors judicial review as a form of protecting constitutional bargaining (2003; Spiller & Gely, p. 39). Others have found that uncertainty may come in the form of imminent regime change (as for example towards

the end of the PRI hegemony in Mexico), imminent change in the executive (as was the case in Argentina's high court) or executive-legislative non-alignment.

The strategizing judge has taken on a central role in research on Latin American courts, which has uncovered a number of important findings that are significant for the purposes of this analysis (Helmke & Ríos-Figueroa, 2011). Building on Ramseyer's findings (1994) that courts in Japan tended to subordinate to the executive in the course of long terms of one-party dominance, Domingo found that PRI hegemony in Mexico had the same effect on courts (2000). Conversely, when one-party rule starts to crumble and shows signs of open decay, ruling parties are willing to negotiate legal guarantees, as happened under President Ernesto Zedillo in Mexico in 1994 (Finkel, 2008; Ríos-Figueroa, 2007). In her seminal study of Argentinian courts, Helmke found similarly strategic behavior. Courts acted exactly opposite to Dahl's prediction. He had argued that justices appointed by a previous administration acted in accordance with the legal political cycle and defected from the incoming administration at the beginning of the term and deferred to their position at the end of its term. Helmke argues that towards the end of a term, judges deferred to the position of the incoming administration to avoid being purged after the change of office holder (Helmke, 2005). Finally, in competitive democracies, too, courts are more likely to challenge the state without fear of political retribution, if disagreement exists between elected officials, as Chavez, Ferejohn, and Weingast, showed in their study of Argentina and the US (2011).¹⁵¹

The most recent, and also most systematic, inquiry into judicial behavior in Latin America, has come from Helmke and Ríos-Figueroa. They framed their inquiry along the axis of vertical and horizontal control and asked contributors to an edited volume to investigate constitutional courts in various countries in Latin America. Breaking down the basic functions of constitutional courts, first articulated by Montesquieu, Kelsen, and

¹⁵¹ The strategic paradigm was also useful for understanding the behavior of judiciaries in authoritarian regimes and their compliance with autocratic dictators. For example, Couso interprets the Chilean judiciary's deference to the autocratic government of General Pinochet not as a consequence of an apolitical and conservative political culture amongst judges, as Hilbink did (2007), but traces it to a strategic decision to avoid controversial cases in order to maintain a minimum in institutional independence. Barros found that even within the context of a military government, factions exist and create the need of co-ordination between groups. The set of rules resulting from their interaction also constrain the actors inside that game and provides the niche, in which a court can exercise some form of judicial independence (Barros, 2002).

Schmitt¹⁵², they posited the methodological framework with two questions: to what extent are courts in Latin America willing and able to protect individual rights? And: to what extent are they willing to and able to arbitrate inter-branch disputes that affect the separation of powers? (2011, p. 5) If courts decided conflicts between branches of government in favor of the less powerful, they did in fact exercise valid horizontal control. In the Latin American context, this usually meant whether the court decided disputes in favor of the legislature, because executives more often than not wield significantly more *de jure* and *de facto* powers due to the woes of presidentialism and delegative democracy. The question of vertical control was tackled by trying to observe if the court decided rights claims in favor of the weaker party. This task, of course, is somewhat more difficult given that in modern constitutional contexts, different rights come into conflict with one-another making the objective identification of the weaker party ontologically more difficult. In Colombia, indigenous peoples' collective rights have come into conflict with the right freely exercise religion.

According to Rodríguez-Raga's work (2011) published in that volume, the Colombian Constitutional Court had built up a reputation as a staunch rights defender (vertical control), but has been relatively weak when it comes to adjudicating constitutional disputes between the various branches of government (horizontal control). Analyzing data from the Colombian Constitutional Court and the *acción popular de inconstitucionalidad* (1992-2005)¹⁵³, Rodríguez-Raga found relations between strategic deference and the "costs for the players associated with both giving up policy and clashing with each other" (2011, p. 95). He argues that the Court most often acts like a prudent strategizer, laying the jurisprudential groundwork for expanding its jurisdiction by upholding the principle in prominent cases, but on the substantive merits of those cases defers to the executive. In less prominent cases in its docket, the Court then moves

¹⁵² Montesquieu identified in his *Spirit of Laws* liberties relative to the constitution that result from the separation of powers, and the political liberties of the subject from the state. Kelsen found that the functional separation of powers that regulates the creation of laws is in itself subject to control through a catalogue of rights that delineate the material content of laws. Finally, Schmitt held that the organizational principle facilitated the implementation of the distributional principle and conjoined together form the *Rechtstaat* component of the modern constitution (Montesquieu, 1949; Kelsen, 1945; Schmitt, 2008; see Helmke and Ríos-Figueroa, 2011, p. 8).

¹⁵³ Note that the time period covered in this study predates the 2010 re-election decision as well as the dispute between Uribe and the Supreme Court, which had an effect on the activism on both the Supreme and Constitutional Court.

to enforce these principles against the executive (Rodriguez-Raga, 2009 & 2011). Such strategizing is not necessarily novel for newly established courts. In fact, *Marbury v. Madison* constitutes the paradigmatic case for such judicial behavior, because justice Marshall decided with Jefferson on the merits of the case and did not impose any obligations, but nevertheless established the principle of judicial review, which other courts at later points in time used to strike down legislation (Vanberg, 2008; see Ginsburg 2003).

This analysis builds on these findings, but adds crucial layers that help us better understand the institutional evolution and behavior. First of all, the observation that the Constitutional Court decided against a powerful and popular president makes clear that its posture in inter-branch adjudication has shifted. It has become a more assertive adjudicator. Post-2010 development affirms this more powerful position of courts within the institutional framework as a consequence of that decision, since the executive now makes deliberate efforts to meet the high courts prior to commencing with a reform project.¹⁵⁴ Such an evident increase in judicial power and institutional independence begs the obvious question whether the augmentation was resultant of strategic action? The contention of this analysis is that the strategic paradigm for explaining judicial behavior has difficulty in accounting for this increase in judicial authority, because it leaves out the centrality of communicative and principled reasoning. Specifically, the conception of preconceived preferences that are not subject to change is difficult to bring in line with the nature of legal deliberation in constitutional issues that utilize the proportionality principle to reach decisions. The substitution doctrine is essentially a dogmatic expression of the proportionality principle that weighs the potential damage to the core of the constitutional charter against the legitimacy of claims that call for its renewal. The argument put forward here essentially holds that the creation of this doctrine evolved in particularly arranged discursive spaces intended to uphold the primacy of legal reasoning over political reasoning. The most central aspect of legal reasoning that sets it apart from

¹⁵⁴ *Revista Semana*. “Vuelve y juega la reforma a la Justicia” 13 September, 2014; Last accessed on: 11 January 2015. <http://www.semana.com/nacion/articulo/vuelve-juega-la-reforma-la-justicia/402640-3>. President Santos exclaims that his first act in the office was to visit the courts and debate a mending of fences between them and the executives. Prior to redrafting another attempt at judicial reform, the President visited the Constitutional Court as well as the Supreme Court, because, as *Semana* writes, Santos knows that the main reform “he has planned for his second term may not be approved without them”.

political reasoning is the coherence between premises and conclusions drawn from these for specific legal and empirical contexts.

4.3. The majoritarian-constitutionalist divide and ability to reform the Constitution

If Colombia's Constitutional Court was a careful adjudicator in inter-branch disputes prior to 2005, and subsequently changed its attitude, the significance of this shift arises, not least, from the fact that Álvaro Uribe was not like any other President in Colombia's history, but one that by virtue of his charisma and sense of mission put a severe stress on the horizontal control function of the Constitutional Court. He united traits of a popular political leader, who generated extremely high approval ratings from policy successes and natural charisma, with a self-confident sense of mission to reform the Colombian polity along lines that more often than not served his personal political needs. As such, the reform agenda initiated by Uribe and his administrations as well as the decisions by the Constitutional Court on various reform projects brought the internal tension between majoritarianism and constitutionalism to the surface. Together, Uribe's political talents as well as the justification for his agenda resting on his articulation of a communitarian state and the so-called *estado de opinión* (state of opinion) warrant a closer inspection of the majoritarian/constitutionalist divide at the center of the re-election debate.

There are two interrelated levels of abstraction where the clash between communitarian and constitutionalist values surface. The foundational iteration involves the justification of political power as such and turns on the question of what constitutes a legitimate political will that gives rise to democratic decisions. The majoritarian lineage of democratic thought developed from Rousseau's General Will as the only source of legitimate power and law as the public and solemn declaration of the General Will on an object of common interest (2002, p. 132), which then degenerated to the simple principle of "majority rule" (Lijphart, 1984, p. 4).¹⁵⁵ The General Will as a vehicle to legitimate

¹⁵⁵ Lijphart specifies the merit of the majoritarian rule as that "any other answer, such as requirement of unanimity or a qualified majority, entails minority rule – or at least a minority veto – and that government by majority and in accordance with the majority's wishes comes closer to the democratic ideal than government by and responsive to a minority" (1984, p. 4).

constitutional reform is explicitly mentioned by Uribe's most important advisor, Jose Obdulio Gaviria, and resurfaces in Uribe's own speeches on the communitarian state and the *estado de opinión*.

The reconstruction of the Constitutional Court's argumentation in the substitution doctrine will evidence that for constitutionalists, the General Will remains a performative act without relation to reason if it is not constrained by procedure (C-141/10; p. 99). In the reality of modern democracy no political body or entity can be intelligibly connected with *one* will. Rather, any polity consists of a plurality of viewpoints, identities, and, above all, individuals, that must recognize each other as equals. This recognition of equals that constitute a plurality is the foundational claim that justifies *and* controls democratic decisions.

The tension between majoritarianism and constitutionalism re-appears in the contentious relation between judicial independence and judicial accountability. Judicial independence, in its broadest sense, entails that judicial decisions are not influenced by normatively irrelevant considerations in order to guarantee the neutrality and purity of judicial reasoning, which in turn is connected to broader imperatives of democratic values such as justice, fairness, and pragmatism of discourse (Rawls, 1993; Habermas, 1996). Practically, this translates into an independence from political interests of current office holders. It is said that judges are independent when they need not and cannot react to threats or favors originating from other political (majoritarian) offices. Such immense freedom from other social and political forces, of course, clashes with the imperative that all power must be democratically legitimized and appointed offices held accountable. Bickel famously critiqued the counter-majoritarian difficulty of constitutional courts as resulting from the power accumulated in the judicial review office, while almost entirely lacking direct democratic legitimation (1962).

Both aspects of the constitutionalist/majoritarian divide, involving ontological claims on the nature of the democratic will and its more specific application in the institution of judicial review, crystallize in the question of constitutional reform. When we ask how far a political reform, initiated by popularly elected bodies, can in fact go, we also pose foundational questions of whether the exercise of political power is legally sanctioned and thereby constrained by constitutional principles that must withstand

legislative authority or if legislative authority, coupled with popular sovereignty, trumps constitutional principles.

Before we can shift the analysis to the argumentation of the Constitutional Court and the development of the substitution doctrine, there are two aspects that require further specification. First is, of course, the normative framework of Uribe's Democratic Security policy, which evolves around communitarian notions of citizenship and political leadership (epitomized in the *estado de opinión*). The second aspect in need of clarification is the institutional context, or more specifically, the legislative politics during Uribe's terms in office. This helps to evaluate to what extent Uribe managed to co-opt the legislature for his purposes in either of his two terms in the presidency or if the alignment between Presidency and Congress fissured in the second term, thereby providing a strategic opening for judges to enforce institutional independence in 2010. Both these elements of the analysis will show that the findings of this analysis belong into the context of what O'Donnell termed delegative democracy, since Uribe managed to dominate public politics – including legislative politics – during both his terms.

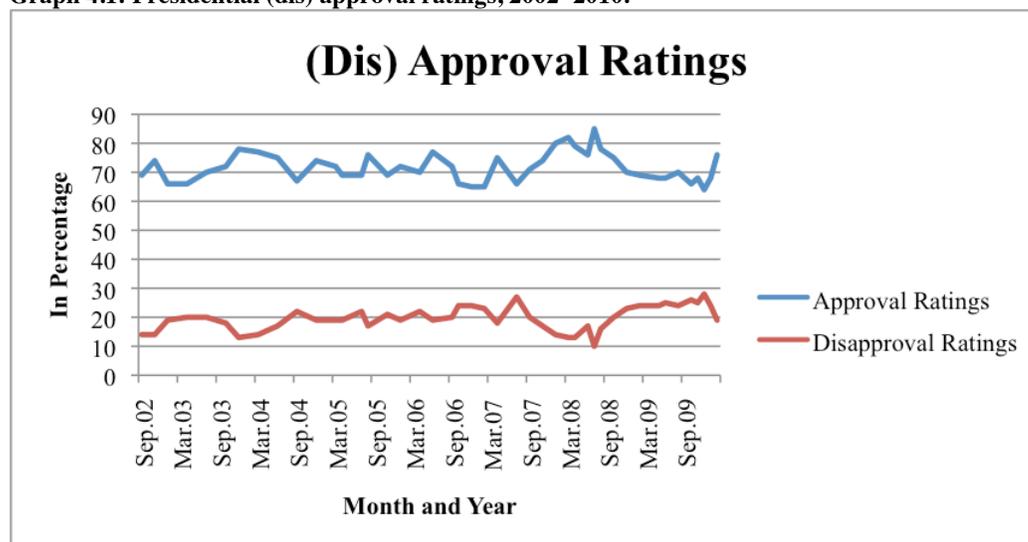
4.3.1. Uribe and the delegative turn in Colombian politics

This analysis has already touched on some critical aspects of Álvaro Uribe's presidency, his rise to power, and successes in office as well as the dark side of his reign displayed in the *parapolítica* scandal and the nepotism and corruption menacing the second term in office. Uribe's high popularity ratings throughout both his terms were most often attributed to improvements in the internal security situation resulting from the tough-hand approach of Democratic Security, which he paired with inviting foreign direct investment and fostering social cohesion between rulers and ruled, as the central imperative of *Democratic Security*. The focal shift in this chapter to majoritarian and constitutional tensions in the legitimation of constitutional amendments places the attention on the third aspect of his generic policy approach: the imperative to create a tightly knit social cohesion between rulers and ruled. From this imperative follows Uribe's rendition of the *estado de opinión*, which remains relatively ambiguous as to how it connects to the *estado de derecho* (state of law; rule of law) and informs practical politics. It is the

normative beacon that serves as the justification of Uribe’s reform agenda and lies at the bottom of Colombia’s delegative trends during the Uribe years.

Foundational for Uribe’s popularity was his success in stabilizing the security situation in Colombia. The numbers of kidnappings decreased almost by the same rate that Colombia had witnessed them rise between 1996 and 2000 (Appendix D, Graph D.2). When he took office in 2002, almost 15% of the country had no police presence (158 of 1098 municipalities). This number was reduced to 0 % in 2004.¹⁵⁶ The intentional homicide rate reduced from 70 to 48 per 100,000 people and the number of terrorist attacks and massacres also declined significantly. In short, Colombia moved from the brink of becoming a failed state to a state that still faces very significant security issues, but had made substantial improvements (see Appendix D). This resulted in a general sense that the situation was indeed improving, producing incredibly high popularity figures for Uribe that, consistently during both his terms, oscillated between the high 60s an 85 % (Graph 4.1).

Graph 4.1: Presidential (dis) approval ratings, 2002- 2010.



Source: Gallup Colombia Polls, *Presidential Terms*. Pachón & Hoskin, 2011.

Armed with his own personal popularity as well as the widespread support for *Democratic Security*, Uribe ideologically *and* practically positioned himself outside of

¹⁵⁶ United States of America. United States Department of State. “Memorandum of Justification Concerning Human Rights Conditions with Respect to Assistance for Armed Forces”. August 31, 2006; Last accessed: 28 January 2015. http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB327/doc13_20050000.pdf.

Colombia's traditional politics (although he was part of the traditional elite), resulting in a strong sense of mission to alleviate Colombia from the ills of civic conflict. It is here that the majoritarian coloration of Uribe's public policy is most readily apparent and expresses itself most forcefully, which brings us back to the third element of his *Democratic Security* policy: the direct identification between rulers and ruled in order to bolster social cohesion and assuage economic cleavages. It rests on a particular notion of social trust that buttresses a specific understanding of charismatic, political leadership, and translates into a particular claim to legitimacy, which in turn includes fairly broad validity claims to address the basic political framework, on which the polity organizes itself.

Uribe's most important political advisor, Jose Obdulio Gaviria Vélez (first cousin of none other than Pablo Escobar), outlines the *uribista* case for re-election with a basic Rousseauesque confirmation that the "General Will is good and to understand it does not require war, but dialectic" (Gaviria Vélez, 2004, p. 34). Evidently, Rousseau's articulation of the General Will is an expansive topic in political philosophy that neither Gaviria nor others really explore extensively. There seem to be two elements that *uribistas* take away from Rousseau: 1) the General Will of a nation is above the particular wills that constitute it, and 2) finding the General Will requires special relations between rulers and ruled that ought not to degenerate into conflict, but should be cherished through trustful relations. Together these two points coalesce into the *estado de opinión* and dictate that public opinion is the guiding democratic principle and not constitutional guarantees.

Gaviria arrives at the centrality of the General Will via an elaboration on the distinct origins of the republics in North and South America. He notes that the ideological cleavages in the North were assuaged through dialogue and a dialectical search for the General Will, while the Southern Cone plunged into warfare and factional hatred between caudillos. From that he and others from the *uribista* camp take away that in the ideal political society "everything can be negotiated and brought to a conclusion with a majority without the use of violence [...] through a permanent dialogue of government

with society”.¹⁵⁷ By situating the dialogue between rulers and ruled as a way to assuage social cleavages, *uribismo* intends to posit itself opposite to the imperatives of class warfare that the leftist guerrilla espouses and constitutes the foundation of the Bolivarian revolutions in neighboring Venezuela. Rather than confrontation, “trust is the key word in social life” (p. 74). Turning to the role of political leadership it becomes clear that trust does not only affect social life, but has a deep impact on political society as well.

Gaviria, relying on Burke and ancient Greek philosopher Anaxagoras, claims that true political leadership is set apart from the particular interests within the political nation, and rests on a coherent vision of life with a corresponding moral universe distinct from the interest representation of regionally elected representatives (p. 100). In the specific case of *uribismo*, said moral universe is a mix of regional peasant folklorism invoking the natural and paternalistic leadership of the hacienda owner to justify an extremely conservative political project (Bejarano, 2013, p. 336). This makes the *political* coloration of the trust between rulers and ruled in *uribismo* abundantly clear, because the instrumental use of populism did not place Uribe on the side with the people against elites, but “placed the latter back on their pedestal” to guarantee the well-being of society (p. 337). According to Uribe’s political philosophy, leaders are to be trusted, since their excel in political leadership and wisdom propelled them to the pedestal above the populace in the first place. Evidently, trust in this mélange of *caudillismo*, peasant folklorism, and natural political leaderships is not the generalized and rationalized form central to liberal democratic theory (Warren, 2000), but a particularized form that bonds together and runs bottom-up (for an analysis see Boesten, 2014).

Applied to the political framework, the *uribista* rendition of the General Will results in a normative majoritarianism that situates the highest authority in the nation with the political decision of the people in competitive elections and rejects constraints on the people’s free expression other than formal and procedural ones. This becomes readily evident when we turn to the most central figure used to justify the re-election: *estado de opinión*.¹⁵⁸ The semantic relation with the *estado de derecho* is deliberate as is the

¹⁵⁷ Interview subject no. 17 (Member of Congress of the Republic of Colombia), 13 March, 2013.

¹⁵⁸ *Semana* showed that Uribe used references to the *Estado de Opinión* more than hundred times in ten months before the decision in 2009. In that year, he opened the legislative session in Congress with a speech, in which he defended the *Estado de Opinión* as superior to the *Estado de Derecho*. See: *Revista*

impreciseness of whether it is superior or equal to it. For Gaviría, it is the element of democratic governance that relates the mandate holders of political power to the electorate. Similar to the General Will, the *estado de opinión* precedes constituted power and therefore has qualities associated with constituent power and plebiscitary democratic governance. From this original moment of political genesis, the *estado de opinión* radiates significance that informs practical politics as well as institution design. In their argumentation on democratic virtues, *uribistas* contend that the various organs of the state are subjected to the supervision by public opinion only.

This can have two ramifications. As Uprimny states the *estado de opinión* can mean something banal like public opinion matters and is central to democratic governance. If, however, put in relation to the horizontal control functions of the other branches of government, it acquires the traits that O'Donnell lamented in his analysis of delegative democracy: “The maximalist idea [of the *estado de opinión*] is risky, because it means that the truly important control in a democracy is the vertical one, which can then be used to justify a breach of the horizontal controls”. It would authorize a popular president, like Chavez or Uribe, to invoke his popular support to ignore the constitutional restrictions and controls.¹⁵⁹

Critics of the *estado de opinión* lamented that its derisiveness had already been experienced in the clash with the Supreme Court, when the President utilized the *estado de opinión* to delegitimize the Supreme Court in its investigation against Members of Congress, and feared that it could be a potent tool to push aside opponents of further re-election. For *uribistas*, on the other side, support for re-election becomes not only a preference, but an imperative, since the prevention of good leadership undermines the good of the *entire* nation contradicting the *estado de opinión*. As Gaviria argues, the prohibition of re-election, according to him a Latin American invention, can mutate to a

Semana. “La estrategia del estado de opinion. 14 August 14, 2009; Last accessed on: 10 January, 2015. <http://www.semana.com/nacion/articulo/la-estrategia-del-estado-opinion/106304-3>. *El Tiempo*. “Qué es el Estado de opinión del que habló Álvaro Uribe en su discurso ante el Congreso?” 27 July, 2009; Last accessed on: 10 January, 2015. <http://www.eltiempo.com/archivo/documento/CMS-5712361>. For an analysis see: *Armando Guío Español*. “El Estado de Opinión: ¿Qué hay detrás de esto?” Last accessed on: 15 January, 2015. <http://relatoresmaticos.uniandes.edu.co/index.php/practicas-democraticas/relatoria/260-el-estado-de-opinion-ique-hay-detras-de-esto.html>.

¹⁵⁹ Uprimny, Rodrigo. 2009. “¿Estado de Opinión o de Derecho?” In *El Tiempo*. 17 August, 2009. Last accessed 25 June, 2015. <http://www.elespectador.com/columna156600-estado-de-opinion-o-de-derecho>.

prohibition of good politics and good governance. For example, he traces the ills befalling Colombia's system of governance to the prohibition of re-election. In the 1930s and 1940s, Alfonso López Pumarejo and his New Deal type policy program *Revolución en Marcha* could not materialize, because his time in office was cut short by the prohibition to occupy the presidency consecutively. Had he achieved his goals, Gaviria argues, the crisis that eventually resulted in *La Violencia* had not occurred either (2004, p. 103-107).

This normative framework provides strong arguments in favor of re-election. By embracing public opinion as the only source of democratic legitimacy, *uribismo* opens a pathway towards constitutional reform that is only subject to procedural and formal control, but does not accept substantial controls inherent in (neo)-constitutionalist paradigms of democratic legitimacy (2004, p.35). Gaviria argues in an effort to embrace the Colombian national hero and liberator Santander that to find the General Will the free people develop mechanisms to “dictate laws, to deliver justice, and direct the executive” (2004, p. 33). Such a functional separation of powers that accepts procedural constraints, but is free of substantial ones, makes sense in the light of the development in legislative politics during Uribe's time in office. The President managed to control and dominate the entire Congress with his popularity and submit the various factions into submission. His position above and outside of traditional politics not only provided himself with high popularity ratings, but also made wide sections of Congress dependent on him personally. This is the second side of the delegative trend in Colombia under Uribe.

4.3.2. The fragmentation and co-optation of Congress

The *uribismo* framework reveals itself as hazardous for the quality of democracy, when we incorporate legislative politics into our analysis. It makes readily apparent that insisting on procedural and formal constraints on the exercise of popular power (for the purposes of constitutional reform) is very self-serving given that Uribe managed not only to dominate public opinion, but also control large majorities in both chambers of Congress. His rise to power and subsequent dominance of the legislature is reflective of the crisis of representation in the Andes, which brought outsiders (from traditional parties) to the pedestal of power and eroded traditional party systems (Mainwaring,

Bejarano, Pizarro Leongómez, 2006). Uribe deliberately concocted his reputation as an outsider to traditional politics and made instrumental use of his status to reap the rewards of a general distrust towards traditional politics in Colombia to control public politics in Colombia. These aspects of the legislative development add to the majoritarian notions evident in Uribe's political philosophy and signal that this case fits well into the paradigm of delegative democracies (O'Donnell, 1994).

Uribe's ascendance to power coincided with the open implosion of the traditional Colombian party system into one of the most fragmented party systems in the Americas, consisting of a high number of electoral entrepreneurs that organized their electoral victories outside of the traditional party structures. There is also little doubt that he at least benefited from the inclusion of regional alliances between traditional political leaders and paramilitary groups. "Armed campaigners" helped his allies to be elected in Colombia's regions and also supported his presidential campaigns. With the help of these alliances, he could develop a network that hurled him from fame in the region of Antioquia (but relative national obscurity) to national power in the nation's capital, Bogotá. Both enabled Uribe to run as an independent candidate, despite having his political home with the Liberal Party (who made Horacio Serpa their candidate in 2002, causing the schism with Uribe), and portray himself as an outsider to traditional politics (Bejarano, 2013).

Legislative politics during Uribe's time in office was a complicated and multifaceted evolution. It begins with the reconfiguration of legislative politics under the new constitution, which did indeed produce critical effects. On the one hand, new rules made Congress much more diverse and fragmented, but as a consequence of that, also more easily co-opted by illegal forces (Gutiérrez Sanín, 2007). Before 1991, Colombia exhibited a long history of bipartisan consociationalism in Colombia. This came to an end with the reforms introduced in the new Constitution that reduced the requirements for participating in the political system and produced one of the most "fragmented party system in the Americas". In 2002, the National Electoral Council (*Consejo Nacional Electoral*, CNE) officially recognized 72 parties of which 45 had representation in Congress (Pachón & Hoskin, 2011; Pizarro, 2002). Thus, while the party system did not implode and completely collapse similar to Peru or Venezuela, it became unrecognizable

due to its denationalization into many little micro electoral entrepreneurs that left voters with little coherent and identifiable national policy plans (Pizarro, 2002). These electoral entrepreneurs were an easily co-opted entry point for illegal forces to influence national politics.

For Uribe, once in office, he could use his popularity and the prerogatives of the presidential office to discipline and incentivize a coalition into obedience out of the many different and particularized political movements represented in Congress. After being elected in 2002, Uribe threatened the legislature to curtail its powers and in exchange accumulate more powers in the presidential office through a referendum. The plot failed, but the threat achieved its apparent goal of disciplining Congress into compliance – particularly, since his threats were backed by high popularity figures that soared as a consequence of his national security successes (see graph 4.1). In the end, he could handily coalesce a broad majority behind him that “approved most of his policy initiatives” (Pachón, Hoskin, 2011). Most important for the purposes of this study, Congress preemptively initiated the reform that doubled the terms in office from one to two and provided Uribe with the publicity stunt to modestly accept the demand by the people to extend his time power.

After the early years of his presidency, which provided him with easily manageable majorities in Congress, the picture became a bit more complicated, because the process of vote personalization was somewhat reversed as a consequence of a political reform in 2003. The reform changed the rules that favored excessive fragmentation (Legislative Act 01 of 2003; Pachón and Shugart, 2009). It introduced a minimum threshold of 2% of the votes (*umbral*) at the national level; restricted parties to present a single open or closed list (as list openness remained optional); and generated incentives to form electoral coalitions through the introduction of the D’Hondt system, thereby effectively reducing the number of parties participating in elections. Pachón and Shugart showed (2010) that as the size of the district in the 2002 election increased, the effective number of parties (ENP) followed suit. In 2006 and 2010, however, the threshold had the effect that most parties introduced lists in all districts resulting in a higher degree of nationalization, irrespective of the district’s size. The evidence though is not fully conclusive, because this process is far from concluded and the Chamber of

Representatives still suffers from a very high degree of fragmentation (Pachón & Shugart, 2010; Battle & Puyana, 2011; Carroll & Pachon, 2014).

When we look at the specifics of the Uribe coalitions in Congress, we see that the President was capable of assembling coalitions with extensive majorities, regardless of the electoral regime. As table 4.1 shows (the %-column shows the percentage of each chamber in Congress belonging to the Uribe coalition), his governing majority even increased in 2006 after the political reform took effect. Only towards the end of his second administration did the governing coalition loose a partner in Vargas Lleras' *Cambio Radical* (Radical Change). Carroll and Pachón relate the loss of *Cambio Radical* to the efforts to generate another re-election reform during the second term. Another explanation for Vargas Lleras's break with Uribe could also have been connected with *parapolítica*. Vargas Lleras survived a bomb attack against him that he attributed to obscure forces with relations to Members of Congress, while Uribe blamed the FARC for the attack. The mastermind was never caught, but it is auspicious that relations between the two alpha machos of Colombian politics soured soon after that incident.

Table 4.1: Uribe's majorities in Congress, 2002-2010.

	Year	House		Senate		Parties in the coalition
		Seats	%	Seats	%	
Uribe I	2002-2005	108	65.10	60	58.80	Conservative Party, Cambio Radical, Liberal faction, Alas Equipo Colombia, Convergencia Ciudadana, Colombia Democrática, Colombia Viva.
	2005-2006	100	62.61	69	66.97	
Uribe II	2006-2007	103	62.43	68	68.80	Conservative Party, Cambio Radical, U Party, Alas Equipo Colombia, Convergencia Ciudadana, Colombia Democrática and Colombia Viva.
	2007-2008	118	63.43	83	70.93	
	2008-2009	92	51.96	70	57.38	Conservative Party, U Party, Alas Equipo Colombia, Convergencia Ciudadana, Colombia Democrática and Colombia Viva.
	2009-2010	91	52.63	59	55.14	

Source: Carroll & Pachon, 2014.

The estrangement between Vargas Lleras and Uribe is the only real case that could support the hypothesis that a decreased alignment between executive and legislature provided a strategic opening for the Constitutional Court to exploit and prohibit another term in office in 2010. We even see some evidence in the different vote

calls for each of the two reform projects in Congress. In 2004, when Law 02 to allow one immediate re-election was debated, the affirmative votes were slightly higher than in 2009, when Congress ratified Law 1354 to allow a second consecutive term in the President's office (table 4.2). The numbers reflect a much more polarized atmosphere, which caused the opposition to abstain from the vote. On the other hand, this abstention actually consolidated a higher percentage in the vote in the House of Representatives (63 of 95 or 66 percent) than in 2004 (95 of 166 or 57 percent) and only a slightly less overwhelming majority in the Senate. Moreover, the cause behind this polarization at least partly resulted from the *parapolítica* scandal, which, as seen in the previous chapter, was driven by the Supreme Court investigations. In the end, regardless of the polarization, the reforms passed with clear majorities.

Table 4.2: Votes in Congress for Legislative Act 02 of 2004 and Law 1354 of 2009.

	Chamber of Representatives		Senate	
	Legislative Session	Affirmative Votes	Legislative Session	Affirmative Votes
Law 02 of 2004	Primary Commission (35)	25	Primary Commission (19)	14
	Plenum (166)	95	Plenum (102)	68
	2 nd Commission (35)	29	2 nd Commission (19)	13
	2 nd Plenum (166)	115	2 nd Plenum (102)	67
Law 1354 of 2009	Primary Commission (35)	28	Primary Commission (19)	12
	Plenum (95)	63	Plenum (102)	59
	Conciliation	84	Conciliation	53

Source: Republic of Colombia. Constitutional Court of Colombia; Congreso Visible.

At first sight, these observations give credit to some of the findings of previous studies on judicial behavior. Above all, it seems to suggest that judicial independence arises in coincidence with increasing fissures between the executive and legislature. It is important to note that these tendencies evolved not from a vacuum, but were directly related to the activism of the Supreme Court in the *parapolítica* investigations. In particular, the exit of *Cambio Radical* from the Uribe coalition is muddled in Congress' affairs with groups at the margin of legality. Thus, to make the argument that breaks

between the legislature and the executive helped the Constitutional Court to decline Uribe's third term in office, one has to at least add the Supreme Court investigations against Members of Congress to the equation. In other words, a potential legislative-executive split, at best, is an intervening variable that depended on the Supreme Court's activism. This activism, in turn, has an implicit relation to the Constitutional Court and the evolution of the *choque de trenes* during the Uribe years. Furthermore, Uribe's propensity to dominate legislative politics in Colombia did not really recede in the second term. His popularity rose sharply (from already high grounds) in the last three months of his presidency as the reform campaign gained in steam (see graph 4.2). This surge in the polls was properly put to use to maneuver the project through the institutions and place potential objectors under pressure. Moreover, my interviews revealed that magistrates felt that the stakes were equally high in either decision and signaled that it had no significant influence on the deliberation process itself. As one interviewee put it: magistrates are not "little kids" and know that constitutional arbitration always involves high stakes.¹⁶⁰

In sum, this brief overview of the legislative politics during Uribe's time in office shows two things: First, the President managed to utilize his high popularity ratings to dominate Congress akin to how he dominated public opinion. Similarly to the trust bestowed upon the natural leader in his Democratic Security, he demanded (and largely received) trust and obedience from his coalition in Congress. Therefore, if under the ideal democratic scenario, the legislature exercises effective (horizontal) control of the executive, Uribe's dominance largely obfuscated this function and made Congress more or less irrelevant. Second, any constraints placed upon Uribe to co-opt the House of Representatives and the Senate originated in the Supreme Court's investigations into criminal allegations. Together, these two aspects give rise to two critical observations: 1) it is difficult to properly identify a strategic opening for the Constitutional Court or a decisive rift between the legislature and executive; 2) legislative politics in the Uribe years reinforce the notion that there was a visible delegative trend in Colombia's democracy that pushed aside horizontal institutions and propelled the executive's position in the institutional matrix.

¹⁶⁰ Interview subject no. 1 (auxiliary judge), 15 April, 2013; Interview subject no. 10 (Constitutional Court judge), 8 March, 2013; Interview subject no. 28 (Constitutional Court judge), 19 November 15, 2012.

With the legislative branch's horizontal control receding in relevance, and the significance of this case confirmed (Colombia under Uribe was a highly majoritarian and delegative case), we now turn to the Constitutional Court and judicial branch. We are left with one crucial hypothesis that identifies the Constitutional Court as a strategic actor. As Rodríguez-Raga impressively shows in his analysis, the Court built its jurisprudence carefully by restraining itself in prominent cases, but upholding the principle, and then applying the principle in less prominent cases. According to his analysis, it is this strategic behavior that made the Colombian Constitutional Court a prudent strategizer. In order to test this hypothesis, we need to investigate whether the substitution doctrine, central to rejecting Uribe's final constitutional reform, grew strategically or not. The next section will address this caveat and show that the origin of the substitution doctrine goes back to the very beginning of Uribe's time in office and was a direct response to his sense of mission. We will see that the thickening of the jurisprudence did not follow strategic imperatives, but in a more deliberative fashion.

4.3.3. The Making of the Substitution Doctrine – neo-constitutionalism and the implementation of ethical reasoning inside the Constitutional Court

Given the communitarian invocation of Uribe's political philosophy, constitutional reform to suit his interest as the natural leader of the Colombian nation is not a surprising outcome. As explained in the discussion on the *choque de trenes*, already his first super minister Fernando Londoño Hoyos, stated prior to his nomination to the Ministry of the Interior and Justice that the country was ungovernable under the new 1991 Constitution and laid out a clear reform agenda addressing the legal regime in Colombia. Uribe followed through and passed several amendments to the Constitution. While the first two presidents under the new Constitution, Gaviria and Samper, did not introduce constitutional amendments, and Pastrana passed seven reforms, Uribe topped them all and throughout his time in office passed a total of 15 pieces of legislation that altered the Constitution (Valencia Villa, 2012, p. 15-18). These ranged from more technical alterations such as the electoral circumscription of the Chamber of Representatives (Legislative Acts 2 and 3 of 2005), the administration of special municipal districts (Legislative Acts 2 of 2007), the District Council of Bogota (Legislative Act 3 of 2007),

to others that directly modified norms concerning issues of fundamental rights, strategic public services, and the incorporation of international norms into national law. These changes involved the introduction of the accusatory system in criminal proceedings (Legislative Act 3 of 2002), the alteration of the political regime of parties and elections (Legislative Act 1 of 2003, Legislative Act 1 of 2004, Legislative Act 1 of 2007, and Legislative Act 1 of 2009), the anti-terrorist statutes (Legislative Act 2 of 2003), and the regulatory system of pensions (Legislative Act of 2005).

It was in response to this reformist agenda that the Constitutional Court developed the substitution doctrine. This doctrine is of such fundamental importance to this dissertation because it developed over the entire period Uribe was in office and gradually specified how and when it is applied. Moreover, the doctrine evolved not from the written text of the Constitution, but was the result of a particular interpretation of the Constitution and its principles. The reconstruction of this doctrine will help to understand how the jurisprudence incrementally grew thicker and responded to the institutional context outlined above. There is little evidence that the Court acted as a prudent strategizer who carefully builds its jurisprudence with consideration to other institutions and powerful actors. Rather, the doctrine developed in cases that were far from unimportant, but central to the executive. Namely, the two re-election decisions were critical benchmarks in the trajectory of the doctrine. In addition, rifts inside the Court concerning the substitution doctrine cannot only be explained with reference to strategic behavior, but to new contexts inside the Court that internally restructured the debate. In other words, there is an argumentative, thus discursive, variable that explains this evolutionary expansion of judicial power as well.

To construct the argument that the substitution doctrine follows a deliberative logic, rather than a strategic one, the reconstruction of the doctrine's evolution is followed by an analysis of the institutionalization of deliberation inside and outside the Court's plenary chamber. This will show that the formal and informal regime inside the Court aimed at establishing a "tranquility of process", which in turn intended to uphold the primacy of judicial reasoning over political reasoning. This will be the final substantive part of the analysis of Colombia's Court and will show that the deliberation and the institutionalization thereof were critical ingredients in the final outcome to reject

another reform project to further President Uribe’s time in the highest office of the Republic. To begin the reconstruction of the Court’s jurisprudence regarding the norms under “Title XIII” concerning “Constitutional Amendments” (Article 374-379), table 4.3 below lists all decisions between 2003 and 2010 that invoked the substitution doctrine and briefly explains the cases’ merits.

Table 4.3: Constitutional Court decisions between 2003 and 2010 and the substitution doctrine.

Decision	Application of the substitution doctrine
C-551/03	Elaborates on the issue of competence, develops the first parameters of the substitution doctrine, but does not apply it to the merits of the political reform; reform passes.
C-1200/03	In an investigation of legislative faculties delegated temporarily to the President, the Court reiterates that “competence defects” do exist, but did not find any in the substance of the case.
C-816/04	In the study of the legislative act that included the anti-terrorist statutes, the Court reiterates the doctrine, finds it applicable, but refrains from a competence investigation, because the procedural defects sufficed to resolve the pertinent question.
C-970/04	The Court reiterates the doctrine and applies it, but finds that President Uribe did not exceed his competences in implementing the accusatory system in Colombia’s penal system.
C-971/04	Similar to C-970/04, the Court reiterates, applies, but finds no defects that amount to a substitution of the Constitution
C-1040/05	The Court reiterates and applies the doctrine, but finds no competence violation in regards to the question of a second immediate term in the President’s office. However, in another part of the legislation, which delegates legislative functions to the State Council, the Court finds a competence defect and strikes down this part on the basis of the substitution doctrine.
C-153/07	The Court reiterates the doctrine in a review of pensions reform, but refrains from applying it.
C-180/07	Similar to C-153/07, the Court reiterates, but does not apply it.
C-588/09	The Court reiterates, applies the doctrine, and declares Article 1 of Legislative Act 1 of 2008 unconstitutional on the merits that it substitutes the norm outlining the administrative career outlined in the Constitution with another norm, which leaves the original constitutional imperative without effect.
C-141/10	The Court, in a split decision (5-4), declares the entirety of the constitutional reform for a potential second presidential re-election unconstitutional on the grounds that it replaces an axiomatic principle (the principle of the separation of powers).

Source: Republic of Colombia. Constitutional Court of Colombia.

The substitution doctrine appeared in 2003, when the Constitutional Court had to decide on President Uribe’s first major reform project passed under the eponymous title “*reforma política*”. From here on, the Court developed the substitution doctrine in ten

further decisions before Uribe's time in power came to an end.¹⁶¹ The table also shows that the 2005 and 2010 decisions on constitutional reform of the electoral clause of the executive were foundational for the evolution of the substitution doctrine. In 2005, the Court, for the first time applied the theory and partially declared a reform unconstitutional based on competence violations. The 2010 decision to disallow Uribe a third consecutive run for the presidency was the first decision to reject a constitutional reform in its entirety based on the substitution doctrine. Thus, it is fair to infer that the creation and development of the substitution doctrine that coincided with Uribe's time in office was a direct response to Uribe's election and his outspoken agenda to reform the constitutional regime in Colombia.

In my interviews, an interviewee contested that the inception of the theory of competence was a direct response of the Court to Uribe and suggested this was merely coincidence. However, the same interviewee also recognized that the selection of Fernando Londoño as the Minister of Justice and Interior sent a clear (threatening) signal to the Court.¹⁶² As explained, Londoño exclaimed before his ascendance to the seat of the Ministry of Justice and the Interior that the country was ungovernable with this Constitution – clearly earmarking the Constitutional Court for reform. In addition, some interviewees equally close to the Court argued that the theory of competence indeed was a direct response to Uribe's election.¹⁶³ What is more, interviewees justified the thesis of the substitution doctrine with reference to Uribe's high popularity, control of the agenda, and influence in Congress. Clearly, they thought Uribe's *de-facto* power in conjunction with the *de-jure* power bestowed upon the office by the Constitution warranted the Court's activist approach.¹⁶⁴ Together the evidence collected in elite interviews points to a response to Uribe's sense of mission and transformation willingness of constitutional foundations.

¹⁶¹ Republic of Colombia. Constitutional Court of Colombia. "El juicio de sustición. Defensa de la competencia para cambiar los acuerdos fundamentales". Internal memo for use by the magistrates on the Constitutional Court.

¹⁶² Interview subject no. 37 (auxiliary judge), 24 April, 2013.

¹⁶³ Interview subject no. 7 (auxiliary judge), 10 April, 2013; Interview subject no. 8 (Constitutional Court judge), 17 May, 2013; Interview subject no. 13 (Constitutional Court judge), 3 May, 2013.

¹⁶⁴ Interview subject no. 8 (Constitutional Court judge), 17 May, 2013; Interview subject no. 10 (Constitutional Court judge), 8 March, 2013; Interview subject no. 13 (Constitutional Court judge), 3 May, 2013.

Uribe's "Political Reform" involved three core projects that addressed electoral rules and the creation of prohibitions to battle corruption, make budgetary debates more public, and overrule several Constitutional Court decisions including the legalization of the consumption of narcotics for private use (Cepeda Espinosa, 2012, p. 70). The law intended to place the reform before the people in a referendum. As any constitutional reform submitted to a plebiscitary vote, this reform project had to undergo an all-encompassing constitutionality review by the Constitutional Court. The Court affirmed the conditional constitutionality in a 6-2 decision, but it compelled the Constitutional Court to specify the jurisprudence concerning constitutional amendments.

It is in the details of the reasoned decision that the Court introduces crucial parameters for expanding the review power of the Constitutional Court (Cepeda Espinosa, 2012). The driving force behind the doctrine was magistrate Eduardo Montealegre, who belongs into the neo-constitutionalist camp.¹⁶⁵ Already in the contentious debate on the *tutela contra sentencias*, which was in its most heated confrontation in the early 2000s when Uribe took office, magistrate Montealegre, publically asserted that reforming the Constitution is not the same as replacing it. The substitution doctrine hinges on this distinction between reforming and replacing the Constitution and inserts it at the nexus between material and procedural constitutional review of charter amendments.

When he penned the decision, Montealegre acknowledged that the content of a constitutional reform was not subject to review, because, naturally, any reform alters the substantive meaning of the established political charter, and the Constitution limited the Court to procedural review in such cases. The inventive turn in the argumentation of the Court came when it argued that substance and procedure overlap in the competence of the actor attempting to create a legal consequence. For constitutional reforms, competence, or the "legal power of producing a determinate legal consequence", is a central component of procedure, because without competence, "it would be legally meaningless to follow each of the requirements of a determinate procedure if one lacks the competence to produce the desired outcome" (Colon-Rios, 2011, p. 374). Therefore, the Court had to

¹⁶⁵ Interview subject no. 37 (auxiliary judge), 24 April, 2013.

investigate whether the concerned actor, namely the legislature, was acting *ultra vires* or within their constitutionally bestowed powers to reform the constitution.

In order to be applicable and have practical relevance, the theory did not only need to uphold that the Court's power to review involves competence defects in constitutional reforms, but also that reforms face limitations. Without any limits to the type of changes a reform is allowed to produce, the power to review the competence of the actors, again, becomes meaningless. Limits to reform arise from the distinction between constituent (*poder constituyente*) and constituted power (*constituyente secundario*). Here the Court agreed with Carl Schmitt's *Verfassungslehre*, and confirmed that a constituted body never attains the constituent power of the sovereign people, but always remains inside the sphere of regulated power (Colon-Rios, p. 375-376). As much as this entails the absolute freedom of the sovereign people, it also contains the limitations placed upon amendment procedures that aim at transforming the valid Constitution:

In the development of democratic principles and of popular sovereignty, the constituent power lies with the people, who have and preserve the power to give themselves a constitution. The original constituent power, then, is not subjected to legal limits and implies, above all, the complete exercise of the political power by the relevant individuals. (...) On the other hand, the power of reform, or derivative constituent power, refers to the capacity certain organs of the state have, on some occasions by consulting the citizens, to modify one existing constitution, but within the paths determined by the [current] constitution itself. This implies that it is a power established by the constitution, and that is exercised under the conditions set by the same constitution. Such conditions comprise matters of competence, procedure, etc. It deals, therefore, with the power of a reform of the constitution itself and, in that sense, it is of constituent nature, but it is instituted by the existing constitution and it is therefore, derivative and limited (C-551/03, translated by Cepeda Espinosa, 2012, p.71).

With the distinction between constituent power and constituted power, the Court constructed a precedent for the competence test to reform the Constitution. It argued that Article 374 of the Constitution, which states that it may be "amended by Congress, constituent assembly, or by the people through a referendum", it implicitly recognizes this distinction, because "a power of reform without limitations of competence also eliminates the basic distinction between the original constituent power and the derived constituent power" (C-551/03, translated by Cepeda Espinosa, p. 72). In this articulation, the question of competence then becomes an issue of procedure, distinct from material

review that examines the substantive constitutionality of a reform by comparing one article with a constitutional rule, norm, or principle.

After introducing the basic parameters of the substitution jurisprudence, the next decisions between 2003 and 2005 that mentioned substitution concerns reiterated the parameters of the doctrine as part of the Court's jurisprudence, but refrained from actually rejecting amendments on the basis that they replaced the Constitution or parts thereof. The Court undertook the next step of actually enforcing the parameters of the doctrine in the 2005 re-election decision. It is therefore difficult to argue that it acted strategically in a *Malbury vs. Madison* manner when it specified the principles set out in the 2003 decision in a decision so central to executive interests. Furthermore, the apparent internal split that surfaced in that decision (prior decisions were unanimous on the merits of the substitution doctrine) can very well have argumentative origins rather than strategic ones, because with Humberto Sierra Porto, nominated by the State Council, a very respected and articulate constitutional lawyer was elected to the Court. He issued a reasoned dissent against the substitution doctrine that for the first time articulated the constitutional concerns with the interpretative steps of the substitution test.

The reform project to allow a second immediate term in the presidential office encompassed four different articles: Article 1, legislating the provisions for the incumbent in order to level the playing field; Article 2, altering Article 197 of the Constitution to the wording that any individual cannot be president more than *two* consecutive terms; Article 3, specifying the role of the vice-president; Article 4, guaranteeing the rights of the opposition in a statutory law. The last Article included a transitory clause, which gave the State Council measures to legislate in case the law did not pass Congress prior to expiration of the legislative term or the Constitutional Court declared parts of the legislation unconstitutional.¹⁶⁶

As described in the previous chapter in the analysis of *yidispolítica*, the legislative process immediately raised suspicions of undue practices in the committee stage. Yet, the Court did not find them to be sufficient to declare the law unconstitutional on procedural grounds. In addition, it also found that a second consecutive term in the presidential

¹⁶⁶ Republic of Colombia. Congress of Colombia. *Acto Legislativo 02 de 2004*. December 27, 2004; Last accessed on: January 7, 2015. <http://www.alcaldiabogota.gov.co/sisjur/normas/Normal.jsp?i=15519>.

office in itself did not amount to a substitution of the Constitution. However, in its study of the statutory clauses included in Article 4 of the legislative act, the Court identified an alteration of basic premises of the Constitution. Said Article read that “[i]f Congress were not able to issue the statutory law within the deadline established, or it were declared void by the Constitutional Court, the Council of State will provisionally issue regulations on the matter during a two-month period” (cited in C-1040/05). The Court held that the reform delegated legislative powers to a judicial body, which was against the clear intention and spirit of the 1991 Constitution. In other words, this clause substituted parts of the Constitution.

In order to legitimate this part of the reasoned decision, the Court further specified the substitution test. In 2003, the Court had simply manifested that, to detect a substitution, the Court must analyze the principles and values of the Constitution. In 2005, it clarified and defined a substitution of the Constitution when “one of its defining elements, instead of being amended, is replaced by an opposing or wholly different one. Substituting implies that the resulting text contradicts the core of the 1991 Constitution and that, therefore, it is no longer recognizable” (C-1040/05). In order to identify those defining elements of the Constitution – critics would say *decide* on the Constitution’s core elements – the magistrates must avoid legal subjectivism by applying a three-tiered test: 1) identify the core element; 2) reference multiple constitutional provisions to define its specificity within the 1991 Constitution; 3) show its importance in the comprehensive constitutional context. From here it can then move on to comparing the original element with the new element in order to estimate whether the new element is different to the degree of incompatibility with the original document (Cepeda Espinosa, 2012, p. 76).

Humberto Sierra Porto focused his dissent on the subjectivism in the substitution test, which, according to him, rests on identifying the major premises in the Constitution without basis in text. His reading is a positivist reading of the constitutional text and the constituents’ intentions behind the phrase “for procedural defects only”. Essentially, he argues that inventing axiomatic principles ignores the original text of the Constitution and intention of the constituent. The constituent representatives in the assembly discussed the issue of material review of constitutional reform and as a response to the intransience for

constitutional reforms under the old regime, intentionally opted for the option of “procedural defects only”.

The central point in his refutation of the substitution doctrine is that “the construction of a ‘major premise’ in the substitution judgment is a construction of material parameter” because it is “up to the constitutional judge to identify what are the essential elements of the 1991 Constitution in order to make the substitution test”. He doubts that the substitution test strips the judge of subjectivism,

when precisely all that is described that is done is the ultimate expression of this; he [the judge] identifies the essential element, demonstrates its essential nature and defines it in the Constitution, he escapes any objective elements in this operation and exercises a typical decisionism that is criticized by the judiciary (Sierra Porto, C-1040/05; p. 771).

Invoking legal decisionism, the account then turns against the differentiation between constituent and constituted power as not very consistently applied in the theory of substituting the Constitution. Sierra Porto holds that this distinction “deliberately ignores the fact that the power to amend a constitution is a constituent power, even if you want to call it derived, limited, or something else”. For once a constitution is established “the whole exercise of constituent power is derivative or constituted, as it must operate within the channels or limits in the constitution” (Sierra Porto, C-1040/05; p. 774-775). Holding that Congress cannot replace the Constitution as a mere power of reform can also serve to stifle popular sovereignty, even if it acts as a constituent. Sierra Porto concludes that for a judicial body to assume a position from where to decide which aspects can be subject to popular vote undermines the democratic foundations of the political system.

The inclusion of Sierra Porto’s reasoned rejection of the substitution doctrine goes to show that there might be more to the Court’s behavior than reacting to incentives. While the Court might have acted strategically and deferred to Uribe’s position on the substance of the case to avoid retaliation, it could also have been Sierra Porto’s argumentation that held the other magistrates to tread a more careful line and couch the application of the substitution test in the review of the less important section of the law. While it was true that the public pressure to pass the reform was immense, with Mario Uribe warning that a negative verdict could call the people to the streets, there was also a

line of argumentation that cautioned against the legal and constitutional consequences rather than the political ones. Thus, even if the decision was strategically informed, it was also discursively embedded in legal arguments that raised fundamental question about its applicability. In the end, the Court voted 6-3 to grant the reform the seal of constitutionality (see table 4.4).

The table shows the vote in each re-election decision and the opinions of each magistrate together with the institution that short-listed the candidate to the Senate. Each column is sub-divided into four further columns denoting the magistrate, followed by the institution or President that submitted the candidate, and how he/she decided on procedural or competence defects. In case of the 2005 decision (C-1040/05), the competence defects are divided into a column that denotes whether the individual magistrate considered the entire reform unconstitutional on competence grounds or only one section (Article 4). The 2010 decision (C-141/10) does not contain such a division, because judges either declared the entire reform unconstitutional on competence grounds or refrained from the competence test entirely.

Table 4.4: Magistrates' votes in the presidential election reform decisions.

Review of Law 02 of 2004. Decision C-1040/05					Review of Law 1354 of 2009. Decision C-141/10			
Magistrate	Short listing institution	Procedural Defects	Competence defects		Magistrate	Short listing institution	Procedural Defects	Competence Defects
			Entire reform	Article 4				
Manuel Jose Cepeda Espinosa	President Pastrana	Majority (no defects)	Majority (no defects)	Majority (defects)	Mauricio González Cuervo	President Uribe	Dissent (no defects)	Dissent (no defects; rejection of doctrine)
Marco Gerardo Monroy Cabra	President Pastrana	Majority (no defects)	Majority (no defects)	Majority (defects)	Maria Victoria Calle Correa	President Uribe	Majority (defects)	Majority (defects)
Álvaro Tafur Galvis	President Pastrana	Majority (no defects)	Majority (no defects)	Majority (defects)	Jorge Ignacio Pretelt Chaljub	President Uribe	Dissent (no defects)	Dissent (no defects; rejection of doctrine)
Clara Inés Vargas Hernández	Supreme Court	Majority (no defects)	Majority (no defects)	Majority (defects)	Jorge Palacio Palacio	Supreme Court	Majority (defects)	Majority (defects)
Jaime Córdoba Triviño	Supreme Court	Dissent (defects)	Majority (no defects)	Majority (defects)	Nilson Elias Pinilla Pinilla	Supreme Court	Majority (defects)	Dissent (no defects; rejection of doctrine)
Alfredo Beltran Sierra	Supreme Court	Dissent (defects)	Dissent (competence defects)		Luis Ernesto Vargas Silva	Supreme Court	Majority (defects)	Majority (defects)
Jaime Araújo Rentería	State Council		Dissent (competence defects)		Juan Carlos Henao Perez	State Council	Majority (defects)	Majority (defects)
Rodrigo Escobar Gil	State Council	Majority (no defects)	Majority (no defects)	Majority (defects)	Gabriel Eduardo Mendoza Martelo	State Council	Majority (defects)	Majority (defects)
Humberto Antonio Sierra Porto	State Council	Majority (no defects)	Clarification of vote: rejection of substitution doctrine		Humberto Antonio Sierra Porto	State Council	Majority (defects)	Dissent (no defects; rejection of doctrine)

Source: Republic of Colombia. Constitutional Court of Colombia, C-1040/05; Republic of Colombia. Constitutional Court of Colombia, C-141/10.

The 2010 decision on presidential re-election is the final observation point of the jurisprudential trajectory of the substitution doctrine. In this decision, the Court for the first time declared a reform unconstitutional in its entirety. Between 2005 and 2010, the Court invoked the doctrine three more times, of which C-588/09 went the furthest by,

similarly to 2005, declaring part of a law unconstitutional. When it turned to the reform to allow a potential third term in office, the Court again had to analyze the law for procedural and competence defects. In 2010, the Court investigated five procedural questions and the competence issue. The latter, as we will see below, was not the result of specific citizens' complaints, but arose because a number of magistrates insisted on the application of the substitution test on the grounds that the Constitution itself stipulated an all-encompassing review for referenda. Since the Court's jurisprudence included the substitution doctrine, this test, too, had to be applied (see below on the institutionalization of deliberation inside the Court).

The Court first had to answer questions regarding its own competence for reform projects that originate outside the legislature and the executive. The Court affirmed its competence, arguing that its jurisdictional reach covered all procedures leading to a constitutional reform that pass through Congress, even when they originate outside the formal institutions and are plebiscitary in nature. After all, Congress still had to validate referenda as well. It then moved to address the five complaints litigators had submitted to the Court in the litigation period. When a referendum for constitutional reform is initiated, its committee of promoters and supporters must register with the National Register of the Civil State (*Registraduría Nacional del Estado Civil*), and receive the support of five percent of eligible voters (C-141/10; p. 11). The promoters raised the funds necessary, but did so with little respect to rules governing such campaigns. As Botero et al. write "the referendum records [were] murky and plagued with irregularities, such as self-loans between organizers that deliberately attempted to obscure the way in which the referendum was financed. Promoters spent six times more than the spending cap permitted", with contributions by individual donors sometimes thirty times as high as allowed (Botero, Hoskin, Pachón, 2010). In addition, Congress violated the requirement to have the votes of support confirmed by the National Registrar prior to vote on the bill and went ahead without approval. The next violation concerned the wording of the referendum. The text placed before the electorate actually read that Uribe would run again in 2014. Promoters of the law assuaged this when the bill was already in Congress. The Court argued that Congress placed itself above the will of the people by changing the

wording this late in the process. In other words: it extra-limited itself (Botero, Hoskin, Pachón, 2010).

The aforementioned violations were *material* violations of the procedures governing amendment processes of the Colombian Constitutions. The final two procedural flaws were formal in nature in that they violated the domiciliary right - or house right - of the Colombian Congress. The majority backing reform in Congress had five *Congresistas* amongst their ranks, who had joined Uribe's party from another party (*Cambio Radical*). However, the laws against *transfuguismo* disallowed such maneuvering between party caucuses and *Cambio Radical* had sanctioned them, essentially invalidating their votes. Without their votes, the reform coalition did not have the required majority. Finally, the Court struck down the bill, because it was not passed within the time limit of the ordinary session that expired December 16 2008 at 24:00. At that time, Uribe's coalition had called in an extra-ordinary session that began at 00:05 of 17 December. However, since extra-ordinary sessions have to be published in the *Diario Oficial* 24 hours before, the session, too, was invalid and the ordinary session long expired (Botero, Hoskin, Pachón, 2010).

These formal violations sufficed to end Uribe's aspiration for another term in 2010. The magistrates voted 7:2 to declare the law for a referendum unconstitutional on procedural grounds. The Court went further, though, and barred Uribe from the presidency as long as this Constitution is valid, and also closed the path through Congress for constitutional reforms of such magnitude. In order to do so, five magistrates on the Court insisted during the deliberation with their colleagues that the Court had to apply the substitution test (see below). After all, the Constitution stipulated that judicial review is all encompassing for constitutional reforms taking the referendum route and the majority insisted on acting in conformance with the rules in the book.

In its final reasoning, the Court found that the separation of powers is an axiomatic principle of the social state of law that is inscribed in the first Article of the Constitution as well as in the democratic principle of the Colombian Constitution (Article 137). In addition, it specified that the separation of powers in the 1991 Constitution was institutionalized by what the Court called the periodization of offices. It entailed that the periods of offices must not align with the periods of offices that have horizontal control

functions. For example, the President can present the short-list of candidates for three positions (out of nine) on the Constitutional Court. Under the original scheme, only every second President had the opportunity to get three of his choices elected by the Senate towards the end of his turn. With one re-election this changed so that *every* President could have the opportunity to affect the composition of the Court (and under certain conditions even have three of his nominees on the Court for an entire term). Furthermore, under the terms of one re-election the President already could pack the board of controlees with his own appointments, making the intended independence of the monetary body somewhat of a travesty. Evidently, another term would further increase executive control over these institutions.

The five magistrates, giving credit to the conditions of presidentialism in Latin America, argued that another term would further dilute these *checks and balances* (*pesos y contrapesos*), not only modifying an axiomatic principle of the Constitution, but substituting it for another. For that, Congress and the President lacked the competence, because only a constituent assembly wields original constituent power legitimating it to draft reforms of such degree. Thus, in a close vote, those five magistrates voted the reform down on competence grounds (C-141/10; see table 4.4). Critical for the Court to reach this conclusion was that a majority on the Court did not react to incentives and issued a constitutionality review solely based on procedural defects, but insisted on applying the competence test of the substitution doctrine in line with the procedures of deliberation inside the Court.

The question now is: can the model of the strategic judge explain the development of Colombia's Constitutional Court that by virtue of this decision expanded its review power and manifested itself as an independent plus powerful arbitrator in inter-branch affairs? My contention is that it cannot. There is simply little evidence in the data that suggests strategic interaction. The complexity of the substitution doctrine, its *ex nihilo* creation and organic growth makes it difficult to believe that judges – who were different ones from those eventually deciding the case against Uribe – foresaw in 2003 how the presidency would unfold in the coming seven years. Their oversight and predictive capacities would have had to be awesome, in particular since legislative-executive coordination transformed thus fundamentally during the Uribe administration. Moreover,

the most critical steps in developing the substitution doctrine, specifying its meaning, and expanding its application, did not occur in unimportant cases, but, in fact, cases of high priority to the executive: the review of the 2003 political reform, the 2004 presidential re-election reform, and the second 2009 presidential re-election reform. Therefore, it is the central contention of this dissertation that the decision to reject another term in office was *sui generis* and constitutes a new case that is difficult to explain with existing theories of judicial behavior.

This finding is corroborated by interview data that explain the substantive reservations against another term. In order to further build my argument that we need to understand the magistrate as a discursive actor it is useful to present the findings from my interviews in a table. Table 4.5 includes responses from interviews with subjects close to judicial institutions – above all the Constitutional Court itself.¹⁶⁷ The data here, and in Appendix C, are presented according to first, second, and third order observation of the position of the interviewees. In this particular case, magistrates belong into the first category, auxiliary judges into the second, and observer and interpreters of jurisprudence of the Court, such as academics and journalists, into the third category. The table shows the answers to generic questions such as the tension between majoritarian democracy and constitutionalism, and then lists answers to specific question on the effects of presidentialism, the role of precedence, the view on the effectiveness of the legislature, and the role of scandals in the second term. The interviews were semi-structured elite interviews that gave subject sufficient time to freely elaborate and explain their answers. Subjects occupied leading positions within their respective institutions (for a closer explanation of the methodology, see Appendix C).

There are two sets of arguments subjects presented to defend the decision as arising from normative and legal facts rather than political convenience. When pushed on the differences between 2005 and 2010, they pointed to the importance of precedence and the interpretation of political scandals as a sign of institutional decay induced by the effects of excessive presidentialism. In their argumentation, this required judicial activism in the defense of the integrity of the Constitution.

¹⁶⁷ In Appendix C, the methodology of these elite interviews as well as the data for my entire interview pool is summarized. It additionally included subjects close to the legislature and executive.

Table 4.5: Interview data – views on constitutionalism inside the Constitutional Court.¹⁶⁸

<i>Constitutionalism and Democracy</i>	First Order Observation (N=14)	Second Order Observation (N=9)	Third Order Observation (N=14)
Tension between majoritarian democracy and constitutionalism is real	6	4	4
Limits to reform within the text of the Constitution	10	4	1
No limits to reform other than procedural	2	1	
<i>Presidentialism</i>			
Expansive de-jure Presidential powers	5	5	
Expansive de-facto Presidential powers	5	6	2
Ineffectiveness of Congress	7	2	2
Relate substitution to Uribe's Presidency	3	4	
Reject the relation between the substitution and Uribe's presidency	1		1
<i>The two decisions (noted changes between 2005 and 2010)</i>			
First re-election set precedent of only <i>one</i> re-election	6	1	
Difference of scandals in each term	6	5	

Source: Conducted and compiled by the author

The 2005 decision judged *one* immediate re-election as feasible under the constitutional regime. This then set a precedent for changes to the norm in the constitution that outlined presidential term limits, which, to be overturned, required good explanation and a very plausible justification of necessity. Many subjects confirmed that

¹⁶⁸ Questions: Can you explain the tension between the sovereignty of the people and the ability to reform the Constitution? Can you explain the role of the judiciary in the Colombian Constitution? What was the importance of democratic security and did it justify re-election? What were the important changes between the first and second decision regarding constitutional reform and re-election? How did the political scandals affect the decision? What importance did the revelations regarding the so-called *Yidispolítica* scandal have? How important were the official investigations by the Supreme Court in the *parapolítica* scandal? Did the image of an institutional crisis resulting from a negative decision regarding re-election matter in deliberations?

in 2005, the relatively volatile improvements in terms of security warranted the need to complete the program of *Democratic Security*. This was not as readily apparent in 2010. There was no good, *objective*, argument put forward that explained why the Court should go against its own precedent other than positions that were rooted in the democratic will and these did not suffice to alter constitutional guarantees.

More damaging to the re-election cause was, however, not so much the lack of a justification for another term, but the apparent dangers of a powerful president coupled with an impaired legislature. Respondents explained the difference between the first and second Uribe administration and highlighted the multitude of scandals in the second term. Even more, it is not only the quantity of scandals that was noticeable, but the quality as well. Interviewees noted some general scandals of corruption and nepotism as well as gross human rights scandals such as the *false positives*, but were fairly unequivocal in that the most damaging revelations concerned the intrusion into the judicial quarters in the course of the wiretapping scandals orchestrated by the DAS.¹⁶⁹ This directly affected the institutionalization of judicial independence and was viewed as a severe breach of confidentiality and even a threat to the democratic and constitutional foundation of the country. With these signs of institutional decay, the fear became immanent that another term would further undermine the stability of the democratic order.

DAS-Gate and the wiretapping of magistrates were, of course, a direct consequence of *parapolítica*, and the co-optation of Congress by groups at the margin of legality that undermined the horizontal accountability function of that branch of government (see previous chapter). Given the constitutionalist turn in Colombia towards viewing the charter as a living Constitution, it is normatively difficult to see the question of another term in the executive isolated from the developments that occurred in the legislature. Since political scandals highlighted the weakness of the legislature and the effects of presidentialism, it only makes sense that the normative focus shifted to the

¹⁶⁹ Interview subject no. 4 (auxiliary judge), 12 April, 2013; Interview subject no. 9 (Constitutional Court judge), 26 November, 2012; Interview subject no. 16 (Constitutional Court judge), 26 November, 2012; Interview subject no. 26 (auxiliary judge), 15 March, 2013; Interview subject no. 37 (auxiliary judge), 24 April, 2013.

checks and balances of the Constitution as an expression of the separation of powers.¹⁷⁰ Since another term in office provided Uribe with the opportunity to pack critical oversight offices (such as the Bank of the Republic and the Attorney General's Office), whose independence is crucial for effectively exercising that control, the danger of further eroding the constitutional order was tangible. Therefore, subjects reckoned that the application of the substitution doctrine was not a convenience or just legitimate, but in fact a necessity.¹⁷¹

In conclusion, if the standard explanations for the Court's behavior pose more problems and questions rather than explaining the outcome and behavior of the Court, the question remains: why did the Court decide the way it did? The reconstruction of the jurisprudential development of the substitution doctrine and the processes within the Constitutional Court revealed one particular moment that had significance for the final decision: the majority's insistence on the compliance with procedural rules of deliberation and fully test the constitutional reform in regards to competence defects. Counterfactual reasoning leads us to conclude that history would have unfolded fundamentally differently were it not for that perseverance in favor of sound procedure. Therefore, it is the implementation of deliberation in legal reasoning that requires explanation.

4.4. *La ley cuenta* – law matters: reason and procedure inside the Court

In Colombia, lawyers and judges often claim: "*la ley cuenta*" (law matters). This can have a rather banal meaning along the lines that judges do not impose their will, but only apply the law, which essentially defends judges' function against suspicions that they act politically without democratic legitimation. There is a deeper meaning expressed in this claim that surfaces, if we view it through an analysis of the procedures that result in legal decisions. It begins with the manifestation that positivist rules always require

¹⁷⁰ Interview subject no. 2 (Constitutional Court judge), 3 May 2013; Interview subject no. 7 (auxiliary judge), 10 April, 2013; Interview subject no. 9 (Constitutional Court judge), 26 November, 2012; Interview subject no. 33 (Constitutional Court judge), 8 April, 2013.

¹⁷¹ Interview subject no. 2 (Constitutional Court judge), 3 May 2013; Interview subject no. 7 (auxiliary judge), 10 April, 2013; Interview subject no. 9 (Constitutional Court judge), 26 November, 2012; Interview subject no. 33 (Constitutional Court judge), 8 April, 2013.

interpretation and it is therefore more complex to validate what the law actually is. Moving from abstract norm, consecrated in text, to application in concrete situations through the production of legal decisions requires at least three steps of interpretation: what are the concrete facts and their legal significance, what is the constitutional norm and the Court's jurisprudence on these norms, and how do these relate to one another. The specification of the relation between concrete facts with legal significance and constitutional norm is the essence of the legal decision. The process of going through these questions is fairly systematic, yet, despite the standardization of procedure and inquiry, magistrates are never fully detached from socio-political biases and do in fact exercise a of form public reasoning (Alexy, 1989). All of these factors combined, turn the phrase "la ley cuenta" into a description of a profound interpretive process that takes place in a politically charged context.

The implementation of deliberation aims at shielding the discursive procedure from the political context. The necessity arises, again, from the tension between majoritarianism and constitutionalism, which Habermas describes as law's inherent claim to "validity regardless of its positivity", and the political will's intention to achieve "collective goals, regardless of the normative constraints that authorize it" (1996, p. 136-137). The dilemma for the constitutional judge then is the task to uphold, both, individuals' private autonomy and citizens' public autonomy "*uno actu*" (Habermas, 1996a). As Habermas, and Arendt before him, theorized, the internal tension of positive valid law can be bridged by communicative power and communicative freedom. While the other institutions in a liberal democracy are functionally specified to defend and uphold the various interests that make up society in the law making process, the constitutional court's specification is loaded with the more "mysterious goal of upholding the rule of law" while, as an unelected body, lacking direct democratic legitimacy (Hübner Mendes, 2012). The implementation of specific procedures to come to legal decisions is key to bridge these contradictions in the function and role of the constitutional judge. The point of legal decision-making in constitutional bodies is to at establishing truths of what the law of the land is, but the rules governing the process accept at the same time that individuals with biases have to make value judgments. These personal values that individual judges may hold are constrained by the role and function

of courts that cognitively establish boundaries of legitimation. These boundaries, in turn, are upheld in carefully protected discursive spaces, in which individual magistrates are held accountable by their peers to not tread beyond the boundaries of legitimation. In the end, it results in a situation, in which the magistrate's most "potent weapon is the coherence of her discourse".¹⁷²

By briefly reviewing normatively informed models of the reasoning judge, we will see that procedure and the implementation of deliberation is of critical importance to uphold a coherent, independent, and autonomously created discourse. The 2010 decision to declare Uribe's second re-election reform unconstitutional is a good example of how procedure can withstand political polarization.

4.4.1. Models of the reasoning judge – between the constitutional and democratic imperative

Liberal normative theory loads the institution to constitutionally review legislation with expansive cognitive capacities in the role of the court as a public reasoner (Rawls, 1993) or Herculean arbitrator that coordinates from a Archimedean point (Dworkin, 1986). Consequently, Constitutional Courts are situated accordingly central in their respective system that coordinates between power and rights. Majoritarian and deliberative theories a la Habermas, on the other hand, sideline the courts in their normative systems, because they allege constitutional courts either invert the democratic principle by their anti-democratic, elitist selection and composition (Bickel, 1962), or because "the operation of law would simply not comport with the transformative claims to which deliberative politics should be permeable" (Hübner Mendes, 2012 p. 10). With the help of procedure and the principle of proportionality as the guiding tool in constitutional adjudication, we can actually identify a middle ground that does not neglect the importance of participative and transformative claims inherent to democratic politics nor does it devalue the special role assigned to constitutional courts.

We get to the middle ground between these conceptualizations of constitutional judges by first showing the shortcomings of either model. The contention with the more liberal versions of the constitutional judge is that it presumes a position outside of social

¹⁷² Interview subject no. 18 (Constitutional Court judge), 30 March, 2013.

and political forces that make the interpreting judge somewhat of a loner. In modern democracies, this is an unrealistic understanding due the ubiquity of social and political power and constant interaction with law. Most interviewees reinforced that judges are not free from social and political biases. The crucial point is that these are filtered through institutional and deliberative structures. The majoritarian and deliberative models for their part undervalue the force of *legal* reasoning and do not sufficiently appreciate how it can shield itself from undue political influence. Additionally, deliberative theories' fear of assigning too much transformative capacities to courts and develop and enforce a valid rights system has been put into doubt by the judicialization of politics that has been particularly prevalent in Latin American countries in the last two decades (Angell, Schjoden, Siedler, 2005).

We can take the phenomenon of the judicialization of politics in governance systems that suffer from malfunctions and political pathologies as a starting point to develop a model that assuages the contention that courts lack democratic legitimacy but exercise vast powers. First of all, the increasing importance of courts in Latin America (as elsewhere) is closely related to their functions in separation of powers models, where, ideally, they exercise the monopoly over the interpretation of laws and their application to concrete cases (Cameron, 2013, p. 42). This function to translate text into language and deeds also involves a representative function; but it is representative of arguments and not votes or interests (Alexy, 1989, p. 16). Kumm, for example, argues “it is not clear what the issue of deep principle could be, that would condemn judicial review, but not electoral representation” because “there are no plausible reasons to identify ‘the people’ with the voice of one institution, even when that institution is a Parliament”, and not with another (Kumm, 2007, P. 26). After all, “in the real world of modern territorial democracy, the right to persuade a court to veto a policy is at least as empowering as the right to change policy” (Kumm, 2007, p. 27). In the context of the Colombian Constitutional Court, we have seen that citizens have successfully leveled complaints to have their rights to basic health care provisions respected. In the run up to the re-election decisions, civil society organizations, on either side of the debate, presented their positions in writings as well. Legal language emanated by the legislature remains general

and requires specification (Alexy, 1989). Therefore, the presentation of arguments in court proceedings is assisting the process of its application to concrete cases.

When placing constitutional courts in the context of modern democracy, in which actors engage deliberatively with each other, it becomes additionally difficult to assume that the court as an institution is void of linkages with society. As Kumm explains, courts engage in Socratic contestation, which is a “practice that gives institutional expression to the idea that all legitimate authority depends on being grounded in public reason, that is, justifiable to others on grounds they might reasonably accept” (2007, p. 4). Courts ascertain whether the settlement of the disagreement between the public authorities and the rights claimant is in fact reasonable, but they are not in the business of settling reasonable disagreements. Evidently, all relevant social actors can bring their arguments to the table and present their defense, which then, in an ideal type setting, almost necessarily forces utility maximizing actors to persuade others with reasons and arguments and not with resources at their disposal. This was exactly the dynamic prevalent in the re-election decision, when magistrates insisted on the soundness of the procedure in order to uphold the dependability of the reasoning process itself.

The Socratic model then incorporates notions of deliberative democracy and connects them with judicial institutions that actively, but not paternalistically, engage in the political process. It is therefore particularly suitable for counteracting political pathologies that can belie even reasonably functioning democracies, but has had very devastating effects in places such as Colombia that have long suffered from a number of predicaments: thoughtlessness based on tradition (not primarily applicable in this case), illegitimate reasons rooted in performative claims to the general good trespassing the limits of public reason (ideological claims), and the utilization of coercive power. Crucial is that the rights bearer has access to contestation and justification and that the court evaluates the proportionality of the claims in a reasonable manner. In the re-election decisions, via the substitution test, the Court evaluated such claims and came to the conclusion that two consecutive terms were justified, but three were not. Proponents of another re-election could only present performative claims that upheld the necessity for another term on the basis that it served the will of the majority. They could not, however, sufficiently explain why the greater good were to benefit from another term.

The normative ideal of Socratic contestation is somewhat elusive, because it functions not from a cosmologically fixed moral universe or normative principles, but gives expression to the multitude of diverse and often conflicting moral universes united in one democratic nation state. It therefore focuses on the validity of the structures, in which these universes interact, and defends the sanctity of deliberative procedure. In its core, it has three normative imperatives tied together in Alexy's rules of reason: (1) prevent a rationally unmotivated termination of argumentation, (2) secure both freedom in the choice of topics and inclusion of the best information and reasons through universal and equal access to, as well as equal and symmetrical participation in, argumentation, and (3) exclude every kind of coercion—whether originating outside the process of reaching understanding or within it – other than that of the better argument, so that all motives except that of the cooperative search for truth are neutralized (Habermas, p. 230; Alexy, 1989, p. 136-137). This then accepts that judges may have a background formed by specific political and ideological biases. It can even accept that the ultimate decision taken overlaps with these biases. It cannot accept, however, that the reasoning resulting in these decisions is rooted in these biases and defies the better *legal* argument that would lead into a different direction.

In the specific context of the Colombian Constitutional Court, subjects spoke of the tranquility of the process essential for the search for judicially sound and coherent verdicts. It essentially aimed at shielding the actual space where deliberation takes place from any kind of coercion – be it in the form of public pressure or private pandering to interests. In the end, this protection of the deliberative space helps us to explain why – in contrast to the predictions of the strategic paradigm – judges change their opinion during a deliberation process. It shows that opinions and even preferences are not as static as the strategic paradigm suggests, but subject to change.

4.4.2. The institutionalization of deliberation in Colombia's Constitutional Court

There are three dimensions important for our understanding of the way judges deliberate and that this dissertation sought to investigate (from micro to more macro level): interpersonally between the individual magistrates; publically, between the magistrates

and the broader public; and institutionally with the other branches of governments and their respective institutions. The third, inter-institutional, dimension was the subject of the last chapter, which entailed the inquiry into the *choque de trenes*. Here, I want to highlight the micro-institutional components of deliberation.

Two assertions are important to close the analysis of the deliberating judge: 1) interviewees were well aware of the fact the judge in general and the constitutional judge in particular face the specific conundrum of having to exercise a task of great importance and authority with very little democratic legitimization; 2) judges are, like any other human, socialized in a specific context, and therefore also exhibit biases towards potentially contentious issues just like any other individual. They do not have superhuman capacities to reason unmitigated from outside influences.¹⁷³ These assertions, however, do not entail that their function to arbitrate in constitutional matters of great public importance is compromised by their individual preferences. Rather, preferences retreat behind the exercise of public reason, if reasoning and deliberation is properly implemented.

Table 4.6 below presents an overview of the data from the interviews on questions of deliberation inside the Court. In the column to the left are phrases that describe the institutionalization of deliberation and the columns to the right list the responses, in which subject made the particular claim. It makes readily apparent that there exists virtual consensus amongst magistrates and auxiliary judges that the deliberation process itself is the essence of judicial independence. The reasons for this valuation of deliberation are also clear. Above all, interviewees wanted to prevent the politicization of the legal process and were adamant to protect the integrity and coherence of the Court's decisions by isolating it from public forces. In order to succeed in this endeavor, there were a number of informal rules for the conduct inside and outside the *Sala Plena*.

¹⁷³ Interview subject no. 10 (Constitutional Court judge), 8 March, 2013; Interview subject no. 26 (auxiliary judge), 15 March, 2013; Interview subject no. 28 (Constitutional Court judge), 19 November, 2012.

Table 4.6: Interview data - the implementation of deliberation in Colombia's Constitutional Court.¹⁷⁴

Institutionalization of Deliberation	First Order Observation (N=14)	Second Order Observation (N=9)	Third Order Observation (N=14)
Deliberation process <i>sine qua non</i> of independence	8	4	
Judicial vs. political argumentation	5	3	
Institutionalization of Deliberation	First Order Observation (N=14)	Second Order Observation (N=9)	Third Order Observation (N=14)
No <i>quid pro quo</i> negotiations in Court	7	2	
Isolation of deliberation process	7	5	
Differentiation along lines of judicial thought	2	2	
Change position as consequence of deliberation	5	4	
Legal Discourse			
Legitimacy lies in the coherence of the discourse	5	3	
Incoherence through politicization of discourse	5	1	

Source: Conducted and compiled by the author.

The first level of analysis concerns the question of public deliberation, or interaction between court and public. Such *public* interaction is evidently of crucial importance in democracies that claim to subject institutions to popular control. Given the exposed position and peculiar conundrum a court faces arising from the lack of direct democratic legitimacy, we might expect the Court to cultivate a particularly open “public persona”. For magistrates, however, it was not so much the public interaction that creates accountability and transparency, but the cohesion in the argumentation. Therefore, rather than increasing public exposure, the Court diminishes public interaction in the attempt to guarantee the tranquility of the process in the decision making procedure. The aim is to

¹⁷⁴ Question: Can you explain the role of deliberation amongst magistrates before and during the process of reaching a decision? What is your view on the press and publicity as democratic phenomena? Does the media have an impact of media discourse on decisions by the Court? How does the Court communicate with the media? Is it legitimate?

assert the autonomy and independence as a collective body and assert the dominance of legal reasoning over political reasoning.

In the time between a demand for constitutional review is submitted (or automatically triggered) and the actual decision taken by the Court, there are two ways of interaction between judges and the bigger public at large: public consultations and interviews with the media. When the litigation for a case begins, the Court invites various parties from Colombian civil and political society to draft their opinion in regards to the decision. This involves civil society groups, religious representatives, and political groups. These groups opine in writing to the Court and the documents produced are the most important input the Court receives from Colombia's society. The reasoned decisions of the Court reiterate and summarize the opinions in favor and against a particular law or amendment, before proceeding to the Court's own interpretation of the legal questions and facts in a given case.

While the process of sending in written opinions is fairly open, public consultations between the judges of the Court and civil society at large is very under-utilized. In fact, the Court has made such negative experiences with public consultations that they terminated them after the political reform in 2003. The contention was that the public pressure on the process of deliberation became thus intense that public consultations existentially hurt the tranquility of the process.¹⁷⁵ This is somewhat surprising given that in these meetings with the public, the magistrates and the Court do not respond to questions, but rather inquire actively from the litigators. It makes sense, however, to avoid the public spectacle of consultations in favor of entirely reasoned and argued written statements, if viewed through the preference of legal reasoning over political reasoning. Public consultations might cut down on the substance of an argument in favor of rhetorical effects, while written texts discipline the author to think through the argumentation and present the entirety of its merits. Interestingly, the Court debated the issue of public consultations, its democratic merits as well as potential pitfalls arising from the public exposure, in the course of the re-election decision (see below).

The second aspect of participation by the Court in the public sphere through media interviews is an even finer line to maneuver. As a public institution that makes

¹⁷⁵ Interview subject no. 29 (professor of law), 10 May, 2013.

crucial decision of high political importance, the Court cannot withdraw entirely from the debate – in particular since it faces peculiar legitimation issues. Nevertheless, the posture by the Court in such engagements with the public is best described as extremely cautious. There are interviews with the Court and the printed press.¹⁷⁶ It is readily apparent that the magistrate fairly tightly manages these interviews and reveals none of the particular positions within the Court. It begins with the fact that only the current President of the Court, who is annually elected by the Court in secret ballot, speaks in interviews with the media. The obvious intention behind is to secure a single unified voice.

The informational degree of such interviews is very limited. Positions within the Court are kept secret until the final decision is revealed in writing, which also provides space for dissenting opinions. This helps to protect the autonomy of deliberation, because it is easier to change an opinion during the process and keep an open mind, if no individual judge feels the obligation to justify perspectives that are not the final ones. The President of the Court safeguards this autonomy by only, and noticeably, speaking in the third person during interviews (“the Court will inquire”), and referencing the *Sala Plena* when asked specific juridical questions. This is very different, for example, from the United States Supreme Court, where individual magistrates engage in a substantial amount of “external deliberation”, while apparently engaging in fairly little internal deliberation. Thus, these interviews are much more an exercise of pedagogy than political interaction: the Court wants to inform the public about the juridical questions at hand, but never reveals who holds what opinion on the Court and expose itself or its members to accusations of bias. In addition, the treatment of interviews speaks to the inferior ability to properly disseminate the opinions and arguments in comparison to the reasoned decisions.

From the interaction between court and public, we move to the implementation of deliberation in the Court itself and the interpersonal relations between individual magistrates. It evolves around the most sacred institutional space of the Constitutional Court: the *Sala Plena*. Mauricio Gonzalez, an Uribe selected magistrate of the Constitutional Court (and president of the Court at the time re-election was decided),

¹⁷⁶ I have not come across interviews on television or radio.

referred to it as the coliseum and arena.¹⁷⁷ Above all, the special protection it receives in the implementation of formal and informal rules serves the purpose to uphold the dominance of legal reasoning over political reason. Therefore, deliberation inside the *Sala* is a most private affair and each magistrate prepares individually to bring the best arguments to the debate in the plenum.

The imperative to let the force of the better argument triumph precludes specific conducts between magistrates. These are not written down in a formal rulebook or regulatory statute, but are the informal rules of how magistrates govern their interaction.¹⁷⁸ Evidently, there is interaction between magistrates before a decision or a deliberation process. Just like in any other working environment, judges have social contact with their peers. The critical point is that social gatherings are exactly that; social meetings where political or juridical questions are never discussed. Individual magistrates discuss specific legal questions – and potentially also political debates – only with their dispatch of auxiliary judges, who support them with research in a constitutional issue prior to the debate in the plenary chamber, but are otherwise extremely reclusive on issues of political and legal importance.

While the working relationships between judges is often collegial and friendly, the professionalism of the task stipulates a very specific collegiality that makes *quid pro quo* agreements between judges least accepted. Magistrates do not “sell” their vote to another judge for that judge’s vote in a future case. Not only were interviewees adamant about this point, they called such conduct the end of the deliberative body itself.¹⁷⁹ This point in particular stresses that deliberation inside the Court depends on the absence of political considerations and the predominance of legal reasoning. Auxiliary judges do sometimes interact with one another and potentially speak on legal question, but rather than trade votes or opinions, exchange know-how.¹⁸⁰

The implementation of debate inside the Court follows a route similar to the way university seminars are conducted. The procedure in regards to a particular constitutional

¹⁷⁷ Student workshop at the Konrad-Adenauer-Stiftung, Bogotá, 20 November, 2012.

¹⁷⁸ Republic of Colombia. Constitutional Court of Colombia. 2008. “Reglamento Interno”. Last accessed on: 2 February, 2015. <http://www.corteconstitucional.gov.co/lacorte/reglamento.php>.

¹⁷⁹ Interview subject no. 10 (Constitutional Court judge), 8 March, 2013; Interview subject no. 30 (Constitutional Court judge), 20 November, 2012.

¹⁸⁰ Interview subject, no. 26 (auxiliary judge), 15 March 2013.

demand is initiated by the random selection of the *ponente* (rapporteur) from the nine magistrates. The elected *ponente* then prepares the initial study (*ponencia*) into the juridical questions posed by a particular constitutional issue. The project presents his/her take on the legal issues and is distributed to the other magistrates and their clerks, who then have time (usually around ten days) to prepare their own interpretation of the legal issue based on the arguments presented in the first *ponencia*. Everyone then summons well-prepared for the deliberation in the *Sala Plena*, where only the magistrates and the general secretary are present. Deliberations end when the President of the Court puts the *ponencia* to a vote in the *Sala*. The President has the right to conclude discussions, but interviewees explained that debates are never arbitrarily terminated, but only if the discussion has come to a natural ending. If the *ponencia* does not reach the five-vote majority threshold, it is given to another magistrate, who introduces his/her project. This can be repeated until a majority has been found.

The implementation of deliberation has as its premise that rationality does not equate certainty. As Alexy states “anyone who equates rationality with certainty must renounce the idea of a theory of legal argumentation” (1989, p. 293). Legal reasoning can never eliminate the uncertainty implicit in general practical discourse, because it is itself a form of practical discourse. It only aims, under the constraints placed on judicial and legal reasoning, to “limit the range of the discursively possible in as rational a ways as one can” (p. 288). Legal discourse only claims for itself to establish ways to exclude coercion so as to better engage in a cooperative search for truth. The final section of this dissertation specifically focuses on how the Court managed to implement these parameters of legal reasoning in the second re-election decision.

4.4.3. Ethical legal reasoning in the Constitutional Court

These more generic considerations have shown that strategic interaction between magistrates is not only absent, but actively prevented. Integral is the institutionalization of informal rules that protect the integrity of the legal reasoning process as well as the privacy of deliberations themselves. The final part of this chapter, and indeed the final substantive part of the dissertation, will look at how these generic considerations played out in the specific case of the re-election reform implemented through Law 1354 of 2009.

The debates on the issue of re-election covered a lot of ground and problematized further issues highlighted here, such as the role of public hearings in the decision making process of the Court. Most decisive in the trajectory of the decision was that the procedure was diligently followed and insisted on. As mentioned above, a majority on the Court rejected a strategic and more convenient route in the final analysis in favor of investigating a jurisprudentially and deliberatively more consistent procedure, which in the end resulted in the verdict that more than two re-elections are unconstitutional violating axiomatic principles of the Constitution.

When the Court receded for deliberation on the question of another re-election, it was imminently clear that this, again, was a very delicate issue, which required a high degree of diligence and care in the reasoning process. This becomes readily apparent in the notable absence of public expositions of the Court on the issue. As an interviewee explained, the tendency of magistrates is to refrain from public commentary regardless of the issue, but in this instance privacy understood in the terms outlined here was of critical importance. The only thing about the procedure of deliberations that became known outside the walls of judicial palace in Bogotá was that Humberto Sierra Porto was the selected *ponente*, which, as my interviews suggested, was met with relief by those, who were not chosen by lot.¹⁸¹

Since there was not much interaction with the public via the press, the implementation of public forums and hearings on the case could have been another arena to connect the institution with the wider public at large. However, as explained, the Court terminated such events already in 2003. In 2009, non-governmental organizations, the *Alianza Democrática* and *Dejusticia*, submitted demands that the Court would implement a public hearing on the case. The majority decided that a public hearing was unnecessary, because a multitude of actors had already submitted positions in writings and these

¹⁸¹ Interview subject no. 18 (Constitutional Court judge), 30 March, 2013. The dissemination of the selection of the ponente was not an indiscretion of the Court, but a normal procedure. Incidentally, a citizen submitted a demand for Sierra Porto to impede himself from the case, but it was turned down, due to an incoherent argumentation in the demand that made references to *tutelas*, which did not touch on the issue at stake in this case. In addition, the media confirmed that the Court generally speaks very little and is intensely reserved about its positions. This was particularly true for this case, as Humberto Sierra Porto is someone that never talks to the press. Interview subject no. 25 (journalist), 8 April, 2013.

served the democratic imperative that citizens are involved in issues of public importance.¹⁸²

The selection of the *ponente* had an effect on the way discussions evolved in the 2010 decision. The draw placed the task to design the initial study with Humberto Sierra Porto; a constitutional lawyer with a distinct positivist orientation to interpret the constitution, who had dissented in 2005 against the substitution doctrine. He had argued that it violated the written text of the constitution, because the extrapolation of axiomatic principles in substitution test was an example of judicial decisionism. Consequently, his initial analysis of the legal question in 2009 did not include an inquiry into whether the proposed reform replaced central tenants of the constitution. Rather, the focus was whether the Court had competence to review the reform at all – since it was implemented outside the political institutions for the purpose of referendum – and if the procedure of the amendment process followed the stipulations outlined by the Constitutions. As explained, the Court held that since referendum had to pass Congress, there was no doubt about the Court’s competence to review the amendment. It then decided that the procedural flaws were so substantial and evident that the reform had to be declared unconstitutional resulting in a reasonably unified decision with 7-2.

The Court could have stopped here and declared the law unconstitutional on procedural grounds and have the backing of a robust majority. In addition, the dissenting judges were two out of the three appointed by Uribe, who had faced some scrutiny regarding their autonomy.¹⁸³ It would have certainly been a more convenient way of concluding the discussion and present a strong, unified position in a highly delicate case with high and powerful interest at stake. The *ponente*, too, was promoting such a course of action to refrain from an analysis of the question of competence in favor of a more unanimous decision. However, five judges, the five to vote against the referendum in the Court’s final decision (Calle Correa, Mendoza Martelo, Henao Pérez, Vargas Silva, Palacio Palacio), insisted that *all* legal questions be analyzed. Since the doctrine of competence had been applied before, it required scrutiny in this instance as well.¹⁸⁴ They

¹⁸² Republic of Colombia. Constitutional Court of Colombia. Sala Plena. “Acta No. 3. 27 January, 2010”.

¹⁸³ Interview subject no. 29 (professor of law), 10 May, 2013.

¹⁸⁴ Interview subject no. 7 (auxiliary judge), 10 April, 2013; Interview subject no. 26 (auxiliary judge), 13 March, 2013; Interview subject no. 29 (professor of law), 10 May 2013.

asked their dispatches to prepare everything in favor or against the applicability of the theory of the substitution in this case.¹⁸⁵ What is noteworthy is that the five magistrates consulted their dispatches together and inquired about the doctrine. In the end, they upheld the doctrine of competence and applied it to the question of re-election, arguing that it violates the fundamental principle of the separation of powers. The final vote was 5-4.

This verdict was presented to the public on February 28, 2010. This time the Court did do something unusual. While decisions are normally only presented in a *comunicado*, read out by the President of the Court, this time the entire Court was present as President Mauricio Gonzalez – an Uribe selection – read to the nation how the Court decided. The evident purpose was to show unity behind the decision, even if the decision was not unanimous. President Uribe accepted the decision and explained that the *Estado de Opinión* does have limits and the Court had bindingly decided that two consecutive terms in the presidential office are its boundaries. This reaction and the widespread acceptance of the Court's verdict showed that in its core, constitutional democracy implies the happiness for some and tranquility of the rest. Opponents to another term and proponents of Uribe could live with the Court's decision and respected its autonomy.

4.5. Conclusion

The point of departure for this chapter (as for the dissertation) was that when the Constitutional Court declared a potential third term in the presidency unconstitutional in 2010, it manifestly displayed its own institutional independence against a charismatic President, who commanded expansive *de jure* and *de facto* power. Prior to that decision, Colombia's Constitutional Court has shown a much more careful attitude in inter-branch constitutional disputes. This fundamentally changed when the Court for the first time declared a constitutional reform unconstitutional in its entirety on competence grounds. The inquiry showed that the substitution doctrine is a novel, and far-reaching reinterpretation of norms that outline the Court's review powers and enables the Court to

¹⁸⁵ Interview subject no. 7 (auxiliary judge), 10 April, 2013.

limit the ability of Colombia's majoritarian institutions to arbitrarily alter the political charter. At the same time, President Uribe was not like other presidents in Colombia's history. He had translated his power and popularity in a healthy sense of mission aiming at fundamentally transforming and reforming the political landscape in Colombia. He legitimized his transformative capacities by appealing to notions of natural leadership, conservative values, and communitarian social bonds between rulers and ruled. The decision to withhold another term brought generic tensions to the surface that are implicit to democratic governance: the majoritarian claims to democratic legitimacy and the constitutionalist constraints placed upon the exercise of power. In the end, *Democratic Security*, Uribe's political program came into conflict with principles of constitutionalism that stipulate that the exercise of political power must be *legally* sanctioned and faces limitation arising from the basic fact that a society is pluralistic and cannot be intelligible understood as being represented by one General (democratic) Will.

This development gave rise to the evident question of what was behind the tangible and objective increase in judicial power. The analysis embedded this question in the quest of how to understand the behavior of the constitutional judge. In a brief review, I showed that the most recent advances in the study of judicial behavior are to be placed in the field of rational choice institutionalism that views the judges as a strategic actor. Therefore, I asked whether this increase of authority can be accounted for with reference to strategic behavior or if other – namely discursive – interpretations of judicial behavior are better suited. Three observations from the field of rational choice institutionalism provided the proper context: 1) courts tend to act more independent when the executive and legislature are non-aligned; 2) courts tend to defect from the executive towards the end of the presidential term; 3) the Colombian Constitutional Court is a prudent strategizer that upholds the principles but defects on the merits in prominent cases, and then applies the principles in less prominent cases.

In order to test these observable implications, the Colombian case provided an extra-ordinary well-suited context, because the Court answered constitutional questions regarding reform of presidential terms in office twice. Moreover, there were ten constitutional decisions (including the two re-election cases) between 2002 and 2010 that quoted the substitution doctrine, which is the dogmatic centerpiece of the Court's

jurisprudence regarding review of reforms of the political charter. Therefore, we could conveniently observe whether the Court's authority increase followed a strategic or discursive logic.

The results showed that in this particular case, the Court did not act strategically, but followed discursive imperatives. As shown, there was a slight fracture in the disagreement between the executive and the legislature in 2009. This did not, however, affect not affect Uribe's majoritarian tendencies to utilize his popularity to control the legislative agenda. The reform did not face substantial obstacles in Congress, and magistrates still weighed the decision before them in the *Sala Plena* as highly contentious. The second point – that courts tend defect at the end of presidential terms – is not really applicable in this case, because either re-election decision would have spelled the end of Uribe's time in office, yet only once did the Court decide unfavorably. Thus, we were left with the prudent strategizer hypothesis. Again, we had to reject this hypothesis for this particular case. The Court did not acquiesce with the executive in prominent cases to then apply the core of the doctrine in less prominent ones, but built its jurisprudence in the most salient cases: Uribe's central political reform from 2003 and the two re-election decisions.

Since conventional explanations could not provide satisfactory answers to the puzzle at the centre of this dissertation, this inquiry turned to the institutionalization of discourse in the Court as an important factor for the Court's independence. The reconstruction of the substitution doctrine and the 2010 decision regarding re-election reform showed that a critical moment during the deliberation was when the eventual majority insisted on the procedure to apply the substitution test. Consequently, this dissertation sought to embed the outcome in an analysis of the implementation of deliberation in Colombia's Constitutional Court – specifically Socratic Contestation – because “a rights-based proportionality review shares a number of salient features and puzzles with the practice of contestation that the Socrates of the early Platonic dialogues became famous for” (Kumm, 2010). The task of the constitutional judge is not to be free from biases and political opinions – an impossible endeavor in modern democracies – but to assess reasons. Her task to assess reasons does not usurp powers from other elected officials, but tests the adequacy of arguments these officials put forward against the text

of the constitutional order. Judicial review is therefore not undemocratic, because “proportionality-based judicial review institutionalizes a right to contest the acts of public authorities and demand a public reasons-based justification” (Kumm, 2010).

Since contestation of acts by public authorities in a court of law is “as basic a commitment of liberal democracy as the right to vote, [...] the real question is not whether judicial review is democratically legitimate, but how judicial institutions ought to be structured to best serve their democracy-enhancing and rights protecting purpose question becomes” (Kumm, 2010). The analysis in this chapter exactly served this purpose and brought a number of critical formal and informal rules to the surface that helped the Court protect a tranquility of process essential for the issuance of a coherent legal discourse.

The implementation of deliberation essentially followed the three imperatives of rational argumentation Alexy devised in his theory of legal argumentation: (1) prevent a rationally unmotivated termination of argumentation, (2) secure both freedom in the choice of topics and inclusion of the best information and reasons through universal and equal access to, as well as equal and symmetrical participation in, argumentation, and (3) exclude every kind of coercion—whether originating outside the process of reaching understanding or within it – other than that of the better argument, so that all motives except that of the cooperative search for truth are neutralized (1989).

Since judges were well aware that they themselves have biases stemming from their socialization and are tasked with deciding questions of fundamental public importance, the primary goal of rules governing the deliberation process was to ensure legal reasoning prevailed over political reasoning. In order to protect the sanctity of the process, judges followed formal and informal rules. The former are inscribed in the internal statutes and involve rules governing the selection of the President and the drawing by lot of the *ponente*. In some instances, these rules even provide coercive resources to whoever gets elected President of the Court, who then has the ability to terminate discussions and put the matter to a vote. However, informal rules assuage this potential leeway of political logic into legal debates by prohibiting that argumentation can be arbitrarily terminated. There usually exists consensus on when to terminate deliberation and vote on the merits of a case.

Informal rules between magistrates serve the imperative to protect the integrity of the *Sala Plena* and affect how magistrates interact with the wider public and with each other. Public interaction between magistrates and civil society – be it through interviews or consultations prior to a decisions – is limited. Various parties can submit opinions in writing and only the President of the Court submits to interviews with the press, but mostly restrains herself/himself to answers in the third person. Public input in the form of written arguments is welcomed, while input in the form of public meetings is shunned, because the latter might cut down on the substance of arguments in favor of rhetorical effects. The most important informal rules governing the interpersonal interaction between judges are that social gatherings exclude politicking. Political matters, and much less specific cases, are not to be discussed outside of the *Sala Plena*. Hereby, the Court attempts to exclude coercion emanating from within the institution itself. This also counts for the stipulation that *quid pro quod* agreements between judges for votes are strictly prohibited. Votes are not to be sold in prior agreements, but argued for!

Given the fortress of rules and regulations judges erected around the deliberation process, it is not surprising that they feel save enough to change their opinions – sometimes in very fundamental ways – if the force of the better argument and the accountability exercised by their peers delegates them to do so. Table 4.6 indicates just that. Even in the case of the substitution doctrine – without a doubt a controversial and basic piece in the jurisprudence of Colombia’s Constitutional Court – judges have shifted their argumentation. C-141/10 was not the last time the Court invoked the substitution doctrine. In 2012, in C-1056/12, the Court denied a reform of the pension plan for Congress. This time the *magistrado ponente* was Nilson Pinilla Pinilla, who, in 2010, rejected the constitutional reform on procedural grounds and did not vote with the bloc that rejected the reform on competence grounds.¹⁸⁶

The ability and appearance of fundamental shifts in opinion goes a long way of explaining what motivates judges to act. This inquiry already showed that the assumption that the Court is a careful strategizer does not match the evolution of the substitution

¹⁸⁶ Interview subject no. 33 (Constitutional Court judge), 8 April, 2013. *Revista Semana*. “Cambio extremo en la Constitución”. Last accessed on: 12 February, 2015. <http://www.cej.org.co/seguimientoreforma/index.php/noticias-en-medios-reforma/542-cambio-extremo-en-la-constitucion>

doctrine. Recently, the strategic account of judicial behavior has made efforts to better incorporate different desires that judges follow when they take decisions and it would be disingenuous to fail to engage with that literature with the finding laid out. Two of its pioneers, Knight and Epstein (2013), who have viewed judges as pursuing policy ideals and turn their preferences into law, have made a remarkable acknowledgement. They write “data and research developed by scholars (mostly from other disciplines) have demonstrated that although the policy goal is crucial to understanding judicial behavior, it is not the only motivation; it may not even be dominant for many judges” (2013, p. 12). They recount three elements to the strategic model of judicial behavior: the *a priori* specification of goals; the inclusion of constraining factors such as the preferences and likely actions of other institutions, colleagues, and public; and the institutional framework that structures the interaction amongst themselves as well as with other actors (p.12). Their correction concerns the first point, arguing that while it has been theoretically possible to include various *a priori* motivations, the strategic account had practically limited itself to maximizing policy as the sole motivational force.

Knight and Epstein survey the literature and coalesce the findings into five groups five of factors that can motivate judges: 1) job satisfaction; 2) external satisfaction; 3) leisure; 4) income; 5) promotion. When we look at the development of the substitution doctrine in Colombia’s Constitutional Court, it is difficult to make a case leisure, income, and promotion as the dominant factors. As judges in the highest court of the land, Constitutional Court magistrates have reached the pinnacle of their careers. Knight and Epstein recount that following precedent can serve judges’ utility function by reducing the time spent on a case and opening up time for leisure. This, too, is difficult to view in this instance, for the Court set precedent and did not follow any. Moreover, increasing review authority leads to a higher future workload and not a reduced one. Dieter Grimm, a famed German Constitutional Court judge, explained in a personal conversation at a conference that magistrates on that Court always dreaded having to decide for increasing the Court’s authority, since it entailed more work in the future.

Job and external satisfaction are more complicated. The former implies subjective professional dimensions (the feeling of doing a good job in the eye of the public) as well as social dimensions involving relations with peers, clerks, and staff. External satisfaction

can involve reputation, prestige, power, influence, and celebrity. Thus, in these categories of desires are notions that Weber summarized as status as well as recognition for being able in the craft of writing reasoned decisions (Shapiro & Levy, 1994). In the realm of judicial decisions, job and external satisfaction boil down to the notion that judges are actors that seek to improve their reputation. Recognition by peers and staff for being a nice person does not really affect the way a judge would decide. The data showed and several interviewees exclaimed that social interaction and professional interaction was carefully separated and being on friendly terms with each other had no affect on how decisions were resolved.

Nevertheless, reputation seeking has an interesting and telling caveat that is important for the understanding of this case. The only way reputation becomes tangible with a legal decision is if the actor, namely the judge, considers that other actors (other judges), or the public at large, will recognize a particular decision as skillfully crafted. In other words, it centers on the capacity and skill of legal reasoning a specific actor displays. This view is indeed plausible for there is some evidence in the data that shows that some form of prestige was influential amongst constitutional judges in Colombia. One subject recounted that magistrate González was viewed with suspicion due to his closeness with Uribe prior to selection to the Constitutional Court. The peers feared that his reasoning was politically motivated and not grounded in legal categories. The subject reported, however, that González' reputation had grown enormously for the skill and providence he displayed in his reasoned decisions.¹⁸⁷ We cannot say with definite confidence whether the judge did in fact intend to reap the recognition of others when drafting legal opinions, all we know is that such a utility is feasible. Importantly, however, reputation always involves the others' judgment to make sense. It tacitly assumes an inter-subjective relation between the judge that wants to feel recognized and those that actually do the recognizing. As a consequence, the actor that seeks recognition cannot know *a priori* what will in fact increase her appreciation, because it is not up to her to bestow the acknowledgment. Crucially, it thereby also defies one basic tenant of the strategic judge paradigm: the apriority of preferences and their stability throughout the process of legal reasoning.

¹⁸⁷ Interview subject no. 29 (professor of law), 10 May, 2013.

It is in this sense that we can make reputation-seeking productive, because it is my contention that it not only must accept judicial decisions as resulting from an inter-subjective activity, it also reinforces the centrality of the *practice* of legal reasoning. Knight and Epstein also make interesting proclamations in this regard. They call for a renewal of the discipline by properly connecting with what legal scholars in particular have been saying for a long time: law matters. Therefore, in order for the strategizing actor to have conceptual validity, it needs to be able to incorporate the importance of law for the self-maximizing agent, even though “many political science studies over the past 60 years have sought to refute” the centrality of law (2013, p. 25). The findings in my analysis suggest that there is indeed pleasure and, therefore also a motivation, for finding the law. This finding of law, however, requires a collective effort around the exercise of public reasoning. It is the debate amongst judges itself that motivates judges to take specific decisions. As one subject poignantly stated the plenary chamber of the Constitutional Court is nothing short but the coliseum of legal decision-making. Its integrity symbolizes the *sine qua non* of coherent and democratic legal decisions. It is centrally concerned with the soundness of procedure and the absence of coercion during deliberation. It is for these reasons that the Colombian constitutional judge in this instance is better understood as a discursive actor rather than a strategic one for the contention is not that judges have a desire and motivation, but that preference are *a priori* and static.

5. Conclusion: Between democratic security and democratic legality. Implementing ethical reasoning in Colombia's Constitutional Court

5.1. The Question

The ancient Roman God of transitions and new beginnings, Janus, most often depicted with two faces pointing into opposite directions (Graves, 1975, p. 130 & 137), is quite possibly one of the most overused analogies in the social sciences employed to describe contradictions and inconsistencies, but in the Colombian case just as likely one of the most fitting ones. The specifically Colombian contradiction consists in the longevity of relatively democratic institutions that coequally exist with extremely high levels of violence and insecurity (Acemoglu & Robinson, 2012, p. 377). This close proximity between legality and illegality, stability and instability, constantly re-appeared in Colombian political history. It is for these reasons that Colombia has for the most part of 20th century been *the* example of a democracy with an adjective, ranging from “restricted”, “controlled”, to “besieged” (Collier & Levitsky, 1997; Hartlyn, 1988 & 1989; Kline, 1995; Archer, 1995; Archer & Shugart, 1997; Bejarano & Pizarro, 2005).

In 2010, the country faced a new, and in the context of its own history, unprecedented challenge. The question of constitutional reform to allow presidential re-election, benefiting an extremely popular and powerful President, Álvaro Uribe, put Colombia's separation of powers model to the test. Colombia's Constitutional Court had to decide how far the legislature can go in amending the political charter before its basic principle are unrecognizably altered. The Constitutional Court turned down the possibility on the basis of two legal components of constitutional reasoning: formal/procedural defects and quasi-substantive defects in the creation of the reform law. Conveniently, this was not the first time, the Court decided on the issue of presidential re-election: in 2005 a reform project benefitting the same president was before the Court. Since the outcome differed in that the Court deferred to the executive's position on most counts in 2005 and defected in 2010, it was safe to infer that something fundamental

changed. Explaining this shift was the task of this dissertation. Understanding judicial power as judges' institutional independence as well as their vertical and horizontal control authority, three key observations stood at the beginning of this analysis: 1) President Álvaro Uribe was an extremely popular and powerful president, who had little scruples to utilize his transformative capacities to initiate a far-reaching reform agenda that served his own political agenda; 2) the Court's authority appreciably increased between 2005 and 2010; 3) the jurisprudence of the Court involved a doctrine that is not explicitly mentioned in the Constitution, but a re-interpretation of the norms outlining judicial review of constitutional reforms.

Comparative politics has tools for investigating and better understanding the historical uniqueness of a process, the post-genesis evolution of institutional structures, and the micro processes within an institutional framework. Placing the aforementioned observations in the context of such conceptual tools resulted in three precise questions that guided each chapter:

- Does the 1991 Constitution amount to a critical juncture in Colombia's political history?
- What did the post-genesis evolution of Colombia's constitutional jurisprudence look like?
- What motivated judges to develop and apply the substitution doctrine, which struck down Uribe's reform to extend the number of terms in the presidential office?

These questions and the investigations into the merits and substance of Colombia's institutional history provided a holistic picture of Uribe's peculiar position in Colombia's history and, above all, the novelty of the 1991 Constitution that established the Constitutional Court. I then moved to dissecting the post-genesis institutional evolution of legal institutions and found that incremental change comes via institutional learning. Finally, this dissertation highlighted the role of contestation in legal politics that is difficult to grasp with the rather static conceptualization of the rationalizing judge.

5.2. The 1991 Colombian Constitution: the critical juncture revisited

Chapter 2 was the most expansive historical chapter and, in order to explore if the 1991 Constitution can be intelligibly understood as a critical juncture, contrasted developments at the end of the 1980s and early 1990s with processes that go back as far as the 19th century. The Colliers understand critical junctures as “periods of significant change, which typically occur in distinct ways in different countries or in other units of analysis” and result in long(er) lasting, distinct legacies (2002, p. 29). These junctures are distinguished from other important historical periods by three components: their preceding conditions, the moment of crisis, and the legacies left by the decisions taken during the critical juncture to overcome the crisis.

To investigate if the 1991 constitutional moment constitutes one of those instances in political history that places the patterns of political life on a distinctly new and consequent path, I had to increase the observational data points by turning inward and longitudinally analyze instances of institution building in Colombia’s history to identify variations in the outcomes. After all, this inquiry concentrated on one specific case, Colombia, and a constitutional decision that was taken in a specific constitutional and political context. The methodological framework dictated to look for other instances of institutional engineering processes in Colombia’s history that followed a similar pattern. This ideal type trajectory could be described as follows:

Political Crisis/Violence → Institutional Engineering → (New) Institutional Framework

The Thousand-Day-War (1899-1902) ushered in the Reyes Reforms, *La Violencia* (1948-1957) in the National Front Pacts, and the drug violence of the 1980s in the 1991 Constitution. These events conveniently provided the basic instances of a most similar research design and to validly measure the effects of each juncture on Colombia’s political system, I differentiated between several sub-systems and held them constant in the analysis of each observational point. The result is that the 1991 Constitution does indeed constitute a critical juncture in Colombia’s history that has resulted to more profound institutional change, and resulted in identifiable legacies.

Following the Colliers' methodological imperatives, this chapter first detailed the base line conditions by exploring the fundamentals of Colombian institutionalism that are rooted in the 19th century post-independence epoch. Historically, the state exercised only a very deficient monopoly of violence. The weak distribution of public goods – above all security – resulted from the concoction between state infrastructure and patronage systems during the genesis of the “two-party-state”. Regional caudillos built local power strongholds by tying a following to their *domus* and co-coordinated with each other through the party labels of Colombia's traditional parties. Two features reflect the clientelistic disposition of the Colombian polity. Firstly, parties were cross-sectional in leadership and following. Socio-economic elites dominated the leadership in both parties, while lower classes populated the followers, reflecting the membership of their patron. Secondly, the normative expectations, which in the context of political institutions that left very little space for meaningful socio-political change must result in disappointment, were restrained through a specific legal discourse. It became known as *Viejo Derecho* and is most centrally focused on a legalistic formalism in the interpretation of constitutional stipulations at the expense of rights protection.

These base line conditions served as comparative parameters of the two most violent and destructive instances of internal conflict in Colombia's 20th century history: the Thousand-Day-War and *La Violencia*. The original crises that led to violent bloodshed essentially consisted in the inability of elites to compromise and strike deals that satisfied the entire range of either party's membership and leadership. The fighting eventually exhausted without producing a clear victor, but signaled to elites that the original political arrangement was insufficient in containing the clashes of interest and identity between them. In both cases, an elite-driven and controlled process of institutional reform eventually established a new arrangement that guaranteed political participation for each party. Above all, reforms in 1910 and 1957 conserved forms of clientelism by placing them on a more stable *formal* institutional setting without fundamentally altering the underlying socio-political interaction. What was lacking was an institutional reform that opened egalitarian paths for participation, socio-economic and socio-political involvement, which could have resulted in sustainable growth and development.

The 1991 Constitution fundamentally differed from these previous instances of institutional engineering. It not only went the furthest in altering the formal political framework, the original crisis preceding the juncture resulted from a profound insecurity that laid open what I call a discursive cleavage between the normative claim of a democracy and the political reality of a system besieged by violence and incapable of providing channels for political participation. Importantly, neither theory nor prior conditions can convincingly explain why students decided to act at that particular moment. It was the collected grief felt after the assassination of highly talented political leader that led to spontaneous collective action. The initial proclamation at the silent march initiated a process of communicative action, during which students first debated in small settings in Bogotá's universities, then joined ranks with students from the entire country, and then started to publically and forcefully organize a push for foundational constitutional reform. Thus, to speak with Robert Frost's crossroad analogy, the movement to implement the constitutional reform took the extra-institutional path rather than the road through Colombia's formal institutions.

The 1991 constituent process was not only unique because it evolved from a profound normative cleavage and unprecedented crisis moment that defies rational explanation, but also because the actual juncture – the constituent assembly in 1991 – followed patterns without precedence in Colombia's history. Its composition featured a number of actors that had been historically excluded from politics: the leftist party movement founded out of the M-19 guerrillas and representatives of indigenous groups. In contrast to negotiations during the previous instances of institutional engineering, the Conservative-Liberal hegemony of formal public affairs was broken. The constituent process in 1991 differed from the other instances of institutional engineering by virtue of its public nature. Citizens could get involved in debates at various stages of the process. The product was astounding. The assembly created a very progressive political charter that impressed with a number of constitutional novelties.

There is not a doubt that the immediate legacy of the 1991 constitutional transformations was profound, yet, whether it was for the better is another question. Evaluating the immediate legacy of the new Constitution, the chapter concluded that it is best described as ambiguous. The clientelistic relations engulfing Colombia's formal

institutions slowly moved from the inside to the outside of the traditional two parties taken the party-system as it was known down with it. Politicians became electoral entrepreneurs, who (particularly in rural areas) deliberately aligned with forces at the margin of legality in order to reap electoral triumphs. Those armed groups at the margin of legality benefitted by gaining the aura of legitimacy required to shield them from legal prosecution. In the middle of these transformations stands the shift towards an electoral system that was intended to boost the national circumscription of the Senate. Contrary to expectations, regional politicians succeeded in pooling regional votes and sought support from armed campaigners that organized the sufficient electoral threshold in areas under their control.

The most profound changes concerned the judicial system. Two new formal bodies were introduced – the Constitutional Court and the Superior Council of the Judiciary – three different types of rights introduced to the level of constitutional norm, and a novel mechanism implemented to enforce rights. All of these novelties reflected original student original demands and grievances on the human rights situation in Colombia. From the abundance of extrajudicial killings perpetrated against political actors, human rights activists, and union leaders, it follows naturally to situate rights more centrally in the constitutional framework and implement mechanisms that aim at their protection and affirmation. In short, the implemented changes best reflect the movement's agency.

In the end, it was readily apparent that the 1991 Constitution – its origin, creation, and implementation – was unprecedented in Colombia's history and it is therefore fair to conclude that it constitutes a critical juncture in Colombia's history. Most of all, it is key to observe that the genuine communicative process produced a very ambitious Constitution that consecrated far-reaching rights guarantees. The profundity of changes, of course, results in new questions. Above all: How do these rights guarantees uphold in a context of conflict and insecurity? The Constitutional Court showed a high propensity to enforce rights in the following years and embraced a jurisprudence that diverged from the formalism associated with the old Constitution. The next interesting question then became, how does such a new and self-confident actor establish itself in such an environment. This led the investigation to look at the post-genesis evolution and analyze

the path-dependence logic that historical institutionalists theorize as the consequence of critical junctures. The rights and rights enforcing mechanism of the new Constitution provided a well-suited testing ground.

5.3. Institutional learning in judicial institutions

As in Chapter 2, the third chapter also placed a conceptual definition at the beginning of the analysis. We saw that path dependence is defined as the idea that initial decisions in one direction induce further movements in that same direction later on. In order to get to the ground of post-genesis evolution of legal institutions in Colombia, the analysis turned on the question of whether path-dependent logic can be utilized to inquire developments that have strong normative connotations. The judicial branch was the branch that exited the 1991 constituent process most profoundly refurbished, and the *tutela* was, without a doubt, one of its most important institutional novelties. *A priori* considerations do not exclude judicial institutions from path-dependent analysis. After all, contingency in the moment of creation as well as a tendency to value earlier legal decisions over later ones invoke characteristics of path dependent development. The novel part here was that focusing on judicial institutions with strong connotations to rights and human dignity provides a level of analysis that must take argumentation about constitutional values into consideration.

The conflict at the centre of this chapter was indeed a complex affair, because it involved several levels of analysis. The so-called *choque de trenes*, or train crash, evolved around the question whether decisions by the high courts are open to rights review by the Constitutional Court (their jurisdictions are crashing). Additionally, since Members of Congress are investigated by the Supreme Court for criminal allegations and do not enjoy parliamentary immunity, the distributive dynamic between the courts can be amplified by the interest of political actors in the legislature and executive. All of this is embedded in a highly normative and value laden discourse that invokes the foundational meaning of the Constitution, since the *tutela* is a central mechanism in the 1991 charter to protect human rights and dignity. This set-up gave us three critical elements that make this case valuable for institutional theory: 1) the proliferation of new courts and contradictions between normative principles in the new Constitution result in a contest

over jurisdiction between the Constitutional and Supreme Court; 2) the legal functions assigned to each branch of government in Colombia's checks and balances system turns the fight over jurisdiction between the high courts into a *political* question that involves majoritarian institutions; 3) the affixture of rights to the standing of *tutela* complaints adds a layer to the analysis that implicates the meaning of foundational norms of the new Constitution and their affects on constitutional adjudication.

Engaging the historical institutionalist literature on path dependence and elaborating on key points of an ideal type definition of the concept, I developed four guiding questions for the investigation:

- Did the jurisprudence regarding the *tutela* follow a mechanical and linear line from its inception in the 1991 Constitution?
- Did earlier decisions matter more than later decisions, and if so, did it forego the possibility to decide differently in later questions on the same merit or do earlier decisions open new possibilities for later decisions on the same merit?
- If the Constitutional Court changed or modified its jurisprudence, did the modification follow mechanically from earlier decisions or did it base its change in principled explanation engaging a legal argumentation evolving around legal values and shifts in legal context?
- If there was a clear break, did that break in turn result in a logically following pattern, indicating reactive path dependence?

These questions then led to design the inquiry as a longitudinal study, focusing on two political scandals evolving around the criminalization of Colombia's Congress and the strategies employed by Members of Congress to avoid prosecution (*proceso 8000* and *parapolítica*). The analysis focused on how the courts interacted as the political drama played out. In the course of the *proceso 8000*, Members of Congress were sued for their vote of absolution in the investigations against President Ernesto Samper. In the 2000s during Uribe years, Members of Congress were accused of having cultivated close relations with paramilitaries associated with the drug trade for electoral purposes. In both cases, the investigations by the Supreme Court became the subject of *tutela* complaints

submitted for revision with the Constitutional Court, thereby placing the conflicts in the realm of right guarantees.

In the final outcome, the investigation showed that neither the institutional design nor normative positions of the most important actors involved shifted. The courts held on to their jurisprudential positions in the *choque de trenes*, maintaining that their decisions are not open to rights review (Supreme Court) or that any factual decision by any public institution is subject to rights reviews (Constitutional Court). The functions of the courts remained the same nor was the *tutela* itself regulated by legislation. The only decree issued in 2000 minimally specified the order of review. Thus, the basic disagreement at the root of the so-called *choque de trenes* remained until the end of the Uribe administration in 2010.

Even though the generic disagreement over the precise application of the *tutela* did not subside, the political scandal developed very differently. In the *proceso 8000* only few Members of Congress were eventually sentenced for their collusion with drug traffickers, while during the *parapolítica* 102 Members of Congress were investigated between 2006 and 2010. With the same token, the political consequences also varied. In the *proceso 8000* political pressure and exposure to the scandal subsided with the Constitutional Court's decision to uphold the inviolability of legislators. It effectively terminated criminal investigations and neither President nor Congress were held accountable for their trespassing. *Parapolítica* investigations, on the other hand, were not halted by an unfavorable Constitutional Court decision. Inquiries continued and in the course overcame several strategic obstructions, legislators utilized in the attempt to prolong the process and effectively evade prosecutions. In the end, thanks to the activism of the Supreme Court, the numbers of investigations and verdicts greatly outnumbered the cases concluded in the *proceso 8000*, and, together, the courts exposed fundamental issues of democratic representation and governance by disclosing the symbiotic relations between *congresistas* and armed groups at the margin of legality. President Uribe's ability to maneuver in the political arena, too, was affected by the courts' activism. His unprecedented control of the legislature was endangered by the investigations, because they disproportionately effected Members of Congress from his coalition. Moreover, he

was forced to spend a lot of political capital to maintain his ability to dominate the political scene and fight off the negative public discourse.

The diverging trajectory between the two scandals highlights the importance of legal facts on the development of political scandals and consequently on institutional development. Legal facts are those “facts” produced in a legal process and have deeper institutional impact than other socially produced “facts”. We saw that even in the *proceso 8000* without legal investigations and independent prosecutions there would not have been “a *proceso 8000*, nor a trial against the president, nor a political crisis” (Uprimny, 1996, p. 120). The increasingly hostile public debate was consistently pushed forward by new revelations that resulted from the legal processes against Samper’s campaign managers and eventually the processes against Members of Congress. Similarly, the most potent revelations of the *parapolítica* scandal were those revealed or affirmed by judicial investigations. While the initial revelations about potential paramilitary infiltrations of the political class – above all the declarations by the AUC commanders themselves – are significant, the scandal received a much more explosive dynamic, once these facts were confirmed and further investigated by judicial bodies. In the so-called *yidispolítica* affair, we furthermore saw that legal facts have a direct impact on constitutional adjudication. Had the involvement of Representative Yidis Medina been known prior to the first re-election decision, the outcome would have differed. Thus, legal facts are crucial for constitutional meaning making. I will return to this point shortly.

Finally, the centrality of legal facts for the continuation of developments required us to specify what caused the investigations to continue in one case (*parapolítica*) and be abruptly discontinued in the first case (*proceso 8000*). In order to find satisfactory answers to these questions, I turned to the normative development in each political affair. Here we could identify a “united front” between the Supreme Court and the Constitutional Court during the *parapolítica* affair as the key difference to the developments during the *proceso 8000*. My interviewees repeatedly argued that the 1999 (SU-047/99) *tutela* decision in favor of Viviane Morales fundamentally obstructed the Supreme Court’s work to further investigate criminal behavior. Similarly, the same subjects held that during the *parapolítica* affair, the Constitutional Court did not interfere with the Supreme Court’s investigation and often backed their interpretation of normative

clauses. As seen, during the *parapolítica* scandal, Members of Congress repeatedly attempted to avoid investigations and utilized four strategies: 1) invoke the transitional justice jurisdiction of the Justice and Peace legislation; 2) submit *tutelas* on the grounds of their special rights of parliamentarians to freely opine without the threat of coercion; 3) claim due process rights violations resultant from the constitutional “privilege” to be criminally investigated by the highest court without the chance of appeal; 4) resign from their seat and thereby also renounce the congressional investiture that involves that investigations are directly passed to the Supreme Court (hereby hoping to not only avoid the reach of the Supreme Court, but also be submitted to the jurisdiction of regional courts where they could more easily exert influence). Only the fourth tactic listed here was successful in slowing down the penal process against incriminated legislators, because the Supreme Court itself decided to refrain from investigations. Once it changed its jurisprudence, the Constitutional Court also supported that interpretation.¹⁸⁸

The final analysis then concluded these observations and put the results in the context of the conceptualizing institutional development along the lines of path dependence. The indeterminacy of a linear development that ties the outcome in the *parapolítica* and *proceso 8000* to early decisions in the *choque de trenes* and/or the Constitution itself led me to manifest three points of a path dependence of legal argumentation:

- Once a decision is taken, the cost of reversal increases, but not exponentially so. Rather, reversals require good explanations rooted in precedent and change of context.
- Earlier decisions do matter more than latter decisions, since discourse (in particular legal discourse) builds on logical coherence. However, earlier decisions might also open new questions further down the road that can significantly alter the path.
- There cannot be a practical point of no return, because all decisions are theoretically forever open to contestation.

¹⁸⁸ Interview subject no. 3 (Supreme Court judge), 18 April, 2013; Interview subject no. 11 (Supreme Court judge), 22 April, 2013; Interview subject no. 33 (Constitutional Court judge), 8 April, 2013.

Contributions in the historical institutionalist school have made advances towards including compliance as a variable for institutional change in order to provide a holistic picture that can also incorporate small, and incremental changes. As Mahoney and Thelen contest, written norms can never be attuned to cover the full range of possibilities of real life situations and always require interpretation. Thus, “the need to enforce institutions carries its own dynamic of potential change”, because “of the interpretation and implementation of these rules” (p. 10). Attuned to the findings in my dissertation, I suggest that the outcome in the *parapolítica* affair was a result of institutional learning that works in tandem with internally, reputation seeking actors, who yearn the recognition of their peers. In the end, it was simply not argumentatively feasible to defend parliamentary immunity as a bulwark for free deliberation, when Members of Congress utilized the norm for impunity. Given the argumentative procedures within a court and the continuous production of legal facts about nefarious relations *congresistas* entertained, we can term this process institutional learning, in which norms are applied differently in order to result in a normatively more appealing outcome. This result then begs the question of what determines a normatively appealing outcome. In order to provide some answers to this proposition, we need to look at the internal working of the institution in order to get an understanding of how courts come to decisions and how they establish what is normatively more appealing.

5.4. The substitution doctrine and the discursive judge

The first two substantive chapters placed the 2005 and 2010 Constitutional Court decisions in the historical and institutional context of Colombia’s turbulent history, which was a long, but nevertheless necessary, route to take. Chapter 4 turned to the contention over Uribe and his re-election bids. These decisions conspicuously brought out the inherent tensions in democratic governance that evolve around majoritarian claims to democratic legitimacy and the constitutionalist constraints placed upon the exercise of power. The principle task was to explain the apparent increase in judicial authority and autonomy. This not only required specifying the observable implications arising from the strategic and discursive model of the constitutional judge, but also made the extrapolation

of the constitutional/majoritarian divide indispensable. Only together can we fully appreciate the importance of the implementation of legal reasoning.

This chapter took the separation of powers model involving the strategic judge as its starting point, because it can (and has been) applied to contexts outside the United States and generated the most recent contributions to the study of judicial behavior. The state of the literature provides three central observational implications applicable to this case: 1) courts tend to act more independent when the executive and legislature are non-aligned; 2) courts tend to defect from the executive towards the end of the presidential term; 3) the Colombian Constitutional Court is a prudent strategizer that upholds the principles but defers on the merits in prominent cases, and then applies the principles again in less prominent cases to defect from the executive.

To test these observations, we explicitly and in detail elaborated the peculiar and unique role Álvaro Uribe played in Colombian politics and how it showed in this specific contention over reforming the Constitution. We saw that Colombia under Uribe – particularly in the second term – displayed trends that O’Donnell first identified as part of a new animal in comparative politics: delegative democracy. We saw that Uribe stands out as a charismatic and unusual ruler in Colombia’s history, who commanded expansive *de jure* and *de facto* power. He displayed a charisma that united a large part of the population behind him and with his popularity disciplined political rivals into obedience. Importantly for the purposes of this study, he had translated his power and status into a healthy sense of mission aiming at fundamentally transforming and reforming the political landscape in Colombia.

Uribistas legitimized the reform program by appealing to notions of natural leadership, conservative values, and communitarian social bonds between rulers and ruled. As a delegative president, he viewed and presented himself as the political expression of the entire Colombian nation. His political program, Democratic Security, envisioned a polity of tightly knit relations between rulers and ruled that placed the leaders back on their pedestal and instated a blind trust towards their capacity to rule. From such communitarian notions of political legitimacy, he and his associates developed a legitimation to reform the Colombian state rooted in the so-called *estado de opinión* (state of opinion). With this doctrine, Uribe claimed that only popular elections and

opinion are a legitimate control of political power and not horizontal controls that lack such grounding in popular legitimacy.

The Uribe years not only stand out for the personal charisma the president himself displayed, but also for the transformations of the party system, which first enabled his comet rise to power, helped him to cement his grip on Colombia's institutions, and then reflected the criminalization and co-optation of Colombia's Congress. Uribe's election to the presidency was only possible because he ran as a renegade candidate, listed himself as an independent, and presented his policies as distinct from the traditional two-party political game that had dominated Colombia for the previous 150 years. As shown, the 2002 electoral cycle produced a partial implosion of the party system that rendered it unrecognizable due to denationalization into many little micro electoral entrepreneurs that left voters with little coherent and identifiable national policy plans (Pizarro, 2002). Effectively, this created a very diverse, but also easily co-opted, Congress that responded to the special interest of illegal forces in the country (Lopez Hernández, 2010). In other words, the legislature as the most central horizontal control institution of liberal democracy was effectively debilitated. Together, the ineffectiveness of Congress and Uribe's propensity to rule as he saw fit, created a tense situation that placed the democratic order under strain.

(Neo)-constitutionalism does not per se reject the notion that the only legitimate political authority emanates from the people, but generically stipulates that power is limited by written or unwritten constitutional norms. Fundamentally, while the majoritarian model of democracy holds that "power is at the disposition of a political will as a means for achieving collective goals, regardless of the normative constraints that authorize it", constitutionalism reintroduces the importance of the normative content of law in order to legitimately speak of the *legal* authorization of power (Habermas, 1996a, p. 777; Rawls, 1993). Firstly, this implies an adherence to formal rules and procedures in the formulation of positive rules. Secondly, neo-constitutionalism goes beyond the mere legalism of majoritarian rule, and further implies the inclusion of rights – not least, minority rights – to guarantee that the majority's will is not compromised by social and political structures of power. The normative basis for the constitutionalist paradigm is not the general will, or other collective entities such as nation and race, but a plurality of

individuals that recognize each other as equals. The Constitutional Court itself expressed this sentiment, quite poetically, in its decision to withhold a third presidential term:

The notion of people that accompanies the conception of constitutional liberal democracy cannot ignore the notion of pluralism, which involves the coexistence of different ideas, races, genders, backgrounds, religions, institutions or social groups. Such a heterogeneous people accepts that all power must have limits and therefore agrees, as a sovereign people, and in accordance with the democratic model, to become self-restraint and establishes channels through which to express all its diversity. Therefore, in contemporary states the voice of the people cannot be appropriated by one group of citizens, even if it is a majority, but it arises from the procedures that guarantee a manifestation of this plurality (C-141/10; translation by the author).

Uribe's motto to create social cohesion through trustful relations between rulers and ruled is the majoritarian caveat of Democratic Security, and the Constitutional Court's manifestation that society consists of a plurality of wills is the countermajoritarian caveat implicit in Democratic Legality.

In the final analysis, we could not refer to conventional explanations from the field of judicial behavior to clarify why Democratic Legality prevailed over Democratic Security. Even though Uribe's coalition lost a critical partner in Congress with *Cambio Radical*, the perception in the Court was not that this made the decision any lighter, nor did magistrates consider the political weight behind Uribe to be much less significant than in 2005. After all, his popularity ratings were as high as in the first term and even peaked in 2008. It was readily apparent that the President was still hugely popular with Colombians and a large majority of them favored another term in office. Whether the timing of the decisions made any difference is impossible to assess, because either decision would have spelled the end of Uribe's time in office. Most importantly, however, the Court's decision is difficult to bring in line with the narrative of a prudent strategist. Contrary to its predictions every important development of the substitution doctrine coincided with an extremely important case for the executive. Not least the two re-election decisions were essential cases in the trajectory of the theory, which in 2010 ended all *uribista* hopes of another term for Álvaro Uribe.

The investigation showed that the institutionalization of discourse did indeed have an important effect on the outcome in 2010. After the Court had come to the conclusion that procedural norms were violated in the formation of the law that called for a

referendum, there was the apparent suggestion that the *Sala Plena* should refrain from a competence test in favor of a more united decision. However, the eventual majority insisted on the complete jurisprudential tests applied to the reform. This then resulted in the verdict that the reform not only incurred formal defects in its creation, but also competence defects: Congress was acting *ultra vires*.

The insistence on the completeness of procedure speaks to importance of the institutionalization of deliberation and the way magistrates identify with discursive practices. From the proverbial assertion that law matters (*la ley cuenta*), the analysis turned to theories outlining the importance of legal deliberation. Since written positivist rules always require interpretation, and judges always have some inherent biases, the procedures of implementing legal reasoning are of outmost importance. In order to guarantee a form of public reasoning that is oriented towards the ancient practice of Socratic contestation (Kumm, 2007 & 2010), deliberation in the Constitutional Court had three imperatives: (1) prevent a rationally unmotivated termination of argumentation, (2) secure both freedom in the choice of topics and inclusion of the best information and reasons through universal and equal access to, as well as equal and symmetrical participation in, argumentation, and (3) exclude every kind of coercion—whether originating outside the process of reaching understanding or within it – other than that of the better argument, so that all motives except that of the cooperative search for truth are neutralized (Habermas, p. 230; Alexy, 1989, p. 136-137). In the Colombian context, subjects spoke of the tranquility of process that is essential for the search of judicial sound and coherent verdicts.

Aware of magistrates' specific role to uphold the rule of law but lacking direct democratic legitimacy and the effects of individual socialization that induce biases, the Constitutional Court functioned with a number of formal and informal rules to guarantee that legal reasoning prevails over political reasoning. Rules involved protecting the sanctity of the *Sala Plena* by isolating it from public debates and guarding it against favoritism amongst individual judges: Individual positions were never revealed to the public prior to the conclusion of deliberation and judges did not engage in *quid pro quod* trades for votes in the chamber. Subjects viewed the *Sala Plena* as the coliseum of legal arbitration and its integrity was identical with the integrity of the institution as such.

Guarding the deliberation from undue influences had the important effect that judges can and do change their opinion. They have voted against their stated ideological preferences if the force of the better argument required them to.

5.5. Agency and the deliberative judge

All of these substantive chapters of the dissertation evaluated processes that have ramifications for institutional theory, and I want to contend that we need to incorporate the contributions of discursive institutionalism in order to paint a more holistic picture of institutions and their transformation. The second chapter highlighted the centrality of communicative action for the selection of topics and procedures to decide on a new foundational political charter. The third chapter unearthed the legal fact production of courts in post-genesis developments that decisively factored into the process of defining institutional boundaries and compliance with institutional stipulations. The analysis identified this process as a process of institutional learning. The fourth chapter problematized decision-making procedures inside courts that imply that judges are *practicing* law. The important factor here is that *practicing* law is tightly connected with deliberative practices of truth finding and constitutional meaning making. Together, these three points are in themselves important contributions to the most current debates in institutionalism and also pose questions for future research. To conclude this investigation, this last section will elucidate how these findings fit into the most recent contributions in the respective fields and make some suggestions for future scholarship.

The chapters have iterated that institutionalism has had difficulties accounting for change, unless it comes in an abrupt and impulsive manner that dislodges stable relations. As Mahoney and Thelen lament, “despite many other differences, nearly all definitions of institutions treat them as *relatively enduring* features of political and social life (rules, norms, procedures) that structure behavior and that cannot be changed easily or instantaneously” (2010, p.4; italics in the original). As they lay out, this bias towards continuity at the expense of smaller shifts is present in all three of the classical expressions of neo-institutionalism: historical, sociological, and rational choice institutionalism (p. 6). The contributions of those strands of political analysis are not in doubt, yet, the literature has started to focus on the more gradual forms of change and has

begun to build a canon that introduces smaller shifts in rule and policy frameworks. At the most general level, this dissertation is a contribution to this growing body of literature that addresses more subtle forms of change.

To properly understand human agency looms as the most fundamental contention against approaches that focus on continuity and lock-in structures. Discursive institutionalism makes the bold claim to better understand agency *and* gradual change by focusing on the versatility of discourse and how ideas are transported. It theorizes about how human agents – rather than actors – generate, interpret, deliberate, apply ideas and thereby create meaning. Vivien Schmidt long criticized that neo-institutionalists do not fully appreciate the centrality of ideas, even though politicians’ main task in democracies is to communicate ideas and thereby legitimate their actions. She explains that the traditional institutionalist schools still have very little to say about how “ideas go from thought to word, to deed, that is, how ideas are conveyed, adopted, and adapted” (2010, p. 309). She proposes a shift to a deliberation-focused institutionalism that centers on the volatile relationship between word and deed that has puzzled philosophers for centuries (Schmidt, p. 304).

The foundational condition for discursively engaging actors is the presence of some form of public. Actors engage in discursive practice, if there is an audience that listens and expects justification for action. Schmidt is correct to insinuate that this is case for public policies in all democracies (Schmidt, 2010, p. 305). Importantly, this is also true for strategic actors, because even strategic actors with fixed preferences, who engage in rhetorical action must convince and persuade an audience with *argumentative* rationality (Risse, 2002; Habermas, 1996). As a consequence, this argumentative logic of appropriateness also has validity for the discursive interaction in political settings. The applicability of discourse for the analysis of human interaction falls apart, however, when discourse and *publicness* is existentially threatened or non-existent. As we saw in the history of paramilitarism in Colombia, until the demobilization process between the Uribe government and the AUC forced the various actors to take public stances, relations between Members of Congress and paramilitaries were very stable.

Schmidt concisely summarizes four points that set discursive institutionalism apart from its classical siblings: 1) regardless of definitional distinctions, they take ideas

and discourse seriously; 2) they set these ideas and discourses in institutional contexts; 3) ideas carry “meaning” and discourse follows a “logic of communication”; 4) discursive institutionalism induces a dynamic into our understanding of institutional change that the other three institutionalisms, “equilibrium-focused” as they are, cannot comprehend, because the locked-in equilibria often pose as insurmountable (2010, p. 304). Consequently, she argues, the increased versatility of discourse as a concept helps to simultaneously “indicate the ideas represented in the discourse and the interactive processes by which ideas are conveyed” (p. 309).

When we look back at the chapters in this dissertation and the results they produced, we saw that meaning making repeatedly appears in the (re)-structuration of institutions: first at the broadest level when ideas were turned into text in the constituent process and then when text is translated into action. In the second chapter, the analysis of the processes leading up to the constituent assembly in 1991 and the debates in the halls of the Luis Angel Arango Library in Bogota disclosed the centrality of agency in collective action. Even under extremely difficult and dangerous conditions of a worsening civil war, the people managed to come together for free and open debates, installing a process that produced a formidably progressive document. The student movement owed most of its appearance to the spontaneity of human action that arise when a collective comes together in a common cause (in this case it was the collective grief over the assassination of a promising political leader). Moreover, throughout the debate, ethical and collective reasoning for the search of a common institutional framework – and not aligned interest or structure – tied the assembly of actors together.

The question of constitution-making has become a very prominent topic of comparative politics; particularly in the Latin American context. Ginsburg writes that “Latin America is something of a constitutional graveyard, in which formal texts have been replaced frequently over the past two centuries” (2014). As a consequence, an increasing number of scholars pay attention to various facets around the issues of constitution-making and the longevity of constitutions. Negretto most recently produced an outstanding contribution to the study of those constitutional moments that structure politics anew (2014). He understands the volatility and frequency of constitutions in Latin America as a chance to properly understand the politics of writing a political

charter and the forces at play at these junctures that until now remained behind the veil of contingency. In his carefully designed study, he shows that similar factors such as actors' resources and expectations about future political development affect the selection of institutional set-ups in such areas as electoral system and presidential powers. Intriguingly, what topics are selected for debates in constituent processes and how judicial institutions are constructed were outside the scope of Negretto's enlightening study.

This dissertation made a first effort at getting at these questions by posing that the initial crisis provided a discursive context that placed the human rights situation in Colombia in the 1980s at the centre of public debate. It suggests that it was not a coincidence that rights and judicial institutions became a central focus of the constituent process, given the normative crisis that preceded the critical juncture. Yet, Negretto is correct to call for more research and a broader scope to study topic selection in constituent bodies. The task is then to increase causal leverage by constructing comparative studies with a broader scope, across cases, to understand under what conditions rights become the central grievance of constitution-making. A positivistic study could take the result of implementing a Kelsenian high court model as supposed to the American model as an indication that the unification of rights under one jurisdiction was a primary concern of constituents and then work back to identify conditions at the beginning of such processes. Such a categorization can be quickly filled with data and provide a large set of observations that is amenable to broader investigations. Moreover, to identify actors and their arguments in a constituent process, rights can be disaggregated by their type. As seen the 1991 Constitution not only included private and civic rights, but also social and collective (cultural) rights. This, too, is amenable to cross-case quantification. Above all, however, this dissertation found that the discursive context and the activism of agents must be closely inspected and incorporated into the analysis. Therefore, future research must make an effort to combine classical approaches (be they quantitative or qualitative) that identify actors, their resources and the implementation of constitutional negotiations with discursive analyses, because constitutions reflect a societal consensus over the commonly shared values and identities that give future

political interaction meaning and significance. These values and identities are most often consecrated in the expression of rights.

In the chapter analyzing the jurisprudence of central features of the new Constitution's rights framework, path dependence proved too static to understand the rootedness of legal argumentation in practical discourse. Thelen already lamented in 1999 that path dependence is too contingent, in that the initial junctures that produce path dependence is unrealistic, resembling a blank slate rarely present in political interaction, and too deterministic in that the reproduction becomes too mechanical (1999, p. 385). This becomes readily evident in legal institutions, because as Robert Alexy powerfully stated on the process of coming to legal decisions: "anyone who equates rationality with certainty must renounce the idea of a theory of legal argumentation" (1989, p. 293). In sum, classical expressions of path dependence have placed too much emphasis on stasis by conceptualizing institutional developments along lock-in and equilibrium based mechanisms. Legal argumentation, on the other side, reopens previous decisions and argumentatively tests if former arguments still have validity under current context conditions, or if the parameters of an earlier decision need to be adjusted. There is an evident discursive nature in these procedures that enables judges to retain their agency and reopen previously closed processes.

My findings in the fourth chapter of this dissertation connect well with the corner stone of the incremental change model: including compliance as a crucial variable to explain institutional development. As we saw, the reopening of past decisions essentially evolves around the activity of making actors comply with specific constitutional norms and in concurrence with the explanation offered by Mahoney and Thelen, in the *proceso 8000* and the *parapolítica* affair actors brought resources to bear when the question of compliance with Supreme Court's decisions arose.

My contention here is that the incremental change model in fact converges with some stipulations from discursive institutionalism. As Mahoney and Thelen themselves explain, compliance as a variable is crucially important for explaining stability *and* change, because of the ambiguous origin of institutions and the resultant "degree of openness in the implementation of these rules" (2010, p.10). Implementing and enforcing institutions always involves "*interpretation, debate, and contestation*" (2010, p.11; italics

added). In other words, the real political action often takes place in the discursive sphere, in which actors engage over the specific meanings of clauses and norms, while general and normatively appealing principles remain relatively static (broad concepts like justice, democracy, the separation of powers, or effective representation in the legislature).

An intriguing result of the analysis of *choque de trenes* is that courts face distributive dilemmas, having to defend their own jurisdictions, but at the same time have to justify their positions and actions consistently, because they operate without direct democratic legitimation. Moreover, the judiciary and courts are institutions that create new institutions and institutional boundaries, because in a separation of powers models they have the monopoly over interpreting texts and translating the written word into speech and action. In other words, their task always requires something akin to being aware of Kant's categorical imperative, since their actions *always* turn into broader laws. Together, this sets incentives to aim for a consistency in argumentation and carefully consider the consequences of one's decisions in the broader constitutional context. That Members of Congress should not associate with criminal elements and, to the best of their capacities, represent the interest of their constituents fairly, is a relatively safe assumption about the role of legislators in constitutional democracies. From the discussion of the *proceso 8000* and the *parapolítica* affairs, we saw that judges became aware that interpreting parliamentary immunity expansively would end in impunity and prestige loss in the eyes of their peers. What I term institutional learning then fits well into the categorization of incremental change, since it evolves from within and does not require abrupt and wholesome change. I want to caution, however, to simply import the mechanical reproduction of institutional change of the traditional articulation into the incremental change model and not properly be aware of human agency.

There were more facets of the processes outlined in the chapter on post-genesis evolution of institutions that had critical discursive caveats. As seen, the capacity to re-evaluate norms in a new context was instrumental for the production of legal facts that developed a dynamic in the public discourse impossible for Uribe to contain – despite his broad powers and extreme popularity. When engaging with critics from NGOs – be they domestic or international – Uribe painted those that railed against his policies as friends of the guerrilla and enemies of the Colombian people, the courts could not as easily be

placed on the other side of a friend/foe distinction. After all, Colombians pride themselves as one of the oldest democracy of the continent and the courts in general embody that tradition of a relatively stable and democratic country. The public defamation strategy used by Uribe and his administration against the Supreme Court essentially built on two pillars: 1) insinuating that the evidence gathered by the courts was contaminated by the paramilitaries themselves; 2) the judges do not fulfill their constitutional function and acted out of lower motivations such as personal revenge against the president. Noticeably, they did not place the Supreme Court on the side of the guerrilla against Colombian democracy. In the end, neither strategy succeeded in discrediting the Supreme Court and its investigations, and forced the President to engage with illegal tactics to silence the magistrates. Evidently, the continued production of legal fact posed a real danger to the President's power.

The continued production of legal facts also played an important role in the processes of giving meaning to constitutional clauses. The absence of timely legal facts about the vote in the committee stage of the first re-election reform that involved Yidis Medina and Teodolindo Avendaño prevented the Constitutional Court from disallowing the first re-election reform on procedural grounds. On the other hand, when legally affirmed knowledge about relations between paramilitaries and Members of Congress was widely available, and cover-up campaigns could be related to the presidential office (as with the wiretapping by DAS of the Supreme Court's chambers), the production of legal facts factored into the creation of constitutional meaning. After all, the Constitutional Court's decision cited the effects of presidentialism on separation of powers models. The importance of legal facts for political strategies can be a valuable tool for future, quantitative analyses of communication, because it suggests a category that sets itself apart from other discursively transported facts in social settings.

The practice of meaning making became most evident in the fourth chapter that followed the decision making inside the *Sala Plena* of the Constitutional Court. It is by now a highly acclaimed accomplishment of the Constitutional Court to have developed a novel approach to a question that constitutional theory in general has had difficulties of addressing: *legally* sanctioning constitutional reform. Going back to the dispute between Carl Schmitt and Hans Kelsen, legal theorists have grappled with the distinction between

constituent and constituted power and what it means for the practice of politics. The Constitutional Court, with its jurisprudence delineating the difference between reforming and substituting the Constitution, broke into new territory that even legal theorists themselves have only begun to understand. This fact by itself makes the Court a pioneer in giving meaning to complex constitutional issues that have relevance beyond the Colombian case.

Still, the jurisprudential evolution of the substitution doctrine told us more about judicial behavior. The substitution test in Colombia's jurisprudence of judicial review regarding reforms of the political charter inquires if a reform touches on basic axiomatic principles of the Constitution, and if the reform unduly changes them beyond recognition. In other words, it is a dogmatic expression of the proportionality principle. The principle of proportionality analyses the legitimacy, suitability, necessity, and reasonability of a legal measure, when it is engaged in judicial review of laws or constitutional reforms. The substitution doctrine enabled judges to properly incorporate the legal context and, for example, engage with the outcomes of the clash between Uribe and the Supreme Court. In that way, the application of the substitution doctrine effectually resulted in specifying the meaning of constitutional clauses – namely the separation of powers. The end result not only validated the clause as a fundamental and axiomatic principle of the Constitution, it also had evident practical ramifications by affirming that it cannot be altered by simple legislation or referendum, but requires a new constituent assembly. Moreover, the production of facts in the context of the *parapolítica* affair at least indirectly affected the creation of constitutional meaning in this final decision to block the referendum law, because it showed the effects of excessive presidentialism on the constitutional order. Ultimately, even ardent critics of the substitution doctrine accepted its validity in the context of such presidentialism.¹⁸⁹

The strategic paradigm of the constitutional judge, whose decisions are rooted in policy preferences, was not sufficient to enlighten the final outcome. However, we also saw that the strategic paradigm has made progress and includes other factors in utility maximization equations of constitutional judges. Reputation as a motivational factor is intriguing, because it tacitly incorporates an inter-subjective actor. Judges act a certain

¹⁸⁹ Interview subject No. 10 (Constitutional Court judge), 8 March, 2013.

way, because they expect recognition by others for upholding a specific argumentation and reasoning. In other words it validates the *practice* of legal reasoning, but leaves out important caveats. For once, seeing the answer to judges' behavior in reputation seeking requires a specification of what actually would increase reputation or tarnish it. In the context of legal decisions, specifying the "right" course of action involves solving complex constitutional questions that, more often than not, defy simple and foregone conclusions. Consequently, finding out what is the right thing to decide requires the individual judges to, at least, engage with all the other judges in a discursive truth finding process.

The findings in my analysis suggest that there is indeed pleasure and, therefore also a motivation, for *practicing* law. This practicing of law, however, requires a collective effort and it is the debate itself amongst judges that motivates them to take specific decisions. Not only does the process itself constitute the *sine qua non* of coherent and democratic legal decisions, magistrates in other contexts, too, have stressed that they do not have a concise will or even conclusion of the best way to resolve a constitutional question beforehand. It is therefore not surprising that aforementioned Dieter Grimm from the German Constitutional Court, answered after his retirement that he missed deliberations of the Constitutional Court most (cited in Hübner Mendes, 2013). Together, reputation-seeking as a variable that affects judges' behavior does not contradict discourse, yet is more illusive than understanding the outcome as a consequence of communication, and thus poses more questions than provide answers. It also puts into doubt as to how far preference can actually be defined as stable. This is why I hold that legal argumentation itself is ontological of judicial behavior.

As alluded to in the conclusion of the fourth chapter, Kneight and Epstein call for a renewal of the discipline of the study of judicial behavior by properly inserting law in the equation. The approach they suggest indeed is promising and was in fact part of the methodology utilized in my investigation: closely inspecting the substantive content of legal decisions. Future scholarship should try to provide wholesome and generalizable answers to specify under what conditions, what type of argumentation dominates in particular legal decisions. I concur that this would be an interesting strategy, because underlying the call for inspecting the reasoning of court decisions is the assumption that

legal argumentation itself is ontological of judicial behavior. Executing such a strategy in future research will undoubtedly be tedious, because the categorization of arguments will require an intimate knowledge of the specific case. Originalism, one of the categories suggested by Knight and Epstein, in the Colombian case can refer to a traditional understanding of basic legal categories that predate the current Constitution, or imply the novel categories inscribed in the 1991 Constitution that directly contradict the traditional categories of Colombian legalistic thought. It is therefore not straightforward to exactly define what originalism means in a specific case. Nevertheless, social science can make a real contribution by employing these strategies, because it gives credit to what legal scholars and many of my subjects have repeatedly affirmed: *la ley cuenta!*

These results that I summarized here and inserted in the most recent literature lead me to suggest a definition of institutions that is not meant to replace other definitions, but highlight further dimensions of political interaction. The struggles over meaning and significance of generalized rules in particular situations gives credit to a dimensions of institutions that has not been captured by the traditional meaning. Douglas North is right to hold that institutions are the “humanly constructed constraints that shape human interaction” (1990, p.3) and so is O’Donnell, who states that they are “regularized patterns of interaction that are known, practiced, and regularly accepted (if not necessarily normatively approved) by given social agents” (1994, p. 5). If we take the notions that they are *humanly* created and known by *agents*, we also need consider that institutions are discursive structures, in which actors negotiate the meaning and significance of norms – rules in other words – with reference to a constitutional text and the intention of the constituents that drafted the Constitution in the first place. Interpretation, transporting meaning, and conveying ones own position with the end to receive a response are fundamental human activities that will be amplified by the ever increasing connectedness of the world through new forms of communication. We saw that the text as basis for negotiation ensured at critical moments that the negotiating process is not simply an expression of the “survival of the fittest” that benefits the actor with the most profound resources. Texts and intention of constituents entail that this process often is an interpretive process that requires actors to make arguments as to how

text and intention apply in the given context. The discursive judge then must be a judge that values the soundness of argumentation over utility maximization considerations.

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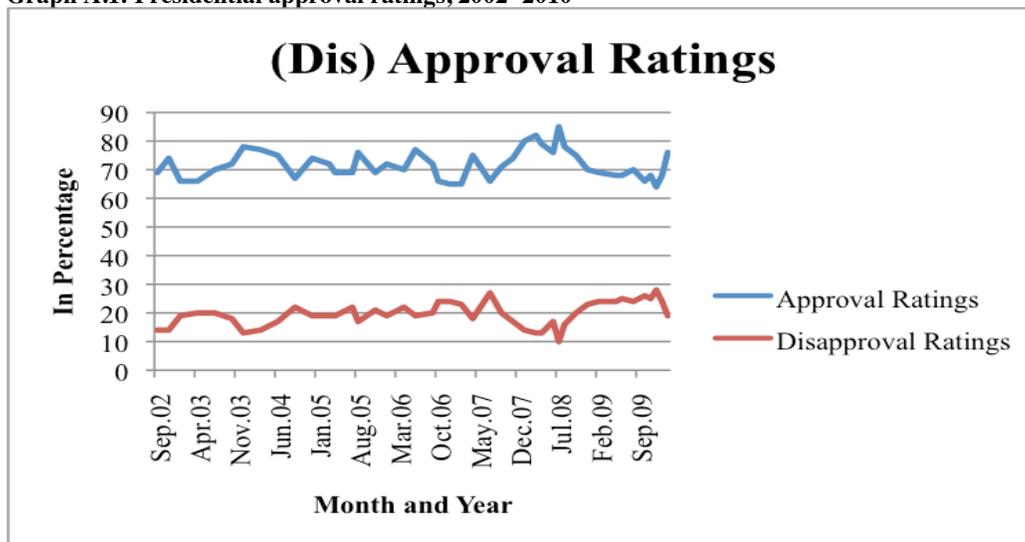
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Appendices

Appendix A: Public opinion and public discourse

Part of the process tracing engaged in this dissertation involved understanding the discourse during Uribe's years in government. I therefore analyzed the reporting in Colombia's biggest and most important weekly political magazine – *Revista Semana*. The purpose was to follow the dominant public debates and discussions and triangulate these with the data obtained from elite-interviews. Furthermore, I also endeavored to see if the public debate was as decisively pro-Uribe as his popularity figures suggest (see Graph 6.1).

Graph A.1: Presidential approval ratings, 2002- 2010



Source: Gallup Colombia Polls, *Presidential Terms*. Hoskin & Pachon, 2010.

Identifying whether a public *debate* is indeed leaning in favor or against a particular political leader is an illusive activity, because debates themselves are difficult to categorize. Already Pollock and Adorno in their famous group experiment study found that survey data to trace public opinion is ontologically deficient, because it does not fully reflect the back and forth that is constitutive of debates and discussions (Perrin & Olick, 2011; Pollock & Adorno, et al., 2011). Moreover, an interviewee reported to me that Uribe best utilized the radio for his political messaging. The time constrains and the

lack of availability of radio transcripts simply made it impossible to incorporate all different types of media into this analysis. Thus, this study does not claim to incorporate all facets of public discourse surrounding Uribe in his presidency. However, another subject also said that the Constitutional Court took notice that the print media at the time of the second re-election reform was not enticed with the prospects of further constitutional amendments to prolong Uribe's time in office. In my judgment, it was therefore necessary to at least see if there is some evidence to suggest that the print media did indeed view Uribe more skeptical by the end of the second term. Furthermore, the data provides the reader with a practical overview of the most important events during Uribe's tenure in the presidential office and serves the purpose of a time line. I therefore accompanied the graphs with an annotation of the most important events in that specific year.

I surveyed the magazine's publications for the entire time of his two terms in the presidency, analyzing the "*Nación*" pages for the entire time of the Uribe Presidency from his inauguration in August 2002 until March 2010, when the Constitutional Court declared the law 1354 of 2009 unconstitutional. I analyzed the articles and disaggregated them according to the space devoted to critical or positive reporting on Uribe's policies. I omitted pages that had a neutral outlook from the tally. A four-page article that was critical of Uribe's strategy to secure his first re-election, but spent half of the four pages devoted to general rules and tactics without specifically addressing Uribe would be counted as two pages in the critical column and the other two pages omitted. If however, there was a four page article that described the paramilitary relations of Mario Uribe, the President's cousin and important political ally in Congress, these would be counted as four negative pages.

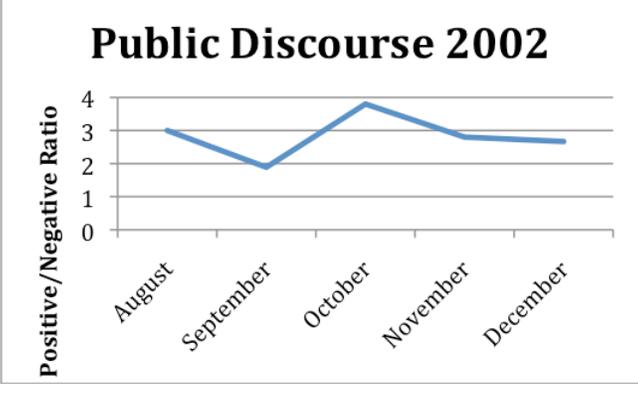
The analysis of the content of the *Revista Semana* required a very close reading and understanding of the arguments and facts reported in the articles, because it aimed at interpretively understanding the creation of meaning. My elite-interviews suggested that print media reports –*Semana's* in particular – provided a more critical context for debates around Uribe and his allies in Congress during the second term. The content analysis therefore required a deep understanding of the context in order to provide any valuable and quantifiable data to trace at least a generic development of debates. The most

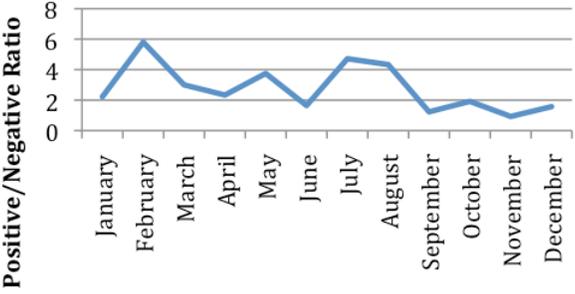
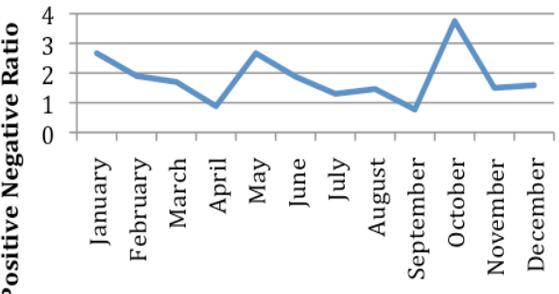
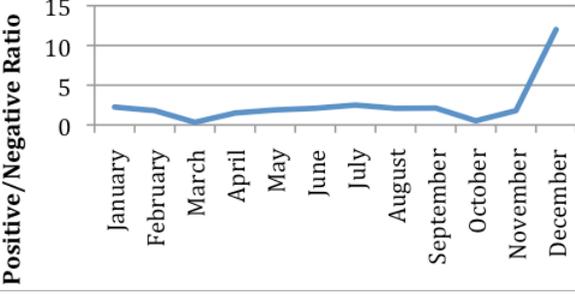
important caveat in the tracing of debate was whether there were explicit connections drawn between Uribe, his coalition in Congress, and evidently negative developments. The evolution of paramilitarism during Uribe's term is telling of the challenges implicit in such an approach to tracing discourse. Prior to the revelations of the *parapolítica* scandal, paramilitaries were certainly not viewed as positive for the development in Colombia, but only very rarely connected to specific politicians. After the first revelations of close relations between paramilitaries and officials, this fundamentally changed. The reports about Jorge Noguera's ties with paramilitaries, who was the director of DAS and a close supporter of Uribe during his first election, are essential for this, since after these revelations paramilitarism was not explained as a phenomenon without political linkages. Rather, there were explicit arguments and studies made that tied Uribe's political support to the influence of paramilitaries. Moreover, after the incrimination of Mario Uribe, these linkages were explicitly along family lines. As a consequence, prior to *parapolítica*, reports that focused on paramilitaries and their dealings with politicians (most often as a consequence of the commencing peace process) were neither tallied as negative or positive, but rather as neutral. After the Noguera revelations and explicit connections drawn between *parapolíticos* and Uribe's coalition in Congress, reports were much more explicitly negative and tallied as such.

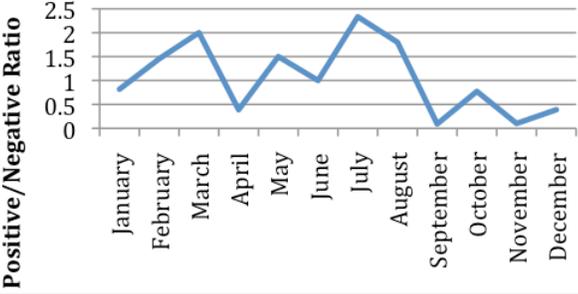
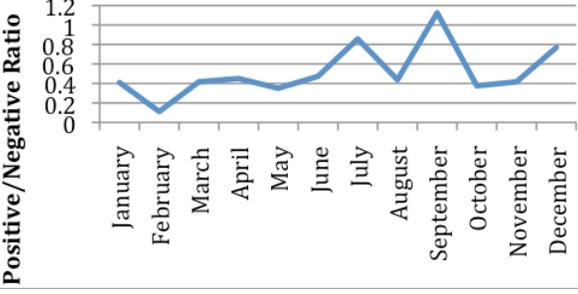
Another challenge was to incorporate reports of the FARC. Uribe made tackling the FARC militarily a prime component of his Democratic Security approach. He legitimized this stance with the cruelty of the FARC, the damage it has done to the Colombian state (and democracy), and its undemocratic nature. Particularly in the first two years of his presidency, FARC attacks that resulted in military and civilian casualties were not that uncommon. Reports about these incidences could be counted as "positive", "negative", or neutral. My strategy was to incorporate these reports into "positive" for Uribe, because they aligned with the *argumentation* that Uribistas put forward in support of their tough hand approach. Only if the military strength by the FARC supported arguments (in editorial pages, for example) for a different approach to the internal conflict (through negotiations or a humanitarian exchange with the FARC), did these reports count as *explicitly* negative.

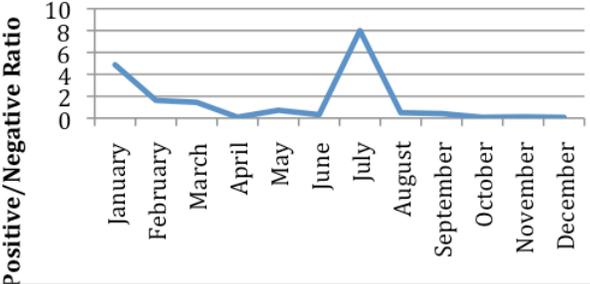
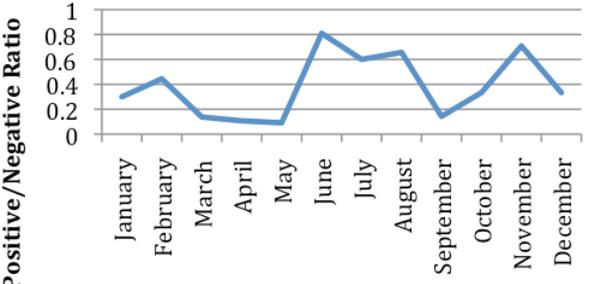
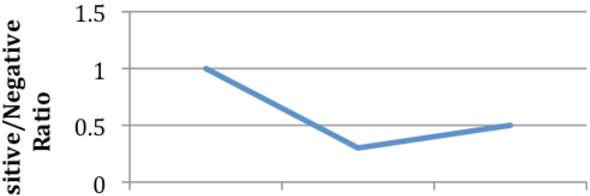
I was consistent with this weighing throughout. In the end, I had a quantitative weighing of *Semana* reporting on Uribe and his government divided into positive and negative pages reported, from which I could derive a co-efficient for each month to show if reports were generally more negative or positive. A co-efficient of 1 represents an equal amount of positive and negative pages. A coefficient over 1 represents a more positive public discourse as it was reflected in the debate in *Semana*. We see a shift of debate occurring in 2006, when Uribe was re-elected and the *parapolítica* revelations were only beginning to come to light. The second term was entirely below 1, with the exception of 2008 when the tensions with Chavez' Venezuela and Correa's Ecuador, attacks against the FARC, and the liberation of Ingrid Betancourt, countered the generally much more negative debate about *parapolítica*, the *falsos positivos*, and other corruption scandals implicating Uribe's sons (*Zona Franca*). It also showed that 2007 and 2009 were the most negative for Uribe in terms of public debates. These were the years when the Supreme Court most forcefully investigated the *parapolítica* scandals and implicated numerous Members of Congress. In 2007, it opened investigations against Mario Uribe and in 2009 it changed its jurisprudence and recontinued investigations against Members of Congress that have resigned from their seat and thereby declined their parliamentary privileges (see chapter 4). The comment column denotes the most important events in the year and highlight specific incidences that have a noticeable effect on the course of the reporting in *Semana*.

Table A.1: Quality of discourse, 2002-2010.

Year	Comments												
 <table border="1"> <caption>Public Discourse 2002 Data</caption> <thead> <tr> <th>Month</th> <th>Positive/Negative Ratio</th> </tr> </thead> <tbody> <tr> <td>August</td> <td>3.1</td> </tr> <tr> <td>September</td> <td>2.0</td> </tr> <tr> <td>October</td> <td>3.8</td> </tr> <tr> <td>November</td> <td>2.8</td> </tr> <tr> <td>December</td> <td>2.7</td> </tr> </tbody> </table>	Month	Positive/Negative Ratio	August	3.1	September	2.0	October	3.8	November	2.8	December	2.7	<ul style="list-style-type: none"> • The FARC attacks the celebrations around the presidential inauguration • President Uribe levels the war tax on the richest Colombians to finance the security war effort • Salvatore Mancuso mentions that 35 % of Congress are paramilitaries' "amigos" • Average: 2.81
Month	Positive/Negative Ratio												
August	3.1												
September	2.0												
October	3.8												
November	2.8												
December	2.7												

Year	Comments																										
<p data-bbox="370 306 829 348">Public Discourse 2003</p>  <table border="1" data-bbox="321 373 896 667"> <caption>Public Discourse 2003 Data</caption> <thead> <tr> <th>Month</th> <th>Positive/Negative Ratio</th> </tr> </thead> <tbody> <tr><td>January</td><td>2.5</td></tr> <tr><td>February</td><td>6.0</td></tr> <tr><td>March</td><td>3.5</td></tr> <tr><td>April</td><td>2.5</td></tr> <tr><td>May</td><td>4.0</td></tr> <tr><td>June</td><td>2.0</td></tr> <tr><td>July</td><td>5.0</td></tr> <tr><td>August</td><td>4.5</td></tr> <tr><td>September</td><td>1.5</td></tr> <tr><td>October</td><td>2.0</td></tr> <tr><td>November</td><td>1.5</td></tr> <tr><td>December</td><td>2.0</td></tr> </tbody> </table>	Month	Positive/Negative Ratio	January	2.5	February	6.0	March	3.5	April	2.5	May	4.0	June	2.0	July	5.0	August	4.5	September	1.5	October	2.0	November	1.5	December	2.0	<ul data-bbox="974 283 1339 703" style="list-style-type: none"> • Security is notably improving. Roads can be travelled as the FARC continues bomb attacks. • Constitutional Court first mentions the substitution doctrine in its review of Uribe's Political Reform • Political referendum fails to achieve the necessary quorum. • Begin of formal negotiations with the AUC paramilitaries • First Justice Minister – Londoño – leaves office in November. • Average: 2.79.
Month	Positive/Negative Ratio																										
January	2.5																										
February	6.0																										
March	3.5																										
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May	4.0																										
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August	4.5																										
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November	1.5																										
December	2.0																										
<p data-bbox="370 741 813 783">Public Discourse 2004</p>  <table border="1" data-bbox="321 808 880 1102"> <caption>Public Discourse 2004 Data</caption> <thead> <tr> <th>Month</th> <th>Positive Negative Ratio</th> </tr> </thead> <tbody> <tr><td>January</td><td>2.8</td></tr> <tr><td>February</td><td>2.0</td></tr> <tr><td>March</td><td>1.8</td></tr> <tr><td>April</td><td>1.0</td></tr> <tr><td>May</td><td>2.8</td></tr> <tr><td>June</td><td>2.0</td></tr> <tr><td>July</td><td>1.5</td></tr> <tr><td>August</td><td>1.5</td></tr> <tr><td>September</td><td>1.0</td></tr> <tr><td>October</td><td>3.8</td></tr> <tr><td>November</td><td>1.5</td></tr> <tr><td>December</td><td>1.6</td></tr> </tbody> </table>	Month	Positive Negative Ratio	January	2.8	February	2.0	March	1.8	April	1.0	May	2.8	June	2.0	July	1.5	August	1.5	September	1.0	October	3.8	November	1.5	December	1.6	<ul data-bbox="974 718 1339 1060" style="list-style-type: none"> • Demobilization of paramilitaries • Every community with police presence. • Debate over re-election begins in the beginning of the year. • The Constitutional Court is turning down anti-Terror legislation. • Paramilitaries visit Congress in July • Average: 1.83
Month	Positive Negative Ratio																										
January	2.8																										
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March	1.8																										
April	1.0																										
May	2.8																										
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August	1.5																										
September	1.0																										
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December	1.6																										
<p data-bbox="370 1150 829 1192">Public Discourse 2005</p>  <table border="1" data-bbox="321 1218 896 1512"> <caption>Public Discourse 2005 Data</caption> <thead> <tr> <th>Month</th> <th>Positive/Negative Ratio</th> </tr> </thead> <tbody> <tr><td>January</td><td>2.5</td></tr> <tr><td>February</td><td>2.0</td></tr> <tr><td>March</td><td>1.0</td></tr> <tr><td>April</td><td>2.0</td></tr> <tr><td>May</td><td>2.2</td></tr> <tr><td>June</td><td>2.5</td></tr> <tr><td>July</td><td>2.8</td></tr> <tr><td>August</td><td>2.5</td></tr> <tr><td>September</td><td>2.5</td></tr> <tr><td>October</td><td>1.5</td></tr> <tr><td>November</td><td>2.0</td></tr> <tr><td>December</td><td>12.5</td></tr> </tbody> </table>	Month	Positive/Negative Ratio	January	2.5	February	2.0	March	1.0	April	2.0	May	2.2	June	2.5	July	2.8	August	2.5	September	2.5	October	1.5	November	2.0	December	12.5	<ul data-bbox="974 1127 1339 1501" style="list-style-type: none"> • Senator Vargas Lleras survives assassination attempt • Claudia Lopez publishes article about atypical voting results • Lopez Obregon requests official inquiry by the Supreme Court into relations between paramilitaries and Members of Congress. • Constitutional Court reviews and passes first re-election reform. • Average: 2.57
Month	Positive/Negative Ratio																										
January	2.5																										
February	2.0																										
March	1.0																										
April	2.0																										
May	2.2																										
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Year	Comments																										
<p data-bbox="370 306 834 348" style="text-align: center;">Public Discourse 2006</p>  <table border="1" data-bbox="321 373 899 667"> <caption>Public Discourse 2006 - Positive/Negative Ratio</caption> <thead> <tr> <th>Month</th> <th>Ratio</th> </tr> </thead> <tbody> <tr><td>January</td><td>0.8</td></tr> <tr><td>February</td><td>1.5</td></tr> <tr><td>March</td><td>2.0</td></tr> <tr><td>April</td><td>0.5</td></tr> <tr><td>May</td><td>1.5</td></tr> <tr><td>June</td><td>1.0</td></tr> <tr><td>July</td><td>2.3</td></tr> <tr><td>August</td><td>1.8</td></tr> <tr><td>September</td><td>0.2</td></tr> <tr><td>October</td><td>0.8</td></tr> <tr><td>November</td><td>0.3</td></tr> <tr><td>December</td><td>0.5</td></tr> </tbody> </table>	Month	Ratio	January	0.8	February	1.5	March	2.0	April	0.5	May	1.5	June	1.0	July	2.3	August	1.8	September	0.2	October	0.8	November	0.3	December	0.5	<ul data-bbox="974 283 1339 1165" style="list-style-type: none"> • Encilce de Jesus López Romero, “La Gata”, is one of the first business women indicted for paramilitary relations. She helped finance Uribe in the Caribbean coast. • Congress is elected in March, increasing Uribe’s coalition. • The DAS It-Technician, Rafael García, becomes the witness for the prosecution in April and incriminates DAS-director (appointed by Uribe for campaign work in the Caribbean) Jorge Noguera. • Constitutional Court reviews Justice and Peace Law and passes it conditionally (victims’ rights to truth). • Uribe is re-elected in landslide victory (62%). • In September the laptop belonging to “Jorge 40” is decrypted. • First public mention of strategic meetings between politicians and the AUC in Santa Fe de Ralito • First subpoenas issued to Members of Congress • Average: 1.05
Month	Ratio																										
January	0.8																										
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April	0.5																										
May	1.5																										
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August	1.8																										
September	0.2																										
October	0.8																										
November	0.3																										
December	0.5																										
<p data-bbox="370 1203 834 1245" style="text-align: center;">Public Discourse 2007</p>  <table border="1" data-bbox="321 1270 899 1564"> <caption>Public Discourse 2007 - Positive/Negative Ratio</caption> <thead> <tr> <th>Month</th> <th>Ratio</th> </tr> </thead> <tbody> <tr><td>January</td><td>0.5</td></tr> <tr><td>February</td><td>0.2</td></tr> <tr><td>March</td><td>0.5</td></tr> <tr><td>April</td><td>0.5</td></tr> <tr><td>May</td><td>0.4</td></tr> <tr><td>June</td><td>0.5</td></tr> <tr><td>July</td><td>0.9</td></tr> <tr><td>August</td><td>0.5</td></tr> <tr><td>September</td><td>1.1</td></tr> <tr><td>October</td><td>0.4</td></tr> <tr><td>November</td><td>0.5</td></tr> <tr><td>December</td><td>0.8</td></tr> </tbody> </table>	Month	Ratio	January	0.5	February	0.2	March	0.5	April	0.5	May	0.4	June	0.5	July	0.9	August	0.5	September	1.1	October	0.4	November	0.5	December	0.8	<ul data-bbox="974 1180 1339 1606" style="list-style-type: none"> • In January, Salvatore Mancuso gives testimony to Justice and Peace Court indicting Uribe’s cousin, Mario Uribe. • Mancuso provides details of meetings in Santa Fe de Ralito and the Pact of Ralito • Álvaro Araújo, the brother of the Chancellor, is indicted. • Indictment of Araújo and M. Uribe escalates relations between President and Supreme Court. He publically attacks Court. • Average: 0.52
Month	Ratio																										
January	0.5																										
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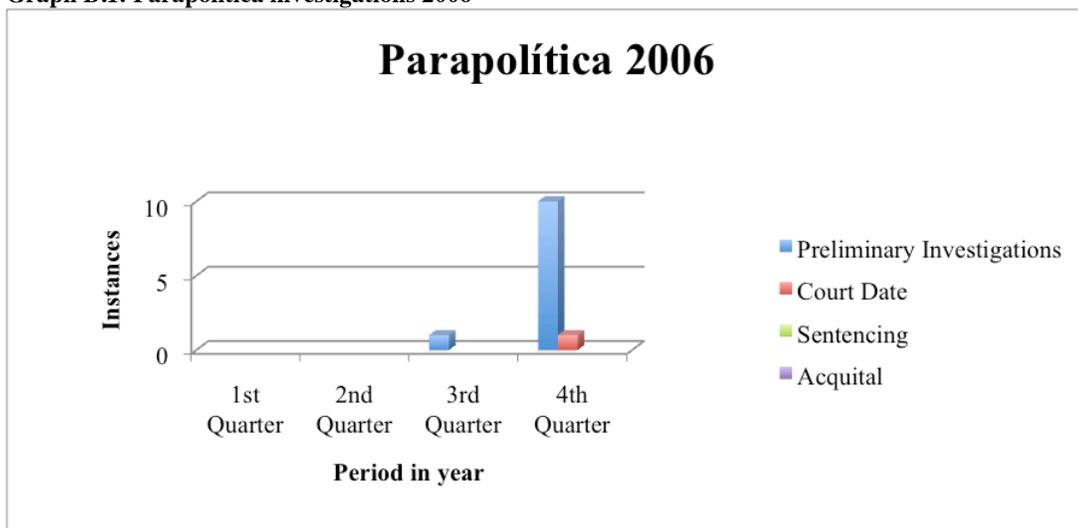
Year	Comments																										
<p style="text-align: center;">Public Discourse 2008</p>  <table border="1" data-bbox="321 373 911 657"> <caption>Public Discourse 2008 - Positive/Negative Ratio by Month</caption> <thead> <tr> <th>Month</th> <th>Ratio</th> </tr> </thead> <tbody> <tr><td>January</td><td>5.5</td></tr> <tr><td>February</td><td>2.0</td></tr> <tr><td>March</td><td>2.0</td></tr> <tr><td>April</td><td>0.5</td></tr> <tr><td>May</td><td>1.0</td></tr> <tr><td>June</td><td>0.5</td></tr> <tr><td>July</td><td>8.0</td></tr> <tr><td>August</td><td>1.0</td></tr> <tr><td>September</td><td>1.0</td></tr> <tr><td>October</td><td>0.5</td></tr> <tr><td>November</td><td>0.5</td></tr> <tr><td>December</td><td>0.5</td></tr> </tbody> </table>	Month	Ratio	January	5.5	February	2.0	March	2.0	April	0.5	May	1.0	June	0.5	July	8.0	August	1.0	September	1.0	October	0.5	November	0.5	December	0.5	<ul style="list-style-type: none"> January until March is dominated by tensions with Venezuela and Chavez. These escalate with Colombia's attack on a FARC Raul Reyes in March. In April Yedis Medina admits to bribery in relation to the first re-election. It starts <i>Yidispolítica</i> and eventually incriminates her in the Supreme Court. Ingrid Betancourt is liberated in September <i>Operación Jaque</i> in July. In September, the first <i>falsos positivos</i> become public In December, Uribe's sons are put in relation with the so-called <i>Zona Franca</i> scandal. Average: 1.5
Month	Ratio																										
January	5.5																										
February	2.0																										
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September	1.0																										
October	0.5																										
November	0.5																										
December	0.5																										
<p style="text-align: center;">Public Discourse 2009</p>  <table border="1" data-bbox="321 978 911 1262"> <caption>Public Discourse 2009 - Positive/Negative Ratio by Month</caption> <thead> <tr> <th>Month</th> <th>Ratio</th> </tr> </thead> <tbody> <tr><td>January</td><td>0.3</td></tr> <tr><td>February</td><td>0.5</td></tr> <tr><td>March</td><td>0.2</td></tr> <tr><td>April</td><td>0.2</td></tr> <tr><td>May</td><td>0.2</td></tr> <tr><td>June</td><td>0.8</td></tr> <tr><td>July</td><td>0.6</td></tr> <tr><td>August</td><td>0.7</td></tr> <tr><td>September</td><td>0.2</td></tr> <tr><td>October</td><td>0.4</td></tr> <tr><td>November</td><td>0.7</td></tr> <tr><td>December</td><td>0.4</td></tr> </tbody> </table>	Month	Ratio	January	0.3	February	0.5	March	0.2	April	0.2	May	0.2	June	0.8	July	0.6	August	0.7	September	0.2	October	0.4	November	0.7	December	0.4	<ul style="list-style-type: none"> In March, <i>Semana</i> reveals that DAS kept tabs on Supreme Court judges. The wiretapping scandal reaches all the way to the President's office. Supreme Court changes its jurisprudence, and recontinues investigations into Members of Congress, who had resigned their seat to avoid prosecution. In December, second re-election law (to call a referendum) passes Congress. Average: 0.38
Month	Ratio																										
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<p style="text-align: center;">Public Discourse 2010</p>  <table border="1" data-bbox="321 1381 911 1577"> <caption>Public Discourse 2010 - Positive/Negative Ratio by Month</caption> <thead> <tr> <th>Month</th> <th>Ratio</th> </tr> </thead> <tbody> <tr><td>January</td><td>1.0</td></tr> <tr><td>February</td><td>0.3</td></tr> <tr><td>March</td><td>0.5</td></tr> </tbody> </table>	Month	Ratio	January	1.0	February	0.3	March	0.5	<ul style="list-style-type: none"> Re-election fails. Powerful politicians, such as Vargas Lleras take a public stand against re-election. Average: 0.46 																		
Month	Ratio																										
January	1.0																										
February	0.3																										
March	0.5																										

Source: *Semana*, 2002-2010. Compiled by author.

Appendix B: Investigating Parapolítica

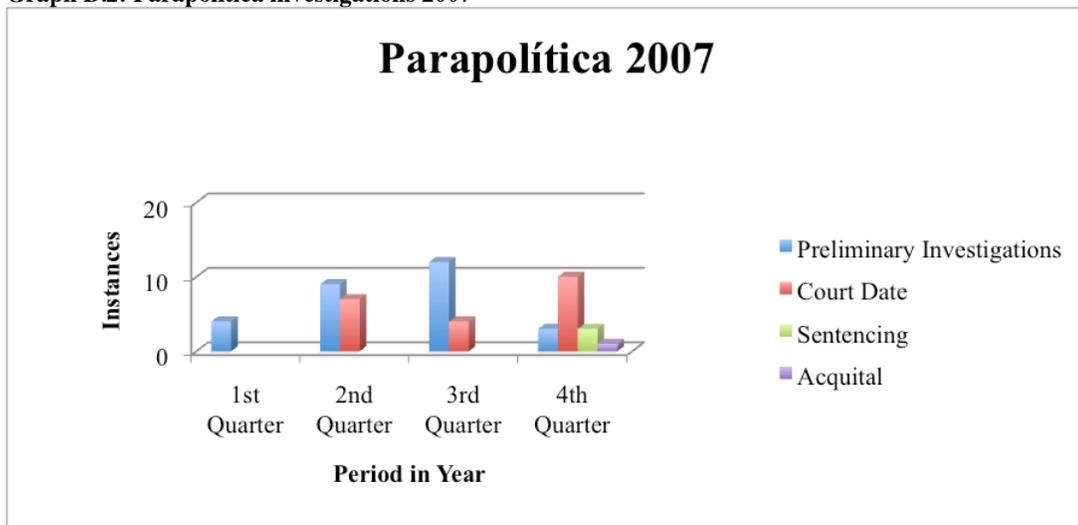
These graphs show the trajectory of the parapolítica investigations in the Supreme Court and Attorney General's office. Its count show official preliminary investigations opened, subpoenas issued, and sentences or acquittals handed out per quarter of each year between 2006 and 2011. I compiled the data with sources in the Colombian national press (*El Tiempo, Semana, El Espectador*) and an NGO (*Congreso Visible*).

Graph B.1: Parapolítica investigations 2006



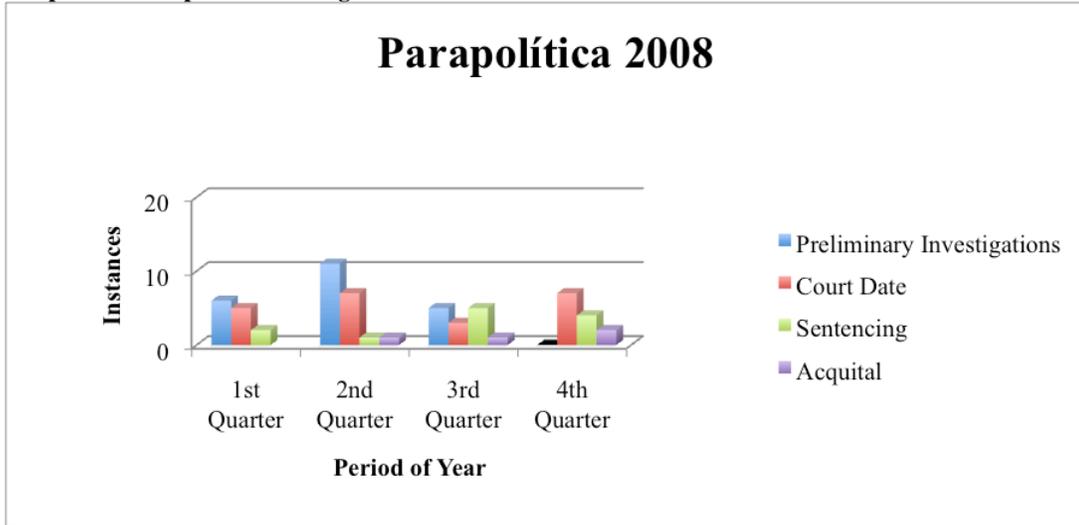
Source: compiled by the author.

Graph B.2: Parapolítica investigations 2007



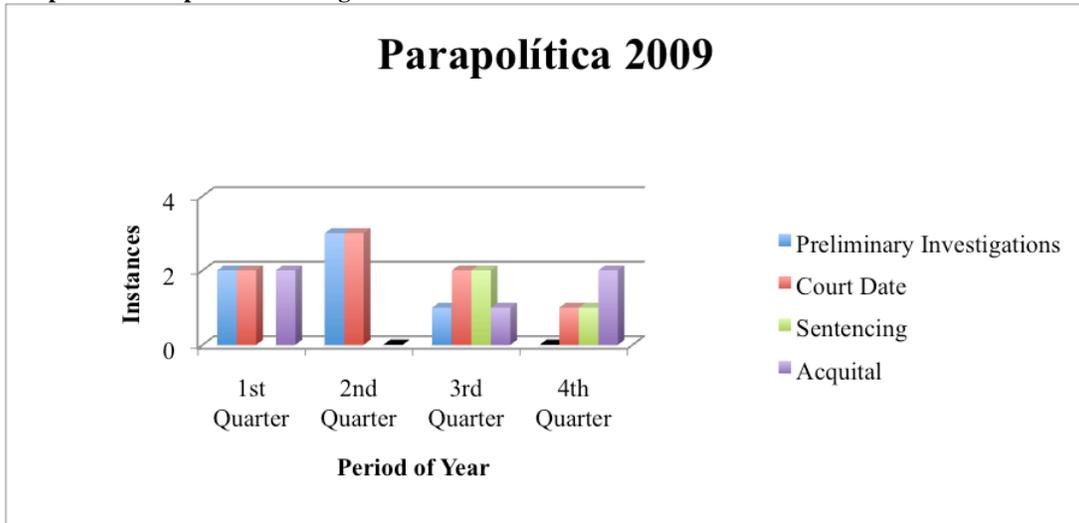
Source: Compiled by the author.

Graph B.3: Parapolítica investigations 2008



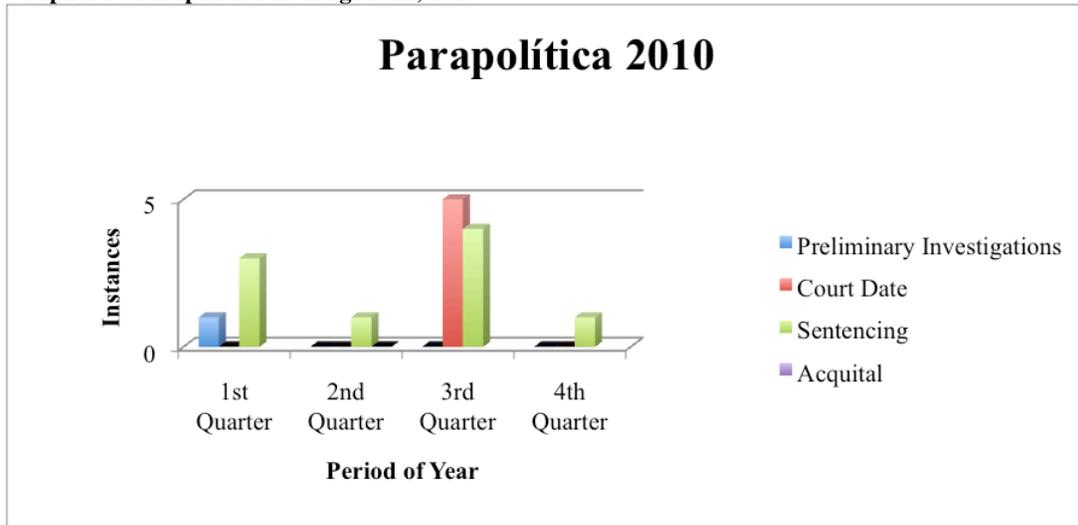
Source: Compiled by the author.

Graph B.4: Parapolítica investigations 2009



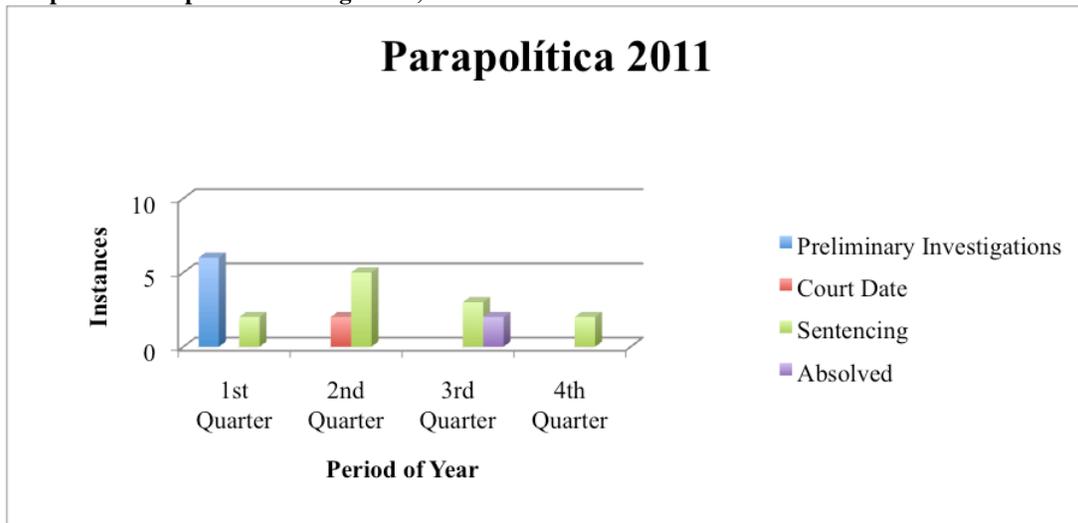
Source: Compiled by the author.

Graph B.5: Parapolítica investigations, 2010



Source: Compiled by the author.

Graph B.6: Parapolítica investigations, 2011.



Source: Compiled by the author.

Appendix C: Interview Data

In total, I conducted over 40 in-depth elite interviews with persons directly or indirectly involved with the Constitutional Court of Colombia as well as individuals, who occupy prominent positions in the analysis of the actions by the Constitutional Court, such as professors of law of the most important law schools in the country or persons engaged with NGOs that are involved in actively litigating Constitutional Court cases. The interviewees consisted of all magistrates of Colombia's Constitutional Court, who were on the Court in 2010 when the decision regarding a law to call for referendum to allow a second re-election was decided save for one, whose auxiliary judge I interviewed. I also interviewed four of the nine members of the Constitutional Court that decided the decision regarding the law to permit constitutional change for a first re-election of the President of the Republic. Furthermore, the interviews consisted of auxiliary judges of eight different magistrates of the Court from different periods. The interviewee list also included three magistrates from the Supreme Court of the Republic. Finally, I interviewed three journalists, four Senators and Representatives from the Chamber of Representatives, ten professors of law and political science with specialization in legal politics and judicial/political culture, and five activists from NGOs litigating Constitutional Court cases. The selection resulted from an analysis of the sentences by the Constitutional Court, a survey of the literature on judicial politics in Colombia as well as an archival research of the most important journalistic publications in Colombia (*La Revista Semana, El Tiempo, El Espectador, La Revista Cambio*). The interviews were in-depth and focused on the issues resulting from the content analysis of publications. They lasted from one hour to two and a half hours. The questions were structured according to these four topics:

1. Democracy and constitutionality:

- Sovereignty of the people and constitutional reform
- The role of the judiciary in the Colombian Constitution
- What is the legal culture (*Cultura Legalista*) in Colombia and how has it changed since the new constitution in 1991?

2. Judiciary and the media:

- The press and publicity as democratic phenomena.
- The impact of media discourse on decisions by the Court.
- How does the Court communicate with the media? Is it legitimate?

3. Deliberation and institutionalism

- The role of deliberation amongst magistrates before and during the process of reaching a decision.
- Can you describe the deliberations regarding re-election?

4. Uribe, democratic security and re-election

- What was the importance of democratic security and did it justify re-election?
- What were the important changes between the first and second decision regarding constitutional reform and re-election?
- How did the political scandals affect the decision?
- What importance did the revelations regarding the so-called *Yidispolítica* scandal have?
- How important were the official investigations by the Supreme Court in the *parapolítica* scandal?
- Did the image of an institutional crisis resulting from a negative decision regarding re-election matter in deliberations?

As is evident in the outline above, the questions were semi-structured, therefore left the interviewee sufficient leeway in answering the question openly, and also involved follow-up questions for clarification.

Following the field research, the interviews were transcribed and analytically structured according to the topics given in the questions. Most often this corresponded to the chronology of the interview, but due to the open-ended nature of the questions, in some cases the interviewee made statements that could also be subsumed under another topic. In the analysis, the structuring of the interview contents according to topics was complemented by an ordering of first, second, and third order observation of the position of the interviewees. Thus, magistrates belong into the first category, auxiliary judges into the second, and observer and interpreters of jurisprudence of the Court into the third category. The epistemological question remains whether this also implies a hierarchical ordering of the content or whether these are simply descriptive analytical categories. While it is true that the magistrates are the closest to the decisions, since they are actively

involved, they are also more likely to produce pre-structured answers to questions regarding the role of the judge in the constitutional politics of Colombia – after all their imperative is to make judgments based on established constitutional norms and legal categories. Conversely, auxiliary judges can be seen in a position to answer more freely, since they are not directly involved nor is their role defined by norms of independence and autonomy that requires aforementioned pre-structured reasoning.

Table C.1: Comprehensive interview data.

<i>Viejo Derecho</i>	First Order Observation from C. Court (N=14) and Congress (N=4, in brackets)	Second Order Observation (N=9)	Third Order Observation (N=14)
Total interview subjects:	N=41		
Bolívar, man of the sword/militaristic	3		3
Santander, man of the laws	4 (+1)	1	5
French Origin	2	1	4
Formalism	11 (+4)	8	9
Public Argumentation in juridical terms/translating conflicts into legal terms	5	4	3
Cult of order and tool of domination	5 (+1)	3	3
<i>Cartas de batalla</i>	3		1
<i>La ley es para los de ruana</i>	2	2	2
<i>Nuevo Derecho and neo-constitutionalism in the new Constitution</i>			
Neo-constitutionalism and rights	11	7	7
Holistic interpretation of norms; rights	7	4	5

principles over formalism			
Peace Pact	4	2	
Visibility of groups and their rights	5	1	1
<i>Acción de Tutela</i>	7 (+1)	5	5
<i>Constitutionalism and Democracy</i>			
Tension between democracy and constitutionalism is real	6 (+1)	4	4
Limits to reform within the text of the Constitution	10	4	1
No limits to reform other than procedural	2 (+3)	1	
Relate substitution to Uribe's Presidency	3	4	
Reject the relation between the substitution and Uribe's presidency	1		1
Leadership and the will of the people	(+3)		
<i>Presidentialism</i>			
President represents the nation (neither in negative or positive sense)	2(+3)	1	
Expansive de-jure Presidential powers	5	5	
Expansive de-facto Presidential powers	5	6	2
Ineffectiveness of Congress	7 (+2)	2	2
<i>Institutionalization of Deliberation</i>			
Deliberation process <i>sine qua non</i> of independence	8	4	
Judicial vs. political argumentation	5	3	

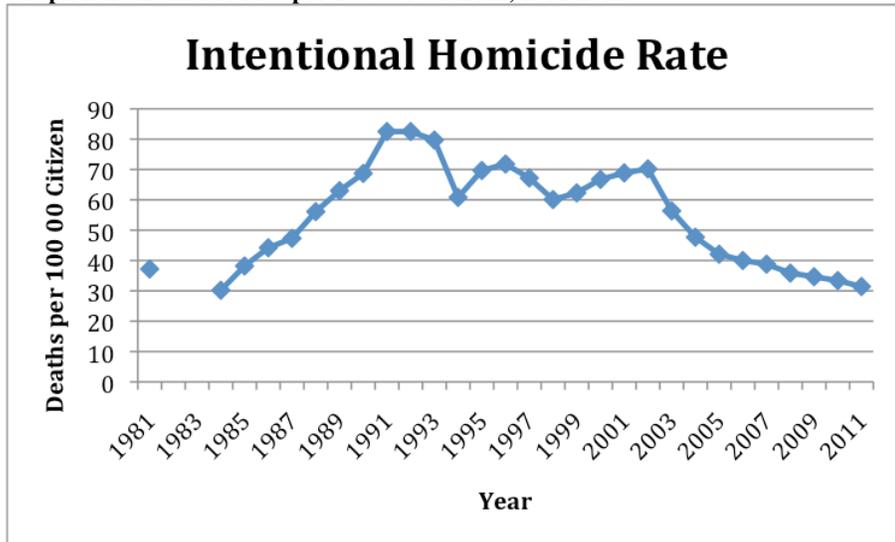
Institutionalization of Deliberation			
No <i>quid pro quod</i> negotiations in Court	7	2	
Isolation of deliberation process	7	5	
Differentiation along lines of judicial thought	2	2	
Change position as consequence of deliberation	5	4	
<i>Legal Discourse</i>			
Legitimacy lies in the coherence of the discourse	5	3	
Incoherence through politicization of discourse	5	1	
Tight management of public interviews	5	1	
The Court speaks publically only as institution (through President)	3	1	
<i>The two decisions</i>			
First re-election set precedent of only one re-election	6	1	
Difference of scandals in each term	6	5	

Source: Compiled by the author.

Appendix D: state and state weakness.

Colombia's state weakness is a characteristic with origins in the 19th century. Chapter 2 makes the argument that the historical weakness is related to the genesis of the two-party system, predating the establishment of the nation state. Chapter 2 then further explained that the drug trade introduced a new quality in terms of state weakness that undermined the few advances made during the National Front period (Bejarano & Segura, 1996). Since the *Bringing the State Back In* project commenced in the 1980s (1984), the state's characteristics have been captured by numerous definitions and measures, but no argument has convincingly diverged in a substantive way that the state at the most basic level presumes the monopoly of violence as its defining trait (Weber, 1968). The measures below consist of indicators that show deficiencies of the monopoly of violence and efforts by the state to combat this short-coming. Already the crudest measurement makes the difficulties Colombia faced in the last three decades readily apparent. The observations are fairly evident, violence erupts exactly the moment Pablo Escobar's attempt to enter legal politics was foiled and he initiated the terror war against Colombia's institution in 1983. Graph 6.8 also captures the wave of paramilitary expansion that commenced in 1993 until 2002. As explained in the same chapter, this is the period of paramilitary expansion and conflict between paramilitary groups and the guerrilla (particularly the FARC). Finally, the graph also shows the "Uribe effect" of his Democratic Security policy. After his election to the presidency in 2002, intentional homicide rates begin to steadily fall. In 2010, they stand at the same level as in the beginning of the 1980s.

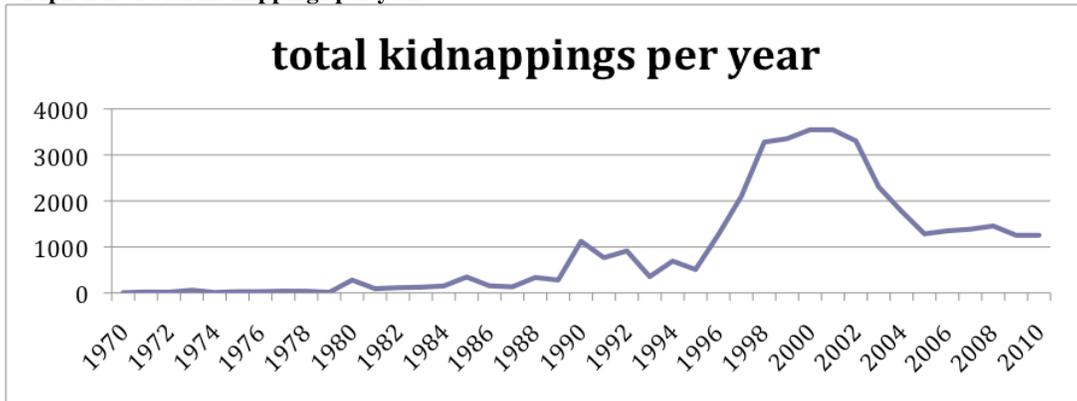
Graph D.1: Homicide rate per 100 000 Citizens, 1981-2011



Source: World Bank, 2014.

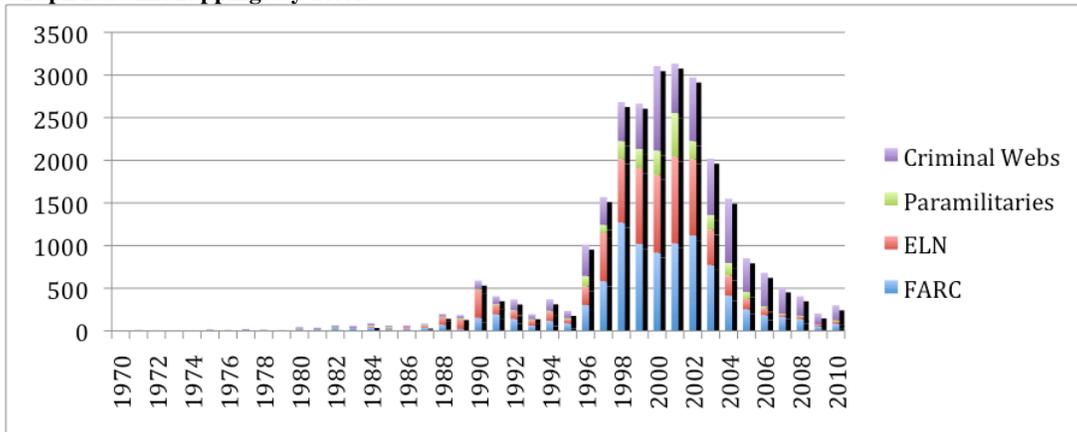
In the second part of the 1990s, kidnappings as strategy symbolized the generic security crisis Colombians faced. Conversely, Uribe's successes in reducing the numbers of kidnappings epitomized the success of his Democratic Security in general. Graph 6.9 traces the evolution of kidnapping events in Colombia. As the graph suggests, the security situation effectively deteriorated after 1996 until 2002 confirming what interviewees indicated was a general sense of insecurity covering the entire nation rooted in the very real threat of being kidnapped. In addition, graph 6.10 shows that guerrilla organizations (FARC, ELN) were behind a vast number of the recorded kidnappings, having made kidnapping for ransom a central part of their strategy to generate funds for the armed struggle. Both graphs indicate a sharp decline after 2002.

Graph D.2: Total kidnappings per year



Source: Informe de Centro Nacional de Memoria Historica, 2013.

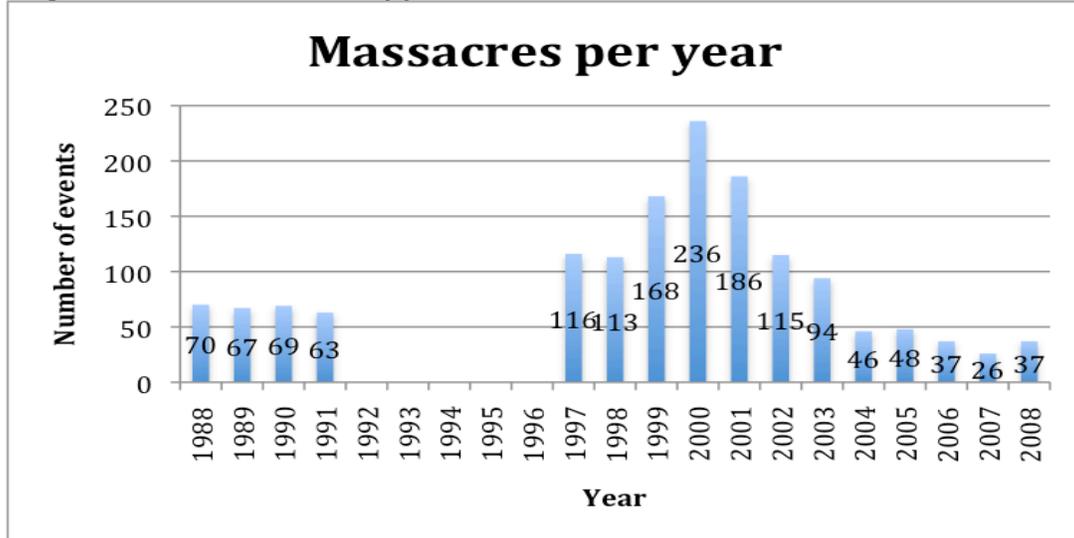
Graph D.3: Kidnappings by actor



Source: Informe de Centro Nacional de Memoria Historica, 2013

A central part of the paramilitary strategy was to bring territory under their control with the use of coercion. A common feature in that strategy was the use of massacres. Graph 6.11 shows the escalation of violence in the late 1990s orchestrated as a response to the Pastrana government's rapprochement with the FARC in the Caguán negotiations (López Hernández, 2010). The graphs shows that massacres increased drastically in 1999 and climaxed in 2000 to then slowly ebb off after 2002. Chapter 3 also sheds some light on the demobilization process with the paramilitaries. The reduction of numbers after AUC heads and Uribe administration officials began to negotiate in Santa Fe de Ralito in 2002 resembles the events detailed in that chapter: paramilitaries could and did not utilize coercion as freely as before and as a consequence, events of massacres are no longer recorded in the high numbers of the late 1990s.

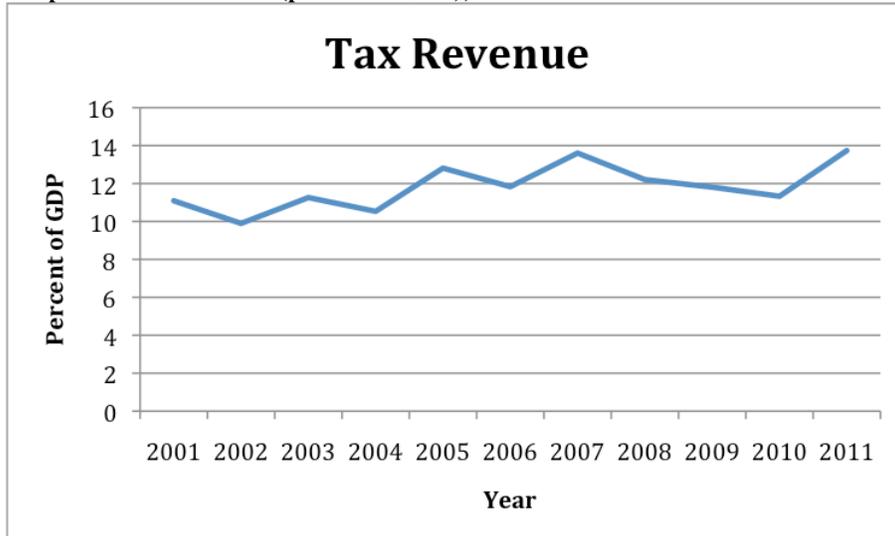
Graph D.4: Massacres committed by year



Source: *Observatorio de Derechos Humanos de la Vicepresidencia de la República; Informe Comisión Interamericana de Derechos Humanos, 1993; Lopez, et al. 2010.*

Graph 6.12 shows that there is a general trend upwards in generating tax revenue with only a relatively modest crunch following the financial crisis in 2008. This, too, indicates that the states is better in monopolizing the means of violence and fulfill its functions better.

Graph D.5: Tax Revenue (percent of GDP), 2001-2011.



Source: *World Bank.*

Appendix E: Democracy indicators

The introduction reviews several surveys of democracy indicators and where Colombia fit in with its contradictory history. Table 6.3 shows various freedom and liberties indicator together with the results of a very recent study that traced the delegative democracy traits in South American nation states.

Table D.1: Freedom House Scores, Polity IV Scores, delegative democracy indicators, 1985-2011.

Year	Freedom House Scores (1-7; 1 being best)			Polity IV (Out of 10)	Delegative Democracy Indicator (out of 8 features)
	Freedom Rating	Civil Liberties	Political Rights		
1985	2,50	3,00	2,00	8	2
1986	2,50	3,00	2,00	8	5
1987	2,50	3,00	2,00	8	0
1988	2,50	3,00	2,00	8	0
1989	2,50	3,00	2,00	8	1
1990	3,50	4,00	3,00	8	4
1991	3,50	4,00	3,00	9	1
1992	3,00	4,00	2,00	9	0
1993	3,00	4,00	2,00	9	0
1994	3,00	4,00	2,00	9	1
1995	3,50	4,00	3,00	7	5
1996	4,00	4,00	4,00	7	4
1997	4,00	4,00	4,00	7	5
1998	3,50	4,00	3,00	7	5
1999	4,00	4,00	4,00	7	2
2000	4,00	4,00	4,00	7	1
2001	4,00	4,00	4,00	7	3
2002	4,00	4,00	4,00	7	4
2003	4,00	4,00	4,00	7	1
2004	4,00	4,00	4,00	7	1
2005	4,00	4,00	4,00	7	3
2006	3,00	3,00	3,00	7	4
2007	3,00	3,00	3,00	7	5
2008	3,00	3,00	3,00	7	4
2009	3,50	4,00	3,00	7	6
2010	3,50	4,00	3,00	7	6
2011	3,50	4,00	3,00	7	

Source: Freedom House (the freedom score consists of the average between political and civic rights), Polity IV, González 2014.