The Colombia Constitutional Court: Building Legitimacy in its First Period

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[Preliminary note: I have worked as a constitutional law scholar for the past 10 years. Since May of this year I have been working as a Deputy Justice at the Colombian Constitutional Court. All my views shared here are personal rather than institutional. I want to make clear that I do not speak on behalf of the Court.]

The Colombian constitutional court has become one of the most recognized and powerful constitutional courts worldwide. Although it has only been working for 25 years, it has gained a very special place in the most relevant literature on the work of prominent constitutional courts in the global south such as the South African and the Indian Supreme Court, among others. Nowadays its case law and rulings are becoming very well known, especially those referring to social and economic rights enforcement, liberal rights, dignity, autonomy, women's rights, euthanasia and dignified death, LGBTI rights, multicultural accommodations and indigenous rights, the so called basic structure doctrine, among many others. Its work has been very popular and influential in the Spanish literature during the last decades and is now taking its own place within the relevant English literature due to the translation of its most famous case law.

The literature about the Colombian Constitutional Court is mostly descriptive or analytical of its case law and famous rulings. In fact, some studies describe the interpretative style of the Constitutional Court, its methodologies, its use of the proportionality principle to interpret and adjudicate cases based on fundamental rights, and its conception on social and economic rights as judicially enforceable. Other studies analyze the constitutional court interventions mainly on public policies related to the health system, the force
displaced people, the victims of the armed conflict, and indigenous communities. These studies draw different conclusions, from suggesting the Colombian court as an archetype for modeling constitutional courts to regretting and highlighting the so called judicial activism of this Court.

However, there is a very poor literature on how this Court became so legitimate and powerful. In other words, there is a lack of studies on why this Court became such a reputable constitutional court and nowadays is one of the key institutions within the Colombian institutional mainstream. Regarding this, the topical opinion suggests that having this constitutional court is a consequence of having dysfunctional legislative bodies and administrative agencies. In my opinion, while this perspective certainly has some value, it is only partially true. This paper aims to advance a taxonomy of reasons that explains this. These reasons are related to its normative framework, its history, its human resources, its popular interventions, and its relations with the legislative branch, the executive branch, the judiciary, and civil society.

1. Normative framework

The Colombian Constitutional Court has a very particular normative framework. On the one hand, the Article 241 of the Constitution literally prescribes that the Constitutional Court is “the guardian of the Constitution”, and consequently establishes broad mandates for this Court. According to it, the Colombian Constitutional Court has the power to declare unconstitutional multiple and diverse normative bodies and political decisions such as constitutional amendments, laws, plebiscites, and executive orders enacted by the President at exercising extraordinary powers, international treaties approbatory laws, among others.

On the other hand, this Court is “the guardian” of a truly extensive Constitution. In fact, in its original version, the Colombian Constitution had 380 articles, which regulate multiple and diverse matters: from fundamental rights, multicultural accommodations, the classical branches of the Government, and some independent bodies, to the financial distribution of public revenue among the Colombian states, the taxing system, the political parties and some specific electoral rules. In other words, ours is a very “broad, detailed and regulatory constitution”.
Therefore, normatively speaking, the Constitutional Court as “the guardian of the Constitution” has “a lot to care about or to guard”; in other words, it has a very extensive jurisdiction. That wide jurisdiction allows the Constitutional Court to be a key institutional actor in every relevant public decision. From protecting fundamental rights such as freedom of expression in classical bilateral cases, declaring the unconstitutionality of certain taxation laws, upholding electoral rules, enforcing fundamental rights, invalidating legislation about political parties and mechanisms of democratic participation, etc.

The Colombian Constitutional Court can conceivably have something to say about every law, policy and regulation in the land.

2. History of the Colombian Constitutional Court

The Colombian Constitutional Court was created by the 1991 Constitution and is considered one of its most important innovations. However, the very idea of judicial review has an established history in the country, dating back to the 19th century Colombian Constitutions. Officially, the judicial review of the laws was introduced to the Colombia’s legal system through the constitutional amendment Legislative Act 3 of 1910. Under this constitutional amendment, the Supreme Court of Justice had the power to declare unconstitutional laws and executive orders. This power was exercised discretely.

Though it was established in 1991, the debate regarding the creation of a Constitutional Court originates in 1968. Since then, this idea was present at every single attempt to amend the Constitution. This idea gained popularity during the 1980s, when there was a generalized consensus about controlling abuses of the government regarding the exercise of extraordinary powers, the armed conflict and the “war against drug trafficking”, which by then were the most prominent topics in public discussions of current affairs.

On the one hand, though discreetly exercised, Colombia had a long tradition of judicial review. On the other hand, the introduction of the Constitutional Court into the Colombian legal system was one of the most “waited and wanted” innovations of the 1991 Constitution. These factors helped the Constitutional Court to gain a wide sense of legitimacy and popularity. The fact that the public were already accustomed to the idea of judicial review enhanced its institutional capital, since society saw this power as one naturally exercised by the judiciary.
In the early days of the constitution, as being an institution whose establishment had been desired by the population, there was a generalized favorable opinion of the Court.

3. The Constitutional Court composition

One of the most important factors that enhanced the institutional capital of the Colombia constitutional court has been its composition in terms of personnel. Particularly, I am talking about the rules for nominating and appointing Justices and their personal and professional profiles.

The Colombian Constitutional Court has nine justices, whereas the Supreme Court of Justice has 23 and the Supreme Court of Administrative Law 32. The fact that the Constitutional Court has the lesser number of Justices has two clear consequences related to the legitimacy of the Court. First, it has fostered the idea of “a selective group of people”, who are, to some extent, beyond the regular justices of the other Courts. Second, it has made it easier for public actor and civil society to identify and know who are the Justices of the Constitutional Court. If you were to ask regular citizens at random for the name of a Justice of the other Courts generally most would struggle to name one, whereas most citizens would be able to identify two or three members of the Constitutional Court.

The election of the Justices of the other Colombian Courts is governed by themselves, with new Justices elected by the Courts themselves. In contrast, nominating and appointing Justices for the Constitutional Court is a very complex process, in which the Senate has the last word. In fact, the Supreme Court of Justice, the Supreme Court of Administrative Law, and the President have the power to submit three nominations for the Constitutional Court. In each nomination they present three candidates respectively for each bench. This process, and particularly the Senate´s election, brings about a unique visibility of the election of the Justices of the Constitutional Court. In fact, the Senate organizes public hearings and candidates present themselves along with “their vision” of the Constitutional Court. Media and press coverage are present in such hearings, making the elections relevant to the public consciousness.

The Constitutional Court has traditionally been composed by highly honorable justices. In particular, during the 1990s, the Constitutional Court Justices were
people from diverse origins, ideologies, and visions on the law, though with one thing in common: they were highly respectable Justices and their ethics were unquestionable. Commentators could disagree with their opinions and criticize them, but there was not a minor blemish on their reputation.

Additionally, Justices in the very two versions of the Court had two more things in common. First, most of them were highly respectable professors, seen as independent and detached from political interests. Second, most of them took part in the National Assembly of the Constitution as advisors, so had been “fathers of the Constitution” behind the scenes, and were embedded in the spirit of transformation which had been present in the enacting of the 1991 constitution.

Finally, the honor of the Constitutional Court has continued until nowadays. Even though what we can call the “idyllic” perspectives of the very first years of the Court have decreased, it is still seen as a respectable Court of Law. Its Justices have been highly qualified jurists from different professional, political and academic backgrounds, but are still seen as generally respectable professionals which has brought about a positive image of the Court as a clean institution. The Court has had just one scandal related to corruption since its creation in 1991, in a country were corruption seems to be the order of the day.

4. Tackling sensitive but ignored public issues

The Colombian Constitutional Court has considered the 1991 Constitution as an aspirational and dynamic document, rather than a conservative and static one. First, many of its most prominent Justices have seen the 1991 Constitution as a set of aspirations that depict the society that we as Colombians want to create. Second, they have also considered the Constitution mainly as a set of principles “under an ongoing construction progress”, which is permanently 'refueled' by the Court’s interpretations and adjudications. Both understandings of the Constitution, as an aspirational and also as a dynamic document, are based on a clear transformative conception of the constitutional law. This conception is another source of the legitimacy and the institutional capital of this Court.

Since its very first cases, the Constitutional Court has tackled issues both sensitive to Colombian society and also ignored by traditional public authorities. Apart from the important decisions on separation of powers, the
President’s reelection, extraordinary powers, etc., the Colombian Constitutional Court has applied itself to traditionally ignored cases related to the protection of forcibly displaced people, sexually diverse individuals, basic social rights such as health, as well as to access to drinking water, rights of inmates, of indigenous people and of afro descendants, among others.

This tendency of the Court to hear and trial “traditionally invisible cases” comes from its very early case law. In a traditionally conservative society, the Constitutional Court trialled cases on the right of a male student to wear long hair in a catholic high school, the right of a female student to use make-up while attending a Christian school, the right of a citizen to ask for the exclusion of her critical and impoverished financial situation from the public database, the right of an inmate to have conjugal visits of her husband, the right to education of a student who was expelled from school because he was playing with a condom during break time, the right of an indigenous political candidate to campaign on radio in his traditional language, and the right of an old and poor rural couple to walk through the farm of a wealthy farmer in order to reach public transport in an easier way, among many others. All those cases are just a few of the most important trialled in the very first years of the Court.

Before the establishment of the Constitutional Court, it was truly unthinkable that such cases could be heard by the judiciary, much less by the highest Courts. Those were “ignored cases”, though many people had known or experienced the same or similar such violations of rights. One of the strengths of the Constitutional Court, that has had a clear impact on its institutional capital, is its ability to make such violations “visible”, to integrate them “into the public agenda”, thus unveiling them as “public issues” subject to judicial protection, rather than as “private acts” exempted from the control of the judges. By doing this, the Constitutional Court has introduced into the Colombian legal system a conception of the Courts and Judges as “great levelers”, in the words of Atticus Finch, the famous character of American literature.

5. Relations with the legislative branch

The Constitutional Court has built its legitimacy out of its relation with the legislative branch. Though its members are elected by the Senate, Justices have been traditionally independent from their electors… “The duty to forget” has
been fulfilled. Justices have normally carried out the Court's mandate of judicial review independently, which has enriched its institutional capital and strengthened its role. Apart from this, the Court has played a strategic role in the adjudication of constitutional amendments and in implementing an active procedure of judicial review.

The classical “ultimate answer” from the legislative to the judicial branch is a constitutional amendment. In fact, during the very first years of the Constitution, threats of constitutional amendments were the regular answer of the Colombian Congress to the Constitutional Court's rulings. However, the Court rapidly introduced the basic structure doctrine as a basis to declare unconstitutional constitutional amendments. Though polemic and controversial, this doctrine has become established and strengthened the Courts role in its relation with the Legislative branch.

The Constitutional Court implemented an active procedural judicial review of laws and constitutional amendments. Many among the most iconic of its rulings have been based through procedural judicial review. Through this, the Court has made clear that a democratic decision should be compatible with the Constitution and also a product of an authentic deliberative process. Before the Constitution, the Congress had no control at the legislative process…. The law making process was exempted from every control. Since its very first judgments, the Court introduced an active review on the deliberative process that precedes the enacting of a law. This kind of judicial review has made out of the Constitutional Court “the controller” not only of the product of the democracy, but also of the democratic process itself.

6. Relations with the executive branch

The Constitutional Court has also developed its legitimacy through its relation with the executive branch. Since its very first judgments, the Constitutional Court achieved a strategic role through three functions. First, through controlling the extraordinary powers of the President. Second, through preventing the enlargement of presidentialism, and third, through reviewing international treaties' approbatory laws.

Colombia lived under a state of emergency during most of the twentieth century. Commentators usually referred to the state of emergency as “a necrotic state of
affairs”. From 1945 to 1991, Colombia experienced 30 years under a state of siege and the President truly abused its extraordinary powers. It is well known that a demonstration by a female high school was used as an excuse for the President to use extraordinary powers for a long time during the 1960s. This situation was overcome with the introduction of the Constitutional Court. Since its fourth ruling, the Court assumed the jurisdiction to review, formally and materially, all the executive orders enacted by the President in using his extraordinary powers. Today, the extraordinary powers are used exceptionally, not permanently, as was usual.

The 1991 Constitution established a presidential system, typical in the Latin American context. Because of the Colombian history of abusive presidentialism, the Constitutional Court has been very keen to prevent presidentialism becoming unconstitutional. The Court has declared unconstitutional multiple attempts to enrich presidentialism by weakening the separation of powers. The most well known example is the judgment on presidential reelection, which declared unconstitutional the constitutional amendment intended to establish a third term for the President, who was very popular at the time.

Finally, the Court has also intervened in international treaties approbatory laws. Though acknowledging that the Constitution grants a wide mandate to the President to direct international relations, the Court has established that this mandates has to be exercised under the Constitution. So the President cannot assume international obligations that erode the supremacy of the Constitution, and the Court has continually reviewed the compatibility of international treaties with the Constitution.

7. Relations with the judiciary

The Constitutional Court has also built its legitimacy out of its relation with the rest of the judiciary. In spite of its area of specialization, every single judge or lower tribunal, even the other high Courts, know and apply the Constitutional Court’s precedent. The idea of the Court “as the closing authority that says what the law is” is very entrenched in our legal system, and the rest of the judiciary usually relies on the Constitutional Court's interpretation when particularly controversial or difficult cases are at stake, even those which are related to
ordinary law. This authority of the Constitutional Court has been fostered by the doctrine of the “acción de tutela” against ordinary judicial decisions. This doctrine allows the Court to invalidate judicial decisions from ordinary judges when those decisions violate the due process of law.

Materially speaking, the Colombian Constitutional Court is the Supreme Court of the Land.

8. Relations with civil society

Traditionally, the other Supreme Courts have been considered inaccessible for ordinary citizens. Those courts trial cases involving large sums of money or significant financial interests and have been characterized by a formal view of the law. Those Courts represent, in the Colombian imagination, that famous gatekeeper of the law depicted by Franz Kafka’s tale “Before the Law”. Kafka says “Before the law sits a gatekeeper. To this gatekeeper comes a man from the country who asks to gain entry into the law. But the gatekeeper says that he cannot grant him entry at the moment. The man thinks about it and then asks if he will be allowed to come in later on. “It is possible,” says the gatekeeper, “but not now.” In contrast, the Constitutional Court, in the Colombian imagination, is the man, who, in Kafka’s terms, thinks “the law should always be accessible for everyone”.

This popular conception is palpable taking into account the two main injunctions that activate the Constitutional Court jurisdiction. “Public action of inconstitutionality” and the so called “acción de tutela” are virtually at the disposal of everyone in Colombia. This implies that the Constitutional Court is in the hands of every Colombian because of the API and the AT. Both injunctions are truly informal (you can even submit them verbally).

The accessibility of the Court is also marked by two more factors. The working of the judgments is easy and accessible to everyone, and the Court has a marked openness to civil society by promoting amicus curies and public hearings, which engage the communities in the case. By doing this, the Constitutional Court works as a kind of “voice amplifier” of popular claims that exist in civil society, which also make the Constitutional Court the most popular Court of Law in the land.