

**WHEN ACCOUNTABILITY MEETS JUDICIAL  
INDEPENDENCE:**

***A case-study of 2008 civil society transparency  
observation of the Colombian Constitutional Court's  
nominations***

**A THESIS**

**SUBMITTED TO THE**

**SCHOOL OF LAW**

**IN PARTIAL FULFILLMENT OF THE REQUIREMENTS**

**FOR THE DEGREE OF**

**MASTER IN THE SCIENCE OF LAW**

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**April 2009**

## ABSTRACT

In 1991, Colombia established a Constitutional Court with expansive powers to protect rights. The power to nominate members of the Court was placed in the hands of the President along with the Supreme Court and Administrative Court. In 2008, fourteen Colombian NGOs formed the *Elección Visible*, a coalition designed to ensure greater accountability in Constitutional Court nominations by the two higher courts. In this study I explore the roots of the resulting clash between the *Elección Visible* and the nominating courts. I show that the conflict arose when NGO demands for *accountability* through a more transparent nomination process were resisted by the nominating courts in the name of *judicial independence*. Moreover, I show that Administrative and Supreme Court's Justices decide whom to nominate according to subjective, political, ideological and personal criteria. In particular, I argue that the Administrative Court relies on a traditional *liberal/conservative* dichotomy in making its Constitutional Courts nominations, while the judgments of the Supreme Court rely heavily on assessments of loyalty towards the Supreme Court once the candidate is appointed to the Constitutional Court. The cost of admitting these "hidden" nomination criteria publicly in a legal system such as the Colombian—still highly formalistic and based on a model of Judge who adjudicates based only on "the law"—is far too high. Therefore, Justices had strong incentives to conceal the "real" nomination criteria from the efforts by *Elección Visible* to ensure greater transparency.

## PREFACE

I am deeply grateful for the support of the institutions and individuals that made possible this research during my JSM at Stanford Law School. Universidad de Los Andes, Bogotá, provided full founding for my living expenses while writing this thesis. The Franklin Family Fellowship, at Stanford Law School, was also instrumental for my financing during this year at Stanford. To Los Andes University and the Franklin family I am most grateful for their generous support.

My research required me to conduct several interviews in Colombia with high-ranked members of the State and the Civil Society. I was specially helped by Professor Eduardo Montealegre. Diana Remolina and Alejandro Botero generously helped me to schedule interviews. Without their role as “door-openers” none of my interviews would have taken place.

At Stanford Law School I was lucky enough to have as advisor a great scholar and person, Professor Joshua Cohen. I am deeply grateful for his involvement in this project, his acute recommendations, and his encouragement. It was a great challenge and privilege to work under his supervision. Professor Robert Weisberg’s one-year “Legal Workshop Seminar” was an enormously interesting setting to discuss many of the issues that I address here. For his encouragement I am also deeply indebted. Professors Lawrence Friedman, Rogelio Pérez-Perdomo and Deborah Hensler gave me invaluable advice. Binyamin Blum offered me generous and brilliant insights and backed me up along the way. I am really indebted for his time and effort. I am especially grateful for Carol Shabram’s English class and for her really helpful editing. Moria Paz’ suggestions and comments were also quite helpful during several stages of my research process.

My classmates were enormously encouraging. Their challenging suggestions were instrumental to shape this thesis. Learning from their own projects was also an highly interesting introduction to many socio-legal issues around the world. Tim Dornis’ and Demian Zayat’s accurate and empathetic readings of my drafts made this thesis a better one.

My family in Colombia was, as always, my main backers and advocates. My mother and grandma, in Ibagué, are an infinite source of love, enthusiasm and care. Talking to them every weekend was a great incentive to push forward. From Bogotá, Mary and Oscar – my amazing mother and father in law—cheered me along the way and made everything easier for me.

Finally, Tatiana, my wonderful wife, filled me with love, inspiration and support. She endured with an admirable and unquenchable strength these months apart. From Bogotá, she was always ready to cheer me up when things were rough without her. Being a brilliant scholar on her own right, she also suggested several important changes, which I did my best to incorporate. I tried to write a thesis that would make her proud. Her approval of this effort is what, ultimately, justifies it.

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## i. INTRODUCTION

*Law, says the judge as he looks down his nose,  
Speaking clearly and most severely,  
Law is as I've told you before,  
Law is as you know I suppose,  
Law is but let me explain it once more,  
Law is the law.  
W.H. Auden*

Was there a time in the United States when the nominations and appointments of Supreme Court Justices were not a matter of interest for mainstream public opinion? Did a particular group of appointments --set in meaningful political or legal contexts--unleash the public attention of American citizens towards the composition of the highest Court in the land? Or was it more a process of slow and imperceptible sedimentation the one that has led Americans to the current situation, where every appointment to the Supreme Court is followed closely by millions of individuals all across the nation?

Traditionally, the nominations and appointments of Colombian higher Courts' Justices have generally been of interest only for members of the legal profession. This situation seems now to be rapidly changing. The transparency observation of the Constitutional Court's nominations conducted by an NGO coalition called *Elección Visible* in 2008 indicates that nominations and appointments of Constitutional Court Justices have become a public issue in Colombia.<sup>1</sup> This was especially evident during 2008's

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<sup>1</sup> There is considerable public awareness about the ideological trends within the Constitutional Court compared to other Courts, and how the arrival of new Justices affects such trends. Sadly, currently we do not have any reliable public opinion study in Colombia that tackles the issue of public opinion awareness and attitudes towards the Constitutional Court itself. Nonetheless, there are some benchmarks that could help to identify public opinion awareness of the Court. Just as in the U.S., *El Espectador* or *El Tiempo* --the Colombian equivalent of *The NY Times* or *Washington Post*-- report or comment on the Constitutional Court's cases on a daily basis. As is the case of U.S. Supreme Court's Justices, some Constitutional Court Justices have become

nominations and appointments. It is reasonable then to argue that the 2008's nominations and appointments of the Constitutional Court signal a departure point for the public awareness about the composition of the highest Colombian Court.

But what has happened in Colombia since 1991 that might explain this new phenomenon? Among the many factors that immediately burst into one's mind as possible explanations, one looms large as the most persuasive: during the last 17 years the Constitutional Court has been able to accomplish a basic rights revolution in Colombia, whose fruits have been enjoyed by most Colombians in their everyday lives. Thanks to the Constitutional Court's rulings many Colombians now perceive themselves as citizens endowed with a set of basic rights that can be protected through judicial mechanisms such as the *tutela*. Being gay, indigenous, afrocolombian, handicapped, pregnant, sick, unemployed, imprisoned, forcefully displaced--among many other identities and situations--has assumed new connotations due to the Constitutional Court's basic rights jurisprudence. Furthermore, during the last 17 years, governments and Congress members have realized that the Constitutional Court is an effective check and balance institution, capable of overthrowing their decisions when they contradict the Constitution. Even more striking is that they have refrained from overtly attacking or suppressing the Constitutional Court when its rulings have undermined their political projects.

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celebrities during their tenures and thereafter. A good illustration of this assertion is the case of Carlos Gaviria. A highly popular and controversial Justice --whose liberal rulings about euthanasia, same-sex couples, personal liberties, among many others, caused prolonged public deliberation-- Gaviria went directly from the Constitutional Court into politics. After finishing his eight-year tenure as one of the most celebrated and attacked Justices in the Constitutional Court's history, Gaviria ran for the Senate in 2002 as the head of the left-wing *Polo Democrático* party, obtaining the 5<sup>th</sup> highest vote during that particular election. In 2006, Gaviria ran for the presidency and obtained the second largest vote --after President Uribe; this feat is considered to be the most remarkable accomplishment ever of any left-wing party in Colombia. Currently, Gaviria is one of the most important Colombian politicians, and one of the most outspoken critics of Uribe's government.

Therefore, the importance of who is nominated and appointed to the Constitutional Court has become highly significant for the civil society and for governmental elites. More than ever, it is now evident in Colombia that the composition of the Constitutional Court has an overarching effect on the furthering of the basic rights transformation accomplished in the past two decades, and on preserving the democratic stability of the country – as, for instance, the Constitutional Court will eventually have to decide whether the current president can reform the Constitution in order to stay in office for a third consecutive period. It comes as no surprise, then, that a wide and publicized NGOs coalition -- *Elección Visible*-- assumed the role of observer of the Constitutional Court's nominations during 2008, and that the nominating Courts' reactions to the NGOs overseeing gained great publicity.

Although prior to the 1991 Constitution Colombia had a long history of higher Court' nominations and appointments, only the Constitutional Court's composition has become matter of interest to the public.<sup>2</sup> Despite the lack of studies attempting to analyze the

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<sup>2</sup> There is considerable public awareness about the ideological trends within the Constitutional Court compared to other Courts, and how the arrival of new Justices affects such trends. Sadly, currently we do not have any reliable public opinion study in Colombia that tackles the issue of public opinion awareness and attitudes towards the Constitutional Court itself. Nonetheless, there are some benchmarks that could help to identify public opinion awareness of the Court. Just as in the U.S., *El Espectador* or *El Tiempo* –the Colombian equivalent of *The NY Times* or *Washington Post*-- report or comment on the Constitutional Court's cases on a daily basis. As is the case of U.S. Supreme Court's Justices, some Constitutional Court Justices have become celebrities during their tenures and thereafter. A good illustration of this assertion is the case of Carlos Gaviria. A highly popular and controversial Justice –whose liberal rulings about euthanasia, same-sex couples, personal liberties, among many others, caused prolonged public deliberation-- Gaviria went directly from the Constitutional Court into politics. After finishing his eight-year tenure as one of the most celebrated and attacked Justices in the Constitutional Court's history, Gaviria ran for the Senate in 2002 as the head of the left-wing *Polo Democrático* party, obtaining the 5<sup>th</sup> highest vote during that particular election. In 2006, Gaviria ran for the presidency and obtained the second largest vote –after President Uribe; this feat is considered to be the most remarkable accomplishment ever of any left-wing party in Colombia. Currently, Gaviria is one of the most important Colombian politicians, and one of the most outspoken critics of Uribe's government.

The public visibility of the Constitutional Court is, however, not accidental, since the 1991 Constitutional Assembly assigned the appointment of Constitutional Court Justices to Congress, stripping all other higher courts from this indirect democratic selection. In contrast, Supreme Court's and Administrative Court's Justices were not "elevated" democratically by the 1991 Constitutional Assembly –its Justices are appointed by cooptation, i.e., by its own Justices. Cepeda considers this fact to be an unequivocal manifestation of the



public's attitudes towards the Colombian Constitutional Court,<sup>3</sup> it is reasonable to argue that without extended public awareness about the Constitutional Court, the NGO coalition *Elección Visible* would have passed almost unnoticed.

In my case-study I will analyze the process that led the NGO coalition *Elección Visible*<sup>4</sup> to clash against nominating Courts. This conflict arose when the NGOs accountability

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supremacy of the Constitutional Court over all other higher Courts in the framers' design. See MANUEL J. CEPEDA, *The Colombian Constitutional Court* 3 Wash. U. Global Stud. L. Rev. 559 (2004).

<sup>3</sup> The literature in the United States is very large. One of the pioneering researchers who focused on the influence of public opinion and interest groups on higher Courts nominations is Martin Shapiro. After studying the literature on the issue and analyzing concrete nomination cases for the U.S. Congress, Shapiro found no relevant impact of interest groups on the Congressional appointments of Supreme Court Justices. See, MARTIN SHAPIRO, *Interest Groups and Supreme Court Appointments* 84 Nw. U. L. Rev. 935, (1989-1990). However, Shapiro's conclusion is contested by political scientists such as Gregory Caldeira. Most of his work has approached the question about how public opinion interacts with Courts and viceversa from different angles. Caldeira has demonstrated the lack of reliable public opinion studies about the Supreme Court's visibility or public support. Caldeira argues that neither is found in the U.S. systematic studies about public opinion attitudes towards the Supreme Court. However, sometimes from a historical perspective –as is the case of Caldeira's study of Roosevelt's 'court-packing plan'-- or sometimes using positivistic approaches to examining public opinion, Caldeira has demonstrated that it is possible to study the interaction between the U.S. Supreme Court and American public opinion. According to Caldeira, public opinion and interest groups do, in fact, influence the Courts. See, GREGORY CALDEIRA, *Commentary of Senate Confirmation of Supreme Court Justices: the Roles of Organized and Unorganized Interests*, 77 Ky. L.J. 532, (1988-1989); GREGORY CALDEIRA, *Public Opinion and The U.S. Supreme Court: FDR's Court-Packing Plan* 81 The American Political Science Review 1139, (1987); GREGORY CALDEIRA, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 The American Political Science Review Author(s): Gregory A. Caldeira 1209, (1986); GREGORY CALDEIRA & JAMES GIBSON, *The Etiology of Public Support for the Supreme Court*, 36 American Journal of Political Science 635, (1992); GREGORY CALDEIRA, et al., *On the Legitimacy of National High Courts* 92 The American Political Science Review 343, (1998); GREGORY CALDEIRA, et al., *Measuring Attitudes toward the United States Supreme Court*, 47 American Journal of Political Science 354, (2003); GREGORY CALDEIRA, et al., *The Lobbying Activities of Organized Interests in Federal Judicial Nominations* 62 The Journal of Politics 51, (2000); GREGORY CALDEIRA & CHARLES E. SMITH, *Campaigning for the Supreme Court: The Dynamics of Public Opinion on the Thomas Nomination* 58 The Journal of Politics 655, (1996); GREGORY CALDEIRA & JOHN WRIGHT, *Lobbying for Justice: Organized Interests Supreme Court Nominations, and United States Senate* 42 American Journal of Political Science 499, (1998).

<sup>4</sup> Although *Elección Visible* was composed of 14 organizations, its "core-group" was comprised of only five NGOs. Of these five organizations, three have become some of the leading Colombian transparency and accountability practitioners: *Transparencia Internacional--Colombia's Chapter*, *Congreso Visible*, and *Movimiento de Organización Electoral*. These organizations have centered their accountability exercises on the popular election of Congress, mayors, governors, and the President. They also conduct ongoing accountability processes for governmental agencies –both at the local and national levels. Their transparency observation of the 2008 Constitutional Court's nominations<sup>4</sup> –by the Supreme Court and Administrative Court-- was their first attempt to apply accountability theories and procedures to the judiciary.

demands for a more transparent nomination process were resisted by the nominating Court' in the name of judicial independence.

The puzzle that I address in my case-study is why the Courts decided to conceal their nominating criteria from the NGOs, igniting a confrontation with *Elección Visible*. This thesis develops three interconnected arguments that might help to address such puzzle: first, from my interviews with the Justices it is possible to infer that Courts use distinct 'political' nomination criteria to select the Constitutional Court's nominees; second, Justices at the nominating Courts have incentives to conceal their political nomination criteria because they are committed with an apolitical formalism, which permeates Colombia's legal culture; third, Justices at the nominating Courts opposed the transparency observation conducted by the NGO coalition *Elección Visible* because it had the prospect of bringing out those political criteria. In the following paragraphs I would like to elaborate some of these points a little further.

Judging from the interviews with Justices it is possible to infer that the Administrative and Supreme Courts interpreted the accountability and transparency language and demands used by the NGO coalition as a threat to their judicial independence for two principal reasons. First, the higher Court Justices firmly reject the idea of being treated as governmental officials who can be held accountable by civil society's organizations. Although the Justices made it clear in their interviews that they are, indeed, accountable to an abstract entity, such as *the people* or the *citizenry*, they considered that particular groups within civil society could not –legitimately-- make the Courts accountable.

Second, Justices officially embrace a kind of apolitical legal formalism. They regard themselves<sup>5</sup> as individuals who adjudicate like independent actors, based on strict legal reasoning, without being influenced by politics, public opinion or private interests. Therefore, Justices think that when they adjudicate or decide nominations, it is not acceptable for civil society organizations to demand transparency or accountability, since their decisions –being independent and based exclusively on “the law”-- are already transparent.

Rephrased in more overarching terms, the hostile reaction by nominating Courts towards the NGO coalition can be interpreted as a clash between *political accountability* and *judicial independence*. This fact can be explained by emphasizing two interrelated points. On the one hand, the nomination system designed by the Colombian Constitution demands that the Supreme and Administrative Court Justices nominate Constitutional Court Justices based on a model of judicial adjudication – which is also based on a model of judicial independence. On the other hand, the Colombian Constitutional Court’s relevance as a key political actor has produced vigorous social and political demands for a transparent nomination and appointment system. Nonetheless, both the Administrative and Supreme Court Justices made their nominations based on a model of judicial independence and refused to make the “hidden” criteria used to nominate candidates to the Constitutional Court transparent. As a result, what my case study reveals is that the Colombian Constitutional Court’s nomination system fails to strike a balance between accountability and judicial independence.

Based on the aforementioned facts, it is reasonable to expect that a future accountability and transparency exercise conducted by NGOs on Constitutional Court nominations,

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<sup>5</sup> The question of whether Justices and judges are deceiving themselves through this self-perception is a separate concern, which I will address in Section IV.

would find similar negative reactions by the nominating Justices. But it is essential to understand the reasons for this negative reaction. Most Administrative and Supreme Court's Justices acknowledged in their interviews that they decide whom to nominate according to subjective, political, ideological and personal criteria. In particular, the Administrative Court relies on a traditional *liberal/conservative* dichotomy in making its Constitutional Court nominations, while at the Supreme Court judicial politics -- i.e. loyalty towards the Supreme Court once the candidate is appointed to the Constitutional Court— appears to be the crucial criterion. Nonetheless, the cost of admitting this “hidden” nomination criteria publicly in a legal system such as the Colombian—still highly formalistic and based on a model of Judge who adjudicates based only on “the law”—if far too high. Therefore, in future accountability processes Justices will probably conceal the “real” nomination criteria from any transparency observation practiced by NGOs. Furthermore, as in 2008, Administrative and Supreme Court Justices will prefer to confront NGOs —who, again, will be accused by the Justices of damaging their judicial independence—as opposed to a public disclosure of the “hidden” criteria used in their nominations of Constitutional Court's Justices. Admitting publicly that higher Courts' Justices nominate using political criteria such as party affiliation or institutional loyalty towards the nominator would open a damaging Pandora box, whose contents will point out at the Courts' lack of neutrality and impartiality. Among the potentially harmful effects of making the “hidden” criteria visible to NGOs—and, eventually, to public opinion – one is especially poignant: admitting the utterly inaccuracy of a formalist model of the judge, who is supposed to adjudicate based only on the written law and without any consideration to extralegal issues such as politics, morals, ideological concerns, or personal proclivities. The idea that judges adjudicate based on a mechanical and statute-based syllogism, is an *Auto de Fé* on which great part of the legitimacy of the legal system rests. That is why it is

reasonable to expect that nominating Courts will resist in the future any attempts to make transparent those “hidden” nomination criteria. Additionally, it is to be expected that overseeing NGOs will also refrain from publicly exposing the Court’s “hidden” criteria – which most of the leading NGO members know or infer-- since that could be too damaging for their relationships with Colombia’s legal elite. That cost is unbearable for most of the NGOs participating in *Elección Visible*. They will prefer, instead, that through the observation process conducted by the NGOs Justices decide to make transparent their own “hidden criteria”. As it will be shown in this thesis, that scenario is unlikely to happen since it would amount to having Justices shooting their own feet before public opinion. Therefore, it is highly probable that the “dirty little secret” of how Constitutional Court’s nominations are carried out at the Courts will remain concealed; no further transparency, then, is to be expected in overseeing processes such as the one conducted by *Elección Visible*.

The thesis relies principally on a socio-legal approach. Although most of the literature that I reviewed can be labeled as part of comparative law’s province –and more especially, part of comparative constitutionalism’s recent developments—the way I address the subject of Colombia’s Constitutional Court nominations fits squarely into socio-legal studies. My interest was to offer a non-formalist, empirical, contextual and *outside*<sup>6</sup> interpretation of why the NGOs transparency observation of the Constitutional Court nomination clashed against the Justices’ judicial independence.

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<sup>6</sup> According to Macaulay, Friedman and Mertz, these characteristics –among others-- make the basic features of a socio-legal approach. By the *outside* point of view of socio-legal studies, the authors mean approaching legal phenomena not from the perspective of legal procedures or rules, but from the perspective of social sciences. My interdisciplinary approach in this thesis benefits especially from political science. See STEWART MACAULAY, et al., *The Impact of Law on Society, in Law in Action -- A Socio-Legal Reader*, (Stewart Macaulay, et al. eds., 2007).

In the first part of this thesis I explain the relevance of the Colombian Constitutional Court, taking both the perspective of comparative constitutionalism and the local impact that the Constitutional Court has had on Colombian society into account. Furthermore, I will place the Constitutional Court's nomination system into a comparative context, explaining why the latter fails to strike a balance between accountability and judicial independence. Finally, I will review interdisciplinary literature on accountability and judicial independence.

In the second part of the thesis I will synthesize the results of my case-study. Since Section iii contains the essence of this thesis, I would like to stress some points about the case study that I present here. My case study was designed as a tool for acquiring reliable empirical data about the transparency observations of the 2008 nominations to the Colombian Constitutional Court. My first objective was to acquire insights into the transparency observation of the nominations at the Supreme Court and Administrative Court conducted by the NGO coalition *Elección Visible*. An additional goal was to obtain reliable data regarding the reactions of the nominating Courts to the NGOs coalition's transparency observation. Furthermore, I wanted to explain why a second coalition – organized by law school Deans-- was received differently by the nominating Courts. This latter coalition --the Deans' Coalition-- was created by the most prominent Colombian law schools as a transparency observation tool for the nomination and appointment of Constitutional Court's justices in 2008; nonetheless, the Deans were significantly less active at the nominating Courts than the NGOs, and decided to focus on the appointment hearings at the Senate instead. As will become clear in Section G, the Deans' decision to leave the Courts alone in their nomination decisions –concentrating, instead, on the Senate's appointments-- was based on “insider” knowledge about the Justices' and the Courts' legal culture. Thus, it would be accurate to say that each coalition designed and applied two different observations of the nomination and appointment of Justices to the

Constitutional Court -- the NGOs Courts-centered strategy, and the Deans' Senate-centered one. Because of this difference in focus, I concentrate on the NGO coalition, and address the Dean's coalition only in relation to the NGOs coalition.

Between December 9 and December 17, 2008, I conducted a total of twelve semi-structured interviews with stakeholders and decision-makers in Bogotá, Colombia. The interviews all took place after the nominations at the Courts were already made, and while most of the appointments were taking place, or about to take place, at the Senate. In the two set of interviews I used a "snow-balling" interview strategy. All of the interviewees were directly involved as relevant actors in the transparency observation of the 2008 nominations and the appointments to the Colombian Constitutional Court. The stakeholders' interview set includes four members of the NGO Coalition -- *Elección Visible*-- and three members of the Deans coalition. The Information that I hoped to obtain from this set of interviews was: (1) how the observation process was executed by both the NGOs and the Deans' coalitions; (2) what obstacles the two coalitions faced during the implementation process; (3) the two coalitions' perceptions of their rate of failure/success in their observation projects for the nominating Courts; and (4) how the NGO coalition perceived the Deans and vice-versa.

The six decision-takers interviews comprised Justices from the two nominating Courts (Supreme Court and Administrative Court), who cast their vote for the nomination decision and who were aware of the observation being conducted by the coalitions. By interviewing these six Justices I planned to obtain: (1) reliable insights into why the Justices ignited a non-cooperative, closed mode in the case of the NGOs, whereas in the case of the Deans an open and cooperative mode was engendered; (2) an approximate understanding of how the Justices perceived these transparency observations; (3)

accurate interpretations of the Justices' classic concept of "judicial independence," and whether this conception was at odds with the transparency observation arising from the NGO coalition; (4) a rough appraisal of the Court's real rationale and the criteria behind their nomination of candidates to the Constitutional Court.

Both the case-study and the literature review Sections were conceived as interdependent units that reinforce each other. Some of the arguments raised in the literature review will, thus, reappear in the case-study Section. Nonetheless, I expect that the empirical approach of Section iii could shed a different light on the issues discussed in the literature review.

## ii. LITERATURE REVIEW

### A. Comparative constitutionalism and "forward-looking" Courts

The Colombian Constitutional Court, embodied in the 1991 Constitution, is the highest Court in the land. Its creation in 1991 occurred in the midst of the wave of constitutional reforms that swept many countries—especially post-communist, developing and post-dictatorial countries-- during the last two decades of the 20<sup>th</sup> Century.<sup>7</sup> The Colombian Constitutional Court is the principal engine of the 1991 Constitution, which like South

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<sup>7</sup> For a general overview of this wave of Constitutionalism in the world throughout the past three decades, see: BRUCE ACKERMAN, *The Rise of World Constitutionalism*, 83 *Virginia Law Review* 772, (1997). TOM GINSBURG, *Judicial Review in New Democracies* (Cambridge University Press 2003); RAN HIRSCHL, *The Political Origins of Political Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 *Law & Soc. Inquiry* 91, (2000); RAN HIRSCHL, *Towards Juristocracy - The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004). For a more specific overview of how this wave of Constitutionalism swept through Latin-American Countries, see: ROBERTO GARGARELLA, *Theories of Democracy, the Judiciary and Social Rights*, in *Courts and Social Transformation in New Democracies*, (Roberto Gargarella, et al. eds., 2006); JAVIER A. COUSO, *The Changing Role of Law and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity*, in *Courts and Social Transformation in New Democracies*, (Roberto Gargarella, et al. eds., 2006); CHRISTIAN COURTIS, *Judicial Enforcement of Social Rights: Perspectives from Latin America*, in *Courts and Social Transformation in New Democracies*, (Roberto Gargarella, et al. eds., 2006).



Africa's,<sup>8</sup> India's,<sup>9</sup> or Hungary's<sup>10</sup> Constitutions could be considered expansive and ambitious Constitutions both for the scope of their bill of rights and for their commitments to a form of Social State<sup>11</sup> based on the adjudication of socioeconomic Rights.<sup>12</sup> For all of these reasons, Colombia's Constitution can be categorized as a 'forward-looking' rather than a 'backward looking' Constitution, based on Teitel's definition.<sup>13</sup> According to Stacy, Colombia's Constitution – along with South Africa's and India's-- is one of the most progressive in the world; furthermore, the Colombian Constitutional Court and the *Tutela* – *citizen injunction*—have been effective enforcement's mechanisms of the Bill of Rights entrenched in Colombia's Constitution. On this point, Stacy argues that,

*The 1991 Colombian Constitution replaced the 1886 Constitution, which contained few fundamental rights. The new Constitution encompasses a broad range of negative and positive provisions, including economic, cultural, and collective rights, as well as civil and political rights.... And also provides two important new judicial mechanisms for the protection of rights and liberties –a separate Constitutional Court and the tutela. The tutela is a citizen injunction that allows any person to seek immediate judicial protection when their Constitutional Rights are violated or*

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<sup>8</sup> CASS SUNSTEIN, *Designing Democracies: What Constitutions do* (Oxford University Press. 2001); HEINZ KLUG, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge University Press. 2000); JACKIE DUGARD & THEUNIS ROUX, *The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor: 1995-2004*, in *Courts and Social Transformation in New Democracies*, (Roberto Gargarella, et al. eds., 2006).

<sup>9</sup> R. SUDARSHAN, *Courts and Social Transformation in India*, in *Courts and Social Transformation in New Democracies*, (Roberto Gargarella, et al. eds., 2006).

<sup>10</sup> ANDRÁS SAJÓ, *Social Rights and Middle-Class Entitlements in Hungary: The Role of the Constitutional Court*, in see id. at

<sup>11</sup> For a recent study of Comparative Constitutional Law centered on social rights, state form and Constitutionalism, see MARK THUSHNET, *Weak Courts, Strong Rights* (Princeton University Press. 2008).

<sup>12</sup> For an understanding of the role played by socioeconomic rights' adjudication in the Colombian Constitution, see: RODRIGO UPRIMNY, *The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates* in *Courts and Social Transformation in New Democracies*, (Roberto Gargarella, et al. eds., 2006).

<sup>13</sup> RUTI TEITEL, *The Role of Law in Political Transformation*, 106 Yale L.J. 2009, (1997). Following Teitel on this point, Colombian socio-legal Scholar Mauricio Villegas uses the term "Aspirational Constitutions" to define Constitutions committed to foster structural social changes in societies trying to overcome former situations of inequality or exclusion –such as the case of the Indian and the South African Constitutions-- or internal armed conflicts –such as the Colombian. See MAURICIO GARCÍA, *Law as Hope: Constitutions, Courts, and Social Change in Latin America*, 16 Fla. J. Int'l L. , (2004).

*threatened by either the government or a private person. All tutelas are forwarded to the Constitutional Court for discretionary review.*<sup>14</sup>

The Colombian Constitutional Court was created under the model of Kelsenian Constitutional Courts, with monopolistic powers over abstract constitutional review –which means that in Colombia, unlike the U.S. “diffuse” model, the Constitutional Court exerts “concentrated” constitutional review.<sup>15</sup> Before the 1991 Constitution, the Supreme Court<sup>16</sup> had the power to strike down national laws and presidential decrees. With the enactment of the 1991 Constitution, the newly-created Constitutional Court had enhanced powers of *concrete* judicial review through the *Acción de Tutela* (writ of protection of basic rights or citizen injunction), *Ex officio abstract review*, and abstract review through *Actio Popularis*. What this means, briefly, is that through *Tutela* any citizen can claim the violation of any basic right included in the Bill of Rights before any judge. The Constitutional Court, on its part, can select or review any number of *Tutelas* produced by Colombian Judges. Furthermore, the Constitutional Court can exert automatic or ex-officio abstract review of most legislation produced by Congress and of most regulation produced by the executive. Finally, the Constitutional Court has the exclusive faculty to revise all *Actio Popularis* filed

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<sup>14</sup> HELEN M. STACY, *Human Rights for the 21st Century--Sovereignty, Civil Society, Culture* (Stanford University Press. 2009). At 128.

<sup>15</sup> Stone-Sweet discusses the two great models of Constitutional Review at length: the American Model, based on a Supreme Court with its non-monopolistic powers of Constitutional Review, and the European or Kelsenian model, based on a Constitutional Court with exclusive powers of Constitutional Review and ‘negative legislation’ functions. See ALEC STONE-SWEET, *Why Europe Rejected American Judicial Review- and why it May Not Matter*, 101 Mich. L. Rev. 2744, (2003). Furthermore, in this article Stone-Sweet probes the fact that the two systems of Constitutional review are converging, based on Merryman’s idea of convergence. See JOHN H. MERRYMAN, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford University Press. 2007). For a further discussion of the convergence thesis see: MARY A. GLENDON, *The Sources of Law in a Changing Legal Order* 17 Creighton L.Rev. 663, (1984). PIERRE LEGRAND, *European Systems Are Not Converging*, 45 Int’l Comp. L. Q. 52, (1996). Martin Shapiro also discusses the characteristics of the model of Kelsenian Constitutional Courts at length. See, MARTIN SHAPIRO, *Judicial Review in Developed Democracies*, in *Democratization and the Judiciary*, (Siri Gloppen, et al. eds., 2004).

<sup>16</sup> The Colombian Supreme Court was created in 1819 as the highest “ordinary” Court in the land. However, it was only through the derogated 1886 Constitution that the Supreme Court was endowed with all its current functions.

by any citizen against laws, constitutional amendments and decrees produced by the executive.

The impact of the Constitutional Court has been remarkable. Since the creation of the Constitutional Court in 1991, the Colombian society and its legal system have experienced a profound basic rights revolution. The Constitutional Court has decided cases that transformed the social landscape regarding racial minorities,<sup>17</sup> indigenous peoples,<sup>18</sup> environmental rights,<sup>19</sup> gender,<sup>20</sup> same-sex couples,<sup>21</sup> euthanasia,<sup>22</sup> basic-subsistence rights and extreme poverty,<sup>23</sup> sexual orientation,<sup>24</sup> personal drug consumption,<sup>25</sup> abortion,<sup>26</sup> gender equality and women's rights,<sup>27</sup> freedom of religion,<sup>28</sup> freedom of the press,<sup>29</sup> protection of persons with disabilities,<sup>30</sup> among many other issues. Several of its rulings have precluded governments from declaring states of exception and the provisional suppression of basic rights.<sup>31</sup> In two recent rulings, the salient

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<sup>17</sup> See, among many others, C-086 of 1994, T-574 of 1996, T-1042 of 2001,

<sup>18</sup> T-380 of 1993, T-652 of 1998, SU-039 of 1997, T-523 of 1997, T-394 of 1999, SU-510 of 1998, SU-383 of 2003

<sup>19</sup> See, SU-442 of 1997, T-284 of 1995, T-071 of 1997, T-574 of 1996, C-860 of 2001.

<sup>20</sup> Some decisions to determine one's gender include: SU-642 of 1999.

<sup>21</sup> In February 2009, the salient Constitutional Court declared numerous laws that established differences between heterogenous couples and same sex couples unconstitutional in areas such as family law, civil law, criminal law, labor law, among other areas. Thanks to that decision, although marriage is still considered to be legal only between heterogenous couples, same-sex couples have the same rights as different-sex couples. See C-029 of 2009.

<sup>22</sup> Decision C-026 of 1995 decriminalized euthanasia in Colombia.

<sup>23</sup> See, among many others, T-533 of 1992, T-401 of 1992, T-046 of 1997, T-1130 of 2001, T-149 of 2002.

<sup>24</sup> See, T-097 of 1994, C-481 of 1998, SU-623 of 2001, SU-111 of 1997, SU-225 of 1998.

<sup>25</sup> Decision C-221 of 1994 decriminalized the consumption and possession of minimal doses of narcotics.

<sup>26</sup> The ruling that decriminalized abortion in extreme cases such as rape, great risk to the mother's health, and grave illness of the fetus, is the following: Decision C - 355 of 2006.

<sup>27</sup> Among the varied rulings dealing with gender equality and women's rights, see: T-098 of 1994, C-622 of 1997, C-112 of 2000, C-410 of 1994.

<sup>28</sup> Cases of protection of minority religious groups include decision C-555 of 1994, T-982 of 2001, T-1083 of 2002.

<sup>29</sup> See, T-066 of 1998, T-094 of 2000, C-329 of 2000.

<sup>30</sup> See, T-288 of 1995, T-823 of 1999, T-1134 of 2000, T-595 of 2002. .

<sup>31</sup> See C-179 of 1994, C-300 of 1994, C-802 of 2002, C-327 of 2003

Constitutional Court reformed the national health system<sup>32</sup> and established the basis for an effective national policy to protect the displaced population<sup>33</sup> –millions of individuals<sup>34</sup> who are fleeing from the internal armed conflict and arrive at urban settlements in states of dire destitution.

The load of the Constitutional Court is immense. Whereas in 1992 8,060 *tutelas* reached the Court, by 2001 the number had peaked at 133,273 cases<sup>35</sup>. By 2008, according to the current Constitutional Court Chief Justice –Justice Sierra Porto-- the number of *tutelas* decided in Colombia may have reached 500,000 cases.<sup>36</sup> Abstract review cases have also experienced an enormous increase, rising from 53 in 1992 to 339 in 2002. The output of the Constitutional Court is also remarkable: since its creation, the Constitutional Court produced an average of 850 decisions per year.<sup>37</sup>

The figures aforementioned just sketch the impact that the Constitutional Court has had on Colombian society. Maybe more important is the incommensurable transformative effect that the basic rights jurisprudence of the Court has exerted on the way traditionally discriminated groups perceive themselves, and are perceived by the State and the rest of society. When the Court produced its first ruling in 1992, outrageous violations of individual liberties were accepted as given, or even justified on the basis of class, race,

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<sup>32</sup> See, C-119 of 2008.

<sup>33</sup> This ruling was produced by the Court in February 2009. The Justice who wrote the opinion was Manuel José Cepeda. It was the last ruling of the salient Constitutional Court, and one of the most celebrated of the past eight years, since it significantly improved the state's duties towards millions of these destitute individuals. Because it is so new, it still lacks a reference number.

<sup>34</sup> According to Jackson, "The war [Colombia's] has ... created 3.2 million internally displaced people (out of a total of 43 million)". JEAN E. JACKSON, *Rights to Indigenous Culture in Colombia*, in *The Practice of Human Rights* (Mark Goodale & Sally Engle Merry eds., 2007).

<sup>35</sup> All the *Tutelas* issued by Colombian Judges reach the Constitutional Court. The Court, nonetheless, decides discretionally which to select. The three "selection" chambers are composed of three Justices; however, the criteria used by the selection chambers remains obscure to outside onlookers.

<sup>36</sup> See, [http://www.eltiempo.com/colombia/caribe/2008-08-05/mas-de-medio-millon-de-tutelas-recibiran-jueces-en-el-2008\\_4427533-1](http://www.eltiempo.com/colombia/caribe/2008-08-05/mas-de-medio-millon-de-tutelas-recibiran-jueces-en-el-2008_4427533-1)

<sup>37</sup> Cepeda, supra, note 2.

gender or sexual option. Apparently minute discriminations like forcing a pregnant teenager to wear a red uniform when attending high school as a way of shaming and punishing –a case decided by the Court during its first year—were addressed by the Court, alongside massive violation of basic rights of same-sex couples, indigenous communities, patients in need of a life-saving medication or medical treatment, or pregnant women demanding their right to maternity leaves. Most of these unjustifiable violations of basic rights survive currently in Colombia; however, they are not taken as granted, and in many cases they are condemned by the Court and by mainstream public opinion.

It is precisely how the Constitutional Court's basic rights jurisprudence has pervaded contemporary Colombian society what could probably explain more accurately –since there might be a multiplicity of complementary factors--why the nomination and appointment of its justices has become increasingly important during the last years.

#### B. Understanding the Constitutional Court's nomination system from a comparative perspective

According to the Constitution, the Constitutional Court must be composed of nine Justices who serve non-renewable eight-year tenures. The Constitution states the basic qualifications required for a candidate to be appointed to the Constitutional Court.<sup>38</sup> Constitutional Court Justices are nominated by the President, the Supreme Court and the Administrative Court.

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<sup>38</sup> Being a Colombian citizen, being a lawyer, having more than 10 years of academic or professional experience, and not having a criminal or disciplinary record are the basic requirements established by the Constitution.

The Supreme Court is the highest Court of what Colombian legal scholars call the “ordinary” judicial branch.<sup>39</sup> All judges and courts in Colombia –municipal, circuit and state tribunals-- that decide cases in criminal, family, civil and labor law, are part of the “ordinary” judicial branch. The Administrative Court,<sup>40</sup> on its part, is the Colombian version of the French *Conseil d'Etat*,<sup>41</sup> i.e., a separate higher Court in charge of adjudicating – among other issues-- cases against decisions of the national government. Since the Colombian political system is “presidentialist” the Colombian President is elected by direct popular vote.”<sup>42</sup> Each nominator is allowed to propose nine candidates in three *three-name* lists to Congress. From those initial 27 nominees, the Senate appoints a total of nine Justices. Figure 1 below illustrates the Constitutional Courts’ nomination and appointment system:

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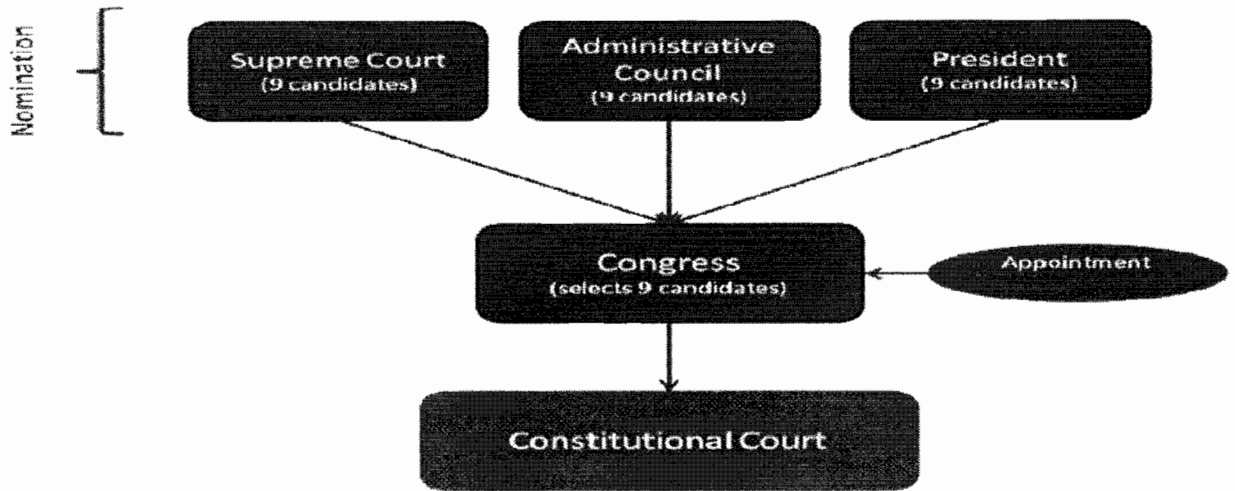
<sup>39</sup>The term “ordinary” judicial branch was originally coined in France, as a way to differentiate civil, criminal, family, and labor law, from administrative and constitutional law. See, MITCHEL DE S.-O.-L’E. LASSER, *The European Pasteurization of French Law* 90 *Cornell L. Rev.* 995, (2005). At 1043.

<sup>40</sup> The Administrative Court had a provisional antecedent in the *Consejo de Estado*, conceived by Simón Bolívar under the model of the 1799 French *Conseil d'Etat*.

<sup>41</sup> For a close-knitted description of the Council d’ Etat, see JOHN BELL, *Principles and Methods of Judicial Selection in France*, 61 *S. Cal. L. Rev.* 1757, (1988).

<sup>42</sup> For a historical account of how the presidentialist system in Colombia has shaped Colombian politics during the 19<sup>th</sup> and 20<sup>th</sup> Centuries, see MARCO PALACIOS, *Between legitimacy and violence : a history of Colombia, 1875-2002* ( Duke University Press, 2006. 2006).

## NOMINATION AND APPOINTMENT OF CONSTITUTIONAL COURT JUSTICES



The diverse institutional designs of higher courts' nomination and appointment systems in most contemporary legal systems represent an attempt to strike a balance between accountability and judicial independence.<sup>43</sup> Garoupa and Ginsburg highlight this point as follows: "While there is near universal consensus on this as a matter of theory, legal systems diverge greatly in the ways in which they appoint judges, as each tries to balance independence with accountability through institutional design."<sup>44</sup> In Malleson and Russell's pioneering comparative study of nomination and appointment systems worldwide,<sup>45</sup> the nomination and appointment system of the Colombian Constitutional Court does not seem to have an identical match either in Constitutional Courts or in Supreme Courts of Europe, Asia, North America or Africa –Malleson and Russel, surprisingly, did not consider any Latin American country in their study. Most nominations and appointment systems

<sup>43</sup> For a general discussion –based on the political science literature- of nomination systems of higher Courts, see: LEE EPSTEIN, et al., *Comparing Judicial Selection Systems* 10 Wm. & Mary Bill Rts. J. 7, (2002 );LEE EPSTEIN, et al., *Selecting Selections Systems, in Judicial Independence at the Crossroads - An Interdisciplinary Approach*, (Stephen B. Burbank & Barry Friedman eds., 2002).

<sup>44</sup> NUNO GAROUPA & TOM GINSBURG, *The comparative Law and Economics of Judicial Councils* Illinois Law and Economics Research Papers Series.

<sup>45</sup> KATE MALLESON & PETER H. RUSSELL, *Appointing Judges in an Age of Judicial Power -Critical Perspectives from Around the World* (University of Tronto Press 2006).

included in Malleson and Russel's book are based on cooptation by the same Courts, executive appointment, Congressional appointment, technical appointing by judicial councils, or a wide mixture of each of those systems.<sup>46</sup>

However, this mind-blowing diversity of nomination and appointment systems can be somehow synthesized along some broad lines. As Garoupa and Ginsburg show, most legal systems construe particular nomination and appointment designs which, ultimately, end up privileging judicial independence or accountability. What these cases illustrate is that a higher Court's nomination and appointment system based on cooptation or judicial self-selection stresses judicial independence and underestimates accountability. On the other hand, a nomination and appointment system that divests the judicial branch of nomination and/or appointment faculties –transferring them to the executive, the legislative or a judicial council-- highlights accountability and undervalues judicial independence. On this point, Garoupa and Ginsburg argue that “The first model of judicial self-selection arguably errs too far on the side of independence, while pure political control may make judges too accountable, in the sense that they will consider the preferences of their political principals in the course of deciding specific cases.”<sup>47</sup>

This balance is tested, as well, when Courts become relevant political actors. What in the literature is referred to as “the politicization of the judiciary and the judicialization of politics” has made Constitutional Courts like Colombia's a locus of public opinion interest. Therefore, in 2008, the nomination and appointment of Constitutional Court's Justices became a case of interest for NGOs that apply transparency and accountability observations to the legislative and the executive branches of government. Furthermore,

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<sup>46</sup> For illustrations of these diverse systems, see, in *Ibid*, the articles of Allan on New Zealand, Morton on Canada, Du Bois in South Africa, Bukuruka in Namibia, O' Brien in Japan and Salzberger on Israel.

<sup>47</sup> Garoupa & Ginsburg, *supra*, note 44.



the type of cases decided by the Colombian Constitutional Court and their impact on the political system and on the society as a whole, also explains why these civil society groups demanded more transparency and accountability in the nomination and appointment process in 2008. These demands by the NGOs are in line with Garoupa's and Ginsburg's prediction about the salience of accountability demands in countries in which Constitutional or Supreme Courts have become relevant political and social actors. Accordingly,

*The more extensive the judges' powers, the more important it becomes to address any potential conflict between the common good and judicial incentives. The conjunction of judicial attributes, politics, and peer-pressure becomes more important as the institutional setup is more prone to change as a result of judicial review. The less important the judiciary is in a given institutional setup, the less need for achieving the appropriate balance between independence and accountability.<sup>48</sup>*

However, in the Colombian case the demands for more accountability and transparency in the nomination process were rejected by the nominating courts, whose judicial independence was –according to them—being threatened by the NGOs transparency and accountability demands. Although according to all of the Justices that I interviewed, the interest of civil society's organizations in the Constitutional Court's nominations taking place at their Courts was completely reasonable and even praiseworthy –given public opinion stakes in the Constitutional Court's composition—the way the observation was actually carried out by *Elección Visible* threatened their judicial independence. When the NGO coalition tried to make transparent the hidden political criteria used by Courts to nominate Constitutional Court's candidates, Justices at the Administrative and Supreme Courts triggered an institutional resistance to the observation, arguing that their judicial independence, autonomy and neutrality was being attacked or questioned by the NGOs. It

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<sup>48</sup> Ibid.

is precisely this clash between accountability and judicial independence the issue that crisscrosses my case study.

### C. An approach to accountability and transparency

During the 1990's, political scientists coined the term "horizontal accountability deficit" to describe how judicial systems were incapable of reining in political corruption in regions like Latin America.<sup>49</sup> The "horizontal" aspect of this kind of accountability is explained by the fact that state corruption should be countered using accountability strategies implemented by the state's institutions. Political scientists such as Przeworski, then, proposed new "accountability agencies" capable of complementing the accountability deficit of the judiciary.<sup>50</sup>

Horizontal accountability is especially difficult to achieve when judges and courts are the passive subjects of accountability analysis –since the judiciary is the usual agent of accountability in a society, rather than its subject. The question, "who should watch the

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<sup>49</sup> For general literature on "Horizontal accountability" see THOMAS CAROTHERS, *The Rule of Law Revival*, 77 *Foreign Affairs*, (1998); LYNN HAMMERGREEN, *The Politics of Justice and Justice Reform in Latin America: the Peruvian Case in Comparative Perspective* (Westview Press, 1998); JUAN LINZ & ALFRED STEPAN, *Toward Consolidated Democracies*, 1 *Journal of Democracy*, (1996); MAINWARING, et al., *Issues in Democratic Consolidation: The New South American Democracies in Comparative Perspective* (University of Notre Dame Press 1992); MAINWARING, et al., *Building Democratic Institutions: Party Systems in Latin America* (Stanford University Press 1995); MÉNDEZ, et al., *The (Un) Rule of Law and the Underprivileged in Latin America* (University of Notre Dame Press 1999); GUILLERMO O'DONNELL, *Illusions About Consolidation*, in *Consolidating the Third-Wave Democracies: Themes and Perspectives*, (Larry Diamond, et al. eds., 1997); GUILLERMO O'DONNELL, *Further Thoughts on Horizontal Accountability* (University of Notre Dame 2000); ADAM PRZERWORSKY, et al., *Democracy, Accountability, and Representation* (Cambridge University Press 1999); ANDREAS SCHEDLER, et al., *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner 1999); MICHAEL DODSON & DONALD JACKSON, *Horizontal Accountability in Transitional Democracies: The Human Rights Ombudsman in El Salvador and Guatemala* 46 *Latin American Politics and Society*, (2004); DAMARYS CANACHE & MICHAEL E. ALLISON, *Perceptions of Political Corruption in Latin American Democracies* 47 *Latin American Politics and Society*, (2005); GUILLERMO O'DONNELL, *Horizontal Accountability in New Democracies*, in *The Self-Restraining State: Power and Accountability in New Democracies*, (Andreas Schedler, et al. eds., 1999). GUILLERMO O'DONNELL, *Horizontal Accountability in New Democracies*, in *The Self-Restraining State: Power and Accountability in New Democracies*, (Andreas Schedler, et al. eds., 1999).

<sup>50</sup> Przeworski, *Ibid.*

watchers themselves”<sup>51</sup> was particularly salient during the transparency observation of the Constitutional Court’s nominations in Colombia in 2008. Lacking a governmental institution capable of conducting horizontal accountability for the Court’s nominations, another question emerged: Who was supposed to observe and make the nominating Courts accountable?

The answer to this latter question lies in the *vertical accountability* that the citizenry or public opinion should undertake when *horizontal accountability* is found wanting. According to O’Donnell, vertical accountability exists when citizens, acting on their own or through representatives, are able to hold governmental officials to some standard of honesty and punish them any time they do not fulfill their duties.<sup>52</sup> In order to do so, the citizenry must be aware of which institutions or which governmental officials are corrupt to discipline them in the voting booths, in the Courts or on the streets -- by instigating public protests. O’Donnell argues, accordingly, that it would be useless to have a citizenry who believes that *all* governmental officials are corrupt or that they are not corrupt at all. That is, public opinion should have factual information about which institutions or which officials are corrupt or venial in order to exert accountability. In this continual process of readjusting the accountability role of public opinion through up-to-date information, civil society organizations play a decisive role as conduits or *screens* that make relevant information about who is corrupt and why transparent. It is precisely this role that has been assumed in Colombia by *Transparency International*, *Congreso Visible* and *Movimiento de Organización Electoral* –members of the core-group of the NGO coalition.

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<sup>51</sup> The original citation of Roman poet Juvenal “Quis custodiet ipsos custodes?” appeared in Clark’s article about accountability of Judges in Germany. See, DAVID S. CLARK, *The Selection and Accountability of Judges in West Germany* 61 *S. Cal. L. Rev.* 1795, (1988). For an interesting comparative study on Court’s accountability, see MAURO CAPPELLETTI, *Who Watches the Watchmen? A Comparative Study on Judicial Responsibility, in Judicial Independence: the Contemporary Debate*, (Simon Shetreet & Jules Deschenes eds., 1985).

<sup>52</sup> O’Donnell (1999), *supra* note 49; O’Donnell (2000), *supra* note 49.

However, this organization's previous attempts to engage in vertical accountability were conducted with the legislative, the executive or governmental agencies. As my case-study shows, their first attempt at engendering accountability with higher courts was unsuccessful.

#### D. An approach to Judicial Independence

The confusion about the difficulties of defining judicial independence is not only common among judges and NGOs—as my interviews show; in the legal and political science literature there is consensus as well about the virtual impossibility of offering an encompassing definition of judicial independence.

Addressing this point, political scientist Lydia Brashear raises the following question: “Despite all this emphasis on ‘judicial independence’, a concrete or consistent definition of the term is elusive. This raises the question: if judicial independence is really so important, why does it defy definition? Furthermore, why do politicians, legal experts and political scientists exalt a concept that they cannot define?”<sup>53</sup> Kornhauser drops the question altogether and concludes that the term judicial independence is not analytically sound or workable.<sup>54</sup> Kornhauser adds that judicial independence as a phenomenon should be approached contextually, disentangling the particularities of the legal and political system in which the term is used. Others, like Russell and Malleson, conclude that if we want to understand what *judicial independence* means we have to explore the many definitions that “judicial” and “independence” may have.<sup>55</sup> According to Ferejohn and Kramer, when we utter the word ‘judicial’ we could be referring to specific Courts (such as the Colombian

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<sup>53</sup> LYDIA BRASHEAR, *Judicial Independence: Often Cited, Rarely Understood*, 15 J. Contemp. Legal Issues 129, (2006).

<sup>54</sup> LEWIS A. KORNHAUSER, *Is Judicial Independence a Useful Concept*, in *Judicial Independence at the Crossroads-An Interdisciplinary Approach*, (Stephen B. Burbank & Barry Friedman eds., 2002).

<sup>55</sup> See Malleson and Russel, *supra*, note 45.

Constitutional Court) to the Courts system (that could include higher and lower courts) or to individual Justices (such as the ones that I interviewed for my case study).<sup>56</sup>

But even more problematic is the term “independent.” The question that continually arises on this point is this: independent from whom? In his groundbreaking book about Courts Shapiro assumes that Courts are never truly independent, since they are part of the government and express the voice of the “governing coalition.”<sup>57</sup> However, Shapiro’s position is minoritarian, since there is an enormous literature that actually tries to define from whom Courts and Judges are independent. Some authors, such as Brashear, emphasize the strategic interaction between the judiciary and the executive. Brashear, for instance, asserts that judicial independence “can and should” be defined as independence from the executive.<sup>58</sup> This tendency in the literature is utilized by the collective of political scientists who work under the *nom de plume* McNollgast,<sup>59</sup> who conceive of judicial independence as a strategic interaction between the judiciary and the executive branch. Furthermore, this line of research is especially pronounced among Latin American scholars, who usually define judicial independence as strategic interaction between the Courts and executives.<sup>60</sup>

A different line of research concentrates on identifying the institutional framework that could foster judicial independence. Within this literature, we find discussions about which nomination and/or appointment systems are better suited to promote judicial

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<sup>56</sup> JOHN A. FERREJOHN & LARRY D. KRAMER, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. Rev. 962, (2002).

<sup>57</sup> MARTIN SHAPIRO, *Courts, a Comparative and Political Analysis* (University of Chicago Press. 1981).

<sup>58</sup> See Brashear, *supra*, note 53.

<sup>59</sup> Matthew Mc Cubbins, Roger Noll, and Barry Weingast. See MCNOLLGAST, *Conditions for Judicial Independence*, 15 J. Contemp. Legal Issues 105, (2006).

<sup>60</sup> See PABLO SPILLER, *Where is the Sin Sincere? Sophisticated Manipulation of Sincere Judicial Voters (with application to other voting environments)* 39 Harv. J. on Legis. 400 (2002); PABLO SPILLER, et al., *Judicial Independence in Unstable Environments, Argentina, 1935-1998*, 46 American Journal of Political Science, (October 2002).

independence, the impact of life-tenure vs. limited tenures of Justices as a way to promoting judicial independence, a discussion about budgetary concerns and judicial independence, among other issues.<sup>61</sup>

Finally, a more recent line of inquiry explores how in new democracies around the globe with “forward-looking” Constitutions and progressive Constitutional Court –such as South Africa, Israel, Colombia, India-- there is a strategic functional division between the judiciary and the legislative in order to offer the false “perception” that there is social change through constitutional justice. Nonetheless, the real outcome of this “false change,” according to this thesis of “juristocracy,” is a perpetuation of the status quo through strategic alliances and interactions between judicial elites and executive and/or legislative elites.<sup>62</sup>

Despite the abovementioned conceptual difficulties that plague judicial independence, most Constitutions in the world incorporate at least a provision to foster it. As the Constitutionmaking.org project has showed in an outstanding series of studies of global Constitutions, at least 75% of all the Constitutions in the world incorporate a provision that grants independence to judicial organs.<sup>63</sup> Although this myriad of provisions regarding judicial independence may be only nominal and ineffectual in many cases, they manifest nonetheless how, during the last three decades, most countries have felt the need to include provisions regarding judicial independence as a way to acquire a valid pass to

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<sup>61</sup> See, among others EPSTEIN, et al., *Selecting Selections Systems*, in; LEE EPSTEIN, et al., *The Norm of Prior Judicial Experience and its Consequences for Career Diveristy in the U.S. Supreme Court*, 91 Cal. L. Rev. 903, (2003); KEITH E. WHITTINGTON, *Political Foundations of Judicial Supremacy* (Princeton University Press. 2007).

<sup>62</sup> See, especially, Hirschl, *supra*, note 7.

<sup>63</sup> CONSTITUTIONMAKING.ORG, *Judicial Independence* (2008), at [http://www.constitutionmaking.org/files/judicial\\_independence.pdf](http://www.constitutionmaking.org/files/judicial_independence.pdf).

what Golub calls the *rule of law orthodoxy*.<sup>64</sup> Nonetheless, despite this phenomenon judicial independence still defies a sound and useful conceptual or methodological framework. As widely-used words that defy definition, judicial independence is everywhere and nowhere at the same time.

### iii. CASE-STUDY RESULTS

#### A. Introduction

My interviews utilized a semi-structured format based on the social-science's literature on *elite interviewing*.<sup>65</sup> In both my interview design and in conducting the interviews, I considered several obstacles reported by social scientists when interviewing elite group members.<sup>66</sup>

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<sup>64</sup> Golub coins, critically, the term "rule of law orthodoxy" in his article, *Beyond Rule of Law Orthodoxy- the Legal Empowerment Alternative* pt. (2003).

<sup>65</sup> ROBERT PEABODY, et al., *Interviewing Political Elites* 23 *Political Science and Politics*, (Sep., 1990); SHARON WERNING RIVERA, et al., *Interviewing Political Elites: Lessons from Russia* 35 *Political Science and Politics*, (Dec., 2002).

<sup>66</sup> Among other, elite interviewing faces obstacles such as: not "getting your foot in the door" while dealing with gate-keepers and busy schedules of higher Courts Justices, law school's deans and top-ranking NGOs members; finding reluctant respondents to politically-risky or status-damaging questions; not being allowed to record the interviews or being denied "on the record" citation of relevant arguments; not being able to generate in my interviewee a sense of credibility and neutrality about my interviewer's role; facing a particular reluctance showed by elite members of the legal profession –high ranked Judges not prone to share their views due to possible collusion with their impartial and independent role, or prestigious lawyers with highly pragmatic or uninteresting opinions; not being able to gain actual access to certain offices of higher Court Justices because of random factors such as Christmas holidays, sudden meetings or absences of the respondents, lack of coordination with assistants fixing schedules for the respondents, etc. in highly unpredictable scenarios such as Courts in countries like Colombia; not having chosen correctly my interviewee's sample and not being able to obtain reliable and valid data from them. For insights on this literature, see: DAVID L. GREY, *Interviewing at the Court*, 31 *The Public Opinion Quarterly* (Summer, 1967); WILLIAM HUNT, et al., *Interviewing Political Elites in Cross-Cultural Comparative Research* 70 *The American Journal of Sociology*, (Jul., 1964); CATHERINE MARSHALL, *Elites, Bureaucrats, Ostriches, and Pussycats: Managing Research in Policy Settings* *Source*, 15 *Anthropology & Education Quarterly*, (Autumn, 1984). MARSHALL. THEODORE M. BECKER PETER R. MEYERS & *Empathy and Bravado: Interviewing Reluctant Bureaucrats* 38 *The Public Opinion Quarterly*, (Winter, 1974-1975); ERWIN O. SMIGEL, *Interviewing a Legal Elite: The Wall Street Lawyer* 64 *The American Journal of Sociology*, (Sep., 1958). SMIGEL. HARRIET ZUCKERMAN, *Interviewing an Ultra-Elite* 36 *The Public Opinion Quarterly*, (Summer, 1972).

Each interviewee agreed to be taped and clearly indicated which statements they preferred to keep “off the record”. Therefore, only the arguments that they agreed to share “on the record” will be used in my case study, which translated as accurately as possible from Spanish to English.

Since the Supreme Court and the Administrative Court encompass large numbers of Justices,<sup>67</sup> I sought interviews with Chief Justices or Vice-Chief Justices who could offer *institutional* answers to my questionnaire.<sup>68</sup> Using a snow-balling strategy, I interviewed the Vice-Chief Justice of the Administrative Court and the Chief Justice of the Supreme Court<sup>69</sup> - in 2006-2007. Furthermore, I interviewed three more Justices at the Administrative Court and one at the Supreme Court.

In the following Sections, I will present the results of my case study in the form of a tentative “thick description”<sup>70</sup> of the process. First, in Sections A, B, C, I will summarize the case of the transparency observation project designed and applied by the NGO coalition – *Elección Visible*-- highlighting their goals and procedures. In Sections D, E I will also summarize the recalcitrant reception that the nominating courts offered to *Elección Visible*, emphasizing why the transparency petitions of the NGOs, which tried to make the nomination criteria visible, were poorly received at the Courts, who managed ultimately to conceal the “hidden” nomination criteria from the observers. Section F will evaluate the

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<sup>67</sup> The Supreme Court comprises 23 Justices, while the Administrative Court is composed of 27 Justices.

<sup>68</sup> By “Institutional” I mean representative views not only of a single Justice, but of the Court as an institution. Since Chief Justices and a Vice-Chief Justices are assigned with the role of spokesmen of their Courts, they speak not only for themselves, but for the whole Court as an institution.

<sup>69</sup> Justice Valencia was Chief Justice of the Supreme Court during the 2006-2007 period.

<sup>70</sup> Anthropologist Clifford Geertz set a very high benchmark for “thick descriptions”. See CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in *The Interpretation of Cultures: Selected Essays*, (1973). Lacking the time and an ethnographic training, it would be pretentious on my part to call this case study a legitimate or comprehensive thick description as proposed by Geertz, capable of explaining not only the behavior of actors, but also the context. However, this case study is a first and tentative step towards that direction. In my use of interviews I tried to learn from Michael C. Mushenos’ strategies as used in his book *Deployed*. See MICHAEL C. MUSHENOS, *Deployed: how reservists bear the burden of Iraq* (University of Michigan Press, 2008).



transparency observation from the NGOs, Deans' and Justices' points of views. I will emphasize the Deans' evaluation of the differences between their coalition and the NGOs coalition. Furthermore, I will sketch the goals and procedures of the Deans' coalition, arguing why their non-confrontational strategy may help to explain the positive reception given by Courts to the Deans' 'escorting'<sup>71</sup> initiative.

#### B. A previous case of transparency observation in Colombia

When the NGO coalition *Elección Visible* was officially created in September 2008 as a mechanism for observing and making the Constitutional Court's nominations transparent, a similar exercise practiced in the 2007 appointment of five Supreme Court Justices constituted the only national precedent at hand. Although this previous exercise in 2007 raised the issue of transparency in judicial nominations and appointments in Colombia for the first time, it proved to be inappropriate in addressing the particular challenges faced by the NGO coalition in 2008.<sup>72</sup> Nonetheless, it deserves a brief analysis as an antecedent to our case.

In March 2007, when the Supreme Court was about to appoint five new Justices,<sup>73</sup> *Excelencia en la Justicia* and Transparency International<sup>74</sup> initiated a short-term

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<sup>71</sup> As it will become clear in Section V, the Deans' coalition preferred to call their work "escorting", rather than "transparency observation", since "escorting" evoked a non-confrontational role while "observing" was more related to accountability.

<sup>72</sup> In 2008, the transparency observation of the Constitutional Court nominations was completely different. First, the nomination process involved several more actors; second, much more was at stake; third, the NGOs assumed a more confrontational and direct role with the nominators.

<sup>73</sup> As Administrative Court's Justices, Supreme Court's Justices are appointed by cooptation. The Colombian Supreme Court is composed by 23 Justices, assigned to three different Chambers –Civil, Criminal and Labor. Justices are appointed by the same Supreme Court, from lists of candidates produced by the Superior Council, a Court-like judicial institution in charge of administering the judicial branch and deciding Judicial promotions. Each Supreme Court Justice serves a non-renewable period of eight years.

<sup>74</sup> *Excelencia en la Justicia* and Transparency International-Colombian Chapter are two of the NGOs that currently constitute the "core group" of *Elección Visible*, which is the NGO coalition created in September 2008 to observe Constitutional Courts' nominations and appointments, and that constitutes the axis/nexus of my case-study.

transparency observation about the appointment of the new Supreme Court's Justices. Although the Colombian Supreme Court is 190 years old, prior to 2007 there were no known cases of transparency observations conducted on its appointments. In order to explain why this first transparency observation exercise occurred precisely in 2007, one has to stress the Supreme Court's pivotal role in what is now widely known as "parapolitics"—*parapolítica*. Since 2006 —when the criminal processes at the Supreme Court began— the term *parapolítica* has been widely used in Colombia to define the criminal cases against members of the government's coalition —mainly members of Congress— who received political and economic support from illegal paramilitary forces. The paramilitaries in Colombia are responsible for innumerable gross violations of human rights and for massive displacement of Colombian population. Since elected, Human Rights groups have accused president Uribe's government of having strong links with the paramilitaries. However, these illegal liaisons were only a matter of speculations until 2006, when the Supreme Court opened several criminal cases against politicians who were members of Uribe's coalition parties. By all accounts, the *parapolítica's* criminal trials at the Supreme Court have constituted the greatest political scandal of Uribe's seven years in power. In 2007, the Supreme Court ordered the incarcerations of more than ten Congress members of the government's coalition parties —in 2008, more than 20 were to follow. These incarcerations marked the beginning of the bitter confrontation between President Uribe and the Supreme Court, which until today is ongoing. Judging by the remarkable impact that the *parapolítica* had on public opinion, it comes as no surprise that the 2007 appointment of new Supreme Court's Justices received unusual attention on the part of civil society groups and the media.

In conclusion to this Section, it is fair to say that when a second wider NGO coalition was formed in 2008 —this time to observe the nomination and appointments of Constitutional

Court's Justices-- there was a pioneering antecedent, but not a very helpful one. In the 2008 Constitutional Court nominations, the NGOs faced quite a different nomination and appointment system, not based on cooptation and involving multiple complex actors.<sup>75</sup> In addition, in 2008 the government's "court-packing" chances were real, and the stakes were much higher.<sup>76</sup> Finally, whereas in 2007 *Excelencia* and Transparency found a polite Supreme Court complying with their basic and uncompromising petitions,<sup>77</sup> in 2008 they came across one nominating Court – the Administrative Court-- actively boycotting the transparency observation process, and another –the Supreme Court-- passively ignoring the NGOs demands for the "real" nominations criteria.

### C. Establishing the NGO coalition: context, goals and procedures

#### 1. Contextualizing the NGO coalition

For the first time in its 16-year history, nearly 70% of the Constitutional Court Justices were being appointed. In 1993, when the "first" Constitutional Court was appointed by the Congress, almost 50% of its members were chosen from the provisional Court installed in 1991. This situation, as well as the sudden demise or resignation of Justices, created an

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<sup>75</sup> This time it involved three nominating stances –two higher Courts and the President- and one appointer – the Senate.

<sup>76</sup> One possible explanation for the minimal set of demands and the acquiescent tone of the 2007's transparency observation process may lie in the fact that the Supreme Court's cooptation system significantly lowered the risk of "court-packing" by the executive. Furthermore, the strife between Uribe and the Supreme Court dispelled many NGOs worries about a Supreme Court filled with the President's partisans. Moreover, while only 5 of 23 Supreme Court's Justices were being replaced in 2007, in 2008 6 of 9 Constitutional Court Justices ended their tenures. Finally, although the Supreme Court gained much public exposure and notoriety during 2007 thanks to the *Parapolitics*, it was clear that the real prize lay in the Constitutional Court, since–due to the variety and importance of its cases- this Court proved itself to be the "real" highest Court in the land.

<sup>77</sup> In 2007 *Excelencia* and Transparency issued two petitions to the Supreme Court: making the candidates' CVs public and sharing the nominations' schedule. While in 2007 *Excelencia* and Transparency refrained from demanding the "real" criteria used by the Supreme Court in its appointments; however, in 2008 the NGOs demands for this "hidden" information constituted the backbone of the entire transparency observation process.

irregular appointment calendar. In 2008, six Justices –Cepeda, Monroy, Araujo, Vargas, Escobar and Córdoba-- completed their eight-year tenures. Three Justices –Cepeda, Araujo and Córdoba-- were members of the Liberal Party, while the other three were affiliated with the Conservative Party. Although each of these Justices exhibited divergent voting behavior during their eight-year tenure, it is possible to establish some ideological trends in their voting. In a recent study published in *Los Andes Law Review*, socio-legal scholar Alejandra Azuero uses networking and content analysis to chart the complex ideological and scholarly map of the Court.<sup>78</sup>

Justices Pinilla, Sierra and González continued at the Court – Sierra in 2004, Pinilla and González in 2006 and 2007, respectively.<sup>79</sup> In particular, Justice's González<sup>80</sup> appointment

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<sup>78</sup> See ALEJANDRA AZUERO, *Redes de diálogo judicial transnacional: Una aproximación empírica al caso de la Corte Constitucional*, *Revista de Derecho Público-Universidad de Los Andes*. (2008 ), at <http://derechopublico.uniandes.edu.co/index.php?numero=22&tipos=Art%EDculos>. According to this study, Justice Cepeda, was primarily a progressive liberal committed to anti-formalist approaches to law. Highly influenced by American constitutionalism and Comparative studies of law –and a graduate of Harvard Law School- he is very active in prestigious American and European academic networks. Cepeda's rulings were instrumental in promoting socioeconomic and minority rights at the Court. However, Cepeda was politically moderate and not specifically defined as a proponent or an opponent of Uribe's government. Justice Córdoba, on his part, usually sided with Cepeda in moderate political positions; however, like Cepeda, Córdoba was recognized as an effective human rights advocate in many of his rulings. Conversely, Justice Araujo -a liberal by affiliation- distinguished himself as the most vehement and radical opponent of Uribe's government at the Court. Most of his remarks against Uribe's government and against some of his peers at the Court were expressed publicly. Justices Escobar and Vargas, although both conservatives and supporters of Uribe's initiatives at the Court, voted in favor of same-sex couples' and abortion rights. Justice Monroy was the most consistent conservative during his tenure; however, most of his rulings on international law, human rights and international criminal law demonstrate a sophisticated and anti-formalist use of materials and sources.

<sup>79</sup> Pinilla is a Conservative Justice who strongly advocates formalist approaches to Constitutional matters. He is considered to be a backer of Uribe's government at the Court. Sierra is a moderate liberal who on several occasions has been labeled as the "swing vote." *Ibid*.

<sup>80</sup> Justice González last job before being appointed to the Court was as Legal Advisor of the Presidency .Before that, he was the director of *Excelencia*, one of the NGO participating in the coalition.

in 2007 was especially remarkable, since many civil society organizations assumed that it constituted the instigation of Uribe's "court-packing" plan in 2007.<sup>81</sup>

These reactions from the media were certainly noticed by the NGOs that later constituted the coalition. As Elizabeth Ungar asserts, "the antecedent of Justice González['s]" [Interview # 9] nomination was clearly interpreted by the coalition's NGOs as an alarm. However, there was no need for editorials or academic analysis to conclude that the government's "court-packing" plans were realizable. With two continuing Justices already on his side and with two nominations of his own, President Uribe needed to influence only one nomination by the Administrative or the Supreme Courts in order to win a majority of five Justices at the Constitutional Court.

Based on the interviews, it would be not fair to say that the NGO coalition was created with the exclusive objective of precluding the government's "court-packing" plans. Their goals were more overarching and less context-based. Nevertheless, it is undeniable that the Uribe's presumptive "court-packing" plan provided the context within which the NGO coalition formed.

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<sup>81</sup> González' nomination by Uribe was viewed by many media analysts as the first move of Uribe's "court-packing" plan on his way towards winning a third presidential term. This fact was underscored by journalist Daniel Coronell. Coronell is arguably one of the most influential Colombian journalists. In 2005, after receiving threats against his family's and his life –attributed to paramilitary groups that strongly opposed his reactions against Uribe's policies- Coronell was awarded a Knight Fellowship at Stanford, where he spent a year teaching and researching. Among the many media reactions to Mr. González' nomination and appointment, one was especially salient. Journalist Daniel Coronell wrote an Op-Ed in *Semana* –the most widely read and respected Colombian weekly publication-- entitled "The nomination list of Dr. Salsa." In that Op-Ed Coronell accurately predicts that "the appointment of the new Justice of the Constitutional Court will not deliver any surprises. Mauricio González Cuervo, the Presidency's legal advisor, will be appointed with no problems whatsoever. González himself designed the nomination list of three names (but only one real candidate)..." Coronell argues that, besides being a faithful crony of Uribe, González' qualifications and independence from the government are nil. "A great singer and even a better salsa dancer –adds Coronell in his article-- he really had fun in law school. His mates during that time called him 'Dr. Salsa'. Nobody recalls his academic merits, but everyone agrees about his dancing abilities." See DANIEL CORONELL, *La Terna del Dr. Salsa* (August the 4th, 2007), at [http://semana.com/wf\\_InfoArticulo.aspx?IdArt=105373](http://semana.com/wf_InfoArticulo.aspx?IdArt=105373).

## 2. Procedures and goals of the NGO coalition

Before the official inauguration of the NGO Coalition, which took place at the Capitol on September 2, 2008, several preparatory meetings were scheduled between some NGOs directors and a small number of Justices and Congressional members. The general goal of these meetings was to present the procedures and aims of the transparency observation initiative to the nominators and appointers. Only the director of *Excelencia* – Mrs. Borrero- and of Transparency –Mrs. Flórez-- attended the preparatory meetings to represent the whole coalition. Mrs. Flórez recollects the following regarding those exploratory encounters:

*During that time there was not really a spokesperson. However, we knew that Excelencia was not very well-liked among some judicial sectors. Therefore, knowing that fact I tried to attend such meetings. The vice-Chief Justice of the Supreme Court went to one and was very receptive. However, I was displeased with the meeting since I sensed that we ended up expressing our thoughts on issues that we were not supposed to touch. I would have preferred another kind of issues, less political; but the meeting was not that bad after all. However, neither the Supreme Court's Chief Justice nor the Administrative Court's attended those meetings. [Interview # 11]*

Mrs. Flórez' assertion about the apprehensions surrounding *Excelencia* seems to be supported by several interviews. Most of these misgivings among the judicial branch are based on the private sector's founding of *Excelencia* and on its commitment to an efficiency model for the Colombian legal system –identified by some with right-wing approaches to legal reform. Its own director –Mrs. Borrero-- acknowledges that “We [Excelencia] are recognized in Colombia as a private sector's NGOs with a centrist ideology”. [Interview # 8] Another interviewee, who asked not to be named on this point asserted:

*You should be aware that at the judicial branch there are some misgivings about Excelencia, since it is an NGO heavily financed by the private sector and has among its directive Committee El Tiempo, Corona, etc. Besides that, there is uneasiness*

*about the fact that the last director of Excelencia is now a Constitutional Court Justice [Justice González].*

In addition to the preexisting suspicions surrounding *Excelencia*, choosing the Capitol as the launching place for the NGOs transparency observation project sent the wrong message to the Courts. This wrong and unintended message –as understood by the nominators-- was that from its inception the NGO coalition was mixing politics with law. As a result, none of the Administrative and Supreme Court Justices attended the inaugural ceremony on September 2. This is explained by Mrs. Flórez as follows:

*We then scheduled the Inauguration and invited the Justices and Congress members, but not a single Justice showed up. We decided to do it at the Capitol, since we wanted to imprint some symbolism to the inauguration. And we learnt informally that Justices disliked our decision to meet at the Capitol. However, we asked them to allow us to make the inauguration at a Court, but they refused. My impression then was that the Justices are very difficult to please. [Interview #11]*

Nonetheless, as scheduled, the NGO coalition's project *Elección Visible* was presented at the Capitol as a pioneering transparency observation exercise of the nominations and appointments of Constitutional Court's Justices. Unlike 2007, this time the transparency observation project was conducted by 13 organizations acting under the name *Elección Visible*. However, the "core-group" of *Elección Visible* included only five NGOs: *Excelencia*,<sup>82</sup> *Transparency*,<sup>83</sup> *Congreso Visible*,<sup>84</sup> *Instituto de Ciencia Política*,<sup>85</sup> and *MOE*.<sup>86</sup> The "core-group" and the supporting organizations were chosen after determining their neutrality and lack of particular interests in concrete nominations and appointments. Consequently, after some internal debates among the "core-group", the coalition decided not to invite law schools. As Elizabeth Ungar explains, "We started from the assumption that law schools such as Externado, Javeriana, Rosario, etc. had an interest in the

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<sup>82</sup> <http://www.cej.org.co/>

<sup>83</sup> <http://www.moe.org.co/home/index.html>

<sup>84</sup> <http://cvisible.uniandes.edu.co/share/user/index.php>

<sup>85</sup> <http://www.icpcolombia.org/>

<sup>86</sup> <http://www.transparenciacolombia.org.co/>

In the coalition's formal petitions to the Courts, qualifications and independence stand as the most desirable criteria for nominating Constitutional Court's Justices. This is explicitly confirmed by all of my interviews with the coalition members. However, *Elección Visible* refrained from defining what they understood by *qualifications* and *independence*. Asked about the reasons for this omission, Mrs. Flórez stresses that

*We never defined them, since we assumed that was part of the nominators' job. But what we clearly said was, 'We don't want straw men candidates', because in the past this has been the usual thing, having in the lists a leading and very remarkable candidate besides two second-rate candidates. We said, 'We want lists with three equally strong candidates'. What we were asking was: 'Go and conduct your process, then tell us what was like, and show us that you chose the best.' But the decision is yours; just tell us what the criteria were. And about independence, we said that we wanted someone capable of taking decisions inspired only in the Constitution. [Interview # 11]*

Despite the coalition's decision of not making their particular definitions of qualifications and independence public, Mrs. Flórez concedes that in their internal deliberation the "core-group" members tried to define *judicial independence* as the lack of undue influence on judges from other Government's branches. Judicial independence was a desirable nomination benchmark since –according to Mrs. Flórez– it fostered checks and balances. The goal of the transparency observation exercise was to guarantee the preservation of the judiciary's *institutional* independence. A different issue was impartiality, which was not considered to be a goal by the coalition. On the issue of differentiating impartiality from independence Mrs. Flórez emphasizes that

*We tried to differentiate independence from impartiality. We understand independence as judges being independent from the other governmental branches. We think that a transparency observation process helps to reinforce this kind of independence among governmental branches. Thus, when we try to make the process of Justices' nomination transparent, what we want to find out is which are the criteria for the nominations, and how is the procedure, in order to guarantee that other branches of government –the executive, more especially– refrain from any kind of cooptation. Therefore, transparency analysis really helps to reinforce independence among governmental branches. In regard to impartiality, I think that*



*transparency doesn't affect impartiality, since impartiality means ruling according to the law, and transparency asks for the sharing of information.* [Interview # 11]

However, none of these conceptual differentiations between independence, impartiality or neutrality, surfaced the inner debates or made it to *Elección Visible's* webpage,<sup>90</sup> where the goals and procedures of the coalition are defined. An analytical differentiation between those three concepts, such as the one drawn by Lawrence Friedman, would have extremely useful to explain to Courts what *Elección Visible* was about. According to Friedman,

*"Impartial implies neutrality; an impartial judge is not prejudiced, not corrupt, and approaches issues with an open mind. A Judge who takes bribes is certainly not an impartial judge; nor a judge who decides on the basis of prejudice... Independent judges are judges who are free from political interference as they go about their work. The government has no right to dictate decisions. Independent judges are the opposite of judges in a dictatorship, who could lose their jobs or their heads if they went against government policy (...) Autonomous seems to have somewhat similar meaning, but a rather different nuance. It implies some kind of insulation, not from government or authority, though this may also be the case, but rather from pressures in general, political pressures, social pressures, peer pressures, even the vague, unconscious pressures which crowd in on the judge from society in general, and from his or her own values and attitudes."<sup>91</sup>*

As it will become clearer in the case-study results, Friedman's distinction is highly important to understand why Courts reacted negatively to the NGOs demands. The fact

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<sup>90</sup> <http://www.eleccionvisible.com> This webpage constituted the main tool of the coalition, where among other features one can find interactive mechanisms conceived as a communication channel between the citizenry and the nominators, a blog where people could react to the nominees' CVs and profiles, a history of the Constitutional Court, the profiles of the salient Justices, related academic documents and videos, the jurisprudence of the Constitutional Court concerning civil society's observing role, a link to a *Facebook* group, a documented history of the coalition, and an "Ethical Pact."

Besides the important fact that in the "Ethical Pact" the principles of neutrality and non-partisanship of *Elección Visible* are declared, its last paragraph deserves a brief mention. It is stated as an *addendum* that "(...) The Board of Excelencia, being aware that Ligia María Borrero--sister of *Excelencia's* director Gloria María Borrero-- on the 5 of September decided to put her name in consideration of the Supreme Court as possible nominee for the Constitutional Court, decided to ask Gloria María Borrero to step aside from the transparency process." This compromising situation --as will become clear in the next Sections-- had some negative consequences for the Court's interpretation and reaction to the NGO coalition.

<sup>91</sup> LAWRENCE FRIEDMAN, *Judging the Judges: Some Remarks on the Way Judges Think and the Way Judges Act, in Norms and the Law*, (John N. Drobak ed., 2006).

that the NGOs refrained from defining judicial independence –as something different from impartiality or neutrality-- deepened the Courts' unwillingness to understand the fact that in demanding judicial independence as a nomination criterion the NGO coalition was not questioning their autonomy and impartiality.

#### D. Assessing the Court's reactions: Three Interpretations of Judicial Independence

##### 1. Judicial Independence as an institutional attribute

In all of my interviews, the Justices considered judicial independence to be a desirable and uncontroversial attribute of Courts as institutions. Thus, the NGO coalition's goal of having a Constitutional Court that decides independently of the wishes or purposes of other branches of the State –but more importantly of the executive's—is widely shared by the nominators. Judicial independence, viewed from this institutional perspective, was something highly praised by both the NGO coalition and the Justices.

Administrative and Supreme Courts Justices all manifested their approval of the citizenry's role as ultimate keeper and overseer of institutional judicial independence. Not a single justice pictured the Court's adjudicative function as being isolated from the “people's” public eye -- the ultimate “observers”.

Nonetheless, without exception, the justices envisioned this “observer” role as an amorphous concept that -- even though it exists-- resists any embodiment in an identifiable group. According to the Justices' answers, the entity that holds Courts accountable –by judging its independence-- is a hazy and nondescript observer: “the people,” “society,” “public opinion,” the “public interest,” the “nation,” the “citizenry.” Justice Lafont –Vice-Chief Justice of the Administrative Court-- exemplifies this idea of symbolic accountability to an undefined and disembodied actor when he underscores the following:

*We Judges make ourselves accountable towards society by producing independent rulings based on justice. When we write rulings not based on justice, then we should be held responsible. But we don't rule having in mind some sectors of society. We have in mind the whole of society. That is why through our rulings we become accountable (...) That is how society can know whether its judges are solving the problems and conflicts of the citizenry. We subject ourselves permanently to such social scrutiny. It is not true that we judges reject every kind of observation. That is not true. I refuse to accept those arguments which state that Judges reject being observed. Because we are observed all the time! [Interview #1]*<sup>92</sup>

When I asked Justice Sáenz about how she interprets the transparency observation conducted by *Elección Visible*, she answered in a similar vein: "I think that the philosophy behind these observation processes is not wrong. The bad thing is the individuals doing the observation". [Interview # 3]

When the observation procedure was transferred from the philosophical to the real world, a different definition of judicial independence was at the forefront of the Justices' perceptions of the whole nomination process. This different and predominant characterization of judicial independence -in the Justices' interviews-- is less institutional and abstract, and more personal. Instead of an attribute of Courts or judicial institutions, judicial independence is an attribute enjoyed by individual judges. A judge is independent when she reaches a decision without taking into account any consideration besides her own discernment. Judicial independence, therefore, is something that cannot be demanded from judges since it is a trait of them that must be taken for granted. External observers, according to the Justices interviewed, should 'trust' that judicial independence is exerted in their rulings.

## 2. Judicial independence as an individual attribute of judges

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<sup>92</sup> It is reasonable to conclude that Justice Pretelt is assuming here that there is not a difference between "regular" adjudication at a higher Court and nominations. If one reads the answer of Justice Lafont (see appendix), he never establishes a difference between the way he reaches decision in a regular adjudicatory case and the nominations' decisional procedure.

Justice Sáenz exemplifies this different approach to judicial independence when she says that “We [judges] must keep our independence. We must insulate ourselves from political influences, whether they come from the executive or from the legislative, or from wherever.” Based on to this more far-reaching concept of judicial independence, all of the Justices concurred that the implementation of the transparency observation compromised their judicial independence, or –in Justice Sáenz’ words-- their “insulation” from undue influences. Paradoxically, the Justices felt that their judicial independence was being defied even when an actual transparency observer –in this case *Elección Visible*-- demanded the nomination of the most independent candidates to the Constitutional Court.

Despite the fact that the transparency observation tried to separate *judicial independence* from *impartiality* –as explained in Mrs. Flórez’ interview-- Justices understood a completely different message. From their interviews, it is possible to conclude that the Justices interpreted the NGOs “independence” demands as being a threat to their judicial autonomy and as a deplorable skepticism about their impartiality as judges.

Justice López, for instance, considers that judges are accountable only to their own discernment and moral standards, and, thus, should be completely independent from any kind of interference. However, for Justice López, a judge is not the passive “mouth that pronounces the words of the law,”<sup>93</sup> but rather, a “bridge-like entity” between the law and social reality. Nonetheless, it is the judge –and only the judge-- who can decide how wide or narrow the bridge is. As a result, Lopez concluded that the NGO coalition intended to interfere with the Justices’ role as independent connectors “between the law and the reality.” Justice López expressed the point as follows:

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<sup>93</sup> CHARLES DE SECONDAT MONTESQUIEU, BARON DE, *Spirit of the Law*, Book 11, Chapter 6 (F.B. Rothman 1991).

*According to my concept, the Judge is someone who serves as a bridge-like element between the law and the reality; the judge is a bridge that can be wider or narrower according to the situation or problem before us. Thus, it cannot be pretended that the judge is subjected to something different than his/her own criteria and judgment. Therefore, for me these observations are completely alien (...) Hence, having a person with no attributions at all -neither legal nor constitutional-overseeing us, means that they are declaring us as incompetent persons. We Administrative Court Justices have a status and a dignity. We all reached this place because we have a well-formed opinion and because we are responsible for our decisions. I think this is an unacceptable intromission which, perhaps, can be interesting in an specific moment; for instance if they want to raise doubts about a specific list of candidates, or if they have something to say once the list is already published, just go out and say it. But refrain from intervening in our decisions because you lack that faculty. [Interview # 5]*

According to Justice Valencia, Supreme Court Justices also believed that the NGOs demands could eventually jeopardize their judicial independence. Despite the fact that they were less vehement and open about their non-conformity with *Elección Visible* than their peers at the Administrative Court, there was nonetheless a marked need for “setting limits” to the coalition’s petitions and interventions. Among these limits, the Justices reported that the preservation of the secret vote was an indispensable mechanism to guarantee the judicial independence. This is expounded by Justice Valencia as follows:

*We thought that this particular intervention --let us don't call it an interference but an intervention-- had limits. Limits in the sense that there was a part of that intervention that was exclusively the Court's business ... For instance, that on the day of the plenary nobody but the 23 Justices can be present. The internal regulation contemplates that it must be two thirds of the total voting, which is a huge demand. The vote must remain secret, which is not a capricious rule, because it is contemplated in the regulations. [Interview # 5]*

The secrecy of the vote is, therefore, an instrumental mechanism to guarantee judicial independence. According to all of the Justices, trying to unveil the rationale behind a judge’s nomination of a candidate by asking them to breach the secrecy of their vote and explain their decisions –as the NGOs were demanding—was a crass violation of their independence. The Justices all declared that the decision to cast a vote for a candidate was reached through an excruciating and complex individual thought process. Justice

Sánchez, for instance, describes how she “begged God to help me reaching a good decision” [Interview # 3]. Without exception, every Justice interviewed declared that the NGOs should know that nominating a candidate is a particularly complex and tortuous process, both in the case of individual contemplation and when the joint decision is made by all of the Justices. Instead of asking the Justices to explain their votes, they should trust their criteria. Justice Sánchez emphasizes this point:

*It is reasonable to ask for transparency. But they should trust our desire to make the right decisions. They should trust. When we discuss the candidates, we always do it in good faith, trying to get the best profiles. However, we must keep our independence. [Interview #3]*

However, all Justices interviewed stressed that when the NGOs persisted in knowing the criteria behind their individual votes, they overstepped the limits of judicial independence. That, according to Justice López

*...is unacceptable, because we are talking here about a task that the Constitution assigns to the Administrative Court. Because we, as Justices of the Administrative Court, by nominating someone are assuming responsibility towards the Country and towards public opinion. Because we know how the judicial branch works and we know what the country needs in a certain moment. [Interview # 4]*

Consequently, according to their renditions, when their Judicial Independence was menaced by the external interference of *Elección Visible*, the Justices decided to keep their nomination criteria concealed from any observation. Moreover, after claiming to be the aggrieved party in the observation process –since they assumed that their judicial independence was being attacked-- both Courts shut their doors to any observation procedure.

### 3. Judicial independence as an indeterminate nomination criterion

The interviews all underscore that Judicial Independence is a highly desirable institutional and personal attribute, both for Courts and individual judges. Justice Sánchez, for instance,

argues that judicial independence was a relevant criterion when she decided her vote.

According to Justice Sáenz,

*Besides the academic skills of the candidates, I was interested in knowing his/her personal qualities. I was interested in knowing whether that person exhibited a behavior according to the job's dignity. I was also interested in the candidate's independence towards the executive and the legislative. For me, that was highly important. I even asked them directly that kind of questions. Because I don't want that, instead of a Court, we end up nominating a "Courtesan". I wanted an independent Court. [Interview # 3]*

Despite the importance that judicial independence has as a normative benchmark, according to several Justices, it is ultimately an indeterminate and uncertain nomination criterion. The first difficulty arises with the definition of *judicial independence*. An unanswered question in all the interviews is: Independent from whom? Another open question is: how is independence measured - if that is possible? How is it possible to determine whether one judge is more independent than another? However, even if Courts were capable of addressing these questions satisfactorily, doubt still lingers: how is it possible to predict whether a candidate once nominated and appointed is going to be an independent judge?

According to several Justices, given the fact that it is virtually impossible to predict whether a candidate will become an independent judge or not, judicial independence seems to lack any real relevance as a nomination criterion. Citing Justice López on this point, predictions about any future judicial independence of a candidate are more matter of sorcery than reliable nomination criteria:

*Nobody can know that. That is sorcery. Sometimes one thinks that a candidate is going to be completely independent, and it turns out to be the most abject and crooked individual. That is very relative. That is why knowing a candidate personally is important, since the interview is not enough. [Interview # 4]*

Even though Justice Valencia argues that judicial independence is something that the Supreme Court considers to be a nomination criterion, he then implies that it is more a *normative* criteria than an *operative* one:

*Once the CV is studied, then, one of the criterion used is independence. We try to predict whether that candidate is going to be independent. A candidate that arrives at the Court with no previous debts. Someone who once at the Court is not going to be obsequious with those who nominated him. Someone who shows independence. Someone who can show us that in all situations he will exhibit a non-mortgaged independence... who can rule and judge independently from any flattering and from any obsequiousness, someone alien to any dithyrambic expressions... And of course, when we are dealing with human issues, it is not possible to say whether we can predict with certainty that such a thing is going to happen. There is always risk involved; we at the Courts understand that it is a real risk. Because we are talking here about human condition. However, we would like that as a future Justice of the Constitutional Court that person would keep a standard of independence. But if you press me on the point about whether this is an absolute certainty, I won't say that.... There are some persons that "eventually", and I want you to cite me here literally, that "eventually" could sacrifice such principles when facing the flattering of power. That must be expected according to the fallibility of human beings. [Interview #5]*

In a different set of interviews of the Deans, Dean Jaramillo –from *La Javeriana* Law School-- underlies a similar point by stressing the futility of asking a candidate whether he or she is going to be independent. Instead of looking into the eventual or probable judicial independence of a candidate, a nominating Court should look into objective benchmarks of judicial independence. According to Dean Jaramillo,

*Judicial independence is a highly relevant criterion that nominators should bear in mind. But more than judicial independence, I think that the key concept should be personal independence, since judicial independence is a concept whose definition is very obscure. If the candidate is a former judge, his attitude –and not only his rulings- must show transparency, clarity, diaphanousness; not only in his judicial role but on the personal level. However, judicial independence is not an objective term. You cannot identify it easily. Independence is to be found in tangible expressions of the Judge or the jurist, like writings, rulings, or documents. But asking a person whether he/she considers him/herself independent or impartial is not illuminating. Of course that person is going to answer "yes, I am independent, I am impartial, I am not mortgaged". [Interview # 7]*

#### 4. Reassessment



In conclusion, it is fair to say that judicial independence seems to have three different functions at the nominating Courts: institutional, personal, and as a nomination criterion. According to the first function, judicial independence is a desirable attribute of the Courts, seen as institutions interacting with other institutions. From this point of view, an independent Court is an institution free of interferences from other governmental institutions. In theoretical or normative terms, Justices agree with the NGOs on the following point: when Courts are not independent, they should be censored by their natural “observer”. However, in the opinion of the Justices, the observer who holds the Courts accountable is an imprecise and disembodied entity with no real impact on the Court’s rulings.

According to the second function of the concept, judicial independence is an attribute or a benefit enjoyed by individual judges. Thanks to judicial independence, judges can insulate themselves from any external influences. This attribute or benefit was threatened when a concrete and embodied observer --*Elección Visible*—demanded to know the “real” criteria used in the nominations. This demand ultimately instigated the Courts’ decision to conceal the nomination criteria that the NGOs were demanding. In short, judicial independence -- seen from this institutional perspective-- trumps any demands for transparency and accountability raised by an external observer.

Finally, judicial independence is understood by Courts as a normative and non-operative nomination criterion due to the fallibility of any prediction about the future independence of a candidate. When the nomination decisions are actually made, judicial independence loses any track as criterion since --according to the Justices—it is impossible to foretell whether a candidate is going to be independent once appointed to the Constitutional Court.

## E. Qualifications as a nomination criteria

### 1. Are the judicial qualifications criteria visible?

For the Justices, the transparency observation was unnecessary: the nomination qualification criteria were clear and public, and there was no need for an external observer to try to uncover them. Furthermore, the Administrative Court Justices argue that the NGOs petitions were irrelevant since even before being asked for them, they had decided to make the candidates' CVs public and to schedule a hearing with all of them. Similarly, before *Elección Visible* demanded the candidates' CVs, the Supreme Court had already decided to make them public --as it was the case with the 2007 observation of their own appointments. This point is stressed by Justice Lafont when he argues,

*We [the Administrative Court] also pioneered the creation of a hearing in which the whole of the Administrative Court listened to all of the sixty candidates interested in being part of the two lists that are constitutionally assigned to the Administrative Court. Subsequently, the Administrative Court evaluated all the CVs of the candidates, and proceeded to elaborate the two lists, composed by three candidates each. This was recognized by the media. The NGOs that you just mentioned should accept this as well. However, having done that, an observation process was unnecessary since the Constitution and the law establish an internal nomination process, where the vote of the Justices remains secret. Then, by doing that we were already complying with the observation process initiated by the NGOs; there was no need of any intervention in our decisions; no need to demand information that they already had handy. Furthermore, on the Administrative Court's webpage we even posted the CVs of the candidates, so everyone interested could have access to them. [Interview # 1]*

This perception of Justice Lafont is reinforced by Justice Guerrero's remark about the redundant nature of the NGOs petitions, taking the fact that the Administrative Court had already decided to apply some of the measures that the coalition was demanding into account:

*Before the NGOs intervened, we've already decided that we were having all the candidates doing public presentations. Then, we concluded that their demand about the Candidates' CVs and the Q&A issue arrived kind of late. Furthermore, the presentations that the candidates were supposed to make at the Administrative*

*Court –that was what we thought-- were eminently about the law. Thus, we never really perceived the importance of the NGOs demands about the Q&A. There was no such thing as a Q&A; only presentations by the candidates where they were free to speak their minds under time-constraints and according to alphabetical order. It was, then, a completely transparent process. As I highlighted, then, we never saw any reason for the overseeing and accountability demands made by the NGOs. [Interview # 2]*

According to Justice Valencia, the Supreme Court complied –as it did in 2007-- with the NGO's demands even though they were unnecessary. Furthermore, Justice Valencia argued that Supreme Court's nominations to the Constitutional Court are based on qualification criteria that were already transparent. By the same token, Justice Valencia added that in its nominations the Supreme Court pays no attention to biased considerations such as ideology, political affiliation, gender, race, among others:

*At this Court [argues Justice Valencia] it is of no importance whether the candidate is from the Liberal Party, the Conservative Party or the Polo [left wing party]. That is irrelevant for us. We also don't discriminate based on gender, race, political thinking or philosophy (...) We only look into the candidates' CVs, their capabilities, their teaching and academic experience, their judicial experience. And of course, we understand that we are going to appoint only the best. We take for granted honesty, and surely, it is only the best the ones that come here. We said that those were the criteria that we followed. And this year, as you surely know, the Court allowed this overseeing and transparency process, to the point that we set the example. I believe that this Court was the only one that, in the case of the nominations to the Constitutional Court, without being asked to --because neither the Constitution, nor the law or the regulation mandates this-- made a public inscription where candidates put their names under consideration. And all the candidates were publicly heard here; we made a series of interviews whose dates and schedules were made public; all of them had the very same possibilities to come here; all of this without being contemplated in the Court's regulation. Because, as you see, this Court is autonomous. [Interview # 5]*

## 2. Qualifications as a indeterminate nomination criterion

Nonetheless, according to the Justices, all of these “visible” qualifications criteria that guide the Courts' nominations are interpreted by each Justice differently, on the basis of personal standards. For instance, all of the Justices interviewed reported different criteria

for determining what characteristics a “qualified” candidate should possess. Despite the alleged “transparency” and “visibility” of the nomination criteria regarding qualifications, each Justice reaches the decision to support a certain candidate based on personal and independent considerations about judicial “excellence.” Nonetheless, the “excellence” criterion has multiple and contradictory meanings among Justices.

Justice Valencia illustrates this point when he declares that “on that document [the Supreme Court’s official response to the NGOs demands] we told them about the criteria that we were going to follow, no harm to the independence of each and every justice.” [Interview # 5] Therefore, it is reasonable to argue that individual considerations about qualifications –based on the “independence of each and every Justice”-- trump institutional guidelines about what the Courts consider to be a qualified candidate. Justices at both the Supreme and Administrative Courts reported that they decided their nominations independently from other Justices or from any institutional benchmark. As a result, the interviews pointed to a proliferation of “qualification” criteria that resist any standardization.

For instance, whereas Justice Valencia highlights “honesty, experience, excellence, respectability” as decisive criteria [Interview #5], Justice López’ qualifications criteria are more difficult to categorize:

*For me, experience is highly important. I think we made a huge mistake with the salient Constitutional Court, nominating people like Cepeda or Araujo... Youngsters unaware of what working in the government is about, how to manage the executive, and even how to manage politics... I think that those who make it to the Court must be great masters. People with experience in the executive, legislative and judicial branches. And also academics. But someone who is exclusively an academic is disastrous. Someone who is exclusively a politician, dreadful as well. We should look for someone above good and evil, someone with nothing to lose. Someone who makes it to the Court is because he/she wants to pay a public service. [Interview # 4]*

These contradictions are best expressed by Justice Guerrero's answer about the "indeterminacy" of the nomination criteria at the Administrative Court. After arguing that there are informal institutional criteria which are "clear" to all Justices, although they are not necessarily formalized, she then contradicts herself by recognizing that the nomination criteria are strictly subjective and individual in the end:

*I think that although they are not formalized, the Administrative Court has some very clear criteria for its nominations. Sometimes it is complicated, but we all have them clear, even though they are not formalized. What do we hold as important criteria? The CV, the professional trajectory of that person, and his/her possible contribution to the institution that he/she is being nominated to. We have some particular expectations about each institution. Every Justice, when looking into the CVs, stresses different points. Therefore, it is difficult to reach uniform general criteria. For instance, it is difficult to pose, as uniform criterion, whether the candidate is a longtime constitutional expert. I would say that the Constitutional part is important, but we don't need only constitutional experts at the Constitutional Court. We need candidates from different legal areas. We have candidates with a very open mind, but perhaps we need people with a more restricted one, capable to strike balances. Each and every Justice has his/her own way to interpret the CVs. That is the formal criteria, but that is just the start; there are many other things that make the difference. [Interview #2]*

Justice López confirms the highly individualistic procedure that each Justice utilizes to determine which candidate she will favor. In her interview she concedes that "Initially we had around 60 candidates. From those initial 60 candidates we voted in order to choose 20. From then on, we voted until we ended up with 5 or 6. That was the idea. Thus, the decision of each justice to vote for those candidates was highly personal." [Interview # 4]

Based on all of my interviews with Justices at both Courts it was clear that personal contact with the candidates was necessary to discern their real qualifications, lacking any institutional or general guideline on the matter. Not a single Justice refrained from scheduling private meetings with some candidates, even though a ban on private "lobbying" at the Courts was a clear demand from the NGO coalition. The practice of private meetings with candidates is openly acknowledged by Justice López:

*After looking into the basic requirements, we elaborate a list, and we bring that list to the Court's plenary. This year we allowed them to make a short presentation. We told them: 'we'll give you five or ten minutes so you can present your subject'. And they did. Some of them were brilliant, others were frankly bad, to the point that I said: 'I frankly don't understand why this person even proposed her/his name'. 'Just forget about it', I said, and then I proceeded to cross out that person from the list. There were others truly brilliant; however, that is not enough if one wants to make a picture about the candidate's personality or interests. Personally, what I did was the following: the persons that I found the most interesting and who I didn't know, because many I knew beforehand so I didn't have any need to ask further, I scheduled with them a personal meeting in order to inquire about subjects that I find important. [Interview # 4]*

Although the NGOs demand of banning private meetings with candidates was discussed at the Administrative Court, most Justices considered that individual contact with the candidates was both useful and legitimate. Justice Guerrero explains her perspective as follows:

*That has been the usual system here; candidates come, although their CVs are already under consideration, in order to meet us and discuss many things, academic issues, legal matters, jurisprudence issues. I think this is useful. Some Justices wanted only these communal interviews, but not the private ones. I said "no"; I think that if one is willing to having them and they want to come, it's all right with me. [Interview #2]*

By way of conclusion on this point, the indeterminacy of both *qualifications* and *judicial independence* as nomination criteria is illustrated by the highly subjective approach that all of the Justices applied in their nomination decisions. This is especially clear from the "real" methodology used by all the Justices to define their nomination vote: individual pondering and private conferences with the candidates. Despite the public hearings with the candidates at the Administrative Court and at the Supreme Court, the Justices based their decision on highly subjective and personal rationale, and on information about the candidates obtained from private contact with them –thanks to personal meetings or to previous relationships. Nonetheless, from my interviews with several Justices it is possible to infer some "hidden" nomination criteria that the Courts never revealed to the NGO coalition. These criteria, unlike judicial independence and qualifications, are more

institutional and general, and less subjective and personal. However, they remained “hidden” to the observers for reasons that I will try to explain in the following Section F.

## F. Grasping the “hidden” nomination criteria: politics and Court’s wars

### 1. Politics and loyalty as nominating criteria

Once four of the twelve candidates nominated by the Courts were appointed by Congress, I asked Mrs. Borrero –director of NGO *Excelencia* --to analyze the outcomes of the nominations. To my surprise, Mrs. Borrero interpretation of the nominations and appointments coincides with the “hidden” criteria that surfaced in several Justices’ interviews. It is interesting to notice that the NGO coalition decided to conceal, as well, this assessment about the “real” nomination criteria used by Courts. In some sense, the “hidden” nominating criteria used by the Courts is some kind of “dirty little secret” that the informed stakeholders know, but prefer to keep concealed. According to Mrs. Borrero,

*If you look at the Supreme Court’s nominations, the rationale is clear: they decide who to nominate according to which Supreme Court Chamber has its turn to nominate—whether the criminal, civil, or labor Chamber. If you pay attention to the nomination of Nilson Pinilla [current Constitutional Court Justice nominated by the Supreme Court in 2007], that was a nomination assigned to the Criminal Chamber of the Supreme Court. Then, if you look closely to this year’s nomination, the first list was elaborated by the Civil Chamber, and the second by the Labor Chamber—it was their turn. All the candidates are, therefore, labor and civil lawyers. And if you look even more closely, five of the six candidates are currently members—or were in the past— of the ordinary judicial branch [from which the Supreme Court is the highest Court], or of the same Supreme Court. Those are the basic criteria for the Supreme Court. In the case of the Administrative Court the criteria is different. Historically, the Administrative Court makes nominations according to memberships to the liberal or conservative party. That is immemorial. Therefore, they produced a list of liberals and a list of conservatives. One of the lists is composed exclusively by Externado University graduates. The other was mixed. There was no regional diversity. The Administrative Court –as the Supreme Court did— chose for every list a woman. There is no Constitutional expert among the candidates. Among the candidates we have only Civil Lawyers, Labor Lawyers, and Administrative lawyers. [Interview # 8]*

As noted by Mrs. Borrero, politics plays an important role as a nomination criterion both at the Administrative and at the Supreme Courts. However, a different kind of approach to politics as a nomination criterion is found at both Courts. Whereas at the Administrative Court party-politics is highly relevant, judicial-politics is more salient at the Supreme Court. Concisely, while the liberal or conservative political/ideological affiliation of a candidate matters at the Administrative Courts' nominations, at the Supreme Court the candidates' loyalty to that Court --once appointed to the Constitutional Court -- is far more important.

## 2. The Administrative Court's "hidden" political criterion

Justice López admits that, at the Administrative Court, a candidate's political "attitude" may steer a nomination decision one way or the other. According to Justice López, it is not political affiliation that matters, but political ideology or philosophy; whether a candidate is more a free-thinker or a defender of the institutional status-quo for instance:

*At this Court we have tried to establish procedures in order to decide according to the profile, the experience, the academic diplomas, and so on. There is, however, a criterion that is taken into account, which is political attitude. That means, individuals with liberal ideas or individuals with conservative ideas. I am not talking here about political parties. I am talking here about ideas, thinking... Whether a candidate has a more institutional thought or a more free-thinking philosophy. [Interview # 4]*

Traditionally, at the Administrative Court, the "hidden" political criterion has played an important role, as Mrs. Borrero asserts. Since the 19<sup>th</sup> Century until today, the Colombian political system has been monopolized by the Liberal and the Conservative party.<sup>94</sup> The institutionalization of this "distribution" of the Colombian State between Conservatives and Liberals was sanctioned by law during the so-called *Frente Nacional*, when the two parties alternated 4 four-year presidential periods --from 1958 to 1974-- and agreed to have parity over all governmental positions as a way to end a bitter civil war during the *violencia*

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<sup>94</sup> Palacios, *supra*, note 42.



years.<sup>95</sup> Mimicking the parity between the Conservative and Liberal parties during the *Frente Nacional*, at the Administrative Court the nominations to the Constitutional Court are aimed at filling a conservative or a liberal slot. Therefore --as Justice López admits-- at the Administrative Court there is one Conservative and one Liberal list of candidates. Thus, candidates are encouraged to overtly declare whether they are conservative or liberal by proposing their names for one of the two lists.

*In this case [argues Justice López], where we had two vacant seats, one of liberal ideas and one of conservative ideas, we asked candidates not to propose their names for both lists at the same time. We asked them to choose whether they belonged to one or the other. Nonetheless, some chose to be on both. For me, those who acted that way were immediately rejected as candidates. My thought was that such person was already showing a lack of criteria and character. [Interview # 4]*

A quick glance at the two lists of nominees --three candidates each-- sent by the Administrative Court to Congress shows, in fact, that one list is exclusively composed by candidates affiliated with the liberal party, whereas the other is filled with only conservative party members. However, the Administrative Court's political approach to nomination is defended by Justice López as a way of striking an ideological balance at the Constitutional Court:

*I think this [the parity system for the nominations] is ideal because, first, it allows to bundle different political parties along these ways of thinking; second, it allows to reach an equilibrium inside the Court. If we had a Court filled with free-thinkers, then all the government's budget will be wasted within half a year. And if we had a Court filled exclusively with conservative individuals, then we will lag behind everything happening in the world and we will not be able to understand many national realities. So I think this balance is fundamental. I would say that at this Court this is the only rationale that exists. [Interview # 4]*

However, there is a thin line between ideological balance and party affiliation. Furthermore, political affiliation, rather than ideology or political philosophy --as Justice López argues-- seems to be the ultimate criterion for nomination at the Administrative

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<sup>95</sup> Ibid.

Court. Asking candidates to disclose whether they want to be part of a liberal or a conservative list is indicative of this trend. Admitting publicly that political affiliation is a relevant criterion for Administrative Court's nominations is a risky decision to make. In order to avoid such a conclusion –suggested by Mrs. Borrero, the NGOs spokesperson-- Justice Sáenz emphasizes that it was not party affiliation what mattered in the nominations to the Constitutional Court, but ideological balance:

*First of all, this woman, Mrs. Borrero... She didn't have a clue about how transparent the process was here. We selected the best CVs. We listened to them a whole day long, we were completely serious about it. In fact, I scheduled meetings with most of them, devoting all my time to this. And this woman comes arguing that we nominate based on political affiliation. Instead, what we wanted was to leave unaltered the balance at the Constitutional Court. [Interview # 3]*

Why, then, were Administrative Court Justices so enraged when the NGO coalition wanted to make this political criterion transparent if –as Justice López argues-- its justification is so reasonable? Why did the Administrative Court keep the ideological parity criterion concealed from the observers, if there are good reasons to argue that the Constitutional Court needs a balanced ideological composition?

To address those questions one has to be aware of the fact that most judges are “bifurcated”, in the sense that while Colombia’s formalist legal culture presses them to declare that they decide cases –among them nomination decisions—only according to law, on the other hand their adjudication is crammed with ideological, political and extralegal tensions. Nonetheless, an actor trying to uncover or make transparent this “bifurcation” would probably be shunned by the higher Colombian courts since the cost of admitting this is far too high for the formalist model of Colombia’s legal system.

### 3. The Supreme Court’s “hidden” political criterion

The Supreme Court's "hidden" political criterion is more circumscribed to the so-called "train-wreck" (*Choque de Trenes*) between that Court and the Constitutional Court. As was the case in Spain after the 1978 Constitution introduced a new Constitutional Court, the creation of a Constitutional Court in 1991 pre-supposed a new distribution of powers between the higher Courts in Colombia. In that new distribution, the Supreme Court has expressed serious misgivings about several Constitutional Court's rulings that overturned the Supreme Court's decisions.<sup>96</sup>

It comes as no surprise, then, that when the Supreme Court nominates candidates to fill a vacancy at the Constitutional Court, the issue of "loyalty" towards the Supreme Court emerges as a relevant nomination criterion. At the Supreme Court the fact that some candidate is liberal or conservative is not as important as the "loyalty" that a candidate should be ready to show to her nominator –the Supreme Court-- once appointed to the Constitutional Court. This point is conceded by Justice Namen [Interview # 12] and by Justice Valencia, who states

*Well... it is not a secret that we believe at the Supreme Court -for reasons which are strictly constitutional and legal- that Supreme Court's rulings are untouchable. This an apothegm. And we don't proceed here out of vanity, because we are sure that we are the "highest" Court in the land. So we don't understand how another Court assumes that it can quash our rulings (...) However, I think I am answering your question with a preamble by touching the issue of the train-wreck. But your question is about the nomination criteria. We don't look for candidates completely and radically in favor of the Supreme Court; we don't look for this kind of extremism. We don't look for candidates that once in the Constitutional Court might resist the same Constitutional Court, we don't want that. We don't want a candidate that once at the Constitutional Court could act as an obstacle or as a "stick blocking the wheel". However, we believe that the Justice once there, should not enhance the roads towards factual violations of the law against the Supreme Court. But that doesn't mean that the candidate should follow strictly or radically this point just for the*

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<sup>96</sup> During the last eight years, this confrontation has assumed the form of a serious institutional clash between the two Courts. The clash reached a point where several Supreme Court's Chief-Justices have publicly declared the Supreme Court's resistance to the Constitutional Courts' rulings that overturned the decisions of a Court that –according to all of the Supreme Court's Justices' interviews-- still is the highest in the land.

*reason that he was nominated here. But we want this person to have a vision about the way the Supreme Court works. Someone who -not in absolute terms but in relative terms- could bring to the Constitutional Court the principles to be found at the Supreme Court. Do I make myself clear? And of course, we will not force this person. But naturally, we would like him to bring to the Constitutional Court the way we think here about the quashing of Supreme Court's rulings... [Interview # 5]*

Therefore, when Justice Valencia claims in Interview # 5 that at the Supreme Court it is irrelevant “whether the candidate is from the Liberal Party, the Conservative Party or the Polo [left wing party]”, he is being completely consistent with the fact that, unlike the case of the Administrative Court, at the Supreme Court it is not party politics what steers the nomination decisions, but loyalty towards the Supreme Court. Nonetheless, his statement about the complete independence that a candidate must show once appointed to the Constitutional Court conflicts with the Supreme Court’s criterion of loyalty.<sup>97</sup> In fact, once at the Constitutional Court, being a Supreme Court loyalist seems to contradict Justice Valencia’s assertion about the Supreme Court’s objective of appointing “Someone who can show us that in all situations he will exhibit a non-mortgaged independence”. [Interview # 5] Having Constitutional Court’s Justices who are not expected to contradict Supreme Court’s rulings, amounts to having “mortgaged” judicial decisions. It is reasonable that the Supreme Court nominates a candidate who will share its approach to legal issues once at the Constitutional Court; indeed, the contrary –nominating to the Constitutional Court someone who is antagonist to the Supreme Court’s jurisprudence or legal approach—would be extremely peculiar and counterintuitive. It is to be expected that Courts nominate not foes but trusted, reliable and sympathetic candidates. Nonetheless,

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<sup>97</sup> Justice Valencia adds further in his interview about the “loyalty” criterion at the Supreme Court: “We want that, if possible -and not being this a straitjacket- this person has a criterion about the Constitutional Court ruling-down Constitutional Court’s rulings. That is not the sole criteria, but it is in fact there. However, I want to be clear this point: it is not an absolute criterion, and the candidate is not obliged to defend radically this criterion. But we want that this candidate carries to the Constitutional Court the Supreme Court’s thinking about this issue. Which doesn’t mean that this person should look for solutions for this issue. We want someone that once there will refrain from striking down all rulings of the Supreme Court... This would be not only inconvenient for both Courts, but for the whole country...” [Interview # 5].

admitting –as Justice Valencia does-- that the Supreme Court expects from candidates that they “bring to the Constitutional Court the way we think here about the quashing of Supreme Court’s rulings” [Interview # 5] means that they are looking for candidates that, once at the Constitutional Court, refrain from declaring that Supreme Court’s rulings must be overturned when, for instance, they violate the basic rights of the defendant. Facing a situation where a Supreme Court ruling under revision of the Constitutional Court clearly violates constitutional basic rights, a Justice nominated by the Supreme Court is expected to act loyally and refrain from overturning the Supreme Court’s decision –despite the fact that some Supreme Court rulings have been quashed by the Constitutional Court because they evidently violate the due process of an individual.

It comes as no surprise that all of the Supreme Court’s nominees were former Supreme Court Justices or Circuit Judges.<sup>98</sup> However, similar to the Administrative Court’s, the revelation of this “hidden” political criterion would be too dangerous for the Supreme Court’s image. Among the probable costs that Courts might face if they uncover these hidden nomination criteria, Mrs. Borrero –*Excelencia*’s director-- underscores the following:

*We think that deliberations at the Courts must remain private. But the thing about the criteria was truly a turning point. We insisted in asking them for the criteria, and they insisted in denying access to the criteria. But listen, here in Colombia we take legal action against everybody for almost everything. So, if they disclose the real criteria, then someone could sue them for violating the basic right to equal treatment. [Interview # 8]*

Trying to gain admission into the Court’s deliberations in order to make the “hidden” criteria transparent was, according to all Justices interviewed, a bold demand from the NGOs. This particularly infuriated Justices, who considered it to be an outrageous attack

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<sup>98</sup> Circuit Judges are part of the “ordinary” branch of the legal system, which has at its apex the Supreme Court.

on the Courts' independence and status. In a more composed tone, Justice Lafont explained why Court's deliberation must remain secret:

*First, judicial rulings are based on an adjudicative technique, which is not common. Second, the process of judicial adjudication is a process in stages that is finally canvassed in a ruling. Then, the deliberations' written records include only a synthesis; those are not literal transcriptions of the deliberations. This is so because in a Court there may be so many opinions about a subject, so many debates, that there is of no real importance in registering them, since the real important issue is the decision. Furthermore, some Judges –me included– think that the only mandatory part of the ruling is the ratio decidendi, which is no more than a big set of obiter dicta. That means that the final decision of a ruling is nothing but a block composed by judicial opinions. And the impact of these opinions is reflected in the decision. It is not true that a ruling has two parts: the actual decisions and the motivations. There is just one ruling, composed by the decision. Then, what I find inconvenient about making public the deliberation is that we find in deliberations many different and contradictory criterion, that throughout the debate become decanted. If we make public such deliberations, then in a latter stage the quality of the decision may become subject to debate; someone can say, for example, that some Justice first assumed a concrete position, and then changed it completely. If we make public written records of the deliberations, then the ruling may be seen as contradictory. Then, it is reasonable that such deliberations remain private. [Interview # 1]*

Admitting that the Courts' nomination procedures are contradictory and not univocal could amount to setting a ticking bomb into the legal formalism model that most Colombian Judges seem to revere. Although the adjudicative practice of Colombian higher Courts' Justices suggests that politics and extralegal considerations play an important role in their decisions, Colombia's mainstream legal education and legal culture—as is also the case of most civil law countries<sup>99</sup>—fiercely deny this fact. Colombian Legal education and legal culture are based on a formalist model according to which the law is coherent and self-contained. Thus, when a judge interprets a statute or a Code in order to adjudicate in a particular case, she only needs to consider “the law” —more precisely, the law in the Codes or, eventually, in the precedent of a higher Court. Any additional consideration to

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<sup>99</sup> For a well-known explanation of civil law's formalism —both of legal education and of legal culture— see JOHN H. MERRYMAN, *Legal Education There and Here* 27 *Stan. L. Rev.* 859, (1975). JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press 3rd ed. 2007).

extralegal rationale is at odds with the impartiality and neutrality that a Judge is expected to exhibit. This is, in fact, an unquestionable supposition on which most of the legal system's legitimacy is based. The scenario where a judge admits that politics, personal inclinations, morality or ideology played a role in one of her rulings, would be extremely harmful for her or for the Court she is part of. Furthermore, a Justice that makes transparent the extralegal foundations of some of her rulings could eventually face serious disciplinary charges.

Therefore, lifting the veil of formalism is still a heavy burden in a Country where Judges perceive themselves –or want to perceive themselves-- as individuals insulated from extralegal elements. As has been demonstrated by Lasser in a groundbreaking comparative study of higher Court judges in Continental Europe and the U.S.,<sup>100</sup> my case-study suggests that Colombian Administrative and Supreme Court Justices –trained in a heavily formalist civil law legal tradition—are “bifurcated” judges. This bifurcation, according to Lasser, becomes evident when one does some “archeology” of the judicial decisions of judges from a civil law tradition: on the surface, judicial decisions seem to be unambiguous, coherent and designed only according to “the law”, without taking any extra-legal factors into consideration. However, if the researcher “excavates” the surface of the rulings –gaining access, for instance, to the complete dossiers of French Courts-- she will find that the deliberations and the previous stages of the written decision are more similar to an American legal realist landscape, crammed with politics, ideology, contradictory personal positions of the judges, etc. Nonetheless, as in France, Colombian Administrative and Supreme Court's justices fiercely deny that behind the tip of the formalist iceberg lies a vast body of subjective extralegal elements based on the fact that

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<sup>100</sup> MITCHEL DE S.-O.-L'E. LASSER, *Judicial deliberations : a comparative analysis of transparency and legitimacy* ( Oxford University Press. 2004).

the costs of admitting the bifurcation are too high to be seriously considered by Colombian higher Courts Justices.

#### G. Judging the transparency observation process

##### 1. The Justices judge the NGO coalition: "You suspect, I suspect"

According to all of the Justices' renditions, the NGOs transparency observation started from the assumption that there was something murky, non-transparent or "hidden" in the Courts' nominations.<sup>101</sup> According to the Justices, the initial use of the words "transparency observation" by the NGOs took for granted the fact that something "fishy" was being cooked at the nominating Courts. As a reaction to this initial suspicion showed by the observers, the Courts decided to be suspicious of the NGO coalition as well.<sup>102</sup> Consequently, the Justices raised their own doubts about the "hidden" interests of the NGO coalition. Conveniently for the Courts, when the sister of the first spokesperson of the NGO coalition --Mrs. Borrero-- decided to put her name in consideration for the Supreme Court as possible nominee for the Constitutional Court, the suspicions grew even more and evolved into an ugly personal turn against Mrs. Borrero.<sup>103</sup> With no

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<sup>101</sup> Justice Guerrero argues that "The way they [the NGOs] decided to start their intervention was by showing suspicion. By implying that at the administrative Court we already had formed a list of nominees beforehand. That touched sensibilities here. Our reaction was like, 'we don't need here any kind of overseers since the process here is completely transparent.' Our immediate reaction when we read the document with the demands was, like, 'but why are these persons demanding to be allowed in the process by implying that there was no transparency in the process?' We said, definitely 'no' to their petitions." [Interview # 2].

<sup>102</sup> Justice Guerrero, for instance, manifests the negative reaction of Courts due to the initial suspicion showed by NGOs: "My first perception was that there was a kind of suspicion about us on their part. There was some kind of misgiving on the part of third parties, in this case NGOs, about the nomination process that we conducted here. This fostered somehow a self-defense and self-protection in our reaction. It produced on us a rejection feeling towards this interference. This was our first perception when we were asked, in a disobliging way, to collaborate." [Interview # 2]

<sup>103</sup> Justice Sáenz states the following regarding Mrs. Borrero: "First of all, this woman... Mrs. Borrero... She didn't have a clue about how transparent the process was here. We selected the best CVs. We listened to them a whole day long, we were completely serious about it. In fact, I scheduled meetings with most of them, devoting all my time to this. And this woman comes arguing that we nominate based on political affiliation (...)



exception, all of the Justices identified the NGO coalition not as a neutral transparency observer, but as an interest group with non-transparent goals of their own.<sup>104</sup> Although the NGO Coalition did its best<sup>105</sup> to send the message that the candidacy of Mrs. Borrero's sister did not reveal a lack of neutrality, the Justices' interpretation remained unaltered.<sup>106</sup> In most interviews with the Justices, the personal animosity toward Mrs. Borrero is evident. Furthermore, the Justices were never inclined to distinguish between the particular attitude showed by Mrs. Borrero as a spokesperson and the institutional procedures of a coalition that gathered 13 organizations. Mrs. Borrero's unfortunate case was used as a scapegoat by the Justices in order to discredit the entire transparency observation. From that point on, the NGO coalition lacked –according to the Justices– any moral standing to demand transparency from the Courts. What is even worse, added to their lack of moral stature, Justices saw NGOs as outsiders or intruders with no previous knowledge about the legal profession. Wrapping up this point, the Justices viewed the NGOs as an interest group of “outsiders” or of “out-of-the-legal-guild” individuals with dubious goals in the Courts' nominations.

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Such a rude woman. We told her that at the Court we were defenders of judicial independence, but that the voting was secret. How come she asked to be invited in order to know the voting system?” [Interview # 3]

<sup>104</sup> About the NGOs being interest groups with “hidden” objectives, Justice Lafont states: “I think there is virtually no NGO in the world that can declare itself as neutral or without a particular interest. That is what justifies their existence. I am fond of them. They are necessary. But all of them have a purpose, and that purpose is what denotes their interests. Then, when a NGO oversees Judges, then they have an interest in some proceedings and results, which reflects the opinion of their members and their ideological position. We cannot ignore that. They have interests. Therefore, their status as mere bridges can be admitted, but always under the idea that they have concrete objectives. That’s the way it is, since that is the nature of NGOs. That is my perception.” [Interview # 1].

<sup>105</sup> Mrs. Borrero, facing this situation, decided to step away from the coalition during her sister’s candidacy. Once her sister declined to be included in the candidates’ lists of the Supreme Court, Mrs. Borrero returned as acting spokesperson of the coalition.

<sup>106</sup> Asked about whether the transparency observation done by the NGO coalition, had any impact on the Courts’ nominations, Justice López answered: “Far from it!!! Not a chance!!! Even more, I thing they are a little group lacking any kind of seriousness. I saw them once, when they tried to get into the Administrative Court, trying to impose themselves in our deliberations. That is an abuse. So, far from it... I rely on my good faith, on my criteria, on my experience. It is possible that I can fail, but I am deeply convinced about my good criteria.” [Interview # 4]

Building on that perception, the Justices interpreted the NGO's petitions to be a treacherous aggression against their judicial independence. According to the Justices' narrative, the NGOs -hiding behind a fake veil of neutrality-- held ill-fated interests and were conspiring against their judicial independence by fostering suspicions about the Justices' autonomy and impartiality. Thus, autonomy, impartiality and judicial independence collapsed as separate concepts for the Justices, and became one indistinguishable bundle of judicial "assets" that they decided to protect from the NGOs attacks. No matter how the NGOs presented their transparency demands, all of the Justices interviewed perceived them as to be interest groups fostering suspicion about the Justices' autonomy and impartiality; therefore --according to the Justices-- a refusal to collaborate in order to protect judicial independence was not only a legitimate response from Courts; it was a mandatory one.

## 2. The Deans judge the NGO coalition: "The 24<sup>th</sup> Justice"

The Deans coalition ran parallel to the NGOs coalition and was aimed less at the nominating Courts and more at the appointers themselves --the Senate. Alejandra Barrios, director of the only NGO that the Deans decided to include --Movimiento de Organización Electoral, or MOE--<sup>107</sup> explains that, although both coalitions began their activities at about the same time, from the start, the Deans' coalition was better received by Courts than the NGOs:

*Both coalitions coincided. Both ran parallel. However, twenty days before the NGOs coalition tried to meet with the Courts, the Deans managed to meet with all the Chief Justices of the Supreme, Administrative and Constitutional Courts. The NGOs met with the vice-president of the Supreme Court, but not with the Chief Justice. And the*

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<sup>107</sup> Alejandra Barrios' interview is highly helpful to understand the way the Deans' coalition differed from the NGOs coalition, since Mrs. Barrios was also part of the Core Group of the NGO coalition. Although Mrs. Barrios decided to work closely with the Deans, she remained part of the Core-Group of *Elección Visible*.

*Administrative Court clearly stated from the start that it was not interested in collaborating with NGOs coalition. [Interview # 10]*

The benefits of forming a different coalition from that of the NGOs was clear, from the start, both for the NGOs and for the Deans. Whereas the NGOs considered that inviting Law Schools to *Elección Visible* would compromise their neutrality since –law schools, traditionally, have held a particular interest in having Justices among their graduates, the Deans tried to avoid the confrontational attitude that the NGOs had assumed from the start. Consequently, the Deans interaction with the nominating Courts followed different behavioral patterns<sup>108</sup> from those used by the NGOs. Furthermore, the Deans were extremely careful about their language during their episodic interactions with the nominating Courts. They never defined themselves as *observers*; instead, they chose the word “*escort*” to describe their activities. According to my interviews with the members of the Deans’ coalition, they tried to transmit the following message to the nominating Courts: the Deans were only accompanying or *escorting* a nomination process that they considered to be transparent from the start. Choosing the word “*escorting*” rather “transparency observation” was, according to Mrs. Barrios, well received by nominating Courts:

*I think the main difference lied in the form both coalitions presented their cases. First of all, the experience in Colombia about accountability processes practiced in nominations made by non-elected organs was very limited. However, to answer your question, a first and very relevant difference between the two coalitions was that the Deans clearly expressed that they were “escorting” -- and not “observing”-- the nomination process at the Courts. That was very different. The Deans said: ‘We escort the nomination at the Courts and we escort the appointment of candidates at the Congress’. Deans were extremely careful with the use of language... [Interview # 10]*

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<sup>108</sup> Deans assumed, to put it short, a “low profile” behavior in their interaction with Courts. This is expressed by Mrs. Barrios as follows: “The Deans assumed a low profile. First, they met just once with the Courts. Second, they met among them just once. The rest of the communication between them was via-email. And besides that, I didn’t perceive any kind of lobbying by the Deans for some of the candidates that happened to be graduates from their law schools.” [Interview # 10]

These different behavioral patterns, added to the Deans' privileged position in the legal profession "guild," had a positive effect on the Justices, whose reaction to the Deans' "escorting" process was welcoming and encouraging.<sup>109</sup> All of the Justices interviewed declared that they considered the Law Schools as the natural and best-suited observers of judicial nominations.

Most of the Deans that constituted the Coalition were not only the visible heads of the most important Colombian law schools, but former Justices as well –either from the nominating Courts or from the Constitutional Court. The Deans' coalition was, then, perceived by the Justices as an "escorting" group of notable members of the legal profession's "guild" who really knew what a nomination process was about. This fact is directly exemplified by Mrs. Barrios assertion about the "weight" that deans have in Justices' minds:

*If I tell them [the Justices] that me, an NGO director, is the one escorting their nomination process, they will surely say something like 'Yeah, O.K., whatever...' But if it is someone like Los Andes Law School's Dean, or La Sabana's, or La Javeriana's, the one proposing to escort the nomination process, then that's something else. For instance, if the law schools deans from private and public universities, or from liberal and conservative law schools, get together and agree to practice this overseeing or escorting exercise, then the Justices will not say 'Whatever...' They will sit with the deans and say 'Now we are talking...' In the case of the Deans there is weight. And it may be a less public or publicized process, but it is –by far- more effective. The communication channels are already there; the Justices are not talking to Alejandra Barrios, but to law school deans they do. And why not with me, you may ask? Because Justices just like to interact with law schools' deans, not with NGOs. [Interview # 10]*

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<sup>109</sup> Justice Guerrero expounds why Law School are more respected as observers by the Courts when she adds: "An intervention of law schools that we obviously respect is more substantial. Because the way law schools approach the subject is completely different. Law schools have a more academic and theoretical approach. However, that academic approach has a more direct contact with the realities of our country. Those approaches are more comprehensive towards what is needed for the nomination of a Constitutional Court Justice. Law schools are more acquainted with human rights and with our country's conflicts. NGOs, on the contrary, are more closed. That is why we consider that Law Schools can do a better job by elaborating questions for the candidates." [Interview # 2]

Unlike the NGOs, Deans took special care to re-emphasize the status of Justices as neutral and insulated adjudicators who decide whom to nominate based on objective criteria. Deans never demanded to know the “hidden” nomination criteria. Rather than interacting constantly with the nominating Courts, the Deans met just once with the Chief Justices of the Administrative, Supreme and Constitutional Court. In that meeting, the Deans let the Chief Justices know about the questionnaire<sup>110</sup> designed by professors at their Law School as the basis for the nominees’ Q&A session at the Senate, before the appointments were actually made. The Deans identified this questionnaire as an academic inquiry into the legal and the constitutional philosophy of the candidates, to be applied at the Senate as a neutral and non-judgmental appraisal of the nominees’ familiarity with some pressing constitutional issues. All these characteristics set the Deans apart from the NGO coalition. Deans were completely aware that they should differentiate themselves from the NGOs transparency observation. Dean Venegas –from *El Rosario* Law School-- emphasizes the different methodologies used by the Coalitions. According to Dean Venegas, the main difference lies in the fact that whereas the NGO coalition aimed at asserting the personal level of competence of the nominees, the Deans conducted a more academic and objective analysis of the nomination process:

*By designing the questionnaire we tried to devise ways to detect whether a candidates’ answer was indicative –according to the legal academia’s criteria-- of certain position about independence or qualifications. Those questions were designed to make evident whether the candidate complied with the Constitution’s directives about the constitutionalization of the Colombian legal system, or whether*

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<sup>110</sup> The questionnaire designed by the Deans coalition is translated in the appendix of this thesis. Mrs. Barrios reports the following about the questionnaire: “That’s why the Deans decided to emulate what the ABA does in the case of the U.S. Supreme Court’s nominations by sending a questionnaire to Congress. The deans chose to ask questions that, maybe, are highly academic and not for the layman; however, the importance of the situation –nomination of Constitutional Court’s justices- deserved an academic treatment. Deans also asked to Congress to televise the Q&A *live*, since the nominees were answering highly relevant questions before Congress and society.” [Interview # 10]

*there was a bias. However, the questionnaire was precise enough to detect this. Additionally, the NGOs process was aimed at the personal level. Their webpage was full of remarks about the candidate's personal trajectory; and that webpage was also not short of remarks made by anonymous individuals about the candidates profiles, where people argued whether those candidates were convenient or not. Our questionnaire was objective. [Interview # 6]*

Furthermore, Deans were highly critical of the way NGOs conducted their transparency observation. Dean Jaramillo –from *La Javeriana* Law School-- made explicit criticisms of the NGO coalition, calling them the pretended “24<sup>th</sup> justice.”<sup>111</sup> According to Dean Jaramillo, NGOs went too far in their transparency observation. Therefore, according to Jaramillo the Courts' negative reactions to the NGOs were completely justified as a way to protect judicial independence:

*I don't know exactly about their demands. But if they asked to be present in the deliberation process or in the candidates' Q&A at the Courts, then that is something else. Allowing the NGOs to participate in those roles would be like allowing them to be the Justice number 24 [there are 23 Justices at the Supreme Court]; it would have been like giving them a seat at the Court as another Justice. That is preposterous. Those are private meetings. And please understand that “private” doesn't means “clandestine” or close to “obscurantism”. And they are private because Justices are high-ranked members of the State, and therefore their deliberations must remain closed to public observation. But if Justice Number 24 asks to be at the deliberations, filming, looking over the shoulder of the Justices, taking notes about the criteria that he/she is using, then that is unacceptable. If they detect irregularities in the nominations, that is completely the exception. The rule is that Courts nominate correctly, independently of overseeing processes by the Civil Society. And by the way, this term “civil society” is like made of latex; everything fits in there. However, I don't think their overseeing or even their existence guarantees any kind of outcome. That is why overseeing must be more like an escorting. They should refine and make more respectful their overseeing role on Courts; civil society cannot start from the assumption that there is something murky in the nomination. And I agree that when information flows freely is a good thing. If these observation processes promote such transparency, that is welcomed. But they should refrain from amputating judicial independence. I welcome that the Candidates' CVs were made public; that is informational transparency and it is good for the nomination process. Those CVs can be shared on a webpage. However, this must be practiced carefully since here we are talking about CVs of very prestigious lawyers. But transparency should stop there. Demanding the nominations' criteria or imposing some criteria is already a far-fetched demand, since the Constitution already*

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<sup>111</sup> By doing this remark, Dean Jaramillo was implying that the NGOs pretended to be one more Justice when they demanded the “hidden” criteria and to be present at the hearings. This is graphically expressed in the term 24<sup>th</sup> Justice, since the Supreme Court is composed of 23 Justices.

*includes the criteria for the nomination of Constitutional Court's Justices. There they are, in the Constitution. And nominations are made according to them- for instance having a Court that reflects a diversity of legal disciplines. But they should stop there (...)" [Interview # 7]*

According to the Deans coalition members, the NGO coalition clearly overstepped the limits of judicial independence by raising demands that shed a mist of suspicion around the Justices' impartiality and autonomy, which is unquestionable. Finally, the Deans were completely confident about the huge positive impact that their "escorting" process had on the final appointments at the Congress. According to the Deans, the contribution that their questionnaire and their Q&A session at the Congress had on the quality of the appointment process is evident.

### 3. The NGOs judge themselves: "The tone makes the music"

*The interviews with the NGOs members suggest two different kinds of evaluations of the accomplishments, failures and lessons of the transparency observation. The first type of evaluation emphasizes *Elección Visibles* pioneering project, and the positive effect of fostering public "awareness" about the relevance of the Constitutional Court's nominations.<sup>112</sup> Although the NGOs members that defend this optimistic evaluation of the transparency observation are aware of the limited impact that their observation actually had on the nominating Courts, they attribute the limits to particular characteristics of*

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<sup>112</sup> This first evaluation is to be found in Mrs. Borrero –*Excelencia's* director- interview. According to Mrs. Borrero, the observation process was blocked by the Justices' suspicion about any kind of accountability over them. However, Mrs. Borrero is optimistic about the future stages of transparency observations in Colombia: "The Administrative Court openly disliked our oversight. That's why this kind of effort is so difficult. Justices thought they were being judged, or spotted for doing something wrong. But this is a process. You said that you noticed my dissatisfaction in the newspaper interview. However, I tried to be objective in the interview. I highlighted what we were able to achieve; however, I also remarked what was not achieved. I am not frustrated. I think we have opened a path here. We positioned the issue; we made the citizenry and the media more aware of the nomination process; we followed the process in a very rigorous way; we received good responses from the candidates; we opened a blog where the citizenry reacted to the nominations; we succeeded in having the Courts making public the lists of candidates and the Q&A they were practicing with the candidates. However, I have to say that the Courts didn't comply with their compromise, since Justices practiced private interviews with the candidates. They didn't tell us what the nomination criteria were. We had to deduce them." [Interview # 8]

higher Court Justices. Thus the interviewees emphasize the Justices' aversion to any kind of transparency; their strong rejection of any observation by outsiders or by members of a guild different from that of the legal profession; their unyielding self-confidence about their neutrality and insulation from politics; their negative perception of what an NGO is, among other factors.<sup>113</sup> According to this first assessment, the lessons learned from the transparency observation are positive in the sense that observing judicial nominations is an ongoing learning-process that cannot be reduced to the 2008 observation alone. On the contrary, the 2008 experiment with *Elección Visible* is just the first step in a long process of judicial accountability and transparency conducted by organizations from civil society.

A second and more self-critical type of evaluation of the transparency observation focuses on how to avoid strategic mistakes in an eventual second transparency observation, such as: excluding law schools from the NGO coalition;<sup>114</sup> choosing a non-confrontational language; using a model of accountability and transparency observation for the case of

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<sup>113</sup> All the abovementioned evaluations are found in Mrs. Flórez –director of *Transparency International*–Interview, when she states the following: “I associated the Courts’ reactions more with a judicial branch not used to be open and accountable, not used to share information or to be observed. We’ve had many overseeing exercises over the executive and the legislative branches. But this is our first time with the judicial branch. So they reacted by asking: ‘Why are you looking at me when I’ve always done this task right, why are you suspicious of me?’ I didn’t interpret them as seeing in us as an interest group with agenda, but maybe that was the case. In fact, what we mentioned from the start was the transparency of the whole process; we were not looking neither into the qualifications of the candidates, nor into the candidates’ ideologies. We tried to make clear that point. Among the members of our coalitions we were clear about not inviting NGOs that have some interests, for instance, in the abortion issue, or in the sexual diversity issue. We told them: ‘move your agenda somewhere else, because here we are concentrating on the transparency issue’. What probably led them to interpret us as having an agenda was the presence of NGOs heavily financed by the private sector. However, this was at the start. Because the most active NGOs were Transparency, Excelencia, MOE, Instituto de Ciencia Política, and Congreso Visible.” [Interview # 11]

<sup>114</sup> Mrs. Ungar asserts, for instance: “We started from the assumption that law schools such as Externado, Javeriana, Rosario, etc. had interests in the nominations. This has been historically the case. However, that is a lesson we learned. In the future, we must work closely with the legal academia. No doubt about it. But we should try not to turn this into a mere academic exercise.” [Interview # 9]



judicial adjudication that is usually applied to politicians and bureaucrats;<sup>115</sup> ignoring the uniqueness of the Judicial “culture”, “psychology”, or “logic”;<sup>116</sup> joining a coalition with NGOs that were disliked by the higher Courts; having as a spokesperson<sup>117</sup> an agonist and a trouble-maker, among other factors. According to several interviews with NGO members, the way the NGOs –and more precisely the spokesperson-- interacted and communicated with Courts obstructed the transparency observation. The “tone” used by the NGO coalition in its communication was, then, harmful to the accomplishment of its goals. Mrs. Ungar puts this in the following terms: “As my mother used to say, sometimes tone makes the music.” [Interview # 9]

Some interviewees that held this view insisted that their organizations emerged somehow “damaged”<sup>118</sup> from the transparency observation because some NGOs that were part of the coalition “externalized” damages on them. This was clearly the case of *Excelencia*. Several interviewees added that the way Mrs. Borrero –*Excelencia*’s director-- assumed

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<sup>115</sup> In her interview, Mrs. Ungar stresses this point: “We committed the sin of being maybe arrogant, thinking that every type of transparency observation can be practiced independently of the subject. Nonetheless, when we spoke with law Deans about our process, they never casted a doubt about it. We should have received a clearer warning from the Deans showing us the challenges ahead. If they have that criticism right now, they should have warned us before.” [Interview # 9]

<sup>116</sup> Mrs. Flórez underlies that in a next transparency observation NGOs should be more aware of the Justices “logic”: “However, we are clear on this point: we are not quitting with this kind of overseeing; whether the Courts wanted or not, we will continue to observe them. But we will improve the process. I think we must understand their logic, because it is mind-blowing that they perceived certain things when we were trying to do the opposite. But we must try to understand better their logic in order to be more assertive. We also must try to foster a sense of trust in them; but that doesn’t mean that we become their buddies, that is not what we want. That is not our job. They are there, we are here, and our interest is what lies in between. And I would like to know about the criteria. What they refuse to release them.”

<sup>117</sup> Elizabeth Ungar argues that “I concede that there was a problem with the spokesperson’s role, that set some obstacles to the process” [Interview # 9]

<sup>118</sup> Mrs. Ungar asserts about this point: “Regrettably, we come out not unharmed. In one the exchanges between Op-ed columnist Bejarano and Gloria María, he says that some of the organizations that joined *Excelencia* in this process don’t share her arguments about Externado graduates’ dominance of the nomination process and about them acting as a mafia. I know very well Gloria María, and that was not what she meant. But I also know Bejarano, and I am completely sure this will have a negative effect on us. This will harm us.” [Interview # 9]

her role as spokesperson damaged not only the coalition, but also the prestige of some of the NGOs that would have preferred a spokesperson with a less-confrontational attitude towards the Colombian judicial elite.<sup>119</sup>

#### iv. Epilogue

On March 16, 2009, President Uribe finally released his 3-name lists of nominees to the Constitutional Court. According to the Colombian media,<sup>120</sup> the two candidates appointed by the Senate on March 25 2009 are faithful cronies of Uribe's government. None of the six candidates had a relevant academic record or a distinguished professional career. The only candidate --who finally was appointed by the Senate-- that has published something is Mr. Pretelt; however, Pretelt's main thesis in that book is that Colombians should re-elect Uribe as President.<sup>121</sup>

*Elección Visible* published a briefing<sup>122</sup> in which it publicly expresses its dissatisfaction with the President's refusal to make the basic information about his nomination picks transparent. Uribe's nominations were announced in the midst of the controversy about his -- by now--all-too-clear plans to reform, for a second time, the Constitution in order to stay in office for a third term. As was mentioned above, the *referendum* proposal must be reviewed by the Constitutional Court before reaching the voting booths. According to many Colombian political analysts, the new Constitutional Court will surely pave the way for Uribe's Constitutional reform. Facing this situation, some analysts predict the end of

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<sup>119</sup> Mrs. Ungar adds the following about the spokesperson issue: "I think, first, that the issue of how visible the spokesperson is can run against a process like this. We should look for another spokesperson's role; something like a shared and rotational spokesperson's role" [Interview # 9]

<sup>120</sup> See, for instance, the article of the influential magazine *Semana*: <http://www.semana.com/noticias-nacion/cambio-extremo-corte/121999.aspx>

<sup>121</sup> Ibid. The name of the book, whose coauthor is Carlos Murcia, is "Why voting yes for the referendum" (*Por qué votar sí por el referendo*).

<sup>122</sup> See, [http://www.eleccionvisible.com/index.php?option=com\\_content&view=article&id=345:eleccion-visible-informa-acerca-de-las-ternas-conformadas-por-el-presidente-uribe&catid=26:noticias-y-comunicados&Itemid=12](http://www.eleccionvisible.com/index.php?option=com_content&view=article&id=345:eleccion-visible-informa-acerca-de-las-ternas-conformadas-por-el-presidente-uribe&catid=26:noticias-y-comunicados&Itemid=12)

the Constitutional Court as an institution capable of attracting the most accomplished legal minds of the country and of continuing to foster basic rights in Colombia.

My study is incapable of proving or disproving such suppositions. I have restricted my case-study to an analysis of the way accountability and judicial independence clashed during the Administrative and Supreme Courts' nomination of candidates to the Constitutional Court, which were observed by *Elección Visible*. In what follows, I would like to underline some of my findings.

### *The NGO Coalition Elección Visible*

Regarding the nature of the NGOs coalition, it is reasonable to argue that they must be understood against the backdrop of the eventual court-packing plan of Uribe's government. However, according to the interviews with the NGO members, it would be inaccurate to assert that the main objective of *Elección Visible* was precluding such plan. It would be more accurate to say that the NGO coalition was designed as a means of practicing a transparency observation of the nomination and appointment of nearly 70% of the members of the highest Court in the land. Furthermore, the decision to observe the nomination and appointment of Constitutional Court Justices by NGOs proves the public's interest in the composition of the Court.

However, from its inception, the NGO coalition members perceived that, lacking a formal invitation, they were trying to force their admission into a "selective cocktail party." Some of them assumed that this was due to the pioneering task that they were undertaking; others perceived the Court's unwelcoming greeting to the NGO coalition from the start. Furthermore, some NGO members also understood that the Courts were difficult actors to include in a transparency observation. According to several NGO members, it was clear from the inception of the observation process that Justices were especially sensitive to

accountability such as those practiced in the past by *Transparency* and *Congreso Visible* on Congress members and policy makers.

Regarding the procedures and goals of the NGO coalition, it is important to stress that *Elección Visible* clearly expressed the fact that judicial independence and qualifications should be the two guiding criteria for the Constitutional Court nominations. Nonetheless, the NGOs never explicitly clarified what they understood by judicial independence and qualifications. Nevertheless, in the inner deliberations of *Elección Visible* judicial independence was defined from an institutional point of view, as an attribute of Courts that decide cases without any coercion or undue influence by other branches of the State. These deliberations, however, never surfaced and the definition both of judicial independence and qualification remained unclear for the NGOs. Finally, as a way of fostering neutrality and dispelling any doubts about them being an interest group, the NGO coalition decided not to invite any law schools. It was believed throughout the design of the coalition that law schools and Deans had vested interests in some particular nomination outcomes.

### *The nominating Courts*

Qualifications and judicial independence constitute highly subjective criteria that each Administrative and Supreme Court Justice interprets according to personal criteria. From all the interviews it is possible to infer that every justice has her own opinion about what a qualified and independent Justice is supposed to be. Although both judicial independence and qualifications are considered by the Justices as highly important criteria, they seem to approach them as normative benchmarks that cannot be made operative during the nominations.

A transparent disclosure of the Courts' nomination criteria might show that candidates' politics and "loyalty" -- towards the nominator-- are relevant benchmarks that steered the Justices' decision to support candidates to the Constitutional Court. Unlike qualifications and judicial independence, politics and loyalty seem to be less subjective and dependable on each Justice's proclivities. Paradoxically, the only *institutional* criteria that I was able to perceive from all of the Justices' interviews were concealed by the Courts. At the Administrative Court, the traditional political criterion of *conservative/liberal* affiliation of a candidate looms large as the decisive institutional benchmark for nominations. At the Supreme Court, loyalty towards the nominator is the institutional criterion that steers nominations of candidates to the Constitutional Court. Party affiliation and loyalty are, thus, the political criteria that steer the nominations at the Administrative Court and Constitutional Court, respectively. Both criteria are not --unlike judicial independence or qualifications-- dependant on the individual considerations of each justice; they are, on the contrary, institutional benchmarks present at those Courts that Justices follow closely when they nominate a candidate.

*The results of the transparency observation carried out by the NGOs coalition*

The institutional and political nomination criteria remained hidden even after the transparency observation. Courts were extremely zealous with keeping these criteria "hidden", and preferred instead a confrontation with the observers than a costly disclosure of these compromising criteria, which could amount to a considerable damage to the Courts' standing as non-political judicial institutions. The collapse of the "formalist" model of a Justice adjudicating based only on unquestionable objective criteria would, eventually, be too costly for Courts. Revealing, thus, the "hidden" or "sunken" criteria to the NGOs was far more damaging than initiating a confrontation with the observers. This

confrontation was carried out by the Courts adducing that NGOs suspicions about the Justices' impartiality and autonomy threatened judicial independence.

Although an analysis of the nomination procedures and outcomes clearly shows that these "hidden" criteria were relevant in the Courts' decisions, NGOs refrained from putting Courts in evidence by disclosing the way the nominations were "really" decided. The reasons for this decision may be found in two possible hypotheses: whether (1) the NGO coalition role as neutral observer excluded any judgmental activity about the nominations' outcomes, or (2) the political costs of revealing these "hidden" nomination criteria were too high for NGOs. Thus, it could be argued that the NGOs bent down over the heavy burden of legal formalism when they refrained from exposing that politics, institutional loyalty, ideology and personal relations are still highly relevant criteria in the Court's nomination. NGOs wanted Justices to make the "hidden" nomination criteria transparent; however, when they refused to do so, NGOs had only one option left: lifting the formalist veil themselves by exposing the underpinnings of the nomination process at the Courts. However, they remained silent. Consequently, after the transparency observation was concluded there is no greater knowledge about how nominations to the Constitutional Court are made at the Administrative and Supreme Court. Ultimately, the NGOs transparency observation of the nominations done by the Courts was precluded by the latter claims based on judicial independence. It is to be expected that future accountability and transparency observation of nominations at the Courts would produce the same disappointing outcomes.

### *What lies ahead?*

One possible explanation of the reason a balance between accountability and judicial independence is still so alien to the nomination of Colombia's Constitutional Court may

reside in the way the nomination system was construed in the Constitution. As Garoupa and Ginsburg reveal in their article, many contemporary legal systems have reformed their higher courts' nomination and appointment system in order to strike a better balance between accountability and judicial independence through the creation of judicial councils. Countries like Israel, France, Italy, the Netherlands, United Kingdom, and some States of the United States, have reformed their nomination systems in order to create judicial councils with the power to nominate and/or appoint higher Courts' Justices. Although judicial councils have come under criticism –and have also found many advocates-- in those jurisdictions and are highly dependent on the particular political climate of those countries, there is consensus about their potential as ideal balancing devices between accountability and independence. According to Garoupa and Ginsburg, "Judicial councils fall somewhere in between the polar extremes of letting judges appoint their own successors and maintaining internal responsibility for judicial discipline, and the alternative of complete political control of appointments, discipline, and promotion. As an intermediate body between politicians and judges, the judicial council provides a potential device to enhance both accountability and independence."<sup>123</sup>

As a concluding remark I would like to suggest that if we want to strike a better balance between judicial independence and accountability in the Constitutional Court's nomination process, legal scholars should open a debate around the creation of a Judicial Council with nomination faculties in Colombia.<sup>124</sup> Instead of insisting on a Constitutional Court's nomination system based on *judicial adjudication*, Colombian legal academia should advocate new institutional arrangements. Among those possible arrangements a judicial

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<sup>123</sup> Garoupa & Ginsburg, *supra*, note 44.

<sup>124</sup> My intuition is that the final appointment by Congress should be left untouched. Therefore, unlike other judicial councils worldwide endowed with appointment faculties, I think that an hypothetical council should go as far as proposing candidates for Congress ultimate appointment.

council where the judicial branch –along members of the other two branches and, eventually, civil society representatives-- could nominate candidates to the Constitutional Court not under the logic of judicial adjudication, but as part of a transparent and accountable deliberation process staged at an *ad-hoc* judicial council, emerges as an interesting option. It is to be expected that civil society groups –such as the NGO coalition *Elección Visible*—might conduct more successful and less confrontational accountability processes on nominations performed by a judicial council. Nonetheless, the details of the composition of the judicial council should be a matter of public deliberation –for instance, whether the judicial branch should have the greatest representation in the Council or not, or whether civil society could have a permanent seat on the council. Finally, comparative analysis and international experiences offer a great array of possibilities and learning experiences on judicial councils. Opening channels of communication with jurisdictions experimenting with judicial councils as a way to balance judicial independence and accountability in their higher Courts' nominations and appointments, is an urgent challenge for future academic work on this area in Colombia.



## BIBLIOGRAPHY

- Ackerman, Bruce. "The Rise of World Constitutionalism." *Virginia Law Review* 83, (1997).
- Azuero, Alejandra. "Redes De Diálogo Judicial Trasnacional: Una Aproximación Empírica Al Caso De La Corte Constitucional." *Revista de Derecho Público-Universidad de Los Andes*, <http://derechopublico.uniandes.edu.co/index.php?numero=22&tipos=Art%EDculos>.
- Bell, John. "Principles and Methods of Judicial Selection in France." *S. Cal. L. Rev.* 61, (1988).
- Brashear, Lydia. "Judicial Independence: Often Cited, Rarely Understood." *J. Contemp. Legal Issues* 15, (2006).
- Caldeira, Gregory. "Commentary of Senate Confirmation of Supreme Court Justices: The Roles of Organized and Unorganized Interests." *Ky. L.J.* 77, (1988-1989).
- . "Neither the Purse nor the Sword: Dynamics of Public Confidence in the Supreme Court." *The American Political Science Review* Author(s): Gregory A. Caldeira 80, no. No. 4 (1986).
- . "Public Opinion and the U.S. Supreme Court: Fdr's Court-Packing Plan " *The American Political Science Review* 81, no. No. 4 (1987).
- Caldeira, Gregory, and James Gibson. "The Etiology of Public Support for the Supreme Court." *American Journal of Political Science* 36, no. No. 3 (1992).
- Caldeira, Gregory, James Gibson, and Vanessa A. Baird. "On the Legitimacy of National High Courts " *The American Political Science Review* 92, no. No. 2 (1998).
- Caldeira, Gregory, James Gibson, and Lester Kenyatta. "Measuring Attitudes toward the United States Supreme Court." *American Journal of Political Science* 47, (2003).
- Caldeira, Gregory, Marie Hojnacki, and John R. Wright. "The Lobbying Activities of Organized Interests in Federal Judicial Nominations " *The Journal of Politics* 62 no. No. 1 (2000).

- Caldeira, Gregory, and Charles E. Smith. "Campaigning for the Supreme Court: The Dynamics of Public Opinion on the Thomas Nomination " *The Journal of Politics* 58, no. No. 3 (1996).
- Caldeira, Gregory, and John Wright. "Lobbying for Justice: Organized Interests Supreme Court Nominations, and United States Senate " *American Journal of Political Science* 42, no. No. 2 (1998).
- Canache, Damaris, and Michael E. Allison. "Perceptions of Political Corruption in Latin American Democracies " *Latin American Politics and Society* 47, no. No. 3 (Autumn) (2005): 91-111.
- Cappelletti, Mauro. ""Who Watches the Watchmen? A Comparative Study on Judicial Responsibility." In *Judicial Independence: The Contemporary Debate*, edited by Simon Shetreet and Jules Deschenes, 550-89. Dordrecht Martinus Nijhoff Publishers, 1985.
- Carothers, Thomas. "The Rule of Law Revival." *Foreign Affairs* 77, no. March-April (1998): 95-106.
- Cepeda, Manuel J. "The Colombian Constitutional Court " *Wash. U. Global Stud. L. Rev.* 3, (2004).
- Clark, David S. "The Selection and Accountability of Judges in West Germany " *S. Cal. L. Rev.* 61, (1988).
- Constitutionmaking.org. "Judicial Independence " [http://www.constitutionmaking.org/files/judicial\\_independence.pdf](http://www.constitutionmaking.org/files/judicial_independence.pdf).
- Coronell, Daniel. "La Terna Del Dr. Salsa " [http://semana.com/wf\\_InfoArticulo.aspx?IdArt=105373](http://semana.com/wf_InfoArticulo.aspx?IdArt=105373).
- Courtis, Christian. "Judicial Enforcement of Social Rights: Perspectives from Latin America." In *Courts and Social Transformation in New Democracies*, edited by Roberto Gargarella, Pilar Domingo and Theunis Roux: Ashgate, 2006.
- Couso, Javier A. "The Changing Role of Law and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity." In *Courts and Social Transformation in New Democracies*, edited by Roberto Gargarella, Pilar Domingo and Theunis Roux: Ashgate, 2006.

- Dodson, Michael, and Donald Jackson. "Horizontal Accountability in Transitional Democracies: The Human Rights Ombudsman in El Salvador and Guatemala " *Latin American Politics and Society* 46, no. No. 4 (Winter 2004) (2004): 1-27.
- Dugard, Jackie, and Theunis Roux. "The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor: 1995-2004." In *Courts and Social Transformation in New Democracies*, edited by Roberto Gargarella, Pilar Domingo and Theunis Roux: Ashgate, 2006.
- Epstein, Lee, Jack Knight, and Andrew Martin. "The Norm of Prior Judicial Experience and Its Consequences for Career Diveristy in the U.S. Supreme Court." *Cal. L. Rev.* 91, (2003).
- Epstein, Lee, Jack Knight, and Olga Shvetsova. "Comparing Judicial Selection Systems " *Wm. & Mary Bill Rts. J.* 10, no. 1 (2002 ).
- . "Selecting Selections Systems." In *Judicial Independence at the Crossroads - an Interdisciplinary Approach*, edited by Stephen B. Burbank and Barry Friedman. Thousand Oaks: Sage Publications, 2002.
- Ferejohn, John A., and Larry D. Kramer. "Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint." *N.Y.U. L. Rev.* 77, (2002).
- Friedman, Lawrence. "Judging the Judges: Some Remarks on the Way Judges Think and the Way Judges Act." In *Norms and the Law*, edited by John N. Drobak: Cambridge University Press, 2006.
- García, Mauricio. "Law as Hope: Constitutions, Courts, and Social Change in Latin America." *Fla. J. Int'l L.* 16, no. 133 (2004).
- Gargarella, Roberto. "Theories of Democracy, the Judiciary and Social Rights." In *Courts and Social Transformation in New Democracies*, edited by Roberto Gargarella, Pilar Domingo and Theunis Roux: Ashgate, 2006.
- Garoupa, Nuno, and Tom Ginsburg. "The Comparative Law and Economics of Judicial Councils " *Illinois Law and Economics Research Papers Series* (2008).
- Geertz, Clifford. "Thick Description: Toward an Interpretive Theory of Culture." In *The Interpretation of Cultures: Selected Essays*, 3-30. New York: Basic Books 1973.

- Ginsburg, Tom. *Judicial Review in New Democracies* Cambridge Cambridge University Press 2003.
- Glendon, Mary A. "The Sources of Law in a Changing Legal Order " *Creighton L.Rev.* 17, (1984).
- Golub, Stephen. "Beyond Rule of Law Orthodoxy-the Legal Empowerment Alternative " In *Rule of Law Series: Carnegie Papers*, 2003.
- Grey, David L. "Interviewing at the Court." *The Public Opinion Quarterly* 31, no. 2 (Summer, 1967): 285-89
- Hammergreen, Lynn. *The Politics of Justice and Justice Reform in Latin America: The Peruvian Case in Comparative Perspective*. Boulder: Westview Press, 1998.
- Hirschl, Ran. "The Political Origins of Political Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions." *Law & Soc. Inquiry* 25, (2000).
- . *Towards Juristocracy - the Origins and Consequences of the New Constitutionalism* Harvard University Press 2004.
- Hunt, William, Wilder Crane, and John Wahlke. "Interviewing Political Elites in Cross-Cultural Comparative Research " *The American Journal of Sociology* 70, no. 1 (Jul., 1964): 59-68.
- Jackson, Jean E. "Rights to Indigenous Culture in Colombia." In *The Practice of Human Rights* edited by Mark Goodale and Sally Engle Merry: Cambridge University Press, 2007.
- Klug, Heinz. *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*: Cambridge University Press, 2000.
- Kornhauser, Lewis A. "Is Judicial Independence a Useful Concept." In *Judicial Independence at the Crossroads-an Interdisciplinary Approach*, edited by Stephen B. Burbank and Barry Friedman: Sage Publications, 2002.
- Lasser, Mitchel de S.-O.-l'E. *Judicial Deliberations : A Comparative Analysis of Transparency and Legitimacy* Oxford University Press, 2004.
- Lasser, Mitchel de S.-O.-l'E. "The European Pasteurization of French Law " *Cornell L. Rev.* 90, (2005).
- Legrand, Pierre. "European Systems Are Not Converging." *Int'l Comp. L. Q.* 45, (1996).

- Linz, Juan, and Alfred Stepan. "Toward Consolidated Democracies." *Journal of Democracy* 1, no. 1 (January) (1996).
- Macaulay, Stewart, Lawrence M. Friedman, and Elizabeth Mertz. "The Impact of Law on Society." In *Law in Action -- a Socio-Legal Reader*, edited by Stewart Macaulay, Lawrence M. Friedman and Elizabeth Mertz. New York: Foundation Press, 2007.
- Mainwaring, Scott, O'Donnell, and Valenzuela, eds. *Issues in Democratic Consolidation: The New South American Democracies in Comparative Perspective*: University of Notre Dame Press, 1992.
- Mainwaring, Scott, and Scully, eds. *Building Democratic Institutions: Party Systems in Latin America*: Stanford University Press, 1995.
- Malleson, Kate, and Peter H. Russell, eds. *Appointing Judges in an Age of Judicial Power -Critical Perspectives from around the World*. Toronto: University of Toronto Press, 2006.
- Marshall, Catherine. "Elites, Bureaucrats, Ostriches, and Pussycats: Managing Research in Policy Settings Source." *Anthropology & Education Quarterly* 15, no. 3 (Autumn, 1984): 235-51
- McNollgast. "Conditions for Judicial Independence." *J. Contemp. Legal Issues* 15, (2006).
- Méndez, O'Donnell, and Pinheiro, eds. *The (Un) Rule of Law and the Underprivileged in Latin America*: University of Notre Dame Press, 1999.
- Merryman, John H. *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*: Stanford University Press, 2007.
- . "Legal Education There and Here " *Stan. L. Rev.* 27, (1975).
- Merryman, John Henry, and Rogelio Pérez-Perdomo. *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* 3rd ed: Stanford University Press 2007.
- Meyers, Theodore M. Becker Peter R., and "Empathy and Bravado: Interviewing Reluctant Bureaucrats " *The Public Opinion Quarterly* 38, (Winter, 1974-1975): 605-13.
- Montesquieu, Charles de Secondat, baron de. *Spirit of the Law, Book 11, Chapter 6*: F.B. Rothman 1991.

- Musheno, Michae C. *Deployed : How Reservists Bear the Burden of Iraq*. Ann Arbor University of Michigan Press, 2008.
- O'Donnell, Guillermo. "Further Thoughts on Horizontal Accountability." In *Workshop on "Political Institutions, Accountability, and Democratic Governance in Latin America*. Kellogg Institute, University of Notre Dame: University of Notre Dame, 2000.
- . "Horizontal Accountability in New Democracies." In *The Self- Restraining State: Power and Accountability in New Democracies*, edited by Andreas Schedler, Larry Diamond and Marc F. Plattner . Boulder: Lynne Rienner., 1999.
- . "Illusions About Consolidation." In *Consolidating the Third-Wave Democracies: Themes and Perspectives*, edited by Larry Diamond, Marc. F. Plattner, Yun-Han Chu and Hung-Mao Tien: Johns Hopkins University Press, 1997.
- Palacios, Marco. *Between Legitimacy and Violence : A History of Colombia, 1875-2002* Durham Duke University Press, 2006, 2006.
- Peabody, Robert, Susan Webb, Jean Torcom, Lynne P. Brown, Carolyn Thompson, and Robin Kolodny. "Interviewing Political Elites " *Political Science and Politics* 23, no. 3 (Sep., 1990): 451-55.
- Przerworsky, Adam, Susan Stokes, and Bernard Manin, eds. *Democracy, Accountability, and Representation*: Cambridge University Press, 1999.
- Rivera, Sharon Werning, Polina M. Kozyreva, and Eduard G. Sarovskii. "Interviewing Political Elites: Lessons from Russia " *Political Science and Politics* 35, no. 4 (Dec., 2002): 683-88
- Sajó, András. "Social Rights and Middle-Class Entitlements in Hungary: The Role of the Constitutional Court." In *Courts and Social Transformation in New Democracies*, edited by Roberto Gargarella, Pilar Domingo and Theunis Roux: Ashgate, 2006.
- Schedler, Andreas, Larry Diamond, and Marc Plattner, eds. *The Self-Restraining State: Power and Accountability in New Democracies*. Boulder: Lynne Rienner, 1999.
- Shapiro, Martin. *Courts, a Comparative and Political Analysis*: University of Chicago Press, 1981.
- . "Interest Groups and Supreme Court Appointments " *Nw. U. L. Rev.* 84, (1989-1990).

- . "Judicial Review in Developed Democracies." In *Democratization and the Judiciary*, edited by Siri Gloppen, Roberto Gargarella and Elin Skaar. London: Frank Cass, 2004.
- Smigel, Erwin O. "Interviewing a Legal Elite: The Wall Street Lawyer " *The American Journal of Sociology* 64, no. 2 (Sep., 1958): 159-64
- Spiller, Pablo. "Where Is the Sin Sincere? Sophisticated Manipulation of Sincere Judicial Voters (with Application to Other Voting Environments) " *Harv. J. on Legis.* 39, (2002).
- Spiller, Pablo, Matías Laryczower, and Mariano Tommasi. "Judicial Independence in Unstable Environments, Argentina, 1935-1998." *American Journal of Political Science* 46, no. 4 (October 2002): 699-716.
- Stacy, Helen M. *Human Rights for the 21st Century--Sovereignty, Civil Society, Culture*, Stanford Studies in Human Rights Stanford University Press, 2009.
- Stone-Sweet, Alec. "Why Europe Rejected American Judicial Review- and Why It May Not Matter." *Mich. L. Rev.* 101, (2003).
- Sudarshan, R. "Courts and Social Transformation in India." In *Courts and Social Transformation in New Democracies*, edited by Roberto Gargarella, Pilar Domingo and Theunis Roux: Ashgate, 2006.
- Sunstein, Cass. *Designing Democracies: What Constitutions Do*. New York: Oxford University Press, 2001.
- Teitel, Ruti. "The Role of Law in Political Transformation." *Yale L.J.* 106, (1997).
- Thushnet, Mark. *Weak Courts, Strong Rights*: Princeton University Press, 2008.
- Uprimny, Rodrigo. "The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates " In *Courts and Social Transformation in New Democracies*, edited by Roberto Gargarella, Pilar Domingo and Theunis Roux: Ashgate, 2006.
- Whittington, Keith E. *Political Foundations of Judicial Supremacy*. Princeton Princeton University Press, 2007.
- Zuckerman, Harriet. "Interviewing an Ultra-Elite " *The Public Opinion Quarterly* 36, no. 2 (Summer, 1972): 159-75.