

Specialized Constitutional Review in Latin America: Choosing Between a Constitutional Chamber and a Constitutional Court

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I. Faith in a Specialized Institution for Constitutional Review

The Panamanian people face a predicament. They have to choose sensibly between a Constitutional Chamber within the Supreme Court and a Constitutional Court,¹ if a specialized institution substitutes the Supreme Court of Justice in exercising constitutional review. This study aims to identify policy issues for deciding between these alternatives drawing on comparable experiences with specialized constitutional review from Costa Rica and Colombia.² Several factors played a role in arranging a specialized institution for constitutional review in these countries: a wish for protecting fundamental rights, a need for promoting active constitutional decision-making, and a longing for modernizing the legal order. Yet, those factors were not decisive, but rather the trust or mistrust in the Judiciary. Also, for the Panamanian predicament, these experiences caution that it is essential to balance the specialized institution for constitutional review with the democratic participation in shaping the Constitution.

The second part of this study tells on the Panamanian constitutional debate about specialized constitutional review. After describing the basics of the Panamanian constitutional review, it presents the state of the debate, justifies the use of Costa Rica and Colombia as relevant comparable models, and suggests questions to guide the analysis. The third and

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¹ Hereinafter Const. Cham. and Const. Ct. respectively.

² This study only analyzes the alternative between a Const. Cham. and a Const. Ct. It does not address other choices, for instance, the possibilities of defending the current judicial review by the Supreme Court or of transforming the Supreme Court itself into a Const. Ct. by transferring its role as a revision court to other tribunal. The already lessened trust in the Panamanian Supreme Court has foreclosed these possibilities.

fourth part focus on Costa Rica and Colombian constitutional review models respectively. These parts show that in choosing a Const. Cham. in Costa Rica, the prestige of its Supreme Court was paramount, while in choosing a Const. Ct. in Colombia the mistrust in its Supreme Court just as paramount was. Each part comprises five sections: a basic report of their respective Constitution and their Supreme Court of Justice before creating the Const. Cham. or the Const. Ct. correspondingly; an account of establishing their institutions for specialized constitutional review, describing also their respective composition and powers; an analysis of the impact of their creation; a summary of the main criticism against the Const. Cham. and the Const. Ct. respectively; and a partial conclusion in each chapter.

The study shows that in both countries a shift in understanding the Constitution took place. This shift signaled a change in the notion of constitutional interpretation bringing more activism to constitutional decision-making. In both countries have been attempts to justify specialized constitutional review by downplaying the classically denominated counter-majoritarian difficulty of judicial review.³ Both legal communities display a faith in specialized constitutional review as a way to strengthen constitutional government. In this faith lay all together their impetus for constitutional reform in the name of democracy and their skepticism of the government by the people.

To choose a constitutional review method involves a decision about the democracy the people deserve. Although the idea of a concentrated Const. Ct. is alluring to assure fundamental democratic values, it still shows some skepticism to the people. A genuine government by the Panamanian people will arrive only conceiving a Const. Ct. as another member in a pluralistic society, where several institutions and individuals shape the Constitution.

II. The Predicament: Constitutional Chamber or Constitutional Court?

The constitutional review exercised jointly by the members of the Supreme Court of Justice began to fall into distrust.⁴ The Supreme Court's powers incremented with the military

³ See *Alexander M. Bickel*, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, New Haven & London, 1986 (1st. ed. 1962).

⁴ All nine members of the Supreme Court of Justice decide constitutional cases jointly by a majority vote. The Cabinet Council, an executive body comprised of the President of the Republic and his or her Secretaries, appoints the members of the Supreme Court for ten years. The National Assembly, which is the elected representative national legislature, must confirm these appointments. See arts. 200 and 194 of the Panamanian Constitution [hereinafter Pan. Const.]. Currently, there are nine justices in the Supreme Court organized into four Chambers with the following jurisdictions: Civil, Criminal, Administrative and Labor, and General Subject Matter. See arts. 71, 73, and 75 of the Judicial Code of the Republic of Panama. For a description of the constitutional jurisdiction in Panama see generally *Salvador Sánchez González*, *Justicia Constitucional en Iberoamérica, Panamá*, <http://www.uc3m.es/ucrm/inst/MGP/JCI/02-panama.htm> (last modified

regime that began with a coup d'état in 1968 and in the following years under a dictatorship, the military exercised an influence on the members of the Court. With the beginning of the new democratic government in 1990, the excessive preeminence of the Supreme Court remained unchanged. The distrust in the excessive power of the Supreme Court inspired proposals to specialize constitutional review. In 1994, two drafts of a new Constitution for Panama proposed more specialization of the constitutional review.⁵ Since then, the debate about the appropriateness of one proposal or the other has been a cardinal topic in the Panamanian legal and political community.

In 1999, this debate took a twist. In the last year of his period, the former President of the Republic of Panama proposed to create a Chamber made up of three members within the Supreme Court. This Chamber would be responsible for deciding actions for habeas corpus and for deprivation or abridgment of fundamental rights against authorities with national jurisdiction.⁶ The proposal met a fierce opposition including a justice of the Supreme Court calling the proposal an “aberration.”⁷ The main objection against the new Chamber was that it could not bring any specialization because constitutional jurisdiction remains with the members of the Supreme Court of Justice jointly. Therefore, former justices and lawyers denounced what they felt as politically disguised motives behind the proposal.⁸ Despite all

Oct. 7, 2002) (providing basic information about the constitutional jurisdiction of Panama); *Allan Randolph Brewer-Carías*, *Judicial Review in Comparative Law*, Cambridge & New York, 1989, p. 243; *Edgardo Molino Mola*, *La Jurisdicción Constitucional en Panamá*, Medellín, 1998; *Cesar Quintero*, *Derecho Constitucional*, San José, 1967; *Carlos Bolívar Pedreschi*, *El Control de la Constitucionalidad en Panamá*, Panama, 1965, pp. 153-155.

⁵ One proposed establishing an independent Const. Ct.; the other proposed establishing a specialized Const. Cham. within the Supreme Court of Justice. See generally *Instituto de Estudios Nacionales, Universidad de Panamá*, Anteproyecto de Constitución de la República de Panamá, Panama, 1994 (2nd ed. IDEN & Portobelo eds. 1997); *Instituto Latinoamericano de Estudios Avanzados*, Anteproyecto de Constitución, Panama, 1994.

⁶ See *José Otero*, Proponen Crear Quinta Sala en la Corte Suprema, *La Prensa*, Mar. 18, 1999, <http://www.sinfo.net/prensa/jueves/portada.htm> (last visited Mar. 18, 1999).

⁷ See *Gionela Jordán V. & José Otero*, La Creación de Nueva Sala en la Corte es una ‘Aberración’, *La Prensa*, Mar. 19, 1999, <http://www.sinfo.net/prensa/viernes/portada.htm> (last visited Mar. 19, 1999).

⁸ They felt that the former President of the Republic wanted to appoint three new justices with ideological or political affinities. See *José Quintero De León*, PRD Busca Aumentar Número de Magistrados en su Beneficio, *La Prensa*, Mar. 28, 1999, <http://www.sinfo.net/prensa/domingo/portada.htm> (last visited Mar. 28, 1999). Also, it was the belief that the then Chief Justice tried to water-down the movement for creating an independent Const. Ct. See *César Quintero*, La Propuesta Sala Quinta, *La Prensa*, Apr. 5, 1999, <http://www.sinfo.net/prensa/lunes/portada.htm> (last visited Apr. 5, 1999). See also *Wilfredo Jordán Serrano*, Samuel Lewis Dice que no le Afectan las Críticas de Pérez Balladares, *La Prensa*, Nov. 15, 1999, <http://www.sinfo.net/prensa/lunes/portada.htm> (last visited Nov. 15, 1999) (referring that the former President Perez Balladares published a newspaper article stating that the creation of the Fifth Chamber was

the opposition, Law 32 of July 23 of 1999 established the new Fifth Chamber, denominated the *Sala Quinta de Instituciones de Garantías*.⁹ Neither the intellectuals nor the Panamanian citizens received the Fifth Chamber well.¹⁰ On September 1999, a new President took office. Complying with an electoral promise, she proposed to the National Assembly to derogate the law that created the Fifth Chamber. In a debate clouded with constitutional concerns, the Law 49 of October 24 of 1999 eliminated the new Fifth Chamber.¹¹ Thus, the constitutional review jurisdiction remains as before. Yet, viewing the confrontation between the Executive, Legislative, and the Supreme Court of Justice, more citizens believe that Panama needs a new Constitution,¹² and perhaps a more specialized constitutional review.

To search for those constitutional policy arguments that would help to solve the predicament of choosing between a Const. Cham. and a Const. Ct., it is necessary to pinpoint the problem formulating the implicit topics in the Panamanian debate. The proposals for change express a view that constitutional review is political and therefore a specialized entity should exercise it. The central dispute is whether specialization should occur within the Court or with an independent Const. Ct. Further, there is the belief that specializing constitutional review further is modernization. If other countries have reached a praiseworthy constitutional development after a specialized constitutional review, then Panama also should take the path to constitutional modernization.¹³ Besides, the debate also hints at

created due to a initiative of Arturo Hoyos, Chief Justice of the Supreme Court Arturo Hoyos at that time).

⁹ See generally Law 32 of July 23 of 1999, published in *Gaceta Oficial*, No. 23,848, Año XCV (July 26, 1999).

¹⁰ See *José Quintero De León*, *Marcha Contra la Sala Quinta Será el Jueves*, *La Prensa*, July 27, 1999, <http://www.sinfo.net/prensa/martes/index.htm> (last visited July 27, 1999) (reporting that the denominated Civic Forum organized a demonstration against creating the Fifth Chamber).

¹¹ See Law 49 of Oct. 24 of 1999, published in *Gaceta Oficial*, No. 23,914, Año XCV (Oct. 24 of 1999). See generally *Manuel Domínguez*, *La Asamblea Hizo Justicia: Moscoso*, *La Prensa*, Oct. 25, 1999, <http://www.sinfo.net/prensa/lunes/portada.htm> (last visited Oct. 25, 1999).

¹² See, e.g., *Alvaro Cabal*, *Ruta Crítica*, *La Prensa*, Jan. 21, 2003, <http://ediciones.prensa.com> (last visited Jan. 23, 2003) (urging for convening a Constitutional Convention in 2003 to adopt a new Constitution); *Asamblea Legislativa*, *Proyecto de Acto Legislativo Que reforma íntegramente la Constitución Política de la República de Panamá (2002)* (taking notice in the findings that in Panama there is a generalized claim for a new Constitution); *Wilfredo Jordán Serrano*, *Recomienda el V Congreso de Abogados: La Constituyente es Impostergable*, *La Prensa*, Feb. 20, 2000, <http://www.sinfo.net/prensa/domingo/portada.htm> (last visited Feb. 25, 1999) (commenting that the V Congress of the Bar Association recommended the election of a Constitutional Convention for the draft of a new Constitution).

¹³ There is trend in Latin America for attributing the power of constitutional adjudication to a specialized institution. See *Allan R. Brewer-Carías*, *El Control Concentrado de la Constitucionalidad de las Leyes. Estudio de Derecho Comparado*, in: *II Simposio Internacional sobre Derecho del Estado. Homenaje a Carlos Restrepo Piedrahita*, Bogotá, 1993, pp. 717-18. See also *Héctor*

assumptions about the principle of the separation of powers and the relation between the judges and legislators.¹⁴ Yet, these assumptions are neither explained nor contested. In addition, the debate brings arguments from foreign experiences of constitutional review to support one solution or another randomly. In sum, the tacit traits of the Panamanian constitutional debate beg the following questions a matter of constitutional policy. (a) What are the controlling questions that should be considered for deciding which the best specialized constitutional review for the Panamanian Legal order is? (b) What will the impact of creating a specialized Const. Cham. or a Const. Ct. on the current Legal order be? An analysis of comparable constitutional experiences may help answer these questions.

The study of relevant comparable constitutional experiences with the two debated proposals of modification, that is a specialized Chamber within the Supreme Court of Justice or a Const. Ct., would be helpful.¹⁵ Two foreign experiences seem fruitful. A Chamber within the Supreme Court has been exercising constitutional review in Costa Rica since 1989,¹⁶ and a Const. Ct. has been exercising constitutional review in Colombia since 1991.¹⁷ In addition, Costa Rica and Colombia are countries with plenty cultural, historical and legal likenesses to Panama to make a convincing comparison. Many questions come to mind to guide the analysis. How is the current constitutional review organized in Costa Rica and Colombia? What were the conditions and reasons of their creation? What has been the

Fix-Zamudio, Jurisdicción Constitucional y Protección de los Derechos Fundamentales en América Latina, in: *Eduardo Quinceno Alvarez* (ed.), Anuario de Derecho Constitucional Latinoamericano, Medellín, 1995, p. 73 (perceiving a trend in Latin America toward adopting the Austrian model of constitutional review). See generally *Arne Mavčič*, The Constitutional Review, The Netherlands, 2001 (giving a panoramic view of the constitutional review systems of the world); *Arne Mavčič*, The Const. Ct. of the Republic of Slovenia, Comparisons, A Tabular Presentation of Constitutional/Judicial Review Around the World, at <http://www.us-rs.com/en/index.html> (last visited Jan. 3, 2003) (same).

¹⁴ See generally *Charles Gardner Geyh*, Courts, Congress, and the Constitutional Politics of Interbranch Restraint. Courts and Congress by Robert A. Katzmann 87 Geo. L.J. 243 (1998) (addressing the relationship between Congress and Courts).

¹⁵ See *Mauro Cappelletti*, Proceso, Ideologías, Sociedad, Buenos Aires, 1974, pp. 301, 303 (considering that the comparative method is particularly fertile in constitutional law). See generally *Ralf Rogowski and Thomas Gawron* (eds.), Constitutional Courts in Comparison: The U.S. Supreme Court and the German Federal Constitutional Court, New York, 2002 (analyzing some aspects of the American and German constitutional review systems); *François Luchaire*, Le Juge Constitutionnel en France et Aux États-Unis, Étude Comparée, Paris, 2002 (analyzing the French and the American constitutional review systems); *Juan José González Rivas*, La Justicia Constitucional: Derecho Comparado y Español, Madrid, 1985 (analyzing the Spanish constitutional review system comparatively).

¹⁶ See Art. 10 of the Constitution of Costa Rica (Constitutional Reform 7128 of Aug. 18, 1989) [hereinafter Costa Rica Const.].

¹⁷ See Arts. 239, 241 of the Constitution of Colombia [hereinafter Colom. Const.]. See generally *Luz Estella Nagle*, Evolution of the Colombian Judiciary and the Constitutional Court, 6 Ind. Int'l & Comp. L. Rev. 59 (1995).

impact of creating these institutions respectively? Has the different composition of the organ deciding the constitutional issues influence on the outcome of the cases? Is there more policy making in the decisions of the Const. Ct.? Is this judicial activism foreseeable with the existence of a Const. Ct.? Does a specialized Const. Cham. within the Supreme Court help keeping the constitutional decisions within the country's legal tradition?¹⁸ What are the criticisms that these constitutional review models warranted? Have they undergone any modification since their start? Are there current discussions about eventual changes? In either case, as constitutional policy, which alternative is more desirable for Panama?

III. The Costa Rican Model: A Constitutional Chamber

No compelling technical reasons justify the Costa Rican Model. The peculiarity of creating a Const. Cham. within the Supreme Court obeyed to the traditional trust in the Judiciary. Constitutional scholars and members of the Legislative Assembly agreed that a separate Const. Ct. would have been the best organization for a specialized constitutional review. Still, they also recognized the advantage of having a Const. Cham. sharing the traditional legitimacy and prestige of the Costa Rican Judiciary and, at the same time, preserving and strengthening the trust in the Supreme Court. Further, it was then a question of political feasibility because prevail the view that neither the justices of the Supreme Court nor the public opinion would have accepted a Const. Ct. separated from the Judiciary. In fact, the Costa Rican model's deviation from an independent Const. Ct. is only institutional. Considering the powers of the Const. Cham., it is a Const. Ct.

The trust in the Judiciary does not seem present in Panama. Thus, it is difficult to justify the model of a Const. Cham. for the Panamanian legal order. Nevertheless, hoping to bring back the trust in the Judiciary, creating a Const. Cham. within the Supreme Court of Justice is conceivable. Yet, the historical experience of Costa Rica does not warrant this choice. Despite recent democratic Panamanian developments showing similarities with Costa Rica, such as abolishing the army and holding regular elections, the Supreme Court in Panama does not enjoy the trust that its Costa Rican equivalent does. The failure of creating a Fifth Chamber in the Panamanian Supreme Court could be a sign of this basic mistrust.

¹⁸ See, e.g., Nagle, *supra* note 17, at 59, 80 (mentioning that the Const. Ct. in Colombia displays a judicial activism foreign to the legal tradition in Colombia). Similar activism occurred in Germany. See, e.g., *Erhard Denninger*, *Judicial Review Revisited: The German Experience*, 59 Tul. L. Rev. 1031 (1985) ("The court's present function with respect to judicial review is positive. Nevertheless, some risks remain. The most serious of these is that an autocratic administration of justice might dangerously narrow the concept of pluralism to a monistic view of civic values." *Id.*).

1. *A Noble Democracy and a Virtuous Supreme Court of Justice*

As an aftermath of the last Costa Rican civil war,¹⁹ the Constitution of 1949 laid the foundation for a stable democracy in Costa Rica.²⁰ In the election of 1948, two candidates ran for the Presidency of the Republic: Rafael Calderón Guardia and Otilio Ulate Blanco. Ulate Blanco won the Presidency by a narrow margin, and the group of the other candidate, Calderón, gained the majority in congress. Next, the electoral council suspended the counts of the votes, declaring Ulate's victory provisionally. Later, on February 10, a fire destroyed ninety percent of the electoral documentation. On February 28, alleging fraud, Calderón Guardia asked the Congress to annul the election. The Congress annulled the elections for president, but not the elections for members of the Congress. Then, on March 8, José Figueres, a ranch-owner and a member of the opposition supporting the candidate Ulate, organized an armed rebellion against the government of Teodoro Picado, the president in office. On April 12, 1948, the movement nearly blocked the capital. On April 19, the termed 'Pact of the Mexican Embassy' was signed, ending the civil war. Following an agreement between Otilio Ulate Blanco and José Figueres, a *Junta de Gobierno* under the head of Figueres ruled the country for eighteen months. At the end of that year, the *Junta de Gobierno* organized elections to a constitutional convention.²¹ On November 7, 1949, the constitutional convention adopted the Constitution beginning a new democratic era.

¹⁹ For an account of the 1948 revolution see generally *John Patrick Bell*, *Crisis in Costa Rica. The 1948 Revolution*, Austin & London, 1971. Cf. also *Felipe Fernández Rivera*, *Presidentes de Congresos, Asambleas y Convenciones Constituyentes de Costa Rica desde 1824 a 1949*, San Jose, 1984, pp. 9, 37 (indicating that the constitutional power in Costa Rica has been convened thirteen times. With the exception of the constitutional convention of 1901, all the others were organized after a political uproar).

²⁰ See *Mario Alberto Jiménez Quesada*, *Desarrollo Constitucional de Costa Rica: Soberanía Externa y Relaciones Entre el Legislativo y el Ejecutivo en Nuestra Evolución Constitucional*, San Jose, 1992 (narrating the history of the Constitution of 1949 and the constitutional history of Costa Rica since its independence in 1821).

²¹ Cf. *Marco Tulio Zeledón*, *Historia Constitucional de Costa Rica en el Bienio 1948-1949*, San Jose, 1950, pp. 20-22 (considering that despite the lack of public liberties and the persecution to some political parties, the constitutional convention of 1949 preserved the main features of the Republic). Cf. also *La Nación* (ed.), *La Historia en Primera Plana, La Nación 1946-1986*, San Jose, 1986, pp. 16, 22 (containing the news at that time); *Oscar Aguilar Bulgarelli*, *La Constitución de 1949. Antecedentes y Proyecciones*, San Jose, 1973, pp. 53-59 (describing the Constitutional Convention); *Rubén Hernández Poveda*, *Desde la Barra. Cómo se Discutió y Emitió la Constitución Política de Costa Rica de 1949*, San Jose, 1991 (compiling newspaper articles published in *La Prensa Libre* informing about the debates in the Constitutional Convention).

In the Latin American context, Costa Rica is unique.²² Socioeconomic similarities with the rest of the Latin American countries have not prevented Costa Rica from having a democratic government. While countries such as Bolivia, Brazil, Nicaragua, and Panama suffered under military regimes in the 70's, Costa Rica enjoyed a fair electoral organization, an effective judiciary, and a Constitution with real normative value.²³ A fortunate combination of political and cultural ingredients enabled developing Costa Rica's stable democracy. Thanks to the elite's internalization of democratic rules since 1949, there is now "a citizenry that strongly supports both democratic norms and its own institutions of government."²⁴ Also, the army's abolition allowed investing funds in education, previously dedicated to defense, resulting in an educated population proud of their culture of peace and

²² See *Gerald E. Fitzgerald*, *The Constitutions of Latin America*, Chicago, 1968, p. 73 (stating that Costa Rica has a well gain reputation for a stable country with a strong democratic tradition). See also *Rubén Hernández Valle & Rafael Villegas Antillón*, *El Constitucionalismo Costarricense en los Últimos Setenta Años*, in: *Instituto de Investigaciones Jurídicas, UNAM* (ed.), 3 *Constitucionalismo, Colaboraciones Extranjeras*, Mexico, 1988, pp. 160, 197-98; *George A Bowdler & Patrick Cotter*, *Voter Participation in Central America, 1954-1981*, Washington, 1982, p. 223 (finding a pattern of freedom in the Costa Rican elections since 1948); *Deborah J. Yashar*, *Demanding Democracy. Reform and Reaction in Costa Rica and Guatemala, 1870 - 1950*, Stanford, 1977, pp. 167, 170-190 (arguing that despite the similar reform movements, Costa Rica, contrary to Guatemala, achieved political democracy). But see *John A. Booth*, *Costa Rica: Quest for Democracy*, Boulder, 1998, p. 150 (suggesting that the democratic culture in Costa Rica may not be an anomaly in Latin America. "Rather, it may mean only that the structural conditions for the development of democratic norms and methods developed first in Costa Rica and are now following elsewhere." Id.).

²³ See *Charles D. Ameringer*, *Democracy in Costa Rica, Politics in Latin America*, New York, 1982, p. 37 ("Unlike the constitutions of many Latin American states, which are merely visionary museum pieces, the Costa Rican Constitution of 1949 is built upon a firm foundation of historical experience and *tico* reality."). See also Booth, *supra* note 22, at 196 (concluding that the seemingly Costa Rican ordinary national-level democracy deserves attention because it became an ordinary democracy in a time, place and cultural milieu that was not ordinary); *Mitchell A. Seligson & Miguel Gomez B.*, *Ordinary Elections in Extraordinary Times: The Political Economy of Voting in Costa Rica*, in: *Elections and Democracy in Central America*, Chapel Hill & London, 1989, pp. 159, 164, 167 (showing that despite the economic crises of the 1980, the democratic culture of Costa Rica supported the political institutions). For the socioeconomic, political, and historical development of Costa Rica see generally *Carolyn Hall*, *Costa Rica. A Geographical Interpretation in Historical Perspective*, Boulder & London, 1985.

²⁴ *Cynthia H. Chalker*, *Elections and Democracy in Costa Rica*, in: *Elections and Democracy in Central America*, Chapel Hill & London, 1995, p. 116. See also *Yashar*, *supra* note 22, at 210-11 (indicating that the unity of elites, institutional organization and ideological cohesion account for the foundation of political democracy in Costa Rica after the civil war of 1948). There is strong evidence suggesting that social and economic conditions are necessary, but not sufficient for a functional democracy. See, e.g., *John A. Peeler*, *Latin American Democracies. Colombia, Costa Rica, Venezuela*, Chapel Hill & London, 1985, pp. 90-93 (analyzing the cases of Colombia, Costa Rica, and Venezuela, the author concludes that for democracy "at least in the culturally hostile environment of Latin America, the key factor is political: the ability of rival elites explicitly to accommodate one another's interests." Id. at 93.).

democracy.²⁵ In addition, the national myths of the homogeneity of the population and of the origin of the Costa Rican democracy from an egalitarian society of small farmers contributed to embrace democratic values.²⁶ Further, the social ways of avoiding conflict and the high tolerance of the population play a positive role in keeping a democratic government.²⁷ Finally, the Judiciary has always enjoyed great respect and trust from the population.²⁸ Briefly, the abolition of the army, the investment in education, the internalization of democratic values, and a respected judiciary have contributed to keeping a stable democratic government in Costa Rica since 1949.²⁹

It is hardly surprising that the constitutional convention strengthened the judicial review power in an already prestigious Judiciary.³⁰ Although the Supreme Court had exercised exclusive judicial review since 1938, its exclusivity was unclear because it had a statutory origin.³¹ The Constitution of 1949 cleared all confusion. Article 10 of the Constitution

25 See *Jorge Mario Salazar Mora*, *Política y Reforma en Costa Rica, 1914 -1958*, San Jose, 1982, pp. 129-164. See also *Charles F. Denton*, *Patterns of Costa Rican Politics*, Boston, 1971, pp. 30-31 (stating “[o]n Dec. 4, 1948, in an unprecedented action in Latin America, Figueres disbanded the military forces of his country.” Id. at 30.); *Seth Rolbein*, *Nobel Costa Rica. A timely Report on our Peaceful Pro-Yankee, Central American Neighbor*, New York, 1989, pp. 3, 86-7 (describing a celebration of the abolition of the army).

26 See generally Booth, *supra* note 22 (describing the national myth that the Costa Rican democracy came from an egalitarian and homogenous society of small farmers).

27 See generally *Mavis Hiltunen Biesanz et al.*, *The Ticos. Culture and Social Change in Costa Rica*, London, 1999.

28 Even the members of the constitutional convention of 1949 that mistrusted the Executive and the Legislative branches had great regard for the Judiciary. For instance, the convention trusted to the Supreme Court to appoint the members of the newly created Supreme Electoral Court to oversee elections, with rank and independence of the other branches of government. See *Aguilar Bulgarelli*, *supra* note 21, at 156-57.

29 Currently, the trust of the Costa Rican people in the institutions seems to be fading. See, e.g., *Rodrigo Madrigal Nieto*, ¡La Desconfianza!, *La Nación*, May 12, 2000 at 15A (commenting that the mistrust in the institutions, which are suspected of corruption, is holding back the country).

30 See *Aguilar Bulgarelli*, *supra* note 21, at 103, 156-57 (stating that the Judicial power was the only one that enjoyed the trust of the constitutional convention); *Ameringer*, *supra* note 23, at 52 (“The members of the Constituent Assembly of 1949, who distrusted the executive and legislative branches, had no misgivings toward the judicial branch.”).

31 Cf. *Jorge Francisco Sáenz Carbonell*, *Orígenes del Control Constitucional en Costa Rica (1812-1937)*, 1 *Revista de Derecho Constitucional* 29-40, 40-64 (1991) (dividing the periods of constitutional review in Costa Rica in a period of review by political organs (1812-1887) and a period of judicial review, but diffuse (1888-1937)). The Constitution of 1871, effective then, was still contemplating a constitutional review by the Legislature. Therefore, there was the issue whether the statutory provisions granting to the Supreme Court judicial review in 1938 were unconstitutional. For example, Alfredo Saborio Montenegro, a justice of the Supreme Court refused to vote in constitutional cases because he considered that articles 962 and 969 of the Code of Civil Process establishing judicial review were unconstitutional. See *id.* at 63.

determined that by a vote of not less than a third of its members acting jointly, the Supreme Court exercises judicial review.³² Briefly, the Constitution of 1949 reaffirmed the exclusive exercise of judicial review by the Supreme Court. In 1989, a constitutional amendment transferred this exclusive judicial review by the members of the Supreme Court acting jointly to a specialized Const. Cham.

2. *Establishing the Fourth Chamber*

In the late 1970's, criticism began against the constitutional review design.³³ The scholar Hernández Valle expressed the following criticisms: (a) The Supreme Court showed a marked conservatism declaring only clear and obvious constitutional infringements; (b) The notion of the presumption of constitutionality of the laws was strong, giving excessive deference to the Legislature; (c) The requirement of a qualified majority of two thirds of the members of the Supreme Court was too strict; (d) The judges exercising constitutional control were not specialists in public law producing poor opinion writing;³⁴ (e) The public entities applying a possible unconstitutional norm could not ask for the Supreme Court intervention (f) The prohibition of presenting a constitutional action against a norm previously declared constitutional by the Court prevented their members from changing their minds or to adapt the law to new circumstances.³⁵ To overcome these deficiencies, Hernández proposed creating a Const. Ct.³⁶ Following his diagnosis, Hernández evaluated

³² According to Article 128 of the Constitution of 1949, the judicial review power included legislative acts as well as executive decrees. Further, the Supreme Court also decided the unconstitutionality of bills passed by the Legislature, at which point the President may veto them based on grounds of unconstitutionality.

³³ Juan Luis Arias, a member of a Special Commission of the Legislative Assembly to study the project to create a Const. Cham., commented that one of the first persons that mentioned the option of a Const. Cham. was Ulises Odio. See Comisiones Especiales, Sesión de trabajo No.1, in 1 Asamblea Legislativa de la República de Costa Rica, Acta No. 21, Ordinaria, Expediente No.10401, at (14) 132 (June 26, 1987) (statements of Arias).

³⁴ See *Rubén Hernández Valle*, *El Control de la Constitucionalidad de las Leyes*, San Jose, 1978, 119-20 (given examples to show the need of having specialists in constitutional law deciding constitutional issues).

³⁵ See *id.* at 110-16.

³⁶ See *id.* at 117-18. Since the Constitution of 1949, the unbalanced distribution of functions among the three traditional powers resulted in an inefficient government. See *Rubén Hernández Valle*, *Democracia y Participación Política*, San Jose, 1991, pp. 97-98. Nevertheless, the National Assembly was reluctant of modernizing the government. Through interpretation, a Const. Ct. could achieve the necessary renewal of the administration of the state, argued Hernández. See *id.* at 102, 103-04 (mentioning an example of the relativization of the principle of separation of powers in taxation. Further, proposing the creation of a Const. Ct., *id.* at 117-37.). See also *Carlos Salazar Leiva*, *Costa Rica: Dialéctica Constitucional y Génesis Doctrinaria*, San Jose, 1985, p. 139 (mentioning similar criticism to the previous constitutional review); *Jaime Murillo Viquez*,

several alternatives for creating a Const. Ct.: (a) A Const. Ct. could be established with the equivalent independence and status of other state powers;³⁷ (b) The Supreme Electoral Court could be transformed into a Const. Ct.³⁸ (c) A Const. Ct. could be created within the Judiciary. He believed that “to the Costa Rican mentality ... that would be the alternative with more chances of success, although it is not the best objectively and technically.”³⁹ Also, it could be an opportunity to modernize the government and the whole Judiciary. He was prophetic. Costa Rica established a Const. Cham.⁴⁰

In the 80’s, the government began to promote a political neoliberal model stressing the protection of fundamental rights.⁴¹ In 1986, the congressional representative Corrales Bolaños presented a project to the Legislative Assembly to creating the Const. Cham.⁴² The participants in discussing the project were aware that ideally a Const. Ct. should be independent of the Judiciary. Congressman Borbón Arias commented: “there are no principle

La Sala Constitucional. Una Revolución Político-Jurídica en Costa Rica, San Jose, 1994, pp. 20-23 (considering that the previous constitutional review was costly and slow and that the majority had practically no access to the constitutional justice); *José Andrés Carrillo Chaves*, *Hacia una nueva Constitución Política de Costa Rica: Análisis y Propuestas*, San Jose, 1995, pp. 204-06 (referring to the problems that the creation of the Const. Cham. aimed to improve).

37 This would assure a functional and activist Const. Ct. See *Hernández Valle*, *El Control de la Constitucionalidad de las Leyes*, *supra* note 34, at 121-23.

38 He pondered that it could be divided into two chambers: one attending only electoral issues, and the other conflicts jurisdiction, *amparo* and judicial vetoes. The constitutional review would be the responsibility of the whole Court. See *id.* at 124-125.

39 See *id.* at 125-126.

40 Around the year 1989, there were allegations of corruption in the judiciary. It is likely that to confront the criticism and an institutional crisis, the judges and legislators accelerated the approval of the creation of the Const. Cham. See *Murillo Víquez*, *supra* note 36, at 38-40. Nonetheless, there is a seeming contradiction. In 1989, the judiciary began to be charged with corruption, but the Supreme Court still enjoyed prestige and acceptance among the population. See *Ameringer*, *supra* note 23, at 53 (“The prestige and respect the Supreme Court of Justice enjoys for its fairness and integrity is not shared by lower courts and in the administration of justice generally.”). See also *Oscar Arias Sánchez*, *Address at the Legislative Assembly (May 10 of 1989)*, in: *Orgulloso de mi Pueblo*, San Jose, 1989, p. 10 (stating that the Const. Cham. was a promise gave to the Judiciary for the betterment of the justice system). See also *Norbert Lösing*, *La Sala Constitucional de Costa Rica: Ejemplo de una Exitosa Jurisdicción Constitucional en Latinoamérica*, in: *Eduardo Quinceno Alvarez* (ed.), *Anuario de Derecho Constitucional Latinoamericano*, Medellín, 1995, p. 217 (mentioning the fear of division in the Judiciary as a reason to maintain the Const. Cham. within the Supreme Court).

41 See *Murillo Víquez*, *supra* note 36, at 34, 38. See also *id.* at 35-36 (mentioning that the constitutional amendment establishing the Const. Cham. was made under the President Oscar Arias, who previously, in 1977, in his capacity as Secretary of Planning, organized a Commission to prepare constitutional reforms to the Constitution of 1949. The idea of creating the Const. Cham. was proposed in that Commission).

42 See 1 Asamblea Legislativa de la República de Costa Rica, *Proyecto de Reforma Constitucional, Exposición de Motivos*, Expediente No.10401, at 1-3 (May 6, 1987).

reasons that justify trusting the constitutional justice to the judicial power, on the contrary, ... nothing assures ... [a] specialization such as the creation of an independent Const. Ct.”⁴³ Also, in a Special Commission organized by the Legislative Assembly to study the project, Zamora wanted “to go back to the impossible dream,”⁴⁴ seizing the opportunity to create an independent Const. Ct.⁴⁵ Yet, Arias said that to take away the constitutional power of the Court would be like cutting off its head.⁴⁶ Although Zamora’s warning that this would be a powerful Chamber,⁴⁷ the members of the Commission ended favoring a Const. Cham.⁴⁸ Later, in June 12, 1989, the Const. Cham., the Fourth Chamber, was approved.⁴⁹ Since then, it exercises constitutional review single-handedly.

Judging from the method of selecting its members and its powers, the Constitution of Costa Rica disguised a Const. Ct. in a Chamber within the Supreme Court. The Const. Cham. comprises seven principal justices and twelve substitutes, elected by a vote of two thirds of

⁴³ 1 Asamblea Legislativa de la República de Costa Rica, Acta No. 20, Ordinaria, Expediente No.10401, at (42-3) 72-3 (June 2, 1987) (statements of Borbón Arias). Further, he warned that creating a Const. Cham. within the Supreme Court would not improve the constitutional jurisdiction because of the already heavy dockets in constitutional cases. See id. at 44.

⁴⁴ See Comisiones Especiales, Sesión de trabajo No. 1, in: 1 Asamblea Legislativa de la República de Costa Rica, Acta No. 21, *supra* note 33, at (1) 119 (statements of Zamora).

⁴⁵ See id.

⁴⁶ See id. at 123. Also, Mora Mora and Hernández insisted that a Const. Cham. would be feasible. See id. at 125. See generally *Néstor Pedro Sagües*, Reflexiones Sobre las Variables de Éxito y de Fracaso de un Tribunal Constitucional, in: Jurisdicción Constitucional de Colombia: La Corte Constitucional 1992-2000: Realidades y Perspectivas, Bogota, 2001, pp. 51-65 (commenting that the constitutional Chamber “is a Latin American invention aiming to make less traumatic for the judicial power the creation of a Constitutional Court.” Id. at 52.)

⁴⁷ See Comisiones Especiales, Sesión de trabajo No. 1, *supra* note 33, at 126. See also Comisiones Especiales, Sesión de trabajo No. 2, in: 1 Asamblea Legislativa de la República de Costa Rica, Acta No. 21, Ordinaria, Expediente No.10401, at (4) 150 (June 30, 1987) (statements of Piza Escalante arguing that the Const. Cham. it is not an ordinary Chamber like the others).

⁴⁸ See Comisiones Especiales, Sesión de trabajo No. 2, *supra* note 47, at (1) 147 (statements of José Miguel Corrales Bolaños, Presidente de la Comisión de Asuntos Especiales, insisting upon being realistic, to have a project with the least opposition). See also id. at (5) 151, (8) (154).

⁴⁹ See Law 7128 of Aug. 8 1989, published in the Gaceta (Sept. 1 of 1989). This Law modified Arts. 10, 48, 105, and 128 of the Constitution of 1949. For a description of the constitutional jurisdiction in Costa Rica see generally *Rubén Hernández Valle*, Temas de Derecho Constitucional, San Jose, 1988; *Rubén Hernández Valle*, 2 El Derecho de la Constitución, San Jose, 1994, pp. 655-723; *Christian Hess Araya*, Justicia Constitucional en Iberoamérica, Costa Rica, <http://www.uc3m.es/uc3m/inst/MGP/JCI/02-costarica.htm> (last modified Oct. 7, 2002) . A major institutional renovation accompanied the creation of the Const. Cham. In fact, a new code of civil procedure, a reform to the organic law of the judiciary, a reform to the penal code and the devise of new institutions such as the Ombudsman, crystallized then. See *Murillo Viquez*, *supra* note 36, at 41-42, 44. See also *Carrillo Chaves*, *supra* note 36, at 192, 227 (corroborating that there were other new institutions besides the Const. Ct.).

the members of the Legislative Assembly. In contrast, the Legislative Assembly elects the other justices of the Supreme Court only by a majority. The Const. Cham. also has independence because of its specialization.⁵⁰ The Const. Cham. decides issues about the unconstitutionality of norms and acts subject to public law, conflicts of jurisdiction between the branches of the State and answer consults on constitutional reform projects, approval of international agreements or treaties and other bills. Moreover, if the Legislative Assembly does not accept the veto of the President against a bill for reasons of unconstitutionality, it would send the bill to the Const. Cham. to decide.⁵¹ Besides, the Const. Cham. has jurisdiction about habeas corpus and *amparo*.⁵² Nevertheless, the Const. Cham. does not have jurisdiction on jurisdictional decisions of the Judiciary and on declarative acts of the Electoral Court.⁵³ It is worth to stress that beside the classical powers of constitutional review, the Const. Cham. has an advisory power through consults.⁵⁴ In the following cases,

⁵⁰ See *Hernández Valle*, 2 El Derecho de la Constitución, *supra* note 49, at 666-67.

⁵¹ See Art. 128 Costa Rica Const.

⁵² See Art. 48 Costa Rica Const. The Law of the Constitutional Jurisdiction develops in detail the constitutional jurisdiction. Law *Número 7135 del 11 de octubre de 1989. Publicada en el Alcance N° 34 a La Gaceta N° 198 del 19 de octubre de 1989 y rectificada por Fe de Erratas a La Gaceta N° 212 del 9 de noviembre de 1989* [hereinafter LJC]. See generally *Christian Hess Araya & Ana Lorena Brenes Esquivel* (eds.), *Ley de la Jurisdicción Constitucional, Anotada, Concordada y con Jurisprudencia Procesal*, Costa Rica, 1997. According to this law, the constitutional jurisdiction aims to assure the supremacy of the Constitution, and to protect the fundamental constitutional rights. Art. 1 LJC. It confers to the Const. Cham. to define the scope of its power, and makes its decisions binding to all other authorities, except to itself. Arts. 7, 11 & 13 LJC. The Const. Cham. has a prevalent position on constitutional review. See generally *Hernández Valle*, *Derecho Procesal Constitucional*, San Jose, 1995, pp. 116-17 (stating that a specialized Chamber within the Supreme Court exercises constitutional review in Costa Rica defining the scope of its power by itself). Surely, all judges consult the Const. Cham. if they have doubts about the constitutionality of a norm or act that they have to apply. See arts. 102-108 LJC (regulating the judicial consult of constitutionality). Although this could have opened the door for judges to decide whether to consult the Const. Cham. or not to apply the law that they considered unconstitutional, the Const. Cham. decided that the judges must consult the Const. Cham. See Sentencia número 1185 de la Sala Constitucional de la Corte Suprema de Justicia de las catorce horas y treinta minutos del día dos Marzo de 1995 (concluding, with the dissenting opinion of Justice Piza Escalante, that an interpretation conformed with the Constitution of art. 8 (1) of the Organic Law of the Judicial Power No. 7333 de 5 de mayo de 1993 does not give any authority to the judges for not applying a law or act for reasons of unconstitutionality. If the judges have doubts about the constitutionality of a law or act, they have to consult the Const. Cham.).

⁵³ See art. 74 LJC (excluding from the unconstitutionality process the jurisdictional acts of the judicial power and the electoral acts of the Supreme Electoral Court). But see *Luis Fernando Solano C.*, *La Jurisdicción Constitucional: Incidencia en otras Jurisdicciones*, in: *Anarella Bertolini & Hubert Fernández* (eds.), *La Jurisdicción Constitucional y su Influencia en el Estado de Derecho*, San Jose, 1996, pp. 206-07 (discussing the constitutional review against a group of decisions that constitute a quasi-normative body).

⁵⁴ Arts. 96-101 of the LJC regulates the consult of constitutionality. See generally *Juan Carlos Rodríguez-Cordero*, *Las Reformas Constitucionales en el Diseño del Sistema Político Costar-*

the consult is mandatory: constitutional reform projects, reforms to the Law of the constitutional jurisdiction and projects about the approval of treaties and international agreements. In addition, at least ten members of the Assembly can ask for a consult of constitutionality on any bill or project. This consult is optional.⁵⁵ Briefly, the Const. Cham. exercises the constitutional review in Costa Rica exclusively, and through advisory opinions, it takes direct part in shaping the legislation. A respected Supreme Court and the likely easy acceptance of a Chamber by the Legislative Assembly and by the public opinion were the main reasons for choosing the Costa Rican model.⁵⁶

3. *Impact of Creating the Constitutional Chamber*

The Const. Cham. forged a legal transformation in Costa Rica. With seven justices selected on September 25, the Const. Cham. began its activities on September 1989. After only three years, Costa Ricans considered the Const. Cham. one of the most important judicial institutions.⁵⁷ The legal community as well as the public engages in discussions with enthusiasm about decisions of the Const. Cham. through the press. There has been a modernization of the constitutional process, a new concept of constitutional interpretation, and a

ricense: el Caso de la Consulta Preceptiva de Constitucionalidad (1989-1997) (2001) (Master Thesis, Universidad de Costa Rica) (analyzing the mandatory consultation to the Const. Cham. for legislative projects aiming to reform the Constitution).

⁵⁵ Also, other institutions, such as the Supreme Court of Justice and the Supreme Electoral Court, can seek advisory opinions about matters related to their jurisdiction. Art. 96 c) LJC.

⁵⁶ The understanding about the nature of constitutional review as political also contributed to its specialization. Even before creating the Const. Cham., the Supreme Court made important political decisions exercising constitutional review. See *Rubén Hernández Valle & Rafael Villegas Antillón*, *El Constitucionalismo Costarricense en los Últimos Setenta Años*, in: 3 *Constitucionalismo*, *supra* note 22, at 176-77. See also *Hernández Valle*, *Democracia y Participación Política*, *supra* note 36, at 43 (stating that the Supreme Court made important decisions with high political content); *Sáenz Carbonell*, *supra* note 31 at 49-51 (indicating that the political elements of the judicial review came for example into light in the case *Alvarado y otros vs. el Estado*, la Sala de Casación 10 de julio de 1909). Currently, contrary to the other Chambers of the Supreme Court, it is an accepted convention that the Const. Cham. plays a political role. See *Eduardo Ortiz*, *Sobre el Proyecto de Reforma de los Artículos 157 y 158 de la Constitución*, 1 *Revista de Derecho Constitucional* 103-04 (1991) (conceding that only the appointment of the justices of the Const. Cham. by the Legislature is justifiable because this Chamber exercises a political function).

⁵⁷ See *Rodolfo Piza Escalante*, *Justicia Constitucional y Derecho de la Constitución*, in: *Gerardo Trejos & Harry Wohlstein* (eds.) *La Jurisdicción Constitucional*, San Jose, 1993, p. 13. From 1945 to 1989, the Supreme Court addressed 318 constitutional cases. In contrast, from only October 1989 to July 1991, the Const. Cham. addressed 228 constitutional cases. See *Carlos José Gutiérrez*, *La Constitución 50 Años Después*, in: *Carlos José Gutiérrez et al.*, *Temas Claves de la Constitución Política*, San Jose, 1999, p. 50.

radical change in the attitudes of judges and officials.⁵⁸ For instance, the lawyer Juan José Sobrado point out that before the Const. Cham. the Legislative body passed unfair and discriminatory laws and officials applied laws without any constitutional foundation. The Const. Cham. stopped this anarchy.⁵⁹ The scholar Sáenz Carbonell asserts that the Const. Cham. plays a role protecting the supremacy of the Constitution as none of the previous constitutional review institutions did.⁶⁰ Concisely, since 1989, Costa Rica began to experience the power of a solid institution that protects the fundamental rights and assures the supremacy of the Constitution. It was a revolution.⁶¹

This legal transformation shows itself in a shift of essential notions: For example, in the notion of sovereignty. In 1990, Justice Piza stated that the sovereignty did not rest on the Legislature, but in the Constitution itself. If the Legislature were sovereign, then any time it passed a law, that law would be the will of the people. Thus, the Constitution would be minimized.⁶² On the contrary, the Const. Cham. decides about the meaning of the Constitution becoming the instrument of the people's will. A rebellion against the Const. Cham. is a rebellion against the Constitution itself.⁶³ Likewise, there was a change in the notion of constitutional interpretation. The Const. Cham. sees its role as adapting the Constitution to societal circumstances. Only when there is enough discrepancy between the values of the society and the text of the Constitution should a constitutional amendment be promoted.⁶⁴

The shift in the notions of sovereignty and constitutional interpretation, making the role of the Const. Cham. more activists, becomes clearer in the advisory opinions. The Legislative

⁵⁸ See *Gutiérrez et al.*, *supra* note 57, at 14.

⁵⁹ See *Murillo Víquez*, *supra* note 36, at 37, 50, 87-92 (analyzing the impact of the Const. Cham. and providing a list of important decisions).

⁶⁰ See *Sáenz Carbonell*, *supra* note 31, at 27, 29, 64. See also A. *Soto Zúñiga*, *En Defensa de la Sala Constitucional*, Address Before the National Assembly (1991), in: 1 *Revista de Derecho Constitucional* 151 (1999) (arguing that with the creation of the Const. Cham. began in fact the protection of the citizens against the abuses of the public power).

⁶¹ See *Murillo Víquez*, *supra* note 36, at 8-9 (considering that before the creation of the Const. Cham. there was in Costa Rica a great deal of respect for the law, but not for the Constitution). See also *Marianella Alvarez Molina et al.*, *Jurisprudencia Constitucional Sobre Medio Ambiente: Principios, Análisis Evolutivo y Crítico de la Jurisprudencia*, San Jose, 2001, p. 144 (indicating that the decisions of the Const. Cham. have rendered more effective the protection of the natural resources); *Hiltunen Biensanz et al.*, *supra* note 27, at 92 (stating that although the judges recently began to be perceived as dishonest, “[r]ecent polls show that the government agency with the most credibility is Sala IV, the Const. Ct., which has often stymied the actions of other branches of government.” *Id.*).

⁶² See *Murillo Víquez*, *supra* note 36, at 48.

⁶³ See *id.* at 72-77 (mentioning Piza Escalante).

⁶⁴ See *Solano*, *supra* note 53, at 200 (1996) 200 (quoting SSC No. 678-91, de las 14:16 horas del 27 de marzo de 1991).

Assembly discussed a project to reform article 24 of the Constitution to allow a more effective search for drug trafficking. In the mandatory consult of March 13, 1991 on this project, the Const. Cham. recognized that its decision is binding to the constitutionality of the process of constitutional amendment. Nonetheless, it claimed its power to give no binding opinions on the subject matter. Affirming the Constitution is a living instrument; the Const. Cham. asserted its power as a supreme interpreter of the Constitution, responsible for adapting the text to the particular circumstances. Further, the Court stated two circumstances that beg for a constitutional reform: First, when the values of the society and the text of the Constitution are incongruent. Second, when new circumstances justify a regulation of a subject matter not explicitly established or when a regulation cannot be inferred from constitutional principles.⁶⁵ The Const. Cham. concluded that the project of constitutional amendment was unconstitutional because it infringed on one of the substantial procedural requirements established in the Constitution for this proposal.⁶⁶ On the subject matter of the proposal, the Const. Cham. suggested that to allow the ordinary legislator to regulate the intervention any communication for criminal investigations would affect the fundamental right to privacy. The Constitution, insisted the Court, assured a sacred sphere of privacy to any individual.⁶⁷

Then, the Legislative Assembly asked the Const. Cham. to clarify its opinion about the scope of its power. Reiterating its status as supreme interpreter of the Constitution, the Const. Cham. stated that it is not surprising that constitutional interpretation adapts the constitutional text to new circumstances. The decisions of the Const. Cham. give dynamism to the constitutional text, as is the case with all Constitutional Courts. This cannot be construed as an invasion of the power of the *constituyente* to reform the constitutional provisions, when the constitutional interpretation does not suffice for that aim. Thus, there is no check on the Legislative Assembly powers.⁶⁸ Although nobody could impede that the *constituyente* proposed reforms, the Const. Cham. has the duty to warn against the inconveniences and risks of exercising the reform's power. In short, the Const. Cham. plays a cooperative role with its preventive and not binding opinion, while the National Assembly has within the strict constitutional terms the power to decide the opportunity for a constitutional amendment.⁶⁹ This power did not substitute those legislative powers of the Legis-

⁶⁵ See Voto No. 678-91, Consulta de Constitucionalidad Mar. 27, 1991, in: *Roberto Tovar Faja et al.*, 2 Consultas de la Asamblea Legislativa a la Sala Constitucional, 1989-1993. El Control Pleno de Constitucionalidad, 1994, 345-46.

⁶⁶ See id. at 350.

⁶⁷ See id.

⁶⁸ See id., at 351-52.

⁶⁹ See id. at 352-53. See also *Roberto Tovar Faja et al.*, 1 Consultas de la Asamblea Legislativa a la Sala Constitucional, 1989-1993. El Control Pleno de Constitucionalidad, San Jose, 1994, vii (discussing the nature of the Const. Cham. when issuing advisory opinions. The author argues for

lative Assembly. Yet, despite this holding, the problem remains. The line between constitutional interpretation and policy is not easy to draw. The Const. Cham. makes value judgments deciding about the reasonability of a legislative discretion.⁷⁰ Beyond the mere confrontation between a law and a constitutional provision, the Const. Cham. like a second legislative chamber tempers the legislative decisions, analyzing their fairness, reasonableness, albeit not their appropriateness or convenience.⁷¹ In summary, through its role in policy decision-making, the Const. Cham. marked a radical shift in understanding the notion of popular sovereignty. It produced an emphasis on protecting the fundamental rights, promoting also major debates in the public opinion about constitutional issues. In the Costa Rican tradition, this is a major accomplishment. Nevertheless, alongside the successes reside the shortcomings of the Const. Cham.

4. Criticism Against the Constitutional Chamber and Suggested Improvements

Heavy dockets, an excessive concentration, an adamantly activist approach of the Justices as well as questions about their independence and impartiality are some of main the criticisms of the specialized constitutional review in Costa Rica. The Const. Cham. has been overloaded with cases because the population trusts the constitutional justice for assuring its fundamental rights,⁷² ample access to the Const. Cham. compels addressing cases that are negligible, and many lawyers abuse the process.⁷³ Further, the Const. Cham.'s management does not seem efficient because its members deal with administrative issues of the Supreme Court in general.⁷⁴ The excessive concentration of the constitutional review is another source of concern. Although the general binding effect of the decision allows legal certainty because it avoids interpretative conflicts within the ordinary jurisdiction,⁷⁵ still, it forecloses the creativity of the judges that might enrich the interpretation of the laws.

self-restraint in this matter to avoid invading the legislative area. See *id.* at ix. In addition, addressing the issue of the nature of the Const. Cham. as a second legislative Chamber, the author concludes that the Const. Cham. exercises a moderating power. See *id.* at vi, ix, xiii, xviii).

⁷⁰ Cf. *Hugo Muñoz Quesada*, La Consulta de Constitucionalidad, in: *Roberto Tovar Faja et al.*, 1 Consultas de la Asamblea Legislativa a la Sala Constitucional, 1989-1993. El Control Pleno de Constitucionalidad, San Jose, 1994. (recognizing the value judgment in the decisions of the Const. Cham.).

⁷¹ See *id.* at xv, xvii, xix.

⁷² See *Lösing*, *supra* note 40, at 256-57.

⁷³ See *Hiltunen Biesanz et al.*, *supra* note 27, at 87-88 ("Access to this court was made so easy, and its authority so broad, that it, too, soon acquired a huge backlog of cases. This backlog ... has often slowed down decision-making and action ... Many feel, therefore, that the court has contributed to the maddeningly slow pace of needed action and change.").

⁷⁴ See *Murillo Víquez*, *supra* note 36, at 70.

⁷⁵ See *Hernández Valle*, Derecho Procesal Constitucional, *supra* note 52, at 130-31.

Similarly, excessive judicial activism has been another criticism against the Const. Cham. The suspensive effect of the *amparo* and the constitutional actions are seen as negative because they do not allow policy-making by the administration.⁷⁶ Further, the Chamber shows the tendency to substitute the ordinary jurisdiction, and the Legislative Assembly has a penchant to consult the Const. Ct. too much becoming the Const. Cham. a Senate.⁷⁷ Briefly, the Const. Cham. is making the Constitution, not only interpreting it.⁷⁸

Indeed, the line between constitutional review and legislative policymaking is blurred because the dominant view in the legal community holds that the Const. Cham. does not suffer the counter-majoritarian difficulty of judicial review. Assuming the sovereignty resides in the Constitution itself, the Const. Cham., as a supreme interpreter of the Constitution, expresses the will of the people.⁷⁹ Costa Rican constitutional scholars overlook that the central tenet of the theory about the counter-majoritarian nature of judicial review is not solved with shifting the place of the people's sovereignty and changing the notion of democracy. For instance, after stating the criticism of the counter-majoritarian difficulty, Hernández argues that this criticism belongs to a limited idea of democracy. It is based on the conception of the government of the majority. Yet, democracy expresses the popular will reflected in the Constitution, argued Hernandez. Restoring the infringed constitutional order and protecting fundamental rights, the Const. Cham. preserves the popular will. Here is the source of the democratic legitimacy of the Const. Cham.⁸⁰ As these arguments suggest, Hernández misread the classical problem of the counter-majoritarian difficulty. Other constitutional organs participate in the recreation of values, but their members are elected.

Another criticism refers to lack of coherence in the decisions of the Const. Ct. and its lack of independence and impartiality. The Constitution of 1949 combines values of the Con-

⁷⁶ See Murillo Víquez, *supra* note 36, at 51-53, 69.

⁷⁷ See Hugo Muñoz Quesada, La Sala Constitucional Como Poder Político, in: Gerardo Trejos & Harry Wohlstein (eds.) La Jurisdicción Constitucional, San Jose, 1993, p. 425.

⁷⁸ See generally Solano, *supra* note 53, at 201 (addressing the problem between legality and constitutionality). See also Murillo Víquez, *supra* note 36, at 72.

⁷⁹ See Rodolfo Piza Escalante, Legitimación Democrática en la Nueva Justicia Constitucional de Costa Rica, in: Eduardo Quinceno Alvarez (ed.), Anuario de Derecho Constitucional Latinoamericano, Medellín, p. 141 (stating that the legitimacy of the Const. Cham. derives from the people).

⁸⁰ See Rubén Hernández Valle, Legitimación Democrática de los Tribunales Constitucionales, in: Gerardo Trejos & Harry Wohlstein (eds.), La Jurisdicción Constitucional, San Jose, 1993, pp. 399-404. See also Manrique Jiménez Meza, Justicia Constitucional y Administrativa, San Jose, 2d. ed., 1999, pp. 52-55 (arguing that the Const. Ct. find its legitimacy in the overall legitimacy of the democratic system understood as an organization popularly shared and accepted by a community).

stitution of 1871 and of a social democratic ideology. This ideological hybrid makes a coherent decisional corpus difficult because the justices are forced to seek ways to harmonize policies that found contradictory solutions in the Constitution.⁸¹ Thus, the Constitution does not offer an acceptable foundation for the policy-making of the Const. Cham. In addition, there is the view that the appointments of the justices of the Const. Cham. by the Legislative Assembly are distributed among the political parties. Thus, the justices might be susceptible to political pressures. Further, the substitute justices can litigate at the Const. Cham., putting in question the impartiality of the constitutional justices.⁸²

Several suggestions have been proposed to overcome these shortcomings: (a) To alleviate the workload of the Const. Cham., the officer in *amparo* or the judges in habeas corpus should decide them as a previous incident. If the officer or the judge denies it, then it will pass or revision to the Const. Cham. automatically. Further, to develop stringent criteria for admissibility of the action of unconstitutionality that would address only issues of true constitutional nature. Moreover, to divide the Const. Cham. in sections: one for habeas corpus and another for *amparo*. The members of the Const. Cham. would decide constitutional issues jointly; (b) To soften the excessive concentration of the constitutional, some features of a diffuse system should be allowed. For example, giving judges, next to the consultation to the Const. Cham., the alternative of not applying the law or provisions contrary to the constitution.⁸³ In addition, decentralizing decisions about fundamental liberties in courts of lesser rank with the possibility of appeal to the Const. Cham.; (c) To restrain the excessive activism of the Const. Cham. in the government, the suspension of the administrative act both in the action of *amparo* and in the action of unconstitutionality should be limited. Moreover, a Committee to investigate the Const. Cham. should be organized in the National Assembly to keep a balance between the Legislature and the Const. Cham.;⁸⁴ (d) To improve the coherence of the decisions of the Const. Cham., a new

⁸¹ See, e.g., *Campo Elías Silva Rivas*, *Comentarios a la Constitución Política, a la Convención Americana sobre Derechos Humanos y a la Ley de la Jurisdicción Constitucional*, San Jose, 1991, p.10 (commenting that the Const. Cham. should emphasize the constitutional interpretation and not a private-law oriented interpretation).

⁸² See *Murillo Viquez*, *supra* note 36, at 47-48, 72.

⁸³ See, e.g., *Piza Escalante*, *Justicia Constitucional y Derecho de la Constitución*, in: *La Jurisdicción Constitucional*, *supra* note 57, at 39 (characterizing the constitutional review in Costa Rica as parallel and diffuse, according to art. 8 (1) of the Organic Law of the Judicial Power No. 7333 de 5 de mayo de 1993). See also *Alex Solís Fallas*, *La Dimensión Política de la Justicia Constitucional*, San Jose, 2000, pp. 73-92 (arguing that art. 8 (1) brought some elements of a diffuse constitutional review system parallel to the concentrated one). But see *Sentencia 1185 de la Sala Constitucional de la Corte Suprema de Justicia*, *supra* note 52 (affirming the concentrated nature of the constitutional review system in Costa Rica); *Lösing*, *supra* note 40, at 220-21 (proposing another interpretation of art. 8 (1) limiting its scope as establishing a diffuse constitutional review).

⁸⁴ See *Muñoz Quesada*, *supra* note 77, at 426.

Constitution with few and more flexible articles should be adopted;⁸⁵ (e) To assure the appearance of propriety of the Const. Cham., the substitutes of the justices should be barred from litigation before the Const. Cham., and better method for publishing the decisions should developed;⁸⁶ (f) In general, to heighten the soundness of constitutional review, the Const. Cham. should be separated from the Judiciary.⁸⁷ In summary, the heart of the criticism and the suggestions for improvement for the Const. Cham. in Costa Rica consists of excessive concentration and judicial policymaking. This excessive activism expresses only a symptom of the counter-majoritarian nature of constitutional review.

5. *Somehow more than a Constitutional Chamber?*

The factors leading to creating a Const. Cham. within the Supreme Court was the tradition of trust in judicial institutions. Also, it was an alternative accepted by the Legislative and the Supreme Court. It was a compromise. Beyond the classical power of judicial review, the Const. Cham. also has advisory powers on the laws debated in the Legislature. Nevertheless, the Const. Cham. does not have the power to review the constitutionality of jurisdictional decisions of the Judiciary and the declarative acts of the Supreme Electoral Court. Those exclusions are coherent within the chosen organization: the Const. Cham. is part of the Supreme Court. Except for this limitation, the Const. Cham. is a Const. Ct.⁸⁸

By creating the Const. Cham., a legal transformation in Costa Rica began. The Constitution became the supreme law of the land. Constitutional decisions shaped the public debate, and

⁸⁵ *Hiltunen Biensanz et al.*, *supra* note 27, at 87-88. See also *Murillo Víquez*, *supra* note 36, at 49 (stating that with the Const. Cham. a new Constitution is necessary more than ever).

⁸⁶ For this purpose, the Const. Cham. of Costa Rica has its website at Sala Constitucional de la Corte Suprema de Justicia, <<http://www.poder-judicial.go.cr/salaconstitucional/> (last visited Jan. 7, 2003). See also Sala Constitucional de la Corte Suprema de Justicia, Tecnología de la Información en la Sala, at <http://www.poder-judicial.go.cr/salaconstitucional/informatica.html> (last visited Jan. 7, 2003) (containing the current technological services offered by the Sala Constitucional).

⁸⁷ See *Murillo Víquez*, *supra* note 36, at 82-84, 85. See also *Rodolfo Saborío Valverde*, 10 Años de la Sala Constitucional: Los Cambios Pendientes, *Revista Contrapunto* (May, 1999), *Revista Jurídica Electrónica*, *Derecho Constitucional*, <http://www.nexos.co.cr/cesdepu/revelec/Sala%20Constitucional%2010%20años.htm> (last visited Jan. 7, 2003) (commenting that the main pending reform of the constitutional jurisdiction is the creation of a Const. Ct. separated from the Judiciary).

⁸⁸ See *Fix-Zamudio*, *Jurisdicción Constitucional y Protección de los Derechos Fundamentales en América Latina*, in: *Eduardo Quinceno Alvarez* (ed.), *Anuario de Derecho Constitucional Latinoamericano*, Medellín, 1995, p. 82; *Piza Escalante*, *Justicia Constitucional y Derecho de la Constitución*, in: *La Jurisdicción Constitucional*, *supra* note 57, at 11-12. See also *Solís Fallas*, *supra* note 83, at 260-61 (pointing out that “the Const. Cham. is a «super» constitutional organ, a supreme power ... [that] is above of all other constitutive powers ...” *id.*).

guided the decision-making in the country. This legal transformation entailed a shift in the notion of popular sovereignty, which passes from the Legislature to the Constitution and thus to the Const. Cham. In addition, the shift in the notion of constitutional interpretation gave a bold activist role to the Const. Cham. legitimating it as a policymaking institution. The view in the legal community of constitutional review as political as well as longing for a more active constitutional decision-making prepared the terrain for this change of perspective.

The Const. Cham.'s success prompted at the same time its major criticism. The public shows discontent with the heavy dockets, and thus with the pace of the decisions of the Const. Cham. In addition, if the Const. Cham. is going to make policy based on the Constitution, then the country needs a new Constitution with fewer and flexible provisions. In addition, concerns about excluding the decisions of the judiciary from the constitutional jurisdiction have emerged suggesting to separate the Const. Cham. from the Judiciary. Briefly, there is an agreement that the Const. Cham. offered a way to continue believing in democracy. Yet, the balance between the democratic legitimated institutions and the Const. Cham. is still an unresolved problem.

IV. The Colombian Model: A Constitutional Court

To create a Const. Ct. in Colombia was part of renewing democratic values in a country suffering an old internal war. The members of the constitutional convention, who drafted the Constitution of 1991, believed a Const. Ct. would protect fundamental rights and assure the supremacy of the spirit of the new Constitution. In their view, the Supreme Court was passive and subject to political influences. In addition, the previous experiment with a Const. Cham., whose members only prepared drafts of decisions to be decided by the Supreme Court, brought limited results. Despite its name and independence from the Supreme Court, the Const. Ct. is part of the Judiciary and conceived as another participant in shaping the Constitution. In fact, constitutional review roles are distributed among various institutions and all judges have the power of not applying a norm considered unconstitutional.

The political circumstances between Colombia and Panama are different. Except for dictatorship that ended in 1989, Panama has not suffered violence that affects the social peace as Colombia has. Nevertheless, in Panama, as in Colombia in 1990, the trust in the Judiciary is sparse. Precisely, the Colombian model tried to improve the trust in the Judiciary, and at the same time to avoid the technical disadvantages of a Const. Cham. Therefore, it designed the Const. Ct. as part of the Judiciary, but separate from the Supreme Court. Therefore, the Colombian model could be useful for the Panamanian legal order and deserves the most attentive study.

1. *A besieged Democracy and a captured Supreme Court of Justice*

Surrounded by an old sociopolitical crisis because of guerrillas, paramilitary groups and drug traffickers, the Constitution of 1991 keeps the democratic ideal alive in Colombia.⁸⁹ In the 80's, the violence nearly provoked a collapse of the political institutions when guerrilla groups assaulted the Palace of Justice and assassinated the kidnapped justices.⁹⁰ In those days of untamed violence, the Constitution of 1991 arose as a revival of social peace within democracy.⁹¹ After constitutional reform discussions failed in the governmental level,⁹² the first stage toward the revival of democracy would come from the University

⁸⁹ See generally *Jaime Buenahora Febres-Cordero*, *La Democracia en Colombia*, Bogota, 1997, pp. 4-13 (describing the sociopolitical situation characterized by guerrilla, drug-trafficking, corruption, abuse of the *estado de sitio* and lack of social mobility. See also *Bureau of Democracy, Human Rights & Labor, U.S. Department of State*, 1999 Country Reports on Human Rights Practices: Colombia (Feb. 25, 2000) (http://www.state.gov/www/global/human_rights/1999_hrp_report/colombia.html) (last visited Mar. 1, 2000) (same); *Jorge P. Osterling*, *Democracy in Colombia. Clientelist Politics and Guerrilla Warfare*, New Brunswick and Oxford, 1989, pp. 325-32 (describing the connection between guerrilla groups and the drug-traffickers). According to the latest U. S. State Department's Report on Human Rights Practices in Colombia, the situation has not changed. See *Bureau of Democracy, Human Rights & Labor, U.S. Department of State*, 2001 Country Reports on Human Rights Practices—2001: Colombia (March 2002).

⁹⁰ See generally *Harvey F. Kline*, *Colombia*, 4 *Latin America and Caribbean Contemporary Record*, New York & London, 1989, B88-94 (describing the dramatic breakdown of peace caused by guerrillas, drug-traffickers and death squads around 1986). See also *Alberto Valencia Gutiérrez*, *Violencia en Colombia. Años ochenta y reforma constitucional*, Santiago de Cali, 1998, pp. 10, 17-54 (noting that after the assault to the Palace of Justice in 1985, the violence was almost generalized, putting in question the minimal requirements for societal life); *Carmenza Echeverri de Restrepo & Libardo Orejuela Díaz*, *La Constitución de 1991 ante la Crisis de Legitimidad Institucional*, Santiago de Cali, 1995, p. 61 (same).

⁹¹ See *Valencia Gutiérrez*, *Violencia en Colombia*, *supra* note 90, at 9, 17-54 (analyzing the violence in the 80 the author asserts that the *violencia* was the frame that made the discontinuity and the rupture in 1991 possible). See also *Arturo Matson Figueroa*, *El por qué de una Constituyente*, Cartagena, 1992, pp. 136-38 (stating that around 1990 was one of the worst times regarding the political and institutional crisis in Colombia).

⁹² In 1988, the President Virgilio Barco Vargas published a letter in *El Espectador*, an important Colombian newspaper. He proposed a call for a plebiscite to repeal Article 218 of the Constitution, which limited a constitutional amendment through the Congress. See generally *Carlos Alberto Ramirez Ocampo & Leticio Rojas Tapi*, 1 *Conocimientos Preliminares de la Constitución Política de Colombia. Un Esbozo de Algunas Crueldades y Bondades que Hemos Vivido Durante Más de 500 Años*, Bogota, 1992, pp. 376-78 (describing the social and political crisis during the government of Virgilio Barco Vargas (1986-1990)). Cf. also *Hernando Valencia-Villa*, *The Grammar of War. A Critique of Colombian Constitutionalism*, Law School 39, 41 (1986) (SDJ thesis, Yale University) (arguing that a constitutional reformism has played a role to prevent social change. See also *id.* at 199.). On February 1988, pursuing a political agreement, a *Comisión de Ajuste Institucional* (Commission of Institutional Adjustment) of twelve members designated by the Congress was organized. The Commission, presided over by César Gaviria

students. In August 25 of 1989, Luis Carlos Galán, a precandidate for the presidency, was assassinated. University students reacted by organizing a silent demonstration.⁹³ After this demonstration, a student movement denominated *We can still save Colombia* was organized to seek ways for constitutional reform. Next, Fernando Carrillo published an article in the newspaper *El Tiempo* in February 1990. He wanted to convince the government to add to the ballot for the presidential election of May 1990 to consult the electorate about convoking a constitutional convention,⁹⁴ and the government accepted.⁹⁵ After the Supreme Court declared the added electoral choice constitutional, the election took place.⁹⁶

Trujillo, was responsible for drafting a constitutional modification that would have been voted on by the people. In April 1988, the Council of State declared the provisional suspension of the agreement, arguing that a constitutional amendment could take place only by the fixed procedure. Nonetheless, on July 27, Barco's government presented a project for constitutional reform to the Congress. In 1989, Congress abandoned this project. See *Diego Younes Moreno*, *Derecho Constitucional Colombiano*, Bogota, 2d. ed., 1995, pp. 55-60

⁹³ See *Carlos Lleras de la Fuente & Marcel Tangarife Torres*, *1 Constitución Política de Colombia: Orígenes, Evolución y Vigencia*, Medellín, 1996, pp. 13-14 (describing the silent demonstration and the communiqué of the students). See also *Jorge Armando Orjuela M. & Víctor Hugo Rodríguez P.*, *Semilla en Tierra Seca. La Constituyente: Del Sueño Juvenil al Negocio Político*, Colombia, 1993, pp. 23 (stating that the assassination of Luis Carlos Galán was the cause facilitating the initiation of the student movement for institutional renovation).

⁹⁴ *Yunes Moreno*, *supra* note 92, at 61-62. See also *Luis Carlos Sáchica*, *Nuevo Constitucionalismo Colombiano*, Bogota, 1994, pp. 30-1 (affirming that the student movement promoted the idea of the *séptima papeleta*, the mass media support it, and the government and the constitutional judges were receptive to it. Further, the author considers that the student expressed the unconformity of a country tired of political violence, corruption, and inefficiency); *Alfonso Palacio Rudas*, *El Congreso en la Constitución de 1991*, Bogota, 2d. ed., 1994, p. 27 (describing that the students promoted a national movement that was channeled by the elected president César Gaviria); *Fernando Álvarez*, *El Por qué de la Reforma Constitucional*, in: *Constitucionalistas ante la Constituyente*, Bogota, 1990, pp. 50-53 (seeing the constitutional reform as a construct of the Press). See generally *Germán Suescún*, *Pobre Constituyente*, Bogota, 1990, pp. 11, 46 (stating in a compilation of political cartoons that the constitutional convention was the most spectacular show of the year).

⁹⁵ See *Edmundo López Gómez*, *La Verdadera Constituyente. Análisis Político y Jurídico*, Bogota, 1990, Anexo 1, 155-56, (containing the decree 927 de mayo 3 de 1990 issued by the President of the Republic acknowledging the popular claim for a constitutional convention, and ordering the inclusion of the additional or so called seventh ballot for the assembling of a constitutional convention to strengthen the democracy and the reform the Constitution). See also *Diego Uribe Vargas*, *Evolución Política y Constitucional de Colombia*, Madrid, 1996, p. 265 (stating that the President interpreted the call for a constitutional convention as a political mandate); *Manuel José Cepeda*, *Introducción a la Constitución de 1991. Hacia un nuevo constitucionalismo*, Bogota, 1993, pp. 219-230 (reproducing memoranda drafted by him as presidential advisor for constitutional reform about the 7th ballot, the popular consultation of May 27 and the Constitutional Convention of 1991).

⁹⁶ See *López Gómez*, *supra* note 95, Annex 2, 3 at 157, 169 (containing the texts of the opinion of the procurador regarding the constitutionality of the decreto 927 del 3 de mayo de 1990, and the decision of the Supreme Court for the constitutionality of the same decree. The decision of the Supreme Court recognized that the institutions have not been able to manage the violence in

César Gaviria Trujillo was elected President, and from an electoral census of 13,903,324, more than five million or around 39 percent voted in favor of calling a constitutional convention.⁹⁷ Next, the President of the Republic issued the decree 1926 of August 24 of 1990 calling for electing a constitutional convention.⁹⁸ On December 9, the people elected 70 representatives nationally to a Constitutional Convention.⁹⁹

In February of 1991, the Constitutional Convention began deliberations. It passed its own rules. It prohibited the Supreme Court and the State Council from interfering with the acts of the Constitutional Convention and commanded the Congress to call for its elections in advance, shortening the period its mistrusted members.¹⁰⁰ With unrestricted power, the

Colombia. See *id.* at 173. Further, the Supreme Court concluded that the decree ordering the electoral organization to count the votes for the convening of a constitutional convention and for the people's participation were political facts that passed the constitutional test. See *id.* at 178).

⁹⁷ See *Carlos Lleras de la Fuente et al.*, *Interpretación y Génesis de la Constitución de Colombia*, Bogota, 1992, p. 14 (suggesting that the massive vote in favor of a constitutional convention was the result of the manipulation of the political *caciques*). See also *Cepeda*, *supra* note 95, at 196-97 (giving the statistics about the elections). After this plebiscite, the political parties signed a political agreement about the constitutional convention. See *López Gómez*, *supra* note 95, Anexo 4, at 181 Acuerdo político sobre la Asamblea Constitucional, de 2 de agosto de 1990, Anexo 5, at 197 Desarrollo del Acuerdo Político sobre la Asamblea Constitucional, de 23 de agosto de 1990. See also *Presidencia de la República*, *Una Constituyente de Todos los Colombianos*. Documentos Para las Comisiones Preparatorias y las Mesas de Trabajo, Bogota, 1990, pp. 29-40, 41-47 (containing the political agreement about the constitutional convention).

⁹⁸ It contained the subject matter that would be addressed by the constitutional convention reforming the Constitution. See *López Gómez*, *supra* note 95, Anexo 6, at 215. Following a decision by the Supreme Court that declared unconstitutional (*inexequible*) the limitations of subject matter to the Constitutional Convention See Sentencia de la Corte Suprema de Justicia regarding the decree 1926 of Aug. 24 (1990), in: *López Gómez*, *id.*, Anexo 8, at 261, 277-79 (considering that the decree 1926 was constitutional, except for the parts related to the political agreement incorporated in the decree limiting the topics to be addressed by the Constitutional Convention).

⁹⁹ See *Matson Figueroa*, *supra* note 91, at 7-20 (providing the list of the representative to the Constitutional Convention of 1991 with a brief biographical data of each of them). The composition of the constitutional convention was a revolution in itself. Indigenous groups, Protestants and guerrilla members, were sitting with traditional politicians, who were a minority in the convention. See *id.* at 3-5, (emphasizing the authentic democratic participation and the heterogeneous representative body in the Constitutional Convention of 1991). In fact, the guerrilla movement M19 gained 19 representatives, and had the majority in the constitutional convention. See *Carlos Lleras de la Fuente*, *La Nueva Constitución Colombiana: un Testimonio*, in: *ILDEA* (ed.), *La Nueva Constitución Colombiana: un Testimonio*, Panama, 1992, pp. 10-11 (describing the composition of the Constitutional Convention). For a brief account of the Constitutional Convention of 1991 see *Ricardo Sánchez*, *Política y Constitución*, Bogota, 1998, pp. 49-61.

¹⁰⁰ Cf. *Vladimiro Naranjo Mesa*, *Bases Para una Reforma del Congreso*, in: *Constitutionalistas ante la Constituyente*, Bogota, 1990, pp. 116-17 (considering that one of the reasons for promoting the constitutional reform via a convention was the lack of credibility of the Congress). See also *Andrés de Zubiría Samper*, *¿Por qué la Constituyente? Un Pacto Social Para un Nuevo País*, Bogota, 2d. ed., 1990, pp. 83-84 (stating that the institutional reform promoted by the

Constitutional Convention began to discuss the new Constitution,¹⁰¹ approving on July 3 its final text.¹⁰² Superseding the shortly centennial Constitution of 1886,¹⁰³ the Constitution of 1991 was the first Colombian Constitution approved without open revolutionary upheaval.¹⁰⁴ Yet, violence continued side by side with democracy.¹⁰⁵

“Colombia has historically been, and remains today, one of the most violent societies in the world in its internal politics.”¹⁰⁶ Nonetheless, it also has a good record of democratic practice measured by regular elections and participation.¹⁰⁷ This puzzle is explainable because

constitutional reform had to do with the need of allowing participation and modernization as a way of maintaining the institutional legitimacy).

¹⁰¹ The Constitutional Convention rejected a constitutional project presented by the government. See generally *Cepeda, supra* note 95, at 255-449 & Annex II (reproducing the project of President Gaviria, his speeches defending the project, and a comparative chart between the Project of the President César Gaviria and the Constitution of 1991); *Presidencia de la República*, Proyecto de Acto Reformatorio de la Constitución Política de Colombia, Bogota, 1991. In total, universities, labor unions, associations, and individuals presented 131 projects and 80 proposals. See *Diego Uribe Vargas*, La Constitución de 1991 y el Ideario Liberal, Bogota, 1992, pp. 43-78 (analyzing the proposals considered in the Constitutional Convention). See also *Lleras de la Fuente et al.*, Interpretación y Génesis de la Constitución Colombiana, *supra* note 97, at 21-25 (narrating the discussion in the Constitutional Convention, to which he was a member).

¹⁰² The Constitution was published officially in the *Gaceta* 116 of July, 20 de Julio of 1991. See generally *María Paola Croce D. & Fanny Yepes López*, La Estructura del Estado Colombiano y la Constitución de 1991, Cali, 2d.ed., 1995; *Javier Sanin* (ed.), El Camino de la Constituyente, Bogota, 1991 (compiling editorials and newspaper articles referring to the Constitutional Convention). For a complete analysis of the Constitutional Convention see *Luis Carlos Sáchica & Jaime Vidal Perdomo*, 1 La Constituyente de 1991. Compilación y Análisis Histórico-Jurídico de sus Antecedentes y Primeras Decisiones, Bogota, 1991.

¹⁰³ Cf. *Luis Córdoba Mariño*, Apuntes de Historia Constitucional y Política de Colombia, Bogota, 1998, p. 291 (stating that the Constitution of 1886 was reformed more than seventy times. *Id.* at 292-93. In addition, the author deplors the substitution of the Constitution of 1886).

¹⁰⁴ See generally *Andrés de Zubiría Samper*, Asamblea Constituyente y Dictadura Constitucional: una constante histórica en Colombia, Bogota, 1991, pp. 12-23 (describing briefly the constitutional conventions and constitutional reforms from 1977 to 1991). Legitimacy was most important quality of the Constitution of 1991. See *Humberto de La Calle Lombana*, La Carta del 91, Instrumento Contemporáneo, El Tiempo, Nov. 13 de 1994 (saying that legitimacy is the most important feature of the new Constitution).

¹⁰⁵ See *Sánchez, supra* note 99, at 18, 102-104 (stating that the Constitution of 1991 is a modern Constitution that attempts to breach with an authoritarian tradition. Nonetheless, it is a Constitution in a country with an internal war). See also *Valencia Gutiérrez, supra* note 90, at 12-13 (arguing that violence and democracy are not extremes in Colombia. The state is at the same time factor of violence and an agent of democratization); *John D. Martz*, The Politics of Clientelism. Democracy and the State in Colombia, New Brunswick & London, 1997, p. 287 (affirming that the “endemic violence” continues. Further, “[c]ivic peace and security had yet to be achieved.” *Id.* at 287.).

¹⁰⁶ *Robert H. Dix*, The politics of Colombia, 1987, New York, Westport, Connecticut; London, p. 7.

¹⁰⁷ *Id.* 7.

“Colombia’s elites have been abetted in their efforts at self-preservation by their periodic ability to reach accommodation on sharing power at moments of acute crisis for the system.”¹⁰⁸ Yet, control remains at the elite within a quasi-democratic culture, in which the differences in income, occupation, education, and life-style are striking.¹⁰⁹ Thus, the Colombian government is democratic in form, but limited to a small portion of the population.¹¹⁰ Further, the lack of consideration for the rights of others and lack of public confidence in the institutions disfavor a democratic culture.¹¹¹ The Constitution of 1991 tried to modernize this political culture,¹¹² marking a rupture in Colombia’s political history of Colombia,¹¹³ overcoming the paralysis of its political life,¹¹⁴ and reviving a social peace compact.¹¹⁵ Although the state of affairs has not improved substantially,¹¹⁶ Colombia

¹⁰⁸ Id. at 8.

¹⁰⁹ Id. at 69-75. See also *Osterling*, *Democracy in Colombia*, *supra* note 89, at 1-41 (describing the geographic and demographic traits of the Colombian society).

¹¹⁰ Dix characterizes Colombia as a quasi-democracy. See *Dix*, *supra* note 106, at 208-09. See also *Jonathan Hartlyn*, *The Politics of Coalition Rule in Colombia*, Cambridge, New York, New Rochelle, Melbourne Sydney, 1988, p. 2 (characterizing Colombia as a controlled democracy).

¹¹¹ *Osterling*, *supra* note 89, at 338.

¹¹² See generally *Martz*, *supra* note 105, at 265-87 (describing the presidential period of Gaviria as guided by a spirit of modernization). See also *Edgar Revéz*, *El Estado Como Mercado. La Gobernabilidad Económica y Política en Colombia Antes y Después de 1991*, Bogota, 1997, pp. 29-30 (stating that before the Constitution of 1991, the government managed the state by the ethics of concessions, war, public works and co-optation. The Constitution of 1991 open new spaces for the arising of new ethics and values). But see *Sánchez*, *Nuevo Constitucionalismo Colombiano*, *supra* note 99, at 375 (expressing skepticism regarding the Constitution of 1991 as a rupture with the past).

¹¹³ See generally *Valencia Gutiérrez*, *supra* note 90, at 8, 61 (considering the Constitutional Convention of 1991 as a discontinuity in Colombia’s history).

¹¹⁴ See *Christopher C. Coleman*, *Colombian Constitutional Change. Report of a Roundtable* (The Center for Latin American and Caribbean Studies, New York University 1991) (commenting that the 1991 Constitution was “an attempt to overcome the country’s deep and violent divisions through a process of major institutional reform.” Id. at 1.).

¹¹⁵ See, e.g., *President César Gaviria*, *Discurso del Presidente al Instalar las Comisiones Preparatorias de la Asamblea Nacional Constituyente*, (Sept. 14, 1990), in: *Presidencia de la República*, *Propuestas de las Comisiones Preparatorias. Asamblea Constitucional*, Bogota, 1991, pp. 7-11 (emphasizing that the Constitution offers an opportunity to revitalize the legitimacy of the institutions). See also *Oswaldo Hernández Ortiz*, *Los Retos del Estado Contemporáneo: Legitimación y Democratización. La Constitución de 1991, Principios y Rasgos Esenciales; su Proyección en la Caracterización de Nuestro Derecho Administrativo*, in: *Alvaro Tafur Galvis et al.* (ed.), *Derecho Constitucional y Administrativo en la Constitución Política de Colombia*, Medellín, 1997, p. 179 (acknowledging that the main purpose of the Constitution of 1991 was the institutional legitimization).

¹¹⁶ See *Humberto Vélez Ramírez*, *Lo Constitucional, lo Real y lo Imaginario del Estado. Doce Ensayos sobre el Estado y la Democracia en Colombia*, Cali, 1992, p. 18 (corroborating that the violence continues, being the state of exception the normality).

counts on a renovated political discourse, in which the Constitution symbolizes a cultural reform aiming to actualize democratic values.¹¹⁷

Naturally, the Judiciary did not escape from the Colombian political atmosphere. The Judiciary is seen as independent. It is subject, however, to intimidation and threats to witnesses and prosecutors. In general, the Constitution of 1991 strengthened the Judiciary with new institutions such as the Const. Ct. and the Superior Council of the Judiciary.¹¹⁸ Surely, the Const. Ct. was the most important and controversial new institution of the Constitution of 1991.¹¹⁹

2. *Establishing the Constitutional Court*

Although judicial review had been the responsibility of the Supreme Court since 1810, it was not free of criticism.¹²⁰ Those criticisms against judicial review in the Supreme Court

¹¹⁷ Cf. generally *Jaime Angulo Bossa*, *Gestación del Constitucionalismo Colombiano*, Bogota, 1992, pp. 139-166, esp. p. 165 (emphasizing that with the Constitutional Convention of 1991 began a new era for the constitutional history of Colombia). Cf. also *Jaime Vidal Perdomo*, *El Proceso Constituyente de 1990-1991*, in: *Sáchica & Perdomo*, 1 *La Constituyente de 1991*, *supra* note 102, at 39 (concluding that the main contribution of the Constitution of 1991 is to have been a way to create the myth of the new country, liberated, in the popular imagination, of atavisms). But see *Lleras de la Fuente*, *La Nueva Constitución Colombiana: un Testimonio*, *supra* note 99, at 18 (stating that without a cultural reform, the Constitution is ethereal).

¹¹⁸ See generally *Jesús Ramírez Suárez*, *La Constitución Colombiana de 1991 (Desarrollos legales, comentarios y jurisprudencia)*, Bogota, 1994, 179 (describing the changes in the Judiciary in the Constitution of 1991). Cf. *Uribe Vargas*, *Evolución Política y Constitucional de Colombia*, *supra* note 95, at 292 (providing a brief historical account of the constitutional review. See also *Javier Tobo Rodríguez*, *La Corte Constitucional y el Control de Constitucionalidad en Colombia*, Bogota, 1996, p. 30 (stating that the judiciary was the branch that underwent more changes).

¹¹⁹ See *Andrés de Zubiría Samper*, *Asamblea Constituyente y Dictadura Constitucional: una Constante Histórica en Colombia*, Bogota, 1991, p. 25 (considering the Const. Ct. as part of the transformation of the Judiciary). See also *Valencia Gutiérrez*, *supra* note 90, at 80 (indicating that one of the most polemic institutions was the creation of the Const. Ct.); *César Gaviria*, *Reflexiones Para una Nueva Constitución*, Bogota, 1990, pp. 28, 103 (stating that is a crucial task for the national survival to dignify the justice system. Further, it poses the question about which institution should be responsible for constitutional review); *Benjamin Ardilla Duarte*, *La Constitución Colombiana de 1991, La Nueva Constitución ¿Mejor, o Peor que la de 1886?*, Bogota, 1992, 53 (noting that the Const. Ct. is one of the most important innovations of the new Constitution); *Hugo Escobar Sierra*, *La Constituyente: Reforma Nacional*, Bogota, 1991, p. 139 (arguing in favor of the creation of a Const. Ct. as a redemptory institution to overcome the tyranny of the judges).

¹²⁰ The idea of the creation of a Const. Ct. was first mentioned in Colombia by a *Comisión Paritaria de Reajuste Institucional* in 1957. This Commission was responsible for writing a draft for a constitutional modification. The members of this Commission believed that the Const. Ct. could correct deficiencies in the constitutional review of governmental and congressional acts. See *Tobo*

were the following: (a) The justices of the Supreme Court lacked the specialized knowledge in Public Law; (b) The justices belonged to a chamber in charge of nonconstitutional issues; therefore, they dedicated more time to those cases, in detriment of constitutional cases; (c) The justices were conservative while deciding constitutional issues. They showed excessive self-restraint in their decisions, hinting at a dependency from other powers. Because of these deficiencies, proposals for further specializing constitutional review appeared. This specialization could be made either through creating a Const. Ct. or through distributing roles within the Supreme Court. Either way, it could bring a modernization of the constitutional review.¹²¹

In 1966, the legislature approved a proposal to create a Const. Ct. advanced by Senator Carlos Restrepo Piedrahita in the first debate.¹²² This proposal, published by the President Lleras Restrepo on September 21 of 1967, would have created the Const. Ct. in the context of a concentrated judicial review.¹²³ Nevertheless, the political and legal community received the concentration of the constitutional review with skepticism. Some Senators felt the diffuse system had many advantages because it allowed the citizens various avenues for

Rodríguez, supra note 118, at 27 (quoting *Carlos Restrepo Piedrahita, Tres Ideas Constitucionales, Iniciativas Para Crear una Corte Constitucional en Colombia*, Bogota, 1978, 96). See also *Germán Cavalier, Control de los Tratados Internacionales. Proyectos Para una Corte Constitucional*, in: *Presidencia de la República* (ed.), *Comentarios Para una Reforma Constitucional. Documentos Para la Asamblea Nacional Constituyente. Selección de Artículos de Prensa, 1969-1990*, Bogota, 1990, p. 109 (commenting the proposal of the creation of the Const. Ct. by a Comisión Paritaria de Reajuste Institucional in 1957, and the subsequent discussion at the Congress); *Jaime Castro, Reforma a la Justicia. La Corte Constitucional*, in: *Presidencia de la República* (ed.), *Comentarios Para una Reforma Constitucional. Documentos Para la Asamblea Nacional Constituyente. Selección de Artículos de Prensa, 1969-1990*, Bogota, 1990, p. 139 (stating that the initiatives in Colombia for the creation of the Const. Ct. were aimed at improving the administration of justice). In fact, the members of the Comisión Paritaria were under the impression that the government of Rojas Pinilla had manipulated the Supreme Court, which was deferential to the exercise of extraordinary powers by the executive. Thus, the decisions of the Supreme Court were seen as politically motivated. See *Diego Uribe Vargas, Estructura Constitucional Para el Cambio. Propuestas de Reformas a la Constitución Colombiana*, Bogota, 2d. ed., 1987, 90, pp. 119-20. See also *Alejandro Martínez Caballero, Supremacía e Interpretación Constitucional*, in: *Colegio Mayor de Nuestra Señora del Rosario & Consejería Presidencial para el Desarrollo de la Constitución* (eds.), *Constitución Política de 1991: Visión Latinoamericana*, Bogota, 1993, p. 124 (indicating that according to Alvaro Copete Lizaralde, the professor Eustorgio Saria in 1950 suggested the idea of creating a Tribunal of Garantía Constitucional following the model of the Spanish Constitution of 1931).

¹²¹ See *Uribe Vargas, Estructura Constitucional Para el Cambio, supra* note 120, 120-22.

¹²² See *Restrepo Piedrahita, Tres Ideas Constitucionales, supra* note 120, at 99. See also *Uribe Vargas, Evolución Política y Constitucional de Colombia, supra* note 95, at 257 (describing the proposal of creating a Const. Ct. by Restrepo Piedrahita).

¹²³ See *Restrepo Piedrahita, Tres Ideas Constitucionales, supra* note 120, at 99-103 (reproducing the text of the approved articles creating the Const. Ct.).

questioning the constitutionality of the acts.¹²⁴ Moreover, an emphasis on specialization could make protecting rights more complex. To take away that power of the constitutional review of the Council of State and the constitutional review via exception did not seem desirable for Colombia.¹²⁵ To soothe the strong discrepancies about creating the Const. Ct. a curious Const. Cham. was created within the Supreme Court in 1968 instead.¹²⁶

This Const. Cham. attempted to make the constitutional jurisdiction more efficient.¹²⁷ It had four members who were specialists in Public Law. Yet, they only prepared drafts for decisions on issues of constitutionality, which in turn the Supreme Court jointly debated and decided. Therefore, the Supreme Court was responsible for the constitutional review.¹²⁸ The Const. Cham. was immediately criticized as subordinated to the Supreme Court, not bringing the advantages of the specialization to constitutional review.¹²⁹ Among these advantages were, for example, avoiding the congested dockets of the Supreme Court, promoting the uniformity of the constitutional jurisprudence or decisions, and considering the distinctiveness of the constitutional interpretation.¹³⁰ Thus, the soundness of this Chamber was put in question.¹³¹ Along these lines of criticism, in 1979 there was another proposal to modify the constitutional review transferring some decision-making to the Const. Cham.¹³² Yet, this proposal failed.

¹²⁴ See id. at 107.

¹²⁵ *Uribe Vargas*, *Estructura Constitucional Para el Cambio*, *supra* note 120, at 126. See also *Restrepo Piedrahita*, *Tres Ideas Constitucionales*, *supra* note 120, at 110 (concluding that the main argument for opposing the Const. Ct. was the Colombian tradition).

¹²⁶ See *Tobo Rodríguez*, *supra* note 118, at 27.

¹²⁷ *Uribe Vargas*, *Estructura Constitucional Para el Cambio*, *supra* note 120, at 129.

¹²⁸ *Tobo Rodríguez*, *supra* note 118, at 31. See *Libardo Rodríguez*, *La Estructura del Poder Público en Colombia*, Bogota, 1984, p. 51 (describing the composition of the Supreme Court, which it was divided in four Chambers).

¹²⁹ See *Restrepo Piedrahita*, *Tres Ideas Constitucionales*, *supra* note 120, at 113-144 (considering that the Const. Cham. was in fact an *Antesala constitucional* with a secondary role).

¹³⁰ See *Tobo Rodríguez*, *supra* note 118, at 28 (quoting *Alfonso López Michelsen*, *Exposición del señor ex-presidente de la República*, in: *Fernando Hincastro et al.*, *Aspectos del Control Constitucional en Colombia*, 1984, pp. 51-52); *Jorge Carpizo & Héctor Fix-Samudio*, *Reporte Regional América Latina*, in: *Louis Favoreau et al.*, *Le Contrôle Juridictionnel des Lois*, Paris, 1986, p. 140.

¹³¹ See, e.g., *Germán Cavelier*, *supra* note 120, at 116-177 (quoting remarks by Senator Carlos Restrepo Piedrahita answering the arguments against the creation of the Const. Ct.). See also *Vladimiro Naranjo*, *Tribuna de opinión. La Corte Constitucional*, in: *Presidencia de la República* (ed.), *Comentarios Para una Reforma Constitucional. Documentos Para la Asamblea Nacional Constituyente. Selección de Artículos de Prensa, 1969-1990*, Bogota, 1990, p. 192 (stating that the projects of the specialists in public law of the Const. Cham. were usually dismissed by the members of the Supreme Court, which were specialists in civil, labor and criminal law).

¹³² *Tobo Rodríguez*, *supra* note 118, at 44, 45.

The claim for creating a Const. Ct. persisted in Colombia. Several factors helped to keep the idea alive, beginning with the successful foreign experiences with constitutional courts in Germany and Italy.¹³³ Assuming that the experiences with dictatorial regimes prompted creating constitutional courts in those countries, Colombia considered the Const. Ct. was necessary for protecting fundamental rights, and for strengthening democracy.¹³⁴ Moreover, scholars, during the II Iberoamerican Colloquium of Constitutional Law concluded that constitutional justice was essential for preserving individual liberties. A Const. Ct. would assure the proper functioning of the state powers, requiring that specialists decide the complexity of constitutional issues.¹³⁵ Thus, the favorable opinion of scholars and the shortcomings of a nondeliberative Const. Cham. would bring to create a Const. Ct. to the center of the debate again.¹³⁶

After more than thirteen years of debate and failed attempts, the Const. Ct. in Colombia was established by the Constitution of 1991.¹³⁷ In the constitutional project presented by President César Gaviria to the Constitutional Convention, to create the Const. Ct. was proposed for the following purposes: (a) to decide constitutional review, avoiding contradictory decisions; (b) to assure the enforcement of rights and liberties, judicially protected,

¹³³ But see *Alfredo Vásquez Carrizosa*, *Una Reforma Pálida*, in: *Presidencia de la República* (ed.), *Comentarios Para una Reforma Constitucional. Documentos Para la Asamblea Nacional Constituyente. Selección de Artículos de Prensa 1969-1990*, Bogota, 1990, 151 (criticizing the use of imported models for constitutional institutions, particularly, for a Const. Ct.).

¹³⁴ *Tobo Rodríguez*, *supra* note 118, at 30 (quoting *Louis Favoreau*, *Les Cours Constitutionnelles*, 1992, p. 11).

¹³⁵ *Uribe Vargas*, *Estructura Constitucional Para el Cambio*, *supra* note 120, at 131-32 (quoting *Universidad Externado de Colombia* (ed.), *La Jurisdicción Constitucional en Iberoamerica, II Coloquio Iberoamericano de Derecho Constitucional*, 1984, p. 725-726).

¹³⁶ *Uribe Vargas*, *Estructura Constitucional Para el Cambio*, *supra* note 120, at 33-35. In 1988, creating the Const. Ct. was in the proposal for constitutional modification presented to the Congress by the government of Virgilio Barco. *Tobo Rodríguez*, *supra* note 118, at 47 (quoting *Presidencia de la República*, *Reforma Constitucional*, Documentos, 1988, p. 37). Regardless of the merits of the proposal, as mentioned earlier, the Senate abandoned the project of constitutional reform. See *Tobo Rodríguez*, *supra* note 118, at 51. See also *Carmenza Echeverri de Restrepo & Libardo Orejuela Díaz*, *supra* note 90, at 167-68.

¹³⁷ In Title VIII, concerning the Judiciary Branch, Chapter 4, from Art. 239 to 245, the Constitution of 1991 regulated the constitutional jurisdiction. See also *Croce D. & Yepes López*, *supra* note 102, at 60-61. See generally *Mauricio García Villegas*, *Comentarios al Título IV de la Constitución: De la Participación Democrática y de los Partidos Políticos*, in: *Comisión Colombiana de Juristas*, *Constitución Política de Colombia comentada por la Comisión Colombiana de Juristas*, Bogota, 1997 (analyzing Chapter 4 of the Constitution). For a history of the constitutional review in Colombia see *Didimo Paez Velandia*, *El Control de la Constitucionalidad en los Estados Latinoamericanos y fundamentalmente en la Republica de Colombia*, Bogota, 1985, pp. 269-294 (narrating briefly the history of the constitutional review in Colombia until 1985). See generally *Juan Manuel Charry Ureña*, *Justicia Constitucional. Derecho Comparado y Colombiano*, Bogota, 1993 (describing in a comparative view the Const. Ct. of Colombia).

in a system headed by the Const. Ct.; (c) to avoid the congested dockets of the ordinary courts; (d) to ensure uniformity in the national jurisprudence.¹³⁸ As mentioned before, the Constitutional Convention rejected this project. Nonetheless, these reasons for creating the Const. Ct. influenced the discussion of the Convention. The delegates to the Convention had ideas of their own. Some members, denouncing the deficiencies of the Supreme Court, argued for the immediate creation of the Const. Ct. as a way to avoid the multiplicity of interpretations and contradictory decisions.¹³⁹ These technical reasons hide the constitutional convention's mistrust of the Executive, Legislative and of the Judiciary.¹⁴⁰ Others disagreed by saying the Supreme Court of Justice should continue exercising constitutional review,¹⁴¹ and that it would be authoritarian to change an already efficient constitutional review.¹⁴² A sub commission was organized to study the pros and cons of creating the

¹³⁸ *Tobo Rodríguez*, *supra* note 118, at 52-53 (quoting *Presidencia de la República*, Proyecto de Acto Reformatorio de la Constitución Política de Colombia, 1991, p. 211). See generally *id.* at 55-59 for the text of the project. But see *Presidencia de la República*, Propuestas de las Comisiones Preparatorias. Asamblea Constitucional, Bogota, 1991, p. 97 (concluding that the creation of a Const. Ct. would be unnecessary and inconvenient. It was argued that the institutions then could have assumed the constitutional review: the Supreme Court or the Council of State). See also *Cámara de Comercio de Bogotá*, 1 Reforma Constitucional. Bases y Textos para la Segunda Legislatura, Bogota, 1989, pp. 174-75; *Presidencia de la República*, Proyecto de Acto Reformatorio de la Constitución Política de Colombia. Bogota, 1991, p. 80-2 (proposing the creation of the Const. Ct. in the Chapter XIV, the constitutional jurisdiction). See also *id.* 211-19 (explaining the reasons for the improvement of the constitutional jurisdiction).

¹³⁹ *Tobo Rodríguez*, *supra* note 118, at 62-63 (quoting Asamblea Nacional Constituyente, Gaceta Constitucional número 91 del jueves 6 de junio de 1991 & Gaceta Constitucional número 95 de martes 11 de junio de 1991).

¹⁴⁰ See *Manuel José Cepeda*, El Poder de los Jueces en el Nuevo Sistema de Separación de Poderes, in: *Colegio Mayor de Nuestra Señora del Rosario & Consejería Presidencial para el Desarrollo de la Constitución* (eds.), Constitución Política de 1991: Visión Latinoamericana, Bogota, 1993, pp. 40, 45 (stating that this strengthening of the judiciary was the result of the mistrust of the Constitutional Convention in the political bodies -Executive and Legislative- and in the traditional judges). See also *Uribe Vargas*, La Constitución of 1991 y el Ideario Liberal, *supra* note 101, at 188 (indicating that the creation of the Const. Ct. was an old debate in Colombia prior to 1991 motivated by a desire of modernization following the model of other nations as well as for the distrust toward the Supreme Court of Justice).

¹⁴¹ *Tobo Rodríguez*, *supra* note 118, at 63.

¹⁴² See *Fernando Galvis Gaitán*, La Constitución, Explicada por los Constituyentes, Bogota, 1991, 130 (quoting Gaceta Constitucional núm. 97, junio 13 de 1991). See also *Uribe Vargas*, La Constitución of 1991 y el Ideario Liberal *supra* note 101, at 193 (stating that José María Velasco Guerrero defended the preservation of constitutional review in the Supreme Court) (quoting Informe de Minoría. "Creación de una Corte Constitucional", Constituyentes: José María Velasco Guerrero y Jaime Fajardo Landaeta. Gaceta Constitucional No. 81 del viernes 24 de mayo de 1991). Also, the President of the Supreme Court of Justice, in a speech addressed to the Convention, argued against creating the Const. Ct. Instead, he favored to improve the Const. Cham. within the Supreme Court. He also warned about the nature of the Const. Ct. as a third legislative Chamber, pointing out the severe criticism against the institution in those countries

Const. Ct. Commission IV of the Constitutional Convention was responsible for the matter of constitutional review.¹⁴³ Garcés Lloreda and Velasco Guerrero, members of Commission IV, presented a report entitled: *Control de Constitucionalidad, Corte Suprema de Justicia y Consejo de Estado*.¹⁴⁴ They proposed creating a Const. Ct. comprised of an uneven number of justices that would be determined by law. The subcommission proposed an article that was voted on secretly by the Constitutional Convention,¹⁴⁵ approving to create the Const. Ct.¹⁴⁶

In summary, the following factors contributed to create a Const. Ct. in Colombia: (a) constitutional law experts, among others, began to promote forming the Const. Ct. inspired by the success of Constitutional Courts in other countries. (b) The failure of the Const. Cham. without decision powers within the Supreme Court made the alternative of the Const. Ct. more plausible; (c) The Supreme Court was seen as too weak vis-à-vis the Executive, and hence a more activist constitutional jurisprudence was needed; (d) The longing for an institutional modernization that would strengthen democracy and the protection of fundamental rights; (e) The conviction among the members of the Constitutional Convention that a new institution for constitutional review was necessary to assure the true normative force of the new Constitution.

Although regulated as part of the Judiciary, the specialized Const. Ct. is different from the Supreme Court. The Const. Ct. is comprised of an uneven number of members belonging to the various specialties of the law, selected by the Senate for eight years.¹⁴⁷ The Senate

where a Const. Ct. operates. See *Echeverri de Restrepo & Orejuela Díaz*, *supra* note 90, at 215-17 (reproducing speech of Pablo Cáceres Corrales, President of the Supreme Court of Justice).

¹⁴³ See generally *Claudia Dangond Gibsone*, *Control Constitucional en Colombia en Cabeza de la Corte Constitucional, a Partir de la Constitución de 1991*, 231-344 (1992) (LL.B. thesis, Pontificia Universidad Javeriana, School of Law) (listing the proposals about constitutional review presented to the Constitutional Convention).

¹⁴⁴ *Tobo Rodríguez*, *supra* note 118, at 60.

¹⁴⁵ See *id.*, at 63 (quoting Asamblea Nacional Constituyente, Gaceta Constitucional número 134 del martes 29 de octubre de 1991).

¹⁴⁶ See *id.* at 71. See also *Carlos Lleras de la Fuente & Marcel Tangarife Torres*, *2 Constitución Política de Colombia: Origen, Evolución y Vigencia*, Medellín, 1996, p. 911 (indicating that 41 votes were in favor of the art. 239 with no record of votes against or abstentions).

¹⁴⁷ See *Tobo Rodríguez*, *supra* note 118, at 77 (stating that the Const. Ct. is a corporation belonging to the judiciary. It has a hierarchy of Supreme Court on the constitutional jurisdiction. Further, if there is a conflict of jurisdiction between the Const. Ct. and other tribunals, the *Consejo Superior de la Judicatura* decides it. See *id.* at 81). See also *Younes Moreno*, *supra* note 92, at 277 (commenting on the integration of the Const. Ct.). See also *Mario Madrid-Malo Garizábal*, *Diccionario de la Constitución Política de Colombia*, Bogotá, 1997, p. 73-74 (describing the composition and powers of the Const. Ct.). See generally *Catalina Botero Marino*, *Justicia Constitucional en Iberoamérica, Colombia*, <http://www.uc3m.es/uc3m/inst/MGP/JCI/02-colom>

selects from lists presented by the President, the Supreme Court of Justice, and the Council of State.¹⁴⁸ The justices of the Const. Ct. cannot be reelected.¹⁴⁹ The Const. Ct. exercises constitutional review predominantly, albeit not exclusively.¹⁵⁰ The Council of State also exercises constitutional review of decrees that did not belong to the jurisdiction of the Const. Ct.¹⁵¹ In addition, all judges still have jurisdiction over the protection of fundamental rights,¹⁵² even though the Const. Ct. can review the decisions of those judges.¹⁵³

bia.htm (last modified Oct. 7, 2002) (providing basic information about the constitutional jurisdiction in Colombia).

¹⁴⁸ Contrary to the designation of judges for ordinary jurisdictions, political authorities should designate the justices of the Const. Ct.. See *Tobo Rodríguez*, *supra* note 118, at 76-7. Art. 173 of the Colom. Const. establishes among the attribution of the higher chamber of the National Congress the election of the justices of the Const. Ct.. See *id.* at 83.

¹⁴⁹ See Art. 239 Colombian Const. See also *Lleras de la Fuente et al.*, *Interpretación y Génesis de la Constitución de Colombia*, *supra* note 97, at 411-12 (agreeing with the uneven number of justices, the length of the period and with the no reelection of the justices. Yet, they do not agree that the law determines the number of the justices because the legislator may interfere or the Const. Ct. can declare the unconstitutionality of laws regarding its composition with extra-constitutional arguments).

¹⁵⁰ See *Tobo Rodríguez*, *supra* note 118, at 75-76 (stating that constitutional review in Colombia resides on a Const. Ct.). See also on the same point *Pedro Antonio Lamprea Rodríguez*, *Principios Fundamentales en la Constitución de 1991*, Bogota, 1994, p. 226 (acknowledging a preference of the decision of the Const. Ct. in relation to the other organs that are obliged to respect the principle of legality); *Luis Carlos Sáchica*, *Constitución Política de Colombia. Comentada, Titulada y Concordada*, Medellín, 3d. ed., 1995, p. 145 (stating that the Const. Ct. does not have exclusive constitutional review, which shared with the Council of State); *Jaime Vidal Perdomo*, *Derecho Constitucional General e Instituciones Políticas Colombianas*, Bogota, 1996, p. 393 (indicating that the concentration of the constitutional review was not achieved in the Constitution of 1991. The Council of State preserved certain constitutional review powers, when deciding about the nullity of certain decrees). See generally *José Ignacio Leiva González & Enrique Rueda Noriega*, *Aproximación al Estudio de la Jurisdicción Constitucional en Colombia*, Bogota, 1994, pp. 27, 42, 51 (mentioning as organs of the constitutional jurisdiction the Const. Ct., the Council of State, and in some sense all the judges of the Republic applying preferentially the Constitution); *Manuel José Cepeda*, *La Ubicación de la Corte Constitucional en el Sistema Político*, in: *Jurisdicción Constitucional de Colombia: La Corte Constitucional 1992-2000: Realidades y Perspectivas*, Bogota, 2001, p. 533 (commenting that despite its leading role, the Const. Ct. “is no more that an interlocutor in a permanent dialog among institutions and social and political actors about what kind of polis we are and what kind of polis we want to be.” *Id.*).

¹⁵¹ *Younes Moreno*, *supra* note 92, at 276. See also *Tobo Rodríguez*, *supra* note 118, at 158-59 (describing the constitutional jurisdiction of the Council of State on the administrative area). See generally *id.* at 74.

¹⁵² See Art. 86 of the Colom. Const. See also *Tobo Rodríguez*, *supra* note 118, at 31-32.

¹⁵³ See *Tobo Rodríguez*, *supra* note 118, at 89-90 (referring to the powers and functions of the Sala Plena of the Const. Ct.). For the review in an action of tutela see *id.* at 90-91. See also *Cepeda*, *Introducción a la Constitución de 1991*, *supra* note 95, at 78-79 (stating that the Const. Ct. has the power to review all decisions of tutela. This power is discretionary. The author argues that this is not exactly a copy of the American writ of certiorari).

Despite such traits of a diffuse system, the Const. Ct. operates as a guide aiming to preserve the consistency of the judicial doctrine. Article 241 of the Constitution confers safeguarding the integrity and supremacy of the Constitution to the Const. Ct., albeit “*in the strict and precise terms of this article.*”¹⁵⁴ Therefore, arguably, the Const. Ct. cannot expand the scope of its power via its decisions.¹⁵⁵ The Const. Ct., however, already has a broad jurisdiction. For example, the Const. Ct. decides actions of unconstitutionality for procedural errors in constitutional amendments, the constitutionality of the bills opposed by the Executive as unconstitutional, the feasibility of international treaties, before they are ratified,¹⁵⁶ and on actions of unconstitutionality of laws brought by any citizen for substantive or procedural grounds.¹⁵⁷ The innovations of the constitutional review process show a shift in the concepts of constitutional interpretation, which is seen as a plural process, where different views have to be considered. The Const. Ct. has become a forum for harmonizing interests, with a prevalent, but not exclusive exercised of constitutional review.

3. *Impact of Creating the Constitutional Court*

The Const. Ct. has been successful, gaining a major institutional importance since its beginning in 1992.¹⁵⁸ It has been active, efficient, and present in most of public debates.¹⁵⁹ In addition, the Const. Ct. has been adapting the previous laws, sparing constitutional

¹⁵⁴ Art. 241 Colom. Const.

¹⁵⁵ See *Lleras de la Fuente et al.*, *Interpretación y Génesis de la Constitución de Colombia*, *supra* note 97, at 415-16.

¹⁵⁶ See Art. 241 (10) Colom. Const.

¹⁵⁷ See Art. 241 (4) Colom. Const. The decree number 2067 of September 4 of 1991 regulates constitutionality review. See generally *Tobo Rodríguez*, *supra* note 118, at 161-200 (describing the different constitutional processes in Colombia). This decree contains innovations such as a public and oral audience and *amicus curiae*. See arts. 12 and 13 of Decree 2067.

¹⁵⁸ From 52 constitutional issues in 1992, the Court addressed 204 in 1993. See *Uribe Vargas*, *Evolución Política y Constitucional de Colombia*, *supra* note 95, at 298 (commenting that in less than four years the new Constitution strengthened the institution and promoted the trust of the people).

¹⁵⁹ See *Hernando Herrera Vergara*, *El Control Constitucional en la Carta Política de 1991 y el Ejercicio Adecuado de la Acción de Tutela de la Corte Constitucional*, in: *Fundación Konrad Adenauer* (ed.), *Dos Años de la Nueva Constitución en Colombia*, Bogota, 1993, pp. 64-66. But see *Revéz*, *supra* note 112, at 16 (showing skepticism because Colombia created a very complex and sophisticated legal order, but the discrepancy between the norm and its enforcement is large). See also *Carlos Gaviria Díaz*, *Regímenes de Excepción, Control Constitucional y Orden Público*, in: *Pedro Santana Rodríguez* (ed.), *Crisis Política, Impunidad y Pobreza en Colombia*, Colombia, 1997, p. 200 (stating that the Const. Ct. had a new philosophical perspective for the implementation of the Constitution).

amendments and becoming an effective agent in protecting fundamental rights.¹⁶⁰ So radical has the change been that the constitutional jurisprudence before 1991 has become “old public law.”¹⁶¹ Briefly, since 1992, the Const. Ct. in Colombia has gained acceptance in the public opinion regaining the citizen’s trust into the Judiciary. In this success also resides its main criticism.¹⁶²

4. Criticism against the Constitutional Court and Suggested Improvements

Some scholars deplore that the constitutional convention did not separate the Const. Ct. from the Judiciary.¹⁶³ Today, there is a constitutional jurisdiction, not yet a Const. Ct.¹⁶⁴ Thus, now it is suggested to separate the Const. Ct. from the Judiciary to be in harmony with its true nature.¹⁶⁵ There is also the concern that the constitutional review is extremely diffuse,¹⁶⁶ because it is scattered among the Const. Ct., the Council of State, and the judges.¹⁶⁷ The Constitution did not establish a hierarchy between the ordinary, the adminis-

¹⁶⁰ See *Tobo Rodríguez*, *supra* note 118, at 247-48 (commenting that the Const. Ct. have been exercising its function with independence, transparence and efficacy). See also *Revéiz*, *supra* note 112, at 82 (expressing satisfaction with the efficiency and success of the Const. Ct.). See *Uribe Vargas*, *Evolución Política y Constitucional de Colombia*, *supra* note 95, at 284 (noting the prestigious achieved by the Const. Ct.).

¹⁶¹ *Tobo Rodríguez*, *supra* note 118, at 247.

¹⁶² See *Hernando Herrera Vergara*, *supra* note 159, at 58 (commenting on the issue of the government by the judges).

¹⁶³ *Sandra Morelli Rico*, *La Corte Constitucional: ¿Un Legislador Complementario?*, Bogota, 1997, pp. 13-14, 15, 17, 19. See, e.g., *Carlos Eduardo Naranjo Flores*, *Introducción al Derecho Constitucional Colombiano*, Medellín, 1994, pp. 177-181 (mentioning the Const. Ct. as part of the organs belonging to the judicial function. The author points out the paradox of maintaining a classical division of the separation of powers, but tempered by novel devices regarding some functions).

¹⁶⁴ See *Tobo Rodríguez*, *supra* note 118, at 249.

¹⁶⁵ See *Morelli Rico*, *supra* note 163, at 30, 31 (stating that there is a conflict because the jurisdictions are not delimited clearly).

¹⁶⁶ See generally *Mauro Cappelletti*, *Judicial Review in the Contemporary World*, Indianapolis, Kansas City, New York, 1970, pp. 69, 71. In the common law tradition, the judicial review tend to be exercise by all judges and therefore it is diffuse; in the civil law countries, the constitutional review tend to be exercise by a Const. Ct. and therefore it is concentrated. See also *Cappelletti*, *Proceso, Ideologías, Sociedad*, *supra* note 15, at 465-67 (commenting that the effect of *erga omnes* is reached also in the diffuse judicial review through the *stare decisis*; and the concentrate review system introduces some kind of consult by the lower judges and courts to the Const. Ct.).

¹⁶⁷ *Luis Carlos SÁCHICA*, *La Corte Constitucional y su Jurisdicción*, Bogota, 1993, p. 25. See also *Guillermo Chahín Lizcano*, *El Control de la Actividad del Estado a la Luz de la Constitución Colombiana de 1991*, in: *Alejo Vargas Velásquez et al.*, *Constitución, Gobernabilidad y Poder*,

trative, and the constitutional jurisdiction.¹⁶⁸ The Constitution itself did not define its supremacy. Therefore, there has been friction between the Council of State and the Const. Ct.¹⁶⁹ Although the *Consejo Superior* of the Judicature resolves conflicts of jurisdiction, there are still concerns with conflicts because of the jealousy of the different courts and judges that exercise constitutional jurisdiction.¹⁷⁰

Other criticism refers to the excessive activism of the Const. Ct. Every question involves a constitutional principle.¹⁷¹ This constitutional activism allowed little space for the work of the lawmakers and the public administration, which are stung with the doubt that they may be acting unconstitutionally.¹⁷² There is the reminder that constitutional review should be exercised within the strict and precise terms of the Constitution.¹⁷³ In short, there is the view there has been an usurpation of the Constitution by the constitutional judges.¹⁷⁴ Similarly, a change in the decree 2007 of 1991 stating that the decisions of the Const. Ct. are issued in the name of the people and by mandate of the Constitution prompted criticism about the democratic legitimacy of the Const. Ct. It was argued that this is a constitutional populism. Others said that this was in harmony with the conception that the constitutional interpretation should be made for the people. For instance, according to Cepeda, the formula indicates a new conception in the constitutional review. It is a constitutional review oriented toward realities, to protect the minorities, and to check the executive and the legislative. It overcomes a formal and positivist conception of the law. Further, Cepeda argued that the notion that only the Congress has the democratic legitimacy to determine the reasonability of a measure is no longer valid. The constitutional judges have a democratic legitimacy derived from the Constitutional Assembly and the Constitution. In addition,

Bogota, 1996, pp. 145-46 (criticizing that the Constitution of 1991 did not create a concentrated system of constitutional review, but preserved the diffuse system).

¹⁶⁸ See *Sáchica*, La Corte Constitucional y su Jurisdicción, *supra* note 167, at 65, 69, 107-109.

¹⁶⁹ See *Morelli Rico*, *supra* note 163, at 27, 28, 73.

¹⁷⁰ Cf., e.g., *John Dugas*, La Constitución Política de 1991: ¿Un Pacto Político Viable?, in: *John Dugas* (ed.), La Constitución Política de 1991: ¿Un Pacto Político Viable?, Bogota, 1993, p. 41 (indicating that with the restructuring of the power relations, the new Constitution created conflicts between the Const. Ct. and the Supreme Court in relation to the action of tutela).

¹⁷¹ See *Sáchica*, La Corte Constitucional y su Jurisdicción, *supra* note 167, at 1-11, 66 (asserting that the Constitution is overestimated). But see *Hernando Londoño Jiménez*, Terrorismo Jurídico Contra la Carta Magna, in: *Fundación Universidad Autónoma de Colombia* (ed.), Apuntes Constitucionales. Seminario de Plural en Rionegro, Bogota, 1995, p. 9 (claiming that critics, such as *Sáchica*, exaggerate the defects of the Constitution of 1991).

¹⁷² See *Sáchica*, La Corte Constitucional y su Jurisdicción, *supra* note 167, at 4. See also *Sergio Clavijo*, Fallos y Fallas de la Corte Constitucional: El Caso de Colombia 1991-2000, Bogota, 2001 (arguing that the activism of the Const. Ct. has affected the economical and social development of Colombia negatively).

¹⁷³ See *Sáchica*, La Corte Constitucional y su Jurisdicción, *supra* note 167, at 69.

¹⁷⁴ See *id.* at 15.

the Senate elects the justices, forming a bond between the justices and the popular will. It is possible to ask about the democratic legitimacy of the judges to assume this task, but this was the decision that the Constitutional Assembly made. It preferred to make a mistake in favor of the citizens and not against them.¹⁷⁵ Although the constitutional judges may be criticized from the view of democratic theory, they will find legitimacy when they strengthen democracy,¹⁷⁶ according to Cepeda.

The issue of the democratic legitimacy of the Const. Ct. is not academic. In the middle of the crises of 1997, in which President Samper was accused of having been involved in financial transactions with the drug-traffickers,¹⁷⁷ he proposed a constitutional reform to limit the Const. Ct. to examine the formal aspects of the decree issued by the Executive suspending public liberties in state of emergencies.¹⁷⁸ Although this proposal failed, it showed an attempt by the Executive to curtail the power of the Const. Ct.¹⁷⁹ Likewise, after the decision on the free development of the personality allowing the decriminalization of possessing a limited quantity of drug for personal use, Gaviria and Samper promoted a referendum aiming to prohibit carrying and consuming controlled drugs. The referendum did not take place. Nonetheless, the intention was to search for ways to override decisions of the Const. Ct. In summary, the proposals of constitutional amendments aiming to overcome decisions of the Const. Ct. show that the counter-majoritarian nature of the Court still is an unresolved issue.

5. *Somehow less than a Constitutional Court?*

A new Constitution trying to restore the social peace establishes a Const. Ct. in Colombia. Several factors favored creating the Const. Ct. First, the understanding of the legal community that a specialized constitutional review was needed for strengthening the protection of fundamental rights. Also, the shortcomings of the experience with a non-deliberative Const.

¹⁷⁵ See Cepeda, *Introducción a la Constitución de 1991*, *supra* note 95, at 120-25.

¹⁷⁶ See *id.* at 126-27.

¹⁷⁷ See Jaime Castro, *Reforma Constitucional y Crisis Política*, Bogota, 1997, pp. 13-17. See also Horacio Serpa Uribe, *Reforma Constitucional, Crisis Judicial, Impunidad y Política Social*, in: Pedro Santana Rodríguez (ed.), *Crisis Política, Impunidad y Pobreza en Colombia*, Colombia, 1997, p. 8 (emphasizing that the political control belongs to the Congress. Public order is a matter for the President and the Government, not the Court).

¹⁷⁸ See *Presidencia de la República de Colombia*, *Propuesta de Reforma Constitucional. Para Responder a los Grandes Desafíos*, Bogota, 1996. See also Carlos Alberto Atehortúa Ríos, *Puntos Neurálgicos de la Reforma Constitucional*, in: *Reforma Constitucional*, 1997.

¹⁷⁹ See Gaviria Díaz, *Regímenes de Excepción, Control Constitucional y Orden Público*, in: Pedro Santana Rodríguez (ed.), *Crisis Política, Impunidad y Pobreza en Colombia*, *supra* note 159, at 201-02.

Cham. as well as the view among the political community that the Supreme Court had been passive to the excesses of the Executive, played a role. More importantly, the belief among the members of the Constitutional Convention that a new Const. Ct. tuned in to the new spirit of the Constitution was necessary for assuring its continued development. Likewise, the inspiration in successful models such as the German, Spanish and Italian systems that have a Const. Ct. for constitutional review, and understanding constitutional review as a political function, favored the alternative of establishing a Const. Ct.

Creating the Const. Ct. in Colombia expresses a shift in understanding constitutional interpretation. The constitutional adjudication is seen as an adaptation of the Constitution to social circumstances, where the Const. Ct. harmonizes interests. The activism of the Const. Ct. is more than tolerated, it is expected. Still, the Constitution attempted to set the boundaries of this activism by expressly limiting exercising constitutional review to the strict terms of the constitutional provisions. In addition, the Const. Ct. operates in a diffuse constitutional review system. It is the preeminent institution for constitutional review, but not the only one. The Council of State and all the judges can exercise it, albeit within stringent limits. This diffuse constitutional review system allows an ample participation of the judges in the constitutional interpretation. Consistent with the structure of a Const. Ct., the Colombian system does not present any exclusion in its constitutional review power. Further, the Const. Ct. does not have any advisory powers. The Const. Ct. has become a prestigious institution that shapes the constitutional discourse in Colombia. The criticism that everything has become a constitutional issue expresses, at the same time, the success of the Const. Ct. On the other hand, some decisions seem too radical for the democratically legitimate institutions. There have been attempts to pass constitutional amendments aiming to curtail its decisions. Although these attempts have failed, the balance between representative institutions and legitimate policy-making exercised by the Const. Ct. is still an unresolved problem.

V. Faith in the Government by the People

In Costa Rica and Colombia, specializing constitutional review was justified for similar aims: (a) To strengthen the protection of fundamental rights; (b) To assure the supremacy of the Constitution; (c) To promote a modern and rational constitutional adjudication; (d) To favor an active constitutional decision-making. These aims implied a shift in understanding the Constitution and of constitutional interpretation. The Constitution became a fundamental law with immediate application that did not need legislative developments to find its effective application. Further, constitutional interpretation ceased to be a mere formal confrontation between a constitutional provision and a subconstitutional norm. In these countries, constitutional interpretation has become a harmonization of social interests. Thus, the view prevails that the constitutional judges engage in acceptable and legitimate

policy-making. The degree of this involvement in the policy-making differs between these countries, however. In Costa Rica, the Const. Cham. has an advisory power that the Const. Ct. in Colombia does not have. Further, in the Costa Rican Constitution, no provision explicitly prevents the Const. Cham. from defining the scope of its power. On the contrary, in Colombia, the Const. Ct. exercises its power within the precise terms of the Constitution.

In both countries, but in different degrees, the specialized Const. Ct. belongs to the Judiciary. In Costa Rica, it is a Const. Cham. within the Supreme Court; in Colombia, it is a separate Court within the Judiciary. Moreover, the Const. Cham. in Costa Rica works in a concentrated system of constitutional review, while the Const. Ct. in Colombia works in a diffuse system of constitutional review. Therefore, the participation of all the Judiciary in the shaping of a constitutional issue is richer in Colombia, than in Costa Rica. In both countries, there are initiatives promoting a complete separation of the specialized constitutional review court. This separation would agree more with the true political nature of a Const. Ct.¹⁸⁰

In both legal orders, there have been attempts to justify the legitimacy of the power of the specialized Const. Ct. to annul legislative decisions made by legitimate democratic bodies. In other words, there were attempts to develop arguments for overcoming the classical criticism against judicial review as expressed by Alexander M. Bickel. In 1962, Bickel stated that “when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it.”¹⁸¹ This is an ongoing problem in the American system,¹⁸² where the distress about the legiti-

¹⁸⁰ Although the idea that the Const. Ct. exercises jurisdictional powers and not legislative powers is widely accepted, in Europe the structure of having constitutional review in a tribunal separate from the judiciary prevailed. In this way, the European model complies with two principles: the supremacy of the Constitution and the separation of powers, which implies that judges do not determine the validity of the laws. See generally *Brewer-Carías*, *El Control Concentrado de la Constitucionalidad de las Leyes*, *supra* note 13, at 720-21.

¹⁸¹ *Bickel*, *supra* note 3, at 16-17. See also *Harry Wellington*, *Interpreting the Constitution*, New Haven & London, 1990, p. 26 (referring to the continuing validity of the Bickel’s criticism against judicial review).

¹⁸² See, e.g., *Larry D. Kramer*, *The Supreme Court 2000 Term, Foreword: We the Court*, 115 *Harvard L. Rev.* 4, 14 (2001) (Separata) (indicating that the Rehnquist’s Court sees itself less as *primus inter pares* in constitutional matters, and more as the only institution authorize to pronounce the meaning of the Constitution); *Albert P. Melone & George Mace*, *Judicial Review and American Democracy*, Ames, 1988 (compiling and analyzing materials regarding the compatibility of judicial review with democratic theory); *Arthur Selwyn Miller*, *Toward Increased Judicial Activism, The Political Role of the Supreme Court*, Westport, Connecticut & London, England, 1982 (justifying the judicial activism of the Supreme Court); *John Hart Ely*, *Democracy and Distrust. A theory of Judicial Review*, Cambridge, Massachusetts & London, England, 1980, 4-5 (mentioning that the function of judicial review of invalidating acts of the political branches is

macy of judicial review remains an unresolved, yet marginal issue.¹⁸³ Although this problem lingers outside the legal mainstream of the United States of America, there have been isolated proposals to create a Const. Ct. or to empower the Congress to override a decision on constitutional issues by the Supreme Court.¹⁸⁴ At any rate, the question of who is the authority to decide constitutional issues has been present since the beginning of the constitutional system.¹⁸⁵ What should the people do when they do not agree with a decision of the Const. Ct.? Constitutional scholars in Costa Rica and Colombia developed a defense of the democratic legitimacy of constitutional review based on arguments aiming to give the Const. Cham. or Court an indirect democratic legitimacy by the way their members are

both the central function, and the central problem of judicial review). See also *Robert F. Nagel*, *Constitutional Cultures. The Mentality and Consequences of Judicial Review*, Berkeley, Los Angeles, London, 1989, pp. 2-3 (commenting that theories of judicial review “are animated by the conviction that aggressive judicial enforcement of the Constitution is valuable and in need of legitimation.” Id. On the contrary, Nagel argues that the routinization of judicial power is an enemy of the constitutional order); *Michael J. Perry*, *The Constitution, the Courts, and Human Rights*. An inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary, New Haven & London, 1982, pp. 6, 10 (differentiating between interpretative review and non interpretative review). In addition to the universal problem posed by the counter-majoritarian difficulty of constitutional review, there has been a reception of American constitutional decisions and authors that justified the applicability of their rationale to Costa Rica and Colombia, albeit with caution. See, e.g., *Pablo Rodríguez Oconotrillo*, *Ensayo sobre el Estado Social de Derecho y la Interpretación de la Constitución*, San Jose, 1995, pp. vii, 9-11, 17, 24-25, 36-39, 46-47, 102-111, 116-119, 142 (using as sources decisions of the Supreme Court of the United States and American authors to support his assertions).

¹⁸³ See *Wellington*, *supra* note 181, at 26. See also *Jack M. Sosin*, *The Aristocracy of the Long Robe. The origins of judicial review in America*, New York, Westport, London, 1989, p. 2. See generally *Frank R. Strong*, *Judicial function in constitutional limitation of government power*, 1997, 159-60 (distinguishing between judicial review and constitutional review); *Mark Tushnet*, *Taking the Constitution Away from the Courts*, Princeton, 1999, p. 9 (developing an argument against judicial supremacy); *John T. Noonan, Jr.*, Remarks at roundtable discussing his book *Narrowing the Nation's Power: The Supreme Court Sides With the States* (2002), in: *ABA Journal*, Power to the State, Jan. 2003, at 43 (stating that “[b]ut I do observe ... that there is a kind of lack of self-consciousness in that the court, more than once, will speak of itself as though it were the Constitution. And there seems to be a sense that if it has interpreted something, that is the Constitution- so that the interpretation is a perfectly good substitute for the actual text. And it does seem to me it is good to raise the awareness that the court is as much a part of the interpretive process as the Congress and the president.” id.).

¹⁸⁴ See *Strong*, *supra* note 183, at 9 (proposing that the “[c]onstitutional Review should be transferred to a Supreme Const. Ct.. This is not a radical proposal. constitutional courts now exist in Austria, Germany, Italy, Russia and the Union of South Africa –and possibly elsewhere. These countries have seen in the experience of the United States the wisdom of separation of the two basic Judicial Functions.”). See also *Tushnet*, *supra* note 183, at 175 (referring to the possibility of a empower the Congress to override a Court decision such as in the Canadian system, in which it is refer as the “notwithstanding” or “override” clause). See also *Perry*, *supra* note 182, at 135-37 (mentioning also the possibility to empower the Congress to reverse Court's decisions and analyzing the counter-arguments. Yet, he is reluctant to go too far).

¹⁸⁵ See *Perry*, *supra* note 182, at 49 (stating that the issue is about separation of powers theory).

elected. Further, these scholars justify the democratic legitimacy of constitutional review by stressing the role of the Court as a protector of minority rights or by deriving its legitimacy direct from the Constitution. Regardless of the merits of these arguments, there are some features of the American judicial review that are not present in the legal orders of Costa Rica and Colombia that may weaken the problem of the counter-majoritarian nature of constitutional review. First, the power of constitutional review is found explicitly in the provisions of the Constitution. This is not the case in the United States, where judicial review is a product of judge-made law.¹⁸⁶ Second, the justices are appointed in Costa Rica and Colombia for a limited period and in Colombia with no possibility of reappointment. In the United States, the justices are appointed for life. Thus, two of the main reasons for questioning the lack of democratic legitimacy of the members of a Const. Ct. are not present in the Costa Rican and Colombian models. Yet, the fact remains that they are appointed, but they have the power to annul decisions of a democratically elected body. This suggests that both, the Costa Rican and the Colombian model, still suffer under the counter-majoritarian difficulty of judicial review.¹⁸⁷

Both models display a faith in specialized constitutional review as a way of preserving democratic values. Both show mistrust of the changing majorities of the Legislatures and of the possible excesses of the Executive. The models differ in how much they trust the Judiciary. In the Costa Rican model, the trust in the Const. Cham. is almost absolute. On the contrary, in the Colombian model, the trust in the Const. Ct. is cautious. The portrait emerging from both models is the following: Costa Rica has a termed Const. Cham. that disguises a powerful Const. Ct., while Colombia has a Const. Ct. as another participant in shaping the Constitution.

Considering the experience of Costa Rica and Colombia, Panama should consider the following issues in the design of a specialized constitutional review: The choice between a Const. Cham. and a Const. Ct. implies a decision on how much trust there is in the Judiciary. A Const. Ct. differentiated from the Judiciary is the best technical alternative, but not

¹⁸⁶ See *Bickel*, *supra* note 3, at 1, (stating that the “power of judicial review ... does not derive from any explicit constitutional command. The authority to determine the meaning and application of a written constitution is nowhere defined or even mentioned in the document itself. This is not to say that the power of judicial review cannot be placed in the Constitution; merely that it cannot be found there”). See also *id.* at 73-74 (pointing out the reverence that *Marbury vs. Madison*, 5 U.S. (1 Cranch) 137 (1803) exerts). See also *Sylvia Snowiss*, *Judicial Review and the Law of the Constitution*, Chelsea, 1990 (reconstructing the establishment of judicial review, Snowiss argues that the understanding of *Marbury* as “the basis for the judicial authority to invalidate legislation and overrule executive action ... did not developed until some time in the middle of the nineteenth century.” *Id.* at 1.).

¹⁸⁷ See *Perry*, *supra* note 182, at 3, 7-8 (indicating that the legitimacy of the policymaking of the Court is an old and repeated problem that is not solved by answering that the Court -a non-electoral accountable institution- realizes substantive values of the democracy).

necessarily the most convenient politically. More important than this choice would be to devise a constitutional review that is more participative, in which the Const. Ct. could be the preeminent institution, but not the only one deciding constitutional issues. As the Colombian model shows, it is advisable that a constitutional review system allows to some extent the participation of all the judges. In this way, judges would not see the Constitution as something foreign to them. In addition, the Const. Ct. would not solely rely on self-references of its decisions, but would profit from the arguments of the lower courts.

Knowing the struggles of both models with excessive activism, it is recommendable to agree on how final the decisions of the Const. Ct. would be. Although the features of constitutional review in Costa Rica, Colombia and Panama may temper its counter-majoritarian nature, any judicial review presents some degree of lack of democratic legitimacy. Therefore, it is desirable to develop a way for reconsidering Const. Ct. decisions through, for example, initiative by the citizens or their representatives. It should be a way that balances the need for a provisional final authority to decide a constitutional issue, but recognizes the fallibility of the Court's decisions. In a democracy, to err is the people's privilege.