

# EVOLUTION OF THE COLOMBIAN JUDICIARY AND THE CONSTITUTIONAL COURT

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Colombians, guns have given you independence, laws will give you freedom.  
—Francisco de Paula Santander<sup>1</sup>

## I. INTRODUCTION

In 1991, Colombia enacted a new constitution, the thirteenth since Colombia gained independence from Spain. Among many significant changes found in the Constitution is an article establishing a new composition of the country's high courts. Not only has the Supreme Court assumed new responsibilities as the highest court of ordinary law, but a new Constitutional Court was established to decide all constitutional law issues brought before it.

Since its creation, the Constitutional Court has been at the center of controversy, due mainly to decisions it has handed down involving issues of personal rights and freedom of expression. Last spring, the Court declared that any prohibition on one's personal use of cocaine, marijuana, and other drugs went

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1. Known as the "Law Giver," Santander (1792-1840) "fought beside Simón Bolívar in the war for independence and was president of the newly formed Gran Colombia in 1833-37." VIII ENCYCLOPAEDIA BRITANNICA 881 (1976). This proclamation was first published in JOSÉ FÉLIX BLANCO AND RAMÓN AZPURÚA, DOCUMENTOS PARA LA HISTORIA DE LA VIDA PÚBLICA DEL LIBERTADOR (Caracas: La Opinión Nacional, 1876), t. 8, pp. 223-224, and reprinted in LUIS HORACIO LOPEZ D., ED., A LOS COLOMBIANOS: PROCLAMAS Y DISCURSOS 1812-1840 (Bogotá, Biblioteca de la Presidencia de la Republica, 1988), p. 152. The full proclamation reads:

Colombianos: Apenas hemos echado la semilla del bien en una tierra fértil, que empapada de la sangre de muchos héroes, ofrece abundante fruto. Mas no es esto obra de un sólo día; sólo el tiempo y vuestras virtudes os lo pueden proporcionar. Las armas os han dado independencia, las leyes os darán libertad. Palacio de gobierno en Bogotá, a 2 de diciembre de 1821 11°.

[Colombians: Scarcely we have planted a righteous seed in a fertile land that, soaked in the blood of many heroes, offers abundant fruit. However, it is not the work of a single day; but what time and your virtues would furnish. Arms have given you independence, laws will give you freedom.]

The quote is inscribed over the entrance to Colombia's Supreme Court. In 1985 the building was destroyed by fire resulting from the Colombian army's inept assault to "rescue" the justices who had been taken hostage by guerrillas of the leftist M-19 movement. Most of the justices, court officials and visiting lawyers were killed in the conflagration.

against constitutionally guaranteed freedoms of self-expression. The decision touched off a storm of debate throughout the government and around the world, especially in the United States where news of the decision under-scored the U.S. government's position that Colombia has become a *narco-democracy*.

I believe the Court's decision, while poorly arrived at, raises a more significant issue—the new role the judiciary is assuming as a lawmaking body. This power contradicts the high court's traditional role in Latin America of being little more than a rubber stamp for the executive and legislative branches. The lack of a legal tradition of *stare decisis* in this civil law country also raises the issue of where the court, in its new capacity of judicial review and judicial activism, should draw its models and legal fundamentals for making its decisions.

The intent of this article is to present and discuss an extraordinary event in the history of Colombia's civil law tradition. Those interested in constitutional law will appreciate the controversy and confusion the inception of the Constitutional Court has generated in Colombia's conservative legal system, especially when the high court, prior to the new constitution, played only a subordinate role to the other branches.

This article begins with an in-depth discussion of the historical foundations of the Colombian judiciary. It explains the composition of the court before and after the 1991 constitution. This is followed by a description of the Supreme Court, and the other high courts of appeal. The article then concentrates on the Constitutional Court and the impact this Court has had as a lawmaking body and how its influence can permanently alter the balance of political power in the Colombian government. The drug legalization case, while extremely controversial and poorly thought out, illustrates how the Constitutional Court views its singular authority to interpret the Constitution and set new precedent in contradiction to the traditional structure of checks and balances.

The article is presented in a comparative point of view relative to the U.S. high court tradition of judicial review and activism because the U.S. system, and to a lesser extent the French system, has been the chief model upon which the Constitutional Court's authority and composition is based. The manner in which the U.S. model is adapted is very interesting, and at times, almost unbelievable. This article will shed light on how the judiciary in a civil law system is taking on a role of judicial activism not previously tolerated by the other branches of government.

## II. HISTORICAL FOUNDATIONS OF THE JUDICIARY

Inspired by the successful popular revolutions in France and the United States, Colombia, then called Nueva Granada, gained independence from Spain in 1810. Combined Granadine regulars and mercenaries from the United States, under the leadership of Simón Bolívar, defeated Spanish forces at the Battle of Boyaca in the highlands north of Santafe de Bogotá.

Seduced by the promise of these newly established nations so full of liberal and democratic ideas, the founding fathers embarked upon the challenge of building a new nation with little prior experience in self-government. Because of the exigencies of unifying a population displaced by large distances and isolating geography, Bolívar and his compatriots looked to the recently developed models of government in France and the United States. They struggled over whether to choose a centralized unitary government as was established in France, or to adopt a federal union of territories as implemented in the United States. Differences of opinion between factions led by Bolívar and Francisco de Paula Santander, respectively, compelled compromise and adaption from both models of democratic government.

From France, the founding fathers borrowed the notion of individual guarantees of a bill of rights as appeared in the *French Declaration of the Rights of Man and of the Citizens*, the concept of separation of powers and the role of the judiciary.<sup>2</sup> From the United States, the Colombian drafters took the concept of a written constitution, the bare text of the Presidential system and the structure of the judiciary; what was not expressly written in the text of the U.S. Constitution was not taken, however.<sup>3</sup>

While the new government grappled with the intricacies of the other political systems, the Spanish law, as Eder noted, remained in force, and the practices of the courts and the modes of Spanish legal thinking continued with little change until the adoption of its own codes later in the 19th century that were modeled after the Code of Napoleon.<sup>4</sup>

The battles for attaining an ideal model and identity has not proven easy, for Colombia has produced thirteen constitutions to date.<sup>5</sup> Taken together, the constitutions are of great importance, for they furnish the historical basis for the

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2. Antonio Narino published a translation in Bogotá in 1793. See generally Phanor J. Eder, *Judicial Review in Latin America*, 21 OHIO ST. L.J. 570 (1960).

3. Indeed, the U.S. Constitution does not expressly provide for judicial review or how checks and balances should operate. Though the function and meaning has evolved over time, these elements of government were unknown to Colombia's founding fathers.

4. Eder, *supra* note 2, at 571.

5. Colombia is known as the "Country of Laws," where a new law is enacted for every new idea. Lawmaking might even be analogous to a sport and reflects the degree of instability in Colombia. For comments and explanations, see generally DAVID BUSHNELL, *THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF* (1993). Colombia's constitutions have been as follows: The Act of Federation of United Provinces of New Granada, known as the Constitution of Tunja of 1811; the Constitution of 1821; the Organic Decree of 1828; the Constitution of 1830; the Fundamental Law for New Granada of 1831; the Constitution of 1832; the Constitution of 1843; the Constitution of New Granada of 1853; the Granadan Confederation Constitution of 1858; the Pact of Union of the United States of Colombia of 1861; the Constitution of the United States of Colombia of 1863; the Constitution of 1886; and the Constitution of 1991.

endless difficulties of today's nation in which the judiciary plays such a complex role.

#### A. *Establishment of Self-Governance*

Understanding the differences between the U.S. and Colombian judiciaries requires an examination of the historical environment in which each developed.<sup>6</sup> Little in Colombia's colonial background could have prepared the budding nation for a judiciary vested with the power ingrained in that of the United States.<sup>7</sup>

One may divide the development of the Colombian judiciary into two elements as compared to the evolution of the judiciary in the United States. First and foremost is the relationship between the former colonies and the motherland and the extent to which each colony nurtured any form of self-governance.

Unlike the English colonies, the Spanish colonies had precious little exposure to self-government. The English colonies were managed as permanent public and private investments and commercial enterprises regulated as mercantile enterprises to ensure exports of raw materials to England and imports of British goods to the colonies. The colonies afforded the opportunity to alleviate over-population in England, while establishing a rigid northern barrier to further Spanish expansion.

The English Crown governed the colonies through charters by which the Crown, more or less, entrusted the colonists to conduct their daily affairs. The colonists, led by ambitious and capable individuals, enacted many of their own laws to administer colonial commerce and social conduct.<sup>8</sup> Within the first century of occupation, the colonists established their own bicameral legislative bodies, including a lower house of representatives elected by popular vote. The English colonies even had a court of appeals.<sup>9</sup> By the mid 18th century, the American colonies had developed a character distinct from that of England.<sup>10</sup> By the time the English colonists aspired toward independence, they understood the fundamentals of self-government and were prepared to challenge the Crown's authority.<sup>11</sup>

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6. The comparisons drawn are to the U.S. federal judiciary and not to those of any states.

7. The law of Castille was the law for the colonies. Under Castillian law the King was subject to no law, and his powers were absolute. See Eder, *supra* note 2, at 570.

8. The laws could not be contrary to the laws of England and had to be reasonable. See E. DUMBAULD, *THE DECLARATION OF INDEPENDENCE AND WHAT IT IS TODAY* 8 (1950).

9. The Governor's Council, composed of colonists serving in the upper house, performed the judicial functions. Their duties were legislative, advisory to the Governor and judicial. See generally 1 SAMUEL E. MORRISON ET AL., *THE GROWTH OF THE AMERICAN REPUBLIC* (7th ed. 1980).

10. DAN BRAVEMAN, & WILLIAM C. BANKS, *CONSTITUTIONAL LAW: STRUCTURE & RIGHTS IN OUR FEDERAL SYSTEM* 6 (2d ed. 1991).

11. *Id.*

In sharp contrast, the Spanish colonies had little experience at home rule, because the Spanish Crown, through an elaborate and aristocratic system, exerted absolute totalitarian rule from across the ocean. The Council of Indies, appointed by the Spanish monarchy and resident in Spain, was the most important group of advisers. The members served as an administrative board, fount of legislation and appeals court all at the same time.<sup>12</sup> The will of the Council was carried out abroad by royally appointed viceroys and provincial governors whose loyalty and interests were to the Crown, not toward the good of the colonial subjects who were treated as an appanage, the personal property of the Crown.<sup>13</sup> Unlike their English counterparts, the Spanish colonists enjoyed no franchises, immunities or liberties afforded Spanish subjects at home.<sup>14</sup>

If the viceroys were the principal agents of the Crown, the *audiencias*, as the advisors to the viceroys but with direct authority from the Crown, performed the duties of the high court in the colonies. In times of crisis, they assumed supreme executive as well as judicial authority.<sup>15</sup> By reviewing the acts of the royal officers in the colonies, the *audiencias* assumed a type of appellant power to protect royal prerogatives.

Contrary to the English colonies in the New World that could occupy government positions and enjoy social privileges, Spain did not trust the *criollos*<sup>16</sup> in government. While the English colonists were astutely aware of the constraints imposed upon them by the power of Mother England, whenever convenient they relied liberally upon their privileges and rights as Englishmen in their disputes with the Crown. In contrast, the subjects of New Granada were often naively uncertain of their limits and were blindly submissive to the Spanish Crown.<sup>17</sup> Only at the lowest local level of government, called the *cabildos*, did Creoles participate in any form of self-representation.<sup>18</sup> However, not only did the *cabildos* lack autonomy and power, but the institution was "marked by corruption, inefficiency, and abuse."<sup>19</sup>

Following independence from Spain, the former colonists were uncertain as to how to rule themselves. They had no historical, home-grown precedent to do so and no exposure to autonomous or democratic rule except for the *cabildos*

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12. BUSHNELL, *supra* note 5, at 10. See also JOHN H. MERRYMAN & DAVID S. CLARK, *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS* 150 (1978).

13. Eder, *supra* note 2, at 570.

14. For information on the rights enjoyed in the U.S. colonies, see generally DUMBAULD, *supra* note 8.

15. BUSHNELL, *supra* note 5, at 29.

16. *Criollos*, or in English, Creoles, were pure-blood Spanish born in the New World and usually educated in Spain or elsewhere in Europe.

17. Consequently, the Spanish colonists never confronted the royal authority until shortly before the Creole revolt of 1781, known as the Revolt of the Comuneros of New Granada. See BUSHNELL, *supra* note 5, at 27.

18. *Id.* at 12.

19. *Id.*

model of local government, which was dominated by rampant corruption and intrigue.

While the United States developed a distinct system from that of England following independence, the Colombian founding fathers could only shop around for a model upon which to bring forth their new democracy. Consequently, Spanish influence on Colombian law and political institutions persisted until late in the 19th century. From Bolívar's address to the new Congress at Angostura in 1819, it appears that the lack of experience with self-governance and the differences between North American and South American cultures were significant in the Congress' decision to establish a system similar to that which they had been under prior to achieving independence. Changing faces, while leaving things the way they were, seemed the easiest route to take.

The more I admire the excellence of the federal Constitution of [the United States], the more I am convinced of the impossibility of its application to our state. And, to my way of thinking, it is a marvel that its prototype in North America endures so successfully and has not been overthrown at the first sign of adversity or danger. Although the people of North America are a singular model of political virtue and moral rectitude; although that nation was cradled in liberty, reared on freedom, and maintained by liberty alone; and—I must reveal everything—although those people, so lacking in many respects, are unique in the history of mankind, it is a marvel, I repeat, that so weak and complicated a government as the federal system has managed to govern them in the difficult and trying circumstances of their past. But, regardless of the effectiveness of this form of government with respect to North America, I must say that it has never for a moment entered my mind to compare the position and character of two states as dissimilar as the English-American and the Spanish-American. Would it not be most difficult to apply to Spain the English system of political, civil, and religious liberty? Hence, it would be even more difficult to adapt to Venezuela the laws of North America.<sup>20</sup>

#### B. *Changes Brought by Independence*

The second element in the development of the Colombian judiciary concerns whether each country's wars of independence brought real changes in

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20. From the address delivered by Simón Bolívar at the inauguration of the Second National Congress of Venezuela, *reprinted in* 1 S. BOLIVAR, *SELECTED WRITINGS OF BOLIVAR* 173, 179 (H. Bierck, ed., 1951).

the form of a restructuring of colonial wealth, adjustments in social systems, and shifts in political power.

The English colonists had clear reasons for pursuing independence, namely, freedom from interference by the Crown in their own government and freedom of self-determination in all matters of society and commerce. Those reasons were clearly and concisely stated in the seditious slogan, "[n]o taxation without representation."<sup>21</sup>

Even though the framers of the U.S. Constitution were influenced by European thinkers and mindful of English traditions, they created a singularly unique document to fit their own society—a living testament to liberty that has stood the test of time for more than 200 years. The framers tried to balance governmental power with the protection of individual rights, knowing that accumulation of power did not serve the country well. The framers believed that fragmentation of power was the best way to prevent such an accumulation. The drafters of the Constitution founded their fledgling government on three principles: 1) Federalism to divide power between the states and the nation (vertical distribution of power); 2) Separation of powers to divide national government between the branches of government (horizontal distribution); and 3) Checks and balances to prevent any branch of government from becoming too powerful (horizontal).<sup>22</sup>

An important change central to the theme of this article resulted from the former colonists dissatisfaction over judges' dependence on the will of the English State and the Crown. The framers expressly emphasized the importance of an independent judiciary by trying to guarantee independence through lifetime tenure and the protection of judicial compensation.<sup>23</sup>

If the struggle for independence in the thirteen English colonies was triggered by a massive desire for self-government, in Colombia it was provoked by a crisis in the Spanish monarchy and increased antagonism between Creoles and European-born Spaniards.<sup>24</sup> Even though the Spanish colonies had been unhappy with discriminatory and absolutist treatment from the Crown, the real linchpin in the move toward independence was Napoleon's move to replace King Ferdinand VII with Napoleon's brother, Joseph. The subsequent resistance movement in Spain resulted in the creation of *juntas* to rule in the name of Ferdinand until he could regain the throne. In the New World, the subjects of New Granada were constrained to choose between the authority of Ferdinand VII or the usurpation of Joseph. Repulsed by the thought of a Corsican commoner ruling over the Spanish aristocracy, the Creoles decided, likewise, to organize

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21. A. E. HOWARD DICK, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 135-50 (1968).

22. Keith S. Rosenn, *The Success of Constitutionalism in the United States and its Failure in Latin America: An Explanation*, 22 U. MIAMI INTER-AM. L. REV. 1, 12 (1990).

23. *Id.* at 15-16.

24. BUSHNELL, *supra* note 5, at 35.

*juntas* to rule in the name of Ferdinand VII. It was then, for the first time, that Creoles were able to taste the intoxicating sweetness of self rule. Not so surprisingly, factions within the New World aristocracy soon realized that anyone could form a *junta* to rule in the name of the deposed King, and that anyone who wanted separation from Spain could use this opportunity to achieve his agenda.

The Creoles, who by default became the new ruling elite following independence, continued to embrace the colonial system while struggling through numerous attempts (over more decades than they would care to admit) to agree upon the form of government they really wanted. Between 1810 and 1816, they quarreled over whether to create a unitary regime or a federal alliance. The number of constitutions enacted throughout the 19th century reflect this continuing inability to reach a lasting consensus toward the ideal form of government.

Paramount to Creole concerns was the caveat that they must preserve, for themselves, the absolute power over their new country that the Spanish King had formerly exercised over them.<sup>25</sup> I am certain that this fact, alone, doomed Colombia from ever achieving the democratic ideals inherent in the French and U.S. models they sought to emulate.<sup>26</sup>

### C. *Early Manifestations of the Judiciary*

Between 1811 and 1858, Colombian efforts to create a senates of censure gave way to a system of legislative supremacy.<sup>27</sup> The senates of censure were intended to screen the provincial constitutions and annul those laws and administrative acts contrary to the Act of 1811. However, the ultimate power rested in the general council which was reminiscent of the *curia* of medieval England.<sup>28</sup>

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25. This is my point of view, and, although debatable, is supported by Professor Merryman who writes that "while [the Creoles] aspired to oust their political superiors, they were also concerned to keep in their place the mass of the people below themselves . . . ." See MERRYMAN & CLARK, *supra* note 12, at 205.

26. Colombia has long prided itself on being one of the oldest democracies in Latin America. I cannot agree with so noble a description of my birth country. While a democratic government clothed in pinstripes and populism exists on the surface, there lurks an ominous and omnipotent side to the Country of Laws. The attitude of the original Creole oligarchy manifested itself over time in the form of a conservative military elite which to this day runs Colombia with an iron fist gloved in a cloth of shadows. One may discuss every facet of government and law in Colombia; for indeed there is much of interest to discuss and debate. But one must be ever mindful and respectful that the military, as the watchdog of the oligarchy, keeps the civilian government on a short leash and allows it to do only that which benefits the oligarchy's status and self-preservation.

27. J.A.C. Grant, *Judicial Control of the Constitutionality of Statutes and Administrative Legislation in Colombia: Nature and Evolution of the Present System*, 23 S. CAL. L. REV. 484, 489 (1949-50).

28. *Id.* at 491.



At the end of 1811, the United Provinces of New Granada was formed in an attempt at achieving unity. The Act of Federation which created the United Provinces was little more than an expression of hope while Creole factions haggled over, among other things, the type of regime they wanted. The constitutions of most of the provinces, called *departamentos*, expressly provided for legislative supremacy.<sup>29</sup> Such a declaration was carried over in the future constitutions of the fledgling nation.

In 1819, the founding fathers proclaimed the formation of Grand Colombia, and a constituent Congress adopted a rigidly centralist constitution providing for a new convention to consider federation after a ten-year period.<sup>30</sup> The institutions put in place were intended to shield the new Colombians from absolutism while guaranteeing certain individual rights, at least on paper.

While a young United States in North America underwent real social revolution, Colombia remained essentially the same. Colonial institutions survived throughout the centuries either because of the power of vested interests or because the continuing strength of traditional beliefs and *preocupaciones* (attitudes) persisted among the elite.<sup>31</sup>

Following the secession of Venezuela and Ecuador from Grand Colombia in 1830,<sup>32</sup> the present state of Colombia began to emerge. Between 1830 and 1853 Colombia produced three constitutions, all of which preserved a centralist form of government. The nation was divided into *departamentos* which, in turn, were subdivided for administrative purposes.<sup>33</sup> In 1886, the country adopted the constitution that provided the institutional framework that would last until 1991 when the present constitution was drafted.

The 1886 constitution is an exceptional document in terms of how the judiciary would evolve throughout the 20th century. Most significant is the absence of any power of judicial review of enacted statutes. This absence of judicial authority reflects the drafters opinion, echoing Rousseau, that there will

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29. The legislature shall resolve by law or decree the doubts and rivalries that arise as to the limits of legislative, executive and judicial powers conforming faithfully to this Constitution. *Constitution of Tunja of 1811 art. 22, reprinted in id. at 491.*

30. The constitution was modeled closely after the French, via the 1812 Spanish Constitution of Cadiz, because Colombians identified more with the French revolution and its attempts to protect itself against tyranny. Also, the Congress was elected by suffrage that excluded most inhabitants from voting. Venezuela and Ecuador did not vote because they were still under royalist control. See BUSHNELL, *supra* note 5, at 51.

31. This was a term used by frustrated reformists among the general population. See BUSHNELL, *supra* note 5, at 54.

32. *Id.* at 71-73.

33. The *departamentos* are broken down into *provincias*, the *provincias* into *cantones*, and *cantones* into local municipalities. All are units of local government that remain subordinate to the central government in Bogotá.

be no probability, no moral possibility, that unconstitutional laws will be passed.<sup>34</sup>

The political model for the 1886 constitution provided for a balance between national and local governments. This arrangement, considered a great achievement at the time, featured general administrative decentralization and political centralization. The charter is known as the "ultra-centralist constitution" because it strengthened the powers of the president while diminishing the authority of the other branches of government.<sup>35</sup> However, a subsequent amendment in 1910 established a form of judicial review, after nearly three decades of virtual dictatorship and inspired by Tocqueville's *Democracy in America*.<sup>36</sup> The amendment provided that, after hearing the opinion of the Attorney General, the Supreme Court would be entrusted with guardianship of the Constitution and empowered to decide definitely as to the *exequibilidad* (enforceability) of the Legislative Acts vetoed by the government, or laws and decrees challenged by any citizen as unconstitutional.<sup>37</sup>

The constitutional questions could be raised in three ways: 1) *Inter Partes*—in the course of ordinary litigation as is done in the United States; 2) *Acción Popular In Rem*—permitting any person, regardless of standing, to bring an action challenging a statute directly to the Supreme Court (which is not used in the United States); and 3) *Veto Presidencial*—in which the Supreme Court must rule definitively as to the enforceability of bills that have been vetoed by the president as unconstitutional.<sup>38</sup>

Under its power of judicial review, the Court invalidated several statutes on the grounds that they disturbed rights vested under contracts or under prior law, interfered with freedom of contract or with freedom of speech, took private property for public use without adequate compensation, appropriated money for other than a proper government purpose or granted special privileges in defiance of the principle of equality before the law.<sup>39</sup>

The present constitution, drafted in 1991, established a more balanced distribution of power among the three branches. This near equilibrium was reached by trimming certain powers from the dominant executive branch and investing the legislative and judicial branches with more authority.<sup>40</sup> The influence of both the U.S. and the French constitutions can be seen within the Articles of the new constitution, the most significant being the introduction of the

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34. Grant, *supra* note 27, at 499.

35. JENNY PEARCE, COLUMBIA: INSIDE THE LABYRINTH 24 (1990).

36. Tocqueville was widely translated and published throughout Latin America. See Eder, *supra* note 2, at 571.

37. 1886 COLOM. CONST. art. 214.

38. *Id.* art. 151(4).

39. Eder, *supra* note 2, at 591, citing Grant, *supra* note 27.

40. Donald T. Fox & Ann Stetson, *The 1991 Constitutional Reform: Prospects for Democracy and the Rule of Law in Colombia*, 24 CASE W. RES. J. INTL L. 139 (1992).

Constitutional Court and other courts of specific jurisdiction. Probably the most significant provision effecting the judiciary is the shifting from a system in which judges brought charges against defendants, the so-called inquisitorial system, to a prosecutorial system modeled on the common law adversarial system in the United States where charges are brought by a government prosecutor. Henceforth, the *Fiscalia General De La Republica* (Prosecutors General's Office) must investigate crimes and bring charges before the courts against alleged offenders.<sup>41</sup>

#### D. *The Judicial Branch and the Present Constitution*

Clearly, the U.S. Constitution has influenced the organization of the Colombian government, and the U.S. court system has been regarded as an inspirational model for organizing the courts, especially that of the Supreme Court. The irony, however, lies in the fact that while the institution was literally copied, it was accomplished with neither genuine understanding nor practical insight of the Supreme Court's function in U.S. government. Rather, the manner in which the model was adapted to fit the Colombian socio-political values resulted in implementation of a very different interpretation of the function of the Supreme Court and the lower courts.

The problem, in my view, is analogous to fitting a square peg in a round hole, for while the U.S. judicial organization was a model, its function could not easily mesh with the legal philosophy and tradition of Colombia's judicial system which is based on two sources radically different from those of the United States. First, Colombia's legal system is based on Roman Law as it was initially adopted in Spain, France and Germany.<sup>42</sup> Second, Colombia imported the French doctrine of separation of powers, as well as France's theory of sources of law. These philosophies differ substantially from the U.S. system of reciprocal checks and balances.

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41. This system elicits great concern because the army and police forces still have considerable judicial police functions. Their authority not only endangers human rights and due process guarantees, but it leaves these agencies free from accountability because the Prosecutor General does not have disciplinary power over them. *See generally*, Human Rights in the World: Colombia, Impact of the New Constitution, THE REVIEW: International Commission of Jurists No. 47 (1991).

42. This pollination of the Roman law is known as the Romano-Germanic family of legal systems and is referred to as the civil law system by legal scholars in the United States and other common law countries. Such a system evolved from the final compilation of the private law of the Roman Empire known as *Corpus Juris Civiles* by Justinian. The *Corpus Juris Civiles* was treated as imperial legislation manifest in the authority of the Pope and the Emperor. *See* JOHN MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 7-14 (1969).

The separation and distribution of governmental power in Colombia amongst distinct institutions, in an effort to preclude intrusion upon one another, established a judiciary subservient to the role of the legislative and executive branches, which in turn were considered more important than the judicial branch. No control whatsoever by the judiciary was allowed over the actions of the other governmental entities, while both legislators/public administrators and the executive branch *did* have their own internal controls. As such, there was a rigid anti-judicial review attitude. Colombia's interpretation of separation of powers established the supremacy of the law as proclaimed by the legislative bodies and the job of judges in a supporting role was only to articulate and assiduously apply such law.<sup>43</sup>

Even if the French notion of separation of powers grew out of conditions peculiar to France's own struggle, they were per se readily adaptable to Colombia's experiences because both legal systems evolved from Roman law rather than from the common law milieu. If the central purpose of the French Revolution was to dissolve and destroy the deeply rooted feudal regime in which the judges—*parlements*—had exerted great control,<sup>44</sup> it is understandable then, that the French doctrine of separation of powers should provide for a judiciary subservient to the other branches.

Even assuming that Colombia had not faced the multifarious problems with judges that France has, one could argue that, in light of the conflicts with their own judiciary, the manifest distrust of the Colombian people toward their courtroom guardians is fitting based upon this grievous history. Surely the ravages of the Inquisition in the New World set a historical precedent for popular revulsion of the *carte blanche* given judges which they asserted to allow abuses against innocent individuals in the name of combating heresy.<sup>45</sup> Consequently, the implementation of the French notion of the separation of powers within government placed totalitarian authority in the hands of the executive branch. Considering the historical precedent, doing likewise in Colombia seemed the logical course to pursue.

The theory of the sources of law imported from France was based on the idea that law emanates only from the Congress through legislation or from the President through the exercise of decree powers, and that the judge can only apply such law. Under this notion a case decided by the courts does not become a binding precedent for later cases. Later cases do not consider prior cases, but rather the laws duly enacted by the political branches. Whereas in the United

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43. For an expansion of the French historical background on separation of powers, see MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 190 (1989).

44. Mike Bothwell, *Nicolo and the Push to 1992—The Evolution of Judicial Review in France*, 1990 B.Y.U. L. REV. 1649, 1651 (1990).

45. The Constitution of 1821 officially abolished the Inquisition. See BUSHNELL, *supra* note 5, at 53.

States the decisions of the court must be followed, the doctrine of stare decisis was and remains inapplicable in Colombia.

### E. *Structure of the Highest Courts*

With the ratification of the 1991 Constitution, the structure of the judiciary changed dramatically.<sup>46</sup> The Articles pertaining to the courts only pretend to strengthen one of the weakest institutions in the entire Colombian political system. No single phenomenon can explain the reasons for the judicial branch's ineffectiveness in preserving the rule of law and, most importantly, in safeguarding basic human rights.

Unlike the United States, Colombia is a unitary political community whose existence and power are derived from the general government.<sup>47</sup> Title VII of the Constitution addresses the judicial branch. Under this section the judicial branch is composed of *la Corte Suprema* (the Supreme Court), *el Consejo del Estado* (Council of State), *la Corte Constitucional* (Constitutional Court), *el Consejo Superior de la Judicatura* (Higher Council of the Judiciary), *el Fiscalía General de la Nación* (Prosecutor General) and *los Tribunales* (Tribunals).

Also, unlike the United States which has a dual state and federal court structure, Colombia is composed of a single national government with a single set of uniform laws. Even though the Colombian system appears to be simple, the high court, as illustrated in the following table, is divided between the Administrative Court, the Supreme Court which serves as the high court of ordinary jurisdiction (encompassing labor, civil, criminal, commerce, and family), the Constitutional Court and the Ethics and Jurisdiction Conflicts Courts.

One of the most significant changes in the judicial branch is the creation of the Constitutional Court. Because of the introduction of this entity into the judicial fabric of the high court, all pre-1991 Supreme Court decisions and judicial branch functions should be judged under parameters different from those of the post-1991 Constitutional Court.

In addition, there are differences between how the United States and Colombia qualify judges to sit on the high courts. For instance, a judge of the Colombian Supreme Court, Constitutional Court or the Council of State must be a lawyer *and* a Colombian citizen by birth.<sup>48</sup> The 1991 Constitution also requires the individual to have a minimum of ten years experience in either the judicial

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46. After several years of escalating violence resulting from guerrilla warfare, drug trafficking, political turmoil, right-wing paramilitary groups and other widespread violence that allowed the executive branch and the military to veil themselves in totalitarian powers, Colombia resolutely promulgated a new social contract.

47. COLOM. CONST. art. 1.

48. *Id.* art. 232(1)(2).

branch, the public ministry, in practice as an attorney or as a law professor at an officially recognized institution.<sup>49</sup>

#### F. *The Supreme Court*

Prior to the 1991 Constitution, the Supreme Court was the highest court for all legal, civil, criminal and constitutional issues. After 1991, the Supreme Court was limited to ordinary jurisdiction.<sup>50</sup> One of the reasons given for relieving the Supreme Court of hearing and deciding constitutional issues is that this institution had always been a victim of intervention and manipulation by the other two branches.<sup>51</sup>

The Constitution of 1886 had established an independent judicial branch. However, at no time during the existence of the Supreme Court did it enjoy independence and autonomy from the other branches of the government as perceived and conducted in the United States. The Court's authority was curtailed by the immense command that the executive branch acquired through the special powers given to it during a state of siege.<sup>52</sup> As Grant noted in 1948:

The Constitution of 1886 and its implementing statutes produced a new combination of features drawn from the many previous systems, with a few additions. Colombia had had sufficient experience in this field to demonstrate the need to concentrate authority, yet those in control feared to give too much power to the Supreme Court.<sup>53</sup>

It is important to avoid equating the Supreme Court's inaction with a lack of judicial independence whenever a question of a political nature arises. Such

49. *Id.* art. 232(4).

50. Prior to 1991, the Supreme Court had constitutional *salas* (chambers). After 1991, that authority was assumed by the Constitutional Court itself. Ordinary jurisdiction includes criminal and civil appeals, but excludes all constitutional issues.

51. The following presidential decrees represent a few of the many invasions on judicial autonomy by the executive branch: 1) Decree 3519 of November 9, 1949, established that the decisions given by the court with regards to extraordinary decrees given by the President and which were challenged for constitutionality had to be decided by three-quarters of the votes of the full court; 2) Decree 1762 of 1956 created the chamber of constitutional business in charge of resolving constitutional challenges and gave the government the authority to appoint its members; and 3) Decree 3050 of 1981 attempted to establish a qualifying majority in decisions that the court would make on constitutional issues, thereby obstructing any declaration of unconstitutionality.

52. Except for brief periods, Colombians have lived under a state of siege for almost forty years. Pursuant to the executive declaration of a state of siege, the President has special powers, including many that, under normal circumstances, are of the exclusive providence of Congress. Consequently, the President cannot only issue legislative decrees, but he can limit civil liberties and create special tribunals.

53. Grant, *supra* note 27, at 501.

passivity is due to Colombia's scrupulous tradition of respecting separation of powers as the drafters of the first constitution adopted the concept from France, and as it is still preserved in today's Constitution. Judges are submissive to the law; they do not make the law. This fact should not be judged by American observers as a shortcoming, especially when in the United States the Supreme Court is viewed as "the nation's balance wheel, continually tilting the flow of power away from one sufficiently powerful branch of the national government to another and to or from the individual and the states."<sup>54</sup> The point to stress in order to assess the merits of the Colombian approach is not whether a judge's decision must become law, but whether such passivity has curtailed the balance of powers.

The role of the military courts relative to the Supreme Court is germane to this discussion and should not be overlooked. Through a possibly coerced presidential decree, civilian courts relinquished considerable power to the military tribunals and to the National Police authority.<sup>55</sup> The 1978 executive action extended the power of the military court to include jailing people for national security offenses. The decree also authorized the military court to decide conflicts of competence between ordinary and military courts. In 1986, military jurisdiction was further extended to give the military criminal jurisdiction over civilians for illegal arms possession<sup>56</sup> and crimes involving drug trafficking.<sup>57</sup> Civilian investigative judges were not barred from investigating crimes in which the military was implicated, but only the military could prosecute, and it was extremely difficult to obtain probative evidence from a predictably uncooperative military.<sup>58</sup> Furthermore, the Disciplinary Tribunal always upheld the army's jurisdiction.<sup>59</sup> Only in 1987, after several people were tortured and disappeared, and after international organizations denounced such situations,<sup>60</sup> did the Supreme Court challenge the constitutionality of the military courts,<sup>61</sup> holding

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54. CONGRESSIONAL QUARTERLY, *THE SUPREME COURT: JUSTICE AND THE LAW* 2 (Michael D. Wormser ed., 1983).

55. *Id.* at 6, citing the National Security Statute decreed by President Turbay in 1988. This appeared in the form of two decrees, Legislative Decree 1923 and Legislative Decree 2347 arts. 8 and 9, respectively.

56. Decrees 1056 and 1058, respectively.

57. Decree 3671.

58. *Human Rights In Colombia As President Barco Begins*, AMERICAS WATCH REPORT (The America's Watch Committee, New York, N.Y.), Sept. 1986, at 50.

59. *Id.* at 38.

60. The procedures authorizing the army to try civilians for arms possession was a way to sweep up so-called insurgents. Yet, such procedures sacrificed a defendant's procedural protections in favor of expediency. Military jurisdiction, by its very nature, threatens the internationally guaranteed right of every Colombian to be tried by competent, independent and impartial tribunals. *Id.* at 39.

61. This Supreme Court had authority to declare laws unconstitutional. See BUSHNELL, *supra* note 5, at 257.

that "the abnormality of times cannot be combated by creating abnormalities in the judicial structures of the Republic."<sup>62</sup>

In the same year, the Supreme Court also declared itself competent to settle disputes of jurisdiction between military and ordinary courts. Furthermore, the Court established that ordinary courts should have jurisdiction over cases involving crimes committed beyond the scope of military service.<sup>63</sup> Nevertheless, during 1988 and 1989, Colombia's continuous state of violence, due to the drug war and guerrilla insurgencies, led the government to again issue several emergency decrees. The Supreme Court struck down sections authorizing the military to conduct searches and seizures and to make arrests without a judicial warrant. However, the Court left standing the authorization of the military to act as an auxiliary to the judicial police. To confront a general strike brought on by civil unrest, the executive branch suspended legal recognition of trade unions by a summary proceeding, allowed the arrest of demonstration leaders and imposed censorship on news about the strike. The Supreme Court invalidated parts of the decrees, allowing the arrest of demonstration leaders. Yet it upheld the constitutionality of the decree that allowed the government to suspend the legal recognition of trade unions and to impose censorship over the media.<sup>64</sup>

As is the practice in the United States, most Supreme Court appointments result from political pressure. Justices are chosen by sitting members of the same Supreme Court from a list of names submitted by the *Consejo Superior de la Judicatura* (Superior Council of Judicature).<sup>65</sup> Justices sit for eight years and cannot be re-appointed.<sup>66</sup> Causes for removal include bad behavior, unsatisfactory performance and attainment of the age of mandatory retirement.<sup>67</sup>

In Colombia, even if observers from the United States think otherwise, the new Constitution establishes several provisions to restore judicial independence. It includes:

[A] guarantee of noninterference with judicial proceedings and the affirmation that judges shall be subject only to the rule of law. More specifically, the danger of encroachments upon the jurisdiction of the ordinary courts by the military tribunals is countered by the clearly

62. Fox & Stetson, *supra* note 40, at 151 (quoting Decision de 5 Mar. 20 1987 (Colom.), Sala Plena, 16 Jurisprudencia y Doctrina 492 (May 1987)).

63. *Id.*

64. Decrees 180, 182, 2201 and 2204, respectively. For further information, see generally *The Killings In Colombia*, AMERICAS WATCH REPORT (The America's Watch Committee, New York, N.Y.), Apr., 1989.

65. COLOM. CONST. art. 231.

66. *Id.* art. 233. In the Constitution, the language used for appointment is elected. This is a good example of how words, when translated literally, can be misleading. In this case, the election of justices is done by members of the Court selecting and appointing justices to sit on the court from a list of aspirants.

67. *Id.*



stated and more narrowly defined jurisdiction of the military courts to adjudicate crimes committed by members of the armed forces in active service and in relation to military service. In addition, the President's formerly unchecked power to declare a state of siege is curtailed by the provision establishing a role for the Constitutional Court in reviewing the constitutionality of the President's decrees for governing during the state of siege.<sup>68</sup>

Colombia's ordinary courts do not use their powers as do their counterparts in the United States. In fact, a Colombian judge would likely conclude that the U.S. courts overstep their judicial role and, at times, supersede the intent of the Congress and the President. To a U.S. observer, Colombian courts, especially the Supreme Court, are not truly independent because they hesitate in dealing with political power. Under the 1886 Constitution, for instance, whenever a question of a political nature arose, the Supreme Court usually disqualified itself by taking the position that the Court did not judge the constitutionality of the legislative activity and that the courts were compelled to respect separation of powers.

Also prior to 1991, Colombian courts hesitated to declare presidential actions unconstitutional. The Supreme Court often found the President's actions to be within presidential discretionary power. The Court not only allowed broad delegation of power by the legislature to the President but condoned the broad interpretation of the President's ordinance power.

Colombia tried to adopt a common law institution that is, per se, the least adaptable to its positivist ideology.<sup>69</sup> In the United States judicial system, judges are trusted individuals who exercise an active role in government. They not only check the other two branches to balance and distribute power among government, but they also expound the Constitution through dynamic, yet valid, interpretations.<sup>70</sup> In such a system, judicial decisions are the great source of law. The judiciary functions as an institution from which law emerges. It is a body

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68. *Id.*

69. One could argue that one of the most influential positivists in Colombia was the Viennese jurist Hans Kelsen. Among the principles that affected Colombia's legal development are that all law derives from the will of the State, and the State exists only and so far as it expresses itself in the Law. Therefore, the State is the subject and object of its norms. The Law constitutes the State as a normative entity and the State is the Law as normative activity. Positive Law is the one imposed by the Organs of the State. Organs of the State are those established as such by the Law. Only those laws can be enforced by the courts. Law is of coercive and autarchic character. Law is the means of how a society attains its ends. Under Kelsen's propositions, the Law is a norm with a hypothetical character (that which is the will of the State). A norm has a condition and a sanction. See HANS KELSEN, *PURE THEORY OF LAW* (Peter Smith, Trans., undated).

70. The judicial role was articulated by Chief Justice John Marshall in *Marbury v. Madison*, 5 U.S. 137 (1803). "It is emphatically the providence and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Id.* at 177.

whose decisions can limit, invalidate and create rights. Its decisions can even modify actions of both political branches.

In contrast to such an active position by the U.S. judiciary, Colombia's judicial branch is extremely passive and formalistic. Ordinary judges are not trusted. Therefore, their function is limited to declaring whether or not a given law is legal, provided that a law has violated the procedures by which the law should be established. In this sense, the Supreme Court is not competing with the parliament, but it is its logical complement.<sup>71</sup> This difference makes it difficult to envision a U.S. type of Supreme Court in a country where the power of the judges is excessively limited by their duty to only apply the positive law. The meaning of the law becomes the key to further understanding the difference between the judicial function of the Supreme Court in both countries.

"Law" in Colombia is only legislation, or executive decrees with a legislative character. Once it has been interpreted by the legislature, law has general binding effect. Judges are then compelled to apply that interpretation to particular cases.<sup>72</sup> Consequently, a judicial decision has effect only in the particular case brought before the Court. Therefore, a court's decisions do not become a general rule applicable to other cases.<sup>73</sup>

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71. JUAN MANUEL CHARRY URENA, *JUSTICIA CONSTITUCIONAL: DERECHO COMPARADO Y COLOMBIANO* 103 (1993).

72. COLOM. CONST. art. 230.

73. Contrary to the dogma that a judicial process in civil law systems is nothing more than automatic application of laws, with no interpretation or scholarly expression, civil law judges do engage in scholarly interpretation of law. A statute needs a judicial interpretation to supply a meaning for laws that are unclear to the lawyers, the parties or even to the judges. Codes are not self-evident in application. Courts usually have to fill *lagunas* (gaps) of law, clarify obscure expressions and reconcile conflicting statutes. In any event, a judge is charged with applying the law and cannot dismiss decisions for a lack of legal clarity. If the meaning of the law is unclear, the judge still must find the meaning to apply the law. To facilitate the judicial process, the system provides directives to the judges. A judge follows the rules of interpretation given to him or her in the Civil Code, arts. 25-32. In sequence, a judge can look at the intention or spirit of the law which is manifested in the law *per se* or in its history. If still unclear, the judge can use analogy with other laws that deal with the same obscure point. Scientific or artistic words have the meaning of their respective fields, unless it is clearly expressed that they have different meaning. If the law is still unclear, the judge looks at the general spirit of the legislation and principles of equity. After these steps have been followed, the judge finds the meaning and applies it to the case. Not to apply a law with the "excuse of silence, obscurity or insufficiency of the law a judge would be held responsible for the negation of justice." Law 153 of 1887, art. 48. Then it would be fair for a U.S. observer to say that what these judges do is find judicial justification of the law given by the political branches. But they cannot deny that these judges engage in a difficult and complex process of interpretation on a level similar, if not identical to, that of a U.S. judge.

Under the 1991 Constitution, law can only emanate from the political branches—never from the judiciary.<sup>74</sup> Judges can only apply those rules formulated by both the legislative and executive branches, and judges' decisions on prior cases are discarded as sources of law or as aids in interpreting the law. Consequently, in order for Colombia to tailor the U.S. institution of the Supreme Court to its own civil law tradition, Colombia found it necessary to make adjustments so profound that today's Court bears no semblance to its model—except in name.

In contrast to the U.S. Supreme Court, Colombia's Supreme Court reviews neither administrative nor constitutional controversies. Such matters become the jurisdiction of the administrative high court (the Council of State) and the Constitutional Court, respectively. In addition, Colombia divides the Supreme Court into chambers.

When the Supreme Court acts as the Court of Cassation,<sup>75</sup> it considers only questions of law and never of fact. As such, its role is to ensure consistency of the judicial decisions by nullifying laws promulgated in violation of legal procedure. The judge must value the validity of the law in the face of a superior law—the Constitution. Cassation supposes the omnipotence of the positive law as a manifestation of the supreme will of popular assemblies.<sup>76</sup>

The Supreme Court only considers that part of the lawsuit dealing with the specific question of law. It is considered an extraordinary recourse to decisions rendered in violation of law. A petition is rejected when the Court decides that the point of law has been correctly decided. If the Court decides that the lower court made an error of law, it will quash its decision and send the dispute back to a Court of Rehearing. This is a new court of the same level as the one from which the quashed decision came. The Court of Rehearing has jurisdiction over the entire dispute, hears the entire case and has the right to follow or disregard the position of the Court of Cassation. If the Court of Rehearing decides to adopt the Court of Cassation's point of view, then the litigation ends, and the Court of Rehearing's decision is final. On the other hand, if the Court of Rehearing refuses to follow the Court of Cassation, a new petition to the Court of Cassation can be taken. In this case, the full Court of Cassation has jurisdiction. If the full court quashes the second petition, it sends the case back to a Court of Rehearing. Only then must the Court of Rehearing yield to the Court of Cassation, and the opinion of the full court must be followed by the Court of Rehearing. Contrary

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74. Congress has the responsibility not only of enacting laws but of interpreting, amending and repealing them. COLOM. CONST. arts. 114, 150. The President has the power to issue decrees, resolutions and orders. *Id.* art. 189(11). These functions, in both political branches, affirm adherence to the principle of judicial submission to the other political branches. The creation of the Constitutional Court, if intended to make this court a law making body, contradicts the language of the present Constitution and goes against the established legal tradition.

75. COLOM. CONST. art. 235 (1). Cassation means to tear or break.

76. URENA, *supra* note 71, at 105.

to what a U.S. observer may conclude, who by now is so thoroughly confused by this procedure, the decision of the Court of Cassation does not have *erga omnes* effect. Such a decision only binds the case in which it is rendered. If, however, after the decision is rendered the same issue is raised in any other court, the Court's decision is only *doctrinal probable* (probable doctrine) persuasive—never obligatory.<sup>77</sup> Any decision of another court can be brought before the Court of Cassation.<sup>78</sup>

The Supreme Court also has the power to judge high public officials such as President, Ministers, Prosecutor General, and others.<sup>79</sup> Additionally, the court may investigate and try members of Congress.<sup>80</sup>

### G. *The Council of State*<sup>81</sup>

Bolívar created an administrative body based on the French model called the *Consejo del Estado* as part of his liberation campaign.<sup>82</sup> As in France, the Council's role was primarily advisory, although over time it became

77. Law 169 of 1896 art. 4 states "[T]hree uniform decisions given by the Supreme Court in Cassation on the same point of law constitute probable doctrine, and the judges should apply them in analogous cases. However, the Supreme Court may change doctrine if it judges the previous decisions to have been erroneous."

78. Many lawyers are never made aware of court decisions because court reports are selective and incomplete. Colombia lacks the resources that the United States enjoys with the various official and unofficial annotated publications of Supreme Court decisions. Colombia produces only the official LA GACETA JUDICIAL (THE JUDICIAL GAZETTE), in which only those decisions appear that the Court permits to be published. Therefore, the decisions are subject to irregular publication, unbound, and with neither topical digesting nor case headnotes, as is the norm in the United States. The published decisions can have annotations to texts by legal writers and references to applicable codes. However, as is done in the United States, there is special citation format for the Court's decisions as follows: The source court followed by the date of the decision, followed by the volume and page number of the Judicial Gazette in which the decision is published. Lawyers tend to rely more on the treatises and annotated versions of the codes, current laws and decrees in guiding them in their practice.

79. COLOM. CONST. art. 235(2).

80. *Id.* art. 235(3).

81. Even though this Institution remains the same as it was under the 1886 Constitution, my discussion is constrained by limitations on having access to the research materials necessary for more authoritative citation.

82. EDUARDO ROZO ACUA, SISTEMA CONSTITUCIONAL COLOMBIANO 178-80 (1982). Establishing a separate tribunal to decide *erga omnes* the legality of administrative actions (court decisions not just limited to the parties but with general effects over the nation) was an acceptable solution to the traditional approach taken by civil law countries. The intention may have been to preserve the strict notion of separation of powers by preventing ordinary courts from reviewing the actions of the political branches, yet at the same time, permitting *erga omnes* effect without *stare decisis*. See MERRYMAN, *supra* note 42.

adjudicatory.<sup>83</sup> Today the Council is the court of final review of administrative complaints. The Council is also the supreme consultative body of government in matters of administration, and its opinion must be heard in all cases determined by the Constitution and the laws.<sup>84</sup> The functions of the Council are: 1) To be the highest Court in administrative actions; 2) To be the government's advisory body on administrative matters; 3) To declare null or unconstitutional government decrees when the Constitutional Court does not have jurisdiction; 4) To prepare and present projects of constitutional reform and of legislative bills; and 5) To know of the process of jurisdictional conflict among administrative courts.<sup>85</sup>

As with the Supreme Court justices, judges of the Council are chosen (appointed) by members of the Council from a list of names submitted by the Council of the Judicature. The Council hears all challenges to administrative acts and decrees.<sup>86</sup> The challenges can be either on constitutional grounds or based on any principle of civil administrative law.<sup>87</sup> In comparison, these actions resemble cases arising out of federal or state tort claims acts in the United States.<sup>88</sup> The Council is divided into various *salas* (chambers): 1) Sala de lo Contencioso;<sup>89</sup> 2) Sala de Consulta,<sup>90</sup> and 3) Sala de Gobierno. The Sala de lo Contencioso and Sala de Consulta form the Council en Pleno.<sup>91</sup> The Council meets en banc (as a full court) whenever requested to do so by the President, the Vice-president when the President is absent or by three or more *Consejeros* (members of the Council). The fact that no one has supervisory jurisdiction on the decisions of the Council involving issues of constitutional law creates a type of double jurisdiction on constitutional matters.

The Council voids or annuls government actions when they are challenged for their legality. This may occur when an *official publico* (government official) acted outside his or her jurisdiction, did not follow the legal procedures or committed a legal error. These attacks describe what is known in the United

83. Over time the Council's role developed into an adjudicatory function. Such development was recognized by the 1886 Constitution, in which Article 141(3) provided for the Council to sit as the nation's highest administrative court. This has been preserved by the 1991 Constitution.

84. COLOM. CONST. art. 237(3).

85. COLOM. CONST. art. 237, and Administrative Law Code art. 128.

86. COLOM. CONST. art. 237(3).

87. According to the code of administrative law, anyone injured by an act of the executive can determine the procedure to follow. Usually these cases deal with issues of taxes, expropriations, admiralty matters, controversies between the nation and its *departamentos* or municipalities, cases involving public or waste lands, torts caused by governmental institutions or officials and other cases specified by law.

88. See Federal Tort Claims Act of 1946, 28 U.S.C. § 1346(b)(c) (1992).

89. The Chamber deals with actions under administrative law.

90. The Chamber of Advisorial character.

91. The full Court.

States as abuse of power and the ultra vires doctrine. A decision of the Council as to an administrative decree, where adverse to the government, causes the law or decree to have force that becomes binding precedent for later cases (that is, the matter is conclusive).<sup>92</sup>

Beneath the Council of State are administrative tribunals in each territorial *departamento* (department). The *tribunales administrativos* (administrative tribunals) are the courts of original jurisdiction, and the *tribunales administrativos de apelación* are the appellate courts. The function of these tribunals is to hear complaints by citizens against officials of the executive branch and other public officers.

#### H. *The Constitutional Court*

One might inquire as to why Colombia wanted to create a special Constitutional Court by taking powers away from the existing highest court of appeal, the Supreme Court, which already had jurisdiction in constitutional matters. Constitutional jurisdiction might have been granted to the Supreme Court alone, thereby making all decisions of constitutionality binding *erga omnes* on all inferior courts.

Likewise, the new Constitution could have made the Supreme Court a more manageable and less divided structure.<sup>93</sup> More importantly, the Court could have been given discretionary power, such as a certiorari mechanism, to refuse jurisdiction. Doing so would have allowed the Supreme Court to put more thought into the issues brought before it.

What the framers did instead was to create a Constitutional Court to handle all matters of constitutional jurisdiction. While the idea is probably sound, the controversy and intrigue emanating from the decision to establish the Constitutional Court have exceeded all foreseeable expectations as to the level of judicial activism displayed by the justices. In retrospect, the power given to the Court appears to have been ill-conceived and poorly orchestrated. The justices of the Constitutional Court assumed the task of fulfilling their duty to the new Constitution by elevating themselves to a higher sense of discretion. In so doing, they tried to copy a type of judicial review both foreign and unfamiliar to them and the Colombian legal tradition.

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92. The Councils' decisions and some decisions of administrative tribunals, are published periodically in the ANUALES DEL CONSEJO DEL ESTADO.

93. The Court was divided in four separate panels, each comprised of six justices. The panels were: 1) penal; 2) civil; 3) laboral; and 4) constitutional. The Court sat as a full bench only when a case or controversy involved a constitutional challenge. See Luz E. Nagle, *The Rule of Law or the Rule Fear: Some Thoughts on Colombian Extradition*, 13 LOY. L.A. INTL. & COMP. L.J. 851, 855 (1991).

## I. *Genesis and Intent*

The *Corte Constitucional* (Constitutional Court) is modeled after the French *Conseil Constitutionnel*, via Spanish adaptation, and is Colombia's highest court entrusted with guarding the integrity and supremacy of the Constitution.<sup>94</sup> Unlike the United States Supreme Court, the Constitutional Court has no jurisdiction at all in ordinary cases; its jurisdiction is exclusively on constitutional matters. What should surely be viewed as an overburdening drawback, the Court is constrained to hear every case presented to it, while the U.S. Supreme Court, through the use of certiorari, only hears those cases it chooses to accept.

In order to offer the nation a court with more representation and legitimacy, the three branches of government collaborate in the Court's composition. Each branch elects one-third of the members of the Court. The Senate appoints the justices from a list of three members chosen by the President, Supreme Court, and Council of State. Each appointment lasts for eight years.

The creation of the Constitutional Court is quite revolutionary for it manifests significant changes to the legal system, including a textual recognition of the Constitution, at least on paper, as the fundamental and supreme law of the land that must be protected.<sup>95</sup> While in the United States the supremacy of the Constitution was established by judicial interpretation,<sup>96</sup> in Colombia it was a result of express language. In this sense, Colombia's Constitution matures into special law that cannot be treated like ordinary law. Accordingly, as is the case in the United States, the Constitution is interpreted as a matter of principle, with expansive interpretive flexibility depending on the philosophical views of the sitting justices. What results is that the justices of the Court may use their power in a manner analogous to Chief Justice Marshall's observation, to expound a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.<sup>97</sup>

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94. Under the 1886 Constitution, the Supreme Court was entrusted only with guarding the integrity of the Constitution, while the 1991 Constitution entrusts the Constitutional Court with guarding both the integrity and supremacy. COLOM. CONST. art. 241.

95. It is fundamental to understand that prior to 1991 the constitutions of Colombia were treated like other statutes. This ordinary law was viewed as a series of rules that served as a checkpoint for the decisions of judges. For this reason, unlike the U.S. Constitution, the Colombian constitutions were not interpreted as a matter of principle or with great flexibility. The constitutions were never what the judges said they were, but rather what Congress said they should be.

96. *Marbury v. Madison*, 5 U.S. 137 (1803).

97. *McCulloch v. Maryland*, 17 U.S. 316, 407, 415 (1819).

### J. *Judicial Activism*

Recent decisions of the Constitutional Court illustrate how it actively began to enforce and extend uniform standards of the Fundamental Rights against not only the government, but also against private individuals.<sup>98</sup> This development could be compared to how the U.S. Supreme Court has expanded and enforced the Bill of Rights against the federal and state governments.

The Court also represents a radical departure from the traditional notion of the separation of powers because it assumes a more active and aggressive role of checks on the political branches. For the first time, the system places confidence in the judges and entrusts them to elucidate and declare the validity of the acts or omissions of the political branches with regard to a superior norm. As Urena notes, the Constitutional Court reveals itself as the one which controls the acts that rule the life of the Nation because the law is imposed upon the administration and justice.<sup>99</sup>

The justices are empowered to monitor the political branches and declare whether a given law is constitutional as a matter of principle. Under this view, where there is no express demonstrable authorization to the court, the justices assume jurisdiction by using principles of law, even if doing so gives the appearance of judge-made law.<sup>100</sup> The decisions of the justices are no longer based on the positive and pre-established law. Rather, the interpretations emanate from the Constitution *per se*. This notion allows the justices to utilize the aid of the judicial order as a whole to determine what is best for the common well-being.<sup>101</sup>

### K. *A Watchdog of Abuse, or a Referee?*

The Constitutional Court has the ability to reign in the authority of the executive branch of government. The executive branch's formerly unchecked power to declare a state of siege, for instance, is curtailed by the provision establishing a role for the Constitutional Court in reviewing the constitutionality

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98. Among the decisions rendered by the Court are: 1) Preventing a private high school from banning a student who wore make-up on the grounds that it violated her right to an education; 2) Giving police protection to a member of a left wing group on the grounds that his right to personal liberty was violated by the army's death threats; and 3) Ordering medical care for a patient inflicted with AIDS who was denied care at a state hospital on the grounds that he was discriminated against because of a disease. *See State of War: Political Violence and Counterinsurgency in Colombia*, AMERICAS HUMAN RIGHTS WATCH (The America's Watch Committee, New York, N.Y.), 1989.

99. URENA, *supra* note 71, at 112.

100. In this respect it is unlike the Supreme Court in the United States.

101. For a broad explanation of the Constitutional Court *see* URENA, *supra* note 71.



of presidential decrees.<sup>102</sup> The Court has the power to rule on ordinary laws and all executive decrees issued by the President pursuant to emergency powers and judge the constitutionality of the laws and treaties issued by the political branches.<sup>103</sup>

The interpretation of the scope of the Constitution, when dealing with the power of the executive, has created intense conflicts. The following excerpt from a letter by the President of the Court suggesting the dangers of a presidential dictatorship illustrates such tensions.

The constitution recognizes the separation of state branches—Common citizens are permitted to do anything that is not specifically prohibited by law, but public servants must limit their actions to the duties outlined by laws and regulations—The President of the Republic is not a common citizen and there are limits on his ability to exercise power—The duty of the Constitutional Court is to decide whether the rules and regulations are in accord with the Constitution. In terms of reviewing laws, for example, this responsibility cannot be fulfilled by Congress, which issues them. The chief executive cannot do this either, because this would imply dictatorship—If we fail to fulfill our duty, the Senate of the Republic is there. The Constitution states that the Senate should act as our judge.<sup>104</sup>

In my opinion, it is too soon to determine the Constitutional Court's position when deciding separation cases between the two political branches, or how well the justices really understand the separation of powers doctrine. Whether the justices would construe the separation of powers as reflecting a shared, but reciprocally limiting, power distributed among branches or as a principle that precludes one branch from performing tasks that the other does remains to be seen. Thus far, the Court has not undertaken cases deciding issues of separation between the political branches.<sup>105</sup>

The Court also performs a consultorial role of broader scope than its Spanish and French models because consultancy in Colombia is available not

102. COLOM. CONST. art. 44.

103. In July of 1994, the Constitutional Court abolished an executive decree declaring a state of internal disturbance to prevent the release of at least 840 inmates from Colombian jails. Pursuant to a 6-3 vote the Court declared that it could examine all state of emergency decrees issued by the President. *Constitutional Court Abolishes State of Internal Disturbance Decree* (Broadcast by BBC Monitoring Service, Latin America, July 4, 1994).

104. *Gaviria Respects Constitutional Court Decisions But Will Advocate Alternatives* (Broadcast by BBC Monitoring Service, Latin America, May 26, 1994).

105. As addressed earlier in this paper, Congress relinquished its power to the executive branch which, in turn, created a greater imbalance in government.

only to government officials but to all citizens who submit constitutional questions to the Court. The questions regard legal concerns such as treaties proposed for ratification, laws passed by the government and other matters of state.<sup>106</sup>

#### L. *Into the International Arena*

The Constitutional Court is competent to decide on the constitutionality of international treaties and the approving laws.<sup>107</sup> The government has to submit to the Court the treaty and its approbatory law six days after its sanction. Once the law is in the Court, any citizen can intervene to defend or attack the constitutionality of the law. The government can only ratify the treaty if the Court decides the approving law to be Constitutional.

#### M. *Protector of Constitutional Rights*

The 1991 Constitution provides several devices through which individuals can assert their constitutional rights:

- \* *Acción de Tutela* (Action of *Tutela*) establishes that any person can bring an action before an ordinary judge seeking the immediate protection of his or her fundamental constitutional rights whenever they are threatened or endangered by acts or omissions of a public authority.<sup>108</sup> Such a proceeding is preferential and summary. The judge, through an order to be immediately implemented, may enjoin others to act or refrain from acting. The order may be challenged and, if so, the judge then sends the order for review to the Constitutional Court for the final decision. This action could perhaps be comparable to a judicial injunction being leveled against actions or omissions of a public authority effecting individual fundamental constitutional rights in the United States.
- \* *Acción Popular* (Popular Action) permits any person, regardless of standing or stake in the controversy, to bring an action directly challenging a law or decree. This action was established for the protection of rights and collective interest related to homeland, space, public safety and health, administrative morality, the environment, free economic competition, and so forth.<sup>109</sup>

In the Court's first year, nearly seven thousand actions were submitted to the Court and between fifty and one hundred appeals were received each day.

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106. COLOM. CONST. art. 241.

107. *Id.* art. 214(10).

108. *Id.* art. 86.

109. *Id.* art. 40(6).

Because there is no certiorari, the Court is obligated to hear every case brought before it.<sup>110</sup>

Has the Constitutional Court become the new lawmaking authority of the country? Has this branch of the judiciary embarked on a cruise into the uncharted waters of judicial activism? An analysis of the Constitutional Court's controversial decision to legalize drug use supports this probability and serves well to illustrate the profound change in the Colombian legal tradition brought about by the 1991 Constitution. Whereas the Supreme Court prior to 1991 only declared null those laws it considered unconstitutional without expounding the Constitution, it did not declare what the law was supposed to be. Clearly, the Constitutional Court is now doing just that.

#### N. *Just Say Yes*

On May 5, 1994 the Constitutional Court legalized the personal use of small quantities of cocaine and other drugs.<sup>111</sup> In its 5-4 ruling, the Court overturned prohibition and held that Articles 51 and 87 of Law 30 of 1986 were unconstitutional because they constituted an intrusion on privacy, autonomy and free development of the personality guaranteed by the 1991 Constitution.<sup>112</sup>

Some of the arguments given by the majority include:

- \* Each individual should elect his or her way of responsible life. In order to reach such a goal it is indispensable to definitively remove the biggest obstacle—ignorance. The road to confront drug addiction is education and not repression.
- \* It does not harmonize with Colombia's basic organization of the typification, as a crime, of the conduct that, per se, only regards those who observe it. Consequently, such conduct is subtracted from being regulated by law and from a judicial system which respects freedom and dignity.
- \* Each person is free to decide if he or she wants to recuperate his or her health. Not even under the 1886 Constitution was the nation considered the owner of one's life. If each individual is the owner of his or her own life, then that person is also free to

110. Some public officials have criticized the overuse of the Action, seeing it as a usurpation of the duties of the political branches. Some appellants have attempted to use the Action in order to appeal sentences handed down after trial. See *McCulloch v. Maryland*, 17 U.S. 316 (1819).

111. Legal measures include up to: 1) twenty grams of marijuana; 2) one gram of cocaine; 3) five grams of hashish; 4) two grams of barbiturates: GACETA DE LA CORTE CONSTITUCIONAL, EDICION EXTRAORDINARIA, CORTE CONSTITUCIONAL, SENTENCIA No. C-221/94.

112. *Id.* at 21. The Court stated that the legislator can prescribe the way in which one should behave with regards to others. However, it cannot do so in the way one should behave toward one's self if such conduct does not interfere with anyone else. *Id.* at 15.

care or not care for his or her health. If one wishes to do so, he or she may deteriorate to death.

- \* The free development of personality is the recognition of the person as an autonomous individual. The first consequence that derives from autonomy consists in that it is the person (and not a self-appointed surrogate) who should give a sense to his or her existence and harmony with his or her course. If autonomy of the person is recognized, then autonomy can only be limited when it enters into conflict with somebody else's autonomy.
- \* Affairs that concern individuals can only be decided by that same person. To decide in another's name is to brutally snatch away that person's ethical condition, to reduce him or her to the condition of an object, *cosificarla*,<sup>113</sup> and to convert that individual into the means for the ends that others choose for him or her.
- \* To recognize and guarantee the free development of the personality, while fixing upon it as limits the capriciousness of the legislator, is something that negates what is being affirmed. This means you are free to choose what is good but the State tells you what is good. Furthermore, it is only in the function of another's freedom that one's own freedom can be restricted.

The *salvamento*, or dissenting opinion, vehemently rejected the majority's arguments offering the following rejoinder:

- \* The fundamental rights consecrated in the Constitution are not absolute. Every guarantee has its limits as do personal prerogatives and the *ordenamiento juridico* (legal order). One cannot reach the extreme to consecrate the right of the individual to self-destruct.
- \* This is a decision without Constitutional support. It contradicts the purpose to secure life and peaceful co-existence, both of which are within the legal framework structured in the Preamble of the Constitution. It also goes against the prevailing general interest and solidarity of the people, that of the promotion of general prosperity, secure peaceful coexistence and just order.
- \* The decision contradicts the constitutional precept according to which the State protects the family as the basic institution of the society, and the protection that should be offered to those

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113. Loosely translated to mean the act of making someone a thing.

persons who because of their physical, economic or mental condition are manifestly weak.<sup>114</sup>

- \* The decision by the majority goes against Article 42 of the 1991 Constitution which states that the family is the fundamental nucleus of the society, and any form of violence against it is considered destructive to the family's harmony and unity and punishable according to the law.<sup>115</sup>

The initial reaction of President Gaviria was vitriolic. He attacked the Court's decision, maintaining that there was a need to secure a national referendum or constitutional reform and demand the Court clarify the decision. He proposed that the Court make clear several aspects of the decision so that at least they could be regulated by Congress in a regulatory law and not make this an absolute right because that would be an absurd decision.<sup>116</sup>

What is particularly significant, and I believe largely under-appreciated by Colombian observers of the legal system, is the fact that not only did President Gaviria recognize that the Court, not being the traditional lawmaking body, was making law, but that the Court should further regulate the recognized right when he stated that Congress or the Court should avoid, or limit, the consumption in educational centers, schools and universities.<sup>117</sup> Clearly, the President unwittingly found himself in a difficult position, having sworn to uphold a new Constitution for which he was largely responsible, while being blindsided by the irresponsible activism of a court he indirectly helped to empower.

Understandably the immediate, and certainly not unexpected, reaction to the Court's decision was overwhelming rejection by the other branches of government, not to mention swift condemnation by the world community. The President, wriggling between a rock and a hard spot, meekly stated that he accepted but did not share the Constitutional Court's decision, which was based on the libertarian interpretation of individual rights and responsibilities.<sup>118</sup> Subsequently, in an attempt to salvage what little credibility the government had enjoyed, a real battle ensued:

- \* On May 7, a campaign to hold a referendum was displaced.
- \* On May 23, an exchange of correspondence occurred between the President of the Constitutional Court and President Gaviria. The president of the Court reaffirmed the independence of the

114. In other words, someone who is a drug addict should be considered to be in a state of diminished capacity and, therefore, is unable to make informed and responsible decisions regarding his or her personal autonomy.

115. *Propician La Autodestruccion*, EL TIEMPO, May 7, 1994 at 6A.

116. *Rechazo General A La Despenalizacion*, EL TIEMPO, May 7, 1994 at 1A.

117. *Id.*

118. *Court Legalizes Drug Consumption*, LATIN AMERICA REGIONAL REPORTS: AMERICA GROUP, May 26 (1994).

branches and asked for respect in deference to the Court's autonomy.

- \* On May 24, because his office lacked the power to overturn the Court's decision, President Gaviria used his power of decree to impose tight restrictions on drug use in public places.
- \* On May 26, the judicial branch publicly requested the government to respect the decisions of the Court.
- \* On July 26, the government announced that for the first time Colombia would use the constitutional mechanism of public participation to decide whether to penalize the consumption of drugs.

Taking desperate measures, the government invoked every option available to curtail the Court's decision, including considering a referendum, legislative action and even constitutional reform. The administration introduced a bill to Congress to approve the addition of Article 49 to the Constitution. This Article stated that the government could restrict and prohibit the carrying, transporting and consumption of drugs, and that sanctions, including criminal, could be imposed in order to preserve public interest, the health of the individual and the harmonic and integral development and full exercise of individual rights.<sup>119</sup>

The Constitutional Court perceived the steps taken by the government as contemptuous and a direct challenge to the Court's authority. The Court especially objected to the referendum. The President of the Constitutional Court declared it was not acceptable that a mechanism of popular participation could become an instrument in the hands of the government to ignore a judicial decision.<sup>120</sup> However, for the government, the referendum would not have been a challenge to the Court; on the contrary, it would have been an appropriate democratic mechanism to obey the Court's decision: "[The Court's perception] could not continue because we [the government] are fully respectful of the majesty of the law and the independence of the other branches."<sup>121</sup> After several public confrontations between the political branches of the government and the judiciary, the Constitutional Court won its fight. On November 2, 1994, the government declared that it did not seek confrontations with other branches of government, particularly with the Constitutional Court. Therefore, the government would henceforth observe and respect the Court's decisions.

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119. *Aprobada Reforma Para Penalizar La Dosis Minima*, EL TIEMPO, Dec. 8, 1994 at 1A.

120. *Gobierno Dijo No Al Referendo*, EL TIEMPO, Nov. 1, 1994 at 1A.

121. *Con Ley Atajarán La Dosis Personal*, EL TIEMPO, Nov. 2, 1994 at 1A. Could this submission by the government to the Court's decision, as if the Court's interpretation were the law of the land, constitute a *Marbury v. Madison* scenario?

O. *Competence of the Justices as Activists*

I believe there are legitimate concerns regarding the high degree of judicial activism and lawmaking awareness in the Constitutional Court. The traditional perspective of the lawmaking role of Colombia's judiciary has changed, and one could argue that the timing for such newly discovered power is a questionable,<sup>122</sup> yet profound, factor in the evolution of Colombian law.

The introduction of judicial activism has been influenced by numerous U.S. legal writers and Colombian lawyers who have had the opportunity to study the U.S. system of judicial review.<sup>123</sup> For the first time a high court has declared itself in actions, if not so much in words, independent from the other branches of government. The Court has exercised a higher degree of discretion when interpreting the Constitution than at any time in history.

But the competence of the justices to assume a lawmaking capacity through judicial activism must be examined critically, if not for any other reason than that it seems too extraordinary that the justices could successfully retool their training and legal conditioning in less than four years, thereby casting aside nearly two hundred years of judicial deference to the other two branches. Where would they acquire the background to pull it off? From what indigenous historical precedent could they proceed? How are their skills acquired, and from where? In moving too quickly are they courageous reformers of a troubled legal system, or meddlesome loose cannons on a listing ship of state?

The Constitutional Court justices are assuming roles and methods similar to those of U.S. appellate justices. However, the civil law tradition dictates that Colombian justices be trained to apply the law, not to create it. The functions and dexterity of the justices in the United States when exercising judicial review cannot be learned readily, and surely not without historical precedent.

The fact that the decision to legalize drugs was based largely on a leap of faith and on the ethereal writings of foreign legal philosophers indicates the lack of anything approaching *stare decisis* so necessary, I believe, for establishing precedent in matters of Constitutional intent. Furthermore, it is no easy task to overcome the tradition of the Colombian Supreme Court, which unlike its

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122. I do not address whether or not legalization of personal doses of cocaine constitutes a legitimate interest of the individual to find judicial protection. Nor do I analyze if such interest, considering Colombia's long history of violation of human rights, is a veil to protect illegitimate groups. The purpose of this section is intended to explore the change in Colombia's attitude toward the judicial branch.

123. Many Colombian lawyers come to the United States for a year of study to get LL.M.'s and go back with numerous books, ideas to share and attitudes of having learned all there is to learn about U.S. common law. No one in so short a time can read in textbooks about the *Marbury v. Madison* decision, judicial review, the Bill of Rights and other important doctrines of the Anglo-American system without embarking on a more in depth course of legal study such as that acquired in pursuit of a J.D.

counterpart in the United States, was created originally to lack the structure, procedures and reasoning required for effective constitutional adjudication.

Truly, the boldness of the Constitutional Court to break from tradition and chart new territory in Colombian law is admirable and necessary for a legal system that for so long existed to support the status quo in favor of the country's oligarchy. It is acceptable that mistakes in judgment will be made in the course of the evolution of the Court. However, decisions such as legalizing drug use, arrived at through uninformed libertarian activism, do nothing to promote efforts by all branches of government to build a more representative and fair democratic system where checks and balances replace the status quo of the oligarchy as the integral component of the rule of law.

### III. CONCLUSION

The position taken by the legislative and executive branches to acknowledge the autonomy of the Constitutional Court did bring a measure of tranquillity to a new judiciary in need of support from the other political branches and strengthened respect for the legal order, especially as to the independence of the judicial branch.<sup>124</sup>

The executive branch has elected to save face by taking the moral high ground of noble enlightenment. With republican and democratic sense that exalts him, the President of the Republic, President Samper, has accepted a principle that is the irreplaceable foundation of the legal order: The rulers are those who must obey the Constitution and not for the Constitution to obey the wishes of the rulers.<sup>125</sup>

Now, even though the country is left to deal with a harsh decision, one can only wonder if, indeed, a better judiciary has emerged.

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124. EL TIEMPO, *supra* note 119.

125. *Id.*