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Between Democratic Security and Democratic Legality. Constitutional Politics and Presidential Re-election in Colombia**

Entre la Seguridad Democrática y la Legalidad Democrática. Políticas Constitucionales y la reelección presidencial en Colombia

Entre a Segurança Democrática e legalidade democrática. Política Constitucionais e da re-eleição presidencial na Colômbia

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Abstract

This paper presents an analysis of the political and legal debate of the declaration of unconstitutionality of the referendum that sought the re-election presidential second term in 2010. On the other hand, it exposes the debate between those who spoke of bias and political argument in the court ruling related to the idea of "democratic security"; while others speak of the persistence of "democratic legality" consisting of autonomy guaranteed legal reasoning from deliberative processes. Finally, it is noted that the degree of institutionalization of discourse of the Court is an important factor that speaks in favor of it's independence.

Keywords: Democratic security, Democratic legality, Presidential re-election, Colombia.

Resumen

Este artículo presenta un análisis del debate político y jurídico de la declaración de inconstitucional del referendo que buscaba la segunda re-elección mandato presidencial en el 2010. Por otro lado, deja en evidencia el debate entre quienes hablaban de un sesgo y argumentación política en el fallo de la corte relacionado con la idea de "seguridad democrática"; mientras otros hablan de la persistencia de "legalidad democrática" consistente en la autonomía del razonamiento jurídico garantizado a partir de los procesos de deliberación. Finalmente, se señala que el grado de institucionalización del discurso en la Corte constituye un factor importante que habla a favor de su independencia.

Palabras claves: Seguridad democrática, Legalidad democrática, Re-elección presidencial, Colombia.

Resumo

Este trabalho apresenta uma análise do debate político e legal da declaração de inconstitucionalidade do referendo que buscava a reeleição presidencial segundo mandato em 2010. Por outro lado, ele expõe o debate entre aqueles que falavam de parcialidade e argumentos políticos na decisão judicial relacionada com a idéia de "segurança democrática"; enquanto outros falam da persistência de "legalidade democrática", que consiste de autonomia garantido raciocínio jurídico de processos deliberativos. Finalmente, refira-se que o grau de institucionalização do discurso na Corte é um fator importante que fala a favor da independência.

Palavras-chave: Segurança democrátic, Legalidade democrática, Re-eleição presidencial, Colômbia

Introduction

The Colombian state is a social state of law, which is defined in the first article of the 1991 Constitution. The question of a constitutional reform, intended to allow presidential re-election, put the meaning of this clause to the test, in regard to how the social state of law in Colombia relates to the imperative of the separation of powers that is expressed in the same article, as well as in the article 113th, in the chapter that deals with the organic structure of the Colombian state. The original constitutional charter only allowed one term in the presidential office, but in 2005, riding on a wave of public support, President Álvaro Uribe succeeded in passing a reform that changed the norm, allowing him a second term in office. In 2010, the Constitutional Court declared unconstitutional another reform of the same norm, which was aimed to attain a potential third term in office. This rule was stated on the ground that the aforementioned reform had violated procedural clauses while in its creation, and would constitute a substitution of an axiomatic principle of the Constitution, for which Congress lacked competence. The longitudinal variation among these two cases of constitutional reform provides for a good opportunity of analyzing both the vertical and horizontal integration of institutions within a context, which is all but conducive for such an institutionalization given Colombia's history of civil war and wide spread corruption, that has had led the country to institutional decay.

The Court has shown a remarkable degree of independence and ingenuity in arguing its stance against another re-election. It developed a doctrine (the substitution doctrine) that –not explicitly mentioned in the constitution– utilizes constituent power as a tool to curtail executive power, as well as the ability to reform the constitution, thereby taking away some of the numinous clouds surrounding the original people's power. Furthermore, the investigation has shown that its independence relied to a large extend on the institutionalization of deliberation within the Court. There exists a deliberate and strategic intention by all judges to mitigate the outside exposure of the deliberation process itself –including their own personal positions– in order to minimize both external and undue pressure, simultaneously averting accusations of bias. As this paper attempts to demonstrate, the academic environment of argumentation in the *Sala Plena* (lit.: full chamber; the plenum where magistrates discuss constitutional cases), provided for an atmosphere of debate, within which new ways of legal thought could prevail.

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The substitution doctrine is steeped in neo-constitutionalist thought, which invokes a novel authorization of political power, rooted in a pluralistic, and not unified, constituent will.

> Because of the character of President Álvaro Uribe, the question of constitutional reform and presidential re-election becomes more pertinent yet. The Antioquian land-owner was a politician, whom united a healthy sense of mission with a charisma never seen before in the Presidency of the Andean Republic. Traditionally, the party system in Colombia has been of such a nature, that the President must be a skilled powerbroker, engaged into a network of patronage relations, by means of which the vote is managed. These relations have functioned like a check on the personal power of the executive (Archer, 1989; Archer & Shugart 1997). Uribe, on the other hand, fits better into the Caudillo President category, whom not only commands *de jure* powers, but also *de facto* powers. His popularity, rooted in his objective successes regarding the security situation, and his style of politics, that invoked traditional folklorism and communitarian identification amongst rulers and ruled, consistently has imply popularity ratings exceeding 60 %. Given this context, the Constitutional Court's decisions also shed light on the tension that exists between popular democracy and constitutionalism (Arango, 2003).

Actors, visions, and decisions

Uribe, Uribismo and Democratic Security

As it was implied at the introduction of this paper, the relevance of the Constitutional Court's decisions is difficult to grasp without a proper understanding of the peculiarity of President Uribe in Colombia's political history. Hence, despite the imminent danger of lapsing into an extremely narrative presentation, we cannot forego some words on this charismatic Caudillo. Often portrayed as the right-wing counterpart to Venezuela's Hugo Chavez, Uribe does, to some degree, constitute the mirror image of the late Bolivarian people's tribune. Uribe grew up as the heir of a rich Antioquia's region landowning family –a region that was capital to the evolution of both the international narcotics trade and paramilitarism–. Uribe's father was killed by FARC guerrillas. This event set him on the mission to completely eradicate the subversive group. Eradicating the guerrillas and bolstering the

state's monopoly of violence became the main elements of the Democratic Security policy of Uribe's presidency. Such a policy is built up on three pillars: 1) establishing the clear authority of the state by means of amplifying its monopoly of violence against internal enemies; 2) fostering a direct relation between rulers and ruled in order to assuage social cleavages and create a strong bond of social cohesion; 3) buttressing of capitalistic institutions to invite direct foreign investment (Botero, 2008; & Gaviria, 2004).

Three aspects of Uribe's rise to power are important to explain the purposes of this paper. They highlight his comet-like rising onto the political scene in Bogotá and, , which is linked to his exceptional position in Colombia's political history. Uribe squarely focused his electoral campaign on a non-compromising position vis-à-vis the FARC, and on a "tough hand, open heart" approach to the nation's security situation. In particular, the notion that "peace is the daughter of authority" (Uribe in Botero Campuzano, 2008) became an incredibly valuable talking point during the presidential campaign, propelling him from a mere 9% in the polls to a 53% victory within four months. The FARC had left the peace negotiations in Caguán, and added to this fail, they have kidnapped presidential candidates Ingrid Betancourt and Clara Rojas, providing credence to Uribe's constant critique of the aforementioned peace process (Viveros, 2002).

The second important aspect is that Uribe was somewhat of a renegade candidate whom, having Colombia's Liberal Party as his political home, nevertheless decided to run as an independent candidate after the Liberal party nominated Horacio Serpa as its official candidate. Thus, he benefitted and accelerated the internal fragmentation of the traditional two-party system, which had existed since the mid-19th century; and managed to contain –through the inclusion of broker patronage relations– radial political forces that in other political systems in the region have driven democracies towards authoritarian regimes (Valenzuela, 1978; & Gutierrez, 2007).

The third aspect of Uribe's ascend to power became clear in the course of his two terms in office –mostly thanks to the investigations by the Supreme Court into what became known as *parapolítica*–. Uribe utilized regional alliances between traditional political leaders and paramilitary groups to bolster his political weight, and quickly build political alliances that hurled him from fame in the Antioquia region (but relative national obscurity) to national power in Bogotá, the nation's capital. Usually the

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political trajectory is the other way around. How much he was personally responsible for fostering co-dependent relations with the paramilitaries is a point of contention. Not disputed is however that half of the uribista senators of the 2006 Senate were investigated for paramilitary ties (Lopez & Sevillano, 2008; & Lopez, 2010).

Given the conditions prevalent in Colombia at the time when Uribe became president, Colombians were inclined to overlook these relations in favor of valuing his successes in exactly those areas where he had promised action. In hindsight, it is plainly evident that the first two years of the Uribe presidency were the most successful –measured by almost all general security measures–. The numbers of kidnappings decreased almost by the same rate that Colombia had witnessed them rise between 1996 and 2000.[1] When he took office in 2002, almost 15% of the country had no police presence (158 of 1098 municipalities). This number was reduced to 0% in 2004.[2] The intentional homicide rate reduced from 70 to 48 per 100,000 people, and so did the number of terrorist attacks and massacres. In short, Colombia moved from the brink of becoming a failed state to a state that still faces very significant security issues, but had made substantial improvements. These early successes are the clearest objective measure for explaining Uribe's extra-ordinary high popularity ratings, which he retains to this very day, even though he is no longer President.

Armed with his own personal popularity as well as the widespread support for *Democratic Security*, Uribe positioned himself outside of Colombia's traditional politics and political history. Thus, it is not surprising that his sense of mission would clash with the imperatives of the Colombian Constitution. His super minister, Fernando Londoño Hoyos, who was a staunch supporter of the *Viejo Derecho* and the old Constitution from 1886, stated before his nomination to the Ministry of the Interior and Justice that the country was ungovernable under the new 1991 Constitution. Uribe, also,

1 Since the success of Uribe's Democratic Security Policy is centrally contingent on the statistics around basic security indicators, it has been found that these are considerably politicized statistics. The Centre for Historical Memory has produced a study under the name Una Verdad Secuestrada, which shows that the number remained relatively stable and high at around 1250 cases a year after 2005, only that now no parties to the conflict are responsible for the highest share of them, but criminal webs. However, my assertions rest on these numbers. It is important to note that these are post-Uribe findings. During his presidency, his successes in the field of security were not contested. See: http://www.cifrasyconceptos.com/secuestro/presentacion_reportes.php.

2 See http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB327/doc13_20050000.pdf

laid out an extensive political reform project that concerned the political charter. Between 1999 and 2009, there were a total of 22 constitutional reforms initiated –seven under President Andrés Pastrana and 15 during the two terms of the Uribe administration– (Valencia, 2012).

The contours of the pro-reform argumentation were squarely majoritarian, running under the banner of the *Estadio Communitario* and the *Estado de Opinión* (Valencia, 2012). The President Uribe, and his most important advisor in strategic and ideological questions, José Obdulio Gaviria, argued that the "general will is *good* and to understand it does not require war, but dialectic" (Gaviria, 2004:35). He argued that upholding the majority's will does not necessarily entail a war of passions undermining the democratic nature of the regime itself, neither does it collide with the empire of law. It does limit the empire of law, however, to the universe of forms –at least when political processes of decision-making are involved– (Gaviria, 2004:51).

The majoritarian coloration of Uribe's public policy is most readily apparent in its second element, namely, direct identification between rulers and ruled in order to bolster social cohesion and assuage economic cleavages. It rests on a particular notion of social trust that buttresses a peculiar understanding of charismatic, political leadership. Dialectically interpreting and finding the general will means "that everything can be negotiated and come to a conclusion with a majority without the use of violence […] through a permanent dialogue of the government with the society".[3] He also said that the result is a relation between rulers and ruled that only propels the most prudent and virtuous leaders to national supremacy. Social trust in this context, of course, does not entail the type of trust that constitutional democracies savor from –namely generalized and rationalized forms of trust–. Rather, *Uribismo* rests on notions of leadership that invoke a coherent vision of life with a corresponding moral universe that separates the leader from the particularized interests that make up society's life world.

When it comes to constitutional issues, these elements of Uribismo coalesce into the concept of the *Estado de Opinion* (state of opinion). The semantic relation with the *Estado de Derecho* (state of law, rule of law) is deliberate as is the impreciseness of whether it is superior or equal to the *Estado de Derecho*. It is essentially a redressing of Bickel's counter-majoritarian problem: since

3 Interviews.

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the courts lack the direct democratic legitimacy of an elected body such as Congress or the President, it only accepts formal limitations on popular power, but not substantial ones. The general articulation of the *Estado de Opinión* as well as its generic application to all courts –be they penal or constitutional– have received reasoned critiques against Uribismo, which are characterized for reprimanding the doctrine on the basis of this impreciseness in its definition, since it leaves the gates open for the abuse of popular power. To them, it is simply a political category that is mingling in judicial waters. On the other hand, for *uribistas* support for re-election becomes not only a preference, but an imperative, since the prevention of good leadership undermines the good of the *entire* nation (Gaviria, 2004).

Constitutionalism in a new key: the Constitution from 1991, the Constitutional Court and constitutional reform.

The new Colombian Constitution, promulgated in 1991, was born in an acute crisis moment in Colombia's history. Drug traffickers and guerrillas had brought the state to the brink of collapse and, in particular, Pablo Escobar's armies of *Sicarios* terrorized Colombia's civilian population and public institutions.[4] Constituents reckoned two problems which were supposed to be at the root of the regime crisis: excessive executive powers and privileges, and a lack of political inclusion and institutional flexibility. To redress these structural grievances, the constituent assembly decided on mechanisms to limit presidential power, which included, amongst other things, a one-term limit (Art. 152), and flexible mechanisms to reform the constitution, which limited to procedural claims the imperative of the Constitutional Court to review such reforms (Art. 241, 1. & 2.).

4 The arrival of the international cocaine trade in the late 1970s and 1980s accentuated the fragility of the Colombian state, which had its roots in the politics of the 19th century (Centeno, 2002;). The narcotics trade brought new violent actors to the forefront (drug traffickers' private armies that later morphed into loosely connected paramilitary groups) and strengthened existing ones (the FARC). By the late 1980s, drug king pin Pablo Escobar had declared war on Colombia's institutions, killing thousands in a terror war with which he fought against the extradition to the United States. The abundance of violence and terror that gripped the Andean nations public life, moved a group of student to campaign for fundamental political change. Activists identified the exclusionary nature of the current political system as the chief underlying reason for the political crisis that had resulted in the copious violence. Consequently, they argued that only a new constitution could appease the conflict and shift the sphere of action from violence between actors outside institutions to negotiations between parties within institutions.

The explicit contention of the Constitution which stated that the Constitutional Court could only review the formal and not the material aspects of reforms, preconfigured the clash that would arise between an executive and legislature that view the right to reform the constitution on their side, and an activist court that had internalized the imperative to guard the integrity of the constitution. The motivation of the Constitutional Court to fulfill the role of the guardian of the constitution with more exuberance is partly explained by the fact that the Court –or important sections of it– viewed the 1991 Constitution as a fundamentally distinct document from the 1886 Constitution, the latter being born out of the factional clashes between conservatives and liberals in the formative years of the Colombian state, and the former as the integral document of a peace accord between the Colombian state and non-state armed actors.[5]

Accompanying the creation and establishment of the new Constitution and the Constitutional Court has been the articulation of what in Colombia's legal thought terms is known as *Nuevo Derecho*. Distinguishing itself from the *Viejo Derecho* of the 1886 Constitution, its relation to neo-constitutionalism is readily apparent with the inclusion of an expansive catalogue of rights that encompasses first (private rights), second (social rights), and third (collective cultural rights) generational rights, as well as mechanisms (*Tutela*) intended to directly enforce these rights.[6]

Important for the purposes of this essay are the novel principles of interpreting constitutional clauses implicit in *Nuevo Derecho*. The above cited formalism, strictness, and rigidness of the *Viejo Derecho* arose, in part,from its jurisprudential heritage, which is mostly French-Continental. The 1886 Constitution was integrally concerned with the organic structure of the state, which only included a limited charter of rights subsumed under the civil code, which were not presented as autonomous constitutional norms. The 1910 and 1911 established principle of judicial review almost exclusively concerned itself with interpreting the principle of legality. This principle implies that "public forces are only allowed to do what the law allows them to do".[7] Interviewees explained that legality as the guiding principle of constitutional interpretation lends itself to a legal positivism that limits the role of jurisprudence. Also, it can function as an effective control on executive power, as Colombia's Supreme Court had shown

5 Interviews.

6 The Tutela is the Colombian equivalent to the German Verfassungsbeschwerde.

7 Interviews.

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in various decisions curtailing the reform activism of presidents. Its formalism, however, also resulted in an undue institutional and socio-political rigidness that greatly restricted the arena for political action.

Nuevo Derecho does not condemn the principle of legality and formalism to irrelevance. Rather, it nuances its strictness by complimenting it with neo-constitutionalist principles of interpretation. Beyond legality, the Constitutional Court also weighs the proportionality, rationality, and efficacy of reforms and laws. As this essay will show, in regards to constitutional norms guiding reform of the charter, the result is somewhat paradoxical. On the one hand, the new Constitution limits the ability to review reforms to formal review, but on the other hand, expands the scope of interpretive principles by embracing a new ethos in the authorization of political power. Thus, when the Constitutional Court argues that the idea of a sovereign people accompanying the conceptualization of liberal democracy becomes unintelligible without inclusion of a plurality and coexistence of different ideas, races, genders, origins, religions and social groups, it tacitly embraces a limitation of political power that is not solely bound by the written word of the Constitution. The principles behind plurality and co-existence reject simple majoritarianism and have transformed Colombia's political charter from a written document into a living constitution embedded in its context and socio-political reality.[8]

This tendency is nowhere as explicitly visible as in the Court's jurisprudence concerning constitutional reform and the separation of powers. To proceed then, I will lay out the argumentation in each decision concerning presidential re-election, which will show a careful attention to procedure and form, but also the invocation of what is called the doctrine of the substitution of the constitution. This doctrine is at the canopy of the shift from *Viejo Derecho* to *Nuevo Derecho*, and manifestly shows the Court's determination and conceptual ingenuity to limit the ability of reforming the Constitution, despite the limitation, placed upon its own capability by the norm, to only let formal review prevail.

The two decisions

The Colombian Constitution provides three ways for amending the charter and its norms: by legislative initiative through Congress, a popular referendum (that passes through Congress), and a constituent assembly.

8 Interviews.

In the first instance of constitutional reform to allow a second presidential term in 2004, the route taken was the ordinary legislative procedure through Congress. In the second instance in 2009, a citizens' initiative commenced the reform process. Such an initiative called upon the Congress to pass a law which would make possible a referendum. Thus, even though the origin of the referendum is plebiscitary in nature, it also passes through the Colombia's formal political institutional order. Regardless of the taken path, the legal questions the Constitutional Court addressed were the same: Were procedural norms violated in the creation of the reform process and did the reform amount to a substitution of the constitution or of principle parts/norms thereof?.[9] The theory of the substitution of the constitution is an evolution of the doctrine of competence that is implied in the notion of procedure. As is detailed below, that doctrine expands the Court's procedural review rights by invoking the distinction between constituent and constituted power, in order to subject constitutional reforms to a test of competence concerning that differentiation. Opponents of the theory argue that this amounts to judicial decisionism and is itself a substitution of the constitution, for the political charter does not distribute the competence to detect its axiomatic principles to any particular political institution.[10]

C-141/05

Law 02 of 2004 commenced the reform process and it took a somewhat tumultuous path through Colombia's legislative institutions. There was a total of ten complaints tabled. Opponents of the reform argued that the authors of the reform disowned the principle of the separation of powers by having the executive assist in legislative debates. The required first reading in the first committee of the Senate was disintegrated due to the absence of the Vice-President of the Senate; an open debate in Congress was suppressed when the President of the Chamber of Representatives ordered the vote to go forward, inJune 17th, 2004, when opposition members were not present out of protest; the exact text of the reform was not published 24 hours prior to debate in the Congressional Gazette, as is demanded by the Constitution, nor were citizens interventions during the debates published in the Gazette; and finally, complaints by fellow

9 See Corte Constitucional de Colombia. C-1040/05 & C-141/10.

10 See in particular Humberto Sierra Porto's dissent in C-1040/05.

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representative Germán Navas Talero against Yidis Medina which were related with her last minute change of vote were not given sufficient voice in the process.[11]

In the end, the Court only declared unconstitucional a statutory law accompanying the reform, and let its substance pass, on the condition that any unfair advantage that incumbents might have over their electoral competitors should be assuaged. It argued that

> The essential elements that define a social and democratic system based on the rule of law, [and] on human dignity, were not replaced in this reform. The sovereign people will decide whom to elect to the presidency, the institutions with supervisory or overseer roles in electoral matters completely preserve their powers, the checks and balances system is still operating, the independence of the government branches is granted, the executive branch does not receive new powers, the reform contains rules to reduce the inequality in the electoral competition, which will be enforced by independent entities, and their decisions will continue to be subject to judicial review, to protect the rule of law (C-1040/05).

It tested the application of the doctrine of the substitution of the constitution, but found that "It is not enough to remark that the reason that may have inspired the drafters of the constitution to prohibit a presidential reelection are nowadays valid standards by which to conclude that the elimination of such a prohibition amounts to a substitution of the Constitution". On the contrary, the magistrates' analysis resulted in the opposite conclusion, namely that a constitution requires clauses and mechanisms to be updated when the

11 What is now known as Yidispolítica, involved two congressmen, Yidis Medina and Teodolindo Avendaño, who, at first, opposed the reform in Congress. However, in a crucial vote in the committee stage, in the House of Representatives, both changed their mind at the last minute, and tilted the vote in favor of the progress of the reform - Medina argued that pork barrel promises by the President changed her mind, and Avendaño cited divine intervention. The political scandal carrying Medina's first name became hugely important in the second Uribe term, and in the prelude to the second attempt to change the Constitution for another re-election. Apparently, it was not only divine intervention and pork barrel spending that caused the change of mind of Medina and Avendaño, but material promises that, as the Supreme Court found in 2009, amounted to indictable offenses under Colombian law. Medina is currently serving time in prison for those actions. Since their vote had crucially tilted the ballot in the committee stage, the Constitutional Court would have decided against the reform on procedural grounds if both had been indicted by a judicial decision, which would have invalidated the vote (interviews by the author).

social and political reality requires it (C-1040/05). Consequently, Uribe ran again in 2006 and handedly won re-election in the first round of Presidential elections by a margin of 40 percentage points (Registraduría, 2006).

C-141/10

The second term in office was more tumultuous for Uribe, and the question of re-election turned up again at the Constitutional Court.[12] Uribe still commanded popularity ratings for a number above 60 percent, and the arguments in favor of another potential term in office, again, were mostly majoritarian in nature: a sovereign people ought to be able to decide democratically who they elect as their head of state and government. The route taking this time was that of a citizen initiative to call on Congress for a popular referendum on the question of constitutional reform. However, the jurisprudential issues that the Court answered in its deliberation were essentially the same: were correct procedures followed? And, Did Congress have the competence to initiate such a reform?

First it established that it had the right to review a citizens' initiative that, even though originating outside of the formal political institutions such as the Congress, does pass through Congress.[13] It then moved to strictly procedural claims that were made against the reform project; and addressed the five complaints litigators had submitted to the Court during the litigation period. When a referendum for constitutional reform is convoked, its committee of promoters and supporters must inscribe with the National Register of the Civil State (*Registraduría Nacional del Estado*

12 Interviewees noted that the political situation was the same as four years before, because the President was still very popular and powerful; but also noted that this popularity and power had left a noticeable damage in the institutional design of the nation. Already, before Uribe was elected for a second time, the Supreme Court had begun its official investigations into paramilitary relations within the Colombian Congress. The extent of these relations, however, only became clear after the election. In addition, the indictment of Mario Uribe, the President's cousin, showed how close these relations were to the center of power. Furthermore, the involvement of paramilitaries in presidential and congressional elections at the regional level questioned the legitimacy of Uribe himself. To top it all off, DAS's contribution in the infiltration of paramilitaries into Colombia's democratic institutions made the threats emanating from excessive presidentialism and abuses of power very vivid. These "institutional scandals" resulted in the third scandal of institutional proportions: the wiretapping of judges and journalists with the decisive help of DAS. Some interviewees made clear that they considered these, from the perspective of a constitutional magistrate, the gravest of all the scandals..

13 Interviews and C-141/10.

Civil), and receive the support of 5 % of legible voters. The promoters raised the funds necessary, but did so with little respect to rules governing such campaigns. As Botero et al. write "the referendum records are murky and plagued with irregularities, such as self-loans between organizers that deliberately attempted to obscure the way in which the referendum was financed. Promoters spent six times more than the spending cap permitted", with contributions by individual donors sometimes thirty times as high as allowed. In addition, Congress violated the requirement to have the votes of support confirmed by the National Register prior to vote on the bill, and went ahead without approval. The next violation concerned the wording of the referendum. The text placed before the electorate actually read that Uribe would run again in 2014. Promoters of the law assuaged this when the bill was already in Congress. The Court argued that Congress placed itself above the will of the people by changing the wording so late in the process, and it extra-limited itself (Botero, 2010).

The aforementioned violations were material procedural violations of the law governing amendment processes of the Colombian Constitution. The final two procedural flaws were formal in nature and violated the domiciliary right - or house right - of the Colombian Congress. The majority backing reform in Congress had five *Congresistas* amongst their ranks who had joined Uribe's party from another party (*Cambio Radical*). However, the laws against *transfugismo* disallowed such maneuvering between party caucuses, and *Cambio Radical* had sanctioned them what essentially invalidated their votes. Without their votes, the reform coalition did not have the required majority. Finally, the bill was struck down, because it was not passed within the time limit of the ordinary session that expired December 16th 2008 at 24:00. At that time, Uribe's coalition had called in an extra-ordinary session that began at 00:05 of December 17th. However, since extra-ordinary sessions had to be published in the Diario Oficial 24 hours before, the session, too, was invalidated, and the ordinary session had expired long before.[14]

Thus, the Constitutional Court, based on procedural claims, declared the reform unconstitutional. Nevertheless, rules required the Court to also address the question of the substitution of the constitution. Here it found that the separation of powers is an axiomatic principle of the social state of law (*Estado*

14 Interviews and C-141/10.

Social del Derecho) that is inscribed in the first article of the Constitution. The substitution clause test requires the Court to investigate whether the proposed reform introduces a new element or whether it replaces an element from the original text. If it finds that the proposition, in its final analysis, contradicts the original norm, it must declare the reform unconstitutional for extra-limiting the competence of its author. In C-141/10, it argued that a third consecutive term in the Presidential office would destabilize the control mechanisms placed on the executive through other horizontal institutions. The Constitution from 1991 was designed so that the President's nomination for offices that perform such control functions (such as the Attorney General, Federal Bank, etc.) could only minimally overlap for a short period of time at the end of the term. Thus, undercutting this periodization with another term in office, directly contradicted the principle of separation of power, which is implicit in the democratic principle of the Colombian Constitution (Art. 137). Arguing that Congress lacked the competence to initiate such far-reaching changes to an axiomatic principle of the Constitution, it closed the two ordinary paths of constitutional reform through Congress for any projects aiming to allow a change of the executive's periods in office. Only a constituent assembly can now perform such a task.[15]

The substitution of the Constitution: a new authorization of political power

In Colombia's constitutional context and in the context of the cases of constitutional reform tha are investigated here, the tension between majoritarian democracy and constitutionalism reappeared in the question whether the constitution has limits inherent to it that defy ordinary mechanisms for constitutional reform. It is here where the question of limitations to popular power poses itself anew. In either case of constitutional reform concerning presidential re-election, the Constitutional Court investigated strictly procedural complaints regarding the creation of the reform and claims that argue with the *substitution clause.* While the Court's defiance towards the executive's and legislative's will and resilience for formal aspects of the Constitution is certainly laudable, and appear as evidence of the Court's independence, it is doubtlessly its interpretation of constituent and constituted power in its substitution of the constitution theory that ranks

15 Interview.

higher in importance in its jurisprudence. It is one of the most controversial pieces of jurisprudence in the Court's twenty year-old-history, and has not only the Colombian public discourse divided, but also separated the Court itself into opponents and supporters of the doctrine.

The theory was a direct response to Uribe's healthy sense of mission and conviction over his own position in Colombia's political history that he liberally displayed in constitutional matters. As explained above, from the beginning Uribe and his Minister of the Interior and Justice, Fernando Londoño Hoyos, aggressively approached constitutional reform to follow through with a fundamental element of their *Democratic Security* program: the creation of a more communitarian state. Also from the very beginning, the Court viewed this as a threat to the accomplishments of the 1991 Constitution –most notably to the protection of rights that had received a much more prevalent position in the jurisprudence thanks to the new Constitution–. The president of the Court, magistrate Luis Eduardo Montealegre, lamented the attack as the most profound assault on the Colombia social state of law, and likened the potential results to Fujimori's Peru (El Tiempo, 2003). It was he, who penned the Court's response to Uribe's political reform from 2003[16], which included the first articulation of the theory of the substitution of the constitution (C-551/03).

Disconcerted by Uribe's aggressive approach, the Court revisited the issue of reformability of the constitution again and asked whether the charter has implicit axiomatic principles that limit the ability of the secondary constituent *(constituente segundario)* to alter these basic principles. In order to perform this interpretive step it turned to the question of procedure in light of the competence of the actors involved. According to the Court, competence in a reform process only makes sense if it distinguishes between primary and secondary constituent power. It argued:

> In the development of democratic principles and of popular sovereignty, the constituent power lies in the people, who have and preserve the power to give themselves a Constitution. The original constituent power, then, is not subjected to legal limits and implies, above all, the complete

16 The reform included stipulations in three different fields: electoral reform and prohibitions to fight corruption, increasing transparency in budget debates, and overruling of several Constitutional Court decisions, which ranged from the minimum increase of public salaries to the admissibility of personal consumption of narcotics in private (Cepeda Espinosa, 2012).

> exercise of the political power by the relevant individuals. (...) On the other hand, the power of reform, or derivative constituent power, refers to the capacity certain organs of the State have, on some occasions, by consulting the citizens, to modify one existing Constitution, but within the paths determined by the [current] Constitution itself. This implies that it is a power established by the Constitution, and that is exercised under the conditions set by the same Constitution. Such conditions comprise matters of competence, procedure, etc. It deals, therefore, with the power of a reform of the Constitution itself and, in that sense, it is of constituent nature, but it is instituted by the existing Constitution and it is, therefore, derivative and limited (C-551/03).

With the distinction between constituent power and constituted power, the Court constructed a precedent for the competence to reform the constitution. When the Constitution holds in article 374 that it may be "amended by Congress, Constituent Assembly, or by the people through a referendum", it implicitly recognizes this distinction, because "a power of reform without limitations of competence also eliminates the basic distinction between the original constituent power and the derived constituent power, or of reform" (C-551/03). The question of competence then becomes an issue of procedure, distinct from material review that examines the substantive constitutionality of a reform by comparing one article with a constitutional rule, norm, or principle.

In a Marbury-vs-Madison-fashion, the Court declared the political referendum constitutional, but established the precedent for the doctrine of the substitution of the constitution. The first time that the Court struck down parts of a reform for substituting the Constitution was the 2005 reform to allow re-election. As explained above, a statutory law accompanying the reform gave transitory powers to the Council of State,a judicial body.[17] In 2003, the Court had simply manifested that, to detect a substitution, the Court must analyze the principles and values of the Constitution. In 2005, it clarified and defined substitution of the constitution when "one of its defining elements, instead of being amended, is replaced by an opposing or wholly different one. Substituting implies that the resulting text contradicts the core of the 1991 Constitution and that, therefore, it is no longer recognizable" (C-551/03).

17 The reform read: *[i]f the Congress were not able to issue the statutory law within the deadline established, or were it declared void by the Constitutional Court, the Council of State will provisionally issue regulations on the matter during a two-month period."* (Cited in C-1040/05).

The primary task the Court has to fulfill is to identify those defining elements of the Constitution –critiques would say *decide* on its core elements–. The Court held that it avoids legal subjectivism by applying a three-tiered test: i.) identify the core element; ii.) Reference multiple constitutional provisions to define its specificity within the 1991 Constitution; iii.) Show its importance in the comprehensive constitutional context. From here it can then move on to comparing the original element with the new element, in order to estimate whether the new element is different, to the degree of incompatibility, with the original document (Cepeda Espinosa, 2012: 76).

The Court found that *one* immediate presidential re-election does not alter Colombia's position as a social state of law, nor does it replace its presidential system with another one, but only modifies the existing one. There was dissent on the Court, with magistrate Cordoba lamenting procedural violations, and magistrate Araujo arguing that the Constitution indeed was substituted. Magistrate Sierra Porto did not dissent from the verdict itself, but argued that the Court should have declared itself incompetent for the substitution review, since it amounted to material review –an imperative that the Constitution explicitly denied the Court–. His dissent is the most articulated critique of the doctrine of the substitution of the constitution. Thus, it is worth to take a quick look at his argument.

The issue of contention between proponents of the doctrine of competence flaws rests on the issue of competence on the one hand, and the question of axiomatic principles on the other. Sierra Porto relies on a more formal and textual interpretation of the constitution, arguing that the Constitution articulates three mechanisms for constitutional reform, and that the same text also dictates that the requirements in these processes are only procedural. In his words, inventing axiomatic principles ignores the original text of the constitution and intention of the constituent. The constituent representatives in the assembly discussed the issue of material review of constitutional reform, and as a response to the intransience of the old Supreme Court in letting constitutional reform pass, deliberately opted for the option of procedural review.

He goes on to insist that "the construction of a 'major premise' in the substitution judgment is a construction of material parameter" because it is "up to the constitutional judge to identify what are the essential elements of the 1991 Constitution, in order to make the substitution test". He doubts that the substitution test strips the judge of subjectivism, "when precisely all

that is described that is done is the ultimate expression of this; he [the judge] identifies the essential element, demonstrates its essential nature and defines it in the Constitution. He escapes any objective elements in this operation, and exercises a typical decisionism that is criticized by the judiciary".[18]

Invoking legal decisionism, the account then turns against the differentiation between constituent and constituted power as not very consistently applied in the theory of substituting the constitution. Sierra Porto holds that this distinction "deliberately ignores the fact that the power to amend a constitution is a constituent power, even if you want to call it derived, limited, or else. For once a Constitution is established the whole exercise of constituent power is derivative or constituted, as it must operate within the channels or limits in the Constitution." Holding that Congress cannot replace the Constitution as a mere power of reform can also serve to stifle popular sovereignty, even if it acts as a constituent. Sierra Porto concludes that for a judicial body to assume a position from where to decide which aspects can be subject to popular vote undermines the democratic foundations of the political system.[19]

The substitution theory was utilized for the first time to strike down a reform in its entirety in the 2010 case concerning re-election. Humberto Sierra Porto had an exposed role in the second case of re-election reform as the magistrate who prepared the initial legal study to commence deliberation within the Court. I will speak to the details of the institutionalization of deliberative process within the Court below. At this point, it suffices to mention that his *ponencia* (as the initial study is referred to) encompassed procedural complaints only. As evidenced by his dissent, which was outlined above, Sierra Porto brought his legal positivist convictions into his jurisprudence, and remained loyal to his opposition to the substitution theory. The decision he promoted wanted to declare the reform unconstitutional on procedural grounds, but refrained from the competence test. It had a 7-2 majority, but five magistrates insisted that rules dictate an all-encompassing jurisprudential analysis, which also must include the subject of substitution.[20]

The argument construted by the five judges begins with the premise that the first decision, regarding presidential re-election in 2005 set a precedent and allowed to change the norm to *one* immediate re-election of

18 Interviews and Humberto Sierra Porto, C-1040/05; p. 771.

19 Interviews and Humberto Sierra Porto, C-1040/05;. p. 774-775.

20 Interview.

the President. They upheld that this limitation is well-grounded, because the term limits placed on a president –in particular in a context of hyper-presidentialism– directly touches on the horizontal institutionalization of the separation of powers. Constituents in 1990, who were aware of the excesses of presidentialism in South America, had intended to balance executive power, by minimizing the time overlap in office between institutions that function as a check on the President, but in which the mandate holder has had a part in appointing. This includes important judicial positions such as the attorney general, and appointments to Federal Bank that are constitutionally mandated to act independent of the political branches of government. The magistrates argued that another term in the presidency undermined such a counter-cyclical periodization of offices, and irreparably damaged the equilibrium between the branches of government.

The unmitigated tilting of the balance of power altered the major premise of the separation of powers implicit in the organization of the Colombian state as a social state of law (article 1), transforming it beyond recognition. Thus, it concluded that due to the incompatibility between original norm and its modification in the reform, the referendum constituted a substitution of the constitution, for which Congress lacked competence. The final vote was 5-4, the doctrine stands.[21]

Deliberation within the Court: the institutionalization of the tranquility of the process

As shown, the fact that the test of competence was applied in the deliberation of the presidential re-election case had a lot to do with the institutionalization of procedure within the Court. Thus, one of the contentions of my research was to investigate this institutionalization. It has shown that deliberation, and the institutionalization thereof is a reminder of the peculiar and contentious position of a judicial court that subjects the legislature and executive to the rule of law. We need to recall that judicial review institutions face very specific critiques in their task of defending the rather mysterious political ideal of the rule of law: they lack direct democratic legitimacy, but must control those representative institutions that have been democratically elected, and reflect (ideally) the various interests that constitute the political society of

21 Interviews.

a given country. Thus, the institutionalization of the deliberation processes aims at the mitigation of the lack of democratic legitimacy, while at the same time maintaining the independence and autonomy in judgment that are required for the exercise of impartial judicial review. The research has shown that the institutionalization of deliberation and procedure within the court follows a conscious and transparent script which aims at assuaging the Court's particular legitimacy conundrum, by enabling what one interviewee termed the tranquility of the process.[22]

The Constitutional Court in Colombia, as a deliberative body, is tasked with two types of reviews: abstract reviews of laws and constitutional reforms, and rights review of *Tutela* complaints (Art. 241, 1-11). Consistent with the number of tasks, there are two different types of revision courts in the Constitutional Court: one for revisions of *Tutelas* and the *Sala Plena*. The former consists of three magistrates and the latter of all nine. Most *Tutelas* are decided in the revision court.However, important *Tutelas* and reunification *Tutelas* that unify the jurisprudence are always decided in *Sala Plena.*

Deliberation over a particular begins with the random selection of a *ponencia* from the nine magistrates. The elected *ponente* is tasked with preparing an initial study into the juridical questions posed by a particular constitutional case. In this case whether the constitution's procedural proviso were violated in the creation of constitutional reform (which also implies the question of competence). The *ponente* then prepares his/her "project" together with his dispatch and distributes it to the other magistrates. Based on this *ponencia*, they research their own take on this issue. This exchange takes place around ten days before the deliberation begins in the *Sala Plena*. When everyone is well prepared then they are summoned for the deliberation in the *Sala Plena*, where only the magistrates and the general secretary are present. Here, the President of the Court, who is annually elected by the Court itself, directs the conversation. Eventually, the project of the *ponente* is put to a vote and passes as decided if it can yield a five-vote majority. If not, as was the case of the second re-election, in which Sierra Porto presented a *ponencia* without the competence test, the *ponencia* moves to one of the contending magistrates, and he/she prepares a study that reflects the critique. This is repeated until the Court reaches a majority, which is then presented by the President to the

22 This entire section is based on interviews conducted by the author.

public and somewhat later published as the reasoned decision. The reasoned decision includes only those *ponencias* that have passed the majority in the court and not the minutes of the conversation nor the rejected *ponencias*. In important cases, though, a magistrate can publish his dissent on a particular clause in the reasoned decision, but this has not occurred very often.

The systemic organization of argumentation, which reflects the way university seminars are conducted, speaks to the nature of the constitutional judge. Interviewees explained that viewing themselves as apolitical and asocial beings would amount to deliberate delusion; with the election to the constitutional tribunal, the magistrates do not attain herculean capabilities that place them in a juridical mount Olympus, liberated from human predispositions, as Dworkin theorized. On the contrary, subjects made abundantly clear that all judges have experienced a unique socialization that exposed them to particular preferences, biases, and ideologies. These cannot be switched-off. Rather, the process and institutionalization of deliberation ought to minimize socio-political biases. The informal rules accompanying the formal institutionalization of deliberation stresses that impression, too. In order to let juridical argumentation prevail over political argumentation (or arguments of convenience), magistrates go to great lengths in order to protect the integrity of the *Sala Plena* as the *sine qua non* of the Courts independence.

First, informal rules concern the interaction of the Court with the public. Of course, the criticalness of public interaction is heightened by the fact that the Court is a deliberative but unelected body, and thus lacks the direct legitimacy of free and fair election. This is a fact that does not go unnoticed by magistrates. However, the strategy to overcome this deficiency of democratic legitimation does not consist of increased public exposure of judges and their individual opinions, but rather an assertion of their autonomy and independence as a collective body. Then the imperative becomes to defend the "tranquility of the process". It is exactly the tranquility of the process that is endangered by too much public exposure; pressures from the parties and the organized interest that could be affected by a particular decision would mount, the process of deliberation affected, and the coherence of their argumentation questioned.

The most damaging critique against the discourse of a magistrate is that it is politically motivated and not guided by principles implicit or explicit in the law of the land. The guidance for public interaction followed by magistrates must be viewed under these aspects. As a consequence the Court followed fairly

clear rules when it comes to the interaction with the public. The overarching maxim is that the Court speaks as a unified whole and not as a conglomerate of particular opinions. Before a decision, the Court only invites arguments sent in for the litigation. It never speaks back, but only collects these arguments and organizes them. They can be found in the reasoned decisions.

When it comes to public debate, the line becomes still finer: As a public institution that makes crucial decision of high public importance, the Court cannot withdraw entirely from the debate –in particular, since it faces peculiar legitimation issues–. Nevertheless, the posture by the Court in such engagement with the public is best described as extremely cautious. There are interviews with the Court and the printed press.[23] It is readily apparent that these are fairly tightly managed by the magistrate. It begins with the fact that only the current President of the Court speaks in interviews with the media. The informational degree of such interviews, however, is fairly minuscule. Since positions within the Court are supposed to be kept secret, the President of the Court does not speak about any of them. Noticeably, he or she only speaks in the third person and if asked about precise juridical question, he proceeds to answer just stating that the *Sala Plena* will have to analyze the issue. Thus, these interviews are much more an exercise of pedagogy than political interaction: the Court wants to inform the public about the juridical questions at hand, but never reveals who holds what opinion on the Court.

Moving from the macro to the micro level interaction, the research identified certain parameters of interaction that magistrates within the Court oblige each other with in order to uphold the integrity of the *Sala Plena* –or the Coliseum as one magistrate referred to it. In a workshop with the *Konrad Adenauer Stiftung* in Bogotá, magistrate Mauricio González explained that the task is to bring arguments to the *Sala Plena.* Evidently, there is interaction between magistrates before a decision or a deliberation process, but these are purely social and never involve the issues to be discussed. This precludes political discussions on a particular question *and* juridical questions. The preparation for a particular project is between the magistrate and his dispatch of auxiliary judges that support the judge. Even less accepted are *quid pro quo* debates between magistrates. The judge was adamant in his presentation that judges do not agree on votes for each other's projects before the deliberation takes

23 I have not come across interviews in television or radio.

place. In his words, such collegiality would mean the end of the deliberative body itself. The auxiliary judges in the dispatches of the various magistrates do talk to each other. As reported, these discussions are also strictly juridical and can be appropriately characterized as an exchange of know-how.

The lack of direct legitimacy, in the magistrates' opinions, shifts the burden to the effort of mitigate their democratic deficit to the coherence of the argumentation: "In the end, the weapon of a judge is his discourse. It depends on his language, its coherence, its logic".[24] The most damaging accusation, of course, would be that this discourse is a discourse of convenience and not of juridical values. The investigation showed that the coherence of the argumentation relies on the integrity of the *Sala Plena* and the juridical nature of the deliberation taking place therein. The resulting strategy is then to minimize the outside exposure of the deliberation process itself –including one's own position– in order to 1) minimize external undue pressure and 2) avert accusations of bias. The generic motto then is to guarantee the autonomy of legal reasoning by protecting the tranquility of the process of deliberation.

Conclusion

When the Constitutional Court declared unconstitutional a potential third term in the Presidency in 2010, it manifestly displayed its own institutional independence. President Álvaro Uribe occupied the mandate with charisma and a sense of mission that led him in many instances to test the borders of constitutional limits. Part of his political program as well as his political persona displayed a distaste for limits on popular elected officials. Together with the wide-spread public support he and his *Democratic Security* enjoyed, his constitutional reform agenda was posed as a threat to the integrity of the 1991 Constitution project, of which the Constitutional Court was an integral part. If we add to these factors the generically weak conditions of Colombia's state and political institutions, the display of the Court's institutional independence becomes even more remarkable.

The key part of the Court's decision was the so-called substitution doctrine. This theory exemplifies the spirit of the 1991 Constitution, in that it invokes, under the banner of constituent power, a pluralistic decision that is prior to the constituted polity. Shifting the locus of "original" power from a unified will –as

24 Interviews.

is the case in Schmittean conceptualizations– to a pluralistic will, not only lifts the metaphysical veil from the concept itself, but also liberates it from being a tool for executive domination. The court accepted Schmitt's affirmation of the difference between reforming the constitution and changing it, but since the Constitution speaks of ways to reform it for all bodies constituted by that Constitution (legislature, executive, judiciary, etc.), substituting it is outside of their competence. It defended its right to test for competence, because competence is an integral part of procedure, subjecting it to the Court's imperative to formal judicial review.

Constructing the doctrine of the theory of the substitution was a direct response to Uribe and his politics. It was also during his tenure as President that the Court developed the jurisprudence and, in its final consequence, utilized the doctrine to strike down a reform in its entirety on competence grounds. Thus, the two cases of constitutional reform also eclipse the time span, in which the Court created a doctrine, developed its principles, and, finally, applied it to strike down a constitutional reform. It thereby displayed a remarkable degree of institutional robustness.

Finally, the paper pointed to the institutionalization of discourse in the Court as an important factor for the Court's independence. Aware of the counter majoritarian difficulty, but loyal to its counter majoritarian task, magistrates on the Court hold that the coherence of the discourse is the judge's most important line of defense against accusations of bias and political argumentation. Then the generic motto is to guarantee the autonomy of legal reasoning by protecting the tranquility of the process of deliberation. The followed procedures are formal rules – such as the selection of the President, the drawing of the ponente, and the house rules – that are accompanied by informal rules – such as not conversing about cases outside the Sala Plena, not reveal positions within the Court to the public, and insist on the argumentation as juridical and not political – that together conjoin to buttress the sanctity of the process.

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In total, I conducted over 40 in-depth elite interviews with persons directly or indirectly involved with the Constitutional Court of Colombia as well as persons, who occupy prominent positions in the analysis of the actions by the Constitutional Court, such as professors of law of the most important law schools in the country as well as persons engaged with NGOs that are involved in litigation Constitutional Court cases. The interviewees consisted of all magistrates of Colombia's Constitutional Court, who were on the Court in 2010 when the decision regarding a law to call for referendum to allow a second re-election was decided save for one, whose auxiliary judge I interviewed. I also interviewed four of the nine members of the Constitutional Court that decided the decision regarding the law to permit constitutional change for a first re-election of the President of the Republic. Furthermore, the interviews consisted of auxiliary judges of eight different magistrates of the Court from different periods. The interviewee list also included three magistrates from the Supreme Court of the Republic. Finally, I interviewed three journalists, four Senators and Representatives from the Camerá, ten professors of law and political science with specialization in legal politics and judicial/political culture, and five activists from NGOs litigating Constitutional Court cases. The selection resulted from an analysis of the sentences by the Constitutional

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Court, a survey of the literature on judicial politics in Colombia as well as an archival research of the most important journalistic publications in Colombia *(La Revista Semana, El Tiempo, El Espectador, La Revista Cambio)*.

The interviews were in-depth and focused on the issues resulting from the content analysis of publications. They lasted between one hour to two and a half hours. The questions were structured according to these topics:

Democracy and Constitutionality

- Sovereignty of the people and constitutional reform
- The role of the judiciary in the Colombian Constitution
- What is the legal culture (Cultura Legalista) in Colombia and how has it changed since the new constitution in 1991?

Judiciary and the media:

- The press and publicity as democratic phenomena.
- The impact of media discourse on decisions by the Court.
- How does the Court communicate with the media? Is it legitimate?

Deliberation and institutionalism

- The role of deliberation amongst magistrates before and during the process of reaching a decision.
- Can you describe the deliberations regarding re-election?

Uribe, democratic security and re-election

- What was the importance of democratic security and did it justify re-election?
- What were the important changes between the first and second decision regarding constitutional reform and re-election?
- How did the political scandals affect the decision?
- What importance did the revelation regarding the so-called *Yidispolitica* scandal have?
- How important were the official investigations by the Supreme Court in the *parapolitica* scandal?
- Did the image of an institutional crisis resulting from a negative decision regarding re-election matter in deliberations?

As is evident in the outline above, the questions were semi-structured, but left the interviewee sufficient leeway in answering the question openly. Questions also involved follow-up questions for clarification.

The interviews were transcribed and analytically structured according to the topics given in the questions. Most often this corresponded to the chronology of the interview, but due to the open-ended nature of the questions, in some cases the interviewee made statements that could also be subsumed under another topic. In the analysis, the structuring of the interview contents according to topics was complemented by an ordering of first, second, and third order observation of the position of the interviewees. Thus, magistrates belong into the first category, auxiliary judges into the second, and observer and interpreters of jurisprudence of the Court into the third category. The epistemological question remains whether this also implies a hierarchical ordering of the content or whether these are simply descriptive analytical categories. While it is true that the magistrates are the closest to the decisions, since they are actively involved, they are also more likely to produce pre-structured answers to questions regarding the role of the judge in the constitutional politics of Colombia – after all their imperative is to make judgments based on established constitutional norms and legal categories. Conversely, auxiliary judges can be seen in a position to answer more freely, since they are not directly involved nor is their role defined by norms of independence and autonomy that requires aforementioned pre-structured reasoning.

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