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**Colombia's Critical Juncture:
The Communicative Origin of the
1991 Constitution****

*La coyuntura crítica colombiana: el origen comunicativo
de la Constitución de 1991*

*A conjuntura crítica da Colômbia: a origem comunicativa
da Constituição de 1991*

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* Recibió recientemente su doctorado en Ciencias Políticas de University of British Columbia. Su tesis doctoral se enfocó particularmente en la Corte Constitucional colombiana. Actualmente es investigador en el Social Science Centre de Berlín. Sus intereses investigativos se centran principalmente políticas constitucionales, derecho constitucional y desarrollo institucional. Actualmente está trabajando en un libro, basado en su disertación doctoral, con el cual propondrá una nueva conceptualización del juez constitucional como un juez deliberativo, siguiendo las evidencias encontradas en la Corte Constitucional colombiana.

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Abstract

It is said that the Constitutions of the nineteenth century Colombia were battle cards that appeased the military confrontation, but at the same time they contained the seed for the next confrontation. The 1991 Constitution breaks with that tradition, as it is not perceived as a battle card, but as a peace pact. Through a comparative politics methodology, this article contrasts the constitutional process of 1991 with other scenarios of deep institutional reconstruction to argue that what makes the 1991 Constitution different from those battle cards was the type of crisis that led to the constitution of the National Constituent Assembly, its origin in a popular movement committed to a communicative action and, lastly, its inclusive and deliberative character, in which groups traditionally marginalized were heard.

Keywords: 1991 Constitution; National Constituent Assembly of 1991; constitutional processes: constitutional history.

Resumen

Se dice que las Constituciones de la Colombia del Siglo XIX eran cartas de batalla que aplacaban la confrontación militar, pero al mismo tiempo contenían la semilla para el siguiente enfrentamiento. La Constitución de 1991 rompe con esa tradición, en tanto esta no es percibida como una carta de batalla, sino como un pacto de paz. A través de una metodología de política comparada, este artículo contrasta el proceso constitucional de 1991 con otros escenarios de profunda reconstrucción institucional para argüir que lo que hace que la Constitución de 1991 sea diferente a aquellas cartas de batalla fue el tipo de crisis que llevó a la constitución de la Asamblea Nacional Constituyente, su origen en un movimiento popular comprometido con una acción comunicativa y, por último, su carácter inclusivo y deliberativo, en el que se escuchó a grupos tradicionalmente marginados.

Palabras Clave: Constitución de 1991, Asamblea Nacional Constituyente de 1991, procesos constitucionales, historia constitucional.

Resumo

Diz-se que as Constituições da Colômbia do século XIX eram cartas de batalha que aplacavam o enfrentamento militar, mas ao mesmo tempo continham a semente para o próximo confronto. A Constituição de 1991 rompe com essa tradição, pois não é considerada uma carta de batalha, mas como um pacto de paz. Através de uma metodologia de política comparada, este artigo contrasta o processo constitucional

1991 com outros cenários de profunda reconstrução institucional para arguir que o que fez a Constituição de 1991 ser diferente a aquelas carta de batalha foi o tipo de crise que levou a constituição da Assembleia Nacional Constituinte, sua origem em um movimento popular comprometido com uma ação comunicativa e, por último, seu caráter inclusivo e deliberativo, em que se ouviu grupos tradicionalmente marginalizados.

Palavras-chave: Constituição de 1991, Assembleia Nacional Constituinte de 1991, processos constitucionais, história constitucional.

Introduction

“The 1886 Constitution was the consecration of the philosophy of the winning party: it was centralizing, authoritarian, and autocratic. The new constitution is a peace pact.”

- Colombian Constitutional Court judge

It is said that in the blood soaked 19th century in the place that were to become the Republic of Colombia, factions dispersed over the gritty territory fought each other always with a constitutional project in their backpack. In the end of each of the seven national civil wars the winning party imposed its vision of political (and social life) on the losing one (Deas, 1997). These *battle cards* then appeased a civil war, but at the same time contained in them the seed for the next round of upheaval and bloodshed (Valencia Villa, 2012). The Constitution from 1991 breaks with that tradition. The common sentiment is that contrary to the battle cards of the 19th century, the 1991 Constitution is a peace pact. This paper is not going to engage in a constitutional comparison between the various documents organizing political life in Colombia. I am interested in what is it precisely that makes the 1991 Constitution different. For that end, I engage in comparative politics methodology, and contrast the 1991 Constitution with other instances of profound institution building. I argue that the 1991 constituent process differs because 1) of the unique crisis that led to the constituent assembly, which resulted from a normative cleavage between the normative claim of a democracy to uphold basic human rights and channels for political participation, and the political reality of a country besieged by drug violence; 2) its origin in a popular movement engaging in communicative action; 3) its deliberative and inclusive procedures, which incorporated previously marginalized groups and public input. The result –a progressive and rights expanding document with novel mechanisms to enforce rights protection– is therefore not a coincidence, but on the contrary it is related to the original crisis, its communicative genesis, and the inclusion of previously excluded groups during deliberation.¹

1 This paper is rooted in my dissertation, which built on expansive elite interviews in Colombia, jurisprudential analyses of Constitutional Court cases, content analyses of newspaper and magazine discourses, and detailed secondary literature surveys. See appendix 1 for a full overview of the methodology and interview data.

The Critical Juncture Framework

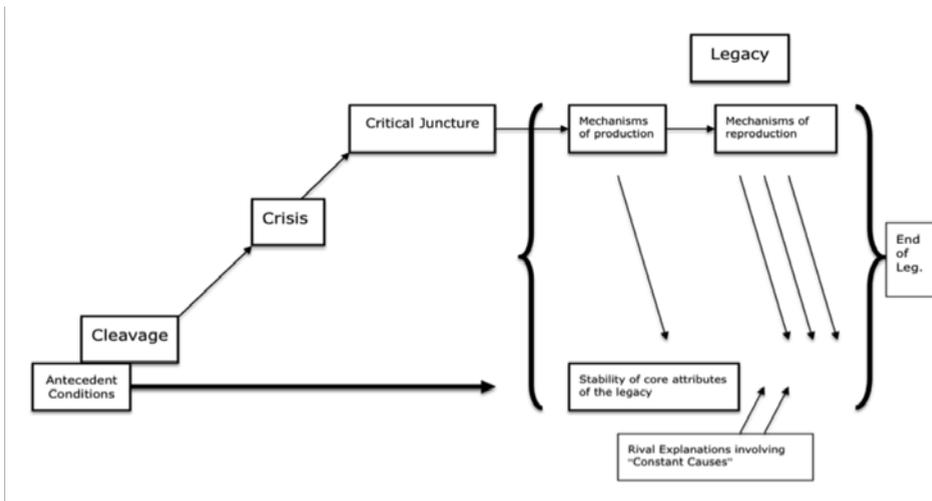
The social sciences have a fascination with change: what causes change, what initiates it, and what arrests change? Modern political science has come to understand the absence of change as a function of the role institutions play in basic interactions. They structure expectations, determine the rules of the game, and exclude certain options from patterns of behavior. In short, institutions' defining feature is their persistence over time. Yet, persistence over time is only intelligible if it contrasts with moments or periods of change. If institutions are structured and stable expectations, then these expectations or rules of the game must have been put into place at some point. In other words, there must be an origin to the stability that institutions instill that "precedes the question of institutional legacies" (Negretto, 2014, p.3).

Such moments are profoundly political ones, during which actors engage with each other with the intention to structure future interaction according to their own interests. To better understand these processes, the Colliers' critical juncture framework from their seminal study on what shaped political arenas in Latin America is an essential analytical tool. It helps us to identify not only the peculiarity of specific moments in history, but their relationship to past and present. After all, institutions – even new ones – are never created *ex-nihilo*, but retain traces of the past (Negretto, 2014).

The Colliers understand critical junctures as "periods of significant change which typically occur in distinct ways in different countries or in other units of analysis" and result in long(er) lasting, distinct legacies (2002, p. 29). These are contingent historical events that did not simply occur randomly, but arose from particular historical crises and had long-lasting consequences, because agents chose one path over another. Periods, or moments, of profound social change such as revolutionary change, cyclical interactions, or political incorporation, were preceded by social and cultural cleavages (Rokkan & Lipset, 1967; Collier & Collier, 2002). Such cleavages create tensions and crises that cannot be contained with existing political mechanisms of conflict resolution and require a reconfiguration of the rules governing socio-political interaction. There are three defining components that characterize a critical juncture: preceding conditions, the moment of crisis, and the legacies left by the decisions taken during the critical juncture. Antecedent conditions can already contain the cleavages from which change evolves, but remain stable until the equilibrium is ruptured (by external forces) and space for fundamental

alterations open up. Such junctures become critical, if the eventual choices and its consequences could not be predicted by existing patterns of behavior, but reflect the presence of new actors, interacting under specific constraints, giving rise to new institutional frameworks that structure (more predictably) future interaction (see Mahoney, 2000, p. 514). In the end, the Collier and Collier model looks like this:

Figure 1
The critical juncture framework



Source: Collier & Collier, 2002, p. 30.

Critical junctures are said to appear in more than one unit of analysis, which usually requires cross-sectional data. Here, I want to utilize the framework to turn inwards within the Colombian case. This helps me to utilize case study strength, namely that phenomena have prima facie causal relationships, while it also mitigates the weakness of lacking cross-sectional data. I contrast three institutional reform processes – the Reyes Reforms (1905-10), the National Front Agreement (53-57), and the 1991 constituent process – that shared the basic ideal type trajectory:

There is a legal distinction between the Reyes Reforms, the National Front Agreement, and the 1991 constituent process in that the latter disrupted the validity of the existing charter, while the two former instances preserved the legality of the existing constitution. As Negretto explains, however, constitutional replacements and amendments “modify the constitution by introducing textual changes, and these formal alterations are sometimes comparable in scope and importance” (2014, p.19). This was indeed the case for these three sub-cases: in each instance, electoral, legislative, executive, and judicial institutions were altered. In addition, even the amendment processes had plebiscitary components and were submitted to popular confirmation in referenda or held in a (flawed) constituent assembly. Yet, the outcome in the 1991 Constitution differed on most of these parameters.

From Political Crisis to Consociational Agreement

Turning to the first two cases, it becomes readily apparent that during the Reyes Reforms and the National Front process, reformers responded to crises that, having evolved from within the political elite, were not rooted in deep social or cultural cleavages.. Essentially, elites were unable to compromise and strike deals that satisfied the entire range of either party’s membership and leadership. The resulting partisan clashes signaled that the original political arrangement was insufficient to contain conflicts of interest and identity, and forced elites to hammer out new deals. These elite-driven processes of institutional reform established new consociational (bi-partisan) arrangements, giving each party significant influence in regard to the path future politics were to take, while protecting forms of cronyism by placing them on a more stable *formal* institutional setting. In the end control over the political process was not relinquished to popular participation demands. The political system remained oligarchic, and contained in it the seed for future upheaval.

The Thousand-Day war, Colombia’s most violent conflict in the 19th century, preceded the Reyes Reforms, and, in the words of Safford & Palacios, “confirmed the saying that war is the continuation of politics by other means” (2002, p.249-250), because factions in each party produced dynamics that moved the country irreversibly down the road to war. More specifically, Mazzuca & Robinson found that the beginning of the violent clashes can be traced to a dysfunctional political framework that permanently excluded Liberals from power and representation, and aggravated the economic crisis by using public

funds for the suppression of contest from the opposition, rather than assuaging its effects and allocate funds for productive investments. “Economic turmoil was” therefore “an indication of the impact of political conflict on the growing fiscal crisis and the associated monetary expansion of the 1890s” (2009, p.307). In other words, socio-economic tensions were compounded to crisis proportion by the failure of political institutions to coordinate between factions and utilize public funds to counter-cyclically soften the effects of fluctuating world prices in key export commodities.

During the 1890s, both parties split into more and less radical factions. On the conservative side, Nationalists and Historical Conservatives disagreed on the rigidity of centralization and importance of foreign trade, while the liberals divided into two factions around the old Radical oligarchy (more radical in name only), and a younger, more bellicose faction called the *Nuevos*. Nationalists and *Nuevos* vehemently opposed each other, while Historical Conservatives and the Radical oligarchy of the Liberal Party were more peace oriented due to their shared commitment to foreign trade (Safford & Palacios, 2002, p.250). The institutional framework further aggravated the political situation by strengthening the more radical faction on each side. Conservative Presidents of the *Regeneración* (a movement of conservative politicians that sought to centralize rule in Colombia) implemented the appointment of Governors as a recentralization mechanism (hallowing Liberal influence at the regional level), and utilized extra-ordinary powers to unilaterally ban political activities ““offensive to public order”” (Mazzuca & Robinson 2009, p.293). When Liberal appeals for more inclusion were ignored by the National faction of the Conservative Party, which dominated the Senate, the younger Liberals rebelled in October 1899, setting in motion a well known escalation pattern: the central government endowed civil and military authorities with the power to decree loans to governors, who used that power to force affluent Liberals to contribute with funds. This reinforced party identity and “divided Colombian along party lines more than along those of socio-economic classes” (Safford & Palacios, p.250). For the next three years, Colombians fought each other along those party lines, which produced the bloodiest internal conflict Latin America had seen yet.

The years prior to the period that Colombians simply refer to as *La Violencia* (the Violence) were marked by socio-economic tensions that surfaced with the mobilization of the working class. It is important to take into account that

political institutions were not only inept to incorporate lower class demands, but contributed to the radicalizing dynamic by again pushing party factions towards conflict with one another. Incorporation of the working class received a catalyst through the election of the Liberals in 1929, which in turn resulted from the shift to proportional representation. It opened the path to Colombia's New Deal Period known as *Revolución en marcha* (Revolution on the March) under President Alfonso López Pumarejo. The Colliers detail three interrelated factors underlying the fact that incorporation of labor by the Liberal Party failed: 1) it was a cross-sectional party with roots in the 19th century; 2) it was not founded for the purpose of working-class representation by workers themselves; 3) incorporation of labor came "early in relation to the development of the Colombian labor movement" (2002, p.271). These three factors split the attitude of the Liberals towards social reforms: the radical wing around labor lawyer Jorge Eliécer Gaitán wanted further social reforms, while the more moderate wing, backed by the landowning oligarchy amongst the Liberal ranks, already considered the López reforms as too extreme.

At the end of the 1930s and the early 1940s, the divide inside the Liberal Party provided the Conservatives with an opening to regain power. While Gaitán was capable of coalescing wide public support behind his leadership, the moderate wing moved towards the Conservative Party. The Conservative Party which had not run candidates since the 1934 elections returned to the polls motivated by the Liberal split. Moreover, goaded by the populism of the Gaitán wing, former President López moved to support the moderate Conservative candidate Ospina, who was elected to the presidency in 1946. The proclaimed unity government between moderate Conservatives and Liberals could not prevent the Gaitán wing from controlling the Liberal faction in Congress, which announced him as their candidate for the 1950 presidential elections. As the Liberal split deepened, Conservatives began to violently retake control of the state at the regional level, transforming the intra-party conflict into an inter-party collusion. As a consequence, the coalition between moderates on both sides of the aisle collapsed, and after Gaitán's assassination in April 1948, civic order broke down entirely: first in Bogotá and then in the entire country. In November 1949 the Conservative Gómez was unopposedly elected president and "with the exclusion of Liberals from all areas of government, both national and regional, the institutional breakdown was complete" (Collier & Collier,

2002, p.312). As in 1899, elite politics as conversation among gentlemen failed, resulting in a drastic escalation of violent conflict.

There are striking similarities between both reform processes, beginning with the role the military played in orchestrating talks between factions – taking on a more or less neutral role –, and the coordination back to civilian control. The government of General Rafael Reyes was in power from 1904 until 1909, and General Rojas Pinilla from 1953 until 1957. General Reyes had built up his prestige in the civil wars of the late 19th century and was nominated for the presidency by the Conservative Party. Rojas Pinilla was “essentially thrust into power in the midst of *La Violencia* by a segment of the Conservative Party and elements of the military” (Hartlyn, 1988, p. 48). The end of both their respective incumbencies in power, too, bore interesting similarities: they slightly overstayed the welcome bestowed upon them, but power was returned to civilian rule without the use of violence or widespread civic activism. General Rafael Reyes was dislodged by a coalition of partisans from both parties in 1909, and General Rojas lost appeal amongst fellow generals, who orchestrated the return to civilian control (Solaún, 1980, p.3; Esguerra Portocarrero, 2012, p.84).

Corresponding to the elite instigation of the processes, institutional engineering during each juncture was decisively elite-controlled and lacking of civic participation. The bi-partisan movement to depose Reyes in 1909, known as the *Partido Republicano*, instituted a constituent assembly to overcome the partisan and factionalist tensions that had fuelled internal conflicts and civil wars. Crucially, it received its support from merchants and industrialists and not a movement; as Hartlyn asserts, it largely “foreshadowed the National Front” (1988, p.27). The National Front agreement was negotiated in Spanish cities between 1956 and 1957, and only post-factum ratified in a plebiscite.

The absence of the popular classes and civil society in the negotiations, while (traditional) party elites played central roles in either instance of institutional reconfigurations, best explains why both outcomes essentially evolved around securing the representation of each party in the most important national institutions (with the National Front going further than the 1910 reforms). General Reyes had already embraced a form of minority representation in the armed forces, encouraging Liberal families to send their children to the armed forces (Bushnell, 1993, p.156). The national assembly incorporated the principle of minority representation for the electoral system and replaced the

majority vote of the legislature with the incomplete vote, thereby assuaging the antagonizing effects of the old electoral regime. This guaranteed the Liberals a greater share of representation in Congress, while Conservatives retained control of the executive until 1930.

The National Front agreement essentially split political power between both parties. Previously elected offices were depoliticized and alternatively handed to partisans from each party. Congressional elections, too, were depoliticized and neither party was allowed to attain a majority in either of the two chambers. Parties in Congress would then agree on a candidate to be elected as President, alternating between each party. Finally, equal share of representation was extended to most public offices save for the military. In the civil service, restrictions on political activities of government officials were imposed as well as prohibitions against political discriminations in hiring practices (Hartlyn, 1988 & 1989).

The Reyes Reforms and the National Front agreement overhauled judicial institutions and increased the formal institutional independence of Colombia's highest court; thereby also reflecting the logic of providing mutual guarantees. While the 1886 Constitution created the Supreme Court, it did not place a lot of value on the question of the constitutionality of laws, and heavily involved both, the executive and the legislature, in investigating claims of such nature. The 1910 reforms entrust the Supreme Court with the quintessential citizens' right of testing the constitutionality of laws. The aptly called *acción popular de inconstitucionalidad* (popular action of unconstitutionality) anticipated Hans Kelsen's introduction of a similar *acción* in the Austrian Constitution after the conclusion of World War I, which marked the beginning of constitutional control by an independent court in Europe (Esguerra Portocarrero, 2012, p.107; see also Cepeda Espinosa, 2007, p.17; Mendieta González, 2010, p.72). The *National Front* implemented the *cooptación* method for selecting vacant positions on the Court, fully depoliticizing the selection process by giving judges on the courts the task to choose replacements (García Villegas, 2001). All of these institutional novelties carry in them the logic of political insurance mechanisms in times of uncertainty (Finkel, 2008; Hartlyn, 1988). Above all, substantive claims to justice and human dignity, consecrated in unalienable rights, were conspicuously missing from either accord.

Significant about both accords is that they succeeded in stabilizing political relations between both parties, and thereby provided a suitable context for

economic development, but never provided responsive political structures capable of incorporating unforeseeable shifts in context and the full range of political expressions. Above all, they lacked proper mechanisms to address socio-economic inequalities and uneven access to power. By depoliticizing and demobilizing society, the National Front agreement left “the way open for the potential emergence of competing, anti-regime forces” (Collier & Collier, p.667; Hartlyn, 1988, p.84 & p.156). In the 1980s, the effects of the international drug trade further compounded these internal contradictions, creating the situation that resulted in the 1991 Constitution.

1991: Constructing Institutions through Communicative Action

Contrary to the first two cases, the 1991 constitution was and is a rights-based constitution. The effects of the international drug trade, an external shock, further compounded the internal contradictions of the Colombia’s consociational regime, creating what I call a normative cleavage between the normative claim of a democracy and the political reality of a state besieged by violence. Institutional engineering has its origin in a popular, student movement that called for a general overhaul of the political regime. The constituent assembly was public, included citizen input, and incorporated previously marginalized groups, resulting in a new constitution that embraced human dignity and rights as organizational imperatives of the constitutional order.

When Colombia became the centre of the international cocaine trade, the country’s criminalization served as an external catalyst to a regime crisis that was bubbling beneath the apparently stable two-party, pacted democracy. It unleashed centrifugal forces, that the State was not able to subdue, within the two-party-system. New, powerful armed actors co-operated with regional party elites, eliminated peasants, unionists, and other left-wing activists who yearned for more inclusion and participation. Party bosses in the country’s center were either complicit in the crimes of regional elites (such as many cadres from the Liberal Party), or became victims of the violence themselves (such as Luis Carlos Galán). Above all, it became evident that the regime could not reform itself from within. During the 1970 and 1980s, progressive wing leaning political leaders attempted to renew the political system from within, yet failed either in Congress or in the *Sala Constitucional* (constitutional plenum) of the Supreme Court. The result was a profound cleavage between the normative claim of a democratic regime and the political reality of a regime incapable of

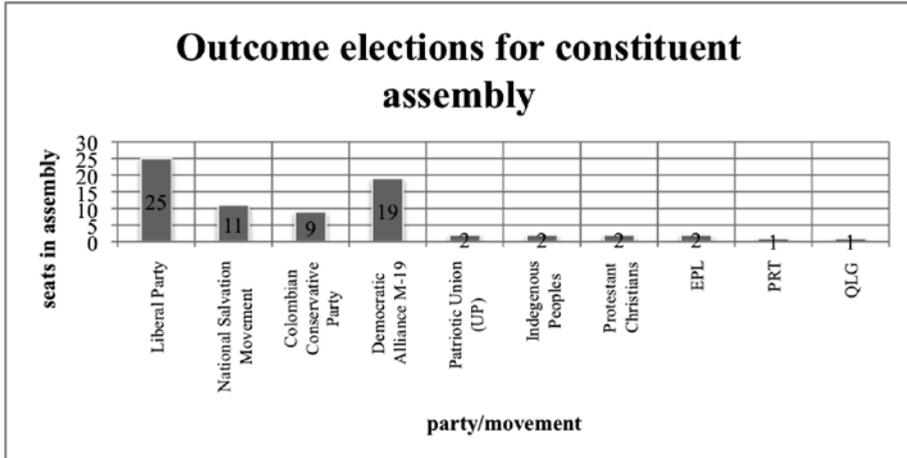
upholding basic human rights and keeping open even minimum channels of political participation.

Spontaneous, civic activism sprung up as a consequence of Liberal candidate Luis Carlos Galán's assassination in 1989. It prompted 20,000 students to take to the street in a silent march and call for an all-encompassing institutional reform. They argued that the violence and ubiquitous terror were symptoms of a much deeper political crisis, rooted in the exclusive and restrictive nature of the National Front regime, joined forces with a broad student alliance, and called for a (symbolic) national plebiscite held alongside the presidential elections in 1990 (Dugas, 2001). After the plebiscite to implement a constituent body, president elect César Gaviria moved to implement elections for a constituent assembly, somewhat dominating the process again. However, the essential student demands became the central pillars of debate in the constituent assembly, and crucial links between civic society and representatives in the constituents assembly did not disappear. Above all, traditional parties did not dominate the constituent assembly and failed to mobilize their cronies (Echeverri Urubura, 2012, p.458). While Congressional elections that year gave 94 percent of the vote share to traditional parties, now only 45 of the 70 delegates came from the two traditional parties (70 percent); and, most notably, 19 came from the demobilized M-19 guerrilla (see Figure 2).

Not only the election to the assembly and its results were peculiar, but the drafting stage preceding the assembly differed from other instances of institutional engineering as well. Citizens could give input in workshops held prior to the election (in more than 1,500 locations in the entire country) and produced 350,000 projects of considerations that had to be considered in debates within the assembly. Finally, debates were held in public and not behind closed doors amongst gentlemen.

The new constitution became a neo-constitutionalist charter that is centered on the protection of human dignity and thereby echoes the grievance that led students to protest on the streets in the first place. The Constitution's norms created an entirely novel institutional structure embedded in a strong normative framework, which, for the first time in Colombia's history, included a vast array of rights at the rank of constitutional norms. Even the most ardent critics of historical constitutionalism in Colombia noted that the emerging Constitution is reflective of the democratic moment at its origin, not adhering to a coherent worldview and normative ideology imposed by the victor, but

Figure 2
Composition of Constituent Assembly 1991



Source: Uprimny, 2003, p. 53.

rather a document of compromise and reconciliation that embraces liberal, conservative, nationalistic, internationalistic, and, above all, social democratic ideas (Valencia Villa, 2012, p.205-212). The new constitution introduced important changes to the legislative and executive branch – such as the lack of parliamentary immunity for the former legislature and the curtailment of emergency powers for the latter – but the most important changes certainly befell the judiciary. It created new courts (the High Council of the Judiciary, the Constitutional Court), a new attorney general office inside the judiciary (*Fiscalía General*), and new mechanisms (*Tutela*) to enforce rights. The Constitutional Court became the final instance of abstract review of constitutionality of laws and the review of concrete rights.

The effect of the new constitution is best seen in the jurisprudence of the Constitutional Court and the shift away from a legalistic judicial culture to a more neo-constitutionalist one; from the Old Law (*Viejo Derecho*) of the 1886 Constitution to the New Law (*Nuevo Derecho*) of the 1991 Constitution²

² This section builds entirely on the interviews conducted in Bogotá from September 2012 until May 2013. For a quick overview of interview results, see Appendix C.

Historical constitutionalism in Colombia evolved out of the political thought of the two most important figures of the independence wars, Simón Bolívar and Francisco de Paula Santander. They were ardent readers of the French tradition of constitutional thought, with its focus on administrative law and the structural organization of the State. It is consequently not surprising that under Old Law, the judge's role in interpreting the law was akin to Montesquieu's vision of the judge as the mouth of the law. This has three interdependent consequences: 1) the most important principle by which judges interpreted the constitutionality of laws was the principle of legality; 2) precedence, if any, has only an extremely minute role in the jurisprudence of the Supreme Court; 3) rights are subsumed under the civil code and have no constitutional standing on their own. The principle of legality holds that "public forces are only allowed to what the law allows them to do"³. If public officials are only limited by the written text, the interpretation of constitutional texts becomes a positivist and textual exercise, giving supreme authority to the written word of the constitution and law. A direct result of the centrality of the principle of legality in Old Law is its most important legacy: a strict formalism in legal questions. Formalism in constitutional interpretation means that legal arguments evolve around questions of procedure and competence and not about substantive contentions.

The "clinging to forms", adherence to order, and subjection of rights to legality in Colombia's historical constitutionalism reflect the generic ambiguity in Colombia's history, and its oscillation between legality and illegality, democracy and cronyism, peace and violence. Colombia's legalism was for the most part situated at the discursive level, which means that valid public arguments had to emulate legal vocabulary, even if actors were motivated by strategic interest⁴. This focus on legal forms and vocabulary fuelled a high confidence in the transformative capacity of law, but at the same time created a veil of ignorance for real socio-political grievances. It was, so to speak, an exercise in "changing everything, so nothing changes." Students in the movement to reform the Constitution not only lamented the corruption of Congress, but also the immobility of the Constitution itself. In the student's stance both corruption and immobilization of the Constitution were at the root

3 Interview, subject no. 5 (auxiliary judge), May 15, 2013.

4 Interview subject no. 35 (professor of law), May 7, 2013.

of what had caused Colombia's intractable position at the end of that decade, and such a situation required change⁵.

The novelty of the 1991 Constitution becomes readily apparent in the first Article. While the 1886 Constitution proclaimed a unitary character that arises out of the sovereignty of the nation (Article 1 and 2), without stipulating what this nation consists of, the 1991 Constitution mainly defined Colombia as a social State of Law that rests in the human dignity of its pluralistic society, whose members come together to work in solidarity in order to attain the general good (Article 1). This characterization of the Colombian nation – which just as well could have been a characterization of the constituent assembly from 1991 – reappears in some of the most important decisions the Constitutional Court has issued. In its 2010 decision, declining the constitutionality of a reform extending presidential terms, the Court argued:

The notion of people that accompanies the conception of constitutional liberal democracy cannot ignore the notion of pluralism, which involves the coexistence of different ideas, races, genders, backgrounds, religions, institutions or social groups. Such a heterogeneous people accepts that all power must have limits and therefore agrees, as a sovereign people, and in accordance with the democratic model, to become self-restraint and establishes channels through which to express all its diversity. Therefore, in contemporary states the voice of the people cannot be appropriated by one group of citizens, even if it is a majority, but it arises from the procedures that guarantee a manifestation of this plurality (C-141/10; translation by the author).

The normative basis for the constitutional paradigm is not the general will, or other collective entities such as nation and race, but a plurality of individuals that recognize each other as equal.

The next most fundamental novelty of the 1991 Constitution concerns the inclusion of rights. The diversity of the constituent assembly as well as the dismal human rights situation in Colombia resulted in rights being taken much more seriously. After all, this was one of the central rallying calls of the student movement. To that end, the first 90 articles of the 1991 Constitution concern

⁵ This is also the reason why the new Constitution has relatively flexible reform mechanisms and lacks anything resembling eternity clauses.

norms, principles and rights, which include first (private rights), second (social rights), and third (collective cultural rights) generational rights⁶. Particularly, the inclusion of cultural rights, paying debt to Colombia's indigenous heritage, foreshadows developments in other South American States by more than ten years. Again, this can be traced to the plurality of the constituent assembly, which gave observer status to an indigenous guerrilla group: the Movimiento Armado Quintín Lame. As my interviewees confirmed, the new Constitution contributed a great deal towards making those previously marginalized groups visible to the Colombian public, giving them a voice of their own.

The centrality of rights and pluralism in the identity of the new Constitution also affects Old Law's most central principle: the principle of legality. The constitutionalism of *Nuevo Derecho* does not delegate it to futility. For example, Article 230 holds that judges are exclusively accountable to the empire of law, upholding the importance and centrality of the written text of the Constitution. Nevertheless, it nuances the strictness in its jurisprudence by also weighing the proportionality, rationality, and efficacy of reforms and laws. Efficacy implies that everything must be interpreted and cannot leave out jurisprudential questions for the sake of rationality. Thus, rationality only comes into play as long as it does not violate the efficacy of the rights review⁷. The most important neo-constitutionalist principle, without a doubt, is the principle of proportionality. It is central for modern constitutionalism, which has to cope with the proliferation of rights, on the one hand, and an increasing number of functions taken over by the State, on the other hand. As such, rights and valid State interest often juxtapose one another in constitutional questions (Kumm, 2010 & 2007). When judges test the proportionality of a law or legal mechanism, they ask if the infringement is proportional to the interest that competes with it⁸.

Pluralism, rights, and new principles of interpretation transformed the Constitution from a "written Constitution to a living Constitution"⁹. This means that the new Constitution values rights not as functioning outside of the legal context, but identifies them in the circumstances of human existence. Living constitutions, of course, take precedence much more serious than static written

6 Interview subject no. 38 (Supreme Court judge), April 17, 2013.

7 Interview subject no. 8 (Constitutional Court judge), May 17, 2013.

8 Interview subject no. 8 (Constitutional Court judge), May 17, 2013

9 Interview subject no. 10 (Constitutional Court judge), March 8, 2013.

constitutions. In addition, the new constitutionalism in Colombia also holds that *derecho substantial* (substantial law) has precedence over *derecho formal* (formal law). In sum, it deviates decisively from the textualism of the old constitutionalism. One interviewee puts it nicely:

The interpretation of law has to be an interpretation that is teleological and takes into account the value of justice, equality, and the value of due process. In the Constitution, the norm acts in an integral manner. It is much more intended as a way to resolve problems¹⁰.

The new Constitution changes the role of the constitutional judge from a dogmatic interpreter of laws and norms to a pragmatic problem solver mediating between norms that exist on paper and actors that function in real life. This is arguably the farthest-reaching consequence of the 1991 Constitution, because it fits into a generic shift towards neo-constitutionalism, apparent in other places at the same time (for example South Africa). If constitutionalism entails the control of the exercise of political power, neo-constitutionalism generally entails the fact that political power is additionally constrained by *rights* based constitutional adjudication.

The prior discussions on the legacy trajectories of the National Front and the reforms at the beginning of the 19th century showed that the new institutional framework had immediate effects. Most notably, violence subsided almost entirely, but crony relations also stabilized within the formal two-party system. The aftermath of the 1991 Constitution is more complex and displays contradictory developments resultant from the institutional juncture and the effects of the then still burgeoning drug economy. Violence did not subside immediately, but as it was being fuelled by the drug economy, continued unabated. It created new violent actors (the paramilitaries of the *Autodefensas Unidas de Colombia*; United Self-Defense Forces of Colombia, hereafter AUC) and strengthened existing ones (FARC). Arguably, the State's capacities further contracted, which in turn developed into a more open and inclusive Colombian democracy that was nonetheless besieged by violent, non-democratic forces in the periphery of the country. These violent forces would eventually grasp important foothold into the national political institutions (Bejarano & Pizarro, 2005).

¹⁰ Interview subject no. 10 (Constitutional Court judge), March 8, 2013. See also Cifuentes, 1995.

Patronage systems, which prior to the 1991 Constitution functioned from within the traditional two party system, now slowly morphed into informal relations that function from outside of that system. This created a new, even more vicious and cynical form of cronyism characterized by its armed nature, which built on the internal fragmentation and eventual collapse of the traditional party system. Central to this process is the national circumscription of the Senate vote, as it was decided in the constituent assembly. It threatened elites' regionally clustered power base by potentially opening the doors for policy alternatives in those regions. As a response traditional elites tried to prevent the actual implementation of such a change in the way regional politics had functioned traditionally in Colombia ¹¹. Paramilitaries for their part, pursued a strategy of counter-agrarian reform, and systematically displaced large populations out of frontier lands. They robbed the peasants' lands, and repopulated it with their own cronies and allies. For them, a central goal of the *political* paramilitary project was the legalization of agrarian counter-reform (López, Hernández, 2010).

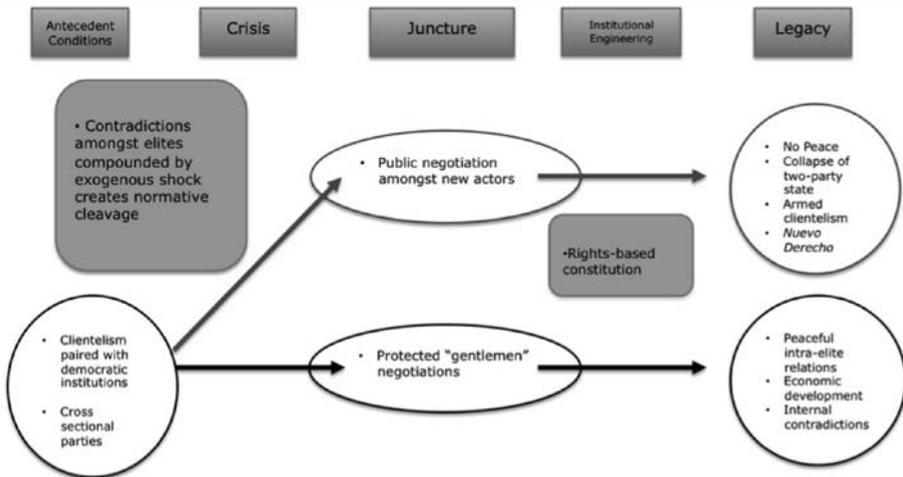
This situation set incentives for both sides to collaborate. Politicians wanted to be shielded from the electoral changes of the 1991 Constitution, while the illegal armed groups aimed at whitewashing their project as a political one (Rodríguez-Raga, 2002, p.222-225). To be sure, narco-paramilitarism in that era became counter-insurgency not because of ideological convictions, but because this was “the basic point of agreement with the elites and State agents that supported their expansion” (Ávila Martínez, 2010, p.117). Thus, AUC commanders undertook “violent campaigns” on behalf of candidates that then shielded their interests in Congress, resulting in the effective co-optation of the legislature. As a result of these evolutions the decisions taken in the 1991 juncture had a long lasting, albeit contradictory legacy.

Figure 2 below helps us to summarize the analysis. The reforms associated with General Reyes and the National Front agreement essentially evolved along the lower ideal-type trajectory (colored in black arrows), while the 1991 followed the top ideal-type trajectory (colored in red arrows).

In the crises leading up to the Reyes Reforms and the National Front agreement, elite intransigence resulted in unmanageable situations of interest

11 This is essentially a prolongation of regional elites' approach to the electoral threat posed by the UP. As it has been seen drug merchants, proto-paramilitaries and sectors of the security apparatus initiated an assassination campaign against activists of the UP, essentially eliminating its entire leadership, because it started to chip away at traditional politicians' electoral strongholds.

Figure 3
The 1991 critical juncture



Source: compiled by the author.

and identity conflicts. The resulting partisan clashes forced the same elites to hammer out new deals in tightly managed processes of institutional reform. They established new consociational arrangements that served to calm political conflict and stabilize crony relations by placing them on a more stable *formal* institutional setting. The political system remained oligarchic, and contained in it the seed for future upheaval. In the crisis leading up to the 1991 Constitution, the international drug trade, which carry along with it an external shock against colombian feeble political stability, unleashed centrifugal forces impossible to contain within the existing institutional arrangement. Moreover, it created a normative cleavage between the normative claim of a democracy (to implement rule by the people) and the political reality of a system besieged by violence and unable to maintain channels for political participation. It culminated in a moment that both transformed the foundations of political interaction, and perhaps more importantly could neither be predicted nor explained on the basis of prior conditions, but resulted from collective and communicative action. The students' movement first coalesced around a small group in Bogotá's universities and

then expanded into a very diverse and national coalition of various students' bodies which began a rearrangement of the Colombian political environment from outside of the country's formal institutions. The juncture itself, namely the constituent assembly, involved citizens in the drafting stage, included previously marginalized groups (former leftist guerrillas and indigenous people) in the debating stage, and was publicly deliberated and decided. In short, the Conservative-Liberal hegemony of formal public, civic and political affairs was broken. It produced a neo-constitutionalist charter.

Conclusion

What does the understanding of the constituent process in Colombia in 1991 as a communicative process tell us about institutions and their origin? We began with the notion that they are defined as devices designed and used to arrest change. It is this caveat that has opened up the space for critiques of our understanding of institutions, which is squarely rooted in the three neo-institutionalist schools. As Mahoney and Thelen lament, "despite many other differences, nearly all definitions of institutions treat them as *relatively enduring* features of political and social life (rules, norms, procedures) that structure behavior and that cannot be changed easily or instantaneously" (2010, p.4). As they point out, this bias towards continuity at the expense of smaller shifts is present in all three of the classical expressions of neo-institutionalism: historical, sociological, and rational choice institutionalism (p.6). The contributions of those strands of political analysis are not in doubt, yet the literature has started to focus on the more gradual forms of change and, above all, is looking for the role that should be accorded to human agency into the analysis of political processes. This is the most fundamental contention against approaches that focus on continuity and lock-in structures.

Discursive institutionalism makes the bold claim that it is a more adequate way to understand agency *and* gradual change, which it does by focusing on the versatility of discourse and how ideas are transported. It theorizes about how human agents – rather than actors – generate, interpret, deliberate, apply ideas and thereby create meaning. Vivien Schmidt has long criticized that neo-institutionalists do not fully appreciate the centrality of ideas, even though politicians' main task in democracies is to communicate ideas, and thereby legitimate their actions. She explains that the traditional institutionalist schools still have very little to say about how "ideas go from thought to word, to deed,

that is, how ideas are conveyed, adopted, and adapted” (2010, p.309). She proposes a shift to a deliberation-focused institutionalism that centers on the volatile relationship between word and deed, which has puzzled philosophers for centuries (Schmidt, p.304).

The foundational condition for discursively engaging actors is the presence of some form of public. Actors engage in discursive practice if there is an audience that listens and expects justification for action. Schmidt is right when she insinuates that this is the case for public policies in all democracies (Schmidt, 2010, p.305). It is important to notice that this is also true for strategic actors, because even strategic actors with fixed preferences, who engage in rhetorical action, must convince and persuade an audience with *argumentative* rationality (Risse, 2002; Habermas, 1996). As a consequence, this argumentative logic of appropriateness also has validity for the discursive interaction in political settings. The applicability of discourse for the analysis of human interaction falls apart, however, when discourse and *publicness* is existentially threatened or non-existent.

Even under extremely difficult and dangerous conditions of a worsening civil war, the people managed to come together for free and open debates, installing a process that produced a formidably progressive document. The students’ movement owed most of its occurrence to the spontaneity of human action, which arise when a collective comes together in a common cause; in this case it was the collective grief over the assassination of a promising political leader. Moreover, throughout the debate, ethical and collective reasoning for the search of a common institutional framework – and not aligned interest or structure – tied the assembly of actors together.

The question of constitution-making has become a very prominent topic of comparative politics; and it is particularly true in the Latin American context. Ginsburg writes that “Latin America is something of a constitutional graveyard, in which formal texts have been replaced frequently over the past two centuries” (2014). As a consequence, an increasing number of scholars pay attention to various facets around the issues of constitution-making and the longevity of constitutions. Negretto most recently produced an outstanding contribution to the study of those constitutional moments that structure politics anew (2014). He understands the volatility and frequency of constitutions in Latin America as a chance to properly understand the politics of writing a political charter, and the forces at play at these junctures that until now remained behind the veil

of contingency. In his carefully designed study, he shows that similar factors such as actors' resources and expectations about future political development affect the selection of institutional set-ups in such areas as electoral system and presidential powers. Intriguingly, what topics are selected for debates in constituent processes and how judicial institutions are constructed were outside the scope of Negretto's enlightening study.

This paper made a first effort of getting at these questions by posing that the initial crisis provided a discursive context that placed the 1980s Colombian human rights situation at the center of public debate. It suggests that it was not a coincidence that rights and judicial institutions became a central focus of the constituent process, given the normative crisis that preceded the critical juncture. Yet, Negretto is correct to call for more research and a broader scope to study topic selection in constituent bodies. The task is then to increase causal leverage by constructing comparative studies with a broader scope, across cases, to understand under what conditions rights become the central grievance of constitution-making. A positivistic study could take the result of implementing a Kelsenian high court model as an indication that the unification of rights under one jurisdiction was a primary concern of constituents, and then work back to identify conditions at the beginning of such processes. Such a categorization can be quickly filled with data and provide a large set of observations that is amenable to broader investigations. Moreover, to identify actors and their arguments in a constituent process, rights can be disaggregated by their type. As it has been seen the 1991 Constitution not only included private and civic rights, but also social and collective (cultural) rights. This, too, is amenable to cross-case quantification. Above all, however, this paper argued that the discursive context and the activism of agents must be closely inspected and incorporated into the analysis. Therefore, future research must make an effort to combine classical approaches (quantitative or qualitative) to identify actors, their resources and the implementation of constitutional negotiations with discursive analyses, because constitutions reflect a societal consensus over the commonly shared values and identities that give future political interaction meaning and significance. These values and identities are most often consecrated in the expression of rights.

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- 94 Republic of Colombia. Constitutional Court of Colombia. C-141/10. M.P. Humberto Antonio Sierra Porto.

Appendix: interview data

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 individuals 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 or persons engaged with NGOs that are involved in actively litigating 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 interviewees list also included three magistrates from the Supreme Court of the Republic. Finally, I interviewed three journalists, four Senators and Representatives from the Chamber of Representatives, 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 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 (*Semana, El Tiempo, El Espectador, Cambio*). 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 interviews were in-depth and focused on the issues resulting from the content analysis of publications. They lasted from one hour to two and a half hours. The questions were structured according to these four topics:

1. 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?

2. 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?

3. 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?

4. 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 revelations regarding the so-called *Yidispolítica* scandal have?
- How important were the official investigations by the Supreme Court in the *parapolítica* scandal?
- Did the image of an institutional crisis resulting from a negative decision regarding re-election matter in deliberations?