Congresspeople in the Courtroom: Analysis of the Use of Constitutional Complaints by Members of Congress in Colombia 1992-2015

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ABSTRACT: The relationship between legislative and judicial branches in constitutional democracies has been the subject of several academic debates. Nevertheless, this literature has made little reference to congresspeople's role as active subjects in judicial scenarios, especially when they present complaints against legislation enacted during their incumbency. This study seeks to address the question of why members of the Colombian Congress make use of constitutional review to overturn laws that they took part in debating. Through the use of quantitative and qualitative analysis, this paper explains how the use of constitutional complaints by members of congress is not limited to a political strategy of opposition by independents and opposition parties, but also serves members of the governing coalition for at least three different purposes: i) to deviate from the political approach of the Executive bill when they do not agree with the contents or when the reforms affect the interests of their constituency; ii) to "clean up" Executive bills of content introduced by the opposition during the law-making process; and iii) to advance certain points of their own political agenda, avoiding the political cost of opposing the reform as it passes through the legislative process.

KEYWORDS: *Author:* Judicial Review; Constitutional Complaints; Third Chamber; Judicialization of Politics; Political Opposition.

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Congresistas en el tribunal: un análisis del uso de la acción de inconstitucionalidad por miembros del Congreso en Colombia 1992-2015

RESUMEN: La relación entre la rama legislativa y la judicial en las democracias constitucionales ha sido objeto de diversos debates académicos. No obstante, esta literatura poco ha dicho sobre el papel que cumplen los congresistas como sujetos activos en escenarios judiciales, en especial cuando demandan leyes promulgadas durante su periodo en el cargo. Este artículo busca abordar la pregunta de por qué algunos congresistas colombianos hacen uso del mecanismo de control constitucional para anular normas en cuya creación tomaron parte. A partir de información de carácter cuantitativo y cualitativo, se explica cómo el uso de las demandas de constitucionalidad por parte de los congresistas no se limita a una estrategia de oposición por parte de los partidos independientes o de oposición, sino que también sirve a los miembros de la coalición de gobierno para diferentes propósitos como: i) apartarse de la línea política del Ejecutivo cuando no se está de acuerdo con los contenidos normativos o cuando la reforma afecta los intereses de su electorado; ii) para "limpiar" iniciativas del Ejecutivo de las modificaciones hechas por fuerzas de la oposición durante el trámite legislativo; y iii) para sacar adelantes ciertos puntos de su agenda, evitando el costo político de oponerse durante el proceso legislativo.

PALABRAS CLAVE: *Autor:* control constitucional; acción de inconstitucionalidad; tercera cámara; judicialización de la política; oposición legislativa.

Congressistas no tribunal: uma análise do uso da ação de inconstitucionalidade por membros do Congresso na Colômbia 1992-2015

RESUMO: A relação entre o ramo legislativo e o judicial nas democracias constitucionais tem sido objeto de diversos debates acadêmicos. Contudo, essa literatura pouco trata do papel que os congressistas cumprem como sujeitos ativos em cenários judiciais, em especial quando demandam leis promulgadas durante seu período no cargo. Este artigo procura abordar a pergunta de por que alguns congressistas colombianos utilizam o mecanismo de controle constitucional para anular normas de cuja criação participaram. A partir de informação de caráter quantitativo e qualitativo, explica-se como o uso das demandas de constitucionalidade por parte dos congressistas não se limita a uma estratégia de oposição por parte dos partidos independentes ou de oposição, mas sim servem aos membros da coalização de governo para diferentes propósitos, como: i) afastar-se da linha política do Executivo quando não se está de acordo com os conteúdos normativos ou quando a reforma afeta os interesses de seu eleitorado; ii) para "limpar" iniciativas do Executivo das modificações feitas por forças da oposição durante o trâmite legislativo e iii) para dar sequência a certos pontos de sua agenda e evitar o custo político de opor-se durante o processo legislativo.

PALAVRAS-CHAVE: *Autor:* controle constitucional; ação de inconstitucionalidade; terceira câmara; judicialização da política; oposição legislativa.

How to Make Sense of the Relationship between the Legislature and the Judiciary? Introducing the Problem

The judicialization of politics and the global expansion of judicial power over public policy issues is already a widely known phenomenon. The spread of legal discourse and procedures into the political sphere, the expansion of the jurisdiction of courts in determining public policy outcomes and the decisions made on core political controversies —fundamental political and moral issues— by courts have been identified as the main expressions of the judicialization of the political field (Hirschl 2008a, 2008b; Loewenstein 1976). Under certain conditions such as democracy, constitutional rights, and separation of powers among others, (Tate and Vallinder 1995) judges have acquired a central role in the settlement of political disputes and the creation of new laws through the interpretation of existing constitutional provisions, whether by abstract review or resolving concrete cases. The rise of this new constitutional order (Ackerman 1997) has turned judicial tribunals into true forums of political discussion, where different actors from civil society, especially those traditionally excluded from the typical representative institutions, and other political agents have found a place to advance their claims (Epp 1998; McCann 2008; Raz 1995).

One of the mechanisms that has served this political phenomenon is the *constitutional review*. As new democracies have adopted written constitutions, new specialized judicial bodies have emerged to enforce constitutional rules through an abstract review of legislation issued by parliaments and Executive officers. Several theories have been proposed to explain the spread of constitutional review, either because of coordination problems between multiple branches of government and governance problems (Shapiro 1999), or because a growing awareness of the rule-of-law and rights and the need to be protected from government action (Cappelletti 1989). However, Ginsburg and Versteeg (2013) have shown through empirical data that the adoption of constitutional review in different countries —including autocracies, old democracies and young democracies— is explained by domestic politics and uncertainties in the electoral market,[1] in other words, constitutional review is adopted as a form of political insurance. It is important to note that constitutional review is one of the reasons that explains, as Georg Vanberg (2005; 2015) argues, the fact that courts around the world have begun to wield their powers and play an important role in the policy-making

1 They argue that "when the difference between the proportion of seats held by the first and second parties in the legislative branch is smaller, and thus electoral uncertainty larger, constitution-makers are more likely to adopt constitutional review" (Ginsburg and Versteeg 2013, 3).

process. In Latin America, Sieder, Schjolden and Angell (2005) have argued that constitutional review has obliged citizens to increasingly resort to the courts to resolve issues previously reserved for the political sphere (Sieder, Schjolden y Angell 2005, 7), although this is not the only factor that explains the judicialization of politics in this region.

Constitutional review and the increasing power of constitutional courts have modified the classic model of separation of powers. The tripartite model based on the theories of Montesquieu and John Locke among others, which estabished a clear division of functions among the branches of power where the legislative power creates the Law and the judicial power enforces it, is now obsolete. This does not mean that current theories have totally dismissed the basic ideas of those classic political theories, as Carolan Eoin (2009) has shown. The model of a legislative-executive-judicial division continues to appear "as an essential element of most constitutional discourse. Disputes arise, not over its inherent validity, but over the mechanics of its actual operation. Contemporary theorists tend to implicitly accept the veracity of this threefold division of power, striving not to replace but to recalibrate it for the modern world" (Eoin 2009, 21). However, these constitutional novelties have led to a reconsideration of the classic structure of political power,[2] where a framework of abstract mechanistic understanding is no longer applied and instead context and specific cases are analyzed, moving away from an acritical attachment to the great traditional theories (Barreto Rozo 2016).

Developing this idea, research on the separation of powers in Colombia has explained the behavior of the branches of power from a dynamic perspective. The work of Juan Carlos Rodríguez Raga (2011), in which he examines the strategic interaction between the Constitutional Court and the Executive, is based on the empirical analysis of abstract constitutional review cases. Specifically, his study shows that the court's assessment of the political context in which it makes a decision, its anticipation of the Executive's reaction to the decision and the costs associated with such a reaction determine the likelihood that the Court will decide against the preferences of the Government. Similarly, Andrea Celemín's (2015) recent research looking at the Constitutional Court's lax criteria for analyzing procedural defects in the legislative process provides some relevant information on the relationship between Colombian judges and parliamentarians, especially over decisions of political importance.

A common point of these and other studies (García Villegas and Revelo Rebolledo 2009; López 2010; Tickner and Mejía Quintana 1997) that seek to

2 See, for instance, the idea of a new separation of powers proposed by Bruce Ackerman (2000) in response to modern advances.

explain the relationships between branches is the idea that the Legislature and the Judiciary maintain a relationship of constant conflict. The exercise of constitutional review over ordinary laws is seen as an external mechanism of contradiction-opposition by the judges against acts of the Parliament, which ends up limiting the normative capacity of the legislature. The litigation scenario thus becomes a space without democratic legitimacy where specific individuals impose their political visions, bypassing the ordinary institutional routes.

Nevertheless, the literature refers little to the role of parliamentarians as active subjects in judicial lawsuits, especially when they present complaints against legislation that they themselves took part in creating. This research seeks to change the focus of attention from the tense relationships that are present in the interaction between both branches of power, to instead, an analysis of parliamentarians' strategic use of judicial mechanisms —concretely constitutional review—, and by doing so turn litigation scenarios into extended spaces of the legislative process. In this paper, Colombia was chosen as a case study as it contains several examples of congresspeople from the opposition, independent parties and the government coalition who have intervened in different constitutional review processes during their incumbency.

To address this problem, this study poses a research question looking at the reasons for members of the legislature making use of constitutional review to overturn laws that they took part in debating. In the first section of the article, a theoretical approach is presented that understands constitutional review as another stage of the law-making process and constitutional courts as a *third chamber* of the legislative process. Furthermore, a brief review of previous research on constitutional complaints presented by parliamentarians is included and some of its conclusions are presented as hypotheses or plausible explanations for the Colombian case study. In the second section there is a short explanation of how constitutional review works in Colombia and a description of how the empirical information was gathered and organized for this study. The third section describes how often parliamentarians present constitutional complaints, the profiles of congresspeople who tend to file these complaints and the legislation they hope to overturn. Likewise, some plausible explanations about the reasons behind this phenomenon are put forward, presenting the different uses of the constitutional review made by parliamentarians and the connection between political strategy and constitutional review in this scenario. In the last section, theoretical conclusions resulting from the data analysis are explained.

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1. From Parliament to Courtroom

To analize the relations between the parliaments and constitutional courts, Alec Stone Sweet (2000) has developed the idea that constitutional forums —the sphere of constitutional litigation— have to be understood as a *third chamber* of the law-making process, together with the two first chambers: the Senate and the House of Representatives. According to his theoretical proposal, constitutional courts ought to be conceptualized as specialized legislative organs and constitutional review ought to be understood as another stage in the elaboration of legislation. In this framework, constitutional courts serve as triadic dispute arbiters capable of resolving disputes between governing majorities and the opposition concerning the constitutional status of proposed legislation, in a way that avoids the simple imposition of a numerical majority in parliament. Adopting this perspective facilitates the observation and evaluation of the complex relationship between law-making and constitutional adjudication (Stone Sweet 2000, 61). The main purposes of this approach are to identify the effects of judicial decisions on the behavior of parliamentarians and to explain how constitutional courts became scenarios where judges, as political actors, extend the political debate according to their individual positions; the judges do not just interpret the law but in fact discuss political issues as legislative officials.

This theoretical approach is useful for examining the case study of Colombia, nevertheless, this paper proposes a reconceptualization of this idea. The constitutional forum can certainly be conceived as a third chamber of the law-making process, not just because the constitutional court behaves as a specialized legislative body, but because it acts as a further arena where members of the parliament can bring up, with certain argumentative constraints, political issues to discuss, especially in order to overturn legislation that they themselves had a role in creating, although they may have been defeated in previous debates. Constitutional review becomes an extension of the legislative debate where members of congress as well as judges discuss issues such as public policy, rights and economics.[3] This new understanding of the constitutional forum and the third chamber thesis can be more useful for explaining the active role of parliamentarians in this scenario.

3 How the court's decision influences the behavior of politicians is certainly a matter of interest here; nevertheless, this study seeks to explain the active role of congresspeople in constitutional litigation, how politicians use constitutional complaints as a tool of political strategy and what incentives lead them to reinforce constitutional review.

The phenomenon of constitutional litigation initiated by elected officials is not new and has been studied in various different countries, all of which have a centralized constitutional court model and an abstract constitutional review. In these countries, parliamentarians may find it more difficult to succeed in the ordinary stages of the law-making process or it is easier for them to transform court proceedings into immediate electoral advantage. Several studies have proposed different explanations for the political actions of members of congress in courtrooms.

Yasushi Hazama (1996) has shown how constitutional review provides opportunities for the parliamentary opposition in Turkey to compensate for its legislative weakness. Data obtained from the record of constitutional court decisions was classified into several variables and using statistical analysis, the author examined what portion of laws reviewed were overturned, which referral reasons brought about a larger percentage of unconstitutional decisions and which overturned laws were the most controversial. He found that constitutional review is mostly used by the parliamentary opposition to nullify government-sponsored laws due to the large number of referrals from the opposition and its relatively high rate of success in obtaining nullity decisions.[4] This is explained, he argues, by the fact that Turkish constitutional review, in its design, is more open to the opposition's appeals than, for instance, its German and Austrian counterparts (Hazama 1996, 319-322). Likewise, a study by Chris Hanretty (2014) illustrates how the Bulgarian constitutional court, a Kelsenian court with restricted power of referral, acts and behaves very much as if it were an additional legislative chamber, where debates are usually of political rather than legal nature. To reach this conclusion, the author gathered the court's decisions over the period 1992-2010 and identified referring actors and the dissenting opinions of the judges, the latter to emphasize the politically conflictual nature of this court. Hanretty shows how, on average, two-thirds of constitutional review cases in Bulgaria are referred by political actors such as parliamentarians, the President and government officials (Hanretty 2014, 545), revealing the usefulness of constitutional litigation as a tool for political strategy.

Stone Sweet's research (1999; 2011) is based in Europe, specifically in France, and analyzes the exercise of constitutional review, a central condition for the judicialization of politics, under legal systems where elected politicians are essentially the only actors who can initiate constitutional litigation before the constitutional courts, meaning that elected officials hold a monopoly over the

4 He found that 90.9 percent of the referrals which concluded in a court decision had been made by the parliamentary opposition. Nevertheless, it was the President, with a success rate of 85.7 per cent, who was the most successful at having laws nullified (Hazama 1996, 326).

power to challenge legislation by way of abstract review. This study reaches the logical conclusion that under this model, the use of constitutional complaint is solely motivated by the interest of the opposition forces to overturn the legislative initiatives proposed by the Executive or the governing coalition in the parliament. Under a model of restricted constitutional complaint such as this it is difficult to find other political strategic uses for constitutional review by politicians.

Nonetheless, there are two outstanding works that have developed different explanations for the parliamentarian use of constitutional review. Studies by Dotan and Hofnung (2005) and Kopecek and Petrov (2015), for Israel and the Czech Republic respectively, aim to explain why parliamentarians go to court to discuss the constitutionality of certain laws. From the analysis of lawsuits and judicial decisions, these researchers found patterns that would explain the strategic behavior of members of congress in judicial lawsuits. These include factors such as the fact that members of the political opposition tend to go to court more frequently, or that the final decisions of the courts are, for the congresspeople, not as important as the mere fact of presenting complaints to gain visibility in the media, among others. Both of these studies support their empirical assessment with texts of the complaints filed by the claimants and the decisions issued by the respective constitutional court. However, Dotan and Hofnung go a step further by studying the impact of litigation on the level of media exposure of the plaintiffs, by means of a media coverage analysis using a coverage index. The main finding for the Israel-based study is that in cases where a parliamentarian presents a complaint, gaining credit through the maximization of media exposure is a dominant consideration; therefore, even when their chances of achieving a legal victory are limited or practically null, congresspeople may resort to litigation or seek court cases to obtain prominence in the media (Dotan and Hofnung 2005, 101). For the Czech case, Kopecek and Petrov confirmed the hypothesis that the judicial review of legislation serves as a tool for the opposition in situations when elections have produced a government with a legislative majority.[5] The main findings of both these studies will be used in this paper as explanatory hypotheses of the use of constitutional review as a political strategy by members of congress. We can summarize these findings in two main hypotheses:

- Constitutional complaints serve as a tool for the political opposition (being the actors who resort to constitutional review most often) in electoral scenarios where the government has a legislative majority.

5 Confirming this, they found that if the government does not have a legislative majority, opposition politicians' interest in pursuing a judicial review of legislation drops because they now have a good chance of success through the ordinary law-making process.

- Congressmen present constitutional complaints to achieve media coverage even if their chances of winning in court are low.

As will be seen below, this paper goes further than these two studies and advances beyond their scope in two ways: first, the Colombian case study, which has more in common with the Israeli circumstances, has a system of constitutional review where constitutional complaints can be filed by any citizen which means that this process is open to the public, rather than a mechanism for the exclusive use of the political opposition. This provides the opportunity to find other reasons or strategies that motivate constitutional complaints presented by congresspeople, different from sheer political opposition; second, as described in the next section, in order to understand the other reasons for resorting to constitutional complaints and their uses for politicians, this study analyzes not only the texts of the complaints and judicial decisions, but cross-references this information with the legislative work of congresspeople and their political agenda (quantitative database). This additional data allows for the scope of the research to be widened.

2. Constitutional Review in Colombia and Data

The U.S. Supreme Court of Justice established the principle of judicial review in 1803 with the case of Marbury v. Madison. A century later in Colombia, the Constitutional Assembly was considering a constitutional amendment through which the Supreme Court of Justice would be the guardian of the constitution.[6] After several debates on the subject, the Assembly approved this amendment and established that the Supreme Court had the ability to decide definitively on the constitutionality of constitutional amendments passed by the Government; in other words, on every law or decree subject of legal action by any citizen that considers those unconstitutional. Hence, since 1910, Colombia's legal system allows public access to the process of constitutional complaint.

The Colombian Political Constitution of 1991 strengthened the constitutional review process by means of the creation of a Constitutional Court —a specialized institution different from the Supreme Court— which is delegated the main functions of constitutional adjudication as control over ordinary laws and the resolution of specific cases of constitutional rights violation. This court exercises two modes of constitutional adjudication: i) concrete-diffused and ii) abstract–concentrated. The first occurs when the Constitutional Court selects an individual case of alleged violation of constitutional rights as ruled upon by a

6 The draft amendment was presented by Nicolás Esquerra, a deputy of the Constitutional Assembly from Antioquia, on May 15 of 1910.

lower court and reviews the main arguments of the decision.[7] The second is the abstract normative control —where the facts have a minor role in the decision— that the Constitutional Court exerts over the whole legal order to protect the constitution. Because the constitutional provisions are considered paramount, this court challenges ordinary laws, statutory acts and executive and constitutional amendments that are alleged to be unconstitutional against those provisions and when it finds a contradiction it overrides the offending legislation. This type of adjudication is basically what Kelsen conceived as constitutional review by judges.

Such a review can be *a priori* and is automatically addressed by the court for statutory acts, international treaties and executive decrees of emergency. However, commonly this review is *a posteriori* when a citizen presents a constitutional complaint —practicing public access to constitutional complaint— about ordinary laws, executive ordinary decrees and constitutional amendments. In other words, this action can be defined as "the political right that citizens have to go to the Constitutional Court and demand a constitutional amendment, a law or a decree with force of law, when they considered that those rules violate the Charter" (Quinche Ramírez 2010).

Since 1992, the Colombian Constitutional Court has proffered 6.066 constitutional review decisions, of which 4.617 (76%) correspond to ordinary and statutory law, 1.287 (21%) to executive decrees with force of law and 162 (3%) to constitutional amendments. Between 1992 and 2015 —the scope of the present research— the number of times that a citizen, who in their lifetime has held the position of parliamentarian, presented a constitutional complaint is 141 in 105 processes (some complaints cluster several plaintiffs). Nevertheless, because the research question points to the use of constitutional review by members of the legislative branch, the analysis takes into account the number of times that a parliamentarian, during their incumbency, complained over laws that they took part in creating, meaning laws proposed and enacted during their incumbency. The following table lists the number of complaints presented by parliamentarians each year:

This data has been obtained from the cross-refencing of two databases. The first is the systematization of basic parliamentarian information carried out by Congreso Visible, a legislative observatory at the Universidad de los Andes.[8] This database contains all the career information of elected members of congress as well as the information of their legislative work: legislative initiatives, votes and

7 Colombia has a legal mechanism, called *acción de tutela*, through which any citizen can file a complaint to any judge to seek for protection of their constitutional rights, without the assistance of a lawyer. There are two judicial stages before the Constitutional Court has the capacity —not the obligation— of selecting any complaint and reviewing the decision.

8 See congresovisible.org

Table 1. Number of Complaints by Year (1992-2015)

Year	Frequency	Percentage
1992	2	4.88
1994	2	4.88
1995	3	7.32
1996	1	2.44
1999	1	2.44
2000	1	2.44
2002	2	4.88
2003	3	7.32
2004	1	2.44
2005	2	4.88
2007	5	12.20
2008	1	2.44
2009	1	2.44
2011	1	2.44
2012	3	7.32
2013	4	9.76
2015	8	19.51
Total	**41**	**100**

Source: Compiled by the author based on information supplied by Congreso Visible.

proposals, public hearings, and so on.[9] The second contains the systematization of the decisions of abstract constitutional review —sorted by variables such as plaintiff, individual justice's opinion, decision, among others— proffered by the Constitutional Court since 1992. This database was initially built by Juan Carlos Rodríguez (2008) who coded a comprehensive set of variables for each case based on the text of the court's majority opinion as well other resources regarding the political context. Since 2010 until present day, this information has been complemented by Congreso Visible using the same variables. By cross-referencing both databases and creating new variables, a series of descriptive statistics was obtained that paints an overall picture of the parliamentarians' use of constitutional review.

9 This information has been collected since 1998, however this observatory holds basic information on parliamentarians elected since 1992 (the 1992-1998 period of information is not available on the webpage).

Complementing this quantitative information, the information contained in the files of the 41 complaints and the court rulings was gathered and analyzed with the objective of identifying different trends that may give an idea about the reasons that members of congress use the public right to constitutional complaint and to understand the main argumentative strategies that they employ.

3. Congresspeople's Constitutional Complaints in Colombia: Empirical Research

a. How Often do Members of Congress Present Constitutional Complaints?

Between 1992 and 2015 a total of 41 constitutional complaints were presented by 70 members of congress, which means that the Constitutional Court reviewed less than 2 lawsuits per year with a mean of between 2 and 3 plaintiffs per complaint. Considering that this Court ruled on 5.963 cases of abstract constitutional review up until 2015, it can be inferred that the number of members of congress' complaints is not significant.

Nevertheless, the fact that in the same year that the Constitutional Court was created and the new Congress installed, a few members of congress made use of the constitutional review to contest ordinary laws undermines the idea that the whole legislative branch is against judicial review and instead shows that, from the beginning, Colombian members of congress have seen constitutional complaints as a part of their political strategy.

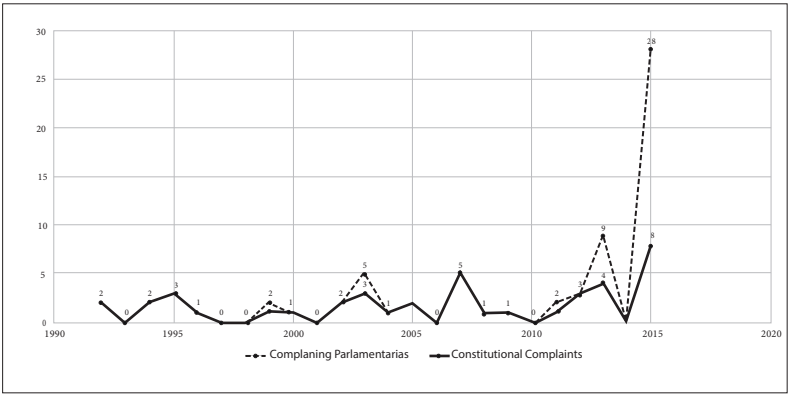
One of the reasons that may explain the earliest use of this legal mechanism by parliamentarians is that, although the new constitution made the judicialization of political issues more noticeable, constitutional review —as mentioned above— had existed since 1910 and many politicians were already familiar with its use. Regarding this, a comprehensive study of the history of the Colombian Supreme Court of Justice and the beginnings of constitutional review shows how, throughout the twentieth century, several parliamentarians were protagonists of constitutional debates, presenting constitutional actions in order to resolve political disputes, especially between the opposition party and the President over the most controversial normative contents (Cajas Sarria 2015, 130-136).[10]

Furthermore, this data shows how, in the constitutional forum, members of congress found a space to dispute, in legal terms, the legislative initiatives with which they disagreed. The historical frequency chart illustrates an important

10 Cajas Sarria shows how, in 1911, the Supreme Court served as a referee of the dispute between the Republican presidency of Carlos E. Restrepo and the opposition forces of conservatism over the bills presented by the Executive.

increase in complaints by members of congress in the years since 2013. This increase is due to a change in the litigation strategy of the plaintiffs, since in previous years they went individually before the Court, while more recently constitutional complaints have been appropriated by congresspeople, members of both the opposition and independents, who present a complaint collectively. The complaints presented in 2015 by two opposition forces, Polo Democrático Alternativo (case number, exp. 10863 and exp. 10864) on the left and Centro Democrático (case number exp. 10691) on the right, and one from an independent party, Alianza Verde (case number exp. 10935), cluster more than five plaintiffs each and exemplify how presenting constitutional complaints has passed from being an individual action to a collective political strategy.

Chart 1. Complaints by Members of Congress during the Period 1992-2015



Source: Compiled by the author based on information supplied by Congreso Visible.

Finally, recognizing that it is difficult to determine the specific reasons as to why there are some years without any complaint presented by parliamentarians —there may be different factors that can explain this fact— the chart illustrates that years with 0 complaints are electoral years, *i.e.*, the same year that elections take place or the year previous, when political campaigns begin. One explanatory hypothesis may be that in those years parliamentarians are looking for reelection so are focused in on their campaigns and are working with their constituencies, so time for constitutional analysis and complaint drafting is short. However, what is certain is that this data contends (at least for the Colombian case study) the idea put forward by Dotan and Hofnung (2005, 4) that constitutional complaints are a strategy that parliamentarians use to improve their exposure to mass media and thus increase their political visibility. If this were the case,

it would make sense that electoral years —where candidates seeking reelection need greater visibility— would present a considerable increase in claims presented by members of congress, which is contrary to the data obtained.

b. Do Constitutional Complaints Respond to National or Subnational Interests?

Identifying the chamber to which the complainants belong does not seem to be a relevant factor explaining why congresspeople come before the court. According to the data, practically half of the protesting members of congress belong to the House of Representatives, while a bare majority of them serve as senators. Likewise, although in principle the representatives would tend to defend local or regional interests, while the senators would focus on issues of national interest, there is no correlation between the chamber to which the complainant belongs and the scope[11]of the legislation under review (see below). As the chart illustrates, the vast majority of complaints are directed against laws whose contents are of national interest and only 5% correspond to contents concerning local or regional interests; therefore, it can be inferred that public access to constitutional review has not been commonly used as a means by which members of congress pursue the interests of their own region.[12]

Table 2. National/Subnational Scope of the Laws taken to court by Chamber of Origin of the Complainant

Chamber of Origin	Scope			Total
	National	Local	Mix	
Senate	21	2	2	25
House of Representatives	14	0	2	16
Total	35	2	4	41

Source: Compiled by the author based on information supplied by Congreso Visible.

c. Who Turns to the Constitutional Court?

Considering that the number of congressional complaints, as it turns out, is not very large, it is remarkable that half of them (54%) belong to three political parties —with a total number of 17 complaining parties. This data confirms the common

11 A law is considered to have national scope if more than one region is affected by the contents of it. This means that the policy behind the law is aimed at more than one region of the country.

12 Even in the only two cases in which legislation or articles with local scope were the subject of complaint (Case numbers: exp. 3170 and exp. 4840), the applicants were neither born in nor elected by the constituency referred to in the legal text.

wisdom[13] that the members of the Polo Democrático Alternativo, the left-wing opposition party to all governments since 2005, are the members who have made the greatest use of the constitutional review mechanism. This is explained by the fact that a minority opposition force does not have the capacity to veto or negotiate during the legislative process.[14] In addition, as mentioned above, in recent times this party has made use of the constitutional complaint action as a collective strategy rather than as an individual practice of its members.

Nonetheless, the complaints presented by the Centro Democrático party[15] —the new right-wing opposition party led by former president Álvaro Uribe — show that even when a party has a large number of members of congress, the constitutional forum remains an ideal scenario to contest legislative initiatives adopted. Centro Democrático has 20 senators (out of a total of 102) and 19 representatives (out of a total of 166) and in the two years of its existence it has repeatedly presented constitutional complaints to oppose various laws issued during the last incumbency.[16]

Likewise, the Partido Liberal has a larger force in Congress —in fact, it is one of the older, most traditional parties that has always counted with large representation and has participated several times in the governing coalition— which makes its case very interesting. Of 9 lawsuits filed by its members of congress, only 4 took place when they were serving as the opposition, and their plaintiffs have always acted individually before the Court.

This case illustrates that public access to constitutional complaint is not only used by members of congress who do not have the ability to defend their interests during the legislative process, but also by those who belong to parties with bargaining power who use constitutional control review as a political tool to overturn legislation with which they disagree. In other words, in Colombia, the constitutional forum seems not to be simply a political scenario where only

13 See,https://cerosetenta.uniandes.edu.co/corte-constitucional-el-segundo-round-de-los-congresistas/

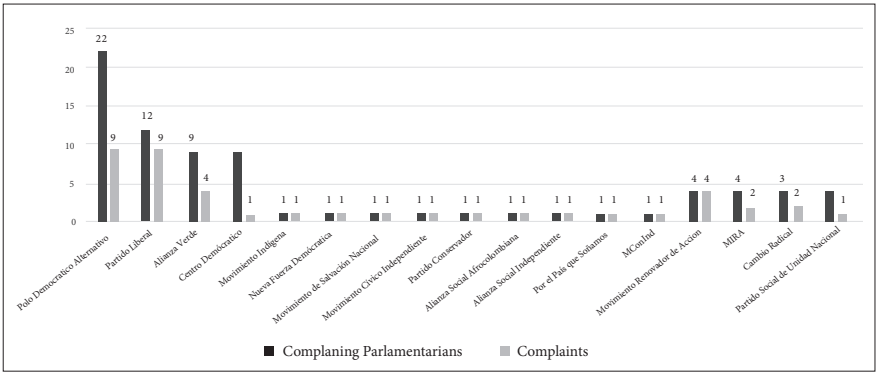
14 This party, which is the only left-wing party with representation in Congress, has never had a large number of parliamentarians, so its legislative work —both approval and disapproval of initiatives— has been very poor. Its members have concentrated on constitutional complaints and political control of government officials as institutional political strategies.

15 Centro Democrático is a political party that entered the political scene for the 2014 elections with surprising political support from millions of voters —its presidential candidate succeeded in overcoming candidate Juan Manuel Santos in the first-round ballot— and a considerable number of elected congresspeople.

16 From 1992 to 2015 —the time scope of this research— Centro Democrático presented only one complaint. However, during 2016, the number of constitutional complaints presented by this party was larger, especially on the legislation relating to the endorsement (plebiscite) and implementation (constitutional amendments for peace) of the peace agreements negotiated between the Government and the FARC guerrilla.

the losing minorities look for what could be called "a legislative second round." As mentioned above, this contrasts with parliamentarian use of constitutional complaint in Europe (Shapiro and Stone Sweet 1994; Stone Sweet 2002) and countries such as Turkey (Hazama 1996), where it is thought of as a legal mechanism used specifically by the parliamentary opposition; a power of referral for abstract review by the judiciary which serves the political interests of politicians looking to block the policies of the Government. This finding led to the contemplation of other motives and uses of the constitutional review as a political strategy.

Chart 2. Number of Complaints and Members of Congress who lodged complaints by Political Party



Source: Compiled by the author based on information supplied by Congreso Visible.

Table 3 confirms that, contrary to the common idea that constitutional review is a tool used only by parliamentarians or opposition groups when they do not have the numbers needed to block a legislative initiative during its process, the same proportion of members of the governing coalition have also made use of this legal mechanism to refute legislative contents in whose formation they participated. It also points out that a fifth of these complaints have been filed by members of independent parties who, despite being a minority, have a bargaining power or veto power greater than the movements or parties that define themselves as the opposition —especially when discussing legislative initiatives that require a qualified majority. Furthermore, in terms of the decisions made about those complaints, it can be seen that members of the governing coalition are as successful as the opposition parties —success is measured by the number of decisions that fall on the side of unconstitutionality— while members of independent parties have been less successful when they have presented constitutional complaints, with

only one decision in favor of their claims. Moreover, this gives some clues of how the Constitutional Court responds to these politically motivated complaints, which appears to be a demonstration of its independency in political terms.

Table 3. Decision of the Court by the Origin of the Complaint

Decision				Total
Complaint Origin	Constitutional	Unconstitutional	Other	
Coalition	2	10	4	16
Opposition	6	8	2	16
Independent	5	1	3	9
Total	13	19	9	41

Source: Compiled by the author based on information supplied by Congreso Visible.

So, if opposition to Government is not the main reason for parliamentarians to present constitutional complaints, what is their motivation for turning to the constitutional forum?

d. What Legislation is Taken to Court and how is it Argued?

Firstly, it is possible to observe that the most frequently challenged rules are those related to economic policy, taxation and regional distribution of resources such as initiatives for the general budget of the Nation, amendments to the tax regime and distribution of royalties —which constitute a significant portion of the Colombian State's income from the exploitation of natural resources— as well as national development plans.[17]

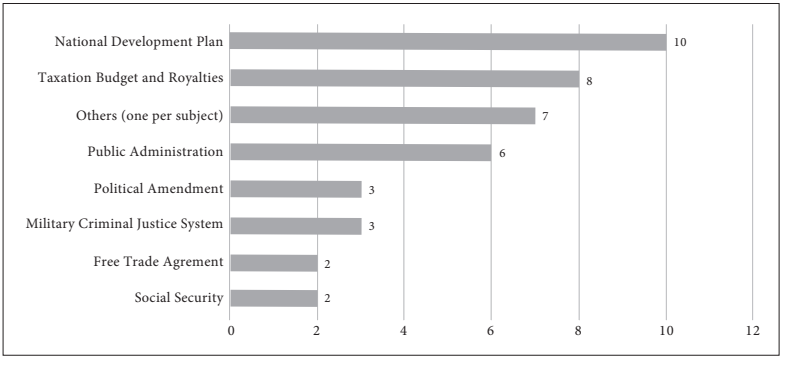
Two factors explain this fact: first, the procedure by which these types of governmental initiative laws are issued have limitations in terms of deliberation, since some of the contents cannot be the object of parliamentary modification due to reservations that the Government has on certain matters, for example, the computation of revenues or the increase of budget items, which makes constitutional review the only mechanism that members of congress have to debate each section in the case of disagreement. Second, the National Development Plan is the formal and legal instrument through which the Government outlines the

17 For instance, the National Development Plan corresponding to the period 2006-2010, formulated by the Government of Álvaro Uribe, received four constitutional complaints. One of the judgments declared it unconstitutional in its entirety due to procedural defects. The same number of complaints were presented against the National Development Plan 2014-2018 issued by the Government of Juan Manuel Santos.

objectives to be developed during its period, in other words, it is the document that provides the strategic guidelines and serves as the basis for public policies formulated by the President and their Government team. For this reason, it is one of the most challenged pieces of legislation, with the opposition parties finding in each article policies with which they generally disagree. In fact, of the ten constitutional complaints aimed at development plans, six of them were presented by members of the opposition, three by independents and only one by a member of the governing coalition.

The other notable subject is public administration; this category includes issues such as the disciplinary regime for public servants —especially elected ones— or labor standards for public officials. It is possible to say that parliamentarians are very interested in these affairs because they are either directly affected by them —for instance, the definition of legal inabilities in order to occupy popular elected positions in the State— or because they affect their *"shares of power"* ("cuotas políticas") in State posts. The category "others" includes topics such as internal armed conflict, national heritage and criminal procedures among others, where there is just one complaint by subject so are not considered significant issues.

Chart 3. Number of Complaints by Subject

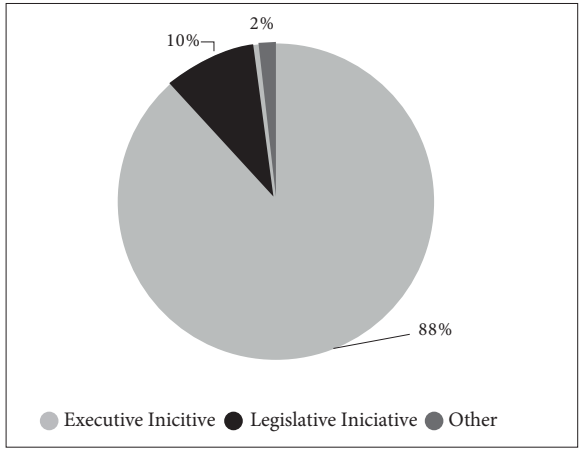


Source: Compiled by the author based on information supplied by Congreso Visible.

Secondly, it can be observed that the vast majority of laws subject to complaint by members of congress are Executive initiatives. This is consistent with the fact that in a hyper-presidential regime such as that in Colombia, National Government bills are more successful in the legislative process and therefore most laws proposed by the Executive are approved. However, it is interesting to note that

13 of the 36 complaints over Executive initiative laws come from parliamentarians who at the time were part of the governing coalition of the incumbent president.

Chart 4. Percentage of Complaints According to the Legal Initiative



Source: Compiled by the author based on information supplied by Congreso Visible.

Some of these cases illustrate clear dissident behavior towards the Government: firstly, during the presidency of César Gaviria (1990-1994), Maria Florángela Izquierdo, a representative of the Partido Liberal —the political party to which the President belonged— brought charges against an Executive initiative (case number exp. 706) that was designed to empower the President and governors to impose sanctions on city mayors when they committed disciplinary offenses as recognized by the Attorney General's Office (the entity in charge of controlling the civil service). It was clear to the plaintiff that the constitutional rules allowed the Attorney General to impose such sanctions directly, without the President or governors taking part in the process. Secondly, in 2011, President Juan Manuel Santos promoted a constitutional amendment that sought to modify the General System of Royalties to distribute the revenue obtained by exploitation of resources throughout the national territory and not only within the departments where the exploitation was carried out. Camilo Abril, a representative of Cambio Radical which was one of the party members of the Government's coalition, presented a complaint (case number exp. 9110) against this reform, arguing that it consisted of a constitutional substitution that could not be passed by way of reform, using the doctrine of unconstitutional constitutional amendment. However, as the media showed at the time, Abril's political motivation was that the decision to

nationalize these resources affected the income of his own constituency which is one of highest oil producing departments and was therefore obtaining higher royalties.[18]

Nevertheless, other members of the coalition used constitutional control to take certain contents to court that were included during the legislative process and were not in line with the initial bill as proposed by the Government. This is the case of Andrés González, from the Partido Liberal and Rafael Pardo and Claudia Blum, both from Cambio Radical who were all part of the coalition of President Álvaro Uribe's government. These members of congress presented a complaint (case number exp. 4840) looking to overturn articles added to the text of the National Development Plan originally submitted by the Government and which were unknown at the time of its deliberation and subsequent approval. This behavior suggests that the constitutional complaints presented by the members of the ruling coalition do not always intend parliamentary dissidence; they serve to undo contents that were not agreed upon from the beginning and that, nonetheless, were added to the text without any deliberation during the legislative procedure. In other words, members of the governing coalition use the constitutional review to clean up Executive bills of contents added by the opposition or independent parties without the government's consent, showing party discipline rather than dissidence.

However, not all complaints presented by members of the coalition are signs of dissent or discipline. Some cases show that, although the complainant agrees with much of the text of a law proposed by the Executive, the constitutional complaint allows them to refute specific contents that they do not consider convenient, without incurring costs that would have resulted from opposing them during the legislative process. For instance, in 2015, the President of the Senate and member of the Government coalition Luis Fernando Velasco, contested (case number exp. 10742) articles related to a tax on fuel included in an amendment to the Tax Statute promoted by President Juan Manuel Santos and his Minister of Finance. In spite of the fact that this senator had constantly opposed an increase in the price of fuel,[19] during the process of amendment he did not present any opposition to the bill which in one of its articles contemplated an increase on fuels.[20] However, after the law was passed, he successfully took the

18 Seehttp://www.elpais.com.co/elpais/colombia/noticias/radican-nueva-demanda-contra-sistema-general-regaliasandhttp://www.elespectador.com/noticias/judicial/demandan-sistema-de-regalias-considerarlo- inconstitucio-articulo-344499

19 See http://www.eltiempo.com/archivo/documento/CMS-13058095

20 In the first debate of the amendment he abstained from voting and in the second debate he voted in favor.

articles in question before the Constitutional Court, a decision that was not well received by the Ministry of Finance.[21]

As we can see, the use of public access to constitutional complaint in Colombia is not limited to a political strategy of opposition by independents and opposition parties or movements, but also serves parliamentarians who are members of the governing coalition for different purposes: to deviate from the political approach of the Executive when they do not agree with the contents or when the reform affects their constituency interests; to clean up Executive bills of contents introduced by opposition or independent forces during the law-making process; and to advance certain points of their own political agenda, avoiding the political cost of opposing the reform during the legislative process.

Finally, table 4 illustrates how most of the complaints formulated by members of congress are based on substantial charges, that is, based on the contrast of the normative content of the laws being contested with the constitutional text. The substantial charges allow members of congress to extend the legislative debate in terms of contents and, through unconstitutional or conditional interpretative petitions, modify the parts of the bill that could not be overturned in the ordinary legislative procedure. Therefore, the constitutional forum becomes a third chamber where members of congress can advance their political arguments, albeit with the restriction of putting their reasoning into legal terms. This shows that a political scenario exists where parliamentarians debate political issues in terms of their constitutional restrictions, different from the ordinary law-making process where they present their arguments without regard to the Constitution. On this subject, some authors such as Mark Tushnet (2008) have shown how *judicial overhang* sometimes promotes legislative disregard of the constitution; for instance, parliamentarians may think "why bother to interpret the constitution at all, much less interpret it well, when the courts are going to end up offering the definitive interpretation anyway" (Tushnet 2008, 81); nonetheless, the Colombian case study illustrates that members of congress, especially the authors of legislative initiatives, have the incentive to make sure that their proposed legislation is constitutional during the law-making process in order to close the window of opportunity for later complaints, since in the constitutional forum —acting as a third chamber— political arguments are not unrestricted, but need to take into account constitutional rules and previous constitutional decisions.

21 Seehttp://www.elespectador.com/noticias/politica/se-cae-impuesto-gasolina-creado-reforma--tributaria- de-2-articulo-602626

Table 4. Decision of the Court by the Type of Argument

Type of Argument	Decision			Total
	Constitutional	Unconstitutional	Other	
Substantial	7	8	3	18
Procedural	3	5	3	11
Both	3	6	3	12
Total	13	19	9	41

Source: Compiled by the author based on information supplied by Congreso Visible.

Furthermore, in 56% of the cases, procedural charges which refer to defects in the creation of laws are also present. These cases show that the most common procedural defects are: i) the inclusion, by the conciliation commissions, of contents previously eliminated in debate; ii) the violation of the principles of consecutiveness and the single-subject rule of legislative initiatives; iii) the inclusion of non-debated content or an error in the type of law or procedure, especially in cases of statutory law which regulates fundamental rights; and iv) the lack of thematic competence of the commissions in which the project begins its legislative process. The data also shows that success is less feasible (in obtaining an unconstitutional decision) when the complaints contain only substantial procedures; this can be explained by the fact that procedural faults are easier to identify whereas substantial arguments depend much more on the interpretation of the justices overseeing the decision.

e. Constitutional Complaint as Political Strategy?

As we mentioned above, the action of constitutional complaint in Colombia has served to advance political discussions by members of the parliament, but this legal action was not intended as a mechanism exclusively for politicians, as in some legal systems in Europe. As a public service which any citizen can use to defend the provisions of the constitution, it is necessary to distinguish in what cases the complaints have been presented by politicians for a political purpose —responding to personal or partisan interests— and when complaints have been introduced as a political strategy responding to a solely public interest. It may be difficult to determine the exact motives behind the complaints, however, here two indicators are proposed that show when it is more possible that a complaint was presented to benefit individual or partisan interests:[22] first, when the subject of

22 Individual interests in this study signify when the member of congress presents a complaint seeking political benefits that allow them to promote their political agenda and keep votes for re-election.

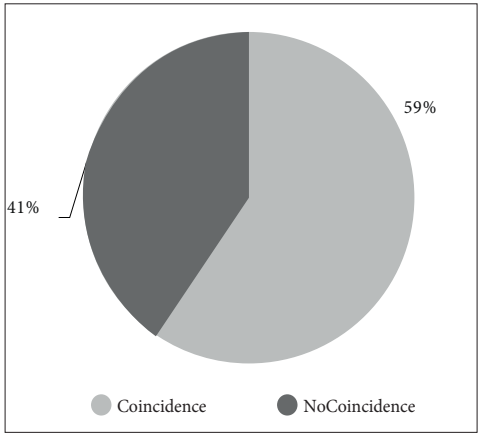
the challenged law coincides with the political agenda of the member of congress or their party; second, when the complaint is based on a direct violation of the political rights of the parliamentarian during the law-making process.

In the first situation, when the subject of the challenged legislation and the political agenda of the member of congress coincide, it allows an understanding of when the constitutional action is used as a political strategy to advance a member's interests. One of the cases that exemplifies this is the above-mentioned complaint of the Liberal senator Luis Fernando Velasco, who through constitutional review managed to eliminate legislation that sought to increase the price of fuel when part of his political agenda has been to constantly seek a reduction in fuel prices. Likewise, the complaint (case number, exp. 8475) made by the left-wing representative Iván Cepeda Castro, who has been an activist for the rights of victims of the armed conflict, against the law that regulated the demobilization of paramilitary groups and granted benefits to them, is part of a collection of strategies that this senator has carried out in his fight against paramilitary forces in Colombia. Another example is the former representative Maria Isabel Urrutia, an Olympic medalist who entered Congress to represent the interests of athletes and for that reason turned to the Court to bring charges against a decree issued by the Executive, which annexed the Administrative Department of Sport, Recreation, Physical Activity and Leisure Time (Coldeportes) to the Ministry of Culture, thus reducing its autonomous budget. In the same way, the texts of the constitutional complaints presented by a number of parliamentarians from both the Polo Democrático Alternativo and Centro Democrático, illustrate that their purpose has been to strike at legislation that contains fundamental policies of the national government with which these political parties disagree.

Secondly, the fact that a complaint contains charges of procedural defects in the legislative procedure concerning the violation of the rights of senators and representatives during the legislative process indicates that the plaintiff is turning to the Court to pursue individual interests rather than public benefits. An interesting case is the complaint presented by the representative David Luna who went before the Constitutional Court to challenge (case number, exp. 7857) a constitutional amendment based on procedural defects. Luna alleged that during the law-making process, he presented a proposal for a nominal vote on some of the articles of the amendment to the bill, a proposition that was never put to the consideration of the plenary, and so the vote was denied. Another interesting case is the intervention of the aforementioned Senator Iván Cepeda in the lawsuit against a law on sexual violence, of which this senator was a co-author. The senator claimed the unconstitutionality of content not included towards the end of the procedure which, according to the senator's judgment, distorted the purpose

of the project. What is interesting about these two examples is that although the charges are for defects in the legislative procedure, the members of congress lodging the complaint use the constitutional forum as a space to resume discussion about these laws and, thus, extend the process of creation for these pieces of legislation.

Chart 5. Coincidence with Political Agenda



Source: Compiled by the author based on information supplied by Congreso Visible.

Looking at the data, it can be seen that just one complaint conforms with the second criteria —charges for procedural defects in the legislative procedure, concerning the violation of the rights of senators and representatives during the legislative process. Moreover, chart 5 illustrates how a large percentage of complaints (59%) corresponds to other criteria, coinciding with individual or partisan political agendas.

A New Way of Understanding Constitutional Review and Legislative-Judicial Relationship: Theoretical Conclusions

Chris Bonneau and Brandon Bartels (2015) have encouraged researchers to make the normative implications of their empirical work more relevant and visible. One of the ways in which research can present normative implications is by showing how empirical findings lead to the reconsideration of conventional wisdoms and the overhaul of theories or constitutional principles in light of new data.

Alexander Hamilton wrote in the Federalist No. 78 about judicial review in terms of a control exercised by the federal courts over the statutes in order to

determine whether they are consistent with constitutional provisions by virtue of the fact that the courts were responsible for protecting the people by restraining the legislature from acting inconsistently with the Constitution.[23] Since that statement, constitutional review has been understood as a control external to the legislature. Strongly associated with the idea of *checks and balances*, the power of constitutional review has been seen as a example of horizontal control among the public branches, *i.e.*, judicial control over the acts of the legislative power. For instance, referring to the enforcement of the rules of the law-making process, Frederick Schauer (2006, 475) saw the judiciary as an external institution capable of and responsible for enforcing constitutional provisions and upholding or overturning legislative outcomes according to constitutional criteria. Other authors such as Tom Ginsburg (2008) and Georg Vanberg (2001) have also conceptualized the constitutional review as a mechanism for external restrictions on legislative work, a faculty that concerns only the justices.

Nonetheless, the use of constitutional review by Colombian parliamentarians has allowed us to see that this mechanism is not so alien to the legislative branch. In fact, it is true to say that constitutional review has incrementally become an internal control process within parliament, through which members of congress assess and confront or support the policies and arguments presented by their colleagues and through which they assure compliance of the parliamentarian rules during the law-making process by other members. In a country where constitutional review is not *ex officio*, but it is triggered by a complaint presented by any actor, it cannot be said that this type of judicial review is an external inspection, particularly when complaints against laws are presented by parliamentarians who participated in the debates and the creation of that same legislation. This leads to in the examination of other ways of understanding constitutional review, no longer as an external control but rather as a mechanism internal to the political dynamics between Congress and the Executive.

Secondly, the idea of constitutional review as a judicial control over parliamentarians has raised a famous normative debate, part of the old discussion between democracy and constitutionalism. For some authors (Colón-Ríos 2012; Gargarella 1996; Tushnet 2000; Waldron 1999, 2006; among others), the judicial control exercised by these courts over parliamentary activity is understood as an impairment of the democratic powers of the representatives of the people. For

23 Hamilton affirmed that "the interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body" (Hamilton 2014, 332).

others (Arango 2007; Dworkin 1997, 2011), review by the courts is essential to the preservation of a democratic rule of law, based on the operation of checks and balances between all branches of power. A new theoretical approach (Gargarella 2014; Hogg and Bushell 1997; Tushnet 2009) to the relation between constitutional courts and parliaments has tried to overcome this debate through a new understanding of judicial review in terms of a dialogue. These authors propose that constitutional review needs to be a dialogue between the legislative and the judiciary rather than a control that judges exercise over the actions of congresspeople, whereby, the last word on constitutional issues cannot be in the hands of the judicial power which is non-representative.

In normative terms, this dialogic judicial review constitutes an excellent theoretical proposal. However, the use of constitutional review by Colombian parliamentarians illustrates, in an empirical way, how members of the parliament are already engaged in a dialogue with the constitutional courts. Again, if we maintain the premise that the constitutional review is an external control to representative branches, it is difficult —although not impossible, of course— to defend constitutional complaint as an adequate mechanism for democratic polity. An empirical approach like the one advanced in this paper demonstrates that even members of the most representative institutions, such as the parliament, have several incentives to use constitutional review for multiple purposes. It is not only social movements and other members of civil society who have found that the constitutional forum is a more representative space to broach their political agendas; parliamentarians and other politicians, representing their constituencies, have found a political scenario where they have more opportunity to succeed, especially when they do not obtain the necessary votes on the legislative to advance their policies.

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