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Colombia's judicial reform: what now?

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Colombia's Judiciary Reform: What Now?

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Abstract

A current body of research examines Colombia's judicial institutions and focuses on the successes and failures of past reforms. While the literature is overwhelmingly negative, scholars have managed to put forward pieces of a potential solution. I draw on these analyses to answer the question, "what is the best possible course of action for Colombia's future judicial reform projects?" Throughout this paper, I draw on Colombian newspapers, think-tank reports, survey research, and academic studies to formulate a cohesive answer. This existing literature identifies that Colombia's weak judiciary stems from Spanish colonialism's lasting influence, the reactive and defensive nature of judges, and persistent political instability. While past reforms have addressed general problems within the nation, I find that Colombia could benefit from a targeted, phased reform agenda. I conclude Colombia's judiciary needs a serious round of comprehensive reforms to address its lack of competence, accountability, and transparency. Moreover, future reforms could benefit from a reformed budget and increased civil society participation. These adjustments could then facilitate public trust in the government, thus propelling its legitimacy.

Lay Summary

Since the 1980s, numerous Latin American countries have initiated difficult and lengthy processes of democratic transition. While some have introduced sweeping reforms to address serious problems within their justice systems, governments still struggle to administer justice efficiently. Despite the newly drafted constitutions aiming to guarantee the protection of citizens' rights, there is a significant gap between constitutional promises and the actual behavior of judicial officials. Citizens suffer from this failure of justice the most, as they routinely encounter widespread corruption, inefficiency, and apathy from their government officials. Nowhere is the corruption, inefficiency, and apathy greater than in Colombia. My thesis will explore the past and present judicial reform attempts in Colombia. I will closely analyze how historical and institutional factors have played a central role in the country's attempt at reform. I will also examine the introduction of the Constitutional Court, its strengths and weaknesses, the general failure of reforms, and the ongoing debates in Colombia regarding the proper path toward reform. Finally, I propose a series of reforms that the Colombian government could take to address the system's most serious and challenging problems.

I. Introduction

Since it gained its independence from Spain more than two centuries ago, Colombia has attempted to create a genuinely democratic government. In the mid-nineteenth century, two powerful political parties, the Conservatives and the Liberals, gained control over Colombia's political institutions[1] and controlled politics in the country for the next 150 years. In the 1940s, an intense feud developed between these two parties that triggered *La Violencia*, a civil war that lasted for almost two decades and took the lives of more than 200,000 people. After a short period of relative peace in the early 1970s, groups not allied with either of the two dominant parties found themselves excluded and marginalized, as widespread protests led to another round of violent uprisings.

Adding to this chaos, two violent groups challenged the government further. First, paramilitary groups, allied with political elites, launched violent assaults against the left-wing Revolutionary Armed Forces of Colombia (FARC), which had been mounting violent upheaval since the 1960s. At the same time, the Colombian state confronted a vicious war with organized crime, in particular, with the large drug-trafficking cartels. The U.S. consumer demand for cocaine had skyrocketed, and the Colombian cartels moved quickly. They paid local farmers to grow coca in the Andean mountains, process the coca into cocaine paste, and trans-ship it into the U.S. to sell at high prices. The turf wars and competition associated with the trafficking networks led to record-breaking crime rates and widespread violence across the country. Both the cartels and the insurgents carried out regular attacks on infrastructure, civil society,

[1] Bruce M. Wilson, "Institutional Reform and Rights Revolutions in Latin America: The Cases of Costa Rica and Colombia," *Journal of Politics in Latin America* 1, no. 2 (2009): 68-70, https://journals.sagepub.com/doi/10.1177/1866802X0900100203.

politicians, political institutions, journalists, and business elites. This led to the death of thousands of social activists, journalists, politicians, judicial officials, and law enforcement officers.[2] Through the 1980s, tens of thousands of Colombian citizens lost their lives, and people in marginalized communities lost any chance at claiming their civil and political rights. Medellin became the murder capital of the world. In 1990, 6349 people were murdered in the city. This is equivalent to 380 deaths per 100,000 people.[3] Scholars and journalists routinely referred to the country as a "failed state."[4]

Starting in the early 1990s, a combination of regional cooperation, enhanced law-enforcement techniques, and markedly increased domestic and international funding diminished the power of first, the Medellín Cartel, and then of the Cali Cartel. In 1993, the Colombian military, alongside the U.S. Drug Enforcement Administration (DEA) killed the leader of the Medellín Cartel, Pablo Escobar. By 2006, the brothers who headed the Cali Cartel, Miguel Rodríguez Orejuela and Gilberto Rodríguez Orejuela, were arrested, convicted, and given 30-year sentences. These two major events shifted the leading international criminal networks' center of operations from Colombia to Mexico. This also initiated a new era in Colombian history with markedly less drug-related violence.

Nevertheless, FARC continued to wreak havoc in the country. By 1999, its membership had burgeoned to more than 18,000 members, and its violent attacks continued. The organization carried out more than 3000 kidnappings that year. In response, nearly a quarter of the Colombian

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[2] Norman A. Bailey, "La Violencia in Colombia," *Journal of Inter-American Studies* 9, no. 4 (1967): 561-75, doi:10.2307/164860.

[3] Sibylla Brodzinsky, "From Murder Capital to Model City: is Medellín's Miracle Show or Substance?" The Guardian, April 17, 2014, https://www.theguardian.com/cities/2014/apr/17/medellin-murder-capital-to-model-city-miracle-un-world-urban-forum. For reference, the murder rate in the U.S. in 2019 was roughly 4.5 deaths per 100,000. The murder rate in Baltimore, the country's most violent city, averages around 50 deaths per 100,000.

[4] Michael Shifter and Vinay Jawahar, "State Building in Colombia: Getting Priorities Straight." *Journal of International Affairs* 58, no. 1 (2004): 143-154, http://www.jstor.org/stable/24357939.

population launched a massive strike across the country, calling for an end to the violence.[5] The "No Más" ("no more") protests helped bring the FARC to the negotiation table with the Colombian government. Although, it took another 17 years before FARC and the Colombian government signed a peace accord. By the late 1990s, the violence finally started to subside. Beginning in the late 1990s, the Colombian government, like many other governments across the region, took significant steps to create a more open, accountable democratic state with a fair system of justice. Its first order of business was to write a new constitution.

This thesis examines Colombia's judicial reforms that resulted in the creation of a Constitutional Court, formed primarily to focus on the rights and grievances of marginalized citizens. It first explores the process of designing a new constitution that showcased this new court and the obstacles that the architects of this document confronted. Second, it analyzes the performance of the Colombian courts, assessing both successes and failures. Third, it identifies lessons learned based on scholarly analyses of the effectiveness of these Colombian reforms. Finally, it proposes further reforms that Colombia might find valuable. I conclude Colombia could benefit if it were to implement specific phases of judicial reform, rather than broad programs that simultaneously target multiple areas of concern.

II. History of Colombia's Attempts to Establish Constitutional Government

[5] David Rampf and Diana Chavarro, "The 1991 Colombian National Constituent Assembly: Turning Exclusion into Inclusion, or a Vain Endeavour?," *Inclusive Political Settlements Paper* 1, (2014): 5, https://www.academia.edu/12650689/The_1991_Colombian_National_Constituent_Assembly_Turning_Exclusion_into_Inclusion_or_a_Vain_Endeavour.

Colombia is no stranger to political instability, as it has implemented 13 constitutions since it declared its independence from Spain in 1810.[6] Creating a workable model has never been easy, as the country's struggle to form an effective and just judicial process continues today. The country's founding fathers, who called their country Nueva Granada, adopted the liberal and democratic model based on that of France and the United States. The leaders of this new country argued over whether to create a centralized unitary government like that of France, or a federal union of territories like that of the U.S. Different perspectives eventually resulted in a compromise that adopted concepts from both models. The founders of Colombia modeled their bill of rights after that of France. The written constitution, which created a presidential system and an independent judicial structure, resembled that of the U.S. Scholars have argued, however, that a set of unwritten assumptions embedded in the U.S. Constitution were lost in translation, resulting in a less-flexible and overly strict implementation of the law in new Colombia.[7]

Like all Latin American countries, Colombia's efforts to create a democratic government were hampered by its strong Spanish influences. Scholars generally agree that the economic, political, and cultural institutions and traditions inherited from Spain's colonial domination remained deeply embedded.[8] Political scientists argue good government creates "functioning

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[6] New constitutions have appeared across Latin America for nearly two centuries. Indeed, the Latin American countries together have produced more constitutions than any other region in the world. Four Latin American countries have had more constitutions than any other country in the world. The Dominican Republic tops the list with 32, followed by Venezuela with 26, Haiti with 24, and Ecuador with 20. Moreover, the average lifespan of a constitution in Western Europe is 77 years; in Latin America, it is 16.5. Ryan Eustace, "Fluid Constitutions: A Latin American Phenomenon," Council on Hemispheric Affairs, July 3, 2014, https://www.coha.org/fluid-constitutions-a-latin-american-phenomenon/.

[7] Luz Estella Nagle, "Evolution of the Colombian Judiciary and the Constitutional Court," *Indiana International and Comparative Law Review* 6, no. 1 (1995): 60-62. https://doi.org/10.18060/17590.

[8] See, for example, Luz Estella Nagle, "The Cinderella of Government: Judicial Reform in Latin America," *California Western International Law Journal* 30, no. 2, (2000): 348, https://scholarlycommons.law.cwsl.edu/cwilj/vol30/iss2/8. Also see Felipe Sáez García, "The Nature of Judicial Reform in Latin America and Some Strategic Considerations," *American University International Law Review* 13, no. 5 (1998): 1267-3125, https://core.ac.uk/download/pdf/235402102. See also Pedro Bossio, "Exploring the Roots of Chronic Underdevelopment: The Colonial *Encomienda* and *Resguardo* and their Legacy to Modern Colombia," *CUNY Academic Works* (2018): 16-56, https://academicworks.cuny.edu/gc_etds/2475.

legal and judicial institutions to accomplish the interrelated goals of promoting private sector development, encouraging the development of all other societal institutions, alleviating poverty, and consolidating democracy." [9] As Luz Estella Nagle has argued, scholars emphasize judicial institutions because they provide the structures and procedures that ensure the proper functioning of institutions, and play a critical role in transforming ideas for reform into reality.[10] However, the Colombian judicial branch has clearly failed to ensure justice to offer redress for legitimate grievances, to remain accessible and responsive, and to protect the rights of Colombian citizens. The legacy of Colombia's colonial past is partly to blame for several reasons. First, Spain granted minimal self-rule to its colonies. When the crown made decisions, the provisional governors, or members of the crown's "Council," enforced them. Members of the Council held absolute executive and judicial authority over all matters. Executive and judicial power remained fully intertwined. Many judicial decisions were thus products of political considerations. As a result, citizens thoroughly distrusted judicial outcomes. Once the region's countries gained independence, power was transferred into the hands of local *caudillos* (strongmen) or small groups of military leaders (*juntas*). The courts then became instruments of the rulers used to enforce the ruling elite's authority.[11] Even as some Latin American countries adopted a more American-style separation-of-powers doctrine, judges remained powerless and controlled by the political elites.

Today, the judiciary continues to suffer from a systemic lack of respect across the region. Colombia, like many countries in the region, remained susceptible to the will of the legislative and executive branches for many years. As the judiciary feared reprisal from the other branches

[9] Nagle, "The Cinderella of Government," 348.
[10] Ibid, 357.
[11] Ibid, 350-354.

and the authority of the Catholic Church during Spanish colonialism, it generally remains subject to the will of those in power in two important ways. First, it has been subject to legislative and executive political ambition and corruption. Judicial officials have often been the target of violent acts of intimidation, as the Colombian government has generally failed to ensure the safety and security of its judicial officers. Second, other branches have regularly made the judiciary the scapegoat for the wrongs committed in the country. The judicial branch has consequently been forced to assume a purely defensive role regarding other major political actors. The judiciary has "long been little more than a maidservant, a Cinderella, to the other branches of government."[12] Consequently, throughout Latin America, the judicial systems have been politically manipulated, corrupted, underfunded, understaffed, under-trained, and incapable of ensuring justice and protecting the rights of citizens.

In the 1980s, numerous Latin American governments moved to initiate democratic transitions. As the countries fell deeply into debt, and their militaries began to exit from power, the transitions were officially initiated. Further, a combination of internal and external pressures, especially from international financial lending institutions, brought about a reorganizing of government institutions and priorities. In many cases, the first order of business was to restructure the judicial system to make it more engaged and protective of the citizens' rights.[13] Many of the transitioning states across the region, including Chile, Argentina, Brazil, and Uruguay, created new constitutions that would help move the process forward.

III. The Colombian Constitution and the Constitutional Court

[12] Nagle, "The Cinderella of Government," 349.
[13] García, "Nature of Judicial Reform in Latin America," 1268; Wilson, "Institutional Reform and Rights Revolutions," 71-75.

In the early 1990s, Colombia began its own complex process of reform. The government first established a constituent-assembly to draft a new constitution with stronger and more transparent democratic institutions. The assembly included representatives from various political parties, former guerrillas, various religious and indigenous groups, and legislatures.[14] The members of the assembly debated whether the country needed a constitutional court, an important question. Proponents of the court argued that despite the many fleeting constitutions, most of them failed to protect the rights of citizens who lack the protection of a trusted court system. Some assembly members, however, feared that having a powerful constitutional court would lead to a "government of judges," in which judges would increasingly take on the role of the legislature. The proponents responded that the court was essential to address social and ethical questions regarding the protection of rights, and not political ones. Both sides eventually agreed the new court must remain autonomous and non-politicized.

In 1991, the assembly created the Constitutional Court of Colombia, the highest and final appellate court in the country's court hierarchy. Its primary function was to decide the constitutionality of laws, acts, and statutes. It was also given an innovative provision, called the *tutela.* The Court, located in Bogotá, held its first session in March of 1992. Nine magistrates, each of whom can serve only a single term for eight years, are chosen by the Colombian Senate.

Colombia's extensive judicial reforms have received praise from legal experts. The creation of the Constitutional Court, in particular, has strengthened socially and politically marginalized citizens' ability to claim their constitutionally protected rights. The Court has since enhanced judicial independence, instituted rules that require no attorney fees or general

[14] Rampf and Chavarro, "The 1991 Colombian National Constituent Assembly," 2.

payments, simplified filing procedures, and employed additional magistrates and court personnel to move through caseloads quickly. The Court, housed in modern, technologically advanced facilities, offers regular programs for citizens to inform them of both the complaint-filing process and of their rights requiring protection, at all times.[15]

Though Colombia stands as an effective model for other regional efforts of judicial reform, the country's new approach has confronted serious challenges. For example, some complain that with the introduction of the Constitutional Court, judges from the other ranking courts have become complacent, more supportive of the status quo, and resistant to change.[16] This "push-back" has created an internal power struggle within the judicial branch. Others have complained that the Colombian Constitutional Court has accrued too much power, and the entire political system now suffers from "judicialization." Judicialization is a social-science term referring to the overreach of the judicial branch. Rodrigo Yepes defined the term in the following manner: "matters traditionally decided through political channels are now increasingly being decided by judges."[17] He concluded the Colombian judiciary has managed to isolate itself from the other branches of government and now functions with nearly full autonomy. Given the level of corruption and mismanagement in the executive and legislative branches, Yepes conceptualized Colombia as an example of judicialization, at least in comparison with other developing countries.[18]

In Colombia, judges are generally viewed as being slightly more transparent and less vulnerable to corruption than the officials in other branches. This has resulted, however, in

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[15] Samuel Issacharoff, "Constitutional Courts and Consolidated Power," *The American Journal of Comparative Law* 62, no. 3 (Summer 2014): 585–612.
[16] García, "Nature of Judicial Reform in Latin America," 1269.
[17] Rodrigo Yepes, "Judicialization of Politics in Colombia: cases, merits, and risks," *International Journal on Human Rights* 6, (2007): 48-63, https://sur.conectas.org/en/judicialization-politics-colombia/.
[18] Ibid, 49-52.

profound tension between judges and other government officials. Judges now often find themselves pitted against the members of the other political branches and are consequently perceived as more democratic. This development has led to a paradoxical shift in democratic legitimacy from the political system to the judicial system, as the elected representatives are the least trusted. As citizens view the judiciary as more accessible and transparent, increasing demands are formulated in legal and judicial terms. Some of the most prominent forms of judicialization have included efforts to counter political corruption, to manage economic policy, and to protect minority groups, individual autonomy, and stigmatized populations. Unlike other scholars, Yepes sees the increasing participation of social actors and citizens as a consequence of judicialization, not as a necessary condition to propel it.[19]

IV. The Constitutional Court and *Tutelas*

The designers of the Colombian Constitution expanded the scope for written protections of fundamental, individual rights. Before 1991, the judiciary consisted of three primary judicial organs – the Supreme Court, the Council of State, and the Superior Judicial Council. The tripartite structure often clashed, causing internal confusion and subjecting the Colombian people to unaddressed and often ignored human-rights violations. For example, the three highest courts consistently refused to protect the rights of its LGBTQ citizens,[20] primarily because the Colombian state had not yet recognized this group as one in need of protection. The Constitutional Court was specifically tasked to address the grievances of marginalized and often

[19] Yepes, "Judicialization of Politics in Colombia," 48-63.
[20] "Colombia: Events of 2020," Human Rights Watch, October 21, 2020, https://www.hrw.org/world-report/2021/country-chapters/colombia#.

unrecognized minority-groups. Since this court is less formal than the others, it provides low-cost access to the court system for average citizens. Constitutional protections in this court are usually afforded through individual *tutelas*, a revolutionary addition to the Colombian justice system.[21]

A *tutela* is an immediate court action that can be requested if an individual feels his or her constitutional rights are being violated, especially if no legal alternative exists for the individual to pursue.[22] *Tutela* cases grant easy access to justice and require no legal fees or lawyers. Within a few years, the ease of access to a Constitutional Court decision had resulted in soaring demand for *tutela* protections. While the Court chooses which of the *tutela* cases it wishes to examine, the judges only have ten days to render a decision once it is selected. These cases typically take precedent over all of the judges' other casework, creating a severe delay in other case decisions and a significant backload regarding other constitutional matters.[23] The new category of fast-track cases has resulted in a seriously overloaded and increasingly ineffectual court system.

V. Plan Colombia

In the 1980s and 1990s, FARC continued to undermine Colombia's rule of law and to pose a much broader geopolitical threat. In 2000, the U.S. consequently launched the partnership known as "Plan Colombia." The plan was a multilateral developmental effort, framed by the

[21] Joris Tielens, "Democracy Isn't Built in a Day," Netherlands Institute for Multiparty Democracy, May 2, 2020, https://nimd.org/democracy-isnt-built-in-a-day-the-case-of-colombia/.
[22] Ibid.

government as an ambitious proposal that would address the multitude of problems that had undermined Colombia's political and economic development for decades. The plan sought to promote the nation's economic growth, train law enforcement, combat the spread of narcotics, and strengthen judicial institutions.[24] Plan Colombia significantly reduced violence within the nation for a time. Homicides declined by 50%, while kidnappings declined by 90%. Colombia also became a model for police officer training, as it established the protocol for 21 other Latin American and African countries.[25] Notably, the U.S. agreed to commit $1.3 billion of the $7.5 billion dedicated to the plan. Yet, its contribution was mostly via military assistance. A group of European states also contributed $1 billion to the institutional components of the plan. Though Colombia technically committed to providing the remaining sum, its actual budget fell far short. Further, little attention was allocated to improving the country's judicial institutions. Any positive benefits have simply followed from the plan's other priorities, such as combatting the spread of narcotics.[26] While this was great news, marginalized communities continued to suffer from a lack of legal and social protections.

VI. The 2012 Judicial Reform Bill

In 2012, the Colombian Congress passed a contentious judicial-reform bill. While the bill introduced some potentially beneficial changes, it primarily protected criminal public officials. On the one hand, the bill granted the Constitutional Court decision-making authority regarding

[24] Luz Estella Nagle, "The Search for Accountability and Transparency in Plan Colombia: Reforming Judicial Institutions – Again," *Strategic Studies* (2001): 1-7, http://www.jstor.com/stable/resrep11850.
[25] "Plan Colombia: A Development Success Story," U.S. Global Leadership Coalition, accessed March 19, 2021, http://www.usglc.org/media/2017/04/USGLC-Plan-Columbia.pdf.
[26] Tielens, "Democracy Isn't Built in a Day."

constitutional protections. This measure sought to prevent clashes among the highest courts over case outcomes. On the other hand, Congress slipped in an additional provision to reduce overall judicial power, as it granted the legislative and executive branches immunity from a guilty court-conviction. Standing law allowed the Supreme Court to investigate and prosecute congressmen and congresswomen who had been indicted for illegal activity, such as collaborating with unlawful paramilitary groups. Under the proposed bill, the 1,300 open investigations of high-ranking government officials facing conviction were to be halted. Rather than propelling government transparency, the proposed bill simply created more controversy. Wisely, President Juan Manuel Santos rejected the bill and sent it back to Congress for review.[27]

VII. The Peace Agreement with FARC

Although President Santos rejected the 2012 bill, members of Congress continued to contribute to insurgent groups. The door to further corruption within the Colombian government was consequently left wide open. For the next four years**,** no official efforts were made for judicial reform, and the domestic insurgency continued. However, in 2016, the government signed a historic peace agreement with the Revolutionary Armed Forced of Colombia (FARC) to end the 52-year armed conflict.[28] The peace agreement has served numerous positive benefits for the country. First, it has minimized congressional support and collaboration with insurgent groups.[29] Second, it has opened up civic life, as violence has dropped significantly since 2016. Third, it has allowed more opportunities for citizens to pay attention to corruption scandals. The

[27] Tielens, "Democracy Isn't Built in a Day."
[28] "The Current Situation in Colombia: A USIP Fact Sheet," United States Institute of Peace, December 3, 2020, https://www.usip.org/publications/2020/12/current-situation-colombia.
[29] Tielens, "Democracy Isn't Built in a Day."

increasing attention to political affairs has since initiated massive public protests in response to government injustices. It is also safer to protest now because paramilitary groups do not openly target grass-roots social movements as they did before the agreement.[30]

VIII. The National Development Plan

In 2019, three years after the signing of the peace accord with FARC, Colombia's current President, Ivan Duque, launched his National Development Plan (PND). The $325 billion socio-economic spending plan set the administration's lofty goals of enhanced education, higher employment, more human and economic security, and environmental sustainability. The government argued this new plan would pave the way for lasting national peace through a simple formula: rule of law + entrepreneurship = equality.[31] While the plan addresses several critical areas in need of improvement, it neglects to commit any resources to judicial reform. It certainly emphasizes a more transparent and efficient state, but it only targets a few individual protection agendas. For example, President Duque failed to carry out highly-anticipated reforms to the electoral and judiciary systems. This failure helps explain Colombia's massive public protests occurring since November of 2019. [32] This dissatisfaction with the executive branch has also contributed to judicialization.

While the National Development Plan offers a great start for Colombia, the judicial branch remains in need of serious reform to ensure PND's overall goal of a more efficient and

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[30] "The Current Situation in Colombia."
[31] Stephen Gill, "Duque Launches His 4-year Development Plan for Colombia," Colombia Reports, May 28, 2019, https://colombiareports.com/colombias-president-duque-launches-4-year-development-plan/.
[32] Sandra Botero and Silvia O. Bahamón, "Colombia is Having its Largest Wave of Protests in Recent Decades. Why?," The Washington Post, December 5, 2019, https://www.washingtonpost.com/politics/2019/12/05/colombia-is-having-its-largest-wave-protests-recent-decades-why/.

just state will succeed. In fact, the government's failure to implement its promises for improved political institutions may lead to another *La Violencía,* especially as public dissatisfaction continues to surge.[33] Hence, I conclude Colombia's government should implement a plan that would focus specifically on the judicial branch and would offer detailed, goal-oriented reforms to bring about this desired measurable and positive change.

IX. Current Judicial Problems and Structure

A. Inefficient Justice Administration and Low Public Confidence

Among the numerous problems facing the judiciary, the process of securing justice in Colombia is painfully slow. Judicial understaffing has led to heavy and backlogged caseloads. The number of judges per 100,000 people in Colombia is 0.5, which falls well below other Latin American countries, including Brazil (1.0), Peru (1.0), and Panama (2.6).[34] In fact, the World Bank estimates it takes almost four years, on average, to enforce a simple contract. The actual amount of time it takes for a case to be resolved exceeds given time restrictions by 200 percent.[35] Moreover, the process in Colombia is very expensive. The cost of litigation as a percentage of the claim, at 41%, is substantially higher than the Latin American average.[36] Although the Constitutional Court and the introduction of the *tutela* were designed to increase access to justice, unforeseen implications remain a problem to be addressed.

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[33] Adriaan Alsema, "Only Peace Process Can Stop Colombia's Return to War," Colombia Reports, February 22, 2021, https://colombiareports.com/only-peace-process-can-stop-colombias-return-to-war/.
[34] Maria, Dakolias, "Court Performance Around the World: A Comparative Perspective," *Yale Human Rights and Development Law Journal* 2, no. 1 (1999): 105.
[35] Ibid.
[36] Gustavo Silva Cano, "Fixing Colombia's Chaotic Judicial System," Colombia Reports, February 27, 2012, https://colombiareports.com/fixing-colombias-chaotic-judicial-system/.

Public confidence in Colombia's judicial system also ranks very low among the states of Latin America. In a recent opinion survey, only 23% of respondents said they trusted the judicial branch, while 39% said they simply had no confidence in it all.[37] Another poll showed that 89% of all Colombians surveyed believed that judges were corrupt and did not apply the law evenhandedly.[38] Despite these disconcerting numbers, the judicial system in Colombia is still generally viewed more positively than the other two branches of government. Nevertheless, the judicial system is overloaded, underfunded, and understaffed, while judges and other judicial personnel are undertrained and inefficient.

B. The Courts

Considering the past reforms, what exactly does the Colombian judiciary look like today? The judicial branch currently consists of four distinct jurisdictions: the ordinary, administrative, constitutional, and special jurisdictions. The highest judicial organs are now the Supreme Court, the Council of State, the Superior Council of the Judicature, and the Constitutional Court. The Supreme Court, divided into two chambers, is technically the highest court regarding ordinary jurisdiction. The Supreme Court's chambers, each with separate jurisdictions, decide which cases are to be heard by its full court. The court can also technically draft its own rules of procedure and can exercise the power of judicial review. Judicial review is the authority to decide if the legislative and executive branches' actions are valid.[39] The Council of State, divided into separate chambers, is also tasked with the authority of judicial review, to act as a supreme consultative

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[37] "Colombia Country Report 2020," BTI Transformation Index, Bertelsmann Stiftung, accessed March 20, 2021, https://www.bti-project.org/en/reports/country-report-COL-2020.html.
[38] Dakolias, "Court Performance Around the World," 115.
[39] "Colombia's Constitution of 1991 with Amendments through 2015," Constitute Project, 1991, https://www.constituteproject.org/constitution/Colombia_2015.pdf?lang=en.

body of the government in matters of war or national security, to present proposals to amend the Constitution and other bills, and to make its own by-laws. It is more an administrative entity than a fully functioning court.

The Superior Council of the Judicature is divided into two chambers. The first is an administrative chamber consisting of six elected judges. Two members are elected by the Supreme Court, one by the Constitutional Court, and three by the Council of State. The second is a jurisdictional disciplinary chamber made up of seven members elected by the National Congress. This Council is in charge of disciplinary and administrative matters such as human resources, operations, and finance. It also has the power to draw up lists of judicial candidates for appointment to any of these specific judicial entities. Indeed, this is a powerful entity. Moreover, the Superior Council has the power to examine and sanction errors of judicial officials and lawyers, to settle jurisdictional conflicts between the differing judicial organs, and to oversee the productivity of the judicial bodies.[40]

Finally, the Constitutional Court is entrusted to safeguard the integrity and supremacy of the Constitution. The members of this court are elected by the Senate of the Republic and are ineligible for reelection. Its most important function is its ability to take up petitions of unconstitutionality brought by citizens and to decide the constitutionality of calls of the Council of State to amend the Constitution, national laws, and bills opposed by the government. It can also approve international treaties, review judicial decisions connected with the protection of constitutional rights, and draft its own by-laws.[41]

This complex structure with clearly overlapping responsibilities and jurisdictions produces contentious turf wars and bitter disagreements. In fact, these internal disputes take up

[40] See "Colombia's Constitution of 1991."
[41] Ibid.

judicial attention than the human-rights issues that this structure is supposed to address. The four organs often ignore the opinions of one another, as they often hold different interpretations of the law. The *tutela*, in particular, is the source of the most common clashes among the courts.[42] For example, a *tutela* may bring a claim before the Constitutional Court that a Supreme Court decision is unconstitutional and must be struck down. Note that a Supreme Court decision follows two rounds of litigation already conducted in the trial and appellate courts. If the losing party disagrees with the Supreme Court decision, it now has another chance to claim a favorable judgment. Hence, the Constitutional Court has become the fallback or default court, if every other appeal fails. Importantly, both the Supreme and Constitutional Court claim binding decision-making authority. It is clear that the disagreement between the courts regarding proper interpretations of the law and constitutional jurisdiction stems from the overlapping responsibilities granted by the Constitution.[43] A careful reading reveals serious contradictions that must be addressed. There is also a glaring gap between the written Constitution and its application. Judges who are supposed to be independent regularly face significant pressure to adhere to the desires of the other branches, despite the Constitution granting the Courts autonomy and judicial review.

C. The Bifurcated System

Following the French civil law model, Colombia has a bifurcated judicial system. The Supreme Court presides over all private law, which consists of civil and criminal matters. Within private law, the civil and criminal spheres of judicial proceedings are entirely separate from one another. The primary differences between civil and criminal cases concern the role of the judge.

[42] Cano, "Fixing Colombia's Chaotic Judicial System."
[43] Ibid.

In a civil law system, as opposed to the American common-law system, it is very difficult for a citizen to bring a civil case before the courts. The Colombian civil-law system, therefore, provides very few resources of legal services. The process, expensive and inaccessible, also offers little direct contact between the judges and the parties during the process. Court hearings remain private, and decisions are made with a limited direct role of the parties involved. In the case of a criminal proceeding, judges conduct the entire investigation on their own by employing their own judicial police and making a decision before the defendant ever appears in court. In this sense, the Colombian system is inquisitorial, since the judge serves as the investigator, prosecutor, and adjudicator simultaneously. The defendant has little ability to confront evidence presented against him or her, and there is no impartial third-party to provide lawful due process.[44]

The Council of State, however, presides over public or administrative law, which regulates the operation and procedures of government agencies. The Council plays an important role in the appointment and replacement of judicial actors within the other high-ranking judicial organs. While most of the abuse of power and official corruption stems from government agencies, past reforms have not addressed the Council's authority, transparency, or degree of oversight. The Council may hold too much authority, making the impact of its decisions susceptible to ulterior motives. For example, in 2011, the Council made a landmark decision by interpreting a new meaning of the Constitution. The Constitution previously held that a nominee for the position of Chief Prosecutor of the Supreme Court needed votes from two-thirds of the Supreme Court to be selected. This allowed Viviane Morales to fill the position, who then

aggressively prosecuted the corrupted allies of the former right-wing president, Álvaro Uríbe. However, the Council of State's decision has since removed her from office, as it concluded that her selection process was unconstitutional. The decision's implications have thwarted the president's agenda to weaken the influence of former, corrupted political figures.[45] Why would the Council decide this? It is possible it was simply fulfilling its duty. However, it is important to remember the members of the Council are elected by the National Congress. It is quite possible that this decision, and perhaps others, were made with a strategic goal to maintain corrupted political influence. It would follow from this conclusion that greater accountability measures are in order.

X. Analysis

Colombia's ongoing struggle to establish transparent democratic governance has caught the attention of many scholars who have provided a variety of theories seeking to explain the country's crisis. As a democratic republic, power and authority should be derived from the people.[46] Elected officials should serve the people who elect them, work to protect rights, and value the enforcement of laws. This is clearly not the case in Colombia. Most of the reforms that have taken place in Colombia since the early 1990s have empowered the judiciary. Bruce M. Wilson asserts that the failure of Colombia's democracy has prompted this empowerment – the judicialization of Colombia – and has resulted in a change in the behavior of the country's

[45] "Colombia's Council of State Unseats Viviane Morales as Chief Prosecutor," Council of Hemispheric Affairs, March 2, 2012, https://www.coha.org/colombia%e2%80%99s-council-of-state-unseats-vivian-morales-as-chief-prosecutor/.

highest court. This "rights revolution," as Wilson labels it, has resulted in the court's shying away from contract-related cases and other disputes in favor of routinely prioritizing the protection of individual rights. This has meant that traditionally marginalized people have been able to present their claims for constitutionally guaranteed rights and be heard.[47] This has also meant, however, that other important disputes have been pushed aside. Thus, the court is fulfilling only part of its total responsibility. Wilson has argued any potential reform project would require the formation of watch-dog organizations to provide support structures and external oversight of the judicial branch.[48] In America, such support structures take the form of reputable organizations like the American Civil Liberties Union (ACLU). Felipe García similarly asserts that the judiciary requires the introduction of new exogenous bodies to monitor judicial functions. Third-party oversight and enforcement are crucial to the institutional structure of successful democratic societies.[49] Both Wilson and García are referring to the need for an active, engaged civil society that monitors the behavior of judges and other officials, publicizes and openly criticizes inappropriate behavior, and serves as the eyes and ears of a society focused on developing transparent, effective political and judicial institutions.

Joris Tielens has argued that Colombia's judicial reforms have actually been quite limited. He contends that, despite Colombia's effort to democratize, the country's political system remains far from democratic. Democracy, he asserts, must be accountable, tolerant, diverse, and inclusive. It must protect the rights of all citizens. Its politicians and political institutions must respond to the needs of the population and must be held accountable if they do not. Colombia, in Tielens's view, has far to go before it can claim to be a legitimate democratic

[47] Wilson, "Institutional Reform and Rights Revolutions," 66-70.
[48] Ibid, 61.
[49] García, "Nature of Judicial Reform in Latin America," 1293-1294.

government with a strong and independent judiciary. The country's current state of affairs is so unstable that such an outcome could never occur "overnight."[50]

Nagle offers a different, and even more negative, interpretation. She believes the lack of political stability has been used to justify superficial judicial reforms. To her, Colombia's judicial reforms have served as a distraction from the other more serious problems confronting the country, including poverty and persistent violence. In an effort to court U.S. foreign assistance, Colombia has pushed forward with an array of judicial reforms to win U.S. support, but these have failed to directly address the country's most pressing problems. Consequently, the reforms within the judiciary have only been an extension of the corruption that plagues the entire political system. Nagle contends that the judicial branch supports reforms because it brings additional funding and more independence. As a result, the branch fails to address fundamental problems. In sum, she believes judicialization is nothing more than the elite political class continuing to manipulate representative democracy to serve its own interests and to starve citizens of genuine and substantive change.[51]

XI. Obstacles Confronting Colombia's Attempts to Reform

Scholars broadly agree on the central obstacles confronting Colombia's efforts at judicial and political reforms. Nagle has argued that the judiciary is no more inclined to reform itself than any other institution in Colombia. The judiciary has long benefited from the status quo and is

[50] Tielens, "Democracy Isn't Built in a Day."
[51] Luz E. Nagle, "Colombia's Faceless Justice: A Necessary Evil, Blind Impartiality, or Modern Inquisition?," *Stetson University*, (July 2013): 945-946, https://www.researchgate.net/publication/228222162_Colombia's_Faceless_Justice_A_Necessary_Evil_Blind_Impartiality_or_Modern_Inquisition.

therefore unwilling to consider reform.[52] Indeed, Nagle points to culture as the most serious obstacle. The higher courts have historically commanded little respect from the other branches or the citizens. Colombian courts, like the courts in so many other Latin American countries, have traditionally "rubber-stamped" the executive's actions by finding constitutional justification for them. This has demonstrated a clear lack of judicial will to interfere in law-making procedures and has provided executives freewill to dominate Colombia's politics as they please. Although the governmental reforms initiated in the early 1990s assigned the judicial branch the responsibility to bring about democratization, transparency, and the protection of human rights, the judiciary has refused to step up and carry out this task.[53] Instead, it has minimized its own power by allowing political elites to bribe judges to ensure favorable outcomes of distributive decisions or to enhance political advantages. Therefore, the judiciary has put its own self-preservation above its democratization obligations.[54]

Indeed, the judiciary has adopted a defensive and reactive response to change and an unwillingness to carry out the kinds of responsibilities envisioned for it in the Constitution. García has argued that judges have grown comfortable with their arrangement with the political elite and subsequently view demands for change as threats to their security, rather than as opportunities for political and social development. Moreover, judges have creative recalcitrant patterns of resistance and have rejected the modern blueprint put before them. Rather, they have clung to performing their traditional tasks. This behavior clearly reflects the organizational patterns inherited from the colonial period and long-enduring institutional instability. The judiciary clearly desires to protect its traditional role and its security. Consequently, its

[52] See Nagle, "Colombia's Faceless Justice," 910; García, "Nature of Judicial Reform in Latin America, 1269."
[53] Nagle, "Colombia's Faceless Justice," 945-946.
[54] Nagle "The Cinderella of Government," 354-356.

popularity and legitimacy among Colombian citizens have suffered.[55] This resistance suggests the need for added pressure from outside of the judicial organization is at this point, hard to envision.

Judicial unresponsiveness clearly must be accounted for when creating a plan for substantive change. According to García, the informal constraints embodied in traditions and culture are almost always more resistant to change than formal policies or rules. This explains why the introduction of the Constitutional Court serves only as a partial solution to the deeper-rooted inefficiencies of the courts. While it offered a convenient path to access justice for Colombian citizens, it failed to address the defensive or reactive nature of the judiciary as a whole. By introducing a court high enough to challenge the long-standing authority of the Supreme Court, it makes sense why the two judicial bodies cannot see eye-to-eye regarding Constitutional interpretation. On one hand, the new Constitutional Court judges seek to liberate the people and provide a remedy for their grievances. Both its focus and its authority vis-à-vis the rest of the judiciary create internal tensions that have destructive potential.

Plan Colombia offered another attempt at judicial reform, but it too fell far short for several reasons. First, the plan failed to consider its impact on the region and the geopolitical threats imposed on Colombia's neighbors. The United States Agency for International Development (USAID)-sponsored judicial reform was viewed by neighboring states as a tool to advance a U.S. foreign-policy agenda, in addition to a rule-of-law program. While this view may have been overly simplified and discounted the positive aspects of the program, the U.S. indeed funded a strengthening of the country's courts with an intent to more effectively prosecute drug lords.[56] Note that Colombia's laws do not allow it to extradite Colombian nationals. Many

[55] García, "Nature of Judicial Reform in Latin America," 1286-1288.
[56] Nagle, "The Search for Accountability and Transparency in Plan Colombia," 27-33.

Colombian traffickers who had been arrested in Colombia and indicted in U.S. courts, had to be tried in Colombian courts, which had a less than impressive conviction rate. So, while improving the administration of justice in Latin America has long been a critically important goal of USAID, Plan Colombia has a drug-trafficking component that tainted, in part, the American effort.

Along with the judicial reforms, Plan Colombia offered military support and institutional strengthening as part of a regional effort to bring down the cartels. In return for U.S. assistance, Colombia, along with Argentina, Honduras, and other Latin American countries, diplomatically supported the 1999 U.S.-led United Nations invasion of Kuwait to repel Iraq's aggression. Colombia's neighbors, especially Ecuador, which the Colombian government had accused of harboring FARC insurgents, viewed Plan Colombia as a threat because of its effort to strengthen the Colombian military.[57] Finally, while the Colombian government managed to bring down the Colombian cartels and the level of drug-related violence, the root problem of a weak, ineffectual, and corrupt government with little interest in ensuring the fair and equitable administration of justice has remained a central problem. To make matters worse, Plan Colombia failed to clearly identify its broader objectives regarding judicial reforms. Consequently, the funding supported spending increases within the judicial branch but resulted in limited real or measurable improvements in the administration of justice. It is evident any future reform must learn from Plan Colombia's mistakes.

The numerous obstacles confronting Colombia raise a central question: what now? How does a system reform itself if those in charge are comfortable with the power that they wield vis-

[57] Pilar Domingo, "Judicial Independence and Judicial Reform in Latin America," in Andreas Schedler, Larry Diamond, and Marc F. Plattner, (eds.), *The Self-Restraining State: Power and Accountability in New Democracies*, (Boulder: Lynne Rienner, 1999).

à-vis the citizens? The country has endured external pressure from international and regional organizations, foreign governments, and legal experts. Yet, its reforms have been superficial, confusing, and have in many instances, created more problems than they have solved. Clearly, Colombia needs a far-reaching, comprehensive round of serious judicial reforms.

XII. So, What Does the Colombian Judicial Branch Need?

In the final section of this paper, drawing from Colombian newspapers, think-tank reports, survey research, and academic studies, I will outline a comprehensive reform proposal to potentially reform Colombia's judiciary. There are a few important considerations to address. First, future reforms mustn't be subject to a "sub-category" of a larger agenda. History shows that overly broad plans with multiple-tiered agendas fail to allocate enough attention to judicialization. Note that judicialization places the judiciary at the center of the political process and provides it with the authority and oversight necessary to act in the interest of the country as a whole.[58] Second, the proposed agenda should also deal with most of the institutional and organizational elements that determine a coherent judicial performance synchronously. The change will likely require a combination of modifications mainly from within the judiciary's institutional and organizational structure. Most importantly, the strategy will be feasible only if Colombia's government develops a broad consensus about the specific reform agenda. Potential opposition from the incumbent leadership should be expected and planned for accordingly. Third, compromise will be essential in the government's effort to create a working consensus. The constituents, who will ultimately judge the legitimacy and transparency of the judicial

[58] Yepes, "Judicialization of Politics in Colombia," 49-51.

branch, must also agree with this consensus. Scholars have suggested that a phased reform process may be the key to smoothly transitioning Colombia and to developing such a consensus.[59]

In sum, the judicial-reform plan should address three major criteria: financial sustainability, judicial competence, and judicial accountability.[60] Also, its overarching goals should be two-fold, addressing responsiveness and trust. The first overarching objective is to establish greater judicial effectiveness regarding its principal functions including the guarantee of administration of justice and dispute resolution.[61] The second objective is to establish sufficient judicial trustworthiness and responsiveness to the demands of society. This will include opening itself to scrutiny and citizen participation, so it can adhere to society's values, rather than its own.

Judicial reform projects are generally oriented in procedural and administrative terms.[62] I will follow this pattern. Procedural reforms target issues of judicial efficiency and effectiveness.[63] Thus, procedural reforms focus on the first objective of judicial effectiveness, including the necessary improvements of judicial competence and accountability, as well as the financial sustainability necessary for the plan. Administrative reforms target improvements to public life, such as eliminating corruption, increasing representativeness, and fostering the participation of citizens and citizen groups.[64] Therefore, administrative reforms target our second

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[59] García, "Nature of Judicial Reform in Latin America," 1322.
[60] "12 Principles of Good Governance," Good Governance, Council of Europe Portal, 2020, https://www.coe.int/en/web/good-governance/12-principles.
[61] García, "Nature of Judicial Reform in Latin America," 1315-1318.
[62] Nagle, "The Cinderella of Government," 373.
[63] Danielle Root and Sam Berger, "Structural Reforms to the Federal Judiciary: Restoring Independence and Fairness to the Courts," Center for American Progress, March 8, 2019, https://www.americanprogress.org/issues/courts/reports/2019/05/08/469504/structural-reforms-federal-judiciary/.
[64] James Iain Gow, "Administrative Reform," Encyclopedic Dictionary of Public Administration, in L. Côté and J.-F. Savard (eds.), 2012, www.dictionnaire.enap.ca.

objective to enhance judicial trustworthiness and responsiveness. It is essential to address objective number one first, as legitimacy and trust can only follow from a sufficient judicial performance.

While pursuing the two primary objectives, the proposal should be strategically implemented in phases. The first phase of the process should properly allocate the funding necessary to carry the plan out. Here, it is important to address the financial burdens placed on potential reform, especially the economic conditionality entrapment with the U.S. The second phase should address overall judicial competence. Improvement to areas such as case management, personnel training and staffing, and education may prove to benefit the judiciary's efficiency and effectiveness. The third phase should focus on changes aimed at increasing the degree of responsiveness and accountability of the judicial governance structure to the needs of an increasing modem and democratic society. Note the recent protests make it clear that the Colombian public seeks improved transparency and functionality from its judiciary. It follows that allowing the public to participate in the later stages of the process will be essential. However, it is critical to first ensure the people will be safe while participating in judicial proceedings, especially considering the history of bribes and threats to judicial actors. Hence, it may take years before the final phase, as suggested, can be realistically implemented, because improving judicial competence and accountability to an acceptable level will take time.

A. Financial Sustainability

First and foremost, the plan proposed in this paper will likely carry a hefty price tag. It is well known the U.S. has a history of creating incentives in Latin America to strengthen the region's rule of law, to support market economies, and to encourage representative democratic

governments. It follows that the U.S. government has financially supported several of Colombia's previous reforms. Many U.S.-funded programs, however, including Plan Colombia, went far beyond judicial reforms and prioritized other agendas. Now, I acknowledge that foreign assistance could help provide critically important funding for the following phases of reform. If possible though, Colombia should try to avoid wholly depending on other sources of assistance and instead allocate a reasonable portion of its own budget to these objectives. This would be a wise far-reaching investment for the country, both in support of its own democratic development and for greater economic and political stability. If this is not possible, an alternative option might be for the country to develop private-public programs that draw on the expertise and resources of private-sector organizations, legal experts, and scholars, combined with public-sector civil servants and occasionally, foreign experts.

B. Competence

Once a financial plan is in order, the internal workings of the judiciary could benefit from thorough adjustment. It is important to first consider the judiciary in Colombia has never been considered to be an equal branch of the government. This has limited the branch's capacity to function independently, as the Constitution intended. We should first determine where current judicial actors lack regarding competence to remedy this discrepancy. First, the Colombian judiciary has little to no ability to investigate a crime in a professional, forthright, or accountable manner. Second, judges have little to no education or training required to accomplish their jobs effectively. Third, they are not required to undertake meticulous background checks before being hired. Since judges lack professionalism, they tend to be more receptive to bribery and intimidation.[65]

[65] Nagle, "Colombia's Faceless Justice," 944-945.

To initiate necessary change, I suggest intensive re-training of the current judicial actors. It is also essential to train aspiring judicial actors before they can take office. As the current members retire, these new and more qualified actors will replace their predecessors. Through continuous replacement, the branch could eventually "turn over a new leaf," and thus function more effectively as a whole. Hence, Colombia should establish a national academy designed to train aspiring judges, judicial police, prosecutors, and investigative units immediately after college. The training academy regimen would likely instill discipline and establish a common loyalty, at least among its aspiring judicial actors. It would also provide overarching cohesiveness and consistency throughout the system, and therefore grant less opportunity for personal gain.[66] The academy should also increase service requirements to ensure only the most qualified individuals are eligible to rise to such positions of power. USAID has long funded such programs in Latin America, with varying levels of success. Perhaps, a country with a civil-law, rather than a common-law system, could help fund the judicial academies and employ its own professionals to train Colombian actors. Since the contributing country would understand civil law procedures, its input may be more compatible with Colombia's judicial system than programs from the United States. For example, Switzerland, a civil-law country, has led 17 Latin American countries' judicial academies since 2004. The course is considered very successful, as it promotes improved justice administration services and judicial training activities.[67]

To advance the judiciary's competency further, improving its access to justice and dispute resolution is critical. Since the 2012 reform-attempt, Colombia has made notable progress in improving its access to justice. The 2015 Justice Service Strengthening Project

[66] Nagle, "The Search for Accountability and Transparency in Plan Colombia," 29-30.
[67] "First COMPAL Regional Training for Judges on Consumer Protection in Latin America," The United Nations Conference of Trade and Development, November 17, 2017, https://unctad.org/es/node/26180.

(JSSP) has advanced legal reforms with a primary focus on transitioning the judiciary from a written to an oral court system. The new system has streamlined previously time-consuming written communications into a single court hearing and consequently reduced the number of backlogged cases across the system. JSSP has also expanded access to justice for groups of society who previously struggled to utilize dispute-resolution services. It also plans to combine its numerous reforms into a "unified management model," consolidating different court systems through a centralized database.[68] Though the Justice Service Strengthening Project has reduced judicial congestion and introduced alternate dispute mechanisms, reform has only targeted major cities. As a result, its positive outcomes have yet to make an impact on more isolated areas. I recommend that new reform builds upon the progress made in cities to eventually expand to every court across Colombia. Divided by region, centralized information centers and courts could be led by judicial actors who have graduated from the training academy.

Importantly, I recognize it will take many years before all of the current judicial actors will retire, allowing the newly trained actors to take their place. There is no also guarantee the first-generation removed will be immune to the same faults as their predecessors. Hence, potentially effective reform should continue to restructure the judicial system itself to address deeper-rooted inefficiencies. Scholars have found the bifurcated structure of Colombia's highest courts harms the judiciary's effectiveness and efficiency at the most fundamental level.[69] The Supreme Court currently presides over civil and criminal matters, while the Council of State presides over the public or administrative law. Additionally, the *tutela* remedy within the

[68] Camilo Ceballos. "Better Access to Justice Services in Colombia," The World Bank, The World Bank Group, September 22, 2015, https://www.worldbank.org/en/results/2015/09/22/better-access-to-justice-services-in-colombia.
[69] Cano, "Fixing Colombia's Chaotic Judicial System;" García, "Nature of Judicial Reform in Latin America," 1290-1292.

Constitutional Court specifically allows the Supreme Court's ruling to be rejected. This lack of a clear hierarchical order among the three highest courts fails to establish one court with supreme authority. Therefore, a critical adjustment is in order.

Below the jurisdiction of the Supreme Court, numerous appellate and district courts currently function similarly to the thirteen U.S. Court of Appeals System. A court of appeals hears challenges to district court decisions within its circuit, as well as appeals from the decisions of federal administrative agencies.[70] I suggest that more appellate and district courts be implemented to take priority hearing all local and regional cases. This would leave only federal-level cases to the highest courts. While non-federal cases may occasionally reach the Supreme Court, this should occur significantly less often than it does in the current structure.

Although, another provision is needed to address the hierarchical confusion between the Supreme and Constitutional Courts. I suggest Colombia keep the Constitutional Court intact. It has already established a trustworthy reputation among Colombian citizens and successfully administers individual constitutional protections. The *tutela* provision itself, however, should be refined. The Constitutional Court should not serve as a "higher" authority to the Supreme Court with the ability to overrule its prior decisions via the *tutela*. Rather, only constitutional-jurisdiction decisions made in lower appellate courts should be subject to additional appeal to be heard by the Constitutional Court. The two courts should then never hear each other's cases, as they would only hear cases within their distinct jurisdictions. The provision should also allow the courts to be less subject to over-rulings from the other. They would also benefit from smaller caseloads, as the new lower courts in each jurisdiction would make the less-impactful decisions on a day-to-day basis.

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[70] "Current Rules of Practice and Procedure," United States Courts, Administrative Office of the U.S. Courts, 2020, https://www.uscourts.gov/rules-policies/current-rules-practice-procedure.

C. Accountability

Reform must also take into serious consideration the current lack of accountability among the courts. First, courts should not be allowed to continue to oversee themselves and to create their own rules of procedure. The current system of granting each court such autonomy means that judges can bend their interpretation of the law as they see fit. Instead, general rules of procedure should be created and ideally enforced independently of the judges themselves.[71] However, scholars struggle to identify a political body that could best enforce such procedures. As of right now, this question remains. What is known, however, is that to entrust any of the courts to make lawful and just decisions, the plan must, in García's words, minimize the "enclave and autocratic nature of the current judicial leadership." [72]

Some scholars have suggested that serious consideration should be given to the selection of court justices to accomplish this. Doing so could allow judges to acquire greater levels of political legitimacy and the people's trust. This recommendation presents the perfect opportunity to provide civil society the participation it desires. Judges in Colombia, however, have strongly resisted any diminishing of their autonomy and have not welcomed civil-society input.[73] Scholars generally recognize the defensive tendencies of Colombian judges when it comes to introducing change, as well as their autocratic desire to retain power and autonomy. We can thereby conclude that any changes to the judiciary's structure and its operational policies must carefully balance the judiciary's autonomy with its accountability vis-à-vis civil society.[74]

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[71] Nagle "The Search for Accountability and Transparency in Plan Colombia," 23-24.
[72] García, "Nature of Judicial Reform in Latin America," 1322-1324.
[73] See, for example, García, "Nature of Judicial Reform in Latin America," 1322-1324; Nagle, "Colombia's Faceless Justice," 945-946.
[74] García, "Nature of Judicial Reform in Latin America," 1316.

Recall the Superior Council can create lists of judicial candidates for a specific judicial entity, including the other highest courts. Hence, it makes sense that judges and congressional members often nominate their political allies to the Superior Council. This then allows further abuse of power to endure. So, there must be changes to the discretionary nature of the appointment process to mitigate the inbreeding within the judicial bureaucracy.[75] I assert the Superior Council's responsibility to uphold the proposed rules of procedures can only be fulfilled if its nomination process is left to a wholly independent actor. Ideally, the president, who is often elected by the people and is potentially less corrupt, would select the members of this body. However, Colombian presidents are not immune to potential misconduct and should not be trusted to carry out this role. A better option might be to entrust the nomination process to the people.[76] Of course, that presents additional problems.

If the selection of the Superior Council's members were to be entrusted to civil society, this would remedy the fact that civil-society participation in Colombia's justice administration falls well below that of most other developing countries. Civil society has historically played no role in contributing to the administration of justice in Colombia, as its civil-law system does not have juries or elected judges. To include the people in this selection process, the Superior Council's nominees should be considered exclusively based on merit with prevalent civil organizations' (CSOs) input.[77] The CSOs would be in charge of finding and providing evidence for or against potential judges and would then put forward potential members. The nominees would have to be vetted in some fashion, before eventually being placed before the public for a vote. Then, the people could choose accordingly. Once an election has taken place, the nominees

[75] Ibid, 1313-1314.
[76] Ibid, 1322-1324.
[77] Ibid, 1305-1307.

with a majority of the votes will proceed to take office. This new selection process would also help society learn to trust the judiciary, as judges will be inclined to act more ethically to meet societal expectations.

The next step to increase judicial accountability is to modify the current watchdog judicial organ. This modified watchdog organ would oversee the new general rules of judicial procedure. I suggest the newly modified Superior Council of the Judicature. This body, wholly within the judiciary, already supervises the courts and could take on an expanded role. Recall the Council already examines and sanctions errors of judicial officials and lawyers, settles jurisdictional conflicts among the differing judicial organs, and oversees the productivity of the judicial bodies. Hence, the Council's modification would allow it to carry out its functions in a more forthright manner. However, some scholars have suggested civil organizations should instead monitor judicial decisions and serve as watchdogs. While entrusting exogenous bodies to oversee the judiciary sounds ideal, this has proven to fail in other Latin American countries. These administrative bodies have often proven to be ineffective and unable to ensure administrative efficiency and accountability. They instead tend to pose an additional disruptive component to the already-weak justice-oversight function.[78] Further, entrusting the oversight function to a non-judiciary body is not ideal given the lengthy past of judicial subordination.

However, there are other ways to implement necessary civil society participation in Colombia. The country could benefit from allowing society to gain insight into the general proceedings of the courts at every level. To accomplish this, the judiciary must first open itself to greater scrutiny from the news media to monitor its proceedings and conduct. Opening judicial proceedings to greater scrutiny would force acting judges to adhere to the public's opinion and

[78] Ibid, 1305-1311.

make it harder to manipulate the system for their personal benefit. Second, a specific code of personal and professional conduct for judges should be introduced by the new Superior Council. Specific sanctions should then be established and enforced to monitor behavior, to ensure the proper enforcement of rules, and to ensure that all judges expedite the court's case-hearing process effectively.[79] Sanctions could range from a simple warning, potentially harming their re-election candidacy, to removal from office.

Of course, these reforms would create a series of new challenges. It is difficult to predict how engaged citizens would become, the extent to which they would investigate the record of the judicial nominees, the transparency of CSOs, and the overall feasibility of this rather drawn-out process. Outside of recent protests, the Colombian citizenry does not have a record of extensive active civil-society engagement. This kind of behavioral change would require a fundamental change in values and attitudes toward both the judiciary and the relationship between citizens and the state. These reforms could thus be tested on a local or "pilot" court, to measure feasibility before expanding to all courts.

Moreover, society cannot gain sufficient insight into the courts unless the clash between how the judiciary attempts to enforce the law and how the people view the law is remedied. A modern democracy's norms often assume the people understand democratic principles and thus submit to live under its single rule of law. However, Colombia currently possesses two rules of law: the unofficial vigilante law remaining from FARC and the official law of the land. The government has historically neglected its responsibility to educate its citizens about their rights and how the democratic-republic system operates. This neglect is partially to blame for the

[79] Nagle, "The Search for Accountability and Transparency in Plan Colombia," 23-25.

citizen's lack of trust towards the judicial system, as there is a clear disconnect between the judicial decision-making process and how the decisions are justified to society.[80]

Though the government has established a few user-information offices in larger cities to disseminate justice-sector standards, this service remains very limited. The lack of trust in the courts should be addressed across the entire nation, especially considering its role in the prominence of judicial vigilantism. Vigilantes are paramilitary groups who take their region's law into their own hands. The people in rural areas especially have come to accept vigilantism, because their only other option is to wait for months or years for the courts to provide legal services.[81] The Colombian state has come to unofficially accept these alternative legal processes as semi-legitimate. However, if the proposed reform were to prioritize judicial outreach and public education, the judiciary could potentially regain the people's trust and thereby reduce their dependency on vigilante administration of justice. If vigilante law's legitimacy is eliminated, then the law of the land could finally rule.

Then, once the people learn of the system, they will expect it to function as designed. The following reforms could eventually be implemented across all courts to garner more of the public's trust. First, lay-citizen juries might be introduced into judicial proceedings. Because of the civil-law nature of the Colombian judicial system, this would require some alterations to the process. But in modern common-law democracies, juries hear evidence, listen to both parties' arguments, and decide whether the court established beyond reasonable doubt for criminal cases or on the balance of probability for civil cases.[82] Juries are essential to democracy because they

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[80] Ibid, 24-25.
[81] Ibid, 31-33.
[82] "Why Jury Trials are Important to a Democratic Society," The National Judicial College, accessed December 23, 2020, https://www.judges.org/wp-content/uploads/2020/03/Why-Jury-Trials-are-Important-to-a-Democratic-Society.

provide an unbiased, impartial perspective derived from the people. Accordingly, decision-making is decentralized and made by a group, rather than a single official. Other Latin American civil-law systems, including that of Mexico, have introduced the partial use of juries, and the results have been positive.[83] Further, juries reflect the notion of justice held by ordinary citizens and thus constitute a key connection between the judiciary and civil society. Second, there is a lack of personal contact between judges and the parties during the judicial process. This largely contributes to the lack of fair judicial treatment towards the disadvantaged, especially in civil matters. Providing adequate direct contact would provide judges with a first-hand understanding of the reality of a case, rather than seeing it through the constrained lenses of a written presentation. Third, the high level of discretion in the management of the criminal process should be resolved. Courts should establish overarching reporting duties, so the judges have to inform the public of their investigative progress as the case proceeds.[84] This will also serve civil society's desire for additional transparency.

XIII. Conclusion

Despite its uphill battle to reverse centuries of judicial subordination, Colombia has made significant strides towards creating a judicial branch capable of protecting individual rights. Fortunately, the Colombian people see hope in such reforms, especially the Constitutional Court. Yet, the people have become discontent with their leadership's failures. They have realized the importance of strengthening judicial institutions and have put pressure on elected leaders to

[83] Hiroshi Fukurai and Richard Krooth, "The Establishment of All-Citizen Juries as a Key Component of Mexico's Judicial Reform," *Texas Hispanic Journal of Law and Policy* 16, no. 51 (2010): 75-77. https://www.researchgate.net/publication/316439397.
[84] García, "Nature of Judicial Reform in Latin America," 1303-1305.

make rapid, substantive progress. Learning from previous reforms' mistakes, Colombia's leadership has plenty of information to work with. However, it is important for future reforms to address the root of the judiciary's problems, to formulate a specific judicial-focused plan, and to carry it out in distinct phases. Colombia must also carefully address the financial sustainability of such a plan and invest heavily in improving judicial competence and accountability. While it is unreasonable to assume this plan could remedy all of Colombia's judicial branch's weaknesses right away, perhaps some of the suggestions listed could lead to a step in the right direction.

Bibliography

"12 Principles of Good Governance." Good Governance. Council of Europe Portal, 2020. https://www.coe.int/en/web/good-governance/12-principles.

Alsema, Adriaan. "Only Peace Process Can Stop Colombia's Return to War." Colombia Reports, February 22, 2021. https://colombiareports.com/only-peace-process-can-stop-colombias-return-to-war/.

Bailey, Norman A. "La Violencia in Colombia." *Journal of Inter-American Studies* 9, no. 4 (1967): 561-75, doi:10.2307/164860.

Bossio, Pedro. "Exploring the Roots of Chronic Underdevelopment: The Colonial *Encomienda* and *Resguardo* and their Legacy to Modern Colombia." *CUNY Academic Works* (2018). https://academicworks.cuny.edu/gc_etds/2475.

Botero, Sandra and Bahamón, Silvia O. "Colombia is Having its Largest Wave of Protests in Recent Decades. Why?" The Washington Post, December 5, 2019. https://www.washingtonpost.com/politics/2019/12/05/colombia-is-having-its-largest-wave-protests-recent-decades-why/.

Brodzinsky, Sibylla. "From Murder Capital to Model City: is Medellín's Miracle Show or Substance?" The Guardian, April 17, 2014. https://www.theguardian.com/cities/2014/apr/17/medellin-murder-capital-to-model-city-miracle-un-world-urban-forum.

Cano, Gustavo S. "Fixing Colombia's Chaotic Judicial System." Colombia Reports. February 27, 2012. https://colombiareports.com/fixing-colombias-chaotic-judicial-system/.

Ceballos, Camilo A.A. "Better Access to Justice Services in Colombia." The World Bank. The World Bank Group, September 22, 2015. https://www.worldbank.org/en/results/2015/09/22/better-access-to-justice-services-in-colombia.

"Colombia's Constitution of 1991 with Amendments through 2015." Constitute Project. 1991. https://www.constituteproject.org/constitution/Colombia_2015.pdf?lang=en.

"Colombia's Council of State Unseats Viviane Morales as Chief Prosecutor." Council of Hemispheric Affairs, March 2, 2012. https://www.coha.org/colombia%e2%80%99s-council-of-state-unseats-vivian-morales-as-chief-prosecutor/.

"Colombia Country Report 2020." BTI Transformation Index, Bertelsmann Stiftung. Accessed March 20, 2021. https://www.bti-project.org/en/reports/country-report-COL-2020.html.

"Colombia: Events of 2019." Human Rights Watch. Accessed March 19, 2021. https://www.hrw.org/world-report/2020/country-chapters/colombia#.

"Colombia: Events of 2020." Human Rights Watch, October 21, 2020. https://www.hrw.org/world-report/2021/country-chapters/colombia#.

"Current Rules of Practice and Procedure." United States Courts. Administrative Office of the U.S. Courts. 2020. https://www.uscourts.gov/rules-policies/current-rules-practice-procedure.

"The Current Situation in Colombia: A USIP Fact Sheet," United States Institute of Peace, December 3, 2020. https://www.usip.org/publications/2020/12/current-situation-colombia.

Dakolias, Maria. "Court Performance Around the World: A Comparative Perspective." *Yale Human Rights and Development Law Journal* 2, no. 1 (1999): 115.

Domingo, Pilar. "Judicial Independence and Judicial Reform in Latin America." in Andreas Schedler, Larry Diamond, and Marc F. Plattner, (eds.), *The Self-Restraining State: Power and Accountability in New Democracies.* (Boulder: Lynne Rienner, 1999).

Eustace, Ryan. "Fluid Constitutions: A Latin American Phenomenon." Council on Hemispheric Affairs, July 3, 2014. https://www.coha.org/fluid-constitutions-a-latin-american-phenomenon/.

"First COMPAL Regional Training for Judges on Consumer Protection in Latin America." The United Nations Conference of Trade and Development, November 17, 2017. https://unctad.org/es/node/26180.

Fukurai, Hiroshi and Krooth, Richard. "The Establishment of All-Citizen Juries as a Key Component of Mexico's Judicial Reform." Texas Hispanic Journal of Law and Policy 16, no. 51 (2010): 75-77. https://www.researchgate.net/publication/316439397.

García, Felipe. "The Nature of Judicial Reform in Latin America and Some Strategic Considerations." *American University International Law Review* 13, no. 5 (1998): 1267-3125. https://core.ac.uk/download/pdf/235402102.

Gill, Stephen. "Duque Launches His 4-year Development Plan for Colombia." Colombia Reports, May 28, 2019. https://colombiareports.com/colombias-president-duque-launches-4-year-development-plan/.

Gow, James I. "Administrative Reform." Encyclopedic Dictionary of Public Administration, in L. Côté and J.-F. Savard (eds.), 2012. www.dictionnaire.enap.ca.

Issacharoff, Samuel. "Constitutional Courts and Consolidated Power." *The American Journal of Comparative Law* 62, no. 3 (Summer 2014): 585–612.

Nagle, Luz E. "Colombia's Faceless Justice: A Necessary Evil, Blind Impartiality, or Modern Inquisition?" *Stetson University*, (2013): 881-954.

https://www.researchgate.net/publication/228222162_Colombia's_Faceless_Justice_A_Necessary_Evil_Blind_Impartiality_or_Modern_Inquisition.

Nagle, Luz E. “Evolution of the Colombian Judiciary and the Constitutional Court.” *Indiana International and Comparative Law Review* 6, no. 1 (1995): 60-62. https://doi.org/10.18060/17590.

Nagle, Luz E. “The Cinderella of Government: Judicial Reform in Latin America.” *California Western International Law Journal* 30, no. 2, (2000): 348-373. https://scholarlycommons.law.cwsl.edu/cwilj/vol30/iss2/8.

Nagle, Luz E. “The Search for Accountability and Transparency in Plan Colombia – Reforming Judicial Institutions – Again.” *Strategic Studies Institute and the North-South Center,* (May 2001): 1-33. https://apps.dtic.mil/sti/citations/ADA390758.

“Plan Colombia: A Development Success Story.” U.S. Global Leadership Coalition. Accessed March 19, 2021. http://www.usglc.org/media/2017/04/USGLC-Plan-Columbia.pdf.

Rampf, David and Chavarro, Diana. “The 1991 Colombian National Constituent Assembly: Turning Exclusion into Inclusion, or a Vain Endeavour?” Inclusive Political Settlements Paper 1 (2014): 5, https://www.academia.edu/12650689/The_1991_Colombian_National_Constituent_Assembly_Turning_Exclusion_into_Inclusion_or_a_Vain_Endeavour.

Root, Danielle and Merger, Sam. “Structural Reforms to the Federal Judiciary: Restoring Independence and Fairness to the Courts.” Center for American Progress, March 8, 2019. https://www.americanprogress.org/issues/courts/reports/2019/05/08/469504/structural-reforms-federal-judiciary/.

Shifter, Michael, and Vinay Jawahar. " State Building in Colombia: Getting Priorities Straight." *Journal of International Affairs* 58, no. 1 (2004): 143-154. http://www.jstor.org/stable/24357939.

Tielens, Joris. “Democracy Isn’t Built in a Day.” Netherlands Institute for Multiparty Democracy, May 2, 2020. https://nimd.org/democracy-isnt-built-in-a-day-the-case-of-colombia/.

Wilson, Bruce M. “Institutional Reform and Rights Revolutions in Latin America: The Cases of Costa Rica and Colombia.” *Journal of Politics in Latin America* 1, no. 2 (2009): 68-75, https://journals.sagepub.com/doi/10.1177/1866802X0900100203.

Yepes, Rodrigo. “Judicialization of Politics in Colombia: cases, merits, and risks.” *International Journal on Human Rights* 6, (2007): 48-63, https://sur.conectas.org/en/judicialization-politics-colombia/.