The role of constitutional courts in furthering democracy in Latin America. The cases of Colombia, Costa Rica and Mexico.

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Introduction

In 1991, Samuel Huntington[1] coined the metaphor of waves of democracy to refer to the major surges of democracy that have taken place in history. The third wave of democratisation began in 1975 with the fall of the dictatorships in Spain and Portugal. This phenomenon was followed by the establishment of constitutional courts in Spain (1980) and Portugal (1983). The democratisation process that took place after the fall of the Berlin Wall (1989) in Eastern Europe, Latin America, Africa and Asia is known as the late third wave. The expansion of democracy during the late third wave was also accompanied by the establishment of constitutional courts. This phenomenon is linked to the need to set limits to governmental action and ensure respect for human rights in emerging democracies. Hence the analysis of constitutional courts is especially relevant.

However, both the expansion of democracy and the expansion of constitutional courts have led to serious questions in practice and within academic discussions. On the one hand, most of the late third wave countries have not become well-functioning democracies. In fact, the late third wave of democratization is seen as a success story in terms of the emergence of 'hybrid regimes', i.e., regimes that share attributes of democratic life with democratic deficits[2]. On the other hand, literature review shows that newly empowered constitutional courts are reluctant to exercise their powers assertively or do so only in some policy areas, for fear of provoking retaliation by political leaders. This prompts to question, what has been the role of late third wave courts in the democratic performance of their countries?

This fascinating question motivated me to conduct an empirical research on the relationship between late third wave constitutional courts and democracy. This section introduces this research, and it proceeds in five parts. The first part presents the background of the research. The second part points out the problem, the purpose statement and the research questions. The third part describes the research design and the context within which the research took place. The fourth part presents the conceptual framework and methods used. Finally, the last part provides an overview of the chapters that integrate the thesis.

[1] See Huntington, S. P. (1991). *The Third Wave. Democratization in the Late Twentieth Century*. University of Oklahoma Press.

[2] See Croissant, A., & Merkel, W. (2004). Introduction: Democratization in the early twenty-first century. *Democratization*, *11*(5), pp. 2-3, Carothers, T. (2002). The end of the Transition Paradigm. *Journal of Democracy*, *13*(1), p. 9, and Møller, J., & Skaaning, S. E. (2013). The Third Wave: Inside the Numbers. *Journal of Democracy*, *24*(4), p. 97.

i. Background of this research

The relationship between democracy and constitutional courts is contested. Scholars have revived old discussions about the counter-majoritarian nature of courts, i.e., constitutional courts threaten democracy when they review the performance of popularly elected authorities. Hybrid regimes pose an extra challenge to constitutional courts because they have to operate under less favourable contextual circumstances. This might imply that the context constrains both democracy and courts.

According to Carothers[3], hybrid regimes are characterised as suffering from democratic deficits such as frequent abuse of the law by government officials, very low levels of public confidence in state institutions and persistently poor institutional performance, that hamper the transition to democracy. Democratic deficits reflect that governments have failed to protect the rights enshrined in the constitution and international treaties or do so only partially. This suggests that the holding of periodic elections is a necessary but not sufficient condition for a successful transition to democracy, to avoid a counter-democratic wave or to improve the quality of democracy. Respect for human rights appears to be a key factor in combating the democratic deficits that cause democracy to stagnate or decline. Given that late third wave countries suffer from democratic deficits, questions arise regarding the role of constitutional courts in the protection of human rights.

ii. The knowledge gap

Scholars have shown great interest in the performance of constitutional courts that emerged during the late third wave. Mostly, the studies developed consist of legal comparisons or case studies that focus on the analysis of judicial review[4], i.e., the horizontal accountability function of constitutional courts. However, constitutional courts also exert a vertical or societal accountability function when set limits to arbitrary acts of authority through the constitutional adjudication of human rights.

The problem is that the vertical or societal accountability function of constitutional courts of the late third wave has not been sufficiently investigated. Moreover, the relationship between the judicial power and the dynamics, quality and stability of democracy remains quite unclear,[5] not to mention the scarcity of quantitative studies in the field. Whether democratic deficits are brought to constitutional courts in the form of rights claims; whether late third wave courts have been

[3] See Carothers, T. (2002), *op. cit.*, pp. 9-10.
[4] Judicial review involves intergovernmental disputes among different bodies and levels of government.
[5] See Kapiszewski, D., & Taylor, M. M. (2008). Doing courts justice? Studying judicial politics in Latin America. *Perspectives on Politics*, *6*(4), pp. 752, 753 and 756.

responsive to rights claims; and whether the judicial enforcement of rights relates to democratic performance are some questions that remain open.

This research seeks to close this gap through an empirical analysis of the vertical or societal accountability function of courts (human rights adjudication) *vis-à-vis* democratic performance in countries of the late third wave.

iii. Research questions and research design

The research was designed around one main research question: Do constitutional courts established during the late third wave shape the furthering of democracy by enforcing human rights? This research question was broken down into several sub-research questions: (1) What is meant by the term 'democracy'? (2) What is the status of the late third wave? (3) What has been the role of constitutional courts of the late third wave? (4) How do constitutional courts relate conceptually to democracy? (5) What is the most suitable way to approach the relationship between constitutional courts of the late third wave and democracy? (6) Have constitutional courts of the late third wave been responsive to human rights claims? (7) Do the internal and external factors of the adjudication process relate to the responsiveness of courts? and (8) Is the judicial enforcement of human rights associated to democratic performance?

To address these research questions, I first built a theoretical and contextual framework as a basis for the empirical analysis. The theoretical framework includes the analysis of the two conceptual pillars of this research, i.e., democracy and constitutional courts. The contextual framework includes the analysis of the social, economic, political and democratic context of the three selected countries for the time frame defined by this research as well as an analysis of the legal and institutional framework of courts. The analytical framework used integrates three aspects: the responsiveness of the courts to rights claims, the internal and external factors of the adjudication process and the democratic performance.

The responsiveness of courts refers to the ability of courts to secure government accountability for rights claims. Internal factors of the adjudication process refer to aspects of the claims' formation stage, i.e., the characteristics of plaintiffs and the characteristics of claims, and the personal attributes and professional background of judges. The external factors of the adjudication process refer to the economic, social and political context. The democratic performance considers five dimensions of democracy: electoral democracy, liberal democracy, participatory democracy, deliberative democracy, and egalitarian democracy.

Secondly, I selected three constitutional courts established during the late third wave in Latin America, i.e., the Constitutional Court of Colombia (1992), the Constitutional Chamber of Costa Rica (1989) and the Supreme Court of Justice of Mexico (1995). The period of this analysis was marked by the establishment of each constitutional court until 2012. The three selected courts were established during the late third wave, however, Colombia and Mexico are considered hybrid regimes and Costa Rica a stable democracy. Thus, the study compares the responsiveness of courts created in the same period but under different regimes.

Thirdly, I gathered data to measure the three aspects of the analytical framework proposed, i.e., the responsiveness of courts, the internal and external factors of the adjudication process and the democratic performance.

The responsiveness of constitutional courts to rights claims. I took a random sample of the decisions issued by the three selected courts in *amparo* proceedings[6], during the period of analysis. The sample size consisted of 373 judgments in Colombia, 382 in Costa Rica and 382 in Mexico. The responsiveness of the courts to rights claims was observed by distinguishing between decisions that granted protection, decisions that denied protection, and cases that were dismissed.

Internal factors of the adjudication process. The characteristics of plaintiffs were collected from the judgments. Data regarding the personal attributes and professional background of the 96 judges who were in office during the period of analysis were collected from public biographies.

External factors of the adjudication process. An analysis of the economic, social and political context of the three countries, during the period analysed, resulted in the identification of external factors of the adjudication process, i.e., the economic growth, presence or absence of violence, corruption, lack of rule of law, poverty and extreme poverty and inequality. Data regarding these factors was collected from the World Bank (WB) database.

Democratic performance. The democratic performance of each country during the period of analysis considered five dimensions of democracy, i.e., electoral, liberal, participatory, deliberative and egalitarian. Democratic indices of these five dimensions of democracy were collected from the Varieties of Democracy (V-Dem) database.

Finally, I analysed the data using statistical techniques. The responsiveness of the courts was determined using descriptive statistics. Inferential statistics were used to answer the empirical

[6] The constitutional complaint, better known in Spain and Latin America as *amparo* proceedings, is a remedy for protection of human rights.

questions posed on the relationship between the responsiveness of courts and the internal and external factors of the adjudication process, as well as on the relationship between the judicial enforcement of human rights and democratic performance.

Logistic regression and linear regression were used to analyse the data. It is important to note that the analysis of the relationship between the responsiveness of courts and the internal and external factors of the adjudication process required a multilevel analysis due to the hierarchical structure of the data. The analysis that explored the relationship between the judicial enforcement of rights and democratic performance used distributed lags and dynamic models in order to identify the implications of judgments over time.

iv. Conceptual framework

Middle-range theories[7] provided a framework for analysing the phenomenon of the responsiveness of late third wave constitutional courts. The theories and concepts that informed this research are listed below.

This research assumes that the analysis of the responsiveness of courts cannot be separated from normative views on democracy. Although constitutional courts are institutions of liberal democracy, this research considers that it is necessary to use a broader concept of democracy. Accordingly, democracy is approached from a multi-dimensional perspective comprehensive of five different ideals or models of democracy, i.e., electoral, liberal, participatory, deliberative and egalitarian[8].

A multidimensional perspective of democracy allowed this research to link each model of democracy to the catalogue of rights provided by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In turn, this facilitated the identification of the type of democracy prompted by courts when adjudicating human rights.

The concept of the accountability functions of constitutional courts[9] was useful in linking democracy and constitutional courts. The relationship between courts and democracy can be

[7] Middle-range theories can be located between grand theories and empirical findings and represent an attempt to understand and explain a limited aspect of social life. See Bryman, A. (2012). *Social Research Methods* (Fourth edition). Oxford: Oxford University Press, pp. 21-22.
[8] See Coppedge, M., Gerring, J., Altman, D., Bernhard, M., Fish, S., Hicken, A., . . . Teorell, J. (2011). Conceptualizing and Measuring Democracy: A New Approach. *Perspectives on Politics*, *9*(2).
[9] See Gloppen, S., Wilson, B. M., Gargarella, R., Skaar, E., & Kinander, M. (2010). *Courts and Power in Latin America and Africa*. New York: Palgrave-Macmillan.

approached through the analysis of the horizontal accountability of courts (judicial review) or through the analysis of the vertical or societal accountability of courts (human rights adjudication). This research focuses on the vertical or societal accountability of constitutional courts triggered by the constitutional complaint or *amparo.*

Given the uncertainties facing countries of the late third wave, context is considered a significant variable to be taken into consideration for this study. The multivariate analytical framework, adapted from Gloppen *et al.*[10], allowed for the integration of the internal and external factors identified by this research to determine their role in the responsiveness of courts. The adapted analytical framework includes the judicial outcomes on human rights adjudication, the internal and external factors of the adjudication process that might be associated with the responsiveness of courts and the democratic performance.

This research adopts *The End of the Transition Paradigm* thesis posed by Carothers. The record of experience shows that most of the late third wave countries have entered a political gray zone. Countries into the gray zone are described as hybrid regimes[11], i.e., regimes that are neither dictatorial nor clearly led in the direction of democracy. Hybrid regimes share some attributes of democratic political life (limited political space for opposition parties, independent civil society and regular elections) and democratic deficits (poor representation of citizens' interests, low levels of political participation beyond voting, frequent abuse of the law by government officials, elections of uncertain legitimacy, very low levels of public confidence in state institutions, and persistently poor institutional performance by the state)[12]. On the one hand, these theories were useful in characterising Colombia and Mexico as hybrid regimes. On the other hand, the concept of democratic deficits interpreted in the light of constitutional law allowed identifying that Carothers' six types of democratic deficits can be challenged via the constitutional courts either through judicial review or through *amparo* proceedings.

v. Significance of this research

This study brings new elements to scholarship on the role of courts in hybrid regimes. First, because while existing studies focus on the interaction between politicians and judges through judicial review, this research emphasises the interaction between citizens and judges through the constitutional complaint or *amparo*. And this opens the door for future research to further explore the relationship between this interaction and the development of individuals' reasoned agency.

[10] Ibidem.
[11] See Croissant, A., & Merkel, W. (2004), *op. cit.*, 1–9.
[12] See Carothers, T. (2002), *op. cit.*, 5–21.

Second, while legal scholarship on courts is often purely normative in nature and political science rarely focuses on court outcomes, the empirical study presented in this research crossed the boundaries of both disciplines and benefited from the exchange of concepts and theories between them. Finally, the use of statistical techniques for data analysis represents an important step towards the development of a more systematic study of judicial politics in late third wave countries.

vi. Overview of the chapters

Chapter 1: Democracy. This chapter discusses the evolution of democracy in order to adopt a concept of democracy for empirical purposes (sub-research question 1) and reveal the state of the late third wave (sub-research question 2). The chapter argues that civil and political rights and economic, social and cultural rights are interconnected and thus both must be present in the operationalisation and measurement of democracy. As a result, the chapter adopts a multi-dimensional approach to democracy from Coppedge *et al.*[13], which encompasses five different ideals or models of democracy, i.e., electoral, liberal, participatory, deliberative and egalitarian. In addition, the chapter reveals that the expansion of democracy during the late third wave did not result in functional liberal democracies, but hybrid regimes emerged instead, i.e., regimes that share attributes of democratic life with democratic deficits[14]. Consequently, Colombia and Mexico can be characterised as hybrid regimes.

Chapter 2: Constitutional courts. The chapter identifies the accountability function of courts as the conceptual link between courts and democracy. This link is used to narrow down the boundaries of this research to the analysis of the vertical or societal accountability function of courts involving the adjudication of human rights (sub-research question 4). Additionally, the analysis of the literature review confirms that the relationship between courts and democracy has not been sufficiently explored and points to some factors that could be useful in explaining the responsiveness of courts to rights claims (sub-research question 3). These factors relate to the legal framework, plaintiffs, judges (internal factors) and the economic, social and political contexts in which the courts operate (external factors). Finally, persuaded by Gloppen *et al.*'s[15] argument that monocausal studies do not provide satisfactory explanations for changes in the accountability function of courts, I adopt a multivariate approach to address the relationship between constitutional courts of the late third wave and democracy (sub-research question 5).

[13] See Coppedge, M., Gerring, J., Altman, D., Bernhard, M., Fish, S., Hicken, A., . . . Teorell, J. (2011), *op. cit.*.
[14] See Croissant, A., & Merkel, W. (2004), *op. cit.*
[15] See Gloppen, S., Wilson, B. M., Gargarella, R., Skaar, E., & Kinander, M. (2010), *op. cit.*

Chapter 3: *The vertical or societal accountability function of courts vis-à-vis democracy*. This chapter discusses the vertical or societal accountability function of courts and *amparo* proceedings, i.e., the legal mechanism that triggers it, *vis-à-vis* democracy. The research hypotheses are formulated within the framework of the literature review on the internal and external factors of the adjudication process that may explain the responsiveness of courts to rights claims.

Chapter 4: The national context. This chapter provides an overview of the social, economic and political context of the three selected countries during the period of analysis. The aim of this chapter is two-fold: on the one hand, it aims to familiarise the reader with the context in which the courts have operated and, on the other hand, to identify specific external factors to be included in the empirical analysis. In addition, it also analyses the democratic performance of the three countries from the establishment of the constitutional courts until 2012.

Chapter 5: The legal context. This chapter analyses the institutional design of the courts as well as the legal framework of *amparo* proceedings. The institutional design of the courts was addressed through the *De jure* Indicator for Measuring Judicial Independence created by Feld and Voigt[16]. The analysis of *amparo* proceedings compares its regulation at both the constitutional and statutory level. These analyses show differences and similarities among the countries that proved useful for the interpretation of the results.

Chapter 6: *Methodology and methods*. This chapter provides a detailed description of all the steps involved in conducting the empirical study, i.e., the selection of the countries, sampling, the measurement instrument, the pilot study, data collection and the statistical methods used to analyse the data. It also discusses the limitations encountered during the research process and the way in which they were addressed.

Chapter 7: *The responsiveness of courts to rights claims vis-à-vis democracy*. This chapter presents and discusses the results of the empirical analysis of (1) the responsiveness of courts to rights claims, (2) the relationship between the internal and external factors of the adjudication process and the responsiveness of courts and (3) the relationship between the judicial enforcement of rights and democratic performance (sub-research questions 6, 7 and 8). The findings reflect quite divergent behaviour of the courts when deciding human rights issues across the countries and regimes. A strong commitment to human rights protection can be observed in Colombia (a hybrid regime) and in Costa Rica (a stable democracy) while in Mexico (a hybrid regime) the

[16] See Feld, L. P., & Voigt, S. (2003). *Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators* (No. CESIFO Working Paper No. 906).

sample shows a high rate of dismissals and the lowest number of cases in which protection was granted. The results also show that the internal and external factors do not explain court responsiveness in Costa Rica (a stable democracy), whereas in Colombia and Mexico (hybrid regimes) the internal factors do play a role in the responsiveness of the courts. Finally, statistically significant associations were found in the three countries in terms of the relationship between the judicial enforcement of rights and some democratic indices. However, the observed increases were not significantly different from zero.

In sum, this dissertation offers a comparative analysis of the responsiveness of constitutional courts to rights claims in two hybrid regimes and a stable democracy, provides new insights into the influence of internal and external factors on judicial outcomes and confirms that the judicial enforcement of rights is indeed associated with changes in democratic indices. I am confident that the insights provided will contribute to improving our understanding of constitutional courts in less democratic contexts. This dissertation is also an invitation to approach legal problems from an empirical and interdisciplinary perspective.

Chapter 1. Democracy

Democracy is considered one of the most contentious concepts ever[17]. Despite the voluminous literature on the concept, there is no consensus on what democracy at large means, beyond the notion of 'rule by the people'. Democracy as a term appeared in Athens in 508 B.C. and describes a form of government that allows people to participate in the decision-making process[18]. Therefore, the etymological definition comes from ancient Greek (δημοκρατία =popular government; δημος *demos* = the commons, the people and κρατια *kratos* =government). However, discussions about the exact meaning of the demos[19] have made the term democracy complex and confusing ever since.

Therefore, if the aim of this research is to assess the association between democracy and late third wave constitutional courts, it is necessary that this chapter traces the evolution of democracy in order to identify where it intersects with courts, determine the current state of the late third wave and clarify the concept of democracy that will be used for the empirical analysis.

To this end, the chapter is organised in five parts. The first part discusses the emergence and expansion of liberal democracy and the role of constitutional courts. The second part provides an overview of the current state of the late third wave and the ambiguity of its outcomes. The third part approaches the difficulties in operationalising the concept of democracy for measurement purposes. The fourth part discusses the necessity to incorporate the concept of the interconnection of rights for a meaningful sense of democracy. Finally, the last part introduces a multidimensional approach to democracy as a useful concept for the purposes of this research.

[17] Cfr. Beetham who holds that disputes about the meaning of democracy which purport to be conceptual disagreements are really disputes about how much democracy is either desirable or incontestable, and whose point of reference lies at one end of a spectrum of possibilities; and different theories of democracy, which involve contestable claims about how much democracy is desirable or practicable, and how it might be realized in a sustainable institutional form. See Beetham, D. (1992). Liberal Democracy and the limits of Democratization. *Political Studies*, *40*(s1), p. 40.

[18] Before that time, a despotic and aristocratic government ruled Athenians. It was after a revolution and the ostracism of Hippias in 510 BC that Athenians commanded Cleisthenes to set a democratic government that allow people to participate in the Athenian politics. See http://etimologias.dechile.net/?democracia (Accessed February 2020).

[19] *Demos*, in the 5th century BC meant Athenian community in the *ekklesia* or popular assembly. However, demos could also be understood as everybody; it was used as well to refer to *polloí*, the many; or to *pleiones*, the majority; or the *ochlos*, the multitude –in a degenerated sense. See Sartori, G. (1990). *Teoría de la democracia. 1. El debate contemporáneo*. (trad. S. S. González). Alianza editorial, p. 42.

1.1. The emergence and expansion of democracy as liberal and representative

In its origins, democracy had an inauspicious denotation[20] linked to what Aristotle described as extreme or radical democracy: a government in which not the law, but the multitude, has the supreme power and supersedes the law by its decrees[21]. In fact, it was not until the French Revolution that the term democracy acquired a positive meaning. The revolutionary Jacobines used it, implying equal access to the exercise of power[22].

The seventeenth and eighteenth centuries were marked by a tendency to see a contradiction between the rule of law and democracy. An overview of the literature shows that the rule of law was privileged over democracy, mostly because the concept of democracy was very often linked to a plebiscitarian[23] approach. It is worth noting that sovereignty was granted not by democracy, but by some sort of social contract. The established order and the government were based on people's voluntary abstention from effectively exercising their natural authority[24]. The rule of law had priority over democracy because the strong and growing property-owning middle class had a special interest in predictability and continuity of law, e.g., in the security of property and of liberal rights, which represented the very essence and origins of what is known today as liberal constitutionalism[25].

[20] Like Plato, Aristotle claims that there are three broad forms of governments. Those in which the one, the few, or the many govern with a view to the common interests are the so-called 'true' forms. Each form possesses a corresponding possible perversion regarding governments which rule with a view to the private interests, whether of the one, or of the few, or of the many. The so-called 'true' types are kingship or royalty (monarchy), aristocracy, and πολιτεία=politeia. The corresponding 'defective or perverted' types of these are tyranny, oligarchy, and democracy, respectively. See Aristotle. (1885). *The Politics of Aristotle, trans. into English with introduction, marginal analysis, essays, notes and indices by B. Jowett*. Oxford: Clarendon Press, Book III.7, pp. 79-80.

[21] In his Politics, Books IV and VI, Aristotle abandons the six-fold model and analyses the two basic types: oligarchy and democracy. He admits that there were not many examples of aristocracy or politeia; oligarchy and democracy were overwhelmingly the commonest constitutions in Greece in his own day. Therefore, he divides democracy into four subtypes, being the first one the most positive, close to politeia. He links the last subtype to a radical or extreme version of democracy. Between the boundaries of these four types, democracy is defined as a form of government that has in view the interests of the needy. However, under a radical or extreme form of democracy, the laws are not supreme, and the people became the tyrant. The decrees of the people override the laws and refer all things to the popular assembly. See Aristotle, *op. cit*., Book IV.4, pp. 116-117. See also Mogens Herman Hansen. (2010). The Mixed Constitution versus the Separation of Powers: Monarchical and Aristrocratic aspects of Modern Democracy. *History of Political Thought*, *31*(3), p. 519.

[22] See Møller, J., & Skaaning, S. E. (2013). *Democracy and Democratization in comparative perspective. Conceptions, Conjunctures, causes, and consequences*. London and New York: Routledge, p. 3.

[23] A radical democracy in terms of Aristotle.

[24] See Sejersted, F. (1993). Democracy and the rule of law: some historical experiences of contradictions in the striving for good government. In J. Elster & R. Slagstad (Eds.), *Constitutionalism and Democracy*. Cambridge: Cambridge University Press, p. 131.

[25] Ibidem.

Consequently, the idea of rule of law emerges alongside that of popular sovereignty as a second source of legitimation[26]. The liberal solution to the possible transgressions of rulers was the establishment of the separation of powers doctrine and constitutionally sanctioned rights. Consequently, classical liberalism is presented as the struggle for the rule of law and fundamental liberties[27].

The liberal State period can be seen as a continuum from the seventeenth century until today. Some significant debates about democracy took place, especially at the end of both world wars, with scholars such as Hans Kelsen (1920) and Joseph Shumpeter (1942), and through the period of the Cold War until now, with the prominent ideas of Robert Dahl (1989) among others. These debates about democracy emerged from the Western experience and were built within the liberal perspective, looking to improve the quality of life.

According to Kelsen, 'Democracy offers to each political conviction the same possibility to express itself and to seek the will of men through free competition. Thus, the dialectic procedure adopted by the popular assembly or parliament in the creation of norms, a procedure which develops through speeches and replies, came to be known as democratic'[28]. Elaborating on Kelsen's ideas in the inter-war period, Schumpeter highlighted the question of whether and how 'the people' are able to govern. According to Schumpeter, the democratic method consists of an institutional arrangement for arriving at a political decision in which individuals acquire the power to decide by means of a competitive struggle for the people's vote[29]. Accordingly, Schumpeter turned the procedural concern with the rules of decision-making into a method for the constitution of governments.

Schumpeter's understanding of democracy as electoral establishes the formation of government as the endpoint of the democratic process[30]. From this perspective, voting is, *par excellence,* a form of vertical accountability exerted by citizens who are principals and with whom legitimate political authority ultimately rests, over the rulers who are the agents of citizens. It is a hierarchical

[26] See Habermas, J. (2001). Constitutional Democracy: A Paradoxical Union of Contradictory Principles? *Political Theory*, *29*(6), p. 766.
[27] See Møller, J., & Skaaning, S. E. (2013), *op. cit.*, pp. 27-28.
[28] See Kelsen H. (1929) "Essência e Valor da Democracia", in H. Kelsen, A Democracia, São Paulo: Martins Fontes, quoted by Santos, B. de S. (2005). Preface. In B. de S. Santos (Ed.), *Democratizing Democracy. Beyond the Liberal Democratic Canon* (pp. vii–xvi). London: Verso, p. xxxviii.
[29] See Schumpeter J. A. (1942) *Capitalism, Socialism, and Democracy*, New York, Harper & Brothers, p. 269, quoted by Mainwaring, S., Brinks, D., & Aníbal, P. L. (2007). Classifying Political Regimes in Latin America, 1954-2004. In *Regimes and Democracy in America Latina. Theories and Methods* (pp. 123–161). New York: Oxford University Press, p. 129.
[30] See Mainwaring, S., Brinks, D., & Aníbal, P. L. (2007), *op. cit.*, p. 129

relationship in which people have the power to challenge, remove and replace the rulers through elections. Therefore, vertical accountability is considered the main procedural mechanism of electoral democracy[31].

Dahl criticized Schumpeter's electoral understanding of democracy by arguing that the concept of democracy extends beyond the constitution of government. Dahl raised two important questions: how far does the democratic political process extend beyond the formation of government and whether rights beyond those traditionally understood as political rights are constitutive of democracy[32]. Dahl's critique revealed the narrowness of the concept of electoral democracy by pointing out that it restricts voters to exert control over their representatives only through voting, while decisions made by elected officials during their mandate suffer from a lack of citizen control.

These conceptual concerns led Dahl to define polyarchy as a political order characterized by the presence of seven institutions, all of which must exist for a government to be classified as a full democracy or a polyarchy. These institutions are (1) elected officials, (2) free and fair elections, (3) inclusive suffrage, (4) the right to run for office, (5) freedom of expression, (6) alternative information and (7) associational autonomy[33]. Dahl's concept of polyarchy highlights the role of rights in furthering political contestation and participation as other forms of accountability additional to the vertical accountability exerted by voting[34].

Elaborating on Dahls' polyarchy concept, O'Donnell added two new elements: horizontal accountability and the rule of law. According to O'Donnell, 'accountability depends on the existence of state agencies that are legally empowered—and factually willing and able—to take actions ranging from routine oversight to criminal sanctions or impeachment in relation to possibly unlawful actions or omissions by other agents or agencies of the state' while rule of law implies that no one, including those who govern, is above the law and that certain freedoms must not be infringed[35].

According to Beetham, continuous horizontal accountability of government can take place directly before the electorate through the public justification of its policies or indirectly through *political accountability* of government before the legislature for the content and execution of its policies,

[31] See Gloppen, S., Wilson, B. M., Gargarella, R., Skaar, E., & Kinander, M. (2010), *op. cit.*, p. 13.
[32] See Dahl Robert A. (1989). *Democracy and its critics.* New Haven and London: Yale University Press, p. 114.
[33] Idem, p. 221.
[34] See Dahl Robert A. (1989). *La poliarquía. Participación y oposición*. Madrid, Tecnos, pp. 14-15.
[35] See O'Donnell, G. A. (1998). Horizontal Accountability in New Democracies. *Journal of Democracy* 9(3), pp. 112-113.

legal accountability before the courts for ensuring that all state personnel, elected or non-elected, acts within the laws and powers approved by the legislature, and *financial accountability* before both the legislature and the courts[36]. Interesting for this research is to note that polyarchy places constitutional courts among the institutions that sustain an accountable government. Thus, constitutional courts are called to exert horizontal accountability which involves internal or intergovernmental control among different bodies and levels of government.

Nowadays, polyarchy or liberal democracy entails five constitutive elements: (1) elections (regular, free, general, equal and fair), (2) political liberties (freedom of speech, opinion, association, demonstration, and petition), (3) civil rights (equal access to and treatment by the law and protection against the illegitimate arrest, exile, terror, torture and unjustifiable intervention in the personal life of citizens), (4) horizontal accountability (lawful government action is checked by the division of powers between mutually independent and autonomous legislative, executive, and judicial bodies), and (5) effective power to govern (the effective right to rule is placed in elected officials)[37].

On the basis of the aspects mentioned above, it is clear that a proceduralist conception of democracy prevailed during its systematization and expansion. Nevertheless, liberal democracy is far from being considered an ideal without objections. Institutional arrangements and procedures, while essential, do not seem sufficient for a comprehensive understanding of democracy. Moreover, when analysing the results of the late third wave, it is considered that liberal democracy has provided not only a necessary basis for modern democracy, but also a constraint on democratization[38].

According to Huntington, three major democratic waves have taken place: the first and the second wave took place in the 19th century and after World War II respectively, while the third wave started in the mid-1970s and is still ongoing[39]. The process of democratization that took place in Eastern Europe, Latin America and Asia after the fall of the Berlin Wall in 1989 is known as the late third wave. The establishment of constitutional courts during the late third wave is the focus of this research.

[36] See Beetham, D. (1994). Key Principles and Indices for a Democratic Audit in Defining and Measuring Democracy. In D. Beetham (Ed.), *Defining and Measuring Democracy*. London-Thousand Oaks-New Delhi: Sage Publications, pp. 28-30.
[37] See Merkel, W. (2004). Embedded and defective democracies. *Democratization*, *11*(5), pp. 38-42, quoted by Møller, J., & Skaaning, S. E. (2013), *op cit.*, p. 263.
[38] See Beetham, D. (1992), *op. cit.*, p. 44.
[39] See Huntington, S. P. (1991), *op. cit*.

Huntington relates the emergence of the first wave of democratization (1828-1926) to the recognition (even though limited) of suffrage in the United States and other Western countries. The second democratic wave, that occurred in Europe between 1943 and 1962, coincided with the establishment of the first constitutional courts. In the aftermath of World War II, Germany (1949) and Italy (1947) produced written constitutions that incorporated judicial review through constitutional courts and provided measures to protect the judicial independence of judges. The constitution of France (1958) also established a body with the power to issue binding decisions on the constitutionality of proposed policy enactments[40]. Hence, the first constitutional court to enter into force in post-war Europe was the *Bundesverfassungsgericht* (Federal Constitutional Court of Germany) in 1951, followed by the *Corte Costituzionale* (Constitutional Court of Italy) in 1955 and the *Conseil Constitutionnel* (Constitutional Council of the French Republic) in 1958.

The third democratic wave that started in 1974 and is still ongoing coincides with the fall of the dictatorships in Spain and Portugal (1975) that was followed by the establishment of the *Tribunal Constitucional de España* (1980) and the *Tribunal Constitucional de Portugal* (1983). This phenomenon was replicated in Central Eastern Europe (CEE) after the fall of the Berlin Wall in 1989 and quickly spread to Asia, Africa and Latin America. Accordingly, it can be said that the second and third democratic waves have been accompanied by the establishment of constitutional courts.

1.2. The late third wave and the ambiguity of its outcomes

The expansion of liberal democracy in non-Western countries that took place during the late third wave produced high expectations[41]. A democratic political system is often expected to generate a number of side benefits such as better-consolidated state institutions; more firmly established rational-legal administrative structures; domestic and international peace; improved economic performance and development; and the adoption of redistributive and welfare policies[42].

However, the difficulties faced in some countries that began the process of democratization during the 1990s, gave room for qualifying the Shumpeterian[43] notion of democracy as 'minimalist'

[40] See Neal, T. C., & Vallinder, T. (1995). Judicialization and the Future of Politics and Policy. In C. N. Tate & T. Vallinder (Eds.), *The Global Expansion of Judicial Power*. New York: New York University Press, p. 519.
[41] In an article published in 1989, Francis Fukuyama claimed the triumph of liberal democracy and capitalism arguing that history, understood as the evolving competition between political, social and economic ideologies, has come to an end. See Fukuyama, F. (1989). The End of History? *The National Interest*, *No.16*, 3–18.
[42] See Giovanni Carbone. (2009). The Consequences of Democratization. *Journal of Democracy*, *20*(2), p. 124.
[43] According to Schumpeter, the democratic method consists of an institutional arrangement for arriving at a political decision in which individuals acquire the power to decide by means of a competitive struggle for the people's vote. Accordingly, Schumpeter turned the procedural concern with the rules of decision-making into a method for the

arguing that holding periodical elections through which people choose their representatives is not enough to qualify countries as democratic where the representatives, once elected, govern under authoritarian practices[44].

Despite the considerable democratic progress around the world after the third wave of democratization[45], a careful look at its outcomes shows a less optimistic perspective for democracy. Notwithstanding that about 100 countries in different regions of the world moved away from dictatorships towards more liberal and often more democratic forms of government, only fewer than 20 of these countries are clearly *en route* to becoming successful, well-functioning democracies[46]. The number of new democracies started rising after the 1989-91 breakdown of the communist regime until around 1995. After the mid-1990s there was a complete absence of further democratic gains[47]. It is considered that since 2006 there has been a democratic recession[48].

According to Carothers, most of the third wave countries have not become well-functioning democracies and are considered to have entered the gray zone. Countries in the gray zone are neither dictatorial nor clearly democratic and are characterised by combining attributes of democratic political life with democratic deficits such as poor representation of citizens' interests, low levels of political participation beyond voting, frequent abuse of the law by government officials, elections of uncertain legitimacy, very low levels of public confidence in state institutions, and persistently poor institutional performance by the state[49].

As a consequence, the late third wave is seen as a success story for 'hybrid' or 'ambiguous' regimes of countries that have fallen into the gray zone between open autocracy and liberal democracy[50].

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constitution of governments. In other words, Schumpeter considers the formation of government as the end point of a democratic process and does not mention the decisions a democratic government should be entitled to make. See Schumpeter J. A. (1942), *op. cit.*, p. 269, quoted by Mainwaring, S., Brinks, D., & Aníbal, P. L. (2007), *op. cit.*, p. 129.

[44] See Couso, J. (2008). Consolidación democrática y poder judicial. Los riesgos de la judicialización de la política. In *Tribunales Constitucionales y Democracia* (pp. 429–457). Mexico City: Suprema Corte de Justicia de la Nación, pp. 432-433.

[45] According to Francis Fukuyama, the number of electoral democracies raised from about 35 in 1970 to over 110 in 2014. See Fukuyama, F. (2015). Why is Democracy Performing So Poorly? *Journal of Democracy*, *26*(1), 11–20, p. 12; Møller and Skaaning count 49 democracies in 1978 and 117 in 2012. See Møller, J., & Skaaning, S. E. (2013), *op. cit.*, p. 99.

[46] See Carothers, T. (2002), *op. cit.*, pp. 5 and 9.

[47] See Møller, J., & Skaaning, S. E. (2013), *op. cit.*, pp. 97-99.

[48] See Fukuyama, F. (2015), *op. cit.*, p. 11.

[49] See Carothers, T. (2002), *op. cit.*, pp. 9-10.

[50] See Croissant, A., & Merkel, W. (2004), *op. cit.*, pp. 2-3. See also Møller, J., & Skaaning, S. E. (2013), *op. cit.*, p. 97.

Studies in the field of democratization tried to conceptually explain the democratic performance of democracies that emerged during the 1990s where electoral procedures coexist with authoritarian styles of government and seek to differentiate democratic states/regimes from non-democratic ones. They started to add adjectives to describe types of democracy that were not thoroughly reputable. Thus, 'competitive authoritarianism'[51], 'illiberal democracy'[52], 'semi-democratic regimes' or 'electoral democracies'[53], 'authoritarian enclaves'[54], 'defective democracies'[55], 'exclusive democracy'[56], 'bureaucratic-authoritarianism'[57], 'hybrid democracies', 'delegative democracies'[58] or 'electoral autocracy'[59] are some of the expressions used to characterize countries that fall in the gray zone.

The outcomes of the expansion of liberal democracy are not only less optimistic but also ambiguous. Carothers[60] observes two broad political syndromes in the gray zone: feckless pluralism and dominant-power politics.

Feckless pluralism[61] is characterised by some degree of political freedom, regular elections, alternation of power and a somewhat independent judiciary. However, the alternation of power

[51] This term describes a regime that holds regular multiparty elections while remaining fundamentally authoritarian. See Levitsky, S., & Way, L. A. (2010). *Competitive Authoritarianism. Hybrid Regimes After the Cold War*. New York: Cambridge University Press.

[52] Fared Zakaria coined this term. According to him, the electoral attribute was construed as 'free and fair elections' whereas the liberal equivalent (also referred to as constitutional liberalism) included the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion and property. Zakaria observes that the two strands of liberal Western democracy were coming apart in non-Western countries, because while democracy seemed to be flourishing, constitutional liberalism did not. See Zakaria, F. (1997). Rise of Iliberal Democracy. *Foreign Affairs*, pp. 23-24.

[53] These terms describe a specific type of semi democracy that manages to hold (more or less) inclusive, clean, and competitive elections, but fails to uphold the political and civil freedoms essential for liberal democracy.

[54] This describes durable pockets of authoritarian practice at odds with the regime's political norms and rules of the game. See Garretón, M. A. (2003). *Incomplete Democracy Political Democratization in Chile and Latin America* (translated by Kelly Washbourne with Gregory Horvath). Chapel Hill and London: The University of North Carolina Press.

[55] This term refers to those democracies that have violated democratic principles and can be subdivided further into four subtypes. See Merkel, W. (2004), *op. cit.*, 33–58.

[56] This is a term that characterizes a democracy that excludes one or more segments of the population from the civil rights of universal suffrage.

[57] This term describes a system of political and economic exclusion of the popular sector by abolishing its channels of participation and by controlling its organizations. See O'Donnell, G. (1988). *Bureaucratic Authoritarianism. Argentina, 1966–1973, in Comparative Perspective* (Translated). Berkeley: University of California Press, pp. 31-32.

[58] These expressions emphasize the coexistence of electoral procedures and authoritarian styles of decision-making. In a 'delegative democracy', the legislature and the judiciary have only limited control over the executive branch, while the actions of government (often headed by a charismatic president) are rarely committed to constitutional norms. See O'Donnell, G. A. (1994). Delegative Democracy. *Journal of Democracy, 5*(1), 55–69.

[59] According to Møller and Skaaning, electoral autocracies have multiparty elections, but they are not competitive enough for the regime to qualified as democratic. That is, in electoral autocracies there is no uncertainty about who will win office. See Møller, J., & Skaaning, S. E. (2013), *op. cit.*, p. 98.

[60] See Carothers, T. (2002), *op. cit.*, pp. 10-11.

[61] Idem, pp. 10-12.

resembles a political transfer between political elites. Political elites are perceived as corrupt, self-interested and ineffective[62]. As a result, they are profoundly cut off from the citizenry.

Dominant-power politics[63] is characterized by the presence of one political group, e.g., a movement, a party, an extended family or a single leader, that dominates the system in such a way that offers few prospects for alternation of power in the foreseeable future. The line between the state and the ruling party is blurred. The main assets of the state are gradually put in the direct service of the ruling party, the independence of the judiciary is in question and the typical pattern is one of dubious but not outright fraudulent elections.

Political syndromes tend to weaken the state that performs poorly *vis-à-vis* its citizens, cause the public's disaffection from and unhappiness about politics and prevent citizens from political participation apart from voting[64]. From this viewpoint, democratic deficits and political syndromes can be seen as institutional obstacles that hamper the realisation of human rights and prevent the development of democracy. For instance, political transfer rather than alternation of power affects the right to vote and to stand as a candidate at elections; an ineffective public administration, large-scale corruption and crony capitalism produced by the power long held by one political group are conducive to systematic violations of human rights to the extent that citizens' right to health, right to education and right to work, among others, can be affected. The erosion caused by political syndromes in countries of the late third wave can be observed in three aspects: violations of human rights and civil war as well as unfulfilled economic and social expectations.

1.2.1. Violations of human rights and civil war

Countries situated in the gray zone are more prone to violate human rights. The so called More Murder in the Middle argument claims that the ends of the political spectrum (full democracy and full autocracy) are less important for understanding human rights violations than those governments that lie between these two extremes. Furthermore, the degree of openness within the

[62] This resembles Fukuyama's concept of neopatrimonial states. According to him, modern states aspire to be impersonal, treating people equally on the basis of citizenship. By contrast neopatrimonial states constitute rent-sharing kleptocracies run for the private benefit of the insiders. Neopatrimonialism can coexist with democracy, producing widespread patronage and clientelism in which politicians share state resources with networks of political supports. In such societies, individuals go into politics not to pursue a vision of public good, but rather to enrich themselves. See Fukuyama, F. (2015), *op. cit*., p. 13.
[63] See Carothers, T. (2002), *op. cit*., pp. 11-12.
[64] Ibidem.

political system is less important for understanding repressive behaviour than the presence of contradictory impulses that exists when elements of democracy and autocracy are combined[65].

Empirical findings support the More Murder in the Middle argument. Davenport and Armstrong II found that below a certain level, democracy has no impact on the violations of human rights, but above this level democracy influences repression in a negative and roughly linear manner. According to them, authorities do not perceive any constraints on repression or alternatives to social control until the highest levels of democracy have been achieved[66].

Cederman, Hug and Krebs not only confirm the hypothesis that links civil wars to democratization, but also contend that there is a relationship between civil wars and autocratization. They argue that changes towards more democracy and more autocracy increase the likelihood of civil-war onsets in a country[67]. Similarly, Krishnarjan, Møller, Rørbæ and Skaaning found that, among the attributes of electoral democracy, freedom of association and freedom of expression drive the relationship between democracy and civil war onset. According to them, it is the intermediate score of freedom of association and freedom of expression that displays the highest probability of a civil war onset. In addition, they found that the cleanness of elections is consistently associated with decreasing probabilities of conflict[68]. The empirical study carried out by Cervellati, Fortunato and Sunde revealed that violent conflicts during the democratic transition have persistent negative effects on the quality of civil liberties in the emerging democracies from the third democratic wave[69].

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[65] See Fein, H. (1995). More Murder in the Middle: Life-Integrity Violations and Democracy in the World. *Human Rights Quarterly*, *17*(1), 170–191; King, J. C. (1998). Repression, Domestic Threat, and Interactions in Argentina and Chile. *Journal of Political & Military Sociology*, *26*(2), 191 and ff., and Regan, P. M., & Henderson, E. A. (2002). Democracy, threats and political repression in developing countries: Are democracies internally less violent? *Third World Quarterly*, *23*(1), 119–136, quoted by Davenport, C., & Armstrong II, D. A. (2004). Democracy and the Violation of Human Rights: A Statistical Analysis from 1976 to 1996. *American Journal of Political Science*, *48*(3), p. 539. See also Muller, E. N., & Weede, E. (1990). Cross-National Variation in Political Violence: A Rational Action Approach. *The Journal of Conflict Resolution*, *34*(4), 624–651; Lichbach, M. I. (1987). Deterrence or Escalation? The Puzzle of Aggregate Studies of Repression and Dissent. *The Journal of Conflict Resolution*, *31*(2), 266–297; Hegre, H., Ellingsen, T., Gates, S., & Gleditsch, N. P. (2001). Toward a Democratic Civil Peace? Democracy, Political Change, and Civil War, 1816-1992. *The American Political Science Review*, *95*(1), 33–48 quoted by Klopp, J. M., & Zuern, E. (2007). The Politics of Violence in Democratization: Lessons from Kenya and South Africa. *Comparative Politics*, *39*(2), 127–146.

[66] Davenport and Armstrong II carried out a study that examines the influence of democracy on state repression, considering data from 147 countries during the 1976 to 1996 period. See Davenport, C., & Armstrong II, D. A. (2004), *op. cit*.

[67] See Cederman, L. E., Hug, S., & Krebs, L. F. (2010). Democratization and civil war: Empirical evidence. *Journal of Peace Research*, *47*(4), pp. 379 and 387.

[68] See Krishnarajan, S., Møller, J., Rørbæk, L. L., & Skaaning, S. E. (2016). Democracy, Democratization, and Civil War. *The Varieties of Democracy Institute, Working Paper*, *34*(August), pp. 6-9.

[69] See Cervellati, M., Forunato, P., & Sunde, U. (2011). Democratization and civil liberties: the role of violence during the transition. *IZA Discussion Paper No. 5555, U. of St. Gallen Law & Economics Working Paper*, (2011–03), p. 29.

It is important to note that large-scale violence during transition can escalate and deescalate abruptly during a process of political change, bringing democratization or producing more violence, extending and complicating the transition to democracy. Klopp and Zuern, using relatively successful cases of democratization of Kenya and South Africa, point out that once an agreement is reached, incentives to use violence decline among actors[70]. Pearce, using the case of Latin America, states that violence has a reproductive quality that put democracy at risk. She explains that violence is transmitted through space and time and this enables the state to build its authority not on the protection of citizens' rights, but on its armed encounters and insidious collusions with violent actors in the name of 'security provision'[71]. Accordingly, '(…) democracy itself is sacrificed to the demands for hard-line security provisions, which often involve abuse of the poorest people who should be at the heart of democratic project'[72]. The internally displaced persons (IDPs) in Colombia (mostly Afro-Caribbean people and indigenous groups)[73], the feminicides in Ciudad Juárez, Mexico[74], and the forced disappearances of students in Iguala, Mexico[75] stand out as dramatic examples of the reproduction of violence against the underprivileged.

Pearce's reproductive quality of violence argument brings the interconnection of rights into the discussion. As rights are interconnected, the restriction or denial of certain liberties triggers the violation of other rights which in turn generates resistance and gives room to use repression as a state measure to secure democracy. Accordingly, ensuring democracy through the use of violence leads to the normalization of the systematic violation of human rights, which creates a complex environment that is not conducive to achieving the necessary political agreements (using democratic institutions) to leave the gray zone.

[70] See Klopp, J. M., & Zuern, E. (2007), *op. cit.*, 127–146.
[71] See Pearce, J. (2010). Perverse state formation and securitized democracy in Latin America. *Democratization*, *17*(2), 286–306.
[72] Idem, p. 301.
[73] Idem, p. 300.
[74] Ibidem.
[75] See Couso, J. (2015). Sine Qua Non: On the role of judicial independence for the protection of human rights in Latin America. *Netherlands Quarterly of Human Rights*, *33*(2), pp. 254-255. Couso uses the case of the forty-three poor students forced disappeared in September 2014 in Iguala, Guerrero committed by drug cartels and state authorities to portrait the concept of mass-killing democracies: one in which '…universal suffrage lives hand in hand with the mass killings of innocent people, with judicial co-optation, and with the state's incapacity to control the monopoly of coercive power.'.

1.2.2. Economic and social expectations unfulfilled

Despite widespread consensus among scholars[76] that the expansion of democracy is expected to lead to economic levelling and secure economic redistribution, the relationship between the democratization process and equality, development and economic growth is far from clear theoretically and empirically.

Eradicating poverty and reducing inequality levels seem to be the Achilles heel in emerging democracies. Those who insist that the establishment of democracy promotes economic levelling argue that democracy enables the poor to use their political leverage via the free vote to secure economic redistribution[77]. However, autocracies seem to be better at poverty eradication than democracies. Empirical studies show that countries such as India and Costa Rica, that are recognized as long lasting or stable democracies in democratic theory, have a substantial proportion of their population stuck below the poverty line[78] while relatively high levels of equality have been achieved under former autocracies such as Singapore, South Korea and Taiwan[79].

The experience of Eastern Europe shows that inequality increased rather than decreased during the process of democratization[80], while examples of Sub-Saharan Africa[81] and Latin America[82] illustrate that countries with an authoritarian background are able to both exacerbate poverty and inequality as well as moderately reduce mass poverty[83].

Democracy seems to be able to maintain moderate levels of poverty and proves to be superior to dictatorship in terms of fighting famine. According to Sen, no substantial famine has ever occurred

[76] See Gradstein, M., & Milanovic, B. (2004). Does Libertè = Egalité? A survey of the empirical links between democracy and inequality with some evidence on the transition economies. *Journal of Economic Surveys*, *18*(4), 515–537, Przeworski, A. (2007). Democracy, Equality, and Redistribution. In R. Bourke & R. Gauss (Eds.), *Political Judgment: Essays for John Dunn* (pp. 281–312). Cambridge: Cambridge University Press; O'Donnell, G. (2007). *Dissonances: Democratic Critiques of Democracy*. Notre Dame: University of Notre Dame and Carbone, G. (2009). The consequences of democratization. *Journal of Democracy*, *20*(2), 123–137 quoted by Møller, J., & Skaaning, S. E. (2013), *op. cit.*, pp. 182-186.

[77] See Przeworski, A. (2007), *op. cit*. Through the 'median voter model' Przeworski suggests that there exists a causal relationship between democracy and redistribution.

[78] See Varshney, A. (2005). Democracy and Poverty. In D. Narayan (Ed.), *Measuring Empowerment. Cross-Disciplinary Perspectives* (pp. 383–402). Washington: The World Bank, p. 385.

[79] Idem, p. 384. Relying on data from the WB and the International Monetary Fund Varshney argues that Singapore has been authoritarian since its birth in the mid-1960s, and South Korea and Taiwan fought against poverty when they were dictatorial (between the mid-1950s and mid-1980).

[80] See Carbone, G. (2009). The Consequences of Democratization. *Journal of Democracy*, *20*(2), p. 132. See also Gradstein, M., & Milanovic, B. (2004), *op cit*., quoted by Møller, J., & Skaaning, S. E. (2013), *op. cit*., p. 185.

[81] For example, Ethiopia, Guinea-Bissau, Niger, Nigeria, Senegal, and Uganda. See Varshney, A. (2005), *op. cit.*, p. 384.

[82] For example, Guatemala, Honduras, Peru, Nicaragua and arguably Brazil. Ibidem.

[83] Such as Thailand, Pakistan, South Africa, and Mexico. See Varshney, A. (2005), *op. cit*., p. 383.

in a democracy with a relatively free press[84]. Authoritarian regimes fail to deal with famines and other catastrophes as the rulers are not held accountable for catastrophic losses[85].

The lack of consistent findings makes the relationship between democracy and economic growth unclear. Scholars[86] note that one can find quite convincing theoretical contributions pointing out that democracy both promotes or hampers economic growth. For instance, five scenarios have been identified by Seawrith: democracy can 1) cause economic growth, 2) prevent economic growth, 3) be irrelevant to economic growth, 4) have a curvilinear relationship with growth, or 5) have other forms of mixed effects on growth[87]. Gerring *et al*. highlighting that democracy needs to be long-lasting and stable if a positive relationship is to be expected between democracy and economic growth. According to them, democracy tends to build up physical, human, social and political capital when it is stable and long-lasting, and these types of capital tend to facilitate economic growth. Therefore, they conclude that emerging democracies must survive their tumultuous youth in order to have positive consequences regarding economic growth[88].

However, if democracy is intrinsically superior to dictatorships, why does its expansion prove to be especially harmful regarding poverty and inequality? Different reasons have been pointed out, e.g., historical reasons, problems with the conceptualization and operationalization of the concept of democracy, lack of studies regarding poverty among democratic theorists, undue emphasis on institutions of electoral democracy during the process of democratization, and the lack of state capacity in emerging democracies to respond to the needs of its citizens. Specifically, Przeworski points out that democracy was simply not conceived as a weapon for redistribution; rather, modern democracy originally represented an attempt to balance political and, to some extent, judicial, but not economic power[89].

The relationship between democracy and poverty does not figure prominently in democratic theory. Varshney considers that two reasons have contributed to this lacuna: 1) scholars that rely on Dahl's polyarchy concept use two basic criteria: contestation and participation and 2) a

[84] See Sen, A. (2003). Freedom Favors Development. In R. Dahl, I. Shapiro, & J. A. Cheibub (Eds.), *The Democracy Sourcebook* (pp. 444–446). Cambridge-London: MIT Press quoted by Møller, J., & Skaaning, S. E. (2013), *op. cit*., p. 188.
[85] See Sørense, G. (2008). *Democracy and Democratization: Processes and Prospects in a Changing World* (Third edit). Boulder: Westview Press, pp. 105-112.
[86] See Møller, J., & Skaaning, S. E. (2013), *op. cit*., p. 186.
[87] See Seawright, J. (2010). Regression-Based Inference: A Case Study in Failed Causal Assessment. In H. E. Brady & D. Collier (Eds.), *Rethinking Social Inquiry: Diverse Tools, Shared Standards* (pp. 247–271). Lanham: Rowman and Littlefield, p. 250, quoted by Møller, J., & Skaaning, S. E. (2013), *op. cit*., p. 186.
[88] See Gerring, J., Bond, P., Barndt, W. T., & Moreno, C. (2005). Democracy and Economic Growth: A Historical Perspective. *World Politics*, *57*(3), p. 335.
[89] See Przeworski, A. (2007), *op. cit*., pp. 21-22.

considerable body of literature is available on the relationship between democracy and economic growth; however, it cannot be assumed that what is good for economic growth is necessarily good for poverty reduction[90]. Furthermore, Shefner argues that research on democratization often focuses on structural and institutional changes, expansion of political rights, representation, and participation. However, few studies consider material changes as an indicator of the responsiveness and accountability of governmental bodies and ignore economic hardships[91].

Møller and Skaaning observe that studies asserting that democracy stimulates economic growth accentuate aspects of liberal democracy much more than the electoral ones[92]. This echoes Gerring *et al*. statement that mature liberal democracies can bring about general well-being and economic growth[93]. Accordingly, free elections in emerging democracies are not worth much in the absence of the rule of law[94]. Hence that emerging democracies are considered minimalist democracies, i.e., electoral democracies that have not reached the levels of liberal democracy.

McCoy, using the case of Latin America, illustrates how the adoption of formal procedures of democracy and broad consensus on macroeconomic liberalization did not entail the expansion of citizenship to civil and social realms. He argues that low and middle-class citizens are striving to bring their needs on the public agenda. On the one hand, the urban poor and indigenous groups are striving to move beyond the broadly established political rights of electoral competition to also enjoy civil rights and social rights. On the other hand, middle class groups are insisting that their governments perform better, deliver promised services and represent broader societal interests. These groups are expressing their voice through street politics and the ballot box which is seen as a threatening sign of mob rule or even 'civil society coups' as well as a welcome sign of more truly democratic societies[95].

Accordingly, the establishment of electoral democracy did not imply the emergence of a strong state able to meet the needs of its citizens. Fukuyama argues that even though democracy has become deeply entrenched in Latin America, the capacity to deliver basic public goods such as education, infrastructure and citizen security is lacking in Brazil, Colombia and Mexico[96]. The

[90] See Varshney, A. (2005), *op. cit*., pp. 387, 390 and 394.
[91] See Shefner, J. (2012). Development and Democracy in Mexico. *Latin American Research Review*, *47*(1), pp. 198 and 201-202.
[92] See Møller, J., & Skaaning, S. E. (2013), *op. cit*., p. 187.
[93] Idem, p. 190.
[94] Ibidem.
[95] See McCoy, J. L. (2008). Democratic Transformation in Latin America. *The Whitehead Journal of Diplomacy and International Relations*, *9*(1), p. 19.
[96] See Fukuyama, F. (2015), *op. cit*., p. 15.

lack of basic public goods prevents democracy from developing because in countries with low levels of income and education, individualized voter incentives (the essence of clientelism) are more likely to mobilize voters and get them to the polls than promises of programmatic public policies[97]. For instance, Cleary found that rich people in Mexico are more active politically and live in areas with better public services[98]. Moreover, weak accountability mechanisms have contributed to inefficient and corrupt provision of government services[99]. Accordingly, the democratic legitimacy of a state is at stake if it is unable to satisfy the economic and physical security of its inhabitants[100].

McCoy asserts that increasing the level of state capacity is advantageous for democracy because it results in responding effectively to the needs of citizens and paves the way for a negotiated change[101]. However, improving state capacity requires resources, such as a basic tax agreement of a society, as well as the state's ability to enforce that agreement[102]. Therefore, taxation is a topic that should be central to the overall discussion about democracy and development[103]. Tanzi argues that the tax collection in Latin America has been insufficient to prevent most democratic governments from facing a central dilemma: either to rely on market-oriented policies that do little or nothing to reduce poverty, or to adopt fiscally unsound policies that risk inflation, bankruptcy or both[104]. Moreover, tax collection as it is in the region tends to be regressive[105]. Due to the neoliberal policy adopted, tax collection focuses on indirect taxes such as the consumption tax, i.e., Value Added Tax instead of direct taxes such those that directly charge the sources of wealth, property or income (e.g., the income tax)[106].

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[97] Idem, p. 17. According to Fukuyama, this situation changes at high levels of economic development because higher-income voters are harder to bribe through an individualized payment, and they tend to care more about programmatic policies.

[98] See Cleary, M. R. (2010). *The Sources of Democratic Responsiveness in Mexico*. Notre Dame: University of Notre Dame Press, quoted by Shefner, J. (2012), *op. cit*. p. 200.

[99] See McCoy, J. L. (2008), *op. cit.* p. 22.

[100] See Shefner, J. (2012), *op. cit.*, p. 197. See also Carbone who asserts that legitimacy can be acquired in two ways. The first is normative: people hold values and beliefs that assert democracy's inherent superiority and value it 'for its own sake'. The second is the performance-based: people come to accept democracy because it helps to attain valued goals such as material well-being or social peace. See Carbone, G. (2009), *op. cit.*, p. 135.

[101] See McCoy, J. L. (2008), *op. cit., op. cit.* p. 28.

[102] Idem, p. 22.

[103] See Philip, G. (2005). Democracy and Development in Latin America. *Latin American Research Review*, *40*(2), p. 219.

[104] Ibidem. Phillip refers to Tanzi's research that can be found in González, J. A., Corbo, V., Krueger, A. O., & Tornell, A. (2003). *Latin American Macroeconomic Reform: The Second Stage*. Chicago: University of Chicago Press.

[105] See Philip, G. (2005), *op. cit*., p. 219 and Gutiérrez Rivas Rodrigo, UNAM, p. 91.

[106] See Pearce who holds that still today Latin American states are unable to persuade their elites to pay taxes. See Pearce, J. (2010), *op. cit.*, p. 298.

This state of affairs has led to the consideration that it is difficult to accept that democracy has advanced. The case of Latin America shows that despite the progress in electoral matters, the support of neoliberal economic policies has caused large segments of the population to live in poverty or to be in a situation of forced migration[107]. According to McCoy, poverty and inequality in Latin America have been a factor in social exclusion and have prevented the construction and consolidation of social cohesion that is needed to clearly define a shared societal vision to accomplish an inclusive democratic transformation[108].

The expansion of liberal democracy during the late third wave has led to considerable progress on electoral matters. However, electoral democracy has been accompanied by a systematic denial of civil and social rights that have contributed to social exclusion, growing frustration and dissatisfaction with democracy and a considerable increase of emigration and mass mobilization. It is important to note that previous literature has discussed the significance of the realization of human rights on democracy, the lack of accountability mechanisms and the revitalization that citizen participation brought to electoral processes. These elements need to be taken into consideration when analysing the role of constitutional courts in emerging democracies.

1.2.3. The late third wave: reasons for optimism

Previous section shows that the expansion of liberal democracy during the late third wave was not as successful as expected. Different reasons could explain this failure. Firstly, liberal democracy expanded without taking into account the different contexts and historical backgrounds of non-Western societies. Secondly, the global expansion of liberal democracy coincided with a crisis facing consolidated democracies[109]. This crisis consisted of a double pathology: the pathology of participation, especially reflected in the dramatic increase in levels of abstention, and the pathology of representation viewed in terms of citizens who feel less valued and less represented by those they have elected[110]. Thirdly, two important phenomena occurred at the same time: the end of the Cold War and the intensive neoliberal globalization[111]. The latter resulted in an unequal

[107] See Shefner, J. (2012), *op. cit.* p. 204
[108] See McCoy, J. L. (2008), *op. cit.*, p. 22.
[109] See Santos, B. de S., & Avritzer, L. (2005). Introduction. Opening Up the Canon of Democracy. In B. de S. Santos (Ed.), *Democratizing Democracy. Beyond the Liberal Democratic Canon* (pp. xxxiv–lxxiv). London-New York: Verso, p. xxxvi.
[110] Ibidem. See also Schmitter, P. C. (2015). Crisis and transition, but not decline. *Journal of Democracy*, *26*(1), pp. 34-35. Schmitter asserts that citizens have become increasingly aware that their representatives and rulers live in an entirely different and self-referential world.
[111] See Santos, B. de S., & Avritzer, L. (2005), *op. cit*., pp. xxxv and xlii. According to Santos, neoliberal globalization corresponds to a new system of capital accumulation, a more intensely globalized system than the previous ones. It aims, on the one hand, at dissocializing capital, freeing it from the social and political bonds that in the past guaranteed some social distribution; and at working to subject society as a whole to the market law of value, under the

distribution of costs and opportunities that may account for the exponential increase of social inequalities[112]. This means that alongside the process of democratization, the demise of mid-century models of economic development and social provision took place[113]. Finally, the failure of institutionalization, i.e., the failure to establish modern, well-governed states that keep pace with popular demands for democratic accountability[114], the erosion of government services, popular perceptions that political parties and leaders are uncaring and unrepresentative of their constituents and the failure to deal with income inequality[115] seem to be systemic in some new democracies.

According to Møller & Skaaning[116], a reverse wave is not likely. They hold that the last genuine reverse wave occurred between the two world wars. Therefore, they consider that the current economic crisis is less severe than the Great Depression was and today there are no serious challengers to democracy as a regime form such as Communism, Fascism and Nazism.

Scholars agree that democracy has been threatened by the global financial crisis that began in 2008, the wars in Iraq, Afghanistan and recently in Syria, the economic success of authoritarian China, the emergence of a new radical Islamist movement, i.e., the Islamic State in Iraq and Syria, and a general dissatisfaction with regime performance in new democracies[117].

The V-Dem Democracy Report 2020 suggests that we are witnessing the rise of the 'third wave of autocratization'. For the first time since 2001, autocracies are in the majority: 92 countries. Hungary's democratic credentials have fallen to the point that it is considered an electoral autocracy and has become the first non-democratic member of the European Union. Autocratization is affecting countries such as Brazil, India, the United States of America, and Turkey that exercise global military, economic, and political influence. Latin America is back to a level last recorded in the early 1990s while Eastern Europe and Central Asia are at post-Soviet

presupposition that all social activity is better organized when organized under the aegis of the market, on the other. See Santos, B. de S. (2005). Preface, *op. cit.*, p. vii.

[112] Schmitter points out that neoliberal reforms failed to produce continuous growth, fair distribution, and automatic equilibration leading. See Schmitter, P. C. (2015), *op. cit.*, p. 35.

[113] The 'developmental state', the 'planning state' as well as the traditional 'welfare state' were assailed in the name of free markets and neoliberal reform. Privatization of industry, cutbacks in social services, an easing of import restrictions, and scores of other political-economic changes threatened the already precarious lots of poor and working classes, even as they were being newly outfitted as democratic citizens. See Brinks, D. M., & William, F. (2011). Commentary: Social and Economic Rights in Latin America: Constitutional Courts and the Prospects for Pro-Poor Interventions. *Texas Law Review*, *89*(1943), p. 1943.

[114] See Fukuyama, F. (2015), *op. cit*., p. 12.

[115] See also McCoy, J. L. (2008), *op. cit*., p. 20.

[116] See Møller, J., & Skaaning, S. E. (2013), op. cit., p. 106.

[117] See Møller, J., & Skaaning, S. E. (2013), *op. cit.*, p. 97 and Fukuyama, F. (2015), *op. cit*., p. 11.

Union lows. India is on the verge of losing its status as a democracy due to the severely shrinking of space for the media, civil society, and the opposition under Prime Minister Modi's government. The acceleration of autocratization has been coupled with pro-democracy movements. Pro-democracy resistance has increased from 27% in 2009 to 44% in 2019. Pro-democracy mobilisations have taken place, among others, in Algeria, Bolivia, Hong Kong, Malawi, Poland and Sudan[118].

Apart from the ambiguous results of the late third wave and the current threats to democracy, there are reasons to be optimistic. The processes of democratization and autocratization contain a valuable amount of information to rethink the path to democracy in a more inclusive and fair way. As McCoy points out, a positive consequence of more than thirty years of electoral democracy is that it has awakened and empowered the voice and demands of common citizens[119].

Following Prezeworski's 'median voter model', it is insisted that in a democratic polity, the poor can exercise their weight (agency) and push the government's economic policy towards their interests in two ways: political mobilization and/or voting[120]. Moreover, both consolidated and new democracies have engaged in innovative practices during the last decades at vertical and oblique accountability[121].

For instance, *referenda*, participatory budgeting, party primary, public funding for political parties, quotas for female electoral candidates or even as members of the legislature and the devolution of greater powers to subnational political units are innovative practices that have revitalised vertical control while efforts to plan for the future, the proliferation of freedom-of-information acts all over the world, the information and communications technology (ICT) impact on the practice of democracy, the introduction of programs for funding civil society, changes in the nature of citizenship, representation by lot, among others, are examples of oblique accountability[122].

It is important to highlight the potential of constitutional courts to contribute to democratic progress under these circumstances. For instance, in addition to political mobilization and voting, citizens can use courts to express their growing frustration with democracy and demand the expansion of their rights. Hence the importance of further exploring the judicial mechanisms offered by liberal democracy.

[118] See V-Dem Institute. (2020). Autocratization Surges - Resistance Grows. Democracy Report 2020, p. 40.
[119] See McCoy, J. L. (2008), *op. cit.*, p. 20.
[120] See Varshney, A. (2005), *op. cit.*, p. 387.
[121] See Schmitter, P. C. (2015), *op. cit.*, pp. 40-41.
[122] Idem, pp. 37-40.

1.3. The shortcomings of the operationalization and measurement of democracy

The conceptual disagreement regarding democracy has been extended to its operationalization. For instance, Dahl's polyarchy concept has been the basis for several studies on democratization[123]. As explained above, the concept of polyarchy denotes the institutional arrangements that have come to be regarded as a kind of imperfect approximation of democracy as an ideal[124]. Although the concept of polyarchy encompasses civil and political rights, no particular level of socioeconomic equality is required for a country to be considered a polyarchy[125]. This lack of attention to socioeconomic and cultural rights might be considered a barrier for a robust understanding of democracy.

It is held that the process of democratization consists of three components: liberalization, transition and consolidation[126]. However, evidence suggests that countries do not follow the assumed sequence of stages of democratization[127]. Therefore, it is inaccurate and misleading to assume that any third wave country moving away from dictatorship is 'in transition to democracy'[128].

Moreover, by expanding the elements of transition and consolidation, the meaning and the operationalization of democratization has become more complex. For instance, to measure the mode of transition the presence or absence of violence and the level of mass mobilization have been added. Similarly, to expand the concept of consolidation of democracy problems and conditions of democratic consolidation have been added[129]. This may include: popular legitimation, diffusion of democratic values, neutralization of antisystemic actors, civilian

[123] See Schneider, C. Q. (2009). *The Consolidation of Democracy. Comparing Europe and Latin America*. New York: Routledge; Diamond, L., Linz, J. J., & Lipset, S. M. (Eds.). (1988). *Democracy in developing countries, Vol. 2*. Colorado-London: Lynne Rienner Publishers-Adamantine press; Sørense, G. (2008), *op. cit.*; Elkit, J. (1994). Is the Degree of Electoral Democracy Mesurable? In *Defining and Measuring Democracy* (pp. 89–111). London-Thousand Oaks-New Delhi: Sage Publications.

[124] See Coppedge, M., & Wolfgang H. Reinicke. (1990). Measuring Polyarchy. *Studies in Comparative International Development*, *25*(1), 51–72.

[125] Idem, p. 52.

[126] Between liberalization and consolidation of democracy lies the transition. The transition period involves a more or less lengthy period of exceptional politics whose outcome is more or less uncertain. The behaviour of actors with newly acquired identities are difficult to predict. The outcome will be determined by either country conditions such as the level of development, the rate of economic growth, the proximity to western culture, the incentives provided by the 'world system' or by the strategic choice of elites. Regime consolidation consists in transforming the accidental arrangements, prudential norms and contingent solutions that have emerged during the uncertain struggles of the transition into reliable institutions. See Schneider, C. Q., & Schmitter, P. C. (2004). *Liberalization, transition and consolidation: measuring the components of democratization*. *Democratization* (Vol. 11), pp. 60-65. See also Schedler who considers that democratic consolidation comes to be synonymous with 'institution building' which implies constructing the infrastructure of modern liberal democracies: party system, legislative bodies, state bureaucracies, judicial systems, and systems of interest intermediation. See Schedler, A. (1998). What is Democratic Consolidation? *Journal of Democracy*, *9*(2), pp. 100-101.

[127] See Carothers, T. (2002), *op. cit.*, pp. 14-15.

[128] Ibidem.

[129] See Schedler, A. (1998), *op. cit.*, p. 92 and Schneider, C. Q., & Schmitter, P. C. (2004), *op. cit.*, p. 66.

supremacy over the military, elimination of authoritarian enclaves, party building, organization of functional interests, stabilization of electoral rules, routinization of politics, decentralization of state power, introduction of mechanisms of direct democracy, judicial reform, alleviation of poverty, economic stabilization[130], the curtailment of the network of *de facto* power relationships (better known as 'corporatism') or the need to prosecute and punish those who committed human rights violations during the military and/or authoritarian regimes and to abolish the censorship policy[131].

To avoid intricate concepts, most democratic indices follow Dahl's concept of polyarchy. Much of the literature emphasises general issues of rights and liberties and is heavily influenced by and dependent on indicators and concepts provided by the United Nations Development Program and by the Freedom House index[132]. Among the democratic indices, Polity IV[133] and Freedom House[134] are by far the most commonly used democratic indices, although more data sets on democracy can be identified[135]. Specifically, in Latin America, Freedom House, Polity IV,

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[130] Idem, pp.91-92.

[131] See Nino, C. S. (1989). Transition to Democracy, Corporatism and Constitutional Reform in Latin America. *University of Miami Law Review*, *44*(1), 129–164.

[132] See Levine, D. H., & Molina, J. E. (2011). Evaluating the Quality of Democracy in Latin America. In D. H. Levine & J. E. Molina (Eds.), *The Quality of Democracy in Latin America* (pp. 1–20). Lynne Rienner Publishers, p. 3.

[133] The Polity IV Project includes 167 countries for the period 1800-2012 and represents the latest generation in the well-known Polity data series that was originally designed by Ted Robert Gurr, building on conceptual work by Harry Eckstein, and introduced in an article titled 'Persistence and Change in Political Systems, 1800-1971'. See Marshall, M. G. (2002). Polity IV, 1800-1999: Comments on Munck and Verkuilen. *Comparative Political Studies*, *35*(1), p. 40. The Polity conceptual scheme examines concomitant qualities of democratic and autocratic authority in governing institutions. According to the Polity IV team, this perspective envisions a spectrum of governing authority that spans from fully institutionalized autocracies through mixed, or incoherent, authority regimes (termed 'anocracies') to fully institutionalized democracies. The Polity Score captures this regime authority spectrum on a 21-point scale ranging from -10 (hereditary monarchy) to +10 (consolidated democracy). The Polity scheme consists of six component measures that record key qualities of executive recruitment, constraints on executive authority, and political competition. It also records changes in the institutionalized qualities of governing authority. Currently, the Polity IV Project is under the direction of Dr. Monty G. Marshall and supported by the Political Instability Task Force (PITF), Societal-Systems Research Inc, and Center for Systemic Peace. The Polity IV data resources and Country Report series are now hosted on the Center for Systemic Peace Web site. See Polity IV Project web page: http://www.systemicpeace.org/polity/polity4.htm (Accessed February 2020).

[134] Freedom House was established in 1941 in New York City. However, it was in 1973 that its well-known flagship publication, Freedom in the World, an annual survey of global political rights and civil liberties, was launched. Currently, it comparatively assesses political rights and civil liberties in 195 countries and in 14 related and disputed territories. For the last 39 years of the survey, each country and territory has been assigned two numerical ratings — one for political rights and one for civil liberties— based on a 1 to 7 scale; a rating of 1 indicates the highest degree of freedom and 7 the lowest level of freedom. Those ratings are the basis for more detailed assessments of country situations based on a 40-point scale for political rights and a 60-point scale for civil liberties. These ratings determine whether a country is classified as Free, Partly Free, or Not Free by the survey. The survey results were yielded after a multi-layered process of analysis and evaluation by a team of regional experts and scholars. In the survey, all Free countries qualify as both electoral and liberal democracies. However, some Partly Free countries qualify as electoral, but not liberal, democracies. See the web site of Freedom House https://freedomhouse.org/about-us (Accessed February 2020).

[135] Munck and Verkuilen have identified nine data sets on democracy: Álvarez, Cheibub, Limongi, & Przeworski; Arat; Bollen; Coppedge and Reinicke Polyarchy; Freedom House; Gasiorowski Political Regime Change; Hadenius;

Prezeworski *et al*.[136] and Mainwaring-Brinks-Pérez Liñán[137] provide annual democracy scores over a long period.

Due to the conceptual disagreement about the concept of democracy, it is not surprising that these indices are not free from criticism. Mainwaring, Brinks & Perez-Liñan have pointed out the shortcomings of these indices. Regarding the Polity IV index they highlight that it does not justify the five categories selected and omits the protection of civil and political liberties and the inclusiveness of political participation, both fundamental to most definitions of democracy[138]. About the Freedom House index, they argue that as coding rules are not available this leads to potentially serious problems of reliability and validity because the criteria used in assessing regimes is not revealed. In addition, it is considered that the Freedom house index contains two systematic biases: scores for leftist governments were tainted by political considerations, and changes in scores are sometimes driven by changes in criteria rather than changes in real conditions. Therefore, some conclusions based on the Freedom House scores are considered misleading[139]. Regarding Przeworski *et al*. index it is argued that the authors use a subminimal definition of democracy, which results in including numerous countries as democratic that other

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Polity IV; and Vanhanen. See Munck, G. L., & Verkuilen, J. (2002). Conceptualizing and Measuring Democracy: Evaluating Alternative Indices. *Comparative Political Studies*, *35*(1), p. 6.

[136] Przeworski *et al*. use a dichotomized model to classify regimes: Democracy or Dictatorship. For them, democracy is a system in which incumbents lose elections and leave office when the rules dictate so. Therefore, contestation is key: ex-ante uncertainty (anyone can win), ex-post irreversibility (losers do not try to reverse results), and repeatability. They consider a regime as a dictatorship if the incumbents will have or already have held office continuously by virtue of elections for more than two terms or have held office without being elected for any duration of their current tenure in office, and until today or until the time when they were overthrown they had not lost an election. They subdivide democracies into three categories: presidential (government serves at the pleasure of the president/the president can dismiss the government); parliamentary (government serves at the pleasure of legislature/the legislature can dismiss the government), and mixed (government responds both to a legislative assembly and to an elected president). The criteria used for the operationalization of democracy follow this order: (1) chief executive is elected in popular elections; (2) legislature (lower house only) is also popularly elected; (3) more than one party; (4) alternation. See Przeworski, A., & Alvarez, Michael E., Cheibub, Jose Antonio Limongi, F. (2000). *Democracy and Development*. Cambridge: Cambridge University Press, p. 30. In particular, Chapter 1: Democracies and dictatorships. Przeworski's codebooks and database are available at the University of New York web page, professor Przeworski's Useful Links. See http://politics.as.nyu.edu/object/AdamPrzeworski (Accessed January 2014).

[137] Mainwaring, Brinks & Pérez-Liñán have developed a data set in order to classify political regimes, especially in Latin America. They depart from defining democracy as a regime (a) that sponsors free and fair competitive elections for the legislature and executive; (b) that allows for inclusive adult citizenship; (c) that protects civil liberties and political rights; and (d) in which the elected governments really govern and the military is under civilian control. They consider this definition of democracy as a minimalist procedural one, which they differentiated from a nonprocedural (Bollen) one on the one hand, and from a subminimal (Przeworski, *et al*.) on the other. Their classification first disaggregates the concept of democracy into the four defining criteria described above and then reagreggates them to form an overall regime assessment. They argue that using a trichotomous classification (democracy, semidemocracy, and nondemocracy or authoritarian) can help capture those regimes that fall into an intermediate semidemocratic zone. They have used these general theoretical and methodological claims to classify political regimes in twenty Latin American countries from 1945 to 2004. See Mainwaring, S., Brinks, D., & Aníbal, P.-L. (2007), *op. cit.*, pp. 123-125 and142.

[138] Ibidem.

[139] Idem, p. 145.

indices regard as semi-democratic or even as authoritarian regimes. Przeworski *et al.*'s definition of democracy considers exclusively contested elections regardless of the lack of civil liberties[140]. According to Mainwaring, Brinks & Perez-Liñan this definition of democracy is problematic because without respect for the core civil liberties, the electoral process itself is vitiated. For instance, elections are not free and fair if the opposition risks reprisals for criticizing the government[141]. To correct this shortcoming, Przeworski *et al.* have included alternation in power which results in counting as democratic only those regimes in which there has been at least one alternation in power.

Mainwaring, Brinks & Pérez-Liñán developed the Mainwaring *et al*.'s democratic index that focuses on a procedural definition of democracy, civil liberties and effective governing power. However, it fails to include aspects such as social equality and accountability[142]. They argue that social equality and accountability are not inherent to the nature of democracy and can lead to a non-minimal definition of democracy that difficult its operationalization[143].

This overview of democratic indices illustrates the complexity of operationalizing and measuring democracy. As the concept of democracy acquires more consistency in terms of its desirable principles and values, measurement represents a problem that seems to limit the development of a substantive concept of democracy[144]. Scholars have opted to operationalize the procedural elements of the concept of democracy, i.e., elections, party system, alternation, political competition, and constraints in executive authority, including, in some cases, civil and political rights, and have restricted themselves from using a more substantive approach to democracy[145]. As a result, economic, social, and cultural rights and accountability have been deliberately excluded when it comes to conceptualizing and operationalizing democracy.

Therefore, proposals to replace Schumpeter's minimalist definition with broader definitions have been quite weak, giving credibility to the argument that, conceptual shortcomings notwithstanding, a minimalist definition of democracy is preferable because its parsimony makes it analytically

[140] Idem, p. 129.
[141] Idem, p. 130.
[142] Ibidem.
[143] Idem, p. 128.
[144] See Coppedge, M., Gerring, J., Altman, D., Bernhard, M., Fish, S., Hicken, A., … Teorell, J. (2011), *op. cit*., pp. 247–267.
[145] According to Coppedge M. *et al*., nearly all cross-national measures of democracy attempt to capture electoral or liberal definitions. See Coppedge, M., Gerring, J., Altman, D., Bernhard, M., Fish, S., Hicken, A., … Teorell, J. (2011), *op cit.*

clearer than its alternatives and hence more suitable for the purposes of empirical analysis[146]. The argument in favour of using Dahl's systematized concept of democracy without major additions can be summarized as follows: it is the most commonly used concept and using it minimizes the risk of 'unsettling the semantic field'[147].

The limitations and difficulties regarding the operationalization of a thicker concept of democracy are significant because ultimately new democracies, such as those of the late third wave, have been assessed in terms of their efficacy to hold elections and to protect civil liberties and rule of law, disregarding economic, social and cultural rights as well as accountability mechanisms. For instance, even though Latin American countries hold periodical elections – which does not necessarily imply that elections are free and fair –, it is undeniable that violence, insecurity, poverty, and inequality remain to be the Achilles heel that prevents the advancement of democracy in the region[148]. As a result, democracy is depicted as a system that is tied to specific civil rights which are limited because of the absence of socioeconomic and cultural rights and linked to political rights that are, to some extent, in force[149].

This brings the concept of the interconnection of rights back into the discussion. A meaningful and well-balanced concept of democracy beyond the electoral parameters might benefit from an understanding of the interconnection between civil and political rights and economic, social and cultural rights.

1.4. The interconnection of rights for a meaningful sense of democracy

Democracy and human rights appear to be distinct concepts within the literature. According to Beetham[150], this separation resulted from the Cold War, from the international rivalry between competing political and social systems and from an academic division of labour, which assigned the study of democracy to political science or comparative politics, and the study of human rights to law and jurisprudence. However, as Beetham suggests, nowadays, the distance between

[146] See Munck, G. L. (2007). The Study of Politics and Democracy: Touchstones of a Research Agenda. In G. L. Munck (Ed.), *Regimes and Democracy in Latin America: Theories and Methods*. New York: Oxford University Press, p. 29. For instance, Adam Prezeworski, who defends a minimalist Shumpeterian conception of democracy, argues that democracy has become an altar on which everyone wants to hang his or her favorite *ex voto*. See Przeworski, A. (2003). Minimalist Conception of Democracy: A Defense. In R. Dahl, I. Shapiro, & J. A. Cheibub (Eds.), *The Democracy Sourcebook* (pp. 12–17). Massachusetts: The MIT Press, p. 12.
[147] See Schneider, C. Q. (2009), *op. cit.*, p. 22.
[148] See Corporación Latinobarómetro. 'Informe 2013', 01 de noviembre 2013, Santiago de Chile.
[149] See Vite Perez, M. A. (2012). *México: democracia y desigualdad social. Un enfoque sociológico*. Mexico City: Miguel Ángel Porrúa, p. 7.
[150] See Beetham, D. (1997). Linking Democracy and Human Rights. *Peace Review, 9*(3), p. 351.

democracy and human rights can no longer stand as the process of democratization has shown democracy along with human rights to be a universal aspiration[151].

Since the mid-nineties, the interconnection of rights for a meaningful sense of democracy has attracted research interest. For instance, Sen[152] has pointed out that civil and political rights have an instrumental role in the conceptualization of economic needs that results in enhancing the hearing that people get in expressing and supporting their claims to political attention. According to him, the conceptualization of economic needs depends on open public debates as well as discussions and may require exercising basic political rights, especially those related to guaranteeing open discussion, debate, criticism and dissent as they are central to the processes of generating informed and reflected choices. Therefore, from Sen's point of view, these processes are crucial for the formation of values and priorities without which democracy will not blossom.

Beetham warns against the direct and indirect repercussions for democracy when economic, social and cultural rights are denied to any significant part of the population[153]. He explains that the deprivation of economic, social and cultural rights has direct consequences to democracy because it hampers citizens' ability to exercise their civil and political rights. Physical security and access to life necessities such as shelter, subsistence, clean water, sanitation and basic health care are previous conditions to exercise civil and political rights. Therefore, those who are denied education or employment cannot engage in civil and public life to the same extent as others.

The indirect consequences for the society and for the viability of democratic political institutions occur because social and economic deprivations affect the quality of democratic life for all[154]. For instance, widespread unemployment, dispossession, or destitution provides a breeding ground for crimes against people and property, and a generalized insecurity invites repressive and authoritarian forms of social control. These conditions also promote politics of intolerance and make electorates vulnerable to populist leaders or parties that ascribe the odium of economic insecurity onto visible minorities, or onto ethnic, racial, religious or linguistic diversity[155].

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[151] See for instance, the Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, The General Assembly Resolution A/RES/49/30, December 1994 on Support by the United Nations system for the efforts of Governments to promote and consolidate new or restored democracies, The General Assembly Resolution, A/RES/46/137, December 1991 on Enhancing the effectiveness of the principle of periodic and genuine elections, Commission on Human Rights resolution 2000/47 on Promoting and consolidating democracy, Commission on Human Rights resolution 2001/41 on Continuing dialogue on measures to promote and consolidate democracy.

[152] See Sen, A. (1999). *Development as Freedom*. New York: Anchor Books, pp. 146-153.

[153] See Beetham, D. (1997), *op. cit*., p. 353.

[154] Ibidem.

[155] Idem, p. 354.

In established democracies, this may not threaten the survival of the electoral politics itself but undermine the social and public life on which the quality of democratic institutions depends. However, in non-established democracies such deprivations threaten both electoral democracy and the social and public life[156].

From a perspective of the interconnection of rights, it is problematic to understand the concept of democracy linked only to civil and political rights because these rights are intrinsically connected to economic, social, and cultural rights. However, a robust concept of democracy raises the parameters of democratic performance, and this may also be problematic because the number of reputable democracies could be considerably reduced.

1.5. Towards a multidimensional understanding of democracy

Coppedge *et al*. consider that if one really wants to puzzle out what democracy means in reality, i.e., how people live and understand democracy; how even different views of democracy can be held in a single polity/country/nation-state by different actors; how the understanding and enforceability of rights are assimilated in established and non-established democracies, it is necessary to accept that the concept of democracy in itself resists closure[157].

From this viewpoint, instead of departing from a single concept of democracy, Coppedge *et al*. propose to capture various possible conceptions of democracy. They found that six models of democracy prevail within theory and practice: electoral, liberal, majoritarian, participatory, deliberative, and egalitarian[158]. A brief definition of each model of democracy, based on Coppedge *et al*., is presented before disaggregating them into values, principles, rights protected and relevant institutions.

Electoral democracy is achieved through competition among leadership groups that struggle for the electorate's approval during periodic elections. Parties and elections are the crucial instruments in this largely procedural account of the democratic process. Civil liberties, active media, a written constitution and an independent judiciary that enforce the rules of the game are considered important factors for ensuring and enhancing electoral contestation.

Liberal democracy (sometimes called consensual or pluralist) stresses the intrinsic importance of transparency, civil liberties, rule of law, horizontal accountability (effective checks on rules) and

[156] Idem, p. 355.
[157] See Coppedge, M., Gerring, J., Altman, D., Bernhard, M., Fish, S., Hicken, A., … Teorell, J. (2011), *op. cit*., p. 258.
[158] Idem, pp. 253-254.

minority rights. These are seen as defining features of democracy, not simply as aids to political competition. The liberal model deems the quality of democracy by the limits placed on government. Therefore, principles and procedures must be established to ensure that rule by the majority does not result in the oppression of minorities or the loss of individual liberties.

Majoritarian democracy reflects the principle that the will of the majority should be sovereign. The many should prevail over the few. To facilitate this, political institutions must centralize and concentrate, rather than disperse, power (within the context of competitive elections), which means that majoritarian democracy is in tension with liberal democracy in many respects. Even so, many aspects of democracy are compatible with both conceptions such as civil liberties, due process, human rights, and transparency.

Participatory democracy is usually viewed as a lineal descendant of 'direct' democracy, as derived from the Athenian model. The participatory component is regarded as the most democratic element of the polity. This model highlights not only the importance of voting, but also the significance of citizen assemblies, party primaries, *referenda*, social movements, public hearings, town hall meetings and other forums of citizen engagement.

Deliberative democracy focuses on the process by which decisions are reached in a polity. A deliberative process is one in which public reasoning, focused on the common good, motivates political decisions. Deliberative democracy requires more than a mindless aggregation of existing preferences; there should be a respectful dialogue at all levels – from preference formation to final decision – among informed and competent participants who are open to persuasion.

Egalitarian democracy addresses the goal of political equality. An egalitarian polity is one that achieves equal participation, equal representation, equal protection (civil liberties extended to all and due process for all), and equal resources (such as income, education and health). Resources are presumed to be a key feature of political empowerment; where resources are not equally shared, it is difficult to imagine a polity in which citizens enjoy equal political power. Political equality presumes social equality.

Coppedge *et al.* argue that one can hardly expect to find a concept of democracy that fits perfectly in a given country. On the contrary, it is possible to find characteristics of these six types of democracy in a single country as long as they do not represent an unsolvable contradiction. Therefore, many combinations of democracy can be envisioned if they do not clash with each

other, or one can even have an approach that includes all six conceptions as part of the concept of democracy[159].

To some extent, these definitions show that the values behind each model of democracy are tied to specific principles and institutions that are necessary for their realisation. The V-Dem project uses this conceptual scheme to operationalize and measure democracy. It provides a multidimensional and disaggregated dataset that reflects the complexity of five high-level principles of democracy, i.e., electoral, liberal, participatory, deliberative and egalitarian[160]. Table 1-1 disaggregates each index of democracy into its main principles and institutions and shows the attributes used for their operationalisation[161].

As can be observed in Table 1-1, the components of the Electoral Democracy Index capture Dahl's concept of polyarchy: freedom of association, suffrage, clean elections, elected executive, freedom of expression and alternative sources of information. Therefore, the Electoral Democracy Index is identified in the V-Dem project as polyarchy and serves as the foundation for the other four indices, i.e., the scores of the Electoral Democracy Index (v2x_polyarchy) are combined with the scores of the components measuring deliberation, equalitarianism, participation and liberal constitutionalism[162]. The V-Dem project is an international research project that has developed new indicators of democracy in countries all over the world from 1789 to the present[163].

[159] Idem, p. 255.

[160] The reduction from six to five types of democracy is explained on the grounds that the majoritarian and consensual principles have proven impossible to be operationalized and measured in a coherent and defensible way. Instead, the V-Dem project provides indices measuring some core aspects of these two principles, the Divided party control index, and the Division of power index respectively. See Coppedge, Michael, John Gerring, Carl Henrik Knutsen, Staffan I. Lindberg, Jan Teorell, Kyle L. Marquardt, Juraj Medzihorsky, Daniel Pemstein, Nazifa Alizada, Lisa Gastaldi, Garry Hindle, Johannes von Römer, Eitan Tzelgov, Yi-ting Wang, and Steven Wilson. 2020. V-Dem Methodology v9. *Varieties of Democracy* (V-Dem) Project.

[161] See Coppedge, M., Gerring, J., Knutsen, C. H., Lindberg, S. I., Teorell, J., Altman, D., … Ziblatt, D. (2019). *V-Dem Codebook V9. Varieties of Democracy (V-Dem) Project.*

[162] Idem p. 39.

[163] See the website of the Varieties of Democracy at the University of Gothenburg https://www.gu.se/en/research/varieties-of-democracy-v-dem (Accessed March 2021).

Table 1-1.V-Dem High-Level Democracy Indices. Principles and institutions.

Indices	Aggregation		Principles and institutions
Electoral Democracy Index (Polyarchy)	Freedom of expression and alternative sources of information Freedom of association Share of population with suffrage Clean elections Elected officials		Government based on contestation and competition. Elections, political parties, competitiveness and turnover. A written constitution, an active media and an independent judiciary.
Liberal Democracy Index	Electoral democracy +	Liberal component	Limited government, multiple veto points, horizontal accountability individual rights, civil liberties, and transparency. Multiple, independent, and decentralized institutions. Media, interest groups, the judiciary, and a written constitution with explicit guarantees.
		Equality before the law and individual liberty index Judicial constraints on the executive index Legislative constraints on the executive index	
Participatory Democracy Index	Electoral democracy +	Participatory component	Government by the people. Voting together with citizen participation. Election law, civil society, local government, direct democracy, *referenda*, social movements, public hearings.
		Civil society participation index Direct popular vote index Local government index Regional government index	
Deliberative Democracy Index	Electoral democracy +	Deliberative component	Government by reason. Public reasoning motivates political decisions, dialogue takes place among informed and competent participants. Deliberative bodies: media, hearings, panels, assemblies, and courts.
		Reasoned justification Common good Respect counterarguments Range of consultation Engaged society	
Egalitarian Democracy Index	Electoral democracy +	Egalitarian component	Government based on political and social equality. Institutions designed to ensure equal participation, equal representation, equal protection, equal resources.
		Equal protection index Equal access index Equal distribution of resources index	

Source: Own elaboration based on V-Dem Codebook V9.

Remarkably, the multidimensional approach to democracy considers courts as necessary institutions to preserve the variety of democratic values. Electoral democracy, liberal democracy and deliberative democracy explicitly refer to courts. Egalitarian and participatory democracy do so implicitly if one considers that courts can be ideal institutions for conducting public hearings, promoting equality and protecting civil and political rights that are essential for citizen participation.

Additionally, the multidimensional approach to democracy seems to favour the understanding that human rights are interconnected. Each dimension of democracy is based on values and principles grounded in human rights. Using the catalogue of rights provided by the ICCPR and the ICESCR, the rights linked to each dimension of democracy were identified. Table A-1 and Table A-2 in Appendix A disaggregate the rights covered by both international covenants.

Accordingly, democracy, as a multidimensional concept, needs to address the full range of human rights, i.e., not only civil and political rights, but also economic, social and cultural rights. From this perspective, democracy can be understood as being structured in three main layers. The thinnest layer corresponds to electoral democracy associated with electoral rights. Liberal and participatory democracy constitute the intermediate layer that covers the catalogue of civil and political rights. Deliberative democracy and egalitarian democracy represent the thickest layer of the concept of democracy comprehensive of a broad spectrum of rights that includes both civil and political rights and economic, social and cultural rights. See Table 1-2.

Table 1-2. Models of Democracy with the International Covenants on Human Rights

	Models of Democracy	Civil and Political Rights								Socio economic and cultural rights						
		Physical integrity	Liberty &Security	Procedural fairness in law	Individual liberty	Prohibition of propaganda (war and national/religious hatred)	Political participation	Non-discrimination/equality before the law	Minority rights	Right to Work	Right to Social Security	Protection and assistance to family and children	Right to an adequate standard of living	Right to health	Right to education	Cultural rights
Thin	Electoral				•		•									
Intermediate	Liberal	•	•	•	•		•	•								
	Participatory[164]	•	•	•	•		•	•	•							
Thick	Deliberative[165]	•	•	•	•		•	•	•	•	•	•	•	•	•	•
	Egalitarian	•	•	•	•		•	•	•	•	•	•	•	•	•	•
	Source: Own elaboration.															

[164] Since participatory democracy stresses citizen participation without rejecting the values protected by electoral or liberal democracy, civil and political rights were considered.

[165] It is assumed that deliberative democracy embraces the protection of socio-economic and cultural rights because, according to Habermas, citizens can only make an appropriate use of their public autonomy, as guaranteed by political rights, if they are sufficiently independent by virtue of an equally protected private autonomy in their life. See Habermas, J. (2001), *op. cit.*, p. 767 *et seq*. Therefore, private or personal autonomy may imply that citizens have to enjoy the same conditions in order to be able to participate in the discussion of public goods as equals. These conditions entail that everyone has access to those goods that are necessary for the development of his/her personal autonomy: food, housing, health services, education and work.

The multidimensional understanding of democracy highlights the significance of human rights on the realization of democratic ideals. From this point of view, the role of constitutional courts in furthering democracy can be approached from the perspective of human rights, i.e., whether constitutional courts are responsive to rights claims and whether the responsiveness of courts may relate to democratic performance.

Accordingly, the multidimensional concept of democracy seems to be useful for the empirical purposes of this research. There are several reasons for this. First, the inclusiveness of the concept brings together a variety of views of democracy. Second, it gives free leeway to take into account economic, social and cultural rights as well as civil and political rights for the effective realization of democracy. Third, the concept is comprehensive of both substantive and procedural aspects of democracy. Fourth, it suggests that democracy is an open-ended process that has the capacity to improve itself by virtue of the amalgam of different ideals that converge in the realization of the full range of human rights. Finally, the five dimensions of democracy have been operationalised and successfully used to measure the progress of democracy in 120 countries.

Concluding section

Chapter 1 traced the evolution of democracy to identify where it intersects with courts, determine the current state of the late third wave and clarify the concept of democracy that will be used for the empirical analysis. A modern conception of democracy builds on liberal and representative democracy. On that basis, the second and third democratic waves have been accompanied by the establishment of constitutional courts. Thus, courts were created to preserve liberal values, in particular to exert horizontal accountability, i.e., to ensure that all state personnel, elected or non-elected, act within the laws and powers endowed.

The expansion of democracy during the late third wave did not lead to well-functioning liberal democracies, but to the emergence of hybrid regimes, i.e., regimes that share attributes of democratic life with democratic deficits. Hybrid regimes suffer from political syndromes that weaken the state's performance *vis-à-vis* its citizens causing public disaffection to democracy and preventing citizens from political participation beyond the ballot box. Moreover, they are more prone to massive human rights violations, civil war and the exacerbation of poverty and inequality. This has resulted in the emergence of the so-called 'third autocratization wave' that

is taking place now. For the first time, since 2001, autocracies are the majority (92 countries out of 179)[166].

A positive outcome of the late third wave is that electoral democracy has been established as the only way to access power. In addition, the processes of democratization and autocratization highlight the awakening of a democratic conscience reflected in the revitalization of citizen participation and mass pro-democracy movements around the world.

The potential of constitutional courts to contribute to democracy under these circumstances should be emphasised. In addition to voting and social mobilization, citizens have constitutional adjudication as a third mechanism to make their voices heard and to seek redress for violations of human rights. From this viewpoint, the constitutional adjudication of human rights can be seen as a correcting mechanism of democracy alongside judicial review[167].

Additionally, the chapter shows that the disagreement about the scope of the concept of democracy has given room to operationalization and measurement problems. Based on Dahl's polyarchy concept, democracies have been assessed in terms of their efficacy to hold elections and to protect civil liberties and the rule of law, deliberately excluding social rights and accountability mechanisms to avoid difficulties in the operationalization process. This is problematic because civil and political rights play an instrumental role in the conceptualization of economic needs. The deprivation of social rights hampers citizens' ability to exercise their civil and political rights (individual level) and affect the quality of life giving room to crime and insecurity that trigger repressive and authoritarian forms of social control (societal level).

The multidimensional approach to democracy seems to be useful for the empirical purposes of this research because, unlike other concepts of democracy, it encompasses a variety of models of democracy, i.e., electoral, liberal, participatory, deliberative and egalitarian. Each dimension of democracy is based on values and principles linked to civil and political rights as well as of economic, social and cultural rights. This approach favours an understanding of democracy grounded in the effective realisation of human rights. In turn, it increases the relevance to observe the responsiveness of constitutional courts to rights claims *vis-à-vis* democratic performance.

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[166] See V-Dem Institute. (2020), *op. cit*., pp. 13 and 40.

[167] This idea is further developed in Chapters 2 and 3 building on the ideas of Nino, C. S. (1993). A Philosophical Reconstruction of Judicial Review. *Cardozo Law Review*, *14*(3–4), p. 799 ff. and Staton, J. K., Reenock, C. M., Holsinger, J., & Lindberg, S. I. I. (2018). Can Courts Be Bulwarks of Democracy? *V-Dem Working Papers*, *71*(July), p. 10.

Chapter 2. Constitutional Courts

Constitutional courts and judicial review have been the subject matter of many studies. Much of the knowledge about these institutions comes from experiences in Western democracies, i.e., North America and Continental Europe. However, since mid-90s scholars have showed interest in the analysis of constitutional courts established in Eastern Europe, Asia, Africa and Latin America during the late third wave[168].

After World War II, constitutional courts were identified as guardians of the Constitution and therefore as a key factor for the democratization process. However, as noted in Chapter 1, most of the countries that began their democratization process after the fall of the Berlin Wall in 1989 have not become well-functioning democracies, but rather hybrid regimes, i.e., regimes that combine attributes of democratic political life with democratic deficits and that have stagnated in the grey zone. This raises the question about the role of constitutional courts *vis-à-vis* democracy in emerging democracies.

The aim of this chapter is to review the literature on the establishment of constitutional courts and their expansion during the late third wave in order to identify theoretical and conceptual elements that can serve as a basis for further empirical analysis of the relationship between constitutional courts and democracy. The chapter is divided into four parts. The first part traces the emergence of constitutional courts in Western countries. The second part reports on the expansion of constitutional courts during the late third wave. The third part examines the literature on constitutional courts in emerging democracies. The fourth part discusses the methods used, research weaknesses and new lines of investigation in the field of courts in emerging democracies. Finally, the concluding section reflects on the elements identified in the literature review as significant for the empirical analysis of the relationship between courts and democracy.

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[168] Among others, Tate, C. N., & Vallinder, T. (1995). *The Global Expansion of Judicial Power*. New York: New York University Press; Sadurski, W. (2009). Judicial Review in Central and Eastern Europe: Rationales or Rationalizations? *Israel Law Review*, *42*(3), 500–527; Ginsburg, T. (2008). Constitutional Courts in East Asia: Understanding Variation. *Journal of Comparative Law*, *3*(80–99); Czarnota, A., Krygier, M., & Wojciech Sadurski. (2005). *Rethinking the Rule of Law after Communism*. Budapest-New York: Central European University Press; Chavez, R. B. (2008). The rule of law and courts in democratizing regimes. In K. E. Whittington, R. D. Kelemen, & G. A. Caldeira (Eds.), *The Oxford Handbook of Law and Politics*. Oxford: Oxford University Press; Domingo, P. (2004). Judicialization of politics or politicization of the judiciary: Recent trends in Latin America. *Democratization*, *11*(1); Gargarella, R., Domingo, P., & Roux, T. (Eds.). (2006). *Courts and Social Transformation in New Democracies. An Institutional Voice for the poor?* Hampshire: Ashgate; Gloppen, S., Gargarella, R., & Skaar, E. (Eds.). (2004). *Democratization and the Judiciary. The Accountability Function of Courts in New Democracies*. London: Frank Cass.

2.1. The emergence of constitutional courts

The establishment of constitutional courts or court-like bodies endowed with judicial review is linked to relevant socio-economic and political crises in Western countries[169]. In the United States, federalism was a key factor for the emergence of a diffused system of judicial review as a means to keep a nation together[170]. In Europe, the atrocities committed during World War II proved that it was necessary to overcome the old reservations and to open the doors for constitutional adjudication[171] in order to limit the power of executive and legislative branches and to protect people's human rights through an independent and centralized constitutional court.

While *Marbuy vs. Madison* (1803) is assumed in constitutional doctrine as a paradigmatic resolution linked to the early emergence of judicial review in the United States, the horrors of the Holocaust and the damage caused by World War II[172] can be considered as the breaking point that triggered the phenomenon of the establishment of constitutional courts as bulwarks of liberal democracy.

World War II gave impetus not only to increase the importance of the protection of human rights and to limit the power of the executive and legislative branches of government but also to the necessity to strengthen the authority of the Constitution. In the 1950s, Western Europe began to emerge as the epicentre of a 'new constitutionalism', a model of democracy and state legitimacy that rejects the dogmas of legislative sovereignty, prioritizes fundamental rights, and requires a mode of constitutional review[173]. Consequently, twentieth-century constitutions drafted following World War II share a commitment to the basic principles of liberal constitutional democracy, i.e., the separation of powers, judicial review of governmental action, and judicial protection of individual human rights[174]. Accordingly, scholars point out that the

[169] See Neal, T. C., & Vallinder, T. (1995), *op. cit.*, p. 519.
[170] See Pasquino, P. (2014). A post-Kelsenian typology of constitutional systems. In C. López-Guerra & J. Maskivker (Eds.), *Rationality, Democracy, and Justice. The Legacy of Jon Elster*. New York: Cambridge University Press, p. 87.
[171] See Grimm, D. (1999). Constitutional Adjudication and Democracy. *Israel Law Review*, *33*(2), p. 194.
[172] See Stone Sweet, A. (2012). Constitutional Courts. In M. Rosenfeld & A. Sajó (Eds.), *The Oxford Handbook of Comparative Constitutional Law*. Oxford: Oxford University Press, p. 818. According to Stone Sweet, the emergence of the so called 'new constitutionalism' in Europe, with its heavy emphasis on rights and review, was a reaction to the terrible consequences of World War II.
[173] Idem, p. 816.
[174] See Scheppele, K. L. (2003). The Agendas of Comparative Constitutionalism. *Law & Courts. Newsletter of the Law & Courts Section of the American Political Science Association*, *13*(2), p. 12 quoted by Roesler, S. (2007). Permutations of Judicial Power: The New Constitutionalism and the Expansion of Judicial Authority - Review Article. *Law & Social Inquiry*, *32*(2), p. 547.

most important transformation in these new constitutions was the introduction of constitutional courts[175].

Therefore, it is not surprising to find in constitutional law literature that constitutional courts endowed with judicial review are considered key institutions not only to prevent abuses of power[176], but also to protect liberal values such as the respect of elections, political liberties, civil rights and the system of check and balances through an independent body[177].

It is worth mentioning that some old European democracies, such as the Netherlands[178] and the United Kingdom[179], refused to adopt new constitutions and to establish constitutional courts or court-like bodies to protect human rights and/or to limit governmental action. Ferejohn & Pasquino point out that probably these established democracies considered unnecessary to implement additional measures to protect their rights against their governments if such measures threatened their parliaments[180] or the fact that there was no key constitutional moment, no 'difficult times' for democracy. In addition, Grimm argues that in the context of democratic regimes, the limits imposed by the constitution are usually respected and therefore courts are not seen as exclusive guardians of the constitution. Inter-agency control, popular support for the constitution and effective media also function as guardians of the constitution[181]. This means that democracy does not necessarily require the establishment of a constitutional court.

However, it seems that constitutional courts were a key factor to settle democracy in challenging times as evidenced by the cases of Germany, Italy and Spain, among others.

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[175] See Ferejohn, J., & Pasquino, P. (2004). Constitutional Adjudication: Lessons from Europe. *Texas Law Review*, *82*(7), p. 1671.

[176] See Vigo, R. L. (2003). *De la Ley al Derecho*. Mexico: Porrúa, p.208.

[177] As mentioned in Chapter 1, liberal democracy entails five constitutive elements: (1) elections (regular, free, general, equal and fair), (2) political liberties (freedom of speech, opinion, association, demonstration, and petition), (3) civil rights (equal access to and treatment by the law and protection against illegitimate arrest, exile, terror, torture and unjustifiable intervention in the personal life of citizens), (4) horizontal accountability (lawful government action is checked by the division of powers between mutually independent and autonomous legislative, executive, and judicial bodies), and (5) effective power to govern (the effective right to rule is placed in elected officials). See Merkel, W. (2004), *op. cit.*, pp. 38-42.

[178] In the Netherlands, Art. 120 of the Grondwet (Dutch Constitution) prohibits judicial review of the constitutionality of Acts of Parliament and treaties. However, this does not exclude reviewing Acts of Parliament which are contrary to international treaty obligations such as the European Convention on Human Rights. See Dannemann, G. (1994). Constitutional Complaints: The European Perspective. *International and Comparative Law Quarterly*, *43*(1), p. 142.

[179] The British judiciary allows judicial review in two fundamental areas: human rights and European law, but formally there is no constitutional review. See Garoupa, N. (2016). *Constitutional Review* (Texas A&M University School of Law), p. 7.

[180] See Ferejohn, J., & Pasquino, P. (2004), *op. cit.*, p. 1674.

[181] See Grimm, D. (1999), *op. cit.*, p. 199.

Moreover, constitutional review of legislation become a new force in politics as part of the transition from an authoritarian regimen[182]. Therefore, the post-World War II period is one of the most significant ones not only for democracy, as pointed out in Chapter 1 but also for the emergence, consolidation and expansion of the constitutional dimension of justice[183]. It is precisely in this period that the establishment of empowered constitutional courts was linked to the prevention of democratic malfunctions[184].

2.1.1. The model of review adopted

Contrary to the United States that has a diffused or decentralized model of review which allows ordinary judges to review constitutional matters, during post-World War II, most European countries opted for a concentrated or centralized model of review in which constitutional matters are dealt with by specialized constitutional courts. Given that judges were essentially career civil servants whose responsibility was to carry out the commands of the legislature, none of the new post authoritarian constitutions considered permitting regular judges to exercise powers of judicial review. These powers had to be vested in a wholly new institution outside of the judiciary[185].

The concentrated or centralized model of review was created in 1920 by Austrian jurist Hans Kelsen[186]. Kelsen conceived a constitutional court as a key element of the new Austrian Constitution and as an independent jurisdictional body outside of the judiciary, whose members were appointed for life by the legislature to adjudicate constitutional disputes (mainly regarding Austrian federalism)[187]. Therefore, in a centralized model of review, constitutional courts possess a monopoly on the power to invalidate infra-constitutional legal norms, including statutes, they are detached from the legislative, executive, and judicial branches of government

[182] See Robertson, D. (2010). *The Judge as Political Theorist. Contemporary Constitutional Review*. New Jersey: Princeton University Press, p. 29.
[183] See Cappelletti, M. (1992). Access to justice as a theoretical approach to law and a practical programme for reform. *South African Law Journal*, *109*, p. 35. Scholars also refer to this phenomenon as the global expansion of judicial power. See also Tate, C. N., & Vallinder, T. (1995), *op. cit*.
[184] For instance, Ferejohn and Pasquino consider that constitutional adjudication is essentially a post-authoritarian phenomenon. See Ferejohn, J., & Pasquino, P. (2004), *op. cit*., p. 1674. Sadurski points out that the establishment of constitutional courts endowed with strong powers took place in Central and Eastern Europe as an inevitable signal of the transition from an authoritarian regimen to liberal democracy. See Sadurski, W. (2009), *op. cit*., p. 500.
[185] See Ferejohn, J., & Pasquino, P. (2004), *op. cit.* p. 1676.
[186] Hans Kelsen, an Austrian jurist, was entrusted with the task of drafting the Constitution of the new Republic of Austria. Accordingly, Therefore, the establishment of the first constitutional court in Europe took place in Austria under the Constitution of 1920.
[187] See Ginsburg, T., & Versteeg, M. (2014). Why do countries adopt constitutional review? *Journal of Law, Economics, and Organization*, *30*(3), p. 591.

and their rulings are final[188]. Usually constitutional courts do not resolve concrete cases between two litigating parties, but answer constitutional questions referred to them by elected government officials[189]. This means that constitutional courts may review statutes 'in the abstract', either before or after the adoption of a law.

One of the factors contributing to the development of constitutional courts during the second and third democratic wave was the constitutionalization of rights[190]. The complete disregard of fundamental rights during the Nazi regime triggered their protection as a concern of the highest priority. Constitutional rights strengthen the position of individuals *vis-à-vis* the legislative, executive and judiciary branches of government provided they can effectuate those rights through a system of constitutional review of governmental action[191].

Therefore, whereas the Austrian model only provided for limited jurisdiction of certain disputes, the German model introduced constitutional complaints[192] which are special proceedings that provide a judicial remedy against violations of constitutional rights and can be lodged by the person adversely affected by the act in question seeking the restoration of his or her rights. Germany is pointed out as an example where constitutional law was used to prevent the history from repeating itself. For instance, the inclusion of human dignity in Article 1(1) of the Basic Law was not only symbolic, but also had immediate legal effect[193].

The introduction of constitutional complaints in Germany, Austria and Spain played an important role in democratizing access to constitutional courts[194] and shaped the role of the courts as guardians of the constitution, i.e., protecting the division of powers through judicial review and, protecting human rights when deciding on constitutional complaints.

Consequently, courts started to gain authority and to be recognized as an important part of the State, i.e., political actors. In turn, this caused the transformation of constitutional systems at a

[188] According to Stone Sweet, this means that constitutional judges occupy their own 'constitutional space', which is neither clearly 'judicial' nor 'political' in classic continental terms. See Stone Sweet, A. (2012), *op. cit.*, p. 818.
[189] See Ginsburg, Tom and Mila Versteeg. (2014), *op. cit*., p. 591.
[190] Santos refers in particular to the emergence of the welfare state through the establishment of social provisions into the constitutions. See Santos, B. de S. (2009). *Sociología Jurídica Crítica. Para un nuevo sentido común en el derecho*. Madrid: Trotta, pp. 89-90.
[191] See Sadurski, W. (1999). Judicial Review, Separation of Powers and Democracy: the Problem of Activist Constitutional Tribunals in Postcommunist Central Europe. *Studi Polici*, *3*, p. 93.
[192] See Ginsburg, Tom and Mila Versteeg. (2014), *op. cit*., p. 592.
[193] This provision formed the basis of all fundamental rights and gave them a purpose. Human dignity was declared to be 'unantastbar' (inviolable). In addition, human dignity not only had to be respected by the state, it should also be protected against attacks from third parties. See Grimm, D. (2015). The role of fundamental rights after sixty-five years of constitutional jurisprudence in Germany. *I.CON*, *13*(1), p. 13.
[194] See Ginsburg, Tom and Mila Versteeg. (2014), *op. cit*., p. 592.

national, international, and even supranational level. According to Mazmanyan, Popelier, and Vandenbruwaene, constitutional review was profoundly transformed at the end of the Second World War not only due to its geographical spread but also due to its gradual expansion beyond the boundaries of sovereign states, conveying itself as the guardian of the emerging transnational constitutional framework[195].

2.1.2. The counter-majoritarian difficulty debate

The tension between democratic representatives *vs.* constitutional judges holds that constitutional courts with the power of judicial review thwart the will of the majority when they declare as unconstitutional laws or acts issued by democratic representatives. Scholars have dealt with this issue at least since 1893, when Thayer famously argued that judicial review debilitates the political branches of government. In the 1960s, Bickel labelled the inconsistency of judicial review with democracy as the 'counter-majoritarian difficulty'[196]. Hence, the theoretical pendulum goes from Dworkin[197] on the side of the legitimacy of judicial review to Waldron[198] on the side of illegitimacy of judicial review. The Dworkin side of the pendulum i.e., legal constitutionalism defends the rule of law while the Waldron side i.e., political constitutionalism defends majoritarian democracy.

From the standpoint of legal constitutionalism, justification of judicial review through the supremacy of the constitution appears in two forms: (1) the supremacy of the constitution necessitates judicial review and (2) the constitution is not always supreme, but if such supremacy is desired, review is the only means to achieve it[199].

Political constitutionalism holds that the democratic mechanism of open elections between competing parties and decision-making by majority rule offers superior and sufficient methods for upholding rights and the rule of law. The absence of popular accountability renders judicial review a form of arbitrary rule which lacks the incentive structure that democracy provides to ensure that rulers treat the ruled with equal concern and respect[200]. Although political

[195] See Mazmanyan, A., Popelier, P., & Vandenbruwaene, W. (2013). Constitutional Courts and Multilevel Governance in Europe. Editors' introduction. In A. Mazmanyan, P. Popelier, & W. Vandenbruwaene (Eds.), *The Role of Constitutional Courts in Multilevel Governance*. Cambridge-Antwerp-Portland: Intersentia, pp. 3-4.
[196] See Bickel, A. M. (1962). *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. New Haven: Yale University Press.
[197] Among others, Hans Kelsen, Justice John Marshall and Ronald Dworkin can be considered defenders of judicial review.
[198] Among others, Alexander Bickel, Jeremy Waldron and Richard Bellamy can be considered critics of judicial review.
[199] See Troper, M. (2003). The logic of justification of judicial review. *I.CON*, *1*(1), pp. 103-108.
[200] See Bellamy, R. (2007). *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy*. Cambridge: Cambridge University Press.

constitutionalism acknowledges the significance of fundamental rights, it rejects their protection via a rigid constitution because this removes them for deliberation[201].

From another perspective, Grimm considers that there is neither a fundamental contradiction nor a necessary connection between judicial review and democracy. On the one hand, a special agency that aims to determine the meaning of the constitution and ensure that all acts of the government conform with constitutional requirements. On the other hand, the existence of this agency and the exercise of its powers cannot be considered undemocratic. On the other hand, democratic states can live without constitutional adjudication. The United Kingdom and the Netherlands are examples of democratic states that do not support constitutional adjudication. This shows that respect for the law and the constitution depends on deeper roots than legal precautions[202].

From this viewpoint, judicial review has several democratic advantages, which also creates some risks. The advantages are as follows: the decisions of courts solve disputes and create certainty about the meaning of the constitution; the enforcement of rights and bills of rights is no longer a merely symbolic and legally irrelevant part of constitutional law. In this way, courts can add legitimacy to the democratic system as a whole by limiting governmental power. On the other hand, there are also risks, such as the lack of accountability and democratic control. Furthermore, the application of norms cannot be clearly distinguished, which enables courts to use their competence both to invalidate certain governmental acts and to require actions that the government was not willing to perform[203].

In 1957 Robert Dahl demonstrated empirically that the Supreme Court of the United States of America is indeed a policy maker and that it was rarely out of line with the policies of the nation's law-making majorities[204]. Since then, scholars claim that the court is essentially a majoritarian institution. On the one hand, it is argued that a clear majority of the decisions of the Supreme Court agree with public opinion[205]. On the other hand, it is assumed that legislative deference to the judiciary is simply one political strategy that is inherent in the structure of

[201] See Salazar Ugarte, P. (2006). *La democracia constitucional. Una radiografía teórica*. México: IIJ-UNAM-FCE, p. 230.
[202] See Grimm, D. (1999), *op. cit.*, pp. 195-196.
[203] Idem, 204-207.
[204] See Dahl Robert A. (1957). Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker. *Journal of Public Law, 6*, 279–295.
[205] Marshall, T. R. (2008). *Public Opinion and the Rehnquist Court*. New York: State University of New York and Friedman, B. (2009). *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*. New York: Farrar Straus and Giroux.

American two-party politics and is used to maintain the hegemony of their preferred issues[206]. Recently, Bassok and Dotan have argued that the counter-majoritarian difficulty is partly solved by demonstrating the enduring public support for the Supreme Court of the United States and the wide acceptance of its judicial review authority by all relevant players. Therefore, they suggest that the authority of judicial review is based on its sociological legitimacy, i.e., the public attitudes regarding the legitimacy of the court[207].

The aptitude of constitutional courts to make law as well as the position that they have the 'final say' have been widely accepted in both American and Kelsenian systems of review since World War II. In general, the fact that constitutional courts review the constitutionality of the performance of the other two branches of the State is regarded positively to the extent that 'court decisions striking down federal statutes look more like exercises of delegated authority than like counter-majoritarian judicial review'[208]. From this perspective, constitutional judicial review is seen as a tool in the service of democracy or as essential to attain other ends compatible with democracy[209].

Another strand of research proposes a weak-form judicial review as a solution to reconcile the tension between parliamentary supremacy and judicial supremacy regarding the judicial enforcement of human rights[210]. According to Tushnet, this debate distinguishes between strong-form judicial review *vs.* weak-form judicial review. The strong-form is identified with the American model of review as the only real alternative to parliamentary supremacy in a context in which the interpretive judgments of the court are final. Weak-form judicial review holds out the promise of protecting liberal rights in a form that reduces the risk of wrongful interference with democratic self-governance[211]. This implies that the power of the legislature to provide constitutional interpretations that differ from or alter the constitutional interpretations provided by the courts is openly acknowledged. Several types of weak-form judicial review have been developed among the Commonwealth systems[212], however, the

[206] See Graber, M. A. (1993). The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary. *Studies in American Political Development*, *7*(Spring), p. 45.
[207] See Bassok, O., & Dotan, Y. (2013). Solving the countermajoritarian difficulty? *International Journal of Constitutional Law*, *11*(1), pp. 13-14 and 18.
[208] See Devins, N. (2004). The Majoritarian Rehnquist Court? *Law and Contemporary Problems*, *67*(3), pp. 69-70 quoted by Bassok, O., & Dotan, Y., *op. cit.*, p. 21.
[209] See Troper, M. (2003), *op. cit.*, p. 109.
[210] See Tushnet, M. (2003). New Forms of Judicial Review and the Persistence of Rights - and Democracy - Based Worries. *Wake Forest Law Review*, *38*(2), 813–838.
[211] Idem, pp. 814-818.
[212] For instance, within the framework of the New Zealand Bill of Rights, courts are charged only with a pure interpretive task. The British Human Rights Act of 1998 is a somewhat stronger version. It directs courts to

'notwithstanding' or 'override' clause of the Canadian Charter of Rights and Freedoms provides the most studied example of weak-form judicial review[213].

However, Tushnet warns that weak-form judicial review may degenerate into a return to parliamentary supremacy or escalate into judicial supremacy. If weak-form judicial review reduces its scope, it will reproduce the worry about the inadequate protection of liberal rights and will end enhancing parliamentary supremacy. By contrast, if weak-form judicial review expands its scope, it will reproduce the worry about interfering with democratic self-governance and will end enhancing judicial supremacy[214].

The adoption of the 'notwithstanding' clause in the Canadian system in 1982 paved the way to a new academic debate, i.e., constitutional dialogue. A weak-form judicial review promotes the interaction between judicial politics and partisan politics giving room for an interbranch constitutional dialogue[215]. Dialogic constitutional review encompasses strategies to preserve the authority of legislatures while allowing courts to review the consistency of legislation with protected rights[216].

Dialogic constitutionalism resonates among constitutional scholars concerned with the judicial enforcement of socio-economic rights[217]. Dixon highlights the capacity and responsibility of constitutional courts to counter legislative blockages in the realization of constitutional rights. According to her, the coercive and conversational aspects of the judicial process may help to ease these blockages[218].

So far, the debate on the counter-majoritarian argument has focused on offering a dynamic solution to the extremes of legislative supremacy *vs*. judicial supremacy on the basis of a concept that identifies democracy with its majoritarian dimension. However, proponents of deliberative democracy introduce novel elements to the discussion about the role of

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interpret statutes in a manner that makes them consistent with the European Convention on Human Rights if such a construction is possible. Courts unable to do so may declare the statute incompatible with the Convention.

[213] The 'notwithstanding' clause that is contained in section 33 of the Canadian Charter of Rights (enacted in1982) allows the members of the national or provincial legislature to insist on the application of its legislation for an additional five-year period, notwithstanding the fact that the court found it inconsistent with some of the rights contained in the Charter. See Tushnet, M. (2003), *op. cit*., pp. 819-820.

[214] Idem, p. 824.

[215] See Hogg, P. W., & Bushell, A. A. (1997). The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All). *Osgoode Hall Law Journal*, *35*(1), 75–124.

[216] See Goldsworthy, J. (2003). Homogenizing Constitutions. *Oxford Journal of Legal Studies*, *23*(3), p. 484, quoted by Gargarella, R. (2014). 'We the People' Outside of the Constitution: The Dialogic Model of Constitutionalism and the System of Checks and Balances. *Current Legal Problems*, *67*(1), p. 5.

[217] See Dixon, R. (2007). Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited. *International Journal of Constitutional Law*, *5*(3), pp. 393-394.

[218] Idem, p. 405.

constitutional courts as institutions that promote an open and constant dialogue among equals and not as institutions that have the last word.

Deliberative democracy is defined '(…) as a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future'[219].

From this viewpoint, liberal institutions such as constitutional courts need to be reinterpreted to promote the deliberative ideal. Habermas offers two arguments that help to understand the reinterpretation of constitutional courts from a deliberative perspective, i.e., the constitution as an ongoing process of constitution-making and the responsive judge[220].

According to Habermas, conceiving the constitution as an ongoing process of constitution-making that continues across generations contributes to understanding the role of constitutional courts and constitutional judges as agents that foster the interaction with the public at large which, in turn, contributes to the democratic legitimation of constitutional courts.

Habermas explains that given the social facts of modern, large-scale and complex societies, the only feasible form of deliberation occurs in the interaction between formally organized institutional decision-making mechanisms and informal and 'anonymous' debates and discussion in the public sphere[221]. Therefore, from a deliberative perspective, constitutional courts are considered institutional channels that can enable the interaction with the public sphere and thus play a role in the realization of the deliberative ideal through promoting the practical reasoning that leads to the justification of actions and decisions[222].

From this perspective, judges neither have the last word nor are they relegated. On the one hand, as courts are seen as forums open to other parties' arguments that facilitate the necessary interaction between the formal and public sphere in the decision-making process, they cannot be seen as institutions that have the last word. On the other hand, as the decision-making process

[219] See Gutmann, A., & Thompson, D. (2004). What Deliberative Democracy Means. In *Why Deliberative Democracy?* Princeton and Oxford: Princeton University Press, p. 7.
[220] See Habermas, J. (2001), *op. cit.*, pp. 768-769.
[221] See Habermas, J. (1996). *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Cambridge: MIT Press, chapter 8, quoted by Bohman, J. (1998). Survey Article: The Coming of Age of Deliberative Democracy. *Journal of Political Philosophy*, *6*(4), pp. 414-415.
[222] See Nino, C. S. (1996). *The constitution of deliberative democracy*. New Haven: Yale University Press, p. 200, quoted by Bohman, J., *op. cit.*, p. 413.

is an ongoing collective process, justifications provided by judges are as significant as those provided by other actors in this continuous dialogue[223].

Accordingly, the tasks of constitutional judges may be reinterpreted from a deliberative perspective through the practice of a 'responsive judge'[224]. Habermas uses Michelman's description of the American Justice Brennan to illustrate a responsive as '(…) *a liberal* who defends individual liberties in strongly moralistic terms; *a democrat* who radicalizes rights of political participation and wants to give a hearing to the voiceless and marginalized as well as to the deviant and oppositional voices; *a social democrat* who is highly sensitive to questions of social justice; and *a pluralist* who going beyond the liberal understanding of tolerance, pleads for politics open to difference and to the recognition of cultural, racial, and religious minorities.'[225] According to Habermas, Brennan qualifies as a responsive judge because '…he renders his decisions as best as he knows how and according to his conscience and only after he has listened as patiently as possible – with inquisitive hermeneutic sensitivity and a desire to learn – to the tangle of views in the relevant discourses conducted in civil society and the political public sphere'. Elaborating on the figure of a responsive judge, Habermas stresses the significance of the interaction with the larger public as a key element that contributes to the democratic legitimation of constitutional judges' decisions and to enhance both private and political autonomy[226].

Thus, according to Habermas[227], the interdependence and the complementarity of democracy and constitutionalism solve the tension between them to the extent that '(…) only the democratic process guarantees that private individuals will achieve an equal enjoyment of their equal individual liberties. Conversely, only when the private autonomy of individuals is secure are citizens in a position to make correct use of their political autonomy.' As a result, in the practice of a responsive judge may lie the solution to the tension generated by the counter-majoritarian difficulty due to the way in which it combines the principle of popular sovereignty and constitutionalism.

[223] Idem, p. 414.
[224] See Habermas, J. (2001), *op. cit.*, p. 769.
[225] Italics are added to emphasize how Michelman characterizes Brennan as a responsive judge. Ibidem.
[226] Habermas explains that autonomy appears in the legal sphere in the dual form of private and public autonomy. While private autonomy takes the form of a legally guaranteed freedom of choice, political autonomy allows the addressees of law to understand themselves as its authors. Idem, p. 779.
[227] Idem, p. 780.

The above discussion shows that the vigorous debate generated around the counter-majoritarian difficulty has been crafted on the basis of a concept that identifies democracy with its majoritarian dimension. However, when the concept of democracy is broadened, the counter-majoritarian difficulty loses relevance. This suggests that the relationship between constitutional courts and democracy is determined by the very notion of democracy. For example, proponents of deliberative democracy consider that constitutional courts play a significant role in the realisation of the deliberative ideal through promoting the practical reasoning that leads to the justification of actions and decisions and, in doing so, gain legitimacy. Moreover, the counter-majoritarian difficulty renders obsolete in less democratic settings, as will be pointed out later.

2.2. The expansion of constitutional courts in emerging democracies

After the fall of the Berlin Wall in 1989 and the collapse of the Soviet Union in 1991, the world experienced one of the most intense decades in terms of democratization. It started in Central and Eastern European countries and quickly extended to Africa, Asia and Latin America. This process took place in the context of a simultaneous transformation of politics, law and economics. Indeed, while there was a momentous shift from authoritarianism to democracy in the political realm, a similarly important change was happening in the field of law from an approach centred on legal positivism and a strict separation of powers to a new paradigm centred on a human rights-based understanding of constitutional law[228] and the acceptance of judicial control of legislation and acts of the government. Hence, the democratization process was accompanied by the establishment of constitutional courts or court-like bodies with the power of constitutional judicial review.

The significance of constitutional courts was such that, according to Sadurski[229], constitutional judicial review in Central and Eastern Europe (CEE) has become an entrenched and powerful factor in the politics and constitutional life, to the extent that it would be impossible to give an account of these new democracies without bringing constitutional courts into the picture.

The establishment of judicial review in Asian countries is seen as a surprising phenomenon given the cultural and political history of the region where most of the political systems had

[228] Lutz and Sikkink noted that Latin America experienced a 'norms cascade' with respect to human rights in the 1980s and 1990s and, in contrast to other regions in the developing world, has a relatively high density of regional norms and structures of human rights. See Lutz, E., & Sikking, K. (2001). "The Justice Cascade": The Evolution and Impact of Human Rights Trials in Latin America. *Chicago Journal of International Law*, *2*(1), p. 3.
[229] See Sadurski, W. (2009), *op. cit*., p. 500.

been dominated by powerful executives without effective judicial constraint until the 1980s[230]. The political systems of non-Communist Asia involved varying degrees of what is called 'authoritarian pluralism' to which a certain degree of political openness was allowed provided it did not challenge the authoritarian government. Therefore, there was little history for active courts protecting rights or interfering with state action.

In Latin America, the transitional period from an authoritarian regime to democratization started in the mid-1980s. This process was marked by the adoption of new constitutions[231] or the introduction of major constitutional reforms[232] that, inter alia, established new constitutional courts or strengthened existing ones.

As far as Africa is concerned, in the 1990s, pro-democracy movements forced constitutional changes in countries such as Malawi, South Africa, Tanzania, Uganda and Zambia that had opened up for competitive elections and strengthened the competences and independence of their judicial system[233].

In all these cases, the establishment of empowered constitutional courts was an inevitable signal of the transition from an authoritarian regime to liberal democracy.

2.2.1. The model of review adopted

Constitutional theory distinguishes between two systems of constitutional review, i.e., diffused or decentralized (ordinary judges can engage in reviewing constitutional matters) and concentrated or centralized (constitutional matters are dealt with by specialized constitutional courts outside of the regular judicial system). As pointed out above, the diffused or decentralized model is associated with the American model of review while the concentrated or centralized model is linked to the European model of review.

Asian and post-communist CEE countries[234] opted for a concentrated or centralized model of review with some adaptations. In CEE countries, the body responsible for conducting

[230] Ginsburg characterizes the relevant position assumed by constitutional courts in Asian countries through a strong-form judicial review as a successful one in terms of their contribution to the democratization process in the region with the exception of Mongolia. See Ginsburg, T. (2008), *op. cit.*, pp. 80, 84, 87 and 91.
[231] Brazil in 1988, Colombia in 1991, Paraguay in 1992, Peru in 1993, Ecuador in 1998 (and recently in 2008), Venezuela in 1999 and Bolivia in 2009.
[232] This is the case in Costa Rica in 1989, Argentina in 1994, and Mexico in 1995.
[233] See Gloppen, S., Wilson, B. M., Gargarella, R., Skaar, E., & Kinander, M. (2010), *op. cit.*, p. 84.
[234] According to Ginsburg, the choice of the continental model was made despite substantial American influence on the law and politics of Korea and Taiwan, and American advice on the drafting process of the Mongolian constitution. Therefore, the continental model dominates in all legal Asian systems, except those directly or indirectly subject to British colonialism. See Ginsburg, T. (2008), *op. cit.*, p. 91.

constitutional judicial review is located outside the judiciary. However, in Estonia, the Constitutional Review Chamber is another chamber within the National Court[235].

After independence, most of the Francophone West African countries opted for a different variation of the American model. Under this model, the supreme court, in addition to its final appellate jurisdiction over all judicial questions, retained exclusive original and final jurisdiction over constitutional questions[236]. South Africa and the majority of countries in West Africa that had a common law tradition[237] opted for a mixed or hybrid model i.e., one that combines both diffused and concentrated models. They chose a decentralized model of review although, they do not adhere to the concept of decentralized constitutional review, whereby any court in the judicial hierarchy has the authority to deny validity to a law it deems unconstitutional in a given case. Instead, if the question of the constitutionality of laws arises in the lower courts, they have to pause the proceedings and refer the issue to the supreme-court and await its decision[238].

Some constitutional courts in Africa are courts of first instance in constitutional matters with the possibility of an appeal to the Supreme Court. This is the case of Malawi and Tanzania that have constitutional panels which can hear cases involving constitutional interpretation and/or the application of constitutional, human, and civil rights. In Uganda, however, the judgments of the constitutional court can be overridden by the supreme courts of this country[239]. South Africa and Zambia[240] have constitutional courts that are the highest authority on constitutional matters and whose decisions are final.

The concentrated or centralized model of constitutional review situates constitutional courts in a special position separated from the rest of the judiciary. However, in Latin America constitutional courts can be found outside of the Judicial Power (Chile, Ecuador and Peru); as part of the Judicial Branch (Bolivia and Colombia); as a specialized chamber set up within the

[235] See Sadurski, W. (2014). *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Second Edi). Dordrecht: Springer, 2014, p. 13.
[236] West Africa includes Benin, Burkina Faso, Cape Verde, the Gambia, Ghana, Guinea, Guinea Bissau, Côte d'Ivoire, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo and Mauritania. See Böckenförde, M., Babacar, K., Ngenge, Y., & Prempeh, H. K. (2017). *Judicial Review Systems in West Africa: A Comparative Analysis*. International IDEA and Hanns Seidel Foundation, p. 21.
[237] Gambia, Ghana, Liberia and Sierra Leone
[238] See Böckenförde, M., Babacar, K., Ngenge, Y., & Prempeh, H. K., *op. cit*., p. 23.
[239] Uganda has three tiers of higher courts, the High Court, the Court of Appeal, and the Supreme Court. See Gloppen, S., Wilson, B. M., Gargarella, R., Skaar, E., & Kinander, M. (2010), *op. cit*., p. 92.
[240] The Constitutional Court of Zambia was established under Article 127 of the Constitution of Zambia (Amendment) Act, No. 2 of 2016.

regular Supreme Court[241] (Costa Rica, El Salvador, Honduras, Nicaragua, Paraguay and Venezuela) or as a supreme court that functions as a court of cassation but has gradually been endowed with competences to exercise judicial review (Argentina, Brazil, Mexico, Panama, Dominican Republic and Uruguay)[242]. Additionally, some countries in Latin America established a mixed or hybrid model of constitutional adjudication. For instance, Colombia, Guatemala, Peru, Bolivia and Ecuador have a constitutional court, but at the same time any judge can decide not to apply the law if it is found contrary to the constitution[243].

The variety of adjustments that emerging democracies have made to the European or American model of constitutional review has resulted in characterizing their constitutional review systems as hybrid ones.

2.2.2. The legal framework

The legitimacy of constitutional courts in emerging democracies is established in their respective constitutions. Constitutions devote a chapter to the constitutional court -or court-like body- that mainly establishes its composition, the guaranties of its independence, the procedure for the selection and appointment of constitutional judges and the competences granted.

The analysis of the legal framework is the starting point for the studies on constitutional courts because it allows to observe how each country's system approaches the independence and stability of constitutional courts that need to be assured for them to fully exert their competences in an environment free of internal and external threats.

Scholars have pointed out four formal determinants of the democratic potential of constitutional courts, i.e., the modes of appointment and tenure, the type and timing of review, the legal standing and the final force of the judgments[244]. Another distinctive aspect found in the legal framework of some late third wave courts is the competences that extend beyond mere

[241] The creation of constitutional chambers has been seen as a political solution in order to avoid a clash between the current Supreme Court and the new constitutional court.
[242] See Ferrer Mac-Gregor, E. (2009). Presentación. In E. Ferrer-Mac-Gregor (Ed.), *Crónica de Tribunales Constitucionales en Iberoamérica*. Buenos Aires-Madrid-Barcelona: UNAM-Marcial Pons, p. 11.
[243] For instance, countries such as Colombia, Guatemala, Peru, Bolivia and Ecuador have a constitutional court, but at the same time any judge can decide not to apply the law if it is found contrary to the constitution.
[244] See Morlino, L., & Sadurski, W. (2010). *Democratization and the European Union. Comparing Central and Eastern European post-communist countries*. (L. Morlino & W. Sadurski, Eds.). New York: Routledge, pp. 9-10; Epstein, L., Knight, J., & Shvestova, O. (2001). The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government. *Law & Society Review*, *35*(1), p. 121. Epstein *et al*., consider that the key characteristics of Court Systems are: (1) institutional structure: who has the power to engage in judicial review?; (2) timing: when can judicial review occur?; (3) type: can judicial review take place in the absence of a real case or controversy?; and (4) standing: who can initiate disputes?

constitutionality. However, there is no agreement among scholars as to whether these are a formal determinant of the democratic potential of courts.

Models of appointment and the tenure

In their study of constitutional courts in CEE, Morlino & Sadurski found three models of judicial selection: exclusively by parliaments, collaborative appointment by two bodies, one of which nominates and the other selects from the nominees list, and a shared system of appointment with different bodies (the president, the parliament and a judicial representative body) having their own 'share' of judges to appoint. Regarding tenure, constitutional judges can be appointed for life, for a fixed term, with shorter terms being renewable only once.

Type and timing of review

Constitutional review can be classified by type, i.e., concrete or abstract review, and by timing, i.e., *a priori* or *a posteriori* review. Concrete review takes place in the presence of a real case or controversy always *a posteriori*. Abstract review occurs in the absence of a real case or controversy and can take place *a priori* or *a posteriori*. According to Navia and Ríos-Figueroa[245], four models of constitutional adjudication result from combining these features, i.e., concrete centralized *a posteriori*, concrete decentralized *a posteriori*, abstract centralized *a priori* and abstract centralized *a posteriori*.

Legal standing

The legitimacy to initiate a procedure before the constitutional courts is directly related to the type of dispute and varies from country to country. For example, usually state organs have legal standing to initiate separation of powers disputes and abstract review *a priori.* There are systems that provide for an automatic review of international treaties or constitutional reforms by the court.

The range of subjects entitled to initiate the process of abstract review *a posteriori* varies from country to country. It includes authorities of the three branches of government, autonomous bodies (e.g., the ombudsman or the procurator's office), religious organizations, trade unions, political parties, the judges and/or parties in the course of a trial, physical and legal persons and the constitutional courts of their own motion. Individuals or legal persons who have been

[245] See Navia, P., & Ríos-Figueroa, J. (2005). The Constitutional Adjudication Mosaic of Latin America. *Comparative Political Studies*, *38*(2), pp. 199-200, 204-205, 207-208.

affected in the sphere of their rights have active legitimacy to file a constitutional complaint or *amparo*.

Final force of the judgments

The decisions of constitutional courts are final. However, an exception to this rule can be found in Mongolia[246], Malawi[247], Tanzania[248], Uganda[249] and Zambia.

Competences beyond the mere constitutionality

Constitutional courts must have certain competences in order to be able to check the behavior of the other government branches. However, in some emerging democracies the competences of constitutional courts consist of responsibilities that go beyond the constitutional review of legislation and administrative action.

For instance, courts can decide on the eligibility and incompatibility of the president and deputies, the certification of local constitutions, the ability of incumbents of representative bodies to remain in office as well as on the constitutionality of parties and other political organisations, dissolution of representative bodies, *referenda*, elections results, impeachment proceedings or accusations against the president or members of the national assembly. These competences are not mutually exclusive. Therefore, one or more of these extended competences can be found in a single court.

There are arguments for and against extending the powers of constitutional courts. On the one hand, it is considered that the emergence of constitutional courts and their prominence can be interpreted as symptoms of an unhealthy democracy[250]. The assumption that the majority cannot be trusted to observe predetermined limits of its powers as well as the need of an independent, non-majoritarian institution to police, monitor and enforce those limits suggests that there is something wrong in the institutional design[251]. Accordingly, the more dysfunctional the

[246] See Article 66 of the Constitution of Mongolia.
[247] See Articles 104 and 108 of the Constitution of Malawi.
[248] See Articles 30 (3) and 117 (3) of the Constitution of Tanzania.
[249] See Articles 132 (3) and 137 (1) of the Constitution of Uganda.
[250] See Ahumada, M. (2009). Tribunales Constitucionales y democracias desconfiadas. In M. Bergman & C. Rosenkrantz (Eds.), *Confianza y Derecho en América Latina*. México: Fondo de Cultura Económica-CIDE; Schwartz, H. (2000). *The Struggle for Constitutional Justice in Post-Communist Europe*. Chicago: University of Chicago Press; Heinz Klug. (2000). *Constituting Democracy: Law, Globalism and South Africa's Political, Reconstruction*. New York: Cambridge University Press; Santos, B. de S. (2009), *op. cit.*, p. 485; Adams, M., & VanSchyff Der, G. (2006). Constitutional Review by the Judicary in the Netherlands. A Matter of Politics, Democracy or Compensating Strategy? *Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht*, *66*(2), p. 412; Tate, C. N., & Vallinder, T. (Eds.). (1995), *op. cit.*
[251] Ibidem.

political system is, the more likely the decisive power is to be dispersed to bodies outside the regular political system[252].

In the same line of thought, Hirschl argues that it has been a transition from the 'judicialization of politics' towards 'juristocracy'. This transition takes place when courts have competences to decide on issues that go beyond the rights-issues to encompass 'mega-politics' which implies a profound transfer of power from representative institutions to judiciaries[253]. For instance, he found that courts in Bangladesh, India, Israel, Spain, Thailand and Turkey have banned (or came close to banning) popular political parties from participating in national elections while in Taiwan (2004), Georgia (2004), Puerto Rico (2004), Ukraine (2005), Congo (2006), Italy (2006) and Mexico (2006) courts became ultimate decision-makers in disputes over national election outcomes, impeaching presidents, deciding about restorative justice, regime legitimacy, executive prerogatives, collective identity and nation-building[254].

On the other hand, according to Ginsburg, extended competences of courts ensure that political problems are conceived of in a legal fashion[255]. According to him, Asian cases offer an example of successful constitutional courts mediating the political process and facilitating democratic consolidation through a peaceful resolution of political disputes. This was the case of constitutional courts in Thailand and Taiwan that have been granted powers to supervise the electoral process and to declare political parties unconstitutional respectively[256].

2.3. Scholarly insights into constitutional courts in emerging democracies

Much of the knowledge of constitutional courts comes from the vast literature and solid theories developed in the United States with respect to the Supreme Court of the United States, as well as from a variety of studies carried out regarding constitutional courts in Western Europe. However, in the 1990s, shortly after the establishment of constitutional courts or court-like bodies in emerging democracies in CEE, Africa, Latin America and Asia, scholars began to show more interest in the study of these newly empowered institutions[257]. Since then, interest

[252] Ibidem.
[253] See Hirschl, R. (2008). The Judicialization of Politics. In K. E. Whittington, R. D. Kelemen, & G. A. Caldeira (Eds.), *The Oxford Handbook of Law and Politics*. Oxford: Oxford University Press, p. 138.
[254] Idem, pp. 126-127.
[255] See Ginsburg, T. (2008), *op. cit.* p. 94.
[256] Ibidem. Regarding the case of Taiwan, See also Garoupa, N., Grembi, V., & Lin, S. C. (2011). Explaining Constitutional Review in New Democracies: The Case of Taiwan. *Pacific Rim Law & Policy Journal*, *20*(1), 1–40.
[257] See Neal, T. C., & Vallinder, T. (1995), *op. cit.*, p. 515.

in this phenomenon has not ceased and today there exists a variety of analysis from different perspectives that account for a field of study that is still developing.

Three topics stand out from the literature review, notably the rationale for the establishment of constitutional courts, the causes and consequences of the judicialization of politics, and whether the courts have been able and willing to exercise their powers. The following sections present the main arguments of these lines of research and the conclusions reached in order to frame the debate on constitutional courts and democracy in emerging democracies.

2.3.1. The rationale behind their establishment

One of the fundamental questions that has been insistently addressed is why political officials use their authority to establish non-majoritarian institutions, such as constitutional courts. Scholars have pointed out different possible answers, ranging from claims that the establishment of constitutional courts was an emulation of an institution that proved its effectiveness in Western Europe to debates involving the dysfunction of a political system and even the suggestion that constitutional courts are welcome in authoritarian regimes.

The *emulation argument* holds that the model of review adopted in newly democratized CEE states was legitimized by having already been 'successfully tried' in Western Europe. The transition to liberal democracy was seen in itself as the most important reason for the tacit, but strong acceptance to establish robust constitutional courts and proves to be the reason why it did not evoke a wide discussion [258]. It is considered that 'the post-War model of constitutional court review, particularly exemplified by Germany, was still the assumed standard for emulation'[259]. The so-called *conditionality argument* linked to the establishment of constitutional courts as a requirement for the admission to the pan-European structures is barely accepted because most of the constitutional courts were set up at the beginning of the 1990s, well before serious talks about possible membership had begun[260].

The *legitimacy hope argument* holds that the institutional distrust of ordinary courts and the weakness of popular representatives are considered a key factor in the building of strong

[258] See Sadurski, W. (2009), *op. cit*., pp. 508-510.
[259] See Issacharoff, S. (2011). Constitutional Courts and Democratic Hedging. *The Georgetown Law Journal*, *99*(Public Law Research Paper No. 10-22), p. 968.
[260] Additionally, official EU documents for law reforms in candidate states do not mention establishing a Kelsenian-style constitutional review as a requirement. See Morlino, L., & Sadurski, W. (2010), *op. cit.*, p. 11. Cfr. Issacharoff who holds that 'The aspirations of entry into the EU may help to explain the acceptance of the constitutional court model across the former Soviet bloc of Eastern Europa, as well as the curious fact that across these countries there was little debate over the creation of these courts.'. See Issacharoff, S. (2011), *op. cit*, p. 968.

constitutional courts. For instance, the African National Congress in 1991, debated that the task to scrutinise constitutional issues would be too difficult to be carried out by ordinary courts because of their lack of credibility and command respect[261]. In the context of the CEE countries, given the profoundly discredit performance of most parliaments, the establishment of constitutional courts was seen as a new beginning[262]. From this perspective, democracy may be benefited because constitutional courts can play a role in restricting majoritarian institutions and compelling elected representatives to live up to their electoral promises[263].

In the context of Latin America, the *political insurance argument* holds that when a ruling party expects to win elections repeatedly, the likelihood of an independent and powerful judiciary is low. However, when a ruling party has low expectations of remaining in power, it is more likely to support a powerful judiciary to ensure that the next ruling party cannot use the judiciary to achieve its political goals. This suggests that in a situation of political deadlock, the constitutional design is more likely to produce a strong accessible system of judicial review as politicians seek political insurance[264].

Similarly, the *party alternation argument* claims that more diffuse political environments contribute to establishing powerful constitutional courts because it creates more disputes for courts to resolve and hinders authorities from over-ruling or counter-attacking courts. In contrast, dominant parties are less likely to design open and powerful systems of judicial review and are less likely to tolerate courts exercising independent power[265].

In contrast, the *hegemonic preservation argument* holds that political, economic and judicial elites advocate the constitutionalization of rights and judicial review in order to protect their increasingly threatened political power[266]. It is argued that delegation of powers may occur even when electoral defeat is not imminent because independent courts may serve to legitimize the decisions of the government's current policy while overturning a few policies here and there[267].

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[261] South Africa opted for a new Constitutional Court that was established in 1994 by South Africa's interim constitution of 1993 and continues to function under the final Constitution of 1996. See the website of the Constitutional Court of South Africa (section on the history of the court) available at https://www.concourt.org.za/ (March 2021).

[262] See Sadurski, W. (2008). *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*. Dordrecht: Springer, pp. 291-293.

[263] See Sadurski, W. (2009), *op. cit*., p. 516.

[264] See Chavez, R. B. (2008), *op. cit.*; Finkel, J. (2005). Judicial Reform as Insurance Policy: Mexico in the 1990s. *Latin American Politics and Society*, *47*(1), p. 88, and Ginsburg, T. (2008), *op. cit*., p. 93.

[265] Ibidem.

[266] See Hirschl, R. (2004). *Towards Juristocracy. The origins and consequences of the New Constitutionalism*. Harvard University Press, pp. 145-146.

[267] See Kapiszewski, D., & Taylor, M. M. (2008), *op. cit.*, p. 745.

Accordingly, it is not surprising that *authoritarian regimes are willing to support constitutional courts.* Independent courts can be established in those countries that do not exhibit high degrees of electoral party-competitive democracy in order to protect property rights and provide juridical security for business and financial investments in accordance with the elite's and their own interests[268].

Therefore, since departing (or new) authoritarians and new democrats agree on the establishment of constitutional courts as an important guardian of government *vis-á-vis* their own interests, the role played by constitutional courts in fragile democracies cannot be taken for granted and deserves to be studied.

2.3.2. The judicialization of politics

If constitutional judges make law and have the 'final say' they are in fact political actors engaged in policymaking[269]. This double role of constitutional courts as political and judicial institutions has given way to an inevitable judicialization of politics[270]. The judicialization of politics is understood as 'the process by which courts and judges (typically high courts or constitutional courts) come to make or increasingly dominate the making of public policies that had previously been made by other government agencies, especially legislatures and executives'[271]. This definition has broadened its scope to encompass the judicialization of social or state-society life[272] which can take place in ordinary as well as in high courts. The causes and consequences of the judicialization of politics in emerging democracies has attracted the attention of scholars. The central discussions held in this regard are presented below.

Causes of the judicialization of politics

The *constitutionalisation of rights argument* holds that a wide range of constitutional rights alongside the willingness of actors within the justice system to assume responsibility for the

[268] See Shapiro, M. (2008). Courts in Authoritarian Regimes. In T. Ginsburg & T. Moustafa (Eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Cambridge: Cambridge University Press, p. 327.
[269] See Shapiro, M. (1981). *Courts: A comparative and Political Analysis*. Chicago: The University of Chicago Press, quoted by Roesler, S. (2007). Permutations of Judicial Power: The New Constitutionalism and the Expansion of Judicial Authority, *op. cit.*, p. 547.
[270] See Garoupa, N. (2016), *op. cit.*, p. 9.
[271] See Tate, C. N., & Vallinder, T. (Eds.) (1995), *op cit.* quoted by Sieder, R., Schjolden, L., & Angell, A. (2005). Introduction. In R. Sieder, L. Schjolden, & A. Angell (Eds.), *The Judicialization of Politics in Latin America*. New York: Palgarave-Macmillan, p. 3.
[272] Ibidem.

implementation of rights and the resolution of social conflicts, triggers the judicialization of politics[273].

In times of change regime or political crisis, *the judicialization of politics from above* can be used by public representatives as a strategy for regime legitimization by showing deference to the resolutions of constitutional courts to the extent that through observing the principles of rule of law and limited government they contribute to the enhancement of both the protection of human rights and democracy[274]. This type of judicialization can be prompted by a political system characterized by fragile and even minority coalitions supporting the government of the day, while the opposition uses the judiciary to fight government policies[275] as well as to increase societal awareness of constitutional rights and a propensity to frame disputes in rights terms[276].

Scholars consider that the weakness of the State in guaranteeing rights, the insecurities and difficulties produced by the economic crisis and the failure of neoliberal policies to alleviate poverty have led ordinary people to resort to the courts[277]. This phenomenon is known as *the judicialization of politics from below* because people use the courts to obtain concrete benefits such as decent housing or access to health services and in doing so, they shape the judicial agenda.

It is argued that *the wide access to justice* encourages individuals as well as organizations and social movements to use legal mechanisms in order to make their voices heard. In turn, courts gain visibility and public support. Colombia is considered as an example of a highly participatory judicial decision-making process where 'any citizen may draft a document stating his or her position in favor or against a legal provision that is being reviewed by the court. The

[273] The political and social democratization of liberal states led to a substantial change in the profile of contemporary constitutional texts, which effectively became three-dimensional protecting individual liberties, political participation rights and welfare rights See Arantes, R. B. (2005). Constitutionalism, the expansion of Justice and the Judicialization of Politics in Brazil. In R. Sieder, L. Schjolden, & A. Angell (Eds.), *The Judicialization of Politics in Latin America*. New York: Palgrave-Macmillan, pp. 231-232. See also Robertson, D. (2010), *op. cit.*, p. 10.

[274] See Domingo, P. (2005). Judicialization of Politics: The Changing Political Role of the Judiciary in Mexico. In R. Sieder, L. Schjolden, & A. Angell (Eds.), *The Judicialization of Politics in Latin America* (pp. 21–46). New York: Palgrave-Macmillan, p. 22.

[275] See Arantes, Rogério B. (2005), *op. cit*., p. 231.

[276] See Kapiszewski, D. (2011). Power Broker, Policy Maker, or Rights Protector? The Brazilian Supremo Tribunal Federal in Transition. In G. Helmke & J. Rios-Figueroa (Eds.), *Courts in Latin America* (pp. 154–186). New York: Cambridge University Press, p. 163.

[277] See Sieder, R., Schjolden, L., & Angell, A. (2005), *op. cit*. p. 2.

court also invites experts, social organizations, and authorities to formally express their opinions. The court's work schedule is public, as are the minutes of its sessions'[278].

Studies conducted in Asia suggest that *the emergence of the middle class* has been an important aspect of the broader process of democratization[279] as well as on the enhance of courts' legitimacy. Korea and Taiwan show that the development of interest groups that seek to advance their causes through litigation has had a direct impact on the stability and legitimacy of courts because such groups by definition have a stake in the continued independence and vitality of courts.

External support had proven to be significant for the judicialization of politics in CEE countries where courts seek or accept support from the European Court of Human Rights (ECtHR) as a strategy to build a common front against the legislature or the administration. Courts frequently resort to the ECtHR in their decisions to maintain the presence of the ECtHR in official discourse, enhance courts' legitimacy in the eyes of public opinion and political actors and send a message of partnership to domestic and external audiences[280]. In Latin America, the *international support* provided by a wide range of non-governmental organizations has played a significant role in the judicialization in the region because they have the capacity to seek and share transnational knowledge as well as be supported by international organizations[281].

It is considered that *docket control*, i.e., the discretion competence of constitutional courts to hear a matter triggers judicial activism contributing to the success of constitutional courts[282]. Docket control allows courts to address a constitutional issue when the timing is right for them to successfully intervene and decide that issue at a time and at a pace that lets them create and deeper their own legitimacy[283]. Nevertheless, the consequences of 'deciding not to decide' are diffuse and gradual in the long term and may undermine courts because constitutional review not only generate outcomes, but also provides courts with information about society and its

[278] See Cepeda-Espinosa, M. J. (2005). The Judicialization of Politics in Colombia: The Old and the New. In R. Sieder, L. Schjolden, & A. Angell (Eds.), *The Judicialization of Politics in Latin America* (pp. 67–104). New York: Palgrave-Macmillan, p. 98.
[279] See Ginsburg, T. (2008), *op. cit.*, p. 98.
[280] See Sadurski, W. (2009), *op. cit*., p. 522.
[281] See Sieder, R., Schjolden, L., & Angell, A. (2005), *op. cit.* p. 7.
[282] See Fontana, D. (2011). Docket control and the success of Constitutional Courts. In T. Ginsburg & R. Dixon (Eds.), *Comparative Constitutional Law,* (pp. 624–641). Cheltenham-Northampton: Edward Elgar, p. 630.
[283] Ibidem. According to Fontana, courts may deeper their legitimacy through diffuse support, i.e., support that courts enjoy from members of the public or political figures who disagree with particular decisions, but agree with the court's ability to make them, and therefore support the fundamentals of the constitutional review even after that court issues specific decisions with which they disagree.

problems. Therefore, the numerous cases that are not heard may affect the rights protection system as a whole[284].

Consequences of the judicialization of politics

Courts may be active in ways that either enhance or undermines checks and balances system and the protection of human rights with negative consequences for them because this leads to a reassessment of inter-institutional relations that ends up weakening judicial independence.

On the one hand, the expansion of the judicialization of politics is viewed as positive in areas, such as electoral process, illegal actions and omissions of state agencies in matters of civil and human rights, the protection of the environment, gender rights, prevention of violence, consumer rights, labour legislation, prevention of work-related accidents, etc.[285] However, this type of judicial activism affects the ability of democratically elected governments to decide on budgetary priorities leading to greater fiscal pressure on a resource-poor state[286]. It is argued that to assure greater judicial activism on the protection of rights or with regard to judicial oversight, it is necessary that judges are sensitive to societal demands and willing to take potentially controversial decisions on political, social or economic matters[287]. It is worth to mention that unwelcome judicial activism may increase the temptation of power-holders to reestablish either a weaker judicial function or to seek to control the courts, either through court packing or outright corruption[288].

On the other hand, courts may be active in ways that do not always enhance democracy by upholding the interests of powerful social, political, or economic groups. For instance, the defense of property rights when they are distributed in very unequal ways, worsens equity or the perpetuation of the local elite or even mafia rule[289]. This type of judicial activism undermines the autonomy and credibility of the courts and has an impact on intra-institutional relations too[290].

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[284] Idem, pp. 634-635.
[285] See O'Donnell, G. (2005). Afterword. In R. Sieder, L. Schjolden, & A. Angell (Eds.), *The Judicialization of Politics in Latin America*. New York: Palgrave-Macmillan, p. 296.
[286] See Sieder, R., Schjolden, L., & Angell, A. (2005), *op. cit.*, pp. 8-9 and O'Donnell, G. (2005), *op. cit.*, pp. 296-297.
[287] See Gloppen, S. (2003). Analyzing the Role of Courts in Social Transformation: Social Rights Litigation, court responsiveness and capability. In *Human Rights, Democracy and Social Transformation: When do Rights Work?* Johannesburg: University of Witwatersrand, quoted by Domingo, P. (2005), *op. cit.*, p. 25.
[288] Idem, p. 22.
[289] See Sieder, R., Schjolden, L., & Angell, A. (2005), *op. cit.*, pp. 3-4.
[290] See Domingo, P. (2005), *op. cit.*, p. 25.

Attempts to *courts' packing* were successful in Russia, Hungary, Argentina and Bolivia. In October 1993, soon after the transition and after an early judicial activist period, the Russian President Boris Yeltsin signed a decree suspending the Constitutional Court until the adoption of a new constitution[291]. In 1998, after almost a decade of judicial activism, the Constitutional Court of Hungary was totally replaced all at once with highly respected law professors that had distinguished reputations but were ideologically close to the Prime Minister who had picked them precisely to have a critical number of new judges in his pocket[292].

Under Carlos Menem's administration in Argentina (1989-1999), opposition politicians campaigned to 're-make' the Court by impeaching individual judges, particularly those viewed as loyal to Menem[293] In May 2007, the Bolivian President Evo Morales started an impeachment trial against four out of five of the magistrates of the Constitutional Tribunal of Bolivia. At the end of November 2007, the tribunal suspended its jurisdictional activities due to the resignations presented by the accused magistrates as a result of political pressure[294].

If controlling the judges becomes unfeasible, rulers may seek to *undermine the prestige (deserved or not) of disobedient judges*[295]. For instance, in Venezuela, after the Supreme Court decided - by a majority - not to authorize the pre-trial hearing of the high-ranking military officers who had deposed President Chávez in April 2002, the National Assembly appointed a special commission to investigate the 'crisis of the judiciary' and dismissed one of the magistrates that played a key role in the pretrial case on the grounds that he had deceived both the Constituent Assembly and the National Assembly by making unsubstantiated claims on his

[291] See Epstein, L., Knight, J., & Shvestova, O. (2001), *op. cit.*, pp. 136-137.
[292] The Constitutional Court of Hungary, one of the most activist courts within the CEE countries, had the last say and struck down legislation, ordered the Parliament to pass laws and generally set the direction of state policy for nearly one decade. See Scheppele Kim Lane. (2005). Democracy by Judiciary (or Courts can sometimes be more democratic than Parliaments). In A. Czarnota, M. Kryugier, & W. Sadurski (Eds.), *Rethinking the Rule of Law after Communism*. Central European University Press.
[293] See Helmke, G., & Sanders, M. S. (2006). Modeling Motivations: A Method for Inferring Judicial Goals from Behavior. *The Journal of Politics*, *68*(4), p. 872.
[294] The magistrates were allegedly accused of breaching their legal duties, of issuing resolutions contrary to the Constitution, and of impeding or hindering the performance of public functions when issuing the resolution SC0018 / 2007. The deactivation of the Bolivian Constitutional Tribunal responds to a political strategy aimed at preventing the Constitutional Tribunal from exercising constitutional control regarding Constituent Assembly's procedural violations of constitutional amendments. See Rivera Santiváñez José Antonio. (2009). Tribunal Constitucional (Bolivia). In Eduardo Ferrer Mac-Gregor (Ed.), *Crónica de Tribunales Constitucionales en Iberoamérica*. Buenos Aires-Madrid-Barcelona: UNAM-Marcial Pons, pp. 78-79.
[295] See Domingo, P. (2005), *op. cit.*, p. 25.

résumé[296]. Finally, in May 2004, the Organic Law of the Supreme Court was enacted, modifying the integration, appointment procedure, and dismissal of magistrates[297].

More recently, we have witnessed the dismantling of constitutional courts in CEE. The last decade has shown the institutional fragility of constitutional courts in the face of the emergence of a new form of anti-liberal regimes in post-communist Europe[298]. These regimes aim to maintain the superficial appearance of democracy by holding elections; however, political parties actually seek to capture the state for their own ideological or economic gains by dismantling the rule of law institutions where courts are central targets. This is accompanied by attacks on the independence of the mass media and civil service as well as on the constitutionally granted rights and freedoms of ethnic minorities, Roma communities, homosexuals and Jews.

This backsliding is more pronounced in countries such as Hungary and Poland both, successful examples par excellence of the transition from socialism to liberal democracy with quite strong constitutional courts[299]. It has been relatively easy in these two countries to pack the courts and curtail their independence, rendering them harmless through legal changes. In Hungary, as a result of the enactment of a new constitution in 2012, power holders increased the number of constitutional judges, loosened their appointment procedure and reduced the competences of the constitutional court[300]. In Poland, a law was passed that reorganised the court and aimed at

[296] Magistrate Arriechi -who was dismissed- filed a write of *amparo* against the National Assembly's decision, requesting the temporary suspension of its effects and its eventual overturning. On December 2002, the Constitutional Chamber accepted the *amparo* writ and the protective measures that had been solicited. Surprisingly, given the importance of the case, a definitive resolution of the case was not forthcoming. On June 2004, the National Assembly once again annulled Magistrate Arriechi's appointment. On June 2004, the pro-Chávez majority of the Sala Constitutional denied the admissibility of the *amparo* and Arriechi was finally dismissed. See Pérez Perdomo, R. (2005). Judicialization and Regime Transformation: The Venezuelan Supreme Court. In R. Sieder, L. Schjolden, & A. Angell (Eds.), *The Judicialization of Politics in Latin America*. New York: Palgrave-Macmillan, pp. 144-145.

[297] The number of magistrates who were henceforth to be elected by a simple majority in the National Assembly was increased to 32. The new law encompasses a procedure for dismissal which allows magistrates who have been accused by the Moral Council of the Republic (made up of the attorney general, the comptroller general and the ombudsman who are appointed by a qualified majority vote in the National Assembly) to be suspended while the National Assembly rules on their dismissal. Idem, p. 150.

[298] See Bojan, B., & Tom, G. (2016). The Assault on Post-Communist Courts. *Journal of Democracy*, *27*(3), pp. 69-82.

[299] Idem, pp. 70-71.

[300] 'The government first changed the rules for nominating constitutional judges so that Fidez could use its two-thirds majority to nominate its own candidates. The next step was a restriction of the court's jurisdiction over fiscal matters, followed by the next move… increasing the number of judges from eight to fifteen and filling seven new positions with their own candidates. However, the most problematic move was embodied in the Fourth Amendment to the Constitution, which drastically limits the jurisdiction of the Constitutional Court. It repeals all of the decisions made by the Court before 1 January 2012 (when the new Hungarian Constitution entered into force), depriving them of legal effect. …And second, the Court is banned from reviewing constitutional amendments for substantive conflicts with constitutional principles.'. Idem p. 74.

making harder the rules on decisions to be binding and establishing that cases must wait in docket for at least six months before they are decided[301]. These forms of dismantling independent and autonomous constitutional courts and the judiciary in general warn about the perils of over-empowering judges for the long-term prospect of democratic rule[302].

As can be observed, the consequences of judicialization of politics in emerging democracies are uncertain. Attacks on the autonomy and independence of constitutional courts represent an assault on the core of democracy because is conducive to the dismantling of the system of checks and balances and human rights protection creating incentives for arbitrary actions by rulers.

Nevertheless, resorting to courts is not only seen as a hope to achieve justice, but also as a rational strategy to make visible daily governmental misconduct, enable social change as well as changes in legal culture[303]. Even though there are no guarantees of the outcomes of the judicial claims, legal disputes can also be used to achieve symbolic legitimization, institutional acknowledgement of the claims, and political and social leverage for petitions[304]. From this perspective, an increase in litigation rates could be interpreted as a signal for the development of a new involvement in social, legal and political change and a new kind of democratic participation. This leads to the next theme addressed in the literature that relates to the ability and willingness of courts to exercise their powers in emerging democracies.

2.3.3. The ability and willingness of courts to exercise their competences

This subsection discusses the findings of studies that focused on whether courts have succeeded in effectively fulfilling their competences, i.e., interpreting the scope of human rights, arbitrating inter-branch/ intergovernmental disputes, or deciding political issues using their extended competences.

[301] 'Almost overnight, Prime Minister Beata Szydlo's new administration packed the Constitutional Court with five judges of its own choosing and refused to sear in the three judges properly appointed by the previous government. The Law and Justice Party (PiS) controlled parliament passed a law reorganizing the court, requiring a two-thirds majority for any decision to be binding, instead of a simple majority, and requiring that 13 of 15 judges hear a given case, instead of 9. …the government went even further and gave the Sejm the power to terminate a judge's mandate…'. Ibidem.
[302] See Domingo, P. (2005), *op. cit.*, p. 41.
[303] Ibidem.
[304] See McCann, M. (1991). Legal Mobilization and Social Reform Movements: Notes on Theory and its Application. *Studies in Law, Politics and Society, 11*, pp. 225-254, quoted by Smulovitz, C. (2005). Petitioning and Creating Rights: Judicialization in Argentina. In R. Sieder, L. Schjolden, & A. Angell (Eds.), *The Judicialization of Politics in Latin America*. New York: Palgarave-Macmillan, p. 154.

Courts willing and able to enforce human rights

Some constitutional courts in emerging democracies are perceived as defenders of constitutional rights – with emphasis on the rights of minorities – against the policies decided on by the political branches of the state. In the last decade, constitutional courts in the global south[305] have stood out for their activism regarding the enforcement of socio-economic and cultural rights linked to disadvantaged groups[306]. For instance, the Constitutional Court of India has addressed fundamental social problems such as hunger and illiteracy; the Constitutional Court of South Africa has become a central institutional forum for promoting rights such as housing and health as well as for obligating the state to take actions against the economic and social legacy of apartheid; the Federal Supreme Court of Brazil and the Constitutional Chamber in Costa Rica have decisively shaped the provision of fundamental social services such as healthcare; in Argentina, some courts have decided on prison overcrowding and environmental degradation[307]; in Colombia the court has authoritatively defended, among others, the right to health, indigenous people's rights, the right to minimum subsistence income, the rights of IDPs and the right to education[308].

It is worth mentioning the prominent role of the Constitutional Court of Colombia in the identification of structural problems and the development of innovative practices such as pointing out failures of state action, outlining procedures and goals, demanding the authorities to submit progress reports to the court by setting dates that could be considered as deadlines and developing monitoring systems to follow up the degree of compliance of their rulings[309].

Courts willing and able to enforce human rights and to decide political disputes

[305] The term 'global south' goes beyond its geographical connotation. The south could be everywhere if it is understood as a condition in the sense that certain groups are deprived of their freedom or excluded from certain rights and opportunities by local and/or (political) systems due to the inequalities produced by globalization. See López, A. J. (2007). *The Global South*, *1*(2), pp. v-vi and 1-11 quoted by Pagel, H., Ranke, K., Hempel, F., & Köhler, J. (2014). The Use of the Concept 'Global South' in Social Science & Humanities, presented at the symposium Globaler Süden/Global South: Kritische Perspektiven, Institut für Asien and Afrikawissenschaften, Humboldt-Universität zu Berlin.

[306] See Rodriguez-Garavito César. (2011). Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America. *Texas Law Review*, *89*, p. 1671. See also Landau, D. (2014). A Dynamic Theory of Judicial Role. *Boston College Law Review*, *55*(4), 1501–1562.

[307] See Rodriguez-Garavito César. (2011), *op. cit*., pp. 1672-1673.

[308] See Cepeda-Espinosa, M. J. (2005), *op. cit*., pp. 80-88.

[309] For instance, in the *Desplazados* case (T-025 of 2004) regarding IDPs, the court aggregated the constitutional complaints (*tutelas*) of 1,150 displaced families and declared that the humanitarian emergency caused by forced displacement constituted an 'unconstitutional state of affairs' associated with systemic failures in state action and ordered a series of structural measures that need to be monitored by a follow-up process. See Rodriguez-Garavito César. (2011), *op. cit*., pp. 1669-1671.

Within the literature review, the Constitutional Chamber of Costa Rica and the Constitutional Court of Colombia are depicted as examples of strong institutions that have been constantly enforcing rights and have held the political powers accountable since their creation in 1989 and 1992 respectively, even though there have been unsuccessful attempts to weaken them[310]. It is considered that having a wide catalogue of rights and wide, easy and inexpensive access to justice have strengthened these courts and have empowered their judges to play a decisive role in the performance of courts as trustworthy institutions able to hold political powers accountable[311].

Courts willing and able to decide political disputes

In Latin America, the record of the 1990s and early 2000s shows that courts have achieved only modest results in stabilising political conflicts due to threats or attacks against courts in the region[312]. The case of Chile reveals that after a post-authoritarian regime a newly empowered high court has been reluctant to exercise their powers assertively or have done so only in some policy areas for fear of provoking retaliation by political leaders[313]. Mexico and Brazil appear as countries in which constitutional courts arbitrate interbranch conflicts but are less inclined to protect human rights[314].

[310] Idem, pp. 11-12. See also Wilson, B. M. (2013). Costa Rica's Constitutional Chamber of the Supreme Court. In G. Helmke & J. Ríos-Figueroa (Eds.), *Courts in Latin America*. New York: Cambridge University Press, p. 55 and 74; Uprimny, R., & García-Villegas, M. (2007). The Constitutional Court and Social Emancipation in Colombia. In B. de S. Santos (Ed.), *Democratizing Democracy. Beyond the Liberal Democratic Canon*. London: Verso, p. 66.

[311] See Feoli, M. (2012). Justicia constitucional exitosa o la transformación del modelo tradicional del juez: un caso andino y un caso centroamericano. *Revista Andina de Estudios Políticos*, *I*(1), pp. 111-112.

[312] Ecuador, Bolivia, Argentina and Peru are the countries with the highest frequency of individual-centered attacks or institutional attacks against courts. Judicial attacks succeeded in 40% of the cases during the period from 1995 to 1999; 57% of the cases in the first five years of the new millennium and 83% of the cases during the period from 2005 to 2008. See Helmke, G., & Staton, J. K. (2011). The Puzzling Judicial Politics of Latin America: A Theory of Litigation, Judicial Decisions, and Interbranch Conflict. In G. Helmke & J. Rios-Figueroa (Eds.), *Courts in Latin America* (pp. 306–331). New York: Cambridge University Press, pp. 309-311.See Couso, J. A. (n.d.). Law and Democratization: The Uses of Constitutional Law in Taiwan, Korea and Latin America. Universidad Diego Portales Chile.

[313] See Couso, J. A. (2004). The politics of Judicial Review in Chile in the Era of Democratic Transition, 1990-2002. In S. Gloppen, R. Gargarella, & E. Skaar (Eds.), *Democratization and the Judiciary. The Accountability Function of Courts in New Democracies*. London: Frank Cass.

[314] See Helmke, G., & Ríos-Figueroa, J. (2011). Introduction: Courts in Latin America. In G. Helmke & J. Ríos-Figueroa (Eds.), *Courts in Latin America*, (pp. 27–54). New York: Cambridge University Press, p. 9.

Courts willing and able to exercise their extended competences

It is argued that courts in Asia have served as consolidators of democracy to the extent that they have been useful in eliminating elements of the old system[315]. The extended competences of courts -those that fall outside the prototypical constitutional-review function- have played a significant role for the transition[316]. Courts have decided on the appointment of the prime minister in Thailand, Taiwan, and Korea, the fundamental character of the political regime as parliamentary or presidential such as in Mongolia[317] the impeachment of the president or the dissolution of a political party such as in Taiwan[318]. Accordingly, the fact that political forces in these countries have an institutional alternative to resolve core questions is considered as a way that may facilitate democratic transition[319].

According to Issacharoff[320], courts find it critical to establish the boundaries of governmental power in unstable democracies. He notes that in almost every new democracy constitutional courts have had to review highly controversial claims of internal power-blocking, assuming without hesitation the adjudication of a political question. For instance, in Albania, the court established the boundaries of governmental power by deciding that in dealing with an independent constitutional officer, e.g., General Prosecutor, the political branches are constrained both substantively and procedurally. In Moldova, the constitutional court was forced to respond to an attempt to restore one party control of a former communist regime by declaring unconstitutional a governmental measure that aimed to ban all activities of an opposition party for one month. In Poland, the court struck down the central provisions of a new lustration law, limiting the scope of the law to those shown to have cooperated with the previous regime, as well as the law's ability to reach political opponents of the government.

Nevertheless, it is recognized that the adjudication of such disputes places constitutional courts in difficult positions in that they are called on to wield expertise that they may not have[321]. Therefore, courts in new democracies are advised to be cautious on core issues of political processes. Additionally, courts that focus on resolving political processes, run the risk of paying

[315] See Ginsburg, T. (2014). Constitutional Courts in East Asia. In R. Dixon & T. Ginsburg (Eds.), *Comparative Constitutional Law in Asia*. Cheltenham: Edward Elgar, p. 69.
[316] See Ginsburg, T., & Elkins, Z. (2009). Ancillary Powers of Constitutional Courts. *Texas Law Review*, *87*(1), p. 1431.
[317] See Ginsburg, T. (2014), *op. cit.*, pp. 69-70.
[318] See Garoupa, N., Grembi, V., & Lin, S. C. (2011), *op. cit.*, p. 12.
[319] Ibidem.
[320] See Issacharoff, S. (2011), *op. cit.*, pp. 964, 969, 971, 1004 and 1005.
[321] Garoupa, N., Grembi, V., & Lin, S. C. (2011), *op. cit.*

less attention to protect fundamental rights and to constraint state authority which are essential tasks they are calling to play[322]. As discussed above, the consequences of the court's involvement in political issues is the threat of compromising the court's neutrality and, consequently, its public credibility and autonomy.

Courts endorsing the conservative agenda of neo-liberalism

After analysing the jurisprudence of the Hungarian and Polish constitutional courts in the field of social rights, Sajó concluded that a status-quo preserving conservatism prevails in the post-communist courts' approach to welfare[323]. According to him, notwithstanding some activist features in the jurisprudence of the Hungarian and Polish constitutional courts, their performance does no not offer much hope regarding the possibilities of judicial anti-poverty politics. Sajó grounds this conclusion on the reluctance of courts to look into the appropriateness of the level of services as well as to consider the notion of dignity in the context of social services forcing different levels of support. Additionally, Sajó notes that courts' conservatism operates in a relatively strong welfare state system, and therefore the reluctance of the courts to be socially activist is not apparent.

Courts as 'democratic enclaves' in authoritarian regimes

The distinction between hybrid and authoritarian regimes is increasingly blurred. Therefore, the study of courts in authoritarian regimes allows observing the circumstances under which courts loss or gain strength and the role they play *vis-à-vis* democracy.

Recent case studies in former and present authoritarian regimes show that courts have adopted policies more in favour of the oppressed majority than the unelected ruling elite[324]. Ip illustrates how the democratic deficit in Hong Kong -under Chinese sovereignty- has encouraged political opposition groups, social movements and people in general to resort to the Hong Kong Court of Final Appeal which has been loaded with highly complex political, social and economic problems. The Court's responsiveness towards people's preferences resulted in the empowerment of the victims of authoritarianism (e.g., Roman Catholic Church, scholars,

[322] See Ginsburg, T. (2008), *op. cit.*, p. 94.
[323] See Sajó, A. (2006). Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court. In G. Roberto, D. Pilar, & R. Theunis (Eds.), *Courts and Social Transformation in New Democracies. An Institutional Voice for the poor?* Hampshire: Ashgate, pp. 84, 97-98.
[324] Examples include, but are not limited to, Pakistan, Argentina, Egypt and Russia. See Ip, E. C. (2014). The Democratic Foundations of Judicial Review under Authoritarianism: Theory and evidence from Hong Kong. *International Journal of Constitutional Law*, *12*(2), p. 331, footnote 5.

human rights organizations, journalists and politicians in opposition) to challenge and resist the Special Administrative Region regime [325].

These findings support the argument that sometimes authoritarian regimes might find it in their self-interest to empower and tolerate relatively independent courts[326]. In the case of Hong Kong, the authoritarian regime and Hong Kong's business-dominated ruling elite value the court capacity to solve constitutional problems between the Special Administrative Region authorities and aggrieved litigants because it contributes to keep Hong Kong's reputation abroad as an international financial center governed by the rule of law[327]. In such circumstances, the counter-majoritarian difficulty may render obsolete in authoritarian regimes[328].

Ip suggests that constitutional courts in authoritarian regimes could evolve into *de facto* majoritarian institutions only if they have enough public support to produce focal points that coordinate the convergence of the regime and the people on policy outcomes preferred by the latter[329]. In the same vein, Moustafa, considers that even though authoritarian regimes use the law and the courts as instruments of political control, courts can serve as a space of contention by paving the way for those willing to challenge the State. For example, in China, courts have opened space for new modes of interaction between state and society; in Egypt, courts allowed activists to challenge state policy; in Turkey, activists were able to take advantage of the limited possibilities of lower-level courts.

Moreover, courts can provide important symbolic resources. For instance, in Egypt activists initiated high-profile cases, knowing in advance that they would not win, to expose the gap

[325] Ibidem. In Hong Kong voting rights are extremely restricted so that neither the Chief Executive nor half of the Legislative Council are elected by universal suffrage. Ip's paper documented the assertiveness of the Hong Kong Court of Final Appeal. Among others, the Court declared the freedom to criticize government institutions and the conduct of public officials as a fundamental freedom in a democratic society; struck down immigration policies that prohibited Hong Kong's one million Non-Permanent Residents from travelling to and returning from overseas; ruled in favour of a mass movement to defend their territory's most visible symbol; vested in protestors the right to resist unlawful arrest; imposed on the police a positive duty to assist peaceful demonstrator; mandated that the SAR authorities revise covert surveillance legislation to comply with privacy rights guarantees under considerable public pressure; declined to tighten the regulation of free speech among opinion leaders; triggered a radical enlargement of the franchise for Village Representative elections; decriminalized gay behaviour in light of general changes of social attitudes toward sexual orientation.

[326] See Ginsburg, T., & Moustafa, T. (Eds.). (2008). *Rule by Law: The Politics of Courts in Authoritarian Regimes*. New York: Cambridge University Press.

[327] See Ip, Eric C. (2014), *op. cit*., p. 352.

[328] Idem, p. 331.

[329] Idem, p. 353.

between the regime's rule-of-law rhetoric and the realities on the ground. This, in turn, provided evidence and arguments to the opposition press[330].

2.3.4. Emerging research in the field of courts

Recent literature[331] with a focus on the role of constitutional courts in new or threatened democracies suggests looking away from the American experience and examining the ways in which third wave constitutions and constitutional courts define the contours of the political arena in nascent democracies. It is argued that courts in new democracies are often faced with particular challenges that are different from the ones found in more mature democracies. For instance, operating in fragile democracies that are at risk of sliding back into authoritarianism or enforcing human rights, especially social rights, in the midst of poorly functioning political systems.

Issacharoff argues that American law engaged the question of democratic integrity late and did so amid specific concerns within a particular legal culture. He therefore encourages moving beyond the question of constitutional review as such and examining how these constitutional courts deal with political questions and the jurisprudential tools that emerge as judges attempt to resolve them[332]. From this viewpoint, it is considered that constitutional courts in fragile democracies should be involved in foundational issues to protect the vitality of democratic competition for office and therefore it is expected that they generate a jurisprudence based on the maintenance of democracy[333].

A more interventionist form of judicial review shapes constitutional courts in new democracies through powerful tribunals that are unencumbered by limiting principles such as the political question doctrine. According to Issacharoff, this poses a new debate about the role of judicial review of democratic decision-making in more mature democracies[334].

Landau, elaborating on Issacharoff's ideas, developed a dynamic theory of judicial role suggesting that courts and scholars should focus on figuring out the best strategies to empower civil society and spread constitutional values. A dynamic theory of judicial role transcends the

[330] See Moustafa, T. (2014). Law and Courts in Authoritarian Regimes. *Annual Review of Law and Social Science*, *10*, pp. 287-288.
[331] See Issacharoff, S. (2011), op. cit. and Landau, D. (2014), *op. cit.*, pp. 1501–1562.
[332] See Issacharoff, S. (2011), *op. cit.*, pp. 963 and 970.
[333] Idem, p. 965.
[334] Idem, pp. 970 and 1002-1003.

strong-form/weak-form review typology because such strategies can be placed somewhere on the spectrum between the two forms of judicial review.

Landau argues that standard constitutional theory that was developed largely in the United States and Europe relies on assumptions that do not apply to new democracies because they often suffer from democratic dysfunctionalities linked to problems of democratic fragility, democratic functioning and a lack of constitutional culture.

Landau observes that the judicial function and constitutional design in new democracies is often based on the premise that democratic institutions must be distrusted, and should protect not only insular minorities, but also carry out majoritarian will. As a result, courts focus on how to make democratic institutions work better.

Using the cases of Colombia and India, Landau identified judicial and constitutional practices in new democracies to preserve democracy, to improve democratic institutions and to build civil society and spread a constitutional culture. For instance, courts are allowed to ban problematic parties, to exert judicial control over constitutional amendments and some issues of legislative procedure, and to issue structural injunctions through which they build civil society groups and give them leverage over the State. From a standard theoretical perspective, these practices are difficult to justify because they go beyond the ordinary judicial review. Therefore, he proposes to use a dynamic conception of the judicial role to better understand these practices in new democracies.

In turn, García-Villegas[335] promotes an aspirational constitutionalism, i.e., a socio-legal proposal that aims to achieve social change through the enshrinement of social rights and the participation of all sectors. According to him, aspirational constitutionalism requires not only legal and judicial strategies to vindicate social rights, but also a militant constitutionalism and a new legal culture focused on the protection of human rights. García-Villegas explains that militant constitutionalism implies a permanent commitment on the part of political forces to apply the constitution, while a new legal culture denotes the need to change the system of legal education and the production of a new legal and judicial doctrine that favours social change.

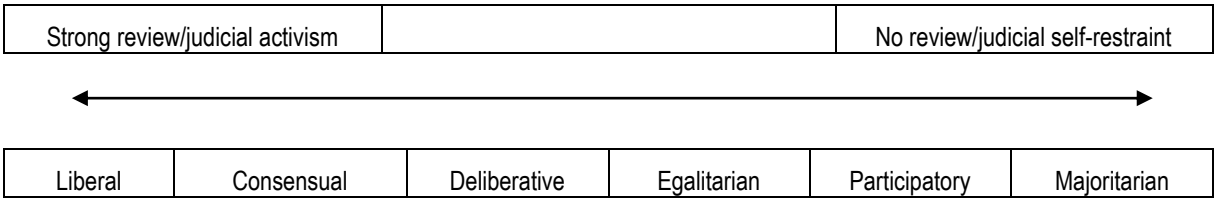
[335] See Garcia-Villegas, M. (2004). Law as Hope: Constitutions, Courts, and Social Change in Latin America. *Florida Journal of International Law*, *16*, pp. 134–139.

Additionally, it is worth noting the adoption of the multidimensional concept of democracy developed by Coppedge *et al*. in the analysis of courts. For instance, Pócza[336] suggests assessing judicial reasoning through democratic theory. To this aim he has developed an analytical framework using Coppedge *et al*.'s five models of democracy as a basis. Furthermore, Staton *et al*.[337] have developed a comprehensive project using the V-Dem democratic indicators to determine whether judicial process might reduce regime conflict.

Pócza designed a qualitative-analytical tool that focuses on identifying the inherent or envisioned ideal type of democracy in judicial decisions. The scope of the scrutiny is limited to the relevant decisions as well as concurring and/or dissenting opinions. It is assumed that judicial reasoning is of higher quality if it provides some insights into the self-understanding or perception of the role of courts and judges within the democratic system, i.e., judges should make clear which model of democracy they prefer. Without this evidence, it is unclear what kind of role the judges ascribe to the Constitutional Court, suggesting a qualitatively less optimal case.

Pócza differentiates between strong and weak constitutional adjudication and locates the six dimensions of democracy proposed by Coppedge *et al*. on a scale attributing positive or negative attitudes towards constitutional review. See Figure 2-1.

Figure 2-1. Pócza's Judicial Review and Dimensions of Democracy.



Source: Figure 2. Judicial Review and Dimensions of Democracy from Pózca, Kalman, 2015.

According to Pócza, liberal democracy (left on the scale) advocates strong forms of judicial review and judicial activism while majoritarian democracy (right on the scale) refutes the very existence of a strong form of judicial review and any form of judicial activism admitting

[336] See Pócza, K. (2015). Democratic Theory and Constitutional Adjudication. *Acta Juridica Hungarica*, *56*(2–3), 199–212.
[337] See Staton, J. K., Reenock, C. M., Holsinger, J., & Lindberg, S. I. I. (2018). Can Courts Be Bulwarks of Democracy? *Op. cit*.

occasionally the applicability of the weak form of review. The other four dimensions of democracy may be located somewhere between these two positions. The analytical framework proposed by Pócza seeks to contribute to a better understanding of judicial reasoning and constitutional adjudication by connecting and relating them to the concepts and theories of democracy. It is important to mention that this analytical framework has not yet been operationalised.

Staton *et al*.[338] depart from the premise that independent judges promote the survival of the democratic regime by allowing violations of norms limiting arbitrary power to be challenged non-violently. They recognise, however, that judges are often subject to public shaming and politically motivated dismissals and that courts are sometimes staffed by partisan allies of the government, their jurisdiction is almost always subject to political control and their decisions can be ignored.

Accordingly, they raise the following questions: what, if any, are the conditions under which judges can be conceived as defenders of democracy? How can judges under political pressure stabilise a democratic regime? In order to answer these questions, they re-examined the empirical claims of existing models of courts and democracy as well as original claims derived from their own work. They analysed judicial behaviour, judicial institutions and policy using a sample of all democratic political systems over more than 100 years. Staton *et al*. concluded that, despite the pressures on judges, courts can enhance regime stability by encouraging prudence on behalf of elites, both those who control the state, i.e., the leaders, and those on whose support the leaders depend.

Interestingly, Staton *et al*.,[339] in questioning whether courts can defend democracy, also faced the conceptual challenge of delimiting what courts are thought to be defending. A review of cases in which courts are alleged to defend democracy led them to conclude that the implicit definitions of democracy are quite diverse, for example, the protection of the right to vote is linked to a minimalist conception of democracy, while the protection of social rights is linked to a more robust version of democracy. This serves to illustrate that the range of rights protected by courts is comprehensive of different concepts of democracy and the importance of clarifying the concept of democracy one has in mind.

[338] Ibidem.
[339] Idem, p. 9.

In addition, Staton *et al*.[340] argue that courts can be bulwarks of democracy if they can promote respect for what they call the fundamental regime rules. In this regard, they point out that democracy is protected when regime rules are respected or when non-compliance with a rule is corrected through the legal process. Thus, according to Staton *et al.*, the success of democracy lies in observing and remedying violations of rights. This confirms the relevance of examining the responsiveness of courts to rights claims as a factor that can be related to democratic performance, as the judicial enforcement of rights remedies violations of rights and thus contributes to the enforcement of fundamental regime rules.

2.4. Methods used, research weaknesses and new lines of research

This section is intended to identify the methods and analytical frameworks used by scholars in the study of constitutional courts in emerging democracies as well as research weaknesses and suggestions for new lines of investigation for the empirical purposes of this research. An overview of the literature shows one that the study of the courts has been evolving from descriptive to a more exploratory approach and from a monocausal to a multivariate approach.

From descriptive to a more exploratory approach

In 1995, scholars traced the origins of the expansion of judicial power, described its (lack of) occurrence in both established and non-established democracies, analysed the circumstances and conditions that promote or retard judicialization, and evaluated the phenomenon from a variety of intellectual and ideological perspectives[341].

In the mid-2000, when constitutional courts or court-like bodies had a track record of little more than a decade, scholars began to discuss the nature and effects of the judicialization of politics within the democratisation and social transformation processes using a comparative framework[342]. Scholars recourse to in-depth historical, political, legal and contextual descriptions to explain the conditions under which courts operate followed by an analysis of the jurisprudence issued. For instance, analysing the gradual development of courts'

[340] Idem, p. 10.
[341] See Neal, T. C., & Vallinder, T. (1995), *op. cit.*
[342] See Gloppen, S., Gargarella, R., & Skaar, E. (Eds.). (2004), *op. cit.* and Sieder, R., Schjolden, L., & Angell, A. (2005), *op. cit.*

jurisprudence[343], a close textual reading of a pair of significant judgements[344], conducting a survey of the record of courts in specific areas such as free speech and non-discrimination[345] or cases that have proved particularly controversial[346].

Although the strategic model and, to some extent, the neo-institutional model[347] have been more influential among scholars examining courts' behaviour in emerging democracies, a myriad of approaches can be found in the studies developed during the 2010s[348]. Scholars not only built on the strategic model but also expanded and challenged it in several novel ways[349].

For instance, Rodríguez-Raga developed a formal theoretical model of the interaction between the Colombian Constitutional Court and the executive branch to empirically test the conditions under which the court defers to the President in cases related to ordinary legislation or executive decrees[350]. To this aim, he created an original data set of all decisions made by the Colombian Constitutional Court in abstract review between 1992 and 2006 and used a logistic regression model to test his hypotheses.

In order to analyse the role that the Mexican Supreme Court has played during and after the transition to democracy, Sánchez, Magaloni, and Magar developed a spatial model of court activism that draws heavily from separation of powers theories specifying the conditions that would render the Mexican court more powerful and prone to engage in policy making[351]. The

[343] See Uprimny, R. (2004). The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia. In S. Gloppen, R. Gargarella, & E. Skaar (Eds.), Democratization and the Judiciary. The Accountability Function of Courts in New Democracies (pp. 46–69). London: Frank Cass Publishers.
[344] See Roux, T. (2004). Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court. In S. Gloppen, R. Gargarella, & E. Skaar (Eds.), Democratization and the Judiciary. The Accountability function of Courts in New Democracies (pp. 92–111). London: Frank Cass
[345] See Couso, J. A. (2005). The Judicialization of Chilean Politics: The Rights Revolution That Never Was. In R. Sieder, L. Schjolden, & A. Angell (Eds.), *The Judicialization of Politics in Latin America*. New York: Palgrave-Macmillan, pp. 105-130.
[346] See Cepeda-Espinosa, M. J. (2005), *op. cit.*, pp. 67-104 and Pérez Perdomo, R. (2005), *op. cit.*, pp. 131-160 respectively.
[347] The strategic model holds that judges are policy seekers constrained by other institutional actors, i.e., the other branches of power, the public opinion and even by other judges on the bench. The new institutional approach considers the effect of variables internal to judicial institutions, ranging from legal culture to caseload management. For the description of the different models found within the US literature see Helmke, G., & Ríos-Figueroa, J. (2011), *op. cit*., p.14; Robertson, D. (2010), *op. cit*., p. 25, and Kapiszewski, D., & Taylor, M. M. (2008), *op. cit*., p. 746.
[348] See Kapiszewski, D., & Taylor, M. M. (2008)., *op. cit*., p. 742.
[349] See Helmke, G., & Ríos-Figueroa, J. (2011), *op. cit*., p. 13.
[350] See Rodríguez-Raga, J. C. (2011). Strategic Deference in the Colombian Constitutional Court, 1992-2006. In G. Helmke & J. Ríos-Figueroa (Eds.), *Courts in Latin America*. New York: Cambridge University Press, pp. 81-98.
[351] See Sánchez, A., Magaloni, B., & Magar, E. (2011). Legalists versus Interpretativist: The Supreme Court and the Democratic Transition in Mexico. In G. Helmke & J. Ríos-Figueroa (Eds.), *Courts in Latin America* (pp. 187–218). New York: Cambridge University Press.

model adds two dimensions to the analysis: it assumes not only that the court is divided along a left-right ideological cleavage, but also that judicial philosophy motivates judges' decisions, i.e., the extent to which judges believe that courts should make law *a la par* of other branches of government *vs*. refraining from ruling based on a strict interpretation of the constitution and the laws. Through an examination of the voting record of all judges, the authors estimate the dimensions that underlie the supreme court rulings using Bayesian Markov chain Monte Carlo techniques.

A sociological institutionalism approach has been used to explore the repertoires of legal ideas and practices that accompany, cause and are a consequence of the judicialization of politics. From this perspective, legal norms and understandings are generated and deployed not only within the formal state justice system, but also within a huge range of informal, subnational, and transnational spheres. Therefore, it is argued that non-strategic action matter to political outcomes and that judicialization can only be fully understood if legal cultures are considered. One of the challenges of this approach is its implicit interdisciplinarity[352].

The use of qualitative methods predominates when scholars opt for a cultural approach. For instance, Rueda used content analysis to explore the way in which the development of a specific legal concept (*mínimo vital*) by the Constitutional Court of Colombia may affect social change[353]. Ansolabehere created a model to analyse the changing frameworks through which the Mexican Supreme Court understands and adjudicates rights claims[354]. Looking at the freedom of speech, participation, and indigenous rights, she argues that judges' shifting relations with society, the government and the judiciary itself have altered the way in which they view rights since the transition to democracy.

From a monocausal approach to a multivariate approach

Gloppen *et al*. consider that existing literature on democracy, democratisation, rule of law, judicial reform or judicialization do not offer satisfactory explanations for shifts in the accountability function of courts as it uses a monocausal approach focusing exclusively on the

[352] See Couso, J. A., Huneeus, A., & Sieder, R. (2010). *Cultures of Legality. Judicialization and Political Activism in Latin America*. New York: Cambridge University Press.
[353] See Rueda, P. (2010). Legal Language and Social Change during Colombia's Economic Crisis. In J. A. Couso, A. Huneeus, & R. Sieder (Eds.), *Cultures of Legality. Judicialization and Political Activism in Latin America* (pp. 25–50). New York: Cambridge University Press.
[354] See Ansolabehere, K. (2013). More Power, More Rights? The Supreme Court and Society in Mexico. In J. A. Couso, A. Huneeus, & R. Sieder (Eds.), *Cultures of Legality. Judicialization and Political Activism in Latin America* (pp. 78–111). New York: Cambridge University Press, pp. 78-111.

structures in which judges operate (institutional approaches) or on the judges and their mindset (attitudinal and strategic models)[355]. To bridge this gap the authors, propose to use the concept of the accountability functions of courts and a multivariate approach to frame the analysis of constitutional courts in emerging democracies.

The concept of the accountability functions of constitutional courts considers both horizontal and vertical or societal accountability. The concept of vertical control exercised by the constitutional courts is particularly noteworthy for this research as implies that 'Courts may also serve as a mechanism for popular control or societal accountability by enabling individuals and groups to use litigation to protect and advance their rights and interests'[356].

The multivariate approach consists in conceptual framework that combines a series of explanatory factors, such as the historical and political context (the legal-political culture and history of the country; the political balance of power and the strength of civil society); the institutional variables (structure of the judicial institutions, the powers, competences and independence of courts); and the actors (ideological, social and professional characteristics of judges)[357]. They argue that the institutional and socio-political context has an impact on litigants' motivations to activate the court and on judges' motivations to assume an accountability function[358].

Research weaknesses

One of the main criticisms of recent scholarship is that rich and philosophically sophisticated literature on judicial review – such as that developed by Waldron and Bellamy – has failed to appreciate the empirical dimension of judicial review issues[359]. Even though there is an increasing recognition that arguments pro or contra constitutional review need to be grounded in an account of how real-world judges decide cases and interact with their political environment, more work is still needed to fill the gap between the normative literature and empirical research on judicial behaviour[360]. As Dyevre argues, an empirical perspective on the

[355] See Gloppen, S., Wilson, B. M., Gargarella, R., Skaar, E., & Kinander, M. (2010), *op. cit*., pp. 2-3.
[356] See Peruzzotti, E., & Smulovitz, C. (Eds.). (2006). *Enforcing the Rule of Law: Social Accountability in the New Latin American Democracies*. University of Pittsburgh Press quoted by Gloppen, S., Wilson, B. M., Gargarella, R., Skaar, E., & Kinander, M. (2010), *op. cit*., pp. 15-16.
[357] See Gloppen, S., Wilson, B. M., Gargarella, R., Skaar, E., & Kinander, M. (2010), *op. cit*., p. 31.
[358] Idem, p. 33.
[359] See Dyevre, A. (2015). Technocracy and distrust: Revisiting the rationale for constitutional review. *International Journal of Constitutional Law*, *13*(1), p. 31.
[360] Ibidem.

judicial behaviour could be helpful in making the normative discussion both meaningful to the public at large and relevant for policymakers[361].

According to Kapiszewsky and Taylor, the failure to acknowledge and cite related work carried out in different countries in the same region; the scarcity of explicitly comparative research within or across countries; the necessity to achieve clear definitions and develop workable operationalisations for the concepts that form the building blocks of theories proposed; and the insufficiently self-conscious use of research methods in the study of judicial politics are some research weaknesses that may have hampered the development of the debate on courts[362].

For instance, descriptive works are generally not intended to test hypotheses; few explanatory works make effective use of the many techniques available to carry out qualitative or quantitative analysis. Not to mention issues such as little reference to the specific data that support the analysis, little or no information about how data were collected, little of no explanation on the technique(s) employed to select the judicial decisions and/or cases[363]. Accordingly, researchers urged to explicitly formulate and test hypotheses that have been advanced to explain judicial behaviour in other parts of the world, to employ and justify case-selection techniques, and to add a general description of the resulting universe of cases in order to clarify the type of cases the study examines, i.e., whether the selection comprises only 'dramatic' cases; the total amount of cases in which decisions were rendered; the total amount of cases in the universe of a particular legal instrument, or the total amount of cases on courts' docket[364].

From a comparative perspective, Hönnige has outlined four challenges posed to research on constitutional courts. The first challenge is to deepen our understanding of constitutional courts at the micro level with emphasis on judges' motives, intra-court rules and inter-institutional relationships. The second challenge is to find a comparable indicator to measure the strength of courts in order to explain the observable variation in court activism and to relate the macro level measure to the theoretical framework at the micro level. The third challenge is the availability of data and the development of methods in comparative research on courts. Comparative datasets for institutions and rulings have to be built and integrated into existing datasets dealing with legislation in different countries. Methods have to be developed, especially for the

[361] Idem, pp. 31-32
[362] See Kapiszewski, D., & Taylor, M. M. (2008), *op. cit.*, pp. 748 and 752.
[363] Idem, pp. 752-753.
[364] Idem, p. 752.

identification of the judges' preferences and the interpretation of rulings. The fourth challenge is to understand the courts' role in building and supporting democracy. Are courts reliable institutions that count when individual rights are under threat? Do courts stabilize or destabilize political systems?[365]

New lines of research

New lines of research are still open for further analysis in the field of courts. For instance, it is recognised that the relationship between judicial power, political dynamics and the quality and stability of democracy remains quite unclear due to the lack of focus on the empirical links between judicial dynamics and regime dynamics. In order to fill this gap, it is suggested to consider the effect of democracy and democratic beliefs on judicial behaviour and courts' involvement in 'critical political junctures', i.e., war or shifts in the dominant national coalition; repeated political, economic and institutional crisis[366] and threats posed when the first holders of power attempt to hold on to power [367].

Other insufficiently explored lines of research are the involvement in judicial politics of actors beyond judges, the nature of the relationships among different courts and different instances of the judiciary[368], the aftermath of judicial rulings both in the short- and long-term[369], the relationship between law and politics from a historical point of view, and the politics of producing legal cultures from a theoretical and empirical point of view[370].

The preceding discussion shows that the study of constitutional courts in emerging democracies has evolved and is at a stage characterized by evidence-based analysis. Greater research and more rigorous use of research methods are also needed to further our understanding of these institutions and their relationship to democracy. Scholars have been quite explicit in pointing out the need to carry out comparative analyses across countries, effectively use qualitative or quantitative research techniques, describe data collection and data analysis techniques,

[365] See Hönnige, C. (2011). Beyond judicialization: Why we need more comparative research about constitutional courts. *European Political Science, 10*(3), p. 355.
[366] Idem, p. 756.
[367] See Issacharoff, S. (2011), *op. cit.* p. 1002.
[368] Idem, pp. 754-756.
[369] See Kapiszewski, D., Silverstein, G., & Kagan, R. A. (2013). Introduction. In Diana Kapiszewski, Gordon Silverstein, & R. A. Kagan (Eds.), *Consequential Courts. Judicial Roles in Global Perspective* (pp. 1–41). New York: Cambridge University Press, p. 7.
[370] See Huneeus, A., Couso, J., & Sieder, R. (2010). Cultures of Legality: Judicialization and Political Activism in Contemporary Latin America. In J. A. Couso, A. Huneeus, & R. Sieder (Eds.), *Cultures of Legality. Judicialization and Political Activism in Latin America* (pp. 3–21). New York: Cambridge University Press, pp. 18-19.

operationalize concepts and formulate hypotheses. In addition, new normative approaches have been introduced into the debate on assessing the performance of courts *vis-à-vis* democracy.

Concluding section

This chapter aimed to review the literature on the establishment of constitutional courts and their expansion during the late third democratic wave in order to identify theoretical and conceptual elements that can serve as a basis for the empirical analysis.

The literature on the establishment of the courts revealed that the introduction of the constitutional complaint in the post-WWII period (linked to the second democratic wave) complemented the jurisdiction of courts and configured them as essential institutions of the accountability system in a well-functioning democracy. Therefore, the accountability function of courts is understood by this research as the conceptual link of the relationship between courts and democracy.

Studies devoted to the analysis of courts in emerging democracies, on the one hand, confirmed that the relationship between courts and democracy has not been sufficiently explored. Scholars have focused on issues such as the rationale for the establishment of constitutional courts, the causes and consequences of the judicialization of politics and whether courts have been able and willing to exercise their powers. On the other hand, the analysis facilitated the identification of some elements that could be useful in explaining the responsiveness of courts to rights claims. For the purposes of this research, these elements were identified as internal and external factors of the adjudication process.

Internal factors. It is considered that the legal framework plays an important role on the performance of constitutional courts because it can restrict or broaden their leeway for action. Plaintiffs and judges are considered key actors in constitutional adjudication. For instance, ordinary people are linked to the phenomenon of judicialisation from below, the democratisation process in Asia is associated with litigation led by the middle class, while international NGOs with adequate resources are considered to have supported the judicialisation of politics in Latin America. With respect to judges, researchers insist on their personal attributes and professional background as well as their willingness and social sensitivity to make potentially controversial political, social or economic decisions.

External factors. The context as a factor that can affect the performance of constitutional courts appears in the literature both implicitly and explicitly. For example, it is argued that the weakness of the State in guaranteeing rights, the lack of security, the difficulties produced by

the economic crisis and the failure of neoliberal policies to alleviate poverty have triggered the judicialisation of politics. Scholars have also highlighted the challenges faced by constitutional courts in fragile democracies, characterised by fractured societies or undermined democratic institutions. These considerations have led to the suggestion that courts should be evaluated in terms of their ability to address threats of excessive concentration of power, empower civil society and disseminate constitutional values.

Finally, the concept of the accountability functions of constitutional courts advanced by Gloppen *et al.*[371] served to narrow the boundaries of this research to the analysis of the vertical or social accountability function of courts (adjudication of human rights). In addition, persuaded by the argument that monocausal studies do not provide satisfactory explanations for changes in the accountability function of courts, I adopted a multivariate approach.

[371] See Gloppen, S., Wilson, B. M., Gargarella, R., Skaar, E., & Kinander, M. (2010). *Courts and Power in Latin America and Africa*, *op. cit.*, pp. 2-3.

Chapter 3. The vertical or societal accountability function of courts *vis-à-vis* democracy

The literature review on constitutional courts in emerging democracies presented in Chapter 2 showed that scholars have focused their analyses on the rationale for the establishment of constitutional courts, the causes and consequences of the judicialization of politics, and whether the courts have been able and willing to exercise their powers.

The findings of these studies have revealed that plaintiffs, judges, the legal framework and contextual factors can be key in the analysis of the relationship between constitutional courts and democracy. In addition, scholars have stressed the value of using a multivariate analytical framework to explain the functioning of the courts. Based on the above, this research proposes to approach the relationship between constitutional courts and democracy from an empirical perspective using a multivariate analytical framework that includes these elements.

The aim of this chapter is to provide a literature review of each of the elements included in the analytical framework, i.e., internal and external factors of the adjudication process and democratic performance, to serve as a basis for the formulation of the working hypotheses of this research. To this end, the chapter is divided into two parts. The first part clarifies the scope of the vertical or societal accountability function of courts and points out the democratic credentials of the constitutional complaint or *amparo* as a legal tool to exercise vertical control. The second part summarises the literature review on the internal and external factors of the adjudication process and formulates the working hypotheses of this research. Finally, the concluding section outlines the main points and provides a link to the subsequent chapters.

3.1. The accountability functions of courts

Since the 1990s, the concept of accountability has become increasingly central to debates on democratic theory and democratisation because it has provided a fruitful ground for thoughts regarding the challenges of institutionalising democratic governance in contexts in which the problems of executive dominance and securing political representation and space for contestation of political power are predominant[372]. However, these studies seldom involve the accountability functions of constitutional courts[373].

[372] See Gloppen, S., Wilson, B. M., Gargarella, R., Skaar, E., & Kinander, M. (2010), *op. cit*., pp. 12-13.
[373] Ibidem.

The relationship between constitutional courts and democracy is complex and less susceptible to be measured empirically[374]. This relationship can be observed when constitutional courts become the reviewer of the constitution, i.e., when they are endowed with the competence to know all the fundamental matters of the State, inserting themselves in scopes that used to correspond exclusively to other governmental authorities[375]. Therefore, it can be said that the conceptual link between courts and democracy lies in the accountability functions that the constitution grants to courts. Courts exert two types of accountability: horizontal and vertical.

Horizontal accountability is exerted by constitutional courts when deciding inter-branch or intergovernmental disputes and constitutionality disputes. These actions are initiated mainly by political actors through constitutional controversies and judicial review. The vertical or societal accountability function of constitutional courts takes place when deciding disputes involving the scope of human rights. It is activated by any person (individually or collectively considered) regarding violations of human rights via the constitutional complaint or *amparo*, as it is known in Spain and Latin America.

3.1.1. The vertical or societal accountability of courts

Scholars in the field of judicial politics highlight the role of courts in facilitating vertical control. Peruzzzotti and Smulovitz have coined the term 'societal accountability' to refer to the fact that courts may also serve as a mechanism for popular control by enabling individuals and groups to use litigation to protect and advance their rights and interests[376]. Gloppen *et al*. consider societal accountability similar to the electoral channel, because it is a legally specified vertical accountability relationship while Helmke and Ríos-Figueroa have identified disputes that involve interpreting the scope of human rights as vertical control[377].

This suggests that voting is not the only mechanism available to citizens to exercise vertical accountability. In addition to elections, individuals can trigger the vertical or societal accountability function of constitutional courts to make popular elected authorities accountable. From this view point, constitutional courts contribute to democracy by preserving the system of checks and balances through the exercise of horizontal control, as well as by protecting

[374] See Nohlen, D. (2008). Jurisdicción constitucional y consolidación de la democracia. In *Tribunales Constitucionales y Democracia*. Ciudad de México: Suprema Corte de Justicia de la Nación, p. 3.
[375] See Vela, E., & Reynoso, J. (2008). Estudio preliminar. In *Tribunales Constitucionales y Democracia*. Ciudad de México: Suprema Corte de Justicia de la Nación, p. XXVII.
[376] See Peruzzotti, E., & Smulovitz, C. (Eds.). (2006), *op. cit.*, quoted by Gloppen, S., Wilson, B. M., Gargarella, R., Skaar, E., & Kinander, M. (2010), *op. cit*., p. 15.
[377] See Gloppen, S., Wilson, B. M., Gargarella, R., Skaar, E., & Kinander, M. (2010), *op. cit*., p. 15 and Helmke, G., & Ríos-Figueroa, J. (2011), *op. cit*., p. 7.

individuals against arbitrary acts or omissions of the state, through vertical or societal accountability.

This suggests that horizontal and vertical control complement each other. According to Gargarella, the system of checks and balances, as it is today, is still imperfect because the dichotomy uphold-strike down prevents the exploration of nuanced solutions favouring a reasoned conversation. Moreover, it is not clear whether the checks and balances system helps to refine the voice of the people[378]. These limitations of horizontal control can be addressed by vertical control that gives voice to those who were not heard during the decision-making process and allows them the opportunity to bring their interests back on the public agenda.

Nevertheless, empirical studies on the effectiveness of the vertical or societal accountability of constitutional courts to further democracy are scarce. As noted in Chapter 2, the focus has been mainly on the analysis of the horizontal control of the courts, given its importance to the system of checks and balances within the paradigm of liberal democracy. In addition, it is argued that constitutional judges can decide on civil and political rights, but should not do so in respect of economic, social, and cultural rights.

Given the significance of the enforcement of human rights for the realisation of democratic ideals, it is also important to focus on the responsiveness of courts to rights claims. According to Nino, judicial review plays a fundamental role in protecting rights, because these are a basic condition that gives epistemic value to the democratic process[379].

From a multidimensional perspective of democracy, the accountability functions of constitutional courts expand beyond the boundaries of liberal democracy. Therefore, in addition to exercising horizontal accountability to protect liberal values, courts are expected to contribute to the realisation of the values and principles of different democratic ideals through the judicial enforcement of human rights.

While electoral, liberal, deliberative, and egalitarian democracy value the establishment of courts, participatory democracy is not prone to accept constitutional control through courts because it favours the direct participation of citizens in the decision-making process. However, as the vertical or societal accountability function of courts takes place through an action initiated

[378] See Gargarella, R. (2014), *op. cit.*, pp. 36-37.
[379] See Nino, C. S. (1997). *La Constitución de la Democracia Deliberativa*. Barcelona: Gedisa Editorial, pp. 274 and 275.

by citizens via constitutional complaint or *amparo*, this can be considered as a form of citizen participation that may contribute to the ideals of participatory democracy.

Deliberative democracy places special emphasis on the deliberative nature of courts and the judicial process to further dialogue and reasoning. As pointed out in Chapter 2, from a deliberative perspective, constitutional courts are considered institutional channels that can enable the interaction with the public sphere and thus play a role in the realisation of the deliberative ideal through promoting the practical reasoning that leads to the justification of actions and decisions[380]. Scholars agree that deliberation and reason-giving are especially valuable aspects of constitutional adjudication for public life because, unlike other political institutions, courts justify their decisions through reasons that take place within an internal process of deliberation[381].

Gargarella highlights that adopting a deliberative approach to democracy has positive implications for understanding the proper role of the judiciary[382]. According to him, the deliberative perspective rejects the traditional assumption that judges should have the 'final say' about the meaning of the constitution, since all important constitutional matters should be open to ongoing discussions among all parties affected. As a result, 'we the people' retain the 'final say' in constitutional matters. Additionally, deliberative democracy identifies the judiciary as a crucial engine of public debate due to its exceptionally good location and because courts and judges represent the main institutional channel that the disadvantaged or those severely affected by the decisions of the political branches can use for becoming heard.

From a deliberative perspective, the inherent dialogic characteristics of courts play a key role regarding the protection of rights because judges can contribute to activating and enriching the discussion about rights, including social rights which might help strength the impartiality of the decision-making process[383]. This, in turn, may also contribute to the promotion of egalitarian democracy, as the judicial enforcement of social, economic, and cultural rights can lead to the empowerment of disadvantaged groups and help reduce the inequality gap.

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[380] See Nino, C. S. (1996), *op. cit.*, p. 200 quoted by Bohman, J., *op. cit.*, p. 413.

[381] See Ferejohn, J., & Pasquino, P. (2003). Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice. In W. Sadurski (Ed.), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (pp. 21–36). The Hague–London–New York: Kluwer Law International, pp. 22-23.

[382] See Gargarella, R. (2006). Theories of Democracy, the Judiciary and Social Rights. In R. Gargarella, P. Domingo, & T. Roux (Eds.), *Courts and Social Transformation in New Democracies. An institutional Voice for the Poor?* (pp. 13–34). Hampshire: Ashgate, p. 28.

[383] Idem, pp. 28-29.

Against the statement that constitutional judges can decide on civil and political rights, but should not do so in respect of economic, social, and cultural rights, Linares argues for a contextual defence of judicial review for egalitarian purposes[384]. Expanding Nino's idea that there is a threshold for the distribution of *a priori* rights[385] from which a society can be considered minimally egalitarian, Linares suggests that judicial review (on social rights) is fully justified in those societies where the distribution patterns are unequal[386]. This implies that when a determined society reaches the distributional threshold, judicial review should not be used to veto laws that affect equal distribution of social rights because the democratic process has epistemic reliability as basic conditions of equality between members are minimally given. While these ideas have been expressed in relation to the judicial review of legislation, they also extend to the judicial enforcement of human rights.

In order to avoid contravening the separation of powers principle and/or the problem of courts having the 'last word' regarding the design and development of public policies in social matters, Gargarella suggests that judges can adopt a variety of responses to political branches. For instance, require them to give more explicit reasons as to why they have excluded or disregarded certain demands; to ask them to rethink or re-elaborate their reasoning; to order them to provide solutions to certain unresolved problems; to define guidelines for authorities instead of direct orders dictating particular solutions, and to propose the adoption of certain particular outcomes, without imposing them on the legislature that could then adopt these suggestions or try different alternatives[387].

Some Latin American constitutional courts have adopted innovative dialogic mechanisms, e.g., organising public audiences with government and members of civil society (Supreme Federal Court of Brazil); ordering the national government to present a coherent plan (Constitutional Court of Colombia); advising the government on what decision should be adopted in order to comply with its constitutional duties (Supreme Court of Argentina); exhorting governments to correct their policies according to prevalent legal standards (Supreme Court of Argentina); creating monitoring mechanisms to ensure the enforcement of their rulings over time;

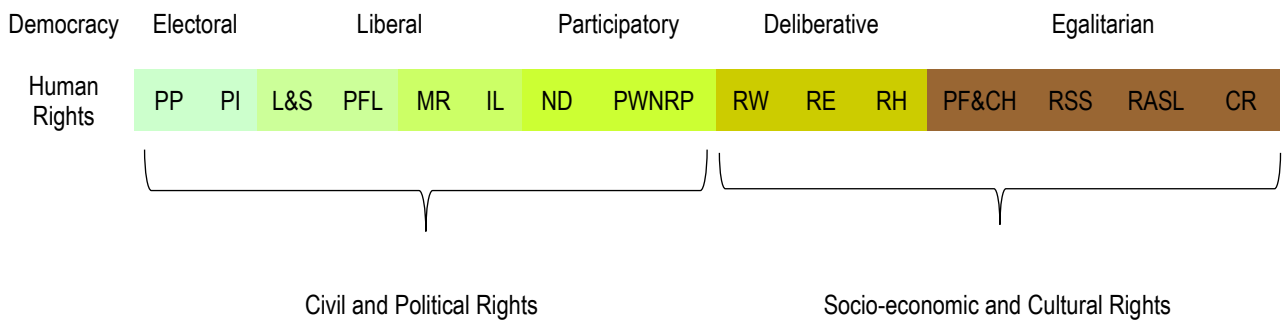
[384] See Linares, S. (2008). Sobre el ejercicio democrático del control judicial de las leyes. *Isonomía: Revista de Teoría y Filosofía Del Derecho*, (28), p. 176.
[385] From Nino's point of view, rights represent conditions that give other validity to the democratic process; therefore, he considers them as *a priori* rights.
[386] See Linares, S. (2008), *op. cit*. P. 176.
[387] See Gargarella, Roberto. (2006), *op, cit*., p. 29.

requesting reports to public or private institutions or challenging the validity of a certain law because it was passed without a proper legislative debate (Constitutional Court of Colombia)[388].

From the above it can be said that courts might contribute to making democratic norms work, holding elected officials accountable and serving as a channel for citizens to exercise vertical or societal control when their rights have been transgressed. The judicial enforcement of those rights that underlie different democratic ideals may enable democracy to evolve. Conversely, the failure to guarantee the values and principles of different democratic ideals puts the democratic system at risk by diminishing the autonomy of citizens and giving free leeway to authoritarian practices.

Considering that a variety of democratic practices can be found in a single country, the vertical or societal accountability function of courts can be expected to occur within the rights-interval between electoral and egalitarian democracy. See Figure 3-1.

Figure 3-1. Rights-interval between electoral democracy and egalitarian democracy.



PP= Political participation; PI= Physical integrity; L&S= Liberty &Security; PFL= Procedural fairness in law; MR= Minority rights; IL= Individual liberty; ND= Non-discrimination/equality before the law; PWNR= Prohibition of propaganda (war and national/religious hatred); RW= Right to Work; RE= Right to education; RH= Right to health; PF&CH= Protection and assistance to family and children; RASL= Right to an adequate standard of living; RSS= Right to Social Security and CR= Cultural rights

Source: Own elaboration.

From a normative perspective, the judicial enforcement of human rights may improve the epistemic quality of the different dimensions of democracy. This merits an approach to the relationship between courts and democracy that focuses on the vertical or societal accountability of the courts by assessing their responsiveness to rights claims.

[388] See Gargarella, Roberto. (2014), *op. cit.*, p. 6.

3.1.2. The constitutional complaint or *amparo* as instrumental in furthering democracy

The second democratic wave reinforced the need for a legal instrument to promote a culture of legality and respect for human rights. From this moment on, the constitutional complaint or *amparo* became an essential legal mechanism of liberal democracy. Through this judicial instrument any person, individually or collectively considered, has the right to go before the constitutional court (or ordinary courts in diffused systems) in case he/she considers that an authority has violated or threatened to violate his/her fundamental rights. As showed in Chapter 2, the constitutional complaint or *amparo* is not always available. However, where it exists, it can be seen as an opportunity to bring social demands into the public agenda.

The constitutional complaint or *amparo* has democratic qualities that deserve further analysis. Firstly, it serves as a mechanism that contributes to the development of individuals' reasoned agency. Human rights violations, understood as the imposition of limits on freedoms, prevents the development and exercise of individuals' reasoned agency[389], i.e., to act and trigger change, to achieve social agreements in accordance with their needs and interests. The imposition of limits on freedom is directly related to State action or omission and results in weakening the ability of individuals, minority groups or broad sectors of society to participate in public debates during the decision-making process. According to Habermas, '…only the democratic process guarantees that private individuals will achieve an equal enjoyment of their equal individual liberties. Conversely, only when the private autonomy of individuals is secure are citizens in a position to make correct use of their political autonomy'[390]. Considering that courts function as referee of the democratic process[391], the judicial enforcement of human rights and freedoms, through the constitutional complaint or *amparo*, might result in individuals being able to develop their potential to benefit themselves and society in general.

Secondly, as it is within the reach of any person, it guarantees the right to access to justice against the arbitrariness of the State and promotes citizens participation via the judiciary. Accordingly, legal systems that grant legal standing for individuals to file constitutional complains strengthen their democratic system.

[389] See Sen, A. (1999), *op. cit*., pp. xii and 19.
[390] See Habermas, J. (2001). Constitutional Democracy: A Paradoxical Union of Contradictory Principles? *Political Theory*, *29*(6), p. 780.
[391] See Nino, C. S. (1993). A Philosophical Reconstruction of Judicial Review, *op. cit.*, p. 832.

Thirdly, it fosters democratic practices by reinforcing a culture of respect to human rights. Constitutional courts have the opportunity to assess acts or omissions of the state in the light of the constitutional values and international human rights standards. Accordingly, judicial decisions on human rights have a twofold effect. At the level of individuals, they provide protection and redress for human rights. At the level of society, they contribute to the strengthening of a constitutional culture based on respect for human rights and democratic values through holding governments and politicians accountable.

Fourthly, it promotes dialogue and deliberation because it allows to place on the public agenda the needs of those who were not taken into account during the decision-making process and to have them widely discussed in a public debate.

Fifthly, in less democratic settings, it provides citizens with an institutional mechanism that allow them to channel their disagreements with the government and challenge it without the risk of reprisal. As pointed out in Chapter 1, hybrid regimes are more prone to violate human rights, therefore, pacific protests can easily result in state repression putting the life and physical integrity of protesters at risk. Hence, in less democratic settings where societal contestation can trigger confrontation between the state and dissatisfied citizens, constitutional complaints can be seen as a rational alternative that allows citizens to raise their claims to government without risking their physical integrity.

Last but not least, the constitutional complaint or *amparo* can be seen as an internal mechanism of democratic correction. Nino warns that '(…) democracy could eat its own tail if certain conditions were not preserved even by undemocratic means'[392]. From this viewpoint, democracy depends for its survival on the operation of certain non-democratic processes such as judicial review. Therefore, Nino considers judicial review as the main mechanism protecting individual rights against the political powers that may ignore or undermine those rights[393]. Therefore, judicial review seems to be the ideal institutional (non-democratic) constraint against the possible arbitrariness of political power that threatens the survival of democracy.

Even though Nino explicitly refers to judicial review, these ideas are extended to *amparo* as this is the judicial mechanism *par excellence* for the protection of human rights. Thus, the

[392] Idem, p. 831.
[393] Idem, p. 799.

judicial protection of human rights serves to limit the malfunctioning of the democratic process by disqualifying collective decisions that ignore them[394].

It suggests that systematic resort to constitutional complaint or *amparo* may, in the medium or long term, result in a society that has strengthened its culture of legality and respect for human rights by allowing its citizens to develop their reasoned agency which, in turn, will facilitate their participation in decision-making processes, giving rise to a process of institutional democratic correction.

In brief, the constitutional complaint or *amparo* can be seen not only as a judicial mechanism that allows citizens to seek protection and redress against human rights violations, but also as an internal mechanism of democratic correction that might allow a particular society to move towards a culture of participation, accountability and dialogue which are key aspects of strengthening democracy.

3.2. A multivariate analytical framework and formulation of hypotheses

From the review of the literature presented in Chapter 2, it can be deduced that there are several elements that could play a role in the analysis of the relationship between courts and democracy. These elements refer to internal and external factors to the judicial environment that may be related to the performance of courts. The characteristics of plaintiffs and the personal attributes and professional background of constitutional judges are two internal factors found in the literature review as crucial to understanding courts' decisions. The economic, political, and social circumstances under which courts operate, were found to be key external factors in understanding courts' performance.

A multivariate analytical framework seems useful for the purposes of this research because it provides a framework to include internal or external factors into the analysis of the responsiveness of courts to rights claims. In addition, it also allows to explore the relationship between democratic performance and the responsiveness of courts to rights claims. Accordingly, the multivariate analytical framework proposed by this research suggests including the outcomes of courts when decide human rights cases, internal and external factors of the adjudication process and the democratic performance.

[394] See Nino, C. S. (1996), *op. cit*., quoted by Oquendo, Á. R. (2002). Deliberative Democracy in Habermas and Nino. *Oxford Journal of Legal Studies*, *22*(2), p. 196.

Therefore, the purpose of this section is to review the literature on the relationship of each of the elements included in the analytical framework *vis-à-vis* democracy in order to determine the working hypotheses of this research.

3.2.1. Judicial decisions on human rights

Assessing the performance of the vertical or societal accountability of constitutional courts involves the analysis of judicial decisions on human rights issued in constitutional complaints or *amparo* proceedings.

The analysis of judicial decisions requires a framework because they are part of a larger puzzle that is litigation. According to Gloppen, litigation can contribute holding governments accountable by bridging policy and implementation gaps, i.e., harmonising national laws and policies in line with international human rights standards[395]. Building on this, Gloppen has developed a multi-step analytical framework to assess to what extent litigation has succeeded in securing accountability for social rights primarily among marginalised groups.

Gloppen[396] breaks down the litigation process in four distinct but interrelated stages, i.e., the claims formation stage, adjudication stage, implementation stage and social outcomes stage. The claims formation stage aims to understand the 'input dynamics' influencing whether rights claims come to the courts, i.e., who litigates and the nature of their claims. Gloppen links this stage to the term 'voice', i.e., the ability of individuals or groups to effectively express their claims or have them expressed on their behalf[397].

The adjudication stage regards what happens in court. The analysis of this stage aims to uncover factors influencing how judges deal with rights claims and hence why courts differ in their 'output'. These factors relate to the strength of litigants as well as the strength of the argument of their claims, but also on the responsiveness and capability of the judges. Accordingly, this stage is linked to the terms 'responsiveness' and 'capability'. Responsiveness refers to the willingness of courts to respond to the concerns of individuals or groups. The legal system is responsive to the claims voiced when it recognises them as a legitimate matter for the court to

[395] See Gloppen, S. (2008). Litigation as a strategy to hold governments accountable for implementing the right to health. *Health and Human Rights, 10*(2), 21–36, p. 24.
[396] Idem, p. 25.
[397] See Gloppen, S. (2006). Courts and Social Transformation: An Analytical Framework. In R. Gargarella, P. Domingo, & R. Theunis (Eds.), *Courts and Social Transformation in New Democracies. An Institutional Voice for the poor?* Aldershot/Burlington: Ashgate, p. 37.

decide[398]. Gloppen explains that the manner in which the claims are articulated, the legal culture, the nature of the legal system, the composition of the court and sensitisation to social (or other) rights issues are factors conditioning responsiveness of courts[399]. Capability refers to judges' ability to give legal effect to social (and other) rights in ways that significantly affect the situation of individuals or groups[400].

The analysis of the implementation stage seeks to understand the responses of government agencies to judicial statements that determine the extent to which relevant authorities comply with the orders of courts and whether the holding of a judgment is carried into legislation and policies. This stage is linked to the term 'compliance', i.e., the extent to which judgments are politically authoritative, and whether the political branches comply with them and implement and reflect them in legislation and policies.

The analysis of the social outcomes stage is intended to facilitate the understanding of how litigation affects the overall conditions in society with regard to social (or other) rights.

Gloppen understands success in litigation from three different perspectives. Success in court occurs if the litigants' claims are confirmed by the court and remedies are provided. Success in the material sense assesses the adequacy of court orders and their implementation in relation to the claim in question. Success in the social sense involves assessing whether the litigation changes public policies and the implementation of rights[401].

The general logic of the theoretical framework developed by Gloppen applies to the analysis of all forms of social (or other) rights litigation. Accordingly, it seems useful for the purposes of this research and will be used as a reference framework for the analysis of two out of four stages of the litigation process, i.e., the claims formation stage and the adjudication stage.

The analysis of the claims formation stage will focus on the plaintiffs and their claims aiming to identify whether the litigation impetus comes from below, from above or from commercial interests and whether winning cases can be distinguished in terms of the resources — legal and otherwise — that enable litigants to effectively argue their cases[402].

[398] See Gloppen, S. (2005). Social Rights Litigation as Transformation: South African Perspectives. *CMI Working Paper WP 2005: 3*, p. 5.
[399] Idem, p. 49.
[400] Idem, p. 37.
[401] See Gloppen, S. (2008), *op. cit.*, pp. 24-25.
[402] Idem, pp. 27-28.

The analysis of the adjudication stage will focus on the courts and the judgments aiming determining the responsiveness of courts to rights claims and the capacity of judges to give legal effect to their orders. According to Gloppen, an effective adjudication framework must distinguish between characteristics of the court itself and the way in which the judges deal with the plaintiffs' claims in their judgments. The analysis of courts considers their nature and composition as well as the legal opportunity structure, i.e., the barriers and opportunities that the legal system presents to litigants such as rules of standing, procedural requirements, and costs. The analysis of the judgments focuses on whether cases were accepted within the court jurisdiction, whether judges uphold the rights claims and on identifying the remedies provided in judicial decisions. This allows to assess the success of rights litigation in a narrow sense, i.e., whether courts uphold plaintiffs against public authority and hold the government accountable for (health) rights[403].

The operationalisation of the analytical framework proposed by Gloppen requires a preliminary study of the composition and the legal opportunity structure of the courts since the institutional design of courts in emerging democracies varies from country to country. A comprehensive discussion on the institutional and legal framework of the three selected courts can be found in Chapter 5.

The framework proposed by Gloppen for the analysis of judicial decisions aims to determine the responsiveness of courts and the capability of judges to give legal effect to their orders. Accordingly, this research understands responsiveness as the ability of courts to secure government accountability for social (or other) rights. Operationalising the concept of responsiveness involves distinguishing between cases rejected on the basis of procedural rules and cases accepted to be decided on the merits. In turn, among accepted cases it is necessary to distinguish between those in which successful litigation took place, i.e., the court held the government accountable, and those that culminated in a judgment denying the protection requested.

The capability of judges to give legal effect to their mandates will be addressed through the analysis of specific orders contained in judicial decisions. Additionally, the legal basis of the judgments is also analysed, i.e., whether judgments are informed by international norms, precedents, technical or legal expertise. The catalogue of rights provided by the ICCPR and the ICESCR, will be used to identify the type of right(s) protected. Table 3-1 shows the analytical

[403] Idem, p. 29.

framework proposed to analyse judicial decisions on human rights (*amparo* proceedings) based on Gloppen's framework.

Table 3-1. Judicial decisions. Analytical framework.

	Variable	Indicator
Adjudication stage	Type of resolution	Granted protection
		Denied protection
		Dismissals
	Rights protected	Civil and political rights
		Economic, social, and cultural rights
	Court orders	Declaratory
		Mandatory
		Supervisory
		Advisory
		Structural
	Legal basis for the judgment	National law
		International norms
		Legal comparisons
		Legal doctrine
		Precedent
	Expert knowledge	Legal
		Economic
		Technical
		Ethical

Source: Own elaboration.

As can be seen, this analytical framework allows for a meticulous analysis of the judgements at the adjudication stage. The proposed categories constitute concrete, observable data. Gloppen's analytical framework also includes *plaintiffs* and to some extent *judges* as factors or explanatory variables within the adjudication process. These factors will be addressed in the following sections.

3.2.2. Plaintiffs

Scholars[404] suggest that within the litigation process there are aspects that might influence on how judges decide. According to them, it is important to observe the characteristics of those who go before the court and how they frame their claims.

Gloppen suggests that the interaction between the four stages in the litigation process may determine the success or failure of social (or other) rights litigation[405]. In other words, she posits

[404] Idem, 21–36. See also Galanter, M. (1974). Why the Haves Come out Ahead: Speculations on the Limits of Legal Change. *Law & Society Review*, *9*(1), 95–160.
[405] See Gloppen, S. (2006), *op. cit.*, p. 42.

an expected relationship between the inputs in the claims formation stage, i.e., the plaintiffs and their claims, and the outcomes in the adjudication stage, i.e., the responsiveness of courts.

Gloppen highlights the importance of the articulation of rights claims for a successful outcome at the adjudication stage. According to her, an effective articulation of claims depends on the institutional structure of the legal system, the social and political context and the resources available to the population[406]. These aspects will be discussed separately. However, the resources available to individuals or groups to go to court could be addressed by analysing the characteristics of the plaintiffs, provided that they are available in the judgements.

Gloppen's associative capacity concept may be useful to identify whether plaintiffs join forces, from associations with the capacity to mobilise around social (or other) rights issues, generate expertise and financial resources locally and internationally and sustain collective action[407]. Legal aid or any other form of legal assistance is another important resource because human rights claims should be framed in legal terms to be successful[408]. Whether plaintiffs go to court individually or in group or by associations as well as whether they have legal aid may be observable through the judgments.

From another angle, Galanter distinguishes between two types of plaintiffs: those who have only occasional recourse to the courts or one-shooters (OS) and those who are engaged in many similar litigations over time or repeated players (RP). According to him, RP have an advantage over OS to the extent that the former have had an anticipated repeated litigation, have low stakes in the outcome of any one case and have the resources to pursue their long-run interests while the claims of OS are too large (relative to their size) or too small (relative to the cost or remedies) to be managed routinely and rationally. Therefore, he associates OS with the 'have-nots' and RP with the 'haves' and argues that the 'haves' have the ability to play the litigation game differently from OS and this ability to play differently, affords RP substantial advantage and benefits[409].

Galanter defines a position of advantage in the configuration of plaintiffs in terms of power, wealth and status and argues that 'this position of advantage is one of the ways in which a legal

[406] Idem, p. 45.
[407] Idem, p. 47.
[408] Ibidem.
[409] See Galanter, M. (1974), *op. cit.*, pp. 97-98.

system formally neutral as between 'haves' and 'have-nots' may perpetuate and augment the advantages of the former'[410].

Similarly, Epp poses significant importance over the legal and material resources that a plaintiff can have as an indispensable element for successful human rights litigation. For instance, financing, organisational support (usually from interest groups) and willing and capable lawyers[411].

The above-mentioned viewpoints contrast with literature reviewed in Chapter 2 suggesting that constitutional courts are prone to protect marginalized and vulnerable people. In the last decade, some constitutional courts started to perform in a more activist fashion regarding the enforcement of socio-economic and cultural rights[412]. Scholars suggest that improving access to and the quality of goods and services such as decent housing or healthcare, is what drives litigators and activists to resort to constitutional courts. This is the case for the Constitutional Court of South Africa[413], the Supreme Court of India[414], the Supreme Court of Argentina[415], the Constitutional Court of Colombia[416] and the Constitutional Chamber of Costa Rica[417]. Interesting for this research is to note that constitutional courts of Colombia and Costa Rica have consistently protected the rights of the most vulnerable groups such as, among others, the

[410] Idem, pp. 103-104.
[411] See Epp, C. R. (1998). *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. University of Chicago Press.
[412] See Gloppen, S., Wilson, B. M., Gargarella, R., Skaar, E., & Kinander, M. (2010), *op. cit.*; Helmke, G., & Ríos-Figueroa, J. (2011), *op. cit.*; Carroza, P. G. (2011). Human dignity in constitutional adjudication. In T. Ginsburg & R. Dixon (Eds.), *Comparative Constitutional Law* (pp. 459–472), Cheltenham-Northampton: Edward Elgar; Rodríguez-Garavito, C. (2011), *op. cit.*; Wilson, B. M. (2006). Changing Dynamics: The Political Impact of Costa Rica's Constitutional Court. In R. Sieder, L. Schjolden, & A. Angell (Eds.), *The Judicialization of Politics in Latin America* (pp. 47–65). Palgrave Macmillan; Cepeda-Espinosa, M. J. (2005), *op. cit.*; Cepeda-Espinosa, M. J. (2004). Judicial activism in a violent context: The origin, role, and impact of the Colombian Constitutional Court. *Washington University Global Studies Law Review*, *3*, 529–700.
[413] The Grootboom case involved a challenge to South Africa's housing policy, which was said to be inconsistent with the constitution's guarantee of the right to housing. See Government of the Republic of South Africa v. Grootboom, [Constitutional Court of South Africa], 46 (CC).
[414] See R.D. Upadhyay v. State of A.P. 2006 (3) SCR [Supreme Court of India] 1132. In this case, the Indian Supreme Court ruled about the conditions of young children living with their convicted mothers instate jails. The Court held that the dignity of these children required that they be provided with appropriate food, clothing and educational opportunities, as well as frequent outing to experience the world outside the prison walls, quoted by Carroza, P. G. (2011), *op. cit*., p. 463.
[415] In Argentina, some courts have undertaken structural cases and experimented with public mechanisms to monitor the implementation of activist judgments such as Verbitsky, on prison overcrowding and Riachuelo, on environmental degradation. Corte Suprema de Justicia de la Nación 3/5/2005, 'Verbitsky, Horacio/habeas corpus', Colección oficial de Fallos de la Corte Suprema de Justicia de la Nación (Fallos) (2005-328-1146) and Corte Suprema de Justicia de la Nación, 8/7/2008, 'Mendoza, Beatriz Silvia y otros v. Estado nacional y otros/daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza-Riachuelo)', Fallos (2008-331-1622). See Rodríguez-Garavito, C. (2011), *op. cit.*, p. 1673.
[416] Idem, p. 1682.
[417] See Wilson, B. M. (2006), *op. cit.*, p. 59.

rights of AIDS patients[418], prison inmates living in overcrowded and indignant conditions[419] and IDPs[420].

From another point of view, Rueda argues that courts do not support the interests of the masses. He found that successful litigation of social rights in Colombia, instead of constituting an opportunity for the expansion of goods and services to the dispossessed, was used by middle-class litigants as an opportunity to minimise the effects that the economic crisis had on them[421]. This resembles Sajó's findings pointed out in Chapter 2 in the sense that the jurisprudence of the Constitutional Court of Hungary on social rights has favoured the post-communist middle classes[422].

It follows from the above that a paradox exists within the literature. On the one hand, Galanter suggests that those associates with the 'haves' have substantial advantage and benefits to succeed in litigation than those associated with the 'have-nots'. On the other hand, recent studies show that constitutional courts in the Global South have been protecting disadvantaged groups. Rueda and Sajó introduce the middle class into the discussion, arguing that it is the middle class that has been favoured by the courts.

The literature reviewed emphasizes that financial and intellectual resources are critical to plaintiffs' ability to access and succeed in their rights claims before the courts. These aspects belong to the first stage of the adjudication process proposed by Gloppen, i.e., the claim formation stage. The analysis of this stage will focus on the plaintiffs and their claims taking in consideration the aspects revealed in the literature.

The first step is to identify the type of plaintiff, i.e., whether it is an individual, a group of individuals or an organisation. Secondly, consider the socio-demographic characteristics of the plaintiffs in the case of individuals, gender, age, occupation and whether they had legal assistance; in the case of organisations, to which sector they belong. Finally, the analysis of the socio-demographic characteristics of plaintiffs can be used as rough measures or indicators to identify whether the cases come from below, from above or from commercial interests, the

[418] In the AIDS medications case, the Constitutional Chamber of Costa Rica laid down the constitutionality of the right to state-funded medical care. As a result, state coverage for drugs for people living with AIDS is now generally and readily available. See AIDS judgments: Resolution No. 5934-97, Resolution No. 0504-I-97, Resolution No. 0769-98, Constitutional Chamber of Costa Rica.
[419] See Rodríguez-Garavito, C. (2011), *op. cit.*, pp. 1670-1671. See also T-153/1998.
[420] See Cepeda-Espinosa, M. J. (2005), *op. cit.*, p. 95.
[421] See Rueda, P. (2010), *op. cit.*, pp. 25-26.
[422] See Sajó András. (2006), *op. cit.*

associative capacity of the plaintiffs, whether they had legal assistance as well as whether they can be linked to the 'haves'. In addition, the analytical framework will address whether plaintiffs have used the variety of existing legal instruments to frame their human rights claims. The characteristics of plaintiffs considered for the analytical framework are described in Table 3-2.

Table 3-2. Plaintiffs. Analytical framework.

	Variable	Indicator
Claims formation stage	Type of plaintiff	Individuals
		Group of individuals
		Organisations
	Individuals' gender	Female; Male
	Individuals' age	Minor
		Adult
		Elderly
	Plaintiffs' occupation	*Open categories
	Legal aid	Yes; No
	Type of organisations	*Type of sector they belong
	Legal basis for the claim	Rights
		National Law
		Regional Law
		International Law
		Precedent
	Expert knowledge	Technical
		Economic
		Legal
		Ethical

*Emerging data will determine the final categories.
Source: Own elaboration.

Hypothesis 1

Accordingly, this research hypothesises that the socio- demographic characteristics of plaintiffs might relate to the responsiveness of courts to rights claims. According to the literature review, it is expected that courts will privilege the protection of the rights of those who are part of vulnerable groups, i. e., women, minors, the elderly, and those associated with low income or lack of resources.

3.2.3. Judges

Kapiszewski, Silverstein & Kagan have pointed out that judges' own incentives, capacities and motivations are crucial to the expansion or contraction of the judicial role[423]. Similarly, Schubert considers that constitutional judges, as subjects in charge of executing courts'

[423] See Kapiszewski, D., Silverstein, G., & Kagan, R. A. (Eds.). (2013), *op. cit.*, p. 28.

competences, have personal and professional attributes that may have an impact on the judicial decision-making process[424]. In addition, Huneeus, Couso & Sieder argue that, under the so-called constructivist or discursive institutionalism, 'institutions are still central to understanding political behaviour, but actors are not just ruled by institutions; they play an active role not only in the reproduction, but also in the re-creation of institutions through discourse and ideas'[425].

Tate & Sittiwong developed a personal attributes model to examine the relevance of the personal attributes of justices to decision making to the case of the Supreme Court of Canada, focusing on all nonunanimous cases during the period from 1949 to 1985. Their findings suggest that regionalism, religion, partisanship and career experience together influence how judges reach decision. More specifically, justices appointed by a Liberal party prime minister and those with political experience prior to appointment were linked to liberal decision making. Also, judges with more judicial experience prior to appointment were more liberal than those with little or non-judicial experience. Justices appointed by the King were more conservative than justices appointed by other prime ministers. Experience in politics and government increases the willingness of a justice to grant the claims of disadvantaged parties[426].

Songer & Johnson replicated the personal attributes model developed by Tate & Sittiwong, extending the time period from 1949 to 2000 to examine the voting behaviour of the justices of the Supreme Court of Canada. In addition to the variables used by Tate & Sittiwong, gender was added as well as an interaction between partisanship and regionalism (origins). The most important implication of Songer & Johnson findings is that the personal attributes model of judicial voting on the Canadian case appear to be time bound, i.e., attributes that provided a robust prediction of judicial outcomes in the 1950s, 1960s and 1970s have lost most of their predictive power in the past quarter century[427].

According to the authors, it appears that since the mid- to late 1970s, the changing agenda of the Canadian Court has produced a modification in the relevance of several attributes that previously appear to have been useful indicators of relevant judicial attitudes. Regionalism appears to play a much greater role in the degree to which judges are liberal in their decisions.

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[424] See Schubert, G. (1987). Subcultures and Judicial Background: A cross-cultural analysis. In J. R. Schmidhauser (Ed.), *Comparative Judicial Systems. Challenging Frontiers in Conceptual Empirical Analysis*. Essex: Butterworths, pp. 222-223.
[425] See Huneeus, A., Couso, J., & Sieder, R. (2010), *op. cit.*, p. 13.
[426] See Tate, C. N., & Sittiwong, P. (1989), *op. cit.*, pp. 911-913.
[427] See Songer, D. R., & Johnson, S. W. (2007). Judicial Decision Making in the Supreme Court of Canada: Updating the Personal Attribute Model. *Canadian Journal of Political Science / Revue Canadienne de Science Politique*, *40*(4), pp. 923-930.

Judges from Quebec are more conservative in personal rights areas, while more liberal than others in economic areas. Justices from Ontario appear to be more liberal in civil rights and liberties areas than other judges. Moreover, partisan differences cannot be fully explained without examining the interaction between party and region. At the same time, gender also seems to predict some judicial behaviour fairly well in the Canadian context. Female judges are more liberal in civil rights areas and possibly more conservative in criminal rights areas than their male colleagues[428].

Kapiszewski found that the new generations of judges who have had the opportunity to receive a more progressive legal training have been an important part of the modest role played by the *Supremo Tribunal Federal* (Federal Supreme Court of Brazil; STF) in the adjudication of rights during the post-authoritarian period between 1985-1994. She attributes the reputation of Brazilian judges as conservative due to the prevalence of legal training focused on civil and criminal law. Law students were trained to see the law as an instrument for maintaining the status quo rather than as a tool for transformation. In addition, there were no significant changes in judicial personnel during the transition, which resulted in a distance between the judiciary and society[429]. Accordingly, the age and educational background of judges appear to be important variables to take into account.

Judges bring to the bench an ideology that is the result of the social, economic, cultural and academic environment in which they have developed, and this ideology has the potential to be a determining factor in their decisions[430]. The findings outlined above show the importance of considering the personal attributes of judges as a component of the relationship between courts and democracy.

Songer and Johnson consider that due to the impossibility to directly measure the attitudes of judges, the personal attributes or social background characteristics can be used as rough measures or indicators of the judge's ideology on particular issues. Personal attributes model has been successfully used to demonstrate the existence of attitudinal voting on a number of courts including the Philippines Supreme Court, United States Supreme Court and its courts of appeals. The advantages of using the personal attributes model are that it is relatively easy to observe the personal characteristics and professional background of the judges and that they

[428] Idem, pp. 930-931.
[429] See Kapiszewski, D. (2011), *op. cit.*, pp. 173 and 177.
[430] Ibidem.

can be measured reliably because their values can be determined objectively[431]. Moreover, these studies show that a set of multiple indicators of attitudes provides a better prediction of judicial votes than that provided by a single attribute[432].

Hammerslev carried out a socio-legal study of Danish judges in the 20th century to identify the integrative role of judges as decision-makers and on the judges' role in preserving existing power structures[433]. To this aim, he collected data on the residential strategies, i.e., to establish whether the judges were born in certain areas of the country; educational strategies, i.e., whether certain gymnasiums or one of the universities are used as investments to reach the highest positions and at the same time reproduce the field of power, and finally the social origin of the judges approached through parental information to analyse the social capital of the judges, i.e., whether there is a reproduction of the jurists and judges and if there are judges dynasties[434]. Hammerslev concluded that high court judges in particular have transformed their social capital into a state form of capital, which distinguishes them from lower court judges with the exception of the judges of the District Court of Copenhagen. He also found that there is a centralisation of the top positions in the field of judges, i.e., educational and residential strategies for these top positions occur around Copenhagen[435].

In the light of the above, it can be said that constitutional judges, as holders of the jurisdiction of the courts, play a fundamental role in the performance of these institutions and shape democracy by interpreting the constitution and granting or denying protection of fundamental rights. Moreover, findings suggest that characteristics of judges do, in fact, impact judicial decisions. This confirms the importance of including the personal attributes and background of judges in the analytical framework as variable that might be associated with the responsive of courts. shows the personal attributes and the professional background of judges considered for the analytical framework. See Table 3-3.

[431] See Songer, D. R., & Johnson, S. W. (2007), *op. cit.*, p. 915.
[432] See Brudney, J. J., Schiavoni, S., Merritt, D. J., & Journal, S. L. A. W. (1999). Judicial Hostility toward Labor Unions--Applying the Social Background Model to a Celebrated Concern. *Ohio State Law Journal*, (60), 1675–1771; Tate, C. N., & Handberg, R. (1991). Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916–88. *American Journal of Political Science*, *35*(2), 460–480; Tate, C. N., & Sittiwong, P. (1989). Decision Making in the Canadian Supreme Court: Extending the Personal Attributes Model Across Nations. *The Journal of Politics*, *51*(4), 900–916 quoted Songer, D. R., & Johnson, S. W. (2007), *op. cit.*, p. 917.
[433] See Hammerslev, O. (2003). *Danish Judges in the 20th Century. A socio-legal Study*. Copenhagen: DJØF Publishing.
[434] Idem, p 17.
[435] Ibidem.

Table 3-3. Personal attributes and professional background of judges. Analytical framework.

	Variable	Indicator
Claims formation stage	Gender	Female; Male
	Age	Years
	Judicial career	Yes; No
	Postgraduate degree	Yes; No
	Studies abroad	Yes; No

Source: Own elaboration.

Hypothesis 2

Based on literature review, this research hypothesises that the personal attributes and professional background of judges relate to the responsiveness of courts to rights claims. It is expected that female judges will be more prone to protect human rights than their male colleagues. Similarly, younger judges and those with a strong academic background and training experience abroad are expected to have fresh and novel ideas and therefore be more prone to protect human rights.

3.2.4. Contextual factors

Institutions do not function in a vacuum; their impact is often mediated by political, social, and ideological contexts[436]. Scholars consider that broader institutional, social, political, and economic forces as well as democratic challenges affect judicialization in any context[437]. The USAID's Office of Democracy and Governance has pointed out that '…the local environment will determine the ability of the courts to exercise independent authority…'[438]. This suggests that the judicial outcomes might differ with regard to their contextual environment.

This research aims to assess the responsiveness of constitutional courts to rights claims, considering external or contextual factors. External factors are therefore understood as those

[436] See Ríos-Figueroa, J. (2013). Institutions for Constitutional Justice in Latin America. In G. Helmke & J. Ríos-Figueroa (Eds.), *Courts in Latin America* (pp. 27–54). New York: Cambridge University Press, p. 28.
[437] See Kapiszewski, D. (2010). How Courts Work: Institutions, Culture, and the Brazilian Supremo Tribunal Federal. In J. A. Couso, A. Huneeus, & R. Sieder (Eds.), *Cultures of Legality. Judicialization and Political Activism in Latin America* (pp. 51–77). New York: Cambridge University Press, pp. 74-75; Kapiszewski, D., & Taylor, M. M. (2008), *op. cit.*, pp. 741-767; Gloppen, S., Wilson, B. M., Gargarella, R., Skaar, E., & Kinander, M. (2010), *op. cit.*; Nohlen, D. (2008), *op. cit.*, p. 140. Nohlen holds that the impact of constitutional jurisdiction varies depending on place and time and according to the problems that politics and law are addressed.
[438] See Staton, J. K., Reenock, C. M., Holsinger, J., & Lindberg, S. I. I. (2018), *op. cit.*, p. 9.

contextual circumstances outside of the adjudication process under which courts operate, i.e., the economic, political and social environment that might relate to judicial outcomes. An overview of the literature that directly or indirectly addresses the possible relationship between contextual factors and court outcomes is presented below.

Political context. McNollgast holds that the judicial doctrine of the Supreme Court of Justice of the United States is driven by the same general electoral forces that drive American politics[439]. He found that generation-long eras of stability in judicial doctrine reflect an underlying stability in the electoral and partisan arenas. In other words, when elections bring about a permanent change in the majority party, elements central to judicial doctrine will also change.

Kapiszewski found that institutional and political factors interact to shape the role of courts[440]. She conducted an empirical analysis of a systematically selected sample of fifty-five politically important cases issued by the STF between 1985 and 2004. Her findings show that the constitutional and political contexts positioned the STF to play a salient role in the distribution of power and economic governance, but a less active role in rights adjudication in the post-authoritarian period.

Kapiszewski observes a sequencing of STF roles over time. Early in the post-authoritarian period, the STF focused on distribution of power, between 1991 and 2001 emphasis was placed on economic policy, finally, in the late 2000s, the STF started to receive and resolve more salient rights cases. She considers that this evolvement occurred for three reasons: 1) because political actors began to accept constitutional limits and therefore it was no longer necessary to resort to the TSF to clarify the distribution of power, 2) because in the early 2000s Brazil completed the implementation of a first-generation economic reform, and this resulted in less judicialization of economic policy and a contraction of the STF's involvement in economic governance and 3) because of the emergence of support structures for the adjudication of rights, such as NGOs that more frequently employ a court-oriented strategy and also because younger judges have been trained in a more progressive manner[441].

[439] See McNollgast. (1995). Politics and the Courts: A positive theory of judicial doctrine and the Rule of Law. *Southern California Law Review*, *68*, p. 1656.
[440] Kapiszewski analysed a sample of fifty-five politically important cases the STF considered between 1985 and 2004. See Kapiszewski, D. (2011), *op. cit.*, p. 156.
[441] Idem, pp. 176-177.

Economic context. Roe and Siegel[442], who consider courts as primary institutions of investor protection, found that courts cannot function well in an unstable political environment and this inability may remain a critical channel connecting political instability to financial backwardness. They hold that even if conventional institutions of investor protection (such as courts) are in place, it is reasonable to expect them to be ineffective in highly unstable polities.

In contrast to the common assumption that during financial crises courts are deferential to governmental policies and manipulate legal language to serve governmental interests, Rueda found that during times of crisis, the Constitutional Court of Colombia did not use the legal language to legitimise adjustment policies. However, Rueda argues that the Court lost an important part of its agency in the orientation of its judicial policy that aimed to direct social expenditure towards sectors of society that have been structurally marginalized by the market. This, because the expansive language of social rights developed by the Court was exploited by the more dominant and middle-class social groups affected by the economic crisis[443].

According to Rueda, during times of crisis, the successful contestation of legal meanings can help to reproduce the status quo instead of producing social change because the language of rights is general and abstract, it prevents courts from distinguishing between different people and types of threats to people's material subsistence. As a result, successful contestation of legal meanings cannot be automatically associated with social change[444].

Crisis regime. Tate explored the relationship between courts and crisis regimes using the cases of India, Pakistan and the Philippines[445]. According to Tate, crisis rulers initially portray their seizure of power as necessary but temporary, but usually end up extending their rule indefinitely, transforming a non-authoritarian, constitutional regime into an authoritarian regime. The three major types of crisis regimes may include those initiated by military caretaker, martial law ruler and emergency powers executive.

Tate found that even though the structure of the courts is not initially changed by the crisis rulers, they try to restrict the scope and depth of the decision making of courts leaving them

[442] See Roe, M. J., & Siegel, J. (2011). Political Instability: Effects on Financial Development, Roots in the Severity of Economic Inequality. *Journal of Comparative Economics*, (39), p. 280.
[443] See Rueda, P. (2010), *op. cit.*, pp. 25-26 and 48-49.
[444] Idem, p. 49.
[445] Tate uses Linz's definition of a crisis regime as a political system which is initiated by the sudden seizure of new or drastically expanded executive powers by a political leader for the purpose of coping with the demands of a leader-proclaimed extraordinary crisis. See Tate, C. N. (1993). Courts and Crisis Regimes: A Theory Sketch with Asian Case Studies. *Political Research Quarterly*, *46*(2), p. 316.

with only routine non-threatening decisions to make, preserving their utility, but reserving the important and threatening litigation to be decided on by more controllable agencies, e.g., military courts or by proclaiming the no-challenge clause of decrees essential to establishing and maintaining their rule. Another way for crisis rulers to control their high courts is attack them on their independence and impartiality. On the one hand, judicial independence can be effectively abolished by simply making courts report to and take instructions from appropriate executive officials. On the other hand, judicial impartiality can be undermined if judges are indoctrinated so that they will reliably interpret the rules as the regime wishes[446].

Security crisis. Cole challenges the conventional wisdom that courts function poorly as guardians of liberty in times of crisis and that judicial review has largely failed to protect individual rights when their protection is most needed[447]. According to Cole, over time, judicial decisions do exert a constraining effect on what the government may do in the next emergency. Cole found that the Supreme Court of Justice of the United States changed its doctrine in matters of national security from rights-restricted to rights-protected after the emergency has passed. For instance, the Court authorised the criminalization of speech during World War I, detention based on race during World War II and guilt by association during the Cold War; however, over time the Court developed a highly protective test for speech advocating illegal activity, subjected all racial discrimination to exacting scrutiny and prohibited guilt by association. To some extent, Cole suggests that these precedents help to judge cases in the midst of the 9/11 where he found that a surprising number of judicial decisions initially upheld claims of constitutional rights against official antiterrorist measures. However, as time went on, courts increasingly deferred to government claims of national security.

The findings outlined above show the importance of considering the contextual factors as a significant variable that might be associated with the responsiveness of courts and therefore it is included in the analytical framework. As can be observed in the literature review, economic, political, security or regime crisis represent an opportunity for different actors, including courts, rulers, NGO's, middle and upper class plaintiffs to use the law and judicialization to their own interests.

Accordingly, Chapter 5 provides a contextual framework under which the constitutional courts of Colombia, Costa Rica and Mexico have been operating since their establishment in the 1990s

[446] Idem, p. 318.
[447] See Cole, D. (2003). Judging the next emergency: Judicial Review and Individual Rights in times of crisis. *Michigan Law Review*, *101*(August), pp. 2565-2566 and 2577-2578.

until 2012 in order to identify specific social, political and economic factors that should be included in the empirical analysis.

Hypothesis 3

Based on the literature review, this research hypothesises that the contextual factors relate to the responsiveness of the courts to rights claims. It is expected that in the face of adverse economic, political, social or security circumstances, constitutional courts will tend to limit the protection of human rights.

3.2.5. Democratic performance

Due to the multiplicity of factors that impact the process of democratization, it is considered that the relationship between constitutional courts and the consolidation of democracy is non-linear, i.e., there is no cause-effect relationship, because the factors involved in the problem of democratic consolidation have a greater explanatory value for the settlement of democracy in comparison with the task carried out by constitutional courts[448]. From this viewpoint, the importance attributed to the constitutional jurisdiction in the process of democratic consolidation should be approached in a restrained manner to avoid overloading the courts with functions that they simply cannot fulfil. This may explain why the outcomes of constitutional jurisdiction are not considered as a variable in studies regarding the consolidation of democracy[449].

The question arises, however, as to whether the role of constitutional courts towards democracy has been minimized. The problems of democratic consolidation are certainly complex. However, this research considers that there are reasons to argue that the outcomes of constitutional courts are an important variable *vis-à-vis* democracy. There are several reasons for this. Firstly, by enforcing human rights, courts help to address the democratic deficits that keep democracy stagnating or regressing. Secondly, there is scholarly consensus on the need for a strong and independent judiciary to protect constitutional rights and to constrain the actions of democratically elected governments that seek to close the political space. This implies that a system of accountability is necessary for a well-functioning democracy.

[448] See Nohlen, D. (2008), *op. cit*., p. 6.
[449] Idem, pp. 7-8. Nohlen refers to the studies carried out by Linz and Stepan, Democratización y consolidación de la democracia; David Potter et al., Democratization; Mark Pyne *et al*., *La política importa*, and the PNUD reports on the development of democracy in the region.

Consequently, it is important to assess the accountability function of courts in order determine whether it fulfils its function of maintaining the proper functioning of democracy.

Assuming that democratic deficits are obstacles to the realisation of rights, if courts respond firmly and enforce the violated rights, it would therefore be expected that these judicial outcomes might contribute to prevent democratic deficits from undermining the state of democracy. The question remains whether constitutional courts can be used to challenge democratic deficits.

According to Carothers, hybrid regimes suffer from democratic deficits, such as poor representation of citizens' interests, low levels of political participation beyond voting, frequent abuse of the law by government officials, elections of uncertain legitimacy, very low levels of public confidence in state institutions and consistently poor institutional performance by the state[450].

Table 3-4 summarises the rights transgressed by democratic deficits and whether the accountability functions of the courts can be used to challenge these transgressions. The catalogue of international conventions on civil and political rights and on economic, social and cultural rights was used as a guide to identify the rights violated behind democratic deficits. As can be observed, the six democratic deficits enumerated by Carothers can be addressed through vertical accountability while two of them can be challenged through both horizontal and vertical accountability.

[450] See Carothers, T. (2002), *op. cit.*, pp. 9-10.

Table 3-4. Democratic deficits *vis-à-vis* the accountability functions of constitutional courts.

Democratic deficits	Rights transgressed	Accountability functions of courts	
		Horizontal	Vertical
Poor representation of citizens' interests	Political participation Minority rights	●	●
Low levels of political participation beyond voting	Individual liberty Physical integrity Procedural fairness in law Liberty and security		●
Frequent abuse of the law by government officials	Individual liberty Liberty and security Non-discrimination/ Equality before the law Procedural fairness in law		●
Elections of uncertain legitimacy	Political participation	●	●
Very low levels of public confidence in state institutions/ Persistently poor institutional performance by the state	Procedural fairness in law Liberty and security Right to health Right to social security Right to education Protection and assistance to family and children Right to an adequate standard of living		●

Source: Own elaboration.

Democratic deficits such as *poor representation of citizens' interests* and *elections of uncertain legitimacy* can be addressed via horizontal accountability. The role of constitutional courts regarding these two democratic deficits has been widely discussed using Ely's participation-oriented, representation-reinforcing judicial review theory. According to Ely constitutional adjudication can be understood as 'antitrust' that intervenes only when the political market is malfunctioning. Thus, judges, as political outsiders, can objectively assess '…claims that either by obstructing the channels of change or acting as accomplices to the tyranny of the simple majority, our elected representatives are not in fact representing the interests of those the system presumes and assumes them to be'[451]. Ely's judicial review theory supports the underlying premises of representative democracy.

Similarly, courts have an important role to play in securing the integrity and trustworthiness of the electoral process. Gloppen *et al.* consider that courts might contribute to levelling the electoral playing field in several ways: by assessing the constitutionality of the legal framework

[451] See Ely, J. H. (1978). Toward a Representation-reinforcing Mode of Judicial Review. *Maryland Law Review*, *37*(3), p. 486-487.

and institutional setup for the elections; by demanding compliance with the rules of the game and sanctioning illegality throughout the electoral process; and by ruling on election petitions challenging the outcome[452]. It is worth noting that some constitutional courts in emerging democracies do not have competences in electoral matters. For instance, in Latin America, electoral systems are characterised by specialised electoral bodies in charge of administrative issues and tribunals that decide electoral disputes[453]. Nevertheless, constitutional courts have some form of appellate jurisdiction.

Hence, citizens are not adequately represented if they have been excluded from the decision-making process, their interests have been affected and their rights transgressed. Under these circumstances, judicial review can be employed to challenge the legitimacy of elections, to invalidate laws or governmental actions that are incompatible with the constitution or international treaties and to represent an institutional alternative to challenge state authority.

Low levels of political participation beyond voting and *frequent abuse of the law by government officials* are democratic deficits associated with the restriction and threat to fundamental freedoms. Scholars point out that constitutional courts might contribute to enabling popular contestation and control over political power by protecting space for political deliberation and social mobilisation through the protection of the freedom of speech and assembly as well as the freedom of the press[454]. As mentioned above, courts are required to ensure that no groups (disadvantaged minorities in particular) are directly or indirectly discriminated or marginalised from the decision-making process[455].

It is not surprising that some emerging democracies have *very low levels of public confidence in state institutions* considering that *institutional performance is persistently poor*. Government's incapability and/or unwillingness to deliver proper and efficient services to their citizens yield to the denegation of citizens' rights and diminish the quality of democracy. A proper and well-functioning policy of public services guarantees the exercise of most fundamental rights without which the subsistence, physical integrity or dignity of the people is endangered. When the performance of institutions is systematically poor, it leads to poverty

[452] See Gloppen, S., Wilson, B. M., Gargarella, R., Skaar, E., & Kinander, M. (2010), *op. cit*., pp. 19-20.
[453] See Orozco Henríquez J. (2012). Sistemas de justicia electoral en América Latina y estándares interamericanos sobre perspectiva de género. *Revista Derecho Electoral*, *13*, p. 212.
[454] See Gloppen, S., Wilson, B. M., Gargarella, R., Skaar, E., & Kinander, M. (2010), *op. cit*., p. 20.
[455] See Ely, J. H. (1978), *op. cit*., p. 486-487.

and inequality, preventing people from developing and thus inhibiting their participation in decision-making processes.

Individuals can go before the court if they consider that one of their fundamental rights has been transgressed in the delivery of public services using the constitutional complaint or *amparo*. The constitutional complaint or *amparo* triggers the vertical accountability of courts and works not only as a mechanism for judicial enforcement of rights, but also as a mechanism for effective checks on executive authorities.

While effective checks on the executive power by the courts regarding basic rights are thought to be necessary in order to maintain and consolidate a modern democracy, the scholarly debate questions, on the one hand, how extensive these controls should be and how to guard the guardians and prevent misuse of the power by the judiciary itself on the other[456]. Gloppen *et al*. consider that the normative standard must be informed by the historical trajectory of each society in order to clarify what the main political problems are that the courts need to address[457].

This resembles Nino's democratic threshold argument. Nino claims that once a threshold has been surpassed, democracy corrects and improves itself. However, when this threshold has not been reached, the vices of the democratic process intensify and those decisions that have been made on the basis of unequal and restricted participation will lead to more inequity and more restrictions[458]. As mentioned above, Nino sees constitutional courts as referees of the democratic process whose mission is to ensure that the rules of the democratic process and the conditions for discussion and decision-making are satisfied. According to Nino, these conditions relate to rights because they give epistemic value to the democratic process. It is therefore the responsibility of judges to locate the threshold by determining whether and to what extent these conditions are being satisfied. Nino emphasises that the activism of judges ought to be aimed at enhancing the democratic process by improving rights, as rights are the conditions that give epistemic value to the democratic process. However, it is important to note that Nino also warns that judges should be careful not to prevent discussion about the most appropriate way to allocate resources[459].

From this perspective, constitutional courts may play an important role in those systems where democracy has not reached the level needed to correct and improve itself. This may be the case

[456] Ibidem.
[457] Ibidem.
[458] See Nino, C. S. (1993), *op. cit.*, p. 835.
[459] See Nino, C. S. (1997), *op. cit.*, pp. 274-276.

in hybrid regimes where alarming levels of poverty, inequality, corruption, impunity, violence, and insecurity persist. In such a context, Nino imposes on constitutional judges the dual task of deciding individual cases while promoting a course of action to improve the epistemic quality of the democratic system[460]. However, once the democratic system reaches optimal levels that enable it to transform its vicious circle into a virtuous one, judges are not required to intervene in the democratic process.

It is worth noting the role of individuals in challenging democratic deficits because by triggering vertical or societal accountability they can prevent or stop governmental arbitrariness and in doing so contribute to enhancing the quality of the democratic process. According to Noguera Fernández, the fact that citizens have legal standing to file an abstract review of constitutionality facilitates their organization and the defence of their interests against state power. Additionally, this is a key step towards the democratisation of constitutional justice because it implies a genuine re-articulation of the notions of sovereignty, constitutional justice and participation[461].

Accordingly, either judicial review (horizontal accountability) or constitutional complaint or *amparo* (vertical or societal accountability) can be used to challenge democratic deficits. From this perspective, it is important to examine the capacity of courts to sanction and/or prevent the abuse of political power and violations of rights as well as to oblige the holders of political power to commit themselves to justifying the way they exercise their power and fulfil (or not) their mandates[462] because by doing so they can contribute to preventing democratic setbacks and improving the epistemic quality of democracy. Hence, it is crucial to explore whether the responsiveness of courts to rights claims may be associated with democratic performance.

Hypothesis 4

Since this research understands democracy as multidimensional, it is hypothesized that the responsiveness of courts to rights claims may be related to the performance of democracy in its different dimensions, namely electoral democracy, liberal democracy, participatory democracy, deliberative democracy and egalitarian democracy. It is expected that an advance (or a setback) in the different dimensions of democracy is observed subsequent to the intervention of courts.

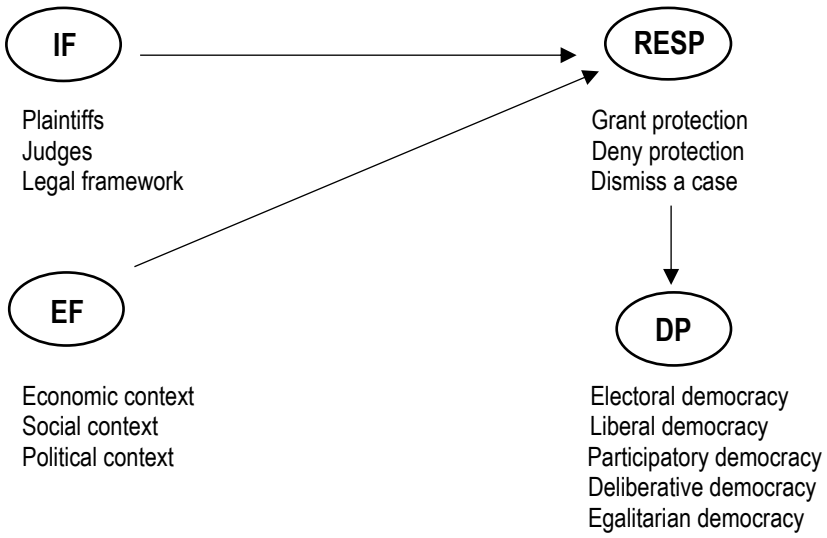
[460] Idem, p. 277.
[461] See Noguera Fernández, A. (2011). ¿Democratizando la justicia constitucional? La articulación entre soberanía, justicia constitucional y el nuevo constitucionalismo. *Oñati Socio-Legal Series, 1*(2), pp. 17-21 and 23.
[462] See Gloppen, S., Wilson, B. M., Gargarella, R., Skaar, E., & Kinander, M. (2010), *op. cit.,* p. 21.

The democratic performance will be measured through secondary data. As mentioned above, the V-Dem project has operationalized and measured democracy from a multidimensional perspective and provides a disaggregated dataset that reflects the complexity of five high-level dimensions of democracy covering 177 countries from 1900 to 2019 with an annual update[463]. Therefore, the democratic performance of the three selected countries relies on the V-Dem Democracy Indices, i.e., Electoral democracy index (polyarchy), Liberal democracy index, Participatory democracy index, Deliberative democracy index and Egalitarian democracy.

The literature review on each of the elements that were considered relevant for the analysis of the relationship between constitutional courts and democracy helped to establish the conceptual and analytical framework of this research and formulate four working hypotheses.

According to the analytical framework proposed, the first step involved determining the responsiveness of courts to rights claims, i.e., whether protection was granted, denied or cases were dismissed. The second step consisted of identifying whether internal and external factors of the adjudication process might be associated with the responsiveness of courts to rights claims. Finally, the relationship between the responsiveness of courts and democratic performance was explored. See Figure 3-2.

Figure 3-2. The responsiveness of constitutional courts to rights claims *vis-à-vis* democratic performance. A multivariate analytical framework.



IF= Internal factors; EF= External factors; RESP= Responsiveness of constitutional courts and DP= Democratic performance.
Source*:* Own elaboration.

[463] See the V-Dem Dataset - version 9 at https://www.v-dem.net/en/data/data-version-9/ (Accessed November 2019).

Concluding section

The aim of this chapter was to clarify the niche of this research and to provide a literature review on the internal and external factors that may explain the functioning of courts to frame the working hypotheses of this research.

This research focuses on the analysis of the vertical or societal accountability function of constitutional courts. In addition to horizontal accountability (inter-branch or intergovernmental disputes and disputes about the constitutionality of legislation), courts exert vertical or societal accountability when deciding disputes regarding violations of human rights. The vertical control or societal accountability function of courts is considered as a mechanism for popular control through which the people hold accountable governmental authorities.

The chapter elaborated on the relevance of focusing on the responsiveness of courts to rights claims *vis-à-vis* democracy by arguing that the judicial enforcement of human rights may improve the epistemic quality of the different dimensions of democracy. In addition, an analysis on the constitutional complaint or *amparo* as instrumental in furthering democracy shows that this might serve as a mechanism to develop individuals' reasoned agency; guarantees the rights to access to justice against state arbitrariness and promotes citizen participation; fosters democratic practices by enforcing a culture of respect to human rights; promotes dialogue and deliberation; provides citizens with an institutional mechanism to challenge state authority without reprisal and can be seen as an internal mechanism of democratic correction that might allow a particular society to move towards a culture of participation, accountability and dialogue which are key aspects of strengthening democracy.

The literature review showed that the socio- demographic characteristics of plaintiffs and their economic condition (the type of plaintiff, gender, age and resources), the personal attributes and professional background of judges (gender, age, and academic background) and contextual factors (political, social, economic, security contexts) are significant in the explanation of the responsiveness of courts and therefore they were included in the analytical framework.

Regarding the relationship between the responsiveness of the courts and democracy, it was identified that both horizontal and vertical control can be used to challenge democratic deficits. Hence the importance of focusing on the ability of the courts to sanction and prevent abuse of political power and human rights violations and to compel authorities to justify the way they exercise their powers as these actions together can contribute to preventing democratic setbacks and improving the epistemic quality of democracy. Accordingly, three working hypotheses

were formulated regarding whether internal and external factors affecting the adjudication process could relate to the responsiveness of courts to rights claims. In addition, the fourth hypothesis was posed to explore whether the responsiveness of courts to rights claims relates to democratic performance.

Hypothesis 1

The socio- demographic characteristics of plaintiffs and their economic condition might relate to the responsiveness of courts to rights claims. It is expected that courts will privilege the protection of the rights of those who belong to vulnerable groups, i.e., women, minors, the elderly and those associated with low income or lack of resources.

Hypothesis 2

The personal attributes and professional background of constitutional judges relate to the responsiveness of courts to rights claims. It is expected that female judges will be more prone to protect human rights (civil and political) than their male colleagues. Similarly, younger judges and those with a strong academic background and training experiences abroad are expected to have fresh and novel ideas and will therefore be more prone to protect human rights.

Hypothesis 3

The contextual factors upon which courts operate relate to the responsiveness of courts to rights claims. It is expected that in the face of adverse economic, political, social or security circumstances, constitutional courts will tend to limit the protection of human rights.

Hypothesis 4

The responsiveness of courts to rights claims may be related to the performance of democracy in its different dimensions, namely electoral democracy, liberal democracy, participatory democracy, deliberative democracy and egalitarian democracy. It is expected to observe an advance in the different dimensions of democracy subsequent to the intervention of courts.

The proposed analytical framework requires a preliminary study of the legal framework and contextual factors under which the constitutional courts of Colombia, Costa Rica and Mexico have been established and operate. Chapters 4 and 5 are devoted to this purpose.

Chapter 4. The national contexts

The literature review revealed that the specific conditions and the legal framework under which constitutional courts were established and function may help to explain their behaviour. According to Ginsburg, judiciaries adjust their behaviour and decisions in response to particular circumstances[464]. If the context shapes the national contours that institutions have to face, it may require careful consideration regarding the performance of courts, particularly, where social, political and economic instability is part of daily life.

Colombia, Costa Rica and Mexico are the three Latin American countries selected for empirical purposes. The three countries became independent from the Spanish Crown in the 1810s. However, since their independence, they have gone through various stages in their democratic processes. This chapter focuses on the social, political and economic context in which the constitutional courts of Colombia, Costa Rica and Mexico have been operating since their creation. The chapter aims to identify specific contextual factors (or the absence of them) that can be incorporated as independent variables in the empirical analysis. In addition, the democratic performance of each country will be examined both prior to and after the establishment of the courts.

To this end, country reports, literature review and specific datasets will be used. Among others, the Worldwide Governance Indicators (WGI)[465]; a research dataset summarizing opinions on the quality of governance provided by a large number of companies, citizens and experts who responded to the survey in industrial and developing countries (developed by the WB); the V-Dem data[466] that provides a multidimensional and disaggregated dataset and distinguishes between five high-level principles of democracy: electoral, liberal, participatory, deliberative and egalitarian.

The chapter is divided into three parts. The first part offers a brief account of the constitutional, political and legal structure of the state in the three countries. The second part focuses on the main social, political and economic events at the national level in order to contextualise the establishment and functioning of the three selected constitutional courts. The third part presents the vicissitudes that the three countries have faced on their way to establishing and maintaining

[464] See Ginsburg, T. (2012). Courts and New Democracies: Recent Works. *Law and Social Inquiry*, *37*(3), p.721.
[465] The WGI consists of data gathered from a number of survey institutes, think tanks, non-governmental organizations, international organizations, and private sector firms. The WGI do not reflect the official views of the WB, its Executive Directors, or the countries they represent. The WGI are not used by the World Bank Group to allocate resources. See https://info.worldbank.org/governance/wgi/ (Accessed September 2020)
[466] The V-Dem dataset is available at https://www.v-dem.net/en/ (Accessed September 2020)

their democracies. Finally, the concluding section identifies the contextual factors included in the analytical framework.

4.1. **Constitutional, political, and legal structure of the State**

4.1.1. Colombia

Colombia is located on the north-western tip of South America with a permanent population of 48,258,494[467] inhabitants, according to the most recent general census conducted in 2018 by the National Department of Statistics. Colombia is divided into 32 departments, five districts and 1,102 municipalities. The main legal and political framework of the country is the Political Constitution of 1991 (from here onwards the Constitution of Colombia). Article 1 of the Constitution of Colombia explicitly states that Colombia is a 'social State under the rule of law, organized in the form of a unitary republic, decentralized, with autonomy of its territorial units, democratic, participatory, and pluralistic, based on respect for human dignity, the work and solidarity of the individuals who belong to it, and the prevalence of the general interest'.

Spanish is the official language of Colombia, but the languages and dialects of the ethnic groups are also official in the territories where they are spoken. It is important to mention that the authorities of the indigenous peoples are able to perform their duties within their jurisdictions.

The executive branch is headed by the President of the Republic who is also the Head of Government and Supreme Administrative Authority. The executive branch is comprised of the ministers in the Office of the President, directors of administrative departments, governors' offices, departmental assemblies, mayoral offices, municipal councils, supervisory bodies, public institutions and state-owned industrial and commercial enterprises. The President of the Republic is elected by popular vote for a period of four years, as is the Vice-President.

The main legislative body in Colombia is the Congress of the Republic. The Congress of the Republic is divided into two chambers: the Senate of the Republic and the Chamber of Representatives. Senators and Representatives are democratically elected for four-year terms. In exceptional cases, the Congress of the Republic performs judicial duties, as it may judge or impeach state officials to hold them politically accountable. It has electoral responsibilities, as it elects some officials, such as the Comptroller-General of the Republic, the Counsel-General

[467] See *Censo Nacional de Población y Vivienda 2018* (2018 National Population and Housing Census) available at Departamento Administrativo Nacional de Estadística (DANE) de Colombia, www.dane.gov.co/index.php/en/estadisticas-por-tema/demografia-y-poblacion/censo-nacional-de-poblacion-y-vivenda-2018/cuantos-somos (Accessed September 2020).

of the Republic, the judges of the Constitutional Court and of the Jurisdictional Disciplinary Division of the High Council of the Judiciary, the Ombudsman and the Vice-President of the Republic when there is a permanent vacancy; it exercises oversight of public officials and is empowered to summon anyone to make statements on matters or events that are being investigated by its committees. The upper chamber or Senate is made up of 100 senators who are elected by the national constituency and two additional senators who are elected by special constituencies for indigenous populations. The lower chamber, or Chamber of Representatives, is currently made up of 166 representatives who are elected by territorial constituencies and special constituencies (Afro-Colombian, indigenous, Colombians abroad and political minorities). Representatives may be re-elected for subsequent terms.

The judiciary consists of the ordinary courts, the administrative court and the constitutional court. The ordinary courts decide cases on criminal, civil and labour matters. Within the ordinary courts, the highest court is the Supreme Court of Justice.

The administrative court deals with litigation in which one of the parties is the State. Within this domain, the highest court and the highest consultative body of the Government is the Council of State. It is the final instance for litigation involving the State and private individuals or in cases involving two state entities, including mixed-economy companies having a public capital of more than 50 per cent. It also decides disputes involving individuals in the private sector who have been assigned responsibilities corresponding to those of State agencies. This jurisdiction includes the courts for contentious-administrative proceedings and the administrative courts.

The Constitutional Court is responsible for safeguarding the integrity and supremacy of the Constitution. This court deals exclusively with matters of constitutionality and sets the rules of jurisprudence regarding the scope of the provisions of the Constitution. In matters relating to *tutela* (protection) actions, it is comprised of all the judges of the Republic.

In addition, the Constitution of Colombia stipulates special courts comprised of the authorities of indigenous peoples and justices of the peace. The justices of the peace have competences to resolve in equity individual and communal disputes according to the criteria of justice prevailing in the community concerned, but their decisions are not equivalent to judicial sentences.

The High Council of the Judiciary is responsible for the administration of the judiciary and for applying disciplinary measures in the judiciary.

The 1991 Constitution introduced the Office of the Attorney General of the Nation as part of the judiciary provided with administrative and budgetary autonomy[468]. At the request of the Counsel-General of the Nation, the Ombudsman or in cases reported by a public official, the Office of the Attorney General of the Nation must investigate and bring charges against the alleged perpetrators before a competent authority, except in cases of service-related criminal conduct of members of the military and of law enforcement in active service.

The military criminal justice system is not part of the organizational structure of the judiciary. It administers justice in respect of service-related offences committed by members of the military or of law enforcement in active service[469].

In addition to the three branches of government, the Constitution of Colombia provides for independent and autonomous bodies, such as monitoring agencies (the Office of the Comptroller-General of the Republic and the Public Legal Service that consists of the Office of the Counsel-General of the Nation and the Office of the Ombudsman), administrative bodies (the National Civil Registry Office and the National Electoral Council) and other entities (the Bank of the Republic serves as the central bank and the National Television Commission).

4.1.2. Costa Rica

The Republic of Costa Rica is located on the Central American isthmus. According to current population estimates as of 30 June 2020, the country had 5,111,238[470] inhabitants. For the purposes of public administration, the national territory is divided into provinces, cantons and districts. There are 7 provinces, 82 cantons and 484 districts[471]. Spanish is the official language of the country and the language most widely spoken by the population. However, national indigenous languages also enjoy the same status.

The political constitution of Costa Rica was created in 1949 and is currently in force. The constitution defines Costa Rica as a democratic, free, independent, multi-ethnic and multicultural Republic with a representative, alternative and responsible government. The

[468] See Articles 249 and 250 of the Constitution of Colombia related to the Office of the Attorney General and Articles 275 to 284 of the Constitution of Colombia that regulate the Office of the General Prosecutor of the Nation.
[469] Offences such as torture, genocide and forced disappearance, understood in terms of the definitions laid down in international conventions and treaties ratified by Colombia, or acts that so patently run counter to the constitutionally defined functions of the military and of law enforcement that their commission, in and of itself, severs the perpetrator's functional connection with his or her service may never be considered service-related.
[470] See Population Projection as of 30 June 2020. Official data published by *Instituto Nacional de Estadística y Censos de Costa Rica* (National Statistics and Census Institute) available at https://www.inec.cr/ (Accessed September 2020).
[471] See Article 168 of the Constitution of Costa Rica.

power is exercised by the people and the legislative, executive and judicial powers. The 1949 Constitution also establishes the Supreme Tribunal of Elections as an independent organ in charge of the organization, direction and supervision of the acts related to the suffrage. In addition, it interprets the constitutional and legal provisions related to electoral matters in an exclusive and obligatory form and issues the definitive declaration of the election of President and Vice Presidents of the Republic. The decisions of the Supreme Tribunal of Elections are not subject to appeal. This means that the declaration of election made by the Supreme Tribunal of Elections cannot be challenged through the Constitutional Chamber[472].

The executive authority is exercised by the President of the Republic and the government ministers. There are two Vice-Presidents of the Republic who replace the President in his absolute absence. The president and the vice-presidents are elected by the people every four years[473]. The legislative power is unicameral.

The Legislative Assembly is given the power to make laws and has 57 deputies. Like the President and the Vice-Presidents, deputies are elected every four years in elections with a closed-list system, universal suffrage and secret ballots and may not stand for immediate re-election[474].

The judiciary is exercised by the Supreme Court and the other courts established by law. The Supreme Court is the highest court of law and has judges who are elected by the Legislative Assembly for a term of eight years. The independence of the judiciary from the other branches of government is enshrined by the constitution. The Supreme Court has four chambers. There are three Chambers of Cassation: the First Chamber of Cassation has jurisdiction over civil, commercial, agricultural and administrative matters, the Second Chamber of Cassation deals with family and labour matters, the Third Chamber of Cassation hears cases involving criminal matters. The Constitutional Chamber is responsible for safeguarding and preserving the principle of constitutional supremacy whereby no rule, treaty, regulation or law of the Costa Rican legal system may be in violation of the Constitution. There are three avenues of access to the Constitutional Chamber: applications for a writ of *habeas corpus*, applications for *amparo* and applications for unconstitutionality actions[475].

[472] See Articles 9, 99 *et seq*. of the Constitution of Costa Rica.
[473] See Articles 130 *et seq*. of the Constitution of Costa Rica.
[474] See Articles 105 *et seq*. of the Constitution of Costa Rica.
[475] See Articles 9, 152 *et seq*. of the Constitution of Costa Rica and Article 49 of the Organic Act on the Judicial Branch.

Another important characteristic of the organisation of the State in Costa Rica is the prohibition for the army to be a standing institution. The Public Force is a standing, civilian police force that, in partnership with the community, must ensure the security and the exercise of the rights and freedoms of all persons in Costa Rican territory[476]. In addition, the Constitution of Costa Rica has an extensive catalogue of human rights[477].

4.1.3. Mexico

Mexico is a country in the southern part of North America. According to the 2015 last general population and housing census, Mexico has 119,938,473 inhabitants[478]. The 1917 Constitution of the United Mexican States (here after Constitution of Mexico) provides that the country is a representative, democratic and federal republic composed of 31 States and Mexico City, where the federal Government is located. Each State of the republic is free, sovereign and autonomous, and has its own Constitution.

The constitution establishes that power is exercised through the executive, legislative and judicial branches, including at the local level. The President of the Republic heads the executive branch of government and is elected for a six-year term by direct vote of the population over the age of 18. The citizen who had performed as President of the Republic, popularly elected or under the interim or alternate character, or provisionally takes the office of the Federal Executive, in no case and under any circumstances may perform again this position. The President chooses his own cabinet ministers[479].

The legislative branch is divided into two chambers: the lower chamber, or Chamber of Deputies, and the higher chamber, or Senate. The Chamber of Deputies has 500 members, 300 of whom are elected by direct suffrage and 200 by proportional representation for a three-year term. The Senate has 128 members - 4 senators per State - elected for six-year terms[480].

The judiciary consists of the Supreme Court of Justice, the Federal Electoral Court, specialized circuit courts, unitary circuit courts and the district courts. The Council of the Federal Judiciary

[476] See Article 12 of the Constitution of Costa Rica.
[477] See the Constitution of Colombia, Title IV: Individual Rights and Guarantees (Articles 20-49), Title V: Social Rights and Guarantees (Articles 50-74), Title VI: Religion (Article 75), Title VII: The Education and the Culture (Article 78), Title VIII: Political Rights and Duties (Article 90 -citizenship- and Article 93 -right to vote).
[478] See *Instituto Nacional de Estadística y Geografía México* (National Statistics and Geography Institute, INEGI for its acronym in Spanish). INEGI Encuesta Intercensal 2015, available at http://en.www.inegi.org.mx/temas/estructura/ (Accessed September 2020).
[479] See Article 80 *et seq*. of the Constitution of Mexico.
[480] See Articles 50 *et seq*. of the Constitution of Mexico.

deals with matters of administration, supervision and discipline for Mexican federal judges, except for the Supreme Court of Justice of the Nation[481].

Since 1990, in Mexico there is an autonomous administrative organ in charge of organising the elections. The Federal Electoral Tribunal, introduced by a constitutional reform in 1996, is a specialised court, within the judiciary, dedicated to electoral matters[482].

It is important to note that significant reforms in the field of the justice system have been implemented in the last decades. In 2008, took place a constitutional reform that renovated the criminal justice system. This reform, that came into force in 2016, set an accusatory system and aimed to strengthen the guarantees of due process, the presumption of innocence, full respect for victims' rights, and effective protection against abuses by authorities[483].

In 2011, through a constitutional reform, the protection of rights established in international treaties ratified by the Mexican State was introduced. This means that before this reform, the *amparo* proceeding protected only the rights recognized by the Constitution of Mexico.

In 2014 another constitutional reform took place that established the Office of the Attorney General as an independent organ. This reform entered into force on 17 December 2018. This means that before this reform, the Office of the Attorney General was ascribed to the executive branch[484].

4.2. **Social, economic and political context**

4.2.1. Colombia

Social and political context

Colombia has been ravaged by internal armed conflicts since its independence in 1819, but the war has been neither continuous nor uniform as its intensity, locations and actors have changed over time[485]. In the late 1940s and the early 1950s a civil war known as *La Violencia* (The

[481] See Article 94 of the Constitution of Mexico.
[482] See Articles 99 *et seq.* and Article 41, fraction V of the Constitution of Mexico.
[483] See *Decreto por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos publicado en el DOF: 18/06/2008* (DECREE whereby various provisions of the Political Constitution of the United Mexican States are amended and added, published in the DOF: 06/18/2008) available (only in Spanish) at http://www.dof.gob.mx/nota_detalle.php?codigo=5046978&fecha=18/06/2008 (Accessed October 2020).
[484] See *Artículo Décimo Sexto Transitorio del decreto en materia política-electoral publicado en el DOF 10-02-2014* (Article Sixteenth Sixth Transitory of the decree in political-electoral matter published in the DOF 10-02-2014) available (only in Spanish) at http://www.dof.gob.mx/nota_detalle.php?codigo=5332025&fecha=10/02/2014 (Accessed October 2020).
[485] See García-Godos, J., & Lid, K. A. O. (2010). Transitional Justice and Victims' Rights before the End of a Conflict: The Unusual Case of Colombia. *Journal of Latin American Studies*, *42*(03), p. 490.

Violence) took place. This was a consequence of a rivalry between the two economic, social and political elites: the Colombian Conservative Party and the Colombian Liberal Party.

In 1957 they reached a peace agreement whereby power was to be shared equally among the two for 16 years[486]. The political regime thus changed from a two-party system to a bipartisan regime called the National Front[487]. According to the terms of the agreement, between 1958 and 1974, the presidential office was occupied successively by members of the Liberal and the Conservative parties in order to secure political alternation. All posts in ministries, municipal councils, and departmental assemblies were evenly distributed between the political parties. The same applied to the members of the Supreme Court of Justice, who were now to be elected from Conservative and Liberal benches by the magistrates themselves. This so-called system of *cooptación* (co-option) and political parity were introduced with the aim of sealing the judicial branch off from political confrontations[488].

The inter-elite war was soon replaced, however, by an anti-regime insurgency waged by various guerrilla groups; the war re-ignited and continues today[489] with less intensity. Colombian scholars debate whether the current conflict is simply the continuation of the bipartisan violence or whether it is governed by different dynamics[490]. It is considered that the start of the current conflict took place in 1964 after left-wing guerrilla groups[491] had been established. Since then, Colombia has undergone an armed conflict between the government, left-wing guerrilla groups

[486] Ibidem.
[487] Ibidem.
[488] See Cepeda-Espinosa, M. J. (2005), *op. cit.*, pp. 69-70.
[489] See García-Godos, J., & Lid, K. A. O. (2010), *op. cit.*, p. 490.
[490] Ibidem.
[491] These left-wing guerrilla groups are: the Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo (Revolutionary Armed Foces of Colombia-People's Army, FARC-EP), Ejército de Liberación Nacional (Army of National Liberation; ELN) and Ejército Popular de Liberación (Popular Liberation Army, EPL). See Offstein, N. (2003). An Historical Review and Analysis of Colombian Guerrilla Movements: FARC, ELN and EPL. *Revista Desarrollo y Sociedad*, (52), 99–142; Peñaranda, D. R., & Guerrero Barón, J. (Eds.). (1999). *De las armas a la política*. Bogotá: TM Editores quoted by García-Godos, J., & Lid, K. A. O. (2010), *op. cit.*, p. 491.

and the right-wing paramilitaries[492]. The violence reached both the political[493] and judicial[494] field in 1980s and 1990s.

The human costs of the armed conflict in Colombia are considerable, 218,094 people died between 1958 and 2012 (40,787 were combatants and 177,307 were civilians). Between 1985 and 2012, more than five and a half million civilians were forced from their homes generating the world's second largest population of IDPs[495].

It seems that violence was significantly reduced at the beginning of the first decade of this century. President Uribe's policy of 'democratic security' facilitated the weakening of the left-wing guerrillas of the Revolutionary Armed forces of Colombia (FARC), the demobilization of paramilitary groups[496] and the drop-off of homicide and kidnapping rates[497]. Moreover, Law 975 of 2005, known as the Justice and Peace Law, and the legal framework to recognize and

[492] The establishment of paramilitary groups coincided with the formation of the left-wing guerrillas. According to García-Godos and Lid, given that they originally were pro-establishment forces, their creation is linked to the Decree 3398 of 1965, which aimed to organise the national defence of citizens against communism. Paramilitary groups have been supported by the national army, local governments as well as rural and drug elites and have been one of the most violent actors in the conflict. See García-Godos, J., & Lid, K. A. O. (2010), *op. cit*., pp. 491-492.

[493] According to Bruce Bagley, after President Belisario Betancur (1982-1986) began to extradite Colombian drug traffickers to the United States in the wake of the 1984 Medellin-ordered assassination of Attorney General Rodrigo Lara Bonilla, the Medellin capos launched a systematic narco-terrorist campaign against the Colombian state designed to force the government to halt further extradition. In August 1989 the leading Liberal party presidential candidate Luis Carlos Galan was assassinated by *sicarios* (hitmen) on the payroll of the Medellin drug lord Pablo Escobar. See Bagley, B. M. (2001). Drug Trafficking, Political Violence and U.S. Policy in Colombia in the 1990s. Retrieved November 11, 2020, from http://www.mamacoca.org/junio2001/bagley_drugs_and_violence_en.htm Three other presidential candidates were assassinated in 1987 and 1990, i.e., Jaime Pardo Leal (1987) and Bernardo Jaramillo Ossa (1990) from the Patriotic Union Party and Carlos Pizarro Leongómez (1990), leader of the M-19 Party.

[494] The 'Palace of Justice Holocaust' as it is known took place on November 6, 1985. A commando of M-19 guerrillas seized the Palace of Justice in Bogotá, demanding the publication of official documents and the public prosecution of the President of the Republic. More than 300 hostages were taken. President Belisario Betancur used the state forces to recapture the building resulting in 27 hours of military intervention that caused the death of 94 people, including the president and twelve judges of the Supreme Court and five magistrates of the State Council, while 244 hostages survived. It is estimated that 11 to 18 people were forcibly disappeared by the state forces. See Leal-Guerrero, S. (2015). "The Holocaust" or "The Salvation of Democracy". Memory and Political Struggle in the Aftermath of Colombia's Palace of Justice Massacre. *Latin American Perspectives*, *42*(3), pp. 140-141.

[495] See the figures offered by the web page of the Centro Nacional de Memoria Histórica at http://www.centrodememoriahistorica.gov.co/micrositios/informeGeneral/estadisticas.html (Accessed October 2020).

[496] In December 2002 the paramilitary group *Autodefensas Unidas de Colombia* (United Self-Defence Forces of Colombia, AUC) declared a unilateral ceasefire, a governmental pre-condition for talks with any of the armed groups. Finally, under the Pact of Santa Fé de Ralito (formalised on 15 July 2003) leaders of the UAC agreed to demobilise fully by the end of 2005. See García-Godos, J., & Lid, K. A. O. (2010), *op. cit*., p. 493.

[497] During the period 2002-2007, kidnappings for ransom fell by 87%, assassinations by 45.2% and terrorist attacks by illegal armed groups by 76.5%. See Posada-Carbó, E. (2011). Latin America: Colombia After Uribe. *Journal of Democracy*, *22*(1), p. 138.

enforce the rights of the victims to the truth, justice and reparation set the basis for transitional justice process in Colombia[498].

Agreements between the Government of Colombia and the FARC. In 2012, the government of Juan Manuel Santos formally began peace talks with the FARC guerrillas. These negotiations started in Oslo, Norway, and later moved to Habana, Cuba. At the end of 2015, Colombia's Victims and Justice Accord was signed by both Colombian government and the FARC[499] and the Special Jurisdiction for Peace was created[500].

After four years of negotiations, on September 26, 2016, the Havana Agreements were signed in Cartagena to end the war between the government and the FARC. These agreements were put to the vote of the Colombian people through a plebiscite that took place on October 2, 2016. The Havana Agreements were rejected by a narrow margin. On November 12, 2016, the renegotiation and modification of the agreements with the FARC was achieved, taking into account the arguments and objections of the promoters of the NO in the plebiscite. On November 24, 2016 at the *Teatro Colón* in Bogotá, the peace agreement was signed and immediately filed with the Congress of the Republic for its study, ratification and implementation. Both the Senate and the House of Representatives approved the text amid criticism and threats from the Democratic Centre party (the main promotor of the NO in the plebiscite) to call a new plebiscite.

Agreement between United Nations and the Government of Colombia. The 'Framework Agreement between the United Nations and the Government of the Republic of Colombia concerning contributions to the system of standby arrangements of the United Nations for the maintenance of peace' was approved and signed in New York City on January 26, 2015[501]. On July 11, 2016, the Congress discussed and approved this framework through the Law 1794 of 2016. The day after, the Presidency of the Republic sent the 'Framework Agreement between the United Nations and the Government of the Republic of Colombia concerning contributions

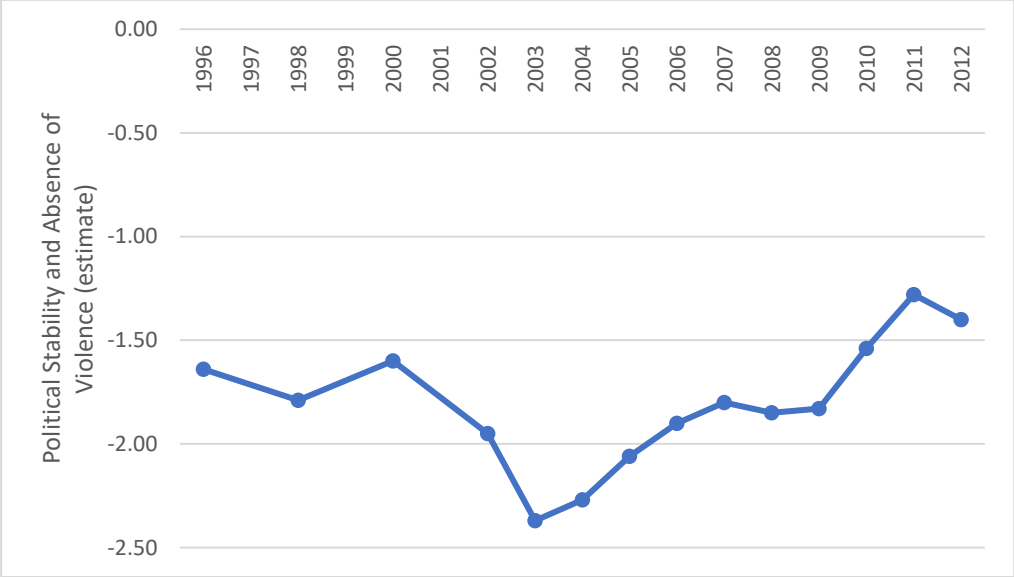
[498] See Pizarro Leongómez, E. (2010). Victims and Reparation: The Colombian Experience. *Review Conference of the Rome Statute*, (May), 1–11.
[499] There are voices pointing out both pros and cons about the Victims and Justice Accord. For instance, for Human Rights Watch and the former President of Colombia, Álvaro Uribe, this agreement seems to be designed in order to absolve the FARC's crimes. See https://colombiapeace.org/ (Accessed March 2020).
[500] See Comunicado conjunto # 60 sobre el Acuerdo de creación de una Jurisdicción Especial para la Paz (only in Spanish) at http://wp.presidencia.gov.co/Noticias/2015/Septiembre/Paginas/20150923_03-Comunicado-conjunto-N-60-sobre-el-Acuerdo-de-creacion-de-una-Jurisdiccion-Especial-para-la-Paz.aspx (Accessed October 2020).
[501] See ACT 1794 2016 (July 11) Official Gazette No. 49,931 of July 11, 2016 Congress of The Republic available in English at https://www.global-regulation.com/translation/colombia/6405395/act-1794-2016.html (Accessed October 2017

to the system of standby arrangements of the United Nations for the maintenance of peace' to the Constitutional Court for its constitutional revision. On April 5, 2017, the Court issued a judgment deciding on the constitutionality of this agreement[502].

With the ratification and implementation of the peace agreement in Congress, the process of demobilization of insurgents and the laying-dawn of arms to the United Nations began on December 1, 2016. The disarmament ended on August 14, 2017.

The context of violence experienced in the last decades in Colombia is reflected in the Political Stability and Absence of Violence, World Governance Indicator that measures perceptions of the likelihood of political instability and/or politically motivated violence, including terrorism. See Figure 4-1.

Figure 4-1. Political Stability and Absence of Violence/Terrorism in Colombia 1996-2012.



Note: Estimate of governance (ranges from approximately -2.5 (weak) to 2.5 (strong) governance performance).
Source: World Bank Group. Worldwide Governance Indicators (www.govindicators.org).

Figure 4-1 shows that the Colombian Constitutional Court has performed its functions in a weak state in terms of political stability and violence, with its most critical point in 2003.

[502] See Sentencia C-214/17 available (only in Spanish) at https://www.corteconstitucional.gov.co/relatoria/2017/C-214-17.htm (Accessed October 2020).

Economic context

During the early 1990s, Colombia was living a period of relative economic stability and growth. Scholars[503] attribute the economic growth to the adoption of the 'Washington Consensus' package (especially trade liberalization and central bank independence) by the Gaviria government in the early 1990s. Foreign investment was increasing, benefiting greatly from the country's recent economic liberalization, and it was enhancing the number of private assents available. Public capital was also on the rise. This was partly because of the large-scale privatization of government-owned companies, the opening of state monopolies, the granting of state licenses to operate the sectors of services and telecommunications, and the investments produced by newly discovered oil fields[504].

Despite continued economic growth, the 1991 Constitution's social justice promises were not carried out[505]. Scholars[506] consider that there was a tension between the social content of the 1991 Constitution and the neo-liberal reforms implemented just after its enactment. It was noted that due to governmental inaction regarding the implementation of social rights the new constitutional court started expanding them on its own[507].

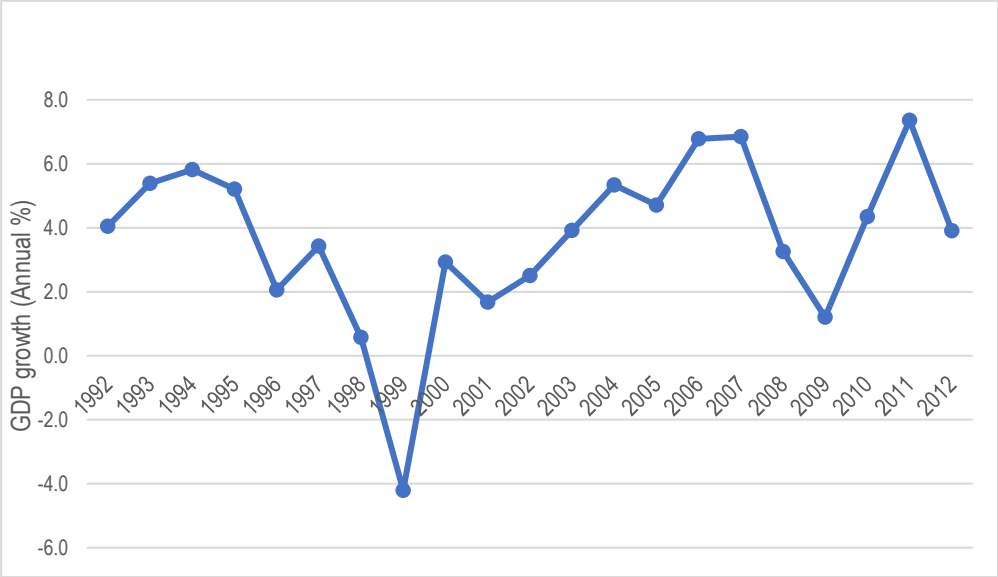
However, Colombia's bonanza period ended in the mid-1990s. Colombia's economic growth decelerated[508]. According to Cárdenas[509], Colombia's economic underperformance, especially in the 1990s, could be explained by its high homicide rate. According to him, the implosion of productivity was caused by the increase in criminality, which diverted capital and labour to unproductive activities.

The focus of President Uribe's (2002-2010) administration on a military defeat of the *guerrilla* war at virtually any cost implied neglecting other important areas of state activity, notably the development of effective and sustainable policies to reduce the country's chronic poverty and overcome its widespread inequality. Uribe's administration promoted market-oriented

[503] See Uprimny Yepes, R. (2006). Should courts enforce social rights? the experience of the Colombian Constitutional Court. In F. Coomans (Ed.), *Justiciability of economic and social rights: experiences from domestic systems* (pp. 355–388). Antwerpen-Oxford: Intersentia, p. 363 and Cárdenas-Santamaría, M. (2007). Economic Growth in Colombia: a reversal of "fortune"? *Ensayos Sobre Política Económica*, (53), 220–259.
[504] See Rueda, P. (2010). Legal Language and Social Change during Colombia's Economic Crisis, *op. cit.*, p. 31-33.
[505] Ibidem.
[506] See Uprimny Yepes, R. (2006), *op. cit.*, p. 363 and Rueda, P. (2010), *op. cit.*, pp. 31-33.
[507] See Rueda, P. (2010), *op. cit.*, pp. 31-33.
[508] See Cárdenas-Santamaría, M. (2007), *op. cit.*, p. 4.
[509] The rise in crime was the result of rapid expansion in drug-trafficking activities, which erupted around 1980. Consequently, the fortunes associated with the emergence of Colombia as the world largest producer of cocaine had a significantly negative effect on growth and productivity. See Cárdenas-Santamaría, M. (2007), *op. cit.*

economic policies that led to modest growth rates, even during the global economic crisis. However, large parts of the population have not shared in the gains from economic growth[510]. Colombia is considered as an upper middle-income country by the WB. Figure 4-2 presents the records of the Gross Domestic Product growth in Colombia during the period of analysis.

Figure 4-2. Gross Domestic Product growth. Colombia 1992-2012.



Note: Annual percentage growth rate of GDP at market prices based on constant local currency. Aggregates are based on constant 2010 U.S. dollars. GDP is the sum of gross value added by all resident producers in the economy plus any product taxes and minus any subsidies not included in the value of the products. It is calculated without making deductions for depreciation of fabricated assets or for depletion and degradation of natural resources.
Source: World Bank national accounts data, and OECD National Accounts data files.

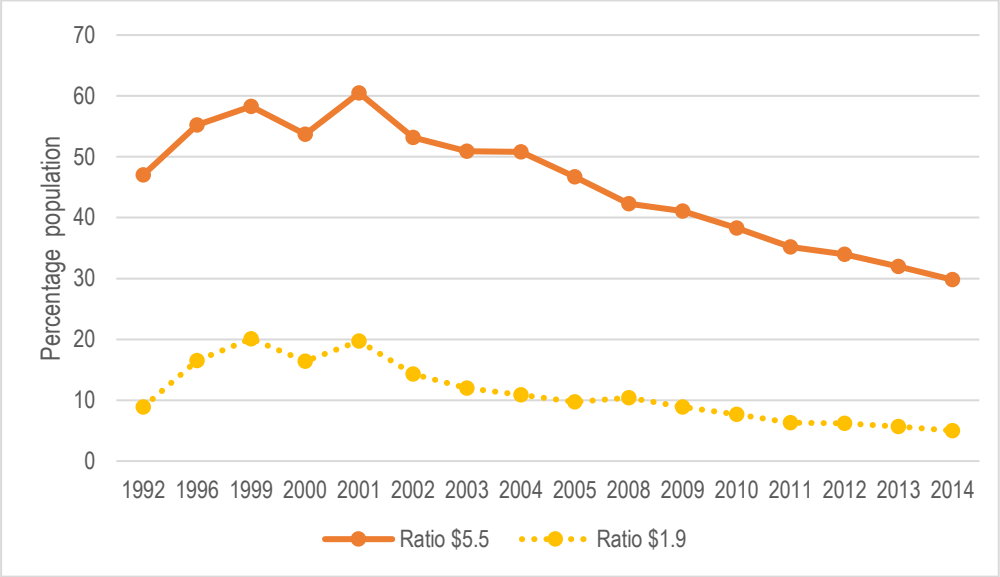
Figure 4-2 shows that the economic decline at the end of the 1990s was the most critical point in terms of economic growth in Colombia in recent years. The global crisis of 2008 is also reflected. This shows that the Constitutional Court of Colombia has exercised its functions in less favourable economic situations.

According to the Human Development Report 2019, between 1990 and 2018, Colombia's Human Development Index (HDI) value increased by 26.9%. The progress of this period has led to an increase of Colombia's life expectancy (7.4 years), mean years of schooling (2.9 years) and expected years of schooling (5.5 years)[511]. However, some rural zones in Colombia still lack access to some basic services. Poverty remains an important feature in Colombian society. Although the poverty index decreased between 2010 and 2011, poverty still represents a

[510] See Bertelsmann Stiftung, BTI 2012 — Colombia Country Report. Gütersloh: Bertelsmann Stiftung, 2012.
[511] See Human Development Report 2019.

significant socioeconomic barrier. Figure 4-3 shows the percentage of population living in poverty and extreme poverty in Colombia between 1992 and 2012.

Figure 4-3. Poverty and extreme poverty. Colombia 1992-2012.



Note: Poverty headcount ratio at $1.90 and $5.5 a day is the percentage of the population living on less than $1.9 and $5.5 a day at 2011 international prices. As a result of revisions in PPP exchange rates, poverty rates for individual countries cannot be compared with poverty rates reported in earlier editions.
Source: World Development Indicators. World Bank.

Figure 4-3 presents data on poverty and extreme poverty in Colombia between 1992 and 2014 from the World Development Indicators. The solid line represents the percentage of population living in poverty, i.e., on less than $5.5 a day, and the dotted line represents the percentage of population living in extreme poverty, i.e., on less than $.1.9 a day. In general, a decrease in poverty rates is observed in the period analysed. The percentage of population living in poverty rose gradually through over the 1990s, i.e., the same decade when the Constitutional Court of Colombia started functioning. However, in the early 2000s, poverty fell steadily over the years. It can be noted that extreme poverty has followed the same pattern, with a slight decrease in the percentage of population living on less than $1.9 a day between 1992-2014.

4.2.2. Costa Rica

Social and political context

Historically, Costa Rica has generally enjoyed greater peace and more consistent political stability compared with many of its fellow Latin American nations. However, the annulment of

the presidential elections in 1948, which the opposition had won[512], brought to the surface accumulated grievances and provoked a two-month civil war that stands as the most significant breakdown of the Costa Rican emerging democratic practices[513]. In 1948, the forces led by José Figueres Ferrer organised a *junta* to rule Costa Rica for a period of eighteen months[514]. This resulted in the establishment of a provisional government, the election of a National Constituent Assembly, and the promulgation of the Constitution in 1949[515]. The 1949 Constitution abolished the Costa Rican Army[516] and created a politically autonomous electoral court system and enfranchised all Costa Ricans over the age of 20[517].

Since the promulgation of the 1949 Constitution, Costa Rica has had an uninterrupted tradition of liberal democracy. As a result, it is the only country in Latin America that has been under continuous democratic rule since 1949. Political, social and ethnic conflicts are not very pronounced, and they are settled for the most part peacefully. There is a developed civil society and a civic culture. The rule of law and institutional stability is well established[518].

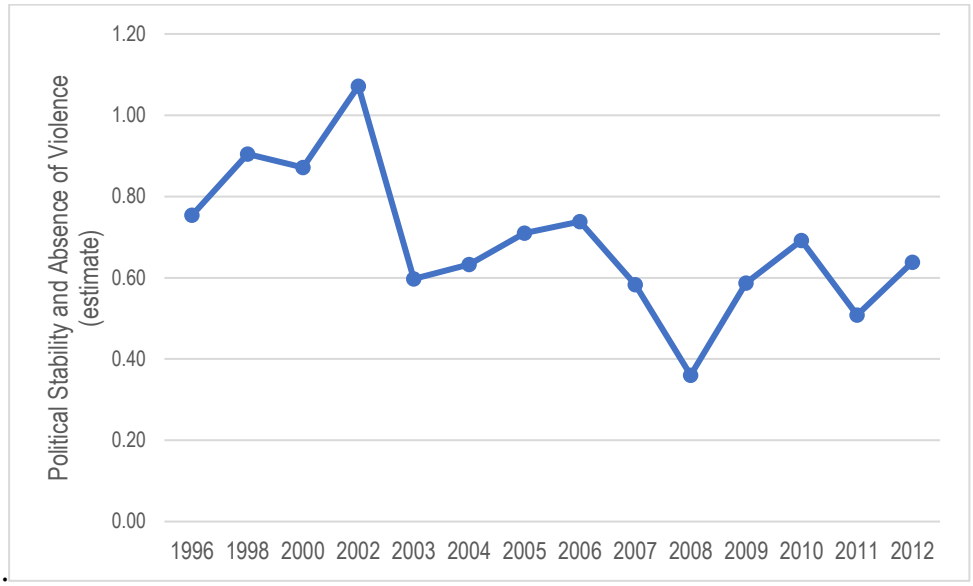
There is a stable, moderate and socially anchored party system that was characterized in the 1980s and 1990s by competition between two large parties, the *Partido Liberación Nacional* (PLN) and the *Partido Unidad Social Cristiana* (PUSC). In the presidential and parliamentary elections of 2002, a third political power, the *Partido de Acción Ciudadana* (PAC), broke the two-party system, open and forced a runoff for the presidency for the first time in the country's history, as no candidate achieved the required 40 % support on the first ballot. Since 2000, the social and political necessity of finding a consensus has been increased by the fact that the new government no longer holds a parliamentary majority[519].

There are no violent movements operating in the country, even though Costa Rica is a shipment point for illegal drugs from Colombia to Mexico and the United States. Drug-related violence,

[512] The election, allegedly won by the opposition candidate Otilio Ulate Blanco and his Party of National Unification (PUN), occurred in an environment of intense party competition characterised by the use of violence and fraud. These results were questioned by members of the governing political party, the National Republican Party (PRN). See Lehoucq, F. E. (1991). Class Conflict, Political Crisis and the Breakdown of Democratic Practices in Costa Rica: Reassessing the Origins of the 1948 Civil War. *Journal of Latin American Studies*, *23*(1), p. 37.
[513] Ibidem.
[514] Idem p. 38.
[515] See Barker, R. S. (n.d.). Stability, Activism and Tradition: The Jurisprudence of Costa Rica's Constitutional Chamber. *Duquesne Law Review*, *45*, 523–555.
[516] See Article 12 of the Constitution of Costa Rica.
[517] See Lehoucq, F. E. (1991), *op. cit*., p. 38.
[518] See Bertelsmann Transformation Index 2003, p. 9.
[519] Ibidem.

however, is not an issue in Costa Rica[520]. Figure 4-4 The Political Stability and Absence of Violence, World Governance Indicator that measures perceptions of the likelihood of political instability and/or politically motivated violence, including terrorism in Costa Rica.

Figure 4-4. Political Stability and Absence of Violence/Terrorism in Costa Rica 1996-2012.



Note: Estimate of governance (ranges from approximately -2.5 (weak) to 2.5 (strong) governance performance).
Source: World Bank Group. Worldwide Governance Indicators (www.govindicators.org).

Economic context

Costa Rica has a stable social market economy that has undergone a gradual process of privatization and liberalization since the early 1980s. In contrast to many other Latin American states, the economic transformation policy in Costa Rica was conceived in gradual and consensual terms.

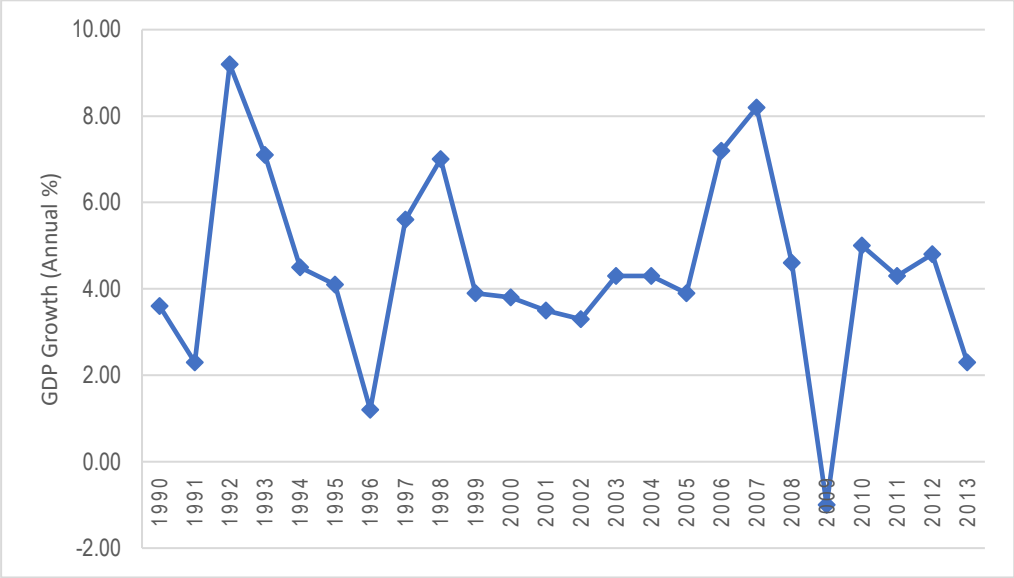
During the trade liberalization process state spending was gradually cut, some state-owned companies were privatized, public subsidies were reduced, the national banking system was opened up, and selective integration into the world market, based on the promotion of non-traditional exports, was pushed forward. This allowed Costa Rica to diversify its production base, first through non-traditional agricultural exports and later through high-tech industries clustered in free-trade zones. The liberalization process was later intensified through the ratification of the Central American Free Trade Agreement (CAFTA), following the country's first-ever *referendum* in 2007. This agreement included a set of laws that called for competition

[520] See Bertelsmann Transformation Index 2006, p. 4.

within the telecommunication and insurance sectors[521], meaning that the state monopolies open up the opportunity to new investors although its firms have remained competitive against the private sector[522].

After years of growth during the 1990s, Costa Rican economy stagnated again. The per capita growth declined in 2000 and 2001, partly due to the collapse of prices on the global market for coffee, bananas and sugar, Costa Rica's traditional agricultural export products[523]. Nevertheless, economic growth was strong, despite a slowing of the economy in 2008[524]. This is attributed to Oscar Arias's economic strategy. Under his administration, social spending was increased as a reaction to the global financial crisis, successfully attenuating its effects. However, this resulted in rising levels of public debt and a higher fiscal deficit in the following years. Figure 4-5 shows the Gross Domestic Product growth in Costa Rica during the period of analysis.

Figure 4-5. Gross Domestic Product growth. Costa Rica 1992-2012.



Note: Annual percentage growth rate of GDP at market prices based on constant local currency. Aggregates are based on constant 2010 U.S. dollars. GDP is the sum of gross value added by all resident producers in the economy plus any product taxes and minus any subsidies not included in the value of the products. It is calculated without making deductions for depreciation of fabricated assets or for depletion and degradation of natural resources.
Source: World Bank national accounts data, and OECD National Accounts data files.

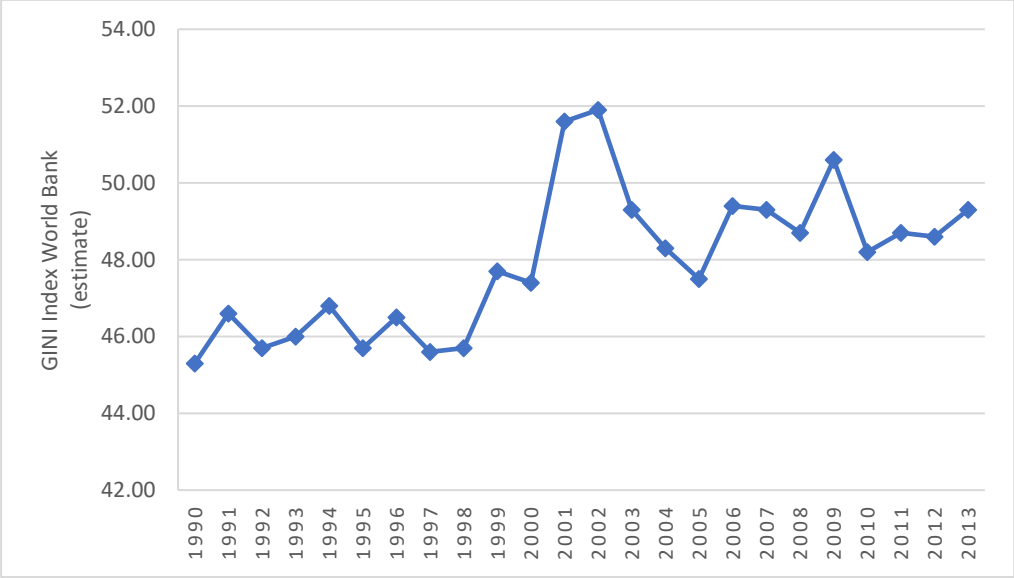
[521] In 2000, efforts to partially privatize the state-owned electricity and telecommunications sectors encountered massive social opposition, among others, from environmentalists; therefore, the projects were abandoned. The bill to privatize the Banco de Costa Rica, which was decisively rejected by the parliament in 2001, faced the same fate. See Bertelsmann Transformation Index 2003.
[522] See Bertelsmann Transformation Index 2014.
[523] See Bertelsmann Transformation Index 2003.
[524] See Bertelsmann Transformation Index 2010.

Since the 1940s, Costa Rica has promoted active and sustained policies for social inclusion that have resulted in high levels of human development and declining levels of poverty. According to the Human Development Report 2019, between 1990 and 2018, Costa Rica's HDI value increased by 21.2 %. The progress of this period has led to an increase of Costa Rica's life expectancy (4.4 years), mean years of schooling (1.7 years) and expected years of schooling (5.5 years).

However, social inequality tended to expand, as the income of the richest decile rose from 16 times that of the poorest decile in 2008 to 19.2 times in 2009. This trend continued during 2012, as the richest decile increased its per capita income by 11.6%, while the income of the poorest rose only by 2.5%. Poverty levels are similar in urban and rural areas, suggesting an absence of regional exclusion, but inequality is still higher in rural regions[525].

The Gini index measures the extent to which the distribution of income (or, in some cases, consumption expenditure) among individuals or households within an economy deviates from a perfectly equal distribution. Figure 4-6 shows the trend of the GINI coefficient in Costa Rica between 1989 and 2012.

Figure 4-6. Gini coefficient. Costa Rica 1989-2012.



Note: A Gini index of 0 represents perfect equality, while an index of 100 implies perfect inequality.
Source: World Development Indicators. World Bank.

[525] See Bertelsmann Stiftung, BTI 2014 — Costa Rica Country Report. Gütersloh: Bertelsmann Stiftung, 2014.

Figure 4-6 shows the behaviour of the GINI coefficient in Costa Rica between 1990 and 2013. As can be noted, in the late 1990s and early 2000s the GINI coefficient increased dramatically. Although it decreased, from 2006 onwards it fluctuated steadily upwards.

4.2.3. Mexico

Social and political context

Despite the 1910 Mexican Revolution's promise of 'Universal Suffrage and No Re-election' and the promulgation of the 1917 Constitution (in full force and effect), Mexico fell under the authoritarian regime[526] of the *Partido Revolucionario Institucional* (Revolutionary Institutional Party, hereafter PRI), which held power uninterrupted from 1921 until 2000.

The series of events that occurred in the late 1980s and during the 1990s marked the decisive collapse of the PRI. The 1988 election fraud – which would have otherwise resulted in the victory of the left wing *Partido de la Revolución Democrática* (Democratic Revolution Party, PRD for its acronym in Spanish) – triggered the already open discontent among the population regarding the single party system. The 1990s were marked by strong economic, social, and political events. On January 1, 1994, Mexico signed the North American Free Trade Agreement (NAFTA) alongside the United States of America and Canada. Meanwhile, in the southern state of Chiapas, the *Ejército Zapatista de Liberación Nacional* (Zapatista Army of National Liberation, EZLN for its acronym in Spanish) launched a rebellion against the dictatorship, demanding recognition of the rights of indigenous people[527]. In March 1994, Luis Donaldo Colosio (PRI Presidential candidate) and Francisco Ruiz Masseiu (PRI General Secretary) were assassinated. Finally, in 1997 the PRI lost its majority in the Congress and the presidency in 2000.

The 2000 elections were undoubtedly the first free and fair elections in the recent political history of Mexico. Vicente Fox's victory in Mexico's presidential elections of 2000 as the candidate of the *Partido Acción Nacional*[528] (National Action Party, hereafter PAN) signified

[526] From the 1930s onward, this form of authoritarianism enjoyed broad popular support and brought about a long period of political and economic success. See Bertelsmann Transformation Index 2006, p. 2.
[527] Indigenous communities in Mexico, although numerically significant (between 9 and 12 million depending on how they are classified), represent 9% to 12% of the population and are quite heterogeneous. They are nevertheless discriminated against, and definitely constitute the poorest communities in Mexico. It was not until the EZLN raised the issue of indigenous communities that the Mexican population at large and the government registered the extent of the discrimination against its indigenous communities and began to accept the vision of a heterogenous but egalitarian Mexican nation. See Bertelsmann Transformation Index 2008. Even after a few constitutional reforms, both discrimination against indigenous people and poorest living conditions still persist.
[528] The PAN is one of the three main political parties in Mexico. It was founded in 1939. They consider themselves as a centre-right, Christian democratic political party.

the alternation of the political party in power and was seen as a great opportunity to bring about the hoped-for transition to democracy[529] which had been brewing some decades behind.

Vicente Fox Quezada won the 2000 elections under the promise to be the 'government of change'. However, 'the period of disenchantment'[530] appeared in the first half of the presidential term. The Fox government failed to achieve Mexico's post-PRI political transformation. Instead, his presidency was marked by stagnation with some regressive tendencies[531]. Paradoxically, the new political pluralism reached at the Congress worked against his reform projects[532]. Fox was not able to forge cross-party policy coalitions with majority opposition parties.

Moreover, Fox weakened the nascent democracy in various respects. Firstly, his persistent actions to ban the left-wing candidate from winning the presidency and his support (using public resources) to the PAN candidate contributed to the polarisation and division of the electorate.

Secondly, most analysts trace the current brutal phase in Mexico's drug war to the early administration of President Vicente Fox, when in January 2001, Joaquín '*El Chapo'* Guzmán, the leader of the Sinaloa cartel, escaped from prison and members of rival groups were killed and jailed. These incidents are thought to have altered the balance of power among Mexico's four main drug trafficking organizations (the Sinaloa, Tijuana, Juárez, and Gulf cartels), which responded by waging an all-out war for control of key trafficking routes[533]. Additionally, the power vacuum during Vicente Fox's last six months of presidency was filled by rampant crime in some areas such as Michoacán, Guerrero and Nuevo León and by serious social conflicts in Oaxaca[534].

Finally, during the government of Vicente Fox, an important anti-corruption reform was carried out. This included legal reforms, changes in bureaucratic organisation and operation, and

[529] In the absence of a majority, disciplined in support of the president as party leader, suddenly Mexico had the conditions for the classic countervailing ambitions theorized by the Federalists. See Carroll, R., & Søberg Shugart, M. (2007). Neo-Madisonian Theory and Lain American Institutions. In G. L. Munck (Ed.), *Regimes and Democracy in Latin America: Theories and Methods* (pp. 51–101). New York: Oxford University Press, p. 80.
[530] See Merino, M. (2012). *El futuro que no tuvimos*. Mexico City: Temas de hoy, p. 11.
[531] The 'quasi impeachment' of López Obrador from his position as Mayor of Mexico City aimed to ban him from the 2006 presidential elections and the suspicion of cronyism surrounding the election of commissioners of the Electoral Federal Institute can be considered as indications of regression. See Bertelsmann Transformation Index 2006, p. 17.
[532] Among them, there were the promised solution to the Chiapas conflict, the related problem of indigenous rights, the tax reform, deepening decentralization of Mexican federalism, justice reform and fight against widespread corruption. See Bertelsmann Transformation Index 2006, p. 1.
[533] See Freeman, L. (2006). State of Siege: Drug-Related Violence and Corruption in Mexico. *Washington Office on Latin America Publications*, 1–28.
[534] See Bertelsmann Transformation Index 2008.

government efforts to promote integrity and ethics, incorporate social organisations in the fight against corruption, increase popular awareness and alter the political culture of Mexico[535]. Paradoxically, when in 2002 the Electoral Tribunal issued a ruling ordering to carry out the investigation of the financing of the Fox presidential campaign in terms of accusations and suspicions about financing from abroad and exceeding the amounts authorized by the electoral legislation, the *Amigos de Fox*[536] association was exonerated by the corresponding judicial instance, without having to assume its responsibility in this regard. Inexplicably, Fox's and his family's economic rise took place during his presidential term. Fox's government awarded contracts to companies in which their relatives figured as major shareholders[537].

Felipe Calderon's PAN presidency (2006-2012) was marked by both the suspicion of electoral fraud and the humanitarian crisis after he declared the war against the drugs cartels[538]. Once in power, President Calderón immediately mobilized the police and the army to fight drug-trafficking hoping that this action will suffice to legitimate his rule[539].

Once again, the 2012 elections were also marked by legal claims of electoral fraud before the Electoral Court. Once again, it was the Electoral Court that stated the outcome of the 2012 presidential election. As a result, Enrique Peña Nieto (PRI) ran the government of Mexico from 2012 to 2018. In 2018, presidential elections were held with the victory of Andrés Manuel López Obrador from the political party *Movimento de Regeneración Nacional* (National Regeneration Movement, MORENA for its acronym in Spanish), a left-wing party founded by himself after his defeat in the 2012 presidential elections.

The governments run by the PAN and the PRI led to the deterioration of institutions, which has given rise to a crisis of insecurity and violence that has reached unprecedented proportions in Mexico. Since 2001, violence has increased dramatically and resulted in one of the bloodiest

[535] See Morris, S. D. (2009). *Political corruption in Mexico: the impact of democratization*. Boulder: Lynne Rienner Publishers, p. 16.
[536] Amigos Fox was an association, organic and financially independent of the PAN (political party of Fox) that economically and politically supported the presidential campaign of Vicente Fox. This association organized breakfasts, lunches, dinners, conferences and other meetings, basically among important businessmen, to raise funds for the presidential campaign of Vicente Fox. See Tejeda Ávila, R. (2005). Amigos de Fox, breve historia de un "partido" efímero. *Espiral, XII*(34), p. 88.
[537] See Olmos, R. (2017). *Fox: Negocios a la sombra del poder*. Ciudad de México: Grijalbo.
[538] It is well known that the drug problem has evolved in Mexico. Unfortunately, Mexico has become a drug producer and consumer, not only a route of passage for drugs coming from Colombia and other producing countries. The presence of drug cartels is concentrated in some states such as those in the north of Mexico. However, the levels of violence generated by drug trafficking have extended quickly and slightly to other states.
[539] See Bertelsmann Transformation Index 2008.

periods in the history of this country[540]. For example, homicides increased from a rate of 57.7 per every 100,000 inhabitants during the government of Vicente Fox (2001-2006) to a rate of 106.4 per 100,000 inhabitants during the government of Felipe Calderón (2007-2012)[541]. The number of cases of forced or involuntary disappearance of individuals has increased substantially. Before 2007, the Mexican government had registered 642 disappearances. In 2012, at the end of the government of Felipe Calderon, the National Registry Data of Missing or Disappeared Persons records 13,681 disappearances. The situation is particularly disturbing because in recent years this figure has gone up. Between 2013 and September 2017, 19,155 disappearances were recorded. The government of Enrique Peña Nieto (2012-2018) acknowledged 33,478 cases of disappearances[542]. It is worth mentioning that these figures should be taken with reservations since they do not consider the unrecorded crime rate or *cifra negra*[543].

Additionally, freedom of expression is at risk. From 2000 to October 2017, the international organisation Article 19 has documented the murders of 111 journalists in Mexico, which were possibly related to their journalistic work. The number of murders of journalists dubbed from

[540] This violence increased due to Calderon's war against drug cartels has given rise to other criminal activities, such as kidnappings and robbery. Moreover, the drug cartels have extended their reach and diversified into other criminal activities such as hijacking, car theft, the abuse and murder of migrants, and business 'protection'. Importantly all branches and levels of government have been infiltrated. City mayors, candidates and even governors have been killed as a form of revenge by these illegal groups. See Bertelsmann Transformation Index 2012.

[541] See 'Consulta de: Defunciones por homicidio' a database available at the website of the Instituto Nacional de Estadística y Geografía at https://www.inegi.org.mx/app/indicadores/?ind=6200002200&tm=6#divFV6200002200#D6200002200 (Accessed March 2021).

[542] After much insistence the families of disappeared people managed that, in April 2012, Felipe Calderón issued a decree creating the *Registro Nacional de Datos de Personas Extraviadas o Desaparecidas* (National Registry Data of Missing or Disappeared Persons, RNPED for its Spanish acronym). The RNPED integrates the data of non-localized persons obtained from the complaints filed with the corresponding ministerial authority. This register includes only those persons who, at the court date, remain unlocated, that is, they do not account for the persons who have already been located. The RNPED data is available at http://secretariadoejecutivo.gob.mx/rnped/consulta-publica.php (Accessed October 2020).

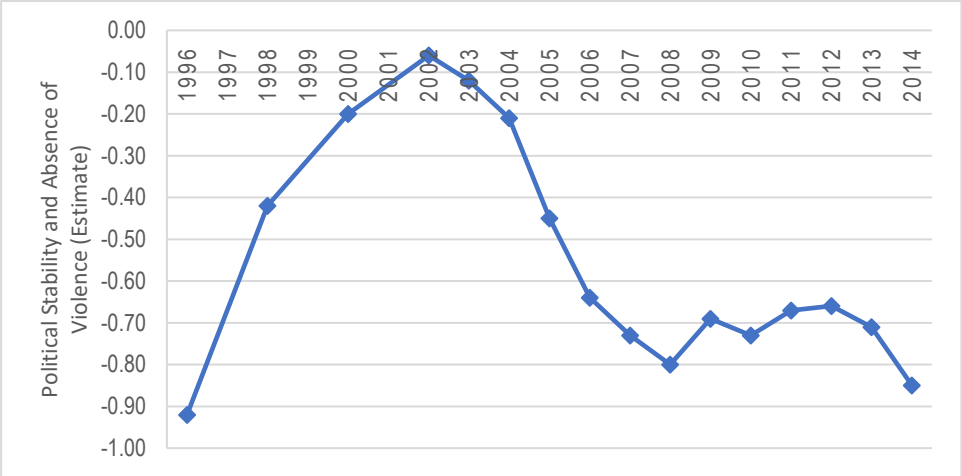
[543] The deficiency and ineffectiveness of the Mexican authorities discourage public denunciation of crimes and have led to unrecorded crime rate, i.e., the level of crimes that were not reported or that did not result in prior enquiry. The unrecorded crime rate in Mexico is over 90%. Since 2011, the Mexican government conducts a survey on victimization and perception of security at a national level. The National Victimization and Perception Survey on Public Security (ENVIPE in its Spanish acronym) reports the 'black figure' from 2010 to 2016 as follow: 2010, 92%; 2011, 91.6%; 2012, 92.1%; 2013, 93.8%; 2014, 92.8%; 2015, 93.7% and, 2016, 93.6. See the ENVIPE 2014 http://internet.contenidos.inegi.org.mx/contenidos/productos/prod_serv/contenidos/espanol/bvinegi/productos/nueva_estruc/promo/envipe2014_nal.pdf ENVIPE 2015 http://www.inegi.org.mx/saladeprensa/boletines/2015/especiales/especiales2015_09_7.pdf ENVIPE 2017 at http://www.inegi.org.mx/saladeprensa/boletines/2017/envipe/envipe2017_09.pdf (Accessed October 2020).

22 during the government of Vicente Fox to 48 during Felipe Calderón's mandate[544], not to mention the fact that 23 journalists disappeared from 2003 to 2015[545].

This situation has led to several massive social demonstrations against violence[546], the emergence of a number of civil society organizations, and an increasingly critical stance against the government strategy on the part of scholars and social and political leaders. Social discontent was channelled into the 2018 elections, leading to a left-wing party governing for the first time in Mexico's history.

The context of violence and governance failures that Mexico has faced in recent decades is reflected in the in the Political Stability and Absence of Violence, a World Governance Indicator that measures perceptions of the likelihood of political instability and/or politically motivated violence, including terrorism. See Figure 4-7.

Figure 4-7. Political stability and absence of violence (estimate). Mexico 1996-2014.



Note: Estimate of governance (ranges from approximately -2.5 (weak) to 2.5 (strong) governance performance).
Source: Worldwide Governance Indicators (www.govindicators.org). World Bank.

[544] See Periodistas asesinados en México (Journalists killed in Mexico) available at https://articulo19.org/periodistasasesinados/. See also Feadle. (2015). Informe estadístico de la Fiscalía Especial para la Atención de Delitos Cometidos contra la Libertad de Expresión, available at http://www.pgr.gob.mx/fiscalias/feadle/Documents/INFORMES/2015/ESTADISTICAS%202015%2006%20JUNIO%202015%20totales.pdf. (Accessed October 2017).

[545] See Articulo19. (2016). La desaparición y desaparición forzada de quienes ejercen la libertad de expresión en México, available at https://www.article19.org/data/files/medialibrary/38261/Mexico---Informe-Especial-sobre-Periodistas-Desaparecidos-[Feb-2016].pdf (Accessed October 2017)

[546] For instance, Illuminate Mexico was a massive demonstration that took place in Mexico City in 2008. It was organized following the kidnapping of Fernando Martí, a 14 -year-old boy, son of a renowned businessman, who was killed by his captors, even though the boy's father had paid the sum demanded. Another remarkable massive protest was the so-called Protest for Peace with Justice and Dignity in 2011 after the murder of Juan Francisco, son of the Mexican poet Javier Sicilia.

Figure 4-7 shows that in the mid-1990s, precisely when the Supreme Court of Justice was established as a constitutional court, there was an increase in the indicator that measures political stability and the absence of violence. However, this trend was reversed in the early 2000s with a gradual decline in the indicator, without any significant improvement being observed in the 2010s.

Economic context

Moving on to economic performance, the developmentalist state that emerged from the Mexican Revolution (1910-1917) constituted the key characteristic of the PRI regime and was the first of its kind in the 20th century. However, the Mexican Presidents Miguel de la Madrid (1982-1988) and Carlos Salinas de Gortari (1988-1994) changed the economic policy of Mexico. They started to subscribe to international economic agreements and to open the economy to international markets. This implied the establishment of a neoliberal policy. The 1994 NAFTA's ratification process caused significant institutional changes, among others, the establishment of the ombudsman in 1992 and the judicial review in 1995 in order to secure investment. In the early days of Ernesto Zedillo's presidency in December 1994 took place the economic crisis, widely known as the Mexican peso crisis or 'Tequila Effect', triggered by an overnight devaluation of the Mexican peso.

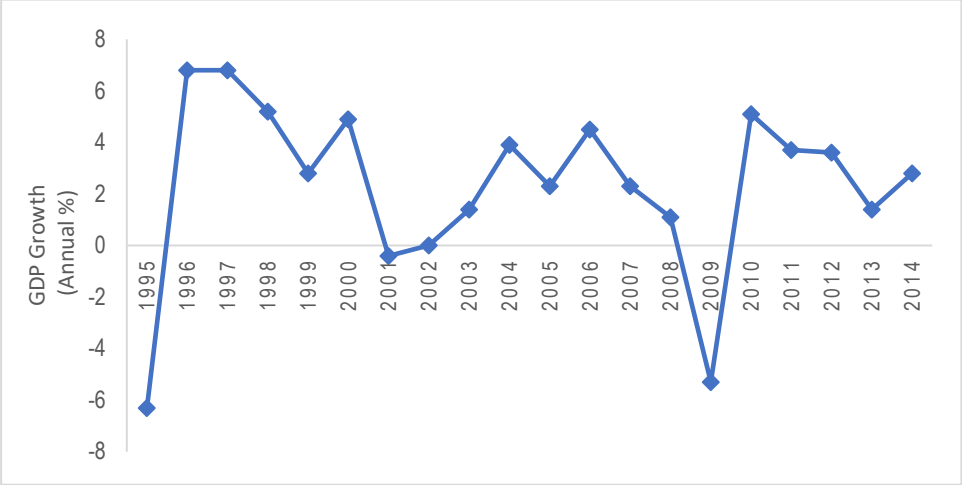
After the 1994–95-peso crisis and consequent decline in economic growth, the Mexican economy, and manufacturing recovered in 2000 thanks to the devaluation of the peso between 1996 and 2000. Therefore, when Vicente Fox (PAN) took office, macroeconomic indicators were relatively stable. However, the Fox government failed to successfully face the social debt toward the poor[547]. This resulted in the increasingly uneven distribution of income and wealth, the spread of vast informal sector[548], falling or stagnating wages, and the increase in the number of people living in poverty from 19.0 million in 1990 to 23.8 million in 2000[549].

Despite the disillusionment associated with the Fox government's political performance, the Mexican economy showed solid growth. However, it did not match the growth of other Latin American countries[550]. Mexico's economic performance is heavily dependent on outside

[547] See Bertelsmann Transformation Index 2006, p. 1.
[548] In 2006 the informal sector amounted to more than 40% of the Mexican workforce. See Bertelsmann Transformation Index 2006, p. 11.
[549] See Bertelsmann Transformation Index 2003, p. 9.
[550] See Bertelsmann Transformation Index 2006, p. 1.

influences, primarily the United States economy[551]. Although the 2008 global financial crisis had a substantial impact on the Mexican economy, it recovered in 2010[552]. Figure 4-8 shows the Gross Domestic Product growth in Mexico during the period of analysis.

Figure 4-8. Gross Domestic Product growth. Mexico 1996-2014.



Note: Annual percentage growth rate of GDP at market prices based on constant local currency. Aggregates are based on constant 2010 U.S. dollars. GDP is the sum of gross value added by all resident producers in the economy plus any product taxes and minus any subsidies not included in the value of the products. It is calculated without making deductions for depreciation of fabricated assets or for depletion and degradation of natural resources.
Source: World Bank national accounts data, and OECD National Accounts data files.

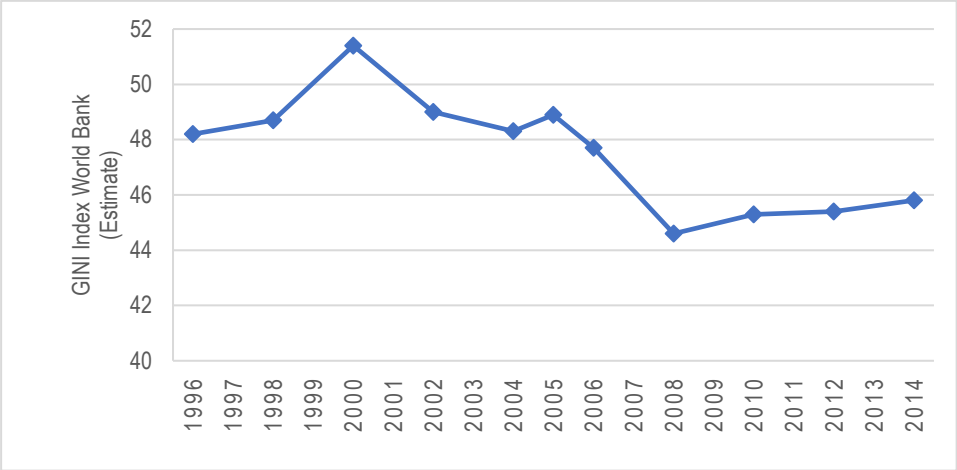
The sudden drops in Figure 4-8 correspond to the 1995 crisis (tequila effect) and the 2008 global crisis. The economic upturns of 1996 and 2010 are followed by a period of fluctuation with no significant change in the growth rate.

If one takes into account the exceptional growth of the Mexican export sector in the last 15 years, one can conclude that poverty and inequality seem to be structurally embedded, and that an economic model based solely on the external market appears incapable of solving these problems. General inequality has been slightly reduced over time. According to the Human Development Report 2019, between 1990 and 2018, Mexico's HDI value increased 17.8%. The progress of this period has led to an increase of Mexico's life expectancy (4.1 years), mean years of schooling (3.1 years) and expected years of schooling (3.7 years)[553].

[551] Not only is the Mexican economy dependent on the United States, which purchases 90% of Mexico's exports, the peso's close peg to the dollar often results in over-valuation of the peso, which hinders Mexican exports elsewhere. See Bertelsmann Transformation Index 2003, pp. 9-11.
[552] See Bertelsmann Stiftung, BTI 2014 Mexico Country Report. Gütersloh: Bertelsmann Stiftung, 2014.
[553] See Human Development Report 2019.

Although the country's Gini index score has declined since 2000, the country's medium level of human development and the existence of extreme poverty effectively mean that Mexico, like the majority of Latin American countries, remains a very unequal society[554]. Figure 4-9 reports the GINI coefficient between 1996 and 2014.

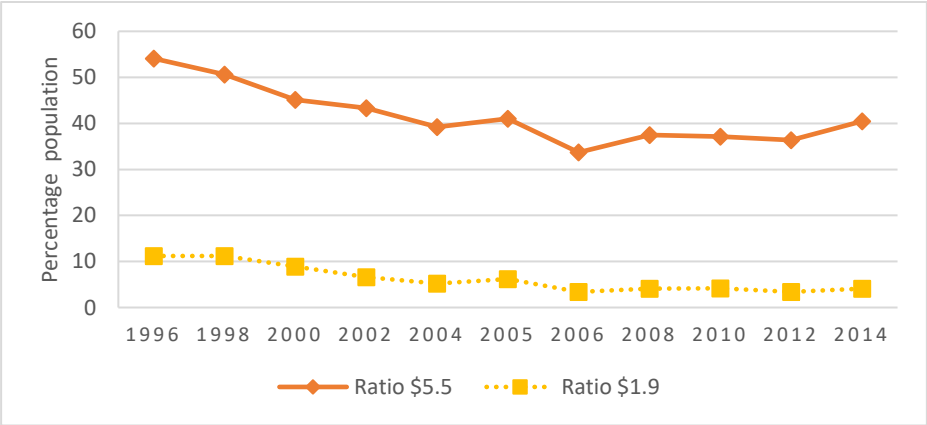
Figure 4-9. Gini coefficient. Mexico 1996-2014.



Note: A Gini index of 0 represents perfect equality, while an index of 100 implies perfect inequality.
Source: World Development Indicators. World Bank.

The evaluation of data presented in Figure 4-9 provides evidence of a gradual fall in the GINI coefficient from 2000 onwards, which confirms that inequality has persisted in Mexico over the period analysed.

Figure 4-10. Poverty and extreme poverty. Mexico 1996-2014.



Note: Poverty headcount ratio at $1.90 and $5.5 a day is the percentage of the population living on less than $1.9 and $5.5 a day at 2011 international prices. As a result of revisions in PPP exchange rates, poverty rates for individual countries cannot be compared with poverty rates reported in earlier editions.
Source: World Development Indicators. World Bank.

[554] See Bertelsmann Stiftung, BTI 2014 — Mexico Country Report. Gütersloh: Bertelsmann Stiftung, 2014, p. 17.

Figure 4-10 presents data on poverty and extreme poverty in Mexico between 1996 and 2014 from the World Development Indicators. The solid line represents the percentage of population living in poverty, i.e., on less than $5.5 a day, and the dotted line represents the percentage of population living in extreme poverty, i.e., on less than $.1.9 a day. Overall, the rate of poverty has remained high. The percentage of population living in poverty declined steadily from 1996 to 2006, but from 2006 to 2014 the percentage of population living in poverty rose slightly. Regarding extreme poverty, there was a slight decrease in the percentage of population living on less than $1.9 a day between 1996-2014.

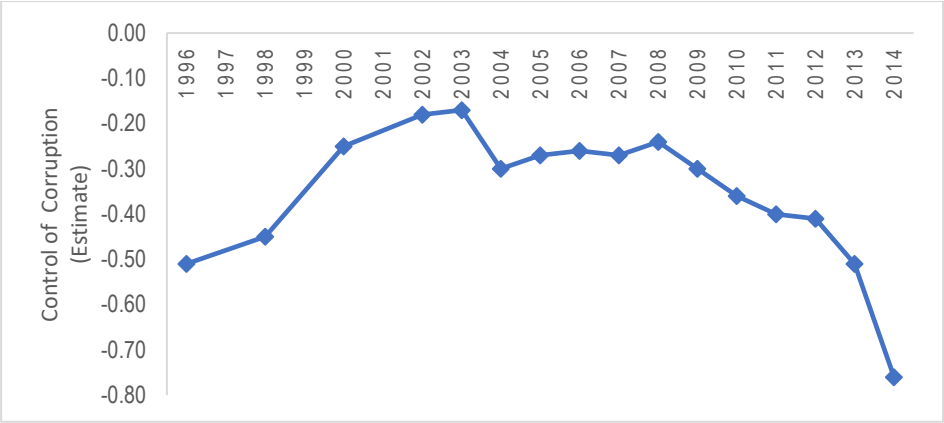
The social, economic and political crisis that Mexico has experienced in recent decades cannot be understood without taking into account corruption and the lack of the rule of law. Corruption and a weak system of law enforcement and administration of justice have prevented the establishment of a strong rule of law[555]. According to Hagene, neopatrimonialism, a sub type of grand corruption, is a more suitable term to describe the situation in Mexico. Neopatrimonialism is '(…) a political practice, which appropriates public funds and institutions for the benefit of particular actors. It operates across institutions, in personal networks, hierarchical, but with a scope for agency also from below, and it should include actors with formal positions of authority who can undertake activities in tension or conflict with the legal order'[556].

It is considered that the institutionalisation of the PRI in 1929 was accompanied by corruption as a tool that allowed the government to negotiate with dissidents to reduce the levels of violence caused by the revolution[557]. However, over time, it became the *modus operandi* of the PRI regime, i.e., the privileges, the political influences, and the favours, as well as the loyalties, disciplines and silences were the base of the system[558]. Thus, a weak state, with exacerbated presidentialism, a single-party regime, legislative and judicial powers subordinated to the executive and the lack of an organised opposition were the ideal conditions for the emergence of drug trafficking with the consent and tolerance of the political system[559].

[555] See Ross, M. (2018). With Friends like These, Who Needs Enemies? Turning Attention to Public Corruption in Mexico. *National Security Law Journal*, *6*(1), 68–97.
[556] See Hagene, T. (2019). Grand corruption in Mexico. *European Review of Latin American and Caribbean Studies*, *108*(July-December), 43–64.
[557] See Nieto, N. (2012). Political corruption and narcotrafficking in Mexico. *Transcience: A Journal of Global Studies*, *3*(2), p. 25.
[558] Idem, p. 27.
[559] Idem, p. 33.

Control of Corruption and Rule of Law are two dimensions of the WGI developed by the WB[560]. Control of Corruption captures perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as 'capture' of the state by elites and private interests. Rule of Law captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, the courts and the likelihood of crime and violence. Figure 4-11 provides an overview of Control of Corruption and Rule of Law in Mexico between 1996 and 2014.

Figure 4-11. Control of Corruption. Mexico 1996-2014.

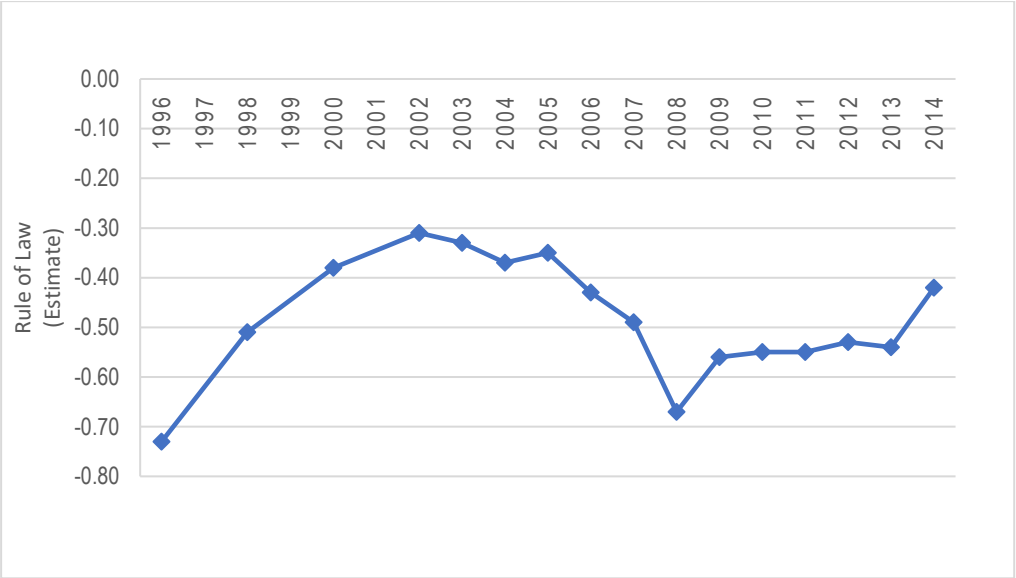


Note: Estimate of governance (ranges from approximately -2.5 (weak) to 2.5 (strong) governance performance)
Source: Worldwide Governance Indicators (www.govindicators.org). World Bank.

Figure 4-11 presents data from the WB on the control of corruption in Mexico between 1996 and 2014. Overall, the control of corruption went down by 25 units from 1996 to 2014. From 1996 to 2003, the control of corruption increased markedly. However, from 2008, it fell continuously from -0.24 in 2008 to -0.76 in 2014, i.e., a decrease of .52 points.

Figure 4-12. Rule of Law. Mexico 1996-2014.

[560] See The Worldwide Governance Indicators (WGI) project website at https://info.worldbank.org/governance/wgi/ (Accessed September 2020).



Note: Estimate of governance (ranges from approximately -2.5 (weak) to 2.5 (strong) governance performance)
Source: Worldwide Governance Indicators (www.govindicators.org). World Bank.

Figure 4-12 presents data obtained from the WB on the rule of law in Mexico between 1996 and 2014. Overall, the rule of law went up by 31 units from 1996 to 2014. From 1996 to 2002, the control of corruption increased markedly. However, from 2005, it fell sharply from -0.35 in 2005 to -0.67 in 2008, i.e., a decrease of .32 points. The sudden drop in 2008 coincides with the global financial crisis. However, from 2008, the control of corruption rose slightly.

The overall overview of the national contexts presented above shows that the convergence of democracy and market liberalisation is not free from social and political tensions and posits a challenge to the consolidation of democracy. Munck holds that this convergence has accentuated the left-right tension in the region and is understood to revolve around the issue of economic inequality, seen as natural and acceptable by the right and socially constructed and unacceptable by the left. According to him, the likelihood of inequality and poverty may contribute to the deterioration of democracy and trigger social discontent which in turn can result in violations of human rights. Munck emphasises that the deterioration of democracy occurs to the extent that political actors committed to promoting or fighting neoliberalism repeatedly start breaking the rules of electoral democracy[561].

Notably, the constitutional courts of Colombia and Cosa Rica have been able to protect human rights under these circumstances. Therefore, the strong commitment to protect human rights of

[561] See Munck, G. L. (2015). Building democracy... Which democracy? Ideology and models of democracy in post-transition Latin America. *Government and Opposition*, *50*(3), pp. 368-369.

the constitutional courts contrasts with the environment in which they have to operate. In contrast, while Mexico has experienced an increase of violence to unseen levels in the last decade, the Mexican Supreme Court does not seem to have the same commitment to the adjudication of human rights as its counterparts in Colombia and Costa Rica. This situation raises the question whether contextual factors might relate to the outcomes of constitutional courts when adjudicating human rights.

4.3. **Democratic performance**

4.3.1. Colombia

Scholars[562] consider that Colombia is not a consolidated democracy, due to significant shortcomings such as its widespread violence, its serious human rights crisis[563] since the 1970s, its lacks of social justice (resulting in a society with deep inequalities) and its state's lack of command of all Colombian territory. Nevertheless, they accept that Colombia is neither a dictatorship nor a simple façade democracy to the extent that, popular and more or less fair elections are held since 1830 and, judicial controls and constitutional checks and balances are generally effective, at least in some parts of the country. Since 1958 Colombia's democracy has been viewed as democracy 'with adjectives'[564]. Adjectives such as 'restricted', 'besieged'[565] or 'under assault' have been used to better describe the Colombian case.

Recent research has pointed out the structural problems of Colombia: i.e., the country's notorious presidentialism; the lack of credibility among the people of the main political parties, the political class, and Congress; the everyday reality of violence as a means to solve conflicts; the traditional ineffectiveness of the public administration[566]: the relative failure of

[562] See Uprimny, R. (2004), *op. cit.*, pp. 50-52, Sierra Rodríguez, M. D. (2015). Estado de derecho: ¿realidad o ficción? *Anuario de Derecho Constitucional Latinoamericano, XX1*, p. 47 and Bejarano, A. M., & Leongómez, E. P. (2002). *From "Restricted" to "Besieged": The changing nature of the limits to democracy in Colombia* (Working Paper #296).

[563] Uprimny asserts that initially, the largest problems were arbitrary detentions; torture and unfair sentences. However, in the 1980s, violations against life became the main concern due to the abrupt increase in massacres, disappearances, torture and murders. See Uprimny, R. (2004)., *op. cit.*, p. 50.

[564] See Bejarano, A. M., & Leongómez, E. P. (2002), *op. cit.*, p. 1.

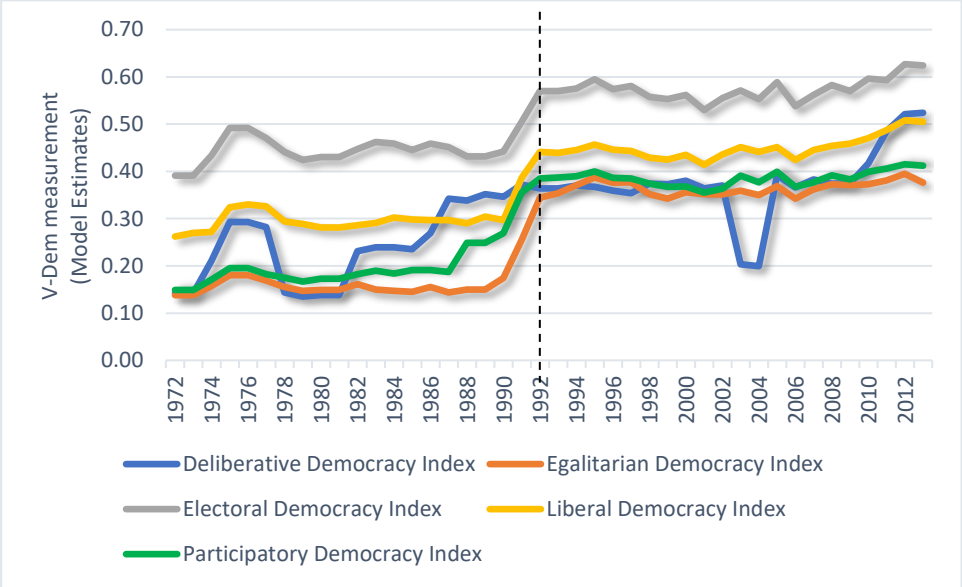
[565] Colombia was under state of siege from 1949 to 1991 during which deep restrictions on constitutional liberties were placed by means of siege presidential decrees. The abuse of state of siege powers has blurred the distinction between legality and illegality and between democracy and authoritarianism. Colombia was not a military dictatorship but was not a well-functioning democracy either, because civilian governments constantly abused the emergency powers. See Uprimny, R. (2004), *op. cit.*, pp. 51-52. In contrast, Bejarano and Pizarro Leongómez use the adjective 'besieged' to highlight exogenous factors that make it impossible for democracy to function adequately. These factors relate to the erosion of the state, the expansion of violence, and the rise of powerful extra institutional actors who constrain the space needed to consolidate a free democratic playing field. See Bejarano, A. M., & Leongómez, E. P. (2002), *op. cit.*, p. 1.

[566] See Cepeda-Espinosa, M. J. (2004), *op. cit.*, pp. 680-681.

governmental efforts to strengthen social democracy both through the agrarian reform and through the extension of social rights; the devaluation of the democratic system as a result of its militarization through the existence of a state of exception and its strongly exclusionist and political patronage character; and the close relationship that is found in Colombia between the anomie of the political discourse and violence throughout the course or its political history[567].

The performance of democracy as seen from a multidimensional perspective provides notable results. Figure 4-13 presents the democratic performance of Colombia before and after the establishment of the constitutional court in 1992. Using the V-Dem data, this overview shows the development of electoral, liberal, participatory, deliberative and egalitarian democracy between 1972 and 2012.

Figure 4-13. Democracy from a multidimensional perspective in Colombia before and after the establishment of the Constitutional Court of Colombia. 1972-2012.



Note: Interval scale, from low to high (0-1).
Source: V-Dem data version 10.0.

As can be seen in Figure 4-13, the increase in democratic indices coincides with the establishment of the Constitutional Court in 1992 (dashed line). While the index of deliberative democracy dropped noticeably in 2003, it increased greatly from 2012 onwards. The indices of electoral, liberal and egalitarian democracy have increased slightly since 2006. The index of

[567] See Uprimny, R., & García-Villegas, M. (2007), *op. cit.*, p. 69.

participatory democracy has remained constant since the establishment of the Constitutional Court.

4.3.2. Costa Rica

Costa Rica has been consistently described as one of the most stable democracies in Latin America, holding free democratic elections since 1948[568]. However, according to *Latinobarómetro*[569], it has lost its democratic capital during the 2010s decade. It is argued that authoritarianism has risen while support for democracy has decreased.

Several corruption scandals during the first decade of this century could explain the disenchantment with democracy in Costa Rica. Specifically, in 2004, the country was struck by the detention of two former presidents, Rafael Angel Calderón Fournier (1994-1998) and Miguel Ángel Rodríguez (1998-2002). The charges against them included payback schemes involving multinational corporations. As a result, the reputation of traditional parties, the PLN and the PUSC, has diminished, which in turn has translated into lower rates of electoral participation and party identification[570].

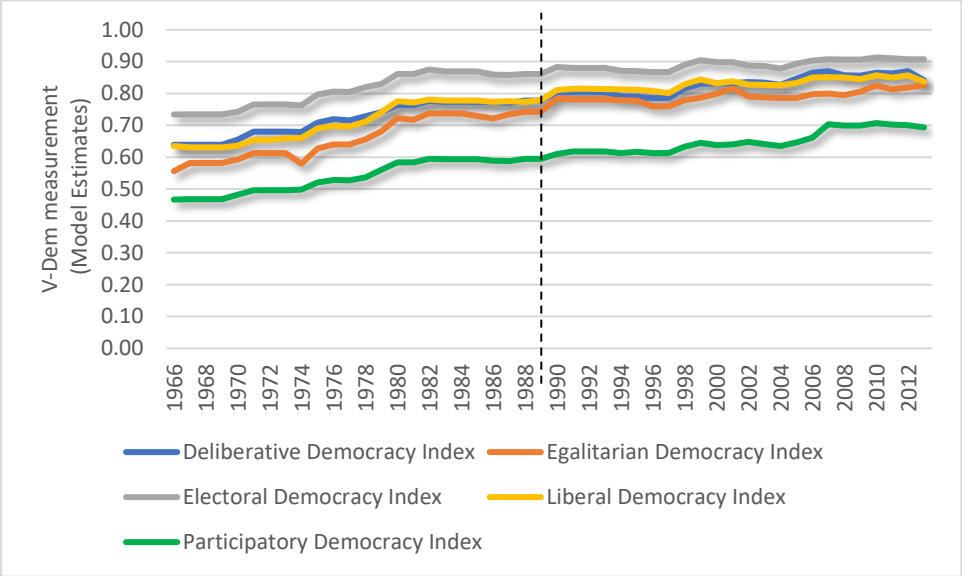
The performance of democracy as seen from a multidimensional perspective shows the following results. Figure 4-14 presents the democratic performance of Costa Rica before and after the establishment of the constitutional chamber in 1989. Using the V-Dem data, this overview demonstrates the development of electoral, liberal, participatory, deliberative and egalitarian democracy between 1966 and 2012.

[568] Corporación Latinobarómetro Report 2010; Sørense, G. (2008), *op. cit*., pp. 20-23; Møller, J., & Skaaning, S. E. (2013), *op. cit*., p. 277 (Table A2. Linking the Cases to Democracy Types (FH lax)). The authors have classified Costa Rica as a Polyarchy. Mainwaring, S., Brinks, D., & Aníbal, P. L. (2007), *op. cit*., p. 158. For these authors, Costa Rica is considered as a democracy since 1958 until 2004, which is the last year of their study. Freedom House considers Costa Rica as Free since 1998 until 2013. See https://freedomhouse.org/countries/freedom-world/scores (Accessed March 2021)

[569] See Corporación Latinobarómetro, Reporte 2013, p. 18. According to Corporación Latinobarómetro 2013 report, support for democracy has declined in Costa Rican from 74% in 2009 to 53% in 2013.

[570] See Bertelsmann Transformation Index 2014.

Figure 4-14. Democracy from a multidimensional perspective in Costa Rica before and after establishment of the Constitutional Chamber of Costa Rica. 1966 to 2012.



Note: Interval scale, from low to high (0-1).
Source: V-Dem data version 10.0.

Overall, Figure 4-14 highlights that democracy in Costa Rica has been at a high and stable level. Since the establishment of the Constitutional Chamber (dashed line), the five democratic indices have increased slightly. The index of participatory democracy has remained slightly below the rest of the democratic indices.

4.3.3. Mexico

As a consequence of 71 years of the PRI regime, democracy in Mexico can be seen as an uncompleted process full of vicissitudes. The 1988 electoral fraud triggered the awareness among the population about the importance of having clean and fair elections and respecting the vote[571]. This was reflected in the establishment of electoral institutions separated from the government such as the *Instituto Federal Electoral* (Electoral Federal Institute, IFE for its acronym in Spanish)[572] and the *Tribunal Federal Electoral* (Federal Electoral Tribunal, TRIFE

[571] See Bertelsmann Transformation Index 2003.
[572] During the PRI regime, the organisation of elections fell under the competence of the Executive branch through the *Comisión Federal Electoral* (Federal Electoral Commission) chaired by the Ministry of the Interior. In 1990 the IFE first appeared withing the Executive branch as a needed authority to give certainty, transparency and legality to the organisation of elections. It was until 1996 that the government gave the IFE total autonomy, i.e., disassociated it from the Executive branch and allowed the participation of civic organizations. The IFE is responsible for creating and managing clean voter rolls, creating ID cards that are secure against forgery, drafting reform proposals for the electoral law, and conducting, monitoring and reviewing elections. It is recognised by all parties and has a good reputation abroad. See Bertelsmann Transformation Index 2003, p. 5. In 2014 the IFE was transformed into Instituto Nacional Electoral (National Electoral Institute, INE for its acronym in Spanish).

for its acronym in Spanish)[573]. Both institutions proved to be significant in Mexico's political transformation, particularly with regard to the electoral process, the growing importance of elections to political legitimacy, promoting a culture of rule of law and the emergence of civic organizations.

Unfortunately, this positive development has suffered considerable setbacks in the 2000s and 2010s. This is illustrated, on the one hand, by the de-legitimization of the electoral authorities regarding their performance after two consecutive presidential elections under suspicion of fraud, in 2006 and 2012[574], and, on the other hand, by the way President Vicente Fox initiated the 'quasi-impeachment' of presidential candidate López Obrador from his position as Mayor of Mexico City in 2006[575].

The humanitarian crisis – caused by the ongoing war against drug cartels and the smuggling of drugs, weapons and people at the country's borders – and the economic crisis can be considered as fundamental threats to the consolidation of democracy. Both the violence generated by the war and the severe economic situation of almost half of the Mexican population living in poverty[576] place grave limits on the autonomy of the citizens and may lead citizens to accept 'strong-handed' policies that may impinge on human and civil rights[577].

Figure 4-15. presents the democratic performance of Mexico before and after the establishment of the Supreme Court of Justice as a constitutional court in 1995. Using the V-Dem data, this

[573] The TRIFE was created in 1990. In 1993 it was endowed with the competence to review elections, with the exception of presidential elections. In 1996 this competence was taken away from the Congress and given to the TRIFE, which is now part of the Federal Judicial branch and renamed *Tribunal Electoral del Poder Judicial de la Federación* (Electoral Tribunal of the Federal Judiciary, TEPJF for its acronym in Spanish). The TEPJF is the highest court in electoral questions. Any decision taken by the IFE or any disagreement between parties eventually arrives before this electoral court. It determines and declares final results and reviews election irregularities. See Bertelsmann Transformation Index 2003, p. 5.

[574] For instance, regarding the IFE, a formerly impartial institution that ensured legitimate elections, in 2003 the Congress approved the replacement of nine IFE commissioners and its president with new board members elected via a secret quota system based on political affiliation. This process of selection raised suspicions of cronyism and can be regarded as the first step in the return of PRI-style leadership. The PRI together with the PAN influenced these negotiations by imposing its majority and employing its veto power. This series of events also clearly signify a step toward *partidocracia*, a political constellation in which political elites exercise excessive control. See Bertelsmann Transformation Index 2006, p. 5.

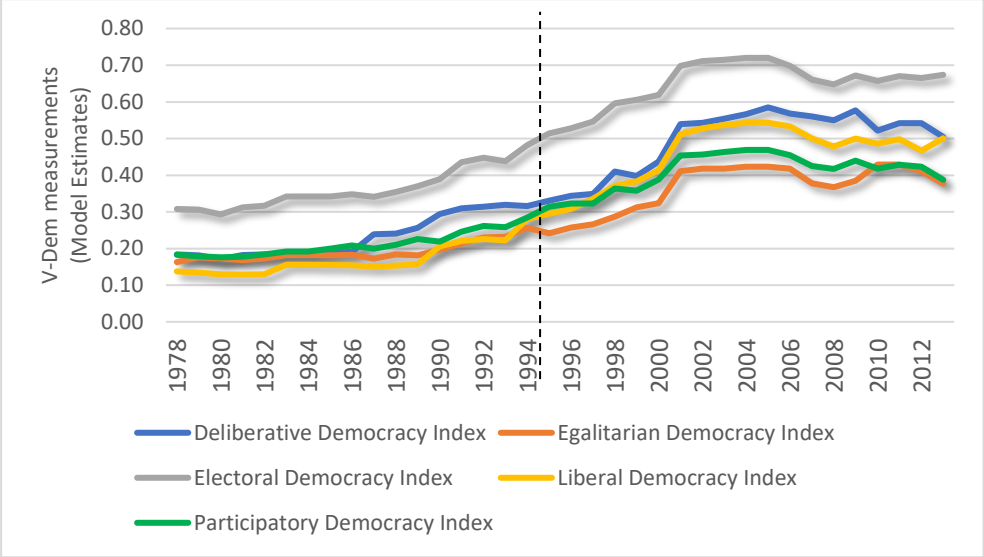
[575] See Bertelsmann Transformation Index 2006, p. 17.

[576] In 2010 46.1% Mexican population was living in poverty, in 2012 poverty decreased to 45.5%, while in 2014 the tendency shows an increase to 46.2%. See Table Medición de la pobreza, Estados Unidos Mexicanos, 2014. Porcentaje, número de personas y carencias promedio por indicador de pobreza, 2010-2014 (Poverty measurement, United States of Mexico, 2014. Percentage, number of people and average deprivations by poverty indicator, 2010-2014) presented by Consejo Nacional de Evaluación de la Política de Desarrollo Social, available at https://www.coneval.org.mx/Medicion/MP/Paginas/Pobreza_2014.aspx (Accessed March 2021).

[577] See Bertelsmann Transformation Index 2008.

overview shows the development of electoral, liberal, participatory, deliberative and egalitarian democracy between 1978 and 2012.

Figure 4-15. Democracy from a multidimensional perspective in Mexico before and after the establishment of the Supreme Court of Justice of Mexico as a constitutional court. 1978-2012.



Note: Interval scale, from low to high (0-1).
Source: V-Dem data version 10.0.

Overall, Figure 4-15 shows that democratic indices have increased after the establishment of the Supreme Court of Justice as a constitutional court in 1995 (dashed line). From 1995 to 2000, the democratic indices increased rapidly. Between 2001 and 2005, the democratic indices remained constant. From 2006 onwards, the democratic indices have declined slightly. In 2008, the indices of electoral and liberal democracy grew modestly, while the indices of participatory, deliberative and egalitarian democracy reported a slight decline.

This overview of the performance of democracy in Colombia, Costa Rica and Mexico showed that the different democratic indices have indeed increased since the establishment of constitutional courts in these countries. The establishment of these courts represented a sign of democratic transformation. Therefore, the next step will be to analyse whether the changes observed in the democratic performance of these countries may be related to the responsiveness of courts to rights claims.

Concluding section

This chapter focused on the social, political and economic context in which the constitutional courts of Colombia, Costa Rica and Mexico have been operating since their creation to identify specific contextual factors (or the absence of them) that can be incorporated as independent variables in the empirical analysis. In addition, the democratic performance of each country was examined both prior to and after the establishment of the courts aiming to have an overview of the development of democracy from a multidimensional perspective.

During the period of analysis, it was observed that violence, militarisation or its absence, political and economic instability, poverty, extreme poverty, inequality, a weak rule of law and corruption were the main contextual circumstances or factors that had challenged not only the work of constitutional courts in the three selected countries, but also the stability and well-functioning of their democracies. Therefore, these factors will be considered for the empirical analysis of the courts.

Specialised well-known institutions systematically measure the above-mentioned factors across time and countries. Therefore, for the empirical purposes of this research, the WB data will be used as a secondary source to collect information on Gross Domestic Product, the Political Stability and Absence of Violence/Terrorism, Rule of Law, Control of corruption, Gini index, Poverty and Extreme poverty. Likewise, the V-Dem project data will be used to measure the different dimensions of democracy through the V-Dem Democracy Indices, i.e., Electoral Democracy Index, Liberal Democracy Index, Participatory Democracy Index, Deliberative Democracy Index and Egalitarian Democracy Index.

In order to complete this preliminary study, Chapter 5 will be devoted to the analysis of the institutional and legal framework of the three constitutional courts discussed in this research. A preliminary study is intended to inform the empirical analysis and to serve as a contextual tool for interpreting the results.

Chapter 5. The institutional and legal context

Chapter 4 presented the contextual framework under which the constitutional courts of Colombia, Costa Rica and Mexico were established and operate. The legal framework seems to closely relate to the behaviour of courts because it can expand or restrict the court's opportunities to play new roles[578]. Therefore, this chapter elaborates on the institutional and legal framework underlying the establishment and functioning of these courts.

As it has already been noted, the legal framework settles the density and specificity of court-empowering provisions. Chapter 2 showed that the constitutional design in emerging democracies varies from country to country. The three countries under analysis have established different systems of judicial constitutional control. Specifically, Colombia has opted for a Constitutional Court that belongs to the Judicial Branch, Costa Rica has a Constitutional Chamber within the Supreme Court and Mexico has endowed constitutional review competences to the Supreme Court of Justice.

Chapter 5 focuses on the main characteristics that govern the institutional life of the courts and the rules of operation of *amparo* proceedings in order to provide the necessary legal context to interpret the responsiveness of courts to rights claims. To this aim, the chapter is organised into three parts. The first part describes the rationale behind the establishment of the constitutional courts of Colombia, Costa Rica and Mexico. The second part approaches the constitutional and legal infrastructure of the courts through the analysis of their *de jure* judicial independence. The third part offers an overview of the regulation of *amparo* proceedings in the three countries and highlights the differences and similarities within the countries.

5.1. **The genesis and the rationale behind the establishment of constitutional courts**

In Colombia, the Constitutional Court was created on the occasion of the drafting of a new constitution in 1991. This was different in Costa Rica and Mexico, where the establishment of the constitutional jurisdiction resulted from an institutional agreement that culminated in a constitutional reform. The Costa Rican Constitutional Chamber emerged in 1989 without a constitutional moment or a critical juncture of any sort[579]. In Mexico, the emergence of a constitutional jurisdiction took place during the last presidential period of the authoritarian regime by a constitutional reform in 1995 that empowered the Supreme Court of Justice with the competence of judicial review. This sub-section provides a description of the context and

[578] See Kapiszewski, D., Silverstein, G., & Kagan, R. A. (2013), *op. cit.*, p. 20.
[579] See Wilson, B. M. (2006), *op. cit.*, p. 48.

the rationale for the establishment of these three constitutional courts, as they vary in purpose and scope.

5.1.1. **Colombia**

Colombia have relied on constitutional law as a mechanism to preserve peace agreements and to contain political conflicts. Colombia's socially and politically violent history contrasts with its highly esteemed judicial system. Colombia has had a relatively independent judiciary since 1958. It was one of the first countries in the world to establish a system of judicial constitutional control or judicial review, which has been more or less respected by political actors for the last 100 years[580].

As mentioned above, the Constitutional Court of Colombia was approved by the Constituent Assembly in 1991 which was set up with a twofold purpose: to promote participatory democracy, and to strengthen state institutions, especially the judiciary[581].

The Constituent Assembly sought to strengthen the judiciary through the creation of a constitutional court, the introduction of new procedures to safeguard different types of rights and interests protected by the new constitution, the establishment of new criteria to guide the interpretation of the new constitution, and substantial changes in the appointment, functions and powers of constitutional judges[582].

The creation of the constitutional court caused a considerable debate among the delegates of the Constituent Assembly. The need to create the constitutional court was included in the Constitution Proposal[583] presented by President Gaviria. Gaviria supported the creation of the constitutional court pointing out the Supreme Court's material inability to deal with the upcoming increase in its workload as the arbiter of the Constitution and the need to create a judicial body that could fully develop the contents of the new constitution.

From his viewpoint, the spirit of pluralism, participation, equality, and respect for human dignity that inspired the Constitution suggested the need to further build upon this broad and inclusive base. He also argued for the need to guide the lower judges' interpretations of the fundamental rights provisions that the constitution contained, and that a judicial body should

[580] See Uprimny, R. (2004). The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia, *op. cit.*, p. 50.
[581] See Cepeda-Espinosa, M. J. (2004), *op. cit*., pp. 545-546.
[582] Idem, pp. 546-547.
[583] President Gaviria submitted to the Constituent Assemply a new Constitution Proposal: Proyecto de Acto Reformatorio de la Constitución Política (Presidencia de la República, 1991).

have the power to adopt legitimate and final decisions to resolve disputes over the content and scope of the new constitution. These arguments were not enough to build a solid majority within the Constituent Assembly. However, President Gaviria's persuasive speech led to the approval of the Court's creation by secret ballot. The final count was forty-four delegates in favour and twenty-six against, with one publicly negative vote[584].

The new procedures introduced by the new Constitution are *acción de tutela* (designed to protect fundamental rights), *acción de cumplimiento* (to order administrative authorities to fulfil their legal mandates in specific situations), *acción popular* (to protect collective rights), and *acción de grupo* (to secure the rights of specific social groups)[585].

The Constituent Assembly also incorporated other changes to the pre-existing system of constitutional judicial review in order to correct its malfunctions and adapt it to the new framework and future challenges. These adjustments may be grouped into four categories: an expansion of the concrete review system through the *acción de tutela*, an extension of *ex officio* review to new types of norms, including a more precise definition of the type of acts and decisions subjected to the Court's scrutiny, an overall broadening of the scope of application of the *acción popular* and its procedure, and the adoption of means to contextualize abstract judicial review of laws[586].

President Gaviria promoted new criteria to guide the interpretation of the constitution. These criteria include reasonability, proportionality, protection of the 'essential nucleus' of constitutional rights, and direct application of fundamental constitutional rights even in the absence of legal regulations[587]. These criteria were not adopted by the Constituent Assembly and therefore were not included in the Constitution's text. However, a mandatory reference to international treaties when interpreting fundamental rights was included in Article 93 of the Constitution and the Gaviria's interpretation criteria were later developed and applied by the judges of the Constitutional Court of Colombia[588].

In addition, the new constitution established a new procedure for the appointment of constitutional judges that was radically different from the previous method of selection of Supreme Court magistrates in Colombia by co-optation. The new appointment procedure aimed

[584] See Cepeda-Espinosa, M. J. (2004), *op. cit*., pp. 549-551.
[585] Idem, p. 546.
[586] Idem, p. 552.
[587] Idem, p. 547.
[588] Ibidem.

to promote the independence of the court, to increase the court's representation and strengthen its legitimacy[589].

Finally, the creation of the Colombian Constitutional Court in 1992 relied on a long tradition of constitutional review in Colombia[590]. Consequently, when the Constitutional Court began operating, the Colombian legal and political culture had already been familiarized with judicial review. The court could therefore act vigorously, without fear that the executive branch or other political forces would decide to shut it down, as had happened in other countries, where the first challenge of constitutional courts was to win legitimacy[591].

On the basis of the above, it can be said that the establishment of the constitutional court of Colombia may be explained through to the legitimacy hope argument advanced in Chapter 2 that holds that institutional distrust of ordinary courts is one of the factors in the building of strong constitutional courts. In the context of the drafting of a new constitution, President Gaviria explicitly pointed out the material inability of the Supreme Court to arbitrate the new Constitution.

5.1.2. **Costa Rica**

Costa Rica also has a long tradition of constitutional control. Costa Rica has had thirteen different constitutions[592] and in most of them it is possible to find a mention about 'control' or

[589] Idem, p. 551.

[590] According to Cepeda Espinosa, constitutional judicial review and the judicialization of politics have been constant features of the Colombian political system. Since the enactment of the 1863 federal constitution, the Supreme Court of Justice was empowered to temporarily suspend the application of laws approved by the federated states and accused of unconstitutionality by citizens, deferring the final decision on the matter to the senate. Between the 1886 and the 1991 constitutions some key constitutional amendments took place. These amendments expanded Colombian Supreme Court's judicial review powers with the objective to protect the basic political agreements enshrined in each constitutional reform. For instance, the 1910 Constituent Assembly introduced a public unconstitutionality action (*actio popularis*) which could be brought by any citizen before the Supreme Court of Justice in order to strike down national laws that violated the constitution. In 1936 the reform introduced important social and political guarantees. Consequently, the Supreme Court was entrusted with the power of interpreting these open clauses. In 1968, the Supreme Court was endowed to carry out ex officio review of legislative decrees issued by the President of the Republic during the states of economic emergency. See Cepeda-Espinosa, M. J. (2005), *op. cit.*, pp. 68-70. See also Cifuentes Muñoz, E. (2002). Jurisdicción Constitucional en Colombia. Ius et Praxis, 8(1), pp. 283-284.

[591] See Uprimny, R., & García-Villegas, M. (2007), *op. cit.*, p. 70.

[592] 1) 1821 Pacto Social Fundamental Interino de Costa Rica, 2) 1823 Estatuto Político de la Provincia de Costa Rica, 3) 1824 Constitución Política de la República Federal de Centroamérica, 4) 1825 Ley Fundamental del Estado de Costa Rica, 5) 1835 Constitución Política de la República Federal de Centroamérica Reformada, 6) 1841 Ley de Bases y Garantías, 7) 1844 Constitución Política del Estado Libre y Soberano de Costa Rica, 8) 1847 Constitución Política, 9) 1859 Constitución Política, 10) 1869 Constitución Política, 11) 1871 Constitución Política, 12) 1917 Constitución Política and 13) 1949 Constitución Política de la República de Costa Rica (in force) See http://www.asamblea.go.cr/sd/otras_publicaciones/forms/allitems.aspx?rootfolder=/sd/otras_publicaciones/colecci%C3%B3n+de+constituciones+pol%C3%ADticas+de+costa+rica&folderctid=0x0120006b07cd91de66e348a93150a0d1d2cb62&view=%7Be76744c2-65b3-431f-8523-e5f25db12692%7D (Accessed March 2021)

'enforcement' of constitutionality. However, due to the fact that no rules were established these constitutional mentions did not have any significance[593].

From 1949 to 1989, Costa Rica's system of constitutional adjudication was rather complex. To some extent, constitutional adjudication was within the exclusive jurisdiction of the Supreme Court functioning in Plenary. Other constitutional matters were within the original jurisdiction of either the First Chamber of the Supreme Court or a district judge, depending on the hierarchical position of the defendant. In the cases commenced before a district judge, there was the right of appeal to the Third Chamber of the Supreme Court. Still other constitutional matters could be decided by a district judge, with the right of appeal to an intermediate appellate court. To further complicate the process, some determinations of unconstitutionality could be made only by an absolute two-thirds majority of the Plenary of the Supreme Court, while others could be rendered by an individual district judge or by a simple majority of an intermediate appellate tribunal. This system was increasingly criticized as illogical, cumbersome, and, consequently, not sufficiently effective[594].

As a consequence, in 1989 the Legislative Assembly amended some constitutional provisions that aimed to remove the powers of judicial review from the Plenary of the Supreme Court and place them in a specialized and concentrated judicial body, along with the other pre-existing Chambers of the court. It is worth noting that the creation of the Constitutional Chamber and its regulation was the result of a wide and long process which started in the 80s.

In 1980, the Special Commission in the Legislative Assembly proposed the creation of a Constitutional Chamber composed of five magistrates with the competence to declare the unconstitutionality of laws by a simple majority. The Supreme Court gave a negative opinion on this project arguing, on the one hand, that it was an extreme measure to leave the declaration of unconstitutionality in the hands of three magistrates and, on the other hand, that the creation of a new chamber was unnecessary given that just one action of unconstitutionality was submitted to them that year. In 1982, a new proposal to reform the constitution urged the creation of a law of constitutional jurisdiction. In 1983, the Special Commission presented a proposal to create a tribunal in charge to resolve disputes among the different branches of government, i.e., Executive, Legislative and the Judiciary, and between the branches and the Supreme Tribunal of Elections. The Supreme Court again issued a negative opinion insisting

[593] The Constitution of 1871 gave rise to judicial review, as well as (at least intermittent) executive and legislative review, of constitutional questions. See Barker, R. S., *op. cit.*, p. 525.
[594] Idem, p. 526.

that the creation of a new organ was unnecessary due to the fact that the Supreme Court already had the competence to declare unconstitutionality and committed itself to be more efficient. Finally, in 1987, the Commission of Special Affairs presented a new proposal pointing out some concerns about the structure and the functioning of the judicial system as well as the necessity to make some adjustments in order to ensure that the system is adequate to fulfil the citizens' demands and to comply with the requirements of Costa Rican democracy[595].

In 1988, President Oscar Arias Sánchez issued a decree that created a commission with the objective to discuss the need to pass bills of interest to the judiciary and to analyse and draw bills designed to make the administration of justice more efficient. The commission admitted the necessity to create a new body that is capable of protecting citizens from abuses of power and invigorating the constitution[596]. Finally, the constitutional reform was approved. Articles 10, 48, 105 and 128 were modified in order to create the Constitutional Chamber within the Supreme Court of Justice, known as 'Sala IV'. Two months later, the *Ley de la Jurisdicción Constitucional* (Law of Constitutional Jurisdiction) was enacted[597].

The Constitutional Chamber was created to correct perceived deficiencies of the constitutional control system as well as deficiencies in the adjudication of fundamental rights in general. These deficiencies refer to the fact that individual and social rights were protected in a split system without appellate recourse; therefore, there was no higher court that could ensure the uniform application of constitutional standards. Moreover, the old constitutional control system had a high voting requirement including a supermajority of two-thirds of the entire Supreme Court judges to declare a law or decree unconstitutional. This created an intended presumption of the constitutionality of legislative and executive provisions[598].

Moreover, according to Wilson[599], the constitutionality of legislators' actions was rarely challenged allowing them to routinely ignore constitutional limits on their powers. He also stresses that the extensive individual and social rights provisions of the Constitution were seldom addressed by the Supreme Court[600].

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[595] Historia de la Sala Constitucional. Corte Suprema de Costa Rica. Available at https://salaconstitucional.poder-judicial.go.cr/index.php/Historia (Accessed March 2021).
[596] Ibidem.
[597] Ibidem.
[598] See Olman A. Rodriguez L. (2011). The Costa Rican Constitutional Jurisdiction. *Duquesne Law Review*, *49*, pp. 249-250.
[599] See Wilson, B. M. (2007). Claiming individual rights through a constitutional court: The example of gays in Costa Rica. *International Journal of Constitutional Law*, *5*(2), pp. 242-243.
[600] Ibidem.

Scholars also point out domestic factors as motivations that triggered the creation of the constitutional chamber. Some examples of such factors include, among others, a severe economic crisis and several corruption scandals in the 1980s in which some Supreme Court magistrates were implicated. There was a pervasive fear that the economic crisis would become a crisis of political legitimacy and would ultimately result in a democratic regime collapse[601].

Once established, the Constitutional Chamber was confronted with the difficult task to deal with unconstitutional acts of authority and/or laws from all government agencies, including the judicial branch, of which it belongs[602]. However, its vigorous activism regarding the protection of human rights is widely recognized not only in Costa Rica, but also at the regional and international level[603].

The above suggests that the legitimacy hope argument may explain the establishment of the constitutional chamber. A new organ capable of correcting the deficiencies in the human rights adjudication system was required, as the Supreme Court was not trusted because of its inefficiency in protecting human rights.

5.1.3. **Mexico**

The establishment of the constitutional jurisdiction occurred in 1995 amid relevant social, political and economic events mentioned in Chapter 4. President Ernesto Zedillo[604] sent a law bill related to judicial review to the Congress as the first act of his government[605]. The Congress approved it immediately. Thus, the constitutional reform of December 31, 1994 came into force the day after its publication in the *Diario Oficial de la Federación* (Mexico Federal Official Gazette). The court keeps its original name as the Supreme Court of Justice as well as its jurisdiction as the Court of Cassation.

According to the preambles, the main objective of the 1994 constitutional reform was to strengthen the Mexican Supreme Court of Justice by turning it into a Constitutional Court,

[601] See Wilson, B. M. (2006), *op. cit.*, p. 48.
[602] See Olman A. Rodriguez L. (2011), *op. cit*., pp. 253-254. Rodríguez argues that since the beginning, the new Constitutional Chamber emphatically showed its willingness to challenge existing laws and constitutional amendments sending the message to the popular branches that the historical presumption of constitutionality of their acts can no longer be hold. See also Wilson, B. M. (2006), *op, cit*, p. 52.
[603] For instance, the Christian Michelsen Institute in Norway has admitted that before 1989, the Supreme Court was unable or unwilling to fulfil its accountability functions. It has been only after the creation of the Constitutional Chamber that the court's accountability function has been strongly applied to all governmental branches. See Olman A. Rodriguez L. (2011), *op. cit*., p. 254.
[604] Ernesto Zedillo Ponce de León was President of Mexico during 1994-2000. His presidency ended seven straight decades of hegemonic rule by PRI party.
[605] On 1 December 1994, Ernesto Zedillo assumed the Presidency of Mexico. On 5 December, he submitted the constitutional reform bill on judicial issues to the Senate.

endowed with the power of judicial review in order to reinforce the check and balances system and the rule of law[606].

Therefore, the 1994 constitutional reform pursued (1) to extend the Supreme Court's jurisdiction to issue declarations of unconstitutionality with *erga omnes* effects; (2) to decide disputes between the three levels of government and between the different branches; (3) to perform as a guarantor of federalism. Because of these new powers, the reform proposed new rules for the composition and organization of the Supreme Court.

Before the reform, the President appointed judges. The reform then sought to establish a more rigorous procedure for the appointment of judges by increasing co-responsibility between the Senate and the President and requiring approval of two thirds of the Senate. Moreover, the reform changed the composition of the Supreme Court and the organization of the Judiciary. Namely, the number of judges was reduced from 21 to 11, a staggered system for the replacement of judges' first generation was established, a lifetime appointment was replaced by a 15-year non-renewable period. The Federal Judicial Council was created in order to alleviate the administrative work of the court.

In 1996, a second constitutional reform took place, in which the review powers of the judiciary were extended to electoral matters. On this occasion, the electoral tribunal was fully incorporated into the judicial branch, and the Supreme Court's review powers were extended to specific electoral disputes[607].

Despite the fact that, before the 1990s constitutional reforms, the Supreme Court already had the exclusive competence to rule on *amparos de inconstitucionalidad*[608] as well as on constitutional controversies[609], it rarely challenged the executive branch, and was perceived as an ineffective and corrupt branch within the political system[610].

Given the economic and social context in which the 1994 judicial reform took place, the consolidation of the Supreme Court as a constitutional court can be linked to the conditionality

[606] See Procesos legislativos. Reforma Constitucional del 31 de Diciembre de 1994 (available only in Spanish).
[607] See Domingo, P. (2005), *op. cit.*, p. 32.
[608] Cases in which the constitutionality of laws are challenged.
[609] Concrete review of conflicts between different levels of the public administration and government.
[610] See Domingo, P. (2005), *op. cit.*, p. 28. Additionally, the impact of these legal mechanisms was very low, among others, because *amparo* cases have *inter-partes* effects, while the absence of a regulatory law avoided the use of constitutional controversies. Justice Olga Maria Sánchez Cordero held that around 60 constitutional controversies were submitted to the Supreme Court between 1917 and 1993. See Sánchez Cordero, O. (1999). La Controversia Constitucional. *Juridica. Anuario Del Departamento de Derecho de La Universidad Iberoamericana*, *1*(29).

argument, i.e., the establishment of the court as a requirement for the admission to an international community committed to the rule of law[611], and to the political insurance argument, i.e., when a ruling party has a low expectation of remaining in power, it is more likely to support a powerful judiciary to ensure that the next ruling party cannot use the judiciary to achieve its political goals[612]. On the one hand, the NAFTA, signed by the governments of the United States of America, Canada, and Mexico, that came into force on January 1, 1994, urged upon the Mexican nation the importance of strengthening the rule of law in order to secure private investment. On the other hand, the weakening of the dominant party in power and the growing political plurality can be seen as factors that triggered the establishment of constitutional review in Mexico.

5.2. **The *de jure* independence of constitutional courts**

The role that constitutional courts play is determined by their willingness and ability to adjudicate cases using their competences free from external incursions or pressures from social, political or powerful economic actors and without having to worry about retaliation from other institutions[613]. Therefore, in order to assess the role performed by constitutional courts exerting constitutional control, either vertical or horizontal, it is necessary to discuss judicial independence.

In general terms, judicial independence is considered to provide positive benefits for a variety of significant issues that range from regime stability to economic development, democracy and

[611] Additionally, official EU documents for law reforms in candidate states do not mention establishing a Kelsenian-style constitutional review as a requirement. See Morlino, L., & Sadurski, W. (2010), *op. cit.*, p. 11.
[612] Among others, Chavez, R. B. (2008), *op. cit.*; Hirschl, R. (2008), *op. cit.*
[613] See Bumin, K. M. (2009). *Viable institutions, judicial power, and Post-Communist Constitutional Courts*. University of Kentucky Doctoral Dissertations. Paper 744, p. 110.

the protection of human rights[614]. However, scholars[615] have pointed out that an excessive emphasis on judicial independence can give room for unaccountable courts and create the danger that authoritarian regimes may achieve a cloak of legitimacy for their laws by having them enforced by independent judiciaries[616]. Thus, assuming that giving meaning to constitutional law implies a certain degree of law making by judges implies that courts have to be accountable.[617].

Considering issues of both judicial independence and judicial accountability, Feld and Voigt[618] created the '*De jure* Indicator for Measuring Judicial Independence' which consists of twelve variables that seek to measure factors that endorse judicial independence, factors that empower constitutional courts and factors that promote judicial accountability. See Table 5-1.

[614] Among others, Linzer, D. A., & Staton, J. K. (2015). A global measure of judicial independence, 1948—2012. *Journal of Law and Courts*, *3*(2), 224–256; Ríos-Figueroa, J., & Taylor, M. M. (2006). Institutional determinants of the judicialisation of policy in Brazil and Mexico. *Journal of Latin American Studies*, *38*(4), 739–766; Gibler, D. M., & Randazzo, K. A. (2011). Testing the effects of independent judiciaries on the likelihood of democratic backsliding. *American Journal of Political Science*, *55*(3), 696–709; Melton, J., & Ginsburg, T. (2014). Does De Jure Judicial Independence Really Matter? *Journal of Law and Courts*, *2*(2), 187–217; Couso, J. (2015), *op. cit.*, pp. 251–258; Feld, L. P., & Voigt, S. (2003), *op. cit.*; Shapiro, M. (2013). Judicial Independence: New Challenges in Established Nations. *Indiana Journal of Global Legal Studies*, *20*(1), 253–277; Ríos-Figueroa, J., & Staton, J. K. (2012). An evaluation of cross-national measures of judicial independence. *Journal of Law, Economics, and Organization*, *30*(1), 104–137; Epperly, B. (2013). The Provision of Insurance? Judicial Independence and the Post-tenure Fate of Leaders. *Journal of Law and Courts*, *1*(2), 247–278; Taylor, M. M. (2014). The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chávez. *Journal of Latin American Studies*, *46*(02), 229–259; Schmidhauser, J. R. (Ed.). (1987). *Comparative judicial systems: challenging frontiers in conceptual and empirical analysis*. London: Butterworths; Prillman, W. (2000). *The Judiciary and Democratic Decay in Latin America. Declining Confidence in the Rule of Law*. Wesport, Connecticut: Praeger; Shetreet, S., & Forsyth, C. (Eds.). (2012). *The Culture of Judicial Independence. Conceptual Foundations and Practical Challenges*. Leiden: Brill | Nijhoff and Keith, L. C., Tate, C. N., & Poe, S. C. (2009). Is The Law a Mere Parchment Barrier to Human Rights Abuse? *The Journal of Politics*, *71*(2), 644–660.

[615] See Shapiro, M. (2013), *op. cit.*, pp. 253-254, Prillman, W. (2000), *op. cit.*, p. 16 and Bumin, K. M. (2009), *op. cit.* Additionally, at the international level there have been significant efforts to formulate International Standards of Judicial Independence. See for instance the Mount Scopus International Standards of Judicial Independence (2008); IBA Code of Minimum Standards of Judicial Independence (1982); UN Basic Principles on the Independence of the Judiciary (1985); Commonwealth (Latimer House) Principles on the Three Branches of Government (2003); Tokyo Principles of the Independence of the Judiciary in the LAWASIA region (1982); Universal Declaration on the Independence of Justice (Montreal 1983); Bangalore Principles of Judicial Independence (2006) and Kiev Recommendations on Judicial Independence (2010).

[616] See Shapiro, M. (2013), *op. cit*., p. 253.

[617] Idem, p. 254.

[618] See Feld, L. P., & Voigt, S. (2003), *op. cit.*

Table 5-1. Feld and Voigt' *De jure* Indicator for Measuring Judicial independence. Variables.

	Variables
Factors that endorse judicial independence	• Whether the constitutional court is anchored in the constitution • How difficult it is to amend the constitution • The appointment procedure • Judicial tenure • The procedure of removal from office • Renewable terms • Salaries cannot be reduced • Fair payment
Factors that empower constitutional courts	• Accessibility of the court and its ability to initiate proceedings • Allocation of cases • Competences assigned to constitutional courts
Factors that promote judicial accountability	• Publicity of the decisions and dissenting opinions of constitutional courts

Source: Own elaboration based on Feld, L. P., & Voigt, S. (2003).

Factors that endorse judicial independence.

This refers to whether the constitutional court is anchored in the constitution and how difficult it is to amend the constitution. Formally, the stability of the powers and procedures of the court depend on how difficult it is to change them. If they are specified in the constitution, a greater degree of independence is expected than in cases where these arrangements are fixed by ordinary law[619].

The first variable, *whether the constitutional court is anchored in the constitution,* relates to whether constitutional courts are mentioned in the constitution. This question encompasses issues such as whether the court's competences, procedures, access and arrangements concerning the members of the constitutional court (e.g., length of term and number of judges) are enumerated in the constitution.

The second variable, *how difficult it is to amend the constitution,* aims to shed light on aspects such as whether the procedure to reform the constitution requires a majority above that necessary for changing ordinary legislation, how many branches of government have to agree and whether there are majority decisions necessary at different points in time.

The third, fourth, fifth and sixth variables relate to *the appointment procedure, judicial tenure, renewable terms and removal procedures* respectively. The appointment procedure of judges

[619] Ibidem.

may have a notable effect on the independence of the court. As it is *inter alia* supposed to protect citizens from illegitimate use of powers by the authorities as well as to settle disputes between the branches of government, it ought to be as independent as possible from the other branches[620].

As pointed out in Chapter 2, it is considered that mechanisms led exclusively by parliaments are quite likely to smoothen conflicts with other bodies of governance[621]. Collaborative mechanisms that require a supermajority seem to deliver consensual constitutional courts that are more deliberative than active lawmakers. In a shared system where more than two organs are involved in the appointment procedure, a greater degree of independence is expected than in cases where only one organ fills the appointments[622]. Moreover, the ways in which constitutional designers decide to combine selection process, term in office and re-appointment influence the independence of constitutional courts.

Feld and Voigt[623] hold that judicial tenure will be crucial for the independence of the judiciary because it is assumed that judges are more independent if they are appointed for life or up to a mandatory retirement. According to them, judges might be less independent if terms are renewable because they have an incentive to please those who can reappoint them. In addition, it is expected that judges might be most independent if they cannot be removed from office, save by legal procedure. Furthermore, it is important to pay attention to the set of institutions that create a system of incentives for a particular type of intended behaviour and not to treat institutions in isolation. For instance, while the appointment procedure and judicial tenure may be combined to generate incentives for independent behaviour, removal mechanisms could point in the other direction[624].

The seventh variable, *prohibition of salary reductions* relates to the general rule stating that the salaries of constitutional judges cannot be reduced increases their impudence[625].

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[620] Ibidem.
[621] Theories of judicial independence: Landeis, W. M., & Posner, R. (1975). The Independent Judiciary in an Interest-Group Perspective. *Journal of Law & Economics*, *18*; Epstein, R. A. (1990). The Independence of Judges: The Uses and Limitations of Public Choice. *Brigham Young University Law Review*, 827–855; Ramseyer, M. J. (1994). The Puzzling (In)dependence of Courts. *Journal Legal of Studies, 23* quoted by Garoupa, N., Grembi, V., & Lin, S. C. (2011), *op. cit.*, p. 3.
[622] See Morlino, L., & Sadurski, W. (2010), *op. cit.*, pp. 9-10.
[623] See Feld, L. P., & Voigt, S. (2003), *op. cit.*, p. 6.
[624] See Helmke, G., & Ríos-Figueroa, J. (2011), *op. cit*., p. 51.
[625] See Feld, L. P., & Voigt, S. (2003), *op. cit.*, p. 6.

The eighth variable, *fair remuneration*, refers to judges being adequately paid in comparison with other jobs that qualified lawyers can perform, e.g., private legal practice or teaching as a university lecturer[626].

Factors that empower constitutional courts

The nineth variable, *accessibility of the court and its ability to initiate proceedings*, relates to the fact that a court that is accessible only by a certain number of members of parliament or other officials will be less effective in constraining government *vis-á-vis* its citizens than a court that is accessible by every citizen who claims that his/her rights are violated[627].

The tenth variable, *allocation of cases*, concerns the point that if the allocation of cases to the different members of the tribunal is at the discretion of the president of the tribunal, his influence will be substantially greater than that of the other members of the tribunal[628].

The eleventh variable, *competences*, relates to the fact that *c*onstitutional courts must have certain competences in order to be able to check the behaviour of the other government branches[629].

Factor that promotes judicial accountability

Finally, the twelfth variable, *publicity of the decisions and dissenting opinions of constitutional courts*. If courts have to publish their decisions, they can be scrutinized by others and the reasoning can become subject to public debate. The transparency will be even higher if the courts publish dissenting opinions[630]. In addition, the transparency of official proceedings may lead to authoritative articulations of rights[631].

To operationalise the *De jure* Indicator for Measuring Judicial Independence Feld and Voigt designed a questionnaire with twelve questions that correspond to the twelve variables described in Table 5-1.

[626] Ibidem.
[627] Ibidem.
[628] Ibidem.
[629] Ibidem.
[630] Idem, p. 7.
[631] See Morlino, L., & Sadurski, W. (2010), *op. cit.*, pp. 9-10.

. The present study replicated Feld and Voigt's questionnaire in order to calculate the *de jure* judicial independence indicator for Colombia, Costa Rica and Mexico. See Feld and Voigt questionnaire(B1), the coded questionnaires for Colombia(B2), Costa Rica(B3) and Mexico (B4) in Appendix B.

The following subsections present an overview of the constitutional and legal provisions that regulate factors that endorse judicial independence, empower constitutional courts and promote judicial accountability in each country. This analysis is followed by the score of the *De jure* Indicator for Measuring Judicial Independence in the three countries presented in Table 5-3.

5.2.1. **Colombia**

Factors that endorse judicial independence

Article 241 of the Constitution of Colombia is the basis of the constitutional court of Colombia. However, the composition of the court is determined by Act 270 of 1996 on the Statute of the Administration of Justice that states that the Constitutional Court is composed of nine magistrates[632]. The procedure to reform the constitution requires a majority above that necessary for changing ordinary legislation and establishes majority decisions at different points in time[633]. Even though the Constitution establishes a rigid procedure to reform the constitution, de facto it can be considered that a flexible procedure prevails due to the numerous times when the constitution has been reformed since their enactment, e.g., the 1991 Constitution of Colombia has been reformed 53 times as of 2019[634].

Colombia has a shared system of appointment. The magistrates of the Constitutional Court are elected by the Senate for individual periods of eight years, from shortlists of three candidates submitted by the President of the Republic (3), the Supreme Court of Justice (3) and the Council of State (3)[635].

The magistrates of the Constitutional Court are responsible for any infraction of disciplinary or criminal law committed in the exercise of their functions. A Commission [*Comisión de Aforados*] within the House of Representatives is responsible for investigating and accusing the magistrates of the Constitutional Court, even if they no longer perform their duties. If the

[632] See Article 44 *Ley 270 de 1996 Estatutaria de la Administración de Justicia* (Act 270 of 1996 on the Statute of the Administration of Justice).
[633] See Article 378 Constitution of Colombia.
[634] See the website of the Senate in Colombia see http://www.secretariasenado.gov.co/index.php/leyes-y-antecedentes/constitucion-y-sus-reformas,
[635] See Article 239 Constitution of Colombia and 44 *Ley 270 de 1996 Estatutaria de la Administración de Justicia* (Act 270 of 1996 on the Statute of the Administration of Justice).

investigation concerns disciplinary offences, the Commission shall investigate and, if appropriate, bring the accusation before the House of Representatives. In no case may sanctions other than suspension or dismissal from office be imposed. The decision of the House of Representatives may be appealed to the Senate of the Republic. In no case shall Congress conduct a probationary hearing. No appeal or action may be taken against the decision of the Senate. If the investigation concerns crimes, the Commission shall present the accusation to the Supreme Court of Justice. Colombia does not have a constitutional provision that protects judges from salary reductions.

Factors that empower constitutional courts

In Colombia access to justice is broad. Citizen are provided with easy, inexpensive and expediting legal tools and processes[636]. This means that any person without any special prerequisites may directly request that a judge intervene to protect his or her fundamental rights and to address the court if he or she believes that any specific law is unconstitutional.

According to the Constitution of Colombia[637], the Constitutional Court of Colombia exerts its constitutional control as follows:

1. Decide on petitions of unconstitutionality brought by citizens against measures amending the Constitution, exclusively for errors of procedure in their formation. (Abstract *a posteriori* review)
2. Decide, prior to a popular expression of opinion, on the constitutionality of the call for a *referendum* or a constituent assembly to amend the Constitution, exclusively for errors of procedure in its formation. (Abstract *a priori* review)
3. Decide on the constitutionality of *referenda* on laws and popular consultations and plebiscites of a national scope. In case of plebiscites, decide exclusively in terms of errors of procedure in their convocation and implementation. (Abstract *a priori* review)
4. Decide on petitions of unconstitutionality brought by citizens against statutes, both in terms of their substantive content as well as errors of procedure in their formation. (Abstract *a posteriori* review)
5. Decide on petitions of unconstitutionality brought by citizens against decrees with the force of law issued by the government on the basis of Article 150, numeral 10 and

[636] See Article 86 and 241 Constitution of Colombia and 15 *Ley 2591 de 1991* (Act 2591 of 1991).
[637] See Article 241 Constitution of Colombia.

Article 341 of the Constitution in terms of their substantive content as well as errors of procedure in their formation. (Abstract *a posteriori* review)

6. Decide on the exceptions provided for in Article 137 of the Constitution.
7. Decide definitively on the constitutionality of the legislative decrees issued by the government on the basis of Articles 212, 213 and 215 of the Constitution. (Abstract *a posteriori* review)
8. Decide definitively on the constitutionality of the bills opposed by the government as unconstitutional and of proposed statutory bills, both in terms of their substantive content as well as in terms of errors of procedure in their formation. (Abstract *a priori* review)
9. Revise, in the form determined by statute, the judicial decisions connected with the protection of constitutional rights[638]. (Concrete decentralised *a posteriori* review).
10. Take the final decision on the execution of international treaties and the statutes approving them. To this end, the government shall submit them to the Court within six days following the adoption of the ratifying statute. Any citizen may intervene to defend or challenge their constitutionality. Should the Court declare them constitutional, the government may proceed to the exchange of notes; otherwise, the case shall not be ratified. When one or several provisions of a multilateral treaty are declared unenforceable by the Constitutional Court, the President of the Republic may declare consent, formulating the pertinent reservation. (Abstract *a priori* review)
11. Resolve the conflicts of competences that occur between the different jurisdictions. (Concrete centralized *a posteriori* review)
12. Enact its own regulations.

As can be observed, the Constitutional Court of Colombia exert both *a priori* and *a posteriori* review. As a rule, administrative acts are excluded from the jurisdiction of the Court, because their review would infringe upon the power of the Council of State, which is the highest judicial authority within the administrative jurisdiction. However, the Court is empowered to review

[638] Colombia has four proceedings for the protection of human rights i.e., *tutela* (to protect human rights), *acción de cumplimiento* (to order administrative authorities to fulfil their legal mandates in specific situations), *acción popular* (to protect collective rights) and *acción de grupo* (to secure the rights of specific social groups). However, only *tutela* proceedings falls within the jurisdiction of the Constitutional Court of Colombia. The other three judicial proceedings (*acción de cumplimiento*, *acción popular* and *acción de grupo*) are essentially within the scope of the contentious administrative jurisdiction i.e., administrative tribunals. See Ley 393 de 1997 (Law 393/1997) that regulates the *acción de cumplimiento* and Ley 472 de 1998 (Law 472/1998) that regulates the *acción popular and acción de grupo*.

the constitutionality of administrative decisions that violate or threaten fundamental rights in concrete cases.

Factor that promotes judicial accountability

The Statutory Law on the Administration of Justice provides that all rulings issued by the Constitutional Court shall be published in the Gazette of the Constitutional Court, which is published monthly by the National Press. The Gazette of the Constitutional Court is distributed to each member of the Congress of the Republic and to all the Judicial Offices in the country. Additionally, the Constitutional Court has a system of systematised consultation of jurisprudence to which all persons have access[639].

5.2.2. **Costa Rica**

Factors that endorse judicial independence

The Constitutional Chamber of Costa Rica is part of the Supreme Court of Justice of this country. Articles 10, 48 and 128 of the Constitution refer to the court and its competences. The constitution establishes the procedure for the appointment of Supreme Court magistrates[640]. The Constitutional Jurisdiction Act establishes that the Constitutional Chamber is composed of seven full-time magistrates and twelve alternate magistrates, all elected by the Legislative Assembly[641].

The procedure to reform the constitution requires a majority above that necessary for changing ordinary legislation and establishes majority decisions at different points in time. The constitution provides that the Legislative Assembly may partially reform the constitution on the proposal of ten deputies or five percent of the citizens registered on the electoral list. The constitutional reform bill shall be sent to the Executive Branch which shall send it back to the Assembly with comments or approve it. The Legislative Assembly shall discuss the bill and it must be approved by a vote of no less than two thirds of the total members of the Assembly[642]. Even though there exists a rigid procedure to reform the constitution, *de facto* it can be considered that a flexible procedure prevails due to the numerous times that the constitution has

[639] See Article 47 *Ley 270 de 1996 Estatutaria de la Administración de Justicia* (Act 270 of 1996 on the Statute of the Administration of Justice).
[640] See Article 157 Constitution of Costa Rica.
[641] See Article 4 *Ley de la Jurisdicción Constitutional* (Constitutional Jurisdiction Act).
[642] See Article 195 Constitution of Costa Rica.

been reformed since its enactment, e.g., the 1949 Constitution of Costa Rica has been reformed 56 times (the last reform in 2015)[643].

Costa Rica has an appointment system led by the parliament. The term in office is limited to 8 years and they can be re-appointed for a second term. The magistrates of the Supreme Court of Justice shall be elected for a period of eight years by the vote of two thirds of the total members of the Legislative Assembly. In the performance of their duties, they shall act effectively and shall be considered to be re-elected for equal periods, unless otherwise agreed by a vote of not less than two thirds of all the members of the Legislative Assembly[644].

According to Morlino and Sadurski's limited terms with the possibility of re-appointment such as is the case in Costa Rica, may promote judges' self-serving behaviour, such as trying to ingratiate themselves with those political agents (or citizens) who have the greatest influence on re-nomination and re-appointment[645]. However, the possibility to renovate judges' mandates in Costa Rica has been used to 'punish' inconvenient judges[646]. This proved a controversial provision when it was applied to the case of Justice Fernando Cruz Castro. On 15 November 2012, for the first time in the institutional history of the country, the Legislative Branch decided not to re-elect Justice Cruz Castro. While no reason was provided for the decision to not re-elect this particular judge, Fabio Molina, leader of the legislative faction of the PLN, held that it was a warning addressed to the Supreme Court. Such a declaration triggered a significant reaction of the society, including the Judiciary itself, law professionals, media, and law scholars (national and international), who severely questioned and condemned the legislative decision. Due to the internal and international pressure that was exerted, Justice Cruz Castro returned to his position as a constitutional judge on the 26th, November 2012.

In Costa Rica judges of the Supreme Court of Justice may not be suspended, except upon declaration that there are grounds to institute proceedings or for other reasons concerning disciplinary measures. In the latter case, the Supreme Court of Justice shall adopt a resolution

[643] See Detlef, N. (2016). América Latina: constituciones flexibles y estructuras de poder rígidas. *Iberoamericana*, (61), 235–240. See also the website of the *Sistema Costarricense de Información Jurídica* available (only in Spanish) at: http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_norma_afectaron_Consulta.aspx?nValor1=1&nValor2=871&param2=2&nValor3=101782, (Accessed October 2020).
[644] See Articles 158 and 163 Constitution of Costa Rica.
[645] See Morlino, L., & Sadurski, W. (2010), *op. cit.*, pp. 9-10.
[646] See Romero Pérez, J. E. (2013). Derecho constitucional y reelección de magistrados del Poder Judicial. *Revista de Ciencias Jurídicas*, *130*, p. 129.

by secret vote of no less than two-thirds of its members[647]. Costa Rica does not have a constitutional provision that protects judges from salary reductions.

Factors that empower constitutional courts

In Costa Rica, access to challenge the constitutionality of a general law or an act of authority is broad. Any person without any special prerequisites may directly request that a judge intervene to protect his or her fundamental rights[648]. To file an action of unconstitutionality there must be a case pending before the courts in which the unconstitutionality is invoked. However, such a requirement is not necessary where the nature of the matter is such that there is no individual and direct injury, or where the defence of diffuse interests, or those of the community as a whole, is involved[649]. As a consequence, it is relatively easy for citizens to transform a complaint into a legal issue that the constitutional justice system must decide upon within a relatively short period[650].

Article 39 of the Law of Constitutional Jurisdiction provides that the President of the Constitutional Chamber or the magistrate whom he appoints, will be in charge of processing *amparo* proceedings.

The jurisdiction of the Constitutional Chamber of Costa Rica is established in Articles 10, 48 and 128 of the Constitution and in the *Ley de la Jurisdicción Constitutional* (Constitutional Jurisdiction Law). Accordingly, corresponds to the Constitutional Chamber of Costa Rica:

1. To guarantee, through the remedies of *habeas corpus*[651] and *amparo*[652], the rights and freedoms enshrined in the Political Constitution and the human rights recognized by international law in force in Costa Rica. (Concrete centralized *a posteriori* review).
2. To review the constitutionality of laws of any kind and of acts subject to public law, as well as the conformity of the domestic legislation with international or community law,

[647] See Article 165 Constitution of Costa Rica.
[648] See Articles 18 and 33 *Ley de la Jurisdicción Constitutional* (Constitutional Jurisdiction Act).
[649] See Article 75 *Ley de la Jurisdicción Constitutional* (Constitutional Jurisdiction Act).
[650] For instance, Article 86 *Ley de la Jurisdicción Constitutional* (Constitutional Jurisdiction Act) establishes that the Constitutional Chamber must resolve the action of unconstitutionality within a maximum term of one month.
[651] The h*abeas corpus* guarantees a person's freedom and integrity, which can be violated or restricted by acts and/or omissions of authority, illegal detention orders or solitary confinement. It also guarantees freedom of movement. See Articles 15-28 *Ley de la Jurisdicción Constitucional* (Constitutional Jurisdiction Law).
[652] The *amparo* guarantees rights and fundamental liberties except those already protected by *habeas corpus*. It can also be lodged against privates if their acts or omissions violate citizens' rights. See Articles 29-56 and 57-65 *Ley de la Jurisdicción Constitucional* (Constitutional Jurisdiction Law).

by means of an action of unconstitutionality[653] and other questions of constitutionality[654]. (Abstract *a posteriori* review).

3. To decide on conflicts of jurisdiction between the powers of the state, including the Supreme Electoral Tribunal, and conflicts of constitutional jurisdiction between the latter and the Comptroller General of the Republic, municipalities, decentralised bodies and other persons governed by public law[655]. (Concrete centralized *a posteriori* review).
4. To decide on the constitutionality of constitutional reform projects, the approval of international agreements or treaties and other bills submitted to it through the legislative consultations[656]. (Abstract *a priori* review).

Regarding the constitutionality of laws, in order to bring an action of unconstitutionality, there must be a case pending before the courts, including *habeas corpus* or *amparo*, or in the procedure for exhausting administrative remedies, in which such unconstitutionality is invoked as a reasonable means of protecting the right or interest that is considered to have been infringed[657]. In addition, the jurisdictional acts of the Judicial Power and the declaration of election made by the Supreme Tribunal of Elections will not be impugnable by this way. See Article 10 Constitution of Costa Rica[658].

As can be observed, the constitutional jurisdiction of the Constitutional Chamber of Costa Rica encompasses the review all legal norms and acts of public authority, except judicial judgments and electoral decisions of the Supreme Electoral Tribunal[659]. The Constitutional Chamber is endowed not only with the power to review against directly applicable rights inserted in the Constitution, but also with those included in international human rights treaties[660]. Through *habeas corpus* or *amparo*, any individual – including minors and non-citizens – can challenge the constitutionality before the court without a legal counsel, and without filing any formal

[653] See Articles 73-95 *Ley de la Jurisdicción Constitucional* (Constitutional Jurisdiction Law).
[654] Questions of constitutionality are those that any judge may refer to the Constitutional Chamber when he or she has reasonable doubts about the constitutionality of any provision or act to be applied, or of any act, conduct or omission to be judged in a case brought before it. See Articles 102 to 108 *Ley de la Jurisdicción Constitucional* (Constitutional Jurisdiction Law).
[655] See Articles 109-111 *Ley de la Jurisdicción Constitucional* (Constitutional Jurisdiction Law).
[656] See Articles 96-101 *Ley de la Jurisdicción Constitucional* (Constitutional Jurisdiction Law).
[657] See Article 75 *Ley de la Jurisdicción Constitucional* (Constitutional Jurisdiction Law).
[658] See Article 10 Constitution of Costa Rica and 74 *Ley de la Jurisdicción Constitucional* (Constitutional Jurisdiction Law).
[659] See Article 10 Constitution of Costa Rica and Article 30 *Ley de la Jurisdicción Constitucional* (Constitutional Jurisdiction Law).
[660] See Article 48, Constitution of Costa Rica and Article 2 *Ley de la Jurisdicción Constitucional* (Constitutional Jurisdiction Law). According to Rodríguez L., Costa Rica moved to a system more compatible with the American Convention on Human Rights due to the influence exerted by the Inter-American Court of Human Rights, which resides in San José, Costa Rica. See Olman A. Rodriguez L. (2011), *op. cit.*, pp. 255-256.

paperwork, at any time of the day or night, and on any day of the year. Additionally, the Constitutional Chamber of Costa Rica can declare, by an absolute majority vote of its members, the unconstitutionality of the provisions of any nature and of acts subject to the Public Law[661].

Factors that promote judicial accountability.

Regarding the publicity of the decisions and dissenting opinions, Article 58 of the Organic Law of the Judiciary establishes that sessions and votes shall be public, except in cases where the law provides otherwise or where the Court agrees that they should be private.

The Constitutional Chamber has its own Centre for Constitutional Jurisprudence which was established when the Chamber was created in 1989. The main task of this centre is the systematisation and updating of case law. In addition, it carries out a thematic classification of cases, is responsible for data protection of judgments containing sensitive information and for updating the Chamber's website.

The website of the Constitutional Chamber provides access to the judgments of constitutional control issued in actions of unconstitutionality, judicial consultations, legislative consultations and conflicts of competence as well as those issued in *habeas corpus* and *amparo* proceedings from 1989 to date. In addition, it offers a version of the Constitution of Costa Rica annotated with constitutional jurisprudence, a database with constitutional principles developed by the Constitutional Chamber in an alphabetical order to facilitate searches, forms to request jurisprudence and personal data protection and a search engine (NEXUS.PJ) that allows free and advanced searches of jurisprudence in more than 400,000 judgments issued by the Constitutional Chamber[662].

5.2.3. **Mexico**

Factors that endorse judicial independence

The federal judicial branch is regulated by Chapter IV of the Mexican Constitution. Article 94 establishes that the SCJN is at the apex of the country's judicial hierarchy, determines its composition, judges' term length and their removal procedure. The procedure to reform the constitution requires a majority above that necessary for changing ordinary legislation and establishes majority decisions at different points in time. Even though the constitution establishes a rigid procedure to be reformed, *de facto* it can be considered that a flexible

[661] See Article 10, Constitution of Costa Rica.
[662] See the website of the Constitutional Chamber of Costa Rica at https://salaconstitucional.poder-judicial.go.cr/index.php/jurisprudenciasec (Accessed October 2020)

procedure prevails due to the numerous times that the constitution has been reformed since its enactment, e.g., the 1917 Constitution of Mexico has been reformed 79 times (the last reform took place in 2018)[663].

Mexico has a collaborative appointment procedure. In order to appoint a justice of the Supreme Court, the President submit a list of three candidates to the Senate. Within a 30-day period, the Senate choose one of the candidates by the vote of two thirds of the present members. If the Senate does not decide within this term, the President has to appoint one person from the list he has proposed. If the Senate rejects the three candidates in the list, the President will submit a new list of three candidates. If the Senate rejects this second list, the President will appoint one person from the list[664].

Judges of the Supreme Court are appointed for a term of 15 years and may be removed only in the cases provided in the Title Four of this Constitution on public servants' accountability to administrative liabilities or corruption acts. Judges shall be entitled to a retirement payment at the end of their term. Supreme Court judges cannot serve a second term, unless they have held the office as provisional or interim ministers[665]. According to Morlino and Sadurski, limited terms in office with no possibility of re-appointment, as in the case of Mexico, may promote self-serving behaviour, such as adjusting judges' actions with regard to their post-term careers[666].

The 1994 constitutional reform established a staggered system for the replacement of the constitutional judges' first generation, which prevented a total renovation of the court[667]. The gradual renovation of the court can be seen as a practical measure that has permitted the continuing renovation of the court with judges from different backgrounds, providing the court with new points of view[668]. Moreover, in Mexico judges' resignations can only be admitted for

[663] See http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_per.htm (Accessed October 2018). See also Detlef, N. (2016), *op. cit.*, 235–240.
[664] See Article 96 Constitution of Mexico.
[665] See Articles 94 and 108, Constitution of Mexico.
[666] See Morlino, L., & Sadurski, W. (2010), *op. cit.*, pp. 9-10.
[667] The system consists of the gradual replacement of the eleven judges as it follows: two judges in 2003, two in 2006, two judges in 2009, two judges in 2012 and the last three judges in 2015. See transitory Article 4 of 1994 constitutional reform. See also Carpizo, J. (1995). Reformas constitucionales al Poder Judicial Federal y a la jurisdicción constitucional, del 31 de diciembre de 1994. *Boletín Mexicano de Derecho Comparado*, *1*(83).
[668] For instance, in 2003 Justice José Ramón Cossío Díaz was elected to replace Justice José Aguinaco Alemán. Justice Cossío Díaz has a successful academic carrier. He holds a PhD in Constitutional Law by the *Universidad Complutense de Madrid* and is a recognised lecturer in Constitutional Law. Justice Margarita Luna Ramos was appointed three months later than Justice Cossío Díaz. She has a successful carrier within the Judicial Branch. She obtained a PhD in Law by *Universidad Nacional Autónoma de México*. In June 16, 2004 Justice Román Palacios

serious causes. A resignation should be submitted to the President of the Republic and if the latter accepts it, he has to send it to the Senate for approval. The judges may be subjected to impeachment. The Senate sets itself as a grand jury, hears the accusation, and imposes the corresponding penalties in a resolution approved by the vote of two thirds of its members present in the session, once the corresponding procedures have been carried out and after having heard the accused officer[669].

The Constitution establishes that the remuneration granted to the Supreme Court's judges may not be reduced during their term[670].

Factors that empower constitutional courts

Access to justice in Mexico is not as broad as in Colombia and Costa Rica. For instance, legitimacy to challenge the constitutionality of laws (abstract review) is restricted to political actors, i.e., parliamentary minorities, the Attorney General, political parties and the Ombudsman[671]. Citizens cannot address the courts if they consider that a particular law is unconstitutional. When the actions of an authority affect their rights, it is possible to resort to the constitutional complain or *amparo* (concrete review). However, it can only be initiated at the request of the offended party, i.e., the holder of an individual or collective right, which has been violated by the challenged act, affecting its legal sphere, either directly or by virtue of his/her status *vis-à-vis* the legal order[672]. In addition, initiating *amparo* proceedings requires having professional assistance, which in turn make access to justice expensive and inaccessible to the average citizen.

Allocation of cases. In Mexico, the Federal Judicial Authority Organization Act establishes that the president of the Supreme Court of Justice is in charge of processing the matters of the competence of the court in Plenary and hands in the cases among its members so that they formulate the corresponding draft resolutions.

The Supreme Court of Justice of Mexico has competences to decide cases related to the following topics:

passed away and Justice Sergio Armando Valls was appointed. He is a former PRI legislator and member of the Council of the Federal Judiciary.

669 See Article 110 Constitution of Mexico.

670 See Article 94 Constitution of Mexico.

671 See Article 105, section I, Constitution of Mexico.

672 See Article 107, fraction I, Constitution of Mexico.

1. Constitutional controversies. These are disputes between branches or levels of government as well as in cases where an authority encroaches on the sovereignty or on the jurisdiction of another authority[673]. The rulings issued by the Court by a majority of eight vote and invalidating general provisions have a general compulsory effect according to the provisions stipulated in Article 105, fraction. I. Exceptions are disputes on electoral matters. (Concrete centralized review).
2. Actions of unconstitutionality. These trials raise a contradiction between a general legal provision (a law, decree, regulation or international treaty) and the constitution aiming to invalidate unconstitutional laws or treaties. They can be initiated within the 30 days after the publication of a regulation by subjects with legal standing and only regarding the laws indicated in the constitution. The rulings issued by the Court may declare the challenged provisions null and void with *erga omnes* effects only if they are approved by a majority of at eight votes[674]. If the case does not meet this requirement effects are *inter-partes*. (Abstract a posteriori review).
3. Constitutional complaint or *amparo*. The Supreme Court of Justice has the competence to review amparo decisions issued by federal district judges or federal circuit magistrates[675]. (Concrete centralized review).
    a. The Court may, by its own motion, or by motion submitted by a unitary circuit court, the Federal Executive or the Attorney General, decide on appeals against rulings pronounced by district judges, provided that the Federal Government is an interested party in the case and the case is transcendental[676].

[673] Disputes can take place between the a. the Federal Government and one state or the Federal District, b. the Federal Government and one municipal authority, c. the Executive Power and the Congress of the Union; the President of the Republic and any of the Houses; or the President of the Republic and the Permanent Committee, acting as federal bodies or as Federal District's bodies. d. two states. e. A state and the Federal District. f. The Federal District and a municipal council. g. Two municipal councils belonging to different states. h. Two powers belonging to the same state about the constitutionality of their acts or regulations. i. A state and one of its municipal councils, about the constitutionality of their acts or regulations. j. A State and a municipal government belonging to another State, about the constitutionality of their acts or general norms. k. Two governmental bodies belonging to the Federal District Government, about the constitutionality of their acts or general norms. l. Two autonomous constitutional entities or between one autonomous constitutional entity and the Federal Executive or the Mexican Congress when the issue is related to the constitutionality of their acts or general norms. This is also applicable to the National Transparency Agency. See Article 105, frac. I, Constitution of Mexico.

[674] Subjects with legal standing to initiate AI: 33% of the members of the House of Representatives, 33% of the members of the Senate, the Executive Federal, 33% of the members of a state legislature, 33% of the members of the Mexico City Assembly of Representatives, political parties (national and local) officially registered, human rights commissions (national and local), transparency agencies (national and local), and the General Attorney. See Article 105, frac. II, Constitution of Mexico.

[675] See Article 103, frac. I, Constitution of Mexico.

[676] See Article 107, frac. V, Constitution of Mexico.

b. The Court may, by its own motion or by motion of the Collegiate Circuit Court, the Attorney General or the Federal Executive, review judgments issued in amparo proceedings by a district judge or a unitary circuit court that are considered important or transcendental, i.e., cases in which the problem of constitutionality persists and cases involving laws or acts issued by the federal government that restrict the sovereignty of Mexico City and the states of the Republic or laws and acts issued by the state authorities or the government of Mexico City that invade federal jurisdiction[677]. In addition, the Court may review decisions that claim a violation of the right to privacy as well as guarantees in criminal matters[678].

c. The Court may review decisions issued by Collegiate Circuit Courts that rule on the constitutionality of general provisions, establish the direct interpretation of a constitutional precept or do not decide such issues when they have been raised, provided that they establish a criterion of importance and significance. The court's review will be limited to strictly constitutional issues[679].

4. Contradictory criteria. In the event that federal courts or the chambers of the Supreme Court of Justice issue contradictory criteria, the Court (in Plenary or Chambers) shall decide which criterion should prevail. The judgments issued by the Court in these cases will only have the effect of establishing jurisprudence and will not affect the specific legal situations arising from the cases in which the contradiction has occurred[680].
5. Call for a *referendum*. The Supreme Court of Justice will decide *a priori* on the constitutionality of the subject of the call for a *referendum*[681].

Factors that promote judicial accountability

The Organic Law of the Federal Judicial Branch establishes that the Coordination of Compilation and Systematization of Theses is the body in charge of compiling, systematizing and publishing the jurisprudence and legal precedents issued by the courts of the Federal Judicial Branch in the Federal Judicial Weekly Gazette. This body belongs to the structure of the Supreme Court of Justice[682].

[677] See Article 107. frac. VIII, Constitution of Mexico.
[678] See Article 107, frac. XII, Constitution of Mexico.
[679] See Article 107, frac. IX. Constitution of Mexico.
[680] See Article 107, frac. XIII, Constitution of Mexico.
[681] See Article 35, frac., VIII, 3o. Constitution of Mexico.
[682] See Articles 177-179 *Ley Orgánica del Poder Judicial de la Federación* (Organic Law on the Judicial Branch of the Federation).

The framework proposed by Feld and Voigt allowed to systematise the regulation of the judicial independence of the constitutional courts of Colombia, Costa Rica and Mexico. Table 5-2 presents a comparative summary of the appointment procedure, term in office and re-election of constitutional judges in the three countries under analysis.

Table 5-2. Appointment procedure, term in office and re-election of judges in Colombia, Costa Rica, and Mexico.

	Colombia	Costa Ria	Mexico
Judges	9	7	11
Bodies engaged in the appointment procedure	Nominates: - President - Supreme Court - Council of State Appoints: - Senate	Nominates and appoints: - Legislative Assembly	Nominates: - President Appoints: - Senate
Term in office	8 years	8 years	15 years
Possible re-election	Non-renewable	Renewable	Non-renewable
Removal procedure	Legislative	Legislative Assembly and Supreme Court	Joint decision (Executive and Legislative)

Source: Own elaboration based on constitutional and legal provisions of each country[683].

As can be observed, the institutional arrangements of the courts vary. Colombia has a shared system of appointment in which the President, the judicial branch and the Council of State nominate three judge each and the Senate appoints them; Costa Rica has an appointment system led exclusively by the Legislative Assembly and Mexico has a collaborative appointment procedure where the President nominates, and the Senate appoints. The three countries opted for a limited term in office; however, in Costa Rica judges can be re-appointed for a second term while in Colombia and Mexico re-appointment is not allowed.

The three constitutional courts exert both *a priori* and *a posteriori* abstract review. However, it is important to note that, during the period of analysis, the Supreme Court of Justice of Mexico did not exercise the abstract review *a priori*. The Constitutional Chamber of Costa Rica has exclusive jurisdiction over matters of constitutionality, *amparo* and *habeas corpus*. Mexico and Colombia have adopted a mixed model of constitutional review that combines characteristics of diffuse and concentrated models of review. As a result, in Colombia any judge exercises

[683] Colombia: Articles 174, 175, 178, 233 and 239 Constitution of Colombia; Costa Rica: Articles 157 and 158 Constitution of Costa Rica; Mexico: Articles 94 and 96 Constitution of Mexico.

concrete control of constitutionality when deciding *tutela* cases, i.e., cases involving the protection of human rights[684]. However, the Constitutional Court has the mandate to review judicial decisions issued by lower judges related to the *tutela* action.

In the case of Mexico, diffuse control coexists with concentrated control of constitutionality. Through diffuse control, local judges adapt their actions to the constitutional parameters in order to guarantee the effectiveness of the principle of constitutional supremacy[685]. Although federal courts have jurisdiction to decide *amparo* proceedings, the Supreme Court of Justice, *ex officio* or at the request of the federal courts, the Federal Executive or the Attorney General may review the judgments issued by district judges (*amparo indirecto*) and by Collegiate Circuit Courts (*amparo directo*) in which the federation is a party and that, due to their interest and importance, so merit[686].

Importantly, the three constitutional courts exercise both horizontal and vertical control. Horizontal control involves judges arbitrating inter-branch or intergovernmental disputes. It is exercised in Colombia through constitutionality of laws/treaties/*referenda*/decrees and conflicts of competence, in Costa Rica through actions of unconstitutionality, judicial consultations, legislative consultations and conflicts of jurisdiction and in Mexico, through actions of unconstitutionality, constitutionality of *referenda* and constitutional controversies. Vertical control involves judges interpreting the scope of individual rights and is exercised through *tutela* in Colombia, *habeas corpus* and *amparo* in Costa Rica and *amparo* in Mexico. This facilitates the comparative analysis of the horizontal or vertical control exercised by these courts. The empirical analysis carried out by this research focuses exclusively on the vertical accountability and *tutela*, *habeas corpus* and *amparo*.

Table 5-3 presents the results of the indicator of *de jure* judicial independence in Colombia, Costa Rica and Mexico after replicating Feld and Voigt's questionnaire. As can be observed, Mexico has the highest *de jure* indicator of judicial independence and is followed by Colombia. Costa Rica appears in the third place. Costa Rica scores low on variables measuring the appointment procedure, judicial tenure and renewable terms in office.

As discussed above, the appointment procedure of magistrates in Costa Rica is led exclusively by the Legislative Assembly. It is considered that in shared systems, such as the one in

[684] See Article 86 Constitution of Colombia.
[685] See Article 133 Constitution of Mexico.
[686] See Article 105, frac. III and 107 frac. V Constitution of Mexico.

Colombia, where more than two organs are involved in the appointment procedure, a greater degree of independence is expected than in cases where only one organ fills the appointments[687]. Feld and Voigt[688] hold that judicial tenure will be crucial for the independence of the judiciary because it is assumed that judges are more independent if they are appointed for life or up to a mandatory retirement. Accordingly, judges are less independent if terms are renewable because they have an incentive to please those who can reappoint them.

Another important aspect of judicial independence, in which both Colombia and Costa Rica score low, is the prohibition of salary reductions. These two countries do not have a legal framework that protects judges in this respect. Mexico scores high because the constitution explicitly prohibits salary reductions for judges in the federal judiciary[689].

Mexico scores low on the accessibility of the court and its ability to initiate proceedings because the legal framework prevents citizens from initiating an abstract review of constitutionality. In Mexico, only political actors have legal standing to file an action of unconstitutionality. In addition, initiating *amparo* proceedings is relatively expensive. In Colombia and Costa Rica, which provide an easy access to justice, it is relatively easy for citizens to transform a complaint into a legal issue that the constitutional justice system must decide upon within a relatively short period. Access to justice is particularly important because social discontent can be channelled through judicial mechanisms having certainty that the system works and that complains will be heard.

With respect to the variables measuring court empowerment and judicial accountability, the constitutional courts of the three countries score high. As discussed above, they exercise both abstract constitutional review (*a priori* and *a posteriori*) and concrete review. In addition, they have developed mechanisms for the dissemination of decisions and dissenting opinions.

This overview of the *de jure* judicial independence of the constitutional courts of Colombia, Costa Rica and Mexico allows to point out the strengths and weaknesses of their institutional design and will serve as a reference framework in the analysis of the findings of the empirical study.

[687] See Morlino, L., & Sadurski, W. (2010), *op. cit.*, pp. 9-10.
[688] See Feld, L. P., & Voigt, S. (2003), *op. cit.*, p. 6.
[689] See Article 94 Constitution of Mexico.

Table 5-3. The *De jure* Indicator for Measuring Judicial independence. Colombia, Costa Rica and Mexico.

	Judicial independence									Empowerment Courts	Judicial accountability			
	STABIA		JUDAPP	TENTERM		RMVAL	SALRDCT	FAIRPMT	ACCESS	ALLOCCAS	COMPTS	PUBLIC	Total	No. answers	Index
Colombia	0,94	0,50	1,00	0,70	1,00	0,00	0,00	N/A	1,00	1,00	1,00	0,67	7,80	11	0,709
Costa Rica	0,81	0,75	0,00	0,60	0,00	1,00	0,00	N/A	1,00	1,00	1,00	0,67	6,83	11	0,621
Mexico	1,00	0,50	0,33	1,00	1,00	0,50	1,00	N/A	0,50	1,00	1,00	0,67	8,50	11	0,773

Notes:

STABIA	The stability of the set of institutional arrangements within which the courts operate. The first column corresponds to the question about whether the constitutional court is anchored in the constitution. The second column refers to how difficult is to amend the constitution.
JUDAPP	The appointment procedure.
TENTERM	Judicial tenure and renewable terms. The first column corresponds to the question about the length term of the constitutional judges. The second column refers to the renewable judges' term.
RMVAL	Removal procedures.
SALRDCT	Prohibition of reduction salaries.
FAIRPMT	Fair payment.
ACCESS	Accessibility of the court and its ability to initiate proceedings.
ALLOCCAS	Allocation of cases.
COMPTS	Competences.
PUBLIC	Publicity of the decisions and dissenting opinions.

Source: Own elaboration using Feld and Voigt (2003) the *de iure* judicial independence indicator.

5.3. **Regulation of *amparo* proceedings**

The *tutela*, *habeas corpus* and *amparo* are the judicial proceedings that need to be scrutinised in order to assess the vertical or societal accountability of constitutional courts of Colombia, Costa Rica and Mexico. In order to facilitate the analysis of the empirical findings presented in the subsequent chapters, this section focuses on the legal framework of these judicial proceedings in each country and identifies their scope and similarities and differences found within the three countries.

5.3.1. **Colombia**

Article 86 of the 1991 Constitution of Colombia established *tutela* action to allow individuals to address issues of human rights before the judge at any time or place through a preferential and summary proceeding. *Tutela* action can be filed against any action or omission of any public authority. Therefore, the protection shall consist of an order to act or refrain from acting which shall be immediately enforceable. Decisions on *tutela* may be challenged before the competent judge shall be referred to the Constitutional Court for review.

It is also provided that the action of *tutela* will take place only when the person has no other means of defence unless *tutela* action is used to prevent irreparable damage. No more than 10 days may elapse between the request for protection and the issuing of the judgment. An action of *tutela* may also be brought against individuals who are responsible for providing a public service or whose conduct seriously and directly affects the collective interest, or against whom the petitioner is in a state of subordination or defencelessness.

The *Decreto Número* 2591 de 1991 (Law-decree 2591 of 1991) regulates *tutela* action. It establishes that the rights protected by the *tutela* action ought to be interpreted in conformity with the international human rights treaties ratified by Colombia[690]. Exhaustion of administrative remedies is optional. Prior to filing the action of tutela it is not necessary to bring another administrative remedy[691].

The action of *tutela* is characterized by its informality. It may be exercised without any formality or authentication, filed in any paper, via telegram or by any other written communication way. In case of emergency or if the action is brought by illiterates or minors, the action of *tutela* can be filed verbally. There is no need to cite the constitutional rule which

[690] See Article 4, Law-decree 2591 of 1991.
[691] See Article 9, Law-decree 2591 of 1991.

has been infringed provided that the violated or threatened right is clearly expressed. It is not necessary to have an authorised representative[692].

Decree Law 2591 of 1991 establishes that all judicial *tutela* decisions have to be send for possible revision before the Constitutional Court[693]. The Court appoints two magistrates that have discretionary powers to determine which *tutela* decisions will be examined. Any justice of the constitutional court or the ombudsman may request the revision of those *tutela* decisions that were not selected for review with the aim to clarify the scope of a determined right or to prevent serious damages[694]. Additionally, the General Prosecutor of the Nation may request the revision of *tutela* decisions when necessary to defend the legal order, fundamental rights and guarantees or public assets[695]. *Tutela* cases that are not excluded from review within 30 days of receipt, must be decided on within three months[696].

Judgements issued by the Constitutional Court of Colombia when reviewing *tutela* decisions produce effects only regarding the particular case[697] and will be immediately notified to the first instance court which, in turn, has to notify the parties and adopt the necessary measures in order to conform its own initial ruling to the constitutional court decision[698].

5.3.2. **Costa Rica**

Article 48 of the 1949 Constitution of Costa Rica established two special proceedings to protect human rights, i.e., *habeas corpus* and *recurso de amparo* (recourse of *amparo*). The competence on matters of *amparo* and *habeas corpus* is reserved exclusively to the Constitutional Chamber of Costa Rica, which also exercises judicial review in a concentrated way[699]. This implies that the Constitutional Chamber of Costa Rica is required it to decide all cases brought before it[700].

It is important to mention that, since its creation, the Constitutional Chamber of Costa, has used broad criteria of admissibility in view of the absence of expeditious procedural channels for the protection of legal situations involving administrative issues. The Chamber argued that the

[692] See Article 14, Law-decree 2591 of 1991.
[693] See Articles 31 and 32, Law-decree 2591 of 1991.
[694] See Article 33, Law-decree 2591 of 1991.
[695] See Article 7, Decree 262 of 2000.
[696] See Article 33, Law-decree 2591 of 1991.
[697] However, the Constitutional Court of Colombia has declared in several cases the existence of a state of affairs unconstitutional. See judgments: SU-559 de 1997; T-153 de 1998; T-606 y T-607 de 1998; T-525 de 1999; SU-090 de 2000; T-590 de 1998; SU-250 de 1998; T1695 de 2000.
[698] See Article 36, Law-decree 2591 of 1991.
[699] Se Articles 10 and 48 of the Constitution of Costa Rica.
[700] See Article 8, *Ley de la Jurisdicción Costitucional* (The Constitutional Jurisdiction Act).

Constitution is an indirect basis for any substantial legal situation of individuals. It was until the promulgation of the Contentious-Administrative Procedure Code (Law No. 8508 of 24 April 2006) and its entry into force on 1 January 2008 that the court ceased to admit matters indirectly related to fundamental rights and the Constitution[701].

Habeas corpus and *amparo* proceedings are regulated by the Constitutional Jurisdiction Law, which was enacted in 1989. *Habeas corpus* guarantees the person's freedom and integrity against any kind of authority's acts or omissions, illegal detention orders, solitary confinement or unduly threats or restrictions to freedom. It also guarantees the freedom of movement[702]. The judgment granting *habeas corpus* shall render ineffective the measures contested in the application, shall order the restoration to the offended party of the full enjoyment of his/her violated rights or freedom, and shall set out the other effects of the judgment in the particular case.[703].

The *amparo* guarantees rights and fundamental liberties except those already protected by *habeas corpus*[704]. Among these rights and liberties are the right to life, the right to health, the environmental rights, the right to an individual identity, the right to education, freedom of association, freedom of expression, religious freedom, etc. It can be filed against any harming actions or omissions from individual persons or private corporations, but only if these persons or corporations exercise public functions or powers that by law or by fact place them in a position of power and ordinary judicial remedies are clearly insufficient to secure the protection of fundamental rights and freedoms[705].

The *amparo* can be filed against any provision, decision or resolution and, in general, against any public administration action, omission or material activity that is not founded in an effective administrative act and violated or threatened to violate the constitutional rights. It can be filed also against arbitrary actions or omissions based on wrongly interpreted or improperly applied regulations[706].

[701] See Resolution No. 17909-2010, *Recurso de Amparo, Sala Constitucional de Costa Rica*. Available at https://nexuspj.poder-judicial.go.cr/document/sen-1-0007-488993 (Accessed October 2020)
[702] See Articles 15, 20 and 24 Constitutional Jurisdiction Law.
[703] See Article 26 Constitutional Jurisdiction Law.
[704] See Article 29 Constitutional Jurisdiction Law.
[705] See Article 57 Constitutional Jurisdiction Law.
[706] See Article 29 Constitutional Jurisdiction Law.

The law excludes the *amparo* action against statutes or other regulatory provisions[707]. Likewise, the law also excludes the *amparo* against judicial resolutions and actions of the judiciary, or other authorities' acts when executing judicial decisions, and against the acts or provisions in electoral matters of the Supreme Tribunal of Elections[708].

The *amparo* action may be brought at any time as long as the violation, threat, disruption or impairment persists and up to two months after its direct effects on the injured party have totally ceased[709]. An *amparo* action does not require any prior recourse and certainly not the exhaustion of administrative remedies[710]. The mere lodging of *amparo* proceedings does not suspend the effects of laws or other normative provisions challenged, but the application of those to the plaintiff, as well as that of the specific acts contested[711].

Both proceedings are free of formalities. Judicial informality allows anyone regardless of age, gender, or nationality to file a case directly with the constitutional chamber twenty-four hours a day, 365 days a year, without a fee, a lawyer or any kind of legal formality[712]. Petitions can be filed in any paper, handwriting, typing or even via telegram or fax[713]. There is no need to cite the constitutional rule which has been infringed provided that the violated right is clearly specified. However, if an international instrument is invoked, it has to be clearly cited[714]. Finally, they are handled on a priority basis, which means any other case of a different kind, may be postponed[715].

5.3.3. **Mexico**

Articles 103 and 107 of the Constitution of Mexico are the basis of the *amparo* proceedings. *Amparo* is conceived as a general proceeding or suit that can be initiated by means of an action brought before federal courts for the protection of all *individual guaranties established in the*

[707] Nonetheless, they can be challenged together with the individual acts applying them, or when containing self-executing or automatically applicable provisions. See Article 30 Constitutional Jurisdiction Law.
[708] See Article 30 Constitutional Jurisdiction Law.
[709] See Article 35 Constitutional Jurisdiction Law.
[710] See Article 31 Constitutional Jurisdiction Law.
[711] Exceptionally, the Constitutional Chamber may order the application or the continued application of such legislation, at the request of the government department the defendant official or agency belongs to, or indeed proprio motu, if suspension might cause or risk specific and imminent harm to the public interest greater than the harm which continued application would cause to the injured party and subject to any conditions which the Constitutional Chamber may deem appropriate to protect the injured party's rights and freedoms and prevent any impairment of the effects of an eventual finding in their favour. See Article 41 Constitutional Jurisdiction Law.
[712] See Articles 5, 18, 31, 33 and 38, *Ley de la Jurisdicción Constitucional* (The Constitutional Jurisdiction Act).
[713] See Articles 19 and 39 Constitutional Jurisdiction Law.
[714] See Article 38 Constitutional Jurisdiction Law.
[715] See Articles 19 and 39 Constitutional Jurisdiction Law.

Constitution[716] against actions carried out by authorities, such as statutes, judicial decisions or administrative acts, and not against private individual actions. This means that in Mexico, federal courts (District Courts, Collegiate Circuit Courts and the Supreme Court of Justice) have exclusive jurisdiction to decide *amparo* cases[717].

Amparo proceedings are regulated by the *Ley de amparo reglamentaria de los artículos 103 y 107 de la Constitución Política, DOF 10 de enero de 1936* (The *Amparo* Law, enacted in 1936). It is important to note that the 2011 constitutional reform introduced the protection of rights established in international treaties ratified by the Mexican State as well as the obligation that human rights provisions have to be interpreted according to the Constitution of Mexico and the international treaties on human rights[718].

As a consequence, in 2013, a new *Amparo* Law come into force. Both reforms introduced significant changes in the field of the protection of human rights via *amparo* aiming to eliminate the technicalities and formalities that hinder access to justice and to extend the scope of protection of *amparo* proceedings. For instance, it was introduced the adhesive *amparo* and the legitimate individual and collective interests; the recognition of the violation of rights by omission of the authorities; the general declaration of unconstitutionality; the creation of the Circuit Plenary; and a new way of integrating precedents. However, it is important to note that the effects of the changes introduced through the 2013 reform on *Amparo* Law, are out of the timeline of this research.

The following paragraphs describe the legal framework of *amparo* proceedings according to the *Amparo* Law enacted in 1936 that was the law in force during the time frame of this study, i.e., 1995 to 2012.

Amparo proceedings are governed by five constitutional and legal principles, i.e., upon request of a party, personal and direct grievance, definitiveness, strict law and relativity of the judgments[719]. The first two principles refer to the fact that *amparo* proceedings can only be

[716] *Amparo* proceedings can be initiated only regarding the protection of the rights recognized in the constitution against authorities and not against private individual actions. See Article 103, fraction I, Constitution of Mexico, text in force before the 2011 constitutional reform.
[717] See Articles 103, fraction I and Article 107 of the Constitution of Mexico.
[718] See Article 1o., Constitution of Mexico, currently in force, since the 2011 constitutional reform.
[719] See Martínez Andreu, E. (2011). Los Principios Fundamentales Del Juicio De Amparo. Una Visión Hacia El Futuro. In M. González Oropeza & E. Ferrer Mac-Gregor (Eds.), *El juicio de amparo: a 160 años de la primera sentencia. Tomo I* (pp. 683–702). Mexico City: Universidad Nacional Autónoma de México-Instituto de Investigaciones Jurídicas de la UNAM. See also Article 107 of the Constitution of Mexico.

initiated at the request of an aggrieved party, i.e., the petitioner must have suffered a violation of his or her fundamental rights as a result of an act of authority.

The principle of definitiveness implies that only when administrative remedies have been exhausted or when there are no means of appeal, *amparo* proceedings can be filed. The principle of strict law implies that the Court must examine the constitutionality of the contested act in the light of the arguments presented by the plaintiff in his/her initial request or in the appeal for review. The principle of the relativity of judgments refers to the fact that the judgment of *amparo* is limited to protecting the parties with respect to the grievance raised, without making general statements on the contested law or action motivating it. Therefore, judgments of *amparo* have only *inter partes* effect. The judgment is always addressed to the government or judicial authorities in question and not to the persons or corporate entities that are parties to the proceedings.

There are two types of *amparo* trial proceedings: (i) *amparo indirecto* (an indirect *amparo* trial) which is filed before Federal District Courts against Federal, State or municipal laws; regulations issued by the Federal or State Executive branches; acts of authority that violate human rights committed by Federal, State or municipal government agencies, and (ii) *amparo directo* (a direct *amparo* trial), which is filed before Federal Collegiate Circuit Courts against final court decisions that violate the Constitution.

In both types of *amparo*, the government act contested may be subject to a provisional suspension, which is a temporary injunction upon the filing of the petition. A permanent injunction may be issued after a hearing where evidence and legal arguments are presented.

The Supreme Court of Justice has jurisdiction to review decisions of the district judges (*amparo indirecto*) regarding disputes that challenged the constitutionality of federal or local laws, international treaties and regulations issued by the President or by the governors provided that the constitutionality problem persists. Decisions of Collegiate Circuit Courts *(amparo directo*) are subject to revision by the Supreme Court regarding judgments that examined the constitutionality of federal or local laws, international treaties and regulations issued by the President or by the governors or those in which Collegiate Courts stated the direct interpretation of a constitutional provision[720]. However, the President of the Supreme Court of Justice has competence to admit or reject the application for review[721].

[720] See Article 83, fraction V., *Amparo* Law.
[721] See Article 90 *Amparo* Law.

The appeal for review before the Supreme Court of Justice has to be brought before the district or Collegiate Circuit Courts or the corresponding administrative authority as the case may be. These authorities will send the original complaint to the Supreme Court within 24 hrs. The time-limit for lodging the application for review is ten days as of notification of the decision referred[722]. The appeal for review has to be filed in a written form together with photocopies enough for the court and for the rest of the parties. In case of failure to comply with this requirement, the review will be deemed not to have been lodged.[723] Even though the law establishes that it can be filed using telegraph or personal appearance, these forms are not used any more. Plaintiffs must clearly express the violations or grievances that were caused upon them by the final resolution. Additionally, if the review is filed against a decision by Collegiate Courts, the plaintiff has to transcribe, literally, the part of the judgment that states the unconstitutionality of the law or that in which a direct interpretation of a constitutional provision was established. If these requirements are not met, *amparo* proceedings are dismissed.

As mentioned above, the Supreme Court of Justice, *ex officio* or at the request of the federal courts, the Federal Executive or the Attorney General may review the judgments issued by District Judges (*amparo indirecto*) and by Collegiate Circuit Courts (*amparo directo*). These cases are selected on the grounds of interest and relevance.[724]. It is worth noting that the Supreme Court of Justice may refer cases in which there is a precedent or cases which it considers appropriate for the purpose of better and prompt administration of justice to Collegiate Circuit Courts[725]. In these cases, the decisions issued by Collegiate Circuit Courts shall be final.

Finally, it is worth noting that one of the long-standing problems facing the Mexican justice system is the fragility of its local courts. State courts have not been able to achieve an optimal degree of independence from the local executive and legislative branches. In addition, they lack adequate resources to provide an effective and reliable justice. Therefore, decisions issued at the local level end up being reviewed in *amparo* by federal courts. This has resulted in a constant saturation and backlog in the federal justice system. Throughout time, the Supreme Court of Justice, has become overloaded by the number of *amparo* cases it has to decide. Among the measures adopted are the creation of more federal courts, limiting the admissibility

[722] See Article 86 *Amparo* Law.
[723] See Article 88 *Amparo* Law.
[724] See Article 105, frac. III and 107 frac. V Constitution of Mexico.
[725] See Article 94, Constitution of Mexico.

requirements of *amparo* proceedings and providing the Court with competence to issue agreements through which it refers matters to Collegiate Circuit Courts[726].

This overview of the regulation of *amparo* proceedings in the three countries shows that the constitutional courts of Colombia, Costa Rica and Mexico operate under different rules when adjudicating human rights. Table 5-4 summarises the differences and similarities regarding rules in *amparo* proceedings among the three countries.

Table 5-4. Rules guiding *amparo* proceedings in Colombia, Costa Rica and Mexico.

	Jurisdiction constitutional court	Docket control	Formality
Colombia	Under review as a second or third instance	Yes	No
Costa Rica	Direct access	No	No
Mexico	Under review as a second instance; exceptionally direct access	Yes	Yes

Source: own elaboration.

As can be observed in Table 5-4, Costa Rica has a concentrated model of constitutionality and is the only country where cases come directly to the Constitutional Chamber. In Colombia and Mexico, where there is diffuse control, constitutional courts decide *ampa*ro cases in second or even third instance through the appeal of review.

The Constitutional Court of Colombia and to some extent the Supreme Court of Justice of Mexico have docket control. Docket control refers to the discretion competence of constitutional courts to hear (or not to hear) a matter[727]. The Constitutional Court of Colombia has the discretionary power to choose which *tutelas* it will decide. The Supreme Court of Justice has the competence to choose cases which, because of their interest and importance, deserve to be decided by the constitutional jurisdiction. It is considered that courts deciding constitutional cases benefit from having the power to set their agenda[728].

[726] See Tafoya Hernández, J. G. (2007). *El amparo de la justicia local*. Mexico City: Consejo de la Judicatura Federal, pp. 163 ss. and Valls Hernández, S. (2001). 50 años de los Tribunales Colegiados de Circuito. *La Jornada*. Retrieved from https://jornada.com.mx/2001/02/26/016a1pol.html#:~:text=Los%20Tribunales%20Colegiados%20de%20Circuito%2C%20que%20dieron%20inicio%20a%20sus,jurisdiccionales%20se%20ha%20incrementado%20considerablemente (Accessed October 2020).
[727] See Fontana, D. (2011), *op. cit.*, p. 624.
[728] Ibidem.

Finally, in Colombia and Costa Rica, *amparo* proceedings are governed by the principle of procedural informality while Mexico has prevailing a system based on formality.

Concluding section

The objective of this chapter was to provide an overview of the leeway that the legal framework allows courts to exercise their vertical or societal accountability function to adjudicate cases of human rights.

The first section of the chapter explored the reasons for the establishment of constitutional courts in Colombia, Costa Rica and Mexico, and provided elements that allow for the establishment of certain expectations regarding the responsiveness of these courts to rights claims. In the case of Colombia, the emergence of the Constitutional Court in the context of a new constitution with a broad catalogue of rights and judicial mechanisms to enforce them encourages hope that it will be a court committed to adjudicating cases of human rights.

In the case of Costa Rica, the creation of the Constitutional Chamber took place after a long debate on the need to strengthen democracy through constitutional jurisdiction. The 1989 constitutional reform aimed at correcting the deficiencies within the system of protection of human rights and checks and balances and established a legal framework with the enactment of the Constitutional Jurisdiction Act. This leads to the expectation of a court with a strong commitment to exercising both horizontal and vertical control.

Finally, in the case of Mexico, the 1994 constitutional reform focused on strengthening the Supreme Court by granting it jurisdiction to review the constitutionality of laws and modified its structure and administration, i.e., the Federal Judiciary Council was created, the number of judges was reduced and a new appointment procedure was established. However, the agenda of human rights was neglected. It was only in 2011 that the reform of human rights took place and in 2013 the new *Amparo* Law came into force, replacing the previous one dating from 1936. This suggests that the court might be more focused on addressing issues of constitutionality.

The second part of the chapter approached the revision of the legal framework of the courts through an analysis of the *de jure* judicial independence. To this aim, Feld and Voigt's questionnaire was replicated to calculate the *De Jure* Indicator for Measuring Judicial Independence of the constitutional courts of Colombia, Costa Rica and Mexico. It measures factors that endorse judicial independence, that empower constitutional courts and that promote

judicial accountability. Results showed that Mexico (0.77) scored the highest, followed by Colombia (0.70) and Costa Rica (0.62).

Similarities were found in terms of the factor promoting judicial accountability. This factor measures whether court decisions and dissenting opinions are published. Differences were found within factors that endorse judicial independence and those that empower constitutional courts.

Factors that endorse judicial independence measure whether courts are anchored in the constitution and how difficult is to amend the constitution, the appointment procedure, judicial tenure, removal procedures, renewable terms, prohibition of salary reductions and fair payment. Colombia and Costa Rica score lower than Mexico because some institutional arrangements within which the courts operate are established at a statutory level and because they do not have a provision that prohibits the reduction of judges' salaries.

The appointment procedure, term of office and re-election of constitutional judges differ in the three countries. Costa Rica scored lower than Colombia and Mexico on these aspects because it has an appointment procedure led by the parliament and judges can be re-elected for a second term. On the one hand, collaborative and shared systems of judicial appointment are thought to lead to more deliberative and independent courts[729]. On the other hand, it is considered that judges may be less independent if their appointments are subject to renewal, as they have an incentive to please those who can reappoint them[730].

Factors that empower constitutional courts measure the accessibility of the court and its ability to initiate proceedings as well as allocation of cases. Mexico scored lower than Colombia and Costa Rica because legitimacy to challenge the constitutionality of laws (abstract review) is restricted to political actors and *amparo* proceedings can only be initiated at the request of the offended party against state authorities. In addition, it is a cumbersome legal remedy that often requires the assistance of a specialised lawyer, which makes it costly and inaccessible to the average citizen.

[729] See Landeis, W. M., & Posner, R. (1975). The Independent Judiciary in an Interest-Group Perspective, *op. cit*.; Epstein, R. A. (1990). The Independence of Judges: The Uses and Limitations of Public Choice, *op. cit.*; Ramseyer, M. J. (1994). The Puzzling (In)dependence of Courts. *Journal Legal of Studies, 23* quoted by Garoupa, N., Grembi, V., & Lin, S. C. (2011). Explaining Constitutional Review in New Democracies: The Case of Taiwan, *op. cit.* and Morlino, L., & Sadurski, W. (2010). *Democratization and the European Union. Comparing Central and Eastern European post-communist countries*, *op. cit*.

[730] See Feld, L. P., & Voigt, S. (2003). *Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators, op. cit.*, p. 6.

The last section was devoted to compare the legal framework of amparo proceedings in the three countries to identify similarities and differences that may be useful for the interpretation of empirical findings.

Similarities were found between the regulation of amparo proceedings in Colombia and Costa Rica. This may be due to the fact that in both cases, the laws regulating amparo were enacted immediately after the creation of the courts, i.e., Constitutional Jurisdiction Law of 1989 in Costa Rica and Law-Decree 2591 of 1991 in Colombia. Unlike Mexico, whose Amparo Law dates back to 1936.

Among the similarities found in these countries are the informality of *amparo* proceedings and the possibility that they may be filed against private actors. Regarding informality, in both countries, it is not necessary to exhaust administrative remedies, *amparo* proceedings can be filed on any paper, by telegram, fax or even verbally in the case of the illiterate or minors (Colombia), it is not necessary to be represented by a lawyer and it is not necessary to cite constitutional provisions infringed.

In Costa Rica *amparo* proceedings can be filled against any harming actions or omissions from individual persons or private corporations, but only if they exercise public functions or powers that by law or by fact place them in a position of power and ordinary judicial remedies are clearly insufficient to secure the protection of fundamental rights and freedoms. In the case of Colombia, *tutela* action may also be brought against individuals who are responsible for providing a public service or whose conduct seriously and directly affects the collective interest, or against whom the petitioner is in a state of subordination or defencelessness.

In Mexico, on the other hand, *amparo* proceedings are governed by more strict rules. For example, the petitioner is required to prove that there is a personal and direct injury against him/her as a consequence of an act of authority. The principle of definitiveness, limits *amparo* proceedings to acts of authority that are not subject to appeal. In addition, *amparo* proceedings must be filed in formal writing and provide the necessary photocopies otherwise will be dismissed.

In summary, Colombia and Costa Rica have *amparo* regulations contemporary to the creation of the courts, characterised by procedures free of formalisms that privilege access to justice. In Mexico, the rules governing amparo date back to 1936 and are therefore stricter and more formal.

Chapter 6. Methodology and methods

The preceding chapters provided the theoretical foundations and the analytical framework for the empirical analysis of the relationship between constitutional courts and democracy in countries of the late third wave. The literature review revealed that despite the great interest in the study of courts in new democracies, there is a lack of comparative studies that use either quantitative or qualitative research methods to approach this relationship.

To fill this gap, this research approaches the relationship between courts and democracy in countries of the late third wave through a quantitative analysis of the responsiveness of courts to rights claims (vertical or societal accountability). On the one hand, the literature review on democracy revealed that democracy and human rights are intertwined, suggesting that judicial enforcement of human rights may lead to changes in democratic performance. On the other hand, the literature review on courts facilitated the identification of internal and external factors of the adjudication process that may contribute to explaining the responsiveness of courts.

Accordingly, this research designed a strategy to approach empirically the responsiveness of three selected courts to rights claims *vis-à-vis* democratic performance. This strategy consisted of three steps: (1) to determine the responsiveness of courts, (2) to determine the association between internal and external factors of the adjudication process and the responsiveness of courts and (3) to explore the association between the judicial enforcement of rights and democratic performance. The period of analysis covered the year of the establishment of the selected courts, i.e., 1992 for Colombia, 1989 for Costa Rica and 1995 for Mexico, until 2012. This chapter describes the development of this analysis.

The aim of this chapter is to describe step by step the empirical analysis. It is organised in four parts. The first part outlines the selection criteria of the case studies. The second part explains the sampling procedure. The third part describes the data collection process and introduces the measurement instruments used. The last part discusses the statistical techniques used for data analysis. The concluding section summarises the main methodological points of this research and reflects on the challenges involved in conducting empirical analyses in this field.

6.1. Selection of cases

A cross-national analysis was designed to facilitate a regional comparison of the responsiveness of courts established during the late third wave. To this aim, the courts of Colombia, Costa Rica and Mexico were selected. The selection was based on their democratic performance and judicial performance.

The democratic performance of the selected countries can be summarised as follows:

- Colombia: no institutional stability over time but minimal democracy,
- Costa Rica: a stable democracy,
- Mexico: institutional stability (no variation over time) and minimal democracy.

Colombia and Mexico share similar structural problems. Nowadays the most visible one is the violence in which the State and drug cartels are involved. As pointed out in Chapter 4, Mexico and Colombia are democracies with adjectives[731], e.g., minimalist democracies, semi-democracies, partly free democracies, and so on, basically due to the fact that they have laid down at least one sound foundation characteristic of a liberal democracy, e.g., holding elections for quite a long period of time in their recent history[732]. This lead to consider them as hybrid regimes, i.e., countries situated in the grey zone that are neither dictatorial nor clearly democratic. As pointed out in Chapter 1, these types of regimes share attributes of democratic political life with democratic deficits[733]. In the case of Colombia and Mexico, electoral democracy coexists with non-democratic practices. In contrast, Costa Rica is considered one of the most stable democracies in Latin America.[734].

Regarding the judicial performance, a previous investigation on the horizontal control of the Supreme Court of Justice of Mexico[735] confirmed that the Court had been concerned with keeping its institutional stability and disregarded the enforcement of human rights[736]. Scholars

[731] See, for instance, Møller, J., & Skaaning, S. E. (2010). Beyond the Radial Delusion: Conceptualizing and Measuring Democracy and Non-democracy. *International Political Science Review*, *31*(3), pp. 277-278. Specifically, Table A2. Linking the Cases to Democracy Types (FH lax) where the authors place Colombia and Mexico in Minimalistic democracy. Scott Mainwaring, Daniel Brinks, and Aníbal Pérez-Liñán consider Colombia as Semi Democracy starting from 1990 to 2004, while they consider Mexico as Democracy from 2000 to 2004. See Mainwaring, S., Brinks, D., & Aníbal, P. L. (2007), *op. cit.*, pp. 157 and 159.

[732] See Hadenius, A. (1994). The Duration of Democracy: Institutional vs Socio-economic Factors. In D. Beetham (Ed.), *Defining and Measuring Democracy* (pp. 63–88). London-Thousand Oaks-New Delhi, p. 68. Table 4.1. Three measurements of democratic durability show that Colombia has had 19.8 years of Political Democracy and 20.0 years of Electoral Democracy. Freedom House considers Colombia Partly Free since 1998. While Mexico is classified as Partly Free in 1999; Free from 2001 until 2010, and again Partly Free since 2011 until 2013. See https://freedomhouse.org/countries/freedom-world/scores (Accessed March 2021).

[733] See Carothers, T. (2002), *op. cit*., p. 9.

[734] Corporación Latinobarómetro Reporte 2010; Sørense, G. (2008), *op. cit.*, pp. 20-23; Møller, J., & Skaaning, S. E. (2010), *op. cit.*, p. 277 (Table A2. Linking the Cases to Democracy Types (FH lax)). The authors have classified Costa Rica as a Polyarchy. See Mainwaring, S., Brinks, D., & Aníbal, P. L. (2007), *op. cit*., p. 158. For these authors, Costa Rica is considered as a democracy since 1958 until 2004 which is the last year of their study. Freedom House considers Costa Rica as Free since 1998 until 2013. See https://freedomhouse.org/country/costa-rica/freedom-world/2021

[735] See Patiño Álvarez, A. A. (2011). The Role of Constitutional Courts in new democracies. The Mexican Case. *Retfærd*, 55–84.

[736] See Magaloni, B. (2003). Authoritarianism, Democracy, and the Supreme Court: Horizontal Exchange and the Rule of Law in Mexico. In S. Mainwaring & C. Welna (Eds.), *Democratic Accountability in Latin America* (pp. 266–306). Oxford: Oxford University Press and Domingo, P. (2005), *op. cit*.

argue that the Court seems to be more willing to arbitrate intergovernmental disputes, but less prone to protect human rights[737]. Since the 2011 constitutional reform on human rights, this has begun to change. In contrast, the constitutional courts of Colombia and Costa Rica stand out in the region for their work on the judicial enforcement of human rights.

The Constitutional Chamber of Costa Rica has been willing and able to arbitrate between different political forces in cases of crisis[738] and is recognised in the region for its strong commitment to protecting human rights. Similarly, the Constitutional Court of Colombia has been promoting the enforcement of human rights, in particular socio-economic and cultural rights and gaining both internal and external respect and prestige from social groups that are critical of the government. Additionally, the Court has identified key structural problems and has settled guideline resolutions promoting dialogue among different political and social actors[739]. The success of these courts seems to lie in the fact that access to justice is simple and inexpensive[740].

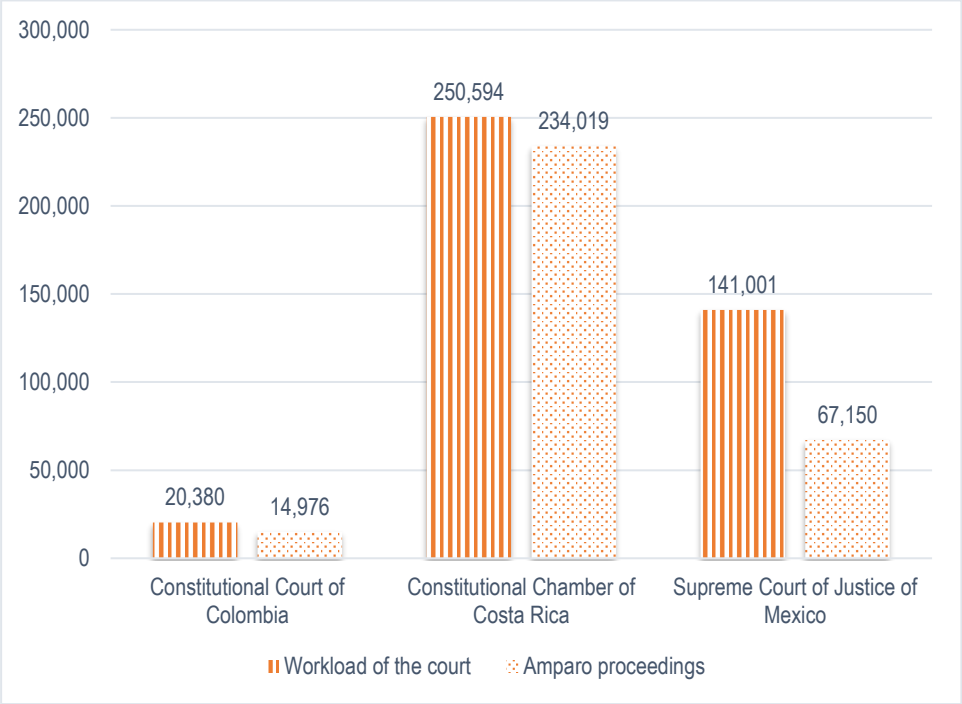
In sum, the similarities and differences among the three countries regarding their democratic and judicial performance place them as suitable for a comparative analysis.

6.2. Sampling procedure and sample size

The analysis of the responsiveness of the courts to rights claims involved the collection of judicial decisions issued in *amparo* proceedings during the period of analysis. The first step consisted of identifying *amparo* cases within the entire caseload of the courts to estimate the size of the sample. Figure 6-1 compares the caseload of the selected courts *vs amparo* cases during the period of analysis, i.e., from their establishment in the 1990s until 2012. It should be noted that sub-types of *amparo* were clustered into a single category[741].

[737] See Helmke, G., & Ríos-Figueroa, J. (2011), *op. cit.*, p. 13.
[738] Idem, pp. 11-12.
[739] See case T-025 of 2004 Constitutional Court of Colombia. See also Rodríguez-Garavito, C. (2011), *op. cit*., p. 1682.
[740] See Uprimny Yepes, R. (2006), *op. cit.*
[741] *Habeas corpus* and *amparo* cases in Costa Rica were grouped together, as were the direct and indirect *amparo* cases in Mexico.

Figure 6-1. Caseload of the constitutional courts of Colombia, Costa Rica, and Mexico *vs.* *amparo* cases from 1990s to 2012.



Source: Own elaboration based on data available on the websites of the three courts.

As can be observed, *amparo* cases were a substantial part of the caseload of the courts during the period of analysis, i.e., 93% in Costa Rica, 73% in Colombia and 48% in Mexico. It is worth noting that Costa Rica, having the lowest population density among the three countries (5,111,238 inhabitants), registers 15.6 times more *amparo* petitions than Colombia (48,258,494 inhabitants) and 3.5 times more than Mexico (119,938,473 inhabitants).

The large number of *amparo* petitions in Costa Rica can be explained due to its concentrated system of constitutionality, broad admissibility criteria, wide access to justice, formalities-free procedures and the judges' commitment to disseminate the court's mission and to engage with society. As discussed in Chapter 5, the Constitutional Chamber has exclusive jurisdiction over constitutional control, *habeas corpus*, *amparo* proceedings and disputes between jurisdictions. This means that the court hears all these cases in first instance. In addition, in the absence of expeditious procedural channels for the protection of legal situations involving administrative issues, the Court used broad admissibility criteria. It was not until the entry into force of the Code of Administrative Procedure on 1 January 2008 that the Court stopped admitting cases

indirectly related to fundamental rights and the Constitution[742]. Notably, the large caseload of the Court does not prevent it from being efficient. It was found that, on average, the court takes 27 days to issue a judgment.

The simplicity and accessibility of the filing mechanism is such that citizens can file a writ of *amparo* or *habeas corpus* even on a piece of bread wrapping paper or a napkin without the assistance of a lawyer. Notably, the first generation of judges engaged in an extensive campaign to raise awareness of the new court's mandate, i.e., organised seminars with international experts to attract the attention of legal experts, visited local courts, disseminated the role of the court in the media and legal journals, met with public officials, teachers, police and community leaders[743]. It seems that the convergence of formality-free procedures and responsive judges encouraged citizens to approach the court with petitions that were in many cases ill-founded.

Once *amparo* cases were identified from the entire caseload of the courts, the next step entailed determining the size of the sample. The *amparo* cases admitted by each constitutional court during the period of analysis is the population *(N)*, i.e., the universe of units from which the sample is to be selected[744]. Accordingly, this research has three populations (*N*) and for each of them a separate sample was selected.

The sample size (*n*) for each country was calculated taking into account a 95% confidence level and a 5% level of precision or confidence interval. The sample was adopted on the basis of a simple random sample technique. It is the most basic form of probability sample where each unit of the population has an equal probability of inclusion in the sample[745]. Table 6-1 presents the population and the sample size of the three selected countries.

[742] See Resolución No. 17909-2010, *Recurso de Amparo, Sala Constitucional de Costa Rica*. Available at https://nexuspj.poder-judicial.go.cr/document/sen-1-0007-488993 (Accessed October 2020). See also https://www.poder-judicial.go.cr/observatoriojudicial/vol94/ (Accessed October 2020).
[743] See the review published in 2009 commemorating the 20th anniversary of the creation of the Constitutional Chamber. https://www.poder-judicial.go.cr/observatoriojudicial/vol94/ (Accessed October 2020).
[744] See Bryman, A. (2012), *op. cit.*, p. 187.
[745] Idem, p. 190.

Table 6-1. *Amparo* cases issued by constitutional courts of Colombia, Costa Rica and Mexico from their creation during the 90's until 2012.

	N	*n*
Colombia	14,976	373
Costa Rica	234,019	382
Mexico	67,150	382
Total cases	316,145	1,137

Source: Own elaboration.

In sum, 1,137 *amparo* judgments comprise the sample used to analyse the responsiveness of the constitutional courts of Colombia, Costa Rica and Mexico to rights claims, from their establishment in the 1990s until 2012.

6.3. Data collection

The responsiveness of courts to rights claims *vis-à-vis* democracy was approached using a multivariate framework involving the analysis of judicial decisions, internal and external factors of the adjudication process and democratic performance. Data collection on these aspects was carried out using both primary and secondary sources. This section presents a detailed description of this process, including decisions adopted to address operational issues.

Judicial decisions on amparo proceedings

Notice that the legal instrument designed to protect human rights has a different name in the three countries. In Colombia it is called *tutela*. Costa Rica has two proceedings to protect human rights, i.e., *habeas corpus* and the writ of *amparo*. Mexico differentiates between *amparo directo* (direct *amparo*) and *amparo indirecto* (indirect *amparo*). For the sake of clarity, all these proceedings will be referred to and clustered as *amparo*, but differentiation will be made when deemed necessary.

Although judicial decisions are in principle electronically available on the website of the corresponding constitutional court, access to these documents is not unproblematic. Firstly, judicial decisions are not always electronically available. In the case of Mexico, it was necessary to submit a formal request for 273 judgments (out of the 382 needed to cover the sample) that were not available on the website of the court. The court approved the request and provided on average 20 sentences per week via email. Secondly, even when judicial decisions are available, each court has its own way to archive and classify them, which can make the collection of data difficult. For instance, while the Constitutional Court of Colombia uses a

basic classification for its cases, e.g., letter 'C' for constitutionality cases, letter 'T' for *tutela* cases and 'SU' for *tutela* cases decided in Plenary, the Constitutional Chamber of Costa Rica and the Supreme Court of Mexico use a broad classification for their cases, i.e., 50+ different types of judicial proceedings were found on their website. Table C-1 and Table C-2 in Appendix C show the judicial proceedings found in the records of the constitutional courts of Costa Rica and Mexico.

A standardised instrument was used to collect data from the judicial decisions. The framework proposed by Gloppen to approach the litigation as a mechanism to secure governments' accountability for rights informed the design of the instrument used to collect data regarding two stages of the adjudication process: the claims formation stage and the adjudication stage[746]. Measurement instrument (1) can be found in Appendix D.

Regarding the claims formation stage, the instrument was designed to collect data on plaintiffs, plaintiffs' claims and defendants. In the case of plaintiffs, the instrument gathered data relating to the type of plaintiff, i.e., individuals or organisations. If plaintiffs were individuals, data was collected regarding their socio-demographic characteristics such as gender, age and occupation. If plaintiffs were organisations, data was collected about the sector to which they belong. In addition, the instrument explored whether plaintiffs had legal assistance and the reasons to bring their claims. With respect to plaintiffs' claims, the instrument was designed to collect data on the legal basis of the claim and whether plaintiffs used expert knowledge. As for the defendant, the instrument sought to collect data regarding the type and the level of the authority.

Regarding the adjudication stage, the instrument sought to collect data on the type of resolution, rights protected, i.e., civil and political rights or economic, social and cultural rights, judge who drafted the judgment, Chief Justice, voting, i.e., unanimity, majority or dissenting opinion, timing and length of the judgments, legal basis of the judgment, i.e., national law, international treaties or conventions, legal comparisons, legal doctrine, precedent, expert knowledge, i.e., technical, economic, legal or ethical, and explicit court orders, i.e., declaratory orders, mandatory orders, supervisory orders, structural judgments or advisory orders.

The next step involved creating a codebook. Coding implied assigning a code to the categories identified in each variable. A pilot test was carried out involving the analysis of 25 *amparo* judgments per country. The pilot test allowed becoming familiar with the content and structure of judicial decisions in the three countries and testing and refining the measurement instrument

[746] See Gloppen, S. (2008), *op. cit.*, 21–36.

used for data collection, i.e., to verify whether the instrument served to transform the information into data that could be collected and quantified in a standardized manner.

During the coding process, several operational problems were encountered, such as lengthy and intricated judgements, missing, inconsistent or redundant data as well as the need for criteria to code ambiguous data.

Lengthy and intricate judgements. A total of 1,137 judgments included in the sample of the three countries were analysed. It is worth noting that reading and analysing the judgments was strenuous and prolonged in the case of Mexico. In contrast to Colombia and Costa Rica, the judgments in Mexico lack a concise summary of the facts and arguments presented by the parties. The judgments were found to include dozens of pages full of transcripts and paragraphs reciting outdated expressions. The court transcribes the initial complaint, the defendant's defence statement, the reasoning of the first and second instance court, as well as precedents. Therefore, for the reader it is easy to get lost in the transcripts and the intricate and outdated language used makes reading tiresome.

Missing, inconsistent or redundant data. The summary of the claims provided by the court at the beginning of the judgments proved inadequate to gather consistent data about the legal basis of the claim, the use of expert knowledge, whether plaintiffs had legal aid, or their reasons for going to court. Collecting data on the respondents was redundant because in Colombia and Mexico it is always an authority[747]. In addition, in some cases it was difficult to code this variable due to the extensive list of authorities provided, i.e., the authority that issued the law on which the act was based, the executing authority and the judicial authority. Information on the costs and expenses for the state, the plaintiff or the lawyer, as well as on whether the plaintiffs were assisted by a lawyer and their reasons to go to court were not consistently available in the three countries. Due to these inconsistencies, these variables were excluded from the analysis.

Ambiguous data. Data was collected at the most detailed level possible, e.g., in petitions filed by a group of persons, the age and gender of each member of the group was recorded. Coding the Plaintiffs' resources variable, for instance, involved the creation of objective criteria to classify the variety of occupations identified in the samples.

[747] Note that in Costa Rica *amparo* proceedings can be filed against actions by subjects of private law. See Articles 57 a 65, *Ley de la Jurisdicción Constitucional*.

The occupation of the plaintiffs was used as an indicator to associate them with 'Haves' (high income) or the 'Have-nots' (low or no income). The variety of occupations found in the sample resulted in a third category, that identifies plaintiffs with medium income. Consequently, the variable 'Plaintiffs-Resources' comprises three categories: 'Haves', 'Have-nots' and 'In between'.

Under the category 'Haves' large-scale business, senior executives, firms and the government were classified. The category 'Have-nots' comprises vulnerable groups, such as inmates, the homeless, elderly in poverty, disabled people in poverty, IDPs, minors in poverty, families in substandard housing conditions or without water, long-term unemployed, students, housewives, blue-collar workers, informal workers, cleaning ladies without social security, sick people (in poverty), members of unions and the retired. Finally, the new category 'In between' consists of small business, independent professionals, NGOs, users of bank and financial services, small entrepreneurial immigrants, and white-collar workers.

In sum, judicial decisions on *amparo* proceedings, as a unit of analysis, were useful to collect data on the claims formation stage and the adjudication stage. The data were collected in three different databases in Access. Finally, the data from the three countries were concentrated in a single data base in Excel. The *Judgements* database consists of 1,137 judicial decisions issued by the constitutional courts of Colombia, Costa Rica, and Mexico and is the master database of this research. A digital and paper archive of the judgements analysed is in the possession of the researcher. The Codebook Database Judgments can be found in Appendix E.

Internal factors

Internal factors refer to possible explanatory aspects within the judicial environment that might relate to the responsiveness of courts. The socio-demographic characteristics of plaintiffs and the personal, professional and academic attributes of judges are the internal factors defined by this research.

As mentioned above, the primary source used to collect data on the socio-demographic characteristics of plaintiffs were the judicial decisions. Regarding judges, a second standardised instrument was designed to collect data on the personal attributes and professional background of the constitutional judges of Colombia, Costa Rica and Mexico who were in office during the period of analysis. The design of this instrument was based on the personal attributes model

developed by Tate & Sittiwong[748] and replicated by Songer & Johnson[749], Kapiszewski's[750] empirical study of the role of the Brazilian Supreme Tribunal and Hammerslev's[751] socio-legal study on Danish judges discussed in Chapter 3. Measurement instrument (2) can be found in Appendix F.

Accordingly, the instrument was designed to collect data on the personal attributes of the judges, i.e., gender and age, the professional background of the judges, i.e., judicial career, last academic degree and studies abroad. These data were collected from the biographies and resumes of judges available on the websites of the three constitutional courts as well as from other sources such as books and electronic newspapers.

Biographical information on 96 judges who were in office during the period of analysis, i.e., 41 judges from Colombia, 35 judges from Costa Rica and 20 judges from Mexico, was coded and entered into a database. The *Judges* database is the second database created for the purposes of this research. The Codebook Database Judges can be found in Appendix G.

The collection and coding of judges' data was not free of operational issues. The biographies or resumes of the judges were not always available on the websites or archives of the constitutional courts. Therefore, data were collated from public biographies and resumes available on the websites of the three constitutional courts, universities, government and private institutions as well as from newspapers and books. The websites of the three courts provide biographies or resumes of current judges, but little or no information regarding former ones. The information available from the courts was found to be inconsistent and dissimilar, i.e., the length and content of each biography varies from one judge to another.

In the cases where the information was contradictory or not available, a data request was sent to the constitutional courts[752]. The courts were always willing to cooperate and provided the information at their disposal; however, in some cases they were unable to supply information due to the lack of data regarding former judges. Additionally, this research requested information about political and religious affiliation of the judges as well as professions of

[748] See Tate, C. N., & Sittiwong, P. (1989), *op. cit.*
[749] See Songer, D. R., & Johnson, S. W. (2007), *op. cit.*
[750] See Kapiszewski, D. (2011), *op. cit.*
[751] See Hammerslev, O. (2003), *op. cit.*
[752] This was the case regarding Colombia and Costa Rica. In the case of Mexico, the main source for data collection was a book edited by the Supreme Court of Justice that contains a biographical review of the judges that comprised this tribunal between 1917 until 2013. See Suprema Corte de Justicia de la Nación. (2013). *Semblanzas de los ministros de la Suprema Corte de Justicia de la Nación (1917-2013). Breve recorrido de su vida y obra, a través de las Épocas del Semanario Judicial de la Federación.* Mexico.

judges' parents aiming to identify the socio-economic background of the judges[753]; however, the request was denied due to the sensitive character of the information.

In sum, the instruments used proved to be effective in measuring the responsiveness of courts to rights claims, the socio-demographic characteristics of plaintiffs and the personal attributes and professional background of judges. The validity of the measuring instruments used lies in the fact that the individual items included in their design correspond to the object and/or the subject being measured and therefore cover the full range of what was intended to be measured.

External factors

External factors refer to possible explanatory aspects outside the judicial environment that might relate to the responsiveness of courts to rights claims. The circumstances that frame the context of a particular country are considered as external factors.

The analysis of the economic, political and social circumstances in which the constitutional courts of Colombia, Costa Rica and Mexico were created and have been operating presented in Chapter 4 revealed five specific contextual aspects that may be associated with judicial outcomes. These aspects relate to shared problems of economic growth, violence (or absence of it), poverty, inequality, rule of law and corruption.

These contextual aspects were empirically approached using secondary data, in particular, the WB database. For instance, economic growth, as measured by the Gross Domestic Product per capita per year, was collected from the database of the WB[754]. Poverty, extreme poverty and inequality were approached using the indicator that measures them in each country provided by the WB Poverty and Equity Data Portal[755]. Political instability and absence of violence, control of corruption and rule of law were addressed through the WGI[756].

The corresponding indicators were collected from the databases of the WB and the WGI project per country on an annual basis for the period of analysis and entered into a single database. The *Country indicators* database is the third database created for the purposes of this research, in

[753] See Hammerslev, O. (2003), *op. cit.*
[754] See GDP World Bank Data at https://data.worldbank.org/indicator/NY.GDP.MKTP.CD (Accessed October 2020)
[755] The databases are available per year, per country at http://povertydata.worldbank.org/Poverty/home (Accessed October 2019).
[756] The WGI project reports aggregate and individual governance indicators for over 200 countries and territories over the period 1996–2019, for six dimensions of governance: i) Voice and Accountability, ii) Political Stability and Absence of Violence/Terrorism, iii) Government Effectiveness, iv) Regulatory Quality, v) Rule of Law, and vi) Control of Corruption. See World Bank Worldwide Governance Indicators database at https://info.worldbank.org/governance/wgi/ (Accessed October 2019).

this case, from a secondary source. The Codebook Database Country indicators can be found in Appendix H.

Democratic performance

As mentioned previously, the normative understanding of the concept of democracy adopted by this research relies on the multidimensional approach to democracy proposed by Coppedge *et al*. The V-Dem project has operationalised and measured democracy from this perspective and provides a disaggregated dataset that reflects the complexity of five high-level principles of democracy, i.e., electoral, liberal, participatory, deliberative and egalitarian. The V-Dem dataset, Version 9, used, covers 202 countries with records from 1789 to 2018 and consists of 450+ V-Dem indicators, 81 indices and 5 high-level indices[757].

The disaggregated V-Dem data were used as a secondary source of data to collect the democratic performance of the three selected countries. Data were collected per country on an annual basis for the period of analysis. The *Democratic indices* database is the fourth database created for the purposes of this research. The Codebook Database Democratic indices can be found in Appendix I.

6.4. Data analysis

The responsiveness of courts to rights claims

For the purpose of this research, responsiveness is understood as the ability of courts to hold the government accountable for violations of human rights. Descriptive statistics were used to determine the responsiveness of the constitutional courts of Colombia, Costa Rica and Mexico.

To this aim, it was necessary to distinguish between cases accepted to be decided on the merits and cases rejected on grounds of inadmissibility. As a result, five types of resolutions across the samples were identified, i.e., granted protection, denied protection, dismissals, voluntary dismissals and miscellaneous decisions. .

Table 6-2 presents the frequencies of the five types of resolutions found in the samples distinguishing between those concerning the responsiveness of courts and those that do not (Colombia n = 373, Costa Rica n = 382 and Mexico n = 382).

[757] See Coppedge, Michael, John Gerring, Carl Henrik Knutsen, Staffan I. Lindberg, Jan Teorell, David Altman, Michael Bernhard, M. Steven Fish, Adam Glynn, Allen Hicken, Anna Lührmann, Kyle L. Marquardt, Kelly McMann, Pamela Paxton, Daniel Pemstein, Brigitte Seim, and D. Z. (2019). V-Dem [Country-Year/Country-Date] Dataset v9. *Varieties of Democracy (V-Dem)*. Retrieved from https://doi.org/10.23696/vdemcy19

Table 6-2. Type of Resolution.

	Resolutions concerning the responsiveness of courts								Resolutions not concerning the responsiveness of courts						
	Granted protection		Denied protection		Dismissals		Subtotal		Voluntary dismissals		Miscellaneous		Subtotal		Total sample
	n	*%*	*n*	*%*	*n*	*%*	*N*	*%*	*n*	*%*	*n*	*%*	*n*	*%*	*n*
Colombia	223	59.8	132	35.1	2	0.5	357	95.7	0	0.0	16	4.3	16	4.3	373
Costa Rica	116	30.4	104	27.2	140	36.6	360	94.2	2	0.5	20	5.2	22	5.8	382
Mexico	37	9.7	68	17.8	206	53.9	311	81.4	4	1.0	67	17.5	71	18.6	382
Total	376	33.1	304	26.7	348	30.6	1028	90.4	6	0.5	103	9.1	109	9.6	1,137

Source: Own elaboration.

Resolutions concerning the responsiveness of courts. Courts are expected to decide rights claims (or disputes) on the merits of the case. A case decided on the merits may result in either granting protection or denying protection. Cases in which protection was granted were used as an indicator of the responsiveness of courts to rights claims since the decision holds the government accountable for human rights violations. The category 'Dismissals' consists of cases that were rejected on procedural grounds without examining the merits of the case. This classification allowed to identify the rate of cases that were decided on the merits (granted protection and denied protection cases) as well as the rate of cases rejected (dismissals).

Resolutions not concerning the responsiveness of courts. 'Voluntary dismissals' refer to cases in which plaintiffs expressed their willingness not to continue with *amparo* proceedings. .

Table 6-2 shows that, during the period analysed, voluntary dismissals have not been a standard practice, i.e., Costa Rica reported 2 cases, Mexico 4 cases and Colombia none.

'Miscellaneous' is a category that includes a range of assorted decisions that do not fit into any of the categories of the variable 'Type of resolution'. Cases classified as miscellaneous in Colombia relate to those where the court declared the '*carencia actual del objeto*' i.e., the claim contained in the *tutela* action was satisfied between the moment of the initiation of the proceedings and the resolution. In Costa Rica, this category comprises cases where the court postponed the *amparo* resolution because the same issue was pending to be decided in an action of unconstitutionality. In Mexico, these cases consist mainly of resolutions where the Mexican Supreme Court delegated its original competence to *Tribunales Colegiados de Circuito* (Federal Collegiate Circuit Courts) to decide cases on the grounds of a precedent previously established by the Court.

Since cases classified as 'Voluntary dismissals' and 'Miscellaneous' are not indicative of the responsiveness of courts, they were excluded from the statistical analysis. Consequently, the scope of the samples was reduced to cases concerning the responsiveness of courts, i.e., Colombia 355 cases, Costa Rica 360 cases and Mexico 311 cases. See .

Table 6-2.

Association between internal and external factors and the responsiveness of courts

This analysis implied to identify whether the characteristics of plaintiffs, the personal and professional attributes of judges (internal factors) and the economic, social and political context (external factors) relate to successful litigation in human rights. To this aim, a multinomial regression analysis was used as an exploratory tool to examine the strength and direction of the relationship between two variables while holding other variables constant. However, due to data with nested components, multilevel modelling was applied to account for the statistical dependency that may result from nested data.

As discussed in the preceding section, data collection in each country took place at three levels, i.e., judgments, judges and period of time. This implies that some variables are clustered or nested within other variables, i.e., data has a hierarchical structure. It should be noted that the analysis of the data was carried out separately in each country, hence *country* is not considered as a level. See Table 6-3.

Table 6-3. Structure of data.

	Colombia	Costa Rica	Mexico	Total records
Judgments	3373	382	382	1,137
Judges	41	35	20	96
Years*	20	23	17	60

*Country indicators were collected on an annual basis considering the period of this research: Colombia 1992-2012; Costa Rica 1989-2012 and Mexico 1995-2012.
Source: Own elaboration.

Accordingly, the data has a two-level structure. Figure 6-2 and Figure 6-3 illustrate this scenario using the case of Mexico as an example of a two-level hierarchical data structure[758].

[758] Both figures were built on the basis of Figure 20.2 An example of a two-level hierarchical data structure: children (level1) are organized within classrooms (level 2) at Field, A. (2015). *Discovering Statistics Using IBM SPSS Statistics* (4th. ed.). Los Angeles-London-New Delhi-Singapore-Washington DC: Sage Publications, p. 816.

Figure 6-2. Two-level hierarchical data structure: judgements (level 1) and judges (level 2). Mexico.

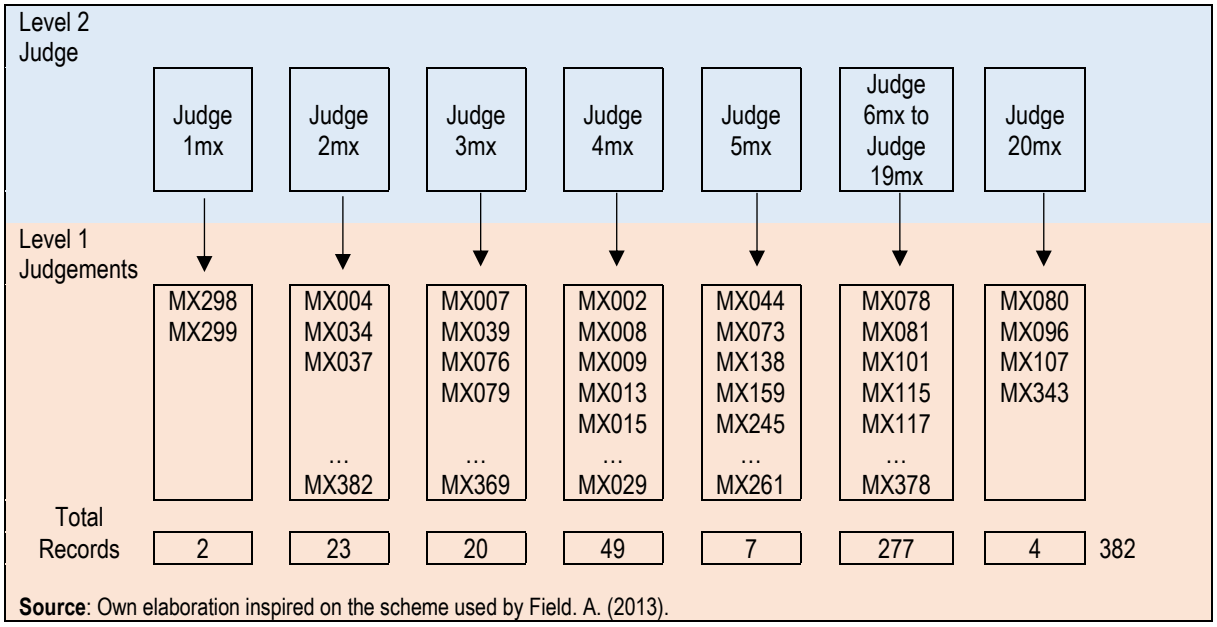
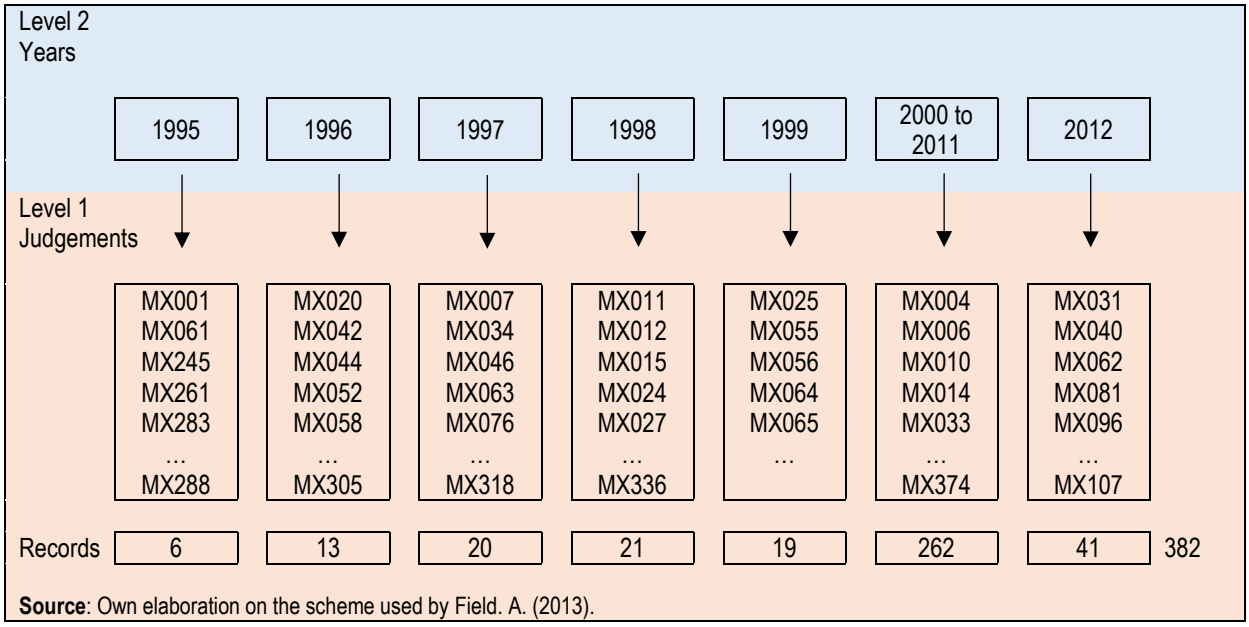


Figure 6-2 illustrates judgments clustered in terms of judges. This means that a court ruling issued by one judge is related to other court rulings issued by the same judge. Similarly, Figure 6-3 illustrates judgments nested in years with typical aggregate features. This means that country observations within the same year will be highly correlated since they share a common context.

Figure 6-3. Two-level hierarchical data structure: judgements (level 1) and years (level 2). Mexico.



A conventional approach assumes that all observations are independent (the error correlation equals zero). This assumption does not fit the structure of the current data. The nesting of judgments in judges and years leads to correlated observations (a dependency among the data) and the possibility to downwardly biased estimates of the standard errors associated with the regression coefficients. To avoid substantive errors in the interpretation of the statistical significance of the relationships a multilevel analysis is appropriate[759]. Therefore, a multilevel analysis was performed[760].

Having clarified how concerns on the hierarchical structure or nested data were approached, the variables included in this analysis will be described. The dependent variable was the responsiveness of courts to rights claims. The independent variables were the internal and external factors of the adjudication process defined by this research. Table 6-4 disaggregates the dependent and independent variables of this analysis.

Table 6-4. Internal and External factors *vs*. Responsiveness. Variables.

	Dependent variable		
Responsiveness of courts			Grant protection; Deny protection; Dismiss a case
	Independent variables		
Internal factors	Plaintiff	Type:	Individuals; Organisations
		Gender:	Male; Female
		Age:	Adult; Minor; Elderly
		Resources:	'Haves'; 'Have-nots'; 'In between'
	Judges	Gender:	Male; Female
		Age:	Age at the decision date
		Academic background	Bachelors' degree; postgraduate degree
		Studies abroad:	Yes; No
		Judicial career:	Yes; No
External factors	Gross Domestic Product		Annual growth percentage
	GINI index		0 perfect equality 100 perfect inequality
	Poverty		Rate headcount ratio at $5.50 a day. Percentage of the population
	Extreme poverty		Rate headcount ratio at $1.90 a day. Percentage of the population
	Political Stability and Absence of Violence		-2.5 (weak) to 2.5 (strong) governance performance
	Rule of Law		-2.5 (weak) to 2.5 (strong) governance performance
	Corruption		-2.5 (weak) to 2.5 (strong) governance performance

Source: Own elaboration.

[759] See O'Dwyer M., L., & Parker, C. E. (2014). *A primer for analyzing nested data: multilevel modeling in SPSS using an example from REL study*. Washington, DC., Department of Education, Institute of Education Sciences, National Center for Education, Evaluation and Regional Assistance, Regional Educational Laboratory Northeast & Islands.

[760] The multilevel analysis was conducted by Professor Jarl Kampen, Department of Statistics at the University of Antwerp (StatUA).

As can be observed in Table 6-4, the DV 'Responsiveness' is a discrete variable measured at a nominal level, i.e., it counts the number of cases granted, denied or dismissed. The IVs have different levels of measurement. Internal factors of the adjudication process consist of discrete variables measured at a nominal level, except for the variable 'Judges-Age' measured at an interval level. External factors consist of country indicators (collected from secondary data), measured using interval or ratio scales. For this analysis, the *Judgements* database was merged with the *Judges* database and the *Country Indicators* database.

Accordingly, for each country, bivariate relationships were first studied. The bivariate analysis consisted of testing the association between each of the independent variables and the dependent variable. This involved analysing the association of 16 independent variables with respect to the dependent variable 'Responsiveness'. Pearson's chi-square test of independence (χ^2)[761] and logistic regression[762] were used for this purpose. In addition, Bonferroni-Holm Method was used as a way to deal with familywise error rates for multiple hypothesis tests[763].It is important to mention that, in the case of Mexico, the bivariate analysis regarding the variables 'Plaintiffs' gender' and 'Plaintiffs' age' was not carried out because the data does not meet the large sample size assumption suitable for a logistic regression analysis[764]. This was due to the fact that in 140 out of 193 cases filed by individuals, the identification data of the plaintiffs were crossed out by the Court on the basis of the rules of personal data protection.

[761] Pearson's chi-square test of independence (χ^2) is a statistic that measures the relationship between two categorical variables. See Field, A. (2015), *op. cit.*, p. 871.

[762] 'Logistic regression models the probability of an outcome and how that probability changes with a change in the predictor variables. The basic assumption is that each one-unit increase in a predictor multiplies the odds of the outcome by a certain factor (the odds ratio of the predictor) and that the effect of several variables is the multiplicative product of their individual effects. The logistic function produces a probability of outcome bounded by 0 and 1.' See Mitchell H., K. (2003). Multivariable analysis: A Primer for Readers of Medical Research. *Annals of Internal Medicine*, *138*(8), p. 646.

[763] The Holm-Bonferroni Method (also called Holm's Sequential Bonferroni Procedure) is a modification of the Bonferroni correction. The Bonferroni correction reduces the possibility of getting a statistically significant result (i.e., a Type I error) when performing multiple tests. However, it is considered that Bonferroni suffers from a lack of statistical power. Therefore, the Holm-Bonferroni method is considered to be more powerful than the single-step Bonferroni. The formula to calculate the Holm-Bonferroni is:

$$\frac{\text{Target Alpha Level}}{\text{n -rank number of pair (by degree of significance) +1}}$$

Where: Target alpha level = overall alpha level (usually .05), n = number of tests. See Glen, S. (n.d.). Holm-Bonferroni Method: Step by Step - Statistics How To. Retrieved April 4, 2021, from https://www.statisticshowto.com/holm-bonferroni-method/

[764] Logistic regression uses a maximum likelihood estimation method; therefore, it requires a large sample size. See Multinomial Logistic Regression. SPSS data analysis examples. UCLA Institute for Digital Research and Education, from https://stats.idre.ucla.edu/spss/output/multinomial-logistic-regression/ (October 2019).See also Mitchell H., K. (2003), *op. cit.*, 644–650.

Subsequently, a model was built on the basis of statistically significant associations found in the bivariate analysis. Multinomial logistic regression[765] was used to determine the independent contribution of each IVs to the DV ('Responsiveness'). *Forced entry* was chosen as a method to enter the variables into a model. This is a method in which all predictors are forced into the model simultaneously and the researcher makes no decision about the order in which variables are entered[766]. Finally, the random effects of multinomial models were estimated using a multilevel analysis applying a mixed multinomial logistic regression.

Association between the judicial enforcement of rights and democratic performance

The independent variable 'Judicial enforcement of rights' was measured using granted protection cases in *amparo* proceedings (cases per year in each country). For this analysis, the dependent variable 'Democratic performance' was measured using the V-Dem Mid- and Lower-Level Democracy and Governance Indices. The V-Dem five High-Level Democracy Indices are strongly related. The V-Dem conceptual scheme considers electoral democracy as an essential element of any other conception of representative democracy. This implies that the construction of the indices of liberal, participatory, deliberative and egalitarian democracy take into account the level of electoral democracy. Therefore, it was necessary to disaggregate the democratic indices into Mid- and Lower- Level Democracy Indices. See Table 6-5.

The V-Dem dataset contains three versions of the variables. The version used by this research was *'Relative Scale' – Measurement Model Output* as this is the preferred version of the variables for time-series, regression and other estimation strategies. This version provides country-year point estimates from the V-Dem measurement model. The measurement model aggregates the ratings provided by multiple country experts and, taking the disagreement and measurement error into account, produces a probability distribution over country-year scores on a standardized interval scale. The point estimates are the median values of these distributions for each country-year. The scale of the measurement model variable is similar to a normal *Z* score even though it does not necessarily follow a normal distribution[767].

[765] Multinomial logistic regression refers to a logistic regression in which the outcome (dependent) variable has more than two categories. See Field, A. (2015), *op. cit.*, p. 880.
[766] Idem, pp. 321, 322, 776 and 800.
[767] See Coppedge, M., Gerring, J., Knutsen, C. H., Lindberg, S. I., Teorell, J., Altman, D., … Ziblatt, D. (2019). *V-Dem Codebook V9*, *op. cit.*

Table 6-5. V-Dem Mid- and Lower- Level Democracy and Governance Indices.

High-level indices	Mid-level indices	Lower-level indices
Electoral Democracy Index (polyarchy)	Additive polyarchy index Multiplicative polyarchy index	- Freedom of expression and alternative sources of information - Freedom of association - Share of population with suffrage - Clean elections - Elected officials
Liberal Democracy Index	Electoral Democracy index +	Liberal component - Equality before the law and individual liberty index - Judicial constraints on the executive index - Legislative constraints on the executive index
Participatory Democracy Index	Electoral Democracy index +	Participatory component - Civil society participation index - Direct popular vote index - Local government index - Regional government index
Deliberative Democracy Index	Electoral Democracy index +	Deliberative component
Egalitarian Democracy Index	Electoral Democracy index +	Egalitarian component - Equal protection index - Equal access index - Equal distribution of resources index

Note: The V-Dem Mid- and Lower Democracy and Governance Indices are country-year scores on a standardized interval scale: -5 (weak) to 5 (strong) with 0 approximately representing the mean for all country-years in the sample (V-Dem data).

Source: Own elaboration based on V-Dem Codebook V9.

A distributed-lag model was applied. It is a dynamic model in which the effect of a regressor *x* on *y* occurs over time rather than all at once. The idea behind this technique is the recognition that a change in the level of an explanatory variable may have behavioural implications beyond the period in which it occurred. For instance, the effects of economic decisions do not occur instantaneously but are spread, or distributed, over future periods[768].

This may be the case regarding the effects of judicial decisions. Chapter 3 advanced the idea that judicial decisions on human rights have a dual effect. At the level of individuals, they provide protection and redress for human rights violations. At the level of society, they contribute to strengthening a constitutional culture based on respect for human rights and

[768] See Hill, R. C., Griffiths, W., & Judge, G. G. (2001). *Undergraduate econometrics* (2nd.). New York: John Wiley & Sons.

democratic values by holding governments and politicians accountable. However, building a culture of respect for human rights takes time. This suggests that judicial decisions on human rights may lead to changes in democratic indices some time after they have been issued. Hence, it is considered appropriate to use a dynamic lag model to explore the relationship between the judicial enforcement of rights and democratic performance.

Accordingly, the values of the independent variable 'Judicial enforcement of rights', measured using granted protection cases in *amparo* proceedings, were lagged. The length of the lag was defined on exploratory basis considering the sample size, i.e., n = 20 years Colombia, n= 23 years Costa Rica and n =17 years Mexico. Three lags were applied, i.e., Lag 1 = 1 year; Lag 2 = 2 years and Lag 3 = 3 years.

Finally, distributed lag values were used in a linear regression to test the relationship between the lagged independent variable and the dependent variables. A linear regression is an appropriate analysis when the goal is to assess the extent of a relationship between a dichotomous or interval/ratio predictor variable on an interval/ratio criterion variable[769]. In this case, the predictor variable(s) is the independent variable and the criterion variable(s) is the dependent variable. The *F*-test was used to assess whether the independent variable predicts the dependent variable. *R*-squared was used to determine how much variance in the dependent variable can be accounted for by the independent variable. The *t*-test was used to determine the significance of the predictor and beta coefficients were used to determine the magnitude and direction of the relationship. For statistically significant models, for every 1-unit increase in the predictor, the dependent variable will increase or decrease by the number of unstandardized beta coefficients. The assumptions of a linear regression, i.e., linearity and homoscedasticity, were assessed.

Concluding section

Chapter 6 presented a detailed overview of how the empirical analysis was conducted, i.e., the study design, the selection of countries, the sampling procedure and sample size, the data collection and measurement instruments used, and the statistical techniques applied. It also reflected on the challenges of conducting empirical research in this field.

[769] Multiple regression is an extension of a simple regression in which an outcome is predicted by a linear combination of two or more predictor variables. The form of the model is: $Y_1 = (b_0 + b_1X_{1i} + b_2X_{2i} + \ldots + b_nX_{ni}) + \mathcal{E}$ in which the outcome is denoted as Y, and each predictor is denoted as X. Each predictor has a regression coefficient b associated with it, and b_o is the value of the outcome when all predictors are zero. See Field, A. (2015), *op. cit*., p. 880.

The first part discusses the adoption of a cross-national study and the selection of Colombia, Costa Rica and Mexico as case studies. The criteria for selecting these three countries were based on an analysis of both their democratic and judicial performance, i.e., Colombia: no institutional stability over time/minimal democracy/strong commitment to protecting human rights, Costa Rica: institutional stability/stable democracy/strong commitment protecting human rights and Mexico: institutional stability/minimal democracy/less prone to prone to protect human rights. The comparative study therefore included two countries characterised as hybrid regimes (Colombia and Mexico) and one country widely recognised as a liberal democracy (Costa Rica).

The second part explained the sampling procedure and the sample size. The determination of the responsiveness of courts involved the analysis of judgments issued by courts in *amparo* proceedings. Accordingly, a simple random sampling was used to select a sample in each country. The sample size for this research consisted of Colombia n= 373 judgments, Costa Rica n= 382 judgments and Mexico n= 382 judgments. Thus, 1,137 judgments were analysed.

The third part described the data collection process and introduced the measurement instruments used. Data were collected from court decisions on *amparo* proceedings, from the public biographies of the judges who were in office during the period of analysis, and from the WB and V-Dem project databases, to collect context indicators and democratic indices, respectively. The literature review informed the design of the measurement instruments.

The fourth part explained the statistical techniques used for the analysis of data. The responsiveness of courts was determined using descriptive statistics. Due to the hierarchical structure of the data, a multilevel analysis was conducted to determine the association between the responsiveness of courts and the internal and external factors to the adjudication process. For the exploratory analysis on the association between the judicial enforcement of human rights and the democratic performance a linear regression was applied. The values of the independent variable were lagged on the assumption that the effects of judicial decisions on human rights do not occur immediately, but over future periods of time.

Finally, the concluding section reflected on the operational problems faced throughout the course of the data collection and analysis. Among others, the design of the measurement instruments was too ambitious and led to problems at the coding stage and, in some cases, judgements or biographies of judges were not available on the courts' website, which led to formal applications to the courts.

Chapter 7. The responsiveness of courts to rights claims *vis-à-vis* democracy

This chapter presents and discusses the findings of the quantitative analyses on the responsiveness of the constitutional courts of Colombia, Costa Rica and Mexico aiming to answer the empirical questions posed by this research, i.e., Have constitutional courts of the third democratic wave been responsive to rights claims? Do internal and external factors of the adjudication process explain the responsiveness of courts to rights claims? and Do courts further democracy by enforcing human rights?

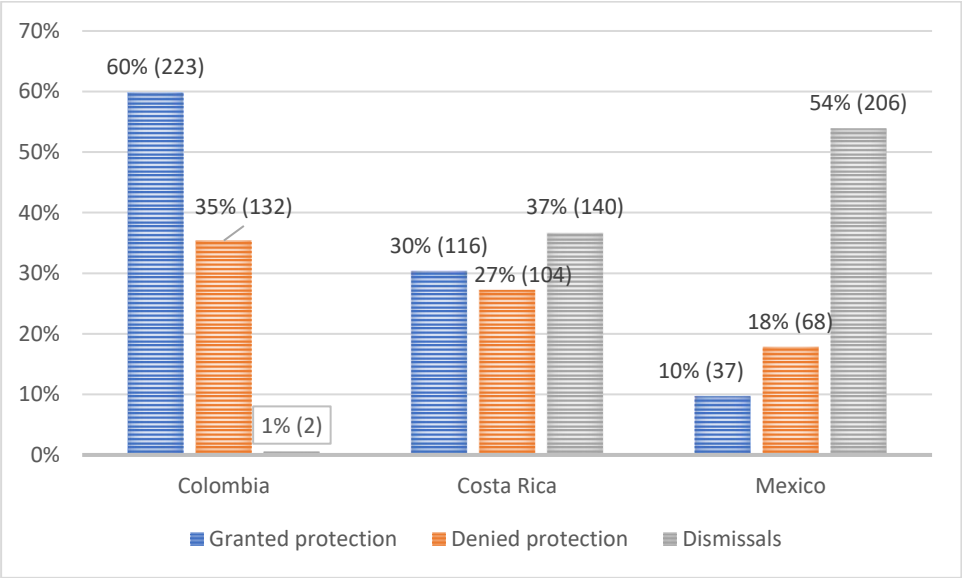
The quantitative analysis was conducted in three stages. The first stage involved determining the responsiveness of three selected courts to rights claims, i.e., whether the courts granted, denied or dismissed rights claims. The second stage consisted of examining whether internal and external factors of the adjudication process may explain the responsiveness of the courts. Finally, the last stage explored whether the judicial enforcement of human rights is associated with democratic performance.

The chapter is consequently organised in three sections. The first section presents the findings in terms of the responsiveness of courts and focuses on cases where courts upheld rights providing an analysis of the judicial reasoning of the judgments. The second section presents the results of the analysis on the association between internal and external factors of the adjudication process and the responsiveness of courts. The last section presents the results of an exploratory analysis on the association between the judicial enforcement of rights and democratic performance. Finally, the concluding section summarises the main findings and reflects on the role of constitutional courts.

7.1. The responsiveness of courts to rights claims

For the purposes of this research, the responsiveness of courts refers to the ability of courts to secure government accountability for social (or other) rights claims. Therefore, in order to determine the responsiveness of the constitutional courts of Colombia, Costa Rica and Mexico it was necessary to distinguish between cases accepted to be decided on their merits and cases rejected on grounds of inadmissibility. Cases accepted to be decided on their merits may result in resolutions granting or denying the protection of human rights. Accordingly, the variable 'Responsiveness' encompasses three categories: granted protection, denied protection and dismissals. Figure 7-1 shows the distribution of the variable 'Responsiveness' in the sample of the three countries, i.e., Colombia n = 357, Costa Rica n = 360 and Mexico n = 311.

Figure 7-1. The responsiveness of constitutional courts.



Source: Own elaboration.

As can be observed in Figure 7-1 the Constitutional Court of Colombia has the highest proportion of cases where protection was granted (60%), followed by the Constitutional Chamber of Costa Rica (30%). In contrast, the Supreme Court of Justice in Mexico has the lowest proportion of cases granted protection (10%) and the highest proportion of cases dismissed (54%).

The degree of variability is greater in Costa Rica (0.8), i.e., cases are distributed more evenly among the three categories of the variable 'Responsiveness'. In Colombia (0.6) and Mexico (0.6), the degree of variability decreases because the vast majority of cases in their samples fall into one category, i.e., granted protection and dismissals, respectively[770].

Accordingly, it can be said that courts respond differently to rights claims. The samples show that the responsiveness of courts to rights claims during the period of analysis was greater in Colombia (hybrid regime) and Costa Rica (democratic regime) where the majority of cases

[770] The variability was calculated using the Index of Qualitative Variation (IQV) which is a single number that expresses the degree of dispersion of cases across the different categories of a variable. The IQV ranges from 0 to 1. An IQV of 0 indicates that the distribution has no diversity at all. An IQV of 1indicates that the distribution is maximally diverse. The formula to calculate the IQV is:

$$IQV = \frac{k(100^2)-\sum Pct^2}{100^2\,(k-1)}$$

Where k = number of categories and $\sum Pct^2$ = the sum of all squared percentages in the distribution.

were accepted to be decided on their merits. In contrast, the Supreme Court of Justice of Mexico (hybrid regime) displayed a tendency to dismiss rights claims.

Before proceeding to the discussion of the cases in which the courts upheld rights claims, a brief analysis is provided regarding the cases reported in Figure 7-1 as 'Dismissals'.

Cases classified under the category 'Dismissals' refer to those that have been rejected on the basis of technical procedural rules without analysing the merits of the case. In the case of Colombia, docket control may explain the scarce number of dismissed cases reported in Figure 7-1. In Colombia, all *tutelas* decided by first instance judges are sent to the Constitutional Court which has discretionary competences to select those to be revised. The two cases reported as 'Dismissals' in Figure 7-1 did not meet the admissibility requirements. In the first case, because according to Article 6(5) of Decree 2591 of 1991, general, impersonal, and abstract acts cannot be challenged through a *tutela* action (T-784/06). In the second case, because according to Article 86 of the Constitution of Colombia, the requirement of immediacy was not met due to the fact that the petitioner waited six years to submit her claim (T-635/04). It is important to note that since the category 'Dismissals' has only two (2) observations in Colombia, it was excluded from the statistical analysis.

In the case of Costa Rica, Figure 7-1 shows that 37% of the cases were dismissed by the court. In Costa Rica, Article 9 of the Constitutional Jurisdiction Act allows the court to reject any manifestly out of order or ill-founded petitions. The court may also reject on the merits, at any time, when it is a mere reiteration or reproduction of a previously rejected petition. In addition, it was found that since the Code of Contentious Administrative Procedure came into force in 2008, the Constitutional Chamber began to reject cases that should be decided by the administrative courts. Most of the cases reported in Figure 7-1 were rejected on the grounds that the claims presented relate to questions of legality that should be decided within the ordinary jurisdiction. It is important to note the pedagogical tone observed in these judgments in explaining the scope of the constitutional jurisdiction and encouraging petitioners to bring their rejected cases before the ordinary courts. A minority of cases were rejected because the alleged facts had been previously decided by the court or because petitioners challenged judicial decisions against which *amparo* proceedings are not applicable.

Figure 7-1 reports that Mexico has the highest percent of cases dismissed (54%). In other words, during the period under analysis, more than half of the *amparo* petitions brought before the Supreme Court of Justice were rejected on the grounds that they did not comply with the

procedural requirements set out in Article 107, section IX, of the Mexican Constitution, Article 83, section V, 86 and 93 of the *Amparo* Law, Article 10, section III, of the Organic Law of the Judicial Power of the Federation and Agreement 5/1999, of 21 June 1999, of the Plenary of the Supreme Court of Justice. That is to say, (1) because in the appeal for review the unconstitutionality of a law or the direct interpretation of a precept of the Constitution was not raised, (2) because the problem of constitutionality did not involve the establishment of a criterion of importance and transcendence in the view of the court, or (3) because the appeal was not presented in due time.

In conclusion, during the period of analysis, Mexico reported the highest rate of dismissals (54%) among the three countries. In Costa Rica, dismissals reached 37% while Colombia reported only two cases equivalent to 1%. Dismissals occur on the basis of procedural rules. All systems have admissibility rules that deserve to be reviewed so that they do not represent an obstacle to the realisation of the right of access to justice.

Rights protected

The ICCPR and the ICESCR[771] were used as a framework to classify rights protected by the constitutional courts of Colombia, Costa Rica and Mexico. Table 7-1 shows rights protected by each court. It should be noted that a single judgment may protect more than one right. This implies that the number of rights protected (RP) is greater than the number of cases reported in Figure 7-1 as 'Granted protection' (GP), i.e., Colombia = 223 GP *vs*. 342 RP, Costa Rica 116 GP *vs*. 138 RP and Mexico 37 GP *vs*. 42 RP.

[771] Both international covenants have been ratified by the three countries, i.e., Colombia in 1969, Costa Rica in 1968 and Mexico in 1981.

Table 7-1. Rights protected by constitutional courts of Colombia, Costa Rica, and Mexico since their establishment in the 90s until 2012.

	Civil and Political Rights							
	Colombia		Costa Rica		Mexico		Total	
	n	%	*n*	%	*n*	%	*n*	%
Physical Integrity	40	12%	1	1%	0	0%	41	8%
Liberty and Security	1	0%	11	8%	8	19%	20	4%
Procedural Fairness in Law	53	15%	56	41%	10	24%	119	23%
Individual Liberty	32	9%	38	28%	1	2%	71	14%
Political Participation	4	1%	0	0%	0	0%	4	1%
Non-Discrimination and Equality	31	9%	2	1%	23	55%	56	11%
Minority Rights	1	0%	0	0%	0	0%	1	0%
Subtotal	162	47%	108	78%	42	100%	312	60%
	Social, Economic and Cultural Rights							
	n	%	*n*	%	*n*	%	*n*	%
Right to Work	40	12%	10	7%			50	10%
Right to Social Security	53	15%	1	1%			54	10%
Protection and assistance to the Family and Children	18	5%	0	0%			18	3%
Right to Adequate Standard of Living	5	1%	0	0%			5	1%
Right to Health	55	16%	16	12%			71	14%
Right to Education	9	3%	3	2%			12	2%
Subtotal	180	53%	30	22%			210	40%
Total	342	100%	138	100%	42	100%	522	100%

Source: Own elaboration.

Overall, the samples show that courts are more prone to protect civil and political rights (60%) than social, economic and cultural rights (40%). However, the degree of variability[772] is greater in Colombia (0.7) because cases are distributed more evenly among the two categories of rights. In Costa Rica (0.4), the degree of variability decreases because the vast majority of cases fall under the category 'Civil and Political Rights' (78%). Mexico has no variation at all because all cases belong to the category 'Civil and Political Rights'.

The broad range of rights protected by courts presented in Table 7-1 proves that *amparo* proceedings have been effective in challenging democratic deficits related to the malfunctioning of institutions responsible for the implementation of the law, i.e., frequent abuse of the law by government officials, low levels of public confidence in state institutions and

[772] The variability was calculated using the IQV.

persistently poor institutional performance of the state. Furthermore, the judicial reasoning of these judgments revealed the ability of courts to articulate the enforcement of (social) rights as instrumental to democracy. The case of IDPs issued by the Constitutional Court of Colombia will be used to illustrate this point.

The problem of forced displacement, which has been affecting Colombia since the 1980s as a consequence of the internal armed conflict, reached the Constitutional Court in 2008. In its paradigmatic decision T-025/2008, the Court declared a state of affairs unconstitutional in this matter[773] and ordered remedies covering not only the petitioners, but also other persons in a situation of forced displacement who had not exercised the *tutela* action. The orders issued by the Court are characterised by their level of detail in pointing out urgent actions as well as short-term and long-term corrective actions, authorities responsible for their execution and time limits[774].

Notably, different authorities have been involved in the execution of the orders issued by the court, such as the Ministry of Finance, the Department of National Planning, the Ministry of Foreign Affairs, the Attorney General and the Ombudsman. The Ombudsman was commissioned to follow up and report on progress and difficulties encountered in the implementation of actions ordered in the judgment.

Another distinctive feature of the judgment T-025/2004 is the introduction of a mechanism for continuous monitoring of compliance. This monitoring has been carried out through public hearings in which public authorities, displaced people and civil society participate. In these

[773] According to the Constitutional Court of Colombia, a state of affairs is unconstitutional when the repeated and constant violation of fundamental rights is found, affecting a multitude of people, and whose solution requires the intervention of different entities to address problems of a structural nature.

[774] *Short-term urgent actions***:** eight days to deliver the humanitarian aid requested and provide guidance on access to other programmes for IDPs; fifteen days to carry out the necessary actions to ensure effective access of IDPs to the health system and guarantee the supply of medicines required for their treatment; one month to carry out the necessary actions to ensure effective access to the education system; two months to evaluate the current situation of IDPs and define the budgetary participation of local, national and international entities and prepare a budgetary contingency plan; three months to design an action plan aimed at correcting deficiencies in institutional capacity and six months to implement actions to ensure that IDPs effectively enjoy the minimum protection of their rights. *Long-term corrective actions***:** organisations representing the IDPs should be allowed to participate in the decision making process and be informed on a monthly basis of the progress achieved; governors and mayors should be instructed to take the necessary budgetary and institutional decisions to guarantee attention to the displaced population in their entities; all authorities should be informed that the filing of a *tutela* action will not be a requirement to access any of the benefits defined in the law and that all public servants are expected to respond in a timely and efficient manner to requests from IDPs, to provide clear and precise information on their fundamental rights, to resolve requests for inclusion in the national registry of displaced persons within a period of no more than eight days and, once their registration has been approved, to provide them with immediate access to assistance for their protection.

hearings, participants discuss solutions to the phenomenon of forced displacement in a deliberative and participatory process and evaluate the progress presented by the authorities.

However, the court's efforts to articulate the protection of IDPs' rights were not sufficient. It was found that in 2008 and 2010 the court reiterated the unconstitutional state of affairs of the displaced people declared in judgment T-025/2004[775]. Throughout the monitoring process, the differential approach and the concept of the effective enjoyment of rights, both present in Judgement T-025 of 2004, were further developed and refined[776].

The differential approach seeks to address the needs of the most vulnerable among the displaced population, i.e., women, children, adolescents, Afro-descendant and indigenous communities. The concept of effective enjoyment of rights was used to address the gap between the legal commitments in favour of IDPs and the resources and institutional capacity allocated to support them. As a result, in 2008 a set of indicators, developed with the involvement of the displaced population, was adopted to measure the effective enjoyment of rights of IDPs. After three assessments based on these indicators, the Court concluded that, with the exception of the health component, the circumstances that led to the declaration of the unconstitutional state of affairs in 2004 still persist.

The Court recognised that T-025/2004 landmark decision has contributed to unblocking public policy on assistance to the displaced population, establishing budgetary allocations and raising awareness on the grave situation of IDPs by introducing it into the public agenda and generating an understanding of it as a violation of rights. Furthermore, the Court considers that this judgment has contributed to judges' recognising themselves as key actors in promoting social transformation[777].

The approach used by the Constitutional Court of Colombia in the IDPs case was also found in other cases in the sample. For instance, in the case of the prisons (T-690/10), the Court ordered to design a plan with objectives, strategies, actions and a schedule of activities to reduce the health and hygiene problems found during an inspection visit. The Municipal Health Department was the authority designated by the court to supervise compliance with the judgment, i.e., to conduct an inspection visit and submit a progress report to a judge of first instance. In the case of street vendors (T-772/03), the Court ordered the Popular Vending Fund

[775] See judgements T-156/2008 and T-284/2010.
[776] See Corte Constitucional de Colombia. (n.d.). Proceso de seguimiento 10 años. Retrieved May 2, 2021, from https://www.corteconstitucional.gov.co/T-025-04/Proceso de Seguimiento 10 años.pdf
[777] Ibidem.

to grant representatives of informal vendors the opportunity to actively participate in the evaluation of public policies for the recovery of public spaces to ensure that such policies were preceded by an analysis of their social and economic situation.

The Constitutional Chamber of Costa Rica also sets strict deadlines and its judgments are characterised by orders requesting the corresponding authorities to take the necessary measures within their competence to comply with the judgment[778]. For instance, regarding the right to health the Court has held that those in charge of clinics and hospitals cannot invoke the problem of waiting lists for surgeries and medical examinations or the lack of financial, human and technical resources to justify deficient and precarious attention to patients, as they have a constitutional duty to adopt and implement organisational changes, hire medical or auxiliary staff and acquire the necessary materials and technical equipment to provide public health services with efficiency, effectiveness, continuity, regularity and celerity.

Courts have cautiously addressed the concern that in an attempt to guarantee the rights of vulnerable groups courts end up imposing fiscal pressures and establishing budgetary priorities that are the responsibility of democratically elected governments[779]. Authorities were asked to define their budgetary involvement and to take the necessary institutional and budgetary measures to comply with the judgements. In case of lack of resources, they are given a reasonable period to apply for them. For example, cases reported in Table 7-1 under the category 'Right to work' in Colombia that are related to long periods of unpaid wages or pensions illustrate this point. In these cases, the specification of the amount and due date of payment is followed by the phrase 'provided there is budgetary provision available'. In the event that there is no budget available to comply with the judicial orders, authorities are required to initiate the corresponding procedures to obtain resources and inform a first instance judge who will be in charge of monitoring compliance with the judgment[780].

In sum, the findings show that the constitutional courts of Colombia, Costa Rica and Mexico have been responsive to rights claims, even though to a different extent in each country. The Constitutional Court of Colombia has been more prone to protect social rights while the Constitutional Chamber of Costa Rica has preserved a balance in the protection of both civil

[778] See, among others, RA 02070-2008, RA 05945-2004, RA 018707-2010 and RA 011002-2012.
[779] See Sieder, R., Schjolden, L., & Angell, A. (2005), *op. cit.*, pp. 8-9.
[780] See, among others, T-326/01; T-606/95, SU-484/08, T-466/01, T-816/03 and T-965/01.

and political rights and social rights. In Mexico, the sample revealed that the Supreme Court of Justice has protected only civil and political rights.

Discussion

According to Gloppen, the responsiveness of courts is conditioned, among others, by the legal framework, i.e., the nature of the legal system, the composition of the court and the legal opportunity structure -rules of standing, procedural requirements and costs[781].

In order to address the analysis of the findings in terms of the legal framework of courts as suggested by Gloppen, the discussion of the rationale for the creation of constitutional courts in Colombia, Costa Rica and Mexico, presented in Chapter 5 sheds light on the vision of the countries and their commitment to the protection of human rights. For instance, the Constitutional Court of Colombia emerged within a context marked by unfortunate violent events that prompted the drafting of the 1991 constitution. The Constituent Assembly was set up with a two-fold purpose: to promote participatory democracy and to strengthen state institutions, especially the judiciary. To this aim, the 1991 Constitution incorporated a broad catalogue of rights and created new mechanisms, *tutela* among others, and institutions of constitutional control, such as the constitutional court.

In the case of Costa Rica, the Constitutional Chamber is the culmination of a constitutional reform that took place after a long process of reflection on the need to strengthen Costa Rican democracy by enhancing the protection system of human rights. The creation of the Constitutional Chamber as a specialised chamber within the Supreme Court was accompanied by the enactment of the Constitutional Jurisdiction Act in 1989. Anecdotal evidence revealed that the first generation of constitutional judges assigned themselves the task of raising society's awareness of the fact that the main goal of the Court was to protect their rights.

In Mexico, the emergence of the Supreme Court of Justice as a constitutional court took place in the midst of a social, political and economic crisis. The 1994 constitutional reform sought to consolidate the Court as a constitutional court by endowing it with the power to abstract review of constitutionality and reforming its composition and the judges' appointment procedure. However, *amparo* proceedings, a well-established institution in the Mexican legal system for the protection of fundamental rights, whose law dates back to 1936, was not discussed during

[781] See Gloppen, S. (2006), *op. cit.,* p. 49 and Gloppen, S. (2008). Litigation as a strategy to hold governments accountable for implementing the right to health, *op. cit.*, 21–36.

the 1994 judicial reform. It was not until 2011 that the constitutional reform on human rights was carried out and until 2013 that a new regulation on *amparo* proceedings was approved.

This brief overview of the reasons for the establishment of the courts shows that in Colombia and Costa Rica the institutional commitment to human rights is reflected in the fact that new procedural rules for the adjudication of human rights entered into force. In Mexico, however, the 1994 constitutional reform that introduced the judicial review did not discuss or modify the 1936 *Amparo* Law.

The results presented in Table 5-3 showing that Mexico (0.77) ranks higher than Colombia (0.70) and Costa Rica (0.62) with respect to the *de jure* judicial independence contrast with the results for the responsiveness of courts that exhibit Colombia and Costa Rica as highly responsive courts. Therefore, the analysis of the institutional framework of the courts and the legal framework of *amparo* proceedings presented in Chapter 5 will be used to identify the aspects that stand out in countries that reported greater responsiveness to rights claims.

The selected constitutional courts operate under different systems of constitutional jurisdiction, resulting in procedural implications for *amparo* proceedings. For instance, Colombia has a diffuse system of review, in which any judge has jurisdiction to decide on *tutela* cases, Costa Rica has a concentrated system in which the Constitutional Chamber has exclusive jurisdiction to hear cases of *amparo* and *habeas corpus* as well as abstract review while in Mexico, diffuse control coexists with concentrated control of constitutionality. Local judges must guarantee the effectiveness of the principle of constitutional supremacy, but only federal courts are vested with jurisdiction to rule on *amparo* proceedings. The Supreme Court of Justice may review rulings issued by federal judges.

The three countries also differ in terms of the appointment procedure and tenure of their constitutional judges. Colombia opted for a shared system of appointment. Magistrates are elected by the Senate for individual periods of eight years, from shortlists of three candidates submitted by the president, the supreme court and the council of state. Costa Rica has an appointment system led by the parliament. The term in office is limited to eight years; however, judges can be reappointed for a second term. Mexico has a collaborative appointment procedure. The President submits a list of candidates to the Senate, which is the appointing body. Constitutional judges serve for a single fifteen-year term.

This suggests that a shared model of judicial selection with a limited term of office without the possibility of re-election seems to favour a more responsive court, as illustrated by the case of

the Constitutional Court of Colombia. According to Morlino & Sadurski[782], where more than two organs are involved in the appointment procedure, a greater degree of independence is expected than in cases where only one organ fills the appointments. The case of Costa Rica, whose system of appointing judges is led by the Legislative Assembly, seems to contradict the literature since the findings of the empirical analysis show the ability of the court to be responsive to rights claims.

Although the institutional and legal framework differs in the three countries, it was found that Colombia and Costa Rica, countries that exhibited greater responsiveness to rights claims, have a legal opportunity structure, a characteristic that was not observed in Mexico. For instance, in Colombia and Costa Rica the legislation provides that *amparo* proceedings may be filed not only against acts of authority but also against acts of non-state actors and establishes a procedure free of formalities. In contrast, in Mexico, *amparo* proceedings may only be filed against acts of authority and its procedure is complex and subject to strict rules, which is why a specialised lawyer is required. This renders *amparo* proceedings expensive and inaccessible to the population at large. Moreover, the analysis of the *de jure* judicial independence presented in Chapter 5 showed that Mexico scored low on the 'Accessibility of the court and its ability to initiate proceedings' (see Table 5-3).

The above analysis suggests that the performance of courts is not related to the model of constitutional jurisdiction adopted. However, a legal framework that provides for a legal opportunity structure seems to favour the responsiveness of courts to rights claims. Arguably, the rules of admissibility and procedure play a key role in understanding the responsiveness of the courts because they materialise the right to an effective remedy by competent national courts against acts that violate fundamental rights granted by the constitution or the law[783]. This supports the claim of Cepeda-Espinosa, a former judge of the Constitutional Court of Colombia, that the success of this court to protect human rights is due to its institutional design that allows broad access to justice and procedures free of formalism[784].

In sum, the nature of the legal system and the composition of the courts appear to be less relevant to the responsiveness of courts, while the legal opportunity structure seems to be a significant element in the judicial enforcement of human rights.

[782] See Morlino, L., & Sadurski, W. (2010), *op. cit*., pp. 9-10.
[783] See Article 8, Universal Declaration of Human Rights.
[784] See Cepeda-Espinosa, M. J. (2005), *op. cit*., p. 98.

The debate now shifts to the ability of courts to adjudicate democratic deficits. Carothers argues that hybrid regimes suffer from serious democratic deficits, including poor representation of citizens' interests, low levels of political participation beyond voting, frequent abuse of the law by government officials, elections of uncertain legitimacy, very low levels of public confidence in state institutions and persistent institutional malfunctioning of the state[785].

The findings show that *amparo* proceedings have been used to challenge democratic deficits, such as frequent abuse of the law by government officials (cases where courts protected the right to physical integrity), very low levels of public confidence in state institutions (cases where courts protected procedural fairness in the law) and persistently poor institutional performance (cases where courts protected the right to health and social security). A systematic denial of human rights is at the root of these democratic deficits as governments have failed or only partially fulfilled their obligation to protect the rights enshrined in constitutions and international treaties.

If democratic deficits can be challenged via *amparo* proceedings, it can be said that it works as a mechanism of democratic correction, to the extent that the judicial protection of human rights serves to limit the malfunctioning of the democratic process by disqualifying collective decisions that neglect them, as Nino has suggested[786].

According to Nino[787], once a certain threshold is passed, democracy corrects and improves itself. However, below the threshold courts, as guardians of the democratic process, have to guarantee that the rules of the democratic process and the conditions for debate (enjoyment of rights) and decision-making are observed. From this viewpoint, judicial activism is justified to the extent that rights give epistemic value to the democratic process.

Nino does not clarify where the democratic threshold lies to justify the judicialization of (social) rights. However, the analysis of the judgments presented above suggests that the constitutional courts of Colombia and Costa Rica have activated the democratic correction mechanism by placing limits on a systematic neglect of minimum rights. Meticulously, these courts have identified structural problems and in doing so have demonstrated that the distributive threshold[788] for the democratic system to correct itself has not been reached. Their intervention

[785] See Carothers, T. (2002), *op. cit*., pp. 9-10.
[786] See Nino, C. S. (1996), *op. cit*., quoted by Oquendo, Á. R. (2002). Deliberative Democracy in Habermas and Nino, *op. cit*., p. 196.
[787] See Nino, C. S. (1993), *op. cit.*, p. 835.
[788] See Linares, S. (2008), *op. cit.*, 149–186. Linares, elaborating on Nino's democratic threshold, suggests that judicial review (on social rights) is fully justified in those societies where the distribution patterns are unequal.

is therefore justified. Importantly, once the democratic threshold has been reached, Nino advices that courts should refrain from intervening in the distribution of resources through the judicialization of social rights[789].

However, if necessary, the judicial enforcement of social rights should not inhibit the debate on the optimal allocation of resources. The Constitutional Court of Colombia not only issued measures to protect the rights of the petitioners, but also determined that in order to remedy the unconstitutional state of affairs it was necessary to allocate resources. Consequently, the allocation of budgetary resources was left to the competent authorities. When the court observed that the judgment was not being implemented, it developed the concept of effective enjoyment of rights to address the gap between legal commitments and adequate resources and institutional capacity to support them. This jurisprudential tool was useful in generating indicators to measure the effective enjoyment of IDPs' rights.

This debate leads to rethinking the role of constitutional courts as democratic catalysts[790]. Both horizontal and vertical judicial review can be seen as mechanisms of democratic correction. As for vertical review exercised through *amparo* proceedings, which is the focus of this research, it can be said that the effectiveness of this legal instrument to challenge democratic deficits lies precisely in judges assuming the dual task of deciding individual cases and, simultaneously, promoting a course of action to improve the epistemic quality of the democratic system, as Nino points out[791]. The case of IDPs (Colombia) also illustrates the ability of courts to adjudicate social rights and at the same time promote actions that improve the epistemic quality of democracy.

The IDPs case in Colombia shows that constitutional judges are able to issue individual judgments regarding specific claims and, at the same time, order remedies covering not only petitioners, but also other persons in a situation of forced displacement who did not file a *tutela* action. The ruling went one step further by designing an action plan with short-, medium- and long-term measures to address the phenomenon of forced displacement involving different authorities. In addition, it established a continuous monitoring mechanism based on public hearings in which participation and dialogue between IDPs and State authorities has been

[789] See Nino, C. S. (1993), *op. cit.*
[790] The term 'catalyst' is borrowed from Young. She argues that courts should aim to play a 'catalytic role' to empower civil society groups in contexts where they have historically been weak. See Young, K. G. (2010). A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review. *International Journal of Constitutional Law, 8*(3), 385–420 quoted by Landau, D. (2014). A Dynamic Theory of Judicial Role. *Boston College Law Review, 55*(4), p. 1537.
[791] See Nino, C. S. (1997), *op. cit.*, pp. 274-277.

privileged. This type of measures is what Gargarella[792] refers to as deliberative alternatives through which judicial intervention is prevented from contravening the principle of the separation of powers.

Has the Constitutional Court of Colombia improved the quality of the democratic system? According to the Constitutional Court of Colombia, the T-025/2004 ruling has succeeded in unblocking the public policy of assistance to displaced persons by introducing it into the public agenda and has generated an understanding of the phenomenon of forced displacement as a human rights violation. In addition, it has resulted in judges perceiving themselves as agents of social change. Therefore, it can be said that the court has contributed to fostering a culture of respect for human rights, participation, accountability and dialogue, i.e., essential values in more than one model of democracy. It is in this context that Landau's dynamic theory of the judicial function, suggesting that the exercise of the judicial power in emerging democracies should be evaluated for its contribution to empowering civil society, disseminating constitutional values and improving democratic institutions, makes sense[793].

The success of constitutional courts as democratic catalysts lies not only in their ability to decide rights claims at the individual level, but also in identifying whether there is a structural problem underlying the petitioner's claim rooted in a systematic violation of human rights. If this is the case, courts are expected to adopt a deliberative approach and issue appropriate measures to prevent further human rights violations, to pave the way for a public discussion, led by the other branches of government, with the participation of those affected and civil society, and to implement a monitoring system for compliance with the judgement open to public scrutiny.

This echoes with Habermas's proposal to reinterpret the courts from a deliberative perspective, which implies assuming the constitution as an ongoing process of constitution-making and having responsive judges.

According to Habermas[794], conceiving the constitution as an ongoing process of constitution-making that continues across generations contributes to understanding the role of constitutional courts and constitutional judges as agents that foster the interaction with the public at large. From this point of view, the democratic legitimacy of the courts would no longer be questioned,

[792] See Gargarella, R. (2006), *op. cit.*
[793] See Landau, D. (2014), *op. cit.*, p. 1562.
[794] See Habermas, J. (2001), *op. cit*., pp. 768-769.

as they are relieved of the burden of having 'the last word' and turn from being counter-majoritarian institutions into catalysts of the democratic process.

Similarly to Nino, Habermas imposes certain tasks on constitutional judges, based on Michelman's description of the American Justice Brennan. Thus, a responsive judge can be described as '(…) *a liberal* who defends individual liberties in strongly moralistic terms; *a democrat* who radicalizes rights of political participation and wants to give a hearing to the voiceless and marginalized as well as to the deviant and oppositional voices; *a social democrat* who is highly sensitive to questions of social justice; and *a pluralist* who going beyond the liberal understanding of tolerance, pleads for politics open to difference and to the recognition of cultural, racial, and religious minorities.'[795] From this point of view, it is assumed that judges have the ability to enforce the rights inherent in different democratic models, suggesting that the democratic process is in good hands and therefore the democratic legitimacy of judges should not be doubted.

In sum, the discussion of the findings on the responsiveness of courts to rights claims in the light of the normative proposals of Nino, Habermas, Landau and Gargarella leads to support a paradigm shift in the role of constitutional courts as democratic catalysts.

The challenges facing democracy, namely the emergence of hybrid regimes that are in the process of devolving into autocracies, call for a reinterpretation of liberal institutions. So far, the arguments of the proponents of deliberative democracy are the most convincing. Moreover, this research has shown that courts can be used to challenge democratic deficits, contribute to improving the quality of the democratic process and bring about cultural change through the enforcement of rights and the development of deliberative alternatives.

Based on these reflections, an association between the judicial enforcement of rights and democratic performance can be expected to be found. Section 7.3 reports the findings of an exploratory study on the relationship between successful litigation of rights and democratic performance.

7.2. Internal and external factors *vs* the responsiveness of courts to rights claims

The empirical analysis of the judgments issued in *amparo* proceedings shows that the constitutional courts of Colombia, Costa Rica and Mexico behave differently when deciding human rights claims. A strong commitment to the protection of human rights was found in

[795] Ibidem. Italics are added to emphasize how Michelman characterizes Brennan as a responsive judge.

Colombia and Costa Rica. By contrast, the findings in Mexico displayed a high rate of dismissed cases. These results raise the question of whether internal or external factors of the adjudication process contribute to explaining the differences found in the responsiveness of courts to rights claims.

The internal factors defined by this research are the socio-demographic characteristics of plaintiffs (type, gender, age and resources) and the personal attributes (gender and age) and professional background of judges (academic degree, judicial career and studies abroad). The external factors were approached through country indicators such as the Gross Domestic product, the GINI coefficient, rates of Poverty and Extreme Poverty and governance indicators such as Political Stability and Absence of Violence, Rule of Law and Control of Corruption.

A logistic regression was used to understand whether the Responsiveness of courts (dependent variable) can be predicted based on the 16 internal and external factors (independent variables) defined by this research. For Costa Rica and Mexico, a multinomial logistic regression was performed because the dependent variable 'Responsiveness' consists of three categories, i.e., Granted protection, Denied protection and Dismissals. In the case of Colombia, a binary logistic regression was used since the dependent variable 'Responsiveness' excludes the category 'Dismissals' because it had only two observations.

It should be noted that an important feature of the multinomial logistic model is that it estimates *k*-1 models, where *k* is the number of levels of the outcome variable. The category 'Granted protection' was treated as referent group and therefore two models were estimated, i.e., a model for Denied protection relative to Granted protection and a model for Dismissed a case relative to Granted protection.

Importantly, the Wald test (Wald statistic column in Table 7-2 and Table 7-3) was used to determine statistical significance for each of the independent variables. The statistical significance of the Wald test can be found in the *p* column. The information presented in these tables can be used to predict the probability of courts enforcing rights (Granted protection) based on a one unit change in an independent variable when all the other independent variables are kept constant. Table 7-2 reports the coefficients of the independent variables that were found to be statistically significant in the bivariate analysis only regarding Colombia and Mexico. The bivariate analysis did not report statistically significant coefficients in Costa Rica (see Table J-1. Bivariate analysis. Costa Rica in Appendix J).

Table 7-2. The responsiveness of courts *vis-à-vis* internal and external factors of the adjudication process. Bivariate analysis. Colombia and Mexico.

	B	SE	OR	95% CI	Wald statistic	*p*	*HBM*
			Colombia[1]				
Granted protection vs Denied protection							
PL_RESOURCES (Have-nots vs Haves)	1.186	.403	3.273	[1.485; 7.210]	8.655	.003	0.003
			Mexico				
Dismissed a case vs Granted protection							
PL_TYPE[2] (ORGANISATIONS)	-1.344	.369	.261	[.126; .538]	13.243	.000	0.004
PL_RESOURCES[3] (HAVE-NOTS)	1.463	.492	4.317	[1.646; 11.321]	8.842	.003	0.004
J_GENDER [4] (MALE)	2.475	.503	11.880	[4.429; 31.863]	24.172	.000	0.004
J_ACADEMIC_BACK[5] (POSTGRADUATE DEGREE)	-1.115	.365	.328	[.160; .671]	9.328	.002	0.004
J_STUDIES_ABROAD[6] (NO)	1.520	.530	4.573	[1.617; 12.933]	8.216	.004	0.005
J_AGE[7]	.097	.025	1.102	[1.050; 1.157]	15.466	.000	0.004

Note: B: Beta coefficient; SE: Standard Error; OR: Odds Ratio; CI: Confidence Interval; *p*: probability value; HBM: Holm-Bonferroni Method.
1= Model χ^2 (2) = 10.422, p = .005;. R^2= .029 Cox & Snell, .039 Nagelkerke; 2= Model χ^2 (2) = 27.117, p < .000;. R^2= .084 Cox & Snell, .102 Nagelkerke; 3= Model χ^2 (2) = 32.485, p < .000;. R^2= .116 Cox & Snell, .138 Nagelkerke; 4= Model χ^2 (2) = 24.188, p < .000;. R^2= .075 Cox & Snell, .091 Nagelkerke; 5= Model χ^2 (2) = 14.976, p = .001;. R^2= .047 Cox & Snell, .028 Nagelkerke; 6= Model χ^2 (2) = 18.462, < = .000;. R^2= .058 Cox & Snell, .070 Nagelkerke; 7= Model χ^2 (2) = 24.911, p < .000;. R^2= .077 Cox & Snell, .094 Nagelkerke.
Source: Own elaboration.

Table 7-2 shows that only some internal factors proved to be statistically significant in Colombia and Mexico. This implies, on the one hand, that external factors are not explanatory of the responsiveness of courts in the three countries analysed. On the other hand, in Costa Rica (democratic regime) neither internal nor external factors are associated with the responsiveness of its Constitutional Chamber.

In the case of Colombia, logistic regression was helpful in determining the effects of Plaintiffs' resources (PL_RESOURCES) on the likelihood of obtaining a judgment that grants rights protection. The logistic regression model was statistically significant, $X^2(2) = 10.422$, $p < .05$. The model explained 39% (Nagelkerke R^2) of the variance in obtaining a decision granting protection and correctly classified 65% of the cases. Plaintiffs classified in the 'Have nots' category were 3.27 times more likely to obtain a decision granting protection than plaintiffs classified as 'Haves'. In sum, plaintiffs with low or no resources at all are more likely to be protected by the Constitutional Court of Colombia than those with high incomes.

In the case of Mexico, statistically significant coefficients were found only for the model that compares 'Dismissed a case' relative to 'Granted protection'. Some characteristics of plaintiffs and judges were found to be explanatory of the responsiveness of the Supreme Court.

Type of plaintiff (PL_TYPE). For organisations relative to individuals, the relative risk of being dismissed rather than being protected is expected to decrease by a factor of 1/.261 = 3.83, given that the other variables in the model are held constant. In other words, organisations are more likely to be granted protection than individuals.

Plaintiffs' resources (PL_RESOURCES). For 'Have-nots' relative to 'Haves' the relative risk of being dismissed rather than being protected is expected to increase by a factor of 4.31, given that the other variables in the model are held constant. In other words, the 'Haves' are more likely to be granted protection that the 'Have-nots'.

Judge's gender (J_GENDER). For male judges relative to female judges, the relative risk of drafting a judgment dismissing a case rather than granting protection is expected to increase by a factor of 11.88, given that the other variables in the model are held constant. In other words, female judges are more likely to draft judgments granting protection to rights claims.

Judge's academic background (J_ACADEMIC_BACK). For judges with a postgraduate degree relative to judges with a bachelor's degree, the relative risk of drafting a judgment dismissing a case rather than granting protection is expected to decrease by a factor of 1/.328 = 3.04, given that the other variables in the model are held constant. In other words, judges with a postgraduate degree are more likely to draft judgments granting protection to rights claims.

Judge's studies abroad (J_STUDIES_ABROAD). For judges that were not trained abroad relative to judges that were trained abroad, the relative risk of drafting a judgment dismissing a case rather than granting protection is expected to increase by a factor of 4.57, given that the other variables in the model are held constant. In other words, judges that were trained abroad are more likely to draft judgments granting protection to rights claims.

Judge's age (J_AGE). If the age of a judge increase by one unit, the relative risk for drafting a judgment dismissing a case rather than granting protection would be expected increase by a factor of 1.10 given the other variables in the model are held constant. More generally, it can be said that younger judges are more likely to draft judgments granting protection to rights claims.

A multinomial logistic regression was performed to determine the unique contribution of the internal factors, identified as statistically significant through the bivariate analysis, to the responsiveness of the Supreme Court of Justice of Mexico. See Table 7-3.

Table 7-3. Internal factors *vs*. Responsiveness. Mexico

	B	SE	OR	95% CI	Wald statistic	*p*
Denied protection vs Granted protection						
J_GENDER (MALE)	2.033	0.0706	7.635	[1.914; 30.452]	8.295	.004
Dismissed a case vs Granted protection						
J_GENDER (MALE)	2.019	0.671	7.529	[2.020; 28.064]	0.043	0.003

Note: B: Beta coefficient; SE: Standard Error; OR: Odds Ratio; CI: Confidence Interval; *p*: probability value. Model χ^2 (14) = 62.504, $p < .000$;. R^2= .212 Cox and Snell, .252 Nagelkerke.
Source: Own elaboration.

The results of the multinomial logistic regression analysis show a reduction in the number of independent variables. The variable 'Gender of judges' (J_GENDER) was found to be the only internal factor statistically significant in both the models, i.e., 'Denied protection' vs. 'Granted protection' and 'Dismissed a case' vs. 'Granted protection'. Findings confirm that in Mexico the probability of being protected increases if the judgment is drafted by a female judge.

Denied protection vs Granted protection. Judge's gender (J_GENDER). For male judges relative to female judges, the relative risk of drafting a judgment denying protection rather than granting protection is expected to increase by a factor of 7.6, given that the other variables in the model are held constant. In other words, male judges are more likely to deny protection.

Dismissed a case vs Granted protection. Judge's gender (J_GENDER). For male judges relative to female judges, the relative risk of drafting a judgment dismissing a case rather than granting protection is expected to increase by a factor of 7.5, given that the other variables in the model are held constant. In other words, male judges are more likely to dismiss a case.

At this stage, the results of the statistical analysis indicate that the *Have-nots* are more likely to succeed in human rights litigation in Colombia, while in Mexico chances of being protected increase if the judgement is drafted by *a* female judge. However, the data have a two-level hierarchical structure with a dichotomous and polytomous dependent variable[796], in which judgements are nested within judges, i.e., judgments drafted by the same judge are likely to be

[796] The dependent variable 'Responsiveness' has two categories in Colombia (granted protection and denied protection) and three categories in Mexico (granted protection, denied protection and dismissed a case).

related to each other. The nesting of judgments in judges leads to correlated observations (a dependency among the data) and the possibility of downwardly biased estimates of the standard errors associated with the regression coefficients[797]. The next step therefore consisted of model the covariation within judges by including the hierarchical structure of the data in the analysis.

The data has one variable at the plaintiffs-level (Colombia) and two variables at the judges-level (Mexico)[798]. The plaintiffs-level variable is a categorical measure of plaintiffs' resources (PL_RESOURCES, 0= Have-nots; 1= In between and 2= Haves). The judges-level variables are a categorical measure of the gender of judges (J_GENDER, 0= Male and 1= Female) and whether their academic training includes studies abroad (J_STUDIES_ABROAD, 1= No and 2= Yes).

The Procedure for Generalized Linear Mixed Models (PROC GLIMMIX) was used to investigate the impact of certain plaintiffs- judges-level variables on the responsiveness of courts to rights claims. Therefore, using plaintiffs- judges-level data (level-1) and the ID judge data (level-2) a two-level hierarchical model was built to investigate the relationship between the responsiveness of courts and predictor variables at all levels.

The model building process starts with a baseline model that includes only the intercept; next, a model is fitted that allows the intercepts to vary across contexts (in this case, the intercepts are intended to vary across judges); to build the final model, predictors and interactions between predictors (if relevant) are added; finally, a comparison is made between these models to see if the fit has improved as a result of allowing the intercepts to vary.

To assess whether allowing the intercepts to vary improves the model, the Akaike Information Criterion (AIC) and the Bayesian Information Criterion (BIC) indices were compared. Smaller values of the BIC indicate a better fit of the data, i.e., allowing the intercepts to vary has improved the fit of the model. Table 7-4 summarizes the outputs of the models estimated for Colombia and Mexico.

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[797] See O'Dwyer M., L., & Parker, C. E. (2014), *op. cit.*

[798] When running a multinomial logistic regression, it is necessary to identify which category of the dependent variable will be taken as the reference category. As mentioned above, within the three categories of the dependent variable 'Responsiveness', the category 'Granted protection' was used as a reference group. It is the category that is the most logical one to use as this research focuses on cases where human rights litigation was successful. However, as a general rule, frequency is used to inform the selection of the reference category. Thus, the category with the highest frequency is used as the reference group. In the case of Mexico, the category with the highest number of observations is 'Dismissals'. A second multinomial logistic regression was carried out considering 'Dismissals' as the reference category. The results indicate that J_GENDER and J_STUDIES ABROAD variables were statistically significant in explaining the responsiveness of the court in Mexico (See Appendix K). Thus, the variable J_STUDIES ABROAD was included for the multilevel analysis.

Table 7-4. Estimates for Two-Level Generalized Linear Models of the Responsiveness of the Constitutional Court of Colombia and the Supreme Court of Justice of Mexico.

	Model 1	Model 2[a]	Model 3	Model 4	Model 5
Colombia					
Fixed effects					
Intercept	-0.51* (0.12)	-0.68* (0.14)			
PL_RESOURCES		0.59* (0.18)			
Error Variance					
Level-2 intercept ID_JUDGE	0.05 (0.10)	0.64 (0.11)			
Model fit					
AIC	472.18	463.69			
BIC	474.99	467.90**			
Mexico					
Fixed effects					
Intercept (DIS)	0.77* (0.34)	0.05 (0.93)	1.00* (0.34)	0.82 (1.02)	0.33 (1.35)
Intercept (GP)	-0.63* (0.23)	0.54 (0.48)	-0.58* (0.26)	1.17 (0.64)	1.25 (0.80)
J_STUDIES_ABROAD (DISS/Yes)			-1.37 (0.84)	-1.32 (0.87)	-0.37 (1.79)
J_STUDIES_ABROAD (GP/Yes)			-0.24 (0.58)	-1.08 (0.66)	-1.25 (1.02)
J_GENDER (DIS/Male)		0.80 (0.99)		0.20 (1.02)	0.73 (1.39)
J_GENDER (GP/Male)		-1.43* (0.53)		-1.94* (0.65)	-2.05* (0.84)
ID_JUDGE (DISS)					
ID_JUDGE (GP)					
J_GENDER*J_STUDIES ABROAD (DIS/Yes/Male)					-1.28 (2.04)
J_GENDER*J_STUDIES ABROAD (GP/Yes/Male)					0.44 (1.31)
Error Variance					
Level-2 intercept ID_JUDGE/DISS	1.40 (0.64)	1.16 (0.55)	1.13 (0.55)	1.00 (0.50)	0.95 (0.48)
Level-2 intercept ID_JUDGE/GP	0.10 (0.26)		0.12 (0.27)		
Model fit					
AIC	488.84	481.23	490.38	480.99	484.30
BIC	492.62	485.95**	496.04	487.60	492.80

Note: * $p < .05$; **= significant decrease in BIC; Values based on SAS PROC GLIMMIX. Entries show parameter estimates with standard errors in parentheses; Estimation Method = Maximum Likelihood.
[a]Best fitting model.
Source: Own elaboration.

According to the BIC rules, Model 2 is the best fitting model in both countries. In the case of Colombia, Model 2 shows that the variable 'Plaintiffs' resources' (PL-RESOURCES) is a significant predictor of successful rights litigation.

In the case of Mexico, Model 2 shows that the variable 'Gender of judges' (J_GENDER) proved to be the only predictor statistically significant to explain the responsiveness of the Supreme Court of Justice. The parameter estimate for 'J_GENDER (GP/Male)' is significant and negative (b = -1.43; p < .05), indicating that the likelihood of being granted protection is lower if the judge who drafts the judgement is male.

Once adjustments have been made to the logistic regression model to account for the statistical dependence introduced by nesting, the results can be interpreted without fear of downward biased estimates of standard errors.

- In Colombia (hybrid regime), the statistical analysis revealed that the socio-demographic condition of plaintiffs (internal factor) explains the responsiveness of the constitutional court. It was found that the 'Have-nots' are 1.3 times more likely to be granted protection by the Constitutional Court of Colombia than the 'Haves'.
- In Mexico (hybrid regime), the gender of the judges (internal factor) was found to be explanatory of the responsiveness of the Supreme Court. It was found that if the judgment is drafted by a male judge, the probability of obtaining a denied *amparo* judgment is multiplied by 7.6 and the probability of having the petition dismissed is multiplied by 7.5. This suggests that female judges are more likely to draft judgments granting protection of rights than their male counterparts.
- In Costa Rica (democratic regime), neither internal nor external factors were found to be statistically significant in explaining the responsiveness of its Constitutional Chamber.

Discussion

External factors

Scholars have argued that institutional, social, political and economic forces, as well as democratic challenges affect judicialization. For instance, McNollgast found that generation-long eras of stability in judicial doctrine in the United States reflect an underlying stability in the electoral and partisan areas[799]. This finding has been confirmed by Roe and Siegel who found that courts cannot function well in an unstable political environment[800]. However, the results of this research suggest that there is no evidence to accept the hypothesis that external factors are associated with the responsiveness of constitutional courts to rights claims. More

[799] See McNollgast. (1995), *op. cit*, p. 1656.
[800] See Roe, M. J., & Siegel, J. (2011), *op. cit.*, p. 280.

specifically, in Colombia, Costa Rica and Mexico, external factors such as economic growth, inequality, poverty and extreme poverty, political stability and absence of violence, rule of law and corruption proved not to be statistically significant in explaining the responsiveness of constitutional courts. However, some reflections emerging from the interpretation of the findings on the relationship between internal and external factors and the responsiveness of courts are worth noting.

On the one hand, the variability found in the responsiveness of the Constitutional Chamber in Costa Rica may be interpreted in light of McNollgast's political stability argument, i.e., that stability in judicial doctrine reflects underlying stability at the electoral and partisan level. This is based on the assumption that it is a theory that was developed to explain the behaviour of courts in democratic regimes. In turn, this would imply that the phenomenon of courts and democracy in democratic regimes should be explored the other way around, i.e., considering democracy as the independent variable and the responsiveness of courts as the dependent variable.

On the other hand, the case of Colombia illustrates that the economic, political, social and security crises that have affected this country since the 1990s, have not prevented the Court from being responsive to (social) rights claims. This may suggest that theories developed to explain the behaviour of courts established in democratic regimes, such as the United States or some Western European countries, are not useful when aiming to explain the behaviour of courts established in third wave democratic countries, characterised as hybrid regimes, as Landau[801] has argued.

In addition, it seems that the phenomenon of violence, far from being an inhibiting factor, increased the sensitivity and capacity of Colombian judges to connect with the most disadvantaged groups in society and prompted the Court to play a leading role in the protection of human rights. Accordingly, a new line of enquiry emerges: constitutional courts in contexts of violence. The following questions, among others, remain unanswered: What role does violence play in the behaviour of courts, or vice versa, what role do courts play in reducing violence? Are courts facing situations of violence responsive to rights claims? What elements – internal or external – appear to inhibit or encourage courts from exercising their constitutional powers in contexts of violence?

[801] See Landau, D. (2014), *op. cit.*, p. 1502.

Internal factors

Plaintiffs

The analysis of the socio-demographic characteristics of the plaintiffs had a two-fold purpose. On the one hand, it intended to identify whether the litigation impetus comes from below, from above or from commercial interests. On the other hand, it aimed to explore whether the socio-demographic characteristics of plaintiffs relate to the responsiveness of courts.

Findings support that the litigation impetus comes from below in Colombia and Costa Rica. Plaintiffs classified under the category 'Have-nots' are more likely to succeed in human rights litigation in these two countries. It is worth remembering that this category comprises plaintiffs with low or no resources at all, such as inmates, homeless, elderly in poverty, disabled people in poverty, IDPs, minors in poverty, families in substandard housing conditions or without water, long-term unemployed, students, housewives, blue collar workers, informal workers, cleaning ladies without social security, sick people (in poverty), members of unions and retired people. These findings support Sieder, Schjolden and Angell's argument that courts are likely to protect marginalised people in weak states where rights are not sufficiently guaranteed[802].

In Colombia, the multilevel analysis confirmed that plaintiffs with low or no resources at all are about 3 times more likely to be protected by the Constitutional Court of Colombia than plaintiffs with high incomes. The Court has developed its doctrine on the protection of vulnerable groups[803] on the basis of the provisions of Article 13, paragraphs 2 and 3 of the Constitution of Colombia, which states:

> '[…] The State shall promote the conditions so that equality may be real and effective and shall adopt measures in favor of groups that are discriminated against or marginalized.
>
> The State shall especially protect those individuals who on account of their economic, physical, or mental condition are in obviously vulnerable circumstances and shall sanction the abuses or ill-treatment perpetrated against them.'

[802] See Sieder, R., Schjolden, L., & Angell, A. (2005). Introduction. In R. Sieder, L. Schjolden, & A. Angell (Eds.), *The Judicialization of Politics in Latin America*, *op. cit.*
[803] See for instance, T-067/02, T-102/08, T-495/97, T-776/02 and T-356/06 among others.

The Court has held that it is necessary to give effect to the constitutional clause of having 'a social state governed by the rule of law... based on respect for human dignity' (Article 1) and that one of the essential goals of the state is 'to serve the community, promote prosperity and guarantee the rights enshrined in the Constitution' (Article 2). In addition, the Court has resorted to the concept of connectedness of civil and political rights in order to grant protection to social, economic and cultural rights. The protection granted by the court in Colombia to vulnerable groups is based on constitutional provisions, commonly found in most contemporary constitutions. However, the findings must be interpreted considering both the legal framework that gives people access to the court as well as the attitude of judges, i.e., their conviction to enforce such constitutional clauses.

In the case of Mexico, the sample shows that the litigation impetus comes from commercial interests. Organisations are the type of plaintiffs that most frequently go before the Supreme Court of Justice. Mostly, these organisations have been classified under the 'Haves' category. The bivariate analysis concluded that in Mexico the 'Haves' who are associated with organisations are more likely to be granted protection than the 'Have-nots' who are associated with individuals (see Table 7-2). Therefore, it is argued that large and wealthy organisations are the driving force behind *amparo* litigation in Mexico. These findings support Galanter's statement that the 'Haves' have the ability to play the litigation game differently[804].

Organisations have brought tax-related cases before the Supreme Court of Justice of Mexico. In these cases, successful litigation has resulted in tax refunds on the basis of the right to equality, legality and proportionality of taxation (23 cases, 55%) (see Table 7-1). The type of organisations and the amounts involved are unknown as the Court has crossed out these data in the judgements provided for this study, on the grounds of the protection of personal data.

These findings should be interpreted in the light of the fact that between 2007 and 2018 the Executive Branch (during the PAN and PRI government periods) condoned taxes to 108 taxpayers, equivalent to 400,902 million Mexican pesos (USD 19,971 million)[805]. This suggests that, during the period analysed, in Mexico wealthy organisations used *amparo* proceedings as part of a broader strategy to avoid contributing to public finances.

[804] See Galanter, M. (1974), *op. cit.*, pp. 103-104.
[805] See Redacción Animal Político. (2019). Gobierno dejará de condonar impuestos a grandes empresas; en 12 años dejaron de pagar 400 mmdp. Retrieved April 15, 2021, from https://www.animalpolitico.com/2019/05/decreto-condonacion-impuestos-empresas-sat/

Judges

Scholars argue that judges' own incentives, capacities and motivations are crucial to the expansion or contraction of the judicial role[806]. For instance, Songer & Johnson[807] found, among others, that gender predicts judicial behaviour fairly well in the Canadian context. They found that female judges are more liberal in civil rights areas and possibly more conservative in criminal areas than their male colleagues. Kapiszewski[808] found that the new generations of judges who have had the opportunity to receive a more progressive legal training have been an important part of the modest role played by the STF in Brazil in the protection of human rights.

This research found that some characteristics of the judges were statistically significant only in Mexico. The final model (multilevel analysis) revealed that the gender of the judges plays a significant role on the responsiveness of the Supreme Court of Justice of Mexico. Findings showed that if the judgment is drafted by a male judge, the probability of obtaining a decision denying protection is multiplied by 7.6 and the probability of having the petition dismissed is multiplied by 7.5. This, interpreted *a contrario sensu*, suggests that female judges are more likely to draft judgments granting protection of rights than their male counterparts. These findings support Songer & Johnson's[809] claim that gender predicts judicial behaviour and encourage the inclusion of the gender as a variable in empirical studies to further the existing knowledge on this topic.

In addition, these findings raise the issue of the lack of representation of women found in the constitutional courts of Colombia, Costa Rica and Mexico. In the period between 1990 and 2012, these courts were predominantly composed by male judges, i.e., Colombia 94%, Costa Rica 94% and Mexico 90%[810].

During the period between 1992 and 2012, the Constitutional Court of Colombia had two female judges. The first generation of judges of the Constitutional Court of Colombia, created by the 1991 Constitution and installed in 1992, was composed of seven male judges who were appointed for a transitional period of one year. In 1993, a second generation of nine male judges

[806] See Kapiszewski, D., Silverstein, G., & Kagan, R. A. (2013), *op. cit.*, p. 28.
[807] See Songer, D. R., & Johnson, S. W. (2007), *op. cit.*
[808] See Kapiszewski, D. (2011), *op. cit.*, pp. 173- 177.
[809] See Songer, D. R., & Johnson, S. W. (2007), *op. cit.*, p. 931.
[810] These percentages include tenured judges. Colombia and Costa Rica have *conjueces*, i.e., individuals serving on a temporary basis when judges are unable to exercise their functions. Considering the *conjueces*, the percentages of male judges during the period of analysis are as follows: Colombia 83% and Costa Rica 80%. See Vargas-Ossa, N. (2019). La institución del Conjuez en Colombia: Una mirada desde la jurisdicción contencioso-administrativa. *Estudios de Derecho*, *77*(169).

was appointed. The first female judge was appointed in 2001 for a single eight-year term. In 2009, a second female judge was designated. In the case of Costa Rica, from 1989 to 2012 the Constitutional Chamber had only one female member. The first female judge was appointed in 2001 for a period of eight years and re-elected for a second period; however, she retired in 2013. In the case of Mexico, between 1995 and 2012, only two women were appointed to the Supreme Court. The first generation of judges (1995) consisted of ten male judges and one female judge. A second female judge was appointed in 2004.

The lack of female representation in the High Courts seems to be a pattern in the region[811] that regrettably includes the Inter-American Court of Human Rights (IACtHR). Between 1979 (year that the IACtHR was founded) and 2012 the IACtHR was predominantly composed by male judges (87%). During this period only four female judges served on the IACHR[812]. It has been argued that women's lack of access to high positions within the judiciary is indeed a glass ceiling or veiled constraints that prevent women from accessing these positions of power[813]. Soto Morales and Ruiz Calvo have pointed out the contradiction that exists in (Latin American) societies that on the one hand demand the materialisation of their rights and on the other hand are incapable of establishing a policy based on equality between men and women among their judges[814].

7.3. Judicial enforcement of human rights *vis-à-vis* democratic performance

The analysis presented in Chapter 4 on the democratic performance of Colombia, Costa Rica and Mexico revealed that democratic indices have increased slightly since the establishment of their constitutional courts.

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[811] Number of female judges vs. court composition: Paraguay 2 out of 3; Bolivia 4 out of 7; Guatemala 2 out of 5, Honduras 2 out of 5; Chile 2 out of 10; Argentina 1 out of 5, Brazil 1 out of 11; Dominican Republic 2 out of 13; Peru 1 out of 7; Panama 1 out of 9 and El Salvador 0 out of 5. Data corresponds to the integration of these courts in 2019.

[812] Judge Elizabeth Odio Benito in 2015 was the fifth female judge appointed as part of the IACtHR. Female judges at the IACtHR (1979-2021): Picado Sotela Sonia, Costa Rica (1989–1994); Medina Quiroga Cecilia, Chile (2004-2009); Abreu Blondet Rhadys, República Dominicana (2007-2012); May Macaulay Margarette, Jamaica (2007-2012) and Odio Benito Elizabeth, Costa Rica (2016-2021). See *Corte Interamericana de Derechos Humanos. (2019). Composiciones Corte Interamericana de Derechos Humanos 1979-2019. Retrieved April 13, 2021, from* https://www.corteidh.or.cr/docs/composiciones/composiciones.pdf .

[813] See Soto Morales, C. A., & Ruiz Calvo, K. E. (2014). Acciones afirmativas para alcanzar la equidad de género en la selección de jueces del Poder Judicial de la Federación en México. Una propuesta. *Revista Del Instituto de La Judicatura Federal Escuela Judicial*, *37*, 137–168; Arbeláez de Tobón, L. (2007). Análisis de género en la carrera judicial y en el acceso a las altas corporaciones nacionales de la justicia en. *Civilizar. Ciencias Sociales y Humanas*, *7*, 35–59; Arias Madrigal, D. M. (n.d.). Transversalidad en la Administración de Justicia: acerca de la incorporación del género en la elección de Jueces/zas y Magistrados/as.

[814] See Soto Morales, C. A., & Ruiz Calvo, K. E. (2014), *op. cit.*, pp. 145-146.

In Colombia, there has been a modest increase in the indices of electoral, liberal and egalitarian democracy. Participatory democracy has remained unchanged. Deliberative democracy showed no fluctuations between 1992-2002; however, it declined sharply in 2003, recovering its level in 2004 and improving from 2008 onwards (see

Figure 4-13). In Costa Rica, all five democratic indices show a slight and steady increase (see Figure 4-14). In Mexico, there was an increase in the democratic indices from 1995 to 2000. During the first half of the 2000s, the indices remained constant; however, from the second half of the decade onwards, a slight drop can be observed. In 2008, there was a modest recovery in electoral and liberal democracy, but a slight decline in participatory, deliberative and egalitarian democracy (see Figure 4-15.). Have the constitutional courts of these countries contributed to this slight improvement in democratic indices?

This section addresses the normative claim that constitutional courts are key institutions for the establishment and promotion of democracy from an empirical perspective. It builds on the premise outlined in Chapter 1 that if the values underlying each model of democracy are linked to rights, then the judicial enforcement of rights is expected to contribute to democratic performance.

The first step of this analysis consisted of linking the rights enforced by the courts to the five models of democracy in order to establish in which democratic indices an increase is expected. See Table 7-5.

Table 7-5. Rights protected *vs*. Rights behind each model of democracy

		Civil and Political Rights							Economic, Social and Cultural Rights									
		PI	LS	PFL	IL	PP	NDEL	MR	RW	RSS	PFCh	RASL	RH	RE	CR	Colombia	Costa Rica	Mexico
Thin	Electoral				●	●										11%	28%	2%
Intermediate	Liberal	●	●	●	●	●	●									47%	78%	100%
	Participatory	●	●	●	●	●	●	●										
Thick	Deliberative	●	●	●	●	●	●	●	●	●	●	●	●	●	●			
	Egalitarian	●	●	●	●	●	●	●	●	●	●	●	●	●	●	53%	22%	0%

PP= Political participation; ND= Non-discrimination/equality before the law; PI= Physical integrity; LS= Liberty and Security; PFL= Procedural fairness in law; IL= Individual liberty; MR= Minority rights; RW= Right to Work; RSS= Right to Social Security; PFCh= Protection and assistance to family and children; RASL= Right to an adequate standard of living; RH= Right to health; RE= Right to education and CR= Cultural rights.

Note: Black dots indicate rights associated with each model of democracy. Red dots denote, on the one hand, that the concepts of participatory, deliberative and egalitarian democracy do not reject the values and rights embraced by electoral and liberal democracy. On the other hand, deliberative democracy requires that people are granted economic, social and cultural rights to be able to participate in a fair dialogue. *Prohibition of any war propaganda as well as any advocacy of national or religious hatred that constitutes incitement to discrimination, hostility or violence by law* (Article 20 ICCPR) was not included because the empirical analysis found no rights protected by the courts under this category.
Source: Own elaboration.

The information presented in Table 7-5 suggests that an intermediate version of democracy could be favoured with the enforcement of civil and political rights, while the enforcement of both civil and political rights and economic, social and cultural rights would promote a more robust version of democracy.

Based on the responsiveness of the three courts in the enforcement of civil and political rights, an increase in the indices of electoral and liberal democracy can be expected. In Colombia and Costa Rica, changes in egalitarian democracy are also expected, given their role in the protection of social rights. Importantly, the influence of judicial decisions on democratic performance is expected to take place in a subsequent period. According to Cole[815], over time, court decisions exert a restrictive effect on what the government can do in the next emergency, suggesting that, in general, court decisions have a prospective effect.

The next step consisted of exploring whether the judicial enforcement of rights is associated with changes in the democratic performance in Colombia, Costa Rica and Mexico. To this end, a distributed lag model was used to estimate whether a change in the level of the explanatory or independent variable (Judicial Enforcement of Rights) can have behavioural implications beyond the period in which it occurred. As mentioned in Chapter 6, a distributed lag model is a dynamic model in which the effect of a regressor *x* on *y* occurs over time rather than all at once. Three lags were applied to the values of the independent variable consisting of 1, 2 and 3 years, identified as Lag 1, Lag 2 and Lag 3 respectively. Finally, a bivariate analysis was conducted to determine the association between the judicial enforcement of rights and democratic performance using linear regressions.

Independent and Dependent variables

The independent variable 'Judicial Enforcement of Rights' measures the number of cases per year in which protection was granted. For this analysis, the independent variable was lagged by 1, 2 and 3 years in order to identify changes in the dependent variable as a result of this lag. Accordingly, this analysis consisted of four independent variables, i.e., 'Judicial Enforcement of Rights No Lag' and 'Judicial Enforcement of Rights Lag 1', 'Judicial Enforcement of Rights Lag 2' and 'Judicial Enforcement of Rights Lag 3'.

[815] See Cole, D. (2003), o*p. cit.*, p. 2577.

The dependent variable 'Democratic performance' is composed of 15 democratic indices (3 high-level, 4 medium-level and 9 lower-level) that relate to the democratic models that are expected to be favoured by judicial enforcement of rights (see Table 7-6).

Table 7-6. Independent and dependent variables. Judicial Enforcement of Rights *vs.* Democratic performance.

Independent variable 'Judicial Enforcement of Rights'	Judicial Enforcement of Rights No Lag Judicial Enforcement of Rights Lag 1 (One-year lag) Judicial Enforcement of Rights Lag 2 (Two-year lag) Judicial Enforcement of Rights Lag 3 (Three-year lag)
Dependent variable 'Democratic performance'	ELECTORAL DEMOCRACY Electoral democracy index Additive polyarchy index Multiplicative polyarchy index Freedom of expression and alternative sources of information index Freedom of association index Clean elections index LIBERAL DEMOCRACY Liberal democracy index Liberal component index Equality before the law and individual liberty index Judicial constraints on the executive index Legislative constraints on the executive index EGALITARIAN DEMOCRACY Egalitarian democracy index Egalitarian component index Equal protection index Equal access index Equal distribution of resources index

Note: The V-Dem Mid- and Lower Democracy and Governance Indices are country-year scores on a standardized interval scale: -5 (weak) to 5 (strong) with 0 approximately representing the mean for all country-years in the sample (V-Dem data).
Source: Own elaboration based on V-Dem Codebook V9.

Table 7-7, Table 7-8 and Table 7-9 report the results of linear regressions carried out to assess whether the independent variables account for variability in each of the indicators of the dependent variable 'Democratic performance' in Colombia, Costa Rica and Mexico.

The coefficients (column *B*) indicate the amount of increase (if positive) or decrease (if negative) in the democratic indices that would be predicted by an increase of one unit in the independent variable. It should be noted that Beta values are not significantly different from zero. The R^2 value indicates the percent of variance in the outcome variable that is explained by the set of predictor variables.

Importantly, it was found that the effects of the judicial enforcement of rights occur within the same year as the judgments are issued in Colombia, one year later in Mexico and three years later in Costa Rica.

Table 7-7. Linear regression. Granted protection *vs*. Democratic performance. V-Dem Mid-Level Democracy Indices. Colombia.

Hight level indices								Judicial Enforcement of Rights				
Mid-level indices								No lag	Lag 1	Lag 2	Lag 3	
Lower-level indices	F	*p*	*df*	R	R^2	$R^{2\ adj.}$	Constant			*B*		KS
ELECTORAL DEMOCRACY												
Electoral democracy index	5.138	.038	1, 16	.493	.243	.196	.592	-.003 *	.	.	.	.001
Additive polyarchy index	5,999	.026	1, 16	.522	.273	.227	.802	-.002 *				.000
Multiplicative polyarchy index	4.808	.043	1, 16	.481	.231	.183	.380	-.004 *				.001
Freedom of expression and alternative sources of information index	4.820	.043	1, 16	.481	.232	.183	.780		-.004 *			.002
Freedom of association index	.000.	.000.	0, 17.	.000	.000	.000	.808					
Clean elections index	15.186	.001	1, 16	.698	.487	.455	.635			-.004 **		.093
LIBERAL DEMOCRACY												
Liberal democracy index	4.134	.059	1, 16	.453	.205	.156	.466	-.003				.019
Liberal component index	.	.	0, 17	.000	.000	.000	.752	.	.	.	.	.
Equality before the law and individual liberty index	3,452	.082	1, 16	.421	.177	.126	.602				.003	.000
Judicial constraints on the executive index	3.615	.052	2, 15	.570	.325	.235	.816	-.001 *		.001		.194
Legislative constraints on the executive index	15.453	.000	2, 15	.821	.673	.630	.865	-.001		-.002 *		.200
EGALITARIAN DEMOCRACY												
Egalitarian democracy index	6.795	.019	1, 16	.546	.298	.254	.358	-.002 *				.026
Egalitarian component index	5.531	.032	1, 16	.507	.257	.210	.550			-.002 *		.200
Equal protection index	.	..	0, 17.	.000	.000	.000	.555.			.		.
Equal access index	3.010	.080	2, 15	.535	.286	.191	.513.	.002			-.002 *	.200
Equal distribution of resources index	6.538	.021	1, 16	.539	.290	.246	.425	.004 *				.110

Note: * = *p*< .05 ** = *p*< .01.
Source: Own elaboration.

Table 7-8. Linear regression. Granted protection *vs*. Democratic performance. V-Dem Mid-Level Democracy Indices. Costa Rica.

Hight level indices Mid-level indices Lower-level indices	F	*p*	*df*	R	R^2	$R^{2\ adj.}$	Constant	Judicial Enforcement of Rights *No lag*	Lag 1 *B*	Lag 2	Lag 3	KS
ELECTORAL DEMOCRACY												
Electoral democracy index	40.575	.000	1, 19	.825	.681	.664	.892				.002**	.200
Additive polyarchy index	18,372	.000	1, 19	.701	.492	.465	.956				.001**	.200
Multiplicative polyarchy index	39.879	.000	1, 19	.823	.677	.660	.827				.003**	.164
Freedom of expression and alternative sources of information index	38.167	.000	2, 18	.900	.809	.788	.955		.001**		.001**	.200
Freedom of association index	3.202	.065	2, 18	.512	.262	.180	.941	.001*			-.001	.200
Clean elections index	48.494	.000	2, 18	.918	.843	.826	.927		.001**		.002**	.034
LIBERAL DEMOCRACY												
Liberal democracy index	43.001	.000	2, 18	.909	.827	.808	.838		.001		.002**	.200
Liberal component index	2.963	.095	2, 18	.480	.230	.145	.955	-.001			.001	.106
Equality before the law and individual liberty index	8.598	.009	1, 19	.558	.312	.275	.971	.001**				.030
Judicial constraints on the executive index	.	.	0, 20	.000	.000	.000	.951	.				.
Legislative constraints on the executive index	.	.	.	.000	.000	.000	.951	.				.
EGALITARIAN DEMOCRACY												
Egalitarian democracy index	55.221	.000	2, 18	.927	.860	.844	.764		.002**		.004**	
Egalitarian component index				.815	.665	.627	.846		.003*		.002*	.200
Equal protection index	15.381	.000	2, 18	.794	.631	.590	.839	.004*.	.006**			.200
Equal access index	4.227	.054	1, 19	.427	.182	.139	.870	.			.003	.004
Equal distribution of resources index	8.294	.010	1, 19	.551	.304	.267	.903	.		-.001*		.000

Note: * = *p*< .05 ** = *p*< .01.
Source: Own elaboration.

Table 7-9. Linear regression. Granted protection *vs*. Democratic performance. V-Dem Mid-Level Democracy Indices. Mexico.

Hight level indices								Judicial Enforcement of Rights				
Mid-level indices								No lag	Lag 1	Lag 2	Lag 3	
Lower-level indices	F	*p*	*df*	R	R^2	$R^{2\ adj.}$	Constant		*B*			KS
ELECTORAL DEMOCRACY												
Electoral democracy index	3.792	.070		.449	.202	.149	.661		.005			.003
Additive polyarchy index	5.905	.028	1, 15	.531	.282	.235	.839		.003 *			.001
Multiplicative polyarchy index	5.015	.041		.501	.251	.201	.481		.008 *			.007
Freedom of expression and alternative sources of information index	.	.	0, 16	.000	.000	.000	.788	.				.
Freedom of association index	.	.	0, 16	.000	.000	.000	.822	.				.
Clean elections index	6.265	.011	.	.687	.472	.397	.774		.007 *	.006 *		.061
LIBERAL DEMOCRACY												
Liberal democracy index	3.792	.070	1, 15	.449	.202	.149	.661		.005			.003
Liberal component index	3.244	.092	1, 15	.422	.178	.123	.667		.008			.032
Equality before the law and individual liberty index	3.236	.092	.	.421	.177	.123	.651	.	.002			.200
Judicial constraints on the executive index	.	.	.	.000	.000	.000	.715	.				.
Legislative constraints on the executive index	.	.	.	.000	.000	.000	.706	.				.

Note: * = *p*< .05 ** = *p*< .01.
Source: Own elaboration.

Colombia

As can be seen in Table 7-7, the independent variable 'Judicial Enforcement of Rights No Lag' concentrates the highest number of statistically significant coefficients, i.e., 6 out of the 15 democratic indices analysed. This suggests that in Colombia the effects of judicial decisions take place in the same year in which they are pronounced. It should be noted that the dependent variable 'Equal distribution of resources index' is the only index where a positive effect associated with the judicial enforcement of rights can be observed (see *B* column). In sum, findings show that the judicial enforcement of rights in Colombia has enhanced egalitarian democracy, which is reflected in an increase in the Equal distribution of resources index.

Egalitarian democracy

The V-Dem Egalitarian democracy index is composed of one high-level index, one mid-level index and three lower-level indices. In the case of Colombia, one of the lower-level indices was found to be positively affected by the judicial enforcement of rights. Table 7-7 shows that the Equal distribution of resources index has a positive coefficient (*B* column) indicating that for every unit increase in the judicial enforcement of rights, a .004 unit increase in this index is predicted in the same year in which a judgment is rendered, holding all other variables constant.

Costa Rica

In the case of Costa Rica, Table 7-8 shows that the independent variable 'Judicial Enforcement of Rights Lag 3' concentrates the largest number of statistically significant coefficients, i.e., 8 out of the 15 democratic indices analysed. This suggests that in Costa Rica the effects of judicial decisions take place three years after they have been issued. Coefficients (*B* column) are positive, indicating that the judicial enforcement of rights in Costa Rica has enhanced Electoral Democracy, Liberal Democracy and Egalitarian Democracy, which is reflected in an increase of three high-level, three medium-level and two lower-level democratic indices.

Electoral democracy

The independent variable 'Judicial Enforcement of Rights Lag 3' was found to be statistically significant in 5 out of 6 indices of the Electoral Democracy.

Electoral democracy index (high-level index). For every unit increase in the judicial enforcement of rights, a .002 unit increase in the Electoral democracy index is predicted to take place three years after a judgment has been rendered, holding all other variables constant.

Additive polyarchy index (mid-level index). For every unit increase in the judicial enforcement of rights, a 0.001 unit increase in the Additive polyarchy index is predicted to take place three years after a judgment has been rendered, holding all other variables constant.

Multiplicative polyarchy index (mid-level index). For every unit increase in the judicial enforcement of rights, a .003 unit increase in the Multiplicative polyarchy index is predicted to take place three years after a judgment has been rendered, holding all other variables constant.

Freedom of expression (lower-level index). For every unit increase in the judicial enforcement of rights, a .001 unit increase in the Freedom of expression index is predicted to take place three years after a judgment has been rendered, holding all other variables constant.

Clean elections index (lower-level index). For every unit increase in the judicial enforcement of rights, a .002 unit increase in the Clean elections index is predicted to take place three years after a judgment has been rendered, holding all other variables constant.

Liberal democracy

The independent variable 'Judicial Enforcement of Rights Lag 3' was found to be statistically significant in 1 out of 5 indices of the Liberal Democracy.

Liberal democracy index (high-level index). For every unit increase in the judicial enforcement of rights, a .002 unit increase in the Liberal democracy index is predicted to take place three years after a judgment has been rendered, holding all other variables constant.

Egalitarian democracy

The independent variable 'Judicial Enforcement of Rights Lag 3' was found to be statistically significant in 2 out of 5 indices of the Egalitarian Democracy.

Egalitarian democracy index (high-level index). For every unit increase in the judicial enforcement of rights, a .004 unit increase in the Egalitarian component index is predicted to take place three years after a judgment has been rendered, holding all other variables constant.

Egalitarian component index (mid-level index). For every unit increase in the judicial enforcement of rights, a .002 unit increase in the Egalitarian component index is predicted to take place three years after a judgment has been rendered, holding all other variables constant.

Mexico

Table 7-9 reports that the independent variable 'Judicial Enforcement of Rights Lag 1' concentrates the largest number of statistically significant coefficients, i.e., 3 out 11 democratic indices analysed. This suggest that in Mexico the effects of judicial decisions take place one year after they have been rendered. Coefficients (*B* column) are positive, indicating that the judicial enforcement of rights in Mexico has enhanced Electoral Democracy, which is reflected in an increase in the Additive polyarchy index (mid-level index), the Multiplicative polyarchy index (Mid-level index) and the Clean elections index (lower-level index).

Electoral democracy

Additive polyarchy index (mid-level index). For every unit increase in the judicial enforcement of rights, a .003 unit increase in the Additive polyarchy index is predicted to take place one year after a judgment has been rendered, holding all other variables constant.

Multiplicative polyarchy index (mid-level index). For every unit increase in the judicial enforcement of rights, a .008 unit increase in the Multiplicative polyarchy index is predicted to take place one year after a judgment has been rendered, holding all other variables constant.

Clean elections index (lower-level index). For every unit increase in the judicial enforcement of rights, a .007 unit increase in the Clean elections index is predicted to take place one year after a judgment has been rendered, holding all other variables constant.

Overall, the results of the exploratory analysis confirm the expectation that there is a relationship between judicial enforcement of rights and democratic performance, although the Beta values (Column *B*) are not significantly different from zero, suggesting that the contribution of courts to democratic performance is minimal.

The disaggregation of the democratic indices provided insight into the specific indicators that improved as a result of the judicial enforcement of rights. The distributed lag model was useful in revealing that the effects of judicial decisions occur at different points in time in each country. It is important to note that a sample covering a longer period of time is needed to verify that these results occur with the same periodicity over time.

Discussion

The results of the exploratory analysis on the association between judicial enforcement of rights and democratic performance confirmed that there is an association between both although to different extents in each country. Expectations were fully met in Costa Rica and only partially met in Colombia and Mexico. Findings will be analysed by checking the type of rights enforced by the courts against the description of the democratic indices that displayed an increase in order to establish whether the values underlying each indicator relate to the rights protected.

Colombia

Based on the findings of the responsiveness of the Constitutional Court of Colombia to rights claims, it was expected to observe an increase in the indices of electoral, liberal and egalitarian democracy. The results of the exploratory study revealed that the judicial enforcement of rights in Colombia is associated with changes in the Equal distribution of resources index, one of the three lower-level indices that comprise the Egalitarian democracy index. In addition, it was found that the effects of judgments take place within the same year in which they are pronounced.

According to the V-Dem project, the Equal distribution of resources index '…measures the extent to which resources, both - tangible and intangible - are distributed in society. An equal distribution of resources supports egalitarian democracy in two ways. First, lower poverty rates and the distribution of goods and services such as food, water, housing, education and healthcare ensure that all individuals are capable of participating in politics and government. …this component also includes measures of the distribution of power in society amongst different socio-economic groups, genders, etc.'[816].

The values underlying the Equal Distribution of Resources Index are consistent with the findings of the empirical study on the responsiveness of the Constitutional Court of Colombia. During the period analysed, 53% of the rights protected by the court were social rights (see Table 7-1).

In addition, it can be said that the court has also contributed to the redistribution of power in society by giving effect to the special protection granted by Article 13 of the Constitution of Colombia to groups that have been discriminated against or marginalised. Special emphasis

[816] See Coppedge, M., Gerring, J., Knutsen, C. H., Lindberg, S. I., Teorell, J., Altman, D., … Ziblatt, D. (2019). *V-Dem Codebook V9*, *op. cit.*, p. 51.

should be placed on the deliberative approach adopted by the court as well as on the implementation of the system of monitoring compliance with its judgments discussed in section 7.1.

Therefore, it can be concluded that changes observed in terms of the increase of the Equal distribution of resources index in Colombia are associated with the judicial application of social rights by the constitutional court.

Costa Rica

Based on the findings on the responsiveness of the Constitutional Chamber of Costa Rica to rights claims, an increase in the indices of electoral, liberal and egalitarian democracy was expected. The results of the exploratory study confirm that the judicial enforcement of rights in Costa Rica is associated with changes in these three models of democracy. In addition, it was revealed that the effects of judicial decisions occur three years after they have been issued.

Regarding electoral democracy, increases are observed in the Additive polyarchy index, the Multiplicative polyarchy index, the Freedom of expression index and the Clean elections index. According to the V-Dem project[817], the additive and multiplicative polyarchy indices seek to measure to what extent the electoral principle of democracy is achieved. However, the indices differ in their operationalization. The Additive polyarchy index is operationalized by taking the weighted average of the indices measuring freedom of association, clean elections, freedom of expression, elected executive and suffrage. The Multiplicative polyarchy index is formed by multiplying the above-mentioned indices. The Freedom of expression index measures to what extent the government respect the freedom of the press and media, the freedom of ordinary people to discuss political matters at home and in the public sphere as well as the freedom of academic and cultural expression. The Clean elections index[818] measures to what extent elections are free and fair, i.e., the absence of registration fraud, systematic irregularities, intimidation of the opposition on the part of the government, vote buying and election violence. Since the bulk of indicators measuring clean elections can only be observed in elections, the index scores were repeated within election periods.

The comparison of the values behind these democratic indices with the rights protected by the Constitutional Chamber of Costa Rica showed that coincidences can be found only regarding the Freedom of expression index. Table 7-1 illustrates that 'Individual liberty' constitutes the

[817] Idem, pp. 41-42.
[818] Idem, p. 44.

second category of civil and political rights that was found to be protected by the Constitutional Chamber of Costa Rica. The ICCPR disaggregates individual liberty into four categories of rights: different types of freedom (movement, thought, conscience and religion, speech, association and assembly), family rights, the right to a nationality and the right to privacy. The category 'Individual liberty' comprises cases where the protection of these rights was at stake.

It should be noted that most of the cases reported in this category relate to the right to petition and right to information, which, according to Article 19 of the Universal Declaration of Human Rights, can be subsumed under 'Freedom of speech' since this right includes, among others, the right to hold opinions without interference and to seek and receive information and opinions[819]. The Court forcefully pointed out that democracy is favoured when the various social, economic and political forces and groups participate in the formation and execution of the public will actively and in an informed manner. Hence, it holds that the right to petition and access to information is an indispensable tool to effectively implement the constitutional principles of transparency and publicity inherent to the Social and Democratic Rule of Law[820].

Regarding indicators measuring clean elections, i.e., the absence of registration fraud, systematic irregularities, intimidation of the opposition on the part of the government, vote buying and electoral violence, the results on the responsiveness of the Constitutional Chamber in Costa Rica do not provide evidence of the protection of rights underlying these values. These are strictly electoral issues that were not the focus of this research. Further research is therefore required to identify the link between electoral democracy and the judicial protection of rights measured here.

The Liberal democracy index also registered an increase. According to the V-Dem project[821], the liberal principle of democracy emphasises the importance of protecting individual and minority rights against the tyranny of the state and the tyranny of the majority. This is achieved through constitutionally protected freedoms, a strong rule of law, an independent judiciary and an effective system of checks and balances, which together constrain the exercise of executive power. Importantly, the Liberal democracy index takes into account the level of electoral democracy. The values underlying the Liberal democracy index are consistent with the results

[819] Universal Declaration of Human Rights, Article 19. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
[820] See *Recurso de Amparo* RA 02772-2004.
[821] See Coppedge, M., Gerring, J., Knutsen, C. H., Lindberg, S. I., Teorell, J., Altman, D., … Ziblatt, D. (2019). *V-Dem Codebook V9*, *op. cit*., p. 45.

of the empirical study on the responsiveness of the Constitutional Chamber of Costa Rica. During the period analysed, 78% of the rights protected by the court were civil and political rights. The Court emphatically protected the right to procedural fairness in the law, which encompasses the right to a due process, a fair and impartial trial, the presumption of innocence and the recognition as a person before the law. As noted above, the Court also protected individual liberties as well as rights associated with the liberty and security of the person, i.e., freedom from arbitrary arrest and detention and it has a special procedure to protect the right to *habeas corpus*.

In addition, the Egalitarian democracy index registered an increase. According to the V-Dem project, 'The egalitarian principle holds that material and immaterial inequalities inhibit the exercise of formal rights and liberties and diminish the ability of citizens from all social groups to participate.'[822]. Therefore, egalitarian democracy is achieved when rights and freedoms of individuals are protected equally across all social groups, resources are distributed equally across all social groups and groups and individuals enjoy equal access to power. Importantly, the Egalitarian democracy index also takes the level of electoral democracy into account. It can be said that, to some extent, the values underlying the Egalitarian democracy index are consistent with the results of the empirical study on the responsiveness of the Constitutional Chamber of Costa Rica. During the period analysed, 22% of the rights protected by the court were social rights. The court placed particular emphasis on the protection of the right to health and the right to work (see Table 7-1).

Mexico

Based on the findings on the responsiveness of the Supreme Court of Justice of Mexico to rights claims, increases in the indices of electoral and liberal democracy were expected. The results of the exploratory study confirm that successful human rights litigation in Mexico is associated with changes in three component-indices of the Electoral democracy index, i.e., the Additive polyarchy index (mid-level index), the Multiplicative polyarchy index (mid-level index) and the Clean elections index (lower-level index). In addition, the exploratory analysis revealed that these changes are likely to take place one year after the pronouncement of a judgment.

[822] Idem, p. 50.

As pointed out above, the additive and multiplicative polyarchy indices seek to measure the freedom of association, clean elections, freedom of expression, elected executive and suffrage. The Clean elections index is a compound of indicators measuring absence of registration fraud, systematic irregularities, intimidation of the opposition on the part of the government, vote buying and election violence.

Findings on the responsiveness of the Supreme Court of Justice of Mexico to rights claims show that the court has protected the right to non-discrimination and equality (in tax issues), the right to procedural fairness in law as well as rights related to liberty and security of the person. As can be seen, there is no evidence that the court protected the rights to freedom of expression or freedom of association, both components of the additive and multiplicative polyarchy indices. Therefore, the increase in these indices is not supported by judicial enforcement of rights. Regarding the Clean elections index, this index is composed of indicators that address strictly electoral issues that were not the focus of this research. Therefore, there is also no evidence to support the increase in this lower-level democratic index. In sum, further research is needed to elucidate the relationship between the judicial enforcement of rights measured here and electoral democracy in Mexico.

The above analysis leads to the discussion of the convenience of including the judicial enforcement of rights in the structure of the components and indicators that integrate the different democratic indices developed by the V-Dem Project.

The V-Dem Project has a structure that disaggregates the five high-level democracy indices into mid- and lower-level indices and indicators. This structure assigns a series of indicators to measure different aspects of constitutional courts. Table 7-10 summarises these indicators and clarifies their scope of measurement.

Table 7-10. V-Dem indicators devoted to the Judiciary.

Indicator (tag)	Scope of measurement
Judicial reform (v2jureform)	Whether reforms on the competences of the court affect its ability to control the arbitrary use of state authority.
Judicial purges (v2jupurge)	Whether the dismissal of judges is due to allegations of corruption or has been arbitrary and politically motivated.
Government attacks on judiciary (v2jupoatck)	How often does the government attack the integrity of the judiciary in public? Attacks include claims that it is corrupt, incompetent or that decisions are politically motivated.
Court packing (v2jupack)	Whether the size of the judiciary has increased for mere political reasons.
Judicial accountability (v2juaccnt)	Whether dismissals or disciplinary measures against judges are taken when they are found responsible for serious misconduct.
Judicial corruption decision (v2jucorrdc)	Whether plaintiffs make extraordinary payments or undocumented bribes to speed up or delay the process or obtain a favourable court decision.
High court name (v2juhcname).	Literal translation of the name of the court in English.
High court size (by law) (v2juhcsizl)	Size of the court established by law.
High court size (in practice) (v2juhcsizp)	Number of judges who, in practice, sat on the bench.
Female judges (v2jufemjdg)	Number of female judges who served in the court.
First woman appointed (v2jufrstfm)	Year in which the first female judge was appointed.
High court independence (v2juhcind)	Whether judicial decisions are autonomous or reflect the wishes of the government.
Compliance with high court (v2juhccomp)	How often does the government comply with judicial decisions with which it disagrees?
Judicial review (v2jureview)	Does the court have competences to invalidate governmental policies on the grounds that they violate a constitutional provision?
Codeable (v2jucodable)	Description of the appointment process in the form of a flow chart.

Source: Own elaboration using descriptions provided by *V-Dem Codebook V9*[823].

The indicators in Table 7-10 are relevant aspects of the institutional and legal framework of the courts *vis-à-vis* democracy. However, it is evident that judicial performance is not considered within the structure of indicators measuring the judiciary.

Based on the normative premise that '…democracy is protected when regime rules are respected or when the failure to respect a rule is corrected via the legal process'[824], the question

[823] Idem, pp. 151-159.
[824] See Staton, J. K., Reenock, C. M., Holsinger, J., & Lindberg, S. I. I. (2018), *op. cit*., p. 10.

arises as to whether the judicial enforcement of rights should be included in the structure of democratic indices and indicators.

This is a question that goes beyond the scope of this research. However, it reveals that more needs to be done in terms of the transparency and accountability of the judiciary. Creating judicial indicators of this nature requires courts to translate their judgments into data. This research has shown that it is possible to systematise the outcomes of *amparo* judgments and measure the responsiveness of courts to rights claims. Courts have the necessary resources to implement an initiative like this. Having judicial databases would facilitate comparative research and internal diagnostics in the interest of strengthening the justice system.

Concluding section

The aim of this chapter was to present the results of the analysis in terms of the relationship between courts and democracy in order to answer the empirical research questions posed at the beginning of this research, i.e.,

1. Have constitutional courts of the late third wave been responsive to rights claims?
2. Do internal and external factors of the adjudication process relate to the responsiveness of courts to rights claims?
3. Is the judicial enforcement of human rights associated to democratic performance?

Have constitutional courts been responsive to human rights?

Findings of the empirical analysis on the responsiveness of constitutional courts of Colombia, Costa Rica and Mexico to rights claims from 1990s to 2012 revealed that courts behaved differently when adjudicating human rights. During the period analysed, the constitutional courts of Colombia (hybrid regime) and Costa Rica (democratic regime) proved to be responsive to human rights claims, while the Supreme Court of Justice of Mexico (hybrid regime) displayed a proclivity to dismiss rights claims. In addition, the empirical analysis on the responsiveness of courts allowed to identify the type of rights protected. Results show that courts in Colombia and Costa Rica protected not only civil and political rights, but also economic, social and cultural rights. In the case of Mexico, the scope of the protection issued by the Supreme Court of Justice was limited to civil and political rights.

These findings were discussed in the light of the legal framework of *amparo* proceedings, as well as through concepts developed in the literature. Accordingly, it was concluded, on the one hand, that the nature of the legal system and the composition of the courts appear to be unrelated

to the responsiveness of courts, while the legal opportunity structure, i.e., rules of standing, procedural requirements and the costs of litigation, seems to play a key role in the success of human rights litigation.

On the other hand, findings show that *amparo* proceedings were effective in challenging three of the six democratic deficits identified by Carothers, such as the frequent abuse of the law by government officials, very low levels of public confidence in state institutions and persistent poor institutional performance. This leads to consider *amparo* proceedings as a mechanism for democratic correction. The adjudication of social rights confirmed that courts have the capacity to dictate short, medium and long-term measures to address structural problems, without compromising their democratic legitimacy. This reinforces Gargarella's idea that courts are called upon to explore deliberative alternatives to avoid contravening the principle of separation of powers. Overall, this leads to reconsidering the role of constitutional courts as democratic catalysts.

Do internal and external factors of the adjudication process explain the responsiveness of courts to rights claims?

The analysis on the relationship between internal and external factors of the adjudication process and the responsiveness of courts considered 16 independent variables, i.e., internal factors: plaintiffs' type, plaintiffs' gender, plaintiffs' age, plaintiffs' resources, judges' gender, judges' age, judges' academic background, judges' judicial career and judges' studies abroad; external factors: gross domestic product, GINI coefficient, poverty, extreme poverty, political stability and absence of violence, rule of law and corruption.

Results show that in Costa Rica, which is a democratic regime, neither internal nor external factors were found statistically significant to explain the responsiveness of the court. In Colombia and Mexico, hybrid regimes, some internal factors explained the responsiveness of the courts. In Colombia, plaintiffs with low resources or no resources at all were more likely to be granted protection by the court. In the case of Mexico, the probability of being granted protection increased if the judgment was drafted by a female judge.

These findings illustrate several aspects. Firstly, theories developed to explain the behaviour of the US Supreme Court are not useful while aiming to explaining the behaviour of courts in hybrid regimes. For example, Roe and Siegel's claim that courts cannot function well in an unstable political environment is not supported in the case of Colombia, where evidence shows that the increased levels of violence or political instability it has suffered in recent decades have

not prevented the court from being very active in protecting (social) rights. Conversely, the findings in Costa Rica, a democratic regime, confirm McNollgast's argument that the stability of judicial doctrine (in the US) is a reflection of the underlying stability in the electoral political arena. This leads to the conclusion that the relationship between constitutional courts and democracy in democratic regimes needs to be addressed by considering democracy as the independent variable and the responsiveness of courts as the dependent variable.

Secondly, the findings seem to indicate that the responsiveness of courts in hybrid regimes is more susceptible to internal factors of the adjudication process. In Colombia, successful litigation was found to be associated with plaintiffs with low resources or not resources at all. Although these findings refer to a socio-demographic characteristic of the plaintiffs, they should be interpreted in terms of the commitment of judges to enforce the special protection that the Constitution of Colombia grants to vulnerable groups. In Mexico, the findings support Songer & Johnson's conclusions that the gender of judges is a variable that can predict judicial behaviour. Findings in Mexico suggest that female judges are more likely to protect rights than their male colleagues. This contrasts with the lack of female representation found in the Higher Courts.

Thirdly, the analysis of the socio-demographic characteristics of plaintiffs revealed that litigation impetus comes from below in Colombia and Costa Rica and from commercial interests in Mexico. These findings, seen in the light of the legal framework of the three countries, confirm the key role of the legal opportunity structure in the judicial enforcement of rights linked to disadvantaged groups. In the case of Mexico, findings support Galanter's theory that the 'Haves' have the ability to play the litigation game differently. The lack of a legal opportunity structure in this country may be indicative of the absence of other social groups litigating before the court. In sum, the results seem to point to judges and the legal framework as the main factors associated with the responsiveness of courts.

Do courts further democracy by enforcing human rights?

The last section explored the relationship between the judicial enforcement of rights and democratic performance. For this analysis, the independent variable 'Judicial Enforcement of rights' was measured using the granted protection cases identified through the empirical analysis on the responsiveness of the constitutional courts of Colombia, Costa Rica and Mexico, while the dependent variable 'Democratic performance' was measured using the High- Mid- and Lower-Level democracy indices developed by the V-Dem project. A

distributed lag model was used to identify whether the judicial enforcement of rights may affect democratic indices over several periods.

The analysis of the type of rights enforced by the courts was used to define the expectations of the models of democracy they promoted. Accordingly, an increase in the indices of electoral, liberal and egalitarian democracy in Colombia and Costa Rica and in the indices of electoral and liberal democracy in Mexico was expected.

Results confirmed that the judicial enforcement of rights is associated with democratic performance, albeit to a different extent in each country. Expectations were fully addressed in Costa Rica and only partially in Colombia and Mexico. In Colombia, egalitarian democracy showed an increase through the Equal distribution of resources index (lower-level index). In Mexico, there was an increase in some of the components of the Electoral democracy index, such as the Additive polyarchy index, the Multiplicative polyarchy index and the Clean elections index.

To identify the contribution of the courts to the observed changes in the democratic indices, the description of what each indicator measures was compared with the rights enforced by the courts. In the case of Colombia, the contribution of the court in the promotion of the values measured by the Equal distribution of resources index was established on the basis that 53% of the rights protected by the court are associated with egalitarian democracy. In Costa Rica, the court's contribution to the Additive and Multiplicative polyarchy indices was found through the rights protected under the category 'Individual Liberty' (28%), which includes the right to freedom of expression, a component of both indices. However, it was not possible to establish the involvement of the court in the improvement observed in the Clean elections index, as electoral matters were not part of this research. Finally, in the case of Mexico, no evidence was found that the rights protected by the court (non-discrimination, equality before the law, procedural fairness in law and liberty and security) relate to the Additive and Multiplicative polyarchy indices and the Clean elections index. More research is needed to elucidate the relationship between de protection of civil and political rights and the Clean elections index.

The role of constitutional courts vis-à-vis democracy

The results of this research show that courts contribute to democratic performance through the enforcement of human rights, even though the contribution recorded was minimal. It can be considered as positive as far as democracy is concerned because it allows to reflect on the

potential of courts as democratic catalysts and individual citizens as the propelling force that sets a mechanism of democratic correction in motion.

The role of courts as democratic catalysts requires certain conditions. Firstly, a legal framework that provides a legal opportunity structure in order to facilitate that different groups in society place their human rights concerns on the public agenda as well as an institutional framework that favours a greater degree of judicial independence. A shared model of judicial selection, i.e., where more than two bodies are involved in the appointment procedure, with a limited term of office without the possibility of re-election seems to favour a more responsive court. Secondly, the determination of judges to take on the dual task of deciding individually while promoting deliberative actions that enhance the epistemic quality of democracy. This dual task aims to evidence that systematic violation of rights limits the proper functioning of democracy and that actions are required from the executive and/or legislative authorities to address the root of the problem identified by the court. In this way, far from contravening the principle of separation of powers, courts strengthen their democratic legitimacy by enhancing democratic values. Finally, political forces are required to assume a militant constitutionalism[825], that is, a permanent commitment to make the constitutional mandate effective.

This view of courts as democratic catalysts is useful not only in hybrid regimes, but also in democratic regimes. Democracy erodes one drop at a time. Courts are therefore called to exercise their powers effectively to correct the malfunctioning of the democratic process. Through horizontal accountability, courts can prevent the enactment of perfectionist laws, laws that did not respect or will affect the preconditions of the democratic process, including *a priori* rights, or laws that undermine the preservation of morally acceptable practices, while by exercising vertical accountability they can improve the epistemic quality of the democratic process by extending *a priori* rights and placing limits on their systematic denial[826].

Accordingly, courts might be held accountable for the effective use of their powers of horizontal and vertical review as corrective mechanisms for the democratic process. This raises the question of the convenience of including judicial outcomes among the components of democratic indices. This is based on the normative premise that '…democracy is protected when regime rules are respected or when the failure to respect a rule is corrected via the legal

[825] See Garcia-Villegas, M. (2004), *op. cit.*, pp 133–154.
[826] See Nino, C. S. (1993), *op. cit*. p. 837. Cfr. Issacharoff, S. (2011), *op. cit.*. Issacharoff holds that courts are critical to establish the boundaries of government power in unstable democracies. Therefore, he encourages moving beyond the question of constitutional review as such and examining how constitutional courts deal with political questions and the jurisprudential tools they use.

process'[827]. This might allow measuring the functioning of courts on the basis of the actual changes reflected in the democratic indices.

In sum, this research suggests rethinking the role of constitutional courts as democratic catalysts in hybrid regimes, elaborating on the conditions that would allow them to play this role effectively without contravening the principle of separation of powers and discussing the convenience of including judicial outcomes as components of democratic indicators. Overall, a paradigm shift from courts as guarantors of the constitution to courts as guarantors of democracy is proposed.

[827] See Staton, J. K., Reenock, C. M., Holsinger, J., & Lindberg, S. I. I. (2018), *op. cit*., p. 10.

Conclusions

Do constitutional courts established during the late third democratic wave shape the furthering of democracy by enforcing human rights? This question triggered the research presented in the seven preceding chapters. The constitutional courts of Colombia, Costa Rica and Mexico were selected as case studies. The analysis covered a period from the creation of the courts in the 1990s until 2012. A sample was taken in each country. In total, 1,137 *amparo* judgments were analysed. A quantitative study was carried out consisting of three stages. The first stage determined the responsiveness of the courts to rights claims. The second stage established the relationship between the internal and external factors of the adjudication process and the responsiveness of the courts. Finally, the last stage explored the relationship between the judicial enforcement of rights and democratic performance.

The first stage of the analysis showed that the constitutional courts of Colombia, Costa Rica and Mexico behave differently when adjudicating human rights. The constitutional courts of Colombia (223, 60%) and Costa Rica (116, 30%) proved to be more responsive to rights claims than their counterpart in Mexico (37, 10%). The courts in Colombia and Costa Rica protected not only civil and political rights, but also economic, social and cultural rights, while in Mexico rights protection was shown only with regard to civil and political rights.

The second stage of the analysis revealed that in Costa Rica, a democratic regime, neither internal nor external factors of the adjudication process explain the responsiveness of its Constitutional Chamber. In Colombia and Mexico, hybrid regimes, some internal factors were found to be related to the responsiveness of the courts. In the case of Colombia, the variable 'Plaintiffs' resources' was statistically significant indicating that the 'Have-nots' are 1.3 times more likely to be granted protection by the court than the 'Haves'. In the case of Mexico, the variable 'Gender of the judge' revealed that if the judgement is drafted by a male judge, the probability of obtaining a decision denying the *amparo* is increased by a factor of 7.6 and the probability of having a petition dismissed is increased by a factor of 7.5. *A contrario sensu*, judgments being drafted by female judges increases the likelihood that rights will be protected. In sum, in Mexico, female judges are more prone to protect rights than their male counterparts.

Finally, the last stage showed that the contribution of courts to democracy is minimal, i.e., the reported increases in democratic indices are not significantly different from zero. It was found that the judicial enforcement of social rights in Colombia is linked to a .004 unit increase in the Equal distribution of resources index (egalitarian democracy).

In Costa Rica, the judicial enforcement of civil and political rights as well as economic, social and cultural rights was linked to a .002 unit increase in the Electoral democracy index, a .001 unit increase in the Additive polyarchy index (electoral democracy), a .003 unit increase in the Multiplicative polyarchy index (electoral democracy), a .001 unit increase in the Freedom of expression index (electoral democracy), a .002 unit increase in the Liberal democracy index (liberal democracy) and a .004 unit increase in the Egalitarian component index (egalitarian democracy). The Clean elections index reported a .002 unit increase, however, it was not possible to establish a link between the increase of this index and the judicial enforcement of rights because the rights protected by the Constitutional Chamber of Costa Rica do not relate with the values behind this index.

In Mexico, findings show a .003 unit increase in the Additive polyarchy index (electoral democracy), a .008 unit increase in the Multiplicative polyarchy index (electoral democracy) and a .007 unit increase in the Clean elections index (electoral democracy). However, the sample found no record of the protection of rights related to the freedom of expression and freedom of association, components of the additive and multiplicative polyarchy indices, or to the adjudication of cases related to the registration of electoral fraud, systematic electoral irregularities, government intimidation of the opposition, vote buying and electoral violence, i.e., components of the Clean elections index.

This final chapter discusses the implications of the findings of this research for the field of courts and democracy, the vicissitudes encountered in the application of the methods and theoretical frameworks and outlines some recommendations. Throughout the chapter, lines of research that remain open for future studies are identified. Prior to the discussion, an introductory restatement of the gap found in the literature, the purpose and objectives of the research and how they were approached is presented.

i. Introductory restatement

a) Gap in the literature

The literature on constitutional courts is abundant as a result of the large number of studies that have been carried out to analyse the role of the Supreme Court of the United States of America or the constitutional courts of Western Europe. These studies mostly consist of legal comparisons or case studies that focus primarily on judicial review, i.e., the horizontal accountability function of constitutional courts. The conclusions of these studies are not unanimous. On the one hand, there are those who defend judicial review and, on the other hand,

its detractors who consider that constitutional courts threaten democracy when they review the performance of popularly elected authorities.

The study of constitutional courts in emerging democracies has captured the attention of scholars and research has generated a variety of analyses from different perspectives that account for a field of study that is still developing. Scholars have focused on the rationale for the establishment of courts, the causes and consequences of the judicialization of politics, and whether courts have been able and willing to exercise their powers.

The literature review revealed that the relationship between the vertical or societal accountability function of courts and democracy has not been sufficiently investigated. Courts, in deciding cases of human rights violations, exercise their vertical or societal accountability function and, in doing so, place limits on arbitrary acts of authority. Closing this gap in the literature can shed light on whether the judicial enforcement of rights is associated with democratic performance.

b) Purpose

The objective of this research was to contribute to the debate on the relationship between constitutional courts and democracy in countries of the late third wave through an empirical analysis of the vertical or societal accountability function of constitutional courts *vis-à-vis* democratic performance.

To this end, a study was designed to compare the responsiveness of courts to rights claims of three constitutional courts established during the late third democratic wave in Latin America: the Constitutional Court of Colombia, the Constitutional Chamber of Costa Rica and the Supreme Court of Justice of Mexico. The period of this analysis was marked by the establishment of each constitutional court until 2012, i.e., from 1992 to 2012 in the case of Colombia, from 1989 to 2012 in the case of Costa Rica and from 1995 to 2012 in the case of Mexico. The legal instrument for adjudicating human rights is the constitutional complaint, also known as *amparo* proceedings in Latin America. A sample of judgments issued in *amparo* proceedings was taken from each country, i.e., 373 in Colombia, 382 in Costa Rica and 382 in Mexico.

c) Research questions

The main research question *Do constitutional courts established during the late third democratic wave shape the furthering of democracy by enforcing human rights?* was broken down into several sub-research questions:

(1) What is meant by the term 'democracy'? (Chapter 1)

(2) What is the status of the late third democratic wave? (Chapter 1)

(3) What has been the role of constitutional courts in countries of the late third democratic wave? (Chapter 2)

(4) How do constitutional courts relate conceptually to democracy? (Chapter 3)

(5) What is the most suitable way to approach the relationship between constitutional courts and democracy? (Chapter 3)

(6) Have constitutional courts of the late third wave been responsive to rights claims? (Chapter 7)

(7) Do the internal and external factors of the adjudication process relate to the responsiveness of courts? (Chapter 7)

(8) Is the judicial enforcement of human rights associated to democratic performance? (Chapter 7)

The first five sub-research questions involved a comprehensive review of the existing literature in the field of democracy, the late third wave, the emergence of constitutional courts and the expansion of constitutional courts during the late third wave, to clarify the state of the art and facilitate the design of the empirical analysis. The last three sub-research questions involved the collection and analysis of data through statistical techniques. The empirical study consisted of the analysis of three independent samples comprising a total of 1,137 judgments, 97 biographical records of constitutional judges as well as 7 country indicators and 16 V-Dem democratic indices covering the period analysed.

ii. Implications in the field of courts and democracy

a) Analysing the role of constitutional courts beyond the limits of liberal democracy

Dahl's polyarchy concept of democracy has been widely used as a basis for empirical studies, occasionally, with slight modifications or adaptations[828]. Dahl defines polyarchy as a political order characterized by the presence of elected officials, free and fair elections, inclusive suffrage, the right to run for office, freedom of expression, alternative information and

[828] See for instance, Schneider, C. Q. (2009), *op. cit.*; Diamond, L., Linz, J. J., & Lipset, S. M. (Eds.). (1988), *op. cit.*; Sørense, G. (2008), *op. cit.*; Elkit, J. (1994), *op. cit.*

associational autonomy[829]. This suggests that democracies have been measured by their effectiveness in holding periodic elections and protecting civil liberties and the rule of law. Social rights have therefore been excluded from Dahl's concept of polyarchy as well as from the democratic indices that have used it as a basis for measurement.

From the perspective of the interconnection of rights this is problematic. For instance, Sen argues that civil and political rights have an instrumental role in the conceptualization of economic needs that results in enhancing the hearing that people get in expressing and supporting their claims to political attention[830]. Moreover, according to Beetham[831], the deprivation of social rights not only hampers the ability of citizens to exercise their civil and political rights, but also affects the quality of democratic life for all, as widespread unemployment, dispossession or destitution provide a breeding ground for crimes against people and property, and insecurity invites repressive and authoritarian forms of social control.

Therefore, considering that rights are interconnected, the multidimensional approach to democracy developed by Coppedge *et al.*[832], which encompasses electoral, liberal, participatory, deliberative and egalitarian democracy, was considered more appropriate for the empirical purposes of this research. Democracy understood as multidimensional facilitated linking the core of each dimension of democracy to the realisation of civil and political rights as well as economic, social and cultural rights, which in turn allowed operationalising the relationship between courts and democracy through the judicial enforcement of human rights.

Coppedge *et al*.'s conception of democracy as multidimensional is innovative because it succeeds in bringing into a single perspective the different types of democracy that exist both in theory and in practice. Through the V-Dem project, disaggregated indicators for each conception of democracy have been developed that are available in open databases and that include measures of democracy in every country in the world since 1789. This detailed understanding of democracy, not found in other concepts of democracy or democratic indicators, led to the adoption of a multidimensional perspective on democracy and to the use of the V-Dem database as a secondary source for measuring the democratic performance in the three selected countries.

[829] See Dahl Robert A. (1989), *op. cit.*, p. 221.
[830] See Sen, A. (1999), *op. cit*., pp. 146-153.
[831] See Beetham, D. (1997), *op. cit*., p. 353.
[832] See Coppedge, M., Gerring, J., Altman, D., Bernhard, M., Fish, S., Hicken, A., . . . Teorell, J. (2011), *op. cit.*

On the one hand, by interpreting Dahl's concept of polyarchy from the point of view of the interconnection of rights, this research contributes to an understanding of democracy in which civil and political rights cannot be dissociated from social rights since the exercise of freedoms requires the enjoyment of basic social rights. On the other hand, by adopting a multidimensional approach to democracy, this research contributes to moving beyond the limits imposed by liberal democracy in the analysis of constitutional courts.

b) A multivariate approach to analyse the responsiveness of constitutional courts

Gloppen *et al.*'s argument that a monocausal approach focusing either on structures (institutional approach) or on the judges and their mindset (attitudinal or strategic models) does not provide satisfactory answers regarding the role of courts[833] resonated convincingly for adopting a multivariate approach because it allowed taking into consideration the context under which constitutional courts have been functioning.

The multivariate analytical framework used considered the external and internal factors of the adjudication process identified in the literature review. External factors were determined on the basis of a preliminary analysis of the economic, political and social context of each country. Six indicators were identified for the empirical analysis, namely Political Stability and Absence of Violence, Gross Domestic Product, Rule of Law, Control of corruption, Gini index, Poverty and Extreme poverty. The internal factors were determined on the basis of Gloppen's multi-step analytical framework to assess to what extent litigation has succeeded in securing accountability for social rights[834]. The internal factors comprise the socio-demographic characteristics of plaintiffs as well as the personal attributes and professional background of judges.

Once the responsiveness of the courts was determined, the frequencies of cases in which the courts granted *amparo* were used to explore whether the judicial enforcement of rights relates to democratic performance. Thus, the analytical framework used comprises: the judicial enforcement of rights, internal and external factors of the adjudication process and democratic performance.

The multivariate analytical framework used proved functional for the empirical analysis of the responsiveness of the constitutional courts of Colombia, Costa Rica and Mexico. Consequently, it can be replicated or adapted for future empirical studies addressing the

[833] See Gloppen, S., Wilson, B. M., Gargarella, R., Skaar, E., & Kinander, M. (2010), *op. cit.*, pp. 2-3.
[834] See Gloppen, S. (2008), *op. cit.*

relationship between constitutional courts and the internal and external factors of the adjudication process.

c) The appointment procedure and the legal opportunity structure play a key role in the responsiveness of courts

The findings of the empirical study contribute to the understanding that the responsiveness of courts to rights claims differs across countries and across regimes. The distinctiveness of each case study can be observed in the percentages of cases in which rights were protected, denied or dismissed as well as in the percentages that distinguish whether the rights protected belong to the so-called civil and political or economic, social and cultural rights.

Table C- 1. The responsiveness of courts to rights claims and the type of rights protected

	Responsiveness of courts			Rights protected	
	Granted protection	Denied protection	Dismissals	Civil and Political Rights	Socio, Economic and Cultural Rights
Colombia (Hybrid regime)	60% (223)	35% (132)	1% (2)	47% (162)	53% (180)
Costa Rica} (Democratic regime)	30% (116)	27% (104)	37% (140)	78% (108)	22% (30)
Mexico (Hybrid regime)	10% (37)	18% (68)	54% (206)	100% (42)	-

Source: Own elaboration.

Gloppen holds that the responsiveness of courts is conditioned, among others, by the legal framework, i.e., the nature of the legal system, the composition of the court and the legal opportunity structure, i.e., rules of standing, procedural requirements and costs[835]. This research showed that the appointment procedure and the legal opportunity structure explain the responsiveness of the three analysed courts.

On the one hand, a shared model of judicial selection with a limited term of office without the possibility of re-election seems to favour a more responsive court, as illustrated by the case of the Constitutional Court of Colombia. In a shared model, the executive, the legislature and the judiciary have their own quota of judges to appoint[836]. On the other hand, the rules of admissibility and procedure proved to play a key role in understanding the responsiveness of the courts in Colombia and Costa Rica to the extent that they materialise the right to an effective

[835] See Gloppen, S. (2006), *op. cit.,* p. 49 and Gloppen, S. (2008). Litigation as a strategy to hold governments accountable for implementing the right to health, *op. cit.*, 21–36.
[836] See See Morlino, L., & Sadurski, W. (2010), *op. cit.*, pp. 9-10.

remedy by competent national courts against acts that violate fundamental rights granted by the constitution or the law[837].

Colombia and Costa Rica provide for a legal opportunity structure, i.e., *amparo* proceedings may be filed not only against acts of authority, but also against acts of non-state actors and the procedure is free of formalities. In Mexico, in contrast, *amparo* proceedings may only be filed against acts of authority and its procedure is complex and subject to strict rules, which is why a specialised lawyer is required. As a consequence, *amparo* proceedings in Mexico are expensive and inaccessible to the population at large. Findings showed that having a legal opportunity structure in Colombia and Costa Rica has facilitated the access of different social groups to constitutional courts thanks to procedures free of formalism.

Finally, a revision of the legal opportunity structure needs to be discussed within the framework of ICT. The courts are not characterised by being at the cutting edge of technology. Although the implementation of e-justice has been discussed in the judiciary, the Covid-19 pandemic[838] took the courts by surprise. In a short time, they had to implement remote sessions, electronic signatures, integrate paper and electronic files and create an electronic system to receive, process and consult files as well as to carry out notifications to the parties.

The Covid-19 pandemic has not only accelerated the use of ICT within the judiciary but has shown that there is no turning back. Hence, a new line of research is emerging: the use of ICT and artificial intelligence (AI) in *amparo* proceedings. Among the aspects that could be addressed are access to justice for vulnerable groups, rendering judicial procedures more flexible to embrace the use of ICTs, training in the use of ICTs within and outside the judiciary, and resistance to change in a sector as traditional as the judiciary.

In sum, by determining that a legal opportunity structure and a shared model of judicial selection are relevant to the responsiveness of courts, this research provides valuable knowledge that may be useful for future research, policy diagnostics or judicial reforms.

d) Constitutional courts as democratic catalysts

[837] See Article 8, Universal Declaration of Human Rights.

[838] In December 2019, an outbreak of pneumonia called COVID-19 coronavirus disease occurred in the city of Wuhan, China, which has spread to countries in different regions of the world. COVID-19 is an infectious disease that threatens the health of the general population due to its easy spread. Given the alarming levels of both spread and severity, on 11 March 2020, the World Health Organization (WHO) declared COVID-19 as a pandemic. The pandemic is ongoing. More information is available on the WHO website. See World Health Organization. (2021). Coronavirus disease (COVID-19). Retrieved July 10, 2021, from https://www.who.int/emergencies/diseases/novel-coronavirus-2019

This research showed that *amparo* proceedings were effective in challenging three of the six democratic deficits identified by Carothers[839], such as frequent abuse of the law by government officials (cases where courts protected the right to physical integrity), very low levels of public confidence in state institutions (cases where courts protected procedural fairness in the law) and persistently poor institutional performance (cases where courts protected the right to health and social security).

A systematic denial of human rights underlies these democratic deficits as governments have failed or only partially fulfilled their obligation to protect the rights enshrined in constitutions and international treaties. Therefore, if democratic deficits can be challenged via *amparo* proceedings, it can be said that these proceedings work as a mechanism of democratic correction, to the extent that the judicial protection of human rights serves to limit the malfunctioning of the democratic process by disqualifying collective decisions that neglect them, as Nino has suggested[840].

From a deliberative democracy perspective, it is argued that both judicial review and *amparo* proceedings are mechanisms of democratic correction that need to be activated when political powers undermine the political process by ignoring or eroding rights[841]. According to Nino, courts as guardians of the democratic process can activate the mechanism of democratic correction to guarantee that the rules of the democratic process, the conditions for debate (enjoyment of rights) and decision-making are observed[842]. From this point of view, the judicial enforcement of rights gives epistemic value to the democratic process.

On this basis, this research contributes to the debate by challenging the widespread assertion that courts cannot decide on social rights as well as arguments about the counter-majoritarian character of courts.

e) External factors do not explain the responsiveness of courts, internal factors matter in hybrid regimes

The findings on the relationship between internal and external factors of the adjudication process and the responsiveness of constitutional courts in Colombia, Costa Rica and Mexico contribute to understanding the local conditions of the responsiveness of courts in democratic and hybrid regimes. For instance, neither internal nor external factors of the adjudication

[839] See Carothers, T. (2002), *op. cit.*
[840] See Nino, C. S. (1996), *op. cit*., quoted by Oquendo, Á. R. (2002). Deliberative Democracy in Habermas and Nino, *op. cit.*, p. 196.
[841] See Nino, C. S. (1993), *op. cit*., p. 799.
[842] Idem, p. 835.

process were found statistically significant to explain the responsiveness of the Constitutional Chamber in Costa Rica, a democratic regime. In Colombia and Mexico, hybrid regimes, internal factors such as the resources of the plaintiffs and the gender of the judges do matter.

External factors. Contrary to what has been held in the analysis of the US Supreme Court[843], it was found that external factors do not explain the responsiveness of the courts. The case of Colombia proved that the high levels of violence and political instability faced in the last decades did not prevent the court from being highly active in the protection of (social) rights. In addition, these findings prompt a new line of research: constitutional courts in contexts of violence. What role does violence play in the behaviour of courts, or vice versa, what role do courts play in reducing violence? Are courts responsive to rights claims in contexts of violence? What elements, internal or external, appear to inhibit or encourage courts to exercise their constitutional powers in contexts of violence? These are, among others, some questions that remain open.

The discussion of the findings of this research raises the issue of public opinion as a crucial element that helps to explain the responsiveness of courts to rights claims[844]. Regarding the US Supreme Court, Caldeira[845] has argued that judges are aware of the importance of public support and that, at least on some occasions, they consciously act to encourage it. Recently, Ríos-Figueroa[846], in the context of the *Theory of Constitutional Courts as Mediators in Latin America*, suggests that diffuse public support can influence both judicial decisions and the enforcement of judgments to the extent that it can back decisions that go against the preferences of the executive power and the legislature. Mazmanyan holds that this occurs in particular in political turbulent times with uncertain outcomes of political processes[847]. Popelier *et al.* argue that in crisis situations, the level of citizens' trust in the government determines the room that

[843] See McNollgast. (1995), *op. cit*. and Roe, M. J., & Siegel, J. (2011). Political Instability: Effects on Financial Development, Roots in the Severity of Economic Inequality, *op. cit.*

[844] I am indebted to Professors Ríos-Figueroa and Gloppen for their comments on my selection of external factors for the analysis of the responsiveness of courts. They allow me to reflect on the potential of public opinion and power distribution as external factors to be taken into account in future research.

[845] See Caldeira, G. A. (1987). Public Opinion and The U. S. Supreme Court: FDR ' s Court-Packing Plan Science Assoc. *The American Political Science Review*, *81*(4), 1139–1153.

[846] See Ríos-Figueroa, J. (2016). *Constitutional Courts as Mediators. Armed Conflict, Civil-Military Relations, and the Rule of Law in Latin America*. New York: Cambridge University Press.

[847] See Mazmanyan, Majoritarianism, deliberation and accountability as institutional instincts of constitutional courts (2013). Constitutional Courts and Multilevel Governance in Europe. Editors' introduction. In A. Mazmanyan, P. Popelier, & W. Vandenbruwaene (Eds.), *The Role of Constitutional Courts in Multilevel Governance*. Cambridge-Antwerp-Portland: Intersentia, p. 177.

courts have to scrutinize governmental acts[848]. Thus, new avenues open up for future research to expand the understanding of the relationship between public opinion as an external factor of the adjudication process and the judicial enforcement of human rights in late third wave countries.

Internal factors. It was found that in Colombia, the 'Have-nots' are 1.3 times more likely to be granted protection by the court than the 'Haves', while in Mexico, if the judgment is drafted by a male judge, it is 7.6 times more likely that protection will be denied and 7.5 times more likely that the petition will be dismissed. This suggests that in Mexico female judges are more prone to protect rights than their male counterparts. These findings provide new insights into the field of the judicial protection of rights in hybrid regimes. The prominent role of the Colombian Constitutional Court in the protection of disadvantaged groups or the role played by the gender of judges in Mexico can be further explored using qualitative methods.

For instance, the claim that courts as guardians of democracy require an understanding of the politics in which judges are expected to play this role[849] demands research focused on the perception of judges *vis-à-vis* democracy, i.e., how judges perceive themselves and how they are perceived by other political actors and by society.

According to Sen[850], human rights violations impose limits on freedoms that impede the development and exercise of the reasoned agency of individuals. Hence, the interaction between courts and individuals is of key importance, as courts and judges become an instrument that facilitates the development of individuals' reasoned agency. The findings from Colombia and Costa Rica show that courts have been highly responsive to the claims of vulnerable groups. Based on Sen's approach, research focused on plaintiffs who succeed in human rights litigation can shed light on whether the judicial enforcement of rights contributes to the development of individuals' reasoned agency.

Findings in Mexico suggesting that women judges are more likely to protect rights contrast with the low representation of women in the High Courts of the region. Therefore, in addition to shedding light on the state of gender and justice in non-Western countries, this research highlights the importance of opening new lines of research on the role of women in the judiciary

[848] See Popelier, P., Kleizen, B., Declerck, C., Glavina, M., & Van Dooren, W. (2021). Health crisis measures and standards for fair decision-making: A normative and empirical-based account of the interplay between science, politics and courts. *European Journal of Risk Regulation*, *12*(3), pp. 1-26.
[849] See Staton, J. K., Reenock, C. M., Holsinger, J., & Lindberg, S. I. I. (2018), *op. cit.*, p. 11.
[850] See Sen, A. (1999), *op. cit*., pp. xii and 19.

in hybrid regimes. What can explain the low representation of women in High Courts in hybrid regimes? What is the state of women's representation in lower courts in hybrid regimes? Are female judges more likely to protect or extend rights than their male colleagues?

f) The relationship between the judicial enforcement of rights and democratic performance

By disaggregating the V-Dem database, which measures democracy from a multidimensional perspective, and linking the rights inherent to high-, mid- and lower-level democracy indices, I was able to specify the democratic components that have been affected by the judicial enforcement of civil and political rights and economic, social and cultural rights. In addition, through the use of distributed lags and dynamic models, I identified the behavioural implications of the judicial enforcement of rights on democratic indices over time.

For instance, in Colombia the effects of judicial decisions take place in the same year in which they are pronounced, while in Costa Rica this happens three years later and in Mexico one year later. Importantly, a larger sample size over time is required to confirm the pattern observed in this study.

The exploratory study on the relationship between judicial enforcement of rights and democratic performance showed an increase on several democratic indices in the three countries. Expectations were met in the case of Costa Rica that reported increases on electoral, liberal and egalitarian democracy indices. On the basis of the performance of the Constitutional Court of Colombia in the protection of rights, increases in the indices of electoral, liberal and egalitarian democracy were expected. However, findings report an increase in one of the lower-level indices that comprise egalitarian democracy. Mexico showed increases in three indices that constitute electoral democracy. Importantly, the observed increases in the democratic indices of the three countries are not significantly different from zero, suggesting a modest influence of courts on democracy. (see Table 7-7, Table 7-8 and Table 7-9).

The findings that showed increases in the indices that comprise electoral democracy in Costa Rica and Mexico are subject to further analysis involving the judicial enforcement of electoral rights. The Clean elections index, a component of Electoral democracy, reported a .002 unit increase in Costa Rica and a .007 unit increase in Mexico. However, it was not possible to establish a link between the increases observed in this index and the judicial enforcement of rights because electoral matters were not part of this analysis.

The three selected constitutional courts do not have jurisdiction to adjudicate disputes in electoral matters. As mentioned in Chapter 3, in Latin America, electoral systems are characterised by the existence of specialised and independent bodies in charge of administrative and jurisdictional issues in electoral matters[851]. Jurisdiction in electoral matters is assigned to the Council of State in Colombia, the Supreme Tribunal of Elections in Costa Rica and the Electoral Tribunal of the Federal Judiciary in Mexico. Therefore, in order to determine whether increases observed in the Clean elections index in Costa Rica and Mexico relates to the judicial enforcement of rights, it is necessary to replicate the analysis carried out by this research with respect to decisions issued by specialised judicial bodies on electoral matters between 1990 and 2012.

Overall, the findings on the implications of the judicial enforcement of rights for democratic performance, though minimal, are viewed with optimism. When state violence, enforced disappearances, corruption and bad governance have been witnessed closely, any crack through which a rational and institutional solution can emerge deserves to be carefully analysed. The findings presented by this research offer the possibility of exploring institutional solutions to structural problems in contexts of high social conflict.

Having a legal instrument to enforce fundamental rights before the courts and having committed tribunals could be an alternative to exercising the right to social protest that, in countries such as Colombia or Mexico, often leads to confrontations with state forces that threaten the integrity and even the lives of demonstrators and undermine democracy because acts of repression are typical of authoritarian regimes. Thus, this research contributes to this purpose by offering elements to strengthen the legal framework of constitutional courts and *amparo* proceedings and by broadening the discussion on courts as democratic catalysts in hybrid regimes. The aim is to effectively use the resources provided by liberal democracy to advance democratisation processes and/or avoid democratic backsliding.

In addition, based on the premise that the effective enjoyment of rights contributes to enhancing the epistemic value of different democratic models this research raises the importance of evaluating the performance of courts when adjudicating human rights. As Staton *et al*.[852] argue, democracy is not only protected when regime norms are respected, but also when non-compliance with a norm is corrected through the legal process. Accordingly, there is a

[851] See Orozco Henríquez J. (2012), *op. cit.*, p. 212.
[852] See Staton, J. K., Reenock, C. M., Holsinger, J., & Lindberg, S. I. I. (2018), *op. cit.*, p. 10.

normative basis for discussing the inclusion of the judicial enforcement of rights as a component of democratic indices. This might allow not only to assess judicial performance in terms of changes reflected in democratic indices, but also to reconfigure the role of constitutional courts from guardians of the constitution to guardians of democracy.

iii. Limitations, vicissitudes and recommendations

This research focused on the quantitative analysis of the vertical accountability function of courts (human rights adjudication) in three Latin American countries, two hybrid regimes and one democracy. This limited the possibility of a broader analysis encompassing horizontal review or the design of a qualitative analysis or a comparative study of courts across regions. However, it offers a new approach to analyse judicial review from a multidimensional perspective of democracy, as well as the possibility of a more ambitious project that includes the analysis of the judicial enforcement of rights across regions or a qualitative analysis focused on judges or plaintiffs.

Chapter 6 addressed a number of operational problems encountered during the collection, coding and analysis of the data. These problems will be briefly outlined here, as they provide an opportunity to discuss some recommendations that may be useful for policy design.

Data availability. This research experienced some difficulties in accessing information. In the case of Mexico, it was necessary to submit a formal request to have access to 273 judgments (out of the 382 needed to cover the sample) that were not available on the website of the court. Regarding the biographies of judges, the websites of the constitutional courts of Colombia, Costa Rica and Mexico provide biographies or curricula vitae of current judges, but little or no information on former judges. The difficulties of data availability encountered during this research point to the need for courts to reassess their transparency and communication policies. All judgments as well as the profiles of current and former judges and issues related to salaries and budget should be available electronically.

Long and intricate judgments. In the case of Mexico, judgments include dozens of pages full of transcripts and paragraphs reciting old-fashioned expressions, causing readers to get lost in transcripts and complex language. Judgments should not only be available, but also accessible to the general public as they are the channel through which courts communicate with society. Courts are therefore encouraged to use clear and simple language to explain the scope of their decisions.

Statistical expertise. The analysis of the data required constant training in statistical techniques and was supported by the Department of Statistics of the University of Antwerp. As empirical studies are becoming increasingly popular in the field of law, this leads to reflect on the importance for law schools to include courses on quantitative and qualitative research methods as well as on statistics in their academic programmes.

Language barrier. Few courts offer an English version of their website. This is not a minor problem, as language should not be a barrier for a judge, a litigant or a researcher from Africa, Asia, Eastern Europe or Latin America to access the jurisprudential criteria developed by courts in other regions. In order to facilitate the dissemination of novel jurisprudential criteria between regions, it is increasingly necessary for the courts to have an English version of their website that offers access to their legal framework and their jurisprudential criteria, at least the most relevant ones.

Databases. In the interest of strengthening accountability, courts ought to have databases of their decisions. The statistical report on the flow of incoming and outgoing cases provided by some courts is useful to know the workload of the courts, however, it does not allow for a comprehensive assessment of the judicial function. Gloppen's[853] analytical framework on litigation as a strategy for holding governments accountable, which informed the design of the measurement instruments used by this research, can serve as a reference for creating databases with disaggregated information on the four stages of the litigation process, i.e., the claim formation stage, the adjudication stage, the implementation stage and the social outcomes stage. Judicial databases would facilitate the elaboration of diagnostics, reports or research for the development of judicial policies focused on improving the administration of justice. Moreover, such an initiative would increase the accountability of the courts by providing the necessary data for the scrutiny of the judicial function.

In sum, it can be concluded that this research has fulfilled the objective of contributing to the debate on the role of constitutional courts established during the late third wave vis-à-vis democracy. The analysis of the responsiveness of courts to rights claims shows divergent behaviour across countries and regimes. It has been argued that the functioning of courts depends to a large extent on the reasons for their origin as well as their institutional and legal framework.

[853] See Gloppen, S. (2008), *op. cit.*

For example, in Mexico (hybrid regime) the court has operated in a complex political and social context under a normative framework that has limited its performance in the field of the protection of rights. In Colombia (hybrid regime) the context is not so different; however, the court has succeeded in protecting human rights somewhat similar to its counterpart in Costa Rica (a stable democracy). In both cases, the establishment of these courts was found to be linked to a strong commitment to the protection of rights that was accompanied by a legal framework that has favoured access to justice and judicial autonomy. This has given the opportunity to advance the idea that courts in hybrid regimes can act as democratic catalysts provided they have the right institutional and legal framework and are staffed with judges committed to the dual task of resolving individual cases and promoting a course of action to improve the epistemic quality of the democratic system.

Finally, the results of the exploratory study on the judicial enforcement of rights and democratic performance reveal a minimal improvement in democratic indices and offer the possibility of considering the strengthening of the courts as part of a much broader institutional strategy to preserve democratic values in times when democracy is threatened by the rise of autocracies worldwide.

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Appendix

Appendix A

Table A-1. International Covenant on Civil and Political Rights.

Article	Right	Disaggregation
Articles 6, 7, and 8	Physical integrity	• The right to life • Freedom from torture and slavery
Articles 9 – 11	Liberty and security of the person	• Freedom from arbitrary arrest and detention • The right to *habeas corpus*
Articles 14, 15, and 16	Procedural fairness in law	• Rights to due process, a fair and impartial trial • The presumption of innocence • Recognition as a person before the law
Articles 12, 13, 17 – 24	Individual liberty	• Freedoms of: - Movement - Thought - Conscience and religion - Speech - Association and assembly • Family rights • The right to a nationality • The right to privacy
Article 20	Prohibition of any war propaganda as well as any advocacy of national or religious hatred that constitutes incitement to discrimination, hostility or violence by law.	
Article 25	Political participation	• The right to join a political party • The right to vote
Article 26	Non-discrimination and equality before the law	
Article 27	Minority rights	• The right to enjoy their own culture • The right to profess and practise their own religion • The right to use their own language

Source: Own elaboration based on the information of the International Covenant on Civil and Political Rights.

Table A-2. International Covenant on Economic, Social and Cultural Rights.

Article	Right	Disaggregation
Art. 6, 7 and 8	Right to work	• The right to the opportunity to gain a living by work which can be freely chosen or accepted. • The right to the enjoyment of just and favourable conditions of work - Remuneration o Fair wages o Equal pay for equal work o A decent living - Safe and healthy working conditions - Equal chances to be promoted. - Rest, leisure and reasonable limitation of working hours and periodic paid holidays as well as remuneration for public holidays • The right to form trade unions and join the trade union of choice. • The right to strike.
Art. 9	Right to social security	• Social insurance
Art. 10	Protection and assistance to the family and children	• Marriage (free consent of the intending spouses) • Maternity leave • Protection of children and young persons against discrimination and from economic and social exploitation
Art. 11	Right to an adequate standard of living	• Adequate food, clothing and housing and the continuous improvement of living conditions. • The fundamental right to be free from hunger.
Art. 12	Right to health	• Provisions for the reduction of the stillbirth rate, infant mortality and for the healthy development of the child. • Improvement of environmental and industrial hygiene. • Prevention, treatment and control of epidemic, endemic, occupational and other diseases. • Conditions which would assure medical service and medical attention in the event of illness.
Arts. 13 y 14	Right to education	• Compulsory primary education available and free to all. • Secondary education (generally available and accessible to all) and higher education (equally accessible) by the progressive introduction of free education. • The development of a system of schools at all levels; adequate fellowship system, and the material conditions of teaching staff shall be continuously improved.
Art. 15	Cultural rights	• The right to take part in cultural life. • The right to enjoy the benefits of scientific progress and its applications. • The protection of the moral and material interests resulting from any scientific, literary or artistic production. • To respect the freedom indispensable for scientific research and creative activity.

Source: Own elaboration

Appendix B

B1. Feld and Voigt questionnaire to measure the *de jure* judicial independence.

Country for which information is provided:	
A *de iure* measure for court independence	
Question	Code
1) Is the highest court mentioned in the constitution? YES ( ) NO ( )	Yes= ½ No= 0
a. Are its competencies enumerated in the constitution? YES ( ) NO ( )	Yes= 1/8 No= 0
b. Are its procedures specified in the constitution? YES ( ) NO ( )	Yes= 1/8 No= 0
c. Is access to the highest court specified in the constitution? YES ( ) NO ( )	Yes= 1/8 No= 0
d. Are the arrangements concerning the members of the highest court enumerated in the constitution? aa. Is the term length specified in the constitution? YES ( ) NO ( ) bb. Is the number of judges specified in the constitution? YES ( ) NO ( )	 Yes= 1/16 No= 0
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:	
2) How difficult is it to amend the constitution?[854]	
a. Is a majority necessary that is above that necessary for changing ordinary legislation? YES ( ) NO ( )	Yes= 1 No= 0
b. How many branches of government have to agree? 1 ( ) 2 ( ) 3 ( )	1= 1/4 2= 1/2 3= 3/4
c. Are majority decisions necessary at different points in time? YES ( ) NO ( )	Yes= 1/4 No= 0
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:	
3) How are the members of the highest court elected/nominated? (PLEASE TICK THE APPROPRIATE LETTER) a. Judges are nominated and elected by one or more members of the executive b. Judges are nominated by one or more members of the executive and are elected by parliament (or a committee thereof). c. Judges are nominated by one or more members of the executive and are elected by the judiciary. d. Judges are nominated and elected by parliament (or a committee thereof). e. Judges are nominated by parliament (or a committee thereof) and are elected by one or more members of the executive. f. Judges are nominated by parliament (or a committee thereof) and are elected by the judiciary. g. Judges are nominated and elected by the judiciary. h. Judges are nominated by the judiciary and are elected by one or more members of the executive. i. Judges are nominated by the judiciary and are elected by parliament (or a committee thereof). j. Judges are nominated by the judiciary, the legislature, or the executive and are elected by actors not representing any government branch (academics, the public at large	

[854] Note on coding concerning this question: The sum of b and c provided that a is answered in the affirmative

			Competence to elect/appoint members of highest court	
Competence to nominate members of highest court		Executive	Legislature	Judiciary
	Executive	0	1/3	2/3
	Legislature	1/3	0	2/3
	Judiciary	2/3	2/3	1

A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:

4) What is the legal term length of the judges on the highest court?

NUMBER OF YEARS_____
In comparison, parliament's election period in number of years____

Concerning legal term length, emphasis in the institutional arrangement is usually either on a specification in number of years or on a fixed retirement age. We thus need two coding scales. Here they are:

Term of office(too)	coding
≥ 12 years	1,0
10 ≤ too < 12	0,8
8 ≤ too < 10	0,6
6 ≤ too < 8	0,4
4 ≤ too < 6	0,2
4 > too	0,0

Often, judges are appointed rather later in their careers. Early and mandatory retirement is hypothesized to constrain *JI* because judges could be less daring during their first couple of years in office. We used the following coding:

Too	coding
for life	1,0
Mandatory retirement (mr) ≥ 75 years	1,0
65 ≤ mr < 75	0,8
65 > mr	0,6

A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:

5) Can judges be reelected? YES ( ) NO ( )	Yes= 0

A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:

6) How can judges be removed from office? (PLEASE TICK THE APPROPRIATE LETTER)	
a. only by judicial procedure	a= 1
b. by decision of one or more members of the executive	b= 0
c. by decision of parliament (or a committee thereof)	c= 0
d. by joint decision of one or more members of the executive and of parliament (or a committee thereof)	d= ½.

A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:

7) Is there a measure against income reduction of judges? Is there a mechanism securing adjustment in real terms? YES ( ) NO ( )	Yes= 1

A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:

8) Are the judges paid adequately?	
a. Are they paid more than university professors? YES ( ) NO ( )	Yes= 1/3
b. Are they paid more than an average private lawyer? YES ( ) NO ( )	Yes= 1/3
c. Are they paid as well as the minister of justice? YES ( ) NO ( )	Yes= 1/3

A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:

9) Who has the possibility to access the highest court?	

a. Individuals in any case relevant to the constitution and with which they are personally concerned.	a= 1
b. Individuals, but only in a subset of cases relevant to the constitution (such as human rights)	b= ½
c. Only other government branches.	c= 0
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:	
10) Is there a general rule allocating the responsibility concerning incoming cases to specific judges? YES ( ) NO ( )	Yes=1
(or does the chief justice have discretion on the allocation of cases?) YES ( ) NO ( )	
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:	
11) Does the constitution (or the law establishing the highest court) preview the power of constitutional review? YES ( ) NO ( )	Yes= 1
Are there any limits to it (e.g., only before a law has been promulgated?) ( ) YES ( ) NO	
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:	
12) Does the highest court have to publish	
a. the main reasons for a decision YES ( ) NO ( )	Yes= 1/3
b. an extended proof? YES ( ) NO ( )	Yes= 1/3
c. Are dissenting opinions published regularly? YES ( ) NO ( )	Yes= 1/3
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:	

B2. Questionnaire to measure the *de* jure judicial independence of the Constitutional Court of Colombia.

Colombia	
Question	Code
1) Is the highest court mentioned in the constitution? YES (χ) NO ( )	Yes= 1/2
a. Are its competencies enumerated in the constitution? YES (χ) NO ( )	Yes= 1/8
b. Are its procedures specified in the constitution? YES (χ) NO ( )	Yes= 1/8
c. Is access to the highest court specified in the constitution? YES (χ) NO ( )	Yes= 1/8
d. Are the arrangements concerning the members of the highest court enumerated in the constitution? aa. Is the term length specified in the constitution? YES (χ) NO ( ) bb. Is the number of judges specified in the constitution? YES ( ) NO (χ)	Yes= 1/16 No= 0
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS: a. Art. 241 CC b. Art. 241 CC c. Arts. 241-242 and 229 CC d. aa. Art. 239 CC bb. Chapter III, art. 22 transitory of CC establishes for the first generation of constitutional court 7 members. Art. 44 *Ley 270 de 1996 Estatutaria de la Administración de Justicia* establishes that the constitutional court is composed of 9 members.	
2) How difficult is it to amend the constitution?[855]	
a. Is a majority necessary that is above that necessary for changing ordinary legislation? YES (χ) NO ( )	Yes= 1 No= 0
b. How many branches of government have to agree? 1 (χ) 2 ( ) 3 ( )	1= 1/4 2= 1/2 3= 3/4
c. Are majority decisions necessary at different points in time? YES (χ) NO ( )	Yes= 1/4 No= 0
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS: a. Arts 157-162 CC b. Congress. c. Arts. 375-379 CC	
3) How are the members of the highest court elected/nominated? (PLEASE TICK THE APPROPRIATE LETTER) a. Judges are nominated and elected by one or more members of the executive b. Judges are nominated by one or more members of the executive and are elected by parliament (or a committee thereof). c. Judges are nominated by one or more members of the executive and are elected by the judiciary. d. Judges are nominated and elected by parliament (or a committee thereof). e. Judges are nominated by parliament (or a committee thereof) and are elected by one or more members of the executive. f. Judges are nominated by parliament (or a committee thereof) and are elected by the judiciary.	

[855] Note on coding concerning this question: The sum of b and c provided that a is answered in the affirmative

g. Judges are nominated and elected by the judiciary.

h. Judges are nominated by the judiciary and are elected by one or more members of the executive.

i. Judges are nominated by the judiciary and are elected by parliament (or a committee thereof).

j. Judges are nominated by the judiciary, the legislature, or the executive and are elected by actors not representing any government branch (academics, the public at large

k.

		Competence to elect/appoint members of highest court		
		Executive	Legislature	Judiciary
Competence to nominate members of highest court	Executive	0	1/3	2/3
	Legislature	1/3	0	2/3
	Judiciary	2/3	2/3	1

4) What is the legal term length of the judges on the highest court?

NUMBER OF YEARS: 8 years
In comparison, parliament's election period in number of years: 4 years

Concerning legal term length, emphasis in the institutional arrangement is usually either on a specification in number of years or on a fixed retirement age. We thus need two coding scales. Here they are:

Term of office(too)	coding
≥ 12 years	1,0
10 ≤ too < 12	0,8
8 ≤ too < 10	0,6
6 ≤ too < 8	0,4
4 ≤ too < 6	0,2
4 > too	0,0

Often, judges are appointed rather later in their careers. Early and mandatory retirement is hypothesized to constrain *JI* because judges could be less daring during their first couple of years in office. We used the following coding:

Too	coding
for life	1,0
Mandatory retirement (mr) ≥ 75 years	1,0
65 ≤ mr < 75	0,8
65 > mr	0,6

A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:
Art. 233 CC; art. 31 Decree 2400 of 1968; art. 128 Decree 1660 of 1978. Retirement age in Colombia for constitutional judges is sixty-five (65).

5) Can judges be reelected? YES ( ) NO (χ)	Yes= 0

A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:
Art. 239 CC.

6) How can judges be removed from office? (PLEASE TICK THE APPROPRIATE LETTER)

a. only by judicial procedure	a= 1
b. by decision of one or more members of the executive	b= 0
c. by decision of parliament (or a committee thereof)	c= 0
d. by joint decision of one or more members of the executive and of parliament (or a committee thereof)	d= ½.

A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:
Arts. 174, 175 and 178 CC.

7) Is there a measure against income reduction of judges? Is there a mechanism securing adjustment in real terms? YES ( ) NO (χ)	Yes= 1

A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:

Are the judges paid adequately?

a. Are they paid more than university professors? YES ( ) NO ( )	Yes= 1/3
b. Are they paid more than an average private lawyer? YES ( ) NO ( )	Yes= 1/3
c. Are they paid as well as the minister of justice? YES ( ) NO ( )	Yes= 1/3
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:	
8) Who has the possibility to access the highest court?	
a. Individuals in any case relevant to the constitution and with which they are personally concerned.	a= 1
b. Individuals, but only in a subset of cases relevant to the constitution (such as human rights)	b= ½
c. Only other government branches.	c= 0
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS: Art. 229-241 CC.	
9) Is there a general rule allocating the responsibility concerning incoming cases to specific judges? YES (χ) NO ( )	Yes=1
(or does the chief justice have discretion on the allocation of cases?) YES ( ) NO ( )	
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS: Arts. 38-44 Reglamento de la CC	
10) Does the constitution (or the law establishing the highest court) preview the power of constitutional review? YES (χ) NO ( )	Yes= 1
Are there any limits to it (e.g., only before a law has been promulgated?) ( ) YES (χ) NO	
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS: Art. 241 CC. Constitutional Court of Colombia is granted with both a priori and a posteriori review.	
11) Does the highest court have to publish	
a. the main reasons for a decision YES (χ) NO ( )	Yes= 1/3
b. an extended proof? YES ( ) NO (χ)	Yes= 1/3
c. Are dissenting opinions published regularly? YES (χ) NO ( )	Yes= 1/3
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS: Art. 47 *Ley 270 de 1996 Estatutaria de la Administración de Justicia.*	

B3. Questionnaire to measure the *de* jure judicial independence of the Constitutional Chamber of Costa Rica.

Costa Rica	
Question	Code
1) Is the highest court mentioned in the constitution? YES (χ) NO ( )	Yes= 1/2
a. Are its competencies enumerated in the constitution? YES (χ) NO ( )	Yes= 1/8
b. Are its procedures specified in the constitution? YES ( ) NO (χ)	Yes= 1/8
c. Is access to the highest court specified in the constitution? YES (χ) NO ( )	Yes= 1/8
d. Are the arrangements concerning the members of the highest court enumerated in the constitution? aa. Is the term length specified in the constitution? YES (χ) NO ( ) bb. Is the number of judges specified in the constitution? YES ( ) NO (χ)	Yes= 1/16 No= 0
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS: a. Art. 10, 48 and 128 CCR b. *Ley de la Jurisdicción Constitucional.* c. Arts. 48 CCR aa. Art. 158 CCR bb. Art. 4o. *Ley de la Jurisdicción Constitucional*.	
2) How difficult is it to amend the constitution?[856]	
a. Is a majority necessary that is above that necessary for changing ordinary legislation? YES (χ) NO ( )	Yes= 1 No= 0
b. How many branches of government have to agree? 1 ( ) 2 (χ) 3 ( )	1= ¼ 2= 1/2 3= 3/4
c. Are majority decisions necessary at different points in time? YES (χ) NO ( )	Yes= ¼ No= 0
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS: a. Arts.195 CCR b. The Congress and the President. Art. 195 CCR. c. Art. 195 CCR	
3) How are the members of the highest court elected/nominated? (PLEASE TICK THE APPROPRIATE LETTER) a. Judges are nominated and elected by one or more members of the executive b. Judges are nominated by one or more members of the executive and are elected by parliament (or a committee thereof). c. Judges are nominated by one or more members of the executive and are elected by the judiciary. d. Judges are nominated and elected by parliament (or a committee thereof). e. Judges are nominated by parliament (or a committee thereof) and are elected by one or more members of the executive. f. Judges are nominated by parliament (or a committee thereof) and are elected by the judiciary. g. h. Judges are nominated and elected by the judiciary.	

[856] Note on coding concerning this question: The sum of b and c provided that a is answered in the affirmative.

i. Judges are nominated by the judiciary and are elected by one or more members of the executive.

j. Judges are nominated by the judiciary and are elected by parliament (or a committee thereof).

k. Judges are nominated by the judiciary, the legislature, or the executive and are elected by actors not representing any government branch (academics, the public at large

		Competence to elect/appoint members of highest court		
		Executive	Legislature	Judiciary
Competence to nominate members of highest court	Executive	0	1/3	2/3
	Legislature	1/3	0	2/3
	Judiciary	2/3	2/3	1

A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:
Art. 157 Constitution of Costa Rica.

4) What is the legal term length of the judges on the highest court?

NUMBER OF YEARS: 8 years
In comparison, parliament's election period in number of years: 4 years; no reelection

Concerning legal term length, emphasis in the institutional arrangement is usually either on a specification in number of years or on a fixed retirement age. We thus need two coding scales. Here they are:

Term of office(too)	coding
≥ 12 years	1,0
10 ≤ too < 12	0,8
8 ≤ too < 10	0,6
6 ≤ too < 8	0,4
4 ≤ too < 6	0,2
4 > too	0,0

Often, judges are appointed rather later in their careers. Early and mandatory retirement is hypothesized to constrain *JI* because judges could be less daring during their first couple of years in office. We used the following coding:

Too	coding
for life	1,0
Mandatory retirement (mr) ≥ 75 years	1,0
65 ≤ mr < 75	0,8
65 > mr	0,6

A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:
Art. 224, *Ley Orgánica del Poder Judicial*. Retirement age in Costa Rica for constitutional judges is sixty-two (62).

5) Can judges be re-elected? YES (χ) NO ( )	Yes= 0

A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:
Art. 158 CCR.

6) How can judges be removed from office? (PLEASE TICK THE APPROPRIATE LETTER)	
a. only by judicial procedure	a= 1
b. by decision of one or more members of the executive	b= 0
c. by decision of parliament (or a committee thereof)	c= 0
d. by joint decision of one or more members of the executive and of parliament (or a committee thereof)	d= ½.

A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:
Art. 182 *Ley Orgánica del Poder Judicial*.

7) Is there a measure against income reduction of judges? Is there a mechanism securing adjustment in real terms? YES ( ) NO (χ)	Yes= 1

A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:

8) Are the judges paid adequately?	
a. Are they paid more than university professors? YES ( ) NO ( )	Yes= 1/3
b. Are they paid more than an average private lawyer?	Yes= 1/3

YES ( ) NO ( )	
c. Are they paid as well as the minister of justice? YES ( ) NO ( )	Yes= 1/3
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:	
9) Who has the possibility to access the highest court?	
a. Individuals in any case relevant to the constitution and with which they are personally concerned.	a= 1
b. Individuals, but only in a subset of cases relevant to the constitution (such as human rights)	b= ½
c. Only other government branches.	c= 0
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS: Arts. 18, 33, 58, 66, Ley de la Jurisdicción Constitucional.	
10) Is there a general rule allocating the responsibility concerning incoming cases to specific judges? YES (χ) NO ( )	Yes=1
(or does the chief justice have discretion on the allocation of cases?) YES (χ) NO ( )	
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS: Art. 11 Ley de la Jurisdicción Constitucional. It corresponds to the President decide about incoming cases.	
11) Does the constitution or the law establishing the highest court) preview the power of constitutional review? YES (χ) NO ( )	Yes= 1
Are there any limits to it (e.g., only before a law has been promulgated?) ( ) YES (χ) NO	
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS: Art. 10 Constitution of Costa Rica. Constitutional Chamber is granted with both *a priori* and *a posteriori* review.	
12) Does the highest court have to publish	
a. the main reasons for a decision YES (χ) NO ( )	Yes= 1/3
b. an extended proof? YES ( ) NO (χ)	Yes= 1/3
c. Are dissenting opinions published regularly? YES (χ) NO ( )	Yes= 1/3
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:	

B4. Questionnaire to measure the *de* jure judicial independence of the Supreme Court of Justice of Mexico.

Mexico	
Question	Code
1) Is the highest court mentioned in the constitution? YES (χ) NO ( )	Yes= 1/2
a. Are its competencies enumerated in the constitution? YES (χ) NO ( )	Yes= 1/8
b. Are its procedures specified in the constitution? YES (χ) NO ( )	Yes= 1/8
c. Is access to the highest court specified in the constitution? YES (χ) NO ( )	Yes= 1/8
d. Are the arrangements concerning the members of the highest court enumerated in the constitution? aa. Is the term length specified in the constitution? YES (χ) NO ( ) bb. Is the number of judges specified in the constitution? YES (χ) NO ( )	Yes= 1/16 No= 0
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS: 1) Art. 94 CPEUM a. Art. 103 and 105 CPEUM b. Arts. 105,n107 CPEUM c. Arts. 106, 107 CPEUM d. aa./bb Art. 95 CPEUM	
2) How difficult is it to amend the constitution?[857]	
a. Is a majority necessary that is above that necessary for changing ordinary legislation? YES (χ) NO ( )	Yes= 1 No= 0
b. How many branches of government have to agree? 1 (χ) 2 ( ) 3 ( )	1= 1/4 2= 1/2 3= 3/4
c. Are majority decisions necessary at different points in time? YES (χ) NO ( )	Yes= 1/4 No= 0
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS: Art. 135 CPEUM	
3) How are the members of the highest court elected/nominated? (PLEASE TICK THE APPROPRIATE LETTER) a. Judges are nominated and elected by one or more members of the executive b. Judges are nominated by one or more members of the executive and are elected by parliament (or a committee thereof). c. Judges are nominated by one or more members of the executive and are elected by the judiciary. d. Judges are nominated and elected by parliament (or a committee thereof). e. Judges are nominated by parliament (or a committee thereof) and are elected by one or more members of the executive. f. Judges are nominated by parliament (or a committee thereof) and are elected by the judiciary. g. Judges are nominated and elected by the judiciary. h. Judges are nominated by the judiciary and are elected by one or more members of the executive. i. Judges are nominated by the judiciary and are elected by parliament (or a committee thereof).	

[857] Note on coding concerning this question: The sum of b and c provided that a is answered in the affirmative.

j. Judges are nominated by the judiciary, the legislature, or the executive and are elected by actors not representing any government branch (academics, the public at large

		Competence to elect/appoint members of highest court		
		Executive	Legislature	Judiciary
Competence to nominate members of highest court	Executive	0	1/3	2/3
	Legislature	1/3	0	2/3
	Judiciary	2/3	2/3	1

A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:
Art. 96 CPEUM

4) What is the legal term length of the judges on the highest court?

NUMBER OF YEARS: 15 years
In comparison, parliament's election period in number of years: 3 years Deputies and 6 years Senators

Concerning legal term length, emphasis in the institutional arrangement is usually either on a specification in number of years or on a fixed retirement age. We thus need two coding scales. Here they are:

Term of office(too)	coding
≥ 12 years	1,0
10 ≤ too < 12	0,8
8 ≤ too < 10	0,6
6 ≤ too < 8	0,4
4 ≤ too < 6	0,2
4 > too	0,0

Often, judges are appointed rather later in their careers. Early and mandatory retirement is hypothesized to constrain *JI* because judges could be less daring during their first couple of years in office. We used the following coding:

Too	coding
for life	1,0
Mandatory retirement (mr) ≥ 75 years	1,0
65 ≤ mr < 75	0,8
65 > mr	0,6

A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:
Art. 94 CPEUM and art. 8o. LOPJF

5) Can judges be re-elected?
YES ( ) NO (χ) — Yes= 0

A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:
Art. 94 CPEUM

6) How can judges be removed from office? (PLEASE TICK THE APPROPRIATE LETTER)

a. only by judicial procedure	a= 1
b. by decision of one or more members of the executive	b= 0
c. by decision of parliament (or a committee thereof)	c= 0
d. by joint decision of one or more members of the executive and of parliament (or a committee thereof)	d= ½.

A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:
Art. 98 CPEUM

7) Is there a measure against income reduction of judges? Is there a mechanism securing adjustment in real terms?
YES (χ) NO ( ) — Yes= 1

A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:

8) Are the judges paid adequately?

a. Are they paid more than university professors? YES ( ) NO ( )	Yes= 1/3
b. Are they paid more than an average private lawyer? YES ( ) NO ( )	Yes= 1/3
c. Are they paid as well as the minister of justice?	Yes= 1/3

YES ( ) NO ( )	
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS:	
9) Who has the possibility to access the highest court?	
a. Individuals in any case relevant to the constitution and with which they are personally concerned.	a= 1
b. Individuals, but only in a subset of cases relevant to the constitution (such as human rights)	b= ½
c. Only other government branches.	c= 0
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS: Arts. 103, 105 CPEUM	
10) Is there a general rule allocating the responsibility concerning incoming cases to specific judges? YES ( ) NO (χ)	Yes=1
(or does the chief justice have discretion on the allocation of cases?) YES (χ) NO ( )	
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS: Arts. 14 fracc. II, LOPJF	
11) Does the constitution (or the law establishing the highest court) preview the power of constitutional review? YES (χ) NO ( )	Yes= 1
Are there any limits to it (e.g., only before a law has been promulgated?) (χ) YES () NO	
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS: Art. 105 CPEUM. Judicial review in Mexico is only *a posteriori*.	
12) Does the highest court have to publish	
a. the main reasons for a decision YES (χ) NO ( )	Yes= 1/3
b. an extended proof? YES ( ) NO (χ)	Yes= 1/3
c. Are dissenting opinions published regularly? YES (χ) NO ( )	Yes= 1/3
A GOOD SOURCE FOR MORE DETAILED INFORMATION IS: Art. 177 *LOPJF*.	

Appendix C

Table C-1. Judicial proceedings found in the records of the website of the Constitutional Chamber of Costa Rica.

1. Acción de inconstitucionalidad
2. Actividad judicial no contenciosa
3. Actividad procesal defectuosa
4. Adición y aclaración
5. Arreglo extrajudicial
6. Autorización para salida de los menores
7. Competencia
8. Conflicto de competencia
9. Consulta judicial
10. Consulta judicial facultativa
11. Consulta judicial preceptiva
12. Consulta legislativa
13. Consulta legislativa facultativa
14. Consulta legislativa preceptiva
15. Convenio preventivo
16. Corrección de error material
17. Desistimiento
18. Desobediencia a la autoridad
19. Diligencias para obtener el exequátur
20. Disolución de cooperativas
21. empty
22. Extradición
23. Gestiones de intervención adhesiva
24. Incidente de cobro de honorarios
25. Incidente de ejecución
26. Incidente de nulidad
27. Incidente de nulidad de notificación
28. Medida cautelar
29. Nulidad de sentencia
30. Otras Consultas
31. Otros Asuntos
32. Procedimiento de revisión
33. Proceso de ejecución de daños y perjuicios
34. Proceso de ejecución de sentencia
35. Proceso de fijación de alquileres
36. Proceso especial tributario
37. Proceso ordinario civil
38. Reconocimiento de unión de hecho y reivindicación
39. Recurso ante sala de casación
40. Recurso de adhesión
41. Recurso de amparo
42. Recurso de apelación
43. Recurso de casación
44. Recurso de hábeas corpus
45. Recurso de queja
46. Recurso de reconsideración
47. Recurso de revisión
48. Recurso de revocatoria
49. Revisión de sentencia
50. Solicitud de desestimación

Table C-2. Judicial proceedings found in the records of the website of the Supreme Court of Justice of Mexico.

- Acción Inconstitucionalidad
- Aclaración de Sentencia
- Amparo Directo
- Amparo Directo en Revisión
- Amparo en Revisión
- Apelación
- Apelación Civil
- Apelación Penal
- Artículo 100
- Artículo 11 Ley Orgánica Poder Judicial de la Federación
- ATJ ct
- Conflicto Competencial
- Consulta
- Consulta procedimiento Art. 14, II LOPJ
- Contradicción de Tesis
- Controversia Constitucional
- Controversia f. XX art. 11 LOPJF
- Cumplimiento convenios coordinación fiscal
- Declaratoria General Inconstitucionalidad
- Denuncia incumplimiento sentencia Controversia Constitucional
- Denuncia repetición acto reclamado
- Dictamen final facultad investigación
- Diligencias Jurisdicción Voluntaria
- Excepción falta personalidad
- Excepción improcedencia vía
- Excepción incompetencia
- Facultad de atracción
- Impedimento
- Impedimento Controversia Constitucional
- Incidente Acumulación
- Incidente de Inejecución de Sentencia
- Incidente Derivados Juicio Ordinario Federal
- Incidente Inejecución del Acto Reclamado

34. Incidente liquidación de Intereses
35. Incidente Nulidad Actos Juicio Ordinario Federal
36. Incidente Pago honorarios
37. Incidente Suspensión Controversia Constitucional
38. Inconformidad
39. Inconformidad Cumplimiento Revisión Administrativas
40. Jucio Ordinario Civil Federal
41. Modificación Jurisprudencia
42. Queja
43. Queja Acción de Inconstitucionalidad
44. Queja Administrativa
45. Queja Controversia Constitucional
46. Reasunción competencia
47. Reconocimiento inocencia
48. Recurso de Reclamación Acción de Inconstitucionalidad
49. Recurso de Reclamación Controversia Constitucional
50. Recurso denegada apelación
51. Recurso Innominado
52. Recurso Reclamación
53. Recurso Reclamación Convenios de Coordinación Fiscal
54. Recurso Revisión Incidente Suspensión
55. Recurso Revocación
56. Responsabilidad Administrativa
57. Revisión Admva.
58. Revisión Fiscal
59. Revisión Incidente Suspensión
60. Sol. Revocación Suspensión
61. Solicitud de Facultad de Investigación
62. Solicitud Facultad de Atracción
63. Solicitud Ley Federal de Transparencia
64. Sustitución Jurisprudencia
65. Varios
66. Varios Controversia Constitucional

APPENDIX D

Measurement instrument (1) 'Judgments'

Claims formation stage

Plaintiff

1. Type

- ☐ Lay Individuals
- ☐ Group of individuals
- ☐ Organization
- ☐ Authority

1.1 Characteristics lay individuals

Name ☐

Gender

- ☐ Female
- ☐ Male
- ☐ Other
- ☐ Do Not know (DK)

Age

- ☐ Minor
- ☐ Adult
- ☐ Elderly
- ☐ Do Not Know (DK)

Profession/Occupation ☐

☐ Do Not Know (DK)

Legal aid

- ☐ No
- ☐ Yes
  - ☐ Public defender
  - ☐ Private lawyer
  - ☐ Other *specify

☐ Do Not Know (DK)

1.2 Characteristics group of individuals

Number of plaintiffs

- ☐ 1
- ☐ 2-5
- ☐ 6-10
- ☐ 10-20
- ☐ >20

Gender

Number females ☐
Number males ☐
Number other ☐
Do Not know (DK) ☐

Profession/Occupation

☐

☐ Do Not know (DK)

Legal aid

- ☐ No
- ☐ Yes
  - ☐ Public defender
  - ☐ Private lawyer
  - ☐ Other *specify

☐ Do Not Know (DK)

1.3 Characteristics organizations

Name

☐

	Not available (N/A)

Type of sector they belong

2. Reasons to bring cases to the Constitutional Court (CC)

	Advance government accountability
	To remedy a concrete problem
	Commercial interests

Defendant

1. Name of the defendant

2. Number of defendants

	1
	2-5
	6-10
	10-20
	>20

3. Type of authority

	Executive
	Legislative
	Judicial
	Amparo contra sujetos de derecho privado
	Executive and Legislative
	Executive and Judicial
	Legislative and Judicial
	Other *specify

4. Level of authority

	Central
	Municipal
	Federal
	Local
	District

Petition/claim

1. What is being challenged

	A norm
	An act of authority
	Judicial decision
	Omission

2. Legal basis of the claim

	Rights
	National Law
	Regional Law
	International Law
	Precedent
	National
	Other jurisdiction
	Regional jurisdiction
	International jurisdictions

3. Grievance

4. Expert knowledge

	Technical
	Economic
	Legal
	Ethical

Adjudication stage

1. Rights at stake

1.1 Civil and Political Rights

1. Physical integrity
- ☐ The right to life
- ☐ Freedom from torture and slavery

2. Liberty and security of the person
- ☐ Freedom from arbitrary arrest and detention
- ☐ The right to habeas corpus

3. Procedural fairness in law
- ☐ Rights to due process, a fair and impartial trial
- ☐ The presumption of innocence
- ☐ Recognition as a person before the law

4. Individual liberty
- ☐ Freedom of movement
- ☐ Freedom of thought
- ☐ Freedom of conscience and religion
- ☐ Freedom of speech
- ☐ Freedom of association and assembly
- ☐ Family rights
- ☐ The right to a nationality
- ☐ The right to privacy

5. Prohibition propaganda for war or religious hatred

6. Political participation
- ☐ The right to join a political party
- ☐ The right to vote

7. Non-discrimination, and equality before the law

8. Minority rights
- ☐ The right to enjoy their own culture
- ☐ The right to profess and practice their own religion
- ☐ The right to use their own language

1.2 Socioeconomic and Cultural Rights

1. Right to work
- ☐ Right to freely chooses or accept work
- ☐ Favourable conditions of work
  - ☐ Remuneration
    - ☐ Fair wages
    - ☐ Equal pay for equal work
    - ☐ A decent living for themselves and their families
  - ☐ Safe and healthy working conditions
  - ☐ Equal opportunity to be promoted
  - ☐ Rest, leisure, reasonable working hours, holidays, public holidays
- ☐ Right to form and join trade unions
- ☐ Right to strike

2. Right to social security
- ☐ Social insurance

3. Protection and assistance to the family and children
- ☐ Marriage –free consent of the intending spouses
- ☐ Maternity leave
- ☐ Protection of children and young persons against discrimination and from economic and social exploitation

4. Right to an adequate standard of living
- ☐ Adequate food, clothing and housing and the continuous improvement of living conditions

The fundamental right of everyone to be free from hunger

5. Right to health
- ☐ 2.5a= Provisions for the reduction of stillbirth-rate, infant mortality and for the healthy development of the child.
- ☐ 2.5b= Improvement of environmental and industrial hygiene.
- ☐ 2.5c= Prevention, treatment and control of epidemic, endemic, occupational and other diseases.

☐ 2.5d= Conditions which would assure to all medical service and medical attention in the event of sickness.

6. Right to education

☐ 2.6a= Compulsory primary education available free to all

☐ 2.6b= Secondary education (generally available and accessible to all) and higher education (equally accessible) by the progressive introduction of free education

☐ 2.6c= The development of a system of schools at all levels; adequate fellowship system, and the material conditions of teaching staff shall be continuously improved

7. Cultural rights

☐ 2.7a= The right to take part in cultural life

☐ 2.7b= To enjoy the benefits of scientific progress and its applications

☐ 2.7c= The protection of the moral and material interests resulting from any scientific, literary or artistic production

☐ 2.7d= To respect the freedom indispensable for scientific research and creative activity.

1.3 CC's rights statement

1.4 1.4 Doubt classification

2. Type of resolution

Costa Rica

Grant protection

☐ 'Con Lugar'

☐ 'Parcialmente con lugar'

Denied protection

☐ 'Sin lugar'

Dismissal

☐ 'Se rechaza por el fondo'

☐ 'Se rechaza de plano'

☐ 'Se archiva el expediente por carecer de interés actual'

Other

3. Burdens imposed

Costs and expenses

☐ For the State

☐ For the petitioner

☐ For the lawyer

4. Organ who decides

☐ President of the Court

☐ Chamber

☐ The Plenary

5. Justice

Name of the Justice who submitted the draft

Name of the Chief Justice at the time of the issued resolution

6. Voting

☐ Unanimity

☐ Majority

☐ Dissenting opinion

*Name Justices that subscribe the dissenting opinion

7. Timing and length

Admission date (date)

Decision date (date)

Number of pages (number)

8. Legal basis of the judgment

☐ National Law

☐ International treaties or Conventions

☐ Legal comparisons

☐ Legal doctrine

☐ Precedent

	Domestic case-law
	Case-law from other jurisdictions

9. Expert knowledge

	Technical
	Economic
	Legal
	Ethical

10. Interpretative argumentation

	Using balancing test
	Using reasonableness test
	Using dialogic expressions
	Using prioritization
	New category

11. Explicit Court order(s) Categories will emerge from the data.

	Declaratory orders
	Mandatory orders
	Supervisory orders
	Structural judgments
	Advisory orders

Appendix E

Codebook Database Judgments

IDENTIFICATION INFO			
ID	Identification number assigned by the researcher to each judgment.	Colombia	CO001 to CO373
		Costa Rica	CR001 to CR382
		Mexico	MX001 to MX382
No.Exp	Identification number assigned by the court to each judgment.	Colombia	T/SU + number
		Costa Rica	Number
		Mexico	AR/ADR + number
CNTRY	Country	Colombia	COL
		Costa Rica	CR
		Mexico	MEX
DEC_YEAR	Year in which the court issued the decision	YEAR (YYYY)	
CNTRY_YEAR	Country named and decision year	Colombia	COLYYYY
		Costa Rica	CRYYYY
		Mexico	MEXYYYY
RESPONSIVENESS OF COURTS			
RESPNSS	Responsiveness of courts based on the type of resolution issued	1= Grant protection	
		2= Deny protection	
		3= Dismiss a case	
		4= Miscellaneous	
		5= Voluntary dismissals	
G_P	Grant protection	0= No grant protection cases (deny protection and dismissals)	
		1= Grant protection cases	
		4= Miscellaneous	
		5= Voluntary dismissals	
D_P	Deny protection	0= No deny protection cases (grant protection and dismissals)	
		1= Deny protection cases	
		4= Miscellaneous	
		5= Voluntary dismissals	
DISMISS	Dismiss a case	0= No dismissed cases (grant and deny protection cases)	
		1= Dismissals	
		4= Miscellaneous	
		5= Voluntary dismissals	

PLAINTIFFS			
PL_TYPE	Type of plaintiff	0= Organisations	
		1= Individuals	
PL_GENDER	Gender of plaintiffs (individuals)	1= Female	
		2= Male	
		3= Mixed	
		4= Do not know (DNK)	
		5= Not applicable-organisations	
PL_INDIV_AGE	Age of plaintiffs (individuals)	1= Adult	
		2=Elderly	
		3= Minor	
		4=Mixed (Adult and menor/elderly and minor)	
		99= Not applicable-organisations	
		-1=Do not know	
		-2= Not applicable-organisations	
PL_AGE_BINOMIAL	Age of plaintiffs (individuals)	0= No adults	
		1= Adults	
		4= Mixed	
		99= Not applicable-organisations	
PL_RESOURCES	Plaintiffs' resources -based on the occupation or the social condition of the plaintiffs-	0= Have-nots	Inmates, homeless, elderly in poverty, disable people in poverty, IDP's, minors, people living in substandard housing conditions, people without access to water at home/at schools, long term unemployed, students, housewives, working class, patients, unions, pensioned
		1= In between	Small business, professionals, NGO's, bank clients, middle class immigrants, citizens (right to petition), taxpayers, political persecuted, judicial system users.
		2= Haves	Large scale business, government, medium size business, executives, professional associations, civil associations.
		77= Data not available	

JUDGES						
ID_JUDGE Judge who submitted the draft	Colombia		Colombia		Costa Rica	
	1co	Angarita Barón Ciro	36co	Sanín Greiffenstein Jaime	28cr	Rodriguez Vega Alejandro
	2co	Arango Mejía Jorge	37co	Sierra Porto Humberto	30cr	Salazar Cambronero Roxana
	3co	Araujo Rentería Jaime	38co	Tafur Galvis Álvaro	31cr	Sancho González Eduardo
	4co	Barrera Carbonell Antonio	39co	Uprimny Yepes Rodrigo	32cr	Solano Carrera Luis Fernando
	5co	Beltrán Sierra Alfredo	40co	Vargas Hernández Clara Inés	35cr	Vargas Benavides Adrián
	6co	Botero Marino Catalina	41co	Vargas Silva Luis Ernesto		
	7co	Calle Correa María Victoria				
	8co	Cepeda Espinosa Manuel José	Costa Rica		Mexico	
	9co	Charry Rivas Jairo	1cr	Abdelnour Granados Rosa María	1mx	Aguilar Morales Luis María
	10co	Cifuentes Muñoz Eduardo	2cr	Albertazzi Herrera Fernando	2mx	Aguinaco Alemán José Vicente
	11co	Córdoba Triviño Jaime	3cr	Araya García Jorge	3mx	Aguirre Anguiano Sergio Salvador
	12co	Escobar Gil Rodrigo	4cr	Arguedas Ramírez Carlos	4mx	Azuela Güitrón Mariano
	13co	Estrada Alexei Julio	5cr	Arias Arias Juan Luis	5mx	Castro y Castro Juventino Víctor
	14co	Gaviria Díaz Carlos	6cr	Arias Gómez Hernando	6mx	Cossío Díaz José Ramón
	15co	González Cuervo Mauricio	7cr	Armijo Sancho Gilbert	7mx	Díaz Romero Juan
	16co	Guerrero Pérez Luis Guillermo	8cr	Batalla Bonilla Alejandro	8mx	Franco González-Salas José Fernando
	17co	Henao Pérez Juan Carlos	9cr	Baudrit Gómez Jorge	9mx	Góngora Pimentel Genaro David
	18co	Hernández Galindo José Gregorio	10cr	Blanco Matamoros Rosa Esmeralda	10mx	Gudiño Pelayo José de Jesús
	19co	Herrera Vergara Hernando	11cr	Calzada Miranda Ana Virginia	11mx	Gutiérrez Ortiz Mena Alfredo
	20co	Isaza de Gómez Carmenza	12cr	Castillo Víquez Fernando	12mx	Luna Ramos Margarita Beatriz
	21co	Martínez Caballero Alejandro	13cr	Castro Alpizar Susana	13mx	Ortiz Mayagoitia Guillermo I.
	22co	Mendoza Martelo Gabriel Eduardo	14cr	Castro Bolaños Jorge	14mx	Pardo Rebolledo Jorge Mario
	23co	Monroy Cabra Marco Gerardo	15cr	Certad Maroto Gastón	15mx	Pérez Dayán Alberto Gelacio
	24co	Montealegre Lynett Luis Eduardo	16cr	Cruz Castro Fernando	16mx	Román Palacios Humberto
	25co	Morón Díaz Fabio	17cr	Godínez Vargas Alexander	17mx	Sánchez Cordero de García Villegas Olga
	26co	Naranjo Mesa Vladimiro	18cr	González Quiroga Horacio	18mx	Silva Meza Juan N.
	27co	Ortiz Gutiérrez Julio César	19cr	Guerrero Portilla Ricardo	19mx	Valls Hernández Sergio Armando
	28co	Palacio Palacio Jorge Iván	20cr	Hernández Gutiérrez José Paulino	20mx	Zaldívar Lelo de Larrea Arturo
	29co	Pardo Schlessinger Cristina	21cr	Jiménez Meza Manrique		
	30co	Pinilla Pinilla Nilson	22cr	Jinesta Lobo Ernesto		
	31co	Pretelt Chaljub José Ignacio	23cr	Molina Quesada Jose Luis		
	32co	Reales Clara Elena	24cr	Mora Mora Luis Paulino		
	33co	Rodríguez Rodríguez Simón	25cr	Pacheco Salazar Aracelly		
	34co	Rojas Ríos Alberto	26cr	Piza Escalante Rodolfo		
	35co	Sáchica Martha Victoria	27cr	Rodríguez Arroyo Teresita		

RIGHTS AT STAKE			
CPRPI	Civil and Political Rights-Physical integrity	1= Yes	0= No
CPRL&S	Civil and Political Rights-Liberty and security	1= Yes	0= No
CPRPFL	Civil and Political Rights-Procedural fairness in law	1= Yes	0= No
CPRIL	Civil and Political Rights-Individual liberty	1= Yes	0= No
CPRPP	Civil and Political Rights-Political participation	1= Yes	0= No
CPRND	Civil and Political Rights-Non-discrimination and equality	1= Yes	0= No
CPRMR	Civil and Political Rights-Minority rights	1= Yes	0= No
SECRRW	Socioeconomic and cultural rights-Right to work	1= Yes	0= No
SECRRSS	Socioeconomic and cultural rights-Right to social security	1= Yes	0= No
SECRPF&CH	Socioeconomic and cultural rights-Protection and assistance to the family and children	1= Yes	0= No
SECRRASL	Socioeconomic and cultural rights-Right to adequate standard of living	1= Yes	0= No
SECRRH	Socioeconomic and cultural rights-Right to health	1= Yes	0= No
SECRRE	Socioeconomic and cultural rights-Right to education	1= Yes	0= No
ORIGHTS	Other rights protected	0= No	
		1= Rights of the disadvantaged and vulnerable groups	
		2= Right to free development of one's personality	
		3= Habeas data	
		4= Human dignity	
		5= Humanitarian aid	
		6= *Mínimo vital* (Right to a minimum level of subsistence)	
		7= Right to a health environment	
		8= Right to property	
		9= Right to water	
		10= Rights of the internal displaced people (IDP)	
		11= Human dignity + *Mínimo vital*	
		12= Human dignity + Rights of the disadvantaged and vulnerable groups	
		13= Human dignity + Right to free development of one's personality	

CHARACTERISTICS OF THE JUDGMENTS			
EXPKNWLGE	Expert knowledge used	1= Technical	
		2= Economic	
		3= Legal	
		4= Ethical	
		-1= Not found	
LBJNATLAW	Legal basis of the judgment-National Law	1= Yes	0= No
LBJINTLAW	Legal basis of the judgment-International Law	1= Yes	0= No
LBJLEGCOMP	Legal basis of the judgment-Legal comparisons	1= Yes	0= No
LBJLEGDOC	Legal basis of the judgment-Legal doctrine	1= Yes	0= No
LBJPREC	Legal basis of the judgment-Precedent	1= Yes	0= No
COURT ORDERS			
DECORD	Declaratory orders	1= Yes	0= No
MANDORD	Mandatory orders	1= Yes	0= No
SUPORD	Supervisory orders	1= Yes	0= No
STRUCTJUD	Structural judgments	1= Yes	0= No
ADVORD	Advisory orders	1= Yes	0= No
OORD	Other orders	1= Yes	0= No

Appendix F

Measurement instrument (2) 'Attributes of judges'

Country			Tipo nombramiento					
ID				Titular		Suplente		
Name of the judge								
Gender	Male		Female					
Date of birth								
Place of birth								
Year of appointment	From		to					
Degree								
University								
Who nominated him/her								
Principal occupation prior to be selected as a judge								
	Judge	Lawyer	Public servant	Politician	Private	International	Academia	Notary
Expertise area								
Observations								

Appendix G

Codebook Database Judges

JUDGES		
J_GENDER	Gender of the judge who drafted the judgment	0= Male
		1= Female
J_YBIRTH	Judge year of birth	Year (YYYY)
J_AGE_DECDATE	Judge age at decision date	Years (YY)
J_ACADEMIC_BACK	Judge academic background	0= Postgraduate degree (specialization, master's degree or PhD)
		1= bachelor's degree
J_PROF_BACK	Judge professional background	1= Experience in one field
		2= Experience in two fields
		3= Experience in three fields
		4= Experience in four fields
		5= Experience in five fields
		99= Data not available
J_STUDIES_ABROAD	Judge studies abroad	1= No
		2= Yes
		99= Data not available

Appendix H

Codebook Database Country indicators

EXTERNAL FACTORS		
GDP	Gross Domestic Product World Bank	Annual growth percentage
PSNV_ESTIMATE	Political Stability and Absence of Violence (estimate). Source: World Bank	-2.5 (weak) to 2.5 (strong) governance performance
RoL_ESTIMATE	Rule of Law (estimate). Source: World Bank	-2.5 (weak) to 2.5 (strong) governance performance
CORRUP_ESTIMATE	Corruption (estimate). Source: World Bank	-2.5 (weak) to 2.5 (strong) governance performance
GINI	GINI. Source: World Bank	GINI index. 0 perfect equality; 100 perfect inequality
POVERTY	Poverty headcount ratio at $5.50 a day (2011 PPP). Source: World Bank	Percentage of population
E_POVERTY	Poverty headcount ratio at $1.90 a day (2011 PPP). Source: World Bank	Percentage of population

Appendix I

Codebook Database V-Dem Democratic

Dependent variable: 'Democratic performance'				
High-level	Mid-level	Lower-level	Tag	Type of variable
Electoral democracy index			v2x_polyarchy	Interval
	Additive polyarchy index		v2x_api	Interval
	Multiplicative polyarchy index		v2x_mpi	Interval
		Freedom of expression and alternative sources of information index	v2x_api	Interval
		Freedom of association index	v2x_mpi	Interval
		Clean elections index	v2x_api	Interval
Liberal democracy index			v2x_libdem	
	Liberal component index		v2x_liberal	Interval
		Equality before the law and individual liberty index	v2xcl_rol	Interval
		Judicial constraints on the executive index	v2x_jucon	Interval
		Legislative constraints on the executive index	v2xlg_legcon	Interval
Participatory democracy index			v2x_partidem	Interval
	Participatory component index		v2x_partip	Interval
		Civil society participation index	v2x_cspart	Interval
		Direct popular vote index	v2xdd_dd	Interval
		Local government	v2xel_locelec	Interval
		Regional government index	v2xel_regelec	Interval
Deliberative democracy index			v2x_delibdem	Ordinal
	Deliberative component index		v2xdl_delib	Interval
Egalitarian democracy index			v2x_egaldem	Interval
	Egalitarian component index		v2x_egal	Interval
		Equal protection index	v2xeg_eqprotec	Interval
		Equal access index	v2eg_eqaccess	Interval
		Equal distribution of resources index	v2xeg_eqdr	Interval
Independent variable: 'Judicial enforcement of Rights'				
ID_Country			1= Colombia, 2= Costa Rica, 3= Mexico	Nominal
Year			YYYY	
Judicial Enforcement of Rights No Lag			GP_FREQ	Continuous
Judicial Enforcement of Rights Lag 1 (One-year lag)			lag1_GP_FREQ	Continuous
Judicial Enforcement of Rights Lag 2 (Two-year lag)			lag2_GP_FREQ	Continuous
Judicial Enforcement of Rights Lag 3 (Three-year lag)			lag3_GP_FREQ	Continuous

Appendix J

Table J-1. Bivariate analysis. Costa Rica

	B	SE	OR	95% CI	Wald statistic	*p*	HBM
Denied protection vs Granted protection							
PL_TYPE	.120	.469	1.128	[.450; 2.828]	.066	.798	0.025
PL_GENDER	-.632	.310	.532	[.290; .976]	4.157	.041	0.003
PL_AGE	-.362	.589	.696	[.220; 2.207]	.379	.538	0.006
PL_RESOURCES(0)	-.735	.552	.479	[.163; 1.414]	1.774	.183	0.005
J_GENDER	.070	.299	1.072	[.597; 1.927]	.055	.815	0.050
J_ACADEMIC_BACK	-.096	.279	.908	[.525; 1.570]	.119	.730	0.010
J_JUD_CARRIER	.316	.277	1.372	[.797; 2.360]	1.305	.253	0.005
J_STUDIES_ABROAD	.204	.271	1.226	[.721; 2.086]	.567	.451	0.006
J_AGE	.010	.020	1.010	[.972; 1.050]	.259	.611	0.008
GDP	.018	.059	1.018	[.906; 1.144]	.092	.762	0.013
PSAV	1.344	.910	3.835	[.644; 22.832]	2.181	.140	0.004
RULE_OF_LAW	.818	1.551	2.265	[.108; 47.323]	.278	.598	0.007
CORRUPTION	1.951	1.071	7.032	[.862; 57.374]	3.317	.069	0.003
GINI	-.024	.088	.977	[.822; 1.160]	.073	.787	0.017
POVERTY	.032	.020	1.032	[.992; 1.074]	2.478	.115	0.004
E_POVERTY	.126	.069	1.134	[.990; 1.299]	3.302	.069	0.004
Dismissed a case vs Granted protection							
PL_TYPE	.164	.435	1.178	[.503; 2.760]	.142	.706	0.025
PL_GENDER	-.257	.276	.773	[.450; 1.328]	.869	.351	0.003
PL_AGE	-.490	.557	.612	[.206; 1.825]	.775	.379	0.006
PL_RESOURCES(0)	-1.061	.508	.346	[.128; 936]	4.372	.037	0.004
J_GENDER	.257	.284	1.293	[.741; 2.254]	.819	.365	0.006
J_ACADEMIC_BACK	.214	.265	1.238	[.736; 2.083]	.648	.421	0.007
J_JUD_CARRIER	-.148	.264	.863	[.514; 1.448]	.313	.576	0.013
J_STUDIES_ABROAD	.020	.253	1.026	[.625; 1.686]	.010	.919	0.050
J_AGE	.020	.018	1.020	[.984; 1.057]	1.173	.279	0.005
GDP	.043	-056	1.044	[.936; 1.164]	.600	.439	0.010
PSAV	.991	.844	2.693	[.515; 14.083]	1.377	.241	0.004
RULE_OF_LAW	.585	1.438	1.795	[.107; 30.086]	.165	.684	0.017
CORRUPTION	.770	.990	2.161	[.310; 15.055]	.605	.437	0.008
GINI	-.201	.084	.818	[.695; .964]	5.766	.016	0.003
POVERTY	-041	.019	1.042	[1.004; 1.081]	4.790	.029	0.004
E_POVERTY	.144	.065	1.155	[1.017; 1.311]	4.913	.027	0.003

Note: B: Beta coefficient; SE: Standard Error; OR: Odds Ratio; CI: Confidence Interval; *p*: probability value; HBM: Holm-Bonferroni Method.
Source: Own elaboration.

Appendix K

Table Q-1. Multinomial logistic regression. Mexico

	B	SE	OR	95% CI	Wald statistic	*p*
Grant protection vs Dismissed a case						
J_GENDER (MALE)	-2.019	0.671	0.133	[0.036; 0.495]	9.043	0.003
Denied protection vs Dismissed a case						
J_STUDIES_ABROAD (NO)	-1.281	0.595	0.278	[0.087; 0.893]	4.625	0.032

Note: Note: B: Beta coefficient; SE: Standard Error; OR: Odds Ratio; CI: Confidence Interval; *p*: probability value; HB: Holme-Bonferroni. Model χ^2 (14) = 62.504, $p < .000$;. R^2= .212 Cox and Snell, .252 Nagelkerke.
Source: Own elaboration.