

Constitutional design and political agency problems: the case of Colombia*

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ABSTRACT

This article presents and explores, from a law and economics' perspective, the Colombian Constitutional structures that create potential for corruption by undermining the checks and balances, the accountability system over politicians and in particular, by altering the computation of the agent once is facing the decision to act according to principal interest or behave in a corrupt way.

A case study from a Colombian high court is presented in order to illustrate the interaction between the identified constitutional provisions to generate a scope for corruption. Finally, possible constitutional amendments are suggested in order to overcome these system failures.

Keywords: Law and Economics, Corruption, System failures, Agency problems, Constitutional design, Constitution of Colombia.

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DISEÑO CONSTITUCIONAL Y PROBLEMAS DE AGENCIA: EL CASO DE COLOMBIA

RESUMEN

Este artículo presenta y analiza, desde una perspectiva del Análisis Económico del Derecho, aquellas disposiciones constitucionales que, en vez de prevenir la corrupción política, la estimulan al afectar la división del poder, la independencia judicial y el sistema de pesos y contrapesos, lo cual se materializa en la afectación del cómputo del agente cuando este se enfrenta a tomar la decisión de cumplir con el principal o actuar de manera corrupta.

Un estudio de caso de un alto tribunal Colombiano es presentado con el objetivo de exponer cómo las disposiciones constitucionales identificadas interactúan entre sí para generar incentivos a la corrupción.

Finalmente, se sugieren algunas reformas constitucionales para superar estas fallas del sistema político constitucional.

Palabras clave: derecho y economía, problemas de agencia, corrupción, fallas del sistema, diseño constitucional, constitución colombiana.

INTRODUCTION

The appropriation of public funds for private purposes has been a practice of government officials throughout history that still persists. This malpractice has become a problem that jeopardizes legal and political institutions, democracy and economic development.

Colombia is perceived as one of the most violent and corrupt states in the world³. The scourge of corruption in Colombian dates back to the colony⁴ era, and since then efforts have been made to mitigate this malpractice. However, in the recent history of the country, especially in the nineties, it was believed that corruption was favoured by the legal and political institutions of the state. Under this assumption, major legal reforms were passed which modified The Criminal Code and The Public Contracts Act, though, the most significant measure taken against corruption was the adoption of the new Constitution of Colombia in 1991, which still determines the domestic legal system⁵.

The aim of this article is to identify and explore, under a law and economics' perspective, the Colombian constitutional structures that contribute to political corruption instead of preventing this malpractice by affecting the check and balance system of the state and the

3 Transparency International, "Corruption Perception Index Report 2011" last visit 3/7/12. <http://cpi.transparency.org/cpi2011/results/>

4 FAJARDO, L. "La corrupción heredada: pasado colonial, sistema legal y desarrollo económico en Colombia", 2002 quoted in GAMARRA VERGARA "Desfalcos y regiones: un análisis de los procesos de responsabilidad fiscal en Colombia", 2.

5 BADEL RUIEDA, "Costos de la Corrupción en Colombia", 30.

accountability over politicians. It also aims to provide a theoretical framework that explains the negative effects of these constitutional provisions and to propose possible constitutional amendments to overcome these political system's failures.

The article is based on the analysis of the Principal-Agent model proposed by Professor KLITGAARD. In this model, the decision to be corrupt is based on a numerical calculation, which payoffs are determined by the benefits and costs of acting corruptly. In this computation, it is taken into account the probability of being caught and punished. Because of that, those constitutional provisions which alter the check and balance system of the Colombian state as affect the accountability system over politicians are analysed as political institutions that foster corruption by affecting the probability of detection and sanction of the corrupt behaviour. In this article, my approach is mainly analytical and speculative.

In the first section, I briefly explore the academic definitions of corruption and its economic effects. I particularly focus on the negative effects that political corruption has had in Colombia and how the state has responded to overcome this malpractice. I also suggest that the core problem in the Colombian fight against corruption is its fragile and damaged democratic institution.

The second and the third section are concerned with the Colombian constitutional structures that foster corruption. Specifically, in the second section I start by describing the Principal-Agent-Client model. This model has provided the economic intuition and the reasoning used in this article to identify and explore each of the constitutional provisions that generate a possible scope for corruption. I advocate that the presented constitutional structures open a scope for corruption because they affect the checks and balances system of the Colombian state and, in particular, the accountability system over politicians. In the third section, I present a case study, which illustrates how the identified constitutional structures interact with each other to generate the potential for corruption.

In the fourth section, I suggest that, in order to fight political corruption in Colombia, it is necessary to strength its democratic institutions by enhancing the division of power of the state, improving the judicial and supervisory bodies' independence, and empowering citizens to exercise vertical accountability.

In the fifth section, I present my conclusions. I suggest that a possible cause of political corruption could emerge from the state's own political system. Therefore, I argue that Colombia should focus on overcoming the shortcomings of its political system in order to prevent political corruption.

SECTION 1. BRIEF DEFINITION OF CORRUPTION AND ITS EFFECTS

The economic concept of corruption can be defined as "the use of public office for private gains"⁶, where the public (the Principal) delegates a duty to an official (the Agent). The

6 BARDHAN, "Corruption and Development: A Review of Issues", 1321.

latter instead of pursuing the interest of the principal "engages in some sort of malfeasance for private enrichment which is difficult to monitor for the principal"⁷.

A current theory has defined corruption as "the breaking of a rule by the bureaucrat (or an elected official) for private gain"⁸. This definition implies that the determination of corruption is given by breaking formal rules and this feature has an important implication in the measure of corruption making this challenge easier.

The effects of corruption have been widely studied. In the Economics literature, one can find two academic positions towards the effects of corruption.

The first view considers that, in developing countries, corruption can enhance the economic growth. When previous public policies prevent efficiency, additional malpractices serve to improve welfare despite the extra cost that it induces. As NATHANIEL H. LEFF stands, "if the government has erred in its decision, the course made possible by corruption may well be the better one"⁹; and as Samuel Huntington explains: "in terms of economic growth the only thing worse than a society with a rigid, overcentralized, dishonest bureaucracy is one with a rigid, overcentralized, honest bureaucracy"¹⁰.

Furthermore, without misguided public policies, one can look at corruption through the Coasean theory where, through a bargaining process, the bureaucrat and the private agent arrange and allocate the resources efficiently. As long as there is competition between the firms for the public contract and the corrupt bureaucrat assigns the contract to the firm with the highest bribe, one could claim efficiency because only the least cost firm can afford this extra cost¹¹.

According to BARDHAN¹², another beneficial effect of corruption that has been developed in the academia is to perceive corruption as a "speed money" strategy. This argument points out that corruption reduces the delays on queuing and makes the administrative process for public service faster.

However, the previous arguments have been questioned in the academic literature. For example, as for speed money, ABHIJIT BANERJEE¹³ analyzes scenarios where bureaucrats create red tapes with the intention to screen clients of different types. This study is coherent with the thesis of GUNNAR MYRDAL¹⁴, who argues that corrupt functionaries instead of facilitating and speed up the access to public service, implement delays in order to obtain more illicit revenues.

7 Ibid.

8 BANERJEE et al., "Corruption", 6.

9 LEFF, NATHANIEL H, "Economic Development Through Bureaucratic Corruption" quoted in BARDHAN, "Corruption and Development: A Review of Issues", 1322.

10 HUNTINGTON, SAMUEL P, "Political Order in Changing Societies" quoted in BARDHAN, "Corruption and Development: A Review of issues", 1322

11 BARDHAN, "Corruption and Development: A Review of Issues", 1322.

12 Ibid, 1323.

13 ABHIJIT, BANERJEE, "A theory of Misgovernance" quoted in Bardhan, "Corruption and Development: A Review of issues", 1323.

14 MYRDAL, GUNNAR, "Asian Drama" quoted in Bardhan, "Corruption and Development: A Review of issues", 1323.

In addition, MAXIM BOYCKO, SHLEIFER and ROBERT VISHNY¹⁵ have suggested, looking at the Coasean bargaining process, the fact that the corruption contracts are not enforceable in court the bribe often enjoys discretion and arbitrary power. The bribing transactions entail several problems especially in relation with the delivery of a good or a service.

Besides the previous argument, if the public contract refers to a license to practice medical services, or a safety permit for construction, the bidding system will fail to efficiently allocate the scarce resources¹⁶.

The second view, considers corruption to be harmful to static efficiency, economic growth and democracy. The negative effects of corruption in terms of efficiency are often described as efficiency costs, which entail waste and misallocation of resources. The theory of rent seeking, for example, points out that competition between the rent-seekers for monopoly rents result in absolute dissipation of resources¹⁷.

BARDHAN¹⁸ states that a payment for a bribe to get a license creates negative incentives to invest. He also adds that in the taxation system these types of payments cannot be deducted from the taxable income and in this way influence directly the decision of the risk-taking in the context of innovation. This situation affects negatively the general investment and economic growth. A similar situation occurs when public resources, designed to enhance productivity by the construction of infrastructures, are appropriated by politicians for their private consumption. Another reason that he points out in the same direction follows that high bribes reduce profitability of productive investment, thereby affecting negatively the economic growth.

Corruption has adverse effects on society, jeopardizing the democratic institution and political stability. According to the preamble of the United Nations Convention Against Corruption, Corruption threatens "the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law"¹⁹. MICHAEL NACHT²⁰ found evidence about the correlation between corruption and political stability; the political scientist argues that corruption is an important forecast for "regimen changes".

Corruption affects both developed and developing countries; for the latter, it represents a greater threat to the stability of the political regimen. Political scandals in developed countries have brought down important political figures, though these incidents have affected citizens' trust in the government, they have not jeopardized the democracy in those countries. By contrast, different effects have occurred in developing countries, for

15 BOYCKO, MAXIM; SHLEIFER, ANDREI and VISHNY, ROBERT, "Privatizing Russia" quoted in Bardhan, "Corruption and Development: A Review of issues", 1324.

16 KLITGAARD "Controlling Corruption" Los Angeles: University of California press, 1988.

17 KRUEGER, ANNE O, "The Political Economy of the Rent-Seeking Society" quoted in Bardhan, "Corruption and Development: A Review of Issues", 1324.

18 BARDHAN *supra* note 6 at 1327.

19 United Nations, "United Nations Convention Against Corruption".

20 NACHT, MICHAEL, " Internal Change and Regime Stability" quoted in KLITGAARD, *Controlling Corruption*

instance, in Latin America, where political corruption has undermined the legitimacy of democratic governments²¹.

Overall, it is worldwide known that the consequences of corruption are more detrimental for the developing countries and the poor people. These countries are particularly affected by corruption because they do not have the capability of paying an additional price distorted by corrupt practice for the public good or service²².

CANACHE and ALLISON²³ contemplate political corruption as "the abuse of public power for private benefit". It affects government outputs because of the disproportional private gain of the actors involved also jeopardize democratic procedure, due to the fact that policies may not result from liberal ideas in the marketplace, instead they might be induced by secret agreements.

1.1 Brief Description of Corruption in Colombia

Colombia, as other developing countries, faces problems like poverty, unemployment and illiteracy, but it's more relevant and critical problems are crime, drugs and violence. This particular position of Colombia forces the government to focus mainly on enhancing security rather than fighting corruption, though, they are intimately correlated²⁴.

The appearance of drug trafficking increased the corruption in Colombia to a matchless level in its history. Due to drug dealing, money spread through the society, damaging its values, principles and buying all kind of public servants from national politicians to magistrates²⁵.

However, in his papers, HOGGARD²⁶ states that some factors composing corruption in Colombia are the historical forms of corruption in the public sector accompanied by traditional manner of smuggling, tax evasion and manipulation of the financial market.

Colombia has been perceived as one of the most corrupt states in the world²⁷, however, the nationals believe that corruption has compounded recently²⁸ and its effects have generated high costs to the Colombian society. The costs of corruption in Colombia can be divided into political costs and economic costs²⁹.

The political costs –also known as indirect economic costs³⁰– have cost Colombia the credibility in its governments, the stability of its political and legal institutions, which

21 CANACHE and ALLISON, "Perceptions of Political Corruption in Latin American Democracies", 106.

22 HOGGARD, "Preventing Corruption in Colombia: The Need for an Enhanced State-Level Approach".

23 CANACHE and ALLISON *supra* note 21.

24 ElGammal, "Fighting Corruption, Lessons Learned from International Experiences: Colombia", 330.

25 HOGGARD, *supra* note 22 at 581.

26 HOGGARD, "Preventing Corruption in Colombia: The Need for an Enhanced State-Level Approach" quoted in ElGammal, "Fighting Corruption, Lessons Learned from International Experiences: Colombia", 331.

27 Transparency International, "Corruption Perception Index Report 2011" last visit 3/7/12. <http://cpi.transparency.org/cpi2011/results/>

28 BADEL RUEDA, "Costos de la Corrupción en Colombia", 25.

29 *Ibid*, 49.

30 *Ibid*, 23.

has threatened investment, the prestige of the political class and the rule of law. Political corruption has also been detrimental to the interests of citizens to participate in political decision making and to the role of the state in the political, economic and social spheres of Colombian society.

The direct economic costs are those caused by corrupt practices which distort the allocation of scarce resources and profoundly undermine economic growth. These costs include the payment of commissions to ensure the award of a state contract or the value of misappropriation of the public servant³¹.

BADEL RUEDA³², in her research, estimates -between 1991 and 1996- a loss to the Colombian state due to the corruption close to the point of GDP. Meanwhile, in 2001, the General Comptroller of the Republic pointed out that of the 26 billion of pesos allocated for public contracting, 2.2 billion were lost due to misappropriation³³.

The 2011 score of Colombia in the corruption perception index (CPI) of Transparency International was 3.4 over 10.³⁴ The political parties, the Congress and the Judiciary are perceived by the Colombians as significantly corrupt institutions scoring 4.0, 3.9 and 3 over 5 respectively. Additionally, the army, NGO's, religious organizations and communication media are the best perceived institutions. The first three of them share the score of 2.8 and the latter 2.9 both over 5³⁵.

The government of Colombia estimates a yearly per capita cost of corruption at US \$6,100 (one percent of Colombia's gross domestic product). Additionally, the World Bank report calculated that the annual cost of corruption in Colombia is US \$2.6 billion, which is equivalent to 60% of the nation's debt³⁶.

Public institutions have responded to this evil. The central authority has established the presidential program to fight corruption, it has provided the using of technology for good governance and it has implemented codes of conduct to control corruption. Additionally, the Legislature has passed laws in favour of fighting corruption like the anti-corruption statute, the Public Contracts Act, laws that criminalize corrupt acts and enhance freedom of information. It also has adopted the provision of the Inter Americas Convention against corruption³⁷.

Despite all these efforts from public institutions, which have lost credibility amongst the citizens³⁸, scandals of corruption keep occurring in Colombia's daily life, especially

31 Ibid, 23.

32 Ibid, 52.

33 Instituto de la Corporación de la Promoción Popular, "Una Discusión Puesta en Cifras: el Monto de la Corrupción en Colombia", julio 2004 quoted in GAMARRA VERGARA "Desfalcos y Regiones: un Análisis de los Procesos de Responsabilidad Fiscal en Colombia", 5.

34 Transparency International, "Corruption Perception Index Report 2011" last visit 3/7/12. <http://cpi.transparency.org/cpi2011/results/>

35 Transparency International, (website), last visit 3/07/12 <http://www.transparenciacolombia.org.co/LACORRUPCION/EnColombia/tabid/101/language/en-US/Default.aspx>, 12.

36 HOGGARD *supra* note 22 at 582.

37 ElGammal *supra* 26 at 332.

38 Ibid.

those related with politicians, which aggregate additional threat to the still deteriorated democratic institutions.

The problem of Colombia in fighting corruption is not issuing laws, but a botched up enforcement mechanisms. This is a consequence of the core problem, which are the fragile and damaged democratic institutions.

However, in this fight against corruption, little attention has been paid to the analysis of failures that could entail *per se* Colombian democratic institutions.

Being conscious of this gap, in the following section I will identify and explore, under the law and economics' perspective, Colombian constitutional structures that instead of contributing to prevent and control corruption, open the scope for the occurrence of this malpractice. I will focus on Colombian political corruption, due to its negative effects on economic growth and political stability.

SECTION 2. COLOMBIAN CONSTITUTIONAL STRUCTURES THAT FOSTER CORRUPTION

In order to illustrate Colombian Constitution provisions that might foster corruption, it is necessary to refer to the basic game theory model of corruption. This model has provided the intuition and the reasoning used in this article to identify constitutional structures that create incentives to corruption and its possible amendments. A brief description of the Colombian Constitution is provided and finally the individual constitutional stipulations are presented.

2.1 Brief Description of the Basic Principal – Agent – Client model of Corruption

Different scholars have studied the problem of corruption from a game theory perspective. This approach provides a useful framework to analyse this agency problem. However, for the purpose of this article, I will focus only on illustrating the main features of this model.

The basic model is described by KLITGAARD³⁹ in his book "controlling corruption". The model consists of a principal and his agent (the feminine pronoun is applied to the agent). She interacts with a client on the behalf of the principal. The agent is employed to act according to the principal's interests vis-à-vis the client. But she also has her personal interests. Consequently she might be disloyal in respect to the principal's interests for the sake of her own. This entails that the agent may be corrupt.

The decisive feature of the model is the agent's computation of her payoffs. The agent may act in a corrupt manner when the likely benefits from doing so exceed the likely cost of her action⁴⁰. *Consequently, "suppose the agent has two choices: to be corrupt or not to be corrupt. If she is not corrupt, she receives a payoff that is the sum of her regular pay plus the moral satisfaction of not being a corrupt person. If she is corrupt, she gets a bribe [or personal benefit]. She also suffers what we might call "moral cost" of being corrupt. [...] Something else may happen to the corrupt agent: she may be caught*

39 KLITGAARD, "Controlling Corruption", 22.

40 Ibid.

and penalized. She has to weight this prospect when making her decision. The penalty could include the loss of her pay and job, a criminal penalty, the disgrace to her name, and so forth.

Here, then, is the agent's choice. If I am not corrupt, I get my pay and the moral satisfaction of not being a corrupt person. If I am corrupt, I get the bribe [or personal benefit] but "pay" a moral cost. There is also some chance I will be caught and punished, in which case I will also pay a penalty. So, I will be corrupt if: the bribe [personal benefit] minus the moral cost minus ((the probability I am caught and punished) times (the penalty for being corrupt)) is greater than the pay plus satisfaction I get from not being corrupt"⁴¹.

The main problem in the agency relation is explained by the contradictory interest that the parties have when they want to maximize their utility. In the case of the principal, he maximizes his utility with the cooperation of the agent; as a contrast, the agent maximizes her utility by pursuing her self-interests, that is, by deviating from the agreement.

To take one step further in the economic reasoning, suppose the principal knows the temptation of the agent to be corrupt. Then, the principal has to draft a contract that minimizes the risk of deviation of the agent; he has to establish enough incentives that induce the agent to undertake her duty⁴².

However, this task is difficult for the principal because of divergent objectives and the asymmetric information in the heart of the principal – agent problem. The principal cannot identify what actions are made by an agent on his behalf and it is costly for him to find out more about the behaviour of the agent. The agent knows what she is doing, but the principal cannot believe her due to the fact that she has incentives to lie and persuade the principal to believe that she is not engaging in any corrupt activities⁴³.

This model also contemplates the client, the bribe giver. The client will be motivated to corrupt the agent if the likely net benefits to do so outweigh his or her likely costs. The principal also wants to induce proper behaviour on the part of the client⁴⁴.

This basic Principal-Agent-Client model suggests that corrupt activities are more likely to happen when agents enjoy greater discretion, have monopoly power over clients and when the accountability is weak⁴⁵.

The Constitution of Colombia can be considered a contract which creates an agency relation between the Colombians (the principal) and the public officials (the agent). As has been detailed above, the drafting of this contract is not easy for the principal due to the incomplete information about the action of the agent. In addition, monitoring is a hard task because of the dispersion of the principal. As a consequence, it is possible to find constitutional structures that instead of aligning the incentives of both parties, they could work in the opposite direction. In this article, I will focus only on the first relationship of the model, the agency relation between the principal and the agent.

41 Ibid, 69-70.

42 Ibid, 22.

43 Ibid, 71.

44 Ibid, 24.

45 Ibid, 74.

2.2 Constitution of Colombia

The current political Constitution of Colombia dates from 1991. It replaced the Constitution of 1886. The Constitution of 1991 was negotiated to end the internal conflict. The result was a long document which attempts to provide to each interest group its own articles and to engage in the creation of a welfare state⁴⁶. For some scholars⁴⁷, the Colombian Constitution appears to be more a micromanagement manual than a political instrument to establish the basic democratic institutions for decision making in a dynamic society.

As a useful background, the U.S. Constitution has been a pattern for the Colombian Constitution. As a result, its government resembles the U.S. administration with the primary difference being that the Judiciary in Colombia has had a limited, restricted and perhaps subordinate role⁴⁸.

The current Constitution defines Colombia as a democratic, decentralized and unified state with autonomy in its territorial entities⁴⁹. It has a presidential system and the judicial review which governed the Supreme Court of Justice in the preceding Constitution has been shifted to an independent Constitutional Court.

Even though, the Constitution of 1991 promotes institutions to procure equity and prosperity; due to its constitutional structure "Colombia is governed in a manner that is both unchecked and unbalanced"⁵⁰. This has resulted in the creation of some constitutional structures with the potential to foster corruption, primarily by preventing an adequate check and balance system. They are briefly outlined here, and in the following section they will be explained in detail.

- Appointment system of Colombian Comptrollers.
- Colombian political opposition structure.
- Colombian Judiciary.
- Colombian social control.

2.2.1 Appointment System of Colombian Comptrollers

In the modern world, especially in the social state based on the rule of law, states intervene in social life of the people to stimulate the production in times of crisis and to facilitate it in times of economic prosperity. Additionally, they do so to protect the lesser economic and social beneficiaries in order to accomplish a better distribution of the national rent.⁵¹

46 KUGLER and ROSENTHAL, *Check and Balance: An Assessment of the Institutional Separation of Political Power in Colombia*. 4.

47 Ibid.

48 HOGGARD, "Preventing Corruption in Colombia: The Need for an Enhanced State -Level Approach", 607.

49 Constitución Política de Colombia, art. 91.

50 KUGLER and ROSENTHAL, *supra* note 46 at 2.

51 DUVERGER, MAURICE, *Hacienda Pública* (Barcelona: Bosch, 1980), 2, quoted in OCHOA DÍAZ and CHARRIS REBELLÓN, "Propuesta de un modelo de control fiscal para el estado colombiano: el sistema de control fiscal nacional", 15.

Therefore, states must allocate efficiently their scarce resources by calculating their spending, investments, building their development plans, preparing their budget and executing it as a duty. The latter step is where the fiscal control takes place. This control has two aims, one political and the other financial. The political objective consists of assessing the degree of compliance of the execution of the public budget with the decision taken by the congress. The financial aim is related to preventing and detecting misuse and misappropriation of public funds.⁵²

However, some scholars⁵³ have argued that the fiscal control cannot be classified as political control because it does not involve the action of a political institution neither the action of the public opinion. In this order of ideas, the fiscal control is categorized as an administrative check or budgetary supervision.

Despite that appreciation, in the organization of the modern states, several authors⁵⁴ point out that the fiscal control is operated by an autonomous and independent institution of the state; this means that the duty of enhancing fiscal control over the Executive is allocated to an institution outside of the traditional branches of the public power. This institution belongs to the so called "fourth power" of the state⁵⁵. Indeed, this system obeys the common law model of fiscal control and it can be defined as the external auditor of a corporation which main propose is to exert legal and financial control over the expenditure of the budget⁵⁶.

In general, the system of fiscal control can take two specific forms: the first, named the system of courts or tribunals; and the second, called the "comptroller"⁵⁷. Both systems present two common features. On the one hand, both structures seek the independence of the control institution over the controlled one, that is, over the executive. On the other hand, both systems enshrine as the basic function of the fiscal control a legality test and not a merit one, with the understanding that the fiscal control is performed on custody of the public goods and over the supported spending of the public treasury⁵⁸.

Consequently, in order that the fiscal control achieve its purposes, an institutional scenario governed by independence is required. Several authors⁵⁹ note that it is not possible to have a serious and impartial control if the independence of the comptroller is not guaranteed. Independence in particular is predicated basically on three aspects: in the first

52 OCHOA DÍAZ and CHARRIS REBELLÓN, "Propuesta de un Modelo de Control Fiscal para el Estado Colombiano: el Sistema de Control Fiscal Nacional", 15.

53 VIDAL PERDOMO, JAIME, "El Control Político en Colombia", 11, quoted in NARANJO GALVES, "Reforma Política y Control Fiscal", 83.

54 SÁCHICA, LUIS CARLOS, "Exposición y Glosa del Constitucionalismo Moderno", 1979, quoted in NARANJO GALVES "Reforma Política y Control Fiscal", 81.

55 NARANJO GALVES "Reforma Política y Control Fiscal", 84.

56 Ibid.

57 Ibid.

58 YOUNES MORENO, DIEGO, "Nuevo Régimen del Control Fiscal", 73-81 quoted in NARANJO GALVES, "Reforma Política y Control Fiscal", 84.

59 RESTREPO MEDINA, "Cumplimiento de Condiciones Básicas para el Ejercicio del Control Fiscal en Colombia", 137.

place, on those who appoint the comptroller; secondly, on whomever it controls; and thirdly, independence is stated in terms of budgetary autonomy.

In the particular case of Colombia, the fiscal control established in the Constitution of 1991 is integrated within the following elements⁶⁰: a technical control which begins within the public entities effected by their own procedures of internal control; a subsequent and selective vigilance by an independent government institution which lies at the national level in the Office of the General Comptroller of the Republic (*Contraloría General de la República*) and at the territorial level by the local and departmental comptroller. The comptrollers are subject to the control of an external auditor, in addition to the control and monitoring that the citizens are entitled to execute over the public funds through oversight groups⁶¹.

OCHOA and CHARRIS⁶² argue that there are several failures in the implementation of the fiscal control model proposed by the constitution of 1991. Firstly, the model has converted into a spoils system. Secondly, the decentralization and autonomy of the territorial entities has become blurred. Thirdly, some of the functions of the comptrollers overlap the functions of other entities leading to unnecessary delay and difficulties in exercising a technical and efficient fiscal control. Finally, the internal control of the public entities has not fully accomplished its objective. For the purpose of this article, I will focus on the first failure indicated above due to its direct relation to political corruption conducted by the lack of independence of the fiscal control body.

In Colombia the prestige of the Office of the General Comptroller of the Republic has been damaged by its lack of independence which leads to be used as a refuge for different political groups⁶³. Several judicial accusations⁶⁴ have been made against some ex-comptrollers about the peddling of influence in the process of hiring personnel inside the institution. This corrupt practice has deeply affected the technical expertise of this government office whose main function is to control government expenditure of the public funds.

Observers⁶⁴ have stated that the origin of this malpractice lies in the appointment system established in the Constitution of 1991. This Constitution mandates the Congress to appoint the national comptroller from a pool of candidates presented by the high courts. In the territorial level, the departmental assembly is constitutionally entitled to designate the department comptroller, and the local council is entitled to assign the local comptroller⁶⁵.

The general auditor supported this view. In his report, he expressed his deep concern about the lack of independence and autonomy of territorial comptrollers due to the appointment system being politicized. Additionally, the general auditor noted the economic

60 OCHOA DÍAZ and CHARRIS REBELLÓN, "Propuesta de un Modelo de Control Fiscal para el Estado Colombiano: el Sistema de Control Fiscal Nacional", 15.

61 *Ibid*, 16.

62 *Ibid*, 22.

63 *Ibid*.

64 *Ibid*.

65 Constitución Política de Colombia, art. 267.

dependence of these control bodies on political decisions, which makes them easy targets of persecution when their decisions affect the departmental and local administration⁶⁶.

SÁNCHEZ TORRES et al.⁶⁷ argue that the person holding the Office of the General Comptroller of Colombia will be subject to pressure due to the way our political organization is established and the manner the political parties operate. Furthermore, this pressure is caused by the way is structured the relationship between the Executive and Congress, which is shaped by the dependence of the Congress on the public payroll that the Executive administers. However, I will refer to this specific discussion in the next heading.

In this regard, The General Comptroller will be under pressure by those who designated him, i.e., the Congress, and by those who are subject to his control, such as the President. The President will have influence over the Comptroller, due to its incidence over Congress expressed by the coalition government.

The authors⁶⁸ quoted above have also stated that the budgetary independence of the Comptroller is endangered by the fact that the Executive is entitled to approve the Annual Month-Adjusted Program (Programa Annual Mensualizado -PAC-) of the Comptroller. The PAC is the scheme of the expenditure and revenue segregated in twelfths. This means that at the national level is the President of the Republic who has the authority to approve such budgetary plan through the Ministry of Finance, and, in the case of territorial Comptrollers, the budgetary approval depends on the governors and mayors.

Along the same line, LOPEZ OBREGON et al.⁶⁹ have concluded in their research, that the performance of the comptrollers will depend on the availability of funds. The authors demonstrated a correlation between territorial comptrollers which have fewer resources and lower results of the performance indicators. Consequently, it was concluded that if the comptrollers' resources are cut, less coverage of fiscal control will be obtained.

In summary, at first glance one could argue that, the independence of the General Comptroller is guaranteed because is the Congress and not the President the institution which appoints him. However, studying in detail the Colombian political organization, it can be inferred that the independence of the control body is endangered due to the fact that the President has an important influence in the congress and he will have incentives to induce the designation of the General Comptroller.

From a law and economics' perspective, the prerogative of the executive to approve the PAC of the comptroller office, jeopardize its independence; compromise the coverage of the fiscal control by opening a possibility to reduce the spectrum of control and supervision. Moreover, it creates a scope for corruption due to the possibility of the agent to reduce the probability to be caught in case of any malpractice.

66 Auditoría General de la República, "El Nuevo Sistema de Control Fiscal Colombiano" (Bogotá, 2003), 11 quoted in OCHOA DÍAZ and CHARRIS REBELLÓN, "Propuesta de un modelo de control fiscal para el estado colombiano: el sistema de control fiscal nacional", 26.

67 SÁNCHEZ TORRES et al. "Macroorganización Estatal, Instituciones y Contralorías", 249.

68 Ibid.

69 LOPEZ OBREGÓN et al. "Diagnósticos y Perspectivas del Control Fiscal Territorial", 42.

To sum up, in order to determinate those constitutional provisions which foster political corruption, it can be argued that the provision that governs the appointment system of comptrollers creates a scope for clientelism and political corruption, instead of fostering the independence of this control body which is necessary to fulfil its role.

2.2.2 *Colombian Political Opposition Structure*

Political opposition is an essential element for democracy. It reflects the pluralism, the tolerance and the freedom of expression of a society. In addition, it embodies the contradiction of ideologies and interests of the political contest⁷⁰. Traditionally, there has been a distinction between parliamentary and extra-parliamentary opposition; in this article I will focus on the former, the opposition exerted by political parties represented in the Congress.

The parliamentary opposition is the best tool to fight political corruption, it creates incentives for parliamentarians to properly fulfil their functions of political control, limits the discretion of public officials, promotes transparency and publicity of the acts of the state⁷¹ by providing information to monitor governmental actions on the part of citizens. Its practice creates the balance and the control needed for good governance.

Colombia has had a long history of civil wars and violence that have failed to build the necessary foundations for the proper exercise of a democratic opposition⁷². This impairment is reflected in the inability to resolve disputes peacefully. Despite that, the problem of this inability to generate a serious political opposition is at the origin of the conflict; the denial of space and guarantees to opposition groups by the Colombian political system has contributed greatly to this failure⁷³.

The Constitution of 1991 sought to overcome these challenges by eliminating the institutional foundations of the Colombian political system profoundly affected by clientelism⁷⁴. However, at present, structural problems can be identified that impede the functioning of a democratic opposition. According to RAFAEL GUARÍN these problems can be grouped into the following "six categories: a) the bureaucratic problem; b) the national security and armed conflict; c) the operation of Congress and political parties; d) electoral fraud; e) the lack of legal protection; and f) the anti-opposition culture"⁷⁵. However, only items a), c), and e) are related to the objective of this article and the analysis will be limited to them.

2.2.3 *The Bureaucratic Problem*

Historically, the Colombian political contest has been related to the control over the bureaucratic payroll. Colombian bipartisan leaders have recognized that one of the main

70 GUARÍN, "Colombia. Oposición, Competencia Electoral y Reformas para la Paz en Colombia", 73.

71 Ibid.

72 Ibid, 76.

73 Ibid, 76.

74 Ibid.

75 Ibid, 77.

causes of disagreement between Liberals and Conservatives were the decisions on state employment that were taken with the change of the political party in government⁷⁶. Despite the change introduced by the new constitution, a high percentage of Colombian politicians continue to use the state as a dispensation of favours and patronage⁷⁷ through the allocation of bureaucratic positions.

Furthermore, access to the bureaucracy has determined the relationship between legislators and the Executive. Previous governments have shaped relations with the Congress by assigning bureaucratic quotas even to political organizations that are considered as "alternative". The problem is not that the victorious parties in the elections have representation in the government; the core problem is that the government discourages political opposition in the Congress by creating dependence on public payroll in exchange for loyalty⁷⁸.

The dependence on the bureaucratic quota leads to the fragmentation of the parties that disfigures the exercise of political control in Congress, where the immediate priority of law makers is to protect their share in the state payroll and not the exercise of their political role for which they were elected⁷⁹.

2.2.4 *The Operation of the Congress and Political Parties*

GUARÍN⁸⁰ has stated that the weakening of the Congress and the inadequate functioning of the political parties have been key factors that have negatively affected the performance of the opposition in Colombia. The Congress has experienced difficulties in maintaining its independence from interest groups and in exercising political control over the Executive because of its lack of technical capacity to conduct investigations into governmental policies. Consequently, the relationship between the Congress and the Executive has become characterized by mutual blackmail. At the same time, Congress exacerbates the difficulties of political parties through its fragmentation, lack of programs and ideologies which manifest themselves as bureaucratic dependence⁸¹.

The internal indiscipline of the political parties and their fragmentation are the product of a political system based on an individual's ability to win the elections rather than on the performance of organized and democratic parties⁸². In this way in the political system the particular interests of the members of each party prevail rather than the public interest or the party's ideology⁸³.

76 Ibid.

77 Ibid, 78.

78 Ibid, 80.

79 Ibid, 80.

80 Ibid, 85.

81 Ibid.

82 Ibid, 86-87.

83 Ibid, 86-87.

2.2.5 *The Lack of Legal Protection to the Opposition*

The opposition is not given its proper constitutional protection. Administrative acts that are directly related to the implementation of effective opposition are subject to lengthy litigation that impedes the effectiveness of their prerogatives because the opposition is not considered a fundamental right⁸⁴. An example related to the right of reply (which is the right of the opposition to react to government excesses) came to light in 1999, when the National Electoral Council granted the right to reply to the opposition party after two years of their having established the request. This also reflects the political composition of this body which is inadequate to guarantee the exercise of the opposition. In the aforementioned decision, it was demonstrated that partisan criteria hindered the recognition of this right⁸⁵.

2.2.6 *Colombian Judiciary (obstacle to upholding the laws)*

Previous studies suggest that the Judiciary has a limited role in the Latin American states. Generally, the Executive branch of the public power system assumed a dominant position followed by the legislature with the Judiciary at the bottom. The cause of this unbalanced division of power may stem from the institution established in the Spanish colonial era⁸⁶.

A strong judiciary is vital to prevent corruption as MARIA DAKOLIAS and KIM TACHUK stated: "the courts are the principal factor in anti-corruption. If courts do not act then the principal [sic] factor in prevention of corruption is lost"⁸⁷. However, the traditional weak role of the Colombian judiciary combined with the highly political selection process of the judges has had a profound impact on the effective enforcement of the laws⁸⁸. Another factor that has reinforced the poor judicial enforcement has been the corruption within the Colombian judiciary⁸⁹. "Being a judge in Colombia does not rank very highly in terms of dignity and this fact has a harmful effect on the legitimacy, credibility and dignity of the justice system"⁹⁰. Corruption within the Judiciary fosters corruption not only within the judicial branch, but also in others sectors of the government; as public officials and private individuals realize that they can be corrupt with impunity. Additionally, judicial corruption jeopardizes greatly the stability and the quality of the legal system. For example, the

84 Ibid, 88.

85 Ibid.

86 SAEZ, FELIPE, "The Nature of Judicial Reform in Latin America and some Strategic Considerations", 13 and Nagle, Luz, "the Cinderella of Government: Judicial Reform in Latin America", 30, quoted in HOGGARD, "Preventing Corruption in Colombia: The Need for an Enhanced State-Level Approach", 607.

87 DAKOLIAS, MARIA and TACHUK, KIM, "Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform", 18, quoted in HOGGARD, SHILOH, "Preventing Corruption in Colombia: The Need for an Enhanced State-Level Approach", 613.

88 HOGGARD *supra* note 48 at 613.

89 Ibid, 614.

90 Transparency International, National Integrity Systems Country Study Report: Colombia 2001, 3, quoted in HOGGARD, "Preventing Corruption in Colombia: The Need for an Enhanced State-Level Approach", 614.

case law can become very unpredictable if the decisions of the judge are based on bribes or political favours rather than the rule of law⁹¹.

The Constitution of Colombia contemplates four high courts, *viz.*: the Supreme Court of Justice, which is the highest criminal and civil court; the administrative court referred to as the Council of State; the Constitutional Court, which enjoys the protection of the Constitution; and the Superior Council of Judicature, whose main functions are the administration of the Judiciary branch and the monitoring of the disciplinary processes against judicial officers and lawyers. All courts are entitled to review other High Court judgments if a writ of "amparo" is filed. This is because the Colombian writ of amparo attempts to anticipate any legal decision that might violate fundamental rights, including the decisions of the High Tribunals.

The appointment system of the High Courts' senior judges has become highly political due to the direct interference of the president and the parliament in the selection of the judges. This system distorts the judicial functions of impartial justice and upholding laws by introducing political patronage into the judicial process. These undesirable incentives reduce the impartiality of the judicial decisions as the senior judges have almost the same incentives as politicians⁹².

The senior judges are appointed by peers or by the congress. In the latter case the list of candidates is sent by the president. The tenure of the elected senior judges is only for eight years without the possibility of re-election. A senior judge does not need judicial experience to be appointed. This expands the criteria of selection to others criteria not related with the judicial expertise of the candidates, such as political affiliation. Additionally, in order to be appointed senior judge of the Constitutional Court, an individual must not have served as a judge within any of the other High Courts for a minimum of one year before being selected. This limits the scope of being chosen as a High Court senior judge based on the judicial career of the candidate. It is evident that other criteria of selection can be introduced in the appointment process of the High Court senior judge.

It is important to note that although senior judges cannot be re-elected after having served in the High Courts, they can hold public office. The short term career of a High Court judge could make them vulnerable to impartial decision making⁹³. Populist decisions or those made to the benefit of some interest groups in order to pursue a political career or to build relations with some economically important groups may result therefrom.

The fact that the Colombian Constitution has established four High Courts without hierarchy between them and with the possibility of mutual review of judgements is a cause of unavoidable jurisdictional conflict within the judicial branch. This conflict jeopardizes judicial stability and creates obstacles to the proper enforcement of laws. For instance, as it has occurred, the Supreme Court of Justice can refuse to change its judgement due to its superior authority despite the decision taken by the Superior Council of Judicature which

91 HOGGARD, *supra* note 48 at 614.

92 KUGLER and ROSENTHAL, *supra* note 46 at 23

93 *Ibid*, 24

mandates a modification of the former decision. In this case, the individuals are not certain about which sentence prevails because both courts have the same hierarchical position. Another example is when the Constitution stipulates that The Council of the State should be made aware of some constitutional cases, but this function sometimes overlaps with the work of the Constitutional Court's thereby creating conflict among the courts. It would clearly be beneficial for the system to establish which one is the highest court in the land.

The vulnerability of the Judiciary in Colombia is well documented. Several scholars have studied the independence of the Judiciary in the former government of Alvaro Uribe⁹⁴. They have concluded that the tendency of the Executive to influence the decisions of judges increases when the judges play a decisive political role through their judicial decisions; and these are contrary to the interests of the Executive and the government coalition in Congress⁹⁵. Carolina Guevara illustrates how the government of the President URIBE used legal and illegal mechanisms to influence the administration of justice and therefore compromise the independence of judges⁹⁶.

In her work, GUEVARA⁹⁷ described the government's harassment of the criminal division of the Supreme Court of Justice, when its decisions in the prosecution of members of Congress and in the peace process with one of the armed group (paramilitares) were contrary to the interests of government. At the beginning, the government actions manifested themselves in constant proposals of judicial reforms, which sought to undermine the functions and the hierarchy of the High Court. Later on, the Executive initiated a smear campaign against the judicial institution by denouncing the High Court judges for having links with drug trafficking⁹⁸. This accusation led to a criminal investigation of the judges by the Congress.

Finally, the most alarming government intrusion into the judicial branch was what is known in Colombia as "las chuzadas". This term describes the illegal interception of communications that were made to the judges of the Supreme Court and other important individuals within politics. According to statements from some witnesses, these interceptions were made because any person who represented a potential danger to the government should be monitored by the DAS⁹⁹ (Administrative Department of Security).

This situation generated a national debate; furthermore, it led to several criminal investigations including an investigation into the actions of the former President ÁLVARO URIBE VÉLEZ. In addition, the national ombudsman sanctioned disciplinary action against the former general secretary of the presidency and the former director of DAS, among others¹⁰⁰. Finally, the fact that the ex-president has been investigated begins to shed light on one of the biggest strikes at the independence of the highest court of the ordinary jurisdiction in

94 GUEVARA. "Independencia Judicial el Caso de la Corte Suprema de Justicia Colombiana"

95 Ibid, 173

96 Ibid, 173

97 Ibid, 166

98 Ibid, 167-168

99 Ibid, 169

100 Ibid, 172

recent times¹⁰¹. It can also be inferred that the intention of some state officials was to intervene in the decisions of the judges, discredit their work and consolidate the supremacy of the Executive¹⁰².

2.2.7 Colombian Social Control

A crucial measure in preventing and fighting corruption is that citizens are able to hold public officials accountable when they engage in corrupt activities. For this "vertical accountability"¹⁰³ to occur, "citizens need to hold political leaders to some standard and punish them when they violate that standard"¹⁰⁴.

In Colombia, the Constitution protects civil participation in government activities. It contemplates the creation of Citizen Oversight Bodies (veedurías ciudadanas), which are groups of individuals that engage in monitoring and gathering information on government actions with the aim of protecting public welfare. These associations do not need a special type of organization and can be formed at the discretion of any citizens.

However, these groups have encountered a lot of obstacles in trying to achieve their objectives. On the one hand, the government has not been helpful with the delivery of information and it has even denied access to documents. Access to government information is crucial for social participation¹⁰⁵. On the other hand, the role of the civil society is weak, in terms of participation; they do not have a lot of initiative in creating these oversight groups¹⁰⁶.

This lack of initiative could be explained by the fact that the citizens do not have a strong mechanism to call their leaders to account. The punishment of a corrupt official depends on government action that could be inefficient and corrupt. As a result, citizens' participation becomes meaningless. Civil society participation needs to be improved; therefore Colombia needs to create strong direct democratic mechanisms in order to enhance not just the number of civil society groups but also to ensure that the civil society becomes an active and vital force to prevent corruption.

The constitutional structures presented above have a common feature; they all influence the check and balance system of the Colombian state and, in particular, the accountability system over politicians. The agent selection process is an important strategy to prevent corruption. In this stage, the principal has the possibility to create barriers to unqualified and dishonest individuals, because of that the current appointment system of comptrollers foster political corruption due to the fact that the controlled agents appoint their watchdog, this fact distorts the incentives of the agent to act according to principal's interest

101 Ibid, 173

102 Ibid, 173

103 O'DONNELL, GUILLERMO, "Horizontal Accountability in New Democracies", quoted in CANACHE, DAMARYS and ALLISON, MICHAEL E., "Perceptions of Political Corruption in Latin American Democracies", 92

104 CANACHE and ALLISON, "Perceptions of Political Corruption in Latin American Democracies", 92

105 HOGGARD, *supra* note 48, at 618

106 Ibid, 617

since the independence of the control body would be seriously undermined. As a result, the probability of a corrupt agent being caught would be lower, and, as a consequence, she would be more likely to be corrupt.

A similar situation with more serious consequences arises with the High Courts' selection system. The High Courts are entitled to scrutinize the actions of the politicians, but, as in the previous case, the controlled agents appoint their watchdog. This situation might lead to impunity for the corrupt politicians. Therefore, the politicians would be incentivized to be corrupt because the benefit that they stand to gain would be compensated by a low probability of receiving a penalty.

The relationship between the congress and the government shaped by access to the bureaucratic payroll, deeply affects the political control in the country. The balance of power is inclined in favour of the Executive due to its prerogative to provide bureaucratic positions, and this is even more the case when this faculty is used to dismiss the opposition parties. The lack of strong political opposition impacts heavily on the control and monitoring of the corrupt politicians. The superior position of the Executive branch can also be predicated over the Judiciary branch. It is evident, as shown in the example cited above, how the government has the necessary mechanisms to put pressure on the Judiciary when their decisions are contrary to the government's interest. A change in the political system needs to be made in order to equalize the division of power.

These system failures affect the incentives of the citizens to exercise social control over politicians despite their position of being the principal in this agency relation. The lack of a robust democratic mechanism that allows vertical accountability leads to a weak social punishment. The efficacy of the social penalty needs to be enhanced in order to align the incentives of both parties.

In the next section, a case study will be presented which illustrates how the constitutional structures identified in this section interact with each other to generate the potential for corruption.

SECTION 3. CASE STUDY: SUPERIOR COUNCIL OF JUDICATURE

While this case deals with a specific situation of a Colombian high court; its analysis can be applied to similar situations that arose in other Colombian political institutions.

In the first place, this case illustrates the importance of the appointment system in the independence of the elected official. The fact that the Congress and the Executive influenced the election of judges and supervisory bodies - as is the comptroller office - creates a relationship based on political favours that distorts the incentives of the public servants to properly fulfil its function of political control, undermining the balance of power at the expense of the institutional check and balance.

In second place, it can be seen how the relationship between the Congress and the Executive are shaped based on the prerogative of the Executive to supply bureaucratic positions. This not only has prevented the construction of suitable spaces for the exercise

of the opposition but, at the same time, it has deeply affected the division of public power and the exercise of mutual accountability.

Finally, it shows the lack of independence of the Colombian Judiciary which generates a scope for impunity, especially for political leaders being investigated for corruption. Additionally, it illustrates the legal instability caused by the lack of hierarchy among the high courts.

3.1 Superior Council of Judicature in Times of President Uribe (2002-2009)

The Constitution of 1991 assigned the administrative and disciplinary functions of the Judicial branch to an independent court within it called the Superior Council of Judicature (CSJ)¹⁰⁷. In this way, it would strengthen the independence of the judges and help solve the management problem inside the Judiciary¹⁰⁸. However, during the government of ÁLVARO URIBE VÉLEZ (2002-2009) the independence, stability and impartiality of this court was questioned because of the political interference by other political institutions.

The Superior Council of Judicature is the highest court of appeal on matters of the administration of justice. It was created in the Constitution of 1991 with the intention to empower the judicial branch and to exercise disciplinary control over the judicial officials and lawyers. The National Constituent Assembly thought that creating this organ within the judicial branch would reinforce the independence of the Colombian judiciary.

The CSJ is divided into two divisions with different appointment systems and functions. One is named the Administrative Division; it is in charge of administering the judicial career, to draw up lists of candidates for the appointment of judicial officers, to monitor the performance of judicial offices, to develop the budget of the judicial branch, to set the territorial division of the administration of justice, among others¹⁰⁹. The Administrative Division which is integrated by six senior judges elected for an eight year period by the high courts as follow: one for the Constitutional Court, two for the Supreme Court of Justice and three for the Council of State¹¹⁰.

The other division is called the Disciplinary Division. Its principal functions include: resolve jurisdictional conflicts between different jurisdictions, to hear the disciplinary processes against judicial officers and lawyers, to appoint judges of the disciplinary rooms of the sectional councils of the judicature, to decide writs of amparo, among others¹¹¹. This division is integrated by seven senior judges appointed by the Congress from lists with three candidates presented by the government, for a period of eight years¹¹². Finally, the two rooms form the complete division of the Superior Council of Judicature. The com-

107 Constitución Política de Colombia, art. 257.

108 Gaceta Constitucional 75 1991 quoted in GARCÍA VILLEGAS, MAURICIO et al. "Mayorías sin Democracia Desequilibrio de Poderes y Estado de Derecho en Colombia, 2002-2009".

109 Constitución Política de Colombia art. 256,257 and Ley 270/1996 art. 85.

110 Constitución Política de Colombia art. 254.

111 Constitución Política de Colombia art. 256,257 and ley 270/1996 art. 112.

112 Ibid art. 254.

plete division makes the main decisions in terms of political representation, planning and accountability of the judicial branch.¹¹³

The relation between the Administrative Division and the national government of the President Uribe was difficult for two main reasons: the first one was the successive government's intention to eliminate or reform the judicial institution, and the second one was due to differences between the two institutions about how to manage the judicial branch¹¹⁴.

The President Uribe and the government coalition in the Congress proposed, on several occasions, the elimination or modification of the CSJ, specifically the Administrative Division. The proposals were based on the interest of the Executive to improve judicial efficiency and increase its participation in the administration of the Judiciary. The first proposal was discussed in 2002, two months after the presidential inauguration. It was proposed the removal of the CSJ and the administration of the branch by the high courts with the ministry of justice. This proposal was strongly criticized by the judges of the high courts arguing that by including an official of the executive branch in the administration of the Judicial branch would affect the independence of justice. They also claimed that the government wanted a state without any political control¹¹⁵.

In 2004, the government again presented a judicial reform. It also provided for the elimination of the council, but the assignment of the management functions of the branch to the head of a new administrative committee. This new institution would be composed of five members; three appointed by the high courts and two ministers, who would have only voice but not vote. This proposal was also criticized by the high courts claiming that the government wanted to manage the judiciary branch. This proposal of judicial reform did not succeed. In mid-2006 the president re-emphasized the need to eliminate the administrative division of the CSJ and appoint a manager in place, but the courts again defended the existence of the council¹¹⁶.

The last proposal to eliminate the Superior Council of Judicature was discussed in 2008, after the presidential re-election and between judicial investigations of "parapolítica" (judicial process against politicians linked to paramilitary forces). The government presented a joint proposal for political reform and judicial reform. This proposal included again the removal of the CSJ. Under this proposal, the administration of the branch would be in charge of a manager chosen by the high courts, three senior judges and a representative of the government. The courts again criticized the proposal, but this time their arguments were that this proposal was moving the main discussion: the political infiltration of armed groups. Finally, the government withdrew the initiative¹¹⁷.

113 Ley 270/1996, art. 79.

114 GARCÍA VILLEGAS et al. "Mayorías sin Democracia Desequilibrio de Poderes y Estado de Derecho en Colombia, 2002-2009", 255.

115 Ibid, 256.

116 Ibid, 257.

117 Ibid, 257-258.

In addition to the proposals to eliminate the CSJ, the government and the administrative division have disagreed on aspects related to the administration of the Judiciary. These matters are linked with the amount and timely disbursement of the budget of the Judiciary and the continuity of service upon strikes inside the branch¹¹⁸.

The relationship between the government of URIBE with the Disciplinary Division was completely different. The appointment system of the judges in this division generated close links with the political sectors¹¹⁹. In 2007 and 2008, six of the seven judges of this Division were elected. It was reported that the new appointments were the result of an agreement between political parties in the government coalition in the Congress and the Executive¹²⁰. Most of the new judges have been political leaders and have had comparatively little experience exercising judicial functions. This has raised questions in the academics, precisely because its proximity to certain political parties can lead to partisan loyalties¹²¹.

3.2 Appointment of the Judges of the Superior Council of Judicature

The research conducted by GARCÍA VILLEGAS et al.¹²² shows a detailed study of the career, and selection process of each of the new judges. However, for the purpose of this thesis it is enough to point out the most polemic cases. On 7 February, 2008, the Congress elected MARÍA MERCEDES LÓPEZ from a list composed solely by the Conservative Party's candidates. In this election one of the opposition parties denounced that the government was handing the CSJ to the coalition parties.

Later, OVIDIO CLAROS was elected senior judge. The day of his election, he explicitly committed with the Congress to be very attentive to everything that the Congress says¹²³. His election was widely criticized for his professional experience and political engagement. In 1997, he was elected comptroller of Bogotá through an appointed system that also included the interference of politicians in the election of the public official. The district council selected him to be comptroller, even though he had seven disciplinary investigations against him and a suspension for thirty days¹²⁴. In 2002, he became congressman. He was intensively criticized for using the supervisory body to win the elections. At last, his postulation in the Disciplinary Division of the CSJ was made apparently by the Colombian Democratic political party, which was the party of the president's cousin.¹²⁵

In the same way, the appointment of PEDRO ALONSO SANABRIA was criticized. He was chosen from a list which only included Conservative Party candidates. SANABRIA has had a long political career. He belonged to the city council of Gachantiva, to the assembly

118 Ibid, 258.

119 Ibid, 260.

120 Ibid, 261.

121 Ibid.

122 Ibid, 263.

123 Ibid, 264.

124 Ibid.

125 Ibid, 265.

department of Boyacá in three occasions and he ran twice the election to be governor of Boyacá, in the second occasion he counted with the support of all the parliamentarians of Boyacá.¹²⁶ The research carried out by GARCIA VILLEGAS et al,¹²⁷ reported that, after SANABRIA lost his second attempt for the department governorship, several parliamentarians of Boyacá approached the President, to request the addition of PEDRO ALONSO SANABRIA on the candidates list that was going to be sent to the Congress for the appointment of the senior judges of the Superior Council of Judicature. The president did so and the Congress appointed SANABRIA.

3.3 The Decisions of the Superior Council of Judicature

According to the above quoted research, the proximity of the Disciplinary Division with the Executive and political parties of the coalition in the Congress, has influenced the judicial decisions of this Division¹²⁸. Following the controversial appointments, let us turn to the decisions that have generated more public controversy.

The first case led to release the former congressman MIGUEL DE LA ESPRIELLA convicted for "parapolítica". The wife of the former congressman filed the writ of habeas corpus arguing that her husband had served three fifths of his sentence. In the first instance, the judge denied the petition because the accused had only served eighteen months in prison for a sentence of forty-five months. However, on appeal, the Disciplinary Division of the Superior Council of the Judiciary awarded the benefit. Apparently, the calculations of the judge Claros allowed the ex-congressman to be entitled of the benefit¹²⁹.

The second questionable decision was the judgment in favour that the former Minister of social protection, DIEGO PALACIO, obtained from the Disciplinary Division. This Division decided that the judgment of the Supreme Court of Justice (the criminal high court), in which was condemned a former congresswoman guilty of bribery, was violating the fundamental rights of the former minister. The decision of the Disciplinary Division was taken on the grounds that the sentence of the Supreme Court included the name of PALACIO without listening to him on trial¹³⁰.

In 2004, when the House of Representatives was discussing the adoption of the presidential re-election, two ministers, DIEGO PALACIO and SABAS PRETEL, apparently offered to the former congresswoman, YIDIS MEDINA, gifts in exchange of her vote for the re-election¹³¹. After MEDINA changed her vote, her peer from the opposition party, GERMÁN NAVAS TALERO, pressed criminal charges against her. The former congresswoman accepted her criminal responsibility and the Supreme Court condemned her for the crime of bribery. The Court justified its decision on the fact that MEDINA'S vote in the presidential

126 Ibid, 266.

127 Ibid.

128 Ibid, 268.

129 Ibid, 270.

130 Ibid.

131 Ibid, 271.

re-election was guided by bureaucratic offers and not by the dictates of her conscience. The court's decision generated a lot of debates as well as criminal investigations against the public officials involved¹³².

The problem with the former minister Palacio was that the court included his name in the arguments of the sentence, to paraphrase the statements of former congresswoman YIDIS MEDINA. The former minister felt, that his name in the sentence without having been heard at trial was a violation to his fundamental rights. For this reason, initially, Palacio filed a writ for the protection of his constitutional rights against the judgment of the Supreme Court, in the Civil Division of the same court, but this was declared inadmissible. The Civil Division argued that the writs of amparo against the judgments of the Supreme Court are inadmissible and its decisions cannot be checked by anyone. Therefore, the former minister interposed the same action in the Disciplinary Division of the Sectional Council of Judicature in Cundinamarca's district. The Council also refused to admit his petition. The Minister appealed this decision and the matter came to the Disciplinary Division of the Superior Council of Judicature. This Division not only admitted the petition, but also granted the protection of his rights. The Division decided to waive sections, of the judgment of the Supreme Court of Justice, which it thought were violating the fundamental rights of the minister¹³³.

The decision of the Disciplinary Division of protecting the minister's claim and dismissal of some parts of the judgment of the Supreme Court, generated a strong conflict between these two high courts of equal hierarchy¹³⁴. The conflict between high courts has been called "train wreck". This confrontation is due to the fact that the writ of amparo proceeds against judicial judgments including judgments of high courts, so the decisions of one high court can be reviewed by another high court¹³⁵. However, the Constitutional Court reviewed the decision of the Disciplinary Division and left it with no effect, agreeing in this way with the Supreme Court of Justice.¹³⁶

This decision of the Disciplinary Division was widely questioned, not only for the political origin of the judges but also for the high discretion exercised to make the decision. In Colombia, there was no judicial precedent which protected the constitutional rights violated by the arguments of the court's sentence¹³⁷. This could be one of the reasons of the judicial bodies, which knew the petition of the former minister before the Disciplinary Division, to rule against him¹³⁸.

132 Ibid, 272.

133 Ibid, 272-273.

134 Ibid, 273.

135 GÓMEZ GARCÍA, "Las Vías de Hecho como Generadoras del Choque de Trenes en la Jurisprudencia Constitucional (1992-2008)", 35-36.

136 GARCÍA VILLEGAS et al. *Supra* note 114 at 255.

137 Ibid, 273.

138

Specifically, it can be inferred from this case, that the Executive has sought to influence the administration of the Judiciary and its failure to do so has caused tensions with the Administrative Division of the Superior Council of Judicature¹³⁹.

A different relation has been developed with the disciplinary room, where its influence on the selection of judges is almost direct. The judges' selection for the criteria of the Executive and the Congress seems to be guided by the political profile of the candidate, rather than their professional qualities. This has weakened the independence, effectiveness and impartiality of the Judiciary, but the worst part is that it has opened the possibility for the impunity of political leaders being investigated for corruption¹⁴⁰. It may be noted that the relationship between the Executive and the Congress is highly influenced by the ability of the Executive to provide bureaucratic positions, situation that jeopardize the check and balance of the Colombian state. Finally, the possibility to review the judgments of high courts without establishing a hierarchy amongst them creates institutional conflicts that affect the integrity of the Judiciary and legal stability.

SECTION 4. RECOMMENDATION OF CONSTITUTIONAL REFORMS

Having identified and described the Colombian constitutional structures that foster corruption, a proposal of constitutional reforms is presented with the aim of strengthening the Colombian check and balance system from an anti-corruption perspective.

In this article, I shall follow the recommendations of the World Bank, which has announced five elements to build an effective anti-corruption strategy, those are: 1) "increasing political accountability"; 2) "strengthening civil society participation"; 3) "creating a competitive private sector"; 4) "institutional restraints on power"; and 5) "improving public sector management"¹⁴¹.

Colombia has the challenge of improving its institutional check and balance system in order to combat the abuse of public office for private benefits. An improvement in political accountability will increase the percentage of detection and punishment, making politicians less willing to engage in corrupt activities¹⁴². Political opposition and the Judiciary play an important role in this task. The parliamentary opposition acts as a watchdog, by monitoring the actions of the governing party and exposing corruption. If the opposition enjoys strong legal protection, its incentives of close monitoring and controlling the government will be aligned with those of the principal because the opposition, is stimulated to damage the reputation of the governing party in order to win the next election. The opposition also serves as the main source of information for the principal, because citizens need to be empowered to play a vital role in punishing corrupt politicians. The principal should have

139 Ibid, 275.

140 Ibid, 276.

141 The world Bank Group, "The New Anticorruption Home Page" quoted in HOGGARD, "Preventing Corruption in Colombia: The Need for an Enhanced State-Level Approach", 596.

142 HOGGARD, "Preventing Corruption in Colombia: The Need for an Enhanced State-Level Approach", 596.

a dominant position over the agent. This position stimulates the agent to act in accordance with the principal's interest. Therefore, it is worth considering the possibility of citizens having the right to exercise the exit option in the case of a corrupt politician. Finally, the judicial function of the enforcement of laws is vital for any anti-corruption strategy. It affects directly the costs in the computation of the agent in deciding whether or not to act in a corrupt manner. An independent and efficient judiciary will prevent corrupt activity.

Overall, the implementation of a strong social control combined with strong opposition, an independent judiciary and an effective fiscal control body are key mechanisms to building transparency in the relation between the state and the individuals. Their implementation would enhance political stability and good governance which are a pre-condition for economic, social and political development¹⁴³.

In the next section, possible constitutional amendments that enhance the Colombian institutional check and balance system will be presented. It is pertinent to point out that besides this proposal, other constitutional and legal reforms are needed to create a proper check and balance system. However, in this article, I will only refer to the institutions that I consider need to be restructured as an immediate priority in the current political situation of Colombia.

4.1 Reform of the Comptrollers' Appointment System

Given the previous diagnostic of the comptrollers' appointment system, I present some ideas that may help to overcome the lack of independence and efficiency of the fiscal control body in Colombia.

In the current appointment system, the politicians influence directly in the selection of the comptrollers. This means the controlled agents appoint their watchdogs. This situation has jeopardized greatly the independence and efficiency of this control body. To enhance the independence of the institution, one could envisage the introduction of a merit system as a method to appoint the comptroller and his staff¹⁴⁴. This system would select the public servants according to their technical expertise in financial control rather than political affiliation. This method of selection would disconnect completely this control body from the political interference which would lead to a more technical and formal fiscal control.

This new situation would mean that the political control, that this institution may exert over those public officials who execute the public budget, would be subdued to formal and technical fiscal control. Therefore, its political functions as a check and balance institution would be blurred. The problem itself is not the influence of politicians in this control institution. The problem is that the political incentives inside this institution are aligned with the agent's interest rather than those of the principal.

143 CHARRY SAMPER, "For a Global Approach to Fighting Corruption: Colombia's Steps Towards Transparency", 149.

144 OCHOA DÍAZ and CHARRIS REBELLÓN, "Propuesta de un Modelo de Control Fiscal para el Estado Colombiano: El Sistema de Control Fiscal Nacional", 39.

The fiscal control in Colombia is *ex-post facto*. This means, that the control is exerted once the politicians have made the expenditure of public funds, at the same time, this control is selective in the sense that, the fiscal control body has the discretion to choose which action is going to investigate. This implies a level of discretion on the part of the control public servant who decides which transaction has the merits to be reviewed. This decision should be taken from the perspective of the principal's interest in order to enhance a proper political check and balance system because political incentives are needed to exercise rigorous fiscal control over public servants. As a consequence, a pure formal and technical fiscal control is not optimal due to its deficiency in political inspection, which leads to a lack of incentives to exercise a robust control.

In order to inject adequate political incentives into this control body, one could consider the allocation of the comptroller to the second political force in the presidential, provincial and municipal election respectively, replicating the proposal submitted to Congress by MISAEAL PASTRANA in 1986¹⁴⁵. The opposition is incentivized to exercise a rigorous fiscal control over the government in order to detect any malpractice and, therefore, damage the government's reputation in order to win the next election. The incentives of the opposition to exercise a robust fiscal control are aligned with the interests of the principal. As a result, allocating the office of the comptroller to the opposition could improve the monitoring and control over the agent.

However, this system does not guarantee the expertise of the comptrollers. The opposition is also incentivized to exert undue influence over the public servants guided by its political ambition. This could generate extra costs in governing because the public servants should take extra precautions in any of their transactions, even when they are pursuing the principal's interests. Additionally, extra resources would be expended unnecessarily on this over-control leading to a waste of public resources.

It is important to bear in mind that assigning the office of the comptroller to the opposition does not alleviate the problem of patronage within the institution. The opposition could just as easily exploit this control entity by manipulating its payroll in order to get support for the upcoming elections.

Overall, the optimal appointment system would be the result of a trade-off between the political and the technical functions of the comptroller office. The system should combine the political and technical elements, where both interact to exert an effective institutional check and balance. Therefore, in this article the merging of the two current appointment systems is advocated. In the first instance, the comptrollers could be appointed by all the political parties of the opposition in order to prevent the limitation of the opposition to the second political force. This appointment would guarantee the political incentive inside the institution to execute a tight and rigorous fiscal control. However, the function of the comptroller must be carefully limited by the law in order to prevent the negative consequences of the over-control.

145 LÓPEZ, MARIO, "Itinerarios de la Oposición" quoted in Guarín, Rafael, "Colombia. Oposición, Competencia Electoral y Reformas para la Paz en Colombia", 94.

In the second instance, the comptroller's staff could be selected through a merit system. This will bring individuals to the control body with the expertise and capacity to exercise a technical fiscal control; additionally it would enhance its independence and prevent possible cronyism within the institution.

4.2 Political Reform

In order to strengthen the political opposition in Colombia, it is necessary to reform the structure of the political system, the electoral system and to improve the constitutional protection of the opposition¹⁴⁶.

Political competition is vital to prevent political corruption. Competition between parties brings about good government. On the one hand, the victorious party would be the one which demonstrates to the principal, its intention to enhance its welfare. On the other hand, the control exercised by the opposition parties over the government, would create incentives to public officials to fulfil their function as it would provide information to the principal about the behaviour of the agent.

Political competition in Colombia is affected by the prerogative of the governmental access to the offices of the state¹⁴⁷. In Colombia, the Executive shapes its relation with the other branches of the public power through the assignation of bureaucratic quotas; additionally, this prerogative is used to split and coerce the opposition¹⁴⁸. This situation leads to an imbalance of power and weak performance in political control.

An action to assure political competition in Colombia is the incorporation of all public servants into the administrative career, except those positions of political responsibility which are both freely appointed and removed from office by the government¹⁴⁹. This change in the access to bureaucratic positions would improve the balance of public power among the three branches by removing from the government the possibility to build a position of superiority amongst them.

However, the government would still enjoy discretion regarding the appointment of positions of political responsibility. To prevent any malpractice in this prerogative it is suggested in the first place, that the law should carefully define the affected positions of political responsibility; and in the second place, the assignment of those positions to members of the opposition political parties should be forbidden¹⁵⁰. In order to pursue this purpose it could be required that an individual member of the opposition parties has to resign from the party at least a year before his appointment¹⁵¹.

The political control exercised by the Congress is not only affected by the supply of political offices that the Executive provides. The lack of scope within this institution to

146 GUARÍN, "Colombia. Oposición, Competencia Electoral y Reformas para la Paz en Colombia", 97.

147 *Ibid*, 102.

148 *Ibid*.

149 *Ibid*.

150 *Ibid*.

151 *Ibid*.

promote the consolidation of the political opposition also affects the effective performance of this political control.

The organization and operation of the Congress and the political parties affect directly the integrity of the institutional control and balance system of the state. It cannot be ignored that the way the political control is established and the legislative process can help or hinder greatly the scope for action of the opposition¹⁵². Thus, the efficient performance of the parliament is a necessary condition to achieve an environment conducive to the exercise of the opposition.¹⁵³

In this regard, scholars¹⁵⁴ have proposed a change in the legislative process of the ordinary laws in Congress. Currently, the legislative process consists of four debates; two of them take place in the committee of each chamber and the other two in each plenary. The reform consists in reducing the approbation of the ordinary laws to two debates which would take place only in the committee of each chamber. In this way, the committees would become more specialized thereby improving the quality of legislation. Additionally, this reform would reduce the cost of collective actions as the size of the group in charge of the approval of the laws would be smaller. Therefore, the plenaries would become a suitable mechanism for political control where the discussion and the participation of the opposition are guaranteed.

The fragmentation of political parties could explain the difficulties experienced by the Congress in the exercise of political control over the government. This fragmentation is due to a political system being based on an individual's ability to win the elections rather than a collective performance guided by a common ideology¹⁵⁵. Thus the internal cohesion of the political parties should be consolidated as they are essential structures for democracy¹⁵⁶.

In order to improve political accountability in Colombia, past studies have suggested a switch from the open list vote system to the closed list in the current part-list proportional representation system¹⁵⁷. In the open list system the voters can directly choose the candidates influencing the order in which a party's candidates are elected. This method has led to a political system where the particular interest of the members of each party prevails, rather than the public interest being reflected in party's interests¹⁵⁸.

In the closed list, voters can only vote for the political parties as a whole, so they do not influence the order in which a party's candidates are selected. This system would improve the discipline and cohesion inside the party and would mean that the seats in Congress are held by the party and not by the individual¹⁵⁹. In addition, this system favours the public

152 Ibid.

153 Ibid.

154 Ibid, 103.

155 Ibid, 86-87.

156 Ibid, 104-105.

157 Ibid, 105.

158 Ibid, 86-87.

159 Ibid, 106.

interest by subordinating the private interests of the congressman to the political interest of the party¹⁶⁰.

Finally, the parliamentary opposition needs strong legal protection in order to exert proper political control. Political participation has been recognized as a fundamental right by the Colombian Constitutional Court and the international human rights' instruments¹⁶¹. The explicit recognition in the Colombian Constitution of the right of opposition as a fundamental right is necessary in order to empowered the opposition with the writ of amparo¹⁶². The Colombian writ of amparo is an effective and inexpensive instrument for the protection of fundamental rights. This constitutional provision would enhance the institutional check and balance system through the strengthening of the opposition.

Another constitutional amendment that would guarantee the legal protection required by the opposition to exert an important role in controlling the government is the reform of the appointment system of the National Electoral Council (NEC)¹⁶³.

The NEC is the public entity with the responsibility to regulate, inspect, monitor and control all electoral activities of political parties, in addition to ensuring the rights of the opposition¹⁶⁴. Its members are elected by the Congress from a list of candidates put forward by the political parties. The influence of the politicians in this body has driven partisan decisions, especially those related with the right of reply of the opposition.

Therefore, it is proposed to disconnect completely the political influence in this council. This could be achieved by the introduction of the members of the NEC to a system of selection based on merit. This would improve the impartiality and independence of this body and would additionally enhance the technical expertise of the council required to perform with efficacy its function of control in the electoral contest.

4.3 Judicial Reform

In the past years, several proposals of judicial reform have been presented to the Congress but none of them have succeeded. One of the reasons for this status-quo is the lack of harmony between the interests of the Executive and the Judiciary. The Executive has long harboured the intention of reforming the Judiciary in order to enhance its participation in their decisions. In this respect, the Judiciary has defended its independence by not supporting the government's proposals that they consider to be to the detriment of institutional check and balance.

The Judiciary in Colombia has to be reformed in a way that enhances its independence, improves the enforceability of its decisions and stresses its role in the political control. Scholars¹⁶⁵ have suggested that Colombia has to work on the legitimacy and integrity

160 *Ibid*, 104.

161 *Ibid*, 98-99.

162 *Ibid*.

163 *Ibid*, 107.

164 Constitución Política de Colombia, art. 264-265.

165 HOGGARD, *supra* note 142 at 614.

within the judicial branch in order to function correctly and fight corruption. They also have recommended several solutions that mainly focus on improving the independency and the accountability of Colombian judicial system.

Greater judicial independence and accountability are vital to enhance the power of the courts to enforce its decisions which are crucial for any anti-corruption strategy. The judicial selection of the High Courts in Colombia must be changed in order to reduce undesirable political influence in the process which distorts the autonomy of the Judiciary. For example, the senior judges of the Constitutional Court and the Supreme Court of Justice "are appointed in a highly political, non-transparent process"¹⁶⁶. The former are elected by the Congress from a list of three candidates presented by the President, the Council of State and the Supreme Court of Justice. The latter are self-selected from a list compiled by the Superior Council of Judicature. A more legitimate selection process based on a system of merit rather than political influences, which provides for more input from citizens, would be desirable¹⁶⁷.

Another important reform that needs to be enacted in order to enhance judicial independence is the term of office of judges of the High Court. The Constitution stipulates that the senior judges can only serve for eight years without possibility of re-election. Judges need longer terms and as has been proposed by some scholars¹⁶⁸, life-long appointments should be considered or if the terms for some reason were to remain fixed, the senior judge should be allowed to serve more than one period.

Legal stability is an important feature that leads to political stability and enhances democracy. When conflicts arise within the Judiciary, the legitimacy and enforceability of the judicial decision-making process are greatly affected. Consequently, it is necessary to prevent any jurisdiction conflict between the Colombian High Courts which could be caused by the lack of a hierarchical structure amongst them. The Constitution should define, which is the highest court in the land¹⁶⁹. In this article, consideration of the Constitutional Court as the highest court in Colombia is proposed. This proposal is justified by the fact that the Constitutional Court is entrusted with the custody and integrity of the Colombian Constitution; which is the Colombian supreme rule.

Finally, the traditionally weak role of the Colombian Judiciary which leads to an imbalanced distribution of power¹⁷⁰, needs to be addressed in order to enhance the accountability amongst the three branches of public power. The Constitution should provide for a structure that fosters the desirable public accountability needed to fight corruption

166 Ibid, 615.

167 Ibid.

168 KUGLER and ROSENTHAL, "Check and Balance: An Assessment of the Institutional Separation of Political Power in Colombia", 25.

169 Ibid.

170 SAEZ, FELIPE, "The Nature of Judicial Reform in Latin America and Some Strategic Considerations", 13 and Nagle, Luz, "The Cinderella of Government: Judicial Reform in Latin America", 30, quoted in HOGGARD, SHILOH, "Preventing Corruption in Colombia: The Need for an Enhanced State-Level Approach", 607.

effectively. A constitutional structure is needed that facilitates judicial political control over the other branches of public power.

Professor RAFAEL BUSTOS GISBERT¹⁷¹ invites us to reflect on the rules of conduct that govern the relationship between citizens and their representatives, using the notion of *trust* that comes from the common law. *Trust* could be defined from a private legal perspective as a relationship whereby private property is held by one party for the benefit of another. The trustee has legal title to the trust property, but the beneficiaries have equitable title to the trust property¹⁷².

A fiduciary relationship exists whenever the settlor (the person who creates the trust) relies on the trustee and places a noteworthy confidence upon her. The person who retains the administration of the trust can act with great freedom but always with due regards to safeguarding and serving the interest of the beneficiaries¹⁷³.

The trustee must act in good faith and with complete honesty. The high degree of freedom conferred to her for the administration of the property is offset by her great accountability to the settlor. So even though the confidence that she has received is very wide, it is balanced against important principles of distrust¹⁷⁴.

The idea of *trust* applied to political representation supposes that the representative is bound to act with great freedom in the service of the public interest. This does not mean that the granting of the trust to a reliable individual is naïve; on the contrary, it is offset by a clear principle of distrust. This principle means that the representative at all times must prove their selves worthy of that trust so that it can still be renewed, because the temptations of the exercise of power are many and varied¹⁷⁵.

All this assumes that in this relationship the presumption of innocence does not apply. In fact, this is reversed and the principle that applies to the representatives is the presumption of guilt, obviously not in the legal sense but in a political sense. This involves the shifting of the burden of proof onto the representatives who shall at all times be able to demonstrate that their actions have respected the interests of those who placed their confidence in them. This is a heavy burden which is accepted voluntarily when the position of the representative is agreed¹⁷⁶.

The Colombian Constitutional Court has developed in its case law the presumption of good faith of public officials. The position of the Court is based on the general presumption of good faith that the Constitution describes in its article 83. The Court has stated that anyone who asserts the bad faith of a public official should prove it¹⁷⁷. This presumption has led to the allocation of the burden of proof on the shoulders of the citizen.

171 BUSTOS GISBERT, "Corrupción Política: Un Análisis desde la Teoría y la Realidad Constitucional", 84-85.

172 Ibid.

173 GARCÍA LÓPEZ, E, "Lógica Parlamentaria" quoted in GISBERT, RAFAEL, "Corrupción Política: Un Análisis desde la Teoría y la Realidad Constitucional", 85.

174 BUSTOS GISBERT, *supra* note 171 at 84-85.

175 Ibid, 86.

176 Ibid.

177 Corte Constitucional, Judgement C-349/04.

This allocation of the burden of proof has been an obstacle for the Judiciary to exercise political control; because the citizen (principal) is the party who bears this burden at the higher cost due to the asymmetric information problem intrinsic in this agency relation. The principal has difficulties in gathering information about the agent's behaviour (either corrupt or productive); and it is costly for him to find out more about the agent's activity. On the other hand, the agent knows what she is doing and enjoys easier access to information.

An example of this obstacle occurred in 2001 when the Constitutional Court was exerting political control over the Congress. A citizen accused the Congress of using the budget law to create "parliamentarian aids". These kinds of aids are budgetary items that are meant to be distributed at the discretion of the Congress. In the view of the citizen, among other arguments, these appropriations affected the independence of the Congress in its function of political control over the government, as the Executive offered budgetary items to certain congressmen to secure their support for legislative decisions¹⁷⁸.

Therefore, the Court analysed the constitutionality of this law under a category of political control called "abuse of power". This type of analysis declares the unconstitutionality of the law if it finds that the Executive has incorporated certain budget items, apparently valid, but for the purpose of influencing the vote of Congress¹⁷⁹.

Despite the testimony of several lawmakers who said that these items were indeed "parliamentarian aids" and were intended to gain the support of parliamentarians for certain votes in Congress, such as passing tax laws and economic reforms that were part of the government agenda. The Court, decided that the previous testimonies were not sufficient to prove the misuse of power, and, therefore, it decided that these budget items were constitutional. This judgement was based on the principle of good faith and on the fact that the citizen was unable to present the proof of the illegitimacy of the intention of the Executive¹⁸⁰.

This decision of the Court reveals the obstacle for the role of the Judiciary in the question of political control created by the allocation of the burden of proof on the shoulders of the citizen, because to require a citizen to prove the illegitimacy of the Executive's intentions is all but impossible.

Therefore, it is suggested, in order to enhance the political accountability in Colombia, to incorporate a normative constitutional structure, which shifts the burden of proof (only for judicial political control) to the representative. Doing things this way, the Judiciary would exercise an important role in the political control and impunity in political corruption could be overcome.

The political principle of distrust that is being suggested has to be limited in order to prevent adverse selection in the political career. The adverse selection problem would consist in the prevention of honest individuals embarking on a career in politics because the cost of being a politician would be too high. The general principle of distrust would imply

178 Corte Constitucional, Judgement C- 1168/01.

179 Ibid.

180 Ibid.

that politicians - including the honest ones - must prove at anytime that they are acting in an honest way. This could be very costly for an individual who is complying with the law because their personal values and good reputation would be put in doubt and perhaps damaged without any valid reason. Consequently only the extremely corrupt individuals with the intention of getting as much personal benefit as they can from the public office would be the ones who would agree to this presumption of distrust. Henceforth, the principle of distrust should apply only to certain agents, especially those who enjoy great discretion, have monopoly power over clients and for whom there is limited accountability.

4.4 Social Control Reform

Empowering citizens to fight corruption directly is a vital element which increases their role in the state. In Colombia, as it has been shown, the lack of a strong accountable mechanism discourages citizens to engage in anti-corruption activities. This problem needs to be addressed by incorporating stronger direct democratic mechanisms in the Colombian Constitution.

A recall election is a direct democratic mechanism that serves to remove an elected or appointed official from office. This mechanism allows citizens to punish directly a corrupt official while it creates incentives to politicians to avoid using public office for private benefit due to the fear of being expelled from office.

The Colombian Constitution contemplates the recall election mechanism. This citizens' participation mechanism applies only to mayors and governors. Until 2000 the recall was only used ten times and none of them succeeded¹⁸¹. The law governing the recall has several requirements for it to proceed. Amongst these is the requirement of a minimum turnout of 60% of the votes recorded for the preceding mayoral election, and also 60% of the votes must be affirmative, to the revocation, and only those who voted in the previous election can do so again¹⁸².

In the research conducted by WILLIAM JIMÉNEZ, the recall did not proceed because the final votes were insufficient. It did not achieve the 60% minimum required by law. This implies a high abstention turnout for the revocation of the mandate that on average stands at a rate of 82%¹⁸³.

The author attributes the low participation, among other reasons, to structural problems presented by the law governing the recall. The law requires very high affirmative votes and also restricts the vote to certain persons. These requirements favour the mayor in office, because instead of campaigning to get votes for the *no*, he prefers to devote his energies to ensuring demobilization and a low turnout on the Election Day¹⁸⁴. In the regular elections, different groups convene and mobilize voters. In votes concerned with the revocation of

181 JIMÉNEZ, "Revocatoria del Mandato: Experiencias, Dificultades y Ajustes Necesarios", 38.

182 *Ibid*, 39.

183 *Ibid*, 40.

184 *Ibid*, 41.

the mandate only one group (the promoters of the recall) promote participation, while another block inhibits participation in rejecting the recall, this results in an increase in the percentages of abstention¹⁸⁵.

Additionally, a significant problem of the recall vote is tied up with political persecution of the supporters and organizers of the recall. The tactics used by the supporters of the mayor in office are intimidation, insults and threats to withdraw benefits provided by the state, discriminatory actions, among others¹⁸⁶.

These structural problems in the regulation of this mechanism of vertical accountability must be overcome in order to improve the role of civil society in the war against corruption. A reform to this mechanism is proposed at the constitutional level where the aim is not getting a number of votes to revoke the mandate (an initiative of the promoters alone), but that the mayor should get a minimum number of votes to continue ruling (in this way the initiative passes to the mayor). This will achieve the active participation of all the forces for and against the recall¹⁸⁷. It would strengthen the check and balance in the state by generating a strong accountability role for the citizens.

SECTION 5. CONCLUSIONS

The main aim of this article was to identify and explore the Colombian constitutional structures that generate a potential for political corruption under a law and economics approach. After studying the Colombian Constitution, it was possible to identify that the selection system of the comptrollers is strongly influenced by the Executive and the Congress. This influence has jeopardized the independence of this supervisory body, has distorted its incentives to exercise political control and has also affected directly the pay-offs of the agent when deciding, according with her computation, whether or not to act in a corrupt manner.

Similar situation, but with more serious consequences, arises with the high courts' selection system. Their highly political selection process combined with the strong position of the Executive, has had a profound impact on its independence and on the effective enforcement of laws; a situation that might lead to impunity for the corrupt politicians.

Additionally, it was identified that the prerogative of the government to supply bureaucratic positions affects greatly the balance of power of the Colombian state. This privilege empowers the government, not only to co-opt the parliamentary opposition but also to distort the mutual political accountability. Regarding the role of the citizens in fighting corruption, it was exposed that even though the Constitution provides the right of recall, this social control mechanism does not have constitutional guarantees that allow its exercise. Therefore, it is suggested the need to empower citizens with strong vertical accountability mechanisms.

185 Ibid,43.

186 Ibid,43.

187 Ibid, 47.

The constitutional structures identified in this work have a common feature: they all influence the checks and balances of Colombian state and, in particular, the accountability system over politicians. This situation has led to an unbalanced distribution of power which has created a scope for political corruption. These constitutional provisions may foster political corruption because they alter directly the probability of receiving a penalty by the agent who has decided to perform in a corrupt way.

Finally, it can be concluded that a possible cause of political corruption could emerge from the state's own political system, which can be referred as a system failure with its own equilibrium point.

Some countries like Colombia, despite its efforts in combating corruption, continue to suffer from the occurrence of this malpractice with its devastating effects. It is suggested that Colombia should focus its attention on overcoming the shortcomings of its political system in order to prevent political corruption.

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