

Judicial Activism in Comparative Perspective

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JUDICIAL ACTIVISM IN PARAGUAY: A REACTIVE FORM OF COMPENSATORY JUSTICE

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What is the role of constitutional justice in countries with low levels of judicial independence? Under those circumstances, most scholars expect to observe weak and deferential courts (Ríos-Figueroa, 2007; Domingo, 2004, 2009). Two reasons make judicial activism unlikely in this context. First, in countries with captured courts (i.e., courts or tribunals that are controlled by the actors that they are supposed to hold accountable), justices usually have close connections with the ruling elites. Thus, they have few incentives to invalidate norms. Second, justices who lack connections with the ruling party have few incentives to take an activist stand, since they can be punished for defying the government.

Against this common wisdom, we find that in Paraguay—a country with long tradition of political manipulation, lack of judicial independence, and strong party hegemony (Pérez-Liñán and Castagnola, 2009 Basabe-Serrano, 2015)—the Supreme Court has ruled systematically against the government. Original data reveals that, between 1995 and 2015, the Court decided in favor of plaintiffs in seven (7) of every 10 actions of unconstitutionality challenging executive decrees or congressional laws. How can we interpret these results? Is the judiciary settling political disputes between partisan elites? Or are all these rulings a form of anti-government judicial activism, addressing a diverse agenda of citizens' rights?

This chapter aims to address these questions by providing a quantitative and qualitative analysis of Supreme Court rulings in actions of unconstitutionality. We identify on which type of controversies justices have invalidated norms, seeking to understand the justices' role in dealing with horizontal and vertical accountability disputes. Horizontal accountability disputes refer to cases in which the judiciary resolves controversies between partisan elites (like Congress and the Executive), while vertical disputes involve controversies between citizens and the State.

We argue that institutional design has shaped the role of the judiciary in ways that transcend partisan politics. In Paraguay, judicial review is concentrated in the Constitutional Chamber of the Supreme Court. The Chamber does not control its docket, the effect of its sentences are *inter partes*, and there is no binding principle of *stare decisis* for its rulings. This hybrid institutional design, which combines features of concentrated and diffuse judicial review, promotes the arrival at the courts of constitutional or legal controversies already addressed in previous decisions. Consequently, the Chamber ends up reasserting its position in multiple cases. Because of this practice, a high frequency of decisions against the government does not necessarily reflect a proactive Chamber creating innovative jurisprudence, but rather a reactive role that demands the replication of rulings in similar cases. While a proactive court can control case stimulus (control the docket and consequently the litigation agenda), a reactive court simply responds to the stimulus (the cases that reach the tribunal). In the following pages we show that, due to the institutional design of constitutional justice, Paraguay's judicial "activism" is a reactive form of behavior.

Even though scholars recognize the importance of repetitive cases at the high court level in many jurisdictions, studies of this problem are rare, both in the Paraguayan context and elsewhere. We offer an empirical assessment of the problem, identifying distinct constitutional controversies that reemerge in repetitive cases. The 4,947 rulings analyzed in this chapter involve only 430 unique controversies, indicating that over 90% of the docket involves matters of law on which the Chamber has ruled previously. Moreover, only four (4) controversies out of 430 cases concentrated 72% of the docket. The Chamber's agenda concentrated on social security issues, civil servants' rights, the adoption of a new criminal procedure, and municipal powers. The Chamber has dealt primarily with vertical disputes, with only a few instances of low-profile horizontal disputes involving the prerogatives of municipalities. Altogether, we find that constitutional activism is a reactive form of compensatory

justice (key for regulating the social security system) and not necessarily a form of mediating conflicts between political elites.

The chapter is structured as follows. Before analyzing the Chamber's docket, we first lay out the political context in which the rulings took place. In the second section, we describe judicial review in Paraguay and provide a conceptual framework for analyzing the Chamber's behavior. In the third section, we present the findings of a novel dataset that identifies constitutional controversies and repetitive cases. In the following section, we present a qualitative analysis of the four controversies that have recurrently appeared in the Chamber.

Courts and Politics in Paraguay

Paraguay's judicial politics takes place in the context of a system dominated by the Colorado Party (Republican National Association-ANR) which has been a dominant party for over seven decades. The transition to democracy started in 1989, when General Alfredo Stroessner was ousted from office. During the transition, political competition flourished between parties and among party factions within the Colorado Party. Still, it was not until 2008 when Fernando Lugo from the Christian Democratic Party put an end to the continuous rule of the Colorado Party, although not for long. President Lugo was impeached and removed from office within a few years of arriving in office, and the Colorado Party eventually returned to power. The emergence of electoral party competition had a positive effect on the legal system since it reduced undue partisan influence on the judiciary (Basabe-Serrano, 2015).

In 1992, the Paraguayan Constitution underwent significant reform, with three substantial changes aimed at promoting judicial autonomy and independence. First, the new Constitution introduced life terms until the retirement age of 75 (Article 261), and reduced the role of the president in the appointment of judges. Previously, judges were appointed for a fixed number of years, concurrent with the president's term. Moreover, an informal requisite required candidates to be affiliated to the Colorado Party. Second, Article 249 granted financial autonomy to the judiciary by establishing a fixed budget of "no less than three percent of the budget of the Central Administration". Third, Article 132 established the principle of judicial review, embodied in a Constitutional Chamber within the Supreme Court. The Chamber reviews claims that challenge norms on concrete cases and *a posteriori*. Its decisions have effects *inter partes* (article 260). Because justices lack the power to remove norms from

the legal framework on unconstitutionality grounds (acting as a veto power or “negative legislator”), ruling in favor of the plaintiff in a particular case usually opens the floodgate for repetitive cases that increase the justices’ workload.

Regardless of these profound transformations, political manipulation of the judiciary has persisted. In Paraguay, as in other countries of the region, politicians have systematically manipulated the Supreme Court by pressuring justices to resign and opening vacancies for allied judges (Pérez-Liñán and Castagnola, 2009). Based on qualitative and quantitative research, we identify at least three mechanisms by which Paraguayan politicians have consistently controlled the court: *cuoteo*, attempts to alter the constitutional interpretation of life tenure, and purges.

Cuoteo: This practice consists of distributing the vacancies in the Court among the parties or factions necessary to form a majority to approve nominations. For *cuoteo* to take place, the Senate and the president typically bargain over multiple vacancies in the court at the same time, to allocate them among coalition members. For example, three years after the enactment of the 1992 Constitution, politicians filled the new seats in the Court by *cuoteo*. The nine seats were distributed in the following way: five to the Colorado Party, three to the Authentic Radical Liberal Party (PLRA), and one to the Christian Democratic Party (Molina et al., 2018).

Constitutional (re)interpretation of the justices’ tenure: A conflict surrounding the tenure of justices has been taking place between Congress and the Court, based on the articles of the 1992 constitution each institution cites to determine the tenure of justices. Congress refers to Article 252, while the Court refers to Article 261. Article 252 refers to the tenure of all judges, establishing that they are appointed for periods of five years, and that those judges who had been confirmed for two periods acquire life tenure until retirement age. On the other hand, Article 261 refers exclusively to the tenure of Supreme Court justices, stating that the only way to remove a justice is by impeachment.

The first controversy on this issue arose in 1999 when the Senate, invoking Article 252, opened the floor to decide which of the nine justices of the Court should be confirmed after their first five years on the bench. On that occasion five justices were confirmed, and the rest were dismissed. The members of the Court ruled instead that justices have life tenure based on Article 261 (Agreements and rulings N ° 222/2000 and 223/2000). The Court won the battle, but the constitutional controversy over the interpretation of life tenure remains open. The Senate continued to challenge life-term appointments, while the

Constitutional Chamber has reaffirmed the previous interpretation of the Supreme Court (rulings 557/2007, 1149/2008, 947/2009, 949/2009, 1010/2015).

Purges: Purges or reshuffles have also been part of the repertoire of political manipulation. One of the most notable moments during the presidential campaign of Nicanor Duarte Frutos was when he promised to “pulverize the Court” if elected. After Duarte Frutos took office in 2003, he threatened to impeach six justices; four of them resigned and the remaining two were impeached and removed from the bench. The ruling coalition filled the six vacancies by *cuoteo* from a list of close candidates.

The mechanisms just described help explain the recurrent pattern of instability of the justices on the bench. As Figure 10.1 shows, the Court was reshuffled on 20 occasions between 1900 and 2021.

According to Basabe-Serrano (2015, 2022) there is a strong presence of informal practices like cooptation, clientelism and corruption for capturing the judiciary. A comparative study recently revealed that in Paraguay, judicial operators have consistently recognized the existence of subtle modes of interference in justices’ decisions, mainly through bribes and clientelist relations. In contrast, direct methods, like threats and verbal or physical attacks, have been unusual during the democratic period (Llanos et al., 2016).

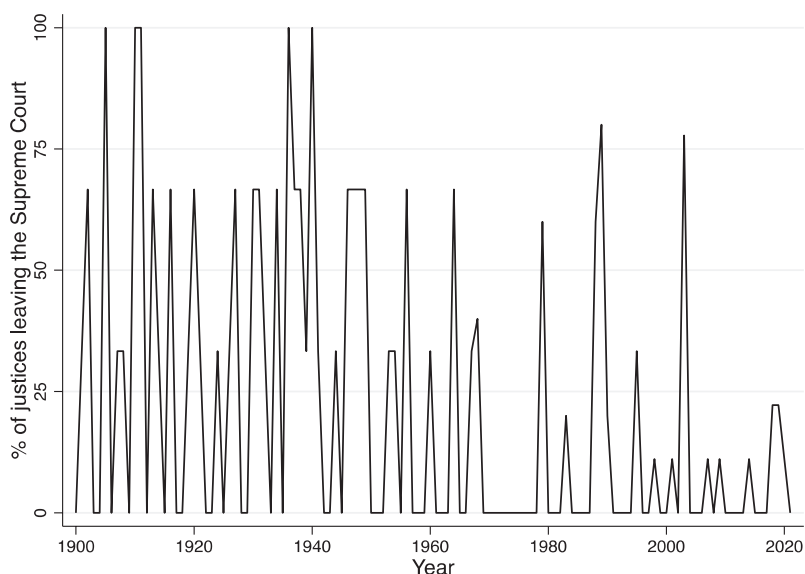


Figure 10.1: Reshuffles in the Supreme Court of Paraguay since 1900–2021

Countries like Paraguay, with a legacy of political manipulation of the Supreme Court, appear to be unlikely places to find activist courts. However, between 1994 and 2014, the Constitutional Chamber ruled against the Executive or Legislature on 70% of the cases. In the next section, we analyze the implications of this type of judicial behavior and its impact on the legal system.

Judicial Activism and Judicial Review in Paraguay

There are different interpretations about what constitutes judicial activism and, therefore, how to identify it. Judicial activism is often related to the idea that courts, through their rulings, protect and expand individual rights by departing from the “official” interpretation of norms (Cross and Lindquist, 2007). Judicial restraint, on the other hand, presupposes the opposite: courts have a narrow or limited interpretation of norms (Skelly, 1968). Both types of behaviors are part of the justices’ repertoire, and it is expected that courts will balance activism and self-restraint. Yet, the presence of more activist justices would imply that government acts are found unconstitutional more often. In Latin America and other developing countries, there is a prominent literature on judicial activism on socioeconomic rights as well (for example, see Gauri and Brinks, 2008; Wilson, 2005; Motta Ferraz, 2009, among others).

Kmiec (2004) and Cohn and Kremnitzer (2005) systematize the main approaches to assess judicial activism and related debates in the literature, as discussed in Staton’s chapter earlier in this volume. Some of these approaches can be applied to our case. In this research, we associate activism with constitutional rulings that challenge the existing legal framework, thus modifying the status quo. The model of judicial activism characteristic of Paraguay’s Constitutional Chamber results from its *sui generis* institutional design, which sets the pace and scope of judicial action. In Paraguay, only one Chamber of the Supreme Court—the Constitutional Chamber—deals with judicial review (Lezcano Claude, 2000; Mendonça, 2012; González, 2014; Ramírez Candia, 2019). Although some cases may be elevated to the Court’s nine-member plenary, the three-member Chamber makes almost every constitutional decision; between 1995 and 2015 the plenary resolved only six of about 5,000 petitions of unconstitutionality. According to article 8 of Law No. 609/95, the three judges appointed to the Chamber remain on those seats for one year. However, the informal rule is that once a justice has been appointed to a Chamber she will remain throughout her tenure. Contrary to other concentrated judicial

review systems, Paraguayan justices do not control their docket, and their decisions have an *inter partes* effect. Even though the Court created a doctrine that suggests that rulings issued by the plenary of the court (and not the chamber) could have *erga omnes* effects (Agreement and Sentence No. 222/2000), this doctrine has been highly controversial and inconsistently applied (Moreno Rodríguez Alcalá, 2018). The possibility that the rulings of the Supreme Court may have *erga omnes* effect comes from article 259 (5) of the Constitution, which establishes that the Court as well as the Chamber can exercise judicial review. So far, the Supreme Court issued decisions claiming *erga omnes* effects in only four cases.¹ Nevertheless, it is precisely the *inter partes* effect and the mandatory docket what create a reactive form of judicial activism in Paraguay.

Inter partes effects: The *inter partes* effect promotes repetitive cases, creating not only a significant workload but also the illusion of a highly proactive court. The Chamber's decisions do not necessarily affect policymaking since they only affect litigants in the case. Moreover, our research shows that the norms that are most frequently challenged have not been reformed or repealed by the elected branches, despite thousands of declarations of unconstitutionality by the Chamber. This situation has been exposed by the media, but the legislature did not address those complaints (Ramírez Bogado, 2018). Some scholars argue that this type of judicial review system transfers control over bureaucratic outcomes from the executive or legislature to the judiciary (Chutkow, 2008). In the long run, the constant filing of cases on the same topic could produce a snowball effect, influencing policymaking. However, this has not been the case in Paraguay.

Mandatory docket: The lack of control over the docket also influences the nature of judicial review exercised by the Constitutional Chamber. The literature has shown that docket control can affect the efficiency and quality of the decisions (e.g., if justices only have a short time to devote to each case), shaping the Court's role within the legal system (Clark and Strauss, 2010). According to Clark and Staton (2015), courts can be *law-applicant* (when having large dockets) or engage in *rule construction* (when having small dockets). In law-applicant courts with mandatory dockets, justices do not necessarily develop new rules but instead apply the same rule on multiple cases. This feature, combined with the *inter partes* effects mentioned above, boosts the proliferation of new claims on the same topic. In contrast, in rule-constructing courts with discretionary dockets, justices select the cases, and have more time and resources

1 Those cases were the rulings Nos. 183/1994; N° 415/1998; 222/2000, and 223/2000, respectively.

to spend on each of them. It is precisely in this type of court that justices can best make policy or influence the legal system.

In Paraguay, the Constitutional Chamber is a law applicant institution. Judicial activism becomes a reactive behavior conditioned by the type and volume of demands from litigants. It is *reactive* because justices must process the demands (claims) and the number of cases filed. The type of demands defines the agenda (i.e., determines which rights are more frequently under dispute in the Chamber). The number of cases reflects the importance of that right for society and a potential area for activism. Because of these reasons, the most appropriate way for studying judicial activism in Paraguay implies identifying, first, which claims have been the most recurrent ones before the courts—especially the Constitutional Chamber—and, second, how the Court has ruled in those cases.

Judicial activism is often associated with independent courts or enclaves of judicial autonomy. However, in this chapter, we reexamine this assumption. Conventional theories predict judicial activism in countries with high levels of judicial independence, since politicians will not punish justices for their rulings. Yet, subnational studies in the US reveal that judicial activism is more likely to occur in states where justices reach office through elections than on states in which justices remain insulated from partisan politics (Wenzel et al., 1997). Politics and electoral accountability also explain judicial activism in subnational courts in the US and in some other countries in the region, such as Chile (Royce and Tiede, 2011). In Paraguay, justices are selected through competitions held by the Council of the Judicature, the Senate nominates a candidate from the shortlist provided by the Council and the President appoints the candidate in the Court. Partisan politics often plays an essential role in that process. Still, due to the *sui generis* institutional design, it is not clear *a priori* whether judicial activism represents a form of judicial independence. In the following sections, we present both quantitative and qualitative analyses of the Constitutional Chamber's rulings to shed light on these issues.

Empirical Data about Constitutional Justice in Paraguay

We use a novel dataset to analyze the role of the Constitutional Chamber in Paraguay, to help elucidate whether the Court has engaged in judicial activism. The dataset contains all actions against the President (executive decree) and/or Congress (law) between 1995 and 2015. During this period, the Chamber

decided on 14,744 actions, of which 4,947 (34%) challenged a decree and/or a law.² The Chamber ruled about 70% of them unconstitutional. Again, due to the *inter partes* effect of the rulings, many of those decisions were repetitions of previous controversies.

To distinguish unique cases from repetitive ones, we adopted a three-step methodology. First, we determined the norm or combination of norms challenged in each case. Second, we grouped the cases by the norm or norms challenged. As a result of these two steps, we identified a total of 444 “unique cases”, i.e., clusters of cases that challenged the same norm/s. Third, once we identified these unique cases, we analyzed the clusters of claims to check for consistency during the coding process. During this phase we found that there were 14 unique cases that could be re-clustered or re-grouped with other unique cases because they all relate to the same issue. The social security cluster is a good example of this phenomenon. When analyzing the clusters of claims, we identified that there were 12 unique cases related to social security issues, and that all of these unique cases could be re-grouped together in one unique case because they were all against norms regulating the public (Decree No.1579/04, Laws No. 2345/03 and 3542/08) and non-contributory systems (Laws No. 525/94, 1534/00, 1661/01, and 1857/02). Another example is the municipal autonomy cluster of cases. When analyzing these “unique cases”, we found two clusters of cases targeting the same type of claim: protecting the autonomy of municipalities. One unique case challenged Law No. 3850 (2009) that established that municipalities should transfer to the central government the prerogative of technical inspection of vehicles, while another unique case challenged Law No. 3966 (2010) that dictated that municipalities should transfer to central authorities the control of national routes. Both cases were grouped together rather than separately. As a result of this re-examination of cases, we identified a total of 430 unique cases for the whole period.³ This means that 4,517 cases (91% of the docket) repeated some of those 430 controversies already decided by the Chamber. Moreover, four (4) of those 430 controversies concentrated 72% of the total docket (3,561 cases). This dramatic docket concentration

2 The remaining of the cases of the docket were actions against a ministerial resolution and/or local authorities.

3 This means that a total of 14 “unique cases” identified in step-two were re-grouped in step-three: 11 “unique cases” were re-grouped within the social security cluster, 2 “unique cases” were re-grouped within the civil servants’ rights cluster and 1 “unique case” was re-grouped within the municipal autonomy cluster.

Table 10.1: Most frequent types of cases resolved by the Constitutional Chamber (1995–2015)

Cluster of Cases	No. of Cases	% Unconstitutional Ruling
Social security system	2661	84%
Civil servants' rights	557	31%
Transition to a new Criminal Procedure System	192	100%
Municipal autonomy	151	72%

raises questions about the Court's efficiency and the value of legal mobilization for legal actors and citizens.

A preliminary analysis of the four most frequent cluster of cases, presented in Table 10.1, reveals that judicial activism has been the most likely behavior adopted by Chamber in these highly repetitive cases. In three of the four clusters of cases the Chamber has declared the norm inapplicable in more than 70% of the individual cases (see Column 3, Table 10.1). Most of these decisions centered on disputes between the state and citizens and not necessarily on conflicts among political elites (except in municipal autonomy cases).

A vast majority of the decisions of the Chamber between 1995 and 2015 therefore referred to controversies already resolved. Figure 10.2a compares the total number of unique controversies decided per year vis-à-vis the total number of cases (the figure employs different scales for readability). For instance, in 2002, only eight (8) of the 793 rulings corresponded to novel controversies, i.e., 99% of the decisions referred to already resolved disputes. A similar situation occurred in 2012 and 2013, when 93% and 91% of the rulings (respectively) referred to previous controversies. Moreover, the Chamber resolved less than ten novel controversies per year in seven of the 21 years under analysis,⁴ while it solved 50 novel controversies or more in three years (2006, 2012, and 2013). On average, the Chamber resolved about 21 unique controversies per year.

When accounting for repetitive cases, the percentage of norms declared unconstitutional declines from 70% to 46% of the docket (Figure 10.2b).⁵ However, the analysis that does not weight cases according to their repetitive status, represented by the darker line, overestimates the Chamber's activist role.

4 In 1995, 1998, 2002, 2003, 2004, 2011, and 2015.

5 The brown line denotes the decisions declared unconstitutional over total cases, whereas the gold line shows the actual new cases declared unconstitutional per year over the actual new cases per year, expressed as a percentage.

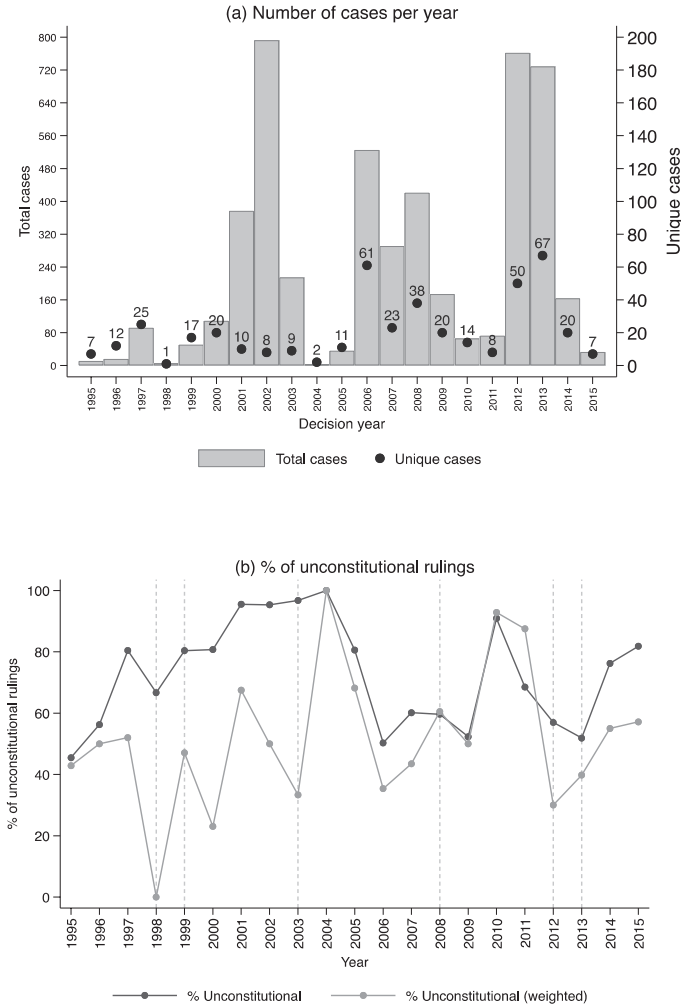


Figure 10.2: Unique vs total cases per year

Note: the bar graph captures the total number of rulings (primary axis) and the dotgraph the total number of unique ruling (secondary axis).

The weighted examination—treating all cases referring to the same constitutional controversy as a unit, represented by the grey line—produces similar results to other courts in the region. For example, in Costa Rica, between 1990 and 2015, the Constitutional Chamber declared a norm unconstitutional in 47% of the cases (Poder Judicial, 2017). In Colombia, between 1992 and 2006, the Constitutional Court ruled norms unconstitutional 38% of the times

(Rodríguez-Raga, 2011). Between 1935 and 1998, the Argentinian Supreme Court ruled 37% of the cases as unconstitutional (Bercholz, 2004). In Mexico, the Supreme Court declared it on 18% of the Constitutional Controversies and 24% of the Constitutional Actions (Castagnola and López-Noriega, 2017).

A closer analysis of the Chamber’s rulings on the four most frequent controversies, though, suggests that early decisions are decisive because those rulings, on average, are upheld in subsequent instances (see Figure 10.3). For example, on social security cases, early unconstitutional rulings remained for subsequent years, while the opposite was the case for civil servants’ rights cases. Criminal Code cases are an extreme example because all the cases appeared in 2003 and were declared unconstitutional.

In sum, one of the most salient features of the Constitutional Chamber is the high number of repetitive cases. This information becomes crucial for studying judicial behavior. Lack of acknowledgment of repetitive cases can cause an inference problem because the high number of decisions of unconstitutionality may result from the institutional design, not from an equivalent number of unique norms violating the constitution. In addition, because

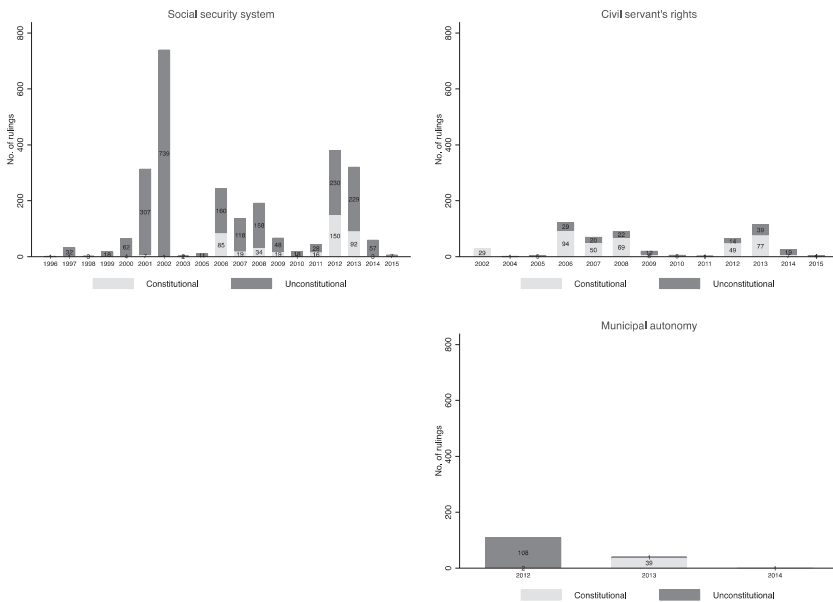


Figure 10.3. Rulings of the Constitutional Chamber on the three most repeated cases
 Note: Criminal Code controversies do not appear because all of them were filled in 2003 and were declared unconstitutional.

Table 10.2: Main role of the Constitutional Chamber on judicial review

Unique Cases	Rights under dispute	Role of the Court	Behavior of the court	Conflict
<i>Social Security System</i>	Social Security and equality	Protector of core values	Activism	State vs. society
<i>Civil servants' rights</i>	Work and equality	Mediator in state bureaucracy	Self-restraint	State vs. civil servant
<i>Transition to a new Criminal Procedure System</i>	Equality	Auxiliary within the judicial system	Activism	Potential conflict in the administration of justice
<i>Municipal Autonomy</i>	Municipal autonomy	Arbitrator in the separation of powers	Activism	Central vs. local government

justices rule similarly in the same type of cases, their votes are not independent, and econometric models should model this behavior to compute unbiased coefficients. In the next section, we present a detailed analysis of the four most repeated controversies.

The Roles of the Constitutional Chamber

This section analyzes the Chamber's role in the four most frequent cluster of controversies to understand the particularities of societal, legal mobilization, and justice behavior. Table 10.2 systematizes the critical findings, and highlights similarities and differences. Overall, the Chamber has acted as an activist body on claims involving the social security system, the transition to a new criminal procedure, and the regulation of the autonomy of municipalities. Meanwhile, on cases regulating state-work relations, the Chamber has restrained itself.

Social Security System

The Paraguayan social security system is a classic case of judicial activism. The Constitutional Chamber intervened to remedy the social conflicts caused by faulty social security legislation. Despite changes in the composition of the Court, judges tended to rule in the same way over time. The judiciary seemed

to intervene when violations of fundamental rights occurred. Affected persons filed lawsuits against norms regulating the public (Decree No.1579/04, Laws No. 2345/03 and 3542/08) and non-contributory systems (Laws No. 525/94, 1534/00, 1661/01, and 1857/02).⁶ The plaintiffs alleged that these laws were unconstitutional since they infringed their rights or did not guarantee their access to their retirement funds. The Constitutional Chamber declared these norms unconstitutional. The Chamber's unconstitutional rulings were recurrent for non-contributory cases. It ruled against the annual budget approved by Congress every year since it limited or excluded Chaco War veterans' and families' rightful access to their retirement funds. Regarding the public sector, the Chamber decided not to analyze the unconstitutionality of its legislation because the legislature had already replaced it (Law No. 1802/01). However, the new law has the same defects as the previous one (except for an additional requirement of seniority). Therefore, courts should declare it void or inapplicable to protect petitioners' access to their retirement funds.

Rights of Civil Servants

The Chamber reviewed lawsuits filed by civil servants and government agencies that challenged two laws that regulate work relationships. One group of civil servants challenged Law 700/1996 that banned them from receiving more than one government salary, while another group disputed Law No. 1626/2000 that disqualified retired civil servants from being re-hired to a public function and receiving retirement funds and current salary. The plaintiffs alleged that these laws were unconstitutional since they infringed their rights to work and equal treatment.

The Chamber's verdicts varied according to the nature of the plaintiff. It declared the disputed laws unconstitutional, displaying a certain predisposition to reverse or annul the Legislature's provisions. Although formally only

6 Different overlapping institutions govern the Paraguayan social security system. A public, a private, and a non-contributory sector coexist in the system. The first sector administers funds for public officials and the banking industry's pension funds. The private structure comprises mutual funds, and the non-contributory system encompasses pensions granted to Chaco War veterans and their families. The entire social security structure runs under the norms enacted by the Paraguayan Congress and the Executive. However, the absence of a single regulatory entity puts intense pressure on the national budget. For example, the pensions of the non-contributory system are established in the annual budget and they entail major financial outlays.

affecting the parties, since the litigant was a public entity, the Chamber's decision impacted all the entity's public servants. In this case, the ruling departed *de facto* from an *inter partes effect*, and embraced instead an *erga omnes effect*. Although it argued that its actions were to protect fundamental rights and constitutional principles, they represented, in fact, an act of mediation between the parties in conflict. This type of disputes should be handled by an Administrative Court rather than a Constitutional Chamber, but due to the lack of a consistent legal system that regulates on the issue, it is the Chamber that ends up resolving the controversies.

Unlike the Social Security controversy, in this case the Chamber adopted a position of self-restraint when mediating conflicts between the State and its employees. When individual civil servants filed lawsuits, the Chamber mostly rejected the claims. It is a classic example of judicial restraint: the Chamber showed deference towards the legislator and ruled in favor of the State.

Transition to the New Criminal Procedure

The transition to a new Criminal Procedure System involved two significant reforms. First, in 1989 the reform of the 1890 Criminal Procedure system, and second, in 1997, the reform of the 1914 Criminal Code. Along with these reforms, transition acts were also established to regulate the passages from the old to the new systems, with Transition Act No. 1444/99 as one of them. Law No. 1444/999 established that all criminal trials had to end before the new code took effect. The Public Ministry of Paraguay filed lawsuits against Transition Act No. 1444 (specifically art. 5) because it established that all claims under the old Criminal Procedure system of 1890 that were not concluded before February 28, 2003 would expire. The Attorney General argued that the law was unconstitutional because it violated the principle of equality, extinguishing unfinished criminal proceedings without an acquittal or conviction.

This is one of the few controversies decided by the Plenary of the Supreme Court and not by the Constitutional Chamber. The Court ascertained in decision No. 979 that art. 5 of Law No. 1444/99 was unconstitutional since it violated the guarantee to effective judicial protection. This interpretation led to other similar judicial decisions, which declared the law inapplicable not just with respect to art. 5, but also with regards to all other articles that could endanger the completion of the criminal proceedings. The practical effect was that criminal cases initiated under the previous criminal procedure did not expire when the new system entered into force.

The Court played an auxiliary role in allowing criminal processes to conclude in time, preventing criminal proceedings from ending without a final verdict. Otherwise, the Criminal Procedure would have failed its primary duty of protecting defendants, bearing a considerable political cost for the judiciary as a whole.

In this case, the Court's Plenary claimed *erga omnes* effects for the sentence. However, as noted above, the conventional interpretation is that the Constitution only allows for *inter partes* effects. The Court claimed *erga omnes* effects to prevent the multiplication of disputes about pending criminal cases. Nevertheless, prosecutors promoted claims in all the cases, since it was the first time that the Court's Plenary enlarged the scope of the effect of its decisions. The Constitutional Chamber handled the repetitive cases, and it systematically supported the Plenary's initial position from sentence No. 979. The Chamber did not address the substance of the cases, but just ratified the precedent.

Municipal Autonomy

Municipalities filed lawsuits against two laws that affected their autonomy by limiting their competence and shifting some of their powers to the central government: Law No. 3850 (2009), which transferred to the central government the technical inspection of vehicles, and Law No. 3966 (2010), which conceded to central government authorities the control of national routes. The Constitutional Chamber mediated conflicts concerning the decentralization of executive functions.

Generally, the Chamber reversed the acts of the Legislature by ruling in favor of municipal entities, to which it granted exclusive prerogatives on the issues submitted for consideration. In doing so, the Chamber delineated each body's prerogatives, thus enforcing the separation of powers principle. The case challenges the traditional idea of the judge as a mere enforcer of the law, subject to the Legislature's will. In this example, the Chamber overturned the Legislature's work, displaying an activist profile in favor of subnational municipal authorities. After the Court's verdicts against the Legislature, Congress removed the legislation from the legal system, engaging in an institutional dialogue between powers.

Conclusion

At the beginning of this article, we wondered about the role of constitutional justice in countries with low levels of judicial independence. Our analysis of Paraguay shows that, even in a new democracy where the judiciary has traditionally been subject to political influence, judicial review deserves careful attention. The goal of this chapter was to understand the roles played by the Constitutional Chamber of the Supreme Court, using a quantitative and qualitative methodology to identify patterns of judicial activism.

The results show that the Constitutional Chamber has not been deferential to the legislature. Even after accounting for an institutional design that produces repetitive cases and artificially inflates the number of decisions against the government, we find that the Chamber's frequency of decisions overturning government acts is fairly high, similar to the one observed in Costa Rica. Paraguay's constitutional case docket, however, focused during the years under analysis on four types of controversies: social security, civil servants' rights, the criminal procedure reform, and municipal autonomy. In three of these controversies, the Chamber ruled against the national government in over 70% of the individual cases. It generally played an activist role in the protection of rights, but it refused to intervene in relations between the State and civil servants.

Constitutional justice in Paraguay is a reactive form of compensatory justice, and not necessarily a form of mediating conflicts between political elites. Paraguay's *hybrid* institutional design of judicial review creates the illusion of a highly activist institution, but this chapter has shown that the figures above should be interpreted carefully. The lack of *certiorari* (i.e., the presence of a mandatory docket) and the *inter partes* effect of the rulings promotes the arrival at the courts of repetitive cases. The absence of any systematic response on the part of the legislature to correct the constitutional deficits of the legislation questioned by the Chamber further exacerbates this situation. For example, the legislative deficit of the pension system forced justices to take an activist role to address individual claims. These types of constitutional rulings do not necessarily represent an attack to the ruling elites, since they do not affect the partisan balance in the institutions, and instead offer compensations for individuals.

These findings do not undermine the importance of the Chamber, nor of its role within the political system, but help to shed light on the scope of constitutional justice in Paraguay and the types of cases that tend to be

adjudicated—including several in which Paraguay’s judges have taken an interest and acted. Judicial activism is therefore a form of compensatory justice for a very specific number of individual rights (and just occasionally to exercise horizontal accountability). It is not necessarily a mechanism for regulating partisan politics or resolving political disputes.

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