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Institutional Reform and Rights Revolutions in Latin America: The Cases of Costa Rica and Colombia

Bruce M. Wilson

Abstract: This article analyzes the conditions that allowed for expansive rights revolutions in Costa Rica and Colombia. My research suggests that many of the preconditions for rights revolutions in other regions of the world are also central to understanding Latin American cases. Of particular relevance is judicial system design including the high courts' operating rules concerning access, standing, and judicial formality. These factors can and do mitigate the need for extensive resources and support structures necessary in other non-Latin American countries in which rights revolutions have occurred.

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Introduction

Just 30 years ago, Karst and Rosenn (1975: 77) bemoaned the dysfunctionality of Latin American courts noting that nowhere in Latin America “does the judiciary wield significant political power.”¹ This pattern has been markedly reversed over the last two decades as many Latin American superior courts have become increasingly important players in their country’s political lives. Even more striking, perhaps, is that some Latin American countries have experienced full-blown rights revolutions, where even socially and politically marginalized groups have harnessed the power of the courts to routinely promote and protect individual and collective rights from the actions and inactions of state and private agencies. What was until very recently an “almost entirely hypothetical” (Gargarella, Domingo, and Roux 2006: 1) discussion concerning the possibility of high courts in less developed countries enforcing social rights has, in some areas of Latin America, become a reality. This article offers an explanation of why, after over 150 years of judicial inactivity and superior court indifference to constitutionally-mandated civil rights, some superior courts have begun to actively enforce and protect those rights, including for the weakest groups in society even against the most powerful.

A rapidly growing literature examines the motivations for the widespread judicial reforms across Latin American in the late 1980s and 1990s and the success or failure of those reforms (See, for example, Hammergren 1998; Jarquin and Carrillo 1998; Prillaman 2000; Domingo and Sieder 2001; Sieder, Schjolden, and Angell 2005; Gargarella, Domingo, and Roux 2006; Couso 2006; Uprimmy 2006; Peruzzotti and Smulovitz 2006). Another budding literature addresses the democratic quandary of unelected superior courts magistrates holding popular branches of government to account and/or promoting and enforcing constitutionally-mandated civil rights and liberties.² The question, though, of why some reformed legal systems spawned rights revolutions, while others retreated to the *status quo ante* de-

1 This article was originally prepared for the symposium, “New Frontiers on Institutional Research in Latin America,” GIGA German Institute of Global and Area Studies, Hamburg, Germany, May 5-6, 2008. The author wishes to thank the following for helpful comments, Siri Gloppen, Kerstin Hamann, Kathleen Hochstetler, Bert Hoffman, Kerri Milita, Oscar Parra, Adam Przeworski, Hans-Jürgen Puhle, Kurt Weyland, Kieran Wilson, and Alicia Yamin.

2 This contentious debate over the appropriateness of superior courts promoting social rights has been a consistent feature of U.S. judicial discourse. See, for example, Horowitz (1977); Rosenberg (1991); Rosen (2007). It has also been addressed for the case of developing countries in general (Gargarella, Domingo, and Roux 2006) and Latin American cases in particular (Sieder, Schjolden, and Angell 2005).

clining to uphold constitutionally-mandated rights, remains a puzzle both for political scientists and practitioners alike.

This article offers an explanation for the rise of two of Latin America's most expansive rights revolutions; those of Costa Rica and Colombia by drawing on the extensive literature used to elucidate the non-Latin American cases. I argue that this literature might readily account for the historical lack of Latin American rights revolutions, but cannot explain the existence or timing of the contemporary rights revolutions. I concur that many of the conditions identified as necessary preconditions (in particular, rights-friendly judges and rights-rich constitutions) for rights revolutions in other regions of the world are also central to understanding the existence of rights revolutions in Latin America. The evidence derived from the case studies of Costa Rica and Colombia, though, suggests that the requirement of deep-pocketed social support groups for successful rights claims might be less important in Latin America than they appear to have been for the U.S. and other countries (Epp 1998). My argument is that the institutional design of judicial systems and their operating rules concerning access, standing, and judicial formality mitigate the need for the extensive resources and support structures identified as pivotal factors in explanations of non-Latin American rights revolutions. That is, in the U.S. and Canada rights-seeking groups need deep-pocketed support structures due to the difficulty and expense of pursuing a judicial strategy to claim their rights. In the two Latin American cases examined here, the need for such support structures is largely removed by the Superior Courts' abandonment of high levels of judicial formality, the adoption of broad definitions of standing, the removal of many barriers to access, and the relatively quick resolution of their cases.

The article unfolds in the following manner. The first section defines the concept of rights revolutions and addresses the existing literature used to explain rights revolutions in many non-Latin American countries. The following section provides a brief overview of judicial reforms in Latin America and then proceeds to discuss why, based on the common explanations, we should or should not expect a rights revolution in Costa Rica and Colombia. The subsequent sections detail the extent of the rights revolutions in both countries, then present an alternative explanation for Latin American rights revolutions based on the experiences of Costa Rica and Colombia. The final section draws out more general conclusions concerning the conditions under which rights revolutions might flourish.

Defining and Explaining Rights Revolutions

According to Charles Epp (1998: 7) a rights revolution is a sea change in the behavior of a country's highest court away from primarily hearing property rights and contract cases to routinely protecting individual rights; superior courts begin to view their function as "the guardian of the individual rights of the ordinary citizen" (Epp 1998: 2). That is, as a result of rights revolutions traditionally marginalized groups who were not just "losers in the political arena, [but were] perpetual losers" (Cover 1982: 1287) are able to harness the power of the courts to claim constitutionally-mandated rights that were historically unprotected. In the U.S. case, this included African Americans, women, prisoners, and more recently, gay people. While there might be general agreement on what constitutes a rights revolution, some debate remains over when they actually begin. For example, there is no agreed date marking the start of the U.S. rights revolution, only a general agreement that it began sometime between the 1930s and the 1960s. Prior to the 1930s, the U.S. Supreme Court was concerned almost exclusively with "business disputes and often supported property rights claims brought by businesses and wealthy individuals." By the 1960s, though, 70 percent of the Court's docket was concerned with modern individual rights cases (Epp 1998: 2).³

Rights revolutions were traditionally explained with reference to the Bill of Rights and activist judges. Charles Epp (1998: 5), though, argues that the "common emphasis on constitutional provisions and judges is exaggerated." He notes that the mere existence of the Bill of Rights in the U.S. Constitution was insufficient to start a rights revolution. Indeed, in its first 150 years of existence, the Bill of Rights was largely ignored. Epp's contribution to our understanding of rights revolutions was to identify under what conditions constitutionally mandated civil rights and liberties are actually enforced. He argues, "Bills of Rights matter, but only to the extent that individuals can mobilize the resources necessary to invoke them through strategic litigation" (Epp 1996: 765). Thus, the existence of constitutionally-protected rights is only a minimal condition for a rights revolution. It is the presence of deep-pocketed, well-organized legal support structures that are "essential in shaping the rights revolution."⁴ These support structures afford groups the finance and the technical skills necessary to usher cases through

3 Another debate, still very much alive, concerns the normative value of unelected judges making decisions that might, in a democratic society, best be left to popularly elected representatives, but this is not addressed here (Larkins 1998; Taylor 2004; Sieder, Schjolden, and Angell 2005).

4 For Epp the legal support structures include well-funded (government or private) rights-advocacy organizations and lawyers with rights advocacy experience.

the slow, complex judicial appeals process, first at the lower courts, then appeals courts, and ultimately on to the U.S. Supreme Court's docket.⁵ They also serve a second purpose of generating public debate and a sufficient number of cases so they might ultimately percolate up from the lower courts to the Supreme Court.

That is, due to the expense and legal difficulty of championing rights cases, these cases would languish in lower courts or fail without resourceful support groups. Rights revolutions, then, are not a function solely of judicial leadership and/or rights-positive constitutions; they require the creation of a "support structure for legal mobilization." These conclusions corroborate the earlier work by Oberschall (1993) and others on the U.S. case. Oberschall notes it was the organizational structures and deep pockets of the National Association for the Advancement of Colored People (NAACP), the American Civil Liberties Union (ACLU), and similarly inclined private foundations that funded the organizational infrastructure required to pursue individual rights claims.⁶ In other words, without these support structures, rights are neither claimable nor enforceable. Thus, in the U.S., the structure of the judicial system necessarily requires a centrally important role for support organizations to make courts consider and protect those rights.

This explanation for the Rights Revolution in the U.S. has been used to account for the existence or absence of rights revolutions in other countries, including less developed democratic countries (see, for example, Flemming and Krutz 2002; Conant 2006). It also appears to offer a compelling explanation for the universal absence of Latin American rights revolutions in the period prior to the judicial reforms of the late 1980s and early 1990s when the necessary pre-conditions were absent. However, it cannot explain the existence or timing of rights revolutions in either contemporary Costa Rica or Colombia.

It could be argued that Epp was discussing only common law legal systems (Latin America has traditionally used a civil law legal system) and thus should not be expected to account for Latin American cases. However, Epp's

5 This, of course, is a highly unlikely outcome given that the U.S. Supreme Court selects only about 150 cases per year, approximately 5 percent of the cases submitted for certiorari consideration (Rehnquist 1985: 6). Rehnquist goes on to argue against both the slowness of the appeals process as well as the small number of cases it selects: "[to] suggest that it is actually desirable to allow important questions of federal law to 'percolate' in the lower courts for a few years before the Supreme Court takes them on seems to me a very strange suggestion; at best it is making a virtue of necessity."

6 Simultaneously, the federal government created the Legal Services Corporation "to fund lawyers for the poor working in neighborhood offices that provided individual client service and also challenged government practices on a systemic, class wide basis" (Hershkoff n.d.).

explanation does not rely on factors germane exclusively to common law systems and could thus, in theory, also apply to other types of judicial systems. Instead, factors such as the rise of large-scale law firms, strong civil society associations, which can supply resources to marginalized groups, can be present in any country regardless of the foundations of its legal system. Consequently, we could expect the factors he identifies as important and relevant for common law legal systems to work in civil law systems as well. In fact, as I demonstrate below, it is not actually the type of legal system that matters for whether and how rights revolutions occur. Rather, it is, in broad terms, the rules governing access to and internal operational rules of the courts that influence the type and extent of resources necessary to successfully harness the power of the courts. These institutional factors are not affected by legal system-type, but can significantly impact the strategies of those seeking protection of their rights. The Latin American cases that form the basis of my empirical study, Costa Rica and Colombia, corroborate this argument illustrating the central importance of institutional rules that allow socially and politically weak groups to successfully pursue legal claims to protect their rights, even in the absence of well-funded support organizations.

Judicial Reform and Rights Revolutions in Latin America

At first blush, before the wave of judicial reforms of the late 1980s and 1990s, Epp's explanation provides a compelling account for the lack of Latin American rights revolutions. Although many Latin American constitutions were historically rights-generous, there were generally major gaps between constitutional rights promised and the reality of rights enjoyed by individuals. As was noted in 1959, "nowhere are constitutions more elaborate and less observed" than in Latin America.⁷ Brian Loveman (1993: 5) also comments that early Latin American constitutions frequently enumerated civil liberties and rights, but they were "routinely accompanied... by provisions for their suspension in times of political crisis." Governments and superior courts similarly viewed these rights as "aspirational" or a "mere proclamation of rights" (Rodríguez-Garavito, Uprimny, and García-Villegas 2003: 157) rather than "actual" rights that should and would be enforced by courts or recognized by governments.

7 Mecham (1959) cited in Karst and Rosenn (1975: 79). The article also notes that Latin American constitutions were historically short-lived; from independence through 1959 the 20 countries of Latin America had produced 186 constitutions, an average of 9.3 constitutions per country in less than 140 years.

Latin America's long history of superior court inaction has been explained with reference to a number of factors, particularly the nature of its civil law legal system. In this system, high court magistrates were expected to be technocratic implementers of laws, deferential to elected (or appointed) branches of government, and to intervene only in exceptional circumstances (Merryman 1985: 35; Rosenn 1987). In Latin America, judicial branch functionaries tended to be poorly paid and understaffed, which accentuates the minor role of courts (Friedman and Perez-Perdomo 2003: 12). The unwillingness of superior courts to act was compounded by the highly formal legal procedures utilized by the courts. Furthermore, standing was defined very narrowly, major hurdles including legal expertise and financial expense diminished access to the court to all but a few citizens. Internal court operational rules made the judicial process slow and difficult.

In the spirit of Epp's conclusions, the lack of rights revolutions even in Latin America's well established democracies can be explained by noting that the rights-friendly constitutions alone were insufficient. The lack of rights-friendly magistrates and, more importantly, the lack of well-funded, legal support structures effectively closed the door on the prospects of a rights revolution. Furthermore, socially and politically marginalized groups generally distrusted legal institutions, thus these groups were unlikely to pursue a judicial strategy to claim their rights (Couso 2006: 62).⁸ Compounding the situation in Latin America is the fact that large scale U.S.-style law firms remain a rarity (Friedman and Perez-Perdomo 2003: 11). In the U.S. case, it was the growth of large law firms that facilitated, according to Epp (1998), the demographic diversification of law firms and the capacity of individual lawyers within those large firms to take on rights cases pro-bono and to be more specialized in constitutional law.

Even in the 1980s, the prospect of a Latin American rights revolution was unthinkable. First, many countries were under military dictatorships, which granted very little space for independent judicial action to protect rights. Secondly, even in the region's democracies there was similarly little expectation that superior courts (supreme or constitutional) would break with their historical pattern of judicial inactivity and act against unconstitutional actions of the popular branches or begin deciding cases in favor of individual or collective rights.

The role of courts in Latin America began to change in the 1980s motivated to a large extent by external forces, especially International Financial Institutions (IFIs), development agencies, and NGOs (Domingo and Sieder

8 This sentiment is nicely captured in Pablo Neruda's poem "Los jueces," in which courts are viewed by powerless marginalized groups as just another arm of state and elite power, not a potential ally protecting their rights (Neruda 1981: 173-174).

2001; Jarquin and Carrillo 1998). Judicial reform in Central America, for example, was employed as one mechanism to help end the region's fratricidal civil wars (Popkin 2000). Other reform projects were part of the World Bank's goal of "good governance" (Faundez 1997). In the following 20 years, over 100 million USD were channeled to judicial reform projects across Latin America resulting in the melding of the assumptions and the goals that motivated the judicial agenda in the first place (Wilson, Rodriguez, and Handberg 2005). However, while many Latin American countries reformed their judicial systems and courts became more engaged, rights revolutions occurred only in a handful of countries; in many other countries, reformed judicial systems fell short of the funding agencies' aspirations (Hammergren 1998; Prillaman 2000; Ungar 2002; Domingo and Sieder 2001; Domingo 2003).

Costa Rica and Colombia – Rights Revolutions in Unlikely Places?

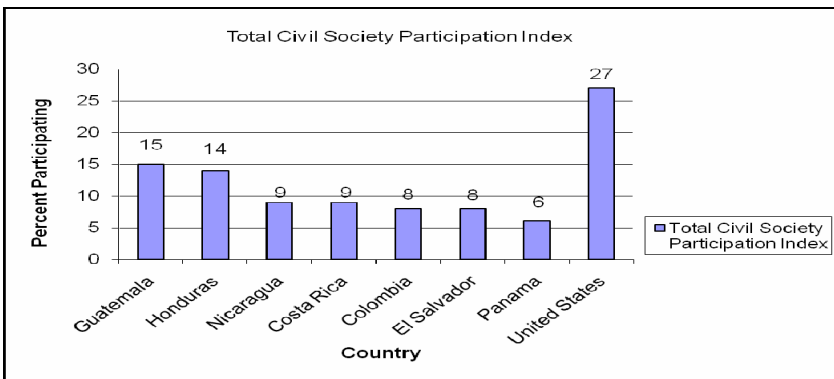
While many Latin American countries have yet to experience any sort of incipient rights revolution, those of Costa Rica and Colombia are generally agreed to be Latin America's most expansive; arguably even more profound than those of the U.S. and Canada. The extensive nature of these two rights revolutions have been discussed in a growing literature by practitioners and academics alike.⁹ Other nascent rights revolutions can be seen even in Argentina's traditionally executive-dominated Supreme Court, which has moved tentatively toward constitutional rights protection (Gargarella 2006; Sumlovitz 2005). In Chile, the Supreme Court, famously unwilling to engage in deciding rights issues, began to reconsider its role in protecting individual rights after the arrest of former dictator Augusto Pinochet in the United Kingdom (Couso 2004, 2005; Hilbink 2003, 2007; Huneus, 2006).

Because Costa Rica enjoys one of the oldest democratic regimes in the hemisphere, politically independent courts, and a rights-friendly constitution (Wilson 2005), the development of a rights revolution might not be so surprising, yet the existing literature cannot account either for its timing or, indeed, for its actual existence. Epp's explanation focuses on deep-pocketed support organizations and large-scale law firms, neither of which exists in Costa Rica. Costa Ricans tend not to join organizations and as Figure 1 shows, Costa Rican civil society is weak, among the weakest in Central America with only 9 percent of Costa Ricans involved in civil society or-

9 For the case of Colombia see Uprimny (2006); Cepeda (2005; 2004). For the case of Costa Rica, see Cruz Castro (2006); Wilson (2005; 2007); Urcuyo (1995); Wilson and Rodríguez (2006); Rodríguez (2002); Murrillo (1994).

ganizations. This is in stark contrast to the U.S. where Epp notes well funded support organizations are pervasive. Figure 1 shows U.S. popular participation in civil society to be three times higher than in Costa Rica.¹⁰ Furthermore, political parties are weak and, once in government, are increasingly less able to implement distinct economic and social policies (PEN 2004; Wilson 2007). And, Costa Rican law firms tend to be very small operations,¹¹ unlike the large, diverse firms in the U.S. and Canada that Epp identifies as important in facilitating and championing legal fights of weak and marginalized groups.

Figure 1: Total Civil Society Participation Index



Source: For Central American and Colombian cases, Seligson et al. (2004). The number for the U.S. replicates Seligson’s methodology using the 2004 NES data.

Colombia appears an even less fertile location for a rights revolution because of its long history of political violence. Figure 1 also shows in Colombia civil society is similarly very weak with only about 8 percent of the population participating in civil society organizations. Also, as in other Latin American countries, Colombian law firms tend to be very small and non-specialized practices. These factors, according to Epp’s explanation, suggest a rights revolution should be unlikely to occur in Costa Rica and virtually impossible in Colombia.

Interestingly, the existence or absence of these particular preconditions for a rights revolution can only partially predict the actual location of rights revolutions in the region. Costa Rica has experienced a major rights revolu-

10 The number for the U.S. was compiled using the 2004 National Election Study (NES) data and a rough approximation of Seligson (2004) methodology.

11 Personal correspondence, Juan Carlos Rodríguez Cordero, Dean of the UMCA Law School, Costa Rica, May 2007.

tion since the late 1980s despite the absence of strong associations that could provide resources to support marginalized groups or individuals in pushing their rights claims through the legal chain. Colombia, the country least likely to have a rights revolution, has in fact experienced one of the most far-reaching rights revolutions in the hemisphere. If the preconditions for rights revolutions outlined by Epp are not met in these countries, then which other factors have contributed to this unlikely outcome?

Colombia and Costa Rica, both former Spanish colonies, became independent republics in the first quarter of the nineteenth century, inherited civil law systems, and had governments dominated by strong executives. In both countries, the Superior Courts were gradually granted the right of Judicial Review. In Colombia, the Supreme Court was granted a judicial review power in 1858, but only started to exercise a very limited judicial review power after the start of the twentieth century. From 1910 through the late 1950s, the Supreme Court began a tradition of using its judicial reform powers, so that by the time of the writing of the 1991 Constitution, the Colombian Court had a tradition of judicial review and significant jurisprudence (Cepeda-Espinosa 2004: 692-695).

In the Costa Rican case, even once the Supreme Court was formally granted a judicial review power, it had little enthusiasm to employ that power. Even after 1957, when the Supreme Court enjoyed both political and financial independence, “magistrates exercised constitutional control with excessive timidity” (Gutiérrez 1999). For example, in the 50 years after the 1948 Civil War only 155 constitutionality cases were filed with the Supreme Court (PEN 2001: 64) and only a very small number of *amparo* cases.¹²

For Costa Rica, the second half of the twentieth century was marked by a brief civil war, followed by a new elite settlement, the promulgation of a new rights-rich constitution, and the return to being one of the most democratic countries in the hemisphere. Colombia’s political history has not been so kind. Since Colombia’s independence from Spain in 1810, its political life has been “dominated by an endless fratricidal war” between the two dominant political parties, the Conservatives and the Liberals, lasting through the mid-twentieth century. In the 1970s a power-sharing agreement between the two parties, “National Front,” ushered in a new phase of Colombia’s political history (Bernal 2006), which was “characterized by rampant corruption, high absten-

12 The writ of *amparo* guarantees everyone, without limitation, the right to appeal to the Court to maintain or reestablish all rights established in the Constitution (individual and social guarantees sections IV and V) not already included under the *habeas corpus* provision (Article 48 of the Constitution). Indeed, the caseload was so low that sitting Supreme Court magistrates argued there was not enough work to justify the creation of a constitutional court (Rodríguez Cordero, 2002: 43).

tion rates, and a complete lack of legitimacy in the eyes of broad sectors of Colombian society” (Barry 2002). These shortcomings of the National Front governments and the political exclusion of groups not allied with the two dominant political parties spawned guerrilla insurgencies and escalating levels of political and narco-trafficking violence in the 1980s, which claimed the lives of many citizens, three presidential candidates, numerous leftist leaders and judges, and magistrates of the Supreme Court.¹³

This escalating violence formed the background against which an elected constitutional assembly undertook the task of writing a new constitution. The assembly delegates represented a wide array of groups including former guerrillas, indigenous people, various ethnic and religious minorities, and representatives of many socially marginalized groups previously excluded from the Colombian political process (Garcia-Villegas 2001; Brooke 1991).¹⁴

The convention, elected in 1990, was an enormously popular undertaking and was supported by 90 percent of the population. The final constitutional document replaced the 1886 rights-poor constitution. It was the product of five months of intense debate among these disparate groups over a draft document drawn up by “a bright young team of lawyers well versed in comparative constitutional law” (Rosenn 1992: 661). The new Constitution of 1991 was

not the product of a triumphant revolution, but instead an attempt, within an extremely complex historical context, at an agreement to broaden democracy to confront violence and political corruption (Uprimny 2007:10).

Uprimny goes on to argue the constitutional delegates, believed that “exclusion, lack of participation and weakness of human rights protection were the basic underlying causes of the crisis in Colombia” (Uprimny 2007: 10).

Two major outcomes of the convention were a rights-rich constitution and a new, independent constitutional court capable of protecting those rights (Bernal 2006).¹⁵ But, in a similar vein to Epp, Garcia Villegas (2001) argues that in the inhospitable environment in which it was promulgated, the new constitution, on its own, could not achieve very much. Yet, in both

13 According to John Martz (1992) no fewer than 20 of Unión Patriótica’s 87 mayoral candidates and “more than a hundred other party aspirants to municipal offices were killed during the six months preceding elections” of 1988.

14 Morgan (1999: 258) points out that while very few women were elected as delegates, many delegates sympathized with women’s issues. One third of the delegates represented disarmed guerrilla groups, two delegates were evangelical Protestants, and three indigenous people represented more than 80 indigenous groups (Brooke 1991).

15 According to Bernal (2006) the idea for a constitutional court came from what was viewed as positive experiences with these types of courts in difficult circumstances in Spain after Franco and Germany after World War II.

countries, the new constitutional courts jettisoned judicial deference and rigid legal formality. Instead, the courts aggressively sought to protect constitutionally-mandated rights even for the weakest, most marginalized groups in their societies. Constitutional Court magistrate Fernando Cruz notes that Costa Rica's new chamber of the Supreme Court transformed the Constitution from a "document of formal reference having little consequence...into a living body of law with actual application to all levels of Costa Rican society" (Cruz 2006: 559).

In the two countries, the constitutional courts' caseload grew rapidly. In the first full 13 years of the Colombian court's existence, the total number of *tutela*¹⁶ appeal decisions rendered by the Constitutional Court increased from 182 in 1992 to 1,061 in 2005, before declining slightly to 902 cases in 2007. Annually, the number of *tutela* cases automatically appealed to the Constitutional Court for discretionary review increased from 8,060 in 1992 to 221,348 in 2005 generating a total of 1.4 million cases from a national population of 44 million (Cepeda-Espinosa 2005: 77; Cepeda-Espinosa 2006: 21-23).¹⁷

Over a similar period the Costa Rican Constitutional Court saw the number of *amparo* cases increase from less than 1,000 in 1990 to over 16,000 in 2005 and almost 17,000 in 2007 (Sala Constitucional 2008). The proportional caseload, taking into account population size, shows the growth rate in caseload for the two Courts to be very similar.¹⁸ In both countries, virtually every article of their respective constitutions has been addressed by the Constitutional Courts in response to cases brought before them (Cepeda-Espinosa 2005; Wilson 2005). Perhaps, though, while the massive increase in caseload indicates a significant shift from judicial passivity to judicial activism, it does not in and of itself confirm the existence of a rights revolution. To establish the existence of a rights revolution, it is necessary to look at the claimants, the cases, and the Court's decisions.

16 Colombia's writ of *tutela* is similar to Costa Rica's writ of *amparo*. Both are simple legal claims to protect basic constitutional rights.

17 *Tutela* cases can be filed with any court in Colombia. The decision of those courts are automatic appealed to the Constitutional court. Permitting all courts in the country to address *tutela* cases further enhances access to the court system as there are courts situated in all parts of the country.

18 Costa Rica's population of 4.3 million is approximately one tenth that of Colombia with 44.3 million (U.S. Department of State 2008a, 2008b), while the caseload is similarly proportional.

Scope of Rights Revolution in Colombia and Costa Rica

The extent of the revolutions has been established in the literature through examinations of the rights situation before and after the creation of the new courts and through an examination of the ability of marginalized groups to win significant, enforceable court decisions upholding their rights. That a rights revolution took place in Colombia is not in question and has been detailed elsewhere (Cepeda-Espinosa 2004; Uprimny 2004, 2007). Here I offer only a brief, broadly painted picture of key court decisions won by the most marginalized groups (socially and politically) to give a flavor of the profundity of the rights revolution.

Colombia

Even as recently as 1981, Dennis Lynch argued that in Colombia there was “little reason to believe the judiciary or government attorneys would be very receptive to innovative forms of legal advocacy” (Lynch 1981). But since 1991 many marginalized groups and individuals have frequently and routinely used the *actio popularis* and *tutela* as a legal opportunity to claim their constitutional rights. These claimants include even the weakest, most marginalized groups in Colombian society such as prisoners, gays, people living with AIDS (PLWA), women, and indigenous people (Morgan 1999).

One of the earliest and most significant cases indicating a nascent rights revolution was the 1992 case guaranteeing PLWA access to state-funded anti-retroviral medications (T-484/92).¹⁹ This decision, along with hundreds of other similar cases, guaranteed the right to health

whenever such protection is necessary to preserve threatened fundamental rights, such as the right to life and personal integrity (concerning diagnose services, medicines, treatment, surgeries, etc.), or the right to human dignity (Cepeda-Espinosa 2004: 697).

This ruling was taken further for children’s health rights (SU-043/95), which the Court argued were a fundamental right in itself. These decisions required the state to expend considerable resources in order to acquiesce with the Court’s view of the right to health and the state’s role in providing that care.

Homosexuals are another stigmatized group that was discriminated against by the state and socially and politically marginalized, but that has

19 This ruling was expanded in 1997 forcing the state to cover required medications or procedures for PLWA unable to finance their own treatment, even if the medications they require have not been officially included in the catalogue of available treatments.

harnessed the willingness of the Constitutional Court to uphold their fundamental rights. Gays not only suffered from officially sanctioned discrimination, but also as easy and frequent targets of death squad actions.²⁰ Court decisions (for example, T-097/94; T-569/94; T-037/95; C-098/96; C-481/98; T-101/98; C-507/99) have overturned longstanding official discrimination against homosexuals in employment (police, military, and education sectors). As a direct result of the Constitutional Court's rulings, gay organizations have become more visible and more included in society at large and the political process.²¹ This is not to suggest that protection of gays' fundamental rights was absolute. Indeed, this point is made emphatically by Uprimny (2007). He notes the Constitutional Court has placed some limits on how far it is willing to go to protect gay people's fundamental rights. The Court has argued that gays

may not be discriminated against because of their orientation, but they may not be equated with heterosexual couples for the purposes of constituting 'family' or receiving social security benefits (Cepeda-Espinosa 2005: 83).

The Court has also ruled against recognizing same-sex unions (C-098/98), upheld the constitutionality of a law banning gays from adopting children (C-814/01), and also has ruled that the healthcare system has no obligation to accept gay partners as beneficiaries (SU-623/01) (Uprimny 2007: 4).

The Court, though, has also ruled in favor of another socially marginalized, politically weak groups including prisoners, granting them minimal conditions of incarceration (T-153/98 and SU-995/99) and healthcare (T-606/98; T-607/98; T-530/99). And, a series of Constitutional Court decisions beginning in 2000, protect the economic wellbeing of public workers (C-1433/00; C-1064/01; C-1017/03; C-931/04) (Bernal 2006). The Court has also weighed in on the issue of minimum wages (T-426/92 and C-1433/00) and is on record stating "annual salary readjustments should never be lower than the inflation rates of the previous year in order to maintain minimum wage increases" (Cepeda-Espinosa 2004, 645). Finally, people displaced by the ongoing political violence (Internally Displaced People) were able to take a claim to the Constitutional Court in 2004 to force the state to meet their basic rights to healthcare and education (T-025/04)

20 UNCHR report in 1994/95 reported significant death squad action against sexual minorities in Colombia E/CN.4/1995/50/ADD.1 and E/CN.4/1995/111.

21 On the success of gays claiming their rights through the constitutional court see Guzmán (n.d.). There are numerous articles in Colombian and international newspapers that testify to the improved situation of gays in Colombia (See, for example, BBC News 2007; *El Espectador* 1999: "Comunidad gay da la cara;" *El Tiempo* 1994: "Los gays de Bogotá salen a la luz").

(HRW 2005). In 2006, the Constitutional Court argued, in certain circumstances, the rights of the mother outweighed those of a fetus, which effectively legalized some abortions in a country that had one of the most stringent bans on abortion. The decision was made in the face of considerable pressure from Catholic Church hierarchy and the opposition of the popular sitting president (Forero 2006). None of these groups could have historically claimed their rights through traditional political avenues, yet they were able to harness the power of the Constitutional Court to have their rights enforced and protected. Just as in the U.S., the Court's decisions do not guarantee these marginalized groups equality, but there is little debate that the Constitutional Court's rulings have enhanced the quality of their lives.

Costa Rica

Costa Rica's new constitutional chamber of the Supreme Court (Sala Constitucional or Sala IV) similarly abandoned the Superior Court's tradition of ignoring rights cases and instead decided many important cases in favor of socially marginalized, politically weak individuals and groups (Wilson and Rodríguez 2006). Within months of its creation, the Court made it clear it would no longer be blindly deferential to the popular branches of government. One of the first decisions of the new Constitutional Court was in favor of a humble ice-cone seller protecting his right to continue to peddle his wares in his usual location, outside of the Legislative Assembly, during a meeting of Presidents from across the Americas (Resolution No. 71-89). The Court's argument in this case sent a very clear message about their willingness to hold the executive accountable and force the executive to consider individual rights when creating and enforcing its policies.

Subsequently, many politically powerless, socially marginalized people have successfully approached the Constitutional Court to protect their rights claims, in a similar manner to those in Colombia. For example, PLWA, after losing an initial case in 1992, won a claim to state-funded medications to treat HIV/AIDS against significant opposition from the state health agency and in a separate case against the state-owned hospitals for refusing to treat HIV/AIDS patients (Resolution No. 3001-97). These cases were filed, not by a well-funded public interest litigation organization, but by three seriously-ill patients suffering from HIV/AIDS (Resolution No. 5934-97). The constitutional basis of the Court's decision rests on Article 21 of the Constitution, which states "life is inviolable." The Court argued,

What good are the rest of the rights and guarantees, the institutions and their programs, the advantages and benefits of our system of liberties, if

a person cannot count on the right to life and health assured? (quoted in Wilson and Rodríguez 2006: 339).

This was one of the clearest and most emphatic statements by the Sala IV declaring a new right to health. Subsequent rulings by the Court have cited this jurisprudence in deciding subsequent health rights cases filed by people suffering from chronic and/or terminal illnesses. Since the success of the 1997 decision, the number of *amparo* cases claiming a right to medications has increased every year with claimants winning over 60 percent of the cases (CCSS 2008).²²

Prisoners, another marginalized, powerless group, have individually filed and won a series of cases forcing the state to end overcrowding in jails (Resolutions No. 4576-96; No. 7484-00). Disabled people and women also won profound victories at the Court to protect them from discrimination and, in gaining physical access to buildings, busses, etc. (Wilson and Rodríguez 2006). Gay people in Costa Rica, another stigmatized group similarly discriminated against by private and state agencies, have succeeded in winning protection of their individual rights in a manner similar to gay people in Colombia. Again, the cases tended to be filed by individuals with no support from the small, nascent gay organizations. A major victory for gay Costa Ricans was a case concerned with police brutality in 1994 (Resolution No. 4732-94). As part of the Court's decision, police were required to be trained in how to better deal with gay people, the result of which was an almost complete cessation of routine police violence against gay people (Wilson 2007; Eijkman 2007).

As in the case of Colombia, none of these marginalized groups were able to protect their rights before the creation of the two Constitutional Courts. Even though Costa Rica had a 50-year old, rights-rich constitution, the pre-reformed Supreme Court was unwilling to enforce individual rights. With the creation of the Court, the abandonment of judicial formality, and the dismantling of barriers to access, the Court rapidly created a legal opportunity structure through which individuals could effectively claim their rights.

Explaining Rights Revolutions in Costa Rica and Colombia

At the time of the creation of their respective Constitutional Courts, the outlook for a rights revolution in either Costa Rica or Colombia was not bright. Even though in Colombia, the Supreme Court had gradually honed

22 These numbers are drawn from data presented by Eduardo Doryan Garrón, Executive President of the Caja Costarricense de Seguros Sociales (CCSS, Social Security agency) at a recent interview (June 2008). If all cases involving a right to health-care are considered, the claimants' success rate is approximately 50 percent.

its judicial review powers in a way the Costa Rican Supreme Court had not, neither court demonstrated any real interest in tackling individual rights issues in general or for the rights of politically weak, socially marginalized groups in particular. These groups, as with similarly situated weak groups across Latin America, tended to view the courts with suspicion and believed any approach to the courts would be hopeless (Couso 2006: 63), if not counterproductive (Hilbink 2007: 269).

According to Epp's explanation (1998: 18), rights revolutions require "widespread sustained litigation," a combination of

rights consciousness with a bill of rights and a willing and able judiciary improves the outlook for a rights revolution, but material support for sustained pursuit of rights is still crucial (Epp 1998: 17).

Thus, Costa Rica and Colombia's judicial reforms by themselves should not have been sufficient to produce a rights revolution due to the non-existence of the required deep-pocketed support structures in both countries. The empirical evidence, though, demonstrates that a rights revolution did, indeed, take place in spite of the lack of support organizations willing and able to push rights cases on behalf of socially marginalized and politically powerless groups. The new Constitutional Courts dispensed with judicial formalities, employed a broad definition of standing, and removed virtually all barriers to access. Thus, an accessible, legal forum was created that allowed marginalized groups and individuals to successfully take their claims to the courts in a way that neither the pre-reformed courts nor the political process had permitted.

The new constitutional chamber of the Supreme Court in Costa Rica, Sala IV, abandoned the strict formality that characterized the pre-reform Supreme Court. Standing was understood to be very broad and access is among the most open in the world. The new Constitutional Court in Colombia is similarly less formal than the pre-reformed court and has broad, low cost access to the court system. *Tutela* cases, like *amparo* cases in Costa Rica, grant broad standing, require no legal fees or lawyers, and grant very easy access to any judge in the country. Judges have just ten days to render a decision on *tutela* cases (they take precedent over all the judge's other case work). The Constitutional Court can then choose which of the *tutela* cases it wishes to examine (Cepeda-Espinosa 2004: 552-553). Constitutional rulings require a decision by the Court's nine magistrates sitting *en banc*, but *tutela* decisions are usually taken by review chambers (*Salas de Revisión*) of the full court (three magistrates sit on each chamber). If there is both a constitutionality and *tutela* aspect to the case, then it is the plenary court that makes the decision (Uprimny 2007: 14). Also, if there is a disagreement among the

chambers, or if a case is deemed to be of significant importance, it will be studied by the full Constitutional Court (Parra 2008).

In both Costa Rica and Colombia judicial reforms re-wrote the rules under which Superior Courts operated and opened up access to virtually any claimant in the country. Before the Costa Rican reforms of 1989, the Supreme Court rarely ruled against the executive and/or legislative branch of government and seldom ruled in favor of individual rights cases (Wilson 2005). The constitutional reform created a new constitutional chamber of the Supreme Court, increased the number of magistrates from 17 to 22, and reassigned them among the four chambers and elected five new magistrates directly to the new constitutional chamber. The Sala IV was designated as the largest of the Court's four chambers. The ability of individuals to file cases was further enhanced by the Court's abandonment of its previously overly formal requirements. Standing is broadly granted, allowing individuals to file claims even if not directly affected by the issue in question, a stark contrast to the pre-reformed court (and to the U.S. courts examined by Epp). Cases can now be filed directly with the Sala IV, 24 hours a day, 365 days a year, by any person in Costa Rica regardless of nationality, age or gender, and can be written on anything and require no legal representation or filing fees.²³

The Supreme Court no longer requires a super majority (two thirds) of the full court to declare a case unconstitutional. Instead, a simple majority of the constitutional chamber is sufficient and is binding on everyone except the court itself. The Court, since its inception aggressively sought cases through highly publicized public forums and posters in public buildings, which outlined the individual and collective rights contained in the 1949 Constitution. As noted earlier, the number of cases filed with the Court grew rapidly; the vast majority of these cases are *amparo* claims.

Conclusions

Evidence from Latin America supports Epp's (1996: 776) observation that constitutionally-mandated rights are not "self-activating." Indeed, rights-friendly constitutions existed for many decades, but those rights were not enforced by superior courts. Similarly, the deep-pocketed legal support structures and large-scale law identified as central to ushering in and growing rights revolutions are absent in the countries with the most profound rights

23 Cases are frequently handwritten and cases have been accepted by the court even when they were written on the wrapping paper for a loaf of bread. Although no formal data is collected on the socioeconomic conditions of claimants, it is generally assumed that these handwritten appeals are from poorer people (interview with Sala IV Magistrate Sosto, San José, Costa Rica, June 2008).

revolutions. Thus, while Epp's reasoning appears to offer a plausible explanation for the lack of rights revolutions, it is unable to account for the rise of a rights revolution in the Latin American context, particularly not in the cases of Colombia and Costa Rica.

The evidence from these cases implies that the institutional design of judicial systems might negate the need for "widespread sustained litigation" (Epp 1998: 18) supported by well-financed civil society organizations. Specifically, broad definitions of standing and low-cost access to superior courts allow individuals to successfully claim their rights at the highest courts without the need of popular support, lawyers, or funding, which is a stark contrast to the judiciaries studied by Epp, where access to the highest court was restricted, expensive, and slow.²⁴

Apart from these conclusions, the two countries examined here indicate other tentative conclusions that require further research. First, the article demonstrates that profound rights revolutions are possible even in civil law legal systems. This counters the claims of many scholars of Latin American courts that superior courts' unwillingness to engage in an active accountability function or to promote constitutionally-mandated individual rights is, in part a function of the civil law legal system. The results presented here intimate that the civil law legal system might not be as powerful an explanatory factor for superior courts' deferential behavior and inaction in rights protection. Clearly, though, more research is required on this issue before more concrete claims can be made.

Second, because successful rights revolutions impose considerable costs on the state and can significantly constrain popularly elected legislatures' policy-making and priority-setting freedom, more research is required on the impacts of those court decisions. For example, one issue touched on in this article, the constitutional "right to health," has presented a major financial burden on the state (and especially the state-controlled health agencies). Courts in both countries mandated the state to fund expensive medications and treatments for patients who presented claims to the courts. Including, in the case of Costa Rica a recent Sala IV decision that mandates the state health agency to provide and pay for a breast cancer drug, Trastuzumab, for 120 patients in the country. Neither that the drug was not on the state list of rec-

24 For example, standing in the U.S. is very restrictive and has been used to exclude challenges to congressional initiatives and bills at the national and state level by politicians (*Goldwater v Carter* 1979) (Dotan and Hofnung 2005: 79) or by individuals seeking to protect their constitutional rights (see, for example, the Pledge of Allegiance case that reached the U.S. Supreme Court in 2004 (*Elk Grove Unified School District v. Newdow*), but was dismissed due to the lack of standing of the father of the minor child in the case (Oyez project 2004).

ommended drugs for breast cancer treatment nor the fact the drug was very expensive and would consume over 4 percent of the agency's national medications budget (Deliyone 2007:127) affected the Court's decision. Forcing the state health agency to pay for and supply the medication makes it more difficult to fully fund other medications or to implement the agency's health care priorities (CCSS 2008).²⁵ Next to the lack of research on the economic consequences of the Court's rights decisions, there is no systematic research on the ethical questions created by the Court's decisions; scarce resources for medical treatment are re-allocated based on the decision of the Court rather without input from a panel of medical professionals with expertise in making such allocation decisions. This has far reaching ethical consequences.

Another area in need of further research concerns the question of which individuals are actually benefiting from using the courts to claim their rights. While the evidence from Costa Rica and Colombia shows that even the most marginalized groups and individuals can approach the Superior Courts, it remains unclear if there is bias in the system against the poorest, least educated people or against more marginalized rural regions of the countries. There is currently little systematic data on the socioeconomic and geographic profile of who uses the courts to claim their rights. All these important questions require further research before we can fully understand the profundity and consequence of the rights revolutions.

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25 Similar cases have been through the Colombian Court and produced similar questions, see Parra (2007).

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Reforma institucional y revoluciones de derechos en América Latina. Los casos de Costa Rica y Colombia

Resumen: Este artículo analiza las condiciones que facilitaron el surgimiento de revoluciones para promover los derechos en Costa Rica y Colombia. Mi investigación sugiere que muchas de las precondiciones para las revoluciones de derechos en otras regiones del mundo también son centrales para entender los casos latinoamericanos. De particular relevancia es el diseño del sistema judicial, incluyendo las reglas de funcionamiento los de tribunales supremos con respecto a acceso, rango y formalidad judicial. Estos factores pueden disminuir la necesidad de recursos extensivos y estructuras de apoyo necesarios en otros países no latinoamericanos en los cuales revoluciones de derechos han ocurrido.

Palabras clave: Costa Rica, Colombia, revolución de derechos, derechos constitucionales