

Implications of Social Rights Adjudication on the Separation of Powers Doctrine: Colombian Case

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Abstract : Separation of Powers (SOP) has often been the most frequently posed objection against the judicial enforcement of socio-economic rights. Although a lot has been written to refute those, very rarely has it been assessed what effect the current practice of social rights adjudication has had on the construction of SOP doctrine in specific jurisdictions. Colombia is an appropriate case-study on this question. The notion of collaborative SOP in the 1991 Constitution has affected the court's conception of its role. On the other hand, the trends in the jurisprudence have further shaped the collaborative notion of SOP. Other institutional characteristics of the Colombian constitutional law have played its share role as well. Tutela action, particularly flexible and fast judicial action for individuals has placed the judiciary in a more confrontational relation vis-à-vis the political branches. Later interventions through abstract review of austerity measures further contributed to that development. Logically, the court's activism in this sphere has attracted attacks from political branches, which have turned out to be unsuccessful precisely due to court's outreach to the middle-class, whose direct reliance on the court has turned into its direct democratic legitimacy. Only later have the structural judgments attempted to revive the collaborative notion behind SOP doctrine. However, the court-supervised monitoring process of implementation has itself manifested fluctuations in the mode of collaboration, moving into more managerial supervision recently. This is not surprising considering the highly dysfunctional political system in Colombia, where distrust seems to be the default starting point in the interaction of the branches. The paper aims to answer the question, what the appropriate judicial tools are to realize the collaborative notion of SOP in a context where the court has to strike a balance between the strong executive and the weak and largely dysfunctional legislative branch. If the recurrent abuse lies in the indifference and inaction of legislative branches to engage with political issues seriously, what are the tools in the court's hands to activate the political process? The answer to this question partly lies in the court's other strand of jurisprudence, in which it combines substantive objections with procedural ones concerning the operation of the legislative branch. The primary example is the decision on value-added tax on basic goods, in which the court invalidated the law based on the absence of sufficient deliberation in Congress on the question of the bills' implications on the equity and progressiveness of the entire taxing system. The decision led to Congressional rejection of an identical bill based on the arguments put forward by the court. The case perhaps is the best illustration of the collaborative notion of SOP, in which the court refrains from categorical pronouncements, while does its bit for activating political process. This also legitimizes the court's activism based on its role to counter the most perilous abuse in the Colombian context - failure of the political system to seriously engage with serious political questions.

Keywords : Colombian constitutional court, judicial review, separation of powers, social rights

Conference Title : ICHDESCR 2020 : International Conference on Human Dignity, Economic, Social and Cultural Rights

Conference Location : Madrid, Spain

Conference Dates : March 26-27, 2020