Constitutional courts and economic policies The Colombian case*

Tribunales constitucionales y las políticas económicas El caso colombiano

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Resumen

Este artículo muestra las diferentes posiciones sobre el debate entre el derecho y la economía, sobre todo, la competencia, legitimidad y conveniencia de la intervención de los tribunales constitucionales en la elaboración de las políticas económicas. Para hacerlo, primero, vamos a presentar el marco general de la evolución del derecho constitucional, es decir, la creciente importancia y el poder de los tribunales constitucionales en las sociedades democráticas contemporáneas. En segundo lugar, nos centraremos en el caso colombiano, por esa razón, inicialmente, vamos a explicar por qué el caso colombiano es relevante para nuestra investigación, en cuarto lugar expondremos los antecedentes del derecho constitucional colombiano, en tercer lugar, vamos a presentar los principales efectos de las decisiones del Tribunal Constitucional de Colombia en la economía colombiana, así como las críticas sobre la actividad de la Corte Constitucional, en quinto lugar, haremos hincapié en el papel de la Corte Constitucional de Colombia en la definición de las políticas de salud. En sexto lugar, vamos a resumir los principales argumentos a favor y en contra de la intervención de la Corte Constitucional de Colombia en la elaboración de las políticas económicas en general, y la política de salud en Colombia en particular. Por último, vamos a exponer algunas conclusiones finales.

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Palabras clave

Derecho Constitucional, Corte Constitucional de Colombia, las políticas económicas, el activismo judicial.

Abstract

This article shows the different positions about the debate between law and economy, especially, the competence, legitimacy and convenience of constitutional courts intervention in the making of economic policies. To do it, first at all, we will to present the general context of the evolution of constitutional law, that is to say, the growing importance and power of constitutional courts in the contemporary democratic societies. Secondly, we will focus in Colombian case, for that reason, first, we will to explain why the Colombian case is relevant for our research, second, we will to set out the Colombian constitutional law background, third, we will to present the main effects of the Colombian Constitutional Court decisions in the Colombian economy as well as the criticism about the Constitutional Court's activity, fourth, we will to emphasize in the role of Colombian Constitutional Court in defining health policy. Thirdly, we will to summarize the main arguments for and against the intervention of Colombian Constitutional Court in the making of economic policies in general, and the Colombian health policy in particular. Finally, we will expose some final conclusions.

Keywords

Constitutional law, Colombian Constitutional Court, economic policies, judicial activism.

Introduction: hypothesis and methodology

This article pretends to bring a possible answer to this question: It is advisable that Constitutional Courts interfere in the making of Economic Policy? This is a currently issue that many countries, especially developing countries, have been facing. The debate about this issue has risen in the last decades because of the new role of constitutional courts in the contemporary societies.

Our hypothesis is that there is a relationship between judicial activism and economic growth; an unlimited judicial activism can be produce economic disequilibrium as well as a complex situation of protection of human rights. It is happen because judges do not pay attention about economic consequences of their decisions.

In our research we used a methodology that combines a compilation of background information as well as comparative method. First at all, we collected all the papers (books, magazines, newspapers) about our research problem, then, we selected the most relevant information. Secondly, we looked for representative cases into the

Colombian Constitutional Court jurisprudence and selected four representative cases (Case of mortgage debtors (case of UPAC), Case of forcedly displaced population, Case of prisoners and the case of the right to health).

Thirdly, we looked at some countries that have faced the same debates about the Constitutional Courts interference in the Economic Policy Making. Finally, after this comparative law exercise, we analyzed the information and suggest an answer for our research question.

1. The power of Constitutional Courts

Constitutional Court annulling reform package would ruin economy. It was a headline in a Turkish newspaper that represents the importance of Constitutional Courts in a contemporary society. Last month one of the most important news in Turkey was the anxiously waiting for the Constitutional Court's ruling about a reform package proposed by Turkish government (Baysal & Kaya, 2010).

The experts had predicted that if the Constitutional Court annuls one or more articles of the package, this would cause great financial damage. For instance, the Court's decision can be scare foreign investors and produce an economic crisis. That is why, businessman, investors and citizens centered their attention on the Justices of the Turkish Constitutional Court. Some Turkish could not understand why the Constitutional Court can be change the economic future of their country.

Just like Turkish, citizens of many countries have been asking the same questions about the competence, legitimacy and convenience of constitutional courts intervention in the making of economic policies. The fact is that indeed, in the last decades has developed a tendency to give more power to courts in order to control the other branches: the legislative and executive.

This tendency has been developing in concordance with other controversial tendency: the theory of social rights and their justiciability. That is why; democratic countries have been incorporating in their constitutions bill of rights that include social, economical and cultural rights (also known as second and third generation rights). To enforce this kind of rights, constitutions provide to citizens several sorts of legal actions.

In this context, constitutional courts have been empowered by constitutions. What this means is that constitutional courts have more powers than before to interfere in economic, social and politics issues. This has stimulated a lot of crashes between the branches, especially between judicial and legislative branches. This situation produced a new way to see the classical principle of separation of powers. According to Cooter (2002):

> *A conventional formula distinguishes among the legislative, executive and judicial branches of government. By convention, law should be made by the legislature, enforced by the executive, and interpreted by the courts. Reality is much more complicated than this simple formula. Each of three branches of government performs all three activities, although not to an equal extent (p.173).*

There is a vigorously debate about the implications of the expansion on judicial power and the effects of this power, particularly in countries where the democracy has not been totally consolidated.

> *Judicial optimists draw on the experience of polities that a successful transition to democracy, such as South Africa and Germany, to argue that judicial review has an important democratic pay-off by strengthening constitutions. Judicial pessimists, on the other hand, draw on the experience of older, consolidated democracies, such as United States, to argue that empowering courts weakens citizen's attachment to constitutions and undermines the ability of legislatures to solve pressing problems (Schor, 2008, p. 3).*

In conclusion, unlike before, the constitutional court has a relevant role in a democratic society. Thus, besides the traditional role of interpreting law the courts have the power to interference in the making of public policies. The constitutional courts can interference in the making of public policies by annulling laws as well as by interpreting those in a specific way in order to enforce social rights.

2. The Colombian case: enforcing rights by judicial activism

In the first section of this paper, we presented the general context of the evolution of constitutional law, that is to say, the new roles of constitutional court in a democratic society. Now, in this section we will present the impact of these tendencies in the Colombian legal system. First, it is important to say why Colombian as well as countries in process to be a consolidated democracy, can be interesting objects of study, then, we will to set out the Colombian constitutional law background, third, we will to present the main effects of the Colombian Constitutional Court decisions in the Colombian economy as well as the criticism about the Constitutional Court's activity, finally, we will to emphasize in the role of Colombian Constitutional Court in defining health policy

2.1 Relevance of legal debates from countries that are on the way to the consolidation of the democracy

Sometimes scholars refuse to study the experience of the developing world because there is a belief that new democracies or countries in process to be a democratic society should to copy the best practices of consolidated democracies, such as United States of America or Germany (Schor, 2008). The problem of this point of view is that important theories as well as legal and political debates about the way towards a consolidated democracy are ignored, even by some scholars from countries in process to be a strong democratic society, who just try to imitated foreign ideas without a critical insertion process.

It is obvious that there are centers of knowledge that have a great influence in the legal theory, however, on the way from these centers to reception sites, sometimes legal theories can change, their meaning can be modified by scholars from reception

sites. These transmutations of ideas should not be dismissed only because there are not totally original ideas. The relationship between "production sites" of judicial theory and "reception sites" is developed at greater length by the professor Diego López (2008).

In the Colombian case, the 1991 Constitution was the product of a great constitutional experimentation, this Constitution created a Welfare State, changed the power structure, incorporated a wide bill of rights composed of civil and political rights, as well as social, economic, cultural, and collective rights, created a new and powerful constitutional watch guard: The Colombian Constitution Court, and last but not least, the Constitution enjoins the State to protect and fulfill the principles and rights in the bill of rights (Article 2 Colombian Constitution) The Colombian case is thus worth studying.

2.2 Colombian Constitutional context

In this section we will expose briefly the main aspects of Colombian constitutional context, to start, we will talk about the powers of the Colombian Constitutional Court, then, we will show some possible causes of Court activism.

The 1991 Constitution created two constitutional citizen actions which determine the Constitutional Court's forms of jurisdiction: abstract and concrete control of constitutionality. The fist one is *the public action of unconstitutionality* by virtue of which any citizen can demand the Court that a law or decree be declared unconstitutional, without him or her being a lawyer or having any particular interest in the issue, as opposed to other legal systems that require either or both of these conditions.

The *tutela action* is the other constitutional action contained in the 1991 Colombian Constitution, by virtue of which any person may directly request any judge to protect his or her fundamental rights when they are being violated by a state agent or an individual which the person is subordinated, and when there is no other legal action that can be used to prevent the right violation from continuing.

As with the *public action of unconstitutionality,* citizens do not need to be a lawyer to file a *tutela action*. Judges are obliged to give priority to *tutela actions*, which are thus decided within ten days.

2.3 Judicial activism

The next point is the sources or causes of Constitutional Court activism. There is not a consensus about it; however, we propose to classify the possible sources of judicial activism in Colombia in four kinds: legal, ideological, factual and political sources, in other words: (i) constitutional competences of Colombia Constitutional Court as well as open texture of the constitution; (ii) new ideology about the judicial role; (iii) usurpation of competences by Constitutional Court and; (iv) inefficiency of the legislative and executive as well as the political parties and social movements.

The 1991 Constitution gives to Court institutional and legal elements in order to enforcement the values, principles and right contained in the Constitution, such a *tutela action* and the *public action of unconstitutionality,* which as we saw earlier, some academics think that these new powers can be explain the judicial activism, nevertheless, the Constitutional Court "has interpreted these competences in a generous way" (Uprimny, 2006, p. 4), for example, the Court interpreted that its competence to decide upon the constitutionality of a law includes not only its power to either maintain it in the legal order by declaring its constitutionality or annul it but also its power to declare it *conditionally constitutional*, by maintaining it in the legal order and offering the only constitutional interpretation the text can be given (Case C-112/00).

For this way, the Court has been modified some laws. It has been possible because of the open texture of the constitution allows judges to interpreter the constitution in an unlimited way (Carrasquilla, 2001, p.22).

On the other hand, some academics think that the source of the judicial activism is not the constitutional text. They argue that we should to look at the new particular set of ideas about the judicial role. That is why, "activism is a function of the ideas held by judges about their institutional role" (Nuñes, 2009, p. 3). The judges believe that they have a main role in a democratic society; they think that should to impulse the social change, for example, protecting social rights.

The new Constitution encourages the judges to interpret the law in a special way. When judges are applying a law in a specific case, they must to remember the values and principles of the Welfare State, if the solution given by the law is "*unfair*", the judges can refuse to apply this law and instead, to apply directly the constitutional values, principles and fundamental right in order to solve the case "*fairly"*.

As opposed to this position, there are a group of Colombian academics who think that the source of the judicial activism is the wrong interpretation of the Constitution by the Constitutional Court. They argue that the creation of the theory about the "new law" or "anti-formalism" is just an invention that allows dangerous judicial discretion. Without a doubt, when the Justices of the Constitutional Court modify the main sense of a law by interpretation, they are creating law, as a matter of fact, the court has not interpreted reasonably the law, the Court has been ignore the law (Tamayo, 2010, p.101) something inadmissible in a Roman-Germany legal system where the positive law (writing into a collection codified) is the main source to decide cases.

Finally, some scholars consider that the problem is the inefficiency of the legislative and executive as well as the political parties and social movements, according to Uprimny (2006b):

> *This activism has also been stimulated by two structural political factors: the crisis in political representation and the weakness of social movements and opposition parties in Colombia. Because of Colombia generalized disenchantment with politics, certain social groups have demanded solutions from constitutional jurisdiction to problems that should be debated and overcome by means of democratic process in the first place" (p. 6).*

2.4 Controversial decisions and their economic consequences

In this section we will analyze three controversial cases that generated strong criticism against the Colombian Constitutional Court because of their economic consequences. These cases are: (i) the case of mortgage debtors (case of UPAC); (ii) the case of forcedly displaced population; (iii) the case of prisoners.

In the next section of this article we will focus in another interesting case: the case of the right to health. All these decisions have implied significant budgetary costs.

2.4.1 The case of mortgage debtors

There was a financial system called UPAC (Unity of constant acquisitive power), in 1997 Colombia went into a deep recession that sent into crisis a lot of debtors, approximately 800.000 debtors who had taken loans to buy their homes with the UPAC system. In 1999, about 200.000 debtors and their families were on the verge of losing their homes.

They asked to the government for a reform of the financial system, even some of them implemented civil disobedience strategies in order to refuse to continue paying their mortgages or to hand their homes over the banks. However, they never received an answer from the Congress or the President.

Finally, debtors decided to launch constitutionality actions against the norms that regulated the UPAC system, the *public action of unconstitutionality* and the *tutela action,* mentioned above. In 1999, the Constitutional Court pronounced three decisions on the matter (Cases: C-383/99 C-700/99 and C-747/99) which protected and relieved mortgage debtors.

In these decisions the Constitutional Court ordered to tying the UPAC system to inflation, forbidding the addition of owed interests to capital debt and the recalculation of mortgages. Furthermore, the Constitutional Court, ordered to Congress to pass a new law on housing financing that allows to Colombians enjoy their fundamental rights to have a home and live with dignity.

These decisions were severely criticized by economist as well as politics and lawyers. The criticisms can be classify in two groups: first, criticisms that attack the competence of the Constitutional Court to make this kind of decisions, and second, criticisms that attack the Court decisions because of their economic consequences.

The main criticism was the violation of the principle of separation of powers. Some scholars argued that the Constitutional Court had encroached upon the powers of Congress (Nuñez, 2005, p. 32). These scholars think that these kinds of issues should to be debated by the Congress and Government because they are legitimated to make decisions about country's economic policy because that is what they were elected for. On the contrary, the justices of the Constitutional Court are not legitimated to interference in the making of economic policies (Kalmanovitz, 2003).

On the other hand, the Court decision was also criticized because of its economic consequences. Economist argued that the addition of owed interests to capital debt

allow that people who have low ingress get a loan with low periodical payment fees, therefore, forbidding the addition of owed interests to capital debt and the recalculation of mortgages restricted the access of poor people to home loans (Clavijo, 2001, pp. 43-49).

2.4.2 The case of forcedly displaced population

The Colombian armed conflict has generated an enormous number of forcedly displaced populations who are forced to leave their homes and to migrate to cities and urban centers where no sources of subsistence have. This situation configures a truly humanitarian tragedy.

In 2004, many forcedly displaced persons started filing *tutela actions*, they asked to government for protection of their fundamental rights, especially the right to human dignity and housing. In this year, the Constitutional Court decided to declare the existence of an "unconstitutional state of things"; this mean that the Court declared that government has been systematically violating forcedly displaced persons rights (Case T-025/04).

In this historic decision, the Court ordered the national authorities to reformulated and clarify the strategies in order to attend the basis needs of forcedly displaced population.

This decision generated the disapproval of many scholars who criticized the Court because of its use of the concrete control of constitutionality to give general orders to national authorities.

In fact, as we saw earlier, in Colombian legal system there are two kinds of constitutional controls: the abstract control (*public action of unconstitutionality*) and the concrete control (*tutela action*). The *public action of unconstitutionality* has erga omnes effects, that is, the judge decision is mandatory to everybody. In these cases, the Court has to decide if a law is constitutional or not.

As opposed to abstract control, the *tutela action* has an *inter partes* effects, that is, the judge only can give concrete orders to persons who are party in the judicial process. In this case, forcedly displaced persons filed *tutela actions,* (concrete control); however, Constitutional Court gave general orders to national authorities.

2.4.3 The case of prisoners

In this case several prisoners filed *tutela actions* against the state's penitentiary authorities. The prisoner was claiming that their constitutional rights to life, dignity and health were being violated by the state as a consequence of the over-crowdedness and precarious circumstances of the prisons they were in.

As the case of forcedly displaced population the Constitutional Court declared the existence of an "unconstitutional state of things". Consequently, the Court ordered to Ministry of Justice to build more prisons, modernize the already existing prisons and hire more security guards for them.

In this case as well as the case of forcedly displaced population and the case of mortgage debtors, the Constitutional Court conditioned the priorities and orientation of the governmental strategies in these sectors. Thus, questions about the competence, legitimacy and convenience of Court decisions have been arising.

2.5 Health policy and Constitutional Courts

The intervention by the constitutional courts in a wide range of issues, including those involving social and economic rights, such as the right to health, has generated a debate about the competence and legitimacy of the judiciary in entering areas which have for long been perceived as belonging property within the domain of the legislative and executive (Muralidhar, 2002, p. 4).

In the case of the right to health, the debate has a particularity: the relationship between it and the right to life. This particularity generates the inclusion of moral reasoning besides to legal, political and economic arguments in the debate, for that reason, some people who disagree with the justiciability of social and economic rights consider that in the case of the right of health can be convenient moderate degrees of justiciability.

On the other hand, some scholars consider that in the debate about the justiciability of the right to health, moral reasoning should to be out of the question. To illustrate this position, we will to quote a passage of a dialogue between William Shatner and Rush Limbaugh1 that took place on a recent episode of the television talk show "Raw Nerve" in the United States, we read this passage in an article wrote by Uwe E. Reinhardt who is an economics professor at Princeton University.

> *"Shatner: Here's my premise, and you agree with it or not. If you have money, you are going to get health care. If you don't have money, it's more difficult.*
>
> *Limbaugh: If you have money you're going to get a house on the beach. If you don't have money, you're going to live in a bungalow somewhere.*
>
> *Shatner: Right, but we're talking about health care.*
>
> *Limbaugh: What's the difference?*
>
> *Shatner: The difference is we're talking about health care, not a house or a bungalow.*
>
> *Limbaugh: "No. No. You're assuming that there is some morally superior aspect to health care than there is to a house*
>
> *Shatner: No, I'm not moral at all. I want to keep the subject, for the moment, on the health care thing."*

1 Rush Limbaugh is a famous radio host in the United States, conservative political commentator, and an influential opinion leader in conservative politics and Conservatism in the United States.

Focusing in Colombian case again, now, we will to describe in a few words the Colombian healthcare system as well as its problems, then, we will to present a landmark decision about right to health in Colombia, the Constitutional Court decision number T-760/08.

2.6 Colombian healthcare system (Law 100)

In 1993, the Colombian government makes a major healthcare reform inspired by neoliberal ideas. The Law 100 created a competitive surrogate model which used public and private insurers as surrogates to purchase health care for insured patients.

This system also established a two-tier system of benefits: (i) the contributory regime for those formally employed, and (ii) the subsidized regime that includes approximately one-half of the benefits in the contributory regime. Every regime has a list of medicines and treatment that the patients can access (in Spanish Plan Obligatorio de salud – POS).

This system has been widely criticized by patients. Inefficiency and poor quality are the main problems of the system, for that reason, patients increasingly turned to the courts to secure treatments and services (Yamin & Parra, 2010, p. 2).

Between 1999 and 2005, the Colombian Human Rights Ombudsman Office calculates that 328.191 *tutelas actions* were presented relating to the right to health; approximately 80% of those cases were granted. In addition, between 1999 and 2005, approximately 89% of surgeries, 93% of the treatments and 84% of the procedures that were petitioned for using *tutela action* were already included in the contributory (Plan obligatorio de salud POS) or subsidized regimen (Plan obligatorio de salud del régimen subsidiado POSS).

These statistics show "a health system with little capacity for internal regulation, where judicial recourse has become a form of *escape valve*" (Yamin, 2010, p. 2).

From 2006 to 2008, the number of *tutelas actions* has been increasing significantly as this chart shows:

Tutela's Actions Filed 2006 - 2008								
Year	**2006**		**2007**		**2008**		**Total**	
Right	number	%	number	%	number	%	number	%
Health	96.229	37,6	107.238	37,8	142.957	41,5	346.424	39,2
Right to Petition	99.819	39,0	103.844	36,6	113.224	32,9	316.887	35,8
Life	86.320	33,7	91.251	32,2	88.621	25,7	266.192	30,1
Social Rights	68.033	26,6	57.594	20,3	77.268	22,4	202.895	22,9
Due Process	40.270	15,7	44.364	15,6	42.281	12,3	126.915	14,4

Source: Colombian Human Rights Ombudsman Office

2.7 The case of the right to health: a landmark decision

The Constitutional Colombian Court has applied the *conexity* theory to enforce social right, thus, social rights can be protected through *tutela action* when those are connected with fundamental rights, for instance, the right to health in some cases is strongly connected with the right to life, for example, when the patient's life is at risk, in this cases the right to health can be enforce by the judges.

In 2008, the Constitutional Colombian Court handed down a landmark decision (Case T-760/08). In this decision, the Court ordered a restructuring of the country's health care system. This decision came as the culmination of a wave of litigation to enforce the right to health, as we saw earlier.

The Court ordered to unify the benefits plans (POS and POSS), first for children and later for adults, in the latter case progressively and taking into account financial sustainability, as well as the epidemiological profile of the population. The Court also called upon the government to adopt deliberate measures to progressively realize universal coverage by 2010.

In addition, the Constitutional Court ordered to National Commission for Health Regulation to immediately and on an annual basis comprehensively update the benefits included in the POS and POSS through a process that includes direct and effective participation of the medical community and the users of the health system.

3. Colombian Constitutional Court in the making of economic policy

In this section of the article, we will to summarize the main arguments for and against the intervention of Colombian Constitutional Court in the making of economic policies.

First at all, the violation of the principle of separation of powers is the main argument against the intervention of Constitutional Court in the making of economic policies. According to this perspective, Constitutional Court does not have the competence to make decision about a country's economic model; this competence is exclusively of the Congress in coordination with the government (Amaya, 2001). For that reason, whenever the Court interferes in economic issues, it violates the principle of separation of powers (Clavijo, 2001)

On the other hand, in spite of not having a democratic origin as the congress or the government, the Constitutional Court exercises an essential democratic role: the defense of the minorities rights (Uprimny, 2006b, p.17). That is why, in a society democracy is necessary an impartial judge who protect the minorities against the power of the majorities.

However, some scholars think that this protective role can generate a macroeconomic disequilibrium that affects the economic growth, for example, the case of mortgage debtors (Kalmanovitz, 2003, p. 151). For that reason, the terrible economic consequences can be justify the not intervention of Constitutional Court in the making of economic policies.

According to this perspective, the economic consequences should to limit the judicial activism. Radical scholars, such as, Arango (2004, p.180) consider that the judges must to enforce the rights, even the social and economic rights, and do not pay attention about the possible economic consequences of their decisions.

In the middle of these theories, some people argue that judicial activism is convenience only if it respects the principle of separation of powers and the judges pay attention about the possible economic consequences of their decisions. For example, justice Cepeda (2004) argue that in the last years the Constitutional Court has considered the economic consequences of its decisions, for that reason, the Court has handed down conditionally sentences.

4. Conclusions

Democracy, economic equality and economic growth are important objectives in contemporary societies; however, sometimes it can be difficult to satisfy at the same time these objectives, especially, in developing countries.

With the constitutionalization of social rights, the judges face difficult dilemmas when they are deciding cases, especially cases of social and economic rights, such as the right to health. For one side, the judges have the pressure of the person who asks for protection to his fundamental rights, on the other side, judges have the pressure of people who are ready to accuse them to violate the principle of separation of powers and produce macroeconomic disequilibrium.

This problematic situation was described by Frank Michelman in the following way:

By constitutionalizing social rights, the argument often has run, you force the judiciary to a hapless choice between usurpation and abdication, from which there is no escape without embarrassment or discredit. One way, it is said, lies the judicial choice to issue positive enforcement orders in a pretentious, inexpert, probably vain but nevertheless resented attempt to reshuffle the most basic resource-management priorities of the public house-hold against prevailing political will. The other way lies the judicial choice to debase dangerously the entire currency of rights and the rule of law by openly ceding to executive and parliamentary bodies an unreviewable privilege of indefinite postponement of a declared constitutional right (p. 22).

The Constitutional Courts activism is not an exclusive Colombian issue, there are a lot of countries where the debate between about the competence, legitimacy and convenience of constitutional courts intervention in the making of economic policies has took place (Mubangizi, 2006), also, there are a variety of answers for this issue and we should to learn about that.

As a final conclusion, we believe that judicial activism is advisable only if it respects the principle of separation of powers and the judges pay attention about the possible economic consequences of their decisions. In economic issues the priorities change from time to time, and this may also require changes in the economic policies, if the Constitutional Court ties the hands of the policy-makers will make it difficult to adjust policies to meet changing conditions. It is obviously that the

Congress and the Government have been inefficient in their constitutional roles of enforce rights, such as the right to health, however, the question is: legislative and executive inefficient justify Constitutional Court activism?

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