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JUDICIAL ACTIVISM IN A VIOLENT CONTEXT:

THE ORIGIN, ROLE, AND IMPACT OF THE COLOMBIAN CONSTITUTIONAL COURT*

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The Constitutional Court, created in 1991, is the highest judicial body in Colombia. It also has the greatest responsibility of all Colombian courts. First, the Court has the responsibility of interpreting and preserving the integrity of a new, very progressive Constitution¹ in a country that currently faces a sort of Leviathan. Colombia faces a recurring nightmare, where irregular armies and terrorism defy democratic institutions,² and the

1. Some people think that the Constitution is best suited for Switzerland. Needless to say, that is not my opinion. Nevertheless, one of the first objections raised against the 1991 Constitution by those who defended the previous 1886 Constitution was that it promised too much for a country like Colombia, and that it seemed to have been conceived for a society that was living in peace. Hence these critics revisited the common phrase with which Víctor Hugo disqualified the 1863 Colombian Constitution, which also contained a generous bill of rights and followed the federal model: "it is a constitution fit for angels."

2. It seems over simplistic to state that there exists a "culture of violence" in Colombia, or that Colombia is a "violent country." See FERNANDO GAITAN DAZA & MALCOLM DEAS, DOS ENSAYOS ESPECULATIVOS SOBRE LA VIOLENCIA EN COLOMBIA (Tercer Mundo ed., 1995); INSTITUTO DE ESTUDIOS POLÍTICOS Y RELACIONES INTERNACIONALES, COLOMBIA: VIOLENCIA Y DEMOCRACIA (Gonzalo Sanchez ed., 1987); EDUARDO POSADA CARBO, REFLEXIONES SOBRE LA CULTURA POLÍTICA COLOMBIANA (2002). However, Colombia has in fact suffered the burden of different types of violence: the so-called "wars" of the nineteenth century, during which nine significant "civil wars," two international armed conflicts with Ecuador, and dozens of regional revolts took place, especially during the "Federal" period. After those involving independence from Spain, the most important internal conflicts during this Federal period were: (a) the "War of the Supremes" (1839–1841), which raised with the pretext of countering a national law that suppressed monasteries with less than eight members and committed their assets to educational purposes, but which in fact served as an excuse to join a number of local leaders (remnants of the Independence period) with substantial popular support in the south of the country against the central government; (b) the 1854 *Coup d'Etat*, led by rebel army leader José María Melo with popular support, and the corresponding reaction by supporters of the government; and (c) the so-called "Thousand Day War" (1899–1902), which was a violent

state has to bear the enormous pressure of imposing its authority and regaining control over several parts of the national territory³ through military action. Second, the Court has the responsibility of safeguarding the rights of all citizens within an unequal society, where living a dignified life seems like a luxury for much of the Colombian population, most of whom live below the poverty line.⁴ Pervasive human rights violations⁵ are

confrontation between liberal guerrillas and the ruling conservative government. Alvaro Tirado Mejia, *El Estado y la política en el Siglo XIX*, NUEVA HISTORIA DE COLOMBIA, VOL. 2 (1989). A second set of conflicts was deemed the so-called “Violence,” a period spanning roughly from 1948 to 1957, marked by extremely violent clashes between conservative and liberal factions across the country, especially in the countryside. A third set of conflicts includes the “communist insurgency,” an upsurge of emerging guerrilla movements originally initiated by a coalition of intellectuals and popular social movements, who adopted social reform slogans and aims, during the 1960s and 1970s. The movement evolved into an armed conflict with very different traits since the mid-eighties, (i) involving: clashes between the guerrilla and paramilitary armies for territorial control (strengthened by the trade in drugs, extortion and kidnappings); (ii) terrorist operations initially directed against public servants (then indiscriminately against the civilian population); (iii) a marked tendency for the conflict to expand from the countryside to the cities and other traditionally peaceful areas; (iv) fragile control of the state in several parts of the national territory; (v) powerful mini-cartels of drug traders in different areas which finance groups of mercenaries and interlink with other violent actors; (vi) and connections with the IRA, ETA, and foreign mercenary organizations.

3. Colombia occupies 1,141,748 square kilometers. Although there is disagreement as to the exact portion which is under the influence of irregular armed groups, some reports state that the FARC Guerrilla movement is present in over 450 municipalities nationwide (almost half of the total municipalities in the country). FARC Guerrilla is organized into more than sixty rural commandos and several urban ones. In comparison, the ELN Guerrilla movement is organized into five large groups across the country, each one consisting of forty-five local commandos. See the different assessments published on the Ministry of Defense website at <http://www.mindefensa.gov.co> (last visited Mar. 1, 2004). In order to strengthen state control across the national territory, different governments have resorted to social programs and military action. The military budget has rapidly risen during the 1990s. In 1994, public investments in defense and security amounted to 0.16% of the GNP. In 2002 this figure rose to 0.37% and peaked at 0.6% of the GNP in 1997. Departamento Nacional de Planeación (Colombian National Planning Department), at <http://www.dnp.gov.co> (last visited Feb. 18, 2004). At the same time, “social” investment with public funds has decreased during the same period from 2.31% of the GNP in 1994 to 1.69% in 2002. *Id.*

4. According to the “Colombia Poverty Report,” published in 2002 by the World Bank, the number of Colombians living under the poverty line (national poverty rate) decreased from 80% in 1978 to 60% in 1995; the extreme poverty rate decreased from 45% to 21% during the same period. However, from 1995 to 1999 the poverty rate increased to 64%, while the extreme poverty rate rose to 23%. Other social indicators are also illustrative of the country’s current situation. MARCELO GIUGALE ET AL., COLOMBIA—THE ECONOMIC FOUNDATION OF PEACE 92 (World Bank, 2002). Illiteracy rates for members of the population, who are twelve years and older decreased, from 5.3% in 1978 to 2.6% in 1999, while child labor from ages twelve to sixteen diminished from 12% in 1978 to 9.5% in 1999. *Id.* According to the calculations of the National Program for Human Development, which are based on the surveys conducted by the National Administrative Department of Statistics, the national illiteracy rate in 2001 was 7.5%, which marked a slight evolution from the 10.8% rate in 1990. PNUD, Departamento Nacional de Planeación, *Agencia Colombiana de Cooperación Internacional Y Programa Nacional de Desarrollo Humano 10 años de desarrollo humano en Colombia* 15, 21 (2003), <http://www.pnud.org.co> (last visited Feb. 18, 2004). The evolution of access to public utilities is also significant. In 1988, 99% of households had access to electricity, 97% to water, 62% to telephone, and 94% to sewage facilities. In 1999, 99% of all households had access to electricity, 99%

increasingly eroding a stable democratic tradition that dates back to the nineteenth century. Third, the Court has the responsibility of keeping the promise of what was envisioned in the adoption of the new Constitution alive. It was seen as a nonviolent revolution towards peace, equality, and participation for all, because it was enacted among pervading political patronage, frequent corruption scandals,⁶ the worst economic recession since the nineteen thirties,⁷ and ceaseless criminal drug trafficking activity.⁸ Mainstream media may make Colombians believe that nothing

to water, 84% to telephone, and 97% to sewage facilities. *Id.* at 23. Although most of the growth in coverage of public utilities resulted from its expansion to lesser covered cities, the World Bank report states that “the missing percentages mask thousands of individuals, concentrated in regional pockets of poverty, where these basic needs are not yet met.” *Id.*

5. Violence rates in Colombia are among the highest in the world. According to the National Institute for Legal Medicine and Forensic Science (Instituto Nacional de Medicina Legal y Ciencias Forenses), a total of 26,311 people were murdered in Colombian territory in 2001, and 241,681 people were wounded. Colombia thus “has the highest homicide rate in the world.” GIUGALE, *supra* note 4, at 96. According to the National Council for the Fight Against Kidnapping, in 2001 a total of 3,041 people were kidnapped in Colombia, and between 1996 and 2001, this number increased threefold. Even though this kidnapping rate diminished during the 1990s, the incidence of other crimes, such as extortion, armed robbery, kidnappings, and car theft substantially increased during the same period. The National Foundation for the Defense of Personal Liberty of the Department of Defense, FONDELIBERTAD, <http://www.antisecuestro.gov/principal.htm> (last visited Dec. 30, 2003). The overwhelming majority of victims are non-combatant civilians. *Id.*

6. Serious public corruption scandals are frequent in Colombia. The most recent such scandals have emerged in the public banking sector (e.g., Banco del Estado, Caja Agraria), the social housing financing entity (e.g., INURBE), the ports sector (e.g., Foncolpuertos, Dragacol), and Congress (e.g., illegal contracts executed by the Chamber of Representatives).

7. Carlos Eduardo Velez et al., *Shared Growth, Poverty, and Inequality, in COLOMBIA: THE ECONOMIC FOUNDATION OF PEACE* 84 (Marcelo Giugale et al. eds., 2002).

Since 1997, after two decades of positive and sustained growth, economic activity in Colombia plummeted to the point of reaching negative figures in 1999. Until the early 1990s, prudent management of the Colombian economy allowed for low government debt levels that, together with low inflation rates by Latin American standards, led to steady—although moderate—growth rates. However, public spending rose from 24 to 36 percent of GDP between 1990 and 1998. Fiscal imbalances helped push Colombia toward a slowdown after 1996, and into recession in fiscal year 1998–1999. The fiscal position continued to deteriorate as the economic slowdown adversely affected tax revenues.

Id. As a consequence, the poverty reduction trend was reversed, and the national poverty rate rose to 64% in 1999, returning to pre-1988 levels. *Id.* Historical rates of unemployment doubled, and several key human development indicators have been affected, with a particular impact upon “young children, adolescents and the internally displaced population.” *Id.* at 95.

8. According to the figures published by the National Directorate for Drugs (*Dirección Nacional de Estupefacientes*), coca crops in Colombia occupied 45,000 acres in 1994 and 102,071 acres in 2002, with a peak of 163,289 acres in 2000. This figure places Colombia far ahead of the other major Andean coca producers, Perú (46,700 acres in 2002) and Bolivia (24,400 acres in 2002). *Dirección Nacional de Estupefacientes* (National Directorate for Drugs), <http://www.dne.gov.co> (last visited Dec. 12, 2003). It is well-known that the illegal armed groups that operate within Colombian territory, in their areas of influence, have recently gained significant control of the trade in drugs to finance their violent activities and gain commercial revenues. *Id.* Nevertheless, independent drug cartels also operate in different parts of the country. *Id.* Most of the drugs produced and processed in

has really changed, and that some of the inspiring dreams of the framers in the 1991 Constituent Assembly have faded away over the last decade.

One may then pose a number of difficult questions, which are the same questions borne by delegates to the 1991 Constituent Assembly while discussing the creation of a Constitutional Court. How can a judicial body defend the rule of law in a land haunted by the empire of force and arbitrariness? Is it really the Court's job to respond to deeply rooted economic and social inequalities, or should that task be left to the democratically-elected branches of government? Should the Court bear the burden of keeping the torch alive, which lit the way towards Colombia's future over a decade ago? If the answer to these questions is, in part, yes, then what kind of Court does Colombia need? Why not maintain constitutional judicial review by the traditional Supreme Court, which had this power for almost one hundred years?

These queries remain largely unanswered, because they remain at the heart of public controversy and debate in Colombia. Only one decade has elapsed since the promulgation of the new Constitution and the creation of the Constitutional Court. While this Tribunal has played a historically unprecedented role in Colombia, its very existence—not to mention the types of decisions it adopts, or their broad-spanning influence over everyday life⁹—is still far from being unanimously accepted by some authorities and private powers. At the same time, however, the Court has positioned itself as an increasingly legitimate forum that responds to some of the most complex problems that affect Colombian society and institutions. Its doctrines on fundamental rights have visibly permeated social practice and discourse at unanticipated levels. Moreover, in recent times, social and political actors have gradually deferred to the court for the resolution of their most difficult questions. It is not unusual to see hundreds of people marching and waving banners in front of the Palace of Justice, expressing their support or opposition to a given cause before the Court.

Consequently, in order to visualize the Court's position within the new Colombian constitutional order, it is useful to take into account the circumstances that surrounded its creation and the definition of its powers, the different constitutional doctrines and landmark judgments it produced,

Colombia are consumed abroad, but internal consumption has been gradually increasing. *Id.*

9. Given the high social, political, and economic impact of the Court's judgments and their frequent controversial effects, private organizations and even public officials occasionally launch proposals for restructuring the Court and its powers, merging it with the Supreme Court of Justice, or even suppressing the Court and reinstating the system of constitutional judicial review that existed before 1991. *See infra* Part IV ("Guarding the Guardians").

and the impact of its decisions on law and politics in Colombia. I will explore each of these subjects separately. From the outset, I would like to clarify that my intention in this overview is to describe generally the origins and impact of the Constitutional Court and its main decisions. I will also provide a general overview of its role within the Colombian system—a comprehensive assessment that has not been fully carried out to date and that obviously requires much more space and time than is available for this specific presentation.¹⁰

On a basic level, one might say that the creation of the Colombian Constitutional Court within the system of separation of powers and checks and balances introduced by the 1991 Constitution has infused the Colombian legal system with an entirely new outlook and perspective. Through its case law, the Court has contributed to the gradual abandonment of the formalist legal approach, which disregarded the importance of preserving constitutional mandates in real-life situations. In that sense, a substantial number of decisions in the field of fundamental rights, within which the Court has adopted a radically innovative approach, have been consolidated. Through its continuous interpretation and application of constitutional principles, the Court has substantially altered imbalances of power in the Colombian social, political, and economic spheres. In the protective spirit of the Constitution, the Court's decisions are highly sensitive to social inequalities and to the needs of the vulnerable, weak, and marginalized. Still, the Court's decisions are not full of sentimental populism, as some critics say.¹¹ Moreover, the Court has become a forum where the most difficult, pressing, complex, and sensitive national problems have found increasingly legitimate responses. In equally important terms, the Constitutional Court has played a remarkably salient role in the construction of the rule of law; for the same reasons, it may be said that the Court has become an important actor in the collective process of maintaining open institutional channels for the peaceful resolution of social conflicts. It is my hope that the following account of the origins,

10. This paper draws on a number of other books and essays I have published on the same topic. MANUEL JOSÉ CEPEDA-ESPINOSA, *LA CARTA DE DERECHOS: SU INTERPRETACIÓN Y SUS IMPLICACIONES* (1993); MANUEL JOSÉ CEPEDA-ESPINOSA, *INTRODUCCIÓN A LA CONSTITUCIÓN DE 1991* (1993); MANUEL JOSÉ CEPEDA-ESPINOSA, *THE WRIT OF PROTECTION FOR HUMAN RIGHTS—POWER FOR THE COMMON MAN IN COLOMBIA* (1993); MANUEL JOSÉ CEPEDA-ESPINOSA, *LOS DERECHOS FUNDAMENTALES EN LA CONSTITUCIÓN DE 1991* (1997).

11. In regards to some of its economic judgments, the Court has actually been accused of populism by some analysts. For a complete review of the debate raised by these matters, see Facultad de Derecho, Universidad de los Andes, *Justicia Constitucional y Política Económica*, REVISTA DE DERECHO PÚBLICO No. 12 (2001); see also *infra* Part II.B.3.

role, and impact of the Colombian Constitutional Court will give some credit to these affirmations.

I. THE MAKING OF THE CONSTITUTIONAL COURT

The Court came to life as a result of the 1991 constitutional reform process, and it was entrusted with the task of preserving the integrity and supremacy of the new Constitution. The establishment of a constitutional system of judicial review was not, however, new to the Colombian legal system. Colombia's first national constitutions had envisioned this type of control since the early decades of the nineteenth century, and the integrity of the pre-existing 1886 Constitution was officially preserved by a high judicial body: the Supreme Court of Justice. The real innovations, which I will explain in detail below, were: (i) the creation of a specialized tribunal at the head of a new "constitutional jurisdiction" to which all Colombian judges belong;¹² (ii) the application of constitutional judicial review to concrete situations through the writ of protection of fundamental rights (*acción de tutela*); (iii) the expansion of abstract review of laws, whether *ex officio* or through *actio popularis*; and (iv) the adoption of a means to contextualize decisions adopted in abstract review. In order to portray the significance and extent of these transformations, I will discuss the main traits of the pre-existing system of constitutional judicial review and highlight the basic reasons that prompted its reform.

A. *The Constitutional System of Judicial Review in the 1886 Constitution*

The Supreme Court of Justice, as the guardian of the 1886 Constitution, had the power to strike down national laws and particular types of presidential decrees, which were found to be contrary to the constitution. However, internal disadvantages of the system, such as the justices' election scheme, the imprecise definition of the Supreme Court's

12. The Colombian Judiciary had traditionally been divided into "jurisdictions," specialized segments of the overall judicial branch, which are hierarchically placed under one of the two so-called "high courts": the Supreme Court of Justice (which is the head of the "ordinary" jurisdiction, encompassing civil, criminal, and labor judges), and the Council of State (which is at the top of the "administrative" jurisdiction, in charge of adjudicating conflicts derived from the exercise of public administrative powers). The 1991 Constitution created a new "constitutional" jurisdiction, which is headed by the Constitutional Court, and encompasses every judge in the nation, when they decide *tutela* cases, including those before the Supreme Court of Justice and the Council of State. Other "jurisdictions" in Colombia include the special military criminal jurisdiction, the indigenous jurisdiction, and "judges of peace" (private citizens granted specific judicial powers by the Constitution and the law in minor cases).

functions, and the Court's frequent jurisdictional clashes with other public authorities, together with external factors, such as the Constitution's dim appeal to citizens' ordinary lives, the Supreme Court's controversial decisions striking down two constitutional reforms, several "emergency powers" decrees,¹³ and the scarce level of protection it granted to fundamental rights, eventually weakened support for this constitutional scheme of judicial review. These factors cumulatively triggered renovation. The situation was further enhanced by the very formalistic prevailing approach to legal issues. This in turn created a deep gap between the Constitution and social realities and needs. It was this gap that undermined the legitimacy of the whole system.

1. *The Origins and Features of the 1886 Scheme*

The origins of the Colombian constitutional system of judicial review may be traced back to the 1886 Constitution. This Constitution granted the President of the Republic veto power over bills passed by Congress that he considered incompatible with the constitutional text. If Congress overrode the veto, the Supreme Court of Justice was called on to resolve the conflict and decide the constitutionality of the objectionable bill.¹⁴

This scheme was significantly broadened by Legislative Act No. 3 of 1910, which introduced two things. First, it introduced a publicly accessible system of abstract national law review. This review can occur through a public unconstitutionality action (*actio popularis*) by which every citizen could file, in defense of the public interest, an unconstitutionality lawsuit against any national law before the Supreme Court. So far as I know, this review is the first one of its kind in the world to be effective at the national level. The Supreme Court decisions had *erga omnes* effects.¹⁵ Second, it introduced an "unconstitutionality exception" by which any judge or public official could decide not to apply laws found to be unconstitutional in specific cases.¹⁶ The decision adopted by the

13. See *supra* note 8; *infra* Part II.B.2.a.

14. CONSTITUCION POLITICA DE COLOMBIA DE 1886 (THE 1886 CONSTITUTION OF COLOMBIA), art. 90 (1886).

15. In 1904, a law created the unconstitutionality *actio popularis* action. Ley 2 de 1904 (Law 2 of 1904). However, this action could only be directed against presidential decrees issued under state of siege powers. Nevertheless, the origins of *actio popularis* can be traced back to the first constitutions of Colombia and Venezuela. See A.R. BREWER-CARIAS, JUDICIAL REVIEW IN COMPARATIVE LAW 279 (1989); see generally CARLOS RESTREPO PIEDRAHITA, CONSTITUCIONES POLÍTICAS NACIONALES DE COLOMBIA (1995).

16. The debate on the unconstitutionality exception had already emerged in Colombian legal circles in the nineteenth century. In 1887, a national law indirectly banned the application of

Court in regards to such seldom invoked “unconstitutionality exceptions” only had *inter partes* effects, so the relevant regulations could still be applied to other situations. After the 1968 amendment, the previous Constitution also permitted *ex officio* review by the Supreme Court over legislative decrees issued by the President of the Republic in the exercise of his exceptional powers during a state of siege or economic emergency.¹⁷

Therefore, the basic functions of the Supreme Court in its role as “guardian of the integrity of the Constitution” were to review bills vetoed as unconstitutional by the President, to carry out *ex officio* review of the legislative decrees issued by the Government in application of state of siege or economic emergency powers, and to examine *actio popularis* presented by citizens against any laws or presidential decrees issued in exercise of expressly delegated legislation powers (*decreto con fuerza de ley*). In addition, the Supreme Court expanded the scope of its own constitutional review functions through a number of landmark decisions. The Supreme Court asserted its jurisdiction in the form of *actio popularis* against constitutional amendments passed by Congress¹⁸ and laws that approved international treaties, which would be reviewed only for defects in the formation procedure.¹⁹

The previous scheme also granted the Council of State²⁰ constitutional judicial review functions, most notably in regards to *actio popularis* filed against administrative acts, and indemnity claims filed by victims of state abuse.²¹

unconstitutionality exceptions and stated that legal provisions issued after the 1886 Constitution would be presumed constitutional and should be applied even if they appeared to be in contradiction with the Constitution. Ley 153 de 1887 (Law 153 of 1887), art. 6. This provision was introduced in order to modify a previous law, Law 57, which had stated that in cases of conflict between the Constitution and a law, the former should prevail. Ley 57 de 1887 (Law 57 of 1887), art. 5.

17. “States of Siege” (introduced in 1886) and “States of Economic and Social Emergency” (introduced in 1968) are currently referred to as “States of Exception” in which the President was temporarily granted extraordinary legislative powers, and enhanced attributions, in order to cope with specific circumstances for which ordinary presidential functions were insufficient. *See infra* Part II.

18. Decision of May 5, 1978 (text on file with author).

19. Decision of November 3, 1981 (text on file with author).

20. Under the 1886 regime, the Council of State was the highest administrative tribunal in Colombia; together with the Supreme Court of Justice, which was the hierarchical superior of every civil, criminal, and labor judge in the country. After the 1991 constitutional reform, the Constitutional Court and the Supreme Council of the Judiciary (*Consejo Superior de la Judicatura*) have now come to share this privileged position. *See supra* note 3. A constitutional amendment to abolish the Supreme Council of the Judiciary, which is composed of two Chambers (a disciplinary one, with jurisdiction over judges and lawyers, and an administrative one, concerned with the organization and management of the whole judicial branch), is pending approval by Congress at the time of this writing.

21. The Council of State could also study the “illegality exceptions” rarely applied by judges or public officials to administrative acts that were deemed incompatible with laws in concrete cases and could apply an unconstitutionality exception to laws or administrative acts.

2. *Advantages and Disadvantages of the System*

This system had a number of positive traits, including strong foundations of the Supreme Court's century-old tradition, broad scope, and easy access for citizens to constitutional judicial review through *actio popularis*.

In spite of these benefits, the scheme had an equally significant number of disadvantages, which gradually accumulated and prompted its transformation. These disadvantages included: (i) the unrepresentative election system; (ii) previous Constitution's lack of appeal to citizens' everyday lives and needs, despite amendments in 1936, 1945, and 1968; (iii) the absence of a responsive fundamental rights protection system; (iv) the imprecise definition of the scope of the Court's functions, which created frequent conflicts with other authorities; and (v) the lack of mechanisms to harmonize the sometimes contradictory pronouncements of the Supreme Court and the Council of State.

The first disadvantage was that the manner in which Supreme Court justices were elected was not democratic, which eventually eroded the legitimacy of their decisions. The Court nominated its own new members²² and required respect for political parity between the two traditional liberal and conservative political parties. This scheme seriously hampered the Court's representativity, because while democratically elected bodies have no control over their composition, only lawyers affiliated with one of the two traditional parties could be appointed as justices. The tribunal's consequent loss of legitimacy became evident in a series of controversial decisions that prompted proposals to change the whole system of judicial review. For example, the Supreme Court struck down the constitutional reforms promoted by Presidents Alfonso López Michelsen²³ and Julio César Turbay.²⁴ It also struck down the tax reform adopted by president Belisario Betancur based on his economic emergency powers.²⁵ In contrast, the Court upheld the contentious state of siege "Security Decree" (*Estatuto de Seguridad*) issued by president Julio César Turbay,²⁶ which heavily restricted human rights. It also upheld a

22. This so-called "co-option" (*cooptación*) system was designed in 1957 to preserve the independence of the highest level judiciary.

23. Decision of May 5, 1978 (amendment authorizing the summoning of a Constituent Assembly) (text on file with author).

24. Decision of November 3, 1981 (amendment dealing mainly with the legislative and judicial branches) (text on file with author).

25. Decision of February 23, 1982 (text on file with author).

26. Decision of October 30, 1978 (text on file with author).

controversial law limiting foreign investment in the financial sector (the so-called “nationalization of banking” law).²⁷

A second disadvantage of this system was the Colombian people’s reluctance to defend the integrity of the 1886 Constitution, because of the weak link between its text and ordinary citizens’ lives. Therefore, although the *actio popularis* was public in theory, strong economic and other powerful pressure groups made use of it in practice, proving that the publicly available legal channel originally devised to defend the public interest had become an instrument for the promotion of cleverly disguised private interests.²⁸

Third, the system as a whole granted very poor human rights protection. It was simply unresponsive to the evolving nature of fundamental rights claims. Although the Supreme Court of Justice and the Council of State touched upon the topic in a number of decisions, they rarely analyzed the actual content or admissibility of restrictive measures placed under their review, not even those adopted under states of siege. Consequently, measures that today would be deemed unacceptable, met with significant and surprising judicial tolerance.²⁹ But perhaps the most serious failure of the system in this regard was the absence of adequate, accessible mechanisms to secure the direct protection of human rights in concrete, everyday situations. The very idea of immediately enforceable fundamental rights was unknown to the system of constitutional law, and consequently to the Supreme Court’s case law.³⁰

Fourth, the lack of clarity and precision in the definition and delimitation of the judicial review functions assigned to the Supreme Court. This lack of clarity led to serious inter-institutional conflicts, when the Supreme Court’s decisions were seen as intruding upon the functions of other branches of government. This occurred in a number of particularly sensitive cases, such as when the Court asserted its jurisdiction to decide formal claims filed against constitutional amendments, which led to the aforementioned declaration of unconstitutionality of two constitutional reforms. A second conflict occurred when the Court asserted its

27. Decision of June 16, 1976 (text on file with author).

28. *Actio popularis* was also used by law students to carry out academic assignments for their Constitutional Law courses or legal clinic practice in public law.

29. This happened, for example, with the repression of a trade union protest through exceptional Presidential powers. See Decision of October 30, 1978; Decision of December 1, 1986 (text on file with author).

30. For a balance of the decisions of the Supreme Court of Justice concerning fundamental rights, highlighting the importance of the bill of rights and the *acción de tutela* introduced in 1991, see LOS DERECHOS FUNDAMENTALES EN LA CONSTITUCIÓN DE 1991, *supra* note 10.

jurisdiction over laws that approved international treaties. A decision of this kind rendered the application of the Colombia-United States Extradition Treaty³¹ impossible, leading to serious consequences for Colombian foreign relations. Moreover, the decision significantly lessened the effectiveness of measures to fight international organized crime. These Court decisions were widely regarded as undue intrusions into the Congressional power to reform the Constitution and into Presidential authority to direct foreign relations.

Finally, the system did not possess mechanisms to harmonize relevant case law. This situation often created unsolvable contradictions between the Supreme Court and the Council of State, which adopted opposite decisions in essentially identical cases. This happened, for example, with regard to the extradition procedures that were envisioned by the Supreme Court as administrative in nature, and, therefore, as procedures under the jurisdiction of the Executive branch. The Council of State, however, understood them as having a judicial component that required a preliminary opinion of the Supreme Court.³² In the same way, the possibility of holding a referendum to modify the Constitution was accepted *obiter dicta* by the Supreme Court in several decisions, but rejected by the Council of State in the *ratio decidendi* of a decision that stopped the initial stages of a referendum in 1988.³³

In the end, these disadvantages proved that the Colombian system of constitutional judicial review required serious adjustments, and when the reform project was announced, very few voices actually defended it.³⁴ The leaders of the two main political parties felt that the existing system had gone out of bounds. Progressive sectors, such as human rights NGOs and labor movements, felt that the Supreme Court had been too lenient towards Executive abuses of State of Siege powers. Citizens, however, remained indifferent to technical debates about constitutional topics, which seemed irrelevant to their ordinary lives.

31. Decision of December 12, 1986 (text on file with author).

32. After the Colombia-U.S. extradition treaty was struck down and presidential candidate Luis Carlos Galán was murdered, President Virgilio Barco issued a State of Siege decree authorizing extradition through administrative procedures. *See generally* VIRGILIO BARCO, UNA NUEVA CONCEPCIÓN DEL ORDEN PÚBLICO (1990).

33. In 1988, the Council of State declared unconstitutional of a political agreement signed by President Barco and opposition leader Misael Pastrana, which outlined the steps to summon a referendum to reform the Constitution. For details on the manner in which this decision helped create the context to summon the 1991 Constituent Assembly, see MANUEL JOSÉ CEPEDA, INTRODUCCIÓN A LA CONSTITUCIÓN DE 1991 (1993).

34. The members of the Supreme Court, of course, opposed it, using arguments that focused on the institution's past performance in its task of safeguarding the agonizing 1886 Constitution.

3. *The Prevailing Interpretative Approach and the Erosion of the Supreme Court's Legitimacy*

A final factor that contributed to undermining the legitimacy and effectiveness of the system was the organic-formalist interpretative approach. The Supreme Court often adopted this approach, and the approach helped broaden the gap between constitutional law and everyday socio-political life.

This situation was perhaps most evident in the field of fundamental rights. Although the Supreme Court of Justice issued several judgments on the matter,³⁵ the Supreme Court focused predominantly on questions such as the jurisdiction of the official who had issued the decision or the procedure by which it was adopted, as opposed to the substantive aspects of the problems at hand. The Supreme Court's formal approach to the protection and interpretation of fundamental rights gave rise to decisions such as its 1978 judgment declaring the constitutionality of a very controversial state of siege decree.³⁶ The decree stated that any criminal act committed by a member of the armed forces would be justified if it took place during previously planned operations launched to prevent or repress activities related to kidnapping and drug trafficking. Several justices expressed concern that this vague, exonerating provision was tantamount to a *de facto* authorization of the death penalty, but the majority of the Court did not support this thesis. The majority argued that the death penalty was strictly defined as "a legal figure by which, after regular procedures, the State imposes loss of life as a punishment for given crimes." From this extremely formalist perspective, deaths caused by the armed forces under the foreseen circumstances did not fit the legal definition of the death penalty. Thus, the substantive approach was again rejected and the decree upheld. Other examples of this same sort of formalistic reasoning are the Court's 1982 judgments that declared constitutional a number of provisions prohibiting judges, notaries, and public officials from being homosexuals, living in unmarried couples, or engaging in "socially unfit behaviour."³⁷

35. Some of the most notorious Supreme Court pronouncements in the field of fundamental rights include the Decision of March 13, 1937 (upholding the law that granted masonic societies the right to acquire legal personality, even though they contradicted Catholic morals) (text on file with author).

36. Decision of March 9, 1978 (text on file with author).

37. Decision of June 1, 1982, Ricardo Medina, J.; Decision of August 12, 1982, Manuel Gaona Cruz, J.; Decision of July 22, 1982, Ricardo Medina, J. (text on file with author).

The main consequence of this organic-formalist approach was a substantial increase in the distance separating the Constitution from society. Pre-1991 constitutional doctrine can hardly ever be read as a response to the challenges posed to the legal system by the harsh and complex Colombian realities. Without disregarding the quality of the judgments, constitutionality decisions issued by the Supreme Court before 1991 were not felt by everyday citizens, political actors, or social organizations to represent a dialogue between the Constitution and the needs and expectations of the time. Many lawyers regarded this phenomenon as a virtue, in terms of autonomy of the law and isolation of the judiciary from contingent issues, public opinion, and majority trends. However, this lack of “dialogue” between the Constitution and reality, the privileged forum of which is the body in charge of constitutional judicial review, eventually gave rise to negative reactions. Many social actors reacted negatively because they felt that they did not fit into the Constitution or that the Constitution was indifferent to their legitimate claims for justice and political change. These social actors saw some of the Supreme Court’s decisions as barriers to the changes they were sponsoring.

These problems became more severe during the eighties. The first two governments of this decade publicly expressed their dissatisfaction with some sudden changes in the Supreme Court’s doctrine. Regarding the states of exception, the Supreme Court’s doctrine became much more restrictive than the traditional line. This change occurred despite the upsurge in the country’s violence, which was fueled by narco-terrorism and a deep economic crisis. One exemplary case was the declaration of unconstitutionality of the tax reform adopted by President Betancourt during a state of economic emergency (yet during President López Michelsen’s government, the Court upheld a tax reform adopted under identical economic emergency decrees). In a second case the Supreme Court struck down the state of siege decrees issued by President Barco to respond to narco-terrorism and to speed up social investment in the poorest areas of the country where guerrilla influence was growing. This decision led the President to appear on television and ask the Court to consider the real context within which the government’s decisions were adopted.

The proposal to create a Constitutional Court that would safeguard the integrity and supremacy of the Constitution gained more strength after these Supreme Court decisions. However, the real reasons that led the Constituent Assembly to create an independent, specialized constitutional

tribunal were not so much related to past controversies as to future needs and hopes.³⁸

B. The 1991 Modification of Constitutional Judicial Review

Let us go back to 1991.³⁹ A Constituent Assembly, summoned in 1990 through democratic elections under the leadership of President César Gaviria, repealed the 1886 Constitution and adopted a new constitution. The new Constitution was adopted after a thorough process of public debate, by far the most inclusive in the country's recent history; even active guerrilla groups took part in the discussions.⁴⁰ The 1991

38. One can appraise the constitutional system of judicial review that operated before 1991 from a different perspective. In spite of the deep and accelerated transformation of constitutional law in the United States and several European democracies during the second half of the twentieth century, Colombian constitutional case law seemed to lag behind, ignoring the advances achieved in these countries. The great issues of post-war constitutional law were not embodied in Colombian judicial or scholarly thought behind the 1886 Constitution. Among the broad array of eloquent silences and omissions, those that refer to the interpretation of rights, particularly the principles of equality, freedom of expression, and privacy, are noteworthy. This may be due in part to the fact that under the former Constitution, a very close cooperation among the different branches of public power probably inhibited the development of strong case-law tendencies in this field. But there are two additional factors. The first factor relates to the Latin American context. The impact of the opposition between capitalism and communism on the subcontinent, the cold war and the doctrines and policies that followed it in the western hemisphere, resulted in a generalized misrepresentation and sub-valuation of the issue of rights, placing them on the left side of the ideological spectrum. Armed conflict increased this noxious effect of the Cold War in Colombia, although the country did not give in to military authoritarianism, as many nearby states did. With the Constituent Assembly, rights became a subject of national consensus, and their effective protection a matter of general, not ideological interest. The second factor regards the prevailing influence of the French school of legal thought. Although there is no doubt that French legal culture has inspired key Colombian institutions and prompted important advances in our legal system, French constitutional law lost global prominence after the 1960s. German and Italian constitutional law, first, and then Spanish constitutional law, after the fall of Franco and the installation of the Constitutional Tribunal, replaced French law influence in several key areas. Although French constitutional scholars, such as Louis Favoreu and Olivier Duhamel, among others, noticed what was happening and promoted radical progress and comparative analysis, they were not as well known in Colombia as their administrative law colleagues, so their influence only began to be felt after 1991. See MANUEL JOSÉ CEPEDA-ESPINOSA, *DERECHO CONSTITUCIONAL JURISPRUDENCIAL* (2001).

39. A very complex socio-political process evolved between the original proposal of a plebiscite to approve the creation of a Constituent Assembly. It was launched by President Virgilio Barco in January 1988, and the proclamation of the new Constitution on July 4, 1991 under President César Gaviria's leadership. A generalized feeling of national compromise, reconstruction, and modernization was reflected in this new Constitution, which came to life as the result of the overall consensus reached by the seventy-two individual members of the Constituent Assembly. The Assembly represented all active political forces, four guerrilla groups, and most social sectors, including indigenous peoples.

40. Based on a popular mandate, the constitutional reform process began with a twofold purpose: (i) to promote participatory democracy or the empowerment of citizens for direct and effective involvement in the public and private decision-making processes, and (ii) to strengthen state institutions, especially the judiciary. The opening of strong participation channels for citizens, together

Constitution came to life as the symbol of a peaceful rebellion, held within institutional channels and against arbitrariness, exclusion, and abuses of power. Moreover, the new Constitution became a new, inspiring horizon in Colombia's uphill battle for peace and equality in society.

A series of innovative mechanisms and institutions were introduced in order to guarantee that the new Constitution, particularly its generous bill of rights, would transcend mere words and become a social reality. This constitutional enforcement system was to be composed of new bodies, new procedures, and new criteria to guide constitutional interpretation. New public entities were created, with the specific functions of safeguarding the integrity and supremacy of the Constitution (e.g., the Constitutional Court),⁴¹ and promoting and protecting fundamental rights, such as the public ombudsman (*Defensoría del Pueblo*).⁴² New procedures were introduced to safeguard different types of rights and interests protected by the Constitution, including those designed to protect fundamental rights (*acción de tutela*),⁴³ to order administrative authorities to fulfil their legal mandates in specific situations (*acción de cumplimiento*),⁴⁴ to protect collective rights (*acción popular*),⁴⁵ and to secure the rights of specific social groups (*acción de grupo*),⁴⁶ which is similar to class actions in the United States). In addition, the Constitution left the door open for Congress to create any other mechanisms and procedures deemed appropriate to safeguard constitutionally protected rights.⁴⁷

New criteria were established to guide the interpretation of the Constitution. These criteria were not initially adopted by the Constituent

with the need to sustain the legitimacy of public institutions through a change in the traditional understanding of representative democracy, constituted the major arguments in favor of reinforcing democratic participation by reforming the Constitution. Within large segments of the Colombian population, the promotion of participatory democracy appealed to growing rejection and distrust of the prevailing political customs, patronage, and patterns of privilege and corruption. Moreover, the ideal of participatory democracy materialized before the public opinion in the very same Constituent Assembly's creation process, thus exemplifying the feasibility of true participation, and prompting its incorporation, as a value, a principle, and a right, into the new constitutional text. From this standpoint, the entire Constitution may be viewed as a tool to promote democratic participation in public and private affairs.

41. CONSTITUCIÓN POLITICA DE COLOMBIA DE 1991 [THE 1991 CONSTITUTION OF COLOMBIA], Title VIII, Ch. 4 [hereinafter COLOMBIAN CONST.].

42. COLOMBIAN CONST. arts. 281–283.

43. COLOMBIAN CONST. art. 86.

44. COLOMBIAN CONST. art. 87.

45. COLOMBIAN CONST. art. 88.

46. *Id.*

47. COLOMBIAN CONST. art. 89.

Assembly,⁴⁸ and therefore not included in the Constitution's text, but were later developed and applied by the Constitutional Court. These criteria include reasonability, proportionality, protection of the "essential nucleus" of constitutional rights, and direct application of fundamental constitutional rights even in the absence of legal regulations. Mandatory reference to international treaties when interpreting fundamental rights was included in Article 93 of the Constitution.

Among these innovations, the creation of the Constitutional Court was an especially thorny issue that caused considerable debate among Constituent Assembly delegates. The actual proposal did not initially raise very much enthusiasm, because the Supreme Court had recently upheld the creation and election of the Constituent Assembly. However, the proposal eventually garnered enough support to build the necessary majority. The 1991 reform introduced other types of modifications to the constitutional system of judicial review, including a significant expansion of its scope and instruments and substantial changes in the constitutional judge's functions and powers. The prevailing spirit of national transformation nurtured the new system of judicial review with unprecedented vigour.

1. The Debate Over the Creation of the Constitutional Court Within the Constituent Assembly

The transformation of the constitutional system of judicial review gave rise to lengthy discussions within the Constituent Assembly. The first and perhaps most divisive topic was the need to create a Constitutional Court. Although this idea was not new to Colombian academic debates, none of the main political forces represented in the Constituent Assembly proposed that the Supreme Court lose the power of judicial review to a specialized Constitutional Court. The proposal was included in the Constitution project presented by President Gaviria's government to the Assembly.⁴⁹ The President actively supported the Constitutional Court's

48. The new Constitution proposal presented by President Gaviria to the Constituent Assembly included some of those criteria. *See* Proyecto de Acto Reformatorio de la Constitución Política (Presidencia de la República, 1991). Nevertheless, two criteria suggested by the Government were expressly included in the Constitution: direct and immediate application of certain rights (although the list finally adopted in the Assembly is incomplete and anti-technical), and proportionality in the context of states of exception. COLOMBIAN CONST. arts. 85, 214.

49. Within President Gaviria's Government, there were also serious internal disagreements on whether the proposal to the Constituent Assembly should include a Constitutional Court, or whether it would be preferable to maintain judicial review powers in the hands of the Supreme Court of Justice. This divergence, the most intense internal one, was finally resolved by President Gaviria in favor of

creation for practical considerations, such as the Supreme Court's material inability to deal with the upcoming increase in its workload as arbiter of the Constitution. The Supreme Court would now be responsible for reviewing all judicial decisions enforcing fundamental rights. The President also recognized the need to entrust a new court with the mission of preserving the innovative spirit of the new Constitution. Although this proposal met with opposition from conservative quarters, it was eventually accepted by a short margin, and the new constitutional tribunal was created.⁵⁰

The idea of setting up a court with the delicate and critical mission of safeguarding the integrity and supremacy of the Constitution had surfaced several times in the course of the previous four decades.⁵¹ Nevertheless, since the 1950s, these occasional proposals were simply presented as solutions to specific excesses or deficiencies in the Supreme Court's work. The proposals did not raise much public controversy and quickly faded away. Despite this background, none of the political parties or groups represented in the Constituent Assembly proposed establishing a constitutional tribunal, except for President Gaviria's government.

This fact may be explained in several ways. First, as a consequence of the century-old tradition of constitutional judicial review in the hands of the Supreme Court of Justice, the proposal to create a Constitutional Court never really raised broad or sustained support among scholars and politicians. In that sense, the evident failures in the existing system of constitutional judicial review were visualized as specific problems that could be easily resolved through focused, isolated reforms for each individual issue. Second, nostalgic and proud fondness for tradition prevented anyone from daring to imagine a completely new system. Third, the political situation of the groups that favored major constitutional

the creation of a Constitutional Court, against the position of his Minister of Justice, who was a former Supreme Court Justice.

50. For a comparison of some easy and difficult votings within the Constituent Assembly, see generally MANUEL JOSÉ CEPEDA, *LA ASAMBLEA CONSTITUYENTE POR DENTRO: MITOS Y REALIDADES* (1993).

51. Some of the more salient (and failed) proposals to create an independent constitutional tribunal, include (i) a proposal by legal expert and Senator Carlos Restrepo Piedrahita during the 1968 constitutional reform process giving rise to a constitutional chamber within the Supreme Court of Justice, which had, until then, carried out constitutional review functions through the Full Chamber; (ii) a proposal included in the constitutional reform proposal launched by president Alfonso López Michelsen and approved by Congress in 1976; and (iii) a proposal initially included in the constitutional reform process under President Julio César Turbay Ayala in 1979, which was rejected by Congress during a second round of debates. Other notorious political figures had supported similar proposals, such as presidential candidate Alvaro Gómez in the 1970s and presidential designee Darío Echandía in the 1950s.

transformations made it difficult for such groups to propose the creation of a Constitutional Court. These groups were factions of the liberal party and the “M-19 Democratic Alliance Movement” (*Movimiento Alianza Democrática M-19*), which was led by demobilized guerrillas. The liberal faction was divided because the party had not presented a consolidated list of candidates to the Assembly. Thus, there was no single liberal party Constitution project, but different proposals presented individually by liberal party delegates. As for the M-19 movement, it presented a consolidated list of candidates and a single Constitution project in two separate documents, but it did not include a proposal to create a constitutional court. The Movement refrained from doing so for two reasons. First, symbolically, having initiated the violent seizure of the Palace of Justice in 1985, which resulted in the destruction of the Supreme Court Justice’s premises and the deaths of over half of the Justices,⁵² the Movement could not legitimately propose the abolition of the Supreme Court as a constitutional tribunal without exposing itself to severe criticism. Second, politically, the legal scholars who formed part of the M-19’s group of delegates included ex-justice José María Velazco Guerrero, who had drafted the judgment by which the Supreme Court banned the “little Constituent Assembly” launched by President Alfonso López Michelsen in 1976.

The conservative forces also did not propose the creation of a constitutional court. The faction led by Alvaro Gómez, a former sponsor of the idea, did not submit a new proposal for the constitution project. Instead, Gomez’s faction submitted a number of specific project proposals related to central issues on its agenda. Misael Pastrana’s faction did not present a Constitution project proposal and vigorously defended the work carried out by the Supreme Court of Justice. Quite curiously, the leading lawyers in Pastrana’s faction saw the creation of a constitutional court, not as the adoption of a European institution, but as an attempt to grant excessive strength to the judiciary. They also felt that it would give judicial decisions too much importance as sources of law, which were identified, paradoxically, with the US experience.

For these reasons, support for the idea of creating a constitutional court was left exclusively in the hands of President Gaviria’s Government. The proposal was actively espoused and defended by the Executive from the beginning of the Constituent process, to ensure the future active

52. The exact number of casualties has never been established.

enforcement and development of the new constitution.⁵³ Practical considerations were derived from the creation of the writ of protection for fundamental rights (*acción de tutela*), which would substantially expand the workload of the constitutional tribunal. There was a clear need to establish a sort of fundamental rights court with enough time and resources available to supervise the application of this new procedure by all the judges in the country, and therefore able to review most *tutela* decisions. The Supreme Court of Justice could not assume the high workload of this system because it was already overburdened with its function as *cour de cassation* or the highest tribunal for civil, criminal, and labor cases.

The Government's second argument in support of the creation of a constitutional court was the need to create a judicial body that could fully develop the contents of the Constitution. There was a need to build upon the broad and inclusive base that gave birth to the Constitution, and within the spirit of pluralism, participation, equality, and respect for human dignity that inspired it. A second need existed to guide the lower judges' interpretations of the fundamental rights provisions that the Constitution contained. Third, a judicial body should have the power to adopt legitimate and final decisions to resolve disputes over the content or scope of the new Constitution.

Despite their weight, these arguments were not enough to build a solid majority within the Constituent Assembly in favor of creating a constitutional court. Nonetheless, a blunt, timely, and persuasive address by President Gaviria to the delegates, in which he encouraged them to redefine the system of constitutional judicial review in order to preserve the new Constitution, changed the minds of many delegates:

Sooner or later, the following questions will have to be answered: who is going to be in charge of the immense responsibility of interpreting and giving jurisprudential development to the new Constitution? To whom are you going to trust the task of promoting the constitutional innovations that will emerge from this Assembly in the decades to come? Who will ensure that that this new Constitution will last, and that it will adapt itself to the dynamic

53. The Minister of Government at the time, Humberto de la Calle Lombana, also played a crucial role in defending the proposal. The relevant debates can be followed in the official publication of the Constituent Assembly, GACETA CONSTITUCIONAL [THE CONSTITUTIONAL GAZETTE], No. 36, 7, 26, No. 56, 5, No. 64, 11, No. 72, 9, No. 74, 3, No. 75, 16, No. 81, 16, No. 82, 2, No. 84, 7, No. 85, 12, 14, No. 91, 4, No. 95, 2, No. 102, 2, No. 109, 31, No. 113, 17, No. 115, 19, No. 124, 3, 12, No. 127, 32, No. 135, 7, No. 137, 4, No. 141, 10, No. 143, 7, 8.

Colombian reality? And above all, which body is going to have the mission of preventing any other powerful authority from hampering the transformations you are encouraging with laws, decrees, resolutions, orders, or any other administrative decisions or happenings? . . . Let us think of the future. The new Constitution requires, in order to be adequately applied, a new system of constitutional judicial review.⁵⁴

One additional reason encouraged the creation of a Constitutional Court: active, public Supreme Court opposition to this proposal and to other innovations valued by the delegates. This attitude, and a good deal of bargaining, led to the final approval of the Court's creation by secret ballot. The final count was forty-four delegates in favor and twenty-six against, with one publicly negative vote.⁵⁵

The Constitutional Court must have an uneven number of justices.⁵⁶ It is currently composed of nine justices.⁵⁷ The system by which the members of the Constitutional Court are designated is radically different from the previous method of election of justices in Colombia. This change was intended to increase the Court's representativity and strengthen its legitimacy. The *cooptación* scheme and the political parity requirement were abolished because of their incompatibility with the open and pluralistic spirit of the new Constitution. The Court's members do not have to be public law experts, and the justices are now elected by the Senate of the Republic.⁵⁸ As part of the process the Supreme Court, the Council of State, and the President of the Republic, each submit three lists of three candidates for consideration. Because the Senate is popularly elected, the Justices on the Constitutional Court are selected by indirect popular election. The justices serve one non-renewable eight-year period,

54. Informal translation. See LOS DERECHOS FUNDAMENTALES EN LA CONSTITUCIÓN DE 1991, *supra* note 10.

55. Antonio Navarro Wolff, the M-19 leader and co-president of the Constituent Assembly, issued his negative vote publicly for the above-explained symbolic reasons. Now, as a member of Congress, he has actively supported the Constitutional Court's existence and role, as he did when he was mayor of Pasto, the capital of the southern department of Nariño.

56. The number of justices, their election system and their period are governed by Articles 239 and 240 of the Constitution. COLOMBIAN CONST. arts. 239–240.

57. The first transition Court (1992–1993) had seven justices, appointed for a one-year period as follows: two by the President of the Republic, one by the Supreme Court of Justice, one by the Council of State, one by the Public Attorney (*Procurador General de la Nación*), and two by these five justices from lists of three candidates submitted by the President of the Republic. Transitory Article 22 of the Constitution.

58. The Senate of the Republic is the second chamber of Congress, popularly elected by national constituency.

in contrast to the members of the Congressional and Executive branches of power,⁵⁹ who serve four-year terms.

2. *A New System of Constitutional Judicial Review for a New Constitution*

In addition to the creation of the Constitutional Court, the 1991 Constituent Assembly introduced other changes to the pre-existing system of constitutional judicial review in order to correct its malfunctions and adapt it to the new framework and future challenges. These adjustments may be grouped into four broad categories: (i) an expansion of the concrete review system through the *acción de tutela*, (ii) an extension of *ex officio* review to new types of norms, including a more precise definition of the types of acts and decisions subjected to the Court's scrutiny, (iii) an overall broadening of the scope of application of the *actio popularis* and its procedure, and (iv) the adoption of means to contextualize abstract judicial review of laws.

a. *Acción de Tutela and Concrete Review*

Constitutional judicial review in specific, individual cases, or concrete review, was significantly expanded in 1991 with the creation of the *acción de tutela*⁶⁰ (writ of protection of fundamental rights).⁶¹

The *acción de tutela* enables any person whose fundamental rights are being threatened or violated to request that a judge with territorial

59. The independence of the Constitutional Court is safeguarded by a number of specific provisions. First, there is a general principle of independence embodied in a fifty year old tradition. Second, financial autonomy, because the court's budget is proposed and implemented by another judicial body (*Consejo Superior de la Judicatura*). Third, justices cannot be appointed by the Executive to any executive office until one year has elapsed since their retirement from the Court. Fourth, justices' salaries must always rise at a rate equivalent to the average of all public salaries' annual increase. Fifth, justices cannot accept nominations for posts, rewards or honors from any foreign governments or international organizations, nor can they execute contracts with such organizations without previous authorization. COLOMBIAN CONST. art 129. Sixth, justices are forbidden from participating in *ex parte* contacts. Seventh, the Constitutional Court adopts its own rules of internal procedure. Eighth, Justices cannot be dismissed or suspended from their posts, unless such measures are adopted within impeachment procedures by Congress (if Senate accepts a formal accusation by the House of Representatives in full).

60. COLOMBIAN CONST. art. 86.

61. Concrete review was also expanded with the creation of three other judicial actions designed to protect specific types of rights or interests: *acción de cumplimiento* (created to order public administrative officials to fulfil their legal duties in particular cases), *acción popular* (designed to protect collective interests such as the environment or cultural heritage) and *acción colectiva* (similar to common law class actions). However, the Court's main pronouncements in concrete review have been issued in relation to the first of these mechanisms, *acción de tutela*.

jurisdiction protect that person's fundamental rights. This measure serves to protect the integrity of the Constitution. Citizens may file informal claims without an attorney, before any judge in the country. That judge is legally bound to give priority attention to the request over any other business. Judges have a strict deadline of ten days to reach a decision and, where appropriate, to issue a mandatory and immediate order. In accordance with the requirements of the specific situation, the *tutela* procedure allows judges to order the adoption of any measure necessary to protect threatened fundamental rights, even before rendering a final judgment. In addition, every single *tutela* judgment can be reviewed by the Constitutional Court, which will select those that it considers necessary to correct or pertinent for the development of its own case law, and issue a corresponding judgment. Except for decisions in which the Court seeks to unify its doctrine on a given matter (*Sentencias de Unificación* or "Unification Judgments") or decisions that are adopted by the Full Chamber (*Sala Plena*), *tutela* judgments are issued by Review Chambers (*Salas de Revisión*). The Review Chambers are composed of three magistrates; there are nine Chambers, each one presided over by one of the nine magistrates.⁶²

Although the *tutela* is formally defined in the Constitution as a means to protect fundamental rights in the Constitution, the Constitutional Court has issued numerous and uniform decisions expanding the catalogue of rights. These decisions have direct and immediate application beyond Chapter I, Title Two of the Constitution, which contains the formal catalogue of fundamental rights, including economic, social and cultural rights, and collective rights. The nature of the right depends on the circumstances of each case, the gravity of the allegations, and the vulnerability of the plaintiff. Still, the constitutional doctrine concerning the enforceability of such rights is still in the making.⁶³ Moreover, the protective spirit that is usually present in Colombian constitutional case-law has expanded in several ways. First, incorporated entities are now

62. Legislative Decree 2591 of 1991 regulates *acción de tutela*. Legislative Decree 2067 of 1991 regulates the procedure for the abstract review of legal provisions. Statutory Law 270 of 1996 regulates the organization and functioning of the Administration of Justice, and introduced some reforms to the above-mentioned decrees.

63. The Constituent Assembly devoted significant attention to the need to define the actual rights which would be enforceable through the *acción de tutela*, but the discussion eventually lost focus. In addition, the overall constitutional system for the protection of fundamental rights was the result of the work of three different subcommissions within the Assembly. In the end, certain aspects, such as actual rights, were not adequately defined. It was therefore left to the Court to define the catalogue of enforceable rights, and Decree 2591 of 1991 recognizes the Court's wide margin of interpretation in order to carry out such task in each individual case.

allowed to make use of this action. This development recognizes the existence of fundamental rights on their behalf because of their definition as legal entities. Second, the writ now includes all state authorities and officials as potential respondents in such a claim, making them potential violators of fundamental human rights.⁶⁴ Third, the jurisprudence allows the presentation of *tutela* claims against private persons in positions of power, provided that certain conditions are met. This substantial expansion of the *tutela* procedure's admissibility has had the effect of granting a higher degree of protection to all types of constitutionally-protected fundamental rights. However, it has also excessively increased the Court's workload, as will be shown later in Part II.A.1.⁶⁵

b. The Expansion of Automatic (Ex-officio) Abstract Review

The Constitution also expanded the catalogue of acts and decisions that must be reviewed *ex-officio* by the constitutional tribunal.⁶⁶ Under the 1886 Constitution, this review procedure was restricted to decrees issued under states of siege or economic emergency, and it was carried out after their promulgation. Today, in addition to the decrees issued under any of the so-called "states of exception," the Constitutional Court must carry out an automatic review of the following types of laws: (i) all laws that approve international treaties, as well as the treaties themselves, which must be adopted by Congress and reviewed by the Court before the Executive can ratify them; (ii) statutory laws,⁶⁷ which are reviewed by the

64. This is very important in the Colombian context, because no authority can claim either immunity or special fora rights. Therefore, the President of the Republic has been respondent in several *tutela* claims, as have active members of the Police and the Armed Forces.

65. Since the adoption of its first judgments, the Court rejected all formalist theses that sought to restrict the scope of the *tutela* and that were grounded on two arguments. First, a very literal one held that the only fundamental rights were those included in Chapter I of Title II of the Constitution, entitled "Of Fundamental Rights." A second, highly formalistic thesis, held that judicial procedures before the ordinary and administrative jurisdictions were, by the sole fact of existing and being legally available, the adequate channels to resolve all controversies related to fundamental rights. *Tutela* actions would therefore only proceed when the legal system did not provide a specific solution. The Court emphatically rejected both arguments, and since Decision T-002 of 1992 the Court has developed an approach centered on guaranteeing the rights and principles that the *tutela* was created to defend, and progressively expanding the catalogue of such rights. The controversy is still alive, in the sense that the formalistic perspective is still influential in some legal circles. However, the prevailing trend within the judiciary and public opinion is that when a constitutional fundamental right is violated or threatened, *tutela* is the appropriate instrument to obtain judicial protection if ordinary channels are not effective.

66. The jurisdiction of the Constitutional Court is directly regulated by Article 241 of the Constitution. COLOMBIAN CONST. art. 241.

67. This refers to laws that regulate specific matters enumerated in the Constitution, such as fundamental rights, participation mechanisms, states of exception, the Administration of Justice, and

Court before the President signs them; (iii) acts that summon a constituent assembly or a referendum to modify the Constitution, which can only be reviewed for procedural validity; and (iv) approval or derogation referendums, as well as other democratic participation mechanisms such as national popular consultations and national plebiscites.⁶⁸

c. The Broadening of Actio Popularis to Trigger Abstract Judicial Review

Citizen access to the system of abstract judicial review is secured by the continuation of the pre-existing *actio popularis* (public unconstitutionality action), which was significantly broadened by the 1991 Constituent Assembly. *Actio popularis* may be filed by any citizen against laws, constitutional amendments (with regard to their procedural validity), and decrees issued by the Government in exercise of delegated legislation powers. Pre-1991 laws that approve international treaties may also be challenged through *actio popularis*,⁶⁹ but such laws if issued after 1991 are subject to automatic review by the Court before their promulgation.

Actio popularis may be filed by citizens with few formalities, without representation by an attorney, and without having to demonstrate a specific legal interest in the subject matter of the claim. The public ombudsman (*Defensor del Pueblo*), created by the 1991 Constitution, can also file an *actio popularis* before the Court as part of her function as promoter of fundamental rights. Parties who may intervene in abstract review, apart from the plaintiff, include any citizen who wishes to support or oppose the claim, the *Procurador General de la Nación*, whose intervention is mandatory as part of her function as promoter of society's interests, and the authorities who took part in the production of the norm then subject to review.

other important topics that are deemed to be best protected through statutory laws' special adoption procedure).

68. National Plebiscites may only be reviewed for procedural validity. "Popular consultations," defined in Articles 104 and 105 of the Constitution, are participation mechanisms by which the President, governors, or mayors may pose a specific question of general interest to the people. The role of the people on such a question has binding effects only if the minimum participation conditions are met and a majority of valid votes are received. COLOMBIAN CONST. arts. 104–105. This figure is regulated by the Statutory Law on Popular Participation Mechanisms, Ley 134 de 1994 (Law 134 of 1994). "Plebiscites" are defined by law as participation mechanisms by which the President of the Republic may summon the people in order to request its binding pronouncement on policies of the Executive that do not require approval by Congress, except for those related with states of exception and the exercise of the corresponding powers. COLOMBIAN CONST. art. 103. This figure is also regulated by the Statutory Law on Popular Participation Mechanisms. Law 134 of 1994, *supra*.

69. Decision C-400 of 1998 (text on file with author).

The new structure limits procedural delays,⁷⁰ which is resulting in a much higher number of abstract review decisions by the Constitutional Court than there was under the Supreme Court. Decisions are adopted by the affirmative vote of a majority of the members of the Court. Dissenting magistrates may express their opinions in separate documents attached to the judgment (*salvamentos de voto*). Justices who agree with the decision, but for reasons which are different or additional to those expressed by the majority, may write concurring opinions (*aclaraciones de voto*).

A statute of limitations was introduced for an *actio popularis* challenging the procedural validity of any law or constitutional mechanism. Therefore, if one year has elapsed since their adoption, these acts cannot be struck down on the basis of procedural defects; laws can, however, be challenged and reviewed on substantive grounds.⁷¹

d. The Means to Contextualize Abstract Review

The Court has broad access to any sources of specialized information that may aid in the delivery of its judgment, including the expert opinions of individuals, universities, or organizations. This option is widely used when professional or technical information is required. The Court may also take into account the opinions of the Executive Cabinet members, who are notified of every unconstitutionality *actio popularis* and summon public hearings to gather information on the socio-political context of the matter at hand.

These innovations were intended to prevent formalistic judicial review and to introduce a more contentious procedure before the Court. Apart from these explicitly-stated objectives, the introduction of a means to encourage the participation of experts, social organizations, and public officials in the judicial review process also sought to bring facts and conflicting perceptions of social reality to the Court's attention. This innovation was meant to help the Court review a given law within the *Colombian* context. The Court's use this power to request that public

70. Once an *actio popularis* has been assigned to one of the Justices, she has ten days to decide on its admissibility. Once admitted, the claim is sent to the *Procurador General de la Nación* in order for him or her to issue a constitutionality assessment within the following thirty days. Simultaneously, the regulations at issue are published by the Court's secretary in a special "list" for ten days, so that any citizen can intervene in the procedure. Once this period has elapsed and the *Procurador General* has sent the corresponding assessment, the individual Justice has thirty days to produce a decision draft, which is presented to the Plenary Chamber, which will then have sixty more days to adopt the decision. If these delays are violated, the justices can be dismissed. During *ex officio* review of state of Exception decrees, delays are cut by two thirds. COLOMBIAN CONST. art. 242.

71. COLOMBIAN CONST. art. 242.

officials argue in defense of the legislation under review and present relevant factual evidence. This has typically happened in two situations: (i) during the review of procedural defects in the adoption of a law,⁷² or (ii) during the review of decrees that declare states of exception, based on the need to solve critical public order situations or socio-economic emergencies.⁷³

This new system, and the broad functions it conferred on the Court, alerted some individuals and groups to the potential dangers that could arise from such an increase in the constitutional judges' power. Nevertheless, since its inception, the Constitution submitted its own guardian to clear checks on its power by different parties. An overview of the checks and balances mechanisms is presented in Part IV below.

II. THE ROLE OF THE CONSTITUTIONAL COURT: "ADJUDICATING" AT THE "CENTER OF THE STORM"

A. *The Jurisdiction and Work of the Court*

According to Article 241 of the Colombian Constitution, there are four mechanisms of access to the Court: (i) the public unconstitutionality action (*actio popularis*);⁷⁴ (ii) *ex-officio* control of certain types of provisions, mainly presidential decrees of states of exception, laws summoning a constitutional referendum or a constituent assembly, laws approving international treaties, and statutory laws; (iii) review of bills as an arbiter, whenever Congress overrules a presidential veto in constitutionality

72. When a law is challenged for procedural validity, the Court usually requests that the relevant authorities send copies of the legislative dossier in order to verify the law's compliance with formal requirements. One example would be decision C-557 of 2000, in which the law that approved the National Development Plan for 1999–2002 was challenged and struck down on procedural grounds. In this case, the Court requested that the General Secretaries of the Senate and the Chamber of Representatives, as well as the Director of the National Planning Department, issue official certifications concerning specific parts of the Law's approval procedure.

73. In these cases, experts or public officials are usually asked to ascertain whether the precise factual constitutional requirements have been met. For example, Decision C-122 of 1999, Fabio Moron Diaz, J., In re Decreto No. 2330 de 1998 (Decree 2330 of 1998), while reviewing the constitutionality of Decree 2330 of 1998 (declaring a state of economic and social emergency), the Court requested specialized official opinions, from the Superintendent of Banks, the Governing Board of the Bank of the Republic, the Financial Institutions' Guarantees Fund (FOGAFIN), the Minister of Public Finance and Credit, the General Controller of the Republic (*Contralor General de la República*) and the Director of the National Planning Department, on specific matters relating to the circumstances invoked by the President to issue said decree.

74. The Court can also review legislative referenda, consultive referenda, and plebiscites (the latter only procedural grounds). But there is a debate on whether these should be reviewed *ex officio* or after an *actio popularis* has been filed against them. COLOMBIAN CONST. arts. 241.3.

issues; and (iv) discretionary review of any *tutela* judgment issued by any judge in the country. The first three mechanisms trigger abstract judicial review.⁷⁵ The fourth triggers judicial review in concrete cases.

Through these four mechanisms, every single law passed by Congress, constitutional amendment (on the grounds of procedural requirements), and judicial decision issued by civil, criminal, labor and other judges throughout the country may be judicially reviewed. As a general rule, administrative acts are excluded from the Court's jurisdiction, because their review would infringe on the power of the Council of State, which is the highest judicial authority within the "administrative" jurisdiction.⁷⁶ However, the Court is empowered to review the constitutionality of administrative decisions that violate or threaten fundamental rights in concrete cases. In the case of certain types of presidential decrees that are not considered administrative acts, the Court may also review the legislation. This includes administrative acts issued under delegated legislative powers, under states of exception, or under exceptional circumstances to promulgate the national budget or the national development plan.⁷⁷ In addition, when the Court reviews a decision adopted by an administrative judge, it may render a judgment concerning not only the constitutionality of the judicial decision itself, but also the relevant administrative acts, if such action is necessary to protect the effective enjoyment of a fundamental right.

It is no surprise that the Court has adopted thousands of decisions on most areas of the diverse and complex Colombian reality. In order to illustrate the magnitude and influence of its work, the following part will make a brief overview of some numerical aspects of its output over the past decade, and its main decisions and case law tendencies.

75. An additional abstract review trigger occurs when Congress overrides the Presidential veto of a bill.

76. Article 237 of the Constitution assigns the Council of State the following functions: (i) to act as the highest tribunal on administrative matters, (ii) to decide upon invalidity complaints presented against governmental decrees that do not fall under the jurisdiction of the Constitutional Court, (iii) to be the highest consulting organ of the government in matters pertaining to public administration (mandatory in cases of passage of foreign troops through national territory), (iv) to prepare and present constitutional amendment projects and bills, (v) to decide on the destitution of members of Congress (*pérdida de investidura*) when they are accused of violating conflict of interests laws or constitutional provisions, and (vi) to carry out any other function ascribed by law. COLOMBIAN CONST. art. 237.

77. COLOMBIAN CONST. arts. 241.5 and 241.7.

I. A Quantitative Overview

A look at the statistics will highlight the evolution of the Constitutional Court's workload. First, the Court's workload is truly immense, and it has steadily increased, going from 235 decisions in 1992 to 1123 decisions in 2002—an approximate 477% increase. Second, there has been an especially sharp escalation in the number of *tutela* decisions. In 1992, 8,060 *tutela* decisions reached the Court for discretionary review. By 2001, that number reached 133,273—an almost sixteen-fold increase. This increase was a consequence of social and political factors which have led people to use this mechanism ever more frequently. Third, abstract review decisions have also increased in number going from fifty-three in 1992, to 339 in 2002—an approximate 639% increase. This increase was mostly because *actio popularis* have also been increasingly filed by citizens in order to protect the abstract compatibility between the laws and the Constitution and to promote fundamental rights issues.⁷⁸ Fourth, abstract judicial review amounts to thirty-two percent of the total final decisions rendered by the Court, while concrete review in *tutela* cases represents sixty-eight percent of this figure. Fifth, the Court has protected the rights of the plaintiff in fifty-eight percent of the total *tutela* cases decided. Sixth, the percentage of abstract review decisions in which the corresponding law or legislative decree has been declared unconstitutional, in whole or in part, is very high reaching twenty-seven percent. Finally, Magistrates' voting, although divided in the most controversial cases, can be regarded as fairly unanimous—in seventy-seven percent of abstract review decisions no dissenting or concurring opinions were issued.

The sheer numerical output of the Constitutional Court is impressive. In eleven years, it has issued a total of 9,442 judgments or an average of 840 decisions per year. This figure illustrates the Court's efficiency, but also reveals that the Court's workload has become far too heavy. Comparing this annual average with the estimate for the Colombian Supreme Court before the 1991 Constitution, one finds that it is almost sixteen times higher. This high number of decisions corresponds to two variables: (i) abstract review procedures over laws, constitutional amendments, legislative decrees and treaties, and (ii) concrete review of *tutelas*. The latter variable has especially substantially increased the Court's workload.⁷⁹

78. In 2002, 561 *actio popularis* were filed, and the Court rejected forty-five percent of them on formal grounds.

79. Although there are no figures available on the workload of the Supreme Court of Justice

TABLE 1: THE WORK OF THE COURT, 1999–2002

YEAR	TOTAL NUMBER OF DECISIONS	NUMBER OF TUTELA DECISIONS	% of total	NUMBER OF ABSTRACT REVIEW DECISIONS	% of total
1992	235	182	77.44	53	22.55
1993	598	394	65.88	204	34.11
1994	582	360	61.85	222	38.14
1995	630	403	63.96	227	36.03
1996	718	370	51.53	348	48.46
1997	680	376	55.29	304	44.7
1998	805	565	70.18	240	29.81
1999	993	705	70.99	288	29.01
2000	1,734	1,340	77.27	394	22.72
2001	1,344	976	72.62	368	27.38
2002	1,123	784	69.81	339	30.19
TOTAL	9,442	6,455	68.36	2,987	31.64

Tutela decisions have increased significantly, especially since 1998, when there was a forty-eight percent increase. The largest leap occurred in 2000, when the number of *tutela* verdicts reached 1,340, which was almost double the previous year in which a peak of 705 decisions were registered. This increase, which is set out in detail in Table 1, is owed to a number of social and political causes. The central cause is the frequent use of *acción de tutela*, perhaps as a result of citizens' fast realization that constitutional protection of fundamental rights could have real effects over their everyday problems. Economic recession also led increasing numbers of persons seeking the enforcement of social rights, especially health, retirement pensions, and salaries. However, this does not mean that the Court always adopts a decision in favor of the plaintiff. As indicated in Table 2, in 58% of the total *tutela* decisions it adopted, the Court ruled in favor of the plaintiff.

before 1991 in constitutional matters, it is clear that the workload did not exceed one hundred decisions per year, and it was probably much lower from the mid-1950s to the 1980s.

TABLE 2: ACTIVISM AND RESTRAINT

ABSTRACT REVIEW DECISIONS	Unconstitutionality 27%	Constitutionality 57%	OTHER(*) 16%
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TUTELA DECISIONS	Granted 58%	Denied 42%
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(*) Other: res judicata judgments, or inhibitory decisions adopted on the grounds of the lack of procedural pre-conditions for deciding on the merits in specific cases.

Another visible tendency is the increase in the number of abstract review decisions, mainly because of the increasing use of *actio popularis* by citizens. Although this public unconstitutionality action was initially devised to review the abstract constitutionality of legislation, citizens have filed a growing number of unconstitutionality suits based on the fundamental rights provisions in the Constitution. This may be explained by the effect generated by the existence of *tutela*, upon citizens' perception of the Constitution's potential impact in their daily lives. The Constitution becomes more relevant for citizens, in proportion to the possibility of accessing its protection channels through a direct, concrete mechanism in matters that affect them directly. The statistics in Table 3 illustrate that between 1992 and 2002 the number of public unconstitutionality suits more than doubled. In 1992, 247 *actio popularis* were filed before the Court, and in 2002 this number rose to 561. Because more than forty percent were rejected for not fulfilling the minimum procedural requirements, the numbers in Table 3 do not fully demonstrate this increase.

Another figure in Table 1 proves that abstract judicial review of legislation has gained importance in Colombia: out of the total number of decisions issued by the Court in that decade, almost one third referred to abstract review over legal provisions. The proportion would have been much higher, had it not been for two causes. First, there was a remarkable increase in the number of *tutela* decisions (182 in 1992, 784 in 2002, and a 1,340 peak in 2000). Second there was frequent rejection of unfit *actio popularis* (an average of forty-two percent of the total suits have been rejected for not fulfilling the minimum procedural requirements). The Court was initially very strict in this respect (ninety-three percent of all claims were rejected in 1992; forty-one percent were rejected in 1993), but between 1994 and 1998 the Court became more lenient. Finally, in 1999 the Court again became more demanding, and in 2002 it rejected forty-five percent of the claims.

As shown in Table 2, the Constitutional Court frequently declares laws wholly or partly unconstitutional; this happened in twenty-seven percent of the cases. This relatively high percentage is perhaps one of the most significant peculiarities of the Colombian system after 1991. It has two main sources. The first is that laws adopted before the 1991 Constitution were more likely to be incompatible with it and can now be challenged through an *actio popularis*. The second is that fundamental rights cases are now reviewed by the justices in a more activist spirit.

TABLE 3: ABSTRACT REVIEW PROCESSES, 1992–2002

KIND OF PROCESS	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	Total	% of total
<i>Actio popularis</i>	247	264	255	309	368	406	339	479	597	524	561	4,349*	91.2
Treaties	10	15	13	17	36	18	29	19	31	22	11	221	4.6
Emergency decrees	26	26	10	12	8	15	4	8	0	0	13	122	2.6
Presidential vetoes	0	3	1	4	4	8	5	4	9	17	5	60	1.3
Statutory laws	0	5	2	1	0	0	0	2	2	3	2	17	0.3
TOTAL	283	313	281	343	416	447	377	512	639	566	592	4,769	100

* Processes initiated before the Court do not always end in a final decision, because *actio popularis* lawsuits can be rejected for not fulfilling procedural requirements. The rate of rejections reached an unusual peak in 1992, when ninety-three percent of all claims were rejected. Overall, an average of forty-two percent of all unconstitutionality *actio popularis* are rejected by the Court. That is the reason why the figures included in the first row of this table do not coincide with those shown in Table 1, which refers only to final decisions in abstract review, and not to the total of processes initiated through *actio popularis*.

Another important issue relates to the Justices' voting. In France, members of the Constitutional Council may not formally express their individual opinions in each judgment, which produces an appearance of constant unanimity in the adoption of decisions. In Colombia, as in the United States, the Justices have been traditionally allowed to issue dissenting opinions when they disagree with the Court's majority decision (*salvamento de voto*). Justices may also concur in the judgment but clarify specific aspects in which they do not share the Court's majority argument (*aclaración de voto*). In recent years, this phenomenon led to the hasty conclusion that the Court is frequently divided, or even that there are fixed blocks of justices that always vote together against the other blocks. This is not true. However, the fact that these voting blocks are misconceptions does not mean that certain voting patterns are not present on specific subjects. Table 4 shows that seventy-seven percent of constitutionality

decisions have been adopted unanimously, and only in thirty-three percent of cases has there been one or more magistrates who disagree with the majority decision. A higher degree of division is evident in Table 5, which shows the level of unanimity in unification decisions under *tutela* actions. This is natural, because cases that reach the Full Chamber for unification of case law are generally difficult ones, where the coexistence of diverse, albeit legitimate, interpretations becomes likely. It is worth noting that even in unified *tutela* judgments, there are still relatively few “five-to-four” decisions (seventeen out of 132 or twelve point eight percent). Since 2000, “five-to-four” decisions have diminished (two out of forty-one or four point eight percent).

TABLE 4: AGREEMENT AND DISSENT (1992–2002)

ABSTRACT REVIEW DECISIONS	77% Unanimous
UNIFICATION DECISIONS (<i>Tutela</i>)	53.03% Unanimous

TABLE 5: AGREEMENT AND DISSENT IN UNIFICATION DECISIONS (1992-2002)

YEAR	Number of Unification Decisions	Unanimous Decisions	Divided decisions with a 5–4 voting	Divided decisions with other votings
1992	0	0	0	0
1993	5	2	1	2
1994	2	2	0	0
1995	12	5	7	0
1996	7	1	2	4
1997	15	8	2	5
1998	22	11	3	8
1999	28	20	0	8
2000	24	15	0	9
2001	11	3	2	6
2002	6	3	0	3
TOTAL	132	70	17	45

These statistics and brief comments show that the work of the Constitutional Court has been quite efficient, that the Court has vigorously exerted its independence, and that it has been instrumental in the protection of fundamental rights. They also prove that the Court’s

workload has evolved at the pace imposed by social needs and by the development of the Constitution. However, numerical assessments are insufficient to illustrate the importance of the changes brought by the Court's work as the guardian and interpreter of the Constitution. It is necessary to pay attention to the basic types of decisions that the Court has adopted while fulfilling its institutional goals. This will show the complexity of the issues faced by the Court, and the mechanisms adopted to address them and to effectuate the Court's decisions.

2. *Basic Types of Decisions and Their Effects*

In general terms, the Court adopts two types of decisions. First, it adopts abstract review judgments, as a result of the constitutional scrutiny of constitutional reforms, treaties, laws, legislative decrees issued under states of emergency or in exercise of delegated legislative powers, and bills vetoed by the President. Second, the court adopts concrete review judgments, which result from the scrutiny of specific *tutela* decisions. However, within these two broad categories, the Court has developed a complex classification of decisions, in accordance with the different types of effects that they may have.

In this sense, one must recall that the Court has consistently affirmed its exclusive power to determine the effects of its own decisions, in both abstract and concrete review judgments, as part of its generic mission to guard the supremacy and integrity of the Constitution.⁸⁰ These effects may vary in accordance with the different requirements posed by the defense of the Constitution in each specific case, as determined by the tribunal. Based on this exclusive power, in a 1993 verdict⁸¹ the Court struck down the procedural regulations⁸² that specified the cases in which abstract review judgments would have retroactive effects. The Court also clarified that its autonomy to determine the effects of its decisions finds its limits *only* in the Constitution's text and spirit, as well as in the need to seek justice and balance conflicting constitutional interests in particular situations.

80. COLOMBIAN CONST. art. 241.

81. Decision C-113 of 1993, Jorge Arango Mejía J., *In re* Artículo 21 del Decreto 2067 de 1991 (Article 21 of Decree 2067 of 1991).

82. Decreto 2067 de 1991, art. 21.

a. Decisions Adopted in Abstract Review

In principle, there are two possible types of abstract review decisions with *erga omnes* effects: those declaring the constitutionality of given regulations and those declaring their unconstitutionality.⁸³ However, throughout its abstract review doctrine, the Constitutional Court has adopted many different kinds of judgments. The Court has established different classifications for these judgments, either from the point of view of the content of the decision or its effects over time. This practice, which the Court calls “modulation of the effects of decisions” (the corresponding judgments are called “modulative decisions”), has given rise to significant controversy. Some critics say that by adopting the former, the tribunal exceeds its own powers and invades the sphere of Congress.⁸⁴

This is not exclusively a Colombian controversy. The problem has arisen in almost every country that has evolved towards a strong system of constitutional judicial review, as a consequence of constitutional judges’ commitment to safeguard the Constitution without causing unnecessary disturbances to the democratic societies in which they operate.⁸⁵ What is more surprising is that “modulative” judgments are not new to Colombian constitutionalism; the Supreme Court developed a significant tradition in this field under the 1886 Constitution.⁸⁶

The need to adopt “modulative” decisions may best be explained through an example. Imagine a provision that has been challenged as unconstitutional and subject to different reasonable interpretations, some of which are constitutional and some unconstitutional. In this case, the Court would not be able to fulfill its basic mission if it could only adopt “pure” constitutionality or unconstitutionality decisions, because simply upholding the provision would be the same as admitting the validity of a number of possible unconstitutional interpretations. Simply striking the

83. *Res judicata* and “inhibitory” decisions in which the Court decides to abstain from deciding are also possible.

84. A specific legal provision authorizes the Court to modulate the effects of its decisions, Estatutaria de la Administració de Justicia (Statutory Law on the Administration of Justice), Ley 270 de 1996 (Law 270 of 1996), art. 45, which states that the Court’s decisions shall have *pro futuro* effects, unless the Court decides on the contrary.

85. See MAURO CAPPELLETTI, *GIUDICI LEGISLATORI?* (Dott. A. Giuffrè ed., 1984); AJA ELISEO, *LAS TENSIONES ENTRE EL TRIBUNAL CONSTITUCIONAL Y EL LEGISLADOR EN LA EUROPA ACTUAL* (S.A. Ariel ed., 1998); THIERRY DI MANNO, *LE JUGE CONSTITUTIONNEL ET LA TECHNIQUE DES DECISIONS ‘INTERPRETATIVES’ EN FRANCE ET EN ITALIE* (1997).

86. For example, in 1912 the Supreme Court declared some of the articles of Law 40 of 1905 unconstitutional, in those aspects related to the owners of emerald mines that fulfilled certain conditions and upheld those articles in regards to any other person or situation.

provision down would be tantamount to excluding constitutionally acceptable interpretations from the legal system and striking down a law that could be compatible with the Constitution. Both of these options would lead the Court to exceed the limits of its own functions. A reasonable alternative available to the tribunal is to uphold the provision under review, conditioning its constitutionality on the fact that only some of its interpretations are valid, while others are unconstitutional and must be rejected. In Colombia this is called a “conditioned constitutionality judgment.”

As one might infer, “modulative” constitutionality judgments do not arise as a consequence of judicial interference with Congressional powers, rather they arise as a means to harmonize the necessity to preserve the Constitution with the Court’s deep respect for the decisions of the legislature. It is through such “modulative” decisions that the Court seeks to uphold the validity of laws as far as constitutionally possible. The Court has only struck down legal provisions when they are not subject to any reasonable interpretation compatible with the Constitution.

One must note that the Court has not been consistent in giving strict technical treatment to its own modulative judgments. Although it has occasionally resorted to detailed classifications of the possible modulations it can order, the Court’s modulative decisions are usually formulated in wholly “interpretative” terms, even if they materially correspond to a different category of such decisions. That is, when the Court modulates the effects of its verdicts, it almost always states that it is using a wholly “interpretative” modulating technique, even though merely “interpretative” judgments are only one of the different kinds of modulative decisions that the Court has adopted throughout its case law. Notwithstanding this technical imprecision, one could classify “modulative” judgments according to two different criteria: (i) those that modulate the effects of the decision upon the content of the legal provision under review, and (ii) those that modulate the effects of the decision in time.

i.

“Modulative” judgments that affect the content of the provision under review may fall into three broad categories: “interpretative,” “expressly integrative,” and “materially expansive” decisions.

In the first category, in certain decisions the Court (a) determines the meaning that should be given to a particular legal provision and issues “strictly interpretative” judgments⁸⁷ or (b) restricts the scope of application or the content of the regulations, by, for example, deciding that a given rule may not be constitutionally applied to X or Y persons, situations or things, or deciding that when it is applied, A or B specific consequences which would normally derive from the norm’s application will be excluded (“reductive” judgments).⁸⁸ In a third scenario the Court incorporates additional requirements for the valid application of the norm, without actually expanding its scope of application to different circumstances or subjects (“additive” judgments).⁸⁹ All of these are “interpretative” decisions, because the Court prescribes, strikes down, restricts, or expands certain possible interpretations of the law or provision and its effects, while upholding the legal validity of the provision.

A second type of “modulative” judgment that affects the content of regulations, relates to the cases in which the Court does not strike down a given provision. The Court instead expressly expands the law’s scope of application to new subjects, situations, or things not initially foreseen, but which are nevertheless required by the Constitution in order for the provision at hand to be valid. In these “expressly integrative” judgments, the Court (i) determines the existence of a legislative omission with regard to the law’s scope of application, and (ii) gives direct application to

87. One example of an interpretative judgment is a 1994 decision in which the Court declared legal provisions prohibiting the organization of strikes in companies and providing for public services unconstitutional based on the understanding that such provisions referred to essential public services as defined by the legislature. Decision C-473 of 1994, Alejandro Martínez Caballero, J., *In re* Artículos 416, 430, y 450 del Código Sustantivo del Trabajo (Articles 416, 430, 450 of the Labor Code).

88. This happened, for example, in the Court’s decision regarding the acceptability of euthanasia in Colombia, when it stated that the criminal provision penalizing “mercy killing” could not be applied to physicians who helped terminal patients die under very strict circumstances, see *infra* Part II.B.1.a.i and accompanying notes. It also happened when the Court upheld the rule in the Organic Statute of the Financial System that allowed for the capitalization of interest in long term credit operations, stating that interest could not be applied to credits granted for the financing and acquisition of housing, see *infra* Part II.B.3.

89. An example of “additive” judgment is Decision C-065 of 1997, Jorge Arango Mejía, J. and Alejandro Martínez Caballero, J. (Vladimiro Naranjo Mesa J., José Gregorio Hernández Galindo J. dissenting), *In re* Artículo 22 de la Ley 42 de 1993 (Article 22 of Law 42 of 1993), in which the Court reviewed a rule that established limitations on official control over entities that managed public funds or were partially state-owned; the provision examined in this case stated that public control would be limited to the amount of state funds received or managed by the entity and to the level of state participation in the entity’s capital. *Id.* The Court upheld the provision, stating that it should nevertheless be interpreted in accordance with other applicable legal mandates, which stated that control should be carried out over: (i) the totality of contracts executed with public funds by privately owned entities, and (ii) the activities of all the constitutive segments of partly State-owned institutions. *Id.*

constitutional mandates in order to expand the law's area of effectiveness to whichever subjects, situations, or things that the legislature unduly excluded. In other words, through "expressly integrative" decisions, the Court decides that an individual regulation is unconstitutional, not because of what it expressly states, but because of its insufficiency in foreseeing certain subjects that should have been regulated. This situation arises frequently in equality cases, in which the Court extends the application of certain rules to circumstances that were not initially foreseen by the legislature and were thus excluded from the law's reach, in a discriminatory way, or with a discriminatory impact or purpose.⁹⁰ It is perhaps the only type of decision in which the Court has sought to be technical, and regarding which the Court has outlined specific requirements throughout constitutional case law. For example, the Court has explained that "integrative" decisions are a direct consequence of the normative value of the Constitution, which the Constitutional judge injects into ordinary legislation in order to fill an apparent lack of regulation.⁹¹ "Integrative" judgments are only admissible in those matters where clear constitutional mandates restrict Congressional discretion. Consequently, the Court has also stated that "integrative" decisions on matters on which the Constitution gives Congress a broad margin of configuration, would be undue intrusions by the Court into the sphere of legislative powers.⁹²

The third type of modulative judgments within this group, comprises all the different types of decisions that do not fall under the other categories, but which the Court has nevertheless adopted since 1992

90. For an example of an "expressly integrative" judgment, see Decision C-109 of 1995, Alejandro Martínez Caballero, J. (Hernando Herrera Vergara, J., Vladimiro Naranjo Mesa, J., and José Gregorio Hernández Galindo, J. dissenting), *In re* Artículo 3° de la Ley 75 de 1968 (Article 3° of Law 75 of 1968). In this case, the Court examined a provision in Law 75 of 1968, which restricted the possibilities that people born to married mothers have to judicially contend their alleged father's paternity in order to establish the identity of their true father. *Id.* The provision at hand stated that "legitimate" sons or daughters could contend their father's true parenthood whenever birth had taken place after ten months had elapsed since the moment when the father or the mother had left their spouse and home. The Court upheld this provision, but on the understanding that this situation was not the only possibility open to people who contest their alleged father's identity because that interpretation would deprive such persons of the possibility of knowing their true identity and be discriminatory as there is no limitation on the father contesting paternity. The Court thus affirmed that Congress had omitted the inclusion of all of the other possible hypotheses of judicial investigation of paternity. The Court declared the constitutionality of the provision under review, stating that all of the other different possibilities for contending parenthood, which are regulated by the Civil Code, are open to sons or daughters in these circumstances.

91. *Id.*

92. Decision C-221 of 1997, Alejandro Martínez Caballero, J. (unanimous), *In re* El literal a) del artículo 233 del decreto 1333 de 1986 y el literal c) del artículo 1° de la Ley 97 de 1913 (Paragraph (a) of Article 233 of Decree 133 of 1986 and paragraph (c) of Article 1° of Law 97 of 1913).

(“materially expansive” judgments). An example of a materially expansive judgement would be a 1993 verdict, in which the Court: (a) struck down a provision that established the specific cases in which it could confer retroactive effects to its own decisions; and (b) stated that, according to the Constitution, it is up to the same Court to freely establish the effects of its judgments.⁹³ In this case, the Court actually declared the law unconstitutional, but the Court then replenished the legal system with a mandate extracted directly from the Constitution’s text (a “substitutive” judgment). Another example of a “materially expansive” judgment would be the 2001 decision in which the Court reviewed the legal provision that criminalizes genocide and declared the unconstitutionality of the phrase that restricted the applicability of this crime to cases in which the victim group was “acting within the law.”⁹⁴ In this case, the Court held that (i) no such restriction has been placed on the configuration of the crime of “genocide” by international humanitarian law or human rights treaties, and (ii) it would be clearly unconstitutional to allow the mass extermination of groups that act “outside” of the law. In the end, the Court actually expanded the legal provision’s scope of application by simply striking down the limitation involved. In other words, through a partial unconstitutionality decision, the Court included a broad array of new legal subjects and situations under the protection of the law. Formally, it was a pure (partial) unconstitutionality decision, and therefore, *stricto sensu*, it was not expressly modulative. However, substantively the decision expanded the scope of the crime of genocide, as would have happened with an “integrative judgment” upholding the provision, since the decision added that genocide could not be committed against groups “acting outside of the law” either.

ii.

“Modulative” judgments can also refer to the moment at which the Court’s decision becomes effective. The general rule in Colombian constitutionalism is that abstract review judgments are effective *pro futuro*—the invalid provision is excluded from the legal system from the moment the judgment is communicated to the relevant authorities.⁹⁵ But as

93. Decision C-113 of 1993, Jorge Arango Mejía, J. (unanimous), *In re* Artículo 21 del Decreto 2067 de 1991 (Article 21 of Decree 2067 of 1991).

94. Decision C-177 of 2001, Fabio Morón Díaz, J. (unanimous) *In re* Artículo 322^a del Código Penal (Article 322^a of the Criminal Code).

95. Estatutaria de la Administración (Statutory Law de Fushticia on the Administration of Justice), Ley 270 de 1996, art. 45 (Law 270 of 1996).

an exception to this general rule, the Court has adopted two types of judgments in which it modulates the temporal effectiveness of its decisions, either granting them retroactive effects or deferring their effectiveness to a given point in the future.

As a result of the general rule of *pro futuro* application of judgments, situations that materialized before given laws or provisions were declared unconstitutional are not modified. However, there are exceptional cases in which the Court has given its decisions retroactive effect. For example, the Court ordered the recalculation of housing loan beneficiaries' outstanding debt, which had been quantified at very high interest rates based on an unconstitutional system that caused mainly poor or middle-class debtors to lose their houses.⁹⁶ These judgments are called "retroactive" judgments. The first judgment of this kind ordered the Government to reimburse an unconstitutional tax, also retroactively, according to a state of exception decree.⁹⁷

In other equally exceptional cases, the Court defers the effects of its unconstitutionality decisions. This occurs when the Court believes that immediate application of the judgment would generate negative consequences for the preservation of other constitutional values. For example, the Court deferred the effects of a 1997 decision declaring a provision that imposed a tax upon certain non-renewable natural resources unconstitutional. The Court argued that the immediate exclusion of such a provision from the legal system, in the absence of an alternative regulation, would cause the automatic application of the general royalties regime to the natural resources at hand—a situation, which had not been specifically approved by Congress. Therefore, in order to avoid intruding upon the legislative sphere, the Court postponed the application of its unconstitutionality decision for a period of five years. During this time period Congress was called upon to regulate the matter. In this case, the Court also ordered that, should Congress abstain from freely regulating the

96. Decision C-700 of 1999, José Gregorio Hernández Galindo, J. (Alfredo Beltrán Sierra J. and José Gregorio Hernández Galindo, J., concurring; Alvaro Tafur Galvis J., Eduardo Cifuentes Muñoz J. and Vladimiro Naranjo Mesa, J. dissenting), *In re* Artículos 18, 21, 23, 137, 138 del Decreto Extraordinario 663 de 1993, Decreto Extraordinario 1730 de 1991, Artículos 3, 11, 13, 15, 16, 17, 18 y 20 del Decreto Autónomo 677 de 1972, Artículos 1, 2 y 14 del Decreto Autónomo 678 de 1972, Artículos 1 al 10 del Decreto Autónomo 1229 de 1972, Artículo 5 del Decreto Autónomo 1269 de 1972, y Artículo 1 del Decreto Autónomo 1127 de 1990 (Extraordinary Decree 663 of 1993, Extraordinary Decree 1730 of 1991, Autonomous Decree 677 of 1972, Autonomous Decree 678 of 1972, Autonomous Decree 1229 of 1972, Autonomous Decree 1269 of 1972). For additional information, see *infra* Part II.B.3.

97. Decision C-149 of 1993, José Gregorio Hernández Galindo, J. (unanimous), *In re* Artículos 16, 17 y 18 de la Ley 6^a de 1992 (Articles 16, 17, 18 of Law 6 of 1992).

issue within the given term, the decision would be made effective and the general royalties regime would be fully applicable to such resources until the legislature took action.⁹⁸ From another perspective, the Court has upheld the temporary constitutionality of regulations whenever their exclusion from the legal system could generate a lack of regulation with constitutionally undesirable effects. This situation arose when the Court declared the system for financing access to social welfare housing unconstitutional. The Court invalidated the corresponding regulations on procedural grounds, but gave Congress a reasonable period to issue new regulations before the Court's decision became effective.⁹⁹ Therefore, the system was temporarily upheld so as to preserve public economic order. More recently, the majority of the Court has shown aversion towards the adoption of this kind of decision, when the impact of its judgments is not clearly detrimental to constitutional values in the broader context in which the judgments are rendered.¹⁰⁰

b. Decisions Adopted in Concrete Review

The second category of judgments issued by the Court is called concrete review decisions. In this type of decision, the Court evaluates the constitutionality of *tutela* judgments adopted by any judge in the country. In general, *tutela* decisions have *inter partes* effects because they only bind the parties to the specific case decided by the Court, and not *erga omnes* effects, as is the case with all abstract review decisions.

In order to visualize the different types of decisions that may be adopted in *tutela* cases, one must understand that, through the *tutela*, judges have the liberty to adopt any measures that they consider necessary to preserve fundamental rights in concrete review cases. In other words, *tutela* cases have no defined remedy. Instead there are as many possible solutions as there are types of fundamental rights violations. In each

98. See *supra* note 92.

99. The regulations should have been adopted by a special kind of law mandated for certain economic matters ("framework laws"), which are developed by administrative decrees. Instead, they were adopted by presidential legislative decrees on the grounds of delegated legislation powers. See *supra* note 96; Decision C-747 of 1999, Alfredo Beltrán Sierra, J. (Alfredo Beltrán Sierra, J. and José Gregorio Hernández Galindo, J. concurring; Vladimiro Naranjo Mesa, J., Eduardo Cifuentes Muñoz, J., Alvaro Tafur Galvis, J. dissenting), *In re* Artículos 121, 134 del Decreto Ley 663 de 1993 (Decree Law 663 of 1993).

100. Decision C-155 of 2003, Eduardo Montealegre Lynett, J. (Manuel José Cepeda Espinosa, J., Rodrigo Escobar Gil, J., Eduardo Montealegre Lynett, J., Marco Gerardo Monroy Cabra, J. dissenting), *In re* Artículos 2 y 5 del Decreto 1604 de 1966, Artículo 11 del Decreto 2171 de 1992 (Articles 2 and 5 of Decree 1604 of 1966, Article 11 of Decree 2171 of 1992).

particular case, judges must evaluate the interests and rights at stake in order to find a remedy that harmonizes them.

This particular trait of the *tutela* system does not, however, exclude the possibility of classifying *tutela* decisions in accordance with two criteria: (i) the difficulty in enforcing the orders that they contain and (ii) the scope of their beneficiaries.

Attending to the degree of difficulty with which they can be enforced, orders issued by *tutela* judges may be simple—when they order an authority or an individual to carry out a specific individual action or to abstain from doing something, or complex—when they adopt orders directed to different authorities and require a set of coordinated activities by all of them. Simple orders are the general rule, in, for example, decisions that order social security entities to register a given individual who had been denied access to the system due to an administrative error, or decisions that order a school to admit a student who had been expelled due to his personal appearance. An eloquent example of a decision involving complex orders was the 1998 verdict in which the Court declared the existence of an “unconstitutional state of affairs” in Colombian prisons—given the prevailing conditions of overcrowding, lack of essential services and security, and generally undignified living circumstances for inmates. The Court then ordered the relevant entities to fulfil their legal responsibilities so as to conform the prison system to its legal requirements.¹⁰¹ The Court granted these entities a period of three months to design the relevant plan, and four years to carry it out.¹⁰²

Tutela decisions may also be classified into two categories based on the beneficiaries: judgments with *inter partes* effects and judgments with effects beyond the formal parties to the case. The second type has had, until now, two manifestations: judgments with *inter pares* effects and judgments with *inter communis* effects.

Inter partes effects are the general rule. In these decisions judicial decisions are only mandatory for the parties to the specific case that was decided. However, in order to seek a just and constitutional solution to

101. Decision T-153 of 1998, Eduardo Cifuentes Muñoz, J. (unanimous), Manuel José Duque Arcila, Jhon Jairo Hernández et al. *contra* Ministerio de Justicia y del Derecho, y el Instituto Nacional Penitenciario y Carcelario (Arcila v. The Minister of Justice and the Nacional Penitentiary Institute).

102. The classification of the different types of orders that *tutela* judges may impart in concrete cases, as well as their power to adjust the content of such orders to the requirements of the situation under review, and the effects of non-compliance with the different types of decisions they adopt, were explained in Decision T-086 of 2003, Manuel José Cepeda Espinosa, J. (unanimous), Evangelina Blanco de Zúñiga *contra* la Sala Civil y de Familia del Tribunal Superior de Cartagena (Evangelina Blanco de Zúñiga v. The Civil and Family Division of the Superior Court of the District of Cartagena).

every different situation, the Court has applied exceptions to this general rule, expanding the obligatory effect of its decisions in *tutela* cases to different spheres.

This kind of expansion is illustrated by judgments in which the Court grants *inter communis* effects. In such cases, the Court has extended its decisions to persons who had not actually filed the corresponding *tutela* claim, but shared common circumstances with the plaintiffs, belonged to the same *community* of persons, and might be negatively affected by a decision that did not include them. The Court recently granted express *inter communis* effects for the first time in a 2001 *tutela* decision protecting the rights of the retired workers of a bankrupt company, who were owed their retirement pensions.¹⁰³ Although only part of the company's retired workers had actually filed the *tutela* claim, the Court extended the effects of its decision to all of them, arguing that, given the limited resources of the bankrupt entity, a judicial decision ordering the liquidator to pay only the plaintiffs' pensions would have left the non-plaintiffs in a worse situation than they were before. This effect would violate the non-plaintiffs' right to equal treatment. In this case, the Court established that this type of decision can only be adopted in exceptional circumstances, in which the protection of plaintiffs' rights would affect the rights of non-plaintiffs who shared common circumstances.

Another expansion of the beneficiaries of *tutela* decisions is illustrated by *inter pares* effects decisions. These decisions occur when the Court orders that the constitutional *ratio decidendi* of a given decision be applied by all judges to every future case in which similar conditions arise. *Inter pares* effects have been adopted, until now, through three different means. The first is by ordering that the precedent should be followed in every future similar case (implicit and eventual *inter pares* effects). The second is by ordering every judge to stop applying a certain regulation in concrete cases, because it is, on its face, contrary to a fundamental constitutional right (explicit and fixed *inter pares* effects). The third is by ordering the respondent, usually an administrative agency, to design a plan that would benefit not only the formal plaintiff, but also all other persons in the same situation (practical and consequential *inter pares* effects). For example, the

103. Decision SU-1023 of 2001, Jaime Córdoba Triviño, J. (Jaime Araujo Rentería, J., concurring), *Librada de Dios Viuda de Fajardo y Otros, contra la Compañía de Inversiones de la Flota Mercante S.A. y Otros* (*Librada de Dios Viuda de Fajardo et al. v. The Merchant Fleet Investment Company*); Decision T-203 of 2002, Manuel José Cepeda Espinosa, J. (unanimous), *Beatriz Helena Salazar de Karpf y Otros contra la Compañía de Inversiones de la Flota Mercante S.A.* (*Salazar de Karpf et al. v. Merchant Fleet Co.*) (enforcing Decision SU-1023, *supra*).

Court granted *inter pares* effects in its 1992 decision on the recognition of the economic value of unmarried female housework. In that case the Court ordered that the doctrine established therein be applied to any future similar cases of women, who had been denied recognition of their contributions to irregular domestic unions.¹⁰⁴ The Court has also recently established that, when it decides to apply the “unconstitutionality exception” by excluding the application of certain regulations in given cases, and applying constitutional mandates instead, such a decision has *inter pares* effect, and must be followed by every judge in the country in similar cases. For this to occur the following conditions must be met: (i) the regulation must be manifestly contrary to the Constitution; (ii) there must be a clear constitutional mandate regarding the regulated issue; (iii) the content of the law should be unconstitutional in itself, in a clearly observable manner, without having to take additional facts or considerations into account; (iv) the provision that is being applied must regulate matters for which the Court has higher Constitutional responsibilities, such as *acción de tutela* or fundamental rights; and (v) the decision must have been adopted by the Court through a unification decision or affirmed several times by the Review Chambers.¹⁰⁵ The Court justified its decision to grant *inter pares* effects to such “unconstitutionality exceptions,” based on the principles of prevalence and effective enjoyment of fundamental constitutional rights. The Court also did so because granting judgments only *inter partes* effects in these circumstances would violate the right to equal treatment of persons in similar situations. Several examples of the third type of decisions exist, because the Court sometimes orders the public administration to design and enforce plans or policies in order to avoid the repetition of the same claim by others, when it is clear that in that particular case the violation of the fundamental right resulted from administrative inaction.¹⁰⁶ However,

104. Decision T-494 of 1992, Ciro Angarita Barón, J. (José Gregorio Hernández Galindo, J. dissenting) Ester Verela *contra* Juzgado 17 Civil Municipal y 9 Civil del Circuito, de la ciudad de Cali (Ester Verela v. 17th Municipal and 9th Civil Court of the Circuit of the City of Cali); *see also infra* Part II.B.1.b.i.

105. *Auto* 071, Feb. 27, 2001, Manuel José Cepeda Espinosa, J. (unanimous), Gloria Inés Pardo de González *contra* Crearsalud Ltda. (Gloria Inés Pardo de González v. Crearsalud, Ltd.).

106. In Decision, T-440 of 1992, Eduardo Cifuentes Muñoz, J. (unanimous), Lucila Díaz Díaz *contra* las Resoluciones Nos. 01651 y 0075 de 1991, proferidas por la Junta Seccional de Escalafón Docente de Boyacá y la Junta Nacional de Escalafón Docente (Díaz v. Resolutions 01651 and 0075 of 1991 promulgated by the Regional Educational Establishment of Boyacá and the National Educational Establishment), the Constitutional Court ordered the Minister of Justice to design and implement a plan for teaching sexual education in all of the country’s public schools with the help of a team of experts and within a twelve month timeframe. Similarly, in Decision T-510 of 2003, Manuel José Cepeda Espinosa, J. (unanimous), *Beatriz en contra* del Instituto Colombiano de Bienestar Familiar–

as I will point out in Part V of this Article, the Court does not issue this type of general order with enough frequency to avoid recurring violations of fundamental rights by some public entities.

B. The Court's Main Decisions and Case-Law Tendencies

A presentation of the Court's powers and workload within the new constitutional system of judicial review would be clearly insufficient to complete a picture of the role that the Court has played in Colombia. A summary of the Court's key decisions and main doctrines in a number of matters, which have proven to be especially controversial and significant for Colombia, will facilitate an appreciation of the magnitude and impact of its work. This summary includes the main decisions adopted with regard to constitutional rights, the organization and functions of the branches of Government, the economy, and the limitation of private powers.¹⁰⁷

1. Decisions Concerning Rights

Even though Colombia has earned a sad reputation as a country with one of the worst human rights records in recent history, the constitutional system adopted in 1991, which is highly protective of fundamental rights and liberties, will ameliorate this problem to some degree. Indeed, the bill of rights included in the new Constitution is one of the Colombian people's most noteworthy collective achievements.

The 1886 Charter did not grant significant protection to fundamental rights. Rather, the Charter merely stated a number of liberties and social guarantees, which were understood to be simple prerogatives given by the state to individuals, but without specific mechanisms to remedy violations. Also, public authorities were given broad powers to restrict such "rights" in order to facilitate the preservation of public order. In order to remedy the Nation's long history of official arbitrariness and abuses of power and narrow the separation between the Constitution and reality, the 1991 Constituent Assembly gave special attention to the introduction of a truly

ICBF-, Regional Nariño (Beatriz v. Colombian Institute of Family Welfare), the Court ordered the Colombian Institute of Family Welfare to adopt a policy to ensure that consent procedures for adoption (i) guarantee that this consent does not contravene the Constitution and (ii) are sensitive to humanitarian issues.

107. Some of the Court's most controversial judgments, in both abstract and concrete review, are summarized in Tables 8 and 9, *infra*.

effective system for the protection and promotion of a new, generous bill of rights.¹⁰⁸

The materialization and operation of the new and extensive catalogue of fundamental rights and duties thus posed one of the greatest challenges to the new constitutional enforcement system. Rights were now to be taken seriously. In other words, rights were no longer remote promises of the legal system, but rather real powers assigned to individuals. Rights were now directly and immediately enforceable in order to protect the most essential interests of the people. This new understanding of rights was underscored in the beginning of the Constituent Process, when bill of rights advocates publicly promoted the new conception by equating individual rights with individual empowerment and by depicting the new catalogue of rights as a necessary pre-condition for the transformation of Colombian society. The position adopted by two leaders who usually opposed each other but agreed in their support for these groundbreaking reforms, shows the consensus surrounding the adoption of a bill of rights.¹⁰⁹ Misael Pastrana, ex-President of the Republic and conservative delegate to the Constituent Assembly, summarized the profound philosophical and political transformation that underlay the creation of this new approach, when he affirmed that the adoption of a strong catalogue of rights had “*made our Colombian democracy a really democratic one.*” Antonio Navarro, former guerrilla leader and co-president of the Constituent Assembly, introduced the M-19 Democratic Alliance Bill of Rights as a separate proposal, and the government publicly announced its advocacy of a generous bill of rights. These events are highly illustrative of the broad reach of this change in the Colombian context. Liberal President César Gaviria delivered an address before the Constituent Assembly on this same point:

After more than 200 years, it has become clear that the separation of public powers is not a sufficient guarantee against abuses. The detailed enumeration of the functions of those who exercise authority is not enough either. What is needed is to give citizens

108. COLOMBIAN CONST. art. 11–95.

109. Although other examples are available, two are symbolic. First, when the conservative president was elected on May 19, 1970, the M-19 Guerrilla movement was created, arguing that there was electoral fraud. Second, twenty-one years later, when an agreement was signed in 1991 to dissolve Congress in order to give immediate application to the new electoral rules adopted by the Constituent Assembly, Misael Pastrana resigned as delegate to the Assembly. At the same time, Antonio Navarro publicly defended the dissolution of Congress by the Constituent Assembly, and the summoning of new elections.

power, and to create mechanisms for them to exercise it in a specific and orderly fashion, through institutional channels, in any place and time. That is precisely what is done with a Bill of Rights and duties like the one we are submitting for this Assembly's examination: to allocate power to ordinary citizens, so that when they are treated in an arbitrary manner, they can have an alternative to aggression, violent protest or subservient and alienating resignation. What we are proposing, and what is appropriate in a democracy, is for citizens to come before judges, before the defenders of fundamental rights or before the constitutional jurisdiction headed by the Constitutional Court.¹¹⁰

If talking about rights is the same as talking about empowerment, then this is a redistribution of social power from the traditional and privileged to the ordinary citizen. It is, therefore, understandable that some of the Court's most significant and controversial contributions to the transformation of Colombian society have been delivered in this field.

One of the greatest challenges for the constitutional judge is to enforce fundamental rights provisions within a legal system, because of the difficulty of balancing conflicting interests in real situations. In each case the interpreter and guardian of the constitutional bill of rights must analyze a number of questions, which are quite difficult to solve. What does it mean to have a certain right within certain conditions? What are the permissible limitations to such rights, and just how far does this right legitimately extend? How will this right relate to other constitutionally protected values, such as fundamental rights or the missions of public authorities? Where should the line be drawn, and according to which objective criteria? The Court has provided different answers to these questions, in accordance with the facts of each one of the thousands of fundamental rights cases it has reviewed.

To understand how the Court has dealt with this challenge, it is necessary to review some of the main decisions in this field. It is particularly helpful to analyze the areas in which the Court has delivered a number of important and highly controversial decisions and in which there is a clear trend in the case law. These areas include decisions regarding basic liberties, such as personal autonomy, freedom of religion, freedom of the press, and freedom of expression. These decisions also include those that deal with equality issues related to discrimination on the grounds of

110. MANUEL JOSÉ CEPEDA-ESPINOSA, *LOS DERECHOS FUNDAMENTALES EN LA CONSTITUCIÓN DE 1991*, *supra* note 10, at 2.

gender, sexual orientation, disability, poverty, or race, as well as those concerning social and economic rights, or collective rights—mainly with regard to indigenous peoples and environmental issues.

a. Basic Liberties

i. Personal Autonomy

Explicit protection of personal autonomy was an innovation of the 1991 Constitution. Article 16 of the Constitution entitles individuals to “freely develop their own personalities,” within the legitimate restrictions imposed exclusively “by the law or by other individuals’ rights.” This broad formula and the corresponding need to define the extent of the constitutionally protected sphere of personal autonomy, has given rise to some of the Court’s most notorious, controversial, and complicated decisions. Not only has the fundamental liberty issue spurred debates on highly sensitive topics, such as euthanasia, abortion, and drug consumption, but it has done so within a social context that is still highly conservative and thoroughly infused with a strong Catholic heritage. Through its different decisions in this field, the Court has proven to be quite liberal and open to innovations on a number of difficult matters. This factor places it at the forefront of current constitutional issues worldwide.

A number of examples taken from different cases in which the Court has explored the extent and limitations of individual freedom illustrate this point: (i) the Court’s interesting position in relation to the right of individuals to make decisions that may cause them harm (personal consumption of drugs, euthanasia, and the mandatory use of safety belts), (ii) the Court’s consistent preservation of the right of individuals to determine their personal appearance, (iii) the more conservative case law tendency on abortion, and (iv) the Court’s difficult decisions concerning the right to determine one’s own gender identity.

Interestingly, through these personal autonomy decisions, the Court has put an end to a number of debates which had been avoided by the Constituent Assembly. Indeed, while discussing the wording and the content of the constitutional article that protected the right to life (current Article 11), some of the delegates introduced the topics of euthanasia, drug consumption, and abortion. However, none of the motions to include specific constitutional provisions on these topics were approved, and most

of the corresponding substantial debates were expressly deferred.¹¹¹ Eventually, the Court became the forum for developing and resolving such debates. This practice shows that the Court has become a legitimate decision-making body on topics affecting national circumstances. This idea will be discussed further in Part III of this Article.

(a) Personal Drug Consumption

In one of its most contentious decisions, the Court declared a legal provision unconstitutional, which criminalized the possession and use of narcotic drugs and imposed penalties such as arrest and mandatory psychiatric treatment.¹¹² The Court stated that the law may only impose upon individuals a given type of behavior when it affects others, and not with regards to conduct that exclusively concerns those individuals alone, because personal conduct is protected by an essential nucleus of personal autonomy. In other words, applying the rule that states that the right to free development of an individual's personality can only be constitutionally restricted when it affects others, the Court struck down the criminalization of the possession and use of drugs. The Court argued that if the state finds it desirable to reduce drug consumption, then in order to avoid violating the Constitution, the state should resort to education, which is a less restrictive alternative.

Four justices¹¹³ dissented, arguing that, in their view, actions intended to harm one's own physical or mental integrity cannot be part of one's own personal liberties. The dissenters stated that drug consumption is not a true personal option, because addiction and vice obstruct free individual will. The dissent also asserted that tolerating drug consumption would be tantamount to legitimizing the noxious effects of drug traffic, which in their view is a crime against humanity.

Apart from its controversial nature in a country like Colombia, which is deeply afflicted with drug problems, this is the first abstract review decision in which the Court applied the rule that it is not legitimate for the state to interfere in a citizen's decision to harm himself. This rule was later applied in the case regarding euthanasia (see below), and in a 1995

111. *Id.*

112. Decision C-221 of 1994, Carlos Gaviria Díaz, J., *In re* Literal j) del artículo 2o. y artículo 51 de la ley 30 de 1986 (Law 30 of 1986).

113. José Gregorio Hernández Galindo, Hernando Herrera Vergara, Fabio Morón Díaz, and Vladimiro Naranjo Mesa.

decision on the legal provision that imposed special penalties for criminal activities carried out under the effects of alcohol.¹¹⁴

(b) *Euthanasia*

In a notorious 1995 verdict, the Court examined the provision of the Criminal Code that penalized “mercy killing,” or murder motivated by pity. An *actio popularis* had been filed against this provision on the grounds that the slight nature of the penalty imposed (six months to three years in prison) was tantamount to an authorization to kill.¹¹⁵ Evaluating the proportionality and reasonableness of the measure, the Court found that these types of actions were motivated by humanitarian considerations. The Court found that these actions were meant to put an end to intense suffering and that it was precisely this subjective element that had led Congress to impose light penalties upon conviction.

Regarding the issue of euthanasia, the Court asserted that it is a matter that should be approached in Colombia from a secular and pluralist perspective, fully respectful of the individual’s moral autonomy and other constitutional rights and liberties. The Court stated that individuals may not be forced to live in extreme circumstances in which they deem life undesirable. From a pluralist perspective, the assertion of an absolute duty to live is not sustainable, because life must not be understood as merely tenable, but instead as life with dignity. Therefore, because the state may not carry out its duty to protect life by completely disregarding an individual’s autonomy and dignity, the Court concluded that in the case of terminally ill persons who are experiencing intense suffering, the state should respect the informed consent of the patient that wishes to die a dignified death. As a consequence, the tribunal stated that the person who helps people in these circumstances die, would be acting out of humanitarian feelings, rather than a desire to kill. Therefore, the Court ordered that in cases in which the necessary conditions were met (i.e., terminal illness, intense suffering, informed consent of the patient that wishes to die), euthanasia was permitted. Nevertheless, to avoid risks of

114. Decision C-026 of 1995, Carlos Gaviria Díaz, J. (Vladimiro Naranjo Mesa, J., Fabio Morón Díaz, J., Hernando Herrera Vergara, J., and José Gregorio Hernández Galindo, J. concurring), *In re* Artículos 44 y 59 del Decreto-Ley 100 de 1995 (Articles 44, 59 of Decree Law 100 of 1995) (declaring a provision constitutional that authorized judges in a criminal trial to impose a prohibition on alcohol consumption as a supplementary penalty for crimes in which alcohol consumption is one of the elements).

115. Decision C-239 of 1997, Carlos Gaviria Díaz, J., *In re* Artículo 326 del Código Penal (Article 326 of the Criminal Code).

abuse and to protect the individual circumstances of patients, the Court held that the justification for applying euthanasia could only be invoked by physicians. It is noteworthy that the Court expressly called upon Congress to regulate euthanasia with the seriousness and detail required by the complex nature of the problem. The Court also ordered that in the absence of such a regulation, future cases of euthanasia must be initially investigated by the judicial authorities in order to determine whether the strict conditions outlined for exonerating doctors are met.¹¹⁶

This extremely divisive decision was accompanied by strong dissenting and concurring opinions. The dissenters argued that the Court had invaded legislative functions and that the majority decision had diminished the constitutional value of life. The dissenters believed that the decision to die under such circumstances can never be a truly free one, and thus cannot be protected as an expression of personal liberty. The dissent stated that the right to freely develop one's own personality is not absolute and should be limited, above all, by the value of life.¹¹⁷ On the other hand, one justice issued a concurring statement in which he emphasized that, in addition to the conditions outlined in the majority decision, the physician should have provided the terminally ill patient with some form of treatment that alleviated her suffering but did not extend her life in an artificial manner.¹¹⁸ This formulation ensures that the final decision to cause death is not a result of a desire to kill, but of a desire to put an end to intense suffering, even if death comes as an indirect, unintended consequence.

(c) Mandatory Use of Safety Belts

The rule regarding whether the state can prevent individuals from inflicting harm upon themselves was restated in a 1997 decision in which the Court upheld the constitutionality of the law requiring use of safety belts in automobiles.¹¹⁹ In this case, the Court affirmed that the state may adopt measures that are adequate to preserve life, but may not restrict personal autonomy for the sake of protecting individuals from themselves.

116. The new Criminal Code, Ley 599 de 2000 (Law 599 of 2000), addresses this issue. Article 106 states that whomever kills another person out of pity, in order to put an end to intense suffering derived from a bodily injury or a grave and incurable disease, shall be punished with one to three years in prison. *Id.* art. 26.

117. Issued by justices José Gregorio Hernández, Vladimiro Naranjo Mesa, and Hernando Herrera Vergara.

118. Eduardo Cifuentes Muñoz, J.

119. Decision C-309 of 1997, Alejandro Martínez Caballero, J. (Hernando Herrera Vergara, J. and Vladimiro Naranjo Mesa, J. concurring), *In re* Artículo 178 del decreto 1344 de 1970 (Article 178 of Decree 1344 of 1970).

Thus, the Court set out a proportionality test to determine when a specific legal provision is respectful of personal liberty. Under this test, such provisions should: (i) seek to promote constitutionally protected values, (ii) be tailored to the specific objective, and (iii) represent the least restrictive alternative to obtain the goal. The higher degree of personal autonomy at issue, the lesser the degrees of state regulation permitted. In this case, although the Court admitted that the use of safety belts almost exclusively benefits the user, it upheld the provision at stake, because it fulfilled all the requirements of the test.

The Court resolved the contradiction with the proposition that individuals may not be bound to take care of themselves when it stated that riding in vehicles, as opposed to using drugs, was not ordinarily related to deep life or death decisions. Also, when accidents occurred in public places and safety belts were not used, there were often third party and societal effects. Congress, therefore, had a legitimate interest in legislating on the issue in the appropriate proportional manner.

(d) Personal Appearance

The Court has protected an individual's right to determine her own personal appearance, because this right is considered part of the essential nucleus of personal autonomy and the expansive right to develop one's own personality. The classic cases in this area have arisen when academic institutions impose dress codes, which include maximum hair length, prohibitions on make-up, and restrictions on certain types of attire in school. The Court, however, has not been entirely consistent in this area.

Initially, the tribunal stated that students' personal appearance could not be transformed into a means to justify denying rule violators their right to an education. In that sense, the Court argued that personal appearance standards, while permissible in certain institutions (e.g., military academies), could never be forcibly imposed upon students.¹²⁰ However, the Court also argued that the establishment of mandatory appearance regulations in schools was not in itself a violation of personal autonomy, because it formed an integral part of the educational process, which parents and pupils had freely consented to upon entry into the institution.

120. Decision T-095 of 1993, Ciro Angarita Barón, J. (José Gregorio Hernández Galindo, J. dissenting), Gonzalo Perdomo Cabrera y Jaime Pelaez Guzman *contra* Colegio Salesiano (Cabrera v. Salesiana School); Decision T-248 of 1996, Jorge Arango Mejía, J. (unanimous), Andrés Felipe Alvarez Cuervo y Jaime Andrés Arias Contreras *contra* de Sebastián Mena Palacios, rector del Liceo San Pablo (Andrés Cuervo et al. v. Sebastián Palacios).

However, the Court stated that the measures imposed may not be disproportionate, unreasonable, or contrary to human dignity.¹²¹ Finally, the Court attempted to harmonize both interests, stating that a proportionality and reasonability test should be applied in each case in order to assess whether the provision at issue is, on its face, contrary to personal autonomy.¹²²

One personal appearance case examined the right of small children to determine their personal appearance. In a 1998 *tutela* case, a four year-old girl attended a nursery school that required children to have short hair.¹²³ The girl's mother argued that, because the child had refused to cut her hair, the child should be entitled to have long hair based on the child's right to personal autonomy. In this case, the Court stated that the right to free development of one's own personality is universal, regardless of the individual's age, and could only be subjected to reasonable and proportional restrictions. In addition, the Court asserted that the scope of those restrictions should be progressively diminished as the individual grows in age, because the extent of the right to personal autonomy is directly proportional to maturity. The bounds of this right should expand to a maximum in those matters that do not affect either the rights of third parties or objective values protected by the legal system. In this particular case, given the maturity of the child, the Court found the restriction on the child's personal autonomy to be disproportionate and unreasonable, because the child was already aware of her own image and had shown a considerable level of independence. Additionally, because no third party rights or legal interests were affected by the girl's decision and there were less restrictive and more effective means to promote hygiene, the *tutela* was granted.

121. See Decision T-366 of 1997 José Gregorio Hernández Galindo, J. (unanimous), Oscar Rodríguez Avila *contra* Colegio Cooperativo Champagnat (Oscar Avila v. Champagnat Cooperative School), Decision T-633 of 1997, Hernando Herrera Vergara, J. (unanimous) Mauricio Cortes Zabaleta y Danny Zamudio Valencia *contra* el Colegio Externado Nacional Camilo Torres (Mauricio Zabaleta v. National Camilo Torres School); Decision T-636 of 1997, Hernando Herrera Vergara, J. (unanimous) Cesar Augusto Lindado Castro *contra* Normal Nacional de Varones de Tunja (Cesar Castro v. National Male Normal-School of Tunja).

122. Decision T-124 of 1998, Alejandro Martínez Caballero, J. (unanimous), Ana Mercedes Díaz Blanco *contra* Colegio Externado Nacional Camilo Torres (Ana Blanco v. National Camilo Torres School).

123. Decision SU-642 of 1998, Eduardo Cifuentes Muñoz, J. (Hernando Herrera Vergara, J. and José Gregorio Hernández Galindo, J. concurring), Jairo Alonso Carvajal *contra* la Directora del jardín infantil "El Portal" de la penitenciaría "La Picota" (Jairo Carvajal v. Director of "El Portal" Nursery School of "La Picota" Penitentiary).

(e) Freedom to Determine One's Gender

One of the most complicated cases that the Court has decided concerned the personal freedom to determine one's own gender identity. This case involved an eight-year old child who was born a hermaphrodite.¹²⁴ The child's mother requested that the social security system authorize an operation to anatomically define the child's gender as a female. The infant's doctor and mother believed that it was urgent to carry out the operation before puberty for both medical and psychological reasons. The social security entities refused to authorize the procedure, arguing that, according to the case law of the Constitutional Court, the child had to consent to the operation. The Court faced the complex problem of determining whether, in cases where there is no risk of death, parents or legal guardians of child-hermaphrodites are permitted to authorize operations that would define the child's sex.

In deciding the case, the Court took into account an enormous amount of technical evidence from national and international sources, recognizing that this case posed a remarkably difficult constitutional problem. The case involved medical, legal, social and ethical issues. There was indeed a great potential for human suffering for the child and the family given the social stigma associated with hermaphroditism. Moreover, the Court stated that any decision adopted, would cause suffering for the parties involved. In its decision, the Court recalled the basic constitutional rules regarding the medical treatment of minors. First, in general, children are not sufficiently autonomous to consent to medical treatment. Second, children's rights to life and health, which are fundamental, can be protected by parents and authorities, even against the child's apparent dissent. Third, parents may not adopt *any* medical decision concerning the minor, because the child is also free and autonomous and not the property of the parent. In that sense, the Court stated that parent's right of intervention cannot disregard the child's health or life, and, in order to determine the scope of the parent's discretion, three criteria should be applied: (i) the urgency of the treatment, (ii) the risks entailed and the impact on the child's present and future autonomy, and (iii) the age of the child.

After a very complex evaluation of the inconclusive state of scientific knowledge on hermaphroditism and of the particular circumstances of the

124. Decision SU-642 of 1999, Alejandro Martínez Caballero, J. (unanimous), *Madre de la menor impúber N.N. contra Estado*, representado según ella por el Instituto Colombiano de Bienestar Familiar y el Defensor del Pueblo (Mother N.N. of a Minor v. State Represented by the Colombian Institute of Family Welfare).

case, the Court concluded that it was not sufficiently clear that the infant required an urgent treatment and that the operation was highly invasive, irreversible, and decisive in nature. Based on these considerations, the Court decided that it was not permissible for the mother to give consent without the child's consent, because uncertainty as to the results of the operation made it preferable to avoid any potential damage. It was better then, in the Court's opinion, to defer the decision on the operation until a time when the child had acquired sufficient maturity to grant consent. Although the court denied the *tutela*, it did order the social security entity to establish a multidisciplinary team to supervise the child's case and help the child to make a mature decision at an appropriate time.

(f) *Abortion*

Abortion was one of the subjects debated by delegates to the Constituent Assembly when discussing the constitutional right to life and the time from which this right would receive legal protection. However, no specific provision was adopted on the matter, and its resolution was deferred to a later time. When the issue of abortion was brought before the Court, it turned out to be one of the issues on which the Court has adopted a more conservative stance. In a salient 1994 decision, the Court upheld a provision in the 1980 Criminal Code that imposed penalties upon women who opted for abortion as well as upon persons who carry out abortions with the pregnant woman's consent.¹²⁵ In this case, the Court affirmed the constitutional protection of life that extends to unborn human beings, who are regarded as "existentially different from the mother." The Court ruled that Congress has the power to select the measures it considers adequate to protect human life, including criminal penalties. Although the Court recognized that conflicts between the rights of the mother and the fetus are possible, the Court concluded that it is for Congress, and not a judicial body, to design an adequate criminal policy for these situations.

Three justices issued a dissenting opinion, in which they agreed with the majority position concerning the legislature's power to criminalize abortion, but strongly criticized the absolute character of the criminal provision under review, because the provision did not account for the possibility of the cases in which abortion is a less damaging alternative for both the mother and the legal system. The dissenters felt this was the case

125. Decision C-133 of 1994, Antonio Barrera Carbonell, J. (Alejandro Martínez Caballero, J., Carlos Gaviria Díaz, J., and Eduardo Cifuentes Muñoz, J. dissenting), *In re* Artículo 343 del Código Penal (Article 343 of the Criminal Code).

when the abortion takes place in the first trimester, or in cases of rape, malformation of the fetus, or danger to the mother's life.¹²⁶ The dissent also expressed its concern with the attribution of legal personality to the unborn fetus and the effect that an absolute criminalization of abortion could have in Colombia, such as irregular, "secret" abortions. Perhaps it was the generally violent situation in Colombia and the resulting constant disregard for the value of human life that prompted the magistrates to defer the decision on whether to decriminalize abortion to "legislative criminal policy."

Later, in a 1997 decision, the Court reviewed an *actio popularis* presented against the provisions of the Criminal Code that established lower penalties for mothers convicted of abortion or child abandonment, whenever their pregnancy had resulted from sexual offenses or unconsensual artificial insemination or embryo implantation.¹²⁷ The plaintiff argued that the low penalties in the law were unconstitutional insofar as they minimized the value of human life. The Court reaffirmed the doctrine established in its 1994 judgment on the legislature's power to criminalize abortion and upheld the constitutionality of the provisions under review. The Court found Congress' measures neither unreasonable nor disproportionate. Thus, Congress had not exceeded the scope of its power in criminal policymaking, especially because abortion remained a crime. It must be noted that this decision expressly defined abortion as an action that should be "repudiated," and quoted a number of Papal Encyclicals to support its line of reasoning—a matter expressly disapproved of by the dissenting magistrates.¹²⁸

However, after the new justices were elected in 2000, the Court, in a very divided decision, took a more moderate stance. This more moderate position is evident in a recent judgment, in which the Court examined the constitutionality of the provision in the new Criminal Code, which authorizes judges to abstain from imposing a penalty for abortion when it occurred under "extraordinary and abnormal conditions of motivation."¹²⁹ Rather, this time, Congress had gone in a different direction, and accepted

126. Eduardo Cifuentes Muñoz, Carlos Gaviria Díaz, and Alejandro Martínez Caballero

127. Decision C-013 of 1997, José Gregorio Hernández, J. (Jorge Arango Mejía, J. concurring; Alejandro Martínez Caballero, J., Eduardo Cifuentes Muñoz, J., and Carlos Gaviria Díaz, J. dissenting), *In re* Artículos 328, 345, 347 y 348 del Código Penal (Articles 328, 345, 347, 348 of the Criminal Code).

128. Eduardo Cifuentes Muñoz, Carlos Gaviria Díaz, and Alejandro Martínez Caballero.

129. Decision C-647 of 2001, Alfredo Beltrán Sierra, J. (Manuel José Cepeda Espinosa, J., Alfredo Beltrán Sierra, J., Jaime Araujo Rentería, J., and Clara Inés Vargas Hernández, J. concurring; Rodrigo Escobar Gil, J. and Marco Gerardo Monroy Cabra, J. dissenting), *In re* Artículo 124 de la Ley 599 de 2000 (Article 124 of 599 of 2000).

that certain abortions could remain unpunished in certain cases. However, Congress did not go as far as to decriminalize certain types of abortions or to forbid completely the criminal investigation and judgment of women who decided to have an abortion under “extraordinary and abnormal conditions of motivation.”¹³⁰ Congress only allowed the judge to waive the imposition of a punishment. Because of legislative discretion in criminal policy, the Court considered that, given the extreme nature of criminal penalties, and their requirements of fairness, proportionality and necessity, judges should evaluate the degree of social damage caused by criminal conduct and impose the appropriate punishment or lack thereof in the interests of justice. Thus in this case, the Court, by a scant majority of five justices, upheld the provision at issue. This was a particularly difficult decision for the Court, because only seven justices sat for the case. Two justices with more liberal views had recused themselves.¹³¹ In addition, two magistrates dissented, stating that the provision should have been declared unconstitutional, not only on procedural grounds, but also substantive grounds because it gave way to imposing restrictions upon life.¹³² The most innovative aspect of this case was that four justices¹³³ wrote a concurrence stating that the decriminalization of abortion is constitutional in certain cases in which (i) the mother’s autonomy is clearly violated (e.g., rape), or (ii) the interest in protecting fetal life is diminished (e.g., severe malformation).¹³⁴

In comparison with the jurisprudence of other constitutional tribunals worldwide, Colombian jurisprudence on abortion, represents an intermediate stance. On the one hand, decisions like the one adopted by the U.S. Supreme Court in *Roe vs. Wade*, recognizing the right of women to choose to carry out an abortion and the qualitative difference between state protection of unborn humans vis-à-vis protection of born persons, represent the most pro-choice position. Other courts have adopted an intermediate stance, such as the German Constitutional Tribunal, for which the fetus receives full state protection. This stance supports the criminalization of abortion, but also admits that, under certain

130. *Id.*

131. One had been co-sponsor of the new Criminal Code, acting as vice-national public prosecutor (Jaime Córdoba Triviño). *Id.* The other one had intervened in the legislative process, as vice-national attorney general (Eduardo Montealegre Lynett). *Id.*

132. Marco Gerardo Monroy Cabra and Rodrigo Escobar Gil. *Id.*

133. Clara Inés Vargas Hernández, Alfredo Beltrán Sierra, Jaime Araujo Rentería, and Manuel José Cepeda Espinosa. *Id.*

134. In a later decision, the Court upheld this same provision on procedural grounds, see Decision C-098 of 2002, Clara Inés Vargas Hernández, J. (Alvaro Tafur Galvis, J., Rodrigo Escobar Gil, J., and Marco Gerardo Monroy Cabra, J. dissenting) (text on file with author).

circumstances, the protection of the mother's rights becomes more important than the interest in the fetus' life. This stance then gives rise to exceptions in the law's application.¹³⁵ The German court's attitude is probably the one that most resembles the Colombian Court's position, especially in light of the new Colombian Criminal Code and the recent 2001 decision.¹³⁶ In Latin America itself, the Colombian position seems more flexible than other states to arguments against punishing abortion in every single circumstance.¹³⁷

ii. Freedom and Equality of Religions

The Court has also granted consistent protection to freedom of religion, despite the overwhelming Catholic majority in Colombia.¹³⁸ In this respect, it must be underscored that, while the 1886 Constitution clearly preferenced the majority religious group, the 1991 Charter focuses on the protection of religious pluralism and tolerance of minorities. The Charter therefore includes generous provisions, which separate church and state, require state neutrality towards religious groups or affiliations, and guarantee the freedom of religion and the equality of all religions before the law.

In order to understand the impact of the Court's decisions in this field, it should be borne in mind that since 1886, despite the constitutional protection of religious freedom, the Colombian Government had made substantial efforts to reinforce its links to the Catholic Church, granting it institutional privileges over other religions. International treaties, laws, decrees and judicial decisions were adopted to support the high degree of cooperation that existed between religious and political leaders. Since the promulgation of the 1991 charter, however, based on the express

135. With regards to the treatment given to the topic of abortion by foreign courts, see VICKY C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999); LOUIS FAVOREU & LOÏC PHILIP, *LES GRANDES DÉCISIONS DU CONSEIL CONSTITUTIONNEL* (1995); DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (1997).

136. A number of factors are significant when debating the desirability of a complete liberalization within the Colombian context, such as: (i) increasing "underground" abortion clinics resulting in the public health problem of a high incidence of death among poor mothers, (ii) unsuspected rates of sexual assault in urban and rural contexts, often resulting in pregnancy, especially amongst teenagers, (iii) low levels of sexual and reproductive education, especially in lower socioeconomic strata, and (iv) the devaluation of human life in the general climate of violence.

137. The Latin American position on this matter is reflected in the American Convention of Human Rights, Article 4-1, which states that "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. . ." American Convention on Human Rights, Nov. 22, 1969, art. 4(1), 9 I.L.M. 673.

138. COLOMBIAN CONST., art. 19.

affirmations of religious freedom and equality among religions, the Court has started to reverse the old trend. Thus, the Court struck down a number of legal provisions that linked the Catholic Church and the government. These judgments have caused a great deal of controversy.

(a) *The Concordat Case*

One of the Court's earliest decisions in this area¹³⁹ was related to the constitutionality of a treaty between Colombia and the Holy See—the “Concordat,” which established a number of privileges for the Catholic Church, such as special cooperation between the Church and the government for the “promotion” of the conditions of indigenous peoples, exclusive church jurisdiction to dissolve Catholic marriages, a higher degree of educational autonomy, the contribution of public funds to the maintenance of catholic institutions, mandatory catholic education in public schools, privileged promotion of the catholic religion in marginal areas, presidential intervention in the nomination of Bishops and Archbishops, special catholic services for members of the armed forces, exclusive criminal jurisdiction over Bishops for the Holy See, and special procedural rules for clerics. The constitutionality of the Concordat had already become a matter of debate within the Constituent Assembly. In fact, the delegates had eliminated the pre-existing reference to the possibility of entering into treaties with the Vatican in order to respect the new mandate of religious freedom and equality.

All of the above-mentioned prerogatives were deemed unconstitutional, because they discriminated against other churches and because they violated the right to religious freedom. One justice expressed his dissent on the grounds that Court lacked jurisdiction to review treaties ratified before 1991.¹⁴⁰ The decision on the Concordat prompted citizen awareness of the implications seriously enforcing rights and principles under the constitutional system of judicial review. It also stirred a reaction from the Catholic Church, which sponsored a referendum on the issue and initiated talks to adopt a new Concordat; both initiatives failed.

139. Decision C-027 of 1993, Simón Rodríguez Rodríguez, J., *In re Ley 20 de 1974* (Law 20 of 1974).

140. José Gregorio Hernández Galindo.

(b) The Sacred Heart Case

A similar decision on religious freedom was the 1994 verdict declaring unconstitutional the legal provision that officially dedicated the Colombian State to the Sacred Heart of Jesus and prescribed a number of celebrations.¹⁴¹ The Court abolished this provision because of the pluralist nature of the Colombian State, of which religious diversity is one of the foremost components. The Court rejected the argument that the law was merely recognizing the social and historical reality of the Catholic majority in Colombia. The Court found that such an assertion was not sufficient to justify the formal endorsement of one Church over others in defiance of the Constitution. This decision is not in agreement with later ones rulings that upheld the officially obligatory character of Catholic and Sunday holidays.¹⁴² In these cases, the Court held that although these holidays were initially conceived in a religious context, they had now been adopted by society as a neutral holiday tradition. In addition, a 1994 decision upheld the constitutionality of the 1887 Law, which provided that custom not contrary to Christian morals may be a subsidiary source of law.¹⁴³ In this case, the Court found that Christian morals, as an essential element of the social order and the grounds for the majority's moral position, might be legally relevant. The Court has recently stated that, it will use several criteria to determine when a law has a religious purpose, effect or connotation and thus violating the Constitution.¹⁴⁴

(c) The Religious Freedom Statutory Law Case

In the 1994 decision on the constitutionality of the Statutory Law that regulates religious freedom,¹⁴⁵ a number of important rules were established. I would like to emphasize the following ideas: (i) the idea that

141. Decision 350 of 1994, Alejandro Martínez Caballero, J. (Vladimiro Naranjo Mesa, J., Hernando Herrera Vergara, J., and José Gregorio Hernández Galindo, J. dissenting), *In re Leyes 33 de 1927 y 1ª de 1952* (Law 33 of 1927, Law 1ª of 1952).

142. Decision C-1261 of 2000, Martha V. SÁCHICA de Moncaleano, J. (unanimous), *In re Artículo 25 de la Ley 50 de 1990* (Article 25 of Law 50 of 1990).

143. C-224 of 1994, Jorge Arango Mejía, J. (Carlos Gaviria Díaz, J., Alejandro Martínez, J., Caballero, J., Eduardo Cifuentes Muñoz, J., and Fabio Morón Díaz, J. dissenting), *In re Artículo 13 de la ley 153 de 1887* (Article 13 of Law 153 of 1887).

144. Decision C-152 of 2003, Manuel José Cepeda Espinosa, J. (Alfredo Beltrán Sierra, J., Jaime Araújo Rentería, J., and Clara Inés Vargas Hernández, J. dissenting in part), *In re Artículo 1 de la Ley 755 de 2002* (Article 1 of Law 755 of 2002).

145. Decision C-088 of 1994, Fabio Morón Díaz, J., *In re Revisión previa del Proyecto de Ley Estatutaria sobre Libertad Religiosa No. 209* (Revision of the Draft Law on Religious Freedom No. 209).

legal protection of religion may be of a positive or negative nature (i.e. freedom to practice or abstain from religion versus religiously motivated harassment or coercion); (ii) the idea that although there is no official state religion, the State supports and protects the free exercise of religion; (iii) the idea of excluding practices defined by the law as psychic, parapsychological, satanic, magical, superstitious, spiritist or similar practices from the category of “religion”;¹⁴⁶ and (iv) the idea of forbidding the conditioning of a student’s access to academic institutions on acceptance of religious education.

(d) Protection of Minorities Cases

A number of *tutela* decisions issued by the Court have focused on the protection of the rights of members of minority religious groups, which are often discriminated on the grounds of their religious belief by public and private powers. The Court has consistently upheld the right to abstain from compulsory catholic education in academic institutions at all levels,¹⁴⁷ the right not to be dismissed from work for observing religious traditions (e.g., the Sabbath),¹⁴⁸ and the rights of minority churches to receive state recognition of their autonomy and hierarchies.¹⁴⁹

From another perspective, defending human dignity and religious practices, the Court has protected minorities even when they are within a given religion. In a highly publicized case, the Court recently protected a disabled minor’s right to dignified treatment. The minor had been denied holy communion by a Catholic priest, who publicly argued that, due to the minor’s mental capacity, the child could not comprehend the meaning of the ritual at hand, and thus was “like a little animal.”¹⁵⁰ Although the Court did not order the priest to administer the Communion because of the religious authorities’ autonomy over the matter and the absence of a unjustified differential treatment, the Court did order the priest to retract

146. The Court qualified all of these practices as valid and protected manifestations of human behavior that may be protected under freedom of expression, but not as religions in themselves.

147. *See id.* Decision C-555 of 1994, Eduardo Cifuentes Muñoz, J. (unanimous), *In re* Artículos 6 y 16 de la Ley 60 de 1993, Artículos 23, 24, 92, 94, 95, 96, 105, 143, 155, 159, 160 y 162 de la Ley 115 de 1994 (Law 60 of 1993, Law 115 of 1994); Decision T-421 of 1992, Alejandro Martínez Caballero, J. (unanimous), Amparo Bedoya Díaz y José Raúl García García *contra* la Escuela Pública “Julio Zuluaga” (Díaz v. The Public School “Julio Zuluaga”).

148. Decision T-982 of 2001, Manuel José Cepeda Espinosa, J., Ana Chávez Pereira *contra* la Caja de Compensación Familiar del Amazonas (Cafamaz) (Pereria v. Bank of Amazonas).

149. *See supra* note 145.

150. Decision T-1083 of 2002, Eduardo Montealegre Lynett, J. (Alvaro Tafur Galvis, J. dissenting), Alexander Morales Bailón *contra* de Fernando Moreno (Bailón v Moreno).

publicly his statement that people with mental disabilities are like animals. The Court held that such a position disregarded the most basic dignity of any human being.

*iii. Freedom of the Press*¹⁵¹

Colombia is, by far, the most unsafe place in the world for journalists, who are frequent victims of the nation's internal armed conflict. Nevertheless, the Constitutional Court has made significant achievements in the definition of the scope of freedom of the press, and of the rights related to the flow of information.¹⁵² Strong trends in decisions exist in relation to (i) the potential conflicts between the right to individual privacy and the right of the media to inform, and (ii) the mass media's social responsibility. Both of these issues have received particular recognition in the inter-American region. Other judgments in this area have earned the Court widespread criticism, such as the judgment on the 1996 "television law."

(a) Freedom of the Press in Conflict with Privacy

The first *tutela* decisions of the Court concerning the press addressed the classic conflict between freedom of the press and the right to privacy. Some of the most debated cases in the field of freedom of the press have arisen when the power of the media clashes with the individual's right to privacy, especially that of public figures or other well-known persons. In the beginning, the Court tended to protect privacy, visualizing the press as a huge power which could invade privacy without restraint. Thus, in a 1992 decision the Court examined the *tutela* filed by the widow of a popular singer against several newspapers that had given substantial

151. The Court has examined the freedom of the press many respects. Due to space considerations, no description of cases on other important topics is included herein. On the right of the media to obtain information, see Decision T-066 of 1998, Eduardo Cifuentes Muñoz, J. (unanimous), Heber Jair Otero Velasco *contra* la Revista Semana (Velasco v. "Revista Semana" Magazine); Decision T-094 of 2000, Alvaro Tafur Galvis, J. (unanimous), Omar Enrique Benjumea y de la Sociedad Salsamentaria San Martín Ltda. *contra* el Canal Caracol (Benjumea v. Channel "Caracol"). For rights of access to airwaves, see Decision C-445 of 1997, Hernando Herrera Vergara, J. (unanimous), *In re* Artículo 16 de la Ley 335 de 1996 (Article 16 of Law 335 of 1996); Decision C-350 of 1997, Fabio Morón Díaz, J. (Eduardo Cifuentes Muñoz, J., Vladimiro Naranjo Mesa, J., Hernando Herrera Vergara, J., and José Gregorio Hernández Galindo, J. dissenting), *In re* Artículos 1, 2, 8, 10, 11, 13, 16, 20, 21, 25, 26, 28 de la Ley 335 de 1996 (Law 335 of 1996); Decision C-329 of 2000, Antonio Barrera Carbonell, J., *In re* Artículos 49 a 57 del Decreto 1900 de 1990 (Articles 49 through 57 of Decree 1900 of 1990).

152. COLOMBIAN CONST. art. 20.

coverage to her husband's death and to his previous extra-matrimonial affair.¹⁵³ In this case, the Court determined that the media organizations are private organizations with great power and social influence and that they can therefore harm the rights of individual citizens on a grand scale. Consequently, the Court expressly affirmed that the constitutional protection of freedom of the press is circumscribed by the media's duty to disseminate true and impartial information, social responsibility, and respect for the rights of others. Thus, the media may not invoke freedom to inform as an excuse to invade the constitutionally protected rights of individuals, such as the right to privacy. This rule is all the more important when the rights of the family and of children are concerned, even in the case of well-known figures, whose right to privacy may be more diffuse but nevertheless present. The Court granted the *tutela*, ordering that the media abstain from disseminating any more information on the case, and imposing an unquantified penalty upon the defendants.¹⁵⁴ This same line of reasoning was adjusted in a later decision,¹⁵⁵ in which a distinction was made between information made public by the media and information made public by a socially notorious person and then disseminated as true and impartial facts by the media. In this case, the Court denied a *tutela* filed by the claimant, regarding the dissemination of facts that the claimant himself had made public. In fact, in the *tutela* decisions adopted after the mid 1990s, the Court made a distinction between the privacy of ordinary citizens and the more reduced privacy of public officials and figures. The Court has said that in those cases, the importance of freedom of the press within a democracy, and its functions for facilitating the accountability of those in power to the people justify the dissemination of information that may reveal facts about the personal lives of public officials and figures.¹⁵⁶

153. Decision T-611 of 1992, José Gregorio Hernández Galindo, J. (unanimous), Clara Elena Cabello de Orozco *contra* Varios Medios de Comunicación (Orozco v. Various Periodicals).

154. Article 25 of Decree 2591 of 1991 enables *tutela* judges, under certain conditions, to impose *in genere* or "abstract" penalties upon violators of fundamental rights. The quantification of these penalties is left to ordinary judges, in front of whom plaintiffs must reappear in order to obtain a specific indemnity.

155. Decision SU-1723 of 2000, Alejandro Martínez Caballero, J. (unanimous), Diomedez Díaz Maestre *contra* Telecolombia Ltda. (Maestre v. Telecolombia, Ltd.).

156. See Decision SU-056 of 1995, Antonio Barrera Carbonell, J. (unanimous), Rosmary Montoya Salazar, Margarita Vásquez Arango y Libia González de Fonnegra *contra* Germán Castro Caycedo, Lucrecia Gaviria Diez y Editorial Planeta (Salazar et al. v. Caycedo et al.); Decision T-048 of 1993, Fabio Morón Díaz, J. (unanimous), Rafael Carbonell y Caronell *contra* La Tarde (Carbonell v. La Tarde); Decision T-066 of 1998, Eduardo Cifuentes Muñoz, J. (unanimous), Heber Jair Otero Velasco *contra* la Revista Semana (Velasco v. La Revista Semana Magazine).

(b) Dissemination of Classified Information and Personal Reputation Issues

Although the Court has ordered the media, including television news programs, to retract false information that seriously affects individual reputations, usually the Court has protected the freedom of the press, the media's criticism of the government, and, occasionally, the dissemination of information deemed disrespectful by public officials.¹⁵⁷

It must not be overlooked that given the prevailing social and political conditions in Colombia, it is not unusual for people who are the object of public accusations in the press and related to armed conflict to be victims afterwards of attacks or threats to their person. A salient case in this area was the 1998 verdict¹⁵⁸ on a *tutela* filed by the mayor of a municipality against a prominent weekly magazine that had named him in an article about mayors purportedly associated with local guerrillas. The magazine cited unspecified army documents as the source of its information. The plaintiff, in response promptly requested that the magazine publicly clarify his innocence and cited the severe security problem created for him by the article. However, the magazine's response was limited to a brief note published in a secondary section that specified the vague nature of the sources it had consulted. The army denied supplying the magazine with any information, which was, in any case, deemed "classified." The Court stated that "classified" nature of documents is only binding on public officials. However, the Court held that the media, in fulfilment of their natural function as scrutinizers of public power, can seek and publish such information under the condition that the information be truthful and presented in an impartial manner and that the affected persons have an opportunity to establish his or her version of the facts. In so deciding the Court recalled previous case law regarding the clash between a right to privacy or the good reputation of public officials and the right of the media to inform. When it is not possible to harmonize both interests, the latter should prevail based on the media's function as a scrutinizer of political power. The article on the plaintiff in this case, therefore, was considered a manifestation of the magazine's exercise of its legitimate functions. In this case, however, the Court determined that the requirement that the

157. In Decision T-206 of 1995, Jorge Arango Mejía, J. (unanimous), Manuel Francisco Becerra Barney *contra* María Elvira Samper Nieto y María Isabel Rueda Serbousek (Barney v. Nieto et al.), the Court affirmed, based on the condition of fairness, a *tutela* decision ordering a popular television news program to rectify the information that it had broadcast about the corrupt activities of a public official.

158. Decision T-066 of 1998, Eduardo Cifuentes Muñoz, J. (Velasco v. La Revista Semana).

information be truthful—a standard applied more or less strictly depending on the nature and impact of the topic—was not been met. The Court also criticized the evident lack of visibility of the note of “clarification,” asserting that the note and the article should, in all fairness, be equally visible. The *tutela* was granted and the magazine was ordered to rectify its untruthful assertions.

The Court has also addressed the conflict between freedom of the press and personal reputation in its abstract review of legislation. In the most recent decision in this area, the Court recognized that the legislature could favor freedom of the press over honor, which is an important value in Hispanic culture. The provision at issue allowed the press to stop any criminal procedure for libel by publicly retracting information that could affect an individual, even without or against the consent of the plaintiffs. The Court upheld the provision on the grounds that, criminal responsibility would not be necessary, because honor could be reestablished once the press retracted harmful information. One Justice concurred, arguing for allowing a more broad and open democratic debate through an active protection of freedom of the press and the establishment of other less restrictive means to protect individual reputations (e.g., *tutela*).¹⁵⁹

(c) *Journalists’ Licensing*

One particular case concerning freedom of the press that has raised a significant degree of public debate was a 1998 constitutionality decision¹⁶⁰ in which the Court banned a law requiring journalists to carry a professional card. This requirement had, in practice, created a kind of licensing system. The primary argument advanced by the Court was the fact that the Constitution does not restrict freedom of expression to those who can prove they have obtained a certain type of education or qualifications in journalism. In other words, no specific group can claim control over the exercise of an activity classified by the Constitution as a fundamental freedom for all persons. The Court also asserted that the exercise of a given profession or occupation can only be regulated when it entails some type of social risk and found that the risks involved in allowing the freedom of opinion implicit in a democratic system are

159. Decision C-489 of 2002, Rodrigo Escobar Gil, J. (Manuel José Cepeda Espinosa, J. concurring), *In re* Artículos 82 numeral 8° y 225 de la Ley 599 de 2000 (Articles 82, 225 of Law 599 of 2000).

160. Decision C-087 of 1998, Carlos Gaviria Díaz, J. (Eduardo Cifuentes Muñoz, J. concurring), *In re* Artículos 2, 3, 4, 5, 6, 7, 8, 9 y 10 de la Ley 51 de 1975 (Law 51 of 1975).

preferable to the risks of suppressing it. In the end, the Court declared the law unconstitutional.

The Court recently ratified this doctrine when it struck down part of a bill, which the President had vetoed. In the Court's view, the bill was an attempt to reintroduce a licensing system by defining professional journalists as those who held a university degree in journalism, or were certified by the Ministry of Social Protection and had worked as journalists during the past ten years. After expounding upon the crucial function of a free press within a democracy and highlighting various previous forms of control over the press that are forbidden by the Constitution, the Court declared that any person can become a journalist because of her right to freedom of expression. Nevertheless, the Court accepted that a law can grant labor and social security benefits to journalists, as well as protect them against violent threats, insofar as: (a) these protective measures are narrowly tailored to exclude any risk of governmental intervention with the free press; and (b) the enjoyment of these benefits depends exclusively on objective criteria.¹⁶¹

(d) Covert Retaliation Against Criticism

Another controversial judgment was a 1998 decision¹⁶² in which the Court rejected an unconstitutional *actio popularis* presented against Law 335 of 1996 ("Law") regulating television services. The plaintiff argued that the Law, as a whole, was an illegitimate instrument devised by Congress with intimidatory and persecutory aims to retaliate against television news channels that had carried out investigative journalism activities during the so-called "*Proceso 8.000*." This was a highly publicized set of criminal and political investigations involving the then President of the Republic and a number of high public officials and political figures. These investigations unleashed in 1995 when the presidential campaign was publicly accused of receiving money from druglords. The plaintiff's argument was supported by the fact that the Law ordered the non-renewal of contracts then operating between providers of television services and the state. The law also required the initiation of a new public tender to select future providers. As a consequence of this

161. Decision C-650 of 2003, Manuel José Cepeda Espinosa, J. (unanimous) (text on file with author).

162. Decision C-456 of 1998, Antonio Barrera Carbonell, J. (Hernando Herrera Vergara, J., Eduardo Cifuentes Muñoz, J., and José Gregorio Hernández Galindo, J. dissenting), *In re* Ley 335 de 1996 (Law 335 of 1996).

tender, television service suppliers who had broadcast news programs denouncing powerful politicians were refused air time, and their television spaces were reassigned to different companies. The Court stated that it is both normal and acceptable for laws regulating the duration of public contracts to be proposed by members of Congress. The Court also stated that the democratic process is a guarantee that the final provisions adopted as law will be the result of public and pluralistic debate, even if the drafting congressional members had personal interest stakes in the new law. In light of its 1997 decision¹⁶³ on the constitutionality of the same legal provision, the Court held that it is within the scope of congressional autonomy to regulate the conditions of concession contracts with television service providers, including their non-renewal. The Court also held that the launch of a new tender did not in itself violate equality of treatment as all of the providers were given equal opportunity to participate. Finally, while the Court asserted that a given law could be declared unconstitutional on the grounds of some discriminatory or coercive purpose or impact, this particular case was not such a situation.

(e) Freedom of the Press and Public Order

Despite grave disturbances to the public order and enduring armed conflict, the Court has preferred the rights of a free press over claims for public order. The Court has stated, for example, that only in extreme situations in which information may pose a clear and present danger to life, physical integrity, or an ongoing military operation may a presidential decree to punish, not for the purpose of censorship, the publication of such information.¹⁶⁴ The Court upheld a presidential decree based on this exception that forbade the publication of any text or verbatim declarations issued by guerrillas or paramilitary groups, and the live transmission of information on military operations when it could imperil the lives of soldiers.¹⁶⁵ In an ordinary law approved by Congress, however, the same

163. Decision C-350 of 1997, Fabio Morón Díaz, J. (Eduardo Cifuentes Muñoz, J., Vladimiro Naranjo Mesa, J., Hernando Herrera Vergara, J., and José Gregorio Hernández Galindo, J. dissenting), *In re* Artículos 1, 2, 8, 10, 11, 13, 16, 20, 21, 25, 26, 28 de la Ley 335 de 1996 (Law 335 of 1996). The Court struck down provisions of the Law that allowed for the evaluation of new programs and the provisions that would result in censorship. *Id.*

164. *See* Decision C-197 of 1994, Carlos Gaviria Díaz, J. (Alejandro Martínez Caballero, J. concurring in part), *In re* Artículo 1o. de la Ley 54 de 1989 (Article 1o. of Law 54 of 1989) (upholding the statutory law concerning presidential powers during states of exception).

165. Decision C-045 of 1996, Vladimiro Naranjo Mesa, J. (José Gregorio Hernández, J., and Jorge Arango Mejía, J. concurring; Carlos Gaviria Díaz, J., Alejandro Martínez Caballero, J., and Eduardo Cifuentes Muñoz, J. dissenting), *In re* Revisión constitucional del Decreto 1902 del 2 de noviembre de

provision was struck down as an excessive intrusion on the freedom of the press, reasoning that no circumstance or level of public disorder justified such a permanent measure.¹⁶⁶ Recently, the Court struck down a presidential decree stemming from the exception that restricted access by journalists to zones of declared armed conflict on the grounds that it violated access to information and gave way to censorship.¹⁶⁷

iv. Freedom of Expression

Two particularly interesting sources of case law dealing with freedom of expression¹⁶⁸ relate to the protection of literary and artistic works, and the freedom of opinion.

The conflict between creative expression and the right to privacy or good reputation was brought before the Court in 1995.¹⁶⁹ Two citizens filed a *tutela* against a writer, arguing that their reputations and privacy had been violated by seemingly false information in that author's literary work. The Court stated that, in principle, freedom of expression—as opposed to the freedom to impart and receive information—has no restrictions, and is not subjected to the same requirements of truthfulness and impartiality. In this case, there was no proof that the author had resorted to an unlawful intrusion on the plaintiffs' privacy in order to obtain the information, and the Court categorized works of art and literature as intangible units. The *tutela* was denied, and the Court expressly rejected the plaintiffs' request that an order of modification be issued to require changes to specific parts of the book.

Another example of the Court's commitment to constitutional freedom of expression and opinion arose in a 1998 *tutela* decision¹⁷⁰ defending a university professor who had been fired from his position after actively participating in a student protest against the policies of the law faculty. In this case, the Court stated that the right to freely express one's own

1995 (Constitutional Revision of Decree 1902 of 1995).

166. Decision C-425 of 1994, José Gregorio Hernández Galindo, J. (Eduardo Cifuentes Muñoz, J., Jorge Arango Mejía, J., Carlos Gaviria Díaz, J., and Alejandro Martínez Caballero, J. concurring), *In re* Artículos 94, 95 y 97 de la Ley 104 de 1993 (Law 104 of 1993).

167. Decision C-1024 of 2002, Alfredo Beltrán Sierra, J., *In re* Decreto Legislativo No. 2002 de 2002 (Legislative Decree 2002 of 2002).

168. COLUMBIA CONST. art. 20.

169. Decision SU-056 of 1995, Antonio Barrera Carbonell, J. (unanimous), Rosmary Montoya Salazar, Margarita Vásquez Arango y Libia González de Fonnegra *contra* Germán Castro Caycedo, Lucrecia Gaviria Díez y Editorial Planeta (Salazar et al. v. Caycedo et al.).

170. Decision SU-667 of 1998, José Gregorio Hernández Galindo, J. (unanimous), Dario Velasquez Gomez *contra* la Universidad De Medellin (Gomez v. University of Medellin).

thoughts, opinions, ideas, concepts, and beliefs places clear restrictions on the abilities of both public authorities and those who occupy positions of power in public or private entities to impede, interfere, or obstruct the free flow of nonviolent expression through legally accepted channels. The Court found this all the more relevant to academic circles, especially in law faculties, and declared that authorities could not punish, prosecute, or exclude a member of the academic community for criticizing university policies. Consequently, the University was ordered to reinstate the plaintiff to his original position.

b. Equality

While the right to equality was not expressly protected by the 1886 Constitution, its existence had been recognized by the Supreme Court of Justice and the Council of State in their interpretation of other constitutional provisions protecting liberties.¹⁷¹ Both tribunals, however, espoused a formal vision of equality, understood as equality before the law. In contrast, the Constituent Assembly declared the right to equality to be the forerunner for all fundamental rights and an essential goal of state activity. Delegates were especially keen on promoting a substantial, and not merely formal, notion of equality. This call was issued a number of times throughout the history of Colombia's profoundly unequal society. It was most sharply voiced by assassinated popular leader and presidential candidate Jorge Eliécer Gaitán. Gaitán declared in the 1940s that "the people do not require rhetorical equality before the law, but real equality before life."

The Constituent Assembly thus focused its efforts on trying to balance power relationships, ensuring a more equitable distribution of social and economic resources and benefits, interpreting the needs of the marginalized and the weak, and alleviating social injustice in general. Consequently, the 1991 Constitution contains strong provisions on universal, formal, and substantial equality. Article 13 includes six basic elements: (i) a general principle of equality of treatment, opportunity, and

171. In a 1970 judgment (Sept. 4, 1970, per Justice Eustorgio Sarria), the Court pointed out that: it is hard to conceive of equality as a right, or at least as a right distinct from other individual rights, when it is nothing different than the logical consequence of the right that men have to possess rights derived from their human nature, and that must, consequently, be equal. However, this human equality is neither absolute nor mathematical. It must be understood . . . in the sense that all men must be equally protected by the law; that the charges imposed must not be arithmetically identical, but proportional.

(informal translation) (text on file with author).

protection, as well as equality before the law and in the enjoyment of rights; (ii) a prohibition on discrimination based on sex, race, national or family origin, language, religion, and political or philosophical opinion; (iii) a state duty to promote the conditions necessary to attain real and effective equality; (iv) the possibility of creating advantages for discriminated or marginal groups; (v) a directive to grant special protection to the weak; and (vi) a mandate to punish those who abuse and mistreat vulnerable persons. The role of states in establishing and preserving equality among their citizens was radically redefined to reflect modern constitutional tendencies. Instead of merely preventing discrimination, the state must now affirmatively correct the numerous inequities that pervade social and economic life. The state's duty is one that has been developed through myriad Court judgments. The examples that follow must be understood in light of Colombia's complex constitutional mandate. However, the Court's decisions on the equality clause have not lived up to the potential of the Constitutional mandate nor have those decisions sufficiently alleviated enduring social inequalities.

i. Gender

The importance of the decisions of the Court dealing with gender equality is apparent when one notes that, well into the twentieth century, women in Colombia had limited political rights, were legally equivalent to minors, had no legal authority over their children, and were *forced* to use their husbands' surnames. These constraints are only a sample of available evidence of the grave structural problem of gender-based misrepresentation, subordination, and violence that the Court's case law wrestles with.¹⁷²

The Court has divided cases involving discrimination against women into two groups and assessed those cases according to an interpreted constitutional mandate for the enforcement of gender equality.¹⁷³ The first group includes highly visible and frequent forms of gender discrimination, such as pregnancy related cases, the exclusion of women from public and private spaces, and restrictions on women's participation in many endeavors and opportunities. In these situations, the Court has typically decided in favor of the women presenting the *tutela* and has established

172. For a comparison of the Constitutional Court's decisions on sexual and reproductive rights with those of other Latin American high courts, see LUISA CABAL ET AL., *CUERPO Y DERECHO: LEGISLACIÓN Y JURISPRUDENCIA EN AMÉRICA LATINA* (2001).

173. COLOMBIAN CONST. art. 43.

clear rules for securing women's substantial equality in society. The second group of cases pertain to a more profound level of "systemic" or "structural" discrimination comprised of ideas, practices, and attitudes that are far more deeply entrenched in social and cultural practice and belief, but are often less visible or discussed. Tribunals have, consequently, given a special degree of protection to women made vulnerable by a combination of their social position and the cultural element of "machoism," so prevalent in Latin American societies. In addition, the Court has approved and upheld affirmative action measures that tend to secure equality at the foundation.

Colombia's Constitution grants pregnant women and mothers a special degree of protection.¹⁷⁴ As a result, the Court has consistently upheld the rights of pregnant women in discrimination cases that involve expelling pregnant teenagers from public schools, pressuring parents to withdraw their pregnant daughters from private schools, and denying university readmission after early withdrawal from classes due to pregnancy or childbirth. In 1997,¹⁷⁵ for example, the Court reviewed a case involving students from a religious school who were expelled during the academic year for becoming pregnant. In this case, the tribunal decided to reinstate the students, invoking the special constitutional protection for pregnant women and single mothers. Hopefully, this ruling will help to avoid the stigmatization of pregnant women and allow them to achieve a healthy childbirth and assume their social responsibilities and duties as mothers. The Court has also enforced special protections for pregnant workers who are dismissed from their jobs or do not receive constitutional treatment as a result of their pregnancy.¹⁷⁶

The Court has also enforced women's equality in cases involving overt discrimination on the basis of gender. Examples of this overt discrimination include denying women access to military training schools,¹⁷⁷ requiring that weddings be in the woman's domicile,¹⁷⁸ or forbidding women to work night shifts.¹⁷⁹

174. *Id.*

175. Decision T-393 of 1997, José Gregorio Hernández Galindo, J. (unanimous), Luz Mery Pulido Ríos y Otras *contra* Varios Establecimientos Educativos (Ríos v. Various Educational Establishments).

176. Decisions T-902 of 2000, Alejandro Martínez Caballero, J. (unanimous), Dignora María Henao Alvarez *contra* La Empresa Industrias Astro Ltda (Alvarez v. The "Industrias Astro" Corporation); Decision T-270 of 1997, Alejandro Martínez Caballero, J. (unanimous) Mariela Trillos Vásquez *contra* Caja de Previsión Social de Barranquilla (Vásquez v. Bank of Barranquilla); Decision T-161 of 1998, José Gregorio Hernández Galindo, J. (unanimous), Yira Luz Castañeda Patiño *contra* "CAPRECOM E.P.S." (Patiño v. CAPRECOM).

177. Decision T-624 of 1995, José Gregorio Hernández Galindo, J. (unanimous), Adriana Granados Vásquez *contra* la Escuela Naval "Almirante Padilla" (Vásquez v. Naval Academy of

The Court has also tackled systemic and structural patterns of discrimination. At the outset, it appeared that the Court had accepted that the stereotype of women's economic dependence on men was a consideration in legal regulation. In a 1992 judgment,¹⁸⁰ it was deemed constitutional to grant the daughters of military men greater social security benefits than their brothers because women are dependent upon men for their livelihood in Colombian society. While this case was criticized by some as perpetuating gender-inferiority stereotypes through their institutionalization in social security systems, the Court has also consistently rejected any provisions, decisions, or situations that foster male dominance or degrade women. The Court has, in fact, fought "the social stereotype that women are not the principal source of income," by ordering the social security system to register as beneficiary a man who was dependent upon his wife's salary, even though this situation was unforeseen by the drafters of the relevant regulation.¹⁸¹ The Court has also upheld the constitutionality of a social security law that established a lower retirement age for women on the grounds that, as a result of widespread patterns of gender discrimination that prevail in Colombia's male-dominated society, even women who work outside the home typically bear the burden of domestic chores and have no free time for themselves. Consequently, the Court held that the state should not merely assume a neutral position. Rather, in order to promote equality as a substantive principle, the state must "overcome secular injustice," *inter alia* through the adoption of affirmative measures, such as the statute granting women earlier access to a pension.¹⁸²

One landmark case in this field dealt with the economic value of female housework and the equal rights of unmarried women *vis-à-vis* married women.¹⁸³ The plaintiff, Ester Varela, was a woman who had been

"Almirante Padilla").

178. Decision C-112 of 2000, Alejandro Martínez Caballero, J. (Alfredo Beltrán Sierra, J., José Gregorio Hernández Galindo, J. concurring), *In re* Artículo 126 del Código Civil (Article 126 of the Civil Code).

179. Decision C-622 of 1997, Hernando Herrera Vergara, J. (Alejandro Martínez Caballero, J. concurring), *In re* Artículo 342 del Código Sustantivo del Trabajo (Article 342 of the Labor Code).

180. Decision C-588 of 1992, José Gregorio Hernández Galindo, J. (unanimous), *In re* Artículo 250 del Decreto 1211 de 1990 (Article 250 of Decree 1211 of 1990).

181. Decision T-098 of 1994, Eduardo Cifuentes Muñoz, J. (unanimous), Amanda Cardona de de Los Ríos *contra* Caja de Seguridad Social de Risaralda (Los Ríos v. The Bank of Social Security of Risaralda).

182. Decision C-410 of 1994, Carlos Gaviria Díaz, J. (unanimous), *In re* Artículos 33, 36, 61, 64, 65, 117 y 133 de la Ley 100 de 1993 (Law 100 of 1993).

183. Decision T-494 of 1992, Ciro Angarita Barón, J. (José Gregorio Hernández Galindo, J. dissenting), Esther Varela *contra* Juzgado 17 Civil Municipal y 9 Civil del Circuito, de la ciudad de

in a relationship for twenty-four years with a man she never married, but with whom she had shared her livelihood and a house.¹⁸⁴ When her companion died, the home the couple shared, which was legally in his name, was passed on to his sister via inheritance. The civil judge in the matter ordered the plaintiff to move out of the house. The Court, having found sufficient evidence of the shared life of the plaintiff and her partner, declared that the everyday housework performed by women and myriad other contributions of women to the economy of informal households must be valued in economic terms and viewed as the female contribution to the kind of patrimonial arrangements protected by the law and the Constitution. The Court consequently granted the *tutela*, overruling the Supreme Court civil judgment grounded solely on Civil Code rules of inheritance. The Court then ordered the civil judge to suspend the eviction order while the plaintiff's entitlement to the house were reevaluated by a family judge. The Court also ordered the application of this doctrine to any future cases of a similar nature. This precedent is especially significant for a society where more than half of the population is organized into *de facto* families. The case of Ester Varela has since exerted substantial influence over legal and political circles, pushing them to remedy social security difficulties of many unmarried homemakers.

Perhaps the most important gender equality decision of the Court related to the establishment of a quota to ensure the effective participation of women in the decision-making processes of organs of public power. This law stipulated that thirty percent of the decision-making positions in the Colombia's executive branch be assigned to women. The regulation thereby secured the equality of opportunities between genders in public sector selection procedures. The Court generally accepted the measures included in this law and characterized these measures as affirmative action provisions. In this case, the Court held the law was constitutional because: (i) there was ample evidence of women's under representation in such decision-making positions and of systemic gender discrimination in Colombia, and (ii) because equality for women should be defended both by guaranteeing equal educational and access opportunities ("equality at the starting point") and promoting equal representation in government ("equality at the destination point").

Much change is still required in order to remedy discrimination against women in Colombia. The pattern of work division on the grounds of

Cali (Varela v. 17th Civil Municipal Division of the City of Cali).

184. *Id.*

gender, the degrading social and cultural representations of women in society, the perpetuation of stereotypes in education, the rates of sexual violence, internalized gender discrimination patterns among women, and the male-dominated culture are issues that will surely come before the court in the future. Regardless, the process has begun, and with unsuspected force.

ii. Sexual Orientation

Homosexuals have also been the object of highly controversial decisions, given the Colombian sociocultural context. Nevertheless, these decisions have granted unexpected groups of individuals collective protection from discrimination and harassment and allowed their greater participation in both public and private spheres. Homosexuality was criminally punished in Colombia until 1981 and, before 1991, homosexuals could be excluded from their professions and sanctioned by disciplinary authorities. Thus, it seems clear that Court decisions can generate important changes in social status, individual opportunities for self-fulfillment and the protection of human dignity. As with abortion, homosexuality is an area in which the Court has proven more conservative; Colombia is just starting down a very long road.

Actio Popularis claims filed by homosexuals have generally arisen, when homosexuals are excluded from institutions or denied opportunities, when regulations impose disciplinary sanctions or discriminatory measures based on sexual orientation, or when regulations exclude homosexuals from certain benefits. The Court usually strikes down discrimination on the basis of sexual orientation. When it comes to extending to homosexual persons the legal benefits granted to heterosexual couples and families, however, the Court has adopted a much less tolerant position.

A number of *tutela* claims have been filed to prevent discrimination on sexual-orientation grounds when individuals are treated differently or excluded from certain institutions. Homosexual individuals have filed numerous complaints against the army, navy, air force, and police as a result of their exclusion from service—these exclusions are typically under the pretext of disciplinary reasons. In one case, the Court granted the claimant protection and affirmed that, the condition of homosexuality itself was not a valid ground for excluding someone from a particular

institution.¹⁸⁵ In that ruling, the Court ruled that disciplinary codes may only punish sexual acts, heterosexual or homosexual, that take place on official premises. Homosexuals were also protected from forcibly declaring their sexual orientation.

This same reasoning was followed in a 1998 constitutionality decision.¹⁸⁶ In this instance, the Court adopted a more liberal position when examining a legal provision in a statute concerning public teachers. This statute classified homosexuality as a behavior worthy of disciplinary action and imposed penalties. The Court reaffirmed that, given the Constitution's prohibition of discrimination on the grounds of sex, any difference in treatment because of sexual orientation is, in principle, forbidden on the grounds that sexual orientation is: (i) a trait probably acquired at birth; (ii) a consequence of historical segregation patterns; and (iii) not a useful category for distribution of social goods or duties. The Court stated that sexuality should also be protected because it is a manifestation of personal autonomy and a valid personal lifestyle choice. Therefore, the Court concluded, any difference in the treatment of homosexuals was presumed unconstitutional and subject to strict constitutional review. In the case at hand, the Court considered that the statute would not: (i) protect minors from potential abuses because there was no proof that homosexuals are more prone to abusive conduct; and (ii) prevent minors from "becoming" homosexual because there was no evidence to prove that a teacher's sexuality bears a conclusive influence on a pupil's personal development. The statute was therefore deemed unconstitutional and was struck down.

Nevertheless, two recent decisions have proven that a divided Court still regards homosexuals as essentially different from heterosexuals on family issues, especially because there is no Congressional statute on the rights of homosexual couples.¹⁸⁷ The first of these cases¹⁸⁸ concerned a

185. Decision T-097 of 1994, Eduardo Cifuentes Muñoz, J. (José Gregorio Hernández Galindo, J. concurring) José Moisés Mora *contra* Gómez *contra* el Director Escuela de Carabineros Eduardo Cuevas (Mora v. School Director Eduardo Cuevas).

186. Decision C-481 of 1998, Alejandro Martínez Caballero, J. (Vladimiro Naranjo Mesa, J. concurring; Alfredo Beltrán Sierra, J. José Gregorio, J. Hernández Galindo, J., and Hernando Herrera Vergara, J. dissenting), *In re* Artículo 46 del decreto 2277 de 1979 (Article 46 of Decree 2277 of 1979).

187. Some think that not even the Legislature, and least of all judges, can recognize homosexual couples' family rights because the text of article 42 of the Constitution says that a "marriage between a man and a woman" is one of the ways to form a family. The Justices who dissented in the following cases disagreed with this interpretation of the marriage clause, arguing that the Constitution, in the same article, as well as in others, protects different kinds of families within a pluralist and democratic society.

188. Decision SU-623 of 2001, Rodrigo Escobar Gil, J., César Augusto Medina Lopera *contra*

homosexual man's request that the social security system register his male partner as his beneficiary. The plaintiff's request was denied on the grounds that the legal system only extended benefits to the "families" of affiliates, and not to homosexual couples. In this case, the constitutional tribunal supported the legislature's discretion to determine the criteria by which the social security system is progressively extended. The only restriction on this support was that no one criterion could violate or unduly restrict the fundamental rights of the individual. When the Legislature decided to extend some benefit to "family," but not to same-sex partners, as with the regulation applied by the social security entity in this case, it was not considered the result of any arbitrary or unreasonable action. Instead, the Court asserted that the Legislature implemented the constitutional protection of the family because of its essential role in society. The Court explicitly stated that homosexual couples do not constitute "families" in a legal sense or, therefore, for purposes of receiving social security benefits under the current regime. This proposition does not, however, affect the fact that homosexuality, for the Court, remains a valid personal option protected by the Constitution. In contrast, the position of a homosexual couple is fundamentally different from that of a heterosexual couple. The Court has also specified that this exclusion from family status does not bar homosexuals from being registered with the social security system, and although they will not be treated as beneficiary partners of other registrants, homosexuals are of course themselves affiliates. The Court was very divided on this issue—four justices wrote a unified dissenting opinion arguing that the Court should have granted homosexual couples the same social security rights as those afforded to heterosexual couples.¹⁸⁹

Another recent decision¹⁹⁰ in this same line upheld the constitutionality of a provision under which only heterosexual couples may adopt children. However, four justices¹⁹¹ dissented on the grounds that the decision violated the homosexual individuals' rights to equality and the free development of personality. The dissenters argued that it was not enough to allow any individual, regardless of sexuality, to adopt; equality requires

Comfenalco E.P.S. (*Lopera v. Comfenalco*).

189. The dissenting Justices were Justices Jaime Araujo Renteria, Manuel José Cepeda Espinosa, Jaime Córdoba Triviño, and Eduardo Montealegre Lynett. *Id.* This decision prompted a (faile) bill to extend social security protection to homosexual couples.

190. Decision C-814 of 2001, Marco Gerardo Monroy Cabra, J., *In re* Artículos 89 y 90 del Decreto Ley 2737 de 1989 (Articles 89, 90 of Decree Law 2737 of 1990).

191. The dissenting Justices were Jaime Araujo Renteria, Manuel José Cepeda Espinosa, Jaime Córdoba Triviño, and Eduardo Montealegre Lynett. *Id.*

express recognition of the right of a homosexual couple to engage in adoption.

iii. Persons with Disabilities

Disabled persons, whether mentally or physically, are another group granted special protections under the Constitution.¹⁹² The Court has a long line of decisions dealing with the interpretation and scope of their fundamental rights and the nature and extent of the state's obligations on their behalf. While disabled persons' ordinary rights as citizens cannot be unduly restricted because of their condition, the Court has gone further in its interpretation of relevant constitutional mandates and assigned this group special, positive rights. These rights include: (i) access to a broad array of benefits and services from which they are usually deprived because of their disabilities; (ii) the right to be free of discrimination based on their disability; and (iii) other rights in other fields, such as labor law.

Most of the Court's cases in this area involve the special treatment that disabled persons are entitled to from both the state and society in order to secure their right of equal access to public services and benefits. In a landmark 1995 *tutela* verdict,¹⁹³ the Court examined a claim filed against the authorities and sports clubs responsible for the construction of a stadium in Cali. These parties had failed to provide special facilities for disabled spectators and provided seating only in higher up areas of the stadium. The stadium authorities invoked regulations that restricted the admissibility of people on the track during matches. The Court ordered the respondents to relocate the seating for handicapped individuals to the track and to build special facilities. First, the Court found that those responsible for the administration of a public space had a duty to actively protect the rights of disabled persons. Second, the Court found that, in the case of disabled individuals, an equal opportunity right was not merely an objective in itself but a means to ensure their other fundamental rights such as a full participation in social life. Finally, the court held that disabled individuals' right to equality is violated both by actions and omissions that unduly restrict their rights, the special treatment to which they are entitled.

192. COLOMBIAN CONST. art 47.

193. Decision T-288 of 1995, Eduardo Cifuentes Muñoz, J. (unanimous), Reinaldo Botero Bedoya *contra* Clubes Deportivo Cali y América, la División Mayor del Fútbol Colombiano y el Fondo de Vigilancia y Seguridad del Municipio de Cali (Bedoya v. Sports Clubs of Cali and America et al.).

In similar decisions concerning the handicapped, the Court emphasized the special constitutional protection granted to the disabled with regard to the right of access to public space, work opportunities, education, transportation, and communication services. These protections place disabled persons on an equal footing with the rest of the population. In 1999,¹⁹⁴ the Court explained how history has traditionally and silently marginalized disabled persons by promoting the ideal of a fully able individual. In order to combat the ramifications of this state position, obstacles to material and substantial equality of the disabled must be removed material and substantial conditions. A 1992 judgment¹⁹⁵ granted the *tutela* requested by a child with learning difficulties who had been denied access to school for having failed to report the results of special psychological and neurological tests that the school had ordered. The Court has recently affirmed this precedent. The Court has stated that educational institutions have an obligation to grant disabled persons access to their premises and services in order to contribute to their social integration; this measure is required even if it results in an additional burden for those institutions.¹⁹⁶

In a similar vein, the Court issued a judgment in 2000¹⁹⁷ that ordered the mayor of Bogotá to remove a number of obstacles preventing vehicles from parking on sidewalks. These obstacles had the unintended effect of restricting the mobility of blind people in public spaces. Interestingly, a disabled individual recently filed a case against the operators of the newly installed mass transportation system in Bogotá, Transmilenio. The plaintiff argued that part of the infrastructure and the vehicles used to provide access to the system were not adequately adapted to the needs of disabled individuals and, therefore, limited access to an essential public service. Taking into account that the right to liberty of circulation can be violated through both actions and omissions, the Court found that an operational

194. Decision T-823 of 1999, Eduardo Cifuentes Muñoz, J. (unanimous), Señor A *contra* la Secretaría de Tránsito y Transporte de Santa Fe de Bogotá, D.C. (Mr. A v. Secretary of Transportation of Santa Fe de Bogotá).

195. Decision T-429 of 1992, Ciro Angarita Barón, J. (José Gregorio Hernández, J. concurring), Julian Mauricio Moreno Alvarez *contra* Julio Maldonado Bulla (Alvarez v. Bulla).

196. Decision T-1134 of 2000, José Gregorio Hernández Galindo, J. (unanimous), Gloria Enid Sepúlveda Monsalve *contra* Directora de la “Escuela Arzobispo García” (Monsalve v. Director of the School of Arzobispo Garcia); Decision T-150 of 2002, Manuel José Cepeda Espinosa, J. (unanimous), Arismel Camargo Baldiris *contra* el Servicio Nacional de Aprendizaje (SENA) Seccional Bolívar (Baldiris v. National Education Service).

197. Decision T-024 of 2000, Alejandro Martínez Caballero, J. (unanimous), Gilberto Pastrana Fernández *contra* la Alcaldía Mayor de Santa Fe de Bogotá, la Secretaría de Tránsito y Transporte de Santa Fe de Bogotá y el Instituto de Desarrollo Urbano del Distrito Capital (Fernández v. Mayor of Santa Fe de Bogotá et al.).

public transportation system is essential to an individual's full enjoyment of the liberty of movement and other associated rights, especially for disabled persons. The Court also found that public transportation must be accessible to all disabled users. The Court affirmed the special protection due disabled persons by governing authorities and private parties—in particular, the obligation to adopt positive measures that ensure the disabled equal access to the goods and services freely enjoyed by the rest of the population. Based on these considerations, the Court concluded that the scope of constitutional protection for a disabled individual's liberty of circulation, includes the right of equal access to the basic transportation facilities of a city. The scope of a disabled individual's freedom of movement demands, at the very least, that operators of transportation systems across the country have a plan that allows for the enjoyment of this right and facilitates the participation of those affected in its design, evaluation, and implementation. The Court issued the corresponding order to the Transmilenio operator, and required compliance within two years.¹⁹⁸

Discrimination against an individual because of his or her incapacity has been completely banned by the Court in a number of *tutela* decisions. The disabled, for example, cannot be forced to vote only when accompanied by a member of their family,¹⁹⁹ and academic institutions cannot exclude them from teaching when there are no alternative non-academic positions available in the school.²⁰⁰ This line of rulings was not an innovation under the 1991 constitutional order. Under the 1886 Constitution, the Supreme Court of Justice had already struck down provisions that discriminated against disabled individuals. In a 1985 judgment the Court prohibited denial of disabled individuals access to posts in the judiciary or public entities. In this case, three justices expressed their dissent arguing that when the law established requirements for access to given positions in public service, it did not violate equality because it was different treatment for persons in different situations. Thus, the change in the constitutional approach is remarkable.

The duty to grant special treatment to disabled individuals has also been affirmed by the Court in other areas. In the field of labor rights, constitutional case law has upheld that it is not acceptable for the Public

198. Decision T-595 of 2002, Manuel José Cepeda Espinosa, J. (unanimous), Daniel Arturo Bermúdez Urrego *contra* Transmilenio S.A. (Urrego v. Transmilenio).

199. Decision C-359 of 1994, Antonio Barrera Carbonell, J. (unanimous), Tercera Enmienda del Convenio Constitutivo del Fondo Monetario Internacional” y de la Ley 92 de 1993 (Law 92 of 1993).

200. Decision T-100 of 1994, Carlos Gaviria Díaz, J. (unanimous), Jorge Alfonso González Martínez *contra* Secretaría de Educación y Otras (Martínez v. Secretary of Education et al.).

Administration to deprive a disabled individual of his or her opportunity to work.²⁰¹ Another related decision stressed that a provision binding employers to pay an indemnity to disabled individuals, who have been removed from their posts may be constitutional, on the understanding that any termination of the employment contract as a result of an individual's disability without official administrative authorization does not produce any legal effects.²⁰² Finally, in the field of liberty of circulation, the Court declared unconstitutional a decision by the Mayor of Bogotá, denying a partially paralyzed person special permission to move in a special vehicle during hours ordinarily restricting traffic because the Court believed the Mayor failed to fulfill his duty to provide the handicapped special treatment.

Despite a consistent pattern of case law upholding the special treatment to which disabled individuals are entitled, the Court has occasionally refrained from fully enforcing this constitutional duty when there is a lack of resources in a given institution or program. This occurs, primarily, in the cases of disabled children who require the provision of special education; a right to which they are entitled by virtue of Article 68 of the Constitution. The Court has refrained from ordering the adoption of special programs, plans, or curricula in order to effectively provide for this right stating that, special education is only mandatory when sufficient means are available and disabled children with no access to special education facilities should be incorporated into normal classrooms.²⁰³ This situation sharply contrasts with the treatment given by the Court to children with exceptional intelligence or abilities, and who are entitled to a similar right to special education under Article 68 of the Constitution. In these instances, a number of orders have been issued by the Court to competent state entities calling on them to adopt reasonable and effective programs to provide for the special educational opportunities that these children require.²⁰⁴

201. Decision T-427 of 1992, Eduardo Cifuentes Muñoz, J. (unanimous), Luis Hernando Suarez *contra* el Director General de la Caja de Previsión Social de Comunicaciones (Suarez v. Director General).

202. Decision C-531 of 2000, Alvaro Tafur Galvis, J. (unanimous), *In re* Artículo 26 de la Ley 361 de 1997 (Article 26 of Law 361 of 1997).

203. Decision T-620 of 1999, Alejandro Martínez Caballero, J. (unanimous), Nubia Stella Pomares de la Rosa *contra* Directivas de la Escuela Urbana "San Juan Bautista de Ovejas-Sucre" (Rose v. Directors of the Urban School of San Juan Bautista de Ovejas); Decision T-329 of 1997, Fabio Morón Díaz, J. (unanimous), Yolanda Barbosa de Morales *contra* Escuela Urbana Luis Maria Rojas (Barbosa de Morales v. Rojas Urban School).

204. Decision SU-1149 of 2000, Antonio Barrera Carbonell, J. (unanimous), Moisés David Acebedo Paredes y Otros *contra* Presidencia de la República y Otras entidades (Paredes et al. v.

iv. Extreme Poverty

Applying the constitutional protection for equality of treatment and opportunity of the weak, the marginalized, and those in need,²⁰⁵ the Court has supported those suffering from extreme poverty and lack of access to social benefits and services. Three different types of judgments serve to illustrate this point: (i) decisions in which the Court has extended social security benefits to very poor individuals; (ii) decisions in which the Court has ordered or upheld measures designed to combat poverty and marginalization from a structural and macro perspective, and (iii) decisions dealing with the internally displaced population.

A classic example of the first line of cases is a 1992 judgment²⁰⁶ in which the Court ordered the social security system to approve an eye operation for an elderly man living in absolute poverty. This order was subject, of course, to verification of his economic conditions. It was argued that the Constitution reflects an awareness of the need to secure the access of impoverished individuals to the most basic social security services. Whenever the Legislature has not fulfilled its constitutional duty to produce laws and address this problem, it has been deemed reasonable to extract rules from the Constitution to defend a person's minimum rights to a dignified subsistence.

Another judgment in which the Court has extended social security benefits to those in greatest need was issued in 1992.²⁰⁷ The Court examined the case of three individuals who, due to their mental disabilities, had been indefinitely deprived of their liberty and placed in criminal psychiatric wards for more than twenty years. The Court acknowledged this serious violation of their fundamental rights to liberty and freedom from cruel, inhuman, or degrading penalties or treatments. The Court also acknowledged the state's duty to give them special treatment for their impairment. Affirming the mandatory character of these duties, the Court stated that persons with mental limitations who have been interned may not be subjected to an unjust and indefinite deprivation of liberty. In addition, the state is obligated to provide such persons with additional protections after the completion of their internment period when

President of the Republic et al.).

205. COLOMBIAN CONST. art. 13.

206. Decision T-533 of 1992, Eduardo Cifuentes Muñoz, J. (unanimous), Ricardo Rivera *contra* el Estado Colombiano (Rivera v. Colombian State).

207. Decision T-401 of 1992, Eduardo Cifuentes Muñoz, J. (unanimous), Luis Francisco Barajas y Otras *contra* Juzgado Primero (10) Superior de Bucaramanga y Otros (Barajas et al. v. Superior Court of Bucaramanga).

they may find themselves in an even more vulnerable state. It was ordered that the Government, through the Ministers of Justice and Health, design and implement programs for the provision of adequate, all-inclusive attention to and protection of persons in the plaintiffs' condition within a period of thirty days.

Invoking a similar rationale in 1997,²⁰⁸ the Court ordered the public entity responsible for a mental hospital to take in a poor woman who suffered from a mental illness. As a result of her extremely poor condition and manifest weakness, the Court enforced the state's duty to provide her with constitutionally mandated special protections. The Court ordered the hospital to treat her as soon as possible.

The Court affirmed this trend of decisions in 2001²⁰⁹ when it examined the case of an elderly and handicapped man living in conditions of absolute poverty and abandonment in Bucaramanga. The Court found that social security entities wrongly classified this man under a health services program that did not correspond to his extreme economic conditions. In spite of his evident need for attention, he was denied free access to medical services. The social security entity argued that it had informed the man of its reclassification procedures, however, given his physical disability, he had not started the relevant procedures. The *tutela* claim was presented by a neighbor on the afflicted man's behalf. The Court recalled the special duty that binds the state to protect persons in circumstances of manifest weakness and held that the state had an affirmative obligation to grant such persons immediate attention required if immediate family cannot. The Court ordered the social security system to reclassify the afflicted man in the appropriate category. The Court then established a rule that whenever there is doubt as to a person's classification social security entities shall err in favor of the applicant. The Court in this case went further, underscoring the plaintiff's old age and extreme conditions and ordering the municipal authorities to grant him the comprehensive and immediate attention required such as a dignified place to end his days, if he so desired.

Following a similar course, the Court, in a 2002 decision,²¹⁰ examined the situation of an impoverished 58 year old man, who could not work

208. Decision T-046 of 1997, Hernando Herrera Vergara, J. (unanimous), *Personero del Municipio de Espinal, Tolima contra Beneficencia de Cundinamarca* (Municipality of Tolima v. Charity of Cundinamarca).

209. Decision T-1330 of 2001, Manuel José Cepeda Espinosa, J. (unanimous), *Pablo Antonio Prada Archila contra la Secretaría de Salud y Medio Ambiente de Bucaramanga* (Archila v. Secretary of Health and Environment of Bucaramanga).

210. Decision T-149 of 2002, Manuel José Cepeda Espinosa, J., *Alfredo Moreno Pérez contra el*

because of a serious heart condition. This man was denied access to a special state subsidy for persons in similar circumstances because of the relevant administrative entity's failure to provide accurate information on the appropriate procedures required in order to obtain the subsidy. In this case, the Court ordered a study to determine whether the plaintiff was actually entitled to registration with the relevant program. It was clearly stated that any state subsidy program should be (i) conducted in such a manner as to avoid recurring problems;²¹¹ and (ii) publicized in a timely, pertinent, correct, and complete manner to all potential beneficiaries in order to avoid differences in treatment that hamper the fundamental rights of society's weakest members.

The Court applied an analogous reasoning in cases involving AIDS patients who cannot finance their medical treatment. In these instances,²¹² the Court has usually ordered the social security system to provide services and medicines necessary for the afflicted to live under dignified conditions as long as scientifically possible. Protection of their social right to good health is a necessary means for preservation of their right to life. In addition, AIDS patients' conditions of special weakness entitle them to receive special protections from the state.

The Court has also ordered measures designed to eliminate social injustices on a larger scale. In one of its earliest decisions,²¹³ the Court examined a *tutela* brought by the inhabitants of a marginalized sector of the city of Bucaramanga who had been deprived access to public transportation because of the local bus companies' unilateral decision to modify the routes near their area. The Court ruled that urban public transportation is an essential means of mobilization for certain social strata dependant on it for transport to work, school, and personal business. This strata is, therefore, entitled to continuous and regular service. Second, the Court held that the actions of public transportation companies have a

Departamento Administrativo de Bienestar Social, Alcaldía Mayor de Bogotá (Pérez v. Administrative Dept. of Social Welfare).

211. This includes untimely responses to requests for affiliation, lack of predictability, scarce participation of beneficiaries in the decision-making process for assignment of public funds, fragile control over the relevant administrative decisions, and disregard for administrative due process.

212. Decision T-177 of 1999, Carlos Gaviria Díaz, J. (Eduardo Cifuentes Muñoz, J. dissenting), Señor X *contra* Secretaría de Salud Pública Municipal de Cali (Mr. X v. Secretary of Public Health of Cali City); Decision T-484 of 1992, Fabio Morón Díaz, J. (unanimous), Alonso Muñoz Ceballos *contra* Instituto de los Seguros Sociales (Ceballos v. Inst. of Social Security); Decision T-505 of 1992, Eduardo Cifuentes Muñoz, J. (unanimous), Diego Serna Gomez *contra* Hospital Universitario del Valle "Evaristo García" (Gomez v. Univ. Hosp. of Evaristo García).

213. Decision T-604 of 1995, Eduardo Cifuentes Muñoz, J. (unanimous), José Manuel de Arco Garcés *contra* la Jueza Primera Penal Municipal de Cartagena (Garcés v. First Criminal Division of Cartagena City).

significant impact upon citizens' everyday lives, placing them in a position of greater public responsibility and accountability and subject to a higher degree of control by the authorities. Third, because the Constitution assigns social significance to private property, the Court ordered the bus companies to reestablish their previous routes through the relevant part of town.

In a similar 1995 ruling,²¹⁴ the Court upheld the constitutionality of legal provisions establishing a scheme of subsidies for public utilities under which consumers from higher economic strata paid higher rates in order to finance consumption by poorer strata. The plaintiff argued that the regulations violated the Constitution insofar as they financed only a *portion* of the lower strata's consumption. In the plaintiff's view, the state had a special obligation to the poorer segments of the population, particularly to those groups or individuals in extreme poverty. The plaintiff argued that these groups should benefit from special societal protection through measures like complete subsidies covering their basic needs. The Court dismissed this argument as too extreme. In the Court's view, the Constitution provides special protection to the weak and the poor and, therefore, allows measures such as the one adopted by Congress. However, the redistributive functions created by Congress to fulfil social and economic rights were limited by the system's fiscal capacity and could not be interpreted in such a way as to disrupt the state's macroeconomic conditions and fiscal balance. Therefore, the Court held that the provision at hand reached a valid equilibrium between democratic principles and the social commitments of the state.

Finally, the Court has adopted a number of important holdings related to internal population displacement—a problem that has grown steadily as a consequence of the recent upsurge in violent conflict within Colombia, which now predominantly affects the civilian population. Hundreds of thousands of individuals, usually entire families, in both rural and urban areas across the nation have had to leave their homes due to threats, fears, or reasonable expectations of death, violent persecution, extortion, or other intolerable situations. Many of these situations have been prompted by the spreading confrontation between illegal armed groups and the state. As a consequence of their displacement, these persons are often forced to migrate to the main cities where they have enlarged growing, and visible, pockets of misery. Many of these migrants rely upon whatever charity is

214. Decision C-566 of 1995, Eduardo Cifuentes Muñoz, J. (unanimous), *In re* Artículos 89, 99 de la Ley 142 de 1994 (Law 142 of 1994).

available for survival. Although there is a special state program for the displaced population currently coordinated by the ministries of the Interior and Justice, financial constraints and organizational flaws render this program notoriously inefficient. Ultimately, the effects of this program are little more than symbolic for the persons in need of its aid. When these individuals have filed *tutela* claims, the Court has reacted in a very protective manner by declaring that forced displacement amounts to a massive, comprehensive, and continuous violation of the affected person's fundamental rights. Dealing with these situations requires the utmost solidarity, and these individuals should receive a special level of state protection. The State is, therefore, bound to create and implement adequate programs to fulfil the basic unsatisfied needs of the affected population.²¹⁵ The Court has also ordered the relevant administrative entities to refrain from applying excessively rigid criteria in granting displaced individuals and families the benefits provided by law. This measure was adopted in order to progressively extend the coverage of these programs and contribute to the alleviation of this crisis.²¹⁶ The programs are also intended to assume the task of adequately coordinating the different state entities participating to relieve displaced individuals and families from the additional burden of administrative inefficiency.²¹⁷

v. Race

The Court's silence on the issue of race can only be described as surprising. In a country with a population that is approximately thirty percent black, an emerging political and social Afro-Colombian movement, and a cultural heritage with substantial African and Afro-Colombian roots, it is shocking that not one of the Court's pronouncements has dealt with the issue of racial discrimination.²¹⁸ This does not mean, of course, that Colombia is a racism-free democracy; sadly, the situation is very much to the contrary. Perhaps the Court's silence can be explained by the fact that the issue of race has not yet become a matter of national attention. Very few cases of individual racial

215. Decision SU-1150 of 2000, Eduardo Cifuentes Muñoz, J. (unanimous), Defensora del Pueblo Regional de Antioquia y Otros *contra* Inspección 8B municipal de Policía de Antioquia (Public Defender of Antioquia et al. v. Police Inspection 8B of Antioquia et al.).

216. Decision T-215 of 2002, Jaime Córdoba Triviño, J., Narciso Doria Segura y Pedro Tuberquia *contra* el Colegio Sol del Oriente (Segura et al. v. Sol del Oriente School et al.).

217. Decision T-268 of 2003, Marco Gerardo Monroy Cabra, J., Defensora Regional del Pueblo, Antioquia *contra* Ciudad de Medellín (Public Defender of Antioquia et al. v. City of Medellín)

218. COLOMBIAN CONST. art. 13.

discrimination have been litigated; fewer still have reached the Court. Afro-Colombian communities have entered the public sphere as multiple ethnic groups, and their lack of unity has affected their treatment by the Court. For example, the myriad groups' special participation rights were upheld when a statute granting ethnic groups a special constituency in Congress was reviewed. In addition, the Court has defended the cultural specificity of some Afro-Colombian communities, such as the *isleño* communities of San Andres.²¹⁹ In a recent *tutela* decision,²²⁰ the Court examined a case in which the management of a building in Cartagena forbade its employees to use the elevators. Although the plaintiff in this case was a black woman and racial discrimination was present,²²¹ the Court granted the *tutela* on grounds that the right of equality is violated whenever access to services based on wholly subjective criteria. In other words, people cannot be denied equal access to everyday services on the grounds of personal conditions, such as socioeconomic status. Such restrictions are only acceptable when there is an objective, reasonable, and constitutionally acceptable justification. The issue of race was only mentioned as one among many unacceptable discrimination factors; it did not constitute a central part of the *ratio decidendi*.

In spite of recent efforts aimed at empowering Afro-Colombian movements, the issue of racial discrimination and segregation is still so deeply entrenched within social practice and culture that, despite the abolition of slavery over 150 years ago, the black population remains one of the poorest, most underrepresented, and vulnerable groups in the country.

c. *Social and Economic Rights*

The purposes and goals of state action were significantly broadened in 1991 to extend beyond the classic aims of protecting persons and property. As amended, the State's agenda now includes social concerns and the protection of fundamental social, economic, and cultural rights. Indeed,

219. See, e.g., Decision C-086 of 1994, Jorge Arango Mejía, J. (Eduardo Cifuentes Muñoz, J. dissenting) *In re* Artículos 14, 23, 24, 25, 33, 34, 36, 37, 42, 45, 57 de la Ley 47 de 1993 (Law 47 of 1993); Decision T-574 of 1996, Alejandro Martínez Caballero, J. (unanimous), Pescadores de Salahonda *contra* Empresa Ecopetrol (The Community Members of Salhonda v. Ecopetrol Company).

220. Decision T-1042 of 2001, Manuel José Cepeda Espinosa, J. (unanimous), Olinda María Calderón Calderón *contra* el Gerente del Edificio el Conquistador (Calderón v. Building Manager of Conquistador).

221. The plaintiff in this case argued that she was being discriminated against because she was black, poor, and female. *Id.* In addition, the plaintiff proved that the manager and residents of the building humiliated her expressly on the grounds of her physical and social traits. *Id.*

the essential nature of the Colombian State was modified, transforming its traditional political formulation as *Estado de Derecho* (A Rule of Law State) to an *Estado Social de Derecho* (A Social Rule of Law State).²²² The impact of this deceptively simple conversion runs deep into the most diverse spheres of public and private action. Precisely for these reasons, the notion of *Estado Social de Derecho* is one that the Court has emphasized, establishing it as the cornerstone of its legal reasoning. The notion has also inspired most of the case law related to the social and economic rights expressly included within the Constitution.²²³

The Court has dealt with the issue of social and economic rights both abstractly and concretely in its decisions. *Tutela* judgments are, however, the area in which the most significant advances have been made. In this field, the Court has highlighted some of the salient features of social and economic rights under the new constitutional order. It has said, for instance, that these rights have a two-fold content: an essential, non-negotiable nucleus that may not be restricted; and a progressive development area, the extent and content of which is to be defined through democratic debate and is essentially tied to the law.²²⁴ The Court also stated, in one of its unification decisions,²²⁵ that the fulfilment of social and economic rights is dependant on the decisions incorporated into the law and that a constitutional judge is not entitled to intervene in the process of congressional assignation and distribution of social benefits. Such interference would seriously hamper the democratic process and standard application of the principle of equality. However, in that same opinion the Court clarified that in some exceptional cases, a constitutional judge may grant a *tutela* pertaining to a social or economic right if certain strict conditions are met. One such example is when the minimum subsistence rights of marginalized or weak groups and individuals are being threatened. This line of reasoning was further refined in a 1998 decision²²⁶ involving children—a group whose social rights are expressly classified as fundamental by the Constitution.²²⁷ Based on these

222. COLOMBIAN CONST. art. 1.

223. COLOMBIAN CONST. Title II, ch. 2, arts. 42–48.

224. Decision SU-225 of 1998, Eduardo Cifuentes Muñoz, J. (Antonio Barrera Carbonell, J. Carlos Gaviria Díaz, J. and José Gregorio Hernández Galindo, J.) Sandra Clemencia Perez Calderon y Otros *contra* Ministerio de Salud y Otros (Calderon et al. v. Minister of Health et al.).

225. Decision SU-111 of 1997, Eduardo Cifuentes Muñoz, J. (unanimous), Celmira Waldo de Valoyes *contra* Caja Nacional de Previsión Social-Seccional Chocó (Valoyes v. National Bank of Chocó).

226. Decision SU-225 of 1998, Eduardo Cifuentes Muñoz, J., Calderon et al. v. Minister of Health et al.

227. COLOMBIAN CONST. art. 44.

fundamental, prevalent, and mandatory rights of children, the Court ordered the municipal authorities of Bogotá to institute an infant vaccination program for the poor. There was, therefore, a sufficient reason to order public expenditure in order to satisfy these rights.

There are three types of cases in which the Court has determined that rights of a social or economic nature may be protected by means of the *tutela*. The Court has held that socioeconomic rights are directly enforceable in specific situations where: (i) social or economic rights that become fundamental “by connection,” such as the rights to health and social security, which are often linked to the preservation of life; (ii) social or economic rights fundamental in and of themselves, such as the fundamental social rights of children, the right to adequate nutrition, or to basic elementary education; and (iii) the right to minimum conditions of dignified subsistence (*mínimo vital*). Nevertheless, the issue of whether social and economic rights are enforceable in and of themselves remains undecided in contexts other than the three mentioned above.²²⁸

Since the advent of its fundamental rights case law, the Court has accepted that social or economic rights may be protected by means of the *tutela* whenever that protection is necessary to preserve another fundamental right directly linked to them. Correspondingly, the Court has consistently protected the right to health through *tutela* decisions whenever a safeguard is necessary to ensure the continuity and quality of life.²²⁹ This protection is also granted in cases in which the right to health is connected mainly to the right to life or the right to personal integrity. The Court has also protected the right to a healthy environment whenever it is necessary to safeguard the rights to life or integrity of persons.²³⁰

In addition, there are situations in which social or economic rights under the Constitution, directly or through judicial interpretation, are fundamental in and of themselves. Such is the case with children’s

228. On this debate, and on the defense of the direct and autonomous enforcement of such rights through *tutela*, see generally Rodolfo Arango, *La Justiciabilidad de los Derechos Sociales Fundamentales*, 12 REVISTA DE DERECHO PÚBLICO (2001); Rodolfo Arango, *Basic Social Rights, Constitutional Justice, and Democracy*, 16 RATIO JURIS 141 (2001).

229. Decision T-534 of 1992, Ciro Angarita Barón, J. (unanimous), Jorge Alexander Moreno *contra* Quinta Brigada del Ejército Nacional, con sede en Bucaramanga (Moreno v. National Army’s 5th Brigade Seated in Bucaramanga).

230. Decision T-123 of 1999, Fabio Morón Díaz, J. (unanimous), Fanny Del Socorro Ipujan *contra* Alcaldía Municipal de Túquerres (Nariño) (Ipujan v. City of Túquerres); Decision T-244 of 1998, Fabio Morón Díaz, J. (unanimous), Humberto Cardona Zamora *contra* Alcaldía Mayor de Santa Fe de Bogotá (Zamora v. Mayor Santa Fe de Bogotá).

fundamental social rights, the right to an adequate nutrition, and the right to elementary education.²³¹

Finally, the Court has consistently asserted the existence of a right to minimum subsistence conditions (*mínimo vital*), derived from the constitutional rights to life,²³² health,²³³ work,²³⁴ and social security²³⁵ in the framework of a Social State (*Estado Social de Derecho*), and from the perspective of human dignity. The practical effect of this right is to entitle persons in conditions of absolute poverty to special assistance from public authorities in order to fulfil their most basic needs. Without this aid, their lives would lack the essential dignity protected by the Constitution. In other words, this right compels the state to actively protect persons and groups who have been traditionally discriminated against, marginalized, or are in conditions of manifest weakness. The state must balance opportunities of these groups with those of the majority in a historically unfair and unequal society. Among the numerous cases decided on these grounds, it is useful to examine the landmark 1992 judgment that inaugurated the concept.²³⁶ In this matter, an elderly man required a retirement pension from social security entities, which were eventually ordered to promptly ensure his inscription. Of paramount importance is the concept that protection of the right to minimum subsistence conditions should be assessed in accordance with the specificities of each individual case. For example, the payment of retirement pensions is not, in itself, a fundamental right, but it may be protected through a *tutela* when payments are unduly suspended and the Court determines that this keeps the recipient from maintaining a minimum subsistence level of income.²³⁷ Along these same lines, the Court has stated that tardiness in the payment of salaries affects minimum subsistence income and concluded that workers do have a fundamental right to the timely remittance of salaries.²³⁸

231. Decision SU-225 of 1998, Eduardo Cifuentes Muñoz, J., Calderon et al. v. Minister of Health et al.

232. COLOMBIAN CONST. art. 11.

233. COLOMBIAN CONST. art. 49.

234. COLOMBIAN CONST. art. 25.

235. COLOMBIAN CONST. art. 48.

236. Decision T-426 of 1992, Eduardo Cifuentes Muñoz, J. (unanimous), Hernando de Jesus Blanco Angarita *contra* Director de la Caja Nacional de Previsión Social (Angarita v. National Bank).

237. Decision T-606 of 1999, Alfredo Beltrán Sierra, J. (Eduardo Cifuentes Muñoz, J. dissenting), Nieves Avilez Pérez y Otros *contra* Municipio de Montería (Pérez et al. v. City of Montería).

238. Decision SU-995 of 1999, Carlos Gaviria Díaz, J. (Eduardo Cifuentes Muñoz, J. concurring), Iván Enrique Brito Roncallo y Otros *contra* la Alcaldía Municipal de El Plato, Magdalena (Roncallo et al. v. Mayor's Office of El Plato, Magdalena).

It should be noted that a vast majority of *tutela* actions concern social rights. The workload of the Court consists primarily of cases regarding: (i) protection of their right to health, which is violated by the lack of provision for treatment, medicine, or surgery prescribed under their physician's diagnosis;²³⁹ (ii) registration with social security entities by employers²⁴⁰ and corresponding payments to the system,²⁴¹ or disbursement to workers;²⁴² (iii) recognition of retirement pensions;²⁴³ or (iv) demands of payment of their public salaries or pensions,²⁴⁴ or private salaries, in extreme situations. In these cases, the Court typically grants the *tutela*.

d. Collective Rights

The 1991 Constitution is also innovative in its treatment of "society" insofar as it does not simply limit state powers, but actively seeks to empower social groups and individuals by emphasizing the protection of vulnerable individuals and the adjustment of social power structures and

239. Decision SU-043 of 1995, Fabio Morón Díaz, J. (unanimous), María Elena Alvarez Ramírez *contra* Instituto de Seguros Sociales (I.S.S.), Seccional Antioquia (Ramírez v. Inst. of Social Security in Antioquia); Decision SU-480 of 1997, Alejandro Martínez Caballero, J. (unanimous) Enfermos del SIDA *contra* Entidad promotora "Salud Colmena," Instituto de Seguros Sociales (AIDS Patients v. Inst. of Social Security et al.); Decision SU-819 of 1999, Alvaro Tafur Galvis, J. (unanimous), Alejandro Moreno Alvarez *contra* el Estado, Ministerio de Salud (Alvarez v. Minister of Health).

240. Decision T-140 of 1999, Alfredo Beltrán Sierra, J. (unanimous), Adalgiza Casallas Martínez *contra* Hospital Universitario de Cartagena (Martínez v. Univ. Hosp. of Cartagena); Decision T-072 of 1997, Vladimiro Naranjo Mesa, J. (unanimous) Julio César Rincón Rodríguez *contra* Jair Díaz Herrera (Rodríguez v. Herrera); Decision T-544 of 2000, José Gregorio Hernández Galindo, J. (unanimous) José Benedicto Ramírez Canchón *contra* el Restaurante "El Gran Sazón" (Canchón v. El Gran Sazón Restaurant).

241. Decision T-398 of 1996, Jorge Arango Mejía, J. (unanimous), José Luis Muñoz Barraza y Otros *contra* William Behaime, Alcalde de Ponedera (Barraza v. Mayor of Ponedera); Decision T-606 of 1996, Eduardo Cifuentes Muñoz, J. (unanimous), Rosa Helena Niño de Quiroga *contra* Castañeda Salazar y Cía. Ltda. o Transportes Petroleros Ltda. (Quiroga v. Castañeda Salazar Transport and Petroleum Co.).

242. Decision T-146 of 1996, Carlos Gaviria Díaz, J. (unanimous), Pedro José Ariza Caicedo *contra* la Federación Nacional de Algodoneros (Caicedo v. National Association of Cotton Planters); Decision T-716 of 1999, José Gregorio Hernández Galindo, J. (unanimous), Alvaro Esteban Castro Aranda y Melva Plaza Prado *contra* el Hospital San Vicente de Paul (Aranda et al. v. Hosp. of St. Vincent); Decision T-320 of 2000, José Gregorio Hernández Galindo, J. (unanimous), Fernando Giraldo Echeverry *contra* Acerías Paz del Río S.A. (Echeverry v. Acerías Paz del Río Co.).

243. Decision T-005 of 1995, Eduardo Cifuentes Muñoz, J. (unanimous), Gina Adarraga Gómez *contra* "Eficacia S.A." y "Colgate-Palmolive Compañía" (Gómez v. Eficacia Co. et al.).

244. *See, e.g.*, Decision T-606 of 1999, Alfredo Beltrán Sierra, J. (Eduardo Cifuentes Muñoz, J. dissenting), Nieves Avilez Pérez y Otros *contra* Municipio de Montería (Pérez et al. v. City of Montería). *See also* Decision T-726 of 1999, Antonio Barrera Carbonell, J. (Eduardo Cifuentes Muñoz, J. dissenting), María del Carmen Trejos de Navarro y Otros *contra* Gobernador del Departamento de Bolívar (Navarro et al. v. Governor of the Department of Bolívar).

trends to benefit the weak, the marginalized, and the poor. Motivated by participatory democracy, this Constitution grants society a central role in the establishment of peace and institutional stability not only during elections, but on a permanent basis. As a necessary precondition for this approach, the Constitution recognizes the existence of different groups and collectives into which individuals are born and live meaningful lives. The Court has, therefore, granted special protection to certain collective actors, interests, and organizations, and has given them a variety of collective rights²⁴⁵ actively recognized and enforced by the Constitutional Court.

The Court was not specifically entrusted by the Constituent Assembly with the task of protecting collective rights in concrete review cases. However, since its first *tutela* decisions in 1992, the Court has understood that, given the diverse links that exist between the protection of collective rights and interests and fundamental constitutional rights and the mandates of respect for human dignity, solidarity, and the general interest, it could not fail to protect communities seeking the intervention. This is especially true when Congress had not yet regulated the scope and procedure of the special actions created by the Constitution for that specific purpose (*acción popular*). Until 1998, *tutela* was the only available mechanism to secure these constitutionally protected rights and interests. After that date, as a result of the precedential case law the accrued during the preceding years, the Court continued to grant protection to different types of collective interests in the gravest situations, despite the availability of *acción popular*. Typically, however, *tutelas* are now granted as transitory mechanisms to avoid irreparable harm, or in cases where fundamental rights are directly affected by the violation of or threat to collective rights.

The protection of collective rights has given rise to a host of interesting phenomena, including new types of legal subjects (indigenous communities), links between the protection of fundamental rights and the protection of interests concerning society and individuals (the environment), and the protection of new forms of collective participation for the advancement of common interests (the case of organized consumers of public utilities). The following section describes the main decision trends followed by the Court in relation to the first two of these types of constitutionally protected collectives.

245. COLOMBIAN CONST. Title II, Ch. 3.

i. Indigenous Peoples

Today, approximately 500,000 individuals belonging to eighty-one different ethnic groups known as “indigenous peoples” in Colombia.²⁴⁶ This status, which has gotten these groups increasing levels of national and international attention for decades, is one topic where Colombian legal issues are linked to the forefront of constitutional law worldwide. In fact, several scholars recognize that Colombia, unlike its neighboring Latin American nations, takes indigenous rights seriously.²⁴⁷ Yet the legacy of the treatment of native Americans and their successors, in Colombia and in Latin America, has been one of continuous tragedy, exclusion, and even genocide. The descendants of pre-Hispanic nations in Colombia began to organize themselves around the second half of the twentieth century in order to claim the legal benefits that were primarily given to them by the system. Currently over twenty-five percent of Colombian territory has been reserved as indigenous land, constitutionally and legally allocated to aboriginal communities across the nation. These communities also benefit from a strongly protective constitutional²⁴⁸ and legal regime that is often viewed as a model for other governments. Unfortunately, many of the aboriginal groups are still in poor condition. Some of these groups are even on the brink of cultural and physical extinction, due to poverty, ill health, armed conflict, and environmental damage. This environmental damage results from an invasion of commercial coca and poppy plantations, police efforts to destroy drug crops through fumigation, and many other causes. Moreover, guerrilla and paramilitary groups attack indigenous communities, compelling them to accept illegal violent activities within their territories and forcibly recruiting young people.

Within this framework, indigenous communities have become legal subjects, entitled to a number of fundamental rights that they can protect through the *tutela*. For example, Article 7 of the Constitution expressly requires the recognition and protection of the nation’s ethnic and cultural diversity. This Article centers on the need to preserve a group’s cultural

246. The production of precise figures is difficult because of the semi-nomadic culture of aboriginal communities in Colombia.

247. See Christian Gros, *Indigenismo y Etnicidad: el desafío neoliberal*, in URIBE ANTROPOLOGÍA EN LA MODERNIDAD 15 (Ma. Victoria Uribe & Eduardo Restrepo eds., 1997); Camilo Borrero Garcia, *Multiculturalismo y derechos indígenas*, CINEP/GTZ, Bogotá (2003); Esther Sanchez, *La aplicación práctica de la política de reconocimiento a la diversidad étnica y cultural*, and “Política de reconocimiento a la diversidad étnica y cultural y de protección al menor,” Ministerio de Salud—Instituto Colombiano de Bienestar Familiar, Bogotá (2002).

248. See, e.g., COLOMBIAN CONST. arts. 7, 8, 10, 68, 70, 171, 176, 246, 329, 330 (recognizing indigenous people).

identity and guarantee its long-term survival. The rights of the community as a collective legal subject should not be confused with the individual fundamental rights of each one of its members, which coexist with the rights of the community. These individual and collective rights have been promoted and upheld by the court and include: (i) territorial rights actively enforced by a constitutional judge, (ii) the right to establish “traditional” indigenous legal systems, and (iii) the right to preserve the integrity of the indigenous culture from external influences.

The Constitution granted indigenous peoples property rights over their ancestral territories and over the immeasurably rich natural resources they possess.²⁴⁹ As a result of this property right and the entitlement to physical, cultural and social survival, indigenous groups received the right to be consulted when a project for resource exploitation is launched in their territories. The Court regards this right, which is recognized in several international instruments, as a fundamental right of the community. In a 1993 decision, the Court dealt with the fact that the territory of the Embera-Katío people of the Chocó department was damaged by massive deforestation caused by the timber industry.²⁵⁰ Similarly, a 1998 *tutela* judgment declared unconstitutional a licence granted to build civil infrastructure works in indigenous territory on the grounds that the relevant community had not been consulted.²⁵¹ A well-known 1997 judgment ordered the suspension of an oil exploitation project in the U’wa territory because the previous consultation requirements had not been met.²⁵²

Regarding the scope of indigenous peoples’ autonomy, the Constitution has included several provisions designed to preserve indigenous culture, such as the ancient right of indigenous individuals to be judged by traditional authorities. One such provision is the “rule of maximization,” which appeared in a 1997 decision.²⁵³ In that case, the Court decided

249. COLOMBIAN CONST. arts. 329–331.

250. Decision T-380 of 1993, Eduardo Cifuentes Muñoz, J. (unanimous), Organización Indígena de Antioquia *contra* Corporación Nacional de Desarrollo del Chocó (Indigenous Organization of Antioquia v. National Corporation for the Development of Small Cuttlefish).

251. Decision T-652 of 1998, Carlos Gaviria Díaz, J. (unanimous), Organización Nacional Indígena de Colombia y Otros *contra* Presidente de la República y Otros (Indigenous Organization of Colombia et al. v. President of the Republic et al).

252. Decision SU-039 of 1997, Antonio Barrera Carbonell, J. (Hernando Herrera Vergara, J., Vladimiro Naranjo Mesa, J., Fabio Morón Díaz, J., and Jaime Vidal Perdomo, J. dissenting), Jaime Córdoba Triviño, Defensor del Pueblo *contra* Ministerio del Medio Ambiente (Public Defender v. Minister of Media & Atmosphere).

253. Decision T-523 of 1997, Carlos Gaviria Díaz, J. (unanimous), Francisco Gembuel Pechene *contra* Gobernador del Cabildo Indígena de Jambaló y Otros (Pechene v. Governor of Cabildo Cabildo Indígena de Jambaló).

whether to overturn the conviction of a Páez individual, who was convicted by traditional authorities and sentenced to public corporal punishment with a whip-like instrument. The Court held that (i) whenever conflicts between indigenous jurisdictions and other national interests arise, the constitutional judge should apply the “rule of maximization” of indigenous autonomy; and (ii) the Rule requires acceptable limitations of autonomy, which are the least restrictive available alternatives. Indigenous peoples are thus limited in their use of their autonomous jurisdictional powers by a standard of “minimum inter-cultural consensus,” which includes the right to life, the prohibition of torture and slavery, and the application of cultural procedural requirements.

Applying these rules to the case, the Court verified that the penalty was imposed in accordance with tradition and that the limits of indigenous jurisdiction were respected. Regarding the issue of corporal punishment, the Court found that the severity of the sentence did not cause such suffering to be considered “torture.” Further, the Court found the whip represented a means of purification within the Páez tradition, and therefore, it should be respected from a non-occidental perspective.²⁵⁴ In a similar case, the Court granted the *tutela* filed by two indigenous individuals who were being investigated by standard government officials for crimes committed within the jurisdiction of their communities. The Court ordered their case to be tried by traditional indigenous authorities.²⁵⁵

The Court has also made significant advances regarding the preservation of cultural identity and integrity. In a delicate 1998 decision,²⁵⁶ the Court upheld the right of the Arhuaco authorities to prevent a Protestant church from promoting its beliefs within tribal land and converting members of the community. The indigenous authorities were constitutionally permitted to impose much more extensive restrictions upon the religious freedom of community members and

254. *Id.* From a historical point of view it is interesting to note, that the whip (*fuete*) and other types of “traditional” punishment examined by the Court in *tutela* cases, correspond to disciplinary measures originally brought and implemented by the Spanish conquerors. Eventually, these punishments were incorporated and given new cultural meaning by the indigenous communities in post-colonial times. Within the Páez culture, the whip is interpreted as a symbol of the thunderbolt, and therefore, it is seen as a purification ritual.

255. Decision T-394 of 1999, Carlos Gaviria Díaz, J. (unanimous), María del Pilar Valencia *contra* Jueces Penal del Circuito y Promiscuo de Familia del Guamo, Tolima (Valencia v. Penal Circuit Judges).

256. Decision SU-510 of 1998, Eduardo Cifuentes Muñoz, J. (Hernando Herrera Vergara, J., Vladimiro Naranjo Mesa, J., and José Gregorio Hernández Galindo, J. dissenting), Alvaro de Jesús Torres Forero *contra* Autoridades Tradicionales de la Comunidad Indígena Arhuaca de la Zona Oriental de la Sierra Nevada de Santa Marta (Forero v. Traditional Authorities of the Indigenous Community of the E. Zone of the Sierra Nevada of Santa Marta).

outsiders on ancestral land in order to preserve their culture and religion. This case is especially noteworthy because it involved the same indigenous authorities who deferred the conflict to the Constitutional Court through the initiation of a *tutela*. This decision illustrates the unsuspected positive effects that the tribunal's decisions have had on indigenous peoples' rights and on the means used to defend those rights: judicial channels.²⁵⁷

Important governmental interests, such as national security concerns related to drug trafficking, have often been insufficient to justify restrictions on indigenous peoples' practices. For example, in one important case,²⁵⁸ Amazonian indigenous peoples filed a *tutela* claim, supported by an *amicus curiae* brief from the Public Ombudsman (*Defensor del Pueblo*). The people wanted to protect their right to self-determination, their participation rights, and their right to survival in healthy conditions. They asked the Court to suspend aerial fumigation with the herbicide *glifosato* over coca or poppy crops in their territories and in nearby areas. The Court abstained from ordering a suspension of fumigation due to a lack of evidence. While the Court admitted that the decision to suspend fumigation may be unilaterally adopted by the competent administrative authorities, it did take several steps in matters of public order and national security to further indigenous rights. First, the Court stated that indigenous communities' participation rights, interpreted in accordance with ILO Convention 169 and with the principle of participative democracy,²⁵⁹ extend not only to the exploitation of natural resources but also to all decisions that affect such communities directly within their territories. This includes decisions concerning the preservation of public order and the enforcement of the criminal policy reflected in the Criminal Code. Second, the Court expressed that indigenous communities should participate in decisions regarding crop eradication, such as the matter of illegal crop fumigation. Third, the Court ordered the Executive to respect the substantive rights to life, health and survival of the indigenous communities if an agreement with the indigenous peoples was not reached after a period of three months.

257. Decision T-405 of 1993, Hernando Herrera Vergara, J., *Comunidades Indígenas del Medio Amazonas contra el Ministerio de Defensa Nacional y la Misión Aérea de los Estados Unidos* (Indigenous Communities v. Ministry of National Defense, U.S. Airforce).

258. Decision SU-383 of 2003, Alvaro Tafur Galvis, J. (Alfredo Beltrán Sierra, J., Jaime Araujo Rentería, J., and Clara Inés Vargas Hernández, J. dissenting), *Organización de los Pueblos Indígenas de la Amazonía Colombiana OPIAC contra la Presidencia de la República y Otros* (Organization of Indigenous Towns of Colombian Amazon v. President of the Republic et al.).

259. COLOMBIAN CONST. art. 2.

Three Justices²⁶⁰ dissented on the grounds that the Court should have gone further and ordered the suspension of the fumigations. The dissenters felt that the Court should give a three-month period to the communities concerned to ensure that participation would be real and effective and that vital indigenous rights would be protected. The dissenters also argued that a precautionary principle should be applied and fumigations suspended until it was adequately proven that the herbicide used was harmless.

The Court has, however, adopted a less activist stance in its abstract review of the Mining Code provisions vis-a-vis the exploitation of mineral resources in indigenous territories. For example, in 2002,²⁶¹ the Court decided an *actio popularis* challenging a Mining Code provision granting the state the ability to determine the location and extent of special indigenous mining areas. This provision enabled national authorities to decide unilaterally issues that should ordinarily be debated by the relevant indigenous communities. Instead of striking down the provision, the Court stated that it should be interpreted in accordance with constitutional and international mandates on the matter; thus the provision should entail proper consultation with indigenous communities. In a later judgment,²⁶² the Court restated that legal provisions regulating mining activities in indigenous territories should be interpreted so as to ensure the right of participation of aboriginal communities, particularly by carrying out appropriate consultation procedures during the relevant decision-making process. Nevertheless, with regards to the bill which later became the Mining Code, the Court felt that the state's obligation had been adequately fulfilled by efforts to submit the draft to indigenous people for approval, even though such consultations eventually failed and no agreement was reached.

ii. Environmental Rights

We have a “green” Constitution. Approximately fifty constitutional articles refer directly or indirectly to the preservation of nature, which is one of Colombia's most valued and threatened assets. Not only does the

260. The dissenting justices were Jaime Araujo Rentería, Alfredo Beltrán Sierra, and Clara Inés Vargas Hernández.

261. Decision C-418 of 2002, Alvaro Tafur Galvis, J. (unanimous), *In re* Artículo 122 de la Ley 685 de 2001 (Article 22 of Law 685 of 2001).

262. Decision C-891 of 2002, Jaime Araujo Rentería, J. (unanimous), *In re* Artículos 2, 3, 5, 6, 11, 35, 37, 39, 48, 58, 59, 121, 122, 123, 124, 125, 126, 127, 128, 261, 267, 271, 275 y 332 de la Ley 685 de 2001 (Law 685 of 2001).

Constitution entitle persons to a healthy environment,²⁶³ but it also imposes upon the authorities and citizens alike the obligation to refrain from damaging the environment and preventing its degradation. The state has affirmative constitutional obligations to promote the conditions necessary for environmental conservation and development, including providing environmental sanitation services, promoting protected areas, enforcing community participation, and engaging in other environmental protection activities.²⁶⁴

The protection of the right to a healthy environment is not new to Colombian constitutional law. The Supreme Court of Justice, in a salient 1987 decision, upheld criminal provisions penalizing environmental law violators. This decision showed how public law was evolving progressively to defend the quality of human life. The Court also stated that “the State has the unquestionable duty to incorporate into its activities the protection of the environment, a duty which may be included even within its classical mission to protect Colombian residents’ life.”²⁶⁵ However, no specific constitutional provisions were enacted to protect natural resources as a fundamental right.

The right to enjoy a healthy environment, which was classified by the Constitution as a “collective” right,²⁶⁶ has been defined by the Court as the basic conditions surrounding individuals, which allow their biological survival and guaranteeing their normal performance and balanced development within society.²⁶⁷ In that sense, the Court has classified the right to a healthy environment as essential for the survival of our species. The Court highlighted the fact that, although the Constitution has classified this right as a collective right, under certain conditions its violation may entail a threat to fundamental human rights. This threat makes *tutela* claims admissible to protect it.²⁶⁸ Consequently, the Court has issued *tutela* decisions protecting the right to a healthy environment when there are specific actions of environmental disruption or degradation and when the integrity of this right is threatened by situations of a general

263. COLOMBIAN CONST. art. 79.

264. COLOMBIAN CONST. arts. 79, 80.

265. Decision of Mar. 12, 1987, Fabio Morón Díaz, J. (text on file with author).

266. The right was protected through a specific legal channel: the *acción popular*.

267. Decision SU-442 of 1997, Hernando Herrera Vergara, J. (Eduardo Cifuentes Muñoz, J. dissenting), Francisco Antonio Escobar Silebi y Otros *contra* Alcalde del Distrito Turístico (Silebi v. Mayor of Turístico Dist.).

268. Decision T-284 of 1995, Antonio Barrera Carbonell, J. (unanimous), Defensoría del Pueblo y Otros *contra* Señor Gobernador y la Junta de Planeación del Departamento del Archipiélago de San Andrés, Providencia y Santa Catalina (Public Defender et al. v. Governor, Head of Dept. of Agriculture of San Andrés).

nature. There are three recent cases in this area. First, the Court has consistently protected the rights of ordinary citizens to live in a healthy environment, when malfunctioning public utilities or private works disrupt normal living conditions. For example, in a 1997 *tutela* decision,²⁶⁹ the Court protected the rights of private citizens affected by a smell caused by their neighbor's septic tank, which had not received the appropriate attention of relevant authorities. Stating that the neighbor's undue disruption of the plaintiff's domestic environment constituted a threat to their rights to health and life, the Court ordered the removal of the tank and the installation of adequate drainage facilities.

Another set of decisions concerns individuals or communities affected by inappropriate waste disposal sites. In a 1999 decision, the Court reviewed the *tutela* presented by a woman on behalf of herself, her family and her neighbors. These citizens lived in poor households alongside a seriously faulty municipal landfill, which had noxious effects on their daily environments and their health. The Court granted the *tutela*, because it considered the disruption of the right to a healthy environment to be a severe threat to the fundamental rights to health and life. Consequently, the Court ordered municipal authorities to buy the plaintiff's land next to the landfill, so she could purchase adequate living elsewhere. In the alternative, the Court ordered the authorities to suspend use of the landfill. For the same reasons, in a 1996 decision²⁷⁰ the Court prevented the establishment of a waste disposal site in Villavicencio because environmental requirements were not met.

Second, the Court has upheld the rights of individuals and communities affected by specific events of environmental damage. However, the actual protection of such rights in cases in which environmental harm has already resulted has been limited by the nature of the *tutela* procedure. This kind of a limitation occurred in a 1996 *tutela* case²⁷¹ in which the Court assessed the impact of a serious oil pollution incident in the Pacific Ocean upon the members of an Afro-Colombian coastal community who depended on fishing for their livelihood. Taking into account that the affected community was entitled to special constitutional protection as an ethnic group, the Court restated the State's special obligations for

269. Decision T-071 of 1997, Eduardo Cifuentes Muñoz, J. (unanimous), Jesús Antonio González *contra* Municipio de Alvarado (González v. City of Alvarado).

270. Decision T-257 of 1996, Antonio Barrera Carbonell, J. (unanimous), Hans Ricardo Tiuso Malagón *contra* Alcalde de Villavicencio y el señor Edgar Ardila Barbosa (Malagón v. Mayor of Villavicencio et al.).

271. Decision T-574 of 1996, Alejandro Martínez Caballero, J. (unanimous), Pescadores de Salahonda *contra* Empresa Ecopetrol (Community of Salahonda v. Ecopetrol Co.).

environmental preservation. The Court affirmed that sustainable development should be sought through decisions that minimize environmental harm, while promoting economic growth from a precautionary perspective. Because the damage had already occurred, and the *tutela* cannot be used in principle to seek economic indemnity, the Court limited its holding to ordering the Ministry of the Environment to monitor the long-term effects of pollution incidents. The Court also called upon other relevant authorities to fulfil their functions in promoting the community's welfare. This judgment is important because it stressed the importance of the precautionary principle for Colombian authorities. Further, according to the Court, the state's constitutional obligation to provide environmental sanitation services includes adopting emergency measures to address oil spill incidents and compensating for individual loss and patrimonial damage sustained by affected persons. But in this particular pollution incident, enforcing such an obligation to compensate through the *tutela* was expressly rejected by the Court.

Finally, the general situation of environmental degradation in the coastal city of Santa Marta was examined by the Court in a 1997 *tutela* decision.²⁷² In this decision the Court examined a complaint filed by several inhabitants against local authorities, which argued that the generalized pollution of the sea and beaches, and the inadequacy of urban drainage systems, were due to the city's lack of planning and control over sewage disposal, urban construction, and coal shipping. The Court granted the *tutela* to protect the plaintiffs' rights to a healthy environment, life and health. The Court felt these rights were violated by the local authorities' failure to regulate land use and urban growth and excessive issuing of construction licences. As a consequence, the Court ordered the pertinent public entities to issue a plan for the regulation of land use in the District of Santa Marta, which was to include sewage disposal systems in accordance with legal requirements. The Court also ordered that construction licences should be granted by the relevant environmental authorities and prohibited license conferral in certain particularly degraded areas of the city. As to the noxious effects of air pollution caused by coal shipping activities, the Court ordered the Ministry of the Environment to adopt a comprehensive plan for the management of coal, through its extraction and commercialization processes, in order to avoid negative impacts on human health.

272. Decision SU-442 of 1997, Hernando Herrera Vergara, J., Silebi v. Mayor of Turístico Dist.

The Court also upheld the right to a healthy environment in a series of abstract review cases. For example, in a 1998 judgment,²⁷³ the Court reviewed the use of the Presidential veto against a bill that established criminal penalties for persons convicted of causing serious environmental damage by illegal mining or oil extracting. The President argued that the requirements of “serious damage” and “illegality of the activity” were unconstitutional, because as they restricted the scope of the general obligation to preserve the environment to extreme cases. The Court accepted these objections and explained that environmental damage, even if it is caused by legal activities, should always be seen as constitutionally illegitimate conduct. The Court stated that the issuance of environmental licences should never be seen as authorization to harm nature. Moreover, it expressed that the Constitution not only requires the state to punish infractors of environmental regulations, but also to actively prevent and control degradation factors and seek compensation for the damages caused.

In a similar judgment,²⁷⁴ the Court analyzed a legal provision requiring contractors of public infrastructure to present environmental impact assessments to the relevant authorities. Prior to this case, standard protocol was that, if the relevant authorities failed to issue a decision within two months after the presentation of the study, acceptance would be presumed. The Court struck down this rule, holding that there should be no barrier prohibiting the authorities from promoting environmental health.

Other important abstract review judgments concern the environmental treaties approved by Congress. Most have been upheld by the Court, including the Agreement on the International Dolphin Conservation Program,²⁷⁵ the United Nations Framework Convention on Climate Change,²⁷⁶ the Kyoto Protocol of the United Nations Convention on Climate Change,²⁷⁷ the United Nations Convention to Fight

273. Decision C-320 of 1998, Eduardo Cifuentes Muñoz, J. (Alejandro Martínez Caballero, J., Carlos Gaviria Díaz, J., and José Gregorio Hernández Galindo, J. dissenting), *In re Ley 235/96 Senado-154/96 Cámara* (Law 235/92 of the Senate Law 154/96 of the House of Representatives).

274. Decision C-328 of 1995, Eduardo Cifuentes Muñoz, J. (unanimous), *In re Artículo 4º de la Ley 105 de 1993* (Article 4º of Law 105 of 1993).

275. Decision C-1314 of 2000, Alvaro Tafur Galvis, J. (unanimous), *In re Revisión Constitucional de la Ley 557 de 2000* (Const. Revision of Law 557 of 2000).

276. Decision C-073 of 1995, Eduardo Cifuentes Muñoz, J. (unanimous), *In re Revisión Constitucional de la Ley 164 de 1994* (Const. Revision of Law 164 of 1994).

277. Decision C-860 of 2001, Eduardo Montealegre Lynett, J. (unanimous), *In re Ley No. 629 de 2000* (Law 629 of 2000).

Desertification,²⁷⁸ the Ramsar Convention for the protection of Wetlands,²⁷⁹ and the Convention on Biodiversity.²⁸⁰

2. *Decisions Concerning the State*

As previously mentioned, one of the central purposes of the Constituent Assembly was to develop a constitutional framework that would strengthen state institutions. State institutions were plagued by a lack of legitimacy, transparency, and efficiency, which in turn resulted in mistrust and contempt among citizens. While the 1886 Constitution, commissioned by President Rafael Núñez, sought to reinforce state presence from a vertical, authoritarian perspective, the 1991 Constitution, commissioned by President César Gaviria, focused on promoting efficiency, accountability, and responsiveness within a system of separation of powers.

Part of the proposed reorganization of the state focused on the redistribution of functions among the three branches of public power. Reformers sought to restore the equilibrium, which had been altered by the historical prevalence of the Presidential office, and to promote higher levels of responsibility, accountability, and efficiency in the different spheres of public life. The Court has actively defended this equilibrium in decisions concerning such topics as the regime applicable to constitutional states of emergency, and the presidential powers for maintaining public order.

a. *States of Exception*

“States of exception” are defined by the Constitution as instances in which the President may require more stringent restrictions upon rights, assuming greater regulatory and police powers in order to cope with circumstances that give rise to the disruption of normality. Three possible “states of exception” are identified by the Constitution: (i) a “state of internal commotion,” to be declared for up to ninety days in cases of severe disruption of internal public order,²⁸¹ (ii) a “state of foreign war,”²⁸²

278. Decision C-229 of 1999, Antonio Barrera Carbonell, J. (unanimous), *In re Ley 461 de 1998* (Law 461 of 1998).

279. Decision C-582 of 1997, José Gregorio Hernández Galindo, J. (unanimous), *In re Revisión de constitucionalidad de la Ley 357 de 1997* (Const. Revision of Law 357 of 1997).

280. Decision C-519 of 1994, Vladimiro Naranjo Mesa, J. (unanimous), *In re Revisión Constitucional de la Leyes 162 y 165 de 1994* (Const. Revision of Laws 162, 165 of 1994).

281. COLOMBIAN CONST. art. 213 (stating that internal commotion may be renewed for ninety

and (iii) a “state of economic, social or ecological emergency.”²⁸³ Precise constitutional requirements must be met for the President to declare a “state of exception,” and excessive restrictions on fundamental rights during such a “state of exception” are prohibited. Because of the principle of proportionality, suspension of rights is forbidden, and both international humanitarian law and human rights treaties should be applied.²⁸⁴ The Constitution also grants special political and judicial controlling powers to Congress and the Constitutional Court over the measures adopted by the President.²⁸⁵

States of exception in Colombia are regulated by a statutory law adopted in 1994,²⁸⁶ after *ex-officio* review by the Constitutional Court.²⁸⁷ The Law establishes clear limits on presidential powers and defines specific controls, both judicial and political when rights are restricted by a presidential decree. Most of the law was upheld by the Court, but some powers were declared unconstitutional, including a provision enabling the government to grant general amnesties or individual criminal pardons during states of exception and a provision that allowed the Court to order the temporary suspension of a state of exception decree restricting certain rights during the Court’s review.

The Court has consistently affirmed that the President of the Republic, when deciding to declare a state of exception, has much discretion in matters such as timing, the seriousness of the disturbance, its duration, and the measures that are to be adopted during its existence. This discretion is significantly reduced when it comes to verifying the objective and precise circumstances that, according to the Constitution, can give rise to the declaration of a state of exception. More specifically, the President has the ability to declare a state of exception, but only when the precise factual requirements outlined by the Charter have been objectively met. Although the President has a large amount of discretion to declare a state of exception, it is not boundless, because the Court can review the President’s decision in order to avoid errors.

An analysis of the declarations of states of internal commotion is illustrative of this point. Six such states have been declared since 1991,

days. After which time it can be renewed for another ninety days with the consent of the Senate).

282. COLOMBIAN CONST. art. 212.

283. COLOMBIAN CONST. art. 215.

284. COLOMBIAN CONST. art. 214.

285. COLOMBIAN CONST. arts. 212–215, 241.

286. Ley 137 de 1994 (Law 137 of 1994).

287. Decision C-179 of 1994, Carlos Gaviria Díaz, J., *In re* Ley Estatutaria No. 91/92 Senado y 166/92 Cámara (Law 91/92 of the Senate, 166/92 of the House).

and most have been upheld. The Court, however, has made it clear that under the new Constitution, this is exceptional because the Constituent Assembly abolished the provision regarding states of siege based on its abuse in the past. In two cases²⁸⁸ the Court completely struck down the corresponding presidential decree—something unprecedented in Colombian history.²⁸⁹ More recently,²⁹⁰ the Court upheld the Presidential declaration of a “state of internal commotion,” finding that a quantitative and qualitative increase in violence justified the exercise of extraordinary powers.

However, the Court recently struck down a decree on procedural grounds that would have renewed, for a second time, this particular state of internal commotion.²⁹¹ The divided Court held that because the validity of a second ninety-day renewal depended upon the consent of the Senate, which must be issued in writing, and the Senate could not be summoned by the President to discuss the matter almost one and a half months before the first ninety-day renewal terminated. Four justices dissented,²⁹² arguing that, even though they agreed with the majority that the autonomy of the Senate should be preserved within a system of checks and balances, the conditions fixed by the majority were too formalistic. The Senate had debated and voted in accordance with parliamentary rules and approved the second renewal. Favorable consent had clearly been given, and therefore, no separate document was needed to repeat what appeared in the official Congressional Records Publication (*Gaceta del Congreso*). In addition, the dissenters noted that the Senate had the Constitutional power to summon itself at a later date if it considered such action appropriate, and therefore, was not forced to make a decision during the extraordinary sessions called by the President.

288. Decision C-300 of 1994, Eduardo Cifuentes Muñoz, J. (Carlos Gaviria Díaz, J. concurring, Hernando Herrera Vergara, J., Fabio Morón Díaz, J., and Vladimiro Naranjo Mesa, J. dissenting), *In re* Decreto N° 874 de 1994 (Decree 874 of 1994) (striking the decree down); Decision C-466 of 1995, Carlos Gaviria Díaz, J. (Jorge Arango Mejía, J. and Fabio Morón Díaz, J. concurring, Hernando Herrera Vergara, J. and Vladimiro Naranjo Mesa, J. dissenting), *In re* Decreto 1370 de 1995 (decree 1370 of 1995) (striking the decree down).

289. In 1994, the Court struck down President Gaviria’s decree declaring a state of internal commotion. It was the first time the judiciary refused to allow a President to invoke emergency powers to address a crisis.

290. Decision C-802 of 2002, Jaime Córdoba Triviño, J. (Jaime Araujo Rentería, J. dissenting), *In re* Decreto Legislativo 1837 de 2002 (Legislative Decree 1837 of 2002).

291. Decision C-327 of 2003, Alfredo Beltrán Sierra, J., *In re* Decreto Legislativo No. 245 de 2003 (Legislative Decree 245 of 2003).

292. *Id.*

The Court adopted a similar position with regards to other types of constitutional states of exception. A 1997 judgment²⁹³ declared a decree of a state of economic and social emergency unconstitutional because the material requirements had not been met. The Government argued that the measure was adopted in response to growing economic devaluation, excessive external debt, slow economic growth, a fiscal deficit, and a low tax income. The Court considered these to be normal economic cycles and not examples of exceptional circumstance. In this particular case the Court applied the rule of subsidiarity, which states that states of exception can only be declared when normal state resources are insufficient to deal with an extraordinary situation.

In its first constitutionality decision under the new Constitution, the Court upheld a decree declaring a state of social emergency. The state of social emergency was enacted to address the turbulent labor climate among the police, which resulted from the Senate's failure to adjust police salaries in a timely manner.

One very important aspect of the Court's work in relation to states of exception has been the constant affirmation of the limits placed by international humanitarian law and international human rights law over the Executive's powers during states of exception. In its constitutional review of the 1977 Additional Protocol to the Geneva Conventions on the protection of victims of internal conflicts, the Court upheld the customary value of international humanitarian law provisions. Similarly, in its 1994 review of the Statutory Law on the matter,²⁹⁴ the Court emphasized that the President is still subject to control of his actions during the state of emergency, and that any restriction on fundamental rights not justified by the state of emergency or necessary to preserve the interests at stake.

The Court frequently refers to international humanitarian legal norms when reviewing "state of internal commotion" decrees. For example, in a recent decision, the Court struck down several articles of such a decree because they violated international humanitarian law norms. One article ordered that every military combat unit should be assigned a public prosecutor to assist in actions by the armed forces that could potentially restrict individual rights. However, the Court struck down the article because a public prosecutor cannot become a permanent member of the

293. Decision C-122 of 1997, Antonio Barrera Carbonell, J., Eduardo Cifuentes Muñoz, J. (Hernando Herrera Vergara, J. concurring in part, Fabio Morón Díaz, J., Carlos Gaviria Díaz, J., and Jorge Arango Mejía, J. dissenting in part), *In re* Decreto 80 de 1997 (Decree 80 of 1997).

294. Ley 137 de 1994 (Law 137 of 1994) was reviewed by Decision C-179 of 1994, Carlos Gaviria Díaz, J., *In re* Law 91/92 of the Senate, 166/92 of the House.

military unit without violating the principle of separation between civilians and military personnel. Another article prohibited entry into previously delineated conflict zones; the Court held that this restriction did not apply to humanitarian NGO's because there is an internationally recognized norm to allow humanitarian access.²⁹⁵

b. Congressional Autonomy

The Constitution carefully protects legislative autonomy, which has also been consistently defended by the Court. While conflicts between Congress and the Court occasionally arise, the Court's constitutional case law has banned most attempts to restrict or disregard legislative autonomy. This primarily arises decisions relying on the constitutional protection of legislative autonomy to adopt specific legal regulations and those relating to the President's exercise of delegated legislation powers.

The Court has defended Congressional autonomy through numerous judgments invoking the principle of legislative autonomy to adopt specific policies, and has therefore applied a lenient constitutional review standard. This has primarily occurred in cases dealing with economic matters, particularly in areas that are not specifically regulated by constitutional provisions. In these cases, the Court has clearly stated that the Constituent Assembly gave Congress the ability to develop public policies based on legislative decisions it considered suitable. However, the Court limits Congressional autonomy when constitutional mandates regulate the subject matter of the legal provisions presented for review, and when such provisions affect fundamental human rights. In these cases, the Court has applied a strict standard of constitutional scrutiny in order to determine the compatibility of a given legislative measure with the Charter.

The Court's decisions in these areas are subject to much debate. One controversial case was a 2000 decision in which the tribunal declared a law unconstitutional that established the National Development Plan for the 1999–2002 period. The Court found unresolvable procedural defects during the law's approval process, primarily due to pressure exerted by the Executive. Due to the extra cost associated with the Nation resubmitting this vital plan to Congress for approval, the Court acknowledged that the Constitution provides an alternative whereby the National Development Plan could be promulgated as a Governmental Decree. However, it also indicated that this alternative only empowers the President to promulgate

295. Decision C-1024 of 2002, Alfredo Beltrán Sierra, J. (unanimous on these points), *In re Decreto 2002 de 2002* (Decree 2002 of 2002).

and grant legal force to the original development plan, without necessarily defining its content, which should proceed by democratic process.²⁹⁶

Another topic that is central to the relationship between the Legislative and Executive branches is the Constitution's allowance for a transfer of legislative functions from Congress to the Government through "delegated legislation powers" (Government could issue legislation with legal status and force in limited conditions).²⁹⁷ Given the history of Presidential abuse of Congress, the 1991 Constitution was very wary of allowing Congress to transfer any of its legislative functions, and thus laid out a strict set of conditions. Constitutional case law has been equally strict in applying the requirements of "precision" and "temporary nature"²⁹⁸ to these delegations of legislative powers, and has often banned decrees issued by the Government due to their non-compliance.²⁹⁹

Historically, the Court has interpreted the requirement of a temporary nature such that the legislative powers delegated can only be implemented once by the President.³⁰⁰ Thus, the President cannot try to use those same powers again to amend the rules already promulgated, even if the delegation period had not expired. The Court has also strictly enforced the requirement that the legislative powers not be used in an *ultra vires* manner, striking down statutes that confer overly broad powers to the Executive.³⁰¹ In these cases, the Court has expressed that these laws based on an extension of legislative powers need to clearly define the subject matter and scope within which the Executive can legislate, and establish the criteria encompassing public policy choices.³⁰²

296. Decision C-557 of 2000, Vladimiro Naranjo Mesa, J. (Eduardo Cifuentes Muñoz, J. dissenting), *In re* Ley 508 de 1999 (Law 509 of 1999).

297. COLOMBIAN CONST. art. 150-10.

298. These special powers can not be transferred for more than six months. COLOMBIAN CONST. art. 150-10.

299. Decision C-368 of 1996, José Gregorio Hernández Galindo, J. (unanimously), *In re* Decreto 2150 de 1995 (Decree 2150 of 1995); Decision C-285 of 1996, Carlos Gaviria Díaz, J. (unanimous), *In re* Decreto 624 de 1989 (Decree 624 of 1989); Decision C-702 of 1999, Fabio Morón Díaz, J., *In re* Artículos 7º, 38, 47, 51, 52, 53, 54, 55, 59, 68, 111 y 120 de la Ley 489 de 1998 (Law 489 of 1998); Decision C-1437 of 2000, José Gregorio Hernández Galindo, J. (Alvaro Tafur Galvis, J. and Cristina Pardo Schlesinger, J. dissenting), *In re* Artículo 42 de la Ley 489 de 1998 (Article 42 of Law 489 of 1998).

300. Decision C-510 of 1992, Eduardo Cifuentes Muñoz, J. (Fabio Morón Díaz, J. concurring), *In re* Decreto Ley 2183 of 1991 (Decree Law 2183 of 1991); Decision C-511 of 1992, Eduardo Cifuentes Muñoz, J. (Fabio Morón Díaz, J. concurring), Decreto 2250 de 1991 (Decree 2250 of 1991).

301. Decision C-1374 of 2000, José Gregorio Hernández Galindo, J. (unanimous), *In re* Artículo 39 del Decreto 261 de 2000 (Article 39 of Decree 261 of 2000).

302. Decision C-097 of 2001, Manuel José Cepeda Espinosa, J. (Jaime Araujo Rentería, J. and Alfredo Beltrán Sierra, J. concurring), *In re* Artículos 2, 3, 4, 5, 6, 7 y 10 de la Ley 588 del 2000 (Law 588 of 2000).

c. *Presidential Authority in Matters of Public Order During Ordinary Times*

There are a series of important Court decisions concerning the President's authority to deal with public order issues during "ordinary times," namely when no "states of exception" are in place. Given the current armed conflict and the widespread disruption of public order in the country, the controversial nature of these decisions can easily be understood. Some Government and military officials have criticized the Court because its intervention can potentially adversely affect the State's ability to respond to situations threatening public order. In reality however, the Court has consistently permitted broad Presidential autonomy and has struck down unconstitutional provisions.

For instance, in a 2001 decision³⁰³ the Court upheld the constitutionality of a law³⁰⁴ enabling the President to temporarily withdraw national armed forces and military personnel from certain areas in order to facilitate peace negotiations with rebel groups. The Court justified this decision on the grounds that the President is the Supreme Commander of the armed forces³⁰⁵ and has the authority to select appropriate means to foster peace. This decision helped establish a de-militarized area in the south of the Country to host peace talks with the FARC guerrilla movement, which were unfortunately unsuccessful.

The Court upheld Presidential autonomy and discretion in a case dealing with the preservation of public order in a 1999 *tutela* decision.³⁰⁶ In this case the Court reviewed a claim brought by a relative of one of the victims of a notorious mass kidnapping in Cali. The distraught relative wanted the judge to order either a comprehensive rescue mission or negotiate with the kidnapers. The Court denied the plaintiff's requests, holding that neither the Court nor any other judicial body could constitutionally invade the protected sphere of the President's autonomy in matters related to the public order and role of the armed forces.

In an important 1995 decision concerning the validity of a law granting state entities certain powers in relation to the preservation of public order and the promotion of peace,³⁰⁷ the Court made a key distinction between

303. Decision C-048 of 2001, Eduardo Montealegre Lynett, J. (José Gregorio Hernández Galindo, J. concurring), *In re* Artículo 8 de la Ley 418 de 1997 (Article 8 of Law 418 of 1997).

304. Ley 418 de 1997 (Law 418 of 1997).

305. COLOMBIAN CONST. art. 189-5.

306. Decision T-683 of 1999, Alfredo Beltrán Sierra, J. (unanimous), *In re* Felipe Ayerbe Muñoz *contra* Presidente de la República (Muñoz v. President of the Republic).

307. Decision C-283 of 1995, José Gregorio Hernández Galindo, J. (unanimous), *In re* Ley 104 de

Presidential powers in matters of public order and the coextensive duty of all public officials to promote peace. The Court upheld the Congressional power to issue laws with the specific goal of promoting public order and the rule of law, as long as the laws did not infringe on the President's constitutional powers in this area. The Court also highlighted the difference between specific presidential powers to direct public order and permanent legislative powers in the area. The latter powers enable Congress to create the general legal framework within which the President may operate. The Court enumerated, as part of this function, some matters for which it is legitimate for Congress to legislate, including: (i) the establishment of criminal penalties; (ii) the definitions of political offenses; (iii) the establishment of mechanisms to promote the effective administration of justice; (iv) the protection of individuals who intervene in criminal procedures; (v) the creation of instruments that promote a peaceful social coexistence; (vi) the extension of benefits for demobilized insurgents; (vii) the generation of attention for victims of terrorism; (viii) the exercise of control over the financing of subversive activities; and (ix) the seizure and confiscation of assets related to the commission of criminal offenses.

Despite its consistent defense of Presidential powers in this area, the Court's case law has also established that the preservation of security is a service that can eventually be provided by private organizations. Indeed, in a controversial 1997 decision,³⁰⁸ the Court upheld the constitutionality of a policy that allowed organized communities (named: *CONVIVIR*) to provide their members with private security services. The policy was believed to foster paramilitary organizations, but the Court disagreed, holding that organizations created under the law would not be acting extrajudicially and that civil society is legitimately entitled to protect itself. The Court, however, forbade these organizations from using weapons legally restricted to use by the Armed Forces. Four justices dissented, warning that the existence of these groups were incompatible with the rule of law and constituted a threat to institutional stability and peace. In addition, they stated that the public service function filled by the

1993 (Law 104 of 1993).

308. Decision C-572 of 1997, Jorge Arango Mejía, J. and Alejandro Martínez Caballero, J. (Alejandro Martínez Caballero, J. concurring; Vladimiro Naranjo Mesa, J., José Gregorio Hernández Galindo, J., Carlos Gaviria Díaz, J., and Eduardo Cifuentes Muñoz, J. dissenting), *In re* Artículos 4°, 23, 24, 25, 26, 27, 28, 29, 39, 40, 41, 42, 43, 44, 45 y 46 del Decreto 356 de 1994 (Decree 356 of 1994).

police and the military could not be delegated by the state to private parties as a means to resolve their own disputes.

Another important decision³⁰⁹ in this area, in 1993, involved the constitutionality of a law that sought to diminish the kidnapping industry by prohibiting the payment of ransoms. This objective was pursued by the law through measures such as freezing the assets of kidnapped persons and their families, and imposing administrative penalties upon entities that executed insurance contracts to pay for ransoms. The Court held that such measures were contrary to the Constitution because they deprived kidnapped victims from their only available means of defense. The Court further stated that preventing kidnapped individuals or their families from using any means to save their lives would be tantamount to compelling the victims to a kind of “social martyrdom,” as it would inhumanely turn them into a tool of the state to accomplish a social objective.

The Court has affirmed that there are clear constitutional limitations on legislative autonomy in the sphere of public order, including the prohibition against the involvement of civil society in the armed conflict. In a 2002 decision,³¹⁰ the Court struck down the so-called “National Defense and Security Law,” because one of its main pillars was the notion of “national power,” which included the direct involvement civil society in national security strategies. The Court considered this type of mandatory civilian involvement in the violent conflict to be unconstitutional, because it endangered private citizens. This contravened elementary principles of international humanitarian law and constitutional mandates stipulating that citizens’ military duties cannot be established by administrative resolutions. The Court stated that the Executive’s fusion of the public and private spheres, forcing citizens to cooperate, is akin to fascism and alien to democracy. The concept of “national power” also violated the principle of separation of powers because it was directed by a council agreed upon by all three branches of Government but under the direction of the President. Moreover, several provisions of the law subverted civilian control to the military by giving the latter exclusive powers to design defense and security policies, which were only to be presented for their final approval to the President. The Court said that the country could have

309. Decision C-542 of 1993, Jorge Arango Mejía, J. (Vladimiro Naranjo Mesa, J. dissenting; Hernando Herrera Vergara, J. concurring), *In re* Artículos 12, 16, 18, 19, 20, 21, 24, 25 y 26 de la ley 40 de 1993 (Law 40 of 1993).

310. Decision C-251 of 2002, Eduardo Montealegre Lynett, J. and Clara Inés Vargas Hernández, J. (Rodrigo Escobar Gil, J. and Marco Gerardo Monroy Cabra, J. dissenting), *In re* Artículos 3, 6, 13, 20, 25, 38, 42, 50, 54, 55, 57, 58, 59, 60, 62 y 72 de la Ley 684 de 2001 (Law 684 2001).

a national security law as long as it respected basic constitutional principles.³¹¹

The Court has also stated that the government's power of maintaining public order must be carried out in accordance with constitutional mandates and international treaties. The Court's recent decision on the constitutionality of the Rome Statute,³¹² which created the International Criminal Court (ICC), is especially relevant because its ratification by Colombia will have important effects. These effects will be felt not only in the subsequent peace process aimed at solving the internal armed conflict, but also by those who continuously disregard international rules that aim to humanize internal armed confrontations. In its decision, the Court emphasized first that allowing the ICC to exercise complementary jurisdiction does not absolve the sovereignty of the Colombian State because the ratification of the Rome Statute is in fact a manifestation of sovereignty. Second, the Court noted that the ICC would have jurisdiction over crimes that are not always defined in a way that respects the Colombian Constitution. In 2001, the Constitution was amended to prevent this conflict by authorizing different treatment for these particular criminals. This amendment thus must be interpreted in a manner compatible with the rest of the Constitution's provisions. The Court believed it had jurisdiction to suggest a number of areas in which the President could formulate interpretative declarations. First, no provision governing the ICC in the Treaty of Rome inhibits the President from granting amnesties or pardons as long as such measures comply with the Constitution and accepted international law. Second, Colombian nationals must be guaranteed their constitutional right to defense, particularly their right to receive legal counsel during an investigation and trial. Finally, under Colombian law, the treaty does not alter the jurisdiction of the national judicial authorities. On these grounds, the treaty was upheld by the Court.³¹³

311. The Court also analyzed in detail specific provisions that were clearly problematic. The Law authorized military officials to impose duties upon citizens. The Law subordinated civilian authorities to a military commander in pre-defined public order zones and transferred judicial functions to the military that pertained to civilians.

312. Decision C-578 of 2002, Manuel José Cepeda Espinosa, J. (Rodrigo Escobar Gil, J. concurring), *In re Ley 742 de 2002* (Law 742 of 2002).

313. President Andrés Pastrana made use of the exception in article 124 of the Rome Statute, which allowed a state to elect not to accept the ICC's jurisdiction over war crimes for seven years upon becoming a Party to the treaty. President Alvaro Uribe Vélez did not withdraw the declaration.

3. *Decisions Concerning the Economy*

Some of the Court's most widely publicized and debated verdicts, especially in 2000, have been those pertaining to economic matters. On the one hand, many of the *tutela* decisions, dealing with social and economic rights, ordered public expenditures that initially were not allocated for in public budgets. On the other hand, as part of its function as guardian and interpreter of the Constitution, the Court makes difficult decisions in abstract review cases dealing with legislative provisions that are highly significant for the preservation of macroeconomic stability in Colombia. The Court took its basic position on which economic statutes can be judicially reviewed in a 1994 decision³¹⁴ analyzing the unconstitutional *actio popularis* in a statute that set the requirements for the creation of certain types of private entities. The Court explained that the Constitution has given Congress a large degree of control in matters exclusively economic in nature, allowing for a lax standard of review. Stricter standards of review should be applied to laws that regulate matters concerning fundamental rights or matters relating to specific mandates in the Constitution. The Court also stated that the Colombian charter is not economically neutral because economic policies are evaluated in light of objectives proclaimed in the Preamble and fundamental economic rights. However, it clarified that the Constitution does not actually impose one economic model over the other; what is important, then, is that the Executive and the Legislature may select any economic policy that fully respects constitutional provisions. This imposes a great deal of responsibility upon a constitutional judge.

Some of the Court's strongest critics argue that its decisions on economic legislation create a high degree of legal instability.³¹⁵ They have stated that as a consequence of its judicial activism, the Court has consistently increased public expenditures, disregarding the negative long-term macroeconomic effects of its decisions.³¹⁶ Since 1990 the Court has been more sensitive to the economic impact of its decisions, without disregarding the protection of rights or the defense of constitutional principles. Three of the most controversial areas with economic

314. Decision C-265 of 1994, Alejandro Martínez Caballero, J. (unanimous), *In re* Artículo 12 y 38 de la Ley 44 de 1993 (Articles 12, 38 of Law 44 of 1993).

315. See Sergio Clavijo, *Fallos y Fallas Económicas de las Altas Cortes: el Caso de Colombia 1991–2000*, REVISTA DE DERECHO PÚBLICO No. 12 (June 2001); Salomón Kalmanovitz, *Los Efectos Económicos de la Corte Constitucional*, RERISTA DE DERECHO PÚBLICO (Oct. 1999). More recently, both of these economists have adopted a more cautious approach.

316. The costs of this have often been quantified by some critics in terms of GNP percentages.

implications include the adoption of *tutela* decisions that generate economic costs for the state, banning regulations that establish the system for financing the acquisition of housing, and deciding on the laws that regulate annual increases in public employees' salaries.

a. Tutela Decisions with Public Costs

Early on, the Court had to address the possibility of ordering, by means of *tutela* decisions, the mandatory development of State activities that increase public expenditures. Although the Court held in a unanimous decision³¹⁷ that *tutela* judges should respect expenditure priorities adopted through the national budget planning process, the Court may order expenditures in exceptional circumstances. However, this position has not been consistently applied in the Court's case law.

Several *tutela* decisions have ordered public authorities to provide services that over extend their budget. For example, in 1999,³¹⁸ a social security entity was ordered to carry out an expensive medical procedure, contrary to regulations, in order not to violate an individual's right to minimum subsistence conditions. The Court has also ordered the social security system to provide special health care services and medications to AIDS patients.³¹⁹ It is clear that in circumstances where the protection of social rights is at issue, the Court has consistently ordered authorities to act in a way that increases public expenditures. For example, in 1998,³²⁰ the Court ordered the local authorities of Bogotá to carry out a mandatory vaccination plan to preserve the health of children in one of the City's poor districts. In 2000,³²¹ a social security regulation was construed to require special headphones for an individual with hearing impairment.³²²

317. Decision SU-111 of 1997, Eduardo Cifuentes Muñoz, J. (unanimous), Celmira Waldo de Valoyes *contra* Caja Nacional de Previsión Social-Seccional Chocó (Valoyes v. National Bank); Decision SU-1052 of 2000, Alvaro Tafur Galvis, J. (José Gregorio Hernández Galindo, J. concurring), Emilio Sánchez Alsina y Otras *contra* Presidencia de la República y el Ministerio de Hacienda y Crédito Público (Alsina v. President of the Republic et al.).

318. Decision T-590 of 1999, Carlos Gaviria Díaz, J. (Eduardo Cifuentes Muñoz, J. dissenting), Alfredo Pineda Torres *contra* la Caja Nacional de Previsión (Torres v. National Bank).

319. Decision T-484 of 1992, Fabio Morón Díaz, J. (unanimous), Alonso Muñoz Ceballos *contra* Instituto de los Seguros Sociales (Ceballos v. Inst. of Social Security); Decision T-177 of 1999, Carlos Gaviria Díaz, J. (Eduardo Cifuentes Muñoz, J. dissenting), Señor X *contra* Secretaría de Salud Pública Municipal de Cali (Mr. X v. Secretary of Health of the City of Cali).

320. Decision SU-225 of 1998, Eduardo Cifuentes Muñoz, J., Sandra Clemencia Perez Calderon y Otros *contra* Secretaria Distrital de Salud (Perez et al. v. District Secretary of Health).

321. Decision T-516 of 2000, Alvaro Tafur Galvis, J. (unanimous), Miguel Camacho *contra* la empresa Solsalud, E.P.S. Seccional Bucaramanga (Camacho v. Solsalud Co.).

322. *Compare* Decision T-042 of 1999, Alfredo Beltrán Sierra, J. (unanimous), Luis Carlos Sánchez Alvarez *contra* Cafesalud E.P.S (Alvarez v. Cafesalud).

In spite of the debate around the costs of upholding rights,³²³ the new Court elected in 2000, has confirmed the basic thesis that social rights can be enforced through *tutela* decisions. The sheer cost of protecting a right is not a sufficient argument for disregarding clear constitutional mandates upholding the effective enjoyment of rights and the state's duty to safeguard life, personal integrity and human dignity. The Court has also stated that the protection of all constitutional rights entail costs which are unavoidable.

b. The "UPAC" System for Financing Housing Alternatives

The most salient economic decisions of the Court in recent times have undoubtedly been those related to the system for financing social housing based on a scheme of "constant purchasing value units" or UPAC (*Unidad de Poder Adquisitivo Constante*). For complicated historical economic reasons, the system had reached a point where it was not only inefficient, but also counterproductive because value units were calculated through annual variations in the interest rates, which were constantly reaching new historical peaks. This contravened the government's original objective and made social housing debts too high to pay. The Court reviewed the constitutionality of these regulations with three decisions that caused an unprecedented level of debate among the private and public sector and in academia.

The first decision, issued in May 1999,³²⁴ reviewed the constitutionality of the legal provisions that the Central Bank relied on to determine the monetary value of UPAC units. The plaintiff claimed that this system made the constitutional right to dignified housing³²⁵ unattainable. The Court held that part of the Central Bank's constitutional autonomy in its role as the supreme monetary authority is the determination of the relevant factors used to preserve the value of money. The Court determined that imposing mandatory criteria was comparable to restricting the Bank's autonomy. The Court also analyzed the effects of the current system on the goal of promoting dignified housing alternatives for the poor, and concluded that the system's structure was unconstitutional. The Court

323. This debate occurs in other parts of the world as well. *See, e.g.*, STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999); RICHARD A. EPSTEIN, *MORTAL PERIL* (1997).

324. Decision C-383 of 1999, Alfredo Beltrán Sierra, J. (Eduardo Cifuentes Muñoz, J. and Vladimiro Naranjo Mesa, J. dissenting), *In re* Artículo 16 de la Ley 31 de 1992 (Article of Law 31 of 1992).

325. COLOMBIAN CONST. art. 51.

therefore banned the provision requiring variations in UPAC units to reflect movements of interest rates in the financial sector. Two justices³²⁶ dissented, accusing the Court of intruding upon the powers of the Legislature.

In 1999, the Court reviewed the constitutionality of provisions in the Organic Statute of the Financial System that structured the UPAC system.³²⁷ The Court adopted a purely formal stance and struck down the provisions as unconstitutional because they were not issued by Congress. The Court deferred the implementation of its decision until the end of the 1999 legislative period, giving Congress time to order a new, constitutional regulation on the matter. The Court has also ordered the system to revise individual debt liquidations in accordance with its previous decision regarding the procedure used to calculate UPAC units.

A few weeks later the Court decided whether an *actio popularis* filed against articles in the Organic Statute of the Financial System were unconstitutional.³²⁸ These articles allowed credit entities to capitalize interest in long-term credit plans, and they applied this system to loans used for financing social housing alternatives. The Court restated the argument it relied on in its previous judgment, namely, that the President cannot regulate state intervention in financial matters by using delegated legislative powers to show the fundamental unconstitutionality of the provisions. However, the Court affirmed that capitalization of interest in long-term credit operations is not contrary to the Constitution itself, rather it is unconstitutional when the capitalization is applied to credits granted for the acquisition of housing alternatives. Access to dignified housing is a fundamental right that must be progressively developed by the law through an “adequate financing system.” Therefore, the Court asserted that the state cannot ignore the need for adequate housing and must issue adequate plans. Given the evident inequities of the system, the Court declared the provision unconstitutional and banned the application of the regulations to loans for the financing of housing alternatives. As in its

326. Justices Eduardo Cifuentes Muñoz and Vladimiro Naranjo Mesa.

327. Decision C-700 of 1999, José Gregorio Hernández, J. (Alfredo Beltrán Sierra, J. and José Gregorio Hernández Galindo, J. concurring; Alvaro Tafur Galvis, J., Eduardo Cifuentes Muñoz, J., and Vladimiro Naranjo Mesa, J. dissenting), *In re* Artículos 18, 21, 23, 134, 137, 138, del Decreto Extraordinario 663 de 1993 (Extraordinary Decree 663 of 1993).

328. Decision C-747 of 1999, Alfredo Beltrán Sierra, J. (Alfredo Beltrán Sierra, J. and José Gregorio Hernández Galindo, J. concurring; Vladimiro Naranjo Mesa, J., Eduardo Cifuentes Muñoz, J., and Alvaro Tafur Galvis, J. dissenting), *In re* Artículos 121 y 134 del decreto ley 663 de 1993 (Articles 121, 134 of Decree Law 663 of 1993).

previous decision, the Court granted Congress a reasonable time frame in which to regulate the matter.

These three judgments completely invalidated a costly system but also generated a remarkable degree of criticism from financial entities and economists. The decisions gave rise to the creation of a new system, based on “UVR” or Real Value Units. The Court reviewed the new system in 2000, and declared it constitutional on the understanding that the interest charged would not be determined by the market. Instead the Court believed that the interest should be governed by precise regulations issued by the Central Bank. The Central Bank was thus entrusted with the task of setting interest rates for loans that would finance social housing alternatives.³²⁹ Since this judgment, several courts have upheld other aspects of the new UVR system.³³⁰

c. Annual Salary Increases

The Court has also adopted controversial abstract review decisions regarding the regulation of annual increases in public and private salaries. In a 1999 decision,³³¹ the Court examined a provision allowing the Government to establish a national minimum wage, and ordered the Government to take into account the inflation rate goals established for the following year. For the Court, this criterion taken by itself, would have been clearly unconstitutional because it would reduce the value of wages. The Court ordered the Government to consider all the criteria specified by the provision, and noted that annual salary readjustments should never be lower than the inflation rates of the previous year in order to maintain minimum wage increases.

In a similar and equally controversial judgment in 2000,³³² the Court declared part of the national budget unconstitutional because Congress

329. Decision C-955 of 2000, José Gregorio Hernández Galindo, J. (José Gregorio Hernández, J., Vladimiro Naranjo Mesa, J., Eduardo Cifuentes Muñoz, J., and Alvaro Tafur Galvis, J. dissenting), *In re* Ley 546 de 1999 y Ley 550 de 1999 (Laws 546, 550 of 1999).

330. Decision C-1192 of 2001, Marco Gerardo Monroy Cabra, J. (unanimous), *In re* Artículos 2 a 9, 12 a 15, 17 a 19, 21, 22, 24, 25, 28, 29, 31, 33, 36, 39 a 42, 46, 47, 49, 50 y 51 de la Ley 643 de 2001 (Law 643 of 2001); Decision C-1140 of 2000, José Gregorio Hernández Galindo, J. (Alvaro Tafur Galvis, J., Alfredo Beltran Sierra, J., Antonio Barrera Carbonell, J., Eduardo Cifuentes Muñoz, J., José Gregorio Hernández Galindo, J., and Vladimiro Naranjo Mesa, J. concurring), *In re* Ley 546 de 1999 (Law 546 of 1999).

331. Decision C-815 of 1999, José Gregorio Hernández Galindo, J. (Vladimiro Naranjo Mesa, J., Eduardo Cifuentes Muñoz, J., and Alvaro Tafur Galvis, J. dissenting), *In re* Artículo 8 de la Ley 278 de 1996 (Article 8 of Law 278 of 1996).

332. Decision C-1433 of 2000, Antonio Barrera Carbonell, J. (Alvaro Tafur Galvis, J. and Cristina Pardo Schlesinger, J. dissenting), *In re* Ley 547 de 1999 (Law 547 of 1999).

failed to fulfill its duty of appropriating sufficient funds to secure the necessary increase in public officials' wages in accordance with the previous year's inflation rate. This position was, however, expressly modified by the Court in a 2001 judgment³³³ in which it accepted the argument that annual increases in salary involved the effective enjoyment of constitutional rights. However, the Court extracted wholly different consequences from it, taking into account: (i) the social context and impact of abstract review decisions in reducing inequalities within a State founded on the rule of law (*Estado Social de Derecho*); (ii) the inadequacy of judicial orders establishing a fixed, immovable standard for determining the value of wages; and (iii) the absence of absolute rights because even fundamental rights are subject to reasonable limitations. On these grounds, the Court found that annual increases in salary are not limited to minimum wages; and public salary policies should strive to maintain the purchasing power of public officials' wages.³³⁴ The Court then stated that the provisions were constitutional so long as the criteria were applied in full.

4. *Decisions Concerning Private Powers*

The 1991 Constitution introduced a number of innovative mechanisms designed to control the arbitrary exercise of power by private parties over individuals and groups. Not every clause, however, has been interpreted and developed by Court decisions. First, some of the relevant constitutional provisions are those intended to redistribute social power, most notably the right of access to property,³³⁵ the possibility of using the *tutela* to counter fundamental rights violations by private parties in

333. Decision C-1064 of 2001, Manuel José Cepeda Espinosa, J. and Jaime Córdoba Triviño, J. (Alvaro Tafur Galvis, J. concurring; Clara Inés Vargas Hernández, J., Jaime Araujo Rentería, J., Alfredo Beltrán Sierra, J., and Rodrigo Escobar Gil, J. dissenting), *In re* Artículo 2° de la Ley 628 de 2000 (Article 2° of Law 628 of 2000).

334. In order to formulate a salary policy the Court applied specific criteria for determining an increase of wages, including:

(1) the right of all public workers to maintain the purchasing power of their salaries; (2) the obligation to increase these workers' annual salary in nominal terms; (3) the salaries of public workers' that are below the average of central administration wages; (4) all public workers' salaries according to the previous year's inflation rate, readjusted in such a manner that the principles of salary scales and proportionality are respected; (5) the limitations on the right to maintain the purchasing power if the provisions are directed to prioritize public spending for the benefit of those who are in a situation worse than that of the public employees (unemployed, poor, indigent, displaced, etc.); and (6) any fiscal savings resulting from the limitation of annual salaries.

Id.

335. COLOMBIAN CONST. art. 60.

exceptional conditions,³³⁶ and the constitutional right to present petitions before private organizations in order to obtain an adequate and prompt response.³³⁷ Second, some constitutional provisions contain mandates designed to require more respect for democracy and fundamental rights by private organizations (such as professional associations, schools, and trade unions). Third, some constitutional provisions support the organization of civil society through non-governmental and grassroots groups, and some assign special participation rights to the different social groups expressly recognized in the Charter.

Perhaps the most feared development in this field is the ability to file a *tutela* against private parties responsible for violating or restricting constitutionally protected rights.³³⁸ According to the procedural regulations and the doctrine of the Court, the *tutela* may be used against private parties when the plaintiff is in a position of subordination or otherwise defenseless in relation to the private party against whom the claim is directed, a private party seriously harms collective interests, or the private party is charged with providing public services or utilities.

The characteristics of “subordination” and “defenseless” have been given specific meaning through the Court’s decisions. Subordination has been strictly defined as the subjection to orders or decisions of third parties who are legally enabled to impose their will.³³⁹ Defenselessness has been given a very broad interpretation by the Court, which has stated that defenselessness must be evaluated in accordance with the particular circumstances of each individual case. For example, defenselessness has been interpreted as: (i) the plaintiff’s lack of effective defense channels (whether legal, material or physical) that enable the plaintiff to counter the attacks or burdens placed upon his or her fundamental rights;³⁴⁰ (ii) the plaintiff’s inability to fulfill a basic or vital need due to the unreasonable or disproportionate manner in which a private party exercises a given

336. *Id.* art. 86.

337. *Id.* art. 23.

338. This ability allows private parties to directly apply fundamental constitutional rights, and it ends the debate in Colombia concerning the application of the state action doctrine.

339. Decision T-333 of 1995, Antonio Barrera Carbonell, J. (Jorge Arango Mejía, J. dissenting) *Martha Beatriz Johnson Ceballos y Otros contra la Asociación de Copropietarios del Conjunto Residencial Montana* (Ceballos v. Owners Assoc. of Montana); Decision T-172 of 1997, Vladimiro Naranjo Mesa, J. (unanimous), Dora Helena Aguilera y Otros *contra* Señora Beatriz Acevedo de Ordóñez (Aguilera v. Ordóñez).

340. Decision T-573 of 1992, Ciro Angarita Barón, J. (unanimous), Juan Guacaneme García *contra* Carlos Ulises Cárdenas (García v. Cárdenas); Decision T-190 of 1994, Alejandro Martínez Caballero, J. (unanimous), María Margarita Marín Zuleta *contra* Aicardo Marín Saldarriaga (Zuleta v. Saldarriaga); Decision T-498 of 1994, Vladimiro Naranjo Mesa, J. (unanimous), Carlos Alberto Blandon *contra* Club Deportivo Armero (Blandon v. Sports Club of Armero).

position or right;³⁴¹ (iii) the existence of a moral, social or contractual bond, which may cause actions or omissions that violate the rights of one of the parties (parent-child relationships or corporate bonds);³⁴² (iv) or the use of social pressure to force specific conduct (e.g., publishing of a person's outstanding debt in a newspaper).³⁴³ The Court has also stated that the condition of defenselessness is presumed in cases where minors invoke the *tutela* to protect their rights.³⁴⁴

The possible scope in applying this instrument to private relationships is far-reaching. The broad array of cases in which the Court has allowed the limitation of private powers through *tutela* include the following: (i) retired workers against their former employers,³⁴⁵ (ii) employees who are denied social security services because their employer failed to make necessary fund transfers,³⁴⁶ (iii) residents of buildings and compounds against co-owners' assemblies and administration bodies,³⁴⁷ (iv) medical practitioners against the administration of the private hospitals where they work,³⁴⁸ (v) users or clients of financial entities who unduly disseminate their personal data,³⁴⁹ (vi) citizens affected by noises coming from a near-

341. Decision T-605 of 1992, Eduardo Cifuentes Muñoz, J. (unanimous), Lucio Quintero Rincon *contra* Eduardo Mendoza (Rincon v. Mendoza); Decision T-379 of 1995, Antonio Barrera Carbonell, J. (unanimous), Pedro Daniel Rojas y Otros *contra* Francisco Próspero de Vengoechea Fleury (Rojas v. Fleury); Decision T-375 of 1996, Eduardo Cifuentes Muñoz, J. (unanimous), Ignacio Barbosa Sánchez y Otros *contra* Isabel Molina y Otros (Sánchez et al. v. Molina et al.); Decision T-081 of 1998, Eduardo Cifuentes Muñoz, J. (unanimous), Yorly Fander Messa Osorio *contra* Ejercito Nacional (Osorio v. National Ejercito).

342. Decision T-529 of 1992, Fabio Morón Díaz, J. (unanimous), Blanca Cecilia Castro Lopez *contra* Gustavo Cardenas (Lopez v. Cardenas); Decision T-233 of 1994, Carlos Gaviria Díaz, J. (unanimous), Maria Aurora Contreras *contra* Junta Administradora del Conjunto Residencial Montana (Contreras v. Administrator of Montana Residential Complex); Decision T-351 of 1997, Fabio Morón Díaz, J. (unanimous), Santos María Escalante Ramírez *contra* Diocesis De Cúcuta Y El Sacerdote Luis Fernando Hoyos Ossa (Ramírez v. Father Ossa).

343. Decision T-411 of 1999, Alejandro Martínez Caballero, J. (unanimous), Danilo Trujillo Betancurt y Otros *contra* Constructora Colmena S.A. (Betancurt et al. v. Colmena Construction).

344. Decision T-172 of 1997, Vladimiro Naranjo Mesa, J. (unanimous), Dora Helena Aguilera y Otras *contra* Beatriz Acevedo de Ordóñez (Aguilera et al. v. Ordóñez).

345. Decision T-524 of 2000, Alvaro Tafur Galvis, J. (unanimous), José Pedro Pablo Rodríguez Ramírez *contra* Siderúrgica Corradine S.A. (Ramírez v. Siderúrgica Co.).

346. Decision T-202 of 1997, Fabio Morón Díaz, J. (unanimous), Guillermo Rueda y Otros *contra* Forjas Técnicas Ltda (Rueda et al. v. Forjas, Ltd.).

347. Decision T-418 of 1999, Fabio Morón Díaz, J. (unanimous), Elizabeth Calderon Montaña *contra* Luz Marina Barbosa (Montaña v. Barbosa); Decision T-333 of 1995, Antonio Barrera Carbonell, J. (Jorge Arango Mejía, J. dissenting), Martha Beatriz Johnson Ceballos et al. *contra* Asociación de Copropietarios del Conjunto Residencial Montana (Ceballos et al. v. Residential Assoc. of Montana); Decision T-233 of 1994, Carlos Gaviria Díaz, J. (unanimous), Contreras v. Administrator of Montana Residential Complex.

348. Decision T-433 of 1998, Alfredo Beltrán Sierra, J. (unanimous), Hermmman Cuervo Pinto *contra* la Fundación Santa Fe de Bogotá (Pinto v. Foundation of Santa Fe de Bogotá).

349. Decision T-261 of 1995, José Gregorio Hernández Galindo, J. (unanimous), German

by privately-owned motor sports track,³⁵⁰ (vii) the inhabitants of a social housing compound that suffered from serious structural defects against the builder who failed to prevent such failures,³⁵¹ (viii) inhabitants of residential areas affected by the smells and noises emanating from their neighbors' animal-raising activities or other poorly operated industries,³⁵² (ix) a priest who was banned from carrying out religious services inside privately operated cemeteries against the cemetery's administration,³⁵³ (x) homemakers who were constant victims of domestic violence against their aggressors,³⁵⁴ (xi) the victims of fraudulent accusations printed in a widely read book against the author,³⁵⁵ and (xii) sports fans against the entities in charge of managing stadiums.³⁵⁶

III. THE IMPACT OF THE COURT

The Constitutional Court's contribution to the materialization and development of the 1991 Constitution has deeply impacted most aspects of Colombian life. Its judgments, which have touched upon all areas of the law and all facets of Colombia's complicated national reality, have led the Court to become a necessary reference point for anyone who wishes to know in detail what has transpired in Colombia in the past decade.

For purposes of clarity, the author has grouped the different effects generated by the Court's decisions into two broad categories. First, the Court exerted substantial influence in strengthening the rule of law and in transforming the entire Colombian legal system. This transformation

Humberto Rincon Perfetti *contra* Sistema Pronta S.A. de Tarjetas de Credito y Otros (Perfetti v. Sistema Pronta Credit Card Co., et al.).

350. Decision T-226 of 1995, Fabio Morón Díaz, J. (unanimous), Ricardo Prieto Rozo *contra* Fernando Escobar (Roza v. Escobar).

351. Decision T-411 of 1999, Fabio Morón Díaz, J. (unanimous), Bentancurt et al. v. Colmena Construction.

352. Decision T-115 of 1997, Hernando Herrera Vergara, J. (unanimous) Alberto Rafael Alemán Orozco *contra* Fernando Colón Ramos (Orozco v. Ramos); Decision T-099 of 1998, José Gregorio Hernández Galindo, J. (unanimous), José Joaquín Manchola Muñoz *contra* Alcalde Local de San Cristóbal (Muñoz v. Mayor of San Cristóbal).

353. Decision T-602 of 1996, José Gregorio Hernández Galindo, J. (unanimous), Berardo Arango Marín *contra* Cooperativa de Trabajo Asociado de Servicios Funerarios (Marín v. Workers Cooperative).

354. Decision T-436 of 1995, Fabio Morón Díaz, J. (unanimous), Luz Marina Montoya *contra* Marco A. Castiblanco (Montoya v. Castiblanco); Decision T-458 of 1995, Alejandro Martínez Caballero, J. (unanimous), Lucelys Ballesteros González *contra* Amaury Vega Ruiz (González v. Ruiz).

355. Decision T-244 of 2000, Fabio Morón Díaz, J. (unanimous), Flor Elvira Russi Rodríguez *contra* Hernán Joaquín Fonseca Jiménez (Rodríguez v. Jiménez).

356. Decision T-288 of 1995, Eduardo Cifuentes Muñoz, J. (unanimous), Rosemberg Zamora y Otras *contra* Clubes Deportivo Cali y América y Otros (Zamora et al. v Sports Club of Cali et al.).

became evident in the fundamental change in the general interpretative approach towards the law and legal issues. The transformation also became evident with the deep infusion of constitutional law into the criminal, civil, administrative, and labor decisions, as well as in other areas of the legal system. Further, the introduction of current issues into Colombian constitutionalism, the rise of new “equity jurisdiction” in Colombia, and the application of substantial pressure for further change in the legal system also evinced the transfer nation.

Secondly, the Court has visibly impacted Colombian politics. In short, the Court interpreted some social conflicts as constitutional problems. Therefore, it contributed to the peaceful resolution of conflicts within society. This means that the Constitution ceased to be an abstract code and became imbedded in social reality. In fact, the Court has become a controversial but legitimate institutional arbiter, called upon to make difficult decisions. It has become a forum in which most controversies are submitted to a second round of decision-making.

Overall, the Court’s largely unprecedented impact upon Colombian life may be summed up as follows:

- (a) The Court has contributed to building the rule of law, expanding it within the context where the rule of force often prevails. In doing so, the Court strengthened public institutions that were threatened by many types of menaces and circumstances. This prompted strong debates regarding the Court’s extensive power, and whether this power encroaches excessively into the political sphere.
- (b) The Court has modified the balance of social and political power by, *inter alia* granting more power to weak, vulnerable, marginal, and disorganized persons with constitutional rights.
- (c) The Court has made these advancements without depriving the state of its legitimate enforcement actions, which enable the State to address social and political problems.

A. *The Court’s Impact in the Legal Field*

1. *Change in the Prevailing Interpretative Approach*

The interpretative approach that prevailed in Colombian legal circles before 1991 was mainly formalist. Once the Constitutional Court decided the first abstract review and *tutela* cases, however, the dominant

interpretative approach perspective began to undergo a major transformation among judges, public officials, and legal practitioners.³⁵⁷ This modification process, which has profoundly impacted Colombia's strong pre-existing legal culture, was largely brought about by the essential focus shift adopted by the new constitutional judge. At the level of judicial review, the change of legal perspective was sudden. The Constitutional Court radically focused on abandoning the formalist approach and adopting an approach centered on the protection of rights and the balance of principles and values. Given the hierarchy of the Court within the Constitutional system, this slow but steady change of approach is being gradually adopted in most *tutela* decisions. For a Hispanic country, with a four-century old legal culture of ritual forms, inaccessible judicial hierarchies, endless procedures, and an amazing overpopulation of lawyers, this general and quick change in prevailing interpretative approaches was an unexpected advantage. Moreover, it evolved into a very interesting socio-legal process that has profound implications for the progressive construction of the rule of law.

I have previously referred to a number of differences between the types of decisions adopted by the Supreme Court under the former Constitution and those adopted by the Constitutional Court after 1991 for more than historical reasons. They serve as eloquent reminders of the great distance that lies between a formalist approach and a "substantialist" approach, which favors the defense of rights and principles. One great difference between these two types of legal focus is that before 1991, the Concordat, decrees declaring a state of exception, regulations covertly discriminating against women, would *not* have been declared unconstitutional. The same may be said of many other laws, measures, and situations that are now subjected to an entirely different sort of constitutional evaluation. However, this does not mean that the new approach is necessarily more rigorous than the former;³⁵⁸ it just means that wholly new outlooks,

357. See, e.g., PHILIP BOBBIT, *CONSTITUTIONAL INTERPRETATION* (1991); SUSAN J. BRISON & WALTER SINNOTT-ARMSTRONG, *CONTEMPORARY PERSPECTIVES ON CONSTITUTIONAL INTERPRETATION* (1993). See generally ROBERT ALEXY, *TEVÍA DE LA ARGUMENTACIÓN JURÍDICA* (Manuel Atienza & Isabel Exejo trans., 1989); CHAIM PERELMAN, *MÉTHODES DU DROIT, LOGIQUE JURIDIQUE ET NOUVELLE RHÉTORIQUE* (1976).

358. A formalist approach, focused on the adequate distribution of functions among public authorities and concentrated on the types of acts by which the functions are carried out and the regularity of the corresponding procedures, can also be very strict and consequentially generate a declaration of unconstitutionality of norms that would otherwise pass a substantial constitutionality review. The most salient examples are the decisions of the Supreme Court by which several Constitutional amendments were banned for procedural reasons. This same point is illustrated by another case, which also proves that the formalistic approach also occasionally appears in the context

dilemmas, and responsibilities have been created for the constitutional judge. Similarly, this does not mean that the new approach has been universally adopted; the formalist approach still remains appealing, particularly in those areas of the country where access to information and legal education is difficult. Further, in politically challenging cases that raise procedural issues, the formalist approach is often still utilized.

Five elements may help examine the fundamental difference that exists between these two types of interpretative approaches. First, the problems posed by each approach are different, because the substantialist approach emphasizes conflicts of values and interests but not formal powers or procedures. Second, the methods used to solve such problems are also different, since the formalist approach typically privileged “black or white” solutions, while the new perspective seeks to harmonize conflicting values and interests. Third, as a consequence, an entirely new type of legal reasoning is applied to solve difficult cases, because the formalist ideal of universally applicable abstract legal categories is no longer viable. Constitutional problems are now seen as matters of degree and balance, which require bringing together diverse values, principles, interests, and rights. Fourth, this system entails a new link between the constitutional system of review and social reality, which must be considered in order to find concrete solutions in particular cases. Finally, the judge is left to consider the impact of her decisions in the context in which they will operate.

of the new Constitution. In one decision the Constitutional Court declared the legally-established system for the financing of housing alternatives unconstitutional. The main reason was not a substantial one focused on the effective enjoyment of the right to adequate housing, but a formal one, i.e. that the legal instrument used to regulate this system was not of the type required by the Constitution to intervene in financial matters. For the Court, a system such as this could not be regulated by means of an ordinary law that in turn empowered the President of the Republic to issue legislative decrees on the matter.

That is why it is mistaken to present the debate between old and new constitutionalism as a replication of the North American controversy between “judicial passivity”—understood as a cautious and restrained application of the constitutional system of judicial review and associated with traditional constitutionalism—and “judicial activism”—defined as the intervention of judges in the definition of preferable constitutional alternatives in hard cases and associated with new constitutionalism. Through cases such as the ones just mentioned, Colombia has shown that it is possible to develop a high level of judicial activism on the grounds of formalistic, traditional arguments. For commentary on the American debate, see RAOUL BERGER, *GOVERNMENT BY JUDICIARY, THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL PROCESS* (1980); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); ROBERT JUSTIN LIPKIN, *CONSTITUTIONAL REVOLUTIONS* (2000); MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982).

The first difference refers to the type of problems that the constitutional judges must solve. Under a formalist approach, typical conflicts are generated between organs of public power and between formally defined spheres of jurisdiction. Recurring issues are whether the authority involved could do what it did, whether it follows the correct procedure, whether the form of the act was adequate, or whether its actions invaded the sphere of jurisdiction of another authority. By contrast, under a “substantialist” approach, typical conflicts are generated between constitutional values, principles, interests, and rights that clash in certain contexts.³⁵⁹

The resolution of these substantial conflicts demands different methods than those used under a formalist approach. When one public authority invades another authority’s sphere of jurisdiction, the solution is simply to protect the organ affected by the intrusion and to punish the infractor. In other words, the judges employ black-and-white solutions. But this method is distinctly inappropriate when dealing with a conflict between values, rights, interests, and principles.³⁶⁰ The method required by the constitutional judge allows the harmonization of rights and principles in concrete circumstances. Each judge is granted a specific value based on objective criteria, and the adequate solution is one that achieves the maximum protection and minimum restriction of all of the values. This method requires the application of new analytical tools and concepts such as “rationality,” “reasonability,” “proportionality,” or “essential nucleus of rights.”

359. These values, principles, interests, and rights have been granted different forms of constitutional protection, depending on the context in which they operate. Certainly, the constitutional judge cannot disregard them, and must make a careful assessment of the specific circumstances of each case. A constitutional conflict thus emerges when two rights are confronted in a particular situation. Examples of this occur when: the freedom to impart information to which a magazine is entitled is confronted with the privacy of a public figure whose personal life was the object of a news article (conflict between rights); the professional duty of a physician to preserve life clashes with the liberty of a terminally ill patient to decide whether she will carry on living in extreme conditions (conflict between a duty and a right); the legal stability that emerges as a consequence of respect for *res iudicata* is confronted with the need to prevent the application of a decision which violates fundamental rights (conflict between two principles); and the state goal of expanding public transportation infrastructure is confronted with the right of an indigenous community to preserve the integrity of ancestral lands (conflict between a public interest and a right).

360. For example, to hold that a magazine can never publish something that a public figure considers private would amount to suppressing the right to information; to ascertain that roads or infrastructure may never be constructed in areas classified as indigenous territory would ultimately leave aboriginal groups and their neighbours in the darkest isolation from development and its benefits and to affirm the abstract prohibition of ordering public expenditures outside of institutional budgets, would be tantamount to forgetting the very existence of basic social and economic needs of the individual. Black-or-white solutions lead to decisions that ultimately disregard rights and principles protected by the Constitution.

A third difference poses a much more extensive challenge. In order to accept that a given solution is not of the black-or-white type, it is necessary to overcome a certain method of legal reasoning characteristic of the formalist approach that is identified by a craving for classification. This method prefers that each phenomenon be placed in a separate, distinct, and irreconcilable category through abstract procedures that do not consider the unique context. The constitutional judge must now assess the comparative importance of the values, principles, interests, and rights that collide in concrete situations. They make this assessment by visualizing the problems as issues of *degree* and *balance*. Most of Colombia's current constitutional issues are located in "gray" areas, which is reflected in the types of questions posed during judicial review.³⁶¹

A fourth difference emerges from the third one. It is related to the link between the law and reality. In matters of degree, decisions may not be adopted in abstract terms that disregard the factual or normative context that gave rise to the conflict. This poses an enormous conceptual challenge, because the law and the judge must be sufficiently open to the context of each case. Additionally, legal reasoning must be able to incorporate the relevant elements provided by that context. This is an interesting challenge, because it requires Colombian lawyers to modify their schemes of thought. It is no longer possible to select general rules and apply them to concrete cases, as most Colombian lawyers were taught to do through a simple syllogism. Thus, Colombian lawyers must ponder factors and criteria that emerge from the specific facts of each case and from their links to conflicting values, interests, rights, and principles, not the other way around.³⁶²

361. To return to our simple example: *To what extent* can a magazine publish information on a public figure's private life? *When is it reasonable* to reveal certain information in accordance with the right to privacy? *When* does control over published information become a *disproportionate* limitation of freedom of the press, similar to forbidden censorship? The difficulty in most constitutional cases is centered on *where to draw the line*, not in the abstract, but in each particular situation, on the grounds of the elements that define the traits and dimensions of each individual conflict.

362. Returning again to our example on the conflict between freedom of the press and the right to privacy: is it relevant to ask whether the information that is being published is a picture of the mayor with his or her lover, or whether it is a picture of the mayor receiving money from a municipal contractor on the gates of her/his house? If the news is related to a public corruption scandal, the difference is relevant. But if the news is related to the ethical profile of the mayor, maybe it is not so significant. That is why some Colombian scholars have begun to talk about the "death of syllogism", of the inadequacy of simple deductive logical reasoning, of the impossibility of maintaining a scheme of thought that proceeds downwards from the top. That is also why some have begun to speak of the need to articulate the rules and sub-rules applied by the Court, to make the reasonability tests more transparent in each decision, to satisfy with enough pertinent reasons the duty of applying strong arguments, of expressly defining the different degrees at which constitutional judicial review should be applied to different issues. This is all perhaps to indicate that it is important not to allow subjectivity to

This leads to a fifth trait of the shift in the interpretative approach. From a substantialist perspective, the effects and impact of constitutional decisions are necessarily born in mind by the judge, not for reasons of convenience, but to avoid the disproportionate restriction of constitutional rights and principles as a consequence of the decision. The clearest examples are *tutela* decisions. These decisions are not adopted in the abstract, but rely on the concrete, specific circumstances of each individual case. They order whatever is necessary to effectively protect the fundamental rights at stake. The *tutela* judge must not give a pre-defined order when faced with a fundamental rights violation, but employs different orders for each case, even if the same rights are being protected. Another way of taking into account the effects and the impact of decision, is through the Court's "modulative" decisions, which would have been unconceivable under the abstract black-and-white approach.

2. *Applying the Constitution to All Branches of the Law*

In addition to spurring the "de-formalization" of legal arguments, the Constitutional Court's case law has rapidly applied the Constitution to all branches of the law. The Court's decisions contributed to the infusion of constitutional principles into all legal sub-disciplines. The principle of legal interpretation according to the Constitution, presented by the Court as a necessary precondition for the preservation of the Charter has led ordinary judges to directly apply constitutional norms and to incorporate constitutional arguments into their legal reasoning. Moreover, the primary commitment of protecting fundamental rights has begun to surface in all types of judicial decisions. This is not, however, an exclusively Colombian phenomenon. This has occurred wherever powerful Constitutional Courts have started to shape the legal systems within which they operate.³⁶³

prevail in the many gray zones of constitutional interpretation, and to set clear rules for the game from the outset.

363. Referring to the European case, one scholar has depicted a situation very similar to ours:

European judiciaries now must take into account the dictates of constitutional "jurisprudence" . . . which is formally binding upon them as higher law. As this case law has expanded in scope and content, once relatively autonomous legal domains (such as penal, administrative, and contract law) have been gradually but meaningfully placed under the tutelage and supervision of constitutional judges. Consequently, judicial processes and litigation strategies, but also the teaching of law and legal scholarship, are being transformed.

In short, the process of constitutionalizing European law has not only begun, it is irreversible.

ALEC STONE SWEET, *GOVERNING WITH JUDGES CONSTITUTIONAL POLITICS IN EUROPE* (2000). *See also* SALLY J. KENNEY, WILLIAM M. REISINGER & JOHN C. REITZ, *CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE* (1999).

The assimilation of constitutional law by other legal sub-disciplines is evident in a variety of protective *tutela* decisions. In labor law cases, the Court has addressed matters like the timely payment of salaries,³⁶⁴ the adequate recognition and payment of retirement pensions,³⁶⁵ the protection of pregnant workers,³⁶⁶ even those hired through “temporary worker” companies,³⁶⁷ the prohibition of changing the legal personality of a company to elude labor obligations,³⁶⁸ respect for the right to strike,³⁶⁹ and the prohibition of discrimination against trade unions members.³⁷⁰ In criminal law cases, the Court addressed issues such as the constitutional limitations upon the types of admissible evidence,³⁷¹ the scope of the exclusionary rule,³⁷² the protection of defendants’ procedural rights

364. Decision SU-995 of 1999, Carlos Gaviria Díaz, J. (Eduardo Cifuentes Muñoz, J. concurring), Iván Enrique Brito Roncallo y Otros *contra* la Alcaldía Municipal de El Plato, Magdalena (Roncallo et al. v. Mayor of El Plato).

365. Decision T-606 of 1999, Alfredo Beltrán Sierra, J. (Eduardo Cifuentes Muñoz, J. dissenting) Nieves Avilez Pérez y Otros *contra* el municipio de Montería (Perez et al. v. City of Montería).

366. Decision T-969 of 2000, Alejandro Martínez Caballero, J. (unanimous) María Palacios *contra* Servicios y Asesorías S.A. (Palacios v. Services and Accessories Co.); Decision C-470 of 1997, Alejandro Martínez Caballero, J. (unanimous) *In re* Artículo 239 del Código Sustantivo del Trabajo (Labor Code); Decision T-380 of 1999, Eduardo Cifuentes Muñoz, J. (unanimous), Carmen Villalba Gil y Otros *contra* Seguro Social E.P.S. y Otros (Gil et al. v. Social Security Services et al.) .

367. Decision T-1101 of 2001, Manuel José Cepeda Espinosa, J. (unanimous), Carmen Villalba Gil y Otras *contra* el Seguro Social E.P.S. y Unimec E.P.S. (Carmen Villalba Gil et al. v. Social Security E.P.S., Unimec E.P.S.).

368. Decision T-286 of 2003, Jaime Araújo Rentería, J. (unanimous), Claudia Lorena Silva Soto *contra* la Cooperativa de Trabajadores de Colombia (Claudia Lorena Silva Soto v. Workers’ Cooperative of Colombia).

369. Decision T-568 of 1999, Carlos Gaviria Díaz, J. (Alvaro Tafur Galvis, J. concurring; Vladimiro Naranjo Mesa, J. and Eduardo Cifuentes Muñoz, J. dissenting), Sindicato de las Empresas Varias de Medellín E.S.P. *contra* Ministerio de Trabajo y Seguridad Social y Otros (Various Companies of Medellín) Minister of Labor and Social Security et al.); Decision C-432 of 1996, Carlos Gaviria Díaz, J. (unanimous), *In re* Artículo 451 del Código Sustantivo del Trabajo (Labor Code); Decision C-271 of 1999, Antonio Barrera Carbonell, J. (unanimous), *In re* Artículos 374 (P) y 376 (P) del Código Sustantivo del Trabajo (Labor Code).

370. Decision SU-342 of 1995, Antonio Barrera Carbonell, J. (Jorge Arango Mejía, J., Vladimiro Naranjo Mesa, J., Fabio Morón Díaz, J., and Hernando Herrera Vergara, J. dissenting), Sindicato de Trabajadores de Confecciones Leonisa S.A. *contra* la Empresa Confecciones Leonisa S.A (Leonisa Textile Labor Union v. Leonisa Textile Corporation, Ltd.); Decision of T-230 of 1994, Eduardo Cifuentes Muñoz, J. (unanimous), Juan de Jesús Jiménez *contra* Febor Entidad Cooperativa (Juan de Jesús Jiménez v. Febor Entidad Association).

371. Decision T-008 of 1998, Eduardo Cifuentes Muñoz, J. (unanimous), William Alberto Tulena Tulena *contra* Sala Penal del Tribunal Superior del Distrito Judicial de Santa Fe de Bogotá (William Alberto Tulena Tulena v. Penal Office of the Superior Tribunal of the Judicial District of Sante Fe de Bogotá).

372. Decision SU-159 of 2002, Manuel José Cepeda Espinosa, J. (Alfredo Beltrán Sierra, J., Rodrigo Escobar Gil, J., and Jaime Araujo Rentería, J. dissenting), Saulo Arboleda Gómez *contra* la Fiscalía General de la Nación y la Sala de Casación Penal de la Corte Suprema de Justicia (Gómez v. National Fiscal General).

(including the right to an adequate technical defense),³⁷³ the rights of prison inmates,³⁷⁴ and the obligation to respect procedural delays.³⁷⁵ In administrative law cases, the Court has considered topics such as the right to obtain adequate and timely answers to petitions,³⁷⁶ the conditions upon which informal traders can be banned from invading public space,³⁷⁷ and the application of constitutional principles governing public service to every public official's activities.³⁷⁸ In civil law cases, the Court decided subjects like the rights and duties of family members *vis-à-vis* each other³⁷⁹ and the application of constitutional social functions to private property.³⁸⁰

373. Decision T-573 of 1997, Jorge Arango Mejía, J. (unanimous), Nicolás Antonio Gil Marín *contra* Penal Municipal de Medellín (Antonio Gil Marín v. Criminal Order 26 of the City of Medellín); Decision T-567 of 1998, Eduardo Cifuentes Muñoz, J. (unanimous), Avelino Pasachoa Cely *contra* la Sala Civil-Familia-Laboral del Tribunal Superior del Distrito Judicial de Santa Rosa de Viterbo (Avelino Pasachoa Cely v. Civil-Family-Labor Office of the Superior Tribunal of the Judicial District of Santa Rosa de Viterbo).

374. Decision T-966 of 2000, Eduardo Cifuentes Muñoz, J. (unanimous), Luis León España, Giovanni Girón Collazos y Arnulfo Moncayo Mera *contra* la Directora y el Comandante de Vigilancia de la Cárcel del Distrito Judicial de Cali Villahermosa (España et al. v. Director and the Commandant of the Prison Guards of the Judicial District of Cali Villahermosa); Decision T-153 of 1998, Eduardo Cifuentes Muñoz, J. (unanimous), Manuel José Duque Arcila, Jhon Jairo Hernández y Otros *contra* el Ministerio de Justicia y el INPEC (Manuel José Duque et al. v. Minister of Justice and the INPEC).

375. Decision T-361 of 1997, Carlos Gaviria Díaz, J. (unanimous), Hector Alonso Zapata Congote y Otros *contra* la Fiscalía Regional de Antioquia (Hector Alonso Zapata et al. v. the Fiscal Region of Antioquia).

376. *See, e.g.*, Decision T-867 of 2000, Alejandro Martínez Caballero, J. (unanimous), Henry Bolaños Daza y Otros *contra* Caja de Crédito Agrario y/o Banco Agrario de Colombia (Daza et al. v. Colombia Bank of Agriculture); Decision T-997 of 1999, José Gregorio Hernández Galindo, J. (unanimous), Edilma Del Socorro Rendón Castaño *contra* CAJANAL (Castaño v. CAJANAL); Decision C-339 of 1996, Julio César Ortiz, J. Gutiérrez (unanimous), *In re* Artículos 49, 60, 72 y 136 del Decreto 01 de 1984 (Decree 1 of 1984).

377. *See, e.g.*, Decision T-883 of 2002, Manuel José Cepeda Espinosa, J. (unanimous), Francy Hernández González *contra* la Alcaldía Mayor de Bogotá, a la Secretaria de Gobierno y a la Alcaldía Local de Teusaquillo (González v. Mayor of Bogotá et al.).

378. Decision C-328 of 1995, Eduardo Cifuentes Muñoz, J. (unanimous), *In re* Artículo 4º de la Ley 105 de 1993 (Law 105 of 1993); Decision T-609 of 1999, Carlos Gaviria Díaz, J. (unanimous), Manuel de Jesús Valdés García y Otros *contra* Gobernación del Chocó y el Hospital San Francisco de Asís de la ciudad de Quibdó (García et al. v. Governor of Chocó et al.); Decision T-533 of 1999, Carlos Gaviria Díaz, J. (Eduardo Cifuentes Muñoz, J. dissenting), Esperanza Pinzón Ortiz *contra* Ministerio de Hacienda y Crédito Público (Ortiz v. Minister of Land and Public Resources); Decision T-396 of 1997, Antonio Barrera Carbonell, J. (unanimous), Diego Jesús Téllez y Otros *contra* la Empresa de Desarrollo Urbano de Villavicencio (Téllez et al. v. Desarrollo Urbano Co.).

379. Decision T-278 of 1994, Hernando Herrera Vergara, J. (unanimous), Diana Patricia Gutiérrez Utima *contra* Blanca Lilia Utima Rivera y Oscar Gutierrez Lizarazo (Gutiérrez v. Rivera); Decision T-182 of 1999, Martha Victoria Sáchica de Moncaleano, J. (unanimous), Andrea del Pilar y Otros *contra* Silvio Nel Huertas Ramírez (Pilar et al. v. Ramírez); Decision T-098 of 1995, José Gregorio Hernández Galindo, J. (unanimous), Carolina y Lina Tatiana Torres Rey *contra* Orlando Torres Sierra (Rey v. Sierra).

380. Decision T-427 of 1998, Alejandro Martínez Caballero, J. (unanimous), María Esperanza Prieto González *contra* el Curador No 3 de la Zona de Usaquén (González v. No. 3 Zone of Usaquén);

Applying constitutional principles to all areas of the law was also prompted by abstract review decisions in which the Court interpreted statutes so as to make them compatible with the Constitution. These interpretations guide judges and administrative authorities in concrete cases. For example, regarding labor law, the Court held that the law cannot exclude strikes prompted mainly for solidarity reasons from legal protection.³⁸¹ In criminal law, the Court held that crime victims have three constitutional rights: truth, justice, and compensation. Consequently, the Court declared some provisions in the Criminal Code unconstitutional. These provisions regulated victims' rights as if the victim's only interest was to claim damages.³⁸² The Court also issued judgments on the types of admissible evidence and the admissible restrictions on their publicity.³⁸³ In administrative law, the Court held that a plaintiff could challenge an administrative act without asking for damages. As a result, citizens can seek the simple invalidation of the act.³⁸⁴ The Court ordered that public utility consumers have the right to participate in the competent regulatory agency's tariff creation,³⁸⁵ and it also limited the President's power to modify the Executive branch's structure.³⁸⁶ In civil law, the Court held that a person's obligation to give alimony to divorced and gravely ill spouses could only be terminated when the dignity and autonomy of the ill spouse would not be affected.³⁸⁷

Decision C-595 of 1995, Carlos Gaviria Díaz, J. (unanimous), *In re* Artículos 3 de la Ley 48 de 1882, Artículo 61 de la Ley 110 de 1912 (Law 48 of 1882, Law 110 of 1912).

381. Decision C-201 of 2002, Jaime Araujo Rentería, J. (Manuel José Cepeda Espinosa, J. and Alvaro Tafur Galvis, J. concurring in part; Clara Inés Vargas Hernández, J., Alfredo Beltrán Sierra, J., Jaime Córdoba Triviño, J., and Manuel José Cepeda Espinosa, J. dissenting in part), *In re* Artículos 359, 379-e, 401, 405, 406, 408 y 467 del Código Sustantivo del Trabajo, Artículo 25 del Decreto 2351 de 1965 (Labor Code, Decree 2351 of 1965).

382. Decision C-916 of 2002, Manuel José Cepeda Espinosa, J. (unanimous), *In re* Artículo 97 de la Ley 599 de 2000 (Law 599 of 2000); Decision C-032 of 2003, Eduardo Montealegre Lynett, J. (unanimous), *In re* Artículo 56 de la Ley 600 de 2000 (Law 600 of 2000).

383. Decision C-394 of 1994, Eduardo Cifuentes Muñoz, J. (Eduardo Cifuentes Muñoz, J., Carlos Gaviria Díaz, J., and Alejandro Martínez Caballero, J. dissenting), *In re* Artículo 37A, 37A, 293, 306, 329, 369C, 415 del Código de Procedimiento Penal (Code of Criminal Procedure).

384. Decision C-426 of 2002, Rodrigo Escobar Gil, J. (unanimous), *In re* Artículo 84 del Código Contencioso Administrativo (Administrative Code). The Council of State disagreed in a divided decision (text on file with author).

385. Decision C-150 of 2003, Manuel José Cepeda Espinosa, J. (Jaime Araujo Rentería, J., Clara Inés Vargas Hernández, J., and Rodrigo Escobar Gil, J. dissenting), *In re* Ley 142 de 1994, Artículo 1° de la Ley 286 de 1996, Artículo 2°, 3° de la Ley 632 de 2000, Artículos 18, 19, 23 de la Ley 689 de 2001 (Law 142 of 1994, Law 286 of 1996, Law 632 of 2000, Law 689 of 2001).

386. Decision C-702 of 1999, Fabio Morón Díaz, J., *In re* Artículos 7°, 38, 47, 51, 52, 53, 54, 55, 59, 68, 111, 120 de la Ley 489 de 1998 (Law 489 of 1998). Several justices dissented in this opinion. *Id.* Decision C-1437 of 2000, José Gregorio Hernández Galindo, J. (Alvaro Tafur Galvis, J. and Cristina Pardo Schlesinger, J. dissenting), *In re* Artículo 42 de la Ley 489 de 1998 (Law 489 of 1998).

387. Decision C-246 of 2002, Manuel José Cepeda Espinosa, J., *In re* Artículo 6 de la Ley 25 de

3. *The Importance of New Concepts and the Incorporation of Current Constitutional Issues into National Case Law*

In the course of its first decade, the Court has not only rendered decisions on the most pressing national problems, but it has also issued pronouncements on broad issues of current constitutional law. These may be classified in three groups: (i) traditional controversies associated with the constitutional judicial review of laws, (ii) post-war debates of western constitutionalism, and (iii) emerging issues in the transition from the twentieth to the twenty-first centuries.

First, the Court has dealt with traditional controversies relating to the role of a constitutional tribunal by establishing transparent criteria to guide its own activity. Several concepts must be understood in this light: “legislative margin of configuration,” the government’s “margin of appreciation” when declaring a state of exception, and “levels of intensity of the equality test.” These three concepts demonstrate the Court’s prudent attitude. Different reasonability tests and guidelines created to solve difficult cases (such as the *pro-libertatis* principle) exemplify this court’s efforts to make its constitutional interpretation more rigorous. Despite these advancements, more must be done in this endeavour.

Second, post-war debates, which have been ignored by Colombian case law, have also been addressed by the Court in what may be called a fast *aggiornamento*. Over a ten year period, the tribunal has had to decide matters which had been addressed in the four prior decades in Europe and the United States. Regarding the debate on the constitutional provisions’ normative character, the Court began by affirming that every word in the Constitution is a true legal imperative that binds every national authority. On the question of whether there are essential political issues that the constitutional judge should not be permitted to decide, the Court has consistently rejected the possibility of spheres of power that would be immune to the general duty of respecting the Constitution. However, perhaps in the field of fundamental rights and basic liberties our constitutional law has been most rapidly and remarkably updated. Through its decisions, the Court has assimilated Western jurisprudential advances, and has gone further in issues such as personal autonomy, sexual discrimination, and social exclusion. Nevertheless, regarding other issues, such as racial equality, homosexual rights, and reproductive rights, there is still a long road ahead.

Third, the Court has coped with some of the current global constitutional debates. In particular, four areas of debate should be underscored. First, in the areas of multiculturalism and the right to be collectively different, the Court has completely abandoned the assimilationist perspective instead of imposing individualist, occidental conceptions upon indigenous peoples. In doing so the Court spoke of intercultural dialogue among equally dignified cultures, as well as free determination of ethnic groups as a pre-requisite for the preservation of diversity. Second, in terms of the enforceability of social rights, the Court recognized the right to minimum subsistence. In doing so, it created the doctrine of unconstitutional state of affairs, and it has protected the right to health and other social rights through *acción de tutela*. Third, in the area of the application of fundamental rights provisions to relations between private parties, the Court agreed that a private person is in a situation of power and advantage over another, the Constitution should be applied through *tutela* directly to protect the weakest person. Finally, regarding the problem of the active status of fundamental rights, the Court has consistently affirmed that fundamental rights empower individuals to defend themselves from arbitrary actions. The Court also demanded positive actions from authorities in order to fulfil their needs.

Conformity with the tendencies of modern constitutionalism is also evident in the central role assigned to the solidarity principle and the progressive definition of equality, which is understood in substantive terms and not merely as formal equality before the law. Conformity is also evident in the authorization of affirmative action mechanisms to benefit both individuals and groups such as women, adolescents, the elderly, children, the marginalized and the disabled. It is also evident the visualization of society not merely as an aggregate of individuals, but as a complex structure where very diverse groups and affiliations interact on the grounds of their different needs and interests. Such groups include ethnic groups, peasants, consumers, public utility users, entrepreneurs, marginalized and formerly discriminated sectors, persons in conditions of special physical, mental, or economic weakness, and even guerrilla groups. These persons have therefore acquired new standing before the law, public institutions, and society which can reinforce their active participation in all relevant societal areas.

Moreover, the Court has introduced a number of analytical instruments into its decision making process and legal reasoning. These tools are in tune with the challenges posed by the new issues the Court faced, and are also quite innovative at the global level. Concepts like “proportionality,” the “reasonability test,” “special protection,” “levels of constitutional

scrutiny,” “essential nucleus of rights and competences,” “legitimate trust,” and several others, which would have sounded alien and certainly beyond the law two decades ago, now form part of the Court’s everyday work.

4. *The Rise of an Equity Jurisdiction*

As a natural consequence of the Court’s shift toward an interpretative approach, judges implemented a new type of legal reasoning in their *tutela* decisions. Rather than applying rigid, abstract, impersonal rules of conduct to individual cases, judges applying the new reasoning began a quest for a just and fair solution in every case within the constitutional framework. The judges did this by carefully valuating and balancing the claims that they confronted in any constitutional conflict. In that sense, *tutela* judges may be seen as part of an overall equity jurisdiction that has emerged as a result of constitutional interpretation and application in individual cases, and which now occupies a central place in Colombian affairs.

The importance of equity as a principle under the Constitution has been expressly recognized and applied by the Court in relation to several specific topics. Such topics include the special degree of protection, and corresponding special treatment, that should be given to weak and defenseless individuals and groups,³⁸⁸ the obligation to use private property in a manner that does not harm community interests or environmental integrity,³⁸⁹ and the interpretation of municipal public officials’ duties favoring the community.³⁹⁰ More recently, the Court underlined the special constitutional status of the equity principle and held that when delivering *ex aequo et bono* awards in the context of labor conflicts (a possibility which is expressly allowed by the Constitution), arbitrators must adopt reasonable decisions.³⁹¹ This year, the Court held that in takings cases, the law cannot establish unified or mandatory amounts for compensation, because in certain cases, the protection of the

388. Decision T-456 of 1994, Alejandro Martínez Caballero, J. (unanimous), *In re* T-38844, T-42884, T-43400 Civil del Circuito de Santa fé de Bogotá (Civil Circuit of Santa fé de Bogotá).

389. Decision T-523 of 1994, Alejandro Martínez Caballero, J. (unanimous), María de Jesús Medina Pérez y Otros *contra* Alvaro Vásquez (Pérez v. Vásquez).

390. Decision T-518 of 1998, Eduardo Cifuentes Muñoz, J. (unanimous), Ana Rosa Serna vda. de Cadavid *contra* Municipio de Angelópolis (Serna v. City of Angelópolis).

391. Decision SU-837 of 2002, Manuel José Cepeda Espinosa, J., Fundación Abood Shaio y Otros *contra* Sentencia de Homologación de la Corte Suprema de Justicia (Foundation Abood Shaio et al. v. Sentence of the Supreme Court of Justice).

vulnerable may require that the judge decide on a case by case basis what constitutes adequate compensation.³⁹²

But apart from developing the principle of equity as recognized by the Constitution and making it operational in concrete situations, the Court's case law has contributed to the creation of a new type of "jurisdiction" that coexists with the ordinary jurisdiction and comprises every single *tutela* decision. One clarification is necessary in this regard: in contrast to the U.S. judicial system, where each judge is empowered to apply the law and to seek an equitable solution to the cases brought before her, in the Colombian civil law system, judges were originally instituted to apply the mandates contained in clear legal provisions and no more. However, as a result of the interpretation rules derived from the Constitution, judges have begun to seek equitable solutions to difficult cases rather than to syllogistically apply abstract norms to concrete problems. In that sense, a parallelism may exist between a formal system of judicial decision making (the traditional jurisdiction) and a new method of approaching legal issues. This new method preserves sufficient flexibility, but also objectively tends to instill justice into concrete situations (the *tutela* constitutional jurisdiction). In that sense, the Court has made a remarkable contribution to a more fair and just resolution of conflicts, where the general mandate of equity stands a higher chance to eventually replace the old latin maxim: *dura lex, sed lex*.

5. *The Pressure for Further Change in the Legal System*

The Court's work has also generated new questions concerning the constitutional judge's role within our democratic society. In particular, it has generated a strong debate on the precise status of the Court's decisions within the legal system. The traditional practice in our civil law system has been to grant special preeminence to legal mandates adopted by statute or decree over judicial decisions.³⁹³ However, both the *erga omnes* effects of the Court's abstract review judgments and the constitutional doctrine's mandatory character have led scholars and observers, in addition to the

392. Decision C-1074 of 2002, Manuel José Cepeda Espinosa, J. (Rodrigo Escobar Gil, J. dissenting), *In re* Artículos 61, 62, 67, 70, 128 de la Ley 388 de 1997, Artículos 29 y 30 (parcial) de la Ley 9 de 1989 (Law 388 of 1997, Law 9 of 1989). Manuel José Cepeda Espinosa and Montealegre Lynett dissented in part, arguing that the court should have gone even further. *Id.* Even though this is an abstract review case, the decision actually binds judges in concrete review cases to balance the interests of the community and those of the owner, within the spirit of an equity jurisdiction.

393. See NEIL MACCORMICK & ROBERT SUMMERS, *INTERPRETING PRECEDENTS: A COMPARATIVE STUDY* (1997).

Court, to inquire upon the emerging force of precedent within our constitutional order. Several of judgments have emphasized the mandatory effect of concrete review verdicts for parties who are not directly involved in the corresponding proceedings. These judgments state that the constitutional doctrine must be followed. Because judicial decisions have acquired new importance as a source of law in Colombia, a natural question becomes: how has the force of constitutional precedents transformed the structure, and the very nature, of our legal system?

The Constitutional Court has made great advancements on the issue of precedents. In constitutional law it has increased its workload to assure that lower judges' *tutela* decisions will be reversed if they are contrary to the Court's doctrine. It has also incorporated precedent explicitly into its reasoning, and as a sufficient base for deciding a case, even in abstract judicial review. Further, the Court extended *tutela* against civil, labor, criminal, and administrative judgments whenever the judge has not followed a relevant constitutional precedent to decide the case. It also accepted that a *tutela* decision by one of its three-member review chambers (*Salas de Revisión*) can be voided by the full chamber (*Sala Plena*) if it is found to be contrary to the Court's doctrine. Finally, the Court developed rules to change or overrule precedents, even in abstract judicial review. In other branches of law, the Court has ordered other jurisdictions to take precedents seriously, by reinterpreting a nineteenth century statute that diminished the force of judicial opinions as a source of law,³⁹⁴ and by reinterpreting another nineteenth century statute which said that three judgments in the same direction amounted only to a "probable doctrine."³⁹⁵

B. The Impact in the Political Domain

Apart from its immense influence in the legal domain, the Court has also generated visible effects in our country's daily political and social activities.³⁹⁶ Informally phrased, it is not that the Court is peeking into

394. Decision C-083 of 1995, Carlos Gaviria Díaz, J. (Eduardo Cifuentes Muñoz, J. concurring), *In re* Artículo 8° de la ley 153 de 1887 (Law 153 of 1887).

395. Decision C-836 of 2001, Rodrigo Escobar Gil, J. (Alvaro Tafur Galvis, J., Alfredo Beltrán Sierra, J., Jaime Araujo Rentería, J., and Clara Inés Vargas Hernández, J. dissenting), *In re* Artículo 4° de la ley 169 de 1896 (Law 69 of 1896). Justices Manuel José Cepeda Espinosa and Marco Gerardo Monroy Cábrea, concurred on the grounds that the Court should have gone even further. *Id.*

396. On the role of the United States Supreme Court, see generally ALEXANDER M. BICKELL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1978); ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* (1978); ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* (1976); ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* (1960); DAVID M.

everything, but rather that it is pulled into everything. A combination of political, social, cultural, and institutional factors cause this phenomenon. Only those causes of a national scope will be highlighted in this discussion. First, the so-called “political crisis” has led to problems that are not solved by political decisions brought before the Court by citizens interested in finding a solution to matters that affect them. Institutionally, Colombia may be said to have the most open and accessible system of constitutional judicial review in the world. Any citizen can appear before the Court to file a claim through the public unconstitutionality action. Any citizen may also request a *tutela* judgment be reviewed by the Court, in the exercise of broadly recognized constitutional rights. A third element is that some social groups and activist citizens quickly understood the implications of such an open system and made rapid use of the constitutional channels to file their petitions before the Court. This is not a massive mobilization, because constitutional procedural rules do not require a significant number of citizens to come together on an issue. Because these rights protect each individual, it is enough for an active citizen to file a short lawsuit before the Court. Individuals may also file a brief request for *tutela* review to bind the Court to adopt a decision on the matter, even if it does not delve into the merits of every claim.

This transformation of political and social matters into constitutional controversies may be explained culturally: Colombia has traditionally been a country of laws. Many of the laws are not applied, but they are there. Laws are constantly issued with the illusion that new norms will solve pressing problems. Because almost every problem has a corresponding law, it is easy to formulate each social or political problem as a matter of regulation and to question the rules before the Court. In addition, constitutional fundamental rights are applicable in every aspect of life, which allows every concrete situation to be formulated as a constitutional case. Alexis de Tocqueville’s famous affirmation about the United States—that in America, every social or political issue sooner or later becomes a legal one—can easily be transplanted to Colombia.

O'BRIEN, STORM CENTER, *THE SUPREME COURT IN AMERICAN POLITICS* (1986); WILLIAM H. REHNQUIST, *THE SUPREME COURT* (1987); GLENDON A. SCHUBERT, *CONSTITUTIONAL POLITICS* (1960); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1994); and LAURENCE TRIBE, *CONSTITUTIONAL CHOICES* (1986).

As to the debate in other systems, see Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002); Vijayashri Stripati, *Towards Fifty Years of Constitutional and Fundamental Rights in India: Looking Back to See Ahead*, 14 AM. U. INT'L L. REV. 413 (1998).

1. No Longer a Paper Constitution

The criticisms that the 1991 constitutional scheme was far too idealistic and that it would become the “sterile symbol of millions of Colombians’ frustrations,” have now been replaced by accusations that the constitutional provisions are being taken too seriously. Additional criticisms are that social rights are being applied in concrete cases in an excessively costly manner, or that constitutional procedures have displaced judges’ attention from ordinary matters to an ever-increasing number of *tutela* claims. This only proves that the first distinct output of the 1991 constitutional system of judicial review has been the ascription of a higher status to the Constitution and its progressive assimilation into all areas of social and individual life in Colombia. Public officials and private citizens have begun to adjust their behavior to the Constitution. Constitutional education has been included as a compulsory subject in all educational curricula. Social discourse incorporates constitutional terms, values, and principles. In short, the Constitution has been instilled with a new life of its own, which has enabled it to abandon the realm of paper and to permeate human relations at all levels. The Constitution was introduced visible and invisible changes into our immediate reality.

2. An Instrument to Seek the Redistribution of Political and Social Power

Throughout its case law, the Court emphatically stated constitutional limitations that may be placed on numerous political and social powers. As discussed above, the Court’s decisions have restricted the diverse types of excesses incurred by public officials *vis-à-vis* private citizens. They have also restricted the different types of private powers that may amount to undue violations, restrictions, or threats to fundamental rights. The Constitution has thus become a guide for social transformation, and for the re-distribution of power within our very unbalanced Colombian society; the ultimate beneficiaries of this process are, in turn, the people and their Constitution.

3. A Legitimate Arbiter Facing Enduring Criticism

The Court has become a kind of arbitrator with sufficient and legitimate authority to adopt all sorts of final decisions. It is the Court who is generally expected to provide an answer from a constitutional perspective. Difficult decisions, such as those related to the “8000 Process” (a campaign finance political scandal), to the extent of

extradition, or to the admissibility of demilitarized stretches of national territory, have been deferred to the Court by the very same authorities in charge of applying them.³⁹⁷ This would not be the case if those responsible for solving such problems actually exercised their authority to adopt a decision. When that does not happen, the Court is asked to decide the matter. Nevertheless, harsh criticism of specific topics is an enduring and visible consequence of the system. Issues such as the admissibility of *tutela* against final judgments, or the review of decrees declaring states of exception, or the Court's intervention in economic matters, have all raised substantial and repeated opposition by all branches of the government. However, the trend is toward a higher degree of legitimacy, promoting fundamental rights at each advance.

4. *A Forum to Make Difficult Decisions*

As a consequence of the prevailing patterns of social exclusion and recurring human rights violations, the failure of the political system to respond to the needs of the citizens, and easy access to courts, the Court has now become a forum in which difficult decisions have to be made. These decisions usually concern topics that have been neglected, evaded, or rejected by other branches of public power. The controversy generated by many of the Court's verdicts is a direct consequence of this new role. It was the Court who defined the official position on difficult issues that the Constituent Assembly had avoided for their thorny character.³⁹⁸

5. *A Second Round for Everything*

As a consequence of the foregoing traits, the Court has become a decision-making body to provide a constitutional solution for virtually every type of conflict. Moreover, in a large number of cases, the Court's activity is initiated by those who have been adversely affected by decisions in previous fora. That is, those who lose a "round" before any public authority or private person, have increasingly brought their cases before the Court to seek a constitutional ruling. Those who do not actually get to the Court, have usually consulted specialized attorneys or informed citizens about the chances of obtaining a favorable *tutela* decision for their case.

397. It is not infrequent even for the Government to come before the Court requesting its decision.

398. Abortion, euthanasia, drug consumption, and the Concordat are but a few of the issues that the tribunal has ruled on.

6. *A Controversial Institutional Actor*

These dynamics, and the system as a whole, generate constant questions. Does the Court have enough institutional capacity to address so many different issues? How can it solve them without invading the jurisdiction of other branches? Is it legitimate for the Court to intervene in matters where there are multiple solutions and divergent opinions? Must it bear in mind extra-legal elements while making its decisions, such as the parties' constitutional interpretation of the issue, or the economic or political cost of its verdicts?

Such questions, which have been studied by scholars and the Court for decades, have become commonplace in public commentary of the Court's decisions. Public opinion has visibly reacted to sensitive judgments, which has prompted proposals to restructure the Court, either by creating a specialized economic chamber, or by merging it with the Supreme Court of Justice to create a new Constitutional Chamber. These proposals have been unsuccessful thus far. In sum, the Court has been placed in a position where it must bear the burden of being at the "storm center."

Nonetheless, these issues should not be understood or addressed in the same way as their "cousins" in the United States context. This point will be further developed in Part IV of this paper.

7. *The Wider Context: Constitutionalism Against Violence*

Another aspect of the Court's political impact concerns the wider context of our internal armed conflict. Against the background of participatory democracy, the Court has strived to reinterpret the nature, scope of application, and functioning of judicial channels for the resolution of conflicts, especially of the writ of protection of fundamental rights known as *acción de tutela*. This instrument has been conceived as a means for fighting arbitrary limitations of human dignity, and has become a generally available tool of individual and collective empowerment. This is especially true for those traditionally under-represented in the political spheres. From this standpoint, the *tutela* has enabled these groups to promote their interests through institutional channels, as opposed to violent means. The Court has also drawn constitutional interpretation rules that have significant effects. Some of these rules expand the number and nature of the rights enforceable through the *tutela* mechanism, avoid formalism in the interpretation of its procedural requirements and broaden access to the *tutela* by the powerless. The importance and impact of the

acción de tutela within the Colombian socio-political structure, may be partially appreciated by reference to the figures referred in Part II above.

Experts who have studied Colombia and the Colombian situation, especially the terrible degrees of violence that have constantly affected it throughout past centuries, have recently begun to highlight the fundamental role played by the administration of justice in the prevention of violence. Legitimate and effective channels for conflict resolution are generally available and can provide a sound alternative to collective or individual “self-defense” from pervasive and brutal conflict. Perhaps the Court has posed a significant contribution to the consolidation of peace, by resolving through institutional channels a number of difficult issues. Perhaps the Court has become, as a consequence of its position within the system, a fundamental actor in the peaceful resolution of conflicts.

IV. GUARDING THE GUARDIANS: JUDICIAL ACTIVISM AND THE SPECIFICS OF THE COLOMBIAN CONTEXT

The foregoing overview of the Court’s broad powers, and of its role within the Colombian State, could lead an external observer, especially one who is aware of the North American debate on judicial power,³⁹⁹ to pose a number of objections to the system of judicial review introduced by the 1991 Constituent Assembly. There are three principal objections to the current system of judicial review.

Some argue that the Court is an anti-majoritarian body with excessive powers. This is so because it is composed of a small number of individuals with a very high degree of decision-making power. Furthermore, these individuals have no link to the people because they have not been popularly elected. Therefore, they are neither representative nor responsible. Others argue that the Court has invaded the policy-making field exclusively reserved to Congress and the Executive, and has in

399. The debate in the United States on the compatibility of a strong and active judicial power with the democratic principle and separation of powers has been marked with different highlights and points of emphasis. The Colombian Constitutional Court was created not only with an awareness of such debate, but as a consequence of certain criticisms directed against the Colombian supreme Court of Justice, which were inspired by what has been called the “government of the judges.” For a synthesis of this debate and its implications in the Colombian context, see MANUEL JOSÉ CEPEDA, *DERECHO POLÍTICA Y CONTROL CONSTITUCIONAL* (1987). During the 1990s, after the creation of the Colombian Constitutional Court, the debate did not surface again in Colombia, although in the United States, it is still alive. *See, e.g.*, RONALD DWORKIN, *LAW’S EMPIRE* (1986); RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* (1998); MARK KOZLOWSKI, *THE MYTH OF THE IMPERIAL JUDICIARY* (2003); JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

several cases acted as a true legislator. From that perspective, the Court has restricted the scope of democratic politics by diminishing the influence of Congress in essentially political matters. As a result, these political matters are now resolved at the constitutional level by the Court. Finally, others argue that the Court has ventured into a broad array of subjects that, due to their very complex technical nature, require a solid expertise that the Justices lack. It is not possible for the members of the Constitutional Court to be experts on every single subject of ordinary life that they deal with in their decisions. As a result, the decisions are technically deficient.

These criticisms are inspired by the United States debate over judicial review. As phrased by Hart,⁴⁰⁰ the “noble dream” of a Constitution effectively defended before any public power that exceeds its limits or disregards basic liberties, may turn into the unexpected “nightmare” of judges who are insensitive to democratic procedures and decide to formulate policies on every conceivable topic.

But the debate that has developed in the United States cannot be automatically transferred to a wholly different social and political context. In addition, because this debate was well known when the Court was created, both the Constitution and the regulations that govern the Court introduced certain innovations aimed at overcoming such objections. Therefore, to assess carefully the relevance of these criticisms to Colombia, one must examine the types of checks to which the Court is subject and the political and institutional specificities of the current Colombian context.

A. Checks over the Court's Powers

The Court's work is subject to two primary kinds of checks. External checks and balances, devised by the Constituent Assembly, prevent the Court from exceeding its jurisdiction. Internal checks, are self-restraint mechanisms, introduced by the Court within the Constitution's spirit of limiting public power.

1. External Checks and Balances

The Constituent Assembly prevented the Court from having the last word on the matters presented to it, even though it is the highest interpreter of the Constitution. Because of the democratic nature of the

400. HLA Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977).

Colombian State, the last word has always been given to the sovereign people. If the people do not use it, political forces have it, and they can make themselves heard through various means. Congress can carry out four types of control over the Court. First, Congress may impeach individual justices. Second, Congress has the power to approve statutory or organic laws. In this way, it can set criteria that the Court must follow on key issues. Third, Congress may make new laws on issues that the Court has already decided upon. But, it can decide them differently while still respecting the Constitution. Fourth, Congress may exercise its constituent control by amending the Constitution. In this way, it can overrule a specific decision of the Court. On the other hand, the sovereign people can control the Court's activities directly through public participation mechanisms such as referenda to amend the Constitution, and public opinion debates.

The enumeration of these external checks and balances⁴⁰¹ proves that the Colombian situation is substantially different from the one in the United States, where the aforementioned objections have been widely discussed. Indeed, the Colombian Constitution is relatively easy to reform, unlike the case in the United States. Congress may rapidly respond to any judgment of the Court that it does not agree with by modifying the relevant constitutional provisions in a short period of time. A constitutional amendment in the United States takes significantly longer. Moreover, in the United States legal system, there are no statutory or organic laws that bind the judge once they have passed constitutional review. Also the United States system does allow the presentation of popular legislative initiatives or national referenda. The Colombian Constitution not only introduced these latter mechanisms, but broadened their scope to include laws and constitutional reforms. In that sense, the Colombian people can express their will in a specific, formal, and legally binding manner, against a given decision of the Court. These mechanisms do not function solely in theory, but rather are applied in practice.

401. There are other types of checks on Justices, which bear a different effect than the ones enumerated. Two examples illustrate the point: (i) the annual output control of Justices' work carried out by the Superior Council of the Judiciary (*Consejo Superior de la Judicatura*), which is an entity that belongs to the Judicial Branch and is independent from the Executive and the Legislative powers; and (ii) the disciplinary control for official misbehavior due to non-compliance with mandatory delays or similar objective causes.

a. Checks by Congress

The Court is subject to the classic control carried out by Congress in the form of impeachment of high public officials. This possibility, which is clearly foreseen in the Constitution,⁴⁰² has remained a hypothetical one. Since 1991, no Constitutional Court Justices have been impeached.

Second, Congress may limit the Court's margin of constitutional interpretation, and control its potential excesses, through the enactment of statutory or organic laws.⁴⁰³ These two types of legislation were created by the Constitution with a special status because they regulate matters that the Constituent Assembly considered of the utmost importance. They are therefore subject to special procedural requirements. Statutory laws, on one hand, regulate topics such as fundamental rights, democratic participation mechanisms, states of exception, and the Administration of Justice. They are considered to be direct developments of the Constitution in those spheres, and limit the Court's margin of discretion (even though the Court also reviews the constitutionality of these laws *ex officio*, before their promulgation and entry into force).⁴⁰⁴ Organic laws regulate matters such as the legislative procedure that must be followed by Congress, or the special requirements that must be met by the laws that approve the national budget or the national development plan. Therefore, through organic legislation, Congress can establish the catalogue of procedural requirements that these bills must meet. This establishes clear rules that must be followed by the Court whenever it is examining a given law's formal validity.⁴⁰⁵

402. COLOMBIAN CONST. arts. 174, 178.

403. *Id.* arts. 151–152.

404. Congress has only adopted one statutory law concerning constitutional rights—Law 133 of 1994, on freedom of religion. It has also adopted the following statutory laws, some of which have been declared in whole or in part unconstitutional by the Constitutional Court. Law 130 of 1994 (Statute of Political Parties and Movements); Law 131 of 1994 (on “Programmatic Voting”—a 1991 Constitutional innovation by which citizens can elect some public officials on the grounds of their programmes, and recall their mandates through new elections if they fail to meet their promises, amended by Law 741 of 2002); Law 134 of 1994 (Citizen Participation Mechanisms, such as referenda and popular initiatives, also amended by Law 741 of 2002); Law 137 of 1994 (States of Exception Statute); Law 270 of 1996 (Statute of the Administration of Justice). One statutory law on habeas data was struck down on procedural grounds. The statutory law on habeas corpus is pending review by the Court.

405. Congress has adopted all the organic laws authorized by the Constitution, except for one. Congress promulgated the Rules of Legislative Procedure (Law 5 of 1992), the Organic Law of the Budget (Law 38 of 1989), the Organic Law of the National Development Plan (Law 152 of 1994), and the Organic Law Concerning the Distribution of Functions and Resources to Territorial Entities (Law 715 of 2001). However, Congress has not yet adopted the organic law that regulates the structure and relations among territorial entities (*Ley Orgánica de Ordenamiento Territorial*).

Third, Congress can issue new legislation on matters that the Court has already decided upon and decide those matters differently. Most of the Court's decisions permit the Congress to adopt new laws on the same subject that was formerly governed by an unconstitutional law so long as the content of that law is not reproduced, and the new law respects the Constitution. This occurs quite frequently, and it is not necessary to highlight specific examples.⁴⁰⁶

Finally, Congress can limit the scope of the Court's margin of interpretation, by directly amending the Constitution.⁴⁰⁷ In contrast to the United States Constitution, which is very difficult to modify, or European ones, which are substantially more rigid than ours, the Colombian Constitution may be amended quite easily by Congress. The Colombian amendment procedure requires twice the number of debates than ordinary legislation, as well as a qualified majority approval during the second round, and is usually completed in less than one year.⁴⁰⁸ This is not merely a theoretical tool. Several decisions adopted by the Court have given rise to constitutional reform processes in Congress. Some of these processes have indeed resulted in specific amendments to the Constitution.⁴⁰⁹ Although the Court has the power to review constitutional amendments approved through Legislative Acts, it can only review the procedural requirements of the amendment. It is therefore not empowered to review the substance of the amendment. This is also true of the laws that summon constitutional referenda and elections for a Constituent Assembly. The Court is thus prevented from having the last word on these matters. The Court has recently stated that the amendment power does not allow for the

406. Nevertheless, Congress cannot use its ordinary legislative powers to detract from the jurisdiction of the Court or to prevent the Court from reviewing the compatibility of specific legislation with fundamental rights. This practice is permitted in Canada. See KENT ROACH, *THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE* (2001).

407. COLOMBIAN CONST. art. 375.

408. This is one among three possible constitutional amendment procedures. The other two are much more rigid: (i) calling for a constitutional referenda, designed for submitting approval of a given constitutional amendment project to the people, presented to citizens through a law approved by Congress at the initiative of the Government or citizens; and (ii) summoning of a Constituent Assembly, which requires Congress to approve a law to present such a project to the people and to allow citizens to decide through direct vote whether such Assembly should be summoned, and whether they accept the Assembly's competence, period, and composition. COLOMBIAN CONST. arts. 378, 376. Both the law that summons a referendum and the one that summons the election of a Constituent Assembly are subject to preliminary review by the Constitutional Court. *Id.* arts. 241–242.

409. Specific instances include when the funds were transferred from the national treasure to the municipalities (Legislative Act 1 of 1995), the modifications to the composition of martial courts (Legislative Act 2 of 1995), and expropriation without compensation for reasons of equity (Legislative Act 1 of 1999).

substitution, derogation or destruction of the Constitution.⁴¹⁰ Thus, the Court does not control the compatibility of the substance of an amendment with any specific constitutional clause that the Court had previously interpreted contrary to the amendment.

There are instances when attempts to respond to a decision of the Court through popular referenda or Congressional amendment have failed. These failures prove that after political and social forces have debated the content of the judgment, they have accepted that the Court's interpretation is an acceptable one. More importantly, they prove that those who could have rejected a given judgment decided not to do so. From that perspective, the judgment of the Court may not be dismissed as being contrary to majority beliefs or as anti-democratic. Rather, the Court's judgments are approved as being compatible with the most stable and broad objects of social consensus.

b. Control by the People

Citizens were also empowered by the Constituent Assembly to place direct limits upon the autonomy of the Court. The most effective tool for this purpose is the constitutional reform process. First, a popular initiative supported by five percent of the electorate is presented to one of the two houses. Then, Congress summons a referendum.⁴¹¹ These controls have not been successful. Two notable examples are the referendum that attempted to reverse the decision that declared the unconstitutionality of the Concordat Treaty between Colombia and the Vatican, and the referendum that sought to reverse the unconstitutionality of a provision in the Criminal Code that criminalized the consumption of personal doses of drugs (See Table 6).⁴¹²

A second means of control frequently exercised by the people is public opinion. The Colombian Court has tolerated degrees of criticism that exceed the limits that other legal systems (such as the North American or several European systems) permit as minimum requirements of respect for

410. Decision C-551 of 2003, Eduardo Montealegre Lynett, J., *In re Ley 796 de 2003* (Law 796 of 2003). Justices Alfredo Beltrán Sierra and Clara Inés Vargas Hernández, dissented on the grounds that they favored striking down the entire referendum law. *Id.*

411. COLOMBIAN CONST. art. 378.

412. As stated by article 378 of the Constitution, referenda may also be carried out at the initiative of the Government, which does not need to be backed by citizen support in order to present such a proposal to Congress. COLOMBIAN CONST. art. 378. President Alvaro Uribe Vélez recently submitted a bill summoning a referendum to amend several aspects of the Constitution. Some of the matters included in that bill were recently struck down by the Court. *See* Table 6, *supra*.

the “administration of justice.” In several cases, the accusations launched against the Court by its critics would amount to contempt for the judges.

For these reasons, that when the Court rules, it does not imply that the opposite decision may not be taken in the political field. The only requirement is that the opposite political decision be adopted through a much more open and rigorous procedure. A constitutional amendment that is more demanding in its approval requirements, ultimately protects minority rights, while also creating more opportunities for democratic debate and ensuring that the final decisions are solid and stable reflections of the popular will.

It should be emphasized that these different types of checks have a crucial justification. They reinforce the legitimacy of a powerful, independent, and activist Constitutional Court. Indeed, whenever the Court’s difficult, activist, or controversial decisions are upheld over time, it is either because political actors have ultimately accepted their legitimacy, or because their critics were not able to gather sufficient support to counter the decision through constitutional amendments. Often times, whenever attempts to amend the Constitution fail, controversial judgments are eventually legitimized, and surrounded by a certain degree of consensus. In these cases, democratic debate proves that the Court’s decision was a reasonable and solid option within the Constitutional possibilities.

Perhaps that is why the public scholars alike have been mostly respectful of the Court. The Court enjoys a remarkable degree of legitimacy, in spite of its position at the center of divisive public controversies and enduring opposition in some areas. Nevertheless, in spite of times of low acceptance (as low as 40% positive image), it now maintains a 58% positive acceptance rate. The acceptance of *tutela* is 78%, the highest of any legal instrument.⁴¹³

2. *Self-Restraint Mechanisms*

The Court has played an activist role throughout its ten years of existence. At the same time, though, it has designed important self-restraint mechanisms, and applied them in a consistent manner within its decision-making process. There are two principal self-restraint mechanisms. First, the Court places limitations upon its institutional

413. Opinion poll published by the newspaper *El Tiempo* on the tenth anniversary of the Constitution. A recent survey shows that the Court has a fifty-five percent positive image. *El Tiempo*, July 23, 2003, at 1–2.

status, which restrict either the scope of its decisions or the reach of its own powers. Second, the Court also exercises judicial caution and prudence with regard to its review powers, the manner in which it applies such review powers, its decisions and the scope of their effects. I will briefly describe each one of these mechanisms.

a. The First Limitation of Power

In the first place, the Court has placed limitations upon the powers that arise from its own institutional status, particularly in regards to the other organs of the judiciary. There are two types of self-restraint mechanisms in this category.

First, the Court established limitations on the mandatory effect of its opinions for other judges. The Constitutional Court has distinguished between the decision and the arguments that support it. The former is binding, while the latter is not. The Court has also affirmed that its interpretations of the Constitution are not binding for other judges, except when the Court explicitly provides so by ascribing *inter pares*, *inter communis*, or *erga omnes* effects to its judgments.⁴¹⁴ This situation resulted from two decisions of the Court. The first one struck down a law,⁴¹⁵ which stated that the doctrine of the Court was “a mandatory auxiliary criterion” for all judges and officials. This 1993 decision⁴¹⁶ held that arguments of the Court lacked legal force beyond the justification of the relevant case. The second decision,⁴¹⁷ concerned the legal rule⁴¹⁸ by which, in the absence of a directly applicable law, judges must apply constitutional doctrine to solve the cases before them. In this decision, the Court held that constitutional doctrine may be applied as an auxiliary or subsidiary source of law, but never as a mandatory criterion for adjudication. This is expressly stated in Article 230 of the Constitution, according to which judges are only subject to the “empire of the law.” In that sense, the Court has prompted judges at all levels to explore their own interpretation of the Constitution, allowing them to reach different results if there are powerful reasons for this departure. The Court has not established in detail which reasons are actually powerful enough to justify

414. See *supra* Part II.A.2.a.i.

415. Decree 2067 of 1991, art. 23

416. Decision C-131 of 1993, Alejandro Martínez Caballero, J. (unanimous), *In re* Artículo 2º, 23 del Decreto 2067 de 1991 (Decree 2067 of 1991).

417. Decision C-083 of 1995, Carlos Gaviria Díaz, J. (Eduardo Cifuentes Muñoz, J. concurring), *In re* Artículo 8º de la ley 153 de 1887 (Law 153 of 1887).

418. Ley 153 de 1887 (Law 153 of 1887), art. 8.

such a course of action. The task of identifying such reasons and applying them to individual decisions is left to the individual judge. However, because the Court has the final word in this respect, it may accept or reject the departure of lower judges from its interpretative decisions. This state of affairs has prompted a debate surrounding the existence and the force of judicial precedents.⁴¹⁹

Second, the Court itself struck down the provision by which an *acción de tutela* could be filed against judicial decisions⁴²⁰ and has only upheld these claims when those decisions are in gross opposition to the law. In these cases, the decisions are said to be based on factual arbitrariness and are not legal pronouncements. This is the doctrine of “*vías de hecho*”, which can only be applied in such extreme cases. This has severely limited the Court’s power to review other judges’ work in ordinary criminal, labor, civil, or administrative matters.

b. Second Limitation of Power

A second type of self-restraint mechanisms has been applied by the Court as a manifestation of judicial prudence and caution. There are three broad categories their fall under this self-restraint mechanism, including the object of the Court’s control, the manner in which the Court carries out its functions, and the Court’s decisions and their effects.

The first category is self-restraint mechanisms that are grounded on judicial caution relating to the object of the Court’s control. This includes the legal provisions, and the acts or actions subject to the Court’s scrutiny. There are six self-restraint mechanisms relating to the object of the Court’s control.

First, the Court may proceed on a case by case basis. Instead of adopting general solutions, the Court proceeds one case at a time. The figure of “*reiteration of constitutional doctrine*,” applied by the Court to decide cases which are essentially similar to those that were dealt with in previous judgments, is justified on these grounds. Whenever the Court determining that an individual case may be decided by applying the same constitutional doctrine that led to previous decisions, it follows the earlier decisions. However, this is done only after carefully examining the facts of the case and concluding that they have sufficient similarity with those of the previous decision. The high frequency of *reiteration of doctrine*

419. See *supra* Part III.A.1.

420. Decision C-543 of 1992, José Gregorio Hernández Galindo, J., *In re* Artículos 11, 12 y 25 del Decreto 2591 de 1991 (Decree 2591 of 1991).

decisions, especially in the past few years, explains the large number of *tutela* decisions I have quoted above. This trend has continued in spite of the Court's discretionary power to select the decisions it will review.

Second, when the Court performs an abstract review of the constitutionality of certain legal provisions, it generally restricts the scope of its analysis to the specific laws or articles which are claimed to be unconstitutional. It does not examine other parts of the same provision, or other articles within the same statute. Nevertheless, the Court may review provisions or statutes which are not the object of an unconstitutionality action through the procedure of *normative integration* (“*integración normativa*”).⁴²¹ However, this instrument has only been given limited application, and the Court has established a number of requirements for its use. Moreover, these requirements have become more stringent over time.⁴²² Today, the application of this procedure is quite restrictive, and abstract constitutional judicial review may have become less expansive, due to an element of prudence which has infused the Court's decisions.

Third, the concept of “relative *res iudicata* effect” for the Court's decisions implies that laws subject to the Court's review are only reviewed in light of specific unconstitutionality charges. If the Court decides to do so, it may allow future claims against the same legal provisions, but only on different grounds. This does not mean that the Court always leaves open the possibility of further controversy. On the contrary, whenever the Court does not specifically express that a decision will have relative *res iudicata* effects, a full or “absolute *res iudicata* effect” for such decision is

421. “Normative integration” is practiced by the Court whenever a citizen has filed an *actio popularis* of unconstitutionality against a given legal provision, the content of which cannot be fully and adequately examined without taking into account other legal provisions, which have not been the object of the same lawsuit. This practice occurs when the content of the law, which has been brought to the Court's attention, is so closely related to another legal provision that it would not be possible for the Court to issue an effective judgment without reviewing the legal provision not at issue and integrating such other legal provision into its decision. Decision C-320 of 1997, Alejandro Martínez Caballero, J., *In re* Artículos 34, 61 de la Ley 181 de 1995 (Law 181 of 1995); Decision C-1106 of 2000, Alfredo Beltrán Sierra, J., *In re* Artículos 546, 548, 549, 550, 551, 552, 556, 557, 558, 559, 562, 565, 566 y 567 del Código de Procedimiento Penal (Code of Criminal Procedure).

422. For an example of the initial, more permissive, line regarding normative integration, see Decision C-113 of 1993, Jorge Arango Mejía, J., *In re* Artículo 21 del Decreto 2067 de 1991 (Article 21 of Decree 2067 of 1991). The provision at issue that had been the object of an *actio popularis* (Decree 2067 of 1991, Article 21, paragraph 2) referred to the *pro futuro* effects of the Constitutional Court's decisions, and the Court finally issued a judgment in which it not only declared the unconstitutionality of said provision, but also that of other articles within the same regulation (Article 21, paragraph 4, and Article 24). *Id.* Decision C-320 of 1997, Alejandro Martínez Caballero, J., *In re* Artículos 34, 61 de la Ley 181 de 1995 (Law 181 of 1995); Decision C-1106 of 2000, Alfredo Beltrán Sierra, J., *In re* Artículos 546, 548, 549, 550, 551, 552, 556, 557, 558, 559, 562, 565, 566 y 567 del Código de Procedimiento Penal (Code of Criminal Procedure).

presumed. This forecloses future unconstitutionality *actio popularis* against the legal provisions examined by the Court. Furthermore, the application of the “relative *res iudicata* effect” implies that the Court is not willing to consider, further unconstitutionality accusations against a given law.

Fourth, “inhibitory decisions” result from defective unconstitutionality suits. Using this tool, the Court refuses to amend an ill-formulated unconstitutionality charge, and materially refrains from exercising control over the legal provision in question. In these cases, no decision is adopted on the merits.

Fifth, the Court frequently refuses to consider unconstitutionality lawsuits that do not comply with the legal requirements until the citizen who filed the *actio popularis* corrects whichever deficiency is identified in the claim by the Court.⁴²³ According to the statistics provided by the Secretary of the Court, forty-two percent of all unconstitutionality *actio popularis* presented before the Court have been rejected.

Sixth, in cases in which unconstitutionality *actio popularis* are filed against a law on the grounds that it breaches the principle of equality, the Court may require a higher degree of argumentation by the plaintiff. In these cases, the applicant must demonstrate which groups are being compared, the reason why they are comparable, and why they must receive equal treatment.

The second category of self-restraint mechanism based on judicial caution, refers to the *manner* in which judicial control is carried out by the Court. While the Court’s activism has been reflected in the introduction of the requirements of “proportionality” or “reasonability” into its case law, it has also imposed clear limits to the scope of applicability of these conceptual instruments.

First, there are different degrees of intensity of proportionality or reasonability tests, according to the subject-matter of the case. As explained in decision C-673 of 2001, the establishment of such varying degrees of intensity comes as a result of the Court’s goal to strike a balance between the powers of the constitutional judge, the ordinary

423. Decision C-1052 of 2001, Manuel José Cepeda Espinosa, J., *In re* Artículo 51 de la Ley 617 de 2000 (Law 617 of 2000). The Court explained that the requirements for unconstitutionality lawsuits have been established in order to provide a minimally sufficient basis to the Court to consider the case. *Id.* The implication is that the plaintiffs in unconstitutionality processes, as parties within an active dialogue with the authorities, must comply with a minimum duty of communication, argumentation, and clarity with regards to: (i) the legal provision being accused; (ii) the constitutional mandates that such provision is accused of violating; (iii) the specific reasons why the law does not comply with the Constitution; and (iv) the reasons why the Court has jurisdiction to study the case. *Id.*

functions of the other branches of government, and the protection of fundamental constitutional rights. In equality cases, for instance, the Court has established three types of reasonability tests—strict, intermediate and soft—that differ in their structure, constitutive elements, and consequences in regard to evidence and argumentation.⁴²⁴

Second, the Court respects a “margin of configuration” left to the legislative or executive branches of power, in order for them to freely design public policies within their constitutional functions.

Third, in matters that concern a given state of affairs and require value judgments by the authorities, such as the decision to declare a *state of exception*, the Court has introduced the doctrine of “manifest error of appreciation” to allow the executive power a wide margin of review to assess the necessity of a given decision on the basis of the facts before the executive branch. Only if the executive power has committed a manifest, or extreme, error of appreciation, will the Court strike down the Presidential decree declaring or extending a state of exception.⁴²⁵

Judicial caution has also led the Court to introduce self-restraint mechanisms over its own decisions, especially in cases involving abstract constitutionality review. This is evident in cases where the Court applied the principle of *conservation of the law*, which justifies the production of “modulative” decisions. Applying the conservation of the law principle, the Court only strikes down legal provisions when such a decision is unavoidable because the law at hand cannot be reconciled with the Constitution by pointing out the legal provision’s constitutional interpretation or meaning. Although, in practice, “modulative judgments” may give rise to the opposite effect (i.e. what some have seen as invasions by the Court into the legislative sphere), the principle which inspires and justifies these judgments is essentially based on judicial caution, and respect for the decisions of Congress or the executive power. These decisions will be struck down only if there is no alternative interpretation of the law to safeguard the supremacy of the Constitution.

The practice of deferring unconstitutionality judgments is the final self-restraint mechanism introduced by the Court as a consequence of judicial caution. As described in Part II.A.2.a, this mechanism addresses the effects of decisions and is a manifestation of the above-referred principle of *conservation of the law*, implying that the Court has allowed the application of an unconstitutional provision, while the competent entities

424. Decision C-673 of 2001, Manuel José Cepeda Espinosa, J. (Jaime Araújo Rentería, J. concurring), *In re* Artículos 4º y 33 del Decreto Ley 2277 de 1979 (Decree 2277 of 1979).

425. *See supra* Part II.B.2.

issue new, constitutional regulations on the same matter. The time periods granted by the Court are usually reasonable, and cannot be extended. For example, in a 1997 judgment, the Court struck down a provision that imposed a tax upon certain non-renewable natural resources. The application of the decision was deferred for five years so that Congress could regulate the matter at hand and, therefore avoid the automatic application of the general royalties regime.⁴²⁶ In the decision that declared the UPAC system unconstitutional,⁴²⁷ the Court deferred the effects of its judgment until the end of the legislative period (approximately nine months later) so that Congress could issue the corresponding regulations.

B. The Political and Institutional Specificities of the Colombian Context

In addition to the foregoing description of the different types of control over the Court, three specificities of the country's political context and three characteristics of its institutional arrangements should be kept in mind while addressing the above-mentioned objections to constitutional judicial review. In light of these specificities, the objections lose weight within the Colombian context.

1. Political Specificities: Presidentialism, Low Credibility of Congress and Political Parties, and Violence

A number of political traits of the Colombian system are relevant when addressing the above objections: (1) the country's notorious presidentialism; (2) the lack of credibility among the people of the main political parties, the political class, and Congress; and (3) the everyday reality of violence as a means to solve conflicts.

On the one hand, the strong emphasis traditionally ascribed in Colombia to the figure of the President of the Republic has granted the executive branch an enormous influence over Congress, which in turn diminishes and in many cases distorts the functioning of the system of checks and balances between the political branches of power.⁴²⁸ First, it

426. Decision C-221 of 1997, Alejandro Martínez Caballero, J. (unanimous), *In re* Artículo 233 del Decreto 1333 de 1986, Artículo 1º de la Ley 97 de 1913 (Decree 1333 of 1986, Law 97 of 1913).

427. Decision C-700 of 1999, José Gregorio Hernández Galindo, J. (Alfredo Beltrán Sierra, J. and José Gregorio Hernández Galindo, J. concurring; Alvaro Tafur Galvis, J., Eduardo Cifuentes Muñoz, J., and Vladimiro Naranjo Mesa, J. dissenting), *In re* Artículos 18, 21, 23, 134, 137, 138, del Decreto Extraordinario 663 de 1993, Decreto Extraordinario 1730 de 1991 (Extraordinary Decree 663 of 1993, Extraordinary Decree 1730 of 1991).

428. The Constitution foresees, in addition to the classical figure of impeachment, several specific forms of political control over Executive Officials. For example, under the "censorship motion"

must be noted that the Colombian Congress, although formally strong, in reality has a rather precarious institutional capacity to exercise its powers—for both technical reasons (e.g., poorly qualified and insufficient staff, and inconsistent access to autonomous information.) and political reasons (e.g., poor party discipline, clientelistic local electoral bases.). Second, in general terms, after presidential elections, members of Congress align themselves as either supporters or opponents of the President, who usually manages to build a comfortable majority in Congress with which to support his or her policies. Therefore, in many cases, Congress adopts its decisions with an agenda of backing the President. Because the main controlling body within the Colombian democracy, in theory, is Congress, and this legislative body often fails to fulfill its function because of political compromise, the “losers” of the process take their issues to the Court. Citizens and social organizations usually look to the Court to request that limits be placed on the government’s policies and that the Court enforce these limites, as instrumentalized through Congressional statutes), and that the Court enforce these limits. These parties do not rely on political arguments, but on constitutional grounds and arguments.

On the other hand, in spite of important reforms imposed upon the political system in 1991, public perception still includes feelings of misunderstanding and disappointment regarding political practices, which are seen as pure clientelism and patronage for the benefit of “politicians” not the people. This has resulted in a situation in which laws are seldom seen by citizens to represent the consent of society or a solid political majority. Thus the Court’s decisions to strike them down are usually met with either indifference or popular approval.

Bearing in mind the above-described flaws in the political system, to which the traditional ineffectiveness of the public administration is added (an ineffectiveness which is both real and perceived by ordinary citizens), it is not surprising that people look to the Court in search of a State answer to their problems. The Court then is not meddling in every issue imaginable; ordinary citizens or political players are bringing their everyday problems to the Court, and the Court is then forced to adjudicate on a notoriously diverse range of subjects.

(*moción de censura*), Congress may decide whether a Minister of the Presidential Cabinet should be removed from his or her post. No specific forms of direct congressional control over the President have been provided in the Constitution, other than the possibility of carrying out impeachment procedures.

Finally, as opposed to most other countries, violence in Colombia is a real, everyday, and, of course, illegal mechanism for the resolution of conflicts. Violence in Colombia is a widespread, generalized, and tangible phenomenon, operating on a national scale for many decades. Because politics are affected by the aforementioned problems, the legislative and executive branches are unfit to function efficiently as a channel for the peaceful expression and resolution of social conflicts. Therefore, the highest degree of institutional legitimacy and credibility is imposed on the judiciary, which is then entrusted with the challenge of addressing issues that are not met by either the political process or aggravated “violent solutions.” Because the intervention of a judge has helped solve conflicts that could have been addressed by arbitrary means, such as personal intimidation or murder,⁴²⁹ the *acción de tutela* has been praised in the Colombian context as an instrument of peace.

2. *Institutional Specificities: Constitutional Amendment, Election of Justices, Fixed Term for Justices, and Access to Judicial Procedures*

In addition to these political specificities within the Colombian context, a number of institutional traits should also be considered while assessing the pertinence of the above-stated objections to our constitutional system of judicial review. The four critical institutional traits include: (i) a flexible amendment mechanism within the Colombian Constitution that can easily be put into practice by Congress; (ii) a system of indirect popular election of the Court’s Justices; (iii) the Justices’ non-renewable eight-year term; and (iv) the participatory nature of the Court’s decision-making process, including citizen access to judicial review and the Court’s discretion to involve experts or interested parties.

First, the Colombian Congress may amend the constitutional text through a relatively flexible mechanism described above called the “Legislative Act.” It is up to Congress to promote any legislative act, without the support of the Executive Branch, the Judiciary, or the people. In order to overrule the Court, Congress has successfully amended specific parts of the Constitution on a number of occasions, as detailed in Table 6. The Court can review the constitutional amendment only on procedural grounds. The fact that the Court has never declared an amendment unconstitutional proves that the requirements imposed by the Constitution

429. See *supra* note 10 and accompanying text.

for Congress' own reform are easily attainable. Furthermore, the process of amending the Constitution through the legislative body is a relatively short one and can be successfully accomplished in less than one year. In that sense, it must be reiterated that the Court does not have the final word on every issue posed before it. Instead, Congress may amend the constitutional text in order to overrule the Court's decisions.⁴³⁰ And if neither Congress nor the people carry out such amendments in response to the high tribunal's judgments, one can conclude that the political forces inside Congress have accepted such judicial decisions, which are thus granted a significant degree of legitimacy within the system as a whole.

Second, Justices are indirectly chosen by the people, through the Senate of the Republic, as described above. The Senate, composed of 102 members,⁴³¹ is elected directly by the people every four years through a national constituency. The role of the Colombian Senate is different from the United States Senate because (i) the Colombian Senate is not restricted to granting its advice and consent to the candidate nominated by the President of the Republic; and (ii) it is the Colombian Senate itself that elects Justices, reflecting *grosso modo* the distribution of the political forces within Congress. Thus, the 1992 Court was composed of five liberal Justices, two independents,⁴³² and two conservatives, while the 2000 Court was composed of six liberal Justices and three conservative Justices. It is noteworthy that the candidate most favored by each that proposes its own list of three potential candidates (the President of the Republic, the Supreme Court of Justice, and the Council of State), is usually not the candidate finally chosen by the Senate. Moreover, there are no public audiences, as in the United States, but closed-door sessions among the different political coalitions. All candidates make only one presentation to the plenary session of the Senate, where they address members of Congress who may formulate questions, but usually abstain from doing

430. In theory, the last word belongs to the people, through two mechanisms: (i) derogatory constitutional referenda in Article 377 of the Constitution by which the people may prevent constitutional amendments approved through legislative acts in regards to certain topics, including fundamental rights, popular participation mechanisms, and Congress; and (ii) the popular constituent initiative, providing that citizens representing five percent of the electorate may present constitutional amendment projects to Congress for Congress to summon a referendum to approve them.

431. At the moment of writing this paper, a referendum proposal has been approved by Congress in order to reduce the size of the Senate. In turn, the Government has submitted to Congress a draft Legislative Act by which the Justices of the Constitutional Court would not be elected by the Senate, but by members of the same Court, through the aforementioned "co-option" (*cooptación*) system.

432. One Justice belongs to the former guerrilla group "M-19," and another one belonged to a faction of the liberal party until leaving the Court, when the former Justice became part of the independent party coalition named "*Polo Democrático*."

so.⁴³³ For this reason, the Senate's popular legitimacy is transferred indirectly to the Justices of the Constitutional Court. This is reflected, *inter alia*, in the formula that precedes all the Court's judgments: "*in the name of the People and by mandate of the Constitution.*"

Third, each Justice is elected for a non-renewable term of eight years. Everytime a term expires political forces bear a direct influence upon the composition of the Court. In practice, however, a few Justices' terms are renewed on an individual basis during that period due to voluntary retirement and the rest are renewed simultaneously at the end of the term. This renewal process restricts the possibility of totally "packing" the Court, but in turn paves the way for debate on the Court's most controversial case-law tendencies. Because they can not be forcibly withdrawn from their post, nor reelected, Justices fulfill their role with independence from the other branches of power.

Finally, the Colombian constitutional judicial review process is participatory in nature for both abstract and concrete review, because (i) any citizen can file a constitutional *actio popularis* against laws of the Republic not subject to preliminary review or any legislative act or decree that has not been the object of a previous judgment with *res judicata* effects; (ii) any citizen can intervene in abstract review procedures by submitting written statements for or against the constitutionality of a given provision; (iii) the Court can invite any relevant authority, expert, or organization to participate in abstract review processes by presenting arguments that support or counter the constitutionality of a given provision; and (iv) as part of its broad evidentiary powers in *tutela* cases, the Court may take into account the opinion of any relevant expert and involve any interested party in the procedure as it deems necessary to adopt an informed, legal, and appropriate decision.

C. A Response to the Objections to the Court's Powers

The foregoing considerations, in particular those that point out the differences between the Colombian and United States judicial review schemes, necessitate responses to major objections to the work and powers of Colombia's highest constitutional judge as follows:

433. During the 2000 elections, only one of the candidates who had been included in one of the lists submitted by the President of the Republic was asked questions about the possibility of extending the recall to the whole Congress and *acción de tutela* against judicial decisions. This candidate was elected.

(a) In regard to the argument that the Court is anti-majoritarian because it is composed of a small minority of individuals with excessive powers, one could counter that the Court's decisions are nevertheless subject to a considerable number of control mechanisms that are democratic in nature and entitle the people, directly or through Congress, to place clear limits upon this high tribunal's work. This limitation is most notably imposed by amending the Constitution in a fast and relatively easy manner in response to the Court's doctrine. The flexibility of the Colombian constitutional text, which was deliberately introduced by the Constituent Assembly as a means to control the work of the Court, guarantees that the constitutional judge will not have the final word.⁴³⁴

(b) There are several possible responses to the argument that the Court is restricting the dynamics and scope of the political system by deciding constitutional issues that should be matters of political debate. First one might say that the Constitution can be amended by such political forces directly or through Congress, so constitutional issues are not excluded from their reach. Second, political tensions and dynamics, as reflected in the work of Congress, can also place limits on the Court's powers through instruments such as statutory or organic laws. Third, the system by which the Senate elects Justices is in itself a reflection of the prevailing tendencies within the political sphere to stimulate the Court to carry out its functions while bearing in mind the social context within which it operates. Finally, the visible flaws in the political system coupled with the prevailing patterns of inefficiency within Colombian public administration, lead people to seek the Court's intervention because they see this as the only feasible manner of obtaining a State solution to their everyday problems.

(c) Another objection is that the Court issues decisions on highly complex matters for which it has no technical expertise. The broad evidentiary powers open to the Constitutional judge may offer a counter argument to this objection. The Court may order and collect any legal type of proof that is deemed necessary to make a decision. In fact, the incorporation of expert opinions into the Court's analysis, whenever they are necessary given the complexity of the case, constitutes an element of judicial caution repeatedly introduced into the work of this tribunal. Therefore, when the materialization of a constitutional right requires compliance with given technical conditions, the Court requires that such a

434. It should be underscored that the feasibility for amending the 1991 Constitution are in contrast with those imposed by the 1886 Constitutional text, on the grounds of which the Supreme Court of Justice struck down two important constitutional reforms.

right materialize in the terms of the technical recommendations issued by experts. For instance, in cases where human health was at stake, the Court ordered that the recommendations of a competent physician be applied. When it is necessary to carry out specific calculations to liquidate debts, such as retirement pensions, the Court has ordered that the liquidation be calculated and conducted by competent authorities in accordance with the corresponding technical formulae. This does not mean, however, that the Court has never ventured into highly technical matters. For example, in economic judgments, the Court has often been criticized for delivering decisions without taking their side effects into consideration—this happened in the public salaries judgment referred to in Part II.B.3 above. In that case, the Court eventually rectified its doctrine and included in its judgment long-term variables that took into account the real Colombian economic context, without actually imposing one technical formula for making the calculations; it left this task to the competent governmental technicians.⁴³⁵ Similarly, in cases regarding health, the Court always makes its decision based on what the competent physician recommends. In this field, the Court has made the most of its evidentiary powers, as demonstrated by its decision involving a child born a hermaphrodite and requiring treatment for the child. As referred to in Part II.B.1.a.i above, the opinions of several national and international experts were requested by the Court in this case and taken into account when delivering the decision. In sum, the Court has always sought and listened to the opinions of technical experts when deciding a given case, without attempting to replace the experts.

(d) One final argument against the Colombian system is that historically, within the Latin American context, experience has shown that a Court that exercises its powers with independence and activism will not survive for a significant period of time. Therefore, it will not be long before the backlash of the public powers and political forces affected or controlled by the Court end up suppressing the Court's very existence.

Nevertheless, to address this final argument, one should bear in mind that: (i) the existence of the Court is a progressive step forward within a century-old tradition of constitutional judicial review;⁴³⁶ and (ii) it is

435. Whenever there has been dissent among the current members of the Court on economic matters, they have tended to be prudent and avoided imposing a given point of view. Nevertheless, they have required the utmost respect for the relevant constitutional provisions.

436. There might be debate and disagreement around the scope of the Court's powers, but it is very difficult to envision a drastic reduction of its functions, or the suppression of the institution of judicial review by an independent organ.

unlikely that the Colombian Congress will “pack the Court,” by increasing the number of Justices and the majority required for adopting decisions. Justices are elected by the Senate every eight years, the Court, as an institution, is subjected to a political evaluation every eight years that determines its new composition in accordance with the political balance at that point in time.

V. A CRITICAL APPRAISAL: FLAWS AND ASPECTS OF THE COURT’S WORK THAT REQUIRE IMPROVEMENT

The purpose of this summary of the Court’s work is not to transmit the image of a “perfect” or “flawless” tribunal. On the contrary, as a key player in the new system of constitutional judicial review introduced in 1991, the Court has faced the challenge of materializing a very innovative constitutional order within a highly complicated and violent reality. The Court has done so during a short decade of evolution. Consequently, many aspects of its decision-making process and its case law should be pointed out as areas where substantial attention and improvement are required, as described below.

A.

First, there are several critical issues that the Court has left out of its case law even though they are important components of Colombia’s everyday social and political life. The Court has not given the same degree of attention to these issues compared to other, sometimes equally, crucial matters. For example:

(1) The issue of *race*, as mentioned in Part II.B.1.b.v above, has received scant consideration by constitutional judges nation-wide even though racism, which still prevails in Colombia, is one of the most silent structural traits of Colombia’s Hispanic socio-cultural heritage.

(2) The principle of *participative democracy*, enshrined in Article 1 of the Colombian Constitution and other basic precepts (such as the Social State grounded on the Rule of Law—*Estado Social de Derecho*-pluralism or human dignity), has not been developed or applied to its full extent in the Court’s case law, in contrast with other basic constitutional principles that have been addressed by the Court. Although it has been mentioned as an important general mandate in some of the Court’s decisions, especially those

concerning popular participation mechanisms or the participation of indigenous groups in the decisions that concern them, the broad reach and implications of participative democracy, as well as its necessary impact on all aspects of ordinary social and political life, have not yet been fully grasped or elaborated on by the Constitutional Court.

(3) Some of the most salient and complex features of the *new Administrative State* designed by the Constituent Assembly (i.e., the most characteristic aspects of the new Public Administration established in 1991, such as the trend towards direct provisions of public utilities and services by private entities under State regulation; the new scheme of relations and control between the Executive and other independent regulatory agencies; the principle of administrative de-centralization; or, the functions and activities of the Administrative Police) have not yet been sufficiently explored by the Court. This lack of attention by the Court occurs in spite of the complexities of their application to the ordinary activities of the Public Administration and the important role the features of the new Administrative State play in the transformation of a traditionally distant, inefficient, and bureaucratic system into an effective and present network of committed public entities.

(4) Although the constitutional *principle of equality* has given rise to a high number of decisions by the Court, and has been applied in a very diverse range of situations through conceptual instruments such as *tests*, much still needs to be done regarding its precise and accurate conceptualization. For example, much needs to be done in accordance with the constitutional distinction between equal treatment, equal opportunities, and equal protection.⁴³⁷

(5) In spite of Colombia's sad reputation as one of the most insecure countries in the world, the protection of *personal security*, especially of those groups or persons at great risk in the context of Colombia's violent conflicts (i.e., political dissidents, human rights defenders, demobilized guerrillas, etc.), has not been addressed in a solid and consistent manner by the Court.

(6) Finally, although *social rights* have been directly enforced in concrete cases, the Court has done so mainly in situations where a

437. COLOMBIAN CONST. art. 13.

statute can be invoked to support its holding and order. Therefore, the Court still has to develop a doctrine concerning the application of social rights to poor Colombian citizens wherever Congress has not enacted legislation to respond to social exclusion.

B.

Judicial caution has often led the Court, in difficult or innovative situations, to apply an excessive degree of self-restraint—depriving itself of a number of legal mechanisms that could allow the Court to grant more effective protection to the rights at stake in concrete cases. A number of examples have been mentioned. The first example is the Court's decision to strike down the legal provision regulating *acción de tutela* against judicial decisions, as well as its highly restrictive admission of such *tutela* claims (only in exceptional cases in which a *vía de hecho* is present, as explained in Part IV.A.2.a above). The second example is the Court's decision to strike down the provision that established the mandatory character of judicial decisions as subsidiary sources of law (see Part IV.A.2.a above), thus substantially restricting the mandatory character of its own judgments and precedents in other cases. The final example is the Court's decision to declare the unconstitutionality of the provision by which lower judges could consult the provision in relation to the constitutional matters under their review.⁴³⁸ Moreover, because the Court has delivered its decisions on a case-by-case basis, it has not given full application to legal instruments that could allow it to protect, in a much more effective manner, the constitutional rights, values, interests, and principles it was mandated to preserve. For example, the Court has abstained from issuing general orders to the authorities that violate constitutional rights in concrete cases. The Court does this because it believes authorities must adopt policies or rules which will guarantee abstention from engaging in similar types of behavior that will disregard fundamental rights in the future.⁴³⁹

C.

Moreover, it is clear that the Court lacks sufficiently effective mechanisms to monitor compliance with its decisions once they have been

438. See *supra* note 387.

439. Decreto 2591 de 19 de noviembre de 1991 (Decree 2591 of Nov. 19, 1991).

delivered. The follow-up of each case is left to the judge who adopted the original *tutela* decision, who is thus entrusted to secure the full application of the Court's verdict and orders. Although it is possible to carry out a special type of contempt procedure whenever *tutela* decisions are not complied with by the relevant authority or private person, this procedure must be brought to the same lower judge. As a consequence, several holdings of the Court are systematically disregarded, not only by the authority or person against whom they were specifically directed, but also by all other relevant public or private entities that do not take the Court's doctrine into account in their daily activities. This has led to the high number of "reiteration of doctrine" decisions issued by the Court, which come as a consequence of the lack of application of constitutional doctrine as precedent in concrete cases. As a primary effect of this situation, the number of decisions adopted by the Court has risen in a considerable manner in recent years, necessarily effecting the overall quality of the judgments. The Court has not actively contributed to the resolution of this practical problem.

D.

Due to the high number of *tutela* decisions adopted by the Court and the comparatively low number of "unification decisions," doctrinal differences are significantly frequent among the judgments of the Court. This has affected its role as a harmonizer of constitutional doctrine to such an extent that in less than ten cases, the Court in plenary session has annulled the decisions of Review Chambers because they counter previous constitutional doctrine.

E.

Other types of flaws in the system are of a procedural nature. For example, given the high workload of the Court, public hearings are seldom conducted in both abstract and concrete review cases (although in the latter case, only the Full Chamber, while adopting a unification decision, can make use of public hearings). As a consequence, the debate and exchange of opinions which could substantially enrich the Court's decisions are rarely available to the Court.

These are only a few of the most notorious flaws in the Court's work. However, as evident as they might be, the Court must strive to resolve these systemic problems. Nevertheless, when the role played by the Constitutional Court is observed from a global perspective, it seems

evident that this institution has been the subject of growing respect for the rule of law, the main enforcer of human rights, and the independent guardian of the supremacy of the Constitution. In addition, the Court has responded to the changing social needs that nurtured its creation in 1991: to preserve respect for human dignity and to defend a constituent consensus for Colombians to assume the risk of opening up democracy in order to construct a stable peace that is administered by legitimate institutions. The great question that remains open is whether, as the public opinion tendencies and powerful interests stop reflecting the original constituent consensus, the Constitutional Court will be one of the first casualties or whether the Court will continue to receive the same institutional respect of the last twelve years of dedicated and active work.

TABLE 6: CONSTITUTIONAL AMENDMENTS OVERRULING THE COURT

Constitutional Amendments approved by Congress through Legislative Acts	
Legislative Act 01 of 1995	Regulates in detail the participation of territorial entities in the National funds classified as “ordinary national income” and the destination that they should be given. Approved in response to decision C-520 of 1994, which gave strict application to the previous constitutional mandate, by which these funds should be applied exclusively to “social investment”, not personnel.
Legislative Act 02 of 1995	States that military courts or tribunals can be composed of both active and retired military personnel. Approved in response to decision C-141 of 1995, which stated that only retired military personnel or civilians could be part of such bodies.
Legislative Act 01 of 1999	Derogates the possibility, open since 1936, of carrying out expropriation for reasons of equity without previous compensation. Approved in response to several decisions, which struck down Bilateral Investment Treaty clauses (that) protect(ed)ing foreign investment by assuring payment of just compensation in cases of expropriation.
Failed Legislative Act proposals	
Proposal launched by a group of Congressmen to prohibit the adoption of “modulative judgements” by the Court.	
Proposal launched by a group of Congressmen to forbid the admissibility of <i>tutela</i> claims against judicial decisions.	
Proposal launched by a group of Congressmen to impose the requirement of qualified majority voting to declare the unconstitutionality of a law	
Failed constitutional referendum initiatives	
Referendum initiative launched by the Catholic Church to introduce a constitutional article authorizing a Concordat with the Holy See, against decision C-027 of 1993, which struck down the central provisions of such treaty.	
Referendum initiative launched with Governmental support, to authorize the criminalization of the possession and use of personal doses of drugs, against decision C-221 of 1994, which struck down the relevant provision in the Criminal Code.	

PENDING REFERENDUM (OCTOBER, 2003)
<p>Referendum bill, introduced by President Alvaro Uribe Vélez to amend several parts of the Constitution, approved by Congress through Law 796 of 2003, summoning the referendum. The text of the referendum had three reforms, among a total of eight, which were directed to overrule previous decisions of the Constitutional Court: (a) the abolition of special pension rights for high officials, interpreted broadly by the Court in several tutela decisions; (b) the authorization to completely freeze public salaries which were (above two) minimum wages (for a period of two years for middle-rank salaries, and four years for high-rank salaries), partially and temporarily disregarding decision C-1064 of 2001; and (c) an authorization to criminalize the consumption of personal doses of drugs, directed against decision C-221 of 1994. The third one of these was struck down from the text of the referendum on procedural grounds by the Constitutional Court, so it will not be submitted to the people on October 25, 2003, when the referendum will be held. The Government immediately introduced a constitutional reform bill to Congress, insisting on this amendment.</p>

TABLE 7-A: EVOLUTION OF CONSTITUTIONAL JUDICIAL REVIEW IN
COLOMBIA (1810-1957)

Period	BASIC FEATURES	Main traits of the system	Important cases
1810–1857	No constitutional judicial review	<ul style="list-style-type: none"> • None 	None
1858–1886	Judicial review “on paper”	<ul style="list-style-type: none"> • In 1858, the Federal Constitution empowered the Supreme Court to suspend laws issued by the federated states. • In 1863, the Federal Constitution introduced an <i>actio popularis</i> against laws approved by the federated states; the Supreme Court of Justice could consequently suspend the application of laws deemed unconstitutional, and send the corresponding statute to the Senate in order for this body to adopt a final decision. 	None.
1886–1910	The foundations of effective judicial review	<ul style="list-style-type: none"> • In 1886, judicial review of laws in force is abolished; only review of overruled presidential objections to bills for reasons of unconstitutionality is allowed. • Law 57 of 1887, article 5, 	<ul style="list-style-type: none"> • In 1889, the Supreme Court of Justice states that the judiciary is not allowed to interpret the Constitution, nor substantive legislation, in a

Period	BASIC FEATURES	Main traits of the system	Important cases
		<p>states that whenever a given law is incompatible with the Constitution, the latter shall prevail.</p> <ul style="list-style-type: none"> • Law 153 of 1887, article 6, states that laws issued after the promulgation of the Constitution shall be presumed constitutional. • Law 2 of 1904, article 2, introduces <i>actio popularis</i> against decrees issued by the President during states of siege. 	<p>general and authentic manner; nor is it allowed to exclude the application of laws in force when it considers them unconstitutional. It only has jurisdiction over bills.</p>
1910–1957	The building of an effective judicial review tradition	<ul style="list-style-type: none"> • Legislative Act No. 3 of 1910 amends the constitution, introducing <i>actio popularis</i> against laws. • Law 96 of 1936 allows the Court to confront contested laws with the totality of the Constitutional text (not just with the provisions invoked in the charge). • Decree 1762 of 1956 creates the constitutional chamber in the Supreme Court of Justice to propose to the Plenary Chamber decision drafts on <i>actio popularis</i>. The Government is given power to elect judges. 	<ul style="list-style-type: none"> • 1911 — First <i>actio popularis</i> case, upholding a law that assigned judicial functions in electoral matters to certain types of judges. • 1937 — Upholds law that grants Masonic societies the right to acquire legal personality. • 1938 — Upholds physical taking of property before payment of compensation (agrarian reform). • 1939 — Ascertain that State intervention in the economy may only be carried out through a congressional statute (banana industries case)

TABLE 7-B: EVOLUTION OF CONSTITUTIONAL JUDICIAL REVIEW IN COLOMBIA (1957–2003)

PERIOD	BASIC FEATURES	Main traits of the system	Important cases
1957–1990	The consolidation of a judicial review tradition.	<ul style="list-style-type: none"> • Plebiscite of 1957. The independence of the Supreme Court is protected by establishing the cooptation procedure for the election of justices. But justices should belong to the liberal or conservative parties (parity system). • 1960 Constitutional Amendment — Establishing that Congress could request, through a majority motion of any Chamber, the Supreme Court to decide on the constitutionality of state of siege decrees within a six day delay after the request. • Legislative Act No. 1 of 1968 introduces a constitutional system of <i>ex officio</i> judicial review of states of exception decrees, setting strict procedural delays for resolving unconstitutionality <i>actio popularis</i>, and institutionalising (through a constitutional article) the Constitutional Chamber of the Supreme Court of Justice. 	<ul style="list-style-type: none"> • 1976—Upholds a law that limits foreign investment in the financial sector. • 1978—Upholds decrees authorizing <i>de facto</i> death penalties by the Armed Forces during certain planned crime-fighting operations. • 1978—Strikes down constitutional amendment summoning a Constituent Assembly. • 1978—Upholds a state of siege decree (highly restrictive of due process and basic liberties). • 1979—Strikes down huge constitutional amendment. • 1982—Strikes down tax reform decree issued on the grounds of economic emergency powers. • 1986–1988—Strikes down (some) state of siege measures adopted to counter narco-terrorism and guerrilla upsurge. • 1986—Strikes down law that approved Colombia-US extradition treaty on formal grounds. • 1990 Upholds summoning of the Constituent Assembly that adopted the

PERIOD	BASIC FEATURES	Main traits of the system	Important cases
			current Constitution one year later.
1991-?	Strengthening of judicial power and activist enforcement of fundamental rights.	<ul style="list-style-type: none"> • 1991 Constitution creates the Constitutional Court. Abstract review is expanded. Concrete review is introduced and given to any judge through <i>acción de tutela</i>. • Decree 2591 of 1991 regulates <i>acción de tutela</i>. • Decree 2067 of 1991 regulates the functioning and procedures of the Constitutional Court. 	<ul style="list-style-type: none"> • First Concrete Review Judgement: T-001/1992, per Alejandro Martínez Caballero and Fabio Morón Díaz, denies the claim filed by some public servants whose initial periods had been shortened by the election of new officials due to the promulgation of the new Constitution. • First Abstract Review Judgement: C-004/1992, upholding the decree declaring a state of social emergency to allow for the increase of public officials' wages, in the face of a police strike. • The Constitutional Court has rendered 9442 decisions from 1992 to 2002.

TABLE 8: THE MOST CONTROVERSIAL DECISIONS OF THE COURT—
ABSTRACT REVIEW

Year				Affirm	Dissent	Concur
1993	Equality of religions	Unconstitutionality of the main articles of the 1974 Concordat between Colombia and the Holy See, which privileged the Catholic Church.	C-027	8	1	0
1994 2001	Abortion	Constitutionality of the criminal provision penalizing abortion, given the prevalence of the right to life. Modified in 2001, upholding a legal exemption to punishment, whenever abortion is performed in "extraordinary circumstances", such as after sexual assault.	C-133 C-647	6 5	3 2	0 4

Year				Affirm	Dissent	Concur
1994	Personal dose of drugs	Unconstitutionality of the criminal provision imposing penalties for possession and consumption of personal doses of narcotic drugs.	C-221	5	4	0
1997	Euthanasia	Impossibility to criminalize doctors who apply euthanasia to terminally ill patients in conditions of extreme suffering and informed consent.	C-239	6	3	3
1997	Security services by armed civilians	Constitutionality of provision allowing organized communities to provide private security services by armed civilians, insofar as the weapons they use have not been restricted to exclusive use by the armed forces.	C-572	5	4	1
1998	Journalism Law	Unconstitutionality of licensing system for the exercise of journalism.	C-087	9	0	1
1998	Television Law	Rejects unconstitutionality <i>actio popularis</i> against the law that prohibited the renewal of concession contracts with television providers, with the consequent exclusion of the news channels that criticized public figures during the "8,000 Criminal Process", on the grounds that the discriminatory purpose or impact of the law had not been proven.	C-456	6	3	0
1999	UPAC decisions	Unconstitutionality of the basic features of the system for financing the construction and acquisition of housing.	C-383 C-700 C-747	7 6 6	2 3 3	0 2 2
2000	Female quotas	Constitutionality of the law establishing mandatory participation of women in at least 30% of decision-making positions in the Executive branch.	C-371	5	4	1
2000	National Development Plan	Unconstitutionality of the Law that approved the National Development Plan for 1999–2002, due to procedural defects.	C-557	8	1	0

Year				Affirm	Dissent	Concur
2000 2001	Increase in public salaries	Unconstitutionality of part of the national budget, for not having appropriated enough funds to increase all public wages at least in a percentage equivalent to the previous year's inflation rate (2000). Later modified in 2001, when the Court established that in times of fiscal deficit, public salaries above two minimum wages need not be increased in the same proportion as the previous year's inflation rate.	C-1433 /2000 C-1064 /2001	7 5	2 4	0 0
2002	National Security Law	Unconstitutionality of a national security law that relied on the notion of "national power", which implied incorporating civilians into the armed conflict and the fusion of separated powers.	C-251	7	2	0
More than one, 1994-2003	States of exception	Unconstitutionality of decrees declaring or maintaining states of internal commotion or economic emergency, because constitutional requirements had not been met. In one case, the unconstitutionality was partial (1997).	C-300/1994 C-466/1995 C-122/1997 C-327/2003	6 7 6 5	3 2 3 4	1 2 4 0

TABLE 9: THE MOST CONTROVERSIAL DECISIONS OF THE COURT—
CONCRETE REVIEW

SUBJECT	YEAR, Ref.	RULE/DECISION	Affirm.	Dissent	Concur
Right to health	T-534/1992, among hundreds ("Necessary treatment" cases)	The right to health, although not fundamental in itself, may be protected through tutela 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.	3	0	0
	SU-043/1995 ("Children's fundamental right to health" cases)	Children's right to health is fundamental in itself. The right to health includes the right to receive treatment, even in the case of incurable diseases which can be controlled.	9	0	0

	SU-480/1997 (“AIDS patients” cases)	AIDS patients who cannot finance their own treatment are entitled to receive it from the social security system, even if the medications or interventions they require have not been officially foreseen in the catalogue of available treatments.	9	0	0
	SU-819/1999 (“Overseas treatment” cases)	The right to health, under certain conditions, can entitle social security affiliates to receive treatment abroad, when no national treatments are available.	9	0	0
Indigenous Peoples’ Rights	T-428/1992 (“Road in indigenous territory” case)	National authorities may not disregard the rights of indigenous communities while building infrastructure elements such as roads. Such/these decisions always must be preceded by an adequate consultation process with affected aboriginal groups.	3	0	1
	SU-039/1997 (“U’wa case”)	Indigenous communities have fundamental collective rights to preserve their cultural identity and all that is necessary for that purpose. This includes the right to prior/before consultation whenever natural resources are to be exploited in their territory. On these grounds, an important oil exploration project in <i>U’wa</i> territory is barred (SU-039/97).	5	4	0
	T-523/1997 (“Whip case”)	Indigenous individuals have a right to be judged by traditional indigenous authorities, even if that entails the imposition of penalties that would be deemed unacceptable in a non-indigenous context.	3	0	0
	SU-510/1998 (“Protestant church case”)	Indigenous authorities have the right to exclude non-indigenous religious groups or churches who preach and convert in their territory, in order to preserve their cultural integrity.	6	3	0
Right to minimum subsistence income	T-426/1992 among hundreds (“Vital minimum cases”)	Whenever the minimum subsistence conditions are not satisfied, and there exists urgent or stringent circumstances, persons are entitled to demand positive actions by the State to fulfill their unresolved basic needs, even if that entails public expenditure.	3	0	0
Right to rectification	T-066/1998 and dozens of others (“Fair rectification cases”)	Individuals affected in their reputation by untruthful information about them disseminated through the mass media, have the right to rectification of such information, in conditions of fairness.	3	0	0

Displaced population	SU-1150/2000 ("Forcible displacement" case)	Individuals who have been forcibly displaced from their land due to violent conflict suffer from massive, multiple and continuous violations of their fundamental rights. These violations must be attended and solved by the State, in particular through the Executive, and through adequate programs that fulfill their basic needs.	9	0	0
Admissibility of tutela against judicial decisions	T-006/1992, T-231/1994 and dozens of others ("Tutela against judgements" cases)	Judicial decisions may be attacked through the <i>acción de tutela</i> whenever they result in gross legal irregularities (<i>vías de hecho</i>), regardless of their <i>res iudicata</i> effects.	3 3	0 0	1 0
Labour union rights	SU-342/1995 ("Trade union persecution" cases)	Employers may not discriminate against workers who belong to trade unions, <i>inter alia</i> , by granting better working conditions or benefits to workers who are not associated therewith or by firing unionized workers.	5	4	0
Right to education	SU-624/1999 and dozens of others ("Poor students" cases)	Academic institutions may not exclude students who have not been able to pay their tuition fees, at least during the academic year. They may not retain grades certificates, even if there has been an unjustified lack of payment by the students' guardians.	8	1	0
Right to free development of one's own personality	SU-642/98 ("Personal appearance" cases)	The State and private organizations may not interfere with individual life options, insofar as they do not unreasonably restrict or violate third parties' rights or the legal order. This includes, <i>inter alia</i> , the right to determine one's own appearance, especially within academic institutions.	8	1	0
Right to determine one's own gender identity	SU-337/99 ("Hermaphrodite case")	Given specific circumstances, parents or legal guardians may not in principle grant substitute consent for the performance of sexual re-adequation procedures, without the affected minor's acceptance of the intervention.	9	0	0
Sexual orientation — homosexual couples	SU-623/2001 ("Homosexual couples" case)	Homosexual individuals may not be discriminated against because of their sexual orientation, but they may not be equated to heterosexual couples for purposes of constituting "family" or receiving social security benefits.	5	4	0

Parliamentary inviolability	SU-047/1999 ("Impeachment of the President" case)	Members of Congress may not be prosecuted for the opinions they issue in development of their functions or for the way in which they vote, even when they are reviewing the actions of high public officials in exercise of Congressional judicial powers.	7	2	0
Arbitral Awards <i>ex aequo et bono</i>	SU-837/2002 ("Awards in equity" case)	Arbitral awards in equity (<i>ex aequo et bono</i>), produced to solve labour conflicts in which collective bargaining has failed, may not be arbitrary, and must be adequately motivated in order to respect the Constitution.	9	0	1