

INTRODUCTION TO COLOMBIAN CONSTITUTIONAL LAW

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It is with great pride that we present this volume, *Introduction to Colombian Constitutional Law*, to the international constitutional law community. This work is the result of a collective effort led by the Department of Constitutional Law of the Universidad Externado de Colombia, an institution whose longstanding commitment to constitutional scholarship, academic excellence, and the advancement of public law has made it one of the most distinguished law faculties in Latin America. The volume was conceived as part of the preparatory activities for the World Congress of Constitutional Law (WCCL 2026), to be held from July 6 to 10, 2026, at Universidad Externado de Colombia, an event hosted by the University as a whole, and one that will bring together the most distinguished constitutional scholars from around the world. It is entirely fitting that an institution of this stature should serve as the venue for such a gathering, and it is in that spirit that the Department of Constitutional Law has taken on the task of contributing to its intellectual agenda through this publication, which offers a general yet substantive account of the most significant features of the 1991 Constitution and of its jurisprudential and institutional development over the past three and a half decades.

Colombian constitutionalism has, over the course of the last thirty-five years, generated a body of doctrine, jurisprudence, and institutional practice that is remarkable not only in the regional context of Latin America, but in the broader landscape of comparative constitutional law. The 1991 Constitution introduced mechanisms and principles—from the direct enforceability of fundamental rights through the *acción de tutela*, to the recognition of cultural and ethnic pluralism as a constitutional value, to the design of autonomous constitutional organs operating outside the classical separation of powers—that have attracted the attention of scholars, courts, and constitution-makers well beyond Colombia’s borders. And yet, despite this international relevance, a significant portion of this rich constitutional tradition remains largely inaccessible to the English-speaking academic and legal world, not because of any lack of scholarly depth, but simply because of the language barrier. This volume is an attempt to begin correcting that imbalance. Its ambition is not merely to describe Colombian constitutional law, but to offer the international community a rigorous and reliable intellectual companion, a text that can serve as a point of entry for foreign

scholars approaching Colombian constitutionalism for the first time, and as a substantive reference for those who seek to engage with it in greater depth. It is our conviction that the ideas forged in the Colombian constitutional experience have much to offer to global constitutional thought, and that making them genuinely available to an international audience is both an academic obligation and an act of intellectual generosity toward a tradition that deserves wider recognition.

The book is organized into seven chapters, each addressing a substantive area of the 1991 Political Constitution that has served as a point of reference for other jurisdictions around the world. The introductory chapter, written by one of the editors, examines the founding myths of Colombian constitutionalism and how they have taken shape. It explores the enduring tension between the construction of a historical narrative and the formation of an institutional identity, arguing that the 1991 Constitution marked a paradigm shift by placing the Constitutional Court at the center of a new constitutional identity grounded in human dignity, pluralism, and substantive equality.

The chapter by Professor Alexei Julio Estrada addresses the treatment that the Constitutional Court has given to the concept of fundamental rights, including questions of standing, scope, the catalogue of protected rights, and the progressive incorporation of social rights into enforceable constitutional guarantees. Professor Magdalena Correa Henao then examines the rights of indigenous peoples—one of the most significant and internationally influential advances of the 1991 Charter. The chapter by Professor Germán Lozano Villegas, co-authored with Daniel Rivas-Ramírez, analyzes women's rights thirty-five years into the life of the Constitution, identifying the constitutional pillars that have underpinned their protection, the jurisprudential progress made in the areas of sexual and reproductive rights, political equality, and access to justice, while also mapping the glass ceilings that persist and the domains in which regression has occurred.

Professor Pedro Pablo Vanegas Gil contributes a chapter dedicated to the constitutional design of the legislative and judicial branches of government. His analysis examines how the 1991 Constitution reconfigured the structure of the State in pursuit of a genuine balance of powers, incorporating for the first time in Colombian constitutionalism the express recognition of autonomous and independent constitutional organs, and establishing mandates of separation, harmonious collaboration, and mutual checks among institutions. Professor Sandra Morelli, in turn, addresses the institutional

design of the Colombian presidential system and its mechanisms of control, with particular attention to the historical evolution of presidentialism from the 1886 Constitution through to 1991, as well as to the treatment of reelection, states of exception, and extraordinary legislative powers. Finally, Professor Alejandro Ramelli offers a study of transitional constitutionalism as it emerged from the Colombian peace process—one of the most singular chapters in the country's recent constitutional history and among the most widely discussed in international comparative law.

Taken together, these chapters offer a clear and accessible account of the most profound transformations that the Colombian State has undergone since the promulgation of the 1991 Constitution, providing foreign readers with the conceptual tools needed to understand the foundations, achievements, and ongoing challenges of contemporary Colombian constitutionalism.

A work of this scope is, by its very nature, a collective endeavor, and it would not have been possible without the commitment and generosity of all who contributed to it. We wish to express our deepest gratitude to the Department of Publications of the Universidad Externado de Colombia, and to the authors for lending their expertise and intellectual energy to this project. We also wish to extend particular thanks to Juan Sebastián López, whose dedicated editorial support was essential to the preparation of this volume. It is through the sustained effort and generosity of all these colleagues that Colombian constitutional thought will now reach the international audience it has long deserved.

Humberto Sierra Porto
 Alexei Julio Estrada
 Magdalena Correa Henao
Editors

THE FOUNDATIONAL MYTHS OF COLOMBIAN CONSTITUTIONALISM AND ITS HALLMARKS

HUMBERTO SIERRA PORTO¹

ABSTRACT

This chapter examines the relationship between foundational myths, national identity and constitutional culture in Colombia, arguing that the absence of a cohesive founding narrative has produced lasting dysfunctions in the country's political and institutional self-perception. Beginning with the sociological and anthropological concept of the foundational myth – understood not as historical distortion but as selective emphasis on the positive elements of collective origins – the chapter analyses comparative paradigms from Chile, the United States, and Mexico, demonstrating how each society has successfully constructed unifying narratives from its historical experiences. Against this backdrop, the chapter diagnoses the Colombian case as critically deficient: the pejorative historiographical denomination of the 1810–1816 period as the *patria boba* has projected a burden of perceived failure onto national identity, displacing the affirmative constitutional values – local self-governance, free thought, and the aspiration for integration – that equally characterized the foundational period. The central argument holds that a critical rereading of this period, one that restores the contributions of diverse social groups and reframes institutional complexity as political sagacity rather than failure, would not constitute revisionism but a recovery of marginalized historical truth aligned with contemporary constitutional values. The chapter then turns to the 1991 Constitution as a substitute cohesive myth, analyzing three paradigmatic expressions of Colombian constitutionalism that have fulfilled the identity-forming function that historical narrative failed to provide: the Constitutional Court's transformative jurisprudence on human dignity and pluralism, the *bloque de constitucionalidad* doctrine integrating international human rights law into constitutional review, and

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the participatory mechanisms of the *acción de tutela* and *acciones populares* as instruments of active citizenship construction. The chapter concludes that Colombia's constitutional identity, though fragile in its historical foundations, has found in these institutional innovations a framework capable of reconciling diversity with democratic cohesion.

KEYWORDS

Foundational myths, Colombian constitutionalism, national identity, *patria boba*, 1991 Constitution, Constitutional Court, *bloque de constitucionalidad*, *acción de tutela*, transformative constitutionalism, collective identity

I. INTRODUCTION

The evolution of Colombian constitutionalism marks a significant milestone with the promulgation of the Constitution of 1863. Although the specific provisions contained therein exerted limited influence on subsequent constitutional texts, the foundational principles of that constitutional document transcended its formal repeal. While the positive law of the Constitution of Rionegro has ceased to possess legal validity, its underlying spirit continues to permeate Colombian constitutional thought and remains permanently integrated within the democratic heritage of the republic, serving as an enduring interpretative reference that informs contemporary constitutional practice.

Within this historical and academic context, this text aims to critically examine the narrative construction of the origins of the Colombian State and its impact on national identity and contemporary political culture from the perspective of what has been understood as *foundational myths*².

The initial question that must be answered by one who undertakes to arrive at a historiographical denomination of the inaugural period of Colombia's republican life is of the utmost complexity: How can a country be founded and commence its institutional life bearing a qualification such as

2 Valencia Villa describes this notion as a "mythical, foundational moment", in Valencia Villa, H. "Cartas de Batalla: Una crítica del constitucionalismo colombiano." Universidad Nacional de Colombia, 1987.

the “*patria boba*”? What consequences does such denomination entail for state idiosyncrasy, recognition, and institutional organization?

During the foundational moments of the State, a narrative was transmitted to subsequent generations through accounts that describe or recreate heroic actions which determined the achievement of glorious outcomes for the people, and which typically bears profound significance for the values that a community deems essential. This narrative phenomenon constitutes what, from a sociological and anthropological perspective of law, is denominated a *foundational myth*.

The utilization of the term *foundational myth* does not necessarily imply a construction divorced from historical truth or from verifiable facts. On the contrary, foundational myths, in their technical understanding, typically derive from actual facts, from truth; they do not constitute distortions³. Subsequently, the distinctive characteristic of such narratives resides in their selective emphasis upon those elements of history that prove positive, that reflect the being and sentiment of a human collectivity at a determinate historical moment.

The significance of foundational myths has been brought into relief by professionals from diverse fields of knowledge: historians, anthropologists, sociologists, political scientists, and even jurists have made substantial contributions concerning the foundational myths of institutions, communities, cultural groups, and nation-states. While one must acknowledge the risk of simplification inherent in assertions of a general character, the determinative factor of foundational myths is the objective of furnishing identity to the idea, institution, or group whose origin is explicated through the narrative.

The principal function of these accounts, it must be emphasized, consists in the construction of a positive collective identity that operates as a cohesive element for the social group and projects itself as a collective entity toward the future. In contraposition, a community whose creation history is characterized by facts bearing negative connotation, commencing with the very denomination of the historical period itself, projects upon its future a burden that, rather than propelling them toward the realization of the values

3 In that regard, Valencia V. H. expressed: “In the United States and in the countries of Latin America there exists an Independence Day, an absolute beginning in time that is equivalent to a mythical origin of the State, to a legitimate foundation for the regime.”

that define their identity, generates dysfunctionalities in social and political aspects of public life.

2. INTERNATIONAL PARADIGMS OF IDENTITY CONSTRUCTION

2.1. THE CHILEAN CASE: HISTORICAL MEMORY AND NATIONAL RECONCILIATION

Within the comparative realm, the analysis of the Chilean case proves particularly salient, specifically through the construction of the Museum of Memory and Human Rights. This museographic space, dedicated to the facts and circumstances that transpired during the military dictatorship, constitutes a paradigmatic example of how a moment of extreme crisis may be converted into the articulating axis of national identity.

In the Chilean museographic narrative converges the vision of the church, the vision of the military, the vision of the communist parties, the vision of distinct sectors, demonstrating how, from that traumatic historical moment, Chile succeeded in articulating and organizing elements of collective identity. The institutionalization of this memory is such that students of all levels attend the museum to comprehend the nation's history.

This model holds particular relevance for Colombia, especially within the context of the ongoing peace process, given that the construction and articulation of national identity surrounding the resolution of crisis and transformative historical moments constitutes a matter of fundamental significance. Accordingly, meaningful connections may be drawn between this constitutional paradigm and Colombia's persistently unfinished peace process, offering interpretative frameworks through which contemporary constitutional challenges might be understood in relation to foundational constitutional experiences.

2.2. THE UNITED STATES MODEL: SELECTIVE CONSTRUCTION OF THE NATIONAL PANTHEON

The second paradigm whose analysis proves valuable corresponds to the United States model of identity construction, wherein collective identity is structured around shared objectives and the selective exaltation of historical

figures. Upon examining United States history and its foundational myths, the positive facets of national founding fathers are systematically emphasized: It is not stated that Franklin and Washington were slaveholding landowners, but rather that they were the precursors of slave emancipation, for instance.

Gore Vidal's historical trilogy concerning Abraham Lincoln is very illustrative in this regard. The narrative recounts how, following the Civil War, when leaders of the African American community convened with the victorious president, he proposed to them a relocation plan to the Caribbean or Central America. This example highlights how historical construction selectively emphasizes certain aspects while omitting others less favorable to the prevailing national narrative.

The significance of the myth resides in the germination within the collectivity of an idea or unifying factor⁴, which is predicated upon the identification of subjects who, from numerous other vantage points, could not be deemed part of a single collective, or at minimum, as peoples possessing a similar identity.

2.3. THE MEXICAN PARADIGM: FOUNDATIONAL MYTHS OF INDIGENOUS PROVENANCE

In contraposition to the Colombian case, Mexico has succeeded in constructing a *foundational myth* grounded in its indigenous origins. Central to this narrative is the founding of Tenochtitlán, conceived as the fulfillment of a divine sign in which peoples migrating from the north witnessed an eagle devouring a serpent, thereby marking the ordained location for establishing the city.

This foundational myth of pre-Hispanic derivation has been successfully incorporated into contemporary Mexican national identity, furnishing a cohesive element that transcends divisions of class, region, and ethnic provenance. This example permits generating a contrasting vision with the Colombian situation, where myths of indigenous origin, notwithstanding their richness, remain far from providing an explanation that identifies the totality of the Colombian population with its origin.

4 Colmenares, G. refers to this notion by asserting that the myth as a unifying factor presupposes the establishment, at least temporarily, of a fictitious impression of unity among the subjects who participate in the heroic moment.

3. THE COLOMBIAN CASE: ABSENCE OF COHESIVE MYTHS AND IDENTITY FRAGMENTATION

The situation in Colombia, conversely, proves critical with respect to national identity. Colombia constitutes a nation wherein the identity of Colombians remains markedly diffuse. This characteristic derives principally from phenomena such as social fragmentation, the geographical division between south and north, educational segregation between private and public institutions, and profound economic inequalities that generate radically divergent vital experiences⁵.

The divisions show themselves even within the university sphere, where entirely disparate regions are observable within a single educational institution, as though foreigners were assembled in a common space. Exceedingly few elements unite Colombians, not even symbolic components such as sport, which has traditionally been considered a unifying factor.

As announced in preceding pages, one of the central axes of this critique is the historiographical denomination of the period 1810–1816 as the *patria boba*⁶. It remains a source of astonishment that this constitutes a narrative whose denomination is pejorative, which is in no respect neutral for all citizens who receive it, but rather represents a pessimistic reading of the inception of the Colombian State that may, to a considerable extent, determine the vision that citizens possess thereof.

This pessimistic vision has succeeded in incorporating itself into Colombian political and institutional behavior. The effects of the promulgation of this perspective have caused the forfeiture of a narrative of a people that, albeit having committed errors, possessed valuable assets and positive elements such as the aspiration for integration, the determination to inscribe its own destiny, the conception that thought, free thought, and the guarantee of the human being constitute the pillars of the free State.

5 Kalmanovitz, S. “La idea federal en Colombia durante el siglo XIX”: *La carencia del principio de igualdad ciudadana y la negación del acceso a la propiedad de la tierra en Colombia impidió la conformación de una base social para una democracia liberal y federal (...) Lo que se dio en el resto de las regiones fue, por el contrario, una clase terrateniente muy concentrada (...)*

6 Concerning the questions that this qualifier might raise in the historical consciousness of the nation and as a source of uncertainty regarding the legitimacy of the independence process, see Colmenares, G. *Las convenciones contra la cultura. Ensayos sobre la historiografía hispanoamericana del siglo XIX*. Santiago, Centro de Investigaciones Diego Barros Arana, 2006.

The positive elements of the Colombian *foundational myth*, whose historical existence is readily demonstrable, do not receive the attention they ought to command, resulting in a deficient identity construction that projects a burden upon the national future rather than constituting a catalyst toward the realization of shared values.

4. HISTORICAL-CONSTITUTIONAL REINTERPRETATION

The thesis proposed in this article consists in proving the necessary historical rereading that does not constitute an exercise in revisionism predicated upon spurious or distorted facts. On the contrary, it entails according to greater relevance to recounting facts that constitute examples of the values upon which the Colombian nation has been erected –or ought to be erected– over those of a negative character.

What is required is a historical memory that incorporates dimensions previously marginalized: the participation in the independence movement of groups other than the *criollos*, the merits of the military strategies developed, the sagacity of the leadership, and especially the complexity inherent in determining which paths ought to be traversed during the formative years of a State.

Within the constitutional DNA of our State resides the participation of local instances, the *juntas of notables* in the processes of political decision-making during the times after the independence proclamation, a fundamental element that has been historically underestimated.

This historical approach would address existing gaps by rendering more detailed, continuous, and above all veracious the history of the formative years of the nation. Moreover, it maintains that greater coherence would be achieved by conceiving the nation as a historical continuum in which different groups participate at distinct moments with diverse roles and contributions.

It must be underscored that this would succeed in generating a history that is not exclusionary toward segments of the population, but rather would demonstrate us to be a nation proud of its cultural diversity and of the contribution that each group has rendered throughout history toward the configuration of our State. Regardless, present generations bear the duty to rescue this memory, in such manner as would permit us to comprehend ourselves as a nation constructed through heroic conduct in which all groups

present within our nation participated, recognizing that these groups proved determinative in the conception and maturation of independence ideals and constituted a fundamental factor in the glorious actions that enabled us to surmount Spanish reconquest attempts.

4.1. THE CONSTITUTION OF 1863: BETWEEN MYTH AND HISTORICAL REALITY

As previously expressed, the analysis proposed seeks to undertake a critical approximation to the historical narrative concerning the Constitution of 1863. The same dynamic of pessimism, of accentuating in history those negative aspects that portray us as a nation that has failed in certain respects, incapable of achieving a destiny commensurate with our aspirations, reproduces itself in the commemoration and study of this fundamental charter⁷. The debates of the Nineteenth Century perpetuate themselves in the present: History continues to repeat itself, centralism and federalism remain subjects of discourse, confessionalism continues to be examined, and the liberalism and conservatism of the Constitution of 1863 and the Constitution of 1886 persist as topics of discussion.

Constitutional history has been instrumentalized to justify contemporary political positions. The virtues of the Constitution of 1886 constitute the narrative of the deficiencies of the Constitution of 1863, and this narrative has served to perpetuate a model of authoritarian and centralist state. This instrumentalization proves detrimental. Colombian history does not operate as an instrument of exaltation but rather has been transmuted into a mechanism for generating collective discouragement. From this emerged a collective consciousness according to which Colombians constitute a failure as a society, that we prove incapable of molding society in accordance with ideals divergent from the authoritarian, repressive, and centralist state model.

Nevertheless, Colombian constitutionalism has allowed the vindication of certain deficiencies and the profound silence that has been denounced so far. On the occasion of the Bicentennial of Independence, historically marginalized actors obtained more visibility within the official narrative:

7 For instance, authors such as Kalmanovitz, S. and Krauze, E. consider that liberal revolutions failed to consolidate consensual orders or a stable Rule of Law, characterizing liberalism as part of anarchic processes unleashed by liberal attacks upon hierarchical structure.

women in the independence movement, the Afrodescendant population, and indigenous communities. The visibilization of circumstances previously marginalized, such as the case of noble women who sold their jewelry to finance the fabrication of *ruanas* and vestments for the Liberating Campaign, or the significance of the Black population evidenced in sites such as the San Felipe Castle in Cartagena, have opened a field in the construction of contemporary debates.

Does Colombian constitutionalism offer a *foundational myth* distinct from that which has been advanced? It might be argued by some that the authentic Colombian foundational myth could be legalism. Following the promulgation of the independence act, and in emulation of the northern example, the first priority of Colombians was the enactment of a Constitution. Notwithstanding that, there has never existed interest in identifying the common elements that would permit discourse concerning *patria*, for instance, or nation, the principal preoccupation would have been formal constitutional organization rather than identity construction. The governmental model or organizational structure, centralism versus federalism, have been studied extensively but never through the lens of identity.

Another perspective that must not be discarded is that which questions the pertinence itself of seeking unified foundational myths in contemporary societies. Why is it of such importance to emphasize foundational myths predicated upon a singular identity when precisely the world characterized by liberal democracies and robust nationalisms proves exceedingly perilous? Could the aspiration for an unequivocal foundational myth constitute a hegemonic danger to Colombia's historical narrative⁸?

Finally, might it be considered that the Constitution of 1991 constructed an identity in Colombia that would not have proven feasible to consolidate within a *foundational myth*? On this particular matter, it may be contemplated that Colombia failed to develop a historical foundational myth, which has occasioned that the recognition of a diverse society –at least in Colombia– has constituted a direct result of constitutional provisions. In that sense, the Constitution of 1991 has fulfilled the cohesive role: Distinct social groups

8 Jelin, E. *Los Trabajos de la Memoria*. Madrid, Siglo XXI de España Editores, 2002. The author argues that *official memories* (memorias oficiales) constitute conscious attempts to maintain social cohesion through selection and exclusion, which implies *obscuring the agency of others* and silencing the errors of founding fathers in order to create a canonical national narrative.

generally converge upon the Constitution of 1991 with a generalized purpose: to vindicate the rights enshrined in the Constitution.

5. MAIN EXPRESSIONS OF COLOMBIAN CONSTITUTIONALISM

The Colombian constitutional tradition since the adoption of the Constitution of 1991 has enabled the development of legal expressions that have become identity-defining when contemplating Colombian constitutionalism. In the first instance, the Constitutional Court has established itself as an institution constructive of Colombian constitutional identity, which has molded the shared values of society. Likewise, the development of the theory of the *bloque de constitucionalidad* has permitted the incorporation into Colombian constitutionalism of considerations of paramount importance concerning the international protection of human rights and the manner of integrating international mandates into the domestic legal order. Furthermore, one cannot overlook the extensive development of the *acción de tutela*, the main mechanism for the protection of fundamental rights in the nation, which marked a transformative moment in Colombian constitutionalism.

Thus, what remains certain is that the transition to the “constitutional State, wherein the Constitution acquires the character of supreme juridical norm” presupposed “the most profound transformation of the political system” in the history of Colombian constitutionalism⁹. Said transformation entailed the creation of an autonomous constitutional tribunal, separated from the Supreme Court of Justice and endowed with a set of characteristics designed to guarantee the impartiality of its members¹⁰.

Consequently, the Constitutional Court has constructed an institutional identity characterized by its autonomy and its positioning as guarantor of constitutional values shared not only domestically, but regionally as well. The legitimacy of the Constitutional Court, founded upon the rigorosity of its pronouncements, has enabled it to adopt decisions of profound

9 Rivero S., H. “Del hiperpresidencialismo al régimen presidencial atenuado. El caso colombiano.” In *El Poder presidencial en América Latina: un poder (i)limitado*. Bogotá, Universidad Externado de Colombia, 2025.

10 The confluence of distinct powers in the composition of the Constitutional Court, as well as the extended yet determinate periods of magistracies, exemplify this principle.

social and political impact¹¹. The structural judgments issued by the Court represent a paradigmatic example of this constitutional identity, as the Court has intervened to remedy situations involving massive violations of fundamental rights, demanding coordinated actions from diverse state entities to overcome Unconstitutional States of Affairs¹². Equally important has been the development of the *substitution doctrine*, which has permitted the Court to establish substantive limits upon the power of constitutional amendment, distinguishing between modification and substitution of the constitutional text¹³.

The institutional position of the Constitutional Court has expressed itself, likewise, in the exercise of control over acts of paramount political relevance, such as constitutional reforms oriented toward enabling presidential reelection, for instance. In addition thereto, more recently the Court has exercised the faculty to provisionally suspend the effects of norms that, in its judgments, prove manifestly unconstitutional, as occurred with the declaration of economic emergency decreed by the National Government, whose decision was rendered in early 2026.

5.1. THE ROLE OF THE COLOMBIAN CONSTITUTIONAL COURT SHAPING SHARED CONSTITUTIONAL VALUES AND SPEARHEADING THE FULFILLMENT OF THE PROMISES OF THE CONSTITUTIONAL TEXT OF 1991

The Constitutional Court of Colombia has enabled profound transformations in Colombia's legal landscape through its jurisprudence. Principles such as human dignity, pluralism, and equality have transcended their status as mere abstract norms within the constitutional text and have acquired substantive content and doctrinal development as a consequence of judicial adjudication by the Court. It must be emphasized that these transformations and significant developments have transpired within a society characterized

11 Regarding the legitimacy of constitutional justice and its foundations, see Bernal Pulido, C. *El derecho de los derechos*. Bogotá, Universidad Externado de Colombia, 2005, 27–51.

12 Constitutional Court. Judgments T-025 of 2004 regarding forced displacement constitutes the principal exemplar of this modality of judicial decision.

13 Constitutional Court. Judgments C-551 of 2003 and C-1040 of 2005.

by cultural, religious, and moral diversity¹⁴. The interpretative function of the Constitutional Court has proven particularly significant in matters pertaining to personal autonomy and the rights of historically marginalized groups. The Court has adjudicated in favor of persons in conditions of profound vulnerability or whose modes of life diverge from majoritarian patterns, thereby acknowledging the diversity and plurality constitutive of the Colombian people¹⁵. This demonstrates how the constitutional court has contributed to the construction of a constitutional *ethic* founded in recognizing differences as a foundational element of Colombia's national and legal identity, interpreting the constitutional text through the lens of progression and within the ever-growing set of international norms and human rights standards, without ignoring the undoubtedly intense cultural and social transformations in the region¹⁶.

This dimension of configuring shared values has manifested with particular intensity in decisions concerning sexual and reproductive rights, sexual and gender diversity, multiculturalism and indigenous peoples' autonomy, and family models, among other sensitive matters where the Court has been required to reconcile constitutional principles seemingly in tension. In the domain of sexual and reproductive rights, for example, the Court has progressively recognized women's reproductive autonomy, establishing the conditions under which voluntary termination of pregnancy

14 See Uprimny, R. "The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges." In *Texas Law Review*, vol. 89, 2011, 1587–1609. For the Colombian context specifically, cf. Lemaitre, J. *El derecho como conjuro. Fetichismo legal, violencia y movimientos sociales*. Bogotá, Siglo del Hombre Editores – Universidad de los Andes, 2009.

15 Constitutional Court. Judgments T-406 of 1992 regarding human dignity as foundation of the constitutional order; Judgments C-481 of 1998 about pluralism and protection of minorities; Judgments T-909 of 2011 about substantive equality and affirmative action. For systematic analysis, see Cepeda Espinosa, M.J. "Social and Economic Rights and the Colombian Constitutional Court." In Gargarella, R. et al. (eds.). *Courts and Social Transformation in New Democracies*. Ashgate, 2006, 157–177.

16 Concerning the incorporation of international standards through the doctrine of the constitutional block, see Uprimny, R. and Guarnizo, D. "¿Es posible una dogmática adecuada sobre la prohibición de regresividad? Un enfoque desde la jurisprudencia constitucional colombiana." In *Dejusticia* (Documentos de trabajo), 2006. Likewise, Quinche Ramírez, M.F. *El control de convencionalidad*. Bogotá, Temis, 2014.; Sierra Porto, H.A. "La operatividad del control de convencionalidad en el ordenamiento colombiano. Criterios de incorporación del DIDH interamericano en el ordenamiento constitucional colombiano." In *Revista de la Academia Colombiana de Jurisprudencia*, vol. 1, no. 378, 2023, 126–168.

proves constitutionally admissible¹⁷, notwithstanding the persistence of moral and religious controversies on the matter.

Concerning sexual and gender diversity, the Court has performed a fundamental role in the recognition of patrimonial and social security rights for same-sex couples, the legal recognition of *de facto* marital unions between persons of the same sex, and ultimately the recognition of marriage equality, constructing a robust body of jurisprudence that has redefined the family institution under parameters of inclusion and non-discrimination¹⁸.

In the sphere of multiculturalism, the Court has developed a robust doctrine regarding ethnic and cultural diversity as a foundation of the Colombian State, recognizing broad self-government faculties to indigenous and Afro-descendant communities, including special indigenous jurisdiction, while simultaneously establishing limits derived from the inviolable core of fundamental rights¹⁹. These jurisprudential interventions, though they have generated resistance in conservative social and political sectors, evidence the Court's capacity to propel processes of social change through evolutionary interpretation of the Constitution, positioning itself as an active agent in the transformation of normative and symbolic structures that perpetuate exclusions or subordinations contrary to the constitutional project of 1991.

It becomes clear that the Constitutional Court of Colombia has transcended its conventional adjudicative function to assume a transformative role as architect of shared constitutional values and principal guarantor of the normative promises enshrined in the 1991 constitutional text. Through sustained and innovative jurisprudential intervention, the Court has grounded abstract constitutional principles, converting them from pure aspirational declarations into actionable rights with concrete normative content and practical enforceability. This effort has proven particularly important in

17 The first opportunity in which the Constitutional Court determined specific rules that would allow the voluntary termination of pregnancy (*IVE*, in Spanish) occurred in 2006, in judgments C-355. Most recently the matter was adjudicated again in 2022 through Judgments C-055/22, allowing *IVES* freely until the 24th week of pregnancy. See also Judgments T-627 of 2012 and Judgments T-301 of 2016 regarding barriers to access to voluntary termination of pregnancy.

18 In this regard, see Judgments C-075/07; C-577/21; SU-214/16.

19 See Constitutional Court. Judgments T-428 of 1992 regarding foundations of ethnic and cultural diversity, T-254 of 1994 about special indigenous jurisdiction and limits, T-002 of 2012 related to indigenous autonomy and women's rights and SU-510 of 1998 resolving criteria for harmonization between ordinary and indigenous jurisdiction.

a deeply heterogeneous society, marked by profound moral, religious and cultural differences that stem from its very origins, allowing the Court's interpretative methodology to privilege an evolutive constitutionalism attentive to both emergent human rights standards and new directions in global constitutionalism.

Notwithstanding the institutional and political resistance generated by its counter-majoritarian interventions, the Constitutional Court has consolidated its position as a crucial protagonist in Colombia's ongoing process of democratic deepening and social transformation. The Court's robust engagement with the aforementioned controversies evidences a sophisticated constitutional adjudication model that refuses to relegate fundamental rights to the likes of majoritarian preference, instead anchoring its interpretative practice in the unalterable core of human dignity and the inherent principles of contemporary constitutionalism²⁰. The Court, rather than acting as a passive interpreter of the constitutional text, has instead taken on the role of a co-constructor of Colombia's constitutional identity, forging –through judicial reasoning– a normative framework based on the promises and design of the National Constituent Assembly that designed the current Colombian constitution.

5.2. THE CONSTITUTIONAL BLOCK DOCTRINE: GROWTH OF CONSTITUTIONAL PARAMETERS IN JUDICIAL REVIEW AND THE INCORPORATION OF INTERNATIONAL LAW IN COLOMBIAN CONSTITUTIONALISM

The development of the *Bloque de constitucionalidad* (Constitutional Block²¹) doctrine constitutes one of the most significant innovations developed by the Constitutional Court since the promulgation of the 1991 Constitution. This instrument has fundamentally transformed the constitutional adjudication

20 For insights in adjudication as a form of law-making and its impact in democratic societies, see Klare, Karl. "Legal Culture and Transformative Constitutionalism" in *South African Journal on Human Rights*.

21 This term has also been translated as "Block of Constitutionality", see Uprimny Yepes, Rodrigo. *The Block of Constitutionality in Colombia. A Jurisprudential Analysis and a Doctrinal Systematization Essay*. 2021.

landscape by expanding the normative parameters against which domestic legislation and state action are evaluated, incorporating international human rights law and humanitarian law into the constitutional review process with binding force equivalent to constitutional provisions themselves. The constitutional block doctrine represents a sophisticated response to the twin imperatives of constitutional supremacy and international legal integration, reconciling the hierarchical structure of domestic law with Colombia's commitments under the international human rights regime.

The architecture of the *bloque de constitucionalidad* finds its constitutional foundation in Article 93 of the Constitution, which establishes a dual mechanism for the incorporation of international norms into the domestic legal order²². The first paragraph of this provision mandates that international treaties and conventions ratified by Congress that recognize human rights and prohibit their limitation during states of emergency shall prevail in the domestic order. The second paragraph requires that constitutional rights and duties be interpreted in conformity with international human rights treaties ratified by Colombia. This constitutional architecture provided the normative foundation upon which the Constitutional Court would construct its expansive doctrine of constitutional integration.

The Court's interpretative elaboration drew explicitly from French constitutional doctrine, particularly the jurisprudence of the *Conseil Constitutionnel*, which had developed the concept of *bloc de constitutionnalité* to designate the ensemble of norms possessing constitutional value despite not being formally incorporated in the constitutional text²³. However, the Colombian Constitutional Court's adaptation transcends mere transplantation²⁴, developing its own constitutional theory responsive to Colombia's particular historical trajectory of armed conflict, systematic human rights

22 This provision establishes that "International treaties and conventions ratified by Congress, which recognize human rights and prohibit their limitation during states of emergency, prevail in the domestic legal order. The rights and duties enshrined in this Charter shall be interpreted in accordance with the international human rights treaties ratified by Colombia."

23 See Uprimny, Rodrigo. "El Bloque de constitucionalidad en Colombia. Un análisis jurisprudencial y un ensayo de sistematización doctrinal" for a historical construction of the concept, origins and background of the *Bloque de constitucionalidad*.

24 See Choudhry, Sujit. "Migration as a new metaphor in comparative constitutional law" in regards to the concept of *transplant* between legal systems; also Otero Suárez, Iván. "La migración de ideas constitucionales en la jurisprudencia de la Corte Constitucional colombiana".

violations, and the transformative aspirations embedded in the 1991 constitutional project. The Court's initial articulation appeared in Judgments C-225 of 1995, wherein it held that norms comprising the constitutional block serve as parameters for constitutional review, possessing hierarchical superiority over ordinary legislation and regulatory norms²⁵.

The Court has developed a sophisticated taxonomy distinguishing between the constitutional block *stricto sensu* and *lato sensu*, reflecting differential gradations of constitutional force. The constitutional block in the strict sense encompasses provisions possessing full constitutional hierarchy, including international human rights treaties and conventions recognized under Article 93, international humanitarian law norms by virtue of Article 214(2) which prohibits their limitation during states of exception, and the fundamental organizational principles enshrined in Article 53 regarding labor rights²⁶. These norms operate as direct parameters for judicial review, such that legislation conflicting with their provisions may be declared unconstitutional with identical consequences as contradictions with express constitutional text.

The constitutional block in the broad sense incorporates norms that, while not possessing full constitutional hierarchy, serve as interpretative criteria and auxiliary parameters in constitutional adjudication. This category encompasses non-binding international instruments such as declarations, recommendations, and observations from international human rights monitoring bodies, as well as soft law instruments that articulate evolving international consensus on human rights standards. While these norms cannot independently ground declarations of unconstitutionality, they function as authoritative interpretative guides in ascertaining the content and scope of constitutional rights, particularly where constitutional provisions employ indeterminate concepts requiring specification through international human rights jurisprudence.

The operational deployment of the constitutional block doctrine reveals a complex hermeneutic methodology integrating multiple normative sources within a coherent constitutional framework. The Court

25 Colombian Constitutional Court. Judgments C-225/95. The norms comprising the *bloque de constitucionalidad* "sirven como parámetro para el control de constitucionalidad de las leyes, por cuanto han sido normativamente integradas a la Constitución".

26 See Corte Constitucional. Judgments C-067/03.

employs the constitutional block not merely as an abstract catalogue of applicable norms but as a dynamic interpretative instrument facilitating progressive elaboration of constitutional content in dialogue with evolving international human rights standards. This methodology, designated by the Court as “conventionality control,” requires judicial organs to evaluate domestic legal norms not only against constitutional text but against the corpus of international human rights obligations binding upon the Colombian state²⁷.

This interpretative approach manifests particularly in the Court’s engagement with the jurisprudence of the Inter-American Court of Human Rights. Colombian constitutional doctrine recognizes Inter-American Court judgments as authoritative interpretations of the American Convention on Human Rights, thereby incorporated into the constitutional block *stricto sensu*. The Constitutional Court has elaborated criteria for harmonizing potential conflicts between domestic constitutional provisions and Inter-American jurisprudence, generally granting interpretative preference to the norm providing greater protection to fundamental rights, better known as the *pro homine* principle that constitutes a universal norm of international human rights law²⁸. This methodology eases constitutional adaptation to international developments without requiring formal constitutional amendment, permitting progressive actualization of constitutional content through interpretative evolution.

5.3. THE TRANSFORMATIVE IMPACT OF THE CONSTITUTIONAL BLOCK DOCTRINE IN COLOMBIAN CONSTITUTIONALISM

The constitutional block doctrine has fundamentally reconfigured Colombian constitutional identity, transforming it from a predominantly

27 See Ferrer Mac-Gregor, E. “Conventionality Control: The New Doctrine of the Inter-American Court of Human Rights.” In *AJIL Unbound*, vol. 109, 2015; Sierra Porto, H.A. “La operatividad del control de convencionalidad en el ordenamiento colombiano. Criterios de incorporación del DIDH interamericano en el ordenamiento constitucional colombiano.” In *Revista de la Academia Colombiana de Jurisprudencia*, vol. 1, no. 378, 2023, 126–168.

28 See Corte Constitucional. Judgments C-442/11 regarding applying the *pro homine* principle to resolve apparent normative conflicts between domestic constitutional provisions and Inter-American human rights standards.

statist and sovereignty-centered juridical order into one characterized by normative openness to international law and human rights commitments. This transformation manifests in multiple dimensions of constitutional practice. Substantively, the incorporation of international human rights law has enriched the normative content of constitutional rights, providing progressive elaborations that transcend the necessarily general formulations of constitutional text. The constitutional block has proven particularly consequential in domains such as victims' rights, reparations for human rights violations, gender equality, children's rights, and the rights of ethnic minorities and indigenous peoples, where international jurisprudence has developed sophisticated doctrinal frameworks subsequently adopted by Colombian constitutional adjudication²⁹.

Institutionally, the constitutional block doctrine has recalibrated the relationship between domestic and international legal orders, dissolving rigid hierarchical boundaries in favor of integrative and dialogical models of legal pluralism. The Colombian legal system operates increasingly within what might be characterized as a "multi-level constitutional order", wherein constitutional interpretation occurs through iterative exchanges between domestic constitutional adjudication, regional human rights jurisprudence, and universal human rights treaty bodies³⁰. This configuration positions the Constitutional Court not merely as guardian of domestic constitutional supremacy but as intermediary articulating Colombia's dual commitments to constitutional sovereignty and international legal integration, a tension inherent to contemporary constitutionalism in an era of human rights internationalization and globalized legal norms.

The doctrinal elaboration of the *bloque de constitucionalidad* represents a paradigmatic instance of judicial creativity in constitutional construction, demonstrating how tribunals can deploy interpretative innovation to actualize constitutional aspirations and integrate domestic legal systems within transnational normative frameworks. By incorporating international human

29 Cepeda Espinosa, M.J. "Social and Economic Rights and the Colombian Constitutional Court." In Gargarella, R. et al. (eds.). *Courts and Social Transformation in New Democracies*. Aldershot, Ashgate, 2006, 157-177.

30 In regard to the idea of multi-level constitutionalism and dialogue between domestic and international authorities, see: Acosta Alvarado, P.A. *Diálogo judicial y constitucionalismo multinivel*; Von Bogdandy, A. "Ius Constitutionale Commune en América Latina: una mirada a un constitucionalismo transformador." In *Revista Derecho del Estado*, 2015.

rights law as constitutional parameter, the Colombian Constitutional Court has contributed substantively to the progressive realization of the 1991 Constitution's transformative project, facilitating the evolution of Colombian constitutionalism toward increasingly robust protection of human dignity, pluralism, and social justice within an increasingly interconnected global legal order.

5.4. CONSTITUTIONAL MECHANISMS OF CITIZEN PARTICIPATION: TUTELA, POPULAR ACTIONS AND THEIR ROLE IN CONSTRUCTING ACTIVE CITIZENSHIP

The 1991 Colombian Constitution inaugurated a transformative constitutional paradigm predicated not merely upon the formal recognition of individual rights but upon the institutional operationalization of participatory democracy through novel mechanisms of judicial enforceability and citizen mobilization. Among these innovations, the *acción de tutela* (tutela action) and *acciones populares* (popular actions) constitute paradigmatic instruments that have fundamentally reconfigured the relationship between citizens and state authority, converting abstract constitutional guarantees into justiciable rights accessible through expedited judicial procedures. These mechanisms embody the constituents' aspiration to transcend the limitations of representative democracy by establishing direct channels through which individuals and communities can vindicate rights, challenge governmental action, and participate actively in constitutional governance. The institutional architecture and jurisprudential development of these participatory mechanisms reveal a distinctive constitutional model wherein judicial intervention operates not as counter-majoritarian restraint but as facilitation of democratic deepening through rights-based mobilization, rooting itself as one of the foundations of modern Colombian constitutionalism.

5.5. ACCIÓN DE TUTELA: ARCHITECTURE AND PROCEDURAL INNOVATION

The *acción de tutela*, created by Article 86 of the Constitution, constitutes an extraordinary judicial remedy designed to provide immediate and effective protection of fundamental constitutional rights when threatened or

violated by governmental action or by private conduct³¹. The procedural characteristics of the tutela distinguish it fundamentally from conventional judicial processes: it requires no legal representation, entails minimal formal requirements, operates with extreme procedural celerity³², and is available before any judge of the Republic regardless of hierarchical jurisdiction. This institutional design reflects a deliberate constitutional choice to prioritize substantive rights protection over procedural formality, democratizing access to justice by removing the technical and economic barriers that traditionally precluded marginalized populations from effective judicial vindication of their rights.

The Constitutional Court's judgments have progressively expanded the tutela's protective scope through doctrinal innovations of considerable significance. Initially conceived as mechanism for protection against governmental violations of civil and political rights, the Court at one point extended tutela protection to encompass social and economic rights through the doctrine of "fundamental rights by connection" (*fundamentalidad por conexidad*), wherein non-fundamental rights acquire justiciability when their violation directly threatens or affects fundamental rights³³. Additionally, the Court has recognized certain social rights, like health, education, and minimum subsistence conditions as inherently fundamental, thereby expanding tutela's protective ambit to encompass socioeconomic dimensions previously relegated to programmatic provisions subject only to political discretion³⁴. Most controversially, the Court has authorized tutela protection against violations by private entities when such entities exercise positions of subordination or power over individuals, extending constitutional obligations horizontally to regulate private conduct affecting fundamental rights³⁵.

The trajectory of tutela utilization reveals its transformation into a principal mechanism of citizen-state interaction and rights vindication. Since

31 The provision establishes that "Every person shall have the right to file a claim before the judges, at any time and place, through a preferential and summary procedure, either by himself or by someone acting on his behalf, for the immediate protection of his fundamental constitutional rights, whenever these are violated or threatened by the action or omission of any public authority."

32 Tutelas have to be decided within ten days.

33 Corte Constitucional. Judgments T-406/92.

34 Corte Constitucional. Judgments T-760/08.

35 See Corte Constitucional. Judgments SU-1150/00.

its constitutional establishment, the tutela has generated millions of judicial proceedings, with annual filings reaching hundreds of thousands³⁶. This intensive utilization reflects the mechanism's accessibility and effectiveness but also reveals structural deficiencies in ordinary administrative and judicial processes that compel citizens to resort systematically to extraordinary constitutional remedies for resolution of grievances. The overwhelming proportion of tutela actions concern health rights –particularly claims against the healthcare system for denial of medical services or medications– demonstrating how constitutional adjudication has become the primary avenue for enforcing social rights in contexts of administrative dysfunction and institutional fragility³⁷.

The tutela's democratizing impact manifests in multiple dimensions beyond simple rights vindication. First, it has facilitated legal mobilization by previously excluded populations like indigenous communities, Afro-Colombian populations, displaced persons, LGBTQ+ individuals, persons with disabilities who employ tutela proceedings strategically to challenge discriminatory practices, demand public services, and assert collective identity claims³⁸. Second, the Constitutional Court's automatic review mechanism (*revisión de tutela*) has enabled the tribunal to develop transformative jurisprudence on structural inequalities, using individual cases as vehicles for broader constitutional declarations addressing systemic violations and institutional failures. Third, the tutela has generated what scholars characterize as a "judicialization of politics", wherein significant policy questions, ranging from healthcare reform, pension systems, environmental protection, to educational access, among others, are increasingly resolved through constitutional adjudication rather than legislative deliberation, raising complex questions regarding democratic legitimacy and institutional balance.

36 Just in 2025 923,397 tutela proceedings took place in Colombia. Source: <https://www.corteconstitucional.gov.co/lacorte/estadisticas>.

37 Claims related to health rank 2nd, with a total of 1,882,888 tutela proceedings since January of 2016. Source: <https://www.corteconstitucional.gov.co/lacorte/estadisticas>.

38 Lemaitre Ripoll, Julieta, Legal Fetishism at Home and Abroad (2007). Available at SSRN: <https://ssrn.com/abstract=2920292>.

5.6. POPULAR ACTIONS: COMMUNITY EMPOWERMENT REVOLVING COLLECTIVE RIGHTS

The *acciones populares*, constitutionally established in Article 88, constitute judicial mechanisms for protection of collective rights and diffuse interests, including environmental integrity, public health, administrative morality, public space, consumer protection, and other rights whose titular is the collectivity rather than discrete individuals³⁹. Unlike the *tutela*'s focus on individual fundamental rights, popular actions revolve a conception of citizenship predicated upon collective solidarity and community responsibility, authorizing *any person* to initiate judicial proceedings for protection of collective interests even absent direct personal injury. This institutional design reflects constitutional recognition that certain rights cannot be adequately protected through individualized litigation but require collective judicial remedies.

Legislative implementation established procedural mechanisms for popular actions, including incentives for successful litigants and provisions for class certification and collective settlements⁴⁰. However, popular actions have generated significantly less utilization than *tutelas*, reflecting both procedural complexities and institutional barriers to collective mobilization. Nevertheless, popular actions have proven consequential in specific domains, particularly environmental protection where citizen groups have successfully challenged extractive industries, infrastructure projects, and governmental authorizations threatening ecological integrity. Notable jurisprudence includes judicial orders requiring governmental action to address urban air pollution, protection of wetlands and cold mountainous formations from development, and enforcement of environmental impact assessment requirements against multinational corporations⁴¹.

39 Article 88 establishes: "The law will regulate popular actions for the protection of collective rights and interests, related to public assets, space, security and health, administrative morality, the environment, free economic competition and others of a similar nature that are defined therein."

40 These incentives, however, have been outlawed.

41 The Council of State has ordered government action to reduce air pollution in cities, like in case No. 90479-01. Also, albeit within the context of a *tutela* proceeding, the Constitutional Court has even ordered the protection of River basins and recognized a river as subject of rights. See Constitutional Court. T-622/16.

The comparative underutilization of popular actions relative to *tutelas* reveals structural asymmetries in participatory mechanisms. While *tutela*'s procedural simplicity and individual focus facilitate widespread mobilization, popular actions require greater organizational capacity, legal sophistication, and collective coordination. This disparity suggests that formal institutional availability does not automatically translate into effective democratic participation.

5.7. CONSTRUCTION OF ACTIVE CITIZENSHIP RESULTING FROM CONSTITUTIONAL MECHANISMS

The constitutional establishment of participatory judicial mechanisms reflects and reinforces a distinctive conception of democratic citizenship predicated not merely upon periodic electoral participation but upon continuous engagement with governmental institutions through rights vindication and judicial mobilization. These mechanisms have contributed to constructing a society in which Colombian citizenship perceive themselves as bearers of justiciable entitlements enforceable against state authority rather than as passive recipients of governmental benevolence, even utilizing *tutelas* –for example– as a vehicle for massive human rights litigation⁴². This transformation possesses profound implications for state–society relations, reconfiguring governmental accountability from purely electoral mechanisms toward continuous judicial oversight and rights-based contestation.

However, excessive reliance upon judicial mechanisms can produce a widely criticized social norm wherein unelected judges displace democratic deliberation, individual rights claims fragment collective political mobilization, and adjudicative framing moves substantive conflicts of political nature over to legal proceedings. The *tutela*'s transformation into ordinary rather than extraordinary remedy suggests systemic failures, wherein constitutional mechanisms compensate for deficient ordinary institutions rather than complementing robust processes.

Notwithstanding these tensions, participatory judicial mechanisms constitute indispensable components of Colombia's constitutionalism and

42 In this regard, the *tutelatón* phenomena has been recognized as a practice in Colombian constitutionalism.

architecture, facilitating rights protection and democratic engagement in contexts of profound institutional fragility and social inequality. The tutela and popular actions demonstrate how constitutional design can operationalize participatory aspirations through accessible institutional channels, even as their implementation reveals persistent challenges of inequality, institutional capacity, and the appropriate balance between judicial intervention and democratic deliberation. The trajectory of these mechanisms reflects the ongoing constitutional project of constructing active citizenship within the structural constraints of Colombia's particular historical and institutional context, demonstrating both the transformative potential and inherent limitations of legal approaches to democratic deepening and social transformation.

6. CONCLUSION

The presented analysis has demonstrated that Colombian constitutionalism confronts a persistent tension between historical narrative construction and institutional identity formation. The pejorative denomination of the foundational period as the "*patria boba*" has generated profound consequences for national self-perception, projecting a burden of perceived failure rather than furnishing a cohesive mythos capable of unifying a culturally, geographically, and socioeconomically fragmented polity. This deficiency stands in marked contrast to the successful integration of foundational narratives observable in comparable countries in the region, wherein selective historical emphasis has enabled the consolidation of collective identities transcending internal divisions.

Nevertheless, the constitutional transformation inaugurated by the Constitution of 1991 has effectuated a paradigm shift in identity construction. The Constitutional Court has emerged as the principal architect of Colombian constitutional identity, establishing through rigorous jurisprudence a normative framework predicated upon human dignity, pluralism, and substantive equality. Through structural judgments addressing massive fundamental rights violations, the substitution doctrine delimiting constitutional amendment powers, and progressive interpretations incorporating international human rights standards, the Court has constructed a constitutional ethos that acknowledges and celebrates societal diversity as foundational rather than fragmentary.

The contemporary challenge resides in reconciling historical memory with constitutional values. A critical rereading of the independence period—one that accentuates the participatory character of local juntas, the strategic sagacity of diverse social groups, and the foundational commitment to free thought and human dignity—would not constitute historical revisionism but rather a veracious recuperation of marginalized narratives. Such reinterpretation would align historical consciousness with constitutional principles, thereby generating a more coherent national identity capable of confronting present challenges whilst honoring the complexity and richness of Colombia's foundational experiences.

REFERENCES

- Acosta Alvarado, P.A. *Diálogo judicial y constitucionalismo multinivel*.
- Bernal Pulido, C. *El derecho de los derechos*. Bogotá, Universidad Externado de Colombia, 2005, 27–51.
- Cepeda Espinosa, M.J. “Social and Economic Rights and the Colombian Constitutional Court.” In Gargarella, R. et al. (eds.). *Courts and Social Transformation in New Democracies*. Aldershot, Ashgate, 2006, 157–177.
- Choudhry, S. “Migration as a new metaphor in comparative constitutional law.”
- Colmenares, G. *Las convenciones contra la cultura. Ensayos sobre la historiografía hispanoamericana del siglo XIX*. Santiago, Centro de Investigaciones Diego Barros Arana, 2006.
- Ferrer Mac-Gregor, E. “Conventionality Control: The New Doctrine of the Inter-American Court of Human Rights.” In *AJIL Unbound*, vol. 109, 2015.
- Jelin, E. *Los Trabajos de la Memoria*. Madrid, Siglo XXI de España Editores, 2002.
- Kalmanovitz, S. “La idea federal en Colombia durante el siglo XIX.”
- Klare, K. “Legal Culture and Transformative Constitutionalism.” In *South African Journal on Human Rights*.
- Lemaitre, J. *El derecho como conjuro. Fetichismo legal, violencia y movimientos sociales*. Bogotá, Siglo del Hombre Editores – Universidad de los Andes, 2009.

- Lemaitre Ripoll, J. “Legal Fetishism at Home and Abroad.” 2007. Available at: <https://ssrn.com/abstract=2920292>.
- Otero Suárez, I. “La migración de ideas constitucionales en la jurisprudencia de la Corte Constitucional colombiana.”
- Quinche Ramírez, M.F. *El control de convencionalidad*. Bogotá, Temis, 2014.
- Rivero S., H. “Del hiperpresidencialismo al régimen presidencial atenuado. El caso colombiano.” In *El Poder presidencial en América Latina: un poder (i)limitado*. Bogotá, Universidad Externado de Colombia, 2025.
- Sierra Porto, H.A. “La operatividad del control de convencionalidad en el ordenamiento colombiano. Criterios de incorporación del DIDH interamericano en el ordenamiento constitucional colombiano.” In *Revista de la Academia Colombiana de Jurisprudencia*, vol. 1, no. 378, 2023, 126–168.
- Uprimny, R. “The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges.” In *Texas Law Review*, vol. 89, 2011, 1587–1609.
- Uprimny, R. “El Bloque de constitucionalidad en Colombia. Un análisis jurisprudencial y un ensayo de sistematización doctrinal.” 2021.
- Uprimny, R. and Guarnizo, D. “¿Es posible una dogmática adecuada sobre la prohibición de regresividad? Un enfoque desde la jurisprudencia constitucional colombiana.” In *Dejusticia (Documentos de trabajo)*, 2006.
- Valencia Villa, H. “*Cartas de Batalla: Una crítica del constitucionalismo colombiano*.” Universidad Nacional de Colombia, 1987.
- Von Bogdandy, A. “Ius Constitutionale Commune en América Latina: una mirada a un constitucionalismo transformador.” In *Revista Derecho del Estado*, 2015.
- Constitutional Court, Judgments T-406 of 1992.
- Constitutional Court, Judgments T-428 of 1992.
- Constitutional Court, Judgments C-225 of 1995.
- Constitutional Court, Judgments C-481 of 1998.
- Constitutional Court, Judgments SU-510 of 1998.
- Constitutional Court, Judgments SU-1150 of 2000.

Constitutional Court, Judgments T-002 of 2012.

Constitutional Court, Judgments C-551 of 2003.

Constitutional Court, Judgments C-067 of 2003.

Constitutional Court, Judgments T-025 of 2004.

Constitutional Court, Judgments C-1040 of 2005.

Constitutional Court, Judgments C-355 of 2006.

Constitutional Court, Judgments C-075 of 2007.

Constitutional Court, Judgments T-760 of 2008.

Constitutional Court, Judgments T-254 of 1994.

Constitutional Court, Judgments T-909 of 2011.

Constitutional Court, Judgments C-442 of 2011.

Constitutional Court, Judgments T-627 of 2012.

Constitutional Court, Judgments T-622 of 2016.

Constitutional Court, Judgments SU-214 of 2016.

Constitutional Court, Judgments T-301 of 2016.

Constitutional Court, Judgments C-577 of 2021.

Constitutional Court, Judgments C-055 of 2022.

Council of State, Case No. 90479-01.

FUNDAMENTAL RIGHTS IN THE COLOMBIAN CONSTITUTIONAL ORDER

ALEXEI JULIO ESTRADA¹

ABSTRACT

This chapter examines the dogmatic framework of fundamental rights within Colombian constitutional law, as developed through Constitutional Court jurisprudence. Drawing upon the Court's authoritative interpretation of the 1991 Constitution, the analysis addresses six dimensions: the conceptualization and cataloging of fundamental rights; the question of rights-holders; the identification of duty-bearers; the structural configuration of rights; their normative content; and regulatory mechanisms. This investigation adopts a descriptive-analytical methodology grounded in constitutional and statutory provisions, judicial precedents, and relevant international human rights instruments, while engaging with theoretical debates regarding rights foundations, horizontal effects, and the tension between formal and material approaches to rights identification.

KEYWORDS

Fundamental rights, Colombian constitutionalism, Constitutional Court, human dignity, essential core, proportionality, bloque de constitucionalidad, horizontal effect (*Drittwirkung*), rights-holders, states of exception, statutory law reservation, economic social and cultural rights

I. INTRODUCTION

Colombia's 1991 Constitution introduced the term *derechos fundamentales* into the domestic legal order, drawing inspiration from the German *Grundrechte*

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tradition and parallel developments in Spanish constitutionalism. Yet the constitutional text exhibits terminological heterogeneity that complicates precise definition. Article 5 invokes “inalienable rights of the person.” Title II, denominated “Rights, Guarantees and Duties,” subdivides into chapters addressing “fundamental rights,” “economic, social and cultural rights,” and “collective and environmental rights.” Article 44 specifies children’s fundamental rights. Article 85 enumerates rights of immediate application. Article 93 references international human rights treaties as hierarchically superior and interpretatively relevant. Article 94 alludes to inherent rights of the human person. Article 95 imposes duties regarding human rights as foundations of peaceful coexistence.

This varied nomenclature –inalienable rights, immediately applicable rights, inherent rights, human rights, fundamental rights– raises the question whether these constitute synonymous expressions or analytically distinct categories. Constitutional Court jurisprudence has addressed these definitional challenges through an evolving dogmatic framework that constitutes the primary source for this chapter. Indeed, the Constitutional Court, as authoritative interpreter of constitutional meaning, exercises definitive hermeneutic authority through both abstract constitutional review and, crucially, through its revision of *tutela* (constitutional protection action) decisions.

While fundamental rights admit historical, philosophical, and political examination, this chapter adopts an analytical and normative methodology. Its descriptive purpose centers on reconstructing the dogmatic structure elaborated through constitutional and statutory provisions, international instruments, and above all, through judicial precedent. The inquiry addresses six dimensions: (i) the concept and catalog of fundamental rights, (ii) rights-holders, (iii) duty-bearers, (iv) the structural configuration of rights, (v) normative content and essential core theory, and (vi) regulatory competencies including states of exception.

2. CONCEPTUALIZING AND CATALOGING FUNDAMENTAL RIGHTS

The threshold question –what qualifies as a fundamental right within Colombian constitutionalism– has generated extensive scholarly commentary and persistent judicial attention. Unlike German or Spanish systems, where

formal criteria derived from constitutional architecture substantially resolve the matter, Colombia's Constitutional Court has consistently rejected purely formal approaches, favoring instead material criteria linked to rights' nature or essence². This methodological choice intertwines conceptual definition with catalog delineation, rendering the questions 'what is' and 'which are' fundamental rights mutually constitutive.

Early jurisprudence invoked essentiality and inalienability as determinative criteria, occasionally supplemented by characterizing fundamental rights as immediately applicable subjective rights. This initial phase witnessed remarkably expansive recognition—environmental rights, for instance, initially received fundamental status. Yet by 1993, doctrinal retrenchment commenced. The Court began privileging rights historically associated with liberal constitutionalism—life, personal integrity, due process—while relegating economic, social, and cultural rights (ESC rights) to a secondary tier, protectable through *tutela* only via *connection* to authentically fundamental rights³.

Paradoxically, connection doctrine—initially conceived restrictively—operated expansively in practice. Through concepts such as dignified life and vital minimum, courts protected welfare entitlements by linking them to civil-political rights⁴. Children's health rights gained fundamental recognition through constitutional text (Article 44). Vulnerable populations—pregnant women, elderly persons, displaced communities—secured heightened protection. This case-specific particularism rendered fundamentality contingent upon concrete circumstances rather than abstract categorization, exemplified

2 The Court initially employed criteria of essentiality and inalienability to identify fundamental rights. See Constitutional Court, Judgments T-002/1992 and T-406/1992. This early phase recognized environmental rights as fundamental, a position that evolved substantially in subsequent jurisprudence.

3 The connection doctrine emerged as a mechanism to protect social rights through their link to traditionally fundamental rights. This allowed access to health services when life or personal integrity were endangered, though initially conceived restrictively. See Judgments T-406/1992 and subsequent elaboration in SU-225/1998.

4 The dignified life and vital minimum concepts have functioned as interpretive bridges enabling welfare rights protection before explicit recognition of their fundamental character. Vital minimum protects "that which a person requires to subsist with dignity" including food, housing, health, education. Dignified life encompasses conditions necessary for autonomous self-determination and social participation. These concepts remain relevant despite broader ESC rights recognition. See T-426/1992 originating vital minimum doctrine.

by the assertion in T-801/1998 that “the reality of each concrete case, the unique and particular circumstances characterizing it, permit defining whether a fundamental right is truly violated.”

A doctrinal watershed arrived in 2003 with T-227/2003’s dignity-centered framework⁵. The Court articulated fundamental rights as those functionally directed toward human dignity, translatable into subjective rights, and sustained by dogmatic consensus. Dignity received tripartite specification: (i) autonomous self-determination (living as one chooses), (ii) access to material conditions and welfare provisions (living well), and (iii) protection of non-patrimonial goods, physical and moral integrity (living without humiliation). Additionally, the capacity for translation into subjective guarantees-requiring legislative or administrative content determination and actionable mechanisms-became determinative.

Contemporary jurisprudence thus identifies four elements: (i) functional relationship to human dignity, (ii) subjective rights configuration, (iii) consensus regarding necessity of specific provisions or abstentions, and (iv) concrete case circumstances. While this framework remains substantially indeterminate-dignity’s content requires interpretation, subjective rights theory remains contested, consensus proves elusive, case sensitivity reintroduces particularism-it has proven instrumental in transcending the civil-political versus economic-social-cultural dichotomy. Between 2007 and 2014, the Court progressively recognized ESC rights’ fundamental character *per se*, incorporating international principles of interdependence and indivisibility⁶⁻⁷.

5 The dignity-based framework was consolidated in Judgments T-227/2003, articulating fundamental rights as those functionally directed toward human dignity, capable of translation into subjective rights, and supported by dogmatic consensus. This tripartite dignity conception-living as one chooses, living well, living without humiliation-has remained the Court’s prevailing framework. See also T-881/2002 for dignity’s conceptual elaboration.

6 The watershed recognition came in T-016/2007, which rejected programmatic character as a barrier to judicial protection: “The fundamental nature of rights cannot depend on how these rights are made effective in practice.” This marked the beginning of *per se* recognition of ESC rights. See also T-760/2008 on health rights and C-313/2014 consolidating this doctrine.

7 Interdependence and indivisibility principles were formally integrated through Judgments C-288/2012, which analyzed the fiscal sustainability constitutional amendment. The Court emphasized that “all human rights imply different obligational facets, some preponderantly welfare-oriented, without this limiting or defining their nature.” See also SU-599/2019 reaffirming this framework.

The resulting catalog defies taxonomic closure. Rights enumerated in Title II, Chapters I and II (civil-political and ESC rights) qualify as fundamental. Rights from the organic portion—such as access to justice (Article 229)—acquire fundamentality. Unenumerated rights developed jurisprudentially—vital minimum, dignified life—receive protection. International human rights treaties contribute both through the constitutional block doctrine⁸ and through interpretive enrichment of textually recognized rights. Notably, property rights and economic liberties (Article 333) remain ordinarily protected only through connection rather than direct fundamental status⁹. Collective rights present conceptual difficulties: while environmental rights typically lack individual fundamental character, connection doctrine permits *tutela* protection when grave individual harm materializes. Simultaneously, certain collective subjects—indigenous and Afro-descendant communities—hold fundamental rights as communities, not merely as aggregated individuals.

3. THE QUESTION OF RIGHTS-HOLDERS

Constitutional silence regarding rights-holders prompted judicial elaboration drawing upon Article 86's authorization of *tutela* for "every person." This textual foundation supported recognizing both natural and juridical persons—including remarkably, public law entities—as rights-holders¹⁰. The inclusion of state institutions represents a striking inversion of fundamental

8 The constitutional block doctrine, developed from C-225/1995, distinguishes between strict sense (non-derogable rights, IHL, *ius cogens*) and broad sense (all human rights treaties with interpretive function per Article 93, second paragraph). This integration has been crucial for incorporating international jurisprudence, particularly Inter-American Court decisions. See C-010/2000 and more recently C-269/2014.

9 Property rights remain protected primarily through connection rather than direct fundamental status. The Court has stated that "the possibility of considering property as a fundamental right depends on the specific circumstances of its exercise," recognizing fundamental character only when affecting vital minimum or dignity. See T-1321/2005, C-591/2014. Economic liberties under Article 333 receive similar treatment per C-263/2011.

10 Recognition of juridical persons, including public entities, as rights-holders represents a doctrinal innovation with complex implications. The Court distinguishes between indirect ownership (serving natural persons' interests) and direct ownership *qua* juridical persons. Public entities' fundamental rights raise particular paradoxes given rights' historical genesis as defensive shields. See T-411/1992, SU-439/2017, and critically T-1189/2003.

rights' historical genesis as defensive shields against governmental power. Yet jurisprudence restricts juridical persons' rights-holding to those compatible with their nature: due process, equality, privacy, good name, correspondence inviolability, associational freedom, information access, and *habeas data*. Rights intrinsically tied to human personhood-life, personal integrity, personal liberty, health, social security-remain unavailable to juridical entities.

The Court has distinguished between indirect rights-holding, where protection ultimately serves natural persons' interests, and direct rights-holding by juridical persons *qua* juridical persons. This doctrinal architecture accommodates constitutional commitments to pluralism and multiculturalism through recognizing indigenous and Afro-descendant communities as collective rights-holders¹¹. Based on Articles 7 and 70's pluriethnic foundations, jurisprudence has established that these communities possess juridical personality beyond mere aggregation, holding rights such as collective territorial property, prior consultation, cultural integrity, and special indigenous jurisdiction. Traditional authorities may vindicate these rights, yet individual community members may also invoke them under certain circumstances.

Foreign nationals present distinct challenges. Article 100 establishes that foreigners hold "civil rights" equivalent to Colombians', subject to potential statutory restrictions for public order reasons, yet jurisprudence interprets "civil rights" expansively as encompassing fundamental rights generally. Differentiation based on national origin constitutes a suspect classification requiring rigorous justification. The Court has invalidated restrictions lacking objective and reasonable grounds-such as prohibitions on foreign union leadership-while upholding nationality-based distinctions when strictly serving public order narrowly construed. Additionally, migratory status affects rights enjoyment: while irregular status does not vitiate core protections against torture or arbitrary deprivation of life, welfare dimensions may require regularization for full access. Political rights remain constitutionally

11 Indigenous and Afro-descendant communities' recognition as collective rights-holders implements constitutional pluriethnicity and multiculturalism. Rights such as prior consultation (Convention 169 ILO), collective property, cultural integrity, and special jurisdiction vest collectively. The Court applies criteria including self-identification, traditional lifestyles, distinct culture, social organization, and customary norms. Leading cases include T-380/1993, SU-383/2003, and more recently SU-217/2017.

reserved to nationals, though statutory law since 2006 has extended local voting rights to registered foreign residents.

Recent jurisprudential innovation has extended rights-holding beyond human and juridical persons to encompass natural entities and sentient beings. The Atrato River decision (T-622/2016) recognized rivers as rights-bearing subjects entitled to protection, conservation, and restoration—a biocentric turn grounding rights in intrinsic ecosystem value rather than instrumental utility¹². Regarding non-human animals, SU-16/2020 established that sentient beings merit individualized protection beyond their ecosystem roles, founding prohibitions on mistreatment and welfare mandates¹³. While jurisprudential consolidation remains incomplete, these developments signal movement toward recognizing biocultural diversity and overcoming anthropocentric paradigms.

The category of subjects of special constitutional protection warrants particular attention¹⁴. Grounded in Article 13's mandate for heightened protection of persons in circumstances of manifest weakness, this classification encompasses constitutionally enumerated groups (children, pregnant women, elderly, disabled persons) and jurisprudentially identified populations (conflict victims, forcibly displaced persons, extreme poverty sufferers). Special protection status generates procedural consequences—relaxed subsidiarity requirements for *tutela* admissibility—and substantive effects, rendering welfare-dimension rights directly justiciable without requiring demonstration of connection to civil-political rights. This has transformed

12 The Atrato River decision (T-622/2016) pioneered recognizing nature as rights-bearing subject, declaring the river “subject to rights of protection, conservation, maintenance and restoration.” This biocentric approach moves beyond instrumental environmentalism toward recognizing ecosystems’ intrinsic value. The Supreme Court extended this to the Amazon River (2018). These developments reflect global trends toward Earth jurisprudence.

13 Judgments SU-16/2020 established that “wild animals are subject to legal protection as individuals to whom the constitutional order recognizes intrinsic value, giving rise to a prohibition on mistreatment and an imperative of animal welfare.” This represents significant doctrinal evolution, treating animals not merely as ecosystem components but as sentient beings with inherent protection warranting individualized consideration.

14 The concept of special constitutional protection subjects encompasses both express constitutional groups (children Article 44, pregnant women Article 43, elderly Article 46, disabled Article 47) and jurisprudentially identified vulnerable populations. Article 13's mandate for special protection of those in “circumstances of manifest weakness” provides textual foundation. The category has expanded to conflict victims, displaced persons, extreme poverty sufferers, persons with HIV/AIDS, drug-dependent persons, and homeless populations. See foundational doctrine in C-707/2005.

tutela into the predominant mechanism for vindicating pension payments, maternity benefits, and healthcare access for vulnerable populations¹⁵.

4. SUBJECTS BOUND BY FUNDAMENTAL RIGHTS

While the Constitution omits express enumeration of duty-bearers, Article 86's authorization of *tutela* against "any public authority" and against private actors under specified conditions provides the textual foundation. Public authorities constitute primary addressees. Vertical binding encompasses all three branches of government (executive, legislative, judicial) plus autonomous institutions (control organs, electoral authorities, central bank). For executive authorities, binding generates obligations both to abstain from rights violations when exercising competencies and to interpret statutory and regulatory norms conformably with fundamental rights or, when interpretation proves impossible, to refuse application under Article 4's constitutional supremacy principle.

Legislative binding epitomizes constitutional supremacy: Congress must respect fundamental rights when enacting laws. The complexity this generates—regarding whether rights possess predetermined content constraining legislation, who determines such content, and legislative configuration's scope—finds partial resolution through essential core theory and proportionality analysis (examined *infra*). Binding manifests institutionally through reserved domains: statutory law for comprehensive rights regulation, ordinary law for rights restrictions (examined *infra*). Judicial binding operates through multiple mechanisms. All judges function as *tutela* judges (Article 86), interpreting and applying fundamental rights in that capacity. Within ordinary jurisdictions, judges must interpret statutes conformably with rights or refuse application when incompatibility proves irremediable. The contentious-administrative jurisdiction exercises constitutional review

15 The transformation from programmatic rights to justiciable entitlements has generated extensive *tutela* jurisprudence. Statistical data reveals health rights as the second most frequent basis for constitutional protection actions, with vital minimum claims also prominent. This judicialization raises questions regarding judicial competence, democratic resource allocation, and separation of powers. The Court has responded through structural remedies ordering policy design while respecting institutional competencies. See T-025/2004 on forced displacement.

of administrative regulations through actions such as nullity for unconstitutionality.

Horizontal binding –the *Drittwirkung* question– has generated extensive theoretical debate in comparative constitutional law¹⁶. German doctrine distinguished between direct efficacy (immediate application in private relations) and indirect efficacy (application mediated through general private law clauses). In Colombia, Article 86’s explicit authorization of *tutela* against private actors under specified presuppositions substantially resolves this theoretical debate, establishing direct efficacy in enumerated circumstances: subordination, defenselessness, public service provision, and grave or direct affectation of collective interests.

Jurisprudence has elaborated these categories extensively¹⁷. Subordination designates juridical dependency relationships (employer–employee, teacher–student) characterized by obligation to comply with hierarchically superior directives. Defenselessness constitutes factual asymmetry–absence of material capacity to resist rights violations, whether through lack of ordinary defense mechanisms or their inadequacy. Subjects of special constitutional protection presumptively occupy positions of defenselessness. Public service provision by private actors ruptures inter-private equality, positioning the provider equivalently to public authorities. The grave and direct collective interest criterion has proven most conceptually elusive. Initially conceived as protecting rights whose violation affects plural, identifiable persons (thus distinguishing from genuinely collective rights protected through popular actions), application has concentrated on environmental contamination cases affecting fundamental rights like privacy or tranquility.

Importantly, these *tutela* admissibility requirements do not exhaust private actors’ substantive binding. Fundamental rights bind private parties

16 The German Federal Constitutional Court’s *Lüth* decision (1958) established that fundamental rights constitute an objective value order irradiating the entire legal system. While German doctrine developed indirect effect theory (application through private law general clauses), Colombia’s Article 86 establishes direct effect in specified circumstances, substantially resolving theoretical debates. For comparative analysis see Martin Borowski, “La Drittwirkung ante el trasfondo de la transformación de los derechos morales en derechos fundamentales” (2020).

17 The Court has elaborated subordination as juridical dependency (employer–employee, teacher–student relationships per T-405/2007) and defenselessness as factual power asymmetry preventing effective self-defense (T-379/2013, T-643/2013). Special protection subjects are presumptively in defenselessness. Application extends to contractual relations (T-738/2011), social media contexts (T-145/2016), and family relations (T-125/1994).

beyond *tutela*'s procedural scope; ordinary judicial remedies vindicate rights in other contexts. Recognizing fundamental rights' primacy within the legal order precludes treating any domain as immune from their influence.

5. STRUCTURAL CONFIGURATION: RIGHTS AS SUBJECTIVE GUARANTEES

Constitutional jurisprudence identifies subjective rights structure as definitional for fundamentality. This theoretical commitment traces to Jellinek's 19th-century theory of subjective public rights and individual *status vis-a-vis* the state. Yet subjective rights theory remains contested within legal philosophy, and the Court has not explained its understanding systematically. Examination of ESC rights' "transmutation" into subjective rights provides interpretive clues: rights acquire subjective character when legislative or administrative development determines concrete entitlements, identifies holders and duty-bearers, and establishes judicial mechanisms for vindication.

Initially, jurisprudence distinguished between welfare rights (programmatic, requiring configuration) and liberty rights (immediately enforceable subjective guarantees). This dichotomy carried ideological freight, presuming ESC rights "expensive" and configuration-dependent while civil-political rights appeared "cost-free" and self-executing. Yet paradigmatic decisions like T-595/2002 demonstrated that classic liberties presuppose material provisions enabling their exercise—freedom of movement depends on transportation infrastructure, expression on telecommunications systems. Conversely, rights like health encompass liberty dimensions (decisional autonomy regarding treatment) unconnected to welfare provision.

Contemporary doctrine recognizes that all rights exhibit multidimensional structure, generating both negative obligations (abstentions, non-interference) and positive obligations (provisions, protection) for duty-bearers. As Alexy demonstrated, rights to negative actions possess identical structural elements as rights to positive actions: holder, object (abstention or provision), duty-bearer¹⁸. Obligations' progressive character-phased

¹⁸ Robert Alexy's principles theory conceives fundamental rights norms as optimization mandates requiring maximal realization within factual and juridical constraints. This contrasts with rules as definitive commands. The theory necessarily links to proportionality as the method for resolving principles conflicts. Critical responses emphasize potential rights-weakening effects and

realization contingent on resource availability and social evolution—does not vitiate justiciability. Certain obligations demand immediate compliance (low-resource requirements, urgency, vulnerable populations). Others permit phased implementation. The Court has indicated that omission threatening imminent unjustified harm triggers judicial intervention despite obligations’ progressive nature.

This structural reconceptualization fundamentally undermines the civil-political versus economic-social-cultural dichotomy. If all rights exhibit welfare dimensions, and all generate resource implications, the traditional justification for differential treatment collapses. International human rights law’s principles of interdependence and indivisibility reinforce this doctrinal evolution. Yet the practical question –which specific provisions courts may mandate absent legislative or administrative development– remains intensely contested, implicating separation of powers, democratic legitimacy of resource allocation, and judicial competence regarding complex policy domains.

6. DETERMINING CONTENT: ESSENTIAL CORE AND PROPORTIONALITY

Rights content determination draws upon multiple interpretive sources. Constitutional provisions and international human rights treaties furnish textual foundations. International soft law—General Comments from treaty bodies, Special Rapporteurs’ reports—provides authoritative interpretive guidance despite lacking formal binding character under traditional international law distinctions. Colombian jurisprudence extensively incorporates these sources, both in *tutela* review and constitutional control. Domestic precedents establish authoritative interpretations – for example, that free development of personality protects pet ownership, smoking, and personal-use drug consumption.

Beyond these sources, jurisprudence invokes essential core theory, imported from German constitutional doctrine¹⁹. The Court defines essential

displacement of constitutional commands by judicial discretion. See Robert Alexy, *Teoría de los derechos fundamentales* (1993); Luigi Ferrajoli’s critique in “Constitucionalismo principalista y constitucionalismo garantista” (2015).

19 Essential core theory distinguishes an intangible nucleus immune from legislative restriction and

core as “the intangible sphere of the right whose respect is imposed on authorities and private individuals,” or “that which identifies a right as such, which expresses its distinctive nature with respect to others.” Essential core theory posits an irreducible nucleus immune from legislative restriction, surrounded by a peripheral zone subject to proportionate limitations. German scholarship debated absolute versus relative conceptions: whether the core constitutes a fixed magnitude predetermined by the rights-enunciation itself, or whether it emerges through balancing against countervailing constitutional interests. Colombian jurisprudence has not definitively resolved this tension, invoking both core-protection language and balancing analysis.

The essential core concept was incorporated legislatively through the Statutory Law on States of Exception (Law 137/1994), which prohibits affecting intangible rights’ essential core (Article 6) and fundamental rights’ essential core generally (Article 7). Practical application, however, encounters difficulties. Determining core content requires interpretation, and identifying “faculties or possibilities of action inherent to a right” or “interests juridically protected” admits contestation. Consider: Does the right to appeal criminal convictions form part of due process’s essential core? Constitutional Article 29’s fourth paragraph appears to establish such a right in criminal proceedings, yet jurisprudence long tolerated its restriction for privileged defendants, suggesting it remained outside the core. Constitutional Amendment 01/2018 and subsequent jurisprudence have now recognized universal appeal rights.

Certain rights have received essential core specification through systematic jurisprudential development. The right of petition illustrates this process²⁰. Through iterative precedent, the Court established that petition

a peripheral zone subject to proportionate limitations. German scholarship debated absolute conceptions (fixed magnitude predetermined by rights-enunciation) versus relative conceptions (emerging through balancing). Colombian jurisprudence has not definitively resolved this tension, invoking both core-protection language and proportionality balancing. See C-756/2008, C-223/2017. The Court has stated essential core comprises “faculties or possibilities of action necessary for the right to be recognizable as pertaining to the described type.”

20 Petition rights illustrate essential core determination through jurisprudential development. The Court has specified core content comprises: (i) effective possibility of submitting respectful requests without reception/processing refusal, (ii) timely response within statutory terms, (iii) substantive response materially addressing all matters raised, establishing complete correspondence between petition and response. See T-077/2018. This specification exemplifies how essential core receives concrete content through precedent consolidation.

rights' essential core comprises: (i) effective possibility of submitting respectful requests without authorities refusing reception or processing, (ii) timely response within statutory terms regardless of whether favorable or unfavorable, (iii) substantive response materially addressing all matters raised—complete correspondence between petition and response, excluding evasive formulas. This specification demonstrates how essential core receives concrete content through precedent consolidation, subsequently incorporated into statutory regulation.

Similarly, the education right's essential core has been determined through international sources²¹. The Court adopted the UN Committee on Economic, Social and Cultural Rights' four-element framework articulated in General Comment No. 13: availability (functioning educational institutions and programs), accessibility (non-discrimination plus physical, economic, and informational access), acceptability (cultural appropriateness, quality, respect for students' dignity), and adaptability (flexibility to diverse needs, capacities, and contexts). This exemplifies how soft law substantially determines constitutional content, with General Comments functioning as authoritative interpretive guides despite lacking formal treaty status.

To determine whether restrictions affect essential core, the Court employs proportionality analysis. Restrictions surviving proportionality scrutiny preserve essential core; those failing violate it. This linkage reveals essential core theory's compatibility problems with proportionality. If proportionality permits rights-content deprivation when sufficiently weighty countervailing interests justify restriction, the notion of an absolutely protected core appears conceptually unstable. The Court has not fully confronted this tension.

Proportionality analysis itself connects to Alexy's principles theory, conceiving fundamental rights norms as optimization mandates—principles requiring maximal realization within factual and juridical constraints, contrasting with rules as definitive commands. Proportionality comprises three

21 Education rights illustrate essential core determination through international sources. The Court has adopted the UN Committee on Economic, Social and Cultural Rights' four-element framework: availability (functioning educational institutions), accessibility (non-discrimination, physical and economic access), acceptability (cultural appropriateness, quality), and adaptability (flexibility to diverse needs). See T-727/2017, referencing General Comment No. 13. This exemplifies how soft law substantially determines constitutional content.

sub-principles: suitability (means-end fitness), necessity (least restrictive alternative), and proportionality *stricto sensu* (balancing). The Court has extensively adopted this framework, though it faces scholarly criticism regarding potential rights-weakening effects and concerns about displacing definitive constitutional commands with judicial balancing discretion²².

Critics from various theoretical perspectives emphasize proportionality's potential to relativize rights protection. Habermas contends that conceiving rights as principles eliminates their deontological character, transforming them from trumps against state objectives into values subject to case-by-case balancing. Ferrajoli argues that principalist constitutionalism weakens constitutional principles, degrading fundamental rights to ethical-political recommendations while subverting sources hierarchy and restoring doctrinal and jurisprudential law as supreme sources. García Amado demonstrates that some purported proportionality applications actually involve subsumption. Despite these critiques, proportionality remains the dominant methodology for examining rights restrictions' constitutionality within Colombian jurisprudence, applied across constitutional review, *tutela* adjudication, and regulatory assessment.

7. REGULATORY COMPETENCIES AND STATES OF EXCEPTION

7.1. RESERVED DOMAIN OF STATUTORY AND ORDINARY LAW

Constitutional Article 152 establishes statutory law's reserved domain²³ for regulating "fundamental rights and duties of persons and the procedures

22 Critique of proportionality from various theoretical perspectives emphasizes its potential to relativize rights protection. Habermas argues teleological conceptions eliminate rights' deontological character, transforming them from trumps against state objectives into values subject to case-by-case balancing. Ferrajoli contends principalist constitutionalism weakens constitutional principles, degrading fundamental rights to ethical-political recommendations and subverting sources hierarchy. See Víctor Ferreres Comella, "Más allá del principio de proporcionalidad" (2020) for nuanced assessment.

23 Statutory laws require approval by absolute congressional majorities, processing within single legislative session, and automatic prior constitutional review (Article 153). This heightened procedural rigor reflects subject matter sensitivity. The Court interprets statutory reservation

and resources for their protection.” This raises two questions: Does *all* regulation require statutory form? Does *every aspect* of a fundamental right fall within the reservation?

Jurisprudence has established restrictive criteria. Statutory law reservation applies when: (i) regulation purports comprehensive, systematic character; (ii) rights themselves constitute the initiative’s direct object; (iii) indispensable protection mechanisms are regulated; or (iv) structural elements receive development. Structural elements encompass rights’ essential core—limits, restrictions, exceptions, prohibitions, and governing principles, plus prerogatives constituting holders’ entitlements and duty-bearers’ obligations. Yet these criteria themselves incorporate indeterminate concepts (“structural elements,” “integral regulation,” “essential core”), affording the Court interpretive latitude. Crucially, statutory reservation receives restrictive interpretation, preserving ordinary legislative competence as the general rule.

Beyond statutory law reservation lies ordinary law’s reserved domain for rights restrictions. This reflects rule-of-law principles: in a Social State under the Rule of Law founded on liberty and equality primacy, restrictions require legislative participation as guarantor of representativeness and democratic legitimation. The Constitution expressly reserves rights restrictions to legislative form in numerous provisions—Article 24 regarding circulation liberty (“with the limitations established by law”), Article 26 concerning professional choice (“The law may require qualification titles”), Article 28 on personal liberty (“by written order from competent judicial authority, with legal formalities and for grounds previously defined by law”). Executive regulatory power exists but remains non-original, subordinate to prior legislative authorization (Article 189–II).

Recent practice during the COVID-19 pandemic, however, witnessed significant restrictions imposed through regulatory decrees and administrative acts absent clear statutory authorization, revealing persistent tensions between emergency exigency and rule-of-law principles²⁴. While the Government

restrictively, applying only to comprehensive, systematic regulation of structural elements—limits, restrictions, exceptions, governing principles, and holder prerogatives/duty-bearer obligations. See C-818/2011, C-044/2015.

²⁴ Recent pandemic jurisprudence reveals ongoing regulatory competence tensions. While Government declared states of emergency, principal circulation restrictions derived from regulatory

declared states of emergency (economic, social, and ecological emergency), principal circulation restrictions derived from regulatory Decree 457/2020 and Ministry of Health resolutions rather than legislative decrees with explicit constitutional authorization. This pattern manifests ongoing gaps between normative requirements–statutory reservation for restrictions–and executive practice during crises.

7.2. THE REGULATION OF FUNDAMENTAL RIGHTS UNDER STATES OF EXCEPTION

States of exception merit particular examination. Upon declaring emergency (foreign war, internal commotion, economic–social–ecological crisis), the President acquires temporary legislative powers, issuing legislative decrees that may limit fundamental rights and establish exceptional regulatory regimes. Article 214 prohibits suspending “human rights nor fundamental liberties,” mandates respecting international humanitarian law, requires proportionality, and reserves to statutory law the regulation of emergency powers, judicial controls, and rights guarantees.

The Statutory Law on States of Exception (Law 137/1994) implements these mandates through multiple provisions: establishing intangible rights absolutely immune from suspension (life, personal integrity, personality recognition, prohibitions on slavery, torture, forced disappearance, conscience, religion, criminal law principles, suffrage, marriage and family, children’s rights, *habeas corpus*, non-extradition of nationals-by-birth); prohibiting limitations so grave as to negate dignity, privacy, association, work, education, or expression (Article 5); requiring that any limitations preserve essential core and establish exercise guarantees (Article 6); prohibiting discrimination based on race, language, religion, national origin, or political opinion (Article 14); and mandating proportionality–restrictions “only admissible to the strictly necessary degree to seek the return to normalcy” (Article 13).

decrees (Decree 457/2020) and administrative acts (Ministry of Health resolutions) rather than legislative decrees with constitutional authorization. This pattern manifests persistent gaps between normative requirements–statutory reservation for restrictions–and executive practice during crises.

Despite protective intent, the statutory framework exhibits terminological confusion and normative antinomies. It employs heterogeneous terminology (human rights, fundamental rights, fundamental liberties, constitutional rights) and varied verbs (suspend, restrict, limit) without clear differentiation. Article 4 lists non-suspendable intangible rights, seemingly implying other rights' suspendability, yet Article 15 prohibits *all* suspension of human rights and fundamental liberties—creating normative antinomies.

“Suspension” itself remains conceptually unclear. According to ordinary language, suspension denotes temporary cessation, deferral, or temporary deprivation. Yet whether absolute temporal restriction for limited duration constitutes suspension versus limitation remains unresolved. If suspension implies temporary deprivation of effect, does proportionate restriction avoiding essential core violation constitute suspension or merely limitation? The framework's incompatibility between essential core protection (suggesting absolute boundaries) and proportionality balancing (permitting restriction when justified by countervailing interests) remains unresolved.

Nevertheless, automatic Constitutional Court review of legislative decrees provides crucial safeguards. The Court applies proportionality testing examining: (i) whether measures maintain proportionality with crisis gravity—restrictions must be proportionate to facts requiring conjuring or effects requiring limitation, and (ii) whether restrictions remain strictly necessary for normalcy restoration—imposing limitations or restrictions on rights and constitutional guarantees only to the absolutely necessary degree to achieve return to normalcy. Additionally, the Court verifies compliance with Article 214's prohibition on suspending human rights and fundamental liberties, though the conceptual indeterminacy previously discussed complicates this review.

The emergency framework also distinguishes between different states of exception—foreign war, internal commotion, economic-social-ecological emergency—with varying competencies and time limits. Internal commotion permits broader restrictions than economic emergency, including limitations on circulation, residence, information, expression, assembly, habeas corpus, and personal liberty. Yet all remain subject to intangible rights protection, essential core preservation, proportionality requirements, and automatic judicial review. Recent practice suggests persistent interpretive challenges regarding these boundaries, particularly concerning executive regulatory actions accompanying legislative decrees during emergency periods.

8. CONCLUSION

This examination of fundamental rights dogmatics within Colombian constitutional law reveals a sophisticated yet incomplete jurisprudential architecture. The Constitutional Court has elaborated material criteria for rights identification grounded in human dignity, subjective rights capacity, and dogmatic consensus, successfully transcending the initial civil-political versus economic-social-cultural dichotomy that characterized early doctrine. Through progressive recognition that all rights exhibit multidimensional structure-encompassing both negative and positive obligations, liberty and welfare dimensions-contemporary jurisprudence has established ESC rights' fundamental character *per se* while incorporating international principles of interdependence and indivisibility.

Yet significant indeterminacies persist. The dignity criterion, despite tripartite specification, remains substantially open to interpretation. Subjective rights theory-central to fundamentality determination-has received insufficient theoretical elaboration. Consensus regarding rights' fundamental character proves elusive empirically and contested normatively. Case-specific particularism reintroduces contingency into abstract categorization. The essential core concept, while legislatively incorporated and jurisprudentially invoked, faces definitional challenges and conceptual tensions with proportionality analysis. These indeterminacies are not merely theoretical curiosities but generate profound practical consequences affecting individual *tutela* adjudication, legislative competence boundaries, executive regulatory authority, and ultimately, the balance between democratic self-governance and constitutional rights protection.

Regarding rights-holders, Colombian doctrine has proven remarkably expansive, encompassing natural persons, juridical persons (including public entities), indigenous and Afro-descendant communities as collective subjects, and innovatively, natural entities and sentient beings. This expansion reflects constitutional commitments to pluralism, multiculturalism, and environmental protection, yet generates conceptual challenges regarding rights' anthropocentric foundations and the coherence of extending rights-bearing capacity to non-human subjects. The category of subjects of special constitutional protection has proven particularly consequential, transforming *tutela* into the predominant mechanism for vindicating welfare entitlements

for vulnerable populations through relaxed subsidiarity requirements and direct justiciability without connection demonstration.

The *Drittwirkung* question finds pragmatic resolution through Article 86's explicit authorization of *tutela* against private actors, establishing direct horizontal effect in cases of subordination, defenselessness, public service provision, and grave collective interest affectation. While jurisprudence has elaborated these categories extensively, the fourth criterion remains conceptually underdeveloped, and questions persist regarding the boundaries between procedural admissibility requirements and substantive binding scope. More fundamentally, private actors' substantive binding extends beyond *tutela*'s procedural scope, reflecting fundamental rights' primacy throughout the legal order.

Structurally, recognition that all rights exhibit both negative and positive dimensions has profound implications. If classic liberties presuppose material provisions and ESC rights encompass liberty dimensions, the traditional justification for differential judicial treatment collapses. International human rights law's principles of interdependence and indivisibility reinforce this evolution. Yet this raises intensely contested questions regarding judicial competence to mandate specific provisions absent legislative development, implicating separation of powers, democratic resource allocation, and institutional capacity regarding complex policy domains. The Court has responded through varied approaches: recognizing concrete entitlements in individual cases despite policy absence, ordering competent authorities to design policies with specified parameters, and employing structural remedies addressing systemic violations.

Content determination through essential core theory and proportionality analysis reveals both methodological sophistication and persistent conceptual tensions. Essential core receives specification through multiple sources—international instruments (particularly soft law), domestic precedent consolidation, and rights—enunciation interpretation. Yet determining what faculties prove “inherent” or which interests merit “juridical protection” remains contestable. The relationship between essential core absolutism and proportionality relativism remains theoretically unresolved. Scholarly critiques emphasize proportionality's potential to weaken rights protection by transforming deontological commands into teleological values subject to balancing, yet proportionality remains the dominant methodology across Colombian constitutional adjudication.

Regulatory competencies reveal continuing tensions between normative requirements and institutional practice. Statutory law reservation receives restrictive interpretation through indeterminate criteria (comprehensive character, structural elements, integral regulation), preserving ordinary legislative space while affording the Court substantial interpretive discretion. Ordinary law's reserved domain for restrictions reflects rule-of-law principles requiring democratic legitimation for liberty limitations, yet executive practice –particularly during emergencies– manifests persistent gaps between constitutional requirements and actual governance. Recent pandemic experience revealed significant restrictions imposed through regulatory decrees and administrative acts without clear statutory authorization.

States of exception frameworks, despite protective intent through intangible rights lists, essential core requirements, and proportionality mandates, exhibit terminological confusion regarding suspension versus restriction, normative antinomies between Articles 4 and 15 of Law 137/1994, and conceptual instability regarding essential core preservation versus proportionality balancing. Automatic Constitutional Court review provides crucial safeguards through proportionality testing, yet interpretive challenges persist regarding these boundaries. The framework distinguishes between different emergency types with varying competencies, yet all remain subject to fundamental protections whose precise contours require case-by-case judicial determination.

In conclusion, while Constitutional Court jurisprudence has constructed a sophisticated dogmatic framework for fundamental rights—successfully incorporating international developments, transcending traditional dichotomies, and extending protection through multiple doctrinal innovations—continuing theoretical development remains essential. Enrichment through legal theory, comparative insights, and critical engagement with international human rights law proves necessary for refining this architecture and addressing its persistent indeterminacies, conceptual tensions, and practical gaps. The balance between judicial rights protection and democratic self-governance, between constitutional commands and legislative configuration, between individual autonomy and social solidarity, remains contested terrain requiring ongoing doctrinal elaboration through precedent consolidation, scholarly dialogue, and practical application to evolving social realities.

REFERENCES

- Alexy, R. *Teoría de los derechos fundamentales*. Madrid, Centro de Estudios Constitucionales, 1993.
- Borowski, M. “La Drittwirkung ante el trasfondo de la transformación de los derechos morales en derechos fundamentales”. 2020.
- Ferrajoli, L. “Constitucionalismo principalista y constitucionalismo garantista.” 2015.
- Ferrerres Comella, V. “Más allá del principio de proporcionalidad.” 2020.
- UN Committee on Economic, Social and Cultural Rights. *General Comment No. 13 on the Right to Education*. Geneva, United Nations, 1999.
- Constitutional Court, Judgments T-002 of 1992.
- Constitutional Court, Judgments T-406 of 1992.
- Constitutional Court, Judgments T-411 of 1992.
- Constitutional Court, Judgments T-426 of 1992.
- Constitutional Court, Judgments SU-225 of 1998.
- Constitutional Court, Judgments C-225 of 1995.
- Constitutional Court, Judgments C-010 of 2000.
- Constitutional Court, Judgments T-881 of 2002.
- Constitutional Court, Judgments T-227 of 2003.
- Constitutional Court, Judgments T-1189 of 2003.
- Constitutional Court, Judgments SU-383 of 2003.
- Constitutional Court, Judgments T-025 of 2004.
- Constitutional Court, Judgments C-707 of 2005.
- Constitutional Court, Judgments T-016 of 2007.
- Constitutional Court, Judgments T-405 of 2007.

Constitutional Court, Judgments T-760 of 2008.

Constitutional Court, Judgments C-756 of 2008.

Constitutional Court, Judgments T-738 of 2011.

Constitutional Court, Judgments C-263 of 2011.

Constitutional Court, Judgments C-818 of 2011.

Constitutional Court, Judgments C-288 of 2012.

Constitutional Court, Judgments C-044 of 2015.

Constitutional Court, Judgments C-591 of 2014.

Constitutional Court, Judgments C-269 of 2014.

Constitutional Court, Judgments C-313 of 2014.

Constitutional Court, Judgments T-145 of 2016.

Constitutional Court, Judgments T-622 of 2016.

Constitutional Court, Judgments C-223 of 2017.

Constitutional Court, Judgments SU-439 of 2017.

Constitutional Court, Judgments SU-217 of 2017.

Constitutional Court, Judgments T-727 of 2017.

Constitutional Court, Judgments T-077 of 2018.

Constitutional Court, Judgments SU-599 of 2019.

Constitutional Court, Judgments SU-16 of 2020.

Law 137 of 1994 (Statutory Law on States of Exception).

Decree 457 of 2020.

CONSTITUTIONAL LAW FOR INDIGENOUS PEOPLES

MAGDALENA CORREA HENAO¹

ABSTRACT

This chapter examines the constitutional protection regime that the 1991 Colombian Constitution, together with International Human Rights Law, has built for indigenous peoples and their members. It begins by reconstructing the fundamental provisions governing the recognition, guarantee, and enforceability of their rights, drawing upon the constitutional text, ILO Convention 169, and the jurisprudence of the Constitutional Court. The analysis traces the historical antecedents –from Law 89 of 1890 to the National Constituent Assembly– that explain the rupture introduced by the 1991 Constitution, which replaced the homogenizing conception of the Nation with a model of unity within ethnic and cultural diversity (Articles 1, 7, and 8). It then systematizes the constitutional provisions that recognize indigenous communities as subjects of special protection, the collective and individual rights attributed to them, and the institutional arrangements –territorial entities, indigenous jurisdiction, and political participation– designed to ensure their autonomy. The chapter assesses how the Constitutional Court has elaborated doctrines such as cultural diversity, ethnic self-determination, prior consultation, and the fundamental right to collective territory, articulating them with the *bloque de constitucionalidad*. The central thesis holds that, despite persistent structural failures –violence in their territories, unmet basic needs, and threats to their physical and cultural survival– indigenous communities today enjoy a significant, imperfect, yet genuinely transformative constitutional protection regime. The chapter closes with a critical evaluation of the gap between normative recognition and material effectiveness.

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KEYWORDS

Indigenous peoples, ethnic and cultural diversity, 1991 Constitution, ILO Convention 169, prior consultation, indigenous jurisdiction, collective territory, *bloque de constitucionalidad*.

I. INTRODUCTION

One of the constitutional triumphs that have taken place since the Constitution of 1991 to the present day lies in the recognition of the rights of indigenous communities and their members. This is the subject of this chapter, which will begin with a synthesis of the fundamental provisions of the Constitution and of International Human Rights Law (hereinafter IHRL) applicable in Colombia for the protection of the country's indigenous populations. It will then turn to a systematic presentation of the case law of the Constitutional Court of Colombia (hereinafter CCC or the Court), developed in the course of deciding *tutela* review and constitutionality cases, through which the contents, scope, and limits of the constitutionalism of indigenous pluralism have been shaped.

I note that I will not expressly address the case of other existing ethnic groups, particularly that of Black, Afro-Colombian, Raizal, and Palenquero communities, despite their demographic significance², their cultural importance, and their presence in the national territory. Undoubtedly, a significant portion of the case law to be presented regarding the rights of indigenous communities also applies to Afro-descendant communities. However, I prefer not to address the latter given the significant distinctions between the two groups, starting with the disconcerting normative inequality in the

2 Constituting the most numerous diverse ethnic group in the country, at 9.68% of the population, compared to indigenous communities, which represent 4.4%. Departamento Administrativo Nacional de Estadística (2018). *Encuesta Nacional de Calidad de Vida 2018*. Available at: <https://www.dane.gov.co/index.php/estadisticas-por-tema/enfoque-diferencial-e-interseccional/autorreconocimiento-etnico>. Also available at: <https://www.dane.gov.co/index.php/estadisticas-por-tema/demografia-y-poblacion/censo-nacional-de-poblacion-y-vivenda-2018/cuantos-somos>

constitutional recognition of rights and guarantees³ and reaching into the specificities of their communal diversity, organizations, and identity⁴.

This chapter will argue that even under the conditions, capacities, and circumstances existing in Colombia throughout the 35 years since the Constitution of 1991, indigenous communities and their members possess today a significant constitutional protection regime—imperfect yet useful and transformative. Although it has not managed to guarantee either security or peace in their territories, nor prevent the loss of their own forms of knowledge, it has undeniably strengthened within indigenous communities a consciousness of their own identity and of the value that their ethnic diversity and cultural richness represent, empowering them to advocate for and advance the defense, respect, and fulfillment of their rights.

2. INDIGENOUS PEOPLES IN THE 1991 CONSTITUTION

2.1. BACKGROUND

In the history of Colombia, the law has addressed indigenous peoples and their communities from the very beginning of the republican formation of the state. Until the end of the nineteenth century, the formulas set forth in decrees, laws, and constitutional provisions revolved around formal equal treatment, unequal treatment, limited freedoms and rights, patronage,

3 Very rich, as will be seen, for indigenous peoples, and extremely poor for Black communities. See arts. 63 and 310 Const., on land protection, and the very telling Transitory art. 55 Const., which confers upon the legislature the function of enacting, subject to special prior requirements, “a law recognizing for the Black communities that have been occupying vacant lands in the rural riverside areas of the rivers of the Pacific Basin, in accordance with their traditional production practices, the right to collective property over the areas to be demarcated by that same law,” now Law 70 of 1993.

4 The unequal treatment of the Afro-descendant population has reached the point where the official statistics that count and characterize them have been challenged through *tutela* actions. Thus, in *tutela* judgment T-276 of 2022, although the Court found the existence of a consummated harm due to “statistical invisibilization of ethnic peoples in the national census,” it acknowledged that there had been a violation of the fundamental rights to equality, to the recognition of ethno-racial diversity, to quality information, and to the progressive realization of economic, social, and cultural rights of Afro-Colombian populations. It therefore ordered the national statistics authority to review its accounts and analyses concerning the number and needs of Colombia’s Afro-descendant populations.

submission, evangelization, and welfare assistance⁵. The trend did not change in the twentieth century but was rather reinforced. The Constitution of 1886, which preceded that of 1991, without expressly addressing the matter⁶, would set the terms of its regulation⁷ in light of the cornerstones of the constitutional structure: a unitary-centralist, presidentialist, and confessional State⁸.

Thus, Law 89 of 1890⁹ was enacted, “[b]y which the manner in which savages being reduced to civilized life shall be governed is determined.” A law that, despite the discriminatory concepts employed in its title and provisions, also established a special legal framework that protected the *resguardos* as an institution embodying indigenous identity and living territory, as well as the *cabildos*, the organizations that govern them¹⁰. Hence, its enforcement has been demanded by the indigenous peoples themselves, and to this day some of its elements remain in effect¹¹.

On balance, the legal effectiveness of this law –and more broadly the situation of indigenous populations– was consistently negative. It is therefore no surprise that since the mid-twentieth century, organizations emerged that led

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- 5 R. Roldán Ortega. *Fuero indígena colombiano*. Bogotá, Ministerio de Gobierno, 1983, 38–40 and 56–57. Cited in: “Incipientes sociedades. Inclusión y exclusión del indígena en la vida republicana, a partir de las constituciones políticas y leyes decimonónicas colombianas (1810–1890)”. In *Artifícios. Revista colombiana de estudiantes de Historia*, N.º 7, April 2017, 48–65. Available at: <https://revistas.icanh.gov.co/index.php/artifícios/article/view/2244/1673>.
 - 6 J. Gómez Espinel. *¿Cuál ha sido el avance en el respeto de los derechos de los pueblos indígenas desde la Constitución Política colombiana de 1886 hasta la Constitución de 1991?* Universidad Católica de Colombia, 2022, 10. Available at: <https://repository.ucatolica.edu.co/server/api/core/bitstreams/55d86ec3-2c6d-4bo9-82d4-bao322e3f936/content>.
 - 7 R. Uprimny Yepes. “La constitución de la diversidad” [online]. Dejusticia, 2006. Available at: <https://www.dejusticia.org/la-constitucion-de-la-diversidad/>.
 - 8 C. Restrepo Piedrahita. *Constituyentes y constitucionalistas colombianos del siglo XIX*. Bogotá, Universidad Externado de Colombia, 2009, 118.
 - 9 Law 89 of 1890. Available at: <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=4920>
 - 10 I. Ospino Pérez. “Legislación y representación indígena durante la regeneración en Colombia: 1886–1892”. In *Revista Aláula*, N.º 1, 2021, 13–23. Available at: <https://revistas.unicartagena.edu.co/index.php/revistaalaula/article/view/3443>. Also in F. Samper. “Los derechos de los pueblos indígenas de Colombia en la Jurisprudencia de la Corte Constitucional”. In *Anuario de Derecho Constitucional Latinoamericano*, Inter-American Court of Human Rights, 2006, 12. Available at: <https://www.corteidh.or.cr/tablas/R21731.pdf>
 - 11 This can be appreciated in CCC decisions pronouncing on the unconstitutionality of many of its provisions. See CCC, judgment C–139 of 1996 and C–463 of 2014.

indigenous movements demanding autonomy from the State and protesting against the violation of their rights, state repression, and the dispossession of their lands and *resguardos*—work that paved the way for 1991¹².

So did Law 21 of 1991 “by means of which ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries is approved,” adopted in 1989¹³, under the Constitution of 1886 and nearly 100 years after Law 89 of 1890, which remained in force.

This international instrument was prepared and agreed upon within the ILO, so its natural focus was the protection of the labor rights of indigenous workers. Nonetheless, its content addressed in a broader manner the situation of indigenous and tribal peoples around the world, characterized by the impairment of their enjoyment of human rights through unequal treatment and discrimination, and the erosion of their own values, customs, laws, and perspectives. Thus, its articles aim to guarantee the rights of indigenous peoples to participate in matters involving their territories, to have their customs and traditions valued, to dignity, and to affirmative socioeconomic measures designed to preserve their existence and identity, as well as their contribution to cultural diversity and to the social and ecological harmony of humankind¹⁴.

Equally significant was the mechanism of constitutional reform that was employed—a National Constituent Assembly (NCA)—which, although not provided for in the Constitution, its convocation and formation by presidential decree under a state of exception were declared constitutional by the Supreme Court of Justice, which at that time exercised automatic constitutional review of such decrees.

12 V. Laurent. *Comunidades indígenas, espacios políticos y movilización electoral en Colombia, 1990–1998. Motivaciones, campos de acción e impactos*. Bogotá, Institut français d'études andines, Instituto Colombiano de Antropología e Historia, 2005, 67–111. Also V. Laurent. “Con bastones de mando o en el tarjetón: movilizaciones políticas indígenas en Colombia”. In *Colombia Internacional*, N.º 71, 2010, 35–61. Available at: http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0121-56122010000100003&lng=en&tlng=es. Also see W. Villa Rivera. “El movimiento social indígena colombiano: entre autonomía y dependencia”. In J. Ac Betancur (ed.), *Movimientos indígenas en América Latina: Resistencia y nuevos modelos de integración*. IWGIA, 2011. Available at: https://iwgia.org/images/publications/0563_Libro_Movimientos_indigenas_FINAL.pdf.

13 ILO Convention No. 169. Available at: https://www.ilo.org/sites/default/files/wcmsps/groups/public/@ed_norm/@normes/documents/publication/wcms_100910.pdf

14 Ibid.

The composition of the NCA is remembered in the most optimistic accounts of constitutional history as one of broad political plurality¹⁵, further enhanced by the varied knowledge and experience of the individuals elected as constituent assembly members. Pluralism was likewise manifested through the election of 2 members from indigenous associations and communities¹⁶, among 70 constituent assembly members. A smaller number¹⁷, given the historical injustice to be remedied through the new constitution¹⁸, but a significant one. Thus, with the support of organizations and political alliances, their presence in the Assembly facilitated the realization of projects in favor of a social rule-of-law State (*Estado social de derecho*) that would, among other things, protect ethno-cultural diversity¹⁹.

These remote and proximate antecedents may partly explain the explicit and rich provisions of the 1991 Constitution that will be presented below, through which rights are recognized and institutions are created in favor of indigenous communities²⁰. The rest is attributable to other factors, including

15 With numerous representation from both traditional parties (Liberal, Conservative, and National Salvation), as well as from the movement constituted by members of the demobilized guerrilla group (Alianza Democrática M-19).

16 On the indigenous constituent assembly members, see M. Díaz Uribe. "Performatividad política y cultural: El movimiento indígena colombiano y su participación en la Asamblea Nacional Constituyente de 1990". In *Jangwa Pana*, Vol. 20, N.º 3, 2021, 10. Available at: <https://revistas.unimagdalena.edu.co/index.php/jangwapana/article/view/4301/3206>.

17 As was also the case with women's representation, since there were only 4 women constituent assembly members: Aida Avella (Unión Patriótica – UP); María Teresa Garcés and María Mercedes Carranza (Alianza Democrática M-19); and Helena Herrán (Partido Liberal). *El Nuevo Siglo*. Torres, March 18, 2021. "El legado de las cuatro constituyentes del 91". Available at: <https://www.elnuevosiglo.com.co/politica/el-legado-de-las-cuatro-constituyentes-del-91>.

18 See D. Bilchitz and M. Correa. "The Difference History Makes: Comparative Reflections on Socio-Economic Rights and Historical Consciousness in South Africa and Colombia". In D. Bilchitz and R. Cachalia (eds.), *Transitional Justice, Distributive Justice, and Transformative Constitutionalism: Comparing Colombia and South Africa*. Oxford, Oxford Academic, 2023.

19 M. Caviedes. "La representación del movimiento indígena en la prensa nacional durante la asamblea nacional constituyente". In *Revista Etnias y Política*, N.º 6, 2008, 94-106. Cited in M. Díaz Uribe. "Performatividad política y cultural: El movimiento indígena colombiano y su participación en la Asamblea Nacional Constituyente de 1990". In *Jangwa Pana*, Vol. 20, N.º 3, 2021, 10. Available at: <https://revistas.unimagdalena.edu.co/index.php/jangwapana/article/view/4301/3206>.

20 P. Pineda Camacho. "La Constitución de 1991 y la perspectiva del multiculturalismo en Colombia". In *Alteridades*, Vol. 7, N.º 14, 1997, 107-129. Available at: <https://www.redalyc.org/pdf/747/74745549008.pdf>.

that element of the miraculous that always underlies the institutions embodying humanity's finest creations.

2.2. INDIGENOUS COMMUNITIES IN THE 1991 CONSTITUTION

As a starting point, the 1991 Political Constitution replaced the understanding of the Nation embodied in the 1886 Political Constitution, as it sought the conservation of diversity within unity²¹.

Thus, among the fundamental principles of the Constitution, Colombia is a State organized as a “unitary, decentralized Republic, with autonomy of its territorial entities, democratic, participatory, and pluralist” (art. 1 Const.), and the “*State recognizes and protects the ethnic and cultural diversity of the Colombian Nation*” (art. 7 Const.). Therefore, it has the duty to protect the Nation’s cultural and natural wealth (art. 8 Const.), the principle of self-determination of peoples (art. 9 Const.), and alongside Spanish, recognizes as official in the territories of ethnic groups their languages and dialects, with the guarantee that “education provided in communities with their own linguistic traditions shall be bilingual” (art. 10 Const.).

There is no reference to indigenous peoples in the catalog of individual rights, except insofar as it enshrines equality—both formal and substantive—as the central axis of rights, the latter qualified by the State’s duty to promote “the conditions for equality to be real and effective and shall adopt measures in favor of discriminated or marginalized groups” (art. 13, para. 2 Const.).

Within the chapter on economic, social, and cultural rights, it protects the territories of the *resguardos* as inalienable, imprescriptible, and non-attachable property (art. 63 Const.), which is reinforced in another provision stating that they are collective property and not alienable (art. 329 Const.). It provides for the right of “*members of ethnic groups (...) to education that respects and develops their cultural identity*” (art. 68 Const.), and consequently the right to equality and dignity of all cultures coexisting in the country (art. 70 Const.) and the “special rights that ethnic groups settled in territories of archaeological wealth may have,” which the legislature must regulate (art. 72 Const.).

21 CCC, judgment T-254 of 1994. Reporting Justice Eduardo Cifuentes Muñoz.

The catalog of rights is completed by the right to prior consultation recognized in ILO Convention 169 (art. 6)²², which forms part of the Constitution through the concept of the *bloc de constitutionnalité* (art. 93, para. 1 Const.)²³. A fundamental procedural right for preserving the rights of indigenous communities and their members²⁴.

Regarding democratic representation, the Constitution provided for an “additional number of two senators elected in a special national constituency by indigenous communities” (art. 171 Const.).

Now, alongside the right to prior consultation, the most robust guarantees that the 1991 Constitution introduced in favor of indigenous communities, their identity, and their collective property are institutional in nature.

On the one hand, the recognition of indigenous territories as territorial entities (art. 286 Const.), with the types of autonomy to which these generally have a “right” (art. 287 Const.), exercised as provided in an organic law to be enacted “in accordance with the principles of coordination, concurrence, and subsidiarity” (art. 288 Const.). But also, and significantly, with the provisions on Indigenous Territorial Entities (ITES), which specify their special relationship with the form of the State (art. 1 Const.): i) a unitary and decentralized State, by again subjecting to an organic law the establishment of the rules for the formation of ITES and their coordination with other territorial entities (art. 329 Const.); ii) a State with autonomy of territorial entities—in the particular case of ITES—by providing that “indigenous territories shall be governed by councils formed and regulated according to the customs and traditions of their communities,” to exercise a significant list of management, administrative, and budgetary functions (art. 330 Const.). And by including the “right” of ITES—and also of *resguardos* that have not been constituted as ITES—to be beneficiaries of the General Revenue-Sharing System (*Sistema General de Participaciones*) or of part of the national revenues distributed at the territorial level (art. 356 Const.²⁵).

22 In concordance with articles 15.2, 17.2, 22.3, 27.3, and 28.1 of the same Convention.

23 See, for example, CCC judgments T-002/2017, C-208 of 2007, C-030/2008, C-461 of 2008, C-615 of 2009, C-915 of 2010, C-641 of 2012, C-189 of 2022.

24 In the case law, reference has also been made to the United Nations Declaration on the Rights of Indigenous Peoples. Despite its significance, it constitutes a soft-law source of IHRL, more aspirational than binding. See Constitutional Court, judgment T-349/2025, para. 64.

25 In accordance with the constitutional reform introduced by article 2 of Legislative Act No. 1

On the other hand, the special indigenous jurisdiction, one of the constitutional exceptions to the principle of unity of *jurisdictio*. The Constitution provides that the “authorities of indigenous peoples may exercise jurisdictional functions within their territorial scope, in accordance with their own norms and procedures, provided they are not contrary to the Constitution and laws of the Republic,” under the “forms of coordination (...) with the national judicial system” established by law (art. 246 Const.).

Paradoxically, the legislative developments called for by the Constitution to complete the materialization of these institutional guarantees have never been enacted²⁶.

Nonetheless, in the case of the organic law for ITES, so important was the normative materialization in question for the 1991 constituent that a transitional provision authorized the Government, while the aforementioned organic law is enacted, to issue “the necessary fiscal provisions and others relating to the functioning of indigenous territories and their coordination with other territorial entities.” Thus, the absence of formal legislation has turned this transitional authorization into a permanent fixture, whereby it has been the governments (under pressure and demands from indigenous organizations) that have determined the pace of development of indigenous territories as territorial entities²⁷. And, to the extent of their oversight functions, constitutional case law as well.

of 2001, confirmed by subsequent amendments, up to the most recent contained in article 1 of Legislative Act 3 of 2024.

26 This observation does not apply to the right to prior consultation, because its value as a fundamental human right, once incorporated into the Constitution, is not contingent upon any law, whether statutory or ordinary, as is typical for rights of this kind. This does not deny the potential value of a legal regulation containing principles, interpretive criteria, and fundamental rules to strengthen the guarantees and effectiveness of the right, drawing on the jurisprudential lines and lessons learned as well as on consultation experiences shared with the communities.

27 Indeed, it has been decree-laws that have configured the ITEs. Four in the first 33 years of the Constitution’s life (Decree-Laws 1088 of 1993, 1953 of 2014, 632 of 2018, and 252 of 2020), and in its last 2 years, fourteen of great significance. Among them, Decree 488 of 2025, whose purpose is “to issue the necessary provisions for the implementation of Indigenous Territories regarding their governance structures, the procedures for the exercise of constitutional and legal competences and attributions, fiscal norms, the definition of their boundaries, and coordination with other entities and institutions of the State” (art. 1). And 8 decrees (numbered 1367 through 1374 of 2025) by which various Indigenous Territorial Entities were created, ordering the formalization of intercultural agreements signed between the National Government and the Indigenous Councils of eight indigenous territories.

In turn, the absolute legislative omission regarding the law establishing the forms of coordination of the special jurisdiction with other jurisdictions, while it may have reduced the comprehensive capacity of the State's justice system, has not prevented the exercise of the power to administer justice by indigenous authorities, in accordance with the jurisprudential lines set by the Constitutional Court²⁸.

3. TRAJECTORY OF CONSTITUTIONAL CASE LAW ON THE PROTECTION OF INDIGENOUS COMMUNITIES

While the Constitution contains an extensive and varied set of provisions that reflect the 1991 constituent's intent that protection of the guarantees and rights of indigenous communities and their members should exist and be enforceable, constitutional case law has played a decisive role in giving concrete shape to those mandates, through the adjudication of cases involving abstract constitutionality review or concrete review through *tutela* actions²⁹.

Building on the foregoing, this section will briefly present some of the most relevant constitutional doctrines established by the CCC, i) regarding the fundamental rights specific to indigenous communities: autonomy, collective property and territory, prior consultation, and ethno-education; and ii) regarding the constitutional institutional guarantees of indigenous jurisdiction and Indigenous Territorial Entities. Case law whose reasoning is based on these premises: legal pluralism, ethnic and cultural diversity, and the fundamental right to ethnic identity³⁰—that is, to a differentiated identity³¹.

28 In original article 256 of the Constitution, jurisdictional conflicts of competence were resolved by the Superior Council of the Judiciary. Even so, the prevailing interpretation regarding the scope of indigenous jurisdiction vis-à-vis other jurisdictions was determined by the CCC in *tutela* review judgments. With Legislative Act 2 of 2015, the function of resolving such conflicts was transferred to the Constitutional Court (art. 241, no. 11, Const.).

29 The judgments are identified as follows. Those designated with “C” are constitutionality judgments. Judgment designated “T” and “SU” are *tutela* review judgments, except that the former are adopted by a review panel (*sala de revisión*) and the latter, upon request of any of its members, are decided by the Full Bench (*Sala Plena*).

30 CCC, judgment SU-091 of 2023. Reporting Justice Alejandro Linares Cantillo.

31 CCC, judgment C-520 of 2023. Reporting Justice Antonio José Lizarazo Ocampo.

The selection of decisions used here draws primarily on recent judgments and their precedents (foundational or landmark decisions³²) that address legal issues related to such rights and guarantees. The case law deals with jurisdictional conflicts in labor and criminal matters—in the latter case, particularly regarding the prosecution of offenses or crimes involving minors or gender-based violence—the failure of authorities and companies interested in carrying out projects on indigenous territories to conduct prior consultation, and some cases in which conflicts arise between individual fundamental freedoms and rights of community members and the power of indigenous authorities and their own norms, as well as inter-ethnic conflicts.

3.1. INDIGENOUS COMMUNITIES AS COLLECTIVE SUBJECTS OF FUNDAMENTAL RIGHTS

The CCC, from its earliest case law interpreting the Constitution, recognized indigenous communities as subjects of fundamental rights³³. These rights “are attributable to these communities as autonomous collective subjects and not as mere aggregates of their members.” And this is because “one cannot truly speak of the protection of ethnic and cultural diversity and its recognition if, at the constitutional level, substantive legal standing is not granted to the different indigenous communities, which is the only thing that confers upon them the status to enjoy fundamental rights and to demand, by themselves, their protection whenever those rights are violated (Const. arts. 1, 7, and 14)”³⁴.

32 The types of leading cases identified in Colombia by D. López Medina. *El derecho de los jueces*. Bogotá, Legis, Universidad de los Andes, seventh reprint, 2009.

33 See Constitutional Court, Judgment T-380 of 1993, in which constitutional protection was granted to the Embera-Catio Indigenous Community of Chajeredó, against the impacts—contamination, sedimentation, and obstruction of river channels, diminution of flora and fauna—derived from forest exploitation (timber) carried out by private parties without prior State authorization in territory “which constituted the natural infrastructure of the subsistence economy and culture of the natives” (tropical rainforest of the Indigenous *Resguardo*). Reporting Justice Eduardo Cifuentes Muñoz, available at: <https://www.corteconstitucional.gov.co/relatoria/1993/t-380-93.htm>. Reiterated in judgments SU-039 of 1997, SU-383 of 2003, T-769, and T-154 of 2009, among others.

34 Ibid.

The fundamental rights held by indigenous communities are both common and specific.

Common fundamental rights, or those shared with the rights of the majority population (*mestizo* without recognized ethnic identity). Political rights, for example, which in the case of ethnic communities may be claimed by their leaders and by individual members as well as by organizations created for the defense of indigenous peoples' rights³⁵. Or collective rights such as the right to a healthy environment, protected through *tutela* proceedings in its dimension as an individual fundamental right. The latter applies when there is a nexus between harm to or threat against the rights of community members such as life or health (indirect or consequential protection), taking into account the degree of impact as determined by the factual circumstances assessed in each case by the *tutela* judge³⁶.

Specific fundamental rights, grounded in the right to indigenous autonomy and, with it, the rights to prior consultation, collective property, and ethno-education. These are the focus of what follows.

3.1.1. AUTONOMY OF INDIGENOUS COMMUNITIES. PRINCIPLE OF MAXIMIZATION

Among the specific fundamental rights of indigenous communities, the most prominent –as the foundational attribute– is the autonomy of indigenous communities³⁷, linked to the principles of self-determination, self-governance, and ethnic and cultural identity and diversity³⁸.

35 CCC, judgments T-154 of 2009. Reporting Justice Nilson Elías Pinilla Pinilla and T-760 of 2009. Reporting Justice Juan Carlos Henao Pérez, cited in judgment T-305/2014.

36 CCC, judgment T-405 of 1993, Reporting Justice Hernando Herrera Vergara, which granted constitutional protection against the violation of the right to a healthy environment of the Indigenous Community of the Middle Amazon, due to the installation and operations of a radar by a North American military group for DEA operations, under the direction of the General Command of the Colombian Armed Forces, available at: <https://www.corteconstitucional.gov.co/relatoria/1993/t-405-93.htm>.

37 Constitutional Court, judgment T-188 of 1993. Reporting Justice Eduardo Cifuentes Muñoz. And judgment T-518 of 2025. Reporting Justice Jorge Enrique Ibáñez Najar.

38 Two recent decisions illustrate the scope of this recognition. Judgment T-180/2024: The Panel considered that the responsible authority violated the rights to due process and to establish Indigenous Territorial Entities of the Indigenous Councils of Bajo Río Caquetá, Mirití Paraná, and Yaigojé Apaporis, by imposing unjustified administrative barriers; by failing to fulfill the

As noted in the preceding chapter, the fundamental right to the autonomy of indigenous communities finds its constitutional basis in articles 246, 287, 330, 1, and 7 of the Constitution. Therefore, in a *tutela* review case in which the competent jurisdiction for trying and punishing certain offenses committed by members of an indigenous community was at issue, the Court stated that autonomy “is an indispensable element for guaranteeing the existence of indigenous communities as subjects of law”³⁹, which manifests itself in “three spheres of protection, namely: i) an ‘external sphere’ that ‘recognizes the right of communities to participate in decisions affecting them (prior consultation)’ and the ‘political participation of communities in Congress’; and ii) a ‘sphere of internal order,’ which relates to the forms of self-governance and self-determination within indigenous communities”⁴⁰.

This in turn manifests itself in the rights to: i) “Decide their form of government (Const. art. 330)”; ii) “(...) exercise jurisdictional functions within their territorial scope (Const. art. 246)”; iii) “the full exercise of the right of property over their *resguardos* and territories, with the limits established by the Constitution and the law”⁴¹.

Autonomy is thus a foundational constitutional good, from which a range of rights and guarantees of different kinds flow for the community, its norms, authorities, and territory. But also protective claims against intervention by the State, so as to safeguard the richness of their culture and their own developments, evolutions, and adaptations.

The latter is what is referred to as the “principle of maximization of the autonomy of indigenous communities (...) also called the principle of minimization of restrictions on autonomy, (...) [which] is configured as an

duty to guide them regarding the budgetary information they needed to provide to meet legal requirements; and by prolonging the verification stage of the implementation requests, in disregard of a reasonable timeframe. And SU-419/2024, where the CCC, based on the principle of maximization and of State action without harm in the face of intra-ethnic conflicts in the election of their representatives, protected the autonomy, self-governance, and ethnic integrity “of the Arhuaco people against the Ministry of the Interior’s interference in the registration of traditional authorities without considering the disagreement within the communities.”

39 Constitutional Court, judgment T-903 of 2009. Reporting Justice Luis Ernesto Vargas Silva. And judgment T-518 of 2025. Reporting Justice Jorge Enrique Ibáñez Najar.

40 Constitutional Court, judgment T-097 of 2012. Reporting Justice Mauricio González Cuervo.

41 Ibid. This full exercise is understood under the collective property regime, which does not share the same regime as private property and therefore does not qualify as an unrestricted right. Constitutional Court, judgment T-650 of 2017. Reporting Justice Alberto Rojas Ríos.

essential interpretive criterion in the Colombian constitutional order”⁴². This principle seeks “to guarantee the preservation of cultural diversity and legal pluralism” and “that state authorities respect communal decisions regarding governance and justice, provided they do not compromise human dignity or threaten public order”⁴³.

The application of this principle may naturally come into conflict with individual freedoms, where “the problems arising from its exercise have been resolved along a line that favors its maximum possible deployment (*pro libertate* principle)”⁴⁴. However, “with regard to the content and scope of the autonomous governance of indigenous peoples, the Court’s doctrine has also inclined toward maximizing its radius of action (...) (*pro communitas* principle)”⁴⁵. For this reason, it has stated that the application of such principles “must be combined harmoniously,” on a case-by-case basis, “in light of their particularities”⁴⁶, where ethno-cultural rootedness from the perspective of the community and its members plays a decisive role in resolving conflicts. Once such ethno-cultural rootedness is established, the radius of action of indigenous peoples’ autonomy is maximized, given that it enjoys “a significant abstract weight in the balancing of rights”⁴⁷.

Likewise, by virtue of the principle of maximization, “the State must respect and guarantee, to the greatest extent possible, the exercise of self-governance and the administration of justice by indigenous peoples”⁴⁸. That is, state intervention in the internal affairs of these communities “must be exceptional and duly justified only if it is absolutely necessary for the protection of fundamental rights”⁴⁹, or of “principles of superior hierarchy”⁵⁰, that “cannot be guaranteed in any other way”⁵¹. Furthermore, it has given

42 Constitutional Court, judgment T-518 of 2025. Reporting Justice Jorge Enrique Ibáñez Najár.

43 Ibid.

44 Constitutional Court, judgment SU-510 of 1998. Reporting Justice Eduardo Cifuentes Muñoz, paras. 41–42.

45 Ibid.

46 Ibid.

47 Constitutional Court, judgment C-463 of 2014. Reporting Justice María Victoria Calle Correa. And judgment T-518 of 2025. Reporting Justice Jorge Enrique Ibáñez Najár.

48 Ibid.

49 Ibid.

50 Constitutional Court, judgment T-518 of 2025. Reporting Justice Jorge Enrique Ibáñez Najár.

51 Ibid. And judgment T-921 of 2013. Reporting Justice Jorge Ignacio Pretelt Chaljub.

rise to the recognition of “the principle of action without harm (*do no harm*), according to which State authorities are obligated not to cause damage to the way of life, rights, or processes of ethnic peoples”⁵².

More specifically, the Court has stated that such state intervention in the exercise of indigenous autonomy shall proceed only when the following are verified: i) “the existence of a superior interest justifying the measure”; ii) “the necessity of the restriction and the nonexistence of less burdensome measures”; and iii) “the proportionality of the limitation imposed with respect to the rights sought to be protected”⁵³.

This amounts to a strict scrutiny standard that shapes a body of case law protective of indigenous autonomy and at the same time restrictive of the intrusion of the normative system and the authority of the majority society. Its outcomes, however, depend on the superior interest at stake and on whether ethno-cultural rootedness endures.

With the passage of years and the affirmation of autonomy by indigenous communities, the case law has deepened its understanding of the right, identifying other fundamental collective rights—even considered autonomous—as attributes designed “to guarantee the identity and social and cultural integrity of indigenous peoples,” comprising “(i) autonomy and self-determination, and (ii) self-governance”⁵⁴, “by virtue of which it falls to each indigenous people to determine who their traditional authorities and legal representatives are autonomously, without external interference”⁵⁵.

⁵² Constitutional Court, judgment SU-419/2024, para. 133.

⁵³ Constitutional Court, judgment T-518 of 2025. Reporting Justice Jorge Enrique Ibáñez Najar. And judgment T-921 of 2013. Reporting Justice Jorge Ignacio Pretelt Chaljub.

⁵⁴ Constitutional Court, judgment SU-419/2024, para. 133.

⁵⁵ Ibid. An interesting aspect of this decision lay in the fact that, due to the irreconcilable differences among the different families of the community regarding the election, the Court did not issue direct orders but rather orders aimed at having the State accompany the best way in which the involved peoples might resolve their inter-ethnic problems. Also in CCC judgment T-445/22, where the Court granted *tutela* protection for the rights of a community in the face of the national authority’s refusal to register it independently from the *resguardo* to which it had been assigned, without maintaining relationships of cultural or territorial belonging. As a way to protect the right to cultural identity of indigenous communities, the autonomy of indigenous peoples, and the right to self-identification.

3.1.2. THE RIGHTS TO TERRITORY AND COLLECTIVE PROPERTY

The Constitution, together with binding IHRL, has protected the close relationship that indigenous communities have with their ancestral territory and the territory in which they reside⁵⁶. From this, the CCC has developed a significant body of case law regarding: the right to collective territory and the right to collective property⁵⁷.

Indeed, the Court “has recognized that for indigenous peoples, their territory is intimately linked with their physical and cultural existence and survival, as it is where they can pursue a life project in accordance with their culture and develop their true autonomy and cultural identity”⁵⁸. An identity that “originates from, is nourished by, and is necessarily tied to an ancestral territory”⁵⁹.

Based on the constitutional provisions mentioned above, it has referred⁶⁰ to the “right to territory” as the special protection assigned to indigenous

⁵⁶ Before 1991, there existed in Colombian law legal mechanisms that allowed the establishment of rights over indigenous territories, although their development was limited. An exceptional manifestation of what was provided for in them was President Virgilio Barco’s order directing the Colombian Institute for Agrarian Reform to issue Resolution 030 of 1988 to establish the Predio Putumayo Indigenous Resguardo for the indigenous communities of the Amazon, known as “the children of tobacco, coca, and sweet yucca—we are 84 clans of the Uitoto people, 15 clans of the Okaina people, 8 clans of the Muinane people, and 25 clans of the Bora people.” See V. Chavarría. “Una línea de tiempo para conmemorar las luchas por el territorio en la Amazonía” [online]. In *Hacemos Memoria*, Universidad de Antioquia. Available at: <https://hacemosmemoria.org/2023/04/23/una-linea-de-tiempo-para-conmemorar-las-luchas-por-el-territorio-en-la-amazonia/>. Also in M. Von Hildebrand. “El legado de Virgilio Barco en el Amazonas”. In *El Espectador*, November 5, 2022. Available at: <https://www.elespectador.com/ambiente/amazonas/el-legado-de-virgilio-barco-en-el-amazonas/>.

⁵⁷ Constitutional Court, judgment T-081 of 2025. Reporting Justice Juan Carlos Cortés González. On the vicissitudes of the concept of indigenous territory, see Santamaría Ortiz, Alejandro. *Territorio indígena*. Bogotá, Universidad Externado de Colombia, 2022; and Burgos Guzmán, Filipo. *La libre determinación indígena: territorio, justicia e identidad*. Bogotá, Universidad Externado de Colombia, 2025, pp. 58–86.

⁵⁸ Ibid.

⁵⁹ Constitutional Court, judgment T-530 of 2024. Reporting Justice Juan Carlos Cortés González.

⁶⁰ Constitutional Court, judgment T-106 of 2025. Reporting Justice Diana Fajardo Rivera, once again a foundational judgment that protects more than 30 indigenous peoples of the Amazon against mercury contamination derived from gold mining. Through the *tutela*, it ordered the suspension of mining licenses, the decontamination of water sources, and the guarantee of cultural and territorial preservation of the affected communities.

territories, “whether as *resguardo* land, or by ordering their constitution as Indigenous Territorial Entities; and by attributing to them the imprescriptible, inalienable, and non-attachable character of *resguardo* lands”⁶¹. This, insofar as “the indigenous collective territory was elevated to constitutional rank, with a special regime that protects the right of indigenous peoples to use the lands they have ancestrally occupied, in such a way that they may freely exercise their customs, traditions, and practices, as a guarantee of the principle of ethnic and cultural diversity”⁶².

And pursuant to ILO Convention 169⁶³, the CCC has identified the right of collective property over the lands and territories of indigenous communities⁶⁴ as a fundamental right but of a collective nature, “*and not (...) an individual one, as understood in classical civil law*”⁶⁵. Underlying this postulate “lies a conception of mutual belonging between the human being and the territory, contrary to the idea under private law that conceives of land as an object of disposition, appropriation, use, and abuse”⁶⁶. At the same time, it constitutes “a guarantee of maximization of the rights to autonomy and self-determination, to ethnic and cultural integrity and identity, as well as to the exercise of self-governance and collective survival”⁶⁷.

The right to collective property comprises: “(i) the right to establish *resguardos*;

“(ii) the protection of the territory includes the regularization and protection against acts of third parties through occupations and other acts;

61 Ibid. It should be highlighted that the foundational nature of the decision lay in determining that “the vindication of the identity, thought, or knowledge and, in general terms, the culture of the Jaguares del Yuruparí, including their conception of the management of life and territory,” made “a comprehensive understanding of the problems raised necessary.” For this reason, the *tutela* reasoning was drafted in dialogue with the plaintiff indigenous authorities, thus dividing the analysis of the legal issues “in the form of books or *trees* of study: the Blue Book or the tree of life, on cultural identity and territory; the Green Book or the book of waters and their impacts, on mining and the right to a healthy environment; and the Yellow Book or the book of food and well-being, on access to health and food security. Finally, a return path was traced with conclusions and remedies in the Root Book.” Ibid., summary of the decision and paras. 791–813.

62 Constitutional Court, judgment T-737 of 2017. Reporting Justice Alejandro Linares Cantillo.

63 Arts. 13 and 14.

64 Constitutional Court, judgment T-955 of 2003. Reporting Justice Álvaro Tafur Galvis.

65 Constitutional Court, judgment T-445 of 2022. Reporting Justice Jorge Enrique Ibáñez Najar. And judgment C-389 of 2016. Reporting Justice María Victoria Calle Correa.

66 Constitutional Court, judgment T-106 of 2025. Reporting Justice Diana Fajardo Rivera.

67 Constitutional Court, judgment T-248 of 2024.

(iii) the protection of this right is a means to guarantee the ethnic integrity and survival of indigenous peoples (...)”⁶⁸. And in the case of indigenous communities displaced by armed conflict and violence, “(iv) the guarantee that the State undertakes the necessary steps” so that, if return to their territories is not possible, they may be relocated “in a consensual manner with those affected, in a territory that allows them to continue the development of their traditions”⁶⁹.

Finally, through the “expansive effect of territory”⁷⁰, the CCC has emphasized that “the constitutional protection of territory is not restricted to lands collectively adjudicated to ethnic groups, but also encompasses places of religious, environmental, or cultural significance for them, as well as the entirety of the habitat they occupy or use in any other manner, even if they fall outside the physical boundaries of collective titles”⁷¹.

4. PRIOR CONSULTATION

The right to prior consultation has been recognized by the Constitutional Court as a “right of a fundamental nature”⁷², which “is incorporated via the *bloc de constitutionnalité*, through various instruments of international human rights law (hereinafter IHRL), among which ILO Convention 169 (...), the

68 Among the ways in which the right is realized are “*the possibility of establishing, expanding, or regularizing indigenous resguardos, requesting the acquisition of lands for indigenous cabildos and parcialidades, or the adoption of protective measures for ancestral territories, among others.*” Constitutional Court, judgment T-081 of 2025. Reporting Justice Juan Carlos Cortés González.

69 Constitutional Court, judgment T-081 of 2025. Reporting Justice Juan Carlos Cortés González. See, for example, the protection of the territory of the Kofán people against invasions, judgment T-387 of 2013. Reporting Justice María Victoria Calle Correa; recognition of the *Embera Dobida de Eyakera* indigenous *resguardo*, judgment T-433 of 2011.

70 Constitutional Court, judgment T-106 of 2025. Reporting Justice Diana Fajardo Rivera. This does not mean that the decisions adopted to protect ethnic communities are free from controversy, as revealed by the annulment of Presidential Decree 1500 of 2018, by which “the ancestral territory of the Arhuaco, Kogui, Wiwa, and Kankuamo peoples of the Sierra Nevada de Santa Marta (SNSM) was redefined, expressed through the system of sacred spaces of the ‘Black Line,’ as a traditional sphere of special protection, spiritual, cultural, and environmental value, in accordance with the principles and foundations of the Law of Origin” and constitutional norms. See Council of State. First Section. Judgment of February 12, 2026. Reporting Councilor: Germán Osorio Cifuentes. Case No. 11001-03-24-000-2019-00262-00.

71 Constitutional Court, judgment C-371 of 2014. Reporting Justice Jorge Ignacio Pretelt Chaljub.

72 Constitutional Court, judgment T-129 of 2011. Reporting Justice Jorge Iván Palacio Palacio.

International Covenant on Civil and Political Rights (...), the International Covenant on Economic, Social and Cultural Rights (...), and the American Convention on Human Rights stand out”⁷³. Its value and specific weight are such that the *tutela* action has been considered the primary mechanism for its protection in cases of threat or non-compliance⁷⁴.

In accordance with Article 6 of ILO Convention 169, the right to prior consultation represents the obligation for the Government to “consult with the peoples concerned, and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.” An echo of this right appears in the Constitution when it provides that “[t]he exploitation of natural resources in indigenous territories shall be carried out without detriment to the cultural, social, and economic integrity of indigenous communities. In the decisions adopted regarding such exploitation, the Government shall promote the participation of the representatives of the respective communities” (art. 330, paragraph, Const.).

Indeed, viewed from the standpoint of ordinary constitutional law, prior consultation represents a specific form of the political right to participation. What distinguishes it is that it constitutes a reinforced political right specific to ethnic communities, the exercise of which is not individual but collective and presupposes greater involvement by their authorities. It is further distinguished by the fact that its fundamental character not only seeks to protect collective property or indigenous territories, but goes further, aiming to preserve ethnic, social, economic, and cultural integrity and subsistence⁷⁵, as well as “a guarantee of environmental justice”⁷⁶.

73 Constitutional Court, judgment SU-123 of 2018. Reporting Justices Alberto Rojas Ríos and Rodrigo Uprimny Yepes.

74 Constitutional Court, judgments SU-039 of 1997 and T-129 of 2011. The ordinary course would be for administrative remedies and judicial review mechanisms before the supreme tribunal of administrative litigation (Council of State) to proceed as principal remedies, with the *tutela* action as the subsidiary mechanism. See art. 6, Decree 2591/1991.

75 Constitutional Court, judgment SU-039 of 1997. Reporting Justice Antonio Barrera Carbonell. This is the foundational judgment of the jurisprudential line on the right to prior consultation. It granted constitutional protection for the rights of the U’wa community settled in the area of specific and local influence of a hydrocarbon exploitation project that had an environmental license but had not adequately complied with the requirement of community participation and consultation. Available at: <https://www.corteconstitucional.gov.co/relatoria/1997/su039-97.htm>

76 Constitutional Court, judgment T-021 of 2019. Reporting Justice Alberto Rojas Ríos, in which,

For this reason, the CCC has clarified that “any type of act, project, work, activity, or initiative that seeks to intervene in the territories of ethnic communities, regardless of the scale of the impact”⁷⁷, including public treaties⁷⁸, must carry out prior consultation, in observance of a set of rules, among which are:

- (i) The conception of prior consultation as a fundamental right is the guiding criterion for its projection and implementation. It cannot “be equated with mere administrative procedures, informational meetings, or similar proceedings”⁷⁹.
- (ii) Reference is made to free and informed prior consultation⁸⁰. The objective is to ensure that the community has full knowledge of the project, its execution, the possible impact on the community regarding its livelihood and social, cultural, economic, and political cohesion, and can weigh the advantages and disadvantages of the project, be heard regarding its concerns, and present claims in defense of its interests. That is, that the indigenous community has the opportunity to express its agreement or disagreement with the project through its authorized

based on Advisory Opinion OC-23/17, the Court highlighted that “indigenous peoples have a special vulnerability to environmental degradation due to their spiritual and cultural relationship with their territories and their economic dependence on natural resources. This is a differentiated impact that this sector of the population may experience, so that this factor must be determinative when identifying a direct impact.”

77 Constitutional Court, judgment T-129 of 2011. Reporting Justice Jorge Iván Palacio Palacio. Through which protection was granted as requested by members of a *resguardo* of the Embera Katío ethnic group, against various State entities, for the violation of the right to prior consultation in the context of problems associated with “(a) construction work on a road that would cross the *resguardos*; (b) the Colombia-Panama electrical interconnection project; and (c) procedures relating to a gold mining concession,” taking into account that the existence of a risk of displacement due to security problems and a need for protection was determined. Available at: <https://www.corteconstitucional.gov.co/relatoria/2011/t-129-11.htm>

78 As was observed in the “International Convention for the Protection of New Varieties of Plants,” of December 2, 1961, approved through Law 1518 of 2012, insofar as the measures established therein and in its development instruments, “directed at protecting the rights of breeders, in the sense of granting to the creators of new plant varieties exclusivity in their exploitation for a determined period, bear an evident and profound relationship of connection with the identity of indigenous and Afro-Colombian communities and with their possibilities of survival.” CCC, judgment C-1051/2012, para. 9.16.

79 Constitutional Court, judgment T-129 of 2011. Reporting Justice Jorge Iván Palacio Palacio.

80 CCC, judgment C-389 of 2016. Reporting Justice María V. Calle Correa.

representatives, as well as to conceive formulas that allow for reaching an accord with the State⁸¹.

- (iii) “It is necessary to establish relationships of effective communication based on the principle of good faith, in which the specific circumstances of each group and the importance of the territory and its resources for that group are weighed (...)”⁸².
- (iv) In accordance with the principle of maximization of autonomy, in the development of prior consultation, it is “mandatory to carry out a joint exercise of balancing the interests at play and to subject the rights, proposed alternatives, and interests of the affected ethnic groups only to those limitations that are constitutionally imperative”⁸³.
- (v) No fixed or single deadline should be established to complete the consultation; rather, the timeframe to be envisaged must be adopted “under a differential approach strategy in accordance with the particularities of the ethnic group and its customs”⁸⁴.
- (vi) On the contrary, it is “mandatory for the State to define the procedure to be followed in each prior consultation process, particularly through a pre-consultation and/or post-consultation process to be carried out by mutual agreement with the affected community and other participating groups”⁸⁵.
- (vii) And it is “mandatory to guarantee that the benefits entailed by the execution of the work or the exploitation of resources are shared equitably. As well as compliance with mitigation and compensation measures for damages caused”⁸⁶.

In addition, “[i]n light of the principle of proportionality,” the Court has distinguished different levels of “prior consultation as a manifestation of the right to participation,” which at their extremes are the level of “free,

81 CCC, judgment SU-039 of 1997.

82 Constitutional Court, judgment T-129 of 2011. Reporting Justice Jorge Iván Palacio Palacio.

83 CCC, judgment T-129/2011.

84 Ibid.

85 Ibid.

86 Ibid.

prior, and informed consent”⁸⁷, the level of “basic participation,” and in the middle, the level of “prior consultation” proper.

Consultation requires the free and informed acceptance or consent of the community when the measure has the capacity to produce an “intense impact.” As an exception, it is reserved only for specific events. For the time being: “i) the transfer or relocation of the indigenous or tribal people from their place of settlement; ii) measures involving a high social, cultural, and environmental impact that jeopardize their subsistence; or iii) those related to the storage and disposal of hazardous-toxic-materials on their lands and territories”⁸⁸. And iv) also when it is proven that all the less harmful alternatives considered “are detrimental and that the intervention would lead to the annihilation or disappearance of the groups, the protection of the rights of the ethnic communities shall prevail under the *pro homine* interpretation principle [...]”⁸⁹.

The basic participation level applies when “there is no direct impact on the community, a situation in which the basic participation standard must be applied”⁹⁰, although properly speaking, the right to prior consultation is no longer at issue here⁹¹.

In the center, prior consultation proper, which shall proceed in cases where the type of direct impact exists that activates the right’s guarantees for the affected communities⁹². What characterizes it is that while it is indispensable, at the end of the process, it does not require the consent of the indigenous community in question. This makes consultation more a right to a process than a right to a result—a procedural right or a right to means—meaning that it is satisfied by conducting the informed and differentiated dialogues seeking an agreement between the State and the communities, but not necessarily by reaching that sole outcome⁹³. And although the Court

87 ccc, judgment SU 123/2018.

88 In ccc, judgment SU 123/2018, para. 17.10.

89 Constitutional Court, judgment T-129 of 2011. Reporting Justice Jorge Iván Palacio Palacio.

90 Ibid.

91 It refers instead to the right to participation that authorities and local communities have in accordance with the Constitution, arts. 40 no. 3, 287, 313 no. 7, Const., over the matters or competences that cover their interest and territorial scope. See CCC, Judgment C-123 of 2014. Reporting Justice Alberto Rojas Ríos.

92 Ibid.

93 Conversely, the earliest decisions regarding the right appeared to lean toward regarding it as a

usually frames the violation or necessary protection of the right to prior consultation alongside the right to administrative due process, it is the latter that materializes the former⁹⁴.

That said, it is a qualified procedure, as it departs from a premise: “that the community has active and effective participation in the decision to be adopted by the authority, which, to the extent possible, should be agreed upon or negotiated”⁹⁵. For this reason, the CCC has insisted that “the search for free, prior, and informed consent is mandatory,” with the accompaniment of the oversight entities that constitutionally have the function of defending human rights⁹⁶ and even of “international organizations whose mandates are oriented toward preventing and protecting the rights of the Nation’s ethnic communities”⁹⁷. And in recent case law, it has further required that in prior consultation procedures, not only the State but also the companies interested in the projects that develop intervention measures on indigenous territories act with reinforced due diligence to make the right to prior consultation effective⁹⁸.

Notwithstanding, the Court has made clear that, as a general rule, when “agreement or negotiation is not possible,” the decision of the state authority prevails. Naturally, such a decision “must be free of arbitrariness and authoritarianism” and to that extent: i) “it must be objective, reasonable, and proportionate to the constitutional purpose that requires the State to protect the social, cultural, and economic identity of the indigenous community”; and ii) “the necessary mechanisms must always be arranged to mitigate, correct, or restore the effects that the authority’s measures produce or may generate to the detriment of the community or its members”⁹⁹.

For indigenous autonomy or self-determination, the right to prior consultation is, without question, a conquest of post-1991 Colombian constitutionalism, having fostered the strengthening of indigenous organizations, the

right to a result, due to the prevalence of the right to cultural integrity. Constitutional Court, judgment T-380 of 1993. Reporting Justice Eduardo Cifuentes Muñoz.

94 See CCC, judgments T-129 of 2011, SU-123 of 2018, and T-472 of 2024.

95 SU 039/1997.

96 *The Ombudsman’s Office (Defensoría del Pueblo)*, art. 282 para. 1 Const. and *the Office of the Inspector General (Procuraduría General de la Nación)*, art. 277 no. 2 Const.

97 T-129/2011.

98 See CCC, judgment T-012 of 2025, T-472 of 2024, T-433/2023.

99 CCC, judgment SU 039/1997.

recognition and participation of their communities through their authorities as decisive agents in the political, economic, and environmental life of the Colombian State¹⁰⁰. With the guarantees, entitlements, and procedural safeguards of inclusive and differentiated due process discussed above, the right to prior consultation represents a definitive piece of the constitutional protection system for indigenous peoples. Both because it allows them to participate meaningfully in State decisions that concern them, and because the effective conduct of the consultation conditions the validity of those decisions.

This positive assessment, however, calls for a couple of qualifications.

The first is that the extensive development of constitutional case law on prior consultation not only reveals the important constitutional judicial guarantee of the right, but also the multiple impacts that indigenous communities have been enduring on their collective property and, from there, on their autonomy, cultural identity, and existence.

Powerful fiscal revenue and business profit interests—above all foreign ones—loom over indigenous territories. These materialize in the variety of measures adopted by public authorities, against which indigenous authorities have brought constitutional actions that the Court has heard, usually finding merit in their claims¹⁰¹, on account of the disregard or deficient guarantee of the right to prior consultation. This refers to public treaties, laws, administrative licenses, concessions, titles, and contracts that are approved, enacted, granted, entered into, or renewed, which in turn are based on clear constitutional mandates, principles, and attributions¹⁰². A tension that constitutional judges can at best contain but never fully dissolve.

The second is that the transformative effectiveness of exercising the right to prior consultation is unclear. Although progress in organization and

100 As of June 2022, the Directorate of the National Authority for Prior Consultation reported that 7,545 prior consultations had been carried out. See <https://www.mininterior.gov.co/micrositios/direccion-de-autoridad-nacional-y-consulta-previa/la-dancp-ha-realizado-7-545-procesos-consultivos-en-el-territorio-nacional/>

101 Particularly when claimed through *tutela* proceedings.

102 Such as the internationalization of the State's relations (art. 224 Const.), the State's ownership of subsoil natural resources (art. 332 Const.), reasons of public utility, sovereignty, or social interest (arts. 58 and 365 Const.), the general direction of the economy in accordance with the law by the State (art. 334 Const.), or the principles of public administration (art. 209 Const.) and fiscal management (art. 267 Const.).

empowerment is recorded, along with improvements in access to services, deep gaps remain with respect to the majority population¹⁰³. These data may suggest the presence of factors both internal and external to the consultation processes that undermine their legitimacy, objectives, and purpose, such as corruption among participating party representatives and the alarming influence of criminal organizations¹⁰⁴.

5. RIGHT TO ETHNO-EDUCATION

The final specific right of indigenous communities to be discussed here is “the right to adequate education in accordance with their values, their culture, and their way of life. This means that indigenous peoples in general and their members in particular have the right to receive from the State a special education, adjusted to the requirements and characteristics of the different groups that inhabit the national territory”¹⁰⁵.

The right-holders are individuals (members of indigenous peoples) and communities. For them, the content of ethno-education encompasses positive entitlements, claim-rights to state provision, and rights to formal and substantive equality. And for the State, obligations of action and provision¹⁰⁶, so that the ethno-educational system to be established meets five

103 DANE. Statistics. Differential Approach. Ethnic Approach. 2022. See <https://www.dane.gov.co/index.php/estadisticas-por-tema/enfoque-diferencial-e-interseccional/autorreconocimiento-etnico>

104 See Transparencia por Colombia. *Riesgos de corrupción en el Sector de Hidrocarburos en Colombia*. 2023. Available at: <https://transparenciacolombia.org.co/wp-content/uploads/2023/08/Estudio-riesgos-de-corupcion-en-el-sector-hidrocarburos.pdf>. Also Ministerio de Justicia y del Derecho. *Crimen organizado en Colombia. Estudio sobre factores, incidencias y acción estatal*. 2025. Available at: <https://repositorio.minjusticia.gov.co/politica-criminal/Biblioteca/Crimen%20Organizado.pdf>.

105 Constitutional Court, judgment C-208/2007.

106 This comprises, in accordance with the Constitution and ILO Convention 169, the right recognized to members of ethnic groups to: i) “receive education and instruction that respects and develops their cultural identity, bilingual in communities with linguistic traditions”; and ii) “that the education programs and services intended for such peoples be regulated by law, and be developed and applied in cooperation with their most representative authorities, with the purpose of responding to their particular needs, and shall encompass their history, their knowledge and techniques, their value systems, and all other social, economic, and cultural aspirations.” Constitutional Court, judgment C-208/2007. “Furthermore, the State has the obligation to guarantee that the education provided in communities with their own linguistic traditions be bilingual, that is, in Spanish and the indigenous language.” Constitutional Court, judgment T-530/2024.

basic principles, namely: “(i) interculturality¹⁰⁷, (ii) community participation¹⁰⁸, (iii) flexibility¹⁰⁹, (iv) progressiveness¹¹⁰, and (v) autonomy”¹¹¹⁻¹¹².

To understand its nature, the CCC has recognized ethno-education as a species of the common right to education, from which its fundamentality derives in a twofold manner: “as a right connatural to all human beings, among whom indigenous peoples are counted, and also because it forms an integral part of the right to cultural identity (...)”¹¹³. In this order, “the provision of the service must develop the identity of the peoples and respect the cultural diversity of the Nation (...) [for] ethnic communities cannot be subjected to education plans or programs designed in a general manner, without considering their cultural specificities”¹¹⁴.

Ethno-education may be regarded as the specific right “indispensable for the survival and subsistence of peoples; [which] preserves cultural identity; [and furthermore] seeks to overcome structural inequalities and discrimination and constitutes an essential manifestation of their autonomy”¹¹⁵. Indeed,

107 Art. 2, Decree 804 of 1995: “(...) the capacity to know one’s own culture and other cultures that interact and are mutually enriched in a dynamic and reciprocal manner, contributing to embodying in social reality a coexistence based on equal conditions and mutual respect.”

108 Ibid. “(...) the capacity of ethnic groups to guide, develop, and evaluate their ethno-educational processes, exercising their autonomy.”

109 Ibid. “(...) the permanent construction of ethno-educational processes, in accordance with the cultural values, needs, and particularities of the ethnic groups.”

110 Ibid. “(...) the dynamic of ethno-educational processes generated by research, which, when coherently articulated, are consolidated and contribute to the development of knowledge.”

111 Ibid. “(...) the right of ethnic groups to develop their [own] ethno-educational processes.”

112 Pursuant to judgment C-054 of 2013. Taken from judgment T-245/2021.

113 Ibid.

114 Constitutional Court, judgment T-530 of 2024. Reporting Justice Juan Carlos Cortés González, through which a *tutela* review resolved an intercultural conflict that, in addition to affecting individual liberties, compromised the right to education of non-indigenous children in the only school in the area, run by the traditional authorities of the Indigenous *Resguardo*. It employs the concept of “prospective *vía de hecho*” (*manifest error of law*), which seeks to have the constitutional judge intervene in the tension between principles and cultures and foster intercultural dialogue. In that sense, it ordered that specific coordination actions be adopted between the indigenous authorities and the Municipality to reduce conflict and therefore the attacks against life, peace, physical and moral integrity, and freedoms of expression. Conversely, it did not protect the right to education of non-indigenous students, since the right to ethno-education of ethnic communities and their members must prevail. Available at: <https://www.corteconstitucional.gov.co/relatoria/2024/t-530-24.htm>.

115 SU-245/2021, para. 169.

the objective of the right is “to protect the legacy of traditional knowledge of the communities and to allow the preservation and dissemination of their own history, culture, language, and religion”¹¹⁶. For which reason “it constitutes a fundamental right with a differential approach for the members of indigenous communities (...) [and] forms part of the normative content of the right to diversity and cultural identity, which also has a *ius*-fundamental status”¹¹⁷.

It bears noting that these important pronouncements by the CCC, which have underpinned both the objective and the case-by-case protection of the right to ethno-education, have not been matched by the legislative and administrative measures necessary for its consolidation. For despite the Court’s efforts¹¹⁸, the intensely service-oriented (*prestacional*) character of the right requires, in addition to judicial remedies and progress in agreements with the communities, normative, institutional, and public policy development, with budgetary allocations and genuine political will, which have thus far been insufficient¹¹⁹.

6. CONSTITUTIONAL INSTITUTIONAL GUARANTEES

The institutions established by the Constitution to guarantee the rights of the communities and their members from within have been addressed in numerous CCC judgments and have given rise to complex lines of case law.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ This is clearly illustrated in the trajectory of judgments C-208/07, which urged the legislature to regulate aspects related to the ethno-education service, revisited and readjusted in judgments SU-245/21 and T-140/2025, as the legislative omission had not yet been remedied.

¹¹⁹ It should be noted that, in the absence of the foregoing, the current government, rather than submitting the project to the Congress of the Republic, exercising the attributions set forth in Transitory article 56 of the Constitution, enacted Decree 481 of 2025, “by which the Indigenous Peoples’ Own Educational System (SEIP) of the indigenous peoples and communities of Colombia is recognized and established.” A decree that, moreover, has already been used as a basis for State obligations in constitutional case law (Constitutional Court, judgments T-442/2025 and T-011/2026).

6.1. INDIGENOUS JURISDICTION

As part of the political and legal autonomy of indigenous communities, the Colombian Constitution created a special indigenous jurisdiction as a constitutional power conferred upon indigenous authorities to exercise jurisdictional functions within their territorial scope, in accordance with their own norms and procedures. However, the exercise of indigenous autonomy is subject to the condition that it not be contrary to the Constitution and the law (art. 246 Const.). Historically, constitutional case law has not given a literal interpretation of this provision, in order to make indigenous autonomy possible.

The delimitation of the scope of this jurisdiction—which reinforces the autonomy of indigenous communities without undermining the principal norms of ordinary law—was only minimally addressed by the Constitution, which provided that “[t]he law shall establish the forms of coordination of this special jurisdiction with the national judicial system” (art. 246, in fine, Const.). Even so, as announced above, 35 years later this law does not exist, which makes the importance of constitutional case law in this area all the more understandable.

Thus, the CCC soon highlighted the four central elements of indigenous jurisdiction in the constitutional order, which are: On one hand, i) the possibility that the indigenous peoples have their own judicial authorities, and ii) the power of these peoples to establish their own norms and procedures, which make up the core of autonomy granted to indigenous communities. And on the other hand, “iii) the subjection of such jurisdiction and norms to the Constitution and the law, and iv) the competence of the legislature to establish the form of coordination of the indigenous jurisdiction with the national judicial system,” which constitute “the mechanisms for integrating indigenous legal orders with the national ones”¹²⁰.

The tension between diversity and unity is plain to see. For this reason, constitutional case law has emphasized the need for the State to make balanced decisions without imposing a particular worldview, “otherwise, [it] would violate the pluralist principle (arts. 1 and 2 Const.) and the equality

120 CCC, judgment C-139-96. Available at: <https://www.corteconstitucional.gov.co/relatoria/1996/C-139-96.htm>

that must exist among all cultures (arts. 13 and 70 Const.)¹²¹. According to the Court, ‘only with a high degree of autonomy is cultural survival possible’¹²² (...) [and this] may only be limited when ‘its exercise disregards constitutional or legal norms of greater importance than the principle sought to be restricted (Const., articles 246 and 330)’^{123–124}.

Also from its earliest case law, it identified “four rules of interpretation for resolving the conceptual differences and value conflicts that may arise in the practical application of diverse legal orders, such as indigenous jurisdiction”¹²⁵: These are: (i) “the greater the preservation of their customs and traditions, the greater the autonomy”¹²⁶; therefore, the power of jurisdiction depends on the strength of traditions, customs, and indigenous authority, given the situation of ethnic communities that have suffered various degrees of cultural destruction–loss of social coercion–where the laws of the Republic govern them to a greater extent; (ii) “constitutional fundamental rights are the mandatory minimum of coexistence for all individuals”¹²⁷; (iii) “mandatory norms (of public order) prevail over the customs and traditions of indigenous communities, provided they directly protect a constitutional value superior to the principle of ethnic and cultural diversity”¹²⁸; and (iv)

¹²¹ Ibid.

¹²² Constitutional Court, Judgment T-349 of 1996.

¹²³ Ibid.

¹²⁴ Constitutional Court, judgment T-379 of 2024, para. 115. Reporting Justice Paola Andrea Meneses Mosquera. In this case, a decision by an indigenous authority was analyzed as a judicial judgment, which was found to have incurred in organic, substantive, and direct constitutional violation defects, since it had convicted community members for conduct equivalent to forced disappearance, also in violation of the due process of those implicated. Available at: <https://www.corteconstitucional.gov.co/relatoria/2024/t-379-24.htm>

¹²⁵ Ibid. It reiterates judgment T-009 of 2007.

¹²⁶ This fundamental principle originates from judgment T-254 of 1994. Reporting Justice Eduardo Cifuentes Muñoz. In this case, the Court granted *tutela* protection for the rights of a member of an indigenous community against the sentence of banishment that the community’s authorities had imposed on him and his family for having engaged in prohibited conduct. Although the Court recognized the power to impose sanctions, these could not violate the non-derogable fundamental rights protected by the Constitution.

¹²⁷ Constitutional Court, judgment T-379 of 2024, para. 115. Reporting Justice Paola Andrea Meneses Mosquera. Because fundamental rights are a substantive limit to the principle of ethnic and cultural diversity, CCC, judgment T-254 of 1994.

¹²⁸ Ibid.

“the customs and traditions of an indigenous community prevail over default legal norms”¹²⁹.

To these interpretive criteria, other more explicit ones have been added that operate as boundary guarantees for indigenous jurisdiction and legal autonomy. For example, “the protection of the core of non-derogable rights”¹³⁰, “the universal human rights system”¹³¹, “the prohibition of torture (which must be interpreted through the lens of diversity) (...) [and] the prohibition of servitude”¹³². Applied, among others, in cases involving the possible violation of freedom of worship¹³³ and labor rights of a pregnant woman¹³⁴, fundamental rights of children and adolescents¹³⁵, violence against women¹³⁶ –including forced disappearance¹³⁷– and violation of the right to due process of the accused person¹³⁸.

¹²⁹ Such as civil laws that grant broad autonomy of private will. *Ibid*.

¹³⁰ Constitutional Court, judgment T-518 of 2025. Reporting Justice Jorge Enrique Ibáñez Najar. And judgment T-349 of 1996. Reporting Justice Carlos Gaviria Díaz.

¹³¹ *Ibid*.

¹³² Constitutional Court, judgment SU-091 of 2023. Reporting Justice Alejandro Linares Cantillo.

¹³³ For example, in judgment SU-510/1998, where the CCC in full bench reviewed the *tutela* filed by an evangelical church and individual indigenous persons against the community to which the latter belonged, on account of the restrictions imposed on their preaching and practices in indigenous territory. The Court confirmed the lower court decisions, in the sense of protecting the freedom of worship of the community members and recognizing the community’s right to collective property and the authority to limit the entry of church members who were outsiders to the community and the conduct of collective worship practices in its territory, as a means of protecting its customs and traditions.

¹³⁴ Highlighted through judgment T-518/2025, in which the CCC protected the fundamental rights to human dignity and to reinforced job stability of an indigenous woman who was pregnant, violated by the Asociación de Cabildos Indígenas del Norte del Cauca – ACIN Cxhab Wala Kiwe, when it forced her to undergo a spiritual rite alien to her customs and did not renew the well-being agreement under which she provided services to the association, despite being aware of her pregnancy. Notwithstanding the recognition of the Special Indigenous Jurisdiction for the resolution of disputes arising from the commitments assumed by the parties, “insofar as the protection of other fundamental guarantees of the plaintiff is involved, such as the right to live a life free of discrimination,” the Court ruled with the objective of “guaranteeing the protection of the plaintiff’s fundamental rights.” And as a remedy, it ordered the adaptation of the community’s own law to the non-derogable principles of the Constitution.

¹³⁵ Constitutional Court, judgment T-443 of 2018. Reporting Justice Gloria Stella Ortiz Delgado.

¹³⁶ Constitutional Court, judgment SU-091 of 2023. Reporting Justice Alejandro Linares Cantillo.

¹³⁷ Constitutional Court, judgment T-379 of 2024. Reporting Justice Paola Andrea Meneses Mosquera.

¹³⁸ Constitutional Court, judgment T-098 of 2014. Reporting Justice Luis Ernesto Vargas Silva.

Regarding legal autonomy, a recent decision has specified the importance that its guarantee cannot alter either the system of sources or the norms that form part of the Constitution, although it can reflect the normative pluralism that strengthens cultural identity¹³⁹.

The principle of coordination, ultimately, “does not imply the subordination of one jurisdiction to another, but rather a mechanism of inter-jurisdictional dialogue to guarantee the protection of fundamental rights. This dialogue leads to the integration of the various judicial authorities involved in a dispute (...) it implies the creation or establishment of inter-ethnic spaces of understanding, judicial and/or extrajudicial, aimed at integrating and harmonizing the different ways of conceiving and applying justice in the territories where indigenous peoples have historically lived”¹⁴⁰. This formula of dialogue is proposed both among different indigenous authorities and between these and the ordinary judicial authorities.

Finally, the CCC has progressively crystallized in its case law the four “factors or elements that activate or determine the scope of indigenous justice competence in a specific case”¹⁴¹, which are: “(i) personal, which verifies ‘the real cultural identity of the subject, in order to determine their

139 Constitutional Court, judgment C-254 of 2025. Reporting Justice Carolina Ramírez. In this case, the provision of Decree-Law 1094 of 2024 granting environmental management competence to indigenous authorities was examined, particularly the provision recognizing that the norms for environmental and territorial protection and for indigenous economies, intellectual property, collective rights, and biocultural rights, issued “by indigenous authorities, from their jurisdictional autonomy (...) shall prevail and shall form part of the intercultural legal bloc of constitutionality.” This, in the plaintiff’s view, violated the principle of constitutional supremacy and the nature of the *bloc de constitutionnalité*. The Court reconciled the principles of legal pluralism and the unity of the Colombian legal order, by construing it as a guarantee of legal autonomy when referring to an intercultural legal bloc. What was found unconstitutional was the attribution of its prevailing and constitutional character, inasmuch as such expressions denote a hierarchical superiority and “unequivocally link indigenous norms with the constitutional sphere, creating ambiguity with the *bloc de constitutionnalité* and suggesting that such norms are part of the constitutional order.” Ibid., summary of the judgment.

140 Constitutional Court, judgment T-518 of 2025. Reporting Justice Jorge Enrique Ibáñez Najar. See also judgment T-522 of 2016, T-368 of 2023.

141 Ibid. And judgment C-463 of 2014. Reporting Justice María Victoria Calle Correa. In this decision, a provision of Law 89 of 1890 was adjudicated, which attributed to the mayors of the municipal district to which the communities belong the authority to resolve disputes between indigenous persons of the same community, or between them and the *Cabildos*, regarding the use of *resguardos* or the boundaries of the portions they enjoy, declaring it unconstitutional.

belonging to a particular community”¹⁴²; (ii) territorial, which “presupposes that the judge must evaluate the geographical location of the unlawful or socially harmful acts under investigation, since, in principle, an indigenous community can only try those that occur within the territorial scope of the *resguardo*”¹⁴³ (a broad concept of territory)¹⁴⁴; (iii) objective, which “refers to the nature of the legal interest affected by the conduct under investigation, in order to determine whether the interest of the proceedings falls exclusively within the indigenous community or the majority society”¹⁴⁵; and (iv) institutional, or the existence of “a system of its own law made up of traditional customs and practices and procedures that are known and accepted”¹⁴⁶.

It must lastly be noted that indigenous jurisdiction has the most robust system of judicial protection guarantees among all the other rights and institutions protecting the autonomy of indigenous communities. Since 2015, its safeguarding operates not only through abstract or concrete constitutionality review (via *tutela* actions), but also through the function assigned to the CCC to hear positive or negative jurisdictional conflicts. The substantive and

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid. In this element, there are sub-rules: “[R]uling C-463 of 2014 summarized the following relevant sub-rules of this element: (i) If the affected legal interest or its holder belongs exclusively to the indigenous community, the objective element indicates that the case must be tried by the Special Indigenous Jurisdiction (SIJ); (ii) If the affected legal interest or its holder belongs exclusively to the majority culture, the objective element directs the judge to refer the case to the ordinary jurisdiction. (iii) If, regardless of the cultural identity of the holder, the affected legal interest concerns both the community to which the actor or active subject of the conduct belongs and the majority culture, the objective element does not determine a specific solution. When the conduct under investigation is of special harmfulness in the majority culture’s assessment, this fact alone does not imply that the SIJ is definitively excluded. In this case, the judicial authority must conduct a more careful analysis of the concurrence of the institutional element to prevent the referral to the SIJ from resulting in impunity or a situation of lack of protection for the victim.

Therefore, when indigenous authorities claim competence to hear a matter, they must demonstrate to the judge what their understanding is of the harmfulness of the investigated facts, in order to evaluate the special relationship that the matter may have with the community’s worldview. This, insofar as, pursuant to article 246 of the Constitution, the exercise of the competence of indigenous authorities has a dispositive character.”

¹⁴⁶ Ibid.

hermeneutic principles and rules identified by case law are maintained¹⁴⁷; the difference in the pronouncements lies in the mechanism, method, and procedures that precede them.

6.2. INDIGENOUS TERRITORIAL ENTITIES (ITES)

The other key institutional guarantee favoring indigenous autonomy is the Indigenous Territorial Entities (ITES). Together with departments and municipalities, they are constitutional territorial entities, that is, “political-administrative figures belonging to the decentralized territorial structure of the Colombian State”¹⁴⁸. All of them enjoy “autonomy for the management of their interests, within the limits of the Constitution and the law,” for which purpose certain “rights” –better understood as “powers”¹⁴⁹– of political, administrative, and financial autonomy are recognized (art. 287 Const.)¹⁵⁰.

For the ITES, such attributes are strengthened under the assumption that, pursuant to the Constitution and laws, “indigenous territories shall not only ‘be governed by councils formed’ but also ‘regulated according to the customs and traditions of their communities’” (art. 330 Const.). From such political and legal autonomy, they are called upon to exercise 8 specific functions, along with others that, once again, the Constitution and laws may provide¹⁵¹. This, together with indigenous jurisdiction, is identified as “the recognition and partial realization of the principle of participatory and pluralist democracy and respect for the ethnic and cultural diversity of the Colombian Nation (art. 7 Const.)”¹⁵².

¹⁴⁷ See, for example, Constitutional Court, Orders A-672/23, A-1078/2023, A-609/2025.

¹⁴⁸ Constitutional Court, judgment C-921 of 2007. Reporting Justice Clara Inés Vargas Hernández.

¹⁴⁹ P. Robledo. *La autonomía municipal en Colombia*. Bogotá, Universidad Externado de Colombia, 2010, 64.

¹⁵⁰ To “1. Govern themselves by their own authorities. 2. Exercise the competences corresponding to them. 3. Administer the resources and establish the taxes necessary for the fulfillment of their functions. 4. Participate in national revenues,” art. 287 Const.

¹⁵¹ Four of them concerning land use, planning, public order, and protection of natural resources, in which relationships of concurrence with the central government can be observed, with debatable margins of autonomy (art. 330, nos. 1, 2, 7 Const.). And the remaining four functions concerning investment, revenue collection and distribution, promotion of community projects, and representation (art. 330, nos. 3, 4, 5, 8 Const.), where the link with the Nation and other territorial entities can be understood as one of coordination.

¹⁵² Constitutional Court, Judgment T-254 of 1994.

However, the failure to enact the organic law on territorial organization that would have the purpose of creating the ITES¹⁵³ restricted for a long time the realization of this institutional guarantee and, in turn, the effectiveness of the rights of indigenous communities. While the *resguardos* have served as vehicles for the exercise of those rights, because they have not been formally constituted as Indigenous Territorial Entities they cannot be regarded as public law entities¹⁵⁴. For this reason, in a recent decision, the Court determined that the failure to establish the ITES was simultaneously a cause of the violation of the communities' rights associated with water, food security, and their very cultural and existential survival, and consequently, their effective organization constituted the primary remedy¹⁵⁵.

The current government's solution for the normative development of the ITES, grounded in transitional constitutional powers conferred in 1991, fills an absolute legislative omission in favor of indigenous communities, albeit without legislative debate. The constitutional validity of the decree-laws enacted will depend on whether functions are not attributed to indigenous authorities beyond their sphere of competence¹⁵⁶; as for their justice in terms of strengthening autonomy for the preservation of the Nation's ethnic and cultural richness-only time will tell.

7. CONCLUDING NOTE

This text has offered a brief review of the constitutional law that Colombia has built in favor of indigenous communities. It has also highlighted the

153 Or the integration of cabildos in the development of indigenous territorial rights. See L. Y. Jiménez Archila. "¿La conformación y delimitación del Territorio es el espiral para el ejercicio de las Entidades Territoriales Indígenas? Art. 329 de la CP de Colombia" [online]. In *Blog of the Environmental and Land Law Department*, Universidad Externado de Colombia, July 2025. Available at: <https://medioambiente.uexternado.edu.co/la-conformacion-y-delimitacion-del-territorio-es-el-espiral-para-el-ejercicio-de-las-entidades-territoriales-indigenas-art-329-de-la-cp-de-colombia/>

154 This means that for fiscal purposes, as established in the same judgment C-921 of 2007. Reporting Justice Clara Inés Vargas Hernández, *indigenous communities and groups or resguardos will require the "intermediation of municipalities in relation to the resources of the General Revenue-Sharing System."*

155 Constitutional Court, judgment T-106/2025, para. 458.

156 Such as imposing sanctions or overriding the authority of another entity. See Constitutional Court, judgment C-478/25. Reporting Justice Héctor Alfonso Carvajal Londoño.

challenges, problems, and instances of non-compliance that persist in the development of recognized rights and guarantees.

Although the assessment may vary depending on whether one emphasizes formal or substantive dimensions (including the decolonial criticism), clear progress has been made in 35 years under the 1991 Constitution, against a history of social discrimination and abandonment of indigenous peoples by the dominant political organization (colonial or republican). Therefore, the constitutional law for indigenous people stands as an example of Latin American constitutionalism at its best—a constitutionalism whose transformative approach aims to reshape political and social reality so as to make democracy, the rule of law, and human rights effective¹⁵⁷.

REFERENCES

- Bilchitz, D. and Correa, M. “The Difference History Makes: Comparative Reflections on Socio-Economic Rights and Historical Consciousness in South Africa and Colombia”. In D. Bilchitz and R. Cachalia (eds.), *Transitional Justice, Distributive Justice, and Transformative Constitutionalism: Comparing Colombia and South Africa*. Oxford, Oxford Academic, 2023.
- Burgos Guzmán, F. *La libre determinación indígena: territorio, justicia e identidad*. Bogotá, Universidad Externado de Colombia, 2025.
- Caviedes, M. “La representación del movimiento indígena en la prensa nacional durante la asamblea nacional constituyente”. In *Revista Etnias y Política*, N.º 6, 2008, 94–106.
- Chavarría, V. “Una línea de tiempo para conmemorar las luchas por el territorio en la Amazonía” [online]. In *Hacemos Memoria, Universidad de Antioquia*. Available at: <https://hacemosmemoria.org/2023/04/23/una-linea-de-tiempo-para-conmemorar-las-luchas-por-el-territorio-en-la-amazonia/>
- DANE. Statistics. Differential Approach. Ethnic Approach. 2022. Available at: <https://www.dane.gov.co/index.php/estadisticas-por-tema/enfoque-diferencial-e-interseccional/autorreconocimiento-etnico>

157 A. Von Bogdandy. “Ius Constitutionale Commune en América Latina: una mirada a un constitucionalismo transformador”. In *Revista Derecho del Estado*, N.º 34, Universidad Externado de Colombia, January–June 2015, 3–50.

- DANE. *Encuesta Nacional de Calidad de Vida 2018*. Available at: <https://www.dane.gov.co/index.php/estadisticas-por-tema/enfoque-diferencial-e-interseccional/autorreconocimiento-etnico>
- Díaz Uribe, M. “Performatividad política y cultural: El movimiento indígena colombiano y su participación en la Asamblea Nacional Constituyente de 1990”. In *Jangwa Pana*, Vol. 20, N.º 3, 2021, 1-20. Available at: <https://revistas.unimagdalena.edu.co/index.php/jangwapana/article/view/4301/3206>
- El Nuevo Siglo. Torres, March 18, 2021. “El legado de las cuatro constituyentes del 91”. Available at: <https://www.elnuevosiglo.com.co/politica/el-legado-de-las-cuatro-constituyentes-del-91>
- Gómez Espinel, J. *¿Cuál ha sido el avance en el respeto de los derechos de los pueblos indígenas desde la Constitución Política colombiana de 1886 hasta la Constitución de 1991? Universidad Católica de Colombia, 2022*. Available at: <https://repository.ucatolica.edu.co/server/api/core/bitstreams/55d86ec3-2c6d-4b09-82d4-ba0322e3f936/content>
- Jiménez Archila, L. Y. “¿La conformación y delimitación del Territorio es el espiral para el ejercicio de las Entidades Territoriales Indígenas? Art. 329 de la CP de Colombia” [online]. In *Blog of the Environmental and Land Law Department*, Universidad Externado de Colombia, July 2025. Available at: <https://medioambiente.uexternado.edu.co/la-conformacion-y-delimitacion-del-territorio-es-el-espiral-para-el-ejercicio-de-las-entidades-territoriales-indigenas-art-329-de-la-cp-de-colombia/>
- Laurent, V. *Comunidades indígenas, espacios políticos y movilización electoral en Colombia, 1990-1998. Motivaciones, campos de acción e impactos*. Bogotá, Institut français d'études andines, Instituto Colombiano de Antropología e Historia, 2005.
- Laurent, V. “Con bastones de mando o en el tarjetón: movilizaciones políticas indígenas en Colombia”. In *Colombia Internacional*, N.º 71, 2010, 35-61. Available at: http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0121-56122010000100003&lng=en&tlng=es
- López Medina, D. *El derecho de los jueces*. Bogotá, Legis, Universidad de los Andes, seventh reprint, 2009.
- Ministerio de Justicia y del Derecho. *Crimen organizado en Colombia. Estudio sobre factores, incidencias y acción estatal*. 2025. Available at: <https://repositorio.minjusticia.gov.co/politica-criminal/Biblioteca/Crimen%20Organizado.pdf>

- Ospino Pérez, I. “Legislación y representación indígena durante la regeneración en Colombia: 1886-1892”. In *Revista Aläula*, N.º 1, 2021, 13-23. Available at: <https://revistas.unicartagena.edu.co/index.php/revistaalaula/article/view/3443>
- Pineda Camacho, P. “La Constitución de 1991 y la perspectiva del multiculturalismo en Colombia”. In *Alteridades*, Vol. 7, N.º 14, 1997, 107-129. Available at: <https://www.redalyc.org/pdf/747/74745549008.pdf>
- Restrepo Piedrahita, C. *Constituyentes y constitucionalistas colombianos del siglo XIX*. Bogotá, Universidad Externado de Colombia, 2009.
- Robledo, P. *La autonomía municipal en Colombia*. Bogotá, Universidad Externado de Colombia, 2010.
- Roldán Ortega, R. *Fuero indígena colombiano*. Bogotá, Ministerio de Gobierno, 1983.
- Samper, F. “Los derechos de los pueblos indígenas de Colombia en la Jurisprudencia de la Corte Constitucional”. In *Anuario de Derecho Constitucional Latinoamericano, Inter-American Court of Human Rights*, 2006. Available at: <https://www.corteidh.or.cr/tablas/R21731.pdf>
- Transparencia por Colombia. *Riesgos de corrupción en el Sector de Hidrocarburos en Colombia*. 2023. Available at: <https://transparenciacolombia.org.co/wp-content/uploads/2023/08/Estudio-riesgos-de-corrupcion-en-el-sector-hidrocarburos.pdf>
- Uprimny Yepes, R. “La constitución de la diversidad” [online]. Dejusticia, 2006. Available at: <https://www.dejusticia.org/la-constitucion-de-la-diversidad/>
- Villa Rivera, W. “El movimiento social indígena colombiano: entre autonomía y dependencia”. In J. AC Betancur (ed.), *Movimientos indígenas en América Latina: Resistencia y nuevos modelos de integración*. iwgia, 2011. Available at: https://iwgia.org/images/publications/0563_Libro_Movimientos_indigenas_FINAL.pdf
- Von Bogdandy, A. “Ius Constitutionale Commune en América Latina: una mirada a un constitucionalismo transformador”. In *Revista Derecho del Estado*, N.º 34, Universidad Externado de Colombia, January-June 2015, 3-50.
- Von Hildebrand, M. “El legado de Virgilio Barco en el Amazonas”. In *El Espectador*, November 5, 2022. Available at: <https://www.elespectador.com/ambiente/amazonas/el-legado-de-virgilio-barco-en-el-amazonas/>
- Political Constitution of Colombia, 1991.

ILO Convention No. 169 on Indigenous and Tribal Peoples. Available at: https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_100910.pdf

Law 70 of 1993.

Law 89 of 1890. Available at: <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=4920>

Law 1518 of 2012.

Legislative Act No. 1 of 2001.

Legislative Act No. 2 of 2015.

Legislative Act No. 3 of 2024.

Decree 2591 of 1991.

Decree 804 of 1995.

Decree-Law 1088 of 1993.

Decree-Law 1953 of 2014.

Decree-Law 632 of 2018.

Decree-Law 252 of 2020.

Decree-Law 1094 of 2024.

Decree 481 of 2025.

Decree 488 of 2025.

Decrees 1367, 1368, 1369, 1370, 1371, 1372, 1373, and 1374 of 2025.

Jurisprudential sources

Colombian Constitutional Court (ccc), judgment T-188 of 1993. Reporting Justice Eduardo Cifuentes Muñoz.

Colombian Constitutional Court, judgment T-254 of 1994. Reporting Justice Eduardo Cifuentes Muñoz.

Colombian Constitutional Court, judgment T-380 of 1993. Reporting Justice Eduardo Cifuentes Muñoz. Available at: <https://www.corteconstitucional.gov.co/relatoria/1993/t-380-93.htm>

Colombian Constitutional Court, judgment T-405 of 1993. Reporting Justice Hernando Herrera Vergara. Available at: <https://www.corteconstitucional.gov.co/relatoria/1993/t-405-93.htm>

Colombian Constitutional Court, judgment C-139 of 1996. Available at: <https://www.corteconstitucional.gov.co/relatoria/1996/C-139-96.htm>

Colombian Constitutional Court, judgment T-349 of 1996. Reporting Justice Carlos Gaviria Díaz.

Colombian Constitutional Court, judgment SU-039 of 1997. Reporting Justice Antonio Barrera Carbonell. Available at: <https://www.corteconstitucional.gov.co/relatoria/1997/su039-97.htm>

Colombian Constitutional Court, judgment SU-510 of 1998. Reporting Justice Eduardo Cifuentes Muñoz.

Colombian Constitutional Court, judgment T-955 of 2003. Reporting Justice Álvaro Tafur Galvis.

Colombian Constitutional Court, judgment SU-383 of 2003.

Colombian Constitutional Court, judgment C-208 of 2007.

Colombian Constitutional Court, judgment C-921 of 2007. Reporting Justice Clara Inés Vargas Hernández.

Colombian Constitutional Court, judgment T-009 of 2007.

Colombian Constitutional Court, judgment C-030 of 2008.

Colombian Constitutional Court, judgment C-461 of 2008.

Colombian Constitutional Court, judgment C-615 of 2009.

Colombian Constitutional Court, judgment T-154 of 2009. Reporting Justice Nilson Elías Pinilla Pinilla.

Colombian Constitutional Court, judgment T-760 of 2009. Reporting Justice Juan Carlos Henao Pérez.

Colombian Constitutional Court, judgment T-903 of 2009. Reporting Justice Luis Ernesto Vargas Silva.

Colombian Constitutional Court, judgment C-915 of 2010.

Colombian Constitutional Court, judgment T-129 of 2011. Reporting Justice Jorge Iván Palacio Palacio. Available at: <https://www.corteconstitucional.gov.co/relatoria/2011/t-129-11.htm>

Colombian Constitutional Court, judgment T-433 of 2011.

Colombian Constitutional Court, judgment T-097 of 2012. Reporting Justice Mauricio González Cuervo.

Colombian Constitutional Court, judgment C-641 of 2012.

Colombian Constitutional Court, judgment C-1051 of 2012.

Colombian Constitutional Court, judgment C-054 of 2013.

Colombian Constitutional Court, judgment T-387 of 2013. Reporting Justice María Victoria Calle Correa.

Colombian Constitutional Court, judgment T-921 of 2013. Reporting Justice Jorge Ignacio Pretelt Chaljub.

Colombian Constitutional Court, judgment C-123 of 2014. Reporting Justice Alberto Rojas Ríos.

Colombian Constitutional Court, judgment C-371 of 2014. Reporting Justice Jorge Ignacio Pretelt Chaljub.

Colombian Constitutional Court, judgment C-463 of 2014. Reporting Justice María Victoria Calle Correa.

Colombian Constitutional Court, judgment T-098 of 2014. Reporting Justice Luis Ernesto Vargas Silva.

Colombian Constitutional Court, judgment T-305 of 2014.

Colombian Constitutional Court, judgment C-389 of 2016. Reporting Justice María Victoria Calle Correa.

Colombian Constitutional Court, judgment T-522 of 2016.

Colombian Constitutional Court, judgment T-002 of 2017.

Colombian Constitutional Court, judgment T-650 of 2017. Reporting Justice Alberto Rojas Ríos.

Colombian Constitutional Court, judgment T-737 of 2017. Reporting Justice Alejandro Linares Cantillo.

Colombian Constitutional Court, judgment SU-123 of 2018. Reporting Justices Alberto Rojas Ríos and Rodrigo Uprimny Yepes.

Colombian Constitutional Court, judgment T-443 of 2018. Reporting Justice Gloria Stella Ortiz Delgado.

Colombian Constitutional Court, judgment T-021 of 2019. Reporting Justice Alberto Rojas Ríos.

Colombian Constitutional Court, judgment SU-245 of 2021.

Colombian Constitutional Court, judgment T-245 of 2021.

Colombian Constitutional Court, judgment C-189 of 2022.

Colombian Constitutional Court, judgment T-276 of 2022.

Colombian Constitutional Court, judgment T-445 of 2022. Reporting Justice Jorge Enrique Ibáñez Najar.

Colombian Constitutional Court, judgment T-368 of 2023.

Colombian Constitutional Court, judgment T-433 of 2023.

Colombian Constitutional Court, judgment SU-091 of 2023. Reporting Justice Alejandro Linares Cantillo.

Colombian Constitutional Court, judgment C-520 of 2023. Reporting Justice Antonio José Lizarazo Ocampo.

Colombian Constitutional Court, judgment T-248 of 2024.

Colombian Constitutional Court, judgment T-379 of 2024. Reporting Justice Paola Andrea Meneses Mosquera. Available at: <https://www.corteconstitucional.gov.co/relatoria/2024/t-379-24.htm>

Colombian Constitutional Court, judgment T-472 of 2024.

Colombian Constitutional Court, judgment T-530 of 2024. Reporting Justice Juan Carlos Cortés González. Available at: <https://www.corteconstitucional.gov.co/relatoria/2024/t-530-24.htm>

Colombian Constitutional Court, judgment SU-419 of 2024.

Colombian Constitutional Court, judgment C-254 of 2025. Reporting Justice Carolina Ramírez.

Colombian Constitutional Court, judgment C-478 of 2025. Reporting Justice Héctor Alfonso Carvajal Londoño.

Colombian Constitutional Court, judgment T-012 of 2025.

Colombian Constitutional Court, judgment T-081 of 2025. Reporting Justice Juan Carlos Cortés González.

Colombian Constitutional Court, judgment T-106 of 2025. Reporting Justice Diana Fajardo Rivera.

Colombian Constitutional Court, judgment T-140 of 2025.

Colombian Constitutional Court, judgment T-349 of 2025.

Colombian Constitutional Court, judgment T-442 of 2025.

Colombian Constitutional Court, judgment T-518 of 2025. Reporting Justice Jorge Enrique Ibáñez Najar.

Colombian Constitutional Court, judgment T-011 of 2026.

Council of State. First Section. Judgment of February 12, 2026. Reporting Councilor Germán Osorio Cifuentes. Case No. 11001-03-24-000-2019-00262-00.

WOMEN'S RIGHTS IN COLOMBIA THIRTY-FIVE YEARS
AFTER THE 1991 CONSTITUTION: ADVANCES, *GLASS*
CEILINGS, AND REGRESSIONS¹

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ABSTRACT

This chapter assesses the state of women's rights in Colombia thirty-five years after the adoption of the 1991 Constitution, arguing that the constitutional transformation inaugurated by the Constituent Assembly has produced significant but structurally fragile advances, coexisting with persistent glass ceilings and identifiable regressions that reveal the limits of legal change in contexts of deep-rooted inequality. The analysis begins by reconstructing the constitutional architecture for gender justice established in 1991, identifying Articles 13, 40, 43, and 53 as the normative pillars from which the Constitutional Court has developed a doctrine of substantive equality, affirmative action, and reinforced protection for women. The chapter then examines the most consequential jurisprudential advances across four domains: the progressive shift from *quota*-based to parity-based models of political representation, culminating in the constitutional review of Laws 581 of 2000 and 2424 of 2024; the landmark decriminalization of abortion in Judgments C-055 of 2022 and its reconceptualization of reproductive autonomy as a fundamental right; the doctrinal expansion of gender-based violence to encompass economic, institutional, and digital dimensions; and the consolidation of transformative adjudication as a constitutional

1 The authors declare the use of artificial intelligence in the realization of this article, in particular in what has to do with the translation into English and the construction of the final list of bibliography, based on the references consulted by them in the research.

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obligation requiring judges to apply a gender perspective as a matter of non-discrimination. The chapter then turns critically to the glass ceilings that persist despite this normative progress – the failure of formal parity to redistribute real power, the structural entrenchment of unpaid care work, and the uneven application of gender-sensitive standards across the ordinary justice system. A final section identifies three forms of regression: the silent doctrinal retreat in enhanced job stability protections, the institutional tolerance of barriers to abortion access despite the clear constitutional standard of C-055, and the systematic failure of lower courts to internalize transformative adjudication. The chapter concludes that the effective realization of women's rights demands a broader articulation between constitutional jurisprudence, structural public policy, and cultural transformation, and that the constitutional subject of gender justice must be expanded to fully and non-instrumentally encompass the claims of trans women.

KEYWORDS

Women's rights, substantive equality, 1991 Constitution, Constitutional Court, reproductive autonomy, gender-based violence, transformative adjudication, parity, glass ceilings, jurisprudential regression

INTRODUCTION

Inequality is a structural feature of our history and remains deeply entrenched even today, even though Article 13 of the Constitution enshrines the right to equality and the prohibition of discrimination. The promise of substantive equality embodied in the 1991 Constituent Assembly remains unfulfilled, and the passage of time seems to suggest that, as a society, we continue to resist making that promise a reality. Indigenous peoples, Afro-descendant communities, persons with disabilities, members of the LGBTIQ+ community, and women continue to face high levels of discrimination, both at the micro and structural levels, as groups that have been historically marginalized.

That said, it is important not to lose sight of the contrast. Without the 1991 Constitution and the jurisprudential work of the Constitutional Court over the past three and a half decades, the current landscape would be markedly worse. Much of the progress that is now taken for granted –or

at least that can be articulated and claimed in legal terms— would likely not exist. This is not because the Constitution has “resolved” inequality, but because it opened a terrain of contestation: it rendered an equality mandate enforceable and provided institutional tools to test and expand its limits. That mandate, moreover, did not emerge in a vacuum. It was the product of long-standing historical struggles —some visible, others obscured— through which subordinated groups succeeded in translating social demands into constitutional language.

In the following pages, we focus specifically on women’s rights. We begin by identifying the constitutional pillars introduced by the 1991 Constitution that have served as the foundation for the protection and enforcement of these rights. We then examine the evolution and advances reflected in the Constitutional Court’s jurisprudence across areas such as sexual and reproductive rights, political equality, and access to justice. At the same time, we also acknowledge the persistence of glass ceilings that have yet to be dismantled, as well as those domains in which setbacks or regressions can be observed.

1. WOMEN’S RIGHTS IN THE POLITICAL CONSTITUTION OF 1991

The constitutional framework for the protection of women’s rights in Colombia does not rest on a single provision. It is built on a set of structural principles, explicit mandates, and legal tools aimed at addressing historical inequalities. The 1991 Constitution did more than expand the catalogue of rights. It reshaped the meaning of equality within a social state governed by the rule of law. In doing so, it redefined —at least at the normative level— the position of groups that had long been subjected to discrimination. Women were no longer treated as passive objects of “protection.” They were recognized as rights-holders, with enforceable guarantees and a defined role in the institutional architecture of the State.

The starting point is Article 13. It enshrines equality as a foundational principle of the social rule of law. Unlike earlier constitutions, it goes beyond formal equality before the law. It imposes a positive duty on the State. The State must promote conditions under which equality is real and effective. It must also adopt measures in favor of groups that are discriminated against or marginalized. The explicit inclusion of “sex” as a prohibited ground of

discrimination is therefore significant. It reflects the understanding that inequality between men and women is not incidental, but structural. Much of the Court's jurisprudence on substantive equality, affirmative action, and enhanced protection has developed from this premise.

This mandate is reinforced by Article 43. That provision prohibits all forms of discrimination against women and affirms equal rights and opportunities for women and men. It also incorporates two specific guarantees. First, it establishes special protection during pregnancy and after childbirth. Second, it mandates State support for women heads of household. As Acosta Alvarado has noted, the importance of this provision lies in its design. It combines an abstract commitment to equality with the identification of concrete vulnerabilities that justify targeted measures⁴. It does not operate as an exception to equality. It is a way of giving equality practical meaning.

A third axis is Article 40. This provision not only recognizes the general right to participate in political power. It also requires the State to ensure the adequate and effective participation of women in decision-making positions within public administration. Here, the Constitution rejects a naïve assumption. Political equality does not arise automatically from the formal recognition of rights. While the provision grants the legislature broad discretion –explaining delays, gaps, and uneven implementation– its core message is clear. The exclusion of women from positions of power cannot be remedied through formal neutrality alone. It requires affirmative and promotional measures.

In the field of labor law, Article 53 –read in conjunction with Articles 13 and 43– has served as the foundation for a decisive line of constitutional jurisprudence. This includes reinforced job stability during pregnancy and breastfeeding, as well as the prohibition of dismissals linked to maternity⁵. The underlying idea is straightforward but demanding. Gender equality

4 Paola Andrea Acosta Alvarado (2007). “Protección de los derechos de las mujeres en la Constitución colombiana”. En *Revista Derecho del Estado*, Universidad Externado de Colombia, N. 20.

5 Cf. Constitutional Court. Judgments T-373 of 1998, T-426 of 1998, T-362 of 1999, T-879 of 1999, T-375 of 2000, T-778 of 2000, T-1566 of 2000, T-352 of 2001, T-206 of 2002, T-961 of 2002, T-862 of 2003, T-1138 of 2003, T-501 of 2004, T-760 of 2008, T-021 of 2006, T-589 of 2006, T-807 of 2006, T-056 of 2007, T-145 of 2007, T-906 of 2007, T-687 of 2008, T-1210 of 2008, T-069 of 2010, T-394 of 2010, T-174 of 2011, T-260 of 2011, T-886 of 2011, T-598 of 2012, SU-070 of 2013, SU-071 of 2013, C-539 of 2014, T-102 of 2016, T-320 of 2016, T-313 of 2017, SU-075 of 2018, T-043 of 2020, T-279 of 2021 and T-329 of 2022, among others.

in the workplace is not satisfied by the mere absence of discrimination. It requires the removal of structural barriers that disproportionately affect women.

This framework is complemented by a set of constitutional principles that do not explicitly refer to women but have been interpreted through a gender-sensitive lens. These include human dignity (Article 1), the free development of personality (Article 16), privacy (Article 15), and the right to health and to a dignified life⁶. Much of the Court's jurisprudence on sexual and reproductive rights, as well as on protection against gender-based violence, has developed within this framework. The Constitution opened the door. Jurisprudential contestation pushed it forward.

Another decisive element is the constitutional block, which incorporates international human rights treaties ratified by Colombia into the domestic legal order with constitutional status⁷. In the context of women's rights, this has significantly expanded the normative horizon. It has strengthened the interpretation of open constitutional clauses and anchored specific standards on equality, non-discrimination, and the eradication of violence against women⁸.

6 Cf. For example: Constitutional Court. Judgments T-440 of 1992, T-569 of 1994, T-101 of 1998, T-562 of 2013, T-565 of 2013, C-131 of 2014, T-804 of 2014, T-478 of 2015, C-085 of 2016, T-697 of 2016, T-240 of 2018, SU-096 of 2018, T-142 of 2019, T-231 of 2019, T-192 of 2020, T-400 of 2020, T-443 of 2020, T-033 of 2022

7 On the figure of the constitutionality block in Colombia, see: María Angélica Prada (2013). "La integración del derecho internacional en el sistema colombiano", in *Protección multinivel de derechos humanos* (s.l.: Red de Derechos Humanos y Educación Superior), pp. 367-392 and more specifically, on the scope given to it by constitutional jurisprudence: Paola Andrea Acosta Alvarado, Juana Inés Acosta López, Julián Eduardo Huertas Cárdenas and Daniel Rivas-Ramírez (2018) "Diagnóstico sobre las relaciones entre el derecho internacional y el derecho interno. El caso colombiano", *Estudios constitucionales*, 16(2), pp.369-402.

8 On the one hand, there are general human rights treaties, such as the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the American Convention on Human Rights; and on the other, specific treaties such as: ILO Convention No. 3 on Maternity Protection (1919), Convention on the Nationality of Women (1933), Inter-American Convention on the Granting of Political Rights to Women (1948), Inter-American Convention on the Granting of Civil Rights to Women (1948), ILO Convention No. 100 on Equal Remuneration (1951), Convention on the Political Rights of Women (1953), Convention on the Elimination of All Forms of Discrimination against Women – CEDAW (1979), Optional Protocol to CEDAW (1999), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women – Convention of Belém do Pará (1994), Agreement by Exchange of Notes between the Republic of Colombia and the United Nations on the presence of UN Women in Colombia (2018).

Finally, this framework becomes operational through constitutional actions, most notably the *tutela* action and the public action of unconstitutionality⁹. These mechanisms have functioned both as tools of enforceability and as instruments of visibility. They have rendered legally contestable forms of inequality that had long been treated as natural or inevitable¹⁰. A note of realism is nonetheless required. The effectiveness of these remedies depends, to a large extent, on access to justice and on the interpretative commitments of judges¹¹.

In short, the 1991 Constitution established a robust architecture for gender justice. It rests on substantive equality, affirmative action, the recognition of specific vulnerabilities, openness to international law, and strong enforcement mechanisms. Experience, however, confirms a central point. This framework is a necessary condition, but not a sufficient one. Its transformative potential depends on interpretation, implementation, and continuous contestation over the meaning of equality in a society marked by persistent inequality.

9 On these judicial guarantees, cf: Humberto Sierra Porto, Paula Robledo Silva, Diego González Medina, and Daniel Rivas-Ramírez (eds.) (2023). *Garantías Judiciales de la Constitución. T. II y V*. Bogotá, Universidad Externado de Colombia.

10 Natalia Ángel Cabo (2021). “Treinta años de adjudicación de derechos sociales, económicos y culturales en Colombia”, in *Manual sobre Justiciabilidad de los Derechos Económicos, Sociales, Culturales y Ambientales* (DESCA), México, Suprema Corte de Justicia de la Nación, 2021, pp. 327–401.

11 In Colombia there is a wide margin of judicial discretion in terms of the evaluation of evidence, as well as for the motivation of decisions. Although there is a system of judicial precedents, as a result of the opposition of criteria and interpretations by the High Courts (Constitutional Court, Supreme Court and Council of State), judges often find grounds to support different positions. Likewise, with regard to international law, it is common to find the unwillingness of judges to use it, either due to formalistic approaches to the legal system, or for fear of incurring in misconduct. In this regard, see: Daniel Rivas-Ramírez y Gabriela Rivera Ramírez (2026). “No hay peor ciego que el que no quiere ver: el (des)uso de los estándares interamericanos sobre habeas corpus en Colombia”, in *Garantías judiciales de la Constitución*. Tomo IX. Habeas Corpus, Bogotá, Universidad Externado de Colombia.

I.1. WOMEN'S RIGHTS AND THE TRANSFORMATIVE ROLE OF CONSTITUTIONAL JURISPRUDENCE: SIGNIFICANT ADVANCES AND NORMATIVE DISPLACEMENTS

One of the most notorious features of contemporary Colombian constitutionalism is the central role that constitutional jurisprudence has assumed in the configuration and expansion of women's rights. Unlike other contexts in which regulatory progress has been mainly anchored in legislative reforms or long-term public policies, in Colombia many of the most significant advances in terms of gender equality, autonomy and protection against violence have been driven by constitutional interpretation. This dynamic is not accidental: it responds both to the structural weakness of the State in the implementation of redistributive policies and to the persistence of deeply patriarchal cultural and legal patterns, which have forced the Constitutional Court to assume a corrective and, in many cases, openly transformative role.

From this perspective, the most relevant advances in women's rights cannot be understood as a simple accumulation of favorable precedents, but as the result of a gradual process of reconceptualization of rights, of protected subjects and of the role of the constitutional judge itself¹². Indeed, the Court has moved from a formalistic reading of equality to a substantive and structural understanding of gender inequalities; from a fragmentary approach to violence against women to a broad, interrelated and functional notion of such violence; and from an idea of judicial neutrality to an explicit recognition of the duty to judge with a gender perspective¹³. These displacements have had concrete impacts in several fields, particularly on the right to material equality, sexual and reproductive rights, the right to a life free from violence, and access to justice.

12 Cfr. Luisa Fernanda Cano Blandón (2024). "¿Hacia un constitucionalismo feminista? El feminismo jurídico crítico en la jurisprudencia constitucional colombiana", *Revista Derecho del Estado*, 60, pp. 9–28

13 Cfr. Constitutional Court: Judgements T-012 de 2016, T-590 de 2017, T-462 de 2018, T-093 de 2019, SU-140 de 2019, SU-201 de 2021, C-102 de 2021, T-255 de 2021, C-111 de 2022, SU-349 de 2022, T-277 de 2023, SU-297 de 2023, T-550 de 2023, SU-241 de 2024, SU-339 de 2024, SU-360 de 2024, T-326 de 2024, T-166 de 2024, SU-274 de 2025, T-145 de 2025, among others.

1.2. MATERIAL EQUALITY AND REDISTRIBUTION OF POWER: FROM FORMAL RECOGNITION TO PARITY

One of the areas in which constitutional jurisprudence has had the most visible impact is the right to substantive equality. This is particularly true in relation to women's access to positions of power and decision-making. For many years, the Colombian legal system operated under a model of formal equality. That model assumed that the law was neutral and that the abstract prohibition of discrimination was sufficient. Empirical evidence, as well as sociolegal studies, however, told a different story¹⁴. So did the strategic litigation pursued by women's organizations¹⁵. Together, they revealed that formal equality was incapable of reversing the structural underrepresentation of women in senior public office.

The Constitutional Court responded with a gradual shift toward a substantive understanding of equality. Under this approach, affirmative action was no longer treated as a tolerated exception. It became a constitutionally required tool. A good example is the constitutional reasoning used by the Court when analyzing the appearance of a *quota*-based model, and later, the move to a parity-based model. The *quota* system was initially introduced by Law 581 of 2000, and Law 1437 of 2011. And it was later replaced by the parity model established by Law 2424 of 2024.

When the Court first examined the constitutionality of the statutory bill that would become Law 581 of 2000, in Judgments C-371 of 2000, it held that the 1991 Constitution is not exhausted by a notion of formal equality. Rather, it imposes on the State a duty to promote real and effective equality. This duty legitimizes –and in certain circumstances requires– the adoption of affirmative action measures in favor of groups that have been historically

14 Lina M. Céspedes- Báez (2014). “Más allá de lo que es medible: el feminismo de la gobernanza y los indicadores en Colombia”. In *International Law, Revista Colombiana de Derecho Internacional*, 25, pp. 375-444; Isabel Cristina Jaramillo (2004), *La crítica feminista del Derecho*, Bogotá: Siglo del Hombre Editores; Mary Luz Alzate Zuluaga (2025), “Suelos resbaladizos, techos y acantilados de cristal. Autoetnografía sobre la desigualdad en las relaciones laborales”. In *Cambios y Permanencias*, 16(2), pp. 25-42.

15 E.g. Corporación Humanas Colombia (2015). *Por una justicia para las mujeres: Litigio estratégico como apuesta feminista*. Bogotá, Corporación Humanas Colombia; more recently: María Camila Moncada Guevara (2025). “Entendiendo el éxito de Causa Justa: factores organizativos, discursivos e institucionales en la lucha por la despenalización del aborto en Colombia” in *Papel Político*, 30.

discriminated against, including women. Such measures may even rely on suspect classifications, such as sex, provided that their purpose is not to entrench inequality, but to remedy structural disadvantages rooted in discriminatory social practices.

In this context, the Court clarified that so-called reverse discrimination measures, including quotas, are not in themselves contrary to Article 13. They are not based solely on group membership. Instead, they respond to the existence of a demonstrable situation of exclusion. The Court further held that these measures must satisfy three conditions. First, they must address effective and verifiable discrimination. Second, they must be reasonable and proportionate. Third, they must be temporary and phased out once substantive equality has been achieved.

On this basis, the Court rejected the idea that equality is guaranteed solely at the “starting point.” It warned that even where training and qualifications are formally equal, significant gaps persist at the point of arrival. These gaps are particularly pronounced at the highest levels of public decision-making. The Court therefore concluded that the Constitution authorizes intervention not only in conditions of access, but also in outcomes. Participation quotas are thus a legitimate tool to correct underrepresentation that cannot be explained by merit, but by structural gender-based factors.

More than twenty years later, when reviewing the statutory bill that would become Law 2424 of 2024, in Judgments C-136 of 2024, the Court grounded its analysis in empirical evidence. It concluded that, while formal equality has improved, substantive equality remains distant. Wage gaps persist. Occupational segregation endures. Women remain underrepresented in decision-making spaces. Most importantly, care work continues to be distributed in profoundly unequal ways. This limits the time and resources available to women to compete under genuinely equal conditions.

In this context, the Court acknowledged that Law 581 of 2000 produced tangible effects. There has been a gradual increase in the presence of women in senior positions within public administration. In some areas, levels close to parity have been reached. These advances, however, have been uneven across sectors and regions. Implementation has also been slow. After more than two decades, structural gaps remain. For these reasons, the *quota* system was recognized as a useful and still necessary instrument, but an insufficient one if treated as a stand-alone solution.

At the same time, the Court's reasoning shows clear doctrinal evolution. It moves from justifying quotas in abstract terms as affirmative action measures to evaluating them through more sophisticated criteria. These criteria combine quantitative data with a qualitative assessment of barriers, such as gender stereotypes, institutional practices, and the social penalization of care responsibilities. The Court also draws a clear distinction between quotas and parity. Quotas are temporary and mandatory measures, designed to be dismantled once equality is achieved. Parity, by contrast, is understood as a permanent constitutional mandate.

Finally, the Court reinforces its substantive approach by warning that quotas must not operate as a ceiling or generate a plateau effect. Their effectiveness depends on comprehensive and intersectional policies. Such policies must recognize that women do not experience exclusion in uniform ways. In this sense, quotas are not justified as paternalistic devices. They are legitimized as tools to neutralize systemic biases, correct distortions of merit, and accelerate institutional and cultural change toward real equality.

In sum, this transition reflects a deeper constitutional insight. The exclusion of women from positions of power is not a temporary imbalance. It is the product of long-standing historical structures of domination¹⁶.

This progress cannot be understood in isolation. It must be read alongside a broader line of jurisprudence. That case law has challenged the presumed neutrality of appointment and electoral procedures. It has also acknowledged the existence of institutional glass ceilings that persist even in formally egalitarian settings. On this point, the Court adopts a clear position. Substantive equality is not achieved merely by removing explicit legal barriers. It requires active intervention in the conditions that reproduce exclusion. This shift is particularly significant in the Colombian context, where the redistribution of political power has long proven resistant to legal reform¹⁷.

16 Constitutional Court. Judgments C-136 of 2024. See Paula Robledo Silva and Daniel Rivas-Ramírez (2026). "Sentencia C-136 de 2024 (Ley Estatutaria sobre equidad de género en altos cargos del Estado)". In *Justicia constitucional a debate. Vol. 5. Crónicas jurisprudenciales del año 2024*, Bogotá, Universidad Externado de Colombia.

17 *Ibid.*

1.3. SEXUAL AND REPRODUCTIVE RIGHTS: FROM CRIMINAL CONTROL TO CONSTITUTIONAL AUTONOMY

Another field in which constitutional jurisprudence has produced substantive advances is that of sexual and reproductive rights. For decades, these rights were trapped in a logic of exceptionality and limited tolerance, especially in terms of voluntary interruption of pregnancy. The partial decriminalization introduced in 2006 by the Constitutional Court had represented an important step forward, but it remained anchored in a restrictive approach that subordinated women's autonomy to specific grounds and persistent criminal control¹⁸.

Judgments C-055 of 2022 marks a turning point in this process. By decriminalizing abortion up to the twenty-fourth week of gestation, the Court did more than expand the scope of legal protection. It redefined the very foundation of the right. Voluntary termination of pregnancy ceased to be a narrow exception tolerated by criminal law. It was instead recognized as a direct expression of reproductive autonomy, human dignity, and the right to health. This conceptual shift has far-reaching implications. It moves the focus of the debate away from the morality of punishment and toward the State's obligation to secure the material conditions necessary for the effective exercise of the right¹⁹.

The Court further held that the contemporary debate on the criminalization of consensual abortion is not the same as the one it addressed in 2006, in Judgments C-355. At that time, the analysis centered primarily on the negative limits of the criminal legislature. The aim was to prevent undue interference with health, understood as a fundamental right mainly through its connection to life and dignity. The Court also made clear that international human rights law did not impose a direct obligation of total decriminalization.

This new Judgement, however, rests on a different legal framework. Health is now recognized as an autonomous fundamental right. This status

¹⁸ Constitutional Court. Judgments C-355 of 2006.

¹⁹ Paula Robledo Silva y Mariana Medina Barragán (2025). "Apuntes preliminares sobre el debate constitucional que llevó a la despenalización del aborto en Colombia". In *Estudios de casos líderes nacionales y extranjeros Vol. XXXII. La interrupción voluntaria del embarazo en la doctrina judicial comparada*, Ciudad de México, Tirant lo Blanch.

was reinforced by Statutory Law 1751 of 2015. As such, it triggers positive State obligations of respect, protection, and fulfillment. It also requires a specific focus on sexual and reproductive health as an integral component of the right to health. On this basis, the Court concluded that there was no *res judicata*. A decision on the merits was therefore both necessary and appropriate.

This shift is also articulated with other jurisprudential developments that have broadened the understanding of reproductive rights beyond abortion. The Court has recognized, for example, the full legal capacity of women with disabilities to make decisions about their reproductive lives, dismantling tutelary and substitute approaches that historically denied their autonomy²⁰. This shift is also articulated with other jurisprudential developments that have broadened the understanding of reproductive rights beyond abortion. The Court has recognized, for example, the full legal capacity of women with disabilities to make decisions about their reproductive lives, dismantling tutelary and substitute approaches that historically denied their autonomy²¹.

Taken together, these advances reflect a clear shift: the Court abandons a biomedical and moralizing conception of reproduction to adopt a rights-based approach, in which women are recognized as full subjects of decision-making, and not as objects of protection or control. This change has had a significant symbolic and normative impact, reconfiguring the terms of public debate and providing a robust constitutional framework for the enforceability of these rights²².

1.4. THE RIGHT TO A LIFE FREE OF VIOLENCE: CONCEPTUAL EXPANSION AND STRUCTURAL JUSTICE

Perhaps one of the most important contributions of constitutional jurisprudence in the field of women's rights has been the expansion and sophistication

20 Cfr. Constitutional Court. Judgments SU-096 of 2018 and C-117 of 2018. See: Paula Robledo Silva y Mariana Medina Barragán (2019). "Dos pasos adelante y uno atrás: protección de los derechos de las mujeres en la jurisprudencia constitucional colombiana de 2018". In *Anuario Iberoamericano de Justicia Constitucional* 23(2).

21 Constitutional Court. Judgments C-102 of 2021.

22 Paula Robledo Silva y Mariana Medina Barragán (2023). "El bucle de los derechos sexuales y reproductivos: avances, resistencias y regresiones en la jurisprudencia constitucional colombiana" In *Anuario Iberoamericano de Justicia Constitucional* 27(2).

of the concept of gender violence. Traditionally, the legal response to this violence has focused on its most visible manifestations – physical and sexual violence – and in the private sphere. However, both academic research and strategic litigation showed that this approach was insufficient to capture the complexity of the violence faced by women, especially in contexts of structural inequality, armed conflict²³ and new technologies²⁴.

The Constitutional Court has responded to this challenge by progressively broadening the concept of gender-based violence, incorporating economic, patrimonial, institutional and digital dimensions. Judgments SU-201 of 2021 constitutes a milestone in this process, as it explicitly recognizes economic violence as an autonomous form of gender violence, particularly relevant in family proceedings and property litigation. In this decision, the Court shows how apparently neutral practices –such as the simulation of legal business or procedural delay– can become mechanisms of domination and control over women²⁵.

This approach is articulated with previous developments in the context of the armed conflict, in which the Court and feminist doctrine had evidenced the interrelationship between sexual violence, forced displacement and land dispossession. For example, Céspedes-Báez illustrates this point by defining sexual violence as a strategy of war aimed at territorial control, and not as a set of isolated events²⁶. Constitutional jurisprudence, especially in the context of the unconstitutional state of affairs declared in Judgments T-025 of 2004 and its follow-up orders (among them, Orders 004 and 005 of 2009), progressively incorporated this structural reading, contributing to the development of differential tools that would later be articulated from an intersectional approach.

23 See: Carolina Vergel Tovar (2018). “Conflicto armado y feminismo de Estado: la incursión de la problemática de la guerra en la acción pública para las mujeres en Colombia” in *Foro: Revista De Derecho*, 29, pp. 89–115

24 About violence on social media see: Ángela María Andrade Perdomo (2024). “Violencia sexual digital contra las mujeres en Colombia: el papel del derecho en la lucha contra la difusión no consentida de contenido sexual” in *Revista derecho del Estado*, 60, pp. 233–269.

25 María Dolores Mino y Jorge Ernesto Roa Roa (2022). “El enfoque de género como un elemento esencial de la adjudicación transformadora. La sentencia SU-201 de 2021” in *Revista Electrónica Iberoamericana* 16(1), 242–253.

26 Lina María Céspedes-Báez (2010). “La violencia sexual en contra de las mujeres como estrategia de despojo de tierras en el conflicto armado colombiano” in *Estudios Socio Jurídicos* 12(2).

More recently, the Court has extended this transformative logic to contemporary settings, including digital violence and, more broadly, the platform ecosystem. It has warned that online spaces are not “neutral.” They are environments in which patterns of silencing, surveillance, and gender discipline are reproduced and amplified. This approach is reflected in Judgments T-280 of 2022. In that decision, the Court recognized that the non-consensual dissemination of intimate content produces multidimensional harms. These harms are psychological, social, and economic. They may also lead to self-censorship and to a reduction in women’s mobility, both online and offline.

In Judgments T-265 of 2025, the Court went further. It examined, from the perspective of equality and non-discrimination, how community standards on social media and their enforcement can have disproportionate effects on women. The Court acknowledged that restricting certain content may be legitimate. Such restrictions may be necessary to prevent sexual exploitation or the non-consensual dissemination of intimate material, including so-called “revenge” content. However, it stressed clear limits. Content rules cannot be drafted in vague or overly open terms. Nor can they operate as forms of indirect censorship of expression linked to sexual autonomy, education, or health.

At the same time, the Court made clear that the problem does not lie solely in the written rules. It also arises in moderation practices, both human and automated. Gender bias may be translated into practices such as shadow banning, the uncritical confirmation of algorithmic decisions, and the absence of cultural or contextual assessment. For this reason, the Court imposed demands for transparency, bias correction, and accessible review mechanisms.

Progress, therefore, lies not only in expanding the catalogue of recognized forms of violence. It also lies in equipping constitutional interpretation with procedural and evidentiary tools capable of correcting the structural asymmetries women face when accessing justice. The Court has consistently articulated specific duties for authorities and judges. These include avoiding stereotypes and revictimization, assessing cases in light of context and power relations, and applying flexible standards of proof. Where direct evidence is difficult to obtain in situations of violence, indicia may be given greater weight. This approach was articulated in Judgments T-012 of 2016 and reaffirmed in T-280 of 2022.

The same logic applies to disputes involving digital platforms and content moderation. In Judgments T-265 of 2025, the Court required intermediaries –whose decisions may affect freedom of expression, equality, and personal autonomy– to operate under non-discriminatory and reviewable procedures. It also warned against the consolidation of an “absolute” sanctioning power in contexts marked by deep inequality, particularly where the impact falls on women. In this way, the Court advances an approach that combines contextual analysis, equality-based reasoning, and institutional correction mechanisms. The aim is to ensure that justice, as well as private digital governance, does not reproduce the very barriers it purports to dismantle.

Finally, this line is closely connected to the development of the concept of institutional violence. This form of violence arises when State authorities themselves, through action or omission, reproduce stereotypes, minimize victims’ accounts, or adopt decisions that disregard the established context. In Judgments T-267 of 2023, the Court emphasized that administrative and judicial decisions adopted without a gender perspective –often under “familist” or formally neutral approaches– can reinforce patterns of inequality and tolerance of violence. Such decisions may render non-physical forms of harm invisible, disregard women’s right not to be confronted with their aggressor, and deprive them of effective protective remedies.

The Court therefore reaffirmed a core principle. A gender perspective is not an optional or ancillary element. It is a constitutional requirement. It must inform the evaluation of evidence, the design of protection measures, and the diligent action of the State. This requirement is indispensable to ensuring real and non-discriminatory access to justice and to guaranteeing a life free from violence, including in emerging digital spaces.

1.5. ACCESS TO JUSTICE AND TRANSFORMATIVE ADJUDICATION: ADJUDICATION FROM A GENDER PERSPECTIVE

One of the most significant advances driven by constitutional jurisprudence concerns access to justice. This right is no longer understood as the mere formal possibility of appearing before a court. It is conceived as a guarantee of an effective judicial response, one that is sensitive to gender and capable of transforming structural inequalities. This approach is most clearly reflected in the development of what the Court has described as transformative

adjudication. Under this model, the constitutional judge is not a passive arbiter. The judge is an institutional actor with both the authority and the duty to intervene in structures of oppression²⁷.

The Court has been explicit on this point. The application of a gender perspective is not a discretionary choice. It is a constitutional obligation, grounded both in the Constitution and in Colombia's international human rights commitments. This position has far-reaching implications. It breaks with the assumption of judicial neutrality and recognizes that the failure to apply a gender perspective may itself amount to discrimination. Legal scholarship has emphasized that this approach legitimizes several adjudicatory techniques. These include *extra* or *ultra petita* decisions, flexible evidentiary standards, and the adoption of structural remedies aimed at correcting persistent inequalities²⁸.

Consistent with this reasoning, the Court has held that when judges disregard contexts of violence, asymmetric power relations, or gender stereotypes, they do more than commit errors of assessment. They reproduce historical patterns of exclusion. For this reason, the Court has endorsed an adjudicatory model that treats *extra* or *ultra petita* judgments, evidentiary flexibility, and transformative remedies as legitimate tools to secure real and effective access to justice for women.

This model has been particularly relevant in cases where women have resorted to alternative strategies of public allegation. These include *escraches* and collective campaigns aimed at making gender-based violence visible in contexts marked by institutional indifference or ineffectiveness. Since at least 2018, and more systematically in Judgments T-275 of 2021, T-289 of 2021, and T-356 of 2021, the Court has recognized these practices as a legitimate exercise of freedom of expression. It has afforded them reinforced constitutional protection insofar as they perform informative, preventive, and denunciatory functions that are clearly of public interest.

In these decisions, the Court has emphasized that *escraches* often emerge as a response to structural failures of the justice system. They operate as a form of "open political trial" or as a mechanism of effective social protection. Their purpose is to break silence, prevent further harm, and demand

²⁷ Mino & Roa Roa (2022), *Op. Cit.*

²⁸ *Ibid.*

State action. Against this background, the Court has warned that imposing standards of neutrality, strict truthfulness, or sanitized language on victims would reinforce patriarchal structures and perpetuate forms of institutional violence.

At the same time, the Court has developed a doctrine of complex balancing. This approach does not ignore the tensions between victims' freedom of expression and the rights to honor, reputation, or the presumption of innocence of those accused. Decisions such as T-061 of 2022, C-222 of 2022, and T-452 of 2022 illustrate this point. The Court has clarified that recognizing *escraches* does not entail the erosion of procedural guarantees. Rather, it requires situating those guarantees within their constitutional context.

Accordingly, the Court has distinguished *escraches* from so-called "parallel trials," typically associated with media activity. It has also articulated differentiated standards based on who makes the allegation and on the nature of the information disclosed. In particular, the Court has been clear that when the *escrache* is carried out directly by the victim, no burden of neutrality or strict truthfulness may be imposed. Doing so would amount to ignoring lived experience and would result in revictimization. More recently, in Judgments T-241 of 2023, the Court took an additional step. It recognized the *escrache* not only as an expression of free speech, but also as a tool to expose institutional barriers and forms of institutional violence faced by women.

Taken together, this line of jurisprudence reflects a substantive understanding of the constitutional balance between freedom of expression, access to justice, and protection against gender-based violence. It rests on a clear premise. Constitutional law cannot remain detached from the strategies of resistance that emerge where the State has failed to provide effective protection.

Overall, the trajectory of women's rights in Colombia underscores the central role of constitutional jurisprudence as a driver of transformation. In a context in which the State has often been reluctant or unable to pursue structural reform, the Constitutional Court has assumed a corrective function. Through this role, it has expanded the content of rights, redefined their foundations, and strengthened mechanisms of enforceability. These advances should not be idealized. Their impact depends largely on implementation and institutional uptake. Yet, from a legal perspective, it is difficult to deny that constitutional jurisprudence has been the arena in which women's

rights have achieved their most coherent and ambitious development in recent decades.

2. GLASS CEILINGS IN WOMEN'S RIGHTS: SCOPE AND LIMITS OF CONSTITUTIONAL JURISPRUDENCE

The Case law of the Colombian Constitutional Court on women's rights reveals a persistent paradox. Constitutional language has grown more sophisticated, and standards of protection have expanded significantly. Yet the lived reality of many women remains shaped by structural constraints that resist legal change. These constraints are commonly captured by the metaphor of "glass ceilings." They do not appear as explicit prohibitions or formal legal regressions. Instead, they operate as diffuse, persistent, and normalized barriers that limit the effective enjoyment of recognized rights.

From this perspective, the central problem is no longer the absence of legal norms. It lies in the difficulty of fully activating their transformative potential. Constitutional jurisprudence has played a crucial role in identifying and naming these barriers. Its capacity to dismantle them, however, has faced clear limits. These limits stem both from the institutional design of the State and from economic, cultural, and political dynamics that extend beyond the legal sphere. Examining rights in which glass ceilings persist therefore requires careful attention to two questions. How far has the Court been able to go? And where does structural resistance begin—resistance that law, on its own, cannot overcome?

2.1. POWER, REPRESENTATION AND DECISION-MAKING: EQUALITY THAT DOES NOT COMPLETELY REDISTRIBUTE POWER

One of the areas in which glass ceilings are most visible is women's access to positions of power and decision-making. As noted in the previous section, constitutional jurisprudence has made significant progress in recognizing women's underrepresentation as a structural equality problem. It has also endorsed robust corrective measures, including parity²⁹. Yet even within

29 Constitutional Court. Judgments C-136 of 2024.

this framework of regulatory advancement, a clear limitation remains. The formal redistribution of positions does not automatically result in a real redistribution of power.

Empirical studies consistently show that increases in the numerical presence of women in public or judicial office do not necessarily transform decision-making structures. Core sites of power often remain shaped by male networks, informal practices of co-optation, and institutional cultures resistant to change. This pattern is also evident within the administration of justice. Women's representation tends to decline as one moves up the judicial hierarchy, particularly in the high courts. There, decision-making informed by a gender perspective remains the exception rather than the rule.

As María Adelaida Ceballos has documented, the Supreme Court of Justice appointed its first woman justice only in 1984. For decades thereafter, women's presence remained exceptional. Over the last twenty years, women have represented approximately 20 per cent of the Court's membership, reaching 31 per cent in 2024. This aggregate figure, however, conceals deep internal asymmetries. The Criminal Cassation Chamber, for example, has had only four women justices throughout its entire history and has never had more than one serving at the same time. More recently, despite the renewal of four of the nine seats in that Chamber over the past two years, all vacancies were filled by men. Only one woman currently remains on the bench³⁰.

This situation reflects more than a deficit of representation. It constitutes a direct failure to comply with constitutional mandates requiring the effective participation of women in the highest decision-making bodies of the State (Articles 40 and 126 of the Constitution). The Constitutional Court reaffirmed this point in Judgments C-134 of 2023, holding that the principle of equality requires parity or, at a minimum, balanced participation in appointments to the High Courts.

A similar pattern can be observed in the Constitutional Court itself. Over its entire history, sixty-nine individuals have served as justices, of whom only sixteen have been women. Of these sixteen, only eight were elected by the Senate as full justices. The remaining eight served in an acting

30 María Adelaida Ceballos (2024). "Más lejos de la paridad en la Corte Suprema", *Dejusticia* (6 de noviembre), <https://www.dejusticia.org/column/mas-lejos-de-la-paridad-en-la-corte-suprema/>

capacity. Gender disparities thus become more pronounced as one ascends the institutional hierarchy.

The procedure for judicial selection further reinforces these dynamics. A recent study shows that over more than three decades, only thirty-seven different women have appeared on shortlists for the Constitutional Court. While some were nominated more than once, experience shows that inclusion on a shortlist does not necessarily translate into a genuine opportunity for appointment. In some cases, female candidates withdrew from the process altogether, citing the absence of real guarantees. Their presence on the shortlist was perceived as symbolic, intended solely to satisfy a minimal formal requirement³¹.

As anticipated, the Constitutional Court has acknowledged the structural nature of this problem. In Judgments C-134 of 2023 and C-136 of 2024, it clarified that gender equality cannot be reduced to a formal minimum. It is a substantive constitutional requirement. Where historical inequalities persist, this requirement may justify stronger corrective measures, including women-only shortlists. From this perspective, the underrepresentation of women in the highest judicial offices cannot be attributed to a lack of merit. It is instead the result of entrenched structural barriers, such as gender stereotypes, unequal access to power networks, and informal lobbying practices that continue to shape elite decision-making spaces.

At the same time, a paradox remains. Constitutional jurisprudence has left unresolved situations in which multiple authorities participate in the formation of shortlists. In such cases, courts have argued that it is unclear which authority bears responsibility for ensuring the inclusion of women. As a result, compliance with gender equity requirements is treated as non-binding rather than mandatory.

The Court is not unaware of these limitations. It has sought to address them by strengthening the principle of substantive equality and by requiring affirmative action. Yet the glass ceiling persists. Constitutional law operates upon structures that are already consolidated. The mechanisms through which power reproduces itself are often informal, opaque, and resistant to

31 Lina Marcela Escobar Martínez, Paula Robledo Silva and Daniel Rivas-Ramírez (2026). “Una radiografía de la elección de magistradas y magistrados de la Corte Constitucional en Colombia (1991 – 2025)”. In *La Corte Constitucional de Colombia en sus 35 años de existencia*, Bogotá, Universidad Externado de Colombia.

normative control. Jurisprudence may succeed in opening doors. It does not always succeed in transforming the internal dynamics that determine who influences decisions, who ultimately decides, and under which interpretive frameworks authority is exercised.

2.2. THE RIGHT TO CARE, INFORMALITY AND ECONOMIC AUTONOMY: DISCURSIVE RECOGNITION AND STRUCTURAL STAGNATION

Another area in which glass ceilings prove particularly resilient is the right to care and social co-responsibility. In recent years, both constitutional jurisprudence and academic scholarship have contributed to recognizing care as a central dimension of social life and as a core axis of gender inequality. The COVID-19 pandemic accelerated this shift. It helped consolidate a more robust discourse on human interdependence and on the need to redistribute care responsibilities.

Yet the discursive recognition of care as a right has not translated into a structural transformation of its social organization. The Constitutional Court has repeatedly acknowledged that care work continues to fall disproportionately on women. This burden affects their economic autonomy, political participation, and access to discretionary time. Despite this recognition, judicial decisions have had only a limited impact on the effective redistribution of care responsibilities among the State, the market, communities, and men.

This glass ceiling is particularly complex. It lies at the intersection of law, economics, and culture. Jurisprudence may identify the problem and order protective measures or reasonable adjustments in individual cases. However, it faces significant constraints when attempting to intervene in an economic and social model that privatizes care and naturalizes it as a female responsibility. At this point, constitutional law encounters a structural limit. It can name inequality, but it cannot fully dismantle the system that produces it.

The right to work and to economic autonomy constitutes another domain in which glass ceilings remain especially visible. Constitutional jurisprudence has recognized that women face structural barriers in the labor market. It has developed tools such as enhanced job security and protection against discrimination. Yet a substantial portion of women's labor experience takes place outside formal employment, in contexts of informality that classical labor law fails to capture.

Empirical studies on women motorcycle taxi drivers illustrate this tension clearly. On the one hand, these women deploy strategies of agency, mobility, and autonomy that challenge traditional gender roles. On the other hand, their labor insertion remains marked by precariousness, lack of social protection, and the persistence of stereotypes associated with care work and docility³². The market, far from being a neutral space, reproduces and redefines gender hierarchies, even when women enter occupations that have traditionally been masculinized.

The Constitutional Court has shown sensitivity to these dynamics in some of its decisions. Its capacity for intervention, however, remains limited. Constitutional law can correct manifest abuses and protect situations of heightened vulnerability. It cannot, on its own, structurally transform a labor market designed around a male subject assumed to be autonomous and free of care responsibilities. In this sense, the glass ceiling does not manifest as a formal denial of the right to work. It appears instead as the persistent impossibility of escaping precarity, even where certain legal guarantees are formally recognized.

2.3. ACCESS TO JUSTICE AND THE GENDER PERSPECTIVE: THE LIMIT OF INSTITUTIONALIZATION

Finally, one of the most complex glass ceilings is found in the field of access to justice itself. As has been pointed out, constitutional jurisprudence has made significant progress in consolidating transformative adjudication and in recognizing the duty to judge with a gender perspective³³. However, the application of these standards remains uneven and, in many cases, dependent on the individual sensitivity of judicial operators.

Diagnoses of access to justice show that stereotypes, prejudices and revictimizing practices persist in the administration of justice, especially at the lower levels of the system. The lack of sufficient training and the cultural resistance to abandoning the idea of judicial neutrality limit the real impact of jurisprudential developments. The glass ceiling here is not normative,

32 Lina Buchely and María Victoria Castro (2019). “Yo me defiendo: entendiendo la informalidad laboral a partir del trabajo de las mujeres mototaxistas en Barranquilla, Colombia” in *Revista CS*, special num.

33 Mino & Roa Roa (2022), *Op. Cit.*

but institutional and cultural: the gender perspective exists as a standard, but it is not applied in a systematic or homogeneous way.

The analysis of rights in which glass ceilings persist shows that constitutional jurisprudence has been a necessary, but not sufficient, condition for the transformation of gender inequalities. The Court has played a fundamental role in naming barriers, expanding the content of rights and offering powerful interpretative tools. However, glass ceilings persist where law meets deeply entrenched economic, cultural and political structures.

In this sense, the limits identified should not be read as failures of jurisprudence, but as indicators of the confines of law in contexts of structural inequality. The Court has pushed those boundaries significantly, but the dismantling of glass ceilings requires a broader articulation between law, public policy and cultural transformation. If the journey analyzed shows anything, it is that, without the intervention of the constitutional judge, many of these rights would not even have been named; but also, that its full realization requires going beyond the sentence and disputing the structures that continue to sustain inequality.

3. WOMEN'S RIGHTS AND JURISPRUDENTIAL REGRESSIONS: FRAGILE ADVANCES, RESTRICTIVE DISPLACEMENTS AND CONSTITUTIONAL SILENCES

The analysis of women's rights from a jurisprudential perspective cannot be confined to identifying normative advances or celebrating landmark judgments. A critical assessment also requires attention to moments of regression. These regressions should not be understood solely as decisions that openly undermine rights. They also take the form of more subtle processes of retreat, stagnation, or erosion of previously achieved standards of protection. In the Colombian context, such regressions rarely appear as explicit denials of rights. They tend to emerge through restrictive reinterpretations, persistent omissions, or repeated failures of implementation that constitutional jurisprudence does not always manage—or does not always choose—to correct.

This section argues that regressions in women's rights often occur at the margins of constitutional jurisprudence. They arise where the Court adopts progressive language but limits its effects; where it recognizes a right but weakens its enforceability; or where it remains silent in the face of setbacks originating in other courts or in the legislative branch. These dynamics are

particularly visible in three areas: enhanced job stability and women's economic rights; the effective implementation of sexual and reproductive rights; and institutional responses to new forms of violence, especially in digital environments. Across these domains, the Court has played an ambivalent role. It oscillates between reaffirming protective standards and allowing their practical dilution.

3.1. ENHANCED JOB STABILITY AND ECONOMIC RIGHTS: THE SILENT RETREAT OF PROTECTION

One of the areas in which the most worrying regressions have been identified is that of enhanced job stability and, in general, the protection of women's economic rights. For several years, constitutional jurisprudence consolidated a robust line of protection for pregnant and lactating women, recognizing that dismissal or dismissal in these contexts constitutes a form of discrimination based on sex. This protection was understood as a direct expression of the principle of material equality and as a tool to correct the structural asymmetries of the labor market.

However, different doctrinal analyses have warned that, as of 2018, a progressive weakening of this standard has been observed, particularly in decisions that introduce stricter evidentiary requirements or that revalue the contractual autonomy of the employer to the detriment of the reinforced protection of women³⁴. These decisions do not formally deny reinforced job stability, but they reduce its effective scope, by demanding additional burdens from workers or by validating dismissals under formally neutral criteria.

The regression here is twofold. On the one hand, empirical evidence on female job insecurity and structural discrimination in employment is neglected. On the other hand, there is an interpretative shift that implicitly reintroduces a logic of formal equality that the Court itself had overcome. The result is fragmented and contingent protection, which increasingly depends on the type of contract, the economic sector or the litigation capacity of the woman concerned.

This regression is especially problematic because it directly impacts women's economic autonomy, a central axis for the exercise of other rights.

34 Robledo Silva & Medina Barragán (2019), *Op. Cit.*

As Buchely and Castro have pointed out, the labor market is not a neutral space, but a field crossed by gender stereotypes, expectations of care and dynamics of precariousness that disproportionately affect women³⁵. By weakening enhanced job stability, constitutional jurisprudence contributes – albeit indirectly – to reproducing these inequalities, rather than correcting them.

3.2. SEXUAL AND REPRODUCTIVE RIGHTS: PRACTICAL REGRESSIONS AND INSTITUTIONAL TOLERANCE

A second area in which relevant regressions are observed is that of sexual and reproductive rights. Judgments C-055 of 2022 represents, without a doubt, one of the most significant advances in this area, by decriminalizing abortion up to the 24th week and recognizing it as a fundamental right linked to reproductive autonomy, human dignity, and the right to health. However, the subsequent analysis reveals that this normative advance coexists with persistent practical regressions, which constitutional jurisprudence has not been able to reverse sufficiently.

Various studies show that, despite the change in the penal framework, women continue to face administrative barriers, abusive conscientious objections, unjustified delays and stigmatizing treatment in accessing voluntary termination of pregnancy services³⁶. These practices not only restrict the effective exercise of the right, but also reconfigure women's experience as a form of institutional violence.

The regression here does not occur in the text of the sentence, but in its tolerated implementation. The Court has reiterated that conscientious objection is individual and not institutional, and that it cannot become a barrier to access; however, the persistence of these practices suggests a significant gap between the constitutional standard and everyday reality. This gap is aggravated in rural contexts, for poor, migrant or disabled women, reproducing internal hierarchies within the group of women themselves.

Follow-up studies on the implementation of Judgments C-055 of 2022 show a clear pattern. The transformation of the criminal framework has not automatically translated into effective, timely, and obstacle-free access

³⁵ Buchely y Castro (2019), *Op. Cit.*

³⁶ Robledo Silva and Medina Barragán (2025), *Op. Cit.*

to voluntary termination of pregnancy services. On the contrary, multiple barriers persist. These include administrative hurdles, unjustified delays, and prohibited practices, such as medical review boards, unnecessary authorizations, and dilatory referrals. The abusive use of conscientious objection also remains widespread. In practice, it often operates as a covert form of institutional objection³⁷.

Between February 2022 and February 2023, 255 women required legal support due to obstacles in accessing abortion services³⁸. This represents a 19 per cent increase compared to the previous year. In many cases, women turned to social organizations only after confronting repeated barriers. By then, time was working against them. Gestational age continued to advance while procedures were “unblocked” that, under Circular 044 of 2022 and Resolution 051 of 2023, should have been resolved immediately or, at most, within five days of the request. The problem, therefore, is not the absence of clear rules. The normative framework is robust. The difficulty lies in uneven compliance and persistent institutional inertia, which turns access to abortion into a genuine obstacle course.

This gap between the constitutional standard and everyday practice has particularly serious consequences. It reshapes access to abortion into an experience of institutional violence. Women are exposed to stigmatizing treatment, legal uncertainty, and avoidable risks to their physical and mental health. Regression thus does not occur in the text of the judgments itself, but in the way its implementation is tolerated. The Court has consistently reiterated that conscientious objection is individual, not institutional, and that it cannot operate as a barrier to access. Yet the persistence of these practices reveals the distance between the constitutional mandate and administrative and medical realities.

This gap is further aggravated in rural and peripheral settings. Seventy per cent of the accompanied cases were registered outside Bogotá. Its impact is also deeply unequal. It disproportionately affects women living in poverty, migrants, and women with disabilities. The report indicates that 30 per cent of the women assisted were not affiliated with the health system, and that 25 per cent were Venezuelan migrants in an irregular situation. In

37 *Causa Justa* (s.f.). *Primer año del fallo histórico ¿Cómo va la implementación de la sentencia Causa Justa (C-055 de 2022)?* Bogotá, Causa Justa – Orientame.

38 *Ibid.*

this way, structural inequalities are not only reproduced. They also generate internal hierarchies among women themselves. A constitutionally recognized right thus becomes intermittent, fragmented, and conditioned by territory, migratory status, and socioeconomic position.

From a critical perspective, this situation reveals an important limit to constitutional control: the Court can redefine the law, but it faces structural difficulties in ensuring compliance with it in fragmented, precarious health systems that are crossed by moral resistance. The regression, in this sense, is not the product of an adverse judicial decision, but of a lack of effective response to institutional disobedience, which ends up emptying the normative advance of content.

3.3. ACCESS TO JUSTICE: HIDDEN REGRESSIONS IN ORDINARY JUSTICE

One of the most complex scenarios of regression emerges in the field of access to justice itself. As discussed above, constitutional jurisprudence has strongly developed the notion of transformative adjudication and has established a duty to adjudicate from a gender perspective. Yet multiple assessments show that these standards are not applied consistently within the ordinary justice system. Stereotypes, prejudices, and revictimizing practices continue to shape judicial decision-making.

The core problem is not the absence of constitutional standards. It is their uneven and selective application. In many cases, women continue to face judicial decisions that minimize violence, impose excessive evidentiary burdens, or reproduce gender stereotypes. These patterns are particularly visible in family, labor, and criminal proceedings. The resulting gap between constitutional jurisprudence and everyday judicial practice constitutes a disguised form of regression. It empties the advances achieved at the constitutional level of much of their practical content.

From a critical perspective, this situation reveals a structural tension. The Constitutional Court can articulate ambitious standards, but it lacks effective tools to ensure their internalization across the judicial system as a whole. Regression, in this sense, is not the result of doctrinal retreat. It stems from a systemic failure of implementation. This failure disproportionately affects women with fewer resources and limited access to litigation.

An examination of the areas in which regressions occur shows that jurisprudential advances in women's rights remain fragile and reversible. Regression rarely takes the form of openly regressive judgments. More often, it operates through silences, restrictive doctrinal modulations, and institutional tolerance of discriminatory practices. Constitutional jurisprudence has been essential in expanding the content of rights and in naming structural inequalities. Its impact, however, is significantly constrained when it fails –or declines– to correct setbacks arising at other levels of the legal and administrative system.

This diagnosis does not undermine the legitimacy of the Court. On the contrary, it calls for a more realistic and demanding understanding of its role. The effective protection of women's rights does not depend solely on landmark decisions. It depends on the capacity of the legal system to sustain those advances over time, in the face of entrenched cultural, economic, and political resistance. In this sense, identifying regression is not an exercise in pessimism. It is a necessary condition for strengthening the enforceability of rights and preventing hard-won gains from becoming merely symbolic achievements.

4. PERSISTENT CHALLENGES AND HORIZONS OF TRANSFORMATION FOR WOMEN'S RIGHTS

The overall assessment that emerges from the analysis of the constitutional framework, constitutional jurisprudence, and relevant scholarship supports a clear conclusion. Women's rights in Colombia have achieved a level of normative and discursive recognition that would have been unthinkable prior to 1991. The Constitution, strengthened by the constitutional block and by an active Constitutional Court, has constructed a robust legal architecture for substantive equality, reproductive autonomy, protection against violence, and access to justice. This progress, however, coexists with persistent structural challenges. These challenges require a reassessment of guaranteed strategies and the projection of new legal, political, and social responses.

A first central challenge concerns the fragility of jurisprudential advances. As this chapter has shown, many of the most significant developments in women's rights have resulted from landmark decisions of the Constitutional Court rather than from sustained public policies or deep institutional reform. While the centrality of the constitutional judge has

been crucial in opening new paths, it also entails vulnerability. Recognized rights may be eroded through restrictive doctrinal modulations, shifts in interpretation, or systematic failures of implementation. The task ahead is therefore demanding. It requires moving from a constitutionalism that recognizes rights to one that stabilizes them over time and embeds them in ordinary institutional practice.

A second challenge lies in the persistence of institutional and cultural glass ceilings that law alone cannot dismantle. Parity, gender-sensitive adjudication, and transformative constitutional reasoning have expanded the normative horizon. Yet they continue to confront masculinized power structures, precarious labor markets, and privatized systems of care that reproduce gender inequality on a daily basis. The unresolved issue here is not legal recognition, but the real redistribution of power, time, and resources. Addressing it requires linking constitutional jurisprudence to ambitious public policies and to profound cultural change.

A third challenge, particularly evident in recent years, concerns the gap between constitutional standards and their effective application, especially within ordinary courts and public administration. Although the Court has consolidated the duty to adjudicate with a gender perspective and has recognized complex forms of violence –including economic, institutional, and digital violence– these standards are applied unevenly. Judicial stereotypes, revictimization, and persistent distrust in the justice system remain widespread. The challenge, at this stage, is no longer primarily normative. It is institutional and pedagogical. The key question is how to ensure that the gender perspective ceases to be an enlightened exception and becomes a routine feature of judicial practice.

In this context, a fourth challenge must be addressed—more uncomfortable, but equally urgent. It concerns the need to broaden the constitutional subject of women's rights by fully and non-instrumentally incorporating the demands of trans women. The 1991 Constitution and constitutional jurisprudence have made important advances in the recognition of gender identity and in protection against discrimination. Yet these developments have coexisted with explicit resistance, including within sectors of legal feminism. Such resistance often reflects the fear that expanding the category of “woman” may dilute historical achievements or obscure forms of oppression rooted in sex.

These tensions have increasingly surfaced in constitutional debates. The Court has been required to balance the protection of cisgender women's rights with the recognition of trans women as subjects of special protection against violence, exclusion, and discrimination. The challenge here is substantial. Gender constitutionalism must not fracture into identity-based disputes that weaken its transformative potential. As critical feminist theory has long argued, equality must be approached from an intersectional perspective. Forms of oppression are not mutually exclusive. They intersect and reinforce one another.

Advancing the rights of trans women does not mean disregarding the historical struggles of the women's movement or the material inequalities that affect cisgender women in specific ways. It means taking seriously the constitutional commitments to human dignity, substantive equality, and non-discrimination. Constitutional law loses legitimacy when it selectively determines who deserves protection based on political anxieties or internal disputes. On this point, constitutional jurisprudence has a decisive role to play. It must resist regressive pressures, avoid exclusionary definitions of rights-holders, and reaffirm that gender justice is compatible only with a broad, plural, and non-essentialist understanding of the category "woman."

Taken together, the challenges that persist in the recognition and protection of women's rights in Colombia should not be read as signs of failure. They are indicators of the depth of the transformation still required. The constitutional project of 1991 opened a decisive door. Constitutional jurisprudence has pushed it forcefully. The task now is to cross that threshold fully. This requires consolidating existing gains, confronting regressions without ambiguity, dismantling persistent glass ceilings, and expanding the horizon of protection for all women, in their diversity.

The call to action is clear. Judges must fully embrace their transformative role and consistently apply a gender perspective. The legislature and the executive must translate constitutional mandates into structural and sustainable public policies. Academia and social movements must continue to contest the meaning of law, expand the subject of equality, and resist regressive trends. Only then will constitutional law cease to be an exceptional refuge and become a shared foundation of justice for all women.

REFERENCES

- Acosta Alvarado, Paola Andrea (2007). 'La protección de los derechos de las mujeres en la Constitución colombiana', *Revista Derecho del Estado* (20).
- Acosta Alvarado, Paola Andrea, Juana Inés Acosta López, Julián Eduardo Huertas Cárdenas and Daniel Rivas-Ramírez (2018) 'Diagnóstico sobre las relaciones entre el derecho internacional y el derecho interno. El caso colombiano', *Estudios constitucionales*, 16(2), pp.369-402.
- Alzate Zuluaga, Mary Luz (2025), 'Suelos resbaladizos, techos y acantilados de cristal. Autoetnografía sobre la desigualdad en las relaciones laborales', *Cambios y Permanencias*, 16(2), pp. 25-42.
- Andrade Perdomo, Ángela María (2024). 'Violencia sexual digital contra las mujeres en Colombia: el papel del derecho en la lucha contra la difusión no consentida de contenido sexual'. *Revista derecho del Estado*, 60, pp. 233-269.
- Ángel Cabo, Natalia (2021). 'Treinta años de adjudicación de derechos sociales, económicos y culturales en Colombia', en *Manual sobre Justiciabilidad de los Derechos Económicos, Sociales, Culturales y Ambientales (DESCA)* (México: Suprema Corte de Justicia de la Nación), pp. 327-401.
- Buchely, Lina y Castro, María Victoria (2019). "'Yo me defiendo": entendiendo la informalidad laboral a partir del trabajo de las mujeres mototaxistas en Barranquilla, Colombia', *Revista CS*, num. especial
- Cano Blandón, Luisa Fernanda (2024). '¿Hacia un constitucionalismo feminista? El feminismo jurídico crítico en la jurisprudencia constitucional colombiana', *Revista Derecho del Estado*, 60, pp. 9-28.
- Causa Justa (s.f.). *Primer año del fallo histórico ¿Cómo va la implementación de la sentencia Causa Justa (C-055 de 2022)?* (Bogotá: Causa Justa – Oriéntame).
- Ceballos, María Adelaida (2024). 'Más lejos de la paridad en la Corte Suprema', *Dejusticia* (6 de noviembre), <https://www.dejusticia.org/column/mas-lejos-de-la-paridad-en-la-corte-suprema/>
- Céspedes- Báez, Lina M. (2014). 'Más allá de lo que es medible: el feminismo de la gobernanza y los indicadores en Colombia', *International Law, Revista Colombiana de Derecho Internacional*, 25, pp. 375-444.

- Céspedes-Báez, Lina (2010). 'La violencia sexual en contra de las mujeres como estrategia de despojo de tierras en el conflicto armado colombiano', *Estudios Socio Jurídicos* 12(2).
- Céspedes-Báez, Lina y Jaramillo Ruiz, Felipe (2018). "Peace without women does not go!" Women's struggle for inclusion in Colombia's peace process with the FARC', *Colombia Internacional* (94).
- Corporación Humanas Colombia (2015). *Por una justicia para las mujeres: Litigio estratégico como apuesta feminista*. (Bogotá: Corporación Humanas Colombia).
- Escobar Martínez, Lina Marcela; Robledo Silva, Paula y Rivas-Ramírez, Daniel (2026). 'Una radiografía de la elección de magistradas y magistrados de la Corte Constitucional en Colombia (1991–2025)', en *La Corte Constitucional de Colombia en sus 35 años de existencia* (Bogotá: Universidad Externado de Colombia).
- Jaramillo, Isabel Cristina (2004), *La crítica feminista del Derecho* (Bogotá: Siglo del Hombre Editores).
- Mino, María Dolores y Roa Roa, Jorge Ernesto (2022). 'El enfoque de género como un elemento esencial de la adjudicación transformadora. La sentencia SU-201 de 2021', *Revista Electrónica Iberoamericana* 16(1), 242–253.
- Moncada Guevara, María Camila (2025). 'Entendiendo el éxito de Causa Justa: factores organizativos, discursivos e institucionales en la lucha por la despenalización del aborto en Colombia', *Papel Político*, 30.
- Prada, María Angélica (2013). 'La integración del derecho internacional en el sistema colombiano', en *Protección multinivel de derechos humanos (s.l.: Red de Derechos Humanos y Educación Superior)*, pp. 367–392
- Rivas-Ramírez, Daniel and Gabriela Rivera Ramírez (2026). "“No hay peor ciego que el que no quiere ver”: el (des)uso de los estándares interamericanos sobre habeas corpus en Colombia', en *Garantías judiciales de la Constitución. Tomo 1X. Habeas Corpus* (Bogotá: Universidad Externado de Colombia).
- Robledo Silva, Paula y Medina Barragán, Mariana (2019). 'Dos pasos adelante y uno atrás: protección de los derechos de las mujeres en la jurisprudencia constitucional colombiana de 2018', *Anuario Iberoamericano de Justicia Constitucional* 23(2).
- Robledo Silva, Paula y Medina Barragán, Mariana (2023). 'El bucle de los derechos sexuales y reproductivos: avances, resistencias y regresiones en la jurisprudencia constitucional colombiana', *Anuario Iberoamericano de Justicia Constitucional* 27(2).

Robledo Silva, Paula y Medina Barragán, Mariana (2025). 'Apuntes preliminares sobre el debate constitucional que llevó a la despenalización del aborto en Colombia', en: *Estudios de casos líderes nacionales y extranjeros Vol. XXXII. La interrupción voluntaria del embarazo en la doctrina judicial comparada* (Ciudad de México: Tirant lo Blanch).

Robledo Silva, Paula y Rivas-Ramírez, Daniel (2026). 'Sentencia C-136 de 2024 (Ley Estatutaria sobre equidad de género en altos cargos del Estado)', en: *Justicia constitucional a debate. Vol. 5. Crónicas jurisprudenciales del año 2024*. (Bogotá, Universidad Externado de Colombia)

Sierra Porto, Humberto, Paula Robledo Silva, Diego González Medina and Daniel Rivas-Ramírez (eds.) (2023). *Garantías judiciales de la Constitución. Tomos II y V*. (Bogotá, Universidad Externado de Colombia).

Vergel Tovar, Carolina (2018). 'Conflicto armado y feminismo de Estado: la incursión de la problemática de la guerra en la acción pública para las mujeres en Colombia', *Foro: Revista de Derecho*, 29, pp. 89-115

STRUCTURE OF THE STATE: INSTITUTIONAL
DESIGN OF THE LEGISLATIVE AND JUDICIAL
BRANCHES OF PUBLIC POWER

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ABSTRACT

This chapter examines the institutional design of the legislative and judicial branches of public power within the Colombian constitutional order, as configured by the 1991 Constitution and interpreted by the Constitutional Court. It begins by identifying the defining features of Colombian constitutionalism regarding state structure: the republican form of government, the principle of separation of powers, the presidential system, a bicameral Congress, and the independence of the judiciary. The analysis reconstructs the historical evolution of these features through the successive reforms to the 1886 Constitution –those of 1910, 1945, 1968, and 1986– demonstrating how each reconfigured the equilibrium among the branches of government, oscillating between executive predominance and legislative preponderance. The chapter then turns to the 1991 Constitution, examining Article 113 and the four mandates that the Constitutional Court has derived from it: separation of branches, integration of public power with autonomous organs, harmonious collaboration, and functional checks and balances. Particular attention is devoted to the institutional reconfiguration of the Presidency –its election, term, and alternation–, the regulation of states of exception and extraordinary powers, the political control mechanisms of Congress through summons and motion of censure, and the relations between the executive and the judiciary. The central argument holds that, notwithstanding the concentration of functions in the President as Head of State, Head of Government, and supreme administrative authority, the 1991 Constitution has progressively limited presidential power through an articulated system of

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inter-branch controls. The chapter closes with a critical reflection on recent practices –decrees convening popular consultations, budgetary reversals by executive action, and regulatory measures in the absence of statutory law– as manifestations of an atavistic presidentialism that persists in the political imagination despite the constitutional advances achieved since 1991.

KEYWORDS

Separation of powers, 1991 Constitution, presidential system, Congress of the Republic, judicial independence, states of exception, motion of censure, political control, Colombian constitutionalism

I. INTRODUCTION

The defining characteristics, or construction laws² of Colombian constitutionalism with respect to the structure of the State may be summarized as follows: the republican form of the State, the tacit or express recognition of the principle of separation of powers, the presidential system of government, a bicameral Congress, and the independence of the judiciary. Nevertheless, the enduring concern throughout our republican life, as regards the structure of the State, has been the pursuit of equilibrium among the branches of government – a kind of institutional “engineering” in the design of the State’s organs

Thus, for example, certain periods of our history have been marked by the predominance of the executive over the other branches of government, as was the case with the original text of the Constitution of 1886, which reinforced the presidential office. Others have been characterized by the preponderance of the legislature, as with the Constitution of 1863, which severely weakened executive power. Ultimately, as Tascón observes, constitutions in Colombia have been enacted either in favor of someone or out of fear of someone: “It has been common in these countries for constitutions to be drafted with a

2 The expression *construction laws of constitutions* was used by the Austrian public law scholar Adolf Julius Merkl to denote “the body of legal institutions that manifest themselves as the substantive expression of a worldview or a political ideology”. Cited in C. Restrepo Piedrahita. *Constituciones de la primera república liberal 1855–1885*, vol. III. Bogotá, Universidad Externado de Colombia, 1985, 128–129.

particular man in mind: among us, that of 1830 was enacted for Bolívar, and that of 1886 for Núñez; whereas that of 1853 was enacted against Obando, and that of 1863 against Mosquera”³.

The Constitution of 1991 likewise incorporated a proposal for reconfiguring the structure of the State, with the aim of achieving equilibrium among the branches of government⁴. With regard to institutional design, the foundational provision that defines the general structure of the State and implicitly enshrines the principle of separation of powers is Article 113 of the Constitution, which establishes: (i) that the branches of public power are the legislative, executive, and judicial; (ii) that, in addition to the organs that comprise them, there exist other organs that are autonomous and independent; (iii) that all organs exercise separate functions; and (iv) that they collaborate harmoniously toward the realization of the purposes of the State.

Indeed, as the supreme constitutional tribunal has made clear, four mandates flow from this provision: 1. a mandate of separation of the branches of public power; 2. a mandate of integration of public power with organs other than those comprising the executive, legislative, and judicial branches, as provided in the second paragraph of the same provision; 3. a mandate of harmonious collaboration;⁵ and 4. a mandate of reciprocal checks and controls⁶.

The separation of powers, as a structural axis of the Constitution of 1991, “is characterized by (i) the precise delimitation, through legal rules, of the competences of each of the powers, together with the definition of their institutional structure; (ii) the application of said principle to fulfill the dual function of rationalizing State activity and protecting the rights and liberties of citizens against the arbitrariness inherent in all omnipotent power; and (iii) the incorporation of mechanisms for the operation of the

3 T. E. Tascón. *Historia del derecho constitucional colombiano*. Bogotá, Universidad Externado de Colombia, 2005. Restrepo Piedrahita similarly notes that constitutions, for one reason or another, “have been and continue to be the product of a fear, or an aversion to something that in prior experience has been deemed harmful, unjust, or undesirable, or that might come to pass in the future”. C. Restrepo Piedrahita. *Constituciones de la primera república liberal 1855–1885...*, 118.

4 M. J. Cepeda Espinosa. *La Constitución de 1991: viviente y transformadora*. Bogotá, Universidad de los Andes, 2022. See also J. C. Esguerra Portocarrero. *Los cimientos de la Constitución*. Bogotá, Tirant lo Blanch, 2023.

5 A. Gómez Velásquez. *El deber de colaboración armónica entre los poderes públicos*. Bogotá, Tirant lo Blanch, 2022.

6 Constitutional Court, Judgments C-247 of 2013

system of checks and balances, grouped under the criteria of harmonious collaboration and reciprocal or inter-organ controls”⁷.

In light of the foregoing, it may be said that the framers of the 1991 Constitution respected the classical doctrine of the “tripartite division of power,” maintaining as such the legislative, executive, and judicial branches – a feature constant since our first National Constitution of 1821. Nevertheless, there appears for the first time in our constitutionalism the express recognition of other “constitutional organs” not situated within the three branches of public power, each endowed with its own constitutional status. These include: (i) the Electoral Organization, composed of the National Electoral Council and the National Civil Registry; (ii) the oversight organs, comprising the Public Ministry – the Office of the Attorney General (*Procuraduría General de la Nación*) and the Ombudsman’s Office (*Defensoría del Pueblo*) – and the Office of the Comptroller General of the Republic (*Contraloría General de la República*). Also bearing this status is (iii) the Bank of the Republic (*Banco de la República*), organized as a legal entity under public law with administrative, patrimonial, and technical autonomy.

The institutional re-engineering also reached the branches of public power themselves, whether through the incorporation of new constitutional organs, the modification of electoral procedures, or adjustments to their competences, as will be explained below. It suffices to note a few examples: a national constituency for the election of the Senate, special constituencies in both the Senate and the House of Representatives, the elimination of alternate memberships in public corporations, the impeachment of congressional investiture (*pérdida de investidura*), a two-round system for presidential elections, and the restoration of the Vice Presidency.

The judicial branch was likewise no stranger to constitutional re-engineering: the creation of the Constitutional Court, the Office of the Attorney General (*Fiscalía General de la Nación*), and the Superior Council of the Judicature (*Consejo Superior de la Judicatura*), together with the introduction of fixed terms and new eligibility requirements for appointment to the high courts, as well as changes to the procedures for their composition.

7 Constitutional Court, Judgments C-288 of 2012.

In this chapter, we turn to the legislative and judicial branches – their constitutional design and general features – while the presidential regime will be addressed in a separate chapter of this work.

THE LEGISLATIVE BRANCH

The organ of the legislative branch is the Congress of the Republic, a collegiate and pluralist political institution and the primary forum for the political representation of the citizenry. Accordingly, and without diminishing the importance of the other branches and constitutional organs, it may be maintained today, within constitutional democracies, that parliaments and congresses enjoy a certain primacy or constitutional hierarchy, by virtue of being the most direct representatives of the holders of sovereignty – a status that confers upon them direct democratic legitimacy⁸. The Constitutional Court itself has underscored this point, noting “that the legislative branch is, par excellence, the organ of public power in which popular representation finds its highest degree of expression”⁹.

In this sense, the constitutional importance of Congress is reflected in its standing as “the organ entrusted with the democratic representation of the people”¹⁰ as the holder of sovereignty – an institution that also possesses “the original competence to define the legal order, on the understanding that it is vested with the legitimacy necessary to impose, with general effect, legal rules and, by the same token, with binding force”¹¹. This importance is further underscored by the fact that the enactment of such norms embodies the principles of deliberation, debate, publicity, consensus, and timeliness.

It is equally relevant to note that Congress is the only constitutional organ that, in the exercise of its preeminent function – the enactment of statutes and the development of the fundamental charter – is subject solely to the Constitution, whereas the other branches of government are bound

8 On Congress in Colombia, see: F. Padrón Pardo. “Organización y funcionamiento del congreso de la república”. In *Lecciones de derecho constitucional*, vol. II. Bogotá, Universidad Externado de Colombia, 2018. See also C. E. Gechem Sarmiento. *El congreso colombiano a partir de 1991*. Bogotá, Universidad Externado de Colombia, 2015.

9 Constitutional Court, Judgments C-242 of 2020.

10 Constitutional Court, Judgments C-332 of 2017.

11 Ibid

not only by the Political Charter but also by statute, without prejudice to the fact that certain sub-constitutional norms may be taken into account as parameters of constitutional review – as is the case, for instance, with the congressional standing orders contained in an organic law.

The constitutional importance of Congress is also reflected in its very placement within the constitutional text. Article 113 of the Constitution, in enumerating the structure of the State and referring to the branches of public power, names the legislative branch first – as does, specifically, Article 114. Furthermore, in the substantive constitutional development that follows, the first title on the structure of the State is dedicated to the legislative branch, treated with a level of detail that the Constitution extends to no other branch or constitutional organ.

Indeed, Title VI, comprising six chapters and Articles 132 through 187 inclusive, is devoted in its entirety to the legislative branch. Together with Article 114 in the general part, these provisions form a specific constitutional statute of 57 articles – representing 15% of the Constitution. This purely quantitative fact already reflects the primacy of Congress in Colombian constitutional law.

I. THE FUNCTIONS OF CONGRESS

As is customary in liberal democracies, the legislative function – that is, the making of law, understood as the creation of general, impersonal, and abstract norms of a permanent and binding character that regulate the conduct of citizens or develop the Constitution – is ordinarily assigned to assemblies, parliaments, or congresses, as they are, by their very nature, the organ of representation par excellence. This is made clear by Articles 114 and 150 of the Constitution, which establish that “it falls to Congress to enact statutes,” as well as to interpret, amend, or repeal them, and to issue codes across all branches of legislation and reform their provisions¹².

Congress is therefore, as the Constitutional Court has noted, “the holder of the general clause of legislative competence, which it may exercise broadly,

12 A. Palacios Torres. “Aspectos constitucionales del procedimiento legislativo ordinario en el ordenamiento jurídico colombiano”. In *Lecciones de derecho constitucional*, vol. II. Bogotá, Universidad Externado de Colombia, 2018.

subject only to the limits imposed by the Charter itself”¹³ – whether by virtue of the Constitution’s decision to assign the regulation of a particular matter to another organ, or by reason of “the constitutional clauses that impose constraints on the legislature’s freedom of normative configuration with respect to certain subjects, and the obligation to respect, within the framework of the legislative regulation of a matter, the constitutional norms and the rights and principles established in the Charter”¹⁴.

This function is so central that the Political Charter itself addresses the structural aspects of the legislative procedure in just over twenty articles (Articles 150 through 170), covering everything from the right to introduce bills to the various requirements for their enactment into law¹⁵.

In general terms, Article 157 of the Constitution sets out the following requirements: (i) the bill must have been officially published by Congress before being referred to the relevant committee; (ii) it must have been approved in first debate in the committee, or in joint session of the permanent committees of both chambers, as applicable; (iii) it must have been approved in second debate in each chamber; and (iv) it must have been signed into law by the President of the Republic. These are the structural elements of the law-making process, the absence of any of which constitutes an irremediable constitutional defect¹⁶.

Congress is also empowered, through legislative acts (*actos legislativos*), to amend the Constitution¹⁷ (Articles 114, 374, and 375), by means of an aggravated procedure requiring approval in two rounds – the first by a simple majority and the second by an absolute majority of the members of each chamber¹⁸.

Beyond legislation, contemporary parliaments and congresses are no longer confined to law-making. In the framework of a renewed understanding

¹³ Constitutional Court, Judgments C-1648 of 2000.

¹⁴ Constitutional Court, Judgments C-473 of 1997.

¹⁵ On this subject, see: Alfonso Palacios Torres, *Concepto y control del procedimiento legislativo* (Bogotá: Universidad Externado de Colombia, 2005); Humberto Sierra Porto, *Concepto y tipos de ley en la Constitución colombiana* (Bogotá: Universidad Externado de Colombia, 1998).

¹⁶ Constitutional Court, Judgments C-481 of 2019.

¹⁷ G. Ramírez Cleves. *Límites de la reforma constitucional en Colombia. El concepto de Constitución como fundamento de la restricción*. Bogotá, Universidad Externado de Colombia, 2005.

¹⁸ As a general rule, the enactment of a statute requires four debates – two in each chamber (committee and plenary) – whereas legislative acts require two rounds, that is, eight debates in total.

of the principle of separation of powers – and specifically with regard to the relationship between the legislative and executive branches – they are also entrusted with the function of exercising political oversight over the Government and the public administration¹⁹.

The purpose of this function is to evaluate or critique the actions of the Executive, with the potential aim of conditioning executive conduct or, in some cases – as occurs in parliamentary systems – bringing about the removal of government officials from office. It is accordingly a function exercised between organs of a political nature (Congress and the President of the Republic), subjective in character, and constituting a review of expediency and advisability that does not necessarily entail the imposition of sanctions upon the body being reviewed.

To this end, the Constitution provides for several instruments of political oversight: (i) the presidential address to Congress (Article 189.12) on the acts of the administration, the implementation of economic and social development plans and programs, and the projects the Government intends to pursue during the new legislative term; (ii) requests for reports from the Government; (iii) the presentation of reports by ministers and heads of administrative departments at the opening of each legislative session; (iv) the scheduling of reserved sessions devoted primarily to oral questions put by members of Congress to ministers and their replies; and (v) the summoning and formal requirement of ministers, superintendents, and heads of administrative departments to appear before congressional sessions.

A notable innovation of the Constitution of 1991 was the introduction of the motion of censure (*moción de censura*) – a mechanism characteristic of parliamentary forms of government – as an instrument of political oversight. The Constitution provides that each chamber may propose a motion of censure against ministers, superintendents, and heads of administrative departments for matters relating to their official duties or for disregarding congressional summons and requests.

A motion of censure must be proposed by at least one-tenth of the members of the relevant chamber, and its adoption requires the affirmative vote of an absolute majority of the members of the chamber that proposed it.

19 On political oversight, see: G. Lozano Villegas. *Control político en el ordenamiento constitucional colombiano: ¿un concepto diluido en el control jurídico o una idea que debe consolidarse?* Bogotá, Universidad Externado de Colombia, 2010.

The vote must be held between the third and tenth day following the close of debate, with a public hearing of the official concerned, and if approved, the official is thereby removed from office.

In addition to their legislative and political oversight functions, each chamber is separately assigned other specific powers. Among the exclusive powers of the Senate, for example, are the authority to accept or reject the resignation of the President or Vice President of the Republic, to grant the President leave to temporarily absent himself from the exercise of office, and to authorize the Government to declare war (Article 173). The House of Representatives, for its part, is responsible, among other matters, for examining and settling the general accounts of the budget and the treasury (Article 178).

With respect to electoral functions, these are similarly distributed: certain appointments fall to the Senate – including the election of the Attorney General (*Procurador General de la Nación*) and the justices of the Constitutional Court – others to the House of Representatives – such as the election of the Ombudsman (*Defensor del Pueblo*) – and still others to Congress in plenary session, including the election of the Comptroller General of the Republic, the members of the National Electoral Council, the members of the National Commission of Judicial Discipline, and, when the occasion requires, the Vice President of the Republic.

Congress is also vested with certain judicial functions (Article 116 of the Constitution), specifically in connection with the special proceeding for the political accountability of high officials (*juicio político* or impeachment) who enjoy constitutional immunity (*fuero constitucional*). The functions of investigation and accusation are assigned to the House of Representatives, while the power to adjudicate rests with the Senate.

Accordingly, it falls to the House of Representatives to bring charges before the Senate, when constitutional grounds exist, against the President of the Republic or whoever acts in that capacity, the justices of the Constitutional Court, the justices of the Supreme Court of Justice, the members of the Superior Council of the Judicature, the justices of the Council of State, and the Attorney General of the Nation (*Fiscal General de la Nación*).

The Senate, in turn, has jurisdiction to hear the accusations brought by the House of Representatives against those subject to constitutional immunity. Once the accusation is admitted, the accused official is automatically suspended from office. If the Senate finds the official responsible and the

accusation relates to offenses committed in the exercise of official functions, or to unworthiness on account of misconduct, the Senate may impose no penalty other than removal from office or the temporary or permanent deprivation of political rights. Where the accusation involves common offenses, the Senate is limited to determining whether or not there are grounds for further proceedings and, if so, placing the accused at the disposal of the Supreme Court of Justice.

2. THE STRUCTURE OF CONGRESS: BICAMERALISM

Under Article 114 of the Constitution, the legislative function is assigned to the Congress of the Republic, which maintains a bicameral structure composed of the Senate of the Republic and the House of Representatives. The bicameral structure of the legislature may accordingly be regarded as a defining feature of Colombian constitutionalism since the dawn of independence – more precisely since the first National Constitution of 1821 – and has remained constant across all subsequent fundamental charters through to the most recent, that of 1991. It is, moreover, a symmetric bicameralism, in that both chambers participate in the law-making process: bills may originate in either chamber and must in any case be approved by both.

Thus, notwithstanding the republican and unitary form of the State, the framers of the 1991 Constitution chose to preserve bicameralism in the legislature. On this point, the Constitutional Court has observed: “In states organized under a unitary form, bicameralism is adopted for various reasons distinct from those demanded by federalism: (i) as a mechanism of self-limitation of the legislative organ through a system of checks and balances, whereby each chamber exercises reciprocal oversight over the work of the other; (ii) to afford the legislative process greater space for reflection and deliberation, so as to produce a final product of higher quality; or (iii) to incorporate territorial factors into the criteria of representation”²⁰.

In this regard, the Constitutional Court has further noted that bicameralism also serves “to allow for greater pluralism within the legislative branch and to lend greater integrity to the legislative process,”²¹ insofar as varied

²⁰ Constitutional Court, Judgments C-866 of 2004.

²¹ Constitutional Court, Judgments C-481 of 2019.

partisan and ideological interests converge alongside national and territorial concerns. The Court concludes that “this multiplicity of interests, embodied in the existence of two collegiate chambers with different modes of election, seeks to broaden public deliberation and to facilitate the reaching of agreements and compromises among the various representatives, with particular respect for minorities within the legislative organ”²².

2.1. THE MIXED FORM OF CHAMBER ELECTIONS: CONSTITUENCIES AND BICAMERALISM

The first point to be noted is that, historically, national constitutions applied “the principle of multiple constituencies”²³ to the composition of the legislative chambers²⁴. For the delimitation of electoral constituencies, constitutional texts provided for the election of members of Congress in accordance with the political and administrative divisions of the Republic²⁵. The Constitution of 1821 established that senators were to be elected at the departmental level, while representatives would be elected at the provincial level. The constitutional texts of 1830, 1832, 1843, and 1853 provided for the election of both at the provincial level²⁶;

²² Ibid.

²³ Augusto Hernández Becerra, *Derecho electoral. La elección popular de alcaldes* (Bogotá: Universidad Externado de Colombia, 1988), p. 59.

²⁴ See Pedro Pablo Vanegas Gil, *Estudios de derecho electoral* (Bogotá: Universidad Externado de Colombia, 2008), in particular the chapter on electoral constituencies in congressional elections.

²⁵ The political and administrative division established by the Constitution of Cúcuta of 1821 comprised departments, provinces, and cantons. The text of 1832 divided the territory into provinces, cantons, and parish districts, a structure maintained in the texts of 1843 and 1853. The original Constitution of 1886 divided the territory into departments, which were in turn divided into provinces and those into municipal districts. The constitutional reform of 1910 divided the territory into departments and municipalities or municipal districts. The reform of 1936 added intendencies and commissariats. In 1945, the capital of the Republic was organized as a Special District subject to its own regime. This territorial division was maintained until the Constitution of 1991.

²⁶ “The electoral constituency during this period was therefore the province for the election of senators and representatives, and the canton for the election of deputies to the provincial chambers. Since the provincial college was composed of electors from the cantonal colleges, all geographic subdivisions of each province had representation – as did the various personalist candidates of that caudillist era, given that political parties did not form until 1848”. O. Delgado. *Colombia elige: mitaca / 84 – Perspectiva / 86*. Bogotá, Pontificia Universidad Javeriana, 1986, 73.

the federal constitutions of 1858 and 1863, in turn, established election by the respective States²⁷.

The Constitution of 1886 provided for the election of senators at the departmental level, while for the House of Representatives it stipulated that departments would be divided into as many electoral districts as they had representatives, in accordance with their respective populations, delegating to statute or to the Government the authority to demarcate such districts. It further provided that any municipal district with a population exceeding fifty thousand inhabitants would constitute an independent electoral district for the election of one representative²⁸.

This system of electing the House through electoral districts was preserved even through the constitutional reform of 1910. The constitutional reform of 1930 (Legislative Act No. 1) definitively established departmental-level election not only for senators – as had been set out in the original constitutional text – but also for representatives, with each department forming a single electoral constituency.

With the adoption of the Constitution of 1991, however, the elections for the two legislative chambers came to employ distinct criteria for the delimitation and creation of constituencies. The upper chamber is elected in a single national constituency coextensive with the national territory, while the lower chamber is elected through multiple constituencies of variable magnitude determined by geographic and mixed criteria, as will be explained below²⁹.

27 “The territorial division into provinces began to change from 1855 onward, as States were created by statute, each composed of a number of contiguous provinces. The 36 provinces were reorganized into 9 autonomous States, which in 1858 united to form the Granadian Confederation; they then became 9 Sovereign States during the Radical period, and finally 9 Departments during the Regeneration”. *Ibid.*

28 These were, in essence, elections in single-member districts as the mode of composing a public corporation.

29 On congressional elections, see: P. P. Vanegas Gil. *El sistema electoral en la elección del Congreso colombiano: su configuración constitucional*. Bogotá, Instituto de Estudios Constitucionales Carlos Restrepo Piedrahita, Temas de Derecho Público No. 99, 2018.

2.2. THE CONSTITUENCY IN THE ELECTION OF THE SENATE

One of the innovations introduced by the Constitution of 1991 with respect to the election of the Senate of the Republic is the establishment of a national constituency coextensive with the entire national territory³⁰. After a tradition of more than 170 years of elections conducted through multiple constituencies, the country thus moved to a single national one. A first consequence of this new model is that certain regions or departments may find themselves without representation in the upper chamber, given that no requirement is imposed upon political parties or movements to ensure adequate regional representation when composing their lists.

This mode of integrating the Senate has accordingly not been free from criticism, with recurring complaints from communities and regions that have found themselves unrepresented in the legislative chamber. It is argued, in this regard, that the national constituency for senatorial elections has failed to fulfill one of the purposes envisioned by the framers³¹: the expectation that candidates for the upper chamber would conduct nationwide campaigns and that their concerns, interests, and proposals would have correspondingly national reach. Experience has shown that the objective of transforming the Senate into a chamber of national interests remains far from achieved, owing in particular to the concentration of the population in large urban centers that also function as major electoral hubs³².

30 Until that point, nationwide voting had been envisaged exclusively for presidential elections.

31 According to Javier Andrés Flórez, the objectives of the national constituency were: “a) to facilitate access for new political forces and/or political minorities to the Senate, thereby promoting the break with the two-party system through the dispersion of votes across the national territory – in other words, the aggregation of small numbers of votes from all departments would allow seats to be obtained without requiring a large vote in any specific region, which would also contribute to the representativeness of those elected; b) to reduce or eliminate clientelist electoral practices carried out by powerful ‘electoral barons’ to perpetuate their hold on power in their respective home departments; and c) the creation of a space for the representation of national interests through politicians with a national profile”. J. A. Flórez. “16 años de la circunscripción nacional para Senado en Colombia: ¿dónde está el espacio de representación nacional?”. *Revista Desafíos*, Universidad del Rosario, vol. 18, 2008, 3.

32 F. Botero. “El senado que nunca fue. La circunscripción nacional después de tres elecciones”. In A. M. Bejarano and A. Dávila (eds.), *Elecciones y democracia en Colombia, 1997–1998*. Bogotá, Fundación Social, Departamento de Ciencia Política, Universidad de los Andes, 1998.

A further relevant innovation concerning the composition of the Senate relates to the number of its members. The Constitution specifies directly that the chamber shall be composed of 100 members elected in the national constituency – a departure from certain nineteenth-century constitutional texts, which fixed a specific number of representatives per electoral constituency.

In the same vein, the Constitution introduced the novelty of special constituencies. In the case of the Senate, a special indigenous constituency –also of national scope– was established with the purpose of guaranteeing minimum representation for these ethnic groups.

Additionally, the constitutional reform of 2015 provided that the candidate who receives the second-highest number of votes in the presidential election shall have the personal right to occupy a seat in the Senate, which shall be additional to the original 102 seats. As this is a personal right, the seat shall not be subject to replacement in the event that the candidate declines to accept it or, having accepted it, subsequently resigns.

2.3. THE HOUSE OF REPRESENTATIVES: COMPOSITION AND ELECTION

For the election of members to the House of Representatives, territorial constituencies are retained, and to that end the constitutional text provides that each department shall constitute an electoral constituency³³. In addition, the electoral constituency of Cundinamarca was separated from that of Bogotá, with the Capital District established as an independent electoral constituency³⁴. Accordingly, under the current political and administrative division of the country, the House of Representatives is elected across

33 It is relevant to note that the Constitution of 1991 elevated the former intendencies and commissariats to the status of departments, which consequently also became electoral constituencies. Under the prior constitutional text – the Constitution of 1886 – those entities were subject to a special regime for the election of representatives, as established in Articles 99 and 177, as amended by Legislative Act No. 1 of 1968.

34 Prior to the entry into force of the Constitution of 1991, Bogotá was integrated into the electoral constituency of the Department of Cundinamarca, reflecting the city's dual status as both the national capital and the departmental capital. This arrangement had, to some extent, affected the adequate representation of the Department, given Bogotá's population and electoral density – that is, the majority of Cundinamarca's representatives in the House came from the capital.

33 electoral constituencies, corresponding to the 32 departments plus the Capital District.

It is important to note, however, that while the delimitation of constituencies follows political and administrative divisions – departments and the Capital District – this does not mean that the House functions as a chamber of representation for territorial entities as such, in the manner of federal state models. It remains, rather, a chamber representing the population settled within those territories. The Constitutional Court has underscored this point, noting that Colombian constitutional law is governed not by the federal system but by the unitary state, and that bicameralism is therefore adopted for reasons distinct from those required by federalism³⁵.

On a separate occasion, in the context of a constitutional challenge to a statute on the ground that it had been approved without the minimum representation of one of the departments, the Constitutional Court held that no provision of the constitutional text obliges the maintenance of a minimum representation regardless of how it was obtained, nor does any provision require the suspension of legislative activity as a result of the temporary loss of territorial representation in that chamber³⁶.

The composition of the House also preserves the application of geographic and demographic criteria: a minimum representation per constituency – set at two seats – and additional representation based on population. Here, as has been the consistent pattern in successive constitutional reforms on the subject, the population threshold was progressively raised: from 100,000 inhabitants or a fraction exceeding 150,000, to 250,000 or a fraction exceeding 125,000 in the original text of the 1991 Constitution; and subsequently, through the constitutional reform of 2005 (Legislative Act No. 3), to 365,000 inhabitants or a fraction exceeding 182,500 above the initial 365,000³⁷.

It is thus clear that the intention of the 1991 framers was to guarantee an equal minimum representation for all constituencies, regardless of the population of the respective department. Under this criterion, two seats are assigned to each constituency by virtue of its status as such.

35 Constitutional Court of Colombia, Judgments C-866 of 2004.

36 Constitutional Court of Colombia, Judgments C-579 of 2004. See also C-709 of 2004.

37 On electoral constituencies in congressional elections, see: Pedro Pablo Vanegas Gil, *Estudios de Derecho Electoral*, *op. cit.*, pp. 55 et seq.

It is also worth highlighting that the 2005 constitutional reform, in addition to raising the population thresholds, provided that from 2014 onward the threshold shall be adjusted in proportion to population growth. The reform further guarantees the existing representation of constituencies by establishing that, should the application of the new threshold result in any constituency losing one or more seats, that constituency shall retain the same number of seats it held as of July 20, 2002.

In this way, the number of representatives was reduced from the 199 members elected prior to 1991 to 161 members elected across the 33 territorial constituencies. As regards the magnitude of the electoral constituencies – that is, the number of representatives elected in each – 24 are small constituencies electing between 2 and 5 representatives (72.7%), of which 12 are binominal (36.3%). Only 3 constituencies elect more than 10 representatives and thus constitute large constituencies, while 6 constituencies elect between six and ten representatives, qualifying as medium-sized³⁸.

This mode of composing the House of Representatives through multiple constituencies also produces notable effects on the formation of parliamentary groups within the chamber, given the confluence of varied interests among its members: on the one hand, those inspired by the ideological platforms of their respective parties, and on the other, those grounded in the needs and interests of their regions – an alignment that may give rise to a common position among legislators from the same region, as exemplified by the so-called *bancada costeña*, composed of representatives elected in the Caribbean coastal departments of Colombia³⁹.

With respect to special constituencies, the constitutional reform of 2015 provides for the election of 4 additional members as follows: one special indigenous constituency electing 1 representative; one special Afro-descendant constituency electing 2 representatives; and one special international

38 “The basic distinction here is between single-member and multi-member constituencies. The latter may in turn be differentiated into small multi-member constituencies (two to five seats), medium-sized (six to ten), and large (more than ten)”. D. Nohlen. “Sistemas electorales presidenciales y parlamentarios”. In *Tratado de Derecho Electoral*, op. cit., 299.

39 So much so that when the legislature regulated the conduct of parliamentary groups (Law 974 of 2005), it envisaged that in cases of “regional controversy” within the House of Representatives, the parliamentary group could resolve to “leave its members free to vote according to their individual judgments”. This provision was, however, declared unconstitutional by the Constitutional Court in Judgments C-859 of 2006.

constituency for Colombians residing abroad, electing 1 representative. Additionally, the reform established that the territorial constituency formed by the Department of San Andrés, Providencia and Santa Catalina shall elect one additional representative for the Raizal community of that department, in accordance with statute – a provision that has yet to be implemented, as the requisite legislation has not been enacted and the corresponding election has therefore not taken place.

Subsequently, Legislative Act No. 2 of 2021 provided that the House of Representatives shall have 16 additional representatives for the constitutional terms 2022–2026 and 2026–2030, to be elected in an equal number of special transitional peace constituencies, one per constituency⁴⁰.

Finally, the constitutional reform of 2015 established that the candidate who receives the second-highest number of votes in the vice-presidential election shall have the personal right to occupy a seat in the House, in addition to the initial allotment of seats. As this is a personal right, the seat shall not be subject to replacement in the event that the candidate declines to accept it or, having accepted it, subsequently resigns.

Representatives from territorial constituencies	161
Representatives from special constituencies	4
Representatives from CITREP	16
Personal seat for the runner-up in the vice-presidential election	1
Total	182

⁴⁰ Regarding the transitional rules for the composition of the chambers: pursuant to the Final Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace concluded with the FARC insurgent group in 2016, Legislative Act No. 3 of 2017 was enacted, partially implementing the political reintegration component. It established that the party or political movement arising from the FARC's transition to political life could present electoral lists in both the Senate and the House, competing on equal terms under ordinary electoral rules. A minimum representation of up to 5 seats per chamber was, however, guaranteed for those cases in which the application of ordinary distribution rules would not yield that number – with the electoral authority assigned to allocate the additional seats needed to reach the minimum of five. These special rules applied exclusively during two constitutional terms: 2018–2022 and 2022–2026.

3. THE ELECTORAL SYSTEM FOR THE CHAMBERS

Congressional elections are held on the second Sunday of March in the election year. Candidate lists may be submitted by political parties and movements holding legal recognition (*personería jurídica*), whether individually or through alliances or coalitions, provided they satisfy the requirements established in Article 262 of the Constitution. Social movements and significant groups of citizens may likewise present candidate lists, subject to compliance with the seriousness requirements established in law – namely, the support of a specified number of citizen signatures and the posting of a seriousness bond in the amount fixed by the National Electoral Council.

As regards the form of candidacy, elections are conducted through single, closed lists, which may be either blocked or unblocked –that is, with or without preferential voting– at the discretion of the party. The constitutional reform of 2003 introduced legal thresholds for congressional elections: in the case of the Senate, the threshold was set –following the 2009 amendment– at 3% of the total valid votes cast. In the 2022 election, for instance, the total number of valid votes in the Senate election was 16,990,304, placing the threshold at 509,709 votes. For the House, the threshold was set at 50% of the electoral quotient, meaning that the threshold varies depending on the size of the constituency – the larger the constituency, the lower the threshold.

Finally, the allocation of seats among lists that have cleared the threshold is carried out through the application of the *cifra repartidora* formula –a divisor method derived from the D’Hondt system– except in constituencies where only two seats are at stake, in which case the electoral quotient is applied instead. It is also worth noting that, pursuant to the Constitution, members of Congress shall have no alternates and may only be replaced – in cases of absolute or temporary vacancy as determined by law – by the unsuccessful candidates who, in descending order of inscription or votes obtained, follow the incumbent on the same electoral list.

In any event, Article 134 of the Constitution provides that “under no circumstances may the following be replaced: those convicted of common offenses related to membership in, promotion of, or financing of illegal armed groups or drug trafficking activities; willful offenses against the public administration; offenses against mechanisms of democratic participation; or crimes against humanity. Nor may those who resign having been formally implicated in criminal proceedings in Colombia for the commission of such

offenses, nor shall temporary vacancies be filled in the case of those against whom an arrest warrant has been issued within the respective proceedings”.

4. CONSTITUTIONAL TERM, INAUGURATION, RULES ON SESSIONS, AND THE SEAT OF CONGRESS

Members of Congress are elected for a fixed institutional term of four years, which begins on July 20 of the election year. The joint inauguration of Congress falls to the President of the Republic, although this ceremony is not a prerequisite for Congress to exercise its constitutional and legal powers.

Under the Constitution, Congress convenes as of right in ordinary sessions during two periods each year: the first runs from July 20 to December 16; the second from February 16 to June 20. In the year in which congressional elections are held, the second period begins on March 16 and concludes on June 20. These two periods together constitute what Colombian parliamentary law terms a *legislatura* – the temporal framework within which statutes must be approved.

Congress may also convene in extraordinary sessions upon the call of the Government and for such time as the Government designates, during which it “may only address the matters submitted to it by the Government, without prejudice to its political oversight function, which it may exercise at any time”.

The Constitution further provides for Congress to convene as of right in the following states of exception: (i) for the duration of a State of War, Congress shall meet with the full exercise of its constitutional and legal powers; (ii) within three days of the declaration or extension of a State of Internal Commotion, Congress shall convene as of right with the full exercise of its constitutional and legal powers; and (iii) in the event of a State of Economic Emergency, the Government shall convene Congress if it is not already in session, and if no such convocation is issued, Congress shall convene as of right.

Any meeting of Congress held outside these constitutional conditions “shall be without legal effect; no effect whatsoever may be given to the acts it performs, and those who participate in its deliberations shall be sanctioned in accordance with the law”. It is nonetheless permissible for each chamber to arrange for its permanent constitutional committees to hold sessions during parliamentary recess for the purposes set out in Article 143

of the Constitution: to debate pending matters, carry out studies assigned to them, and prepare draft legislation entrusted to them by the chambers.

The Constitution also establishes rules on the seat of Congress (Article 140). The primary rule designates the capital of the Republic – Bogotá, pursuant to Article 322 – which is simultaneously the capital of the Department of Cundinamarca and is organized as the Capital District. The second rule provides that the chambers may, by mutual agreement, relocate their seat to another place, which must be read in conjunction with the power conferred by Article 150.6, allowing Congress by statute to “vary, in extraordinary circumstances and for serious reasons of public convenience, the current residence of the high national powers”. Finally, the Constitution provides that “in the event of a disturbance of public order, Congress may meet at the place designated by the President of the Senate”.

It follows, as the Constitutional Court has made clear, that the establishment of permanent alternate or parallel seats of Congress is constitutionally impermissible. The Court held “that the provision contained in Article 140 of the Constitution itself prohibits the establishment of more than one seat for the Congress of the Republic, regardless of the designation one might wish to assign to them; moreover, the seat of Congress need not necessarily be located in the capital of the Republic, as the Constitution contemplates the circumstances and conditions under which the chambers may decide to relocate to another place”⁴¹.

This conclusion does not, however, preclude the constitutional and legal committees from, as the Court has noted, “holding sessions or conducting hearings in specific cases at a location other than the seat of Congress,” nor does it prevent the holding of ceremonial acts in other venues⁴².

It is also permissible, albeit on an exceptional basis, for Congress to hold virtual sessions. The general rule for its functioning remains in-person attendance, as this is the “most adequate mechanism for accommodating a vigorous democracy through the possibility of intense debate, active and free participation, and the expression of all currents of opinion under conditions of greater ease”⁴³. In-person sessions at the official seat thus constitute,

⁴¹ Constitutional Court, Judgments C-063 of 2002.

⁴² *Ibid.*

⁴³ Constitutional Court, Judgments C-242 of 2020. “In this sense, preventing in-person attendance at sessions of the collegiate organs of the State in times of pandemic is not permissible. Indeed,

in the view of the Constitutional Court, “the most expeditious means of guaranteeing genuine democratic debate, as they offer greater facilities for deliberation, community participation in the respective sessions, and the exercise of direct political oversight”⁴⁴.

5. THE FUNCTIONING OF CONGRESS AND ITS CHAMBERS. THE PERMANENTE COMMITTEES

The general rule of bicameralism is that the chambers function separately, particularly in the exercise of their constituent and legislative functions. The Congress meets in joint plenary session, forming a single body, only for the purpose of exercising certain (i) ceremonial functions – such as opening and closing its sessions, administering the oath of office to the President of the Republic, or receiving heads of state or government of other countries – and (ii) electoral functions – such as electing the Comptroller General of the Republic, the members of the National Electoral Council, the justices of the National Commission of Judicial Discipline, or the Vice President of the Republic when a replacement for the popularly elected officeholder is required.

Once the ordinary sessions of Congress have been inaugurated, the chambers commence their separate functioning, both in plenary and in committee. For each constitutional term, both the Senate and the House shall elect “permanent committees,” which are responsible for conducting the first debate on draft constitutional reforms (draft legislative acts) and on bills, thereby enabling more specialized deliberation in the law-making process.

Under current legislation (Law 3 of 1992), seven permanent constitutional committees operate in each chamber. The law specifies the number of members that compose each committee as well as the subject-matter areas assigned to each. Committees are elected by the electoral quotient system, following the submission of lists; however, parties and movements with

the degree of required in-person attendance becomes more demanding depending on the weight of the decisions to be adopted (e.g., legislative acts, statutory laws, tax provisions, criminal norms, etc.). It must therefore be said that virtual proceedings are a measure of last resort – a subsidiary and exceptional form of deliberation”.

44 Constitutional Court, Judgments C-008 of 2003.

parliamentary representation may agree on “a complete list of the Committees, or of some of them, in which case they shall be voted on as a bloc”.

In any event, “it is the obligation of members of Congress to belong to one of the permanent committees, and membership may be held in only one of them”. In addition to these committees, the law also provides for legal, ad hoc, and special committees.

6. PARLIAMENTARY AUTONOMY: CONSTITUTIONAL DIMENSIONS

One of the distinguishing features of the constitutional recognition of the separation of powers is reflected, in the case of the legislative branch, in the principle of parliamentary autonomy. This principle recognizes Congress’s capacity to regulate itself and to dispose of its own governance and administrative organs – capacities that are indispensable for the legislative branch to exercise its constitutional functions without interference from other constitutional organs. Its constitutional foundation may be found in Article 113 of the Constitution, which provides that the branches of public power have separate functions, thereby imposing a limit on other constitutional organs so as to prevent interference in the organization of Congress and its chambers.

For the Constitutional Court, this “means that Congress, by express constitutional provision, enjoys autonomy and full capacity for self-organization, which translates, in particular, into: a) regulatory autonomy – that is, the capacity to issue norms for its own functioning, without the intervention or interference of any other organ and without the Government having the power of initiative in these matters; and b) financial and administrative autonomy, in that the chambers have the authority to establish their own rules of procedure and to administer their own services and the personnel that provides them”⁴⁵.

6.1. REGULATORY AUTONOMY

This is the capacity of Congress and its chambers to issue their own rules of procedure – that is, the norms necessary for their internal functioning, which

45 Constitutional Court, Judgments C-830 of 2001.

“consists of a series of provisions establishing the procedures to be followed for the proper exercise of legislative activity, as well as aspects relating to internal administrative functioning and organization,⁴⁶” together with the catalogue of the rights, duties, and prohibitions of members of Congress. In the Colombian system, the rules of procedure must be contained in a statute – and more precisely in a special type of statute known as an “organic law” – unlike in other countries where such rules are customarily adopted by administrative act.

This special type of statute is characterized by the requirement that its adoption be approved by an absolute majority of the members of each chamber. This feature already reflects “the importance and superior hierarchy of this class of statutes with respect to ordinary statutes within the constitutional order”⁴⁷. It is further characterized by the capacity to “condition the enactment of other statutes on the subject to its prescriptions, such that a violation or disregard of the procedures and principles it enshrines at the time of enactment of ordinary statutes may render the latter unconstitutional”⁴⁸.

6.2. THE GOVERNING AND ADMINISTRATIVE ORGANS OF THE CHAMBERS AND THEIR COMMITTEES

This dimension means that each chamber disposes of its own governing and administrative organs, as provided for in the Constitution and the relevant rules of procedure. Each chamber is thus recognized as having the power to “elect its own steering committees” (*mesas directivas*), as well as those of its permanent committees, for one-year terms corresponding to the legislative session beginning on July 20, and no member may be re-elected to these positions within the respective four-year term.

Under the congressional rules of procedure, the steering committees of the chambers shall be composed of a president and two vice-presidents, while those of the permanent committees shall consist of a president and one vice-president. The Constitution and the law further provide two rules concerning

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Constitutional Court, Judgments C-446 of 1996.

the participation of parties and movements in the steering committees: one relating to “minority” parties and the other to parties in “opposition”.

First, the congressional rules of procedure (Law 5 of 1992) provide that minority parties “shall have participation in the First Vice-Presidencies of the Steering Committees of the Senate and the House, through the party or movement that holds the majority among the minorities”. Second, the Opposition Statute (Law 1909 of 2018) establishes as one of the rights of organizations that have formally declared themselves in opposition the right to participate in at least one of the positions on the steering committees of the chambers.

One might initially consider these two provisions to be mutually exclusive, with the Opposition Statute taking precedence. However, both constitutional and electoral jurisprudence have held that the two norms are complementary and must therefore be applied systematically: the election of steering committees shall follow both rules – the first vice-presidency assigned to minority parties and one of the remaining positions reserved for parties declared in opposition.

6.3. ADMINISTRATIVE AND BUDGETARY AUTONOMY

The Constitution assigns Congress the competence to administer its own affairs by granting it the power to “[c]reate the administrative and technical services of the Chambers” (Article 150.20), as well as the power to elect, in addition to its steering committees, the secretary general, to fill the positions created by law, and to organize its internal police, among other matters (Article 135 of the Constitution).

7. THE NATURE OF THE PARLIAMENTARY MANDATE AND PARLIAMENTARY CAUCUSES

The constitutionalization of the free mandate, on the one hand, and the strengthening of political parties in modern democracy⁴⁹, on the other,

49 “Since, as we have seen, the democracy of our time is necessarily a democracy of parties, it seems that the democratic state must be configured as a party-state, given that only parties can provide the state system with the inputs capable of shaping it democratically – such as the electoral mobilization of the population, the conveyance to the state of political orientations and social demands...” M. García-Pelayo. *El Estado de partidos*. Madrid, Alianza Editorial, 1986, 85.

compel a reconsideration of the content of political representation. It is therefore necessary to address this subject in connection with two constitutional principles that, at first glance, might appear contradictory: the prohibition of the imperative mandate, on one side, and the requirement that elected members act through parliamentary caucuses, on the other⁵⁰.

Political representation is an instrument through which the right of citizen participation is made effective. Article 3 of the Constitution provides that sovereignty resides in the people, from whom public power emanates and who exercises it directly or through their representatives. This gives rise to a relationship –or connection– between the represented subject (the people) and their representatives (the elected), from which emerges a principle that, in the words of García Roca, constitutes a genuine point of departure in the democratic constitutional state: the prohibition of the imperative mandate⁵¹.

Under the former Constitution of 1886, this principle was expressly recognized in the following terms: suffrage is exercised as a constitutional function; one who votes or elects imposes no obligations upon the candidate, nor confers any mandate upon the elected official. This provision is reiterated in the Electoral Code of 1986 –still in force– in Article 6 of that instrument.

Nevertheless, this absolute prohibition of the imperative mandate began to acquire a new dimension under the constitutional order of 1991. In the first place, the earlier formulation of the 1886 Constitution was replaced by the following, set out in Article 133 of the 1991 Constitution: members of directly elected collegiate bodies represent the people and must act with due regard for justice and the common good; the elected official is politically accountable to society and to their electorate for the fulfillment of the obligations inherent in their investiture. While this new formulation does not necessarily imply the complete abandonment of the prohibition of the imperative mandate, the institution is nonetheless subjected to new dimensions⁵².

50 P. P. Vanegas Gil. “Entre el mandato representativo y el mandato del partido: en últimas, ¿de quién es la curul? Una aproximación en el derecho constitucional colombiano”. In *Democracia, representación y nuevas formas de participación. Una mirada en prospectiva*. Bogotá, Universidad Externado de Colombia, 2021.

51 García Roca, *Cargos públicos representativos...*, *op. cit.*, p. 123.

52 The prohibition of the imperative mandate “constitutes, fundamentally, one of the essential traditions of the constitutional state and of representative government. In one formulation or another, the constitutional texts of different periods have incorporated the prohibition of the imperative mandate upon parliamentarians, which has remained in force beyond the constitutions

Thus, the formula “one who elects imposes no obligations upon the candidate, nor confers any mandate upon the elected official” was eliminated in favor of a general accountability clause: “the elected official is politically accountable” for the fulfillment of the obligations inherent in their investiture. The existence or continuity of the electorate’s confidence in their representatives –as well as compliance with those obligations– is verified, in principle, through the periodicity of elections: before each new electoral call, citizen-voters may give their final judgments at the ballot box.

Under the new constitutional framework, what emerges is a redefinition of the free mandate of elected officials, which will inevitably have consequences for the content of the right to passive suffrage in its dimension of remaining in and exercising representative office.

At this juncture, it is appropriate to address the caucus regime – a figure incorporated into our nascent parliamentary law by Legislative Act No. 1 of 2003, commonly known as the political reform⁵³. That constitutional reform provided that “members of public corporations elected by the same party or political or civic movement shall act within them as a caucus, in the terms established by law and in accordance with the decisions democratically adopted by such parties or movements”.

Nevertheless, the most notable innovation for present purposes is that the framers themselves empowered parties to establish a regime of sanctions for non-compliance with their directives, which may extend to expulsion from the party and may include the loss of the member’s right to vote in the corporation – whether Congress, departmental assembly, municipal council, or local board – for the remainder of the term for which they were elected⁵⁴.

of nineteenth-century liberalism, affirming itself even in the democratic constitutions of the inter-war and postwar periods, coexisting in both eras with the institutions of direct and participatory democracy, and with the constitutionalization of political parties and the functions proper to them in contemporary democracies”. C. Ortega Santiago. *El mandato representativo...*, op. cit., 106.

53 See: F. Padrón Pardo. *El concepto y función de las bancadas: las transformaciones de la representación política*. Bogotá, Universidad Externado de Colombia, 2015.

54 The caucus regime for elected members of public corporations was not substantially modified by the constitutional reform of 2009, approved by Congress at the close of the 2008–2009 legislative session. On this specific point, two new paragraphs were added to Article 107 of the Constitution: the sixth provides that “the leadership of political parties and movements must promote processes of internal democratization and the strengthening of the caucus regime”; while the final paragraph establishes that a member of a public corporation who decides to stand in the

The caucus regime is accompanied, within that same constitutional reform, by the general prohibition on dual party membership – that is, on simultaneously belonging to more than one political party or movement. How to regulate the matter, how to reconcile these two premises, and what their implications and scope are – both with respect to rank-and-file members and to those who are elected – are questions that remain open.

Here we encounter an important subject for analysis: the nature of the relationship between “parties” and “candidates,” the submission of the latter to party discipline – matters into which the legal order has thus far had limited reach, and which in the Colombian case have been introduced only within a very general framework.

These questions also give rise to further problems, such as determining the type of “mandate” generated by the electoral act: is it an imperative mandate of the parties over their candidates? And what becomes of the political representation of the electorate? What is the proper interpretation or scope of the principle enshrined in Article 133 of the Constitution, which provides that “members of directly elected collegiate bodies represent the people and must act with due regard for justice and the common good,” and that “the elected official is politically accountable to society and to their electorate for the fulfillment of the obligations inherent in their investiture?”

In this light, the prohibition on dual party membership for those elected under a given party acquires a significance that extends well beyond the internal life of the party and extends to the very functioning of the popularly elected public corporations⁵⁵.

Party-switching (*transfuguismo*) –the conduct of one who becomes a *tránsfuga*, defined as “a person who, upon separating from the party that presented them as a candidate, does not relinquish the public office they hold”⁵⁶– generates several difficulties with respect to the definition of the

following election for a different party “must resign their seat at least twelve (12) months before the first day of the candidate registration period”.

55 Law 974 of 2005 regulated the conduct of members of public corporations in caucuses and amended the congressional rules of procedure accordingly. On dual membership and the prohibition of party-switching, see also the Constitutional Court judgments issued in response to several unconstitutionality actions brought against that statute: C-342 of 2006 and C-453 of 2006.

56 *Diccionario de la Real Academia de la Lengua*, 22nd edition (Madrid: Real Academia Española, 2001), p. 1501. On party-switching, see B. Tomás Mallén. *Transfuguismo parlamentario y democracia de partidos*. Madrid, Centro de Estudios Políticos y Constitucionales, 2002.

parliamentary mandate. This phenomenon, to the extent that it occurs within a single term, produces effects on the “governability” of the political system, as it alters the representation and balance of political forces within the various corporations and affects not only legislative work but also the exercise of genuine political oversight.

The rights of representatives within public corporations –such as the right to attend and vote– may be limited or suspended at the will of the political party that presented them on its electoral list. This creates a dependence of the representative upon the party that compels a qualified interpretation of the purity of the representative mandate. This proposition requires an examination of the connections among the principle of popular sovereignty (Article 3 of the Constitution), the right of political participation (Article 40), the prohibition of the imperative mandate (Article 133), the constitutionalization of political parties (Article 107), and the inviolability of the parliamentary vote (Article 185).

In this regard, one finds elements pointing toward the classical conception of political representation, the free mandate, and the prohibition of the imperative mandate. Yet alongside these, other constitutional provisions –particularly those introduced by the amendments of Legislative Act No. 1 of 2003 analyzed in this section– appear to suggest that we are witnessing a transition toward a different kind of mandate, one characterized by a limitation on the independence of the holder of representative office.

While the principle that elected officials represent the people remains intact, and while the holders of the right to passive suffrage and of representative office remain the citizens themselves, the new dynamic introduced by the 2003 constitutional reform means that the conduct of representatives will be more closely bound to the party. It would appear, then, that the will the representative is expected to reflect is no longer strictly that of the people, but rather that of the parties – the parties that nominated them as candidates and whose electoral support binds them closely to the party caucus, from which they may not freely depart without incurring the sanctions prescribed by the party’s statutes, including deprivation of the right to vote in the relevant corporation.

The disciplinary regime is entrusted to the party, which retains a margin of discretion in applying sanctions – ranging up to expulsion from the party or deprivation of voting rights – but says nothing about the representative’s seat. In other words, once the sanction of expulsion or deprivation of voting

rights within the corporation has been applied, the representative retains the investiture, which is affected only – in the latter case – in the exercise of the right to vote: a form of *capitis deminutio* of the elected official.

The assignment of the competence to apply such sanctions – in particular, the deprivation of the representative's right to vote – to an institution of a private nature, such as political parties, raises a fundamental concern. While political parties undoubtedly fulfill transcendent functions in the contemporary democratic state, this arrangement would effectively vest them with the power to terminate or suspend the mandate of an official who was popularly elected. The party thus becomes both judge and interested party in the controversy arising from a member's departure from the caucus, rendering its disciplinary decisions highly questionable.

In this light, the framers appear to signal a transition from the representative mandate toward an imperative or party mandate. This reading is supported by the fact that the legal order itself now contemplates that citizens who agree to stand as candidates on a party's or movement's list know in advance that, if elected, they are obligated to act as part of that party's caucus – an obligation that, under this framework, does not in itself give rise to a constitutional violation.

8. THE PERSONAL STATUTE OF MEMBERS OF CONGRESS

The constitutional importance of congresses and parliaments in contemporary democracies is evident in their standing as the organ of representation par excellence, entrusted with the creation of the law that governs the conduct of citizens. This preeminence is further reflected in the special status of their members – also referred to as the congressional statute – which may be defined as the body of norms establishing the eligibility requirements, disqualifications, incompatibilities, special jurisdictional immunity, parliamentary allowances and remuneration, and the catalogue of rights and duties applicable to members of Congress. These provisions, almost invariably of constitutional rank, give expression to the special legal condition attaching to members of legislative assemblies.

The Constitution and the law develop several aspects of this statute. The constitutional text itself sets out the regime of eligibility requirements, disqualifications, and incompatibilities, as well as the constitutional immunity

governing investigation and trial, parliamentary inviolability, parliamentary allowances, and the impeachment of congressional investiture.

This is so because, while the right to stand for election belongs in principle to all citizens, it is a right subject to legislative configuration: both the framers and the legislature may restrict it by establishing special eligibility requirements or by providing grounds for disqualification that preclude its exercise⁵⁷.

With respect to eligibility requirements, the Constitution establishes a differentiated regime between the two chambers: to serve as a senator, a person must, in addition to being a citizen in good standing, be a native-born Colombian and be at least 30 years of age at the time of election; to serve in the House of Representatives, a person must, in addition to being a citizen in good standing, be at least 25 years of age.

The establishment of grounds for disqualification is grounded in the need to guarantee, on the one hand, the probity, morality, and integrity of those called upon to hold popularly elected office⁵⁸. These provisions are also designed to protect the freedom of the voter and the principle of equality in the formation of electoral will – ensuring, in other words, that the electoral expression is authentic and that its formation is not affected by extraneous factors.

In this regard, the Colombian legal order is characterized by a disqualification regime that is broadly dispersed across norms of varying legal rank – some general, applying to all popularly elected offices, and others specific to each. The regime also encompasses disqualifications of different kinds, including electoral, disciplinary, fiscal, and contractual grounds, among others.

In the case of members of Congress, it is the Constitution itself that sets out the applicable disqualification regime, constituting a closed system

57 “The right to passive suffrage is a right subject to legislative configuration – that is, it falls to the legislature to delimit the content of the right without affecting its essential core. While the right to passive suffrage is a fundamental right, it is not for that reason absolute; full compatibility exists between the fundamental character of the right and its legal development or regulation”. P. P. Vanegas Gil. *Las candidaturas en el derecho electoral colombiano*. Bogotá, Universidad Externado de Colombia, 2009, 40.

58 On the concept and rationale of ineligibilities, see P. P. Vanegas Gil. *Las candidaturas...*, op. cit., 75 et seq.

insofar as the legislature is not empowered to expand or modify it⁵⁹. In this connection, it should be recalled that one of the objectives of the 1991 framers was to enhance the dignity of Congress – hence the establishment of a stringent regime, not only with respect to disqualifications but also with respect to incompatibilities.

Article 179 of the Constitution enumerates the grounds for disqualification applicable to members of Congress. Some relate to the State's sanctioning power – for example, persons who have been sentenced to custodial penalties for willful offenses, or those who have previously impeached their congressional investiture. Others are connected to the exercise of public functions, whether by the prospective candidate or by their relatives: a person who has exercised the functions of a public employee holding jurisdictional authority or political, civil, administrative, or military authority within the twelve months preceding the election shall be ineligible, as shall a person who has ties by marriage or kinship to officials exercising civil or political authority.

A further ground for disqualification concerns the contractual activity of candidates for congressional office. A person who has intervened in the conduct of business or the conclusion of contracts with public entities, or who has served as the legal representative of entities that administer taxes or parafiscal contributions, within the six months preceding the election, is likewise ineligible. With a view to neutralizing nepotism, persons who are related by marriage or kinship and seek to register as candidates for the same party are also disqualified. Finally, persons holding dual nationality –with the exception of native-born Colombians– are ineligible, as are those who seek election to more than one corporation or office whose terms coincide, even partially.

With respect to the regime of incompatibilities and conflicts of interest, the Constitution sets out the activities and acts that members of Congress are prohibited from carrying out or engaging in during the exercise of their office – that is, prohibitions directed at these officials against simultaneously holding or exercising powers or positions other than those to which they have been elected. As the Constitutional Court has noted, the purposes of this incompatibility regime are: (i) to ensure the fulfillment of congressional

59 Constitutional Court, Judgments C-540 of 2001.

functions in accordance with the common interest rather than private interests; (ii) to secure the full dedication of members of Congress to their functions, undistracted by other activities; and (iii) to prevent undue influence over the conduct of other organs of the State⁶⁰.

Accordingly, members of Congress may not hold public or private positions or employment – the office of member of Congress being one of exclusive dedication. They are likewise prohibited from acting as agents or attorneys, or from entering into contracts with public entities; from serving as members of boards of directors or supervisory bodies of official entities or of institutions that administer taxes; and from concluding contracts or conducting business with natural or legal persons under private law that administer, manage, or invest public funds, act as contractors of the State, or receive donations from it.

9. THE IMPEACHMENT OF CONGRESSIONAL INVESTITURE

The institution of the impeachment of congressional investiture (*pérdida de investidura*) is a creation of the 1991 framers. It is a public action of a sanctioning nature, enshrined in Articles 183, 184, and 237 of the Political Constitution,⁶¹ whose purpose is the censure and subsequent punishment of those who, as members of public corporations, have engaged in conduct incompatible with the dignity of the investiture conferred upon them⁶². The impeachment of investiture is thus the sanction imposed upon members of Congress when they incur in the grounds established in the Constitution and the law – a sanction whereby the official is not only removed from office but permanently loses the right to be elected, as provided in the Constitution itself (Article 179.4).

The Council of State, the competent tribunal for impeachment of investiture proceedings, has consistently held in its jurisprudence that this action is understood “as a sanctioning jurisdictional proceeding of an ethical purpose, insofar as the grounds conceived by the framers constitute a

60 Constitutional Court, Judgments C-247 of 2013.

61 Constitutional Court, Judgments SU-1159 of 2003.

62 Council of State, Judgments of September 27, 2016. Case No. 5000-23-15-000-2024-00121-01 (PI).

codified set of rules designed to censure and sanction conduct contrary to the dignity of the office exercised by the representatives of the people – a dignity that arises by virtue of the citizens’ vote and that elevates the principle of democratic representation”⁶³.

Through this judicial mechanism, the aim is to strip from its holder the investiture or office received by popular mandate – specifically from members of public corporations – so that those elected “cease in their mandate” by reason of having incurred in one of the grounds established in the Political Constitution, following the judicial procedure established for that purpose.

IO. PARLIAMENTARY INVIOABILITY AND CONSTITUTIONAL IMMUNITY

Article 185 of the Constitution, addressing parliamentary privileges, provides that members of Congress shall be inviolable with respect to the opinions expressed and votes cast in the exercise of their constitutional powers. A member of Congress may therefore not be prosecuted on account of opinions or votes expressed in the course of parliamentary activity⁶⁴.

As the Constitutional Court has noted, the objective of this guarantee is to secure the independence of members of Congress from interference by others; it is accordingly conceived as an institutional guarantee in favor of Congress and democracy as a whole, rather than as a personal privilege of the senator or representative as such⁶⁵. The protection of inviolability is, however, as the Court has clarified, conditional upon two requirements: “(i) it must concern an opinion or a vote – meaning that other acts of senators and representatives are not covered, even if performed within the congressional chamber itself; and (ii) the opinion or vote must be expressed in the exercise of congressional functions – meaning that opinions or votes expressed by a senator or representative outside parliamentary debates, when acting as an ordinary citizen, are not protected”⁶⁶.

Finally, the Constitution establishes a special jurisdictional immunity (*fuero*) for members of Congress, providing that offenses committed by these

63 Council of State, Judgments of April 12, 2024. Case No. 11001-03-15-000-2024-00535-00 (PI).

64 Constitutional Court, Judgments C-1174 of 2004. See also Judgments SU-047 of 1999.

65 Ibid.

66 Ibid.

officials shall fall under the exclusive jurisdiction of the Supreme Court of Justice, which is the sole authority empowered to order their detention.

THE JUDICIAL BRANCH

The transformations in the structure of the State brought about by the Constitution of 1991 were equally manifest in the constitutional design of the judicial branch, whose essential elements included the strengthening of judicial independence, the right of access to justice, and the effective protection of the rights and liberties of individuals – all within the framework of the constitutional principle of the social rule of law (*estado social de derecho*), expressly enshrined in Article 1 of the Constitution⁶⁷. The innovations incorporated in the Political Charter reflect the overarching objective of strengthening the judicial power in Colombia: the creation of new jurisdictions, among them the Constitutional jurisdiction with a specialized tribunal; the concern for judicial governance, which gave rise to the creation of the Superior Council of the Judicature; the establishment of the Office of the Attorney General (*Fiscalía General de la Nación*) and the transformation of the criminal process; and other far-reaching changes.

Articles 113 and 116 of the Constitution are the first provisions to address the judicial branch, expressly identifying it as one of the branches of public power and enumerating the superior organs that compose it – from the highest courts (*cortes de cierre*), through the tribunals, down to the judges – as well as the Office of the Attorney General, all of which are charged with “administering justice”. Title VIII then develops this framework in greater detail across 32 articles (Articles 228 through 257A), beginning with the general principles, before addressing the closing courts of the various jurisdictions, the Office of the Attorney General, and, finally, judicial governance and administration.

67 See: J. I. Cuervo Restrepo. “La rama judicial y la administración de justicia”. In *Lecciones de derecho constitucional*, vol. II. Bogotá, Universidad Externado de Colombia, 2018. See also A. Julio Estrada. *Las ramas ejecutiva y judicial del poder público en la Constitución colombiana de 1991*. Bogotá, Universidad Externado de Colombia, 2003.

I. GENERAL PRINCIPLES

The administration of justice –understood as the function of resolving the conflicts that may arise in social life, whether between private parties or between individuals and the State in any of its manifestations– is recognized by the fundamental Charter as a public function: an activity exclusive to the State, aimed at ensuring the fulfillment of the rights and liberties of citizens. The administration of justice thus becomes a cornerstone upon which the social rule of law is constructed, enabling progress toward the fulfillment of the essential purposes of the State as set out in Article 2 of the Constitution, and in particular the purpose of peaceful coexistence.

Article 228 of the Constitution accordingly serves as the nuclear provision on the administration of justice, establishing it as a public, independent, and transparent function, characterized by the primacy of substantive law, administrative deconcentration, and judicial autonomy. For the Constitutional Court, the judicial branch is “the backbone of the effectiveness of the social rule of law”⁶⁸.

The Constitution expressly recognizes the principles of autonomy, independence, and impartiality that must characterize the exercise of this public function. In this regard, the Constitutional Court has observed that “the principle of autonomy and independence of the judicial power is one of the expressions of the separation of powers. It has been noted that this defining feature of the Constitution implies that the organs of public power must exercise their functions autonomously and within the margins determined by the Political Charter itself”⁶⁹. The impartiality of judges likewise constitutes a pillar of the administration of justice, given explicit expression in the constitutional text’s provision that judges, in the exercise of their functions, are subject only to the rule of law.

The Constitution likewise enshrines the right of every person to access the administration of justice, together with the requirement that this function be provided free of charge and supported by mechanisms of transparency as a means of legitimizing judicial decisions. It further establishes the mandate of the primacy of substantive law, ensuring that procedural formalities

68 Constitutional Court, Judgments C-037 of 1996.

69 Constitutional Court, Judgments C-288 of 2012.

do not become an obstacle to the effective enjoyment of individual rights. Finally, the Constitution itself emphasizes the duty to observe procedural time limits, which translates into “the right to have matters resolved by a judge within a reasonable time, or the prohibition of unjustified delays – a right that has been sufficiently recognized in the Colombian legal order and in the international treaties ratified by our State”⁷⁰.

The functioning of the judicial branch shall be deconcentrated, thereby guaranteeing the presence of the State as judge throughout the national territory. To this end, the Superior Council of the Judicature is charged, subject to statute, with “establishing the division of the territory for judicial purposes and determining the location and redistribution of judicial offices”. Under the applicable legislation, the territory is divided into judicial circuits and districts, within which the trial courts (*juzgados*) operate as “the basic cell of the judicial organization”. In any event, “in accordance with the needs of each city and municipality, there shall be municipal judges of small claims and multiple jurisdiction over matters falling within the Ordinary Jurisdiction”.

2. COMMON ASPECTS OF THE PERSONAL STATUTE OF THE JUSTICES OF THE SUPREME COURT OF JUSTICE, THE COUNCIL OF STATE, AND THE CONSTITUTIONAL COURT: REQUIREMENTS AND CONSTITUTIONAL TERM

The requirements for election to these courts are: being a native-born Colombian and a citizen in good standing; holding a law degree; not having been sentenced by judicial decision to a custodial penalty, except for political or unintentional offenses; and having served for fifteen years in positions within the Judicial Branch or the Public Ministry, or having practiced law or taught legal subjects at officially recognized institutions of higher education with a good professional standing (*buen crédito*) for the same period.

70 M. Ardila Trujillo. “La prohibición de dilaciones injustificadas en la jurisprudencia constitucional”. *Revista Derecho del Estado*, no. 23, December 2009, 68. The author also justifies its constitutional incorporation in the following terms: “Judicial delay, court congestion, and recurring dilatory practices in judicial proceedings mark the daily reality of access to justice in Colombia; it is therefore unsurprising that the Colombian Constitution devotes several articles to the subject and that statutes regulating the administration of justice are largely enacted with the intention of eradicating this problem”.

Membership in the judicial career is not a requirement for appointment as a justice of these courts.

The requirement of “good professional standing” in the practice of law – as contemplated by the Constitution of 1991 for attainment of the offices it specifies – “serves as an instrument ensuring that whoever is responsible for selecting and designating a citizen must not only verify the required experience, but must also confirm that such professional trajectory is free from material censure”⁷¹. Jurisprudence – in particular that of the electoral judge – has progressively given content to this requirement, treating it as an indeterminate legal concept and holding that good professional standing is assessed on a case-by-case basis through the analysis of objective elements that allow the conclusion that the legal professional has practiced the profession “free from accusations, imputations, or public, private, or sectoral censures that have led to ethical, disciplinary, or criminal proceedings –and that may or may not have resulted in a sanction– provided that the conduct giving rise to such imputation and eventual sanction bears a connection to professional practice”⁷².

They are elected for individual terms of eight years, may not be re-elected, and shall remain in office for as long as they demonstrate good conduct, maintain satisfactory performance, and have not reached mandatory retirement age⁷³. With respect to the swearing-in of these justices, the Constitution did not regulate the matter; however, the Statutory Law on the Administration of Justice (Law 270 of 1996, hereinafter LEAJ) provided that they “shall take the oath of office before the President of the Republic”. The Constitutional Court, however, declared this provision conditionally constitutional, “on the understanding that justices may also, at their election, take the oath of office before the president of the respective court or before a notary”⁷⁴.

71 Council of State, Contentious-Administrative Chamber, Fifth Section, Judgments of December 7, 2022, Case No. 11001-03-28-000-2021-00032-00.

72 Ibid.

73 In Colombian constitutionalism, the duration of judicial tenure has varied considerably: from life appointments, as under the first National Constitution of 1821 and the centennial Constitution of 1886, to fixed terms ranging between four and five years, as under the fundamental charters of 1832 and 1853.

74 Constitutional Court, Judgments C-134 of 2023.

3. COOPTION AS THE METHOD OF ELECTING JUSTICES OF THE SUPREME COURT AND THE COUNCIL OF STATE, AND THE BALANCE OF PROFESSIONAL PROFILES IN THEIR COMPOSITION

The Constitution of 1991 chose to retain cooption as the method of electing the justices of these two high courts, a practice that had been in place since 1957. Throughout Colombia's republican history –from the first National Constitution of 1821 onward– the designation or appointment of the justices of the courts at the apex of the judicial hierarchy has passed through various phases: from parliamentary election by Congress or its chambers, to appointment as a prerogative of the President of the Republic, to mixed systems combining the intervention of both. These different methods of selection already reflect the competing constitutional concerns at play – whether the perceived need to retain political influence over the composition of the high courts of justice, or, conversely, the desire to insulate that process from such influence.

Under the Constitutions of 1821, 1832, 1843, 1858, and 1863, for example, the election of justices fell to Congress, acting through one or both of its chambers, sometimes by means of complex candidate nomination procedures. Under others –such as the Constitutions of 1830 and 1886– this power was vested in the President of the Republic. Special mention must be made of the Constitution of 1853, which in terms of democratic ambition went further than any other in the American context, introducing for the first and only time in Colombian constitutionalism the “direct popular election” of the justices of the Supreme Court of Justice.

During the long period of the centennial Constitution of 1886, the system evolved from presidential appointment to legislative designation –restored by the reform of 1945– and ultimately to “cooption” in 1957, arguably with the purpose of distancing the appointment of justices from the political passions that tend to arise when organs of political representation with partisan origins are empowered to determine the composition of these tribunals – all the more so given that among their special functions is the trial of high State officials, including the President of the Republic and members of Congress themselves.

Under the current constitutional framework, the justices of the Supreme Court of Justice (hereinafter CSJ) and the Council of State (hereinafter CE)

shall be elected by the respective court, following a public hearing, from a list of ten eligible candidates submitted by the Superior Council of the Judicature, itself drawn up through a regulated public selection process in accordance with the law⁷⁵. This represents a transition from absolute cooption to a restricted or limited form thereof: the two high courts no longer enjoy full discretion in the selection of their members, but must choose from a list proposed by another organ of the judicial branch.

The Constitution also provides that the selection processes for justices of the CSJ and the CE shall observe the criterion of balance among candidates drawn from professional practice, the judicial branch, and academia – without, however, specifying, nor does the law, any particular number or percentage of justices that must come from each of these professional backgrounds.

A further concern regarding the composition of the high courts relates to gender parity, particularly given that the number of female justices has been considerably lower than that of their male counterparts. While the Constitution does not include gender parity among the criteria for the election of these justices, the amendment to the LEAJ introduced by Law 2430 of 2024 does incorporate this criterion. Specifically, the new Article 53A, addressing the principles that shall govern the public selection process for composing the lists and shortlists of candidates for positions as justices of the CSJ, the Council of State, and the National Commission of Judicial Discipline, provides: “c) Gender equity: selection processes shall be designed to ensure compliance with the principles of parity, alternation, and universality in the participation of women in lists and shortlists”.

In order to achieve gender parity in the composition of the high courts, this principle must be present at every stage of the judicial appointment process – both in the formation of the list of candidates and in the election itself. The electoral judge has held that compliance is mandatory at the first stage (the composition of the list), while at the election stage it is to

75 The Constitution did not determine the voting mechanism or formula applicable in these cases, leaving it to the courts themselves to establish the relevant rules in their internal regulations, as well as “the time frame within which” such justices must be elected. The Constitution has not been indifferent to the concern arising from prolonged periods of “interim” vacancies, when extended periods pass without the appointment of permanent justices to fill vacant seats.

be achieved gradually and progressively⁷⁶, as the Constitutional Court has likewise indicated⁷⁷.

Accordingly, one means of progressively achieving the commendable goal of parity in the composition of the courts would be, as the Council of State has noted, to “direct selection processes exclusively toward the female gender, as only in this way can the material fulfillment of this important principle of gender-balanced composition in a high tribunal be guaranteed, without undermining the legitimate expectations of those participating in such electoral processes”⁷⁸.

4. THE JURISDICTIONS UNDER THE CONSTITUTION

Jurisdiction, understood as “the power of the State to administer justice in the exercise of the sovereignty of which it is the holder, through the cognizance and adjudication of the various causes (civil, criminal, administrative, etc.) [...] is unitary and indivisible”⁷⁹. All judges accordingly exercise jurisdiction in the name of the State, but limited to the competences assigned by law⁸⁰.

The Constitution enumerates the various jurisdictions and, while it does not specify the object of each, that object may be inferred from the judicial competences set out in the Constitution and the law – particularly in the procedural codes. In the development of the title on the judicial branch, the constitutional text establishes several jurisdictions: the ordinary, the contentious-administrative, the agrarian and rural⁸¹, and the constitutional. Chapter V then addresses the special jurisdictions, recognizing the indigenous jurisdiction and making reference to justices of the peace.

Consistently with the foregoing, Article 12 of the LEAJ provides that the judicial function “is exercised as a proper, habitual, and permanent

76 Council of State, Contentious-Administrative Chamber, Fifth Section, Judgments of June 26, 2025, Case No. 11001-03-28-000-2025-00005-00.

77 Constitutional Court, Judgments C-134 of 2023.

78 Council of State, Contentious-Administrative Chamber, Fifth Section, Judgments of June 26, 2025, Case No. 11001-03-28-000-2025-00005-00.

79 Constitutional Court, Judgments C-154 of 2004.

80 Constitutional Court, Judgments C-655 of 1997 and C-392 of 2000.

81 Recently created by Legislative Act No. 3 of 2023, which added Chapter IIIA and Article 238A.

function by the corporations and persons vested with legal investiture to do so,” and further provides, in accordance with the Constitution, that it “is exercised by the constitutional jurisdiction, the National Commission of Judicial Discipline and the Sectional Commissions of Judicial Discipline, the contentious-administrative jurisdiction, the justices of the peace, and the ordinary jurisdiction, which shall have cognizance of all matters not assigned by the Constitution or the law to another jurisdiction”.

While the Constitution does not develop each of the jurisdictions in detail, it does address each of them – specifically the ordinary, contentious-administrative, and constitutional jurisdictions – regulating in general terms the closing courts of each, establishing their composition, structure, and constitutional functions, as well as the aspects common to all three high tribunals or courts, such as the method of election, term of office, and eligibility requirements, as discussed above.

4.1. THE ORDINARY JURISDICTION: THE SUPREME COURT OF JUSTICE

Under the distribution of competences established in the procedural codes, the ordinary jurisdiction has cognizance of all matters not expressly assigned by law to another jurisdiction – including civil, family, commercial, labor, and criminal matters. The closing tribunal of this jurisdiction is the Supreme Court of Justice, composed of an odd number of justices to be determined by statute.

The name of this high tribunal has varied since the origins of the Republic: from the *Alta Corte de Justicia* in the earliest constitutional texts of 1821 and 1830, to the *Corte Suprema de Justicia* –a designation first used in the fundamental charter of 1832 and maintained in the Constitutions of 1843 and 1858– to the *Suprema Corte de la Nación* in the fundamental norm of 1853 and the *Corte Suprema Federal* in the Constitution of 1863. The name *Corte Suprema de Justicia* was restored by the fundamental charter of 1886 and has remained unchanged ever since, including under the Constitution of 1991.

With respect to the number of justices, early constitutional texts customarily fixed that number in the constitutional document itself: five, for example, under the Constitutions of 1821, 1830, and 1863; three under the charter of 1853; and seven in the original text of the Constitution of 1886. In other cases, the power to determine the number of members was delegated

to the legislature, as under the Constitutions of 1843 and 1858. During the period of the Constitution of 1886, the number was in some instances increased to nine –as under the reform of 1910– or left to the legislature to determine, as occurred with the reform of 1945, an approach maintained in the Constitution of 1991. Under the LEAJ, the CSJ is composed of 23 justices, not counting the justices of the special chambers –the Special Chamber of Investigation and the Special Chamber of First Instance– through which the court exercises its jurisdiction over officials subject to constitutional immunity (*aforados*). The number of justices on these special chambers is fixed directly in the constitutional text: the Special Chamber of Investigation is composed of 6 justices, and the Special Chamber of First Instance of 3 justices.

The Constitution also provides that the CSJ shall be divided into chambers and special chambers in accordance with the law, which shall further specify the matters assigned to each, as well as those falling within the jurisdiction of the Full Chamber (*Sala Plena*). The LEAJ accordingly divides the CSJ into three Chambers of Cassation: the Civil and Agrarian Chamber of Cassation, composed of 7 justices; the Labor Chamber of Cassation, composed of 7 justices; and the Criminal Chamber of Cassation, composed of 9 justices. In addition, a Full Chamber composed of all 23 justices of the Chambers of Cassation, and a Governing Chamber composed of the president, the vice-president, and the presidents of each Chamber of Cassation, are also established.

With the aim of ensuring the separation of investigation and trial functions, the principle of double instance, and the right to challenge a first conviction in proceedings involving officials subject to constitutional immunity, the constitutional reform of 2018 (Legislative Act No. 1) created the two special chambers already mentioned: the Special Chamber of Investigation and the Special Chamber of First Instance, composed of 6 and 3 justices, respectively. The Constitution established that the justices of these special chambers shall not form part of the Full Chamber, shall not have jurisdiction over administrative or electoral matters, shall not be assigned matters falling within the competence of the Criminal Chamber of Cassation, and shall exercise exclusive jurisdiction solely over the investigation and first-instance adjudication of matters involving constitutionally immune officials, under the conditions established by law.

Finally, Article 235 of the Constitution sets out the special powers of the CSJ, which fall essentially within two dimensions: its role as a court of cassation and its role as the court of natural jurisdiction in criminal matters for public officials subject to constitutional immunity. The civil, labor, and criminal chambers of cassation are accordingly vested with jurisdiction over the extraordinary remedy of cassation, with the purpose of “unifying jurisprudence, protecting constitutional rights, and exercising legal review of judicial decisions”.

In criminal matters, the CSJ has jurisdiction to try the President of the Republic and the high officials referred to in Article 174 of the Constitution, following the political trial before Congress; to investigate and try members of Congress; and to try – following accusation by the Attorney General, the Deputy Attorney General, or their delegates before the CSJ – the Vice President of the Republic, ministers, the Attorney General (*Procurador General*), the Ombudsman (*Defensor del Pueblo*), agents of the Public Ministry before the Court, before the Council of State, and before the tribunals, heads of administrative departments, the Comptroller General, ambassadors and heads of diplomatic or consular missions, governors, justices of the tribunals, and generals and admirals of the armed forces, for the punishable acts imputed to them.

4.2. THE CONTENTIOUS-ADMINISTRATIVE JURISDICTION: THE COUNCIL OF STATE

Under the applicable legislation, this jurisdiction has cognizance – in addition to what the Constitution provides – of “the controversies and disputes arising from acts, contracts, facts, omissions, and operations subject to administrative law, in which public entities are involved, or private parties when exercising administrative functions”⁸². The closing tribunal of this jurisdiction is the Council of State, which acts as the supreme court of contentious-administrative matters.

The existence of the Council of State may be traced to a period even prior to the Republic itself, with the “Decree of the Supreme Chief creating

82 Article 104 of the Code of Administrative Procedure and Contentious-Administrative Matters (Law 1437 of 2011).

a provisional Council of State, of October 30, 1817,” issued by the Liberator Simón Bolívar in Angostura. Since then, its presence in Colombian constitutionalism has been marked by successive phases: its express incorporation in the Constitutions of 1830 and 1832, its suppression in 1843, and its restoration under the Constitution of 1886⁸³.

Until that point, the institution had been characterized primarily by its consultative and certain administrative functions – but in no case by judicial functions. It was, however, in the Constitution of 1886 that the embryonic foundations of the Council of State as the supreme court of contentious-administrative matters first appeared, with the provision that it would be an attribute of this organ to “decide contentious-administrative questions, should the law establish this jurisdiction”.

The Council was once again suppressed in 1905, at which point the contentious-administrative jurisdiction had yet to be established. Legislative Act No. 3 of 1910, while not restoring the Council itself, did provide in mandatory terms that “the law shall establish the contentious-administrative jurisdiction”. Pursuant to this constitutional authorization, Law 130 of 1913 was enacted, establishing the jurisdiction and creating at its apex the Supreme Tribunal of Contentious-Administrative Matters, along with the first eight sectional contentious-administrative tribunals – laying the foundations for the nascent jurisdiction at the national level⁸⁴.

It was with the constitutional reform of 1914 that the Council of State was definitively restored with the dual nature it retains to this day under the Constitution of 1991. Legislative Act No. 1 of that year provided that “[t]here shall be a Council of State composed of seven members, namely: the First Designate to exercise Executive Power, who shall preside over it, and six Counselors appointed as determined by law”. As to its competences, the constitutional text assigned it the functions of “[a]cting as the supreme consultative body of the Government in administrative matters” and “[d]ischarging the functions of the Supreme Tribunal of Contentious-Administrative Matters in accordance with the rules established by law”.

83 Á. Namén Vargas. “Prólogo”. *Antología Jurisprudencia y Conceptos – Consejo de Estado 1817–2017*. Bogotá, Consejo de Estado – Imprenta Nacional, 2019, vol. I, XXXI et seq.

84 C. E. Marín Vélez. *Proceso evolutivo y antecedentes de los juzgados administrativos: el Consejo de Estado, los tribunales administrativos, los juzgados administrativos*. Bogotá, Consejo Superior de la Judicatura – Imprenta Nacional, 2007, 23.

Article 236 of the Constitution of 1991 provides that the “Council of State shall have an odd number of justices as determined by law”. Under the LEAJ and the Code of Administrative Procedure and Contentious-Administrative Matters, it is composed of 31 justices. The Constitution further provides that “[t]he Council shall be divided into chambers and sections to separate its jurisdictional functions from the other functions assigned to it by the Constitution and the law,” and that “[t]he law shall determine the functions of each chamber and section, the number of justices that must compose them, and their internal organization”.

Under the applicable legislation, the Council of State exercises its functions through three chambers: the Full Chamber (*Sala Plena*), composed of all its members; the Contentious-Administrative Chamber (*Sala de lo Contencioso Administrativo*), composed of 27 justices; and the Consultative and Civil Service Chamber (*Sala de Consulta y Servicio Civil*), composed of 4 justices. A Governing Chamber is also established, composed of the president and vice-president of the Council of State and the presidents of the Consultative and Civil Service Chamber and of the sections of the Contentious-Administrative Chamber.

With respect to the Contentious-Administrative Chamber, the LEAJ provides that it “shall be divided into five sections, each of which shall separately exercise the functions assigned to it by the Full Chamber of the Council of State in accordance with its subject-matter specialization and workload, pursuant to the law and the internal regulations of the Corporation”. The principal subject matters assigned to each section may be summarized as follows. The First Section, composed of 4 justices, has cognizance, among other matters, of proceedings on subjects not assigned to other sections, as well as of controversies in environmental matters and of the impeachment of investiture of municipal councilors and departmental assembly members. The Second Section, composed of 6 justices divided into two sub-sections, has cognizance of proceedings concerning labor and social security matters not arising from an employment contract, as well as matters relating to the annulment of appointment acts accompanied by claims for restoration of rights or from which such claims derive. The Third Section –the largest in the corporation– is composed of 9 justices divided into three sub-sections and has cognizance, among other matters, of contractual controversies, direct reparation claims arising from administrative acts, omissions, or operations, direct reparation claims against acts or omissions of judicial agents, and

agrarian, contractual, mining, and petroleum matters. The Fourth Section, composed of 4 justices, has cognizance, among other matters, of proceedings concerning taxes and fiscal and parafiscal contributions, with the exception of fees. Finally, the Fifth Section –also known as the Electoral Chamber– composed of 4 justices, has cognizance of the electoral nullity action and of acts of electoral content.

With respect to its constitutional powers, the text makes discernible two distinct dimensions: those corresponding to it as a judicial corporation and those corresponding to it as a consultative organ. In its judicial capacity, the Constitution assigns it the function of “serving as the supreme court of contentious-administrative matters”. It also acts as a constitutional judge insofar as it has cognizance of “nullity actions on grounds of unconstitutionality against decrees issued by the National Government whose review does not fall within the jurisdiction of the Constitutional Court”.

The Council of State has likewise been assigned jurisdiction over the *electoral nullity action*, which means that this jurisdiction also functions as an electoral court. While the former Constitution of 1886 had envisaged the creation of scrutiny judges to decide “with the character of judges of law, the questions arising as to the validity or nullity of electoral records and of elections themselves”⁸⁵, and while their incipient development was pursued through Laws 7 of 1888 and 119 of 1892, the scrutiny judges were definitively abolished by the reform of 1910. Electoral contentious jurisdiction has thus been merged with the very origins of the Contentious-Administrative Jurisdiction in a history spanning more than a century –112 years– of judicial review of electoral acts, and all that this has meant for the process of consolidation of Colombian democracy.

The confidence placed in the Contentious-Administrative Jurisdiction to serve as the electoral court has been affirmed by the Constitution of 1991. Several references to this jurisdiction and to the electoral action appear throughout the Political Charter, typically introduced through political-constitutional reforms. The political reform of 2003 –Legislative Act No. 1– which added a paragraph to Article 264⁸⁶, employs the expressions

85 Article 180 of the Political Constitution of 1886.

86 “PARAGRAPH. The contentious-administrative jurisdiction shall decide the electoral nullity action within a maximum period of one (1) year. In cases of single instance, as provided by law, the time limit for adjudication shall not exceed six (6) months” (emphasis added). In our view, this

“contentious-administrative jurisdiction” and “electoral nullity action,” and that provision establishes a judicial time limit for resolving “the electoral nullity action”.

The political reform of 2009 –Legislative Act No. 1– adds a new paragraph to Article 237 of the Constitution⁸⁷ expressly assigning the Council of State constitutional jurisdiction over the electoral nullity action. As if that were not sufficient, and in what amounts to a genuine lapse in constitutional drafting technique, it creates a procedural prerequisite that once again employs the expressions “electoral contentious matters” and “administrative jurisdiction”⁸⁸.

These normative references underscore the special constitutional emphasis placed on the Contentious-Administrative Jurisdiction, to the point that it may be said that the electoral nullity action is of constitutional rank and has been expressly assigned by the Constitution to the Contentious-Administrative Jurisdiction. The Contentious-Administrative Jurisdiction thus constitutes one of the keystones of the Social Rule of Law – not only because it is entrusted with ensuring the submission of the administration broadly conceived to the Constitution and the law, and with guaranteeing the rights of individuals who may be affected by public action, but also because these judges serve as guardians of democracy.

The Council of State was also assigned jurisdiction over the “impeachment of congressional investiture” – an action that, as discussed in the preceding chapter, was introduced by the Constitution of 1991. The constitutional text, however, did not specify whether this competence was to be exercised by the full chamber or by the Contentious-Administrative Chamber. The legislature of 1992, upon the enactment of the Congressional Rules of Procedure (Law 5), provided that the jurisdiction would belong to the Council of State in plenary session. The Constitutional Court, however,

provision is in any case poorly placed within the constitutional text, given that it does not appear in the chapter on the Judicial Branch.

87 “The following are powers of the Council of State: [...] To hear the electoral nullity action subject to the rules of jurisdiction established by law” (emphasis added).

88 “PARAGRAPH. In order to bring Electoral Contentious proceedings before the Administrative Jurisdiction against a popular election act where the claim is based on grounds of nullity arising from irregularities in the voting process or in the vote count, it is a procedural prerequisite to submit such irregularities, prior to the declaration of election, to examination by the competent administrative authority, headed by the National Electoral Council” (emphasis added).

held that “the impeachment of investiture unequivocally constitutes a jurisdictional function, and in the case of the provisions in question, the term ‘Council of State’ refers, for these purposes, to the plenary of its Contentious-Administrative Chamber – not to a joint session of that chamber with the Consultative and Civil Service Chamber, since, by the very mandate of the framers, the division of the Council into chambers and sections is intended to give effect to the constitutional mandate requiring the legislature to ‘separate the jurisdictional functions from the other functions assigned to it by the Constitution and the Law’”⁸⁹.

Article 237(3) of the Constitution addresses the first power historically assigned to the Council of State –its very *raison d’être* throughout much of its existence in the nineteenth century– namely, “acting as the supreme consultative body of the Government in administrative matters, and being necessarily consulted in all those cases determined by the Constitution and the laws”⁹⁰. The same provision specifies that, in cases involving the transit of foreign troops through the national territory or the stationing or transit of foreign warships or military aircraft, “the Government must consult the Council of State in advance” – in this case, the full chamber of the corporation.

The Council of State has likewise been assigned the power to prepare and submit bills, a faculty already enshrined in the former Constitution of 1886 but now expanded under the Constitution of 1991 to include the preparation and submission of draft constitutional reform acts (Article 237(4)). As the Constitutional Court has noted, “there is no doubt that, by the express will of the framers, the Council of State is vested with legislative and constituent initiative – that is, with the dual power to present before Congress both draft constitutional reform acts and bills, a faculty that, as has been explained,

89 Constitutional Court, Judgments C-319 of 1994. This decision declared unconstitutional, among other provisions, Article 298(3), under which “the Council of State in plenary shall have cognizance of these grounds”.

90 “The original function of the Council of State was consultative in nature, serving as a legal advisory body to the government. It was so conceived in the Decree of Angostura of October 30, 1817, inspired by the Napoleonic precedent and signed by the Liberator Simón Bolívar. Under the Constitution of 1821, with similar functions, it was called the Council of Government, a name adopted again by the Constitution of 1843 and retained by the Constitution of 1853”. Augusto Hernández Becerra, “Prólogo,” *Constitución y derecho administrativo. Doctrina básica del Consejo de Estado desde 1830*, vol. I, p. I.

was expressly enshrined in Article 237(4) of the Political Constitution, and that is exercised independently and autonomously, outside the scope of its function as a consultative body of the Government”⁹¹.

Of all the organs vested with legislative initiative (the power to submit bills) under the Constitution, only two are equally recognized as holding constituent initiative: the Council of State and the National Electoral Council.

4.3. THE CONSTITUTIONAL JURISDICTION: THE CONSTITUTIONAL COURT

One of the most significant innovations of the Constitution of 1991 was the creation of the *Constitutional Court* as the tribunal entrusted with *safeguarding the integrity and supremacy of the Constitution*. The idea of constitutional supremacy – and with it the need to establish mechanisms of constitutional review – may be traced to the very origins of our republican life⁹², and was definitively established by the constitutional reform of 1910⁹³, which assigned to the Supreme Court of Justice “the guardianship of the integrity of the Constitution” and vested in it the power to decide conclusively on the unconstitutionality of legislative acts objected to by the Government, and “on all laws or decrees challenged before it by any citizen as unconstitutional”.

The Supreme Court of Justice thus served as the *de facto* constitutional tribunal until 1991, when the specialized court arrived in Colombian constitutionalism. It is equally relevant to note, however, that the idea of a constitutional court had been present in our constitutional thought since at least 1957. The *Bipartisan Commission for Institutional Readjustment* of that year proposed, as a solution to potential deficiencies in constitutional review, the following: “The solution to this problem might be attempted through the creation of a Constitutional Court distinct and separate from the Supreme Court of Justice”⁹⁴.

91 Constitutional Court, Judgments C-535 of 2012.

92 C. Restrepo Piedrahita. “Tentativas para instituir en Colombia una Corte Constitucional”. In *La jurisdicción en Iberoamérica*. Bogotá, Universidad Externado de Colombia, 1984, 182 et seq.

93 “Its principal decision was Legislative Act No. 3 of that year, in which a process of 99 years – beginning with the Constitution of Cundinamarca of 1811 – culminated in the explicit constitutional affirmation of the principle of supremacy and the establishment of the system of judicial review”. *Ibid.*, p. 203.

94 *Ibid.*, p. 222.

A further antecedent is the constitutional reform bill presented by then-Senator Carlos Restrepo Piedrahita in 1966, which was approved in the first legislative session and envisaged the creation of a constitutional court; it was subsequently rejected in the second session and replaced with the creation of a constitutional chamber within the Supreme Court of Justice⁹⁵. It would not be until the Constitution of 1991 that a new high tribunal was established through the creation of a specialized jurisdiction in constitutional matters.

With respect to its composition and method of election, Article 239 of the Constitution provides that the *Constitutional Court* shall have an odd number of justices as determined by law, elected by the Senate of the Republic for individual terms of eight years from shortlists of three candidates submitted respectively by the President of the Republic, the Supreme Court of Justice, and the Council of State.

As may be observed, the composition of the high constitutional tribunal involves the participation of all three branches of public power: the legislative branch, to which the power of election through the Senate falls; the executive branch, headed by the President of the Republic, who is responsible for the nomination of candidates through the submission of shortlists; and the judicial branch, through the nomination of candidates by way of shortlists presented by the two high courts, the CSJ and the Council of State.

Under the LEAJ, the Constitutional Court is composed of 9 justices drawn from shortlists submitted as follows: 3 by the President of the Republic, 3 by the Supreme Court of Justice, and 3 by the Council of State. They are elected for individual terms of 8 years and may not be re-elected. The justices of the Constitutional Court thus have different origins with respect to their nomination – whether from the head of the executive or from the two high courts.

It is noteworthy that, for the composition of this high court – the guardian of constitutional supremacy – the Political Charter provides that a criterion of selection attentive to the “various specializations of law” shall be observed. This contrasts with the Constitutional Chamber that had functioned within the Supreme Court of Justice since the reform of 1968, which expressly required that it be “composed of justices specializing in public law”.

95 Ibid.

The Constitution also establishes a specific disqualification and a specific incompatibility applicable to the justices of this Court. With respect to the former, persons who have served as ministers or as justices of the CSJ or the Council of State during the year preceding the election may not be elected. With respect to the incompatibility, Article 245 of the Constitution provides that “[t]he Government may not confer any position upon the justices of the Constitutional Court during the period of exercise of their functions or within the year following their retirement”.

As regards constitutional justice, the creation of the Constitutional Court did not entail a transformation to a concentrated model of constitutional review. Colombia’s system remains a diffuse one –consistent with “the tradition of Colombian constitutionalism” since the twentieth century– given that the Council of State and the administrative tribunals also retain competences in the area of constitutional review.

The powers of the Constitutional Court as guardian of the integrity and supremacy of the Constitution may be summarized as follows, in strict accordance with the terms of Article 241 of the Constitution:

- Constitutional review through the public action of unconstitutionality

To decide on citizens’ challenges against legislative acts – on grounds of formal defects only – and against statutes, on both formal and substantive grounds. It bears noting that the public action of unconstitutionality was incorporated into Colombian constitutional law by the constitutional reform of 1910.

- Automatic constitutional review, which may be either prior or subsequent:

- With respect to mechanisms of citizen participation: to decide, prior to the popular vote, on the *constitutionality of the convocation of a referendum or a Constituent Assembly*; and on the *constitutionality of referendums on statutes and of national-level popular consultations and plebiscites*.
- With respect to legal norms: to decide conclusively on the *constitutionality of the legislative decrees* issued by the Government on the basis of states of exception; and on the enforceability (*exequibilidad*) of *international treaties and of the statutes approving them*.
- With respect to bills: *to decide on the constitutionality of bills objected to by the Government as unconstitutional*; and to decide conclusively on the constitutionality of bills for *statutory laws (leyes estatutarias)*.

– Discretionary review of *tutela* judgments:

With respect to the *tutela* action – which may be filed by any person before the courts for the purpose of obtaining “the immediate protection of their fundamental constitutional rights, whenever these are threatened or violated by the action or omission of any authority” – the Constitution provides that the judgments, which shall be immediately enforceable, may be appealed before the competent court. It further provides that all *tutela* judgments must be referred to the Constitutional Court for “their eventual review”.

As may be observed, the constitutional provision does not impose an obligation to review all *tutela* judgments; on the contrary, the high tribunal enjoys a margin of discretion in selecting which cases to review. The Constitutional Court has held that “discretionary review is more important, by reason of its content and scope, than mandatory review, because the very role of the Court in *tutela* matters is one of guidance, consolidation of jurisprudence, and constitutional pedagogy – all of which is achieved more efficiently through judgments preselected for their importance and paradigmatic character, than through a large number of mandatory decisions, most of which would amount to repetitions of identical cases, turning the Constitutional Court into a third instance drowning in a sea of confirmatory judgments”⁹⁶.

– Other powers

In addition to the power to issue its own rules of procedure, the Constitution assigned two further special powers to the high constitutional tribunal that do not bear a direct or immediate relationship to constitutional review. The first is the power to rule on the excuses referred to in Article 137 of the Constitution; the second – introduced by the constitutional reform of 2015 – is the power to resolve jurisdictional conflicts arising between jurisdictions.

Under Article 137 of the Constitution, “any permanent committee may summon any natural or legal person” regardless of their public or private character, “to render oral or written statements, which may be required under oath, on facts directly related to the inquiries being conducted by the committee”⁹⁷. Should the person excuse themselves from appearing and the

⁹⁶ Constitutional Court, Judgments C-018 of 1993. See also Judgments C-1716 of 2000, among many others.

⁹⁷ This mechanism falls within the category of public oversight (control público), as the Constitutional Court has clarified. In Order (Auto) 1696 of 2024, the Court noted: “In Order 543 of 2016,

committee insist on the summons, the Constitutional Court's jurisdiction is activated to determine whether the excuse is well-founded or unfounded, after hearing the summoned person.

In accordance with constitutional jurisprudence, the jurisdiction of the high tribunal is triggered "whenever three circumstances concur: (i) a permanent committee of Congress summons any natural or legal person to render oral or written statements on facts directly related to the inquiries it is conducting; (ii) the summoned person excuses themselves from appearing; and (iii) the respective committee insists on the summons. Only once these three elements have been established shall it fall to this Tribunal to decide on the merits whether the excuses put forward by the person summoned are, or are not, well-founded"⁹⁸.

The power to resolve jurisdictional conflicts between jurisdictions –originally assigned by the Constitution of 1991 to the Superior Council of the Judicature– was transferred to the Constitutional Court by the balance-of-powers reform (Legislative Act of 2015). The high tribunal has held that such a conflict arises in those cases where "two or more authorities administering justice and belonging to different jurisdictions dispute cognizance of a proceeding, either because each considers that none of them has jurisdiction (negative conflict) or because each considers the matter to fall within its exclusive competence (positive conflict)"⁹⁹.

Constitutional jurisprudence has further identified three requirements that must be met for a jurisdictional conflict to arise – one subjective, one objective, and one normative¹⁰⁰: "The subjective requirement demands that

this Court specified that, although its earlier jurisprudence had initially assimilated the summoning power established in Article 137 of the Constitution to the figure of political oversight, since 2015 it has held that 'the objective of this instrument goes beyond the essence of that type of control, corresponding in fact to what the law terms public oversight.' On that occasion, the Court elaborated on the differences between political oversight and public oversight, holding that 'whereas political oversight is a function enshrined at the national level in Articles 114 and 208 of the Political Constitution, with specific manifestations in paragraphs 3, 4, 8, and 9 of Article 135 of the Charter, public oversight is specifically regulated in Article 137, as a broad faculty conferred upon the permanent committees of Congress to gather relevant information facilitating the exercise of their various functions, including the processing of bills or constitutional reform proposals, or even the discharge of the judicial functions assigned to them.'"

98 Constitutional Court, Order (Auto) 140 of 2016.

99 Constitutional Court, Orders (Autos) 345 of 2018; 328 of 2019; 452 of 2019; 041 of 2021.

100 Constitutional Court, Orders (Autos) 155 of 2019; 452 of 2019; 503 of 2019; 129 of 2020; 415 of

the controversy be raised by at least two authorities administering justice and belonging to different jurisdictions. The objective requirement establishes that there must be a judicial cause over which the controversy arises – that is, it must be verifiable that a proceeding, incidental matter, or any other jurisdictional process is underway. The normative requirement provides that the authorities in conflict must have expressly stated the constitutional or legal grounds on which they consider themselves competent or incompetent to hear the cause”¹⁰¹.

4.4. SPECIAL JURISDICTIONS

Beyond the three principal jurisdictions – ordinary, contentious-administrative, and constitutional – the Constitution of 1991 enumerates, in Article 246 and without further development in the constitutional text, what may be termed the “special indigenous jurisdiction,” insofar as the Constitution recognizes the authorities of indigenous peoples the power to “exercise jurisdictional functions within their territorial sphere, in accordance with their own norms and procedures, provided these are not contrary to the Constitution and the laws”. The Constitution also authorizes the legislature to “create justices of the peace charged with resolving individual and community conflicts in equity”.

Finally, a recent constitutional reform created the “Agrarian and Rural Jurisdiction” and authorizes the legislature to determine “its competence and functioning, as well as the special agrarian and rural procedure, on the basis of the principles and criteria of agrarian law established by statute”. The constitutional provision further requires that “effective access to justice and protection be guaranteed for peasant farmers and ethnic groups: Black or Afro-Colombian communities, Palenquero communities, Raizal communities, indigenous peoples and communities, the Rom community, and the victims of the armed conflict”.

2020.

101 Constitutional Court, Order (Auto) 148 of 2024.

5. THE OFFICE OF THE ATTORNEY GENERAL

Another significant innovation with respect to the judicial branch was the adoption of a new model of criminal investigation – a Colombian variant of the accusatorial system. To this end, the Constitution established the Office of the Attorney General of the Nation (*Fiscalía General de la Nación*, hereinafter FGN), composed of the Attorney General, delegated prosecutors, and such other officials as determined by law.

The FGN is charged, in general terms, with the obligation to “conduct the exercise of criminal prosecution and investigate facts bearing the characteristics of a criminal offense that come to its attention by means of a complaint, special petition, private complaint, or ex officio, provided there are sufficient motives and factual circumstances indicating the possible existence thereof”.

The Constitution addressed in express terms the apex of the institution –the Attorney General– establishing the method and competence for their election, the term of office, and the eligibility requirements (Article 249). It determined that this high official shall be elected by the CSJ from a shortlist of three candidates submitted by the President of the Republic. While in the Colombian system the FGN does not form part of the executive branch – as would be the case in a pure accusatorial system – the head of the executive retains some degree of influence through the nomination of the candidates eligible to lead the investigative organ¹⁰². The electoral court has recognized that the President enjoys broad discretionary latitude in composing the shortlist for this purpose.

With respect to eligibility requirements, those applicable to the position of Attorney General are the same as those required to serve as a justice of the CSJ: native-born Colombian citizenship, a law degree, and at least fifteen years of experience in the judicial branch, the Public Ministry, or in the practice of law or legal academia for the same period. As regards the constitutional term, the Constitution fixed it at four years without the possibility of re-election, without specifying whether it constitutes a personal

¹⁰² Council of State, Contentious-Administrative Chamber, Fifth Section, Judgments of August 21, 2025, Case No. 11001-03-28-000-2024-00113-00.

or institutional term. The electoral court, however, has held that its nature is individual or personal.

6. THE GOVERNANCE AND ADMINISTRATION OF THE JUDICIAL BRANCH: THE DISCIPLINARY JURISDICTIONAL FUNCTION OVER OFFICIALS AND EMPLOYEES OF THE JUDICIAL BRANCH

With the aim of deepening the principle of autonomy and independence of the judicial branch, the Constitution of 1991 advanced toward a model of judicial governance through the creation of a body within the judicial branch itself, entrusted with its governance and administration without interference from the other branches of public power. To this end, the Constitution of 1991 established the Superior Council of the Judicature, which originally comprised two chambers: an administrative chamber responsible for the administrative management of the branch, and a disciplinary jurisdictional chamber responsible for the disciplinary regime applicable to judicial officers.

Criticisms of this model of judicial governance, however, led to a constitutional reform intended to re-engineer the design adopted in 1991. The constitutional reform of 2015 (Legislative Act No. 2) abolished the Superior Council and replaced it, with respect to judicial governance and administration, with the Judicial Governance Council (*Consejo de Gobierno Judicial*) and the Judicial Branch Management Office (*Gerencia de la Rama Judicial*).

The Constitutional Court, however, by Judgments C-285 of 2016, declared this new model of judicial governance unconstitutional and ultimately revived the Superior Council of the Judicature¹⁰³. With respect to the disciplinary jurisdiction, the model outlined in the 2015 reform was nonetheless retained. With these considerations in mind, the following is a general presentation of the model conceived in 1991 and reinvented in 2015.

103 “The Court concluded that, although Congress had broad powers to modify the management model of the Judicial Power, and even to suppress the organs created by the Constitution of 1991 to govern and administer this branch of public power, the new scheme introduced by the Legislative Act exceeded the power of constitutional reform available to Congress, because it suppressed the principle of judicial self-governance as a manifestation of the principle of separation of powers and the principle of judicial independence”. Constitutional Court, Judgments C-285 of 2016.

6.1. GOVERNANCE AND ADMINISTRATION
OF THE BRANCH: THE SUPERIOR COUNCIL
OF THE JUDICATURE

Judicial self-governance –understood as “the capacity of the Judicial Branch to manage and conduct itself, without dependence on or interference from other powers and organs of the State”¹⁰⁴– has been assigned, in its organic dimension, to the Superior Council of the Judicature. This organ is composed of 6 justices elected for a term of eight years, distributed as follows: 2 elected by the Supreme Court of Justice, 1 by the Constitutional Court, and 3 by the Council of State.

With respect to eligibility requirements, the Constitution likewise provides that members of the Council must be native-born Colombian citizens in good standing and at least thirty-five years of age, hold a law degree, and have practiced the profession for ten years with good professional standing. Members of the Council may not be drawn from among the justices of the nominating corporations themselves.

As regards its constitutional functions and powers, the Superior Council of the Judicature is charged with administering the judicial career; preparing lists of candidates for the designation of judicial officers; monitoring the performance of judicial offices; preparing the budget proposal for the judicial branch; establishing the territorial division for judicial purposes; determining the location and redistribution of judicial offices; and creating, suppressing, merging, and transferring positions within the administration of justice. It also exercises a regulatory function and is accordingly empowered to issue the regulations necessary for the effective functioning of the administration of justice, those relating to the internal organization and functions assigned to the various positions, and those governing the judicial and administrative procedures conducted in judicial offices in matters not addressed by the legislature.

¹⁰⁴ Ibid.

6.2. THE DISCIPLINARY FUNCTION OVER OFFICERS OF THE JUDICIAL BRANCH: THE NATIONAL COMMISSION OF JUDICIAL DISCIPLINE

The National Commission of Judicial Discipline was created in 2015 by the balance-of-powers reform, replacing the Disciplinary Jurisdictional Chamber of the Superior Council of the Judicature, which had functioned from 1991 until 2020, when the Commission's members were elected for the first time¹⁰⁵.

The Commission is composed of 7 justices elected by Congress in plenary session: 4 elected from shortlists submitted by the Superior Council of the Judicature, and 3 from shortlists submitted by the President of the Republic. They serve personal terms of eight years, must satisfy the same eligibility requirements as justices of the Supreme Court of Justice, and may not be re-elected.

The National Commission of Judicial Discipline exercises disciplinary jurisdictional functions in connection with infractions of the disciplinary regimes applicable to officials and employees of the Judicial Branch, with the exception of those who enjoy constitutional immunity. It is also charged with examining the conduct of and sanctioning practicing attorneys for professional misconduct, at the instance specified by law, unless this function is assigned by law to a Bar Association.

REFERENCES

- Ardila Trujillo, M. "La prohibición de dilaciones injustificadas en la jurisprudencia constitucional". In *Revista Derecho del Estado*, N.º 23, December 2009.
- Botero, F. "El senado que nunca fue. La circunscripción nacional después de tres elecciones". In A. M. Bejarano and A. Dávila (eds.), *Elecciones y democracia en Colombia, 1997–1998*. Bogotá, Fundación Social, Departamento de Ciencia Política, Universidad de los Andes, 1998.

¹⁰⁵ Under the transitional provisions, the justices of the Disciplinary Jurisdictional Chamber of the Superior Council of the Judicature were to continue in office until the members of the National Commission of Judicial Discipline took their oath of office. Congress elected these justices in December 2020; they were sworn in on January 13, 2021.

- Cepeda Espinosa, M. J. *La Constitución de 1991: viviente y transformadora*. Bogotá, Universidad de los Andes, 2022.
- Cuervo Restrepo, J. I. “La rama judicial y la administración de justicia”. In *Lecciones de derecho constitucional*, vol. II. Bogotá, Universidad Externado de Colombia, 2018.
- Delgado, O. *Colombia elige: mitaca /84 – Perspectiva /86*. Bogotá, Pontificia Universidad Javeriana, 1986.
- Esguerra Portocarrero, J. C. *Los cimientos de la Constitución*. Bogotá, Tirant lo Blanch, 2023.
- Flórez, J. A. “16 años de la circunscripción nacional para Senado en Colombia: ¿dónde está el espacio de representación nacional?”. In *Revista Desafíos*, Universidad del Rosario, vol. 18, 2008.
- García-Pelayo, M. *El Estado de partidos*. Madrid, Alianza Editorial, 1986.
- García Roca, J. *Cargos públicos representativos*. Madrid, Aranzadi, 1999.
- Gechem Sarmiento, C. E. *El congreso colombiano a partir de 1991*. Bogotá, Universidad Externado de Colombia, 2015.
- Gómez Velásquez, A. *El deber de colaboración armónica entre los poderes públicos*. Bogotá, Tirant lo Blanch, 2022.
- Hernández Becerra, A. *Derecho electoral. La elección popular de alcaldes*. Bogotá, Universidad Externado de Colombia, 1988.
- Hernández Becerra, A. “Prólogo”. In *Constitución y derecho administrativo. Doctrina básica del Consejo de Estado desde 1830*, vol. I. Bogotá, Consejo de Estado.
- Julio Estrada, A. *Las ramas ejecutiva y judicial del poder público en la Constitución colombiana de 1991*. Bogotá, Universidad Externado de Colombia, 2003.
- Lozano Villegas, G. *Control político en el ordenamiento constitucional colombiano: ¿un concepto diluido en el control jurídico o una idea que debe consolidarse?* Bogotá, Universidad Externado de Colombia, 2010.
- Marín Vélez, C. E. *Proceso evolutivo y antecedentes de los juzgados administrativos: el Consejo de Estado, los tribunales administrativos, los juzgados administrativos*. Bogotá, Consejo Superior de la Judicatura – Imprenta Nacional, 2007.

- Namén Vargas, Á. “Prólogo”. In *Antología Jurisprudencia y Conceptos – Consejo de Estado 1817–2017*, vol. I. Bogotá, Consejo de Estado – Imprenta Nacional, 2019.
- Nohlen, D. “Sistemas electorales presidenciales y parlamentarios”. In *Tratado de Derecho Electoral*. México, Fondo de Cultura Económica, 2007.
- Ortega Santiago, C. *El mandato representativo*. Madrid, Centro de Estudios Políticos y Constitucionales, 2005.
- Padrón Pardo, F. “Organización y funcionamiento del congreso de la república”. In *Lecciones de derecho constitucional*, vol. II. Bogotá, Universidad Externado de Colombia, 2018.
- Padrón Pardo, F. *El concepto y función de las bancadas: las transformaciones de la representación política*. Bogotá, Universidad Externado de Colombia, 2015.
- Palacios Torres, A. “Aspectos constitucionales del procedimiento legislativo ordinario en el ordenamiento jurídico colombiano”. In *Lecciones de derecho constitucional*, vol. II. Bogotá, Universidad Externado de Colombia, 2018.
- Palacios Torres, A. *Concepto y control del procedimiento legislativo*. Bogotá, Universidad Externado de Colombia, 2005.
- Ramírez Cleves, G. *Límites de la reforma constitucional en Colombia. El concepto de Constitución como fundamento de la restricción*. Bogotá, Universidad Externado de Colombia, 2005.
- Restrepo Piedrahita, C. *Constituciones de la primera república liberal 1855–1885*, vol. III. Bogotá, Universidad Externado de Colombia, 1985.
- Restrepo Piedrahita, C. “Tentativas para instituir en Colombia una Corte Constitucional”. In *La jurisdicción en Iberoamérica*. Bogotá, Universidad Externado de Colombia, 1984.
- Sierra Porto, H. *Concepto y tipos de ley en la Constitución colombiana*. Bogotá, Universidad Externado de Colombia, 1998.
- Tascón, T. E. *Historia del derecho constitucional colombiano*. Bogotá, Universidad Externado de Colombia, 2005.
- Tomás Mallén, B. *Transfuguismo parlamentario y democracia de partidos*. Madrid, Centro de Estudios Políticos y Constitucionales, 2002.

Vanegas Gil, P. P. *Estudios de derecho electoral*. Bogotá, Universidad Externado de Colombia, 2008.

Vanegas Gil, P. P. *Las candidaturas en el derecho electoral colombiano*. Bogotá, Universidad Externado de Colombia, 2009.

Vanegas Gil, P. P. *El sistema electoral en la elección del Congreso colombiano: su configuración constitucional*. Bogotá, Instituto de Estudios Constitucionales Carlos Restrepo Piedrahita, Temas de Derecho Público N.º 99, 2018.

Vanegas Gil, P. P. “Entre el mandato representativo y el mandato del partido: en últimas, ¿de quién es la curul? Una aproximación en el derecho constitucional colombiano”. In *Democracia, representación y nuevas formas de participación. Una mirada en perspectiva*. Bogotá, Universidad Externado de Colombia, 2021.

Political Constitution of Colombia, 1886.

Political Constitution of Colombia, 1991.

Constitution of Cundinamarca, 1811.

National Constitution, 1821.

Legislative Act No. 1 of 1968.

Legislative Act No. 3 of 2017.

Legislative Act No. 2 of 2015.

Legislative Act No. 3 of 2023.

Law 974 of 2005.

Law 1437 of 2011 (Code of Administrative Procedure and Contentious-Administrative Matters).

Colombian Constitutional Court (CCC), Judgments C-018 of 1993.

Constitutional Court, Judgments C-319 of 1994.

Constitutional Court, Judgments C-446 of 1996.

Constitutional Court, Judgments C-037 of 1996.

Constitutional Court, Judgments C-473 of 1997.

Constitutional Court, Judgments C-655 of 1997.

Constitutional Court, Judgments SU-047 of 1999.

Constitutional Court, Judgments C-392 of 2000.

Constitutional Court, Judgments C-1648 of 2000.

Constitutional Court, Judgments C-1716 of 2000.

Constitutional Court, Judgments C-540 of 2001.

Constitutional Court, Judgments C-830 of 2001.

Constitutional Court, Judgments C-008 of 2003.

Constitutional Court, Judgments C-063 of 2002.

Constitutional Court, Judgments SU-1159 of 2003.

Constitutional Court, Judgments C-154 of 2004.

Constitutional Court, Judgments C-579 of 2004.

Constitutional Court, Judgments C-709 of 2004.

Constitutional Court, Judgments C-866 of 2004.

Constitutional Court, Judgments C-1174 of 2004.

Constitutional Court, Judgments C-342 of 2006.

Constitutional Court, Judgments C-453 of 2006.

Constitutional Court, Judgments C-859 of 2006.

Constitutional Court, Judgments C-247 of 2013.

Constitutional Court, Judgments C-288 of 2012.

Constitutional Court, Judgments C-535 of 2012.

Constitutional Court, Judgments C-134 of 2023.

Constitutional Court, Judgments C-285 of 2016.

Constitutional Court, Judgments C-332 of 2017.

Constitutional Court, Judgments C-481 of 2019.

Constitutional Court, Judgments C-242 of 2020.

Constitutional Court, Order (Auto) 140 of 2016.

Constitutional Court, Orders (Autos) 345 of 2018; 328 of 2019; 452 of 2019; 041 of 2021.

Constitutional Court, Orders (Autos) 155 of 2019; 452 of 2019; 503 of 2019; 129 of 2020; 415 of 2020.

Constitutional Court, Order (Auto) 148 of 2024.

Constitutional Court, Order (Auto) 1696 of 2024.

Council of State, Contentious-Administrative Chamber, Fifth Section, Judgments of December 7, 2022, Case No. 11001-03-28-000-2021-00032-00.

Council of State, Judgments of September 27, 2016, Case No. 5000-23-15-000-2024-00121-01 (PI).

Council of State, Judgments of April 12, 2024, Case No. 11001-03-15-000-2024-00535-00 (PI).

Council of State, Contentious-Administrative Chamber, Fifth Section, Judgments of June 26, 2025, Case No. 11001-03-28-000-2025-00005-00.

Council of State, Contentious-Administrative Chamber, Fifth Section, Judgments of August 21, 2025, Case No. 11001-03-28-000-2024-00113-00.

ABSTRACT

This chapter traces the historical trajectory of presidentialism in Colombia from the founding of the Republic to the constitutional order established in 1991, arguing that the persistent concentration of executive power has constituted the defining structural tension of Colombian constitutionalism. Beginning with the adoption of the presidential model at independence –shaped by the imperatives of territorial consolidation and the repulsion of Spanish reconquest– the chapter examines how successive nineteenth-century constitutions oscillated between federalist limitation and centralist reinforcement of executive authority, culminating in the markedly authoritarian configuration of the 1886 Constitution and its infamous Article 121, which enabled the executive to displace Congress as the effective legislator for nearly a century. The analysis then reconstructs the gradual democratizing reforms of the twentieth century –1910, 1936, 1945, 1968, and 1986– demonstrating how each sought, with varying success, to contain presidential hypertrophy through limitations on states of exception, extraordinary powers, and territorial centralism. The chapter proceeds to examine the 1991 Constitution’s institutional response: while preserving the presidential regime, the new constitutional order introduced an articulated framework of counterweights – a robust catalog of rights, reinforced constitutionality review, autonomous territorial entities, judicial independence, and congressional mechanisms of political control including summons and the motion of censure. The central argument holds that, understood as a system, the 1991 Constitution has substantially curtailed the scope of presidential power, notwithstanding the persistence of Caesarist impulses in the political culture of successive governments. The chapter closes by critically assessing recent executive overreach –including attempts to circumvent congressional majorities through

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popular consultations and govern by decree in the absence of statutory authorization— as evidence that the atavistic presidentialism of 1886 continues to haunt the constitutional imagination of those who hold power.

KEYWORDS

Presidentialism, separation of powers, 1886 Constitution, 1991 Constitution, states of exception, extraordinary powers, motion of censure, executive hypertrophy, Colombian constitutional history, checks and balances

I. INTRODUCTION

The advent of the independence movement in South America was inspired by the ideas of freedom promoted by the French Revolution and the North American Revolution. But once the Spaniards had been definitively expelled from these lands and the first romantic cry for independence from the local authorities, but submission to the authority of King Ferdinand VII, had been overcome, as long as he came to reside in the new continent,² it was

2 Act of Independence (Act of the Extraordinary Cabildo of Santa Fe) July 20, 1810, where it was stated: In the city of Santafé, on the twentieth day of July, eighteen hundred and ten, and at the hour of six o'clock in the afternoon, the S.S. of the M.I.C. met in an extraordinary capacity, by virtue of the fact that the people had gathered in the public square and proclaimed by their Deputy, the Councilor Don José Acevedo and Gómez to propose to him the members in whom the people themselves were going to deposit the Supreme Government of the Kingdom; and the said Alderman having made it clear that it was necessary to have the authority of the present Chief, His Excellency Don Antonio Amar, a deputation was sent composed of the Accountant of the Royal Mint, Don Manuel de Pombo, Dr. Miguel de Pombo and Don Luis Rubio, neighbors, to said Most Excellent Lord, presenting to him the just and arranged requests of this people, and asking him, for his safety and in view of the occurrences of today, to place arms at the disposal of this Corps, sending for the time being a Company to guard the chapter houses, commanded by Captain Don Antonio Baraya. His Excellency being forced upon the requests of the people, he lent himself with the greatest frankness to them.

Immediately the list of the subjects that he had previously proclaimed was manifested to the same people, so that together with the legitimate members of this body (with the exception of the intruders Don Bernardo Gutiérrez, Don Ramón Infiesta, Don Vicente Rojo, Don José Joaquín Álvarez, Don Lorenzo Marroquín, Don José Carpintero and Don Joaquín Urdaneta) (Save the memory of the illustrious patrician doctor Don Carlos de Burgos), the Supreme Government of this Kingdom be deposited in the entire Junta temporarily, while the same Junta forms the Constitution that will strengthen the public happiness, counting on the noble Provinces, from which their Deputies will be asked at the moment, this Body signing the regulations for the elections in said Provinces, and both this and the Constitution of Government must be formed on

necessary to organize the nascent republics institutionally. At that time, it was the model of the United States of America that offered a paradigm that consulted the desires of Gran Colombia, a very extensive territory occupied by three incipient nations since that time with perceptible ethnic, geographical and cultural differences and that, by the will of the victors, would have to be governed by one or another charismatic leader with a messianic vocation such as Simón Bolívar first and Francisco de Paula Santander later.

Since presidentialism, unlike the parliamentary regime, tends to exalt³ anti-democratic Caesarism at the expense of the separation of powers and public liberties, despite the fact that the election of the president is made directly by the people without census exclusions, the decision to opt for the presidential regime in Colombia has been a determining factor in an institutional history of the disability of Congress. of hypertrophy of centralism, of restrictions on public freedoms and of attempts to affect the alternation in power, as well as the periodicity of elections. In fact, it is not enough to boast of not having, especially from the 60s of the twentieth century until today, unlike other Latin American countries, an extensive inventory of military dictators with heads of state throughout our history, to proclaim ourselves satisfied with our system of checks and balances.

In any case, and despite what has been said, it is not possible to maintain categorically that the presidential regime *per se* is incompatible with democracy, and the United States of America is a paradigmatic example of this. What happens is that, if it is not in step with a federal regime and with

the bases of freedom and respective independence of them, bound only by a federative system, whose representation must reside in this capital, to watch over the security of New Granada, which protests not to abdicate the essential rights of the sovereignty of the people to any other person than that of its august and unfortunate Monarch Don Fernando VII, whenever he comes to reign among us, this new Government being subject for the time being to the Superior Junta of Regency, in the meantime existing in the Peninsula, and on the Constitution given to it by the people, and in the terms aforesaid, and after the Lord Alderman his Deputy having exhorted him to guard the inviolability of the persons of Europeans at the time of this fatal crisis, because from the reciprocal union of the Americans and the Europeans must result the public happiness, protesting that the new Government will punish criminals according to the laws, he concluded by recommending very particularly to the people the person of His Excellency Mr. Antonio Amar; The people responded with the signs of the greatest complacency, approving what their deputy had expounded in https://www.cervantesvirtual.com/obra-visor/acta-de-independencia-acta-del-cabildo-extraordinario-de-santa-fe-20-de-julio-de-1810--0/html/008e6ca8-82b2-11df-acc7-002185ce6064_2.html

3 G. Gortázar. *El cesarismo presidencial*, Madrid, Renacimiento, 2025.

a Congress that exercises effective control over the executive, it entails a greater risk of promoting populist governments, messianic leaderships and in general rulers whose personality and role tend to be confused with that of the State, which deinstitutionalizes the exercise of power and imprints authoritarian overtones on it. This is so because in a single person, the figure of head of state, head of government and supreme administrative authority is concentrated. Latin America offers multiple examples of this.

The fact that the president is popularly elected by direct vote or by more complex methods such as that of the electoral colleges of the United States of America, and that they have a fixed term, gives stability to the system, but at the same time implies less power of parliament in terms of exercising control over the executive. In this key, the history and reality of presidentialism in Colombia must be read and understood, even during the validity of the Constitution of 91, where political control suffers from rickets and the motion of censure, which has never progressed, proceeds only against ministers.

But with regard to the presidential regime in Colombia today, it is already established that the vigorous catalog of rights, the strengthening of the constitutionality review, the limitations on states of internal commotion, the limitation of extraordinary powers, territorial autonomy and the autonomy of the judicial branch, constitute an institutional fabric that prevents the excesses of the presidential figure.

2. BRIEF HISTORICAL REVIEW

After the period of the provincial constitutions and once independence was consolidated in 1819 with the Battle of Boyacá, it was chosen, with the Fundamental Law of Angostura, for the union of the territories of Venezuela and New Granada in a single state that from the promulgation of the Constitution of 1821 would be called Gran Colombia⁴. In this text, a strong and centralized executive was introduced, capable of facing the risk of the Spanish reconquest. Sovereignty is then rooted in the Nation, the pillar of the unitary state.

4 Under that name was understood what are today: Venezuela, Colombia, Panama and Ecuador.

As for the President: His term was foreseen for 4 years, without immediate reelection. The proscription of powers to deprive any person of liberty was established. With respect to the congress, the obligation to convene it to sessions was established, which should happen in its own right. In any case, it was up to the President to report on his management. The appointment of ministers would also have to be approved by Congress.

As for the declaration of a state of emergency, an important control of the congress was also foreseen in the following terms:

“Article 128.- In cases of internal commotion by armed force that threatens the security of the Republic, and in those of a sudden foreign invasion, it may, with the prior agreement and consent of the Congress, dictate all those extraordinary measures that are indispensable and that are not included in the natural sphere of its powers. If the Congress is not in session, it shall have the power by itself; but he will summon him without the slightest delay, to proceed in accordance with his agreements. This extraordinary authorization will be limited only to the places and time that are absolutely necessary”

Despite being a centralist constitution with a strong executive, the congress had an important control function.

This constitutional text was replaced by another from 1830, which was intended to prevent the dissolution of Gran Colombia. There, a system of indirect election of the President was established, who would also have a presidential term of 8 years and without reelection.

This constitution was actually stillborn and in 1832 the Constitution of New Granada came into force. There the indirect election of the President of the Republic was established, for a period of four years. The maintenance of public order was, and as in the two previous constitutions, its first function was to maintain public order.

The appointment of secretaries of the office no longer required the approval of Congress and the declaration of a state of emergency will be governed by the following rules:

“Article 108.- In cases of grave danger due to internal commotion, or external attack, which threatens the security of the Republic, the Executive Power shall apply to the Congress, and in its recess, to the Council of State, so that, considering the urgency, according to the report of the Executive, it may grant it, with the restrictions it deems appropriate, in whole or in part, the following powers:

1. To call into service that part of the National Guard that is considered necessary;

2. To negotiate the advance that is deemed indispensable, of the contributions and income from the national revenues, with the corresponding discount, or to negotiate or demand by way of loan a sufficient sum, provided that the expenses cannot be covered with ordinary revenues, designating the funds from where, and the term within which the payment must be verified;

3. In order that, being informed that there is an attempt against the tranquility or security of the Republic, he may issue summons for the appearance or arrest of the suspects in this crime, interrogate them or have them interrogated, and must place them at the disposal of the competent judge within seventy-two hours, to whom he will transmit the documents that gave rise to the arrest, together with the proceedings that have been carried out;

4. To grant general or particular amnesties or pardons.

Article 109.- The powers granted to the Executive Power, according to the preceding Article, shall be limited only to the time and objects indispensable to restore the tranquility and security of the Republic; and the use that the Executive Power has made of them shall be reported to the Congress at its next meeting.

Article 110.- The President of the Republic is responsible in all cases of infraction of the Constitution and the laws, in those of abuse of the powers granted to him in accordance with Article one hundred and eight of this Constitution, and in any other cases of misconduct in the exercise of his functions.”

This constitution was in effect until 1843, when a markedly conservative constitution was promulgated. Its main characteristics can be summarized as follows: It was a centralist, confessional constitution, with a reduced congress since its annual sessions would last only 60 days per year extendable by up to 90 and the ordinary sessions had to be convened by the executive. The duration of the presidential term would be 4 years and there would be no immediate reelection. This constitution also established the census vote. Ten years later, the liberals imposed a constitution that reflected their ideology. With it, the census vote was abolished, slavery was prohibited, greater autonomy was recognized for territorial entities and freedom of worship was established. The presidential term continued to be 4 years.

The Granada Confederation was created in Colombia with the constitution of 1858. It introduced the bases of federalism, in which the power of the executive is also diminished by transferring many of its powers to local governments. This is complemented by the adoption of the residual competence clause in favor of that same territorial level. The rich catalogue of public freedoms was also preserved.

Five years later, the constitution of Rionegro was adopted, which deepened the federal form of distribution of power at the territorial level. The separation of church and State, the abolition of slavery, a broad code of public liberties and a series of restrictive powers for the president of the Republic, while the residual clause of competence is drafted in favor of the States characterize this text that governed for 23 years, until the conservative victory when it was declared that it had ceased to exist and was replaced by that of 1886: The most conservative in Colombia, centralist, and with a six-year executive, while the congress would have to meet every two years and extraordinary sessions could only be convened by the executive.

The most remarkable thing about this constitution was the formula for the distribution of power in the territorial sphere: political centralization and administrative decentralization, with which any trace of sovereignty of the States disappears.

The text complements the powers of the state of emergency along with the extraordinary powers to issue decrees with the force of law at the head of the executive. Finally, a confessional state was established, and the catalogue of public freedoms was restricted, even authorizing administrative retentions.

Regarding the state of emergency the famous 121 that would end up being the source to strip Congress of its legislative power for almost a century, this was established:

“In cases of foreign war or internal commotion, the President, after hearing the Council of State and with the signature of all the Ministers, may declare public order disturbed and the whole or part of the Republic in a state of emergency.

By means of such a declaration, the President shall be invested with the powers conferred on him by the laws, and, in their absence, by those conferred on him by the Law of Nations, to defend the rights of the Nation or to suppress the uprising. Extraordinary measures or decrees of a provisional legislative nature issued by the President within these limits shall be binding provided that they bear the signature of all the Ministers.

The Government shall declare public order restored after the disturbance or external danger has ceased; and shall pass to the Congress a reasoned statement of its provisions. Any authorities shall be responsible for the abuses they may have committed in the exercise of extraordinary powers.

Article 122.- The President of the Republic or whoever in his place exercises the Executive Power, is responsible only in the following cases, which shall be defined by law:

1. For acts of violence or coercion in elections;
2. For acts that impede the constitutional meeting of the Legislative Chambers, or hinder them or the other Corporations or public authorities established by this Constitution, from exercising their functions; and
3. For crimes of high treason.

In the first two cases, the penalty may not be other than dismissal, and, if the President has ceased to exercise his functions; that of disqualification from exercising the Presidency again.

No act of the President, except that of the appointment or removal of Ministers, shall have any value or force until it is countersigned and communicated by the Minister of the respective branch, who is responsible for the same act.”

That constitution contemplated the death penalty!

The outlook of the regime inaugurated in 1886 would not be complete if reference is not made to Law 61 of 1888 or the law of the horses that in its famous article k imposed press restrictions. The law allowed the president to impose sentences of confinement, expulsion from the territory, imprisonment and loss of political rights to opponents and to make administrative arrests.

The Congress was suppressed! Meanwhile, the president was given a very broad power to convene extraordinary sessions and appoint magistrates of courts and supreme court.

The 1886 constitution exacerbated the authoritarian features of our legal system. It did so to restore order and security threatened by federalist ideas and the inter-party wars of the time from which the conservatives emerged victorious in the Battle of *La Humareda*.

Thus, we can conclude that, during the nineteenth century, the idea of a strong executive had already led to the birth of the Republic in the face of the imperative of repelling any attempt at Spanish reconquest. The Constitution of 1843 was also adopted after the conservative triumph in the battle

of the Supreme Court. It was then the wars that sustained the adoption and permanence of regimes with a strengthened presidentialism.

2.1. REFORMS TO THE 1886 CONSTITUTION

While it is true that this constitution was in force for 105 years, the twentieth century passed at the same time as important reforms that contributed to the modernization of the Colombian state.

Let's examine the main ones:

2.1.1. CONSTITUTIONAL REFORM OF 1910

The first was in 1910, it alleviated the authoritarian excesses of the 1886 constitution by eliminating the death penalty, establishing the constitutionality review, establishing the responsibility of the president for violation of the constitution and the law and finally reducing the presidential term to 4 years. The aim was to achieve political peace and overcome conservative hegemony.

Another transcendental reform was that of 1936, that of *Revolución en Marcha*, led by Alfonso López Pumarejo, which established the separation of church and state, trying to blur the confessionalism that had taken over the State in 1886. Within this perspective, freedom of conscience was erected.

The most important aspect of this reform was to establish the social function of property, a series of guarantees for the working classes including the right to strike. The foundations were also laid for state interventionism in order to achieve a fairer economic order. The literal rule recited as follows:

“Article 11. The State may intervene by means of laws in the exploitation of public and private industries or enterprises, in order to rationalize the production, distribution and consumption of wealth, or to give the worker the just protection to which he is entitled.

Paragraph. Laws enacted in the exercise of the power granted by this Article require the favorable vote of the absolute majority of the members of both Chambers for their approval.”

2.1.2. CONSTITUTIONAL REFORM OF 1945

Two other reforms of great importance to rationalize state interventionism and modernize the country were those of 1945 and 1968. In the first, together

with some modifications to the territorial regime and the extension of rights to the working class, as well as the prohibition of the armed forces from participating in the elections, the powers of the executive and the legislature in terms of interventionism in the economy are rationalized:

“The State may intervene by mandate of the law in the operation of public and private industries or enterprises, in order to rationalize the production, distribution and consumption of wealth, or to give the worker the just protection to which he is entitled.

This function may not be exercised in use of the powers of Article 69, paragraph 12, of the Constitution”

This article refers to the extraordinary powers with which the President may be vested, by law, *pro tempore*, when necessity demands it or public convenience advises it.

In effect, overcoming *laissez faire* in order to protect the less favored classes is a task that, based on the law, corresponds to the government, with which its competencies and faculties were evidently strengthened, contributing to strengthening the presidentialism that has characterized us.

2.1.3. THE CONSTITUTIONAL REFORM OF 1968

The reform of 1968, led by President Carlos Lleras Restrepo and processed in Congress in its first stage by the senator for Quindío, Carlos Restrepo Piedrahita⁵, basically sought to strengthen the executive by creating ministries, administrative departments, public establishments and industrial and commercial companies, emulating the model of the French central administration⁶.

The state of emergency, a figure from which, together with the extraordinary powers, the President of Colombia usurped the legislative function of Congress practically throughout the twentieth century, not only to issue decrees of great relevance such as the exchange control, but even to regulate the price of movie tickets, was subject to important limitations that should be reported here.

5 Colombian constitutionalist, protagonist of our institutional history, defender of liberal ideas and promoter of guiding ideas of our current constitutional order such as the municipal power, the constitutional court, the legislative power and the restriction of the powers derived from the state of siege and extraordinary powers.

6 The contributions of the jurist Jaime Vidal Perdomo on this point deserve to be remembered.

In this sense, the economic emergency that would have to be decreed for a predefined term must be reported, once it is no longer in force, the measures adopted under its protection would continue to apply. This new figure was foreseen for when events other than those provided for in article 121 -of disturbance of public order- occurred, but which could disturb or threaten to seriously and imminently disturb the economic and social order.

For its part, the following modifications were introduced to Article 121, also tending to limit its scope and with it the legislative powers of the government: In case of war between nations, the law of nations should be respected; in addition, the decrees by which the measures issued on the occasion of the state of emergency were adopted had to have the signature of all the ministers, constituting a form of intra-organic control over the President of the Republic. Something very important was also provided within the logic of the sources of law and the prevalence of formal laws over material ones, since such decrees would not repeal the laws in force and could only suspend those that are incompatible with the measures adopted; in no case could the normal functioning of Congress be impeded, to which the President should send a reasoned statement on the causes that determined the declaration. It also provided for the responsibility of the president and his ministers in the event that this declaration had been unjustified and, finally, with regard to the automatic control of the constitutionality of the decrees issued on the occasion of the declaration, the term for the pronouncement of the Supreme Court of Justice was reduced to one third.

2.1.4. THE CONSTITUTIONAL REFORM OF 1986:

In 1986, through legislative act number 1, the popular election of mayors was established, who until then had been appointed by the governor, agent of the President of the Republic in the respective department. This decision not only took an important step in the deepening of Colombia's democracy, but also erected a new limit to presidential power, breaking at least partially the hierarchical subordination of mayors to the figure of the President of 1991.

2.2. THE 1991 CONSTITUTION

The 1991 constitution does not abandon the presidential regime, but it does introduce provisions that imply greater control for those who exercise

the function, while valuing and strengthening the role of the legislator. In addition, by transforming Colombia into a pluralist state with institutions of participatory democracy, expanding the catalog of public rights and freedoms, introducing limitations on extraordinary powers, as well as on states of internal commotion, guaranteeing the autonomy of the Bank of the Republic, creating the National Television Commission, expanding the powers of the control bodies, to create the National Electoral Council, to create constitutional actions starting with the tutela action, but also popular actions, group actions and enforcement actions, to create a constitutional court responsible for exercising control over the decrees with the force of law issued by the government, to retain the jurisdiction of administrative litigation to exercise constitutionality review and legality with respect to the normative acts of the government and the acts of the government. To strengthen the non-contractual responsibility of the State, to submit military promotions to the approval of Congress, to introduce the motion of censure with respect to ministers, the presidential figure, although it retains the role of head of state, head of government and supreme administrative authority, and although from the point of view of our political culture a role of leading preeminence is reserved for it, That preeminence must be exercised within an institutional network of strong checks and balances.

2.2.1. THE PRESIDENT OF THE REPUBLIC

This more than thirty-year-old constitutional text contains a more extensive regulation of presidential functions in Title VII of this Constitution. It begins by declaring in Article 188 that the President of the Republic symbolizes national unity, in such a way that what at first glance seems to be a mere rhetorical manifestation of the constituent assembly, imposes on the apex of the executive a positive action to achieve social cohesion under the same political project, which is the decision of Colombians, to maintain a common political destiny of whose freedoms and rights that same head of state and government ends up being a guarantor⁷.

7 See Article 188 of the Constitution

2.2.2. ELECTION, PERIOD, ALTERNATION

The President is elected by popular vote, direct for a period of four years. Re-election, in the constitution of 91, was prohibited. Moreover, this debate had not been presented on the Colombian political scene since the fall of Rojas Pinilla and in reality it was reviewed with great suspicion.

However, through legislative act number 2 of 2004⁸, reelection was authorized only once. This is how both Álvaro Uribe and Juan Manuel Santos aspired to re-election and exercised the presidency for two consecutive constitutional terms.

Legislative act number 02 of 2015 once again prohibited reelection. However, in the government of Gustavo Petro, several voices of his supporters have been raised who have proposed re-election through orthodox and non-orthodox means. As the times for constitutional reform have long since expired, there is talk of popular consultations, and many other options totally alien to our logic and constitutional letter. It is regrettable that our constitutional regime, well into the third decade of the twenty-first century, continues to throw hints of Caesarist personalism above the constitutional rules. More than two centuries of constitutional history should not give space to such attempts to assert political voluntarism over institutional rigor.

2.2.3. STATES OF SIEGE AND EXTRAORDINARY POWERS

These are two institutions that are different in their causes and *raison d'être*, but they coincide in their effects since both endow the national government with legislative powers, which seriously affects the principle of separation of powers and supposes a supplanting of the formal legislator. However, in this writing it is necessary to refer to what the teacher Dr. Carlos Restrepo Piedrahita and researcher of our constitutional institutions discovered in his book: *The Extraordinary Faculties: A Small History of a Transfiguration*⁹.

8 The Court declared Legislative Act 02 of 2004 enforceable, as indicated in Judgments C-1045 of 2005.

9 C. Restrepo Piedrahita. *The Extraordinary Faculties: A Small History of a Transfiguration*, Bogotá, Universidad Externado de Colombia, 1973.

What is proposed there is an example of how in our legal system there were vicissitudes that in many cases contributed to strengthening governmental powers in a totally inconvenient way. All of them justified on grounds of public order.

2.2.4. INNER COMMOTION.

The traditionally called state of emergency mutated its name with the 1991 constitution. And not only. The institution was regulated in detail, and a specific statutory law was established.

The main features are as follows:

The declaration of commotion may respond to the need to repel offensive foreign war and with the sole purpose of protecting sovereignty, the alteration of internal public order and finally in situations of economic disturbance of public order or ecological emergency.

As for the internal commotion regulated in Article 213, it is stressed that it must be a serious disturbance of public order that imminently threatens institutional stability. Its declaration requires the signature of all the ministers, its maximum duration will be 90 days, but it may be extended for two equal periods, the second of which requires a prior and favorable opinion from the Senate and the powers derived from such a declaration will be limited to averting the crisis or preventing its effects from spreading. The Senate will exercise control based on the report presented by the government and the Constitutional Court will exercise automatic control of the declaration (Article 212).

With the promulgation of the constitution of 1991, internal commotion ceased to be the permanent state in which the Republic was maintained, the abuse of the figure ceased and most importantly, the suspension of human rights was proscribed.

Article 215 refers to the economic and social emergency, as well as ecological or events that constitute a public calamity. By virtue of this declaration, decrees with the force of law are issued aimed at overcoming the crisis and even include the power to establish taxes on a temporary basis. The measures cease to be in force in the following fiscal year. These decrees may be modified by Congress during the following year if they refer to matters of government initiative; otherwise, the government preserves the power of reform at any time.

Obviously, political liability for abuse of these powers is foreseen; Congress will exercise political control and the Constitutional Court, automatic jurisdictional control.

Thus, it is not possible to ignore the fact that the state of emergency, after internal commotion, ceased to be a permanent or at least recurrent institution of the President of the Republic to exercise legislative power, even ostensibly affecting public freedoms and fundamental rights. The legal regime currently in force in this area undoubtedly constitutes a reduction in the hypertrophy of presidential power.

2.2.5. EXTRAORDINARY POWERS

There was also a delimitation of them. The Constitution states:

“ARTICLE 150—It is the responsibility of Congress to make laws. Through them, it performs the following functions:

10. To vest, for up to six months, the President of the Republic with precise extraordinary powers, to issue regulations with the force of law when necessity demands it or public convenience advises it. Such powers must be expressly requested by the Government and their approval will require an absolute majority of the members of both chambers. The Congress may, at any time and on its own initiative, modify the decree-laws issued by the Government in the exercise of extraordinary powers. These powers may not be conferred to issue codes, statutory or organic laws, or those provided for in paragraph 20 of this article, or to decree taxes.”

Despite the important regulatory limitations, it is regrettable that very significant reforms such as that of the Office of the Comptroller General of the Republic or that of the Office of the Attorney General of the Nation, are made behind the backs of Congress. The very leaders of the respective entities propose this path, draft their own decree with the force of law, have it approved by the executive and thus achieve a regime totally outside the parliamentary democratic debate.

2.2.6. POLITICAL CONTROL THROUGH SUMMONS AND MOTION OF CENSURE

Perhaps more important than legislating, is the function of Congress to exercise political control. Hence the importance of the ordinary sessions

of the congress being of sufficient duration. Let us remember that, in the extraordinary ones, summoned by the executive, only the issues that justify such a call are discussed.

Numerals 8 and 9 of article 135 of the Constitution after the reform of legislative act number 1 of 2007 were as follows:

“8. To summon and require the Ministers, Superintendents, and Directors of Administrative Departments to attend the sessions. Summons must be made at least five days in advance and formulated in a written questionnaire. In the event that the Ministers, Superintendents or Directors of Administrative Departments do not attend, without an excuse accepted by the respective chamber, it may propose a motion of censure. The Ministers, Superintendents or Administrative Directors shall be heard in the session for which they were summoned, without prejudice to the continuation of the debate in subsequent sessions by decision of the respective chamber. The debate may not extend to matters unrelated to the questionnaire and must be at the top of the agenda of the session.

9. To propose a motion of censure with respect to the Ministers, Superintendents, and Directors of Administrative Departments for matters related to the functions of the office, or for disregard for the requirements and summons of the Congress of the Republic. The motion of censure, if necessary, must be proposed by at least one tenth of the members of the respective Chamber. The vote shall be held between the third and the tenth day following the end of the debate, with a public hearing of the respective official. Its approval will require the affirmative vote of half plus one of the members of the House that has proposed it. Once approved, the official will be removed from his position. If it is rejected, another may not be presented on the same subject unless it is motivated by new facts. The resignation of the official in respect of whom a motion of censure has been promoted does not prevent it from being approved in accordance with the provisions of this article. Once one Chamber has pronounced on the motion of censure, its decision inhibits the other from pronouncing on it.”

Unfortunately, parallel to the written order, there are perverse extra-institutional logics that have transformed the two institutions into instruments of coercion of the executive to obtain bureaucratic and contractual perks, selectively sanctioned by the judiciary, so that their practice continues to be generalized and in political reality lacks social reproach.

2.2.7. TERRITORIAL AUTONOMY

Although the public deficit and public order have been excuses for not deepening Colombia's territorial autonomy, the truth is that the popular election of governors ostensibly limited the power of the executive at the departmental level. Although they retain the status of agents of the former, within the narrow margin of autonomy that the law and the constitution grant them, they have constituted an important counterweight to the hypertrophic presidentialism reigning in the centralist state.

2.2.8. THE GOVERNMENT AND THE JUDICIARY

Although Colombia has a long tradition of judicial independence. Until 1991, the administration of the branch depended on the government. The creation of the Superior Council of the Judiciary left the Ministry of Justice and Law lacking justification and thereby deprived the government of any power with respect to the judges, who although they negotiate with the executive the amount of the budget and limitations arise due to budgetary availability, in reality today the autonomy is categorical and absolute, with which the presidential power in that area was also ostensibly diminished and the Ministry of Justice and Law is a second-rate portfolio that no longer even administers the prison system.

3. CONCLUSIONS

While it is true, the history of Colombia is born and develops within a logic of a strong executive, justified by its responsibility to maintain public order threatened first, by the risk of the Spanish reconquest, then by the permanent political struggles between liberals and conservatives and later, well into this century and up to the present day, by the guerrillas, paramilitarism and drug trafficking, and although the scourge of public order and insecurity cannot be contained and, on the contrary, finds new agents and contexts to transmute and remain – today there is talk of *Bacrim*, *Clan del Golfo*, *Tren de Aragua* and other forms of common organized crime – the truth is that the last 60 years have been notable efforts within the institutional dynamics, so that without affecting the public freedoms of ordinary citizens, and without vesting the President of the Republic with all-encompassing powers, the

various forms of violence can be repelled or mitigated, including generous peace processes, agreements, amnesties and pardons.

Understanding our constitution as a system, and although the President of the Republic concentrates the functions of Head of State, Head of Government and supreme administrative authority, according to articles Constitution, he does not enjoy the power that he himself and his ministers often believe they have.

Hence, they prefer decrees to convene popular consultations to achieve the approval of laws that were unlikely to achieve parliamentary majorities, or to reverse the future validities already committed budgetarily and contractually in certain projects, or seek by decree to develop certain measures in the field of health that, in the absence of a law, must create truncated. but they do not succeed. And what can we say about the other decrees with which they try to change the powers of judges to prevent the Council of State from hearing the *tutelas* against the president.

All these desperate attempts account for a very precarious legal advice, and atavistic lags in the minds of the rulers who in their unconscious and in that of their entourage, preserve the idea that the presidentialism of the year 2025 is that of 1886. In spite of everything, we have made a lot of progress!

REFERENCES

Gortázar, G. *El cesarismo presidencial*, Madrid, Renacimiento, 2025.

Restrepo Piedrahita, C. *The Extraordinary Faculties: A Small History of a Transfiguration*, Bogotá, Universidad Externado de Colombia, 1973.

Colombia. Constitución Política, 1991.

Corte Constitucional de Colombia. Sentencia C-1045 de 2005.

THE 1991 CONSTITUTION AND THE FINAL AGREEMENT
TO END THE ARMED CONFLICT AND BUILD A STABLE
AND LASTING PEACE

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ABSTRACT

This article analyzes the central role played by constitutional law in the legal framework and implementation of a peace process carried out by President Santos's administration with the largest and oldest armed group in Latin America, the FARC-EP.

Throughout the article, it examines how an issue that was considered a legal reserve, such as the authorization to conduct peace talks, ended up being included in the Constitutional Text. This led the Constitutional Court to examine unprecedented and challenging issues, such as the legal nature of a peace agreement, its hierarchy, its relationship with current regulations, and the relationship between the new institutions created by the agreement and those already in place.

Likewise, an assessment is made of the functioning of the EJP, just halfway through its existence, showing how transitional judges have implemented a restorative justice model that, while it has had some initial developments in Colombia (e.g., criminal justice for adolescents), is being applied for the first time to the investigation and punishment of crimes against humanity and war crimes. This has entailed a challenge in terms of applying constitutional and international standards to guarantee the fundamental rights of victims.

KEYWORDS

EJP, Peace Agreement, Transitional Justice, restorative justice, transitional constitutionalism

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I. INTRODUCTION

Peace processes around the world tend to be embedded in tensions of various kinds and intensities. The dynamics of political negotiation – which involve managing competing interests, building trust between adversaries, and ensuring both the speed and security of implementation of what has been agreed – frequently clash with numerous legal rigidities, characterized by the confluence of procedures, techniques, stages, and institutions whose operational logics, typically slow-moving, tend not to align with the urgent needs and timelines of politics.

The magnitude of the tensions arising between a pre-existing legal order and a given peace agreement will depend on the nature and depth of the commitments undertaken by the negotiating parties, as well as on the historical context in which they are carried out. A negotiation conducted in the setting of a failed state – whose conclusion gives rise to the construction of a new political, economic, and social order – is not the same as one conducted within pre-established institutional channels.

Ceasefire obligations, disarmament, reincorporation, and the activation of verification mechanisms, given their operational character, do not typically generate significant friction. In fact, states generally possess legal norms of various kinds that authorize the President of the Republic to negotiate peace agreements with armed or insurgent groups, with a view to achieving their disarmament and reintegration into civil society. Colombian Law 418 of 1997, as amended by Law 2272 of 2022, is a good example of this.

By contrast, the *mise en œuvre* of commitments to implement reforms – of varying depth – in electoral, political, agrarian, educational, judicial, military, and institutional matters, as well as the granting of amnesties, pardons, and clemency measures, in addition to the establishment of transitional justice mechanisms, typically generates tensions between the provisions of the peace agreement and the pre-existing national legal order – and even the international legal order – particularly with regard to the fulfillment of obligations concerning the respect and guarantee of the human rights of victims.

At the same time, the ratification of what has been agreed gives rise to various debates. Some consider it essential in terms of the legitimacy of the peace process, and that it somehow “shields” the agreement before international human rights or criminal bodies – most notably the ICC; others argue

that the right to peace, being a fundamental right, cannot be subjected to the will of the majority.

In the Colombian case, the 1991 Constitution does not impose a duty to ratify peace agreements; it merely establishes the legal effects of carrying out such ratification by means of a plebiscite. Should the affirmative option obtain the highest number of votes, the President of the Republic becomes obligated to submit the corresponding bills for constitutional or legislative reform before the Congress of the Republic, with a view to transforming a political decision into a legal norm; in the contrary case, the President shall be prohibited from doing so.

Likewise, the normative implementation of peace agreements gives rise to debates of every kind – ranging from calls for constituent assemblies, to *ad hoc* mechanisms such as expedited legislative procedures (*fast track*), to recourse to ordinary congressional channels. Comparative experiences illustrate the risks and advantages offered by each of these approaches.

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Likewise, the normative implementation of peace agreements gives rise to debates of every kind – ranging from calls for constituent assemblies, to *ad hoc* mechanisms such as expedited legislative procedures (*fast track*), to recourse to ordinary congressional channels. Comparative experiences illustrate the risks and advantages offered by each of these approaches.

Similarly, ensuring compliance with what has been agreed may come into tension with the preservation of the democratic principle (the majority rule). This tension is further sharpened insofar as the execution or implementation of certain commitments undertaken by the negotiating parties entails the adoption of far-reaching normative measures, whose fulfillment falls to governments other than those that negotiated the peace.

Peace agreements tend to be perceived as a kind of “foreign body” within systems of sources of law. To put it in elemental terms: within the famous Kelsenian pyramid, their placement does not appear to be clear. Do they

constitute a form of “parallel and transitional constitutional regime”? How are the contents of a peace agreement to be harmonized with the Constitution in force? And what role is the constitutional judge called upon to play in this regard?

When peace agreements are not limited to regulating the demobilization of an illegal armed group and its transformation into a political party, but instead provide for the creation of numerous political and judicial decision-making bodies, the emergence of additional problems of articulation between existing and newly created institutional frameworks is foreseeable. Such is the complex setting within which transitional justice in Colombia is inscribed.

Indeed, beyond the collisions that may arise between the pre-existing legal order and the commitments undertaken in a peace agreement (normative tensions), the creation of new administrative bodies (planning bodies, decision-making bodies, and the like) and judicial institutions may trigger jurisdictional conflicts and institutional disarticulation within the State (institutional tensions). Hence, while the creation of new institutions may be envisaged, such institutions cannot configure “a parallel or *ad hoc* institutional framework for the fulfillment of what has been agreed, operating in an insular and disarticulated manner from pre-existing public authorities”².

Against this backdrop, the central objective of this article is to assess the constitutional challenges entailed by the process of negotiation, implementation, and verification of the Final Peace Agreement (hereinafter, the FPA) signed between the former FARC-EP and the Government of President Santos, as well as to offer an evaluation of the functioning of the transitional justice model provided therein.

2. THE COMPLEX RELATIONSHIP BETWEEN THE CONSTITUTION AND THE FPA

Prior to the negotiations conducted between the Government of President Santos and the former FARC-EP, academic debates surrounding the relationship between peace agreements and the Constitution were virtually nonexistent in Colombia. Indeed, such agreements were understood in terms

2 Constitutional Court, Judgments C-224 of 2017.

of “political accords,” the implementation of which was required to pass through the Congress of the Republic.

At the same time, the 1991 Political Charter was confined to regulating the powers available to the National Government to address situations disrupting public order –among them, the armed conflict (arts. 213 et seq. of the CP)– but not peace processes, a matter whose regulation was of a statutory nature.

In that sense, the regulation of peace negotiations was set forth in an enabling law, by means of which the Congress of the Republic authorized the President of the Republic to initiate, conduct, and conclude peace processes with illegal armed groups –agreements whose contents were directed at the demobilization and reincorporation of such groups into civil life, while the reforms agreed upon were to be implemented through legislation. All of this changed with the peace process negotiated between the Santos Government and the former FARC-EP. Let us examine the constitutional reforms associated therewith.

3. THE CONSTITUTIONAL REFORMS THAT CHANNELED AND SECURE THE FUTURE IMPLEMENTATION OF THE FPA

Unlike the peace processes previously negotiated in Colombia (e.g., negotiations with the M-19, the Quintín Lame, the EPL, and the AUC), the one conducted between the Santos Government and the former FARC-EP involved three constitutional reforms. Let us examine each in turn.

3.1. A NEGOTIATING AGENDA ESTABLISHED IN THE CONSTITUTION

At the outset of the negotiations, President Santos promoted before the Congress of the Republic the enactment of a Legislative Act with a twofold purpose: (i) to unblock the judicial proceedings pending before Justice and Peace –the first transitional justice process created in Colombia as a result of the negotiations between the Uribe Government and the AUC– through the implementation of case and situation prioritization techniques; and (ii) to establish as the guiding framework of the negotiating agenda the activation

of transitional justice mechanisms, which would encompass not only the FARC-EP but also State agents.

The adoption of Legislative Act 01 of 2012, more widely known as the “Legal Framework for Peace,” coincided with the conclusion of the confidential phase of the peace process conducted with the FARC-EP, marked by the adoption of the “General Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace,” which served as the roadmap for the future negotiations, structured around six (6) points. In this regard, it is worth noting that while point five of the General Agreement addressed the issues of justice and victims’ rights in only rudimentary terms, the aforementioned constitutional amendment laid down the broad contours for the future implementation of transitional justice in the country (the second transitional justice process currently in force in Colombia).

By way of summary, it may be said that, for the first time in Colombian constitutional history, a constitutional reform thematically framed a peace process – a competence that had until then been exercised exclusively by the legislature.

3.2. A CONSTITUTIONAL REFORM DESIGNED TO EXPEDITE THE NORMATIVE IMPLEMENTATION OF THE FPA

As the negotiators of the FPA approached the conclusion of their work, a concern arose among them regarding the need to ensure that what had been agreed would be implemented swiftly by the Congress of the Republic – a fear that was heightened by the possible accession to power of a political sector opposed to the FPA, as indeed came to pass. To that end, they recognized the need to once again reform the 1991 constitutional text.

The question of the normative implementation of the FPA has been the subject of intense debate across various comparative experiences. In some contexts –particularly African ones– internal armed conflicts have been concluded through the signing of a peace agreement and the convening of a Constituent Assembly as the instrument for materializing the commitments undertaken. In others, the ordinary legislative route was selected for implementing what had been agreed, while some have opted for an intermediate approach consisting of reducing the timeframes and the number of approval

debates for the constitutional and legislative reform bills indispensable for the normative implementation of what was agreed upon.

In the Colombian case, Legislative Act 01 of 2016 adopted the formula of the “Special Legislative Procedure for Peace” (hereinafter, the SLPP) –more widely known as the *fast track*– consisting of “an abbreviated legislative procedure that sought to reconcile the country’s political and legal institutional framework with the substantive content of the Agreement”³.

In brief, it entailed reducing by half the number of approval debates required for constitutional reforms, suppressing one debate in the case of ordinary legislation, and vesting the President of the Republic with extraordinary *pro tempore* powers to issue decree-laws aimed at the normative implementation of the FPA. The legislative initiative rested exclusively with the Head of State, while the Constitutional Court would exercise automatic and single-instance review over the FPA’s implementing norms.

The overall assessment of the *fast track*, according to specialists, is bitter-sweet⁴. Indeed, during its period of validity, five constitutional amendments essential to the fulfillment of what had been agreed were approved – particularly in the area of justice – namely: (i) the creation of the Comprehensive System of Truth, Justice, Reparation, and Non-Repetition Guarantees (hereinafter, the SIVJRNR), comprising the EJP⁵ (a judicial body), the Unit for the Search of Persons Deemed Disappeared (a humanitarian body), and the Commission for the Clarification of Truth (a historical memory body), established by Legislative Act 01 of 2017; (ii) the entrenchment of constitutional formulas to ensure the stability and compliance with the FPA by future governments (Legislative Act 02 of 2017); (iii) the political participation of the former FARC-EP (Legislative Act 03 of 2017); (iv) the reform of the royalties system to secure resources for peace (Legislative Act 04 of 2017); and (v) the exclusive state monopoly on the use of force and the prohibition of paramilitary groups (Legislative Act 05 of 2017).

At the same time, the President of the Republic issued thirty-five (35) decree-laws aimed at implementing the various points of the FPA⁶. The vast

3 Durán Smela, D. and Cruz Gutiérrez, D., *El “fast track”: ¿un mecanismo de flexibilización de la Constitución de 1991?* In *Rev. Derecho Estado*, no. 48, Bogotá, Jan./Apr. 2021.

4 Ibid.

5 Especial Jurisdiction for Peace.

6 The decree-laws addressed the following matters: 5 concerning point 1 (Comprehensive Rural

majority were declared constitutionally sound by the Constitutional Court. Likewise, two laws were approved through the *fast track* mechanism: Law 1820 of 2016 (benefits for those appearing before the EJP); and Law 1830 of 2017 (participation of former FARC-EP delegates in the Congress of the Republic).

It should be noted that the two principal laws governing the work of the EJP were not approved through the SLPP: (i) Statutory Law 1957 of 2019 on the EJP, due to the issuance of Judgments C-332 of 2017, by which certain provisions of Legislative Act 01 of 2016 were declared unconstitutional; and (ii) Law 1922 of 2018 on the procedural rules applicable before the EJP, which was processed by means of ordinary legislative procedure.

4. A CONSTITUTIONAL AMENDMENT AIMED AT ENSURING COMPLIANCE WITH THE FPA

Beyond the pursuit of expediency in the normative implementation of the FPA, the negotiators feared that what had been agreed would be disregarded by subsequent governments. This concern led them to conclude that, in some manner, the FPA ought to be regarded as a binding legal norm and not merely as a political accord. This was, of course, not only a novelty in Colombian public law, but also gave rise to a complex discussion within our system of sources of law.

Comparative experiences reveal that debates over the legal nature of peace agreements have attracted the interest of scholars around the world. Governments, local administrations, legislators, judges, and even victims, while acknowledging the undeniable political importance of peace agreements, tend to lack sufficient clarity as to whether the commitments undertaken by the negotiating parties are legally binding. We are confronted with an unresolved controversy, in which doubts, concerns, and uncertainties far outnumber certainties⁷.

Reform); 3 concerning point 2 (political participation); 8 concerning point 3 (end of the conflict); 2 concerning point 4 (eradication of illicit crops); 9 concerning point 5 (SIVJNRN); and 6 concerning point 6 (ratification and verification).

7 Ramelli, A. *La naturaleza jurídica del Acuerdo de Paz en Colombia. Aspectos controversiales*. Bogotá, Editorial Académica Española, 2019.

In recent years, distinguished jurists have taken on the difficult task of attempting to unravel the legal nature of peace agreements, going beyond mere classifications of negotiation models. As a starting point, they have drawn a distinction between: (i) a pre-negotiation agreement; (ii) a document embodying final commitments; and (iii) additional implementation or renegotiation agreements⁸. The focus of the discussion tends to center on the second of these categories, given the essentially political nature of the others.

Some authors argue that peace agreements tend to exhibit a hybrid or mixed legal nature, insofar as they may simultaneously constitute: (i) a humanitarian agreement; (ii) a political document; (iii) an international instrument governed by Article 3 of the Vienna Convention on the Law of Treaties; (iv) a unilateral international legal act of a State; and (v) in certain cases (e.g., East Timor), a binding agreement by virtue of its incorporation into a UN Security Council Resolution⁹.

In the Colombian case, in order to endow the Havana Agreement with legal character, Article 4 of Legislative Act 01 of 2016 provided that it constituted a humanitarian agreement within the meaning of Common Article 3 of the Four Geneva Conventions of 1949, that it formed part of the *bloque de constitucionalidad* in its broad sense, and that it was incorporated into domestic law by means of a formula similar to that employed for international treaties (congressional approval and prior constitutional review).

Once the approval plebiscite for the Havana Agreement was lost (August 2016) and its renegotiation concluded, the Teatro Colón Agreement was signed (November 2016). From that point on, it was decided to repeal the aforementioned stability formula for the FPA and replace it with a weaker one, contained in Legislative Act 02 of 2017: all references to humanitarian agreements, to the *bloque de constitucionalidad*, and to incorporation into domestic law were removed. In their place, certain contents of the new FPA relating to fundamental rights would serve as parameters of validity and development for its implementing norms, on the condition that the Constitution was respected. Compliance by the following three presidential terms

8 Wallenstein, P. and Sollenberg, M. "Armed Conflicts, Conflict Termination and Peace Agreements, 1989–96." In *Journal of Peace Research*, vol. 34, no. 3, 1997, 339.

9 Bell, C. "Peace agreements: their nature and legal status." In *American Journal of International Law*, vol. 100, 2006, 387 ff.

was also provided for – a formula that was declared constitutional by the Constitutional Court through Judgments C-630 of 2017.

On three occasions (Judgments C-379 of 2016 and C-322 and C-360 of 2017), the Colombian Constitutional Court was compelled to answer a troubling legal question: what is the legal nature of the Final Agreement? Although the political and normative contexts in which this question arose were entirely different in each instance, the answer was always the same: the FPA is an exclusively political text, devoid of any binding force, and consequently must be “converted” into a legal norm in order to be applied.

The majority and negationist thesis regarding the legal character of the FPA led, in practice, to paradoxical results: on the one hand, it permitted the endorsement of the so-called “peace plebiscite,” since the FPA did not constitute a legal norm – which would otherwise have led to its being struck down on the grounds that it would have amounted to a referendum; on the other hand, it notably weakened its stability and compliance, as Judgments C-630 of 2017 held that all of its components gave rise to obligations of means rather than of result, and that public authorities moreover enjoyed a broad margin of discretion in selecting the means by which to fulfill them.

The minority thesis, reflected in certain dissenting opinions, posited the mixed nature of the FPA, understanding it as a political document with certain legal components. This approach did not dismiss the need for subsequent normative implementation of the FPA – that is, it did not advocate for its direct and automatic application. On the contrary, recognizing the legal character of certain parts of the FPA implied that it would serve as a parameter of validity for its implementing norms.

5. A CONSTITUTIONAL REFORM BY WHICH THE ISVJNRN WAS CREATED

Legislative Act 01 of 2017 created the SIVJNRN, comprising three complementary components: the UBPD (humanitarian component), with a mandate of 20 years; the CEV (historical memory body), whose three-year term concluded with the delivery of its final report entitled “There is a Future if There is Truth,” leaving in place a Follow-up Committee on the Recommendations of the Truth Commission; and the EJP (judicial body), with a mandate of fifteen years.

The Constitutional Court, through Judgments C-674 of 2017, declared the majority of the articles contained in Legislative Act 01 of 2017 to be constitutional. Among the provisions struck down, the following are particularly noteworthy: (i) the participation of foreign jurists in the judicial proceedings of the EJP; (ii) the restrictions placed on the Constitutional Court in the exercise of its power to select and review *tutela* judgments issued by the EJP; and (iii) the mandatory appearance before the EJP of third parties and State agents not belonging to the armed forces, among others.

The creation of the SIVJNR has its historical roots in a constitutional reform already discussed in this article: the “Legal Framework for Peace”. That reform already envisaged the creation of a future transitional justice system that would cover not only the signatories of the FPA but also State agents. Reference was likewise made to the establishment of a Truth Commission, although the idea of constructing the SIVJNR emerged during the peace negotiations around 2015, when two competing visions of the justice model came into conflict: while the Santos Government proposed that former FARC combatants appear before the Justice and Peace system (the first transitional justice model created in Colombia), the insurgents advocated for the creation of a tribunal entirely independent of the traditional Colombian justice system. At the same time, victims’ groups defended the idea of establishing a specialized unit for the search for disappeared persons. In the end, a series of middle-ground solutions were reached, reflected in the architecture of the SIVJNR.

6. ADVANCES OF THE RESTORATIVE TRANSITIONAL JUSTICE MODEL

Seven years after its creation, the EJP is consolidating itself as a unique restorative transitional justice model in the world, insofar as it has succeeded in investigating –and, in the coming months, sanctioning– those bearing the greatest responsibility for the most serious and representative crimes committed during the Colombian armed conflict. Let us briefly examine its structure, jurisdictional scope, functioning, and an overall assessment of its work.

6.1. ORGANIZATIONAL STRUCTURE OF THE EJP

The EJP is composed by the Magistracy, the Investigation and Prosecution Unit (hereinafter, the UIA), and the Executive Secretariat (hereinafter, the SE).

The Magistracy, in turn, is made up of three Chambers of Justice (SAI¹⁰, SDSJ¹¹, and SRVR¹²), each composed of six (6) magistrates, while the Tribunal for Peace comprises four sections (SAR¹³, ScR¹⁴, SR¹⁵, and SA¹⁶), each composed of five magistrates.

The aforementioned organizational structure of the EJP reflects, with regard to the Chambers of Justice, the objectives of the FPA, namely: (i) the centrality of victims; (ii) accountability of those bearing the greatest responsibility; and (iii) providing legal certainty to those who participated in the hostilities. The structure of the Tribunal, in turn, reflects the coexistence of two models of justice: (i) restorative and dialogic justice, for those who acknowledge their responsibility for the commission of international crimes and make a full contribution to the truth; and (ii) adversarial justice, for those who deny their responsibility for the perpetration of such crimes and may be found either innocent or guilty.

The UIA is the body responsible for investigating and prosecuting those bearing the greatest responsibility who do not accept charges for the commission of international crimes – that is, it functions as a “prosecution office” within the EJP. It is likewise responsible for conducting risk assessments with respect to victims, appearing parties, and participating counsel, and it also has a forensic technical support team and carries out judicial police functions in compliance with orders issued by the Magistracy.

Finally, the SE performs various administrative support functions for the work of the Magistrates and Prosecutors, as well as ensuring the rights of the victims participating in the proceedings. To that end, it comprises various sub-directorates and offices responsible for matters such as the management of the restorative system, victim and appearing-party assistance, communications, procurement, international cooperation, payroll, among others.

¹⁰ Chamber of Amnesty or Pardon.

¹¹ Chamber for the Definition of Legal Situations.

¹² Chamber for the Acknowledgment of Truth, Responsibility, and Determination of Facts and Conduct.

¹³ Section for Cases with Absence of Acknowledgment of Truth and Responsibility.

¹⁴ Section for Cases with Acknowledgment of Truth and Responsibility.

¹⁵ Review Section.

¹⁶ Appeals Section.

6.2. JURISDICTIONAL SCOPE AND FUNCTIONING OF THE EJP

The mission of the EJP is delimited by compliance with the FPA. In that regard, its actions and procedures are framed by three complementary jurisdictional scopes: (i) personal; (ii) temporal; and (iii) material.

With respect to the personal scope of jurisdiction, by virtue of Judgments C-674 of 2017, those appearing before the EJP may be either mandatory or voluntary. The former are members of the armed forces and former members of the FARC-EP; the latter are civilian third parties and State agents not belonging to the armed forces (e.g., members of Congress, governors, mayors, members of departmental assemblies, and so forth).

Regarding the temporal scope of jurisdiction, the EJP only investigates and sanctions offenses committed before December 1, 2016, the date on which the Teatro Colón Agreement entered into force.

As to the material scope, the crimes falling within the EJP's jurisdiction are those directly or indirectly related to the armed conflict, which includes the commission of international crimes such as war crimes, crimes against humanity, and genocide, as well as ordinary offenses bearing a material nexus to the armed conflict.

Concerning the functioning of the EJP, it should be noted that its normative framework of operation is complex, encompassing: (i) the text of the FPA; (ii) partially, Legislative Act 01 of 2012, with respect to the powers to prioritize and select cases; (iii) Legislative Act 01 of 2017, by which the SIVJNR was created; (iv) Statutory Law 1957 of 2019 on the Administration of Justice in the EJP; (v) Law 1820 of 2016 on criminal benefits for appearing parties and the competencies of the SAI and the SDSJ; and (vi) Law 1922 of 2018 on procedural rules for the EJP. In addition to the foregoing, the Magistracy frequently resorts to a referral clause (art. 72 of Law 1922 of 2018), which allows it to fill normative gaps by drawing on Law 1592 of 2012, Law 1564 of 2012, Law 600 of 2000, and Law 906 of 2004.

It should likewise be noted that the EJP administers two complementary models of justice. The following table illustrates the points of divergence between them and the ordinary Colombian justice system:

CRITERIA	Restorative Justice in the EJP	RETRIBUTIVE JUSTICE IN THE EJP	ORDINARY JUSTICE
Centrality	The victims	The accused	The accused
Purpose of the process	Restoration of the fundamental rights of victims: truth, justice, and reparation	Establishment of individual criminal responsibility	Establishment of individual criminal responsibility
Initiation of the process	A <i>macrocase</i> grouping hundreds of individual cases	A <i>macrocase</i> grouping hundreds of individual cases. At the trial stage it becomes a specific case	Report on a specific criminal act
Participation of victims	Active and essential at each and every stage of the process: submission of reports, voluntary statements, observations hearing, and responsibility acknowledgment hearing	They participate previously in the <i>macrocase</i> and subsequently in the oral trial. They may request evidence and present their theory of the case	Their participation is non-essential and limited to certain procedural stages. They do not participate directly in the oral trial
Sanction	Restorative. Conceived in terms of the restoration of victims' rights. The legislature establishes only the minimum and maximum penalties, but not their content	Punitive. Between 15 and 20 years of deprivation of liberty	Punitive. The <i>quantum</i> is established by the legislature
Importance of the judgments	It is not the most important element. It is merely a procedural act. What is essential is the dialogic path undertaken by the victims and the appearing parties, and the fulfillment of the proper sanction	It is an essential procedural act insofar as it determines the responsibility or innocence of the appearing party, after having undergone a dialogic process	It is an essential procedural act

7. AN ASSESSMENT OF THE EJP SEVEN YEARS ON

More than seven years after the EJP's creation, offering a comprehensive assessment of its activities is no simple task. Let us approach it through three (3) major themes.

The defeat of denialism and the surpassing of the truth threshold of ordinary justice

In societies that must confront the horrors of the past, it is common to encounter manifestations of so-called "denialism" – understood as a biased reinterpretation of history, contrary to compelling evidence, aimed

at concealing the occurrence of crimes, downplaying their effects, and ultimately diffusing individual responsibility.

At the same time, in situations of internal armed conflict, dictatorship, or apartheid, impunity rates tend to be remarkably high, owing to the lack of independence and autonomy of judges and prosecutors, the intimidation or assassination of witnesses, and the scarcity of technical resources, among other factors.

In its early stages, the EJP received the investigations and the truths established by the ordinary justice system, as well as those produced by the Justice and Peace model – many of them incomplete, fragmented, and constructed without the active participation of victims. Likewise, despite the enormous work carried out by the CEV, the judicial determination of the existence of various macro-criminal phenomena, their patterns, magnitude, and above all the identification of those bearing the greatest responsibility, remained a historical debt owed to Colombian society.

Faced with the challenge of investigating and sanctioning crimes committed over more than fifty years of internal armed conflict, the EJP decided to create *macrocases* – or *megacausas*, as they are known in Argentina. To date, eleven (11) macrocases are open, maintaining strict symmetry between members of the armed forces and members of the former FARC-EP, namely: (i) the taking of hostages and other serious deprivations of liberty; (ii) the territorial situation of Nariño; (iii) killings followed by enforced disappearances, or “false positives”; (iv) the territorial situation of Urabá; (v) the territorial situation of Northern Cauca and Southern Valle; (vi) the victimization of members of the *Unión Patriótica*; (vii) the recruitment and use of children in the armed conflict and other crimes committed against them within the context of life in the ranks, including ill-treatment, torture, homicide, sexual and reproductive violence, and violence based on prejudice; (viii) crimes committed by State agents in association with paramilitary groups or civilian third parties in the armed conflict; (ix) non-amnestiable crimes committed against ethnic peoples; (x) crimes committed by the FARC-EP; and (xi) gender-based violence, sexual violence, reproductive violence, and other crimes committed on grounds of prejudice based on sexual orientation.

Just as the number of offenses is very high (nearly 250,000), so too is the number of appearing parties: (i) 9,925 former members of the FARC-EP; (ii) 4,878 former members of the armed forces; and (iii) 217 comprising third

parties, State agents not belonging to the armed forces, and individuals involved in social protest, for a total of 15,020 appearing parties.

The defeat of denialism and the surpassing of the threshold of ordinary justice thus required a transformation of investigative strategies – in other words, a “Copernican leap”. To that end, by employing criminal analysis tools (e.g., data mining, cross-referencing of variables, georeferencing, identification of criminal patterns, and so forth), drawing on methodologies specific to transitional justice (e.g., case prioritization and selection), and reconstructing the structure and functioning of both legal and illegal organizations (e.g., chains of command, communications, strategies, military operational planning, and so forth), the transitional judges rewrote the history of the war in Colombia.

In other words, through a traditional case-by-case investigation it would be impossible to reverse biased historical narratives, to prove the systematic and widespread nature of the crimes, and ultimately to reach the leadership of the organizations responsible for the commission of international crimes.

With regard to the reversal of denialism, for instance, the EJP succeeded in judicially establishing that: (i) at least 6,402 young men were falsely presented as combat fatalities; (ii) the FARC-EP adopted a policy of forcible recruitment of children under the age of 15; (iii) the same armed organization implemented a policy of forced contraception against illegally recruited girls; (iv) municipal cemeteries were used as concealment sites for false positives; and (v) “*La Escombrera*” became a repository for victims of the armed conflict – among other truths that had remained hidden.

With respect to the surpassing of the truth threshold, it should be noted that the EJP’s investigations take as their starting point what was established in the ordinary justice system and in the Justice and Peace process. That constitutes the point of departure for investigating new crimes and individuals who were never prosecuted. To that end, the transitional judges hear hundreds of appearing parties in voluntary statements (e.g., more than 800 in macrocase 03), analyze victims’ accounts, gather evidence (e.g., judicial inspections of military and police units, testimonies of former paramilitary commanders, and so forth), and cross-reference thousands of data points, with a view to achieving the fullest possible truth about what occurred – whether in terms of criminal patterns or individual cases.

Thus, the EJP is not a model founded simply on the granting of criminal benefits; nor is it an instrument for repeating investigations and proceedings

already conducted by the Colombian justice system. On the contrary, it is a model of justice founded in the pursuit of the fullest possible truth.

8. ROBUST PARTICIPATION OF VICTIMS

To date, 11,746 individual victims and 394 collective subjects have been accredited to participate in the judicial proceedings conducted by the EJP. Within those collective subjects there are thousands of individual victims. For instance, in Case 05 alone – which investigates the situation in Cauca and Valle del Cauca – approximately 200,000 victims have been accredited.

Victims have participated in every stage of the proceedings before the EJP, in the following ways and settings: (i) preparation and submission of reports; (ii) participation in voluntary statement hearings with appearing parties; (iii) participation in public observation hearings on voluntary statements; (iv) participation in truth and responsibility acknowledgment hearings; and (v) hearings before the ScR of the Tribunal for Peace, with a view to contributing to the structuring of restorative judgments.

And indeed, in a restorative transitional justice model, the active participation of victims is not merely important but essential. In fact, the legitimacy of the system rests upon the voices of the victims. Without it, the process would amount to nothing more than the granting of criminal benefits in exchange for general and abstract acknowledgments of responsibility, accompanied by accounts devoid of any corroboration.

In that regard, the holding of Public Hearings for the Acknowledgment of Responsibility –conducted in the very locations where the crimes were perpetrated (e.g., Ocaña, Dabeiba, Valledupar, and so forth), in which both individual and collective victims, as well as appearing parties, participated on a fully equal footing– stands as a notable example of restorative techniques applied in settings involving the commission of international crimes.

9. TOWARDS LEGAL CERTAINTY FOR APPEARING PARTIES

The EJP model distinguishes between those bearing the greatest responsibility and those who do not. This is a legal category of long standing, developed within international criminal justice, which proves highly useful for focusing investigative efforts on specific individuals.

Those bearing the greatest responsibility are those who either held a position of political, military, or religious leadership within the organization –and in that capacity not only controlled it but also devised the criminal plans (*those bearing the greatest responsibility by virtue of leadership*)– or played a fundamental role in the emergence, expansion, or execution of macro-criminal patterns, regardless of their position within the chain of command (*those bearing the greatest responsibility by virtue of determinative participation*).

The EJP model thus focuses on the investigation and sanctioning of those bearing the greatest responsibility, whose number is limited, while providing the bulk of the rank and file with legal certainty through the granting of conditional criminal benefits (amnesties and conditional waivers of criminal prosecution). To date, 140 conditional waivers of criminal prosecution have been issued.

With regard to the charges brought against those bearing the greatest responsibility, the figures are as follows:

267 charges for war crimes and crimes against humanity 85 against FARC-EP appearing parties, 182 against members of the armed forces, five against civilians, and one against a former official of the now-defunct DAS	
84 charges against FARC-EP	173 charges against members of the armed forces, five against civilians, and one against a former official of the now-defunct DAS
Case 01: seven members of the last Secretariat. 34 charges against mid-level commanders: – 10 from the Central Joint Command. – 8 former mid-level commanders of the Western Bloc. – 7 former mid-level commanders of the Northwestern Bloc. – 5 former mid-level commanders of the Caribbean Bloc. – 4 former mid-level commanders of the Magdalena Medio Bloc. <i>2 additional regional charges in preparation.</i> Case 02: 15 individuals bearing the greatest responsibility for sexual violence, gender-based violence, and violence based on prejudice. Damage to nature and to the Territories of Ethnic Peoples. Case 05: 22 individuals bearing the greatest responsibility for crimes committed against Ethnic Peoples and peasant communities. Case 07: six members of the last Secretariat.	Case 03: <i>Sub-case Norte de Santander</i> : 10 members of the armed forces. 1 civilian. <i>Sub-case Costa Caribe – La Popa</i> : 15 members of the armed forces. 28 members of the National Army. Joint Case 03 and 04 of Dabeiba: 10 members of the armed forces. <i>Sub-case Casanare</i> : 26 members of the armed forces. 2 civilians. 1 former DAS official. <i>Sub-case Antioquia</i> : 48 members of the armed forces. 2 civilians. <i>Sub-case Huila</i> : 36 members of the armed forces. 17 generals have been charged in the context of Case 03. Two of them, Paulino Coronado and Henry Torres Escalante, have already acknowledged responsibility before the victims, the justice system, and the country in a public hearing.

As can be observed, the EJP has strictly fulfilled its constitutional mandate by focusing its activities on the investigation and sanctioning of those bearing the greatest responsibility for the most serious and representative crimes, while seeking alternative legal outcomes for those who did not play a leading role in the commission of international crimes.

IO. CONCLUSION

First. The relationship between constitutional law and the pursuit of peace in Colombia is longstanding. Given the prolonged duration of the internal armed conflict and its unfortunate persistence, over the years that relationship had centered on the political decision *par excellence* –in the terms of Carl Schmitt– that is, recourse to states of exception. The negotiation of a peace agreement between the Government of President Santos and the former FARC-EP guerrilla revealed the need to design and set in motion a constitutional law for peace rather than for war. In that regard, the function of constitutional law shifted from serving as a limit upon and authorization for the President of the Republic to “restore public order,” to becoming a legal instrument aimed at framing a political negotiation, regulating the implementation of what had been agreed, and ultimately creating institutions designed to fulfill the commitments undertaken by the parties at the negotiating table.

Second. With the signing of the Havana Agreement, the loss of the peace plebiscite, its renegotiation, and finally its congressional ratification, the Constitutional Court was compelled to examine novel and highly challenging issues, including: (i) the legal and political nature of the peace agreement; (ii) the relationship between existing norms and the commitments undertaken by the parties; (iii) the hierarchical status of the agreement within the Colombian system of sources of law; and (iv) the relationship between existing institutions and those envisaged in the peace agreement, among others.

Third. Having reached the midpoint of its constitutional term, the EJP has demonstrated that it is possible to implement a transitional justice model that is not punitive but restorative. This represents a genuine novelty in comparative experience, given that some countries had opted for the traditional channels of ordinary criminal justice –with custodial sentences proportionate to the gravity of the crimes, as in the Argentine case– while

others placed their bets on non-judicial models of historical memory, as occurred in South Africa.

Fourth. The Colombian experience demonstrates the leading role that constitutional law is called upon to play in a country's pursuit of peace and in the peaceful resolution of social conflicts. From its historical and essential role of limiting the exercise of political power, constitutional law in Colombia evolved into an instrument for legally framing a political negotiation with an armed group and, ultimately, into a tool for guaranteeing the rights of victims to truth, justice, reparation, and guarantees of non-repetition.

REFERENCES

- Abbott, K., Keohane, R., Moravcsik, A., Slaughter, A. and Snidal, D. "The concept of legalization". In *International Organization*, MIT Press, 2000.
- Aïvo, F. "Le rôle des Accords Spéciaux dans la rationalisation des conflits armés non internationaux". In *Société Québécoise de Droit International*, 2015, 27.
- Bell, C. "Peace agreements: their nature and legal status". In *American Journal of International Law*, vol. 100, 2006.
- Bernal, Parra, Sierra, Ramelli, Caldas, Andrade and Zambrano. *Reflexiones jurídicas sobre el proceso de paz*. Bogotá, Universidad Externado de Colombia, 2016.
- Comité International de la Croix-Rouge. "Guerre civile en Espagne". In *Revue internationale de la Croix-Rouge*, 1936, 67.
- Durán Smela, D. and Cruz Gutiérrez, D. "El 'fast track': ¿un mecanismo de flexibilización de la Constitución de 1991?" In *Revista Derecho del Estado*, no. 48, Bogotá, January–April 2021.
- Heffes, E. and Kotlik, M. "Special agreements as a means of enhancing compliance with IHL in non-international armed conflicts: An inquiry into the governing legal regime". In *International Review of the Red Cross*, vol. 96, 2014.
- ICRC. *Commentary of Article 3: Conflicts without an international character*. Geneva, ICRC, 2016.
- Kroc Institute for International Peace Studies. *Informe sobre el estado efectivo de implementación del Acuerdo de Paz en Colombia*. New York, University of Notre Dame, 2017.

Kroc Institute for International Peace Studies. *Segundo Informe sobre el estado efectivo de implementación del Acuerdo de Paz en Colombia. Diciembre 2016–Mayo 2018*. New York, University of Notre Dame.

Mambo, P. “Les rapports entre la Constitution et les Accords Politiques dans les États africains: Réflexion sur la légalité constitutionnelle en période de crise”. In *McGill Law Journal*, 2012.

Manzan, I.E. *Les accords politiques dans la résolution des conflits armés internes en Afrique*. La Rochelle, Université de La Rochelle, 2016.

Ramelli, A. *La Constitución colombiana y el derecho internacional humanitario*. Bogotá, Universidad Externado de Colombia, 2001.

Ramelli, A. *Derecho internacional humanitario y estado de beligerancia*. Bogotá, Universidad Externado de Colombia, 2004.

Ramelli, A. *La naturaleza jurídica del Acuerdo de Paz en Colombia. Aspectos controversiales*. Bogotá, Editorial Académica Española, 2019.

Rondeau, S. “Participation of armed groups in the development of the law applicable to armed conflicts”. In *International Review of the Red Cross*, vol. 93, no. 883, 2011.

Sassòli, M. “Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law”. In *Journal of International Humanitarian Legal Studies*, 2010.

Wallensteen, P. and Sollenberg, M. “Armed Conflicts, Conflict Termination and Peace Agreements, 1989–96”. In *Journal of Peace Research*, vol. 34, no. 3, 1997.

Constitutional Court, Judgments C-379 of 2016.

Constitutional Court, Judgments C-224 of 2017.

Constitutional Court, Judgments C-332 of 2017.

Constitutional Court, Judgments C-630 of 2017.

Constitutional Court, Judgments C-674 of 2017.



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