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# Constitutionalization of Rights in Colombia: Establishing a ground for meaningful comparisons\*

*Colombia is the quintessential example of a democracy able to persist over a very long time at remarkably low level of quality.*<sup>1</sup>

*... [U]nder these circumstances, and above all in the great urban areas, the lack of access to justice translates not only into a feeling of frustration, but also into violence.*<sup>2</sup>

## SUMMARY

Introduction. I. Posing the Question. II. From Colony to Republic: from ineffectiveness of law to violence. A. Ineffectiveness of the law. B. Violence and Paradox. III. 1991 Constituent Assembly: Inputs and Outcomes. A. Normativization of the Constitution. B. De-formalization and Constitutionalization of Law. IV. The Constitution and the Quotidian: Emancipation and Risks. A. Constitutionalization of Daily Life. B. Emancipation under threat. V. Conclusion

## ABSTRACT

Considered out of context, the 1991 Colombian Constitution might be read as an extension of a trend in constitutional reform that has swept the world since the early 1970s, renewing state commitments to the Social Rule of Law model and human rights. Accordingly, the Colombian constitutional reform

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1. JOHN PEEL. *Building Democracy in Latin America* (2<sup>nd</sup> ed., 2004), 177.

2. CÉSAR R. RODRÍGUEZ, MAURICIO GARCÍA-VILLEGAS and RODRIGO UPRIMNY. 'Justice and Society in Colombia: A Sociolegal Analysis of Colombian Courts', in LAWRENCE. M. FRIEDMAN and ROGELIO PÉREZ-PERDOMO. *Legal Culture in the Age of Globalization: Latin America and Latin Europe* (2003), 174.

could be described as a copy-cat reform, whose failure resides in the internal ambivalences of the Social Rule of Law model and human rights discourse, and is starkly revealed in the social, political and economic reality of Colombian citizens. This paper problematizes this position: instead, the paper argues that the Colombian constitutional text should be read and evaluated on the basis of its particularities. The paper outlines reasons for studying the Colombian Constitution as a socio-juridical phenomenon, situating the constitutional text beyond its normative nature and the interpretative boundaries of the law. By adopting this approach, the paper concludes that the socialization of the nation-building project in Colombia has been an impressive achievement of the 1991 political and legal constitutional experiment, but that distinctive failures of Colombia's constitutional reform can also be identified in this process.

#### KEY WORDS

Colombia, Constitution, 1991, social rule of law State, human rights, nation-building

#### RESUMEN

Considerada fuera de contexto, la Constitución colombiana de 1991 es leída como la materialización de una tendencia reformista mundial que, desde la década de los setenta, ha pretendido renovar los compromisos estatales a través del modelo de Estado social de derecho y la protección de los derechos humanos. En este sentido, la reforma constitucional colombiana es descrita como una simple imitación cuyos fracasos se evidencian de forma dramática en la realidad social, política y económica en la cual aún viven los colombianos y que emergen de las ambivalencias internas del modelo de Estado social de derecho y del discurso de los derechos humanos. Este artículo discute el anterior argumento resaltando que el texto constitucional colombiano debe ser leído y evaluado con base en sus particularidades. El artículo propone estudiar la Constitución colombiana como un fenómeno socio-jurídico, situando el texto constitucional más allá de su naturaleza normativa y de los límites interpretativos del derecho. Adoptando tal posición, el artículo concluye que la socialización del proyecto de construcción de Estado en Colombia ha sido un resultado muy significativo, aunque no ajeno a singulares fracasos, del experimento político y legal de 1991.

#### PALABRAS CLAVE

Colombia, Constitución, 1991, Estado social de derecho, derechos humanos, construcción de Estado

## INTRODUCTION

Colombia welcomed the last decade of the twentieth century with a new constitution and a new form of government. The Social Rule of Law State (*Estado social de derecho*) was the core concept of the 1991 Constitution. As a result of a constituent assembly that embraced ideas of diversity, equality and participatory democracy, the new Constitution looked to a liberal state as the natural requirement of democracy, and the materialization of human rights as the benchmark of justice. The constitutionalization of a Social Rule of Law State, based on a generous bill of rights, was modeled on the 1948 German Constitution and the 1978 Spanish Constitution.<sup>3</sup> This constitutional change in Colombia followed an international trend for the constitutionalization of human rights that has been occurring since the early 1970s.<sup>4</sup> Characteristic of almost all the new constitutions is the privileged position occupied by a bill of rights, and the social and political significance of judicial review mechanisms by their constitutional courts.<sup>5</sup> A country that has experienced long periods of political and social turmoil, Colombia embarked on the 1991

3. See 1948 German Constitution, art. 20,1 and 1978 Spanish Constitution, art., 1,1. Both constitutions were based on the same political model articulated by the German-Austrian legal scholar and socialist philosopher HERMAN HELLER. See especially HERMAN HELLER. *Escritos políticos* (1985) 283. DAVID DYZENHAUS. *Legality and Legitimacy, Carl Schmitt, Hans Kelsen and Herman Heller in Weimar* (1997), 161.

4. Apart from Colombia, just in Latin America these are the countries inscribed in the trend of constitutionalization: Chile (1980), Nicaragua (1987), Brazil (1988), Peru (1993), Bolivia (1994), Venezuela (1999), Argentina (1994), Paraguay (1992), and Ecuador (1998). This trend is defined by HIRSCHL, as one of the most significant developments in comparative law, and one of the most significant phenomena in late twentieth and early twenty-first-century legal and government theory. RAN HIRSCHL. 'The Political Origins of Judicial Empowerments through Constitutionalization: Lessons from four Constitutional Revolutions', in ROBERT DAHL, IAN SHAPIRO, and JOSÉ ANTONIO CHEIBUB (eds.). *The Democracy Sourcebook* (2003), 232. See also: JAMES GIBSON, GREGORY CLADEIRA and VANESSA BAIRD. 'On the Legitimacy of National High Courts' (1998) 92 *American Political Science Review* 343; and NEAL TATE and TORBJORN VALLIDER. *The Global Expansion of Judicial Power* (1995). See on the European case: ALEC STONE SWEET. 'Constitutional Dialogues: Protecting Rights in France, Germany, Italy and Spain', in SALLY J. KENNEY, WILLIAM M. REISINGER and JOHN C. REITZ. *Constitutional Dialogues in Comparative Perspective* (1999). See on constitutionalization of rights in post-communist countries: JEFFREY SITZER. 'Experimental Constitutionalism: A Comparative Analysis of the Institutional Bases of Rights Enforcement in post-Communist Hungary', in SALLY J. KENNEY, WILLIAM M. REISINGER and JOHN C. REITZ. *Constitutional Dialogues in Comparative Perspective* (1999).

5. According to LEE VAN COTT, six trends can be identified in these constitutions: (1) a propensity to create European-style constitutional tribunal; (2) the introduction of new rights, including all three generations of human rights; (3) and increasing acceptance of binding international law, particularly with respect to human rights; (4) the incorporation of institutions and to procedural figures to protect certain fundamental constitutional rights (such as the ombudsman—in the case of Colombia the office of the People's Defender—*el Personero del Pueblo*), and the writ of injunction (or *amparo/tutela*); (5) a concern for the better functioning of the judiciary to address endemic governmental corruption; and (6) contradicting these trends is a shift in economic policy that promotes the shrinking and privatization of the State and its functions and the restriction of social and economic rights to conform to the new neoliberal economic model.

constitutional reform seeking positive change. In order to achieve an elusive peace, Colombia's Constitutional Assembly posed the enactment of a new constitution as a reconciliatory, forward-looking project. The new constitution was charged with significant normative and synchronizing capabilities over the whole production and interpretation of the law in Colombia.<sup>6</sup> The Constitution was placed at the peak of the legal system, permeating the existing Colombian Law with ideals democracy and social justice.<sup>7</sup> The impact of the new constitution has been profound: without doubt, the 1991 Constitution and its fundamental rights have radically altered Colombia's legal and social milieu. However, they have not done so in a straightforward fashion. The consequences of constitutional change have unfolded in the context of Colombian legal culture, a traditional, formalistic legal culture that operates in an unequal society, where life above the poverty line and outside the conflict can seem like a luxury.<sup>8</sup>

As a result, considered out of context, the 1991 Constitution could simply be read as a paradigmatic case of parrot-like reform, a *déjà vu*, whose total failure is underscored by the social, political and economic situation that Colombian people still experience.<sup>9</sup> This paper disagrees with this position. Following LEGRAND's suggestion for more meaningful approaches to comparative legal studies, the Colombian Constitution should be understood according to its own development.<sup>10</sup> The aim of this paper is to establish a ground for studying the Colombian Constitution as a socio-juridical phenomena – a ground that takes the constitutional text beyond its simple normative nature and, consequentially, beyond the interpretative boundaries of the law. Only

Donna Lee van Cott, *The Friendly Liquidation of the Past: The Politics of diversity in Latin America* (2000), 16.

6. JAVIER PÉREZ ROYO. *Las fuentes del derecho* (1988), 31.

7. ROGELIO PÉREZ-PERDOMO and LAWRENCE. M. FRIEDMAN. 'Latin Legal Cultures in the Age of Globalization', in LAWRENCE. M. FRIEDMAN and ROGELIO PÉREZ-PERDOMO. *Legal Culture in the Age of Globalization: Latin America and Latin Europe* (2003), 6.

8. According to the "Colombian Poverty Report", published in 2002 by the World Bank, the number of Colombians living under the poverty line (national poverty rate) decreased between from 80% in 1978 to 60% in 1995; during the same period, the extreme poverty rate decreased from 45% to 21%. However, from 1995 to 1999 the poverty rate increased to 64% while the extreme poverty rate rose to 23%. CARLOS EDUARDO VÉLEZ (et al.). *Colombian Poverty Report* -World Bank (2002), ix.

9. See especially, LAURENCE WHITEHEAD. 'Reforms: Mexico and Colombia', in MANUEL ANTONIO GARRETÓN and EDWARD NEWMAN (ed.). *Democracy in Latin America: (Re)constructing political society* (2001), 93-94.

10. PIERRE LEGRAND. 'Alterity: About Rules, For Example', in PETER BIRKS and ARIANNA PRETTO. *Themes in Comparative Law: In honour of Bernard Rudden* (2002), 21. See also, BERNHARD GROBFELD. 'Comparatists and languages', in PIERRE LEGRAND and RODERICK MONDAY (ed.). *Comparative legal studies: traditions and transitions* (2003), 182. See in particular on differences of this approach with Legal Transplants: PIERRE LEGRAND. 'The Impossibility of 'Legal Transplants' ' (1997) 4 *Maastricht Journal of European and Comparative Law*; ALAN WATSON. 'Legal Transplants and European Private Law' (2000) 4 *Electronic Journal of Comparative Law* 4 [www.ejcl.org/ejcl/44/44-2.html] at 25 April 2006.

in its own social context should the Constitution be expected to justify its own existence and repercussions. Adopting this approach, this paper argues that impressive achievements, as well as failures, have resulted from Colombia's 1991 political and legal experiment. I will evaluate the constitution successes and failures in terms of its capacity to socialize nation building in Colombia.

The structure of this paper is as follows. First, I describe the particularities of the constitutionalization of rights in Colombia, identifying them as the proper departure point for a valid scrutiny of the effects of the 1991 Constitutional reform. In this first section I will expand the theoretical framework that drives the paper taking distance from certain critical readings that oversimplify – according to my view – the social nature of human rights. Secondly, I examine the historical and social context in which the Constitution was implemented. To do this, it will be necessary to outline the evolution of violence in Colombia, both as a consequence and a cause of legal inefficacy and the plurality of legal orders in Colombia. Thirdly, I outline the development of the Constitution and the interpretation that the Constitutional Court (hereafter the Court) has made of the new Constitution's bill of rights. Finally, I identify some successes and failures of the constitutionalization of rights in Colombia.

## I. POSING THE QUESTION

Critical interrogations of the normativization of human rights often depart from the presumption that there is a nation-state structure, or national elites, with enough social manoeuvrability to apply and enforce norms and rights effectively. In the case of right-wing analysis, constitutional reforms tend to benefit a few in power, while restraining room for governmental decision and market functioning.<sup>11</sup> On the other hand, more left-wing critiques have equated constitutional reforms with legal reformism, in which universal principles discipline the territory of local identities and community values.<sup>12</sup> Although both approaches reveal the ways in which governments and courts may use constitutional crafting for policymaking and social control, they are not adequate for situations where the State is extremely weak and/or the category of national elites is strongly contested. What would be the role, effects and repercussions of a constitutionalization of rights in this scenario? Furthermore, in societies that lack national hegemonic agents, these criti-

11. See e. g. CASS R. SUNSTEIN. 'The Negative Constitution: transitions in Latin America', in IRWIN P. STOTZKY (ed.). *Transitions to Democracy in Latin America: The Role of the Judiciary* (1993), 374 -375.

12. DOUZINAS describes the encounter points of both right and left critiques: COSTAS DOUZINAS. *The End of Human Rights, Critical Legal Thought at the turn of the Century* (2000), 164.

ques do not explain the origin and desire of people for unity and security. As DOUZINAS points out, in institutional or political vacuums where despair and violence uncontrollably arise, people crave the principle of the One, for new foundational principles or new unitary historical actors.<sup>13</sup> However, giving the intertwine between ideologies, political mobilization and law, these unifying forces have often been represented in legal corpus, in the case of Constitutions, or validated through a legalistic ethos, in the event of government reforms. If this is the case, the law as element in the quest for social order: how should be understood the trade off between the controlling/manipulative intentions of law and the agency involved in the call for and use of legal archetypes? While these unresolved queries do not annul critical projects on constitutionalization of rights, they reveal a possible role that law could play in the popular quest for consistency and coherence within fragmented and heterogeneous struggles for justice.<sup>14</sup>

Three further considerations must be acknowledged. Firstly, assuming that there is a competent, functional state is inappropriate for the vast number of nation-states where power is strongly contested, and where a chaotic contingency of power ruins aspirations for social inclusion or social welfare. The definition of the law that I will use here acknowledges that law exceeds the norms, acts and codes that emanate from State institutions. A reductionist definition based on state legal centralism fails to recognise how societies are increasingly regulated by more than one legal system. Rather than being exclusively ordered by the official law, modern societies are regulated by a plurality of legal orders, interrelated and socially distributed in the social and geographical field in different ways.<sup>15</sup> State law cohabits with others types of law, but also with social uses and interpretations of law in everyday circumstances, sites, and settings. As a consequence of its diverse origins, the law not only regulates but also constitutes or creates social phenomena.<sup>16</sup> However, a plurality of laws does not by itself imply an adequate normative situation. In SANTOS'S words, 'there is nothing inherently good, progressive, or emancipatory about legal pluralism'.<sup>17</sup> The concept of law, the elements of the Law, and its uses make it an instrument of social regulation and social emancipation, depending in how it functions as a symbol of violence and/or a symbol of social power. *Mutatis mutandis*, positing the constitutionalization of rights as a straightforward imposition without considering the grassroots

13. Ibid., 171. DOUZINAS complements his analysis on Human rights in COSTAS DOUZINAS and ADAM GEAREY. *Critical Jurisprudence: The Political Philosophy of Justice* (2005).

14. DOUZINAS. *The End of Human Rights*, above n 12, 171.

15. BOAVENTURA DE SOUSA SANTOS. *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (2<sup>nd</sup> ed., 2002), 89.

16. ROGER COTTERRELL. 'Law as Constitutive', in *International Encyclopedia of Social and Behavioral Sciences* (2002), 8499. See also J. GRIFFITHS. 'Legal Pluralism', in *International Encyclopedia of Social and Behavioral Sciences* (2002), 8650-8654.

17. SANTOS, above n. 15, 89.

social counteraction to constitutional reform obscures the law's role in society - at large and on the individual agency.<sup>18</sup> The law is one of the gears within social control, social conflict or social change. Either as moral code or as semiotic discourse, the law should be understood as a feature of social relations that allows the construction of social systems of action.<sup>19</sup> For the purposes of this paper, the symbolic connotations of the State, groups and social practices with legal/normative implications merit more attention.

Secondly, critical theory often ignores the counter-hegemonic side of law. Even in fully capable States that have sufficient legitimacy to apply the law, the law can agitate the political and social milieu. In States where authority is contested, especially at the periphery, some uses of law can provide a terrain for social contestation that a weak State cannot offer.<sup>20</sup> The majority of the critical theorists consider that the symbolic effects of law operate only to the benefit of State institutions and their aims of political manipulation.<sup>21</sup> However, too much emphasis on the unitary character of state domination leads critiques to a rather simplistic image of law as an institutional mechanism for social control. The strength of state legal domination undermines the possibility - even if it is often remote - of emancipation from hegemonic structures through progressive norms that were supposed to have only material effects. Others, however, more disposed to accept certain autonomy in the symbolic use of law, consider that while a considerable institutional advantage may exist relative to the possibilities of appropriation and political manipulation of legal meanings, social movements and individuals can also use these artifacts in their favour.<sup>22</sup> Still in situations of overwhelming odds, people's use of rights and judicial enforcement carries the possibility of articulating alternatives to their reality.<sup>23</sup> Therefore, considered locally - stepping away from the presumption that law is self-sufficient and self-producing - the law, in the form of human rights or decolonized public-law theory, has been used with counter-hegemonic outcomes.<sup>24</sup>

18. HERBERT JACOB. 'Introduction', in HERBERT JACOB et al. (ed.). *Courts, Law, and Politics in Comparative Perspective* (1996), 13.

19. MAURICIO GARCÍA-VILLEGAS. 'Symbolic Power without symbolic violence?' (2003), 55 *Florida Law Review* (2003), 172.

20. SOUSA SANTOS. *Toward a New Legal Common Sense*, above n. 15, 450.

21. MARK TUSHNET. 'An Essay on Rights', 62 *Texas Law Review* (1984), 1363; ROBERT W. GORDON. 'Some Critical Theories on Law and Their Critics', in DAVID KAIRS (ed.). *The Politics of Law: A Progressive Critique* (1998); JOAN ROELOFS. 'Judicial Activism as Social Engineering: A Marxist Interpretation of the Warren Court', in STEPHEN C. HALPEN and CHARLES M. LAMB (eds.). *Supreme Court Activism and Restrain* (1982); DUNCAN KENNEDY. 'American Constitutionalism as Civil Religion: Notes of an Athiest' (1995), 19 *Nova Law Review*.

22. See especially: SOUSA SANTOS. *Toward a New Legal Common Sense*, above n. 15.

23. LAURA NADER. *The Life of the Law: Anthropological Projects* (2002), 167.

24. See especially UPENDRA BAXI. 'The Colonialist heritage', in PIERRE LEGRAND and RODERICK MONDAY (ed.). *Comparative legal studies: traditions and transitions* (2003), 53; ROGER COTTERRELL. 'Comparatists and sociology', in PIERRE LEGRAND and RODERICK MONDAY (ed.). *Comparative legal studies: traditions and transitions* (2003), 146.



Thirdly and finally, it is worth noting that legal progressivism in the south must be reviewed cautiously. Since the 1970s, the major international development agencies have dedicated a large fraction of their resources and time promoting judicial authority, and procedural efficiency in civil and criminal jurisdictions.<sup>25</sup> Nonetheless, as UPRIMNY and GARCÍA-VILLEGAS have observed, the situation of constitutional judges has been different: firstly, they have rarely been the beneficiaries of this international economic aid because they are considered too politically embedded and abstract; and secondly, their decisions usually affect essential hegemonic interests, not contractual stability or impassable property rights.<sup>26</sup> In view of all these factors, constitutional law might be a double-edge sword, even in the complicated scenario of the south.<sup>27</sup>

In this essay, I will argue that the encounter between Colombian reality and the 1991 Constitution offers some valuable, particular insights for more conventional critiques on constitutionalization of rights. Even though critiques based on the language, method, and sources of legitimacy of the human rights discourse have a bearing on the Colombian experience, I would argue that a total renunciation of the constitutionalization of rights is unwarranted in this case. It is too easy to formulate a critique against the 1991 Constitution on the basis of general arguments against the constitutionalization of rights. Instead, it is important to notice that the Court and its interpretation of the 1991 Constitution's bill of rights emerged to fill the institutional gap in Colombia left behind by the State.<sup>28</sup>

The concept of hegemony in GRAMSCI, understood as an arena of struggle for political meaning, is important for the defense of this position.<sup>29</sup> However,

25. Under the banner of "Law and Development", the promotion of governance and rule of law have occupied the agenda of scholars and international development agencies. See on critiques especially JAMES GARDNER. *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (1980). See on the new wave of Law and Development in South America: STEPHEN GOLUB. *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, Carnegie Paper n. 41 (October 2003).

26. Both contractual stability and social interpretation of property rights have been contested terrains in Colombian Constitutional jurisdiction. See especially: SALOMÓN KALMANOVITZ. *Los efectos económicos de la Corte Constitucional* (1999); SALOMÓN KALMANOVITZ. *Constitución y modelo económico* (2001).

27. In this regard, UPRIMNY and GARCÍA-VILLEGAS have advanced a very fruitful scholarship on this particular area. See especially: RODRIGO UPRIMNY and MAURICIO GARCÍA-VILLEGAS. 'The Constitutional Court and Social Emancipation in Colombia', in BOAVENTURA DE SOUSA SANTOS (ed.). *Reinventing Social Emancipation: Toward New Manifestos, Volume 1: Democratizing Democracy - Beyond the Liberal Democratic Canon* (2005).

28. As the Indian Court has done. See e. g. UPENDRA BAXI. 'Taking Suffering Seriously: Social Action Litigation before the Supreme Court of India', in UPENDRA BAXI. *Law and Poverty: Critical Essays* (1988); UPENDRA BAXI. 'The Avatars of Judicial Activism: Explorations in the Geography of (In)Justice', in S. K. VERMA and KUSUM (eds.). *Fifty Years of the Supreme Court in India: Its Grasp and Reach* (2000), 156-209; UPENDRA BAXI. 'Preface', in S. P. Sathe, *Judicial Activism in India* (2001).

29. GARCÍA-VILLEGAS. 'Symbolic Power without symbolic violence?', above n. 19, 157.

under the Gramscian rubric that “the exercise of hegemony” binds society together,<sup>30</sup> the dysfunctionality of institutions, law and actors in Colombia stems in part from an endemic *lack* of an identifiable hegemony or historical block.<sup>31</sup> As a result, in the case of law, it has been widely used but in permanent dispute. Such disputability has fostered a fragmented popular acceptance of law, as well as a plurality of paralegal spheres of social action.<sup>32</sup> Nonetheless, the highly contested nature of the law makes it a potential source of emancipation.<sup>33</sup> When the law offers dignity that the State cannot provide, legal technologies have catapulted individual and social aspirations.<sup>34</sup> The 1991 Constitution grew out of this mixed scenario, and it is in this context that meaningful critiques and comparisons can be made.<sup>35</sup> The path followed by the Court has initiated a process of normativization of the Constitution and de-formalization of the existing highly positivistic legal hermeneutics. In doing so, it has established itself as an identifiable terrain for social re-education. Achieving some level of institutional hegemony, the constitutional pronouncements have also been able to foster a *constitutionalization of daily*

30. ANTONIO GRAMSCI. *Selections from the Prison Notebooks* (1971).

31. NAZIH RICHANI. *Systems of Violence: The Political Economy of War and Peace in Colombia* (2002), 15.

32. See e. g. , ANTONIO CARLOS WOLKMER. ‘El pluralismo jurídico: Elementos para un ordenamiento alternativo’ (1993) *Crítica Jurídica*, 13; ANTONIO CARLOS WOLKMER. *Pluralismo jurídico: Fundamentos de una nueva cultura en el Derecho* (3<sup>rd</sup> ed. 2001); CÉSAR RODRÍGUEZ. ‘Editor’s Introduction’ (2003) 26 *Beyond Law*, 7.

33. For instance, according to MARÍA CLEMENCIA RAMÍREZ’s study of *el movimiento de los cocaleros* in Putumayo, southern part of Colombia, the common trait of indigenous social movements in Colombia, is the sense of extreme exclusion from a state, which is ambiguously absent and immanent. As a result, the struggle to construct citizenship is a struggle for “the right to have rights” against abandonment, stigmatisation, and marginalisation. Through the demand for “membership” into the community of the already considered citizens, excluded inhabitants form the social contract are exercising a “politics of citizenship”. MARÍA CLEMENCIA RAMÍREZ. ‘The Politics of recognition and Citizenship in Putumayo and in the Baja Bota of Cauca: The Case of 1996 Cocalero Movement’, in BOAVENTURA DE SOUSA SANTOS (ed.). *Reinventing Social Emancipation: Toward New Manifestos, Volume 1: Democratizing Democracy - Beyond the Liberal Democratic Canon* (2005), 239.

34. The use of the Declaration of the Rights of Man and of the Citizen during the independence is probably the most memorable appeal of law in a counter-hegemonic action. But, there are also more subtle examples of uses of law with emancipatory notes. Continuing with the study of *el movimiento de los cocaleros*, since the politics of citizenship is carried out in the midst of the armed conflict, in a zone dominated by the army, the paramilitaries, and the guerrillas, the “construction of citizenship” becomes a form of resistance and empowerment. In this context, citizenship is not simple a legal status but a form of identification, a type of political identity; ‘something to be constructed, not empirically given.’ CHANTAL MOUFFLE. ‘Democratic Citizenship and the Political Community’, in Chantal Mouffle (ed.). *Dimensions of Radical Democracy* (1992), 231.

35. See e. g. , DIEGO EDUARDO LÓPEZ MEDINA. *Teoría impura del derecho - La transformación de la cultura jurídica en América Latina* (2004).

*life*, a nascent *habitus*, for articulating more benevolent arenas within the intricate Colombian phenomenon of legalism without State.<sup>36</sup>

## II. FROM COLONY TO REPUBLIC: FROM INEFFECTIVENESS OF LAW TO VIOLENCE

Before reviewing the constitutionalization of rights in Colombia, I want to explore in more detail the historical background that supports the nature of the law in Colombia. While the ubiquitous, international referent for Colombia is drug trafficking, the common ground for many Colombians is violence – often related to drugs, but more usually a consequence of basic inequalities of power that have been present since colonial times.<sup>37</sup> Violence here is not reduced to physical injury: in the daily life of many Colombians, violence encompasses material deprivation, physiological unrest and class and race disadvantage. This fact is reflected in popular descriptions of violence as ‘common’, ‘endemic’, and even ‘unbound’.<sup>38</sup> Cynically, Colombia is still considered a model of democratic stability and economic growth in Latin America.<sup>39</sup> Beneath this bloodless contradiction, there are two themes worthy of further inquiry: (A) the ineffectiveness of law and (B) legal pluralism.

### A. INEFFECTIVENESS OF THE LAW

At the heart of Colombia’s nation-building enterprise, there is a special place for the law and, more specifically, for the constitutionalization of political, social and economic ambitions.<sup>40</sup> The lack of political and administrative experience in the Hispanic colonies at the beginning of the 19th century, hand-in-hand with the post-colonial republics’ search for legitimacy, necessitated the adoption of legal models of political organization nurtured by other revolutions, particularly the American and French revolutions. However the

36. See on *habitus*: PIERRE BOURDIEU. *Outline of a Theory of Practice* (1977), 261. See also: LOÏC WACQUANT. ‘Habitus’, in JENS BECKERT and MILAN ZAFIROVSKI (eds). *International Encyclopedia of Economic Sociology* (2005), 315-319.

37. See especially: JORGE L. ESQUIROL. ‘Continuing Fictions of Latin American Law’ (2003) 55 *Florida Law Review* 41, 109. See also: ESQUIROL. ‘The Fictions of Latin America Law (Part I)’ (1997) *Utah Law Review* 426.

38. CAROLINE MOSER and CATHY McILWAIN. *Encounter with Violence in Latin America: Urban poor perceptions from Colombia and Guatemala* (2004), 3.

39. For instance, the World Bank’s website introduces Colombia in these terms: *In a country struggling to end decades of conflict that has taken rural areas of the country hostage, Colombia’s sound democratic political system and years of sustained economic growth remain resilient*. The World Bank, *Colombia* [worldbank.org] at 23 May 2006.

40. LINN A. HAMMERGREN. *The Politics of Justice and Justice Reform in Latin America* (1998), 232-252.

reception of the foreign revolutionary ideologies and institutions in South America did not always occur directly, homogeneously, or peacefully. Independence from Spain ignited fratricidal independence wars with ethnic and class overtones.<sup>41</sup> New legal and political ideas were channeled through the hands of local Creole elites, who were typically landowners, conservative, and Catholic, while new political movements were concentrated in the urban centres of colonial administration, where the dispute for power had traditionally been acted out.<sup>42</sup>

In Colombia, as for many other Latin American countries, the birth of the nation-state was not accompanied by the autochthonous political battle with the *ancien régime* that ignited the French Revolution, nor by the colonial autonomy and class uniformity of the struggle for American Independence. Revolutions in Latin America have typically involved the continuity of colonial social and institutional practices, such as patronage and clientelism, which then permeates the post-colonial application of law.<sup>43</sup> In post-colonial times, the production of rational, abstract, and universalistic law addressed the question of how to emulate American and French political technologies in an unpromising terrain. Even though the post-colonial legal project aspired to *liberté, égalité, and fraternité*, it could neither erase the memory of three hundred years of law as imperial command, nor achieve uniform changes in the socio-economic institutions of the neo-republican inhabitants. Finally, it could not overcome its past of class domination: slavery, for instance, remained stubbornly legal in Colombia until 1857. In other words, the historical revolutionary process in Colombia came to be seen as transference of power from a foreign monarchic elite to the local Creole elite.<sup>44</sup> The

41 In the case of Colombia, according to statistics collated between 1778 and 1780, *La Nueva Granada*, the name of Colombia at the time, had 800.000 inhabitant. Most of them lived in small country municipalities of 5.000-15.000. Bogotá, in the last quarter of the eighteenth century, had 20.000. ANTHONY MCFARLANE. *Colombia antes de la independencia: Economía, sociedad y política bajo el dominio borbón* (1997).

42. There was not such equality proclaimed by the revolutionary independentist leaders. Colombia's population was formed by Indigenous, African-Blacks, White-Europeans, and *mestizos*—a broad mixture of many levels of racially mixed but free Creols. *Mestizos* represented 46%, whites 26%, indigenous 20%, and black slaves 8%. JAIME JARAMILLO URIBE and GERMÁN COLMENARES. 'Estado, Administración y Vida Política en la Sociedad Colonial', in *Manual de historia de Colombia* (1992).

43. See e. g., FRANCISCO LEAL BUITRAGO and ANDRÉS DÁVILA LADRÓN DE GUEVARA. *Clientelismo: el sistema político y su expresión regional* (1990).

44. In words of MAURICIO VILLEGAS,

Detrás del igualitarismo formal proclamado por los próceres de la independencia permanecía una división del trabajo entre clases sociales: mientras los criollos descendientes de España asumían los nuevos cargos públicos, los indios y los negros seguían siendo la fuerza animal que cavaba minas, cultivaba haciendas y plantaciones, construía caminos, levantaba iglesias y edificios públicos. (GARCÍA-VILLEGAS. 'Apuntes sobre codificación y costumbre en la historia del derecho colombiano' (2003), *Precedete* 2003, 107).

selection of constitutional models and law in general remained a matter of political legitimacy, rather than a question of instrumental efficacy or social relevance.<sup>45</sup>

Under the conditions of precarious hegemony that characterized colonial governments throughout the 19th century in Latin America, a culture developed with a widespread perception of the illegitimacy of power, thwarting attempts to construct a rule of law regime based on effective rather than logocentric law. Since 1580, the Spanish colonists in Colombia pursued a policy of total transformation of autochthonous structures and legal systems: Spanish law was the only law recognized by the State.<sup>46</sup> Therefore, a system of *de jure* legal plurality never developed. Instead, a proliferation of unofficial legal fields – that is, a *de facto* legal plurality – was common and worked successfully against a unified, coherent, effective colonial law. Colonial governments – and following Independence, sovereign States – were not successful in creating legal systems that enjoyed both social recognition and instrumental effectiveness. The law produced in Spain was rarely interpreted and applied in the way it had been envisaged in the metropolis.<sup>47</sup> The large territories and the cultural diversity of Latin America's inhabitants, as well as a shortage of economic resources and social polarization based on race and lineage, produced its own interpretation of the imperial law (*el derecho indiano*).<sup>48</sup>

Nonetheless, the instrumental inefficacy of the law was neither an unexpected outcome of the law's understanding, nor a whim of the political leaders in the struggle for independence. It was something derived from the conception of the law itself. In Colombia, the law has historically been understood as the fruit of the abstract entity of popular sovereignty, brought to life by legislators and governors. From here the law derives its political function and social representativeness. The classic theory of law in Colombia is of law as a hybrid between the Napoleonic Code<sup>49</sup> and its formalistic appraisal (*école*

45. MAURICIO GARCÍA-VILLEGAS and CÉSAR RODRÍGUEZ, 'Law in Society in Latin America: Toward the Consolidation of Sociological Critical Studies', in CÉSAR RODRÍGUEZ (ed.), *26 Beyond Law* (2003), 29.

46. *Ibid.* 25.

47. *Ibid.*

48. The main official/legal compilation of the time is the *Recopilación de Leyes de Indias* (1680). The legislation tended to be uniform for all Spanish colonies, as it was for the different parts of Brazil. The structure of colonial administration (King—colonial council—viceroys—*audiencias*) and the mechanisms of administrative and judicial control (*visita* and *residencia*) were similar for Spain and Portugal. R. PÉREZ-PERDOMO, 'Law in Latin America', in *International Encyclopedia of Social and Behavioral Sciences* (2002), 8526-8527.

49. The first NAPOLEON CIVIL Code transplanted into Latinoamérica was *Código Civil de Oaxaca* (1827-1829). It was followed by *Bolivia* (1831), *Costa Rica* (1841), *República Dominicana* (1845), and *Chile* (1855). The Chilean Code started a second wave of civil law transplants within Latin America. It was adapted (a second hand transplant) to *Colombia* (1873), *Venezuela* (1862), *Uruguay* (1868), *Paraguay* (1876), *Argentina* (1869).

*de l'exégese*),<sup>50</sup> the Germanic private-Roman law with its syllogistic reasoning, and, during the twentieth century, the infusion of HANS KELSEN's "Pure Theory of Law".<sup>51</sup> As a result, even though the law is intentionally blind to its social lack of success, it pushes ideologically for a process of egalitarian amalgamation based on presumptions such as equality before the law. The law does not need to be effective: it is sufficient that it is rightly produced and interpreted to formally exist. The conditions of abstraction and formal interpretation have allowed the law to cohabit with a great cultural, social and economic hybridism. Under these conditions, multiple legal fields and codes of conduct emerged as a result of class difference, diverse identities and regional variation. They materialized an indispensable social hermeneutics of the law where elevated aspirations confront stubborn factuality.<sup>52</sup> The political and legal arrangement in contemporary Colombia depends on the cognitive dissonance at its foundation, and the projection of this dissonance into the future. According to GARCÍA-VILLEGAS and RODRÍGUEZ, 'the gap between the written law and reality does not seem then to be a dysfunction or a failure of these models but rather its characteristic element.'<sup>53</sup>

Since colonial times, a disarticulation between the law and social reality has existed. The law has been used for hopeful discourses of change, peace and unity, as well as self-serving attempts to legitimate political power.<sup>54</sup> This culture of legal inefficacy has undermined the consolidation a singular hegemony status on the head of the State. Laws and their institutions become dysfunctional without an effective hegemony exercised by a dominant group – or small population within a class – that projects moral authority and leadership, and that is accepted by both the establishment and society at large. In Colombia, the production of law has allowed the shell of the State and its atomized ruling members to remain stable, while there is a general sense of society falling apart. This has become known as the *Colombian Paradox*. In their respective disciplines, political, social, legal and economics

50. With the adoption of the Chilean Civil Code, there was the direct application of exegetic principles of interpretations. The pinnacle of this hermeneutics is placed on the aphorisms: "la ley es una declaración de la voluntad soberana manifestada en la forma prevenida en la constitución nacional" (art.4); la costumbre, "[...] en ningún caso tiene fuerza contra la ley" (art. 8); and "la ignorancia de la ley no sirve de excusa" (art. 9).

51. HANS KELSEN. *Pure Theory of Law* (2<sup>nd</sup> ed, 1967).

52. In Latin American the clearest example of the interaction between the official legal law and the grassroots paralegal norms emerges in shantytowns of big cities. See especially on *favelas* in Brazil; BOAVENTURA DE SOUSA SANTOS. *Law against Law* (1974); SOUSA SANTOS. 'The Law of the Oppressed' (1977) 12 *Law & Society Review*; SOUSA SANTOS. 'Notas sobre a história jurídico-social de Pasárgada', in CLAUDIO SOUTO and JOAQUIM FALCÃO (eds.). *Sociologia e Direito* (1980). See on the case of Peru - from an economic reading, HERNANDO DE SOTO, *El Otro Sendero* (1989).

53. GARCÍA-VILLEGAS and RODRÍGUEZ, above n. 45, 25.

54. GARCÍA-VILLEGAS. 'Apuntes sobre codificación y costumbre en la historia del derecho colombiano', above n. 44, 98.

commentators in Colombia have pointed out the country's resilient capacity to remain in a painful state of stability. The Colombian State can maintain its long-standing democratic ethos, a functioning economy within the context of a civil war, a small population who are outward-looking and oriented towards the developed West, while, sharing the same geographical space, political corruption, uncontrollable violence and massive poverty.<sup>55</sup>

Uncritical readings of this reality have prompted endless waves of legal reform. ALBERTO ALESINA's interpretation epitomises this type of reformist tendency. For ALESINA, 'Colombia faces a critical juncture in its recent history, one road leads to civil war, chaos, and economic collapse. The other leads to peace, reforms, and economic progress.'<sup>56</sup> In order to solve the antinomy between these extremes, the reformist solution begins by defining Colombian reality as a relationship that contradicts itself and is therefore absurd or contradictory. Regardless his apparent clarity, ALESINA's view obscures the consequences of perpetuating the Colombian "*paradoja macondiana*", the belief that there are two realities paradoxically entwined, but materially disconnected. One is a reality characterized by violence and misery, the other embraces peace and progress. On one side, a Colombia that is one of the most unequal and violent countries in the world, and, on the reverse side, a country with a flamboyant democratic heritage and an impeccable external debt record. Yet the paradox does not interrogate blandishments such as "one of the oldest democracies in Latin America" or "a country with long term sustained economic growth", but poses Colombia as 'a fascinating case study of what can go wrong and how to fix it.'<sup>57</sup> From this perspective, the only answer is a new wave of legal production and institutional reforms that will close the gap.<sup>58</sup> In the reformist endeavor, the production of law has become a substitute for the political system, establishing lines of communication between the State and the citizenry without materializing such policies. In other words, the production of law or legal reformism stands in for, often in

55. See e. g. CEPAL. *Panorama social de América Latina* (1999). See in the case of inequality and access to justice: CÉSAR A. RODRÍGUEZ. 'La Justicia Civil', in BOAVENTURA DE SOUSA SANTOS and MAURICIO GARCÍA-VILLEGAS. *El Caleidoscopio de las Justicias en Colombia* (2001). See on the case of inequality and law: LEOPOLDO MÚNERA. 'La justicia es pa' los de ruana', in O. CORREAS (ed.). *Sociología jurídica en América Latina* (1991); JUAN MÉNDEZ, GUILLERMO O'DONNELL and PAULO PINHEIRO (eds.). *The (un)rule of law in Latin America* (1999). See on inequality and economy: MARCELO M. GIUGALE, OLIVER LAFOURCADE and CONNIE LUFF. *Colombia: The Economic Foundation of Peace* (2003).

56. ALBERTO ALESINA. 'Introduction and Summary', ALESINA (ed.). *Institutional Reforms: The Case of Colombia* (2005), 1.

57. *Ibid.*

58. The international project in which ALESINA's was involved focused on reforms on the following areas: (1) institutional separation of political powers; (2) electoral and party system; (3) punitive legal system; (4) regional and local administration; (5) treasury; (6) educational system; (7) social spending; and (8) the independence of Colombian central bank. *Ibid.*

a merely symbolic fashion, the incapacity of the State to respond the social demands for security, social justice and participation.

The underbelly of this unusual configuration of law, State and society, is that politics in Colombia does not function as a field of mediation for social conflicts, which must be solved by other, often violent, means.<sup>59</sup> Justifications for exceptional, extra-legal behaviour are also common in almost every aspect of Colombian social life: from the proliferation of armed groups, drug trafficking, illegal economies, tax evasion, exploitation of workers, sexual offenses and family violence to squatting in public property, informal economies, repeated missed payments of mortgages or school fees, and so on.<sup>60</sup> It is also frequently the case that State's intervention or nonintervention in specific social spaces is carried out in such a chameleonic way that they vary by the geographical setting and the area under regulation.<sup>61</sup> As meaningless norms continue to pile up, obedience to the law is constantly ruled out as an ethical way of action. The ordinary citizen's attitude of disobedience, distrust or simply negligence concerning the need to comply with the law continues despite almost 200 years of republican history.<sup>62</sup> However, the mismatch of form and substance, and subsequently law's precarious regulatory power, are reflected today by how the symbolic powerfulness of law cohabits with its instrumental weakness. MICHAEL TAUSSIG summarizes this in a striking way:

[In Colombia] the universe of right and wrong is territorialized by a grid of laws, and each law is numbered. The signs against smoking cigarettes in the airports have the number of the relevant law made prominent, as do the notices on TV

59. ÁLVARO TIRADO MEJÍA. 'Violence and the State in Colombia', in EDUARDO POSADA CARBÓ (ed.). *Colombia: The Politics of Reforming the State* (1998), 124; MAURICIO GARCÍA-VILLEGAS. 'Law as Hope: Constitution and Social Change in Latin America' (2001-2002) 20 *Wisconsin international Law Journal* 2, 364.

60. An illustrative case is how the cars are driven not just in Colombia, but in many Latin American countries. According to LIMA LOPES:

Although the traffic laws are the same as those in the majority of countries in the Northern hemisphere and developed economies, the effective behavior of drivers and pedestrians turns out to be much different from that prescribed by the laws. Latin American cities are invaded by traffic signs and signals. But it would appear that their significance is quite limited in practical terms. Stop signs tend to mean, at best, "Slow Down." Traffic lights may represent something more than an invitation to reduce speed, nevertheless, the probability of someone ignoring a red light is great. This behavior has a particular impact. Traffic becomes unpredictable to the extent that it is not enough to comply with the established signals: each driver must approach the corner and evaluate, in each concrete case, whether or not she should stop. Many times, a look from the other driver is what determines whether or not one needs to stop. (JOSÉ REINALDO DE LIMA LOPES. 'Law of Inequalities: On the Non-universal forms of Legal Pluralism', in CÉSAR RODRÍGUEZ (ed.), 26 *Beyond Law* (2003), 92).

61. GARCÍA-VILLEGAS and RODRÍGUEZ. 'Law in Society in Latin America' above n. 45, 46.

62. *Ibid.*, 39.



warning against sex and violence in an upcoming show [...] But the numbers never fit reality – neither the reality of the human condition nor the reality of the subtle distinctions necessary to law.<sup>63</sup>

## B. VIOLENCE AND PARADOX

In Colombia, violence is structural and law production plays a role within this.<sup>64</sup> Shoulder by shoulder since the Spanish Conquest, systematic violence has structured human experience in what is now the territory of Colombia.<sup>65</sup> The current internal conflict in Colombia has evolved for over 150 years, beginning with the struggle between Conservative and Liberal parties in the nineteenth century and *La Guerra de los Mil Días* that left 100,000 people dead, a struggle that escalated during a fourteen-year period from 1948 to 1964 known as *La Violencia*.<sup>66</sup> *La Violencia* is a simple name to identify a social, highly collectivized process that took at least 200,000 lives, including 112,000 – that is, one percent of Colombia's population – during the period 1948-1950.<sup>67</sup> This was followed by *El Frente Nacional*, a disempowering institutionalization of bipartisanship between the late 1950s and the early 1970s, which thereafter welcomed twenty-five years of rule under the permanent emergency powers of the executive to control social unrest.<sup>68</sup> Today, violence in Colombia is a complex system of interdependent conflicts with

63. MICHAEL TAUSSIG. *Law in a Lawless Land: Diary of a Limpieza in Colombia* (2003), 16.

64. According to PAUL FRAMER, structural violence is 'a broad rubric that includes a host of offensives against human dignity: extreme and relative poverty, social inequalities ranging from racism to gender inequality, and the more spectacular forms of violence that are human rights abuses, some of them punishment for efforts to escape structural violence.' PAUL FRAMER. *Pathologies of Power: Health, Human Rights, and the New War on the Poor* (2003), 8.

65. Many artists in Colombia have collated the imaginary of violence. In literature, some of the most influential titles are: JOSÉ EUSTASIO RIVERA's novel *La Vorágine* (1924), GABRIEL GARCÍA-MÁRQUEZ's *La Mala Hora* (1962) and GUSTAVO ÁLVAREZ GARDEAZÁBAL's *Cóndores no entierran todos los días* (1972). See especially: SANTIAGO VILLAVECES –IZQUIERDO. 'Looking backward and Forward: A Pre(Re)View', in GEORGE E. MARCUS (ed.). *Cultural Producers in Perilous States: Editing Events, Documenting Change* (1997), 376.

66. See especially: GERMÁN GUZMÁN CAMPOS, ORLANDO FALS BORDA, and EDUARDO UMAÑA CAMPOS. *La violencia en Colombia* (2005); PAUL OQUIST. *Violence, Conflict, and Politics in Colombia* (1980).

67. OQUIST, above n. 66, xi. See on new perspectives on the social, political and geographical dynamics of *La Violencia*; MARY ROLDÁN. *Blood and Fire* (2002).

68. BRUCE MICHAEL BAGLEY. 'Colombia: National Front and Development', in ROBERT WESSON (ed.). *Politics, Policies, and Economic Development in Latin America* (1984), 125. See on *El Frente Nacional* and its effects: GARY HOSKIN. 'Colombian Political Parties and Electoral Behavior During the Post-National Front Period', in DONALD L. HERMAN (ed.). *Democracy in Latin America: Colombia y Venezuela* (1988), 47; R. ALBERT BERRY and FRANCISCO E. THOUMI. 'Post-War and Post-National Front Economic Development of Colombia', in DONALD L. HERMAN (ed.). *Democracy in Latin America: Colombia y Venezuela* (1988), 63.

some visible emerging features: a cross-national state of “undeclared” war, that has different levels of intensity depending the region, city or town, and even the neighbourhood; a subsequent official policy of counter-terrorism and force; an economic crisis that impacts those most affected by violence; and, finally, a general sense of despair expressed by active reclusion in urban self-protected clusters (such as *condominios* and *conjuntos residenciales*). Since 1980, some 100,000 people have died directly as a result of the conflict, and two million *desplazados* have lost their property and employment, and now subsist at the fringes of society. Another million have left the country altogether.<sup>69</sup> Furthermore, the multiplicity of actors<sup>70</sup> in the conflict is fuelled by the availability of substantial economic resources, principally from narco-trafficking in the case of guerrilla organisations, paramilitary groups, and urban gangs; and from the “War on Drugs”, in the case of the official army and politicians.<sup>71</sup> Consequently, profits from the sale of cocaine manage to lubricate a seemingly unwinnable war while maintaining a good fraction of the State’s economy.<sup>72</sup>

In this situation, fragmented interpretations of the law arise in Colombia. They permit a multiplicity of quasi-legal, quasi-illegal practices. Looking to reconcile law with social reality, a sort of natural law emerges that gives

69. MARCELO M. GIUGALE. ‘Synthesis’, in MARCELO M. GIUGALE, OLIVER LAFOURCADE and CONNIE LUFF. *Colombia: The Economic Foundation of Peace* (2003), 2. See also: FRANCISCO GUTIÉRREZ SANÍN and ANA MARÍA JARAMILLO. ‘Paradoxical Pacts’, in BOAVENTURA DE SOUSA SANTOS (ed.). *Reinventing Social Emancipation: Toward New Manifestos, Volume 1: Democratizing Democracy: Beyond the Liberal Democratic Canon* (2005), 215.

70. The main actors of the current violence in Colombia are: Colombia’s largest guerrilla insurgency, the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo [FARC-EP]), the National Liberation Army (Ejército de Liberación Nacional [ELN]) and , Colombia’s right-wing paramilitary groups, in turn, trace their origins to small “self-defence groups” formed by local landowners and businessmen to defend themselves and their property against violence, operating with the tolerance of, and often in collusion with Colombian military units, and to death squads created by drug cartels in the 1970s and 1980s. See e. g. United Nations Development Programme. *El conflicto, callejón con salida: Informe nacional de desarrollo humano para Colombia*, Bogotá, UNDP (2003), 285-319.

71. For instance, \$800 million US dollars are the amount allocated for the 2007 Plan Colombia by the US Congress and the US Defense Department. See especially: ‘Cámara de Representantes de E.U. aprobó 640 millones de nueva ayuda a Colombia para 2007’, in *El Tiempo*, June 9 2006, at [eltiempo.terra.com.co/judi/2006-06-09/ARTICULO-WEB-\_NOTA\_INTERIOR-2939858.html] at 10 June 2006. See on War on Drugs: CYNTHIA J. ARNISON and TERESA WHITFIELD. ‘Third Parties and Intractable Conflicts: The Case of Colombia’, in CHESTER A. CROCKER, FEN OSLER HAMPSON and PAMELA AALL. *Grasping the Nettle: Analysing Cases of Intractable Conflict* (2005), 231; The Heritage Foundation. *Helping Colombia Fix Its Plan to Curb Drug Trafficking, Violence, and Insurgency* (April 26, 2001); DOUG STOKES. *America’s Other War: Terrorizing Colombia* (2005); GRACE LIVINGSTONE. *Inside Colombia: Drugs, Democracy, and War* (2004); NOAM CHOMSKY. ‘Plan Colombia’ (Spring 2001) 6 *Alternative Press Review* 1; GARRY LEECH. *Killing Peace: Colombia’s Conflict and the Failure of U.S. Intervention* (2002).

72. JIMMIE BRIGGS. *Innocent Losts: When Child Soldiers Go to War - Ch. 2. “Sometimes I Feel Like Killing”*; *Violent Childhoods in Colombia* (2005), 41. See generally: FRANCISCO THOUMI. *Political Economy and Illegal Drugs in Colombia* (1995).

authority to those who have the means to take it. Guerrillas, paramilitaries, and formal gangs share the State's failure as their rationale but most of the time, they do no more than perpetuate a situation of exploitation and oppression. Worse, they have dispersed throughout the whole society the pernicious use of physical and psychological violence as a valid means of social interaction.<sup>73</sup> The outcome has been a social implosion: a violent reciprocity based on the fear of the similar and of oneself. Given that personal response is the way to secure life and property, individual actions have become boundless. Due to the other may use violence; one should fear everyone; one is validated to use violence.<sup>74</sup> Because every one is entitled to appeal to this natural law, anyone can be a victim and anyone can be the victimizer.<sup>75</sup>

Today, the official army, paramilitaries, guerrillas and urban gangs continue taking over territory, imposing their duties and obligations on the local inhabitants and dispensing their own version of justice. The different forms of justice are delivered according to their author: imposing taxes, restructuring entities, arresting the poor: when is the State; controlling State departments and the public service: in the case of politicians; and displacing indigenous populations, kidnapping the rich or the poor, cleansing and other malaises: when the army, guerrillas, paramilitaries and common delinquency are involved.<sup>76</sup>

*Independencia, La Guerra de los Mil Días, La Violencia, El Frente Nacional*, and drug-related conflict constitute a succession of events that has taken over the State as a battleground for faction disputes. They have molded a State that is no capable of providing a political space for the construction of a national identity or a bureaucratic umbrella distinct from political forces.<sup>77</sup> The actors in these battles neither re-distribute power nor concentrate the totality of the State. None of them is capable to advance their project consistently; rather, they just battle for a stake in the nation building project in Colombia. As PAUL OQUIST observed almost twenty-five years ago, Colombia's famous stability is simply a disguise for a structure of social domination that denies the overwhelming majority of the population access to socioeconomic and

73. LIMA LOPES, above 60, 91. See in the case of Colombia violence and the perpetuation of fear: CAROLINE MOSER and CATHY McILWAINE. *Urban Poor Perceptions of Violence Exclusion in Colombia* (2000); MOSER and McILWAINE, above n. 38.

74. Regardless of gender, belief, ethnicity and age, everyone is part of this implosion. One out of every four irregular combatants in Colombia is under the age of eighteen. Guerrilla and paramilitary groups, in particular the FARC-EP, continue to recruit and use child soldiers. Human Rights Watch. *Colombia: Armed Groups Send Children to War* (February 22, 2005) [[www.hrw.org/english/docs/2005/02/22/colomb10202.htm](http://www.hrw.org/english/docs/2005/02/22/colomb10202.htm)] at 20 May 2006. See also; JULIE M. LAMB, MERCY LEVY and MICHAEL R. REICH. *Wounds of War* (2004), 32; ANDREA PEÑA. 'Infancia Infeliz' (2006) *Semana.com* [[www.semana.terra.com.co](http://www.semana.terra.com.co)] at 28 July 2006.

75. GUTIÉRREZ SANÍN and JARAMILLO, above n. 69, 195.

76. CAROLINE MOSER. 'Violence in Colombia: Building Sustainable Peace and Social Capital', in ANDRÉS SOLIMANO. *Colombia: Essays on Conflict, Peace, and Development* (2000), 16-17.

77. RODRÍGUEZ, GARCÍA-VILLEGAS and UPRIMNY, above n. 2, 138.

political power, and therefore circumscribes their ability to satisfy – even minimally – their most basic necessities, ‘[a] scenario of social contradictions that presages the continued maturation of violence.’<sup>78</sup>

In this space of contestation of the law and its uses, the 1991 Constitution can be seen as another production of law, another expression of faith, a belief in the law’s capacity to provide a technical answer to the social, political, and economic ills that face Colombia.<sup>79</sup> Yet, what differentiates it has been its core focus: the survival of those caught in the cross fire of the Colombian conflict. Without losing sight of its utopian, iconoclastic and defiant origin, the 1991 Constitution and its rights have been applied with one eye on the constitutional text and another on the social situation. Adopted after a process of public debate that included participation by demobilized guerrilla groups, indigenous and religious minorities, the 1991 Constitution came to life as the symbol of peaceful rebellion, held within institutional channels and against arbitrariness, exclusion, and abuses of power.<sup>80</sup>

### III. 1991 CONSTITUENT ASSEMBLY: INPUTS AND OUTCOMES

Determined to overcome the grim outlook for Colombia law at the end of last century, the aspirational soul of the Constituent Assembly aimed to transform an entrenched social and political reality into a social revolution.<sup>81</sup> This Assembly, summoned in 1990 through democratic elections, repealed the 1886 Constitution and adopted a new Constitution. The 1886 Constitution was brief in text and ambitions, general, coherent, and technically well-wrought. The 1991 Constitution, on the other hand, is generous in text and spirit, written in plain language, and idealistic instead of precise. In addition to these differences of form, both constitutions are operatively very different. The 1886 Constitution was merely an informative text, without much social relevance. The current Constitution, however, has become the legal, political and economic foundation of Colombia. These differences have made the 1991 Constitutional text a common social referent, a status that the 1886 Constitution could never have achieved.

78. OQUIST, above n. 66, 238.

79. JOE FOWERAKER, TODD LANDMAN and NEIL HARVEY. *Governing Latin America* (2003), 80.

80. PEEL, above n. 1, 108-109.

81. According to VAN COTT, the 1991 Colombian Constitution can be described as a post-nationalist constitution due to its aspiration to construct a national identity and unity around diversity. See especially: VAN COTT, above n. 5, 10. GARCÍA-VILLEGAS asserts also that ‘the 1793 French constitution and Colombia’s current 1991 Constitution are good examples of aspirational constitutions. The United States constitution – despite the foundational political philosophy that inspired it – may, in contrast, be seen as an example of Protective constitution’: GARCÍA-VILLEGAS. ‘Law as Hope’, above n. 59, 354.

The constitutional reform process began with a twofold purpose: (1) to promote participatory democracy and empower citizens for direct, effective involvement in the public and private decision-making processes, and (2) to strengthen State institutions, especially the judiciary, with the aim of level vast social inequalities and struggles of authority and power. In order to articulate these targets, the traditional Rule of Law State (*Estado de derecho*) was exchanged for a more socially conscious political model: the Social Rule of Law State (*Estado social de derecho*).<sup>82</sup> It became the State's responsibility, under this new social dimension, to ensure that well-being and equality were adequately ensured for all.<sup>83</sup> Additionally, a series of mechanisms and institutions were introduced in the Constitution to facilitate that the text was applied at both the abstract level and in quotidian disputes. Besides the establishment of a Constitutional Court, the Constitution also extended the constitutional jurisdiction to all judges in Colombia. It extended the catalogue of acts and decisions subjected to be reviewed *ex-officio* by the Court, and included a generous bill of rights backed up by a powerful guardianship writ, the *tutela*. These reforms represented a twofold strategy by the Constituent Assembly to tackle the legal rigidities of a country deeply embedded in a tradition of legal ineffectiveness.

#### A. NORMATIVIZATION OF THE CONSTITUTION

In order to ensure the desired constitutional enforcement, a whole system of bodies, new procedures, and new criteria to guide constitutional interpretation was adopted in 1991. The Court was created with the specific functions of safeguarding the integrity and supremacy of the Constitution,<sup>84</sup> and the figure of a Public Ombudsman (*Defensoría del Pueblo*) to protect and promote the charter of fundamental human rights was established.<sup>85</sup> New procedures were introduced to safeguard different types of rights and interests protected by the Constitution, including a writ to order administrative authorities to fulfil their legal mandates in specific situations (*Acción de Cumplimiento*),<sup>86</sup> to protect collective rights (*Acción Popular*),<sup>87</sup> to secure rights of specific social

82. 1991 Colombian Constitution (hereafter: Colombian Const.), art. 1.

83. FELIPE SAEZ. 'The Judiciary', in MARCELO M. GIUGALE, OLIVER LAFOURCADE and CONNIE LUFF. *Colombia: The Economic Foundation of Peace* (2003), 829. See especially: C-1064/2001.

84. Col. Const. Title VIII, Chapter 4.

85. Col. Const. arts. 281-283.

86. Col. Const. art. 87.

87. Col. Const. art. 88.

groups (*Acción de Grupo*)<sup>88</sup>, and finally the writ of protection of fundamental rights (*Acción de Tutela*).<sup>89</sup>

With incipient roots in the 1858 Constitution, and effectively since a constitutional reform in 1910, constitutional review, either concrete review or abstract constitutional review, have been part of judicial practice in Colombia.<sup>90</sup> However revision by the Supreme Court, the constitutional peak body before 1991, was very restricted. Concrete constitutional review only operated to decrees issued under states of siege or economic emergency, and it was carried out after their declaration. Under the 1991 Constitution, any citizen could appear before the Court to file a claim against a norm through the public unconstitutionality writ.<sup>91</sup> Yet perhaps the most visible advancement in the process of normativization of the Constitution for the Colombian people at large has been its generous bill of rights and the writ of *tutela*.<sup>92</sup> The 1886 Constitution did not grant significant protection to fundamental rights. Rather, it merely stated a number of liberties and social guarantees, which were understood to be simple prerogatives given by the State to individuals, but without specific mechanisms to remedy violations.<sup>93</sup>

88. Col. Const. art. 88.

89. Col. Const. art. 86. Hereinafter *tutela* cases, *Sentencias de Tutela*, are referred as *T*; *Sentencias de Unificación*, when the Court unifies a precedent, they are referred as *SU*; and in the case of abstract constitutional review cases, *Sentencias de Constitucionalidad*, are referred as *C*. They will be followed by their reference number, and finally, the year of the decision.

90. See especially; 1856 Colombian Constitution – *Constitución de la Confederación Granadina* – art. 50, and 1910 Constitutional Reform – *Acto Legislativo Número 3*, 31 October 1910, art. 41. It is also important to mention that between the 1856 Constitution and the 1910 constitutional reform, Colombia had the 1886 Constitution. Heavily marked by conservative political values, the 1886 Constitution erased the constitutional review from the Colombian constitutional map. In 1910 liberal ideas were brought to limit the executive power and to constrain public administration by a renewed set of Constitutional premises.

91. In addition to decrees issued under any state of exception, the Court must carry out an automatic review, *ex-officio*, of the following types of laws: (1) all laws that approve international treaties, as well as the treaties themselves; (2) statutory laws, which are reviewed by the Court before the President signs them; (3) acts that summon a constituent assembly or a referendum to modify the Constitution, which can only be reviewed for procedural validity; and (4) approval or derogation referendums, as well as other democratic participatory mechanisms such as national popular consultations and national plebiscites. See especially: Col. Const. arts. 104-105 and Ley 134 de 1994 (*Ley Estatutaria sobre los Mecanismos de Participación Popular*).

92. Which resembles the Spanish system. The Spanish Constitutional Tribunal was established by the 1978 Constitution, and started its work in 1980. The Tribunal has jurisdiction over conflicts between state authorities; the petition of *amparo* against administrative acts and court decisions interfering with fundamental rights; the lawfulness of treaties in the light of the Constitution; and the constitutionality of laws. Under the present Spanish Constitution, an individual may invoke this writ to request the Constitutional tribunal to assure the protection of his or her fundamental rights against an administrative act or judgment of a court, when the ordinary courts have not provided such protection. See especially: VICKI C. JACKSON, MARK TUSHNET. *Comparative constitutional law* (1999), 471-472. See also: NÉSTOR IVÁN OSUNA PATIÑO: *Tutela y amparo: derechos protegidos* (1998).

93. MANUEL JOSÉ CEPEDA ESPINOSA. 'Judicial Activism in a violent context: The origin, role

In 1991, the bill of fundamental rights was strategically adopted to transcend mere words. In order to achieve this goal, the writ of *tutela* has played a crucial role. The writ enables any person whose fundamental rights are being threatened or violated to request that a judge with territorial jurisdiction protect that person's fundamental rights. Citizens may file the claims informally without an attorney. The judge is legally bound to give priority attention to the request over any other business. In accordance with the requirements of the specific situation under revision, the *tutela* procedure allows the judge to order the adoption of any measure necessary to protect threatened fundamental rights, even before pronouncing a final judgment. Furthermore, every single *tutela* can be potentially reviewed by the Court, which will select those that it considers necessary to correct or pertinent for the development of its own case law, and issue a corresponding judgment.<sup>94</sup>

The *tutela* is formally defined in the Constitution as a means to protect fundamental rights in the Constitution. However, in order to preserve the constitutional mandates in real-life situations, the Court has issued numerous and uniform decisions expanding the catalogue of rights, the effects of *tutela* decisions and the subjects of a plaintiff's claim. For example, the Court rejected all formalist theses that sought to restrict the *tutela* to the catalogue of rights included in the Constitution.<sup>95</sup> The Court emphatically rejected a minimalist or *numerous clausus* view of the rights. Since Decision T-002 of 1992, the Court has developed an approach centered on guaranteeing the rights and principles that the *tutela* was created to defend, instead of focussing exclusively on the right's literal description. In the same vein, the Court has considered international humanitarian law, and international human right law treaties ratified by the legislative, to be constitutionally relevant, and therefore directly enforceable.<sup>96</sup>

and impact of the Colombian Constitutional Court' (2004) 3 *Washington University Global Studies Law Review* 529, 575.

94. Except for decisions in which the Constitutional Court seeks to unify its doctrine on a given matter (*sentencias de unificación*) or decisions that are adopted by the full chamber (*Sala Plena*), *tutela* judgements are issued by review chambers (*salas de revisión*). The review chambers are composed of three magistrates; there are nine chambers, each one presided over by one of the nine magistrates. See especially; *Decreto Legislativo 2591 de 1991* (which regulates the procedure for the abstract review of legal provisions), *Decreto Legislativo 2067 de 1991* (which regulates the procedure for the abstract review of legal provisions), and *Ley Estatutaria de Justicia 270 de 1996* (which regulates the organization and functioning of the Judiciary).

95. The formalistic/restrictive interpretations were grounded on two arguments. First, a very literal interpretation held that the only fundamental rights were those included in Chapter 1, Title Two of the Constitution. A second thesis, held that the judicial procedures before the ordinary and administrative jurisdictions were, by the sole fact of existing and being legally available, the adequate channels to resolve all controversies related to fundamental rights. *Tutela* actions would therefore only proceed when the legal system did not provide a specific solution. CEPEDA ESPINOSA, above n. 93, 575.

96. See especially; C-574/92, C-295/93, C-225/95. The first two cases started the application of Colombian Const. art. 93, where international treaties are considered integral part of the Cons-

Progressively, the Court has expanded the effects of *tutela* in order to ensure the normative value of the Constitution.<sup>97</sup> First, seeking a just solution, the Court has also expanded the originally *inter partes* effects of *tutela*. The Court has granted *inter communis* effects to persons who have not actually filed the corresponding *tutela*, but share common circumstances with the plaintiffs, belong to the same community, and might be negatively affected by a decision that does not include them.<sup>98</sup> Second, the writ now includes all State's authorities and officials as potential respondents in such a claim, making them potential violators of the fundamental rights. Third, the jurisprudence allows the presentation of *tutela* claims against private persons in positions of power, provided that certain conditions are met. In these terms, the *tutela* may be used against private parties when plaintiff is in a position of subordination or otherwise defenceless in relation to the private party against whom the claim is directed, a private party seriously harming collective interests, or the private party when it is in charge of public services or utilities.<sup>99</sup> Fourth, the Court has extended *tutela* against civil, labour, criminal and administrative judgements whenever the judge has not followed a relevant constitutional precedent to decide the case. To put it briefly, in its interpretation and use of *tutela*, the Court has encouraged the use of *tutela*, and has established a solid doctrine of precedent in Colombia, where traditionally the only source of the law has been "the typographic law".<sup>100</sup>

Under the 1886 Constitution, the Supreme Court often adopted a formalistic approach that helped widen the gap between constitutional law and quotidian socio-political life. The Supreme Court focussed predominantly on questions such as the jurisdiction of the official who had issued the decision, or the procedure by which it was adopted, as opposed to the substantive aspects of

titution. Sentence C-225/95 coined in Colombia the concept "*bloque de constitucionalidad*". It refers to the components of the Constitution that go beyond the constitutional text. Apart of the international humanitarian law and international human rights treaties, these components are: the foreword of the Constitution, the international treaties about borders, international doctrine on human right law from the international monitoring bodies. See e. g. MÓNICA ARANGO OLAYA. 'El bloque de constitucionalidad en la jurisprudencia de la Corte Constitucional Colombiana' (2004) *Precedente* 2004, 79-102.

97. CEPEDA ESPINOSA, above n. 93, 554.

98. Another examples is *inter pares* effects decisions. Firstly, the Court may order that the constitutional *ratio decidendi* of a given decision be applied by all judges to every future case in which similar circumstances arise. Secondly, It also happens when the Court orders judges to stop applying a certain regulation in concrete cases, because it is contrary to a fundamental right. Finally, the Court has ordered administrative agencies to design a plan that would benefit not only the formal plaintiff, but also all other persons in the same situation. *Ibid.*, 572-573.

99. *Ibid.*, 647.

100. See especially C-083/95 and C-083/01. See also on binding effects of constitutional precedent *ratio decidendi*, T-566/98 and Colombian Const. art. 13 y 29. The positivistic interpretation of law has its pristine source in Colombia in *Ley 153 de 1887* and *Ley 169 de 1896*.



the problems at hand.<sup>101</sup> In contrast, the Court has provided different answers, balancing the conflicting interests in a real situation without using the formal, syllogistic, general-to-particular model. The new constitutional hermeneutics have broadened the base of basic liberties, such as personal autonomy and individual freedom,<sup>102</sup> freedom of religion,<sup>103</sup> freedom of press,<sup>104</sup> and freedom of expression.<sup>105</sup> The Court has also been active on equality issues related to discrimination on the grounds of gender, sexual orientation, disability, extreme poverty, and race.<sup>106</sup> Finally, there have been countless judgments concerning social, economic rights and collective rights. The Constitution not only promotes the protection of individuals from the State and individual empowerment, but it also recognizes the existence of different groups and

101. For instance, CEPEDA ESPINOSA cites the 1978 judgement declaring the constitutionality of a very controversial state of siege decree, Decision of March 9, 1978. It stated that any criminal act committed by a member of the armed forces would be justified if it took place during previously planned operations launched to prevent or repress activities related to kidnapping and drug trafficking. Several justices expressed concern that this vague, exonerating provision was tantamount to a *de facto* authorization of the death penalty, but the majority of the Court did not support this thesis. CEPEDA ESPINOSA, above n. 93, 543.

102. Colombian Const., art. 16. In several cases the Court has explored the extend and legitimate limitations of personal autonomy. Some examples are the Court's position in relation to the rights of individuals to make decisions that may cause them harm, such as personal drug consumption (C-221/1994 and C-026/1995), euthanasia (C-239/1997), and the mandatory use of safety belts (C-309/1997); the right of individuals to determine their personal appearance (T-095/1993, T-248/1996 and T-124/1998); and the right to determine one's own gender identity (SU-642/1999).

103. Colombian Const., art. 19. Despite the overwhelming Catholic majority in Colombia, and that a past of absolute protection and official engagement with the Catholic Church—officially called *Concordato*—, the Constitutional Court has granted consistent protection to freedom of religion (C-027/1993, C-350/1994, C-1261/2000, and C-224/1994).

104. Colombian Const., art. 20. The Court has pronounced on freedom of the press in conflict with privacy (SU-1723/2000); the right to obtain information (T-066/1998); dissemination of classified information and personal reputation issues (T-206/1995 and T-066/1998), journalists' licensing (C-087/1998); and on freedom of press and public Order (C-425/1994 and C-1024/2002).

105. Colombian Const., art. 20. See especially on the right to be part of strikes as an extension of the freedom of expression: SU-667/1998.

106. Colombian Const., art. 13, on equality as a right, includes six basic elements. First, a general principle of equality of treatment, opportunity, and protection, as well as equality before the law and in the enjoyment of rights. See particularly in gender equality; Colombian Const., art. 43, T-393/1997, T-902/2000, T-270/1997, T-494/1992, and T-624/1995. Second, a prohibition on discrimination based on sex, race, national or family origin, language, religion, and political or philosophical opinion. See on sexual orientation; T-097/1994, C-481/1998, SU-326/2001, and C-814/2001. See especially on race; Colombian Const., art. 13, C-086/1994, T-1042/2001. Third, a state duty to promote the conditions necessary to attain real and effective equality. See on conditions necessary for persons with disabilities; Colombian Const., art. 47, T-288/1995, T-823/1999, T-1134/2000, T-024/2000, T-595/2002, T-427/1992, and T-620/1999). Fourth, the possibility of creating advantages for discriminated or marginal groups. See on Extreme Poverty; Colombian Const. art. 13. See also on displaced population Section iv of this paper. Fifth, a directive to grant special protection to the weak. Finally, sixth, a mandate to punish those who abuse and mistreat vulnerable persons.

grants them a variety of collective rights.<sup>107</sup> The Court's pronouncements for equality of treatment in the workplace, health provision and public utilities supply stand by their own as highly advanced and responsible, given the harsh reality of Colombian life.<sup>108</sup>

In their approach to social and economic rights violations, the Court has assessed claims in accordance with specific conditions of each individual case, without strictly attending to the programmatic human rights bias that places some political issues beyond the constitutional judge's radar. The Court has consistently subverted spheres of power that would be immune to the general duty of respecting the Constitution.<sup>109</sup> Although the Court held in unanimous decisions that *tutela* judges should respect expenditure priorities adopted through the national budget planning process, the Court may order expenditures in exceptional circumstances. The Court has conscientiously ordered public or private expenditures when fundamental rights are under threat or, in an abstract review process, legislative provisions are in contradiction with the fundamental rights and/or the Social State of Law.<sup>110</sup> One of the most controversial<sup>111</sup> – yet common – criteria is when the minimum subsistence rights of marginalized or weak groups and individuals are being threatened.<sup>112</sup> Following this line of reasoning, the Court has determined that rights of social or economic nature may be protected using *tutela* in the following situations: (1) when the social and economic rights under threat are “by connection” directly linked with another fundamental rights; for example, the rights to a health or social security in a situation where the life is under threat;<sup>113</sup> (2) when social and economic rights are considered in and of

107. Colombian Const., Title II, Ch. 3. Until *Ley 472 de 1998*, *tutela* was the only available mechanism to secure these constitutionally protected rights and interests. After the *Ley 472*, where *Acciones Populares* were regulated as an independent action from *tutela*, the Court has continued to grant protection to different types of collective interests.

108. Topical cases in the workload of the Court are: (1) protection of rights to health, which is violated by the lack of provision for treatment, medicine, or surgery prescribed under their physician's diagnosis; (2) un-attendance of the registration with social security entities by employers and corresponding payments to the system or disbursement to workers; (3) recognition of retirement pensions; or (4) demands of payment of their public salaries or pensions, or private salaries, in extreme situations.

109. CEPEDA ESPINOSA, above n. 93, 659.

110. The most mentioned cases are (1) the *tutelas* that generate economic costs for the state especially in health and education provision; (2) banning of the long-standing regulation that used to establish the system for financing the acquisition of housing and was contrary the principle of affordability of housing (C-383/1999, C-700/1999, C-747/1999, C-955/2000 and C-1192/2001); and (3) deciding on the laws that regulate annual increases in public employees salaries (C-815/1999, C-1433/2000 and C-1064/2001).

111. See *e. g.* RODOLFO ARANGO. 'La justiciabilidad de los derechos sociales fundamentales' (2001) 12 *Revista de Derecho Público*; RODOLFO ARANGO. 'Basic Social Rights' (2001) 16 *Ratio Juris*, 141.

112. See *e. g.* SU-111/1997. See also: SU-225/1998.

113. In the case of protection of the right to health or a healthy environment when them is necessary to ensure the continuity and quality of life; T-534/1992, T-123/1999.

themselves fundamental, that is, in the case of the right to adequate nutrition or elementary education of children;<sup>114</sup> and (3) when social and economic rights are elements of the minimum conditions of dignified subsistence, the right to survival – or *mínimo vital*, which is based on the constitutional rights to life, health, work, and social security.<sup>115</sup>

Some of the Court's strongest critics argue that its combative protection of the Constitution creates a high degree of economic and political instability. They have stated that as a consequence of its judicial activism, the Court has consistently increased public expenditures, disregarding the negative long-term macroeconomic effects of its decision.<sup>116</sup> Despite these critiques, the Court has confirmed the basic thesis that social rights can be enforced through *tutela* decisions. The sheer cost of protecting a right has not mounted a sufficient economic or political argument for disregarding clear constitutional mandates upholding the effective enjoyment of rights and the state's duty to safeguard life, personal integrity and human dignity.<sup>117</sup> The Court's progressive protection of social and economic rights, and in particular the configuration and protection of a *mínimo vital*, have had the practical effect to entitle persons, principally in conditions of absolute poverty, to prompt and effective assistance to fulfil their most basic needs.<sup>118</sup> The right to survival

114. See especially: SU-225/1998.

115. *Mínimo vital* was established in the case T-426/1992. See especially in the case of minimum subsistence and income; T-606/1999 and SU-995/1999. The right to survival acquired a material force when there is a threat to one of the core rights and the State has the capacity to prevent serious harm; if both elements are present, and proved in the context of a *tutela* writ, then the state has a duty to rescue, and judicial protection is in order. The Constitutional Court has used this rule in cases when there is a significant delay in the payment of, or in the recognition of entitlement to social security; delay in the payment of salaries, discriminatory dismissal of a pregnant woman, the lack of provision of health care services, and the exclusion of vital medicines and treatments from the Colombian Mandatory Health Plan. See reference to specific cases: JULIETA LEMAITRE RIPOLL. 'Someone writes to the Colonel: Judicial Protection of the Rights to Survival in Colombia and the State's Duty to Rescue' (paper presented at the SELA 2005, Law and Poverty, Panel 2: The Institutional Strategies for Eradicating Poverty, Rio de Janeiro, Brazil, June 16-19, 2005), 2 [islandia.law.yale.edu/sela/sela2005.htm] at 15 April 2006. In 2005 a Senate Committee discussed a new version of the writ of *tutela* – *acción de tutela "social"*. It would be focus on the protection of core rights of the *mínimo vital* (the right to nourishment, health, housing, basic education, employment and social security). While ensuring the protection of the right to survival, the *acción de tutela social*, would maximize its benefits for the people in grater disadvantage controlling current opportunistic uses of the generic *acción de tutela*. See especially: CARLOS GAVIRIA DÍAZ et al. *Ponencia para primer debate al proyecto de Ley Estatutaria número 01 de 2005 Senado: por medio de la cual se regula la protección judicial de algunos derechos sociales*, Senado de la República, Colombia (22 August 2005).

116. See e. g. HUGO PALACIOS. 'El control de constitucionalidad en el Trópico', *Precedente* (2001); SERGIO CLAVIJO. 'Fallos y fallas económicas de las altas cortes: el caso de Colombia 1991-2000' (2001) 12 *Revista de Derecho Público*; MAURICE KUGLER and HOWARD ROSENTHAL. 'Check and balances: An Assessment of the Institutional Separation of Political Powers in Colombia', in ALBERTO ALESINA (ed.). *Institutional Reforms: The Case of Colombia* (2005), 80.

117. CEPEDA ESPINOSA, above n. 93, 643.

118. *Ibid.*, 619.

not only subverts an exclusive model of justice, based on the possibility to afford a lawyer or circumvent the system, but also allows the poor privileged access to a procedural and material justice. It forces the law to leave behind the pretension of neutrality and assume an active role solving class imbalances.<sup>119</sup> In this case, the law has been instrumentalized, passing from a submissive function, to a law that can also be used symbolically by those who require it. Without *tutela*, the legal system would have continued to reproduce the *status quo*, while daily impotence before the powerful would have remained hidden under the mantle of progressive legislation that enshrines democracy and the faceless of rule of law.<sup>120</sup>

#### B. DE-FORMALIZATION AND CONSTITUTIONALIZATION OF LAW

The priority and applicability of the Social Rule of Law State and the bill of fundamental rights in Colombian constitutional interpretation has brought about a transformation of the formalistic notion of law among judges, officials, and legal practitioners. Methodologically, the substantialist approach has privileged values, principles, interests and rights over jurisdictions, administrative spheres of actions and formalities. Normatively, the social reality and the search for concrete solution have acquired relevance over formal procedures or abstract legal categories. Such a transformation was not explicit in the constitutional text, but has resulted from discursive strategies of the Court, which has developed an appropriate scenario to work within the context of the 1991 Constitution.<sup>121</sup> The protection of rights over formalities, and the balance of principles and values instead of a syllogistic application of law, was a paradigmatic leap for a Latin American country with a legal culture of ritual forms, inaccessible judicial hierarchies and endless procedures.<sup>122</sup>

In terms of actual cases, the new hermeneutics engendered through the work of the Court have opened up a set of judicial solutions that go beyond the pre-1991 black-and-white commands of the Supreme Court. In current constitutional litigation, the judge must arrive at a solution that achieves the maximum protection and minimum restriction of all of the values involved in the claim. Hence, the constitutional judge – potentially every Colombian judge – is required to consider the impact of his or her decisions in the context in which they will operate. Clearly, it is no longer possible to select

119. LEMAITRE RIPOLL, above n. 115, 12.

120. *Ibid.*, 4.

121. For instance DIEGO LÓPEZ has studied the Court's own interpretation of Hart and DWORKIN according to the Colombian context. HART has given to the Court the basis to expose ambiguities and vagueness in the law; and, DWORKIN, the Court has borrowed the substance for judicial creation of law and moral attitudes toward the decisional process. LÓPEZ MEDINA, above n. 35.

122. CEPEDA ESPINOSA, above n. 93, 651.

general rules and apply them to concrete cases, as most Colombian lawyers were taught to do through a simple *Código Civil*'s type-syllogism. Today, Colombian judges and lawyers must consider factors and criteria that emerge from the specific facts of each case and then they may establish the links to conflicting values, interests, rights, and principles, not the other way around. In response, a new set of legal constructions have come about: *mínimo vital*, *proporcionalidad*, *test de razonabilidad*, *protección especial*, *erradicación de las justicias presentes* and *núcleo esencial de los derechos humanos*; concepts which would have sounded alien and beyond the law two decades ago.<sup>123</sup>

The principle of legal interpretation according to the Constitution – triggered by the Constitution's values, principles, rights and actions, but ignited by the Court – has prompted judges to apply constitutional norms and incorporate constitutional arguments into their legal reasoning, disregarding legal thematic boundaries. This assimilation has occurred through the growing use of *tutela* and constitutional abstract reviews. For instance in labour law cases, the Court has addressed matters like the timely payment of salaries, the adequate recognition and payment of retirement pensions, the protection of pregnant workers, even those hired through “temporary worker” companies, the prohibition of changing the legal personality of company to avoid labour obligations, respect for the right to strike, and the prohibition of discrimination against trade union members. In criminal cases, the Courts addressed issues such as the constitutional limitations upon the types of admissible evidence, the scope of exclusionary rule, the protection of defendants' procedural rights (including the right to an adequate technical defence), the rights of prison inmates, and the obligations to respect procedural delays. In administrative law, the Court has considered topics such as the right to obtain adequate and timely answers to petitions, the conditions upon which informal traders can be banned from invading public space, and the application of constitutional principles governing public service. Finally, in civil law cases, the Court has decided on the rights and duties of family members vis-à-vis each other, a person's obligation to give alimony to a divorced and gravely ill partner, and the application of constitutional social functions to private property.<sup>124</sup> The primary commitment to protect fundamental rights has begun to surface in all types of judicial decisions, a phenomenon that is now recognized as the “*constitucionalización del derecho ordinario*”.<sup>125</sup>

As analysed in Section II, a salient feature of Colombia is the tremendous fragmentation of political and social forces that have imploded in a general

123. Ibid., 661. At some degree this is a validation of MARK VAN HOECKE's *Law as Communication*, due to the Court's use of institutional legitimation and communicative legitimation through a process of conceptual creation. See e. g. MARK VAN HOECKE. *Law as Communication* (2002), 208.

124. Complete references of these cases are in CEPEDA ESPINOSA, above n. 93, 656-658.

125. MAURICIO GARCÍA-VILLEGAS and RODRIGO ÚPRIMNY. *La reforma a la tutela: ¿ajuste o desmonte?* (2002), 7.

state of fear. With the arrival of the 1991 Constitution, a legal common ground was created throughout a democratic consensus. Obviously, as with all democratic attempts at consensus, it was representative and therefore partial. Nevertheless, this consensus has been consolidated by the Court's work over the past fifteen years. The gap between law and society is acquiring new shades. It is not simply reinterpreted with several legal or illegal legalities. The Constitution has offered a scenario where a judicial reading is compatible with substance instead of form, the material instead of the procedural, the structural and subjective instead of the positive and objective. There has thus been a transfer of claims from the non-existent political forum to a responsive judicial forum. Despite all the risks that this transfer implies, in principle there should be no room for silence in the Courts. Power-holders cannot avoid debate or refuse to respond to the Court as they can do in the market or in the political arena.<sup>126</sup> In this way, the Colombian Constitution experience is unusual: Colombians have used law – the most essential instrument for domination in society – to achieve some level of social emancipation establishing a virtuous building block of institutional hegemony.

#### IV. THE CONSTITUTION AND THE QUOTIDIAN: EMANCIPATION AND RISKS

It is possible to formulate the gap between social experiences and expectations in Colombia as a problem to be overcome by social emancipation. However, it is difficult to find in the collective memory of Colombian a struggle or a movement that have worked towards 'social emancipation' that is not linked to violence and fear. The only collective memories that approximate this idea are the anti-colonial struggles during Colombia's fight for independence and the guerrilla struggles. But in these struggles, the final benefits were, and have been, concentrated in the hands of few, who ably manipulated more widespread aspirations. The ideas of good order and good society, held by both independent *caudillos* as illegal gangs, have often been couched in the religious and authoritarian terms of their pedagogic agendas. They have translated force of arms into the force of reason/legal reason.<sup>127</sup> According to SANTOS, this has been achieved through the affirmation of religious law rather than secular law, formality rather than substance, revelation rather than revolution.<sup>128</sup> However, according to the argument that I have been attempting to sustain here, the 1991 Constitution and Constitutional Court

126. See *e. g.* JORGE CORREA SUTIL. 'Access to Justice and Judicial Reforms in Latin America: Any Hope of Equality?' (paper presented at the SELA 1999, Equality, Panel 6: Equality in the Administration of justice, La Serena, Chile, June 17-20, 1999), [islandia.law.yale.edu/sela/jcorre.pdf] at 15 May 2005.

127. TAUSSIG, above n. 63, 92.

128. SOUSA SANTOS. *Toward a New Legal Common Sense*, above n 15, 444.

have managed to resolve some of the dissonances between law and society, and the ineffectiveness of law before reality, a project that has produced substantive, positive outcomes for people who have traditionally been excluded from the locus of power.

#### A. CONSTITUTIONALIZATION OF DAILY LIFE

The Court's interpretation and protection of Constitutional mandates have been outstanding, not only because of the variety of subjects that it has addressed, but also because it has, to a certain degree, reformed the Colombian social perception of the law with its responsiveness and progressive orientation.<sup>129</sup> When the Court began its work, the Colombian population turned to the constitutional instance to demand answers to problems that, in principle, should be debated by means of citizen's participation in the political sphere and resolved by the State's action.<sup>130</sup> Their demand for equality and justice shifted from the political field, the most adequate scenario of social emancipation, to the judicial field – a restrictive landscape that traditionally has been identified by its violent symbolic use.<sup>131</sup> However, in the context of the Colombian State's institutional fragmentation and lack of hegemony, there was a space for action by the Court. UPRIMNY and GARCÍA-VILLEGAS observe that '[o]n many occasions, what has taken place is not that the Court takes on other powers, but rather that it has stepped in to fill the vacuum that they have left.'<sup>132</sup> Nationwide, the number of *tutelas* and constitutional actions has steadily increased during the last fifteen year. There were 10732 *tutelas* presented across the whole country in 1992; in 2002, the number had increased by 141609. Of those *tutelas* presented, the Court selected 590 in 1992 and 1161 in 2002 for review and decision. By mid-2004, the accumulated total of *tutelas* examined by the Court was 21793. This same growth has been witnessed in the number of constitutional reviews of statutes, constitutional amendments, legislative decrees and treaties: 69 demands were filled in 1992, and 358 in 2002. By mid-2004, the accumulated number of constitutional reviews was 3868. Roughly the Court had an output of 26000 decisions by mid-2004.<sup>133</sup> These figures represent how the Constitution has

129. UPRIMNY and GARCÍA-VILLEGAS. 'The Constitutional Court and Social Emancipation in Colombia', above n 27, 66.

130. BOAVENTURA DE SOUSA SANTOS and LEONARDO AVRITZER. 'Opening Up the Canon of Democracy', in SOUSA SANTOS (ed.), *Reinventing Social Emancipation: Toward New Manifestos, Volume 1: Democratizing Democracy: Beyond the Liberal Democratic Canon* (2005), iii.

131. See especially: PIERRE BOURDIEU. 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 805.

132. UPRIMNY and GARCÍA-VILLEGAS. 'The Constitutional Court and Social Emancipation in Colombia', above n. 27, 73.

133. Figures of this brief quantitative overview come from the Court's website (www.

deeply touched most aspects of Colombian life, reinterpreting social conflict as constitutional problems.

The constitutional reform in Colombia is a paradigmatic case whose total failure should be declared if it is only evaluated in light of the social, political and economic situation that Colombia still experiences. Nonetheless, the Constitution has generated a social phenomenon termed “constitutionalization of daily life”, a nascent social *habitus*.<sup>134</sup> It differs with the traditional *habitus* of domination through law; instead appealing to the constitutional rights as a shared normative standard of sociopolitical expectations, individual and collective behaviour and institutional judgment. According to WACQUANT, *habitus* is a practical competency, which is acquired through and for action, which operates beneath the level of consciousness, a matrix of perceptions that comes into place when one performs an action according to socially learned patterns.<sup>135</sup> However, while *habitus* sediments individual and group history in the body, *habitus* is shaped in the cognitive struggle according to the time, place, and configuration of contemporary socio-political power.<sup>136</sup>

The 1991 Constitution and jurisprudence of the Court have increasingly channelled and articulated the frustrations, hopes and expectations of Colombians. From a constitutive understanding of the relation between law and society, the Constitution is conceived as a form of organizing the world into categories and concepts that contribute to the formation of the conscience and, as such, determining the course of human actions. This constitutive vision substitutes the dynamic and instrumentality of legal production as an exclusive artefact of the State.<sup>137</sup> This complexity is supposed to explain not just the occasional impact of the constitutionalization of rights in Colombian law, but rather how the constitutional categories have framed daily conflicts in legal terms and how they, as social representations, have modify ways of thinking about, and responding to, those problems and conflicts.<sup>138</sup> This has happened not only on the individual level; the *tutela* has also served as the key point for organizational processes and collective mobilization that dispute the

constitucional.gov.co/corte/) and CATALINA BOTERO MARINO. *Justicia Constitucional en Iberoamerica: Colombia*, Instituto de Derecho Público Comparado, Universidad Carlos III de Madrid (2002) [www.uc3m.es/uc3m/inst/MGP/JCI/02-colombia.htm] at 17 May 2006.

134. ESTEBAN RESTREPO. ‘Constitutional Reform and Social Progress: The Constitutionalization of Daily Life in Columbia’ (paper presented at the SELA 2002, Law as object of transformation, Panel 2: The new wave of constitutionalism, Punta del Este, Uruguay, June 6-9, 2002), 11 [islandia.law.yale.edu/sela/paper.htm] at 15 May 2006.

135. WACQUANT, above n. 36, 316.

136. PIERRE BOURDIEU and LOÏC WACQUANT. ‘The Cunning of Imperialist Reason’ in Symbolic Power and Democratic Governance’, in LOÏC WACQUANT. *The Mystery of Ministry: Pierre Bourdieu and Democratic Politics* (2005), 178.

137. RESTREPO, above n. 134, 11.

138. See on human rights as social representation e. g. WILLIEM DOISE. *Human Rights as Social Representations* (2002).



discourse and social structures.<sup>139</sup> In the majority of these struggles, a combination of strategies for political and legal actions to remedy the situation of those affected is evident. These range from citizenry recognition, to the use of constitutional judgments as consolidation of public consciousness. In this way, the constitutional ground has established a sort of tactical counter-hegemonic alliance between the Court and certain social sectors that have been excluded or hindered from developing the emancipatory values enshrined in the 1991 Constitution. Good examples of these progressive alliances are towards the protection of minorities, gender groups and consumer groups.<sup>140</sup>

The ubiquitous of the Constitution has induced a positive motion toward reconstructing Colombian social and political relations by promoting more just interpersonal and collective relations.<sup>141</sup> Constitutional legal constructions, such as the new legal language by the Court, have gone beyond the courts and appeared in the everyday Colombian lexicon. Becoming very evident the new *habitus* mentioned above, Colombians have taken *tutela*, the writ, and translated into a common verb: *entutelar*. In making *tutela* an action, the writ has re-established a connection with the other through a process of recognition instead of subordination, and argumentation instead of annulment. From this point of view, it is possible to see that a *constitutionalization of daily life* tends to activate the emancipatory agenda of rights: the justice behind the norm, the politics *for* rights rather the politics *of* rights.<sup>142</sup>

139. See especially the UPRIMNY and GARCÍA VILLEGAS study in which they establish some parameters to examine the emancipatory potentials of different types of constitutional claims according to the rights involved in the case and the geographical, social, political and economic context within which they are inscribed: UPRIMNY and GARCÍA-VILLEGAS. 'The Constitutional Court and Social Emancipation in Colombia', above n. 27.

140. The recognition of indigenous population autonomy is an epitome of progressivism and historical responsibility. For instance, the Court has completely abandoned the assimilationist perspective of imposing individualistic, occidental conceptions upon indigenous people. The constitutional recognition of indigenous collective rights, and individual indigenous in relation with their community, have given rise to a reinvigoration on the need to preserve the indigenous cultural identity and guarantee its long-term survival. It has also created a space where individual rights have been articulated to coexist with rights of the community. The most important cases have been: (1) indigenous territorial rights actively enforced by a constitutional judge, (2) the right to establish and enforce indigenous legal norms, and (3) the right to preserve the integrity of the culture to external influences. Examples of these situations are (1) the 1997 judgement where the Court ordered the suspension of oil exploitation project in the U'wa territory because the previous consultation requirements had not been met (SU/039-1997); (2) the acceptance of corporal punishment with a whip-like instrument as acceptable according to the indigenous autonomy and conformance with a standard of "minimum inter-cultural consensus" formed by the right to life, the prohibition of torture and slavery, and the application of cultural procedural requirements (T/523-1997 and T-394-1999); and finally, (3) the preference for preservation of cultural identity and integrity in front of the freedom of religion. In the last case, the Court upheld the right of the Arahua authorities to prevent a Protestant church from preach within tribal land and converting members of the community (SU/510-1998).

141 RESTREPO, above n. 134, 4.

142 UPENDRA BAXI. *The Future of human Rights* (2002), viii.

The Court and Constitutional intervention appears legitimate to broad sectors of society that feel that there is at least one able power exists that acts progressively. Since access to constitutional justice is straightforward, and the constitutional judges tend to adopt progressive positions, many social groups have made use of legal arguments rather than resorting to personal confrontation. The recognition of a violation, or the recognition of duties towards the effective satisfaction of the petitioner's fundamental rights, activates a mode of social subordination to a shared order that constrains and protects.<sup>143</sup> Anti-formalism and constitutionalization of law have made the Constitution a forum where the most difficult, pressing, complex, and sensitive national problems have found increasingly legitimate responses. None the less, it is precisely these successful achievements by the Court in unfolding citizenry awareness that have revealed the contradictions and limits of citizenship under an overreaching human rights reading.<sup>144</sup>

#### B. EMANCIPATION UNDER THREAT

For Justice CEPEDA ESPINOSA, the bill of rights included in the new Constitution, and its interpretation by the Court, has become 'one of the Colombian people's most noteworthy collective achievements.'<sup>145</sup> This position of general optimism has been based on the assumption that talking about rights is the same as talking about a coordinated social empowerment, or that a constitutional protection is equivalent to the redemption of Colombian sense of human dignity. Yet, social change through the law is the result of a complicated formula. The law and the rights embedded in the Constitution are two of an important set of components or conditions within a universal of institutions, a *habitus* entrenched in the popular culture, national lobbying groups, violent alliances, and external economic and political forces. Because the realities that gave rise to the 1991 constitutional reform were serious and pervasive, the aspirations of the Constitution were naturally harder to achieve.<sup>146</sup> The broad and deep aspirations of the 1991 Constitution required a synchronization of these forces to ensure the progressive improvement of conditions of the whole project called Colombia. However, the social and institutional context in which the constitutional reform has been applied has proved largely unfavorable to the fulfillment of its expectations. GARCÍA-VILLEGAS points out four basic obstacles that challenge the

143. RESTREPO, above n. 134, 16.

144. EMIR SADER. 'Toward New Democracies', in SOUSA SANTOS (ed.). *Reinventing Social Emancipation: Toward New Manifestos, Volume 1: Democratizing Democracy - Beyond the Liberal Democratic Canon* (2005), 458.

145. CEPEDA ESPINOSA, above n. 93, 575.

146. GARCÍA-VILLEGAS. 'Law as Hope', above n. 59, 364.

good intentions of the current Constitution.<sup>147</sup> First, Colombia has been at war for 150 years and has experienced prolonged internal unrest since its foundation. Although Colombia's paramilitary groups declared a unilateral cease-fire in 2002, in practice both guerrillas and paramilitary groups continue to commit massacres, assassinations, acts of torture, and other grave breaches of international humanitarian law. This generates a field where survival translates into opportunism, lack of social compassion, despair, and political blindness.<sup>148</sup> Second, the Colombian political system is often driven by a politics of survival where patrimonialism and clientelism are prevalent. Without tackling these tendencies, citizenship-building will be undermined by class interests and pressure groups. Third, Colombian society is a puzzle of micro-realities due to the existence of severe social inequalities. In the arenas of law and justice, economic marginalization in an already impoverished nation means that many people are silenced from the legal order and, from any positive externalities of the judiciary activity. Finally, Colombia has not avoided global practices of State reductionism, trade liberalization, and de-regulation of labour market. Since the beginning of 1990s – coeval with the enactment of the Constitution – governments have been dismantling the incipient traces of the State.

The experience of Colombia's internally displaced population (IDP) offers a clear summary of the challenges to the new Constitution. Internally displacement is a consequence of Colombia's violence; often a response to fear generated by indiscriminate attacks from all parties to the conflict, but in many cases to massacres, selective killings, torture, and specific threats.<sup>149</sup> The Consultancy on Human Rights and Displacement (Codhes), estimates that during the period 1985-2005, 3.5 million Colombians were displaced.<sup>150</sup>

147. *Ibid.*, 367.

148. The intensification of the displacement is linked with the acceleration of the conflict since the Presidential project *Seguridad Democrática* (2002-2006). *Seguridad Democrática* and the past presidential anti-drug policy frames have been heavily sponsored by the US Government *Plan Colombia* since 1999. See especially: JENNIFER S. HOLMES. 'Plan Colombia, Violence, and Citizen Support in Colombia', in JENNIFER S. HOLMES (ed.). *New Approaches to Comparative Politics: Insights from Political Theory* (2003), 83-105.

149. Internally Displaced Persons (IDPs), according to the United Nations, are defined as "persons who have been forced to flee their homes as a result of armed conflicts, situations of generalized violence, violations of human rights, natural or human-made disasters, and who have not crossed an internationally recognized State border." See U.N. Economic and Social Council, Commission on Human Rights, 55th sess., provisional agenda item 14(c), Specific Groups and Individuals: Mass Exoduses and Displaced Persons, Report of the Representative of the Secretary-General on Internally Displaced Persons Submitted in Accordance with Commission Resolution 1999/47, Addendum: Profiles in Displacement: Follow-Up Mission to Colombia, U.N. Doc. E/CN.4/2000/83/Add.1 (2000), para. 2.

150. Codhes. 'Conflicto humano y crisis humanitario en Colombia: Desplazados en el limbo', *Codhes Bulletin No. 56* (2005). See also: HIRAM RUIZ. *Colombians Flee War Without End*, Migration Information Source, (1<sup>st</sup> December 2002) [[www.migrationinformation.org/Feature/display.cfm?ID=76](http://www.migrationinformation.org/Feature/display.cfm?ID=76)] at 14 April 2006.

Since 2002 at least 3 million people have been forced out of their homes and communities. That is, over 5 percent of Colombia's total population of 43 million has been forcibly displaced in the last three years alone. Displacement disproportionately affects indigenous, Afro-Colombians, women and children.<sup>151</sup> Nearly 50 percent of displaced Colombians are unemployed. Most live in shantytowns surrounding Colombia's largest cities and find only poorly paid day labour or work in the informal economy.<sup>152</sup> The condition of the IDP represents the political and legal vacuum where the lives of almost two million people, the most impoverished Colombians, have been abandoned.

*Ley 387* of 1997 established the State's responsibility for formulating policies and adopting measures for the prevention of internal displacement and the protection and socio-economic stabilization of the IDP. However, aid has been largely insufficient, and national coverage limited. In early 2004, the State's system of attention for the displaced population had reached such a state of crisis that the Colombian Court ruled that the State's IDP policy was not providing satisfactory results. Indeed, the problems were such that they amounted to an "unconstitutional state of affairs" – *un estado inconstitucional de cosas*.<sup>153</sup> The decision was based on a repeated and constant violation of

151. Of those recorded as displaced by the Social Solidarity Network between 1995 and August 2005 and whose ages are known, 54 percent were under age eighteen. See Red de Solidaridad Social, *Registro Único de Población Desplazada* (2006) [www.red.gov.co] at 26 June 2006. Sixty-three percent of those who are forcibly displaced relocate to Colombia's largest cities, according to the ombudsman's office (*Defensoría del Pueblo*). See especially: Defensoría del Pueblo, *El desplazamiento forzado en Colombia* (2002), 25-27. Codhes estimated that 33 percent of those displaced in 2002 were Afro-Colombian. Even though less than 4 percent of the national population is Afro-Colombian, according to the 1993 census, Afro-Colombians are far more likely than other groups to suffer displacement. Similarly, some 12 percent of Colombia's displaced population is indigenous, even though indigenous peoples make up less than 2.5 percent of the national population. Codhes, 'Conflicto humano y crisis humanitario en Colombia: Desplazados en el limbo', *Codhes Bulletin No. 56* (2005).

152. See LILIANA OBREGÓN, and MARÍA STAVROPOULOU. 'In Search of Hope: The Plight of Displaced Colombians', in ROBERTA COHEN and FRANCIS M. DONG (ed.). *The Forsaken People: Case Studies of the Internally Displaced* (1998). The conflict has added more than 400,000 IDPs to Bogotá's urban poverty belt, which includes the huge informal settlements of Sumapaz, Ciudad Bolívar, Usme, and Soacha. MIKE DAVIS, *Planet of Slums* (2006), 49. The current sub-employment in Colombia is 32%. Departamento Nacional de Estadística (Dane). *Síntesis Estadística Semanal – Semana del 12 al 16 de junio* (2006).

153. See especially: T-025/2004 (January 22, 2004). The declaration of an "unconstitutional state of affairs" (*estado inconstitucional de cosas*) was declared first in the cases T/714 1996 and T/025 of 1994 when the court condemned the conditions of jails. It is an exception to the inner limitation of justifiability of social rights. Due to a gross violation of fundamental rights of a specific group (jailed population or internal displaced population) and under specific limitations (such as general clamour of justice, potential justice system overburden caused by several actions denouncing the same violations) the Constitutional Court has allowed itself to go beyond the constitutional constraints imposed by the State's scarcity of resources. The Court declaring an "unconstitutional state of affairs" have made a difference between a basic core of social rights, which is justiciable; and an extended layer of them, which is only justiciable in a programmatic way. Thus, in an extreme situation of violation of social rights, they became justiciable (what has

fundamental rights affecting a multitude of persons and requiring the intervention of several entities to attend to problems of a structural nature.<sup>154</sup> The Court ordered the State to identify the number and needs of the displaced population, define a comprehensive national plan of action, determine the resources for this plan, and, within six months of the Court's decision, ensure that all displaced persons enjoy a "minimum level of protection" of their rights. In response to the decision, the government enacted a new national plan of action and increased the budget for programs that assist displaced persons.<sup>155</sup> Nevertheless, in a series of three orders issued in August and September 2005, the Court found that the government's response fell short of what was required to remedy *el estado inconstitucional de cosas*.<sup>156</sup>

Facing the same contradictions, RAJAGOPAL points out that despite the opportunities for contestation using human rights law, individual and group discourses can become uncertain.<sup>157</sup> In the case of Colombia's IDP, the Court currently is witnessing how its role can be passed from being an example of emancipation to become an empty constitutional exercise. To state that the situation of the IDP represents an "unconstitutional state of affairs", the Court is challenging well-established conventions. The interrogation of the Colombian social contract itself is also a question about the history of law production, formalism, positivism and ineffectiveness of law – in this case *Ley 387* of 1997. However, as strong as the declaration of an unconstitutional state of affairs sounds, it is simply a rhetorical claim about the validity of the social contract. It appears to push to the limit the Court's capacity to de-formalize and reconstruct the law on constitutional grounds – it is the court trying to push the nation-building project by its own. Yet, at the end of the exercise,

come to be called *erradicación de las injusticias presentes*), and the state capacity and scarcity of resources are put aside in order to bring some immediate release. See the origin of the theory '*erradicación de las injusticias presentes*', in SU/225-1998, T/177-1999, T/772-2003 and C/617-2002. See especially: LEMAITRE RIPOLL, above n. 115.

154. See especially: T-025/2004. See also: Comisión Colombiana de Juristas. *Alcances y retos de la sentencia T-025 de la Corte Constitucional sobre el desplazamiento forzado* (May 2004).

155. See especially: *Ley 917/2004* (December 3, 2004).

156. Auto No. 176 of 2005 (Const. Ct. August 29, 2005), p. 1. See also: Codhes. *Los autos de la Corte* (September 21<sup>st</sup> 2005).

157. BALAKRISHNAN RAJAGOPAL. 'Limits of Law in Counter-Hegemonic Globalization: The Indian Supreme Court and the Narmada Valley Struggle', in BOAVENTURA DE SOUSA SANTOS and CÉSAR RODRÍGUEZ. *Law and Globalization from Below: Toward a Cosmopolitan Legality* (2005), 188. See on how human rights can be either a source of emancipation or a technology of domination: BALAKRISHNAN RAJAGOPAL. 'Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy' (Paper presented at the Human Rights and Global Justice Conference, Scarman House, University of Warwick, UK, 29 – 31 March 2006) at [www2.warwick.ac.uk/fac/soc/law/events/past/2006/rightsandjustice] at 15 May 2006, 3-4; SUNDHYA PAHUJA. 'Operationalising the Universal: Development and the Rule of Law' (Paper presented at the Human Rights and Global Justice Conference, Scarman House, University of Warwick, UK, 29 – 31 March 2006) [www2.warwick.ac.uk/fac/soc/law/events/past/2006/rightsandjustice/] at 15 May 2006, 12.

both structural inequalities remain and the perceptual value of constitutional rights has been eroded. If the Court cannot deliver the expectations that the Constitution has encoded, the emancipatory power of the Court's decisions will slip into the arena of political manipulation. The judicial empowerment through the 1991 constitutional fortification of rights may provide an effective institutional way for traditional politicians to remain in their positions and even diminish a possible scrutiny of the government's policies.<sup>158</sup> Therefore, the transfer of major issues to the Court by the Executive, the Legislative and the corporate sector might be a sinister way of insulating policymaking from popular political pressures. In this sense, judicializing politics through the constitutionalization of daily life in Colombia may amount to politicians, civil servants and civil society as a whole transferring their responsibilities onto the Court.

Voicing the IDP's grievances in terms to which the Courts can respond and government can ignore, they risk stunting their own aspirations and pleading for permission to conform to the *statu quo*. In this context, the claim for and the recognition of rights run the risk of becoming a folkloric, mechanic, and bureaucratic *habitus* that threatens the institutional prevalence of the Court and the counter-hegemonic pretensions of these rights. From this perspective, the fruitful use of the bill of rights may become trapped in the self-imposed limits of human rights discourse. To paraphrase BAXI, the Colombian constitutionalization of rights emerges as Herculean in its most creative moment, but at other times better resembles Sisyphus.<sup>159</sup>

## V. CONCLUSION

The arguments presented in this paper looked for establishing a ground in which Colombian constitutional text must be read, evaluated and compared on the basis of its particularities and not just in its similarities with the wave for the constitutionalization of rights that have swept the world in the last three decades. Importantly, the particularities that this article brings to the forefront of analysis are not confined to the 1991 Constitution legal character, they are instead social in essence. The 1991 Constitution has become a necessary reference point for anyone who wishes to know in detail what has transpired in Colombia during the last years. The project of making the law effective and realizable became a shaping agent of the State nation building project, as well as a landmark in the social imaginary. It has served as a nationwide common referent to claim for or to contest social revindication, something that has been long due in the country. It promoted the alliance of disparate groups, bound not only by shared economic or political interests

158. HIRSCHL, above n. 4, 235.

159. BAXI, above n. 142, viii.

but also by a particular normative view. It is also important to note that the 1991 Constitution has not entirely fulfilled its creators' ambitions for peace. The Constitution, fundamental rights and *tutela* have been efficiently able to protect what Osuna calls the *microderechos de la cotidianidad*, but the role it has played in resolving the chronic violence is less clear.<sup>160</sup> As a result of the Colombia's state of affairs, the 1991 Constitution aspired to be an omnipotent and redeeming legal project. These ideals gave the new Constitution political, legal and social resonance, but they have also proved to be self-destructive when the whole Colombian nation-building enterprise gravitates to a purely judicial flank. In this crossroad between the social nature of the Constitution and its capacity and limitations to revindicate the construction of the State lays a promising agenda for further research and political action.

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