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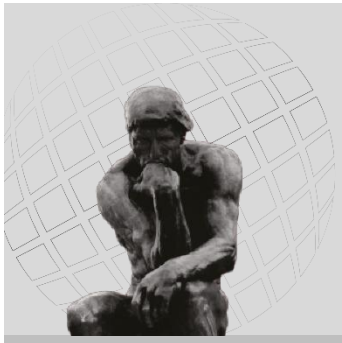

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How Courts Defend Democracy: Challenging Authoritarianism and Advancing Social Transformation

Como os Tribunais Defendem a Democracia: Enfrentando o Autoritarismo e Promovendo a Transformação Social

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Abstract

As authoritarianism subtly infiltrates democratic institutions, the rule of law faces an unprecedented crisis. This article examines how judicial systems, particularly the Colombian Constitutional Court, have become a line of defense against democratic erosion. From blocking abusive constitutional reforms to challenging executive overreach, courts have emerged as key actors in preserving democracy. Through the lens of transformative constitutionalism, this study explores how judicial interventions can not only resist authoritarian tendencies but also drive social transformation by tackling deep-rooted inequalities. Comparing Latin American and European approaches, it highlights the potential of legal mechanisms—such as conditionality models and structural litigation—to safeguard democratic values. However, the rise of constitutional populism poses new threats, often disguising itself as a tool for reform while undermining institutional stability. Against this backdrop, the article argues for a balance between constitutional stability and judicial activism, ensuring that courts remain both guardians of democracy and agents of change. In a time when democracy is under siege worldwide, this analysis underscores the judiciary's vital role in upholding the rule of law and protecting fundamental freedoms.

Keywords: rule of law; democracy; constitutionalism; judicial power; democratic erosion.

Resumo

À medida que o autoritarismo se infiltra sutilmente nas instituições democráticas, o Estado de Direito enfrenta uma crise sem precedentes. Este artigo examina como os sistemas judiciais, especialmente a Corte Constitucional da Colômbia, tornaram-se a última linha de defesa contra a erosão democrática. Desde bloquear reformas constitucionais abusivas até conter o expansionismo do Executivo, os tribunais emergem como atores-chave na preservação da democracia. Sob a perspectiva do constitucionalismo transformador, este estudo explora como as intervenções judiciais podem não apenas resistir às tendências autoritárias, mas também impulsionar a transformação social ao enfrentar desigualdades estruturais profundas. Comparando abordagens latino-americanas e europeias, destaca o potencial de mecanismos legais — como modelos de condicionalidade e litígios estruturais — para proteger os valores democráticos. No entanto, o avanço do populismo constitucional impõe novas ameaças, muitas vezes disfarçadas de reformas, enquanto minam a estabilidade institucional. Diante desse cenário, o artigo defende um equilíbrio entre estabilidade constitucional e ativismo judicial, garantindo que os tribunais permaneçam tanto guardiões da democracia quanto agentes de mudança. Em um momento em que a democracia está sob ataque em todo o mundo, esta análise destaca o papel essencial do Judiciário na defesa do Estado de Direito e das liberdades fundamentais.

Palavras-chave: *Estado de Direito; democracia; constitucionalismo; Poder Judiciário; erosão democrática.*

Summary

1. Introduction

Democracy is the only system that mankind has invented so far to ensure that people live in a "peaceful, prosperous and free" society. In 2024, the Council of Europe defined the ten Reykjavik principles to protect democracy. They call for a deliberative democracy that combats disinformation, fights corruption and invests in a democratic and inclusive future. This is a reaction of the Council of Europe in which its 46 states forcefully reaffirmed that the Russian Federation "will be the first and the last country" to break with the values of that organization (Council of Europe, 2023).

This European example and its reaction only ratifies that democracies in the world are in a process of degradation. This movement no longer occurs exclusively, as before, with violent *coups d'état*, but with a gradual and subtle shift towards authoritarian and anti-democratic institutions and practices. Wars are no longer declared, but take the form of invasions, territorial claims or disproportionate exercises of preventive defense. In countries where it has not gone this far, democratic erosion has occurred through a gradual process and "as a result of a series of changes that appear to be limited when viewed separately, but capable of determining a general decline of liberal democracy when taken together" (Carlino; Groppi; Milani, 2022, p. VII). Regarding this issue, a study by Team Populism showed that there's been a surge in populist rhetoric in the world in at least 40 countries (Lewis *et al*, 2019). Also, the Tony Blair Institute[1] states "that there are nearly five times as many populist leaders and parties in power today than at the end of the Cold War, and three times more since the turn of the century" (Kyle & Meyer, 2020).

Some of the tools used for this anti-democratic decline are "attacks on the independence of the judiciary, co-optation of constitutional courts and independent bodies by political majorities, control of the media, restriction of the right of expression and assembly, compression of territorial autonomy" (Carlino; Groppi; Milani, 2022, p. VII). All this in the context of the paternalistic protagonism of the Executive power or of a populist leader who presents himself as a representative of the people.

Democratic deterioration can be identified in at least five aspects: "(a) the concentration of power in the executives and the weakening of the separation of powers; (b) the abuse of rights by individuals and the abuse of power by public entities; (c) the expansion of the role of judges in discretionary political decisions, with a further weakening of the separation of powers; d) an enormous extension of the expert model in public administration and government organizations and procedures, together with the delegation of discretionary political powers; e) the abdication, for purely economic reasons, of the pedagogical role of liberal democracies, with the underlying and implicit message that even liberal democracies no longer believe so much in their founding values" (Perini, 2022, p. 4).

On the other hand, the notion of rule of law, which appears to be intimately linked to the idea of democracy (Demuro, 2022, p. 5) is "an ideal in a set of values that dominate liberal political morality" (Waldron, 2023). The most important consequence of the rule of law is that persons in positions of authority exercise their power within a coercive

[1]Described as "a not-for-profit, non-partisan organization helping governments and leaders turn bold ideas into reality. We do it by advising on strategy, policy and delivery, unlocking the power of technology across all three. We do it by sharing our insights, so everyone can benefit. And we do it to help build more open, inclusive and prosperous countries for people everywhere" (Tony Blair Institute, [2025?]).

framework of public norms and not in an arbitrary manner (Waldron, 2023). It requires that citizens respect and comply with the rules, even if they disagree with them, and that the law is the same for all, so that no one is immune and everyone has equal access to the protection granted by law (Waldron, 2023).

In this dimension, the World Justice Project has identified the rule of law as a set of four universal principles: (i) the government and its officials are accountable to the law; (ii) laws are clear, public, stable, fair and protect fundamental rights; (iii) the enforcement process is accessible, fair and efficient; and (iv) access to justice is carried out by competent, independent and adequately resourced adjudicators, lawyers, judges and representatives (Agrast; Botero; Ponce, 2011, p. 9).

The two elements are connected. The crisis of democracy is closely related to the decline of the rule of law. The values shared by liberal constitutionalism - democracy, legality, equality, among others - must be seen in an integrated way. They reinforce the idea that constitutional democracy is defended on different fronts: politics, law, economics and morality. A system that does not respect fundamental human rights cannot be associated with the term rule of law; and a legitimate rule of law cannot be said to exist if it is not compatible with human rights (Agrast; Botero; Ponce, 2011, p. 9 and Waldron, 2023).

Seen from these two dimensions (democracy and rule of law), the crisis of the rule of law is correlative or proportional to the crisis of democracy. It is not possible to maintain that democracy enjoys good health while the rule of law is in decline or that the latter is optimized in an anti-democratic context. If this relationship is taken into account, it is worrying to know that only 8% of the world's population lives under democratic regimes. This has led to the establishment of conditionality systems in Europe aimed at protecting their democracies. In these models, European Union funds (i.e. next generation) are conditional on the beneficiary states meeting minimum standards of rule of law (rule of law, democracy and human rights). In particular, in relation to respect for judicial independence, an impartial justice system, alternation in power and guarantees for the fundamental rights of minorities (Kirst, 2021, p. 101-110).

Latin America unfortunately lacks a system of political and economic integration that has the capacity to articulate a model of conditionality of funds based on standards of democracy and human rights. One of the tasks on the research agenda is the development of the Inter-American Democratic Charter and of a conditionality scheme that promotes compliance with the decisions of the organs of the Inter-American Human Rights System. As long as this does not happen, the regional democratic erosion (i.e. Venezuela, Nicaragua or Mexico) advances and deepens the systemic deficits of the States of the region without a solid international safeguard to stop the democratic crisis.

On this ocassion, we want to study this phenomenon in the case of Colombia. The country is no stranger to this phenomenon. Although it has always been considered a stable democracy, the truth is that the country has a weak culture of legality. The law is not the reason for the actions of most of the population, authority is only respected insofar as it has coercive force and the symbolic power of law is a distant aspiration. Not only has the State failed to build a modern democracy due to armed conflicts, high poverty rates and low institutionalization, but it is also permeable to authoritarian turns (national and local) based on the prioritization of security as a fundamental element and objective of public policy. As violence spreads to other Latin American countries, faith in force as the best State reaction spreads proportionally and its best messiah is always the-already powerful- president of the Republic (Laborde, 2024).

This democratic crisis has received-like most of the social problems of the last three decades- a strong-and almost exclusive- response from the judiciary. Colombia's Constitutional Court has confronted this deterioration by controlling abusive constitutionalism, preventing far-reaching authoritarian drifts and confronting structural inequality. This paper explores some of the causes of the crisis and the responses that have been found by the Court. Under this perspective, the judiciary stands as a mechanism of transformational constitutionalism that is not only concerned with fulfilling the promises of the Constitution but also with maintaining the democratic regularity of the system. This gives it greater legitimacy, but, at the same time, makes it a target for anti-democratic attacks.

It is possible to identify many structural causes and manifestations of the crisis of democracy and the rule of law in Colombia. This chapter concentrates on three of them: conservative constitutionalism; the erosion of democracy

that fosters abusive constitutionalism; and the deep structural inequality in the region. Because of their dimension and specialty. The final part of the chapter deals independently with the growing constitutional populism.

An overview of Latin America shows that the time of the abuse of states of exception has returned. After the pandemic, the use of this figure has become common again and has become part of the landscape in which democracies are temporarily less democratic (Zwitter, 2012, pp. 95-111) in countries such as El Salvador (IACHR, 2024) or Ecuador (EFE, 2024). Despite its apparent democratic stability, Colombia is no stranger to this reality. During the pandemic, the state of emergency was abused through two continuous declarations. These allowed the Executive to issue more than a hundred decrees. The constant presence of drug trafficking, criminal gangs, residual armed groups, FARC guerrilla dissidents, human traffickers and other classic armed actors (guerrillas) facilitate the temptation to use force, declare states of exception or attribute excessive power to the armed forces. The figure of the president as supreme commander of the armed forces reinforces his individual role and concentrates great functional, budgetary and administrative power in the Executive.

The Constitutional Court maintains an essential role in keeping the basic conditions of the democratic system in a context in which Congress is trying to recover its leading role in the country's social agenda in the midst of a panorama of profound delegitimization and a perception of distance from the citizenry. The politicization of the powers, the risk of factious actions, the non-compliance with the decisions of international human rights courts and the absence of a career civil service that is replaced by precariously hired personnel through discretionary elections add factors to the deterioration of the rule of law.

In order to study this phenomenon, this article studies the causes of the crisis of the rule of law and the responses that the judiciary can provide. In order to do this, the first chapter focuses on conservative constitutionalism and its responses. The second chapter studies the democratic erosion and one of it's manifestations: the abusive constitutionalism and also the way the Colombian Constitutional Court has controlled it. The third chapter analyses the relation between inequality and the crisis of the rule of law and the tools that the Colombian Constitutional Court has implemented to tackle this issue. Lastly, the fourth and final chapter focuses on the constitutional populism and the discourses about reforming current Colombian constitution.

2. Conservative constitutionalism and the Court's response

2.1. Conservative constitutionalism: an empirical critique of transformative constitutionalism

One of the most subtle and dangerous risks to the rule of law is conservative constitutionalism. This is a way of thinking about the tools (some of them novel) of constitutionalism to maintain structures of discrimination, inequality and democratic erosion. Conservative constitutionalism even focuses its criticism against the mechanisms of social transformation through law (i.e. tutela action or structural litigation) and rages against the ineffectiveness of some of these tools as proof of their illegitimacy.

In this area, conservative constitutionalism criticizes the control of constitutional reforms that has served to maintain democracy and prevent abusive constitutionalism; it disdains unconstitutional states of affairs (ECI) that have made invisible problems of insular or discrete minorities visible and refuses to extend the social agenda of the courts to social or environmental rights. In general, any novel mechanism created to address inequality, poverty or the destruction of democracy is sharply criticized by conservative constitutionalism.

One of the central axes of Latin American conservative constitutionalism is that it uses the empirical argument to reject transformational constitutionalism. The former accuses the latter of constituting a false promise or an empty illusion that has not served to change anything. In this way, conservative constitutionalism veiledly hides its comfort with the situation. The failure of transformative constitutionalism constitutes a kind of oxygen for conservative

constitutionalism. In reality, the problems of efficacy of structural and transformative judicial intervention are assumed as a triumph on the part of this delirious and indolent inertia in the face of the situation of human beings who suffer the violation of their rights.

The greatest danger of Latin American conservative constitutionalism is that it has come to denounce all new and contemporary forms of transformative constitutionalism. To do so, it appeals to the oldest arguments of democratic illegitimacy and outdated objections to the basic elements of the modern constitutional State. And with that spearhead, conservatism has the aim-rarely explicit- of anchoring society in the past of both constitutional theory and its structural remedies. And, therefore, it leads it down a path that prevents it from solving the problems it hypocritically claims to be concerned about.

The empirical argument adduced against transformational constitutionalism ("nothing has changed") is, in reality, the argument of conservative resignation (Hirschman, 1991). To criticize the constitutional model because the structural social problems surpass it and to pretend to change the few mechanisms that exist to confront them is to propose, often unknowingly, to destroy the few tools that have been created to advance socially. That is the danger of conservative constitutionalism and this is what differentiates conservative constitutionalism from other illiberal forms of constitutionalism, such as abusive or authoritarian constitutionalism. Currently, in Argentina and El Salvador, very strong projects of illiberal constitutionalism are being developed, which were previously forged under the guise of conservative constitutionalism.

Unlike other forms of illiberal constitutionalism, conservative constitutionalism does not seek to destroy the constitutional courts. But it is interested in co-opting them or in including within the courts judges who pretend to be highly technical but who, in reality, impede the transformative role that these institutions should have. Under the cloak of disagreement on the interpretation of the Constitution or with formalistic readings of the competencies of the courts, conservative constitutionalists adopt minimalist positions that reduce the scope of protection of rights or reduce the effectiveness of the instruments to protect those rights. This explains the issuance of conservative rulings that are camouflaged with supposedly technical arguments (USA, 2023).

For this reason, conservative constitutionalism is fascinated with the idea of judicial activism. And it raises it as one of its flags. All this without even taking the trouble to specify what activism means contextually or to filter the concept through the sieve of the role that corresponds to each of the powers in deficit democracies. This conceptual transplantation does not occur out of ignorance but out of audacity and, on several occasions, a certain intellectual laziness. Under this logic of Latin American conservatism, it is always better to devote intellectual efforts to criticize progress (even if it is unsatisfactory and improvable) than to think of building with one's own ideas a social understanding and a constitutional mechanism to respond to the pressing problems of community life in Latin America.

That does not mean that everyone has to agree with the role of the courts in social transformation. There are strong good faith disagreements about the existence, role and legitimacy of constitutional courts. And most serious critics do so in good faith. However, there is no hiding the fact that many of these criticisms have been transferred to the countries of the global South without taking into account the social, political and economic context. This not only has homogenizing pretensions but also prevents an accurate analysis based on the environment in which the institutions operate. For this reason, good-faith criticisms have been instrumentalized by conservative constitutionalists as if the disagreement itself did not exist or as if the last word were always the one that emerges in the global north.

In fact, the role of the courts is only one small arena in which conservative constitutionalists are contesting. It is, in fact, a way of understanding democracy as a whole and the role of constitutional and knowledge institutions in limiting power. Thus, conservative constitutionalism is not exclusive to the global south but can occur, with great intensity, in countries such as the United States or Italy.

Therefore, it is important to clarify that transformative constitutionalism is not conservative. Transformative constitutionalism confronts social reality, it is uncomfortable with inequality, poverty and misery. Transformative constitutionalism includes both the aspiration and the mechanisms to react to the state of affairs of non-compliance

(often willful and other times negligent or guilty) with constitutional promises. Transformative constitutionalism is never conservative in the sense of inert comfort with the causes and consequences of the social problems of the countries of the region.

On the contrary, conservative constitutionalism can -without realizing it- be transformative. When systemic setbacks occur, the preservation of advances and democratic constitutional structures is transformative. It is an advance in the midst of retrogression and constitutes a fixed point and anchor when there is retrogression. So conservative constitutionalists, often unknowingly, are also transformers. But transformative constitutionalists are not conservatives.

2.2. Responses to conservative constitutionalism: more transformative constitutionalism

The answer to conservative constitutionalism is transformative constitutionalism. It is not just a matter of being on the fascinating progressive side of constitutionalism (West, 1990, p. 641-721) but of defending the transformative role of law, the aspirational character of Constitutions and a reaction to the inaction, indolence, inertia or negligence that prevents those promises from being effective. It is useful to understand (with respect) what a conservative constitutionalist thinks in each context (Chemerinsky, 2004, p. 53-62) and to assimilate that the debate transcends the false dichotomy between judicial restraint and activism (Lawson, 2002). For most of the population this debate is minor. What matters most to the citizen is who listens, which authority hears a claim and which office has the door open to ask for a benefit.

It is important to differentiate the unconstructive criticisms of conservative constitutionalism from important questions that seek to improve the articulation of constitutional tools for the protection of rights. The question of the (in)efficacy of an ECI is fundamental and free of suspicion if it is accompanied by a recognition of its advances and fundamental ideas for its better functioning.

Today it is essential to recognize that structural litigation is an element of constitutional convergence. It has spread with different manifestations and expressions from the United States to the global south. It is a reasonable expansion due to the existence in different contexts and societies of structural problems. Institutional blockages, bureaucratic inertia and the neglect of politically powerless groups are cross-cutting problems of modern democracies.

It is not surprising that the place where the most vigorous current debate on an unconstitutional state of affairs is taking place is in Brazil. However, convergence also occurs in the realm of limits and difficulties. The ECI appears as a successful tool with a reasonable migration to Brazil. But the expansion of an instrument also ratifies its problems and limits. Facing the risks of the rule of law demonstrates the need for comparative law. The impossibility of solving problems in isolation not only because they are interconnected, but also because they are common. It is a matter of advocating the extension of a global transforming law. This idea is feasible because of the existence of institutional blockages, bureaucratic inertia and the abandonment of groups without political power in all latitudes.

With regard to the ECI in particular, it is important to examine the limits of this mechanism in accordance with the paradox of the structural. Indeed, the more structural the social problem, the more the declaration of an ECI is justified. However, the more structural the problem, the less likely it is to be overcome or resolved by mere judicial intervention. This structural paradox has less to do with judicial ability or the capacity of the courts for social transformation and more to do with an underlying social condition: the existence of a society in a generalized unconstitutional state of affairs in which there is a strong danger to democracy and the rule of law.

3. Democratic erosion, abusive constitutionalism and judicial control over power

3.1. Democratic erosion and abusive constitutionalism

Democratic erosion refers to the "risk of a slow but ultimately substantial deterioration of the margins of the rule of law, democratic and liberal rights" (Ginsburg; Huq, 2018, p. 39). In Latin America this problem occurs in a particularly serious way and, although there have been no violent coups in recent decades, "we should not forget that Latin American countries have a long and tragic history of political abuses; restriction of rights; violations of the Constitution; and emergency powers that were quickly adopted in times of crisis and then retained by executive authorities, even many years after the crisis had completely faded away" (Roa, Gargarella, 2020, p. 5).

Currently, one of the most dangerous and widely used mechanisms of democratic erosion is abusive constitutionalism. This "involves the use of mechanisms of constitutional change - constitutional reform and constitutional substitution- to weaken democracy" (Landau, 2013, p. 191). Specifically, the phenomenon occurs when the holders of power (individuals or political parties) resort to these mechanisms of constitutional change to ensure their (unlimited) permanence in power and reduce the political and judicial control to which they should be subject in a fully democratic regime.

Abusive constitutionalism is called constitutionalism because, in relation to dictatorships and totalitarianisms, it is a more subtle form of concentration of power that does not totally disregard the constitutional regime, the basic structure of the State and the formal guarantee of fundamental freedoms. It is called abusive because it materially destroys the foundations and undermines the effectiveness of democracy, political pluralism and fundamental rights. Because of this double condition, Mark Tushnet has pointed out that abusive constitutionalism is a manifestation of the 'paradox of liberal tolerance' because it implies the use of mechanisms of liberal constitutionalism to eliminate the very foundations of liberalism (Tushnet, 2016, p. 2-3).

Tushnet and Landau agree that abusive constitutionalism does not have the potential to turn a constitutional regime into a dictatorship or totalitarianism. However, they recognize that it does have the capacity to create the conditions for movement or party hegemony, obstruct the channels of political change, and reduce the guarantee of rights (Landau, 2013, p. 195). In a broader context, the use of abusive constitutional reforms is complemented by the closing of spaces for opposition sectors, the monopoly of information, the increase of electoral fraud, the co-optation of parliaments, courts, control or oversight bodies and the violation of the rights of minorities (Landau, 2013, p. 199-200)[2].

In global constitutionalism, recent experiences of abusive constitutionalism can be found, inter alia, in Bolivia, Colombia, Ecuador, El Salvador, Hungary, Nicaragua, Mexico, Turkey, Russia and Venezuela (Landau, 2013, p. 191)[3]. In all these countries the Constitution has been reformed to guarantee the permanence of popular leaders in the presidency and the mechanisms of constitutional change have been used to reduce the rights of the opposition, limit the independence of judges and increase the concentration of power.

In addition to these cases, Brazil faced one of the strongest threats to democracy under the government of President Jair Bolsonaro. Under this regime, the independence of powers was threatened, a discourse of discrimination (anti-LGBTIQ+) was installed, decisions were adopted that were clear mistakes in terms of human rights (i.e. the campaign Brazil does not stop during the Covid-19 pandemic, which caused more than 711,000 deaths) and a right-wing populism was installed that unabashedly promoted the government of the military or the return of the dictatorship. This threat had one of its highest points in the events of January 8, 2023. On that day, hundreds of people were summoned to the esplanade of the three branches of government in the city of Brasilia to invade the Congress, the Federal Supreme Court and the Planalto Palace (Gortázar, 2023; Nicas & Romero, 2023). This incursion was not a

[2]That the strategies of force have been replaced by more subtle ones is clearly demonstrated by Ozan Varol (Varol, 2014).
[3]On Hungary, Turkey and Russia: Dixon & Landau, 2015, p. 607.

mere anti-democratic symbol, nor was it limited to the destruction of some buildings and fixtures of historical, cultural and civil value. As investigated by the judicial authorities of that country, it was part of the strategy to mobilize the army against the democratically elected government of Luis Ignacio Lula da Silva (Brasil, 2023). The way Brazilian democracy resisted with the fundamental role of the Federal Supreme Court on that occasion and in the following days is a fabulous example of the role that the law and the courts can play with the cooperation of the other branches of government in order to protect the democratic system.

Looking at the Colombian case, it is possible to identify several cases of abusive constitutionalism that have been ultimately stopped by the Constitutional Court. This chapter will describe four of these events. In these cases, the constitutional elusion presented itself by (i) increasing the power of the executive branch or trying to avoid its control or (ii) by attempts from the Congress to modify electoral rules or reforming the Constitution.

First, Colombia faced a serious attempt at democratic erosion through the classic strategy of perpetuating a popular leader in power by modifying constitutional provisions prohibiting presidential reelection. In effect, through Law 1354 of 2009, Congress intended to call a referendum to reform the Constitution and allow a second reelection for the president of the Republic. Note that the original design of the 1991 Constitution did not allow reelection. However, the Constitution had already been reformed in 2004-through Legislative Act 2 of that year- to allow it immediately and only once. This reform attempt was promoted by a president who was highly popular for the time and who had large majorities in the legislative branch[4]. Thus, both the first effective reform to the Constitution and the attempt to reform it a second time were designed to directly and immediately benefit President Álvaro Uribe Vélez himself.

This first attempt to install the same person in the presidency of the Republic through a referendum to reform the Constitution was prevented by the Constitutional Court. In Judgement C-141 of 2010, the Court established that the constitutional reform proposal to be consulted to the people implied a substitution of several basic pillars of the Constitution (i.e. equality, democratic principle, alternation in the exercise of public office). In addition, two dozens of serious procedural flaws had been committed in the processing of the law calling for the referendum. For this reason, the court declared the unconstitutionality of this initiative of popular consultation for the purpose of constitutional amendment (Colombia, 2010a).

Secondly, there have been phenomena of democratic erosion and abusive constitutionalism that refer to the subversion of the system of sources through constitutional circumvention. It is important to point out that in Colombia there is a special type of laws called statutory laws. These regulate specific matters: fundamental rights and duties and their guarantees; the administration of justice; the regime of political parties and movements; mechanisms for citizen participation; and states of exception. The approval of these laws requires qualified majorities and a prior, comprehensive and automatic control of constitutionality.

However, there are cases in which the president of the Republic issues decrees and regulates matters that are reserved to statutory laws. This occurs when a constitutional reform orders the president to regulate a certain matter that coincides with those matters that are reserved to statutory laws. In this case, the regulation is based on a direct, concrete and limited mandate that was exceptionally established in the Constitution. The latter are the so-called statutory decrees. The Constitutional Court has stated that both laws and statutory decrees must be subject to prior control of constitutionality as a requirement for their constitutional validity (Roa, Aristizábal, 2024a, p. 66).

In 2016, Colombia signed the Final Peace Agreement between the Government and the FARC-EP. This agreement was intended to end several years of internal conflict. Among the measures for its implementation, through Legislative Act 2 of 2021, the creation of special peace constituencies for Congress was foreseen and powers were granted to the National Government to regulate several of the elements of these constituencies. This was done through Decree 1207 of 2021. This regulation had the force of law.

[4]According to the news portal El Colombiano, his popularity averaged 72% in his eight years in office (elColombiano, 2010).

Thus, the government was able to regulate a statutory matter by means of an express constitutional authorization. It should be recalled that the Court has indicated that this type of decree is subject to the same control of constitutionality as statutory laws, i.e., to prior judicial review. In spite of this, the Government issued the decree and it was put into effect without this prior control. In this way, an attempt was made to circumvent the prior and automatic control of constitutionality that corresponds to the Constitutional Court.

The reaction of the Constitutional Court to this attempt at constitutional circumvention was to reaffirm its competence to previously control the draft statutory laws. In Judgment C-302 of 2023, it was stated that when the President is empowered by a constitutional amendment to issue a statutory regulation, this exception does not allow him to evade the control of constitutionality (Colombia, 2023a). Therefore, the draft statutory decree must be subject to a prior, automatic and comprehensive control of constitutionality. For this reason, the Court declared the unconstitutionality of Decree 1207 of 2021. In order to prevent the absence of regulation from jeopardizing the new elections of the special seats for peace, the Court ordered Congress to issue the corresponding statutory rules.

Thirdly, Article 38 of Law 906 of 2005 included a prohibition for governors, municipal and district mayors, secretaries, managers and directors of decentralized entities of the municipal, departmental or district order so that in the four months prior to the elections they could not carry out various contractual and budget execution activities. This provision was intended to prevent corruption and guarantee a transparent and equitable democratic process.

Years later, and under the pretext of the economic reactivation after the Covid-19 pandemic, Law 2159 of 2021 modified the contracting regime during the election period. The Congress, by means of an ordinary law, modified the original regime that prohibited the territorial entities from signing inter-administrative agreements in the four months prior to the elections and authorized them to sign them. Law 996 of 2005 was statutory, so it had prior control of constitutionality, but Law 2159 of 2021 was not processed as statutory and was not subject to this automatic control.

Faced with this new attempt of constitutional circumvention, the Constitutional Court intervened. In Ruling C-153 of 2022, the Court declared the provision unconstitutional for violating the reserve of statutory law and made a strong appeal to Congress. In this, it stated that the action taken constituted an attempt to circumvent the control of constitutionality that put at serious risk the principles that guide democratic elections (Colombia, 2022a, para. 173).

Lastly, through Legislative Act 2 of 2015, a modification was implemented that created an instance of judicial government that allowed the participation of the executive branch in the management body of the judiciary. In addition, the members of the management body would no longer be of exclusive dedication but had to concur to this function together with their position in other corporations. The Court studied the rule and, after finding that judicial independence and self-government were fundamental axes of the Constitution, concluded that:

"[A]lthough Congress had broad powers to vary the management model of the Judicial Branch, and even to abolish the bodies created in the 1991 Constitution to govern and administer this Branch of public power, the new scheme introduced in the Legislative Act exceeded the power of constitutional reform available to Congress, because it abolished the principle of judicial self-government, as a manifestation of the principle of separation of powers and the principle of judicial independence". (Colombia, 2016b, para. 10).

These cases show that some of the cases of abusive constitutionalism in Colombia have aimed to enhance the power of the executive branch by reducing judicial independence or eluding the judicial review. The response from the Court has tried to avoid these risks by adopting an active role in the legal system and through method such as the review of constitutional reforms or the study of non-legal norms, such as the statutory decree.

3.2. Controlling abusive constitutionalism and confronting democratic erosion

As mentioned above, there have been multiple manifestations of abusive constitutionalism in Colombia. Specifically, three of these were described: the attempt to establish a second immediate presidential reelection; the issuance of a statutory regime through a decree without submitting it to prior judicial control; and the relaxation of

restrictions on public contracting during election time through a law that was not subject to prior control of constitutionality.

In the first place, regarding the attempt of the second reelection, in 2010 the Court ruled in Judgement C-141 of 2010. There, it declared the unconstitutionality of the call for a constitutional referendum (Colombia, 2010a, para. 6). In addition to finding very serious procedural flaws in the reform process, the Court applied the substitution test and concluded that the constitutional reform to be submitted to the vote of the people implied a substitution of some essential elements of the Constitution, such as the democratic principle, the principle of equality, the alternation in public office and the separation of powers (Robledo; Roa, 2011, p. 645-651).

Regarding the issuance of Statutory Decree 1207 of 2021, in Judgement C-302 of 2023, the Court declared it unconstitutional because the President put it into effect and omitted his obligation to automatically send it to the Court. Some citizens filed lawsuits against the decree on material or substantive grounds. However, the Court declared it invalid for a procedural reason. Specifically, the error was the failure of the president to send it for automatic review by the Court. In that judgment, the corporation established that:

> The control of the decrees that regulate matters of statutory content has been approached from a demanding perspective and restrictive interpretation of these authorizations. The former is justified because, by means of this type of rules, the derived Constituent temporarily alters the competence for the issuance of statutory laws. This implies that the normative attributions conferred to bodies-other than Congress- to issue this type of regulation must be evaluated based on their exceptional and extraordinary condition (Colombia, 2023a, para. 76).

The third phenomenon consisted in the fact that, by means of an ordinary law, Congress modified a statutory law that incorporated electoral guarantees. In Judgement C-153 of 2022, the Court declared the rule unconstitutional when it found:

> (i) [T]he disregard of the statutory matter on this occasion; (ii) the fact that this situation was widely warned in the Congress of the Republic; and (iii) the impact, given the time limits of the amendment to the law of guarantees promoted by Article 124 of Law 2159 of 2021, to the principles of checks and balances, and constitutional supremacy by circumventing the prior control of constitutionality before this Corporation, as well as the affectation to a normative statement with statutory reserve that reflects and is an expression of expensive constitutional principles, such as transparency and balance of representative democracy, and the consequent principle of electoral equality (Colombia, 2022a).

These behaviors demonstrate that a constitutional justice system can detect and stop attempts at democratic erosion. However, the institutional design of these systems or safeguards is very relevant. As has been indicated in other work (Roa; Aristizábal, 2024a), the fundamental pillar for a constitutional justice system to effectively detect and combat manifestations of abusive constitutionalism consists in the existence of a mechanism of broad active legitimacy for citizens to bring cases before the courts. This is what is known as democracy without shortcuts. This is nothing more than allowing citizens to be the masters of the agenda of both popularly elected and non-elected decision-making bodies. The idea is that people can easily and without barriers have access to the control of constitutionality as a forum for the protection of democracy and the rule of law. This institutional design not only ensures that the courts will direct their gaze where the citizenry demands it and not exclusively where professional politicians or the members of the courts themselves decide. It also implies that judicial procedures and decisions appear to be connected to people's everyday problems. Thus, the democratic and social legitimacy of the courts increases to the extent that they take their place as appropriate forums for resolving social disagreements, claiming the protection of rights and protecting the democratic system. It would be wrong to accuse the courts of a democratic deficit when, at the free request of the citizenry, they intervene to protect the foundations of the rule of law itself.

This system is not exempt from risks. For example, Josep María Castellà and Marco Antonio Simonelli have stated that “even in countries where populist parties have not come to power, populist politics have an impact in proceedings before administrative and judicial authorities” (Castellà; Simnoelli, 2020, p. 10). The public action can be presented by any citizen, and the necessary consequence of this is that any kind of ideology can be presented to the Court. Nonetheless, the plural composition of the Court’s judges, the citizen intervention and public hearings during the proceedings ensure that, whichever is the origin of the public action, different voices will be heard.

4. Inequality and judicial transformative approach

4.1. Socioeconomic inequality as a regional drama

It is not possible to understand the advance of the phenomena of democratic erosion in Latin America without referring to the social context in which they operate. The Latin American democratic equation is profoundly unbalanced. Unfortunately, this occurs to the same extent that a profound imbalance in the social equation has been maintained. For that reason, Colombia has been described as one of the most unequal countries in the most unequal region of the world. Specifically, Gargarella has stated that "the great drama facing the region, from its independence until today, and which remains unresolved, is the drama of inequality" (Gargarella, 2014, p. 347). Likewise, Piketty points out that "slave and colonial societies are among the most unequal in history" (Piketty, 2021, p.101) so that Latin America can be framed under that description.

According to the Economic Commission for Latin America and the Caribbean (CEPAL), by 2021, 33.8% of the population would live in poverty and 14.4% in extreme poverty (OXFAM, 2017). Specifically, in the case of Colombia, according to the World Inequality Database, by the year 2022, 10% of the population would own 60.6% of the wealth, while 50% of the population would only participate in 6.9%. Land distribution is no different: by 2017, 80% of the land represented only 1% of the Agricultural Production Units[5].

The impact of inequality on the rule of law is very relevant. Rawls argued that the minimum of material conditions to be recognized for each citizen should be sufficient for each to develop as a free and equal person. This is seen in opposition to the social minimum understood as the satisfaction of basic human needs. For Rawls, the minimum must be sufficient to provide what is necessary not only to satisfy these needs, but to ensure that people see themselves and others as free and equal citizens (Rawls, 2001, p. 177).

Robert Lamb expresses this idea as follows: "[w]elfare capitalism, by operating essentially reactively, is not capable of granting the needy the means to assert their agency, since, although it is capable of satisfying their immediate material needs, it does not empower them or promote their sense of dignity" (Lamb, 2021, p.228). Thus, to satisfy the principles of justice, it is not enough to establish a minimum that ensures that people do not succumb to hunger or disease, but it must go further, the minimum content of social welfare must ensure that people can develop as free and equal citizens.

For his part, Sen considered that the degree of development of a nation could be better identified by using criteria other than the classic scale of Gross Domestic Product (GDP), per capita income or economic growth rates. For Sen, what is fundamental is to examine the degree of expansion of fundamental human freedoms, which include both civil and political rights (intrinsic freedoms) and economic, social and cultural rights (instrumental freedoms) (1999). Hence, today there is a multidimensional poverty index and many countries refer to happiness as a better indicator of the population's well-being (UNDP, 2023).

Seen in this light, inequality implies a crisis of the rule of law because it prevents the inclusion of certain groups in society. There is no doubt that hungry or homeless citizens do not go to the polls and are not interested in the political destiny of a society that has excluded them or over which they feel they have no influence. In this same sense, and as the doctrine has argued, "the reduced possibility of social mobility, the difficulties of daily life resulting from cuts in public spending, the uncertainties of a future that seems to depend on uncontrollable variables, generate, in the multitudes of citizens of Western democracies, a multiplicity of negative emotions: resentment, envy, distrust, insecurity, fear and even anger" (Carlino; Groppi; Milani, 2022, p. IX).

[5]The Colombian National Administrative Department of Statistics defines UPAs as "the unit of organization of agricultural production. It must comply with the following conditions: 1. It produces agricultural, forestry, livestock, aquaculture goods; 2. It has a single natural or legal producer who assumes the responsibility and risks; 3. It uses at least one means of production such as buildings, machinery, equipment and/or labor on the properties that comprise it. (Colombia, 2014a).

The Colombian Constitutional Court has taken note of this situation and has understood that its role is to examine these inequalities and give a voice to those who lack political representation or are marginalized. Regarding discrete or insular minorities, the court indicated that this is a concept that can be applied to vulnerable groups. Specifically, the Court noted that these are groups that "lack the political capacity or the necessary attention from the authorities. The dimensions of their weakness may lead the State to be unaware of their existence (blind spots), to fail to address their situation (burdens of inertia) or to do so through insufficient measures that do not overcome the structural dimensions that place them in vulnerability" (Colombia, 2021a, para. 103).

As it has been stated in another work (Roa; Aristizabal; 2024a, p. 9) the Court has established the differences between opposition groups and a minority. The latter is based on a quantitative and arithmetic criterion with respect to the electoral result. According to the Court, "the determination of who are majorities and who are minorities will depend, not on a legal provision, but on the sovereign will of the people, expressed directly through electoral mechanisms; that is, it will be the citizenry, through voting, which will lay the basis for classifying a given political current as a minority" (Colombia, 2001a, para. 3.4.3). Regarding discrete or insular minorities, it was indicated that this is a concept that can be applied to vulnerable groups.

The existence of these groups is directly recognized by the Colombian constitutional order. In Article 13 of the Constitution (second paragraph), the constituent provided a mandate for the promotion of groups that are discriminated against or marginalized. The Constitutional Court has identified that these groups must have the following three characteristics. First, they must be an identifiable social group. Second, they must be in a situation of prolonged subordination. Third, that their political power is severely limited by socioeconomic or class conditions or by prejudice from others (Colombia, 2015a, para. 31).

Regarding the clauses on vulnerable groups in the regional Constitutions, it has been stated that with these figures "it is not a matter of eliminating the individual from the equality test, but of taking into account his position on the ladder of stratified societies, and of recognizing that he belongs to a disadvantaged group" (Aldao; Clérico; Ronconi, 2017, p. 88). Thus, inequality has a negative impact not only on the guarantee of the material conditions of existence, but also implies a risk for the rule of law, since it creates insular minorities that are excluded from the democratic and political process. The fact that inequality is so profound in the region also explains the powers of intervention of the constitutional courts.

In its rulings the Court has identified many vulnerable groups, these are the following (Colombia, 2021a, para. 87): informal vendors or workers (Colombia, 2017j); the displaced population and victims of the armed conflict (Colombia, 2004a); the rural population (Colombia, 2015e) and peasants (Colombia, 2012a; Colombia, 2017a; and Colombia, 2018a); young people who have been under the care and protection of the Colombian Institute of Family Welfare (Colombia, 2014c); homeless (Colombia, 2014b); persons with disabilities (Colombia, 2017b); those who have been diagnosed with HIV or AIDS (Colombia, 2017i); the elderly (Colombia, 2019d); persons deprived of liberty in general (Colombia, 2015b; Colombia, 2016a) and women (Colombia, 2018d) and LGTBIQ+ persons deprived of liberty specifically (Colombia, 2018e; Colombia, 2019e); sex workers (Colombia, 2016d; Colombia, 2010b); the indigenous population (Colombia, 2017l); children and adolescents (Colombia, 2001d); children of the Wayuu ethnic group (Colombia, 2017h); ROM peoples (Colombia, 2013b); black, Afro-Colombian, Palenquera and Raizal population (Colombia, 2019b); mothers heads of household (Colombia, 2003b); traditional miners (Colombia, 2017k); disaster victims and victims of disasters (Colombia, 2011b); persons linked to the System for Identification of Potential Beneficiaries of Social Programs (Sisben) (Colombia, 1999); persons in socioeconomic vulnerability (Colombia, 2013c); human rights defenders (CCC. Judgment C-577 of 2017; Colombia, 2023d); domestic workers (Colombia, 2014d); beneficiaries of the social security system (Colombia, 2018c; Colombia, 2012c); veterans survivors of the Korean and Peruvian wars who are destitute (Colombia, 2003a); people who carry out recycling work (Colombia, 2009); and LGTBIQ+ persons in general (Colombia, 2021c).

4.2. Fighting structural inequality through structural litigation

In matters of inequality, the role of the constitutional courts may be more limited, but not for that reason irrelevant. It is not that the courts cannot or should not deal with cases of discrimination, adopt redistributive decisions or ratify equality policies that have been enacted by the legislature. It is a matter of examining the material and factual limits that a court faces in eradicating structural and historical phenomena of inequality. Under these limits and in the exercise of its transformative role, the Colombian Constitutional Court has incorporated several measures to combat structural inequality. This chapter will emphasize three of them: the thesis of the subjects of special protection, the idea of criteria suspicious of discrimination and the recognition of situations of structural inequality (Roa; Aristizábal, 2024b).

First, the subjects of special constitutional protection are "those persons who, due to their particular physical, psychological or social condition, deserve positive state action for the purpose of achieving real and effective equality" (Colombia, 2011a, para. 1.5; Colombia, 2013d; Colombia, 2021b). The Court has recognized as subjects of special constitutional protection children and adolescents (Colombia, 1998d; Colombia, 2008c; Colombia, 2020), pregnant women (Colombia, 2018f), the elderly (CCC. Judgment T-374 of 2022), persons with disabilities (Colombia, 2023c; Colombia, 2024) and persons in a situation of displacement (Colombia, 2004a), although this list is not exhaustive[6].

Based on this qualification, the legislation has explicitly recognized health protection for these subjects[7]. The Court has also indicated that the requirements for access to the tutela action should be more flexible when it comes to discussing certain types of claims against them (Colombia, 2024). It has also indicated that these persons can be the object of affirmative actions (Colombia, 2006), understood as "policies or measures aimed at favoring certain persons or groups, either to eliminate or reduce social, cultural or economic inequalities that affect them, or to ensure that members of an underrepresented group, usually a group that has been discriminated against, have greater representation" (Colombia, 2000; Colombia, 2022b).

Second, the suspicious criteria of discrimination are a tool used by the Constitutional Court to identify whether in a given case a discrimination is harmful or whether it is an affirmative action. For the Court, a distinction is based on suspect criteria if it meets three characteristics (Colombia, 1994, Colombia, 1998a; Colombia, 2000; Colombia, 2016c). First, when it is based on traits that people cannot voluntarily dispense with without losing their identity. Secondly, it involves subjects that have been traditionally undervalued by cultural valuation patterns. Finally, they are not criteria on the basis of which, in principle, a "rational and equitable distribution or sharing of goods, rights or social burdens" can be made (Colombia, 1994; Colombia, 1998a; Colombia, 2000; Colombia, 2016c).

This category has two main effects. On the one hand, when the Court studies a case of discrimination, it must analyze four criteria to establish the harmfulness of the discriminatory act: i) it must be based on a criterion suspected of discrimination, ii) the decision is not justified by a constitutionally imperative purpose, iii) the action produces unequal treatment between persons and iv) there is a harm (Colombia, 2011c; T-030 of 2019; Colombia, 2019f). If the Court finds that these four elements are present, then the discrimination is harmful and must be reproached.

The second effect is related to the intensity of the integrated judgment of equality. This test has been the formula used by the Constitutional Court to evaluate the legitimacy of differentiated and potentially discriminatory treatment (Colombia, 2001b; Colombia, 2001c; Colombia, 2008b; Colombia, 2013a; Colombia, 2015c; Colombia, 2017c; Colombia, 2017d; Colombia, 2017e). The test is called integrated because "the elements of the proportionality test are applied (suitability, necessity and proportionality in the strict sense) but with three different levels of scrutiny (light, intermediate and strict)" (Roa; Aristizábal, 2024b, p. 13).

[6]For example, for the year 2000, the jurisprudence only referred to "children, the elderly, the physically handicapped, or women heads of household" (Colombia, 2005), but in 2018 it considered those with a diagnosis of HIV or AIDS (Colombia, 2018b) and in 2020 to people suffering from orphan diseases (Colombia, 2020).

[7]Law 1751 of 2015 (article 11) (Colombia, 2015a).

The criteria suspected of discrimination are relevant when it comes to establishing the intermediate and strict intensities for the judgment. The Court has pointed out that the intermediate intensity equality test is applied when a suspicious criterion is used to establish a positive or favorable differentiating measure (i.e. affirmative actions)[8]. In the same sense, the strict intensity test is used when the measure is not positive and uses one of the criteria or categories suspected of discrimination in a negative sense[9]. Also when the norm may have a negative impact on people who are in a situation of manifest weakness or affect marginalized or discriminated groups.

Finally, the constitutional court has recognized that there are situations of structural inequality that do not affect a few individuals but an entire social group. In the words of the Court, this implies "that the acts and scenarios of discrimination against specific groups is not random or circumstantial, but corresponds to patterns that have been repeated over time, causing the consolidation of barriers that prevent or hinder the enjoyment of rights by that community" (Colombia, 2019g, para. 7.3). Likewise, the Court has held that these patterns are naturalized and made invisible, which makes it difficult to confront them (Colombia, 2017g). In addition, the court has indicated that this type of discrimination "continues to be immersed in the dominant cultures of the different peoples, communities and social groups that inhabit Colombia. Classist, sexist or racist patterns persist in legal, social and institutional structures, sometimes so intimately linked to everyday practices that they simply become invisible. They are structural discriminations that are simply not seen" (Colombia, 2012b, para. 3.1.2.).

The Court has identified at least four events of structural discrimination: against persons with disabilities (Colombia, 2004b, para. 5.3.3.5), women (Colombia, 2008a; Colombia, 2008d; Colombia, 2022c, para. 23), the black, Afro-descendant, Palenquera and Raizal population (Colombia, 1996, para. 6) and LGTBIQ+ persons (Colombia, 2019g, para. 7.4; Colombia, 2017g). How should we respond to these situations? Most of the time, "individual remedies are clearly insufficient in the face of structural discrimination phenomena. In many cases, this form of concrete remedy may create privileges within discriminated groups or internal tensions within vulnerable groups" (Roa; Aristizábal, 2024b, p. 22).

For this reason, the Constitutional Court of Colombia has resorted on several occasions to the use of structural judgments to combat structural inequality. This type of decision stands out because it seeks to overcome situations of violation of fundamental rights through complex orders that include actions to be taken (e.g. to legislate) or to be given (e.g. to provide a subsidy or humanitarian aid) and combine short, medium and long term objectives (Roa, 2019, p. 467 and Roa; Aristizábal, 2024b, p. 23).

It is possible to find different rulings in cases such as prison overcrowding (Colombia, 1998b; Colombia, 2022e), the provision of water to communities on the Caribbean Coast (Colombia, 2019c), the affectation of ethnic communities by the construction of hydroelectric projects (Colombia, 2014e), health care (Colombia, 2008e) and the satisfaction of the rights of the displaced population (Colombia, 2004a), human rights defenders (Colombia, 1998c; Colombia, 2023d) and the security of the signatories of the Final Peace Agreement (Colombia, 2022d). Not all of these decisions have implied the declaration of an unconstitutional state of affairs[10], but they have incorporated structural orders to solve the problems they faced.

[8]This intensity of judgment applies "(1) when the measure may affect the enjoyment of a non-fundamental constitutional right, or (2) when there is an indication of arbitrariness that is reflected in the serious affectation of free competition". Likewise, it applies in cases where there are rules based on suspect criteria but with the purpose of favoring historically discriminated groups. These are cases in which affirmative actions are established, such as measures that use a gender or race criterion to promote the access of women to politics or ethnic minorities to higher education." (Colombia 2019a, para. 19).

[9]"This type of scrutiny is applied to hypotheses in which the Constitution itself establishes specific equality mandates, which translates into less freedom of configuration of the Legislator and, consequently, into a more rigorous judgment of constitutionality. Thus, the Constitutional Court has applied strict or strong scrutiny when the measure (i) contains a suspicious classification such as those listed non-exhaustively in paragraph 1 of Article 13 of the Constitution; (ii) affects persons in conditions of manifest weakness or discriminated or marginalized groups; (iii) in principle, seriously impacts a fundamental right; or (iv) creates a privilege". (Colombia, 2019a, para. 20).

[10]It is the idea according to which "there are situations of massive and generalized violation of rights that generate a social problem whose victims could individually resort to the tutela action mechanism to obtain protection of their rights. In these cases, the violation of constitutional rights is the result of the prolonged omission of the authorities to comply with their obligations, the existence of practices contrary to the Constitution, the absence of legislative and administrative measures or incorrect budgetary provisions" (Roa; Aristizábal, 2024b, p. 24).

Finally, it is important to reflect on the role of the Court in addressing inequality under the first left-leaning government in Colombia, that of president Gustavo Petro. This is relevant because there's been voices of concern regarding some kind of conservatism on the Courts part[11]. In this context, the Colombian Constitution does not have a specific economic program, and it allows for different economic models[12], nonetheless, it has certain central economic clauses that must be held by the Court. In this sense, it will be important for the future that the judges identify which economic aspects of the Constitution imply some of its axis and thus cannot be affected by a right- or left-wing economic program. Regarding this issue, recently the Court held that:

> "Although desirable, the increase in revenue to finance public social spending must be subject to constitutional mandates. It insisted that the fact that a tax provision substantially increases tax collection is not sufficient to consider it valid if, at the same time, it disregards such a clear constitutional limit as the prohibition of confiscation of taxes. Likewise, the Court emphasized that when a regulation provides for a source of tax collection that does not comply with the Political Constitution, the increase of income in the revenue budget is, consequently, invalid. Therefore, it cannot be argued that as a result of the declaration of unenforceability of the tax regulation, income for the general budget of the Nation is lost, since it is not possible to lose what is appropriated contrary to the constitutional order" (Colombia, 2023b, para. 362).

5. Facing constitutional populism. A defense of the 1991 Constitution: complying with it to transform society

This analysis of the crisis of the rule of law in Colombia cannot end without referring to recent attempts to establish a model of constitutional populism. In particular, through the proposal of constitutional reforms of popular origin and of determinable content through social movements. In this context, it is relevant to return to the thesis of constitutional dualism in order to know when a demand for a new constituent pact is a harangue and when it is a true constitutional moment. The success of a constituent process-as Chile's experience shows- depends, to a large extent, on knowing how to distinguish between a demand or social mobilization and a true moment of constitutional transformation.

Three decades ago, Yale Law School professor Bruce Ackerman referred to constitutional dualism. That idea suggests that a democracy faces two types of decisions that are adopted in well-defined circumstances (moments). On the one hand, there are the determinations that the people adopt in exceptional moments from the point of view of time and the conditions of deliberation. These decisions enjoy the highest degree of democratic legitimacy because they are agreed upon at moments of constitutional politics or constitutional moments. On the other hand, there are the decisions taken on a daily basis by the legislator and the government. These are adopted in legislative or governmental policy moments and have a lower degree of democratic legitimacy (Ackerman, 1993).

The above classification between two types of decisions corresponding to constitutional times and legislative or governmental times means that there are moments in the history of a political system in which the people are more involved in the decision-making process and moments in which they are less involved. In the latter, the citizenry lets the representative democratic process flow and grants a greater space of discretion to its representatives. This level of involvement of the people in the decision-making process has direct effects on the degree of democratic legitimacy and on the effectiveness of the decision itself. Therefore, the Constitution has greater democratic credentials than laws or administrative regulations.

A constitutional moment is a complex period in which a new deep social disagreement or the intention of the political community to change the way in which an old disagreement has been resolved is identified. Within this process,

[11]In the column "¿Se está "Lochnerizando" la Corte Constitucional" Rodrigo Uprimny reflected on this issue: Uprimny, 2024.
[12]Uprimny has stated that Constitutions like the colombian "seem at the same time to expand state intervention and the redistributive functions of the authorities by recognizing new social rights and maintaining state direction of the economy, but also seem to reduce such intervention by making possible the privatization of certain public services that were previously state monopolies." (Uprimny, 2011, p. 117).

the proposals that make up the extremes of the debate also emerge; the people pronounce themselves in favor of some of these proposals, either in popular consultations and referendums or in parliamentary and presidential elections; the social movement is activated in favor of or against the proposals; local or national elections occur that confer prevalence to the options or candidates that support one of the proposals and the new decision is implemented.

Under an ideal perspective, in constitutional moments, decisions would be taken through constitutional reforms or new Constitutions, while in ordinary political moments, legislative and regulatory decisions would be adopted to give effect to the Constitutional norms. Unfortunately, in practice, it may happen that the Constitution is formally amended without there being a constitutional moment or that all the conditions for the existence of a constitutional moment concur without the processes of formal constitutional change being promoted or succeeding.

Since the Constitution was approved, the country has only had two true constitutional moments. The first gave rise to the National Constituent Assembly, caused a break with the 1886 Constitution and led to the approval of the 1991 Constitution. The second constitutional moment occurred with the partial transition that meant the peace process with the FARC guerrillas. In this process, several important constitutional amendments were approved through an expedited constitutional reform process (fast track). Generally speaking, the other reforms to the Constitution (more than sixty to date) occurred without a true constitutional moment.

Knowing how to identify when a constitutional moment exists- and especially when it does not occur- is not only a matter of theoretical adaptation. On the contrary, the fact that formal constitutional changes respond to true constitutional moments and not to passing winds is fundamental to: preserve the legitimacy of the existing Constitution and of the amendment that is intended to be introduced, ensure the effectiveness of the amendment and preserve the stability of the original constitutional consensus. What happens when the Constitution is reformed (totally or partially) without there being a true constitutional moment is that this change falls into the void and does not solve the social problem it was intended to attack. This ineffectiveness of the Constitution generates the same level of social frustration that arises when the Constitution is not reformed despite the fact that there was a broad and true constitutional moment. The latter has happened in Chile in the last seven years after the failure of two outstanding attempts to adopt a new Constitution.

This dualistic distinction is fundamental to understand and evaluate any proposal for partial or total constitutional reform of the 1991 Constitution. Beyond the specific content proposed in each amendment (i.e. peace, justice, pensions, corruption), citizens should always ask themselves: are we in a constitutional moment in which the cause of our structural problems or of any specific one that besets us lies in a deficiency of the current text of our Constitution or in the entire Constitution in force? The answer to this question should determine much of our position on whether we should initiate a process of constitutional change with the institutional and deliberative wear and tear that this implies.

This question is a good way to detect cases of constitutional populism (Jakab, 2015). These occur when the existence, extension or aggravation of a structural social problem is attributed to the Constitution (all or one of its parts) (Corrias, 2024). Thus, the reform of the Constitution appears as the only magic formula to change that social aspect. A clear populist tendency to convene constituent assemblies has been identified, which has led to a reformulation of the concept of constituent power. There is even talk of the death of constituent power (Ferreres, 2024, pp. 63–75). This populism is endowed with a certain constitutional fetishism and is similar to the situation of someone who loses the game and chooses to blame the rules of the game or the referee as a way of covering up his dissatisfaction with the result derived from his inability to beat the rival. The excessive reform of the Constitution is a way of covering up the responsibility for not effectively complying with it. In the case of the 1991 Constitution, the excessive insistence on its reform denies that social transformation can occur with the current Constitution. It is not perfect, but it provided the Colombian system with the dogmatic and functional mechanisms necessary to build a true welfare state. Not in vain, it is one of the Constitutions with the greatest vocation within the global transforming constitutionalism.

Moreover, social change is too important to be left to the Constitution alone. Therefore, Colombian society should make a sort of ten-year pact. This would consist of a decade without formal constitutional reforms. It would be a kind of institutional break to look elsewhere and, specifically, towards the structural causes of the pressing social and political problems. The 1991 Constitution is sufficiently aspirational to cover most of the challenges of this generation in the social, political, environmental and new technology fields. The duty of citizens (and this includes, first and foremost, the authorities) is to comply with it, to take it seriously and not to modify it. Guaranteeing the rights of the weakest requires bringing the promises of the current Constitution closer to people's lives in order to change those lives. What does not seem a contemporary necessity is to change the Constitution so that those lives wait in desolation for a constitutional amendment to do for them what – usually- is not behind the motivation for a new constitutional pact. So let's comply with it instead of changing it!

5.1. Against anti-democratic constitutional populism

Under the approach of anti-democratic constitutional populism (Halmai, 2018), some proposals should be evaluated which, not because they are far-fetched or excessively unconstitutional, should be omitted as relevant dangers for the stability of the democratic and constitutional system. In Colombia, since 1992, all presidents have yielded to the temptation of proposing a National Constituent Assembly with the excuse of solving pressing social problems or correcting errors in the institutional design. The truth is that the idea of perpetuating in power has always been latent in the background. Even President Juan Manuel Santos, who presumes to have abolished reelection in Colombia in 2015, presented the proposal for a constitutional amendment that would prohibit this figure only after having reelected himself and thus ensure eight years in office as president. One of the first things that Colombian political leaders should learn is that today the republic is in a mature situation to know that the Constitution and the constituent power are not to be played with for personal purposes.

From a legal and formal perspective, reelection was abusively imposed in several States of the region (i.e. Bolivia, El Salvador or Nicaragua) through the easy instrumentalization of the control of conventionality and the Inter-American jurisprudence. That rationale was diluted because the Inter-American Court answered-in an advisory opinion that was requested by Colombia- to a question that nobody seriously informed was asking in international human rights law. The question was whether re-election was a human right. The Inter-American court made it very clear (in case it was needed) that presidential reelection is not a human right and that the limitation to the exercise of public office is not contrary to the human right to equality. Therefore, prohibiting reelection is not a limitation to political rights or a violation of the principle of equality of those who govern (I/A Court of HR, 2021).

Despite this, recently President Gustavo Petro has proposed a kind of popular constitutional reform. His argument is that the Congress of the Republic has not approved the laws that concretize the government program of the president who was popularly elected for the period 2020-2024. This idea of the president ignores the separation of powers, the role of political control of the parliament and that a reform to the Constitution must generate a moment of social and political consensus instead of constituting a transcendental imposition of a government program. The constituent process is not a scenario that occurs as a substitute for the lack of agreements in ordinary politics. When the Congress fails to advance in the legislative agenda or does not reach fundamental agreements to respond to the pressing problems of the country, this is a precaution-and not an incentive- to carry out a constituent process that does not have the intrinsic virtuality to generate consensus nor the capacity to put the citizen agenda in the interests of politics.

Moreover, the pretension of constitutionalizing a government policy or a party's political plan is one of the examples of abusive constitutionalism. It is the strategy in which the winners take all. This way of acting politically is harmful because it generates a dynamic of cycles-or pendulums- that was well known in Colombia until before 1991.

In the latter, the party that won the elections took it all by drafting its own Constitution. The constitutional history of Colombia unfortunately runs between the incessant dichotomy of liberal and conservative Constitutions that prevented - until 1991- the necessary maturity of a deliberative and consensual republic.

Even now, under the deliberative paradigm of the 1991 Constitution, the new deliberative dynamics are not taken seriously. One of the most interesting deliberative forms of citizen participation are the assemblies or mini-publics that have occurred in Germany, British Columbia, Scotland, Ireland or Mongolia. However, in none of these cases has it been proposed that these assemblies completely replace institutional power or that they take place without some form of institutional power (referendum, Congress or elections) validating (or not) the agreements that have emerged there. In Colombia, the aspiration is for the groups to empower themselves and participate. Not that these, in the midst of their marginalization, become islands of decision-making outside institutional channels, as is now proposed. Therefore, not even the current occurrence of a social movement-such as that of the then seventh ballot- would allow or justify a constituent process in Colombia under the institutional channels of the 1991 Constitution. The movement of the seventh ballot-with its subsequent judicial and electoral endorsement- took place at a time of constitutional rupture and in the face of a Constitution that closed the channels for transforming constitutional change.

In addition, the 1991 Constitution does not represent any obstacle to social change or to facing contemporary social challenges. Contrary to what is often argued, the current Constitution is an open constituent pact that fosters social transformation. The most important objective of the 1991 Constitution is the construction of a welfare state. The great proof that a real social transformation can occur without the need for a new Constitution is that in Colombia a transition (admittedly partial and incomplete) was made within the Constitution after the peace process with the FARC. In the environmental sphere, which today is by far and with good reason the most pressing global concern, the 1991 Constitution allows for both sustainable development policies and others of greater sensitivity to the climate catastrophe. In short, the 1991 Constitution has not ceased to be a good tool for facing the future. The citizens of many countries in the world would like to have the level of agreements that exist in Colombia at the constitutional level.

Of course, the evaluation of the current Constitution must take place without conformism. Constitutionalists have a good list of mistakes that were made in the institutional design of 1991 and others that have been introduced in the last three decades. In the next decade, the Constitution should remain stable so that society can think with calmly about what is clearly not right: the territorial ordering, the autonomy of the superintendencies in a regulated world, the cracks in the electoral system or the economic configuration of investment in relation to the protection of the rights of marginalized subjects and groups. None of these require urgent reform, merit a National Constituent Assembly or are on the agenda of those most interested in convening one. For this reason, we must not give in to the anti-democratic constitutional populism that is present in all spectrums of political thought.

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