Is there Hope in Judicial Activism on Social Rights?
Assessing the Dimension of Judicial Activism on Social Rights in Colombia*

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Introduction

Since its creation in 1991, the Colombian Constitutional Court (hereinafter, CCC) has been one of the main protagonists of the country’s institutional and political life. Its vigorous intervention on various economic, political and social matters has promoted important changes in the institutional balance of power, as well as in the concrete lives of traditionally marginalized or excluded social groups. This judicial progressive activism\(^1\) has prompted a great deal of both academic and political discussion. It has been defended by some scholars and social movements, while it has been strongly criticized by others, including relevant legal and political actors.

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* We are very grateful to Sebastián Rubiano and Santiago Vargas, who generously assisted us in the empirical research for this paper.

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\(^1\) Following Uprimny, we do not believe that activism and progressiveness of the judges should be identified, given that there may also be conservative activism, that is, judicial intervention in political and social matter that does not promote social transformation, but instead the perpetuation of the status quo. See Rodrigo Uprimny, *The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates*, in *courts and social transformation in new democracies: an institutional voice for the poor?* 127 (Roberto Gargarella et al., eds., 2006). The best example of conservative activism is the activity of the United States Supreme Court in the early twentieth century. Moreover, as Santos points out, “up until recently[,] the best known instances of court activism were politically conservative, if not reactionary.” Boaventura de Sousa Santos, *Los paisajes de la Justicia en las Sociedades Contemporáneas*, in *el caleidoscopio de las justicias en colombia* 85 (Boaventura de Sousa Santos & Mauricio García Villegas eds., 2001).
The discussions regarding the intervention of the CCC have been especially intense regarding the protection of social rights\(^2\) it has endeavored. Indeed, not only has this protection been one of the fields in which the Court has been most progressive; it has also meant a significant judicialization of economic policies, thus becoming a very sensitive political issue.

That is why, in this article, we will attempt to assess the CCC’s activism regarding social rights. To do so, we will develop the following hypothesis: THE POLITICAL ASSESMENT OF THE judicial protection of social rights depends on the notion of Constitution one defends. If such notion is either too wide or too restrictive, or takes the material context too little or too much into account, grasping the real dimension of judicial activism on social rights will always be a disappointing task. We will illustrate this hypothesis by referring to an empirical research conducted on the CCC’s intervention on social rights between 1992 and 2006.\(^3\)

The article is divided in four sections. In the first section, we will develop our theoretical approach, by looking at the different notions of Constitution and to the different ways in which these notions value judicial activism on social rights and the social change it may bring about. In the second section, we will offer a contextual description of the Colombian case, so as to offer some key elements of Colombia’s constitutionalism. In the third section, we will present

\(^2\) There is a great deal of ambiguity in the expression “social rights”. It may include or exclude certain rights, depending on the width with which one understands the concept. From a restrictive point of view, the notion of social rights only includes welfare rights, that is, rights that imply a State’s positive duty to deliver a service or an economic subsidy to citizens. In contrast, in the widest conception of the term, social rights include not only welfare rights, but also rights that only imply a negative obligation of the State consisting in non-intervention, but that can be considered social rights either because they are second generation rights, and/or because their protection is determinant for people to be able to claim their welfare rights (such as the right to form labor unions or to go to strike). Some have suggested that, rather than dividing social rights between those that are and are not welfare rights, one should look at the “welfarian” dimension of each right, given that, most of the times, the same social right might imply both positive and negative State obligations. This position has been defended by the CCC, see, CORTE CONSTITUCIONAL, Ruling T-595 de 2002.

The judicial protection of social rights in a strict sense –i.e., welfare rights- or in their “welfarian” dimension is that which generates the harshest criticisms, since it is seen as judicial activism, or judicial intervention in redistributive matters. However, as we shall see, we believe that true judicial activism on social rights does not cover the whole set of welfare rights or the “welfarian” dimension of social rights. Rather, we argue that judicial activism on social rights only takes place when judges order the State to comply with a positive duty to provide a service or a subsidy, which was not clearly stated as a legal obligation before. Whereas, there is no real judicial activism when the judge simply orders the State to provide a service or a subsidy, which, according to the preexisting law, it was already in the duty to provide. That is why, for the purpose of assessing true judicial activism on social rights, we distinguish between non-welfare and welfare social rights, as well as between welfare rights in a wide and a strict sense, and only think of real judicial activism in the latter sense.

\(^3\) As we will later see in more detail, the research was conducted in two phases. The first phase’s results, which covered the CCC’s 1992 to 1997 period, were published in Mauricio García, Derechos sociales y necesidades políticas. La eficacia judicial de los derechos sociales en el constitucionalismo colombiano, in EL CALEIDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA 455 (Boaventura de Sousa Santos & Mauricio García Villegas eds., 2001).The second phase’s results appear in this article for the first time.
our empirical research on the CCC’s intervention on social rights, and will extract some preliminary conclusions on the real dimension of judicial activism in Colombia. In the fourth and final section, we will draw some general conclusions, which will try to link the theoretical approach to the empirical research.

I. The Theoretical Approach: Notions of Constitution and its Relation to Social Change

In our perspective, the understanding of the notion of Constitution is a key element to value the judicial protection of social rights and its potentialities for bringing about social change. Indeed, depending on the reach and effects one believes a Constitution has and should have, one will tend to be more or less critical regarding the social changes that judicial activism on social rights may or may not produce. In the following lines, we will first distinguish two different models of Constitutions and will look at the institutional arrangements they tend to bring about, particularly regarding the distribution of competences of social rights protection (a); we will then focus on those Constitutions –such as the Colombian 1991 Constitution-, which tend to attribute the competence of protecting social rights to the judiciary, and will analyze the different academic and political criticisms that arise against them (b).

a) Models of Constitutions

We differentiate two models or types of Constitutional texts: protective Constitutions and aspirational Constitutions.4

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On the one hand, protective Constitutions are generally fostered in political and social contexts in which basic conditions of social progress and institutional stability have been reached. Therefore, these Constitutions tend to protect or preserve such conditions, and to prevent a history of abuses that has been overcome from taking place again. Protective Constitutions have thus minimalist or modest goals, in the sense that they reflect an effort to secure the present. That is why these Constitutions tend to treat rights, and particularly social rights, as political matters or programmatic norms, the materialization of which is mostly carried out by legislators and the executive.  

On the other hand, aspirational Constitutions usually prosper in contexts in which there is great dissatisfaction regarding present conditions and a very weak legal protection of rights, but at the same time a strong belief in the possibility of reaching a better future through Constitutional law. For that reason, rather than pretending to preserve the present, these Constitutions aim at radically changing it and to improve social change. That is why aspirational Constitutions tend to have ambitious or maximalist goals, which imply the existence of a big gap between the Constitutional text and the social reality it aims at regulating. Among these ambitious goals, the applicability of Constitutional rights in general, and of welfare rights in particular, is central. These rights are thus treated as legal norms, which MUST be protected.

Aspirational constitutions are sometimes the result of a victorious revolution. When that happens, social rights are applied through the political system, i.e. through legislation made by a parliament in which a clear political majority is

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5 This model of Constitutions is common in core countries, and especially in those with an Anglo-Saxon tradition. However, at times, protective Constitutions are enacted in peripheral or semi-peripheral countries, in which the present is not particularly attractive, or it is so only for a dominant minority. Such is the case of the Colombian Constitution of 1886.

6 Aspirational Constitutions are common in peripheral and semi-peripheral societies. Cass Sunstein maintains that there are two kinds of Constitutionalism: one from the North and the West, and the other from the South and the East of the world. Cass Sunstein, The Negative constitution: Transition in Latin America, in TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY (I. P. Stotzky, ed., Westview Press, 1993), where unsatisfied needs are big, but so are hopes of law being able to deal with them in the future. This is especially true in the case of Latin America, where the conception of law, and Constitutions in particular, as the product of the will of the people capable of transforming the context without restrictions was inherited from the French Rousseanian thought and revolutionary tradition. However, in some circumstances, aspirational Constitutions emerge in developed countries facing times of instability - such as happened in Germany and Italy after World War II, or in post-Franco Spain. Ruto Teitel, Transitional Jurisprudence: The Role of Law in Political Transformation, 106 The Yale Law Journal 7 (1997), 209-280.

7 Nevertheless, this characteristic should be approached with caution, given that the objective of this type of constitutionalism is to create a pluralist and tolerant society that excludes static and unchangeable models of society and life. See Gustav Zagrebelski, IL DIRITTO MITE (1992). In this sense, emphasis is placed more on procedures than on content, specifically on the procedures required to achieve co-existence amongst people holding different worldviews.
in place, as a result of the previous revolution.\(^8\) Indeed, revolutions bring with them a generalized desire for social transformation, which actors who actively participated in the revolution are willing to materialize, and which very likely will receive social support. Besides, revolutions bring about important institutional changes, which very often imply an opening of spaces in the political arena for those who were engaged in the revolution. Moreover, it is very likely that post-revolutionary States will tend to recruit their agents from those who participated in or at least supported the revolution. And this means that different State actors will be eager to engage in the effective application of the aspirational Constitution, which may lead to low levels of inter-institutional conflict, given that different State agents are committed to a similar political project.

But very often aspirational constitutions are promulgated in countries in which no previous political or social revolution has happened. In these cases it is possible that the constitution become rather a symbolic text. But it is also possible, especially when a strong constitutional court is established by the constitution text, that judges take seriously the constitutional obligation for the protection of social rights and social change and force both the parliament and the administration to do so. In this case, there a tension between the judiciary and the other two branches. In seeking social change, judges may end up intervening in economic and political matters usually dealt with by parliament or the executive. As a result, important inter-institutional conflicts often arise between constitutional judges and political organs.

Contexts in which a revolution has not taken place may be more hostile for an aspirational Constitution. Indeed, even if the Constitution is the result of a momentary national agreement on the necessity of structural transformations, it is possible that political actors engaged in the constituency process will not continue to be committed to its results afterwards. This may happen because of the fact that, apart from the production of the Constitutional text, not much social transformation takes place. Thus, political commitment to the social transformation project may weaken soon after, being reduced to a few State agents still willing to defend it. In such settings, inter-institutional conflict is very likely to foster because while some State actors may be willing to support and effectively apply the progressive content of the aspirational Constitutions, others –often more- may insist on interpreting the Constitution as a set of political promises, which need not be materialized right away. As we will see in detail in the next section, this is precisely what has happened in Colombia since

\(^8\) However, this does not mean that aspirational Constitutions emerging from post-revolutionary contexts are always eagerly applied by all State agents equally. There are some cases that illustrate that, despite them all being supporters of the revolution; some State agents are more active in the development of the new aspirational Constitution.
the Constituent Assembly of 1991, where the progressive Constitutional text regarding social rights has only been strongly defended by the Constitutional Court, thus generating a great deal of conflict between the Court and the political powers, who tend to interpret it in rather restrictive ways.

For aspirational Constitutions to be materialized, political will of State agents and social mobilization of the population in favor of their contents are fundamental. Moreover, for aspirational Constitutions to effectively bring about the social transformations they promise, the existence of a legal culture that favors rights protection and social change is also necessary. This is so because, having such ambitious goals, the legal or judicial development of aspirational Constitutions is a necessary condition for their effective application, but it is insufficient. In order to achieve their stated goals, these constitutions need external sources of support, different from the State bureaucracy implementing their Constitutional mandates.  

The existence or absence of a previous revolution is not as relevant for the luck of protective Constitutions as it is for aspirational Constitutions. Indeed, protective Constitutions impose minimal restrictions to public authorities in order to prevent power abuses, but leave the issue of further developing Constitutional rights or protecting social rights to the competence of political agents. Therefore, protective Constitutions do not need a strong political will of State agents or a deep social commitment to it in order to be materialized; their materialization basically consists in those agents respecting the limits to power that they impose and, by doing so, in protecting the basic or fundamental rights of citizens.

b) Debates prompted by aspirational Constitutions

Aspirational Constitutions do not only face the difficulties derived from inter-institutional conflicts. They also face political and academic criticisms.

From a conservative point of view, aspirational Constitutions wonder into political and economic fields, whose matters should be decided by political actors. Within this conservative perspective, it is possible to identify at least two types of critiques

The first defends a minimalist notion of the Constitution, in the sense that it should only be understood as a set of general principles that guide the action of

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9 On the one hand, they require what we call –following Donald Kommers’ use of the concept of “militant democracy”- militant constitutionalism. This means that the effective application of aspirational Constitutions needs a permanent commitment from the political forces that enabled them to emerge, and in particular, a strong support of the social changes they are willing to bring about by means of the constitutionalization of social rights.
the legislator and that, therefore, do not have a normative but rather a political or programmatic character. From this point of view, with their ambitious goals and their generous formulation of rights –especially social rights–, aspirational Constitutions go too far in their content and scope and end up regulating matters that should be reserved to the competence of the legislator. This is not only problematic because of the inter-institutional conflicts that may arise between political actors and constitutional judges, but also because of the deficit of democracy it may bring about as a result of judges colonizing political and economic matters. This point of view is adopted by some one that may be named restrictive constitutionalist; he believes that the goals and rights contained in aspirational Constitutions should be interpreted in the most restrictive way possible, that is, not as legal norms that can be directly applied, but as political promises and guiding principles, which may only materialize when political actors believe it convenient to develop them.

The second perspective shares this critical vision and defends the importance of interpreting them in a restrictive way, but does so for different reasons. Indeed, inspired in the economic theories of law, he does not belief in constitutional law as an efficient mechanism for regulating social life, unless it is subordinated to economics, and particularly to the principles of market efficiency and wealth maximization. From this point of view, aspirational Constitutions are anything but efficient; they enshrine social rights as applicable legal norms and, in doing so, they compete with and make civil and particularly property rights uncertain, interfere with the functioning of the free market, and create obstacles to economic development. The person how adopts this point of view may be a distrustful economist. He believes that aspirational Constitutions should be restrictively interpreted, and that the

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10 Cita?


12 Posner, Ob. Cit. These postulates were adopted by the first generation of Law and Economics, but are currently questioned by most of its advocates. Thus, although most of them consider that the analysis of law in terms of efficiency is still useful to evaluate the way in which judges should rule, they do not believe that the notion of efficiency is the only important factor to evaluate law. See for example, Ulen, 1989.

13 Rodriguez and Uprimny synthesize the different criticisms social rights protection has received from philosophical, classical economic, and institutional neoliberal theorists. César Rodríguez and Rodrigo Uprimny, ¿Justicia para Todos o Seguridad para el Mercado? El Neoliberalismo y la Reforma Judicial en Colombia, in César Rodríguez, Mauricio García and Rodrigo Uprimny, ¿JUSTICIA PARA TODOS? SISTEMA JUDICIAL, DERECHOS SOCIALES Y DEMOCRACIA EN COLOMBIA (Norma, 2006).
development of their goals should be left to the competence of political actors, who are more sensitive to economic restraints than constitutional judges are.14

But aspirational Constitutions are not only criticized by authors who defend conservative positions. From a progressive perspective, aspirational Constitutions are often criticized not because of their ambitious goals and generous rights’ content, but, quite on the contrary, for the restrictiveness of their scope in effects. Indeed, from this progressive, yet critical, point of view, aspirational Constitutions fail in achieving their purposes, as they are not able to fully bring about the rights’ protection and social transformation they promise they would. Within this perspective, it is possible to identify at least two conceptions of what a Constitution should be.

The first one defends a maximalist but also principled notion of the Constitution, according to which the constitutional text should be considered immediately applicable and non negotiable. This personage may be named the intransigent constitutionalist. He agrees with the content of aspirational Constitutions, but believes they tend to fall short in their scope and effects. Indeed, most of the times, aspirational Constitutions encounter difficulties and constraints in the contexts they are to be applied, especially because, paradoxically, societies experiencing the greatest degree of need generally adopt the most pretentious Constitutions. Therefore, the content of these Constitutions, and particularly the social rights recognized therein, are interpreted as needing to be progressively materialized, rather than fully and immediately developed. This is unacceptable for the intransigent constitutionalist, who then criticizes aspirational Constitutions for submitting social rights to political or economic considerations, which should be considered irrelevant given that the full realization of those rights is a legally binding imperative that needs to be complied with, despite the difficulties this project may encounter.15

The second progressive personage may be a disillusioned utopist. He agrees with the aims of aspirational Constitutions but, nonetheless, criticizes them for falling short in accomplishing them. From this point of view, Constitutions should be able to promote social transformation. However, they never do so satisfactorily because they work as a functional apparatus to structural unequal power relations. According to the disillusioned utopist, aspirational Constitutions are particularly problematic in the sense that, although they do not promote real social change, they give the impression of doing so, through

14 For an illustration of this stance in Colombia, see Sergio Clavijo, Fallas y fallos de la Corte Constitucional (Alfaomega-Cambio, 2001); Alberto Carraquilla, Economía y Constitución: hacia un enfoque estratégico, 12 Derecho Público (2001).

15 For an illustration of this stance in Colombia, see Rodolfo Arango, Ob. Cit.
generous formulations of social rights and by opening the possibility of their judicial protection. This possibility allows for social rights to be protected in certain cases, which, despite of being marginal and of not constituting a true challenge to actual power relations, show themselves as important emancipation tools. In that way, from the disillusioned utopist’s perspective, aspirational Constitutions and their clauses on social rights legitimize the status quo of power relations, by opening the space to meaningless legal victories that, moreover, have the perverse effect of deviating attention—through their emphasis on the legal strategy—away from the true political struggle against oppression.16

Even though all the aforementioned perspectives are different both in political orientations and in the arguments they use to criticize aspirational Constitutions, they share one common methodological stance: an instrumentalist conception of the relation between law and social change. In fact, they all believe that Constitutional texts are capable, by themselves, to promote social change, as if they were external objects to the contexts in which they aim at intervening, that is, as if they were instruments or tools that may cause changes on those contexts.17

We are convinced that instrumentalism is not only a theoretically and methodologically erroneous way of understanding the relation between law and social change; it is also very counterproductive for progressive political stances. On the one hand, instrumentalism is founded on the false belief that legal institutions are external to their context and can act upon them as if they were causal entities.18 This belief has been refuted by contemporary sociology of law, and particularly by the constructivist methodological stand regarding the relation between law and social change. In contrast with instrumentalism, constructivism understands the relation between law and context not as a causal relation, but as relation of mutual or reciprocal incidence. Law is therefore not conceived as an external but as a constitutive element of the context in which it

16 For a general illustration of this theoretical stance, see among many others, Duncan Kennedy, Liberdad y Restricción en la DECISIÓN JUDICIAL. EL DEBATE CON LA TEORÍA CRÍTICA DEL DERECHO (CLS) (Diego Eduardo López ed., Juan Manuel Pombo & Diego Eduardo López Medina trans., Siglo del Hombre Editores 1999) (1986). For its illustration in Colombia, see Óscar Mejía and Lina María Mápura, DERECHO Y COSIFICACIÓN SOCIAL: Límites y paradojas de la jurisprudencia emancipatoria, in XXX.


18 This belief was quite important in the legal sociology field for a while. During the sixties, it was strongly promoted by the Law and Development movement, which saw in the law the fundamental motor for bringing development to countries in the global south. However, policies based on this idea rapidly failed, and the movement was submitted to intense criticisms. See.
intervenes; law determines that context, but at the same time, it is determined by it.19

The constructivist stance admits a political progressive perspective that falls in the middle of both too optimistic and too pessimistic views.20 According to this intermediate progressive view, aspirational Constitutions and the judicial protection of social rights they entail, constitute an important mechanism to promote social change; nonetheless, the effectiveness of this mechanism is, if individually considered, only partial. In order to be more effective, the legal strategy must be part of a wider political strategy aiming at social transformation through the materialization of social rights. This wider political strategy implies the existence of contextual elements, different from law itself, such as an active political and social support of the Constitutional project in general and of judicial progressive activism regarding social rights in particular, as well as of a favorable legal culture of rights protection.

From a political point of view, this constructivist thesis seems more favorable to social transformation. Given that a serious political commitment of different social actors with the Constitution is necessary for a real social change to take place, the critical stances only weaken this possibility, by means of not committing to the transformation project and thus limiting its possible effects. In that way, these critical stances actually help their critical visions of aspirational Constitutions come true, and thus work as auto-accomplished prophecies. In so doing, these critical stances end up being quite functional to conservative perspectives: they deem aspirational Constitutions to failure, just as those perspectives would have wanted.

II. The 1991 Colombian Constitution: An Aspirational Constitution in Hostile Ground21

19 For constructivism’s origins in the theory of social action, see Peter L. Berger y Thomas Luckmann, LA CONSTRUCCIÓN SOCIAL DE LA REALIDAD (Amorrortu 1967). For a theoretical application of constructivism to to law, see Pierre Bourdieu, LA FUERZA DEL DERECHO (Uniandes, 2000). For more contemporary developments of constructivism, see Alejandro Portes XXX; Peter Evans XXX.

20 This intermediate thesis is inspired by the work of Michael McCann, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994). For the use of this intermediate thesis in previous works of the authors, see Mauricio Garcia & Rodrigo Uprimny, Tribunal Constitucional e emancipacã social na Colombia, in DEMOCRATIZAR A DEMOCRACIA. OS CAMINHOS DA DEMOCRACIA PARTICIPATIVA, 298-339 (Boaventura de Sousa Santos ed., 2002); Maria Paula Saffon, Can Constitutional Courts be Counterhegemonic Powers vis-à-vis Neoliberalism? The Case of the Colombian Constitutional Court, 5 Seattle Journal for Social Justice 2 (2007); Mauricio García Villegas, No sólo de mercado vive la democracia, 6 REVISTA DE ECONOMÍA INSTITUCIONAL No. 10 (2004)

21 This section is mainly based on Saffon Ob. Cit.; García & Uprimny, Ob. Ci.
Colombia’s current Constitution is a good example of an aspirational Constitution that has achieved an important degree of efficacy but that, nonetheless, faces many obstacles that hinder its possibility of promoting social change. These obstacles have to do with several factors that characterized the Constituent process: the absence of a preceding revolution or even of a triumphant party, the subsequent deficit of a strong political will of developing the Constitutional emancipatory project in its aftermath, the existence of a strong judicial activism on social rights operating as a default, and the inter-institutional conflicts and aligid academic and political debates derived from such an activism.

The promulgation of the Colombian 1991 Constitution was not the result of a prior revolution or even of the triumph of a new political party; it was rather the product of a consensual attempt to confront a profound political crisis consisting in political corruption and violence. Thus, the main objective of the Constituent Assembly from which it emerged was, without a doubt, that of broadening democracy. The pluralist composition of the Assembly contrasted with the traditional two-party system of political domination. Many traditionally excluded social and political sectors were able to actively participate in the process of making the new Constitution, such as members of demobilized guerrilla groups, religious and political minorities, indigenous communities, and student movements.\textsuperscript{22}

As a result, the 1991 Constitution is strongly aspirational in both its goals and contents. It was certainly intended to create a new societal model, its main ideological orientations including the broadening of participation mechanisms, the imposition of social justice and equality, and the guarantee and effective protection of a rich set of Constitutional rights. In order to accomplish these ambitious goals, the Constitution incorporated a genererous Charter of Rights composed of civil and political rights, as well as social, economic, cultural, and collective rights.\textsuperscript{23} Moreover, the Constitution declares that many of those rights are directly enforceable\textsuperscript{24} and cannot be suspended during states of

\textsuperscript{22} More than forty per cent of the delegates to the Constituent Assembly did not belong to the Liberal and Conservative parties, which until that day had dominated the political scene. Out of the seventy elected delegates at the Assembly, nineteen represented the Democratic Alliance–April Nineteen Movement (AD-M19 in Spanish), a political party created by former guerrilla group M-19 after the peace process; two came from the Patriotic Union, a left-leaning political party that was drastically targeted by paramilitary violence; two represented children and students; two came from indigenous communities, and other two represented non-Catholic Christians. See Jaime Buenahora, \textit{El proceso constituyente} (Bogotá: Tercer Mundo, 1992).

\textsuperscript{23} \textit{CONSTITUCIÓN POLÍTICA DE COLOMBIA}, arts. 11-82 (1991).

\textsuperscript{24} \textit{Id.} at arts. 4 & 85.
It specifically recognizes social rights as subjective and enforceable rights, and establishes the State’s duty to satisfy them. It also states that human rights treaties ratified by the Colombian State are legally binding in the same way that Constitutional rights are.

Furthermore, the Constitution text designed several institutional and procedural mechanisms, addressed at making access to constitutional justice a simple, affordable, and accessible endeavor. First of all, it created the Colombian Constitutional Court (CCC), as a high Court specifically devoted to the interpretation of the Constitution and the protection of fundamental rights. In contrast to the Supreme Court of Justice (the former institution in charge of carrying on judicial review), the CCC has engaged in progressive activism regarding many other areas of constitutional law—including the protection of social rights. This progressive activism has been the result of several contextual elements, but it could take place especially due to the constitutional text’s breadth regarding rights and the design of procedural mechanisms aimed at guaranteeing their effective protection.

On the one hand, the 1991 Constitution created the *tutela* action, which permits any person to request any judge in the country to protect her fundamental rights whenever they are being infringed or threatened by the action or omission of a state institution or of a particular person exercising a dominant position. It is rather easy for people to transform a complaint into a constitutional issue because the *tutela* action exempts them from complying with any particular prerequisites in order to make the legal claim. Indeed, the *tutela* action does not even need to be written. Moreover, *tutela* actions are decided within a
very short period of time because judges have to decide them prior to any other legal claim. Therefore, *tutela* actions provide ordinary citizens with an accessible and inexpensive mechanism to challenge the violation of fundamental rights.

This mechanism of rights protection is all the more effective because of the CCC’s power to annul the *tutela* rulings of any judge. The power of the Court consists of a sort of certiorari, by means of which it selects and revises all those *tutela* rulings that are, according to its discretion, worthy of a pronouncement. This power allows for the CCC to preside over all judges in the country concerning constitutional matters. This is especially so, given that *tutela* actions can also be presented against judicial decisions (even those coming from high Courts, such as the Supreme Court of Justice and the State Council) that severely and flagrantly violate a fundamental right. By revising them, the CCC closes the constitutional debate.

On the other hand, the 1991 Constitution assigned the CCC the exclusive power of deciding “public actions of unconstitutionality”, which any citizen may bring against all laws and certain governmental decrees. Since its creation, the CCC has been able to exercise this form of judicial review in a rather progressive way because neither the citizenry nor other state institutions view this function as strange or exaggerated to the country’s legal culture. This is due to the fact that judicial review has existed in Colombia since 1910, but

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37 Id. at art. 15.

38 However, the structural problems of citizens’ lack of awareness of their rights are far from disappearing.

39 See CONSTITUCIÓN POLÍTICA DE COLOMBIA, art. 86 (1991); Decree No. 2591, November 19, 1991, arts. 32-36 (Colom.).

40 See id. In general, the CCC revises a *tutela* ruling either because it has never before made a pronouncement on the subject or because it wants to change its precedent.


42 CONSTITUCIÓN POLÍTICA DE COLOMBIA, art. 241 (1991). See also Decree No. 2067, September 4, 1991 (Colom.). The CCC can exercise judicial review of those governmental decrees that have been promulgated either in the exercise of exceptional powers conferred by Congress to regulate matters that are the competence of the legislature or to declare states of siege. Judicial review of all other governmental decrees is exercised by the State Council. Besides the competence to decide *public actions of unconstitutionality* against laws and the aforementioned decrees, previous to their promulgation the CCC decides on the constitutionality of *statutory* laws (which regulate special constitutional issues, such as fundamental rights and political participation mechanisms), laws that incorporate to the legal order international treaties ratified by the state, and laws that are objected by the President for constitutional reasons. Finally, the CCC also revises *public actions of unconstitutionality* against projects to reform the Constitution, acts convoking a referendum or a Constituent Assembly to reform the Constitution, and acts convoking and executing referendums regarding laws, plebiscites, and public consults. Regarding these projects and acts, the CCC exercises an exclusively formal revision of eventual procedural vices. Saffon, *Ob. Cit.*
previously fell under the power of the Supreme Court of Justice. The CCC’s progressive activism while exercising judicial review has also been possible because public actions of unconstitutionality are not conditioned to any special prerequisites; demandants to not need to prove they have a special interest in the issue and they can present the action without a lawyer. This has resulted in a frequent use of this action by citizens.

Although these procedural mechanisms allow for an important degree of judicial activism, the CCC’s development of the 1991 Constitution’s aspirational goals and contents would not have been as intense, had the political forces themselves taken on this task. However, what happened in the aftermath of Constitution’s promulgations was that many of the social and political actors who were the main participants in the Constituent Assembly dispersed and weakened soon thereafter. Thus, political institutions, and Congress in particular, were not composed of people truly committed to the development of the Constitution’s goals of a social state of law and an inclusive society.

To some extent, this lack of commitment of political actors to the social promises of the Constitution can find an explanation in the Constitutional text itself, whose tension between its neoliberal economic clauses and its social promises has allowed the political actors to favor the former in detriment of the latter. In the first years of the nineties decade, the Colombian government began the implementation of a strategy of economic liberalization, which was supported by economic international agencies. This meant that, whereas the social clauses of the Constitution demanded more state’s intervention in wealth redistribution, the government implemented policies aimed at cutting back on State’s intervention so as to let the market forces assign resources. Over time, this created a tension between the normative or aspirational Constitution (composed of the text, the values and the rights set out in the Charter) and the real Constitution (consisting in the relation between political forces), which has translated in an inter-institutional conflict between political actors and the Constitutional Court.

43 See CONSTITUCIÓN POLÍTICA DE COLOMBIA (1886).

44 See CONSTITUCIÓN POLÍTICA DE COLOMBIA, art. 241 (1991); Decree No. 2067, September 4th, 1991 (Colom.).

45 See id.

46 This was particularly the case of the AD-M19 Movement and the National Salvation Movement, which played an important role in the Constituent Assembly, but which, a few years later, practically lost all political prominence.

47 (Gómez, 1995)
Indeed, little by little, the weakening of the political forces committed to the 1991 Constitution and the government’s neoliberal strategies translated in the Constitutional Court presenting itself as one of the few institutions eager to defend the social clauses and progressive content of the Constitution. This semi-isolated struggle has been confronted by many state institutions, which consider it an infringement of the principle of separation of powers and an obstacle to economic development, and therefore resist it by insisting in privileging neoliberal policies over social state policies, by being reluctant to obey the CCC’s rulings, and even by proposing legal reforms intended to curtail the CCC’s powers.

To some extent, this inter-institutional conflict has been reproduced in the Colombian political and academic debate on the Constitution and on the role of the Constitutional judge. The different perspectives in this debate partially coincide with those exposed in the previous section of this article. Firstly, there is a conservative perspective, which considers that the aspirational content of the Constitution is excessive and thus allows for a dangerous intervention of Constitutional judges in political and economic matters. This perspective is defended by some social sectors -such as businessmen- and certain academicians -mainly economic analysts-, who have harshly criticized the CCC’s progressiveness, and particularly its activism regarding social rights, for being populist and ingenuous.

Secondly, there is a progressive but critical perspective, according to which, unless the CCC is able to develop the whole of the Constitutional social clauses—which it has not-, it cannot be considered as an institution in favor of social transformation, and should not then be supported but criticized. As we saw in the last section, this perspective is functional to the conservative perspective, for it weakens social commitment to the aspirational content of the Constitution and, in so doing, contributes to its failure.

Thirdly, there is another progressive perspective, which supports the aspirational content of the Constitution and the way the CCC has intended to materialize it. This perspective is defended by some social sectors, which

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48 Other institutions that have played this role are some judges when deciding tutela actions, and control organs such as the Ombudsman and the Public Ministry.

49 Such is the case of members of government agencies in charge of developing economic and financial policies—like the Central Bank or the Treasury Minister.

50 Uprimny, 2006, Ob. Cit.


52 See, e.g., Mejía and Mápura, Ob. Cit.
politically sympathize with the Constitution’s social clauses -such as human rights NGOs and *tutela* users-, and by some academicians –mainly constitutional lawyers- provided the CCC with an important support from certain social sectors and benefit from their implementation.

For this perspective not to incur in the absolute disappointment and skepticism of the previous one regarding the Constitution’s aspirations, it is important to always understand it as an intermediate position according to which the CCC’s role is an important but insufficient element to bring about social transformation.\(^53\) This implies that it is neither the Constitutional text itself, nor the CCC’s interpretations of it, but the active commitment of social and political movements to one another, which may end up promoting social change. It is from this perspective that we analyze the important but insufficient achievements of the CCC regarding the protection of social rights in the next section.

### III. Assessing the True Dimension of Judicial Activism on Social Rights: an Empirical Study

In this section, we will present the results of an empirical research aimed at assessing the efficacy of the CCC’s activism regarding social rights. In particular, we will try to illustrate that this activism has had a very important although still restricted efficacy. We will first start by briefly describing the scope and methodology used for conducting the empirical research (a), and we will then analytically describe the main findings of the research (b).

#### a) Scope and Methodology of the Research

The main objective of the research hereby described and analyzed was to have a precise idea of the way in which the CCC decides individual cases concerning social rights, so as to be able to assess the efficacy of its decisions.

That is why the research focuses on the CCC’s *tutela* decisions and not on its abstract decisions regarding the constitutionality of laws.\(^54\) That is also why, although all Colombian judges decide *tutela* actions, we only focused on the

\(^{53}\) García and Uprimny, *Ob. Cit.*

\(^{54}\) While all nine members of the CCC decide abstract constitutionality rulings, *tutela* rulings are decided by panels of three Magistrates, except when, due to the relevance of the issue, the panel decides to put the case under the consideration of the whole Court. According to the Court’s conventions, *constitutionality* rulings are identified with a C letter; *tutela* rulings of the different panels of the CCC are identified with a T letter; and *tutela* rulings of the plenary of the CCC are identified with the letters SU. Each of these letters is followed by the number of the ruling and its issue date. We will use these conventions to cite CCC’s the rulings to which we will refer.
way in which, based on its certiorari power, the CCC revised their judgments in individual cases. The reason for limiting the research to the CCC’s *tutela* decisions is that this has probably been the field in which the CCC’s activism concerning social rights has received the harshest criticisms, so it is important to have a clear understanding of such activism. The reason for excluding of the analysis other Constitutional judges’ *tutela* decisions is that the CCC plays a key role in the functioning of the *tutela* action. This is so not only because the CCC is the last instance of decision in *tutela* cases, but also because its precedent determines to a great extent the way in which all other Constitutional judges interpret and apply the Constitution’s Charter of rights.

The empirical findings that we will describe and analyze were derived from a random sample of all *tutela* rulings brought in by the CCC between 1992 and 2006.

b) The Judicial Protection of Social Rights by the CCC

In order to assess the dimension of the CCC’s activism on social rights, we will analyze the data of our empirical study, by showing: the ratio of the CCC judgments on social rights (i); the ratios of the different types of judgments on social rights, based on the nature of these rights (ii), and the annual evolution of the CCC’s activism on social rights (iii).

i) Quantity of the CCC’s favorable judgments on social rights

55 This can be explained by the fact that, as we will see, social rights are not conceived as directly applicable rights that could also be generally protected by *tutela* judges. However, the CCC has developed the *conexity* doctrine, according to which they could be protected in some exceptional circumstances. This doctrine has been criticized, especially because this judicial protection generally implies the State’s obligation to deliver a service or subsidy.

56 Despite Colombia’s continental legal tradition, the CCC has developed a very rigorous doctrine of the mandatory character of its precedent, not only for itself, but for all judges who decide constitutional issues, including the other two high courts –the Supreme Court of Justice and the State Council-. The implementation of this doctrine has found great resistance in the latter courts, which has brought about what is commonly known as the “clash of trains” among the high courts. For an analysis of the CCC’s doctrine on constitutional precedent, see Diego López, EL DERECHO DE LOS JUECES (Legis, 2000). For a discussion of the “clash of trains” issue, see Mauricio García and Rodrigo Uprimny, *la reforma a la tutela: ¿ajuste o desmonte?, in ¿Justicia para todos?, Ob. Cit.

57 The sample is composed of data obtained at two different stages of empirical research: the first stage, conducted in 1998 and published in 2001, covered the CCC’s rulings from 1992 to 1997, and used as sample 334 randomly selected judgments; the second stage, conducted in 2007, covered the CCC’s rulings from 1998 to 2006, and used as sample 309 randomly selected judgments. Since the period of time covered by each sample was not the same and nor was their degree of representativity, we used a mathematical formula so as to be able to ponder the data of each period of time. However, we will not always present the pondered data; whenever there are interesting or substantial differences between the two periods under analysis, we will distinguish them.
The first step in assessing the CCC’s activism on social rights is to determine how many of its judgments nominally deal with the issue of social rights and, moreover, how many of these judgments concede the demanded protection of the right(s) invoked and how many do not.

Here, the criteria we use to determine if a judgment deals or not with a social right is if the CCC’s decision refers to a right that is classified as such by the Constitutional text itself or not. Indeed, the 1991 Constitution distinguishes between civil and political rights or fundamental rights –which are those that are directly applicable, and include rights such as life, due process and personal integrity (Title I, Chapter 1 of the Constitution)- and economic, social and cultural rights –such as health, education, or housing (Title I, Chapter 2 of the Constitution)-.

The following tables show this distinction in terms of percentages of the CCC’s rulings dealing with one type of right or the other, and the percentage of judgments in which the CCC concedes or denies the protection of a social right.

**Table 1. Ratio of pondered social rights’ judgments (1992 – 2006)**

<table>
<thead>
<tr>
<th>Cases</th>
<th>% Out of the total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil and Political Rights</td>
<td>44%</td>
</tr>
<tr>
<td>Social Rights</td>
<td>55%</td>
</tr>
<tr>
<td>Total</td>
<td>100%</td>
</tr>
</tbody>
</table>

**Table 2. Judicial decisions on social Rights**

<table>
<thead>
<tr>
<th>Social Rights</th>
<th>Decisions %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conceded SR</td>
<td>66</td>
</tr>
<tr>
<td>Denied SR</td>
<td>34</td>
</tr>
</tbody>
</table>

As the previous tables show, more than half of the CCC’s *tutela* judgments in the last fifteen years have dealt with Constitutionally classified social rights, and 66% of these judgments have favorably protected these rights. Besides, the number of judgments on social rights has augmented in 10% in the last ten
years, but the ratio between conceded and denied protection of such rights has not changed.

These are particularly suggestive numbers, given that, as it is expressly stated in the Constitutional text and in the CCC’s consolidated precedent on the matter\(^ {58}\), as a general rule, only fundamental or civil and political rights have immediate application and can be judicially protected through the *tutela* action.\(^ {59}\)

However, in half of the *tutela* cases selected and reviewed by the CCC, there is a claim of violation of a social right, and in 66% of those cases the CCC has conceded its protection. Although this might sound like outstanding judicial activism at a first glance, looking into the CCC’s decisions on social rights with a bit more of detail will lead us to tinge this conclusion.

### ii) Different types of judgments on social rights

A detailed analysis of the CCC’s judgments shows that there is a great variety of *tutelas* concerning social rights, which, apart from the fact of referring to a right included in the Constitutional chapter on social, economic and cultural rights, do not have much in common. For the moment, we distinguish between two types of judgments on social rights:

1) **Judgments on social rights in general**: these judgments include all those cases that imply a right that is classified as economic, social or cultural by the 1991 Constitution (Title II, Chapter II).

2) **Judgments on welfare rights**: these judgments include those cases, which belong to the former classification and, moreover, imply an economic decision on whether a service or subsidy should or should not be delivered to an individual or group of persons, generally by the State. Examples of this sort of cases include, among many others, the payment of a retirement pension, the construction of a house, or the opening of a space at a public school.

The following table shows this classification of social rights in terms of number of cases and percentages of the CCC’s rulings dealing with one type of right or the other, as well as the number and percentage of judgments in which the CCC concedes or denies the protection of either kind of right right.

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\(^{59}\) This rule is derived from the constitutional distinction between directly applicable or fundamental rights and social rights. On this, see CORTE CONSTITUCIONAL, Ruling T-395, 1998.
Table 3. Pondered distribution of social rights’ cases (1992 – 2006)

<table>
<thead>
<tr>
<th>Cases</th>
<th>% of total social rights cases</th>
<th>% of conceded cases</th>
<th>% of denied cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Welfare rights</td>
<td>76%</td>
<td>71%</td>
<td>28%</td>
</tr>
<tr>
<td>Non welfare social rights</td>
<td>24%</td>
<td>50%</td>
<td>50%</td>
</tr>
<tr>
<td>Total</td>
<td>100%</td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>

The previous tables show a very interesting evolution of the distribution of the CCC’s judgments on social rights. Indeed, while in the first studied period the CCC’s judgments on social rights were almost evenly distributed between welfare rights (54%) and non welfare rights (46%) cases, in the second period almost every judgment of the CCC concerning social rights had to do with a welfare right (91%). Also, in both periods, decisions conceding the welfare right protection were more than those denying it, always being around 70% of the total judgments on welfare rights.

Again, this seems like very important judicial activism on social rights, since the judicial protection of welfare rights implies an intervention of the judge in economic decisions, and particularly an order –most of the times to a State entity- to make a payment or provide a service. However, this appreciation should be tinged once again, given that it is possible to distinguish between two kinds of judgments concerning welfare rights:

1) **Judgments on welfare rights implying a payment of what is owed:** these judgments include those cases, which demand from the judge an economic decision on weather a service or subsidy should or should not be delivered, but which can be decided by telling if what is requested by the petitioner is owed to her, most of the times by the State. These cases include all those situations in which the petitioner has a clear right of
receiving a payment or service, pre-established in a contractual or administrative relation.

2) **Judgments on welfare rights in a strict sense:** In contrast to the previous type of judgments on welfare rights, this type of judgments only include those cases in which the economic decision of the judge is not the result of verifying a pre-existing obligation, but the consequence of the judge considering necessary for that obligation to be realized.

The following table shows this classification of welfare rights in terms of number of cases and percentages of the CCC’s rulings dealing with one type of right or the other.

**Table 4. Pondered distribution of CCC’s judgments on welfare rights (1992 – 2006)**

<table>
<thead>
<tr>
<th>Cases</th>
<th>% of total welfare cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Payment of what is owed</td>
<td>63%</td>
</tr>
<tr>
<td>Welfare rights in a strict sense</td>
<td>37%</td>
</tr>
<tr>
<td>Total</td>
<td>100%</td>
</tr>
</tbody>
</table>

The former tables show that, although the CCC’s judgments on welfare rights occupy quite an important ratio of its task as a *tutela* judge, more than half of them (63%) constitute a payment of what is owed to the petitioner by virtue of a preexistent obligation. This type of judgments grew in ten percent from one period to the next.

Strictly speaking, judgments on welfare rights that constitute a payment of what is owed cannot be considered true judicial activism on social rights. Indeed, in these cases, the *tutela* action functions as a judicial remedy against the administration’s inefficacy. This is so because the judicial order of paying an amount of money or delivering a service is nothing different from an order to comply with an already existent obligation. In that sense, *tutela* judgments of
this kind are a sort of action of compliance, through which the beneficiary of a service or subsidy demands a payment of what has been recognized to her beforehand. Moreover, in these cases, the *tutela* judge does not accomplish her natural function of discerning rights; rather, she executes an administrative routinely function aimed at collecting payments owed by the State as a result of its pecuniary duties.

In contrast, judgments on welfare rights in a strict sense may be considered as judicial activism on social rights because, in these cases, the legal problem judges face is weather they should recognize a right whose protection demands the deliverance of a service or subsidy, despite the fact that this service or subsidy is not clearly stipulated as a legal obligation. Judicial activism only takes place in those cases in which the judge responds this question affirmatively or, exceptionally, when responding it negatively, the judge explicitly admits the possibility of an affirmative response.

In that way, if we exclude CCC’s judgments concerning cases of payment of what is owed from her judgments on welfare rights, we certainly have a more precise idea of the dimension of real judicial activism on social rights. Only in this kind of cases does the CCC truly intervene in political or economic issues, by means of directly applying the Constitution—with no legal intermediation—and clearly confronting political state organs. As the following tables illustrate it, these truly activist judgments are rather rare if compared to the total amount of *tutela* judgments pronounced by the CCC. The following tables identify the number and percentage of judgments in which the CCC concedes or denies the protection of welfare rights in a strict sense, compared to the numbers and ratios of other types of social rights.

### Table 5. Pondered ratios of social rights protection conceded and denied (1992-2006)

<table>
<thead>
<tr>
<th>Cases</th>
<th>Decisions</th>
<th>% of the case</th>
<th>% of welfare rights</th>
<th>% of total</th>
</tr>
</thead>
</table>

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60 This is a specific Colombian legal action aimed at guaranteeing public authorities compliance with legal norms. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA, art. 87 (1991).
According to the previous tables, the CCC’s judgments in which the protection of welfare rights in a strict sense is conceded only represent eleven percent of all her *tutela* judgments. Although this percentage has grown from 9 to 12% in the last years, we are still in the presence of a restrictive phenomenon of judicial activism.

This does not mean, anyhow, that these judgments are totally irrelevant for the purpose of achieving social change. Indeed, they are extremely important for the lives of individual petitioners who obtain Constitutional protection, but also for similar cases in the future, given that they create a precedent on how similar cases should be solved. Moreover, as we will see in the next section, some of the topics addressed by these judgments have suffered important structural changes, due to the CCC’s precedent—as is the case of the right to health.

The next table illustrates the different topics that these judgments on welfare rights in a strict sense addressed in the period of 1998 to 2006.
Table 6. Protection of welfare rights conceded by the CCC (1998 – 2006)

<table>
<thead>
<tr>
<th>Facts of the <em>tutela</em> action</th>
<th>% of the total of judgments on welfare rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Payment of what is owed</td>
<td>49%</td>
</tr>
<tr>
<td>Right to health</td>
<td>32%</td>
</tr>
<tr>
<td>Right to social security (pensions)</td>
<td>14%</td>
</tr>
<tr>
<td>Children’s right to health</td>
<td>3%</td>
</tr>
<tr>
<td>Children’s right to education</td>
<td>1%</td>
</tr>
<tr>
<td>Others</td>
<td>1%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

The previous table shows that *tutela* actions on the right to health constitute more than half of the total of *tutela* actions regarding welfare rights in a strict sense. As we will see in the next section, the relevance of the topic of health has marked the evolution of the CCC’s judgments on social rights, not only by substantively increasing their number, and by pointing towards a new phase of consolidation of the CCC’s precedent on the subject.

Since 1998, *tutela* actions concerning social rights grew exponentially. Whereas in 1995 citizens brought three thousand *tutela* actions concerning the protection of the right to health, in 1999, the number increased to approximately forty thousand *tutela* actions.\(^6^1\) This implied a big emphasis of *tutela* judgments on social rights, since health *tutela* actions alone started

representing around 30% of all *tutela* actions presented in the country.\textsuperscript{62} It also implied a growth of *tutela* judgments on social rights, which acquired its maximum peak in 2000. This is illustrated by the following graphic.

The growth of *tutela* actions on the right to health came along with an outstanding growth of public expenditure on health issues, which went from two million dollars in 1998 to almost seven million dollars in 1999.\textsuperscript{64} As a result, the CCC’s judgments on social rights were generically criticized in a vehement way by political actors and economic analysts. Indeed, a plausible reason for this outstanding increase of both *tutela* actions on the right to health and the public expenditure derived from them may be found in the fact that, applying the CCC’s precedent, constitutional judges were consistently making favorable rulings for citizens, which generated a massive use of the *tutela* as a way of obtaining medical services in an easy and prompt way.

Criticisms of the CCC’s judgments on social rights generated inter-institutional conflicts, as political actors in charge of the health system resisted to comply with the CCC’s orders. Prove of this resistance is the fact that, in this first phase, although the executive power complied with individual *tutela* decisions, it did not make any structural changes in public policy, so as to prevent these judgments from taking place again. This is precisely why CCC’s judgments that imply mere reiterations of the precedent are so frequent. Another prove of this resistance is the fact that, during this phase, government actors publicly defended proposals in favor of curtailing the CCC’s powers concerning economic issues.

\textsuperscript{62} Id.

\textsuperscript{63}

\textsuperscript{64} *The Enforcement of Social Rights*, supra note 7; *Should Courts Enforce Social Rights?*, supra note 5.
These criticisms of the CCC’s judgments on social rights also prompted intra-institutional conflicts, as not all Magistrates of the CCC were willing to support a precedent that implied such problematic effects for the institution. As a result, in its first phase, the CCC’s precedent on social rights in general, and on the right to health in particular, was not completely univocal and consolidated, and dissident votes were frequent.\textsuperscript{65}

This situation has radically changed in the last years, or in what can be considered as the second phase of the evolution of the CCC’s judgments on social rights. Indeed, the CCC’s precedent on social rights in general, and on the right to health in particular, is so consolidated within the CCC that it is rare to find a \textit{tutela} ruling on this issue, which contains a single dissident vote.\textsuperscript{66} Moreover, the CCC is so convinced on its precedent that it keeps selecting \textit{tutelas} concerning topics it has already discussed and settled, so as to insist in the necessity of uniformly applying it. This explains why, as we so in the last section, between 1998 and 2006, 35 out of 37 rulings of the CCC on social rights were not \textit{originary}.

But the second phase of the evolution of the CCC’s judgments on social rights is not only characterized by the changes occurred within the CCC. It is possible to affirm that, in the last years, the relation between the CCC and political powers in charge of developing public policy on social rights has become less conflictive and more complimentary. Indeed, in the last years, State institutions in charge of issuing regulation on public health services have applied the CCC’s precedent on the right to health, and have thus incorporated the possibility of a Committee within the medical entity to decide whether a patient should receive a medicine that is not included in the Mandatory Health Plan, in those cases in which the requirements imposed by the CCC are complied with. Besides, last year, Congress issued a law in which it attempts to generate positive and negative incentives so that medical entities comply with the CCC’s precedent on health issue, without the need of having a \textit{tutela} action presented against them.

Moreover, it has been a few years since the government has openly attacked the CCC and its powers, or defended legislative reforms in order to curtail its powers. Although this may have a different explanation –such as the fact that most of the Justices’ periods are ending and the government will have the opportunity of appointing quite a few-, it still shows that the relation between the CCC and the government has moved to a less conflictive situation.

\textsuperscript{65} We thank Aquiles Arrieta for this idea.

\textsuperscript{66} \textit{Id.}
Nothing of what was previously said means that all tensions between the CCC and political actors have disappeared. Rather, it means that, due to the consolidation of the CCC’s precedent on social rights, government’s resistances against its applicability have been reduced, or at least they have become subtler. As a result, this has also made the activity of the CCC concerning social rights much more routinary and less activist. This is only natural, given that activism is the first step of achieving a change in the normative system, which, once attained, reduces the degree of activism needed.

However, it is important to bear in mind that this activism was not as important as the CCC’s critics would suggest. Since its creation, the CCC’s judgments on social rights have been mostly on welfare rights, the protection of which was already recognized in a legal disposition. The following shows this graphic.

It is also important to clarify that the CCC’s activism on social rights -that is, those judgments that protect welfare rights not previously recognized by law- has not been equally intense concerning all welfare rights. Thus, while the CCC has been particularly insistent in the necessity of protecting the right to health under certain circumstances, even when it has not been previously recognized by a legal disposition, it has very scarce judgments on subjects such as the welfare rights to housing or alimentation. This indicates that the CCC is selective regarding the battles she decides to carry out. It also means that the fact of having reached a phase of decantation of its precedent regarding social rights does not imply that the CCC can now sit still or move on to other subjects. In order to achieve some degree of social change through its decisions, it is still crucial that it applies its precedent to other very relevant welfare rights.
IV. Conclusions: Aspirational Constitutions, Social Rights and Social Change

In the first section of this article, we tried to prove why aspirational Constitutions and the judicial activism on social rights they allow for, are important, although insufficient tools for achieving social transformation. In order to attain full efficacy, these legal elements must be supported by a militant constitutionalism, which commits to their materialization and is thus able to make the promises of the Constitution come true.

In the second section, we showed that this was particularly the case in contexts in which, like Colombia, aspirational Constitutions are not the product of a previous triumphant revolution and, moreover, are not strongly defended by political actors in the aftermath of their issuing. In these situations, no matter how activist Constitutional Courts are, their efforts will always be limited in their possibilities of attaining social transformation.

In the third section, we analyzed the CCC judgments on social rights through an empirical research, which tried to assess the real dimension of the Court’s activism on social rights, and showed that this dimension is much less important than what it seems because it contains a big portion of judgments on welfare rights based on a payment of what is owed, which, added to judgments on non welfare social rights, leave quite a small room for real judicial activism, i.e. judicial protection of welfare rights in a strict sense.

In this last section, we wish to conclude by showing that the CCC’s activism on social rights is best understood and valued if analyzed from a constructive and intermediate perspective, according to which this type of activism is a relevant and necessary element for attaining social transformation, but it is nonetheless insufficient to generate it by itself. A constructivist perspective allows us to understand that no matter how aspirational a Constitution or how activist the judges in charge of applying it, they cannot produce social transformation, as if they were external elements capable of causing changes in the contexts to which they belong. However, it also allows us to see that there is a relation of mutual reciprocity between law and context, based on which law’s promises can be used by political and social movements as part of a wider struggle for achieving social transformation.

In the case of the CCC, its judgments on social rights are insufficient to promote social transformation for various reasons. On the one hand, most of those judgments do not actually constitute judicial activism capable of directly applying social rights and, by so doing, producing changes in their respective
fields. Rather, they are remedial judgments, intended to protect already recognized social rights, which public agents deny or refuse to apply, despite their obligation to do so. Moreover, these judgments are only able to protect those persons that are, to some extent, already legally protected, and thus leave marginalized and excluded groups unprotected. As a result, these groups do not use the tutela action as a mechanism for claiming their rights’ protection, which helps explain the fact that most tutela judgments do not deal with their cases. If these judgments do not refer to the cases of the most needed, it is very difficult to sustain that they may help promote social change. Instead, these judgments may be interpreted as a means for protecting middle classes and, thus, for preserving the status quo.

On the other hand, the CCC’s judgments on social rights that can really be identified as judicial activism are not very many, and consequently their effects are, even if important, limited to produce effective social transformation. This is so not only because of the low number of decided cases, but also because they are, by nature, individual cases, which do not have immediate or direct effects at a macro level. Although individual cases constitute a precedent for future similar cases, these future cases are still individual, and therefore their decisions do not imply structural transformations. Furthermore, the CCC activism on social rights is also limited because, as we argued in the second section, it is mostly a lonely struggle, which faces great resistances. This implies that the changes it may promote do not find the necessary political will to be materialized. Moreover, this implies that the CCC might reduce or limit its activism by the fear of having its powers curtailed by those who oppose it.

That is why the CCC’s activism on social rights may be interpreted, at the same time, as an unstabling and a stabling mechanism. Indeed, as well as insisting in the need of direct applicability of social rights and, thus, of social transformation, this activism could also have a legitimizing function. This function would be aimed at attenuating the tension between the aspirational discourse of the Constitution and a reality full of deprivations and institutional difficulties that hinder it from being materialized. And it would consist in the delimitation of a space of what is possible in Constitutional law, which does not commit neither with the ineluctable protection of social rights, nor with the dominant social and institutional structure. In that way, the CCC would allow for the rhetoric of solidarity to maintain the citizenry hope in change, while at the same time it would admit and deal with the restrictions derived from the context. According to this vision, Constitutional law would imply processes of negotiation and conciliation of opposed interests, allowing for renovation and stability to achieve agreements. In so doing, the CCC would allow for a way too generous Constitution to have an impact in a way too unfair society.
The former interpretation is also important because it does not close the doors of a wider political and social struggle of defense of social rights to seize its emancipatory content. Indeed, aspirational Constitutions and judicial progressive interpretations of their contents are a double edge sword. They may function as a strategy against deception and despair, but they may also be taken seriously and used as a tool for promoting social change. This is, in fact, the only way of seriously thinking about social emancipation.