Should Courts enforce social rights?
The Experience of the Colombian Constitutional Court[1]

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The debate about the convenience of the judicial enforcement of social rights[2] is one of the major issues that theories of law and democracy are facing today. It is a very difficult discussion, because there are strong arguments in favor of both positive and negative answers. While some argue that social rights must be judicially protected or else they are not real rights, others fear this protection will unavoidably drive to an antidemocratic government by judges.[3] The arguments on each side are so strong that we could even say there is something like a theoretical draw or tie in the debate. However, the intensity of the theoretical and normative discussions has not been an

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[*] This text is a modified and updated version of the articile of Rodrigo Uprimny. "The Enforcement of Social Rights by the Colombian Constitutional Court:Cases and Debates" in Roberto Gargarella, Pilar Domingo and Theunis Roux (Eds). *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor*? Ashgate. Forthcoming. [1] I want to thank my research assistant Ms Maria Paula Saffon for her important contributions for the final version of this paper..

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[2] The expression "social rights" is very ambiguous. Some include in this concept welfare rights -such as the rights to education, health or housing-, labor rights -like the right to form labor unions and to go to strike-, economic liberties –such as property or freedom to contract-, and even cultural rights -like the right to speak one's own language-. Although there are good reasons to link all these rights in some aspects, in this paper, I will restrict the meaning of social rights to welfare rights. These rights imply the state's duty of delivering a service or an economic subsidy to its citizens, in order for them to enjoy those goods that are necessary for living with dignity and for enjoying real freedom. I believe that the justiciability of this type of rights provokes the most acute academic and political discussions regarding social rights. Even if labor rights do not imply a positive obligation of the state, I will consider them as a case of social rights, because their protection is fundamental for workers to be capable of claiming their welfare rights.

[3] Literature on the subject is very extensive. For approaches in favor of the justiciability of social rights, see R. Alexy, *Teoría de los derechos fundamentales* (Madrid: Centro de Estudios Constitucionales, 1997); V. Abramovich & C. Courtis, *Los derechos sociales como derechos exigibles* (Madrid: Trotta, 2002). For critical and more skeptical views on the subject, see G. Rosenberg, *The Hollow Hope*, (Chicago: University of Chicago Press, 1991); M. Tushnet, 'An Essay on Rights', *Texas Law Review* 4 (1984), 1363-1402; F. Von Hayek, *Law, Legislation and Liberty* (London: Routledge and Paul Kegan, 1973). For approaches in favor of the justiciability of social rights in Colombia, see R. Arango, 'Los derechos sociales fundamentales como derechos subjetivos', *Pensamiento Jurídico* 8 (1998), 138 ff.. For stances against it, see S. Kalmanovitz, 'Las consecuencias económicas de los fallos de la Corte Constitucional', *Economía Colombiana* 276 (1999).

obstacle for the activism in the protection of social rights that some judiciaries in several countries have performed during the last decades.

For that reason, I believe it might be useful to look at the problem of justiciability of social rights in a new way, by suspending -at least for a while- the abstract discussions about the convenience of justiciability, and proceeding to analyze the concrete empirical developments of judicial enforcement in different countries. I think these comparative studies could provide new elements to the discussion, because one would be able to see if the promises of judicialisation of social rights have been fulfilled, or if, on the contrary, the fears of its adversaries were justified.

The Colombian experience could be useful to advance in this discussion, because, since its creation in 1991, the Colombian Constitutional Court (CCC) has been quite active in the protection of social rights in several fields. There has been a significant judicialisation of certain economic policies, which has been enthusiastically supported by some scholars and social movements, as well as severely criticized by others. In the last decade, this debate has been one of Colombia's major political issues.

The Colombian case is thus worth studying. In fact, it provides some practical experiences of judicial protection of social rights, as well as a vivid social and academic discussion about the matter.

This paper describes and evaluates the development of the enforcement of social rights by the CCC, and the social and academic discussions it has encouraged. In the first section, I present the socio-political setting in which the decisions of the Court are inscribed and the legal and institutional elements that might have influenced it. In the second section, I analyze central cases that are representative of the CCC's justiciability of social rights. In the third section, I present a general outline of the discussions that these judicial interventions have prompted. In the fourth part, I offer some general remarks about the relationship between the justiciability of social rights and social emancipation. In the fifth section, I expose some final conclusions.

1. A favorable social, political and institutional setting for the progressive protection of social rights

The judicial protection of social rights in Colombia began after the enactment of the 1991 Constitution, and in particular soon after the creation of the CCC. Even if the country's long tradition included both judicial review and a certain respect for judicial independence, before 1991 there was no real justiciability of social rights.[4] There are two main reasons why this protection was made possible after the enactment of the 1991 Constitution, and not before. First, the previous 1886 Constitution had a rather meager Bill of Rights, which hardly included any social or economic right as an enforceable legal rule. Second, the Supreme Court of Justice, previously in charge of the judicial review, believed that its function consisted, for the most part, in the resolution of conflicts between state institutions, not in the enforcement of rights –specially not social rights-.

[4] For a general overview of judicial review in Colombia in the twentieth Century, see Cepeda, M.J., 'La Defensa Judicial de la Constitución', in F. Cepeda (ed.), *Las fortalezas de Colombia* (Bogotá: Ariel, BID, 2004) 145-187.

Given the importance of the enactment of the 1991 Constitution in the Colombian experience of justiciability of social rights, I will briefly present the context in which it took place, so as to indicate and analyze the factors that, from then on, permitted the CCC to undertake the task of enforcing social rights.[5]

The Constituent Assembly of 1991 was not the product of a triumphant revolution; it was a consensual attempt to broaden democracy, as a means to confront a generalized state of political corruption and violence. Therefore, the Assembly's composition was very pluralist in comparison to Colombian electoral standards. In particular, some social sectors that had traditionally been marginalised from the political arena played an important role in the creation of the new Constitution. Indeed, the Constituent Assembly was composed by seventy delegates, from whom 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.[6] As a result, more than forty per cent of the delegates did not belong to the Liberal and Conservative parties, which until that day had dominated the political scene, and many interpreted the situation as the end of the two-party system of political domination. Moreover, given that the voting system was based on qualified majorities, and there was no clearly dominant group, all the assembly's delegates had to seek consensus and organize dialogue and transactions to make decisions.

In that framework, it is not surprising that the ideological orientations of the 1991 Constitution were radically different from the former Constitution, and included the incorporation of a rich charter of rights accompanied by new and effective judicial mechanisms for their protection, the broadening of participation mechanisms, and the imposition of equality duties and social justice upon the state. The 1991 Constitution's objective was to introduce a new model of society and to transform Colombia's reality. It is, using Teitel's words, a "forward looking" rather than "backward looking" Constitution.[7]

One of the new features of the 1991 Constitution is its generosity on the subject of rights. In contrast with the 1886 Charter, which contained a fairly meager declaration of rights, the 1991 Constitution confers great legal force to classic civil and political rights, as well as to social and economic rights, and to collective or third generation rights. It disposes that constitutional norms containing most of these rights are directly applicable (Articles 4 and 85). Furthermore, it states that international treaties on the subject are legally binding for national authorities and constitute relevant criteria for interpreting constitutional rights (Article 93). Finally, it establishes that these rights may not be suspended during states of siege (Article 214), and it includes ILO conventions as part of the domestic legislation (Article 53).

The 1991 Constitution is also very distinct from the text it supersedes in that it is characterized by its direct judicial applicability. Indeed, the new Constitutional text

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[5] The following is based on M. García Villegas & R. Uprimny, 'Tribunal Constitucional e emancipaçã social na Colombia', B. de Sousa Santos (ed.), *Democratizar a democracia. Os caminhos da democracia participativa* (Rio de Janeiro: Editora Cvilizaçao Brasileira, 2002) 298-339.

[6] See J. Buenahora, *El proceso constituyente* (Bogotá: Tercer Mundo, 1992).

[7] R. Teitel, 'Transitional Jurisprudence. The Role of Law in Political Transformation', *Yale Law Journal* 106 (1997), 2014.

created the constitutional jurisdiction and a special organ -the CCC- in charge of saying the final word about its interpretation and application. It also designed a special constitutional procedure for constitutional claims that makes access to constitutional justice much easier and not so costly. This certainly favors some kind of judicial activism regarding human rights, which had less legal grounding in the former Constitution.

The Constitution contains two constitutional citizen actions, which determine the CCC's two main forms of jurisdiction and of decision-making. The first one is an *action popularis* by virtue of which any citizen may demand the CCC that a law or decree be declared unconstitutional, without him or her being a lawyer or having any particular interest in the issue.[8] In each case, within five months after the action is filed, the Court declares, with general effects, if a norm is or is not in conformity with the Constitution.[9] These CCC's rulings are decided by all members of the Court, and are an expression of abstract and concentrated constitutional control. This control has existed in Colombia since 1910, and was previously exercised by the Supreme Court. Even if this Court never exercised it in a progressive way, the Colombian legal and political culture was already familiar with judicial review, and in that way enabled the CCC's activism in social rights to take place immediately after the Court's creation, in 1992. The CCC's power to annul laws was never seen as strange or exaggerated, and thus, the Court was able to act vigorously, needless of securing its legitimacy to do so before political forces or the other public branches.

The CCC's activist judicial review has two facets: an ample interpretation of its competences regarding the declaration of the constitutionality or unconstitutionality of a law, and a progressive interpretation of constitutional texts, including –among others- an active intervention in state's economic policy. As for the first form of activism, although the Constitution concedes wide competences to the Court for annulling any legal disposition found unconstitutional, the CCC has interpreted these competences in a generous way. It has, in fact, understood that its competence to decide upon the constitutionality of a law includes not only its power to either maintain it in the legal order by declaring its constitutionality or annul and remove it from the legal order by its declaration of unconstitutionality, but also its power to declare it *conditionally constitutional*, by maintaining it in the legal order and offering the only constitutional and thus binding interpretation the text can be given.[10] This last type of decisions has enabled the Constitutional Court to exclude or include certain words or even entire sentences to a legal text, as well as to indicate the only manner in which a text may be interpreted in order to be considered constitutional. Its critics have considered this

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[8] Decree 2067 of 1991. The CCC only reviews the constitutionality of those executive decrees by means of which a state of siege is declared, and of those proffered by the executive power in exercise of the competence to legislate explicitly delegated by Congress (1991 Constitution, Art. 241, nums. 4, 5, 7). Judicial review of ordinary decrees is carried out by the State Council. Apart from the laws and decrees submitted to its revision by any citizen, the CCC exercises judicial review of the formal vices in the formation of Congress acts that pretend to reform the Constitution when attacked by citizens (Art. 241, num. 1). It also exercises judicial review on all laws approving international treaties ratified by the Colombian government (1991 Constitution, Art. 241, num. 10), on all projects of laws ruling important matters such as fundamental rights and political participation (1991 Constitution, Art. 241, num. 8: Art. 152), and on those projects of law whose constitutionality is objected by the President before their ratification (Art. 241, num. 8). Finally, it exercises a formal review of the vices of formation of acts that pretend to convoke a referendum, a popular consultation or a plebiscite (Art. 241, nums. 2, 3).

[9] According to the Court's conventions, this kind of rulings is identified with a C letter (which corresponds to constitutionality rulings), followed by the number of the ruling, and by its year of emission. The sentences of abstract constitutionality control to which we will refer in the following section will be so identified.

[10] See, among many others, CCC, Sentencia C-112, 2000.

power similar to that of the legislator's and, for that reason, anti-democratic and illegitimate. I will study the CCC's activism regarding the interpretation of the constitutional text in the second section.

The other constitutional action contained in the 1991 Constitution is the *tutela*, by virtue of which any person may directly request any judge in the country to protect his or her fundamental rights when they are being violated by a state agent or an individual to which the person is subordinated, and when there is no other legal action that can efficaciously be used to prevent the right violation from continuing.[11] Citizens do not need a lawyer to file a *tutela* action, nor do they need to fulfill any special requisites. And judges are obliged to give priority to *tutela* actions, which are thus decided within a short period of time (ten days). *Tutela* actions' appeals are decided by the *tutela* judge's hierarchic superior, and all cases end up in the docket of the CCC, who can discretionally review, by a sort of *certiorari*, any case.[12] These cases are decided by different sections of the Court, each composed by three Justices.[13] The CCC's decisions of *tutela* actions only have an *inter partes* effect. Therefore, citizens may very easily transform a complaint into a legal action and obtain a quick resolution of their conflicts. This is particularly relevant, because comparative legal studies demonstrate that greater access to courts provides courts with greater political influence.[14]

As we have seen, the constitutional justice's procedural design confers enormous legal power on the CCC. This facilitates the Court's activism because, as comparative sociology demonstrates, there tends to be more judicial activism in countries where most of the authority is concentrated in a single supreme court, instead of it being distributed among different courts and jurisdictions.[15] Hence, even if the Constitution grants explicit competences and thus imposes certain limits to the Court's functioning, these limits are ample and the Court has interpreted them in a further more ample way. There are three realms in which this large interpretation has aroused discussions on weather the Court is breaching the constitutional limits of its competences.

The first realm consists in the CCC's interpretation of its competences as including its ability to annul other judges' decisions -even those of the Supreme Court and the State Council-, when they violate a fundamental right. The Court has admitted this possibility by granting that, in exceptional cases, citizens can file *tutela* actions against judicial decisions. However, Justices of the Supreme Court and the State Council, as well as others who have participated in the discussion have criticized the Court's position as implying that the CCC is a super-court that lords even over the other high courts.

The second realm in which the competence of the CCC has aroused debate has to do with the judicial review of executive decrees that declare a state of siege. In fact, even though the Constitution attributes the Court competence to review these decrees (Article

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[11] 1991 Constitution, Art. 86; Decree 2591, 1991.

[12] 1991 Constitution, Art. 241, num. 9; Decree 2591, 1991.

[13] Whenever there is a *tutela* case of special relevance, either because it is a new case for the Court or because it is important for the clarification and unification of its precedent, all Justices gather to decide it. According to the Court's conventions, the first type of rulings is identified with a T letter (that corresponds to *tutela* rulings) and the second type with the letters SU (which refer to unification rulings). Again, each of these letters is followed by the number of the ruling, and by its year of emission. The *tutela* and unification sentences to which we will refer in the following section will be so identified.

[14] H. Jacob et al, *Courts, Law and Politics in Comparative Perspective* (New Haven: Yale University Press, 1996) 396 ff..

[15] H. Jacob, supra n. 11, 389.

241 num. 7), traditionally, this review –previously exercised by the Supreme Court- was restricted to the formal vices of the decrees. The CCC has, however, expanded the judicial review to the material contents of the decrees and to the question of weather they comply the Constitution. This has off course created resistance in certain sectors.

Finally, the interpretation made by the CCC of its own competences has also been criticized in the realm of judicial review of the Constitution reforms carried out by Congress and attacked by citizens. This is so because the Constitution grants the Court a restricted competence, according to which it can only decide upon the formal vices of formation of those reforms. Nevertheless, the Court has defended that, even if Congress has the faculty of reforming certain constitutional dispositions, it may never transform, in so doing, the essence of the Constitution. Hence, the Court has established that there are some intangible constitutional principles that can only be reformed by a Constituent Assembly, because their reform would mean a transformation of the Constitution itself. And it has sustained that the trespassing of this limit is a formal vice, the constitutionality of which the CCC is competent to examine.

The institutional and legal elements mentioned above have certainly created a favorable climate for the CCC's activism regarding social rights. This activism has also been stimulated by two structural political factors: the crisis in political representation and the weakness of social movements and opposition parties in Colombia. Because of Colombians' generalized disenchantment with politics, certain social groups have demanded solutions from the constitutional jurisdiction to problems that should be debated and overcome by means of the democratic process in the first place. In many situations, the Court does not take on other powers, but rather steps in to fill the vacuum left by them. This intervention appears legitimate to broad sectors of the polity, because it makes them believe that there exists at least one power that acts ably and progressively. On the other hand, there is a historical tradition of weak social movements in Colombia, which have become even weaker because of the constant menace of violence they are submitted to. Many social leaders and activists have been murdered in the last decades, and the risks of social mobilization have therefore risen. This situation tends to strengthen the judicial role, since social groups are tempted to make use of legal arguments through a procedure that is both easy and cheap and that generally guarantees progressive decisions, instead of recurring to social and political mobilization and to the serious risks it implies.

The previous elements may explain the CCC's activism concerning the protection of social rights. However, an important question still remains: why did the Court take on a progressive role, when it could have undertaken an activism of another nature –i.e., a conservative or non-progressive one?[16] In order to answer this question it is relevant to consider the constitutional transition, and the reconfiguration of power it brought about. The Court's activism regarding social rights might not have been necessary had the political forces themselves taken on this task. Nonetheless, many of the political actors that dominated the 1991 Constituent Assembly were rapidly weakened in the following years and almost disappeared from the political scene.[17] As a result, the forces that have

[16] This question supposes not identifying activism and progressiveness of judges, since there may be conservative activisms, such as the US Supreme Court's in the early twentieth century.

[17] For example, the AD-M19 movement -which won twenty-seven percent of the votes for the Constituent Assembly- practically disappeared from the electoral scene four years later. In a similar way, the National Salvation Movement -a Conservative Party splinter group that won fifteen percent of the votes- lost a considerable part of its electoral contests in the following years.

dominated Congress and the electoral scene since 1992, although not clear enemies of the 1991 Constitution, are not committed to developing it.

Besides, there is a strong tension between the social content of many of the Constitution's clauses and the economic policies that the Colombian government has implemented since 1990. Indeed, even if the Constitution authorizes certain neoliberal policies and privatization of public companies, many of its dispositions promote the active intervention of the state in the search for social justice. Yet, the Gaviria government (1990-1994), which had vigorously encouraged the constituent process, initiated a neoliberal strategy for economic liberalization. This strategy openly contradicted the Constitution's demands of state intervention in wealth redistribution, as it pretended to cut back on the state's social presence and to let the market forces assign resources.[18]

The weakening of the political forces that composed the Constituent Assembly and the government's neoliberal policies soon converted the CCC into practically the only body disposed to and capable of implementing the Constitution's progressive content. Since its first decisions, the CCC exercised this function with vitality, and particularly protected social rights in a vigorous way. Certainly, this has afforded the Court with great legitimacy in certain social sectors, and has generated a sort of tactic alliance between the CCC and social groups that had traditionally been excluded or marginalised from developing the progressive values enshrined in the Constitution.[19]

But the Court's progressivism has also frequently placed it on the edge of the knife, because it has generated significant criticisms from other sectors of the polity, in particular from businessmen's groups and government officials. Contrasting enough, while representatives and leaders of some social movements have showered the Court with praise and support, several sectors of Congress and government have tried, so far unsuccessfully, to bring about numerous constitutional reforms to eliminate the Court or to severely restrain its power. It is true that a Constitutional Court may be progressive in a conservative environment by means of creating its own and autonomous identity. There are, however, certain factors that may constrain this possibility, such as an important increment of political pressure towards the conservatisation of judicial decisions, and the possibility of reintegrating the Court with conservative Justices.

I believe that, in the last years, some of this has happened in Colombia. In fact, the political climate has changed since President Uribe (2002-2006) attained power; not only because of his conservative stands, but also because of the great support they have received from the vast majority of the population. President Uribe and his Ministers have deeply criticized some of the Court's progressive decisions and have therefore intended to reform the Constitution in order to limit its powers. On the other hand, President Uribe is aspiring to be reelected (for the 2006-2010 period) and will most likely succeed. If this is so, during his Presidency three Justices will end their period, and this means that it is possible for the Court to be reintegrated by conservative Justices. In fact, the CCC's members are nominated by Congress, from lists of three personss appointed by the Supreme Court of Justice, the State Council and the President –three lists of three names each-. Each Justice has an individual eight-year period and, when finished, he or she needs to be replaced by a person pertaining to a list of the same

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[18] See J. A. Ocampo, 'Reforma del Estado y desarrollo económico y social', *Análisis político* 17 (1992).

[19] M. J. Cepeda, 'Democracy, State and Society in the 1991 Constitution: The Role of the Constitutional Court', E. Posada Carbó (ed.), *Colombia: The Politics of Reforming the State* (London: Macmillan Press, 1998) 76.

origin of his or hers. All three Justices that are about to conclude their periods belonged to lists appointed by the President, and will thus be replaced by persons appointed by the President and nominated by a Congress that –after the march 2006 elections- is composed by a majority of parties that explicitly support President Uribe.

The dangers of a conservatisation of the CCC's composition, competences and rulings might have influenced the Court's activity in the last years. Indeed, although still active and independent, the Court has demonstrated some kind of prudence in its rulings, prudence that may not mean its conservatisation, but that nonetheless shows how a conservative environment may limit the progressive potentialities of a Constitutional Court. This may be specially so in the case of social rights, the justiciability of which is regularly criticized by conservative actors.

2. Some examples of the forms of justiciability of social rights developed by the Colombian Constitutional Court

It is very difficult to summarize the CCC's work on social rights, given the variety of matters it has addressed and the high number of rulings it has produced.[20] I will, nonetheless, intend to present the central cases the Court has addressed on this subject, by classifying them in the different forms of judicial protection of social rights it has developed, that is: (i) personal protection in individual cases; (ii) protection of groups that share a similar situation; and (iii) abstract review of economic policies. The first two forms of justiciability have been developed by the CCC's rulings based on its *certiorari* power to revise *tutela* actions regarding social rights; the third form of justiciability is the result of the abstract judicial review of laws and decrees containing economic policies, the constitutionality of which has been attacked by citizens and decided by the CCC.

2.1. Individual protection of social rights

Even though the 1991 Constitution does not clearly allow for the direct judicial enforcement of many social rights, and restricts the use of the *tutela* action mainly to civil and political rights, since its first rulings and based on a broad interpretation of the Constitution, the CCC stated that *tutelas* could be used for the protection of social rights, in at least two kinds of situations:[21] (i) whenever social rights must be treated as fundamental rights, either because the case involves a group that deserves a special protection of the state –e.g., children-, or because the social right whose protection is invoked does not imply an economic expenditure on the part of the state; (ii) whenever the CCC considers a social right may be enforced indirectly, via the doctrine of "conexity".

1. Social rights as directly applicable rights: *the case of labor rights*[22]

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[20] For a general overview of the Court's work, see M. J. Cepeda, supra n. 18, 91. The Court has produced an average of 1,000 rulings a year in very different fields; decisions on social rights are undoubtedly one of its main jobs.

[21] For a development of the legal discussion, see T. E. Chinchilla, *¿Qué son y cuáles son los derechos fundamentales?* (Bogotá: Temis, 1999).

[22] A great deal of the information on which this section is based was obtained from the empirical investigation contained in: M. García Villegas & R. Uprimny, supra n. 4.

Labor rights, understood as the rights of workers to form or join labor unions and to go to strike, are not social rights in a strict sense. Indeed, they do not entail a positive obligation of the state to deliver a service or a subsidy, but simply the negative duty to abstain from hindering their exercise.[23] However, it is possible to argue that labor rights are social rights if this expression is used in a broad manner, and particularly if one admits that the guarantee of these rights may be a necessary condition for workers to be able to obtain the due protection of their social rights in a strict sense (such as health, education and housing). Thus, the progressive way in which the CCC has protected labor rights is an important example of justiciability of social rights that has also created an important potential for social emancipation.

The Colombian trade unions' political strategy began in the 1970's and had an essentially ideological and confrontational character, very much influenced by a Marxist concept of class struggle. By the 1990's, this strategy, and the leftist social and political movements in general, were in crisis. When the 1991 Constitution was enacted, new social movements oriented towards the recognition of minorities commenced to appear. In contrast with these new social movements, the trade union movement has had difficulties to adapt to this new sort of political struggle, which is more centered on recognition than on economics.[24]

Nevertheless, the Court's rulings protecting the right of equality of workers have facilitated the adaptation of the trade union movement to new political contingencies more than anything else. In fact, before 1991, the trade unions' legal strategy focused on the negotiation of collective labor agreements to defend labor rights. This strategy was reduced to its minimum expression when neoliberal hiring and firing policies were included in new labor laws during de 1990's. As a result, legal defense of labor rights, fundamentally through *tutela* actions, gained a significant importance. This legal strategy has led trade unionists to a new pragmatic negotiating culture, which is less based on staunch ideological principles.

This change of perspective in trade unions' political action was sparked by the broadening of the legal corpus that, according to the Court, protects workers' rights. In fact, based on constitutional principles –mainly equality- rather than on labor law, the Court has upheld *tutela* rulings against employees that, in spite of not breaking any dispositions of the labor code, exercise subtle discriminatory practices against unionized workers. For instance, in one occasion, the Court ruled against an employee who gave more extra hours of work to non-unionized workers than to unionized ones.[25] Despite the employee argued that, according to the labor code, this was part of the freedom to run his business, his real objective was to get workers to leave the union. In another occasion, the Court ordered the rehiring of 2,000 unionized workers who had been laid off from an electric company.[26] Although the layoff was carried out in accordance with all the legal requirements, only unionized workers were laid off, and the CCC decided it violated the principle of equality. In an analogous case, by applying ILO principles, the Court ordered the rehiring of more than 200 unionized workers.[27]

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[23] For the differences and relations between welfare and labor rights, see supra note 1.

[24] N. Fraser, 'Social Justice and the Age of Identity Politics: Redistribution, Recognition, and Participation', G. Paterson (ed.), *The Tanner Lectures On Human Values* (Utah: University of Utah Press, 1998), vol. XIX, 3-67.

[25] Ruling T-230, 1994.

[26] Ruling T-436, 2000.

[27] Ruling T-568, 1999.

According to Union leaders, in Colombia, workers' rights are being undermined more than ever, due to the country's economic crisis, state policies that cut back on personnel, and the situation of generalized violence and insecurity.[28] Thus, they see workers' legal battles before the Court as a "ray of light" in the midst of a very difficult situation, and they believe the Court is the only legal body that has had some success in halting the deterioration of labor conditions in recent years. However, leaders are also aware that the Court cannot bring about structural changes to labor rights' protection. That is why they see the CCC as a symbol that trade unions should embrace to articulate a defensive and effective battle, but whose importance is nonetheless circumstantial. In the medium and long term, it is the political arena and not the legal battle what will be decisive for workers' rights.

2. Social rights as indirectly applicable rights: *the "conexity" doctrine and the case of the right to health*

The CCC does not only protect social rights when they can be assimilated to fundamental rights; it has also admitted the justiciability of other social rights through an indirect way, by establishing they can be judicially protected if they are strongly connected to a fundamental right. Thus, for a social right to be protected through an individual *tutela* action, its violation must imply, at the same time, the violation of a fundamental and directly applicable right -e. g., the rights to life, physical integrity or human dignity. This is what the Court has called the "conexity" doctrine.

The Court has applied the "conexity" doctrine since its very first rulings, but it did not produce any major conflicts between judges and other public authorities up until 1998. This can be explained by the fact that, before 1998, the number of *tutela* rulings conceding the protection of a social right was over two per cent, and most of these rulings referred to cases of persons that held a contract with the state to obtain health, education or social security services.[29] In that context, judicial activism appeared unacceptable only to the most obstinate of social constitutionalism's opponents.

Nevertheless, since 1998, the situation dramatically changed, due to the extraordinary growth of *tutela* actions filed against the state's Social Security Institute (ISS, in Spanish)[30] claiming the protection of the constitutional right to health. Through these *tutela* actions, people often request the constitutional judge to protect their right to health by ordering the ISS to deliver, at no charge, a health service that is not included in their health plans, weather because of its high cost or because of certain legal restrictions –such as medical preexistences-. In order to make the doctrine of "conexity" applicable to their cases, people claim that an adequate protection of their right to health

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[28] According to personal information given by union leader Luis Eduardo Garzón, during the past 10 years, 2,500 labor leaders have been killed throughout the country.

[29] The socially marginalized, who were not a part of this field of rights' protection, were not the object of any sort of judicial protection. Paradoxically, greater necessities came along with a more restricted use of the *tutela* action. Population excluded from the circles of protection of social rights does not consider the *tutela* to be an adequate instrument for guaranteeing their constitutional rights. They are skeptical about the vindicatory possibilities of the *tutela* action. This attitude can find an explanation in the lack of information regarding the potentiality of the *tutela* for their rights' protection or, maybe, in the knowledge or suspicion of the restrictive character of judicial decisions. See M. García Villegas, 'Derechos sociales y necesidades políticas. La eficacia judicial de los derechos sociales en el constitucionalismo colombiano', in B. de Sousa Santos & M. García Villegas (eds.), *El caleidoscopio de las justicias en Colombia* (Bogotá: Uniandes, 2001) vol. I, 455-483.

[30] The ISS is a State's public corporation of the national order. Since 1995, it has been authorized to compete in the market of health services.

is fundamental for the protection of their rights to life, physical integrity and/or human dignity, and thus succeed in obtaining a judicial recognition of the obligation of the state to deliver them a service, even if the service is not contemplated in the law.

As a result, whereas before 1998 only 2,999 actions of this sort were filed against the ISS, in 1998 those actions augmented to 10,771. At a general level, in 1995, there were about 3,000 *tutela* actions invoking the protection of the right to health by means of the "conexity" doctrine, which constituted around ten per cent of all the *tutela* actions presented during that year. Meanwhile, in the first semester of 1999, that percentage incremented to thirty per cent, and the sum of *tutela* actions filed for that concept was about 20,000, that is, somewhat 40,000 a year.[31] Obviously, the growth of *tutela* actions in this field has implied an outstanding growth of the state expenditure needed to comply with health-related *tutela* decisions: while in 1998 around two million dollars were required, in 1999 almost seven million dollars were spent.[32]

The tremendous growth in the use of the *tutela* action as an instrument to obtain from the state health services that would not otherwise be delivered has evidently caused a great deal of polemics. Indeed, many have questioned the convenience of this judicial intervention, and have signaled its problematic economic consequences –particularly the risk of making the social security system financially unsustainable-, and its constitutional difficulties –especially the problems of equality it might generate among users who profit from it and users who, in similar conditions, do not. Others, however, as beneficiaries of these rulings, find in the Court's progressivism a means for satisfying a basic need of such magnitude as health, and for improving their life quality in an important way.

2. Protection of marginalized groups' social rights: *the case of prisoners and forcedly displaced population*

The CCC's judicialisation of social rights has not only been centered in individual cases; in recent years, it has expanded to massive and systematic violations of social rights of stigmatized and particularly weak populations. Such has been the case of Colombian prisoners and forcedly displaced people.

A few years ago, several prisoners filed numerous *tutela* actions against the state's penitentiary authorities, claiming their constitutional rights to life, dignity and health were being violated as a consequence of the over-crowdedness and precarious circumstances of the prisons they were in. After upholding a few *tutela* actions, the Court realized that the situation of the petitioners was a generalized phenomenon in all the country's centers of reclusion, and hence declared the existence of an "unconstitutional state of things".[33] Therefore, the Court ordered the government –and in particular the Ministry of Justice and the Colombian Institute of Penitentiaries and Prisons (INPEC, in Spanish)- to put a definite end to the infrahuman situation of prisoners in a limited period of time. The order of the Court has brought about significant governmental expenditures directed to build more prisons, modernize the already existing infrastructures and hire more personnel for them. Although this has

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[31] See Corte Constitucional & Consejo Superior de la Judicatura, *Estadísticas sobre la tutela* (Bogotá: Autores, 1999).

[32] See L. C. Sotelo, 'Los derechos constitucionales de prestación y sus implicaciones económico-políticas', *Archivos de macroeconomía* 133 (2000).

[33] Ruling T-153, 1998.

certainly reduced the over-crowdedness of prisons, it seems that the relief may only be temporary, for more prisoners go in than out of prisons and, in consequence, it is likely that over-crowdedness will persist.

On the other hand, in recent years, many forcedly displaced persons started filing *tutela* actions, so that local and national authorities would protect their fundamental rights to human dignity and housing, among many others. The intensification of the Colombian armed conflict has generated an enormous proportion of forcedly displaced population, who are obliged to leave their homes and to migrate to urban centers where they have no sources of subsistence. Their situation configures a truly humanitarian tragedy. As in the case of prisons, after upholding various individual *tutela* actions, the Court decided to declare the existence of an "unconstitutional state of things", because of the inconsistencies and precariousness of the state policy regarding forced displacement.[34] In this decision, the Court ordered the national authorities to reformulate and clarify the strategies vis-à-vis forced displacement, in order to attend the basic needs of this population. It also retained its jurisdiction to verify the compliance of state organisms to its orders.

Decisions of the CCC concerning prisoners and forcedly displaced people have not only confronted the problem of the violation of fundamental rights of marginalized groups; they have also generated a significant judicialisation of public policy. In fact, the Court has ordered a considerable amount of public expenditure to ameliorate the insufferable situation of these groups.[35] Moreover, the Court has conditioned the priorities and orientations of the governmental strategies in these sectors. Therefore, even if it is difficult to deny the necessity of the measures ordered by the Court in these fields given the atrocious circumstances of prisoners and forcedly displaced people, multiple questions may arise about the convenience and legitimacy of it being the Court who ordered them. Anyhow, after years of being in the state's oblivion, the Court was the first authority to seriously consider the situation of these marginalized populations, and to protect and defend their rights vigorously.

2.3. Abstract constitutional review of economic legislation: *the case of mortgage debtors*

As well as protecting fundamental and social rights through the revision of *tutela* actions, by exercising its power to abstractly review the constitutionality of laws and to declare them totally or partially unconstitutional when they violate the Constitution, the Court has severely conditioned economic policy. It has, for instance, annulled laws that extended the VAT tax to first necessity products[36]; extended certain pension benefits to specific sectors of the population, in application of the equality principle[37]; ordered a partial increase of public servers' revenues corresponding to inflation[38], and forbidden the modification of certain pension regulations to protect workers' acquired rights.[39] All

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[34] Ruling T-025, 2004.

[35] The Court's ruling about prisons has already cost approximately 240 million dollars; and, according to some preliminary information, the recent ruling about forced displacement could approximately cost 425 million dollars. General Budgetary Direction of the Ministry of Treasure, unpublished document (2004).

[36] Ruling C-776, 2003.

[37] Ruling C-409, 1994.

[38] Rulings C-1433, 2000; C-1064, 2001 and C-1017, 2003.

[39] Ruling C-754, 2004.

these decisions have implied very important economic and budgetary costs[40] and have, for that reason, aroused much controversy. Surely, the Court's intervention in the mortgage debtors' crisis at the end of the last decade represents one of the most controversial examples of the judicialisation of economic policy in Colombia.

In 1997, the country went into a deep recession that sent hundreds of thousands of middle class debtors into crisis. The situation of 800,000 debtors, who had taken loans to buy their homes with the so-called UPAC (unity of constant acquisitive power) system, was particularly aggravated by certain state's measures. In 1999, people talked about 200,000 families on the verge of losing their homes. Although these debtors were middle class individuals who very rarely participate in social protests, the gravity of their situation grew to such proportions that debtors organized themselves to defend their rights against financial institutions. They sent petitions to the government and Congress, asking for a reform of the financing system and demanding some relief in their debts. Some even implemented civil disobedience strategies and refused to continue paying their mortgages or to hand their homes over to financial institutions.

Very soon after the crisis began, debtors and their associations launched constitutionality actions against the norms that regulated the UPAC system before the CCC.[41] The Court pronounced a number of rulings on the matter, which, in general, protected and relieved debtors, by tying the UPAC to inflation, forbidding the addition of owed interests to capital debt, and ordering the recalculation of mortgages. In addition, the Court ordered the Congress to pass a new law on housing financing, within the next seven months.[42] These rulings placed the Court in the eye of the storm both because the public and the media focused considerable attention on them, and because some government sectors, business groups and analysts fiercely attacked them. Even though debtors and some social movements celebrated its decisions, the Court was harshly criticized for its ignorance regarding the operation of market economy and for overstepping its boundaries in detriment of Congress competences. Many critics even proposed a constitutional reform in order to forbid the Court's rulings on the constitutionality of economic legislation.

In late 1999, following the Court's command, Congress passed a new law on housing financing, which tied the cost of mortgages to inflation and incorporated 1.2 billion dollars in relief for debtors.[43] Despite the social turbulence it caused, it is evident that the Court's rulings generated an immediate modification of the UPAC system. Still, many debtors expressed their partial dissatisfaction with the content of the law, and launched a new attack before the Court in January 2000.[44] During that period, users' associations and individual debtors brought numerous cases before civil judges, requesting the application of the relief measures decreed by the law, and the reduction of their mortgages in accordance with the Court's doctrine.

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[40] For instance, decision C-409, 1994 has cost several hundred million dollars, and maintains its cost at a rate of approximately 340 million dollars a year; meanwhile, decision C-776, 2003, reduced fiscal incomings in approximately 320 million dollars.

[41] Some argue this was the result of the government and Congress's lack of receptiveness of the debtors' claims.

[42] Rulings C-383, 1999; C-700, 1999 and C-747, 1999.

[43] Law 546, 1999.

[44] Ruling C-959, 2000.

In summary, mortgage debtors' organizations were spawned in reaction to a payment crisis that threatened them with the loss of housing and principally sought a solution to be able to maintain their homes. Even though debtors held street protests and engaged in political action, the judicial strategy -and particularly the legal battle before the CCC- definitely determined the movement's profile, which can be described as a combination of civil disobedience with legal foundations based on constitutional arguments. These rapidly growing organizations attained their objective, at least partially, by transforming their individual complaints into constitutional and legal debates.

Nevertheless, some risks and limitations of the Court's intervention can be identified. On the one hand, its decisions may not necessarily translate into greater access to housing for low-income sectors in the future, given that they primarily protected middle class debtors at a substantial budgetary cost for the state, and state measures of the kind might depress the construction sector. On the other hand, the excessive weight of the legal strategy in the debtors' movement has limited the potential of their associations, which have in many cases become centers for receiving complaints regarding mortgages recalculation, and will then show great difficulty to persist in the long term.

3. The controversy about the Constitutional Court's progressive activism

The previous cases illustrated the different forms in which the CCC enforces social rights, and the evident impact that such a judicial enforcement has in the behavior of certain economic sectors, as well as in the governmental design of economic policies. The government has realized that its economic policies and decisions have to abide by the Court's lineaments, if it wants them to stay in the legal system. This situation has created a great deal of controversy. Indeed, the judicial protection of social rights implies enormous difficulties because of the complex effects it may have on economic dynamics, public expense and the arbitration of scarce resources. That is why many academic and social actors question the fact that the Court may end up taking the final decisions on crucial economic matters, and propose a strict limitation of its power to decide these issues, and the creation of a specialized economic section in the Court in charge of resolving them.

There is a basic problem underlying the discussion about the Court's activism on social rights: is the justiciability of social rights possible and legitimate? I will dedicate this section to answering this question. To do so, I will first examine some of the principal reasons that several analysts have adduced against the judicial protection of social rights; then, I will try to respond to each one of them and, in so doing, I will point out the potentialities and limits of the judicial protection of social rights.

3.1. Objections to a judicial protection of social rights

Some academicians argue that constitutional tribunals should not be competent to protect social rights because of the anti-technical, antidemocratic and socially prejudicial character of judicial decisions on that subject.

First, criticisms concerning the anti-technical character of judicial decisions on social rights are founded on two kinds of objections. The first kind of objections point out that, because of their lack of technical capacity on this field, constitutional judges' rulings will most certainly produce bad economic policies. The other kind of objections indicate that judges do not bear in mind budgetary restrictions and that, as a result, tend to be prodigal when adjudicating social rights. This is very inconvenient, because it may lead to "judicial

populism", the risks of which are bigger in Third World countries like Colombia, where the possibility of financing the general satisfaction of social rights is still very limited.

Second, objections about the antidemocratic character of judicial intervention in social rights are founded on the idea that this intervention is contrary to democratic and participative philosophy, and in particular to the idea that it is Parliaments and governments who are legitimated to make decisions about a country's economic model, because that is what they were elected for. According to this perspective, the judicial protection of social rights is anti-democratic, in so far as constitutional tribunals, composed by non-elected judges, end up imposing their economic philosophy, and thus take away the majorities' right to choose the basic development options of a country.

Third, criticisms of the justiciability of social rights that emphasize on its socially prejudicial character have two main reasons. On the one hand, the justiciability of social rights discourages social and political mobilization because it unduly interferes in the political system and the justice administration. From this point of view, this erodes democratic participation, because citizens replace electoral battle and political mobilization for judicial actions. Furthermore, the judicialisation of economic policies brings about a politisation of justice, which affects judicial independence. It may also imply an overload of the judicial apparatus, because of assuming tasks that do not belong to it and for which it lacks the technical and material resources. In that way, the transference of economic problems' resolution to judges may even result affecting the legitimacy of the judicial system.

On the other hand, according to this type of criticisms, judicial enforcement of social rights is socially prejudicial because it perpetuates -as law does in general- the unequal distribution of power in society. In practice, the constitutional judges' progressive discourse augments their legitimacy and popular support, but is not be instrumentally efficacious. In fact, instead of benefiting the poorest sectors of the population, the judicial protection of social rights ends up protecting middle class entitlements and defending conservative positions in favor of hegemonic power. Therefore, the enforcement of social rights is not an instance of resistance or social emancipation; quite on the contrary, it reinforces the *status quo* of social domination.[45]

All these objections are based on reasonable theoretical arguments and on unfortunate historical experiences, and should thus be seriously considered. Indeed, it is true that, in most cases, judges are not experts in handling economic variables and have, for that reason, a tendency to ignore the financial consequences of their rulings. It is also true that judicial anti-democratic interventions are possible and have in fact happened in history.[46] Moreover, it is true that an excessive judicialisation of economic policy can be negative for both democratic dynamics and the judicial apparatus itself, because it may generate excessive expectations about the providential character of tribunals and, in so doing, may accentuate the demobilization of citizenry.

Consequently, I believe there are relevant criticisms against the judicial enforcement of social rights that should be carefully analyzed. I believe, however, as I will argue in the

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[45] For an application of these criticisms to CCC's rulings about prisons, see L. Ariza, 'La prisión ideal: intervención judicial y reforma del sistema penitenciario en Colombia', in D. Bonilla & M. Iturralde (eds.), *Hacia un nuevo derecho constitucional* (Bogotá: Universidad de los Andes, 2005) 283-328.

[46] The classic example, although not the only one, is the way in which, in the first decades of the XX Century, the United States Supreme Court obstructed the establishment of the Welfare State, in spite the fact that it was massively supported by the polity.

next section, that none of those criticisms is conclusive and, therefore, should not lead to the conclusion that the CCC's competence to examine the constitutionality of economic policy decisions should be eradicated, or that it should be attributed to a special economic section of the Court.

3.2. Arguments in favor of a judicial protection of social rights[47]

First, the argument about the judges' lack of economic knowledge is easy to refute, given that judges always have at their disposition experts, technical concepts and audiences, so they can become familiarized with the extent of economic or any other matters they are not experts in. To assert that judges can only decide those subjects in which they are specialists would conduce to an antidemocratic conception of law, as it would mean that macroeconomic decisions should always be left to a selected body of technocratic men, different not only from judges, but also from Congressmen and citizens, who are no experts on economic matters either.

On the other hand, although objections founded on the lack of sensitivity of judges concerning the financial consequences of their rulings are partially valid, they are insufficient because they do not take into account certain particularities of the judicial function, and they ignore role of the law in a democratic society. In fact, it is true that judges should not totally ignore the effects of their economic decisions, but it is also true that a certain insensitivity of judges for the consequences of their decisions is also important for the protection of individual rights. This insensitivity allows for judges to be the only public authorities that will, at any time and under any circumstance, be willing to protect individual rights, even when their decisions are politically unpopular or economically expensive. The CCC's declarations of Colombian prisoners and forcedly displaced people as "unconstitutional states of things" are good examples of this. The CCC was the only state authority eager to assure the rights of these marginalized populations, regardless of their considerable costs. If courts founded their decisions exclusively on their repercussions, they would most certainly lose their independence and become political bodies. Moreover, law would lose its meaning as a normative instance of social cohesion.

Second, criticisms about the antidemocratic character of judicial protection of social rights are founded on the so-called "countermajoritarian objection", which challenges the legitimacy of constitutional control in general.[48] This objection poses arduous inquiries that could not be responded to in a few lines' space. Besides, I believe it is not appropriate to fully embark on this discussion, because what is nowadays being criticized in Colombia is just the intervention of the CCC in the economic sphere, not the constitutional control in general. Nonetheless, I will briefly mention that, contemporarily, the legitimacy of judicial review is precisely defended on democratic

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[47] This section is based on R. Uprimny, 'Legitimidad y conveniencia del control constitucional de la economía', 12 Revista de Derecho Público (2001) 145-183.

[48] For a summary of the debate, see E. García de Enterría, *La Constitución como norma y el Tribunal Constitucional*, (Madrid: Editorial Civitas, 1985); R. Gargarella, *La justicia frente al gobierno* (Barcelona: Ariel, 1996).

grounds.[49] Indeed, it is a fact that the majority principle on which democracy is founded has certain defects; the constitutional judge minimizes them, since it operates as an independent authority that guarantees the respect, continuity and impartiality of the democratic process, as well as the unconditional protection of fundamental rights -which are a precondition for the functioning of democracy-. Thus, in spite of not having a democratic origin, the constitutional judge exercises an essential democratic role.

Yet, it is one thing to admit –as probably some of the critics of judicial protection of social rights would- the general legitimacy of judicial review, and another to accept that constitutional tribunals should intervene in economic matters. Most of the Colombian critics of justiciability of social rights do not accept the latter, arguing that, due to their particularities, judges should not intervene in economic matters, or al least should do so in a very prudent way. According to this perspective, this is so even if the Constitution recognizes social rights, because these rights cannot be satisfied in the same way that civil and political rights are. Indeed, the fulfillment of social rights generally requires a public expense coming from resources that are scarce by definition, and their protection by a constitutional judge might generate a macroeconomic disequilibrium, or may subtract resources that were bound to satisfy other social rights –in which case the judge could paradoxically become a factor of the violation of fundamental rights-. That is why, for instance, some have criticized the *tutela* decisions in which the CCC has ordered the provision of certain medicaments needed by victims of catastrophic diseases (but excluded from the Obligatory Health Plan), arguing that the expenses they order to be spent in a few sick persons cause a disequilibrium in the social security system, which sometimes ends up by creating a scarcity of resources needed to vaccinate hundreds of children.[50] In consequence, it is impossible to satisfy all social rights at once, and the decisions about the allocation and distribution of scarce economic resources should be left to political organs.

In spite of the relevance of the previous objections, the difficulties –that no one should deny- of judicial protection of social rights do not lead to concluding their absolute legal inefficacy or non-justiciability. On the one hand, although specific, social rights are not as opposed to civil and political rights as it is commonly argued. The difference between the two types of rights must be nuanced, since neither all social rights imply positive obligations of the state, nor all civil and political rights generate state's abstention duties only.[51] For that reason, the protection of all kinds of rights involves economic costs and implies arbitration between the alternative uses of scarce resources.

On the other hand, political organs do not have absolute freedom to choose any economic model, unless one denies the normative force of the Constitution's social content and of international treaties that recognize social rights. This denial is unsustainable because, just as there can be no democracy without the protection of

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[49] See A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1986); M. Cappeletti, 'Necesidad y legitimidad de la justicia constitucional', *Tribunales constitucionales europeos y derechos fundamentales* (Madrid: Centro de Estudios Constitucionales, 1984); J. Elster & R. Slagstrad (comps.), *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988); J. H. Ely, *Democracia y desconfianza* (Bogotá: Universidad de Los Andes, 1996); and especially C. S. Nino, *La constitución de la democracia deliberativa* (Barcelona: Gedisa, 1997). For the classic justifications of judicial review, formulated by the American founding fathers, see A. Hamilton, *The Federalist* No. 78; US Supreme Court, *Marbury v Madison* 1803 USSCJ.

[50] S. Kalmanovitz, supra, n. 2.

[51] An example of the first case is the right of workers to form unions, which basically entails the obligation of the state not to interfere in their development. An example of the second case is the right to a public legal defense for those who cannot afford one.

rights like freedom of expression and due process, the incorporation of social rights in a Political Charter supposes that there cannot be a real democratic deliberation unless a certain social equality and a basic satisfaction of people's needs are guaranteed. Accordingly, all economic strategies chosen by the political organs must be oriented towards a progressive satisfaction of social rights. And it is clear that a "countermajoritarian" authority –such as the CCC- should guarantee that social rights are treated as real normative limits, so as to not end up having a mere rhetorical efficacy.

As a result, I think the difficulties of a judicial enforcement of social rights do not hinder the CCC from deciding theses issues. That does not mean, however, that the consequences of those difficulties on the judicial function should not be ignored. First of all, given the state's duty to fulfill social rights has a progressive character, which means that their satisfaction depends on the availability of resources, one must bear in mind that the interpretative task of the constitutional judge is certainly more difficult in this field. He or she must not only take into account the problem of limited resources, but also the progressiveness principle. Second, since social rights entail a public expense, the constitutional judge cannot ignore the crucial role that law has on the definition of social rights' content and mechanisms of protection, and must recognize the ample freedom of Congress to develop strategies for the satisfaction of those rights. In conclusion, the Constitution must be interpreted as an open but not neutral text; judges should orient their decisions towards the defense of its pluralist character and thus avoid adopting rigid formulas, in order to maintain the possibility of a vigorous democratic deliberation about social rights.

Third, criticisms about the harmful effects of the judicial enforcement of social rights on the judicial apparatus and the political system should not be ignored. Certainly, an excessive judicialisation of social rights can be inconvenient for both social mobilisation –since popular participation and democratic culture may be negatively affected- and justice -which may tend to its politisation and overloading-. However, these risks should not lead us to condemn all forms of judicial protection of social rights; instead, lawyers and judges should be aware of them and actively contribute to their neutralization. Hence, lawyers should know that their task is not to substitute but to complement or reconstitute social movements. Judges should prevent the excessive politisation and overloading of their activity and, for that purpose, they should be willing to develop flexible decision techniques that do not foreclose the discussion, but that instead let it return to the political arena. Besides, judges should contribute to the strengthening of social movements, by fortifying them whenever they are the weak part of a legal dispute, but should never take the discussion away from them. Finally, one should always keep in mind that the legal battle is only a part of the wider political struggle for social emancipation, and that no transcendental transformation will be achieved, if law is the only weapon used for that purpose.

On the other hand, it is impossible to deny the relevance of criticisms regarding the conservative effects that judicial decisions on social rights may have in terms of the distribution of power and wealth in society. In fact, it is difficult to think in law in general, and in judicial decisions in particular, as adequate instruments for social emancipation, since they can easily be utilized as domination mechanisms to perpetuate the *statu quo* of power relations.[52] However, I believe this perspective has to be nuanced in the Colombian case for two reasons. First, Colombia is a semi-peripheral country, in which the autonomy of the legal system is reduced with respect to both the political

[52] See M. Tushnet, supra, n. 2.

system –because of the political instrumentalisation of law- and the social system – because of law's inefficacy and the prevalence of legal pluralism over official law-. Law is often utilized for institutional legitimisation rather than for social regulation. Therefore, the debate regarding the relation between law and social change should be posited in less instrumental terms.

Nonetheless, the production of law with legitimizing intentions is a double-edged sword, as symbols of social change and protection of rights embodied by law may be appropriated and taken seriously by citizens, social movements and state institutions, and used as effective instruments of resistance against hegemonic power. Some of the CCC's rulings analyzed in this essay are good examples of this, since they have produced significant social mobilization. In these cases, the emancipatory power of the Court's decisions lies in the fact that they concretize the expectations encoded in the Constitution, and thus contain a political message that actors can interpret as a pretext for political action.

Second, I believe that it is nowadays possible to affirm that emancipatory results can be achieved through the judicial battle if, as I mentioned before, they are part of a wider social struggle. In fact, the idea of revolution as the only means for social emancipation is in crisis and is quite problematic in chaotic and anomic societies like Colombia, where neither control nor discipline have ever been specific traits of the legal system. Moreover, during the last decade, the Colombian social movements' political fight has used the legal strategy as an essential element, and classical political confrontation has been overshadowed. This is particularly the case of new social movements, usually concerned with cultural matters and demands of social and political recognition[53], and radically different from old social movements, generally linked to class struggle.[54] And it is also the case of the Colombian trade union movement, which, despite of having classical features and aspirations, has actively used the legal strategy as an instrument both for its revival and for its emancipatory struggle.

4. **The Constitutional Court and social emancipation in Colombia**

In the previous sections, I believe to have shown that it is possible for a constitutional tribunal to produce progressive decisions on social rights that may have an emancipatory impact. This does not mean that these decisions can be emancipatory under any circumstances; on the contrary, there are some aspects that can weaken their emancipatory potential. It is therefore important to develop contextual analyses capable of identifying which conditions allow or impede progressive constitutional practices to have emancipatory and democratizing effects, in order to sharpen variables that may help us recognize and take advantage of potentially emancipatory judicial decisions regarding social rights.

It is important to bear in mind that the relation between judicial decisions and social practices is a complex phenomenon that cannot be reduced to a causality link. In fact, although judicial decisions cannot produce, by themselves, direct and effective instances of social change, they are not irrelevant for the evaluation of these changes either. For

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[53] N. Fraser, supra, n. 23; B. de Sousa Santos, *De la Mano de Alicia; lo social y lo político en la post-modernidad* (Bogotá: Siglo del Hombre, 1998).

[54] A. Giddens, *The Constitution of Society* (Berkeley: University of California Press, 1984); A. Touraine, *The Self Production of Society* (Chicago: University of Chicago Press, 1977).

that reason, the elements I propose in the following lines should not be understood as *causes* that explain the emancipatory potential of the judicial protection of social rights, but rather as factors that, according to my empirical analysis, may strengthen or undermine this emancipatory potential. These elements are: the type of judicial decision, the difficulties of compliance, the social context, the nature of the beneficiaries and the role of the legal strategy.[55]

4.1. Types of decisions

The impact a judicial decision may have depends, in the first place, on the nature of the writ emitted by the judge.[56] Progressive judicial activism can be either ideological or remedial; besides, while ideological progressive activism may present either innovatory or preservationist judicial decisions, remedial progressive activism may imply either positive or negative judicial remedies.[57] Let us see.

We are in presence of ideological progressive activism when a judge recognizes certain rights, the existence of which is disputed by political forces, and confers them to certain social group or groups. Ideological activism may present two forms: it is innovatory when judicial decisions go against the majority to create rights that have never been recognized before; and it is preservationist when judicial decisions tend to preserve a guarantee or right for which precedents clearly exist but, whose existence is constantly threatened by political forces.

In contrast, we are in presence of remedial progressive activism when the judicial decision faces a right whose existence is incontrovertible and challenges its violation, but it is nonetheless susceptible of being criticized because the legal remedies it decrees may invade the competencies of other state entities. Remedial activism can imply negative and positive remedies: whereas negative remedies are judicial enforcements of prohibitions and are hence easier to execute, positive remedies consist in judicial mandates to do something, and their compliance may encounter greater resistance.

It is likely for negative remedial orders (prohibitions) to have the highest emancipatory potential, as opposed to the great deal of controversy and opposition, and the consequent lower emancipatory potential, that innovatory ideological activism might generate. Most of the cases studied in section 2 found their emancipatory impulse in preservationist and innovatory ideological activism, or in positive remedies. That impulse is thus very likely to confront the obstacles of being hindered or eliminated by political forces that actively oppose and controvert it.

In the following table, I summarize the types of decisions that can be taken by a progressive Court and relate them with the previously studied cases:

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[55] These variables are taken from García Villegas and Uprimny, supra, n. 4.

[56] Erwin Chemerinsky, 'Can Courts Make a Difference?', Neal Devins and Davidson Douglas (eds.), *Redefining equality* (New York: Oxford University Press, 1998), pp. 191-204.

[57] I partly follow the terminology proposed by William Wayne, 'The two faces of judicial activism', David O' Brien (ed.), *Judges on Judging. Views from the Bench* (New Jersey: Chatham House Publishers, 1997), pp. 302 ff..

Types of Progressive Activism			
Ideological Activism		**Remedial Activism**	
Innovatory Activism	**Preservationist Activism**	**Positive Remedies**	**Negative Remedies**
- Protection of the right to health *- Modification of the UPAC system*	*- Protection of union members' job stability against discrimination*	*- Improvement of prisoners and forcedly displaced people's life conditions*	*- Prohibition of taxes on first necessity products*

4.2 Problems of compliance

The impact of a judicial decision does not only depend on the nature of the writ, but also on the obstacles it may or may not confront in order to be efficaciously complied with. For this purpose, we may distinguish those judicial decisions regarding social rights that present little or no problems of compliance, from those that present serious problems of compliance.

In the first category we may include judicial decisions that protect social rights by means of a *tutela* ruling whose writ consists on an simple order to do or to abstain from doing something, as well as judicial decisions that abstractly evaluate the constitutionality of economic legislation (see section 2.3). In both cases, compliance with the writ emitted by the constitutional judge is frequent, and non-compliance is rare. In the first case, this can be explained by the fact that the *tutela* judge has a specific mechanism -the *incidente de desacato*, which is similar to the contempt of court- for verifying the compliance with his or her decision. This mechanism allows the judge to impose a sanction of detention or fine to the public authority or individual that omits to comply with the decision in the forty-eight hours following the judicial decision.[58] In the second case, the judicial decision is almost always complied with, given that it is a general decision of either annulling or maintaining a legal disposition in the legal order, and therefore has an *erga omnes* effect.[59] Hence, a non-complier of the judicial decision will, in fact, be a non-complier of the laws.

In the second category we may include all those judicial decisions that, for some reason, confront obstacles to be complied with. The best example of such a case is given by those judicial decisions that contain complex orders –usually to other public authorities- with the objective of solving a structural problem, such as the CCC's orders to put an end to the infrahuman situation of both prisoners and forcedly displaced people. These decisions have the benefit of intending to solve a problem structurally and not

[58] Decree 2591, 1991.

[59] This becomes a bit more problematic when the constitutionality control's decision consists in declaring the norm *conditionally constitutional*, and when full compliance with the ruling implies compliance with the interpretation given to the norm by the CCC. In these cases, the difficulty can be found in the resistance of judicial authorities to comply with the constitutional precedent, for cultural or political reasons.

superficially, and of letting open the debate about the mechanisms that might be used to solve it. However, it is extremely hard to verify the compliance of this type of decisions, given that the authorities to which orders are directed may avoid compliance, without explicitly disobeying the ruling. Thus, these authorities may obstruct the enactment of the rights protected by the judicial decision by, for example, adducing budgetary restrictions or administrative difficulties. Although the final result will be the precarious protection of social rights, it will be so without these authorities openly committing contempt. This is pretty much what happened with the CCC's decision about prisons, which ordered the government to implement all the measures needed to give an end to the over-crowdedness of prisons, but whose effective compliance is very difficult to evaluate. In its ruling on forcedly displaced people, the CCC implemented an original strategy in order to avoid the risk of non-compliance of rulings with complex and structural orders. In fact, it retained its jurisdiction after the ruling, and explicitly attributed itself the competence to evaluate, control and sanction the government's compliance with the complex orders the ruling contained. Although the CCC has not yet exercised this new competence it created, this strategy may reduce the risks of non-compliance of this type of decisions, without simplifying the order (and therefore reducing its capacity to solve the structural problem).

Another obstacle judicial decisions may confront in terms of their compliance is the reluctance of public authorities to submit to the precedent of the Court. This obstacle has to do both with a legal culture that is not used to the obligatory character of precedent, and with the conflicts of power that may arise from the Court's pretension to apply its decisions to other authorities –in particular to other high courts-. Thus, those constitutional decisions explicitly ordering that the rules contained in them be applied not only to the particular case, but also to all future cases analogous in facts may well be complied with in the particular case, but probably will not be in future cases. For instance, in numerous opportunities the CCC has established the general conditions in which the protection of the right to health is obligatory, even if the medicament the client requires is not included in the health plan. Although health institutions are well aware that, if they do not follow the rule of the Court a *tutela* action will be filed against them, there are very few willing to comply without an express order of a constitutional judge in that sense. A similar thing happens with decisions of the Supreme Court of Justice and the State Council that explicitly decline to follow the precedent of the CCC, despite the fact the CCC has said in multiple opportunities that all judges of the Republic are obliged to it, and despite the fact that it has, in effect, emitted *tutela* rulings against the high courts for not applying its precedent and thus violating the Constitution.

4.3. The decisions' political costs

Progressive courts are always subjected to the risks their decisions may bring them in terms of political costs. In fact, progressive judicial rulings frequently affect the interests of specific actors, and the political consequences of taking them might influence the final decision of the judge. It is thus important to carefully weigh these costs in each case, even if this evaluation is extremely difficult in contexts of institutional, social and political fragmentation, such as the Colombia.

Beyond the risks of these specific political costs, the Court is subjected to a general danger operating as a sort of backdrop, against which it acts. This danger consists in the latent possibility that political forces unite to finish off the Court by reforming the Constitution or by pressuring it in such a way that, for its own protection, its decisions end up adopting a conservative orientation. As I mentioned earlier, this danger has incremented in the last few years, due to the conservative visions that President Uribe

and his government hold with respect to the Court, and due to the great possibility it exists of him being reelected. The fact that this danger haunts the Court might explain the prudence it has adopted in recent decisions. This general danger acquires a similar, only less dramatic, connotation when the election of new judges takes place, as it posits the risk of a neutralization of the Court's activity through the appointment of conservative judges. In previous periods of election of new judges, this danger seems to have been notably reduced by the fact that the Court's progressive orientation has become one of its principal sources of legitimacy.[60] However, in a new and much more conservative setting, and with the possibility existing that President Uribe may appoint three new Justices, the extent of the reduction of this danger by the progressive image of the Court is not so clear.

But even if the Court succeeds this impasse of a conservative climate and a new period of election of judges, and persists with the progressive orientation it demonstrated in the cases analyzed in section 2, a question remains regarding the type of relation that exists between progressive decisions' political costs and social effects. And one thing is clear: the emancipatory possibilities of the Court's progressive decisions seem to be greater in contexts in which a consensus has been formed on the values and principles defended by the Court. Because it is difficult for actual cases to conform exactly to an ideal type, our case studies are located along a spectrum of intermediary possibilities. For example, cases of the UPAC movement and forcedly displaced people seem to enjoy broad public support. In contrast, trade unions and prisons' cases operate in a less favorable political climate, because the first face a significant opposition, while the second have an extremely weak public support. Cases regarding the right to health are located in an intermediate position, since they are inscribed in a favorable ideological context, but their judicial solutions tend to be divisive.

4.4. The nature of the beneficiaries

The emancipatory potential of a judicial decision also depends on the way it is received by social actors. The most important factor to evaluate this criterion is, perhaps, the degree of internal cohesion among the decision's beneficiaries, degree that varies according to the type of social actors. The first type of social actors are disperse and usually seek individual interests. These actors will choose a collective practice only when it works to the advantage of their own individual strategy. The mortgage debtors' movement offers an example of this type of social actors because, despite its strength, it could be easily taken apart whenever the implementation of the Court's decisions presents difficulties. Prisoners and forcedly displaced people form part of this type of actors as well, but their dispersion is much more acute, for these two groups cannot even be considered social movements.

The second type of social actors are strongly connected through their community links and values. Several Colombian indigenous communities whose autonomy rights have been protected by the CCC are a good example of this situation this situation.

The third type of social actors is constituted by social movements whose internal cohesion depends on the shared political interests of their members. This is the case of

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[60] In 2001, seven of the nine Magistrates of the Court were replaced, but its general political orientation remained unmodified, until, at least, a couple years ago.This demonstrates that the socially perceived mission of an institution may influence the behaviors of its members. Based on Howard Gillman, I formulated this idea in a previous text of mine. See, R. Uprimny, 'The Constitutional Control of Presidential Extraordinary Powers in Colombia', *Democratization* 10 (2003), 63.

trade unions, since its internal cohesion does not depend exclusively on the Court's decisions, even though these can bring new life and energy to the political struggle.

4.5. The relative weight of a legal strategy

We should finally ask what kind of influence do the Court's decisions have on the strategy of counter-hegemonic struggle of social actors. There are two possible answers to this question. The first arises when the judicial decision explains the emancipatory struggles of social actors, as well as their existence, combativeness, achievements, etc.. This is the case of the UPAC debtors, who found their most important element of cohesion and struggle in the Court's decision. An analogous thing can be said about the prisoners, forcedly displaced people and health rights' cases, because for all of them the Court's decisions were a fundamental niche of social emancipation, but their dispersion and lack of cohesion may limit their legal strategies from producing a profound social change.

The second answer appears in cases in which the legal strategy was not perceived as a relevant element of the political struggle in the past, but acquires an unusual importance in a specific moment. This often coincides with a moment of crisis in the political strategy of the movement or with a time when the movement faces a danger of disintegration, such as the current situation of trade unions.

In conclusion, the effectiveness of the Court's progressive decisions increases when the following factors coincide: remedial judicial decisions -preferably instructing on prohibitions- with judicial mechanisms to guarantee their effective compliance, put forth in consensual contexts, which social movements -be they disperse or community-based- can politically appropriate and adopt in a legal strategy that forms part of their wider political struggle and of the construction of their identity. This is the ideal combination of factors for progressive judicial activism to have a greater potential in bringing about emancipatory practices. However, it is not a proposition cast in stone, but is more of a tendency. The combination of all factors is not necessarily required so that emancipatory practices can be generated.[61] In contrast, the fact that this combination takes place does not necessarily guarantee social emancipation.[62] It is a model that indicates tendencies, and empirical research is therefore always indispensable for corroborating the veracity of the tendency in concrete cases.

5. Some final conclusions

This article corroborates a modest but significant idea: progressive judicial decisions on social rights may or may not become an adequate instrument for social emancipation; it all depends on the context of these decisions and on weather certain factors do or do not take place. This modest idea should mark the parameters of how empirical investigation, legal theory and political action should be guided in the search for social transformation.

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[61] Even if they all brought about emancipatory practices, the cases we studied lack one or more of these factors. Thus, in the right to health cases, the consensual element is deficient; the prisoners and forcedly displaced people's cases are not community based; and the trade unions' case appears to lack at least three factors -a consensual audience, the movement's characterization as either disperse or community-based, and a constitutive legal strategy-, but because of its specificity as a classic social movement willing to survive through legal strategy, it still presents an interesting emancipatory potential.

[62] None of the case studies serve as an example of this situation. However, it is clear that not every progressive decision leads to social emancipation. An interesting complement to this research would be to expand the number of cases and to include progressive decisions that have not led to emancipatory practices.

On the one hand, the investigation challenge consists in a rigorous development of sociolegal empirical and comparative studies for better understanding the contextual limits and possibilities of judicial progressive strategies for the protection of social rights. These studies shall bring about more precise variables for the identification of those judicial decisions with a potential for social transformation.

On the other hand, the theoretical challenge refers to the need of formulating specific legal concepts capable of responding to the complexities posed by social rights, and of enhancing the progressive potentiality of judicial decisions on these issues. As we have seen, the protection of social rights faces serious obstacles in contexts in which, like Colombia, poverty and iniquity dominate the social scene. We are in need of "a new theoretical construction"[63] that may enable the adaptation of constitutional activism on social rights to the specificities of the country's context, and the development of original judicial tools of interpretation that can be used to defend the normative force of social rights.

Finally, the political challenge implies the rearticulating of legal and social struggles. In fact, neither exhaustive empirical investigations, nor arduously constructed legal concepts are capable of giving a solution to the problem of social rights and emancipation in a thorough way. Constitutional justice can become an important instrument for democratic progress, only if we think of it as part of broader social struggles. The accomplishment of the emancipation promises made by the 1991 Constitution is too serious a matter to leave it only to judges; citizens' participation is indispensable for the realization of democracy.

[63] Eduardo Cifuentes, 'El constitucionalismo de la pobreza,' *Lecturas Constitucionales Andinas* 3 (1994).