Readings on the Colombian Constitutional Court
Professor Manuel Jose Cepeda Espinosa
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# I. EQUALITY

## a. Equality and protection of dignity. The case of same-sex couples: *Decision C-075 of 2007*

**Introductory note.** The Court had protected individuals of all sexual orientations. Nevertheless, it had not accepted the legitimacy of same sex couples. The closest it had got to that, was in a 5 to 4 decision in which the majority opinion (per Justice Rodrigo Escobar Gil) held that an homosexual man did not have the right to register his couple as if it were the equivalent of a spouse or permanent companion for the purpose of including him as part of his family entitled to public health insurance. The concept of family couple applies only to heterosexual relations. The four dissenters argued that he could since public health insurers could not discriminate against same sex couples.

***Decision C-075 of 2007*** **(Per Justice Rodrigo Escobar Gil):** In an eight to one vote[1], the Constitutional Court decided to declare Law 54 of 1990 constitutional under conditions and to extend its enforcement to same-sex couples[2].

Law 54 of 1990 establishes regulations regarding "marital union in fact", i.e., the association between a man and a woman resulting in the creation of common marital property without the need of marriage. The claimants argued that the restriction of marital unions in fact to heterosexual couples left homosexual couples unprotected in several fields since the definitions contained in Law 54 of 1990 had negative effects on them concerning penal, civil and labor issues. Hence, the claimants submitted that Law 54 of 1990 infringed Articles 1[3] and 38[4] of the Constitution.

[1] Justice Jaime Araujo Rentería dissented because he considered that, although other discriminatory regulations were not contested, the decision should have been assessed to avoid other type of discrimination against same-sex couples.

[2] The Court decided: "To declare Law 54 of 1990 CONSTITUTIONAL as amended by Law 979 of 2005 and in the understanding that the protection measures therein included cover as well homosexual couples."

[3] E.N, Article 1 states: "Colombia is a State of social rights organized as a decentralized Republic with autonomous regional institutions governed by democratic, participatory and pluralistic principles, founded on the respect to human dignity, the work and solidarity of its citizens and the predominance of the general interest." (ff. Underlined by us).

First, the Court defined the scope of its analysis. It took into consideration the effects of a previous decision, **C-098 of 1996 (per Justice Eduardo Cifuentes Muñoz)**, which had declared constitutional the provisions questioned in the present case. Although the previous analysis was limited to Law 54 of 1990 conceived as a measure for family protection, it "left the door open for a new constitutionality examination regarding the possibility of a negative impact for homosexuals derived from the enforcement of the said regulation". According to Article 243[5] of the Constitution, the Court could not refer back to issues on which it had already ruled, but it was empowered to do so regarding those matters which were not part of the *ratio decidendi* of the previous decision. The Court decided then to examine whether "not recognizing common marital property for homosexual couples implies their lack of protection regarding civil law enforceable regulations and a discriminatory treatment as compared with heterosexual couples whose marital property status has been indeed regulated."

Contrary to what the claimants requested, the Court restricted its examination to the question on "whether the law, by establishing a marital property regime between permanent mates and restricting it to unions between a man and a woman, disregarded same-sex couples' fundamental rights to equal protection, human dignity, subsistence income and free association of members of same-sex couples." Therefore, the Court excluded from its analysis the regulations related to civil, penal and labor matters mentioned by the claimants arguing that they had failed to contest the relevant legal provisions. Consequently, the Court limited its study exclusively to the marital property regime germane to "permanent mates" as they are called in Law 54 of 1990.

The Court examined the regulations enshrined in Law 54 of 1990 and concluded that "homosexuals who live together are unprotected from the point of view of marital common property because once their cohabitation comes to

[4] E.N, Article 38 states: "The right of people to freely associate with the aim of undertaking activities commonly sought by citizens shall be protected."

[5] E.N, Article 243 states: "Rulings adopted by the Court in the process of its jurisdictional control are to be considered contitutional res judicata. || Authorities will not be allowed to reproduce the material contents of a legal act declared unconstitutional in its essence as long as the provisions which were invoked to compare the ordinary law and the Constitution prevail."

an end, they have no legal tools to claim for their share of the common capital they have accrued with their partners during their relationship."

On the basis of this assumption, the Court stated that "any discriminating treatment founded on a person's sexual orientation is deemed unconstitutional and will be subject to strict constitutional control" (Decision C-481 of 1998, per Justice Alejandro Martínez Caballero [case of homosexual teachers]). In agreement with article 24 of the American Convention on Human Rights[6] and article 26 of the International Covenant on Civil and Political Rights[7], the Court also pointed out that "the ban on discrimination due to sexual orientation emerges from international regulations which are comprised in our constitutional block and forbid all sorts of discrimination." The Court quoted as well the conclusions arrived at by the UN Human Rights Committee which stated that "the ban on discrimination due to people's sex includes the category of 'sexual orientation', making it, therefore, a questionable differentiation criterion" (*Toonen v. Australia*) and that "if no arguments on how this distinction between same-sex partners […] is reasonable and objective, or no evidence which would point to the existence of factors justifying such a distinction has been advanced, then it must be considered as an infringement of article 26 of the Covenant" (*Young v. Australia*).

Hence, the Court concluded that "(i) according to the Constitution, all forms of discrimination on the basis of sexual orientation are prohibited; (ii) since there are differences between heterosexual and homosexual couples, there is no constitutional mandate to grant them equal treatment; (iii) the legislator has the competence to define the necessary measures to duly protect the different social groups and gradually advance towards the full protection of individuals facing situations of exclusion, and (iv) any differential treatment regarding assimilable groups or people is constitutionally valid only if it responds to the principle of sufficient reason."

[6] E.N, American Convention on Human Rights, article 24: "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."

[7] E.N, International Covenant on Civil and Political Rights, article 26: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

After analyzing the allegations pleaded by the claimants, the Court considered that the "constitutional duty of protection" should be established. For the Court, "[t]he *right to protection*, contrary to the right to freedom, guarantees all persons that the State will adopt factual and normative measures to protect them" (Decision C-507 of 2004, per Justice Manuel José Cepeda Espinosa [*case related to the difference in legal age established for men and women*]). Hence, the definition of such rights would correspond firstly to the Congress. The Court stated that the task of "determining the type or degree of protection required by other similar groups has been assigned to democratically elected legislators. Therefore, when examining whether a group of people is less protected than others, constitutional judges cannot substitute legislators' considerations or set maximum or ideal levels of protection."

However, the Court held that it was its competence "to determine whether (i) the legislator has not observed the minimum protection ordered by the Constitution; (ii) whether the vulnerability of a group exceeds admissible constitutional limits, or (iii) whether the relative lesser protection of a group obeys to discrimination, case in which it would be prohibited by the Constitution."

The Court went on to determine if the contested provision violated the Constitution, and particularly the right to human dignity therein enshrined.

The Court first noted that "the law, in regulating "*marital union in fact*", creates a regime of protection of patrimony for the members of heterosexual couples, but does not do so for homosexual couples." The Court also adverted that "the way in which patrimonial protection is granted to those who have decided to form a couple as a permanent and singular life project, comes within the margin of legislative configuration, since there is no single binding formula according to the Constitution and the required protection may be reached by different means."

The Court, however, did note that "this margin of legislative configuration is limited by the Constitution and the respect to the fundamental rights of persons." For that reason, "the absence of patrimonial protection for homosexual couples is harmful to the dignity of the human person, is contrary

to the right to free development of personality and entails a form of discrimination prohibited by the Constitution."

According to the Court, "human dignity is a superior value and a founding principle of our Social State, according to which all persons are entitled to receive a treatment consistent with their human nature." Human dignity "has been conceived [in the Court's law case] as the expression of individual autonomy, as the embodiment of certain material standards of living, or as the manifestation of the intangibility of physical and moral integrity."

The Court stated then that "people's autonomy is restricted by others' rights and by the legal system" (Article 16, PC[8]), but that "such restriction cannot be taken to the extreme of converting people into instruments to safeguard the general interest, thus affecting their dignity." The Court also pointed out that "the principle of human dignity entails a constitutional mandate which determines not only a negative duty of non interference, but also a positive duty to protect and preserve appropriate conditions for a dignified life."

Accordingly, the Court concluded that "the absence of legal recognition of homosexual couples attempts against the dignity of the individuals involved because it undermines their autonomy and their capacity for self-determination by denying the legal effects as regards marital property ensuing from their decision to share their lives."

Hence, the Court held that in this case it was possible to identify "the minimum mandatory level of protection that the Constitution" grants to same-sex couples, "because the absence of legal provisions in the field of marital property specifically designed for homosexual couples would imply their having to accept general civil law regulations which restrict their autonomy to decide upon the property-related consequences of their decision to live together as a couple leaving the issue in a 'legal limbo' whose consequences are potentially harmful when their cohabitation eventually comes to an end."

[8] E.N, Article 16: "All persons have the right to the free development of their personality with no other restrictions than those emerging from others' rights and from the legal system."

The Court further held that this "protection deficit" in Law 54 of 1990 violated the second realm of human dignity "given the material consequences that this may bring about for those who would lose what they are entitled to from the marital property jointly acquired during their relationship and which could negatively impact on their livelihood". Additionally, the Court concluded that it was discriminatory since "homosexual couples have the same need for protection and […] there are no objective reasons which may justify a differentiated treatment."

Thus, the Court decided that, although the protection of the marital property of couples was an issue which "belonged to the jurisdiction of the legislator, it is contrary to the Constitution to establish legal regulations which protect exclusively heterosexual couples". Therefore, the Court decided to declare Law 54 of 1990 constitutional under conditions, and to extend its effects to same-sex couples. Consequently, the civil law regulations which grant protection to unmarried heterosexual couples who live together will cover as well same-sex couples.

**Note:** After the adoption of this decision, the Court extended the protection due to homosexual couples to other spheres besides those comprised in Law 54 of 1990. In ***Decision C-811 of 2007*** **(per Justice Marco Gerardo Monroy Cabra)**, the Court included health coverage for same-sex couples. In ***Decision C-336 of 2008*** **(per Justice Clara Inés Vargas Hernández)**, the Court adopted the same stand regarding retirement pension coverage. In ***Decision C-029 of 2009*** **(per Justice Rodrigo Escobar Gil)**, the Court again granted homosexual couples the protection established by law regarding the following: (i) protection in the case of heinous crimes; (ii) social security benefits for armed forces and police members; (iii) State subsidies for low-income families; (iv) housing subsidies; (v) access to land property in rural areas; (vi) insurance compensation coverage in case of accident; (vii) impediments to access public positions; (viii) civil liability for alimony; (ix) migration regulations, and (x) criminal laws related to spouses. All these decisions extending legal protection to same-sex couples in different spheres were founded on the "protection deficit" regarding individuals who have the same dignity. In the most recent decisions, however, the prohibition of

discrimination, the protection of the right to dignity and the duty to ensure its realization were established with greater strength. The most recent decision concerned same sex marriages. In 2011, in a decision not yet published and whose reach is still uncertain, the Court held that same sex couples may marry and that the form of this marriage shall be regulated by Congress within a delay given by the Court. In the absence of a specific statute, the ordinary civil code would apply after the delay.

## II. SOCIAL RIGHTS

### a. Minimum subsistence level

**Introductory note.** Since its first year the Court held that social rights were justifiable in concrete cases. The most importance decision in this line concerned a pension. In it the Court deduced from several clauses of the Constitution a right to a minimum level of subsistence (derecho al mínimo vital). This right has then been applied in very diverse cases. It has played two main functions: from a procedural perspective it has opened the way for the enforceability of different social rights whenever they are "in connection" to the fundamental right to minimum level of subsistence or other fundamental right, and from a substantive perspective it has set a limit to what the state can and cannot do concerning decisions that directly affect the living conditions of Colombians. Moreover, as a fundamental right the "vital minimum" can also be autonomously and directly enforceable.

***Decision T-426 of 1992*** **(per Justice Eduardo Cifuentes Muñoz):** In a unanimous decision, the Court protected the right to the minimum level of subsistence of the petitioner, a senior citizen who requested a change in his pension due to the death of his spouse, yet the public pension fund did not answer his request for substituting himself as new recipient of the pension who belonged to his deceased wife. In addition, due to lack of resources, the petitioner had not been able to have a required surgery. Consequently the Court, in addition to protecting the right to a pension, granted the tutela "due to the violation of the fundamental right to social security."

In the first place, the Court acknowledged that seniors are the subjects of special protection. Regarding this, it pointed out: "Long lines of elderly people

waiting to be paid the necessary pensions to survive, the lack of a social service to assist senior citizens and physically or mentally handicapped persons, like the service existing in other societies – a service that necessarily must be offered in this country – to guarantee the satisfaction of basic needs and, in general, the absence of an adequate protection and assistance system, are objective factors that place this social group under circumstances of manifest marginality and weakness."

The Court stated that even though the Constitution does not explicitly address the right to the minimum level of subsistence, such a right could be deduced from the text. "Even though the Constitution does not acknowledge a right to subsistence, the latter can be deduced from the rights to life, to health, to work and to assistance, or to social security. The person requires a minimum of material elements to subsist. The acknowledgement of fundamental rights in the Constitution aims to guarantee the economic and spiritual conditions necessary for the dignity of the person and the free development of his personality.

(…)

"Any person has the right to a minimum of conditions for his material security. The right to a minimum vital – the right to subsistence as the petitioner calls it – is a direct consequence of the principles of human dignity and of the Social State of Law, which define the just political, social and economic organization chosen as a goal by the Colombian people in their Constitution (…).

"The right to the minimum vital not only includes the faculty to neutralize situations violating human dignity, or the faculty to demand assistance and protection by discriminated or marginalized persons or groups or people who are under circumstances of manifest weakness (Political Constitution art. 13[9]), but also, above all, it aims to guarantee equality of opportunities and social

[9] E.N, the Article states: "(…) The state will promote the conditions necessary in order that equality may be real and effective will adopt measures in favor of groups which are discriminated against or marginalized. // The state will especially protect those individuals who on account of their economic, physical, or mental condition are in obviously vulnerable circumstances and will sanction any abuse or ill-treatment perpetrated against them." (underlined by us)

leveling in a society historically unjust and unequal, with cultural and economic factors that have grave incidence in its "social deficit."

"The right to a minimum vital does not grant a subjective right to a person to demand, directly and without considering the special circumstances of the case, an economic guarantee from the State. Even though the social duties of the State (PC art. 2[10]) may eventually generate such a guarantee, as long as it remains infeasible, the State has the obligation to promote real and effective equality before the inequitatable distribution of economic resources and the scarcity of opportunities."

The Court also pointed out that the right to social security for senior citizens becomes a fundamental right, "according to the circumstances of the case." "The right to social security is not expressly acknowledged in the Constitutions as a fundamental right. Nonetheless, this right, established in a generic manner in article 48 of the Constitution[11], and in a specific manner regarding elderly persons (CP art. 46, par. 2[12]), acquires the character of fundamental when, according to the circumstances of the case, not to acknowledge it has the possibility of endangering other fundamental rights and principles such as life (PC art 11), human dignity (PC art 1), physical and moral integrity (PC art.12) or the free development of personality (PC art 16) of senior persons (PC art. 46).

[10] E.N, the Article states: "The essential goals of the state are to serve the community, promote general prosperity, and guarantee the effectiveness of the principles, rights, and duties stipulated by the Constitution; to facilitate the participation of all in the decisions that affect them and in the economic, political, administrative, and cultural life of the nation; to defend national independence, maintain territorial integrity, and ensure peaceful coexistence and the enforcement of a just order. // The authorities of the Republic are established in order to protect all persons residing in Colombia, their life, dignity, property, beliefs, and other rights and freedoms, and in order to ensure the fulfillment of the social duties of the state and individuals."

[11] E.N, the Article states: "Social Security is a mandatory public service which will be delivered under the administration, coordination, and control of the state, subject to the principles of efficiency, universality, and cooperation within the limits established by law. // All the population is guaranteed the irrevocable right to Social Security. // With the participation of individuals, the state will gradually extend the coverage of Social Security to include the provision of services in the form determined by law. // Social Security may be provided by public or private entities, in accordance with the law. // It will not be possible to assign or use the resources of the Social Security institutions for other purposes. // The law will define the means whereby the resources assigned to retirement benefits may retain their constant purchasing power."

[12] E.N, the Article states: "The state, the society, and the family will all participate in protecting and assisting senior citizens and will promote their integration into active and community life. // The state will guarantee them services of social security and food subsidies in cases of indigence."

"The concrete situation of a great number of elderly people forces the right to assistance and social security to become for them a fundamental right. According to the Constituent Assembly itself, "in Colombia it is estimated that in 1990 there were 2.016.334 people over sixty years of age, out of which 592.402, more than one fourth, do not have the resources necessary to subsist. Besides, it is known that most individuals who are senior citizens suffer some type of social abandonment and very few elderly have access to social security. The figure does not reach even 1% in all the national territory," (…Gaceta Constitucional No. 85, pg. 8-9). That is why the Constitution guarantees senior persons the services of **integral social security** and a subsidy for food in case they are indigent," (PC art. 46).

Elderly persons under conditions of abandonment or who represent a disproportionate economic burden for a family having scarce resources and who, consequently, become an inconvenience for family integrity, have the fundamental right to social security according to the terms set by the law."

(…)

"Finally, it is important to forewarn that the protection of and the assistance to elderly persons is not an obligatory function of either the State, society or family standing alone. The three must concur to fulfill this social function (PC art. 46), without it being possible for any of them to abstain from this juridical obligation under the pretext that the others must do it. When the burden of protection or assistance to senior citizens is for their families of such a magnitude, considering their economic conditions, that it becomes a grave inconvenience for them as a basic institution of the society (PC art. 5[13]), then the State or society must step in to guarantee the fulfillment of this obligation. Because of this, the argument given by the judge in this case that the State should not be obliged to provide protection and assistance to the petitioner as this is an additional obligation of the family, is unacceptable. The omission or irresponsible behavior as to the solution of the pension substitution issue ended up in this case violating the concurrent obligation of the State to protect and assist the elderly."

[13] The Article states: "The state recognizes, without any discrimination whatsoever, the primacy of the inalienable rights of the individual and protects the family as the basic institution of society."

The Court designed an innovative remedy to protect the right of the petitioner and to highlight the importance of the right to the minimum level of subsistence. Besides ordering specific actions to protect his rights, it condemned the State to pay an indemnity in favor of the petitioner, and it ordered that the same actions be taken by public pension funds regarding other elderly persons.

### b. Health

#### i. Individual Remedies

**Introductory Note:** The 1991 Constitution referred to the right to health in several of its articles. Article 44[14] mentions it as a fundamental right of children. Article 49[15] defines "health care" as a "public service under State responsibility" and establishes that all citizens are entitled to have "access to health care, promotion and protection." The Constitution awards the State the leading role in the operation of the system, which should be run following principles of "efficiency, universality and solidarity", and grants the legislator the power to design it.

In 1993, the legislature issued Law 100 through which the General Social Security System was created. Regarding health, the legislature chose a social security system that included private participation in health care delivery. In the first place, the law established two main types of affiliation: contributory plans and subsidized plans. Contributory plans are for those who have financial capacity to pay (workers or independent contractors) while subsidized affiliation covers those who cannot afford to pay and are therefore subsidized by the state. According to the Constitution, the inclusion of subsidized personnel should be gradual until reaching universal coverage as established by the Law. Those who are not affiliated through any of these two avenues, because they cannot afford to pay and yet are not covered by subsidies, are called "affiliated members." Affiliated members have access to public health care centers when they are sick, but they are not entitled to a

[14] Article 44 states: "The following are basic rights of children: (…) health and social security (…)"
[15] Article 49 states: "Public health and environmental protection are public services for which the state is responsible. All individuals are guaranteed access to services that promote, protect, and rehabilitate public health (…)"

specific health care service package and are forced to pay a percentage of health care costs in many cases. The methodology used to define priorities regarding access to the subsidized program is done through a survey of people's socioeconomic status that is known by as 'SISBEN.'

Those who are covered by the system through either type of program have the right to a package of services known as the Healthcare Mandatory Plan (HMP). This plan includes fewer items in the subsidized version than in the contributory version, but its gradual improvement to reach the same standards as the contributory plan was set as a goal by Law 100 of 1993. HMP service delivery corresponds to the Health Promotion Institutions (HPI). HPIs ensure health care services included in the HMP by signing contracts with direct health care deliverers known as Healthcare Service Delivery Institutions (SDI). Users are free to choose their HPI, as well as their preferred SDIs from among those owned by or under contract with their HPI. The Law also allows users to change to another HPI after a minimum period of time.

In exchange for HMP delivery, HPIs receive an insurance premium, the so-called Per Capita Payment Unit (CPU), from a public fund whose budget is collected mainly from fees paid by those who are affiliated to the system through the contributory option. The National Council on Health and Social Security (NCHSS), one of the authorities appointed to run the system, sets the CPU value to finance HMP service coverage.

Health system users can affiliate their close relatives as HMP beneficiaries. To access health care services, users have to pay small amounts of money called 'joint payments.' Joint payments may be compensating fees or shared payments. Compensating fees are aimed at streamlining health care service use and are charged both to members and beneficiaries. Shared payments aim to jointly finance health care services and are charged only to beneficiaries.

Finally, there are several relevant authorities involved in running the General Health and Social Security System. The Ministry of Social Protection plays the leading role in the operation of health and labor-related issues within the system and has the power to issue regulations on different aspects of the health system, as well as to promote the establishment of regulations through

Government decrees. The National Council on Health and Social Security (NCHSS) is in charge of regulating important aspects of the system such as MHP-covered services and CPU value. Health authorities, health insurance companies, service delivery institutions and users have representation in the NCHSS. This Council has been recently replaced by the Health Regulating Commission. Lastly, the National Health Supervision Committee is in charge of system surveillance and control.

Although the head of the health system at the national level is the Ministry of Social Protection, the Constitution contemplates decentralization in service delivery (art. 49). Local administrations, then, are responsible for health care service delivery, as well as of policy definitions within their jurisdiction in fields such as public health.

Law 100 of 1993 caused a significant change in people's access to health care services as it enabled more citizens to enjoy more services. However, from the very start, the Law had some problems regarding access to life-saving health care services that users could not pay for and that were not included in the MHP and to health care services that were included in the plans, but that HPIs refused to cover or to deliver in time.

From the very enactment of Law 100 of 1993, the lack of an efficient system to deal with conflicts related to health care service access resulted in *tutela* actions becoming almost the only mechanism to achieve such access. The amount of *tutela* writs requesting protection for the right to health has steadily grown. In 1993, the right to health was the 11$^{th}$ most popular right protected via the *tutela*. In 2003, it was the most popular right, and by 2008, around 100,000 *tutela* writs were filed in the country requesting protection for the right to health.

The review of *tutela* writs by the Constitutional Court has therefore played a central role in the development of the law in this area.

The health-related constitutional case law may be divided into four stages. The Court's case law initially focused on the protection of citizens in specific cases without taking into account global considerations regarding the health system

and its financial aspects. During this first stage, the Court issued ***Decision T-534 of 1992*** **(case of the "sick soldier")** which ruled on the case of a young man who was recruited by the national army for compulsory military service. From the beginning of his training, he declared that he had health problems, but his commanders paid no attention to his complaints. Given this situation, before the oath of enlistment and during a break, he visited a private doctor and was diagnosed with lung cancer. Once he reported this to his superiors in the Army, they refused to authorize the health care he required because the formal oath of enlistment ceremony had not taken place. Later he was declared unsuitable for service and dismissed. The soldier then filed a *tutela* writ requesting protection for his rights and access to the health care he required. The Court (per Justice Ciro Angarita Barón) protected the soldier's rights and ordered his transfer to the health care center suggested by his physician.

According to the Court, the fact that the right to life is enshrined in the Constitution (article 11[16]) implies that the State has the "duty" to "protect citizens' lives by adopting all those measures that would allow them to live in dignified conditions," as well as "to presume their good faith." And therefore, "as the soldier is a Colombian citizen, his dignity entitled him to receive from the State efficient and timely care for his health and life from the moment he was recruited and put under the authority of his immediate commanders. The lack of a symbolic ceremony cannot be pleaded as an excuse, even less so when the soldier was serving the country to his best ability."

Another important decision was ***SU-043 of 1995*** **("case of the girl with a terminal illness"),** which examined the case of a 14 year-old minor who had a congenital disorder requiring permanent medical treatment. The girls' parents had her registered in the health system as a beneficiary and she had received medical treatment all her life. One day, however, the girl's mother was informed that it was not possible to continue delivering the service because one of the girl's diseases was classified as a "non-curable but treatable condition," and a favorable prognosis was a requirement for service delivery. Although the country's health care system had already been modified, doctors

[16] EN, the Article states: "The right to life is inviolable. There will be no death penalty."

considered that the girl could not be treated because the rules governing the new system had not been established and the new service package to be covered by insurance plans was still unknown. The girl's mother, a low-wage worker, filed a *tutela* writ claiming that the girl's fundamental rights to life, health and social security had been infringed. The mother requested that the health insurance company be ordered to cover the girl's treatment costs. In a unanimous decision, the full Court (per Justice Fabio Morón Díaz) protected the girl's rights and ordered the health insurance company to deliver the health care services she required[17].

Reiterating previous case law, the Court stated that children's right to health was fundamental and that "merely programmatic, doctrinaire and general definitions of the right to social security [were insufficient] to avoid delivering medical and hospital care to minors suffering from incurable illnesses, and that they should not be invoked to invalidate delivery in the case of children."

In the second stage, the Constitutional Court case law began to show concern for the financial impact that court decisions protecting specific users' rights to health have had on the system.

***Decision SU-480 of 1997*** **("the financing of AIDS medication not included in the MHP")**, for example, examined the case of several people living with HIV/AIDS who had filed *tutela* writs requesting the delivery of medication required for their treatment (protease inhibitors and antiretroviral drugs), but not covered by the MHP. In a unanimous decision, the full Court (per Justice Alejandro Martínez Caballero) protected the claimants' rights. In those cases where a prescription had been written, the Court ordered the HPI to provide the medication. The Court also protected HPIs' right to sue the State in order

[17] The Court decided: "**First:** To revoke the decision pronounced by the Second Court of Medellín on August 3, 1994. ‖ **Second.** Grant the *tutela* writ requesting protection for the claimant's minor daughter's fundamental constitutional right to social security and health and, consequently, order the Colombian Social Security Institute in Antioquia to deliver the medical treatment and hospital services to the claimant María Elena Alvarez Ramírez's minor daughter according to provisions established in Law 100 of 1994 and in Decrees 1298, 1919 and 1938 of 1994."

to recover the cost of medications that were not covered by health plans. Finally, the Court ordered the regulatory authority to adjust the CPU value[18].

After reviewing the information provided by several institutions and organizations, the Court stated that "[s]ince here we are dealing with a contractual relationship, the HPI is liable only for matters specified in the contract and entrusted to it by the State according to rules. If the matter goes beyond these rules, then it is fair that the life-saving medication should be covered by the State […]. Where should the money come from? It was already mentioned that there is a Solidarity and Guarantee Fund that operates under the constitutional principle of SOLIDARITY and to which stakeholders should turn to on this occasion." The Court clearly stated that "physicians in charge CAN prescribe drugs that are not included in official lists to patients living with AIDS, and that HPIs must deliver such medication."

The third stage in constitutional case law on the protection of the right to health witnessed an ever growing amount of *tutela* writs. In 2005, 81,017 *tutela* writs (36% of the total amount) requested protection for this right in cases where access to medical care was the main concern. At this stage, the Court usually granted the protection requested. Although acknowledging that the right to health was a social right (which was not as such subject to protection via the *tutela*), the Court granted protection whenever the right was related to the rights to life, to integrity and to dignity. The Court had followed this line from the beginning, but in this stage the distinction between the right to health and other rights started to fade. First implicitly and later explicitly,

[18] The Court ruled: "**Eighth**.- The Social Security Institute and 'Salud Colmena (HPI)' are **SUMMONED** to provide the medications in the form of generics, unless they are available only as trademark drugs, as prescribed by the HPI physician in charge and taking into account the number of weeks paid by users. This should be observed even if such medications are not included in Government lists and especially when patients' lives are at risk. || **Ninth** - The National Council on Social Security is **SUMMONED** to adjust CPU value so it reflects the real cost of services and to prevent contracting parties' financial imbalance. || **Tenth**.- **ORDER** the Social Security Institute to adopt the relevant measures so that by October 31, 1997, the Solidarity and Guarantee Fund be paid all corresponding amounts as indicated in the motive section of the present ruling. || **Eleventh- ORDER** the Ministry of Public Finances to deliver the amounts under obligation to the so-called Solidarity account as established by article 221 of Law 100 of 1993, and by Law 344 of 1996. **Twelfth-** Decisions T-122891, T-123132, T-120042, concerning *tutela* writs previously denied, are **REVOKED** as regards not granting the *tutela* to members of the 'Club de la Alegría' that had requested that San Pedro Claver Clinic arrange a place for their meetings, and, instead, the Court **GRANTS** the request and **ORDERS** the Social Security Institute to provide a place for the 'Club de la Alegría' meetings according to the considerations stated in the motives of the present ruling.

the Court started to hold that the right to health was a fundamental right in and of itself, as was stated in decisions T- 859 of 2003 (interpretation regarding elements required to carry out medical procedures included in the MHP) and C-336 de 2008 (right of homosexual citizens to affiliate their partners as beneficiaries).

In this stage, the number of health-related *tutela* writs was extremely high, evincing failures in the system as a whole. Congress reacted by passing Law 1122 of 2007, which referred to certain critical aspects in the operation of the system, but disregarded other very significant aspects. Among other things, Law 1122 of 2007 modified evaluation instruments used by the different stakeholders, and introduced a result-based approach; it created a new regulation body, the Health Regulation Commission, with the participation of five health experts; it set for 2010 the goal of universal coverage; it increased users' fees; it defined some new rules on the flow of funds among institutions involved in the system and on insurance issues; it established restrictions on health promotion and service delivery companies regarding their freedom to contract; it established additional rules for health service delivery; and it modified various aspects of the surveillance and control mechanisms within the health system. But people kept filing *tutela* writs because the technical and scientific committees set up by each HPI rejected medical service requests. Law 1122 had eliminated the elements that prompted these refusals in the case of costly medications and other drugs used in the treatment of catastrophic illnesses by establishing that reimbursements ordered through *tutela* writs would only amount to 50% of drug costs. In decision C- 463 of 2008 (per Justice Jaime Araujo Renteria), the Court extended this rule to all health care services, but without defining rules for the scientific assessment of requests by the above mentioned committees.

### c. Structural remedies

#### i. Failures in health regulation: *Decision T-760 of 2008*

In this context of ongoing *tutela* writs, the Court pronounced ***Decision T-760 of 2008*** **("failures in health regulation", per Justice Manuel José Cepeda Espinosa),** on structural problems of the system regarding the protection of

the right to health as far as medical treatment was concerned. Besides protecting each claimant's right, the Court issued general orders addressed to regulating and supervising authorities. The decision ushered in a new stage in case law which may imply a reframing of the health care system, depending on how the Court's orders are enforced.

***Decision T-760 of 2008*** is lengthy (422 pages) and it examines the process of providing medical care services from the moment users request the service until HPIs receive reimbursement of costs not included in the MHP. To this end, the Court grouped 22 *tutela* writs requesting access to medical treatments and procedures prescribed by physicians in charge, but denied by HPIs. Some of these services were included in MHP benefits, while others were not. Another two *tutela* writs were taken into account which had been filed by health insurance companies requesting reimbursement from the State for services already delivered and not included in the mandatory health plan. Concerning the operation of the system as a whole, the Court collected information from health authorities, relevant stakeholders, civil society organizations and control bodies. After examining the evidence collected in the proceedings, the Court found that there were regulation failures – under the responsibility of the Ministry of Social Protection, the National Council on Health Social Security, and later the Health Regulation Commission – as well as supervision problems – under the responsibility of the Health Supervision Committee – which had led people to resort to *tutela* actions to access health care services prescribed by physicians.

The Court (1) started by reiterating that it acknowledged the right to health as a fundamental right. Then, (2) it summarized rules established through case law on access to the right to health, and (3) it ruled on the specific individual cases. Finally, (4) it identified regulatory and supervisory failures in the health sector and gave general orders to relevant authorities to correct them. The Court grouped the failures in three categories: failures related to benefit plans, failures related to the flow of funds within the system, and other issues.

Specific cases referred to situations where the right to health was infringed and whose solution was clear as repeatedly reiterated by the Court's case law.[19]

Concerning regulatory failures, the Court stated that all problems could be summarized in a single one: "Do the failures mentioned in the present decision and supported on the evidence collected represent a violation by relevant authorities of their constitutional duty to *respect*, *protect* and *guarantee* the effective realization of people's right to health?"

For the analysis of the legal issues in question, the Court started by reiterating that acknowledged that "fundamental rights are "(i) those considered as such by general consensus and (ii) those *subjective rights aimed at ensuring human dignity*," and pointed out[20] that the right to health is fundamental in an "autonomous manner" when it can be materialized in subjective guarantees derived from the norms which govern its fulfillment. Some of these guarantees, the Court went on, are to be found in the Constitution itself (articles 48[21] and 49[22]); others, in the constitutional block, and the majority in

[19] "Access to health care services included in the mandatory health plan (MHP) and paid through compensating fees; access to health care services not included in the MHP; access to health care services necessary for children's adequate growth; acceptance of work disability certificates when payments are overdue; access to integrated health care services; access to high-cost health care services and catastrophic illness treatments and diagnostic tests; access to health care services required by 'affiliated members,' especially children; access to health care services that imply people must travel away from their place of residence and settle somewhere else; freedom to choose the 'institution in charge of health care service delivery,' and doubts as to whether intraocular lenses were included in the MHP and on whether HPIs were entitled to reimbursement of these costs. Other cases also examined by the corresponding Court's Panel referred to HPIs requesting timely reimbursement of health care costs not included in the HMP."

[20] In Decision T-859 of 2003.

[21] Article 48 states: "Social Security is a mandatory public service which will be delivered under the administration, coordination, and control of the state, subject to the principles of efficiency, universality, and cooperation within the limits established by law. // All the population is guaranteed the irrevocable right to Social Security (…)"

[22] Article 49 states: "Article 49. Public health and environmental protection are public services for which the state is responsible. All individuals are guaranteed access to services that promote, protect, and rehabilitate public health. // It is the responsibility of the state to organize, direct, and regulate the delivery of health services and of environmental protection to the population in accordance with the principles of efficiency, universality, and cooperation, and to establish policies for the provision of health services by private entities and to exercise supervision and control over them. In the area of public health, the state will establish the jurisdiction of the nation, territorial entities, and individuals, and determine the shares of their responsibilities within the limits and under the conditions determined by law. Public health services will be organized in a decentralized manner, in accordance with levels of responsibility and with the participation of the community. // The law will determine the limits within which basic care for all the people will be free

the laws and rules established to govern the National Health System and define specific services to which people are entitled to.

"[The] Review Panel will not present in detail the scope and contents of the concept of a fundamental right in general or in relation with the specific case of health. It will, instead, refer to various decisions pronounced by the full Constitutional Court or by its review panels acknowledging the right to health as a fundamental right. In the present decision, the Panel will review in detail the consequences derived from acknowledging the right to health as fundamental, especially in regard to regulatory failures within the system."

"3.2.2. Constitutional case law has rightly pointed out that acknowledging the fundamental nature of a right does not entail that all of its aspects are susceptible of protection through *tutela* actions. First, because constitutional rights are not absolute; in other words, they may be restricted according to rational and proportional criteria established through constitutional case law. Second, because the possibility of demanding the enforcement of obligations derived from fundamental rights in general and the adequacy of doing so by resorting to a *tutela* action are two clearly different things."

"3.3.8. The progressiveness [of social rights] explains the impossibility of demanding by legal process, in concrete individual cases, immediate fulfillment of all the obligations derived from the field of protection of a constitutional right, but this in no way means that the State is licensed to refrain from adopting adequate measures to comply with such obligations as they gradually come into being."

The Court then presented examples of medical care services that it had denied, such as dental care and fertility treatments. It considered that these exclusions from the MHP were legitimate because the Constitution does not establish that health care benefit plans are unlimited.

"[Concerning the types of obligations implied in the right to health, the Court accepts the distinction included in the] *Observations of the Committee on*

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of charge and mandatory. // Every person has the obligation to attend to the integral care of his/her health and that of his/her community."

*Economic, Social and Cultural Rights* (CESCR), [which] adopted in 1989 . . . 'general observations' regarding the *International Covenant on Economic, Social and Cultural Rights* (ICESCR, 1966) . . . . For the Committee, the ICESCR acknowledges that states have three types of obligations derived from internationally accepted rights: to *respect*, to *protect* and to *guarantee*."

"Given the ongoing discussion in regard to the third type of obligation, the Court will resort to the first two to differentiate in the present decision the various situations in which the right to health is infringed. According to the above mentioned Committee, . . . the obligation to *respect* 'demands from States to refrain from directly or indirectly interfering with the enjoyment of the right to health' [and the] obligation to *protect* 'requires that States adopt measures to prevent third parties' interference in the implementation of the guarantees mentioned in article 12 (ICESCR, 1966)."

Based on these definitions concerning the right to health, the Court established "the scope and contents of the right to access health care services in the light of constitutional case law, focusing on judicial standards applicable to the cases under consideration in the present process. [The Court referred then to the following judicial standards]:"

[2.1. Operation of a Health System capable of ensuring access to health care services.

2.2. Affiliation to the System and guarantees for health care service delivery.

2.3. Adequate and necessary information to freely and easily access health care services.

2.4. The right to demand from institutions in charge access to high-quality, efficient and timely health care services.

2.5. Access to health care services required by individuals under special constitutional protection such as children].

"[Based on these standards, the Constitutional Court resolved the 22 specific cases. Subsequently, it posed the question as to whether] the problems under

discussion in specific cases . . . went beyond particular situations, reflecting, instead, structural failures in the Health and Social Security System arising, among others, from problems related to regulatory issues."

"[The Court pointed out that] the number of *tutela* writs [requesting protection for the right to health] quadrupled between 1999 and 2005. The percentage of this type of action also increased with the total number of *tutela* actions during the period […]."

Then the Court went on to identify possible regulatory failures based on the problems detected. In the first place, the Constitutional Court found that the MHP had not been updated since the passing of the Law in 1994. It pointed out that "although the specific changes introduced in the HMP [by authorities during recent years] have eventually helped to improve coverage and service delivery, they do not constitute an actual *update* as established in the law. A proper update implies more than just specific changes, but rather a systematic revision of the MHP according to (*i*) demographic changes; (*ii*) the country's epidemiological profile; (*iii*) the technology available in the country, and (*iv*) the financial conditions of the system. Taking into account that the present MHP was adopted in 1994, when the HGSSS had just started to operate, i.e., 14 years ago, it is reasonable to suppose that it is time to modify it and adapt it to the country's new health conditions."

"[The Court also found that] besides problems related to medical services not included in benefit plans, many of the *tutela* writs that are filed respond to users' doubts regarding what is and is not included in the MHP, and to the lack of institutional mechanisms within the System to resolve such doubts."

This regulatory failure prompted the Court to order the Health Regulation Commission to update the HMP based on detected health priorities, as well as to explicitly indicate the items included in the plan, those not included now, but expected to be included once sustainability is ensured, and those removed from benefit plans and the reason for doing so. The Court noted that the updated HMP had to be effectively financed by the CPU and revised yearly. The Court also ordered that effective participation from user and medical organizations be ensured during the updating process.

The Constitutional Court noted that *tutela* writs filed by citizens to request protection for their right to health frequently sought access to health care services actually included in the MHP. In fact, "around 56.4% of *tutela* actions filed [from 2003-2005] were filed to demand a service to which users were legally entitled to and that, therefore, should have been delivered without resorting to a lawsuit."

"[Based on this considerations, the Court concluded that] the State is not protecting people's right to health if it allows violations that are clearly *disregarding* this right by hindering people's access to services already included and paid for in mandatory health plans. This situation of constant and unjustifiable infringement of the right to health has come about because many of the competent authorities have systems of incentives and disincentives that do not promote its effective enjoyment, and because surveillance and control mechanisms have not been duly applied."

In order to amend this regulatory failure, the Court ordered the Ministry of Social Protection and the National Health Supervision Committee to adopt measures aimed at identifying those HPIs and SDIs that most frequently refuse to deliver services included in the HMP and to inform control bodies about measures adopted to penalize them.

Finally, regarding MHP regulatory failures, the Court found that competent authorities had unaccountably disregarded an obligation established by the legislature from the very moment the health system was set up in 1993. The obligation established in the law called for equalizing the items included in the subsidized plans with those in the contributory plans, as the latter included fewer services in sensitive health care areas.

The Court pointed out that the orders it had issued would be "insufficient as long as the difference between benefit plans for contributory and subsidized affiliates persist." The Court's Panel recalled that "besides periodical updating of benefit plans, [the Law] also established the obligation to gradually unify contributory and subsidized health plans, setting 2001 as the deadline . . . ." "[The Court has been able to verify that] to date no program has been

designed to set specific goals regarding the progressive standardization of benefit plans backed by a schedule with precise deadlines for each goal . . . .”

“The need to unify benefit plans is even more necessary in the case of children . . . , as the Constitution grants them special protection, giving predominance to their fundamental right to health.” To amend this regulatory failure, the Court ordered the Health Regulation Commission (HRC) to design a plan and a schedule to gradually advance toward the standardization of a single HMP. Additionally, it ordered the HRC to strive to eliminate differences regarding children quickly, warning that if the definition of a new MHP for children was not fulfilled by the deadline, the Court would simply order that subsidized affiliates enjoyed the same plan as contributory affiliates without any further delay. Concerning these two orders, the Constitutional Court emphasized the importance of counting with adequate financial backing for the new benefit plans through the CPU, calling attention to two additional aspects:

“In the first place, a smooth operation of the system depends on an adequate administration, which can only be fulfilled if the State balances appropriately the amount of revenue entering the system and the need for quality service delivery. Thus, the adoption of measures to rationalize the access to services included in mandatory health plans, without disregarding people’s right to health and effective access to health care services, is not only legitimate but necessary.”

“Secondly, the obligation established by the law regarding the standardization of contributory and subsidized benefit plans may result in negative incentives for some users. In effect, the standardization of benefit plans may lead some users to avoid affiliating with the contributory plans because they would clearly “pay less” in the subsidized plans. Restricting the subsidized plan only to those who lack economic capacity to belong to the contributory plan requires that measures be designed, implemented and evaluated by competent authorities . . . .”

On the other hand, regarding failures in the flow of funds within the system, the Court found that when *tutela* judges ordered an HPI to deliver a health care service not included in the HMP, or when a Technical and Scientific

Committee[23] authorized its delivery, it was very difficult for HPIs to get reimbursement of service costs despite the State's obligation. For this reason, the Court ordered competent authorities to regulate the flow of resources within the system by adopting measures to correct failures in specific fields.

The Court also found that there were unnecessary requirements complicating and delaying the procedure that HPIs had to comply with to request reimbursements. The Court detected, for example, that "the requirement placed on HPIs to present the *tutela* final judgment[24] becomes an obstacle for obtaining the reimbursement when it is deemed that a *tutela* ruling is final only if the Constitutional Court has ruled or declined to take a case. This because the procedure of referring *tutela* writs to the Constitutional Court, where review is eventually accepted or declined, can take several months.[25]" "[T]aking into account that the Constitutional Court has repeatedly pointed out that '*reimbursement procedures must be speedy*,' and that the flow of funds within the system points at ensuring protection for users' right to health, [i]t is contrary to the Constitution to postpone the recognition of the right to reimbursement until the Constitutional Court has selected or denied review of the ruling through which the petitioner's claim to a health care service has been satisfied."

The Court also ordered the SGF to eliminate some specific barriers in the process to obtain reimbursement of services not included in the HMP and to send a report on compliance to the Court. Likewise, the Court found that "although regulations have established clear deadlines for reimbursements, it is evident that there are serious barriers to delivering them on time, which explains why so many reimbursement requests have accumulated at the SGF." The Court ordered the Ministry of Social Protection and the SGF to adopt a contingency plan to pay pending reimbursements to HPIs and present that plan before a committee set up "by the Council of State and before the

[23] Technical and Scientific Committees are set up within HPIs to assess and authorize health care services not included in the HMP prescribed by physicians in charge.

[24] Editor's note: The final judgment is a document certifying that a judicial ruling has passed through all proceedings stages or that deadlines for challenge are overdue, and that, therefore, it is final."

[25] Editor's note: Once rulings in the second instance have been issued, or if deadlines for challenge are overdue, *tutela* writs filed by citizens everywhere in the country are sent to the Constitutional Court where a Selection Panel chooses some cases for review.

Constitutional Court on the date established in the decision. In the event that by this date, at least 50% of the reimbursement requests pending to September 31, 2008, have not yet been paid, a compensation mechanism will be applied for this 50%. The other 50% must be totally paid before the date established in the present decision." "If subsequent research evinces that the SGF has paid reimbursements it was not obliged to, the Fund must adopt measures to negotiate compensation for such payments with relevant HPIs."

Finally, the Court stated that "the large amount of reimbursement requests in the framework of the present system entails high transaction costs, as all requests must be audited and, once approved, they must be paid one by one. This results in delaying reimbursement payments and, consequently, the timely flow of resources to finance the effective enjoyment of the right to health. It also implies that HPIs cannot plan, in advance, investments to improve service delivery."

"The situation herein described demands measures to improve the reimbursement procedure and to ensure a timely flow of resources within the system. However, the constitutional judges have no competence to establish specifically the way to solve these problems, which prevent the public administration from adopting adequate and necessary measures to effectively ensure the best possible health care services to the population with available resources . . . ." Therefore, the Court ordered the Ministry of Social Protection to design effective regulations in this area.

Regarding other issues under examination, the Court held that users newly affiliated to the system did not receive enough information on their rights and on the performance levels of their chosen HPI. The Court considered that "the right to information must also be protected to ensure the effective realization of the right to health, under which it is necessary to provide information on the rights and duties of all stakeholders involved in the Health and Social Security System: users, the State, and insurance and service delivery institutions . . . ."

"In effect, people's rights to information must be guaranteed not only when they are already affiliated to the system, but before they affiliate. Information is crucial so as to allow people to make an informed choice . . . . Besides

learning about their rights and duties, before affiliating to an HPI or selecting an SDI people should know about (i) the affiliation options they have, and (ii) the performance level of each institution . . . ."

To correct this regulatory failure, the Court ordered the Ministry of Social Protection to adopt measures that would allow users to access information on their rights and on HPI performance. To achieve this, each user should receive (i) a bill of patients' rights and (ii) a document on HPI performance levels.

Lastly, the Court found that "the country's health system is not operating in accordance with the principle of universal coverage, which is one of the founding principles of social security established in . . . our Constitution."[26] "The importance of ensuring universal health care coverage was underlined from the very first stages of discussion around Law 100 of 1993. [The Law] later established that the general social security system had to have universal coverage. In the [the Law], the legislature set a deadline to fulfill this goal in the following terms: "*The General Health and Social Security System will create the required conditions to ensure access to a Mandatory Health Plan for all citizens before the year 2001.*" "[But d]espite the aforementioned, the deadline . . . to achieve universal coverage has not been fulfilled."

In 2006, the Congress of the Republic discussed an amendment to [the Law], which emphasized once more the need to achieve universal health care coverage. "The amendment was enshrined in Law 1122 of 2007, "*Through which changes are introduced in the General Health and Social Security System and other provisions are adopted.*" According to the debates held in the Congress, article 9 of the Law established a new deadline to achieve universal health care coverage: "*In the following ten years, the General Health and Social Security System will reach universal coverage in levels I, II and III of SISBEN for those people meeting System affiliation requirements*."

"The goal set in Law 1122 of 2007 was confirmed in the National Development Plan adopted through Law 1151 of 2007 […]." "[Although the

[26] The Article states: "Social Security is a mandatory public service which will be delivered under the administration, coordination, and control of the state, subject to the principles of efficiency, *universality*, and cooperation within the limits established by law." (emphasis added)

Court acknowledged] the institutional commitment in the purpose of achieving universal coverage, [it emphasized] the need to comply with the new deadline set by the legislature."

"Thus, the present decision will order the Ministry of Social Protection to adopt the necessary measures to ensure sustainable universal coverage of the General Health and Social Security System before the deadline set by the legislature, and to report every six months . . . on partial progress achieved toward fulfillment of the said goal. If the goal proves unattainable on the set deadline, noncompliance must be explained and justified and a new deadline set."

*"*[In closing, the Court pointed out that] for more than a decade people have had to resort to *tutela* actions requesting legal intervention to solve controversies that could have been settled by competent regulatory bodies. This fact clearly points to regulatory failures in the health system, which in turn explains the general orders herein issued to correct them. Consequently, the decision to be adopted by regulatory bodies aimed at complying with the present decision must result in improving access to health care services and, eventually, in reducing the amount of *tutela* writs filed for this purpose."

"For this reason, and without detriment to the autonomy of health sector authorities to design and implement the indicators they consider adequate, the Court will order the Ministry of Social Protection to report . . . on the number of *tutela* writs filed to request protection for the right to health, particularly in regard to the legal issues described in the present decision. If the measures to be adopted by the regulatory bodies are suitable, people will gradually stop resorting to *tutela* actions . . . ."

### ii. Rights of the Most Vulnerable: Internal Forced Displacement

***Decision T-025 of 2004*** **(Per Justice Manuel José Cepeda Espinosa).** In a unanimous decision, a chamber of the Court protected the fundamental rights of persons displaced due to Colombia's ongoing armed conflict, uprooted mainly by guerrilla and paramilitary groups. The Court examined the situation

of internally displaced persons (IDPs) based on 108 *tutela* writs filed by displaced families against different state institutions.[27] The claimants were women, men and children demanding access to assistance programs for displaced population, especially those regarding housing, productive projects, health care and education.

By taking a comprehensive look at all *tutela* writs filed around the country, the Court was able to get a general picture of the conditions to which the 3 million people internally displaced were subject. Through this decision, the Court protected not only the claimants and their families, but also all past, present and future displaced persons. It did so by declaring a "state of unconstitutional affairs," a doctrine used since 1997 on nine occasions to respond to massive and repeated violations of rights due to structural causes affecting specific groups of population, such as prisoners, elderly public servants deprived of their pension rights in poor territorial entities, public notaries exposed to political patronage. For example, a previous declaration of a 'state of unconstitutional affairs' was used to protect the rights of prisoners held in [overcrowded jails] and unhealthy conditions.[28]

Regarding IDPs, the Court found "a state of unconstitutional affairs affecting all displaced persons given that the seriousness of the infringement of their constitutional rights, already protected by a congressional statute, was not in the least in accordance with the amount of resources actually destined to ensure effective realization of such rights or with the institutional capacity to implement the corresponding constitutional and legal provisions." As a result, the Court issued two types of orders—complex and simple: "Complex orders . . . aim at ensuring all IDPs's rights, regardless of whether they have resorted to *tutela* writs or not to demand protection for their rights. Their objective is to ensure that institutions in charge of displaced people's assistance establish within a reasonable span, and within their competence, those changes required to overcome problems related to fund insufficiency and lack of institutional capacity to implement state policies aimed at [assisting the] displaced

[27] Those state institutions included the Social Solidarity Network, the Presidential Administrative Department, the Ministry of Public Finances, the former Ministries of Health, Labor and Social Security (the present Ministry of Social Protection), the Ministry of Agriculture, and the Ministry of Education.
[28] Decision T-153 of 1998, per Justice Eduardo Cifuentes Muñoz.

population." But "simple orders aim at responding to specific requests by stakeholders included in the present *tutela* writs . . . ."

Based on the facts expounded in the various *tutela* writs, on the evidence gathered in the proceedings and the arguments presented by the different state institutions, the Court reflected upon the following legal issues:

"1. Is the *tutela* writ applicable to the examination of public authorities' actions and omissions concerning displaced people's assistance in order to determine if problems related to the design, implementation, assessment and follow up of relevant state policies contribute to the violation of this population's fundamental rights in a constitutionally pertinent manner?"

"2. Are displaced people's right to a minimum level of subsistence and to receive prompt replies to their petitions – especially regarding humanitarian aid, economic recuperation, relocation, housing, health care and education – infringed when access to the corresponding services and programs is subordinated by authorities themselves (i) to the availability of funds that have not been allotted by the State; (ii) to the redesigning of the tool used to determine the form, scope and procedures to obtain assistance, and (iii) to defining which institution will be responsible for delivering such assistance, as the entity previously in charge is presently under liquidation[29]?"

"3. Are the rights of the claimants to petition, work, a minimum level of subsistence, decent housing, health care and access to education infringed when the institutions in charge of delivering the aid established by law (i) fail to respond in full, precise and concrete manner to these requests, or (ii) refuse to deliver such aid (a) because funds allotted are not enough to respond to requests; (b) because compliance with legal requirements to access such aid is lacking; (c) because there are previous requests waiting to be solved; (d) because the institution receiving the petition is not competent in the matter; (e) because requirements and conditions established by the legislators to access such aid are changed; (f) because the institution receiving the request is presently being liquidated?"

[29] A liquidation process aims at extinguishing an entity's juridical personality by making an inventory of its assets in order to pay debts.

First, the Court summarized the applicable constitutional law. The Court first recounted the 17 *tutela* decisions that had been pronounced up to that moment regarding the protection due to IDPs. In these cases, the Court had protected the constitutional rights of specific claimants, but not those of the displaced population as a whole. The rights protected by the Court were the following: to a dignified life, to the free development of personality, to a family, to education, to health, to work, to physical integrity, to decent housing, to juridical personality and to equality.

The Court also referred to the Guiding Principles on Internal Displacement adopted by the United Nations "as a tool that contributes to interpret this population's rights."[30]

Subsequently, the Court referred to state actions and omissions constituting a violation of displaced people's fundamental rights. In this respect, the Court stated: "Public policies on displaced people's assistance have failed to counteract the serious deterioration of displaced people's already vulnerable conditions[,] to ensure the effective realization of their constitutional rights, or to overcome the circumstances resulting in the violation of such rights . . . .

It is true that displaced people's critical situation is not caused by the State, but by the internal armed conflict, especially the actions carried out by illegal armed groups. However, . . . the State has [a constitutional] duty[31] to protect the [displaced] population . . . , and therefore, the obligation to respond."

[30] Thus, it gave "soft law" a function in translating general international rights into specific mandates of protection of IDPs in accordance to their specific needs, a further step in the evolution of the doctrine of the constitutional block.

[31] Article 2 states: "The essential goals of the state are to serve the community, promote general prosperity, and guarantee the effectiveness of the principles, rights, and duties stipulated by the Constitution; to facilitate the participation of all in the decisions that affect them and in the economic, political, administrative, mid cultural life of the nation; to defend national independence, maintain territorial integrity, and ensure peaceful coexistence and the enforcement of a just order. // The authorities of the Republic are established in order to protect all persons residing in Colombia, their life, dignity, property, beliefs, and other rights and freedoms, and in order to ensure the fulfillment of the social duties of the state and individuals."

The Court then carefully analyzed each of the public policies aimed at assisting displaced people.[32] The Court concluded that there were two main general problems: "(i) [l]imited institutional capacity to implement the policies, and (ii), insufficient funds . . . ." Regarding the first problem, the Court reasoned that difficulties were related to three aspects: "(i) the design and regulatory development of public policies on forced displacement; (ii) their implementation, and (iii) their follow up and evaluation."

Concerning the second problem, the Court stated that: "From a constitutional point of view, it is imperative to allot the required budget to ensure that displaced people's fundamental rights are fully realized. The State's constitutional obligation to guarantee adequate protection to citizens that are facing shameful life conditions due to internal forced displacement cannot be postponed indefinitely. As established by . . . the Constitution,[33] social public expenditure should be prioritized over any other allocation. Law 387 of 1997 acknowledged that assistance to displaced people is urgent and has priority. Through case law the Court has repeatedly insisted on the priority of allotting funds to deliver assistance to this population . . . ."

Examining the serious problems and gaps that state public policies on displaced people's assistance have, the Court found a state of unconstitutional affairs after pointing to the following elements: "(1) there is a repeated violation of the fundamental rights of many people – that therefore resort to *tutela* writs claiming protection for their rights and overcrowding judicial courts – and (2) the origin of such infringement is not exclusively ascribable to the authorities accused, but also to structural factors."

In the present case, the Court pointed out that: "Several elements confirm the existence of a state of unconstitutional affairs concerning the situation of internally displaced people. [First], the seriousness of the violation of rights

[32] These policies are based on several documents gathered from government institutions, human rights organizations and international agencies evaluating such policies and programs, and on the answers to a questionnaire prepared by the Court.

[33] Article 350 states: "The Appropriations Law must include a component entitled public social expenditure that will consolidate the parts dealing with public social expenditure according to the definition made by the respective organic law. Except in case of foreign war or for reasons of national security, public social expenditure will have priority over any other allocation . . . ."

faced by displaced people was overtly acknowledged by the legislature by addressing [their conditions] and . . . massive violations of multiple rights . . . .

"[Second], another element that confirms the existence of a state of unconstitutional affairs regarding forced displacement is the considerable and growing amount of *tutela* writs filed by displaced people to access aid, as well as the fact . . . that the writ of *tutela* has been included as a previous step in the administrative procedure established to obtain assistance. [A]lthough there is some development regarding the issue, it is also true that [this is an old problem that still lacks a solution]. [E]mphasis should be placed on the lack of resources actually destined to deliver assistance in the various policy components, as well as on problems regarding institutional capacity that affect state policy development, implementation and follow up . . . .

"[Third], the cases . . . reveal that infringements affect the majority of displaced people around the country and that authorities have not taken steps to adopt the necessary corrective measures . . . . [The i]nstitutions in charge of displaced people's assistance have already detected several . . . shortcomings in policies and programs. Likewise, human rights organizations have identified problems regarding coordination, lack of resources, administrative obstacles, unnecessary paper work and procedures, deficient design of some policy instruments, [and failure] by authorities to adopt necessary corrective measures. [This] situation has worsened the vulnerable conditions of the displaced population and the massive violation of their rights . . . .

"[Fourth], the continued violation of displaced people's rights is not the responsibility of a single institution. [S]everal State institutions, by act or omission, have tolerated this continued violation of displaced people's fundamental rights . . . .

"[Fifth], the violation of displaced people's rights springs from structural factors . . . , among them[,] the lack of balance between what the law establishes and the means to comply with its provisions . . . ."

In previous paragraphs, the Court had explained the scope of instructions aimed at ensuring an adequate budget allocation in the following manner: "By

ordering the adoption of this type of measure, the Court does not mean to disregard the separation of powers established in our Constitution, or to ignore other authorities' duties."[34] "The Court is not suggesting that the writ of *tutela* may be used to order non-budgeted expenses or to modify budget planning as established by the Legislature. It is not defining new priorities or modifying policies designed by the Legislature and developed by the Executive either. On the contrary, the Court, taking into account the legal instruments established to develop displaced people's assistance policies, as well as their design and engagements taken by the different entities, is invoking the constitutional principle of harmonic collaboration among the branches of power to ensure compliance with the obligation to offer effective protection to the rights to which all residents in our national territory are entitled to. This falls within the province of constitutional judges in a Democratic Social State whenever rights that have a clear welfare dimension are being violated."

Thus, the Court instructed the National Government to undertake in a year span "all necessary efforts to ensure that the budget goal set by [the competent executive authorities] is achieved. If by the end of the year or before, it is evident that it will not be possible to allot the required amount of funds, they will have to (i) redefine policy priorities, and (ii) design the modifications required in state policies on displaced people's assistance. In any case, such modified measures will have to guarantee the effective realization of the minimum conditions required to ensure the right to life in dignified conditions."

The Court also referred to authorities' constitutional duties regarding the welfare dimension of such rights. In this respect, the Court stated: "When a State fails, without a constitutionally valid justification, to take measures addressing the exclusion to which some of its members are subject to, and it has been proved that such failure infringes a constitutional right, judges' stand will be not that of replacing those organs of power implied in such forbearance, but ordering compliance with State obligations."

[34] In fact, in 1997 Congress had adopted a statute providing for the protection of IDPs, but it remained in the books without any significant implementation. At the time of the Court´s decision the national budget for IDPs was low and decreasing.

"[T]ransparency calls for properly informing on the benefits that will be granted, as well as on the institutions responsible for ensuring compliance with what has been legally established. . . . The same should apply to the scope of acknowledged rights by specifying the contents of the corresponding state obligations. Coherence points to the harmony that should exist between, on the one hand, what the State 'promises' and, on the other, the financial resources and the institutional capacity to fulfill those promises, especially if promises have become legal regulations. Coherence implies that if the State has created a specific welfare right through a law, it should plan so as to [allot] the resources required to ensure its effective realization and . . . the institutional capacity to duly respond to service demands generated by the creation of such specific right.

Minimum requirements the Court adopted to ensure effective realization of welfare social rights were: "(i) periodic drafting and updating of the diagnosis of the situation . . . ; (ii) public policy designs aimed at progressively achieving full realization of the rights, that should include specific goals to measure advances in set deadlines; (iii) periodic dissemination of results achieved . . . so that relevant social stakeholders . . . may participate in the development of relevant public policies and detect flaws, difficulties or circumstances that prevent full realization of rights so as to correct them or draw up new and more adequate public policies."

Finally, the Court referred to the minimum satisfaction levels regarding displaced people's constitutional rights: "[G]iven the present extent of displacement in Colombia, as well as State resource limitations [, authorities] should] set priority areas where timely and efficient assistance should be delivered. . . . [I]t may be impossible to satisfy simultaneously and up to the maximum possible level the welfare scope of all constitutional rights due to displaced people." "Notwithstanding, the Court emphasizes that there are certain minimum rights to which displaced people are entitled, that should be satisfied in any circumstance by authorities, as they entail dignified subsistence of individuals subject to this situation. Which are, then, those minimum rights that should be always satisfied?

"To define the minimum satisfaction level of displaced people's constitutional rights a distinction must be made between (a) the respect for the essential core of displaced people's fundamental rights, and (b) the compliance by authorities of certain welfare duties derived from rights internationally and constitutionally recognized to displaced people. Regarding the first, it is clear that authorities' actions may not in any circumstance result in disregarding, damaging or threatening the essential core of displaced people's fundamental rights – just as they cannot act in any way that may affect the essential core of the rights of any person settled in Colombian territory. In this sense, displaced people cannot be subject to actions carried out by authorities that may attempt, for example, against their physical integrity or their freedom of expression.

"Concerning the second consideration, the Court notes that the majority of rights recognized to displaced people . . . impose on authorities clear welfare obligations that evidently require public expenditure – which does not inhibit classifying some of them as fundamental rights . . . . According to the Court, welfare rights that are part of the minimum that should always be guaranteed for displaced people are those closely related to the preservation of life in dignified conditions proper for autonomous human beings.[35] It is precisely in this point, i.e., the preservation of basic conditions required to lead a dignified existence, where a clear limit should be established between state obligations of mandatory and urgent compliance concerning displaced population, and those that obviously should be satisfied, but do not have the same priority; this does not mean that the State should not use all possible institutional resources to ensure full realization of all displaced people's rights."

In this sense, the Court listed those displaced people's minimum rights that should always be satisfied by the State. Among these it is worth mentioning the right to a minimum subsistence, and as part of it, the right to receive the emergency humanitarian aid granted by the State to displaced people for three months, a period that may be extended to another three months.[36] The Court

[35] Citations omitted.

[36] However, in this respect the Court considered that there were especially vulnerable individuals among displaced people who require help for a longer period: "including (a) those in a situation of extraordinary emergency, and (b) those that are not in a condition to generate their own income through socioeconomic stabilization or reintegration projects, as is the case with children who have nobody looking after them, the elderly, who given their age or health condition cannot generate their own income, and female heads of

notes that just as the State cannot abruptly cut humanitarian aid for those that are not in the condition of generating their own income, people cannot expect to survive indefinitely on such aid."

The Court also ordered that the decisions on measures to be adopted by the Executive to comply with the Court's instructions must involve the participation of relevant organizations. The Court also ordered a list of displaced people's rights[37] should be spread around the country.

An innovation introduced by this decision was that the Court estimated that the decision alone was not enough to solve the problem, and that it was necessary to verify the sentence's results as to whether the state of unconstitutional affairs was overcome. Therefore, the Court invoked the legal provision by which *tutela* judges may maintain jurisdiction until violated rights are re-established.

**Follow up on compliance with *Decision T-025 of 2004* carried out by the Court itself:** As the Court maintains its competence to verify compliance with the orders imparted in ***Decision T-025 of 2004***, it has issued many "follow-up provisions on compliance" with the decision. The Court adopted 110 follow-up provisions on compliance through August 2009. The most important ones analyzed specific issues and contained specific orders, all within the framework of the original T-025 decision.

Likewise, the Court has carried out frequent public hearings attended by representatives of the national government and of displaced people, as well as stakeholder NGOs and the Office of the United Nations High Commissioner for Refugees (UNHCR). The most important NGOs formed a Follow-Up Commission to evaluate compliance with the decision and to better coordinate their activities and achieve greater impact.

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household that have to dedicate all their time and efforts to taking care of children or elderly family members. In these two situations it is fair that the State should continue delivering required humanitarian aid to ensure a dignified subsistence to those involved until the situation of extraordinary emergency ceases, or until the situation of individuals that are not in the condition of generating their own income changes. This must be assessed in each case.

[37] The list includes ten rights stated by the Court, including displaced people's basic right to receive humanitarian aid and their right to truth, justice and reparation as victims of forced displacement and other crimes.

The following are some of the most significant follow-up judicial orders that have been issued in this case:

**Indicators of results achieved:**[38] From 2005 to 2007, the Court was flooded with long government reports, some of which were returned to the Government because of their vagueness or irrelevance. To make sure that a rights approach permeated all public policies on the issue, and that proper evidence was supplied, the Court believed it necessary to find a way to measure concrete results in terms of effective enjoyment of rights by IDPs.

In a follow-up provision, the Court ruled on a set of proposed indicators presented by the Presidential Agency on Social Action and the National Planning Department.[39] The indicators were statistical measures used to measure progress in the extent to which rights were actually being enjoyed by the displaced population.

In this provision, the Court adopted 163 mandatory indicators to be applied by the government to measure itself, out of which, 34 are indicators regarding the effective enjoyment of rights (i.e., result indicators that measure results achieved in the actual and practical realization of rights). The other 129 are "complementary or associated indicators" that measure especially relevant legal aspects and reflect the gradual impact of each program as it improves with time. However, the Court detected gaps to be solved by the government in indicators regarding (i) the right to truth, justice and reparations; and (ii) a differentiated approach regarding specific needs by the most vulnerable displaced groups (women, children, indigenous peoples, Afro-Colombian communities, disabled people and the elderly). Likewise, the Court rejected some indicators presented by the government, such as those related to national and regional coordination, as clearly inadequate, and ordered their redesign.

On social rights, the Court adopted, for example, the following indicator regarding the right to health:

[38] Provision 116 of 2008.

[39] On their own accord, the Follow-Up Commission, some NGOs, and the UNHCR also presented proposals on this respect.

**HEALTH Effective realization indicator**

- Access to the General Social Security System (GSSS) (all people are affiliated with the GSSS)
- Access to psychosocial counseling (psychosocial support was actually delivered to all people requesting it)
- Access to the vaccination program (all children in the household have received a complete vaccination scheme)

**Complementary indicator**

- People affiliated with the GSSS / People included in DPUR
- . . .

**Associated sector indicators**

- Displaced pregnant women attending pre-birth controls
- Displaced people with access to sexual and reproductive health programs (12 or more years of age)
- People receiving mental health care according to diagnosis and type of GSSS affiliation / people included in DPUR requesting psychosocial support (ND)
- 1-2 year-old children with measles, mumps, rubella (MMR) vaccine / children included in DPUR
- . . .

Responsible national entities presented a preliminary report on all indicators at the end of 2008 based on data collected from relevant agencies. The Follow-Up Commission used well-known experts to prepare an independent report based on a field survey. Both reports were presented simultaneously in a public hearing before the Court with the participation of displaced people's organizations. Subsequent reports are being presented every six months to the Court to show progress on effective realization of rights, until the Court determines whether the state of unconstitutional affairs has been overcome.[40]

**Differentiated approach.** A number of specific orders have aimed at focusing on the fundamental rights of the most vulnerable and specially protected segments of displaced population – namely women, children and adolescents,

[40] In 2008, Congress passed a statute demanding that these same result indicators be applied by territorial entities (departments and municipalities) and that periodic reports be presented before each congressional house on progress achieved, thus backing the Constitutional Court and extending the scope of its decisions to governors and mayors around the country.

indigenous peoples, Afro-Colombian communities, and disabled persons. Throughout 2007 and 2008, the Court gathered a large amount of specialized information relating to each one of these groups. Thereafter, it issued orders that described the relevant situation and the special risks and needs of each vulnerable group of population, assessed their impact upon the effective enjoyment of fundamental rights, and imparted the corresponding complex orders to governmental authorities.

In Provision 092 of 2008, for example, the Court "identified eighteen sex-related issues in forced displacement, i.e., aspects of displacement that impact women in a particular, specific and heightened way in the context of the Colombian armed conflict." After assessing from a constitutional point of view each of these sex-related issues, and explaining their incidence on the realization of the fundamental rights of women involved, the Court ordered the creation of twelve specific programs by the national government aimed at solving the most serious problems within a short period of time.

The Court also gave instructions to the General Prosecutor's Office aimed at solving continuing impunity concerning crimes against women and informing the Court of results related to criminal investigations regarding violent acts against women. The Court became aware of these crimes while reviewing reports presented by organizations of displaced women. Likewise, the Court defined two constitutional presumptions protecting displaced women, most importantly creating a "constitutional presumption on automatic extension of emergency humanitarian aid for displaced women until their dignified self-sufficiency has been verified" by governmental authorities.

The orders regarding children and adolescents and disabled people follow the same line as the one concerning displaced women. The orders regarding indigenous peoples and Afro-Colombian communities, on the other hand, include an important difference: they demand the adoption of specific safeguard plans to impede the ethnic extinction of specific communities in danger because of the armed conflict.[41]

[41] For example, Provision 004 of 2009, protecting the fundamental rights of indigenous peoples or indigenous individuals displaced or at risk of displacement due to the armed conflict, instructed the

**Criteria to overcome the state of unconstitutional affairs.** Before six new Justices came into office in early 2009, the Court issued a provision establishing that the state of unconstitutional affairs declared in decision T-025 of 2004 persisted. The Court arrived at this conclusion after determining that the government had not implemented long lasting solutions in five basic areas. Two of them refer to the lack of "evidence to prove that public policies concerning displaced people's constitutional rights do result in achieving the effective realization of such rights, including two essential issues on which the Court has insisted in repeated rulings: (i) a rational orientation of public policies aimed at this objective, and (ii) the introduction of a differentiated approach, especially regarding women, minors, the elder, indigenous and Afro-Colombian communities, as well as people with disabilities" and of "evidence that displaced people and organizations that fight for their rights are participating in a timely, meaningful and effective way in the adoption by the State of decisions that interest and affect them."

Consequently, the Court issued a series of orders aimed at fostering actions to overcome this state of unconstitutional affairs, among which it is worth mentioning the implementation of a plan to strengthen institutional capacity by August 31, 2009; the recasting of housing and land-related policies within set deadlines, and the adoption of a policy to guarantee displaced people's rights to truth, justice, reparation and non-repetition, as well as a special one on income-generating strategies for them. Also innovative is the order on creating an accreditation mechanism for national authorities and territorial entities so as to clearly establish which of them have contributed to overcoming this state of unconstitutional affairs and those that, on the contrary, lag behind or show indifference to the seriousness of the problem.

The justices who took office in 2009 have continued supervising compliance with decision T-025 of 2004. Their principal decision was to summon the director of the Presidential Agency on Social Action to an accountability

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Government on the creation of a Program to Protect the Rights of Indigenous Peoples Affected by Displacement. Furthermore, the Court ordered the government to adopt safegard plans to protect each of the 16 indigenous peoples at risk of extinction or disintegration, which should be previously subject to consultation with the indigenous authorities of each of the endangered ethnic groups.

hearing in July 2009. Then, a hearing on the involvement of territorial entities on the resolution of IDPs problems was held in the fall of 2009.

The hearings continued from time to time, as well as the awards on specific topics. In 2011, the Court held that the progress concerning the right to health was sufficient and thus there was not a need for permanent judicial follow-up. But on other matters, the Court convened a hearing at the highest level of government and ordered the offices in charge of investigating public servants to report on disciplinary, fiscal and criminal sanctions imposed on public officials who did not obey the orders of the Court.[42]

## III. PROBLEMS OF SEPARATION OF POWERS AND THE ROLE OF THE JUDICIAL BRANCH

### a. Problems concerning the legislative branch

#### i. Taxing power of the Congress and its limits. The case of the VAT tax levied on "necessities": *Decision C-776 of 2003*

***Decision C-776 of 2003* (per Justice Manuel José Cepeda Espinosa):** In a unanimous decision, the Constitutional Court declared unconstitutional the article of a tax reform that levied a 2% VAT tax on any good or service that had previously been exempted or excluded from the tax. The tax reform was important because it aimed towards a structural change in the tax system by making the VAT base universal, among other things.

The Court confirmed that among the new goods taxed were "prime necessity products," defined by it as "those consumed by wide sectors of the population in order to take care of their vital prime necessities." The same definition applied to some basic services as well.

The main legal dispositions challenged were articles 34 and 116 of Act 788 of 2002, through which a tax reform was implemented. Article 34 established a 7% VAT tax (to be increased to 10% in 2005) on the sale of specified goods such as (i) horses, donkeys and male mules; (ii) some grains; (iii) other foods such as those prepared with flour; and (iv) chocolate, among others. Article

[42] Provision 219 of 2011.

116, instead, did not list the goods and services taxed in a specific way, but it only stated that "as of January 1, 2005, the goods and services dealt with in [various] articles will have a two per cent (2%) tax." These included (i) entertaining services; (ii) goods and services related to productive activities in the agricultural and farming sector among others; and (iii) prime necessity goods and services such as water, rice, corn, meat, chicken, bread, fruit, vegetables, tubers, medicines, notebooks and pencils, medical and dental services, education, public transportation, and housing rentals.

In addition to other aspects of Act 788 of 2002[43], articles 34 and 116 were challenged for violating articles 1, 65, 95 and 363 of the Constitution. The petitioner argued that, by means of article 34, Congress had violated the special protection for foods set in article 65 of the Constitution[44]. In addition, it asserted that both article 34 and article 116 violated "the principles of fiscal justice and equity of the Constitution," by taxing with the same percentage people with different economic capacity.

The nation's "Procurador"[45] agreed with the petitioner's arguments, and provided the Constitutional Court with data regarding poverty and indigence rates, school attendance levels, employment, income distribution, among other indicators, to ascertain that the challenged dispositions, applied in Colombia's factual context, violated the Constitution.

[43] The other aspects discussed before the Court had to do with the alleged violations of legislative procedure when adopting Act 788 of 2002, the inclusion of criminal norms in the tributary reform, the permanent delegation of public functions to private citizens, the prohibition of retroactivity in taxes, and the autonomy of territorial entities in Colombia.

[44] E.N, the Article states: "The production of food crops will benefit from the special protection of the state. For that purpose, priority will be given to the integrated development of agriculture, animal husbandry, fishing, forestry, and agroindustrial activities as well as to the building of physical infrastructural projects and to land improvement. // Similarly, the state will promote research and the transfer of technology relating to the production of food crops and primary resources of agricultural origin in order to increase productivity."

[45] E.N. The "Procurador General de la Nación" has no equivalent in the United States. It is an institution, independent from the three branches of government, with constitutional status responsible for the discipline of public servants, mainly of the executive branch. It must express her/his opinion on the constitutionality of any act reviewed by the Court, but the opinion should be based on the promotion of the public interest. Thus, it cannot be assimilated to the Solicitor General. The "Procurador" is elected by the Senate from a list of three candidates (nominated by the Supreme Court, the Council of State and the President of the Republic).

Hence, the Court defined the juridical problem to be solved as follows: "Do articles 34 and 116 of Act 788 dated 2002 impose taxes that are contrary to the principles of equity and progressiveness of a tributary system within a Social State based on the Rule of Law (articles 363[46] and 95-9[47] of the Political Constitution [P.C.], in agreement with article 1[48] of the P.C)?"

To solve this problem, the Court started by examining the reach of the norms challenged, and confirmed that article 116 meant "a very meaningful expansion of the [VAT] base, carried out in an indiscriminate way on very diverse goods and services." After reaching this conclusion and to establish the implications of such expansion for the tax system, the Court considered it necessary to study the evolution of the VAT in Colombian legislation, in order to determine the previous distribution of the tax load among the different sectors of the population, and also how low-income families would be affected by the new reform.

The Court conducted a historical overview of the VAT, from which it concluded that the sales tax had been instituted in 1963, applicable to some manufactured goods; and in the mid 70s it became a value added tax applicable to the sale of goods and services. In 1974 and in 1992, for goods and services respectively, a technical legislative norm was introduced according to which what was taxed by VAT was not mentioned, but what was exempt from it was. The Court also verified that the VAT base had been gradually expanded throughout the years, and yet, until the enactment of Act 788 of 2002, prime necessity goods and services – with certain exceptions – had always been excluded or exempt from the VAT. Further, those exclusions and exemptions had been declared constitutional by the Court, since they fostered real and effective equality in a society with high poverty indexes. The Court considered that these conclusions were quite important as they

[46] E.N, the Article states: "The tax system is based on the principles of equity, efficiency, and progressiveness. // Tax laws shall not be applied retroactively."

[47] E.N, the Article states: "(…) The following are duties of each person and each citizen: (…)9. To contribute to the financing of state expenditures and investments in accordance with the principles of justice and equity."

[48] E.N, the Article states: "Colombia is a Social State based on the Rule of Law organized in the form of a unitary republic, decentralized, withe the autonomy of its territorial units, democratic, participatory and pluralistic, based on respect of human dignity, on the work and solidarity of the individuals who belong to it, and the predominance of the general interest."

showed that Congress, through Act 788 of 2002, by making the VAT base universal, had introduced a structural change within the entire tax system.

After explaining that the Congress had indeed the power to introduce a structural modification in the tax system, as long as it respected the constitutional principles that informed it, the Court then went on to state the precedents related to the "the Congress' ample taxing power […]as well as to the constitutional framework within which it is inscribed."

The Court emphasized that "in a democracy, it is the Congress of the Republic by virtue of the principle that there is no taxation without representation (art.338 of the P.C.[49]) which decides what to tax and what not to tax, within an ample margin of configuration that the Court itself has defined as "the amplest discretionality."" Because of this, the Court asserted once again that the Congress of the Republic had, in principle, the faculty to eliminate exclusions and exemptions in the payment of the VAT on goods and services.

The Court, however, also noted that Congress had to dictate the taxation policy "within the parameters set by the Constitution since, in a State based on the Rule of Law, the powers that have been constituted, even if an ample margin of configuration exists, must be exercised respecting the limits set by constitutional order." Thus, according to the Court, Congress would have the faculty to define who would be charged a tax and who would not, as long as "the principles of equity, efficiency and progressiveness upon which the tributary system must be founded (art. 363, P.C.)" were respected.

The Court also stated that "the State's taxation power has as its necessary corollary the duty that every person has to pay taxes" (article 95-9 of the Constitution) and that "this is a duty of singular importance in as much as it is an instrument to fulfill the purposes of the State (art.2 of the P.C.[50]) under

[49] E.N, the Article states: "In peacetime only the Congress, departmental assemblies, and district and municipal councils may levy fiscal or fiscal-type dues. The law, ordinances, and resolutions must directly determine active and passive earnings, the events and bases that are taxable, and the rates of the levies (…)"

[50] E.N, the Article states: "The essential goals of the state are to serve the community, promote general prosperity, and guarantee the effectiveness of the principles, rights, and duties stipulated by the Constitution; to facilitate the participation of all in the decisions that affect them and in the economic, political, administrative, mid cultural life of the nation; to defend national independence, maintain

conditions of solidarity (art.1 of the P.C.)." Likewise, the Court pointed out that Congress' taxing power "lies within the framework of the State's function to intervene in the economy by means of the law (art.334, P.C.[51]) in order to carry out the ends mentioned above [to guarantee the effectiveness of rights, to rationalize the economy, to improve the quality of life of the inhabitants, to equitably redistribute development opportunities and benefits], and to foster social and economic policies (...)"

The Court went on to refer to the constitutional principles which limit the congressional power to tax, especially the principles of (i) legality (art. 150-12[52] and 338 of the P.C.), (ii) equity, efficiency and progressiveness (art. 363 of the P.C.), and (iii) equality (art. 13 of the P.C[53]).

The Court noted that the principle of legality "derives, amongst others, from the maxim according to which *there is no taxation without representation* by virtue of the democratic character of the Colombian constitutional system." According to the Court, in addition to meeting the procedural steps necessary for the passing of a statute (EN: defined by the Court as the instrumental expression of the principle), "the material manifestation of this principle refers to the *deliberation* about the tax imposed on each good or service in the public forum provided by the representative body of the people." For the Court, this

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territorial integrity, and ensure peaceful coexistence and the enforcement of a just order. // The authorities of the Republic are established in order to protect all persons residing in Colombia, their life, dignity, property, beliefs, and other rights and freedoms, and in order to ensure the fulfillment of the social duties of the state and individuals."

[51] E.N, the Article states: "The general management of the economy is the responsibility of the state. By means of the law, the state will intervene in the exploitation of natural resources, land use, the production, distribution, use, and consumption of goods, and in public and private services in order to streamline the economy with the purpose of achieving an improved quality of life for the inhabitants, the equitable distribution of opportunities, and the benefits of development and conservation of a healthy environment (…)"

[52] E.N, the Article 150 section 12 states: "It is the responsibility of Congress to enact laws. Through them its exercises the following functions: (…) 12. Establishing fiscal contributions and, exceptionally, parafiscal contributions in cases and under the conditions established by law."

[53] E.N, the Article states: "Article 13. All individuals are born free and equal before the law and are entitled to equal protection and treatment by the authorities, and to enjoy the same rights, freedoms, and opportunities without discrimination on the basis of gender, race, national or family origin, language, religion, political opinion, or philosophy. // The state will promote the conditions necessary in order that equality may be real and effective will adopt measures in favor of groups which are discriminated against or marginalized. // The state will especially protect those individuals who on account of their economic, physical, or mental condition are in obviously vulnerable circumstances and will sanction any abuse or ill-treatment perpetrated against them."

principle was relevant for the solution of the case, as the expansion of the VAT base "was not the object of even minimal public deliberation in Congress concerning its implications for the equity and progressiveness of the tax system" as a whole.

The Court then analyzed the principles of equity and progressiveness stated in article 363 of the Constitution. It concluded that "the principle of equity demands that goods or services be taxed …[in such a way that] users have the capacity to withstand the tax […] while those persons who, due to their economic conditions, may suffer an insurmountable and disproportionate burden as a consequence of the payment of such legal obligation, shall be exempted." The Court also noted, in agreement with decision C-643 of 2002 [constitutionality of the income tax and payroll tax], that this principle, along with the principles of progressiveness and efficiency, refer to the "system as a whole and not to a specific tax."

Likewise, the Court pointed out that the principle of progressiveness was "a criterion of analysis of the proportion of each tax payer's total contribution in relation to his/her contributive capacity," so that the "tax load should be higher as one's income and assets increase". Additionally, the Court noted that a wider dimension of the principle requires "an assessment of the destination and effects of the public expenditure financed with the collected resources".

Then the Court analyzed each specific relevant topic for determining the constitutionality of the universalization of the VAT base.

As to the VAT itself, the Court pointed out that in multiple cases it had concluded that "in spite of its nature as an indirect tax, the VAT does not violate the Constitution."

As to the principle of progressiveness, the Court said that even though the VAT`s design doesn`t respond to it as a separate kind of tax, it is still relevant in a constitutional analysis of the system taken as a whole and requires "examining whether the tax system, once the mentioned indirect tax has been included, is affected in its systemic progressiveness."

As to the principle of efficiency, also stated in article 363 of the Constitution, the Court asserted that "a tax is efficient as long as it generates few economic distortions, and so is […] the tax that can obtain a larger number of resources at the lowest cost possible." On this matter the Court pointed out that its area of judicial review was limited, considering the "ample discretionality" Congress had. However, it recalled cases where the principle of efficiency had been applied, based on (i) weighing the goals and means proposed in the taxing measures, and (ii) the analysis of the long-term implications of certain measures.

Regarding the principle of equality (art. 13, P.C.) the Court mentioned the duty of Congress "to take into account the differences that in fact exist in society so as not to worsen, with the taxing measure, inequalities already existing." The Court recalled certain cases where discriminatory measures had been declared unconstitutional, and highlighted the particular relevance of the principle of equality for the case at issue, since the final purpose of the exemptions eliminated by article 116 of Act 788 of 2002 was "to foster real and effective equality in a Social State of Rule of Law."

The Court went on to discuss the principle of a Social State of Rule of Law and the constitutional right to the minimum level of subsistence. It considered that these general principles were relevant because "[t]he special principles which the tax system (article 363, P.C.) must respect, shall be interpreted in the light of the fundamental principles established in the Constitution."

The Court emphasized that the concept of Social State of Rule of Law requires an organization of the state geared towards "obtain[ing] social justice and human dignity," (Sentence C-1064 of 2001 [case of the yearly salary increase for public officers]), and originates from the premise of "an intimate and unbreakable inter-relation between the spheres of "State" and "society," the latter of which is visualized not as an entity composed by free and equal subjects according to the XIX Century concept of a liberal State, but as a conglomerate of persons and groups under conditions of real inequality." That is why, said the Court, "the State's action must be geared towards guaranteeing its citizens dignified living conditions" (Sentence SU-747of

1998 [case of threats against juries acting during election time]). For doing this "the State is endowed with ample faculties to intervene in the economy."

The Court pointed out that "the principle of a Social State of Rule of Law […] is reinforced by the fundamental principles of human dignity, work, and solidarity (art.1 of the P.C.)." The Court also stated that, according to the principle of human dignity, a person has the right […] to live a meaningful life, in an environment free from fear of lacking access to what is materially necessary to survive and to live with dignity." Finally, it said that the principle of equality "represents the most tangible guarantee of the Social State of Rule Law for individual or for groups exposed to suffer deterioration in their life conditions as subjects of a democratic society."

For the Court this implies the duty "to view the factual reality upon which [the measures adopted by the authorities] will be effective in order to materialize the ultimate purpose of […] fostering dignified living conditions for the whole population."

The Court went on to specify the contents of the right to the minimum level of subsistence. Thus, it reminded that, since 1992 it has acknowledged "in an extended and reiterated manner … [the existence of this] right which is derived from the principles of the Social State of Rule of Law, of human dignity and of solidarity, in agreement with the fundamental rights to life, to personal integrity and to equality." The Court stated that this right "protects every person […] against any degradation that compromises not only his/her physical subsistence but, above all, his/her intrinsic value."

The Court considered that "the fundamental right to the minimum level of subsistence has a positive and a negative dimension." The positive one refers to the State`s obligation to "provide the person […] with the necessary and indispensable means to survive in a dignified manner and to avoid his/her degradation or annihilation as a human being". The negative dimension refers to "a limit or lower parameter that cannot be overstepped by the State, concerning the disposal of the material goods that the person needs to carry out a dignified existence." Consequently, the fundamental right to the

minimum level of subsistence "constitutes a limit on the State's taxing power."

Stating that the decision in this case would be made based on the Colombian Constitution, the Court referred -merely as an example of the constitutional relevance of the impact generated by taxes- to the decisions made by the Constitutional Court of Germany, the Constitutional Court of France, and the Supreme Court of the United States, who had dealt with the issue of the limits to the taxing power of the State, based on their respective constitutions.

Continuing with the analysis, the Court went on to examine the specific contents of articles 34 and 116 of Act 788 of 2002, and determined that article 34 was constitutional while article 116 was not.

The Court considered that article 34 enumerated the goods taxed in a "clear and precise" manner and that none of them could be classified as a "prime necessity good." The Court stated that the foods taxed by article 34 were not prime necessity ones since "their specific consumption is not required to preserve life under dignified conditions," as they could be substituted by other foods, such as the ones listed in article 116. Likewise, it considered that article 34 did not violate the Social State of Rule of Law or the fundamental right to the minimum level of subsistence. Also, it considered that it was not violating either the principles of equity and progressiveness in taxes.

The Court went on to analyze article 116, initially referring to "the social, economic and institutional context" under which it was adopted. The Court mentioned several reasons for this contextualized analysis to be carried out.

First of all, there was a need to interpret the Constitution "as a living text so it responds to the changing national situation and to the specifics of our country's reality." Secondly, there was also a need to take into account any "limitations of economic resources or insufficiencies in the administrative capacity of public entities," when evaluating the constitutional "mandates of progressive fulfillment" concerning social rights. Thirdly, the relevance or implications of a certain norm were better appreciated if the context was considered. And finally, there was a need to keep in mind the institutional

context into which a new tax reform takes place when its meaning is discussed in regards to the tax system as a whole.

Accordingly, the Court examined several elements of the context within which article 116 was adopted. In the first place, it confirmed the fact that even though the tax system as a whole had certain progressive elements, these were undercut by "a very high level of tax evasion and an erosion of the tributary base," caused by the great number of exemptions and amnesties granted for progressive taxes, such as the income tax. In the second place, it took into account that there would not be any compensation for the new tax imposed on the poorest population (2% VAT on prime necessity goods and services), and that social spending has been slowing down in the last years. Besides, according to official reports, revenues from this tax would be used to finance expenses in security and defense, not social programs.

The Court also took into account that all the sources of evidence coincided in saying that poverty indexes in Colombia had increased in the last few years, even contrary to the trend recorded for the rest of Latin America; that more than half of the Colombian population was below the poverty line; that almost one fourth of the Colombians were below the indigence line; and that low-income persons were using a higher percentage of their earnings to purchase those goods and services taxed by article 116.

The Court went on to examine article 116 directly, warning that even though "the goal aimed at by the legislator when expanding the VAT base is legitimate," the means used had "certain characteristics that rendered it manifestly unconstitutional." The reasons provided by the Court are explained in the following lines.

First of all, the Court stated that "the norm did not acknowledge the limits derived from the protection of the minimum level of subsistence in a Social State of Rule of Law."

Taking into account the factual context mentioned earlier, the Court considered that "the exercise of the taxing power of the State cannot be aimed or have the clear meaning of pushing the lower income individuals of the

population towards poverty, and the poor towards indigence, nor to keep them below such levels […].”

On this matter, the Court concluded that article 116 had a great impact “on wide sectors of the population whose total income is practically used to satisfy basic needs because it makes more difficult and, in extreme cases, even prevents these people from acquiring the indispensible means needed to live a dignified life”. Having said that, the Court warned that the Constitution does not forbid “in a general and absolute manner, imposing certain tax charges on prime necessity goods and services […] as long as there exist effective policies that compensate their effect on the right to the minimum level of subsistence […].” Then, the Court noted that there weren´t any state measures through which the poor were compensated for the negative effects of article 116.

Additionally, the Court pointed out that the decision contained in article 116 was part of a tax system “with grave failures regarding the collection of taxes particularly geared towards the development of the principle of progressiveness […].” Therefore “the expansion of the VAT base has a regressive effect on the system as a whole”

In addition, the Court found out that there was not a minimum public deliberation as to the reach and implications of article 116. Such a transcendental decision concerning an indiscriminate set of goods and services was the outcome of a last minute addition of the Government to the tax reform pending in Congress.

The Court, consequently, concluded that when “the VAT base is extended to levy a tax on goods and services that had previously been excluded in order to foster real and effective equality (art. 13 of the P.C.) in a Social State of Rule of Law (art. 1 of the P.C.), the legislator violates the principles of progressiveness and equity that rule the tax system (art. 363 of the P.C. and art. 95-9 of the P.C., interpreted in accordance with article 334 of the P.C.) […] if, such a reform is introduced (i) in an indiscriminate manner, without the minimum public deliberation in Congress as demanded by the respect for the principle of no taxation without representation, into a tax system, (ii) with

grave failures both regarding revenues coming from taxes with a progressive design as well as (iii) concerning the expenditures with redistributed ends, (iv) by means of expanding the VAT base to all prime necessity goods and services (v) upon which the effective enjoyment of the right to the minimum level of subsistence of a wide sector of the country's population depends on, considering the deficiencies of the social protection network."

Therefore the Court, at the same time that declared constitutional article 34, decided to declare unconstitutional article 116 of Act 788 of 2002.

b. **Problems concerning the executive branch**

i. **States of exception: declaration and regime: *Decision C-802 of 2002***

**Introductory note:** Colombia has suffered public order problems of varied intensity, origin and impact for two centuries. At times such problems derived in violence and armed conflict, as was noted in the introductory chapter. The 1886 Constitution allowed the President to declare a state of siege in case of grave perturbation of the internal public order or of external war. In virtue of such a declaration, the President could issue decrees with the force of law, signed by all the cabinets' ministers. Between 1886 and 1991 every president governed by making use of the state of siege. Legislative decrees were geared not only to solve public order problems but to facilitate the exercise of governance. That is why stage of siege decrees regulated all sorts of issues.

Indeed, the main legislator was not Congress but the Executive. In addition, some states of siege were declared in order to repress social protests and union demonstrations. Obviously, when legislative decrees were aimed at public order problems, they tended to be repressive, restricting basic liberties, and lacking effective controls. The Supreme Court of Justice, which had the power to review bills for constitutionality before 1991, usually approved the legislative decrees. Abuses of the state of siege made the emergency powers lose prestige and turned them into the symbol of excessive presidential intervention; and they showed the poverty of the system of separation of powers, and of checks and balances. Additionally, as the country was

constantly living under a state of siege, the instrument lost its intimidating strength through time.

In 1991, the Constitutional Assembly proposed to put an end to the state of siege. After a harsh negotiation process, an agreement was reached among the constituents of different ideological tendencies by which the state of siege was abolished and, instead, a regime of "states of exception" was created. For problems of internal public order the figure of "state of internal commotion" was created, and for external conflicts a different figure was created, called the "the state of exterior war." Neither of the two states of exception allows for declarations of "martial law" or resort to the concept of "reason of state." Even though the President maintains the power to declare both states of exception, the conditions to do so are much more demanding, the powers he can exercise are more limited, and the duration of the state of internal commotion is no longer indefinite. The latter can only last 0 days, which can be extended for up to two more similar periods, the second of which requires prior approval from the Senate.

The "state of internal commotion" is regulated by article 213[54] of the 1991 Constitution. Besides, article 214[55] enunciates several additional limitations

[54] E.N, the Article states: "In the case of a serious disruption of public order imminently threatening institutional stability, the security of the state, or the peaceful coexistence of the citizenry, and which cannot be resolved by the use of the ordinary powers of the police authorities, the President of the Republic, with the approval of all the ministers, may declare a state of internal commotion throughout the Republic or part of it for a period no longer than 90 days, extendable for two similar periods, the second of which requires the prior and favorable vote of the Senate of the Republic. // Upon such a declaration, the government will have the powers strictly necessary to deal with the causes of the disruption and check the spread of its effects. // The legislative decrees that the government issues suspend the laws incompatible with the state of disturbance and are no longer in effect as soon as public order is declared to have been restored. The government may extend its application for a period of up to 90 more days. // Within the three days subsequent to the declaration or extension of the state of disturbance, the Congress will meet at its own behest, with all its constitutional and legal powers. The President will transmit to it an immediate report concerning the reason, motivating the said declaration. // In no case may civilians be questioned or tried by martial law.

[55] E.N, the Article states: "The states of exception referred to in the previous articles will be subject to the following provisions: // 1. The legislative decrees must carry the signature of the President of the Republic and all his/her ministers and may refer only to matters that have a direct and specific connection with the situation which the declaration of the state of exception has set out. // 2. Neither human rights nor fundamental freedoms may be suspended. In all cases, the rules of international humanitarian law will be observed. A statutory law will regulate the powers of the government during the states of exception and will establish the legal controls and a guarantees to protect rights, in accordance with international treaties. The measures which are adopted must be proportionate to the gravity of the events. // 3. The normal

that must be respected during the state of commotion or the state of exterior war. Out of those limitations, it is worthwhile to highlight three, which have been of great importance to moderate the use of states of exception and subjecting them to the power of law. First, there is the duty to respect human rights and international humanitarian law. Second, there is the application of the principle of proportionality between the exceptional measures and the gravity of the facts. Third, there is faculty given to the Congress of the Republic to regulate, through statutory law, the measures that can be adopted, their limitations, and their controls. Congress exercised this attribution through the Statutory Act of Exceptional States (Act 137 of 1994). Except for a few provisions, it was approved after a priori abstract review by the Constitutional Court. In ***Decision C-179 of 1994***, the Court highlighted the importance of this act, which must be respected by all public powers, and which defines "straight on" the rules of the game as applicable when the state of exception is in force.

The state of external war has never been declared. On the other hand, the state of internal commotion has been declared seven times. The decree declaring the state of exception must be submitted to the Constitutional Court, so that the latter controls its constitutionality. The same applies to decrees through which exceptional faculties are exercised.

There is abundant constitutional jurisprudence regarding the states of exception. The most controversial piece of this jurisprudence is whether the Constitutional Court can revise in depth the decree declaring the state of internal commotion or, whether extending its control beyond the formal aspects represents a judicial invasion of the executive power's competences. There have been several proposals for constitutional amendments to strip the

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functioning of the branches of government or state organs will not be interrupted. // 4. As soon as the foreign war or the causes that gave rise to the state of internal disturbance have ceased, the government will declare public order to be restored and will lift the state of exception. // 5. The President and the ministers are responsible when they declare states of exception without the occurrence of a foreign war or internal disturbance, and they are also responsible, as are other officials, for any abuse that they may commit in the exercise of the powers to which the earlier articles refer. // 6. The government will send to the Constitutional Court on the day following their promulgation the legislative decrees issued under the powers mentioned in the above articles so that the Court may decide definitively on their constitutionality. Should the government not comply with the duty to transmit the decrees, the Constitutional Court will automatically and immediately take cognizance of them."

Court of this power, although all have failed until now. Before 1991, the Supreme Court had simply exercised formal control of this decree (ie. whether the proper procedures had been followed), arguing that only the President had the juridical competence and the knowledge to identify the facts perturbing public order, to evaluate their gravity and impact, and to see whether the norms in force were sufficient to face the threat. After 1991, the Constitutional Court took three meaningful steps by controlling the decrees declaring a state of internal commotion. First, it found that the reach of its control included the material or substantive aspects of the declaratory decree because the presidential faculty. Second, the Court established criteria to find the balance between, on the one hand, the competence of the President, as the one responsible to preserve and reestablish public order; and, on the other hand, the competence of the constitutional justice to defend the supremacy of the Constitution, even in times of perturbation, violence, armed conflict or, even exterior war. In essence, this equilibrium is part of the doctrine of "the margin of appreciation" of the gravity of the facts, and of the sufficiency of the ordinary measures which the President has within reach. This margin is wide, but not limitless. It respects presidential discretion, but also demands that the presidential decision be clearly motivated, with specific reasons, and based on proven public facts. Third, the Court has prevented the state of internal commotion from being used to face problems that, even though they have some relation with the preservation of public order, are of a structural and not of a momentary nature.

Using these doctrines, the Court has declared totally unconstitutional three declaratory decrees of a state of internal commotion (see sentences C-300 of 1994; C-466 of 1995 and C-070 of 2009). In addition, it has declared as partially unconstitutional two states of internal commotion (see sentences C-027 of 1996 and C-802 of 2002), and it has declared as constitutional two other states of interior commotion (see sentences C-556 of 1992 and C-031 of 1993). To all the presidents who have made use of this figure, the Court has declared as unconstitutional some states of interior commotion. This led to the fact that, between and 2002, this figure was not used with the argument that the Court would prohibit it. For other reasons, the said period coincided with the expansion of the guerrilla's presence in different sections of the country,

as well as with the deep penetration of paramilitary groups in certain zones. There was also an escalation of the armed conflict and a wider use of terrorist methods.

The President elected in 2002, Alvaro Uribe, based his campaign on the recovery of security by means of a tough, confrontational security policy. He announced amendments to the Constitution arguing that the legal framework in force, according to the interpretations by the Constitutional Court, prevented the reestablishment of order. The same day he took office some hand-made rockets fired by the FARC guerrillas hit the presidential palace, just several meters away from the Congress building where the ceremony was taking place. The new President quickly declared the state of internal commotion to fight the guerrilla. The minister of the interior warned that the Constitutional Court could not control the constitutionality of the declaration, and thus said that the latter would be sent to the Court only as "a gesture of courtesy." But in decision 802 of 2002, the Court examined the substantive constitutionality of the decree, although it upheld most of it, and thus preserved the Court's jurisprudence, while clarifying the criteria used to exercise the integral control of the declaratory decrees.

***Sentence C-802 of 2002*** **(per Justice Jaime Córdoba Triviño) :** In a 7-2 decision the Court declared Decree 1837 of 2002,[56] which declared the state of internal commotion, constitutional, except for article 3[57], and one of the

[56] E.N, the Decree 1837 of 2002 stated: "Article 1: To declare the State of Internal Commotion in the totality of the national territory for the term of ninety (90) calendar days as of the moment this decree is in force.
Article 2. An ample and detailed presentation of the reasons for this declaration will be submitted to Congress.
Article 3. The legislative decrees issued under and as a consequence of this declaration will be sent to the Constitutional Court so they can be examined.
Article 4. This decree is in force as of the date of its issuance. To be published and met."

[57] The Court decided "To declare CONSTITUTIONAL, in the terms expressed in the argumentation at the end of this sentence, article 1 of Decree 1837, August 11, 2002.
SECOND. To declare CONSTITUTIONAL article 2 of Decree 1837, with the understanding that the political control exercised by the Congress of the Republic is not limited to the report from the Government as to the reasons for the commotion, but that it extends to the additional decrees and administrative measures to be issued throughout the development of the internal commotion under the terms of article 39 of Act 137 of 1994.
To declare UNCONSTITUTIONAL article 3 of Decree 1837 of 2002, as it excludes from the control of the Court the declaratory decree of internal commotion, violating thus articles 2146.6 and 241.7 of the Constitution.
FOURTH. To declare CONSTITUTIONAL article 4 of Decree 1837."

reasons adduced.[58] The Court also held that article 2 was only conditionally constitutional, to avoid its restricting the faculty of control exercised by Congress on legislative decrees.

One justice dissented to the vote against the decree being declared constitutional. Another justice[59] dissented to the vote against the fact that the reasons to declare the state of commotion were the attacks to the infrastructure of essential services[60]. Finally, another two justices dissented as to the declaration of unconstitutionality of article 3 of the Decree[61].

The Court started by studying the figure of state of internal commotion established in the 1991 Constitution. The limitations that ought to be taken into account to declare such a state of exception are clearly stated there.

*a) Formal requirements:* (…)

*b) Material requirements:* (…)

[58] The part declared as unconstitutional said: "That Colombia has reached the highest criminal rate recorded on the planet." In addition, the Court pointed out that reasons 2 and 6 of the Decree being mentioned had "statements of rhetorical or political contents that, because they are not aimed at the fulfillment of material presuppositions of the declaration of internal commotion, do not empower the government to legislate." Such considerations adduced: That the Nation as a whole is being subjected to a regime of terror into which democratic authority is sinking, and it makes the productive activity more and more difficult and haphazard, multiplying misery and unemployment for millions of our fellow citizens," and "the situation of insecurity has generated an additional deterioration of the rural zones and, specifically, the conditions for and possibilities of employment in the country's poorest population.

[59] Justice Jaime Araujo pointed out: "the acts do not happen haphazardly, and that the state has ordinary powers already foreseen and enacted in many laws for the preservation of the normality that must be applied, and there only the lack of political will to do so."

[60] Justice Alfredo Beltrán explained. "My disagreement regarding this point lies in the fact that to accept that one of the acts that cause grave perturbation of public order is the carrying out of terrorist acts "against an infrastructure of essential services" as mentioned in section c) of the "final consideration," it is not true, in my judgment, that they are unusual because, notwithstanding their gravity, they have been a mechanism used throughout the duration of the armed conflict besieging the Republic, acts which, although occasionally increased, at times decrease, and at the moment of the declaration of the State of Internal Commotion (August 11, 2002) all the infrastructures of essential services in the national territory were working fully."

[61] Justices Marco Gerardo Monroy and Rodrigo Escobar stated : "We consider that article 3 of Decree 1837 should not have been considered unconstitutional because the interpretation that the same implies a legislative omission is only one of the possible interpretations…the considerations made by the Court as to the motives of its competence to know about the constitutionality of that Decree, and on the reach of the decree as to the matter of stating, towards the future, the Court's doctrine on this specific case, would have sufficed."

*c) The non-suspension of human rights and fundamental liberties:* "Numeral 2 of article 214 of the Political Constitution, as a limit to the legislative decrees issued by the executive under the state of internal commotion, prohibits the suspension of human rights and fundamental liberties."

The Court noted the International Covenant on Civil and Political Rights and the American Convention of Human Rights: "From the profound contents of these dispositions and their implications in the constitutional right of exception of the Party Nations the reach of the principles contained therein can be discerned, thus":

*1-Principle of intangibility of rights:* "The American Convention considers intangible the rights to juridical personality (Art.3), to life (Art. 4) to personal integrity (Art. 5), the prohibition of slavery and servitude (Art. 6), the principle of ex post facto laws (Art. 9), liberty of conscience and religion (Art.12), the rights of the family, (Art. 17), the right to a name (Art.18), the rights of the child (Art.19), the right to nationality (Art.20), and political rights (Art. 23). The only intangible right in the Covenant, different from the ones mentioned, is the one relative to the prohibition to be incarcerated for the mere fact that a contractual obligation is not met [debtors' prison] (Art.11)."

*2 – Principles of necessity and proportionality:* The measures would be legitimate if (i) it is infeasible to establish others much less harsh, (ii) they are apt to contribute to the solution of the fact that originated the threat, (iii) the perturbation cannot be ended through ordinary means, and (iv) there does not exist another measure of exception that generates a lesser impact in terms of protection to rights and guarantees."

*3 – Principle of temporality:* "The specific characteristic of the application of the measures of exception is its limited duration in time; in this sense, the international instruments studied oblige the States to apply such measures only for a strictly peremptory period of time to overcome the fact that is threatening the Nation's life."

*4 – Principle of legality:* The state of exception does not imply ignoring the basic postulates of the State of Law. This way, international instruments desire

that the state of exception be, above all, a system of faculties subjected to the State of Law, in which the limitations of state acts, the minimum requirements of the measures adopted, and the listing of applicable prohibitions are defined."

*5- Requirements of form. Proclamation and Notice:* "(…) supranational norms set two procedural requirements whose purpose is to facilitate control by the other States members of multilateral organisms. The first of them is the proclamation or declaration, stated in Article 4.1.of the Covenant, (…). The notification, on the other hand, consists of the duty the State has to notify, through the Secretary General of the respective multilateral organism, and in the case that the faculty to restrict guarantees is to be used, the dispositions it purports to restrict, the reason for the restriction, and the date when the said limitations are to be ended.

*d) As to the rules of International Humanitarian Law:* "The prevalent character of international humanitarian law prohibits its being over-ridden through the measures of a state of exception. It is evident that as armed conflicts belong to the environs of general international law, its precepts acquire the same function as the intangible rights referred to when analyzing articles 4 of the International Covenant and 27 of the American Convention which, at the same time, are reinforced by the obligation to meet its commitments, which the Colombian state has signed by virtue of the ratification and approval of the Geneva Agreements and its Additional Protocols."

*e) Subjection to statutory law:* (…)

*f) Proportionality between the measures adopted and the gravity of the facts:* (…)".

*g) The non-interruption of the normal functioning of the branches of public power or of the organs of the State:* (...)

*h) The non-investigation or trial of civilians by military penal justice:* (…)

*i) The duty to declare that public order has been reestablished when the causes that originated it have ceased:* (…)

Afterwards, the Court referred to the system of controls exercised during states of exception, which are: political control and juridical control. "Political control corresponds to the competent organ of public power, that is, the executive, because of the acts issued. The organ of control is the Congress of the Republic since, as the instance of representation that embodies popular sovereignty, is it the adequate forum to start the public debate on the political reasons of opportunity underlying the declaration of the state of exception and the faculties exercised because of it." As to juridical control it pointed out: "…different from political control, it is not a matter of opposing the will of the executive to the will of the organ of control, but it is a work of comparison between the act issued and the parameter of normative control. This also explains that it is a juridical judgment, wherein reasons of law are used to confirm or negate the constitutional validity of the controlled act (…). The Constitution has endowed the Constitutional Court with competence for the juridical control of the states of exception."

After this, the Court analyzed its own competence to decide on the constitutionality of the rights that declare a state of exception. As to this matter it pointed out:

*1) Determination of the Court's competence from the juridical nature of the declaratory decree of internal commotion:*

It is submitted [by some participants to the proceedings] that the declaratory decree is an act of government, or in other words a political act, and therefore, it is subject to review of the same nature, political review. Thus, it is argued, since the decree is a political act, it cannot be subject to any judicial review whatsoever, and the Court has not competence to pronounce itself on its constitutionality.

This argument would have found support in the original formulation of the State of Right, in which judicial review had no clear place. It would suffice to affirm the triple division of power and its subjection to law, since the sole reference to law was sufficient to legitimize an exercise in public power; law

was reduced to [the laws enacted by Congress] and judicial jurisdiction was limited to its application through a syllogistic method. In this way, it was understandable for lawmaking processes to be free of review, since the law, given the representative character of the organ enacting it, had the capacity of legitimizing itself. That way, the idea of domains of public power free from judicial review and that of self-restraint of the political branches were conceived.

However, that position was rapidly revised. Constitutional jurisprudence first denied that the political motives of an act would suffice to exclude it from review, and then, it did not hesitate to subject those acts to judicial review. Thus the current State model is characterized by the disappearance of otherwise absolute domains of power, the conception of a system of effective restrictions on power and the fundamental role of judicial review in their structure and functionality. Judicial review is a manifestation of the democratic principle, since it affirms the subjection of the rulers to the basic ground rules laid down by the ruled.

(…)
In this context, even though the declaratory decree is an act which has political effects, it is evidently a legal act that contains elements which are closely regulated by the Constitution itself, and a discretionary elements also recognized by the Constitution. The regulated elements are expressly foreseen in Article 213, according to which the President may only declare a state of internal commotion "in case of grave disturbance of public order that attempts imminently against the institutional stability, the security of the State or the coexistence of citizens, and may not be solved by the use of ordinary police attributions". The discretionary elements consists of the President's competence to appreciate the existence of these facts and qualify their gravity and transcendence, as well as to decide whether or not to declare the state of internal commotion.

Being a legal act, it is clear that the declaration of a state of internal commotion is a legislative decree which is subject to judicial review, oriented at finding whether constitutional limits have been complied with or not.

*2) Determination of the Court's competence from the applicable constitutional norms:* (…)

"a) States of exception are special regimes conceived for situations of abnormality, but they are regimes conceived within the law, and not outside of it. That is, any state of exception is a regime of juridical application."

"b) The Constitution has placed the declaration of a state of internal commotion under various formal and informal propositions (Articles 213 and 214). According to that, if the Court has been entrusted with the protection of the Constitution (Art. 241), the control that it exercises also extends to the norms dictated based on the constitutional dispositions that regulate the declaration of such state of exception."

"c) (…) within that framework, public powers can also exercise the faculties conferred upon them, but they must do so without ignoring the Constitution's supreme normative character. According to this, in the present constitutional regime there are no faculties to issue juridical acts that are not subjected to limitations,… and as to the imposition of those limitations, they make no sense if an instance of control is not set up; it is then mandatory to conclude that there are also no juridical acts that lack an instance of juridical control."

"d) The constituent assembly has subordinated the declaration of the state of internal commotion to the concurrence of a valued factual presupposition and has judged on the sufficiency of ordinary police measures. To satisfy such demands is fundamental as they determine the material environs that can be the object of regulation by means of the legislative decrees issued with the declaration of internal commotion. The correspondence between this factual presupposition and the material environs regulated by such decrees is a demand from such an entity, that to violate it determines the constitutional invalidity of the said…."

"e) (…) It must be inferred that the Court does control such acts, and that that control must be adequate to defend the integrity and supremacy of the Constitution. And it is clear that this can only be achieved if the control is both formal and material."

The Court declared article 3 unconstitutional since it ignores the Court's competence to control the constitutionality of the decree declaring the state of

internal commotion by omitting to mention the said decree among the ones that would be sent to the Court for review.

Later in the decision, the Court stated that from article 213 of the Constitution there appear three requirements to declare the state if internal commotion:

**Factual Premise:** "(…) It has to do with a fact of the phenomenological world, from an empirical point of view, that starts with the occurrence of concrete facts, perceptible and, consequently, verifiable, that objectively generate an alteration of the conditions of security and tranquility demanded to exercise the rights."

"As an event of the phenomenological world, the factual presupposition, under constitutional control, is susceptible to an objective judgment of its existence. That is, the Constitutional Court must determine whether the perturbation of public order did occur or did not occur (….)"

**Value Premise:** "The Constitution considers this presupposition when it stated that "in case of **grave** perturbation of the public order **that imminently attempts against institutional stability, the security of the State, the citizens' coexistence…**"

"As can be seen, this presupposition (…) involves a value judgment based on that factual presupposition. It is an evaluation related to the intense perturbation and its consequences, an evaluation that corresponds to the President of the Republic to make, as the authority in charge of preserving the public order."

"According to this presupposition, on the one hand, the perturbation of the public order is not any perturbation foreseen in the superior norm; it is not any perturbation, but one of grave nature. Nevertheless, this added value under any circumstance is of a subjective nature as defined by the President of the Republic, because he has to refer to an objective perception of the intensity of the perturbation."

On the other hand, according to the higher mandate, the alteration of public order, in addition to being a grave one, must imminently attempt against institutional stability, the security of the State or the citizens' coexistence. That is, the alteration of public order, as a verifiable factual presupposition, in addition to being grave, must have the possibility of attempting, of placing under severe danger, of threatening, of generating a risk for those areas of protection. And that serious danger must be imminent, that is, it does not have to do with some danger that is proposed as a distant or remote possibility for the institutions, the State or the citizens, but of an effective risk that can materialize at any moment, of a danger that can be potential due to its temporary immediacy."

Within this framework, the value presupposition of the state of internal commotion imposes upon the Court the need to carry out an objective judgment of pondering, since the purpose is to determine whether the evaluation carried out by the President of the Republic as to the alteration of the public order is arbitrary or not, and whether or not in that evaluation there was a manifest error of appreciation."

"(…) that is, once it has been established that the President's evaluation is not arbitrary nor is it the result of manifest error, there is no place for the constitutional justice to interfere. That is why the latter is forbidden from casting judgment on a value presupposition of the declaration of the states of exception that goes beyond the determination of an arbitrary evaluation or a manifest error, because what happens as of that moment cannot any longer be the object of judicial objections, which correspond to the constitutional justice, but must be judgments of opportunity or convenience, judgments that, as it is known, are completely foreign to the competence of the constitutional justice as instance of juridical control of the limitations set by the exercise of power."

**Judgment on the sufficiency of ordinary measures:** "According to this presupposition, to declare the state of internal commotion is the extreme measure of the State's juridical and political agenda. It is the last resort to defend the Colombian people and the institutional organization that has been given to them, of the aggression implicit in the grave alteration of the public

order which in an imminent manner attempts against institutional stability. By virtue of this principle, the only time it is possible to use the state of internal commotion is when the ordinary juridical tools that the State has do not permit it to stop the grave alteration of the public order that threatens to dissolve the agreement that makes coexistence possible."

« Within this framework of reference, the President is endowed with the faculty to evaluate the sufficiency or insufficiency of the ordinary attributions of the police to overcome the grave perturbation of the public order and its implications…

"(…) the methodology to be used by the Court is through an objective judgment of assessment geared to establish whether his evaluation of the insufficiency of the ordinary measures of the police was arbitrary or not, and whether there was a manifest error of evaluation in doing so.

"(…) the analysis of the judgment of sufficiency of the ordinary measures of the police must be global and not detailed…"

Finally, the Court went on to study Decree 1837 of 2002.

On the factual presupposition, the Court said: "Three of the four facts generating the perturbation of the public order and used by the National Government to declare the state of internal commotion have been verified since it was demonstrated with documents and figures that they have indeed taken place in the last two years. In relation to them, since there is an objective base, such declaration is legitimate."

"This is so because multiple criminal conducts have been shown by irregular armed groups, such as attacks against defenseless citizens, violations to their human rights, the violation to the rules of the International Humanitarian Law, and the commission of crimes against humanity; also included are terrorist acts and terrorist attacks against the infrastructure of essential services and, finally, the same happens with acts to coerce local and sectional authorities and their families as they are the legitimate representatives of regional democracy and also administrators of justice."

On the contrary, the fourth of the facts used, that is, that Colombia has recorded the highest index of criminality on the planet, has not been demonstrated, and for this reason the Court excludes it as a reason of perturbation of the public order."

"As to the value presupposition, the Court pointed out: "In this context, it is necessary to conclude that the President of the Republic, when evaluating that the facts mentioned in the reason for the decree declaring the state of internal commotion generated a grave alteration of the public order, he did not incur in arbitrary evaluation or manifest error…"

"This is so because the evaluation made by the President of the Republic on the gravity of the facts and their potential to imminently attack the institutional stability, the State's security or the citizens' coexistence, did not go beyond the constitutional limitations because an intensification and expansion of the armed conflict has taken place, as well as the violation under exceptional dimensions of human rights and of the International Humanitarian Law. Levels of public perturbation have undergone a qualitative and not only a quantitative change, in the nature of the acts of violence, which have translated into indiscriminate attacks against the civil population, as well as into selective attacks against State dignitaries of all levels and against legitimate leaders of civil society, due to an increase in the capacity of the lawless armed groups."

Finally, the Court referred to the sufficiency of the ordinary police measures and pointed out: "It is not under discussion that acts similar to those being used now, have been part of the national reality for a long time and, therefore, it could be argued that Colombia is going through a structural abnormality, and that it is necessary that acts such as those be dealt with by means of permanent and general State policies and through the use of ordinary police faculties from the President of the Republic. Nonetheless, at the same time it is acknowledged that such acts . . . have acquire an unexpected intensity, that is, they have acquired a new qualitative dimension, in this same sense it must be inferred that ordinary juridical tools that the State has to face this unusual and destabilizating qualitative shift must also be endowed with more power."

"Sufficient elements exist to state the reasonableness of the President of the Republic's evaluation of the insufficiency of the ordinary police attributions to face the grave alteration of the public order affecting the country."

"If the desired end is to eliminate the grave perturbation of public order and its implications, the exceptional measures being announced, from a general perspective, show themselves as the suitable means to reach that purpose."

"(…) among the faculties granted to the executive by the constitutional law of exception, is the one to limit the exercise of some rights. Nonetheless, since the sole declaration of the state of exception does not necessarily imply the restriction of rights, and taking into consideration the incidence that a measure such as this has in the development of community life when it is to be used, it is necessary that the liberties to be restricted be generically identified by the said legislative decrees."

"The decree whose revision is being made satisfies this demand because it, announces the need to restrict the free circulation of persons and vehicles in places and at specific times determined by the authorities. Therefore, this and no other fundamental liberties can be affected by these legislative decrees."

"(…) Nonetheless, …the [specific] decrees for the implementation of the state internal commotion, will be judged one by one to verify that they respect the Political Constitution, the International Treaties on Human Rights and the Statutory Law of Exceptional States.

Especially, the Court considers that the said measures adopted under the state of internal commotion must respect what is stated in insert 2 of article 213 of the Constitution that establishes that they can only be "the ones strictly necessary to overcome the causes of the perturbation and to prevent the extension of their effects;" a constitutional criterion developed in articles 8 to 14 of the Statutory Law of the States of Exception (…)"

**Note on the application of C-802 dated 2002:** Recently, through ***Decision C-070 of 2009***, the Court declared the unconstitutionality of Decree 3929 of 2008, which declared a state of internal commotion due to the extended strike

by administrative officers of the judicial branch as well as by several judges in all the country. Although it reiterated sentence C-802, it found that the decree had one grave problem in its reasoning. The Court pointed out that the Government did not comply with the statute's requirement that declarations justify that the acts that originated the internal commotion were of such gravity that they affected the institutional order, the State's security and the citizens' coexistence. The government declined to give specific reasons as to the impact of the acts in the perturbation of public order. Likewise, it pointed out that the Government did not evaluate the ordinary means within its reach to end the crisis.

**Note on economic emergencies**. In the 1991 Constitution, a third state of commotion is foreseen: "the state of economic, social and ecological emergency." It replaces the "state of economic and social emergency" created in 1968 in order to separate the economic emergencies from the expansive regime of the state of siege. Before 1991, this state of exception was used to dictate tax reforms and for the governmental intervention in the financial sector before a scandal of bad management of financial resources by some banks. After 1991, it has been used to take care of a transitory social emergency caused by the [government's] refusal to increase police salaries (Decree 222, declared as constitutional by sentence C-004 of 1992); to face a financial emergency in the context of recession at the end of the 90s (Decree 2330, 1998, declared as constitutional with conditionings by sentence C-122, 1999); and to respond to the social emergency generated by the massive swindle of savings accounts holders by organizations based on the Ponzi pyramid and fed by laundering narcotrafficking moneys (Decree 4333 of 2008, declared as constitutional by sentence C-305 of 2009). It was also declared to face the calamities resulting from earthquakes in specific areas of the national territory (Decree 195, 1999, declares as constitutional by sentence C-216 of 1999).

## IV. CONSTITUTIONAL REFORM: Unconstitutional/Constitutional Amendments

### a. The case of the referendum to limit rights, change budgetary rules and modify the electoral system: *Decision C-551 of 2003*

Soon after the inauguration of the President in 2002, a proposal to amend the Constitution was the object of a heated debate. Three issues were at stake: (i) a reform of electoral rules and the creation of prohibitions in order to fight corruption; (ii) the need to make a more transparent debate of the budget and (iii) the overruling of several decisions of the Constitutional Court on diverse topics, from the minimum increase of public salaries to the admissibility of personal consumption of narcotics in private. The Government introduced a referendum proposal to Congress. In the congressional debates the referendum was severely modified. In the end it was called "referendum against corruption".

Through ***Decision C-551 of 2003*** **(per Justice Eduardo Montealegre Lynett)** the Court studied the constitutionality of Act 796/1991, which for the first time after the issuance of the 1991 Constitution called for a referendum for the people to consider a constitutional reform project on several issues, such as the limitation of labor rights, the modification of the electoral system, the reduction of State expenditures, the changing of rules to approve the budget, and the possibility of punishing the consumption of illegal drugs, among other issues. The Court, in a 6-2 decision, declared the partial constitutionality of the act through which Congress, at the initiative of the President of the Republic, had called the referendum[62], and it considered constitutional the 19 paragraphs of article 1 of the said act.

[62] The Court resolved: "One.- To declare CONSTITUTIONAL paragraph one and the contents appearing in sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12 13, 14, 15 and 18 of article 1 of Act 796/2003 except what is indicated in paragraphs 2, 3, 4 and 5 of this sentence.
To declare UNCONSTITUTIONAL in its totality sections 10, 16, 17 and 19 of article 1 of Act 796/03 the expression "and the local ombudmen of number 12, and paragraph of section 6 that added article 176 and that literally says:
Paragraph.- In order to facilitate the reincorporation to civilian life of the illegal armed groups who are decidedly part of a peace process, under the Government's leadership, it can establish for one single time, special peace regions for the elections to public corporations that take place before August 7 of the year 2006, or to appoint for only one time, the plural number of congressmen, deputies and councilmen, in representation of the said groups in a peace process and demobilized individuals.
The number will be established by the National Government, according to the valuation made of the circumstances and the advancement of the process. The names of the congressmen, deputies and

In this decision the Court introduced for the first time the prohibition of he substitution of the constitution doctrine.

The Court established limits on the power to reform the constitution via referendum, and for this purpose it distinguished two concepts: the reform of the constitution and the substitution of the constitution for a totally different one. The Court said: "In the development of democratic principles and of popular sovereignty, the constituent power lies in the people, who have and preserve the power to give themselves a Constitution. The original constituent power, then, is not subjected to legal limits and implies, above all, the complete exercise of the political power by the relevant individuals. (…) On the other hand, the power of reform, or derivative constituent power, refers to the capacity certain organs of the State have, on some occasions by consulting the citizens, to modify one existing Constitution, but within the paths determined by the [current] Constitution itself. This implies that it is a power established by the Constitution, and that is exercised under the conditions set by the same Constitution. Such conditions comprise matters of competence, procedure, etc. It deals, therefore, with the power of a reform of the Constitution itself and, in that sense, it is of constituent nature, but it is instituted by the existing Constitution and it is therefore, derivative and limited. (…)

"The obvious question is, in addition to these matters of preparation, whether the power of the reform has limits of competence in the sense that there are

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councilmen this article refers to, will be agreed upon between the government and the armed groups, and their nomination will correspond to the President of the Republic.

.For the effects foreseen in this article, the Government can ignore certain inabilities and requirements necessary to be a congressman, deputy or councilman.

Three.- To declare UNCONSTITUTIONAL the following expressions of the transitory paragraph of section 14 of article 1 of Act 796/2003 "expansion of the" and "democratic."

Four.- To declare UNCONSTITUTIONAL the introductory notes of the contents appearing in sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12 13, 14, 15 and 18 of article 1 of Act 796/2003, except the expression "DO YOU ACCEPT THE FOLLOWING ARTICLES ? in each one of them, which is declared CONSTITUTIONAL.

Five.- To declare UNCONSTITUTIONAL the inclusion of the box "blank vote "of sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12 13, 14, 15 and 18 of article 1 of Act 796/2003.

Six.- To declare CONSTITUTIONAL article 2 of Act 796/03

.Seven.- To apply the Statutory Act for Participation Mechanisms, Act 134/94 within the eight (8) days alter the communication of the resolution of this sentence, which hill be done by the Secretary General of the Constitutional Court on July 10, 2003, the President of the Republic will set a date for the referendum, which has already be called by Congress of the Republic through law 796/03.

some issues that are prohibited from its [the reform's] capacity to reform constitutional norms. (…) "In Colombian constitutionalism, the power of the reform has limits of competence since the 1991 Constitution cannot be substituted. It has to do with a limitation expressly established by the original Constituent in article 374[63] of the Constitution adopted in 1991 by the Constituent Assembly commissioned by the sovereign people. The precedent argument shows that a power of reform without limitations of competence also eliminates the basic distinction between the original constituent power and the derived constituent power, or of reform. (…)

"The derivative constituent power, then, does not have the competence to destroy the Constitution. The constituent act establishes the legal order and, because of that, any power of reform limits itself only to a revision. The power of reform, which is constituted power, is not, therefore, authorized to annul or substitute the Constitution from which its competence is derived. The constituted power cannot, in other words, grant to itself functions that belong to the constituent power and, therefore, cannot carry out a substitution of the Constitution not only because it would then become an original constituent power, but also because it would undermine the bases of its own competence."

To apply these rules to this particular case, the Court held: "To know whether in the power of reform, included in the case of this referendum, there was a defect of competence, the constitutional justice must analyze whether the Constitution was substituted by another one, and to do this it is necessary to analyze the principles and values of the Constitution, and those arising from the set of constitutional principles. [The Court explained that this process was not the same as] studying the substantive constitutionality of the reform by comparing one article of the reforming text with a constitutional rule, norm or principle – which would be the equivalent to exercising material control."

"For example, a constitutional amendment could not be used to substitute the social and democratic state of law with a republican structure (Political Constitution art. 1), for a totalitarian state, for a dictatorship, or for a monarchy, as this would imply that the 1991 Constitution had been replaced

[63] E.N, the Article states: "The Political Constitution of Colombia may be amended by Congress, a Constituent Assembly, or by the people through a referendum."

by a different one, even though it has formally been done through the power of constitutional reform. And therefore, since the Court must analyze whether the power of reform has overcome its limits of competence, it is necessary for us, when studying each one of the paragraphs of article 1 of Act 796/03, to examine whether the projects of constitutional reform submitted for approval of the people imply a substitution of the 1991 Constitution."

The Court concluded that the referendum did not substitute the Constitution. The first time the Court stroke down a constitutional amendment, in part, on the grounds that the reformer of the constitution had exceeded its competence, was in the first presidential re-election case.

### b. The case of the proposed constitutional amendment allowing presidential re-election: *Decision C-1040 of 2005*

**Preliminary note.** As it was noted earlier in this text, Alvaro Uribe Velez was elected president of the Republic for the 2002 – 2006 term. Halfway through his term, and with considerable support from citizens, a group of congressmen presented a constitutional amendment to establish the possibility of presidential re-election for the following term or for a later period. Presidential re-election had been expressly forbidden by the 1991 Constitution in Article 197[64]. In the past, re-election had been possible in Colombia, but not for the immediately subsequent term. The legislative initiative amending the Constitution was approved by the Congress of the Republic after a heated debate regarding its convenience and after significant pressure exerted by the government to achieve the required majority. After analyzing the many claims filed by citizens against the amendment, the Constitutional Court declared it constitutional, thus enabling the incumbent president to run for a new term. President Uribe won the elections and took office for the 2006 – 2010 period. Elections were carried out in the framework of a statutory law adopted by the

[64] The original text reads as follows: "Neither the President of the Republic, nor any citizen who may have exercised the Presidency in any capacity, may be re-elected. This prohibition does not cover the Vice-President if he holds that office for less than three months, continuously or discontinuously, during the preceding term. (…)"

The modified text reads as follows: "Nobody may be elected to hold the office of President of the Republic for more than two terms."

Congress and also reviewed by the Constitutional Court. To grant equal opportunities for all candidates, the law established regulations regarding, among other issues, access to mass media, campaign financing, appointment to official posts, and contract awards by the State.

Constitutional amendments, which go through a very demanding procedure in the Congress, may be contested by any citizen before the Constitutional Court by filing an unconstitutionality action. The Court then examines two types of flaws: those concerning parliamentary procedures and those related to the competence of the legislature. The latter type of review is very limited: the Court's only jurisdiction is to determine whether the amendment constitutes a total or partial "substitution" of the current Constitution for a different one. The Court has said that it has no competence to exert control over the substance of constitutional amendments (other than to determine whether a substitution has occurred) and the Colombian Constitution does not include any provisions that per se cannot be amended.

***Decision C-1040 of 2005*** **(Per Justices Manuel José Cepeda Espinosa, Rodrigo Escobar Gil, Marco Gerardo Monroy Cabra, Humberto Antonio Sierra Porto, Alvaro Tafur Galvis, Clara Inés Vargas Hernández).** In this decision, the Court examined the constitutionality of Legislative Act 02 of 2004, which amended a constitutional article to enable the re-election of the President of the Republic for another term, whether consecutive or not. In a 6 – 3 vote on procedural issues, and a 7 – 2 vote on competency issues (i.e., whether the amendment constituted an impermissible substitution of the Constitution), the Court declared the amendment constitutional, except the following excerpt, which was declared unconstitutional on competency grounds: *"[i]f the Congress were not able to issue the statutory law within the deadline established, or it were declared void by the Constitutional Court, the Council of State will provisionally issue regulations on the matter during a two-month period."* The statutory law this passage referred to was to be issued in order to create the rules regarding re-election procedures and to establish guarantees for other parties and candidates, mainly of the opposition. If this law was not issued on time, it would be impossible to carry out elections having the incumbent president as one of the candidates.

Concerning procedural flaws, the Court examined ten arguments presented by the claimants in favor of declaring the law unconstitutional, and rejected all these claims.

Concerning the issue of substitution of the Constitution (competency flaws), the Court started by clarifying the concept: "[A] judgment on substitution does not involve a comparison between the amendment and the Constitution to see if the former contradicts the latter, as, by definition, a constitutional amendment does contradict the provision subject to change within the Constitution." A substitution refers to "a transformation of such extent and import, that the Constitution in force before the amendment appears to be so different from the resulting text as to render it incompatible. Case law has . . . [held] that the Legislature cannot introduce even partial substitutions when they involve replacing crucial defining axes of the Constitution by others that are completely opposite and wholly different . . . ."

The Court highlighted that the only holder of unrestricted power to amend the Constitution is the people.[65] Hence, constitutional amenders are not sovereign and they have limited competence according to the Constitution. The Constitution bestows the power to amend the Constitution[66], among others, to the Congress of the Republic which, being a body established and regulated by the Constitution itself, can only exercise such power 'in the terms established by the Constitution,' and not in an unrestricted manner.[67] Therefore, only the people may create a new Constitution.

Thus, "the legal action of substituting the Constitution occurs only when one of its defining elements, instead of being amended, is replaced by an opposing or wholly different one. Substituting implies that the resulting text contradicts the core of the 1991 Constitution and that, therefore, it is no longer recognizable. The Congress of the Republic . . . may not replace the 1991

[65] Article 3 of the Constitution states: "Sovereignty resides exclusively in the people from whom public power emanates. The people exercise it in direct form or through their representatives within the limits established by the Constitution."

[66] Article 374 states: "The Political Constitution of Colombia may be amended by Congress, a Constituent Assembly, or by the people through a referendum."

[67] Article 380 states: "The previous Constitution in force, as amended, is hereby repealed. // This present Constitution is effective from the day of its promulgation."

Constitution by a new and wholly different one [, nor] may it introduce the kind of partial amendment that would render unrecognizable those essential and defining elements that give our Constitution its identity. This does not inhibit the Congress from introducing significant amendments to the Constitution to respond to society's evolution and citizens' expectations."

Article 379[68] establishes that the Court must make sure that amenders comply with all 'the requirements' established in Chapter XIII of the Constitution. The first requirement refers precisely to the competence of the body issuing amendments, as regulated in the first article of the said Chapter. Competence is the prerequisite needed so that the amender (in this case the Congress of the Republic) may follow the procedure established to validly amend the Constitution. The Constitutional Court must then verify that the Legislative Act is in fact an amendment and that it does not abolish or substitute the Constitution.[69]

In determining whether a substitution has occurred, the Court clarifies its method of review: First, the Court emphasizes that its review will be "an autonomous judgment concerning competence. If the body which issued the amendment had competence to issue the amendment, then we would be before a real constitutional amendment whose review could only be exerted regarding procedural flaws."

"[T]o establish the major premise in a judgment of substitution it is necessary to (i) clearly identify [the defining core] element; (ii) define through reference to multiple constitutional provisions its specificity within the 1991 Constitution, and (iii) show why it has an essential and defining nature for the Constitution considered as a whole. Only in this way will it be possible to establish the major premise and avoid legal subjectivism."

Once the defining core element has been established, "[a] judgment of substitution of the Constitution . . . establishes (a) whether the amendment

[68] Article 379 states: "Legislative acts, the referendum, the popular consultation, or the act of convocation of the Constituent Assembly may be declared unconstitutional only when the requirements established under this title have been violated. // Public measures against these acts may be taken only within one year following their promulgation with due regard to the provisions in Article 241, paragraph No. 2."
[69] Articles 374 and 380 of the Constitution.

introduces an essential new element in the Constitution; (b) whether it replaces [the defining core element identified that was] originally adopted by the Constituent Assembly, and (c) it compares the new principle with the previous one to confirm, not if they are different, which will always be the case, but if they are different to the point of incompatibility."

Upon clarifying the above mentioned method, the Court concluded that the amendment under examination did not substitute the Constitution, as it did not replace the form of State nor the governmental system or the political regime enshrined in the 1991 Constitution.

"(i) The Court holds that allowing presidential re-election – only for a single time and subject to a statutory law aimed at ensuring the rights of the opposition and equal opportunities for all candidates during the presidential campaign – is not an amendment that substitutes the 1991 Constitution by another wholly different text. The essential elements that define our Social and Democratic State as one founded on human dignity were not replaced by the amendment. The people will freely decide who to choose as President, . . . the system of checks and balances still operates, the independence of constitutional bodies is safeguarded, the Executive is not bestowed with new powers, the amendment includes regulations to reduce inequalities in the election process under the administration of institutions which continue to be autonomous, and the acts to be adopted are still subject to judicial review so as to guarantee respect for the Social State of Rule of Law."

"[I]t is clear that with or without presidential re-election, Colombia is still a Social State of Rule of Law organized as a decentralized republic where regional institutions are autonomous, and founded on democratic, participatory and pluralistic principles. None of these defining elements is suppressed, subverted or substituted by [this amendment]."

"(ii) Beyond considerations regarding its convenience or political opportunity, it cannot be argued that a system which [permits] presidential re-election will lose its democratic nature by that mere fact, or that our presidential regime will be transformed into extreme presidentialism. Many examples could be drawn from comparative law where such a mechanism exists and does not

imply a non-democratic state. On the contrary, in this kind of system the people, through elections, maintain their role as arbitrators in power processes . . . .”

“(iii) [I]t cannot be said that the amendment, which lifted the ban on presidential re-election, has changed the governmental system enshrined in the Constitution. [T]he amendment . . . does not substitute our presidential system for another different one because it only modifies one of its elements. According to the accepted doctrine, the defining feature of the system is the people’s direct or semi-direct election of the President of the Republic, who cannot be removed from his position by the legislative body before his term is over, [and] the legislative body cannot be dissolved by the President of the Republic . . . .”

“[Thus], lifting the ban [on presidential re-election] is definitely possible within the scope of amendments admitted by the Constitution, and therefore, it cannot be stated that the Congress, acting in its role as constitutional amender, has transgressed its competence by approving the act under discussion.”

The Court also rejected the arguments that held that the amendment infringed the principle of equality. The Court stated that: “[A]lthough immediate presidential re-election may by itself give some advantage to the incumbent president and to his party over his political opponents, the amendment introduced regulations and guarantees aimed at ensuring adequate balance during the election campaign, as well as equal conditions for all candidates. The result of this provision will depend not only on the specific regulations that will have to be issued through a statutory law, but also on the context of their implementation. In any case, the amendment did include specific mandates to ensure equality during the election campaign.”

Finally, the Court analyzed the faculties bestowed on the Council of State to issue a provisional law if the Congress did not manage to adopt the corresponding statutory law regulating the election process, or if the law was declared void by the Constitutional Court. The Court concluded that such faculties would imply a partial substitution of the Constitution, and struck them down.

In this regard, the Court said: "In the first place, the Court notes that the subject matter that the Council of State is given provisional power to regulate does not fall into the legislative competence because the power provisionally granted to the Council of State aims at regulating a specific election process to be carried out in brief whose shaping, therefore, is not in the hands of the Legislature."

"Indeed, the provision creates a transitory legislative power subject to no effective control in order to ensure its obedience to the Constitution. . . . The legislative power is granted to a body within the judicial branch which is not directly or indirectly elected by the people, which does not represent society and would have to issue regulations with no participation from involved stakeholders, without a previously established legislative procedure, and subject to no congressional control or constitutional review before the 2006 [presidential] elections."

"For the Court, this provision in the amendment does introduce a wholly different element from those that define the identity of the 1991 Constitution by establishing a legislative power subject to no control, which is not adjusted to democratic principles, and which is granted the authority to define fundamental rights as regards the distribution of public power. This kind of legislative power would be completely different from the legislative power in place now, which is subject to the Constitution, has been elected by the people, and represents our political and social pluralism. Besides, the actual legislative power would limit itself to issuing the law with no subsequent participation in deciding controversies over its meaning, and is subject to a system of checks and balances designed to avoid or invalidate arbitrary restrictions on the fundamental constitutional rights to which all Colombian citizens are entitled."

"Therefore, granting such power to the Council of State involves a partial and temporary substitution of the Constitution because for a time the Council of State will be free to arbitrarily adopt mandatory regulations for all citizens and the Constitution will lose its supremacy . . . ."

**Dissenting vote by Justice Jaime Araujo Renteria**

Besides considering whether the approval of the amendment had procedural flaws, Justice Araujo pointed out that: "The dogmatic and the organic design of the Constitution is based on a distribution of political power whose head is the President of the Republic for a limited period of time with no possibility of a new term. In other words, the structure itself of our government system as established by the Constitution was designed by the constitutional assembly under the assumption that the head of the Executive would be in office for a set term of four years. Consequently, changing the distribution of political power undoubtedly alters the structure of our government system because it was originally conceived for a four-year period and not for an eight-year term."

**Dissenting vote by Justice Alfredo Beltrán Sierra**

[Dissent omitted]

**Dissenting vote by Justice Jaime Cordoba Triviño**

Justice Cordoba held that the approval of the amendment had several procedural flaws related to the process of resolving conflicts of interest of several congresspersons and to bypassing debates on the convenience of the amendment. However, he agreed with the Court on the issues concerning the substitution of the Constitution.

Regarding his differences on the approach the Court used to analyze claims on procedural flaws, he concluded the following: "[T]he question that the Court had to solve in this case was probably one of the most important decisions in its history. On this occasion, the Court had to define, regardless of the consequences and risks implied in the decision, if Colombia is a democracy exclusively founded on the principle of the majority or a constitutional democracy in which the majority – no matter who leads it – has to comply with the limits and restrictions established in the Constitution. After almost 15 years of contributing to the construction of a constitutional democracy through its decisions, the Court decided that it was not appropriate to continue exerting strict control over the procedures that regulate the shaping of the will expressed in the Constitution. It chose, therefore, to approve procedures which

are legitimate only in democracies exclusively founded on the principle of the majority. Accordingly, it disregarded some fundamental facts and rendered irrelevant – or turned into mere formalities – some procedural requirements that guarantee the principles of transparency, impartiality and ethical conduct during the adoption of laws or constitutional amendments. For a moment, the Court forgot that it is precisely the defense of constitutional democracy that justifies its existence."

**Concurring opinion by Justice Humberto Antonio Sierra Porto**

Justice Sierra shared the decision declaring the amendment valid; however, he considered that the Court should have declared itself without competence to examine claims concerning the so-called substitution of the Constitution. He stated that: "[T]his category of competence-related flaws is closely linked to the idea of material limits or, in other words, the concept that there is a certain type of procedural flaw that given its nature affects the substance itself of acts of Congress. Thus, when the Constitutional Court transferred the concept of competence-based flaws to the review of constitutional amendments in decision C-551 of 2003 [the first constitutional referendum case], it in fact opened the way to the review of substantive matters in the constitutional amendment process, something which has no support whatsoever in our constitutional text."

### c. Final note (pending): The case of the referendum for a second presidential re-election. *Decision C-141 of 2010*

After Uribe's re-election in 2006, efforts began to amend the Constitution once again in order to allow him to run for a third term. This time, the proposed amendment would be done through a constitutional referendum. This referendum for constitutional reform, as opposed to the constitutional amendment of 2004, was invalidated by the Court as an attempt to substitute the democratic principle and the principle of equality, two essential defining elements of the Constitution. This case showed that, although the restrictions on constitutional amendment were rather flexible, they were restrictions nonetheless.

***Decision C-141 of 2010*** **(Per Justice Humberto Antonio Sierra Porto):** After a massive campaign to collect citizens' signatures in favor of a referendum to amend the Constitution and allow for a second immediate presidential re-election, the law was presented to and adopted by the Congress. In its review of the law, the Court declared it unconstitutional on both procedural (7 - 2) and competency (5 - 4) grounds.[70]

To sum up the competency vice, the Court said that in the first presidential re-election decision the Court had accepted its validity on the condition that the amendment clearly authorized one re-election only: "According to the Court's previous decision [C-1040 of 2005], *'a constitutional amendment that suppresses the ban on presidential re-election, allowing it for one time only, does not constitute, in and of itself, a substitution of the Constitution'* and that is the premise on which the Court will base its analysis [as to whether an amendment allowing] a second re-election, and thus, a third presidential term, substitutes the Constitution."

The Court also added new arguments: "Given the predominant place of the President of the Republic in a presidential system, and the aggregate of his constitutional functions, . . . it is clear that any alteration in the rules governing the President's competencies or legal status has notable repercussions on the whole of the State structure and the set of principles and values that sustain it. . . . [T]he possibility of exceeding the maximum authorized time for the exercise of command has deep repercussions on the institutional design adopted by the Constituent, . . . beginning with the risks impinging on equality

[70] Justices Mauricio González Cuervo and Jorge Pretelt Chaljub dissented on the procedural vices and four justices dissented on the substitution of the Constitution argument (Humberto Sierra, Mauricio González, Jorge Pretelt, Nilson Pinilla). The vice of competence argument was written by the five justices that voted in favor of it and incorporated in the final decision.

The procedure and competency flaws upon which the referendum was declared unconstitutional were the following: (i) violation of financing limits for citizens' initiative campaigns; (ii) changes in the original text introduced during Congress debates; (iii) lack of formal calling to the Congress extraordinary sessions where the referendum was discussed; (iv) violation of the Law on Parties by five (5) representatives who voted against the collective stand of their party, and (v) substitution of the Constitution through an amendment which would disregard "some structural principles of our Political Constitution such as the principle of the separation of powers and the system of checks and balances, the rule of alternation and pre-established periods, the right to equality and the general and abstract nature of laws."

of treatment and opportunities for competing candidates and the objective conditions that enable freedom of choice for electors.

If the second re-election were to be made effective, the third presidential period would breach the rule of alternation of political power, it would preserve for a prolonged time the ideological tendencies espoused by the government, and it would also preserve the governmental teams in charge of developing public policies, thus facilitating the continuity of a dominant majority, with a notable setback for renovation. [This] would result in a disproportionate growth of presidential power along with a loss of effectiveness of controls on the President's conduct.

[B]esides the restriction on equality of treatment and opportunities for other candidates and on freedom of choice for the electorate, a second re-election would affect [political] minorities, whose guarantees are constitutionally recognized, since they would have to add yet a third term in which they would not have the chance of conducting State affairs or contributing to them.

In addition, the growth of presidential power . . . would impact gravely on the structure adopted in the Constitution, which [was enacted to] impose moderation in the exercise of power, prevent arbitrariness and contain the executive tendency to exceed its competenc[y].

In the absence of effective checks and balances and a true separation of powers, the end result would be a predominance of the executive branch, so marked that it would disfigure the characteristics of a typical presidential system to turn it into a deformed version known as 'presidentialism' which is precisely characterized by an exaggerated predominance of the executive and a tendency to pass the maximum terms of presidential office.

. . . [I]n a truly constitutional State, the fundamental aim of separation of powers is not mere effectiveness in carrying out State functions, but the guarantee of fundamental rights, such that when the principle of separation of powers is breached, so are the rights, principles and values on which it stands. . . . [S]eparation of powers and a presidential system define the system of government instituted in 1991; participative and pluralistic democracy,

founded on the people integrated by majorities and minorities, and the republican model is the form of government that was decided upon in 1991. Thus, concentration of power in the executive branch, the presidentialism that follows, the prolongation of preponderance by a majority that surrounds the President for a lapse that is over the maximum allowed, and the disfiguration of the republican conception of government, replace the political form as adopted in the current Constitution . . . .

The inescapable conclusion is that the second re-election and therefore the third term of office entail a rupture of the Constitution, [substituting] definitional axes of the Constitution, related to the institutional structure and the rights, principles and values which support that structure."