

See discussions, stats, and author profiles for this publication at: <https://www.researchgate.net/publication/382496123>

Confronting Vulnerability and Discrimination before Courts: Egalitarian Transformative Constitutionalism in the Constitutional Court of Colombia

Article · July 2024

CITATIONS

0

READS

32

2 authors:



Juan José Aristizábal

Corte Contitucional de Colombia

4 PUBLICATIONS 0 CITATIONS

SEE PROFILE



Jorge Ernesto Roa Roa

Pompeu Fabra University

96 PUBLICATIONS 225 CITATIONS

SEE PROFILE



MAX PLANCK INSTITUTE

FOR COMPARATIVE PUBLIC LAW
AND INTERNATIONAL LAW

MPIL RESEARCH PAPER SERIES | No. 2024-19

**Confronting Vulnerability and Discrimination before
Courts:
Egalitarian Transformative Constitutionalism in the
Constitutional Court of Colombia**

Jorge Ernesto Roa Roa and Juan José Aristizábal

ISSN 2702-9360



MAX PLANCK INSTITUTE

FOR COMPARATIVE PUBLIC LAW
AND INTERNATIONAL LAW

MPIL RESEARCH PAPER SERIES

No. 2024-19

**CONFRONTING VULNERABILITY
AND DISCRIMINATION BEFORE
COURTS:**

**EGALITARIAN TRANSFORMATIVE
CONSTITUTIONALISM IN THE
CONSTITUTIONAL COURT OF
COLOMBIA**

AUTHORS

Jorge Ernesto Roa Roa and Juan José Aristizábal

EDITORIAL DIRECTORS

Armin von Bogdandy, Anne Peters

EDITOR-IN-CHIEF

Moritz Vinken

TECHNICAL ASSISTANCE

Verena Schaller-Soltau

Angelika Schmidt

ISSN 2702-9360

All MPIL Research Papers are available on the MPIL website at <https://www.mpil.de/en/pub/publications/mpil-research-paper-series.cfm> and on the SSRN at https://papers.ssrn.com/sol3/JELJOUR_Results.cfm?form_name=journalbrowse&journal_id=2765113

Copyright remains with the author

Suggested citation

Roa-Roa, Jorge Ernesto and Aristizábal, Juan José, Confronting Vulnerability and Discrimination Before Courts: Egalitarian Transformative Constitutionalism in the Constitutional Court of Colombia (July 03, 2024). Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2024-19.

Available at SSRN:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4888533

ABSTRACT

Colombia is one of the most unequal countries in the most unequal region of the world. Which is the role of the constitutional courts and how can they address the challenges generated by structural inequality to materialize the constitutional promise of equality? This document analyses the principal tools used by constitutional courts and approaches structural discrimination, subjects of special constitutional protection and discriminated or marginalized groups, amongst other instruments. The text is based on the practice of the Constitutional Court of Colombia, one of the most representative courts in the constitutionalism of the global south. In global comparative law, this Court is recognized for making great efforts to insert itself into the transformative constitutionalism and, thus, attempting to make the constitutional promise of equality a reality.

KEY WORDS:

Transformative constitutionalism, discrimination, equality, constitutional courts, vulnerability

Confronting vulnerability and discrimination before courts: Egalitarian transformative constitutionalism in the Constitutional Court of Colombia

Jorge Ernesto Roa Roa*

Juan José Aristizábal**

1. Equality as a constitutional promise and the devices that configure *the law of the weakest*

Colombia is one of the most unequal countries in the most unequal region of the world. It was so in 1991 and it is so today¹. Therefore, it was not strange that the 1991 constituent had established equality (value, principle and right)² and the specific mandates derived from it as one of the central axes of the Constitution³. It could be said that equality and overcoming structural discrimination are two of the central promises of Colombian constitutionalism. Although they are unfulfilled promises, this does not mean that normative, jurisprudential and functional tools do not exist to move decisively towards the construction of a more egalitarian society in which the central pillar is based on the fact that each person is treated with “equal consideration and respect”⁴.

The Constitution, international human rights treaties, jurisprudence and legislation make up in the Colombian constitutional system what Ferrajoli calls the *law of the weakest*⁵. In this matter, as in many others, the Constitution and the block of constitutionality can

* Constitutional lawyer, international consultant in human rights and arbitration. Former law clerk of the Constitutional Court of Colombia. He is a postdoctoral researcher at Pompeu Fabra University in Barcelona and professor at several universities in Latin America and Europe. Contact: jorgeroaroa@gmail.com.

** Lawyer from Universidad de Caldas. Master in Constitutional Law from Universidad Externado de Colombia. He is an official of the Constitutional Court of Colombia. Contact: juanj.aristizabal@gmail.com.

¹ Santos, Juan Manuel. *The Battle Against Poverty: Colombia: A Case of Leadership*. Oxford University Press, Oxford, 2023, pp. 148-159.

² Constitutional Court of Colombia (CCC). Judgment SU-150 of 2021, para. 102.

³ These are the following four mandates: “(a) to give equal treatment to identical factual situations; (b) to give different treatment to factual situations that have no element in common; (c) to give equal or similar treatment to factual situations that present similarities and differences, when the former are more relevant than the latter; and (d) to give different treatment to factual situations that present similarities and differences, when the latter are more relevant than the former”. CCC. Judgment SU-150 of 2021, para. 103.

⁴ Dworkin, Ronald. *Taking Rights Seriously*, London, Duckworth, 1977, p. xv.

⁵ Ferrajoli, Luigi. *Derechos y garantías. La ley del más débil*. Editorial Trotta, 7th ed., Madrid, 2010, p. 17.

claim a certain normative sufficiency. Thus, the causes for the existence of structural inequality must be sought (for the most part) outside the legal structures.

Likewise, constitutionalism in the region has had a marked concern for equality. In general, at the end of the twentieth century and the beginning of the twenty-first century, constitutional amendments were approved that expanded the regime of economic, social and cultural rights. In this way, a greater commitment to the fight against discrimination was established. “Almost all of the reforms have been very generous in recognizing constitutional rights for their inhabitants, since they not only incorporated civil and political rights inherited from the demoliberal traditions (...) but also broadly established economic, social and cultural rights -such as education, housing or health- and even advanced in the recognition of forms of collective rights”⁶. Colombia was no stranger to this influence.

For this reason, equality appears in the Constitution in the preamble and in articles 13 (on equality in general), 42 (with respect to family relations), 53 (among workers), 70 (with respect to access to culture), 75 (on access to the electromagnetic spectrum), 209 (as a principle of public service) and 227 (as a guide for international relations). There it is possible to identify it in its normative function of value (preamble and articles 13 and 227), principle (articles 13, 42, 53 and 209), right (articles 13, 42, 53, 70 and 75), mandate (article 13) or aspiration (article 75).

In addition, Article 93 of the Constitution is a mechanism of normative expansion that integrated duly ratified international treaties into the legal system. The Colombian State has ratified multiple treaties that have equality as a central axis and that integrate the block of conventionality. Among these are the American Convention on Human Rights, the Convention on the Rights of Persons with Disabilities, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights or “Protocol of San Salvador”.

Thus, the Colombian legal system is endowed with the necessary normative devices to configure a State model in which the *law of the weakest* prevails. A system that has been created not only to recognize the different asymmetries between those who make up society, but also to ensure the existence of institutional designs, public policies, a

⁶ Uprimny, Rodrigo. *Las transformaciones constitucionales recientes en América Latina: tendencias y desafíos en Rodríguez, César. El derecho en América Latina*. (Madrid: Marcial Pons, 2011), 113.

regulatory system and an administration that will intervene decisively to reduce the different normative and factual gaps between individuals.

This aspiration and the power of this normative mandate explain the constitutional jurisprudence that will be analyzed in the following sections. It will show how the Constitutional Court has extensively developed the categories that make it possible to *deal* with inequality: subjects of special protection, vulnerable groups, minorities or suspicious criteria of discrimination. Of course, the impact that each one has on different institutional aspects will be indicated. Since the drama of inequality is structural, a reference to the mechanisms with which the Constitutional Court has responded to this phenomenon in a structural manner is also inevitable.

2. Subjects of special constitutional protection, vulnerable, discriminated or marginalized groups and minorities: an open list in the construction of the language of equality

One of the fundamental ideas that justify the existence of constitutional justice is that *judicial review* can contribute to preserve the conditions that make the democratic procedure valuable, improve the quality of representation or protect the rights of minorities. All of the above, in order to monitor and guarantee the proper functioning of the activity carried out by the legislator⁷.

Theoretically, this argument was developed and successfully disseminated, among others, by John Hart Ely. To illustrate his idea, Ely suggests an analogy between the political system and the following two cases: the role of antitrust institutions that correct the dysfunctionalities of the market without imposing specific objectives and the role of the referee in sports who ensures compliance with the rules of the game without having the ability to determine which team will be the winner. According to Ely, just as the market is intervened to correct its dysfunctions or the referee ensures that the competing teams do not gain an advantage by violating the rules of the game, constitutional judges only intervene in the political procedure when it fails. Procedurally, the political system

⁷ Ely, John Hart. *Democracy and Distrust. A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980). The extended version of the argument on pages 73-183 and the summarized version on page 103. Also in: Ely, John Hart. "Toward a Representation-Reinforcing Mode of Judicial Review". (Maryland Law Review, vol. 37, no. 3, 1978), pp. 451-487. Another author who follows this thesis can be found in: Replegle, Ron. "The Scope of Representation-Reinforcing Judicial Review". (Columbia Law Review, vol. 92, no. 6, 1992), pp. 1592-1624.

can fail in two different ways: when the channels of political change are closed or blocked, or when the majority affects the rights of an underrepresented minority⁸.

This is the core of the well-known argument on the theory of legislative failure⁹. This theory was expressed by Justice Harlan Fiske Stone in the second and third paragraphs of footnote number four of *United States v. Carolene Products Co*¹⁰. According to Owen Fiss, the legislative failure theory can be synthesized as follows: “(...) judges must respect the decisions of the legislature unless (there occurs) victimization of a discrete and insular minority; that is, a group prevented from forming coalitions and thus from participating effectively in majority politics”¹¹.

This failure occurs when, based on prejudice or a hostile attitude, representatives act systematically against the rights of a minority that has no or little representation in the legislature¹². Ely’s central point is that, when the political system fails, the least likely to notice and recognize it are the representatives themselves. On the contrary, judges have two relevant conditions to determine the existence and remedy the errors of democratic procedure: their expertise in procedural matters and their status as observers or external agents of the political process¹³.

⁸ Ely, John Hart. “Toward a Representation”. op. cit., p. 486.

⁹ Fiss, Owen. *El derecho como razón pública* (Madrid: Marcial Pons, 2007), pp. 26-38.

¹⁰ Paragraph 1: “There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth (...)”. Paragraph 2: “It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation”. Paragraph 3: “Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious (...) whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”. SCOTUS. *United States v. Carolene Products Co*, 304 U.S., 144, 152 n. 4 (1938). For a discussion of the context and elements of this court Judgment, see: Ackerman, Bruce. *We the People. Foundations* (Cambridge: Harvard University Press, 1991), pp. 119-130.

¹¹ Fiss, Owen. *El derecho como razón pública*, op. cit. p. 26.

¹² “Malfunction occurs when the process is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or vote, representatives beholden to an effective majority are systematically disadvantaging some minority out simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system”. Ely, John Hart. *Democracy and Distrust*. op. cit., p. 103.

¹³ Ely, John Hart. *Democracy and Distrust*, op. cit. p. 103.

Under the first condition, judges are well suited to make such an assessment because they are experts in resolving disputes involving procedural subjection. Second, judges are uniquely positioned as outside observers to determine whether one of the instances of political procedural error occurred.

Thus, even critics of the existence or functioning of constitutional justice recognize that the courts can play a very relevant role in the protection of insular or discrete minorities. It is an intervention to correct a dysfunctionality of the democratic system in which groups that have been historically marginalized and therefore lack political representation remain marginalized. This occurs because the political system does not see them, is not interested in the problems of these groups due to their low capacity for agency or the weakness of these groups is so high that their problems are visible to society, but not to state agents. For this reason, the courts can intervene when the legislator approves norms that negatively affect them. This intervention is far from being considered activist. On the contrary, it is a correction that strengthens the democratic system.

This procedural defense of judicial review has as its background a notion of democracy that emphasizes the substantial value of equal democratic dignity. This has led transformative constitutionalism to defend a judicial intervention based on the idea that constitutionalism should reflect the language of equality¹⁴.

Within this framework, at the individual level, Article 13 of the Constitution (third paragraph) recognized that there may be persons who (whether or not they belong to a discriminated or marginalized group) may be subject to discrimination in such a way that they require reinforced constitutional protection. These criteria make it possible to identify a series of subjects of special constitutional protection. At the individual level, what is relevant is not belonging to a group but the condition or situation that derives from aspects such as their economic position and their physical or mental characteristics. This is without prejudice to the existence of other aspects or reasons that may lead a person to be discriminated because of that condition and, therefore, deserve the same reinforced constitutional protection.

The category of subjects of special constitutional protection is made up of “those persons who, due to their particular physical, psychological or social condition, deserve positive

¹⁴ Roa Roa, Jorge Ernesto. “El rol del juez constitucional en el constitucionalismo transformador latinoamericano”. In: Córdova Vinuesa, Paúl (coord.) *Jurisprudencia constitucional transformadora en Ecuador, Bolivia y Colombia*. Corporación de Estudios y Publicaciones, Quito, 2022, pp. 231-253.

state action in order to achieve real and effective equality”¹⁵. Some of the subjects of special constitutional protection are children and adolescents¹⁶, pregnant women¹⁷, the elderly¹⁸, persons with disabilities¹⁹ and persons in a situation of forced displacement²⁰.

This list is not exhaustive. In year 2000, the jurisprudence only referred to “children, senior citizens, physically handicapped, or women heads of household”²¹ as subjects of special constitutional protection. However, the catalog has been subsequently expanded. In 2020, persons suffering from orphan diseases were included²² or in 2018, those diagnosed with HIV or AIDS were considered as subjects of special protection²³.

The effects of this category are broad. For example, the legislation has explicitly recognized health protection for these subjects²⁴. The Court has also indicated that the requirements for access to the tutela action should be more flexible when it comes to discussing certain types of claims against them²⁵. As will be indicated below, it has been established that these persons can be the object of affirmative actions²⁶.

From a community or collective perspective, in Article 13 of the Constitution (second paragraph), the constituent provided a mandate for the promotion of *groups that are discriminated against* or *marginalized*. The Court has identified that these groups must have the following three characteristics. First, they must be an identifiable social group. Secondly, they must be in a situation of prolonged subordination. Third, that their political power is severely limited by socioeconomic or class conditions or by prejudice from others.

On the other hand, the Constitutional Court has emphasized that there is another classification that refers to *oppressed* groups. This applies when, in addition to the three previous characteristics, the members of the group are also exploited, suffer stereotypes,

¹⁵ CCC. Judgments T-167 of 2011, para. 1.5; T-736 of 2013 and T-017 of 2021.

¹⁶ CCC. Judgments SU-225 of 1998, T-282 of 2008 and T-413 of 2020.

¹⁷ CCC. Judgment T-075 of 2018.

¹⁸ CCC. Judgment T-374 of 2022.

¹⁹ CCC. Judgment T-412 of 2023 and T-076 of 2024.

²⁰ CCC. Judgment T-025 of 2004.

²¹ CCC. Judgment T-025 of 2004.

²² CCC. Judgment T-413 of 2020.

²³ CCC. Judgment T-033 of 2018.

²⁴ Law 1751 of 2015 (article 11).

²⁵ CCC. Judgment T-076 of 2024.

²⁶ CCC. Judgment T-989 of 2006.

are made invisible and their members are subjected to violence precisely because they are part of that group²⁷. For example, the Court has protected people who carry out recycling work²⁸. With respect to them, it has been found that the aforementioned characteristics are met because:

“It is not difficult to understand that informal recyclers survive in a hostile physical and social environment. On the one hand, they have to face the multiple social stigmas that are generated by the simple association of an activity with elements that society discards (...) the fact that waste pickers live and survive on the remains that are useless to others, on what others despise, generates a problem in terms of the construction of social imaginaries. Society rejects garbage and extends this rejection to those who work with it. As a result, a series of stereotypes predominate that end up placing waste pickers at the bottom of society and generate a view that they are annoying, smell bad, tend to steal, hinder traffic, and dirty the city. Prejudices against recyclers are so strong that they have even gone so far as to carry out *social cleansing* campaigns to *get rid* of them”²⁹.

In an exercise of multilevel judicial dialogue, the Court has implemented the criteria of the Inter-American Court of Human Rights (IAHR Court) to identify vulnerable groups³⁰. The Constitutional Court has indicated that the determination of one of these groups depends on the following five factors: the context in which the lack of protection is caused; the degree of exposure to a risk or limitation; the level of potential or actual affectation in relation to a threat in accordance with the characteristics of the group that endures it; the intensity, frequency and duration of the threat or situation; and the group’s capacity for reaction or agency.

In Judgment C-116 of 2021, the Court resorted to these criteria to decide a claim of unconstitutionality against a rule that recognized veterans of the security forces as a vulnerable population. The Court considered that the challenged provision “attributes a condition that includes a group of persons who, as such, do not have the situation or condition that constitutionally justifies the attribution of the general quality of vulnerable. As the jurisprudence of this court has indicated, it is an *overinclusive statute* or classification that is too broad”³¹.

²⁷ CCC. Judgments T-736 of 2015, para. 31 and T-291 of 2009.

²⁸ CCC. Judgments T-291 of 2009 and T-387 of 2012 and Auto 268 of 2010.

²⁹ CCC. Judgment T-291 of 2009, chapter 5.

³⁰ CCC. Judgment C-116 of 2021, para. 92.

³¹ CCC. Judgment C-116 of 2021, para. 118.

The groups that the Court has identified as discriminated against or marginalized - sometimes also described as vulnerable groups- are the following³²: informal vendors or workers³³; the displaced population and victims of the armed conflict³⁴; the rural population³⁵ and peasants³⁶; young people who have been under the care and protection of the Colombian Institute of Family Welfare³⁷; homeless³⁸; persons with disabilities³⁹; those who have been diagnosed with HIV or AIDS⁴⁰; the elderly⁴¹; persons deprived of liberty in general⁴² and women⁴³ and LGTBQ+ persons deprived of liberty specifically⁴⁴; sex workers⁴⁵; the indigenous population⁴⁶; children and adolescents⁴⁷; children of the *Wayuu* ethnic group⁴⁸; ROM peoples⁴⁹; black, Afro-Colombian, Palenquera and Raizal population⁵⁰; mothers heads of household⁵¹; traditional miners⁵²; disaster victims and victims of disasters⁵³; persons linked to the System for Identification of Potential Beneficiaries of Social Programs (Sisben)⁵⁴; persons in socioeconomic vulnerability⁵⁵; human rights defenders⁵⁶; domestic workers⁵⁷; beneficiaries of the social security

³² CCC. Judgment C-116 of 2021, para. 87.

³³ CCC. Judgment T-701 of 2017.

³⁴ CCC. Judgment T-025 of 2004.

³⁵ CCC. Judgment C-623 of 2015.

³⁶ CCC. Judgments C- 644 of 2012, C-077 of 2017 and C-028 of 2018.

³⁷ CCC. Judgment C-586 of 2014.

³⁸ CCC. Judgment C-385 of 2014.

³⁹ CCC. Judgment C-147 of 2017.

⁴⁰ CCC. Judgment T-522 of 2017.

⁴¹ CCC. Judgment T-015 of 2019.

⁴² CCC. Judgments C-143 of 2015 and C-026 of 2016.

⁴³ CCC. Judgment T-267 of 2018.

⁴⁴ CCC. Judgments T-288 of 2018 and T-060 of 2019.

⁴⁵ CCC. Judgments T-594 of 2016 and T-629 of 2010.

⁴⁶ CCC. Judgment SU-217 of 2017.

⁴⁷ CCC. Judgment T-979 of 2001.

⁴⁸ CCC. Judgment T-302 of 2017.

⁴⁹ CCC. Judgment C-359 of 2013.

⁵⁰ CCC. Judgment C-295 of 2019.

⁵¹ CCC. Judgment C-1039 of 2003.

⁵² CCC. Judgment SU-133 of 2017.

⁵³ CCC. Judgment T-191 of 2011.

⁵⁴ CCC. Judgment T-307 of 1999.

⁵⁵ CCC. Judgment C-613 of 2013.

⁵⁶ CCC. Judgment C-577 of 2017 and SU-546 of 2023.

⁵⁷ CCC. Judgment C-871 of 2014.

system⁵⁸; veterans survivors of the Korean and Peruvian wars who are homeless⁵⁹; people who carry out recycling work⁶⁰; and LGTBIQ+ persons in general⁶¹.

The Constitutional Court has also used the concept of *minority*. The court has established the differences between opposition groups and a minority. The latter is based on a quantitative and arithmetic criterion with respect to the electoral result. According to the Court, “the determination of who are majorities and who are minorities will depend, not on a legal provision, but on the sovereign will of the people, expressed directly through electoral mechanisms; that is, it will be the citizenry, through voting, which will lay the basis for classifying a given political current as a minority”⁶².

Regarding discrete or insular minorities, it was indicated that this is a concept that can be applied to vulnerable groups. Specifically, the Court warned that these are groups that “lack the political capacity or the necessary attention from the authorities. The dimensions of their weakness may lead the State to be unaware of their existence (blind spots), to fail to address their situation (burdens of inertia) or to do so through insufficient measures that do not overcome the structural dimensions that place them in vulnerability”⁶³.

Thus, both at the individual level (subjects of special protection) and at the collective level (discriminated groups, the marginalized, minorities) there is a constitutional tradition that develops the normative provisions that make up the constitutional promise in favor of equality. It is now time to examine some of the effects of these categories in the specific analysis of measures that use suspicious criteria of discrimination or in the method of judging a potentially discriminatory norm.

3. Suspicious criteria of discrimination: a list that recognizes the challenge of growing inequality to be curbed through affirmative action

Article 13 (first clause) of the Constitution established a list of suspicious criteria of discrimination. Following the pattern of most contemporary Constitutions -and with a clear influence of the Spanish Constitution (Article 14)- the first clause of the 1991

⁵⁸ CCC. Judgments T-084 of 2018 and SU-897 of 2012.

⁵⁹ CCC. Judgment C-1036 of 2003.

⁶⁰ CCC. Judgment T-291 of 2009.

⁶¹ CCC. Judgment T-068 of 2021.

⁶² CCC. Judgment C-169 of 2001, para. 3.4.3.

⁶³ CCC. Judgment C-116 of 2021, para. 103.

Constitution refers to sex, race, national or family origin, language, religion and political or philosophical opinions.

The Constitution was careful to formulate a formula that was sufficiently open to recognize that not all suspicious criteria were identified at the time the Constitution was originally drafted. For that reason, the Constitutional Court was quick to indicate that this is an open list and that the Constitution's enumeration does not exclude other suspect grounds for integrating very broad causes within some of the categories expressly set forth in the Constitution. Specifically, the Court has indicated that "these reasons or criteria set forth in the Constitution, although not in an exhaustive manner, allude to those categories that are considered suspicious, since their use has historically been associated with practices that tend to undervalue and place certain persons or groups in situations of disadvantage"⁶⁴.

Constitutional jurisprudence has held that beyond the categories that were expressly recognized in Article 13, the suspect criteria of discrimination have three characteristics⁶⁵. On the one hand, they are based on traits that people cannot voluntarily dispense with without losing their identity. Secondly, these are subjects that have traditionally been undervalued by cultural valuation patterns. Finally, they are not criteria on the basis of which, in principle, a "rational and equitable distribution or sharing of goods, rights or social burdens" can be made⁶⁶.

The suspicious criteria of discrimination also make it possible to determine when discrimination with harmful effects occurs. The Constitutional Court has indicated that four elements must be verified to identify the harmfulness of an act due to discrimination. First, the act must be based on a suspicious criterion of discrimination. Secondly, the decision is not justified by a constitutionally imperative purpose. Thirdly, it produces unequal treatment between persons. Finally, this action or decision causes prejudice⁶⁷. This precedent was applied by the Court when it reviewed the case of a bar owner who reprimanded a same-sex couple for holding hands. The Court evaluated the elements described above and held that:

"In this case, the discrimination suffered by the plaintiff because of her different sexual orientation is accredited, since the action of the administrator was

⁶⁴ CCC. Judgments C-371 of 2000 and T-804 of 2014.

⁶⁵ CCC. Judgments C-410 of 1994, C-481 of 1998, C-371 of 2000 and T-077 of 2016.

⁶⁶ Ibid.

⁶⁷ CCC. Judgments T-909 of 2011, T-030 of 2019 and T-335 of 2019.

motivated by such condition, a criterion that this Corporation has considered suspicious, it also lacks any justification since it did not seek to achieve a constitutionally imperative purpose and, on the contrary, the reproach to the manifestations of affection of the different couple constituted a violation of fundamental rights (...), it produced an unequal treatment, since the analysis of the evidentiary material in the file allows to conclude that the employee did not make the same call of attention to other heterosexual couples and finally, it constituted a prejudice, since it constituted a detriment.), produced an unequal treatment, since the analysis of the evidentiary material in the file allows concluding that the employee did not make the same call of attention to other couples of heterosexual condition and finally, configured a prejudice in the exercise of the superior guarantees set forth in the amparo, particularly because they were rebuked for the mutual expressions of affection, which generated their withdrawal from the place, and in addition, the defendant conditioned their entry to the fact that '(...) they know how to behave’”⁶⁸.

The existence of the suspicious criteria of discrimination implies that they cannot be used for the negative distribution of goods, rights or social burdens. However, these same categories are useful when it comes to the adoption of measures in favor of these groups. For example, through affirmative action. These are based on the idea that in society “no one should suffer for being a member of a group that is considered less worthy of respect, as a group, than others”⁶⁹. To guarantee equality, the social system must ensure that “those with the same level of talent and ability and the same willingness to make use of those gifts should have the same prospects for success regardless of their social class of origin, the class into which they were born and raised to the age of reason”⁷⁰.

The Constitutional Court has applied this perspective. Thus, the court has considered that affirmative actions are “policies or measures aimed at favoring certain persons or groups, either in order to eliminate or reduce social, cultural or economic inequalities that affect them, or to ensure that members of an underrepresented group, usually a group that has been discriminated against, have greater representation”⁷¹. These can be derived from the express mandate of Article 13 of the Constitution with respect to marginalized or discriminated groups. They may also be based on the constitutional provisions of Articles 43 (women), 44 (children), 45 (adolescents), 46 (senior citizens) or 47 (persons with disabilities)⁷².

⁶⁸ CCC. Judgment T-355 of 2019, para. 52.

⁶⁹ Dworkin, Ronald. *Una cuestión de principios*. (Buenos Aires: Siglo Veintiuno Editores, 2012), p. 373.

⁷⁰ Rawls, John. *La justicia como equidad: una reformulación*. (Barcelona: Paidós, 2001), p. 74.

⁷¹ CCC. Judgments C-371 of 2000 and T-115 of 2022.

⁷² CCC. Judgment T-115 of 2022, para. 93.

The Court has distinguished between three types of affirmative actions. On the one hand, awareness-raising actions. These seek to sensitize society to a problem⁷³. For example, this includes publicity campaigns for the prevention of breast cancer or orders to different officials to attend human rights training courses⁷⁴. Secondly, those of promotion and facilitation, such as economic support, scholarships or subsidies⁷⁵. For example, the Generation E program, which seeks to guarantee economic support for students who score well on state tests; or the housing subsidy for the displaced population. Finally, those of inverse or positive discrimination. These are based on suspicious criteria of discrimination and “are produced in a situation of special shortage of desired goods, (...) which implies that the benefit provided to certain people has as a counterpart the detriment of others”⁷⁶. For example, quotas in universities for vulnerable groups⁷⁷ or the prioritization of subjects of special protection to receive compensation in the framework of the armed conflict before other victims⁷⁸. As opposed to the second type, in these events, the prioritization of one group diminishes the resources available to the majority or *unqualified* groups.

This description of the characteristics and the use that the Court has given to the suspicious criteria of discrimination shows the importance of these figures. They have become a diagnostic tool for identifying serious cases of discrimination and a framework from which to focus actions to guarantee material equality. It is a sample of conceptual categories that effectively impact reality. It is now time to show the importance of these categories in the Court’s judgment of equality to determine whether or not a measure is compatible with the prohibition of discrimination. Likewise, the effects of these categories on the burden of proof regarding the reasonableness of a measure that establishes differentiated treatment will be analyzed.

3.1. The impact on the judgment of proportionality: the different intensities (intermediate and strict) of the integrated judgment of equality

The Constitutional Court has used the proportionality test since 1996⁷⁹. Even that first use occurred in a case related to the right to equality. On that occasion, the Court

⁷³ CCC. Judgment T-115 of 2022, para. 92 and Judgment T-500 of 2002.

⁷⁴ CCC. Judgment T-412 of 2023.

⁷⁵ CCC. Judgments C-371 of 2000 and C-964 of 2003.

⁷⁶ CCC. Judgments C-371 of 2000 and C-293 of 2010.

⁷⁷ CCC. Judgment T-110 of 2010.

⁷⁸ CCC. Judgment T-377 of 2022.

⁷⁹ Calderón, Juan Jacobo. “Robert Alexy, la Corte Constitucional y los desafíos a la optimización: entre democracia y derechos”. *Teorías contemporáneas del Derecho*. (Bogotá: Legis, 2022), pp. 209-240.

declared unconstitutional a law that created a benefit for young people who had performed compulsory military service. This law provided that this group would receive an additional score (10%) in the national educational selectivity tests for university entrance. On that occasion, the court concluded that “the accused norm establishes an unreasonable differentiation in the opportunities for access to higher education, to the detriment of persons who did not perform military service and who, having academic merits to continue their studies in their higher education, may be displaced by the beneficiaries of the privilege granted by the defendant norm”⁸⁰.

Since that first Judgment, the Court has held that “the Constitution does not categorically prohibit unequal treatment, which implies that some measures that produce asymmetries may be considered constitutional”⁸¹ and others must be expelled from the legal system. Thus, a methodological tool is required to evaluate the constitutional legitimacy of differentiated treatment in order to adopt a judgment of constitutionality or unconstitutionality. In Colombia, this tool is the integrated test of equality or equality test.

Indeed, the integrated test of equality has been the formula used by the Constitutional Court to evaluate the legitimacy of differentiated and potentially discriminatory treatment⁸². It is called integrated because it combines the methodological elements of the reasonableness test usually applied by the European Court of Human Rights⁸³ with the gradation of different intensities that is typical of the Supreme Court of the United States⁸⁴.

The starting point of this integrated test is that the elements of the proportionality exam are applied (suitability, necessity and proportionality in the strict sense) but with three different levels of scrutiny (light, intermediate and strict). This differentiated intensity is due to the “level of freedom of configuration that the Legislator has, which will depend on the nature and subject matter of the rule subject to constitutionality control”⁸⁵.

The use of suspicious criteria of discrimination or the adoption of measures that may be unfavorable to historically discriminated or marginalized groups has a direct consequence on the methodology for judging the constitutional validity of those

⁸⁰ CCC. Judgment C-022 of 1996.

⁸¹ CCC. Judgment C-345 of 2019, para. 21.

⁸² CCC. Judgments C-093 of 2001, C-673 of 2001, C-624 of 2008, C-313 of 2013, C-601 of 2015, C-220 of 2017, C-389 of 2017 and C-535 of 2017.

⁸³ CCC. Judgment C-022 of 1996.

⁸⁴ CCC. Judgment C-445 of 1995.

⁸⁵ CCC. Judgment C-345 of 2019, para. 21.

provisions. Specifically, there would be a double impact on the specific test of proportionality that the Constitutional Court makes to assess whether or not differential treatment is legitimate.

3.1.1. The integrated judgment of mild equality: the irrelevance of suspect categories and the problems inherent in such deferential scrutiny

First of all, it is important to note that the presence of suspected categories of discrimination is not relevant when it comes to the judgment of mild intensity. This would be the gradation of the most deferential judgment with the legislator. The grounds for choosing this scrutiny are the presumption of constitutionality that plays in favor of the laws, the democratic principle and the identification of a series of matters on which the Constitution conferred a wide margin of discretion to Congress.

Among many other matters, this level of judgment would be applicable when dealing with rules on economic or tax aspects, international relations and international policy. Or in any other case in which there is “a specific competence defined by the Constitution in the head of a constitutional organ”⁸⁶. The Court has indicated that this low level of rigor is the general rule. When this low intensity is used, the court is limited to verifying that the objective pursued by the measure is not prohibited by the Constitution and that the means chosen is potentially suitable to obtain that purpose.

This first level of scrutiny is not relevant when there are suspicious criteria of discrimination. However, this does not mean that the mild test of equality is free of problems. For example, it is not clear that a weak intensity test should be applied in all processes in which there is a constitutional regulatory power in favor of Congress. If this were so, this general rule should be applicable in all cases and there would be no exceptions. Perhaps the only exception would occur when the rule under scrutiny had been approved by an authority other than the one empowered by the Constitution. This would be a case of unconstitutionality of the rule due to lack of competence of the authority that issued it rather than a question of equality or non-discrimination.

The existence of an express competence in the Constitution in favor of Congress is not a good parameter to define the level of intensity of the equality trial. Either it happens that this ground renders meaningless the other intensities of the test or the grounds for increasing the level of scrutiny render useless the jurisdictional ground for choosing the

⁸⁶ CCC. Judgment C-345 of 2019, para. 21.

weak intensity. Most often, the court is confronted with cases where the authority that issued the rule establishing discriminatory treatment was clearly competent. However, the court had to increase the intensity of the test due to other criteria in clear inapplication of the thesis of competence as a mechanism to weaken the test. It may also happen that the norm has been approved by the authority expressly empowered by the Constitution to do so, that it refers to economic, tax or international relations matters and, even so, the test should be more demanding due to the presence of criteria typical of the intermediate or strict test. Again, the assumptions for a weak judgment would have been left without effect.

The same problem occurs when the criteria for a test to be mild (express competence to issue the regulation) concur with elements of the highest or strongest intensity. In such cases, the constitutional judge is faced with the need to decide whether to give prevalence to the reasons that justify the weak test (democratic principle, express competence or presumption of constitutionality) or those that impose an intense or strict test. What should the court do when there is an overlap between light and strict intensities? Of course, an intelligent way out is to strike a balance and opt for an intermediate test. Of course, it is not very clear why the middle ground should prevail in such cases.

The option in favor of the intermediate test when there are grounds for a mild and a strict test has been applied by the Court. It has thus proceeded by indicating that: “the express assignment of powers is not the only criterion that determines the depth of this scrutiny in the processes of control of constitutionality”⁸⁷. Therefore, “the Court has applied the intermediate level test when dealing with those matters in which the legislator has a wide margin of configuration, but whose measures must respect express constitutional principles and limits”⁸⁸. Thus, “when the Court has found reasons to apply both a light intensity test (broad power of configuration) and a strict test (creation of a possible privilege), the Court has opted to harmonize these two postulates based on the intermediate intensity proportionality test”⁸⁹.

Moreover, the invocation of the principles of democracy, preservation of law and presumption of constitutionality of laws leaves the impression that, when the level of intensity of the judgment is increased, these principles disappear from the judgment of equality. What actually happens is that these principles remain present throughout the

⁸⁷ CCC. Judgment C-154 of 2023, para. 70.

⁸⁸ CCC. Judgment C-154 of 2023, para. 71.

⁸⁹ CCC. Judgment C-414 of 2022, para. 151.

scrutiny of constitutionality except when it comes to rules that adversely affect people who are in vulnerable groups, discriminated against or who correspond to categories suspected of discrimination.

3.1.2. The impact of the suspect categories on the intermediate and strict intensities of the judgment of equality: the favorability or detriment of the measure as a guiding criterion

The impact of suspicious criteria occurs in the intermediate and strict equality tests. On the one hand, the intermediate intensity equality test is applied when a suspect criterion is used to establish a positive or favorable differentiating measure (i.e. affirmative action)⁹⁰. In such cases, three aspects must be verified. First, that the purpose is constitutionally important. Secondly, that the chosen measure is effectively conducive to achieving that objective. And that this means is not obviously disproportionate.

On the contrary, the strict intensity judgment is used when the measure is not positive and uses one of the criteria or categories suspected of discrimination in a negative sense⁹¹. Also when the rule may have a negative impact on people who are in a situation of manifest weakness or it affects marginalized or discriminated groups. This rigorous intensity of the test of equality imposes that the end pursued is not only permitted or important, but that it is imperative. In other words, it must be one of those that the State cannot fail to pursue. In addition, the means chosen must be necessary and irreplaceable (conduciveness). This implies that it has a proven suitability so that there are no other means less harmful to those who may be affected by the differential treatment. Finally, it is examined “whether the benefits of adopting the measure exceed or not the restrictions imposed on other constitutional values or principles; that is, whether the measure is proportional in the strict sense”⁹².

⁹⁰ “This intensity of judgment applies “(1) when the measure may affect the enjoyment of a non-fundamental constitutional right, or (2) when there is an indication of arbitrariness that is reflected in the serious affectation of free competition”. It also applies in cases where there are rules based on suspicious criteria but with the purpose of favoring historically discriminated groups. These are cases in which affirmative actions are established, such as measures that use a gender or race criterion to promote the access of women to politics or ethnic minorities to higher education”. CCC. Judgment C-345 of 2019, para. 19.

⁹¹ “This type of scrutiny is applied to hypotheses in which the Constitution itself indicates specific equality mandates, which translates into less freedom of configuration of the Legislator and, consequently, into a more rigorous judgment of constitutionality. Thus, the Constitutional Court has applied strict or strong scrutiny when the measure (i) contains a suspicious classification such as those listed non-exhaustively in paragraph 1 of Article 13 of the Constitution; (ii) affects persons in conditions of manifest weakness or discriminated or marginalized groups; (iii) in principle, seriously impacts a fundamental right; or (iv) creates a privilege”. CCC. Judgment C-345 of 2019, para. 20.

⁹² CCC. Judgment C-345 of 2019, para. 20.

Intensity	Application scenarios	Elements of the survey	Relevance of the suspicious criteria
Slight	1. Economic and tax matters. 2. International politics. 3. There is a specific competence defined by the Constitution in the head of a constitutional body. 4. A repealed pre-constitutional rule that still produces effects is being examined. 5. In principle, there is no threat to the right in question.	1. The purpose and means used are not <i>prohibited</i> by the Constitution. 2. The means must be suitable or <i>adequate</i> to achieve the proposed end.	Not relevant
Intermediate	1. The measure may affect the enjoyment of a non-fundamental constitutional right. 2. There is an indication of arbitrariness that is reflected in the serious impairment of free competition. 3. Standards based on <i>suspect</i> criteria, but with the aim of <i>favoring</i> historically discriminated groups.	1. A constitutionally <i>important</i> end or objective. 2. The means to achieve it is <i>effectively</i> conducive. 3. The measure is not <i>obviously</i> disproportionate.	They are relevant when the measure favors them
Strict	1. The measure contains a <i>suspect</i> classification such as those listed non-exhaustively in the first clause of Article 13 of the Constitution. 2. Affects people in conditions of <i>manifest weakness</i> or discriminated or <i>marginalized</i> groups. 3. It seriously impacts a fundamental right. 4. Creates a privilege.	1. The purpose pursued by the standard is <i>imperative</i>. 2. The means chosen, in addition to being effectively conducive, is <i>necessary</i> (it cannot be substituted by others that are less harmful to the rights of those subject to the rule). 3. The benefits of adopting the measure exceed or not the restrictions imposed on other constitutional values or principles; that is, whether the measure is <i>proportional in the strict sense</i>.	They are relevant when the measure is detrimental to them

3.2. The impact on evidentiary burdens: the burden of proof is reversed when there is evidence of discrimination.

The second impact of these categories is on the burden of proof. This effect is not disconnected from the impact on the proportionality test. To a certain extent, a provision that establishes a negative treatment based on a suspicious criteria of discrimination implies a certain dynamic evidentiary burden that transfers strong argumentative duties to the authority that established the harmful differential treatment. The presumption of constitutionality tends to disappear or lose its useful effect when it comes to this type of measures. For this reason, the Court has also pointed out that the burden of proof is reversed when actions occur that affect persons belonging to marginalized groups or when there is an indication that such differential treatment hides a suspicious discrimination. The following cases adequately illustrate this impact.

In the first place, the guarantee of reinforced labor stability is a protection for workers who are in conditions of manifest weakness for reasons of health, pregnancy, maternity leave, among others. The Court has held that, to “protect the person in a situation of disability, it is presumed that the dismissal was due to the disability. However, this is a presumption that can be rebutted since the burden of proof is on the employer to show that the dismissal is due to just cause”⁹³. Thus, the protected worker is not required to prove how he/she was discriminated against, but the employer must prove that he/she acted based on objective and reasonable criteria.

Second, as previously indicated, the Court has established four criteria for identifying discrimination⁹⁴. In assessing these parameters, the Court has held that a dynamic burden of proof must be applied. The latter is defined as a “procedural instrument that shifts the obligation to prove the absence of discrimination to the person who intends to carry out a differentiated treatment and not to the person who alleges the violation of the right to equality, since the former is in a position of superiority, which privileges its ability to provide the necessary means of proof to assume its judicial defense”⁹⁵. In addition, the Court has considered that “in scenarios of discrimination, the burden of proof must

⁹³ CCC. Judgment SU-087 of 2022, para. 35.iii.

⁹⁴ Supra 3.

⁹⁵ CCC. Judgments T-335 of 2019, para. 39 and T-031 of 2021.

be reversed, specifically when the person who alleges discriminatory treatment suffered it based on a suspect category or is in a situation of subjection or defenselessness”⁹⁶.

The Court has applied this reversed burden of proof in cases of racial discrimination⁹⁷, when there occur dismissals of people with HIV⁹⁸ or calls for positions in which people with HIV participated⁹⁹. In Judgment T-031 of 2021, the Court reviewed a tutela action filed by a citizen who was suspended in a selection process on the same day he reported that he had an HIV diagnosis. The company argued that it had hired another candidate; a woman who better fit the required profile. However, the Court found that the company “did not prove that the woman it opted for was in the initial selection process, but rather that it was a subsequent hiring, a fact that does not blur the presumption of HIV discrimination that operates in favor of the plaintiff”¹⁰⁰.

Third, the jurisprudence of the Constitutional Court has ruled on multiple occasions on the gender approach that authorities must adopt in dealing with cases of violence against women. In evidentiary matters, the Court has held that judges must “analyze the facts, evidence and norms based on systematic interpretations of reality, so that in this hermeneutic exercise it is recognized that women have been a traditionally discriminated group and as such, differential treatment is justified” and “make the evidentiary burden more flexible in cases of violence or discrimination, favoring evidence over direct proof, when the latter is insufficient”¹⁰¹.

In fourth place, there are two very relevant cases that were decided in two judgments of the first decade of the 21st century¹⁰². In these, the Court reviewed two tutela actions in which it was disputed whether some bars had incurred in racial discrimination against two people who were not allowed to enter the premises due to the color of their skin. In both cases, the evidence was essentially testimonial. Thus, it was the plaintiffs’s word against that of the commercial establishment. The latter always maintained that it did not allow them to enter because the premises were full. In the first case, the trial judge dismissed the testimonies of the plaintiff and her friends as *suspicious*. The Court reproached this assessment and indicated that “according to the rules of sound criticism, it was the duty of the judge to evaluate each of them and not to refuse to do so

⁹⁶ CCC. Judgments T-457 of 2023, para. 147; T-572 of 2017, T-033 of 2018 and T-031 of 2021.

⁹⁷ CCC. Judgment T-572 of 2017.

⁹⁸ CCC. Judgment T-033 of 2018.

⁹⁹ CCC. Judgment T-031 of 2021.

¹⁰⁰ Ibid.

¹⁰¹ CCC. Judgments T-267 of 2023, para. 6.8 and T-878 of 2014.

¹⁰² CCC. Judgments T-1090 of 2005 and T-131 of 2006.

based on the friendship relationship they have with the plaintiff”¹⁰³. Considering these testimonies, in both processes the Court found that the discotheques were not able to demonstrate that the refusal was due to the occupation of the premises, but that it was evident that the prohibition of entry responded to discrimination.

In a similar sense, the Court has held that, in cases of discrimination, the judge's duties increase. In resolving a series of cases of discrimination based on physical appearance, it held that “the burden of proof is attenuated with respect to the person who alleges discrimination, so that the constitutional judge is obliged to deploy a copious evidentiary activity in order to determine whether it is a case of discrimination”¹⁰⁴.

The above account shows the impact of the prohibition of non-discrimination on the burden of proof. It deals with the concrete procedural effects that fall on various aspects of constitutional law and the effect of the irradiation of fundamental rights in the guarantee of enhanced job stability, in the fight against racial discrimination or in other areas in which an indication of discrimination can reverse the burden of proof¹⁰⁵.

4. Eliminating structural discrimination: the unfulfilled constitutional promise and the hope for multilevel progress

The above categories (i.e., suspicious criteria, vulnerable groups) convey the idea that discrimination is concrete, limited and punctual or, at most, collective. However, in Colombia there are several areas in which inequality is so acute that it is structural. For this reason, the Constitutional Court has used the notion of structural discrimination on different occasions. In the words of the Court, this implies “that the acts and scenarios of discrimination against specific groups is not random or circumstantial but corresponds to patterns that have been repeated over time, causing the consolidation of barriers that prevent or hinder the enjoyment of rights by that community”¹⁰⁶. Likewise, the Court has held that these patterns become naturalized and invisible, making it difficult to confront them¹⁰⁷. In addition, the court has indicated that this type of discrimination “continues to be immersed in the dominant cultures of the different peoples, communities and social groups that inhabit Colombia. Classist, sexist or racist patterns persist in legal, social and institutional structures, sometimes so intimately linked to everyday practices

¹⁰³ CCC. Judgment T-1090 of 2005, para. 7.2.

¹⁰⁴ CCC. Judgment T-564 of 2016, para. 64.

¹⁰⁵ CCC. Judgment T-357 of 2022, para. 88.

¹⁰⁶ CCC. Judgment T-376 of 2019, para. 7.3.

¹⁰⁷ CCC. Judgment T-141 of 2017.

that they simply become invisible. They are structural discriminations that are simply not seen”¹⁰⁸.

The most emblematic cases of structural discrimination that have been identified by the Court are four. On the one hand, the court established that there is structural discrimination affecting people with disabilities. The court alluded to the need to make this state of affairs visible and raise awareness in society¹⁰⁹. There is also a situation of discrimination due to the differentiated impact of the armed conflict on women¹¹⁰. Currently, the court has held that gender discrimination not only stems from the armed conflict but also from “different forms of violence, some evident and others silent, have affected their development in public and private life, at work and in the family”¹¹¹.

Third, the Court has held that there is structural discrimination against the Afro-Colombian population. Since the 1990s, the Court considered that “the discrimination applied to a group is expressed through the invisibility that the members of this group acquire for the dominant group and that explains that facts that are public and notorious can be denied”¹¹². Finally, the court has found that LGTBIQ+ persons have also suffered structural discrimination. Specifically, it has pointed out that given “the coincidence of criteria regarding the generalized situation of inequality and arbitrary differential treatment against the LGTBIQ+ population, there is no doubt about the structural nature of the discrimination suffered by its members, due to the contextual preponderance of sexist patterns and standards of normalization that tend to make the problem of lack of protection invisible”¹¹³.

To construct this notion of structural discrimination, the Court has used the criteria of international human rights law. In particular, the Court has dialogued with the Committee on Economic, Social and Cultural Rights to establish the difficulties of access to the health system for the disabled population¹¹⁴. It has also resorted to the standards of the *Belém do Pará* Convention and the Inter-American Court of Human Rights to recognize the need to apply a gender perspective in judicial proceedings¹¹⁵. Likewise, when

¹⁰⁸ CCC. Judgment T-691 of 2012, para. 3.1.2.

¹⁰⁹ CCC. Judgment T-397 of 2004, para. 5.3.3.5.

¹¹⁰ CCC. Auto 092 of 2008 and Judgment T-496 of 2008.

¹¹¹ CCC. Judgment T-357 of 2022, para. 23.

¹¹² CCC. Judgment T-422 of 1996, para. 6.

¹¹³ CCC. Judgment T-376 of 2019, para. 7.4 and Judgment T-141 of 2017.

¹¹⁴ CCC. Judgment T-412 of 2023.

¹¹⁵ CCC. Judgment SU-080 of 2020.

reviewing a case of discrimination against women soccer players¹¹⁶, it made an extensive review of the different inter-American instruments that have ruled on discrimination against women. The court referred to chapter four of the 2001 report of the Inter-American Commission on Human Rights (IACHR) and the judgments of the IACHR Court in the cases of *Campo Algodonero v. Mexico*, *Women Victims of Sexual Torture in Atenco v. Mexico* and *Favela Nova Brasília v. Brazil*.

Likewise, regarding the protection of LGTBIQ+ persons, the Court has referred to the Inter-American Convention Against All Forms of Discrimination and Intolerance and the reports of the IACHR and the jurisprudence of the IACHR Court on the matter. For example, in Judgment T-236 of 2023, it reviewed a case of discrimination against a trans worker who was called by her non-identity name¹¹⁷. The Court resorted to the standards established in the reports on *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas* and *Advances and Challenges Toward the Recognition of the Rights of LGBTI Persons in the Americas* of the IACHR and *Advisory Opinion OC-24/17* of the IACHR Court.

Finally, in cases of racial discrimination, the Inter-American Convention against Racism, Racial Discrimination and Related Intolerance¹¹⁸ has been invoked. Also, in reviewing a case of underrepresentation of Afro-Colombian communities in the national census¹¹⁹, the Court turned to the reports *Economic, Social, Cultural and Environmental Rights of People of African Descent: Inter-American Standards to Prevent, Combat and Eradicate Structural Racial Discrimination* and *Right to Self-Determination of Indigenous and Tribal Peoples* of the IACHR.

Individual remedies are clearly insufficient in the face of structural discrimination phenomena. In many cases, this form of specific remedy may create privileges within discriminated groups or internal tensions within vulnerable groups. For this reason, the judicial remedy in cases of structural discrimination must be at the same level of complexity for judicial intervention to be truly effective and have a transformative impact¹²⁰. Hence, the constitutional jurisprudence of Colombia has been a pioneer in

¹¹⁶ CCC. Judgment T-212 of 2021.

¹¹⁷ CCC. Judgment T-236 of 2023.

¹¹⁸ CCC. Judgment T-457 of 2023.

¹¹⁹ CCC. Judgment T-276 of 2022.

¹²⁰ Roa Roa, Jorge Ernesto. "O papel do juiz constitucional no constitucionalismo transformador latino-americano". In: Olsen, Ana; Fachin, Melina and Mello, Patricia. *Diálogos Constitucionais Transformadores*. Lumen Juris, Brasília, 2022, pp. 99-114.

the Latin American use of structural judgments and the declaration of unconstitutionality states of affairs (ECI).

5. Structural Judgments: transformative judicial interventions to reduce the under-application of the Constitution

In Colombia there is a predominant model of strong constitutionalism¹²¹. This is prone to the existence of judicial judgments, such as the so-called integrating judgments and structural judgments. The former seek to remedy the legislator's inaction (i.e. legislative omissions) by means of the normative integration of the legal system. The latter seek to overcome situations of violation of fundamental rights through complex orders that include actions (e.g., to legislate) or actions to give (e.g., to provide a subsidy or humanitarian aid) and combine short, medium and long term objectives¹²².

Structural judgments deepen the formula of strong constitutionalism because they imply the intervention of the constitutional judge in a situation of systematic violation of fundamental rights. This situation may have its origin in the legislator's inaction caused by an institutional blockage, the absence of political consensus, disinterest in legislating on the matter or reluctance to assume the political cost of making judgments that divide public opinion¹²³. The Constitutional Court has handed down structural sentences in cases such as prison overcrowding¹²⁴, the provision of water to communities on the Caribbean Coast¹²⁵, the affectation of ethnic communities by the construction of

¹²¹ Roa Roa, Jorge Ernesto. "El modelo de constitucionalismo débil y la legitimidad de la justicia constitucional En Colombia". In: Correa Henao, Magdalena and Robledo Silva, Paula. *Diseño institucional del Estado democrático en América Latina*. Universidad Externado de Colombia, Bogotá, 2018, pp. 113-136.

¹²² Roa Roa, Jorge Ernesto. *Control de Constitucionalidad Deliberativo*. Universidad Externado de Colombia. Bogotá, 2019, p. 467.

¹²³ The prototypical cases of structural Judgments in Colombian constitutionalism are: CCC. Judgments T-025 of 2004 (attention to the displaced population) and T-760 of 2008 (right to health). For an analysis of these Judgments, see: Rodríguez Garavito, César (coord.) *Más allá del desplazamiento. Políticas, rights and overcoming armed displacement in Colombia* (Bogotá: Universidad de los Andes, 2010), pp. 7-760 and Rodríguez Garavito, César. "La judicialización de la salud: síntomas, diagnóstico y prescripciones". In: Bernal, Óscar and Gutiérrez, Catalina. *La salud en Colombia: logros, retos y recomendaciones* (Bogotá: Universidad de los Andes, 2012), pp. 507-560.

¹²⁴ CCC. Judgments T-153 of 1998 and SU-122 of 2022.

¹²⁵ CCC. Judgment T-012 of 2019.

hydroelectric projects¹²⁶, health care¹²⁷ and the satisfaction of the rights of the displaced population¹²⁸.

Among other elements, the structural judgments contain concrete orders to overcome the systematic violation of fundamental rights, including guidelines for the elaboration of public policies¹²⁹. In a negative vision, these parameters limit the margin of action of the administration and Congress, while, in a positive vision, they guide them in the resolution of problems with high levels of complexity¹³⁰. An essential note of this type of judgments is that they have a transforming effect on bureaucratic or administrative structures that were inefficient for the effective guarantee of rights¹³¹. For this reason, many Judgments that are called structural, in reality, are only potential cases of structural intervention by the judiciary that have not achieved the expected transformative impacts.

For its part, the unconstitutional state of affairs (ECI) refers to the jurisprudence of the Constitutional Court according to which there are situations of massive and generalized violation of rights that generate a social problem whose victims could individually resort to the tutela action mechanism to obtain the protection of their rights. In these cases, the violation of constitutional rights is the result of the prolonged omission of the authorities with respect to the fulfillment of their obligations, the existence of practices contrary to the Constitution, the absence of legislative and administrative measures or the incorrect budgetary provision¹³².

The ECI requires a judicial pronouncement which, generally, is made by means of a structural sentence¹³³. Indeed, overcoming this situation adverse to the public values of the Constitution involves complex measures, coordination between the different

¹²⁶ CCC. Judgment T-462A of 2014.

¹²⁷ CCC. Judgment T-760 of 2008.

¹²⁸ CCC. Judgment T-025 of 2004.

¹²⁹ Bazán, Víctor (ed.) *Justicia Constitucional y Derechos Fundamentales. La protección de los derechos sociales. Las sentencias estructurales*. (Bogotá: Fundación Konrad Adenauer, 2015), p. 93.

¹³⁰ Rodríguez Garavito, César. "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America". (Texas Law Review, vol. 89, 2010), pp. 1669-1698.

¹³¹ Fiss, Owen. "The Forms of Justice". (Harvard Law Review, vol. 93, no. 1, 1979), pp. 17-44.

¹³² Roa Roa, Jorge Ernesto. *Control de Constitucionalidad Deliberativo*. op. cit, p. 473.

¹³³ Henao, Juan Carlos. "El juez constitucional: un actor de las políticas públicas". (*Revista de Economía Institucional*, vol. xv, nº 29, 2013, p. 86).

authorities and the provision of resources. The court itself decides when an ECI has been overcome¹³⁴.

The Colombian Constitutional Court has declared an ECI, *inter alia*, in the following cases: the affiliation of teachers to the National Teachers' Benefits Fund¹³⁵; the delay in the resolution of pension petitions before the Caja Nacional de Previsión Cajanal¹³⁶, the competition for notaries¹³⁷; conditions within the penitentiary and prison system¹³⁸; human rights defenders¹³⁹ and the security of the signatories of the Final Peace Accord¹⁴⁰.

In these cases, the judge takes the floor to directly remedy the normative discrimination (integrative judgment), to establish the general guidelines on the basic elements that a public policy must contain in order to overcome a situation of structural violation of constitutional rights (transformative judgment) and to issue specific orders aimed at protecting the rights of those affected by this type of situation (ECI). In addition, the court can retain the last word insofar as it has designed mechanisms to control compliance with its orders through compliance hearings, informal technical sessions and follow-up orders¹⁴¹.

The participatory content of the constitutionality process has been enhanced in the structural Judgment processes through the system of compliance hearings and technical sessions¹⁴². In these spaces, the court summons the Government, Congress, control bodies, non-governmental organizations, civil associations, victims and any authority in charge of resolving the structural situation of systematic violation of fundamental rights. The court has occasionally traveled to the regions of the country to listen *in situ* to all those interested in overcoming an ECI. On one occasion a judicial inspection was convened in the department of La Guajira in the framework of the ECI on Wayuu

¹³⁴ Calle Correa, María Victoria. "La Constitución en marcha. El cumplimiento de sentencias estructurales en la Corte Constitucional colombiana". In: AAVV. *Anuario de Derecho Constitucional Latinoamericano 2016*. (Bogotá: Konrad Adenauer Stiftung, 2016), pp. 449-459.

¹³⁵ CCC. Judgment SU-559 of 1997.

¹³⁶ CCC. Judgment T-068 of 1998.

¹³⁷ CCC. Judgments SU-250 of 1998 and T-1695 of 2000.

¹³⁸ CCC. Judgments T-153 of 1998, T-606 of 1998 and SU-122 of 2022.

¹³⁹ CCC. Judgments T-590 of 1998 and SU-546 of 2023.

¹⁴⁰ CCC. Judgment SU-020 of 2022.

¹⁴¹ Roa Roa, Jorge Ernesto. *Control de Constitucionalidad Deliberativo*. op. cit, p. 473.

¹⁴² Roa Roa, Jorge Ernesto. "A cidadania dentro da sala de máquinas do constitucionalismo transformador latino-americano". *Revista Direitos Fundamentais & Democracia*, vol. 28, no. 2, 2023, pp. 91-115.

children¹⁴³. There, for example, it was decided that the Court should have the support of translators to ensure adequate communication. Likewise, the monitoring chamber of the ECI on prison matters ordered the judicial inspection of five transitory detention centers¹⁴⁴.

This means that a structural Judgment is not the product of the exclusive reflection of a group of judges trained in law and inexperienced in economic issues or public policy. The court has been a meeting place between those responsible for overcoming a situation of structural violation of rights and those who suffer from it, the Court has captured the deliberation on relevant social problems and has generated deliberation outside the court¹⁴⁵. The main characteristic of this form of judicial intervention is that the court interacts with the administration, with the legislator, with the victims of the structural situation of violation of rights and with civil society in such a way that constitutional judges “instead of defining the details of public policy, involve multiple voices in the collective exploration of solutions to complex problems”¹⁴⁶.

Despite these instruments, the minimum level of aspiration of constitutional promises is far from the level guaranteed by judges and other authorities. Among many other reasons, this is due to the fact that the causes of structural discrimination go beyond the scope of the court's competences and possibilities. The effective fulfillment of constitutional promises is a primary responsibility of political institutions, the administration and the judiciary. It is a cooperative work that cannot be replaced by the proactive action of only one of the powers¹⁴⁷. There may be compensatory Judgments for the deficits of other powers, but the compensation is always limited. Thus, the full effectiveness of the Constitution cannot be achieved only by judicial Judgments.

In the Latin American and Colombian context, accusations of judicial activism by the Constitutional Court are often a way of expressing conservative concerns about certain

¹⁴³ CCC. Decision A-274 of 2023.

¹⁴⁴ Order of February 27, 2023.

¹⁴⁵ Roa Roa, Jorge Ernesto. “La jurisdicción constitucional nos representa. La adjudicación estratégica y cooperativa en el constitucionalismo transformador”. *Revista Iuris Dictio*, nº 30, May-December 2022, pp. 41-57.

¹⁴⁶ Rodríguez Garavito, César and Rodríguez Franco, Diana. *Juicio a la Exclusión. El impacto de los tribunales sobre los derechos sociales el Sur Global*. (Buenos Aires: Siglo Veintiuno Editores, 2015), p. 154.

¹⁴⁷ Roa Roa, Jorge Ernesto. “El diseño de la justicia constitucional y el carácter subsidiario del Sistema Interamericano de Protección de los Derechos Humanos”. In: Crispín Sánchez, Arturo (coord.) *Mecanismos procesales en el Sistema Interamericano de Derechos Humanos. Peticiones y trámite en sede supranacional*. Gaceta Jurídica, Lima, 2023, pp. 9-53.

judicial judgments¹⁴⁸. In many cases, judicial activism is an easy argument to express disagreement with a particular judicial judgment. What seems more certain is that Latin American judges always under-apply the Constitution. And this is not because the courts are negligent, but because even the greatest and most transformative judicial effort to bring constitutional promises closer to people's lives is insufficient to achieve the transformation to the level that has been promised in the generous bills of rights. So overcoming structural discrimination in the world's most unequal region requires less judicial self-restraint and more transformative constitutionalism that leads to effectively treating all people with equal consideration and respect.

¹⁴⁸ Roa Roa, Jorge Ernesto. "Activismo judicial, legitimidad democrática de la protección judicial de los derechos e incidente de impacto fiscal". *Anuario de Derecho Constitucional Latinoamericano*, year xxiii, Bogotá, 2017, pp. 455-482.

6. Bibliography

- Ackerman, Bruce. *We the people. Foundations.* (Cambridge: Harvard University Press, 1991).
- Bazán, Víctor (ed.). *Justicia Constitucional y Derechos Fundamentales. La protección de los derechos sociales. Las sentencias estructurales.* (Bogotá: Fundación Konrad Adenauer, 2015).
- Calle Correa, María Victoria. “La Constitución en marcha. El cumplimiento de sentencias estructurales en la Corte Constitucional colombiana”. En: AAVV. *Anuario de Derecho Constitucional Latinoamericano 2016.* (Bogotá: Konrad Adenauer Stiftung, 2016).
- Dworkin, Ronald. *Una cuestión de principios.* (Buenos Aires: Siglo Veintiuno Editores, 2012).
- *Taking Rights Seriously*, London, Duckworth, 1977.
- Calderón, Juan Jacobo. “Robert Alexy, la Corte Constitucional y los desafíos a la optimización: entre democracia y derechos”. *Teorías contemporáneas del Derecho.* (Bogotá: Legis, 2022).
- Ely, John Hart. *Democracy and Distrust. A Theory of Judicial Review.* (Cambridge: Harvard University Press, 1980).
- Ely, John Hart. “Toward a Representation-Reinforcing Mode of Judicial Review”. (*Maryland Law Review*, vol. 37, nº 3, 1978).
- Ferrajoli, Luigi. *Derechos y garantías. La ley del más débil.* Editorial Trotta, 7ª ed., Madrid, 2010.
- Fiss, Owen. “The Forms of Justice”. (*Harvard Law Review*, vol. 93, nº 1, 1979).
- *El derecho como razón pública.* Colección Filosofía y Derecho. (Madrid: Marcial Pons, 2007).
- Henao, Juan Carlos. “El juez constitucional : un actor de las políticas públicas”. (*Revista de Economía Institucional*, vol. xv, nº 29, 2013, pp. 67-102).
- Rawls, John. *La justicia como equidad: una reformulación.* (Barcelona: Paidós, 2001).
- Repplogle, Ron. “The Scope of Representation-Reinforcing Judicial Review”. (*Columbia Law Review*, vol. 92, nº 6, 1992).
- Roa Roa, Jorge Ernesto. *Control de Constitucionalidad Deliberativo.* Universidad Externado de Colombia. Bogotá, 2019.
- “El rol del juez constitucional en el constitucionalismo transformador latinoamericano”. En: Córdova Vinuesa, Paúl (coord.). *Jurisprudencia constitucional transformadora en Ecuador, Bolivia y Colombia.* Corporación de Estudios y Publicaciones, Quito, 2022, pp. 231-253.
- “O papel do juiz constitucional no constitucionalismo transformador latino-americano”. En: Olsen, Ana; Fachin, Melina y Mello, Patricia. *Diálogos Constitucionais Transformadores.* Lumen Juris, Brasília, 2022, pp. 99-114.

- A cidadania dentro da sala de máquinas do constitucionalismo transformador latino-americano”. *Revista Direitos Fundamentais & Democracia*, vol. 28, núm. 2, 2023, pp. 91–115.
 - “El diseño de la justicia constitucional y el carácter subsidiario del Sistema Interamericano de Protección de los Derechos Humanos”. En: Crispín Sánchez, Arturo (coord.). *Mecanismos procesales em el Sistema Interamericano de Derechos Humanos. Peticiones y trámite en sede supranacional*. Gaceta Jurídica, Lima, 2023, pp. 9-53.
 - “La jurisdicción constitucional nos representa. La adjudicación estratégica y cooperativa en el constitucionalismo transformador”. *Revista Iuris Dictio*, nº 30, mayo-diciembre de 2022, pp. 41-57.
 - “Activismo judicial, legitimidad democrática de la protección judicial de los derechos e incidente de impacto fiscal”. *Anuario de Derecho Constitucional Latinoamericano*, año xxiii, Bogotá, 2017, pp. 455-482.
 - “El modelo de constitucionalismo débil y la legitimidad de la justicia constitucional En Colombia”. En: Correa Henao, Magdalena y Robledo Silva, Paula. *Diseño institucional del Estado democrático en América Latina*. Universidad Externado de Colombia, Bogotá, 2018.
- Rodríguez Garavito, César (coord.). Más allá del desplazamiento. Políticas, derechos y superación del desplazamiento armado en Colombia. (Bogotá: Universidad de los Andes, 2010).
- Rodríguez Garavito, César y Rodríguez Franco, Diana. Juicio a la Exclusión. *El impacto de los tribunales sobre los derechos sociales el Sur Global*. (Buenos Aires: Siglo Veintiuno Editores, 2015).
- Rodríguez Garavito, César. “Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America”. (Texas Law Review, vol. 89, 2010).
- Rodríguez Garavito, César. “La judicialización de la salud: síntomas, diagnóstico y prescripciones”. En: Bernal, Óscar y Gutiérrez, Catalina. La salud en Colombia: logros, retos y recomendaciones. (Bogotá: Universidad de los Andes, 2012).
- Uprimny, Rodrigo. Las transformaciones constitucionales recientes en América Latina: tendencias y desafíos en Rodríguez, César. El derecho en América Latina. (Madrid: Marcial Pons, 2011).

Cover: Imbalanced World, 1996, Veronika Dell'Olio (photo: Miriam Aziz)

“Essential to our concept was the establishment of a connection to the work and objectives of the institute. In view of the diversity of the research tasks concerned, we have attempted to highlight an overarching idea that can be understood as the institute’s mission. We see this as the ideal of peaceful relations between peoples on the basis of an internationally validated notion of justice.... The depicted sculpture...[symbolizes] an imbalanced world in which some peoples are oppressed while others lay claim to dominance and power. The honeycomb form of the circular disks denotes the [international] state structure. Glass parts ... [represent] the individual states [The division] of the figure ... into two parts [can] be interpreted as the separation of the earth into two unequal worlds. The scissors-shaped base, on the one hand, makes the gap between them clear, on the other hand, a converging movement of the disks is conceivable.... The sculpture [aims] at what is imagined – the possibility of the rapprochement of the two worlds.”
[transl. by S. Less]

Art in architecture, MPIL, Heidelberg



MAX PLANCK INSTITUTE

FOR COMPARATIVE PUBLIC LAW
AND INTERNATIONAL LAW

Im Neuenheimer Feld 535
D-69120 Heidelberg
Tel.: +49 (0)6221 482 - 1
Fax: +49 (0)6221 482 - 288

www.mpil.de
SSRN@mpil.de