

CONSTITUTIONAL
REASONING IN
LATIN AMERICA
AND THE CARIBBEAN

Edited by Johanna Fröhlich

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The Jurisprudence of the Constitutional Court of Colombia

MAGDALENA CORREA INÉS HENAO AND JORGE ERNESTO ROA ROA

I. Legal, Political, Institutional and Academic Context

A. Legal and Political Culture as Context for the Constitutional Reasoning

Since the beginning of its independent history, the Colombian State has followed a legalistic tradition. All political, social and economic processes and conflicts are resolved through the law. In the nineteenth century, eight constitutions were approved. This tradition has determined the predominantly formal value of the law as the supreme legal norm. In this context, the Constitution has specifically been understood to be a norm of a political nature.

The judicial function has been decisive in the history of Colombian institutions. Despite its formalism and adherence to the letter of the law rather than to the objective of pursued justice, the judiciary has been the branch of public power that has most closely complied with the principles of the rule of law. However, this does not signify that there is an overall positive assessment of the functioning of the administration of justice¹ or that this constitutional function is exercised without any interference or problems with corruption.² In comparative terms within Latin America, Colombian judges and courts are recognised as being relatively independent.³

The great revolution in Colombian legal thought commenced in 1991. Since then, different methods of reasoning have survived and competed, but distinct forms of judicial reasoning have also been harmonised. On the one hand, with the traditional rule of

¹ R Uprimny, C Rodríguez Garavito and M García Villegas, 'Las cifras de la justicia' in M García Villegas, C Rodríguez Garavito and R Uprimny, *¿Justicia para todos? Sistema judicial, derechos sociales y democracia en Colombia* (Grupo Editorial Norma, 2006).

² D Rico Chavarro, 'La rama Judicial del poder público en Colombia: "Independencia versus intervencionismo"' (2011) 3 *Criterio jurídico garantista* 12–31.

³ M García Villegas and MA Ceballos Bedoya (eds), 'Estudio preliminar. Derecho, justicia y sociedad en Colombia' in *Democracia, justicia y sociedad: Diez años de investigación en Dejusticia* (Dejusticia, 2016) 26–27.

law and its particularities, it was understood that the judge's function was to subsume the resolution of the specific case under what is established in the law. On the other hand, the more complex decisions based on constitutional interpretation⁴ are premised on the normative structure of constitutional rules that are built from notions of broad, varied and debatable contents.

For their part, the ordinary and contentious-administrative courts have sustained over the years a relative tension with the jurisprudence of the Constitutional Court of Colombia (CCC). Although this tension is generally not continuous, it is certainly clear that these courts do not always follow the CCC's pronouncements. This situation has been dubbed a 'train wreck', which occurs with the application of the action of legal protection (*tutela*) against judicial decisions. Indeed, the CCC has often revised decisions of the Supreme Court of Justice and the Council of State, which has resulted in the revocation of those judgments in which the claimants had been denied the protection of their rights.

B. The Court and Constitutional Litigation

According to Article 241 of the Constitution, the Court is responsible for 'the safeguarding of the integrity and supremacy of the Constitution'. This responsibility is executed through three types of activity: (i) deciding on petitions of unconstitutionality or exercising the automatic review of the constitutionality of laws and decrees with the force of law, including reformative acts of the Constitution, referenda or a Constituent Assembly to amend the Constitution; referenda on laws and popular consultations and plebiscites with a national scope; bills opposed by the Government; proposed statutory bills; and international treaties and their approving laws; (ii) revising, in accordance with the law, judicial decisions related to the *tutela* action of constitutional rights; and (iii) resolving jurisdictional conflicts. This chapter only addresses the first two types.⁵

i. Function of Constitutional Review

The CCC's exercise of constitutional review has two variations. The first is the product of the exercise of the unconstitutionality action, and the second is automatic or exercised at the request of the national Government. Both variations are decided in the CCC's Plenary Chamber, although their processing is carried out by the office of one of the judges who sits on the panel.

Public action can be exercised by any natural person who has Colombian citizenship.⁶ However, this does not preclude foreigners and legal entities, under both

⁴R Gargarella, 'La dificultosa tarea de la interpretación constitucional' in *Teoría y Crítica del Derecho Constitucional* (Abeledo Perrot, 2008) 123–47.

⁵Constitutional review judgments are identified with the letter 'C', and *tutela* judgments are usually identified with the letter 'T'. When their nomenclature begins with the acronym 'SU' (unification judgments), they correspond to *tutela* reviews that the Plenary Chamber has adopted. See R Uprimny, 'Should Courts enforce social rights? The Experience of the Colombian Constitutional Court' (11 October 2006) *Dejusticia* 4–5, at www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_67.pdf.

⁶JE Roa Roa, *La acción pública de constitucionalidad a debate* (Universidad Externado de Colombia, 2015).

private and public law, from going before the CCC to file lawsuits against legal norms they consider to be contrary to the Constitution. These claims must be channelled through a natural person with citizenship because this is the only party who has standing (*legitimación*) to initiate the case.⁷

The Court also reviews a certain number of bills or laws, acts and legislative decrees whose constitutionality must be assessed, without the need for a lawsuit. The case arrives at the Court either because the Constitution directly mandates an automatic review petition or at the Government's request (Government objections prior to the approval of laws). These reviews must be initiated prior to the approval of the normative text (statutory laws call for mechanisms of citizen participation) or after it (legislative decrees or acts reforming the Constitution).

In the procedures of the two variations of constitutional review, there are no actual procedural parties because the process is objective, or it challenges legal norms. The participation of the *Procurador General de la Nación*, or whoever acts on his or her behalf, is mandatory. In addition, during the relevant procedural phases, both the President and the Congress of the Republic may submit written briefs expressing their views on the matter. Likewise, the magistrate who hears the case may invite public entities, private organisations and experts on related topics, or anyone who participated in the norm's drafting, to submit briefs that communicate their views on the case.⁸

It has been understood that not only any citizen but also any person or organisation, *motu proprio* and within the procedure, may also submit a brief regarding the review under discussion. In this way, it is becoming increasingly common to identify in the proceedings different types of contributions that the Court recognises as interventions, *amicus curiae* or opinions (*conceptos*).⁹

In addition, in abstract review proceedings – and also in the *tutela* reviews resolved in the Plenary Chamber – any magistrate may request that public hearings be held, which the Court will decree, 'considering the background of the act subject to constitutional judgment and the importance and complexity of the issues' to be resolved.¹⁰

Although the action of unconstitutionality is public, the lawsuit must meet minimum requirements.¹¹ Indeed, it is necessary to identify the challenged rules and the constitutional norms that have allegedly been infringed. Additionally, it is essential to precisely draft a complaint of infringement (*concepto de violación*) that contains a clear (understandable), certain (or that relies on an existing and unambiguous legal proposition), specific (where the description of how the challenged norm violates the Constitution is presented in an objective and verifiable form), pertinent (or that the accusations are of a constitutional nature) and sufficient (in argumentative and probative elements of judgment that produce the least doubt about the alleged unconstitutionality).¹²

⁷ Judgment C-163/2021.

⁸ Roa Roa (n 6).

⁹ Judgment C-294/2019.

¹⁰ JE Roa Roa, *Control de constitucionalidad deliberativo. El ciudadano ante la justicia constitucional, la acción pública de inconstitucionalidad y la legitimidad democrática del control judicial del legislador* (Universidad Externado de Colombia, 2019) 213–393.

¹¹ Judgment C-1052/01.

¹² Roa Roa (n 10) 213–393.

According to CCC statistics, between 1992 and September 2021, the Court received 14,407 actions of unconstitutionality,¹³ which resulted in a total of 4,426 decisions¹⁴ on those actions. This signifies that the CCC only admits or is aware of approximately 30 per cent of all unconstitutionality claims. And based on the approximate number of those that the Court accepts, only 33 per cent of the decisions reach the merits of the case – that is, they resolve the constitutional issues that citizens have raised.

When the CCC carries out a comprehensive review, the Court must address the norm at issue within the totality of the Constitution's precepts. Decisions on the merits have the effect of constitutional *res judicata*, and they are binding and have *erga omnes* effect on the rule's operative part. The section of the rule that describes its purpose is only an auxiliary criterion for judicial use and for the application of legal rules in general.

The issued judgments have been of various types, and they respond to what has been called the 'modulation of the decision's effects' (*modulación de los efectos de la sentencia*).¹⁵ With regard to their content, the judgments contain declarations of clear, simple or conditioned constitutionality or unconstitutionality, whether these are interpretive, integrated or substituted. And regarding temporal effects, the decisions of unconstitutionality are retroactive, deferred or immediately effective.¹⁶

On this last aspect, the general rule is that the declaration of a norm's unconstitutionality or unenforceability means that it is excluded from the legal order, and it therefore cannot be applied once the CCC's ruling has been published. The decision is not properly an annulment because such a measure usually takes effect in the future unless the Court determines otherwise.¹⁷

Finally, the function of constitutional review is not exclusive to the Constitutional Court. The Constitution establishes what the jurisprudence itself calls a 'diffuse functional' (*difuso funcional*) model.¹⁸ On the one hand, the Constitutional Court and the Council of State are the organs responsible for the abstract review of constitutionality, the latter having residual jurisdiction; 'on the other hand, all judges and corporations (...) must decide on *tutela* actions or resolve actions and remedies provided for to guarantee constitutional rights or when making use of the exception of unconstitutionality in the specific cases submitted for their consideration.'¹⁹

ii. Function of the Review of the Tutela

As Rodrigo Uprimny has described, the *tutela* action, 'enacted by the 1991 Constitution (art. 86) and regulated by Decree 2591/91, (...) is the judicial action by which any person can request a speedy decision (within 10 days) by a judge to protect his or her fundamental rights.'²⁰ It is an informal action, which does not require legal technicalities

¹³ Statistics of the Constitutional Court, Constitutional Court of Colombia, at www.corteconstitucional.gov.co/lacorte/estadisticas.php.

¹⁴ *ibid.*

¹⁵ Roa Roa (n 6).

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ C-1154 of 2008.

¹⁹ C-1154 of 2008 and C-415/2012. Italics added.

²⁰ See Uprimny (n 5) 5.

or a lawyer, and which all individuals can request without distinction of nationality, sex, age or ethnicity.

Unlike in the constitutional review procedure, in the *tutela*, there are procedural parties that can be either natural or legal persons. On the one hand, the standing of petitioner(s) as plaintiff(s) of a *tutela* in an active case is established by being nothing more than the subject(s) of a fundamental right that is considered violated or threatened, although the Ombudsman (*Defensor del Pueblo*) is also empowered to exercise a *tutela* 'on behalf of any person who requests it or who is in a situation of helplessness and defencelessness'.²¹ On the other hand, the *tutela* is directed against the authorities or individuals (under certain circumstances) who cause or are responsible for the indicated violation or threat.

Under specific rules of apportionment and competence, all domestic judges, other than those of the CCC, are responsible for handling *tutelas*. The process has two stages although the appeal is not mandatory. The CCC's role becomes decisive because 'all cases end up in the docket of the CCC, which can discretionally review, by a sort of *certiorari*',²² although all the decided and binding *tutelas* reach the CCC and enter the Court's selection process.²³ The latter can be requested by the parties who acted as plaintiffs or defendants during the initial proceedings. When a *tutela* is not included in the selection, the parties may insist,²⁴ which is also an option 'of the Ombudsman, the *Procurador General de la Nación*, the National Agency for Legal Defence of the State or a Magistrate of the Constitutional Court'.²⁵

Once the *tutela* decision to be reviewed has been selected, in the procedure, like in abstract reviews, the judge who examines it can admit evidence. In that context, the judge can request opinions or interventions from persons or entities with expertise, which allows the reviewing chamber to have better materials to examine when deciding the case.

The review's purpose may be to revoke or modify the lower court's decision, unify constitutional jurisprudence or clarify the general scope of constitutional norms.²⁶ According to the CCC's statistics, it is estimated that of the total number of *tutela* decisions that reach the Court,²⁷ it selects only about 0.23 per cent.²⁸

The decision is usually made by a review chamber comprised of three judges.²⁹ The CCC itself has recognised two different types of orders or remedies that it confirms or establishes in the *tutela* review process to address situations involving the infringement of fundamental rights. Namely, these are 'simple orders and complex orders, depending on

²¹ Art 46, Decree 2591/1991.

²² See Uprimny (n 5) 5.

²³ This process is carried out by a selection chamber composed of two magistrates who decide on a monthly basis the *tutelas* that will be reviewed.

²⁴ This takes the form of a letter of 'insistence' (*'insistencia'*) in which the parties reiterate the selection request.

²⁵ Art 55, Agreement 02/2015. Constitutional Court. Italics added.

²⁶ Art 35, inc. 1° of Decree 2591/1991.

²⁷ 8,295,032 filings.

²⁸ This percentage is obtained by comparing the universe of *tutela* rulings that were filed with the number of review decisions that the Court issued between 1992 and June 2021 (19,446 T and 447 SU).

²⁹ However, in some cases identified by the letters SU, it is the Plenary Chamber that decides, adopting unification rulings.

the characteristics of the case and the degree of complexity that the resolution requires, which is determined from such variables as (i) the number of actions or abstentions that are incorporated in the order; (ii) the number of subjects and/or authorities to whom the order is addressed; and (iii) the period required for its execution.³⁰

iii. Institutional Impact, Effectiveness and Transformative Power of the CCC's Decisions

The CCC's decisions have different levels of effectiveness, depending on their content. Apart from those that confirm the constitutionality of norms, which do not propose any alteration of the legal order, those with provisions that are declared unconstitutional (and especially when their constitutionality is conditioned) can be relatively complex to execute, which is dependent on the clarity of the order and not necessarily on the order itself.³¹

However, where the effectiveness of the Court's judgments is most often discussed is in the *tutela* reviews. In general, these judgments are not fulfilled. This is due to the criticism they evoke when imposing the obligated authorities' unforeseen fees or budgetary allocations, or because they imply an inequitable distribution of scarce resources that benefits less-disadvantaged groups compared to others that do not access the *tutela*. Further, if the judgments are truly transformative, when confronted with preponderant political or economic interests, the sentences are not executed.³²

The prestige and power that the CCC has garnered since its formation has prompted various reactions from the Government, the legislative branch and other authorities and private institutions – specifically, openly reticent when the judgments have altered decisions of economic public policy, and in a biased way when they affect measures of political interest. So far, however, the foregoing has not necessarily meant that the CCC has altered its way of exercising review of the acts of the Government and the legislator.

C. The Judges

The CCC is composed of nine magistrates elected by the Senate of the Republic from shortlists prepared by the President of the Republic, the Supreme Court of Justice and the Council of State. Their eight-year terms are personal in nature, and the judges cannot be re-elected.³³ They can be tried in a special procedure at the request of the Congress of the Republic,³⁴ and they can only be removed from their positions for 'crimes committed in the exercise of their duties, for indignity, for misconduct or for common crimes'.³⁵

³⁰ SU-092/2021.

³¹ C-123/2014.

³² SU-039/1997.

³³ Art 238, Constitution of Colombia.

³⁴ Arts 174 and 175, Constitution of Colombia.

³⁵ Art 329 et seq, Law 5a/1992.

Since its creation in 1991, and its formation the following year, the CCC's institutional stability has been preserved despite several attempts to weaken its power directly or indirectly by reforming some of its constitutional competences.³⁶

During the CCC's 30 years of existence, its magistrates have mostly been career judges, trial lawyers and academics. Although regional representation has not been especially limited, ethnic and cultural minorities have not been represented on the bench. As of 2020, only six women have been elected judges of the Court; currently, five of the nine members are female.

The most relevant changes in constitutional jurisprudence can be found less in the variations in the Court's composition and more in the occurrence of social and cultural phenomena, as well as in political changes and offshoots of ordinary constitutional reforms³⁷ or the peace process.³⁸

II. Types of Arguments in Constitutional Reasoning

A. The Structure of Constitutional Arguments

The sample judgments included in this study accurately reflect the argumentative structure of Colombian constitutional jurisprudence. This structure tends to be complex because it is built with either independent-inconclusive arguments together with conclusive arguments, or with parallel-conclusive arguments (35 cases). This prevalence might be explained by the fact that the constitutional judge has a wide range of principled constitutional norms from which to choose.

B. Types of Arguments in Constitutional Reasoning

The CCC's tenor and the characteristics of the selected judgments envision that judicial reasoning is constructed from an unequivocal acceptance of the Constitution's normative value, although the types of arguments the Court uses are quite varied.

i. Constitutional Nature of Norms

Five judgments include discussions about the constitutional nature of norms relevant to the cases. The nature of these cases' constitutional issues, and the scopes of what

³⁶ JE Roa Roa, 'Activismo judicial, legitimidad democrática de la protección judicial de los derechos e incidente de impacto fiscal' (2017) *Año XXIII Anuario de Derecho Constitucional Latinoamericano* 455–82.

³⁷ (Constant) use of states of emergency (C-070/2009, C-252/2010), government initiatives on gross legal reforms (C-038/2004, C-030 of 2008, C-175 of 2009), and acts of constitutional reform, such as the call for a constitutional referendum (C-551/2003), and the legislative acts that introduced the possibility of presidential re-election (C-1040/2005, C-141/2010).

³⁸ Copious jurisprudence was produced related to the CCC's central function, fulfilled during the implementation process of the Peace Agreement through the transitional constitutional norms, whereas the CCC would carry out automatic abstract control, either before or after, of the totality of the norms dictated by the Constituent Assembly, the legislator and the Government: C-699/2016, C-332/2017 and C-274/2017.

they aim to resolve, explain the reasons to include this kind of argument. One case is associated with the constitutional value conferred on the popular referendum.³⁹ Two decisions seek to determine the contours of the constitutional protection of progressive rights: one involves people in a vegetative state's right to health,⁴⁰ and the other is an abstract review case that addresses the rights of peasants (*campesinos*).⁴¹ And two of the five cases are related to the scope of the constitutional competence to review public international treaties along with the substantial number of constitutional rules invoked: one decision declares unconstitutional those supervening norms of the Concordat that had entered into force prior to the 1991 Constitution,⁴² and another recognises the constitutionality of the measures provided for in the Rome Statute but without compromising or binding national judges.⁴³

ii. Debating the Applicability of Constitutional Law

The analysis of 'the constitutional enforceability and justiciability' of the Constitution, or whether it can be applied directly to resolve a case, is identified in 16 decisions of which half are among the selected rulings that were issued during the CCC's first 10 years. This is understandable given the importance of establishing the binding power of constitutional mandates from the CCC's jurisprudence. Twelve cases are *tutela* reviews due to the nature and legal basis of constitutional rights, which consist of a fundamental, constitutional and binding international human rights law (IHL) and a somewhat broad or narrow legislative configuration, found by examining civil⁴⁴ and political⁴⁵ liberties, the right to equal treatment in equal situations⁴⁶ and non-discrimination⁴⁷ as well as social rights⁴⁸ and even economic freedoms and rights.⁴⁹ Four constitutional cases refer to matters in which it is vital to define the obligatory content of constitutional norms, either to review public international treaties,⁵⁰ the power of constitutional reform and the Constitution's irreplaceable content⁵¹ or the harmonisation with the American Convention on Human Rights (ACHR).⁵²

No decision expressly includes the question of the control of conventionality⁵³ in the argumentation. However, in an opinion in which freedom of expression is safeguarded under very broad contours of protection, inter-American jurisprudence is a fundamental part of the argumentation.⁵⁴ In a judgment that addresses a legal norm, which invokes another constitutional rule that provides fewer guarantees than Article 23 of the

³⁹ C-699/2016.

⁴⁰ T-057/15.

⁴¹ C-644/2012.

⁴² C-027/1993.

⁴³ C-578/2002.

⁴⁴ SU-337/99, T-391/2007 and SU166/1999.

⁴⁵ SU-047/99.

⁴⁶ T-494/1992 and T-590/2017.

⁴⁷ T-1090/2005.

⁴⁸ T-406/1994, T-881/2002 and T-418/2010.

⁴⁹ T-629/2010 and T-543/2017.

⁵⁰ C-073/1993 and C-578/2002.

⁵¹ C-332/2017.

⁵² C-111/2019.

⁵³ This is a doctrine that creates an international obligation for State parties to the Pact of San José to interpret any national norm in accordance with the ACHR and, in general, with the Inter-American *corpus iuris*.

⁵⁴ T-391/2007.

ACHR (specifically, for the removal of popularly elected authorities), the Court resolved whether there is a disparity between these norms and explained the value it attaches to the inter-American jurisprudence on the matter.⁵⁵

iii. Analogies

There are only four decisions in the sample that allude to analogy. This result is partly explained by the sample itself and partly by the CCC's proclivity to employ methods of constitutional interpretation. Analogy only had a useful impact in one decision, where it served to explain the reasons why it could not be applied to the definition of the Court's procedural powers when it exercises the constitutional review of constitutional reforms.⁵⁶

iv. Ordinary Meaning of the Words of the Constitution

In nine judgments, there were references to the ordinary meanings of the Constitution's words/phrases/articles: of these, seven involved abstract review and two were *tutela* reviews. In the first group, the majority adopted it as one of its basic arguments, rejecting it as the exclusive method of interpretation to establish the meaning of concepts used in the constitutional review rules (issued by the legislator⁵⁷ and by the national government during states of emergency⁵⁸) or review parameters (involving constitutional reforms⁵⁹ or laws calling for an approval of a constitutional referendum⁶⁰).

The Constitution's words were presented as the argument *par excellence* in the dissenting opinions to the *tutela* decision adopted by the Plenary Chamber regarding same-sex marriage. Notwithstanding the Constitution's provisions on the composition of the family by marriage, the majority recognised that the fundamental right to enter into a marriage contract also applies to same-sex couples.⁶¹

v. Domestic Harmonising Arguments

The type of interpretation that has prevailed most often in Colombian constitutional jurisprudence is that of the systemic or integrative understanding of the Constitution: 38 decisions expressly recognise this as a type of argumentation. This is explained by the reception of the principle of constitutional unity that serves both to interpret specific constitutional norms as part of a complex and coherent system and to expand the scope of the rights and institutional guarantees provided therein.

vi. International Harmonising Arguments

A rather remarkable element of the CCC's judicial reasoning is the Court's common use of international law requirements to interpret the Constitution and to decide the

⁵⁵ C-111/2019.

⁵⁶ C-699/2016.

⁵⁷ C-590/05 and C-591/05.

⁵⁸ C-070/2009 and C-252/2010.

⁵⁹ C-332/2016.

⁶⁰ C-141/2010 and C-699/2016.

⁶¹ SU-214/2016.

cases. A good number of the decisions (28 judgments) incorporate them, in most cases combining references to norms of the Inter-American Human Rights System (IAHRS) and other norms of hard and soft international law.

Regarding the use of binding, conventional and universal IHRL, although the Constitution establishes a difference between the ‘constitutionality block’ *stricto sensu* or *lato sensu*,⁶² it also establishes that both substantially comprise international instruments of hard law. However, the CCC has not been particularly rigorous in interpreting and applying one⁶³ or the other.⁶⁴

vii. *Precedents*

The sample aptly reflects the most important change that has occurred in Colombian law since the issuance of the Charter in 1991 – that is, the value that the CCC has placed, from the beginning, on constitutional precedent within the system of sources of law as a fundamental argument in which the Constitution is interpreted and in which the case’s issues are addressed. Apart from the first selected judgment from 1992, the others all contain references to a precedent-based argument.

The strength of precedent is largely a conception of the Court itself, since in the Constitution, jurisprudence is an auxiliary criterion of judicial proceedings (Art 230, Const.). Precedent-binding force has been recognised based on the principles of legal equality and certainty (Arts 13 and 29, Const.) in relation to the right of access to justice (Art 229, Const.). However, horizontal and vertical precedents for ordinary and contentious-administrative justice are not insurmountable. Judges, in the exercise of their functional independence, may stray from those as long as the reasons for doing so are justified.⁶⁵ On the contrary, the constitutional precedent is mandatory since it is based on the effects of constitutional *res judicata* provided for in the Constitution for the substantive decisions that the CCC adopts (Art 243, Const.).⁶⁶ Changes or alterations can only be made by the Court and by satisfying argumentative requirements that the current jurisprudence would be erroneous or inadequate due to (i) a ‘*subsequent social change*’;⁶⁷ (ii) ‘being contrary to the values, objectives, principles and rights on which the legal system is based’;⁶⁸ and (iii) ‘a change in the positive legal system’.⁶⁹

viii. *Doctrinal Analysis of Legal Concepts or Principles*

Similarly, the CCC quite frequently includes principles in its reasoning that are not expressly specified in the constitutional text – that is, in 25 cases out of 40 in the sample.

⁶² ME Góngora-Mera, ‘The Block of Constitutionality as the Doctrinal Pivot of a *Ius Commune*’ in A von Bogdandy, E Ferrer Mac-Gregor, M Morales Antoniazzi, F Piovesan and X Soley (eds), *Transformative constitutionalism in Latin America. The emergence of a New Ius commune* (Oxford University Press, 2017) 248.

⁶³ C-070/2009.

⁶⁴ T-417/2010, C-182/16 and T-590/2017; C-644/12, C-674/2017 and C-T-236/17.

⁶⁵ C-621/2015.

⁶⁶ C Bernal Pulido, ‘El Precedente en Colombia’ (2008) 21 *Revista Derecho del Estado* 81–94.

⁶⁷ C-836 of 2001.

⁶⁸ C-228 of 2002.

⁶⁹ C-111/2019.

They serve mainly to recognise unnamed fundamental rights⁷⁰ and to interpret rights and principles of a political nature,⁷¹ procedural guarantees,⁷² and Government, administrative⁷³ and judicial⁷⁴ competences and functions.

ix. Arguments from Silence

The Court relied on *argumentum ex silentio* in five judgments as part of the reasoning for its decisions, drawing on an omission or lack of express reference to a right or principle in the Constitution or a law,⁷⁵ and explaining that constitutional or legal silence does not necessarily prohibit or exclude certain interpretations.⁷⁶

x. Teleological/Purposive Arguments

Teleological arguments are instead a constant: 20 judgments refer to the purpose of the text and 16 to the intention of the Constitution-maker.⁷⁷ Recourse to these arguments can be understood as a sign of the CCC's interest in legitimising its interpretations of the Constitution rather than presenting its own views on the function that each of the constitutional provisions has in the constitutional order, which is already clear from the Charter's text or from the Constituent Assembly's preparatory work.

xi. Non-Legal Arguments

Also noteworthy is the high number of decisions (26 out of 40) in which non-legal arguments are utilised, operating either to measure the problem that the case poses or to resolve it. Arguments of a sociological (16 cases), economic (13 cases), scientific (8 cases) and moral or religious nature (7 cases) are used alone or combined.⁷⁸ This practice reflects a constant in the CCC's reasoning, which assumes that constitutional law is a legal discipline but whose contents, guarantees, effectiveness, development and noncompliance are not only understood from its normative sources but also from the interaction of these with other areas of knowledge.

xii. References to Scholarly Works

Another factor that demonstrates the CCC's interpretative openness in fulfilling its function as the Constitution's interpreter is the Court's recurrent references to scholarly works (29 cases). The most common references are to IHRL experts, both Latin

⁷⁰ SU-166/99, T-025/04, C-355/06, C-644/12 and T-057/15.

⁷¹ C-141/10.

⁷² C-1052/01, C-141/10 and C-674/17.

⁷³ C-578/02, C-332/17 and T-617/2010.

⁷⁴ C-578/02, C-332/17 and T-617/2010.

⁷⁵ C-371/00, SU-383/03 and T-057/2015.

⁷⁶ SU-214/16 and C-699/2016.

⁷⁷ C-027/93.

⁷⁸ 13 use only one type of non-legal argument, and 13 combine different ones.

American and those from the global North and South. Citations to foreign constitutional law scholars are also observed, with preference shown for European and North American authors. Although this practice is not the judgment's definitive or exclusive argument, references to doctrine (especially foreign) is an auxiliary criterion that the CCC uses to elucidate the constitutional State's range of principles, rights and institutions that are relevant to the cases. Additionally, in some cases, doctrine is cited to understand the properties or characteristics of the institutions that regulate the norms under review.

xiii. References to Foreign (National) Law

Although they lack any binding force, references to the experiences of foreign legal institutions also occupy a prominent place in the CCC's argumentation. This practice is presented as a kind of pragmatic use of comparative law for the interpretation of domestic law (substantive) or as an interpretive technique in and of itself (procedural).⁷⁹ In other words, the Court does not follow the guidelines of the comparative law discipline since it focuses on analysing the normative texts issued in other States. The weight given these sources is apparent in the understanding of the subject matter under analysis, especially in judgments that address difficult issues or are of great constitutional significance.⁸⁰

xiv. Pro Homine/Pro Persona Principles

The *pro persona* principle is unquestionably a major premise within the CCC's reasoning for constructing the interpretation that best guarantees fundamental rights and the definition of the purposes that justify functions, institutions and competences. Thus, it is surprising that express reference to the principle is only reported in three decisions,⁸¹ although it is the implicit basis for many others in which the objective or subjective infringement of constitutional rights is raised.

xv. Other Methods

Finally, 27 rulings use other types of arguments or methods. For cases related to the regulation or limitation of fundamental rights, the argument types that stand out are weighing, the reasonableness and proportionality test, the equality test with its different levels of depth (depending on the compromised right's scope or its holders' affectation) and the regressivity test. When 'organic' problems or the development of constitutional competences must be resolved, the assessment of the jurisdictional forums, the

⁷⁹ A Baraggia, 'Challenges in Comparative Constitutional Law Studies: Between Globalization and Constitutional Tradition' (2017) *Special Issue – Comparative Law, Law and Method* 7.

⁸⁰ Abortion (C-355/2006); freedom of expression (T-391/2007); same-sex marriage (SU-214/2016); the 'right to try' in health (T057/2015) and the right to nondiscrimination in taxation based on gender (C-117/2018); the ruling that declared the second presidential re-election unconstitutional (C-141/2010) and the first decision that examined the special legislative procedure (C-699/2016).

⁸¹ C-221/1994, T-881/02 and C-182/2016.

legislative immunity and the *in dubio pro legislatore* are notable, along with cases where the Court judges acts of constitutional reform, the syllogism that is part of the constitutional substitution test.

The Court uses all these methods, without any rule's permission or prohibition. Their inclusion in constitutional judicial reasoning derives from the CCC's own interpretation of their constitutional functions.

C. The Overall Weight of the Arguments

The complete review of the arguments noted in the sample shows an imprint in the CCC's reasoning that can be traced from the beginning of the Court's existence. The CCC is a court that hears demands for justice, which are presented by way of action of unconstitutionality or *tutela* – including the most difficult cases, conjointly with various types of arguments used interchangeably, with the Court seeking to demonstrate the rationality of its case analyses and the accuracy and legality of its decisions.

Not all the arguments satisfy the same function since some are part of the obiter dictum and serve as context to understand the case's subject matter, and others are useful for identifying and resolving the constitutional issue of the case. With regard to the latter, there is a clear preference for methods of constitutional interpretation that include legal arguments or the Constitution as a norm along with its system of sources, with binding and enforceable principles, guarantees and purposes. In cases where a power allocation is reviewed, the argumentation is constructed from constitutional unity and the comparable value of all constitutional assets. In those where fundamental rights are compromised, the argumentation is less weighted because in general it is crafted to justify either the least possible restriction or the most desirable comprehensive protection. The argument accounts for reality, scientific knowledge, data and information to describe how the case's legal issue materialises and to foster the idea of the Constitution as a living norm.

This is confirmed because 30 of the 40 analysed judicial opinions are structured with the ratio decidendi and obiter dictum arguments, these being the longest. With the passage of time, it can be observed in the judgments that the ratio decidendi is becoming more technical and improving in clarity and defining the reasons, contents and effects of the ruling. Of the remaining 10 cases, seven are practically equal in terms of 'the proportion between the ratio decidendi and obiter dictum arguments (...) and the decorative, rhetorical or deceptive arguments'.⁸² And in just three, the judicial opinion's majority uses mostly rhetorical or deceptive arguments. In both groups, the results could be explained in terms of the complexity of the issues to be resolved, by involving or stressing principles, rights or constitutional functions that compromise or confront deep-rooted political,⁸³ social, cultural and institutional conceptions.⁸⁴

⁸² See the CORE Latam Codebook Question 50 on the 'Overall Weight of the Argument' in the Appendices of this volume.

⁸³ C-221/1994, C-578/2002, C-141/2010, C-252/10, C-123/2014, SU-214/16 and T-590/2017.

⁸⁴ SU-383/03, C-591/05 and C-699/16.

D. Judicial Candour and Judicial Rhetoric

In general, the CCC's decisions are extensive, as it is shown in Table 1.

Table 1 The average extension of the CCC's decisions for the duration of its existence

TIME PERIOD	Avg. No. of Pages
1992–2019	163.5
1992–2000	90.1
2001–2009	183.091
2010–2016	202.272
2017–2019	175.88

Undoubtedly, such lengthiness accounts for the weight of obiter dicta and the breadth of arguments it usually garners. Over time, this has been compounded by the detailed presentations of the increasingly numerous interventions during the procedure, which also evaluate and assist when describing the legal problem and resolving it while developing specific opinions on the matter. But constitutional jurisprudence has been assuming the role of serving as the source from which not only constitutional law is explained but also substantive and procedural principles of public and private law that relate to the case's constitutional issue. In this sense, the target audience of the judgment's reasoning is not only the parties or stakeholders in the process but also the general public.

However, since the Court generally uses technical language, it could be assumed that it is primarily intended for judges, courts and the legal community, including academics and law students. Besides, in terms of clarity, the judgments' length and language make them extravagant and difficult to understand and make it challenging to disseminate constitutional doctrine and the subrules it contains.

E. Length, Dissenting and Concurring Opinions

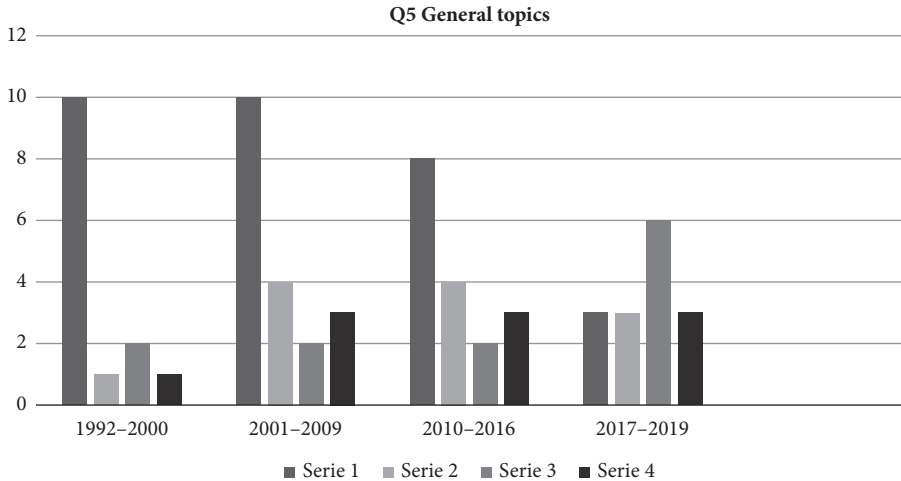
The page lengths of the judgments in the sample, which can be seen in the table above as averages per time period, reflect their enlargement over time, with a slight decrease in recent years. The importance or representative nature of the selected decisions can be added to the reasons above. All in all, this is a common feature of the CCC's jurisprudence, and in this sense, the cases that the Court hears are not always particularly complex. Thus, it is the Court's own unique reasoning that best explains the 'long' sentences.

The recurrent formulation of dissenting and concurring opinions – which can be seen in 28 of the 40 judgments in the sample – according to the legislation, can be raised by Court members who disagree with either the decision or with the majority's arguments. In any event, their value, in addition to making the judgments even longer, reflects pluralistic positions that feed the debate and that encourage the evolution of precedent or the improvement of argumentation.

F. Framing of Constitutional Issues

The sample includes 18 *tutela* review judgments and 22 constitutionality rulings. However, even with this variance, the results on the general topics to which the judgments refer (see Figure 1) can be considered indicative of the ways in which the law is interpreted and how the CCC practices its constitutional judicial function, with variations barely apparent during the last short period subject to the selection.

Figure 1 General topics in the selected rulings of the CCC for the duration of its existence



Note: Series 1 refers to Fundamental rights, Series 2 refers to Organisation of the State, Series 3 refers to Due process, and Series 4 to other materials.

Apart from *tutela* review judgments, it is natural that fundamental rights and due process are recurring topics in the Court's jurisprudence. It is a distinction of the CCC's reasoning to place special value on the substantive aspects of cases, even in seemingly formal matters. Therefore, in decisions also involving State organs, public functions and powers, or processes and procedures, the constitutional judge values the exactness of the norms, the fulfilment of procedural requirements and the worthiness of the constitutional functions attributed to the State's powers and authorities. However, the judge also appeals to the principles on which these created organs and powers are based.⁸⁵

As for the results of the 22 constitutional judgments, 12 were upheld and 10 dismissed. The balance between them is a product of the relevance of the chosen cases. This is not entirely representative of the jurisprudence of objective review, where approximately only one-third of the decisions fully or (most often) partially accept the claims of unconstitutionality. In this type of review, the constitutional judge is usually deferential to the legislator, applying both self-restraint and the principle of the preservation of the law.

⁸⁵ This has been observed, for example, in the decisions on legislative decrees declaring states of emergency (C-070/2009 and C-252/2010) and in the interpretation of the competence to review reformatory acts of the Constitution (C-141/2010).

The case of *tutela* review judgments is distinct. All 18 in the sample were upheld – that is, they protected the claimed fundamental rights (and others), issued orders and set remedies. This reflects the CCC's *tutela* jurisprudence, since in most cases, the *certiorari* is exercised precisely to reinforce fundamental rights.

G. Key Concepts

The sample offers a very revealing panorama of the importance that the best liberal tradition of Colombian constitutionalism still harbours – in principles, rights and in the deeply rooted structure of the State's system of government and institutional design. This system developed concurrently with an openness to guarantee, pluralism and deliberation in interpretation and constitutional adjudication and with the recognition of the State's reinforced social dimension (broad in terms of guarantees), which the Constitution of 1991 introduced.⁸⁶

The liberal tradition itself is represented in 26 judgments, which accounts for different manifestations of the rule of law that the Constitution includes (Arts 1, 6, 29, 95, 113, 121 and 209, Const.), such as constitutional supremacy, legality and legal certainty. The same number of judgments consider the democratic form of government, which also reflects its status as a core principle of the Colombian Constitution, both in its procedural and substantive aspects (preamble, Arts 1, 2, 3 and 40, Const.; and another 23 constitutional norms of a substantive and organic nature).

Judicial independence, whose importance to the Colombian State extends far beyond what is provided for in the Constitution (Art 228, Const.) and in transitional constitutional norms that introduced the Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz*) (eg, Arts 7, para. and 12 of Legislative Act 1/2017), is considered in seven judgments, where it is especially relevant either as external,⁸⁷ internal,⁸⁸ organic⁸⁹ or functional⁹⁰ independence.

The concept of sovereignty is addressed in eight judgments, with its double constitutional meaning (Arts 3 and 9, Const.) of popular and representative sovereignty and external sovereignty in the context of international relations.

As far as principles are concerned, no fewer than 29 judgments refer to equality before the law (Art 13, Const.) and political equality (Arts 40 and 258, Const.).⁹¹ And there are five decisions that address secularism, one of the most firmly established advances of the 1991 Constitution.⁹² On civil and political fundamental rights, 16 decisions consider basic procedural rights, while freedom of expression is the subject of three in which serious legal positions are established in defence of the least possible restriction of that freedom and its link to the right to information as part of the fundamental

⁸⁶ L Villar Borda, 'Estado de derecho, Estado social de derecho' (2007) 20 *Revista Derecho del Estado* 74–96.

⁸⁷ C-027/1993, C-578/2002 and SU-214/16.

⁸⁸ C-590/05 and T-590/2017.

⁸⁹ C-674/17.

⁹⁰ T-590/17 and C-591/2005.

⁹¹ T-1090/2005, T-629/2010 and C-182/2016.

⁹² J Aguirre and CA Peralta, 'La Constitución Política de 1991 y la diversidad religiosa: un análisis de la discusión doctrinal sobre la laicidad del Estado colombiano' (2021)(50) *Revista Derecho del Estado* 135–64.

core of consumer rights.⁹³ And the five decisions that address the right to privacy do so in connection with private autonomy and the general principle of freedom.⁹⁴

With regard to the State's institutional design and structure, five judgments highlight the republican form of government. This form, in place since the nation's initial establishment as an independent State, is an irreplaceable element of the Constitution, which is part of its identity⁹⁵ and which explains the 'impermanence of power' of the democratically elected authorities, along with 'periodic, competitive and free elections'.⁹⁶

Regarding the government system by procedural structure, it is striking that only seven decisions include it in their key concepts. Apart from the cases that address government powers in states of emergency⁹⁷ or administrative powers in emergency situations⁹⁸ and presidential decisions,⁹⁹ only two materially consider hyper-presidentialism,¹⁰⁰ which is so much a part of the constitutional historical imprint that it has not been surmounted by the Charter of 1991 and its development. In other words, hyper-presidentialism has not been raised before the CCC as problematic, nor does the Court attribute greater meaning¹⁰¹ to the 'checks and balances' system, which is unbalanced towards the Executive, and which proves to be something assumed or taken for granted and accepted, being what Roberto Gargarella¹⁰² deems 'the identity mark of constitutionalism' of the region.¹⁰³

Something similar could be inferred in terms of the State government's structure and system. Although Colombia's nineteenth-century history was immersed to a large extent in bloody civil wars fought between centralist and federalist elites,¹⁰⁴ the centennial Constitution of 1886 established the State's unitary form, which was maintained in the 1991 Constitution although tempered by the principles of pluralism (Arts 1, 7 and 8, Const.), decentralisation and territorial autonomy (Arts 1, 246 and 288, Const.). In the CCC's most significant jurisprudence, the difficulties posed by the propensity for the centralisation of national power have not been litigated and are absent. This explains why only two judgments address territorial autonomy and the principle of subsidiarity,¹⁰⁵ while five consider the concept of nationhood and within it the question of plurality.

For the same reason, and notwithstanding its broad constitutional provision, only four judgments in the sample pertain to the mechanisms of political control. Despite being the fundamental political component of the system of 'checks and balances',¹⁰⁶

⁹³ C-578/2002; T-391/2007 and T-543/2017.

⁹⁴ C-221/94, SU-337/99, C-355/06, T-391/07 and T-629/10. See JC Upegui Mejía, *Transparencia estatal y datos personales: el problema de la publicidad de la información personal en poder del Estado: estudio comparado México-Colombia* (Bogotá, Universidad Externado de Colombia, 2020).

⁹⁵ C-699/2016 and C-674/17.

⁹⁶ C-141/2010.

⁹⁷ C-070/2009 and C-252/10.

⁹⁸ C-318/95.

⁹⁹ C-578/02 and C-699/16.

¹⁰⁰ C-141/10 and C-332/17.

¹⁰¹ SU-383/03, T-236/17, C-644/12, C-117/18 and C-123/14.

¹⁰² R Gargarella, 'Sobre el "Nuevo constitucionalismo latinoamericano"/The "new Latin American constitutionalism"' (2018) 27 *Revista Uruguaya de Ciencia Política* 109–29.

¹⁰³ C-599/16 and C-332/17.

¹⁰⁴ C Sixirei Paredes, 'Federalismo y centralismo en los orígenes de la Colombia contemporánea' (2014) 33 *História* (São Paulo) 330–45.

¹⁰⁵ T-617/2010 and C-123/2014.

¹⁰⁶ C-252/10 and C-699/16.

the cases reveal that there are no mechanisms that make it enforceable,¹⁰⁷ and although there are fiscal-administrative and disciplinary actions available to pursue inefficient or corrupt actions,¹⁰⁸ their results are quite meagre.

The express constitutional reference to human dignity as one of the foundations of the social rule of law (Art. 1, Const.) anticipates that this is a concept that the CCC recurrently uses and recognises as the sustenance of all rights.¹⁰⁹ In fact, 26 judgments appeal to human dignity, among which one stands out that laid the foundations of its structure, comprised of aspects of freedom, material equality and non-discrimination.¹¹⁰

Without being provided for in the Constitution, 17 cases of those selected (eight of constitutionality and nine of *tutela* review) resort to proportionality as a formula for controlling arbitrariness in the use of emergency powers; within the regressivity test¹¹¹ for norms that reduce the scope of social and economic rights; within the equality judgment when considering norms or situations of fact; and for resolving collisions between rights and other legal assets. The study's sample provides a good idea of what proportionality has represented in the CCC's jurisprudence – as an immanent method of adjudication derived from the openness with which the CCC has understood the Constitution from the beginning – along with the sources and interpretive methods that were transplanted, first subtly,¹¹² then with the mixed structure built from the use of the proportionality judgment in Europe and North America, according to the subject matter and nature of the measure judged.¹¹³

In the same vein, although it was only added to the Constitution in 2011, the core of constitutional rights is employed in 14 judgments, generally with an argumentative value more rhetorical than normative. The qualitative analysis of the decisions highlights the introduction of pluralistic thinking, noted in the concept of family, which is considered in seven decisions and under different constitutional connotations. The same is found in the concept of justice, which is addressed in 11 judgments appearing in the form of corrective justice, which guides the exercise of the parliamentary function and especially the judicial function, others as distributive justice as a defining element of the social rule of law, which manifests itself in the protection of freedoms and equalities, between maximum and minimum. In addition, 10 cases include references to post-material values, which have in common their appearance when referring to the recognition of the fundamental rights of minorities, communities and individuals that warrant special protection.

As a hallmark of this dynamic conception of the Rule of Law that the sample reveals, seven cases address the concept of transition. Four reference the 'process of remodelling social and cultural institutions', which brought about the Constitution of 1991 and the

¹⁰⁷ SU-047/99.

¹⁰⁸ T-418/10 and C-111/19.

¹⁰⁹ B Carvajal, *La dignidad humana como norma de derecho fundamental* (Universidad Externado de Colombia, 2020).

¹¹⁰ T-881/2002.

¹¹¹ M Correa and MA Osorio, 'Socio-Economic Rights in the Colombian Constitutional Jurisprudence: Proportionality Analysis and the Prohibition of Regressive Measures' in L Clérico, X Pou and E Restrepo (eds), *Proportionality and Transformation: Theory and Practice from Latin America* (Cambridge University Press, 2022 [forthcoming]).

¹¹² C-318/95.

¹¹³ C-709/2002, C-1041/2007, C-417/2009 and T-466/2019.

social, legal and culture transformations, and in three cases, the transition is understood as a transformational process from a domestic conflict to a state of peace. And although only one decision resorts to the notion of constitutional custom, its use had a large impact on the judgment.¹¹⁴

Finally, in the key concepts of the sample, the incorporation of social constitutionalism is apparent in the 12 judgments that address issues related to the enforceability of economic, social, cultural and environmental rights. These decisions expose how the very concept of fundamental rights has been understood from the notion of the social rule of law's perspective, where what is inherent in the human person is not only associated with civil and political individual freedoms and rights but also with the satisfaction of basic needs,¹¹⁵ while the areas of free personality development are also safeguarded by access to public services.¹¹⁶ With the guarantee of the rights to life, physical integrity and the personal security of the victims of the conflict, it is also essential to provide policies, goods and services that meet at least essential requirements,¹¹⁷ while the guarantee of the right to prior consultation and collective property has been carried out to protect both indigenous and black communities,¹¹⁸ as well as the collective assets of the environment and cultural diversity that their territories preserve. And the presidential powers in states of emergency, and the legislative powers needed to develop or distribute competences between the nation and local powers, have been centred around the most suitable satisfaction of social and economic rights.¹¹⁹

Among all the aforementioned decisions, 18 refer to judicial activism, used as an argument to support the dissenting and concurring opinions to salvage or clarify judicial votes¹²⁰ or to justify the orders that the Court uses to remedy deficits in the protection of required areas of fundamental rights.¹²¹

III. Comparative Perspective

One of the fundamental findings in comparative public law is the existence of courts accorded high levels of prestige. These are courts that are prominent in comparative constitutional jurisprudence because of their judgments' content, methodology, operation or their decisions' impact. In Latin America, the Constitutional Court of Colombia has distinguished itself globally for three reasons: its transformative character (content and impact of its rulings), its public hearings (methodology) and the opening of constitutional review to citizens (operation).

Unlike other courts that occupy this position due to their location (eg, the Supreme Court of the United States) or their intrinsic power (eg, the Court of Justice of the

¹¹⁴ T-629/10.

¹¹⁵ T-406/92 and T-881/2002.

¹¹⁶ C-221/94 C-355/06, T-629/2010 and C-644/2012.

¹¹⁷ T-025/2004.

¹¹⁸ SU-383/03 and T-236/17.

¹¹⁹ C-252/2010, C-644/12 and C-123/14.

¹²⁰ C-141/10, C-644/12, SU214/16, C-332/17 and C-674/17.

¹²¹ T-406/92, C-027/93, C-221/94, C-239/97, SU047/99, SU-337/99, T-025/04, C-355/06, T-391/07, T-418/10, T-617/10 and C-123/14.

European Union), the CCC offers analysis and commentary that are useful to resolve common problems through a global comparative conversation. This role has had a positive internal effect associated with civil society's progressively higher level of awareness of the Court's design, integration and decisions. From the normative system's domestic structure, the Constitutional Court promotes a long, slow and difficult process towards the progressive constitutionalisation of the legal system and a culture of constitutional deliberation. And from the social perspective, the CCC has triggered an empowerment of people or groups for whom the doors of the ordinary judiciary were closed and for whom traditional actions did not permit the channelling of a jurisdictional claim for the protection of their rights.

For the Court, these circumstances involve a constant, fluid and loyal dialogue with the standards of other courts (domestic and international), an open look at comparative law and the awareness of being a local judicial actor immersed in a global dialogue. A fundamental challenge that the Court faces is the preservation of its independence in an environment in which its greater legal and social power makes it attractive to public and private actors' interference. And, of course, judges must understand that their actions occur in contexts marked by deep inequality, exclusion, and poverty in which the Constitution's public values are aspirational. This means that, through dialogue between powers and with citizens, the Court must seek institutional and social allies to promote real transformations that bring people's reality closer to constitutional promises.

Likewise, this position is not synonymous with infallibility. The Court should not assume that any decision or grounds based on its prestige must be accepted. As such, it is important to note that this qualification does not imply unanimity or the absence of disagreements among the judges about their rulings. On the contrary, since decisions are more relevant, they elicit a high degree of internal debate. Even disagreements that seem unimportant internally are widespread and have a far-reaching external impact. In addition, the Court must work deliberatively and transparently to invite society's highest level of scrutiny. So, it is not a question of endorsement but rather an obligation of deliberation, diligence, care, and above all, the maintenance of the material conditions of independence and methodology that have led the Court to its current position.

IV. Evaluation, Pathology and Criticism

The sample does not fully reflect the CCC's judicial reasoning, but as a whole, it serves as a good representation of the Constitutional Court's best-known profile: strong, a guarantor and a seasoned activist, which in exercising its functions, responds positively to the transformative mandate of the 1991 Constitution. However, this assessment hardly represents a large part of its jurisprudence.

Indeed, in the objective review of constitutionality, there have been significant developments in the CCC's jurisprudence on organic or institutional components, in which an equal guarantor position is observed as long as fundamental rights are clearly not compromised, albeit conservative in the interpretation of others and therefore highly deferential to the legislator and the Executive. Among them, it is worth highlighting the very weak constitutional review of matters of a financial, tax and budgetary nature, of

the distribution of powers in the territorial sphere and of economic policies,¹²² public international treaties¹²³ and of the state of emergency measures decreed during the COVID-19 pandemic.¹²⁴

For its part, in the function of *tutela* review, the Court has been much more transformative, although the activism attributed to it is more symbolic than material.¹²⁵ This does not suggest, however, that the CCC's recognition in the international arena, at least in the global South, is not without support. It has been a strong constitutional court, not only because of the indisputable shortcomings of representation and the political will to develop the Colombian Constitution's normative mandates identified as aspirational,¹²⁶ but also for historical reasons (the tradition of judicial review in Colombian constitutionalism), normative reasons (the competences the Constitution grants to the CCC) and conceptual reasons (the constitutional norm and the function of interpreter and guarantor).

Finally, the Constitutional Court does not only have a broad agenda; the progressivism of its decisions has approached the character of a transformative court.¹²⁷ However, the transformative character of the judiciary is exhibited, if not daily, then with each of its opinions and with the sustained maintenance of a jurisprudence that is transformative. On the contrary, the transformative potential of constitutional justice is not, as often believed, a type of capital that accumulates and can be squandered. Citizens demand, on a daily basis, the protection of constitutional promises. And that is the duty of the Constitutional Court.

¹²² D Landau, 'Instituciones políticas y función judicial en Derecho Constitucional comparado' (2011) 13 *Revista de Economía Institucional* 13–83.

¹²³ M Inés Correa Henao, 'El control de constitucionalidad de los acuerdos de inversión en Colombia. Análisis desde la cláusula de expropiación indirecta' in A von Bogdandy, P Salazar, M Morales Antoniazzi and FC Ebert (coords), *El constitucionalismo transformador en América Latina y el derecho económico internacional. De la tensión al diálogo* (UNAM, MPI, DFP, 2018) 511–45.

¹²⁴ R Gargarella and JE Roa Roa, 'Diálogo democrático y emergencia en América Latina (Democratic Dialogue and Emergency in Latin America)' Max Planck Institute for Comparative Public Law and International Law Research Paper, no 2020-21, June 2020 at papers.ssrn.com/sol3/papers.cfm?abstract_id=3623812.

¹²⁵ JE Roa Roa, 'El rol del juez constitucional en el constitucionalismo transformador latinoamericano (The Role of Constitutional Courts in Latin American Transformative Constitutionalism)' Max Planck Institute for Comparative Public Law and International Law Research Paper, no 2020-11, May 2020, at papers.ssrn.com/sol3/papers.cfm?abstract_id=3571507.

¹²⁶ M García Villegas, 'Constitucionalismo aspiracional' (2013) 15 *Revista Iberoamericana de Filosofía, Política y Humanidades* 77–97.

¹²⁷ JE Roa Roa, 'La ciudadanía dentro de la sala de máquinas del constitucionalismo transformador latinoamericano' (2021) 49 *Revista Derecho del Estado* 35–58.

