



Global Review *of* Constitutional Law 2023

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I. INTRODUCTION

2023 was a year of multifaceted developments and challenges for Colombia, encompassing legal, political, social, economic, and security-related aspects. In Section II, we discuss the implications of these developments for the constitutional landscape in the country. Section III discusses nine judgments of the Court in three subsections. First, three rulings concerning liberties are discussed. These cases revolve around drug consumption in public spaces, organ donations, and the protection of human rights defenders. Secondly, three cases concerning Social Rights and Sustainable Development are analyzed. These cases relate to pension requirements for women, the right to disconnect from work, and infrastructure deficiencies of public schools in rural areas. Thirdly, three cases concerning democracy and political rights are discussed. These concern royalties for natural resource exploitation, a reform of the justice system, and the constitutional authority of the presidency over electoral matters. Finally, Section IV provides an overview of potential constitutional developments in the years to come.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The regional elections of 2023 in Colombia saw traditional political parties secure victory in the main mayorships and governorships

with no significant surprises. These results dealt a blow to Gustavo Petro's political capital as he completed his first year as President of the Republic. Additionally, his congressional bench faces increasing fragility, and there's an ongoing criminal investigation into alleged corruption in the financing of his presidential campaign. Despite these challenges, Petro continues to pursue his mandate, focusing on structural reforms. Structural reforms concerning pensions, taxes, the health system, and labor regulations are being discussed by the Congress.

A major difficulty of the current government has been its weak budget execution. According to a report from the Ministry of Finance, 87.3% of the total annual budget was executed, leaving nearly 17 trillion Colombian pesos uninvested by 2023 (approximately \$4.48 billion). Some analysts and critics argue that this marks one of the lowest levels of budget execution in the past decade. Furthermore, frequent changes in the government's cabinet and the shelving of several bills in Congress hinder the implementation of its so-called *transformative agenda*.

Finally, the government continues to convene peace negotiation processes with seven armed groups. Among them, a ceasefire has been agreed with the National Liberation Army (ELN), the oldest active guerrilla in Colombia, and the Gulf Clan, a criminal gang dedicated to drug trafficking and extortion. However, these processes are still considered weak due to persistent violations of international humanitarian law (IHL). According to the International Committee of the Red Cross, while there's a decrease in national figures of mass forced displacement, some regions experience exponential growth, with increases of up to 1000% in 2023.

III. CONSTITUTIONAL CASES

1. Cases Concerning Liberties

1.1. C-127/2023: Minimum and personal dosage in areas of public space regularly frequented by minors

In the ruling C-127/2023, the Court reviewed a regulation that prohibited any type of carrying and consumption of psychoactive substances in certain areas of public space usually frequented by minors, such as parks and areas of cultural interest. In the opin-

ion of the plaintiffs, the prohibition does not pursue the purpose of the rule since the personal consumption of psychoactive substances is only part of the private sphere of the subject and does not disturb the rights of third parties.

Based on the judgment of reasonableness and strict proportionality, the Constitutional Court concluded that the prohibition of carrying and consuming psychoactive substances of minimum and personal dose is not a necessary measure and sometimes not even conducive to the imperative purpose of protecting the best interests of children and adolescents.

To reach this conclusion, the Court decides to analyze separately the conduct of consumption and possession. The Court establishes that the measure is unnecessary and disproportionate due to the lack of consideration of less burdensome alternatives such as the regulation of the consumption of psychoactive substances in manner, time, and place. It is also a measure with an absolute prohibition that seriously affects the fundamental rights of consumers.

Finally, the Court decided to declare the possession of psychoactive substances constitutional, however, it clarified that this restriction does not apply when the possession is for personal consumption or for a medicated dose. Regarding the conduct of consumption of psychoactive substances in parks and areas of cultural interest, the Court decided to uphold the constitutionality of the rule in favor of guaranteeing the rights of children and adolescents, provided that the regulation issued by the authorities is in accordance with the principle of *pro infants*, proportionality, reasonableness, and territorial autonomy.

1.2. T-371/23: Organ donation to foreigners

The second case involves a guardianship action initiated by a Venezuelan adolescent in a situation of irregular migration to protect their right to health. The minor

required a liver donation as per their medical prescription. However, the health entity argued that the minor did not meet the legal requirements to be included in the transplant waiting list because they were a non-resident foreigner. The law permits this procedure only for Colombian nationals and foreigners residing in the country.

In its ruling T-371/23, the Constitutional Court upheld the primacy of the minor's rights to life and health for humanitarian reasons. It declared the unconstitutionality exception and disregarded the rule prohibiting organ donation in this specific case.

In its rationale, the Court acknowledged that while the rule aims to prevent transplant tourism and allocate scarce resources, it failed to consider the principle of solidarity and the current humanitarian crisis resulting from the mass migration of Venezuelans to Colombia. Furthermore, the Court stressed the importance of prioritizing the rights of children and adolescents in situations of serious vulnerability.

Moreover, the Court emphasized that under the current special migratory regime and judicial precedent, Venezuelan migrants with temporary protection permits have the same health coverage as nationals and foreigners residing in Colombia. However, this comprehensive protection does not eliminate the specific restriction on organ transplant procedures based on migratory status. Therefore, the Court declared an exception to the application of the rule in this particular case.

1.3. SU-546/23: Unconstitutional state of affairs in relation to human rights defenders

In the ruling SU-546/23, the Court declared a state of unconstitutionality due to the widespread and severe violation of the fundamental rights of leaders and human rights defenders, as well as the inadequacy of the responses from the Government and the Attorney General's Office (FNG).

A group of social leaders initiated guardianship actions to protect their rights to life and personal integrity in response to ongoing threats and attacks. According to the claimants, the existing protection schemes are insufficient, lack a differential approach, and fail to address the systematic stigmatization of this population.

In examining this case, the Court recognized and elaborated on the right to defend rights. It emphasized the vital role of social leaders whose safety and work must be safeguarded by all authorities, particularly when they face high-risk circumstances due to their societal contributions. Additionally, the Court underscored the State's obligation to ensure the exercise of the right to defend rights within a human security framework, in line with constitutional and international obligations.

Regarding the authorities' response to the situation of defenders, the Court found that the government's policies have been disjointed and ineffective. It also criticized the Prosecutor's Office for its lack of diligent, transparent, and timely investigations.

Consequently, the Court mandated the government to implement a comprehensive plan to guarantee the rights of human rights defenders, addressing the disconnections and inefficiencies in its policy. Furthermore, it directed the Attorney General's Office to revise its investigative strategy to uncover the criminal structures behind the violence. The authorities are required to provide periodic reports on the progress of these investigations.

2. Cases concerning Social Rights and Sustainable Development

2.1. C-197/23: Differentiated pension requirements for women

The first decision discussed in this subsection concerns the legal regime of pensions for women. In this case, the Constitutional Court decided a challenge of judicial review

filed by a citizen against article 9 of law 797 of 2003, which established the minimum requirement of 1300 weeks of contributions for both men and women to obtain their pension. According to the plaintiff, the challenged provision is incompatible with the special protection granted to women under the Colombian Constitution, as well as with the case law of the Constitutional Court recognizing material gender equality.

The Court concluded that the challenged provision, although seemingly neutral, was unconstitutional. According to the Court, the provision creates a legal situation of indirect discrimination against women that needs to be addressed. Given the structural barriers women face in the labor market, the law disproportionately impacts women's rights, particularly their autonomy and economic independence in old age. The law treats men and women equally despite their differing conditions in the labor and social security spheres without addressing the structural discrimination against women. This lack of gender perspective, in the view of the Court, fails to ensure effective access to pensions for women. While the law is necessary for the financial sustainability of the pension system, it does not adequately fulfill the principles of universality and progressiveness regarding women's access to pensions. Thus, the Court ordered the legislator to establish a new pension regime that ensures material equality for women.

In light of the delicate financial sustainability of the pension system, the Court established that the effects of its decision start on January 1, 2026. If by that date the Congress has not adopted a new differential regime, the Court decided that the minimum number of weeks of contribution required for women to obtain their pension will be reduced by 50 weeks in 2026 and, from January 1, 2027, it will be reduced by 25 weeks each year until reaching 1000 weeks.

2.2. C-331/23: Right to disconnect

The second ruling of the Constitutional Court regarding social rights relates to the right to disconnect from work. In 2022, the Colombian Congress enacted the law 2191, which regulated the right to disconnect from work. In a nutshell, this right implies that workers cannot be contacted to discuss work-related matters outside of their regular working hours. Nevertheless, the statute explicitly exempted workers in managerial positions and those in the military and emergency services from this right.

In this case, the Court decided a challenge of judicial review against the exemption of workers in managerial positions from the right to disconnect. According to the claimants, such exemption infringed upon the rights to equality and the right to work in decent conditions.

The Court discussed the scope of the right to disconnect and conducted a balancing test on the challenged provision. It established that while restricting workers in managerial positions from the right to disconnect serves a legitimate and imperative constitutional purpose in ensuring the proper functioning of public and private entities, it concluded that this restriction was not reasonable and proportional. This is because there is an irreducible core of the right to disconnect that protects all individuals, regardless of their position within the organization.

Based on these considerations, the Court ruled that Article 6(a) of the statute is constitutional insofar as it is understood that workers and public servants in managerial positions have the right to disconnect from work, which in their case is not tied to their working hours but does nevertheless not compromise the minimum content of the fundamental right to disconnect. According to the Court, criteria of necessity and proportionality should be considered in each case, taking into account the nature of their functions and the conditions of their employment.

2.3. T-547/23: Structural deficiencies in public school infrastructure

The third decision of this subsection concerns the conditions of public schools and their connection to the right to education enshrined in Article 67 of the Colombian Constitution. The case originated in a guardianship action filed by the mother of a student enrolled in a public school in the Northeast of the country. The plaintiff claimed that existing infrastructure deficiencies infringed upon the right to education of students in this and other public schools in the region.

The Constitutional Court guaranteed the fundamental rights to education and human dignity for students attending multiple public schools. Despite pleas to rectify infrastructure deficiencies, the Court found authorities failed to take administrative and budgetary measures to protect children's rights. Judicial inspections confirmed substandard conditions for learning.

To prevent future violations, the Constitutional Court stressed the need for coordination among territorial entities and the Ministry of National Education, urging substantial budgetary efforts. Orders were issued to safeguard fundamental rights and prevent further indignities.

Furthermore, authorities were required to publicly apologize to students from both institutions, acknowledging their obligations and the State's responsibilities while recognizing the failure to fulfill their constitutional duties.

The Court adopted a tailored approach, directly engaging with school governance and student communities, emphasizing schools as spaces for holistic development, which was lacking in these cases. Given the significance of these decisions, students were encouraged to understand and oversee their implementation, empowering them to report violations to the Court and ensuring compliance with the ruling.

3. Cases concerning Political Rights, Democracy and Separation of Powers

3.1. C-489/23: a highly expensive judicial decision

One of the most controversial decisions of 2023 was Judgement C-489/23. The context of that sentence is as follows. The Colombian Constitution establishes that non-renewable natural resources (i.e., oil, coal, and other minerals) are the property of the State. Companies that exploit these resources must pay the State a price (royalty) for these resources (Article 360). For the companies, the payment of this royalty is a real expense that must be included in their budgets as an expense incurred by them in favor of the State. Therefore, this royalty should be deductible when paying income taxes. Otherwise, they claim, they would pay taxes twice for the same event.

In 2022, Congress enacted a law (2277/2022) that prohibited the deduction of royalties from corporate income tax returns. Congress considered that royalties were a legitimate cost for the exploitation of natural resources and a mechanism to dissuade companies from exploiting those resources when it is not truly profitable. That was the law that was reviewed in this judgment.

After applying a proportionality test, the Constitutional Court declared an invalid part of Article 19 of Law 2277 of 2022. The Constitutional Court recognized that the law was suitable to increase the collection of taxes that allow financing social public spending (the Welfare State) because, by prohibiting the deduction of royalties, it significantly increased the level of State revenues. However, the court concluded that the means to that end was impermissible because it was not based on the contributive capacity of the taxpayers and was disproportionate.

Specifically, the Court held that such prohibition was against the constitutional principles of equity and tax justice. The current situa-

tion with the Court's decision is that companies can deduct from their taxes the payments they make to the State for royalties.

Much of public opinion, many scholars, and the Government itself have criticized this decision. It was argued that the Court resolved a problem of constitutionality that had not been initially raised by the plaintiffs of the law. This would be very serious in a system that has a rogatory judicial review of laws. It was also objected that the Court was not sensitive to the economic situation of the country, that it did not recognize the suitability of royalties to avoid the exploitation of natural resources in contexts of climate emergency, and that it had been highly inconsistent and contradictory in its arguments.

The Government estimates that this ruling prevents the entry of resources equivalent to 27 billion pesos. For this reason, this ruling has been appealed by the Ministry of Finance through the mechanism of the fiscal impact incident. This instrument allows the Government to request that the Court moderate, modulate, or defer the effects of its ruling to avoid serious effects on fiscal sustainability. This is one of the most important cases that will be on the agenda of the Constitutional Court in 2024.

One of the most controversial decisions of 2023 was Judgment C-489/23. The Colombian Constitution establishes that non-renewable natural resources (e.g., oil, coal, and minerals) are the property of the State. Companies that exploit these resources must pay the State a price (royalty) for their use (Article 360). For these companies, the payment of royalties is considered a genuine expense that must be included in their budgets as a cost incurred in favor of the State. Therefore, they argue that these royalties should be deductible when calculating income taxes, as not doing so would result in double taxation for the same event.

In 2022, Congress enacted Law 2277/2022, which prohibited the deduction of royalties

from corporate income tax returns. Congress considered royalties to be a legitimate cost for resource exploitation and a mechanism to discourage companies from exploiting resources when it is not truly profitable. This law was the subject of review in the case at hand.

After applying a proportionality test, the Constitutional Court declared part of Article 19 of Law 2277 of 2022 invalid. The Court recognized that the law was effective in increasing tax revenue for financing social public spending (the Welfare State) because, by prohibiting the deduction of royalties, it significantly increased State revenues. However, the Court concluded that the means to achieve this end was impermissible because it did not consider the contributive capacity of taxpayers and was disproportionate.

Specifically, the Court held that such prohibition violated constitutional principles of equity and tax justice. As a result of the Court's decision, companies can now deduct payments made to the State for royalties from their taxes.

This decision has been criticized by much of the public opinion, scholars, and the Government itself. It was argued that the Court addressed a constitutional issue that had not been initially raised by the plaintiffs of the law. It was also objected that the Court was not sensitive to the economic situation of the country, did not recognize the effectiveness of royalties in preventing resource exploitation in the context of climate change, and exhibited inconsistency in its arguments.

The Government estimates that this ruling will result in the loss of revenue equivalent to 6 billion dollars. Therefore, the ruling has been appealed by the Ministry of Finance through the fiscal impact incident mechanism. This instrument allows the Government to request the Court to moderate, modulate, or defer the effects of its ruling to avoid serious effects on fiscal sustainability.

The final resolution of this case is one of the most important issues before the Constitutional Court in 2024.

3.2. C-134/23: a comprehensive reform of the justice system

Statutory laws occupy a special place in the system of sources of the Colombian Constitution. They regulate matters of great importance, such as fundamental rights, the electoral system, mechanisms for citizen participation, and the administration of justice (Article 153). The approval and reform of statutory laws are subject to an automatic, prior, and comprehensive judicial review. The Constitutional Court preventively reviews the content of the entire law and compares it with the entire Constitution from both a procedural and substantive perspective.

The Statutory Law on the Administration of Justice (LEAJ) was enacted in 1996 (Law 270/1996) and has been partially amended on several occasions. One of the most important and comprehensive reforms to the LEAJ was approved in 2021. During two years, this bill was subject to review by the Court before being sanctioned by the President of the Republic.

In the ruling C-134/2023, the Court reviewed the 100 articles of the bill that modified the LEAJ. It is impossible to point out in this report the details of the Court's decision. However, it can be concluded that the Court overwhelmingly endorsed the most important reform to the judiciary. The Court's judgment is divided into four sections: procedural control, provisions on the general structure of the judiciary, governance, and administration of the judiciary, and operational aspects of the judiciary.

Of the one hundred articles of the LEAJ, fifty were declared valid, seven were declared invalid, and the rest were subject to decisions of partial invalidity or conforming interpretation. Undoubtedly, this will be a much-debated decision because it enabled a major reform to the judiciary but also inter-

vened in many aspects that were approved by Congress but did not fully pass the constitutionality test. The reform of the judiciary always seems to be an unfinished task in Colombian constitutionalism. To such an extent that a new initiative to reform the judiciary has already been proposed, which will have to be processed as a statutory law and will also be controlled by the Constitutional Court itself.

3.3. C-302/23: preventing constitutional avoidance

One of the most intriguing cases of judicial review occurred in Decision C-302 of 2023. This judgment reviewed a decree (Decree 1207 of 2021) issued by the president under the authority of a constitutional amendment (Amendment 2 of 2021). The decree regulated the popular election process of senators and representatives to the chamber designated to occupy the peace seats. These seats were established as part of the peace agreement with the FARC guerrillas in 2016 and were created through the constitutional amendment of 2021.

Specifically, the constitutional amendment authorized the President to regulate the popular election process for these seats. Consequently, the President issued Decree 1207 of 2021. However, the Constitutional Court determined that this decree pertained to matters protected by the Constitution, particularly through the reservation of statutory law. According to the Court, the decree addressed the exercise of the fundamental right to be elected and the functioning of the electoral system, both of which can only be regulated by specific statutory laws.

The Court did not question the president's authority to issue the decree. Instead, it ruled that while the president could issue the decree, the approval process had to align (to the maximum extent possible) with that of a statutory law. One essential element of statutory law approval, according to the Court, is prior, automatic, comprehensive, and final judicial review.

As the President did not submit the decree to the Court for prior automatic review, this constituted a procedural flaw that could not be rectified. Consequently, the Court declared the decree invalid. The Court emphasized that it is the Government's obligation to automatically and preemptively submit norms of statutory content, issued based on exceptional authorizations in constitutional amendments, for judicial review. Additionally, the Court concluded that in a constitutional State of law and deliberative democracy, the judicial scrutiny of norms depends on their content rather than their designation.

With this ruling, the Court intervened to prevent a case of constitutional avoidance. It prevented a regulatory norm (a decree) from regulating statutory matters without adhering to the system of judicial review mandated by the Constitution for such norms. Not even an order of a constitutional amendment can empower the president to evade judicial control of normative acts with a statutory level that must typically be approved by Congress with a special level of consensus and parliamentary majorities.

IV. LOOKING AHEAD

The year 2024 promises to be highly significant in constitutional terms. One of the pivotal debates expected in the Constitutional Court revolves around the fiscal impact incident of Ruling C-489/23. It is crucial for the government that the court either moderates or defers the effects of this ruling to ensure sufficient resources are collected to finance the majority of the proposed social reforms.

Furthermore, the government's institutional response to the failure of its proposed reforms in the legislature will be intriguing. It's likely that a Constituent Assembly will be proposed to enshrine in the Constitution the reforms rejected by Congress. Proposing a new Constitution, whether in part or in whole, has been a common tactic of governments since 1991. Alternatively, the

government might attempt to implement some reforms through executive decree (constitutional avoidance). However, reinstating a state of emergency to implement social policies seems improbable, given the Constitutional Court's stringent criteria for such measures, especially in addressing long-standing or structural social issues.

Additionally, the Congress of the Republic faces the challenge of demonstrating its ability to effectively address the social problems of citizens through debate and action. While Congress has demonstrated strong political oversight by obstructing the government's agenda, there's a growing demand for proactive legislative initiatives to address pressing issues. Failure to do so risks undermining Congress's social legitimacy, which remains limited.

The Constitutional Court will witness significant debates in 2024, marking the twentieth anniversary of the unconstitutional state of affairs declared in 2004 (T-025/04) regarding the population displaced by violence. While this decision has brought visibility to the issue, bureaucratic processes both within and outside the Court have somewhat diluted its impact, allowing the underlying social problems to persist or worsen. This raises questions about the effectiveness of unconstitutional states of affairs as mechanisms of transformative constitutionalism.

Colombia boasts a rich and dynamic constitutionalism, yet it grapples with growing inequality among its population. While it serves as a prime example of transformative constitutionalism, it also faces significant challenges. The constitutional jurisprudence agenda requires modernization and a renewed commitment to openness, particularly in addressing environmental concerns such as the climate emergency and protection of the Amazon. The Court has the opportunity to play a leading role in these areas by issuing landmark decisions akin to those of the German Constitutional Court, the Inter-American Court, and the European Court of Human Rights. Furthermore,

fostering greater openness to international dialogue and comparative law will enhance Colombia's engagement with global constitutionalism.

V. FURTHER READING

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BOLIVIA

In a case addressing the election rules for Bolivian high courts, the Tribunal found that re-electing public officials for more than one consecutive term is unconstitutional. The ruling underscored the inherent risk of longer terms, which can lead to anti-democratic governments.

BOSNIA AND HERZEGOVINA

Bosnia and Herzegovina faced the aftershocks of the series of political crises that started in 2021 while the National Assembly of the Republic of Srpska exerted influence on the Constitutional Court of Bosnia and Herzegovina. The European Court of Human Rights once again confirmed the discrimination.

BRAZIL

In 2023, significant changes were anticipated in Brazil with President Lula's third nonconsecutive term and his appointment of two new Supreme Court justices. The violent events of January 8, spurred by Bolsonaro's supporters, deeply challenged Lula's authority, underscoring the judiciary's vital role in protecting Brazil's democracy amid political extremism.

CABO VERDE

In 2023, an important informal constitutional change was discussed and some political tensions flared-up in CV. Furthermore, the legislative agenda led to the approval of relevant acts, and the CCCV delivered a couple of relevant opinions. A small number of constitutional law papers were published as well.

CHILE

A new constitutional replacement attempt failed in 2023. After the failure of the 2022 constitutional referendum, in which Chilean voters rejected the Constitutional Convention's proposed constitution, Chilean voters rejected a new draft in 2023. This time, the proposal came from an elected Constitutional Council dominated by a right-wing coalition.

CHINA

In 2023, the constitutional review in China received further development upon the NPCSC's Decision on Perfecting and Strengthening the Record and Review System. Besides, the draft revision for the Public Security Administration Punishment Law and government data auctioning have ignited widespread concerns about rights protection.

COLOMBIA

Colombia's constitutionalism faces the challenge of making viable the social changes that citizens have demanded at the ballot box in one of the most unequal countries in the world. This implies controlling the exercise of power in a reasonable and constructive manner to avoid undermining democracy and the separation of powers.

CUBA

The year 2023 marked the continuation of the constitutionalization of Cuban Law, as the National Assembly implemented an extensive legislative program aimed at aligning the entire legal system with the Constitution as its normative and axiological framework. This text is dedicated to analyzing this process.

