Building a bridge between reality and the constitution: The establishment and development of the Colombian Constitutional Court

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The Colombian Constitutional Court has gained a high reputation around the world. In a country that is plagued by the war on drugs, violence, inequalities, and corruption, the court has managed to strengthen the rights of the displaced and homeless victims of these conflicts, women, workers, sick persons, and other underprivileged social groups. The trust of the citizens in the court therefore is high, which is reflected in the constantly growing number of constitutional complaints and judicial reviews. By proving its independence, the court has also earned the respect of politicians. However, the court took on this role only gradually, and had to learn from mistakes made at the beginning. This article presents not only the history and the most important achievements of the court from its founding to the present, but also addresses the challenges it faces.

1. Introduction

The twentieth century is often perceived as a century of constitutionalism.[1] After the fall of authoritarian systems, the establishment of constitutional courts was supposed to serve as an "insurance of democracy"[2] meant to consolidate newly established democratic regimes. This holds true for Latin America, where nowadays the judiciary and, in particular, the highest courts are no longer considered to be "a frequent casualty of regime change,"[3] but have emerged as important institutions supporting the

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1 Ernst Benda, *Das Jahrhundert der Verfassungsgerichtsbarkeit*, 19 Rechtshistorisches Journal 549 (2000).

2 Silvia von Steinsdorff, *Verfassungsgerichte als Demokratie-Versicherung? Ursachen und Grenzen der wachsenden Bedeutung juristischer Politikkontrolle*, in Analyse demokratischer Regierungssysteme 479 (Klemens H. Schrenk & Markus Soldner eds., 2010).

3 Gretchen Helmke & Julia Ríos-Figueroa, *Introduction. Courts in Latin America*, in Courts in Latin America 1 (Gretchen Helmke & Julia Ríos-Figueroa eds., 2011).

process of democratization. Unlike other (neighboring) countries, Colombia had no dictatorship in place, but suffered from political dissatisfaction, violence, and inequality, which made people demand change. The country hoped to reach a political and social transformation by means of a new constitution and a constitutional court that would protect the rights and principles laid down in the constitution. Today, the Colombian Constitutional Court has existed for twenty-four years and has evolved constantly. Without its jurisprudence, especially regarding the *tutela*—the most popular legal remedy in Colombia—there would be no "bridge between reality and the Constitution," as former justice Manuel José Cepeda put it in the weekly magazine *La Semana*.[4] The court is regarded today as a paradigm of independence and a guarantor of the rule of law, which has greatly contributed to the citizens' trust in the constitutional state, despite some problems in the process of implementation of the court's judgments. However, the court has not reached the status it enjoys today without some setbacks and controversy. Several rulings provoked severe criticism that the court had exceeded its competences. From a democratic perspective, some of these arguments are very convincing. However, what is often not taken sufficiently into account is the context of the court's actions. The purpose of this article is to show that, in the end, the structural and administrative shortcomings of the Colombian state have made it possible and necessary for the court to assume the position it has today.

The article starts out by explaining how the Constitutional Court has managed to become such an important actor in Colombia's institutional structure, beginning with its establishment in the 1990s (Section 2) and the first steps it took to emancipate itself from the jurisprudence of its predecessor, the Supreme Court (Section 3). Then the article takes a closer look at the *tutela*, the Colombian constitutional complaint, which has become one of the main instruments for the court to strengthen the rights both of individuals and vulnerable groups, and has particularly had a great impact on Colombia's social policy (Sections 4 and 5). The development of the court's jurisprudence indicates its high level of self-confidence, which served to undermine other political actors and lead to several attempts at limiting the influence of the Constitutional Court (Section 5). Some critics even speak of a "dictatorship of the Court" and reproach it with having usurped too much power—a view that is examined at the end of this article (Section 6).

2. Birth at the time of violence

Colombia's Constitutional Court was established with the adoption of the new Constitution in 1991, following the examples of other South American countries.[5] Two difficult periods preceded the process of constitution-making: *La Violencia* and the *Frente Nacional*. *La Violencia* was a long-lasting, very violent conflict between the liberal and the conservative parties over the control of various (in particular rural) parts of

[4] Gabriel Bustamente Peña, *El origen y desarrollo de la acción de tutela en Colombia*, Semana (June 9, 2011), *available at* http://www.semana.com/nacion/articulo/el-origen-desarrollo-accion-tutela-colombia/241093-3.

[5] E.g., Ecuador (1945), Guatemala (1965), Peru (1979).

the country. After nearly ten year of struggles, the conflict finally came to an end with an unusual agreement between the two main parties to the conflict.[6] According to this agreement, the so-called "National Front" (*Frente National*), the power in the legislative and the position of the president rotated regularly between the liberal party and the conservative party regardless of the election results.[7] Thus, for the Colombians, there began a more peaceful, but undemocratic time, *La Violencia*, which "depoliticized the parties and replaced them with electoral machines whose main goal was to distribute government bounty."[8] However, this supremacy of the two parties did not prevent other parties, such as the ANAPO (National Popular Alliance), from being active. In the 1970 presidential elections, their candidate, Rojas Pinilla, managed to gain 39 percent of the votes, and the conservative candidate, Misael Pastrana Borrero obtained 40.6 percent, according to the official election results. Borrero was declared winner, but Pinilla's supporters were convinced of election fraud.[9] As a consequence, radical students and workers, in particular disappointed members of the ANAPO, formed the armed guerrilla group M-19 to prepare a violent seizure of power, which culminated in 1985 with the occupation of the Palace of Justice.[10] Even when the M-19 gave up the arms in 1989 after peace negotiations, the Revolutionary Armed Forces of Colombia (FARC) and rightist paramilitary groups kept on fighting.[11] Politics focused on combating the insurgencies and the increasingly pressing problem of illegal drug trade, but neither military nor political instruments, such as negotiations, were successful: the production of cocaine increased by 672 percent between 1981 and 1990. Further, the numbers of kidnappings, extortions, and murders had risen, and in the presidential campaigns of 1989 and 1990, three presidential candidates were killed by paramilitary groups.[12]

These incidents, political standstill, and the assumption that the government and the Congress were involved in drug trafficking caused college students to form the *Movimiento de la Séptima Papeleta*.[13] Student groups around the country demanded a substantial change in Colombian politics by means of a new constitution, which should be drafted by a constituent assembly. In order to put pressure on the government, they called upon the population to vote for the establishment of a constituent

[6] Mauricio Cárdenas, Roberto Junguito, & Mónica Pachón, *Political Institutions and Policy Outcomes in Colombia: The Effects of the 1991 Constitution*, at 4, *available at* http://www.iadb.org/res/laresnetwork/files/pr232finaldraft.pdf.

[7] David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 Harv. J. Int'l L. 319, 335 (2010).

[8] Philip Keefer & Norman Loayza & Norman LoayzaNorman Loayzaoping Countries and the War on Drugs 209 (2010).

[9] Johannes Eurich & Christian Oelschlägel, Diakonie und Bildung: Heinz Schmidt zum 65. Geburtstag [Social Welfare Work and Education: In Honor of Heinz Schmidt's 65th Birthday] 455 (2008).

[10] Rafael Cadavid, Kolumbien unzensiert [Colombia Uncensored] 47 (2010).

[11] Cárdenas et al, *supra* note 6, at 5.

[12] *Id.* at 6; James Brooke, *Gunmen in Colombia Kill as Many as 35 Leftists*, New York Times (Jan. 24, 1994), *available at* http://www.nytimes.com/1994/01/24/world/gunmen-in-colombia-kill-as-many-as-35-leftists.html.

[13] *La papeleta que cambió a Colombia*, El País (July 3, 2011), *available at* http://www.elpais.com.co/elpais/colombia/papeleta-cambio-colombia.

assembly in the elections of 1990.[14] This is where the name of the movement originates from; in addition to the six ballot (*papeletas*) for several elections,[15] the *Movimiento de la Séptima Papeleta* demanded a seventh ballot to vote on the establishment of a constituent assembly. Even though this ballot did not exist formally, more than a million Colombians supported this informal election procedure and voted for a constitutional reform.[16] As a consequence, President Barco used his emergency powers and scheduled a referendum on the establishment of a constituent assembly, although actually only the Congress had the power to amend the Constitution (art. 209 Constitución Política (CP) 1886).[17] In the referendum, 88 percent of the voters supported the convocation of a constituent assembly.[18] Current literature agrees that this course of action was unconstitutional, but nevertheless democratic.[19] Notwithstanding the evident unconstitutionality, the Supreme Court upheld the referendum following the argumentation of the President[20]—not yet knowing that its power would be subsequently impaired.

Further elections were held to nominate the members of the assembly.[21] Due to the fact that neither the members of the Congress nor the executive were allowed to run for the *Asamblea Nacional Constituyente*,[22] the composition was "radically different . . . from that of the Congress":[23] many members were representatives of the major parties, but the proportion of the parties was completely different. Additionally, members also represented demobilized guerrillas as well as indigenous and religious groups.[24] This composition of the assembly is certainly one of the reasons why it was possible for Colombia to have a very progressive constitution (with a strong Constitutional Court) after such a difficult and violent period.

The question whether Colombia needed a constitutional court was highly controversial in the constituent assembly. Some members feared that having a constitutional court would lead to a "government of judges," and argued that the Supreme Court had been a levelheaded institution that also protected minority rights.[25] Interestingly, the government did not oppose the establishment of a constitutional court. Instead, it expressed the opinion that a constitutional court was necessary for the control of the new constitution and for addressing fundamental ethical issues such as abortion

[14] *Id.*.

[15] Elections of the Senate, the House of Representatives, the national parliaments (Asambleas Departamentales), the municipal administrative boards (juntas administradoras locales), the municipal councils and the mayors.

[16] Tulia Gabriela Falleti, Decentralization and Subnational Politics In Latin America 136 (2006).

[17] *Id.*

[18] Miguel Schor, *The Emergence of Constitutional Courts*, 16 Ind. J. Global Legal Stud. 1, 13 (2008).

[19] Juan Avila, *The Case of Colombia's Constituent Assembly*, 26 Exec. Intell. Rev. 72, 72 *et seq.* (1999); Schor, *supra* note 18, at 12 *et seq.*; Falleti, *supra* note 16.

[20] Supreme Court, Case No. 138, May 24, 1990.

[21] Schor, *supra* note 18, at 13.

[22] Falleti, *supra* note 16, at 136 *et seq.*

[23] *Id.* at 137.

[24] Schor, *supra* note 18, at 13.

[25] *Constitutional Court divide a constituyente*, El Tiempo (June 5, 1991), *available at* http://www.eltiempo.com/archivo/documento/MAM-96486.

or in vitro fertilization.[26] Later examples were mentioned by government delegates in the assembly and showed that the fear of too much interference was limited because the government assumed that the Constitutional Court would be dealing mainly with "moral" instead of "political questions." They expected the Court not to be "*una institución politizada*,"[27] a politicized institution.

3. Growth of the first teeth: the determination of the state of emergency

The expectation that the Court would not interfere fundamentally in the distribution of power was probably based on how the judicial review was exercised by the Supreme Court before 1990. Already the 1886 Constitution had provided for the possibility of judicial review (art. 151 CP 1886) by the highest court, which used to be the Corte Suprema. Despite an extension of competences through the introduction of an *actio popularis* (Legislative Act No. 3 of 1910) and an *ex officio* review over presidential decrees regarding his/her powers during a state of emergency (Legislative Act No. 1 of 1968), the Supreme Court remained a relatively toothless tiger. This can be illustrated very well by the example of the control over the state of emergency: art. 121 CP 1886 provided that the Supreme Court always decided "*definitivamente*" (conclusively) on the constitutionality of the declaration of the state of emergency after the government had issued the relevant decrees. Although the wording of art. 121 CP 1886 did not imply any restrictions of this review, the Supreme Court used to exercise only a formal control of the declaration of the state of emergency. That is, it merely examined, for example, if the competent state organ had acted.[28]

By contrast, the Constitutional Court had already determined in one of its first judgments in 1992 that, apart from the formal control, it also had the power to examine the material requirements for a state of emergency.[29] It pointed out that the Constitution expressly assigned the court the task of keeping and protecting the integrity and supremacy of the Constitution (art. 241 par. 7 CP). Accordingly, in the case of the declaration of a state of emergency, such duty could only be fulfilled if the control was not limited to purely formal aspects: "If the government declares the state of emergency and there are no unexpected, serious or imminent facts given that disrupt or threaten to disrupt the economic, social, or ecological order of the country or which constitute a grave public calamity, does it not infringe on the integrity of the Constitution?"[30]

However, the court applied its jurisdiction carefully and more rhetorically at the beginning,[31] probably to prevent a big confrontation right from the start, but in the

[26] *Id.*

[27] *Id.*

[28] *El abuso de los estados de excepción*, El Espectador (Aug. 4, 2011), *available at* http://www.elespectador.com/node/263552.

[29] Constitutional Court, C-004/92, May 7, 1992.

[30] *Id.* Translation by the author.

[31] Mauricio García Villegas & Rodrigo Uprimny Yepes, *¿Controlando la excepcionalidad permanente en Colombia? Una defensa prudente del control judicial de los estados de excepción*, 1 (14) Documentos de Discusión de "Djs" 1 (2005).

following years some presidential decrees concerning the state of emergency were declared unconstitutional[32]—"something unprecedented in Colombian history."[33] Of course, these decisions were highly controversial (even among the court justices): some stated that it was an embarrassing decision for the court, others feared that the government would lack the means to enforce such judgments and fight violence, while yet others maintained that the court had encroached on the President's competences.[34] Despite the criticism, the decisions were accepted and respected by the government,[35] which was certainly one of the reasons why the court was so successful in the following years.

4. Transition to adulthood: the interpretation of the requirements for a *tutela*

This shift from a (not exclusive, but prevalent[36]) formal review under the Supreme Court, "that effectively marginalized courts from the political problems of the nation,"[37] to a more self-confident and independent jurisprudence of the Constitutional Court, was not only reflected in the control over the state of emergency; over the years, the court also developed a remarkable jurisprudence on fundamental rights. This was only possible because of the establishment of the *acción de tutela*, the Colombian constitutional complaint, which became one of the main instruments allowing the court to stand its ground. The *tutela* is a writ that can be filed by anyone in an informal way before a judge for immediate protection of his/her fundamental constitutional rights in the case of an action or omission by any public authority (art. 86 ¶ 1 CP). One may even file a *tutela* in the name of another party (art. 86 ¶ 1 CP). Apart from a public authority, a private party can also be defendant of a *tutela* when the plaintiff is in a subordinate position or otherwise defenseless in relation to that private party (art. 86 ¶ 4 CP). A *tutela* is admissible, however, only when there is no other (equally suitable) legal remedy to protect the individual's rights, except when it is used as a temporary device to avoid irreversible harm (art. 86 ¶ 3 CP).

The judge has to decide within ten days from the filing of the *tutela* (art. 86 ¶ 3 CP) and—to the surprise of many Colombians—in most cases, judges comply with this

[32] Constitutional Court, C-300/94, July 1, 1994; Constitutional Court, C-466/95, Oct. 18, 1995. *See also* Rodrigo Uprimny Yepes, *La judicialización de la política en Colombia: casos, potencialidades y riesgos*, 6. Sur. Revista internacional de direitos humanos 53, 55 (2007); Rodrigo Uprimny Yepes, *The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia*, *in* Democratization and the Judiciary: The Accountability Function of Courts in New Democracies 46, 55 (Siri Gloppen, Roberto Gargarella & Elin Skaar eds., 2004).

[33] José Manuel Cepeda Espinosa, *Judical Activism in a Violent Context*, 3 Wash. U. Global Stud. L. Rev. 529, 534 (2004).

[34] El Tiempo on 29/19/1995, *El polvorín de la conmoción interior*, El Tiempo (Oct. 29, 1995), *available at* http://www.eltiempo.com/archivo/documento/MAM-440206.

[35] *Constitutional Court divide a constituyente*, *supra* note 25.

[36] Cárdenas et al, *supra* note 6, 16.

[37] Schor, *supra* note 18, at 16.

deadline. The law allows the judges to adopt any measure necessary to protect the threatened or violated rights (art. 7 ¶ 2 Decree 2591 of 1991). If the appellant is not satisfied with the judgment, he or she can appeal before a superior judge or court (art. 31 Decree 2591 of 1991). Finally, every single *tutela* judgment can be reviewed by the Constitutional Court *ex officio*, that is, there is no action necessary by the appellant (art. 86 ¶ 2 CP).

Thus, for the first time in Colombia's constitutional history, the 1990 Constitution provided an enforcement mechanism for the protection of fundamental rights. These were no longer "understood to be simple prerogatives given by the state to individuals,"[38] but as a means of protecting individuals from unconstitutional interference by the state. The Constitutional Court used this opportunity to strengthen the legal position of Colombia's citizens by a wide interpretation of two requirements for a *tutela*. First, it interpreted the subsidiarity of the *tutela* very generously[39] and, second, it broadened the scope of the rights that can be protected by a *tutela*.

According to the wording of article 86 CP, any person has the right to file a *tutela* for the immediate protection of his/her fundamental constitutional rights. Strictly speaking, fundamental rights are those rights listed in the constitution in the chapter "fundamental rights" (*Título II, Capítulo 1 "De los Derechos Fundamentales"* (arts. 11–41 CP)). However, in a 1992 judgment, the Constitutional Court determined that it was its task to classify a given right as fundamental.[40] In the court's opinion, the titles in the Constitution were only auxiliary criteria for the interpretation of individual norms. Every other understanding would contravene the character of the Constitution as fully protecting human rights, and therefore, would go against the intentions of the *constituyente*.[41]

Subsequently, the court significantly expanded the catalog of enforceable rights, at first by developing the right to minimum subsistence derived from several other rights—the right to life (art. 11 CP), health (art. 49 CP), work (art. 25 CP), and social security (art. 48 CP)—and the fundamental principles of a social state and the respect of human dignity (art. 1 CP).[42] This opened the *tutela* to cases the *constituyente* might not have thought of. Suddenly, people could file a *tutela* because their pensions or their salaries were not paid properly—but only in exceptional cases where without those payments their minimum subsistence could no longer be guaranteed.[43]

In addition to these legal innovations, already astonishing in comparison to pre-1991, the court developed a theory that contributed to the track record of the *tutela*.

[38] Espinosa, *supra* note 33, at 575.

[39] Katrin Merhof, Der internationale und innerstaatliche Schutz von Arbeitnehmerrechten in der kolumbianischen Blumenindustrie [The International and National Protection of Labor Rights in the Colombian Flower Industry] 46 (2014).

[40] Constitutional Court, T-002/92, May 8, 1992.

[41] *Id.*

[42] Constitutional Court, T-426/92, June 24, 1992.

[43] Constitutional Court, T-246/96, June 3, 1996; Constitutional Court, T-584/11, July 27, 2011 (pensions); Constitutional Court, T-063/95, Feb. 22, 1995 (salary). *See also* Constitutional Court, T-535/2010, June 29, 2010. This applies not only in cases of a relation that is subject to public law but also in disputes between privates, e.g., if there is a relation of subordination (art. 86 ¶ 4 CP).

According to this theory, a non-fundamental right is enforceable provided that there is a direct conjunction with a fundamental right, or when the non-fundamental right is a condition for the full enjoyment of a fundamental right.[44] Thus it has become possible, for example, that a female worker who has been dismissed because of her pregnancy, files a *tutela* on the basis of a violation of the right of mothers to special protection in work relations (art. 53 CP), which is in itself a non-fundamental right, but in conjunction with the right to equality (art. 13 CP), a fundamental right.[45] The right to social security (art. 48 CP) or the right to health (art. 49 CP)—both non-fundamental rights—have also become enforceable because both ensure the protection of the (fundamental) right to life (art. 11 CP) or the protection of human dignity (art. 1 CP).[46] The court also determined some socioeconomic rights as fundamental in themselves. This was the case of children's rights such as the right to adequate nutrition, health, or elementary education.[47]

These examples clearly show that, already in the first years since its establishment, the court started developing an independent jurisprudence, especially on social rights—a jurisprudence that ran counter to the will of the constituent assembly which had assumed that constitutional socioeconomic rights were not enforceable.[48] The court's interpretation of the conditions for a *tutela* made this writ an unprecedented success story.[49] This broad and flexible legal remedy is one reason why the Constitutional Court in Colombia developed in a more progressive and activist way than courts in other Latin American countries with a more difficult access to justice, such as, for example, Chile. It "has likely changed the opportunity structure of those seeking to hold the government account, build legitimacy and also a supportive constituency for the courts in broader sections of the population."[50]

5. Further milestones: "structural judgments"[51]

The *tutela* was not only an instrument for the court to strengthen the (social) rights of individuals, but also exert significant influence over Colombian politics relating to the protection of socially vulnerable groups. This protection was not an accomplishment of the Court that was reached by deciding one singular *tutela* case. The instrument of

[44] Constitutional Court, T-406/92, June 5, 1992; with considerations on the legislator's will by referring to the debates in the constituent assembly.

[45] Constitutional Court, T-005/00, Jan. 13, 2000.

[46] Constitutional Court, T-534/92, Sept. 24, 1992; Constitutional Court, T-426/92, June 24, 1992.

[47] *See, e.g.*, Constitutional Court, T-049/95, Feb. 15, 1995; Constitutional Court, SU-043/1995, Feb. 9, 1995; Constitutional Court, T-002/92, May 8, 1992; Constitutional Court, T-1017/00, Aug. 9, 2000. The difference to the classification above is that the article containing these rights of children (art. 44 CP) already speaks of "derechos fundamentales de los niños", i.e., of the fundamental rights of the children.

[48] David Landau, *The Reality of Social Rights Enforcement*, 53 Harv. Int'l L.J. 401, 417 (2012).

[49] On the critic of the *tutela*, *see infra* Section 6.2.

[50] Siri Gloppen, Bruce M. Wilson et al., Courts and Power in Latin America and Africa 56 (2010).

[51] Constitutional Court, Order No. 047/13, Mar. 17, 2013; César Rodríguez Garavito, *Evaluando el impacto y promoviendo la implementación de las sentencias estructurales sobre DESC en Colombia*, *available at* www.escr-net.org/usr_doc/Rodriguez-Colombia-español.pdf.

the Court rather was to decide numerous cases at once and assign the government to develop a whole policy program on the issue.

5.1. Jurisprudence on the rights of internally displaced persons

Perhaps the most famous example of the Constitutional Court's impact is its jurisprudence on the rights of internally displaced persons (IDPs). Ranking even below Sudan, Colombia is the country with the biggest number of IDPs—victims of the internal armed conflict between left-wing guerrillas and right-wing paramilitary groups, supporting landowners or acting as drug traffickers, and the state's armed forces.[52] For a long time, the state had failed to provide sufficient means to support IDPs. This failure led to a wave of *tutelas* filed by IDPs to invoke their rights to equality, life, access to health and education, minimum income, housing, and freedom of movement.[53] From its inception, the court expressed the view that the situation of the IDPs in Colombia was a humanitarian crisis.[54] In 2003, the court dealt with over a thousand cases of IDP families, which finally led to the landmark decision T-025/04.[55] In this decision, the court declared the situation of IDPs reflected "unconstitutional state of affairs" ("*estado de cosas inconstitucional*").[56] In its judgment, the court determined that the situation was characterized by repeated and constant violation of fundamental rights affecting a multitude of people as a result of systemic failures, in particular the inactivity of the authorities in charge, and the lack of any legislative, administrative, or budgetary measures aimed at avoiding the rights violation. The court declared that individuals forcibly displaced were entitled to the rights to truth, justice, and reparation. In order to protect those rights, the court then issued orders for the adoption of measures that benefitted not only the plaintiffs but also other individuals in a comparable situation. Also, it assigned the state the task of remedying the budgetary and administrative shortcomings and of establishing the minimum mandatory levels for the protection of IDPs' rights that were to be secured in an effective and timely fashion. For this reason, the state was to calculate what sum would be necessary for an adequate protection (in particular of elderly people, women (heads of households), children, and ethnic minorities) in order to examine in a second step if such a protection was realizable.[57]

The government accepted the judgment and designed a program for IDPs, although the program did not completely meet the requirements set by the court.[58] Having foreseen this possibility, the court did not stop at this one judgment. Since the situation

[52] José Manuel Cepeda Espinosa, *How far may Colombia's Constitutional Court go to protect IDP rights?*, Forced Migration Rev. 21, 21–22 (2006).

[53] *Id.* at 22.

[54] *Id.* at 22.

[55] Constitutional Court, T-025/04, Jan. 22, 2004.

[56] A term the Court had already used before*: see, e.g.*, Constitutional Court, T-068/98, Mar. 5, 1998; Constitutional Court, SU-559/97, Nov. 6, 1997.

[57] *See, e.g.*, Constitutional Court, T-025/04, Jan. 22, 2004, 2d order, and *supra* Section 3.

[58] *Gobierno responderá a la Corte sobre desplazados*, El Tiempo (Sept. 11, 2004), *available at* http://www.eltiempo.com/archivo/documento/MAM-1501435.

of IDPs was a systemic problem, which could not be solved immediately but required financial, administrative, and institutional efforts, the court decided to maintain the competence to supervise the political progress. The judges included follow-up mechanisms in the verdict, such as public hearings with the different actors involved, and they issued numerous awards to evaluate the measures taken by the competent authorities so far, and, if necessary, imposed new orders on those authorities.[59] To this end, a special chamber charged with the follow-up of the respective judgment was founded in April 2009, as the scope of the case exceeded the capacities of the court. The sheer size of the case file—1,500,000 pages—tells the enormity of the task.[60] The follow-up process has been going on until today. In 2013 alone, twenty-six awards were issued to control the progress on the human rights' situation of IDPs.[61]

A conclusive evaluation of the effectiveness of the judgment on the protection of IDPs in Colombia would go beyond the scope of this article. Numerous publications have been written on this important judgment and its impact; the media keeps on tracking and evaluating the political measures it set in motion.[62] Most authors agree that the judgment had positive effects by putting the issue on the political agenda and ushering it into larger social debates. The judgment helped to solve the blockade in public institutions and encouraged the respective organizations and affected groups to persist in calling for the implementation of IDPs' rights.[63] Nevertheless, it is understood that there "is still a long way to go."[64]

The court's verdict set standards in a way that no other constitutional court ruling had done before. It was not only that the court demanded an overhaul of the policy on the protection of IDPs; more significantly, this was the first time that a ruling included follow-up mechanisms that continue having a lasting impact.[65] A similar development, starting with an equally revolutionary judgment, took place in yet another

[59] Constitutional Court, Seguimiento a la Sentencia T-025 de 2004, *available at* http://www.corteconstitucional.gov.co/t-025-04/.

[60] Constitutional Court, T-534/92, Sept. 24, 1992; Constitutional Court, T-426/92, June 24, 1992.

[61] Constitutional Court, Autos de Seguimiento a la Sentencia T-025 de 2004/Year 2013, *available at* http://www.corteconstitucional.gov.co/T-025-04/A2013.php.

[62] *See, e.g.*, Judicial Protection of Internally Displaced Persons: The Colombian Experience (Rodolfo Arango ed., 2009), *available at* http://www.brookings.edu/~/media/Research/Files/Papers/2009/11/judicial protection arango/11_judicial_protection_arango.PDF; César Rodríguez Garavito & Diana Rodríguez Franco, Cortes y cambio social. Cómo la Corte Constitucional transformó el desplazamiento forzado en Colombia (2010); Rafael Pizarro Nevado & Beatriz Londoño Toro, Derechos humanos de la población desplazada en Colombia Colombiaoro, de sus mecanismos de protección (2005); some examples for articles in the media: *Corte Constitucional anuncia medidas por precaria atención a desplazados*, El Espectador, January 22, 2014, *available at* http://www.elespectador.com/noticias/judicial/corte-constitucional-anuncia-medidas-precaria-atencion-articulo-183450; *Las mujeres desplazadas*, El Tiempo, July 10, 2006, *available at* http://www.eltiempo.com/archivo/documento/MAM-2096374; *Desplazados: Acnur dice que aún falta*, El Tiempo, July 17, 2003, *available at* http://www.eltiempo.com/archivo/documento/MAM-2418595.

[63] Rodríguez Garavito & Franco, *supra* note 62, at 276.

[64] Federico Guzmán Duque, *The Guiding Principles on Internal Displacement: Judicial Incorporation and Subsequent Application in Colombia*, *in* Judicial Protection of Internally Displaced Persons, *supra* note 62, 175, at 201.

[65] Christine Smith Ellison & Alan Smith, Education and Internally Displaced Persons 87 (2012).

domain of social life: the court became a driving force for a reform of the health system in Colombia.

5.2. Jurisprudence on the health system

In 2008, the court issued a sentence that bundled twenty-two *tutelas* in "representation" of numerous other writs claiming the right to health.[66] The particularity of this sentence is that—like the one on the protection of IDPs—it not only addresses each individual *tutela*, but that it contains general orders. These orders resemble public policies more than standard court rulings, i.e., the court calls for a reform of the whole health system and includes follow-up mechanisms. Among others, the court intends to correct systemic deficits that impede the user's equal access to health services, such as processes leading to inappropriate transfers of administrative costs to patients and to delays in receiving medical services. The judges enjoin the government to adopt deliberate measures to progressively realize universal health coverage until 2010, and, in case this is not possible "to achieve this goal, the reasons for this failure should be given and a new goal set and duly justified."[67]

Particular sections[68] were dedicated to the medical care of children, and the court demanded that, by October 2009, the government undertakes special measures to remove obstacles to equal access to care necessary for the adequate development of a child. This order did not include the possibility of a justification in case of a failure of implementation by the state. Should the government fail to take the necessary measures by the designated date, "it is understood that the obligatory health plan of the contributory regime will cover children from both the contributory and subsidized regimes."[69] That is, the court ordered immediate enforcement in case of non-fulfillment of the judgment's instructions.

Another feature of the judgment that should be pointed out was the role of international law. Over twenty-seven pages, the court elaborately described the development of the (international) human right to health[70] and referred several times to international obligations of the Colombian state in the judgment.[71] In particular, the judges provided an overview of the right to health framework set out by the United Nations Committee on Economic, Social and Cultural Rights.[72] They used the classification of the obligations—to respect, to protect, and to fulfill—as described by the Committee in General Comment No. 14 (2000),[73] in order to justify the orders imposed on the

[66] Constitutional Court, T-760/2008, July 31, 2008, translation by the International Network for Economic, Social and Cultural Rights, *available at* http://www.escr-net.org/usr_doc/English_summary_T-760.pdf. The extent of the judgment can be illustrated by means of the 327 (DIN A5) pages it comprises—an impressive evidence for the detailed investigation the Court had accomplished.

[67] *Id.*, 29th order.

[68] *Id.*, 21st order §§ 4.5, 5.3, 6.1.2.

[69] *Id.*, 21st order.

[70] *Id.*, 2nd annex.

[71] *Id.*, *e.g.*, §§ 3.4, 4.4.3.1, 4.5.2.2.

[72] *Id.* § 3.4.

[73] UN Economic and Social Council, *The right to the highest attainable standard of health*, E/C.12/2000/4, *available at* http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En.

government and to preclude the excuse of a lack of financial resources not to implement these orders.[74]

To summarize, the decision is significant for several reasons. First, the extent of the orders went far beyond the decision of the individual *tutelas*, and aimed to reform the whole health system. Second, it opened a public debate on the right to health and legitimized "the claim for a more equal health care system in Colombia."[75] Third, it stressed the position of the right to health as an enforceable fundamental right. As in the judgment on the rights of IDPs, the court included follow-up mechanisms, such as public hearings with the respective stakeholders, to supervise the implementation of the orders. Numerous awards were issued for this purpose, both by the special chamber to follow-up and by the competent chamber which had issued the original decision.[76]

The reaction to the measures adopted in the wake of the decision has been mixed. In 2009, the Comisón Colombiana de Juristas spoke of a "grave non-compliance" with respect to equal access to healthcare.[77] Today, some progress has been made, for example, in the unification of children's healthcare—one crucial demand by the court which had not been guaranteed prior to the judgment.[78] The number of *tutelas* claiming the right to health significantly decreased for the first time between 2008 and 2010, but it remains high, and a slight increase can has even been observed since 2010.[79] That is why criticism of the healthcare system remains valid.[80] It must be noted, however, that the peak of right-to-health *tutelas* filed was reached in 2008, and, today, these *tutelas* no longer make up such a significant portion of filed claims. [81]

5.3. What conclusion is to be drawn from "systemic judgments"?

Even though the political measures might not have been as effective as it had been hoped, this does not mean that the judgments did not have positive effects. Both the healthcare and the IDP rights judgments certainly helped raise awareness of (international and constitutional) rights in Colombia and, thereby, had "indirect"

[74] Constitutional Court, T-760/2008, July 31, 2008, § 3.4.2.9.4.

[75] Camila Gianelle-Malca, Siri Gloppen, & Elisabeth Fosse, *Giving Effect to Children's Right to Health in Colombia? Analysing the Implementation of the Court Decisions Ordering Health System Reform*, 5 J. Hum. Rts Practice 153, 172 (2013).

[76] More information on the "Sala Especial de Seguimiento a la Sentencia T-760 de 2008" *available at* http://seguimientot760.corteconstitucional.gov.co.

[77] Comisón Colombiana de Juristas, *Boletín No. 2: Serie sobre los derechos económicos, sociales y culturales*, *available at* http://www.coljuristas.org/documentos/boletines/bol_n2_desc.pdf.

[78] Gianelle-Malca et al., *supra* note 75, at 172.

[79] Defensoría del Pueblo, *La tutela y el derecho a la salud* 13 (2013), 226, *available at* http://www.defensoria.gov.co/attachment/605/207685%20La%20tutela%20y%20el%20derecho%20a%20la%20salud.%202013.%20Definitivo%20en%20imprenta.pdf.

[80] Óscar Rodriguez, *Colombia. crisis del sistema de salud*, 115 Le Monde Diplomatique: Edición Colombia (2012), *available at* http://www.eldiplo.info/portal/index.php/component/k2/item/227-colombia-la-crisis-del-sistema-de-salud; Yama Amat, *El derecho a la salud, bajo amenaza sistemática: Corte Constitucional*, El Tiempo (May 11, 2003), *available at* http://www.eltiempo.com/justicia/ARTICULO-WEB-NEW_NOTA_INTERIOR-12793421.html.

[81] Defensoría del Pueblo, *supra* note 79, at 136 *et seq.*

or "symbolic" effects—which, in the long run, might have similar consequences as "direct" or "instrumental" effects.[82] The issues addressed by the judgments entered the political agenda, launched a social debate, and helped alter the perception of the urgency and gravity of the problems—not only among politicians, but also among excluded social groups who felt validated by the judgments. The court's jurisprudence provided them with "possible strategies for political and legal action to remedy their situation"[83] and inspired them "to use legal strategies to vindicate rights and see social change."[84] To this day, the civil society continues to use both judgments as benchmarks for evaluating the work of the government.[85] Current news articles still periodically refer to both judgments.[86] Thus, it can be said that the two rulings contributed to the transformation of the Colombian society. Every organization and every individual involved in the protection of IPDs and every person affected by an insufficient protection of his or her rights, for example because of an ineffective healthcare system, can refer to the court's sentence, confident in having a strong supporter at his or her side.

So far, the history of the court seems to have been a long chain of successes. However, an institution that claims as much power as the Colombian Constitutional Court does, is bound to create opposition trying to put obstacles in its way.

6. The stumbling blocks

6.1. The wounded vanity of the Supreme Court versus the lust for power of the Constitutional Court, or the "choque de trenes"

In contrast to the Supreme Court prior to 1991, the Constitutional Court has always had power and the willingness to use it—a fact that caused conflicts with other political institutions. One of the most prominent conflicts is the power struggle between the Supreme Court and the Constitutional Court, the so-called "*choque de trenes*" ("train

[82] Rodrìguez Garavito, *supra* note 51, at 3 *et seq.*. *Contra* Rodrigo Uprimny Yepes & Mauricio García-Villegas, Democratizar a democracia. Os caminhos da democracia participativa [Democratizing Democracy. Paths to Participatory Democracy] 66, 82 (2002).

[83] Yepes & García-Villegas, *supra* note 82, at 66, 81.

[84] Alicia Ely Yamin & Oscar Parra-Vera, *How do Courts Set Health Policy? The Case of the Colombian Constitutional Court*, PLOS Medicine (Feb. 17, 2009), *available at* http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1000032.

[85] Rodrìguez Garavito, *supra* note 51, at 4. *See also, e.g.*, the event *10 años de la sentencia T-025/04: Actividades de las víctimas del conflicto*, Colectivo de Abogados (Jan. 20, 2014), discussing the situation of IDPs today, *available at* http://www.colectivodeabogados.org/10-anos-de-la-Sentencia-T-025-04.

[86] *See, e.g.*, *Corte Constitucional pide acciones ante violencia a mujeres desplazadas*, El Universal (May 31, 2013), *available at* http://www.eluniversal.com.co/cartagena/nacional/corte-constitucional-pide-acciones-ante-violencia-mujeres-desplazadas-121471; Fernando Galindo G., *Las tutelas en salud: el fracaso del modelo*, El Espectador (Sept. 13, 2013), *available at* http://www.elespectador.com/opinion/tutelas-salud-el-fracaso-del-modelo-columna-446295; *Serias falencias en ayuda humanitaria a desplazados*, La Opinion (May 31, 2013), *available at* http://www.laopinion.com.co/demo/index.php?option=com_content&task=view&id=421255&Itemid=78; Amat Yama, *El derecho a la salud, bajo amenaza sistemática: Corte Constitucional*, El Tiempo (May 11, 2013), *available at* http://www.eltiempo.com/archivo/documento/CMS-12793421.

crash").[87] The dispute between the two courts emerged as a direct result of the *tutela* which could be filed to contest an act or omission by any public authority (art. 86 ¶ 3 CP). In the second year of its existence, the Constitutional Court decided that this regulation had to be interpreted in such a way that a court would also be considered to be a public authority and, consequently, a *tutela* could be filed against a court ruling.[88] Hence, the Constitutional Court assumed the competence to review the rulings not only of the lower courts, but also of the Supreme Court. Unsurprisingly, this interpretation of "public authority" did not meet with the approval of the Supreme Court. The dispute culminated in 2000/2001 when the Constitutional Court decided that a verdict of the Supreme Court dealing with the payment of a pension[89] violated the fundamental rights of the complainant.[90] However, the Supreme Court did not reverse its judgment, but instead confirmed it "to defend the constitution and the law."[91] By doing so, the Supreme Court openly disregarded the Constitutional Court's decision.[92] Hereupon the complainant filed a *tutela* again, and it was accepted by the Constitutional Court.[93] The court argued that, according to article 27 of Decree 2591 of 1991, a judge would keep the competence to rule until the rule of law has been restored. It declared the verdict of the Superior Court—the judicial authority that preceded the Supreme Court—which had expressed the same view as the Constitutional Court, to be immediately enforceable. In the Constitutional Court's opinion, the disregard of the *tutela* had been a systematic violation of the Constitution and of international law, in particular of article 2 ¶ 3 of the International Covenant on Civil and Political Rights and article 25 of the American Convention on Human Rights (i.e., the right to judicial protection and to an effective remedy). The bank that was ordered to pay the pension, initially only paid part of the sum; the rest was finally paid after another Constitutional Court order[94]—in total eight years after the first legal proceedings. In the end, the case went before the Inter-American Commission on Human Rights, which considered the disregard of a *tutela* of the Constitutional Court as a violation of article 25 of the American Convention on Human Rights and recommended that Colombia take the necessary measures to prevent such conflicts between courts in the future.[95]

The problem has not yet been solved by the legislature, and the danger of a "*choque de trenes*" still exists today. And "clashes" happen not only between the Constitutional

[87] Given that there are not many trains in Colombia, it is unclear where this nickname comes from.

[88] Constitutional Court, C-543/92, Oct. 1, 1992 (under certain circumstances, e.g., when the ruling court lacks competence or has misconceived a binding precedent).

[89] Supreme Court, Case No. 12370, Feb. 11, 2000.

[90] Constitutional Court, Case No. SU-1185/01, Nov, 13, 2001.

[91] Constitutional Court, Order No. 045/04, Apr. 20, 2004 (referring to Supreme Court, May 16, 2002); Nelcy López Cuéllar & María Carolina Olarte Olarte, *Incumplimiento de sentencias de la Corte Constitucional de Colombia: Aparentes garantías, silenciosos incumplimientos*, 71(88) Vniversitas 113 (2007).

[92] Constitutional Court, Order No. 045/04, Apr. 20, 2004 (referring to Supreme Court, May 16, 2002); Cuéllar & Olarte, *supra* note 91.

[93] Constitutional Court, Order No. 010/04, Feb. 17, 2004.

[94] Constitutional Court, Order No. 045/04, Apr. 20, 2004.

[95] Inter-American Commission on Human Rights, Report No. 44/08, Case 12.448, July 23, 2008.

Court and the Supreme Court, but also between the Constitutional Court and the State Council (*Consejo de Estado*), the highest court of the administrative judicial branch.[96] This illustrates that the power struggle among Colombia's highest courts is not only a challenge for the Constitutional Court but also for the whole judicial branch. The faith in the judiciary certainly could suffer from conflicting jurisprudence and struggle for dominance of the two highest courts—struggles that are also called "*guerra de poder y vanidades*" ("war of power and vanities" or "clash of vanities").[97] It should be the legislator's task to find a solution to this dispute, but there is no agreement on what the role of the Constitutional Court should be in the Colombian institutional structure.

6.2. Political attacks

An institution as confident and as powerful as the Constitutional Court can be seen as an unwelcome critic. Members of the legislative and the executive have—unsuccessfully—tried several times to restrict the functions and the jurisdiction of the Constitutional Court, especially in the wake of rulings not in their favor. Both the governments of Ernesto Samper and of Andrés Pastrana, for example, planned to eliminate the constitutional review of emergency decrees for economic or national security reasons.[98] Similarly, the minister of interior in President Álvaro Uribe's government, Fernando Lodoño, announced the restriction of some of the court's functions. He claimed that the Constitution of 1991 "did bad things, but the Constitutional Court has made them even worse."[99] To prevent the court from rendering a decision on the prohibition of aerial fumigation of drug crops, he wrote a letter to the court trying to convince the justices of his own, opposing, legal opinion.[100] Senator Enrique Gómez Hurtado even planned to draft a law to abolish the Constitutional Court, because, in his view, the court was "wreaking havoc in the judiciary."[101] However, over the years, the court had already gained such a far-reaching reputation and, with it, a high level of legitimacy, that all these attempts did not pass the Congress, mostly because the proposals had been withdrawn by the government even before being introduced.[102]

Considering the current situation, it is obvious that the trust in and the reputation of the court are pillars too fragile to be relied upon: Colombians are losing trust in all

[96] *See, e.g.*, *Nuevo choque de trenes en las altas cortes*, Caracol (Feb. 16, 2009), *available at* http://www.caracol.com.co/noticias/judiciales/nuevo-choque-de-trenes-en-las-altas-cortes/20090216/nota/763992.aspx; *Tutela revive amenaza de "choque de trenes" entre altas cortes*, El Tiempo (June 14, 2013), *available at* http://www.eltiempo.com/archivo/documento/CMS-12871263.

[97] Rubén Darío Henao Orozco, Choque de vanidades. Estudio de la acción de tutela en las altas cortes colombianas (2007); Hernández-Mora, *Salud, Una injusticia: Guerra de poder y vanidades*, El Tiempo (May 21, 2008), *available at* http://www.eltiempo.com/archivo/documento/CMS-4198721.

[98] Juan Carlos Rodriguez-Raga, Courts in Latin America 81, 86 (2011).

[99] *Londoño Hoyos critica funciones de la Corte Constitucional*, La Semana (July 8, 2003), *available at* http://www.semana.com/noticias/articulo/londono-hoyos-critica-funciones-corte-constitucional/51606-3.

[100] *La polémica carta del Ministro Lodoño*, El Tiempo (Apr. 28, 2003), *available at* http://www.eltiempo.com/archivo/documento/MAM-989342.

[101] *La Corte Constitucional está generando un inmenso desorden jurídico*, Interview with Enrique Gómez Hurtado, La Semana (Apr. 7, 2004), *available at* http://www.semana.com/on-line/articulo/la-corte-constitucional-esta-generando-inmenso-desorden-juridico/63979-3.

[102] Rodriguez-Raga, *supra* note 98, at 86.

institutions, including the Constitutional Court. That Colombians put no faith in the Congress or political parties is no news,[103] but it comes as a surprise that the court is also suffering from this lack of confidence. Unfortunately, there have been no studies as to why the court is affected by the climate of mistrust in public institutions in Colombia. The weekly magazine *La Semana* assumes that the "thunderstorm" of the farmer's strike in 2013[104] infected the whole country and extended the disappointment in agricultural policy and the respective institutions to the state and its institutions in general.[105]

The election of new justices in 2009 sparked renewed debates of the court's independence. The candidates were alleged to have been nominated for their connections to the government rather than based on their merit. None of the nominees was an expert in constitutional law, had completed a PhD, or gained a special reputation because of his/her professional career.[106] One of the candidates had to withdraw on the grounds of bias in numerous proceedings because he used to be an employee of former President Uribe.[107] These incidents show that the court is not infallible, and they might have been an influencing factor in the decline in the confidence in the court. It remains to be seen if this mistrust is deeply rooted and long-lasting, or whether the people's confidence can be restored.[108]

At least the numbers of *tutelas* submitted to the courts seem to tell a different story. In 1999, fewer than 90,000 *tutelas* were filed each year; in 2006 there were around 250,000; and since 2010 more than 400,000 each year.[109] This means that, even while the institution of the Constitutional Court (and, by extension, the judiciary as a whole[110]) may not have the popular vote of confidence, the *tutela* is still considered to be an effective rights enforcement mechanism. However, these very numbers also invite criticism. The apparently endlessly growing caseload is interpreted not only as a

[103] *¿Quién representa a quién?*, La Semana (Sept. 14, 2013), *available at* http://www.semana.com/nacion/articulo/encuestas-quien-representa-quien/357598-3.

[104] See, e.g., *Colombia Agricultural Strike Sparks Fear of Shortages*, BBC (Aug. 24, 2013), *available at* http://www.bbc.co.uk/news/world-latin-america-23829482; *Colombia Farmers' Strike Gets Bogota Marchers' Support*, BBC (Aug. 29, 2013), *available at* http://www.bbc.com/news/world-latin-america-23892958.

[105] *¿Quién representa a quién?*, *supra* note 103.

[106] *Eligen dos nuevos magistrados a la Corte Constitucional*, La Semana (Mar. 25, 2009), *available at* http://www.semana.com/nacion/justicia/articulo/eligen-dos-nuevos-magistrados-corte-constitucional/101389-3; *Cambio de seis magistrados de la Corte Constitucional despierta inquietudes*, El Tiempo (Nov. 5, 2008), *available at* http://www.eltiempo.com/archivo/documento/CMS-4647082.

[107] Jose Manuel Acévedo M., *Las ternas de uno*, Vanguardia (Oct. 17, 2008), *available at* http://www.vanguardia.com/historico/11373-las-ternas-de-uno.

[108] The history of the German Bundesverfassungsgericht shows that a loss of trust might happen, but that this does not necessarily bring about a long-term crisis. In contrary, a quick recovery is possible: *see* Gary S. Schaal, Das Bundesverfassungsgericht im politischen System [The German Constitutional Court in the Political System] 175, 186 (2006).

[109] Defensoría del Pueblo, *supra* note 79, at 203.

[110] Around 70% of the respondent in two polls declared to have a negative image of the Colombian judiciary (which has been the highest rejection rate since 2005); Gobernación Santander, *Encuesta Gallup Junio 2013* (June 2013), slide 121, *available at* http://de.slideshare.net/gobernacionsantander/encuesta-gallupjunio2013; *Colombia Opina 2013*, Ipsos Public Affairs (July 31, 2013), *available at* https://www.scribd.com/doc/157634962/IF-13-024008-Colombia-Opina-2013-2-M8-pdf.

sign of people's faith in the complaint system; for the critics of the court, these numbers also show how the court has extended its powers, among others by its broad interpretation of the requirements for a *tutela*. Several lawyers blame the court for having usurped too much power and thereby causing legal insecurity in Colombia.[111] "Is the Constitutional Court too active?" is the question raised with regard to the court's jurisprudence on *tutelas*.[112] Even if the court no longer imposes such concrete measures on the government, the accusation that it acts like a legislator continues to reverberate in the media.[113] Harsh critics reproach the court for "manipulating" its sentences and, thus, for infringing upon the separation of powers.[114]

7. The Constitutional Court and the separation of powers: a "government of judges"?

It is a common allegation against constitutional courts that they interfere too much in politics.[115] In Colombia, in particular, the question whether the court's interference has led to a "government of judges"[116] or even to a "constitutional dictatorship" has been a hot topic of debate.[117] Specifically, several judgments have provoked criticism. For example, in case C-700/1999, the Constitutional Court ruled on the right to adequate housing of several claimants and enjoined the government to implement a social housing scheme according to a detailed financial plan and time schedule set out by the court.[118] Subsequently, the media spoke of the "the dictatorship of the Court"[119] and the question was raised: "Who can defend us against the judgments of the Court?"[120]

[111] José Guillermo Castro, *La Corte Constitucional: ¿demasiado activa?*, RazonPublica.com (Feb. 25, 2013), *available at* http://www.razonpublica.com/index.php/politica-y-gobierno-temas-27/3584-la-corte-constitucional-idemasiado-activa.html; Germán Alfonso López Daza, *El Juez Constitucional como Legislador Positivo: ¿Un Gobierno de los Jueces?*, 24 Revista mexicana de derecho constitucional 168, 178 (2011) (with further references), *available at* http://biblio.juridicas.unam.mx/revista/pdf/CuestionesConstitucionales/24/ard/ard5.pdf.

[112] Castro, *supra* note 111.

[113] Rafael Nieto Loaiza, *El Gobierno no es de los jueces*, El Colombiano (Oct. 26, 2013), *available at* http://www.elcolombiano.com/historico/el_gobierno_no_es_de_los_jueces-KYEC_266905.

[114] López Daza, *supra* note 111, at 171.

[115] See, e.g., for a critique of the *Bundesverfassungsgericht* in Germany, Bernhard Großfled, Götterdämmerung? [Twilight of the Gods?], 27 Neue Juristische Wochenschrift 1719 (1995).

[116] López Daza, *supra* note 111; Loaiza, *supra* note 113.

[117] María Isabel Rueda, *Se conjuró una dictatura constitucional*, El Tiempo (Feb. 27, 2010), *available at* http://www.eltiempo.com/archivo/documento/CMS-7313654.

[118] Constitutional Court, C-700/1999, Sept. 16, 1999, *confirming* Constitutional Court, C-383/99, May 27, 1999; see also Constitutional Court, C-747–99, Oct. 6, 1999; Constitutional Court, C-955/00, July 26, 2000.

[119] *La dictatura de la corte*, La Semana (July 5, 1999) (translation of the author), *available at* http://www.semana.com/economia/articulo/la-dictadura-de-la-corte/39825-3; Almut Schilling-Vacaflor & Anna Barrera, *Lateinamerikas neue Verfassungen: Triebfedern für direkte Demokratie und soziale Rechte?* [Latin America's New Constitutions: Motivating Forces for Direct Democracy and Social Rights?], 1(6) Giga Focus Lateinamerika 2 (2011).

[120] Maria Isabel Rueda, *La Corte ataca de nuevo*, La Semana (Oct. 18, 1998), *available at* http://www.semana.com/opinion/articulo/la-corte-ataca-de-nuevo/52917-3 (translation of the author).

However, when reproaching a court with undemocratic behavior, one has to bear in mind the circumstances in which a court acts. Colombia's political system has been shaped by the incapability of state institutions to solve the problems the country faces, which applies in particular to the Congress.[121] The consequences can be illustrated with the example of healthcare. The Constitutional Court has undeniably opened the door to the enforcement of the right to health by means of a *tutela*, but the right to health was actually not supposed to be a fundamental right. However, the flood of *tutelas* was not based on this wide interpretation of enforceable rights, but rather on the failure of the state to implement a functioning healthcare system. Thus, filing a *tutela* was a way of guaranteeing the right to health, which is mandated in the Constitution and international treaties. In the end, it was the high number of *tutelas* that made the court issue a "systemic decision." In 2008, every 1.5 minutes, someone filed a *tutela* to claim the right to health.[122] Between 1999 and 2012, 1,089,864 (out of 3,555,120 in total) *tutelas* were filed with regard to the right to health; that is, almost 31 percent of all *tutelas*.[123] These numbers explain why the court started to fill the "vacuum" created by the "weakness of the mechanisms for political representation."[124] By means of its systemic judgments, the court has—in contrast to the state—"proven able to develop many of the information-gathering and monitoring capacities that we usually associate with legislatures."[125] And the Constitutional Court has drawn lessons from the reactions to judgments, such as those to the above-mentioned ruling on the right to adequate housing. Subsequently, the Court started to act more cautiously in comparable cases, and refrained from imposing concrete measures on the government, but, instead, demanded in more general terms to take the necessary measures and regularly report on the progress.[126]

8. Conclusion

Even those who criticize the Constitutional Court are usually very aware of its achievements and its role in strengthening individual rights and ensuring the constitutionality of political decisions. By acting as a guarantor of rights, the court has proved its independence for over twenty years. One should not forget that the basis for such a strong court was made by the *constituyente* who developed an extensive catalog of individual rights and included the *tutela* in the Constitution. Even though the court's judgments may not have always produced the substantial results the court had expected them to, at the very least they sparked discussions and social debates on certain issues that had

[121] Landau, *supra* note 7, at 345; Rodrigo Uprimny Yepes & Villegas Mauricio García, *La Corte, defensora protagónica de la Constitución*, El Espectador (July 4, 2011), *available at* http://www.elespectador.com/impreso/politica/articulo-281888-corte-defensora-protagonica-de-constitucion. Accordingly, the trust in the Congress is very low: only 30% of the respondents of the Gallup survey had a positive image of the Congress (Gobernación Santander, *supra* note 110).

[122] More than 340,000 *tutelas* (41.5% of all *tutelas*), *see* Defensoría del Pueblo, *supra* note 79, at 136.

[123] *Id.* at 136.

[124] Yepes & García-Villegas, *supra* note 121, at 71.

[125] Landau, *supra* note 7, at 322.

[126] Which can be seen, e.g., in the judgment on IDP's rights. *See* Schilling-Vacaflor & Barrera, *supra* note 119, at 6.

not been on the political agenda before. In contrast to the time prior to the establishment of the court, not only lawyers closely follow the elections of the court justices, but the public takes a keen interest as well.[127] The media report on every important judgment, discuss them critically, and observe their political implementation, while social groups and non-governmental organizations demand the recognition of constitutional rights when trying to enforce their interests. Thus, the court has contributed to creating a constitutional awareness in Colombia—an important factor in maintaining a stable democracy in a country that still has to fight against poverty and for peace.

[127] Everaldo Lamprea Montealegre, When Accountability Meets Judicial Independence: A Case Study of 2008 Civil Society Transparency Observation of the Colombian's Constitutional Court's Nominations 1 (Masters Thesis, School of Law, 2009), *available at* http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan045166.pdf.