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Maria Paula Saffron

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Can Constitutional Courts be Counterhegemonic Powers vis-à-vis Neoliberalism? The Case of the Colombian Constitutional Court

Maria Paula Saffon¹

I. INTRODUCTION

A. The Paradoxical Expansion of Neoliberal Policies and Social Rights Protection

In recent decades, neoliberal economic policies² have expanded throughout the world while at the same time social rights³ have begun to be vigorously protected by national judicial systems. The parallel existence of these two competing phenomena constitutes a great paradox. Indeed, the breaking point between neoliberal ideas and policies and other egalitarian liberal democratic positions is, without a doubt, the discussion on social rights protection. Seen as unjust, authoritarian, and inefficient, social rights protection is strongly criticized by neoliberal theorists coming from philosophical, classical economic, and institutional perspectives. These differing perspectives share one common view: social rights protection is a great obstacle to the guarantee of civil rights, the free market, and economic development.⁴

In a time when neoliberalism seems to have triumphed, it is strange that one of the tendencies that fiercely confronts it has acquired such impetus. Since the late 1970s, and with an unforeseen importance in the 1980s and 1990s, social rights have been vigorously protected in many countries of the world.⁵ This protection has been possible through the application of international treaties⁶ that deal with the issue, as well as through the progressive activism⁷ of a large number of national courts.⁸ However, neoliberal policies have, at the same time, moved forward under the

auspices of international organizations⁹ and been welcomed by national governments.¹⁰

The vigorous judicial protection of social rights appears as a reaction to policies, such as those proposed by neoliberalism, which endanger the social achievements obtained in the 1940s, 1950s, and 1960s.¹¹ During those times—during the height of the welfare state and state redistributive policies—political and administrative powers, not judges, properly assumed the protection of social rights.¹² In contrast, political and administrative powers currently advocate for the dismantlement of redistributive policies, while judges fiercely argue that social rights should be upheld before the law.¹³

B. The Protection of Social Rights: A Tool for Emancipation or a Legitimization Tactic?

What seems particularly paradoxical about the tension between the progress of neoliberal strategies and judicial activism regarding social rights is the involvement of state actors on both sides: on the one hand, the legislative and executive branches and on the other, the judicial branch. In analyzing the relationship between law and social emancipation,¹⁴ such tension may be interpreted in two ways: first, as a true resistance by the judiciary vis-à-vis the strategies put forward by other public powers or second, as a legitimization tactic of neoliberal policies. The first interpretation posits that the tension surrounding social rights protection is a matter of clashing globalization movements. These analyses describe the existence of two different, opposing globalizing movements: the first is hegemonic globalization that propagates neoliberal ideas and policies,¹⁵ and the second is counterhegemonic globalization, which brings together ideological and political projects that try to counter neoliberal ideas and policies.¹⁶ Thinking of the judiciary as a legitimate form of resistance to other public powers fits into this latter movement. Judicial activism regarding social rights is, from a globalization analysis perspective, part of a

counterhegemonic power that fights for social justice in the context of the global economy. It does so through the imposition of legal limitations against the advance of neoliberalism and its consequences: market deregulation and an emphasis on civil and political rights as the only rights worth the state's protection. Defending social rights requires a permanent state redistributive policy, which clashes with neoliberal logic and has been expressly fought against by neoliberals. Consequently, social rights protection could become a prime example of the resistance against neoliberalism.

The second interpretation critically analyzes judicial power as a functional apparatus and means of legitimizing neoliberal strategies.¹⁷ From this perspective, the judicial protection of social rights gives the impression that neoliberalism will not impede the attainment of social inclusion or the struggle against inequality. However, this perspective fails to acknowledge that judicial protection of social rights would neither allow the full guarantee of these rights nor inhibit the advancement of neoliberal policies. Accordingly, social rights protection would be reduced to the concession of meaningless legal victories, which would not constitute a real challenge to neoliberalism. Moreover, those victories would have the perverse effect of deviating attention—through their emphasis on the legal strategy—away from the true political and counterhegemonic struggle that could resist neoliberalism. Thus, far from being counterhegemonic, this perspective posits that social rights protection would become an important part of hegemonic globalization in a neoliberal sense.

C. The Compromissary Theory: Finding Effective, yet Limited, Resistance to Neoliberal Policies Through the Judiciary

It is possible to find a compromissary theory¹⁸ that falls between the two interpretations previously described. According to this theory, progressive judicial protection of social rights constitutes effective resistance to the advancement of neoliberal policies. Nonetheless, the effects of this

resistance are, if individually considered, only partial. To overcome the limited effectiveness of judicial protection, a strategy for the defense of social rights that transcends the legal sphere must be created and carried out by nonjudicial public actors and popular social movements.

The judicial protection of social rights has the capacity of imposing some substantial limitations on the progress of neoliberal policies, which should be considered an important accomplishment of the counterhegemonic globalization project.¹⁹ Yet, in the absence of a wider counterhegemonic strategy, it is difficult for the judicial power, on its own, to prevent the advance of neoliberalism. Indeed, an effective counterhegemonic strategy would require the support of the judicial protection of social rights by both de facto and political powers in the national and international context. In addition, the strategy would have to address the transfer of rights protection to other areas of struggle beyond the legal domain (i.e. to the political arena). The judicial progressive activism regarding social rights undertaken by the Colombian Constitutional Court (CCC) is a good example of the plausibility of this interpretation.

D. Illustrating the Compromissary Theory: The Experience of the Colombian Constitutional Court

Since its creation in 1991, the CCC has actively and progressively defended the protection of social rights in areas such as health, labor, social security, education, and housing. Its endeavors have constituted effective resistance to the neoliberal policies that have been implemented in Colombia. These policies have developed the neoliberal economic clauses present in the Colombian Constitution, which clash with the social promises of the constitutional text.²⁰ Indeed, through a strategy of economic liberalization and with the support of international agencies, the Colombian government has privileged the neoliberal orientation of certain constitutional clauses over the rights-based general orientation of the Constitution.²¹ In contrast, the CCC has emphasized the importance of

protecting constitutional rights, human dignity, social inclusion, and equality and has, therefore, imposed specific, considerable limitations on neoliberal policies.

Nonetheless, the CCC's decisions in these areas focus on individual protection of social rights. The limits imposed by the CCC on neoliberalism's advancement have focused on avoiding the destruction of the essential content of those social rights. Accordingly, the CCC's decisions have imposed not-so-fragile barriers to neoliberal policies; yet, the decisions have failed to go beyond this, as they have not attacked these policies in a profound manner. Consequently, the CCC's decisions have in no way prevented the fundamental restructuring of neoliberal state policies in Colombia or posed a true challenge to these policies on a global scale.

Truthfully, because of various limitations imposed on the judiciary, the situation could not be any different or better. The problem in Colombia is that the struggle for social rights protection, which the CCC has embarked upon, has been mostly a lonely and isolated struggle. Beyond some voices coming from civil society and academia, which receive the CCC's work on these issues with enthusiasm, the legislative and executive powers strongly defend and vigorously advocate for neoliberal policies.²² In fact, these powers perceive the CCC's actions as an obstacle to the accomplishment of those neoliberal policies,²³ which they claim have democratic characteristics and broad support from certain sectors in society.²⁴ Furthermore, the legislative and executive powers' defense of neoliberal policies gains power because of the wider globalization project, encouraged and partly subsidized by de facto international powers.²⁵

Faced with an increasingly consolidated coalition of state and international powers that favor the implementation of neoliberal policies in Colombia, the CCC's decisions regarding social rights could hardly put up a meaningful barrier to prevent neoliberalism's advance. This assessment is in no way a criticism against constitutional courts in general or against the CCC in particular. It is simply intended as a warning concerning the

possible overvaluation and excessive hope that neoliberalism's critics may place on judicial progressive activism with regards to social rights. Indeed, the judicial power's field of action as a social emancipation mechanism is, *per se*, limited. However, even though judicial protection of social rights on its own is not enough to prevent the progress of neoliberal strategies, it is an important obstacle in preventing neoliberal strategies from resulting in the complete annulment of people's rights.

Moreover, while social rights protection currently does not constitute an efficient counterhegemonic strategy, it can constitute a base and motivation for such a strategy in Colombia. Social rights can become the symbol of a political and social movement²⁶ that can more openly critique the indiscriminate advance of neoliberal policies and fight for an alternative model of economic development and globalization. Even though the consolidation of an anti-neoliberal social and political movement seems quite distant in current Colombian reality given the political and *de facto* powers' alignment in favor of neoliberalism's progress,²⁷ it cannot be discarded as unattainable. The first step—a crucial step—in constructing and implementing a counterhegemonic strategy is to consider the judicial protection of social rights as an effective, although partial, resistance to the neoliberal advance.

Thus, the legal protection of social rights as a tool for obtaining justice, equality, and social inclusion is important but, on its own, insufficient. Only if it is conceived of as part of a wider political, social, and economic strategy struggling against the neoliberal model can it have long-lasting, structural counterhegemonic effects. Indeed, this wider counterhegemonic strategy should serve as a general framework and source of legal strategy. Moreover, the wider counterhegemonic strategy would work to reinforce the legal strategy by accomplishing overall strategic goals outside the legal sphere.

The case of the CCC's intervention concerning social rights in general, and health and labor rights in particular, proves the partial effectiveness of

the judiciary in resisting neoliberal policies. In the next section, I discuss the context in which the CCC was created and has acted throughout the last fifteen years, so as to identify the political and institutional elements that might have influenced its progressive activism regarding social rights protection. Then I discuss two specific examples—health and labor rights—which illustrate the way the CCC has resisted neoliberal policies by vigorously protecting social rights. For both health and labor rights, there are existent tensions between neoliberal policies, which in recent decades have been implemented in Colombia in the areas of public health and labor law, and the progressive decisions taken by the CCC concerning these matters. My analysis of those tensions shows that even though these judicial decisions have imparted effective limits to neoliberal policies concerning these issues, they have not attacked the core of these policies. This is due in part to the CCC limiting its decisions to those issues that do not pose any structural challenges to neoliberalism and to the lack of support the CCC has received from political and de facto powers. Lastly, in conclusion, I discuss the limitations of and potential for the CCC's rulings on these matters as a counterhegemonic power vis-à-vis neoliberalism.

II. A FAVORABLE SOCIOLEGAL SETTING FOR THE JUDICIAL PROTECTION OF SOCIAL RIGHTS²⁸

The advent of judicial protection of social rights in Colombia occurred through changes in the national Constitution and the creation of an accessible system of justice that encourages judicial activism. The judicial protection of social rights only became possible in Colombia with the promulgation of the 1991 Constitution, which incorporated new social, economic, and cultural rights as part of a rich Charter of Rights.²⁹ It also created the Constitutional Court as an institution specifically devoted to the interpretation of the Constitution and the protection of fundamental rights.³⁰ In contrast to the Supreme Court of Justice, the former institution in charge of carrying on the judicial review, the CCC engaged in progressive

activism, not only regarding social rights, but also regarding many other areas of constitutional law.³¹ This progressive activism was the product of several contextual elements, but it was most notably the result of the constitutional text's breadth regarding rights³² and the creation of protective judicial mechanisms.³³ It was also a consequence of the increasing weakness of social movements and political representation in Colombia.³⁴

A. Constitutional Content's Role in Progressive Activism

The CCC's progressive activism can be explained, first, by the content of the Constitution itself and the context in which it was enacted. Indeed, in stark contrast with the preceding Constitution, the 1991 Constitution incorporated a rich set of individual, social, and collective rights³⁵ accompanied with effective mechanisms for their direct enforcement by the judiciary.³⁶ This can be explained by the context in which the 1991 Constitution was enacted and, thus, by the ideological orientations it contains. Instead of being the product of a triumphant revolution, the 1991 Constitution was the result of a consensual effort to confront a hostile environment of political corruption and violence through broadening democracy.³⁷ This occurred because many traditionally excluded social and political sectors were able to participate in the Constituent Assembly, such as members of demobilized guerrilla groups, religious and political minorities, indigenous communities, and student movements.³⁸

The diverse composition of the Constituent Assembly illustrated a desire to change the country's societal model and, in particular, to create a more inclusive society and bring about social justice by imposing welfare duties upon the state. These attempts were realized partly through the creation of a broad Charter of Rights, which includes not only civil and political rights, but also social, economic, cultural, and collective rights.³⁹ In addition, the goal of attaining a more just society materialized through constitutional dispositions, which addressed the direct applicability of broadly recognized constitutional rights.⁴⁰ Indeed, with a serious intention of making these

rights effective norms rather than mere political compromises—as they were interpreted prior to 1991—the Constitution states that many of these rights are directly enforceable⁴¹ and cannot be suspended during states of siege.⁴² It also establishes that human rights treaties ratified by the Colombian state are legally binding in the same way that constitutional rights are.⁴³ Moreover, regarding social rights, the Constitution specifically recognizes them as subjective and enforceable rights and, thus, establishes a correlative duty on the state to satisfy them.⁴⁴

The effectiveness of constitutional rights was not simply guaranteed by declarations of their direct enforceability, but also by a constitutional procedural design that makes access to constitutional justice a simple, affordable, and accessible endeavor.⁴⁵ In fact, the 1991 Constitution created the *tutela* action, which permits any person to request any judge in the country to protect his or her fundamental rights whenever they are being violated or threatened by the action or omission of a state institution or of a particular person exercising a dominant position.⁴⁶ Given that the *tutela* action exempts citizens from complying with any particular prerequisites in order to make the legal claim⁴⁷ (in fact, the *tutela* action does not even need to be written⁴⁸), it is rather easy for any person to transform a complaint into a constitutional issue. Moreover, judges have to decide *tutela* actions prior to any other legal claims and, therefore, these actions are decided within a short period of time.⁴⁹ Thus, *tutela* actions provide ordinary citizens with an accessible and inexpensive mechanism to challenge the infringement of fundamental rights.⁵⁰

Along with the *tutela* action, the preservation of fundamental rights is also assured by the CCC's power to annul the *tutela* rulings of any judge.⁵¹ This power consists of the CCC's revising, by a sort of certiorari, all those *tutela* rulings that are, according to its discretion, worthy of a pronouncement.⁵² Furthermore, the CCC's power to annul or modify the rulings of all other Colombian judges also permits citizens to present *tutela* actions involving judicial decisions—even those coming from other higher

courts, such as the Supreme Court of Justice and the State Council—that severely and flagrantly violate a fundamental right.⁵³ The rulings of these *tutela* actions may end up being revised by the CCC, which then has the power to close the constitutional debate and, consequently, to preside over all judges in the country concerning constitutional matters.⁵⁴

Moreover, the CCC's powers are not limited to *tutela* actions. The constitutional tribunal also exercises judicial review through its exclusive power of deciding “public actions of unconstitutionality”, which any citizen may bring against all laws and certain governmental decrees.⁵⁵ Public actions of unconstitutionality have existed in Colombia since 1910 and formerly fell under the power of the Supreme Court of Justice.⁵⁶ Thus, since its creation, the CCC has been able to exercise abstract control of the constitutionality of norms in a progressive way. Indeed, given that judicial review has long been part of the Colombian legal tradition, neither the citizenry nor other state institutions viewed its exercise by the CCC as strange or exaggerated.⁵⁷ As with *tutela* actions, the CCC's progressive activism, through its constitutionality rulings, has also been possible because of the absence of special prerequisites for citizens bringing public actions of unconstitutionality⁵⁸ and, thus, has resulted in the frequent use of this action by citizens. Citizens can, in fact, directly petition the CCC to declare the unconstitutionality of a law without having an interest in the issue and without the need of a lawyer.⁵⁹

*B. Courts as a Default: How Political and Social Context Created
Judicial Progressive Activism*

Besides the aforementioned institutional elements, there are also extrajudicial structural factors that have stimulated the CCC's progressive activism regarding social rights.⁶⁰ To begin with, these factors concern the country's social movements and opposition parties' traditional weaknesses.⁶¹ An additional factor has been the country's deep crisis of political representation.⁶² This crisis stems from citizens feeling a general

lack of representation in the political arena, which has resulted in wide sectors of society seeking solutions from the Constitutional Court for political problems that should be, in principle, resolved by Congress and government.⁶³ Without a doubt, the CCC's activism has given it important doses of legitimacy in the eyes of the Colombian citizenry.⁶⁴

Yet, the CCC's legitimacy cannot be explained exclusively in terms of its willingness to solve the problems for which citizens have not found solutions in political institutions. In general, the CCC has taken decisions concerning these problems in a progressive—more than a conservative—way.⁶⁵ This has been especially pronounced regarding the protection of social rights.⁶⁶ The CCC's progressive activism on this matter can be explained by the fact that many of the political forces that were the main participants in the Constituent Assembly dispersed and weakened soon thereafter.⁶⁷ Thus, political institutions, and Congress in particular, were not composed of people truly committed to the development and implementation of the 1991 Constitution's goal of a social state of law and an inclusive society, and such responsibility fell to the Constitutional Court.

The lack of commitment to the Constitution's social promises by political actors was particularly acute because of internal tensions in the Constitution between social promises and neoliberal economic clauses.⁶⁸ In general, since the writing of the 1991 Constitution and with the support of international financial agencies, the Colombian government has tended to privilege the neoliberal component of the Constitution by implementing a strategy of economic liberalization.⁶⁹ The favored neoliberal strategy includes policies to privatize public services, minimize state intervention in the redistribution of wealth, and individualize social rights protection.⁷⁰

In such a setting, the CCC has ended up being one of the few state institutions eager to defend the social clauses and progressive content of the Constitution. This semi-isolated struggle against the devastating advancement of neoliberal policies in Colombia has provided the CCC with important support from certain societal sectors who sympathize with the

Constitution's social promises and benefit from their implementation.⁷¹ However, it has also been confronted by other social sectors—often more powerful—and by many state institutions who emphatically criticize the CCC's progressiveness as an obstacle to economic development.⁷² Consequently, these sectors have proposed several legal reforms in order to curtail the CCC's powers dramatically, particularly regarding the CCC's vigorous protection of social rights.⁷³

III. THE CCC'S PROGRESSIVE PROTECTION OF SOCIAL RIGHTS VIS-À-VIS THE ADVANCEMENT OF NEOLIBERAL POLICIES

The CCC's work on the subject of social rights has been prolific and varied. Indeed, the Court has produced a great number of rulings on the matter, each addressing very different issues.⁷⁴ Many of these rulings have placed important obstacles in front of, but not created structural challenges to, the state's neoliberal policies concerning various social rights.⁷⁵ Instead of exhaustively describing all of these rulings, the cases of health and labor rights will be used to illustrate this situation.⁷⁶ These issues are examples of the way in which the CCC has exercised an important, although limited, role of resistance vis-à-vis the implementation of neoliberal policies in Colombia.

A. *The Case of the Right to Health*

The CCC's activism in protecting the right to health of Colombian citizens came during a time of increased privatization of health services due to the implementation of neoliberal policies, and was made possible through citizens' utilization of the *tutela* actions to preserve their constitutional rights to health, human dignity, and personal integrity.

The Colombian health system suffered a profound restructuring in the early 1990s, with the passing of Law 100 in 1993.⁷⁷ With a marked neoliberal policy of opening public health services to market forces, the system proposed under Law 100 had attaining total basic health system

coverage as its main objective (i.e., to cover the entire Colombian population).⁷⁸ While the objective of Law 100 is not itself problematic, the methods for attaining total basic health care have led to a lack of protection for certain aspects of the right to health care.

For example, in order to accomplish total basic health care, Law 100 made it possible for private sector, mixed public-private, and already-existent public entities to compete for the provision of the service.⁷⁹ Health care providers could do so either as Health Promoter Entities (*Entidades Promotoras de Salud, EPS*) or as Health Service Providers (*Instituciones Prestadoras del Servicio de Salud, IPS*).⁸⁰ The argument behind the law was that the provision of health services should be based on a contribution system for employed people or for those with the ability to contribute as independent workers.⁸¹ Furthermore, Law 100 created a subsidized health system (SISBEN) for people unable to contribute to their own health care; SISBEN was financed with national and state fiscal resources and by contributions from those who could afford it.⁸²

The presumption behind the reform was that by putting an important part of health services in the hands of the private sector, the public health service could be more efficient and provide coverage for many of the people the previous system was unable to cover.⁸³ In order for the subsidized health system to be financed efficiently and for the “business” of providing public health service to be profitable, Law 100 and its regulatory decrees established a series of restrictions and conditions on accessing basic health system services.⁸⁴ These included, for example, the restriction of services and medicine provided in the Mandatory Health Plan (*Plan Obligatorio de Salud, POS*) as a means to exclude high-cost or preexistent illnesses, among other things.⁸⁵

These restrictions and conditions on access to medicine and treatments free of additional cost (other than an individual’s contribution) have been the main target of the CCC’s rulings concerning the right to health. Indeed, through the *conexity* doctrine,⁸⁶ the CCC has insisted that all constitutional

judges should indirectly protect the right to health in specific cases.⁸⁷ The CCC distinguishes fundamental rights—such as the rights to life, dignity, or personal integrity—from other nonfundamental rights found in the Constitution: social, economic, and cultural rights, as well as collective rights.⁸⁸ As a general rule, the Constitution establishes that only fundamental rights have immediate application and, hence, can be judicially protected in a direct manner and preferably through the *tutela* action.⁸⁹ However, finding conexity with a fundamental right, the CCC has accepted the possibility of judicially protecting nonfundamental social rights in those cases where their vulnerability would imply the violation of one or more fundamental rights.⁹⁰

Concerning the right to health, conexity is generally established with the fundamental rights to life, physical integrity, and human dignity.⁹¹ In these cases, the application of the conexity doctrine aims to protect an individual's right to health through a *tutela* ruling.⁹² For example, this happens whenever a citizen requests a judge to order a medical entity to provide free treatment or medicines, which are initially excluded from the Mandatory Health Plan.⁹³ When the *tutela* action is adjudicated against a private entity, that private entity can appeal to the state's Solidarity and Guarantee Fund (*Fondo de Solidaridad y Garantía, FOSYGA*) to recover the surplus cost not covered by the Mandatory Health Plan.⁹⁴ When a *tutela* action is adjudicated against a public entity, the public entity assumes the cost of the treatment or medicine.⁹⁵ The logic underlying the distinction between private and public entities is that private entities should not bear the cost of a state decision that affects the affordability and competitiveness of the health business.

Since its first rulings in the early 1990s, the CCC's decisions have been truly progressive, as they have implicated the protection of the right to health when the right to physical integrity or life (considered not only as the right to survive, but as the right to do so under humane conditions) is in danger. Nonetheless, until 1998, the progressive character of the

constitutional rulings on this issue did not produce any major resistance or criticisms from public authorities or members of civil society, probably because the economic effects of the rulings on the public budget were not very important.⁹⁶ Resistance and criticism began with vehemence in 1998 when the number of *tutela* rulings on health issues increased exponentially, resulting in an increase in public expenditures on health issues.⁹⁷

Tutela actions concerning the right to health went from 10 percent of total *tutela* actions presented in the country in 1995 to 30 percent in 1999.⁹⁸ This meant that, whereas in 1995 citizens brought three thousand *tutela* actions concerning the protection of the right to health, in 1999, the number increased to approximately forty thousand *tutela* actions.⁹⁹ Accordingly, the number of *tutela* actions presented against the state entity provider of public health service alone (the Social Security Institute, or *Instituto de Seguro Social, ISS*) increased from 2,999 to 10,771 in 1998. This implied an outstanding growth of public expenditure on health issues from two million dollars in 1998 to almost seven million dollars in 1999.¹⁰⁰

A plausible reason for this outstanding increase of right to health *tutela* actions may be found in the fact that constitutional judges were consistently making favorable rulings for citizens. Thus, citizens began to see *tutela* actions as a mechanism to obtain medical services that were excluded from the Mandatory Health Plan in an easy and prompt way. Practice also shows that private health providers started suggesting that citizens bring *tutela* actions in order to receive the excluded medical services because the FOSYGA would end up covering the additional cost.

This steep increase in the use of *tutela* actions in order to obtain health services that were not part of the Mandatory Health Plan has caused a great polemic for three reasons. First, the health system appears to lack long-term sustainability because of the Colombian state's scarce resources.¹⁰¹ Second, the system may cause inequality problems because only those system users who invoke the *tutela* action can have state-financed access to the services excluded from the Mandatory Health Plan.¹⁰² Finally, some

argue that the resources designated to the health service are used in an inefficient manner by covering high-cost illnesses and medicines, which prevents wider and more complete coverage of services for the rest of the population.¹⁰³

However, the other side of the story is portrayed by those who benefit concretely from the system and have seen a broadening of their health protection, as well as by other users who are more aware of the possibility that their right to health will be protected, even in those cases where the law does not provide for it.¹⁰⁴ The active promotion of individual protection of the right to health by the CCC has had a fundamental impact on the satisfaction of many citizens' basic need for health protection; consequently, it has improved their quality of life.¹⁰⁵ Furthermore, it has spread the message to many citizens that their physical integrity or dignity will be protected when faced with life-threatening situations.

Nevertheless, it is important to point out that the CCC's rulings in health matters have restricted the protection of this right to individual cases only. In so doing, the Court has limited the possible harmful effects of the health policy upon individual citizens' rights, but it has never attacked the policy's overall structure or design. In addition, having found Law 100 to be constitutional (except for certain particular dispositions), the CCC assumes that the state's health policy, considered as a whole, is compatible with the Colombian constitutional system.¹⁰⁶ Moreover, the CCC only corrects the policy's excesses or its harmful effects in particular cases, consistently making it clear that the protection of the right to health is only given in exceptional cases: when a fundamental right is in danger, the user does not have enough resources to pay for the excluded service, and a doctor from the entity in question orders the service.¹⁰⁷

Despite its sometimes limited application, the CCC's stance on the right to health care has not only placed human dignity at the core of the discussion, but it has also improved the quality of life of countless citizens who would otherwise have had to sacrifice their lives and health due to

utilitarian considerations. Furthermore, the Court's position respects the importance of the results coming from the democratic debate and, thus, justifies judicial intervention only when it identifies abuses regarding citizens' fundamental rights. Accordingly, the CCC has imposed effective barriers against the harmful effects of the neoliberal policy, which partially privatized public health services and opened it to market forces. It has done so by establishing clear limits to the potential violation of rights, even when violating citizens' rights is beneficial to the efficiency of the system and its coverage ratio.¹⁰⁸

Additionally, with this progressive protection of the right to health, the CCC has spread the message that social rights are not mere promises but that the justice system can effectively uphold them. This message has resonated in the political debate by generating initiatives promoted in Congress to reform Law 100.¹⁰⁹ These reforms seek to incorporate in the law constitutional precedent regarding the right to health and move this right from a programmatic status to that of a directly applicable right.¹¹⁰

Despite the increased discussion on the need to reform Law 100, there are still many open questions on how the changes would be made and what impact they would have on neoliberal policies in general. For example, it is still not clear whether these initiatives would mean a structural reform of Law 100 or whether they would be limited to the protection of the right to health as a fundamental right only in the exceptional cases pointed out by the CCC's doctrine. Further, these initiatives have been formulated based on scattered efforts from actors that represent minority visions in the population (particularly former judges from the Constitutional Court¹¹¹) and are not based on a cohesive movement made by health system users.¹¹² Alternatively, these initiatives may be resisted by government institutions, which might lead them to fail. Finally, these Congressional attempts compete with other projects to reform Law 100 which follow a different ideology¹¹³ that tends to reinforce the health policy's neoliberal orientation of providing efficient service and avoiding complete system collapse.¹¹⁴

According to the promoters of these neoliberal legal initiatives, the system is deemed to fail as a result of the CCC's decisions and the health subsidy offered to citizens without financial resources.¹¹⁵ Some of these proposals are currently in the final phase of becoming law—they have been passed by Congress and are awaiting for presidential sanction, which will doubtlessly come about, given that the proposals have received wide support from the government.¹¹⁶

In spite of the consequences that the imminent passage of this law will have, the CCC's activism in regards to health care and protecting the basic, and fundamental, rights to life and personal dignity of Colombia's citizenry serves a valuable and positive role in counteracting neoliberal health care policies. While the CCC's rulings address individual cases under specific circumstances, their impact has sparked political debate and may serve as a catalyst to Colombia implementing a more just and equitable system of health care in the future. Unfortunately, given the current law reform proposals, it appears this will not happen in the short term.

B. The Case of Labor Rights

The CCC's rulings on labor matters have followed a similar logic to that on health issues in the sense that, when facing a system where labor conditions are more flexible and public spending continues to be cut, the rulings have limited some aspects of the state's policy. Although the purpose of these limits has been to guarantee individual rights, they have not prevented the neoliberal strategy from continuing its path.

Since the early 1990s, the Colombian government has backed before Congress a series of neoliberal type reforms of the Labor Code (*Código Sustantivo de Trabajo*).¹¹⁷ Only until 2002 was it successful in passing a reform of that type, through Law 789.¹¹⁸ The objective of this law was to make the workers' protection system more flexible when it comes to issues such as wages, social benefits, extra hours, dismissals, and tryout periods.¹¹⁹ The assumption behind these labor reforms is that if employers have fewer

labor costs, they will be able to generate more employment and the national economy, which has long been in crisis, will be reactivated.¹²⁰

Despite the fact that several years passed since such reforms were implemented, this assumption has yet to be empirically proven, given that the unemployment rate has not significantly improved and workers' conditions seem to have worsened.¹²¹ However, the CCC has implicitly accepted this assumption through rulings, which have primarily found the labor flexibility policy justified.¹²² Indeed, when simply analyzing its constitutionality, the CCC has not struck down the legislative reform even though it has deemed it regressive when compared with previous labor protections.¹²³ Thus, although the CCC has stated that regressive measures concerning the protection of social rights are unconstitutional and violate international treaties that stipulate the principle of progressiveness of such rights,¹²⁴ according to the CCC, regressive measures can be justified if and only if (1) they fall within the criteria of reasonability and proportionality; and (2) they have the potential to help overcome a profound economic crisis.¹²⁵

Ruling C-038 of 2004 exemplifies the CCC's stand regarding regressive measures.¹²⁶ This ruling declared the constitutionality of Law 789 of 2002, even though it considerably reduced the content of several labor guarantees that workers had previously considered important gains.¹²⁷ In its decision, the CCC defended the thesis of the immovable character of acquired rights.¹²⁸ However, it nuanced this thesis by applying the proportionality principle. In particular, the CCC argued that withdrawing the protections afforded by social rights legislation should be seen as unconstitutional and, yet, it could be justified for grave reasons, such as profound economic difficulties that make it impossible to maintain the previous degree of rights protection.¹²⁹ Therefore, according to the CCC, regressive measures to augment labor flexibility, aimed at increasing employment and economic growth, would be justifiable.¹³⁰

Thus, the CCC's ruling in no way imposes a structural obstacle to the neoliberal policy of labor flexibility that favors the strengthening of the market. Moreover, in a certain manner, the CCC agrees with the policy when it justifies it as a way to overcome the unemployment crisis in the country. This does not mean, however, that the CCC has completely agreed with all the necessary measures for the implementation of such a policy; indeed, many of the Court's rulings have created effective obstacles to the policy in an attempt to prevent individual rights from being trampled. In fact, the CCC's imposition of the proportionality burden on the state and the exceptional circumstances in which it admits regressive measures are important limitations to the neoliberal policy of labor flexibility. According to the CCC, as a general rule, the state must accept the progressiveness principle in social rights and prevent these rights from being harmed in such a way that their situation is worse than before the measure.¹³¹ In case of not doing so, the state must give compelling reasons for worsening workers' rights.¹³²

On several occasions these criteria have led the CCC to declare state policies that violate workers' rights unconstitutional. Two examples are the reformation of workers' pension system and the freezing of civil servants' salaries.¹³³ These neoliberal measures no longer seek to make labor law more flexible but rather operate to constrain public spending.¹³⁴ The CCC determined that such a reason for restraining workers' rights was not compelling enough to warrant adopting regressive labor policies.

Concerning the implementation of a less favorable pension system for certain workers¹³⁵ who were close to retirement age, the CCC expressed that the workers had not acquired rights regarding their future pensions; yet, it was legitimate for these workers to expect to receive their pension under the conditions established under the previous law.¹³⁶ Therefore, the CCC ruled against the state's policy of reducing the fiscal deficit through the elimination of the pension plan, which represents an extremely heavy burden for the state.¹³⁷ Moreover, the CCC established that Congress's

freedom to rule on the matter could not be exercised in an unreasonable and disproportionate manner, as it would violate the social right to social security.¹³⁸

Regarding the civil servants' wage system, the CCC established the doctrine of the right to a vital and mobile wage.¹³⁹ Indeed, the court was facing a state policy that wanted to "freeze" (i.e. not index to inflation) civil servants' wages that were above two minimum salaries—the state's aim was to alleviate the country's long-standing and profound economic crisis.¹⁴⁰ Consequently, the CCC emitted a ruling declaring the unconstitutionality of such a measure and ordering the readjustment of all those salaries that had not been indexed.¹⁴¹

However, the CCC has not been constant in its radically protective position when it comes to the right of civil servants' wage mobility. In more recent rulings, it has decided to change its position by arguing that workers' purchasing power is untouchable for those workers who earn less than two minimum salaries. Yet, regarding the rest of the workers, a restrictive measure can be reasonable and proportional when facing an economic crisis,¹⁴² if and only if this measure is temporary and is intended to help overcome the crisis.¹⁴³ Moreover, annual salary raises can, at most, be limited to 50 percent—no more.¹⁴⁴

In the aforementioned cases, the CCC has imposed important restrictions on labor flexibility policies and cutting public spending for civil servants' pensions and wages. Furthermore, through these actions, the CCC has limited the harmful effects of neoliberal strategies on workers' rights to work, have a salary, and have social security. Nonetheless, for better or for worse, these are once again restrictions that do not address the core of neoliberal structural reform policies with respect to labor legislation; on the contrary, in a certain way, these policies are accepted and justified during an economic crisis, thereby implicitly facilitating neoliberal policies.

However, through its decisions, the CCC has had a positive impact not only upon working conditions and workers' quality of life, but also by

opening the way for a political struggle in favor of workers' rights. The Court has accomplished this by recognizing that these rights cannot be trampled upon by state policies on the matter.¹⁴⁵

In addition, throughout the years, the CCC has reinforced workers' rights by upholding the right to form labor unions and by protecting workers from direct or indirect discrimination.¹⁴⁶ Even though the right to form a labor union is a fundamental right according to the 1991 Constitution, it is also a social right in a wider sense because it constitutes a necessary condition for workers to claim the protection of their social rights.¹⁴⁷ As a consequence of the CCC's active protection, some labor union leaders have admitted seeing "the light at the end of the tunnel" of loneliness, violence, and inefficiency of political actions; a tunnel in which they have been immersed for a long period.¹⁴⁸ Through legal strategy, workers have found a new way to fight for their rights and renew their movement. Because of this, even though they are aware that it is only one tool in the struggle, they have begun to see the judicial system as a mechanism to satisfy their demands, at least in the short run.

In that way, as with health care, the CCC should be seen as an important obstacle to unchecked neoliberal labor policies, as it operates to help protect social rights of Colombian workers.

IV. CONCLUSION: LIMITS AND POTENTIALITIES OF THE JUSTICIABILITY OF SOCIAL RIGHTS AS A COUNTERHEGEMONIC MECHANISM

Without a doubt, the progressive protection of health and labor rights promoted by the CCC has constituted an important obstacle to the devastating advance of neoliberal policies implemented in these fields. The CCC has explicitly recognized that these policies cannot come to the point of invalidating such important rights as health, physical integrity, life, labor, wage mobility, social security and the expectation of receiving a pension. Furthermore, the CCC has protected the value of life under humane

conditions, upholding workers' purchasing power and workers' legitimate expectations to retire under the conditions they had foreseen.

Accordingly, the CCC has had a positive effect upon the quality of life of many human beings. Additionally, it has spread the message that when in a vulnerable situation, people's voices can be heard and the state cannot trample individual rights as it pleases. With this message, the CCC has made it possible for the discourse regarding the defense of such rights to have a place in the political arena. Moreover, it has also inspired legislative initiatives that incorporate the rules established by the CCC—for example, the right to health—and has also served to ignite the spark for weakened social movements—as in the case of workers.¹⁴⁹ In order to achieve these protections, the CCC has used different, sometimes contradictory, strategies. For instance, on the one hand, it has defended legitimate expectations and in some cases acquired rights (based upon the principle of legality), and on the other hand, it has recognized that the protection of constitutional rights can be given, in some cases, even when it is against legal dispositions (for example, when ordering the provision of health services excluded from the Mandatory Health Plan).

Therefore, the CCC has shown that its rulings concerning social rights can have direct and indirect emancipatory effects.¹⁵⁰ It has also presented itself as a political actor, defending and protecting social rights causes through different argumentative strategies.¹⁵¹ Accordingly, the CCC seems like a counterhegemonic power of great importance and ability to effectuate concrete changes. Moreover, the Court has an expansive defense strategy concerning social rights, which imposes limitations on neoliberal policies and has the potential of being extended into the political arena. Therefore, the CCC plays a crucial role in the creation of a counterhegemonic globalization project by defending the social rights protection argument that so often clashes with neoliberal policies. In so doing, the CCC is part of a wider context of progressive justiciability of social rights in different countries around the world.

However, the CCC's role as part of this counterhegemonic project has well-defined and well-established limits, which means that its actions cannot be considered a sufficient tool in order to confront the neoliberal strategy. On the one hand, as a judicial institution, the CCC finds its powers of progressive activism substantially limited by the power of the majority. The CCC cannot reach the point of replacing the democratic debate's function in the decision-making process of economic policies, nor can it decide how far rights can go. The power of the political majority in Colombia has had, until the present time, a tendency to favor the implementation of neoliberal policies to the detriment of a wider social rights protection.¹⁵² There is no doubt the explanation for this is due in part to the pressure coming from international de facto powers, such as multilateral financial institutions.¹⁵³ The latter have pressured political institutions to implement neoliberal reforms, such as the partial privatization of the health system, higher flexibility in labor law, and cuts in public spending in certain areas.¹⁵⁴ These pressures diminish government institutions' decision-making ability¹⁵⁵ and become great obstacles for the success of the social rights protection strategy.

On the other hand, despite the fact that the Court's rulings can constitute the spark that will ignite social and political mobilization in favor of social rights protection, this spark cannot stay lit on its own; it requires the existence of wider social movements that defend the political project of social rights protection at a local level. Furthermore, it is necessary to connect it with other strategies that move in the same direction at an international level in order to combat corresponding international neoliberal pressures. This implies an immense challenge for Colombia, which has been characterized for decades by weak social mobilization and fragile political movements.¹⁵⁶

The above-mentioned limits sufficiently explain the restrictions imposed on the CCC's progressive activism concerning social rights. A constitutional court exercises the role of a countermajority power; however,

it is a countermajority power that cannot go beyond the power of the majority.¹⁵⁷ Thus, even if constitutional tribunals have the crucial task of limiting the political majority's excesses, when the latter insists in following a univocal political orientation, constitutional tribunals cannot undermine the majority's democratic foundation. In Colombia, such a political orientation has become particularly definite because it is backed and pressured by de facto international powers that limit the array of options available in the decision-making process.

Consequently, the only way in which the neoliberal policies can be countered is by coping with the immense challenge of constructing social movements capable of defending social rights, as well as establishing connections with other movements that do so on the international level. The establishment of these connections concerns not only social movements and nongovernmental organizations interested in social rights protection,¹⁵⁸ but also judges themselves, who should find creative ways of establishing international networks among them.¹⁵⁹ This is by no means an easy task, but it appears as the only available strategy to use for the protection of social rights as a consolidated way of resisting neoliberal policies.

¹ Researcher of the Center for the Study of Law, Justice and Society (DeJuSticia) and law lecturer at Universidad de los Andes and the National University of Colombia. I am very grateful to Claudia Martínez, who generously helped me with the translation of this paper.

² I use the expression "neoliberal policies" in a rather strict sense to refer to the package of structural adjustment measures promoted by multilateral financial institutions in the 1990s during the first and second stages of the so-called Washington Consensus. These measures consisted of a set of conditions that countries, such as many in Latin America (including Colombia), had to fulfill in order to be granted loans. Indeed, these countries were trying to get out of the deep economic crisis of the 1980s, which was a consequence of the balance of payments deficit. See John Williamson, *What Washington Means by Policy Reform*, in *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED?* 7-20 (John Williamson ed., 1990); César A. Rodríguez & Rodrigo Uprimny, *¿Justicia para Todos o Seguridad para el Mercado? El Neoliberalismo y la Reforma Judicial en Colombia*, in *¿JUSTICIA PARA TODOS? SISTEMA JUDICIAL, DERECHOS SOCIALES Y DEMOCRACIA EN COLOMBIA* 109, 113-16 (2006) [hereinafter *Justicia para Todos*]. These measures constitute neoliberalism's paradigmatic policies, in the sense that they try

to materialize the idea (dominant in the nineteenth century and then again in the late 1970s) that the market is the most appropriate mechanism to coordinate society. However, these are not the only policies that could be considered as neoliberal. I refer to them given that they include measures, which, in health and labor law matters, have been implemented in Colombia. These matters constitute this article's main argument.

³ Strictly speaking, the expression "social rights" refers to welfare rights, which imply a positive obligation of the state to deliver a service or an economic subsidy to citizens, such as the right to education, housing, and health. However, it may also include other rights, the protection of which is determinant to claim or enjoy welfare rights, such as labor rights.

⁴ According to Rodríguez and Uprimny, neoliberal criticisms of social rights come from three types of relatively independent lines of thought: (1) those proposed by individualistic liberal philosophy authors, such as Nozick and Hayek; (2) those put forward from an economic perspective by strictly neoliberal thinkers, such as Milton Friedman; and (3) those coming from economic neoinstitutionalism founded by Douglass North. *Justicia para Todos*, *supra* note 2, at 118. From a philosophical point of view, Hayek's and Nozick's criticisms are directed to the concept of social rights itself, which, according to them, is incompatible with civil rights and leads to the destruction of the liberal order and to authoritarianism. Moreover, proponents of this perspective argue that true freedom is negative freedom or that of noninterference and that property rights are an essential factor for the protection of freedom. The market is thus the most appropriate way for social regulation, which is why the state's function should be limited to guarantee that neither it nor anyone else could interfere in the exercise of personal freedom and in the right to property. Given the importance of property in these lines of thought as a means to enjoy freedom, redistributive policies are considered as authoritarian and unjust, as they have nonconsensual effects upon property. Social rights are, consequently, mere "mirages," which represent "the path towards servitude." FRIEDRICH A. HAYEK, 2 *LAW, LEGISLATION AND LIBERTY* (1989). Authors, such as Friedman, argue from an economic and neoliberal point of view that the state can only intervene in order to guarantee the stability and the growth of the monetary base; therefore, state intervention and income redistribution policies lead to chronic deficits in the balance of payments. This leads to an unacceptable increase in the state's debt, as well as to a high inflation rate. The latter not only hampers economic growth, but it also affects the lowest income earners. It is for these reasons that the public policies promoted by the Washington Consensus are destined to reduce state intervention to a minimum in order to avoid interference with the free market, as well as to bring down the social policies promoted in earlier decades. Social rights defense is, then, one of these policies' main targets. MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE* (1980). *See also* Williamson, *supra* note 2; *Justicia para Todos*, *supra* note 2, at 122-124. Finally, contrary to neoliberal arguments, from a neoinstitutionalist perspective, the market does not successfully function on its own; rather, it requires institutions that will guarantee this. Nonetheless, not all institutions allow the market to function properly, nor do all institutions encourage economic growth. Only those institutions that do not impose transaction costs on economic exchanges and that, furthermore, assure the reduction of such transaction costs, are considered beneficial for the efficient functioning of the market, and as such, for economic growth. In this manner, those institutions that clearly

define property rights and guarantee that contracts will be upheld are preferred. An example of this kind of institution is an efficient and predictable judicial system. Social rights do not comply with any of these characteristics, as they encourage redistributive conflicts among economic actors. These actors may prefer to dedicate their efforts to the rent seeking that can be derived from these conflicts and leave aside productive economic activities that encourage economic development. DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (POLITICAL ECONOMY OF INSTITUTIONS AND DECISIONS) (1990). *See also Justicia para Todos, supra* note 2, at 124-125.

⁵ *See* Rodrigo Uprimny, *Should Courts Enforce Social Rights? The Experience of the Colombian Constitutional Court*, in JUSTICIABILITY OF ECONOMIC AND SOCIAL RIGHTS: EXPERIENCES FROM DOMESTIC SYSTEMS, 355-388 (Fons Coomans ed., 2006) [hereinafter *Should Courts Enforce Social Rights?*].

⁶ *See, e.g.*, International Covenant on Social, Economic and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

⁷ By “progressive activism,” I mean a vigorous judicial intervention on political and social matters, which is characterized by promoting social change or the emancipation of traditionally marginalized or excluded social groups. In that way, following Uprimny, I do not believe that activism and progressiveness of the judges should be identified, given that there may also be conservative activism. *See* Rodrigo Uprimny, *The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates*, in COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? 127 (Roberto Gargarella et al., eds., 2006) [hereinafter *The Enforcement of Social Rights*]. The best example of conservative activism is the activity of the United States Supreme Court in the early twentieth century. Moreover, as Santos points out, “up until recently[,] the best known instances of court activism were politically conservative, if not reactionary.” Boaventura de Sousa Santos, *Los paisajes de la Justicia en las Sociedades Contemporáneas*, in EL CALEIDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA 85 (Boaventura de Sousa Santos & Mauricio García Villegas eds., 2001).

⁸ *See The Enforcement of Social Rights, supra* note 7.

⁹ Such as the International Monetary Fund and the World Bank. *See Justicia para Todos, supra* note 2.

¹⁰ *See Justicia para Todos, supra* note 2.

¹¹ This argument is owed to Rodrigo Uprimny. On this, *see* Javier A. Couso, *The Changing Role of Law and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity*, in COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? 61, 71-72 (Roberto Gargarella et al., eds., 2006).

¹² *See id.*

¹³ According to Couso, the judicial protection of social rights was largely a consequence of the ratification of international human rights treaties, which followed the decline of the welfare state. *See id.*

¹⁴ On this discussion, *see*, among many others, MICHAEL MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); GERALD N.

ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

¹⁵ See Couso, *supra* note 11.

¹⁶ See BOAVENTURA DE SOUSA SANTOS, LA GLOBALIZACIÓN DEL DERECHO. LOS NUEVOS CAMINOS DE LA REGULACIÓN Y LA EMANCIPACIÓN [LAW'S GLOBALIZATION. THE NEW ROADS OF REGULATION AND EMANCIPATION] (1998); LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (Boaventura de Sousa Santos & César A. Rodríguez Garavito eds., 2005).

¹⁷ See among many others, DUNCAN KENNEDY, LIBERTAD Y RESTRICCIÓN EN LA DECISIÓN JUDICIAL. EL DEBATE CON LA TEORÍA CRÍTICA DEL DERECHO (CLS) (Diego Eduardo López ed., Juan Manuel Pombo & Diego Eduardo López Medina trans., Siglo del Hombre Editores 1999) (1986) [hereinafter KENNEDY].

¹⁸ This thesis is inspired by the work of MCCANN, *supra* note 14.

¹⁹ When using the expression, “counterhegemonic globalization project,” I assume, as certain globalization analyses posit, that there is more than one globalization project. Indeed, apart from what these analyses call the hegemonic globalization project, there is a counterhegemonic globalization project, which resists and tries to counter the propagation of neoliberal policies endeavored by the former. See *supra* page 2. See also SANTOS, *supra* note 16; LAW AND GLOBALIZATION FROM BELOW, *supra* note 16.

²⁰ Mauricio García & Rodrigo Uprimny, *Tribunal Constitucional e emancipação social na Colombia*, in DEMOCRATIZAR A DEMOCRACIA. OS CAMINHOS DA DEMOCRACIA PARTICIPATIVA, 298-339 (Boaventura de Sousa Santos ed., 2002) [hereinafter *Tribunal Constitucional*]. See also *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5; LUIS JAVIER ORJUELA, LA SOCIEDAD COLOMBIANA EN LOS AÑOS NOVENTA: FRAGMENTACIÓN, LEGITIMIDAD Y EFICIENCIA (2005).

²¹ See *Tribunal Constitucional*, *supra* note 20; *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5.

²² See ORJUELA, *supra* note 20; JAIRO ESTRADA, CONSTRUCCIÓN DEL MODELO NEOLIBERAL EN COLOMBIA 1970-2004 (2004); JOSÉ ANTONIO OCAMPO, RECONSTRUIR EL FUTURO. GLOBALIZACIÓN, DESARROLLO Y DEMOCRACIA EN AMÉRICA LATINA (2004).

²³ See, e.g., Alberto Carrasquilla, *Hacia un Enfoque Estratégico*, 12, 9-26 (2001) (Mr. Carrasquilla is the former Minister of Treasury).

²⁴ See Salomón Kalmanovitz, *Las Consecuencias Económicas de los Fallos de la Corte Constitucional*, 276 *Economía Colombiana* (1999); SERGIO CLAVIJO, FALLAS Y FALLOS DE LA CORTE CONSTITUCIONAL (2001).

²⁵ On this, see OCAMPO, *supra* note 22.

²⁶ For the idea of the constitutional protection of rights as a symbol of a political and social movement, see *Tribunal Constitucional*, *supra* note 20.

²⁷ See OCAMPO, *supra* note 22; Rodrigo Uprimny, *Agendas Económicas de Modernización del Estado y Reformas Constitucionales en América Latina: Encuentros y Desencuentros* [hereinafter *Agendas Económicas*] (unpublished paper).

²⁸ This section is mainly based on *Tribunal Constitucional*, *supra* 20; *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5.

²⁹ *Tribunal Constitucional*, *supra* note 20; *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5.

³⁰ See CONSTITUCIÓN POLÍTICA DE COLOMBIA, arts. 239-245 (1991) (Colom.).

³¹ *Tribunal Constitucional*, *supra* note 20.

³² See CONSTITUCIÓN POLÍTICA DE COLOMBIA, arts. 11-41 (fundamental rights); at arts. 42-77 (social, economic and cultural rights); at arts. 78-82 (collective and environmental rights); at arts. 83-94 (protection and application of rights) (1991).

³³ See CONSTITUCIÓN POLÍTICA DE COLOMBIA, arts. 83-94 (protection and application of rights) (1991).

³⁴ *Tribunal Constitucional*, *supra* note 20; *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5.

³⁵ See CONSTITUCIÓN POLÍTICA DE COLOMBIA, arts. 11-41 (fundamental rights); at arts. 42-77 (social, economic and cultural rights); arts. 78-82 (collective and environmental rights) (1991).

³⁶ See CONSTITUCIÓN POLÍTICA DE COLOMBIA, arts. 83-94 (protection and application of rights) (1991).

³⁷ *Tribunal Constitucional*, *supra* note 20.

³⁸ According to Uprimny, this pluralist composition was interpreted by many as the end of the two-party system of political domination, which controlled the Colombian electoral scene for many decades. *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5. In fact, over forty percent of the Assembly's delegates did not belong to the two traditional parties: the Liberal and Conservative parties. Furthermore, one of the main forces of the Constituent Assembly was the Democratic Alliance-April Nineteenth Movement (AD-M19 from its Spanish initials), which was created by former guerrilla group M-19 after the peace process. See JAIME BUENAHORA, *EL PROCESO CONSTITUYENTE* (1992).

³⁹ CONSTITUCIÓN POLÍTICA DE COLOMBIA, arts. 11-82 (1991).

⁴⁰ *Id.* at arts. 83-94 (1991).

⁴¹ *Id.* at arts. 4 & 85 (1991).

⁴² *Id.* at art. 214 (1991).

⁴³ *Id.* at art. 93 (1991).

⁴⁴ See *id.* at arts. 42-77.

⁴⁵ *Tribunal Constitucional*, *supra* note 20; *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5.

⁴⁶ CONSTITUCIÓN POLÍTICA DE COLOMBIA, art. 86 (1991). See also Decree No. 2591, November 19, 1991 (Colom.).

⁴⁷ See Decree No. 2591, November 19, 1991 (Colom.).

⁴⁸ *Id.* at art. 5 (Colom.).

⁴⁹ *Id.* at art. 15 (Colom.).

⁵⁰ However, the structural problems of citizens' lack of awareness of their rights are far from disappearing.

⁵¹ See CONSTITUCIÓN POLÍTICA DE COLOMBIA, art. 86 (1991); Decree No. 2591, November 19, 1991, arts. 32-36 (Colom.).

⁵² *See id.* In general, the Colombian Constitution Court [hereinafter CCC] revises a *tutela* ruling either because it has never before made a pronouncement on the subject or because it wants to change its precedent.

⁵³ *See*, among others, CORTE CONSTITUCIONAL, Rulings (Sentencias [S.]) S. T-173/93; S. T-008/98; S. SU-159/00; S.C-590/05; S. T-173, 1993; S. T-008, 1998; S. T-504, 2000; S. T-957, 2005.

⁵⁴ *Tribunal Constitucional*, *supra* note 20; *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5.

⁵⁵ CONSTITUCIÓN POLÍTICA DE COLOMBIA, art. 241 (1991). *See also* Decree No. 2067, September 4, 1991 (Colom.). The CCC can exercise judicial review of those governmental decrees that have been promulgated either in the exercise of exceptional powers conferred by Congress to regulate matters that are the competence of the legislature or to declare states of siege. Judicial review of all other governmental decrees is exercised by the State Council. Besides the competence to decide *public actions of unconstitutionality* against laws and the aforementioned decrees, previous to their promulgation the CCC decides on the constitutionality of *statutory* laws (which regulate special constitutional issues, such as fundamental rights and political participation mechanisms), laws that incorporate in the legal order international treaties ratified by the state, and laws that are objected by the President for constitutional reasons. Finally, the CCC also revises *public actions of unconstitutionality* against projects to reform the Constitution, acts convoking a referendum or a Constituent Assembly to reform the Constitution, and acts convoking and executing referendums regarding laws, plebiscites, and public consults. Regarding these projects and acts, the CCC exercises an exclusively formal revision of eventual procedural vices.

⁵⁶ *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA (1886).

⁵⁷ *Tribunal Constitucional*, *supra* note 20; *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5. *See also* Manuel José Cepeda, *La Defensa Judicial de la Constitución*, in *LAS FORTALEZAS DE COLOMBIA*, 145-87 (Fernando Cepeda ed., 2004).

⁵⁸ *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA, art. 241 (1991); Decree No. 2067, September 4th, 1991 (Colom.).

⁵⁹ *See id.*

⁶⁰ *Tribunal Constitucional*, *supra* note 20. *See also* *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5.

⁶¹ *Tribunal Constitucional*, *supra* note 20. *See also* *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5. It is difficult to identify the main cause of these traditional weaknesses because there seem to be many concurrent causes. Examples include the country's geography and precarious infrastructure, which has traditionally impeded the organization of national social movements; the enduring armed conflict, whose actors have seen in members of opposition parties and social movements a target of their attacks; and an institutional tradition of—at least formal—democracy, which, compared to other countries on the continent, has not produced the eminent need to resist the state's power, etc.

⁶² *Tribunal Constitucional*, *supra*, note 20.

⁶³ *Id.*

⁶⁴ *Id.*; *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5.

⁶⁵ *The Enforcement of Social Rights*, *supra* note 7.

⁶⁶ *Id.*; *Should Courts Enforce Social Rights?*, *supra* note 5.

⁶⁷ This was particularly the case of the AD-M19 Movement and the National Salvation Movement, which played an important role in the Constituent Assembly, but which, a few years later, practically lost all political prominence. *Tribunal Constitucional*, *supra* note 20; *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5.

⁶⁸ *Tribunal Constitucional*, *supra* note 20. See also *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5; ORJUELA, *supra* note 20.

⁶⁹ See *Tribunal Constitucional*, *supra* note 20; *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5.

⁷⁰ This article focuses on the analysis of the policies privatizing public health services and making labor laws more flexible.

⁷¹ Such is the case of the users of the *tutela* action and of many human rights nongovernmental organizations (NGOs). See *Tribunal Constitucional*, *supra* note 20; *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5.

⁷² Such is the case of members of government agencies in charge of developing economic and financial policies—like the Central Bank or the Treasury Minister—as well as of many Colombian economic analysts. See Rodrigo Uprimny, *Legitimidad y conveniencia del control constitucional a la economía* [hereinafter *Legitimidad y conveniencia*], in *¿Justicia para Todos?*, *supra* note 2, at 113-16. See also *Tribunal Constitucional*, *supra* note 20.

⁷³ *Legitimidad y conveniencia*, *supra* note 72. See also *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5.

⁷⁴ These issues include, among others, the social rights to health, labor, union formation, striking, housing, education, social security, nurture, and culture.

⁷⁵ Besides the cases of health and labor, which will be analyzed in this article, the cases of unions, strikes, and social security are also good examples.

⁷⁶ I will refer to the *tutela* and *constitutionality* rulings through which the CCC has affected neoliberal policies concerning the health system and labor law. It is important to note that *tutela* rulings are decided by panels of three Magistrates, except when, due to the relevance of the issue, the panel decides to put it under the consideration of the whole Court. In contrast, all nine members of the CCC participate in *constitutionality* rulings. According to the Court's conventions, *tutela* rulings of the different sections of the CCC are identified with a T letter; *tutela* rulings of the plenary of the CCC are identified with the letters SU; and *constitutionality* rulings are identified with a C letter. Each of these letters is followed by the number of the ruling and its issue date. I cite in such a way the rulings to which I refer.

⁷⁷ See Ley 100 de 1993 (Colom.) and its justification.

⁷⁸ See *id.*

⁷⁹ See *id.* at arts. 4, 8, 156(i).

⁸⁰ See *id.* at art. 155, nos. 2(a) & 3.

⁸¹ See *id.* at art. 157, no. 1.

⁸² See *id.* at arts. 156(j), 157, no. 2, 211-217.

⁸³ See *id.*

⁸⁴ *Id.* at art. 162.

⁸⁵ *Id.* at art. 164. The Mandatory Health Plan does not require an additional payment on behalf of the contributor.

⁸⁶ By virtue of the conexity doctrine, the CCC has accepted the possibility of judicially protecting social rights in those cases where their vulnerability would imply the violation of one or more fundamental rights or, in other words, in those cases where a social right has a relation of conexity with a fundamental right.

⁸⁷ See CORTE CONSTITUCIONAL, S. T-1239/01; S.T-150/00; S. C-112/98; S. T-645/98; S.T-395/98.

⁸⁸ This distinction is explicitly made in the constitutional text. See CONSTITUCIÓN POLÍTICA DE COLOMBIA, arts. 11-82 (1991).

⁸⁹ This rule is derived from the constitutional distinction between directly applicable, or fundamental, rights and social rights. On this, see CORTE CONSTITUCIONAL, S. T-395/98.

⁹⁰ See CORTE CONSTITUCIONAL, S. T-633/02; S.T-1239/01; S. T-150/00; S.C-112/98; S.T-395/98; S. T-271/95.

⁹¹ See CORTE CONSTITUCIONAL, S. T-645/98; S. T-395/98; S. T-494/93.

⁹² See CORTE CONSTITUCIONAL, S. T-633/02; S. T-1239/01; S. T-150/00; S. C-112/98; S. T-645/98; S. T-395/98; S. T-271/95.

⁹³ See *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5.

⁹⁴ See, e.g., CORTE CONSTITUCIONAL, S. T-1239/01.

⁹⁵ See, e.g., CORTE CONSTITUCIONAL, S. T-150/00; S. T-645/98; S. T-271/95.

⁹⁶ See *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5.

⁹⁷ See *Tribunal Constitucional*, *supra* note 20; *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5.

⁹⁸ CORTE CONSTITUCIONAL & CONSEJO SUPERIOR DE LA JUDICATURA, ESTADÍSTICAS SOBRE LA TUTELA (1999) [hereinafter CORTE CONSTITUCIONAL & CONSEJO SUPERIOR DE LA JUDICATURA]. See also *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5.

⁹⁹ CORTE CONSTITUCIONAL & CONSEJO SUPERIOR DE LA JUDICATURA, *supra* note 98.

¹⁰⁰ *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5.

¹⁰¹ *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5.

¹⁰² *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5.

¹⁰³ See Kalmanovitz, *supra* note 24.

¹⁰⁴ See *The Enforcement of Social Rights*, *supra* note 7.

¹⁰⁵ This assertion is based on the fact that many have obtained a positive judicial ruling and have thus had their health and lives adequately protected.

¹⁰⁶ CORTE CONSTITUCIONAL, S. C-1498/00; S. C-408/94. *See also*, CORTE CONSTITUCIONAL, S. C-177/98; S. C-146/98; S. C-112/98; S. C-054/98; S. C-596/97; S. C-590/97; S. C-410/97; S.C-665/96; S. C-663/96; S. C-370/96; S. C-173/96; S. C-111/96; S. C-003/96; S. C-584/95; S. C-577/95; S. C-461/95; S. C-376/95; S. C-255/95; S. C-221/95; S. C-168/95; S. C-126/95; S. C-030/95; S. C-027/95; S. C-529/94; S. C-512/94; S. C-497A/94; S. C-476/94; S. C-475/94; S. C-410/94; S. C-409/94; S. C-387/94.

¹⁰⁷ CORTE CONSTITUCIONAL, S. T-1239/01.

¹⁰⁸ *See* Kalmanovitz, *supra* note 24; CLAVIJO, *supra* 24.

¹⁰⁹ A good example of these initiatives is a bill, presented to Congress in 2005 by Senators of the Polo Democrático Alternativo leftist political party, which sought, among other things, to incorporate the CCC's precedent on the right to health. The project was voted on and passed by the Senate, but it did not manage to pass in the House of Representatives in 2006.

¹¹⁰ *See supra* note 88.

¹¹¹ The bill presented to Congress in 2005 was an initiative of the Polo Democrático Alternativo party and particularly of former Senator Carlos Gaviria, who prior to his arrival in the Senate was a justice of the CCC and ran for president in the last elections. The Polo Democrático Alternativo is a minority party, which, although has gained a lot of strength in the last years, does not always find enough support for its bills. This is particularly so in sensitive economic issues as the one discussed.

¹¹² Unfortunately, and probably due to the weakness of social movements in general, to date there is no such thing as a cohesive movement of health system users in Colombia.

¹¹³ The most recent example of this is Proyecto No. 40/06 Senado (Colom.), supported by government, which was passed in December and is now in the final process of becoming a law. This bill's main objectives are the celerity, frequency, efficiency, and competitiveness of the health service providers; the inspection, vigilance and control of the service; and the agility of reimbursements of extra costs assumed by EPS and IPS. Thus, the bill is not very concerned with problems of access to and coverage of the health service. It has also been criticized by the opposition because it maintains pronounced vertical structures within the network of service providers.

¹¹⁴ *Id.*

¹¹⁵ According to Kalmanovitz, who defends the CCC's interventions regarding civil and political rights but harshly criticizes those regarding social rights, the CCC's decisions on the specific subject of the protection of the right to health bring about a disequilibrium of the social security system. He particularly criticizes the CCC's *tutela* rulings that have ordered health providers to cover the cost of medications or surgeries to treat catastrophic illnesses, arguing that they solve the problem of a patient at the cost of compromising the right to health of millions. Kalmanovitz, *supra* note 24, at 125.

¹¹⁶ Proyecto No. 40/06 Senado (Colom.), *supra* note 113.

¹¹⁷ In particular, during President Pastrana's administration (1998-2002), the government backed two legislative initiatives aimed at reforming the Labor Code, one in 1998 and another in 2001. Neither initiative passed through Congress. *See* Juan Carlos Echeverry & Mauricio Santamaría, *The Political Economy of Labor Reform in Colombia*, 22

Documentos CEDE, available at <http://economia.uniandes.edu.co/var/vw/archives/cede/documentos/d2004-22.pdf>.

¹¹⁸ See Ley 789 de 2002 (Colom.).

¹¹⁹ See *id.* and its justification.

¹²⁰ See *id.* and its justification. For a defense of Law 789's underlying reasoning, see Jairo Nuñez, *Éxitos y fracasos de la reforma laboral en Colombia*, Documentos 43 CEDE (2005).

¹²¹ See Alejandro Gaviria, *Ley 789 de 2002: ¿Funcionó o No?* 45 Documentos CEDE 1, (2004), <http://economia.uniandes.edu.co/documentocede2004-45.htm>.

¹²² Particularly, see CORTE CONSTITUCIONAL, S. C-038/04; see also S. C-1064/01.

¹²³ See CORTE CONSTITUCIONAL, S. C-038/04.

¹²⁴ See, e.g., International Covenant on Social, Economic and Cultural Rights, *supra* note 6.

¹²⁵ CORTE CONSTITUCIONAL, S. C-038/04.

¹²⁶ CORTE CONSTITUCIONAL, S. C-038/04.

¹²⁷ In fact, this labor reform increased daily working hours (thus reducing the value of extra labor hours during that period); eliminated the leisure compensation for Sunday labor when this labor is not usual; made the tryout contract system more demanding; reduced the bonus for usual work on Sundays; reduced the amount of compensation for being dismissed without a just cause (while having an indefinite contract); and reduced labor guarantees in learning contracts. Compare Ley 789 de 2002 (Colom.), *supra* note 120 with Ley 50 de 1990 (Colom.).

¹²⁸ CORTE CONSTITUCIONAL, S. C-038/04.

¹²⁹ CORTE CONSTITUCIONAL, S. C-038/04.

¹³⁰ CORTE CONSTITUCIONAL, S. C-038/04.

¹³¹ See Rodrigo Uprimny & Diana Guarnizo, *¿Es Posible una Dogmática Adecuada Sobre la Prohibición de Regresividad? Un Enfoque Desde la Jurisprudencia Colombiana* (May 2006) (on file with author), investigaciones.php.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ These were the workers who had decided to change their contribution system and for whom the transition system was not to be valid.

¹³⁶ CORTE CONSTITUCIONAL, S. C-789/02.

¹³⁷ See generally ARMANDO MONTENEGRO & RAFAEL RIVAS, *LAS PIEZAS DEL ROMPECABEZAS. DESIGUALDAD, POBREZA Y CRECIMIENTO* 223-61 (2005) (criticizing the intervention of the CCC in the matter).

¹³⁸ CORTE CONSTITUCIONAL, S. C-789/02. For a critical approach to the arguments of this ruling, see *id.*

¹³⁹ CORTE CONSTITUCIONAL, S. C-1433/00.

¹⁴⁰ CORTE CONSTITUCIONAL, S. C-1433/00.

¹⁴¹ CORTE CONSTITUCIONAL, S. C-1433/00.

¹⁴² CORTE CONSTITUCIONAL, S. C-1064/01.

¹⁴³ CORTE CONSTITUCIONAL, S. C-1064/01.

¹⁴⁴ CORTE CONSTITUCIONAL, S. C-1017/03. In subsequent years, the CCC decided that the freezing of civil servants' salaries had become a disproportionate measure that did not acknowledge the right to wage mobility; yet, instead of declaring it unconstitutional, it ordered the government to refrain from freezing the salary increase in the following year.

See CORTE CONSTITUCIONAL, S. C-931/04.

¹⁴⁵ See CORTE CONSTITUCIONAL, S. C- 931/04; S. C-789/02.

¹⁴⁶ See CORTE CONSTITUCIONAL, S. T- 436/00; S. T-568/99; S. T-230/94.

¹⁴⁷ For the strict and broader definitions of social rights, see *supra* note 3.

¹⁴⁸ See *Tribunal Constitucional*, *supra* note 20.

¹⁴⁹ *Id.*

¹⁵⁰ Judicial rulings have direct emancipatory effects when they transform social reality in a way that effectively protects the rights of minorities or other weak populations. Judicial rulings have indirect emancipatory effects when, although they do not transform social reality, their discourse on rights helps create or strengthen existing political and social movements. For this distinction, see MCCANN, *supra* note 14.

¹⁵¹ For the idea of strategic legal argumentation as a means to obtain counterhegemonic ends in general, and the protection of rights in particular, see LAW AND GLOBALIZATION FROM BELOW, *supra* note 16.

¹⁵² See ORJUELA, *supra* note 20; *Tribunal Constitucional*, *supra* note 20; *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5.

¹⁵³ OCAMPO, *supra* note 22; *Agendas Económicas*, *supra* note 27.

¹⁵⁴ *Justicia para Todos*, *supra* note 2.

¹⁵⁵ LAW AND GLOBALIZATION FROM BELOW, *supra* note 16.

¹⁵⁶ See *Tribunal Constitucional*, *supra* note 20; *The Enforcement of Social Rights*, *supra* note 7; *Should Courts Enforce Social Rights?*, *supra* note 5.

¹⁵⁷ ALEXIS DE TOCQUEVILLE, LA DEMOCRACIA EN AMÉRICA (Fondo de Cultura Económica, 2d ed. 2001).

¹⁵⁸ For an example of international connections among NGOs, see César Rodríguez, *Global Governance and Labor Rights: Codes of Conduct and Anti-Sweatshop Struggles in Global Apparel Factories in Mexico and Guatemala*, 22 POL. & SOC'Y N2, 203, 203-33 (2005).

¹⁵⁹ On judges' international networks, see Ann-Marie Slaughter, *Courting the World*, 141 FOREIGN POL. 78, 78-79 (2004).