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## The Colombian Constitutional Court from a Prodemocratic Reading

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### ABSTRACT

This article has four parts. The first one shows the reception of the “Counter-majoritarian Difficulty” (CMD) in Colombia, it is to say, how the tension between judges and democracy, a constitutional topic created by Alexander Bickel in America, was received. The second part explains the answer that constitutional judges in Colombia gave to the tension with the democratic principle by promoting dialogical rulings. The third one describes, in a general way, the LGBTBI movement in Colombia and dialogues it generated in the Constitutional Court to achieve the protection of their rights against majorities. Finally, in the fourth part, some jurisprudence lines of the Colombian Court are shown to demonstrate how it promotes, collaborates, and aids democracy when this is not granted by the representatives.

**KEY WORDS:** counter-majoritarian difficulty, Alexander Bickel, judges, democracy, Constitutional Courts

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## **La Corte Constitucional colombiana desde una lectura prodemocrática**

### **RESUMEN**

Este artículo tiene cuatro partes. El primero expone la recepción de la “Dificultad Contramayoritana” (CMD) en Colombia, es decir, cómo se entendió la tensión entre jueces y democracia, un tópico constitucional creado por Alexander Bickel en América. La segunda parte explica la respuesta que dieron los jueces constitucionales en Colombia a la tensión con el principio democrático al promover fallos dialógicos. El tercero describe, de manera general, el movimiento LGTBI en Colombia y los diálogos que generó en la Corte Constitucional, logrando la protección de sus derechos contra las mayorías. Finalmente, en la cuarta parte, se muestran algunas líneas jurisprudenciales de la Corte colombiana, para demostrar cómo promueve, colabora y ayuda a la democracia cuando esta no es otorgada por los representantes.

**PALABRAS CLAVE:** Dificultad contramayoritaria, Alexander Bickel, jueces, democracia, Corte Constitucional

## I. The reception of the “Counter-majoritarian Difficulty”<sup>1</sup> in Colombia

For Valencia Villa, it was necessary to establish the relevance of a judicial review to protect the Constitution and its rights. He states that said constitutional contribution is definitely North American and named by Bickel<sup>2</sup>:

This experience can be improved with the help of the contemporary North American considerations about judicial review and democracy (...). This formulation of the problem by the former Yale professor illustrates the critical role of the judicial review in Colombia as it was presented before. There is nothing similar in the national legal bibliography because there is no critical theory of law, just mere legal engineering, empiric explanation of norms and current procedures without reflexive or investigative context and no historic or ideological prosecution. (Valencia Villa, 2020, pp. 68-69)<sup>3</sup>

Years later, with the 1991 Constitution, this reception arrived with the former justice Ciro Angarita Barón. In the ruling T-406/92 the jurist established the basis of what would become this new Social State of Law and for that he explained in detail what the Fundamental Rights were and how the judge should behave. To sustain this, he says:

The idea of judicial review appears as the functional key to avoid a power overflow and to achieve an adaptation of the law to the social reality. Keeper of the advantages of the wise away from society, that thinks in the objectivity of values and gifted with the advantages of those who have the commitment of considering on a daily bases ‘the reality of live litigations’, the judge has full capacity, as no other member of the political regime, to perform this role (5). In summary, the judicial review applied by courts in the contemporary constitutional State is the best formula to achieve the relation legal security-justice. (Ruling T-406/92)<sup>4</sup>

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<sup>1</sup> Friedman, B. (2004). Mediated Popular Constitutionalism. *Michigan Law Review*, 101. Friedman, B. (2002). The Birth of an Academic obsession: The History of the Counter-majoritarian Difficulty, Part five. *Yale Law Journal*, 112. Friedman, B. (1998). The History of the Counter-majoritarian Difficulty, Part One: The road of judicial supremacy. *New York University School of Law*, 73(2). Friedman, B. (2000). The History of the Counter-majoritarian Difficulty, Part Three: The Lesson of Lochner. *New York University School of Law*, 76. Friedman, B. (2000). The History of the Counter-majoritarian Difficulty, Part Four: Law’s policies. *University of Pennsylvania Law Review*, 148(4). Friedman, B. (2004). The Importance of Being Positive: The Nature and Function of Judicial Review. *University of Cincinnati Law Review*, 72. Friedman, B. (2005). The Policies of Judicial Review. *Texas Law Review*, 84. Friedman, B. (2002). The history of the Counter-majoritarian Difficulty, Part Two: Reconstruction political Court. *The Georgetown Law Journal*, 91(1).

<sup>2</sup> Bickel, A. (1962). *The Least Dangerous Branch*. Indiana: Bobbs-Merrill. Bickel, A. (1975). *The morality of consent*. New Haven & London: Yale University Press. Bickel, A. (1978). *The Supreme Court and the idea of progress*. New Haven & London: Yale University press.

<sup>3</sup> Translator’s note (TN).

<sup>4</sup> Ruling T-406/92, Constitutional Court of Colombia,. The note (5) in parenthesis it is out of text. This is, without doubt, the first textual manifestation of the “counter-majoritarian difficulty” in the Colombian Constitutional Court. In this statement the former justice supports his argumentation with Bickel in his fifth footnote. The bibliographic reference is: Bickel, A. (1962). *The Least Dangerous Branch*. Indiana: Bobbs-Merrill. and in the ruling T-428/92 this was restated. (TN)

Later on, in 1997, the former justice Manuel José Cepeda would refer to Bickel when he writes the prologue to J. Ely's book, translated to Spanish as *Democracia y desconfianza*<sup>5</sup>. From this moment forward, professors Diego López Medina and Rodrigo Uprimny are the ones that in a way made approaches to Bickel. In Colombia, other academics and the courts have generally made implicit pronouncements on the "bickelian topical". Parallel to this, and with the help of Roberto Gargarella, some academics began to comprehend the problem of the "Counter-majoritarian Difficulty" (CMD) in its version of "counter-majoritarian power" (Bassok, 2012; Burt, 1995). Therefore, this context allows building a bridge with the "judicial review skeptics", who argued in the middle of the development of contemporary constitutionalism (Scheppelle, 2003; Wen-Cheng, 2012).

Considering this, the "judicial review skeptics" are based on an argumentative lineage that relies on the idea that there is overconfidence in judges and high distrust in representative democracy. But, according to some "judicial review skeptics" as Javier Tamayo Jaramillo, Salomón Kalmanovitz or Sergio Clavijo, to argue on behalf of a thesis like this one is to strengthen the "counter-majoritarian argument" because this overconfidence on judges is an antidemocratic thesis that would weaken the people's power. This may be just partially true, because the Court has faced many debates about constitutional rights and serious unconstitutionality lawsuits, such as the IVA conflicts<sup>6</sup>, the minimum dose of drug use, the "justice and peace" law, euthanasia, abortion, jails overpopulation, the health services crisis, lawsuits against rulings, the U'wa indigenous group, the violence displaced civilians, the social security system, the reelection referendum, the marriage equality for LGTBI population, the legal framework for peace, the anti-drug policies, the anti-terrorism laws, among other topics. All of them has been a constant debate in the academy and in Colombian policies, which has placed the Court in the eye of the storm. Somehow, these rulings have probed on which side of the political spectrum the Justices of the Court are based on their decisions, and the kind of Court that we have. We also realize which kind of policies we have, what kind of Law we are developing and, overall, what kind of society we have. Because of this, the national debate around the Court's rulings had repercussions on every corner of the country, and even in other Latin American countries to observe the prodemocratic or counter-majoritarian work that nine people can do as the democracy's highest point<sup>7</sup>; this, of course, was not gratefully received by democrats, and the skepticism was obvious. Many of the Court's first rulings resulted in power struggles with the Congress and the executive power exposing the Court's existence to danger, but soon enough,

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<sup>5</sup> Ely, J. (1997). *Democracia y desconfianza. Una teoría del control constitucional. [Democracy and distrust: a theory of judicial review]*. Bogotá: Editorial Universidad de los Andes, Siglo del Hombre.

<sup>6</sup> "IVA" stands for "Impuesto de Valor Agregado", a tax on the added value of goods.

<sup>7</sup> For a detailed explanation of these thesis read: Agudelo, C.A. (2014). *La Democracia de los Jueces: La "rama menos peligrosa" como poder prodemocrático en la práctica constitucional*. Leyer. Esquirol, J.L. (2011). The turn to legal interpretation in Latin America. *American University International Law Review*, 26(4), 1031-1072. Esquirol, J.L. (2009). Writing the law of Latin America. *George Washington International Law Review*, 40, 693-732.

in the 90's, the Court won material legitimacy from its prodemocratic or rights protection rulings, processing lawsuits that lower instance judges had denied, or declaring unconstitutional some Congress or executive approved laws that were against constitutional rights and principles. Although in some of its rulings the Court gave immediate answers, in other cases, the most transcendental and structural ones for the country, it persuaded the other branches of power and the civil society by searching for alternatives or public policies in order to find a solution.

To mention a case, the overpopulation in prisons ruling in 1998 (Ruling T-153/98, Constitutional Court of Colombia)<sup>8</sup>, and a later ruling on the same subject in 2013 (Ruling T-077/13, Constitutional Court of Colombia)<sup>9</sup>, the judges insisted on the existence of overcrowding in Colombian jails, violating all kinds of inmate's rights. Nevertheless, even after the Court proffered these two rulings, its decisions did not have the impact required to move all the governmental structure towards the search of a solution, but they generated "interinstitutional dialogues", such as the one later improved in ruling T-025/04 about forced displacement.

On the other hand, in some rulings the Court has been dangerous or "counter-majoritarian". For example, when it approved the reelection of former president Álvaro Uribe in 2006, even if it was denied for a second reelection in 2010, the Court was prodemocratic, but it was counter-majoritarian because it prevented the substitution of the constitution. This means that, at first sight, it is clear that the Constitutional Court was a protagonist in two major national rulings in which the substitution of the constitution was heavily debated. One side, the executive power, promoted the reelection with a populist support from a minority group, the other side, the Court, allowed these executive power faculties. Because of this, for a promoter of deliberative democracies, these two rulings, especially the first one from 2006, the judicial review used a counter-majoritarian power because these subjects are to be decided by the first constituent, the people, in the creation of a constitution. Nevertheless, even a promoter of deliberative democracy would have to accept the fact that the Court used a prodemocratic power in the second attempt for reelection of former president Uribe.

In Colombia, we are deep in the CMD and we now know that a Court needs to have clear strategies to avoid making this jurisdictional function mistake. In the Congress of the Republic of Colombia, for example, there is frequent fear and caution to pass a law because it may be declared unconstitutional by the Court. It is important to acknowledge this, considering that the political costs of creating a law can be high, especially if its enacting and efficiency is not coherent with the Court's positions regarding the protection of constitutional rights. Nonetheless, as deliberativists would say, this would weaken the democracy because, as long as a protagonist role is given to the judges, the parliaments do not fulfill authentically their legislative

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<sup>8</sup> TN.

<sup>9</sup> TN.

functions. But this is not a problem of the judges, it is rather a problem that arises due to the lack of meditation and deliberation in the public spheres in order to adjust the laws to the constitution.

Additionally, this “democratic autorestriction” can also be due to the fact that the permanent majorities in Congress prevent certain minority laws to pass. For this reason, the incursion on a dialogue that involves judges, representatives and the society where they try to moderate their disagreements before a final decision becomes interesting. The Court recognized that in Congress, and, on other levels, the Assemblies, Councils and Local Action Boards, there are obstacles and blockades in the deliberations that are fundamental to build a society. As a result, an “interinstitutional dialogue” is necessary, in the style of Bickel and Conrado Mendes<sup>10</sup>, only to mention these two authors, in which the theory of “judicial dialogue” collaborates with democracy when these “counter-majoritarian difficulties” appear, which can be generated by the judges but also by the elected representatives.

Let us illustrate the former with an example. If the executive has the support of a sector of society in its proposals and its bills, but these are rejected by a Court, then it becomes a “counter-majoritarian power”; this was the case of the *New Deal* in the United States of America, for example (Horwitz, 1998; Hwang, 2003; Limbach, 1999). On a contrary, if the democratic support is for the judges and the executive power opposes the judicial rulings, the latter would be the one to act as a counter-majoritarian force. In both situations a CMD is generated, the interesting point here is the way it is solved, because the “counter-majoritarian” or “prodemocratic” power can be formed depending on whether or not they have democratic support.

On the other hand, in a Social State of Law some juridical and economic problems that are immersed in society for some time are noticeable, which has generated an additional social public expense and a difficulty to solidly build the constitutional building. For example, armed conflict, poverty, unemployment, external debt, just to name a few of this issues that deserve special attention from the State, along with the neglect of the rights to health access, education, liberty, security, life, equality, amongst others; all this problems demand an “interinstitutional dialogue” where the public powers must be the protagonists. Therefore, this dialogue will help to provide answers to the dilemmas that economists and lawyers create when they try to propose an alternative in order to reduce the distance between minimum resources and basic needs, leaving the Court in a good position as a prodemocratic power and earning back the lost citizenship trust. This does not excuse the Court from the big challenges that a Constitutional Court must face in an underdeveloped country which will be pointed ahead.

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<sup>10</sup> Mendes, C. (2011). *Direitos fundamentais, separação de poderes e deliberação*. Editora Saraiva. Posner, R. (2010). *How Judges Think*. Harvard University Press. Rostow, E.V. (1952). The democratic character of judicial review. *Harvard law review*, 66(2),193. Rush, M. (2010, June). Constitutional dialogues and the myth of democratic debilitation: defusing the counter-majoritarian tension?. [conference]. *Annual meeting of the Canadian Political Science Association, Concordia University, Montreal, PQ, Canada*.

Of course, this does not mean that judges can save everything. The interest in the debate between economists and lawyers is justified on the will to make the CMD noticeable as a “bickelian topical” that has reached the root of this problem. A possible defense from judges as public policies makers becomes more reasonable if it is done from an “interinstitutional dialogue” theory; \ according to Thomas Pogge: “How is it possible that extreme poverty prevails for half of humanity despite enormous economic and technological progress and in spite of illustrated laws and moral values of our mostly dominant western civilization?” (Pogge, 2005, p. 15).

Based on this political framework, Professor Helena Alviar considers that there must be a new theory in the public policies subject and that dialogue between economists and lawyers is necessary; we would add the judges and the citizenship into this dialogue. To defend this, Alviar says that the Social State of Law demands that social public expenditure be consistent with the principle of equal treatment because “the democratic direction of the economy must be based on a rise of the social public expenditure to generate jobs, and the equality must be configured through the provision of social services such as job programs, family, housing, health and social assistance policies” (Alviar, 2005, p. 155). Similarly, the jurisprudence and dialogues advances that the Court generated with public and private entities comes from the difficulties that were being solved: “For this reason, the remuneration must assure a vital minimum, as the jurisprudence of this Court has understood so and, also, being mobile, so that it always has equivalence with the price of the job done” (Alviar, 2005, p. 175).

This is the argument that this work wants to introduce: showing that constitutional judges can be collaborators of the rights and democracy. This can also be justified with the words of Rodolfo Arango: “The lack of recognition of the right to a vital minimum would affect, amongst others, the fundamental rights of life and corporal integrity, and all the others fundamental rights that such juridical position materially implies”<sup>11</sup> (Arango, 2005, p. 213) Now, if the Courts, in these cases, can aid to fulfill this objective, why should not we let them? Arango is in this same line when he defends the judicial review on taxes:

The constitutional relevance of considering the social, economic and institutional context when applying judicial review to tax laws is emphasized. This, amongst other reasons, because of the narrow relation between the contributive capacity of the person and the right to the vital minimum. (Arango, 2005, p. 216)<sup>12</sup>

After this context of the entrance of CMD in Colombia, we can show, with clearer examples, how the Colombian Constitutional Court can aid or amplify the concept of democracy when it protects the rights as a last “life insurance” of the people.

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<sup>11</sup> TN.

<sup>12</sup> TN.



## **2. The Unconstitutional State of Affairs and the promotion of deliberation based on dialogical rulings of the Colombian Constitutional Court**

The debate about the Unconstitutional State of Affairs (ECI by its Spanish denomination “Estado de Cosas Inconstitucional”) highlights the fact that the constitutional dialogue, especially between economists and lawyers, is more common than it seems. Almost more than two decades have passed since the Universidad de los Andes organized a forum where the call for this dialogue was made. However, this calling persists, in spite of the exhortations that the Court promoted through its rulings in the late 90’s and early 2000’s<sup>13</sup>. This discussion space has been caused by cases that have grown to a “maturity” state, even with the opposition from the economists and the Court’s critics. These are cases around pensions, the health system crisis, the IVA, the UPAC<sup>14</sup>, the overpopulation in prisons or the forced displacement; that’s why in all these cases the judicial intervention on the economy by the constitutional judge has been fundamental.

To express an idea about the ECI is enough to study the ruling T-025/04 about forced displacement. Now we consider the work of Luis Ricardo Gómez Pinto<sup>15</sup> where he exposes the difficulties that dialogue has to face in this case. The most relevant aspect of his work is that it drives attention towards how the Court’s methodology of the ECI has been useful to establish a space of discussion on the topics of the right and public policies, and it will help us to show to the judicial review skeptics that a Court can promote deliberation (Elster, 1998). Gómez Pinto claims:

In this context, the 26 of July of 2000 the Constitutional Court issued one of the most polemic rulings. The ruling C-955/00 opens the door for contemporary constitutional law analysts, on one hand, and critics of the economic apparel of the State, on the other, to find the ideal space to discuss about the Colombian economy and the Constitutional Court, which represents a new inflexion point to focus the national economy and the law from the same perspective. (Gómez Pinto, 2012, p. 57)<sup>16</sup>

Many detractors of the Court’s economic intervention have existed since its creation. In spite of so many discussions, even nowadays they still make the same objections

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<sup>13</sup> For a general exposition on this subject, read: Agudelo, C.A. (2017). La tensión entre la democracia y los jueces. In M.C. Jiménez & P.B. Arboleda (Eds.), *La garantía judicial de la Constitución* (pp. 55-105). Editorial Universidad de Caldas.

<sup>14</sup> “UPAC” stands for “Unidad de poder adquisitivo constante”, a variable used to calculate the cost of some housing loans.

<sup>15</sup> Gómez Pinto, L.R. (2012). *El juez de las políticas públicas*. Editorial Universidad Javeriana, Grupo Editorial Ibáñez. (hereafter Gómez Pinto, *El juez de las políticas públicas*). For another recent study regarding the ECI, read: Arboleda, P.B. & Jiménez, M.C. (Eds.). (2017). *La garantía judicial de la Constitución: la relación entre los jueces, los derechos y la constitución*. Editorial Universidad de Caldas.

<sup>16</sup> TN.



to the Court in the cases of forced displacement, the overpopulation in prisons, the health system crisis, the low quality on education, the justice system reforms, amongst others, which show a deep concern for the search of an “interinstitutional dialogue” (Rehnquist, 2002; Whitman, 2012). Additionally, this indicates that the judicial review critics and apologists have been on different shores of the debate, and this stopped the dialogue from advancing and strengthens in response to these CMD.

Gómez Pinto explains this situation from ruling C-955/00, referring to the constitutionality of Laws 546 and 550 of 1999, which proclaimed the housing regime of the country. The Constitutional Court revised the constitutionality of these laws and demanded a regime that promoted and facilitated the business reactivation and the restructuring of the territorial entities to ensure the social function of enterprises. However, instead of finding a dialogue, these suggestions generated critics towards the Court, even “considering the Court as a ‘dictator’ judge, which notably influenced the strength of its constitutionality declarations during the year 2000”<sup>17</sup>.

What the Court aimed for in this ruling was the general wellbeing, guarding the most vulnerable part of the population in housing and business subjects. However, this ‘privileges’ that the Court pursued, generated an immense social expenditure that the government did not want to assume. Something similar happened when the Court -two years before the housing ruling- in ruling T-153/98 manifested that prison problems regarding health, access to water, dignity and overpopulation, amongst others, demanded great economic efforts from the government to ensure the fundamental rights of the inmates. This ruling, even if it is “pyrrhic” for many authors (Ariza, 2015), also placed the debate on another ECI that deserved the attention of the executive and legislative powers.

Thus, in the constitutionality ruling C-955/00, the Court reiterates the fight against the proliferation of useless economic policies and the government policies that only “submerged certain sector of the population in an economic crisis, because it meant the bad use of the minimum resources of the country” (Gómez Pinto, 2012, p. 86)<sup>18</sup> Later, the tension between the judges and the government persisted when the Court again declared an ECI that insisted in an adequate distribution of the resources. This was the case of the forced displacement in the ruling T-025/04, where the Court plays a major role in the handling of the resources for the solution of a recurrent problematic and without fixing by the government.

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<sup>17</sup> Gómez Pinto (2012) says: “But, most than anything else, this was a direct attack from the administrative authorities against the conception of liberal and material justice as adopted by the Court in that moment” (p. 84). Jeremy, W. (2009). Judges as moral reasoners. *International Journal of Constitutional Law*, 7(1). Waldron, J. (2006). The core of the case against judicial review. *Yale Law Journal*, 115(6), 1346-1486.. Wen-Cheng, C. (2012). A core case for judicial review: Striking a dynamic balance between constitutionalism and democracy. *Paper presented at the Annual Meeting of the Law and Society Association*.

<sup>18</sup> Swindler, W. & Hanson, A.B. (1968). The Warren Court. *10 Wm. & Mary Law Review*, (263).

The former was represented by the indifference and little action of the executive power to answer the Court's suggestions in public policies subjects. This was a clear example of what Bickel had already explained: that the judges were considered the "least dangerous branch", while the executive still was considered the strongest power. The justice, *i.e.*, the judges, continues to work without the "gold and the blade", is a goddess that has cloaked eyes, as well as tied hands and feet.

Even if things are like this for the Court, following Bickel we find that if the judges are the "least dangerous brand" they can still be prodemocratic and promote a dialogue like a responsible professor on a "rational seminary". This is why the Court states:

The pattern of violation of the rights of the displaced population has persisted through time, without any adoption of the corrections necessary by the competent authorities, and without any implementation of the punctual solutions ordered by the Court about the violations detected in the rulings issued by now, to avoid the relapse of the authorities sued in this action. (Ruling T-025/04)<sup>19</sup>

Therefore, in ruling T-025/04 the Court explains how the fundamental and social rights have been repeatedly violated. According to Gómez Pinto: "Every person forced to abandon their birth place suffers a detriment in their already affected economic, social and cultural rights, and are frequently submitted to the dispersion of their families" (Gómez Pinto, 2012, p. 91). This is a clear example of how the Court, answering a calling from the society, was prudent by letting the government perform its executive functions. After all this, and acknowledging that neither the Congress nor the executive were taking action, the Court picked up the society's calling in a prudential attitude and waited for the "constitutional issue" to grow on maturity to decide.

Consequently, the Court recognized that the displaced population suffered a general wrongdoing, because their workplace also changed, and the low possibility of finding a new job made the satisfaction of their rights a difficult task. This was a problem for the Court that took a macroeconomic connotation, because the sources of job market, according to Gómez Pinto, had reduced in relation with the sources of job market they had before the displacement. The previous request of the Court regarding housing and jails, in the middle of all the counter-majoritarian criticism, was now again requested for the forced displacement. However, the social problems in Colombia grew when the Court's rulings about ECI -or mature cases, following Bickel's denomination- were ignored.

The former was the result, amongst other things, of the ruling T-025/04 that had a direct relation with the cases previously discussed by the Court. This meant that the

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<sup>19</sup> TN.

situation of a displaced person without job or incomes, made housing acquisition almost impossible:

The displaced population, once relocated, did not have the conditions to get a housing loan under factual and efficient terms (...) the actions implemented in ruling C-955/00 were not integrated in the protection policies for displaced groups. Equally, they cannot access to any job source because they do not have the conditions. (Gómez Pinto, 2012, p. 93)

Therefore, the Court was emphatic at establishing that the displaced people deserved a different treatment and that the resources of the budget policies should consider specially this group of people: "it manifested itself {the Court} as a judicial authority of intervention in the distribution of the public resources regarding the inattention of the public administration" (Gómez Pinto, 2012, p. 95) At this point, the works of *Dejusticia* are especially relevant regarding the investigations about following the rulings effects on forced displacement<sup>20</sup>.

Accordingly, the Court has been invited to participate in a "interinstitutional dialogue" that respects the equality principle since its first decade. However, nowadays said principle continues to be violated by the government when it ignores the Court's callings. Thus, as the competent authorities have not fixed these problems, the Court took the ECI seriously to indicate a series of parameters on public policies. Its rulings involved the participation of the Attorney General, the citizenship, the judges, the lawyers, the executive and legislative powers through the public hearings and follow-up acts, and exhortation to the academy to investigate these problems. These are the deliberative and interinstitutional dialogues that a Court promotes through dialogical rulings, driving these dialogues to new public policies from the judges and building the "legalization of policies", a practice that is becoming more common in Latin America. Now we can study briefly another answer the Court has given to the society's callings and how this has been a strategy to promote citizen deliberation.

### **3. The LGTBI Movement and the callings to the Colombian Constitutional Court**

The Colombian Constitutional Court has used wisely (in most cases) its "strategic location" to decide mature constitutional affairs. But in these cases the Court has not acted as the "last word", it just has learned to listen to the callings of some excluded groups slowly and prudentially, following the bickelian strategy- granting rights through an "interinstitutional dialogue". On the matter, Professor Julieta Lemaitre

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<sup>20</sup> For this, consider the work García Villegas, M. & Ceballos Bedoya, M.A. (Eds.).(2016). *Justicia, democracia y sociedad, diez años de investigación en Dejusticia*. Bogotá: Colección Dejusticia

(2005)<sup>21</sup> states that there was certain progressivism in the Court in the first ruling about homosexuality because the Court favored a student that was expelled because of his sexual orientation and the ruling said that “it would be unconstitutional to expel a student because of his homosexuality”. This progressivism does not appear in the following rulings of the Court (Lemaitre, 2005, p. 189) According to Lemaitre: “in the first Court certain justices appear as conservative, especially Hernando Herrera and José Gregorio Hernández. Considering that Hernando Herrera was the speaker of the ruling about the student that wore high-heel shoes and makeup (T-569/94)” (Lemaitre, 2005, p. 206). In contrast, magistrate José Gregorio Hernández as the speaker in ruling T-037/95, “decided that the lawsuit was not conceded in the case of a student of the Police School that was sanctioned for trying to seduce another student outside of the institution. In this ruling the Court used derogatory language, calling “homosexuality” an ‘abnormal condition’” (Lemaitre, 2005, p. 207). Nevertheless, just a year after this position, a much more progressive and prodemocratic ruling that included the excluded people appeared in ruling C-098/96, in which former magistrate Eduardo Cifuentes amplified the doctrine of the right to free sexual choice.

The previously stated facts are proof of how the legal concepts are introduced or excluded by a Court from the society’s callings, basing their decisions on the beliefs, ideologies and prejudgments of those who decide through the rulings. Because of this, the methodology used by professor Lemaitre allows to enlighten the “interinstitutional dialogue” promoted by the Court around the autonomy and the free development of personality, amongst other rights. As its clear, and paraphrasing Levi and Bickel, legal concepts and mature cases, homosexuality in this case, have gone in a progressive scale in favor of the LGBTBI community, to the point that nowadays the concept of “equal marriage” is considered.

But this has not been an answer only from the Court; it is due to (i) the multiple lawsuits filed by the social movements against the legislative majorities that do not agree with a non-heterosexual way of life. (ii) Those that are outside the legislative majorities, but promote equal marriage inside the Congress. (iii) The magistrates of the Constitutional Court that have granted rights to the LGBTBI community in different rulings. And (iv) a series of dialogues that allowed equal marriage, in ruling C-577/11.

In Bickel’s terms, this is the most representative case of a mature constitutional affair, in which the Court can decide without committing to judicial activism, because it gave the legislative the necessary time to establish a law on that subject. Of course, an LGBTBI representative would argue that this constitutional affair is not mature enough to close the debate. In the words of the Court:

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<sup>21</sup> TN.

It is possible to say that homosexual couples also have the right to decide if they want to start a family, in a regime that offers more protection than it could provide for a *de facto* marital union –which they can have if they want–, because constitutionally it is possible to establish a contractual institution as a form of starting a homosexual family in a different way of the marital union in fact, and to grant the right to the free development of personality, also overcoming the protection deficit suffered by the homosexuals. (Ruling C-577/11)<sup>22</sup>

Even when the Court gave the Congress a two-year deadline to decide on the form of contractual institution for equal marriage, years passed and the legislative power did not take any position on this matter. A new dispute about same-sex marriage possibility was caused. The notaries were obligated to formalize those partnerships, even against the desire of a certain group of society and themselves, because there was no law regulating equal marriage. However, the Court's decision obliged them; therefore, to overcome the law's empire in the rights subject it is indispensable to promote a "judge's democracy" based on an "interinstitutional dialogue" and with the use of "passive virtues" (Kronman, 1985; Peretti, 1999). Moreover, notaries, legislators, judges and the society also need to deal with the topic of same-sex couple adoption (Bickel, 1962; Heise, 2000). Similarly, they will have to deal with abortion, euthanasia, the minimum dose of drug use, free development of personality, equality, liberty, freedom of speech, freedom of conscience, amongst other fundamental rights that still generate constitutional or counter-majoritarian difficulties.

Hence, the Court has protected the excluded minorities, but not in the way that J. Ely intended, *i.e.*, by not making the judges only into guardians of the participation mechanisms, but rather using the "passive virtues"; the Court has suggested the legislatures to protect and grant the fundamental rights. If the legislative power does not fulfill its constitutional functions, the Court will rule with its directions, which are justified by the calling of minorities and the fundamental rights and principles that have been discussed in the society, not affecting other recognized rights: "Thus, the constitutional jurisprudence contributes to favor a healthy and articulated political discussion about topics that are essential to the life of the nation" (Restrepo, 2003, p. 11)<sup>23</sup>.

In conclusion, some LGBTI rights would not have been granted without the judges intervention because, amongst other things, all representative democracy did regarding this community's callings was to block the democratic procedures in Congress. That is why democracy is not only achieved in the congress, there is another way of achieving it: in the streets, at the dinner table, in the academy, etc., but all of this has a result if a Constitutional Court responds to these interinstitutional callings, building dialogical

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<sup>22</sup> TN.

<sup>23</sup> TN.

rulings and making possible the return of those debates to the citizenship in order to have an argumentative enrichment of the deliberative constructions.

#### **4. Some prodemocratic rulings of the Colombian Constitutional Court**

The role of the judges in Colombia has significantly changed thanks to a greater conception of the sources of law that overcomes the mere legalism given through the law (Kennedy, 1980, Kennedy, 2008). If in Colombia this culture still needs to be consolidated amongst the instance judges, the Constitutional Court has understood the law differently. The progressivism of the Court can be seen by the hand of rulings that have been milestones and precedents in Colombia and where a calling is made by the academy to strengthen this jurisprudence lines, not to delete them or turn the Court in a regressive one, like it has in some of the most recent rulings, being a counter-majoritarian Court.

There is a greater listing of rulings that show how the Court has built a stronger democracy than the one we see on parliaments, or at least it tries to widen the rights through its decisions and placing restrictions to the legislative power when it violates the rights and guaranties of the citizens (Dahl, 1986). This is not the space to show all this jurisprudence lines, it will be enough just to point out some cases in which the Court has contributed to make a prodemocratic Court in spite of its non-democratic origin, countering the counter-majoritarian thesis that state that the constitutional judges enact powers against the majorities.

Some examples of this are the rulings about homosexuality, such as T-097/94, C-507/99, T-100/98, and C-481/98, not to mention the latest rulings about patrimonial goods, marriage, and adoption. The decisions on overpopulation in prisons, the T-153/98, or the ruling about forced displacement T-025/94 are examples of the prodemocratic work of the Court. Also rulings T-128/94 and T-205/94 regarding abandoned children or victims of abuse, in which the role of the constitutional judge in building the constitution is clear. Of course, as it can be seen so far, these accomplishments were made along with litigators, citizens and the favorable answers of the Court.

The same happens with rulings T-079/94, T-211/95 and T-683/2 that have protected pregnant students from being expelled of their schools. Likewise, rulings like T-036/95 and others that protect senior citizens who have special protection as mandated by the constitution; or the protection of AIDS patients in T-849/01 and T-843/04. So far, we have named important rulings regarding the protection of rights and liberties. On economic matters the Court is not left behind, because in the rulings about IVA, C-776/03, or housing, C-383/99 and C-700/99, it has protected the citizens from the neo-liberal economic policies that the government has tried to establish. Consequences of these policies are also abuses to the health

system, the Court answered, for instance, with the famous ruling T-760/08. For a better tracking of these subjects the magnificent work of Dejusticia can be studied: *Justicia, democracia y sociedad*<sup>24</sup>.

In recent years, the Court also has taken seriously the constitutional mandate about the protection of the environment, subject that was left behind in the Court and is still a great challenge for the judges and for public policies in general. There is a whole jurisprudence line created around the protection of the environment and natural resources, rulings that are coherent with the “green constitution” that lies in the Political Constitution of Colombia, e.g., C-123/14, C-449/15, C-035/16 and C-077/16, to only mention a few. And the most famous ruling, T-622/16 about the Atrato River, where the Court, through dialogical judicial activism, has created an important precedent in environmental protection, stating that the earth, the rivers, etc. are entitled to have rights, not just in their relations with human beings, but for themselves. In that case, the constitutional judges recognized a reconciliation between the cultural and the environmental constitution, stating the existence of “biocultural rights”; regarding this issues, there is plenty of bibliography, but a salient work is *La Corte ambiental. Expresiones ciudadanas sobre los avances constitucionales*<sup>25</sup>.

Anyway, this prodemocratic work of the Court and its prestige image depends on great jurisprudence lines that it has created not only for the country, but for other courts that see in the Colombian Constitutional Court a beacon on rights subjects. And this is the image to hold against a “counter-majoritarian image” that is being created in the academy, policies and citizenship in general (Colón Ríos, 2011). All of this without mentioning the famous rulings about the Social State of Law, specially T-406/92, the abortion rulings, particularly C-355/06, the decisions about euthanasia, regarding mercy killing, C-239/97, the famous ruling about personal drug dose, C.221/94. In a time so convulsed for Colombia because of the drug trafficking mafias, these rulings are work material to teach in the academy the role of the constitutional judge.

Another current relevant issue is the fracking regulation; the Court must search for the good praxis regarding the handling of the contaminated water and prohibit fracking in zones with water shortage, or assure that the fracking projects are submitted to citizen consultation and approval by the affected municipalities. Also the rulings regarding the legal framework for peace, its implementation, jurisdiction, etc., where the countries with an acute democratic crisis, like Colombia, place their trust in the courts to ensure the pacts and treaties made between subversive groups and the citizenship, as has happened in Taiwan, Mongolia and Korea. Now, even if some courts appeared to merely grant the transition to democracy, the courts are

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<sup>24</sup> Dworkin, R. (1996). *Freedom's law: The moral reading of the American Constitution*. Oxford University Press.

<sup>25</sup> Orduz, N. (Ed.). (2018). *La Corte Ambiental, expresiones ciudadanas sobre los avances constitucionales*. Heinrich Böll Stiftung.



much more than that and they must face great challenges. Also, because transition processes led to new roles for the judges, like the Hungarian Constitutional Court in 1989, when it had to deal with many controversial affairs like the welfare system, unemployment, the Welfare State disappearing and the reconstruction of the private property (García Villegas and Ceballos Bedoya, 2016). Something similar happened to the courts of Lithuania, Slovakia and Czech Republic. So the building of democracy by the Court as an aid or collaboration with the other public powers is manifest, but the great challenge is to work on different fronts to aid the constitutional construction, which requires various adjustments on different areas, especially on the basis, where it is necessary to strengthen the ideas of Nino and Habermas: that the judges must guard the democratic process, the personal autonomy and the continuity of the constitutional practice, or in the words of the German philosopher: guarding the self-government, autonomy and deliberation.

## **Conclusion**

The democratic deliberation must be expanded, and the constitutional judges have been doing it in Colombia, this is a thesis that has been being consolidated in the academy, as it is also recognized now by Roberto Gargarella, a great critic of the Constitutional Courts as the “last word”. For this author, following another North American thesis, deliberation is also a task for the Constitutional Courts with certain requirements (Gargarella; 2006, Aguilar de Duque, 2012).

To achieve this, the Courts must be guardians of the strengthening of the two fundamental principles: the democratic and popular sovereignty principle and the supremacy of rights and human dignity principle. The Court must follow the progressive and democratic tendency, but in a stronger fashion, not only respecting the participation mechanisms as Ely and Habermas would want, but also by the hand of society's callings, as suggested by Bickel. In our case, these callings answer to social movements that claiming the lost rights that a parliament will never grant. As we have shown, even if the ECI have explained somehow these dialogues between the Court and the society, this task has not been fully achieved, because the callings to the Court are more and more common by the minorities and even majorities, like the students and teachers movement nowadays; and this is a task for the “democratic constitutionalism” or, in the terms of Gargarella, “militant constitutionalism”, which implies a strengthening of the active participation of social actors and politic representatives (García Villegas & Ceballos Bedoya, 2016).

There is no doubt that the Court's bet on deliberation is accompanied by a conscience of the restriction given by the principle of inviolability of rights that implies limits for the executive and legislative powers, and even for the majorities themselves. Experience has shown that since 1991 the Court has been useful; regarding social rights, to mobilize the government and the legislators in benefit of social policies that otherwise would not have seen the public light. Regarding the student movement,

public universities have accomplished a lot with the mobilization, not forgetting what they did for the promotion of the Political Constitution of 1991 with the “Séptima Papeleta” movement (García Villegas and Ceballos Bedoya, 2016). That is why the dialogical rulings, principally the ECI declaratory, generate a reasonable and impact judicial activism for the development of the social, economic and cultural rights mostly through follow up acts and hearings, as seen in the ruling T-025/04, where the Court answered the calling of more than 1,150 lawsuits of displaced families.

Therefore, the “interinstitutional dialogue” of the courts is urgent, especially with the first constituent, to shield democracy and the rights from the executive and legislative blockades. This dialogue would advocate for a deliberative democracy, but guarding the existence of the Constitutional Court, as Conrado Hübner Mendes from Brazil or Sebastián Linares from Spain have stated. The constitutionality or not of a law is not enough, there must be a kind of “notwithstanding” clause, like the ones that Canada has, in spite of its imperfections (also steps towards building the “interinstitutional dialogue”). This clause grants the magistrates the power to insist on a law even after the negative of a court. Besides, what must be clear is that the social and equality problems are not only a task for the judges, because inequality is a characteristic of human nature and no judge will ever solve it by being a social assistant (García, 2017) because whenever a society loses its values and principles, and no one respects or grants them, no judge will save it.

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