



Global Constitutionalism and Democracy: the Case of Colombia

Chris Thornhill¹  · Carina Rodrigues de Araújo Calabria²

Published online: 29 July 2020
© The Author(s) 2020

Abstract

Focusing on the case of Colombia, this article sets out a sociological examination of constitutions marked by strong, activist judiciaries, by entrenched systems of human rights protection, and by emphatic implementation of global human rights law. Contra standard critiques of this constitutional model, it argues that such constitutions need to be seen as creating a new pattern of democracy, which is often distinctively adapted to structures in societies in which the typical patterns of legitimation and subject formation required for democratic government were obstructed. In polities with such constitutions, legal institutions and norm setters have at times assumed the status of *functional equivalents* for more typical democratically mandated actors and institutions. In such polities, further, global law assumes essential importance as it creates new sources of normative authorization for legislation and stimulates new lines of articulation between government and society. The article concludes that analysis of such polities, exemplified by Colombia, shows that the common categories of democratic-constitutional analysis are no longer always adequate for understanding current tendencies in democratic formation, and they can easily undermine democracy itself.

Keywords Global constitutionalism · Colombia · Democracy

1 Introduction

In recent years, a model of national constitutionalism has become widespread that deviates from classical patterns of constitution making. This new constitutional model is closely linked

✉ Chris Thornhill
chris.thornhill@manchester.ac.uk

Carina Rodrigues de Araújo Calabria
carinacalabria@gmail.com

¹ University of Manchester, Manchester, UK

² Universidade Federal de Pernambuco, Recife, Brazil

to the emergence of a global constitutional order, as it is characterized by the fact that domestic constitutional norms reflect international human rights law, and international norm setters often predefine the basic principles of the national constitution.¹ This model is marked, further, by the fact that, within the domestic polity, judicial bodies assume particular prominence, and they subject political institutions to strict control, at times curbing legislative activity, or even acquiring legislative responsibilities.² The acquisition of such authority by judicial institutions is normally justified on the grounds that they enforce norms based, either directly or indirectly, in international human rights law.³ In this model, as a result, legislative force is not solely vested in agents of popular sovereignty, and the original authority to initiate legislative acts may reside in transnational organizations, supranational judicial organs, or domestic courts, applying international norms. Generally distinctive in this model of democracy is that the legal system operates at a high degree of autonomy in the national political order, and the relative power of legal institutions is sustained by the fact that national constitutional law is opened to a system of global norms. Overall, this model can be classified as judicial constitutionalism or even as transnational judicial constitutionalism.

The emergence of this constitutional model has stimulated a number of very critical commentaries. It is often asserted in such commentaries that the legal system in this model leads to the weakening of democracy, owing to the fact that it allows international norms externally to pre-construct the legislative decisions of sovereign populations.⁴ In particular, it is claimed that this model relativizes the significance of national constituent power as the original source of constitutional law, as the popular will can only form a basis for government if proportioned to the existing corpus of hyper-entrenched international human rights law.⁵ It is also argued that this model diminishes the importance of politics per se, as judicial intervention in political processes means that legislation loses its distinctive quality as politically legitimated. Theorists grouped together as exponents of political constitutionalism are outspoken in this line of critique, arguing that, in any legitimate political system, the decisions of strictly sovereign political subjects must form the premise for legislation, and these decisions must be expressed through a legislature.⁶ These theorists thus immovably oppose polities with strongly autonomous legal systems. Some extreme perspectives view the judicial pattern of constitutionalism as facilitating the semi-tyrannical hegemony of powerful international actors, as it allows global elites to dictate policy constraints to populations with weaker positions within the global economy.⁷

These critiques of transnational judicial constitutionalism are susceptible to query on a range of grounds. Increasingly, such critiques can be repudiated, simply, because they are politically irresponsible. In many contemporary societies, democracy is coming under attack from neo-nationalist governments, often appearing in varying shades of populism. This is visible for example in Hungary, Poland, Brazil, India, the UK, and the USA. In each of these polities, historically, the

¹ See the discussion of global constitutionalism from human rights perspectives in Milewicz (2008), Schwöbel (2011) and Peters (2014).

² Stone Sweet (2000); Alter (2001, 54); Ferejohn (2002).

³ This is inevitably the case in courts working within supranational human rights systems. But important decisions by other powerful courts are often authorized through reference, direct or indirect, to international human rights. See the case in Constitutional Court Case No. CCT/3/94 S v Makwanyane and Another (6 June 1995) (South African Constitutional Court) and the case in *Chameli Singh and Ors. v. State of U.P. and Anr.* (AIR 1996 2 SCC 549; Date of Judgement [Indian Supreme Court]).

⁴ See Hirschl (2000, 2007), Waldron (2006), Bellamy (2007), Colon-Rios (2014) and Gargarella (2015).

⁵ See this debate in Patberg (2013), Thornhill (2014) and Krivenko (2017, 100).

⁶ See note 9 below.

⁷ Schneiderman (2008).

interaction between national institutions and global norm setters played an important role in stabilizing and expanding democracy. However, each polity is now experiencing a reduction in the quality of democracy. In each case, democratic crisis is reflected in hostility to global norms and scepticism towards domestic judicial institutions, at least to the extent that such institutions protect global normative principles. In some respects, advocates of emphatically political variants on constitutionalism have propagated a diction of political legitimation that favours the re-emergence of populist nationalism. The insistence of such theorists that legitimate government must be founded, simply, in the sovereign will of national citizens is close to some aspects of the populist stance, and it can easily unsettle the democratic systems of governance that constitutional theorists purport to defend.⁸ When theoretical outlooks directly coincide with processes that lead to the negation of their own professed purpose, such outlooks, evidently, require urgent revision.

Critiques of judicial constitutionalism can be rejected, second, on the ground that they lack an adequate sociological understanding of democratic politics. In some ways, the political irresponsibility reflected in critiques of judicial constitutionalism is the product of their sociological insensitivity, which leads them to endorse simplified and counterfactual normative constructs. Such critiques presuppose, paradigmatically, that democracy is a polity type that is legitimated, invariably, by the fact that social agents participate equally in law making through legislative or other representative institutions.⁹ In this regard, such critiques are inclined to apply the norms of classical democratic theory very literally, and they impute legitimational processes in democracy to a strictly construed set of norm-producing practices, expressed in concepts of popular sovereignty, citizenship, and collective will formation, and they presume that all societies contain political subjects able to construct legitimacy for legislation through such practices.¹⁰ Moreover, such critiques presume that every society has the capacity to impose a representative structure on its articulations with such political subjects, so that the interests of sovereign citizens can be straightforwardly mediated through legislative institutions. In many settings, however, the vocabulary of democratic theory projects legitimational processes that cannot be aligned to actual conditions of government. In many societies, the legitimational forms imputed to democracy in conventional conceptual constructions of political subjectivity do not exist, and the political system cannot easily be articulated with the subjects from which it is expected to extract legitimacy. Even in classical democratic societies, the presumption that democratic institutions were legitimated by national populations formed as volitional subjects was a fiction, and the demos conceived as the source of institutional legitimacy had to be created by political institutions themselves.¹¹ In many contemporary democracies, the idea that the political system can obtain legitimacy through immediate exchanges with organized political subjects is plainly reductive. Accordingly, many critiques of judicial democracy, especially those that insist on legislative institutions as the necessary fulcrum of democracy, analyse the preconditions of legitimate democracy by

⁸ For example, in the UK, advocates of political constitutionalism have often endorsed classical theories of parliamentary sovereignty, and this has provided a conceptual armoury to support politicians seeking to leave the European Union. The result has laid bare the deep crisis of national democratic institutions in the UK. Some theorists have noted a necessary proximity between populism and more standard constitutional-democratic theory (see Canovan (1999, 14) and Blokker (2018)).

⁹ See standard iterations in Bellamy (2008, 154), Webber (2009, 215) and Loughlin (2010). Bellamy's assertion that constitutional democracy is a 'form of politics that strives to motivate law-making in the public interest and render it accountable to citizens' presupposes, immediately, the material existence of a public body of citizens, which provide the political foundation for democracy (see Bellamy (1996, 456)).

¹⁰ Webber (2009, 18).

¹¹ See Kelsen (1950, 6–7).

fictitious standards, and their challenge to existing democratic polities promotes a deep simplification of democratic legitimation.

This article aims to add a new sociological analysis of democracy to debate about global-legal or global-judicial patterns of constitutionalism. It uses this analysis to assess this democratic model by criteria that are sensitively adapted to the societal conditions in which democratic polities are located, seeking, thus, to avoid the reductivism inherent in many critiques of judicial constitutionalism. More importantly, this article seeks to promote an understanding of democracy able to resist the current shift towards democratic simplification in constitutional theory and practice. It attempts to outline a complex framework for analysis of democracy, and, in this respect, it is guided by the conviction that adequate sociological comprehension of democracy is essential to its continued development. The categories in which democracy is typically analysed are not adequate to its factual foundations, and this contributes to the risks that frequently surround contemporary democracy. Above all, the fixation of democratic theory on static constructs of sovereignty and popular citizenship requires sharp correction if contemporary democracies are to be reliably interpreted and the case for democracy securely advanced.

Democracy, it is contended here, needs to be observed as a socially variable mode of political formation. In essence, democracy is a polity type that is oriented towards the production of consensual legitimacy for law, and in which law is distributed through society on premises created through broad consensus. Naturally, there are some conditions that all democracies need to satisfy, in order to qualify as such. The most indispensable amongst such conditions is full enfranchisement of the population in regular competitive elections, without exclusion from the exercise of electoral rights on grounds of ethnicity, socio-economic position, or gender.¹² Above this threshold, however, democratic systems need not presuppose one single legitimational process, and the lines of communication between the polity and subjects in society cannot be fixed to uniform categories of political agency and subjectivity. There is in fact no compelling reason why concepts of democracy should be configured around simple analyses of popular sovereignty. During the first emergence of democracy, it was widely intuited, especially amongst sociologists, that democratic polities had been brought into being by transpersonal processes of social transformation, and they evolved as variable instruments for creating legitimacy for law, under conditions of rising social complexity. On this account, the growth of democracy was driven by the integrational expansion of society as a whole, and democracy acquired legitimacy as a polity type able to produce consensus for law in a form adapted to the complex environments and the varied subjective forms that modern society increasingly contained.¹³ On this view, democracy could emerge in highly contingent fashion, and it was not necessarily instituted by considered acts of rational, participatory, or eminently political subjects. On this view, further, citizens could create consensual premises for law in multiple roles, not all focused on conventional electoral activities, and the rights through which citizens shape legislative acts and bring legitimacy to law could be exercised in manifold, complex fashion.¹⁴

This classical sociological analysis of democracy retains validity today. As mentioned, many democracies are confronted with deep challenges in constructing the subjects around

¹² Dahl (1998, 78).

¹³ Durkheim (1902, 28–29); Weber (1921/22, 571). For a more programmatic recent statement of this outlook, see Luhmann (1983[1969]).

¹⁴ Thornhill (2018, 39–133).

which they are expected to explain their legitimacy. In many settings, even primary categories of democratic agency and personhood—the sovereign people, the national citizen—cannot easily be mapped onto factually existing subjects, and the capacity of the political system for articulating with and representing such subjects is minimal. In many settings, polities have been required to institutionalize legitimational practices, and even to construct democratic agents and subjects, in improvised adaptive processes, and atypical patterns of integration are needed before democratic legitimation can occur. If observed closely, in fact, many democracies have evolved, at least in part, around functional equivalents to classical democratic forms of legitimation and subject formation. Sociological attentiveness to such complex phenomena is vital for understanding the current realities of democracy. In particular, reflection on such phenomena is important for interpreting the prevalence of global-judicial models of constitutionalism in contemporary society. In many respects, this model has emerged as a system of equivalence, in which global human rights norms act as surrogates for classical patterns of norm production, allowing the political system to integrate social actors (citizens) persons in society and to legitimate legislation in a form that compensates for the weak formation of political subjects in national society. In this model, the legal system acts at a high level of autonomy specifically, not to reduce democracy, but to construct equivalents for classical democratic procedures, often in societies where such procedures do not gain immediate traction. A perspective that reflects on constitutional law, not solely as a normative order, but as an adaptive system for constructing legitimacy for law, is thus required to capture the present form of democracy.

This article develops these claims, specifically, by examining constitutional conditions in Colombia. Colombia is selected for analysis because, since 1991, its polity is one of the most extreme examples of transnational judicial constitutionalism. For this reason, some critics of judicial activism have singled out Colombia for admonishment, implying that more classical patterns of constitutional organization should be preferred.¹⁵ Indeed, hostility to judicial power in Colombia has been sharply articulated in governmental policy. Colombia itself is now threatened by the anti-judicial tendencies seen in other countries, especially those that have embarked on the path to more populist governmental techniques.¹⁶ On these grounds, Colombia provides a case study both for assessing the correlation between judicial influence and democratic institutionalization and for observing how democracy might be unsettled by more classical processes of political mobilization. Most importantly, Colombia is examined here as a society in which, for embedded historical reasons, the political system faced acute problems of socio-political integration and democratic subject construction. The study of Colombia shows emphatically that, in some settings, the basic

¹⁵ One Colombian author has argued that the Constitutional Court has transformed itself illegitimately into the ‘final link in the pyramid of public power’: López Daza (2011, 172) (see more subtle analysis in Higuera Jiménez (2009)).

¹⁶ Research for this article was mainly conducted in the period 2015–2017. During this time, the Colombian Constitutional Court was affected by several events that threatened to alter its institutional role and to reduce its authority. At different points in time, the composition of the Court was changed, and a new judicial system, dealing exclusively with cases arising from the civil conflict, was placed alongside the existing judiciary. Then, Ivan Duque was elected Colombian President in 2018. Duque is overtly hostile to aspects of international law, and he has threatened to dismantle the Constitutional Court and to weaken the power of the judiciary more generally. With other leaders in South America, in 2019 he issued a joint communication to the Inter-American Commission on Human Rights, arguing for an increase in the autonomy of national courts within the Inter-American Human Rights System. Despite this, the orientation of the Constitutional Court has not yet been substantially revised, and its decisions still reflect a strong commitment to recognition of international human rights law (see Decision C-252 of 2019 (Justice Carlos Bernal Pulido)).

subjects of democratic legitimation—including, even, the people themselves—do not exist as simply manifest entities. On the contrary, political institutions obtain legitimacy by devising equivalents to the subjects from which they are expected to extract legitimacy and through which they produce legislation. In consequence, the case of Colombia demands a deep revision of the ways in which classical principles of democracy are applied to material constitutional realities. Above all, it demands a sociological reconstruction of core categories of democratic theory, and it shows that, in some settings, democracy itself may need to be re-thought if it is to be sustainably defended.

This article is not alone in claiming that transnational constitutional norms have democracy-enhancing results. However, more favourable discussions of transnational judicial constitutionalism have usually proceeded from a position located within classical accounts of democracy.¹⁷ Typically, such positive analyses claim that such constitutions improve the quality of democracy by stabilizing justified legislative outcomes;¹⁸ by providing strong checks on political branches, averting uncontrolled executive enactment of global directives;¹⁹ and by stimulating public deliberation on core executive decisions.²⁰ By contrast, using one empirical case study, this article argues that accurate analysis of judicial constitutional forms may require that we adopt a new sociological lens for understanding core democratic functions.

2 Colombia, Democracy and Global Human Rights Law

At one level, Colombia has a relatively long-standing and continuous history of competitive democracy, whose origins reach back to the middle of the nineteenth century. Unusually for Latin America, Colombia has only limited experience with military intervention in civil politics, and rotation of governmental office has only infrequently been interrupted.²¹ Nonetheless, as discussed below, democracy in Colombia has a fragile history, and it has often possessed only formal or nominal character. Distinctive features in the structure of Colombian society—in particular, deep cultural fissures between different regions and extreme material variations between different groups, high prevalence of private power and patrimonialism, and low societal convergence around centralized institutions—have meant that, historically, democratic institutions could not easily be consolidated. As discussed below, this is reflected in the fact that formal state institutions have often been rivalled in force by other organizations, the political system was endemically porous to elite interests, societal antagonisms often resulted in seismic violence and protracted civil conflict between different socio-political groups, and democratically mandated governance bodies often relied on prerogative legislation to preserve their control. In each respect, the formation of Colombian democracy has been marked by acute problems in the integrational dimensions of the polity, and the basic structural inclusivity required to connect societal actors to democratic institutions has not been fully established. Overall, at key junctures, the public authority of the state was only patchily felt in society, and the ability of state institutions to attach their legitimacy to integrated citizens was weak.²²

Against this background, the current governmental order in Colombia can be seen, paradigmatically, as a polity that has been created through international human rights law. Indeed,

¹⁷ See Freeman (1990, 367).

¹⁸ Zurn (2007, 246).

¹⁹ See Benvenisti (2008, 272).

²⁰ Benvenisti and Downs (2012), 167).

²¹ See Uribe de Hincapié (1998, 26).

²² See García Villegas (2009, 24, 43, 48).

it is a polity in which the global rise of human rights has helped to remedy deep-lying structural-integrational problems that impeded democratic institution building.

Important researchers are currently exploring the historical genealogies of human rights law in Colombia.²³ At an immediate level, however, human rights law began to gain impact in Colombia in the 1980s, during the extreme crisis of democracy caused by escalating civil conflict and acute state repression. In this period, proponents of rival ideologies in Colombia, attached to hostile positions in the civil conflict, began to explain their prerogatives in the register of international human rights.²⁴ Simultaneously, international organizations became increasingly engaged with the causes and consequences of the violence in Colombia, leading to the heightened domestic penetration of global instruments as means for conflict resolution. In 1985, the Colombian government accepted jurisdiction of the Inter-American Court of Human Rights (IACtHR), intensifying the enforcement of the American Convention on Human Rights (ACHR) within Colombia. However, the most important early step in the legal consolidation of human rights occurred in 1990, during a state of exception imposed because of the intensification of civil conflict. Responding to this situation, successive Presidents issued two emergency decrees, Decree 927/1990 and Decree 1926/1990, which led to the creation of a National Constitutional Assembly in early 1991 to draft a new constitution for the Republic.²⁵ The Constitution produced by the Constituent Assembly was adopted in 1991. The 1991 Constitution was conceived partly in conventional terms, as a formal document to regulate functions of state. But it was also conceived as a political pact or inter-group treaty. In particular, the new Constitution was designed to establish working arrangements between select parties in the civil conflict, to expand popular participation in public functions, and—by these means—to solidify the basic institutions of the state.²⁶ Different parties in the constitution-making process shared a strong orientation towards human rights, and human rights figured prominently in debates in the Constituent Assembly.²⁷

Ultimately, the prominence of human rights during the period of constitution making in 1991 was reflected in the final text of the Colombian Constitution, which forms a classical example of the rights-based, judicial constitutional model. This is visible both in the Constitution itself and in the strategies by means of which its core provisions were put into effect:

2.1 The Structure of the Constitution

The 1991 Constitution provides for different categories of rights, with varying status and enforceability. It establishes a series of fundamental rights, centred on classical rights and rights of personal dignity, which are immediately enforceable. However, it establishes a range of rights, albeit granted weaker protection, which extend beyond classical human rights. For instance, Article 49 determines that the state is responsible for organizing, directing and regulating the delivery of health services and environmental protection. Article 79 establishes certain environmental rights, declaring that the state has a duty to ‘protect the diversity and

²³ González Jácome (2018).

²⁴ Grajales (2017, 59–61); González Jácome (2015, 231–32). For a rather different view, see Tate (2007, 101).

²⁵ The same Decree No. 1926 that convened a National Constitutional Assembly in 24 August 1990 declared a state of exception. In 1996, Colombia had been governed under states of emergency for 36 years out of the previous 44 (see Inter-American Commission on Human Rights (1997, 660)).

²⁶ This objective shaped Decree 927/1990 that led to the Constituent Assembly.

²⁷ Restrepo Yepes, Bocanument Arvelaez and Rojas Betancur (2014, 287, 304).

integrity of the environment, to conserve areas of special ecological importance, and to foster education for the achievement of these ends'. Art 67 declares that education is 'an individual right and a public service that has a social function'. Alongside this, the Constitution emphasizes the importance of labour rights (Arts 53–57), indicating that private property implies inherent social and ecological obligations (Arts 58–60, 63–64). As part of its general guarantee of equality (Art 13), it recognizes the rights of vulnerable and historically discriminated groups, such as women (Art 43), children and adolescents (Arts 44 and 45), disabled people (Art 47), and ethnic minorities. Indigenous groups had three representatives in the Assembly that wrote the Constitution, and they obtained rights of representation, self-governance, and qualified judicial autonomy (Arts 171, 246, 329, 330, 356), most of which were already envisaged in existing international instruments.

Important in this respect is the fact that the Constitution promotes a two-level conception of human rights. It constructs a framework in which human rights can be viewed both as a set of strictly positive norms and as an autonomous and evolving sphere of the law. Distinctively, first, Article 94 states that 'the rights and guarantees contained in the Constitution and in international conventions shall not be understood as a denial of other rights inherent in the human person, which are not expressly stipulated in those documents'. This Article was subsequently interpreted to imply that the catalogue of rights in the Constitution could be enlarged, or subject to enhanced judicial construction. As discussed below, this Article provided an important context, in which judicial actors could promote an expansionary approach to basic rights. Second, as examined below, the fact that it emphasizes post-classical rights means that historically vulnerable sectors of society have been able to engage directly with the political system through the medium of rights, and the societal reach of basic constitutional provisions has been augmented because of this.

2.2 The Structure of the Judiciary

In addition to consolidating basic rights, the 1991 Constitution provides a robust apparatus to ensure their protection, enforcement, and democratic elaboration, and it added new organs to the judiciary.

Significant amongst the judicial institutions created by the Constitution are the Constitutional Court, which, as the highest judicial organ, has constitutional jurisdiction; the Council of State (Consejo de Estado), which has administrative jurisdiction; the Supreme Court, with ordinary jurisdiction; and the Superior Council of the Judiciary, with disciplinary jurisdiction. In addition, the Constitution established a Human Rights Ombudsman (Defensoría del Pueblo). The Constitution also created specific organs to supervise branches of government, in response to human rights violations. After the Constitution entered force, additional human rights mechanisms were established, including bodies to deal with litigation before international courts, with the implementation of international judicial rulings, and with domestic reparation for breaches of human rights.²⁸ Alongside this, the Constitution sets out provisions for new types of legal action and representation in human rights cases. Amongst these are provisions for public interest litigation, designed to protect collective interests and fundamental

²⁸ Some examples are Resolution 0-2725/1994, creating a National Body of Human Rights Prosecutors; Law 228/1996, establishing instruments to guarantee compensation to victims following decisions of international organs; Law 1448/2011, known as Law of Victims and Land Restitution, establishing compensatory mechanisms for victims of the civil conflict, and flanked by the creation of a Monitoring Commission for Implementation of Law 1448/2011.

rights (Art 88). Most importantly, the Constitution makes provision for the filing of tutelas (Art 86). Tutelas are petitions that allow an individual citizen to demand suspension of any action or omission of a governmental or private entity that threatens a fundamental right. Although the instrument of the tutela is not in itself new, it has acquired very distinctive implications in Colombia. In Colombia, a tutela can be filed in very informal manner, even in oral and handwritten form. As a result, tutelas have often been submitted by marginal subjects, relating to abuses of rights that afflict persons in disadvantaged social positions, and they have led to an exponential increase in access to law for such subjects. Tutelas can also be filed by proxies, through *agencia oficiosa*, to represent interests of a subject who cannot ‘promote his or her own defence’—that is, for instance, a subject whose immediate access to justice is restricted for literacy-related, cultural, or geographical reasons.²⁹ As discussed below, tutelas have acquired a central role in the promotion of fundamental rights and in the extension of the societal reach of legal organs, and they have often provided openings for legal actors to construct new rights or to extend existing rights to new subjects.

2.3 The Constitution and International Human Rights Law

The 1991 Constitution accords a privileged position to international human rights law in the domestic legal order. It states that international treaties ratified by the Congress that recognize human rights should have precedence over domestic norms; it forbids the limitation of these rights during states of emergency; and it stipulates that human rights treaties shall be used as interpretative guides for realizing the rights and duties defined in the Constitution (Art 93). The special position given to international human rights law has been strengthened by judgements of the Constitutional Court. Generally, the Court has adopted the principle that international human rights norms are identical with the values declared in domestic constitutional law,³⁰ so that domestic rights provisions need to be purposively aligned to international norms. It has also ruled that international norms prevail over domestic law in cases in which they give stronger protection to human rights.³¹ Importantly, it has recently strengthened this line of jurisprudence, to argue that international human rights law must have higher standing than principles set out in other spheres of international law.³²

On this basis, the Court has tended to use international norms to harden its own power in relation to other branches of government in the elaboration of constitutional norms. At an early stage, the Court declared that the sovereignty of governmental institutions should be seen as strictly constrained by international human rights law, claiming that human rights ‘are too important for their protection to be left exclusively in the hands of states’.³³ In this, it proposed itself as the custodian of global human rights law, entitled to check the power of government bodies on globally authorized grounds. More specifically, in a ruling of 1992, the Court established criteria to determine whether a right has a fundamental character and is subject to petition by tutela. It decided that such criteria are met if the right in question is protected in an international human rights treaty.³⁴ In so doing, the Court significantly widened the scope of

²⁹ Decision T-267 of 2011 (Justice Mauricio González Cuervo).

³⁰ Decision C-408 of 1996 (Justice Alejandro Martínez Caballero).

³¹ The Court articulated this principle in Decision C-148 of 2005 (Justice Alvaro Tafur Galvis); Decision C-187 of 2006 (Justice Clara Inés Vargas Hernández); Decision C-438 of 2013 (Justice Alberto Rojas Rios).

³² Decision C-252 of 2019 (Justice Carlos Bernal Pulido).

³³ Decision C-408 of 1996 (Justice Alejandro Martínez Caballero).

³⁴ Decision T-002 of 1992 (Justice Alejandro Martínez Caballero).

its own jurisdiction. In some cases, the Court has simply interpreted internationally defined rights as domestic constitutional rights. Relying on the Universal Declaration of Human Rights and the International Covenant on Economic and Social Rights, for example, the Court established a right to subsistence and a right to a minimum living standard, and these rights were subsequently used to prescribe public policies to the government.³⁵

As part of this commitment to domestic entrenchment of international human rights law, the Constitutional Court has established the core doctrine of the block of constitutionality, originally derived and modified from French public law. Central to this doctrine is the principle that some internationally recognized norms that are not expressly mentioned in the Constitution can be accorded near-constitutional rank, and they can be applied as ‘parameters for testing the constitutionality of laws’.³⁶ Ultimately, the Court extracted great latitude from this doctrine, and it incorporated a broad range of international norms in domestic public law. For example, it decided that international soft-law norms regarding the rights of displaced persons, especially the Deng and Pinheiro principles promulgated under UN auspices, should be construed as binding sources of domestic rights.³⁷ It also directly incorporated the ACHR, and, by extension, the rulings of the IACtHR. The jurisprudence of the IACtHR thus assumed a *de facto* constitutional position in Colombian public law.³⁸ In later cases, the Court imputed a special force to the jurisprudence of international human rights organs.³⁹ The international norms absorbed in the block of constitutionality have been defined as obligatory, not only for public entities, but also for non-state actors. Consequently, international human rights have been interpreted to form a binding legal/constitutional structure for all persons in society,⁴⁰ leading to the deep penetration of international law in the practices of everyday life.

2.4 The Constitutional Court

From the outset, overall, the Colombian Constitutional Court emerged as a highly activist Court, with a very distinctive constitutional role and a prominent position in the polity as a whole.⁴¹ Notably, the fact that the National Constituent Assembly was established during a state of emergency had important immediate consequences for the Constitutional Court. The Constituent Assembly, convoked in February 1991, finished writing the Constitution in July 1991. With the support of the President César Gaviria (1990–1994), the Constituent Assembly dissolved the regular Congress, instituted a transitional legislative body known as *El Congreso* (‘the mini Congress’), and called elections to form a new Congress. During its limited mandate from July to November 1991, *El Congreso* formalized certain exceptional provisions enacted by the government during the state of emergency. This meant that, directly after ratification of the Constitution, emergency legislation was in force, which curtailed the effect of the human rights in the Constitution. The fact that, at its enactment, the new

³⁵ Decision T-426 of 1992 (Justice Eduardo Cifuentes Muñoz).

³⁶ Decision C-225 of 1995 (Justice Alejandro Martínez Caballero).

³⁷ See Decision T-327 of 2001 (Justice Jorge Ignacio Pretelt Chaljub); Decision T-068 of 2010 (Justice Jorge Ignacio Pretelt Chaljub). See Vidal López (2007, 41).

³⁸ See discussion in Decision T-1319 of 2001 (Justice Rodrigo Uprimny Yepes). One account argues that the Court strives for ‘permanent harmonization’ between domestic law and the norms in the Inter-American human rights system: Santofimio Gamboa (2017, 134).

³⁹ Decision T-568 of 1999 (Justice Carlos Gaviria Díaz); Decision C-010 of 2000 (Justice Alejandro Martínez Caballero).

⁴⁰ See Decision C-225 of 1995 (Justice Alejandro Martínez Caballero).

⁴¹ For theoretical background, see López Medina (2004, 414–17).

Constitution was subject to restrictive provisions meant that the Constitutional Court quickly assumed an activist role. In some of its earliest rulings, it nullified on grounds of unconstitutionality some acts introduced by the interim Congress,⁴² claiming elevated powers to defend the Constitution.⁴³

Partly as a result of these factors, the Constitutional Court soon began to act as the repository of constituent power. Even before the drafting of the Constitution, in fact, the Supreme Court approved the Decrees that led to the convocation of the Constituent Assembly in 1991. It declared that these Decrees were legitimate because they ensured that the people were able to act as the ‘primary constituent’ of the state.⁴⁴ After 1991, the Constitutional Court construed the constituent power of the people and the normative force of human rights as essentially identical, and it assumed entitlement to act as protector of both. In one of its first decisions, the Court declared that it was entitled to decide which rights can be ranked as fundamental and to establish protection and remedies accordingly.⁴⁵ It also constructively interpreted the value of human dignity expressed in the Constitution as a meta-norm, which it construed as a teleological directive to enlarge the system of rights protecting human dignity, especially in the ‘social dimension’ of human life.⁴⁶ In both respects, the Court interpreted the human rights provisions in the Constitution as providing a broad warrant for its assumption of *de facto* constituent powers.

The distinctive position of the Constitutional Court is most evident in its *tutela* rulings, in which it has routinely performed functions that far exceed normal obligations for judicial scrutiny. In some cases, for example, the Court has decided that *tutela* cases have broad social implications, such that its decision in one case needs to be accorded a widened scope, setting precedents for parties other than the individuals directly involved in the given adjudicatory process: such decisions are ascribed *inter comunis* effect.⁴⁷ A decision was imputed *inter comunis* effect for the first time in 2001.⁴⁸ In some rulings with *inter comunis* effect, the Court has claimed that the case brought before it reflects a condition of structural unconstitutionality, or ‘an unconstitutional state of affairs’, and it has formulated its judgement in order to remedy a set of problems that resonate widely across society as a whole. Rulings of this kind include cases in which a violation of human rights reported in a *tutela* is judged by the Court to be the result of deep-rooted structural causes, not solely attributable to one entity or to one public authority, and requiring far-reaching solutions.⁴⁹ Early instances of such rulings can be found in prison law, social security law, health law, and in education law, which were focused on

⁴² See Decision C-479 of 1992 (Justices Jose Gregorio Hernandez Galindo and Alejandro Martínez Caballero), declaring the inapplicability of part of transitory decree 2067/1991 enacted by *El Congreso*; Decision C-543 of 1992 (Justice Jose Gregorio Hernandez Galindo), declaring unenforceable Article 11 of Decree 2591/1991. Other rulings affirmed the role of judicial decisions in creating rights alongside the legislative process (see Decision T-406 of 1992 (Justice Ciro Angarita Baron)).

⁴³ See Inter-American Commission on Human Rights (1993).

⁴⁴ Cajas Sarria (2015, 406).

⁴⁵ Decision T-002 of 1992 (Justice Alejandro Martínez Caballero).

⁴⁶ Decision T-881 of 2002 (Justice Eduardo Montealegre Lynett).

⁴⁷ See Decision T-025 of 2015 (Justice Gabriel Eduardo Mendoza Martelo), extending the right to have access to benefits from a healthcare program “Colombia Mayor” (Great Colombia) to all elderly people residing in a certain area. Other examples of decisions with effects *inter pares* are Decision T-534 of 1992 (Justice Ciro Angarita Baron); Decision T-583 of 2006 (Justice Marco Gerardo Monroy Cabra); Auto 071 of 2001 (Justice Manuel José Cepeda Espinosa).

⁴⁸ Decision SU-1023 of 2001 (Justice Jaime Córdoba Triviño).

⁴⁹ Decision T-025 of 2004 (Justice Manuel José Cepeda Espinosa).

systemic, but relatively circumscribed institutional crises.⁵⁰ Instances of this are especially important in environmental law cases.⁵¹ However, the most important cases of this kind relate to the conditions of population groups displaced by civil violence, in addressing which the Court has issued judgements with very broad implications for the normative structure of society in its entirety. In such cases, the Court has assumed authority to prescribe multiple remedies with binding effect for all parties implicated in the instant case and for all persons affected by conditions similar to those revealed in the given tutela. The leading cases of this kind are strongly supported by international law, and violation of international human rights law is often seen as grounds to justify the designation of a tutela as displaying structural unconstitutionality and to authorize the resultant attribution of *inter comunis* effect to the relevant decision.⁵²

In these respects, the Constitutional Court has clearly acted simultaneously as a constituent, legislative, and as a policymaking organ. Indeed, it is often motivated by the sense that it is obliged to assume broad powers of legislation, as it views other branches of government, especially Congress, as ineffective in the performance of political responsibilities.⁵³

3 Global Law, Democratic Citizenship and Structural Adaption

In these respects, the Colombian Constitution stands at an extreme position on the spectrum of judicial authority and activism. As mentioned, the distinctive position of legal institutions in the Colombian polity means that is often viewed as the leading example of judicial constitutionalism, in which judicial bodies that apply global norms usurp functions properly exercised by democratically mandated branches of government. However, this description is only sustainable from a perspective that adopts a sociologically static account of democracy. The relative autonomy of legal bodies can equally be viewed as forming a system of equivalence, in which the assimilation of global human rights law into Colombian society obtains deep structural impact, creating preconditions for democracy that compensate for weaknesses in national democratic formation. Such structural impact is evident in the fact that global law consolidates institutional foundations for democracy that had been absent as society persisted in its purely national form. Such structural impact is also manifest in the fact that global law generates surrogates for more conventional forms of political agency and subject formation, and it promotes consensus production for law in a form adapted to the material fabric of Colombian society.

⁵⁰ Decision T-153 of 1998 (Justice Eduardo Cifuentes Muñoz); Decision T-068 of 1998 (Justice Alejandro Martínez Caballero); Decision SU-559 of 1997 (Justice Eduardo Cifuentes Muñoz).

⁵¹ For example, in Decision T-291 of 2009 (Justice Clara Elena Reales Gutiérrez), orders regarding recycling were extended from one case to include an entire city (Cali). Other examples are Decision T-203 of 2002 (Justice Manuel José Cepeda Espinosa); Decision SU 783 of 2003 (Justice Marco Gerardo Monroy Cabra); Decision SU 636 of 2003 (Justice Jaime Araujo Rentería); Decision T-843 of 2009 (Justice Jorge Ignacio Pretelt Chaljub); Decision T-088 of 2011 (Justice Luis Ernesto Vargas Silva); Decision T-213A of 2011 (Justice Gabriel Eduardo Mendoza Martelo); Decision T-149 of 2016 (Justice Gabriel Eduardo Mendoza Martelo). See González-Manrique et al. (2014, 181, 182).

⁵² This is not invariably the case. But some important rulings with *inter comunis* effect are strongly founded in international law. See for example Decision SU-254 of 2013 (Justice Luis Ernesto Vargas Silva).

⁵³ See Landau (2012).

3.1 Institutional Formation

The structural impact of global law in Colombian society can be observed, quite simply, at the level of institutional consolidation, as processes of judicial norm construction based in global law have clearly diminished the force of some historical obstructions to democracy.

As mentioned, the establishment of a robust democracy in Colombia was impeded, originally, by the fact that political institutions struggled to assert a monopoly of power in society. One reason for this was that societal elites tended to resist the formation of a strong national political system, preferring to safeguard their social positions by private means and refusing to invest monetary resources (taxation) required for effective building of state capacity.⁵⁴ This meant that the fiscal revenue needed to establish a strong overarching national state was not guaranteed. One further reason for this was that members of political elites tended to occupy strongly developed regional positions, and they often secured societal support, not through national political representation, but by localized patrimonial means. This meant that political organizations did not mediate effectively between national government and regional constituencies.⁵⁵ As a result, central institutions were often too weak to sustain a nationally overarching legal/political system,⁵⁶ and, in the absence of a strong state structure, essential public functions were often arrogated by actors outside the formal political domain, including guerrillas or paramilitaries.⁵⁷ One important analysis of the history of violence in Colombia has attributed the power of military organizations directly to the reduced integrative reach of formal institutions.⁵⁸ This set of factors necessarily meant that one core precondition of democracy—the presence of national institutions able to articulate closely with citizens in all parts of society—was absent.

In this context, the penetration of global norms into Colombian society played a key role in hardening the societal foundations of the political system and in creating structural foundations for democracy. Indicatively, the Constitutional Court has declared that its use of global law is driven by consciously ‘Weberian’ considerations, and its endeavour to solidify a body of human rights in society is part of a policy to elevate the state’s monopoly of force vis-à-vis other actors and organizations.⁵⁹

The Constitutional Court gave strongest expression to this state-building strategy in its most important tutela ruling, T-025/04. This ruling, which concerned victims of mass displacement caused by civil violence, formed a central pillar for the later jurisprudence of the Court, and it established parameters for the Court’s subsequent activism in policy questions. In this tutela, the Court declared that the displacement afflicting large numbers of Colombians indicated that the state itself was experiencing a deep structural crisis. Accordingly, it decided that the instant tutela reflected, not an isolated legal fact, but an unconstitutional state of affairs, to which the state itself had

⁵⁴ Uribe López (2013, 198).

⁵⁵ Uprimny (1989); Martz (1997).

⁵⁶ García Villegas (2009, 60). For the view that the idea of ‘national community’ exists only as a fiction in Colombia, see Pécaut (1999, 16).

⁵⁷ González, Bolívar and Vázquez (2003, 31, 198, 231, 250, 257). One account describes the FARC as an ‘alter-Estado’: Agnew and Oslender (2010, 201).

⁵⁸ Arjona (2016, 81).

⁵⁹ Decision SU-1150 of 2000 (Justice Eduardo Cifuentes Muñoz).

causally contributed.⁶⁰ In reaching this verdict, the Court argued that the structural crisis of the state was measurable in criteria derived from human rights law: that is, state failure was evident in the degree to which displaced population groups were deprived of their rights.⁶¹ From this position, the Court concluded that provision of guarantees for basic rights was a vital aspect of effective state structure and protection of rights was a core measure of state capacity. From this position, then, it concluded that it was authorized to prescribe remedies to public agencies to ensure that they took measures to guarantee full enjoyment of basic rights amongst persons displaced by conflict. In this respect, the Court viewed its own promotion of human rights as an active contribution to the reinforcement of the state, serving to reinforce linkages between the state and persons at different points in society. Eventually, the Court drew up a series of indicators to evaluate the success of government bodies in resolving the structural crisis. These indicators were largely based in standards designed to measure the quality of human rights protection, partly drawn from international law.⁶² As part of this process, international guidelines were invoked by the Court to enhance the fiscal performance of the government and to improve lines of communication between regional and national governmental bodies, both of which were seen as preconditions for protection of displaced persons.⁶³

In these respects, global law entered Colombian society as a medium of hard structural reinforcement, and it served to remedy historical weaknesses in the institutions required to sustain a democratic order. International human rights law acted to extend and stabilize an increasingly solid institutional structure across society, able to integrate societal groups in a setting in which national law had failed to accomplish this. Far from limiting the sovereign power of the national state, global law entered national society as the bedrock for the reinforcement of sovereign state institutions.

3.2 Citizenship Formation

The structural impact of global law in Colombia is also evident in other dimensions of society that are vital for the consolidation of democracy. Even the basic construct of the citizen, the primary fulcrum in the processes of integration and legitimation that sustain national democracy, has evolved, some respects, as an artefact of global law.⁶⁴

It is widely documented that in Colombia, as in many Latin American countries, the ideals of national citizenship and popular sovereignty projected in classical constitutionalism did not find a receptive environment. To be sure, both the Republic of New Granada (1831–1858) and, after 1886, the Republic of Colombia were founded around such ideals. Yet, a number of social factors meant that principles of national citizenship had restricted capacity to integrate

⁶⁰ The first case in which the Court used the concept was Decision SU 559 of 1997 (Justice Eduardo Cifuentes Muñoz), concerning pension rights. However, such reasoning gained traction in cases concerning the prison system, particularly in Decision T-153 of 1998 (Justice Eduardo Cifuentes Muñoz), where the Court held that conditions in the prison system reflected an unconstitutional state of affairs.

⁶¹ See Auto 109 of 2007 (Justice Manuel José Cepeda Espinosa).

⁶² In one declaration, the Court stipulated that a ‘charter of basic rights for displaced people’ had to be implemented, and fulfilment of this stipulation was a core indicator of compliance with the relevant jurisprudence (see Auto 178 of 2005 (Justice Manuel José Cepeda Espinosa)).

⁶³ Auto 177 of 2005 (Justice Manuel José Cepeda Espinosa).

⁶⁴ On the primary role of the citizen in promoting national integration, see Bendix (1996[1964]) and Gosewinkel (2001).

society. In consequence, society as a whole did not acquire a fully nationalized shape and governmental legitimacy could not easily be attached to simple expressions of popular sovereignty.

First, during the nineteenth century, Colombian society possessed an extremely localized structure, and local sources of authority retained a dominant position as foci of socio-political co-ordination and obligation.⁶⁵ As mentioned, patronage widely stood in for national political participation as a source of political loyalty and authority.⁶⁶ One important account describes early Colombian citizenship as ‘hybrid citizenship’, containing disparate elements of local, clientelistic, and national obligations.⁶⁷ The Constitution of 1886 formally promoted rigidly centralized statehood and uniform citizenship, but, in reality, central institutions did not pierce deeply into the pluralistic fibre of society.⁶⁸ Second, as indicated, social elites in Colombia were often unwilling to support a nationally unifying political order, and one core precondition for a solid national political order (i.e. a sustainable fiscal system, to which citizens were willing to commit a portion of their income) was difficult to establish.⁶⁹ The material basis of citizenship was, therefore, always precarious. Most obviously, third, the intermittent periods of extremely high social violence reflected the weak articulation of citizenship. This violence had its origins in anti-colonial movements, and it was intensified by contests over land and resources beginning in the nineteenth century.⁷⁰ More structurally, however, violence was induced by the disjuncture between state and society, which meant that insurrectionist patterns of participation or citizenship often appeared more likely to yield benefits than formal or nationally institutionalized political interaction.⁷¹ This violence exploded most catastrophically in the civil conflicts of the 1940s and 1950s and the 1980s and 1990s. In these periods, the insurgents and paramilitaries that took control of society often formed *de facto* governance regimes, establishing shadowy analogues to state institutions in some regions, even creating judicial orders and rudimentary fiscal systems.⁷² Inevitably, this meant that national citizenship, based in territorially overarching claims to rights of inclusion and participation, possessed a fictional quality.⁷³ In each respect, the multi-polar form of citizenship militated against the consolidation of subjects able to sustain democracy.

The Constitution of 1991 marked a strategic response to these problems. In the first instance, the impetus for the writing of the new Constitution came, in part, from social movements and student groups, who saw the formation of a new trans-sectoral constitutional pact, designed to create robust and consensually founded institutions, as a pathway out of violence.⁷⁴ The writing of the Constitution involved representatives of different social groups, including some—although not all—of the actors in the civil violence, and during the drafting process consultation bodies were institutionalized to mobilize and coordinate civic engagement. Although written in a representative assembly, the Constitution was shaped by a multi-centric constituent power, in which previously marginalized factions, divided by their

⁶⁵ Conde Calderón (2009, 271); Márquez Estrada (2011).

⁶⁶ Leal Buitrago and Ladrón de Guevara (1990).

⁶⁷ Uribe de Hincapié (1996, 75).

⁶⁸ See the classic study in Leal Buitrago (2016), 115. See excellent analysis in Palacios (1980, 1631).

⁶⁹ Uribe López (2013, 145, 287).

⁷⁰ See Aguilera Peña (2014a, 11, 35, 41).

⁷¹ Leal Buitrago (2016, 137).

⁷² Arjona (2016, 182); Aguilera Peña (2014b, 377).

⁷³ See Tilly’s definition of democracy as involving ‘broad, equal, protected, binding consultation of citizens with respect to state actions’: Tilly (2007, 34).

⁷⁴ Decree 927/1990 stated that constitutional reforms were required to reinforce state institutions.

positions in the long-standing conflict, were integrated into core norm-setting activities. Once drafted, the Constitution endorsed a strong ethic of civil participation (Art 2). In each respect, the Constitution was driven by a pervasive affirmation of political citizenship, and it reflected an outlook that viewed intensified collective participation as a technique for galvanizing society as an aggregate of national citizens and, in so doing, for fortifying national political institutions.

Alongside this, significantly, the Constitution expressed a new ethic of national integration by constructing citizenship, in part, on the basis of global norms. Eventually, the Constitution contributed to the rise of national citizenship in Colombia because it located political participation within a global-legal framework, and it attached the exercise of national citizenship to the enactment of norms, with constitutional force, extracted from the international arena. This link between national citizenship and global law is manifest, as discussed, in the fact that the drafting of the Constitution was strongly influenced by rising international enthusiasm for human rights law. More particularly, however, this link became visible in patterns of constitutional practice that took hold after the Constitution entered force.

To be sure, the 1991 Constitution did not have an immediately solidifying impact on the rival constituencies in Colombian society. In fact, the years after 1991 were marked by the escalation of violence and by the assumption of increased autonomy by the local governance systems constructed by military units, guerrillas, and paramilitaries.⁷⁵ This period witnessed the persistence of clientelistic methods of political mobilization, in which patronage remained a key line of communication between society and government.⁷⁶ Moreover, this period witnessed continuing tendencies to very low electoral participation.⁷⁷ It is thus debatable whether, after the new Constitution took effect, Colombia became a fully nationalized society, with a nationally inclusive and integrative political system. Initially, the idea that the Constitution could imprint a unifying ethic of citizenship onto a deeply fissured society proved illusory.⁷⁸

Over a longer period of time, however, the socially consolidatory objectives of the 1991 Constitution acquired reality, in part at least. Crucially, these objectives were realized, to a large degree, not by decisively political processes, but by a mass of legal exchanges. In fact, the legal system itself began to frame and to facilitate patterns of citizenship practice, which, slowly, created a more generalized and robustly inclusive foundation for the political system in society, forming deepening articulations between the governmental order and actors at different social and regional locations. In this context, acts of citizenship were expressed, not solely—or even primarily—through classical patterns of political participation, but through legal appeals and acts of litigation, often involving reference to global legal principles. As a result, citizens engaged with the political system, not only as political agents, but also, in part, as litigants, closely linked to a global normative order, and interactions mediated through the legal system played a key role in constructing a basis of political integration and legitimation for society as a whole. The legal system began to operate as a semi-autonomous system, and, in so doing, it galvanized a series of equivalents to classical political citizenship roles.

⁷⁵ See González, Bolívar and Vázquez (2003, 168–169); Aguilera Peña (2014b, 173).

⁷⁶ García Villegas (2009, 74).

⁷⁷ Electoral participation in Colombia is generally much lower than in most other Latin America countries, including Chile, Uruguay and Argentina. See Andrés Flórez (2011, 173).

⁷⁸ Human rights violations escalated through the 1990s (see analysis in Fernando Londoño (2016, 211)).

3.2.1 Citizenship Formation 1: the Spread of Tutelas

This distinct form of inner-legal citizenship is seen, first, in the societal penetration of tutela litigation. As discussed, tutela litigation has emerged as a practice in which individual subjects obtain widened access to rights, often exercising tangible impact on legislation and policymaking. Such litigation forms a broad opening between the political system and societal actors, reaching deep into society and forming an expansive integrational base for the political system.

According to official data, more than 7 million tutelas were submitted between 1992 and 2018 in Colombia.⁷⁹ In 1997, tutelas represented 3% of the total of legal actions in Colombia. In 2018, they represented almost 28%, forming the main mechanism used by citizens to enforce their rights.⁸⁰ In this same year, it is calculated that a tutela was filed approximately every minute.⁸¹ Furthermore, public awareness of tutelas is remarkable. More than 80% of the Colombians are aware of the existence of tutelas, whereas only 20–25% of people are aware of other instruments for collective litigation. Approximately 65.1% of Colombians have a favourable opinion of this mechanism.⁸² Significantly, tutela litigation has broad geographical reach.⁸³ Most tutelas are filed in urban areas. However, the number of cases outside large population centres has also increased.⁸⁴ Tutelas address violations in a number of constitutional spheres. Historically, most tutelas have addressed the right to petition, the right to health, and a range of economic, social, and cultural rights. However, claims to other rights have given rise to many tutelas each year. In recent years, tutelas related to the right to petition and to humanitarian assistance have been decreasing. Allegedly, this reduction is due to the Peace Agreements and to measures implemented by institutions created to provide protection for victims of violence (for instance the Unidad para la Atención y Reparación a las Víctimas).⁸⁵ The creation of new mechanisms for pursuing remedies reveals the institutional strengthening of the Colombian legal system and indicates that tutelas may reveal priority areas for defence of rights. In these respects, tutelas have assumed unprecedented importance as a distinct pattern of citizenship practice, acting to create a unified normative and territorial environment for the national political system, linking actors at different societal locations to legislative processes. In view of the fact that, on average, only circa 40% of the population vote in general and plebiscitary elections, tutelas represent a primary channel of socio-political participation and incorporation.⁸⁶

⁷⁹ Colombia, Defensoría del Pueblo (2018, 52).

⁸⁰ Colombia, Rama Judicial, Consejo Superior de la Judicatura (2018, 13–14).

⁸¹ Colombia, Defensoría del Pueblo (2018, 161).

⁸² Data are taken from La Rota, Lalinde, Uprimny (2017, 84).

⁸³ In 2018, 1074 of the 1122 (95.7%) existing Colombian municipalities filed at least one tutela for violation of fundamental rights (see Colombia, Defensoría del Pueblo (2018, 61).

⁸⁴ See Colombia, Defensoría del Pueblo (2018, 61–66).

⁸⁵ See Colombia, Defensoría del Pueblo (2018, 53–60). The UARIV (Unidad para la Atención y Reparación Integral a las Víctimas) was created by Law 1448/2011.

⁸⁶ See Monsalve Solórzano (2004, 54–72).

3.2.2 Citizenship Formation 2: Tutelas and New Constitutional Subjects

This distinct form of inner-legal citizenship is evident, second, in the fact that tutela litigation creates political roles for a range of social groups who struggled historically to avail themselves of citizenship rights.⁸⁷ In particular, the Constitutional Court has ruled that, owing to their marginality and vulnerability, certain subjects need to be granted require heightened protection when they engage in legal process, and rights established in tutelas initiated by such subjects should be subject to particularly robust remedies, with strong guarantees for implementation. In the wake of T-025/04, the Constitutional Court elaborated the concept of the ‘subject of special constitutional protection’, which it used to designate groups whose rights require especially secure assurances.⁸⁸ Subjects placed in this category include inter alia displaced people, children, elderly people, prison detainees, women, and ethnic and indigenous groups. Recently, this designation has migrated beyond cases treated by the Constitutional Court, and it has become a maxim of administrative law, such that some collective groups now claim elevated protection from administrative violation.⁸⁹ There is a strong probability that tutelas and other claims filed by these subjects will trigger acts of public policy and legislation to guard their rights and avert further violations, and subjects assuming such protected form possess a legal personality that allows them to act, in effect, as constitutional subjects.

In such jurisprudence, the Court has attempted to fill the historical void of national citizenship, aiming to incorporate all subjects, at least minimally, in a shared structure of normative inclusion.⁹⁰ Indicatively, the Court has ruled that all citizens in Colombian society are entitled to enjoy certain rights, and, for persons whose enjoyment of such rights is impeded, the government has an obligation to take additional steps to facilitate the exercise of rights at the level of a universal minimum.⁹¹ This concept of the universal minimum was derived, to a large degree, from international law.⁹² In this respect, global law became a functional surrogate for the unifying effects of national citizenship. At the same time, the granting of special protection has meant that subjects in protected categories have been able to assume quite particular forms of constitutional subjectivity and even to use their protected status to generate new rights. For example, indigenous groups have been able to assert their legal personality, not only to preserve given basic rights, but to concretize additional or subsidiary rights—such as rights to indigenous identity, and rights to recognition and

⁸⁷ One account describes the position of displaced persons as close to internal ‘statelessness’: Uribe de Hincapié (2000, 48, 54).

⁸⁸ Auto 073 of 2014 (Justice Luis Ernesto Vargas Silva).

⁸⁹ This norm is now also established in administrative law. See Decision Consejo de Estado, Sala de lo Contencioso Administrativo, Sección Cuarta, 70001-23-33-000-2015-00197-01 AC (2015) (Justice Hugo Fernando Bastidas Bárcenas) (Council of State). This case recognized indigenous peoples as ‘subjects of special constitutional protection’. This term has also been used in administrative law to define the status of displaced persons. See Decision Consejo de Estado, Sala Plena Contenciosa Administrativa, Sección Tercera, 25000-23-26-000-2001-02697-01(33977) (2015) (Justice Hernán Andrade Rincón) (Council of State).

⁹⁰ Agnew and Oslender (2010, 210). For parallel claims, see Sebastián Gómez García (2009, 145), arguing that, in elevating constitutional protection for displaced persons, the Court has established a form of *super-citizenship*, to project robustly secured rights into the most abandoned sectors of society.

⁹¹ See discussion in Decision T-485 of 2011 (Justice Luis Ernesto Vargas Silva).

⁹² The classification of women in this category was based in the Convention on the Elimination of all Forms of Discrimination Against Women (C-667/06), which was used to justify affirmative action for women. The special position of indigenous groups was based, in part, in rights defined under ILO 169 (Decision T-235 of 2011 (Justice Luis Ernesto Vargas Silva)).

protection of traditional medicines.⁹³ Moreover, the granting of such protected rights has meant that rights can be transferred to social subjects living in situations analogous to those occupied by already protected subjects, so that the ascription of special protection to one group has generated parallel patterns of subjectivization or personhood amongst similar groups. In some cases, the Constitutional Court has decided that rights established for indigenous communities, as subjects of special constitutional protection, need to be broadened so that they cover other communities, such as African Colombians and even traditional mining communities.⁹⁴ Special protection jurisprudence has thus served to create common thresholds of inclusion for all society. However, this jurisprudence has also given rise to new forms of citizenship and it has allowed new actors to shape the legal form of society. In this respect, litigation formed a mode of citizenship that was specifically adapted to the structure of society. It helped to establish a uniform stratum of national norms to surmount the inherent polycentricity of society, yet it also allowed the exercise of citizenship rights in subjective forms reflecting society's highly variable inner environments, enabling marginal subjects to obtain access to the political system.

3.2.3 Citizenship Formation 3: Tutelas and Sectoral Citizenship

This distinct form of inner-legal citizenship is seen, third, in the additional patterns of subject formation that occur in tutela litigation.

In some respects, tutelas do not only serve to articulate existing citizens with the political system. They also engender new patterns of political subjectivity and citizenship, and they allow the exercise of citizenship practices in quite spontaneous fashion, often giving rise to entirely new patterns of legal personhood. One result of human rights litigation in Colombia is that persons have begun to acquire a separate constitutional personality in the different functional domains contained in society, and they increasingly form articulations with the political system, not as generic citizens, but in particular sectors of societal interaction—as sectoral citizens. In some ways, the Constitutional Court has promoted tutela jurisprudence to craft a multi-centric sectoral constitution for society as a whole, in which many subjects, often lacking formal legal identity, acquire the force to consolidate constitutional norms with a differentiated, functionally specific emphasis, so that multiple, sectoral patterns of citizenship come into existence. In some such cases, the subject acquiring rights does not formally or materially exist prior to the recognition of the rights in questions, and the recognition of rights actually brings the rights-endowed subjects (citizens) into being.

The Constitutional Court began to construct sectoral constitutional norms in some of its first rulings. In early tutelas, it ruled that the Constitution of 1991 should not be interpreted as a document restricted to classical constitutional functions of placing limits on state power. On the contrary, it argued that the Constitution 'contains the basic legal order for the diverse sectors of social and political life'. In particular, it stated that the Constitution provides elements of an economic constitution, based in 'property, labour, enterprise', which establishes elements of a 'social constitution', and it sets out principles for an ecological and a cultural constitution.⁹⁵ Over a longer period, the Court expanded this approach, and it elaborated a

⁹³ Decision T-001 of 2012 (Justice Juan Carlos Henao Pérez); Decision T-282 of 2011 (Justice Luis Ernesto Vargas Silva).

⁹⁴ See Decision SU-133 of 2017 (Justice Luis Ernesto Vargas Silva).

⁹⁵ Decision T-411 of 1992 (Justice Alejandro Martínez Caballero).

series of quite differentiated constitutional orders in separate parts of society. Importantly, these orders were not entirely separate, and all were connected and shaped by the transversal commitment of the Court to give effect to the value of human dignity. Nonetheless, these orders acquired striking autonomy in their own sphere of application.

This tendency can be seen, for example, in the sphere of healthcare. Originally, the right to health was not fully established as a fundamental right in the Constitution. Article 49 of the Constitution creates an obligation for the state to provide healthcare. However, this obligation did not originally create a right protectable by tutela: that is, a justiciable fundamental right. Indeed, the Constitutional Court opined in 1993 that the Constitution ‘does not directly recognize the right to health’.⁹⁶ However, in cases of tutela litigation concerning health rights in the 1990s, the Court established the principle that rights to health should be defined as fundamental and justiciable parts of the constitutional order. In reaching this conclusion, the Court promoted a deliberately constitutional approach to healthcare rights, stating that such rights are immediately enforceable, via tutelas, when they are connected with an ‘immediately applicable fundamental right’, such as, for example, the right to life.⁹⁷ In so doing, the Court constructed fundamental health rights using the principle of connectedness (*conexidad*). This principle was used to formulate the claim that there are some rights which, although not declared fundamental in the Constitution, are ‘fundamental rights by connectedness’: that is, rights that are constitutionally protected by virtue of their ‘intimate and ineradicable relation with other fundamental rights’.⁹⁸ Ultimately, the Constitutional Court intensified its protection of health rights to declare, simply, that the right to health is a fundamental right.⁹⁹ Such rulings were widely supported by international health law principles.¹⁰⁰

In these respects, the Constitutional Court established a set of rights that formed a distinct sectoral constitutional order—a health constitution. In so doing, it also promoted the presumption that the mass of exchanges relating to health contains multiple distinct subjects and multiple distinct legal communities, not all of which were initially covered by, or visible in, the formal law of the constitution. The Court expanded the right to health to establish differential rights, with gradations reflecting the vulnerability of implicated parties. It ruled, for instance, that the right to health required particular protection in cases where it was denied to children,¹⁰¹ to the aged,¹⁰² and to persons displaced by the civil conflict.¹⁰³ In these respects, the Court did not only create new constitutional rights: it created new constitutional subjects, health subjects, with distinct personality in the health constitution, able distinctively to claim rights and to affect legislation regarding health rights. The right to health has even been interpreted to recognize a river, the Atrato running through the Choco province, as entitled to protection from contamination, owing largely to its importance for the ecosystem of the region and the health of its inhabitants.¹⁰⁴ This ruling relied extensively on international norms regarding access to food, and international treaties regarding protection of biodiversity

⁹⁶ See Decision T-597 of 1993 (Justice Eduardo Cifuentes Muñoz). This case ruled that state agencies are obliged to provide health care, but it was not defined as a fundamental right.

⁹⁷ Decision T-597 of 1993 (Justice Eduardo Cifuentes Muñoz).

⁹⁸ Decision T-491 of 1992 (Justice Eduardo Cifuentes Muñoz).

⁹⁹ Decision T-760 of 2008 (Justice Manuel José Cepeda Espinosa).

¹⁰⁰ Decision T-062 of 2006 (Justice Clara Inés Vargas Hernández).

¹⁰¹ Decision T-610 of 2014 (Justice Jorge Ivan Palacio Palacio).

¹⁰² Decision T-199 of 2013 (Justice Alexei Julio Estrada).

¹⁰³ Decision T-239 of 2013 (Justice María Victoria Calle Correa).

¹⁰⁴ Decision T-622 of 2016 (Justice Jorge Ivan Palacio Palacio).

and rights of indigenous communities, especially Convention 169 of the International Labour Organization (ILO 169).

A related logic is evident in *tutela* cases concerning the environment. The Colombian Constitution contains some positive environmental provisions. However, it does not provide immediate justiciable guarantees for rights to environmental protection. At an early stage in the development of its jurisprudence, nonetheless, the Constitutional Court ruled that it could hear *tutela* cases regarding environmental damage if these cases addressed environmental questions that caused a potential ‘violation of a fundamental constitutional right, with respect to one or a number of determinate persons’.¹⁰⁵ In its rulings in environmental *tutelas*, the Court initially followed a *conexidad* line of reasoning to establish a right to a healthy environment, arguing that environmental pollution could lead to the denial of ‘fundamental rights’, such as rights to ‘life, personal integrity, intimacy’, or, by extension, ‘health’.¹⁰⁶ The Court found that, as a matter connected to life and health, the state had an obligation to introduce policies to reduce environmental damage as a ‘priority public service’.¹⁰⁷ Eventually, the Court declared that environmental rights were of a fundamental nature,¹⁰⁸ and even that they formed ‘rights of constitutional rank’.¹⁰⁹ Notably, the determination of such rights was supported by extensive citation from international law.¹¹⁰

As in health law, the establishment of constitutional rights in environmental litigation gave rise to a line of jurisprudence, in which certain sectoral subjects acquired new legal visibility. Environmental obligations have acquired particular importance in cases affecting minority communities, such as indigenous populations, especially when their traditional lands are affected. In such cases, the Constitutional Court has found a heightened administrative duty for the government to prevent environmental damage.¹¹¹ In cases where building works, mining activities or developmental projects have risked causing environmental damage, the Court has dictated that there should be provisions for prior consultation with indigenous communities and that due recognition should be shown for their right to cultural integrity.¹¹² Notably, such rulings widely relied on international law, especially ILO 169. In some environmental cases, animals have also been configured as legal subjects, entitled to protection from cruelty.¹¹³ These rights were deemed to flow from the basic constitutional right to ecological balance, from the character of animals as ‘sentient beings’, and from the general environmental interest in the maintenance of biodiversity and the natural equilibrium of species.¹¹⁴

A similar sequence of steps can be seen in judicial constructions of the right to education. In the first instance, the 1991 Constitution did not place the right to education under fully enforceable constitutional protection. Article 67 states that education is an individual right. However, this right was not included in the list of rights subject to immediate and binding

¹⁰⁵ Decision T-257 of 1996 (Justice Antonio Barrera Carbonell).

¹⁰⁶ Decision T-046 of 1999 (Justice Hernando Herrera Vergara).

¹⁰⁷ Decision T-046 of 1999 (Justice Hernando Herrera Vergara).

¹⁰⁸ Decision C-431 of 2000 (Justice Vladimiro Naranjo Mesa).

¹⁰⁹ Decision T-760 of 2007 (Justice Clara Inés Vargas Hernández).

¹¹⁰ See especially Decision T-608 of 2011 (Justice Juan Carlos Henao Pérez).

¹¹¹ See Decision T-428 of 1992 (Justice Ciro Angarita Barón).

¹¹² A classic example is Decision C-418 of 2002 (Justice Alvaro Tafur Galvis). In a recent decision, the right to consultation is extended to other actors perhaps impairing the right to cultural integrity. See Decision SU-133 of 2017 (Justice Luis Ernesto Vargas Silva).

¹¹³ Decision C-666 of 2010 (Justice Humberto Antonio Sierra Porto).

¹¹⁴ Decision C-666 of 2010 (Justice Humberto Antonio Sierra Porto).

constitutional guarantees. Despite this, the Constitutional Court established the principle that the right to education possessed a fundamental quality, insisting on its ‘close linkage’ with the basic values enunciated in the Constitution, and it concluded that the right to education could be subject to tutela.¹¹⁵ The Court also used the doctrine of the block of constitutionality to cement this right,¹¹⁶ and relevant jurisprudence was marked by broad use of international law.¹¹⁷ Over a longer period, the basic right to education was expanded to generate more differentiated rights, as the Court ruled that the government was under obligation to offer education that was available, accessible, acceptable, and adaptable: the right to education acquired four subsidiary characteristics.¹¹⁸ This implied, for example, that the right to education was relatively neutral to the social location of the claimants to this right, and the government was expected to offer education to all social groups, even in remote regions.¹¹⁹

As above, the emergent education constitution in Colombia provides recognition for new legal persons, as subjects of the education constitution, and it enables persons to shape and construct new constitutional rights. Naturally, the right to education is particularly entrenched for children. However, disabled persons and persons with learning difficulties are perceived as educational subjects with elevated constitutional protection, who require particularly strong guarantees of access to education.¹²⁰ Indigenous population groups have also acquired a distinct personality in this regard, and they are recognized as possessing a right to a ‘special system’ of education, tailored to their cultural needs, flowing from the right to identity.¹²¹ In many instances, such rights were created through a direct articulation between national and international legal norms.¹²²

This list of sectoral constitutions and sectoral constitutional subjects in Colombian law is not exhaustive. However, developments in health law, environmental law, and education law have an exemplary quality. These constitutions have evolved in spontaneous fashion; in many cases, they have been developed on contingent foundations, and they do not extract authority from a clearly positivized set of legal norms. Above all, these constitutions have been created by acts of sectoral citizenship, in which litigation concerning domain-specific rights creates new avenues for legal inclusion and law production. In the construction of these constitutions, a condition of sectoral citizenship emerges alongside more classical majoritarian patterns of interest representation. In this process, the construction of sectoral norms by distinct functional subjects replaces the representation of the people as a collective actor, and persons enter the political system through multiple channels of articulation, usually linked to litigation for particular global rights. This enables rights and forms of subjecthood to appear that could not easily take hold in more conventional legislative systems. In the context of a society marked historically by uneven nationalization of citizenship practices and by weak capacity of state institutions to interact with citizens in unitary form, the sectoralization of citizenship creates compensatory, socially proportioned openings for legal recognition and participation in law making. The political form of the citizen thus emerges, eminently, through legal actions,

¹¹⁵ This position has been settled since the decision in Decision T-406 of 1992 (Justice Ciro Angarita Baron).

¹¹⁶ Decision T-306 of 2011 (Justice Humberto Antonio Sierra Porto).

¹¹⁷ Decision T-458 of 2013 (Justice Jorge Ignacio Pretelt Chaljub).

¹¹⁸ Decision T-743 of 2013 (Justice Luis Ernesto Vargas Silva).

¹¹⁹ Decision T-743 of 2013 (Justice Luis Ernesto Vargas Silva).

¹²⁰ Decision T-247 of 2014 (Justice Mauricio González Cuervo); Decision T-513 of 1999 (Justice Martha Victoria SÁCHICA de Moncaleano).

¹²¹ Decision T-907 of 2011 (Justice Jorge Ignacio Pretelt Chaljub).

¹²² In Decision T-601 of 2011 (Justice Jorge Ivan Palacio Palacio) the right to special education provisions for indigenous people is justified through use of the block of constitutionality.

and the representation of society through citizenship rights occurs, primarily, as an inner-legal process.

3.2.4 Citizenship Formation 4: Public Interest Litigation

This distinct form of inner-legal citizenship is seen, fourth, in the expansion of legal agency in Colombia. One implication of the growing autonomy of the legal system is that actors across society have recognized that litigation is a core domain of collective norm formation, and political groups and social movements increasingly engage in litigation to obtain legislative outcomes and to establish new rights of recognition. Consequently, the Constitutional Court has acted as a ‘catalyst’ for waves of legal mobilization—for example, for indigenous rights, gender rights, and ethnic rights.¹²³ Indicatively, T-025/04 was filed by a collective litigator, and other leading *tutelas* have been strategically filed to gain heightened recognition for collective subjects.

Alongside the growth of *tutelas*, the period since 1991, and especially up to 2010, saw a rise in public interest litigation, in administrative law.¹²⁴ Like *tutelas*, public interest litigation in Colombia now forms a core constitutional instrument for securing rights, especially historically unconsolidated rights, such as environmental rights and healthcare rights.¹²⁵ One environmental case, the famous Río Bogotá case, led to a ruling with very broad legislative reach, which both instituted and financed an integrated and co-ordinated system for decontaminating and managing water supplies around Bogotá.¹²⁶ The importance of public interest litigation in Colombia is tied to the fact that, under Law 472, Art. 40 (1998), public agencies are required to act in accordance with broadly defined standards of administrative morality, which impose moral obligations on all organs of government.¹²⁷ On this basis, society is deemed to have a collective interest in the morality of governmental and quasi-governmental agents and even a right to moral administration. Litigation against public bodies can be initiated when this right is not recognized. This right has very broadly applicable force, and it provides wide standing for litigants in public interest cases. Moreover, this right provides substantial scope for litigants to affect public policies, as it presumes that policies must be sensitive to public interests and can be appealed on the grounds that they are not.¹²⁸ International law has been commonly invoked to strengthen claims made in public interest cases.¹²⁹

¹²³ See Sandoval Rojas (2013, 203).

¹²⁴ Such cases increased after 1991. However, subsequent to Law 1425/2010, which eliminated economic incentives for public interest litigators (articles 39 and 40), the number of cases decreased significantly. According to the Consejo Superior de la Judicatura, between 2009 and 2013, the number of cases decreased by 77% (see Páez-Murcia, Lamprea-Montalegre and Vallejo-Piedrahíta 2017).

¹²⁵ See analysis in Coral-Díaz et al. (2010). The ‘collective right to administrative morality’ is established in Law 472/1998. However, this right presupposes ‘concretion’ by the courts: Matallano Camacho (2010, 152).

¹²⁶ Decision Consejo de Estado, Sala Plena Contenciosa Administrativa, Sección Primera, 25000-23-27-000-2001-90,479-01 AP (2014) (Justice Marco Antonio Vellilla Moreno) (Council of State). In Colombia, lack of resources cannot excuse a public body for not fulfilling the terms of a ruling in a public-interest case. See Decision Consejo de Estado, Sala Contenciosa Administrativa, Sección Primera, 18001-23-31-000-2011-00256-01 AP (2015) (Justice Guillermo Vargas Ayala) (Council of State).

¹²⁷ The ‘collective right to administrative morality’ is established in Law 472/1998. However, this right is conceived in the spirit of an ‘open texture’ and presupposes precise ‘concretion’ by the courts, thus allowing the courts latitude in constructing the content of the right (see Matallano Camacho (2010, 152)).

¹²⁸ Fager Sáenz and Díaz Márquez (2013, 59).

¹²⁹ The ruling in the Río Bogotá case makes extensive use of international law.

The democratically formative role of public interest litigation in Colombia has been accentuated by the Constitutional Court, which has accorded to such litigation a clearly political, constitutive force. In some leading opinions, which define the scope of public interest litigation, the Court has declared that public interest cases should be encouraged as an instrument for promoting ‘law based in participation and solidarity’. Most importantly, it has construed litigation of this type as a practice for protecting interests of a very strictly collective nature, of relevance for all citizens, not attached to specific subjects, and not registered through damages to clearly identified rights.¹³⁰ In leading relevant case law, it has been ruled that, in public interest cases, matters should be treated that do not have a ‘subjective or individual content’, and which do not relate to a ‘damage that can be repaired subjectively’.¹³¹ In consequence, such cases are focused on ‘collective rights, in contrast to individual rights’: on rights that ‘belong to the entire community’, and whose holder ‘is a plurality of persons’.¹³² Standing for filing such cases, consequently, depends solely on membership in the national community, and no other claim apart from interests inherent in citizenship is required to justify legal proceedings.¹³³ Collective litigation is thus clearly envisioned as a forum, in which uncertainly defined subjects can take legal shape, and emergent social concerns can be transmitted towards the political system. In some ways, it forms an ultra-sensitive channel of political communication, which promotes highly diffuse citizenship practices and opens the political system to interests not easily expressed by conventional political subjects.

None of these observations is intended to imply that judicial interactions devised a miraculous remedy for problems of weak institutional integration or incomplete elaboration of citizenship rights in Colombia. In some respects, however, the rise in litigation, especially in tutelas, can be seen to have modified, not only the legal system, but also the legitimational structure of the polity, creating compensatory conditions of national integration and national citizenship in a society historically marked by low inclusion of citizens. In particular, human rights, based in global norms but constructed and protected through tutelas, form an inter-group vocabulary of legal understanding, which connects different parts of society, and links social agents, at different societal positions, to the political system.¹³⁴ Through these various processes, Colombia has assumed the form of a democracy that contains multiple subjects (citizens) capable of participating in legal/political activities, such that the range of persons able to play a role in the construction of legal norms has been greatly widened. This means that the political system is able to produce and legitimate legislation in many ways, and it is articulated with persons requiring legislation in its environment through many channels, each of which is accessed by a range of different subjects. Legal exchanges form a key line of political communication, in which social demands are translated into law, and legal exchanges themselves create new acts of legislation, new constitutional norms, and new legal subjects (citizens). The autonomous force of law, in other words, is not a limit on democracy: the legal system itself, sustained by strong presumptions in favour of global human rights, is the basic source of democratic formation and integration, and it even constructs the subjects on which democracy relies. The political system has evolved as a multi-articulated democracy, in which

¹³⁰ Decision C-215 of 1999 (Justice Martha Victoria Sáchica de Moncaleano). The Court has defined solidarity itself as a ‘constitutional value’ (Decision C-459 of 2004 (Justice Jaime Araújo Rentería)).

¹³¹ Decision T-528 of 1992 (Justice Fabio Moron Diaz).

¹³² Decision T-254 of 1993 (Justice Antonio Barrera Carbonell).

¹³³ Decision T-528 of 1992 (Justice Fabio Moron Diaz).

¹³⁴ Lemaitre Ripoll (2009, 107).

new channels of interaction, partly constructed within the law itself, replace classical patterns of participation and will formation.

The political institutions in Colombian society struggled, historically, to generate democratic citizenship on national foundations alone. In fact, purely national political institutions did not create a fully nationalized society. Eventually, more stable patterns of citizenship and stable patterns of national inclusion began to emanate from exchanges within the legal system, acting at a heightened level of autonomy. National citizenship was created, in part, through an alignment of national law to global law, and global law was used to design adaptive models of national citizenship which national institutions themselves had not established.

4 Conclusion

In many respects, Colombia is a paradigmatic example of polity with a transnational judicial constitution, usually seen as comprising a set of global legal norms that limit political-democratic modes of agency. However, the case of Colombia demands that we re-formulate our approach to constitutions shaped by autonomous interactions between national law and global law. What is discernible in Colombia is that the distinctive global-legal form of the constitutional order only contradicts norms of democratic legitimacy if democracy is understood in sociologically unreflected categories. The Colombian Constitution has in fact created a foundation for the emergence of a distinctive pattern of democracy, in which global legal rights stimulate the formation of multiple lines of articulation between the political system and society. In this respect, litigation appears as an important source of norms with *de facto* constitutional rank, and litigation triggers the emergence of new patterns of citizenship. As a result, the Constitution needs to be seen as a document that greatly facilitates the exercise of participatory political agency, locking the political system into its societal environment by opening up multiple processes of socio-political engagement and norm construction, and even materializing new political subjects.

Analysis of Colombian constitutionalism tells us that common approaches to judicial constitutionalism are sociologically naïve in their understandings of politics and democratic practice. This model may appear as a deficient form of democracy to perspectives that insist that majority-mandated legislation is the sole authorized expression of the popular will.¹³⁵ If democracy is viewed as a political order that maximizes popular participation and allows a maximum number of persons to recognize laws as outcomes of their own engagement, the judicial-constitutional model can easily, in some settings, realize democratic normative expectations more fully than classical democratic systems. This model gives reality to the claim in early sociology that democracy is a system of consensual inclusion, in which rights of citizenship are exercised and construct legitimacy for law in multiple fashion. In this model, access to law making depends, not on the possession of a majoritarian mandate, but on the capacity of actors to challenge for and exercise globally acknowledged rights, so that rights provide thresholds of legitimate participation and pre-figure outcomes of such participation.¹³⁶ In the case of Colombia, the rise of a transnational judicial constitutionalism has tended to enhance the quality of the political system as a distinctive public order, open to citizens at different locations in society and capable of extending an overarching system of norms across

¹³⁵ Waldron (1999, 166).

¹³⁶ For a similar insight, see Kingsbury (2009).

society. By contrast, in comparable societies that have recently abandoned judicial constitutionalism in favour of more direct models of mobilization, national political systems have almost invariably begun to show symptoms of privatism and patrimonialism as techniques for generating societal support.¹³⁷ Clearly, many forms of political communication that have evolved in Colombia will simply disappear if the autonomous power of the legal system is reduced.

In a world in which many democracies have suddenly become fragile, it is important to avoid burdening democratic political systems with the expectation that they comply with legitimational expectations that are not matched to actual patterns of integration and subject formation in society. The act of looking for the people as a fully implicated political subject in democracy, lying somewhere beneath the system of equivalence on which democracy often depends, can easily destroy the complex, compensatory forms, in which democratic citizenship becomes real. The future of democracy itself may well depend on the use of a sociologically measured perspective for understanding democracy, able to identify varied and contingent ways in which global law articulates premises for the legitimization of laws in national societies and for national citizenship more widely. The future of Colombian democracy, currently under threat because of its judicial bias, may have implications that extend far beyond Colombia itself.

Acknowledgements Early versions of this article were presented in 2018 at Universidad Javeriana in Bogotá and at the Constitutional Court of the Republic of Colombia. We wish to thank Juan Barrero Berardinelli and Justice Alberto Rojas Ríos for the opportunity to discuss our work in these fora. We are also grateful to colleagues at Universidad de Los Andes, Universidad Católica de Pereira and Universidad Católica de Manizales for opportunities to present our research.

Authors' Contribution Authorship of this article is divided equally between both authors.

Funding Information Some research for this article was funded by the European Research Council (Advanced Grant 323656–STC).

Open Access This article is licensed under a Creative Commons Attribution 4.0 International License, which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons licence, and indicate if changes were made. The images or other third party material in this article are included in the article's Creative Commons licence, unless indicated otherwise in a credit line to the material. If material is not included in the article's Creative Commons licence and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder. To view a copy of this licence, visit <http://creativecommons.org/licenses/by/4.0/>.

References

- Agnew J, Oslender U (2010) Territorialidades superpuestas en disputa: Lecciones empíricas desde América Latina. *Tabula Rasa* 13:191–213
- Aguilera Peña M (2014a) *Guerrilla y población civil. Trayectoria de las FARC 1949-2013*, third edition. Centro Nacional de Memoria Histórica, Bogotá

¹³⁷ See the analysis of Brazil and Venezuela in this respect in Leonardo Santos (2014) and Mazzucca (2013).

- Aguilera Peña M (2014b) *Contrapoder y justicia guerrillera, fragmentación política y orden insurgente en Colombia (1952–2003)*. IEPRI, Bogotá
- Alter K (2001) *Establishing the supremacy of European law. The making of an international rule of law in Europe*. Oxford University Press, Oxford.
- Andrés Flórez J (2011) *Democracia y abstencionismo electoral*. In: Araújo Oñate R, Torres Villarreal M (eds) *Retos de la democracia y participación ciudadana*. Editorial Universidad del Rosario, Bogotá, pp 153–178
- Arjona A (2016) *Rebelocracy. Social order in the Colombian civil war*. Cambridge University Press, Cambridge
- Bellamy R (1996) *The political form of the constitution: the separation of powers, rights and representative democracy*. *Political Studies* 44:436–456
- Bellamy R (2007) *Political constitutionalism. A republican defence of the constitutionality of democracy*. Cambridge University Press, Cambridge
- Bendix R (1996[1964]) *Nation-building and citizenship. Studies of our changing social order, new and enlarged edition*. Transaction, New Brunswick
- Benvenisti E (2008) *Reclaiming democracy: the strategic uses of foreign and international law by national courts*. *The American Journal of International Law* 102(2):241–274
- Benvenisti E, Downs G (2012) *The democratizing effects of transjudicial coordination*. *Utrecht Law Review* 8(2):158–171
- Blokker P (2018) *Populist constitutionalism*. In: de la Torre C (ed) *Routledge handbook of global populism*. Routledge, Abingdon, pp 113–127
- Cajas Sarria M (2015) *La historia de la Corte Suprema de Justicia de Colombia, 1886–1991, I: Del Frente Nacional a la Asamblea Constituyente, 1958–1991*. Ediciones Uniandes, Bogotá
- Canovan M (1999) *Trust the people! Populism and the two faces of democracy*. *Political Studies* 47:2–16
- Colombia. Defensoría del Pueblo (2018) *La tutela y los derechos a la salud y a la seguridad social*. Available at: <https://www.defensoria.gov.co/public/pdf/Tutela-los-derechos-de-la-salud-2018.pdf>. Last accessed 18 June 2020
- Colombia, Rama Judicial, Consejo Superior de la Judicatura (2018) *Informe al Congreso de la República*. Available at: <https://www.ramajudicial.gov.co/documents/2341315/23653047/Resumen+Ejecutivo+-+Informe+al+Congreso+de+la+Rep%C3%BAblica+2018.pdf/08d7df52-269f-4446-8859-b48206674bff>. Last accessed 18 June 2020
- Colon-Rios J (2014) *Five conceptions of constituent power*. *Law Quarterly Review* 130:306–336
- Conde Calderón J (2009) *Buscando la Nación. Ciudadanía, clase y tensión social en el Caribe colombiano, 1821–1855*. La Carreta, Medellín
- Coral-Díaz A, Londoño-Toro B, Muñoz-Ávila L (2010) *El concepto de litigio estratégico en América Latina: 1990–2010*. *Vniversitas* 121:49–75
- Dahl R (1998) *On democracy*. Yale University Press, New Haven
- Durkheim É (1902) *De la division du travail social*, second edn. Alcan, Paris
- Fager Sáenz N, Díaz Márquez M (2013) *Ciudad Bolívar no tiene agua: hacia la justiciabilidad de los derechos colectivos de los menos favorecidos*. In: Londoño-Toro B (ed) *Litigio estratégico en Colombia. Casos paradigmáticos del Grupo de Acciones Publicas, 2009–2013*. Editorial Universidad del Rosario, Bogotá, pp 45–67
- Ferejohn J (2002) *Judicializing politics, politicizing law*. *Law and Contemporary Problems* 65(3):41–68
- Fernando Londoño J (2016) *La travesía de una democracia incompleta: reformas políticas en Colombia (1991–2015)*. In: Casa-Zamora K et al (eds) *Reformas políticas en América Latina: tendencias y casos*. Secretaría General de la Organización de los Estados Americanos, Washington, DC, pp 183–226
- Freeman S (1990) *Constitutional democracy and the legitimacy of judicial review*. *Law Philos* 9(4):327–370
- Gargarella R (2015) *Democracy and rights in Gelman v. Uruguay*. *The American Journal of International Law* 109:115–119
- Gómez García L (2009) *Desplazados forzados en Colombia: Una nueva categoría de ciudadanos?* *Revista Opera* 9:135–152
- González Jácome J (2015) *Estados de Excepción y democracia liberal en América del Sur: Argentina, Chile y Colombia (1930–1990)*. Pontificia Universidad Javeriana, Bogotá
- González Jácome J (2018) *The emergence of revolutionary and democratic human rights activism in Colombia between 1974 and 1980*. *Hum Rights Q* 40(1):91–118
- González F, Bolívar I, Vázquez T (2003) *Violencia política en Colombia. De la nación fragmentada a la construcción del Estado*. CINEP, Bogotá
- González-Manrique U et al (2014) *Innovación Jurisprudencial del Derecho Procesal Constitucional Colombiano: efectos de sentencias inter pares e inter comunis*. *Revista Principia Iuris* 21:169–193
- Gosewinkel D (2001) *Einbürgern und Ausschließen. Die Nationalisierung der Staatsangehörigkeit vom Deutschen Bund bis zur Bundesrepublik Deutschland*. Vandenhoeck und Ruprecht, Göttingen

- Grajales J (2017) *Gobernar en medio de la violencia. Estado y paramilitarismo en Colombia*. Editorial Universidad del Rosario, Bogotá
- Higuera Jiménez D (2009) Estudio Integrado de la Legitimidad de la Corte Constitucional en Colombia. *Principia Juris* 12:91–117
- Hirschl R (2000) The political origins of judicial empowerment through Constitutionalization: lessons from four constitutional revolutions. *Law and Social Inquiry* 25(1):91–149
- Hirschl R (2007) The new constitutionalism and the judicialization of pure politics worldwide. *Fordham Law Review* 75:721–753
- Inter-American Commission on Human Rights (1993) Second report on the situation of human rights in Colombia, Chapter III, The political and legal system in Colombia. Available at: <http://www.cidh.org/countryrep/Colombia93eng/chap.3.htm>. Last accessed on 18 June 2020
- Inter-American Commission on Human Rights (1997) Annual report for 1996, OEA/Ser.L/V/II.95, Doc. 7 rev, March 14, 1997
- Kelsen H (1950) *The law of the United Nations. A critical analysis of its fundamental problems*. Stevens and Sons, London
- Kingsbury B (2009) International law as inter-public law. In: Richardson H, Williams M (eds) *NOMOS XLIX: moral universalism and pluralism*. New York University Press, New York, pp 167–204
- Krivenko E (2017) *Rethinking human rights and global constitutionalism. From inclusion to belonging*. Cambridge University Press, Cambridge
- La Rota ME, Lalinde S, Uprimny R (2017) Encuesta Nacional de Necesidades Jurídicas. Análisis general y comparativo para tres poblaciones. Available at: https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_618.pdf. Accessed 21 Jul 2020
- Landau D (2012) The reality of social rights enforcement. *Harv Int Law J* 53(1):189–247
- Leal Buitrago F (2016) *Estudios sobre el Estado y la política en Colombia*. Universidad de los Andes, Bogotá
- Leal Buitrago F, Ladrón de Guevara A (1990) *Clientelismo. El Sistema político y su expresión regional. Transversal*, Bogotá
- Lemaitre Ripoll J (2009) *El derecho como conjuro. Fetichismo legal, violencia y movimientos sociales*. Universidad de los Andes, Bogotá
- Leonardo Santos M (2014) Representação de Interesses na Câmara dos Deputados: o Lobby e o Sucesso da Agenda Legislativa da Indústria. *Revista Ibero-Americana de Estudos Legislativos* 1:52–70
- López Daza G (2011) El juez constitucional colombiano como legislador positivo: ¿un gobierno de los jueces? *Cuestiones Constitucionales: Revista Mexicana de Derecho Constitucional* 24:169–193
- López Medina D (2004) *Teoría impura del derecho. La transformación de la cultura jurídica latinoamericana*. LEGIS, Bogotá
- Loughlin M (2010) *Foundations of public law*. Oxford University Press, Oxford
- Luhmann N (1983[1969]) *Legitimation durch Verfahren*. Suhrkamp, Frankfurt am Main
- Márquez Estrada J (2011) La Infancia de la nación. Estrategias políticas y culturales en el proceso de formación de la ciudadanía en Colombia: 1810–1860. *Clío América* 5(9):63–84
- Martz J (1997) *The politics of clientelism. Democracy and the state in Colombia*. Transaction, New Brunswick
- Mataillano Camacho E (2010) Acción popular de moralidad administrativa. *Revista Digital de Derecho Administrativo* 4(2):195–262
- Mazzucca S (2013) The rise of rentier populism. *J Democr* 24(2):108–122
- Milewicz K (2008) Emerging patterns of global constitutionalization: toward a conceptual framework. *Indiana Journal of Global Legal Studies* 16(2):413–436
- Monsalve Solórzano A (2004) *Legitimidad y soberanía en Colombia 1958–2003*. Editorial Pontificia Bolivariana, Medellín
- Páez-Murcia A, Lamprea-Montealegre E, Vallejo-Piedrahíta C (2017) Medio ambiente y acciones populares en Colombia: un estudio empírico. *Vniversitas* 134:209–247
- Palacios M (1980) La fragmentación regional de las clases dominantes en Colombia: una perspectiva histórica. *Rev Mex Sociol* 42(4):1663–1689
- Patberg M (2013) Constituent power beyond the state: an emerging debate in international political theory. *Millennium – Journal of International Studies* 42(1):224–238
- Pécaut D (1999) La pérdida de los derechos, del significado de experiencia y de la inserción social. A propósito de los desplazados en Colombia. *Estudios Políticos* 14:13–28
- Peters A (2014) *Jenseits der Menschenrechte. Die Rechtsstellung des Individuums im Völkerrecht*. Mohr, Tübingen
- Sandoval Rojas N (2013) La movilización social en tiempos de la Constitución: feministas, indígenas y víctimas de crímenes de Estado ante la Corte Constitucional colombiana. *Colombia Internacional* 79:191–217

- Santofimio Gamboa J (2017) El Concepto de Convencionalidad. Vicisitudes para su construcción sustancial en el sistema interamericano de derechos humanos. Ideas fuerza rectores. Universidad Externado de Colombia, Bogotá
- Schneiderman D (2008) Constitutionalizing economic globalization. Investment rules and democracy's promise. Cambridge University Press, Cambridge
- Schwöbel C (2011) Global constitutionalism in international legal perspective. Nijhoff, Leiden
- Stone Sweet A (2000) Governing with judges. Constitutional politics in Europe. Oxford University Press, Oxford
- Tate W (2007) Counting the dead. The culture and politics of human rights activism in Colombia. University of California Press, Berkeley
- Thornhill C (2014) Rights and constituent power in the global constitution. *International Journal of Law in Context* 10(3):357–396
- Thornhill C (2018) The sociology of law and the global transformation of democracy. Cambridge University Press, Cambridge
- Tilly C (2007) Democracy. Cambridge University Press, Cambridge
- Uprimny R (1989) Legitimidad, clientelismo y política en Colombia. Un ensayo de interpretación. *Cuadernos de Economía* 10(13):113–164
- Uribe de Hincapié M (1996) Proceso histórico de la configuración de la ciudadanía en Colombia. *Estudios políticos* 9:67–76
- Uribe de Hincapié M (1998) Órdenes complejos y ciudadanía mestizas: una mirada al caso colombiano. *Estudios políticos* 12:25–46
- Uribe de Hincapié M (2000) Notas para la conceptualización del desplazamiento forzado en Colombia. *Estudios Políticos* 17:47–70
- Uribe López M (2013) La nación vetada. Estado, desarrollo y Guerra civil en Colombia. Universidad Externado de Colombia, Bogotá
- Vidal López R (2007) Derecho global y desplazamiento interno. Creación, uso y desaparición del desplazamiento forzado por la violencia en el Derecho contemporáneo. Pontificia Universidad Javeriana, Bogotá
- Villegas M (2009) Caracterización del régimen político colombiano (1956-2008). In: Villegas M, Rebolledo J (eds) *Mayorías sin democracia. Desequilibrio de poderes y Estado de derecho en Colombia, 2002-2009*. Dejusticia, Bogotá, pp 16–83
- Waldron J (1999) The dignity of legislation. Cambridge University Press, Cambridge
- Waldron J (2006) The Core of the case against judicial review. *Yale Law J* 115:1346–1406
- Webber G (2009) The negotiable constitution. On the limitation of rights. Cambridge University Press, Cambridge
- Weber M (1921/22) *Wirtschaft und Gesellschaft. Grundriß der verstehenden Soziologie*, Mohr, Tübingen
- Yepes R, Bocanument O, Arvelaez M, Rojas Betancur M (2014) *Voces de la Asamblea Nacional Constituyente de 1991*. Selo Editorial, Medellín
- Zurn C (2007) Deliberative democracy and the institutions of judicial review. Cambridge University Press, Cambridge