

ADMINISTRATIVE MORALITY IN COLOMBIA

By

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ADMINISTRATIVE MORALITY IN COLOMBIA

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## Abstract

This dissertation analyzes a cause of action created by the Colombian constitutional reform of 1991: administrative morality. This cause of action was created with the purpose of facilitating citizen engagement in governmental administration by allowing ordinary people to file a lawsuit to challenge governmental corruption. This constitutional reform fostered high hopes of law-inspired social change. The Constitution of 1991 did not define administrative morality and there has been no study of its meaning or effect. This dissertation addresses two questions: what is administrative morality? And what has been the impact of this cause of action on governmental administration? Drawing on governmental and legislative documents, court cases, journalistic articles, and interviews with key actors, the dissertation demonstrates that administrative morality has only partially met its framers' aspirations. The Colombian legislature adopted enabling legislation that provided a financial incentive to file lawsuits on administrative morality but then revised the law to reduce this incentive. The Colombian Council of State (the supreme court for administrative matters) has generally ruled against plaintiffs and with governmental defendants. Key agencies of public administration have developed no common interpretation of administrative morality and do not provide policy guidance, training, or oversight in order to comply with the norm. Media coverage initially fostered hope that the new norm would bring significant reforms, but as time passed the media have become less hopeful. Still, the dissertation also suggests that administrative morality has encouraged people to develop higher expectations of governmental performance.

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## Chapter 1: Introduction

“Look there are no protests in front of the Congress. Rather, citizens see and legitimate more the role of the judge because he is capable of making fair decisions, because as long as the judiciary makes coherent decisions, decisions that are coherent to the needs of the people, the government is legitimate.”

-Remarks of justice Enrique Gil when referring to the protest of individuals displaced by the violence in Colombia, in front of the Supreme Court

The Colombian constitution of 1991 was framed in an attempt to strengthen the democratic system by creating mechanisms aimed at broadening political participation and stating a longer catalog of civil and political rights. This constitution implied a profound change in the institutional frame of the country. It shifted from being conservative politically and legally to being more inclusive and participatory.<sup>1</sup> New and more robust guarantees of rights were a key component of the 1991 constitutional reform.<sup>2</sup>

This dissertation examines one of these new rights, a collective right to “administrative morality.” My core question is: what is the character of the new right to administrative morality, and what are its implications for public administration in

Colombia?

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<sup>1</sup> Luis Carlos Sachica and Jaime Vidal Perdomo, *La Constituyente De 1991: Compilacion Y Analisis Historico-Juridico De Sus Antecedentes Y Primeras Decisiones* (Editorial Camara de Comercio de Bogota, 1991).

<sup>2</sup> Beatriz Londoño-Toro and María Lucía Torres-Villarreal, “¿Podrán Las Acciones Populares Colombianas Sobrevivir a Los Recientes Ataques Legislativos Y Jurisprudenciales?,” *Vniversitas*, no. 124 (2012).

The framers of the Constitution of 1991 developed administrative morality specifically as a means to check bureaucratic corruption. By stating that administrative morality is a principle of public administration and a collective right, framers of the Constitution of 1991 meant to provide individuals with legal mechanisms to improve public administration. Specifically, individuals were entitled with judicial actions that they could use when bureaucrats do not comply with administrative morality.<sup>3</sup> In the context of the Constitution of 1991 these legal mechanisms were meant to encourage citizen participation in the improvement of public administration.

The meaning of administrative morality and consequently what it demands from public administrators, however, is somewhat unclear. This dissertation examines a) the meaning of “administrative morality” in the view of the framers of the 1991 Colombian Constitution and, to the extent this can be known, what they hoped to achieve with it; b) implementation of the new constitutional provisions in subsequent statutes; c) how this meaning has been developed or altered in the course of subsequent litigation and judicial decisions; and d) how the news media and official public administration leaders have framed and interpreted this right.

This chapter describes the cultural and governmental context for the 1991 constitutional reforms; summarizes what is known about those reforms and what is known about the right to “administrative morality” in particular; describes my research questions in more detail; and then summarizes the theoretical lenses and data that I will use to answer these questions.

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<sup>3</sup> Ernesto Matallana Camacho, "Acción Popular De Moralidad Administrativa (Popular Action of Administrative Morality)," *Revista Digital de Derecho Administrativo*, no. 4 (2010).

## **The context: Colombian government and society**

Colombia has been an independent state since 1810 and it follows the European tradition of civil law.<sup>4</sup> Colombia has been traditionally Catholic and it was a Catholic-based state until 1991 when the constitution declared the equality of religions under the law.<sup>5</sup> In the preamble to the constitution of 1991 the framers invoked God's protection but did not refer to a particular religion or set of beliefs.<sup>6</sup> As this statement illustrates, Colombia has been a religious country that has been moving from being mainly Catholic to having more participation of other religions and beliefs.

Political power in the country is organized in three branches: the executive, the legislature (Congress with two chambers), and the judiciary.<sup>7</sup> In the top of the hierarchy of the judiciary there are four courts that analyze lawsuits on specific areas of law: the Supreme Court (civil and criminal law), the Council of State (administrative law), the Constitutional Court, and the Supreme Council for the Judiciary.<sup>8</sup>

Colombia is a republic with a centralized political power (one president and one congress) and it grants administrative autonomy to regional governments. The political system is presidential, organized under principles of democracy, participation, pluralism, respect for human dignity, work, and solidarity among the people.<sup>9</sup>

With regards to public administration Colombia has professional administrators

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<sup>4</sup> JH Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford Univ Pr, 1985).

<sup>5</sup> Colombian constitution 1991, article 19.

<sup>6</sup> Colombian constitution 1991, Preamble.

<sup>7</sup> Colombian constitution 1991, article 113.

<sup>8</sup> Colombian constitution 1991, article 28.

<sup>9</sup> Colombian constitution 1991, article 1.

under a civil service regime that was established in 1938. Regulations addressing the civil service aim to foster the application of the principles of merit and equality in relation to the access, promotion, and retire of the public service.<sup>10</sup> The National Commission for the Civil Service is the governmental agency responsible for the administration and oversight of civil servants' careers.<sup>11</sup>

Notwithstanding Colombia's institutional commitment to the civil service and professional administration, corruption in governmental administration has been a significant concern.. Governmental documents have recognized the negative impact of corruption on governmental legitimacy and on the quality of governmental services due to the economic inefficiency that corruption fosters.<sup>12</sup> Currently the governmental strategy for anti-corruption focuses on the role of the Observatory for Anticorruption that articulates efforts of information management, communication campaigns, and education on anticorruption by involving different social actors. By strengthening the anti-corruption campaign the government aims to enforce the value of integrity and to improve the quality of the services that citizens receive. In this context integrity in governmental administration implies that the governmental organization grants services in the conditions that are expected by the citizens.<sup>13</sup>

The increasing concern about the need to address issues of corruption and lack

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<sup>10</sup> Pedro Alfonso Hernández, "La Provisión De Empleos De Carrera En Colombia: Lineamientos De Un Nuevo Modelo De Gestión De Personal En El Sector Público," (Bogotá, CNSC, mimeo, 2005).

<sup>11</sup> Comisión Nacional del Servicio Civil, "Comisión Nacional Del Servicio Civil," [http://www.cnsc.gov.co/esp/quienes\\_somos.php](http://www.cnsc.gov.co/esp/quienes_somos.php).

<sup>12</sup> CONPES, " Document 3186. A National Policy for Improving Efficiency and Transparency in Public Contracting," (Bogotá2002).

<sup>13</sup> Presidencia de la República, "Observatorio Anticorrupción," <http://www.anticorrupcion.gov.co/educacion/>.

of transparency has been present not only in Colombia but in Latin America overall. A key impetus for the new Latin American constitutionalism of the past two decades, to be discussed below, is the growing desire to address corruption via a strengthening of the rule of law. The Latin American constitutional reforms of the 1990s focused on strengthening constitutional rights and creating judicial actions allowing courts to challenge governmental corruption. I next turn to these constitutional reforms.

### **Latin American Constitutionalism and the Judicialization of politics**

Latin American legal practices and ideas about law witnessed profound changes during the 90s as a consequence of constitutional reforms and the new role of legal actors like the courts.<sup>14</sup> During this decade constitutions were amended in a number of Latin American countries. These new constitutions incorporated longer catalogs of social, economic, and cultural rights in order to grant better protection to the people.<sup>15</sup> For instance, Rosenn observes that Brazil and Colombia have long traditions of failing to enforce key rights, and this is especially true during states of exception when basic constitutional controls are relaxed. By the late 1980s democratic reformers throughout Latin America had come to see these violations as unacceptable, and they worked to reform constitutions to address the problem. Enhancing the judiciary was a key element of these reforms. Thus the Brazilian and Colombian constitutional reforms (1988 and

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<sup>14</sup> J Couso, A Huneeus, and R Sieder, *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge Univ Pr, 2010). "A number of the chapters suggest the importance of a foundational or constitutional moment in explaining subsequent patterns of judicialization." R Sieder, L Schjolden, and A Angell, *Judicialization of Politics in Latin America* (Palgrave Macmillan, 2005), 10.

<sup>15</sup> Couso, Huneeus, and Sieder, *Cultures of Legality: Judicialization and Political Activism in Latin America*.



1991 respectively) included procedural mechanisms to permit the courts to remedy in practice alleged violations of constitutional rights.<sup>16</sup>

Throughout the region these institutional changes focused on key aspects of constitutional systems like establishing constitutional checks on bureaucratic behavior, enforcing the rule of law, and facilitating citizen participation in government. The Colombian constitutional reform of 1991 is an example of these changes in Latin America. The popular action on administrative morality, established as part of those reforms, particularly exemplifies these bureaucracy-checking purposes.

As a consequence of these institutional changes courts in many Latin American countries were granted a key political role as defenders of constitutional commitments, advocates of rights, and arbiters of social policy conflicts.<sup>17</sup> In a significant institutional shift, courts were also granted the power to review legislation and strike it down as inconsistent with the constitution. Consequently judges have begun participating in social debates that previously were officially deferred to elected branches of government.<sup>18</sup> This process has been called the “judicialization of politics.”<sup>19</sup>

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<sup>16</sup> KS Rosenn, "The Success of Constitutionalism in the United States and Its Failure in Latin America: An Explanation," *The University of Miami Inter-American Law Review* 22, no. 1 (1990).

<sup>17</sup> Couso, Huneeus, and Sieder, *Cultures of Legality: Judicialization and Political Activism in Latin America*.

<sup>18</sup> *Ibid.*, 8. The role of judges in Latin American countries is different from the role of judges in the United States. Latin American legal systems were built keeping the sharp separation of powers of Montesquieu, under the civil law tradition. The separation of powers in civil law systems intended to establish and maintain a division between executive, legislative, and judiciary branches of power. The main purpose of this separation was to prevent intrusions from one branch into the other. There was a specific concern about governmental and judicial discretion because historically these two branches offered dramatic examples of abuses against individuals' rights. This attitude towards judiciary didn't exist in the United States because the system of checks and balances that emerged in this country didn't fear the judicial lawmaking and judicial interference in administration. Judges in the United States and England had been a progressive force interested in protecting the individual against the abuse of power by the ruler. These differences in the role of judges among the civil law and common law traditions lead us to analyze some characteristics of the role of courts in Latin

Scholars have long observed that democratic nations in Latin America tend to have more effective judicial protection of the constitution than do authoritarian systems.<sup>20</sup> They have observed that democracy, as a system built upon pluralism, require a relatively strong judiciary.<sup>21</sup> The recent trend towards the judicialization of politics seems to be associated with an increasing emphasis on democratic pluralism in Latin American constitutional systems. Thus, in Colombia, the Constitution of 1991 granted enhanced means of participation in government to several racial, religious, social, and political groups.<sup>22</sup>

Still, the relationship between courts and democracy is far from being clear. Couso argues that in the Chilean context, courts have not actively engaged in rights protection and have not contributed to democratization. He relates this judicial conservatism in Chile to such factors as judges' ideology, the organization of the courts, and the focus on private law in the Chilean system.<sup>23</sup> Sieder, too, observes that increasing protection for peoples' rights depends on more than the involvement of courts.<sup>24</sup>

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America and its implications for policymaking processes. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*.

<sup>19</sup> *Ibid.*

<sup>20</sup> DS Clark, "Judicial Protection of the Constitution in Latin America," *Hastings Const. LQ* 2(1974): 422.

<sup>21</sup> *Ibid.*

<sup>22</sup> Luis Felipe Botero, *Acción Popular Y Nulidad De Actos Administrativos: Protección De Derechos Colectivos* (2004).

<sup>23</sup> J. Couso, "The Judicialization of Chilean Politics: The Rights Revolution That Never Was," *The Judicialization of Politics in Latin America* (2005).

<sup>24</sup> Sieder, Schjolden, and Angell, *Judicialization of Politics in Latin America*.

Scholars have identified three characteristic effects of the judicialization of politics in Latin America.<sup>25</sup> First, political discourse has increasingly used the language of the law and of judicial decisions. The people have learned about core judicial decisions from the media and from individual successful cases. Based on the knowledge of these lawsuits, the language and categories used by judges became popular and individuals have included these new terms in their conversations and their lives. Judges' interpretation of the constitution is now part of social dynamics.

Second, participants in political struggles increasingly have turned to the courts to influence the political process.<sup>26</sup> They do so with what Couso has called new "juridical tools" that authorize new causes of action in court.<sup>27</sup> He has argued that a key component of the judicialization of politics is the creation of these new juridical tools. These causes of action allow individuals to sue government officials and agencies, thus, in theory, enhancing their legal accountability.

A third characteristic of the judicialization of politics is the increasing use of legal language and legal instruments in daily life.<sup>28</sup> The new legal actions created by constitutions seemed to be an alternative way for people to "play the system." It is said that people realized that by learning how to use legal language their problems were more likely to receive a favorable ruling from the court. Thus, it is reported that when an individual could not get a particular health treatment in Colombia the most efficient way to get it was by filing a lawsuit claiming that the lack of such treatment was a threat

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<sup>25</sup> Couso, Huneus, and Sieder, *Cultures of Legality: Judicialization and Political Activism in Latin America*, 9-10.

<sup>26</sup> *Ibid.*, 10.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*, 9.

to his life; in doing so the treatment became a matter of constitutional rights. In cases like this, individuals started using legal terms that were previously considered technical language reserved for lawyers.

A key motivation for these institutional changes in Latin American countries has been to make rights more effective. Thus, a key reason for the turn to judicial enforcement of constitutional rights has been to bring greater protection to individual rights. A related motivation has been to enhance the quality of citizenship. By enforcing rights (in this case through judicial mechanisms) it is said that democratic citizenship becomes stronger.<sup>29</sup> This concern for enhancing citizenship in Latin America reflects the widespread acknowledgment that persistent poverty under the previous regimes reflected a weak conception of democratic citizenship.<sup>30</sup>

In all, the judicialization of politics reflects a deep change in institutional arrangements. Traditionally under Latin American constitutions the separation of powers implied that judiciaries were to remain insulated from politics and to refrain from engaging in political disputes and policy making.<sup>31</sup> The new Latin American constitutionalism seemed to alter this previous understanding and to favor the power of judges in relation the other two branches.<sup>32</sup> The new constitutions declared that all public authorities are required to protect constitutional rights and that judges have authority to rule against violators. The new constitutions even declared that judges have authority to control executive and legislative action in order to protect individual

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<sup>29</sup> Sieder, Schjolden, and Angell, *Judicialization of Politics in Latin America*, 1.

<sup>30</sup> *Ibid.*

<sup>31</sup> Clark, "Judicial Protection of the Constitution in Latin America," 415 - 16.

<sup>32</sup> *Ibid.*, 420.

rights.<sup>33</sup>

### **The Colombian Constitution of 1991**

The Colombian Constitution of 1991 is an instance of the new Latin American constitutionalism. The Constitution of 1991 was born as an initiative of students (in a movement called the seventh ballot), political elites, the Supreme Court, the media, and even guerrilla groups<sup>34</sup> who claimed that the Constitution of 1886 was not legitimate and that it was necessary to create a political frame more adequate to the modern Colombian context.<sup>35</sup>

Restoring the legitimacy of the Colombian political system was a core concern of the constitutional assembly. The Constitution of 1886 was crafted as a conservative constitution with mechanisms of representative democracy and favoring formal structures of participation. The Constitution of 1886 was conceived to promote a stronger central power in the executive with the purpose of restoring the stability and the peace that had been threatened by the tensions between traditional political parties.<sup>36</sup> The constitution designed the regions (departments) as units of the central government; the governors were agents of the central government.<sup>37</sup>

The Constitution of 1886 intended to recover stability and order in the country

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<sup>33</sup> Ibid., 416.

<sup>34</sup> Sachica and Vidal Perdomo, *La Constituyente De 1991: Compilacion Y Analisis Historico-Juridico De Sus Antecedentes Y Primeras Decisiones*.

<sup>35</sup> Hernan. Olano Garcia, *Constitucion Politica De Colombia (Comentada Y Concordada)* (Bogota: Ediciones Libreria Doctrina y Ley, 2006).

<sup>36</sup> Miguel. Malagon Pinzon, "La Regeneracion, La Constitucion De 1886 Y El Papel De La Iglesia Catolica," *Revista Civilizar*, no. 11 (2006).

<sup>37</sup> Art. 193, Colombian constitution, 1886. The introduction to the constitution of 1886 stated: "In the name of God, source of supreme authority, the representatives of the states of Antioquia, Bolivar, Boyacá, Cauca, Cundinamarca, Magdalena, Panama, Santander y Tolima, gathered in a National Constitutional Assembly... And with the purpose of strengthening national unity, justice, freedom, and peace, state the following constitution."<sup>37</sup>

after an era of politic turmoil and violence among political parties. In 1885 the representatives from different regions of the country gathered to frame a new constitution and started a new era that has been called "Regeneration." Order in the country was achieved through three key mechanisms: centralizing political power, strengthening the executive, and enhancing the power of the Catholic Church as a source of education and social control.<sup>38</sup> These three pillars were an expression of the values of the conservative party in Colombia at that time.

The focus of enhancing order in the Constitution of 1886 was a sharp departure from the previous regime (the Constitution of 1863), which had established a federal system and liberalized the economic system by reducing considerably governmental intervention. After 1885 Conservatives changed this regime by strengthening values like order and unity, and consequently by favoring political centralism. In this political system the Catholic Church had considerable influence in the country and over the government as a means to achieving national unity.<sup>39</sup> The national unity led to a constitutional system in which centralized political control was the core value.

A key characteristic of the Constitution of 1886 was a restrictive understanding of civil rights. The constitution of 1886 avoided general enunciations of rights and, instead of protecting human liberties, it placed particular limitations on governmental powers. For instance, the article 32 of the constitution stated that in time of peace nobody could be affected in his property unless this disturbance is due to conviction,

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<sup>38</sup> J.O. Melo, "La Constitucion De 1886," *Nueva historia de Colombia* 1(1989).

<sup>39</sup> Malagon Pinzon, "La Regeneracion, La Constitucion De 1886 Y El Papel De La Iglesia Catolica."

compensation, or contribution according to the law.<sup>40</sup> Although this article is akin to a right to private property it does not declare the existence of the right but instead merely forbids its disturbance in times of peace. The distinction was thought to be significant: the Constitution of 1886 was a constitution of governmental powers and limits on them, not a constitution of rights. Another example is related to freedom of press; the constitution of 1886 stated that the media is free in time of peace but it is also responsible for violations against the good name of the people, social order, and public peace.<sup>41</sup> This is quite far from the right to freedom of the press in the United States and elsewhere.

By the beginning the 1990's this 19<sup>th</sup>-century constitutional frame did not represent the Colombian social spectrum and did not provide enough mechanisms for minority-group participation. The campaign for restoring the legitimacy of the political system focused on motivating citizen engagement and participation. In the words of the Colombian president when the Constitution of 1991 was framed: "The institutional legitimacy will be more solid as long as citizen engagement includes all the social groups that had the opportunity of expressing their opinions in this evolution of the country. We are then, witnesses of a fascinating process of constitutional engineering or, if you wish, of a proof of the art of governing a nation."<sup>42</sup> Put simply, the Constitution of 1991 was born with the purpose of fostering social change towards invigorating citizen engagement.

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<sup>40</sup> Article 32, Colombian constitution 1886.

<sup>41</sup> Melo, "La Constitucion De 1886."

<sup>42</sup> Former president Cesar Gaviria Trujillo. In: Olano Garcia, *Constitucion Politica De Colombia (Comentada Y Concordada)*.

The Constitution of 1991 is recognized as a landmark in the evolution of the country for it created mechanisms to improve the democratic legitimacy of the political system.<sup>43</sup> By fostering democratic participation, granting administrative autonomy to the regions, and recognizing civil rights of under-protected minorities the constitution meant to change the dynamics in the country. The catalog of rights in the Constitution is longer and specifically identifies three types of rights: civil rights;<sup>44</sup> social, economic, and cultural rights;<sup>45</sup> and collective rights.<sup>46</sup> In the chapter of social, economic, and cultural rights, the Constitution grants protection to the journalistic activity and it states: "The journalistic activity will receive protection from the government in order to guarantee its freedom and professional independence."<sup>47</sup> Therefore, the constitution guarantees freedom of the press but does not limit its protection to the press: it refers to all the expressions of the journalistic activity. This statement is broader than the one included in the constitution of 1886 and it focuses on specific characteristics of the journalistic activity that deserve protection from the state.

In addition to creating or expanding substantive rights, the Constitution created new mechanisms for enforcing these rights. One of these was the action of tutelage (accion de tutela).<sup>48</sup> Through this action individuals are entitled to file a lawsuit when a

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<sup>43</sup> M. Cardenas, R. Junguito, and M. Pachon, "Political Institutions and Policy Outcomes in Colombia: The Effects of the 1991 Constitution," *Documento de Trabajo, Washington, Banco Interamericano de Desarrollo* (2006).

<sup>44</sup> Title II, chapter 1 Colombian constitution: About the fundamental rights.

<sup>45</sup> Title II, chapter 2 Colombian constitution: About the social, economic, and cultural rights.

<sup>46</sup> Title II, chapter 3 Colombian constitution: About collective rights.

<sup>47</sup> Article 73, Colombian constitution.

<sup>48</sup> In a civil law system an action is the right to claim judicial protection when a certain right or interest has been violated. Actions are created by the constitution or the statutes and they entitle individuals with the possibility of filing a claim against the individual (or group of individuals) that harmed a right or interest protected by the law. Actions can be public or private depending on the



public or private authority is violating or posing a threat to a civil right.<sup>49</sup> The procedures necessary to file such a lawsuit were deliberately made simple; an attorney is not even necessary to pursue such a lawsuit. This new cause of action attempted to empower individuals so they will pursue judicial remedy in cases of civil rights violations, with the hope that in the long-term this action would improve the rule of law in the country.

The action for tutelage has had a profound impact on policy-making processes in Colombia and several factors have contributed for this impact to be considerable. Constitutional Court Justice Manuel J. Cepeda argued that citizens have increasingly used the action for tutelage because they perceive that rulings in actions for tutelage can improve civil rights violations specifically in cases related to health-care, pensions, and salaries. Justice Cepeda also argues that the action for tutelage has been able to address social problems that other organs in the government and the legislative have not been able to address.<sup>50</sup>

Justice Cepeda described the impact of the rulings in actions for tutelage in terms of the power of the Constitutional Court to enforce its rulings. The enabling legislation for the action for tutelage states that once the ruling has been made the authorities (public or private) that are responsible for the violation of civil rights should comply with it without delay. If these authorities do not comply with the ruling within the next 48 hours after it was made the judge has the authority to contact their

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type of right or interest they aim to protect. Popular actions (my emphasis) are a public type of action because they aim to protect collective rights. Juan Angel Palacio Hincapie, *Derecho Procesal Administrativo* (Libreria Juridica Sanchez R., 2004).

<sup>49</sup> Article 86, Colombian constitution 1991.

<sup>50</sup> Manuel J Cepeda, "Judicialization of Politics in Colombia," in *Cultures of Legality: Judicialization and Political Activism in Latin America*, ed. J Couso (Cambridge University Press, 2010).

superiors and demand compliance. If these actions do not lead to compliance the judge could declare that the authorities have disrespected the authority of the Court and put them in prison until they comply with the ruling. Also the judge will retain the authority until civil rights have been entirely restored or the threat has ceased.<sup>51</sup>

In addition to the power of the judge to enforce rulings of actions for tutelage media have also recognized the role of the Constitutional Court. Cepeda explains: "...when newspapers speak of 'the Court' it is almost immediately assumed that they refer to the constitutional court, although there are several different high courts in Colombia."<sup>52</sup> Media coverage of the Constitutional Court suggests the salience of this court and its impact on social issues.

Thus, when analyzing the impact of the action for tutelage there are three institutional conditions that seem to make this action effective in terms of fostering social change: first, judges who are willing to make rulings to protect civil rights and who are willing to enforce these rulings. The second condition is the existence of enabling legislation that grants judges with the authority to enforce effectively their rulings. Third, the public perceives that the action for tutelage is a cause of action that effectively resolves violations of civil rights. In this dissertation I analyze a different cause of action stated by the Constitution of 1991 (popular actions in administrative morality) and I demonstrate that in administrative morality some of these institutional

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<sup>51</sup> Departamento Administrativo de la Presidencia de la República de Colombia, "Decreto 2591," in *Por el cual se reglamenta la acción de tutela consagrada en el artículo 86 de la Constitución Política* (Bogotá 1991).

<sup>52</sup> Cepeda, "Judicialization of Politics in Colombia."

mechanisms have not been achieved. Consequently the impact of popular actions in administrative morality has been only partially achieved.

Administrative morality, the topic of my proposed dissertation, is part of a new category of rights called “collective rights.” These rights are different from civil rights to the extent that civil rights are individual while collective rights are said to belong to the society as a whole.<sup>53</sup> They are collective in the sense that they protect interests of the population as a whole or, at least, a majority of the population. Some examples of collective rights are: public goods, public space, public security, free economic competition, and administrative morality (my emphasis), among others.<sup>54</sup> Thus the range of collective rights under the Colombian law is broad and involves a wide range of areas of social and political life.<sup>55</sup>

To enforce the new collective rights the constitution also created a new cause of action, or, in common language, a new type of lawsuit. This is the popular action, established by article 88 of the constitution. Popular actions are meant to be easily accessible to the ordinary citizen. The Constitution delegated to the legislature the matter of how to structure these popular actions.<sup>56</sup> Subsequent legislative statutes have been adopted for this purpose, and this legislation clarifies that popular actions to

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<sup>53</sup> Luis Felipe Botero, *Accion Popular Y Nulidad De Actos Administrativos* (Bogota: Legis, 2004).

<sup>54</sup> Art 88, Colombian constitution 1991. The constitution seemed to have created a mixture between collectivist ideals and individualist pragmatism. The application of collectivist ideals means that groups’ interests prevail over individual’s interest, and the Constitution refers to a prevalent general interest over individual’s interests. On the other hand, the application of individual pragmatism implies that only individuals are legitimized to make decisions in relation to their rights, but that individuals need the group in order to achieve their expectations. Botero contends that the Colombian Constitution seems to apply this latter concept as well because individual’s rights are inalienable and they are entitled to claim for their protection by judicial actions (ibid).

<sup>55</sup> Congreso de la Republica de Colombia, “Ley 472,” (Colombia1998). Colombian Constitution, 1991.

<sup>56</sup> Article 88, Colombian constitution 1991.

protect collective rights are viable in two cases: when collective rights are under a threat or when they have been violated by public or private agents.<sup>57</sup> The statute also defined that once an individual files a popular action the judge is responsible for adjudicating the process even if the initial complaint did not follow the formalities required by law. In other words, all individuals are entitled to file a popular action, even without legal training or legal representation and it is the judge's responsibility to interpret the claim in order to reach a decision.<sup>58</sup>

The constitution of 1991 also changed the judicial structure in order to enhance judicial enforcement of the new constitutional rights. Prior to the reforms, Colombia had two apex courts: the Supreme Court and the Council of State. Under the regime of the constitution of 1886, the Supreme Court was the final appellate court in civil matters and judicial review.<sup>59</sup> Under the constitution of 1886 the Council of State performed an advisory role to the executive with regards public administration. Also, the Council was the final appellate court in cases involving the administrative process of governmental agencies.<sup>60</sup>

To these two high courts, the 1991 constitutional reforms added the Colombian Constitutional Court.<sup>61</sup> Previously, judicial review and constitutional litigation were deferred to the constitutional section of the Supreme Court, but the constitution of 1991 created a new, independent court with the purpose of protecting the supremacy of the constitution in the legal system. The constitution states: "The constitutional court

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<sup>57</sup> Congreso de la Republica de Colombia, "Ley 472." Art. 2.

<sup>58</sup> Ibid. Art. 5.

<sup>59</sup> Article 151, Colombian constitution 1886.

<sup>60</sup> Acto reformatorio de la constitucion, Septiembre 10<sup>th</sup>, 1914.

<sup>61</sup> Art. 241, Colombian constitution 1991.

is responsible for keeping the integrity and supremacy of the constitution, according to the strict application of the following rules.”<sup>62</sup> By keeping the integrity and supremacy of the constitution, the Court holds considerable power in the Colombian legal system. Since the Constitution is the supreme norm in the country, in case of a conflict between the constitution, the statutes, or any other regulation, the Constitution prevails.<sup>63</sup> Therefore, the interpretation given by the Court to a certain regulation has authority over other organs.

Although the Constitutional Court might seem to play the key role in enforcing the 1991 Constitution’s new rights, this is not always the case because, as we will see below, some of the new constitutional rights are mainly within the jurisdiction of the Council of State. Thus the reforms expanded that court’s constitutional role, too.

The Constitution of 1991 also created incentives to develop oversight associations related to different areas of policy-making. The fourth chapter of the constitution (Titulo IV) regulates the democratic participation and political parties. This title states that the government will contribute to the organization, promotion, and training of citizen organizations with the purpose of strengthening their participation and oversight over public administration.<sup>64</sup> Although this provision seems to encourage popular participation in government it might also have other possible implications. For instance, it is possible that by authorizing the government to subsidize citizen organizations it may also favor increased governmental control over lower levels of

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<sup>62</sup> Art. 241, Colombian constitution 1991.

<sup>63</sup> Art 4, Colombian constitution 1991.

<sup>64</sup> Art 103, Colombian constitution 1991.

administration. In other words, by setting up government-supported advocacy organizations the constitution may have created the possibility of citizen organizations acting as the government's "police" or "auditors" over the behavior of lower-level administrators.

The Constitution of 1991 recognized the diversity of the regions by stating that although Colombia will have a centralized political structure (one constitution, one congress, and one president), it will be administratively decentralized.<sup>65</sup> Thus, city councils and regional assemblies (the legislative bodies) were granted broader power specifically with regards to budgetary decisions.<sup>66</sup>

### **Administrative morality**

Administrative morality, the topic of this dissertation, is a legal concept created by the Constitution of 1991. While it is an increasingly significant constitutional concept, its legal definition remains somewhat unclear. At least we know that it was thought to be a means to check bureaucratic corruption. The constitution refers to administrative morality in two ways. First, the constitution states that administrative morality is a collective right protected through popular actions.<sup>67</sup> Thus, the constitutional framers seem to have intended it to be thought of as a "public good"—a good enjoyed by the

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<sup>65</sup> Art 1, Colombian constitution 1991.

<sup>66</sup> Art 300 and 313, Colombian constitution 1991.

<sup>67</sup> Art 88, Colombian constitution 1991.

people as a whole—but still enforceable by individual lawsuits. Second, the constitution stated that morality is one of the principles of public administration.<sup>68</sup>

As to a collective right, scholars argue that it belongs to society as a whole, and each one of its members is entitled to claim for its protection.<sup>69</sup> This statement implies that when an individual identifies certain behavior that, in his opinion, violates standards of proper administrative behavior, he is entitled to file a popular action to correct this behavior. As to a principle of public administration, statutes contend that public administrators should guide their performance based on both legal regulations and principles.<sup>70</sup>

In spite of these references to administrative morality the constitution did not provide a definition of what this right encompasses. Judicial decisions have developed this concept on a case-to-case basis. The courts with broadest jurisdiction over these questions have been the administrative courts, with the Council of State as the superior appellate court on administrative matters. According to the Council of State the collective right to administrative morality implies that public agents should perform their duties in pursuit of the public interest and with honesty, loyalty, and in fulfillment of the law.<sup>71</sup> In other words, administrative morality seems to require a high quality, legally responsible public administration in pursuit of the public good. The Council of State, as the final appellate court with regards administrative affairs, has been

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<sup>68</sup> Art 209, Colombian constitution 1991. Other principles of public administration are: equality, effectiveness, economy, promptness, impartiality, and publicity.

<sup>69</sup> Botero, *Acción Popular Y Nulidad De Actos Administrativos: Protección De Derechos Colectivos*.

<sup>70</sup> Congreso de la República de Colombia, "Ley 489," (Bogotá1998). Article 3.

<sup>71</sup> *Ap 151*,(2001).

developing the concept of administrative morality since its first case on the matter in 1997.

Administrative morality was not entirely new concept to the Constitution of 1991. A few journalistic articles dating at least to 1957 (and continuing through 1990), discovered during my research for this dissertation, refer to the moralization of public administration and they refer to morality as a standard of governmental administration. These articles suggest that the concept of administrative morality long pre-dated the 1991 constitutional reforms. Several Colombian legal experts interviewed for this dissertation, particularly Camilo Orrego and Beatriz Londoño, confirmed this as well.<sup>72</sup> According to these interviewees, the Colombian legislation and professional values of public administrators had long developed administrative morality and popular actions as checks for governmental administration.

According to Londoño popular actions existed in the Colombian civil code and allowed individuals to enforce collective interests.<sup>73</sup> These legal mechanisms, first established in 1873, aimed to protect public space and the right of the collectivity (rights of non-determined individuals) through a civil action (articles 1005, 2359, and 2360 Colombian Civil Code). In Londoño's opinion these causes of action were the origins of popular actions as stated in the Constitution of 1991 and they pursued the same purpose: facilitating citizen engagement to protect collective interests.

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<sup>72</sup> "Interview Camilo Orrego," (2012). "Interview Beatriz Londoño," (2012).

<sup>73</sup> "Interview Beatriz Londoño."



Likewise, Orrego observed that administrative morality has been understood as a principle of public administration for a long time.<sup>74</sup> According to this lawyer, arguing otherwise would be like suggesting that before the Constitution of 1991, Colombian public administration was entirely immoral, and this is not plausible.

With this research I do not ignore the antecedents of popular actions and administrative morality as checks of governmental behavior. In fact in chapter 7 I prove that public administrators' understandings of administrative morality is an example of legal pluralism. Different normative orders provide elements for administrators to implement administrative morality, some of them being the civil code and legislation on transparency of public administration that was in place before the constitution of 1991.

The notion of "morals" in the Colombian context has been traditionally related to Catholic-Christian beliefs given that the majority of the population has traditionally professed this religion. In fact the Constitution of 1886 was framed by the assumption that Catholicism was the official religion of the country and would be recognized as a key basis for the social order.<sup>75</sup> The Constitution of 1991 assumed a different understanding with regards religion by stating that freedom of beliefs would be protected by the state and that all churches and beliefs are equal under the law.<sup>76</sup>

In spite of this constitutional change in the status of the Catholic religion, in the debates of the Constitutional Assembly of 1991 some framers recognized the key role of morals as an element of the Colombian culture. They argued that moral obligations

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<sup>74</sup> "Interview Camilo Orrego."

<sup>75</sup> Constitution of 1886, introduction.

<sup>76</sup> Constitution of 1991, article 19.

provide support and legitimacy to the legal system.<sup>77</sup> Thus, administrative morality is a concept that is embedded in the Colombian cultural system and is related to a Catholic-Christian understanding of morals.<sup>78</sup>

### **Research questions**

What is “administrative morality” and how has it been interpreted and applied? How have subsequent statutes altered the meaning or implementation of this right? How have the courts interpreted “administrative morality”? How have government agencies interpreted this concept? How have the popular media, the institution most accessible to the mass public, interpreted the concept?

This dissertation examines the interpretations of administrative morality given by the Colombian Council of State, the Constitutional Court, governmental documents, administrators and the popular media. The Council of State, as the “supreme” court for administrative matters, provides the final authoritative interpretation of the rules governing Colombia’s administrative system, and its decisions on the new collective right of administrative morality have developed the legal interpretation of this right. The mass media provide the most accessible source of information for ordinary Colombians.

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<sup>77</sup> Comisión1a, "Derechos Colectivos," in *Asamblea Nacional Constituyente* (Bogotá Mayo 6 de 1991).

<sup>78</sup> In my interview with Marcela Restrepo from Transparency Colombia she explained that the way administrative morality was framed it seemed like it was the application of Christian morals to governmental performance. In her opinion this application required an in depth debate and analysis that was missing from the debates of the Constitutional Assembly. "Interview Marcela Restrepo," (2012). On the relationship between morals and administrative morality: Nicolás Polanía, "Moralidad Administrativa" (Universidad Externado de Colombia, 2006).

Each of these institutional settings thus provides contributes interpretations of “administrative morality,” but for different populations or audiences.

### **Theoretical foundations for study of these questions**

#### ***Can Constitutional rights and the judiciary reform a society?***

At the broadest level my dissertation examines whether broad constitutional reform of the sort embodied in the Colombian Constitution of 1991 can reform governmental administration. To address this question, I will frame my analysis in light of leading theories of the potential of law for fostering social change. Analysis of this question has been developed the furthest in the United States and so my discussion draws especially on theories of legal reform in that country.

A leading theory, advanced by Gerald Rosenberg, is that constitutional rights and judicial enforcement of them generally cannot foster long-term social change.<sup>79</sup> This is so for several reasons. First, courts lack independence from the political branches in the sense that judges are appointed by these branches and thus typically are part of the ruling coalition rather than separate from it. Their policies are generally consistent with those of the ruling political coalition. Second, when courts defy the ruling coalition the political branches generally can limit the impact of these rulings. Third, in the few cases where courts defy the ruling coalition and are not checked by it, they lack the power to enforce their decisions. They depend on voluntary cooperation. As Rosenberg observes, however, this does not mean that courts never have any influence. They have influence

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<sup>79</sup> Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 2008).

when key conditions are met: when their decisions are supported by a sympathetic population or sympathetic government officials.

Rosenberg illustrated this thesis by analyzing the impact of *Brown vs. Board of Education* on racial segregation in public schools. He showed that school districts in the South successfully defied the *Brown* decision until the mid-1960s when Congress made desegregation a condition for receiving federal education funding. He also showed that *Brown* had surprisingly little effect on public opinion and media coverage of racial.<sup>80</sup>

When exploring the impact of *Brown* Rosenberg argues that the law has a contingent impact over social behavior because there are other social forces that produce stronger effects. Specifically Rosenberg argues that the electoral system is a strong force to foster social change and that it is through elections that social change occurs. As a consequence, the power of courts and constitutional rights to produce social change is relatively weak compared to the power of political majorities and the political branches of government.<sup>81</sup>

A second stream of the literature suggests that judicial decisions on constitutional rights can foster social change by changing people's mentality of what is legally possible.<sup>82</sup> In a study on pay equity reform, Michael McCann argues that social movement organizers used legal rights and judicial decisions to help inspire a sense that social reform was possible. This helped to mobilize a social movement in favor of pay equity reform in spite of the limited power of courts to enforce their rulings. The social

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<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Michael W McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (University of Chicago Press, 1994).

movement used judicial decisions as leverage to gain wage concessions from major employers. Thus, although judicial decisions by themselves may have had only a limited impact, their use in the hands of social movement organizers came to have a broader inspirational force. In this way rights worked as cultural conventions and they fortified the bonds between reformers (women and their allies) and they modified the moral social discourse with regards pay equity.<sup>83</sup>

Building on McCann's theory, a third theory suggests that legal rights may contribute to policy change when several key supporting conditions are present.<sup>84</sup> Epp argues that new legal rights changed policies and bureaucratic practices in policing, parks administration, and the implementation of sexual harassment norms. In these areas policy reforms occurred when aided by the combined efforts of popular pressure for reform and administrative officials' support for reform. In the presence of these two supporting conditions, local administrative agencies have adopted administrative rules, employee training, and internal oversight aimed at giving administrative effect to legal rights. In the absence of these supporting conditions, however, there was less administrative change in these areas. A key element of these changes, Epp explains, was growing recognition of the need to reform not only individual employees' behavior but also administrative systems.<sup>85</sup>

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<sup>83</sup> Ibid.

<sup>84</sup> C.R. Epp, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* (University of Chicago Press, 2010).

<sup>85</sup> Ibid.

A fourth stream of the literature led by Lauren Edelman<sup>86</sup> argues that in cases of ambiguous legal reforms professional administrators imitate what others are doing with the purpose of demonstrating legal compliance. In analyzing the case of the Civil Rights Act of 1964 bureaucratic agencies created visible structures (EEO offices) and rules that would allow them to verify compliance in case of litigation. This bureaucratic interpretation and implementation of the Civil Rights Act of 1964 shaped the courts' understandings of it. This theoretical frame indicates that professional administrators' understandings of legal reforms shape the implementation process of these reforms and affect its possible impact.

Another stream of the literature sustains that legislatures play an essential role in the implementation of constitutional reforms. Farhang argues that congressional statutes shape the institutional context in which rights are enforced and to that extent the congress fulfills a key role in the implementation of constitutional rights.<sup>87</sup> Farhang demonstrates that in the civil rights movement in the US the congress chose to rely upon private litigation to enforce civil rights by allowing the winning plaintiff to get attorneys fees from the defendant.<sup>88</sup> Thus, statutes and specifically regulations related to attorneys fees played an essential role in the civil rights movement and in facilitating enforcement of the Civil Rights Act of 1964.

Although these theories were developed in the US context they may aid in understanding the role of law and legal reform in other contexts. Others have applied

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<sup>86</sup> L.B. Edelman, "Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law," *American journal of Sociology* (1992).

<sup>87</sup> Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the United States* (Princeton University Press, 2010).

<sup>88</sup> Ibid.

some of their insights to the study of legal reform in various countries.<sup>89</sup> This dissertation uses these theories as possible lenses to see the Colombian context and the Constitutional reform of 1991.

## **Thesis**

The Colombian Constitution of 1991 brought high hopes to the country particularly with regards to the placing checks on governmental authorities. How much of these expectations have been achieved? In this section I will summarize the dissertation's thesis and the evidence for it. Put simply, it is my thesis that administrative morality as a constitutional right may contribute to bureaucratic change but the conditions for this to happen are not (yet) present in Colombia.

The first part of the analysis (Chapter 2) focuses on the framing of the constitutional right to administrative morality. This chapter gives particular attention to the key actors and groups who favored particular constitutional provisions, and the reasons they marshaled for why these provisions should be adopted. The chapter shows that the constitutional framing process did not provide a clear understanding of administrative morality nor did the framers clearly articulate what they hoped to achieve with this new right. Thus, the new right to administrative morality was limited from the outset by deep ambiguity over its meaning and purpose.

In a sense the constitution-framing process did not end in 1991, however, as the Colombian Congress subsequently has adopted several key statutes that significantly

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<sup>89</sup> Gretchen Helmke and Julio Rios-Figueroa, *Courts in Latin America* (Cambridge University Press, 2011).

affect the implementation of the collective right to administrative morality. As in other countries, enabling legislation may be as crucial to the effect of constitutional rights as are the terms of these rights themselves. Chapters 3 and 4 examine these statutes and their implications for this new right. The earliest enabling legislation passed by the Congress supported robust enforcement of the new right to administrative morality. Twelve years later, in 2010, the Congress passed enabling legislation that posed serious restrictions to popular actions in administrative morality. In sum, the legislative conditions for effective implementation of the right to administrative morality have changed, limiting its impact.

The third part of the analysis (Chapter 5) focuses on judicial rulings on administrative morality. The Council of State, the high court with jurisdiction over “administrative morality” cases, has decided some 215 popular actions on this issue since 1991; the Constitutional Court has decided 9 cases on the topic. I will show that the Courts were initially supportive of the high aspirations that the constitution posed on the impact of administrative morality but their support for these rights and these high aspirations diminished with time. These courts also shifted from deciding high-impact cases involving government policy to focusing on lower-impact cases involving the particular decisions of low-level administrative officials. This has reduced the impact of administrative morality over time.

Creative reconstruction of the law by public administrators is shaped by prominent professional interpretations of legal requirements, and these professional interpretations at times vary considerably from a strictly legal interpretation. Chapter 6



shows that the government has not institutionalized the concept of administrative morality. By this I mean that the government has provided no policy documents or training on the meaning of administrative morality to aid administrators in giving effect to this norm. The result is competing, inconsistent understandings of the norm among professional administrators. Administrators interviewed for this study claim to know what administrative morality is, but they do not agree on a definition or on its implications for administrative practice.

While it would be nearly impossible for me to conduct an adequate study of popular understandings of “administrative morality” among ordinary Colombians, coverage of the issue in the popular news media is an essential step toward understanding how the new constitutional rights are popularly interpreted. In order to explore the role of media in the development of administrative morality Chapter 7 uses the theoretical framework of Haltom and McCann who examined how the news media in the United States “constructed” the popular meaning of tort law in that country.<sup>90</sup> Haltom and McCann showed that popular media coverage tends to focus on individual actors rather than institutional processes, and on individual mistakes rather than institutional sources of harm. Using this framework, in Chapter 7 I show that the Colombian media were initially supportive to administrative morality and its potential for changing bureaucratic behavior; coverage initially focused on broad systemic reform and tended to portray litigation over such issues relatively positively. With time journalistic articles became more skeptical of the potential for broad reform and more

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<sup>90</sup> Ibid.

critical of lawsuits seeking to achieve it.

In sum, more than twenty years after the 1991 constitutional reforms, administrative morality, while widely discussed, remains undefined and without clear effect. I argue that the notion of administrative morality has only partially achieved the high expectations that were brought up by the constitutional framing process of 1991. While popular actions on administrative morality changed what the people thought it was legally possible by encouraging them to use this cause of action as a check of governmental performance its impact is still low. For administrative morality to achieve its expected results it would be necessary an institutionalization of this notion that engages different social actors. The literature suggests that legal reforms do not foster social change on its own but that it requires the collaboration of different social agents for reforms to being effective.<sup>91</sup> In the Colombian case I argue that for administrative morality to achieve its purpose it would be necessary the legislative support in enabling legislation that re instates the monetary incentive to sue and that broadens the power of judges to enforce these actions. It would also be necessary the support of the courts by showing their will to enforce these actions by making them effective checks of governmental performance. A key part of the institutionalization of administrative morality should come from the government by providing guidelines and training that would allow professional administrators to enforce administrative morality. Finally it would be essential to foster citizen engagement in the use of popular actions and their

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<sup>91</sup> Epp, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State*. Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the United States*. Edelman, "Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law"; Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change*; McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*.

potential to impact governmental performance. These factors combined could provide effectiveness to popular actions in administrative morality.

## **Data**

This dissertation relies on several types of data. The first category is historical documents on the framing of the 1991 Constitution. I have gathered the minutes of discussion sessions and drafts of constitutional documents, with particular attention to the documents relevant to the framing of the “administrative morality” right. These documents are available in the national archives, and I gathered the key minutes and documents during a trip to Colombia in the summer of 2012.

The second category of data consists of the universe of cases involving administrative morality decided by the Colombian Council of State and the Constitutional Court from 1997 to the present. The relevant period begins in 1997 because since that year the Council of State has decided cases as an appellate court and has started exerting functions of judicial review in administrative affairs. Between 1997 and 2011 the Council has decided 215 cases of administrative morality. In addition, the Constitutional Court decided 9 of cases on administrative morality during the study period. I coded these cases of the Council of State and Constitutional Court on a number of relevant dimensions. .

A third type of data consists of semi-structured interviews with a number of key officials. I interviewed justices and clerks of the Council of State; scholars whose research has examined the new right to administrative morality; prominent lawyers

whose work has focused on the administrative morality; officials within the government whose work has focused on improving Colombian public administration; and representatives of several two non-governmental organizations whose work has focused on improving Colombian public administration. In all I conducted 13 interviews.

Fourth, I have gathered official guidances on the meaning of administrative morality, particularly official publications of the National Direction for Planning and the Superior School of Administration as described above.

The final type of data consists of a coding of all journalistic articles that address administrative morality published by two national printed media, one newspaper and one magazine.<sup>92</sup> I chose these sources because they are two of the most popular media sources in the country with national coverage, and one is generally regarded as conservative while the other is regarded as liberal. These sources provide access to online information, and using this online data-base I have gathered the universe of articles published since 1991 that refer to “administrative morality.” My database consists of 199 articles published from 1990 to 2011. The majority of articles in the database were published in the time frame of 2003 to 2011 (103 articles), while during the first decade of the Constitution of 1991, 89 articles were published.

## **Conclusion**

In sum, this dissertation examines the meaning of the Colombian constitutional right to administrative morality. First, by exploring the origins of this legal mechanism

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<sup>92</sup> The newspaper “El Tiempo” and the magazine “Semana”.

and the reasons why it was included in the constitution, it will be possible to identify the original purpose of administrative morality and its goals with regards the Colombian public administration. Second, the analysis of judicial decisions will provide evidence about the evolution of administrative morality and the current characterization of this collective right. The analysis of the rulings of the Council of State and the parties that have intervened in popular actions will also reveal the different forces and parties that have shaped the evolution of administrative morality.

Ultimately, by studying the evolution of judicial decisions on administrative morality, high-level professional administrative interpretation of this right, and popular media coverage of this right, it will be possible to analyze whether and how the promises of the Colombian Constitution of 1991 are being met. These promises centered on guaranteeing new rights against governmental abuse and new checks on governmental corruption.

## Chapter 2: Administrative morality in the debates of the Colombian Constitutional Assembly of 1991

Administrative morality was created by the constitution of 1991 as a collective right and a principle of public administration. In the context of the constitution of 1991 where democratic participation was a core goal, the framers created judicial actions that entitle any person in the country to protect not only individual rights but also rights to protect collective interests. How were collective rights and administrative morality? Given that the constitutional reforms of 1991 originated as an initiative of popular social movements,<sup>93</sup> to what extent did leaders of these movements play a role in framing the provisions regarding administrative morality? What was the constitutional framers' purpose for including administrative morality as a check for governmental performance? What was the framers' understanding of the meaning of these concepts? This chapter addresses these questions.

Traditionally the checks for governmental performance have been based on the law: whether governmental agents comply with their legal duties or not. This principle is stated in article 6 of the constitution of 1991.<sup>94</sup> By introducing the language of "morality," the concept of administrative morality seems to add a requirement to act beyond simple compliance with legal duties. What is the nature of this additional dimension is a key theme in this chapter.

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<sup>93</sup> Fernando Carillo, *Constitucionalizar La Democracia Social. El Proceso Constituyente De 1991 Y América Latina*, ed. Editorial Temis (Bogotá2011).

<sup>94</sup> "Individuals in the private sector are only responsible for violating the constitution and the law. Governmental agents are responsible for the same reason and for violating or omitting their functions." Art. 6 Colombian Constitution.

My sources for this chapter consist of the transcripts of the debates of the Constitutional Assembly. The Constitutional Assembly organized their work on commissions that specialized by topics. These commissions had the goal of debating and analyzing their topics and crafting a first draft of the new constitutional norms. Commissions presented these drafts to the entire Assembly and the Assembly had the authority of approving the constitution. After the Assembly's approval the commission for coding would analyze the entire text to guarantee that it was a harmonic and coherent document.<sup>95</sup>

### **The Structure and Process of the Constitutional Assembly**

On February 6<sup>th</sup> of 1991 the Constitutional Assembly assigned topics to five specialized commissions. The first commission specialized on constitutional rights, constitutional principles, constitutional duties, and individual freedoms. The second commission focused on urban planning, regional and local autonomy. The third commission analyzed the regulation for the government and the congress, the military and police, international relations, and exceptional circumstances (war and internal crisis). The fourth commission focused on regulations for the judiciary and oversight agencies. The fifth commission analyzed economic, social, and ecologic issues.<sup>96</sup>

The constitution of 1991 develops the concept of administrative morality in two articles. On the one hand, the article 88 refers to popular actions as a judicial

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<sup>95</sup> Hernán Alejandro Olano, *Constitución Política De Colombia. Con Estudio Preliminar*. (Librería Doctrina y Ley, 2006).

<sup>96</sup> Ibid.

mechanism to enforce collective rights, one of them being administrative morality. This article deferred to the Congress the regulation of popular actions to protect collective rights such as public funds, public space, public security, public health, administrative morality, a healthy environment, free economic competition, and other rights defined by the legislation. On the other hand, article 209 of the constitution states the principles that are to guide the Colombian public administration. According to this article, public administration is to be based on principles of equality, morality, efficiency, economy, celerity, impartiality, and publicity.

In this chapter I will focus especially on the framing of articles 88 and 209. I focus on the debates of the members of the National Constitutional Assembly while they were crafting these articles. The transcriptions of the debates allow me to identify the reasons why the framers created the new constitutional right to administrative morality and the purposes they pursued with this mechanism. I analyze debates that took place in different sub commissions of the Assembly and also debates that included the entire constitutional Assembly.

Administrative morality was discussed by commissions first, fifth, and the commission for coding and compiling.<sup>97</sup> Each of these commissions considered an initial draft and discussed whether or how the draft should be modified. Once the commissions finished their preliminary analysis the entire Assembly discussed the proposed language and approved final texts. Finally, the commission for coding and

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<sup>97</sup> Article 88 was debated in commissions fifth and first before the debate and approval by the whole Assembly. Last revisions were made by the commission responsible for compiling and coding the constitution. Article 209 was debated in commission third before the debate and approval by the entire Assemblé. In Appendix A I include a list of debates of these articles.



compiling completed final revisions to grant cohesion and structure to the constitution. The Constitution was also revised by the Institute Caro y Cuervo<sup>98</sup> with the purpose of improving the grammar, syntax, and use of language in the document.

The framer Augusto Ramirez Ocampo described the process in this way:

“The Assembly was such a diverse and representative group as Colombia hasn’t ever seen again. Political and academic arguments were mixed with popular wisdom, the indigenous understanding of the world, social struggles, former guerrilla members, youth, and different regions... The Assembly also gathered the results of team groups from all over the Colombian territory. Thus, debates began, we organized framers in commissions, and drafts were crafted. Debates were flowing and the will to concur led to reaching consensus in spite of the historical disagreements between framers. With big efforts of synthesis the final text was coming along. The essence started showing up and each piece of the country represented in the Assembly was added and crafted carefully to give birth to this big political, legal, and cultural project called the Constitution.”<sup>99</sup>

Although this is a somewhat idealized description, Ocampo’s observation illustrates the unprecedented breadth of participation in the National Constitutional

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<sup>98</sup> <http://www.caroycuervo.gov.co/es?language=es>. The Institute Caro y Cuervo is the governmental agency responsible for promoting and developing research, teaching, and promotion of the Colombian languages and literature.

<sup>99</sup> Gabriel Bustamante, "La Anécdota De La Redacción De La Constitución," *Semana*, Julio 2 2011. In this article framer Ocampo also refers to an anecdote in relation to the final version of the constitution that got lost in a computer with an encryption that nobody could get access to. Once the final draft of the constitution was finished the framers saved the constitution in a computer. Former guerrilla members of the group M-19 had brought a specialist in computer sciences and they suggested the encryption of the file to protect the information while it was officially published. Once it was encrypted nobody could have access to the file again. In spite of the efforts of experts (Colombian and American experts) nobody could break the encryption and so the framers thought about requesting an extension of six months to reconstruct the document. At the end, the Assembly did not request an extension and the framers put together a new document based on what they could remember of debates and discussions: "... each framer ended up bringing back notes, recalling debates and discussions by using personal notebooks, journals, and even napkins with drafts of the constitution. Thus, we were able to finish the constitution and I think that the original document is still encrypted in that computer."

Assembly of 1991. The final constitutional language emerged from drafts and debates that included a wide range of groups and sectors of the population. This chapter analyzes the evolution of these drafts in relation to administrative morality.

### **The Context of Administrative Morality: The Stated Purpose of Constitutional Reform and Article 88's Declaration of Collective Rights**

There were several drafts of the Constitution of 1991, all of them crafted by different individuals, social groups, or members of the Assembly. The government of President César Gaviria Trujillo developed one draft with six chapters: first, to bring a new type of legitimacy to the government through participative democracy; second, to create a new bill of rights for the country and to foster the campaign against injustice and the search of peace; third, to foster stronger institutions, capable of solving current problems; fourth, to restructure the separation of powers so as to improve efficiency and accountability in government; fifth, to take steps toward federalism by enhancing the autonomy of regional governments; and sixth, to modernize the economy by enhancing transparency and social fairness and thereby increase productivity.<sup>100</sup>

This draft was developed under the assumption that the constitution should keep some of the legal principles that guided former constitutional documents but that should include new key principles that seemed to be essential for the country in 1991. Specifically this draft referred to the principles of equality and solidarity as key aspects of the new constitutional order: "Currently, one century after the constitution of 1886

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<sup>100</sup> Presidencia de la República, "Exposición De Motivos Al Proyecto De Reforma Constitucional. Apartes Del Primer Borrador," (Bogotá1991).

was framed, we should keep principles like justice, freedom, and peace but we could enrich them with a new horizon. A new horizon that would be equality and solidarity... it is necessary to demand solidarity among the Colombian people and the respect among each other as an essential and simple condition for the development of our nation."<sup>101</sup> In the new constitutional structure the principle of solidarity aims to bring together governmental efforts and the private efforts to achieve the public good.<sup>102</sup>

According to the governmental draft of the constitution, the various constitutions over the course of the Colombian history have responded to different historical needs. For instance, the Constitution of 1886 focused on unity as a core value, necessary for strengthening a centralist political system. The Constitution of 1957 focused on the importance of the political agreements among parties that led to the end of a violent stage in the Colombian history. In 1991, the government referred to equality and solidarity as principles that could steer the country towards the development of the country.<sup>103</sup> It is relevant that this preliminary document highlighted the importance of solidarity as a key value of the new constitutional order. During the debates of the National Constitutional Assembly, solidarity was the basis for the development of collective rights such as administrative morality.

In the government's draft, the introduction of the Constitution states that the authority resides in the people who invoke God's protection. According to this document, by invoking God's protection the draft is acknowledging the religious beliefs

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<sup>101</sup> Ibid.

<sup>102</sup> C 215,(1999).

<sup>103</sup> "Exposición De Motivos Al Proyecto De Reforma Constitucional. Apartes Del Primer Borrador," 90.

of the majority Colombian population who believe in God, with no reference to a specific religion.<sup>104</sup> This may be related to the notion of administrative morality to the extent that the Constitution recognizes the religious values embedded in the population and consequently morals are valid criteria to measure governmental accountability.

When referring to collective rights, the draft of the government declares that collective rights belong to a collectivity and due to their nature it is not possible to satisfy them individually.<sup>105</sup> Also, when one of these rights is violated all members of the collectivity suffer damage not as individuals but as members of the collectivity. When referring to specific collective rights like a healthy environment and the right of consumers and users the draft emphasized on the responsibility of the people for protecting them. For instance with regards the protection of a healthy environment this draft explained: "The exercise of this right demands not only governmental intervention but also community's action to preserve it and defend it."<sup>106</sup> It is noticeable that this draft did not include administrative morality as a collective right.

Another draft of article 88 was crafted by three framers (Guillermo Perry, Horacio Serpa, and Eduardo Verano, three members of the liberal party) who participated actively on the debates of this norm on the fifth commission.<sup>107</sup> This document highlights the fact that no previous constitution had collective rights as part

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<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Guillermo Perry, Horacio Serpa, and Eduardo Verano, "Derechos Colectivos, Medio Ambiente Y Acciones Populares " in *Proyecto 62, Asamblea Nacional Constituyente* (Bogotá1991), 10. This document makes reference to another draft of article 88 although they are part of the constitutional collection in the archive of the Colombian Public Library Luis Angel Arango. Another project, although significantly shorter and less detailed, was crafted by framers Ivan Marulanda, Guillermo Perry, Jaime Benitez, Angelino Garzon, Tulio Cuevas, and Guillermo Guerrero.

of the bill of rights. For instance, although the constitution of 1936 referred to the existence of certain “social obligations” from the government to the people, collective rights did not receive protection. Thus, developing the concept of “social obligations” as entitlements of the people, the framers of 1991 argued that it is necessary to grant protection to collective rights as a means to protect multiple individuals in the collectivity. When collective rights are harmed it is not only the individual victim who suffers the negative consequences but many others as well. For instance the document by Perry, Serpa, and Verano refers to public health and public security and explains that every individual is entitled to live free public dangers and risks. According to these framers in cases of natural disasters (they mentioned the tragedy of the eruption of the Nevado del Ruiz) individuals are entitled to receive protection for the government not only as individuals but also as members of a collectivity that is suffering harm. In cases like this, the damage has identical and homogeneous characteristics for all individuals in the collectivity.<sup>108</sup>

This document acknowledges some obstacles in the definition and protection of collective rights. It states that although the mere existence of collective rights is not in doubt, it is not easy to provide a definition of what these rights entitle since the “people” or the “collectivity” are not subject of law. Traditionally rights belong to individuals or corporations, not the “people” as a whole, and consequently the “people” were not capable of exercising rights. “The definition if this notion [collective rights] is not easy because a right always assumes the existence of a subject of law. The

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<sup>108</sup> Ibid.

collectivity is not subject of law and therefore is not entitle to rights.”<sup>109</sup> In spite of this difficulty the draft by Perry, Serpa, and Verano insists that individuals and businesses would be entitled to file a popular action to protect a collective right that benefits the members of the collectivity.<sup>110</sup>

In this draft Perry, Serpa, and Verano argued that in the draft of crafted by the government the protection was focused on a right to a healthy environment and the rights of consumers and users. In their opinion this protection should be broadened to other rights that are essential to social life like the right to public security and public health, the right to the use of public goods and public space, and free economic competition.<sup>111</sup>

Regarding the crucial question of enforcing collective rights, this draft by Perry, Serpa, and Verano authorizes “popular actions” as a means of enforcement. “Popular actions” are legal causes of action that entitle any person to file a suit in order to protect a group that he is part of. This draft summarized what apparently was a general understanding of the framers in 1991: “Almost all the projects of a general constitutional reform include popular actions as a collective remedy for public damages, it is the right of the collectivity to defend itself.” Thus, popular actions were at the core of the constitutional reform to the extent of them being a new mechanism that allowed the collectivity to protect its interests. About the origins of popular actions this document refers to the experience of different countries on this matter. Popular actions

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<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

had been developed by Anglo-Saxon countries but they were adopted in countries like Spain, Brazil, Italy, and Argentina. In these countries popular actions were used to protect the environment, consumers' rights, in cases of public calamities due to negligence, and in cases of urban planning, among others.<sup>112</sup>

The draft by Perry, Serpa, and Verano concludes by asserting that popular actions are an improvement towards developing a new legal system based on solidarity. This new approach to law seemed to respond to new challenges in society such as environmental damages, consumers' damages, and various threats against the physical and economic integrity of communities.<sup>113</sup>

The various drafts described above were analyzed in a first debate by the fifth commission of the National Constitutional Assembly on April 12<sup>th</sup> of 1991. The members of this commission had different opinions of whether it would be possible for the congress and judges to create new collective rights or if collective rights would be limited exclusively to those defined in article 88. On the one hand some framers like Helena Herrán de Montoya, a member of the liberal party, argued that to grant protection to certain rights (individual or collective rights) it was necessary to list them or at least to provide a clear definition of what these rights meant. On the other hand framers like Guillermo Perry argued that the definition of collective rights was a process in progress and consequently it would be necessary to allow the congress and judges to create new rights in the future. Although this topic was analyzed and debated the commission did not make a decision on it.

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<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

In this first debate on April 12<sup>th</sup> of 1991 the framer Jesus Perez Gonzalez Rubio, a lawyer and scholar who belonged to the liberal party with experience in the public sector<sup>114</sup> suggested the inclusion of a new collective right that was in his opinion the most important one: the right to demand from authorities compliance of the law. According to this framer by creating this collective right the people would have key legal mechanism to strengthen the rule of law and a peaceful society. According to framer Perez: "In my draft I also propose that popular actions could be applicable to compel authorities to comply with its duty through a judicial injunction; this would be a mechanism to enforce the law in order to avoid violations against constitutional norms."<sup>115</sup>

Although administrative morality did not exist as a collective right at this point the right to demand legal compliance from authorities may be at its origin. The debate about the inclusion of this new collective right was not profound or long but it reveals that the framers' idea was to create a guarantee that allowed citizens to keep authorities accountable for their legal behavior as a means to protect the rule of law.

Framers also argued that the syntax of the document was not optimum and they deferred to a sub-commission the job of improving it. Although syntax appeared to be a problem, framers summarized the structure of this norm by stating that the first part the article would include a list of collective rights and the consequences for those who harmed those rights. In the second part the norm would state the most important

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<sup>114</sup> "Los Constituyentes De Colombia En 1991," *Semana*, Abril 7 2011. "Plantea Jesús Pérez González-Rubio Constitución Para La Igualdad Ante La Ley," *El Tiempo*, Diciembre 8 1990.

<sup>115</sup> Comisión 5a, "Derechos Colectivos," in *Asamblea Nacional Constituyente* (BogotáAbril 12 de 1991).



elements of the protection of a healthy environment, the rights of consumers, and the right to public space. In the third section the article would authorize popular actions as mechanism for enforcing collective rights.<sup>116</sup>

On the second debate on April 16<sup>th</sup> of 1991 the fifth commission debated on three aspects of collective rights and popular actions: its' origins, what do collective rights and popular actions entitle and its' possible impact on the Colombian society, and some possible challenges of these legal mechanisms. In relation to the origins of collective rights and popular actions, the framer Carlos Rodado contended: "... I think that what is important in this article is not the rhetorical enunciation of certain rights but the creation of a mechanism that Anglo Saxons call injunction which is the right of a citizen to demand from the government the compliance with certain duties..."<sup>117</sup>

According to framer Rodado, popular actions are judicial injunctions to demand from the government compensation when it failed to protect collective rights. It is noticeable the reference to a mechanism of the common law (judicial injunctions) as the origins of popular actions. In several debates of the Assembly various framers referred to foreign legislations, including the common law, as the inspiration for the concept of collective rights and popular actions.<sup>118</sup>

Other framers in the same debate of April 16<sup>th</sup> argued that the origins of collective rights and popular actions were old mechanisms already known in the Colombian legislation. Framer Jesus Perez Gonzalez Rubio argued: "It is incredible but

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<sup>116</sup> Ibid.

<sup>117</sup> "Derechos Colectivos," in *Asamblea Nacional Constituyente* (BogotáAbril 16 de 1991), 12.

<sup>118</sup> Although popular actions were new to the Colombian legal system, the ordinary administrative regulations had developed legal mechanisms to keep the government accountable. What was new in the case of popular actions was the compensation for collective rights.

this is [based] on article 2359 of our Civil Code, the one that was written last century: ‘general rule, the action is granted...’ and it refers to popular actions...”<sup>119</sup> Framer Perez Gonzalez Rubio quoted the Colombian Civil Code to argue that popular actions were not a new mechanism in the Colombian legislation since it existed in a code for over a hundred years. During the same debate, some framers (who are not identified by the transcript) offered a different opinion: they contended that Civil Code regulations were not applicable to the relation between the government and citizens and so that popular actions should be included in the new Constitution of 1991: “I am very sorry but one is the relationship of the civil code among people and another thing is the relationship between individuals and the government... I am just trying to avoid that those who are governing this country would not drown in lawsuits...”<sup>120</sup> In sum, there are two main streams in relation to the origins of popular actions, one of them focusing on foreign legislation (injunctions in the Common law) and the second one focusing on existent legislation in Colombia (the Colombian civil code).

On the same session of April 16<sup>th</sup> the fifth commission also debated about the concept of collective rights and popular actions and their possible impact. Framer Alvaro Cala from the political party called “Movement for National Salvation”<sup>121</sup> argued that collective rights could improve the Colombian society by motivating the people to go beyond their own interests. These mechanisms would allow the people to protect the needs of a bigger part of the population by allowing them to act on behalf of a group.

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<sup>119</sup> Comisión 5a, "Derechos Colectivos," 5.

<sup>120</sup> Ibid.

<sup>121</sup> This political party was founded in 1990 and it tended to provide a new perspective to conservative ideals. Olano, *Constitución Política De Colombia. Con Estudio Preliminar.* .

Individuals are entitled to file a lawsuit to protect the group instead of demanding individual actions or the participation of all members of the group.<sup>122</sup> Thus this norm would strengthen solidarity in the Colombian society.

Another possible purpose of article 88 was to foster a greater respect for life, as opposed to a fatalism that accidents and abuses are inevitable. According to framer Iván Marulanda, a member of the liberal party, in Commission fifth, in other cultures such as in Anglo Saxon countries or in France, there is a “cult to protect life” that motivates preventive actions of the government to reduce possible life threats of the population. Framer Marulanda argued that in Latin countries culture leans towards fatalism and it is not until disasters happen and people die when the government and the people take action to improve certain situations. Consequently, Latin American countries should take into consideration the model of foreign countries and try to reduce known risks to personal safety.<sup>123</sup> Specifically, framer Marulanda hoped that this article could foster cultural change to overcome a cultural fatalism.

In order to achieve this impact framer Carlos Lemos, a member of the liberal party, thought that the writing style of the Constitution should be easily understandable to everybody: “... the Constitution should be clear in a sense that any person who reads it understands its’ meaning; that it wouldn’t be necessary to call a lawyer to explain what contingent damage means; I know that this is a legal term but, if we go to the street and we ask let’s say not just any citizen walking by the street but a journalist what

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<sup>122</sup> Comisión 5a, "Derechos Colectivos," 9.

<sup>123</sup> Ibid., 10.

contingent damage is, well, I think it won't be understandable."<sup>124</sup> Framer Lemos' concern about drafting the Constitution with accurate terms but at the same time making it understandable to any citizen in the country so the Constitution seemed to be an important part of ensuring its' social impact. Also, it is relevant that the standard to measure clarity of the document used by the framers was not to make it understandable to any citizen walking on the street but to a journalist. This reference to journalists as a primary audience is significant. It is consistent with this dissertation's premise that public interpretation of constitutional principles occurs in the news media as well as in court. How journalists understand the constitution and its key rights is likely to influence public understanding of these things. Chapter 6 develops an analysis of media analysis in relation to administrative morality in Colombia.

The second debate of article 88 that took place in April 16<sup>th</sup> also analyzed the characteristics of collective rights. In this debate framer Alvaro Cala, a member of the political party "Movement for National Salvation", referred to two types of collective rights: those with a social and economic content and those without a social and economic content. Framer Cala explained that in the majority of the drafts on this topic all collective rights had a social and economic content.<sup>125</sup> Although framer Cala did not provide examples of this type of rights one could think that rights of consumers and users or the collective right to a healthy environment have a social and economic content.

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<sup>124</sup> Ibid., 47.

<sup>125</sup> Ibid.

With regards collective rights with no social and economic content referred to the initiative of framer Jesus Perez Gonzalez Rubio:

“... in the last discussion doctor Jesus Perez showed us that there are also other collective rights that do not have a social or economic content, like the right to legal compliance by governmental authorities, because they affect all citizens, I mean, the fact that they do not comply with their legal duties and that’s why, in spite of the argument that this right may not be specific to our topic of discussion, we thought that doctor Perez was right and that we should define collective rights in a broader way...”<sup>126</sup>

At this point of the constitutional framing process the right to administrative morality was not part of the catalog of collective rights; it was not even mentioned in the discussions but since early stages there is evidence of the initiative of framer Jesus Perez Gonzalez Rubio to include the collective right to legal compliance of governmental authorities. The relevance of the collective right to legal compliance is that in later debates it disappears while administrative morality takes its place. I will discuss this modification in depth in the next section of this chapter. Therefore, the collective right to legal compliance of governmental authorities was approved by the fifth commission as a collective right without a social and economic content.

A striking characteristic of collective rights is that they apply not only to public authorities but to private authorities as well. In some cases, like when a healthy environment is under threat, citizens could also be responsible for violations and compensation of violations of collective rights.<sup>127</sup>

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<sup>126</sup> Ibid., 9.

<sup>127</sup> Ibid.

In this debate of article 88 that took place on April 16<sup>th</sup> framers like Carlos Rodado, a member of the conservative party, argued against collective rights. They offered three objections: this norm could be only a repetition of what was already said in different parts of the constitution, it could be too vague, and it could be too onerous to the government. One of the framers (who is not identified by the transcript) argued: “The government has to have an immense capacity, almost by using futurology, to know when somebody is going to have an improper thought, if we bring this to its’ extreme consequences, I believe that it’s a norm that forces government in a situation with no defense, in a country in which everybody wants to take advantage out of the government...”<sup>128</sup>

According to this stream of framers, collective rights are developed in several other norms of the constitution. Specifically they referred to legal compliance from government authorities as a logical demand that should not be necessarily included in the catalog of collective rights. One framer, who was not identified, insisted that these obligations are embedded in other constitutional rights.<sup>129</sup> Some framers also argued that article 88 was very generic and broad since the article did not provide definitions of what these rights entitle. Given this vagueness any type of interpretation could be acceptable and this could be problematic for the ones responsible of implementation and interpretation. Broad norms could lead to a vulnerable government that, at the end, would be responsible for everything that happens in the country.<sup>130</sup>

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<sup>128</sup> Ibid.

<sup>129</sup> Ibid., 6.

<sup>130</sup> Ibid., 7.

In sum, the second debate of April 16<sup>th</sup> of 1991 developed some elements of collective rights and popular actions. It also pointed out to some of the risks that interpreters and implementers could find with this norm.

The draft of article 88 was approved not only by the fifth commission but also by the first commission (responsible for drafting sections on fundamental rights). The First Commission debated the draft of article 88 on May 6<sup>th</sup> of 1991 and in this debate framers in commission first agreed with the content of the norm passed in the fifth commission but they insisted on improving the syntax of the document, by working on a sub-commission with members of both commissions.<sup>131</sup> During this debate the article was not modified substantially.<sup>132</sup>

In a debate of June 10<sup>th</sup>, the entire Assembly debated over the three articles on collective rights and popular actions that were approved by the fifth and first

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<sup>131</sup> The topics of disagreement between commissions referred to whether contingent damage should be included in the norm, whether the list of collective rights was restricted by the enunciation in the norm, and the type of guilt from the subject who violates collective rights in order to complain compensation. Comisión 1a, *ibid.* (Mayo 6 de 1991).

<sup>132</sup> During this debate commission first analyzed the principle of “good faith” and its’ inclusion in the constitution. During this debate Commission first debated on certain aspects of relationship between law and morals. According to framers in Commission first, good faith is a principle that the legal system was “forced” to adopt in order to grant with moral reinforcement the legal duties. According to this debate, morals add legitimacy to the legal system to the extent that framers and legislators had chosen to incorporate moral-based mechanisms to bring meaning to legal institutions: “... I think that no right could exist or could be effective without good faith. This is one of the principles that in the evolution of legal systems has been adopted as a pillar, it is a moral principle that law has had to adopt to grant moral guarantee to the legal system itself” *ibid.*, 17. According to the framers, it is hard to provide a definition of all moral concepts, like good faith. Thus, the judge is responsible for developing a definition, based on notions like his own individual criteria. *Ibid.* In other words, framers assumed that the legal system is built upon moral concepts and morals are a vague concept, hard to define. The responsibility of defining moral concepts falls on judges by using their own criteria. It seems that members of the Constitutional Assembly (some of them at least) agreed on moral concepts as ideas that could strengthen the Colombian society: “... this is a beautiful proposal –the one about good faith- that could reconcile the Colombian population, nowadays seems to be necessary, and essential for the renovation of the country; it is at the same time a come back to our origins what Colombia is. It is necessary to go back to the concept of Colombia as a moral power mentioned by Luis Lopez de Mesa, it is the spirit of this Assembly and therefore of the framers that have participated in this debate, and with whom I very much agree...” *ibid.*, 19.

commission. The first article included the list of collective rights, the second article on popular actions, and the third article on the most important collective right that is the right of consumers.<sup>133</sup> When explaining the draft the framer Guillermo Perry Rubio, a member of the liberal party, argued that the origins of these norms were found on foreign legislation (Anglo Saxon legal systems, Brazil, Portugal, Spain, besides others), in the Roman legal system, and in the Colombian Civil Code.<sup>134</sup>

Administrative morality was not in the list of collective rights but the right to demand from authorities compliance with legal duties was part of the list. Framers contended that the collective right to demanding compliance of legal duties from authorities was a mechanism to enforce the rule of law: "... we are providing the people, the citizens, with a tool applicable to all laws, with the purpose of enforcing the Constitution and the law in presence of the authorities in all cases, through the use of popular actions."<sup>135</sup>

Although in previous debates framers argued that the most important collective right was a healthy environment, in this case the right of consumers seemed to be a core piece of the debate. According to the framers in the debate of June 10<sup>th</sup>, individual, small damages suffered by consumers add up into an enormous damage to the collectivity and it was necessary to create a mechanism that allowed compensating these damages.<sup>136</sup>

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<sup>133</sup> Plenaria, *ibid.* (Junio 10 de 1991).

<sup>134</sup> *Ibid.*, 90.

<sup>135</sup> *Ibid.*, 141.

<sup>136</sup> *Ibid.*



In relation to popular actions, the framers emphasized that popular actions shall be open to any person who would be interested in filing a claim for a violation of collective rights.<sup>137</sup> According to the constitution an oversight agency called “Defensoria del Pueblo” has the responsibility of collaborating with the protection of collective rights and this agency is entitled to file a popular action but the entitlement to file this action is not restricted to the “Defensoría del pueblo”. According to the debate, popular actions should be available to any person representing the collectivity.

### **Introduction of “administrative morality” as a collective right**

After this debate, on June 14<sup>th</sup>, the entire Assembly approved the final text for article 88. In this final version of the norm, administrative morality is mentioned as a collective right while the right to demand compliance from authorities disappeared. According to the document that was read and analyzed during this debate, article 88 stated: “The legislation will regulate popular actions to protect collective rights and interests in relation to public funds, administrative morality, the environment, public space and public health, free economic competition, and others similar that are defined by the law...”<sup>138</sup>

It is striking that this is the first appearance of the term “administrative morality.” There is no indication of why did the term was included in the draft. During this debate framers did not analyze administrative morality but focused on other aspects of the norm. At the end of the session the Assembly approved the articles

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<sup>137</sup> Ibid., 89.

<sup>138</sup> “Derechos Colectivos,” in *Asamblea Nacional Constituyente* (Bogotá) junio 14 de 1991).

related to collective rights, including administrative morality, including administrative morality.<sup>139</sup>

The record provides very little information as to why the framers introduced the concept of “administrative morality,” or even who favored it and what they intended. There is no previous mention of the concept on the debates of the fifth and first commission, neither administrative morality is mentioned during the first debate of the entire Assembly.

After the Assembly approved the document, the Commission for coding worked on compiling and organizing the document that the Assembly had approved. On June 22<sup>nd</sup> the Commission for coding debated about whether it was convenient to eliminate administrative morality for being a vague concept and not related to collective rights. The Commission also debated on whether article 88 was a repetition of concepts and rights that are already developed in different sections of the constitution.<sup>140</sup>

Several framers of the Commission for coding expressed concern on the debate of June 22<sup>nd</sup> with regards administrative morality for being a vague concept. (In the following discussion I will generally not identify the names of those who contributed to the debate for the simple reason that the transcripts do not identify the names of speakers.) Various framers suggested that since “administrative morality” is a vague and broad term, it would allow people to file lawsuits for any reason, and that this is not always desirable. When debating on this concern, several framers compared administrative morality to the right to public funds, since both of them are concepts

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<sup>139</sup> Ibid.

<sup>140</sup> Comisión codificadora, *ibid.* (Junio 22 de 1991).

that entitle the people to sue the government for almost any reason.<sup>141</sup> This concern echoed earlier debates in the Commission fifth when some framers contended that with popular actions the government could be in a situation of inferiority in relation to the people, and that it would be too demanding to the government.

Another critique of the Commission for coding on June 22<sup>nd</sup> was that administrative morality did not seem to have a clear connection to other collective rights and that it was regulated in several other norms in the constitution. “And administrative morality, what do you say huh? This concept is so abstract... Well, about administrative morality, I would think... that it is in the statute for public employees and in the draft by [framer] Juan Carlos Esguerra about the responsibility of the government and public employees... I don’t know if this is related to this topic [to collective rights] ... I think that we could leave this out because it is included like in other two or three articles.”<sup>142</sup> Thus, the framers perceived administrative morality as a noble interest, but not necessarily a collective right.

The Commission for coding analyzed the list of collective rights in order to clarify whether they are rights or interests.<sup>143</sup> Framers in this commission argued that Commission fifth had addressed this key issue with regard to who possesses collective rights. These framers suggested that since it was difficult to determine who possesses these collective rights, it is better to call them “interests.” Pursuant to that discussion, some of the framers in the Commission for coding asserted that “interests” seemed to

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<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

be a better term for values such as public security or administrative morality. They asserted that these things are not “rights.” At the same time they suggested that categories like free economic competition and public space *are* rights and consequently the use of the word “rights” in relation to them was justified. A consequence of this debate was to describe administrative morality as both a right and an interest.<sup>144</sup>

Whether administrative morality is a right or merely an “interest” seems to have important legal implications. If it is a “right,” it seems to merit judicial protection, even against the actions of legislatures or high government agencies. If it is merely an interest, then it seems properly subject to legislative or administrative authority. Remarkably, framers in the Commission for coding did not answer these questions but they asserted that in the list of collective rights provided by article 88 there are two different categories: rights and interests. They seemed to relate to different legal constructs. In the end, the Commission for coding authorized enforcement of both rights and interests through the mechanism of popular actions.

Given these doubts about the characteristics of administrative morality, some framers in the Commission for coding considered as an option the elimination of administrative morality from the list of collective rights. They argued that although the document was already approved by the Assembly, the Commission for coding had the authority for recommending changes to the document. In order to recommend changes, the Commission should find strong arguments to do so, otherwise those who had been working on previous drafts could be offended by the modification: “...we have to work

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<sup>144</sup> Ibid.

together... everybody has his own words or expressions and in a century people would say it was my grandpa who included administrative morality, and that is part of the history of our family, and so if we decide to take it out of the article we need to use strong arguments..."<sup>145</sup> At this point, in the session of June 22<sup>nd</sup> the debate did not seem to be about the content of the article or the characteristics of administrative morality. It seemed to be about finding strong arguments to support the elimination of this right from the document in order to avoid possible conflicts with other framers in the general Assembly.

On June 22<sup>nd</sup> the Commission approved the draft by eliminating the list of collective rights and interests, just stating that the Congress would regulate popular actions to protect collective rights and interests mentioned in the Constitution and other similar rights defined by law. The entire Assembly reviewed this draft and decided to include in the final draft the full list of collective rights and interests, including administrative morality.<sup>146</sup>

In the end, then, the final draft of the Constitution of 1991 included a right to administrative morality, but neither the Constitution nor the debates over this right offered any clarification of the meaning of this key right.

### **Morality and the principles of the administrative function: Article 209**

The second norm in the constitution that regulates administrative morality is article 209. This article refers to the principles that guide the Colombian public

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<sup>145</sup> Ibid.

<sup>146</sup> Plenaria, *ibid.* (Junio 29 de 1991).

administration. The first debate of Article 209 of the constitution took place in the third commission in which framers analyzed this draft: "About the administrative activity. Article 135. The administrative activity will be performed by following principles of morality, efficacy, economy, solidarity, and impartiality by using mechanisms of decentralization, delegation, and desconcentration..."<sup>147</sup>

The Article 209 was debated in fourth sessions (one of them in the third commission and the rest with the entire Assembly) and in any of these sessions morality was specifically analyzed.<sup>148</sup> During this first debate the commission did not modify the draft.<sup>149</sup> During the second debate<sup>150</sup> on May 22<sup>nd</sup> the speaker, framer Carlos Lleras de la Fuente explained that article 209 provides a general definition of what the administrative activity entitles and the way in which it performs its' duties. In this debate the framers did not analyze the content of the principles of the administrative activity and did not modify significantly the draft of this article.

In the third and fourth debates (May 30<sup>th</sup> and June 30<sup>th</sup> respectively) the Assembly debated on topics like whether the enunciation of principles in article 209 was exclusive or if there were other principles applicable to the administrative activity.<sup>151</sup> Another topic of analysis was whether the administrative function was the best term to refer to the Colombian public administration. The Assembly decided to keep administrative function as the title of this chapter of the constitution and consequently

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<sup>147</sup> Comisión3a, "De La Actividad Administrativa," *ibid.* (Mayo 15 de 1991).

<sup>148</sup> These debates took place on May 15<sup>th</sup>, May 22<sup>nd</sup>, May 30<sup>th</sup>, and June 30<sup>th</sup> of 1991.

<sup>149</sup> Comisión3a, "De La Actividad Administrativa."

<sup>150</sup> Plenaria, *ibid.* (Mayo 22 de 1991).

<sup>151</sup> "De La Actividad Administrativa," in *Asamblea Nacional Constituyente* (Bogotá Mayo 30 de 1991). Although the Assembly did not make a final decision on this point, the framers decided to include two more principles: publicity and equality.

the article 209 refers to the administrative function.<sup>152</sup> In sum, framers did not analyze extensively Article 209 and when they analyzed it they did not focus on the topic of morality as a principle of the administrative function.

There is no reference in the article or in the debates to popular actions or to whether the principle of morality is the same notion that was developed as the collective right of administrative morality. Given that the focus of my research is to explore the development of litigation in administrative morality by different actors since 1991 I will mainly explore elements related to the implementation of popular actions and administrative morality as it is stated in article 88 of the constitution.

## **Conclusion**

The terms “morality” and “administrative morality” were included in the Colombian constitution in two articles: Article 209 and Article 88. When analyzing the debates of these two articles it is notable that the framers did not focus on the concept of morality and its possible impact on Colombian public administration. In the case of article 209 framers did not analyze “morality” at all, while in the case of article 88 the concept of “administrative morality” only appeared in the final three debates, and even there it remained largely undefined.

The lack of a profound debate and conceptual clarity regarding “morality” and “administrative morality” in the Constitution Assembly could be due to the framers’ assumption that everybody would understand these concepts. If so, in retrospect that

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<sup>152</sup> "De La Actividad Administrativa," in *Asamblea Nacional Constituyente* (Bogotá) Junio 30 de 1991).

surely seems like a naïve assumption. During the last debate of article 88 framers in the Commission of compiling and coding were uncertain about the reasons to include administrative morality and the possible negative implications (if they were some) it could have for the Colombian public administration. It may be possible that framers in commission fifth and the entire Assembly were more confident on the meaning of the concept and its positive implications.

In the case of article 88 about collective rights, administrative morality seems to be a further development of the collective right to demand from authorities compliance of legal duties. Although there is no evidence in the transcriptions about how did the right to demand compliance from authorities evolved into the notion of administrative morality, the first right disappeared from the drafts once administrative morality was included. Because of this apparent substitution, it is possible to understand the original meaning of administrative morality as somehow related to, or even a substitution for, the a right to demand governmental compliance with the rule of law. If so, however, it is not clear whether the substitution was meant to make this right to demand compliance more clear or more ambiguous. On the surface, the substitution “administrative morality” seems less clear but also broader in its implications than mere compliance with legality.

Finally, it is noticeable that through the debates there was one framer who insisted on the importance of a collective right to demand legal compliance from authorities. Framer Jesus Perez Gonzalez Rubio participated in different debates of article 88 arguing that this collective right was the most important and basic of all since



it would allow people to enforce the rule of law and consequently to cooperate with the achievement of peace in the country. But there is no evidence to indicate whether this framer supported the inclusion of administrative morality as a collective right and its final approval by the Assembly.

Why the framers introduced the concept of “morality” in relation to compliance with public administrative duties remains unclear. During the last debates some framers raised concern about the vagueness of the concept and whether it was a repetition of other constitutional norms. In spite of this, none of the framers objected the including references to morality. There are just a few references to morals and its’ relationship with the legal system in these debates of the Constitutional Assembly.<sup>153</sup> According to these references morals are part of the Colombian culture and they bring meaning to the legal system. The legal system is built upon moral obligations, it was said, and so morals improve the legal system’s legitimacy.<sup>154</sup> To this extent, administrative morality could refer to morals as the basis of legal duties and authorities in the country should comply with these duties.

In sum, the framing debates leave much that is unclear about the original understanding of “administrative morality.” This key right may be a version of an earlier requirement for the government to comply with legal duties. But it also may be something broader. The framing debates leave its implications for Colombian public administration unclear.

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<sup>153</sup> Comisión 1a, "Derechos Colectivos," *ibid.* (Mayo 6 de 1991). Presidencia de la República, "Exposición De Motivos Al Proyecto De Reforma Constitucional. Apartes Del Primer Borrador."

<sup>154</sup> Comisión 1a, "Derechos Colectivos."

### **Chapter 3: Authorizing and then Eliminating Incentives to Employ Popular Actions.**

This chapter examines the Colombian legislative statute that established procedures for popular actions and group actions. When the constitution regulated popular actions and collective rights it also deferred to the Congress the definition of the elements and procedures for implementing these notions.<sup>155</sup> In 1998 the Congress passed the statute for popular actions (Law 472 of 1998) and set the elements for filing lawsuits and the procedures followed by the courts. The statute also aimed to develop the purpose of the framers and included mechanisms to motivate citizen engagement. A fundamental reform to the statute was approved in 2010 when the government promoted the elimination of the monetary incentive. Thus, in this chapter I will study these two key pieces of legislation: the statute of popular actions of 1998 (law 472) and its' fundamental reform of 2010 (law 1425). In examining these pieces of legislation my analysis will focus specifically on the legislature's attempt to give practical meaning to the broad language in the 1991 Constitution.

These pieces of legislation are highly relevant for the development of popular actions and administrative morality because they are the guidelines that plaintiffs, defendants, and courts follow when implementing them. In the context of the Colombian legislation the statute for popular actions represented a major development because it was the first time that the Congress studied and passed legislation on

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<sup>155</sup> Art. 88, Colombian Constitution 1991.

collective rights as a new category of constitutional rights. As the House Representative Viviane Morales explained in one of the drafts to the statute:

“Though, the novelty of the topic [popular actions] and its’ special characteristics bring considerable challenges to legal studies in terms of renewing and adjusting some of our traditional institutions. For instance, it is necessary to modify the perception that since collective rights don’t belong to a specific person they end up being something that belongs to nobody. So this is where the profound social and political implications of popular actions rest. These actions imply the awakening of citizen solidarity so the public interest wouldn’t only concern the government or bureaucrats.”<sup>156</sup>

In the legislative process of the statute Congress members were aware of the possible social and political implications that this norm could bring to the Colombian context. In this chapter I will analyze the legislative process of the statute and the modification of 2010. I will address the following questions: What are the origins of these pieces of legislation? Who were the stakeholders that participated in the legislative debates and which were their interests? Do these statutory provisions facilitate or provide incentives for citizen engagement?

In order to answer these questions I study legislative and governmental documents related to the approval of the statute and its 2010 reform. I also analyze

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<sup>156</sup> National Press, "Congressional Gazette 207," (Bogotá1995).

interviews with key actors related to the implementation of these pieces of legislation: one auxiliary justice at the Council of State (Fabián Marín), two administrators (Camilo Orrego and Eduardo Arce), two scholars and practitioners (Luis Felipe Botero and Nicolás Polanía), and one scholar who participated of the legislative process of the statute (Beatriz Londoño)<sup>157</sup>.

The statute of popular actions and group actions develops the procedure of these actions and it provides indications related to the judicial enforcement of collective rights. The statute has six chapters and it includes norms related to the process in popular actions and group actions, funds for the promotion of collective rights, and evidence.<sup>158</sup> The statute refers to popular actions and group actions since the article 88 of the constitution created both of them as new judicial procedures that the people could use to protect interests of the community. While popular actions focus on violations or threats against collective rights, group actions target violations against individual rights suffered by a group of people under similar circumstances. Group actions pursue economic compensation for the victims by clustering individual claims under one judicial process.<sup>159</sup> I will focus on popular actions given that they are the judicial action that enforces collective rights, one of them being administrative morality.

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<sup>157</sup> Londoño is also a professor and researcher in popular actions and an advisor at the legal clinic that provides support to citizens who want to file constitutional actions, including popular actions. She worked at an oversight agency (Defensoría de pueblo) that promoted the approval of the statute in 1998.

<sup>158</sup> "Ley 472."

<sup>159</sup> National Press, "Congressional Gazette 207."

## **Theoretical conceptions of the legislative development and mobilization of constitutional rights**

It is widely recognized that constitutional rights are not self-enforcing. They depend on mobilization by individuals and groups. Yet the individuals and groups who are aggrieved by abuses or problems typically do not have the resources to hire lawyers and bring cases. Thus it is common to establish monetary and other incentives to lower the cost of bringing these suits.

Farhang argues that congressional statutes shape the institutional context in which rights are enforced and to that extent the congress fulfills a key role in the implementation of constitutional rights.<sup>160</sup> According to Farhang in the civil rights movement in the US the congress chose to rely upon private litigation to enforce civil rights. In order to make effective private litigation as an efficient mechanism for rights' enforcement the United States Congress allowed the winning plaintiff to get attorneys fees from the defendant.<sup>161</sup> Thus, statutes and specifically regulations related to attorneys fees played an essential role in the civil rights movement and in facilitating enforcement of the Civil Rights Act of 1964. Farhang has argued that without these attorney-fee provisions, there would be considerably less civil rights litigation in the United States.

Epp also argues that the US rights' revolution grew as a consequence of the pressure exerted by rights advocates in a deliberate, strategic, and organized way.<sup>162</sup>

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<sup>160</sup> Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the United States*.

<sup>161</sup> Ibid.

<sup>162</sup> Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Cambridge Univ Press, 1998).

The pressure of rights advocates was made possible by the development of a support structure for legal mobilization. This support structure consisted of rights-advocacy organizations, rights-advocacy lawyers, and sources of financing. According to Epp this support structure was essential in the US rights revolution given that the enforcement of constitutional rights through the courts is a costly and slow process. Especially Epp highlights the relevance of the financial support to private litigation in order to make court-based reform operative.<sup>163</sup>

I use these theories as frames to explain the role of the enabling legislation on popular actions in the development of administrative morality. The statute of 1998 was the first norm that set the rules for litigation on administrative morality. Thus, understanding the rationale behind the statute, the parties that participated in legislative debates, and the element of the statute is a crucial aspect in the development of litigation in administrative morality.

With regards the costs of litigation, the statute regulated the monetary incentive for plaintiffs when the action is granted. The statute also created the Fund for the defense of collective rights with funds of the public and private sector to provide financial support to low-income plaintiffs. These mechanisms could be the support structure for litigation, following Epp's frame, and they fulfill a fundamental part in the development of popular actions. This chapter analyzes the legislative development of the monetary incentive and the Fund for the defense of collective rights as elements of the statute of popular actions and its' reform of 2010.

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<sup>163</sup> Ibid.

## **Statute of popular actions: motivating citizen participation**

### ***Legislative approval of the Statute***

Although popular actions were created by the Constitution of 1991 it was only seven years later when the Congress passed the Statute for popular actions. The first time the Congress analyzed a draft of this statute was in 1993 when the Defensor del Pueblo and a member of the Congress presented projects for debates. These drafts and others in the following years were presented but they did not finish the entire congressional process in one legislature and so the Statute did not pass the statute until 1998.

According to the legislative documents, in spite of the interest of the Congress these drafts did not reach all necessary approvals in the time that the statute of the Congress requires but there is no indication as to why did the procedure was not fulfilled in time: "In order to comply with the demand of the article 88 of the constitution in the sense of regulating popular and group actions there have been several drafts and projects to fulfill this constitutional demand... Unfortunately in spite of receiving a first approval at the first commission of the Senate the project did not make it on time, which implied that the project was not enacted..."<sup>164</sup>

In the second semester of 1995 three more projects were presented (two by members of the Congress and a third one by the Defensor del Pueblo) and the Congress passed the Statute of popular actions.<sup>165</sup>

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<sup>164</sup> National Press, "Congressional Gazette 207."

<sup>165</sup> "Congressional Gazette 498," in *Ponencia para primer debate sobre los proyectos de ley numeros 005 de 1995, 024 de 1995 y 084 de 1995 cámara acumulados, número 10 de 1996 senado* (Bogotá1996). "Congressional Gazette 207." "Congressional Gazette 277," in *Proyecto de ley 085 /95 Cámara* (Bogotá1995).

Several social groups participated in the debates of the statute. For instance, in the report for second debate in the Senate the speaker referred to the opinions of the Defensoria del Pueblo, NGOs like Fundepublico<sup>166</sup>, legal scholars, and interest groups like the National Business Association.<sup>167</sup> This demonstrates vibrant interest from a wide range of groups and provides evidence of the initial expectations that different stakeholders had on the possible impact of popular actions. These stakeholders represent different types of social interests and all of them were represented in legislative discussion of the statute.<sup>168</sup>

During the debates of the statute the Congress analyzed elements of popular actions and collective rights, and highlighted some of their characteristics that were to be developed by the Statute. The Congress emphasized that popular actions were meant to be mechanisms of participation that could facilitate and motivate citizen engagement. The constitution of 1991 stated innovative political and legal mechanisms that could improve equality, citizen participation, and civil rights but focusing on society as a whole rather than focusing on the individual. In this context popular actions are the best mechanism since it allows individuals to file one lawsuit to protect collective rights.<sup>169</sup>

During the debates the Congress took into consideration that although popular actions were constitutionalized only in 1991 they were not completely new to the Colombian legal system. For instance, the Civil Code included actions to protect the

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<sup>166</sup> According to media reports this NGO was an active participant in the first stages of the implementation of popular actions.

<sup>167</sup> National Press, "Congressional Gazette 167," (Bogotá1997).

<sup>168</sup> Ibid.

<sup>169</sup> "Congressional Gazette 198," in *Ponencia para segundo debate a los proyectos de ley numeros 05, 024 y 084 de 1995 de Cámara, acumulados* (Bogotá1996).



public patrimony and to avoid contingent damage. Other laws also created entitlements for individuals to file actions in protection of social interests.<sup>170</sup> The speakers at the first debate at the House, representatives Yolima Espinosa, Viviane Morales, and Dario Martinez, explained that the framers acknowledged the importance of popular actions and they chose to constitutionalize this mechanism in order to improve the protection that already existed in the Colombian legislation.<sup>171</sup>

In my interviews with administrators Eduardo Arce and Camilo Orrego they also referred to the fact that popular actions were not new to the constitution of 1991 because the Colombian legal system already had mechanisms that allow individuals to protect and enforce social interests.<sup>172</sup> Specifically with regards administrative morality Camilo Orrego, former head legal counsel of the city of Bogotá and current expert at the National Agency for Legal Defense of the Government, explained that administrative morality implies that the government should perform focusing on the public interest and that consequently administrative morality was not born with the constitution of 1991:

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<sup>170</sup> "Congressional Gazette 493," (Bogotá1995), 2. The speaker referred to actions like the actions to protect the rights of consumers, the action to prevent the danger related to constructions or trees, actions for the protection of the environment, and actions to protect banking from unfair competition.

<sup>171</sup> Ibid.

<sup>172</sup> "Interview Eduardo Arce," (2012). "Interview Camilo Orrego." This argument was also supported by auxiliary justice Fabián Marín and professor Beatriz Londoño. "Interview Fabian Marín," (2010). "Interview Beatriz Londoño." Also with regards media coverage I identified media reports previous to the constitution of 1991 referring to the moralization of the Colombian public administration. These references in media reports could imply that there was a relationship between the concept of morals and the perception of a transparent and efficient public administration in Colombia even before the Constitution of 1991.

“Admitting that it [administrative morality] is something new would be as much as admitting that governmental agents before the constitution of 1991 privileged individual interests over the public good. There is no evidence that this is true because in the constitution of 1886 it is clearly stated that governmental agents should serve the public interest, and that is our rule of law, that is our tradition.”<sup>173</sup>

Orrego emphasized that the developments of the constitution of 1991, especially administrative morality, are rooted in the Colombian legal tradition of the rule of law. Orrego perceives as particularly relevant that the public interest as the core of the Colombian public administration tradition.

When passing the statute the Congress also took into consideration that popular actions had been implemented in several countries around the world. In five out of the six reports for debates speakers made reference to foreign experiences with these actions. Specifically speakers mentioned legislation in countries like the US, Canada, Brazil, Portugal, France, Germany, and Argentina.<sup>174</sup> According to the reports for debate, these legislation adopted popular actions in different ways. Some countries, like France, have used popular actions to protect rights of consumers. Other countries chose to grant a broader range of protection to popular actions. This is the case of Germany, Italy, Brazil, the US, and Canada. The reports mention that Argentina and Brazil had

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<sup>173</sup> "Interview Camilo Orrego."

<sup>174</sup> "Congressional Gazette 277," (Bogotá1995). "Congressional Gazette 493." "Congressional Gazette 207." "Congressional Gazette 498." "Congressional Gazette 198."

successful experiences with popular actions to protect the environment and the rights of consumers.<sup>175</sup> In other countries like Japan the legislation entitled specific organizations or associations to promote and file actions when collective rights are violated. Also, countries like Argentina and México, Spain, and Brazil stated actions so the people could sue the government or private businesses to protect collective rights. In these cases, similarly to popular actions in Colombia, the purpose of the entitlement was to protect society in circumstances where the people appear to be subordinate to strong organizations such as corporations or the government.<sup>176</sup>

In the reports for debate speakers referred to the importance of making the action accessible to all individuals which implied setting an easy procedure and simple requirements to file the suit.<sup>177</sup> For instance, plaintiffs are not required to file the suit at the administrative court, which usually implies going to a main city. Instead, the plaintiff could file the suit at the local court and this court would be responsible for sending it to the specialized judge.<sup>178</sup> Also, the statute entitled the people to get counsel from the Defensoria del Pueblo or the Personeria municipal when necessary to file the lawsuit.<sup>179</sup>

Another mechanism to facilitate people's use of popular actions is the creation of the "Fund for the defense of collective rights" and interests. This Fund was created to support the claims filed by lower income plaintiffs based on criteria of the impact of the harm to collective rights, salience of the action, social relevance, and the economic

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<sup>175</sup> "Congressional Gazette 277."

<sup>176</sup> "Congressional Gazette 207."

<sup>177</sup> "Congressional Gazette 498."

<sup>178</sup> "Congressional Gazette 493."

<sup>179</sup> Ibid.

situation of the plaintiff.<sup>180</sup> With regards the creation of this Fund the draft for first debate at the Senate explained that taking into consideration that low-income citizens would expected to be frequent plaintiffs in these processes the Fund for the defense pursued two purposes: on the one hand it would be a motivator for low-income citizens to file these suits and on the other hand it could ensure equal access to popular actions and group actions.<sup>181</sup> According to the statute this Fund would be managed by the Defensoría del Pueblo (oversight agency) and it would provide economic support to claims based on criteria like impact of the harm related to the suit, public interest, salience of the collective right under threat, and the economic need of the plaintiffs.<sup>182</sup> The article 70 of the statute lists seven funding sources for the Fund: funds from the national government, donations from private organizations (Colombian or foreign organizations), 10% of the economic compensations that are obtained as a consequence of suits funded by the Fund, and the fees that judges impose over the parties in popular actions and group actions.<sup>183</sup>

During the legislative debates several members of the Congress emphasized the value of ensuring the informality and flexibility in the procedure of popular actions. Anybody is entitled to file a suit and the plaintiff is not required to follow strict regulations in relation to the evidence he needs to present with the suit. Furthermore, the judge has the authority to require the proofs he thinks that are necessary in order to make his ruling. Also, the judge has the faculty of make temporary decision that could

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<sup>180</sup> "Congressional Gazette 207."

<sup>181</sup> "Congressional Gazette 498."

<sup>182</sup> Congreso de la Republica de Colombia, "Ley 472." Articles 71 and 72.

<sup>183</sup> Ibid. Art. 70.

protect the collective right from violation while the process is decided. These characteristics of the action demanded a new role from the judiciary. Since formalities were reduced in this type of actions the judge's discretion acquire a wider range during the process: "Therefore, the judge or justice shall use a wider range of discretion, which is a feature that completely departs from our judicial tradition, by giving the judge a new role in the development of the collective justice".<sup>184</sup>

In popular actions related to administrative morality the statute grants power to judge to make temporary rulings to protect this collective right. The judge is required to notify the Procuraduria (national agency for disciplinary control) about the suit so this oversight agency could also start a disciplinary process when necessary. According to the statute when a popular action is in course it is also possible to start a criminal trial when there are felonies involved in the violation of administrative morality.<sup>185</sup>

In relation to administrative morality in early stages of the legislative process the Congress analyzed the possibility of defining this collective right but during the debates members of the NGO Fundepublico suggested to eliminate the definition. According to the documentary records administrative morality was defined as "Administrative morality and prevention of any corrupt behavior. Administrative morality is the right of the community to a legal management of public funds, by following criteria of diligence and due care, and by following the standard of a good public servant."<sup>186</sup> Although this concept was taken into consideration in the debates the Congress accepted

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<sup>184</sup> National Press, "Congressional Gazette 493."

<sup>185</sup> "Ley 472."

<sup>186</sup> "Congressional Gazette 493."

Fundepublico's suggestion and in the definite version of the statute administrative morality is undefined.<sup>187</sup> The reports did not provide information about the arguments of Fundepublico to eliminate the definition.

The definition included in the drafts related administrative morality to an anti-corruption mechanism and related it to public finance. In terms of this definition a moral behavior would be the one that takes into consideration diligence, due care, and follows the standard of a good public servant. These concepts are vague and if the definition had remained in the statute they would have been for the judge to implement. Notions like the "good public servant" are not new to the Colombian legislation. In the Civil Code the notion of the "good father of the family" is used as a standard of a reasonable person who behaves with due diligence and care.<sup>188</sup> Also, in the Commercial legislation refers to the "good business man" as a similar standard.<sup>189</sup> Thus, the standard of the "good public servant" was not rare to the Colombian legal tradition but it has not been used as a standard for governmental behavior. In the final version of the Statute administrative morality was left undefined.

In the next section I will analyze the elements of the statute.

### ***Elements of the statute of popular actions***

According to the statute popular actions are judicial actions to protect collective rights and interests. The purpose of these actions is to avoid a contingent harm, to stop

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<sup>187</sup> "Congressional Gazette 167."

<sup>188</sup> Congreso de la República de Colombia, "Código Civil Colombiano," (Bogotá1887). Art 63.

<sup>189</sup> Congreso de la República de Colombia, "Ley 222," (Bogotá1995). Art 23.

the threat, danger, or harm over collective rights and to restore things to the way they were before the violation.<sup>190</sup> When a popular action is initiated to stop the contingent harm or danger against a collective right, the judge is required to process it over any other type of process, with exception of Habeas Corpus, actions for tutelage, and the action for compliance.<sup>191</sup>

The statute lists some collective rights but it leaves an open possibility for other norms to define collective rights.<sup>192</sup> This norm answers the debate started by the members of the constitutional assembly in 1991 in relation to whether the list of collective rights shall be exclusive (only the collective rights listed in the constitution or the statute would be considered collective rights) or if it would be possible for other regulations or authorities to state other collective rights. According to the statute, collective rights could also be stated by the Constitution or other norms approved by the Congress such as laws, statutes, and international treaties. Thus, this statute did not

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<sup>190</sup> "Ley 472," Art. 2. . This norm states that the Constitution, other statutes, and International treaties can also define collective rights that could be enforceable through popular actions. The Constitutional Assembly debated over whether collective rights shall be defined exclusively but the constitution. The Assembly allowed the Congress to create new collective rights. The statute confirms this choice by allowing other constitutional or legislative norms in the future to create other collective rights.

<sup>191</sup> Ibid., Art. 3. . The actions mentioned in this article are constitutional actions that involve essential rights such as life, freedom, and other constitutional rights in situations of danger. Thus, judges should privilege in first place these constitutional actions, in second place he shall rule in cases of popular actions to stop contingent damage or danger against collective rights, and in third place he shall decide any other type of action. This hierarchy aims to focus judges' efforts on rights going from the most essentials to the ones that are less related to people's life and integrity.

<sup>192</sup> The article 4 of the Statute lists the following rights: a healthy environment, administrative morality, ecologic equilibrium and the sustainable exploitation of natural resources, public space, public funds – public patrimony, cultural patrimony of the country, public security and public health, access to infrastructure that guarantees public health, free economic competition, access to public services and the right to efficient and timely granted public services, banned production, import, possession, and use of chemical, biological, and nuclear weapons, the right to security and prevention of disasters, the development of constructions according to urban planning regulations, and the rights of users and consumers.

allow courts to create other collective rights, which was one of the options analyzed by the constitutional assembly.

When regulating the elements of popular actions, the statute refers to the parties who are entitled to file one, when can they do it, and against whom. According to the statute, all individuals and businesses are entitled to popular actions. Also, NGO's popular and civic organizations, and other civil society organizations are entitled to file a popular action. The statute also refers to public agencies performing oversight functions<sup>193</sup>, specifically the Procurador General de la Nación, el Defensor del Pueblo and Personeros Distritales and municipales, each one of them in their own jurisdiction, would be entitled to act as plaintiffs in popular actions. Other public agents who do not perform oversight functions but who are responsible for promoting collective rights are also entitled to file a popular action.<sup>194</sup>

Popular actors could sue a public or a private authority when the authority's behavior (action or omission) violates or endangers collective rights and interests. According to the statute, in order to file this lawsuit popular actors are not required to follow ordinary administrative procedures, such as formally requesting the authority to protect collective rights, prior to initiating an action in court. In other words, the plaintiff could file a popular action without previously contacting the authority that caused the violation or threat.<sup>195</sup> This norm aimed to facilitate the protection of collective rights,

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<sup>193</sup> The article entitles agencies that exert control, intervention, or oversight over other administrative agencies to file popular actions in protection of collective rights. The exception to this entitlement is when the violation of collective rights has been caused by the same oversight agency. In that event such agency is not entitled to file a suit. "Ley 472." Article 12, num 3.

<sup>194</sup> Ibid., Article 12.

<sup>195</sup> Ibid., 10.



especially in those cases when there was an imminent threat of a violation and the ordinary administrative procedures could imply a higher risk for the collective right.

Also, this norm eased the requirements to file a popular action and ideally it would encourage citizens to participate through these judicial mechanisms. Administrative procedures are frequently formal and they require attorney representation while any individual could file popular actions.<sup>196</sup>

The new administrative code, adopted in 2011, reversed this provision of the 1998 statute by requiring those seeking to file a popular action to file a complaint against the authority before filing a popular action.<sup>197</sup> Since the administrative code only started operating in July of 2012 it is too soon to assess the impact of this reform on popular actions. However it would be expected that this additional requirement would discourage some popular actors who have no legal training or limited funds.

The article 17 of the statute refers to the mechanisms for supporting plaintiffs in order to motivate the use of popular actions. This norm refers to three types of support that plaintiffs could receive. First, the plaintiff is entitled to receive help from oversight agencies such as the Personeria Distrital or the Defensoria when filing the lawsuit. This help could focus on writing the claim or petition, especially in those cases when it is

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<sup>196</sup> According to this article plaintiffs could file a popular action with or without legal representation. When the plaintiff files the action directly (without legal representation) the Defensoria del pueblo could be part of the process. Ibid. Article 13. The Defensoria del Pueblo is responsible for promoting, communicating, and protecting civil rights (Art. 281 of the Constitution). In development of these functions the Defensoria is entitled by the constitution to file popular actions in protection of collective rights.

The constitutional court analyzed in judicial review articles 12 and 13 of the statute. According to the Court these articles fulfill constitutional mandates and consequently they are constitutional. *C 215*.

<sup>197</sup> Congreso de la República de Colombia, "Código De Procedimiento Administrativo Y De Lo Contencioso," in *Law 1437* (Bogotá2011). According to the current Administrative code the plaintiff shall request from the authority to protect the collective right before filing a popular action. This requirement could be waived when collective rights are under an imminent threat. Art. 144.

urgent to protect the collective right or when the plaintiff does not know how to write. Second, the norm allows plaintiffs to file the suit at any municipal court (even civil or criminal court) when there is not an administrative court in the city or region where the plaintiffs lives. This aid aims to facilitate citizens' use of popular actions because it does not require from an individual to travel to a main city to file the suit at the administrative court. Third, once the judge receives the suit he is authorized to make precautionary decisions to protect collective rights when they are under a serious threat.<sup>198</sup> These three mechanisms intend to enable individuals to file popular actions by facilitating the access to judges and the elaboration of the claim. This norm attempted to facilitate popular actions even in small towns that are distant from main cities in the country.

Regarding who may be the target of these lawsuits, article 14 authorizes popular actors to file a suit against individuals, businesses, or public authorities that had developed a behavior that threatens or violates collective rights. This behavior could be an action or an omission against a collective right. It is possible to sue an unknown defendant when it is unclear who was responsible for the violation. In this case, according to the article 14 it would be the judge's responsibility to identify it.

According to the statute, the Council of State and subordinate administrative courts are responsible for ruling in cases of popular actions when the defendant is a public

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<sup>198</sup> These are decisions that the judge can make at any stage of the process but especially in early stages with the purpose of providing provisionary protection to the rights or interests that are object to litigation. These are temporary mechanisms of protection aimed to avoid permanent harm to the rights and interests. Some examples of precautionary decisions are: suspending the effects of administrative acts and demand certain behaviors from plaintiffs or defendants. Ibid. Art. 229.

agency or a private contractor. In other cases civil judges would have jurisdiction.<sup>199</sup>

Within the administrative jurisdiction the statute defined that administrative judges would make the first level ruling and that the Tribunals would be the appellate court. The plaintiff could choose to file the suit at the residence of the defendant or at the place where the facts happened.<sup>200</sup> Based on this attribution of competences it is possible that civil judges, ruling in cases of private parties, could use some criteria different from the ones used by administrative judges.

The statute requires the judge hearing a popular action to make his or her ruling within 20 days after the parties have presented closing arguments. When the ruling is favorable to the plaintiff's claims, the judge is authorized to demand from the defendant a certain behavior or to stop certain behavior. The judge may also require the defendant to do what would be necessary to restore situations to the way they were before the violation took place. The ruling could also demand economic compensation in favor of the administrative agency responsible of enforcing the collective right, only if this agency is not responsible for violating the collective right. The statute requires the ruling to be precise and to set the timeframe in which the responsible party must comply with these demands. The judge is to state all the behaviors that should be avoided in order to prevent future violations to the collective right.<sup>201</sup>

The statute allows the judge to keep its jurisdiction over the case until the term for complying with the ruling expires. During this time the judge has the competence to

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<sup>199</sup> "Ley 472." Art 14.

<sup>200</sup> Ibid. Art 16.

<sup>201</sup> Ibid. Art 34.

make decisions to guarantee that the ruling will be implemented. Also, the judge is authorized to create a committee for verifying compliance. In this committee could take part the judge, the parties of the suit, the public agency responsible for protecting the collective right, members of oversight agencies, and NGOs.<sup>202</sup>

The committee for verifying ruling compliance offers a valuable opportunity of collaboration between different parties to protect a collective right. In the committee public servants, plaintiffs, civil society organizations, oversight agencies, and the judge join resources to share perspectives and protect collective rights. By participating in the committee, stakeholders may also gain awareness of their own responsibility in the promotion and enforcement of collective rights.

Although the committee seemed to be a good opportunity for the parties to collaborate the experience of plaintiffs seems to be different. In my interviews, one plaintiff in popular actions (Juan Carlos Garcia) and one law professor and legal consultant (Beatriz Londoño) expressed doubts regarding the possible impact of the committee. Garcia referred specifically to one popular action when he got very disappointed because by the end of the process the Tribunal ruled that the collective right was not under threat anymore although in his view this was not entirely true. As a consequence, he said that he had lost all interest in participating in the committee because, he thought, it was going to be a scenario for the governmental agency to praise itself rather than recognizing a problematic situation that needed solution.<sup>203</sup>

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<sup>202</sup> Ibid.

<sup>203</sup> "Interview Juan Carlos Garcia," (2012).

Professor Londoño argued that judges constitute committees in just a few cases and that in these cases their possible impact is reduced because the defendant do not comply with the terms of the ruling and the committee did not enforce compliance.

Londoño observed:

“For instance, in the case of Machetá ... the purpose was to depollute a field from toxic residues. Legally it worked fine. The judge conformed the committee. In that case the plaintiff was a farmer and we [the law school] supported the action. In that case, the judge invited the farmer, the oversight agency, the administrative agency to participate of the committee for verifying compliance... and so what happened was that the administrative agency said that they have done everything perfectly well, it is like a self-compliment of the administration. We have been to that place several times and the farmer is aware of it. He says, look, I received the economic incentive but the situation has not improved... Thus, this was a ruling that seems very pretty in the paper but it did not change a thing.”<sup>204</sup>

According to Londoño it seems to be a gap between the rulings and the implementation of the rulings to the extent that the violation of collective rights remained. Also, the committee seemed to be a place where the administration has a privileged position and the committee does not effectively oversee a full implementation of the ruling.

Garcia expressed disappointment on what could be a mechanism of collaboration between different stakeholders. He also argued that he lost interest in the implementation of the ruling and consequently he did not try to engage in any follow up activity related to the ruling. The plaintiff’s interest seems to be a highly relevant factor

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<sup>204</sup> "Interview Beatriz Londoño." Professor Londoño refers to the mechanism of collaboration by which any individual or business could support a plaintiff's claim at any time during the process before the judge makes a decision. NGOs and other civil society organizations as well as oversight agencies, and administrative agencies responsible of promoting collective rights could also support the plaintiff's claims.

in relation to the role of the committee. Professor Londoño argued that promoting the role of the committee requires individual commitment because these committees have no funding and the implementation of the rulings is expensive. Thus, it depends on the individual commitment of the members of the committee the possible impact that they could cause.

### **Eliminating the monetary incentive for popular actors: law 1425 of 2010**

The right to gain compensation for violations of rights is well-established in American law as an incentive for private enforcement of public law.<sup>205</sup> It is thought that without this incentive key public rights would go largely unenforced because most ordinary individuals do not have the means to pay for an attorney. The statute of 1998 contemplated a monetary incentive for plaintiffs when the judges grant the action.<sup>206</sup>

According to the original text of the statute the plaintiff in a popular action was entitled to receive an incentive that judge estimates within the range of 10 and 150 times a minimum monthly wage. Whether the plaintiff is a private party or a governmental agency this party is entitled to the incentive. In the case of governmental agencies, the incentive would go to a special fund created by the statute, the “Fund for the defense of collective rights.”<sup>207</sup> The statute also included a specific norm about the incentive in cases related to administrative morality. In these cases, the plaintiff

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<sup>205</sup> Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the United States*.

<sup>206</sup> "Ley 472," Art 34.

<sup>207</sup> Ibid., Art. 39.

would be entitled to an incentive equal to the 15% of the funds that the governmental agencies recuperate as a consequence of the suit.<sup>208</sup>

The impact of monetary incentive for plaintiffs was broadly debated in 2009 when the government motivated a reform for the statute.<sup>209</sup> Some argued that plaintiffs should not receive economic compensation for complying with their civic duty of protecting collective rights. Others argued that the economic compensation motivated plaintiffs to filing frivolous claims just to obtain monetary compensation and consequently that it had worsened the problem of congestion in the judiciary. Others claimed that the monetary incentive was a fair compensation for the expenses and burdens related to filing a lawsuit and that although protecting collective rights pertains everybody in society the plaintiff deserves an economic reward for his actions.

In 2009, the Ministry of Interior and Justice first promoted the initiative for eliminating the monetary incentive for plaintiffs.<sup>210</sup> The Ministry argued that popular actions had grown in number given the fact that plaintiffs had pursued making profit as the goal of filing these suits. Consequently considerable governmental funds, specifically funds of regions and cities, had been wasted in paying popular actors. According to the

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<sup>208</sup> Ibid., Art. 40. This article also states that in cases of public contracting the attorney of the governmental agency and the attorney of the contractor would be obliged to pay all the money that the governmental agency lost for the violation against administrative morality. This article assumes a connection between violations of administrative morality and cases of corruption. Consequently a lawsuit to enforce administrative morality could lead to recover public funds that had been wasted in corruption.

Also, this norm entitles citizens to request copies of documents related to contracting out processes in order to have access to the information that they could need to initiate the suit. This article aimed to strengthen popular actions by giving citizens the access to the information they could use to exert oversight over bureaucratic behavior and to identify immoral behavior when that is the case.

<sup>209</sup> National Press, "Congressional Gazette 680," in *Ponencia para Segundo Debate al Proyecto de Ley 056 de 2009 Cámara. Por medio de la cual se derogan algunos artículos de la Ley 472 de 1998-acciones populares y de grupo* (Bogotá2010). "Congressional Gazette 885," (Bogotá2010).

<sup>210</sup> "Congressional Gazette 622," (Bogotá2009).

Ministry citizens have the responsibility of protecting collective rights and it should not be necessary to offer any type of reward for complying with one's responsibility. Based on these considerations the Ministry proposed the elimination of the monetary incentive to popular actors.<sup>211</sup>

In the document presented at the Congress in 2009 the Ministry argued: "Currently in Colombia the use of popular actions has had a considerable growth which, according to our analysis, has been motivated by the interest of the plaintiffs of receiving the monetary incentive stated by the Law 472 of 1998 [statute of popular actions] to those who engage in a judicial process to protect collective rights."<sup>212</sup> It is noticeable that neither in this document nor in other documents related to the debates of the elimination of the incentive the Ministry presented data relating the monetary incentive and the increase of popular actions. Even more, the draft of the law that eliminated the incentive assumed that the growth in popular actions was negative for the Colombian public administration, but neither the Ministry nor any member of Congress provided any evidence in support of this assertion.

The House of Representatives supported the elimination of the incentive based on considerations of the lack of representativeness of popular actions, the opinion of different social organizations in relation to the need of regulation to the incentive, and the situation of congestion and delay in the administrative jurisdiction, and the power of the Congress to legislate over these issues. According to representatives Adriana Franco

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<sup>211</sup> Ministerio de Justicia, "Exposición De Motivos. Proyecto De Ley 056 De 2009 Cámara. Por Medio De La Cual Se Derogan Algunos Artículos De La Ley 472 De 1998 - Acciones Populares Y De Grupo.," (Bogotá2009).

<sup>212</sup> Ibid.



Castaño, Rosmery Martínez Rosales, Carlos Arturo Correa Mojica, and Fernando de la Peña Márquez speakers of the draft for second debate in the House, the monetary incentive is an expression of the tension between the principle of solidarity and the economic motivation of plaintiffs when filing a suit to protect collective rights.<sup>213</sup> The speakers argue that in fulfillment of the principle of solidarity plaintiffs' motivation should mainly be the protection of collective rights out of concern for social well-being. This altruistic motivation differs from the selfish economic motivation that, according to the speakers, has led the plaintiffs.<sup>214</sup>

After debate, Congress passed a law in 2010 eliminating the monetary compensation for plaintiffs.<sup>215</sup>

In my interviews I found different opinions in relation to the monetary incentive. Two of the interviewees had been plaintiffs in popular actions and both of them supported the monetary incentive as a fair reward for the expenses related to the suit.<sup>216</sup> In both interviews funding was a core concern when referring to their role as popular actors. One of the interviewees (prof. Londoño) works as a researcher in a private university and this institution provides funding for popular actions. The second plaintiff (García) is an attorney who was more insistent when referring to the negative stereotype that plaintiffs have received due to the monetary compensation.<sup>217</sup> García argued:

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<sup>213</sup> National Press, "Congressional Gazette 680."

<sup>214</sup> Ibid.

<sup>215</sup> Congreso de la Republica de Colombia, "Ley 1425," in *Por medio de la cual se derogan artículos de la Ley 472 de 1998 Acciones Populares y Grupo*, ed. Colombia (Bogotá2010).

<sup>216</sup> "Interview Beatriz Londoño." "Interview Juan Carlos Garcia."

<sup>217</sup> "Interview Juan Carlos Garcia."

“I think that the instrument [popular actions] is valuable but unfortunately it has been condemned as evil. I mean, here the biggest concern turned out to be the monetary compensation, although it is the least relevant but it ended up being the most highlighted... I mean, I don’t know, there was a stereotype... like the lawyer who decides to file a popular action is a guy with no money, with nothing else to do, and so to catch a penny he just identifies a possible violation of collective rights and he copies and pastes that thing like a thousand times. That was not the point...”<sup>218</sup>

According to this plaintiff, popular actors are depicted by the media and even by the courts as people who are virtually unemployed and who want to make a living out of suing the government. This depiction seemed to be embedded in his understanding of popular actions to the extent that when he started explaining his motivations to file a popular action he was almost apologizing for pursuing such endeavor: “It was a nice experience but it was very disappointing... We chose to file popular actions with high impact; I mean that’s what we wanted to do. Obviously, yes, we were looking for an economic compensation but we wanted to do so with a nice topic and the answer of the Tribunals was unfair...”<sup>219</sup> When referring to a “nice topic” he described cases of popular actions with high potential impact in terms of protecting a healthy environment, public funds, and administrative morality. He insisted that he was concerned about the country’s social well-being and that the economic compensation was simply a means for covering the expenses related to the lawsuit.

Similar kinds of allegations of litigants being irresponsible actors have been depicted by media in the United States. Haltom and McCann analyzed media coverage

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<sup>218</sup> Ibid.

<sup>219</sup> Ibid.

of tort litigation in the United States and, according to these scholars, the American media have consistently portrayed tort litigants in unflattering, self-interested terms.<sup>220</sup>

The widespread perception conveyed by the popular media is that litigants are irresponsibly seeking large damage awards simply to enrich themselves.<sup>221</sup>

Other interviewees were more cautious about the monetary incentive by acknowledging the abuses of plaintiffs when filing superfluous popular actions and contributing to congestion in the jurisdiction. Botero, one of the interviewees, is a law professor and a legal consultant for private businesses. He argued that the “tsunami” of lawsuits generated by the monetary incentive led to low-quality popular actions and to processes with different purposes from the ones pursued by the constitution.<sup>222</sup> In another interview a law professor and legal consultant (Polania) also acknowledged the abuses of plaintiffs when filing numerous and superfluous popular actions but, in his opinion, the solution was not to eliminate the monetary incentive. On the one hand, the economic incentive was a fair compensation for the plaintiff’s role and on the other hand in cases of frivolous litigation the judge had other alternatives to discourage this behavior.<sup>223</sup>

Botero also suggested that elimination of the incentive would have a negative impact. In his opinion, popular actions had a valuable impact by giving visibility to problems that were hidden due to the lack of a legal mechanism that could put them into the judicial agenda. This attorney argued that popular actions are public

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<sup>220</sup> William Haltom and Michael McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* (University of Chicago Press, 2004).

<sup>221</sup> Ibid.

<sup>222</sup> "Interview Luis Felipe Botero," (2012).

<sup>223</sup> "Interview Nicolás Polanía," (2012).

mechanisms that ensured citizens the access to the jurisdiction in order to solve conflicts pertaining to the community as a whole.<sup>224</sup> This interviewee referred to the importance of popular actions as a legal mechanism that entitled the people to improve social problems. He suggested that it is possible that popular actions made citizens more aware of their collective problems once they realized that there was a legal mechanism that entitled them to solve them.

According to Botero, three types of concerns led the debate about the monetary incentive: the economic impact for the government, congestion in the judiciary, and the interest of private businesses. In relation to the economic impact of the incentive he argued that it was foreseeable. When the statute entitled individuals to receive a monetary compensation for filing popular actions an economic impact was expected and the possibility of abuses in the use of the action was expected too.<sup>225</sup>

The Senate analyzed the economic impact of the monetary incentive. In the report for second debate the speaker argued: "Apparently [the monetary incentive] does not produce a significant negative effect over public funds but what causes a serious harm is specifically the monetary incentive stated in article 40 [of the statute] related to administrative morality."<sup>226</sup> The speaker argued that the economic impact of the incentive over public funds is not significant but in congressional documents there is no empirical data supporting this assertion.

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<sup>224</sup> "Interview Luis Felipe Botero."

<sup>225</sup> Ibid.

<sup>226</sup> National Press, "Congressional Gazette 885." The senator refers to articles 39 and 40 of the statute. According to former article 39 the plaintiff was entitled to an economic incentive that the judge would estimate in an amount that goes between 10 and 150 minimum wages. According to article 40 in popular actions related to administrative morality the incentive up to 15% of the amount that the public agency retrieves as a consequence of the action.

When referring to the monetary incentive in cases of administrative morality Senator Roberto Gerlein in the draft for the second debate at the Senate in 2010 argued that unscrupulous plaintiffs had used the action selfishly, suing the government in cases where big amounts of money are involved, and consequently gaining a considerable incentive.<sup>227</sup> In Senator Gerlein's critique, the plaintiff's motivation is the basis of the reproach specifically by using expressions like "unscrupulous plaintiffs" and their "selfish" motivation. Gerlein did not refer to the facts that could have originated the suit or that the cause of the monetary incentive could be the wrongful behavior of the administration when violating administrative morality. In other words, the speaker did not take into consideration that if plaintiffs had gained considerable sums of money (although there is no estimate of this amount) it was because judges had ruled in favor of popular actors. In these rulings judges recognize violations against administrative morality, identify the responsible of the immoral behavior, and consequently recover public funds that were lost due to the wrongful behavior.

In addition to the economic impact of the monetary incentive, the elimination of the incentive seemed aimed to address two additional issues: congestion in the judiciary and the impact over businesses. In relation to the impact over businesses, popular actions forced private firms to change their procedures. During my interviews professor Botero argued: "The decision of the Congress ultimately legitimized two types of interests over citizens' interests: interests of businesses to cut that stream because they were pointed out for doing wrong things and they were on the spot in a bunch of cases

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<sup>227</sup> Ibid.

... And the second type of interest is related to congestion in the judiciary, a mantra by the Ministry of Interior and Justice. Let's be more efficient they said, let's be so and so they said... and one of the poorest alternatives they found to improve judiciary efficiency was to cut causes of action..."<sup>228</sup> Businesses' interests were evident in Congressional debates since one of the most important Colombian business associations (FENALCO) intervened by supporting the elimination of the incentive. According to FENALCO by eliminating the incentive, popular actions would return to being a worthy mechanism for rights' protection rather than a source of profit. FENALCO argued that several lawyers had harassed public and private institutions that are trying to make a living by suing them in popular actions that are commonly reckless just to gain the monetary incentive.<sup>229</sup>

Botero's observations are based on his experience as a legal consultant for this type of firms. In this role he noticed that businesses had to adapt their behavior and procedures as a consequence of popular actions. Some lawsuits, he argued, highlighted mistakes caused by faulty procedures and consequently businesses were forced to improve.<sup>230</sup>

Congestion in the judiciary was one of the elements analyzed by the Congress when passing the law for eliminating the monetary incentive. In the report for second debate of the House congestion in the judiciary was described by presenting some statistics from the Superior Council for the Judiciary. According to these statistics in the

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<sup>228</sup> "Interview Luis Felipe Botero."

<sup>229</sup> "Congressional Gazette 885."

<sup>230</sup> "Interview Luis Felipe Botero."

year 2009- 2010 a total of 51.361 constitutional actions were filed, and 23.997 of those were popular actions. The congress requested an inventory of the number of popular actions that were specifically under study of the administrative jurisdiction. According to this inventory for the same time frame the administrative jurisdiction had 232,889 cases under study and 19,384 cases were popular actions.<sup>231</sup>

After reviewing the number of cases in the administrative jurisdiction representatives Adriana Franco Castaño, Rosmery Martínez Rosales, Carlos Arturo Correa Mojica, and Fernando de la Peña Márquez speakers of the draft for second debate in the House concluded:

“From these statistics the only possible conclusion is that there is a high load of litigation of popular actions in relation to group actions which, logically, reveals the perverse effect of the economic incentive as a legal mechanism known by the plaintiffs in an action that is supposed to be based on solidarity to protect collective rights. Therefore it is necessary to state better regulations that could prevent or at least reduce the use of the economic incentive as a mechanism that could diminish the quality of the lawsuits, given that some individuals do not file lawsuits out of a social concern.”<sup>232</sup>

In this argument the speaker of the House argued that the fact that there were more popular actions than group actions was due exclusively to the monetary incentive.

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<sup>231</sup> "Congressional Gazette 680."

<sup>232</sup> Ibid.

The speaker offered no empirical evidence in support of this assertion. In addition, it is striking that the focus of the speaker's analysis is on whether the plaintiff had an honorable or self-interested motive rather than on whether the action or court rulings contributed to identifying and addressing problems. In other words, in the Congressional debate it seemed to be more relevant whether the plaintiff's motivation was to help rather than the actual impact that the action had. This focus on purity of motive appears to be a sharp departure from the monetary incentive's original purpose, which was to improve the public service.

The Colombian Congress also took into consideration the opinion of NGOs in relation to the incentive. The Corporation for the Excellence on Justice argued that although the monetary incentive had a positive effect it was necessary to regulate the criteria for estimating the sum that the plaintiffs received. In relation to the monetary incentive in cases of administrative morality the Corporation argued plaintiffs could be motivated to file frivolous suits just to receive an economic incentive.<sup>233</sup> Thus, the economic incentive in those cases could have a negative effect.

The debate in Congress also took into consideration a survey of popular attitudes that had been conducted by the National Department for Statistics in 2007.<sup>234</sup> According to legislative debates popular actions are not known by the population in comparison with the action of tutelage and the action to request information from governmental agencies.

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<sup>233</sup> Ibid.

<sup>234</sup> "Congressional Gazette 1040," in *Enmienda de Ponencia Para Segundo Debate al Proyecto de Ley 169 de 2010 Senado, 056 de 2009 Cámara por la cual se modifican algunos artículos de la Ley 472 de 1998 -Acciones Populares y de Grupo* (Bogotá2010). "Congressional Gazette 680."



The Congress just focused on the results of the survey for 2007, which is the first year in which the Dane published the results of this survey. According to the same survey in 2011 44.2% of the interviewees have heard about popular actions while 87.7% have heard of the action of tutelage and 77.6% have heard about the action to formulate petitions to the administration.<sup>235</sup> It is relevant that in 2011, even after the monetary incentive was eliminated, citizens seemed to be aware of the existence of popular actions as mechanisms for protecting rights.

Taking all these elements into consideration the Congress decided to eliminate the monetary incentive. The Colombian Congress reached this decision after resolving a disagreement between the House and the Senate. The House favored the elimination of the incentive while the Senate leaned towards reducing the monetary incentive. After a final debate among members of the two chambers the Congress voted in favor of eliminating the economic incentive for plaintiffs.<sup>236</sup>

## **Conclusion**

This chapter has shown that the Colombian Congress has recognized that key constitutional rights are not self-enforcing and has addressed how to encourage private lawsuits as a means of this enforcement. Like legislatures in other countries, including the United States, the Colombian Congress adopted a statute aimed at facilitating private lawsuits by providing litigants with a monetary incentive to help cover their

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<sup>235</sup> DANE, "Encuesta De Cultura Politica - 2011," (Bogotá2012).

<sup>236</sup> NationalPress, "Congressional Gazette 78," in *Acta de Plenaria 33 del 14 de Diciembre de 2010 Senado* (Bogotá2011).

costs. But then, amidst growing controversy over these lawsuits, the Congress rescinded this support.

The initial statute of popular actions developed the procedural features of these actions and provided guidelines for their implementation. They were designed to encourage people's participation in order to enforce collective rights, one of them being administrative morality. The statute included mechanisms for supporting popular participation such as a monetary incentive in cases when the judge ruled in favor of the claim. Also, according to the statute the suit was not required to fulfill the formalities that are common in ordinary actions, and the plaintiff could receive legal advice from oversight agencies when it would be necessary to file the suit.

When analyzing the legislative debates it is noticeable that foreign experiences influenced the legislation on this topic. Legislative documents mention the successful experience of North American, Latin American, European, and Asian countries in relation to judicial actions that focused on protecting collective rights. In addition to foreign experiences legislative documents referred to popular actions already existent in the Colombian legislation emphasizing on the experience that the country already had with similar legal mechanisms.

After some years of implementation the debate about the impact of popular actions focused on plaintiff's motivations for filing a suit. In this debate the standard of a good citizen was identified with an altruist motivation and consequently the motivation of receiving a monetary incentive was considered as superfluous. In other words, in cases when the plaintiff filed suits pursuing monetary compensation he was perceived as a

selfish and opportunist individual. Another element that was taken into consideration was the economic impact of the monetary incentive on public funds. In the debates the Congress frequently referred to the negative economic effect of popular actions over local governments, specifically those actions related to administrative morality. Regardless of this assertion none of the governmental or legislative documents analyzed empirical data that quantified the economic impact of popular actions on public funds.

As a consequence of this debate, the Congress eliminated the monetary incentive for plaintiffs. My interview respondents unanimously agreed that the elimination of the incentive will have a negative effect on the use of popular actions. While interviewees recognized that plaintiffs were interested in receiving monetary compensation and that some of them have engaged in frivolous litigation they also indicated that popular actions have brought to public attention some problems that were hidden before. Popular actions created an opportunity for citizens to legally ask for protection when collective rights are violated.

The plaintiffs' perspective of the enabling legislation reveals skepticism with regards the real potential of the action. Although the statute was meant to provide a real opportunity for individuals to check governmental performance García and Londoño explained that in their experience in popular actions this rarely occurs because the government has considerable power. They argued that governmental agencies have used the legal procedures to portray symbolic compliance with the constitution and the statute on matters related to collective rights. In other words, although popular actions had created the opportunity of combining efforts from different key actors the

government still has significant power over some stages of the process like the committee for verifying ruling compliance.

When analyzing the key actors who have participated in the debates of popular actions and the statute businesses seemed to have an important voice. Fenalco, the most important business association, participated of the debates and supported the elimination of the incentive. Also, NGO's like Fundepublico took part in the debate and had a key role in relation to administrative morality. This NGO argued in favor of the elimination of the definition of administrative morality and in fact the definitive version of the statute left administrative morality undefined.

The legislative debates rested on a lack of a systematic analysis of the impact of popular actions. In 1998 (when the original statute passed) the Congress legislated under the assumption of making popular actions an effective mechanism of popular participation. In 2010, when the monetary incentive was eliminated, the Congress did not make a rigorous analysis of the impact of the action or even the economic impact that it had caused.

Still, based on the experience of the United States, as documented by the studies discussed above, it is reasonable to conclude that eliminating the monetary incentive for popular actions will considerably reduce their number and effectiveness.

#### Chapter 4: The Administrative code and popular actions

In the wake of the 1991 constitutional reform the Congress adopted one other key piece of legislation to implement the reform: the new administrative code (Law 1437 of 2011). The administrative code is among the most important regulations for administrative agencies and was adopted as an effort at modernizing the administrative jurisdiction and bureaucratic behavior. According to the legislators modernizing public administration is tied to the application of the Constitution of 1991 and consequently the code develops some elements of the new causes of action created by the Constitution.<sup>237</sup>

The administrative code includes three articles that regulate popular actions and administrative morality. Article 3 provides a list of principles that the authorities should interpret and apply in administrative behavior, one of them being administrative morality. This is the first definition of administrative morality provided by the Colombian legislation. Article 139 regulates the action to overrule electoral acts and Article 144 regulates the action for the protection of collective rights and interests (popular actions). These two norms reduced the authority of judges in popular actions to overrule administrative regulations, contracts, or electoral acts even if they are related to a violation of administrative morality. In these cases the judge has the authority to demand the necessary behaviors to stop the harm or threat to administrative morality

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<sup>237</sup> "Exposición De Motivos Ley 1437 ", (Gaceta del Congreso No. 11732009).

but the judge cannot refer to the legality of the administrative regulation, contract, or electoral act. My analysis will focus specifically on these provisions.

These regulations have profound effects in the implementation of administrative morality. The Constitution has been in place for twenty years and in this time frame different actors (legislators, courts, plaintiffs, administrative agencies, media, and civil society organizations) have developed a notion of administrative morality. In 1998, as we saw in the previous chapter, the Congress adopted a statute for popular actions that aimed to facilitate popular litigation regarding administrative morality by providing a financial incentive to file these lawsuits. Then in 2010, as the previous chapter also showed, Congress adopted a statute that eliminated the monetary incentive for plaintiffs in popular actions. This norm is a setback in the development of popular actions with regards the high hopes that the framers put in these actions.

Against this backdrop of previous legislative action, and twenty years after adoption of the 1991 constitution, the Congress passed the new administrative code that brings essential elements about popular actions and administrative morality. How the norms of the code interact with the existent regulatory frame for popular actions is the topic of this chapter.

With the purpose of analyzing the new administrative code I study legislative and governmental documents related to its approval.<sup>238</sup> I also analyze interviews with actors with broad experience in litigation of popular actions: one plaintiff (Juan Carlos Garcia), one administrator (Camilo Orrego), two scholars and practitioners (Luis Felipe Botero

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<sup>238</sup> A full list of these gazettes is in Appendix B.

and Nicolás Polanía), and a member of the NGO Transparency Colombia (Marcela Restrepo).

Following the approach of Chapter 3, in this chapter I consider the new administrative code in light of theories of the legislative development and mobilization of constitutional rights. I summarized these theories in the previous chapter and will not repeat that discussion here other than to note that it is widely understood by scholars of constitutional rights that enforcement of these rights is facilitated by legislative enactments that lower the financial cost of filing these lawsuits.<sup>239</sup> In the context of this observation, this chapter analyzes the rationale behind the code, the parties that participated in legislative debates, and the articles of the code that will impact litigation in administrative morality.

### **History of the Administrative code**

The idea of passing a new Administrative code was born in Colombia's administrative courts. Judges at different levels (administrative judges, tribunals, and the Council of state) developed the concept of "Re-thinking the administrative jurisdiction" with the purpose of making it more capable of facing current challenges.<sup>240</sup> The former Administrative code was framed in specific historical circumstances<sup>241</sup> and by 2010 it seemed necessary to formulate new rules and structures for the administrative jurisdiction.

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<sup>239</sup> Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the United States*; Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*.

<sup>240</sup> "Exposición De Motivos Ley 1437 ", 56.

<sup>241</sup> Presidencia de la República de Colombia, "Decreto Ley 01," in *Por el cual se reforma el Código Contencioso Administrativo* (Bogotá1984).

In the document that explains the draft of the new Administrative code, judges and members of the government argued that since the previous administrative code passed four major changes had taken place, changing considerably social life and the legal practice. These four changes demanded a new legal scheme for the administrative jurisdiction.<sup>242</sup>

First, the understanding of the government and the state had changed as a consequence of globalization. A globalized world had implied the standardization of social, political, technological, and cultural processes, affecting the relationship between the government and the people. Also, new technologies had modified the traditional role of the government and its relationship with the people.<sup>243</sup> Second, the constitution of 1991 changed the role and expectations of the government in social life. The constitution of 1991 changed the paradigm of legality from being based on laws and statutes to a paradigm in which the constitution was the most important source of rights. This shift in paradigm posed challenges on public administration because it meant a change in bureaucratic behavior, from focusing in the legislation to focusing on constitutional principles. These principles implied a new type of accountability that public administrators were not familiar with and consequently a new administrative code was necessary in order to implement this new type of accountability.<sup>244</sup> Third, the

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<sup>242</sup> "Exposición De Motivos Ley 1437 ".

<sup>243</sup> Ibid., 53.

<sup>244</sup> Ibid., 55. Specifically the principles of public administration stated in article 209<sup>244</sup> of the constitution demanded from public authorities the commitment to these principles. These principles were not entirely new to the Colombian legal system but they were perceived as aspirations more than legal obligations. The constitution of 1991 created judicial actions to enforce these principles. Administrative morality is one of these principles. The new role of the government was also mentioned in documents and drafts of the code while the legislative process developed. For instance when the Senate first debated the code, Senators argued



structure of administrative judges and courts had changed since the former code passed. Originally Administrative Tribunals and the Council of State were the organs with authority to rule in cases in which governmental services were involved. Tribunals would work by regions of the territory while the Council would work as an appellate court for the entire territory.<sup>245</sup> After several years of development, in 2006 administrative judges were created and started performing as first instance judges, changing the role of the Tribunals into appellate courts.<sup>246</sup> Thus, it was necessary to develop new regulations for judges, Tribunals, and the Council of State. Fourth, judicial congestion had been growing with serious negative effects for the legal system. Consequently, the new administrative code could contribute to improve this situation.<sup>247</sup>

These four factors supported the initiative of crafting a new administrative code with the final purpose of modernizing the Colombian administrative law.<sup>248</sup> The document that explains the draft of the code gives signs of the negative perception of

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that the Constitution of 1991 and the rulings of the Constitutional Court have expanded the obligations of the government. An example of these obligations is the concept of "essential minimum" developed by the Constitutional Court and that demands from the government to guarantee to the people access to all the goods and services that would need to have a dignified living. According to the Senate these demands imply a new role of the government that should be reflected in modern legal regulations for public administration. NationalPress, "Congressional Gazette 1210," (Bogotá2009), 2.

<sup>245</sup> Presidencia de la República de Colombia, "Decreto Ley 01." Article 82.

<sup>246</sup> Consejo de Estado, <http://www.consejodeestado.gov.co/>.

<sup>247</sup> "Exposición De Motivos Ley 1437 ", 57.

<sup>248</sup> During the process of legislative approval of the code sometimes modernization seemed to be a matter of survival of administrative law. The document that presented the code to the Senate for its first debate states: "Globalization of the economy leads to globalization of the legal system... Those countries that do not face this direction take the risk that legal actors chose to go to international arbitration, contracts, international courts or chamber for alternative dispute resolution, and consequently they will end up throwing away the internal administrative law of those who are resisting to change" NationalPress, "Congressional Gazette 1210." In this case, alternative dispute resolution and private mechanisms to solve conflicts are perceived as threats for traditional administrative law. The modernization of the legal system was perceived as the proper answer to this threat.

public administration held by judges and members of the government.<sup>249</sup> For instance, when referring to the Constitution of 1991 and how it changed the standards for public administration, the document argues that public administrators with their performance violate and ignore some constitutional rights of the people. Specifically the document refers to the omission of the administration when it does not replying citizens' requests or when it does it but not in a timely manner. According to this draft the Colombian administration has set a burden on people's shoulders by leaving them no other alternative than filing lawsuits so judges would grant what the administration neglected.<sup>250</sup> This draft crafted by judges and the government suggests that litigation is a consequence of governmental mistakes. In other words, the judges who prepared the draft of the new administrative code worked under the assumption that they could use the new institutional frame (causes of action, fundamental rights, among others) to do what the administration wrongfully has failed to do.

In order to draft the new administrative code the executive created a commission with justices from two high courts, two governmental ministers, and two additional representatives of the government. This commission received advice from the French Administrative Council with the purpose of learning about current legal frames in Europe. According to the draft of the new administrative code, the Colombian legal system was framed by following the French system, and consequently learning

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<sup>250</sup> "Exposición De Motivos Ley 1437 ", 55.

from its recent developments seemed to be necessary in the process of modernizing the Administrative jurisdiction.<sup>251</sup>

In order to modernize rules and structures administrative judges gathered in meetings and forums since 2007. Judges and members from Tribunals from all around the country participated in these events and assessed the performance of the administrative jurisdiction. They also analyzed new sources for funding of the jurisdiction and mechanisms to improve judicial congestion. When these debates developed further the judges called the attention of the executive in order to include the reform of the administrative jurisdiction in the political agenda. The executive agreed on the importance of modernizing the administrative jurisdiction through a legislative reform. In other words, the executive supported the idea of a “structural legislative reform” leading to the approval of a new administrative code.<sup>252</sup>

Significantly, this document also aims to strengthen the role of the administrative courts in general and the Council of State, the apex administrative court, in particular. After the constitution of 1991 was framed the Constitutional Court was perceived as progressive and liberal while the rest of the courts, including the Council of State, were perceived as conservative. This document argues that the Constitution of 1991 also changed the goals and character of the administrative jurisdiction and this jurisdiction is capable of going beyond legality to grant constitutional rights.

Traditionally the administrative jurisdiction focused on analyzing the legality of administrative regulations and behaviors and this was perceived as conservative since

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<sup>251</sup> Ibid.

<sup>252</sup> Ibid.

administrative judges supposedly focused on protecting the rule of law instead of individual rights. In order to change this perception, judges who crafted the draft of the Administrative code argued that after the Constitution of 1991 administrative judges started focusing on protecting constitutional rights for the people. The document argues that the new constitutional causes of action, being highly informal and flexible, motivated a change in judges' rulings and allowed them to focus on individual rights rather than mere legality.<sup>253</sup> Thus, the new administrative code was crafted with the intention of improving people's perception of administrative judges.

### **Legislative approval of the Administrative code**

In this section I will analyze the arguments that the Colombian Congress took into consideration when passing the Administrative code. I will analyze the official publications about the drafts in progress of the Administrative Code after each session of debate.

The first draft of the Administrative code provided a longer definition of administrative morality than the one in the final version. According to this draft, the principle of morality implies that administrative behaviors should follow rules of public ethics and morals and that consequently public servants should behave with rectitude and honesty. Also, this definition of Administrative morality demanded from public authorities the adoption of codes of ethics and good government.<sup>254</sup>

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<sup>253</sup> Ibid., 55.

<sup>254</sup> NationalPress, "Congressional Gazette 1173," in *Project 198 of 2009* (Bogotá2009).

By including the term “public ethics” this document added an additional element to the interpretation of Administrative morality. This element placed administrative behavior in the context not of a specific type of morals but in the context of ethical behavior<sup>255</sup>. In my interview with the director for public sector in the NGO Transparency Colombia she argued that the term public ethics could bring a more accurate meaning because it avoids the reference to religious morals. Also, the term public ethics is used in the international context in the anti-corruption campaign.<sup>256</sup> In spite of this, the final version of the code eliminated the reference to public ethics.

When referring to popular actions the draft already stated that when the violation of collective rights had origins on the behavior of a public agency it would be possible to file a popular action to protect this right, even if the violation was related to an administrative regulation or a public contract. This norm also banned the judge from overruling the administrative regulation or contract that could be involved in the violation of the collective right<sup>257</sup>. This version of the document did not emphasize the limit for the judge in popular actions when analyzing electoral administrative regulations.<sup>258</sup>

During the first debate of the code in the Senate it was proposed to expand the definition of Administrative morality. The proposed definition stated: “Due to the principle of administrative morality all public employees and private contractors who perform public functions are obliged to perform always with rectitude and honesty, and

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<sup>255</sup> Polanía, "Moralidad Administrativa."

<sup>256</sup> "Interview Marcela Restrepo."

<sup>257</sup> NationalPress, "Congressional Gazette 1173," Art 141.

<sup>258</sup> Ibid., 136.

by following parameters of good administration. Thus, the administrative behavior should conform not only to strict legality but also to ethical standards and public morals, particularly in managing and taking care of public funds; avoiding the expedition and implementation of illegal administrative acts. In fulfillment of this principle the authorities would adopt codes of ethics and good government.”<sup>259</sup>

This norm included new elements such as mentioning private contractors as implementers of administrative morality. It also referred to “good administration” and “public funds” like additional criteria in the application of administrative morality. Finally, this draft made reference to going beyond strict legality in the public service in order to apply administrative morality. In spite of this proposition, the Senate passed in first debate a simpler version of the definition of administrative morality. This version took out the concepts of “good administration”, “strict legality”, public funds, and the avoidance of illegal acts.<sup>260</sup>

The House of Representatives debated the document approved by the Senate. When the House analyzed the draft of the code it took into consideration comments sent by the Council of State, some scholars, and some people in relation to the document. These comments reflect the interest of different stakeholders not only when crafting the draft of the code but also during the legislative approval.<sup>261</sup>

During the first debate the House passed a simpler definition of administrative morality by stating: “Due to the principle of administrative morality all the people and

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<sup>259</sup> "Congressional Gazette 264," (Bogotá2010).

<sup>260</sup> Ibid., 73.

<sup>261</sup> "Congressional Gazette 683," (Bogotá2010). "Congressional Gazette 951," (Bogotá2010).

the public employees are obliged to perform with rectitude, loyalty, and honesty in administrative behavior."<sup>262</sup> This definition is similar to the one included in the definitive version of the code and it focuses on principles that resemble administrative morality such as rectitude, loyalty, and honesty. This draft not only focuses on public officials and private contractors but it opens the door for ordinary citizens to file lawsuits to enforce administrative morality.<sup>263</sup>

During the first debate the House of Representatives included a new paragraph in the article about popular actions. According to this norm, before filing a lawsuit the plaintiff should request the authority or the private contractor to adopt actions in order to protect the collective right under threat. If the authority or private contractor does not respond to the request within 15 days then the plaintiff could file the lawsuit.<sup>264</sup> This new requirement gives the administration the opportunity of improving its behavior or correcting a mistake before the judicial process starts.

This requirement could be a valuable opportunity for the administration especially if public agents perceive popular actions as an opportunity to improve public services rather than a competition against the people. In my interview with Orrego, former head legal counsel of the city of Bogota, he referred to his experience as the legal director of the city of Bogotá in relation to popular actions. He alluded to the hearing (audiencia de pacto de cumplimiento) that takes place at the beginning of a popular action in which the parties try to reach an agreement in relation to the

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<sup>262</sup> "Congressional Gazette 683." "Congressional Gazette 951."

<sup>263</sup> "Congressional Gazette 683." "Congressional Gazette 951."

<sup>264</sup> "Congressional Gazette 951." This norm states that exceptionally the plaintiff is entitled to file a lawsuit without requesting an action from the authority when there is a threat of an irremediable harm to a collective right.

protection of collective rights. He argued: "I say that when you are sued in a popular action it is an opportunity of learning about how do people and society see you and they tell you, hey look, there are not street signs here so cars are running over people, or the city is not picking up trash here, or there is an electricity wire loose and it's going to electrocute somebody. It is an opportunity to improve."<sup>265</sup> If public agents perceive popular actions as an opportunity to improve their processes and grant a better service to the people, then the request of a plaintiff before filing a lawsuit is an ideal scenario to save resources (costs and time related to litigation) that could be invested in protecting collective rights.

Orrego argued that the administration is not always aware of where the problems are and that popular actions could be an opportunity for collaboration between plaintiffs and the administration. "... This is not a matter of counterparts but this is about protecting rights. The citizen points out: you with your action or inaction are threatening or harming a right. If as a rule of behavior I am supposed to protect rights and among them collective rights, then when the citizen tells me there is a violation I am supposed to go and make it right. The thing is that one does not know all the risks that exist against collective rights..."<sup>266</sup> Thus in the opinion of Orrego popular actions do not depict the traditional example of litigation in which two parties confront each other and one wins and the other loses. This is not about the government against the people but about the government and the people collaborating to protect collective rights.

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<sup>265</sup> "Interview Camilo Orrego."

<sup>266</sup> Ibid.



Orrego presents one positive perspective of popular actions and their possible impact on public administration, but other stakeholders perceive them differently. In my interview with Juan Carlos Garcia he described his experience as a popular actor (litigator) as frustrating. He argued:

“... we decided to be popular actors because we really thought that these actions had high impact, that was the only thing we wanted to do. Yes, we were doing it, and getting monetary compensation motivated us, but we were doing it in pursue of nice things; but the answer of the tribunals was completely inequitable, in spite of the fact that we won the cases. Sadly, what I understood out of the rulings was that ... the people were winning these cases because the administration was not complying with its functions. The governmental inefficiency generated convictions but rather than focusing on what the administration should improve the solution was to keep doing the same things and these things are violations of the rights of the entire community due to the inefficiency of public administration. I think that this reasoning is completely stupid and hum if I were the administration I would invest on prevention even if it were costly rather than keep paying little by little... So that was very disappointing on the judiciary.”<sup>267</sup>

Garcia’s disappointment is noticeable in phrases when he contrasts what he wanted to achieve when decided to be a popular actor and the high purposes he wanted to serve with the discouraging answer of the judges in popular actions. He refers to “high impact”, “doing nice things”, and he even acknowledges his monetary motivation by almost apologizing for this economic interest. Garcia’s disappointment focuses on two aspects of popular actions. One the one hand, he focuses on the judiciary and the simplistic rulings they made in popular actions. On the other hand, he focuses on the inefficiency of the Colombian public administration.

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<sup>267</sup> "Interview Juan Carlos Garcia."

In relation to the judiciary, during the interview he referred to the high cost related to filing a popular action and the costs involved in pursuing this type of action. These costs are never acknowledged by the judge and to make things worse, according this plaintiff, the ruling do not solve the real problem that is involved in the lawsuit. These seem to be symbolic rulings that won't improve governmental performance. When he referred to the governmental performance he also revealed disappointment. He argued that there could be a very good opportunity for the Colombian public administration in popular actions to identify failures in processes in order to make things better. In his opinion, instead of taking advantage of this opportunity the government keeps paying monetary compensations in a case-by-case basis because there is no improvement implemented as a consequence popular actions.

Although Garcia agrees with the Orrego in relation to the opportunity that popular actions provide to governmental agencies, Garcia is more skeptical of the use of this opportunity. In his experience, governmental agencies are not learning from what popular actors point out as faulty behavior but they keep doing the same things, and consequently governmental agencies keep being sued and losing in cases for popular actions. If this is the case, if administrative agencies are not taking advantage of this opportunity to improve, then the requirement of filing a complaint directly against the governmental agency before filing a popular action might not make a difference.

The final version of the code was approved by a commission for conciliation with members of the Senate and the House.<sup>268</sup> The code kept the shorter version of the

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<sup>268</sup> "Congressional Gazette 1075," (Bogotá2010). "Congressional Gazette 1072," (Bogotá2010).

definition of administrative morality and stated that the judge in popular actions could not overrule administrative regulations or public contracts.<sup>269</sup> Also, the code kept the requirement of before filing a popular action, plaintiffs should request directly to the administrative agency to stop the violation of the collective right or to develop actions to protect it.

### **Structure of the administrative code**

On its first articles the code states the purpose, scope, and principles of public administration. Specifically, article 3 states that all authorities should interpret and apply the norms of the code and the administrative procedures in light of constitutional principles, the principles of the administrative code, and the other principles in specific regulations. Specifically the code refers to the principles of due process, equality, impartiality, good faith, morality, participation, responsibility, transparency, publicity, coordination, efficacy, economy, and celerity<sup>270</sup>.

The Administrative code is the first legislative norm that defines administrative morality. The code states: "5. Through the principle of morality, all individuals and public servants are obliged to perform with rectitude, loyalty, and honesty in administrative behavior."<sup>271</sup> This definition refers to administrative morality as a principle. It uses the same terms as article 209 of the constitution. This suggests an obligation for public agents to behave by following ethical standards of rectitude,

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<sup>269</sup> The final version of the code was published in: "Official Journal 47956," (Bogotá2011). "Congressional Gazette 12," (Bogotá2011).

<sup>270</sup> Colombia, "Código De Procedimiento Administrativo Y De Lo Contencioso."

<sup>271</sup>Ibid. Article 3, num 5.

loyalty, and honesty. This principle implies an obligation for public agents to behave ethically, and it also grants individuals a right to demand from public agents the application of these ethical standards and enforce this right in court.

Although this definition provides some elements clarifying the range of application for administrative morality, these elements are still vague. The code defines administrative morality in terms of other values such as rectitude, loyalty, and honesty, which are broad and non-concrete. As a consequence, one might argue that the essence of this new legal principle is its vagueness. Some might argue that this is a virtue since this principle aims to address all manner of administrative actions and procedures, and to do so vagueness or generality is desirable. While this is true, in the case of administrative morality and collective rights the constitution created entitlements for the people to file a lawsuit against governmental agencies and these lawsuits imply specific obligations for administrative agencies. How judges in particular cases are to give specific and concrete meaning to this vague and general principle is the essence of the problem. They will necessarily have wide discretion to supply this meaning.

In one of my interviews to Nicolás Polanía, one of the few scholars who has done extensive research on administrative morality, referred to the definition provided by the code arguing that it was a mistake.<sup>272</sup> He suggested, first, that any attempt to define administrative morality is an impossible task. Essentially it is possible to identify characteristics of administrative morality but it is impossible to define it since by defining it one may set boundaries to the concept. Concepts like good faith and

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<sup>272</sup> "Interview Nicolás Polanía."

administrative morality are essentially flexible and it is better to interpret them rather than defining them. “By interpreting rather than defining you could get better results because words are like ties and the excessive definition of a concept makes institutions more vulnerable.”<sup>273</sup> In Polania’s opinion flexibility in administrative morality could contribute to institutional resilience probably because flexible concepts facilitate adaptability to new circumstances.

Defining and setting boundaries to abstract concepts has some disadvantages, as Polania argues. When a legal system privileges reliability and predictability the potential development of some legal concepts is reduced because individuals interpret those institutions in a restrictive way. Administrative morality, Polania argues, is a concept aimed to control public authorities’ behavior and any type of definition would reduce its potential. “You end up opening the door to some type of illusion because if a certain behavior does not fit perfectly well in the definition there would not be any immoral behavior.”<sup>274</sup> In the specific case of the definition provided by the new Administrative code Polania argues that the legislator used “ethereal” notions that were equally abstract and vague. Thus, this definition did not contribute to clarifying the understanding of administrative morality.

In spite the opinion of this scholar, it is undeniable that in the Colombian legal culture reliability and predictability are very important values and so the vagueness in the concept of administrative morality has created tensions on its application. Before the Administrative code passed public agents were compelled to look into court cases to

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<sup>273</sup> Ibid.

<sup>274</sup> Ibid.

try to find a definition of administrative morality. Court cases are scattered and not all public agents have the resources to follow the latest decisions of the Council of State. Therefore the fact that the Administrative code provided a definition of this notion favors clarity in the legal system. In spite of this advantage, the definition of article 3 presents challenges to the interpretation of administrative morality. As Polania argued, the code defined administrative morality in terms of other values that are similarly vague and abstract. The code defines administrative morality as performance by following criteria of rectitude, loyalty, and honesty. By mentioning these values the code provided more information about the expectations of administrative behavior and the way in which bureaucrats shall perform their duties but the problem of vagueness of the norm remains. What does rectitude, loyalty, and honesty mean and how do they relate to legality?

The code did not include more information about how to determine the content of these values. The Congress might have kept this vagueness in order to grant flexibility in the implementation of administrative morality.

Polania further suggested that the only way to strike a balance between flexibility and predictability is through trust in the administrative judges. We should trust administrative judges as professional decision-makers capable of developing guidelines for the implementation of administrative morality. “The worst case scenario was trying to define administrative morality [legislatively] because a definition limits the concept and it reduces its potential. When in doubt, we should trust the [judicial]

institution rather than reducing it.”<sup>275</sup> According to Polania, the article 3 of the code reduced administrative morality.

In addition to the definition of administrative morality, the code also sets other parameters in the use of popular actions and collective rights. Specifically the code addresses an important concern that had arisen in the implementation process of the statute of popular actions and collective rights. Given the informality and flexibility of popular actions, some people had filed lawsuits attacking the legality of administrative regulations that had violated collective rights. In these cases the Council of State had different opinions in relation to whether the judge, when deciding a popular action, had the authority to overrule administrative regulations. Some judges in the Council argued that the judge was not entitled to declare the illegality of an administrative regulation but that should restrain his ruling to correcting the violation of the collective right under discussion. Other judges in the Council argued that judges do have the authority to overrule an administrative regulation that had violated a collective right.<sup>276</sup>

The Administrative code addressed this key issue and declared that judges in popular actions do not have authority to overrule administrative regulations. Thus, the code states: “When the threat on collective rights and interests comes from a governmental agency’s behavior it is possible to file a suit even if the violation is caused by an administrative ruling or a public contract, but in either of these cases the judge

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<sup>275</sup> Ibid.

<sup>276</sup> "Dos Secciones Del Consejo De Estado Unificarán Su Jurisprudencia Sobre Acciones Populares," *Ambito Jurídico*, [http://www.ambitojuridico.com/BancoConocimiento/N/noti-110609-02\\_\(dos\\_secciones\\_del\\_consejo\\_de\\_estado\\_unificaran\\_su\\_jurisprudencia\\_sobre\\_acciones\\_pop\)/noti-110609-02\\_\(dos\\_secciones\\_del\\_consejo\\_de\\_estado\\_unificaran\\_su\\_jurisprudencia\\_sobre\\_acciones\\_pop\).asp](http://www.ambitojuridico.com/BancoConocimiento/N/noti-110609-02_(dos_secciones_del_consejo_de_estado_unificaran_su_jurisprudencia_sobre_acciones_pop)/noti-110609-02_(dos_secciones_del_consejo_de_estado_unificaran_su_jurisprudencia_sobre_acciones_pop).asp). *Auto Expediente 73001233100020070012701*, (2011).

could not overrule the ruling or the contract; the judge is entitled to adopt the necessary mechanisms to stop the threat or the harm for a collective right.”<sup>277</sup> The judge in popular actions should protect the collective right under threat but to do so he is not entitled to overrule the administrative regulation or contract that might be related to the violation.

Article 139 also addressed a growing controversy over lawsuits that used the right to administrative morality to attack the outcome of elections. In the years after 1991 it had become common for individuals to use popular actions to attack the legality of popular elections, alleging violations against administrative morality. In some of these cases judges used their power to analyze the legality of the election or the legality of an administrative regulation. Popular actions were perceived as a simple mechanism that empowered common individuals to point out cases of corruption. At the same time, these cases were perceived as an easy way to avoid the formality of ordinary administrative actions that could be used to attack the legality of administrative regulations related to elections. For instance, since any individual is entitled to file a popular action without legal representation these lawsuits lacked the requirements of an ordinary lawsuit. Plaintiffs in popular actions did not need to support their pledge in relation to the lack of legality of an electoral act, contributing to congestion in the jurisdiction.

Article 139 addressed this controversy by prohibiting judges from relying on administrative morality to rule on the outcomes of elections. It stated: “Electoral

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<sup>277</sup> "Código De Procedimiento Administrativo Y De Lo Contencioso." Art. 144.



decisions cannot be attacked through the judicial mechanisms of protection for collective rights included in the law 472 of 1998.”<sup>278</sup> This article limits the authority of judges in popular actions because in a case where the violation of a collective right is related to an electoral decision the judge cannot analyze the legality of such regulation; he should restrain his ruling to other mechanisms to protect collective rights. Motivated by this critique, the code reduced the power of the judge in popular actions by not allowing him to overrule administrative regulations.

These norms of the Administrative code have been controversial and the Constitutional Court analyzed them in judicial review as a consequence of a lawsuit filed by a citizen. The citizen argued that the article 144 of the code violated the Constitution because this article changed the purpose of popular actions. According to the plaintiff, when the code restricted the authority of the judge to overrule administrative regulations and public contracts that could violate collective rights it created a norm that discriminates against public agencies. Since article 144 only restricted the authority of judges when analyzing public contracts it did not refer to contracts subscribed by private parties. According to the plaintiff, the Administrative code changed the purpose of popular rights as relevant mechanism to protect collective rights.<sup>279</sup> In this court case several public and private organizations intervened, and the majority of them argued that the article 144 of the code was in harmony with the Constitution and consequently

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<sup>278</sup> Ibid. Art. 139. This law is the statute for popular actions.

<sup>279</sup> C-644,(2011).

it should not be overruled. The Court summarized the main characteristics of popular actions and concludes that the article 144 does not violate Constitutional mandates.<sup>280</sup>

Finally, the Court claims that by reducing the authority of the judge to rule on administrative regulations and contracts, the code did not affect the possible impact of popular actions. According to the Court the judge retains the authority to demand behaviors from the parties in order to stop the threat or harm to collective rights. Thus, overruling administrative regulations or public contracts is not the only thing that the judge could do to ensure the protection of collective rights. For all these reasons, the Court rules in favor of the legality of article 144.<sup>281</sup>

This ruling of the Constitutional court in relation to the authority of the judge in popular actions has been controversial. From the court case and from the interviews I conducted in Colombia it was possible to identify two aspects of the ruling. On the one hand, one could ask whether article 144 is constitutional or not. This is an analysis of the content of the norm in relation to constitutional principles and values; the extent to which article 144 develops and agrees with constitutional values. Clearly, granting administrative judges a new power akin to judicial review (the power to strike down administrative regulations and contracts) would be a departure from traditional understandings of the judicial role in civil law systems. In this way the Court's decision reaffirmed the traditional understanding of the judicial role. On the other hand, one

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<sup>280</sup> In cases of judicial review public and private organizations are allowed to intervene with the purpose of presenting their opinion with regards the norm that is being analyzed. Six public agencies (oversight agencies, ministries, and the Council of state), five academic institutions (public and private), and citizens organized in seven clusters intervened in this case. Out of these nineteen interventions thirteen argue that the article 144 is in harmony with the constitution.

<sup>281</sup> C-644.

could ask whether the norm is conducive to effective enforcement of collective rights and to giving the greatest effect to popular actions. Clearly the decision to remove judicial authority to strike down administrative regulations works to limit the effective enforcement of collective rights.

In my interview with Camilo Orrego who is the former head legal counsel for the city of Bogota for several years and has worked as a public employee for eleven years, he argued that article 144 is unconstitutional because it reduces the impact of the action. He argued: "... around 40% of popular actions start because of an omission of the administration, say, the government did not install street lights, the pavement is in bad shape, etc, etc, and the rest of them start with actions of the administration. These actions take the form of administrative regulations and contracts and currently these are not part of the range of popular actions... I think that the code sacrificed collective rights and that makes it unconstitutional."<sup>282</sup> Orrego argues that the code sacrificed collective rights because it pushed plaintiffs to choose ordinary administrative actions over popular actions. Ordinary actions are not as salient as popular actions, since popular actions were created by the constitution and judges privilege cases of constitutional actions. While popular actions are decided in a year an ordinary action takes 15 years in average to until its final ruling. Orrego argues that the article 144 of the code left collective rights in a worse situation of protection than they were before in those cases where administrative regulations and public contracts are at stake. Consequently, this article should be unconstitutional.

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<sup>282</sup> "Interview Camilo Orrego."

Others differ with Orrego's assertion. For instance Luis Felipe Botero, scholar and practitioner argues that article 144 is constitutional because the Congress is entitled to regulate judicial decisions and procedures the way they want. "Simply put, the article 88 of the Constitution [article on collective rights] did not refer to administrative regulations or public contracts and so this topic was not regulated by the constitution. Thus, it was under the authority of the Congress to set and define the content and range of these actions [popular actions]."<sup>283</sup> Botero answers the question of whether this norm is constitutional or not from a different perspective. This scholar compares the content of article 144 with what was regulated by the Constitution in relation to popular actions. Since the Constitution kept silent about the range of popular actions then the Congress was entitled to set its boundaries. Botero continues the analysis by stating that article 144 did not ban judges from analyzing cases where administrative regulations are involved. Even in those cases, judges should find different mechanisms to protect collective rights different from overruling administrative regulations or public contracts. It is possible for judges in popular actions to discuss the legality of these regulations but he cannot overrule them.

In relation to whether article 144 is constitutional or not these two attorneys present a different perspective. While Orrego argues that article 144 is unconstitutional because it reduced the range of the action Botero argues that it is constitutional since the Congress was entitled to reduce the faculties of the judge. The difference between these opinions lies in the concept of what the constitution stated in relation to popular

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<sup>283</sup> "Interview Luis Felipe Botero."

actions. Botero would argue that the article 88 of the Constitution is clear and did not authorize judges to strike down administrative regulations and contracts, and therefore the interpreter should not assume what is not written in the article. Since article 88 did not refer to administrative regulations or public contracts then the framers did not intend to regulate this aspect and left the Congress with such authority. Orrego would argue that article 88 created popular actions in order to allow the people to protect collective rights through a judicial action that was effective, brief, and with high impact to reduce inequalities between the people and businesses or the government. If that was the purpose of the constitution then article 144 is unconstitutional because it reduced the range and impact of popular actions to protect collective rights. These are two interpretations of the Constitution of 1991 and they lead to different conclusions with regard judicial review of article 144 of the Administrative code.

While these scholars differ in relation to whether article 144 is constitutional or not they both agree on the negative impact that this norm will have on popular actions. Botero, referring to administrative morality, argued: "I believe that popular actions are still a tool because administrative morality is still a collective right and popular actions are still one of several mechanisms that people could choose to protect society against corruption... Perhaps these norms that restrict the range of popular actions would change judges' minds into thinking that popular actions are not that important. Judges in popular actions could think 'you are bringing me an administrative act hmm no, here we are not allowed to overrule that, folks, so sorry' and they decide that case lightly. It

may end up downgrading the impact of the action.”<sup>284</sup> Botero and Orrego concur on the impact of this change on judges’ minds with regards the importance of popular actions. What was perceived as strength of the Constitution of 1991 (the creation of effective judicial rights to protect constitutional rights) seemed to be under a risk due to the new Administrative code. While these scholars agreed on this issue, they differ on whether this is a matter of constitutional analysis or of convenience of the law. Botero argues that this is a matter of convenience and Orrego contends that it is a matter of unconstitutionality of the law.<sup>285</sup>

## **Conclusion**

The administrative code is a key piece of legislation that provides guidelines for administrative agencies with regards their performance and procedures. The code aimed to modernize administrative procedures and administrative litigation by developing the principles that the Constitution of 1991 set for governmental agencies. Justices and members of the government who promoted the reform of the administrative code in 2010 shared the assumption that the Colombian public administration had systematically ignored constitutional rights of the citizens and constitutional principles. Specifically the reformers argued that it was a common use that the administration did not provide answer to citizens’ requests or at least they did not do it in a timely manner. Given the lack of diligence of the administration the resort

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<sup>284</sup> Ibid.

<sup>285</sup> These two positions reflect different approaches to constitutional interpretation. Botero follows literal interpretation of the law while Orrego seems to follow a more teleological approach.

to courts seemed to be the best option to protect constitutional rights. This is the assumption that lies behind the new administrative code.

In addition to pursuing the modernization of administrative procedures according to the principles of the constitution, the code also brought key changes to popular actions. Article 3 of the code was the first piece of legislation to define administrative morality but in fact this definition does not provide enough elements for the institutionalization of administrative morality. Rectitude, loyalty, and honesty in administrative behavior are the categories that Article 3 used to characterize compliance with administrative morality. In spite of the good intentions of the Congress of providing a normative frame for administrative morality this article did not bring much clarity to the implementation of administrative morality. By using vague principles this article failed to provide clear implications to what administrative morality implies for administrators.

One positive aspect of Article 3 is that it clarified that not only governmental agents are compelled to comply with administrative morality. According to this norm "all individuals and public servants are obliged to perform with rectitude, loyalty, and honesty in administrative behavior."<sup>286</sup> Thus, Article 3 states that private contractors who are performing administrative functions are also obliged to comply with administrative morality and that administrators do not have the exclusive responsibility to implement this notion.

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<sup>286</sup> Colombia, "Código De Procedimiento Administrativo Y De Lo Contencioso."

While the Administrative code aimed to strengthen judicial checks over administration it also set a key limitation to the potential of popular actions. The Articles 139 and 144 of the code restricted the authority of judges in popular actions to overrule administrative regulations, contracts, or to invalidate elections.<sup>287</sup> These articles were analyzed by the Constitutional Court. This Court concluded that the administrative code did not change the nature of popular actions since judges still kept their authority to protect collective rights.<sup>288</sup> The Court did not define what type of authority is the one that the judge still holds but it emphasized on the fact that the administrative code only restricted judges' authority to overrule administrative regulations, contracts, or electoral acts but it left intact the rest of judges' powers to protect collective rights.<sup>289</sup>

Based on my interviews the forecast of the impact of this norm on popular actions is negative. Orrego and Botero argued that this restriction would discourage judges to give popular actions the importance that the framers intended. Also, it could prevent judges from solving what is the cause of the violation of collective rights. When a plaintiff argues that a certain administrative regulation, contract, or electoral act has violated administrative morality this violation will remain until the illegality of such an act is reversed.

Despite the good intentions of the framers of the constitution in 1991 for making popular actions an effective check to governmental performance the administrative code of 2011 posed a considerable restriction to their possible impact.

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<sup>287</sup> Ibid. Article 139 and 144.

<sup>288</sup> C-644.

<sup>289</sup> Ibid.



## Chapter 5: Court Case Analysis

Courts have had a key role in the development of administrative morality. In the absence of a legal definition, the Council of State and the Constitutional Court have developed criteria for the implementation of administrative morality. Citizens, businesses, civil society organizations, and governmental agencies have engaged in administrative morality litigation and they have brought different elements to the analysis of the Council and the Court.

This chapter explores what types of litigants have brought these cases, what are the key issues in these cases, and how the courts have resolved these cases, with particular attention to changes over time. Do these cases mainly involve lower-level administrators or upper-level administrators? Do they mainly involve individual errors or abuses, or broader policy questions? Do these cases mainly involve claims against local or regional governments, or do they also involve claims against the central government? What policy areas are most and least implicated in these cases? Do these cases involve all kinds of policy areas or just a few? If the latter, which policy areas are most implicated? Who brings these cases? Are they mainly the product of individuals or of organized groups? Who wins these cases? Do those bringing the complaint against administrative agencies typically win, or do administrative agencies typically win? When a plaintiff wins, what does “winning” mean? Do courts award financial damages, or do they order changes in administrative practice or policy? Finally, over time, has the Council of State given a broad or narrow interpretation of “administrative morality”?

Colombian scholarship has focused on the normative level of administrative morality, aiming to identify the elements of the action, its features as a collective right, and the characteristics of some of the actors who have been involved in its development. For instance, a preliminary analysis performed in 2003 pointed out that approximately 72% of the actions were initiated by individuals instead of organizations, and that 51% of those individuals were not lawyers. This study also suggested that among the lawsuits pursued through popular actions, administrative morality was the least frequent cause of action.<sup>290</sup>

While these studies have contributed to our understanding, in order to understand the implications and possible impact of administrative morality more fully it will be helpful to develop a comprehensive and empirically-based description of these cases.

My analysis focuses especially on whether administrative morality cases have challenged important governmental policies or merely the mistakes of low-level individual officials. If the former, one might think of administrative morality litigation as a major factor in shaping government policy. If the latter, it is more akin to oversight by the leaders of government policy over front-line administration. This practical distinction has been explored in some other studies of judicial policy making.

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<sup>290</sup> Beatriz Londoño Toro, Laura García Matamoros, and Carlos Parra Dussán, "Eficacia De Las Acciones Constitucionales En Defensa De Los Derechos Colectivos," *Colección Textos de Jurisprudencia, Universidad del Rosario, Bogota* (2003).

The literature on constitutional reforms in Latin America suggests that courts are performing a key role in political systems by enforcing constitutional rights.<sup>291</sup> This Latin American stream of literature developed by Javier Couso and others suggests that through constitutional litigation and judicial review courts have received the power to intervene actively in policy-making and to impact social life. These scholars argue that court cases have shaped language by teaching people about legal discourses that they could use in order to being successful when pursuing the enforcement of constitutional rights.<sup>292</sup> These writings suggest that Latin American courts have done more than simply check or oversee low-level officials: they are checking and reforming broad governmental policy.

Other scholarship suggests that courts are likely to intervene primarily against lower-level officials, not broad policy. Some rational choice scholars have argued that judicial review generally is a form of top-down oversight over government administration rather than a check on high government policies.<sup>293</sup> In the United States the Supreme Court is more active in checking state and local policies and administration than national policies.<sup>294</sup> This seems true of other countries, too. Rajeev Dhavan analyzed the Supreme Court of India's decisions regarding government policies and observed that the vast majority involved decisions against low-level officials rather than

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<sup>291</sup> Couso, Huneeus, and Sieder, *Cultures of Legality: Judicialization and Political Activism in Latin America*.

<sup>292</sup> Ibid.

<sup>293</sup> Mathew McCubbins, Roger Noll, and Barry Weingast, "The Political Origins of the Administrative Procedure Act," *Journal of Law, Economics, and Organization* 15, no. 1 (1999).

<sup>294</sup> Herbert M Kritzer, "The Government Gorilla: Why Does Government Come out Ahead in Appellate Courts?," *In Litigation: Do the 'Haves' Still Come Out Ahead* (2003).

high government policy.<sup>295</sup> A related body of literature suggests that litigants fare better in court the more they have key financial and organizational resources, and governments tend to have more of these resources than private litigants. In a classic article Marc Galanter argued that parties with more resources (the "haves") tend to come ahead in litigation because they have superior material resources and usually they are more experienced in filing lawsuits ("repeat player status").<sup>296</sup> Superior material resources contribute to parties' capability to hire better legal representation and investigate in developing a better litigation strategy. Resourceful parties are more likely to bring expert witnesses and extensive discovery to the process, which increases their opportunities to get a favorable decision. Likewise, the "repeat player status" gives experience to parties and allow them to identify in a better way those factors that may put them in a better situation in relation to the litigation dynamic.<sup>297</sup> In popular actions on administrative morality the "haves" would be the governmental agencies that are sued because they have more resources than the plaintiffs (who are frequently individuals). Thus, party capability would suggest that governmental agencies are more likely to win in cases of administrative morality.

In this chapter I use this distinction between government policy and the mistakes of lower-level officials as a lens to analyze the decisions of the Council of State and Constitutional Court. I understand the latter category, individual mistakes, as involving cases in which the administrative behavior that is being challenged was an action by an

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<sup>295</sup> Rajeev Dhavan, *The Supreme Court of India: A Socio-Legal Critique of Its Juristic Techniques* (NM Tripathi, 1977).

<sup>296</sup> Marc Galanter, "Why the Haves Come out Ahead: Speculations on the Limits of Legal Change," *Law & Soc'y Rev.* 9(1974).

<sup>297</sup> *Ibid.*

individual official that affected an individual member of the public in a particular situation. By contrast, policy or Institutional violations are those in which the complaint is against a policy or institutional practice that affects a broader body of the public. While it is true that individual mistakes can add up to a broad impact, the difference between the two categories well captures differences between cases in my data set. This approach to individual versus institutional violations speaks to how broad is the possible impact of administrative morality and whether it has capacity to foster broad social change by addressing high impact cases that refer to the implementation of broad policies. If court cases depict administrative morality as a collective right that targets systematic violations, then courts' decisions are striving to meet the high aspirations of the framers in 1991. But if court cases mainly focus on mistakes by low-level officials, then it is doubtful whether these aspirations are being met.

### **The administrative jurisdiction in Colombia**

Although the decisions of the Constitutional Court will be summarized later in this chapter, the chapter focuses primarily on the administrative jurisdiction, which are the courts dedicated to hearing complaints about administrative actions . The administrative jurisdiction in Colombia has three levels of hierarchy. At the local level, administrative judges are the ones who make decisions in relation to administrative issues. At the regional level (departments), administrative tribunals have the jurisdiction regarding administrative affairs. At the national level is the Council of State, which is responsible for making decisions in appeals and other major cases.

Although administrative judges and tribunals in Colombia make decisions in relation to cases of administrative morality this research addresses only decisions made by the Council of State and the Constitutional Court. Since the Colombian Council of State (the Council) is the organ with highest hierarchy within the administrative jurisdiction it is important to analyze the Council's decisions because they guide other judges' rulemaking.

Specifically in relation to collective rights and administrative morality, the analysis of the Council's ruling is relevant because this Court's rulings have authority over judges' rulemaking. Given the vagueness in the concept of administrative morality it is important to analyze the Council's decisions and the way in which these decisions shape public administration in Colombia.

### **Judicial interpretation of administrative morality**

A question related to administrative morality in the Colombian legal system is the role of judicial decision-making in the development of this concept. Due to the ambiguity of the term administrative morality, and the absence of clarifying language in the text of the Constitution, much of the legal definition of this term has been left to judges, who have developed the concept through their decisions in cases. With regards political dynamics, Latin American scholarship has argued that the traditional separation of powers has been transformed as a consequence of constitutional reforms.<sup>298</sup> Courts in Latin America have received the power of making policy and enforcing it with the

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<sup>298</sup> Sieder, Schjolden, and Angell, *Judicialization of Politics in Latin America*.

purpose of protecting constitutional rights. This new role of the judiciary has increased the social impact of judicial decision-making and has transformed the dynamics among the three branches of power.<sup>299</sup>

## Data and Methods

The Council of State, the high court with jurisdiction over “administrative morality” cases, has decided some 215 cases on this issue since 1991. The Constitutional Court has decided eight cases on administrative morality, all since 2001.

In relation to the Council of State I identified 215 court cases by using the descriptors morality, administrative morality, and principle of morality in the Council’s search-engine.<sup>300</sup> Out of these 215 cases, 35 files were not available on line and 17 cases were not popular actions. Additionally, I did not include in this analysis 12 cases in which the Council did not make a ruling in relation to the main legal issue at stake.<sup>301</sup> This leaves 151 cases that are the focus of my analysis.

The majority of these cases were decided in the time frame of 2001 and 2007 (84%), 13% were decided between 2008 and 2011, and only 3% in the time frame 1997-2000. For the purpose of this analysis I will use these three time frames as stages in

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<sup>299</sup> Helmke and Rios-Figueroa, *Courts in Latin America*. Couso, "The Judicialization of Chilean Politics: The Rights Revolution That Never Was; Couso, Huneeus, and Sieder, *Cultures of Legality: Judicialization and Political Activism in Latin America*; Sieder, Schjolden, and Angell, *Judicialization of Politics in Latin America*; Cepeda, "Judicialization of Politics in Colombia."

<sup>300</sup> "Consejo De Estado. Tribunal Supremo De Lo Contencioso-Administrativo," <http://www.consejodeestado.gov.co/>.

<sup>301</sup> In relation to these 12 cases, 4 of them were eventual revisions and 8 referred to preliminary rulings (autos). These decisions did not provide conceptual elements in relation to the legal issues at stake and about administrative morality and consequently they are not in the database. The eventual revision is a mechanism stated by the new Administrative Code and that aims to unify judicial criteria in a certain topic. Ap 01647,(2011).

rulings of the Council since the data suggest them as changing points in the growth of popular actions related to administrative morality.<sup>302</sup>

In relation to the Constitutional Court I identified nine cases under the descriptors administrative morality and administrative morals.<sup>303</sup> One of these cases was a preliminary ruling (“auto”) so I did not include it in this analysis.

All the cases of the Council in my database are popular actions related to violations of administrative morality in which the Council ruled as the appellate level court. In 2006 administrative judges started deciding cases as first-level judges while the Tribunals performed functions of the appellate court; consequently since 2006 the Council has not received new cases as an appellate court so it can start performing its role on unifying judicial criteria in eventual revisions.<sup>304</sup> My analysis focuses on the Council’s rulings in popular actions so I did not include data of eventual revisions in this analysis due to two reasons. First, in my search I only found 4 cases of eventual revisions decided by the Council until 2011. These are not enough data to analyze the Council’s decision-making on its new role. Second, my research focuses on analyzing different elements of administrative morality and the way it has been implemented by different actors. In order to answer that question I will focus on the criteria that the Council’s has

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<sup>302</sup> See table of frequencies in Appendix C

<sup>303</sup> "Corte Constitucional De Colombia," <http://www.corteconstitucional.gov.co/relatoria/>.

<sup>304</sup> Art. 272 Administrative Code: “Purpose of the eventual revision in popular actions and group actions. The purpose of the eventual revision stated in the article 36A of the law 270 of 1996, Statute for the Jurisdiction... is to unify judicial criteria in processes to protect collective rights and interests and the compensation of damages caused to groups; consequently [this action] will ensure the homogeneous application of the law to similar factual and legal cases.



developed in 14 years of analysis as an appellate court. To this extent eventual revisions are out of my scope of analysis.

With regards the Constitutional Court it has ruled in relation to administrative morality in three different types of cases: one ruling of unification, five cases of judicial review, and two revisions of actions for tutelage. With the ruling of unification the court analyzes several court cases (even involving different jurisdictions) and sets criteria in relation to constitutional rights. In a similar way, the Court has jurisdiction to revise actions of tutelage<sup>305</sup> ruled by other judges when they have salience in terms of constitutional rights. Finally, the Court has jurisdiction in cases of judicial review when citizens or public agents file a claim that a certain regulation is unconstitutional.<sup>306</sup>

In my analysis I used a coding scheme involving twenty-one variables in relation to court cases on administrative morality.<sup>307</sup> The first variable is the primary legal issue at stake in the suit. Legal issues include financial malfeasance of a governmental agency, willful misconduct by an individual official, and individual (human) rights violations. In 40% of the cases the plaintiff referred to a secondary legal issue so I included a variable to identify this information.

The variables type of plaintiff and type of defendant address the characteristics of the parties involved in the lawsuit; plaintiffs and defendants were classified in 6 categories: individuals, businesses, non-profit organizations, local governments, regional

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<sup>305</sup> Art 86 Colombian Constitution: "Action for tutelage. Every person will be entitled to the action of tutelage to claim from judges, at every moment and every place, with priority and a brief procedure, for his own or a third party, the immediate protection of his constitutional rights whenever these rights have been violated or posed under threat by the action or omission of a public authority."

<sup>306</sup> Art. 241, Colombian Constitution.

<sup>307</sup> See list of codes in Appendix E.

governments, and national government. In this analysis I included information about a secondary plaintiff and a secondary defendant in order to characterize the different parties that are using popular actions.<sup>308</sup> Also I explored whether the type of parties has an effect on the outcome of the court case (decision).

The court cases under analysis focus on violations against the collective right of administrative morality and some of the cases also referred to other collective rights that have been violated under the same circumstances. Thus, I also explored other collective rights that were mentioned in the suit.

I also identified the policy area addressed in each lawsuit, and I consolidated these policy areas into 6 of broadly defined areas: governmental service to individuals, utilities, public finance, education, and environmental protection.

Also, I explored each case's decision by identifying three types of cases: cases where the plaintiff obtains a favorable ruling, cases where the defendant obtains a favorable ruling, and cases where each party achieves partial satisfaction.

Following the discussion above, I also coded whether each article depicts the central issue as primarily a matter of individual mistake or abuse or institutional failings.

## **Findings**

### ***Narratives in court cases***

#### ***Constitutional Court cases***

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<sup>308</sup> The files do not refer necessarily to a categorization between primary and secondary plaintiff and defendant but I coded these variables depending on the type of claim and the facts of the case.

Traditionally there has been a tension between the constitutional court and the council of state. What media called the “clash of trains” describes the tension between these two courts in cases where the constitution had granted them jurisdiction to make decisions involving governmental agencies. In spite of the constitutional entitlement for both, the constitutional court had claimed authority to have the last word with regards constitutional rights. According to the Constitution the Constitutional Court has the authority to protect the supremacy of the constitution and with this purpose it assigned the Court with several functions, one of them being to revise the court cases related to the action of tutelage of constitutional rights.<sup>309</sup> The court interprets this constitutional function as an authorization to analyze other courts’ rulings when related to constitutional rights. This interpretation has led to political conflicts among the courts that are noticeable in some of the rulings. In a case of 2011 the Court selected for a revision a case that the Council was analyzing at the same time. The Court argued that, in spite of the Council’s jurisdiction over the case, it was possible for the Court to study the same issue in order to avoid irreparable damages to constitutional rights.<sup>310</sup> Thus, although the Council was analyzing this legal issue the Court claimed temporary jurisdiction over the case in order to avoid irreparable damages.

Another example of this tension between the Constitutional Court and the Council is a case of 2007 when the Court overruled a section of a Council’s decision for it, according to the Court, lacked of a clear argument.<sup>311</sup> In a decision of 2003 the

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<sup>309</sup> Art. 241, ordinal 9th. Colombian constitution.

<sup>310</sup> T 230,(2011).

<sup>311</sup> T 446,(2007).

Council declared the responsibility of a business in a violation of administrative morality. The business filed an action of tutelage arguing that the Council made an illegal ruling when declaring it responsible of this violation. According to the Court, judges should support their decisions on arguments that are related to the facts and the legal foundations of the case and the Council failed to do so. Thus, the Court overruled that section of the Council's decision.

Cases at the Constitutional Court address a variety of legal issues, among them cases of judicial review. For instance in a case of 2000 two citizens filed a suit arguing that two articles of the statute of popular actions contradict the constitutional principle of good faith. According to the plaintiffs, the article 40 of the statute that refers to the responsibility of legal directors of public agencies and private contractors contradicts the constitutional principle of good faith because this norm makes them responsible to pay the public funds that were mismanaged.<sup>312</sup>

Another type of claim ruled by the Court is the revision of actions for tutelage when the Court decides that the case has salience. In a case of 2011 the Court analyzed the decision of an administrative tribunal in a popular action of administrative morality. After the Tribunal made its final ruling the defendant (Ministry of Transportation) filed an action for tutelage arguing that the Tribunal made blatant mistakes on its ruling and that these mistakes were serious violations against the rule of law.

Finally, in another case the Court unifies judicial criteria with regards the selection process of notaries in the country. This topic brought several lawsuits in

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<sup>312</sup> *C 088*,(2000).

different jurisdictions, including several actions for tutelage. Thus, the Court decided to revise the actions for tutelage ruled with regards the selection process of notaries and clarify the implementation of different constitutional rights involved in this issue.<sup>313</sup>

In six of these cases the Court refers to an institutional implementation of administrative morality, specifically when it relates a general interpretation of a certain norm. For instance, in a case of 2005 the Court analyzed the draft of the law that regulates the election of the president.<sup>314</sup> In 2004 the Colombian constitution was amended to allow presidential reelection and the Congress passed a law setting the rules for this constitutional norm to be implemented. In the case of 2005 the Court argued that the draft of law included some restrictions for the president when he has decided to run for office on a second term and that these restrictions are legitimate since they ensure equality and administrative morality. In this case, the Court referred to administrative morality and its implementation with regards presidential reelection.

In two cases the Court referred to individual violations of administrative morality. In a case of 2007 the Court revised the action of tutelage filed by a business against the Council of State alleging that the Council violated constitutional rights in a ruling for popular actions.<sup>315</sup> In this case the Court analyzed how the Council applied administrative morality in this specific case.

The Constitutional court refers to the legal development of popular actions and explains that these actions existed even before the Constitution of 1991. The ruling

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<sup>313</sup> *Su 913*,(2009).

<sup>314</sup> *C 1153*,(2005).

<sup>315</sup> *T 446*.

observed that a “long time before the constitution of 1991 was framed our legal system stated popular actions according to the articles 1005 and 2359 of the Civil code...”<sup>316</sup>

According to the Court the framers acknowledged the importance of these mechanisms and decided to include a constitutional action to protect collective rights.

The Court follows the Council’s criteria for interpreting and implementing administrative morality. “So now, in relation to popular actions for administrative morality the Constitutional Court follows the criteria set by the Council of State on this matter.”<sup>317</sup> In a ruling of unification, which sets criteria that other judges shall follow, the Court summarized the Council’s criteria: “... according to the Council of State the criteria for popular actions of administrative morality to succeed are: 1. The behavior under analysis should be a public function. 2. The behavior should be illegal. 3. The behavior should cause harm of a general interest and should favor the public agent or a third party. 4. The wrongful behavior should violate legal principles.”<sup>318</sup> The Court recognizes the requirements set by the Council and applies them when analyzing whether a particular behavior violated administrative morality. In other words, although the Court makes decisions in relation to administrative morality it applies Council’s criteria to define whether there was a violation of administrative morality or not.

The Court argued that administrative morality is a principle encourages administrators to attend to key purposes of administrative procedures rather than simply following procedures legalistically. For instance, in a case of 2001 the Court

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<sup>316</sup> Ibid. In a case of 2004 the Court also referred to the legal development of popular actions, before the constitution of 1991. *C 459*,(2004).

<sup>317</sup> *T 230*.

<sup>318</sup> *Su 913*.

analyzed whether the expiry of a certain legal action was constitutional.<sup>319</sup> In that case the Court argued that the purpose of the constitution was not only to make rights real but also to make processes efficient. The Court went on to say that the principles of equality, morality, efficacy, and economy should guide procedural rules. In a case of 2006 two citizens filed a suit against a norm of the criminal code for it violated the principle of morality because it reduced the punishment for a certain type of felonies. According to the plaintiffs the Congress, trying to achieve efficiency in the jurisdiction, violated administrative morality because it overlooked the seriousness of that type of behavior. The Court argued: "... in this case... there is no contradiction between efficiency of the judiciary and morality.... This is a case where the Congress has discretion, granted by the Constitution, to legislate by applying criteria of good reason and proportionality."<sup>320</sup> In this case the Court harmonized the application of efficacy and morality as principles that seemed to be contradictory in relation to the criminal code. In this case administrative morality was applied in relation to a procedure and it worked as a criterion for whether such procedure was constitutional or not.

In sum, cases on administrative morality in the Constitutional Court involve a mix of higher government policies and lower administrative activities and procedures. Still, in examining these cases one would be hard-pressed to conclude that they address the key issues of government fraud and abuse that seem to have been the concern of the framers in 1991.

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<sup>319</sup> *C 709*,(2001).

<sup>320</sup> *C 988*,(2006).

### ***Narratives in Council of State's cases***

The Council of State is the court that has more clearly developed guidelines for the implementation of administrative morality and these guidelines are followed by the Constitutional Court, lower level administrative courts, and administrators. In this section I will study the characteristics of administrative morality that have been developed in rulings of the Council since 1997.

The Council of State's analysis with regards administrative morality has varied with time. During the first years the Council's rulings referred to administrative morality as a principle of public administration and how it should impact governmental performance based on article 209 of the Colombian constitution.<sup>321</sup> In the latter years the Council refers to administrative morality more frequently as a right, based on article 88 of the constitution, and supports its decisions on previous rulings, the Constitution, and the law.

The difference between these two norms consists in the emphasis they give to administrative morality. The article 209 lists the principles that administrators should pursue in their performance; these are principles like equality, morality, efficiency, economy, celerity, impartiality, and publicity. The Council focused on this article in the early years of the development of the notion of administrative morality and it developed some guidelines about what morality implies for the Colombian public administration. For instance one of the topics that the Council analyzed was the

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<sup>321</sup> The article 209 of the constitution states the principles that guide the Colombian public administration. According to this article, public agencies shall perform by following principles of equality, morality, efficiency, economy, celerity, impartiality, and publicity.



relationship between morality and legality and whether they imply the same demands for public administrators.<sup>322</sup> On the other hand, article 88 focuses on litigation on collective rights and the entitlement for individuals to enforce them through popular actions. When the Council refers to this article its rulings are less abstract and they stress what plaintiffs could demand from governmental authorities.<sup>323</sup>

Plaintiffs have used these two articles as legal basis when filing suits for violations of administrative morality. There is no evidence that one of these articles has been more closely related in the suits to high government policy versus individual mistakes of the administration. The Council does not refer to this issue either and analyzes both articles without relating them to high government policy or to individual mistakes of the administration.

When characterizing administrative morality the Council has focused on three main topics: administrative morality as a notion of open texture, the criteria for applying administrative morality, and the relationship between legality and morality. In a case of 2006 the Council argued that according to the article 1 of the constitution Colombia is a pluralistic country and that consequently providing a definition of administrative morality could harm the core principle of plurality. “In other words, administrative morality that is stated in article 88 of the Constitution and in article 4 of the law 472 of 1998 as a collective right and in article 209 of the Constitution as a principle of the administration has an open texture, and is the judge’s responsibility to articulate it; the judge should not do it on a subjective way but based on the ends that

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<sup>322</sup> *Ap 170*,(2001).

<sup>323</sup> *Ap 00908*,(2011).

the administrative act pursues.”<sup>324</sup> Understanding administrative morality as an open texture concept seems to be an interpreting tool for making it compatible with the notion of pluralism. If pluralism is supposed to be a core principle of the legal system it is necessary to make administrative morality a flexible concept that adapts to each circumstance. Under this perspective the uncertainty that is related to the lack of a unique definition of administrative morality seems to be a requirement of pluralism.

The Council developed criteria for judges to keep into consideration when analyzing cases of administrative morality. First, the Council applies a concept from criminal law and refers to administrative morality as a blank norm.<sup>325</sup> According to this criterion, the article 4 of the statute of popular actions that refers to collective rights and specifically to administrative morality is a blank norm that needs of other norms to complete its meaning. Thus, the judge should take into consideration those other norms that relate to a moral public administration in a specific case. It is relevant that the norms related to administrative morality vary from case to case and the judge is called to determine which norms apply in a specific situation. In other words, this criterion suggests that judges have discretion to complete the meaning of administrative morality given that it is a blank concept.

The second criterion is that a violation of administrative morality implies a violation of legality that affects the entire society.<sup>326</sup> With this requirement the Council

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<sup>324</sup> *Ap 01546*,(2006).

<sup>325</sup> *Ap 00818*,(2006).

<sup>326</sup> Not any violation of the law implies a violation of administrative morality. “According to the room [of decision] while it is true that the rule of law is relevant for the entire society ... it does not mean that a simple violation of legality is a violation of a collective right; according to the Law 472 of 1998

argues that although all violations of administrative morality imply a violation of legality it demands additional elements. The plaintiff should prove that, besides an illegal behavior, the motives of the administrative act are opposed to what legality demands like it occurs in cases of corruption or fraud. Consequently the plaintiff should prove an illegal behavior and illegal motives in relation to the administrative act.<sup>327</sup> When exploring the relationship between morality and legality the Council observed that not every violation of legality is a violation of administrative morality. For a violation of administrative morality to take place it is necessary that the intention behind the act is different from the one that the act should have according to the law.<sup>328</sup>

In some cases the Council has interpreted legality not only in terms of the violation of a specific norm but as the violation of legal principles. In a case of 2006 the Council argued: “As a consequence the room [of decision] does not find any proof of the violation of this right [administrative morality] since there was no evidence on file of the violation of the principles of the administrative function, or evidence of corruption, waste of funds, or other behaviors that favor individual interests and harming the public interest”.<sup>329</sup> In this case the Council described violations of administrative morality as violations of legal principles. Thus, when the judge relates administrative morality not only to norms and procedures but also to legal principles the range of its applicability broadens since legal principles are abstract concepts (I.E. equality, economy, morality, and so on). In one of my interviews with an auxiliary justice at the Council, Fabian

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it is clear that a violation of a collective right implies a threat to the entire society and not only a situation where legality is at stake” *ibid.*

<sup>327</sup> *Ap 1640*,(2006).

<sup>328</sup> *Ap 01546*.

<sup>329</sup> *Ap 01345*,(2006).

Marin<sup>330</sup>, he argued that the interpretation of administrative morality has had stages. On a first stage legality was interpreted as norms and procedures that the government should follow while on a second stage legality was interpreted as including legal principles. The case of 2006 seems to fit into the second stage of interpretation of the Council.

A third requirement related to a violation of administrative morality is that although there is no legal definition of administrative morality the Council referred to the definition in one of the drafts of statute of popular actions: "Administrative morality is the right of the community so that public funds would be managed according to the law, and by following the care and diligence of a good public agent."<sup>331</sup> With this reference the Council emphasized on the relationship between administrative morality and public funds. In a case of 2001 the Council argued that theoretically it might be possible to find a violation of administrative morality isolated from its consequences but that in fact it's hard to find an event where governmental agencies violate only administrative morality; usually this type of violations also affect other rights like public funds, free economic competition, public safety, prevision of disasters, besides others.<sup>332</sup> According to the quantitative analysis (Figure 2), in 85% of the cases plaintiffs identified other collective rights under threat in the same circumstances of the suit. In other words, plaintiffs also related violations of administrative morality to violations to other collective rights like public funds and public space.

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<sup>330</sup> "Interview Fabian Marin," (2010).

<sup>331</sup> *Ap 00818*.

<sup>332</sup> *Ap 166*,(2001).

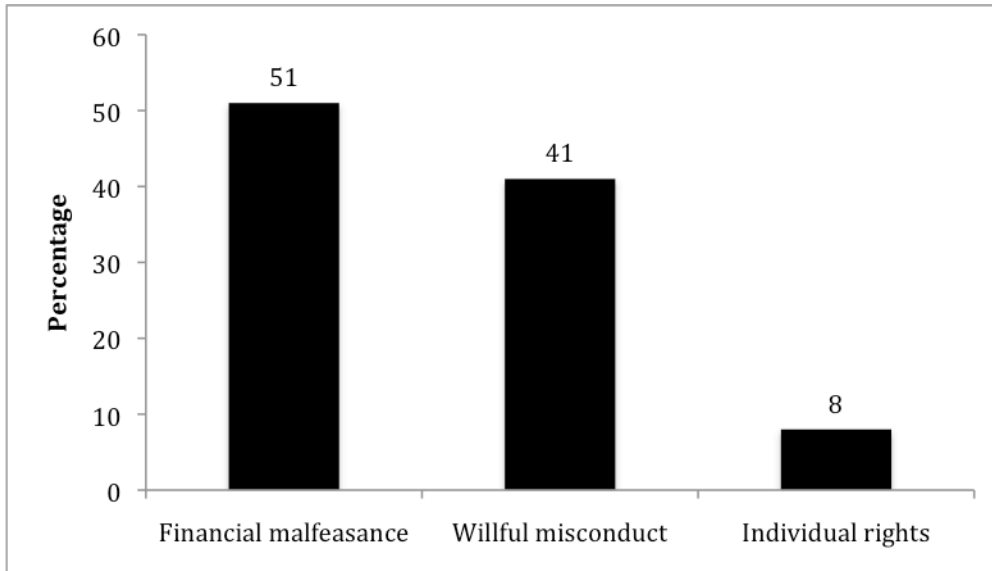
### ***Patterns in Council of State cases***

Cases at the Council of State seem to fall under three stages. In the first stage (1997-2000) just a few cases were decided while the majority of cases were decided in the second stage (2001-2007), with a high concentration of cases in 2001, 2005, and 2006. Finally, there is a third stage (2008-2011) in which the number of cases dropped considerably.<sup>333</sup> Although the constitution created popular actions in 1991 it was only in 1997 when the Council decided the first case. It is possible that the Statute of popular action that passed in the Congress in 1998 boosted the number of popular actions and it took three years for this growth to reach at the Council level. This time frame is understandable given that the Council was the appellate court in administrative lawsuits and consequently that the Tribunals were the first level courts.

The Council's cases refer to three types of claims: cases related to financial malfeasance, cases referring to a willful misconduct of a governmental agent, and cases where the violation of collective rights implied a violation of individual rights. Claims of financial malfeasance represent 51% of the court cases while 41% of the cases refer to willful misconduct. Individual rights violations were the main legal issue at stake only in 8% of the cases (see figure 1).

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<sup>333</sup> See table of frequencies, Appendix C.



**Figure 1: Type of claim in Council of State cases on administrative morality. N=151.**

Financial malfeasance refers to situations in which public funds have been mismanaged due to corruption, inefficiency, illegal behavior, lack of transparency, or improper decisions of the administration. For instance, in a case decided in 2001 the union of the Procuraduría General de la Nación (oversight agency at the National level) sued the head of the agency (the Procurador) for, according to the union members, he did not comply with a ruling of the Council of State that overruled the appointment of 72 employees of this agency. According to the Union the Procurador approved that these employees kept receiving salaries in spite of the Council's decision. In this case the

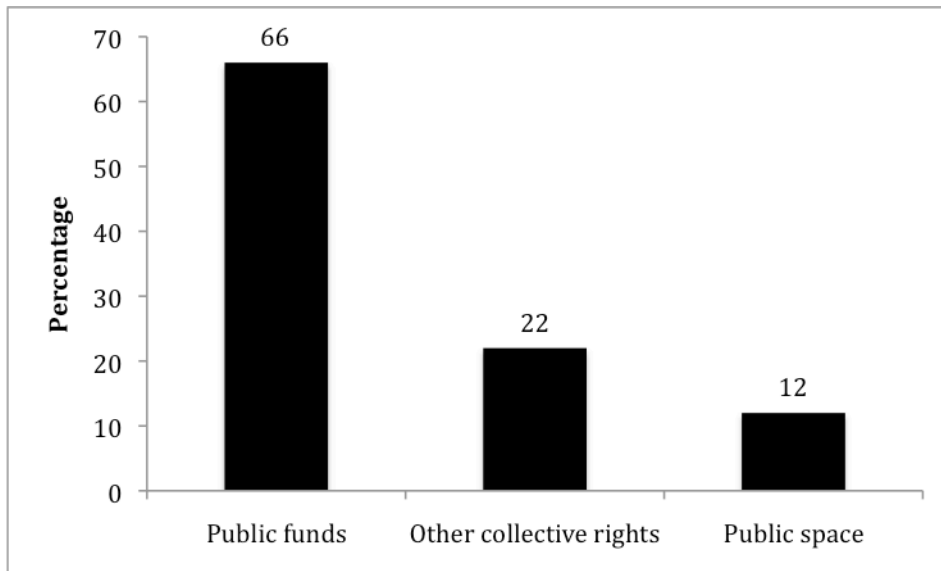
Union demanded from the Council to declare that the Procurador's behavior was illegal and that he mismanaged public funds.<sup>334</sup>

In claims related to financial malfeasance the plaintiffs attempt to prove that there has been an improper management of public funds that had affected social interests and that consequently the defendants should be responsible for paying the sums that were misspent. The majority of cases in the database focus on financial malfeasance and this finding is consistent with the analysis of the variable "other rights". In order to support their claim plaintiffs identify all the collective and individual rights that they think have been violated under the circumstances related to the suit. I explored the collective rights that plaintiffs considered violated in addition to administrative morality (variable "other rights"). In the majority of cases the plaintiffs related violations of administrative morality to violations of public funds (Figure 2).<sup>335</sup>

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<sup>334</sup> *Ap 167*,(2001).

<sup>335</sup> Under the category "other collective rights" in Figure 2 plaintiffs referred to a healthy environment, access to public services or efficient provision of public services, public security, free economic competition, rights of consumers and users, protection of the cultural patrimony, access to infrastructure related to public health, and ecologic equilibrium and rational/sustainable exploitation of natural resources.

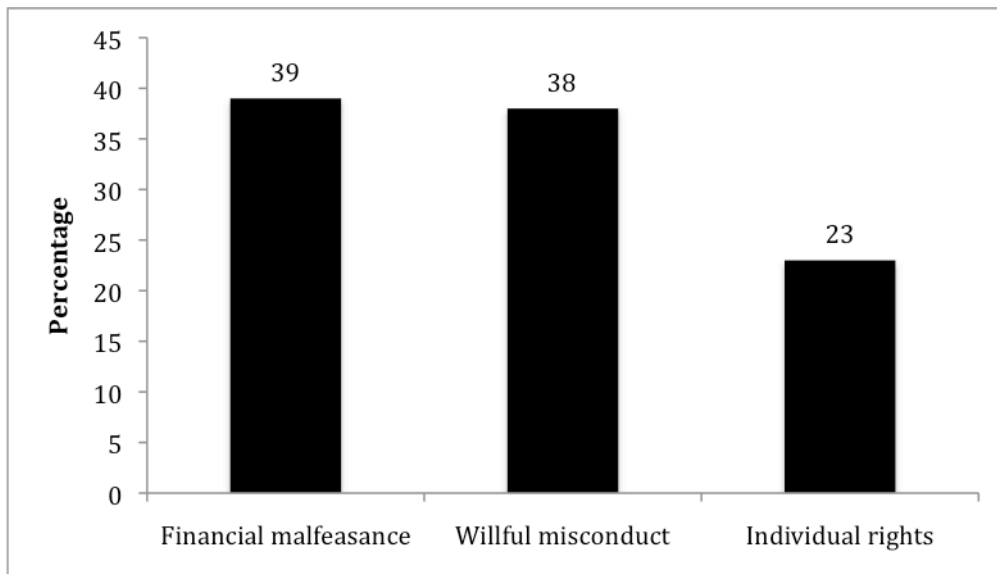


**Figure 2: Collective rights other than administrative morality in Council of State cases in which administrative morality is the primary issue. N=127.**

In relation to a secondary legal issue at stake, in 40% of the cases the plaintiffs identified a secondary type of claim (issue2). Mismanagement of public funds (39% of the cases) and willful misconduct (38%) are the most frequent categories of secondary issue at stake identified by plaintiffs (Figure 2). For example, in a case of 2007 the citizen Luis Domingo Cárdenas sued the city of Bogota arguing that the city did not comply with the contract C-4016 of June 25<sup>th</sup> of 1998. By this contract the city hired a private firm to dispose waste from a trash yard in order to avoid contamination to the Tunjuelito River. The plaintiff argued that the contractor polluted the River and that the city was responsible for this violation. The plaintiff filed a popular action so the judge would declare the noncompliance of the contract and the responsibility of the city due to the violation of its duty to oversight contract execution. As a secondary petition the



plaintiff focused on the violation against public funds and demanded from the city to recover the money that the city spent in mitigating the negative impact of the non-compliance.<sup>336</sup>

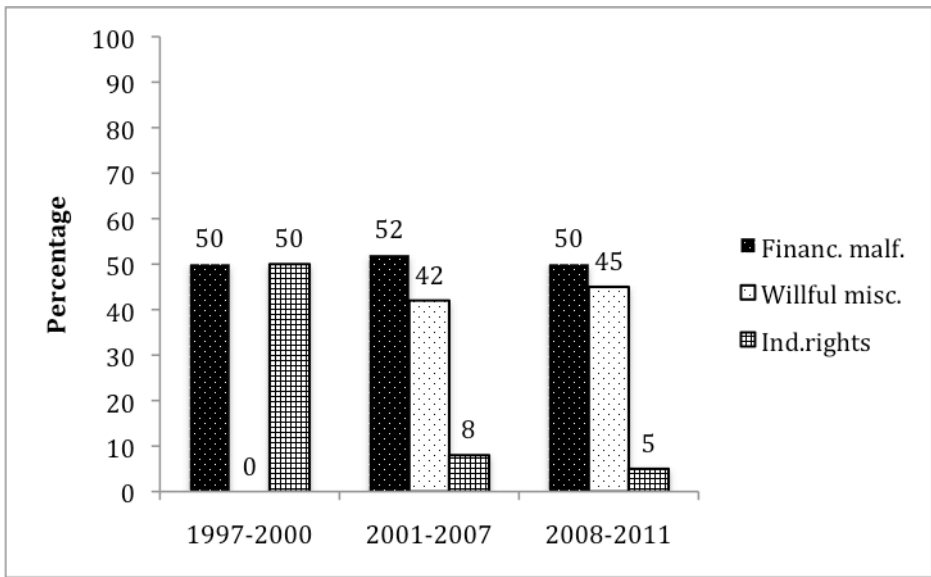


**Figure 3: Secondary type of claim in Council of State cases in which administrative morality is the primary issue. N=61.**

With regards the variation of the primary type of claim in time cases of financial malfeasance represented 50% of the claims in the entire time frame 1997 to 2011. Willful misconduct became a relevant category since 2001 when it started representing over 40% of the cases. In relation to individual rights, although in the first stage they represented half of the cases that the Council decided (with a very small N) in the second and third stages there were only a few cases under this category (Figure 4).

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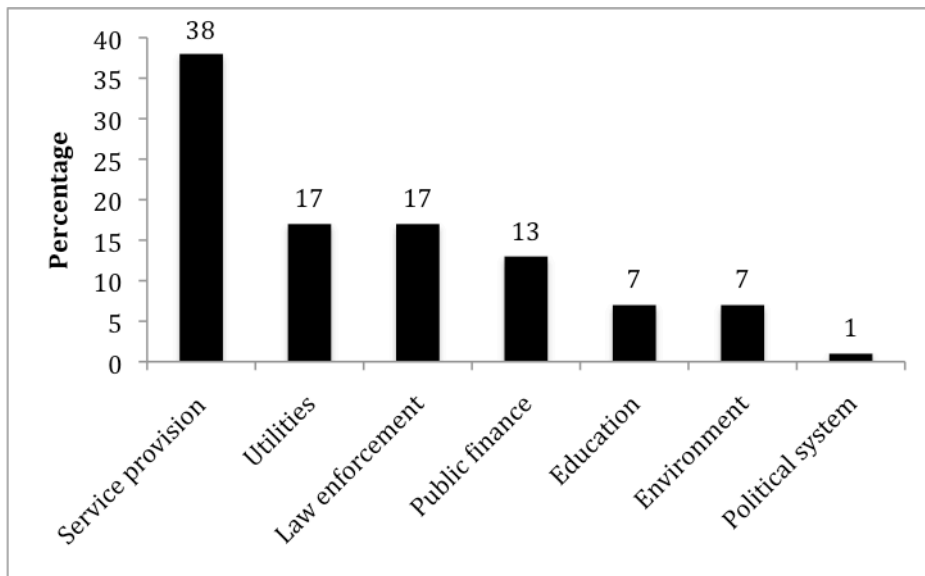
<sup>336</sup> *Ap 00509*,(2007).



**Figure 4: Type of claim over time in Council of State cases on administrative morality. 1997-2000: N=4. 2001-2007: N=127. 2008-2011, N=20.**

In addition to a legal issue at stake plaintiffs also identify a norm that support their claim. In 72% of the cases plaintiffs referred to the Constitution, the statute, or an administrative regulation as the norm that entitled them to file a popular action. In these cases the plaintiffs seemed to have some legal knowledge that allow them to identify a legal norm supporting their claim. The court cases do not provide information about the legal training of the plaintiff or they do not assert whether the plaintiffs are attorneys. Due to this lack of information it is not possible to answer the question of how do plaintiffs learn about the legal sources of administrative morality and popular actions. When plaintiffs make reference to a legal source they mainly refer to the statute of popular actions (68%) and in a smaller percentage they refer to constitutional

norms (31%).<sup>337</sup> Contrary to widespread expectations the plaintiffs refer more frequently to the statute than to the constitution. The constitution of 1991 was framed to bring the people closer to the government and different public agencies have lead communication campaigns to increase citizens' awareness of their constitutional rights. If such campaigns of constitutional rights' promotion achieved their purposes one might expect that plaintiffs would be more likely to refer to constitutional norms as a support to their claims but the data suggest that plaintiffs more frequently refer to the statute of popular actions. This finding is also counterintuitive based on the assumption that it would be easier for the people to get familiar with the constitution rather than specific pieces of legislation.



**Figure 5: Policy area in Council of State cases on administrative morality. N=149.**

<sup>337</sup> N=109. See table of frequencies of the secondary foundation for claim in Appendix D.

In relation to the policy area that is the focus of the claims, the policy areas fall into seven categories: governmental service provision, utilities, law enforcement, public finance, education, environmental protection, and political system. The majority of cases falls under the category service provision (38%) and refers to cases where the government has failed to provide services or when those services have low quality. Examples of these services are housing, road construction, public lights, and oil and natural gas distribution. In a case of 2001 two citizens sued the national agency for oil refinement and distribution (ECOPETROL) arguing that ECOPETROL signed a contract to build a line of gas pipes with a private contractor that did not have the financial capacity to comply with this contract. According to the plaintiffs ECOPETROL selected the contractor based on an initial estimate of the contract but it later added additional objects to the contract that overcome the financial capacity of the contractor. As a result, the contract did not comply with some aspects of the contract affecting third parties.<sup>338</sup> In this case the plaintiffs highlighted the lack of transparency of ECOPETROL because it did not select from the beginning a contractor that had the financial capacity that would be necessary to comply with the contract. Instead, it seemed like ECOPETROL divided the contract in parts so it would appear as if the contractor had enough experience and assets to build the gas line. The noncompliance of the contractor implied that ECOPETROL had to invest more resources than it was expected and it also harmed economic interests of those who had commercial relations with the

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<sup>338</sup> *Ap 151.*

contractor. In this case the Council ruled against the plaintiffs arguing that they did not provide evidence of the violation of administrative morality by ECOPETROL. The Council found evidence of disagreements among the contractors and the contractors and third parties but these disagreements are not related to violations of public funds or administrative morality. Thus, the Council denied the action.<sup>339</sup> This is a case in which the plaintiffs related administrative morality to a faulty behavior of the administration in service provision, specifically in the construction of infrastructure (gas pipes). According to the plaintiffs this faulty behavior of the administration (choosing a contractor with inadequate capacity for complying with the contract) was posing risks to the public service and to rights of the third parties affected by the contract. It is also relevant that according to the Council's view this was not a case of violation of collective rights but a case of legal disputes among private parties (the contractors and the contractors and third parties). There was not evidence of the violation of administrative morality or public funds.

The second most common policy areas are utilities and law enforcement, with 17% of the cases on each category (Figure 5). Although utilities are a type of service that the government provides or guarantees to the population I analyzed these data separately since one of the purposes of the framers when creating popular actions was to entitle the people with a legal mechanism that allowed them to protect their interests in an uneven relationship like the one between individuals and utilities' companies. The rights of consumers and users were a big concern of the framers and

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<sup>339</sup> Ibid.

consequently it was expected that users of utilities would benefit from popular actions to demand good services. 17% of the cases fall under the category “utilities.” In a case of 2007 a citizen filed a suit against the Superintendent for Public Utilities arguing that this agency was threatening collective rights due to its decision to contract out the water service in the region of San Andres. According to the plaintiff the Superintendence opened a public bidding to contract out this service and that some of the conditions of the public bidding implied a reduction in the coverage of the water service for the region.<sup>340</sup> This case did not only focus on a specific case of defective service provision but it targeted a broader impact of what the plaintiff perceived as a threat to the community of that region. When answering to the suit the regional government and the Superintendent revealed that the water provision in the region had been going through a low coverage crisis and that the Superintendence hired a consultant to explore alternatives to solve this crisis. As a result of the study the Superintendent and the regional government decided to contract out the water service and one of the conditions for the contractor was to develop a plan to expand coverage to all the population in the region. In spite of this, the plaintiff perceived this contract as a threat against the population and their right to access public utilities given that this region attracts tourists and, according to the plaintiff, by contracting out water provision the contractor would focus on the tourist areas of the region (hotel complexes) rather than reaching all sectors of the population. The Council ruled in favor of the defendant arguing that the plaintiff did not prove that the behavior of the

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<sup>340</sup> *Ap 00004*,(2007).

Superintendence violated administrative morality. Furthermore, according to the Council, the Superintendent's behavior was aimed to protect collective rights by planning a gradual increase in the water service coverage for the region.<sup>341</sup> In this case the popular action was not a mechanism for the plaintiff to stand up to the agencies responsible for providing access to public utilities. Instead the Council ruled in favor of governmental agencies that prove having a plan to improve service provision.

The cases under the category law enforcement refer to areas like jail administration, oversight agencies, homeland security, and policy enforcement. For instance in a case of 2003 two citizens sued the city of Bogota for negligence in maintaining several sidewalks in the city that were being used as parking spots or as sites for informal vendors to do business. Consequently, pedestrians have been forced to walk on the road assuming unnecessary risks. With this popular action the plaintiffs demanded from the city to take control over these public areas by removing individuals and vehicles that have been illegally occupying the public space and to rebuild the sidewalks that have been destroyed.<sup>342</sup> In this case the Council ruled in favor of the plaintiff because there was a violation to the collective right to public space. At the same time the Council acknowledged that administrative morality was not violated by the defendant since there was evidence that the defendant have performed its duties with diligence.<sup>343</sup> This case shows popular actions as an effective legal mechanism to protect collective rights to the extent that the Council ruled in favor of the plaintiff. To this

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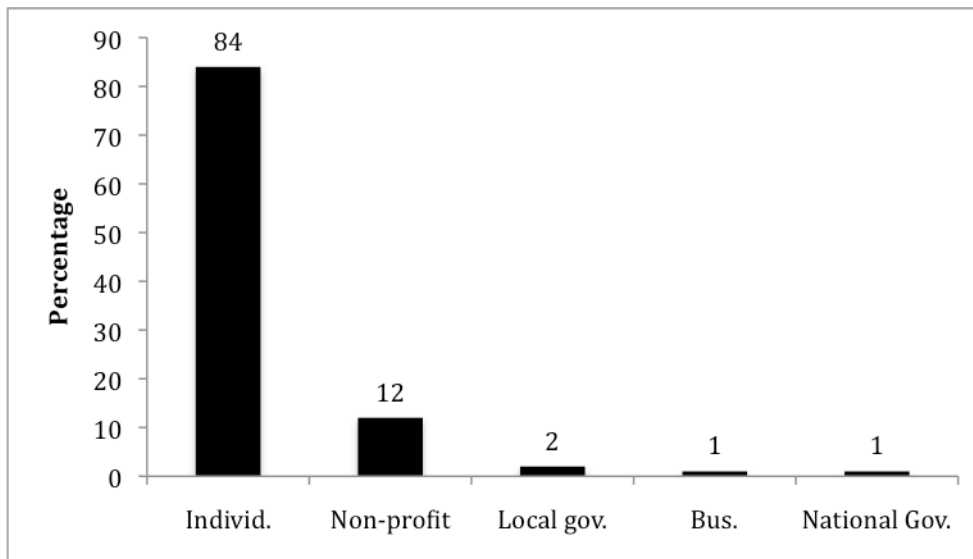
<sup>341</sup> Ibid.

<sup>342</sup> *Ap* 2335,(2003).

<sup>343</sup> Ibid.

extent the Council gave popular actions the meaning that the framers pursued. At the same time in this ruling the Council acknowledged the efforts of the administration to perform properly and declared that these efforts were enough evidence to declare that administrative morality was not violated.

What types of plaintiffs have been using popular actions? As Figure 2 illustrates, by far the largest proportion of primary plaintiffs are individuals (Figure 6) and the majority of them are men.<sup>344</sup> This pattern is constant in the three stages: 1997-2000, 2001-2007, and 2008-2011.<sup>345</sup> Only 20% of the cases had a secondary litigant and in this category the largest proportion of plaintiffs are individuals.<sup>346</sup>



**Figure 6: Primary plaintiff in Council of State cases on administrative morality. N=151.**

<sup>344</sup> In the universe of cases 74% of the plaintiffs are men (N=151).

<sup>345</sup> In the time frame 1997-2000 75% of the plaintiffs were individuals (N=3), from 2001 to 2007 individuals represented 83% of the plaintiffs (N=105), and from 2008 to 2011 90% of the plaintiffs were individuals (N=18).

<sup>346</sup> Under the category secondary litigant 94% of plaintiffs are individuals (N=32).



Although according to the files majority of plaintiffs are individuals it is not possible to ascertain whether these individuals had some organizational support or affiliation that they did not acknowledge in the suit. In other cases it might be possible that the court clerk that summarized the claim for the file did not include this information because it was unclear in the claim or because the clerk did not perceive this information as relevant. For example, in a case of 2007 three citizens appeared as individual plaintiffs suing the Secretary for Transportation of Bogota.<sup>347</sup> At a first glance this was the case of Epaminondas Moreno Parrado, Jorge Eliécer Miranda, and José Cipriano Leon against the city of Bogota but when reading more about the case it seems that these individual plaintiffs had organizational support to file the suit: “Since the lawsuit is very confusing we will transcribe some fragments here: ‘According to the articles 12 and 18 of the Law 472 of 1998 [statute of popular actions] we EPAMINONDA MORENO PARRADO acting as an individual and currently I am the president of the Union of the Secretary for Transportation of Bogota (SETT); JORGE ELIECER MIRANDA TELLEZ acting as an individual and currently I am a board member of the Association of Employees of the Contraloria Distrital [oversight agency], we file this suit to protect the rights of public funds and administrative morality...’”<sup>348</sup> This case illustrates the possibility that some or even many of the cases of individual litigants are in fact cases brought by organizations. This poses a challenge in terms of exploring the applicability of theories like party capability because what was presented as a case of three individuals suing a governmental agency in fact has the support of a union and an

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<sup>347</sup> *Ap* 170.

<sup>348</sup> *Ibid.*

employees' association. It is possible to assume that in both cases the plaintiffs have got organizational support when filing the suit. There are other similar cases in which although the plaintiffs identified themselves as individuals they had organizational resources to support their claim. In a case of 2001 two citizens filed a suit against the mayor of the city of Sandoná (Nariño) but these were not two common citizens. One of them was a city Council member and the other one was a member of an advisory board of the city; although they did not file the suit in their condition of council member or board member their organizational affiliations influence their role as litigants. Thus, although the largest proportion of primary plaintiffs are individuals it may be possible that they had organizational support when filing a popular actions.

According to the media analysis some journalistic articles referred to plaintiffs as “bounty hunters” especially when particular plaintiffs filed several suits against different governmental agencies for the same reason. When conducting the analysis of the Council’s cases I identify seven cases with the same type of claim and same facts filed by two different plaintiffs. Two individuals sued seven different cities alleging that they did not comply with the statute of public utilities.<sup>349</sup> According to Sergio Sanchez (who filed two suits) and Jose Omar Cortes filed (who filed five suits) the majors and councils of these cities ignored their legal duties related to the law 142 of 1998 that created the “Fund of solidarity and social redistribution” with the purpose of subsidizing low income population and facilitate their access to public utilities. It was the

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<sup>349</sup> *Ap 00932*,(2006). *Ap 00938*,(2006). *Ap 00857*,(2006). *Ap 00543*,(2006). *Ap 00290*,(2006). *Ap 00413*,(2007). *Ap 10838*,(2006).

responsibility of the cities to implement this norm by creating the Fund and none of these cities had created this Fund.

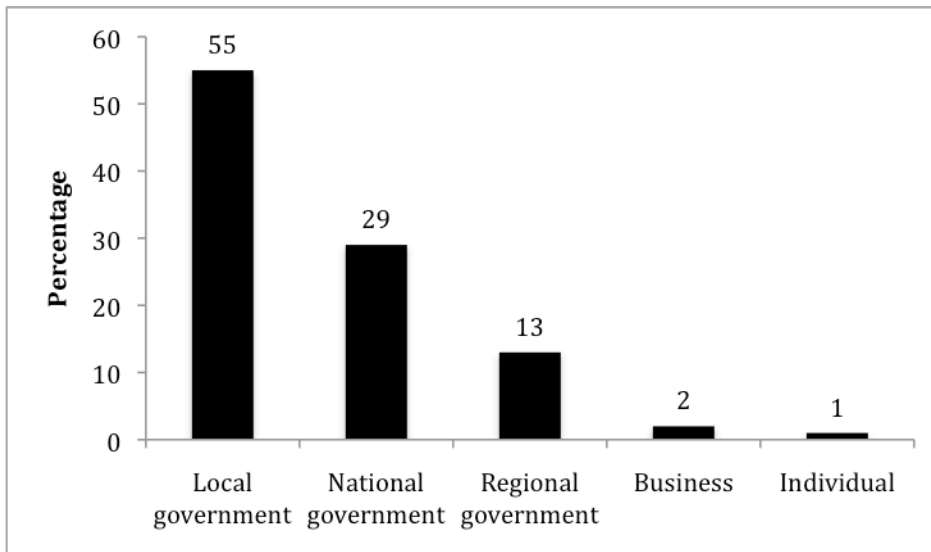
In six of these cases the Council ruled in favor of the defendant arguing that the cities did create the Fund given that the city council passed a norm to do so. Even more the Council criticized the role of the plaintiff observing that the suit lacked of the necessary elements to prove that the cities violated collective rights: “The room [of decision] insists that, on the one hand, the plaintiff just filed a suit based on generic accusations that are almost identical to the ones he used in all the other popular actions he had filed against different cities. On the other hand, on file there is evidence to prove the legal existence of the Fund. These proofs were ignored by the plaintiff.”<sup>350</sup> This case reveals a negative tone from the Council in relation to the plaintiff who had filed several popular actions against different defendants by using “almost identical” arguments. What seemed to be problematic is not only that the arguments were almost identical from one suit to other but that also that the claim seemed to ignore basic evidence that controverts the main legal issue at stake. Moreover, in two of these cases the Council confirmed fines against the plaintiff that the Tribunals had imposed in the first instance ruling. “As noted by the Tribunal the Fund was created five years before the suit was filed and consequently the Council will confirm the fine of 20 minimum wages.”<sup>351</sup> In the latter case the Council not only disapproved the plaintiff’s arguments but it also punished his behavior with a fine.

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<sup>350</sup> *Ap 00413.*

<sup>351</sup> *Ap 00543.*

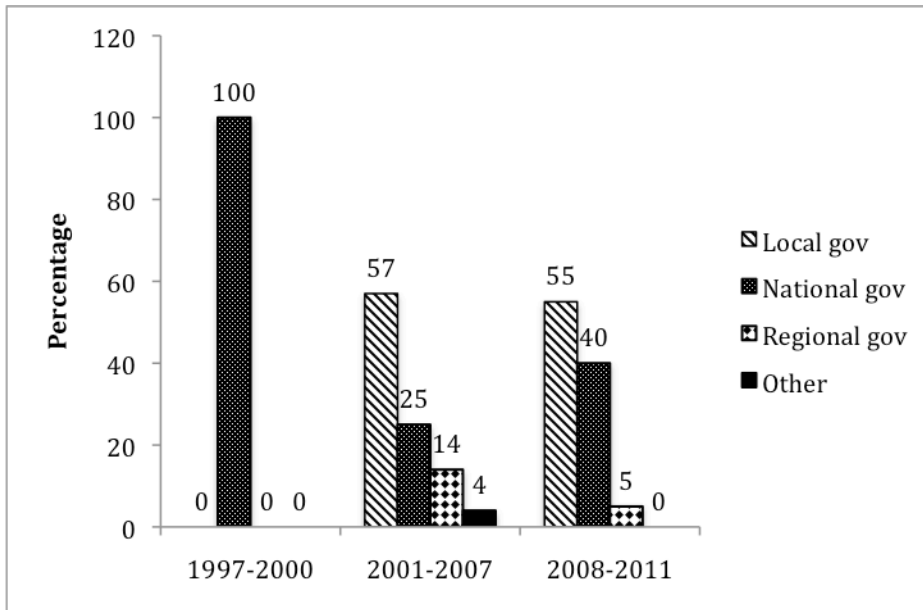
With regards the defendants in 55% of the cases local governments are sued for violations against administrative morality. In 29% of the cases the defendant is the national government or public organizations at the national level. Regional governments and regional level public organizations only account for 13% of defendants. In 2% of the cases businesses were sued in their role of contractors of the government or when they have participated of the violation. In 1% of the cases the plaintiffs sued an individual for a violation of administrative morality (Figure 7).



**Figure 7: Primary defendant in Council of State cases on administrative morality. N=149**

During the first three years (1997-2000) all the cases were against the national government or organizations at the national level. During the second period (2001-2007) local governments appear as defendants in over 50% of the cases while the national government only accounts for 25% of the cases. In the third period (2008-2011) local governments and organizations at the local government constitute over 50% of the

cases while the national government appears as defendant in 40% of the cases (Figure 8).



**Figure 8: Type of defendant per year in Council of State cases on administrative morality. 1997-2000, N=2. 2001-2007, N=127. 2008-2011, N=20**

An example of a lawsuit against a local government organization is a case of 2005 when the Personería de Cartagena (oversight agency at the local level) sued the local government of Cartagena for it restricted the transit of vehicles in some streets in the historic center of the city.<sup>352</sup> The city government stated that in order to protect cultural zones some roads would be only destined to the use of pedestrians. According to the plaintiff the city government did not have legal authorization to regulate the use of the roads because that function was legally assigned to the city Council. The plaintiff

<sup>352</sup> Ap 00135,(2005).

also argued that the government lacked adequate planning and it did not take the people's perspective into consideration before changing the regulations in the historic area. According to the plaintiff, the population disagreed with the governmental decision since it violated collective and individual rights. Due to this decision people were forced to take long walks to reach their destinations; kids were forced to walk on their own since school buses cannot take them to their homes, etc. In this case the Council ruled in favor of the plaintiff because, according to this Court, the city government made a decision that was under the competence of the city council. In spite of this, the Council argued that there was no evidence of the violation of administrative morality because the plaintiff failed to prove that the administration pursued illegal motives.<sup>353</sup> This ruling has mixed messages with regards the potential of popular actions and administrative morality. On the one hand, the popular actions were an effective check on governmental performance because they allowed a citizen to point out to a wrongful behavior of the city of Cartagena. On the other hand, the Council seemed did not find enough evidence to proof an illegal motivation in the administration and consequently there was no evidence of the violation of administrative morality.

In a case of 2006 the defendant was a governmental agency at the National level. Mr. Carlos Farfan sued the Ministry of Finance for it did not comply with legal regulations.<sup>354</sup> According to Mr. Farfan the law 44 of 1990 stated that the national government would provide funding to the cities were native Colombian reservations are located since the reservations do not pay taxes for the use of the land. According to the

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<sup>353</sup> Ibid.

<sup>354</sup> *Ap 02753*,(2006).

plaintiff in the city of Ortega there are 11 reservations and the national government had not paid the funds stated in the law 44 of 1990.

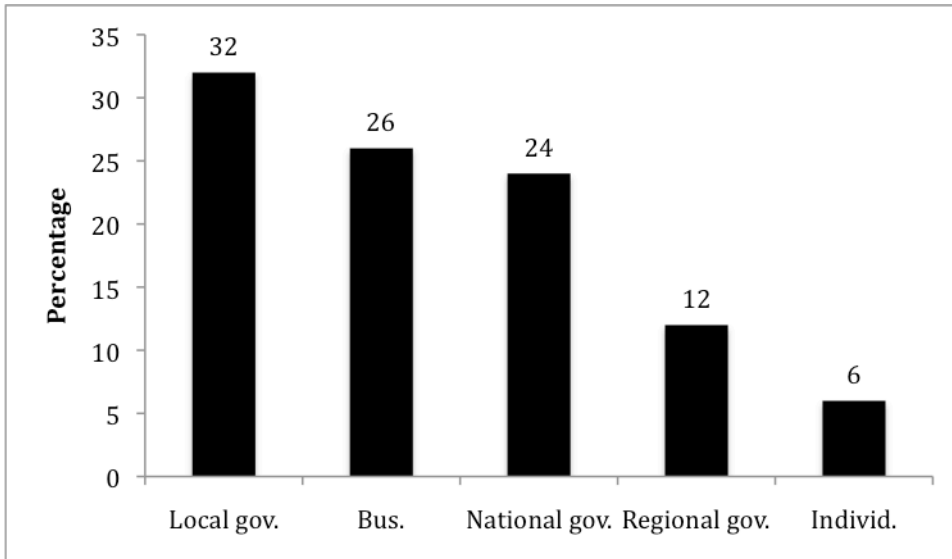
With regards popular actions against individuals, in a case of 2005 an oversight agency at the national level (the Procuraduría General de la Nación) sued Amadeo Tamayo a contractor for the region of Cesar. The Procuraduría argued that Mr. Tamayo did not comply with its legal obligations and that consequently he was not entitled to receive the salary set in the contract. In this case although Mr. Tamayo was an individual, due to the existence of a legal bond with the region of Cesar he was responsible of for complying with administrative morality.<sup>355</sup>

In addition to identifying a primary defendant, over half of the cases (52%) involve a secondary defendant. As Figure 9 illustrates local governments, businesses, and the national government are the most frequently parties identified as secondary defendants in cases of administrative morality.<sup>356</sup>

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<sup>355</sup> *Ap 01588,(2005).*

<sup>356</sup> Only a small proportion of the cases included a third defendant (25%, N=38) and consequently I did not include information about this variable in this analysis.



**Figure 9: Secondary defendant in Council of State cases on administrative morality. N=78.**

I am interested in exploring whether popular actions have been focusing on institutional violations of administrative morality or if they have focused on individual cases.

Individual violations of administrative morality refer to cases in which the administrative behavior affected an individual in a particular situation. In other words cases of individual violations of administrative morality are those in which the plaintiff pointed out to an immoral administrative behavior that produced negative effects for a determined individual. Institutional violations are those in which the administrative behavior brings negative consequences to a broader group. These cases are framed by plaintiffs in terms of the broad negative effective that comes as a consequence of an immoral behavior in the implementation of a general policy. In other words, the variable individual versus institutional speaks to the possible impact of popular actions and



whether they have targeted high impact cases that refer to the implementation of broad policies or whether they have focused in cases with limited impact. The data suggest that popular actions have focused more on individual violations (70%) rather than on institutional policy (Figure 10). An example of an individual case is the suit filed by the union of health-care professionals ANTHOC against the lottery of Bogotá.<sup>357</sup> The plaintiff argued that the lottery contracted out management services for the time frame 2000 - 2001 and that in this process the lottery chose a contractor that did not fulfill the requirements of the bidding process. ANTHOC argued that the lottery contracted SONAPI in spite of the fact that SONAPI did not make the best offer in the process since the other participant (Unión Temporal Multinacional de Apuestas) offered better conditions. ANTHOC also argued that the lottery manipulated the bidding process the favor SONAPI. The Council ruled in favor of the defendant arguing that SONAPI fulfilled all the requirements of the bidding process and that its offer was competitive. The Council also argued that the plaintiff failed to prove that the offer of the participant Unión Temporal Multinacional de Apuestas was better than the offer of SONAPI.<sup>358</sup> In this case the plaintiff filed the suit arguing that administrative morality had been violated by the selection of the contractor SONAPI in this specific case. The Council ruled against the plaintiffs arguing that the lottery's behavior did not violate the law.

An example of a case involving an institutional violation of administrative morality is the suit of two citizens against the Superior Council for the Public notaries.<sup>359</sup>

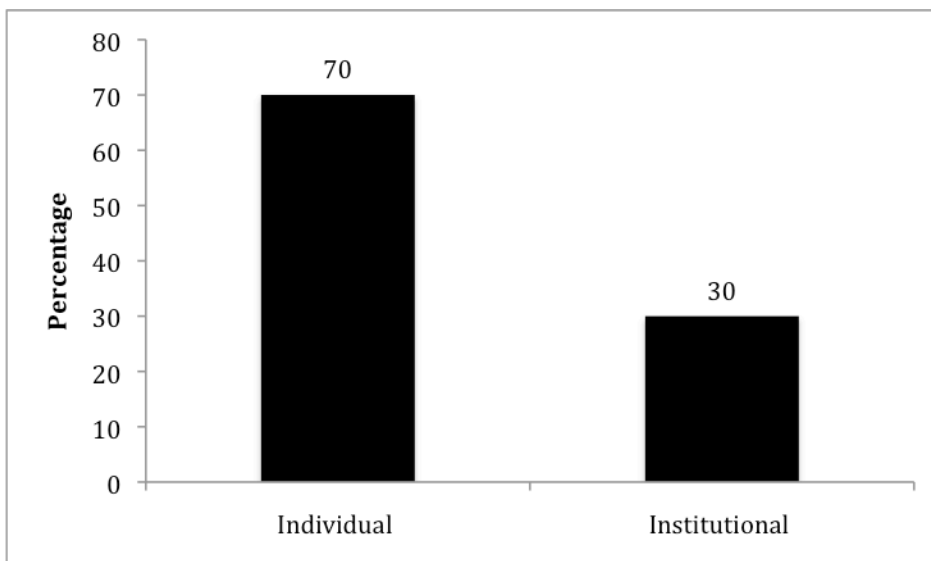
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<sup>357</sup> *Ap 238*,(2001).

<sup>358</sup> *Ibid.*

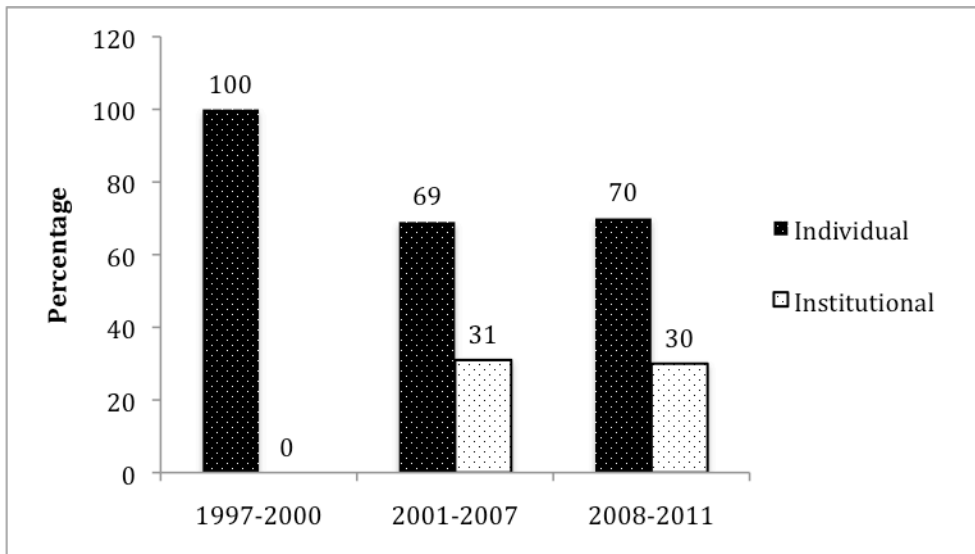
<sup>359</sup> *Ap 447*,(2002).

According to the plaintiffs the Superior Council for Public notaries started an illegal selection process to appoint notaries in the country. The selection process started in 1999 and in 2000 the Administrative Tribunal of Cundinamarca demanded the Ministry of Justice and the Supreme Council to postpone the selection process until the Congress have provided legal parameters for the issue. The plaintiffs argued that in spite of this ruling the Supreme Council “willingly and stubbornly” continued with the process and misspent public funds on it. In 2000 the Congress passed the law 588 regulating public notaries and set the requirements for the selection process of notaries. In opinion of the plaintiffs the criteria set by the Congress are different from the ones that guided the selection process. Thus, the process to select public notaries had been illegal. This case referred to the entire selection process of all public notaries in the country and consequently targeted an institutional violation of administrative morality.



**Figure 10: Type of claim: individual claims vs. institutional claims in Council of State cases on administrative morality. N=150.**

Plaintiffs have mainly pursued individual violations of administrative morality and this pattern has not changed in time (Figure 11). In the three periods under analysis the majority of the cases have focused on individual cases rather than institutional violations of administrative morality.



**Figure 11: Type of claim: individual claims vs. institutional claims in Council of State cases on administrative morality per year. 1997-2000, N=3. 2001-2007, N=127. 2008-2011, N=20.**

Turning to the decision of the cases it is noticeable that the Council strongly tends to decide in favor of the defendant (Figure 12). This tendency has not changed in time since in the three stages under analysis the defendants have won majority of the cases (Figure 13).

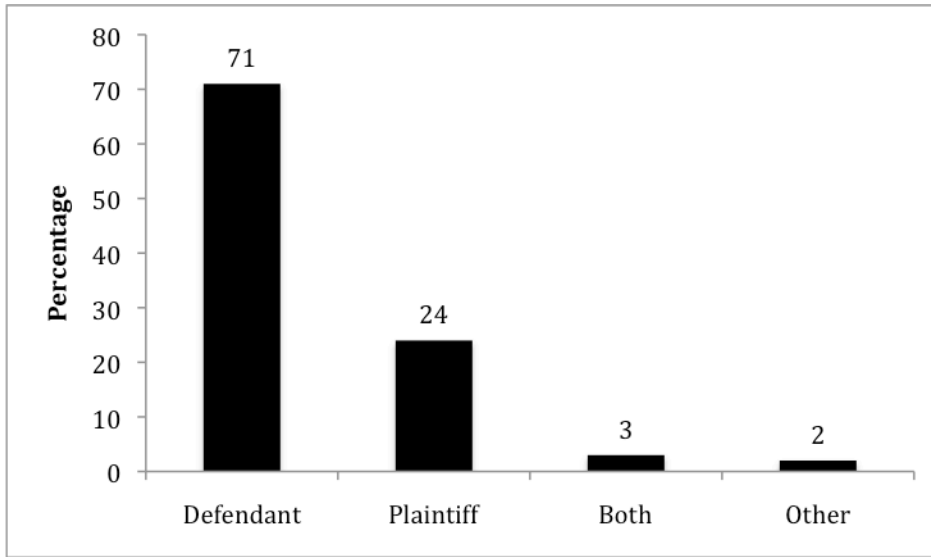


Figure 12: Type of decision in Council of State cases on administrative morality. N=150.

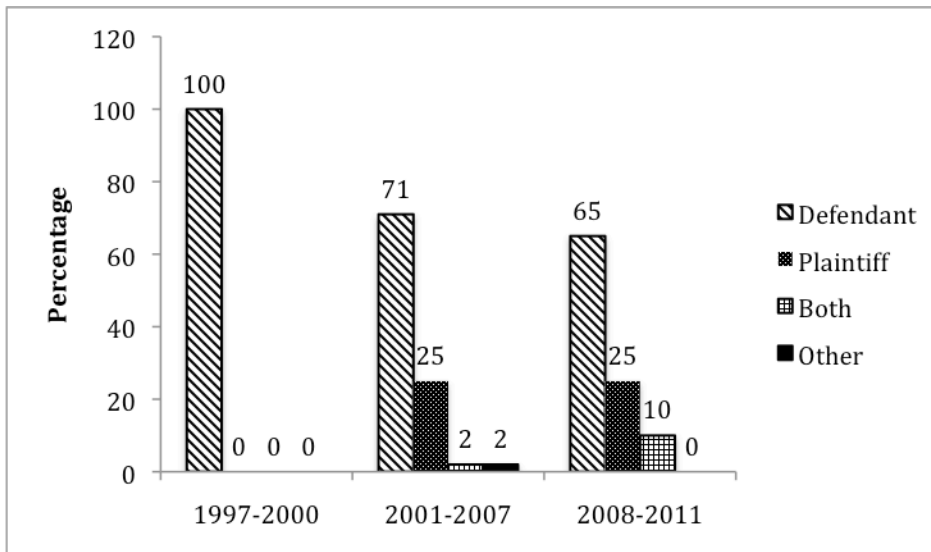


Figure 13: Type of decision in Council of State cases on administrative morality per year. 1997-2000, N=3. 2001-2007, N=127. 2008-2011, N=20.

One of the arguments of the Council for ruling in favor of the defendants is that the plaintiffs failed to prove the alleged violation. In a case of 2006 a citizen filed

a suit against the water supply company of Bogota because it contracted out auditing services over the city's performance.<sup>360</sup> According to the plaintiff the contract between the city and the contractor (Arthur Andersen) violated collective rights of public funds and administrative morality because the auditing functions could have been performed by oversight agencies at the local level with no cost for the city. On a first ruling the Tribunal ruled in favor of the plaintiff but the Council overruled this decision and favored the defendant. According to the Council the plaintiff should have proved that the public agency violated administrative morality and public funds by contracting out auditing services but this did not happen. The only thing that was proved in this case, according to the Council, was that the water supply company had signed a contract with Arthur Andersen but there was no evidence of the negative effects of the contract in terms of public funds and administrative morality.<sup>361</sup> In a case of 2007 the Council reiterated the importance of the evidence provided by the plaintiff when arguing: "On this case, although the plaintiff was not completely accurate with regards the facts that led him to file the popular action, the evidence highlights the omission of the administration by not investing due funds on the solidarity account from 2000 to 2006. This omission affected low-income and vulnerable population..."<sup>362</sup> In this case the Council did not condemn the lack of accuracy of the plaintiff with regards the facts of the case because there was enough evidence to determine that collective rights were violated.

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<sup>360</sup> *Ap 1640*.

<sup>361</sup> Another example of this argument by the Council is the case *Ap 02356*,(2006).

<sup>362</sup> *Ap 01252*,(2007).

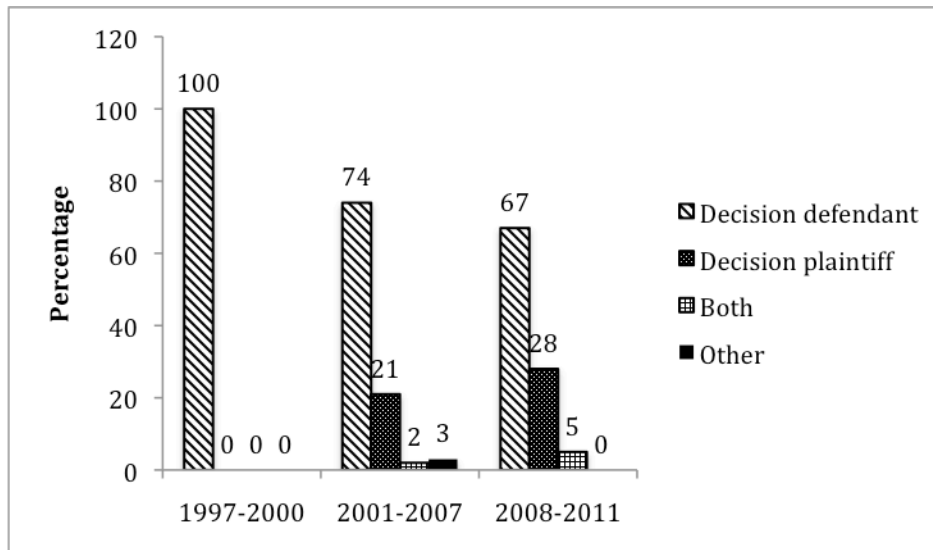
In other cases the Council rules in favor of the defendant but it recognized that the governmental performance could improve. In a case of 2007 the plaintiff argued that the city of Popayan has not finished a road construction and that this lack of efficiency was harming the population.<sup>363</sup> In this case the Council argued that the plaintiff failed to prove that the population was suffering harm and consequently ruled in favor of the defendant. In spite of this decision the Council urged the city to finish the road construction, making sure that there would be enough future funding for this purpose, and taking the necessary actions to facilitate the transit during the rainy season. In this case the Council ruled in favor of the defendant but it acknowledged that, in spite of the lack of evidence on file with regards rights' violations, the governmental service seemed to be defective.

Do the Council's decisions vary depending on the type of plaintiff? When focusing on cases of individual plaintiffs the Council's decisions have been changing in time. On a first period the Council ruled in favor of governmental agencies in all cases but this pattern changed in the second and third stage when the Council started granting actions to the plaintiffs. In the second period (2001-2007) the Council ruled in favor of the plaintiffs in 21% of the cases while in the third period plaintiffs won 28% of the suits (Figure 14). Although 28% is still a small percentage of cases won by plaintiffs these data suggest that the Council has been more prone to grant plaintiffs claims in

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<sup>363</sup> *Ap 01837,(2007)*. In a similar way in a case of 2011 the Council acknowledged the limitations of the government to provide services like public utilities. In this case the Council urged the water supply company of Bucaramanga to conduct analysis in order to check the availability of continuous water supply for the neighborhood Mirador de Arenales in the city of Giron. Also, the Council urged the city of Giron to develop actions to guarantee the water service to the same neighborhood. *Ap 02865,(2011)*.

later years and it may suggest that the possible impact of popular actions has increased. It may be possible that the perception of justices at the Council with regards plaintiffs and their claims has improved or it is also possible that the plaintiffs have gotten experience and they are more likely to frame their suits in a way that is more acceptable for the justices.<sup>364</sup>



**Figure 14: Type of decision per year in Council of State cases of administrative morality when plaintiffs are individuals. 1997-2000, N=3. 2001-2007, N=127. 2008-2011, N=20.**

Do the Council’s decisions vary with the type of defendant? In cases when the national government is sued it tends to win in a largest proportion of cases (79%) in comparison to the cases that plaintiffs win (19%). The same occurs when regional governments or regional agencies are sued (they win in 79% of the cases), and when

<sup>364</sup> One element that could shape justices’ perception of the plaintiffs is the elimination of the monetary incentive because that would change the motivation of the plaintiff to file a suit. Without being entitled to a monetary incentive plaintiffs who bring cases to the jurisdiction aim to strengthen the legal system and to protect collective rights without what it has been perceived as a selfish motivation to receive a reward. Since the elimination of the incentive took place in 2010 future research will be necessary to estimate its impact on the Council’s decisions.

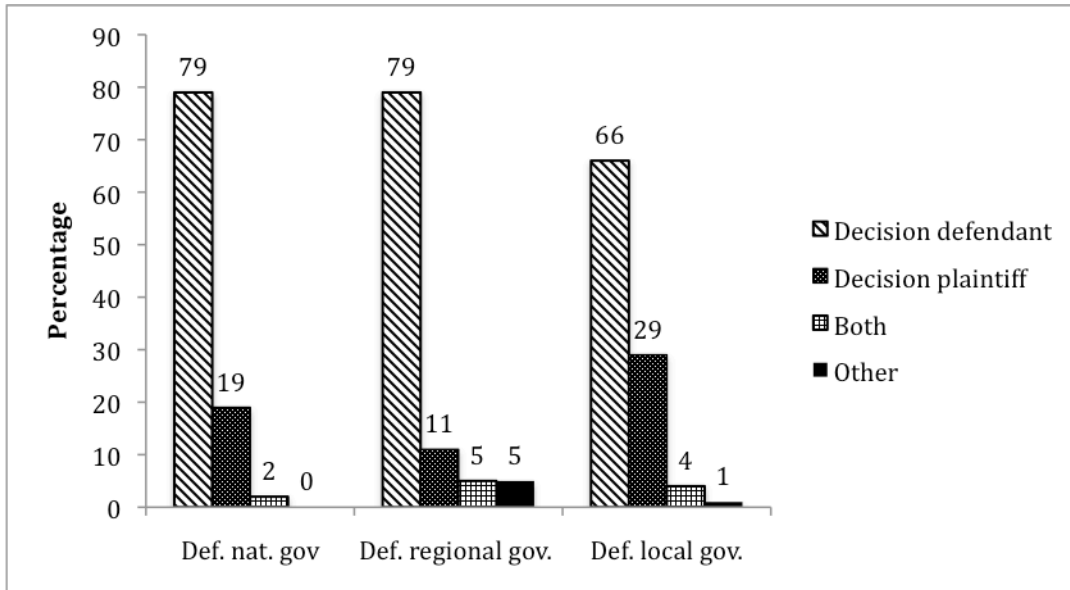
local governments are sued (66%). Local governments and local agencies are the level of government most frequently sued and although the Council frequently rules in their favor it does it in a smaller proportion in comparison to the national and regional governments (Figure 15).

These data provide evidence of the applicability of the litigant capacity theory to the extent that individual plaintiffs lose in the largest proportion of cases while the government wins.<sup>365</sup> Even more, when comparing the proportion of winnings the national government gets favorable decisions in a larger than proportion than the regional and local level of government. In other words the national government as the most resourceful litigant wins in a largest proportion in comparison to other levels of government.

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<sup>365</sup> Marc Galanter, "Why The 'haves' Come out Ahead: Speculations on the Limits of Legal Change," *Law & Society Review* 9(1975).





**Figure 15: Decision by type of defendant in Council of State cases on administrative morality. Defendant national government, N=42. Defendant regional government=19. Decision local government=83.**

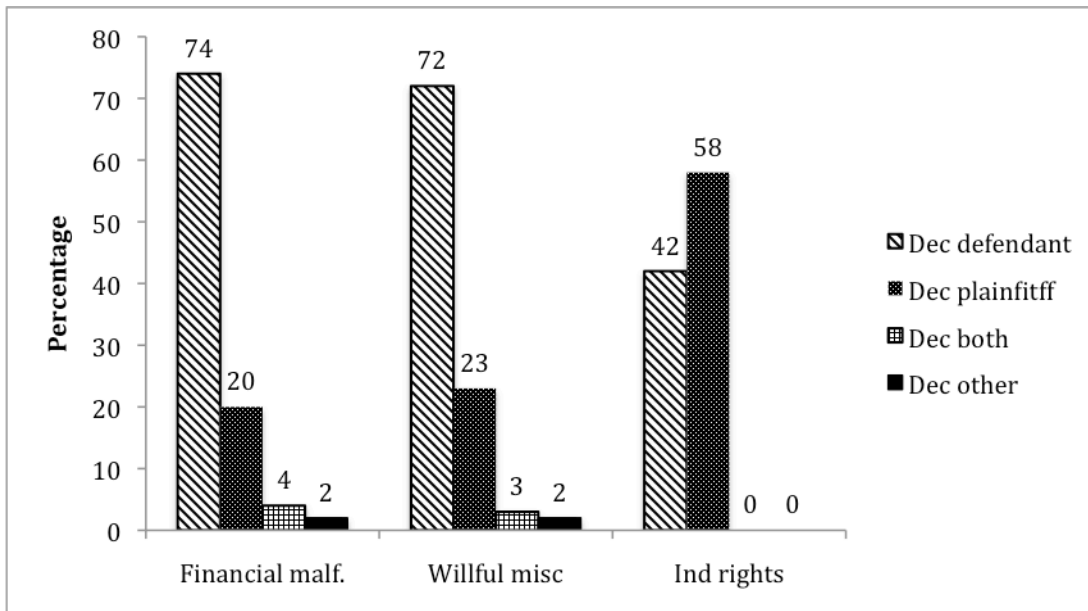
Who wins, however, varies dramatically by type of case. The defendant (the government) wins in a largest proportion of cases about financial malfeasance and willful misconduct but this is reversed in cases of individual rights (Figure 16). When individual rights are at stake the plaintiffs win in 58% of the cases while the defendants win in 42%. Although the number of cases related to individual rights as a main issue is low in comparison to the other two categories the Council seems to favor plaintiffs. For example in a case of 2004 the Council ruled in favor of the plaintiff and it emphasized on the role of popular actions as a mechanism for consumers' protection. In this case the citizen Exenober Hernandez sued the National Company for telecommunications (TELECOM) because it charged different rates for the same type of services in different areas of Bogota.<sup>366</sup> TELECOM offers services of long-distance calls in stores located in

<sup>366</sup> Ap 00254,(2004).

different areas of the country and Mr. Hernandez argued that in two stores in the city of Bogota TELECOM was charging different rates to call to the city of Honda in Colombia. For Mr. Hernandez this difference in call rates was a violation of equal protection of the law. The Tribunal ruled in favor of TELECOM arguing that as soon as the agency realized that there was a mistake in the rates it corrected the situation. According to the Tribunal since the mistake was solved the claim was not applicable and the ruling should go in favor of the defendant. At the appellate level, the Council analyzed the case from a different perspective. The Council found enough evidence suggesting that there had been a violation of collective rights but the question addressed by the Council was different: does a change in the circumstances that motivated the popular action imply a ruling in favor of the defendant? According to the Council, the Statute of popular actions entitled plaintiffs to file a suit when collective rights are violated in the present or when they have been violated. The Council argued: "In this case the violation does not simply disappear when technical mistakes are improved, otherwise it would be like saying that consumers, who are the weaker party in a commercial relationship, do not have legal mechanisms to protect themselves. The room [court panel] will rule against TELECOM but will not demand from it to compensate damages or will not demand any specific behavior from it."<sup>367</sup> In this case the Council seems to focus on the symbolic value of the ruling because by favoring the defendant it could have communicated that popular actions do not have the potential of protecting consumers. The Council seemed to want to emphasize symbolic value of recognizing that the plaintiff, the consumer, was right.

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<sup>367</sup> Ibid.



**Figure 16: Decision by primary type of claim in Council of State cases on administrative morality. Financial malfeasance N=76. Willful misconduct, N=62. Individual rights, N=12.**

## Conclusion

Court cases on administrative morality fall under two categories, depending on the Court that made the decision. Decisions from the Council of State follow the traditional pattern of a litigious procedure in which a plaintiff (mostly individuals according to the data) sues a defendant (local governments and the national government in majority of the cases) by arguing that there has been a violation of administrative morality. The second category, decisions of the Constitutional Court, combines different types of actions that follow a more public type of litigation in which a claimant argues that a certain regulation is unconstitutional or in which the Court decides to revise a certain decision for its salience in terms of constitutional rights.

These different types of court cases set the criteria for different parties to understand and apply the concept of administrative morality.

Cases from the Council of State tell the story of popular actions as a mechanism set by the Constitution of 1991 that aimed to entitle individuals to protect collective rights. According to the data popular actions have been successful to the extent that individuals are the most frequent plaintiffs and that they have targeted violations perpetrated by local governments and the national government. In other words, individuals have used this legal mechanism to enforce collective rights against big players like local and national governments.

At a first glance these findings seem like good news in terms of the democratic implications of popular actions but there is evidence that plaintiffs are receiving organizational support when filing the claim. In my interview with the auxiliary justice Roberto Molina at the Council of State he argued that civil society organizations do not present themselves as plaintiffs in popular actions because some justices have negative perceptions of them. Civil society organizations like NGOs could be authors of popular actions but they choose not to participate directly to avoid negative rulings.<sup>368</sup> Future research would be necessary to explore the organizational support that some plaintiffs receive when filing a popular action.

Most frequently plaintiffs sue the government for cases of financial malfeasance in policy areas related to service provision. In my interview with Eduardo Arce, a public agent working at a National level organization, he argued that popular

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<sup>368</sup> "Interview Roberto Molina," (2012).

actions have focused on certain policy areas in which the government invests considerable resources because plaintiffs have perceived litigation as a possible source of income.

“The thing is, and I believe we discussed this topic before, the impact of popular actions on the daily life of public agents is almost zero unless we refer to specific policy areas.... popular actions have targeted certain areas where public agencies have big budgets like mine exploitation, road construction, environment. Other sectors like banking, education, that are core areas, I think that plaintiffs did not care...”<sup>369</sup>

According to this interviewee since the motivation of plaintiffs is economic they have focused mainly on policy areas where considerable public funds are invested. In spite of this perception the data suggest that plaintiffs file actions in areas that supposedly involve high budgets (like road construction and fuel exploitation) and in areas that are not economically salient (like public utilities and education).

The data suggest that local governments are the most frequently sued in popular actions. This finding is related to the constitutional attribution to different levels of government. According to the constitution, the local level of government is responsible for granting services to the population while the regional government is responsible for working as a middle level between the national government and the cities, by articulating and supporting policy implementation.<sup>370</sup> Given the constitutional functions of the cities individuals perceive them as the level of government closest to them and the one that is responsible for granting good public services. Thus, they are the most frequently sued in popular actions.

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<sup>369</sup> "Interview Eduardo Arce."

<sup>370</sup> Art. 298 and Art. 311, Colombian constitution.

In spite of the positive aspects of popular actions (citizen engagement and demanding better public services from local governments) their impact is still reduced since the Council tends to rule in favor of the defendant in the majority of cases. Also the data suggest that plaintiffs target individual violations of administrative morality in majority of cases rather than institutional violations. These findings also suggest that popular actions regarding administrative morality may have only a limited impact on governmental performance.

In considering the overall significance of these cases it is important to note that a key reason why the Council rules against plaintiffs is that plaintiffs fail to provide enough evidence of the violation of administrative morality. Judges undoubtedly need evidence to make informed decisions. But the weakness of the evidence in many of these cases suggests a key limitation of the popular action mechanism. Popular actions were intended to allow any citizen to demand responsibility from the government. But citizens without legal training are less likely to present adequate evidence or be able to navigate the complex legal procedures and formalities involved in these cases. Popular actions could have a higher potential if they are conceptualized not as public actions but as ordinary actions without the formalities of administrative actions. If that is the case it may be necessary to accept that the purpose of popular actions is different from the one conceived by the framers. Auxiliary justice Molina argued that, in fact, popular actions are not perceived as constitutional actions (public actions). That these actions have been implemented as ordinary administrative actions and that consequently the litigant is more likely to succeed if he has had legal

training. Only through legal training the litigant could prove that there was a violation of a collective right.<sup>371</sup>

The data suggest that there is an exception of the pattern of rulings against the plaintiffs when referring to cases of individual rights' violations. In cases of individual rights' violations plaintiffs win in 58% of the cases, while in cases of financial malfeasance and willful misconduct plaintiffs lose in majority of the cases. The data suggest that the Council gives importance to the symbolic value of the rulings when referring to individual rights.

Finally, with regards the evolution of popular actions at the Council the situation of plaintiffs has improved in a little proportion in the time frame 2008-2011. In cases of individual plaintiffs, in a first period of the rulings (1997-2000) the defendants won all cases while in a second period (2001-2007) the defendants won 79% of the cases; in a third period (2008-2011) defendants won 72% of the cases. These data reveal a variation in favor of the plaintiffs that could be related to a change of perception of justices in relation to plaintiffs or to an improvement in the quality of the suits.

These findings suggest that popular actions have only partially fulfilled the framers' expectations. Individuals are the most frequent plaintiffs who have been using popular actions to enforce administrative morality and this is evidence that these actions have motivated citizen engagement. In spite of this, the possible impact of these suits seems to be limited to low-level cases given that the majority of suits focus on individual mistakes of the administration rather than on addressing broad policy

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<sup>371</sup> "Interview Roberto Molina."

mistakes. Suits on administrative morality have mainly focused on cases of financial malfeasance confirming that administrative morality is perceived as a check for the management of public funds. With regards the rulings, the Council of State has been conservative by frequently granting the actions to the defendants (mainly governmental agencies at the local and national level).



## Chapter 6: Interpreting “administrative morality” for public administration

Studies of the administrative interpretation of legal rules often find that administrators creatively adapt these rules to their settings.<sup>372</sup> This creative adaptation is shaped by prominent professional interpretations of legal requirements, and these professional interpretations at times vary considerably from a strictly legal interpretation.

Institutionalization of legal reforms is a core part of the implementation process of these reforms and it contributes to develop a clear understanding of what new legal institutions imply. In this chapter I will analyze the institutionalization of administrative morality as part of the anticorruption and transparency policy of the Colombian government and the way in which administrators have implemented it. I focus on public administrators’ understanding of administrative morality and the way in which this notion applies to their decision-making processes. The research question that I will address in this chapter is: How do public administrators interpret and apply constitutional and judicial criteria of administrative morality?

There are two main governmental agencies that develop policy criteria with regard the anti-corruption campaign and transparency in governmental performance: the Presidency and the National Direction for Planning. One would expect to find administrative morality and popular actions as key mechanisms of the anti-corruption

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<sup>372</sup> Edelman, Lauren B. 1990. “Legal Environments and Organizational Governance: The Expansion of Due Process in the Workplace.” *American Journal of Sociology* 95(6): 1401-1440. Edelman, Lauren B. 1992. “Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law.” *American Journal of Sociology* 97(6): 1531- 1576. Epp, Charles R. 2009. *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* (Chicago: University of Chicago Press).

and transparency policies given that the Constitution of 1991 thought about them as such. Therefore in this chapter I will focus on anti-corruption and transparency documents from these agencies.

Also I will analyze interviews with three key public administrators who referred to the decision-making process with regards administrative morality and the criteria that public administrators apply on this topic.

Theories on the institutionalization of new legal norms provide somewhat competing explanations. As described below, some scholars have characterized institutionalization of legal reforms in the US as processes of symbolic compliance, others describe it as the creation of new systems of accountability based on professional values, and others refer to the interaction of different normative systems. I will use these theories as frameworks to describe the institutionalization process of administrative morality in Colombia. My purpose with this chapter is not to test the applicability of these theories to the Colombian context but to use them as lenses to improve understanding of the development of the concept of administrative morality as it is applied by governmental agents. I will use policy documents and interviews to achieve this purpose.

### **Theoretical conceptions of the institutionalization of legal norms**

Whether and how new legal norms are institutionalized in administrative processes is a subject of much research. An influential body of scholarship led by Lauren

Edelman<sup>373</sup> argues that when legal reforms are ambiguous public organizations mimic what others are doing to symbolize compliance to legal demands. In the case of the Civil Rights Act of 1964 bureaucratic agencies created visible structures (EEO offices) and rules that would allow them to verify compliance in case of litigation. Then, what started being just bureaucratic symbolic compliance was later adopted by courts as the right interpretation of the Civil Rights Act and the way for demonstrating compliance. In this case bureaucratic interpretation of a legal reform shaped the courts' understanding and implementation of a legal institution.

Another answer to the question of the role of bureaucracies in legal reforms' implementation is that legal reforms are capable of fostering institutional changes when advocates of implementation outside of public agencies and inside of them press for institutionalization. In the US Epp argues that the rights revolution generated profound institutional changes in areas of police use of force, workplace sexual harassment, and playground safety.<sup>374</sup> According to Epp, under pressure from these internal and external advocates of change, a new model of legalized accountability has grown and consolidated by the creation of administrative regulations, training, and systems of internal oversight to enforce compliance of the legal reforms. According to Epp these reforms went considerably beyond what Edelman has characterized as merely symbolic compliance. These mechanisms of implementation suggest that bureaucratic professional norms and identities adapted to these internal and external pressures, thus

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<sup>373</sup> Edelman, "Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law."

<sup>374</sup> Epp, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State*.

fostering legal reforms' implementation.

Alternatively it is possible that formal law is incapable of displacing other normative bases for administrative action. The theory of "legal pluralism" posits that in many contexts formal law competes with other normative orders and fails to control the field. One of characteristics of the implementation process of the Colombian constitution of 1991 is its interaction with legal norms that were in place before 1991. These norms that pre-existed the framing of the constitution could have influenced bureaucrat's understanding of the legal reforms that came with the Constitution. Merry argues that in a certain society two or more legal systems can coexist in the same social field and generate complex interactions among them.<sup>375</sup> These legal systems could be state and non-state regulations or in other words the interaction between norms could be fostered by regulations set by the government or regulations set by other social groups such as corporations, universities, clubs, religious groups, etc. The interaction of these different types of regulations is a complex process that brings as a result the understanding of "law" that is actually applied.<sup>376</sup>

In the case of administrative morality, anti-corruption and transparency regulations that were already in place by 1991 could have shaped administrators' understanding of its application and possible impact. It is also possible that non-state regulations could have shaped the bureaucratic understanding of this collective right. Norms based on religious beliefs or individual ethical values may be part of what governmental agents take into consideration in their daily decision-making processes.

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<sup>375</sup> S.E. Merry, "Legal Pluralism," *Law & Soc'y Rev.* 22(1988).

<sup>376</sup> J. Griffiths, "What Is Legal Pluralism," *J. Legal Pluralism & Unofficial L.* 24(1986).

Merry and Griffith, scholars who support the theory of legal pluralism, argue that there are multiple possible effects to the interaction between legal orders in society.<sup>377</sup> One option is that state law penetrates and changes other normative orders and so state law could be capable of fostering institutional changes. Other option could be that nonstate normative orders resist legal reforms and try to avoid its implementation; it is also possible that nonstate normative orders strategically adapt to legal reforms by capturing the symbolic capital of state law.<sup>378</sup> By analyzing data from interviews with strategic governmental agents I will explore the elements related to the interaction between the implementation of administrative morality as defined in the Constitution and by the Courts, policy documents, and professional bureaucratic values.

These three theoretical frameworks provide somewhat competing conceptions of institutionalization of legal reforms. As I go through the data I will analyze whether the institutionalization of administrative morality has meant an empty symbolism, a deeper institutional reform due to forces internal and external to governmental organizations, or whether it has failed to penetrate social phenomena given its interaction with other norms.

### **Data and methods**

Policy documents on the anti-corruption campaign and transparency are made by the Presidency and the National Direction for Planning. In this chapter I analyze these documents in order to identify the governmental understanding of administrative

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<sup>377</sup> Merry, "Legal Pluralism." Griffiths, "What Is Legal Pluralism."

<sup>378</sup> Merry, "Legal Pluralism."

morality and its expected impact on public administration.

I will also analyze interviews with three key agents with the purpose of exploring the factors that bureaucrats take into consideration in their decision-making process related to administrative morality. These three interviewees are managers at organizations of the National level of government and they have experience in different policy areas.

### **Policy documents**

When analyzing policy documents related to anti-corruption strategies and transparency it is surprising to find that they do not mention administrative morality or popular actions. The document “Strategies for the construction of an anticorruption and citizen service’s plan” by the Presidency includes four types of strategies: calculating corruption risks per governmental agency, reducing procedures (red tape), accountability (rendición de cuentas), and improving citizen services. With regards citizen engagement this document focuses on accountability as a means to bring the public closer to the administration. It focuses on strengthening what is called “public scenarios” for accountability in order to provide citizens with transparent information of what administrators are doing. These mechanisms strengthen values like transparency and trust in institutions but they do not refer to administrative morality. Thus, the governmental strategies for transparency and citizen services do not contemplate administrative morality or popular actions as part of the anti-corruption strategies.

The Secretary of Transparency, a division of the Presidency, is responsible for

anti-corruption policies in the country by focusing on prevention and sanction of corrupt behaviors. The Secretary designs specific policies based on policy areas and levels of government (national, regional, or local) given the assumption that corruption varies from one level to another. On a video in their website the Secretary of Transparency invites citizens to participate in policy making through three mechanisms: social media<sup>379</sup>, through email address, and through the website [www.urnadecristal.gov.co](http://www.urnadecristal.gov.co) ([www.glassurn.com](http://www.glassurn.com)). The website “glass urn” encourages citizen participation by allowing individuals to ask questions on specific policy topics such as protection to children and adolescents, protection to national parks, and homeland security.<sup>380</sup> The people can post their questions or comments on the website and the government answers these comments. The website is organized around three categories: governmental transparency, citizen participation, and government answers. Thus, the website focuses on providing visibility to specific policies that are considered salient. It also allows citizens to ask questions and receive answers from the government. There is no mention of administrative morality of collective rights on the website.

The Secretary for Transparency coordinates the Observatory for anticorruption and integrity.<sup>381</sup> The Observatory is a recent initiative of the government and is an information system that aims to foster knowledge generation, dialogue, and education with regards the anti-corruption campaign. The Observatory works under the assumption that through information different parties such as public agencies, civil

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<sup>379</sup> The secretary mentions specifically Twitter with the hash tag #nomascorruption (#nomorecorruption).

<sup>380</sup> <http://www.urnadecristal.gov.co/tematicas>

<sup>381</sup> <http://www.anticorruption.gov.co/observatorio>

society, the private sector, the international community, and citizens can create synergies to fight corruption. In order to achieve this goal the Observatory engages in three activities: information management, fostering dialogue amongst parties with regards corruption, and providing education on individual integrity.<sup>382</sup>

The Observatory articulates efforts of five types of organizations to achieve these purposes: the Secretary for Transparency, the National Commission for Citizenship, the National Commission for Moralization, Regional Commissions for Moralization, and oversight agencies. Ministers from different areas, justices, members of oversight agencies, congressmen, and administrators are members of the commissions for moralization and their function is to coordinate annual anticorruption strategies in order to pursue transparency, efficiency, and morality in public administration.<sup>383</sup> In the context of the Observatory the notion of morality is used to refer to the governmental commissions that focus on anti-corruption policy. The presence of national and regional commissions for moralization speaks about a policy where morals are a parameter for bureaucratic performance. In spite of this reference to morals, administrative morality and popular actions are not mentioned as part of the Observatory's functions. Thus, morality is a core notion in the Observatory but it is not enforced through popular actions. The Observatory favors information management, education, and citizen engagement over other legal mechanisms like administrative morality.

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<sup>382</sup> <http://www.anticorruccion.gov.co/observatorio>

<sup>383</sup> [http://wsp.presidencia.gov.co/Prensa/2011/Diciembre/Paginas/20111209\\_01.aspx](http://wsp.presidencia.gov.co/Prensa/2011/Diciembre/Paginas/20111209_01.aspx). A graph of the structure of the Observatory is included in Appendix F.



The National Direction for Planning also provides guidelines for administrators. Specifically, the National Council for economic and social policy (CONPES), a division of the National Direction for Planning, sets policy that relates to bureaucratic performance. I found four documents related to bureaucratic performance<sup>384</sup> but there was not a specific document on administrative morality or popular actions. The Document 3186, A national policy for improving efficiency and transparency in public contracting, analyzes the negative effects of corruption on public contracting and argues that corruption harms public morals and the legitimacy of the government. This document refers to the Statute for public contracting<sup>385</sup> as a development of constitutional principles for public administration such as morality. These are the only references to morality in this document and there is no reference to administrative morality as a collective right or to popular actions.

The Document 3248, *Renewing Public Administration*, analyzes modernization of the government based on three characteristics: fostering a managerial government, participation, and decentralization.<sup>386</sup> According to this document a modern government is achieved through austerity, efficacy and efficiency, results-oriented administration, and flexibility. In this document there is no mention of administrative morality or popular actions.

The Document 3249, *A Policy of Public Procurement for a Managerial State*,

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<sup>384</sup> CONPES, "Document 3186. A National Policy for Improving Efficiency and Transparency in Public Contracting." "Document 3249. A Policy of Public Procurement for a Managerial State," (Bogotá2003). "Document 3248. Renewing Public Administration," (Bogotá2003). "Document 3294. A Renovation of Public Administration: Result-Based Performance and Reform of the Performance Review System," (Bogotá2004).

<sup>385</sup> Congreso de la República de Colombia, "Ley 80," (Bogotá1993).

<sup>386</sup> CONPES, "Document 3248. Renewing Public Administration."

argues that there are four pillars to governmental contracting out: the approval of a new statute for public procurement, the definition of a new institutional frame, implementation of a comprehensive system for online contracting out, and training.<sup>387</sup> These strategies focus on improving efficiency, transparency, and a managerial approach to the Colombian public administration. This document does not mention administrative morality or popular actions.

The Document 3294, *Renovation of Public Administration: Result-Based Performance and Reform of the Performance Review System*, aims to strengthen a result-oriented public administration through processes of evaluation, follow-ups, and accountability.<sup>388</sup> According to this document the goals of the performance review system are: increasing the impact of public policies and public organizations, improving the application of efficiency and transparency in planning public funds' allocation, motivating the application of transparency in public organizations through citizen engagement. This document focuses on transparency and efficiency in the Colombian public administration but it does not refer to administrative morality or popular actions.

In sum, it is striking that among the various documents addressing administrative corruption and accountability administrative morality is never mentioned. These documents provide guidelines for the improvement of governmental performance through the reduction of corruption and strengthening transparency. These documents focus on a managerial approach and a result-oriented performance by

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<sup>387</sup> "Document 3249. A Policy of Public Procurement for a Managerial State."

<sup>388</sup> "Document 3294. A Renovation of Public Administration: Result-Based Performance and Reform of the Performance Review System."

highlighting the importance of citizen participation. The documents refer to morality as a principle that is violated by corruption but there is not further development of this notion and there is no reference or criteria for the implementation of the collective right of administrative morality. Consequently, policy documents do not institutionalize administrative morality or popular actions.

If policy documents are not providing policy guidelines for administrative morality in governmental performance, how do administrators implement it? In the next section I will analyze interviews with administrators.

### **Administrative morality in agents' decision-making processes**

Administrators at different levels of government and in different policy areas implement administrative morality in diverse ways. In this section I will analyze the interviews with four key actors on governmental institutionalization of administrative morality: three governmental agents and the director for legal affairs of the NGO

**Transparency Colombia**. These four interviewees have wide experience in governmental performance in different policy areas and they represent different approaches to the institutionalization of administrative morality.

The first interviewee is William Espinosa, the Provost for Academic Affairs for the **Superior School for Public Administration** that is the governmental organization that provides training to public administrators. As the head of academic affairs of the school Espinosa designs and coordinates research, teaching, and service activities in the training for public administrators at the undergraduate and graduate levels. Espinosa's

experience and knowledge in training public administrators brought valuable elements of the teaching strategies that the school uses with regards administrative morality and ethics in public administration.

I will also analyze my interview with Camilo Orrego who has experience in two major fields that are highly relevant for my research. Orrego was the head legal counsel of the city of Bogota (the biggest city and capital of Colombia) for seven years and currently works as a policy expert on the recently created **National Agency for the Judicial defense of the government**. Based on his experience while being the head legal counsel of Bogota Orrego provided core information about how local governments implement administrative morality. Also, and based on his current position, Orrego provided valuable insights on the possible impact of administrative morality on governmental performance.

Eduardo Arce who is the Legal Vice-President of the Fiduciary “La Previsora” has worked for the government for seven and a half years and has experience working at different policy areas at the national level. Based on his current experience Arce referred to the variation of administrative morality in different regions of the country. Since majority of the court cases on administrative morality decided by the Council of State are cases on financial malfeasance the testimony of Arce is highly relevant given that the Fiduciary “La Previsora” develops bank-like activities and manages pensions from public teachers in the country.

The last interview I will analyze in this section captures the perception of civil society organizations that focus on anticorruption and transparency in public

administration. **Transparency Colombia** has been a key actor in promoting and preventing corruption in public organizations for the last 15 years and it has focused on bringing transparency back to the public agenda. My interview with the director for legal affairs of Transparency Colombia, Marcela Restrepo, I gathered key information on the perspective of a civil society organization on governmental performance. Specifically this interviewee referred to her experience on the strategies that civil society organizations could use to support the anticorruption campaign and keeping public organizations accountable. Transparency Colombia works with public organizations in different areas of the country so Restrepo provided highly relevant information on how governmental ethics vary from one place to another.

My analysis of these interviews allows me to characterize different sides of the spectrum with regards the institutionalization of administrative morality. Although these four interviews are not a representative sample of governmental agents and NGOs' perceptions on administrative morality they provide evidence of the sharp differences between them. These interviews tell the story of the lack of a shared discourse on administrative morality and its implications for the Colombian public administration.

***William Espinosa, Provost for Academic Affairs of the Superior School for Public Administration***

The Provost for Academic Affairs of the Superior School for Public Administration argued that administrative morality refers to bureaucratic legal compliance but it goes

beyond that:

“... I guess that they [the constitutional and governmental notion of administrative morality] talk about administrative habits that regulate governmental behavior, I mean, the law but not only the law; it is the law plus something anchored in traditions, like habits ... so [duties related to] administrative morality are explicit in principles like economy, efficiency, efficacy... but it is about ethics, ethics that overcome all...”<sup>389</sup>

Thus, according to Espinosa administrative morality is related to good habits and values like economy, efficiency, and efficacy. He argued that by complying with these principles governmental agents are loyal to ethical standards that ensure the common good.<sup>390</sup> This interviewee defined administrative morality by relating it to the ethical standards that bind bureaucratic behavior to the purpose of the state, which is to serve the public. Although Espinosa provided philosophical elements to the ethical component of bureaucratic behavior it is not clear in this interview what administrative morality is.

With regards the institutionalization of administrative morality and given his experience as the Provost of Academic Affairs he referred to the curriculum of the School and its potential for training public administrators. Espinosa argued that the curriculum is good but it lacks essential elements such as training in socio-legal studies and humanities, and ethics. In his opinion it would be necessary to include this elements in the curriculum in order to modernize it and make it more flexible so it would provide public administrators with the necessary skills.<sup>391</sup>

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<sup>389</sup> "Interview William Espinosa," (2012).

<sup>390</sup> Ibid.

<sup>391</sup> Ibid.

In spite of Espinosa's skepticism towards the current training provided by the school he acknowledged the core role of formal education in bureaucratic performance. He argued that training has the potential for improving the quality of administrative decision by motivating responsibility in governmental agents: "Why does the Colombian government is so weak on its performance? It is because of that, because it does not have agents with training for making responsible decisions and that what is college could give".<sup>392</sup>

Espinosa's conception of administrative morality and its institutionalization tells the story of a notion that goes beyond the law that could have the potential to improve bureaucratic performance by connecting it to the common good but it is unclear how to implement this notion. With regards the institutionalization of this concept it is noticeable that in his opinion the curriculum of the School does not have elements that would be necessary to provide training on administrative morality and ethical values. In spite of this limitation Espinosa sees potential on formal training to implement administrative morality and ethical values in bureaucratic contexts. In his opinion there are cases in Colombia of successful bureaucratic performance. That is the case of Medellin (the second largest city in the country). He explained that in Colombia there is a wrong assumption that a successful agent is the one who applies the law when in fact success should be dictated by one agent's capacity of solving problems. In his opinion the "Empresas publicas de Medellin" is successful because all governmental agents there focus on solving problems and they have the power to do it while in other regions

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<sup>392</sup> Ibid.

and organizations public agents live out of fear. Espinosa explained that training could foster an understanding of performance based on responsibility, which is an example of successful bureaucratic performance.<sup>393</sup>

What Espinosa describes as administrative morality is not an action of symbolic compliance with this collective right nor he refers to internal and external forces that interact to create new mechanisms of bureaucratic accountability. Espinosa describes his own approach to administrative morality that is based on legal compliance but it is complemented with ethical notions and values. These notions and values are reflected in what he thinks could improve bureaucratic training that is emphasis on legal training, professional ethics, and humanism.

***Camilo Orrego, former head legal counsel for the city of Bogotá***

Camilo Orrego who was the head legal counsel for the city of Bogotá referred to administrative morality in a different way. Orrego argued that administrative morality was not a fundamentally new notion to the Constitution of 1991:

“Accepting that it is something new would be as much as saying that governmental performance before the Constitution of 1991 aimed to privilege particular interests and there is not evidence that this is the case because on the constitution of 1886 clearly stated that governmental performance focuses on the public interest; that has been the basis for our rule of law, it is tradition”.<sup>394</sup>

Orrego mentioned that the notion of a moral public administration as the

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<sup>393</sup> Ibid.

<sup>394</sup> "Interview Camilo Orrego."



governmental performance that focuses on the common good existed prior the constitution of 1991. The demand for governmental agents to pursue the common good in their actions was already established in the constitution of 1886 so, according to Orrego, what was new to the constitution of 1991 was the entitlement for individuals to demand compliance through the jurisdiction.<sup>395</sup>

When explaining the notion of administrative morality and violations to it Orrego argued that they imply two things. On the one hand, a violation of administrative morality implies corruption; an illegal behavior displayed by the public agent. On the other hand, a violation of administrative morality implies that the public agent performed based on the wrong reasons, reasons different from the common good. Orrego argues that this diversion from what should be the right motivation (the common good) is often related to a mismanagement of public funds but that this is not an essential element to all violations of administrative morality.<sup>396</sup>

Orrego explained that governmental agents follow a rational and deductive process to analyze laws and statutes in a specific situation and that these regulations allow them to judge whether their behavior is legal and if it complies with administrative morality. As examples of regulations he mentioned the anticorruption statute and the law 734 that regulates conflict of interests and other circumstances that could bias agents' objectivity in the decision-making process.<sup>397</sup> In Orrego's opinion agents' decision-making process is rational and it allows them to differentiate mere

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<sup>395</sup> Ibid.

<sup>396</sup> Ibid.

<sup>397</sup> Ibid.

legality from compliance with administrative morality. It is also noticeable that the regulations he referred to (the anti-corruption statute and the law 734) relate to ethics in governmental performance.

According to Orrego regulations provide governmental agents with information about governmental goals which is what determines compliance of administrative morality: "...you know if you are behaving ethically, complying with administrative morality, when you realize that in your decision you pursued governmental goals ... So this is about whether your goals when performing match public goals, and public goals you can find in the constitution and are developed by laws, policy (CONPES) documents, administrative regulations, governmental strategies and programs, and public investments".<sup>398</sup> For Orrego regulations provide governmental agents with information about governmental goals and they determine administrative morality compliance.

Orrego analyzes morals as a component of administrative morality and he argues that it relates to bureaucratic behavior in two ways. On the one hand, when public agents are appointed they receive the trust of the entire society and that imposes on them the demand for honoring that trust. On the other hand, the public servant should behave with rectitude and by following ethics when managing public funds because they belong to the entire society.<sup>399</sup>

With regards the institutionalization of administrative morality Orrego differs from the Provost for Academic Affairs. Orrego explained that he did not receive training on administrative morality and that in his opinion this was a matter of individual

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<sup>398</sup> Ibid.

<sup>399</sup> Ibid.

formation rather than training: "...I mean, I believe that ... this is an issue of personal formation, this is a matter of values...".<sup>400</sup> Orrego explained that when a public agent gives oath to protect the constitution and the law he does not need a paper that explains what administrative morality is. To that extent administrative morality, in Orrego's opinion, lies on "the bottom of each person": "This is like something like when your parents, at home, at elementary school they teach you that you should not steal".<sup>401</sup> Thus Orrego argued that training would not contribute to the implementation of administrative morality because it cannot instill the right motivation to public agents.

Although Orrego conceptualized administrative morality as a two dimensional concept (legal compliance and motivation) he argued that in a daily basis public agents interpret administrative morality as legal compliance: "...in the basic language of a public agent I mean, day by day, the public agent believes that he acts correctly because he complies with the law and his morals is the law because the law is, bottom line, a positive criteria and the law tells you what is right and what is wrong. If you, as a public agent as a servant of the law, comply with it and make others to comply with it then you are right... and I believe this is the day-to-day life of our public agents, it is ones day-to-day".<sup>402</sup>

According to this interviewee then there is a different conception of administrative morality that focuses only on the law. Although courts have ruled in relation to administrative morality with the purpose of clarifying this notion Orrego

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<sup>400</sup> Ibid.

<sup>401</sup> Ibid.

<sup>402</sup> Ibid.

argued that not everybody has access to court cases. Orrego explained that the courts develop certain criteria and they refer to legal principles as guidelines for administrative morality but that it is not realistic to expect that all individuals would have access to these sources. In a similar way it would not be realistic to expect that the people would get to read about legal principles and consequently a more simplistic approach to administrative morality could be more common amongst parties who apply the concept.<sup>403</sup> This suggests the existence of different understandings of administrative morality.

Thus, Orrego provides elements of an understanding of administrative morality that is based on different normative orders. This interviewee argued that the regulations previous the constitution of 1991 regulations ensured that governmental agents perform with the right motivation and that was the basis for administrative morality. Also, regulations on ethics and transparency in public administration inform bureaucratic decision-making. In addition to these different normative sources that interact in the implementation of administrative morality Orrego referred to the different conception of other administrative agents for whom administrative morality means mere legal compliance. These elements provide evidence of legal pluralism with regards this notion.

***Eduardo Arce, Legal Vice-President of the Fiduciary “La Previsora”***

A different approach to administrative morality was presented by Eduardo

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<sup>403</sup> Ibid.

Arce, the Legal Vice-President of the Fiduciary “La Previsora”. Eduardo Arce, who has been working for the government for seven and a half years, explained that governmental agents apply administrative morality when they comply with the law, the constitution, transparency, and correctness in relation to their behavior, in relation to the processes they lead, and the decisions they make.<sup>404</sup> It is noticeable that in his initial description of administrative morality Arce refers to legal regulations like the law and the constitution but he also refers to some concepts that seem to go beyond legality such as transparency and correctness.

With regards the legal component Arce argued that the evolution of administrative morality has led to the creation of rules that work as guidelines for public agents in their decision-making processes: “So, nowadays all public agencies have internal codes of conduct, ethics codes, corporate government manuals... That, plus the required training on the disciplinary regulations ... help public servants to make a decision in relation to their compliance of administrative morality”.<sup>405</sup> It is noticeable that the regulations mentioned by this interviewee relate to ethical behavior in public administration such as codes of ethics or the disciplinary regime for public agents.

In relation to the supra legal component of administrative morality Arce explained that there are two possible approaches to administrative morality. The first approach is based on legality and consequently legal compliance implies compliance with administrative morality. The second approach sees administrative morality is a concretion of morals and consequently it goes beyond legality. In this second approach

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<sup>404</sup> "Interview Eduardo Arce."

<sup>405</sup> Ibid.

public agents understand their performance as a fulfillment of moral obligations and individual understanding of morality: "... it depends on who is giving you the answer. Based on my formation the term administrative morality is a type, a specific form of a moral command but not everybody can have the same formation or that approach and so for them it [administrative morality] would be only a tool that based only on a constitutional norm or a legal obligation".<sup>406</sup> This testimony points out to the different approaches to administrative morality depending on individual formation and individual understanding of morality. Arce's perception highlights the role of ethical and moral norms in the implementation of administrative morality.

This interviewee also highlighted the variation in conceptions of administrative morality among regions of the country and among different levels within an organization. With regards geographical variations Arce explained: "There are regions of the country where in spite of the fact that they receive training, all the stuff related to administrative morality, in fact, that thing does not stick. But it is also true that there are organizations with bad reputation but that try hard to improve it".<sup>407</sup> This quote speaks to the different approaches to administrative morality that different organizations choose. In spite of the fact that all organizations in all regions follow the same regulations and policy documents some implement it in a more efficient way than others.

In relation to the variation among levels of organizations Arce argued that in higher levels of organizations, agents with more discretion are more sensitive to

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<sup>406</sup> Ibid.

<sup>407</sup> Ibid.

administrative morality. He argued that at the managerial level agents are more exposed to public pressure of the media and civil society organizations and consequently they are more careful in the application of administrative morality.<sup>408</sup> More research would be necessary to explore whether exposure to control of the media and civil society organizations shape managers' decision-making with regards administrative morality. Also, future research could clarify whether street-level bureaucrats implement administrative morality in a different way from managers.

In relation to the institutionalization of administrative morality, specifically when referring to training, Arce explained that public agents have several opportunities to learn about transparency and anti-corruption mechanisms. According to Arce there are conferences on transparency organized by different Ministries. In Arce's opinion transparency is the "twin sister" of administrative morality and consequently when receiving training on it public agents are learning about administrative morality. Arce also mentioned that the Administrative Department for the Public function and some oversight agencies like the "Procuraduría General de la Nación" have developed guidelines related to corruption. In his opinion these institutional mechanisms had helped to make more specific the dimension of administrative morality that goes beyond legality and that otherwise would be extremely vague: "So let's say that going beyond formal legality, that I do believe that public agents know it very well specifically with regards their own duties, that set of institutional tools that are presented as public policies and that have been given to governmental agencies, had helped public agents

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<sup>408</sup> Ibid.

to bring to the ground all those concepts and contexts that probably otherwise wouldn't be clear.”<sup>409</sup>

This interviewee seemed to recall different forms of institutionalization of administrative morality like training and policy documents and he had a very positive impression of those institutional tools. It is noticeable that all the institutional tools he mentioned focused on transparency and anti-corruption mechanisms but not to administrative morality or popular actions. In his perspective those institutional mechanisms have provided him with the necessary elements to understand administrative morality in spite of the fact that there is no specific policy or training on administrative morality.

It is also noticeable that when referring to these trainings and documents Arce suggested that sometimes they motivate organizations to develop certain behaviors as a sign of symbolic compliance: “One notices the rush for introducing this topic [transparency] but in several cases, I cannot say that it is in all cases... I believe that it is about answering what the public wants to hear and to generate a perception that we are working, that we are honest, that we are transparent, and consequently that our administrative behavior fulfills morality”.<sup>410</sup> To this extent Edelman’s theory on symbolic compliance could be applicable to administrative morality. Policies on transparency and anti-corruption mechanisms could have led administrative organizations to prove symbolic compliance but there is no evidence that the courts adopted administrative behaviors as proofs of compliance with administrative morality. Further research would

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<sup>409</sup> Ibid.

<sup>410</sup> Ibid.



be necessary on this issue.

Arce was the only interviewee who referred specifically to the impact of administrative morality over governmental agencies. “Indeed, the topic of administrative morality would not have much importance, I mean, people would not pay that much of attention to it if it were not for two enforcement mechanisms: one that is formal and institutional ... and another that is non-institutional or civil”.<sup>411</sup> When referring to formal mechanisms Arce mentioned the role of oversight agencies when investigating violations of administrative morality. With regards non-institutional mechanisms Arce highlighted the role of the media, interest groups, oversight groups, and civil society organizations. In his opinion the combination of these two types of strategies is what gives salience to administrative morality in the public agenda.

Arce argued that litigation has low impact on governmental: “We don’t have a stable bureaucracy ... and so the rulings with this purpose [rulings enforcing administrative morality] come when the individuals responsible for the violations are already gone, then it is necessary to initiate other types of enforcement mechanisms like disciplinary and fiscal actions but inside the organization the message we receive is like oh! the rogue agent is already gone”.<sup>412</sup> Arce points out to judicial congestion and the lack of stability in public organizations as causes of the low impact of popular actions on organizations. Judicial congestion implies that rulings on administrative morality cannot be implemented at a timely manner and the lack of stability implies that it is easier to blame individuals who are not working at the agency anymore. To this extent

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<sup>411</sup> Ibid.

<sup>412</sup> Ibid.

Arce suggested that violations of administrative morality are perceived as individual mistakes rather than institutional violations.

Thus, Arce exemplifies a mixed approach to administrative morality and its' institutionalization. He concurs with Espinosa and Orrego about the two dimensions of administrative morality: it is the law but it is something else. When defining the extra legal aspect to administrative morality Arce's testimony differs from other interviews. Arce spoke about the different conceptions of administrative morality depending on the individual understanding of morality. Also he referred to the regional and organizational variation in the conception of administrative morality. This lack of a unique notion of administrative morality exemplifies the existence of several layers of norms that interact in the implementation of administrative morality. Arce referred to constitutional norms, legal norms, ethical norms, and policies as institutional mechanisms that guide bureaucratic decision-making and that explain different understandings of this notion. These different layers of norms and regulations suggest that legal pluralism is applicable to the implementation of administrative morality.

Arce also explained that there is a combination of formal and informal mechanisms that have fostered the consolidation of administrative morality. As formal mechanisms he referred to policy documents and training that bureaucrats receive but none of these mechanisms is specifically focused on administrative morality. Arce emphasized the role of informal mechanisms like the media and civil society groups in promoting transparency and anti-corruption as core topics in the public agenda. This combination of formal and informal mechanisms exemplifies what Epp called external

advocates and their role in implementing legal reforms. There is no evidence in Arce's testimony of professional bureaucratic values or internal advocates supporting the implementation of administrative morality.

Arce's perception also suggested that the implementation of administrative morality in bureaucratic organizations has been an application of Edelman's symbolic compliance. This interviewee argued that due to institutional mechanisms such as training and policy documents organizations have tended to prove symbolic compliance that does not necessarily reflect administrative performance.

Arce described the institutionalization of administrative morality by referring to training and policy documents on transparency and anti-corruption mechanisms. It is noticeable that the institutional mechanisms that he identified as a development of administrative morality do not refer specifically to it or to popular actions.

### **Administrative morality and *Transparency Colombia***

With over fifteen years of experience in this area the NGO Transparency Colombia is an important actor with regards the implementation of transparency and anti-corruption policies. This organization has focused on prevention of corruption: "Transparency Colombia wants to promote transparency and integrity in governmental agencies in Colombia, we want to contribute to the promotion of transparency".<sup>413</sup> Transparency Colombia provides a key perspective of civil society's organizations with regards transparency and anti-corruption policies. In this section I will analyze my

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<sup>413</sup> "Interview Marcela Restrepo."

interview with the Director for public affairs of this NGO, Marcela Restrepo.

Restrepo explained that administrative morality is an adaptation of Christian ethics to public service but in her opinion the creation of administrative morality and its implementation lacks a rigorous discussion of its implications. Restrepo argued that administrative morality refers to the ethical demands that governmental agents should comply with in a similar way than medical doctors have their ethical codes. These ethical codes are higher demands than other types of standards.<sup>414</sup> In Restrepo's opinion this understanding of the ethical standards for governmental agents has not been yet developed in Colombia. "One thing is if I am a very decent person and all but a different thing is when I understand that I have a collective responsibility, that I have in my hands people's lives. That is a different dimension."<sup>415</sup>

In these quotes Restrepo identified different aspects to administrative morality. The first aspect is related to the ethical component that applies to public administrators in a similar way that medical ethics applies to doctors. Second, this ethical component is related to public trust and administrators' responsibility of managing public resources that could benefit the entire population. The third component is related to the social understanding of the ethical demands of the public service. Restrepo referred to the development of this ethical understanding as dependant of social evolution. In more developed societies (specifically she mentioned the anti-corruption campaign in Spain) there is a different level of institutional development that allows society to understand and implement ethics in public administration.

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<sup>414</sup> Ibid.

<sup>415</sup> Ibid.

According to Restrepo these levels of development vary considerably from one region of the country to another: “And so when we work with governmental agencies we ask them, ok how far are you willing to go? The hard way or the easy way? And we have sat with governors like Sergio Fajardo [governor of Antioquia] and we have told him ok governor, we are very sorry but you cannot keep talking here about promoting transparency, no, you have to go after the bad guys, you have all the institutional capacity, but I cannot ask the same to the mayor of San Jose del Guaviare, no”.<sup>416</sup> In this quote Restrepo refers to different levels of institutional capacity that allow different organizations in different regions of the country to implement ethics and administrative morality in public administration.

Restrepo also related administrative morality to non-governmental rules that refer to ethical behaviors and rectitude in social life. These norms could shape bureaucratic understanding of administrative morality: traditional good manners, Christian morals, and ethical principles: “So the reading we give to morality is like the laws of civility by Carreño<sup>417</sup>, like Christian morals, like stealing is bad, they [the framers] took them and like that, they copied it to governmental performance...”.<sup>418</sup>

Restrepo’s portrayal of administrative morality describes the interaction of different types of norms, governmental and non-governmental, that shape the conception of administrative morality. Restrepo mentioned the constitution as the key

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<sup>416</sup> Ibid.

<sup>417</sup> A traditional handbook on good manners. Manuel Antonio Carreño, *El Manual De Carreño: Manual De Urbanidad Y Buenas Costumbres Para Uso De La Juventud De Ambos Sexos En El Cual Se Encuentran Las Principales Reglas De Civildad Y Etiqueta Que Deban Observarse in Las Diversas Situaciones Sociales* (Libros de El Nacional, 2001).

<sup>418</sup> "Interview Marcela Restrepo."

governmental norm with regards administrative morality. With regards informal norms she mentioned ethics, social rules based on institutional development, and non-governmental rules that refer to ethical behaviors and rectitude in social life. The interaction of governmental and non-governmental rules is described by legal pluralism as the implementation process of legal reforms and that seems to be the case of administrative morality according to Restrepo.

## **Conclusion**

Policy documents and interviews suggest two different interpretations regarding bureaucratic interpretation of administrative morality. The first, based in the government's official anticorruption and transparency policy documents, is a story of the complete absence of administrative morality from the anticorruption and transparency discourse of the government. This is a striking finding because it suggests that the country's executive has not institutionalized the notion of administrative morality in Colombia.

Policy documents on transparency and anti-corruption mechanisms focus on values like transparency and citizen engagement, and emphasize on a result-oriented public administration. Morality is mentioned only three times in the documents that I analyzed and in none of them is it explained as a collective constitutional right. Instead, it is presented as an informal principle of public administration. When documents referred to morality they suggest that morality shall guide bureaucratic behavior, but there is no discussion of what this might mean. The treatment suggests that the authors

of the documents were not referring to the new constitutional right but instead to a traditional popular conception of morality. Thus, governmental policies do not provide professional guidelines as to the way of implementing administrative morality.

Even more, the Colombian government has not included popular actions (litigation) in administrative morality as part of the transparency and anti-corruption mechanisms that the government privileges. This suggests that in spite of the framers' attempts to authorize new judicial controls on governmental performance these controls are not perceived by the government as one of their priorities when designing anti-corruption policy.

The second interpretation is based on public officials' perceptions of what administrative morality is and what it implies for their decision-making process. The officials interviewed for this dissertation, Espinosa, Orrego, Arce, and Restrepo, agreed that administrative morality is an important concept. This is significant, especially in light of the complete absence of the concept from official government documents. They also agreed that administrative morality has two components: legal compliance and something that goes beyond it. They also agreed on the relationship between administrative morality and public trust. According to these officials, administrative morality is related to the public trust that comes with their appointment as governmental agents. Administrative morality, they said, requires officials to adjust their motivations to serve the public interest.

In spite of this agreement the interviewees disagreed sharply on questions of meaning and implementation. They refer to governmental and non-governmental

norms that provide meaning to administrative morality. Some of the interviewees, like Arce, emphasized individual ethics as a component of administrative morality. Others, like Espinosa, interpreted administrative morality as referring not to one's individual ethics but to the common good, following Greek philosophy.

Interviewees also differ on the value of training as part of the institutionalization of administrative morality. Espinosa argued that training could improve public administration by training bureaucrats for being more responsible and result-oriented. Orrego explained that administrative morality is not a matter of training because it depends on socialization that occurs in the family or elementary school. Arce explained that one side of administrative morality depends on individual socialization processes but he also argued that the government could and has provided training and guidelines with regards administrative morality.

In sum, there is no shared discourse on what administrative morality means or on whether training as a mechanism of institutionalization has contributed to the implementation of administrative morality. This lack of a shared discourse reduces the possible impact of administrative morality and its potential for fostering social change. Also, the diverse notions of administrative morality provide evidence of the different normative layers that take part of the development of administrative morality. Interviewees argued that popular actions and administrative morality exists in the Colombian legal system before the constitution of 1991 stated them. To this extent legal norms and institutions from before the constitution of 1991 have shaped



administrators' understanding of administrative morality.<sup>419</sup> The interviewees also recognize the constitution of 1991 and its enabling legislation as part of the notion of administrative morality. Individual values, ethics, and religious values also shape individuals' understanding of administrative morality. These diverse normative criteria interact to shape the implementation process of administrative morality and they are evidence of the applicability of legal pluralism.

There is little evidence that something like legalized accountability, as Epp describes it, has taken hold in Colombia. Given the lack of a shared discourse at the executive level there are not internal forces (professional values) that could foster the implementation of administrative morality as a legal reform. Advocacy groups such as Transparency Colombia have motivated the implementation of transparency and anti-corruption strategies and they have been successful in putting these topics in the public agenda. In spite of this partial success advocacy groups are not exerting pressure in a same direction with professional democratic values with the purpose of implementing administrative morality.

Likewise, Edelman's theory of symbolic compliance only explains part of the phenomena described by Arce with regards the importance of informal mechanisms in shaping bureaucratic behavior. In Arce's opinion formal mechanisms have had a lower impact on governmental agencies to comply with transparency and anti-corruption demands. But informal mechanisms have put transparency and anti-corruption

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<sup>419</sup> Supporting this approach to administrative morality and popular actions: Londoño-Toro and Torres-Villarreal, "¿Podrán Las Acciones Populares Colombianas Sobrevivir a Los Recientes Ataques Legislativos Y Jurisprudenciales?."

mechanisms in the public agenda, motivating some organizations to develop actions to prove bureaucratic compliance with administrative morality.

Instead, the theory of legal pluralism seems to help illuminate remarkably different understandings of administrative morality among professional administrators. If conceptions of administrative morality vary considerably among high officials in the nation's capital, we might expect these interpretations to vary even more widely throughout the country's diverse regions and levels in administrative agencies. Further research would be necessary to explore this possibility.

## Chapter 7: Coverage of Administrative Morality in the Popular Media

“The new constitution blows its first candle this week but the ambience is not entirely festive. One year after the constitution was framed the new constitution does not inspire the same zeal, and a lot of the dreams that the country wanted to achieve do not look possible anymore. Instead of realities they have revealed themselves as goals perhaps too distant to be true. The peace, human rights’ protection, administrative morality, political renewal; these were ideals that motivated the need of a deep political reform, as deep as the one we had, but that today seem as unachievable as they were before”. (Revista Semana, July 27<sup>th</sup>, 1992)

This chapter examines how the Colombian media have characterized the new right to administrative morality. To what extent have the media characterized this right positively? To what extent have they characterized it negatively? To what extent have they portrayed it as a meaningful judicial check on bureaucratic abuses? To what extent do the media characterize administrative morality as a check on systemic or institutional problems—or merely as a check on abuses by individual officials?

Answering these questions is important because the news media in Colombia play a prominent role in Colombian politics and law, and their coverage is likely to influence how both members of the public and public officials understand the meaning of administrative morality.

The Colombian media had an important role in both the constitutional reforms of 1991 and the evolution of these reforms. Scholars argued that media provided the

institutional support that was necessary for the constitutional reform to succeed.<sup>420</sup>

Since 1986 president Barco (1986-1990) attempted to pass several constitutional reforms through the Congress but none of them was approved. It was not until March of 1990 when a student movement with the support of mass media encouraged citizens to add a “seventh ballot” in the elections in order to support the idea of a Constitutional Assembly.<sup>421</sup>

### **Media coverage of administrative morality**

Helmke and Levitsky observe that in Latin America the courts and government agencies have too often undermined constitutional rights in the process of interpretation and application.<sup>422</sup> They suggest that informal mechanisms have partially filled the gap left by inadequate governmental enforcement.<sup>423</sup> They define informal institutions as “socially shared rules, usually unwritten, that are created, communicated, and enforced outside officially sanctioned channels”.<sup>424</sup>

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<sup>420</sup> Olano Garcia, *Constitucion Politica De Colombia (Comentada Y Concordada)*.

<sup>421</sup> J. Dugas, "Structural Theory and Democratization in Colombia: The Role of Social Classes, Civil Society, and the State in the 1991 Constitutional Reform" (1995). The role of media appeared as crucial since the Congress seemed to be incapable to adjust the constitutional frame to the political needs at that time: "The ignominious failure of Congress to enact significant constitutional reform did not go unnoticed....The apparent inability of congressional politicians to confront the political crisis provoked a growing student movement to rally behind the idea of reforming the 1886 constitution by means of a popularly-elected National Constitutional Assembly.... The student movement with the help of the mass media, encouraged citizens to include an extra ballot in their electoral envelopes...". Thus, mass media was part of the support structure that was necessary to reform the Constitution of 1886.

<sup>422</sup> G. Helmke and S. Levitsky, *Informal Institutions and Democracy: Lessons from Latin America* (Johns Hopkins Univ Pr, 2006).

<sup>423</sup> Ibid.

<sup>424</sup> Ibid. Although Helmke and Levitsky argue that the core element of informal institutions is a “socially shared meaning” this concept is debated among scholars. For instance, Brinks contend that the essence is the nature of the rules’ enforcement. Brinks argues that informal rules include prescriptions (what individuals shall do) and means of enforcement in case of violations to the rule. These means of enforcement are informal and this is the essence of informal institutions. D. Brinks,

While it would be nearly impossible for me to conduct an adequate study of popular understandings of “administrative morality” among ordinary Colombians, a workable alternative is to examine coverage of the issue in the popular news media.

In addressing the Colombian media’s characterization of the new right to administrative morality, I will draw on the theoretical framework of William Haltom and Michael McCann who analyzed media coverage of tort litigation in the US.<sup>425</sup> They show that the popular media’s interpretations of key legal rights differ significantly from strictly “legal” interpretations and have considerable influence.<sup>426</sup> According to these scholars the American media have consistently portrayed tort litigation as the product of individual mistakes (like spilling coffee on oneself, in the famous McDonald’s coffee-burn lawsuit) rather than institutional or systemic problems (like the McDonalds Corporation’s decision to sell its coffee at temperatures that were certain to cause severe burns within seconds if spilled on skin). This systematic skewing of media coverage, Haltom and McCann argue, undercuts the potential for tort litigation to address institutional failings.

It is possible that Haltom and McCann’s observations are especially characteristic of the United States and may not be as widespread elsewhere. Haltom and McCann suggested that the values of individual responsibility and populist antipathy toward formal state intervention are powerful in the American cultural context, and this context

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"The Rule of (Non) Law," *Informal Institutions and Democracy in Latin America*. Baltimore, Johns Hopkins (2006).

<sup>425</sup> Haltom and McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis*.

<sup>426</sup> *Ibid.*

contributed to the media bias that they observed.<sup>427</sup> These individualistic values are somewhat less prominent in Colombia, and with this study I will be able to analyze whether media coverage of the 1991 Colombian constitutional reforms is systematically skewed in a similar way.

Latin American scholarship, by contrast, argues that popular discourse has been considerably influenced by the language used by courts in their rulings.<sup>428</sup> Through the media the people have learned about individual successful cases and the courts' reasoning in these cases. Thus, according to this Latin American-based research, many people have adopted the language and categories used by judges.<sup>429</sup>

In order to explore the role of media in the development of administrative morality this chapter examines how the news media in Colombia have framed administrative morality and the cases raising this issue.<sup>430</sup> To do so, I will ask questions similar to those examined by Haltom and McCann. They showed that popular media reporting of court cases tend to focus on individual actors rather than institutional processes, and on individual mistakes rather than institutional sources of harm. For example, the reporting of the infamous McDonald's coffee-burn case focused nearly exclusively on Stella Liebeck's mistake in opening a hot cup of coffee on her lap, but not on the fact that McDonald's Corporation had a corporate policy of serving its coffee at 20 degrees above the industry standard, a temperature well known to cause severe burns within seconds of contact with skin. Haltom and McCann argue that the media's

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<sup>427</sup> Ibid.

<sup>428</sup> Couso, Huneus, and Sieder, *Cultures of Legality: Judicialization and Political Activism in Latin America*.

<sup>429</sup> Ibid.

<sup>430</sup> Ibid.

failure to report on institutional processes tends to undercut the possibility of using law to contribute to institutional reform. Using Haltom and McCann's framework, in a similar way, the narratives that I will analyze in this paper convey meaning in the Colombian context and will allow me to identify media's perception of the use of administrative morality and its potential.

Haltom and McCann focused on analyzing print mass media because the print mass media shape the agenda for other news media. Also, newspaper accounts are perceived as more reliable than television news. For these reasons I will focus on newspaper and magazine accounts of administrative morality for the last twenty years.

## **Data and Methods**

My data are drawn from an original database of 176 articles from printed media sources in Colombia. These 176 articles are the universe of articles that refer to "administrative morality" published by two national printed media, one newspaper and one magazine, from 1991 through the end of 2011.<sup>431</sup> I chose these sources because they are two of the most popular media sources in the country with national coverage, and one is generally regarded as conservative while the other is regarded as liberal. The newspaper "El Tiempo" is regarded as conservative to the extent that it tends to be favorable towards governmental actions. This newspaper is printed daily and it circulates in all the territory. The magazine "Semana" is published weekly and it also circulates in all the territory. "Semana" is known for being more liberal on its approach

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<sup>431</sup> The newspaper "El Tiempo" (<http://www.eltiempo.com/>) and the magazine "Semana" (<http://www.semana.com/Home.aspx>).

and more critical towards governmental actions. These sources provide access to online information, and using this online database I have gathered the universe of articles published since 1991 that refer to “administrative morality.” The majority of articles in the database were published in the time frame of 2001 to 2011 (102 articles), while during the first decade of the Constitution of 1991, 74 articles were published. The majority of articles in the database were published in “El Tiempo” (92% of the articles), while the rest of them were published in “Semana” (8% of the articles).

In my analysis I used a coding scheme<sup>432</sup> in which I identified fourteen variables in relation to media’s portrayal of administrative morality. The first variable is the primary legal issue at stake in the article. Legal issues include financial malfeasance of a government agency, willful misconduct by an individual official, corruption in the electoral process, disputes over financial incentives to support litigation, and individual (human) rights. The variables type of defendant and type of plaintiff address the characteristics of the parties identified in the articles; I classified the parties among 6 categories: individuals, businesses, organizational interest groups, local governments, regional governments, and national government.

I also identified the policy area addressed in each article, and for purposes of presentation here I have consolidated these policy areas into 6 of broadly-defined areas: governmental service to individuals, security and criminal law, regulatory policy, publicly owned businesses, political processes, and infrastructure.

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<sup>432</sup> Appendix G.



I also explored each article's tone toward the plaintiff or claimant, the defendant, toward administrative morality, and toward the formal mechanism or action used to enforce administrative morality. "Tone" refers to whether the article generally appears to offer a positive, negative or neutral impression of the object in question (e.g., toward the plaintiff). By analyzing the tone I will explore whether the Colombian printed media are systematically more negative or positive toward plaintiffs or defendants and toward the right to administrative morality and the legal action to enforce it.

Following Haltom and McCann, I also coded whether each article depicts the central issue as primarily a matter of *individual* mistake or abuse or *institutional* failings.<sup>433</sup>

### **Patterns in Colombia Media Coverage**

The articles in the database fall into two broad classes: reports on specific cases involving violations of administrative morality and general commentaries on administrative morality that do not refer to a specific case. General commentaries represent 40% of the articles in the database, while 60% of the articles refer to actual cases of violations of administrative morality.

Within this category of articles that focus on particular cases, the articles refer to five types of issues: financial malfeasance, violations of individual rights, willful

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<sup>433</sup> I also identified whether a secondary issue, a second litigant, second defendant, a second type of action, or second intent of reform appeared in the articles. Only a very small percentage of the articles included information about these objects beyond the primary plaintiff, defendant, etc., and so these variables were not taken into consideration in this analysis.

misconduct of the administration (other than violations of individual rights), electoral corruption, and litigation incentives. The largest proportions focus on cases of financial malfeasance and willful misconduct of the administration (see Figure 17).

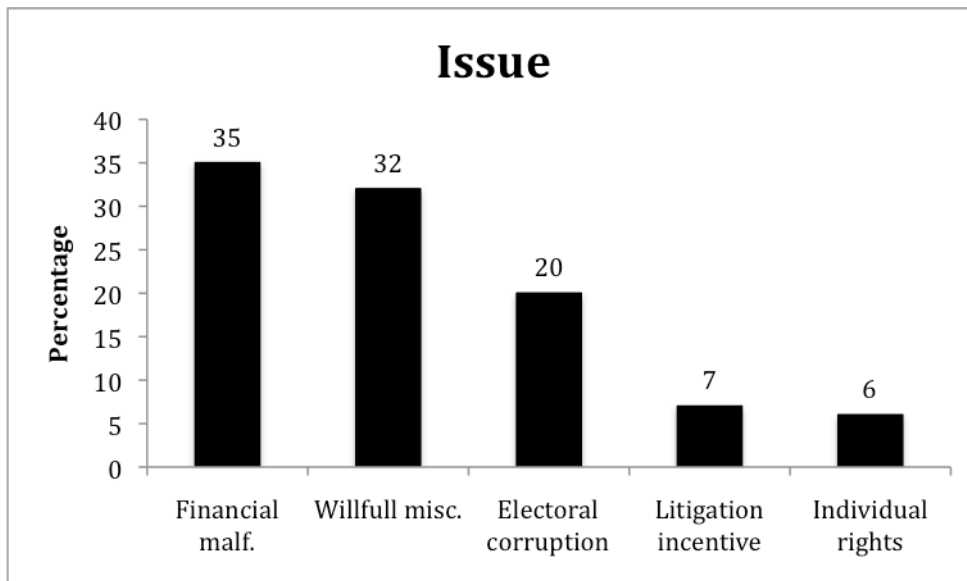


Figure 17: Primary issue. N=102.

Financial malfeasance refers to situations in which public funds have been mismanaged due to corruption, inefficiency, illegal behavior, lack of transparency, or improper decisions of the administration. For instance, according to an article of 2001 a lawyer filed a popular action against the regional government for it invested 2.017 million Colombian pesos (approximately one million dollars) to repair a public park. According to the lawyer quoted in this article those funds were invested in a different way from the one approved by the legislature to the extent that they were supposed to be spent on the reconstruction of the region after an earthquake, and consequently the government had violated the collective right to administrative morality. In this article

media coverage focused on whether the regional government had misspent public funds or not.<sup>434</sup>

Willful misconduct refers to cases in which a public agency made an illegal or inconvenient decision in matters not related to individual rights or public finance. Willful misconduct is related to improper decisions of the administration, lack of transparency, inefficiency or corruption. An example of willful misconduct is the case of Pedro Jimenez, a member of the regional legislative organ in Cesar (region located in the North of the country) who, at the time when he was elected, had a romantic relationship with a governmental agent. According to the journalistic article, an oversight agency condemned Jimenez for violating regulations regarding transparency in public administration.<sup>435</sup> This article does not refer to a case of inadequate management of public funds but to the fact that Jimenez did not comply with regulations that protect public administration.

Another cluster of articles refer to fraud in elections. For example, some plaintiffs used popular actions to denounce candidates who allegedly received electoral support from dead voters. For instance, in an article published in 2008 the newspaper "El Tiempo" tells the story of Diana Herrera, a young lawyer who noticed that the mayor of a small town registered his candidacy by using signatures of dead people. According to the newspaper, Diana was trying to prove that the mayor had violated administrative morality and rules of fair game when he registered his candidacy to run for office.<sup>436</sup>

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<sup>434</sup> "El Parque Del Cafe Debe Devolver Dinero," *El Tiempo*, July 12th 2001; *ibid.*

<sup>435</sup> "Diputado Pedro Jimenez Fue Destituido E Inhabilitado Por 12 Años," *El Tiempo*, April 18th 2009.

<sup>436</sup> "Denuncian Fraude En Elección Del Alcalde De Girardot," *El Tiempo*, November 28th 2008.

Articles about litigation incentives are those that focus on the monetary incentive that the plaintiff receives when the judge grants the action. The Colombian legislature assumed that citizens are more likely to file a lawsuit when a monetary incentive was granted to those who file actions for violations of administrative morality and those actions succeed.<sup>437</sup> The monetary incentive is an issue discussed in 6.86% of these articles. In an article published in 2008 media call attention to a piece of news according to which a councilman in Tunja (a city located in the central region of Colombia) had declined to receive \$1.200 million Colombian pesos (approximately \$600,000 dollars). According to this article, the city government had started negotiations to sell the farmers market to a private company and the councilman decided to file a popular action to protect the farmers' right to administrative morality. The judge granted the action and applied the statute that regulates popular actions by awarding the councilman with a monetary incentive.<sup>438</sup> In this case the councilman declined to receive the incentive but the article asks the question of whether it is convenient or not to set a monetary incentive to motivate citizen participation in enforcing collective rights. The article includes the testimony of two law professors who argue that the monetary incentive leads to abuses in the use of the action by plaintiffs who are just interested in receiving the incentive.

With regards individual rights, only 6% of the articles referred to situations in which an individual right has been violated. For instance, in the article "Anticorruption

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<sup>437</sup> Congreso de la Republica de Colombia, "Ley 472."

<sup>438</sup> According to the statute in cases of administrative morality the plaintiff is entitled to receive up to 15% of the sum that is recovered through the action. Law 472 of 1998, Article 40. After several years of debate the Congress eliminated this article of the statute and currently the plaintiff is no longer entitled to a monetary incentive (Law 1425 of 2010).

campaign does not admit negligence” media allude to the case filed by Uriel Molina, a public agent working with the Environmental Unit in the city Sevilla (located in the west region of Colombia). Molina argued that his right to due process was violated when the city of Sevilla conducted a disciplinary investigation without following legal procedures. Molina argued that the city did not take into consideration evidence in his favor, but only evidence against him. As a consequence, Molina filed an action for tutelage arguing violations of due process. The Colombian Constitutional Court analyzed the case and concluded that the disciplinary investigation violated Molina’s rights to due process and right to counsel. On its ruling the Court argued that the irregularities in criminal and disciplinary processes reduce the governmental capacity to properly investigate violations against administrative morality.<sup>439</sup>

The pattern observed here—a media focus primarily on financial malfeasance—is striking. In this media coverage, administrative morality appears to be relevant mainly to the proper management of public funds. Council of State cases follow the same pattern given that the over 50% of the cases of administrative morality refer to suits for improper management of public funds (Figure 1). It is possible that the media have covered cases other than those heard in the Council of State but the patterns of both types of data (journalistic articles and court cases) suggest that administrative morality has focused on the proper management of public funds.

It is possible that administrative morality has been used to enforce individual rights’ violations in cases that have not been publicized by the media because they do

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<sup>439</sup> "Lucha Anticorrupción No Admite Negligencia ", *El Tiempo*, January 22th 1995.

not reach enough salience to get media coverage. It is possible that violations of administrative morality more focused on individual rights' violations have been analyzed by lower-level judges and they never get to attract public attention. This possible interpretation is exemplified in the article of the public agent working with the Environmental Unit in the city Sevilla mentioned before. Although this case reported a violation of due process, it got salience because it was decided by the Constitutional Court and it was framed by the media as a ruling with profound impact with regards anticorruption policies.

The article highlights under the title a fragment of the ruling related to the governmental anticorruption: "In an unequivocal ruling, yesterday the Constitutional Court warned about the imminent threats that negligent behaviors pose on the jurisdiction and oversight agencies in the anticorruption campaign".<sup>440</sup> Although the case was legally based on a public agency's failure to fulfill legal requirements related to due process, the journalistic article focused mainly on the Court's analysis with regards anti-corruption policies. For instance, in the first paragraph the article writes: "It is so little what the Colombian governmental would be capable of achieving in the campaign against corruption, says the Court, if prosecutors do not fulfill its duties with diligence, transparency, and effectiveness while conducting investigations against public officials". It was only in the last part of the article where the facts of the case were summarized and only then the article makes clear that this was a case of a violation of individual

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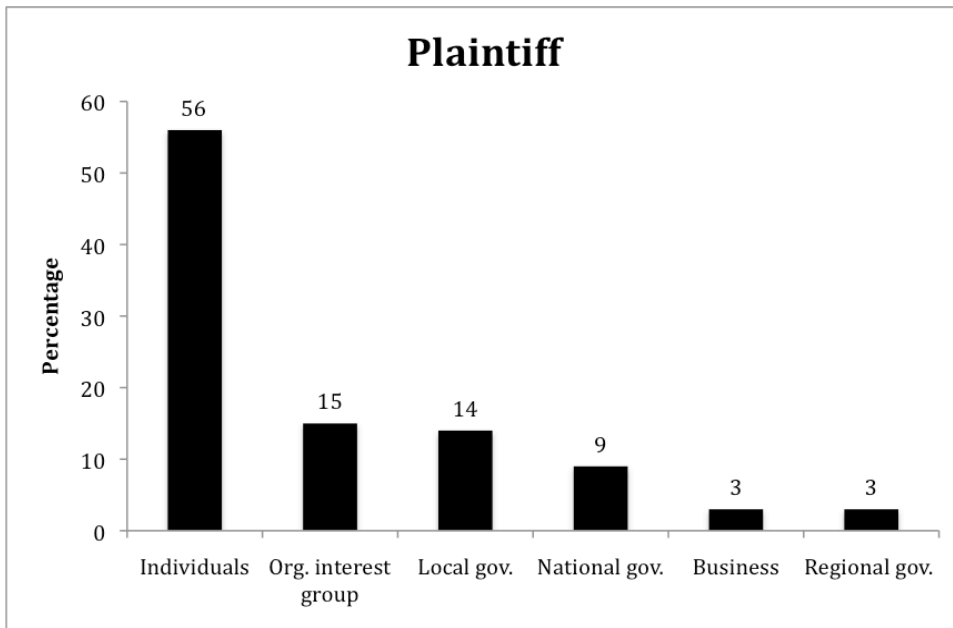
<sup>440</sup> Ibid.

rights. Thus, in those accounts related to individual rights' violations media draw on general implications that went beyond the facts of the specific case.

What types of plaintiffs are featured in these media stories? Do the media focus on organizational plaintiffs or on individual plaintiffs? As Figure 18 illustrates, by far the largest proportion of articles focuses on individual plaintiffs (Figure 18). An example of an individual plaintiff filing a claim for administrative morality is the case of Mauricio Agudelo who, according to an article published in 2009, filed a lawsuit against the public agency EMCALI (municipal company of the city of Cali), responsible for public utilities in the city of Cali. The article does not provide more information about the plaintiff, just his name and the facts that lead him to file the claim.<sup>441</sup> A much smaller proportion of articles focuses on organizational interest group plaintiffs. A scattering of other categories of plaintiffs appear in these articles, but the numbers are very small in most of these other categories. (In Colombia, governments sometimes act as plaintiffs in cases of administrative morality, so it is not surprising that they might appear as plaintiffs in some of these articles.)

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<sup>441</sup> "36 Mil Millones De Pesos Perdería Emcali Por Decisión Del Juzgado 18 Administrativo ", *El Tiempo*, November 10th 2009.



**Figure 18: Primary plaintiff. N=78**

In Council of State cases of administrative morality individuals also represent the majority of plaintiffs (84% of the suits) while non-profit organizations represent 12% of the plaintiffs (Figure 6). The patterns in both types of data (journalistic articles and Council of State cases) suggest that individuals have been using popular actions to enforce administrative morality. These findings indicate that the purpose of the framers to foster citizen engagement seems to be achieved.

With regards to defendants, 39% of the articles refer to local governments as defendants in cases of administrative morality. In 30% of the articles the defendant is the national government or public organizations at the national level. Regional governments and regional level public organizations only account for 9% of defendants according to journalistic articles. In 9% of the cases the defendant was an individual who, under particular circumstances, was responsible for complying with administrative



morality. Examples of these cases are those involving former governmental officials or candidates in public elections. Besides public organizations, in 7% of the articles the defendants were private businesses and in 6% were organizational interest groups and advocacy organizations.

Council of State cases confirm the same pattern with regards defendants (Figure 7). In litigation at the Council, local governments represent 55% of the defendants while the national government represents 29% of the defendants. Journalistic articles and court cases indicate that administrative morality has been mainly used to check performance of local governments. These data also suggest that cases of administrative morality had focused on the national government.

Turning to the policy-area that is the focus of media coverage, the policy areas fall into six general categories: governmental services to individuals, security and criminal law, regulatory policy, publicly owned business, political process, and infrastructure. The majority of articles falls under the category political process (Figure 19) and refer to cases of administrative morality related to the interaction between branches of power. These articles typically describe processes conducted by oversight agencies, cases of political control exerted by the congress, new legislation in relation to administrative morality, elections, and political appointments. An example of political processes is the article titled "It's not convenient that the *Personero* of Bogotá is friends with the mayor, says councilman Vicente de Roux".<sup>442</sup> In this article media report on the appointment of the *Personero* in Bogota, who is responsible of promoting and enforcing

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<sup>442</sup> "No Es Conveniente Que Personero De Bogotá Sea Amigo Del Alcalde, Dice Concejal Vicente De Roux," *El tiempo*, February 20th 2008.

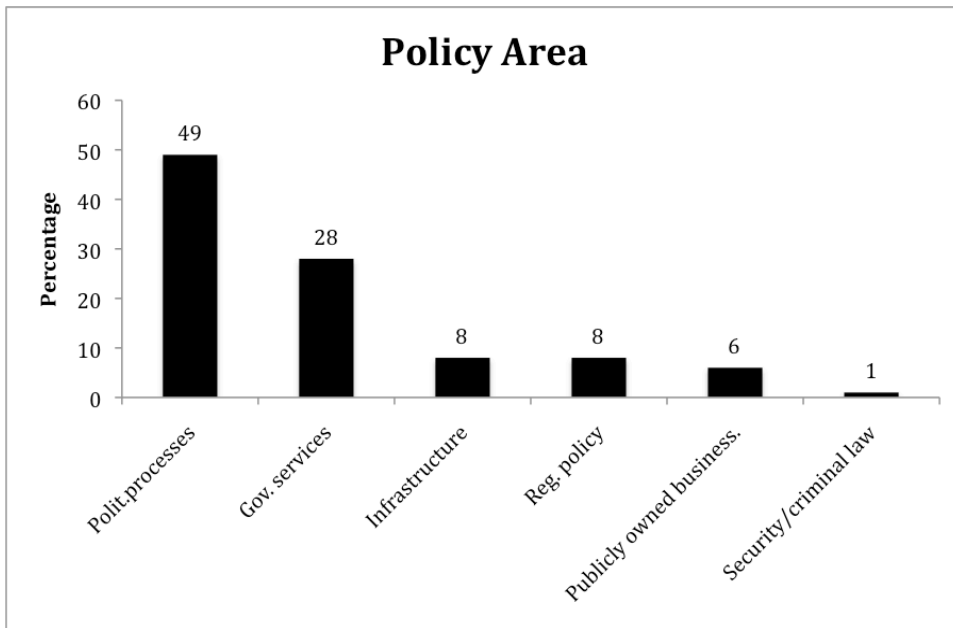
human rights and the disciplinary oversight over public servants at the local level, and is appointed by the city council.<sup>443</sup> This journalistic article describes the appointment process of the *Personero* in Bogota in 2008 and specifically refers to the fact that one congressman (Vicente de Roux) did not support the appointment of one member of his political party. Congressman de Roux argued that he did not support the appointment of the candidate of his party because he is a friend of the mayor. According to de Roux the *Personero* is the main responsible for protecting administrative morality and is supposed to exert oversight over the local government and consequently it was inconvenient to appoint a close friend of the mayor.<sup>444</sup> The second most common policy area is governmental services to individuals. Services such as social welfare, utilities, and housing are included under this category (in Colombia, access to utilities is legislatively assigned to local governments).<sup>445</sup>

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<sup>443</sup> Colombian constitution, 1991. Article 118.

<sup>444</sup> "No Es Conveniente Que Personero De Bogotá Sea Amigo Del Alcalde, Dice Concejal Vicente De Roux."

<sup>445</sup> For instance, according to the Art. 331 of the Colombian Constitution local governments are responsible for granting public services, developing infrastructure, under the parameters defined by the Congress. In relation to utilities, the Article 5 of the Law 142 of 1994 defers to local governments the responsibility of granting these services to citizens.

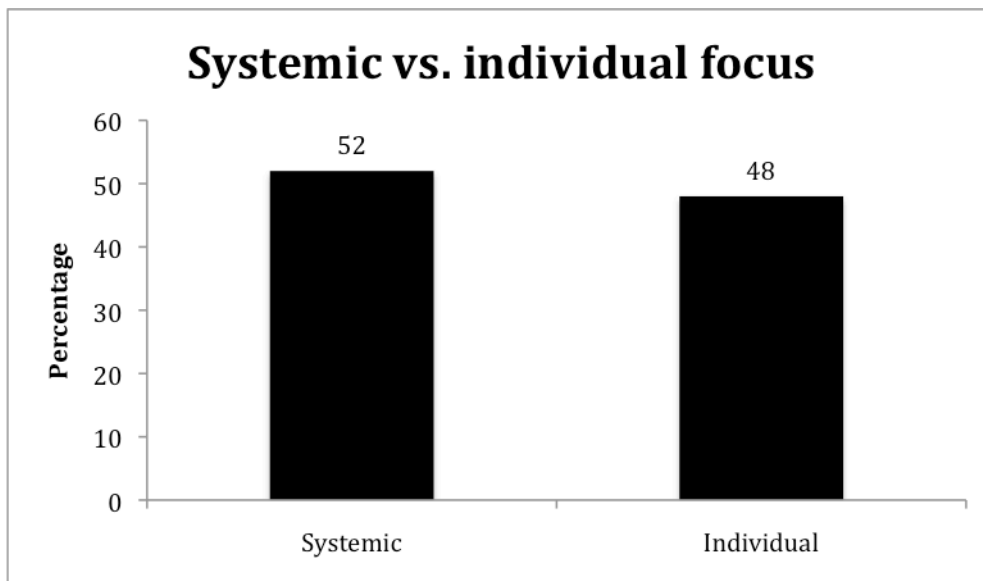


**Figure 19: Primary policy area. n=171**

These findings differ from the policy areas of cases at the Council of State (Figure 5). The majority of the cases at the Council referred to governmental service provision, utilities, and law enforcement while the majority of the journalistic articles fall under the categories political processes. It seems like media gave salience to cases in which administrative morality was a check for political issues like elections. On the contrary the Council focused on cases where administrative morality could be a check for quality in governmental services.

My central focus in this chapter is on whether media coverage of administrative morality focuses mainly on individual-level violations or on systemic, institutional problems. As noted, in the United States, media coverage of tort cases tends to focus almost entirely on individual matters to the exclusion of systemic matters (Haltom and McCann 2004). Somewhat surprisingly, in Colombia the print media have focused

almost equally on systemic, institutional issues and individual violations (Graph 20). I will return below to whether this relatively equal distribution has changed over time, and what are the implications of this distribution.



**Figure 20. Primary framing of media article: systemic failings or individual errors. n=171**

In addition, I am interested in seeing whether the media discuss plaintiffs and defendants with a generally positive or negative tone. “Tone” refers to whether the person or agency is depicted positively or negatively (or neutrally). Strikingly, the articles generally reveal a neutral to positive tone towards the plaintiffs, while the tone towards the defendants tends to be neutral to negative (Figure 21). It is noticeable that the tone towards the defendants in these articles tends to be strongly negative while

the tone towards the plaintiffs is almost evenly distributed between neutral and positive.

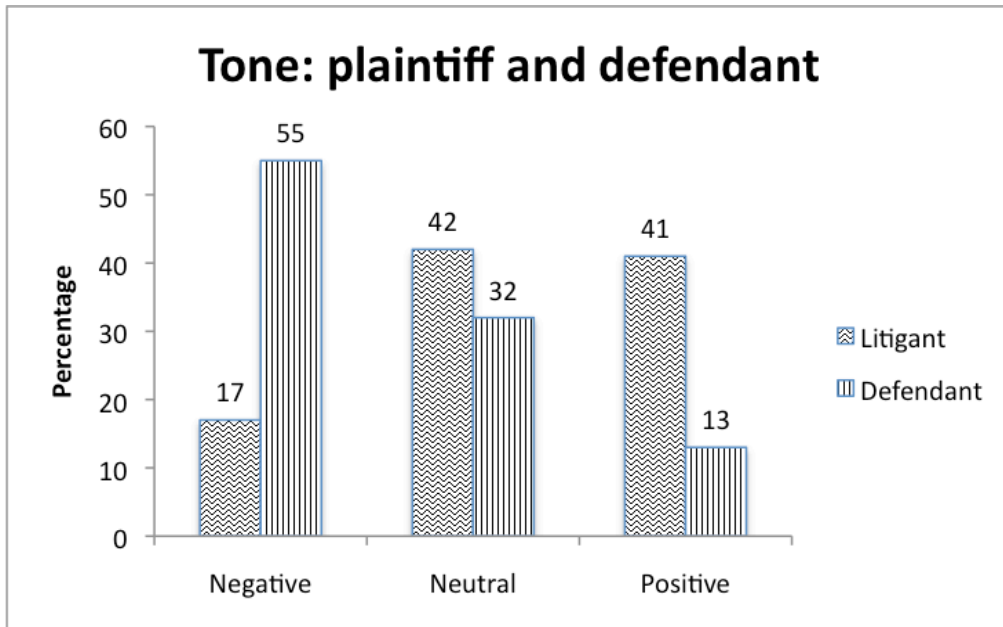
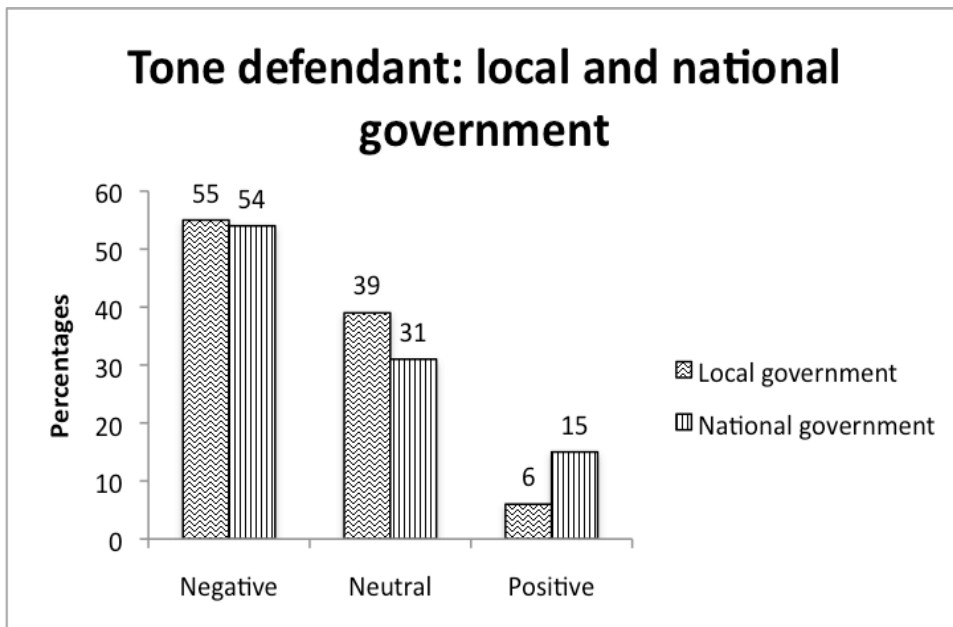


Figure 21: Tone toward primary plaintiff and defendant. Plaintiff: n=113. Defendant: n=126.

The tone in these articles does not vary significantly from one type of plaintiff to the other. As indicated in Figure 18 individuals, organizational interest groups, and local governments are the most frequently-discussed plaintiffs and the tone toward each of these three groups seems to be neutral to positive. In the case of the defendants, the tone is negative especially in relation to local governments and the national government (Figure 22).



**Figure 22: Tone toward governmental defendants: local and national government. Local government n=33. National government n=26.**

In relation to the plaintiffs, Figure 21 suggests that generally the tone is neutral to positive. This neutral-to-positive tone is present in both high-profile challenges to the fairness of political processes, (Figure 23) and more low-profile challenges to government services to individuals (Figure 24).

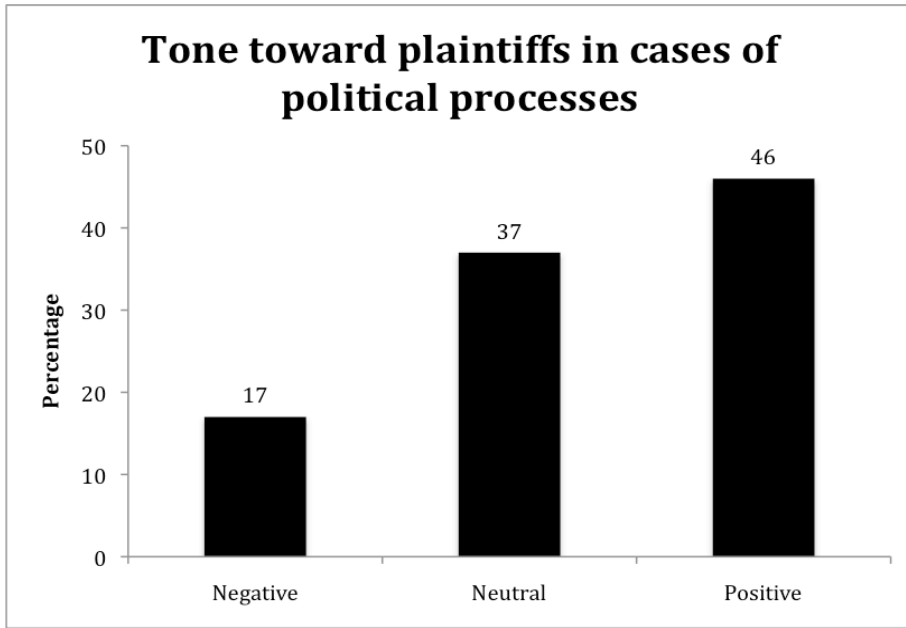


Figure 23: Tone toward plaintiffs in high-profile challenges to political process. n=35

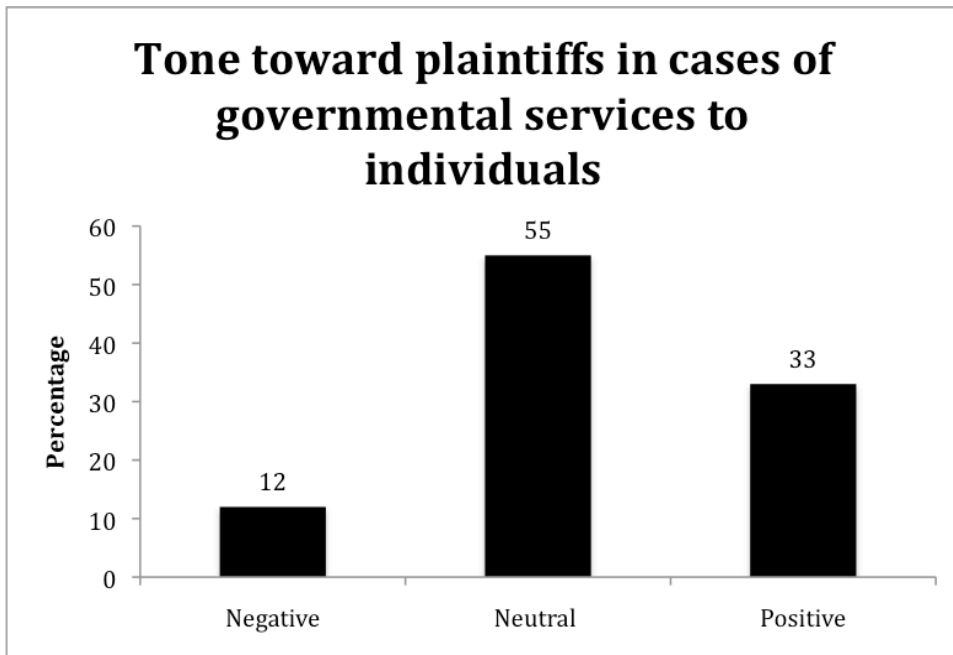


Figure 24: Tone toward primary plaintiff in low-profile cases of individual service-provision. n=42

Additionally, I am interested in whether the tone toward the plaintiff varies with whether the article focuses on individual mistakes or systemic/institutional problems. Significantly, the tone with regards the plaintiff does not seem to vary. Media reports are neutral to favorable towards the plaintiff both in articles framing the issue as an individual mistake and in articles framing the issue as an institutional problem (Figure 25).

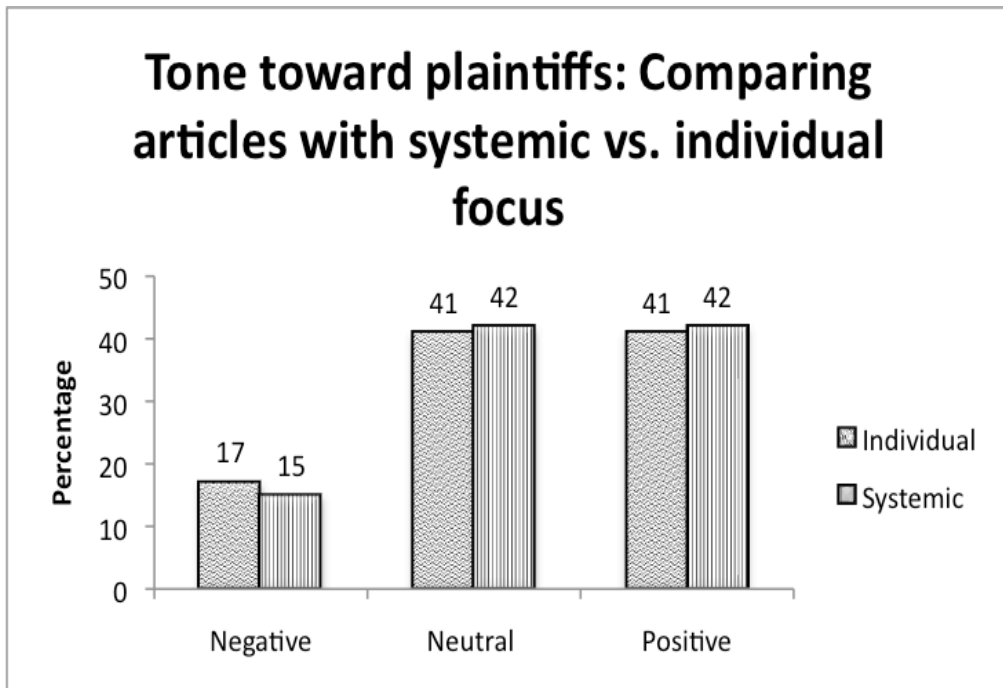
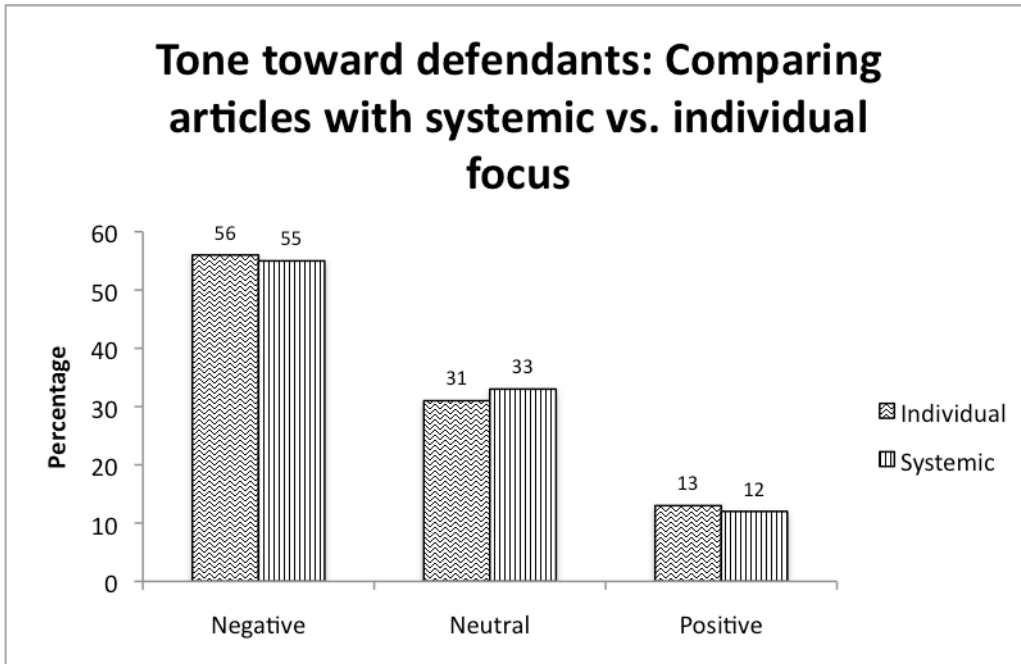


Figure 25: Tone toward plaintiffs: systemic versus individual focus. n=110

Similarly, the tone toward the defendant does not seem to vary between articles framed as institutional problems and those framed as individual violations (Figure 26).





**Figure 26: Tone toward defendants: systemic versus individual focus. n= 123**

Articles in the database make reference to different legal mechanisms used by plaintiffs to enforce administrative morality. Some examples of the actions mentioned are: popular actions, electoral actions, ordinary administrative actions, actions for tutelage, and oversight agencies' procedures. In relation to these various legal mechanisms the media's tone tends to be neutral to positive (Figure 27). The majority of articles in which a legal procedure was used (56.50% of the articles in the database) referred to popular actions as the procedure chosen by the plaintiff to enforce administrative morality. In these articles the tone towards popular actions keep the same pattern of neutral to positive (Figure 28).

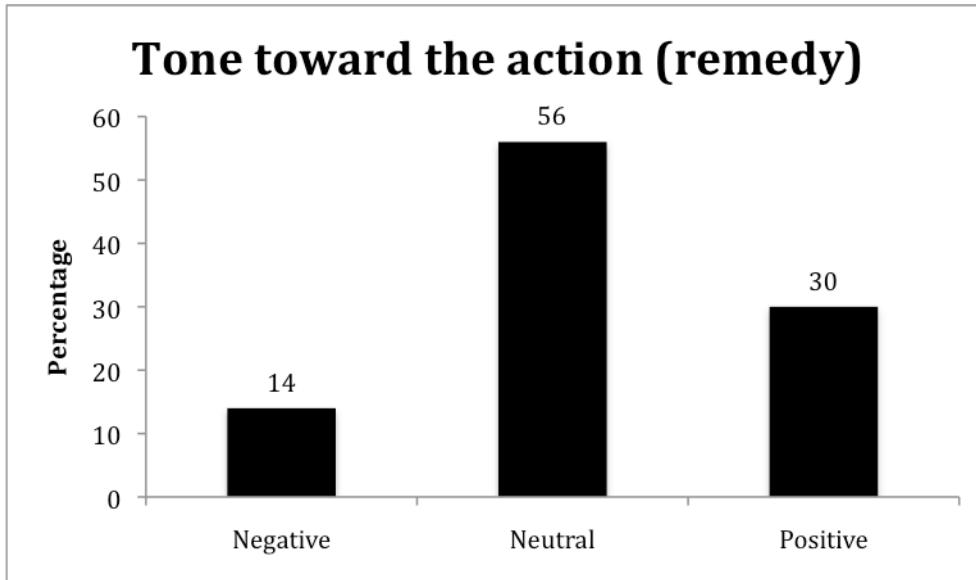


Figure 27: Tone toward the action (remedy). n=115

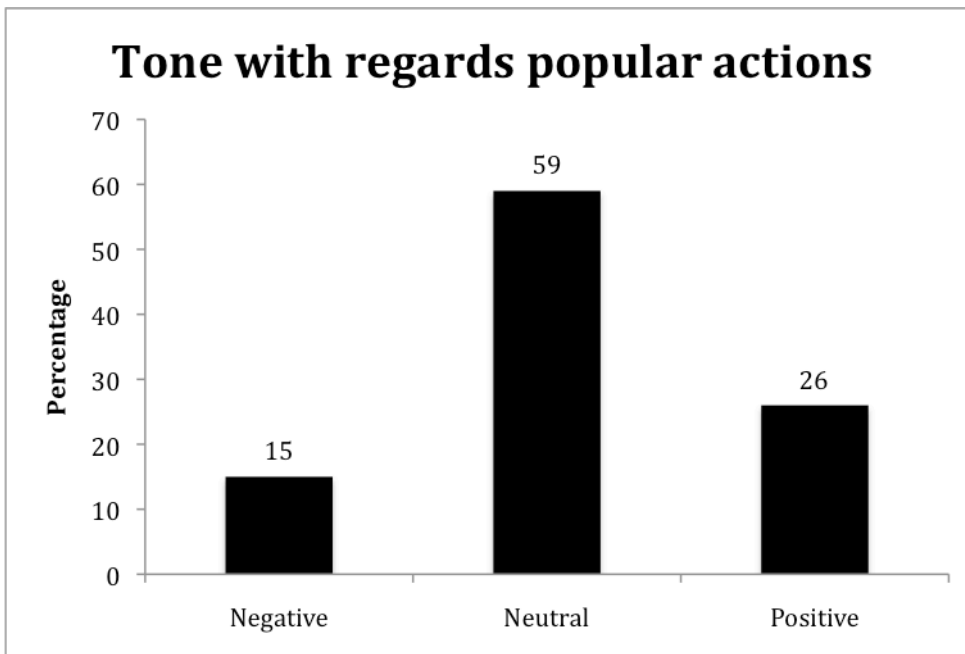
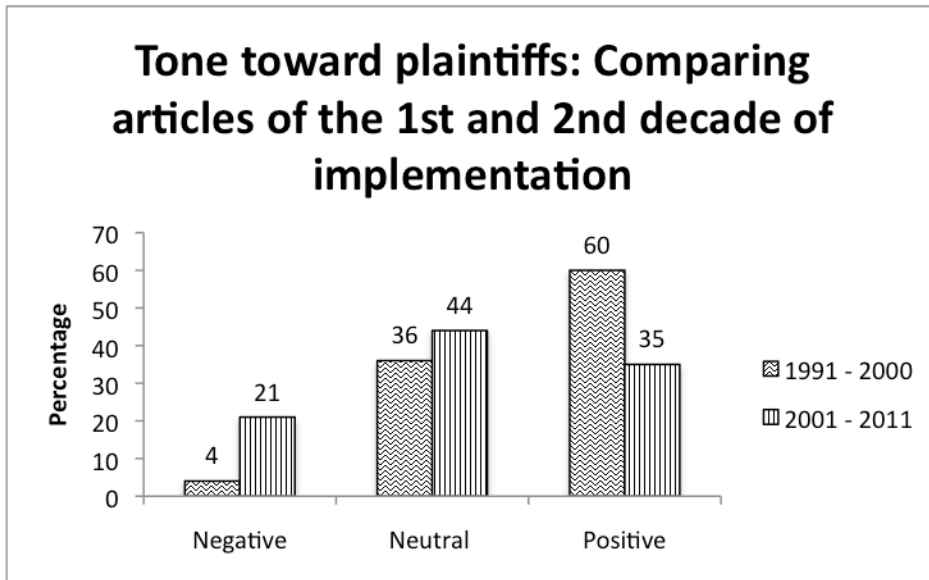


Figure 28: Tone toward popular actions. n=78

Finally, have these patterns in tone and framing remained relatively constant over the twenty years since constitutional reform, or have they changed? Strikingly, the tone toward plaintiffs has changed over time. In the first decade after 1991, the tone toward the plaintiffs was more positive than in the second decade (Figure 28). Media coverage seems to have become increasingly skeptical of plaintiffs' good intentions when filing actions for administrative morality. Media coverage increasingly has alleged that plaintiffs are interested mainly in securing financial compensation rather than improvements in administrative policy or service, and coverage has implied that lawsuits are unjustifiably consuming public resources without providing meaningful benefits or improvements. For instance, in an article of 2009 titled "The lawsuit hunter" media described the case of Javier Elias Arias, a native Colombian who had filed 900 lawsuits in nine regions of the country, and whose monetary pretensions were estimated in \$2.500 million Colombian pesos (approximately \$1,250,000 dollars). According to the article Arias' claims sometimes overcome the budget of the cities and regions he has sued, and sometimes his claims are absurd. An example of an absurd claim would be the lawsuits that Arias filed against the city of Cartago for not having counters in public agencies for individuals who are shorter than the average height. One employee of the city of Cartago argued that in the city there are no people considerably shorter than the average and consequently such counters are not necessary.<sup>446</sup> Cases like the one of Arias could have motivated a less optimistic perception with regards plaintiffs and their motivation when filing popular actions.

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<sup>446</sup> "El Caza Demandas," *Semana*, November 7th 2009.



**Figure 29: Changes over time in media tone toward plaintiffs. First decade n=25. Second decade n=88**

This increasingly negative tone toward litigants seems to be confined to plaintiffs, as the media tone toward defendants does not seem to have changed over time (see Figure 29). To be sure, the tone toward defendants remains relatively negative—but, in contrast to the tone toward plaintiffs, the tone toward defendants has not become more negative over time.

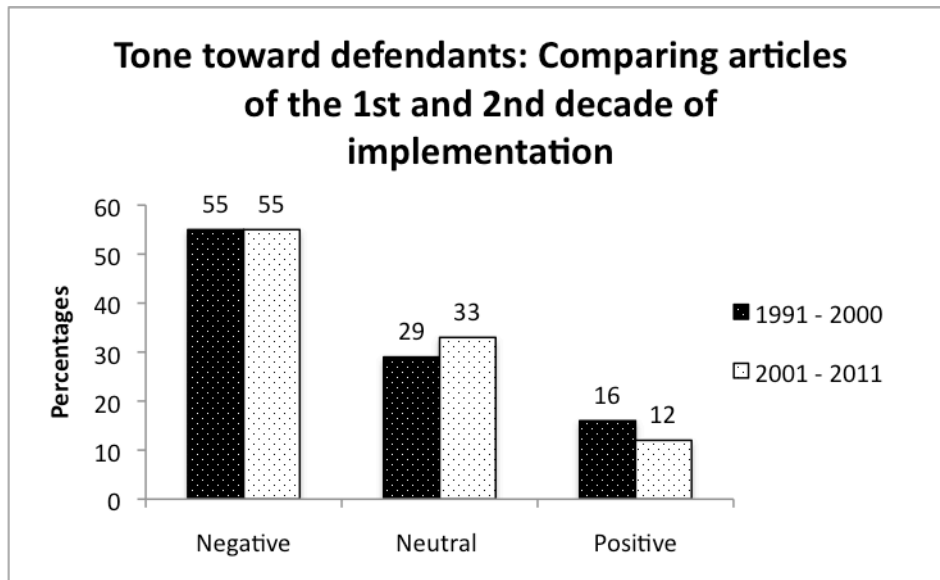


Figure 30: Changes over time in media tone toward defendants. First decade n=31. Second decade n=95

In relation to the action used by plaintiffs, during the first decade of implementation the tone was positive to neutral, probably as a reflection of the hopes that the Constitution of 1991 brought in relation to the new judicial actions that were created (Figure 30). During the second decade, journalistic articles seemed to be more skeptical about the action used by plaintiffs to the extent that in majority of the articles the tone is neutral and no longer positive.

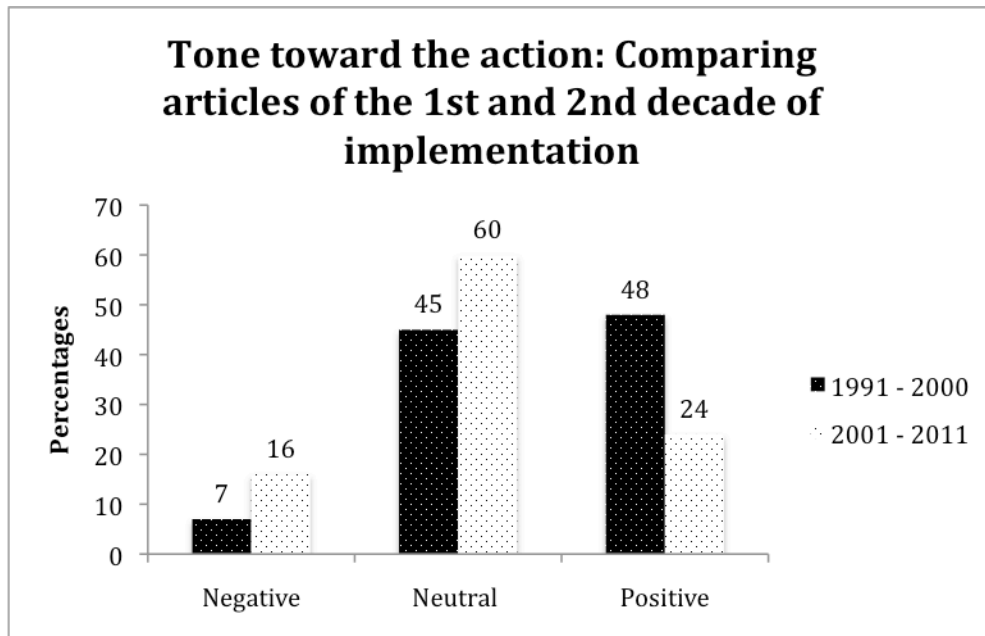


Figure 31. Changes over time in tone toward the legal action. First decade n= 27. Second decade n=88

During the first decade of implementation of the Constitution of 1991 media seemed to focus on cases of systemic reform (Figure 31), suggesting the potential of administrative morality and popular actions to foster a systemic change. In an article of 1996 an article of a newspaper analyzed the progress of the implementation of the Colombian Constitution on its fifth year.<sup>447</sup> This article suggests that five years are not enough to perceive a real transformation in a country with several and serious problems. It also argues that it is essential that the Congress focus on the development of constitutional rights that were still pending to be implemented due to the lack of legislative regulation. One of these constitutional rights was popular actions that could allow the enforcement of collective rights such as administrative morality.<sup>448</sup>

<sup>447</sup> "La Carta Aún Sin Destino," *El Tiempo*, July 30th 1996.

<sup>448</sup> Ibid.

Strikingly, in the second decade since reform this tendency shifted: the framing of media coverage shifted to a focus on individual violations to administrative morality. For instance, in 2007 media reported that a judge ruling against the mayor of Medellín stating that he should move out of the house in which he was living for it was property of the city. According to the judge the mayor violated administrative morality for using a public good for his own particular benefit.<sup>449</sup>

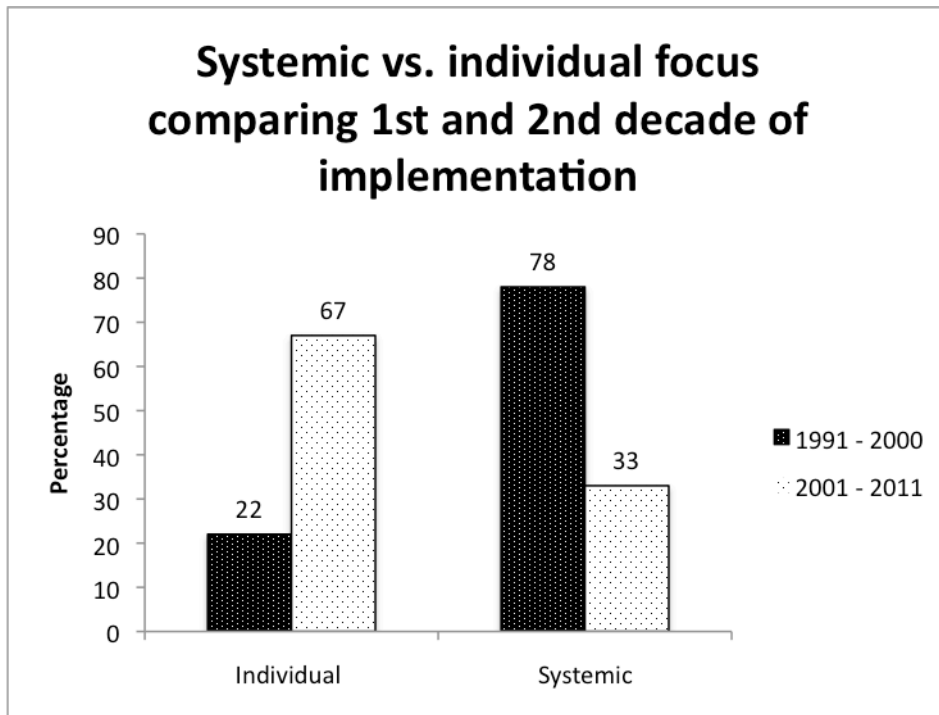


Figure 32: Changes over time in framing: systemic versus individual. First decade n= 73. Second decade n=98.

<sup>449</sup> "Noticias Breves De Justicia," *El Tiempo*, January 30th 2007.

## Conclusion

I began this chapter by noting the research showing that the popular media in the United States adopt a generally negative tone toward plaintiffs in litigation and tend to frame the issue in cases as a matter of individual mistake rather than institutional failing.<sup>450</sup> It is thought that this diminishes the reform potential of lawsuits in the United States. In this chapter I have shown that in comparison to the United States media coverage in Colombia has adopted a surprisingly positive tone toward administrative morality litigation. Further, the Colombian media have relatively often framed the issues in administrative morality cases as a matter of institutional failings rather than merely individual mistakes. The Colombian media have characterized administrative morality as a right that demands certain behaviors not only from individuals in public administration but also from institutions and policy in general.<sup>451</sup>

But this chapter has also shown that the popular media became increasingly skeptical and negative toward administrative morality litigation over the past twenty years. In the first decade of implementation of the Constitution of 1991 journalistic articles commonly framed the issues as a matter of institutional failings and administrative morality as a solution to these institutional problems. . It seems that in the second decade of implementation of the Constitution of 1991 the Colombian media

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<sup>450</sup> Haltom and McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis*.

<sup>451</sup> An example of a case of a systemic violation against administrative morality is the article titled: "The District [Bogota] does not want to assume responsibility for mistakes in property appraisals' argues the *Contralor* Oscar Gonzalez Arana". The *Contralor* is the head of an oversight agency responsible for controlling budgetary management in public agencies. This article refers to the investigation conducted by Gonzalez Arana in relation to the process of property appraisals in Bogota that are the basis for calculating property taxes in the city. Gonzalez Arana identified weaknesses in the process and filed a popular action against the city of Bogotá for the additional cost that taxpayers assumed due to mistakes in the process of appraisal. "El Distrito No Quiere Asumir Fallas En El Avalúo Catastral;, Dice El Contralor Oscar Gonzalez Arana,," *El Tiempo*, July 13th 2007.



have shifted their focus somewhat from an institutional focus to a focus on individual violations of administrative morality. These findings suggest that the concept of administrative morality has evolved and this evolution may have reduced its potential impact for improving institutional performance in bureaucratic administration.

The tone in the articles with regards the defendants (mostly governmental agencies at the local and national level) is neutral to negative during the two decades of implementation of the Constitution. By contrast, in general, the tone with regards the plaintiffs seems to be neutral to positive.<sup>452</sup> In spite of this general difference, during the second decade of implementation the percentage of articles with a positive tone with regards the plaintiff decreased in comparison to the first decade. In other words, the tone towards plaintiffs shifted over time from being majority positive to being more neutral.<sup>453</sup>

Given the circumstances under which the Constitution of 1991 was created, (circumstances of generalized violence, systemic corruption, and lack of representativeness from main institutions like the Congress) the Constitution of 1991 brought hope of deep changes to the country. These changes were supposed to come through citizen engagement revealed in different mechanisms of participation that the Constitution created. One of these mechanisms is 'popular actions' in cases of

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<sup>452</sup> In general, the tone towards plaintiffs is more positive in cases of political processes than in cases of governmental services to individuals (See Graphs 7 and 8). This might be due to the fact that the majority of articles related to political processes (83%) have a systemic focus while the majority of articles related to governmental services to individuals (79%) tend to focus on individual cases. Future research will be necessary to explore whether media tend to express a more positive tone towards plaintiffs in cases of systemic reform.

<sup>453</sup> The Colombian Congress eliminated the monetary incentive for plaintiffs in cases of administrative morality in 2010.

administrative morality. These hopes might be the reason for a systemic approach in media coverage towards cases of administrative morality. For the first time, after years, cases of corruption and wrongful behavior of administration were identified and it was possible to correct mistakes of public administration through popular actions.

In the second decade of implementation, these hopes brought by the Constitution seem to have decreased. Media have become critical with regards plaintiffs looking for monetary incentives and no interest in improving the quality of public administration. An article published in 2010 exemplifies the skepticism towards popular actions due to the monetary incentive that plaintiffs receive. The article is titled "The price of justice" and writes:

*"Popular actions, a sort of tutelage that focuses on collective rights and administrative morality, are about to be reformed in the Congress and there is a strong controversy about the possible implications of the reform... This constitutional mechanism helped to expose scandals such as the irregular transaction in which former minister Fernando Londoño bought bond titles from Invercolsa... and [the action also helped] to take care of environmental demands of those who live near-by dumpsters... In spite of its usefulness, the mechanism has some weaknesses. The main weakness is the monetary incentive that plaintiffs receive."<sup>454</sup>*

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<sup>454</sup> "El Precio De La Justicia," *Semana*, November 30th 2010.

This reference illustrates both the initial hopes attached to popular actions and the growing disillusionment toward them. In the first years of implementation big scandals of corruption were fought through cases of administrative morality and the judiciary found a way to contribute to improving public administration through popular actions. Later on, the media began suggesting that benefits of these actions were outweighed by the costs, and began suggesting that plaintiffs were filing numerous and absurd lawsuits for no reason other than the monetary. Currently, media seem to be skeptical about the future impact of popular actions for administrative morality given that the incentive was eliminated.

The Colombian constitution of 1991 intended to provide a participatory frame to strengthen citizen engagement and human rights. The analysis presented in this paper suggests that while the media report extensive individual involvement in popular actions, there is growing disillusionment with these actions. Media coverage of administrative morality and popular actions to enforce this new right has shifted considerably in the twenty years since adoption of the constitution. Early hope in the power of administrative morality to bring about institutional reform has shifted toward disillusionment in popular actions.

## Chapter 8: Conclusion

The Colombian constitutional reform of 1991 was a profound change in the institutional setting of the country. For the first time representatives from different political, social, and demographic groups participated from a constitutional assembly with the purpose of agreeing on a new institutional frame for Colombia.<sup>455</sup> One of the main characteristics of the Constitution of 1991 was its emphasis on constitutional rights (a longer catalog of rights was approved) and the creation of judicial actions that allow citizens to demand from judges the enforcement of these rights.<sup>456</sup>

The Colombian constitutional reform of 1991 was not an exception in the Latin American context. During the 1990s several countries faced similar reforms with the purpose of providing better protection to constitutional rights that were systematically violated especially during states of exception when basic constitutional controls were relaxed.<sup>457</sup> In these constitutional reforms the courts had a key role as enforcers of constitutional rights and as a consequence constitutions granted courts the power of exerting control over bureaucratic behavior by enforcing the rule of law. This new role of courts in Latin America has brought new dynamics to the separation of powers specifically by allowing courts to participate in policy-making processes. This process has

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<sup>455</sup> Carillo, *Constitucionalizar La Democracia Social. El Proceso Constituyente De 1991 Y América Latina*.

<sup>456</sup> Sachica and Vidal Perdomo, *La Constituyente De 1991: Compilacion Y Analisis Historico-Juridico De Sus Antecedentes Y Primeras Decisiones*; Londoño-Toro and Torres-Villarreal, "¿Podrán Las Acciones Populares Colombianas Sobrevivir a Los Recientes Ataques Legislativos Y Jurisprudenciales?."

<sup>457</sup> Couso, Huneeus, and Sieder, *Cultures of Legality: Judicialization and Political Activism in Latin America*; Rosenn, "The Success of Constitutionalism in the United States and Its Failure in Latin America: An Explanation."

been called the “judicialization of politics.”<sup>458</sup> The Colombian constitutional reform of 1991 is an example of this process.

The judicialization of politics has impacted social life in several ways.<sup>459</sup> Courts’ rulings have shaped political discourse because the media has publicized the core judicial cases and the people have learned about the categories and the language used by courts. This language has been increasingly used by the people in their daily lives and it is now part of citizens’ relationships with the government. Courts’ interpretation of the constitution is now part of social dynamics.<sup>460</sup>

The resort to courts in the Latin American constitutional reforms was set with the purpose of making rights more effective. By creating judicial actions, the constitutions entitled the people to file suits against governmental authorities and demand from them protection to constitutional rights. This check to bureaucratic performance motivated a more active judiciary that changed from being isolated from political debates to being one of its key actors.<sup>461</sup>

In the Colombian case popular actions, the term for lawsuits that are easily filed by members of the public, are an example of the new constitutional actions that were created with the purpose of granting protection to constitutional rights. The relevance of popular actions is related to the type of rights that they aim to enforce: “collective rights.” The Constitution of 1991 was the first in Colombia to refer to collective rights,

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<sup>458</sup> *Ibid.*

<sup>459</sup> Couso, Huneeus, and Sieder, *Cultures of Legality: Judicialization and Political Activism in Latin America*.

<sup>460</sup> Sieder, Schjolden, and Angell, *Judicialization of Politics in Latin America*.

<sup>461</sup> Couso, Huneeus, and Sieder, *Cultures of Legality: Judicialization and Political Activism in Latin America*; Cepeda, “Judicialization of Politics in Colombia.”

and the framers included this category in order to motivate citizen engagement in the protection of social goods. Collective rights are different from civil rights because while civil rights are individual, collective rights are said to belong to society as a whole.<sup>462</sup> Some examples of collective rights are: public goods, public space, public security, free economic competition, and administrative morality, among others.<sup>463</sup> This dissertation has focused on administrative morality. Although the constitution did not provide a definition of administrative morality, according to the framing process this right was meant to protect the rule of law as a fundamental social value in administrative processes.<sup>464</sup>

Popular actions aimed to foster solidarity among the population by allowing any individual to file a suit in order to protect a collective right.<sup>465</sup> The creation of popular actions and collective rights revealed the intention of the framers to motivate a social change in the Colombian society by motivating citizens to acting in pursue of an interest that goes beyond their individual motivations. Specifically in the case of popular actions on administrative morality the intention of the framers was to motivate citizen engagement in bureaucratic performance.<sup>466</sup> Has this purpose been achieved? Did popular actions on administrative morality work as an effective check on bureaucratic performance? In this dissertation I explored these questions and specifically addressed whether the Colombian constitutional reform of 1991 has been able to change governmental administration through popular actions on administrative morality.

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<sup>462</sup> Botero, *Acción Popular Y Nulidad De Actos Administrativos: Protección De Derechos Colectivos*.

<sup>463</sup> Art 88, Colombian constitution.

<sup>464</sup> Comisión 5a, "Derechos Colectivos."

<sup>465</sup> "Derechos Colectivos."

<sup>466</sup> Ibid.

My research questions are: What is administrative morality? What are its implications for the Colombian public administration? Studies in administrative morality in Colombia have provided a normative analysis of this notion and have set the theoretical foundations for a more comprehensive and empirical approach.<sup>467</sup> In this research I explored the interpretation that different actors have on administrative morality and their perception of the possible impact that this notion has had in the last twenty years. I analyzed these data by using three theoretical frames about the capacity of legal reforms to reform governmental administration.

The theoretical framework proposed by Gerald Rosenberg suggests that constitutional rights and judicial enforcement of them generally cannot foster long-term social change.<sup>468</sup> According to Rosenberg the potential of courts to foster social change is bounded by the political coalitions that exert power over the executive and the legislature. Thus, in Rosenberg's frame the potential of courts is limited and it depends on the support of the other branches to generate impact over society.

A second theoretical framework proposed by Michael McCann suggests that judicial decisions on constitutional rights can foster social change by changing people's conceptions of what is legally possible.<sup>469</sup> In a study of pay equity reform McCann argued that legal mobilization inspired a change in people's perception of what is legally possible. Based on this change in people's perception, the people used court decisions

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<sup>467</sup> Londoño-Toro and Torres-Villarreal, "¿Podrán Las Acciones Populares Colombianas Sobrevivir a Los Recientes Ataques Legislativos Y Jurisprudenciales?"; Matallana Camacho, "Acción Popular De Moralidad Administrativa (Popular Action of Administrative Morality)." Botero, *Acción Popular Y Nulidad De Actos Administrativos: Protección De Derechos Colectivos*; Polanía, "Moralidad Administrativa."

<sup>468</sup> Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*

<sup>469</sup> McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*.

in order to pressure employers to change their behavior. Thus, according to this stream of the literature while court cases cannot foster social change, popular pressure in the form of litigation and legal mobilization can foster social reforms.

A third theoretical framework suggests that legal rights may contribute to policy change when several key supporting conditions are present.<sup>470</sup> Epp argues that in presence of a legal reform, liability pressure combined with support from key administrators can foster social change. Epp demonstrated that in the areas of policing, parks administration, and the implementation of sexual harassment norms in the US these conditions were present and they motivated local agencies to adapt their policies. The decision of local agencies to change their policies and procedures was reached as a consequence of the understanding that reforms were necessary not only as a consequence of individual mistakes but also as a consequence of systemic failures.<sup>471</sup> Although these theories have been developed in the US context I used them as lenses to understand the Colombian constitutional reform of 1991.

In this chapter I will summarize my observations and then I will discuss its implications for debates over the implementation of constitutional reforms in Latin America.

## **Summary**

Administrative morality was included in the Constitution as a collective right so individuals could file a suit against governmental organizations. This dissertation

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<sup>470</sup> Epp, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State*.

<sup>471</sup> Ibid.



provides the first analysis of the debates surrounding the addition of this key right to the Constitution. Still, even after my examination of these debates in Chapter 1 the origins of this collective right remain unclear. During the debates of the Constitutional Assembly the framers initially referred to a collective right to demand legal compliance from governmental agents. Framer Jesus Gomez Perez specially referred to this collective right as the most essential of all because it was related to protecting the rule of law. While the collective right to demand legal compliance from authorities disappeared from the Constitution, administrative morality was included in the catalog of collective rights.

The creation of popular actions and administrative morality as one of the collective rights is an example of what scholars have called the judicialization of politics in Latin America.<sup>472</sup> Latin American constitutions that were framed during the 1990s created judicial actions that allowed judges to participate in policy-making processes. In the Colombian case the Constitution created actions that entitled courts like the Constitutional Court or the Council of State to get involved in policy-making processes. Administrative morality is a good example of a cause of action that would allow individuals to bring to the jurisdiction cases related to corruption, allowing judges to impact policy-making.

It is striking that during the constitutional framing process there was no debate on the notion or implications of administrative morality. During the first four debates of the article on popular actions framers mentioned a collective right to demand from

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<sup>472</sup> Couso, Huneeus, and Sieder, *Cultures of Legality: Judicialization and Political Activism in Latin America*; Sieder, Schjolden, and Angell, *Judicialization of Politics in Latin America*.

authorities compliance of their legal duties. During the fifth debate of the article on collective rights the notion of administrative morality appeared on the draft but there was no explanation of where did the term came from.

Only in the last debate of the article related to collective rights some framers studied the ambiguity that the expression administrative morality implied. These framers showed concern about this vagueness and its possible implications for bureaucratic performance. In spite of this analysis, the Constitutional Assembly approved the inclusion of administrative morality as a collective right. In the framers' opinions they did not have enough reasons to eliminate administrative morality and by doing so they would only reduce possibilities for citizen engagement. Thus, from the constitutional perspective administrative morality was born without a clear meaning.

In 1998 the Congress passed the first piece of enabling legislation on popular actions: the law 472, Statute for Popular Actions.<sup>473</sup> In Chapter 2 I analyzed this Statute and its reform of 2010. During the legislative debates Congress members acknowledged the experience of foreign countries (South American countries, the US, and European countries) on the implementation of collective rights and popular actions. The Statute aimed to motivate citizen participation by creating a monetary incentive for plaintiffs in cases where the judge granted the action. The Statute also motivated citizen participation by favoring flexibility with regards the formal requirements to file the suit. The Statute did not provide a definition of administrative morality.

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<sup>473</sup> Congreso de la Republica de Colombia, "Ley 472."

In my interviews with key actors I found out that popular actions, as characterized by the statute, were widely believed to have had a positive impact. For instance, the professor and practitioner Luis Felipe Botero argued that popular actions had brought up conflicts that were latent in society but that the people could not bring to the authorities due to the lack of a legal mechanism. In spite of this positive impact, as perceived by scholars, the monetary incentive was highly criticized by local governments and by the judiciary. Local governments argued that plaintiffs had filed frivolous suits and that they were impacting negatively local budgets. The media documented local governments' critiques by referring to some plaintiffs as bounty hunters.

The economic motivation of plaintiffs was interpreted as an abusive use of popular actions. In my interview with Juan Carlos Garcia, a frequent litigator, he explained that due to plaintiffs' interests on receiving the incentive popular actors were perceived as petty and selfish. According to Garcia the media, judges, and the administration portrayed a perverse image of plaintiffs in popular actions.

The government promoted a reform for the Statute of Popular actions with regards the incentive arguing that the government was spending considerable sums of money in responding to suits in popular actions. As a consequence, in 2010 the Congress passed a law (Law 1425 of 2010) eliminating the monetary incentive.<sup>474</sup> During the debates of the law the Congress referred to the negative impact of the monetary incentive but there was no empirical data estimating this impact. Also, during the

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<sup>474</sup> "Ley 1425."

legislative process the debate focused on the motivation of plaintiffs for filing a suit. In this debate the standard of a good citizen was identified with an altruist motivation and consequently the plaintiff should not have initiated suits with the purpose of receiving a monetary incentive.

In several interviews scholars, practitioners, and government officials argued that the elimination of the incentive would impact negatively the implementation of popular actions and administrative morality. Thus although in 1998 the Statute attempted to motivate citizen participation the law of 2010 considerably reduced the incentives to file popular actions. Future research will be necessary to assess the implementation of this norm and the impact of the elimination of the incentive.

With regards the procedure in popular actions plaintiffs argued that the government is still in control of a considerable part of the process. Beatriz Londoño (scholar and consultant for plaintiffs in popular actions) argued that although popular actions have been an important mechanism to join forces in the improvement of governmental performance they do not provide a good scenario for plaintiffs to controvert governmental actions. According to Londoño the government has used popular actions to convince judges of their good performance and consequently plaintiffs had lost interest in this cause of action. Garcia confirmed this perception by arguing that popular actions did not offer a real opportunity for plaintiffs to stand up to the government.

In Chapter 4 I studied another fundamental piece of legislation that the Congress passed in 2011 with regards popular actions and administrative morality: the

administrative code.<sup>475</sup> In an effort to modernize judicial processes, justices in the Council of State worked together with members of the government and civil society to draft a new code that could contribute to reducing judicial congestion and improving bureaucratic performance. The code was premised on the assumption that governmental performance is defective and that judicial intervention is necessary to improve it.

On administrative morality and popular actions the code made two fundamental contributions. First, the code included a definition of administrative morality stating that all public servants shall perform with rectitude, loyalty, and honesty in their administrative behavior.<sup>476</sup> It is notable that this definition, adopted ten years after the constitution was framed, is the first formal legal definition of administrative morality. But whether this definition will contribute to clarifying the meaning of administrative morality remains unclear because this definition is value-based. Article 3 of the code described administrative morality in terms of “rectitude, loyalty, and honesty” in administrative performance and it is uncertain whether this description will contribute to clarify administrators’ understanding of the notion in their responsibilities. Still, the debates helped to clarify some elements of the legislators’ understanding of the meaning of this term. During the legislative debates several legislators referred to administrative morality as related to the proper use of public funds. Although no element of this discussion was enacted in to law, it suggests that legislators may think of

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<sup>475</sup> Colombia, "Código De Procedimiento Administrativo Y De Lo Contencioso."

<sup>476</sup> Ibid. Article 3.

administrative morality as a legal norm that prohibits misuse of public funds or financial malfeasance.

The second element developed by the administrative code is its restriction on the power of judges in popular actions to overrule administrative acts or administrative contracts. According to the administrative code judges in popular actions are entitled to adopt the necessary mechanisms to stop the threat or harm to collective rights but they are not entitled to overrule administrative acts or contracts. During the legislative process judges argued that plaintiffs were using popular actions to avoid the formalities related to ordinary administrative actions. Administrative actions are more demanding than popular actions in terms of the formalities and proofs that are necessary to file a claim. Consequently, in judges' opinions, the power to overrule acts and contracts should be restricted to ordinary actions. As a result the administrative code reduced the power of judges in popular actions.

In my interviews different parties expressed concern about the consequences of this norm by reducing the impact of popular actions. Juan Carlos Garcia, a popular actor, argued that this reduction in judges' power limits the impact of rulings to the extent that rulings will not attack the real cause of the violations of administrative morality. Camilo Orrego, former legal counsel of the city of Bogota also argued that this norm would negatively affect popular actions.

In Chapter 5 I studied the guidelines that the courts have developed for the implementation of administrative morality. The Council of State has been the more active court on this regard. For instance, the Council has explained that administrative

morality is not related to individuals' understandings of morality but to the motivation of governmental agents when performing their duties. A moral administration would be the one in which the public agent fulfills the purpose pursued by laws applicable to the specific case. It seem like with this criterion the Council aimed to reduce subjectivity in the implementation of administrative morality by clarifying that "morality" in administrative morality is not related to an individual understanding of the notion but to the agent's motivation.

The Council has also argued that administrative morality is a concept with an open texture and that is the judge's responsible to fill it in with content in a case-to-case basis. For instance the Council has argued that a violation of administrative morality is a violation of legality that affects the entire society. This type of violation requires from the plaintiff to prove that the administrative act is illegal and that it pursued wrong motives. The Council has also emphasized the relationship between administrative morality and public funds. This court has argued that in fact most violations of administrative morality imply a mismanagement of public funds.

Cases decided by the Constitutional Court reflect the tension between this court and the Council of State. This tension is noticeable when the Court has claimed jurisdiction over cases that the Council is also analyzing but that the Court argues to have constitutional authorization to study in order to protect constitutional rights. In spite of these tensions the Court applies criteria set by the Council.

In my analysis of the court cases decided by the Council as the apex court in administrative affairs I found that plaintiffs in a majority of the cases are individuals.

There is evidence that some individuals have received organizational support when filing their claims but in most of these cases it is unclear whether individual plaintiffs have organizational support for their litigation. Further research will be necessary to identify how broad has been the organizational support for individual litigants. By exploring this aspect of popular actions it would be possible to determine more precisely whether the party capability theory explains litigation in popular actions.

My data suggest that the plaintiffs who are suing the government (mainly local governments and the national government) are primarily individuals and that the Council rules in favor of the defendants in the majority of cases (71%). This pattern holds for two of the three types of claims in cases of administrative morality: in cases of financial malfeasance and willful misconduct defendants tend to win (74% for financial malfeasance and 72% for willful misconduct), but in cases of individual rights violations plaintiffs win more frequently (58%). In cases of individual rights violations, the Council seemed more concerned about the symbolic importance of its rulings and tends to grant more actions than in comparison to the other two types of claims.

In examining the court cases I also found that a primary reason for denying plaintiffs' claims is that they lack evidence to support the claim. The evidentiary weaknesses of many plaintiffs' claims poses questions with regards to the capacity of ordinary individuals as plaintiffs to develop plausible cases in court. It appears that many ordinary plaintiffs have simply lacked the capacity to develop sufficient evidence to support their claim. This suggests a basic dilemma at the heart of the right to pursue popular actions. On the one hand popular actions are supposed to be widely available



for use by ordinary people. But to the extent that administrative morality relates to the motivation of public agents, and these motivations are typically revealed only through sophisticated development of evidence, it is not clear that typical plaintiffs can possibly have access to the necessary evidence to prove their case. Some sort of legal training may be necessary to be successful in this type of litigation. My interview with auxiliary justice Roberto Medina confirms this analysis.<sup>477</sup> In his opinion, during the implementation of popular actions they changed their character from being a constitutional action (that challenges policy) to being an ordinary administrative action (that challenges particular administrative decisions). According to Medina judges have been demanding more rigorous requirements from plaintiffs in a similar way that they do for ordinary administrative actions.

In my analysis over time the data suggest that there are three time frames as changing points in the growth of popular actions related to administrative morality. The Council decided the first popular action for administrative morality in 1997. In the first time frame (1997-2000) the Council decided just a few cases and plaintiffs lost all of them (N=3). In 2001 the number of cases decided by the Council grew significantly and this pattern seemed to be constant through 2007. In the second time frame (2001-2007) the number of cases grew considerably (N=127) and defendants won in 79% of the cases. In my interview with Johanna Vega, an attorney working at the third section of the Council, she explained that there are no apparent reasons that motivated this

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<sup>477</sup> "Interview Roberto Molina."

change in the data.<sup>478</sup> In 2008 the number of cases ruled by the Council decreased significantly, showing a new change in the data. In the time frame 2008-2011 the number of cases decreased (N=20) and the defendants kept winning but at a smaller percentage than in previous years (72%).

With regards the type of claim the court case analysis confirms the low impact of popular action on administrative morality based on the type of claim. In the majority of cases (70%) plaintiffs filed suits with individual impact rather than with an institutional impact.<sup>479</sup> In other words, only in 30% of the cases the claims focused on achieving deep-institutional changes of behavior in the administrative agencies.

In Chapter 6 and Chapter 7 I examined how administrative morality has been interpreted beyond the courts. In chapter 6, I examined administrative interpretation of administrative morality. I showed that the executive has not institutionalized administrative morality, by which I mean that the government has not developed official communications to its agencies to clarify the requirements of this right, agencies have not conducted training or education regarding this right, and key administrators have very different understandings of its meaning.

To understand the executive's interpretation of administrative morality, I analyzed policy documents on transparency and anti-corruption mechanisms. Also I analyzed interviews with key actors at different levels of the government (local and national governments) and agents with experience at different policy areas. Policy documents do not refer to administrative morality and popular actions. These

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<sup>478</sup> "Interview Johanna Vega," (2012).

<sup>479</sup> N=150.

documents only mentioned the term “morality” a few times as a principle of public administration that governmental agents should apply and as a principle that gets violated when administrative performance is inefficient. There is no mention of popular actions or administrative morality as an entitlement that allows the people to demand a better governmental performance. Thus, policy documents have not institutionalized administrative morality and instead have left its interpretation to individual criteria of governmental agents.

When analyzing interviews with governmental agents they agreed that administrative morality implies legal compliance but that it also requires something beyond mere legal compliance. The interviewees explained that “something else” in terms of different elements like complying with the goals in specific regulations, individual values and individual morality, and pursuing the public good. But what this “something else” is varied considerably from person to person. Some emphasized individual morality; others highlighted the importance of the relationship between administrative morality and the public interest; others referred to the norms about ethics and transparency. These considerable differences in interpretation of administrative morality highlight a basic theme of this dissertation: that there is the lack of a shared discourse in Colombia on the meaning of the constitutional right to administrative morality.

Interviewees also differ on the role of training as a mechanism for institutionalizing administrative morality. Interviewees agreed that there is presently little training on this concept. They disagreed over whether training would be helpful.

William Espinosa, the Provost for Academic Affairs of the Superior School for Public Administration, argued that training could contribute to the implementation of administrative morality and to the improvement of governmental performance. By fostering skills of responsibility and efficiency in public agents training could contribute to the strengthening of the implementation of administrative morality. Camilo Orrego explained that training does not impact the implementation of administrative morality because it is mainly related to individual values and personal education. Eduardo Arce, Legal Vice-President of the Fiduciary "La Previsora," argued that the government has provided training to public agents on topics like transparency and anti-corruption. Arce explained that these trainings contribute to the implementation of administrative morality. At the same time Arce explained that in his opinion administrative morality is rooted in the agent's personal understanding of morality. To this extent administrative morality is not a matter of training but a matter of individual values. Different perceptions on training also provide evidence of the lack of a shared discourse on administrative morality and its' institutionalization.

Different interviewees identified different normative systems that inform their understanding of administrative morality. For instance, they referred to the constitution, individual values, regulations that were in place when the constitution of 1991 passed, and ethics as set of norms that are part of their notion of administrative morality. As legal pluralism suggests there are several normative orders related to the implementation of administrative morality.<sup>480</sup> Due to the lack of an institutionalization

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<sup>480</sup> Merry, "Legal Pluralism; Griffiths, "What Is Legal Pluralism."

of the notion of administrative morality different agents apply administrative morality by focusing on different normative orders. This reduces the potential impact of administrative morality as a check for governmental performance.

As I showed in Chapter 7, media coverage of administrative morality has become increasingly disillusioned about the potential for this right to improve public administration. Early journalistic articles on the new right expressed high expectations and hope for how the new right might foster greater citizen participation in government. But over time these expressions of hope were diminished. Additionally, media coverage has changed from a focus on stories of administrative morality as a corrective to institutional failings to a corrective merely of the mistakes of individual officials. Thus, media reports during the first decade of implementation of the constitution (1991-2001) focused on popular actions that targeted institutional violations of administrative morality. During the second decade of implementation (2002-2011) media reports focused on cases of individual violations of administrative morality. These reports changed from showing the possible impact of popular actions in reducing institutional corruption to addressing cases of individual violations of administrative morality.

On the other hand, my analysis of media coverage revealed that the media have been generally more positive toward plaintiffs (typically individuals) than toward government defendants. The national government and local governments are the most frequently sued in popular actions for administrative morality. The media's tone with regards defendants in popular actions tends to be neutral to negative. In other words,

media tend to be neutral to negative towards governmental performance related to popular actions for administrative morality. In relation to plaintiffs media's tone reveals an opposite tendency.

Still, the tone of stories has shifted over time. Stories have become increasingly critical towards plaintiffs in the second decade of implementation of the constitution. During the second decade media published reports on plaintiffs being bounty hunters and filing frivolous suits against local governments. According to these journalistic accounts plaintiffs' behaviors were contributing to judicial congestion and were affecting negatively local governments' budgets.

Thus, media portrayal of popular actions on administrative morality reveals skepticism about their potential. On the one hand, the media have displayed a negative tone with regard to defendants (local governments and the national government), thus portraying governmental performance as deficient. On the other hand, the tone regarding plaintiffs has been changing from being positive to being more neutral. What at the beginning seemed like positive portrayals of plaintiffs' interest and capacity for improving policy-making processes has turned into skepticism. Plaintiffs are being described as selfish and unreasonable and as filing frivolous suits and consequently they are portrayed as wasting public resources. This skepticism is confirmed by the type of claim that media have described as related to popular actions on administrative morality. During the first decade of implementation media related administrative morality as capable of targeting institutional cases while in the second decade media focused on individual cases. Thus, the impact of the lawsuits portrayed in

journalistic accounts has been decreasing suggesting that administrative morality has not been able to foster the institutional change that seemed possible when the constitution was framed.

Other key actors in the implementation of administrative morality are the oversight agencies that exert fiscal and disciplinary control over governmental agencies. In my interviews different participants mentioned the impact of these agencies on governmental performance<sup>481</sup> and the power they have due to the reputational costs that they could represent. Future research will address the role of oversight agencies like the Procuraduria and the Contraloria as well as agencies at the regional and local level of government.

Future research would also address the organizational support that plaintiffs have received. This analysis revealed that individual plaintiffs are the ones who most frequently file popular actions for administrative morality and the media analysis confirmed this finding. At the same time there is evidence of the organizational support that individuals have received in some cases. Future research could assess the types of organizations that provide such support and the impact they aim to achieve with these actions.

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<sup>481</sup> For instance, Espinosa argued that oversight agencies cause fear in governmental agents and make them inefficient because governmental agents tend to make conservative decisions to avoid investigations. Orrego and Arce mentioned codes of ethics and other regulations related to the ethical behavior of administrative agents. These norms are enforced by oversight agencies.

## **Broader implications**

This analysis of popular actions in administrative morality has three main broad implications in terms of the institutionalization of administrative morality and its possible impact on governmental performance. The first is that the framers had high aspirations for the new constitutional right to administrative morality but these aspirations have not been fulfilled. This is in part due to a lack of clarity about this concept in the framing debates themselves. The subsequent lack of clarity regarding the new constitutional right can be traced directly to the lack of clarity among the framers themselves. The second implication is that the implementation of administrative morality has been the story of growing disillusionment with an action that could have brought a deep institutional change but that ended focusing on cases with little impact. Third, the lack of a shared discourse on administrative morality has reduced the impact of administrative morality. I will address each of these in turn.

The framers had important aspirations in mind when they designed collective rights like administrative morality and when they chose to enforce collective rights through a judicial action that was supposed to be available to any person. This collective right was created to be a check for legality in governmental performance but the lack of a debate on this issue reduced the potential impact of the action. During the debates it was noticeable that the framers attempted to provide the people with a mechanism that could motivate them to protect collective interests. This would have meant a change in the Colombian culture to the extent that plaintiffs traditionally had focused on individual rights and individual interests but these new actions targeted



broader interests. Thus, enforcing the rule of law and fostering a social change towards solidarity were high aspirations of the framers but they were hindered by the lack of debate and definition.

The framers assigned the Congress the responsibility of developing the elements of popular actions and administrative morality but it took the Congress seven years to pass the statute. Several key actors participated of the debate of the statute demonstrating the salience of the topic. Oversight agencies, legislators, and NGOs articulated their visions on popular actions and debated on the convenience of leaving administrative morality undefined. The Congress decided to leave administrative morality undefined and consequently deferred to the courts the task of stating its core elements. During the legislative debates one NGO (Fundepublico) argued in favor of leaving administrative morality undefined and in my interviews I found supporters of this vagueness but it is possible that if the Congress had provided more clear elements to administrative morality its impact would have been higher.

Since 1997 the courts, specially the Council of State, have been making decisions on popular actions for administrative morality and they have provided guidelines for its implementation. These guidelines are the clearest process of institutionalization that administrative morality has had and other actors, including the Constitutional Court, have used these guidelines to clarify its meaning. In spite of the advantages of this institutionalization process the Council has frequently denied plaintiffs' suits reducing its impact.

One challenge of the institutionalization process of administrative morality by the courts has been the demand for plaintiffs to provide evidence with regards the illegal motivation of governmental agents when violating of administrative morality. It may not be a realistic expectation that a citizen with no legal training could provide evidence of the motivation of governmental agents and consequently plaintiffs are prone to lose the lawsuits. In one of my interviews with an auxiliary justice at the Council of State he argued that popular actions have shifted to being ordinary administrative actions. He argued that in reality the flexibility and simple requirements that were supposed to motivate citizen engagement have been replaced by a more rigorous process from plaintiffs. This shift could pose a challenge for the success of administrative morality in checking governmental performance. The institutionalization of administrative morality by the courts has changed its character.

The governmental lack of institutionalization of administrative morality shows the disarticulation between constitutional mechanisms like popular actions and governmental strategies for transparency and anti-corruption campaigns. Governments since 1991 have focused their anti-corruption and transparency campaigns on strategies that are not related to popular actions. In these documents the mention of morality only appears as a reference to a principle of public administration that governmental agencies should respect but not as the collective right that is enforced through popular

actions.<sup>482</sup> Thus, the government does not take popular actions into consideration as mechanisms for improving transparency in performance.

In my interview with Orrego, former head legal counsel of Bogota, he explained that in his opinion popular actions for administrative morality offered valuable opportunities of collaboration with the citizens. In his experience litigation offers the administration with the opportunity of learning from things that are not working well in relation to governmental services. In his opinion by approaching litigation with this perspective the administration obtains two benefits. On the one hand, the judicial process could be used as an opportunity of mediation between the citizens and the administration in which the administration improves the services that are not working well. With this perspective, the judicial process could finish before the ruling and it would be less expensive for both parties than facing the entire process. On the other hand, if the administration reaches an agreement with the citizens before the ruling the administration has more options to decide the conditions in which the governmental service would improve. In other words, there would be a motivation for governmental agents to negotiate with plaintiffs in popular actions to avoid the final ruling because the final ruling implies an intervention of judges on administrative processes that they do not know well. The approach described by Orrego is an example of what could be the institutionalization of administrative morality by the government. Litigation in administrative morality could be used as an opportunity for improving governmental

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<sup>482</sup> CONPES, " Document 3186. A National Policy for Improving Efficiency and Transparency in Public Contracting; "Document 3248. Renewing Public Administration; "Document 3249. A Policy of Public Procurement for a Managerial State; "Document 3294. A Renovation of Public Administration: Result-Based Performance and Reform of the Performance Review System."

performance if the administrative agents receive guidelines about how to respond to these suits.

Currently the government has started developing policies regarding defense against litigation with the purpose of making more efficient the administration's response to litigation. In 2011 the government created the National Agency for Legal Defense of the Government.<sup>483</sup> This agency aims to lead strategies for legal defense through an efficient, comprehensive, and permanent administrative performance that would protect constitutional rights; the agency also focuses on optimizing public funds management. According to the agency's webpage its goal for the year 2017 is to progressively reduce rulings against the government and to change the litigious culture in the country.<sup>484</sup> It seems like this new governmental agency provides a new approach to litigation that could strengthen governmental performance.

The institutionalization of policies with regards governmental litigation could provide administrative agents with elements that favor the implementation of constitutional actions like popular actions. These policies could highlight questions of the possible impact of administrative morality in governmental performance to the extent that by clarifying its impact the government could improve its performance and reduce litigation. It is noticeable that one of the objectives of the agency is to reduce rulings against the government. Future research would be necessary to explore the policy mechanisms designed by the agency with this purpose.

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<sup>483</sup> "Agencia Nacional De Defensa Juridica Del Estado," [http://www.defensajuridica.gov.co/porta\\_agencia.html](http://www.defensajuridica.gov.co/porta_agencia.html).

<sup>484</sup> Ibid.

The lack of institutionalization of administrative morality and its disarticulation with governmental anti-corruption mechanisms could be one of the reasons why NGO's like Transparency Colombia chose public pressure over formal mechanisms like popular actions on their quest for transparency. This disarticulation leaves administrative morality and popular actions as isolated events to the extent that they have no concrete repercussions on governmental performance. Since this is the case, civil society organizations have chosen to exert pressure over the government by getting attention of the media or other mechanisms that could imply a higher reputational cost.

The second implication of this analysis is that in the context of the constitutional reform of 1991 administrative morality promised to be a legal mechanism for institutional reform but there is clear evidence of growing disillusionment with this high aspiration. The framers envisioned collective rights as tools for deep institutional and cultural changes that could focus people's attention on social needs and specifically on a high quality public administration. According to the media analysis and court case analysis during the first decade of implementation of the constitution actors used administrative morality in cases of broad impact. These were cases of corruption that involved high sums of public funds and cases in which implementation of general policies violated administrative morality. By the second decade after adoption of the new Constitution both the court cases and media coverage of the issue changed towards focusing less on broad institutional problems in the government and more on relatively minor mistakes by individual officials that affected one particular individual or a small group.

The reduction of the scope and aspiration of these cases is also related to the growing debate in the second decade over whether the monetary incentive was encouraging frivolous litigation. The debate about the monetary incentive focused on the frivolous litigation that developed as a consequence of plaintiffs' interest in gaining the monetary incentive and that led to the stereotype of plaintiffs as bounty hunters. This stereotype was consistent with the behavior of some litigants that filed frivolous suits and were contributing to judicial congestion and inefficiency in administrative behavior. Facing these problems the government, instead of developing guidelines to improve their defense against litigation opted to discourage people's use of popular actions. Rather than choosing this alternative it would have been possible for judges to sanction frivolous suits by using fees and other legal mechanisms rather than eliminating the monetary incentive. Thus, the elimination of the incentive by the Congress favored the status quo and dramatically reduced the possibilities of popular actions of fostering institutional change.

The third implication of this analysis is that the lack of a shared discourse on administrative morality has reduced its possible impact. The current normative frame provided by the administrative code defined administrative morality like the obligation to perform with rectitude, loyalty, and honesty in administrative behavior. According to the Council of State and the Constitutional Court the notion of administrative morality should be implemented according to the specific legal norms that regulate specific cases. These courts also argue that administrative morality refers to the motivation of governmental agents when performing their duties. The media have portrayed

administrative morality as an anti-corruption mechanism related to the financial administration. Finally, governmental officials relate administrative morality to different notions of individual values and ethics, and to the public good. The different perceptions of administrative morality are layers that have interacted and have characterized this notion as of today. These layers are the different normative orders that legal pluralism describe when explaining the implementation of legal reforms.

Various actors have implemented the notion of administrative morality based on their own individual understanding of it. As a result the possible impact of administrative morality is limited and it is likely to remain limited until this notion faces an institutionalization process that brings together a shared perception of what is required by this constitutional right. In my interview with justice Luis Fernando Alvarez from the Council of state he explained that administrative morality has not fulfilled its constitutional purpose partly because there is no shared understanding of its definition. According to Alvarez, the most basic question related to administrative morality would be “whose morality are we talking about?” and in his opinion in order fulfill the potential of this notion it would be necessary to identify a notion of morality that could be generalizable and that is not relative.<sup>485</sup> Alvarez’s analysis of administrative morality identifies the lack of a shared notion as the factor that hinders the successful implementation of it.

In sum, administrative morality has not fulfilled its potential due to its lack of institutionalization that would allow articulating efforts from different social sectors. It

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<sup>485</sup> "Interview Luis Fernando Alvarez," (2012).

would be necessary for the congress to re instate the economic incentive for plaintiffs in popular actions and for the congress to broaden the power of judges in this type of actions. Also in relation to the courts it would be necessary to strengthen the will of courts to enforce administrative morality as a check of bureaucratic performance. As a third condition it would be essential to foster governmental institutionalization of administrative motality by providing guidelines, training, and oversight in order to support administrators' implementation of this notion. Lastly, it would be necessary to motivate citizen engagement in popular actions for administrative morality as a check of governmental performance. Without these conditions administrative morality only partially could achieve its purpose.

### **A general evaluation**

The purpose of this dissertation has been to describe and map out the concept of administrative morality in Colombia by studying the approach of the different parties that have been involved in its implementation. Thus the purpose of this analysis has not been to evaluate the different elements of administrative morality but to describe them. In spite of this purpose, it has been inevitable to draw normative implications regarding the meaning of administrative morality and its possible impact on the Colombian public administration in the future.

Empirical data provide evidence of the small impact that administrative morality has had since the Constitution of 1991. With this perspective it would be easy to argue that administrative morality is not an efficient anti-corruption mechanism and that



framers' intentions have failed. This conclusion is confirmed by some of my interviews specifically when interviewees explained that administrative morality has not changed governmental performance in the country. To this extent constitutional norms have not been capable of fostering institutional and cultural change.

Although this is a possible interpretation there is an alternative explanation that in my opinion would more accurately describe the potential impact of administrative morality. Administrative morality has fostered some social change by entitling individuals to voice concerns of corruption and lack of transparency in governmental behavior that they could not raise before. Some of my interviewees explained that popular actions have provided visibility to citizens' concerns about governmental performance.

Administrative morality changed the people's perception of the institutional mechanisms that they could use to control corruption. For instance, it is well known that notaries manage considerable sums of money and that they have significant power in Colombia. In spite of this status of power two citizens in 2002 filed a suit for the lack of transparency in the selection process of notaries in all the territory.<sup>486</sup> This is an example of how administrative morality changed the notion of what was legally possible in the country by empowering citizens to keep the administration accountable. Before the constitution of 1991 these two citizens would not have had an institutional mechanism that allowed them to voice their claim and administrative morality was the mechanism to do it.

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<sup>486</sup> *Ap* 447.

Administrative morality provides evidence of the evolution of public values in Colombia. The framers included collective rights as a new institution in the constitutional reform with the purpose of fostering solidarity among the population. They insisted in the importance of individual initiative to promote collective needs and popular actions were the institutional mechanism to do it. Although popular actions on administrative morality have not achieved their potential they have had an evolution process that has made the people to think about their expectation of governmental performance.

In all my interviews the participants defined administrative morality as the combination of legality and “something else”. The ambiguity of administrative morality and the need to explain what that “something else” is has motivated reflection and discussion on the expectations of governmental performance or what is considered corruption. This debate still lacks depth and it has not reached a conclusion of a shared discourse on administrative morality but it has motivated courts, civil society, the media, plaintiffs, and administrative agencies to walk towards an understanding of public administration based on values rather than based on mere legality. For instance, the Constitutional court argued that the idea of solidarity in the constitution of 1991 should be developed in agreement with the concept of religious pluralism. Given the separation of church and state in Colombia there is no single exclusive ethical paradigm, and Colombian institutions should be open to all ethical standards as long as they respect constitutional rights.<sup>487</sup> This ruling of the Constitutional Court and its analysis of

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<sup>487</sup> C 459.

pluralism is an example of the development of public values in Colombia. Specifically it speaks to the ethical component of administrative morality and how to articulate it with other values like pluralism.<sup>488</sup>

There is evidence in Colombia of the positive impact that constitutional actions have brought after the constitution of 1991. The action for tutelage (article 86 of the Constitution) fostered a profound institutional change in the country. This action has been widely used by the people and has allowed them to demand protection of constitutional rights when public and private authorities violate them.<sup>489</sup> Given its simple and brief procedure the action for tutelage has been successful in providing remedy to circumstances in which fundamental rights were under threat. The high impact of the action for tutelage is an example of the judicialization of politics in Colombia and it proves that constitutional actions could foster institutional change. In a similar way popular actions could have the potential of motivating citizen engagement towards checking governmental corruption. It will be necessary an institutionalization process in which the object of administrative morality is well-defined and in which it becomes a priority in anti-corruption policies.

The recently created Observatory for Anticorruption exemplifies the possible future impact of administrative morality. The Observatory articulates efforts of the

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<sup>488</sup> Referring to the impact of the constitution of 1991 in the anticorruption campaign a scholar in a publication of an oversight agency at the national level (Contraloria General de la Republica) explained: "This regenerating project is not far from the debate of whether to impose a certain ethical paradigm on politics. As a consequence of this debate it would be possible to identify the values accepted by a certain society in order to include them in the mythical system [symbols and institutions] in order to define what is not incorrect, inappropriate, or corrupt in the political environment".

<sup>489</sup> Cepeda, "Judicialization of Politics in Colombia."

national and regional commissions for moralization and the national commission of citizens in the anti-corruption campaign. Commissions for moralization are new initiatives launched in 2011 by president Santos with the purpose of articulating governmental efforts against corruption and to foster transparency, efficiency, and morality in public administration.<sup>490</sup> The notion of morality in administration seems to be at the core of the Observatory and the commissions. This could be an opportunity for the government to institutionalize administrative morality and to use popular actions as mechanisms to enforce a shared understanding of this notion. With this purpose the National Agency for Legal Defense of the government could also design policies on the implementation of administrative morality.

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<sup>490</sup> "Presidencia De La Republica,"  
[http://wsp.presidencia.gov.co/Prensa/2011/Diciembre/Paginas/20111209\\_01.aspx](http://wsp.presidencia.gov.co/Prensa/2011/Diciembre/Paginas/20111209_01.aspx).

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## Appendix A: Debates Article 88 and Article 209 of the Constitution

### Debates Article 88 of the Constitution

Commission	Date of the debate
Fifth	April 12 <sup>th</sup> , 1991
Fifth	April 16 <sup>th</sup> , 1991
First	May 6 <sup>th</sup> , 1991
Entire Assembly	June 10 <sup>th</sup> , 1991
Entire Assembly	June 14 <sup>th</sup> , 1991
Entire Assembly	June 29 <sup>th</sup> , 1991
Commission for coding	June 22 <sup>nd</sup> , 1991

In a first search on the archives it seemed like the fourth commission had analyzed administrative morality but there is no evidence in the transcripts that this commission had analyzed the topic.

### Debates Article 209 of the Constitution

Commission	Date of the debate
Third	May 15 <sup>th</sup> , 1991
Entire Assembly	May 22 <sup>th</sup> , 1991
Entire Assembly	May 30 <sup>th</sup> , 1991
Entire Assembly	June 30 <sup>th</sup> , 1991

**Appendix B: Congressional Gazettes and Official Journal with publications  
about the Administrative code**

Gazette number	Date	Debate
Gazette 1173/09	November 17 <sup>th</sup> , 2009	Draft analyzed by the Senate. Project 198 of 2009 signed by the president of the Council of State and the Vice-minister of Justice.
Gazette 1210/09	November 27 <sup>th</sup> , 2009.	Report of the first debate Senate - Commission.
Gazette 264/10	May 27 <sup>th</sup> , 2010	Report of the second debate Senate.
Gazette 683/10	September 23 <sup>th</sup> , 2010	First debate House – Commission.
Gazette 951/10	November 23 <sup>th</sup> , 2010	Report of the first debate House of Representatives - Commission.
Gazette 1075/10 House Gazette 1072/10 Senate	December 7 <sup>th</sup> , 2010	Unified text – Commission of conciliation Senate and House.
Gazette 12/11	January 7 <sup>th</sup> , 2011	Publication of the final text. Law 1437, 2011
Official Journal 47956	January 18 <sup>th</sup> , 2011	Publication of the final text. Law 1437, 2011

**Appendix C: Table of frequencies Court cases per year**

Year	Percentage
1997	0.6
1998	0
1999	0.6
2000	1
2001	15
2002	9
2003	9
2004	8
2005	17
2006	17
2007	10
2008	4
2009	4
2010	2
2011	3

N=151

**Appendix D: Secondary foundation of the claim (Legal norms referenced by plaintiffs to support claims of administrative morality, Secondf)**

Secondf	Percentage
Statute	68
Constitution	31
Administrative regulation	1

N=109

## Appendix E: Codes Court Case Analysis

Variable name	Variable label/ instructions/codes (value labels)
issue1, issue2, and issue3	First substantive issue Secondary substantive issue Third substantive issue Issue. According to the claim, which issue is pursued?  0=none  Financial Malfeasance (1-20) 1=transparency <sup>491</sup> 2=corruption <sup>492</sup> 3=inefficiency <sup>493</sup> 4=improper decision (claimant not agreeing with decision made by the agency) <sup>494</sup>  Individual Rights (21-40) 21=due process 22= charging for services not provided/ charging excessively 23= improper decision 24= proper housing 25= efficiency 26=receiving proper answers from the administration 27=freedom of movement 28=life/ personal integrity 29=individual patrimony 30=equality 31=legal counseling and due process 32=recreation  Willfull misconduct (41 – 60) 41=divert attention from administrative mistakes to other factors

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<sup>491</sup> Normas de transparencia-contratacion

<sup>492</sup> Openly argues corrupt or “favoreciendo a terceros”

<sup>493</sup> Didn’t do what it should/ diligence

<sup>494</sup> In most cases of improper decision, plaintiffs argue illegality in administrative behavior.



42=improper decision  
43=transparency  
44=inefficiency  
45=corruption

secondf<sup>495</sup>

Secondary foundation for claim  
0= None  
1=constitution  
2=statute  
3=administrative rule  
4=judicial decision

secondf2

Secondary foundation for claim  
0= None  
1=constitution  
2=statute  
3=administrative rule  
4=judicial decision

secondf3

Secondary foundation for claim  
0= None  
1=constitution  
2=statute  
3=administrative rule  
4=judicial decision

litcat1, litcat2, litcat3

Litigant categories

Individuals (1-4)

1=female  
2=male  
3=under 18 years old  
4=gender not ascertained

Private Business (5 -10)

5=small businesses  
6=Temporal union/consortium  
7=Foreign company  
8=Medium size business  
9=Big size business

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<sup>495</sup> Rules mentioned by plaintiffs in relation to Admin Morality and Popular Actions.

10=Unable to classify

Private/Non-profit organizations (11 - 25)

11= non profit advocacy

12= professional association

13= union

14= educational association or institution

15=religious or charitable organization

16= political party or political group

17= tribe or association of indigenous people

18= other

19=Neighbor association/ Junta de accion comunal

25= unable to classify specific type

Government

100 – 299= local municipalities

101=municipio de Acacias

102=municipio de Medellin

103=municipio de San Juan de Pasto

104=municipio de Ibague

105=Alcaldia de Cali

106=Municipio de Palmira

107=Municipio de Pereira

108=Distrito turistico y cultural de Cartagena

109= Municipio de Bello

110= Municipio de Soledad

111=Municipio de Barbosa

112=Alcaldia municipal de San Jose de Cucuta

113= Alcaldia de Bogota/ Distrito capital de Bogota

114= Municipio de Villavicencio

115=Municipio de Popayan

117=Municipio de dos quebradas

118=Alcalde de Calarca

119=Municipio de Neiva

120=Municipio de Ortega (Tolima)

121= Municipio de Sincé

122= Municipio de Zipaquirá

123= Municipio de Cóbbita

124= Municipio de Guacayamas (Boyacá)

125= Municipio de Albania

126= Municipio de Dibulla

127= Municipio de Distraccion

128= Municipio de El Molino

129= Municipio de Hatonuevo

130= Municipio de Barrancas  
131= Municipio de Fonseca  
132= Municipio de la Jagua del Pilar  
133= Municipio de Maicao  
134= Municipio de Manaure  
135= Municipio de Riohacha  
136= Municipio de San Juan del Cesar  
137= Municipio de Urumita  
138= Municipio de Villanueva  
139= Municipio de Uribia  
140= Municipio de San Juan de Tolima  
141=Municipio de Tibacuy  
142=Municipio de Ayapel  
143=Municipio de Sincelejo  
144=Municipio de Ocaña  
145=Municipio de Pueblo Nuevo  
146=Municipio de Sabanalarga  
147=Municipio de Sandoná (Nariño)  
148= Municipio de Madrid (Cundinamarca)  
149=Municipio de Yaguará  
150=Municipio de Tocaima  
151=Municipio de Mesitas del Colegio  
152=Municipio de Chaguaní  
153=Municipio de Arauca  
154= Municipio de Arauquita  
155= Municipio de San Francisco de Putumayo  
156= Municipio de Armenia  
157= Municipio de Barrancabermeja  
158= Municipio de Tunja

300 – 599= local agencies<sup>496</sup>

300= local policy agency  
301= social welfare  
302=Oversight agency  
303=lottery  
304= Empresa Ibaguerena de acueducto y  
alcantarillado de Ibague  
305=secretaria de educacion distrito turistico y  
cultural de Cartagena  
306=fondo financiero especializado de Cali

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<sup>496</sup> Sometimes plaintiffs sue the agency and divisions of the same agency at the same time, same action.

307=empresa licorera de Narino  
308=Empresa de energia y alumbrado de Pereira  
SA ESP  
309=Caribetell SA ESP  
310=Empresa de energia de Pereira SA ESP  
311= Departamento administrativo del medio  
ambiente del distrito de bogota  
312=Alcaldia local de Chapinero  
313= Junta administradora local de Chapinero  
314= Departamento administrativo de la  
defensoria del espacio publico Bogota  
315= Instituto de desarrollo urbano  
316=Departamento adminsitrativo de planeacion  
distrital Bogota  
317=Secretria de transito y tranporte de Bogota/  
secretaría de movilidad  
318= Secretaria de obras publicas de Bogota  
319=Secretaria de planeacion de Ibague  
320=Secretaria del interior de Ibague  
321= Jefe de justicia y orden publico de Ibague  
322=Empresa de acueducto y alcantarillado de  
Bogota  
323=Alcaldia local de ciudad Bolivar  
324=Secretaria de hacienda Bogota  
325=Direccion de impuestos distritales Bogota  
326=Unidad de recaudo de impuestos a la  
propiedad Bogota  
327= Departamento administrativo de impuestos  
distritales Bogota  
328= Concejo municipal de Giron  
329= Fondo de vivienda de interés social y reforma  
urbana del Distrito de Cartagena  
330=Curaduría urbana 2a de Neiva  
331=Departamento Admin Distrital de medio  
ambiente de Barranquilla  
332=Secretaria de Planeación distrital de  
Barranquilla  
333= Curaduría urbana 2a de Barranquilla  
334=Univ Distrital Francisco J de Caldas  
335= Concejo distrital de B/quilla  
336= Empresa de Servicios públicos de la Plata  
Huila ESP  
337=Empresas municipales de Cali EMCALI

338=Empresa de Servicios públicos de acueducto y alcantarillado de Sincelejo EMPAS  
339=Agua de la sabana SA ESP  
340=Empresa de servicios públicos de Ocaña ESPO SA  
341=Secretaría de desarrollo territorial y bienestar social de Cali  
342=Empresa de servicios públicos AAA Atlántico SA ESP  
343=Junta de Acción communal del barrio dos mil Villavicencio  
344= Fondo de Educación y seguridad vial. Secretaria de tránsito de Bogotá  
345=Jardín Botánico Bogotá  
346=Empresa de acueducto, alcantarillado y aseo de Madrid (Cundinamarca)  
347=INEM Julián Motta Salas de Neiva  
348=Juzgado civil del circuito de San Andrés  
349=Alcaldía local de Teusaquillo  
350= Electrificadora del Tolima SA  
351=Alcaldía local de Mártires  
352=Junta administradora local de Mártires  
353=Empresa de servicios públicos de Neiva  
354=Secretaría de gobierno de Cali  
355=Compañía de acueducto metropolitano de Bucaramanga

600 – 699= regional governments  
600= regional policy agency  
601= regional social welfare  
602=Oversight agency  
603= Departamento de Narino  
604= Gobernacion del Valle del Cauca  
605=Concesión Fund Aburrá  
606=Gobernación de C/marca  
607=Depto de Cauca  
608=Depto de Cauca  
609=Depto de Guajira  
610=Depto de Boyacá  
611=Gob de Bolivar  
612=Depto archipiélago de San Andrés, Providencia y Santa Catalina  
612= Depto de Santander

613= Depto de Arauca

614= Depto del Meta

700 – 799= regional agencies

700= regional policy agency

701= regional social welfare

702=Oversight agency

703= Direccion departamental de Salud del Cauca

704=Corporacion autonoma regional del Valle

705=Electrificadora del Caribe SA ESP

706= Departamento administrativo de transito y transporte del Valle.

707= Central hidroelectica de Caldas

708=Termoelectrica de la Dorada SA ESP

709=Industria licorera del Cauca

710=Asociación de municipios del macizo colombiano

711=Asamblea de Boyacá

712=Comité departamental de cafeteros del Cauca

713=Industria licorera de Bolivar

714=Corporación autónoma regional de la Guajira

715=Lottery

715=Asamblea de Santander

716=Caja de compensación familiar del Cauca  
COMFACAUCA

717=Departamento Administrativo distrital del medio ambiente DADIMA.

718=Instituto Departamental de tránsito y transporte del Meta

719=Corpoamazonía

800= national government

801= regional policy agency

802= regional social welfare

803= Oversight agency

804=Fondo Rotatorio del ejercito

805=Ministerio de Educacion Nacional

806=ICFES

807=Departamento Administrativo Nacional de la economia

808=Ecopetrol

809=superintendencia de servicios publicos domiciliarios

810=Registraduria nacional del estado civil  
811=Senado de la Republica  
812=Presidencia de la Republica  
813=Consejo de Estado  
814=Corte Suprema de Justicia  
815=Ministerio de Desarrollo economico  
816=Procurador general de la nacion  
817=Superintendencia financiera  
818=Ministerio de cultura y turismo  
819=Departamento administrativo de la  
presidencia de la republica  
820= Ministerio de transporte  
821=Consejo superior de la carrera notarial  
822= Ministerio de Defensa nacional  
823=INPEC (National institute for jails)  
824=Empresa nacional de telecomunicaciones  
(TELECOM)  
825=Contraloria General de la republica  
826=Banco del Estado  
827=Ministerio de Hacienda y credito publico  
828=Universidad Nacional de Colombia  
829=INURBE  
830=Policía Nacional  
831=Instituto de Fomento Industrial IFI  
832=Supersociedades  
833=Instituto Geográfico Agustín Codazzi  
834=Instituto Colombiano para la reforma agraria  
(INCORA)  
835=Congreso de la República  
836=Min minas y energía  
837=Supernotariado y registro  
838=Vicepresidencia  
839=Direcc de Impuestos y aduanas nacionales  
(DIAN)  
840=Min de protección social  
841=Fondo de solidaridad y garantía (FOSYGA)  
842=Consejo Nacional de seguridad social en salud  
843=Supersalud  
844=Ministerio de Comunicaciones  
845=Ministerio de Comercio, industria y turismo  
846=Comisión de regulación de agua potable y  
saneamiento básico  
847=Ministerio de ambiente (ambiente, vivienda y  
desarrollo territorial)

848=Banrep  
849=Consejo superior de vivienda  
850=Ministerio de agricultura y desarrollo rural  
851=Caja nacional de prevision social  
852=Instituto colombiano para el fomento de la educación superior  
853=Instituto de seguros sociales (ISS)  
854=Dirección de reclutamiento y control reservas Ejército Nacional  
855=Unidad administrative especial aeronáutica civil  
856=Consejo Superior de la judicatura  
900=Not ascertained

typedef1, typedef2, typedef3 Defendant categories

chll Challenge to policy/individual official action<sup>497</sup>  
0= challenge to policy  
1=challenge to individual decision

polar Policy area (defined by policy area of the agency, not specific matter)  
0=None  
1= Security/ homeland security  
2= Social welfare/housing (similar to 6)  
3= Academic  
4= Utilities (access to)  
5= Policymaking  
6= Service provision (infrastructure?): welfare, housing, oil exploitation, highways, public banks, public lights, water, emergency attention, pensions  
7= Oversight agency  
8= Lottery/ liquor producer  
9= Municipality/ region  
10= Education / universities  
11=Court  
12=Healthcare  
13=Environmental issues (waste)

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<sup>497</sup> Based on impact of the decision



14=Jails  
 15=Policy enforcement (law enforcement)> public space  
 16=Economic intervention (construction licenses)  
 17=Electoral system  
 18=culture and recreation  
 19=transportation  
 20=communication to the public/telecommunications  
 21=political participation / political system  
 22=public finance (management of public funds>  
 destination of public funds, tax admin)  
 23=agriculture and development  
 24=infrastructure (public works –aqueduct 64, sidewalk 48  
 and 49). Alcantarillado. Public lights? Same than 6?

year

Year of the decision. Ordinal variable

1997

1998

othright1

Is the admin. morality claim related to another collective right? (1-15)

0= none

1=public funds

2=public space/ use and defense of good for common good

3=public health

4=healthy environment

5=access to public services/ efficient provision of public services

6=Public security

7=Free economic competition

8= Rights of consumers and users

9=Protection of the cultural patrimony

10=Access to infrastructure related to public health

11=Urban development according to norms

15=not mentioned

16=Right to security and prevention of disasters

17=Ecologic equilibrium and rational/sustainable exploitation of natural resources

appellant

Appellant  
0= None  
1=defendant  
2=plaintiff  
3=oversight agency  
4=not applicable  
5=other (case 74)

decision

0=Plaintiff  
1=defendant  
2=both  
3=other (case 20 – cosa juzgada)

Judge name

.=not in the case  
1=writes opinion  
2=joins opinion  
3=concur  
4=dissent

Type of decision (typeofdec)

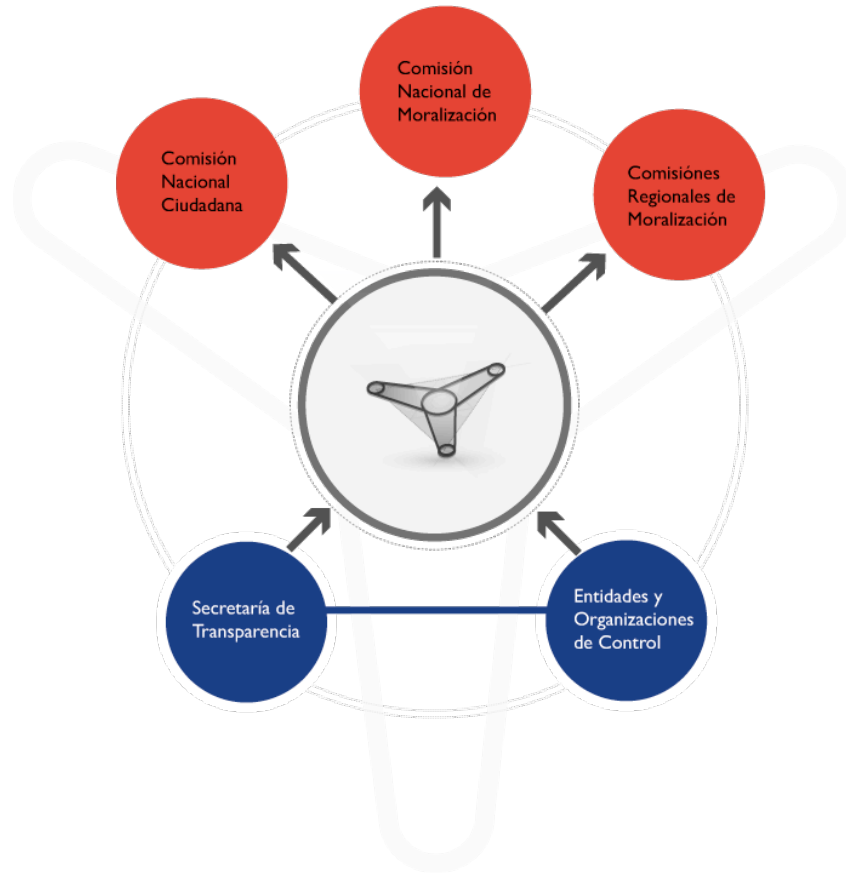
0=Procedural decision / partial decision (auto)  
1=final ruling (sentencia)

Eventual revision

0=no  
1=yes

## Appendix F: Structure of the Observatory for Anticorruption and Integrity

¿CÚAL ES LA ESTRUCTURA DEL OBSERVATORIO?



<http://www.anticorrupcion.gov.co/observatorio>

**Appendix G: Codes How do printed media portray the concept of  
administrative morality?**

Variable name	Variable label/ instructions/codes (value labels)
Topic	Main topic. What is the article about?  <u>Judicial action</u> (Claimant filed a lawsuit to enforce administrative morality. judicial process coded by the organ that made the decision) 801 = Administrative judge 802 = Tribunals 803 = Council of State 804= Constitutional Court 805= Supreme Court 808= Not ascertained  <u>Oversight agency</u> (Administrative morality is enforced by an oversight agency) 810= Procuraduria 811= Contraloria 812= Personeria 813=Comite Interinstitucional para la Vigilancia y el control del proceso electoral (Fiscalia – Procuraduria) 814=Inspecciones de policia1  <u>Social movement</u> (civil society organizations fostering social change through administrative morality) 820  <u>Statute / reform to a statute referred to administrative morality</u> 840  <u>General commentary</u> (the article comments on a certain situation or concepts related to administrative morality. No lawsuit or oversight agency has been used to enforce administrative morality) 850

tone1                    With regards the active subject complying or not with administrative morality  
-1=negative  
0=neutral  
1=positive  
9=non applicable

tone2                    With regards the lawsuit or formal action used to enforce the right  
-1=negative  
0=neutral  
1=positive  
9=non applicable

tone3                    With regards the right: administrative morality  
-1=negative  
0=neutral  
1=positive  
9=non applicable

tone4:                    With regards the litigant or claimant  
-1=negative  
0=neutral  
1=positive  
9=non applicable

Reform message: Does the article refer to the need of a systemic or an individual solution?  
0= individual  
1= systemic  
9= none or other

Source:  
1= el tiempo  
2= semana