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The 1991 Constitutional Reform: Prospects for Democracy and the Rule of Law in Colombia

Donald T. Fox* and Anne Stetson**

INTRODUCTION

On July 4, 1991, after five months of deliberation, the delegates¹ to the Colombian Constitutional Assembly (the “*Constituyente*” or the “Assembly”) fulfilled their mandate to reform the country’s Constitution of 1886. The new Charter was inaugurated with the full endorsement of the President of the Republic, César Gaviria Trujillo.² The aims of this constitutional reform were to endow the country with modern democratic institutions designed to foster greater participation in the democratic process, to strengthen the rule of law in a country where the proliferation of political violence had corroded Colombian political and legal institutions, and to secure a firm ground for human rights with mechanisms to protect these rights.

The new Charter adopted a number of methods to facilitate the restoration of democracy and peace to Colombia. First, the participation of a wider range of political parties in the traditional parliamentary democracy is called for and citizens from the full spectrum of Colombian society are assured the right to vote freely for a wider range of officials. Second, the new Constitution establishes a more equitable balance of power among the three governmental branches by trimming certain powers from the formerly dominant executive branch in favor of vesting the legislative and the judicial branches with greater authority. Finally, a full human rights agenda is articulated and institutions are established specifically to protect these rights.

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¹ These delegates were chosen through direct elections pursuant to a national referendum.

² Speaking at the Constitution’s inauguration ceremony at the Assembly, President Gaviria described the document as a “peace treaty” among Colombians. Message by the President of the Republic, César Gaviria Trujillo, On the Occasion of Adjourning the Sessions of the National Constituent Assembly, 14 (July 4, 1991) (Eng. trans.) (on file with the *Case Western Reserve Journal of International Law*).

This article considers the prospects for accomplishing the interlocking goals of promoting democracy and effectively protecting human rights through the new constitutional framework. Why the 1886 Constitution has failed to provide strong democratic institutions and to protect individual rights poses the necessary backdrop for any view to the future of a democratic and peaceful Colombia. Of central relevance in assessing the prospects for the new Constitution's success is whether the new Constitution has strengthened the judiciary sufficiently to enable it to uphold constitutional norms. The success of the reform hinges as well on legislative support. Because nearly one-third of the new Constitution's provisions require legislation for their full implementation, Congressional support will be essential to the effectiveness of the constitutional reform. Prospective legislative measures are beyond the scope of this article; however, it is to be noted that any complete evaluation of the success of the constitutional reform is subject to future developments in the Colombian legislature.

Accordingly, part I of this article surveys the constitutional changes rendered by the *Constituyente* to the legislative and executive branches. Part II analyzes the adequacy of steps taken by the Assembly toward providing Colombia with a strong judiciary. Part III considers specific human rights provisions of the Constitution and the mechanisms established for their implementation. The article concludes with an assessment of the reform's prospects for strengthening Colombia's democratic institutions.

I. CONSTITUTIONALISM IN COLOMBIA: 1886 FORWARD

A. *The Political Context Preceding Reform*

Colombia's history of parliamentary democracy dates back to the early nineteenth century.³ The Constitution of 1886, which was in effect up until the current reform,⁴ instituted the principle of the separation of powers within the state⁵ and the competence of the judicial branch to review the constitutionality of legislative and executive decrees.⁶ It also provided for the election of a President through national polls,⁷ a Senate elected through departmental elections,⁸ and a House of Representatives

³ For a discussion of Colombian constitutional history, see generally DIEGO URIBE VARGAS, *LAS CONSTITUCIONES DE COLOMBIA* (1977); JAVIER OCAMPO LÓPEZ, *¿QUÉ ES LA CONSTITUYENTE?* 78-114 (1990).

⁴ Modest reforms to the 1886 Constitution have been made over its 106-year tenure. See *infra* note 49 and accompanying text.

⁵ CONSTITUCIÓN DE COLOMBIA art. 55 (1886) [hereinafter 1886 CONST. COLOM.]

⁶ *Id.* art. 214.

⁷ *Id.* art. 171.

⁸ *Id.* art. 176.

elected at the local district level.⁹ The judicial branch contemplated by the Constitution of 1886 consisted of a system of local and intermediate appeals courts headed by a Supreme Court of Justice.¹⁰ An administrative court system, based on the French model, was authorized under the guidance of the highest administrative court, the Council of State.¹¹

Despite the formal political and judicial order established by the Constitution of 1886, the tendency to resolve political conflict through violence has plagued Colombia since the early stages of its history.¹² Shortly after Colombia gained its independence from Spain as *Nueva Granada* in 1811, an explosive clash arose between the ideologies of liberalism, rooted in the tradition of the French Enlightenment, and conservative ideologies.¹³ For example, the period known as *La Violencia* witnessed undeclared civil war between the liberal and conservative parties and resulted in the deaths of more than 200,000 Colombians between 1947 and 1953.¹⁴

This struggle diminished when, in 1957, a constitutional amendment effected a reconciliation between the two traditional parties whereby they would share the political leadership of the country.¹⁵ Labeled benignly the *Frente Nacional* (National Front), this solution of bipartisanship called for alternating rule by the liberal and conservative parties. It also authorized the two parties each to elect one half of the Congress and to appoint equal numbers to the judiciary and the bureaucracy, to the exclusion of all other political parties.¹⁶ The arrangement endured formally until 1986 when the installation of the administration of liberal President Virgilio Barco coincided with the unilateral decision of the conservative party to terminate the pact of dual governance.¹⁷

But political violence did not end with this reconciliation. The leg-

⁹ *Id.* art. 177.

¹⁰ *Id.* art. 58.

¹¹ *Id.* art. 136. The Council of State had jurisdiction over civil claims against the state, including cases involving alleged liability for human rights abuses committed by public authorities under states of siege. *Id.* art. 141. See also LAWYERS COMMITTEE FOR HUMAN RIGHTS, COLOMBIA: THE RULE OF LAW UNDER ATTACK, 1 (Nov. 1989).

¹² The literature on the history of violence in Colombia is extensive. Among the seminal works are GERMAN GUZMAN ET.AL., *LA VIOLENCIA EN COLOMBIA* (1963); UNIVERSIDAD NACIONAL DE COLOMBIA, *COLOMBIA: VIOLENCIA Y DEMOCRACIA* (1988); DANIEL PÉCAUT, *CRÓNICA DE DOS DÉCADAS DE POLÍTICA COLOMBIANA 1968-1988* (1987). For a recent and exhaustive study by a government commission see REPÚBLICA DE COLOMBIA, COMISIÓN DE SUPERACIÓN DE LA VIOLENCIA, *LA VIOLENCIA QUE NO SE NEGOCIÓ EN LOS ACUERDOS DE PAZ* (1992).

¹³ See, e.g., Fabio Zambrano Pantoja, "Contradicciones del sistema político colombiano", *el Centro de Investigación y Educación Popular (CINEP)*, Documentos Ocasionales No. 50, at 19 (1988).

¹⁴ COMISIÓN ANDINA DE JURISTAS, *COLOMBIA: EL DERECHO A LA JUSTICIA* 24 (1988).

¹⁵ Decreto Legislativo Numero 0247 de 1957.

¹⁶ *Id.*

¹⁷ COMISIÓN ANDINA DE JURISTAS, *supra* note 14, at 25.

acy of bipartisanship, for all its external orderliness, has been rife with destructive ramifications. The exclusion of all other parties from the political system resulted in the impossibility of acceding to power or participating in political decision-making for peasant and labor groups, and the failure of the *Frente Nacional* to represent the views of those sectors of the population not aligned with it.¹⁸ In turn, this produced a mixture of indifference, alienation, and hostility on the part of those members of Colombian society who were effectively disenfranchised by the *Frente Nacional*.¹⁹

As a result in part of coerced bipartisanship, the stage was set for the emergence of an alternative ideology that would displace the relatively quiescent struggle between the liberal and conservative factions.²⁰ During the 1960s, the Marxist guerrilla movement spawned by *La Violencia* dramatically increased in strength due to various causes: the strong hold the liberal and conservative parties had over national politics, the counterinsurgency activities of the armed forces that provoked the establishment of the rural-based Colombian guerrilla movement FARC (*Fuerzas Armadas Revolucionarias de Colombia*),²¹ and the success of Castro's revolution in Cuba which inspired the establishment of the rural Marxist guerrilla group ELN (*Ejército Liberación Nacional*).²² Other groups arose in turn, most notorious among them being the urban *Movimiento 19 de abril*, or M-19, which has since traded its guerrilla role for a political one.²³

The violence already permeating Colombian society spawned another source of violence: the "anti-subversives" or para-military death squads, which proliferated in the 1980s.²⁴ At least 138 such organizations dedicated to campaigns of assassination and the exercise of private justice have been identified, some of which include military officials in

¹⁸ Fernan E. Gonzalez "¿Hacia un nuevo colapso parcial del estado?" CINEP Documentos Ocasionales No. 50 at 8 (1988).

¹⁹ See POLITICS OF COMPRISE: COALITION GOVERNMENT IN COLOMBIA (Barry et al. eds., 1980).

²⁰ For a succinct history of the guerrilla movement in Colombia, see Marc Chernick, *Negotiated Settlement to Armed Conflict: Lessons from the Colombia Peace Process*, 30:4 J. OF INTER-AMERICAN STUD. & WORLD AFF. 53 (Winter 1988/89).

²¹ Marc Chernick & Michael Jimenez, *Popular Liberalism and Radical Democracy: The Development of the Colombian Left 1974-1990* (Nov. 30-Dec. 1, 1990) (Conference Paper No. 43) (on file with author).

²² PÉCAUT, *supra* note 12, at 390-391.

²³ The M-19 exerted a strong influence at the Assembly, with its current director, Antonio Navarro Wolf, sharing Assembly leadership with the heads of the Social Conservative and Liberal parties. See *infra* notes 42-45 and accompanying text.

²⁴ The distinctions between self-defense groups, paramilitary groups, and death squads ("sicarios") are blurry at best and artificial at worst, given that they share both common tactics and in some cases individual members. See, e.g., AMERICAS WATCH, *THE "DRUG WAR" IN COLOMBIA: THE NEGLECTED TRAGEDY OF POLITICAL VIOLENCE* 5-10 (1990).

their membership.²⁵

But the self-defense phenomenon existed long before the organization of guerrilla forces, having originally developed in response to the government's aggressive policy of suppressing popular unrest and to the impunity long enjoyed by members of the security forces of the state.²⁶

The paramilitary presence in the country continued to develop throughout the 1970s and 1980s, fanned by the implementation of the government's doctrine of national security, the emergence of the organized guerrilla movement, and the concurrent flourishing of the narcotics trade.²⁷

The cocaine industry emerged as an economic and political force in the 1970s, adding another variable to the already perplexing calculus of violence and disorder in the country.²⁸ Between 1985 and 1988, Colombian drug traffickers derived an annual income from the cocaine trade of between U.S. \$2.5 and \$3 billion.²⁹ The surge in these illicit activities produced corruption, violence, and a wave of fear that deeply affected the will and capacity of political and judicial institutions to confront the leaders of the drug industry.³⁰

The narcotics trade aggravated destructive tendencies already entrenched in Colombian politics: problems with wealth distribution that had characterized the economy since colonial days, violence between liberals and conservatives, the blockage of the political system due to an enforced two-party system, the wave of destruction of guerrilla groups

²⁵ See Statement by Jorge Orlando Melo, former Consejería Presidencial de Derechos Humanos. Report of Colombian Delegation to the United Nations Human Rights Committee, *U.N. Press Release*, U.N. Doc. HR/CT/182 (April 2, 1982) (confirming military complicity with paramilitary self-defense groups). In the mid-1980s, the Colombian Attorney General uncovered evidence linking fifty-nine active-duty military officers with the best-known paramilitary group, MAS (*Muerte a los Secuestradores*), and charged that this represented only one of many connections between the military and para-military groups. ALFREDO VASQUEZ CARRIZOSA, *LOS NO ALINEADOS* 121-125 (Bogotá 1986).

²⁶ For example, FARC, one of the largest guerrilla organizations, was founded in 1966 to centralize efforts of the self-defense communities in agricultural regions of Colombia. See Chernick & Jimenez, *supra* note 21, at 19.

²⁷ For a description of the cycle of violence in Colombia, see AMERICAS WATCH *supra* note 24 at 5-17.

²⁸ The emergence of the cocaine industry in the midst of political chaos in Colombia is discussed in AMERICAS WATCH COMMITTEE, *AMERICAS WATCH REPORT: THE KILLINGS IN COLOMBIA* 17-22 (1989).

²⁹ Bruce Bagley, *Colombia and the War on Drugs*, 67 FOREIGN AFF. 71-92 (1988).

³⁰ With the assassinations in April 1984 of Minister of Justice Rodrigo Lara Bonilla, who had launched an aggressive campaign to prosecute drug traffickers, and of Attorney General Carlos Mauro Hoyes in January 1988, the *narcotraficantes* stunned the Colombian government and judiciary. These assassinations evidenced the extremes to which the *narcotraficantes* were willing to go against the state to defend their economic interests. See COMISIÓN ANDINA DE JURISTAS, *supra* note 14, at 35-46 (1988).

excluded from the economic and political oligarchy, and the violent reactions of the paramilitary. As a consequence of these factors, the Colombian state in the late 1980s reached a narrowing of the political arena that threatened the breakdown of the formally democratic regime.³¹

By the late 1980's, the profound disorder within Colombian society compelled aggressive political change.³² One of the early acts in the administration of President Gaviria was to adopt a policy initiated during the Betancur administration (1982-1986) aimed at negotiating with guerrilla groups to lay down their arms in exchange for partial amnesty and mainstream political participation.³³ In addition, in an attempt to pacify the violent actions of the Medellín drug traffickers, the government encouraged voluntary submission to justice by promising reduced sentences to drug traffickers who surrendered and confessed.³⁴ The subsequent decision by the *Constituyente* to prohibit extradition also initially facilitated the pacification of the Medellín cartel.³⁵ However, the explosion of drug violence in the late months of 1992 has to date defied government control. Nor has political violence ebbed since the new constitution's promulgation.³⁶ In November 1992, President Gaviria declared a state of exception³⁷ due to internal commotion in response to the upsurge in guerrilla violence resulting from the breakdown in negotiations between the remaining guerrilla groups and the Colombian government.³⁸ A flurry of legislative attempts to contain the new guerrilla war have been

³¹ For an analysis of the gradual erosion of the political institutions of a Colombian state engaged in a spiralling of violence see, Alexander W. Wilde, *Conversations Among Gentlemen: Oligarchical Democracy in America*, in *THE BREAKDOWN OF DEMOCRATIC REGIMES* 28 (Juan J. Linz & Alfred Stepan eds., 1978), cited in Pécaut, *supra* note 12, at 432 (describing various factors prior to 1978 and the quick rise of drug trafficking activity).

³² Although the violence directly fomented by drug trafficking reached new heights in the late 1980s, the ultimate cause of violence that pervades Colombia continues to be its closed, elite and antidemocratic economic and social system. See, e.g., Fals Borda, Universidad de Bogotá, *El Mundo*, September 11, 1989, at 54.

³³ Decretos Legislativos nos. 2047 y 3030 (1990).

³⁴ Decreto Ley 2047 (5 de septiembre 1990), promulgated by President Gaviria, replaced the extradition policy of his predecessor, Virgilio Barco, with one of partial amnesty for drug traffickers. This policy succeeded in the much-heralded (and temporary) surrender of Pablo Escobar, the leader of the Medellín cocaine cartel. See *Colombia Struggles to Seal its Judges' Armour*, N.Y. TIMES, Oct. 13, 1991, at 14.

³⁵ CONSTITUCIÓN DE COLOMBIA art. 35 (1991) [hereinafter 1991 CONST. COLOM.].

³⁶ Despite the substantive advances represented by the surrender of well-known drug traffickers, the disbanding of guerrilla groups, and the new Constitution, the human rights situation in Colombia had not, at the time this article went to press, shown persuasive signs of improvement. In 1991, the number of political killings and disappearances was over 3,500, representing a figure close to that for 1990. Letter from Gustavo Gallón, Director, Comisión Andina de Juristas (Seccional Colombia) to Donald Fox (February 7, 1992) (on file with authors).

³⁷ The term "estado de excepción" represents the 1991 Constitution's parlance for what had previously been termed a "state of seige." See *infra* notes 50-57 and accompanying text.

³⁸ Decreto 1793 de 12 de noviembre de 1992. Formal negotiations with the Simón Bolívar

issued under the current state of exception, threatening a return to legislation by executive fiat that the 1991 Constitution had attempted to discourage.³⁹

B. *The 1991 Constitutional Assembly*

The task of effecting deeper reforms of Colombian political institutions took the peaceful form of constitutional revision. The 380 articles contained in the new Constitution represent an expansion on the 218 articles contained in the Constitution of 1886, which may be explained by the difficulty of renovating an existing political structure rather than building a wholly new one. The *Constituyente*⁴⁰ sought to retain the democratic structure of the Constitution of 1886, while redistributing certain powers to the legislature and judiciary that had been appropriated by the executive branch over the years.⁴¹ The Assembly thereby hoped to draw a broader array and greater number of citizens into the political process.

The composition of the Assembly itself reflected the national commitment to injecting a higher degree of participation into the framework of Colombian government. The Assembly was composed of 70 representatives elected in December 1990 under new electoral rules designed to be fairer to minority groups. Further, the Assembly broke with bipartisan tradition by distributing the greatest number of seats among three parties. This resulted in three co-chairmen of the Assembly: Antonio Navarro Wolf of the M-19, Horacio Serpa Uribe of the Liberal Party, and Alvaro Gómez Hurtado of the Social Conservative Party.⁴²

No single party, however, exercised a clear majority in what has been described as the first body in Colombia to work by seeking consensus.⁴³ Nineteen seats went to the M-19, the liberal party won 24 seats,

Guerrilla Coordinate (the "SBGC") — the umbrella group representing the three guerrilla groups still mobilized (the FARC, the ELN, and the EPL) — were stalemated in October 1992.

³⁹ See, e.g., Decreto 264 de febrero 1993 (providing mitigation of punishment in exchange for information and collaboration with judicial investigations); Decreto 1810 de noviembre 1992 (extending judicial police power to the armed forces to investigate civilians accused of committing narcotics or terrorist crimes); Decreto 1834 de noviembre 1992 (extending anonymity and physical protection to witnesses testifying against alleged guerrillas).

⁴⁰ The working structure of the Assembly consisted of five committees and twenty-six subcommittees. See PRESIDENCIA DE LA REPÚBLICA, *UNA CONSTITUYENTE DE TODOS LOS COLOMBIANOS: DOCUMENTOS PARA LAS COMISIONES PREPARATORIAS Y LAS MESAS DE TRABAJO* (Bogotá 1990).

⁴¹ See discussion *infra* at notes 46-62 and accompanying text.

⁴² Stan Yarbro, *Colombia's New Constitution Tackles Old Corruption*, L.A. TIMES, July 8, 1991, at A4; Richard Boudreaux, *Next Step: Colombians Setting Aside Hatreds for New Constitution*, L.A. TIMES, Apr. 30, 1991, at 2 (world report section).

⁴³ Yarbo, *supra* note 42; *Colombia: Cooling it*, ECONOMIST, Mar. 30, 1991, at 4. "Liberals and Conservatives are balanced by M-19 [a former guerrilla movement that is evolving into a social

and the Social Conservatives held 20 seats.⁴⁴ Seven seats were occupied by minority representatives, including previously unrepresented indigenous peoples.⁴⁵

1. Changes Rendered to the Executive Power

The Constitution of 1886 established a strong state ("*dictadura constitucional*") with the presidency as its dominant feature.⁴⁶ Historically in Colombia, as elsewhere in Latin America, the pattern established during the colonial period cast the executive branch as the dominant political force, to the point of attenuating the other two branches of government. More specifically, under the Constitution of 1886, 160 state enterprises were subject to the control of the President, including the banking sector, electricity, petroleum, and others.⁴⁷ The President also had absolute control over the management of both public and private credit in the country.⁴⁸ The constitutional reform of 1968⁴⁹ further strengthened Presidential power by allowing the office control over setting the national budget and of national revenues and expenses.

Another example of the extensive powers of the President is found in the executive's authority to declare a state of siege. The Constitution of 1886 granted the President the power to declare a state of siege and govern by decree,⁵⁰ thereby endowing the executive with sweeping powers that enabled him to bypass the legislature.⁵¹ This power was used

democratic coalition], and by the National Salvation Movement, a dissident Conservative group. Minority representatives, including two Indians, have seven seats; three other guerrilla movements have been given seats in return for disarming." *Id.* Two seats were occupied by representatives from the *Ejército Popular de Liberación* (the "EPL"), one by a representative from the *Partido Revolucionario de los Trabajadores* (the "PRT"), and one by the *Movimiento Indígena Quintín Lame*.

⁴⁴ Boudreaux, *supra* note 42.

⁴⁵ Three delegates representing 600,000 Colombian Indians held seats at the Assembly. James Brooke, *Door Opens a Crack for Colombia's Indians*, N.Y. TIMES, May 2, 1991, at A10.

⁴⁶ ALFREDO VAZQUEZ CARRIZOSA, *EL PODER PRESIDENCIAL EN COLOMBIA II* (1986).

⁴⁷ 1886 CONST. COLOM. art. 120.

⁴⁸ *Id.*

⁴⁹ Colombia has experienced modest constitutional reforms since the 1886 Constitution was promulgated. These occurred in 1910, 1936, 1945, 1957, and 1968. The 1945 reform introduced into Congress a system of permanent committees for first debate of proposed legislation. 1886 CONST. COLOM., Art. 80. The 1957 revision institutionalized a bipartisan government. Decreto Leg. No. 0247 de 1957. The 1968 reform strengthened the presidential power by granting it the authority to set the national budget. Acto Legislativo no. 1 de 1968. Unlike the 1991 *Constituyente*, each of these constitutional changes left the structure of the Constitution of 1886 intact and did not purport to replace the political structure it envisioned with a new constitutional blueprint.

⁵⁰ The most recent state of siege under the 1886 Constitution was declared in 1984 after the assassination of then Justice Minister Lara. Decreto Legislativo No. 1038 de 1 de mayo, 1984. That state of siege was lifted by President Gaviria with the promulgation of the new Constitution on July 4, 1991. Decreto No. 1686.

⁵¹ 1886 CONST. COLOM. art. 121.

extensively after 1958, as Colombia lived under an almost constant state of siege from that time. Subsequent to a general labor strike in 1977, the imposition of a state of siege was accompanied by presidential use of the armed forces to suppress popular protest, a pattern that recurred throughout the 1980s.⁵² Presidential reliance on the armed forces increased their power within Colombia until they became an autonomous entity with their own means of publicity, budget, universities, intelligence services, as well as courts of justice paralleling the civilian judicial system.⁵³

Under the new Constitution, the expansive emergency powers of the President have been scaled back.⁵⁴ This marks an important limitation on the executive's power in favor of the legislature and the judiciary. A state of exception may now be imposed only with unanimous cabinet consent and can last no more than 90 days.⁵⁵ Senate approval is required to obtain two possible extended 90-day periods, inviting what may prove to be a debate which is capable of checking executive abuse of emergency powers. Furthermore, legislative measures taken pursuant to a declaration of a state of exception are explicitly required to be directly related and proportionate to the events provoking the declaration.⁵⁶ Most importantly, fundamental rights and liberties cannot be suspended under any circumstance, even under states of exception.⁵⁷

A further reform affecting the scope of Presidential power is the popular election of departmental governors⁵⁸ instead of the former procedure by which they were appointed by the President.⁵⁹ In addition, the presidential term is now limited to a single four-year term⁶⁰ and the vice-presidency, abolished in 1957, has been re-established as an elective office.⁶¹ Finally, Congress now holds a power of censure over cabinet members.⁶²

⁵² PÉCAUT, *supra* note 12, at 309-311.

⁵³ VAZQUEZ CARRIZOSA, *supra* note 46, at VI.

⁵⁴ 1991 CONST. COLOM. arts. 212-215.

⁵⁵ *Id.* art. 213.

⁵⁶ *Id.* art. 214.

⁵⁷ *Id.* art. 214(2). This constitutional provision implements obligations undertaken by Colombia as a party to the American Convention on Human Rights and the International Covenant on Civil and Political Rights, which limit the rights that may be derogated from in times of state emergency. See American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 99 (art. 27(2)); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 4(2), 999 U.N.T.S. 171, 174. See also notes 139-41 *infra* and accompanying text.

⁵⁸ 1991 CONST. COLOM. art. 260.

⁵⁹ 1886 CONST. COLOM. art. 120(4).

⁶⁰ 1991 CONST. COLOM. arts. 190 & 197.

⁶¹ *Id.* arts. 202-205.

⁶² *Id.* art. 135(9).

2. The Legislative Power

International legal scholars increasingly support the concept that self-governance represents an essential characteristic of a state complying with internationally embraced human rights standards.⁶³ The pluralistic thrust of the new Colombian Constitution, which places at its core increased political participation by all sectors of Colombian society at many levels of the government, is in harmony with this emerging theory.

For example, the new Constitution renders profound changes in the law governing campaigning. The previously sanctioned system of "auxilios," whereby public funds were allocated directly to each member of Congress to underwrite civic improvements in the member's district (but instead were widely used to finance re-election campaigns) has been abolished.⁶⁴ Under the new Constitution, public campaign financing will replace the "auxilios" system.⁶⁵ In addition, to discourage nepotism and control of the government by a few ruling families, relatives of representatives are prohibited from running for public office.⁶⁶

Lastly, the abuse of power by government officials is guarded against in the new Constitution through a provision that restricts members of Congress from holding a second job. This same provision also prohibits members from taking positions or engaging in contracts that have links to the government.⁶⁷

The election process has also been changed. As discussed earlier, Colombian elections since 1957 had been restricted to two political parties (liberals and conservatives or, as of 1987, the Social Conservatives)⁶⁸ and were held only for the Congress and the President. Departmental governors were not elected but appointed by the President, and no vice-presidential office existed. Elections were marked by a high rate of absenteeism, suggesting a popular belief that voting was futile.⁶⁹ Under the

⁶³ See Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT'L L. 1, 34-42 (1989) (customary international law of human rights and international rights conventions obligate states to accord citizens the right to participate in political governance); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 872 (1990) (popular sovereignty is required by customary international law of human rights); cf. Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77 (1988) (arguing that conceptions of rights of political participation are diverse and cannot be generalized to all governments).

⁶⁴ For a brief discussion of the *auxilios* system and its abuse, see Vladimiro Naranjo Mesa, *Bases para una reforma del Congreso*, in CONSTITUCIONALISTAS ANTE LA CONSTITUYENTE 115, 125 (1990).

⁶⁵ 1991 CONST. COLOM. art. 179.

⁶⁶ *Id.* art. 179(5)-(6).

⁶⁷ *Id.* art. 180.

⁶⁸ See *supra* notes 15-17 and accompanying text.

⁶⁹ The absenteeism rate in the 1986 elections reached 50%. COMISIÓN ANDINA DE JURISTAS,

old system, votes were purchased and corruption flourished.⁷⁰ Further, as a result of the constitutional reform in 1945, a system of permanent congressional committees was introduced. These committees read and evaluated all proposed legislation before it was presented for discussion to Congress,⁷¹ which effectively insulated Congress against access by the public and consequently eroded the legislature's influence over public opinion.⁷²

The new Constitution introduces a number of election reforms designed to address these problems. Secret polling with official ballots has replaced the former system where each candidate printed and distributed his or her own ballots which were sometimes accompanied by payments to ensure their use.⁷³ This reform should discourage the purchasing of votes.

For the first time, national elections for the 100-member Senate have been established.⁷⁴ In addition, two Senate seats have been reserved for these indigenous peoples in order to ensure the representation of the country's indigenous peoples. These changes denote a concern for the establishment of a more representative Senate. Up to five seats in the House of Representatives have been reserved to ethnic and political minorities to insure minority participation.⁷⁵ Perhaps most notably, with respect to the opening up of the government, the new Constitution includes a popular initiative provision enabling direct access by citizens to Congress.⁷⁶ This provision enables Colombians to introduce bills which have been approved by at least 5% of the electorate.⁷⁷

In order to give these changes to the legislative branch the greatest chance of success, the *Constituyente* ordered the dissolution of the Congress as of July 5, 1991 and called for new elections on October 27, 1991.⁷⁸ In the interim, President Gaviria governed by decree with a 36-member legislative commission (informally called the "*Congresito*") which oversaw his actions, advised him, and retained the power to veto any state of siege decrees deemed over-broad.⁷⁹

supra note 14, at 25. On absenteeism in general see EDUARDO UMAÑA LUNA, LA TRAMOYA COLOMBIANA 297-298 (1988).

⁷⁰ *Colombia: Cooling it*, *supra* note 43.

⁷¹ 1886 CONST. COLOM. arts. 79-80.

⁷² VAZQUEZ CARRIZOSA, *supra* note 46, at 286.

⁷³ 1991 CONST. COLOM. art. 258.

⁷⁴ *Id.* art. 171.

⁷⁵ *Id.* art. 176.

⁷⁶ *Id.* art. 155.

⁷⁷ *Id.*

⁷⁸ *Semana*, Edición No. 475 (Bogotá, June 1991).

⁷⁹ 1991 CONST. COLOM. provisional arts. 6-8.

II. TOWARD A STRONG AND INDEPENDENT JUDICIARY

The judiciary in Colombia has undergone profound attacks against its institutional integrity as a result of the rule of violence in the country and the gradual encroachment upon judicial independence by a strong executive branch. To reinforce the rule of law and the efficacy of the judicial system, the new Constitution reasserts the complete independence of the judiciary⁸⁰ and creates new judicial institutions such as the *Fiscalía General de la Nación* (Prosecutor General),⁸¹ the Constitutional Court,⁸² and the *Consejo Superior de la Judicatura* (Higher Council of the Judiciary).⁸³

A. Historical Background

While an independent judicial branch was established by the Constitution of 1886,⁸⁴ the expansion of executive power over the last forty years had the countervailing effect of limiting the authority of the civilian courts. The framework for a career judiciary was established by the Constitution of 1886 under which entry into the judiciary was based on competitive exams and the comparison of credentials by the judiciary.⁸⁵ This process marked an effort to protect judicial integrity and independence. The Constitution of 1886 also sought to protect individual judges against conflicts of interest by prohibiting them from holding any other paid office or from practicing law, while permitting them to engage in university teaching.⁸⁶

Nonetheless, these protections were overcome by the executive's establishment of an alternative military tribunal system competent to try broadly-defined national security offenses, designed to allow the executive to bypass the ordinary court system.⁸⁷ The gradual expansion of the jurisdiction of the military courts has been one of the most controversial aspects of the Colombian legal system.⁸⁸ The Constitution of 1886 provided: "Crimes committed by members of the military while on active

⁸⁰ 1991 CONST. COLOM. art. 228.

⁸¹ *Id.* arts. 249-253.

⁸² *Id.* arts. 239-245.

⁸³ *Id.* arts. 254-257.

⁸⁴ 1886 CONST. COLOM., arts. 55 & 58.

⁸⁵ 1886 CONST. COLOM. art. 162; Estatuto de la Carrera Judicial y del Ministro Público, Decreto-Ley No. 250 de 1970, Vol. VVI, No. 33023 Diario Oficial 809 (28 de marzo 1970).

⁸⁶ 1886 CONST. COLOM. art. 160.

⁸⁷ The National Security Statute decreed by President Turbay in 1988 extended the power to the military to try and jail accused subversives. Decreto Legislativo 1923; *see also* GALLÓN, QUINCE AÑOS DE ESTADOS DE SITIO EN COLOMBIA (Bogotá, 1979).

⁸⁸ The erosion of civilian court jurisdiction in favor of a military justice system has been facilitated in part by the intermittent state of siege in Colombia. For a succinct description of the declining influence of the civil judiciary in Colombia since the *Frente Nacional* see COMISIÓN ANDINA DE JURISTAS, *supra* note 14, at 98-111.

duty and relating to military service shall be tried by courts martial or military courts of justice, in accordance with the Military Penal Code.”⁸⁹ This provision was interpreted broadly by the Military Penal Code of 1958, which established that as well as trying military crimes, the military courts would try common crimes committed by members of the military while on active duty or committed by civilians in the service of the armed forces. Legislation in 1971 extended this jurisdiction to members of the National Police.⁹⁰ A new Code of Military Justice was promulgated on December 12, 1988, which made its dispositions more narrowly applicable to members of the military who commit a military crime or a common crime in the course of military service.⁹¹

Until March of 1987, the Supreme Court did not challenge the constitutionality of the judgment of civilians by military courts because of a controversial interpretation of the Constitution. On March 5, 1987, in the spirit of President Virgilio Barco’s reformist administration, the Court reversed its judgment and held that “the abnormality of the times cannot be combatted by creating abnormalities in the judicial structures of the Republic.”⁹²

Another significant indication of the attenuation of the independence of the judiciary is the fact that the military courts were authorized by the government to decide conflicts of competence arising between the ordinary courts and the military courts. However, in July 1987, the Supreme Court established that it had the power to settle disputes over jurisdiction and instructed that in the case of a crime committed beyond the scope of military service, the civil courts would have jurisdiction.⁹³ Nevertheless, both military and ordinary courts continued to exercise jurisdiction as disciplinary courts in spite of the pronouncement of the Supreme Court of Justice.

Another example of the weak position of the judiciary was the creation of the Tribunals of Special Jurisdiction in 1976 to handle alleged violations of the declared state of siege or of participating in subversive activities.⁹⁴ However, the Colombian Supreme Court lodged its objections to the expansive jurisdiction of the Special Tribunals and issued decisions declaring unconstitutional trials by the Tribunals of certain se-

⁸⁹ 1886 CONST. COLOM. art. 170.

⁹⁰ Decreto-Legislativo No. 2347, arts. 8 & 9.

⁹¹ Código Penal Militar, art. 14 (1988).

⁹² Decisión de 5 de marzo 1987 (Colom.), Sala Plena, 16 *Jurisprudencia y Doctrina* 492 (May 1987).

⁹³ Decree 050, July 1987.

⁹⁴ Decreto-Legislativo No. 2260 de 1976, Vol. CXIII, No. 34676 Diario Oficial 481 (17 de noviembre 1976) (Colom); the authority of these tribunals was expanded in 1978 by Decreto Legislativo No. 1923 de 1978, Vol. CXV, No. 35101 Diario Oficial 1033 (21 de septiembre 1978) (Colom).

rious crimes.⁹⁵

Further power was removed from the ordinary courts by Decree 474 of 1988. This decree created the Courts of Public Order, a separate court system with jurisdiction over crimes of a terrorist nature or linked with terrorist activity.⁹⁶ This jurisdiction has expanded with the continued challenge to the government by guerrilla groups and narcotics traffickers.⁹⁷

Executive constraints on the right to *habeas corpus* also restricted the judiciary when the government modified the procedure for appeal or for a writ of *habeas corpus*.⁹⁸ As a result of that decree, an appeal involving the crimes enumerated and sanctioned in Decree 180 could only be submitted to a superior judge in the jurisdiction where the detainee was located. This judge was obligated to proceed according to the previously issued opinion of the Public Ministry; that is, he or she could not rule on the appeal without the report of a Public Ministry official. These constraints on the right to *habeas corpus* clearly limited the availability of it as a viable recourse.

Such incursions on the jurisdiction of the ordinary courts contradicted the Basic Principles on the Independence of the Judiciary adopted by the UN General Assembly in 1985.⁹⁹ Rooted in principles of justice enumerated in the UN Charter,¹⁰⁰ the Universal Declaration of Human Rights,¹⁰¹ the International Covenant on Civil and Political Rights,¹⁰² and the International Covenant on Economic, Social and Cultural Rights,¹⁰³ the Basic Principles call for the guarantee of the independence of the judiciary by each state and by its Constitution. Specifically, Article 5 of the Principles states that

Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

As a Party to each of these conventions, the Colombian government has undertaken the obligation to promote judicial independence.

⁹⁵ 16 Jurisprudencia y Doctrina 813, 829 (Aug. 1987).

⁹⁶ Decreto 180 (1988) (the "Anti-Terrorist Statute").

⁹⁷ See *infra* notes 112-116 and accompanying text.

⁹⁸ Decreto legislativo 182 de 27 de enero de 1988.

⁹⁹ G.A. Res. 32, U.N. GAOR, 40th Sess., Supp. No. 53, at 204, U.N. Doc. A/40/53 (1986); G.A. Res. 146, U.N. GAOR 40th Sess., Supp. No. 53, at 254, U.N. Doc. A/40/53 (1986).

¹⁰⁰ U.N. CHARTER pmb. and arts. 1 & 55.

¹⁰¹ G.A. Res. 217, U.N. Doc. A/810 (Dec. 10, 1948).

¹⁰² 999 U.N.T.S. 171, 6 I.L.M. 383 (1967).

¹⁰³ 993 U.N.T.S. 3, 6 I.L.M. 360 (1967).

B. *The Colombian Judiciary: 1991 Forward*

The new Constitution establishes several mechanisms to restore judicial independence. For example, the integrity of the judicial decision-making process stands protected by a constitutional guarantee of noninterference with judicial proceedings and the affirmation that judges shall be subject only to the rule of law.¹⁰⁴ More specifically, the danger of encroachments upon the jurisdiction of the ordinary courts by the military tribunals is countered by the clearly stated and more narrowly defined jurisdiction of the military courts to adjudicate crimes committed by members of the armed forces in active service and in relation to military service.¹⁰⁵ In addition, the President's formerly unchecked power to declare a state of siege is curtailed by the provision establishing a role for the Constitutional Court in reviewing the constitutionality of the President's decrees for governing during the state of siege.¹⁰⁶

A second category of provisions aimed at the protection of judicial independence pertains to the personal security of members of the judiciary. In Colombia, the issue of security is of particular importance, given the history of violence against individual judges, particularly those assigned cases in which a suspected violation of narcotics law or a politically charged issue arises.¹⁰⁷ While the Constitution of 1886 established a judicial system based on the Spanish model, as inherited from the French, the 1991 constitutional reform marked a shift in the direction to the American model. The Colombian judiciary has traditionally functioned under the inquisitorial system in which the judge brought charges against a defendant.¹⁰⁸ This role left the largely unprotected Colombian judges in a visible and vulnerable position which, coupled with the relatively weak position of the judiciary in the governmental structure and the impunity of the narcotics traffickers and insurgent groups when accused before the courts, opened individual judges and the judicial system at large to physical attack.¹⁰⁹ The new Constitution seeks to insulate judges from the criminal law process by adopting an accusatorial system in which charges are brought against a suspected criminal by a govern-

¹⁰⁴ 1991 CONST. COLOM. arts. 228 & 230.

¹⁰⁵ *Id.* art. 221.

¹⁰⁶ *Id.* art. 214(6).

¹⁰⁷ Over 225 judges, magistrates and court workers have been murdered since 1989. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 11, at 4 (Nov. 14, 1989). In 1991 alone, 44 lawyers and judges were the target of physical attack. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, IN DEFENSE OF RIGHTS: ATTACKS ON LAWYERS AND JUDGES IN 1991 54-66 (1992).

¹⁰⁸ Alejandro David Apente, *Constitución de 1991: la Administración de Justicia*, 13 *Análisis Político* (Bogotá, 1991).

¹⁰⁹ For a thorough account of the debilitating effect of a strong executive and of violence on the Colombian judiciary see generally COMISIÓN ANDINA DE JURISTAS, *supra* note 14. See also LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 11.

ment prosecutor.¹¹⁰

To this end, the office of the *Fiscalía General de la Nación* (Colombian Prosecutor General) was established by the new Constitution.¹¹¹ The office is charged with the investigation of crimes and with bringing charges against alleged criminals. Its competence is of national scope and it oversees the direction and coordination of the judicial police. The office is designed to enjoy full administrative autonomy.

In the interest of the continued protection of the independence and security of judges adjudicating terrorism and drug trafficking cases, the new Constitution did not prohibit the continued authority of the Public Order Courts under the Statute for the Defense of Justice, a transitory measure initially imposed by President Gaviria under the now-lifted state of siege.¹¹² This statute provides for a system of anonymous judges ("*jueces sin rostros*") whose identity remains veiled both to the accused and to the state as a means of combating the threat of judicial assassination.¹¹³ These judges operate out of fortified bunkers to protect against attack and issue unsigned opinions.¹¹⁴ To ensure against arbitrary decisions by a judge whose identity remains unknown throughout the course of a trial, the statute requires that every trial be attended by a representative from the office of the *Procuraduría General de La Nación* (Attorney General).¹¹⁵ The norms of the statute were adopted as permanent legislation by the *Congreso*, with modifications to accommodate constitutional norms.¹¹⁶

The office of the *Procuraduría General de la Nación* continues to carry constitutional authority to conduct investigations into rights violations involving public officials, including members of the armed forces and the national police.¹¹⁷ The new Constitution amends the role of the office by linking its mission to that of the *Defensor del Pueblo* (Human Rights Ombudsman).¹¹⁸

¹¹⁰ 1991 CONST. COLOM. art. 250. See also *infra* notes 112-116 and accompanying text. Admittedly, this measure may only serve to displace the attacks onto the prosecutor rather than the judge.

¹¹¹ *Id.* arts. 249-253.

¹¹² Decreto Legislativo 2700.

¹¹³ REPÚBLICA DE COLOMBIA, Adiciones al tercer informe periódico presentado por el gobierno de Colombia de acuerdo con el Artículo 40 del Pacto Internacional Sobre Derechos Civiles y Políticos 6, para. 21 [hereinafter REPUBLICA DE COLOMBIA].

¹¹⁴ Charles B. Rangel, *Colombian Judicial Integrity More Important than Extraditions*, WALL ST. J., June 28, 1991, at A13.

¹¹⁵ REPÚBLICA DE COLOMBIA, *supra* note 113, at 7, para. 22.

¹¹⁶ Decreto 2790 de 1991 (30 de nov. 1991).

¹¹⁷ Decreto 1846 de 1986 and Ley 4a de 1990 regulate the competency and responsibilities of the Procuraduría General in the protection of human rights.

¹¹⁸ 1991 CONST. COLOM. art. 277(2). For a discussion of this newly minted office, see notes 170-174 *infra* and accompanying text.

The powers of other judicial bodies have also been expanded by the new Constitution. For example, the Constitution now recognizes the authority of the courts established by indigenous people,¹¹⁹ providing that "The authorities of the indigenous peoples may exercise jurisdictional functions within their territory, in conformity with their means and procedures, as long as these are not contrary to the Constitution and laws of the Republic." The Constitution also establishes the office of the *Consejo Superior de la Judicatura*,¹²⁰ which oversees the regulation of the judiciary and the resolution of jurisdictional conflicts.

Following the example of Spain,¹²¹ the new Constitution establishes a Constitutional Court¹²² which is entrusted with the task of guarding the integrity and supremacy of the Constitution by judging the constitutionality of laws and treaties issued or entered into by the other branches of government.¹²³ The Court may be consulted by citizens as well as by government officials who submit a constitutional question regarding laws passed by the government,¹²⁴ international treaties proposed for ratification,¹²⁵ and other legal matters.¹²⁶ The mandate of the Colombian Constitutional Court renders it more accessible to its citizens than its European counterparts.¹²⁷

The establishment of a separate court to protect the supremacy of the Constitution may provide valuable protection for individual rights and the rule of law. However, there exists the risk that the addition of a special constitutional court may add to, rather than limit, jurisdictional confusion which the proliferation of courts in Colombia has produced.

¹¹⁹ 1991 CONST. COLOM. art 246.

¹²⁰ *Id.* arts. 254-257.

¹²¹ The Spanish Constitutional Court was established by the post-Franco Constitution of 1978 with the power of judicial review of statutes. SP. CONST. art. 159. It, in turn, was based on the French Conseil Constitutionnel, established by the 1958 Constitution. FR. CONST. (Vth Repub.) arts. 56-63.

¹²² 1991 CONST. COLOM. art. 239. The magistrates of the Constitutional Court are elected by the Senate upon the recommendations of the President.

¹²³ *Id.* art. 241.

¹²⁴ *Id.* art. 241(4)-(5).

¹²⁵ *Id.* art. 241(10).

¹²⁶ For example, the Constitutional Court has the competence to review judicial decisions of lower courts in *acciones de tutela* and to adjudge challenges to the constitutionality of referendums about laws. *Id.* arts. 241(a) & 241(3).

¹²⁷ Submissions to the French Conseil Constitutionnel may be made by the Presidents of the two chambers of Parliament, the President of the Republic, the Prime Minister or, subsequent to the constitutional reform of 29 October 1974, by sixty members of Parliament signing an appeal. See Y. Meny, *Law, Politics and the Court*, in GOV'T & POLITICS IN W. EUR. (London 1990).

Access to the Spanish Constitutional Court is similarly restricted to government authorities. SP. CONST. art. 162(1)(a) (1978).

III. CONSTITUTIONAL TREATMENT OF HUMAN RIGHTS

A. Human Rights Provisions

While the Constitution of 1886 articulated the basic nucleus of citizens' rights,¹²⁸ the new Constitution fully enumerates first, second, and third generation rights.¹²⁹ New rights are asserted to provide for the greater effectiveness of constitutional guarantees, for example, the right to bring an action of *tutela*,¹³⁰ and *acciones populares*.¹³¹ The Constitution of 1991 also takes a step beyond mere conceptual formulation by establishing protective mechanisms to render the outline of rights meaningful and effective. For example, institutions specifically dedicated to the protection of human rights have been created, such as the office of the *Defensor del Pueblo*.¹³² It is, in the words of the Colombian government, "a Constitution whose spine is the protection of human rights."¹³³

The preamble to the new Constitution emphasizes popular sovereignty and the democratic character of the Republic, invoking the supreme power of the people as the source of political order.¹³⁴ The Constitution later buttresses the concept of popular sovereignty expressed by the Preamble¹³⁵ while also fortifying the new participatory democracy.

The provision in the 1886 Constitution most frequently cited as forming the basis of a constitutional imprimatur on human rights is brief:

The authorities of the Republic are established to protect all persons residing in Colombia in their lives, honor, and property, and to secure the fulfillment of the social duties of the State and of individuals.¹³⁶

The new Constitution incorporates the language of its predecessor as one aspect of its *raison d'être*, more explicitly stating its democratic character:

¹²⁸ The Constitution of 1886 guaranteed fundamental civil and political rights in its articles 16-53.

¹²⁹ The 1991 Constitution articulates the full panoply of rights in eighty-five articles ranging from civil and political to economic, social, and cultural rights.

¹³⁰ *Id.* art. 86 (authorizing a summary procedure for the protection of fundamental rights threatened through the action or inaction of public authorities). See also, *infra* section B(1).

¹³¹ *Id.* arts. 88 & 282. Article 88 provides: "The law will regulate popular actions for the protection of collective rights and interests related to the homeland, space, public safety and health, administrative morality, the environment, free economic competition, and other areas of similar nature defined in it." *Id.*

¹³² *Id.* arts. 281-283.

¹³³ REPÚBLICA DE COLOMBIA, *supra* note 113, at 2, para. 4.

¹³⁴ 1991 CONST. COLOM. pmb.

¹³⁵ *Id.* art. 3. "Sovereignty resides exclusively in the people, from whom public power emanates. The people exercise it in direct form or through their representatives within the limits established by the Constitution." *Id.*

¹³⁶ 1886 CONST. COLOM., art. 16.

The essential goals of the state are to serve the community, promote the general prosperity, and guarantee the effectiveness of the principles, rights, and duties stipulated by the Constitution; to facilitate the participation of everyone in the decisions that affect them and in the economic, political, administrative, and cultural life of the Nation; to defend national independence, maintain territorial integrity, and insure peaceful coexistence and the enforcement of a just order. The authorities of the Republic are established in order to protect all individuals residing in Colombia, in their lives, honor, property, beliefs, and rights and freedoms, and in order to insure the fulfillment of the social duties of the state and of individuals.¹³⁷

This inclusion of rights language demonstrates that the *Constituyente* was conscious of a human rights regime now firmly in place.¹³⁸ It also acknowledges the right of self-governance of the Colombian people and the obligation of the state to protect that right. Moreover, the fundamental principles and rights of Colombians are enunciated prominently in the first two sections of the Constitution of 1991, comprising a *carta de derechos* (bill of rights) directly incorporated into the Constitution.

Whereas the Constitution of 1886 guaranteed certain rights throughout its text, the separate treatment of rights in a constitutional *carta de derechos* signifies their prominence in the vision held by the *Constituyente* of the new Colombian political order. The new Constitution guarantees civil, political, economic, social, and cultural rights. Despite the criticism by some delegates to the Assembly that the *carta de derechos* merely repeats Colombia's obligations under the international rights conventions it is party to,¹³⁹ the *Constituyente* ultimately voted to include a lengthy *carta de derechos* to demonstrate the important status

¹³⁷ 1991 CONST. COLOM. art. 2.

¹³⁸ While the Declaration of the Rights and Duties of Man emanating in 1789 from the French Revolution established a legal rights vocabulary available to the authors of the 1996 Constitution, it was not until the abuses of World War II were responded to that an international rights regime was firmly established. See, e.g., LOUIS HENKIN, *THE RIGHTS OF MAN TODAY* (1978).

¹³⁹ Colombia is bound to the human rights standards enunciated in the rights conventions to which it is party: the UN CHARTER; the Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967); Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 383; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360; Convention on the Prevention and Punishment of the Crime of Genocide, Aug. 12, 1949, 78 U.N.T.S. 277; International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, 5 I.L.M. 352 (1966); International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068 (XXVIII 1974); Convention on the Elimination of All Forms of Discrimination Against Women, Mar. 1, 1980, G.A. Res. 180, GAOR, 34th Sess., 19 I.L.M. 33 (Colombia signed July 17, 1980); Convention Relating to the Status of Refugees, 189 U.N.T.S. 137 (1954); Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, 6 I.L.M. 78 (1967); Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Mar. 9, 1984, 23 I.L.M. 1027, as modified, Feb. 4, 1985, 24 I.L.M. 535 (Colombia signed Apr. 10, 1985 and ratified

which the protection of human rights was considered to merit.¹⁴⁰

In accordance with international law, the new Constitution explicitly prohibits derogation from inalienable rights even during times of emergency.¹⁴¹ Article 13 consecrates equality before the law as a fundamental right permeating the new constitutional order. This right recurs specifically in guarantees of the equal rights of minority groups,¹⁴² the equality of women and men before the law,¹⁴³ and of equal opportunity for workers, regardless of race, gender, religion, or political affiliation.¹⁴⁴ Further, the Constitution establishes rights for the special protection of women¹⁴⁵ and children.¹⁴⁶ The chapter opens with a guarantee of the most fundamental of human rights, the right to life.¹⁴⁷ It is this right that has been more profoundly violated than any other during the reign of violence in the country.¹⁴⁸ As noted above, this guarantee represents continuity with the Constitution of 1886, which expressly guaranteed the right to life.¹⁴⁹ Consistent with this guarantee, the new Constitution perpetuates the prohibition against the death penalty¹⁵⁰ that the Constitution of 1886 established.¹⁵¹

The new Constitution's prohibition against forced disappearance, torture, and cruel, inhuman, or degrading punishment provides a constitutional guarantee that had been absent in the earlier Constitution.¹⁵² While the Colombian Civil Penal Code contains provisions against the

Dec. 8, 1987, 27 I.L.M. 1414, 1415); and the American Convention of Human Rights, Nov. 22, 1969, 9 I.L.M. 99 (1970).

¹⁴⁰ Letter from Manuel José Cepeda, Presidential Adviser for Constitutional Reform, República de Colombia, to Anne Stetson, (June 11, 1991) (on file with the *Case Western Reserve Journal of International Law*).

¹⁴¹ As party to the International Covenant on Civil and Political Rights, Colombia is bound by Article 4(2) of the Covenant which prohibits derogation from the rights to life, freedom from torture or cruel, inhuman or degrading treatment or punishment, freedom from slavery and servitude, equality before the law, and to the freedom of thought, conscience, and religion even in times of public emergency. 99 U.N.T.S. 171, 6 I.L.M. 368. Article 5 of the new Constitution recognizes the primacy of these rights. 1991 CONST. COLOM. art. 5.

¹⁴² *Id.* art. 7.

¹⁴³ *Id.* art. 43.

¹⁴⁴ *Id.* art. 53.

¹⁴⁵ *Id.* art. 43.

¹⁴⁶ *Id.* art. 44.

¹⁴⁷ *Id.* at 11.

¹⁴⁸ Statistics indicating the number of political killings and disappearances annually since 1980 mark an average of ten people killed daily for political or allegedly political reasons. See Andean Commission of Jurists, 62 *Andean Newsletter* 4 (Jan. 13, 1992); AMERICAS WATCH COMMITTEE, *supra* note 28, at 39, citing statistics compiled by *Centro de Investigación y Educación Popular* (CINEP), a Jesuit human rights organization.

¹⁴⁹ 1886 CONST. COLOM. art. 16.

¹⁵⁰ 1991 CONST. COLOM. art. 11.

¹⁵¹ 1886 CONST. COLOM. art. 16.

¹⁵² 1991 CONST. COLOM. art. 12.

use of torture¹⁵³ and other cruel, inhuman, or degrading treatment,¹⁵⁴ no constitutional safeguards existed prior to the reform to bolster the legislation. The *Constituyente* also provided constitutional protection against secret detention¹⁵⁵ and against *ex post facto* judgment.¹⁵⁶ The new Constitution carries this guarantee further by requiring that one who is preventatively detained must be brought before a competent judge within thirty-six hours so that a prompt determination of the detainee's status may be made in accordance with the law.¹⁵⁷ These provisions are intended to protect against the continued use of torture which is more likely to take place when a prisoner is held incommunicado or in secret detention without access to relatives, lawyers, or doctors and without being brought before a judicial authority.¹⁵⁸

The new Constitution also elevates social, economic and cultural rights to constitutional prominence. The right to familial integrity,¹⁵⁹ the rights of children,¹⁶⁰ the right to Social Security,¹⁶¹ the right to education,¹⁶² and even the right to recreation¹⁶³ are all guaranteed.

B. Protection and Implementation of Rights

The inclusion of a chapter on the protection and implementation of rights denotes the non-programmatic nature of the rights previously enumerated. The new Constitution provides several mechanisms by which citizens may assert their constitutional rights when threatened with arbitrary action by government authorities.

1. Tutela

Article 86 establishes the action of *tutela*, one of the most important and controversial mechanisms for the protection of fundamental

¹⁵³ Código Penal, art. 279.

¹⁵⁴ Código Penal, arts. 331-342.

¹⁵⁵ 1991 CONST. COLOM. art. 28. While this right was set forth in the earlier Constitution, the new Charter requires a judicial authority to issue an arrest warrant whereas the Constitution of 1886 merely required any competent authority to issue a warrant. 1886 CONST. COLOM. art. 23.

¹⁵⁶ 1991 CONST. COLOM. art. 29 (Colom.). The 1886 Constitution failed to prohibit *ex post facto* judgment absolutely. 1886 CONST. COLOM., art. 28.

¹⁵⁷ 1991 CONST. COLOM. art. 28.

¹⁵⁸ See, e.g., Report of the U.N. Special Rapporteur on Torture Regarding Colombia, U.N. Doc. ¶272(a), E/CN.4/1990/17. ("Since a great number of allegations received by the special Rapporteur referred to torture practiced during incommunicado detention, incommunicado detention should be prohibited.")

¹⁵⁹ 1991 CONST. COLOM. art. 42.

¹⁶⁰ *Id.* art. 44.

¹⁶¹ *Id.* art. 48.

¹⁶² *Id.* art. 67.

¹⁶³ *Id.* art. 52.

rights.¹⁶⁴ Through an action of *tutela*, every person has a right to seek immediate judicial judgment where one of his or her fundamental constitutional rights is threatened by the act or omission of a public authority. The protection contemplated by the Constitution is a judicial order to be issued on behalf of the complainant. Failure to comply with the order immediately may, under the constitutional provision, be punished by a competent judge and remitted to the Constitutional Court for its judgment or revision.

The procedure for bringing an action of *tutela* before a court is governed by subsequent legislation implementing presidential decrees regulating the action.¹⁶⁵ The remedy of *tutela* marks one of the successes of the 1991 Constitution. During the first four months of 1992, 2500 actions of *tutela* were brought by private citizens,¹⁶⁶ twenty percent of which were decided in favor of the citizen.¹⁶⁷ The most frequent uses of the action were to protect rights to health care, equal opportunity in the workplace, due process, and equal protection.¹⁶⁸

2. Defensor del Pueblo

The mechanisms established by the new Constitution to effect the protection of human rights include the establishment of the office of the *Defensor del Pueblo*, a Human Rights Ombudsman acting under the direction of the Attorney General, an office independent of the executive. The *Defensor* is to be elected for a four year term by the House of Repre-

¹⁶⁴ *Id.* art. 86. The provision was widely discussed in Colombia both by the *Constituyente* and by the *Congresito*. See, e.g., *¿Tutela: y eso qué es?*, SEMANA, 19 Nov. 1991, at 40-41; G. Gallón, *La acción de tutela: consideraciones en torno a su reglamentación*, COMISIÓN ANDINA DE JURISTAS SECCIONAL COLOMBIANA (Oct. 1991).

Tutela was initially proposed by the Colombian government as a uniquely Colombian version of the remedy of *amparo*, a means of recourse established in the legal regimes of many Latin American countries. The remedy of *amparo* is a judicial guarantee more comprehensive than that of *habeas corpus*, in that it embraces protection against unlawful governmental interference with physical liberty as well as all other individual rights. See Opinión Consultiva OC-8/87 de Corte Interamericana de Derechos Humanos sobre el *habeas corpus* bajo suspensión de garantías, at para. 32-36; D. ZORATTO, *LOS ESTADOS DE EXCEPCIÓN Y LOS DERECHOS HUMANOS EN AMÉRICA LATINA* (Caracas, 1990).

Constitutional provisions for the remedy of *amparo* have been established in Argentina (ARG. CONST. arts. 29 & 36), Mexico (MEX. CONST. de 1917, art. 107), Nicaragua (NIC. CONST. de 1987 arts 184, 188, 190), and Venezuela (VEN. CONST. de 1961, art. 49).

¹⁶⁵ Decreto 2591 de 19 de noviembre de 1991, "Se Reglamenta la acción de tutela."

¹⁶⁶ Roundtable discussion with Manuel José Cepeda, Presidential Advisor for the Development of the Constitution, Republic of Colombia, at Columbia University, Institute of Latin American and Iberian Studies, May 11, 1992. See also PRESIDENCIA DE LA REPÚBLICA, *White Paper on Acción de Tutela* (May 1992) (on file with author).

¹⁶⁷ PRESIDENCIA DE LA REPÚBLICA, *supra* note 166.

¹⁶⁸ For the Government's perspective in support of *tutela*, see PRESIDENCIA DE LA REPÚBLICA, *Proyecto de Acto Reformatorio de la Constitución Política de Colombia*, at 203-207 ("Alcances de la norma del derecho de *amparo*") (Febrero de 1991); 1991 CONST. COLOM. art. 281.

sentatives from a list submitted by the President.¹⁶⁹ The office is responsible for monitoring the protection and development of human rights.¹⁷⁰ In this, much of the work assigned to the *Defensor* corresponds to that of the *Consejería Presidencial para Derechos Humanos*, established in 1987.¹⁷¹ However, the office of the *Defensor* has, unlike that of the *Consejería*, a formal legal mandate and enjoys full independence from the executive.¹⁷² The *Defensor's* primary obligation is to serve as a liaison between citizens whose rights have allegedly been violated and the government. The procedure that the *Defensor* follows is to receive complaints from citizens regarding violations of their rights and to act to protect those rights.¹⁷³ Among the office's means of fulfilling this responsibility is the power to bring an action of *tutela* on behalf of an alleged victim of a rights violation, as well as to invoke the right of *habeas corpus*.¹⁷⁴ The *Defensor* also oversees the development of human rights in Colombia by sponsoring academic study and publications. These include an annual report on the human rights situation in Colombia which is aimed at generating an increased awareness of and respect for human rights in the country.

These mechanisms, in addition to the reinforcement of an independent judiciary, together are designed to strengthen and broaden the protection of human rights in Colombia.

CONCLUSION

The Constitution of 1991 made great strides toward formally mandating increased democratic participation and strengthening the rule of law in Colombia, conditions favorable to the establishment of a human rights regime. The political diversity of the *Constituyente* and the extraordinary political optimism demonstrated by the constitutional reform heralded a channeling of political energy toward a more democratic and peaceful Colombia. Although the new constitutional blueprint does not erase the disparities between rich and poor, nor between political majorities and minorities, a less violent resolution of these disparities has been made available by the prospect of broader political participation and by the dismantling of an institutionalized bi-partisan system. However, without the political will necessary to implement the mandated changes

¹⁶⁹ 1991 CONST. COLOM. art. 281.

¹⁷⁰ *Id.* art. 282.

¹⁷¹ President Barco established this commission as an executive measure to monitor the human rights situation in Colombia and promote respect for rights in the country. Decreto no. 2111 de 1987 (noviembre 8).

¹⁷² REPÚBLICA DE COLOMBIA, *supra* note 113, at 7, para. 24.

¹⁷³ Legislation regulating the powers and procedures of the *Defensoria del Pueblo* were sanctioned by President Gaviria in late 1992. Ley 24 de 16 de diciembre de 1992.

¹⁷⁴ *Id.*

and the institutions and leadership to effect the 1991 Constitution's reforms, necessary changes in the Colombian political system will not transpire.

One profound omission made by the *Constituyente* is the failure to trim the constitutional authority of the military. The new Charter left a provision for the trial of members of the armed forces by military courts in accordance with the Military Penal Code,¹⁷⁵ thereby continuing the legacy of secret trials even in cases in which military personnel have been accused of human rights violations. As a result, the difficulty of obtaining justice in the case of such violations will continue to invite impunity on the part of the armed forces as regards human rights violations. Further, the jurisdiction of the *Fiscalía General* explicitly excepts that office from prosecuting offenses committed by active duty members of the armed forces,¹⁷⁶ posing a built-in cushion for the military against the new accusatorial system.

The new Constitution also fails to circumscribe the military's latitude under the national security doctrine, whereby a subordinate officer who commits a human rights abuse may be excused on the basis of his due obedience to superior officers.¹⁷⁷ Given that commanding officers are rarely sentenced in Colombia, this omission by the *Constituyente* to limit the autonomy of the armed forces will likely limit the Constitution's impact on protecting human rights from abuse by the Colombian military. Notably, the Colombian government's draft constitution included extensive reforms of the military.¹⁷⁸ These proposed provisions did not, however, survive the opposition coalition of *Constituyente* members from the Social Conservative Party and the M-19,¹⁷⁹ the latter of whom were successfully lobbied by the military to oppose the proposed diminution of its power.¹⁸⁰

Despite the lack of direct limitations of the military justice system by the constitutional reform, however, certain constitutional changes will indirectly limit the military. Measures implemented which will force the military to be more accountable for individual human rights violations include *tutela*, which can be used to challenge an action by any public authority, including a member of the military or the police; the *Defensor del Pueblo*; and the Constitutional Court. The use of these mechanisms, especially *tutela*, will necessarily increase the military's consciousness of the need, in the course of protecting the state, to protect the lives of all

¹⁷⁵ 1991 CONST. COLOM. art. 221. The provision is identical to article 170 of the Constitution of 1886.

¹⁷⁶ 1991 CONST. COLOM. art. 250.

¹⁷⁷ Gallón, *supra* note 164, at 3 (letter dated Jan. 5, 1992).

¹⁷⁸ PRESIDENCIA DE LA REPÚBLICA, *supra* note 166, at 298-300.

¹⁷⁹ Interview with Manuel José Cepeda, *supra* note 166.

¹⁸⁰ *Id.*

citizens of the state, including those challenging the authority of the state through subversive activity, and regardless of their political affiliation.

The rights declared and the new mechanisms established by the Constitution require legislation for their implementation. Nevertheless, the first step of providing constitutional guarantees has been made. The constitutional reform calls for a greater balance among the branches of government and a stronger judiciary capable of protecting the Constitution and the rights it guarantees. To effect these reforms, both political initiative and restraint will be required: initiative to maintain the political momentum necessary to effect the changes called for by the new Constitution, and restraint on the part of the executive to avoid falling back into the traditional pattern of governing by emergency decree.

To achieve greater political participation and a more stable society will admittedly require more than a constitutional assembly. The ability to translate the most carefully drafted constitutional text onto a state's political reality is necessarily limited to the degree of faithfulness by which the text is interpreted, the political power of those entrusted with the task of interpretation to effect that faith, and the willingness of the state and its citizens to operate within the legal regime it establishes. In Colombia, a nation in which a strong executive and political violence have displaced many of the ordinary functions of a constitutional democracy, the opportunity to reinvigorate Colombian institutions by means of a text would have been a folly were it not for the broad-based political support backing the constitutional reform and the belief in the reform's symbolic and substantive power to usher in a more peaceful era in the political history of Colombia.¹⁸¹

¹⁸¹ See Conclusions and recommendations made by Professor Mariclaire Acosta, General Secretary of the Academia Mexicana de Derechos Humanos, Professor Joaquín Ruiz-Giménez, former *Defensor del Pueblo* of Spain, and Donald T. Fox, Chairman of the American Section of the International Commission of Jurists. Published by the Comisión Andina de Juristas, *Violencia en Colombia* (1990). MARICLAIRE ACOSTA ET AL., CONCLUSIONS AND RECOMMENDATIONS OF THE REPORT OF THE 1989 MISSION CONDUCTED FOR THE INTERNATIONAL COMMISSION OF JURISTS (1990) (English translation, International Commission of Jurists *Newsletter* at 34-39 (No. 45, April/June 1990)).

