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# Taking *Machismo* to Court: The Gender Jurisprudence of the Colombian Constitutional Court

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## ARTICLE

## TAKING MACHISMO TO COURT: THE GENDER JURISPRUDENCE OF THE COLOMBIAN CONSTITUTIONAL COURT

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1. Martha I. Morgan is Robert S. Vance Professor of Law, University of Alabama, Box 870382, Tuscaloosa, Alabama, 35487-0382 USA; e-mail: mmorgan@law.ua.edu. As a teacher of constitutional law, I have long been interested in exploring the role that law can play in advancing social justice generally and women's rights, in particular. See, e.g., Martha I. Morgan, *Founding Mothers: Women's Voices and Stories and the 1987 Nicaraguan Constitution*, 70 B.U. L. REV. 1 (1990); Martha I. Morgan with Mónica María Alzate Buitrago, *Constitution-Making in a Time of Cholera: Women and the 1991 Colombian Constitution*, 4 YALE J. OF L. & FEMINISM 353 (1992). Four years after observing the 1991 Colombian Constituent Assembly and surrounding events, I revisited Colombia, with the valuable assistance of my Colombian colleague Mónica Alzate, to assess the early impact of the new constitution and the Constitutional Court it created, focusing on its gender jurisprudence. I made a brief return trip in December 1998 to update my research. I would like to thank Dean Kenneth Randall and the Alabama Law School Foundation for supporting this research. I particularly want to thank Catalina Botero, Magistrada Auxiliar, and Esteban Restrepo, Abogado Asistente, for their assistance with my research at the Colombian Constitutional Court and Luz Estella Nagle for her valuable comments and suggestions. Others who deserve thanks for generously giving their time to comment on prior drafts include James Garland, Margo Gutiérrez, Harvey Kline, Alexander Springer, Norman Stein, and Adrien Wing. Special thanks are due to my colleague Wythe Holt for his patience and care in reviewing and commenting on numerous drafts and to Patricia Wallace for her valuable editorial assistance. I also want to express my appreciation to José Cano who provided the transcriptions of many of the interview tapes and Piedad Gómez who assisted me in Colombia. I presented a talk based on an earlier version of this work at the Women's Rights Committee of the Inter-American Bar Association in May 1998 in Lima, Peru. A piece drawing on this article and on my earlier work with Mónica Alzate on women's rights in Colombia will be published later in 1999 by New York University Press in an anthology edited by Adrien Wing, tentatively titled *Global Critical Race Feminism*.

Note that the Constitutional Court's opinions generally are cited by number and year only, not by party names. The letter "T" before the opinion number signifies a *tutela* action and the letter "C" signifies an action of unconstitutionality. "SU" indicates a

"We cannot separate ourselves from the law. We are in a state of law." María Cristina Calderón, Director of Legal Services, PROFAMILIA.<sup>2</sup>

"We want to make sure that people's fundamental rights do not just stay on paper." Carlos Gaviria Díaz, Magistrado and former President of the Colombian Constitutional Court.<sup>3</sup>

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*sentencia de unificación*, a *tutela* decision by the full Court rather than a panel of three justices. Cases cited in this Article, given only by their number and year, have been supplied by the Constitutional Court itself on CD-ROM. Cases are available on the Internet at <www.fij.edu.co> (Cases on file with the *Inter-American Law Review*).

Translations from Spanish to English are by the author unless otherwise noted.

2. Interview with María Cristina Calderón, Director of Legal Services, PROFAMILIA, Bogotá, Colombia (July 7, 1995).

3. Juanita Darling, *Colombians Happy to Tell It to the Judge*, L.A. TIMES, Dec. 22, 1996, at A39. Magistrado(a) is the title given a member of higher courts in Colombia and other Latin American countries. After consulting Colombians about appropriate translations for English-speaking audiences, I have decided to use the title "Justice" when referring to the members of the Constitutional Court in order to denote a level of status and respect analogous to that of members of the U.S. Supreme Court. The office of President of the Colombian Constitutional Court is held by one of the justices selected through election by the Court's nine members. The presidency has rotated among the justices, with Justice Eduardo Cifuentes Muñoz most recently assuming the office in February 1999. Each justice is assisted by two magistrados(as), auxiliaries, auxiliary or assistant magistrados, who are experienced lawyers and law professors serving in positions similar to permanent senior law clerks, and by other young lawyers serving as judicial assistants.

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## I. INTRODUCTION

Colombia may seem an unlikely crucible for a progressive gender jurisprudence. But Colombia is a country of extremes.<sup>4</sup> In a country where the judicial system itself has been one of the

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4. Interview with María Isabel Plata, Director of PROFAMILIA, Bogotá, Colombia (Dec. 15, 1998).

targets of brutal violence, ordinary courts have been plagued by inefficiency and delay and have been largely inaccessible to all but the powerful elite. *Machismo* and conservative Catholicism have circumscribed and marginalized women's roles and lives within the society. Yet Colombian women's rights advocates have been active participants in the contemporary global struggle for gender justice. And justices of their new Constitutional Court are using the broad positive rights regime of the 1991 Colombian Constitution and its streamlined methods of implementation and enforcement in a determined effort to make these rights more than just paper guarantees for women and other traditionally politically powerless groups. During the early years under the new Constitution, women's rights advocates, and their foes, have presented the country's Constitutional Court<sup>5</sup> with cases involving a full spectrum of contemporary gender issues—abortion, affirmative action, domestic violence, employment discrimination, sexual orientation, teenage pregnancy, and women in the military—and more.<sup>6</sup> Since issuing its first decisions in February 1992, the Court has produced a surprising body of gender jurisprudence that merits study both as comparative constitutional interpretation and for what it has to say about the role that law, in the hands of a willing judicial body, can play in promoting social change in general and in improving the status of women in particular.

Long seen as the "Cinderella" among the Colombian governmental branches, the judicial branch under the new constitution is finally moving into the public spotlight. It is apparent that the Constitutional Court has become a leading participant in Colombia's ongoing societal conversation about human rights and the meaning of fundamental rights under the new constitution. In this article, I draw from personal interviews and observations as well as documentary sources to report on some gender-related aspects of this conversation. To the extent

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5. For an excellent comparative account of the history of the Colombian judicial system and the new Constitutional Court by a scholar intimately acquainted with both Colombian and U.S. systems, see Luz Estella Nagle, *Evolution of the Colombian Judiciary and the Constitutional Court*, 6 IND. INT'L. & COMP. L. REV. 59 (1995). Professor Nagle is a former Colombian judge.

6. The Court has also addressed a wide range of other contemporary constitutional issues. See generally Manuel José Cepeda, *Democracy, State, and Society in the 1991 Constitution: The Role of the Constitutional Court*, in COLOMBIA: THE POLITICS OF REFORMING THE STATE 71, 91 (Eduardo Posada-Carbó ed., 1998) (noting that "[a]lmost all key issues of modern constitutional law have been dealt with by the Court").

that I move beyond the role of chronicler or annalist, it is to offer some preliminary reflections<sup>7</sup> on the contrast between the Colombian Constitutional Court's avowedly activist interpretive approach—itsself a dramatic departure from longstanding assumptions about the role of the judiciary under the predominantly civil law legal traditions of Latin America<sup>8</sup>—and the stern rebukes Justice Antonin Scalia and other purported advocates of judicial restraint are currently leveling against the traditional use of such approaches in interpreting the federal constitution of the United States.<sup>9</sup> In this respect, I believe that the U.S. judiciary would do well to heed Ronald Dworkin's admonition that we not "lose our nerve, when all around the world other people, following our example, are gaining theirs."<sup>10</sup>

The 1991 Colombian Constitution was promulgated on July 4, 1991, after an initial draft<sup>11</sup> was debated over a period of five months by an elected constituent assembly that brought together government officials, leaders of former guerrilla groups, and representatives of indigenous peoples of Colombia. As Belisario Betancur, President of Colombia from 1982-86, has recently written, "the moment had come to 'shuffle and deal again.'"<sup>12</sup>

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7. I hope to explore these issues in more depth in a later work on contemporary Latin American constitutionalism. For further discussion of what has been described in Colombia as the "New Constitutionalism" or the "Constitutionalism of Poverty," see generally NUEVAS CORRIENTES DEL DERECHO CONSTITUCIONAL COLOMBIANO (1994) (on file with author); Eduardo Cifuentes Muñoz, *La acción de tutela: el constitucionalismo de la pobreza*, in LECTURAS CONSTITUCIONALES ANDINAS 3, COMISIÓN ANDINA DE JURISTAS 103 (1994).

8. See generally Nagle, *supra* note 5.

9. See generally ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997). Justice John Paul Stevens has referred to Justice Scalia's opinion for the Court in *Printz v. United States*, 521 U.S. 898 (1997) (invalidating the federal Brady Handgun Violence Prevention Act's interim provisions requiring state and local governments to conduct background checks on prospective handgun purchasers) as "as activist" as *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating state law prohibiting use of contraceptives by married persons). Speech by Justice Stevens to the Chicago Bar Association, *America and the Courts* (C-Span broadcast, Oct. 24, 1998).

10. Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1268 (1997). See generally RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996).

11. Keith Rosenn has noted that Colombia's Constituent Assembly did not start from scratch but worked from "a well organized and detailed draft prepared by a bright young team of lawyers well versed in comparative constitutional law." Keith S. Rosenn, *A Comparison of the Protection of Individual Rights in the New Constitutions of Colombia and Brazil*, 23 U. MIAMI INTER-AMER. L. REV. 659, 661 (1992).

12. Belisario Betancur, *Prologue, Colombia: From the Actual to the Possible*, in COLOMBIA: THE POLITICS OF REFORMING THE STATE, *supra* note 6 at xix.

Women were vastly under-represented as members of the Constitutional Assembly,<sup>13</sup> but women's rights organizations lobbied<sup>14</sup> and found support for many gender justice provisions among men and women within the Assembly. The new Charter replaced an 1886 Constitution that lacked many of the fundamental rights common in contemporary constitutions. A product of compromise and consensus, the new Constitution defines Colombia as an *estado social de derecho*, or social state of law,<sup>15</sup> and includes a broad "three generational" panoply of both negative and positive or affirmative rights—including civil, political, social, economic, cultural, and collective rights.<sup>16</sup>

Expectations on behalf of women's rights activists and other advocates of peace and social justice were high for the 1991 Colombian Constitution. Students who had come of age in Colombia's exceptional contemporary culture of violence campaigned for the new constitution, under the optimistic slogan: "We can still save Colombia."<sup>17</sup> The Colombian Supreme Court

13. Of the seventy-four members of the Constitutional Assembly, only four were women.

14. For discussion of some of the groups involved in this effort and of some of their efforts, see Consuelo Cuesta Ch., *Con rostro de mujer*, in CONSTITUCIÓN 1991: CAJA DE HERRAMIENTAS 68 (Mario Jurich Durán ed., 1992).

15. Manuel José Cepeda, the dean of the Universidad de los Andes Law School who served as adviser to President Gaviria on constitutional affairs, has described this concept as uniting the rule of law with a social state and as representing a middle ground between liberal and socialist notions of the state. Cepeda, *supra* note 6, at 86; see also Eduardo Posada-Carbó, *Reflections on the Colombian State: In Search of a Modern Role*, in COLOMBIA: THE POLITICS OF REFORMING THE STATE, *supra* note 6, at 7 (describing Cepeda's interpretation of the concept). For references to this concept in German and Spanish constitutional theory, see Cifuentes, *supra* note 7, at 104 n2.

16. For discussion of the generational developmental history of constitutional rights, see Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519 (1992). For an argument that negative rights should play a principal role in Latin American constitutionalism and against a positive constitution, see Cass R. Sunstein, *The Negative Constitution: Transition in Latin America*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY (Irwin P. Stotzky ed., 1993). Sunstein includes within his argument that a constitution should be negative, "the sense that it should be directed against the deepest risks in the relevant nation's political culture," but argues to exclude positive rights "largely because they are difficult to enforce through the courts." *Id.* at 368-69. See also Keith S. Rosenn, *The Success of Constitutionalism in the United States and Its Failure in Latin America: An Explanation*, 22 U. MIAMI INTER-AM. L. REV. 1, 26 (1990) (expressing the view that "aspirational or utopian provisions," such as those dealing with family rights, health protection, and education, "seem far more appropriate as part of a political platform or a sermon than in a constitution").

17. For a recent paper discussing the student movement from the perspective of social movement theory, see John C. Dugas, *The Origin, Impact, and Demise of the 1989-1990 Colombian Student Movement: Insights From Social Movement Theory*, Paper

gave its approval to the reform process<sup>18</sup> with forward-looking comments about the evolution of constitution-making and the new roles constitutions play in the modern world.<sup>19</sup> The Court foresaw that a new constitution could serve not just to distribute and limit government power but also to “integrate diverse social groups, to conciliate opposing interests,” in the search for “constitutional consensus” as a foundation for public order, social harmony, and peace.<sup>20</sup> Colombians referred to the new Constitution as a “new social contract” or “new peace treaty.”<sup>21</sup> One of the Constitution’s main aims was to reform the prior system radically by promoting participatory democracy and transferring power to citizens so that they might be involved in fundamental decisions affecting them in both the public and private spheres. The other main aim was to strengthen the judicial power.<sup>22</sup> Women’s rights advocates who participated in the constitution-making shared the hope that a new constitution could be instrumental in resolving the myriad and intersecting forms of violence that have permeated their lives, ranging from

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presented at the meeting of the Latin American Studies Association, Chicago, Ill., Sept. 24-26, 1998 (manuscript on file with author).

18. For a discussion of the reform process, see William C. Banks & Edgar Álvarez, *The New Colombian Constitution: Democratic Victory or Public Surrender?*, 23 U. OF MIAMI INTER-AM. L. REV. 39 (1991).

19. For an excellent recent discussion of transitional constitutionalism, including comments on the new Colombian Constitution, see Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2057-77 (1997). “Transitional constitutions not only operate as codifications of prevailing consensus but also transform that consensus.” *Id.* at 2076.

For general discussion of the role of the judiciary in democratic transitions in Latin America, see *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* (Irwin P. Stotzky ed., 1993). For comparisons of women’s participation in transitions from authoritarian to democratic rule, see *WOMEN AND DEMOCRACY: LATIN AMERICA AND CENTRAL AND EASTERN EUROPE* (Jane S. Jaquette & Sharon L. Wolchik eds., 1998).

20. Sentencia de la Corte Suprema de Justicia Sobre el Decreto 927 de 1990, No. 2149 (334-E), May 25, 1990, reprinted in EDMUNDO LÓPEZ GÓMEZ, *LA VERDADERA CONSTITUYENTE* 169 (1990).

21. See Jayni Edelstein, *Colombia: Impact of the New Constitution*, 47 INT’L COMMISSION OF JURISTS REV. 1 (1991). The Colombian Constitution is not a transitional constitution in the usual sense, as Colombia has long been a formal representative democracy. Amnesty International aptly refers to Colombia as a paradox. “[B]ehind this façade of stability and democracy is a country plagued by internal conflict and appalling levels of violence.” AMNESTY INTERNATIONAL, *COLOMBIA, POLITICAL VIOLENCE: MYTH AND REALITY* 1 (1994). See generally JENNY PEARCE, *COLOMBIA: INSIDE THE LABYRINTH* (1990).

22. Cepeda, *supra* note 6, at 72.



domestic violence and other criminal activity to violence by armed right- and left-wing groups and government forces.<sup>23</sup>

Eight years after the tumultuous events surrounding the adoption of the constitution, peace in Colombia still seems a distant dream.<sup>24</sup> Despite the incorporation of guerrilla groups

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23. For a description of how Colombian women's groups have analyzed their society's interrelated forms of violence, see Socorro Ramírez, *Mujeres, Democracia y Participación*, GACETA, Apr.-May 1991, at 49.

They have insisted on the necessity of transcending the reading of violence as a simple listing of deaths and terrorist incidents, and upon the appropriateness of also analyzing its internalization as a privileged form of relation and as a mechanism to settle conflicts, in the home or in the street, in the workplace or in organizations, and also those against the State. . . . They have resisted those who think that one has to accommodate oneself to the warlike spirit and that violence can only be answered in its own language. On the contrary, they insist on the urgency of a civil and democratic construction of peace and life.

At a recent conference on "Women, Justice, and Peace," held at the *Buen Pastor* (Good Shepard) Women's Prison in Bogotá, Elsa Gladys Cifuentes, national director of Equality for Women, called intrafamily violence the greatest and most immune form of violence in the country and urged that it be given the same attention as negotiations with the guerrillas. She argued that this everyday violence in the home is eating away the social fabric and producing human beings who are insensitive to suffering and who accept violence as the normal and justified way of resolving conflicts. *Foro sobre mujer y justicia, en el Buen Pastor*, EL TIEMPO (Bogotá), Oct. 7, 1998. (Note from the editors of the *Inter-American Law Review*: The reader will notice that *El Tiempo* articles are sometimes cited without giving a specific page number. Although the author, Inter-Library Loan at the University of Miami School of Law, and our friends in Colombia have tried to locate hardcopies of all the articles, we have met with only partial success and have occasionally been forced to rely on either poor copies without page numbers or copies retrieved from the internet. For current articles in *El Tiempo*, please see their website at <<http://www.eltiempo.com>>.

For further discussion of how Colombia's culture of violence affects women, see Morgan, *Constitution-Making*, *supra* note 1. See also Donny Meertens, *Victimas y sobrevivientes de la guerra: tres mirados de género*, 34 REVISTA FORO 19 (June 1998). Recent media accounts of women's participation in Colombian guerrilla groups could lead other women to see them as alternative role models. Interview with María Isabel Plata, *supra* note 4. For a comparative discussion of Peruvian women who have "chosen violence" as leaders within the Maoist guerrilla group *Sendero Luminoso* or Shining Path, see Maruja Barrig, *Female Leadership, Violence, and Citizenship in Peru*, in WOMEN AND DEMOCRACY: LATIN AMERICA AND CENTRAL AND EASTERN EUROPE, *supra* note 19, at 104.

24. Harvey Kline captures the short-lived euphoria the new Constitution evoked:

On July 4, 1991, there was a rush of euphoria as the Constituent Assembly presented the new Constitution. After the signing, the national orchestra played Handel's "Hallelujah Chorus," television viewers saw members of the assembly—men and women, former guerrillas and kidnapping victims, indigenes and members of the *oligarquía*, Roman Catholics and representatives of the evangelical movement—embracing each other. Some seventy Colombians of different backgrounds had learned to get along with each other. Yet the euphoria was short-lived; later that month Bogotá newspapers were reporting on the activities of clean-up squads in Pereira, the

such as the M-19 into the constitutional process, other groups remain active.<sup>25</sup> Both left-wing guerrilla and right-wing paramilitary violence continues<sup>26</sup> in the face of repeated efforts by both former President Samper and now President Pastrana to negotiate peace accords.<sup>27</sup> In the judicial system alone, thirty-five officials were assassinated in the six months prior to April 1998.<sup>28</sup> The toll is similarly grim in other sectors, including journalists and human rights advocates. Among journalists, for example, six of the continent's thirteen violent deaths have occurred in

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president's hometown.

HARVEY KLINE, *COLOMBIA: DEMOCRACY UNDER ASSAULT*, 137 (2d. ed. 1995).

25. Commenting on over three decades of guerrilla activity in Colombia, former President Betancur says that "Colombians, with black humour, say that our guerrillas are already a part of the establishment they are trying to fight." Betancur, *supra* note 12, at xv.

26. See, e.g., AMNESTY INTERNATIONAL, *supra* note 21 (reporting that "[g]uerrilla groups active in Colombia in recent years have also contributed to the spiral of violence with persistent disregard for the minimum humane standards established in international humanitarian law," but finding that "[s]tatistics compiled by independent bodies and by the government itself clearly show that by far the greatest number of political killings are the work of the Colombian armed forces and the paramilitary groups they have created."). *Id.* at 5. Alexander Springer asserts, however, that the paramilitary have long since emancipated themselves from their former military protectors. Comments of Alexander Springer, Jan. 29, 1999 (on file with author).

27. For a recent assessment of the latest peace proposals, see Héctor-León Moncayo S., *Las condiciones sociales y políticas de la Paz en Colombia: La Apuesta del Pragmatismo*, Paper presented at the Meeting of the Latin American Studies Association, Chicago, Ill., Sept. 24-26, 1998 (manuscript on file with author). He reiterates that "reforms must be made, not because the guerrilla demands it but because, in justice, it must be done. And because in this way, you change the social conditions and conditions of exercise of power from which this type of violence comes." In a similar vein, former President Belisario Betancur acknowledged in his 1994 presentation to the Organization for Economic Co-operation and Development of ten requirements for peace that "in all armed conflicts in Latin America there are subjective or personal agents—guerrillas—as well as objective agents—a lack of social infrastructure, for example." See Betancur, *supra* note 12, at xxiii.

28. *Ellos sacan la cara por la justicia colombiana*, EL TIEMPO (Bogotá), Apr. 5, 1998. These recent killings take place against the backdrop of memories of the November 6, 1985, seizure of the Palace of Justice by the M-19 guerrilla movement after which over 100 persons, including eleven of the twenty-four members of the Supreme Court, lay dead following the army's violent counterattack. See generally ANA CARRIGAN, *THE PALACE OF JUSTICE: A COLOMBIAN TRAGEDY* (1993). (M-19, or Movement 19, refers to the date of the fraudulent election on April 19, 1970, and also became the name for the guerrilla group formed in 1972). Commenting on the situation of the predominantly women judges of the lower courts, Luz Nagle points out that "lower court judges had such a low life expectancy (about two years when I was a judge) that women lawyers were more expendable and thus should fill those positions in the court system." Letter and comments to the author from Professor Luz Estella Nagle, Nov. 12, 1998 (on file with author).

Colombia.<sup>29</sup> The U.S. State Department reported that in 1997, more than a third of the world's terrorist attacks (107 out of 304) occurred in Colombia and 83% of the 128 Latin American attacks took place there.<sup>30</sup> The prolonged violence has led to overwhelming pessimism. In a poll published in April 1998, 85% of Colombians responded that the country was in bad shape and that they did not believe the situation was going to improve.<sup>31</sup>

But if it has fallen short of bringing peace, the new Constitution has changed Colombians' views of constitutional rights and of the role of courts in protecting these rights. By combining broad substantive rights with a new Constitutional Court and the availability of a streamlined writ of protection called a *tutela*<sup>32</sup> for claiming immediate protection of these rights, the new charter has opened the judicial system to women and other marginalized groups who before had little reason to consider using Colombia's courts as a means of social redress.

Easy access to courts has its critics. Some Colombians have complained that the country is suffering from an epidemic of acute "*tutelitis*."<sup>33</sup> In July 1995, the Colombian Congress came

29. Rafael Santos, *Tristeza de colombiano*, EL TIEMPO (Bogotá), Apr. 26, 1998. For a first-hand account of the dangers of reporting on the drug wars, see MARÍA JIMENA DUZÁN, *DEATH BEAT: A COLOMBIAN JOURNALIST'S LIFE INSIDE THE COCAINE WARS* (1994). See also GABRIEL GARCÍA MÁRQUEZ, *NEWS OF A KIDNAPPING* (1997).

30. *Colombia, insólito récord en terrorismo mundial*, EL TIEMPO (Bogotá), May 1, 1998. While acknowledging that violence is Colombian society's biggest problem, Bogotá's former mayor, Antanas Mockus, pointed out that "guerrilla[s], narcos, and paras constitute only one fifth of the violence in the country." Alirio Fernando Bustos, *Una conducta ilícita cada 30 segundos*, EL TIEMPO (Bogotá), May 4, 1998, at 13A. Studies reveal that 80% of the violence consists of "common" crime. *Id.*

31. *A sembrar optimismo*, EL TIEMPO (Bogotá), Apr. 28, 1998, at 4A.

32. *Tutelas* are actions to seek protection of fundamental constitutional rights through orders similar to injunctions. *Tutelas* may be initiated in any court in the country and must be resolved within ten days. Judgments are effective immediately though subject to direct appellate review in the ordinary courts and to discretionary review by the Constitutional Court. CONST. POL. COL. art. 86. See discussion *infra*, Part II.B.

33. A defender of the *tutela* noted that it had been described as a "nasty creature," a "monster," a "new King Kong" that is sowing chaos. "The president of the Supreme Court referred to it in forums and interviews as an '*estorbo*' (nuisance or obstacle) that will plunge the judiciary to the bottom of the abyss; something that neither the narcotrafficking nor the violence has achieved." Víctor Guerrero Apráez, *Huracán sobre la tutela*, CONSTITUCIÓN 1991: CAJA DE HERRAMIENTOS 96 (Mario Jurich Durán ed., 1992). Attempts to use *tutelas* to address seemingly trivial matters provide continual fuel for those advocating reform. See, for example, the media report on recent *tutelas* filed by four aspiring candidates for the title of Miss Colombia against the competition organizers for excluding contestants from their localities from the competition. *Reinado en los*

close to adopting a court-packing plan that would have attempted to change the Court's direction by adding six justices to the Court,<sup>34</sup> and in 1997, it seriously considered but ultimately rejected other proposals to reform the *tutela* and rein in the Constitutional Court.<sup>35</sup>

Writing at a time when the new Colombian Constitution was "still in diapers,"<sup>36</sup> with the collaboration of Colombian women studies specialist Mónica Alzate Buitrago, I described the experiences of Colombian women in its adoption and examined their hopes and fears for its implementation.<sup>37</sup> Here I explore the early implementation of the constitution, focusing both on how women have used the courts to assert their new constitutional rights and liberties and on how the Constitutional Court has begun to elaborate a gender jurisprudence grounded in principles such as equality, autonomy, and tolerance.

What emerges is a picture of the Colombian Constitutional Court's rapid and openly activist involvement in the society's debates over issues such as gender and sexual orientation. Justice Eduardo Cifuentes Muñoz, now President of the Court, explains that the "Court's idea is that jurisprudence is a very powerful instrument for changing cultural habits and, particularly, prejudices."<sup>38</sup> The role of courts in so-called "culture wars" has been hotly debated in the United States in recent years. In cases dealing with gender and sexual orientation under the U.S. Constitution, Justice Scalia has chastised the U.S. Supreme Court for "taking sides" in the culture wars.<sup>39</sup> He views the issues raised in these cases as cultural debates that should be

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*tribunales*, EL TIEMPO (Bogotá), Oct. 7, 1998.

34. Cepeda, *supra* note 6, at 90. The 1995 proposal also would have required a two-thirds vote of the judges to invalidate laws. *Id.*

35. The proposed reforms were aimed at (1) reversing the Constitutional Court's revision of *tutelas* against judicial opinions in certain circumstances and (2) lessening the "burden" on the Supreme Court and other appellate courts of considering direct appeals of *tutelas*. See discussion, *infra*, Part II.B.

36. Plinio Apuleyo Mendoza, *Todavía en Pañales*, EL TIEMPO (Bogotá), Aug. 26, 1991, at 5A.

37. See Morgan, *Constitution-Making*, *supra* note 1. For other early English language commentary on the 1991 Constitution, see Rosenn, *supra* note 11; Donald T. Fox & Anne Stetson, *The 1991 Constitutional Reform: Prospects for Democracy and the Rule of Law in Colombia*, 24 CASE W. RES. J. INT'L. L. 139 (1992).

38. Interview with Eduardo Cifuentes Muñoz, Magistrado of the Colombian Constitutional Court, Bogotá, Colombia (July 5, 1995).

39. See, e.g., *Romer v. Evans*, 517 U.S. 620, 637-53 (1996) (Scalia, J., dissenting); *United States v. Virginia*, 518 U.S. 515, 566-603 (1996) (Scalia, J., dissenting).

left to the political processes and argues that, in the absence of express constitutional prohibitions, courts have no proper basis for striking down practices that follow longstanding social traditions. While Justice Scalia's purportedly passive constitutional methodology has not been embraced by a majority of the U.S. Supreme Court, neither is the current Court comfortable assuming a role such as the Warren Court played in social change. Colombia's recent constitutional developments present an opportunity for reflection on contrasting constitutional and judicial approaches to the relationship between the judiciary and the political processes.<sup>40</sup>

In a larger sense, the Colombian Constitutional Court's gender cases provide an opportunity to reflect on perhaps the most fundamental question about constitutional law—does it matter? Are constitutions destined to be “only paper, dead tree, with ink on it,” as Joel Bakan recently framed the question?<sup>41</sup> Or, in the hands of litigants and judges who are willing to take sides in their society's struggle to establish a culture of respect for human rights, can a constitution become more than “just words”? Progressive rights-talkers, including women's-rights-as-human-rights-talkers, should continue to examine this question as they monitor and evaluate the transformative effects of contemporary constitutions.<sup>42</sup>

Part II of this Article gives an overview of the key substantive and procedural features of the new Colombian Constitution that have enabled and encouraged women's rights

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40. For general treatments of these issues in U.S. legal scholarship, see, for example, JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962). For discussion of related issues under the 1991 Colombian Constitution, see Sandra Morelli Rico, *¿La Corte Constitucional: Un legislador complementario?* 45 *TEMAS DE DERECHO PÚBLICO* (1997).

41. JOEL BAKAN, *JUST WORDS: CONSTITUTIONAL RIGHTS AND SOCIAL WRONGS* (1997). In this recent critique of the Canadian Charter of Rights and Freedoms, Bakan concludes that, given its failure to take private power seriously, the Charter can have little effect on people's “real lives.” See Didi Herman, *Book Review, Just Words: Constitutional Rights and Social Wrongs by Joel Bakan*, 35 *OSGOODE HALL L.J.* 407 (1997).

42. For recent commentary describing and evaluating substantive and procedural protections for human rights in contemporary constitutions, see, for example Rosenn, *supra* note 11; René Provost, *Emergency Judicial Relief for Human Rights Violations in Canada and Argentina*, 23 *U. MIAMI INTER-AM. L. REV.* 93 (1992); *Special Issue: The South African Constitution in Transition*, 3 *REV. OF CONST. STUD.* (1996); Brice Dickson, *Protecting Human Rights Through a Constitutional Court: The Case of South Africa*, 66 *FORDHAM L. REV.* 531 (1997).

advocates to bring legal challenges to a wide range of discriminatory laws and practices. Part III discusses some of the gender-related cases that have been decided under these provisions from 1992 through 1998 and presents views on these cases by some of the participants in the early development of the country's gender jurisprudence. Part IV takes a broader look at how Colombians assess the early work of the Constitutional Court, with particular attention to its gender decisions and its treatment of *tutelas*. The final section offers some comparative reflections on the Colombian Court's interpretive approach and on what the Colombian experience suggests about the transformative potential of constitutions in the area of gender and sexual orientation. I conclude that the Constitutional Court's early gender jurisprudence provides an important, albeit limited, example of judicial commitment to making a constitution more than "just words" in the war against *machismo*<sup>43</sup> and for a human rights culture.<sup>44</sup> But, with the terms of most of the

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43. For a review of definitions and theories of *machismo*, see ELIZABETH E. BRUSCO, *THE REFORMATION OF MACHISMO: EVANGELICAL CONVERSION AND GENDER IN COLOMBIA* 77-91 (1995). The Spanish word *macho* literally means a male animal. The classic definition in U.S. literature is Stevens' description of *machismo* as "the cult of virility," the chief characteristics of which are "exaggerated aggressiveness and intransigence in male-to-male interpersonal relationships and arrogance and sexual aggression in male-to-female relations." Evelyn Stevens, *Marianismo: The Other Face of Machismo in Latin America, in FEMALE AND MALE IN LATIN AMERICA* (Ann M. Pescatello ed., 1973).

44. Less dramatically perhaps, women's right activists in other parts of Latin America have also increasingly (and sometimes successfully) turned to the courts in their battles against gender discrimination in recent years. The trend is particularly evident in Costa Rica where in 1989, a new Sala IV of the Supreme Court was established to handle constitutional issues. See generally ZARELA VILLANUEVA MONGE & ALEXANDRA BOGANTES RODRÍGUEZ, *PRINCIPIO DE IGUALDAD Y JURISPRUDENCIA CONSTITUCIONAL* (1995) (analyzing the gender cases of the Costa Rican Supreme Court and its Sala IV). For example, in August 1992, the Costa Rican Supreme Court ruled on a challenge brought by Costa Rican women to a regulation requiring a husband's consent for a married woman's sterilization, stating that if the regulation were applied in this manner it would be unconstitutional. Expediente No. 1496-M-91, Voto No. 2196-92 (Aug. 11, 1992). In June 1994, the Costa Rican Court held that social security regulations allowing widows' pensions in cases of *de facto* unions only if the couple had lived together for five years or had children were unconstitutionally discriminatory. Expediente No. 1569-V-91, Voto No. 2648-94 (June 7, 1994). But in November 1992, the Court rejected a challenge to the practice of awarding lower monetary prizes in women's sports competitions than in men's events. Expediente No. 2910-S-92, Voto No. 3444-92 (Nov. 13, 1992) (The Inter-American Commission on Human Rights also rejected a challenge to this practice under the American Convention, finding that the applicant lacked standing. *Montoya v. Costa Rica*, Report No. 48/96, Case 11.553 (Oct. 16, 1996).) In January 1994, the Costa Rican Supreme Court ruled on behalf of a man who challenged a provision in the Law for the Promotion of Women's Social Equality that required property obtained through government programs to be registered in the name of the woman in cases of *de facto*

current Justices ending in 2001, and as the Court confronts negative media reports of a 5-4 split among the justices and renewed calls for judicial reform,<sup>45</sup> it remains to be seen whether the footholds it has established will translate into lasting change for Colombians.

## II. RIGHTS AND REMEDIES

### A. *Background of the Constitution's Substantive Gender-Related Guarantees*

During the early stages of contemporary Latin American women's movements,<sup>46</sup> leaders generally placed low strategic

unions. Expediente No. 1237-90, Voto No. 94 (Jan. 18, 1994). For a discussion of the Costa Rican women's movement generally, see *The Costa Rican Women's Movement: A Reader* (Ilse Abshagen Leitinger ed. & trans., 1997).

For information on women's resort to the Guatemalan Constitutional Court, see ACCIÓN DE INCONSTITUCIONALIDAD POR DISCRIMINACIÓN A LA MUJER EN EL CÓDIGO PENAL, CENTRO PARA LA ACCIÓN LEGAL EN DERECHOS HUMANOS (n.d.) (documenting Guatemalan women's rights activists' March 7, 1996, success in the Guatemalan Constitutional Court in their challenge to the penal code's discriminatory treatment of adultery) (on file with author). See Guatemalan Constitutional Court, Expediente 936-95, decision of Mar. 7, 1996. Earlier, the Guatemalan Constitutional Court rejected a challenge to discriminatory provisions of the Guatemalan Civil Code, including its requirement that married women seek their husband's consent to work outside the home. See Guatemalan Constitutional Court, Expediente 84-92, decision of June 24, 1993. One judge dissented from this decision. Voto Razonado del Magistrado Gabriel Larrios Ochaíta. Following the Constitutional Court's decision upholding these civil code provisions, on February 8, 1995, a challenge to them was filed before the Inter-American Commission on Human Rights. Letter from María Eugenia de Sierra and Center for Justice and International Law (CEJIL) to Ambassador Edith Márquez Rodríguez, Executive Director of the Inter-American Commission on Human Rights, Feb. 8, 1995 (on file with author). The Inter-American Commission delayed action in the case until an individual claiming to be affected by the law was added as a party but then reportedly ruled favorably on the case in late 1998.

For discussion of early gender and sexual orientation cases in the Nicaraguan Supreme Court, see Martha I. Morgan, *The Bitter and the Sweet: Feminist Efforts to Reform Nicaraguan Rape and Sodomy Laws*, 26 U. MIAMI INTER-AM. L. REV. 439 (1995).

45. See discussion, *infra*, Part IV.

46. For a history of Latin American women's movements, see FRANCESCA MILLER, *LATIN AMERICAN WOMEN AND THE SEARCH FOR SOCIAL JUSTICE* (1991). See also *LATIN AMERICAN WOMEN, COMPARED FIGURES 177-94* (1995). For a discussion of the history of the Colombian women's movements, see Morgan, *Constitution-Making*, *supra* note 1, and its cited sources. For a comparison of women's participation in transitions from authoritarian to democratic regimes in Latin America and Eastern and Central Europe, see *WOMEN AND DEMOCRACY*, *supra* note 19. For a recent report on the status of women's rights in the Americas, see *REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS ON THE STATUS OF WOMEN IN THE AMERICAS*, OEA / Ser. L1V/11.100, Doc. 17 (Oct.

priority on litigation. The reasons were both ideological and pragmatic. On a theoretical level, many questioned the utility of law as a tool for changing societal beliefs and attitudes underlying *machismo*, the region's harsh brand of gender subordination. On a more practical level, they were dubious about the role that their slow, weak, and sometimes corrupt judicial systems could play in eradicating discriminatory laws or practices. And as former judge Luz Nagle stresses, "almost every single higher court position was filled by a man, while the lower courts where I served were predominately women."<sup>47</sup>

A recent study by researchers at Colombia's National University documents women's continuing tendency to resort to institutions other than the judicial system, at least in the first instance, to resolve conflicts.<sup>48</sup> Research also shows that while women who did turn to the courts won their cases more frequently than men did in family matters,<sup>49</sup> men were more successful in cases in the labor area.<sup>50</sup> For women, distrust and lack of knowledge of the judicial system have often translated into avoidance.

As María Cristina Calderón, Director of Legal Services for PROFAMILIA, points out, there has also been an uneasy relationship between leaders of the feminist movement and women's rights lawyers:

Immediately, they [feminist leaders] think that we [women's rights lawyers] have little sensitivity, that we don't understand the social problems, that we are not

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13, 1998).

47. Letter from Professor Luz Estella Nagle to author, *supra* note 28.

48. REPUESTA AL CUESTIONARIO SOBRE LA CONDICIÓN DE LA MUJER EN LAS AMÉRICAS: COLOMBIA, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *citing* MINISTERIO DE JUSTICIA Y DEL DERECHO, UNIVERSIDAD NACIONAL DE COLOMBIA, FACULTAD DE DERECHO, CIENCIAS POLÍTICAS Y SOCIALES, DIRECCIÓN GENERAL DE POLÍTICAS JURÍDICAS Y DESARROLLO LEGISLATIVO, "GÉNERO Y JUSTICIA," ESTUDIO SOBRE LA INCIDENCIA DE LA MUJER EN LOS FALLOS JUDICIALES, LA ACCIÓN DE TUTELA Y LA VIOLENCIA CARCELARIA, UNIDAD DE INVESTIGACIONES JURÍDICAS Y SOCIALES, GERARDO MOLINA UNIJUS [hereinafter REPUESTA AL CUESTIONARIO] (on file with the *Inter-American Law Review*).

49. There is, however, Luz Nagle points out, "natural law doctrine imbedded in the code regarding family matters and the woman's role in the family unit. Consequently, the stereotype of macho society is reinforced." Letter from Professor Luz Estella Nagle to author, *supra* note 28.

50. *Mujeres examinan como les aplican la ley*, 198 MUJER/FEMPRESS (Santiago), Apr. 1998, at 16.



anthropologists or sociologists or psychologists but are formalists. And we think, or I think, . . . that to refuse to acknowledge the value of law as an instrument is also an error. The law does not change things just like that. But it is a grand instrument. And you have to work with the laws we have or change them or find other laws. But we cannot separate ourselves from the law. We are in a state of law.<sup>51</sup>

Despite lingering skepticism about rights-based discourse as a means of pursuing social justice, Colombian women's groups, like their counterparts throughout Latin America, adopted much of the law reform-laden agenda of the international women's movement during the 1970s and 1980s, and Colombians ratified the rights-based Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>52</sup> in 1981.<sup>53</sup> CEDAW, with its broad definition of discrimination against women<sup>54</sup> and its approval of positive discrimination,<sup>55</sup> provided a model for legal reform.<sup>56</sup> During Colombia's constitutional assembly, women's rights organizations, working both inside and outside the assembly, sought to incorporate the principles of CEDAW into the new constitution.<sup>57</sup> Although women were vastly

51. Interview with María Cristina Calderón, *supra* note 2. See also María Isabel Plata & María Cristina Calderón, *Legal Services: Putting Rights Into Action—PROFAMILIA-Colombia*, 44 AM. U. L. REV. 1105, 1109 (1995).

52. Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), 1249 U.N.T.S. 13 (1981). Formally, CEDAW refers to the committee charged with maintaining the convention but this acronym also has become used commonly to refer to the convention itself.

53. Ley 51 de 1981. The definition of discrimination had been further developed in a 1990 decree:

Discrimination can be direct or indirect.

Direct discrimination exists when a person receives a treatment less favorable than another because one belongs to one or the other sex.

Indirect discrimination means the application of conditions of employment that although equal in a formal sense, in practice favor one sex over the other.

Decreto 1398, "Por el Cual se Desarrolla la Ley 51 de 1981, Que Aprueba la Convención sobre la Eliminación de Todas las Formas de Discriminación Contra la Mujer Adoptado por las Naciones Unidas" (July 3, 1990).

54. CEDAW, art. 1, 1249 U.N.T.S. 16.

55. *Id.* art. 4, 1249 U.N.T.S. 16.

56. For case studies of how CEDAW has been used to shape constitutional legislative norms, to litigate on behalf of women's rights, and to influence governmental policies, see BRINGING EQUALITY HOME: IMPLEMENTING THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN CEDAW (Ilana Landsberg-Lewis ed., 1998).

57. See PROPUESTAS DE MUJERES A LA ASAMBLEA NACIONAL CONSTITUYENTE (Jan. 1991); *Sin los derechos de la mujer la democracia no va*, EL TIEMPO (Bogotá), Apr. 28,

underrepresented in the constitutional assembly, the feminist agenda was not lost: Colombia's 1991 Constitution recognizes both the equal rights of women and the State's positive obligation to "promote conditions of equality."<sup>58</sup>

As a result of the efforts of women's organizations and of the parallel efforts of supportive men and women within the constitutional assembly, the constitution contains several formal guarantees related to women's rights. First, in stark contrast to the 1886 Constitution it replaced, the 1991 Constitution expressly reflects both CEDAW's prohibition on discrimination against women and its approval of special positive measures as a means of assuring substantive rather than merely formal equality. Article 13 of the new Constitution incorporates these twin principles of equality:

All persons are born free and equal before the law, will receive the same protection and treatment from the authorities, and will enjoy the same rights, liberties and opportunities without any discrimination for reasons of sex, race, national or family origin, language, religion, or political or philosophical opinion.

The State will promote conditions so that equality will be real and effective and will adopt measures in favor of groups discriminated against or marginalized.

The State will specially protect those persons who because of their economic, physical or mental condition find themselves in circumstances of manifest weakness and will punish abuses and mistreatment that are committed against them.<sup>59</sup>

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1991. For a detailed discussion of these proposals, see Morgan, *Constitution-Making*, *supra* note 1, at 375-80. See also María Isabel Plata, *Reproductive Rights as Human Rights-Colombia*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 515, 517-19 (Rebecca J. Cook ed., 1994).

58. CONST. POL. COL. art. 13.

59. *Id.*

Todas las personas nacen libres e iguales ante la ley, recibirán la misma protección y trato de las autoridades y gozarán de los mismos derechos, libertades y oportunidades sin ninguna discriminación por razones de sexo, raza, origen nacional o familiar, lengua, religión, opinión política or filosófica. El Estado promoverá las condiciones para que la igualdad sea real y efectiva y adoptará medidas en favor de grupos discriminados or marginados.

El Estado protegerá especialmente a aquellas personas que por su

The Constitutional Court's early decisions under Article 13 relied on principles of reasonableness and proportionality derived from European law; more recently the Court has also employed the concept of levels of scrutiny drawing both on cases from the European Court of Human Rights and on cases from the U.S. Supreme Court. Unlike the U.S. Supreme Court, however, the Colombian Court has applied "strict scrutiny" and placed a heavy burden of proof on the defender of the challenged action when faced with discrimination based on sex (and, more recently, sexual orientation) as well as when dealing with infringements upon fundamental rights.<sup>60</sup>

In addition to Article 13's general equality guarantee, Article 40 provides that "the authorities will guarantee the adequate and effective participation of women in the decision-making levels of Public Administration,"<sup>61</sup> Article 42 states that "family relations are based in the equality of rights and duties of couples and in reciprocal respect among all its members,"<sup>62</sup> and Article 43 declares: "Women and men have equal rights and opportunities. Women cannot be subjected to any type of discrimination."<sup>63</sup>

condición económica, física o mental, se encuentran en circunstancia de debilidad manifiesta y sancionará los abusos o maltratos que contra ellas se cometan.

The draft of Article 13 that emerged from the Constitutional Assembly's Committee did not incorporate the concept of affirmative or positive discrimination but the version approved in the plenary debates tracked language proposed by assembly member María Teresa Garcés and others that incorporated both negative and positive concepts of equality as called for in proposals by women's groups. See Morgan, *Constitution-Making*, *supra* note 1, at 381.

60. See, e.g., Sentencia No. C-481/98 (strict scrutiny is applicable to a law treating homosexuality as a grounds of misconduct for teachers because if sexual orientation is biologically determined, the law is equivalent to a sex classification and if sexual preference involves personal choice, the law infringes on the right to the free development of one's personality). See discussion *infra*, Part III.B.5. See generally Eduardo Cifuentes Muñoz, *Mujer e igualdad*, Paper presented at Conference in Guayaquil, Colombia, Sept. 27, 1996 (on file with author); César A. Rodríguez, *El test de razonabilidad y el derecho a la igualdad*, OBSERVATORIO DE JUSTICIA CONSTITUCIONAL: BALANCE JURISPRUDENCIAL DE 1996 (1998).

61. CONST. POL. COL. art. 40. "... Las autoridades garantizarán la adecuada y efectiva participación de la mujer en los niveles de la administración pública." In 1992, however, the Council of State, in a case filed by Angela Cuevas de Dolmestch, rejected the argument that based on Article 40 it should nullify the President's Decree naming his cabinet because it contained only one woman. Expediente No. 0589, 21 Revista Mensual 579 (1992).

62. CONST. POL. COL. art. 42. "... Las relaciones familiares se basan en la igualdad de derechos y deberes de la pareja y en el respeto recíproco entre todos sus integrantes."

63. CONST. POL. COL. art. 43. "La mujer y el hombre tienen iguales derechos y oportunidades. La mujer no podrá ser sometida a ninguna clase de discriminación. ..."

Finally, Article 53 includes equality of opportunity and special protection for women, maternity, and minors among the fundamental principles to be considered by Congress in enacting a labor law.<sup>64</sup>

One of the most controversial features of the new constitution was its extension of civil divorce to religious marriages. According to Article 42, "[t]he civil effects of all marriages will be terminated by divorce according to the civil law."<sup>65</sup> Article 42 also recognizes that a family can be formed by "natural or judicial bonds, by the free decision of a man and a woman to contract marriage or by the responsible will to form it,"<sup>66</sup> and, as mentioned above, guarantees equality of rights among couples. It further provides: "Any form of violence within the family is considered destructive of its harmony and unity, and will be punished according to the law."<sup>67</sup>

Having confronted the Church on the issue of divorce, the Constitutional Assembly was unwilling to confront it a second time with respect to abortion. Although Article 42 also recognizes the right of couples "to freely and responsibly decide the number of their children,"<sup>68</sup> the constitutional assembly rejected demands of women's groups that free choice about motherhood, including the right to legalized abortion, be explicitly guaranteed. On the other hand, Article 43 guarantees special state assistance and protection to women during

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64. CONST. POL. COL. art. 53. "El Congreso expedirá el estatuto del trabajo. La ley correspondiente tendrá en cuenta por los menos los siguientes principios mínimos fundamentales: Igualdad de oportunidades para los trabajadores; ...protección especial a la mujer, a la maternidad y al trabajador menor de edad."

65. CONST. POL. COL. art. 42. "...Los efectos civiles de todo matrimonio cesarán por divorcio con arreglo a la ley civil...."

66. CONST. POL. COL. art. 42. "La familia es el núcleo fundamental de la sociedad. Se constituye por vínculos naturales o jurídicos, por la decisión libre de un hombre y una mujer de contraer matrimonio o por la voluntad responsable de conformarla...."

67. *Id.* "Calquier forma de violencia en la familia se considera destructiva de su armonía y unidad, y será sancionada conforme a la ley...."

68. *Id.* "La pareja tiene derecho a decidir libre y responsablemente el número de sus hijos,...." In May 1992, the Ministry of Health issued a resolution ordering all health institutions to guarantee women the right to decide on issues affecting their health or sexuality. But in July 1993, the Council of State opined that the new constitution required the mutual consent of the couple (and thus allowed a spousal veto) for obtaining family planning services. Plata & Calderón, *supra* note 51, at 1109 (1995) (citing Consejo de Estado, Sala de lo Contencioso Administrativo, Exp. No 7795 (July 1993)). The Council of State's interpretation did not have a direct effect and has been undercut by later decisions of the Constitutional Court. Interview with María Isabel Plata, *supra* note 4.

pregnancy and after birth, including "support benefits from it if they then become unemployed or abandoned."<sup>69</sup> It further provides that the "State will provide help in a special manner to women heads of family."<sup>70</sup> And, as mentioned above, protection for maternity is also among the fundamental principles that Article 53 directs lawmakers to consider in enacting a labor law.

Other articles that women have used in their legal attacks include Article 11's right to life;<sup>71</sup> Article 12's prohibition of cruel, inhumane, or degrading treatment;<sup>72</sup> Article 15's guarantee to all persons of the "right to personal and family privacy and to their good name;"<sup>73</sup> Article 16's recognition that "all persons have the right to the free development of their personality without limitations except those imposed by the rights of others and the legal order;"<sup>74</sup> Article 18's guarantee of freedom of conscience;<sup>75</sup> Article 21's right to dignity;<sup>76</sup> and Article 67's right to education.<sup>77</sup> Also significant are Articles 93 and 94 regarding international human rights law and unenumerated human rights:

Article 93. International treaties and conventions ratified by the Congress that recognize human rights and that prohibit their limitation in states of emergency have priority in the internal order.

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69. CONST. POL. COL. art. 43. "...Durante el embarazo y después del parto gozará de especial asistencia y protección del Estado, y recibirá de este subsidio alimentario si entonces estuviera desempleada o desamparada...."

70. *Id.* "... El Estado apoyará de manera especial a la mujer cabeza de familia."

71. CONST. POL. COL. art. 11. "El derecho a la vida es inviolable. No habrá pena de muerte."

72. CONST. POL. COL. art. 12. "Nadie será sometido a desaparición forzada, a torturas ni a tratos o penas crueles, inhumanos o degradantes."

73. CONST. POL. COL. art. 15. "Todas las personas tienen derecho a su intimidad personal y familiar y a su buen nombre, y el Estado debe respetarlos y hacerlos respetar...."

74. CONST. POL. COL. art. 16. "Todas las personas tienen derecho al libre desarrollo de su personalidad sin más limitaciones que las que imponen los derechos de los demás y el orden jurídico." Compare Article 2(1) of the 1949 Basic Law of the Republic of Germany and similar provisions in the constitution of France, Italy, and Spain.

75. CONST. POL. COL. art. 18. "Se garantiza la libertad de conciencia. Nadie será molestado por razón de sus convicciones o creencias ni compelido a revelarlas ni obligado a actuar contra su conciencia."

76. CONST. POL. COL. art. 21. "Se garantiza el derecho a la honra. La ley señalará la forma de su protección."

77. CONST. POL. COL. art. 67. "La educación es un derecho de la persona y un servicio público que tiene una función social...."

The rights and duties consecrated in this Charter will be interpreted in accordance with international treaties on human rights ratified by Colombia.<sup>78</sup>

Article 94. The enunciation of rights and guarantees contained in the Constitution and international conventions in effect should not be understood as a negation of others which, being inherent to the human being, are not expressly contained in them.<sup>79</sup>

Finally, Article 85 provides that many of the constitution's

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78. CONST. POL. COL. art. 93. Los tratados y convenios internacionales ratificados por el congreso, que reconocen los derechos humanos y que prohíben su limitación en los estados de excepción, prevalecen en el orden interno.

Los derechos y deberes consagrados en esta Carta, se interpretarán de conformidad con los tratados internacionales sobre derechos humanos ratificados por Colombia.

For a discussion of similar provisions incorporating international human rights laws in recent constitutions in Latin America and elsewhere and analysis of the relationship between international law and internal law in protecting human rights, see Antonio Cançado Trínade, *La interacción entre el derecho internacional y el derecho interno en la protección del los derechos humanos*, EL JUEZ Y LA DEFENSA DE LA DEMOCRACIA: UN ENFOQUE A PARTIR DE LOS DERECHOS HUMANOS 233 (1993). See also BRINGING EQUALITY HOME, *supra* note 56. For an illustration of the Colombian Constitutional Court's reliance on Article 93 as incorporating provisions of the Convention on the Elimination of All Forms of Discrimination Against Women, the American Convention on Human Rights, and the International Pact on Human Rights, see Sentencia No. T-273/93. Similarly, the Guatemalan Constitutional Court relied in part on the Guatemalan Constitution's incorporation of International Conventions in its 1996 decision invalidating its country's penal code's discriminatory treatment of adultery. See *supra* note 44. For a more general discussion of how human rights guaranteed by the Inter-American Convention on Human Rights have been upheld by the highest courts of state parties to the Convention, see Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, 26 U. MIAMI INTER.-AM. L. REV. 297, text accompanying notes 315 and 316 (1995) (discussing the Constitutional Chamber of the Costa Rican Supreme Court's reliance on an advisory opinion by the Inter-American Court in ruling that a naturalization law could not discriminate based on gender, Expediente 2965-S-91, Voto: 3435-92, Nov. 11, 1992).

79. CONST. POL. COL. art. 94. "La enunciación de los derechos y garantías contenidos en al Constitución y en los convenios internacionales vigentes, no debe entenderse como negación de otras que, siendo inherentes a la persona humana, no figuren expresamente en ellos."

Manuel José Cepeda points to the Ninth Amendment of the U.S. Constitution as the source for this provision and argues that as an express recognition of natural law, Article 94 provides a principle for interpretation of the 1991 Constitution's "silences"—that is, its protection of rights contained in draft provisions that the constitutional assembly rejected or failed to approve. MANUEL JOSÉ CEPEDA, *LA CONSTITUCIÓN QUE NO FUE Y EL SIGNIFICADO DE LOS SILENCIOS CONSTITUCIONALES* 27-28 (1994).

fundamental rights, including those in Article 13, are of immediate application.<sup>80</sup>

*B. The Constitutional Court, the Tutela, and  
Other Constitutional Procedures for Protecting  
Fundamental Rights*

The gender-related guarantees of the 1991 Constitution provide litigants with new textual hooks for challenging numerous discriminatory practices, and the Constitutional Court undertook an impressive media campaign to educate people about their rights under the new constitution.<sup>81</sup> Three features of the 1991 Colombian Constitution provide important judicial mechanisms for the protection of its newly recognized fundamental rights and liberties. Two of these are new: the creation of a separate Constitutional Court and the introduction of the *tutela*. The third feature, the public action of unconstitutionality, existed under prior law but has taken on new significance with the creation of the Constitutional Court.

Article 4 of the Constitution recognizes the supremacy of the Constitution as law, providing that it is "*norma de normas*" and that "[i]n all cases of incompatibility between the Constitution and the law or other legal norm, the constitutional dispositions shall be applied."<sup>82</sup> Article 241 entrusts the Constitutional Court with the "safeguarding of the integrity and supremacy of the

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80. CONST. POL. COL. art. 85: "The rights established in articles 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 26, 27, 28, 29, 30, 31, 33, 34, 37, and 40 are of immediate application."

81. Interview with Manuel José Cepeda, Dean of the School of Law fo the Universidad de los Andes and constitutional advisor to President Gaviria during the adoption of the 1991 Constitution, Bogotá, Colombia (Dec. 15, 1998). According to María Isabel Plata, Executive Director of PROFAMILIA, however, the mere knowledge of the existence of formal rights means little to the average Colombian woman unless she also has sufficient self-esteem to insist that her rights be respected and has access to economical and efficient judicial mechanisms for their enforcement. Interview with María Isabel Plata, Bogotá, Colombia (June 29, 1995). See also Plata & Calderón, *supra* note 51.

82. CONST. POL. COL. art. 4. Writing in the Constitutional Court's Report on its work from 1992-95, Magistrado Auxiliar Rodrigo Uprimny describes the new constitution as imposing "a new vision of the judicial ordering and a new form of interpreting and applying rights," and as creating a "new paradigm of the legal relationship between the state and individuals." DESARROLLO JURISPRUDENCIAL DE LA CONSTITUCIÓN POLÍTICA 104 (1995). He stresses, in this regard, the importance of Article 4's recognition of the constitution as law and as superior to all other laws or judicial norms. *Id.* at 102-103.

Constitution.<sup>83</sup> Members of the Court are selected by the Senate from lists of three candidates submitted by the President, the Supreme Court, and the Council of State.<sup>84</sup> After interim one-year appointments under the Constitution's transitional provisions, justices serve eight year terms and are limited to a single term. The Court is currently composed of nine justices, or *magistrados*; all are men.<sup>85</sup> With the exception of Justice Alfredo Beltrán Sierra, who was appointed to fill a vacancy created by the resignation of Justice Jorge Arango Mejía in April 1998, and Justice Alvaro Tafur Galvis, who was appointed to the vacancy created when Justice Hernando Herrera Vergara resigned in February 1999, the current members were appointed to the first full terms under the new Constitution in 1993. (Several of the justices also served among the seven member interim one-year appointments provided for in Transitory Article 22).<sup>86</sup> In 1993,

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83. Among other functions, the Constitutional Court is to:

1. Decide on the petitions of unconstitutionality brought by citizens against measures amending the Constitution, no matter what their origin, exclusively for errors of procedure in their formation.
2. Decide, prior to a popular expression of opinion, on the constitutionality of the call for a referendum or a constituent assembly to amend the Constitution, exclusively for errors in the procedure of their formation.
3. Decide on the constitutionality of referendums about laws and popular consultations and plebiscites of a national scope, in case of these last ones, exclusively for errors of procedure in their convocation and implementation.
4. Decide on petitions of unconstitutionality brought by citizens against the laws, both for their substantive content and for errors of procedure in their formation.

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8. Decide in definitive manner on the constitutionality of bills opposed by the government as unconstitutional and of proposed statutory bills, both as to their substantive content and for procedural errors in their formation.
9. Revise, in the form determined by law, the judicial decisions connected with the actions of *tutela* [protection] of constitutional rights.
10. Decide in definitive manner on the feasibility of international treaties and the laws approving them. . . .
11. Draft its own bylaws.

CONST. POL. COL. art. 241.

84. CONST. POL. COL. art. 239.

85. Women have served as temporary and interim judges on the Court, and women's names have been included on the lists presented to Congress but (with the exception of a woman who was named to the initial one-year Court but resigned) no woman has been appointed to a permanent position on the Court. See Interview with Martha Sáchica de Moncaleano, acting Judge and Secretary General of the Constitutional Court, by Alexander Springer, Bogotá, Colombia (Mar. 26, 1999).

86. CONST. POL. COL. art. transitorio 22. Seven members were appointed to serve one-year terms, with two named by the President, and one each named by the Supreme Court, the Council of State, and the Prosecutor General. These five named the remaining



the Senate appointed the justices by consensus as a "package," thus providing a more representative body than would otherwise have been possible.<sup>87</sup>

Colombia's *tutela*<sup>88</sup> allows any person to seek immediate judicial protection of their fundamental constitutional rights. Article 86 provides that the action may be filed with any justice and must be ruled on within ten days. Although orders granting *tutelas* may be appealed to higher courts and are subject to discretionary review by the Constitutional Court, under the implementing decree they must be complied with within forty-eight hours of the initial order granting protection.

Colombia's new writ of protection for fundamental rights initially was inspired by the Mexican *amparo*, an action that somewhat resembles but is much broader than the writ of *habeas corpus*,<sup>89</sup> and by similar *amparo* provisions in the 1978 Spanish Constitution.<sup>90</sup> But as adopted by the 1991 Constitutional Assembly, after a study of various countries' mechanisms for protecting fundamental rights, the *tutela*, as described in Article 86 of the new Constitution, is uniquely Colombian.<sup>91</sup> The *tutela* is designed to provide "immediate protection of...fundamental constitutional rights, when any of these [rights] are violated or

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two members from lists presented by the President. Failure to appoint the initial five justices within five days after the Constitution became effective was to be considered bad conduct. Transitory Article 23 granted the President extraordinary authority to prepare a decree establishing procedures for the Constitutional Court within two months of the promulgation of the Constitution, stipulating that the Congress could repeal or modify these rules. CONST. POL. COL. art. transitorio 23. Transitory Article 5 (b) specifically authorized the President to draft a decree regulating the right of *tutela*. CONST. POL. COL. art. transitorio 5 (b). See Decree 2591 of 1991 (Nov. 19, 1991) (regulating the *tutela*). The Constitution abolished the sitting Congress and Transitory Article 1 provided for elections for an initial interim Congress in October 1991; a special commission of thirty persons elected by the Constitutional Assembly was created and authorized to approve the decrees prepared by the president in the use of his extraordinary powers.

87. Interview with Manuel José Cepeda, *supra* note 81.

88. *Cassell's Spanish Dictionary* defines *tutela* as "tutelage, tutorage, guardianship, protection." For a more in-depth discussion of the origin of Colombia's *tutela* and its Latin American antecedents, see PEDRO PABLO CAMARGO, *MANUAL DE LA ACCIÓN DE TUTELA* (1994).

89. Article 30 of the 1991 Colombian Constitution guarantees the right to invoke *habeas corpus* and requires that once invoked it must be complied with within 36 hours. For a general discussion of the antecedents of *amparo* and *habeas corpus*, see the discussion by Costa Rican Professor of Constitutional Law Rubén Hernández Valle, in *LA TUTELA DE LOS DERECHOS FUNDAMENTALES* (1990).

90. Edelstein, *supra* note 21, at 5.

91. Interview with Manuel José Cepeda, *supra* note 81.

threatened by the action or omission of any public authority."<sup>92</sup> The remedy consists of an injunctive order, which is immediately effective, though also subject to appeal.<sup>93</sup> All *tutelas* are forwarded to the Constitutional Court, which has discretionary review.<sup>94</sup> Except where used as a temporary mechanism necessary to avoid irremediable harm, the action of *tutela* will proceed only if no other judicial defense of constitutional rights is available.<sup>95</sup> The Constitution also includes a special provision with respect to collective interests and the "horizontal" use of *tutelas*:

The law will establish those cases in which the action of tutela will proceed against individuals charged with rendering a public service or whose conduct seriously and directly affects the collective interest, or with respect to whom the applicant is found in a state of subordination or vulnerability (*indefensión*).<sup>96</sup>

The Constitutional Court has interpreted "fundamental rights" of the *tutela* provision broadly. According to the Court "fundamental rights" protected by the *tutela* are not limited to those enumerated in the Constitution under the rubric "Fundamental Rights" (Articles 11-41).<sup>97</sup> The Court has

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92. CONST. POL. COL. art. 86.

93. *Id.*

94. *Id.* Justice Jorge Arango Mejía explained that the Court chooses to review *tutela* actions on the basis of their importance or the magnitude of the constitutional violation involved. Interview with Jorge Arango Mejía, Magistrado of the Colombian Constitutional Court, Bogotá, Colombia (July 5, 1995). As Keith Rosenn has noted the *tutela* "makes Colombia an unusual hybrid, combining a decentralized form of judicial review with a constitutional court." Rosenn, *supra* note 11, at 684.

95. CONST. POL. COL. art. 86.

96. CONST. POL. COL. art. 86. See also Decree 2591 de 1991 (Nov. 19, 1991) (implementing Article 86), Gaceta Legislativa No. 16, Sept. 27, 1991, as modified by Sentencia No. C-134/94; Decreto 306 de 1992 (Feb. 19, 1992). According to Dean Cepeda, those working on the new constitution were aware of and wanted to avoid problems associated with the state action doctrine under the U.S. Constitution. He explained that the framers wanted the constitution to deal with the effects of power and that much of the power in Colombia is private power. Consistent with this purpose, the *tutela* is not available against all private action but is limited to specific situations involving power differentials. Interview with Manuel José Cepeda, *supra* note 81.

97. In an early *tutela* opinion rejecting this limited view of fundamental rights, the Court wrote, "[t]he fundamental character of a right is not dependent on the location of the article that guarantees it within the text of the charter, but the criteria for determining this quality must be one that is in obedience with a material conception that flows from one's inheritance of human dignity." Sentencia No. T-615/92, cited in

supplemented these rights through doctrines of *derechos fundamentales por conexidad* (a nexus theory of defining when social, economic, and cultural rights are deemed directly enforceable fundamental rights) and of *derecho al mínimo vital* (the right to minimum conditions of material security).<sup>98</sup> The Court has also broadened the application of the *tutela* by generously interpreting Article 86's requirement that rights be "threatened," its requirement that no other judicial defense is available, and its threshold showing of "irreparable prejudice" when the *tutela* is sought as a temporary mechanism.<sup>99</sup>

Significantly, as mentioned above, the *tutela* is available against certain private actions. The initial decree implementing Article 86 enumerates nine instances in which *tutelas* could be brought against private entities and individuals. Here, too, the Court has interpreted the Constitutional provisions broadly. In a March 17, 1994, opinion the Constitutional Court removed restrictions on the type of fundamental rights that could be asserted in such instances and reiterated its commitment to wide application of the *tutela* by declaring:

[T]he action of *tutela*, by its nature, protects the integrity of fundamental rights, and not just some of them, given that human dignity is unitary and indivisible. Therefore, its protection must be full, total, and integral....

[I]f, as is determined, the action of *tutela* lies to protect the fundamental rights of people, then it is not logical to realize a differentiation with respect to which rights can be protected and which cannot. It is worth reiterating that this Corporation has already determined that the mechanism consecrated in constitutional Article 86 is applicable to *all* fundamental rights, that is, those that are found consecrated in the Constitution, those that are determined by international treaties (art. 94, C.P. [Political Constitution]), and those that the Constitutional Court recognizes while

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DESARROLLO JURISPRUDENCIAL DE LA CONSTITUCIÓN POLÍTICA, *supra* note 82, at 104.

98. See Cifuentes, *supra* note 7, at 114-22.

99. See DESARROLLO JURISPRUDENCIAL DE LA CONSTITUCIÓN POLÍTICA, *supra* note 82.

realizing its corresponding review of *tutela* rulings, having in consideration the nature of law and the concrete case....<sup>100</sup>

The second important judicial protection of constitutional rights is the *acción pública*, or public action, of unconstitutionality. As Article 40 of the Constitution mandates, any citizen, regardless of whether one has any personal injury or stake in the controversy, can bring this action.<sup>101</sup> A citizen may "interpose public actions in defense of the Constitution and the law."<sup>102</sup> The Constitution authorizes the Constitutional Court "to decide on petitions of unconstitutionality that citizens present against laws, both for their substantive content and for procedural errors in their formation."<sup>103</sup>

Previously within the jurisdiction of the Supreme Court, the action has taken on added significance now that it is entrusted to a separate and independent Constitutional Court. Justice Arango describes the public action of unconstitutionality as one of the world's broadest. For example, there is no standing requirement as one finds in the United States. As Justice Arango explains: "the only requirement for presenting an action of unconstitutionality is to be a Colombian national and be over eighteen years old and not have lost citizenship rights.... All Colombian citizens can complain, independently of whether the law they challenge causes them problems or not."<sup>104</sup>

Moreover, the parties to the action are not the only ones governed by the Constitutional Court's decisions. As Article 243 of the Constitution states: "The *fallos* (rulings) that the Court dictates in the exercise of its jurisdictional control become *cosa juzgada constitucional*." Rulings invalidating laws in public actions of unconstitutionality are obligatory or binding. Previously, the Supreme Court had exercised a final power of

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100. Sentencia No. C-134/94, discussed in addendum to Pedro Pablo Camargo, *supra* note 88. According to Camargo, Mexico and other Latin American countries that have procedures similar to the *tutela* in some respects do not provide for their use against private entities or individuals. The exceptions he notes are under Costa Rica's *amparo* and, in exceptional cases, under the Brazilian *mandado de segurança*. *Id.* at 207.

101. CONST. POL. COL. art. 40(6): "Every citizen has the right to participate in the formation, exercise, and control of political power. To make this right effective, one can: (6) Interpose public actions in defense of the Constitution and the law."

102. *Id.*

103. CONST. POL. COL. art. 241(4).

104. Interview with Jorge Arango Mejía, *supra* note 94.

judicial review in such cases; the 1991 Constitution places this power in the hands of the Constitutional Court.<sup>105</sup>

Although formally *tutela* rulings are binding only on the parties, as a practical matter, the effects of *tutela* decisions extend further for several reasons.<sup>106</sup> First, the Constitutional Court receives all *tutela* decisions and can exercise its discretionary power to review and reverse any that depart from its decisions in prior *tutela* cases. Second, the Court has applied Article 13's equality principle to the judiciary by requiring that justices either treat later similar cases equally or state the reasons for their departures.<sup>107</sup> Additionally, the Court has created a concept somewhat like the class action in U.S. law whereby it designates a case presenting systemic constitutional violations as an *estado de cosas inconstitucionales* (literally, a state of unconstitutional things) and issues orders that are applicable beyond the parties to the case.<sup>108</sup>

Unification of constitutional jurisprudence is an important guiding consideration, and the Court has lamented that the older courts have not fully accepted the changes in the structure of the judicial system wrought by the new Constitution. Justice Eduardo Cifuentes Muñoz explains this phenomenon and notes that it is not unique to Colombia:

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105. Cepeda, *supra* note 6, at 85.

106. The law regulating the Constitutional Court's *tutela* jurisdiction provides that its *tutela* rulings have effects only between the parties. L.E. 270/96, art. 48; *see also* Decreto 2592 de 1991, art. 36. Article 230 of the Constitution reflects the traditional civil law view that judges only apply the law and do not make law, stating that "equity, jurisprudence, general principles of law and doctrine are auxiliary criteria." Under a 1887 law, modified in 1896, Colombia recognized that three uniform decisions by the Supreme Court on the same point of law constitute *doctrina probable* that judges should apply in analogous cases. *See* Nagle, *supra* note 5, at 78. An early decree stating that the constitutional doctrine established by the Court was "obligatory" auxiliary authority, Decreto 2067 de 1991, art. 23, led to early panel decisions treating doctrine established in *tutelas* as having general obligatory effects. *See* JOSÉ VICENTE & BARRETO RODRÍGUEZ, ACCIÓN DE TUTELA, TEORÍA Y PRÁCTICA, 384-85, 422-25 (2d ed. 1998). In a 1993 decision, the Constitutional Court ruled that the portion of the early decree according to "obligatory" status to constitutional doctrine was unconstitutional. Sentencia No. C-131/93.

107. Interview with Eduardo Cifuentes Muñoz, Magistrado of the Colombian Constitutional Court, Bogotá, Colombia (Dec. 11, 1998). *See, e.g.*, Sentencia No. T-321/98.

108. *Id.* Interview with Rodrigo Uprimny, Magistrado Auxiliar, Bogotá, Colombia (Dec. 14, 1998). *See, e.g.*, Sentencia No. T-153/98, Estado de cosas inconstitucional en los Centros de Reclusión del País (ordering systemic changes in prison conditions throughout the country).

In the abstract, it seems that no judicial official disputes that the [prevailing order] gives the Constitutional Court the authority to unify the constitutional jurisprudence (C.P., artículo 241)... However, for sociological reasons related to the constitutional transformation, at the moment of resolving concrete cases, the older tribunals, whose primacy was indisputable in the prior constitutional order, refuse to adapt to the constitutional change, and thus to recognize the superior competency that the Charter gives the Constitutional Court in the matter of the *tutela* action. This phenomenon is not exclusive to our country, but has been presented in all those States that, in the second half of the present century, have changed, in a substantial form, their constitutional structure of judicial power. However, the truth is that in these States, sooner rather than later, the highest tribunals adapt to the constitutional changes, which in our country, it seems, still has not happened.<sup>109</sup>

To summarize, the new Constitution's extensive recognition of both positive and negative substantive rights and the Constitutional Court's broad jurisdiction and responsibility for safeguarding fundamental rights provide the backdrop for the emerging gender jurisprudence described in the following section.

### III. THE EMERGING GENDER JURISPRUDENCE, 1992 - 1998

#### A. Domestic Violence

In a society characterized by violence, one of the first uses of *tutelas* by Colombian women was as a means of seeking protection against violence in their homes.<sup>110</sup> A 1990 survey

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109. Sentencia No. T-008/98. This opinion by Justice Eduardo Cifuentes Muñoz also discusses the Constitutional Court's understanding that *tutelas* may be brought against judicial decisions if the case involves a *via de hecho*—a decision that is so far outside the judicial function, in one of several ways, that it cannot be classified as a judicial act—that affects fundamental constitutional rights, and the other requirements for granting a *tutela* are met. The Court earlier invalidated portions of the initial decree regulating *tutela* actions against judicial decisions. See Sentencia No. C-543/92.

110. For a more in-depth discussion of the Court's jurisprudence on domestic violence, see Isabel Cristina Jaramillo S., *El "hogar," ¿espacio privado o público? in DERECHO CONSTITUCIONAL: PERSPECTIVAS CRÍTICAS* (Manuel J. Cepeda, et al. eds., 1999) (on file with the *Inter-American Law Review*).

indicated that 58% of women who had been in formal or de facto marriages had been physically or psychologically abused by their partners. Women quickly began using *tutelas* to obtain orders against physical or psychological abuse by husbands or companions.<sup>111</sup> As previously noted *tutelas* can be filed not only against public authorities (and against private entities that provide public services or that seriously and directly affect the common interest) but also against private persons with respect to whom the petitioner is in a position of subordination or vulnerability. The Constitutional Court has recognized that physical or psychological violence against women violates their fundamental rights to personal integrity,<sup>112</sup> health, and life.<sup>113</sup> And, while the relief in a *tutela* action generally is an order directing or prohibiting certain actions, fines and jail sentences may be imposed for noncompliance with such orders.<sup>114</sup> Thus, husbands could be sent to jail for continuing to abuse their wives after being ordered to stop.

The Constitutional Court's first *tutela* decision granting protection to a victim of spousal abuse was released on September 18, 1992.<sup>115</sup> The action was filed on behalf of Blanca Cecilia Castro Lopez against her husband Gustavo Cárdenas, alleging he had subjected her to severe physical violence and threats, in public and private, including attacking her with a machete. The lower courts ruled that *tutelas* did not cover domestic abuse and that, in any event, her own actions showed that other remedies including separation or seeking police assistance were available.<sup>116</sup>

Instead of opting to affirm this conservative approach, the Constitutional Court reversed on the grounds that domestic abuse in this case constituted a denial of the fundamental constitutional rights to life and physical integrity under Articles 11 and 12 and of domestic peace between spouses based in

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111. See, e.g., Sentencia No. T-529/92; Sentencia No. T-382/94; Sentencia No. T-487/94; Sentencia No. T-552/94.

112. See CONST. POL. COL. art. 12. See, e.g., Sentencia No. T-529/92.

113. See CONST. POL. COL. art. 11. See, e.g., Sentencia No. T-529/92.

114. Article 52 of Decree 2591 of 1991 on *desacato* (contempt) provides that disobeying a judicial order in a *tutela* action is punishable by up to six months *arresto* and a fine of up to twenty times the minimum monthly salary, without prejudice to other applicable penal sanctions.

115. See Sentencia No. T-529/92.

116. *Id.*

Articles 42 and 43. The opinion of Justice Fabio Morón Díaz illustrates the Court's broad reading of these constitutional guarantees. He couched protection against domestic violence as within "one of the fundamentals of all democratic-liberal constitutional legal systems"—"the disposition of their public authority to assure its members respect for their lives and goods," a "doctrinaire presupposition [without which a] society does not have a Constitution."<sup>117</sup> Díaz further stated that

respect for the life and physical integrity of others, in a broad moral and legal sense, cannot be reduced to only the police protection or the criminal punishment of the aggressor, it includes the duty neither to abuse, nor offend, nor torture, nor threaten people, much less one with whom one shares a domestic union of procreation and development of children and the family, and the promise of mutual material and spiritual fostering.<sup>118</sup>

With this decision, the Court demonstrated that it would interpret the rights enumerated in the new constitution with an eye toward imposing "special considerations fundamentally related to the highest social values and with the full dignity of the natural person without any distinction."<sup>119</sup>

The judicial activism represented by this case and others helped spur a legislative response, in the form of a new law aimed at protecting women against spousal abuse. In July 1996, acting to comply with Article 42's direction that "[a]ll forms of violence in the family shall be considered destructive of its harmony and unity and shall be sanctioned according to the law," Congress enacted, for the first time, domestic violence legislation.<sup>120</sup> The law established a penalty of one to two years in prison for physical, psychological, or sexual abuse of any member of the nuclear family.<sup>121</sup>

In a further step demonstrating the interaction between the judicial and the legislative processes, the Constitutional Court had an opportunity to review the constitutionality of this new

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117. *Id.*

118. *Id.*

119. Sentencia No. T-529/92.

120. Ley de Violencia Intrafamiliar, Ley 294/96.

121. *Id.*



law.<sup>122</sup> By means of a public action, Gloria Guzmán Duque challenged the constitutionality of two of this law's provisions: Article 22 (Intra-familial Violence) and Article 25 (Sexual Violence Between Spouses).<sup>123</sup> Her complaint alleged that these articles violated Article 42 and Article 44 (rights of children) of the Constitution because of their lenient treatment of family violence.<sup>124</sup>

On June 5, 1997, the Constitutional Court rejected the challenges to Article 22, which established a penalty of one to two years in prison for physical, psychological, or sexual abuse of any member of the nuclear family.<sup>125</sup> The Court ruled that this provision was constitutional because it established a separate new offense and did not preclude application of the more severe punishment prescribed for other established offenses if their elements are established.<sup>126</sup> The Court, however, found that Article 25 violated the constitutional right to equality in that the law provided more lenient penalties for interspousal rape than for other forms of rape.<sup>127</sup> The Court recognized that civil marriage does impose additional duties, but "personhood is not alienated or transferred."<sup>128</sup> Thus, the woman does not lose her individual personhood, nor is her "sexual liberty. . . considered diminished."<sup>129</sup>

The adoption of the law on Intra-familial Violence, in turn, prompted the Court to rule that *tutelas* could no longer be used to redress domestic violence because there now is an alternative available judicial procedure that affords immediate protection for victims of intra-familial violence.<sup>130</sup> Many lower courts have

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122. Justice Cifuentes has pointed to the intra-familial violence law as an example of positive interaction between the Constitutional Court and Congress. He described the new law as a response to the Court's *tutela* jurisprudence involving domestic abuse. Interview with Eduardo Cifuentes Muñoz (Dec. 11, 1998), *supra* note 107.

123. Sentencia No. C-285/97.

124. While Jacquin de Samper, wife of then President Samper, blamed the new law with contributing more to the disintegration of the family than to family unity and led a campaign to reform the law to make it less punitive and more rehabilitative, others believed the new law was too lenient. *Menos Punitiva y Mas Rehabilitadora*, 193 MUJER/FEMPRESS (Santiago), Nov. 1997, at 20.

125. Sentencia No. C285/97.

126. Sentencia No. C285/97.

127. *Id.*, citing CONST. POL. COL. art. 13.

128. *Id.*

129. *Id.*

130. Interview with Eduardo Cifuentes Muñoz (Dec. 11, 1998), *supra* note 107. See, e.g., Sentencia No. T-420/96.

reacted negatively to the new law, however, and some judges have proposed "dejudicializing" domestic violence.<sup>131</sup> Such a response has raised the question of whether domestic violence is redressable through these legal remedies. As Justice Cifuentes has stated, the Court might find it necessary to reopen the door to *tutela* actions against domestic violence if the new law is not faithfully implemented.<sup>132</sup>

## B. Sexual and Reproductive Rights

### 1. Pregnancy and Maternity Rights

Colombian women also have used *tutelas* to raise issues of reproductive freedom. For example, teenage mothers brought some of the first such actions, successfully obtaining orders regaining admission to high schools after becoming pregnant.<sup>133</sup> The Court based its rulings in these cases on the new Constitution's protections against discrimination and on its protection of human dignity and the free development of personality,<sup>134</sup> as well as on its declaration of a right to education<sup>135</sup> and its special protection of pregnant women.<sup>136</sup>

Despite numerous rulings in favor of pregnant teenagers and teenage mothers, such young women continue to confront negative cultural attitudes in schools. On September 21, 1998, the Court granted a *tutela* on behalf of pregnant students and students in *uniones de hecho*, or de facto marriages, who were forced to wear red aprons or pinafores.<sup>137</sup> The Court ruled that the school's practices violated rights of the family as the basic institution of society, as well as rights to equal protection, and to the free development of one's personality.<sup>138</sup> Similarly, on

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131. Interview with María Isabel Plata, *supra* note 4.

132. Interview with Eduardo Cifuentes Muñoz (Dec. 11, 1998), *supra* note 107.

133. See, e.g., Sentencia No. T-420/92; Sentencia No. T-292/94.

134. CONST. POL. COL. art. 16.

135. CONST. POL. COL. arts. 44, 67.

136. CONST. POL. COL. art. 43: "...During pregnancy and after birth women will enjoy special assistance and protection of the state, and will receive support subsidies from it if they then become unemployed or abandoned."

137. Sentencia No. T-516/98. See Adriana Palacio Garcés, *Damaris ya no es la chica de rojo*, EL TIEMPO (Bogotá), Sept. 24, 1998.

138. Sentencia No. T-516/98.

November 11, 1998, the Court granted a *tutela* against a school in Cali that refused to permit a pregnant sixteen-year-old to attend regularly scheduled classes contending that she could "contaminate" other students and lead them down a "bad path."<sup>139</sup>

In the employment context, the Court has afforded protection to pregnant workers by recognizing a concept of *fuero de maternidad* (analogous to the longstanding concept of *fuero sindical* that protects the job security of union activists) to protect against loss of employment for reasons related to pregnancy.<sup>140</sup> In September 1997, the Court ruled that women workers cannot be dismissed from their jobs without cause during pregnancy or within the first three months after giving birth and that employers who unlawfully terminate an employee during these periods are not only obligated to pay the employee sixty days' salary as provided in Article 239 of the labor code but also must reinstate all employment rights.<sup>141</sup> Justice Alejandro Martínez Caballero's opinion relied on Articles 13 and 43 and on Article 53's recognition of special protection for women, maternity, and minor workers as fundamental principles that must be taken into account in labor legislation to supplement or modify Article 239 to deny all effect to such unlawful terminations.<sup>142</sup>

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139. Sentencia No. T-656/98.

140. Interview with Catalina Botero, Magistrada Auxiliar, Bogotá, Colombia (Dec. 16, 1998).

141. Sentencia No. C-470/97. The Court earlier had stopped short of declaring such a right to reinstatement. See Sentencia No. C-710/96.

142. Sentencia No. C-470/97. Justice Antonio Barrera Carbonell defends the Court's use of such "conditional" or "modulating" decisions against charges that judges are legislating: "What is worse: to destroy the work of the legislator or to save it? Making [such modifications] is a type of harmonious collaboration between powers." Interview with Antonio Barrera Carbonell, Magistrado of the Colombian Constitutional Court, Bogotá, Colombia (Dec. 11, 1998). For other opinions dealing with pregnancy and maternity rights in the workplace and recognizing that the Constitution and international conventions guarantee special protection for pregnant and nursing employees, see, for example, Sentencias Nos. T-568/96; C-710/96. Although the *tutela* is generally not available to seek reinstatement because of the availability of other means of judicial relief under labor laws, an exception exists in cases of pregnant workers; the *tutela* may be used as a transitory mechanism to prevent irreparable injury when reinstatement is required to assure the minimum necessities of life (*el mínimo vital*) for a mother or her newborn. Sentencias Nos. T-606/95; T-311/96; T-373/98; T-426/98. [Note also the recent Sentencia No. C-199/99 (upholding a provision of the 1998 civil service law that governs benefits due pregnant civil service workers in lay offs, as conditioned on the Court's broad interpretation of the phrase "compensation entitled to.")]

In announcing the Court's decision, the Bogotá newspaper *El Tiempo* noted that, in Bogotá alone, an average of four women workers a day are fired from their jobs because they are pregnant.<sup>143</sup> A leader of one women's rights organization, Olga Amparo Sánchez Gómez, Director of Equality for Women, praised the Court's opinion, telling the press that "[t]o have a child should not be an obstacle to working. These barriers must begin to be torn down, because in Colombia to be a mother seems a punishment."<sup>144</sup>

In an earlier case involving social security coverage, the Court ruled against Avianca Airlines in a *tutela* action brought by a copilot denied health care coverage for a miscarriage on the grounds that it was not an illness. The Court found violations of fundamental rights related to health, procreation, irrevocable social security protections for maternity, and personal integrity. It characterized the decision to deny coverage as "a discrimination based on the woman's role in procreation."<sup>145</sup>

## 2. Sex Education

Another issue the Constitutional Court addressed early on was sex education. Justice Cifuentes has explained his view of the need for sex education to remove the taboo about sexuality, noting that "ignorance and prejudice, in part, explain the subordinate position that some wrongly assign to women."<sup>146</sup> In 1992, the Court considered whether a teacher's fundamental rights were violated when she was fired for teaching sex education to her third grade class.<sup>147</sup> An opinion by Justice Cifuentes in a *tutela* action by Lucila Díaz Díaz found that academic freedom was a fundamental personal right and that teachers could not be punished for teaching sexual education in class, because it was not unreasonable but rather was intended to help lower the number of undesired pregnancies, reduce sexually transmitted diseases, and reduce irresponsible parenthood.<sup>148</sup> The Court also directed the Minister of Education

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143. *No a despido de embarazadas: Corte, EL TIEMPO (Bogotá)*, Sept. 26, 1997.

144. *Id.*

145. Sentencia No. T-341/94.

146. Cifuentes, *supra* note 60.

147. Sentencia No. T-440/92.

148. *Id.*

to engage experts to study the best content and methodology for teaching sex education and to order whatever changes or modifications necessary to ensure that schools throughout the country conform to the experts' recommendations within twelve months after receiving their report.<sup>149</sup>

### 3. Women Prisoners

The Constitutional Court has also approved use of the *tutela* to protect the reproductive rights of women prisoners. In 1993, the Court granted an order against the enforcement of prison regulations requiring female prisoners to be fitted with an IUD or take contraceptives as a condition of conjugal visits when male prisoners were not subjected to any similar requirements.<sup>150</sup> The Court had earlier concluded that an incarcerated person's right to conjugal visits was a limited fundamental right, dependent upon the capacity of the facility to accommodate such visits.<sup>151</sup>

Attorney Blanca Amelia Medina Torres, who was a pre-trial detainee in The Good Shepard Women's Detention Center in Bogotá, filed a *tutela* challenging regulations and practices requiring that women inmates who desire conjugal visits take sex education courses and either show they were incapable of conceiving or be fitted with an IUD or take contraceptives. The warden of the prison defended the regulations, arguing that Medina Torres would try to get pregnant to escape punishment. The court said that this assumption violated Article 83 of the Colombian Constitution, which requires public authorities to presume the good faith of individuals in *all* actions that come before them. According to the Court, the unequal treatment of women prisoners constituted sex discrimination in violation of Article 13, violated reproductive and family rights provisions of Articles 42 ("[t]he couple has the right to decide freely and responsibly the number of their children") and 43 ("[d]uring

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149. *Id.* See also *Educación sexual es una obligación*, EL TIEMPO (Bogotá), Aug. 18, 1997. Dean Cepeda pointed to this case to illustrate difficulties in ensuring effective implementation of judicial opinions. Although the Minister of Education complied with the Court's order to prepare a national plan for sex education, the Court's order did not ensure that the plan would be of high quality or effectively implemented. Interview with Manuel José Cepeda, *supra* note 81.

150. Sentencia No. T-222/93.

151. *Id.* The court also charged the state to equip all detention facilities to permit conjugal visits.

pregnancy and after birth, women will enjoy special assistance and protection of the state") as well as similar provisions in international human rights documents incorporated in the Constitution (including the U.N. Convention on the Elimination of All Forms of Discrimination Against Women),<sup>152</sup> and violated the right under Article 16 to the development of one's personality through the exercise of responsible parenthood.<sup>153</sup>

#### 4. Abortion

Not surprisingly in this overwhelmingly Catholic country, another reproductive freedom issue has met with less success in the Constitutional Court. In 1994, a majority of the Constitutional Court rejected a direct constitutional challenge to the country's strict criminal abortion law.<sup>154</sup>

Over objections of three dissenting justices, the Court upheld the law as a protection of the right to life.<sup>155</sup> Justice Antonio Barrera Carbonell wrote the Court's opinion rejecting arguments that Article 343 violated the Constitution's recognition of a

152. The opinion cited the text of the Convention's Preamble to the effect that "women's role in procreation must not be a reason for discrimination," and to its Article 16 which embraces the same right as Article 43 of the Colombian Constitution. Sentencia No. T-273/93. It also found violations of Article 11 of the American Convention on Human Rights (the San José Pact) ("Nobody shall be the object of arbitrary or abusive interferences in their private lives, in that of their family, in their home and correspondence, nor to illegal attacks on their honor or reputation.") American Convention on Human Rights, Nov. 22, 1969, O.A.S. Official records OEA/Ser.K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1 of Jan. 7, 1970, reprinted in 9 I.L.M. 99, 105 (1970), and the similar provision in Article 17 of the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 177.

153. Sentencia No. T-273/93. The Court has also protected the rights of women, but not men, in prison to care for their young children. See OBSERVATORIO LEGAL DE LA MUJER, EL LEGADO DE LA CONSTITUCIÓN 52 (Cristina Motta ed., 1998) (comparing Sentencias Nos. T-437/93 and T-598/93 with Sentencia No. T-277/94).

154. Sentencia No. C-133/94. Article 343 of the penal code provides: "A woman who causes her abortion or permits another to cause it, will incur imprisonment for from one (1) to three (3) years." The penal code recognizes no exceptions for therapeutic abortions. For further discussion of this case, see Reed Boland, *Population Policies, Human Rights, and Legal Change*, 44 AM. U. L. REV. 1257, 1266-68 (1995).

For discussion of the Constituent Assembly's rejection of proposals from both sides of the abortion debate that the new Constitution expressly address abortion—either by guaranteeing the right to abortion (or free motherhood) or by defining life as beginning at conception—see, Morgan, *Constitution-Making*, supra note 1, at 388-96. See also CEPEDA, supra note 79, at 54.

155. CONST. POL. COL. art. 11.

couple's right to decide their number of children<sup>156</sup> or the constitutional guarantees of women's rights to equal protection,<sup>157</sup> to personal and family privacy,<sup>158</sup> and to the free development of their personality.<sup>159</sup> In closing, the majority did suggest a role for the legislature in resolving possible conflicting rights of women and the unborn.

We do not discard the possibility of eventual conflicts between the fundamental right of a pregnant woman and the rights of the unborn; but in the court's judgment it is not its mission but the task of the legislature to design criminal policy through the adoption of rules that contribute to the solution of such conflicts.<sup>160</sup>

Justice Eduardo Cifuentes Muñoz wrote a dissenting opinion joined by Justices Carlos Gaviria Díaz and Alejandro Martínez Caballero. For the dissenters, the penal code's absolute criminalization of all abortion violated the procreative autonomy that was part of the constitution's protection of the right of parents to decide the number of children they want to have (Article 42) and of the right to free development of one's personality (Article 16). Their opinion referred to the U.S. Supreme Court's decision in *Roe v. Wade*,<sup>161</sup> and echoed its reasoning in some respects.<sup>162</sup> The dissent objected to recognizing legal personhood of a fetus and placed little weight on the constitutional assembly's rejection of proposals to guarantee a right to abortion. The dissenters criticized the Court's double standards regarding abortions:

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156. CONST. POL. COL. art. 42.

157. CONST. POL. COL. art. 13.

158. CONST. POL. COL. art. 15.

159. CONST. POL. COL. art. 16.

160. Sentencia No. C-133/94. Justice Barrera emphasized this last portion of the opinion when questioned about his decision in this case. Interview with Antonio Barrera Carbonell, *supra* note 142. Justice José Gregorio Hernández, who joined the majority opinion, also explained his view that Congress—but not the court—could depenalize abortion. Interview with José Gregorio Hernández, Magistrado of the Colombian Constitutional Court, Bogotá, Colombia (Dec. 15, 1998).

161. *Roe v. Wade*, 410 U.S. 113 (1973). *Roe* was modified in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

162. "The protection of the unborn, according to the different periods of its development and its relative weight in comparison with the rights of the persons involved, in particular the pregnant woman—a solution that is graduated or by periods—allows avoiding an 'all or nothing' decision, that disregards fundamental rights." Salvamento de Voto, Sentencia C-133/94.

It does not escape the magistrates who sign this dissenting opinion that the society and the State work with a double moral [standard] of being complacent and accepting the impunity of abortion but at the same time pretending to cover this activity with a drastic and absolute formal penalization of said conduct, knowing that women, bereft of support, will see themselves forced by insurmountable circumstances—rape, incest, deformities, danger to the health or life of the mother—to make the decision to abort, justified by hopes of a life of dignity.<sup>163</sup>

On January 23, 1997, a day after the twenty-fourth anniversary of *Roe v. Wade*,<sup>164</sup> the Colombian Constitutional Court again addressed the abortion issue.<sup>165</sup> The case was an action of unconstitutionality filed by José Euripides Parra challenging the provisions of the penal code that provide criminal penalties for abortions in cases of pregnancies resulting from rape or involuntary insemination.<sup>166</sup> Article 345 of the penal code provides that “[a] woman pregnant as a result of violent or abusive carnal access or nonconsensual artificial insemination who causes her own abortion or permits another to cause it, will incur *arresto* of from four (4) months to one (1) year.”<sup>167</sup> The Court rejected the challenger’s demand that it invalidate the code’s recognition of “lesser” penalties in these cases and instead establish as uniformly applicable the even harsher penalties provided for other abortions.<sup>168</sup> The majority upheld the legislative judgment about the appropriate severity of the penalty for abortions in such “attenuating circumstances.”<sup>169</sup> But the five justices joining the main opinion once again expressed their views about abortion as an attack on human life, which they saw as beginning with conception. Their opinion included parts of papal encyclicals by Pope Paul VI and Pope John Paul II.<sup>170</sup>

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163. *Id.*

164. *Roe*, 410 U.S. 113.

165. Sentencia No. C-013/97.

166. *Id.*

167. CÓD. PEN. COL. art. 345.

168. Sentencia No. C-013/97.

169. *Id.*

170. Sentencia No. C-013/97. The court also rejected the action’s challenge to Articles 347 and 348 of the penal code which provide lesser penalties for abandoning, abusing or killing a minor under such circumstances (provided the act occurs within eight days of the child’s birth). CÓD. PEN. COL. arts. 347 & 348.



Four justices joined separate opinions expressing their differing views on this matter. Justice Jorge Arango Mejía objected to the use of the papal encyclicals and made it clear that he believed that Congress could decriminalize abortion without running afoul of the new constitution.<sup>171</sup> Three justices went further, joining an opinion objecting to the majority's handling of the matter altogether. Justices Eduardo Cifuentes Muñoz, Carlos Gaviria Díaz, and Alejandro Martínez Caballero rejected arguments that this was a matter for determination by the legislative processes.

There are decisions [with respect to] which the weight of the majority gives them sufficient legitimacy and once adopted bind everyone without exception. However, there are matters and subjects which, like the one under analysis, pertain to the private and moral sphere of the person and whose definition is outside the democratic processes.

The woman who is a victim of sexual aggression is confronted with a tragic decision: Preserve the fruit of a criminal pregnancy and assume the consequences derived from this, which carries a reduction or substantial loss of her rights of self-determination, or expel the fetus in her womb through a nonconsensual invasion of her intimacy and affirm consequently, her right to her own body and liberty. . . . A woman who in these circumstances has an abortion does nothing more than an act of legitimate defense and now that it has been established that this is legally denied to her, it is equivalent to establishing an extraordinarily onerous burden.<sup>172</sup>

These three justices argued that it violated the constitution to impose criminal penalties on abortions by women who are pregnant because of rape or involuntary artificial insemination. They accused the justices in the majority of imposing their own moral and religious prejudices.<sup>173</sup>

Calling the majority's rhetoric "sexist and patriarchal," these justices concluded:

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171. Aclaración de voto a la Sentencia No. C-013/97.

172. Salvamento de voto a la Sentencia No. C-013/97.

173. *Id.*

The price that the Court has paid by assuming one moral position, of the various that are present in Colombian society, making this its own, and deciding the constitutionality of a law on this basis, could not be higher: it has lost its impartiality and ceased ruling according to law.<sup>174</sup>

In October 1998, legislators from throughout Latin America gathered in Bogotá for a university sponsored conference on the medical, religious, ethical, statistical, and social aspects of abortion.<sup>175</sup> Media coverage of the conference underscored the current contours of the problem,<sup>176</sup> noting that today abortions are eight times more frequent than ten years ago. The latest studies show that in Colombia one in three women who have been pregnant have had an abortion.<sup>177</sup> Twenty-six of every 100 women attending the country's universities have had an abortion. Of every 100 women who have abortions, twenty-nine suffer complications, eighteen of which are very serious.

Legislators attending the conference sponsored by Externado University expressed their concern about the position of the Catholic Church, urging that it "must be more flexible in regards to its conception of abortion and must be willing to analyze the typical social reality of our women."<sup>178</sup> Despite the alarming statistics and the call for more flexibility, in December 1998, the Colombian Senate rejected proposals to depenalize or lessen the penalties for abortion in certain instances, including cases of rape.

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174. *Id.*

175. *Aborto: otra 'moda' en la U.*, EL TIEMPO (Bogotá), Oct. 9, 1998.

176. *Id.* See generally Mónica María Alzate, *Free Motherhood in Colombia: Between the Catholic Church and the Law*, Thesis for Master of Arts Degree in Women Studies, University of Alabama, 1993 (manuscript on file with author).

177. *Aborto: otra 'moda' en la U.*, *supra* note 175.

178. *Id.*

## 5. Sexual Orientation<sup>179</sup>

Sexual autonomy or freedom from universalist or culturally predefined roles of sexual orientation is a critical aspect of the global gender justice agenda.<sup>180</sup> In Latin America, *machismo* incorporates a particularly virulent, if complex, strain of homophobia.<sup>181</sup> In 1991, Colombian gays and lesbians were still overwhelmingly closeted and did not openly participate in the constitutional process. In the intervening years some members of this community have emerged to invoke the new Constitutional Court's protection under the new charter.

The Constitutional Court confronted one aspect of this controversial issue in 1994 when it selected for review a *tutela* filed by a young man who had been refused admission to military school based on his homosexuality.<sup>182</sup> In the face of strong Colombian moral and religious sentiments against homosexuality, a panel of the Court ruled that he must be admitted.<sup>183</sup> The Court found that exclusion from military schools

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179. I prefer to use the term sexual orientation to describe the diverse universe of manifestations of consensual adult sexuality and to refer to persons who are gay, lesbian, bisexual, or transgendered as such, rather than to use the problematic terms "homosexuality" and "homosexuals." However, these terms have been used at times by the court and some of the others quoted here and I also will use them at times in talking about these cases.

180. See Julie Dorf & Gloria Careaga Pérez, *Discrimination and the Tolerance of Difference: International Lesbian Human Rights*, in *WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* (Julie Peters & Andrea Wolper eds., 1995). See also Laurence Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61, n.135 (1996) (the authors note the struggle for recognition of lesbianism in the United Nations Fourth World Conference on Women Beijing Declaration and Platform for Action. U.N. Doc. A/CONE 177/20 (1995)). Compare Andrew Koppleman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. Rev. 197 (1994).

181. For example, until recently, it was traditional in much of Latin America to stigmatize only the so-called "passive" partner in male same-sex sexual activity. The penetrator's actions were not viewed as inconsistent with the power dynamics of *machismo*. See generally ROGER N. LANCASTER, *LIFE IS HARD: MACHISMO, DANGER, AND THE INTIMACY OF POWER IN NICARAGUA* 235-78 (1992). See also Morgan, *supra* note 44, at 460. The same selective "stigmatization" characterized the classical Athenians according to K.J. Dover. KENNETH JAMES DOVER, *GREEK HOMOSEXUALITY* (1989).

182. Sentencia No. T-097/94.

183. *Id.* For a comparative perspective on how sexual orientation issues have been dealt with by other Latin American judiciaries, see the discussion of the Argentine Supreme Court's interpretation of the Argentine Constitution Article 19's guarantee of

and institutions based on homosexuality violated the petitioner's fundamental rights to due process, to his good name, and to education. The decision relied on Article 16's guarantee of the right to the free development of one's personality and Article 15's guarantee of the right to intimacy and one's good name. Justice Cifuentes, the author of the opinion, grounded the Court's opinion in the "intent of the constitutional assembly...to raise to the status of a fundamental right the liberty related to vital choices and individual beliefs."<sup>184</sup> Justice Cifuentes noted that the assembly "emphasized the liberal principle of no institutional interference in subjective matters that do not constitute attempts against social coexistence and organization."<sup>185</sup> The opinion placed homosexuality "within this ambit of protection." The opinion acknowledges that society as a whole had yet to embrace the constitutional principles that the Court was enforcing:

[Although] the law has played an essential role in transforming societal beliefs [about homosexuality], these still are found lagging behind in relation to normative ideals. The values of tolerance and pluralism, fully adopted by judicial ordinance, must still overcome enormous obstacles in order to be fully ensured in daily life.<sup>186</sup>

The opinion distinguished between the status of homosexuality and homosexual conduct, however, finding that the latter, like other sexual conduct, could be prohibited within the military. And the Court stated that military institutions were entitled to demand discretion and silence concerning members' sexual preferences.<sup>187</sup>

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personal autonomy, including the opinion in *Comunidad Homosexual Argentina*, see Carlos S. Nino, *On the Exercise of Judicial Review in Argentina*, in *TRANSITION TO DEMOCRACY, THE ROLE OF THE JUDICIARY*, *supra* note 16, at 322-25 (citing [1991-E] L.L. 679 (1991)). In that case, the majority of the Argentine Court affirmed the decision of lower tribunals upholding the government's refusal to grant legal personality to an association of homosexuals. For discussion of the Nicaraguan Supreme Court's rejection of a challenge to a penal code reform that criminalized inducing, promoting, or propagandizing homosexual sodomy (Sentencia No. 18, Mar. 7, 1994), see Morgan, *supra* note 44.

184. Sentencia No. T-097/94.

185. Sentencia No. T-097/94.

186. *Id.*

187. *Id.* The Court has subsequently revisited distinction between conduct and status when it found discriminatory and unconstitutional a law that described "homosexuality or the practice of sexual aberrations" as misconduct for which teachers could be suspended or dismissed. See Sentencia No. C-481/98 and discussion *infra* at text

Justice Cifuentes reflected on the opinion and the reaction it caused:

Yes, I was the author of a decision of the *tutela* division where we decided that within the armed forces there cannot be discrimination against homosexuals in what has to do with, the opinion refers basically to, sexual acts within the military. Thus, the court ruled that for functional reasons, military regulations could prohibit sexual relations—but homosexual relations the same as heterosexual. Because obviously, it could affect mental discipline, the good order within an institution, if inside it sexual relations could take place. But it would not be legal or constitutional only to proscribe or prohibit homosexual relations. And, the Court indicated in the opinion that there could not be discrimination for reasons of sex and thus, except from the functional, institutional point of view, there is no need to establish a prohibition like this of sexual relations. The consideration of being homosexual must not have any effect on anything having to do with access to the army or one's service within the same.<sup>188</sup>

Justice Cifuentes acknowledged that the decision provoked disagreement within the three-justice panel that decided it, with one of the justices dissenting from the ruling. Public reaction was also divided, he said: "In the society in general, yes, it was the object of much commentary where, well, it caused a certain impact. I think in general terms it was not well received on the

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accompanying notes 198-203. In February 1999, the Court was presented with a challenge to Article 84 of Decreto 0085 of 1985, a provision of the Armed Forces Disciplinary Code that prohibits homosexual acts (as well as notorious adultery and association with drug addicts and prostitutes). See *Debate con pudor en la Corte*, EL TIEMPO (Bogotá), Feb. 21, 1999; *Ejército dice no a homosexuales*, EL TIEMPO (Bogotá), Feb. 19, 1999.

[On July 14, 1999, the Court struck down parts of the Military Disciplinary Code, including its treatment of being homosexual as a breach of honor and its prohibitions on relations with homosexuals. The Court upheld the provision punishing public homosexual acts by service members but on the condition that it apply to heterosexual acts as well. Justice Vladimiro Naranjo Mesa wrote the opinion for the Court and stated that openly revealing one's homosexuality or living with one's partner in houses on military installations could not be grounds for dismissal from the service, nor could displays of affection for one's partner outside the service. Prohibitions on adultery and concubinage were also held unconstitutional. Sentencia No. C-507/99. See *Si a homosexuales, con discreción*, EL TIEMPO (Bogotá), July 15, 1999; *Homosexuales sí pueden estar in F.M.*, EL ESPECTADOR (Bogotá), July 15, 1999.]

188. Interview with Eduardo Cifuentes Muñoz (July 5, 1995), *supra* note 38.

part of the military will, but also it was well received in other sectors."<sup>189</sup>

Other *tutelas* have demonstrated the Court's willingness to interpret Constitutional imperatives liberally. For example, in ordering a Christian school to readmit gay students, the Court said that excluding these students violated their rights to education, to free development of their personality, and to equality.<sup>190</sup> The Court even went so far as to place on the schools responsibility for promoting tolerance among their students.<sup>191</sup>

Even with these broad readings of the Constitution, the Court's cases dealing with gay rights are nonetheless grounded in an individual rights regime. Dean Cepeda has observed that the Court has refused to reckon with the institutional aspects of the discrimination against gays and lesbians.<sup>192</sup> The tensions and contradictions in the Court's jurisprudence dealing with sexual orientation is illustrated by comparing two actions of constitutionality in this area. First, in 1996, the Court considered a constitutional challenge to a 1990 law that extended legal rights to partners in permanent de facto marriages but only covered such relationships between "a man and a woman."<sup>193</sup> Justice Cifuentes wrote the opinion for the Court upholding the law based on a finding that the law was designed to benefit a group of women who had traditionally not been protected.<sup>194</sup> He cited the traditional disadvantages women had suffered in such relationships with men and their role in procreation as differences that justified the special protection extended to heterosexual partnerships.<sup>195</sup> Speaking about this opinion later, Justice Cifuentes expressed deference to the political arena, to which gay rights' organizations could turn instead of simply resorting to the judiciary by claiming protection under a law designed to protect women concubines.<sup>196</sup> In a separate

189. *Id.*

190. Sentencia No. T-100/98; *Colegios no pueden excluir a homosexuales*, EL TIEMPO (Bogotá), Mar. 27, 1998.

191. Sentencia No. T-100/98.

192. Interview with Manuel José Cepeda, *supra* note 81.

193. Sentencia No. C-098/96. For further discussion of this case and of other seemingly inconsistent cases from 1992-96 dealing with sexual orientation, see Cristina Motta, *La Corte Constitucional y los derechos de los homosexuales*, in OBSERVATORIO DE JUSTICIA CONSTITUCIONAL: BALANCE JURISPRUDENCIAL DE 1996, 290 (1998).

194. Sentencia No. C-098/96.

195. *Id.*

196. Interview with Eduardo Cifuentes Muñoz (Dec. 11, 1998), *supra* note 107.

concurring opinion, Justices Cifuentes and Naranjo emphasized that a law establishing legal recognition for homosexual unions would be just and appropriate. The family was not a single concept but an institution that has evolved and continues evolving; the right to a family must follow course and be respectful of pluralism and the right to free sexual choice.<sup>197</sup>

In the second case, public school teacher Germán Rincón Perfitti challenged a provision of a 1979 law governing the conduct of teachers listing "homosexuality or the practice of sexual aberrations" as misconduct for which teachers could be suspended or dismissed. He alleged that this provision in Article 46 of Decree 2277 violated the right to equality and the right to work by impeding the right to freely choose one's profession.

On September 1, 1998, the Constitutional Court heard presentations in the case. A lesbian teacher wore a black mask as she stood before an overflowing courtroom and told the Court, "I cover my face for fear of being punished for my sexual orientation and of the discrimination that I could be subjected to by the education community."<sup>198</sup> Social scientists, representatives of teachers organizations, and government officials also presented their opinions to the Court. On the other side, the representative of the Public Ministry supported the law but argued it applied only when the teacher's behavior "transcends into public life and constitutes a threat to the adequate functioning of education."<sup>199</sup>

One week later, on September 9, 1998, the Constitutional Court ruled for the teacher by a vote of six to three.<sup>200</sup> Magistrate Alejandro Martínez Caballero's opinion for the Court reviewed the treatment of homosexuality as either a sin or an illness and contained an extensive discussion of the contemporary debate over whether sexual orientation is at least in part biologically determined, is a matter of personal choice, or is socially constructed. Acknowledging that it was not the Court's role to

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197. Aclaración de voto a la Sentencia No. C-098/96 (Cifuentes and Naranjo, JJ.). Justices Hernando Herrera Vergara and José Gregorio Hernández wrote concurring and dissenting opinions, respectively. They stressed that Articles 42 and 43 of the Constitution expressly refer to unions between men and women.

198. *Maestros "gay" pasaron al estrado*, EL TIEMPO (Bogotá), Sept. 2, 1998.

199. *Id.*

200. Sentencia No. C-481/98. See also *Poencia favorable a profesores "gay,"* EL TIEMPO (Bogotá), Sept. 9, 1998.

resolve this debate, the opinion concluded that, in any event, the law must be subjected to strict scrutiny. According to the opinion, if sexual orientation is biologically determined, discrimination on these grounds constitutes sex discrimination. And if sexual preference is considered a matter of personal choice, the law infringes on the fundamental right to the free development of one's personality and thus is also subject to strict scrutiny.

The Court found that the law was discriminatory in considering homosexuality itself as reprehensible conduct. Although warning that teachers may be sanctioned for conduct that attempts to attack the sexual freedom of their students, the majority questioned: "Why does the law not include men who seduce their female students or women who seduce their male students?"

The dissenting justices shared the view of the *Procuraduría*. Justices Hernando Herrera Vergara, José Gregorio Hernández Galindo, and Alfredo Beltrán Sierra argued that the law did not punish teachers for being homosexual but for conduct or sexual insinuations that are carried out with students and advanced their thesis that "the practice of homosexuality is conduct that can be punished because really this goes against the rights of children." They added that parents have the right to choose the best education for their children.<sup>201</sup> Justice Hernández' dissent referred to the saying in the fable of Pombo that "where there's cheese, don't send cats," and invoked "popular wisdom" that "the occasion makes the thief."<sup>202</sup> When questioned about this dissent, Justice Hernández pointed out that his views were those adopted by the Court, but his dissent reflected his belief that many times homosexuality is conditioned or acquired, not biologically determined, and stated that for that reason he would not hand over his eleven-year-old son to a teacher who was homosexual.<sup>203</sup>

Finally, to add a postscript to the discussion of same-sex marriage, after several months of attempting to convince a notary to perform the ceremony and prepare the written docu-

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201. *Enérgico salvamento*, EL TIEMPO (Bogotá), Sept. 10, 1998.

202. *Salvamento de voto a la Sentencia No. C-481/98*.

203. Interview with José Gregorio Hernández, *supra* note 160.



ment, on December 11, 1998, the first "gay marriage" having legal effects was formalized before a notary in Bogotá.<sup>204</sup>

## 6. Other Sexual Autonomy Issues

In September 1997, the Constitutional Court acknowledged that to engage in prostitution and transvestism is part of the constitutionally protected right to the free development of the personality but nevertheless granted relief in a *tutela* action brought by Hernán Villamil Camacho and his neighbors, who sought to remove prostitutes and transvestites from a zone in northern Bogotá.<sup>205</sup> The Court stressed that prostitution is not a punishable offense but added that conduct can be limited when it interferes with the fundamental rights of others to the free development of their own personalities, to privacy, and to free movement. The mayor and police authorities were ordered to apply the Police Code provisions on public scandals and harassment to maintain public order, personal security, and conditions of morality in the zone. Justice Cifuentes wrote a concurring opinion clarifying his vote by emphasizing the rights to engage in prostitution and transvestism and expressing his disagreement with the main opinion's reliance on the notion of public order to justify granting relief to the neighbors.<sup>206</sup>

In August 1998, the Court unanimously rejected a challenge to Article 259 of the penal code's treatment of incest as a crime punishable by six months to four years imprisonment.<sup>207</sup> The challenger, with the support of the President's Counsel for Human Rights, had urged the Court to invalidate the penalization of incest between consenting adults, arguing that it violated the right to free and healthy sexuality.<sup>208</sup> The Court upheld the current law as justified by the State's duty to protect

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204. Claudia Cerón Coral, *Una historia de amor y de leyes: y los declaro: 'marido' y 'marido,'* EL TIEMPO (Bogotá), Dec. 13, 1998, at 22A. (A recent *tutela* decision has grappled anew with the difficulty surrounding intersexuality. This case, from 1999, will be on file with the *Inter-American Law Review* as soon as we receive it from the Colombian Court via the author. See also *Hermaphrodites in manos de medicos*, EL TIEMPO (Bogotá) May 14, 1999).

205. Sentencia No. SU-476/97; "*Matrícula condicional*" a los travestidos, EL TIEMPO (Bogotá), Sept. 26, 1997.

206. Aclaración de voto a la Sentencia SU No. 476/97.

207. Sentencia No. C-404/98; *Incesto no goza de bendición judicial*, EL TIEMPO (Bogotá), Aug. 11, 1998.

208. Sentencia No. C-404/98.

the family. Although the main opinion, written by Justices Eduardo Cifuentes and Carlos Gaviria, concluded that a penal provision restricting personal liberty could not be justified solely based on public morality, its lengthy discussion of the role of moral arguments in constitutional adjudication provoked a separate opinion. The opinion objected to the unnecessary reliance on public morality, arguing that "in a pluralist society like the Colombian, one must ask: 'Is there only one public morality or are there several? And if there is only one, who determines it? And if there are various, which has priority and why?'"<sup>209</sup> Justices Barrera, Martínez, and Gaviria also wrote a second separate opinion stating their view that in cases between consenting adults not living within a nuclear family, judges should apply the requirement in Article 4 of the Penal Code that for conduct to be punishable it must damage or threaten the legal interest protected by the law.<sup>210</sup>

A recent proposal to reform the penal code would remove incarceration as a penalty for incest between consenting adults and replace it with a fine. Luz Nagle, a former judge on cases involving incest between parents and children, discusses incest and points out the special problems of rural Colombia:

This was a tough issue for me because when I was a judge riding my circuit on horseback into very remote mountain villages I sometimes had to deal with incest cases. These were some of the most difficult cases I handled because the peasants just couldn't understand how the laws against incest could apply to them when 1) their peasant traditions for generations dictated that children were a father's property to do with as he pleased, and 2) they lived so far from the larger societal notions of the rule of law that they could not conceive that they were doing anything wrong in society. It was very hard having to sentence someone to jail who truly did not understand the reasons why he was being made accountable for his behavior.<sup>211</sup>

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209. Aclaración de voto a la Sentencia No. C-404/98.

210. Segunda aclaración de voto a la Sentencia No. C-404/98.

211. Letter from Professor Luz Estella Nagle to author, *supra* note 28.

### C. *Diverse Family Structures*

Several of the Constitutional Court's decisions have dealt with the Constitution's recognition of Colombia's diverse family structures. As a result of factors such as war and other violence, poverty, and high rates of teenage pregnancy, over 25% of families are headed by single women. Women become heads of families not because of changes in roles within the family as much as because of changes in the status of men.<sup>212</sup> In addition, according to a study completed in July 1998, by the National Administrative Statistics Department (DANE), the number of Colombian families living in *uniones libres* or *uniones de facto* has increased from 10% in 1983 to 35% in 1998.<sup>213</sup> The study also reveals an increase in the number of widows, corresponding to an increase in deaths, especially of men between twenty and forty-four years old as a result of the intensification of the violence.

Article 43 of the Constitution states that "[t]he state shall support the woman head of family in a special manner."<sup>214</sup> Relying on this provision as well as on constitutional guarantees of the right to work and due process, the Court granted a *tutela* prohibiting municipal authorities from closing a small business owned by a woman head of family.<sup>215</sup> The *tutela* was filed by Rosa Ana Orduz vda. (*viuda* or widow) de Briceño after the authorities revoked the permission they had granted her to run the family blacksmith shop following her husband's death. She and her oldest son were operating the shop out of the house she shared with her three young children and eight other members of her extended family. When the neighborhood grew and a residential complex was built next to her house, some of the new residents complained that the business disturbed them, and the authorities ordered the business closed.

After finding violations of due process and labor rights, Justice Carlos Gaviria Díaz turned to Article 43's special

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212. See *¿Por que llega a ser jefa de familia?* MUJER/FEMPRESS (Santiago), Nov. 1998, at 14 (reporting on recent research by the organizations Enda América Latina and Vamos Mujer in Medellín which also pointed out the gender-bias in the current concept of head of family that focuses on who is the principal economic provider, whose last name is used, and who has decision-making power).

213. Socorro Ramírez, *Revolución silenciosa*, MUJER/FEMPRESS (Santiago), Oct. 1998.

214. CONST. POL. COL. art. 43.

215. Sentencia No. T-414/93.

protection for women heads of family. According to Gaviria, the authorities acted contrary to the *estado social de derecho* because they did not assist "in a special manner a woman head of family," and, knowing that the death of her husband left her and her children "in a desperate situation of helplessness," they made her unemployed.<sup>216</sup> Gaviria also pointed out that the authorities' action placed Orduz in a position where she could turn to the State for subsidies rather than continue with her business, where she was productively providing for herself and her children.<sup>217</sup>

In a case dealing with *uniones de hecho*,<sup>218</sup> the Court protected the property rights of a woman upon the death of her companion in a de facto union. It ruled that disregarding the value of the woman's domestic work in acquiring and improving the home where the couple had lived in favor of inheritance rights of the man's sister and only heir violated the woman's rights of equality and due process.<sup>219</sup>

The action was filed by Esther Varela who had lived with Hernando Guerrero Trujillo for twenty-four years prior to his death. For the last twenty-one years they had shared possession of a house he bought in 1970. When he died in 1989, the courts in Cali rejected Varela's claim that the value of her domestic work should be considered in determining the rights to his property. Instead the courts awarded the property to the deceased's sister.

Justice Ciro Angarita's decision for the Constitutional Court found for Varela. The Court announced that the constitutional doctrine enunciated would have binding effect on authorities in similar cases involving domestic work in relations between men and women. Angarita's opinion demonstrates the Court's sensitivity to the historical economic plight of women and the Court's commitment to work toward the elimination of all forms of discrimination against women:

Proceeding in this manner, the [Cali] Tribunal associated itself with those who hold that domestic work is "invisible" and as such, lacks all significance in the market economy.

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216. *Id.*

217. *Id.*

218. See e.g., Juan Lozano, *Extraña reforma*, EL TIEMPO (Bogotá), Sept. 28, 1998.

219. Sentencia No. T-494/92.

This Court can do nothing less than manifest its total disagreement with this view because it encourages and deepens the inequality and injustice in social relations, makes economic development unequal, and damages the fundamental rights of human beings.

[The opinion then cited national and international efforts towards including the value of domestic work in economic indicators and quoted from the work of Colombian Professors Elssy Bonilla Castro and Penélope Rodríguez S. on the role the social division of work plays in the subordination of women.]

On the other hand, the constitutional assembly of 1991 was aware not only of salary discrimination that Colombian women are victims of today but also that many of them do not receive any pay for their work. It was for this reason that they elevated to the level of a constitutional canon the elimination of all forms of discrimination against women and fully guaranteed their rights.<sup>220</sup>

The Court has also relied upon Article 42's recognition that the family can be formed by legal or natural bonds and its guarantee of equal rights and duties for all children whether born within marriage or not to invalidate numerous provisions of the Civil Code that discriminated against children born outside marriage.<sup>221</sup>

When faced with a challenge to a 1989 law requiring that birth registries follow the Spanish tradition of using double *apellidos* (surnames) with that of the father listed before that of the mother, however, the Court rejected arguments that this violated Articles 13, 42, and 43 and international human rights laws.<sup>222</sup> The majority did not see this as having anything to do with equality of rights and obligations. They saw the matter as simply one of logistics: there had to be an order and the law provided one. Justices Cifuentes, Gaviria, and Martínez dissented, contending that the law was not innocuous but reflected a longstanding patriarchal tradition that relegates

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220. Sentencia No. T-494/92 (footnote to *Constitutional Gaceta* omitted).

221. See, e.g., Sentencia No. C-105/94; Sentencia No. SU-253/98.

222. Sentencia No. C-152/94.

women to a secondary plane.<sup>223</sup> They pointed out that the need for uniformity would also be met by placing the mother's last name first, but argued that the sensible solution, consistent with the constitutional principle of equality of rights, would be to allow couples to decide the order by mutual consent.<sup>224</sup>

#### D. Positive Discrimination

Article 13 textually enshrines the concept of positive discrimination or affirmative action. As Justice Eduardo Cifuentes Muñoz notes, the Constitutional Court has accepted that women are among the marginalized groups entitled to such affirmative measures:

It seems to me that the general tendency of the Court's jurisprudence has been to recognize that historically women belong to a group that has been in conditions of manifest weakness before men and thus it is necessary that at all levels the state must take positive differential action. And at the same time, apart from this positive differentiation, the woman has equal rights with the man, independent of positive discrimination, within the bosom of the family, in social institutions like universities and schools, and in institutions like Social Security and the world of work.<sup>225</sup>

The Constitutional Court has taken seriously Article 13's requirement that "[t]he state will promote conditions so that equality is real and effective and will adopt measures in favor of groups discriminated against or marginalized."<sup>226</sup> In late 1992, the Court invoked both the positive and negative aspects of Article 13's concept of equality in a challenge to law granting single (*célibes*, celibate or never married) daughters of military officials special social welfare rights.<sup>227</sup> In an opinion by Justice José Gregorio Hernández Galindo, the Court upheld the positive discrimination in favor of daughters over sons as a measure to

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223. Salvamento de voto a la Sentencia No. C-152/94.

224. *Id.* For a discussion of a pending challenge to the law requiring that birth certificates list the father's last name first, see Socorro Ramírez, *Opción de apellido*, MUJER/FEMPRESS (Santiago), Jan. 1999, at 3.

225. Interview with Eduardo Cifuentes Muñoz (July 5, 1998), *supra* note 38.

226. CONST. POL. COL. art. 13.

227. Sentencia No. C-588/92.

make the principle of equality "real and effective," given women's frequent economic dependency on men in Colombian society. On the other hand, it ruled that the discrimination between single and married daughters violated Article 13's protection against discrimination and Article 16's guarantee of the free development of one's personality, reasoning that "every person, in the exercise of their liberty, must be able to choose without coercion and in a manner free of stimulation established by the legislator, between contracting marriage or remaining single." Accordingly, the law was held valid except for the terms "*célibes*" and "remains in a state of celibacy" which were held unenforceable.<sup>228</sup> Although this decision demonstrates the Court's reliance on the "positive" aspect of Article 13 in the realm of gender classifications, it has been criticized as perpetuating stereotypical views of women as economically dependent.<sup>229</sup>

In the context of women's employment-related rights, the Court invoked this principle of positive discrimination in rejecting a challenge to differential retirement ages of fifty-five for women and sixty for men.<sup>230</sup> The Court requested and considered statistical evidence and opinions by social scientists before concluding that this positive discrimination in regard to pension rights was a rational, reasonable, and proportional measure designed to compensate for women's continuing inferior position in the labor force and for the physical and mental burdens placed upon them because of their double workload as members of the paid labor force and as those responsible for the society's unpaid domestic work.

The Court rejected a municipality's attempt to denominate certain housekeeping and maintenance positions as exclusively for women, however. It established a strict test of necessity for any attempt to limit employment to persons of one sex and concluded that it was not indispensable that one be a woman to perform the essential tasks of these jobs. Men could perform the jobs as well as women and excluding men meant "contributing to perpetuating prejudices disregarding the essential equality of all human beings."<sup>231</sup>

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228. *Id.*

229. Interview with Manuel José Cepeda, *supra* note 81.

230. Sentencia No. C-410/94.

231. Sentencia No. T-026/96.

### *E. Other Employment-Related Issues*

Forty-one percent of the Colombian workforce are women and 25% of these are heads of households.<sup>232</sup> Unemployment rates are much higher for women than men; in 1996, 15.6% of women were unemployed, but 9.6% of men.<sup>233</sup> In September 1998, the unemployment rate for men was 12.5% and that for women had risen to 18.0%.<sup>234</sup> In November 1998, the country's slow economic growth had resulted in the highest unemployment rate in twenty-five years; the seven largest cities had an overall jobless rate of 15.1% consisting mostly of the poor, youth, and women.<sup>235</sup> By the end of 1998, the unemployment rate had risen to 15.7% in seven cities and 15.9% in eleven cities.<sup>236</sup> Among urban residents polled about expectations for 1999, fear of becoming unemployed displaced fears related to guerrilla warfare, narcotrafficking, and common crime.<sup>237</sup>

In addition to the cases dealing with employment rights discussed in the sections above, the Court has addressed employment-related issues in numerous other contexts. For example, in a 1997 decision in an action presented by María del Pilar Leyva and Sandra Cadena Cortázar, the Court struck down a part of Article 242 of the labor code that prohibited women factory workers from working at night.<sup>238</sup> The 1951 law provided that "[w]omen, regardless of age, cannot be employed during the night in any industrial company, except a company in which only members of the same family are employed."<sup>239</sup> In a unanimous opinion by Justice Hernando Herrera Vergara, the Court held that the law violated the constitutional guarantee of equal rights and opportunities for women and men and added that the state has a constitutional obligation to promote women's participation in public and private administrative levels.

In press comments, Olga Sánchez described the Court's opinion as closing a gap between the law and the reality of

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232. *Mujeres podrán trabajar de noche en las industrias*, EL TIEMPO (Bogotá), Nov. 28, 1997.

233. *Discriminación*, EL TIEMPO (Bogotá), Sept. 26, 1997.

234. *Sube el empleo independiente*, EL TIEMPO (Bogotá), Jan. 4, 1999.

235. *Vivienda social, la gran empleadora*, EL TIEMPO (Bogotá), Nov. 18, 1998.

236. *Sube el empleo independiente*, *supra* note 234.

237. *Al país le irá peor que a los colombianos*, EL TIEMPO (Bogotá), Dec. 26, 1998.

238. Sentencia No. C-622/97; *Mujeres podrán trabajar*, *supra* note 232.

239. Sentencia No. C-622/97.



women's lives:

The decision of the Constitutional Court reconciles the reality of the country with the law. Many women, by necessity, work at night. What the Court has done and is doing is to legalize what already had come into existence.... This law, that existed in the Labor Code to favor one condition of the woman, that of housewife and mother of the family, now is not in accord with the process of change that women have undergone in our society....<sup>240</sup>

Another case from late 1997, though not directly involving claims of sex discrimination, bears mentioning here. In October, the Constitutional Court ruled that all employees, whether public or private, have a constitutional right to earn a salary that is proportional to the quantity and quality of the work they perform: "for equal work, equal pay."<sup>241</sup> The Court stated that salary differentials were permitted but must correspond to justified, real, proven reasons and not simply to the subjective preferences of the employer or an intent to impede or discourage union activity or other worker organizing.

The Court has also addressed the rights of domestic workers. In 1995, the Court itself raised the issue in a public action of unconstitutionality brought by the People's Defender against another provision of the labor code.<sup>242</sup> The Court invalidated portions of the code that provided lesser unemployment benefits for domestic workers, concluding that if domestic service is a luxury those who enjoy it must pay for it in a manner similar to

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240. *Mujeres podrán trabajar*, *supra* note 232. In comparison, a 1997 amendment to Japan's Equal Employment Opportunity Law of 1987 that will permit women to work at night has provoked mixed reactions among working women and women's organizations. Some greeted the new law as an extension of employment rights for women, allowing them to compete for better paying nighttime jobs now held by men. Others believe the law was really designed to allow big business to be more competitive and will lead to women being forced to work night shifts and overtime or to their being forced into lower paying part-time jobs. THE WOMEN'S WATCH, Sept. 1997, at 4.

241. Sentencia No. SU-519/97; *Corte Constitucional respalda equidad salarial*, EL TIEMPO (Bogotá), Oct. 16, 1997. In the United States equal pay for equal work, not child care as had been expected, was the top concern among working women in a national survey by the AFL-CIO. Ninety-four percent of those polled said equal pay was very important to them and over one-third believed they did not receive it. THE WOMEN'S WATCH, *supra* note 240, at 4.

242. Sentencia No. C-051/95. The Court also invalidated the labor code's authorization of lesser social benefits for employees of non-profit entities which was challenged by the People's Defender.

how other employees are paid. Limiting the benefits to domestic workers was in opposition to raising their standard of living as the constitutional principle of social solidarity required. However, the opinion found certain differences in the labor code's treatment of domestic workers such as different maximum hours of work to be reasonable.<sup>243</sup> In July 1998, the Court upheld the Labor Code's broad definition of what constitutes "salary" for the predominantly female domestic workers.<sup>244</sup> But the opinion by Justice Fabio Morón also warned employers that domestic workers have the right to overtime pay for work in excess of ten hours a day.

In 1994, the Court found a social security policy to be unconstitutional. The policy at issue established medical benefits for the wives or permanent companions of male employee members but did not provide such benefits to members' husbands or male companions.<sup>245</sup> By means of a *tutela* a woman employee challenged the policy when her husband was denied coverage.<sup>246</sup>

In an opinion by Justice Cifuentes, the Court ruled that the agency's action violated Article 13's equality guarantees and ordered it to put an end to this sex discrimination by immediately considering the application for benefits for petitioner's spouse.<sup>247</sup> The opinion demonstrates the Court's proactive role in leading Colombian society away from traditional ways of thinking about women and their roles. Justice Cifuentes noted that "[t]he historical vision of woman's role must not affect . . . the recognition of benefits that have the effect of increasing her income as a pensioner."<sup>248</sup> The Court also challenged traditional views of *machismo* as it pointed out that the reality in Colombia no longer sustains such a social construct:

A less weighty reason for sustaining the ability of only men pensioners to claim their spouses or permanent companions is expressed in the stereotype that a man who is dependent on his woman is less "manly." This social prejudice, however, is

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243. Sentencia No. C-051/95.

244. Sentencia No. C-372/98; *Si al pago de horas extras para empleadas domésticas*, EL TIEMPO (Bogotá), July 22, 1998.

245. Sentencia No. T-098/94

246. *Id.*

247. *Id.*

248. *Id.*

contrary to the statistics of a growing number of women "heads of family" who, for diverse circumstances, have responsibility for the costs of the home. . . . The simple cultural conception of the roles of men and women cannot be used to deprive a woman of the benefit of extending social security to her spouse or permanent companion, as the legal rules provide for men.<sup>249</sup>

In an interview, Justice Cifuentes pointed out that in this social security case the Court was cognizant of both visible and invisible forms of discrimination. Cifuentes also observed that this case was the Court's first decision to reach beyond the particulars of the case at hand as it directed the social security agency to cease the discrimination against women.<sup>250</sup>

In 1996, the Court ruled that an older law that terminated survivor benefits to a worker's widow if she remarried violated widows' constitutional rights of equality and the right to the free development of one's personality.<sup>251</sup> It announced that any woman denied benefits pursuant to this law after 1991 could obtain payments.

Other gender-related cases include several related to military training and service. In 1994, the Court rejected arguments that not subjecting women to obligatory military service was unconstitutional.<sup>252</sup> In 1995, Adriana Granados, a nineteen-year-old woman, filed a *tutela* claiming equal rights to admission to Colombia's navy.<sup>253</sup> Her success in that case paved the way for the enrollment of the first twenty-eight women cadets.<sup>254</sup> After *tutelas* in 1996 dealing with admission to the air force<sup>255</sup> and to the naval officer training school,<sup>256</sup> in 1997, thirty-four women joined the *Fuerza Aérea* as pilot trainees and twenty entered the naval officers training school.<sup>257</sup> Military installations

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249. *Id.*

250. Interview with Eduardo Cifuentes Muñoz (July 5, 1995), *supra* note 38.

251. Sentencia No. C-309/96.

252. Sentencia No. C-511/94.

253. Sentencia No. T-624/95.

254. Pamela Mercer, *Colombians Winning Quick Redress from Courts with Writs*, N.Y. TIMES, Nov. 29, 1996, at A19.

255. Sentencia No. T-704/96.

256. Sentencia No. T-463/96.

257. *De coronelas a generales*, MUJER/FEMPRESS (Santiago), Nov. 1998, at 14.

have been adapted to provide private lodging, separate bathrooms, pregnancy tests, and maternity uniforms.<sup>258</sup>

#### IV. COLOMBIAN PERSPECTIVES ON THE CONSTITUTIONAL COURT

The preceding discussion presents a fairly positive picture of Colombia's contemporary gender jurisprudence. That picture, however, is incomplete without a more in depth consideration of issues such as access to courts, lower courts' responses to the Constitutional Court's opinions, and legislative responses to those decisions—issues which I am at present unable to fully assess. Nevertheless, thus far the work of the Constitutional Court has overall been favorably received by the justices on the Court itself, of varying views, and by women's rights activists and those sympathetic to their causes. I do not present critiques of these decisions from those embracing more traditional standpoints on gender issues, but the last part of this section describes the more general attacks upon the Court's use of the *tutela* and the ensuing public debate.

##### A. *Views on the Court's Gender Jurisprudence*

Despite the limitation imposed by comparative legal scholarship—the difficulty of assessing the cultural import of legal decisions from a distance and by an outsider—based on the available evidence from the media and my interviews, many Colombians' evaluations of the Constitutional Court's evolving gender jurisprudence are mixed but positive overall.

First, the justices themselves view their gender decisions as an important part of the early jurisprudence under the new Constitution. When interviewed in 1995, Justice Cifuentes' general assessment of the role of the Constitutional Court in protecting the rights of women and minorities was positive.<sup>259</sup> Similarly, in 1998 interviews Justice Cifuentes, as well as Justices Barrera, Beltrán, Hernández, and Martínez, expressed generally favorable opinions concerning the importance of the Court's gender jurisprudence.<sup>260</sup>

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258. *Id.*

259. Interview with Eduardo Cifuentes Muñoz (July 5, 1995), *supra* note 38.

260. Interviews with Antonio Barrera Carbonell, *supra* note 142; Alfredo Beltrán

Although he gave the Court an overall positive rating on gender issues, Justice Cifuentes criticized the abortion decisions and pointed to the absence of women on the Constitutional Court and their low numbers in other important positions as evidence of the persistence of *machismo* and intolerance. He further observed that women's real access to the world of work has not been commensurate with the Constitutional Court's ideals and opinions. Cifuentes nonetheless remained optimistic about political activism and "an awakening of the rights of the woman, . . . especially of the woman *campesina*, the woman of the poor sectors of the population."<sup>261</sup>

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Sierra, Magistrado of the Colombian Constitutional Court, Bogotá, Colombia (Dec. 16, 1998); Eduardo Cifuentes Muñoz (Dec. 11, 1998), *supra* note 107; Jose Gregorio Hernández, *supra* note 160; and Alejandro Martínez Caballero, Magistrado of the Colombian Constitutional Court, Bogotá, Colombia (Dec. 14, 1998).

261. Interview with Eduardo Cifuentes Muñoz (July 5, 1995), *supra* note 38. After the Congressional elections of March 8, 1998 (held on International Women's Day), the number of women in the Colombian Senate doubled from seven to fourteen (out of a total of 102 senators) and the number of women in the House increased from sixteen to nineteen of the 167 members. Socorro Ramírez, *Casi casi la hora de las mujeres*, MUJER/FEMPRESS (Santiago), May 1998, at 6. And, after several attempts to pass legislation implementing the 1991 Constitution's promise in Article 40 of adequate participation of women in all spheres of public power, in 1998 a bill passed the House and moved to the Senate. The bill would have required that, beginning in January 1999, at least thirty percent of decision-making or higher level positions be held by women. Socorro Ramírez, *Mayor Participación en Poderes Públicos*, MUJER/FEMPRESS (Santiago), May 1998, at 14. The Council of State had earlier refused to consider Article 40 to be self-executing. Like at least four prior proposals, the 1998 quota bill failed to gain approval. One positive sign for the future of women's political participation was the remarkably strong showing by Noemí Sanín, an independent candidate for president in the 1998 elections, who came close to making the run-off election.

For discussion of affirmative action with respect to access to elective and party positions as expressly guaranteed under Article 37 of the 1994 Argentine Constitution and of Argentina's earlier law (Ley No. 24012) that guarantees a minimum of thirty percent of candidates for national elective office be women, see María Teresa Flores, *La igualdad real de oportunidades*, INVESTIGARE, Año 1, No. 2 (on file with author).

In addition to Argentina and Colombia, within Latin America the constitutions of Cuba, Ecuador, Nicaragua, and Paraguay impose affirmative duties to promote women's equality. On the regional legislative front, Bolivia adopted a law similar to Argentina's 1991 law in 1996, and a 1995 Brazilian law requires political parties to ensure that women hold at least 20% of elected positions. Effective in 1996, an amendment to Costa Rica's Electoral Law requires political parties to adopt mechanisms to assure that 40% of candidate lists be women. See REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *supra* note 46, at 23. In Guatemala, women's organizations together with leading women in the Guatemalan Congress have proposed a quota law requiring that at least thirty percent of candidates be women. The Guatemalan Congress rejected quota proposals in 1991 and 1994, as did the Electoral Reform Committee (formed pursuant to the peace accords) in 1997. See DEMOCRACIA Y PARTICIPACIÓN POLÍTICA DE LAS MUJERES EN GUATEMALA (2d ed. 1998).

A former Colombian judge now living and teaching law in the United States, Luz Nagle, offered a positive assessment of the significance of the *tutela* on gender issues in Colombia:

In a country where the justice system is greatly inefficient, the courts have been unreachable and have reinforced the disaffection, discrimination, and subjugation of women; the law is the exclusive possession of the wealthy, the elite, the judges and the lawyers; sexism, patriarchy, and *machismo* are the rule, the *tutela* is the only hope for transformation.

*Tutelas* have become a quick and friendly way for women to redress their issues. The "regular" system is still impregnated with bias and the social stereotype that women ought to be submissive, "walk behind their man," supporting him without complaint. To reach a resolution through a lawsuit takes too long. Now, with the *tutela*, women are heard. . . .

Using *tutelas*, vocal and determined women have challenged the status quo and demanded that the largely male court and the country pay attention to their concerns. Women are using *tutelas* to change, if not the society's approach to them, the legal system that rules them. . . . *Tutela* is improving equal rights and is serving as a vehicle for social change.<sup>262</sup>

She too cautioned, however, that the "possibility of imminent transformation" requires more than *tutela* decisions. "It requires more aggressive and meaningful approaches by women, more women in high and influential positions and a real commitment from men."<sup>263</sup>

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[Note: As this article went to press, the Colombian Congress finally approved a law that, upon approval by the President and a favorable review by the Constitutional Court, would require that thirty percent of high public offices, including ministers, be held by women and that a woman be included on candidate lists for appointment to the Constitutional Court and certain other bodies. See Juanita León, *Mujeres, a las altas esferas*, EL TIEMPO (Bogotá), June 23, 1999. President Pastrana raised objections to this quota bill, however, returning the matter to Congress. E-mail message from Catalina Botero (July 21, 1999).]

262. Statement by Professor Luz Estella Nagle, Nov. 25, 1998 (on file with author). For an outside scholar's assessment of other aspects of the *tutela*, see Alexander P. Springer, *Political Justice? Assessing the Role of Colombian Courts*, Paper presented at the meeting of the Latin American Studies Association, Chicago, Ill., Sept. 24-26, 1998 (manuscript on file with author).

263. *Id.*

Although studies of the Court's work are few thus far, Colombia's official reply to an Inter-American Human Rights Commission questionnaire's inquiry about the decisions reached in gender discrimination cases in the last five years gave the following characterization of the cases: "In all cases in which it has been demonstrated that the conduct was discriminatory and violated fundamental human rights, there has been a good disposition by the judges and courts to render opinions favorable to the petitioners."<sup>264</sup>

The response also notes that, according to researchers at Colombia's National University, the Constitutional Court has had a very important influence on the attitude of judicial authorities towards women.<sup>265</sup> Despite evidence that more men than women won favorable *tutela* decisions in labor matters,<sup>266</sup> the researchers concluded that the Constitutional Court has been important for women, not only because it has unified the jurisprudence on gender, but also because of its broad reading of the new constitutional rights for women.

Other surveys of the Court's gender jurisprudence that have been undertaken have given it mixed appraisals. In a document prepared for use in training and workshops on the new constitution, Marta Lucía Tamayo provides an overview of the jurisprudence produced under the new constitution and concludes that it has been varied and contradictory.<sup>267</sup> On one side she places advances and preciseness in themes such as equality, protection of workers' maternity rights, women's rights in the educational and penitentiary systems, and domestic violence. But she also observes stagnation and conservatism in areas of reproductive autonomy.

In a more empirical study, Isabel Cristina Jaramillo, a professor of judicial theory at the Universidad de los Andes, has

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264. REPUESTA AL CUESTIONARIO, *supra* note 48, at 122.

265. *Id.* at 52, citing DIRECCIÓN GENERAL DE POLÍTICAS JURÍDICAS Y DESARROLLO LEGISLATIVO, *supra* note 48.

266. Of the thirty-eight cases studied, women won in thirteen of the thirty-eight in the first instance, in three of twenty-two on appeal, and in eighteen of the thirty-eight in the Constitutional Court. *Id.* at 52. The researchers also found that Colombian judges they interviewed shared many of society's gender stereotypes in the family law areas. On the average, male judges had more progressive gender attitudes than did female judges. *Id.* at 54.

267. MARTA LUCÍA TAMAYO, LA NUEVA CONSTITUCIÓN Y LOS DERECHOS DE LAS MUJERES 39 (1995) (on file with author).

chronicled and critiqued the Court's jurisprudence on women. She examined a sample of 123 decisions—105 *tutelas* and eighteen actions of unconstitutionality. Of the *tutelas*, 58.1% were resolved favorably for the complainant (as opposed to only 43.3% of all *tutelas*) but the results varied among the nine *tutela* panels. Jaramillo presents hypotheses concerning (1) the existence of two different images of the woman—capable, strong, and equal to the man in the public sphere and weak, economically dependent, loving, sacrificing, fully a mother, in the private spheres—and (2) the existence of parallel tensions between a concept of protection of the woman based on paternalism and one based on recognizing women as autonomous subjects, and between the perception that women must be protected as part of a less favored social group and the perception that women must not be given undeserved privileges.<sup>268</sup>

In a valuable recent publication, Jaramillo and other researchers in a project directed by Cristina Motta present an analysis of the “reach of the Constitution,” that focuses on the 123 cases in Jaramillo's study, categorizing and describing the Court's gender jurisprudence.<sup>269</sup> They also analyze the debates about women's rights in the Constitutional Assembly and provide a comparison of women's rights in other Latin American Constitutions. Asserting that “[l]aw has found, in the field of issues of gender, a privileged space to demonstrate its true emancipatory and reality transformative capacity,”<sup>270</sup> their assessment of the Court's gender jurisprudence addresses both its legal and symbolic value. They emphasize the privileged position that the Court's institutional role as the legitimate interpreter of the constitution gives it as a speaker in the social discourse over gender issues and its consequent influence in the construction of the social discourse around issues of gender.<sup>271</sup>

Turning to views of other women's rights advocates, María Isabel Plata and María Cristina Calderón, Executive Director and Director of Legal Services for PROFAMILIA, gave very high marks to the Court's gender decisions. Plata credited the Court with “giving the air that was needed in Colombian Law to new

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268. ISABEL CRISTINA JARAMILLO S., CRÓNICA DE LA JURISPRUDENCIA DE LA CORTE CONSTITUCIONAL COLOMBIANA SOBRE LAS MUJERES (work in progress).

269. OBSERVATORIO LEGAL DE LA MUJER, *supra* note 153.

270. *Id.* at 7.

271. *Id.* at 33-34.



ideas, ideas of change, to new interpretations, to recognizing women, recognizing differences.<sup>272</sup> Calderón commented on the importance of the Court's use of international human rights conventions to support its decisions with an in depth study of human rights: "Each decision is a class in Law."<sup>273</sup> They proclaim themselves strong defenders of the Court, and express concern only about the abortion decisions.

Socorro Ramírez, Colombian feminist author and historian who has closely followed the development of women's rights under the new constitution, notes how widely women have resorted to the courts to protect their rights under the new constitution. She credits the Constitutional Court with breaking new ground under the new constitution but her overall assessment of the Court's work is mixed. According to Ramírez, despite substantial advances, the Court lags behind in its treatment of women's reproductive and sexual rights.<sup>274</sup> Referring to a study of the Court's decisions dealing with these rights by Lizeth Salazar, a law student at the National University of Colombia, she observes that, "a definition of reproductive and sexual rights as fundamental rights does not exist; instead they are immersed in other classic rights such as life, equality, liberty, and personal security...." The study points out that international organizations are formulating such definitions as a means of assuring meaningful equality for women.<sup>275</sup>

Ramírez' own critique of the Constitutional Court's most recent abortion decision revealed her disappointment with the performance of the majority of the Court in that case.<sup>276</sup> But she and other feminists were heartened by the separate views of four of the nine justices. She reported on Justice Cifuentes' remarks at a press conference held in PROFAMILIA on February 27, 1997, where he criticized the Court's ruling as "sacrificing greater goods such as human liberty and impeding its fulfillment."<sup>277</sup>

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272. Interview with María Isabel Plata, *supra* note 4.

273. Interview with María Cristina Calderón, *supra* note 2.

274. Socorro Ramírez, *La tutela*, 187 MUJER/FEMPRESS (Santiago), May 1997, at 6.

275. *Id.*

276. Socorro Ramírez, *¿Defensora de encíclicas or de derechos?* 186 MUJER/FEMPRESS (Santiago), Apr. 1997, at 9.

277. *Id.* Justice Cifuentes' remarks reportedly moved feminist psychologist Florence Thomas to say, "For the first time I have the feeling that at last they hear us and that we

Speaking in late 1998, Ramírez underscored the unresolved tension in the court's jurisprudence between philosophies of individualism and communalism.<sup>278</sup> Similarly, Dean Cepeda did not believe that the Court had gone far enough in confronting the subordination of women or in addressing the institutional, as opposed to individualistic, aspects of discrimination based on sexual orientation.<sup>279</sup> In short, what Sonia Alvarez has noted in discussing the Brazilian Constitution's recognition of women's rights appears to be true in Colombia as well: gender role equality has more easily won acceptance than has gender role change.<sup>280</sup>

And the picture is even more complex for Afro-Colombian women who bear multiple burdens in Colombia. Senator Piedad Córdoba, herself an Afro-Colombian, spoke of the intersectionality of gender, race, and class and the "triple discrimination" of being a woman, black, and poor. She noted the resistance of these strains of discrimination to cure through formal legal guarantees, observing that articles in the constitution alone will not end this kind of discrimination.<sup>281</sup>

are on the point of winning this battle." *Id.*

278. Interview with Socorro Ramírez, Bogotá, Colombia (Dec. 10, 1998).

279. Interview with Manuel José Cepeda, *supra* note 81.

280. SONIA E. ÁLVAREZ, *ENGENDERING DEMOCRACY IN BRAZIL: WOMEN'S MOVEMENTS IN TRANSITIONAL POLITICS* 252 (1990).

281. Interview with Senator Piedad Córdoba de Castro, Bogotá, Colombia (July 4, 1995). In an earlier interview with the *New York Times*, Senator Córdoba de Castro spoke of the difficulties posed by the low level of identification among black and mixed-race people in Latin America. Karen De Witt, *Black Unity Finds Voice in Colombia*, N.Y. TIMES, Apr. 18, 1995, at A5. She acknowledged the lack of reliable statistics because countries do not openly categorize by race but estimated that blacks represented 21% of Colombia's 35 million people. *Id.* In a recent poll, 83% of Colombians interviewed said that they were not racist but 85% believed that there is racism in Colombia, and 78% had witnessed racial discrimination. Francisco Celis Albán, *Racismo a flor de piel*, EL TIEMPO (Bogotá), Oct. 12, 1998. According to social anthropologist Mauricio Pardo, "we tend to think that racism does not exist because. . . constitutionally we are equal before the law. *Id.* But, one can think that it is bad to be racist and at the same time have a series of contradictory attitudes." He pointed out: "Indigenous people and blacks were subordinated by law. Blacks until 1853, with the abolition of slavery, and *los indios* until 1991 with the new Constitution. Before, *los indios* were considered minors. *Id.* See generally PETER WADE, *BLACKNESS AND RACE MIXTURE: THE DYNAMICS OF RACIAL IDENTITY IN COLOMBIA* x (1993):

The official image of Colombia is that of a racial democracy, and even, in the new Constitution of 1991, of an ethnically plural society, but beneath or rather parallel to and integrated with this image is a pervasive, apparently self-evident social order in which Colombia is a mestizo, or mixed blood, nation that is gradually erasing Blackness (and indianness) from its panorama.

Moreover, as the Senator further observed, "Afro-Colombians live in the poorest regions of the country," and they have no "visible presence" in positions of power or authority.<sup>282</sup>

Not surprisingly, the Court's decisions enforcing fundamental rights have not eradicated the discriminatory practices challenged. For example, despite the Court's rulings protecting pregnant teenagers' educational rights, complaints continue about instances where such students have been expelled or required to attend night classes or special tutoring sessions. Last year parents have presented fifty-seven complaints about expulsions of pregnant students, according to the president of the federation of parents' associations. A campaign to raise societal consciousness and provide support for these students has been launched under the theme "If the test is positive, don't take a negative attitude."<sup>283</sup> But, on the other hand, the prevalence of these *tutela* actions themselves demonstrate that many pregnant teenagers and their families are now aware of their rights and of how to challenge their denial. And the same is true in the other areas covered by this Article.

### B. *Tutelitis or Protection of Fundamental Rights?*

Within Colombia, critics of the Constitutional Court's activist role in protecting fundamental rights have targeted its use of the *tutela*, lamenting that the country is suffering from an epidemic of *tutelitis*. From the *tutela*'s introduction in November 1991 until August 1997, 142,635 of them were initiated; by 1998 the Constitutional Court had reviewed and ruled on approximately 2,700.<sup>284</sup> Justice José Gregorio Hernández Galindo,

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*Id.*

For discussion of the Constitutional Court's treatment of *tutelas* on behalf of indigenous and Afro-Colombian petitioners, see Donna Lee Van Cott, *The Impact of the 1991 Colombian Constitution: Ethnic Rights*, Paper prepared for delivery at the XXI International Congress of the Latin American Studies Association, Chicago, Ill., Sept. 24-26, 1998. For cases protecting the rights of indigenous communities, see also, DESARROLLO JURISPRUDENCIAL DE LA CONSTITUCIÓN POLÍTICA, *supra* note 82, at 22. See generally Cepeda, *supra* note 6, at 83-84 (noting that the Court has protected indigenous community rights even when no individual fundamental right was violated).

[In late May, 1999, Senator Cordoba herself was a victim of kidnapping by paramilitaries who held her for two weeks before releasing her.]

282. *Id.*

283. EL TIEMPO <<http://www.eltiempo.com/diario/lunes/bog01.htm>>.

284. *Magistrados, con úlcera por tutelas*, EL TIEMPO (Bogotá), Aug. 27, 1997;

speaking while President of the Constitutional Court, turned aside concerns about the judicial system being “flooded” with these citizen injunctions:

I do not consider that the exercise of the action of *tutela* can be understood as a flood but more as the desperate search of those who do not have other judicial avenues for their defense, for effective and prompt solutions to various serious circumstances that affect to a greater or lesser degree their fundamental rights.

Our concern should not be with how to counteract the use of a tool created for the protection of rights but with verifying that in practice and always, human dignity is respected and violations of the guarantees cease.<sup>285</sup>

During his term as President of the Constitutional Court, Justice Carlos Gaviria Díaz echoed support for the *tutela*: “We want to make sure that people’s fundamental rights do not just stay on paper.” Fewer *tutelas* will be filed, he said, as Colombians become aware that there are penalties for violating constitutional rights.<sup>286</sup>

Other judges in the country—especially judges on the Colombian Supreme Court who lack the Constitutional Court’s discretionary review power and must rule on all *tutelas* appealed to them and whose own opinions have been held subject to attack by *tutelas* in some instances—do express concern about the proliferation of *tutelas*. As presiding judge of Colombia’s Supreme Court, Judge José Roberto Herrera argued that there has been “a great abuse.” In his opinion, “about 90% of the cases we see are frivolous.”<sup>287</sup> He estimated that the Supreme Court spends 60-80% of its time reviewing appeals in *tutela* actions .

In August 1997, the president of the Supreme Court appeared before a Congressional Committee considering proposed reforms to the *tutela* and vehemently denounced the

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REPUBLICA DE COLOMBIA CORTE CONSTITUCIONAL SISTEMAS, JURISPRUDENCIA DE LA CORTE CONSTITUCIONAL, 1 DE FEBRERO DE 1992 HASTA [20] DE NOVIEMBRE DE 1998.

285. John Gutiérrez, *La radiografía de la acción de tutela (III)*, EL TIEMPO (Bogotá), Jan. 9, 1996.

286. Darling, *supra* note 3.

287. *Id.*

“avalanche” of *tutelas* that his court must consider. He noted that his court had considered 11,000—five times the number that the Constitutional Court, with its discretionary review, has decided. He complained that because of these cases he had no time to take care of his family or attend social events, and blamed the workload for giving him an ulcer.<sup>288</sup>

Interviewed while still on the Constitutional Court, Justice Jorge Arango Mejía maintained that the *tutela* has had both positive and negative effects.<sup>289</sup> It has “served to defend, maintain, and show respect for fundamental rights consecrated in the constitution” but also “has produced great congestion” in the courts of first or second instance because “people have abused the action of *tutela* by presenting an exaggerated number of *tutelas* in cases where they are not justified.”<sup>290</sup>

According to remarks delivered by then Justice Arango in 1995, several factors explain why Colombians have used the *tutela* as if it were a universal panacea.<sup>291</sup> First, judges, lawyers, and litigants do not understand the purposes of the action and the rights it protects. Widespread publicity has led some to believe that “to file a *tutela* is to affirm your condition as citizen or demonstrate that you are in the latest fashion.”<sup>292</sup> One does not need a lawyer to file the action and this has led to an unwonted flowering of *tinterillos* (untrained lay providers of legal services) eager to make money without being concerned about the client’s interests.<sup>293</sup> Moreover, “Colombians have traditionally been litigious. Now, overnight, we’ve seen them given an easy to manage weapon, that apparently serves for the most dissimilar uses and that effortlessly satiates the passion to litigate.”<sup>294</sup> Add to all this “the deficiencies in public administration and especially the slowness of justice and it is easy to understand

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288. *Magistrados, con úlcera por tutelas*, *supra* note 284.

289. Interview with Jorge Arango Mejía, *supra* note 94. See also Jorge Arango Mejía, *La tutela y la seguridad jurídica*, presented May 23, 1995, Cali, Colombia (on file with author).

290. Interview with Jorge Arango Mejía, *supra* note 94.

291. Arango Mejía, *supra* note 289.

292. *Id.*

293. *Id.* Article 38 of Decree 2591 of 1991, provides that lawyers who file several actions based on the same facts and rights will be punished by suspension of their professional card for at least two years and by cancellation of their professional license for repeated instances of such conduct.

294. *Id.*

why there is a tendency to convert the action of *tutela* into a type of magic legal remedy.<sup>295</sup>

Arango predicted that the number of *tutelas* will not decrease.<sup>296</sup> Noting that Article 41 of the Constitution requires all schools to teach about the Constitution, he warned that “a superficial and disorderly understanding of the Constitution and the laws will not make good citizens but bad litigants.”<sup>297</sup> He described that the situation as a “vicious circle.” “There is an excess of *tutela* actions because ordinary justice is slow, inefficient, and as *tutelas* increase, of necessity, it will be slower and more inefficient.”<sup>298</sup>

In a sample of fifty-six judges surveyed as part of a 1995 Ministry of Justice study of the *tutela*, 93% said it was an effective mechanism for the protection of rights and 95% believed that the problems associated with its use could be resolved. However, 79% concluded that law schools were not providing sufficient training to enable future judges to resolve problems of constitutional law.<sup>299</sup>

As justices differ in their assessment of the *tutela*, so do others in the society. “The *tutela* has been like a tank of oxygen for the judicial system,” according to Gustavo Zafra, dean of the Javierana University law school. “The law has ceased to be the monopoly of judges and 75,000 lawyers.” Instead, courts must now speak the language of citizens, much like the Vatican’s mandate that priests turn and face their congregations and celebrate Mass in contemporary languages.<sup>300</sup>

Mauricio García, who heads the Center of Judicial Investigations at the Universidad de los Andes, credits the action with improving equal rights,<sup>301</sup> and Manuel José Cepeda, dean of the law school at the same university, says the new action has proved that the law can apply to everyone—“a novel concept in Colombia.”<sup>302</sup> He points out that if courts acted more expeditiously on ordinary cases and lawyers engaged less in

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295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. Gutiérrez, *supra* note 285.

300. Darling, *supra*, note 3.

301. Mercer, *supra* note 254.

302. Darling, *supra* note 3.

intentionally delaying tactics to prolong such litigation, fewer *tutelas* would be filed.<sup>303</sup>

In a recently published volume on political reform in Colombia, Cepeda elaborated on his assessment of the role of the Constitutional Court, in general, and the *tutela*, in particular. Cepeda lauds the *tutela* as "a very successful instrument for the redistribution of power."<sup>304</sup> He observes that the accessibility of the *tutela*, now used by even "marginalised citizens," has "contributed to the spread of constitutional values."<sup>305</sup> Cepeda concludes that, "[t]he court has indeed been a leader of a revolution protecting fundamental rights: it has 'taken rights seriously'; it has conceived itself as a 'forum of principles.'"<sup>306</sup>

The Colombian public generally voices strong support for the *tutela*. In a 1996 poll, more than 77% said that the actions help solve the problem of the judicial system's inefficiency.<sup>307</sup> Despite its popularity among litigants and the public, from its inception the *tutela* has been the object of fierce attacks. In 1997, the Colombian Congress came close to approving Constitutional reforms of the controversial action. Congressional hearings provided a platform for a highly publicized turf battle with the Constitutional Court on one side and the Supreme Court and the Council of State on the other.<sup>308</sup> One of the major points of contention was the Constitutional Court's willingness to allow use of *tutelas* as a means of attack on rulings of the Supreme Court and the Council of State.<sup>309</sup> The other was the heavy work load *tutela* appeals have imposed on these tribunals. In the end, on November 18, 1997, Congress sided with the Constitutional

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303. *Id.*

304. Cepeda, *supra* note 6, at 91.

305. *Id.*

306. *Id.*

307. Mercer, *supra* note 254.

308. See, e.g., *La tutela, entre dos fuegos*, EL PAIS (Cali), Sept. 3, 1997; *Se ahonda pugna entre cortes por tutela*, EL TIEMPO (Bogotá), Sept. 4, 1997; *'Si se aprueba reforma a la tutela, que se acabe la Corte'*, EL TIEMPO (Bogotá), Sept. 5, 1997; *No son omnipotentes*, EL TIEMPO (Bogotá), Sept. 11, 1997; *Nuevo round de cortes por tutela*, EL ESPECTADOR (Bogotá), Sept. 11, 1997, at A14; *Reformas a la tutela, un debate sin fin*, EL TIEMPO (Bogotá), Sept. 11, 1997.

309. See, e.g., *La tutela vuelve a enfrentar a cortes*, EL TIEMPO (Bogotá), Aug. 31, 1997; *Hay conspiración contra la tutela*, EL TIEMPO (Bogotá), Sept. 6, 1997; *'Tutelazo' al Consejo de Estado*, EL TIEMPO (Bogotá), Sept. 12, 1997; *Tutela no puede atentar contra la seguridad jurídica*, EL TIEMPO (Bogotá), Nov. 10, 1997; *Nueva desautorización entre Cortes*, EL TIEMPO (Bogotá), Nov. 10, 1997.

Court and refused to weaken the popular new constitutional mechanism.<sup>310</sup>

## V. COMPARATIVE PERSPECTIVES ON THE COURTS, CULTURE WARS, AND LAW'S TRANSFORMATIVE POWER

### A. *Sources for Colombia's Constitutional Interpretation*

What accounts for how readily the justices of the Colombian Constitutional Court have embraced such generous interpretive methodologies and willingly used them in an activist defiance of many traditional cultural beliefs? One obvious explanation for the mindsets of the justices of the Colombian Constitutional Court is that they are not interpreting provisions adopted in 1791 or 1868 but a Charter that is still in its infancy and whose original meaning is closer at hand.<sup>311</sup> Indeed, Justice Cifuentes pointed to that as one factor differentiating the Colombian and U.S. situations.<sup>312</sup>

A related explanation for the Colombian Court's expansive interpretations, and one that Justice Cifuentes also mentioned, can be traced to the fact that the new constitution, like contemporary constitutions generally, is much longer and more explicit than our federal constitution. (When adopted it was one of the world's longest national constitutions.) As discussed above, the Constitution has numerous provisions establishing rights ranging from equality to free development of personality and imposes affirmative duties to promote many of these rights. Title I of the Constitution (Articles 1-10) sets out fundamental principles, among which the most significant for the Court's work have been Article 4's recognition of the Constitution as law, and as the supreme law of the land (*norma de normas*), Article 1's principle that Colombia is an *estado social de derecho* (social

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310. John Gutiérrez, 'Congreso no dió la talla en reforma de tutela,' EL TIEMPO (Bogotá), Nov. 28, 1997.

311. But close proximity to the framing of the document also carries with it a heightened awareness of the complex and diverse motives of the founders and of the corresponding difficulty of ascertaining either their subjective intent (which Justice Scalia himself rejects as a proper interpretive guide) or the "objective intent" or "import" of their work in a static sense.

312. Interview with Eduardo Cifuentes Muñoz (Dec. 11, 1998), *supra* note 107.



state of law), and the principles of participatory democracy, solidarity, and *convivencia* (coexistence) recognized in Articles 1 and 2.<sup>313</sup> And in keeping with the new Constitution's acceptance of the need for limits on both public and private centers of power, the protection of many of its rights extends to both public and private actors.<sup>314</sup>

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313. CONST. POL. COL. art. 1:

Colombia is a social state of law, organized in the form of a unitary republic, decentralized, with autonomy of its territorial entities, democratic, participatory and pluralist, founded in respect for human dignity, work, and the solidarity of the people who comprise it and in the prevailing of the general interest.

[Colombia es un Estado social de derecho, organizado en forma de república unitaria, descentralizada, con autonomía de sus entidades territoriales, democrática, participativa y pluralista, fundada en el respeto de la dignidad humana, en el trabajo y la solidaridad de las personas que la integran y en la prevalencia del interés general.]

Article 2 describes the essential ends of the State as:

To serve the community and promote general prosperity and to guarantee the effectiveness of the principles, rights, and duties consecrated in the Constitution; to facilitate the participation of all in the decisions that affect them and in the economic, political, administrative, and cultural life of the nation; to defend the national independence, maintain territorial integrity and to ensure peaceful coexistence and the existence of a just order.

The authorities of the republic are instituted to protect all people who are residents in Colombia, in their life, honor, goods, beliefs, and other rights and liberties, and to ensure the compliance with the social duties of the State and private individuals.

[CONST. POL. COL. art. 2:

Son fines esenciales del Estado: servir a la comunidad, promover la prosperidad general y garantizar la efectividad de los principios, derechos y deberes consagrados en la Constitución; facilitar la participación de todos en las decisiones que los afectan y en la vida económica, política, administrativa y cultural de la nación; defender la independencia nacional, mantener la integridad territorial y asegurar la convivencia pacífica y la vigencia de un orden justo.

Las autoridades de la república están instituidas para proteger a todas las personas residentes en Colombia, en su vida, honra, bienes, creencias y demás derechos y libertades, y para asegurar el cumplimiento de los deberes sociales del Estado y de los particulares.]

314. As noted, the text of the Constitution expressly contemplates its application to private power in at least some instances. Thus Article 86 provides that "the law will establish those cases in which the action of *tutela* will proceed against individuals charged with rendering a public service or whose conduct seriously and directly affects the collective interest, or with respect to whom the applicant is found in a state of subordination or vulnerability." CONST. POL. COL. Art. 86. In its gender cases alone, the court has granted relief against private actors ranging from private schools to husbands. As previously noted, other rights under the 1991 Constitution are expressly applicable to private entities. For example, Article 15 provides, in part: "All people have the right to personal and family intimacy and to their good name. In the same manner, they have the right to know, update, and correct information that has been collected about them in data

Looking not just to its length or to the number of rights the Colombian Constitution protects but to the nature and scope of these rights has greater explanatory value. As we have seen, in keeping with the principle of a social state of law, the constitution protects not only so-called "first generation" civil and political rights, understood as negative, individual rights, but also affirmative and collective second and third generational rights such as social, economic, and cultural rights. In refusing to accept a limited conception of "fundamental rights," the Court has furthered the positive rights regime of the constitution. The Court grounds its broad interpretive hermeneutic "in the constitutional mandate according to which, the Colombian State is founded on the value of human dignity, which determines, not only a negative duty of non-interference but also a positive duty of protection and maintenance of the conditions of life with dignity."<sup>315</sup> In this sense, like some originalists of U.S. jurisprudence, the Colombian Constitutional Court roots its jurisprudence in the original intent or spirit of the constitutional assembly, which sought to empower those previously left outside the political process.

The Colombian Constitutional Court's interpretive approach cannot be fully appreciated without reference to certain fundamental constitutional principles that have guided the Court's early work. An early opinion by Justice Ciro Angarita Baron, writing for a *tutela* panel in 1992, illustrates the importance of these principles to Court's interpretive approach. Ruling on a public health and sewage claim, the opinion

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banks and in files of public and private entities." CONST. POL. COL. art. 15. And Article 20 recognizes the social responsibility of the mass media and guarantees "the right to corrections under equal conditions." CONST. COL. POL. art. 20. Article 6 provides that "Individuals are responsible before the authorities for infringing the Constitution and laws. Public servants are for the same reasons and for omissions or acting beyond their limits in the exercise of their functions." CONST. POL. COL. art. 6.

Perhaps nowhere is awareness of the increasing significance of private power (and the corresponding impotence of public authority) more heightened than in Colombia. Writing in *El Tiempo*, Antanas Mockus recently described Colombia's "free market in violence" as the "Colombian Sickness." Antanas Mockus, "La enfermedad colombiana," EL TIEMPO (Bogotá), Mar. 25, 1998. According to Mockus, in Colombia there is even "a fragmentation and privatization of what in other societies is the last resort: the use of force." *Id.* With a "gradual substitution of private justice for state justice or divine justice," Colombia has 25,500 violent deaths a year instead of the 3,000 such deaths that would be expected if it were no more violent than other countries as a whole. *Id.*

315. Sentencia No. T-696/n.d., as quoted in DESARROLLO JURISPRUDENCIAL DE LA CONSTITUCIÓN POLÍTICA, *supra* note 82, at 105.

addresses several important issues concerning the nature of the new Constitution, the role of the Court, and its interpretive methodology, beginning with Article 1's definition of Colombia as an *estado social de derecho*—the first of Title I's fundamental principles—and explaining it as combining the concepts of a social welfare state with those of a democratic constitutional state.

Justice Angarita describes the new constitution as consecrating new values and rights, such as second and third generational socio-economic and communal rights, and creating mechanisms such as participatory democracy,<sup>316</sup> political and judicial control of power, and a catalog of principles and fundamental rights that inspire all interpretation and functioning of the political organization. In turn, these changes from a liberal state to a social state of law have changed the judiciary's role not just quantitatively, by adding to the law, but qualitatively as well, producing "a new manner of interpreting the law."<sup>317</sup> Two principles have pushed the Court into dispensing with tradition in favor of an active judicial role. First, the Court does not see the law itself as a sacrosanct "emanation of the popular will."<sup>318</sup> Like the constitutional assembly, the Constitutional Court seeks to defend fundamental rights, even if those rights run counter to popular opinion. Secondly, the Court is concerned with material justice.<sup>319</sup>

Obviously, this approach to law and the process of constitutional interpretation raises separation of powers issues. The Court seems willing to resolve these issues in favor of broad judicial power, and the legislature, with its recent affirmation of the *tutela*, seems to support this kind of judicial pressure. The Court in the sewage case exercised power to declare means of enforcing constitutional guarantees where the legislature had

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316. For description of the constitution's mechanisms of participatory democracy, including mandatory voting, recall of elected officials, the plebiscite, the referendum, popular participation in constitutional reform, popular consultation, the *cabildo abierto* (a Spanish mechanism somewhat like the town meeting), legislative initiative, popularly elected local and regional administrative boards, and mandatory education about the constitution in public and private schools, see Raúl Osorio Vargas, *La participación: derecho al derecho*, in *CONSTITUCIÓN 1991: CAJA DE HERRAMIENTAS* (Mario Jurich Durán ed., 1992).

317. Sentencia No. T-406/92.

318. *Id.*

319. *Id.*

failed to adopt implementing statutes.<sup>320</sup> Acknowledging that under the prior system fundamental rights were reduced to having only symbolic force, the opinion characterizes the Constitution as adopting a "new strategy" for making fundamental rights effective by giving priority to judges, rather than the administration or the legislature, for this responsibility. "Today, with the new Constitution, these rights are those that the justices say through the *tutela* decisions."<sup>321</sup> The Court refused to limit fundamental rights to those that are of immediate application or to those listed as fundamental rights in Chapter 1 of Title II of the Constitution.<sup>322</sup> Taking what it termed an intermediate position on whether social, economic, and cultural rights were judicially enforceable, it declared that, in the absence of implementing legislation, *tutela* justices had the authority to give immediate protection to fundamental rights to the point of soliciting the intervention of the authorities competent to provide services needed to put an end to the violation. This resolution was deemed compatible with a contemporary interpretation of separation of powers under which

a judge can become an instrument of pressure against the legislature, in such a manner that if it does not want to see its sphere of decision invaded by other organs, it will accept its responsibilities for developing the law.... This counter-balance of powers...is the best guarantee of the effective protection of the rights of the members.<sup>323</sup>

In reaching its decision, the Court says that it will consider both "the seriousness of the violation of the fundamental right in light of the constitutional texts [and] the economic possibilities for solving the problem."<sup>324</sup>

The opinion concluded that the right to public health extended to the completion of construction of a sewage system, in circumstances where fundamental constitutional principles and rights such as human dignity, life, and the rights of the disabled

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320. *Id.*

321. *Id.*

322. *Id.* The opinion referred to the debates in the constitutional assembly to support its resolution of these points.

323. *Id.*

324. *Id.*

were threatened, and thus was susceptible of being protected through a *tutela*.

The Court's early work reflects the thinking of German and Spanish legal theorists. German philosopher Theodor Viehweg's *Topics and Law* has been particularly influential, providing support for an interpretive approach that is problem-oriented and highly contextualized.<sup>325</sup> As Justice Gaviria has written,

what Viehweg says to us is to forget the axiomatic character of law, that the law does not have an axiomatic character, it has a searching (or investigative, *cetético*) character, a fundamentally problematical character, an open (*aportético*) character. What one does is to search, to investigate which is the principle that most clearly is going to satisfy the necessities in the resolution of a particular case.<sup>326</sup>

And this means that no longer is the legislator seen as sovereign and the judge as secondary, a mere vicarious applier of the sovereign's norms. Rather, the judge is going to play the role of the protagonist.<sup>327</sup>

Justice Cifuentes has embraced a highly contextualized interpretive methodology, which he describes as the constitutionalism of poverty. He contends that the Court's jurisprudence is based in the reality of the Colombian situation, especially the country's poverty. He recognizes the constitutional mandate of positive rights, but he also grounds the Court's role in "social reality marked by inequality and social injustice."<sup>328</sup> In this Cifuentes distinguishes Latin American democracies from older democracies as he argues that judicial activism is necessary lest "the Constitution. . . be subsumed in lethargy and lose social credibility."<sup>329</sup> Cifuentes places the *valor* (value, force, validity) of

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325. *E.g.*, Interview with Catalina Botero, *supra* note 140; Conversation with Alexander Springer, Bogotá, Colombia (Dec. 14, 1998). See generally THEODOR VIEHWEG, TOPICS AND LAW (W. Cole Durham, Jr., trans., 1993). Viehweg, a law professor at Mainz, and Chaim Perelman were leading figures in the 1950s European revival of interest in Aristotelean rhetoric. Bernard E. Jacobs, *Book Review: Ancient Rhetoric, Modern Legal Thought, and Politics: A Review Essay on the Translation of Viehweg's "Topics and Law,"* 89 Nw. U. L. Rev. 1622 (1995).

326. Carlos Gaviria Díaz, *La interpretación constitucional*, in NUEVAS CORRIENTES DEL DERECHO CONSTITUCIONAL COLOMBIANO, *supra* note 7, at 121, 133.

327. *Id.*

328. See Cifuentes, *supra* note 7, at 126, 127.

329. *Id.*

the Constitution in the hands of the judiciary, and identifies the judicial activism as "a reflection of a progressive Constitution and of a reality characterized by poverty."<sup>330</sup>

### B. Originalism and Culture Wars

Turning back to the Constitutional Court's gender decisions, we have seen that they are an important part of the overall equality struggle in Colombia today. The justices on this new Court view it as part of their role to be leaders in the society's ongoing battles over respect for human rights, with a special responsibility for protecting the rights of those who have been unable to gain such respect through the ordinary political processes. Indeed, except with regard to abortion and some matters of sexual orientation, they generally have used the constitution as a weapon against traditionalism, interpreting it to defy longstanding social views, not just on gender and sexual orientation, but also on other controversial topics such as the right to use drugs,<sup>331</sup> and the right to die.<sup>332</sup>

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330. *Id.* See also Eduardo Cifuentes Muñoz, *Derechos fundamentales e interpretación constitucional*, in NUEVAS CORRIENTES DEL DERECHO CONSTITUCIONAL COLOMBIANO, *supra* note 7, at 7. Other justices on the Constitutional Court, even the more conservative ones such as José Gregorio Hernández also express positive views on the activist role of the Court. Interview with José Gregorio Hernández, *supra* note 160; interview with Antonio Barrera Carbonell, *supra* note 142.

331. See Sentencia No. C-221/94 (ruling that the penal code's criminalization of the possession and use of small amounts of marijuana or cocaine violates the right to freely develop one's personality).

332. As the U.S. Supreme Court noted in rejecting arguments for a federal constitutional right to die in *Washington v. Glucksberg*, 521 U.S. 702, 718, n.16 (1997), the Colombian Constitutional Court had recently accepted similar arguments under the Colombian Constitution. The previous month, the Colombian justices had ruled by a vote of six to three in favor of a constitutional right to doctor-assisted euthanasia for the terminally ill, invalidating Article 326 of the Penal Code's treatment of such euthanasia as homicide punishable by six months to three years imprisonment. Justice Carlos Gaviria Díaz wrote the May 20th opinion for the Court, Sentencia No. C-239/97. See *Fallos humanos: un aval para el derecho a morir*, EL TIEMPO (Bogotá), Dec. 27, 1997. See also Serge F. Kovaleski, *Colombian High Court Legalizes Mercy Killing: Vatican Assails Assisted Suicide Decision*, HOUSTON CHRON., Aug. 24, 1997, at 28A, cited in CRUMP, GRESSMAN, & DAY, CASES AND MATERIALS ON CONSTITUTIONAL LAW 563-64 (1998): "In announcing the decision, the court's president explained, 'The State has the duty to protect life, but this duty is not absolute—it has a limit. There is not just one morality. Every person can determine their own sense of life, whether it is sacred or not.'" *Id.*

A superficial reading of the Constitutional Court's jurisprudence may lead to an exaggerated view of the degree to which the Court's opinions, outside the ambit of abortion, conflict with teachings of the Catholic Church. However, much of the Court's jurisprudence is fairly consistent with liberal strains of Catholic social teachings. Indeed,

Looking to the U.S. Constitution for a comparative perspective, after more than 200 years, the proper balance between judicial review and deference to the ordinary political processes and the role that tradition should play in U.S. constitutional interpretation (and how and when it should be determined) continue to be hotly debated.<sup>333</sup> In recent gender discrimination decisions, Justice Antonin Scalia derides the majority for taking sides and imposing constitutional standards in what he sees as mere cultural debates that should be left to the political processes. In his dissenting opinion in *U.S. v. Virginia (VMI)*, he decries the Court's disregard of tradition and claims that the democratic system is destroyed "if the smug assurances of each age are removed from the democratic process and written into the Constitution."<sup>334</sup>

Reiterating his "originalist" view that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down," he characterizes the majority's willingness to depart from society's traditions as the guide to constitutional interpretation as "not law, but politics-smuggled-into-law."<sup>335</sup> If the U.S. Supreme Court as a whole has yet to embrace Scalian hermeneutics over more traditional views of the constitution as a living document to

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Justice Cifuentes' explication of "the constitutionalism of poverty," Cifunetes, *supra* note 7, bears striking similarities to liberation theology's "the option for the poor."

333. In January 1998, the Constitutional Law Section of the American Association of Law Schools devoted its program at the annual AALS meeting to Justice Scalia's attack on the role the federal judiciary has played in what he terms our society's "culture wars" and to his accompanying charge in *Romer v. Evans*, 517 U.S. 620 (1996), (in which the majority invalidated a Colorado state constitutional amendment that discriminated against gays, lesbians, and bisexuals) that modern constitutional interpretations represent only the "dogma of the educated elite." "Constitutional Law: Dogma of the Educated Elite?," Section Program of the Constitutional Law Section, 1998 Annual Meeting of the American Association of Law Schools, Jan. 9, 1998, San Francisco, Cal.

334. *U.S. v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting). In an earlier dissent in *J.E. B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 160 (1994), he attacked the majority's opinion holding that gender-based peremptory challenges to jurors violate equal protection, saying that "the Court's legal reasoning in this case is largely obscured by anti-male-chauvinist oratory." "Today's opinion is an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes (or as the Court would have it, the genders), and how sternly we disapprove the male chauvinist attitudes of our predecessors." *Id.* at 156.

335. *U.S. v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting).

be interpreted in light of our evolving values and traditions,<sup>336</sup> the normative comfort margin may be tightening.<sup>337</sup>

When asked about the role of the court in what some might term "culture wars," Justice Cifuentes considered it very difficult for a Constitutional Court to separate itself from the society's problems and cultural conflicts.<sup>338</sup> In his view, the court should not close cultural discussion but it must ensure that the dialogue takes place within a framework that respects constitutional values. He stated that the Colombian Court's function today is very different from the role the U.S. Supreme Court can play because "public opinion in the United States is more evolved, is more accustomed to the values of liberty and equality, it is a public opinion that even can be much more evolved than the Supreme Court of Justice itself in some cases." In contrast, in Colombia, "the lack of an informed public opinion has obligated the Constitutional Court to fill a vacuum, in a certain sense."<sup>339</sup> He stressed that the Constitutional Court must be aware that its role is situational and temporal; "it is not trying to close the possibilities that the same society question itself and resolve its problems. And thus, the Court's decisions have to stimulate this public discussion, this public debate, without substituting for it."<sup>340</sup>

Despite this judicial activism, the Constitutional Court does view constitutional intent and purpose as relevant to its interpretive task. The Court at times refers to the intentions or purposes of the Constituent Assembly to support its decisions, as in this example from the opinion prohibiting denial of admission to military institutions based on sexual orientation:

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336. See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), Joint Opinion of JJ. O'Connor, Kennedy, and Souter:

Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer bounds of the substantive sphere of liberty which the Fourteenth Amendment protects. See U.S. CONST. amdt. IX ...

The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. *Id.* at 848, 849.

337. See *Washington v. Glucksberg*, 521 U.S. 702 (1997) (finding no fundamental right to physician-assisted suicide in the nation's history, traditions, and practices).

338. Interview with Eduardo Cifuentes Muñoz (Dec. 11, 1998), *supra* note 107.

339. *Id.*

340. *Id.*



The constitutional assembly wanted to raise to the status of fundamental rights the liberty related to vital choices and individual beliefs, and thus emphasized the liberal principle of no institutional interference in subjective matters that do not constitute attempts against social coexistence and organization.<sup>341</sup>

As this quotation illustrates, the Court's activism itself can be defended as an originalist position if one accepts that the constitutional assembly intended the Court to play a transformative role in developing the new Constitution, and particularly its fundamental principles of a "social state of law," "coexistence," and "participatory democracy." According to Dean Cepeda, the Constitutional Court has reinterpreted the traditional function that judicial actions to enforce constitutional rights play in representative democracies in light of the new Constitution's commitment to participatory democracy: "Now [silent majorities] speak with a strong voice in what might be called a strategic alliance of the powerless with the judges to protect fundamental constitutional rights."<sup>342</sup> Cepeda concludes that the Court's decisions "reveal a philosophy that goes beyond the debate between new left and new right. They have preserved the original consensus that informed the Constitution. The Court has generally been on the side of those without access to power in the political process, reflecting the spirit of the Constitution."<sup>343</sup>

In short, the Constitution and the members of the Colombian Court reject the formalistic proposition, implicit in Justice Scalia's criticisms, that law is something entirely separate and apart from politics, and that the distribution and redistribution of power is never to be the explicit subject of judicial opinions. This reduces if not alleviates concerns about "smuggling" politics into constitutional interpretation.

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341. Sentencia No. T-097/94. More complex questions about the "intent" of the framers are raised by issues that the constituent assembly considered and rejected or failed to include in the final draft of the constitution. For example, both abortion and the right to die fall in this category. Dean Cepeda argues in his *La constitución que no fue* (*The Constitution That Wasn't*) that Article 94's recognition of unenumerated rights may be looked to as textual warrant for providing protection in some such cases. CEPEDA, *supra* note 79, at 27-28.

342. Cepeda, *supra* note 6, at 76.

343. *Id.* at 91.

Something more than the Colombian Court's confidence in its ability to divine and apply societal traditions at the time the Constitution was adopted is at play here. The Colombian judges are convinced that their Constitution must be read not as merely enshrining the values of their society in 1991 but as affording protective shelter to fundamental human rights that have yet to be fully accepted or embraced by the majority of the society. In his separate opinion in the 1997 abortion case, Justice Cifuentes, joined by two other members of the Court, emphasized that "there are matters and subjects which, like the one under analysis, pertain to the private and moral sphere of the person and whose definition is outside the democratic processes."<sup>344</sup> While the majority disagreed as to a constitutionally protected right to abortion, in other areas the court has refused to rely on the political processes to protect minority rights. Justice Cifuentes explained how his Court views its role:

[T]his is a role that the Constitutional Court has assumed because it is aware that the function of a constitutional court is not only to restrain and to reiterate the rights of powerful groups but, without engaging in populism or demagoguery, really the function of a constitutional court is to assume in the social and political arena, the defense of those groups that actually have been at the margin of the institutions, at the margin of social development and economic development, and this is the case, naturally, with women. Women, homosexuals, low income workers, children, in the end all these groups of persons are the groups that have been most advantaged by the decisions of the Constitutional Court. Because the Constitutional Court is aware that through the institutional mechanisms of political representation, the demands of these groups are not duly articulated, so that it is the Constitutional Court, at least with respect to the judicial system, that has to take responsibility for helping these groups in a much more direct and decided manner....<sup>345</sup>

In this sense, the Colombian Constitutional Court's actions present a modified example of the type of transformative role Ruti Teitel understands the transitional judiciary to play in periods of political transformation. In contrast with ordinary

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344. Salvamento de voto a la Sentencia No. C-013/97.

345. Interview with Eduardo Cifuentes Muñoz (Dec. 11, 1998), *supra* note 107.

periods where the counter-majoritarian problem is a real issue, transitional times may well call for activist adjudication that can insure rights and thus establish and strengthen the legitimacy of the nascent democracy.<sup>346</sup> According to Teitel, though the U.S. transition was not as dramatic as that in many contemporary transitional societies, the federal constitution itself may be better understood through the supplemental lens of transitional constitutionalism.<sup>347</sup> She suggests the implications of such a perspective for constitutional interpretation:

A transitional perspective contributes a unique view to the debates over the ongoing relevance of "original intent" to the contemporary significance of relevant constitutional provisions. The transitional perspective shares with the "fidelity" school of interpretation the understanding that constitutions are best examined in light of historical and political contexts, but it adds to the understanding of constitutions as codifying purposes that are transformative and dynamic.<sup>348</sup>

In short, the justices of the Colombian Constitutional Court readily admit to charges of judicial activism. They generally describe their interpretive philosophy as "systematic," combining the use of text, context, history, and other interpretive aids, rather than using what we refer to in the United States as an "originalist" approach.<sup>349</sup> In Colombia, Justice Cifuentes noted, the debate over "originalism" versus a "living constitution" really does not exist as it is presented in the United States.<sup>350</sup> He explained that for the Colombian Court, the intent of the constitutional assembly is a secondary criteria; it is more important to interpret the constitution as an "instrument of *convivencia* (coexistence)" that "offers solutions for each generation and thus is not anchored to a vision of the past."<sup>351</sup> Justice Martínez echoed this view, saying that a constitutional justice "has to interpret for the time and the era in which he is called upon to interpret the norm" and that "one does not

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346. Teitel, *supra* note 19, at 2032-34.

347. *Id.* at 2070-75.

348. *Id.* at 2074-75 (citations omitted).

349. *E.g.*, Interview with Antonio Barrera Carbonell, *supra* note 142; Interview with Eduardo Cifuentes Muñoz (Dec. 11, 1998), *supra* note 107.

350. Interview with Eduardo Cifuentes Muñoz (Dec. 11, 1998), *supra* note 107.

351. *Id.*

interpret a norm for the past but for the present."<sup>352</sup> An open norm like the Colombian norm of *convivencia*, he acknowledged, "by its own structure, allows the ideology of the judge to become involved."

C. *The Future of Colombian Gender Jurisprudence: More Than Just Words?*

Given the Colombian Constitutional Court's willingness to interpret the country's new constitution as a tool for changing cultural values, its evolving gender jurisprudence may provide insights on the fundamental question of whether constitutions are up to the task. As Joel Bakan queries, can a constitution be more than "just words"?<sup>353</sup> The question merits further study and must await future developments but some observations are possible.

The Colombian Constitution's creation of a new and independent Constitutional Court to oversee the protection of the fundamental rights it recognizes and its provision of expedited procedures for their protection gives reason for optimism. Establishing this new tribunal has led to friction with the preexisting judicial bodies but it also has allowed the Constitutional Court to take a fresh start and interpret the new charter free of backlogs or corruption that beset other parts of the judicial system. Although analysis of other courts is beyond the scope of this article,<sup>354</sup> South Africa's recent experience with its new Constitutional Court<sup>355</sup> lends further support to the thesis

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352. Interview with Alejandro Martínez, *supra* note 260.

353. See also BAKAN, *supra* note 41. In this recent study of the Canadian Charter of Rights and Freedoms, Bakan is doubtful about the transformative power of constitutional law. With respect to the Canadian Charter, much of his pessimism is based on its failure to, as he puts it, take private power seriously. *Id.* For discussion of whether the Bill of Rights of the 1996 South African Constitution has any "horizontal" effects on private companies or individuals, see Dickson, *supra* note 42, at 548-49. See generally ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1993). If concern about the extent to which private centers of power are beyond the reach of constitutional law were the only reason for doubt about the role constitutions can play in social change, there would be more room for optimism under the Colombian Constitution. See *supra* text accompanying notes 41-42.

354. For a summary of the history of constitutional courts, generally and in Latin America, and for a comparative table of the rules governing their composition, see JAVIER TOBO RODRÍGUEZ, LA CORTE CONSTITUCIONAL Y EL CONTROL DE CONSTITUCIONALIDAD EN COLOMBIA 35-36, 106-114 (1999).

355. See Dickson, *supra*, note 42, at 548-49. On the new Constitutional Court and its

that a separate and independent constitutional court that takes its task seriously can be key to the success of transformative constitutional law. The role of new Constitutional Courts in other parts of Latin America and in the transitional societies of Central and Eastern Europe are providing further evidence for examining this thesis.<sup>356</sup>

Colombian jurists and activists I interviewed generally see the early experiences under the new Constitution as evidence that constitutions can be more than paper. Justice Cifuentes admits that one of the greatest risks of Latin American constitutions is that they proclaim rights that are very generous but are not complied with or enforced in reality. He emphasizes that the new Colombian Constitution directly addresses the divorce between law and reality that has existed in Latin America since the days of the colonial conquest, reflected in a saying popular throughout the region, "se obedece pero no se cumple" (we obey but we do not comply with or follow). He views the *tutela* as one of the mechanisms designed precisely to immunize the Constitution against this "virus." And the Social State of Law is not simply a State of Law but imposes an obligation on the political powers to provide the material conditions so that these rights can be a reality. Thus the effectiveness of rights has been made a theme of the positive constitutional law itself. The Court's activism is an attempt to avoid the great risk that the nominal constitution not be a real constitution, which he sees as the challenge facing his and future courts.<sup>357</sup>

Justice Martínez expressed his belief that when a constitution has mechanisms like the action of unconstitutionality and the *tutela*, it is capable of doing things not just on paper but in reality. He believes that the Court's jurisprudence has opened society's eyes. The big change in judicial perspective has been to make a pedagogy of its

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early interpretive approach, see Patric Mtshaulana & Melanie Thomas, *The Constitutional Court of South Africa: An Introduction*, 3 REV. OF CONST. STUD. 98 (1996); Hugh Corder & Dennis Davis, *A Ringing and Decisive Break with the Past?*, 3 REV. OF CONST. STUD. 141 (1996).

356. See Teitel, *supra* note 19. On women and the transitional societies of Central and Eastern Europe generally, see WOMEN AND DEMOCRACY, *supra* note 19; Frances Elisabeth Olsen, *Feminism in Central and Eastern Europe: Risks and Possibilities of American Engagement*, 106 YALE L.J. 2215 (1997).

357. Interview with Eduardo Cifuentes Muñoz (Dec. 11, 1998), *supra* note 107.

constitutional thinking. Its activism has not been limited to placing in its opinions what is really happening in society but extends to explaining why it has done so. He explains that the Court has had to play a more activist role than they would have otherwise wanted because of the reality that someone had to give the society a beacon to walk toward and the parties and Congress had failed to do so. He also emphasizes that the Court's activist role in applying the 1991 Constitution is linked to providing solutions to the reality of the society's violence. He describes the Court as breaking a series of taboos that were factors that have generated violence in society.<sup>358</sup>

Without doubt the Constitution has had an impact on the real life of the people, according to Dean Cepeda. His certainty is based both on what people have told him about how their lives have been changed because they won—or lost—a *tutela* action, and on instances where he has been involved in decision-making in the university or the government when someone has said, "let's not do that because a *tutela* will be filed against us." The very idea of the Constitution was that it should no longer be—shall we say—a theology but should become an instrument of social change, he explains. What the *tutela* tried to do was to redistribute social power; rights are defined as powers; rights are powers. The *tutela* is the manner of making such power effective and in this sense, it is redistributing power in the society.<sup>359</sup>

María Cristina Calderón echoed the view that people have come to think of rights as power. Before, the people did not believe in justice of the laws. Before, the State was the axis; the *tutela* has changed the rules of the game. Now the rights of the individual are first; before the State was first.<sup>360</sup>

Of course, over-reliance on courts to protect human rights has its familiar dangers. One is that as courts and judges change so may their jurisprudence. Recent reports on the Colombian Constitutional Court give cause for concern about the future of the Court and thus of its jurisprudence supporting women's human rights. Seven of the nine current justices are serving eight-year terms that expire in 2001. The consensus among those interviewed was that the constitutional assembly made a

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358. Interview with Alejandro Martínez, *supra* note 260.

359. Interview with Manuel José Cepeda, *supra* note 81.

360. Interview with María Cristina Calderón, *supra* note 2.

mistake by failing to provide for staggered terms. Among the uncertainties were how many of the justices would serve their full terms and whether the Senate again would select the new justices as a package by consensus.<sup>361</sup>

The justices I questioned expressed their optimism that the court's jurisprudence on gender and other human rights would ensure, noting that public acceptance of the *tutela* should help ensure continuity in this regard. But others worried that even if the new justices want to remain faithful to the current court's jurisprudence, their task will be difficult given the enormous number of decisions it has issued and the paucity of material analyzing the decisions. And because most *tutelas* are decided by one of nine different panels of three justices, conflicts can exist; it is difficult for even the current justices to stay abreast of all the decisions.<sup>362</sup>

Judicial activism of the type the Colombian Constitutional Court has engaged in also invites backlash.<sup>363</sup> So far attacks on the Court and proposals to "rein in" or restrict it have failed. But renewed attempts to discredit the Court may at least partially explain claims that the Court has become polarized and politicized. Since 1997, a 5-4 division on the Court has been reported.<sup>364</sup> Initially, the split was linked to events surrounding the release of the decision in the May 1997 "right to die" case.<sup>365</sup>

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361. When Justice Arango resigned in April 1998, the President sent the Senate the names of three candidates; the appointee selected was Justice Alfredo Beltrán, formerly a Supreme Court Justice. In February 1999, Justice Hernando Herrera resigned and was replaced by Justice Alvaro Tafur Galvis.

362. *E.g.*, Interview with Manuel José Cepeda, *supra* note 81; Interview with Rodrigo Uprimny, *supra* note 108.

363. For example, Nagle has criticized the Court's May 5, 1994, decision on personal drug use (the "Just Say Yes" decision) as "poorly arrived at...through uninformed libertarian activism" and details how it provoked extremely negative and potentially dangerous reactions against the new Constitutional Court by the executive and legislative branches. However, she concludes that in this case, the Court's decision ultimately led to the other branches' acknowledgment of the autonomy of the Court and thus may have strengthened the independence of the judiciary. Nagle, *supra* note 5, at 85-90.

364. See *El 5-4 de la Corte Constitucional*, EL TIEMPO (Bogotá), Aug. 11, 1997, at 3A, cited in *Magistrados de la Corte radicalizan división*, EL TIEMPO (Bogotá), Sept. 30, 1998.

365. John Gutiérrez, *Pugna constitucional*, EL TIEMPO (Bogotá), Sept. 30, 1998 (reporting that the division began May 20, 1997 when Justice Cifuentes resigned as Vice-president of the Court because of changes he claimed that had been made to part of the opinion in the "right to die" case, causing Justice Gaviria, who had written the opinion, to return from a trip to Switzerland to respond to Cifuentes' accusations). Note also Interview with Eduardo Cifuentes Muñoz (Dec. 11, 1998), *supra* note 107; Interview with Manuel José Cepeda, *supra* note 81.

Beginning in late September 1998, reports of increasing politicization and polarization on the Court were almost daily fare in the country's media.<sup>366</sup> Justice Antonio Barrera Carbonell was moved to publicly defend the Court's independence and to deny the existence of internal conflicts:

[To say that the Court is politicized] is disrespectful of the Court because it has demonstrated that it is an independent Court, precisely in the manner in which it has made its decisions without taking into account the opinions of some who could consider them catastrophic. The Court has made the decision that corresponds to the law and has not yielded to the pressures of any class.

Absolutely nothing is happening in the Court, the same harmony reigns as always. In the Court, there are ideological debates as in all institutions that handle matters of national importance, but there is no internal problem here, there are not internal conflicts.

The truth shows that the Court has developed a rigorously juridical body of work and the proof of this is the prestige, both national and international, that the body has.<sup>367</sup>

The cases provoking these recent reports dealt with highly politicized issues related to the retroactivity of extradition legislation and legislators' immunity for their roles in acquitting former President Samper of charges of accepting campaign money from drug cartels.<sup>368</sup> But damage to the Court's credibility and prestige could have much broader effects. These criticisms of the Court are especially troublesome because they were aired at a time when proposals for reforming the 1991 Constitution were

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366. See, e.g., *¿Cambiar el congreso o reformar las Cortes?* EL TIEMPO (Bogotá) Sept. 30, 1998; *¿Qué pasa en la Corte?*, EL TIEMPO (Bogotá), Oct. 1, 1998.

367. "Somos una Corte independiente," EL TIEMPO (Bogotá), Oct. 5, 1998.

368. See, e.g., Luis Carlos Gómez, *Dos caras de la extradición en la Corte*, EL TIEMPO (Bogotá), Oct. 4, 1998 (interviewing Justice Vladimiro Naranjo, President of the Court and one of the four dissenting justices in the extradition case, and Carlos Gaviria Díaz, author of the majority opinion, who points out that other cases repudiate the rumored existence of two blocs on the Court); *Corte revisará tutela del 8,000*, EL TIEMPO (Bogotá), Oct. 3, 1998.



under consideration.<sup>369</sup> In the beginning the reform proposals primarily focused on Congress—with *El Tiempo* running a poll on whether the Congress should be replaced.<sup>370</sup> But attention turned as well to reform of the judiciary,<sup>371</sup> with judges of the Supreme Court and Council of State calling for “a thorough reform of the judiciary that is not just cosmetic.”<sup>372</sup> However, in December 1998, the Constitutional Court justices I questioned about this did not believe any eventual reforms would affect the *tutela* or the work of the Constitutional Court.

Even assuming that the Constitutional Court continues to be willing and able to take gender rights seriously, questions remain about the extent to which law can bring about change in people’s real lives. Justice Cifuentes’ opinion in the case on homosexuality in the military acknowledged the difficulties.

It should be noted that if on this topic the law has played an essential role in transforming societal beliefs, these still are found lagging behind in relation to the normative ideals. The values of tolerance and pluralism, fully adopted by judicial ordinance, must still overcome enormous obstacles in order to be fully assured in daily life.<sup>373</sup>

While the early years under the new constitution have proven to many Colombians that a constitution can be more than words, Justice Cifuentes cautions against over-estimating the capacity of the courts to produce rapid social change.

[The judiciary] is simply one stage, among many settings, where women have to act. . . . It seems positive to me that

369. See, e.g., Juan Lozano, *Extraña reforma*, EL TIEMPO (Bogotá), Sept. 28, 1998.

370. As of October 6, 1998, 69.3% of the 9,384 votes cast agreed that the current Congress should be closed and new congresspersons elected. EL TIEMPO (Bogotá), Oct. 6, 1998.

371. *¿Cambiar el Congreso o reformar las Cortes?*, *supra* note 366.

372. See *Palo de las cortes a proyecto de reforma*, EL TIEMPO (Bogotá), Oct. 15, 1998. Justice José Fernando Ramírez, President of the Supreme Court, argued that merely changing the manner of selecting justices was not sufficient: “A true constitutional reform must address the solution of serious problems like court congestion, access to justice, and impunity in criminal matters.” *Id.* The President of the Council of State, Judge Dolly Pedraza, reportedly referred to the *tutela* and the accusatory system as the type of constitutional issues that merit urgent consideration. *Id.* (The new Constitution replaced Colombia’s traditional inquisitorial system of criminal justice with an accusatorial system. See Cepeda, *supra* note 6, at 85).

373. Sentencia No. T-097/94.

they are trying to stimulate a more active and forceful participation by women in the political world, not only in the judicial world. Judicial decisions are little triumphs. But it seems to me that the political struggle could yield larger dividends for women because the process of validation and equality could be had in less social time. Victories through jurisprudence are slow victories.<sup>374</sup>

Similarly, former Justice Arango reflected on the important but limited role that law can play in bringing about social change.

Article 13 of the Constitution refers to equality and says that equality is real, does it not? And it absolutely prohibits all discrimination based on race, sex, religion, national origin, political convictions, etc. There can be no [such] discrimination for any purpose. To the contrary, the state must protect the weakest so that the equality will be real. . . . And the jurisprudence of the lower courts and the appellate courts and this court has been applying these principles . . . . Naturally, this is not a process of one day or of one year, it is a slow process. Because I do not believe that a society can be changed through laws as much as through education. Changing the way people live, what people think, reeducating the people is more than making laws. If you were to change people through laws, it would be very difficult. Because nothing is easier than making a law, and nothing is more difficult than enforcing it.<sup>375</sup>

## VI. CONCLUSION

It is too early to fully assess how effective the new Colombian Constitutional Court will be in its mission, as described by Justice Carlos Gaviria, "to make sure that people's fundamental rights do not just stay on paper." But Colombian women's rights advocates are taking *machismo* to court on a wide range of charges and they generally are finding a surprisingly receptive Constitutional Court. This experience is one that merits further observation by those of us who remain optimistic, if not convinced, that constitutional law can play a

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374. Interview with Eduardo Cifuentes Muñoz (July 5, 1995), *supra* note 38.

375. Interview with Jorge Arango Mejía, *supra* note 94.

transformative role in creating a culture of respect for fundamental human rights.