

THE COLOMBIAN TALE OF TWO LEGAL REVOLUTIONS*

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This Article focuses on a case study of Colombia’s judicial system by discussing the scope and competence of courts when facing legal revolutions. The term “revolution” is defined narrowly to mean the process of altering an existing constitutional system—either through constitutional amendments, or outside of such process—in order to achieve legal and social transformations. With this definition in mind, this Article aims to assess the role that Colombia’s courts play within said revolutions by evaluating two events in Colombian constitutional history: (1) the enactment of the 1991 Constitution; and (2) the implementation of the Peace Agreement with the Colombian Armed Revolutionary Forces (the FARC) after it was originally rejected in a plebiscite.

This Article will also draw a parallel between both events in order to demonstrate that constitutional courts are not the ideal arena to carry out “legal revolutions.” Rather, these revolutions should be fought in the political arena. To support this thesis, the 1991 constitutional revolution will be portrayed as a “down-to-top” process that had strong popular support and changed the judicial tradition of the highly formalist and conservative Colombian Supreme Court. On the other hand, during the second revolution explored by this Article, the Colombian Constitutional Court had to take a conservative approach in its implementation of the Peace Agreement due to the lack of popular support for that agreement. This decision resembled what Ran Hirschl called “hegemonic preservation.”

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Finally, this Article concludes that “legal revolutions” limit the counter-majoritarian powers that are exercised under substantive judicial review, and that such powers pose a threat to the judiciary’s legitimacy when the judiciary works as a “top-to-down” agent for legal revolutions.

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Introduction

Colombian legal and judicial histories are perfect examples for analyzing legal revolutions¹ that modify a country’s legal system. Both will be examined in this Article alongside the 1991 “pluralist revolution,” which led to the enactment of a new constitution in Colombia, and the 2016 “judicial revolution,” which was carried out by the political elites and the Constitutional Court (the Court) exemplifying the judicialization of a political process.

Moreover, this Article will demonstrate that the purposes of the aforementioned revolutions in Colombia were not to construct or impose a narrative and legal system on the defeated side, but to implement law that has been accepted by its putative subjects after much deliberation, mutual pledges, and compromise. However, revolutions can fail when the public perceives them as impositions from higher up institutions, such as Colombia’s Constitutional Court. This is because courts derive their powers from the Constitution and must therefore rely on legality. Hence, this Article discusses how courts can help achieve general public acceptance of the law that arises from revolutions, without seizing the public’s power to *make* law through deliberation.

I. The Narrow Concept of Revolution

Defining “revolution” can be a troublesome task. Many authors, at various historical moments and depending on moral-political conceptions, have given different meanings to this term.² By the seventeenth century, the

1. This might sound paradoxical; however, this is not a controversial approach. *See generally* Mark Tushnet, *Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power*, 13 INT’L J. CONST. L. 639 (2015).

2. Neil Davidson also proposes the following observation:

[Saint] Augustine may . . . have been the first person to use the term “revolution,” to mean both the type of eternal recurrence in which he claimed the Greeks believed and bodily reincarnation. Augustine could no more comprehend the

term took on a new meaning: “an irreversible movement beyond [a political point of origin], propelled by underlying social changes.”³ Today, revolutions are understood as synonymous to progress and resistance. Furthermore, today, revolutions are depicted as a political phenomenon marking a new beginning⁴ aimed at constituting a new polity.

How these revolutions take place is an even more contested question. Some revolutions are the result of violence that was provoked by a “social question”⁵ or by some sense of obligation to stop an ongoing injustice. These actions embody the ideas of “constituent power,”⁶ and “the will of the people.” For the narrow scope of this Article, however, revolutions can be defined as a sentiment of novelty, often accompanied by violence or violations of pre-existing rules,⁷ that call for radical change in the existing legal or social systems and seek to: (1) establish a new, stable political order; (2) re-incorporate forgotten social groups into the political realm; and (3) promote desired, moral principles such as freedom and equality.⁸

possibility of fundamental social change than the thinkers he polemicized against. He did believe that there had been progress in the earthly city of the world, but its limits had been reached by the establishment of the Christian church; the only significant change that remained for mortals was to gain admission to the City of God, a fate for which they were either predestined or not.

NEIL DAVIDSON, *HOW REVOLUTIONARY WERE THE BOURGEOIS REVOLUTIONS?* 10 (2012).

3. *Id.* at 13. Hannah Arendt argues against this point, claiming that “revolution,” as used in the Glorious Revolution, was marked to describe a “restoration” rather than a new beginning. Therefore, the “novelty” implication that we usually credit to present-day revolutions should be traced to both the American and French Revolutions. HANNAH ARENDT, *ON REVOLUTION* 33–43 (Penguin Books 2006).

4. See generally ARENDT, *supra* note 3.

5. As Bruce Ackerman recently explained, for Hannah Arendt “would-be revolutionaries should resist the temptation to place the problem of social and economic injustice at the center of their program. Rather than emphasizing ‘social questions,’ as [Arendt] calls them, they should concentrate on building new political institutions” Arendt’s definition was a result of contrasting the successful American revolution and the difficulties of the French revolution. For Ackerman, however, this view was erroneous because Arendt “[did] not move beyond the late eighteenth century to test her thesis against the experience of more recent revolutions on a human scale.” For Ackerman, therefore, the “social question” has been at the center of struggles in India, South Africa, and modern-day France. For purposes of this Article, we agree with Ackerman and depict how social questions have been at the center of the revolutions studied here. BRUCE ACKERMAN, *REVOLUTIONARY CONSTITUTIONS: CHARISMATIC LEADERSHIP AND THE RULE OF LAW* 41 (Harvard Univ. Press 2019).

6. Interestingly, a ruling from the Colombian Supreme Court of Justice stated that the essence of revolutions is the rupture of the pre-existing legal order—whether it is aimed against the entire State structure or directed only towards part of it. As a result, revolutions can never be studied under the positive legal system, as they will always be inoperative and illegal. As previously mentioned, a revolution can reject either the entire existing legal order, or only part of it. If only part of the existing legal order is rejected by the revolution, this means that the remaining part is accepted. Consequently, citizens of partial revolutions would remain subject to the surviving law. Lastly, a revolution’s validity is granted by being the intermediate legal order between the previous legality and the one sought to be established. See Corte Suprema de Justicia [C.S.J.] [Supreme Court], noviembre 28, 1957, Guillermo Hernández Peñalosa, Expediente 2188-2189-2190, Gaceta Judicial [G.J.] (p. 442–43) (Colom.).

7. ARENDT, *supra* note 3, at 29.

8. Of course, revolutions can end up establishing wicked moral values. But, at least

In the movements discussed later in this Article, the element of violence does not necessarily refer to an armed confrontation, but rather a violation of the pre-existing legal order in order to achieve desired changes. This definition necessarily highlights the constitution-making element that might follow a revolutionary moment⁹ in order to create a new and stable polity.¹⁰ Such concept of constituent power does not have to be viewed through the absolutist lens characterized by the controversial German scholar Carl Schmitt, and by Hannah Arendt in her studies of the French Revolution. Rather, as William E. Scheuerman argued, constituent power should be construed in terms of “genuinely liberal and democratic credentials.”¹¹

Finally, here, the term “revolution” is limited to the act of replacing an existing constitution. Therefore, any action that falls outside the legal process for changing an existing constitution, constitutes a “revolution.” As Arendt explained, revolutions should be grounded “on common deliberation and on the strength of mutual pledges” without the authorship of a “strong architect,”

during the revolutionary process, revolutionary leaders convince citizens that they are fighting for a new and better government. Thus, the revolutionary *process* itself, and not just the actual *outcome* of the revolution, should be highlighted.

9. By using this term, we are not endorsing Ackerman’s well-known theory of constitutional moments or constitutional change. It far exceeds the aim of this Article to evaluate Ackerman’s theory, but suffice it to say that we agree with Andrei Marmor’s evaluation.

The assumption is that the constitution legally enshrines values we should all see as fundamental as well, it’s just that there is not always the political opportunity to incorporate those values into the law and render the values legally binding. This is an interesting point, but from a moral perspective, I think it leaves the basic question in its place: either the constitutional protection of such values makes no practical difference, in which case it would be pointless, or else, if it does make a difference in being legally authoritative, then the inter-generational question remains: why should one generation have the power to legally bind future generations to its conceptions of the good government and the kind of rights we should have? An answer of the form: we just had the political opportunity to do it, is hardly a good one.

ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 145 n.10 (2d ed. 2005).

10. In the same ruling, one of the Justices of the Colombian Supreme Court noted that a revolution differs from a *coup d’état*, since the former pretends to carry out a transcendental change in the legal system, while the latter “totally binds its executors to the existing legal system.” Corte Suprema de Justicia [C.S.J.] [Supreme Court], noviembre 28, 1957, [Guillermo Hernández Peñalosa], Expediente 2188-2189-2190, Gaceta Judicial [G.J.] (p. 442–43) (Colom.).

11. William E. Scheuerman derives this conclusion by highlighting the pluralistic concept of “nation” laid out by Emmanuel-Joseph Sieyès, rather than that laid out by Carl Schmitt which described “nation” as a homogeneous and ethnic concept. He also emphasizes the fact that Sieyès saw the constituent power as being limited by a rationalistic vision of the natural law, where “representative bodies are forbidden to undertake non-general legal acts, and they have no authority to regulate the private affairs of citizens.” These reasons, according to Scheuerman, are “clearly a long way off from Schmitt’s Volk, acting according to a ‘pure decision not based on reason and discussion and not justifying itself.’” William E. Scheuerman, *Constitutions and Revolutions: Hannah Arendt’s Challenge to Carl Schmitt*, in *LAW AS POLITICS: CARL SCHMITT’S CRITIQUE OF LIBERALISM* 252, 260 (David Dyzenhaus ed., Duke Univ. Press 1998).

or an individual “absolute”¹² who imposes these changes.¹³ Instead, revolutions should be the “combined power of the many,”¹⁴ thereby putting aside the idea of revolutionary constituent power as a “pure decision not based on reason and discussion and not justifying itself.”¹⁵ As will be discussed later in this Article, the new laws or political orders that emerge from revolutions should be met with public acceptance. That is, these new laws should be able to satisfy what philosopher Bernard Williams called “the Basic Legitimation Demand”—a demand which every legitimate state must satisfy if it is to show that it wields authority rather than sheer coercive power over those subject to its rule. In order to meet that demand, Williams says, the state “has to offer a justification of its power to *each subject*.”¹⁶

II. 1991: The Pluralist Revolution

Colombia is a country that relies on a “legalistic” narrative.¹⁷ If its’ revolutionary movements were studied, some sort of legal or constitutional moment would always appear. In fact, the slogan of one of Colombia’s founding fathers Francisco de Paula Santander, who was known as the “man of laws,” presides over Bogota’s Palace of Justice. The slogan reads, “Colombians: weapons gave you the independence, laws will grant your freedom.”¹⁸ Thus, it is not paradigmatic, contradictory, or even controversial to study revolutionary movements in Colombia as legal transformations because many of these movements (e.g., the establishment of the provincial constitutions in the first decades of the nineteenth century) were turning points in Colombian legal tradition.¹⁹ This is especially true in the context of Colombia’s constitutional history, which has witnessed nine national constitutions²⁰—the most enduring constitution being the conservative

12. This can be an implied critique to Carl Schmitt’s theory, for whom these decisions are made by “a sovereign . . . who decides on the exception.” CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPTS OF SOVEREIGNTY* 5 (George Schwab trans., Univ. Chicago Press 2005).

13. ARENDT, *supra* note 3, at 206.

14. *Id.*

15. Scheuerman, *supra* note 11, at 260.

16. BERNARD WILLIAMS, *IN THE BEGINNING WAS THE DEED: REALISM AND MORALISM IN POLITICAL ARGUMENT* 4 (Geoffrey Hawthorn ed., Princeton Univ. Press 2005). *See also* David Dyzenhaus, *Dugardian Legal Theory*, in *THE PURSUIT OF A BRAVE NEW WORLD IN INTERNATIONAL LAW* 3, 40 (Tiyanjana Maluwa, Max du Plessis & Dire Tladi eds., 2017).

17. By this term, we mean that almost any political dispute in Colombian history has been construed in terms of the law. The best example is that during the nineteenth century, almost every civil war ended with the enactment of a new constitution by the prevailing party of the war.

18. This phrase is engraved at the entrance of Colombia’s Palace of Justice: a government building which hosts the Supreme Court, the Constitutional Court, the Conseil d’etat, and the administrative body of the judiciary.

19. *See generally* HERNANDO VALENCIA VILLA, *CARTAS DE BATALLA: UNA CRÍTICA DEL CONSTITUCIONALISMO COLOMBIANO* (1987).

20. *See* William C. Banks & Edgar Alvarez, *The New Colombian Constitution: Democratic Victory or Popular Surrender?*, 23 U. MIAMI INTER-AM. L. REV. 39, 48-61 (1991) (explaining that there were nine national constitutions enacted from 1821 to 1991). *See also* GUILLERMO SÁNCHEZ LUQUE, *EL JUEZ DEL “NUEVO DERECHO”*: DEL GOBIERNO DE LOS OÍDORES AL GOBIERNO DE LOS JUECES ¿NEOCONSTITUCIONALISMO O

Constitution of 1886.²¹ But Colombia's constitutional history also suffered from political exclusion because only two political parties dominated the political arena: liberals and conservatives. And the National Front—an agreement which ended a civil conflict that arose in Colombia during the second half of the twentieth century—amplified this sense of exclusion by dividing offices and access to power exclusively between these two political parties.²²

As a result of this political paradigm, and following the example of other Latin-American countries, some revolutionary armed groups arose in the 1960s demanding access to power and redistribution of land—things that many prior legal and constitutional changes promised but failed to deliver.²³ Consequently, the political and social climate in Colombia during the last decades of the twentieth century was one of social turmoil, violence, terrorism, and public distrust.²⁴ Political leaders were murdered and presidential powers were abused resulting in a semi-permanent “State of Siege” that the 1886 Constitution permitted.²⁵ During these turbulent times, a group of students named “*Frente Unido Estudiantil de Colombia*” (United Students’ Front of Colombia) began and led a peaceful revolution to bring about social and legal change.²⁶ These students were convinced that changing the legal structure of Colombia was the best way to bring social reforms to a country dominated by fear, drugs, and terrorism. Their objective was simple but challenging: The constitution needed to be changed—not just modified, but totally replaced—to address the social turmoil, to confront the nation’s real problems, and to reinstate hope among the citizenry. Merely amending the constitution would not work because constitutional amendments in Colombia require congressional support and, at that time, Congress was heavily influenced by the executive powers of the country and by antiquated political structures.²⁷

Through their movement, the United Students’ Front of Colombia sought to introduce an additional ballot in the 1990 congressional elections. The new ballot would allow Colombians to express their desire to replace the

NEOCOLONIALISMO? 35 (Fabricio Mantilla & Hernando Herrera eds., 2017).

21. That constitution itself underwent some “revolutionary changes.” The most prominent one being the limitation of private property in 1936. That limitation led to private property no longer being considered a “sacred, individual” right, but rather an “individual” right that was limited by a “social function.” See generally VALENCIA VILLA, *supra* note 19.

22. See generally DAVID BUSHNELL, *THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF* (Univ. California Press 1993).

23. See generally *id.*

24. WILLIAMS, *supra* note 16, at 4–9.

25. See Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 529, 631 (2004).

26. Óscar Alejandro Quintero Ramírez, *Sociología e Historia del Movimiento Estudiantil por la Asamblea Constituyente de 1991*, 7 REVISTA COLOMBIANA DE SOCIOLOGÍA 125 (2002).

27. See Cepeda-Espinosa, *supra* note 25, at 672. See also JULIETA LEMAITRE RIPOLL, *EL DERECHO COMO CONJURO: FETICHISMO LEGAL, VIOLENCIA Y MOVIMIENTOS SOCIALES* 149 (2009).

Constitution.²⁸ If the majority of the votes tallied in favor of replacing the Constitution, then the Constitutional Assembly would be summoned to draft a new constitution. For these students, their actions were an exercise of constituent power, and thus not limited by the existing legal order. In other words, their actions were a true revolution that sought to transcend existing legal forms, without firing a single bullet.²⁹ Unfortunately, however, the institution in charge of counting electoral ballots argued that they had no legal authority to count the additional ballots since the elections were only called to choose members of Congress and, given that the possibility to summon a Constitutional Assembly did not yet exist within the Colombian constitutional legal system, it could not be triggered by this vote.³⁰

In response, and using the broad powers granted by the State of Siege,³¹ then-President Virgilio Barco-Vargas issued Executive Order 927 of 1990 (Order 927)³² to give said institution the necessary authority to count the additional ballots during the presidential election that was to take place in May of 1990.³³ Order 927 recognized that there was a “popular claim to improve and fortify the legal institutions,”³⁴ which would require going “back to normality and overcome[ing] the recurring situation of the perturbation of the public order.”³⁵ But this language simply aimed to justify the exercise of the State of Siege. Additionally, Order 927 explained that the legal institutions could only be fortified through the “broad and active participation of the citizens.” This language more closely resembles the sort of “revolutionary talk” previously mentioned and forms part of what we call the element of democratic legitimacy.

Order 927 further stated that on “[M]arch 11, 1990 a considerable number of citizens, by their own initiative, by the need to solidify the institutions and by means of their constitutional right to vote, and their sovereign autonomy, openly expressed their will for the constitution to be amended” and that many political and social forces have backed their initiative.³⁶ This language reinforced the idea of people as sovereign.³⁷ A concept that is often repeated in constitutions and laws, but only paid lip service to by politicians. Nevertheless, as will be shown later in this Article,

28. Cepeda-Espinosa, *supra* note 25, at 672.

29. *Id.*

30. *Id.*

31. See generally Mauricio García Villegas & Rodrigo Uprimny, *¿Controlando la Excepcionalidad Permanente en Colombia? Una Defensa Prudente del Control Judicial de los Estados de Excepción*, DOCUMENTOS DE DISCUSIÓN DE “DJS” (2005), https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_198.pdf [<https://perma.cc/X9A5-W9PC>].

32. In the Colombian legal context of that time, a *Decreto-Legistivo* (Legislative-Decree), which is basically an Executive Order issued under the State of Siege, had the status of law.

33. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Constitucional, mayo 24, 1990, Pablo J. Caceres Corrales, Expediente 2149 (334-E), Gaceta Judicial [G.J.] (No. 20, p. 11) (Colom.) [hereinafter Expediente 2149].

34. *Id.* at 9.

35. *Id.*

36. *Id.*

37. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 3.

the recognition of people as sovereign can sometimes destroy the very institutions which recognize such sovereignty.

Order 927 also reinforced the constituent power of the people. First, it argued that “new alternatives for political participation”³⁸ were needed. Therefore, the goal of the 1991 revolution was to achieve a more open political system that would channel value pluralism among Colombian citizens. Second, originally, Order 927 seemed to call for preservation of the existing Constitution, claiming that “frustrating the popular movement in favor of the institutional change would weaken the institutions in charge of achieving peace.”³⁹ But upon further inspection, Order 927 added a majoritarian touch to the idea of “the will of people” stating that a secondary consequence to interfering with the revolution would be “a frustration among the population.”

Finally, and keeping in mind that Order 927 was pending judicial review by the Colombian Supreme Court (the Supreme Court), President Barco-Vargas quoted the Schmittian theory of constituent power then-used by the Supreme Court. According to that theory, the government had to allow the public to express themselves in the May 1990 elections since “the constituent nation, not only because of the legal powers it has to act, but also because of the force and the efficacy of its political power, enjoys the highest autonomy to adopt the decisions regarding its fundamental political structure.”⁴⁰ Accordingly, the people, as sovereign, can transcend the existing rules for constitutional amendments when it is clear that there is a “popular will” to adopt a fundamental political decision. In that case, the popular will was one to replace the existing constitution, outside the legal procedures established for doing so.⁴¹

When reviewing Order 927, the Colombian Supreme Court acknowledged the existence of a “popular claim in favor of the institutional strengthening” which was a “public and self-evident fact” that had been backed “by the political parties, the media, the students, and the people by means of the ‘*séptima papeleta*’ [additional ballot].”⁴² The Supreme Court also recognized that the power of judicial review entails a duty to recognize the “social reality” to which the norm under control ought to be applied. In that case, the social reality was the Colombian people aiming to reform their institutional design (by means of a peaceful revolution) to establish a Constitutional Assembly.

One of the most interesting remarks made by the Colombian Supreme

38. Expediente 2149, *supra* note 33, at 11.

39. *Id.*

40. *Id.*

41. This is true only in the sense that the Colombian Supreme Court acknowledged—following Schmitt’s advice—that “the original unharnessed willfulness which alone made constitutional government a reality can never be extinguished” and “[t]he all-powerful omnipotent subject of every liberal system, the people, continue[] to have a very real existence above and beyond the institutional complex of liberal constitutionalism. The *pouvoir constituant* remains a force to be reckoned with well after the revolution.” Scheuerman, *supra* note 11, at 257.

42. Expediente 2149, *supra* note 33, at 15.

Court was that the “armed groups, which ha[d] been reaching agreements with the government, conditioned their reincorporation to civil society to the calling of such [C]onstitutional [A]ssembly.”⁴³ Such argument gave the Supreme Court the evidence it needed to open up the democratic procedure and hold that counting the additional ballots, and thereby summoning the Constitutional Assembly, was constitutional—even though neither of the two processes were contemplated by the 1886 Constitution (the controlling constitution of the time).⁴⁴ Furthermore, the Supreme Court’s decision reinforced the idea that this “legal procedure” was a true revolutionary tool, one which could unite armed groups and ordinary citizens in a common goal. As such, the Supreme Court did not step against the will of the people. For that reason, the Supreme Court acted not as a counter-majoritarian institution, but as an instrument of the sovereignty of the people, stating that “not channeling these demands of the people w[ould], without any doubts, contribute to destabilize[ing] the public and social order.”⁴⁵ This was one of the most remarkable moments because the court, exercising judicial review, directly recognized democratic legitimacy as the cornerstone of a highly controversial decision.

In October of 1990, after the Colombian presidential election was held, and with growing popular support for the additional ballot establishing the Constitutional Assembly, the newly elected President César Gaviria-Trujillo issued Executive Order 1926 (Order 1926) officially convening the Constitutional Assembly.⁴⁶ Just like the prior order, Order 1926 was subjected to judicial review by the Supreme Court. Once again, the Supreme Court upheld the Constitutional Assembly’s summoning under a theory of “constituent power.” According to the Supreme Court, constituent power

represents the last resort of the moral and political power, capable even at the darkest time, to set the historical course of the State, appearing as such with all its essence and creative vitality. As such, it is capable of opening channels of expression which have been obstructed, or even creating those that have been denied, at the end, it is capable of turning into a success what has been considered—for many reasons—an incompetent system, due to its loss of vitality and acceptance.⁴⁷

Perhaps what is even more interesting about the Supreme Court’s decision is that the judiciary, when exercising judicial review, did not portray citizens as “hobbesian predators” in need of strong constitutional barriers, but

43. *Id.* at 16.

44. *Id.*

45. *Id.*

46. *See* Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Constitucional, octubre 9, 1990, Hernando Gomez Otálora, Fabio Morón Díaz, Expediente 2214 (351-E), Gaceta Judicial [G.J.] (Colom.) [hereinafter Expediente 2214].

47. *Id.* Schmitt would probably say that the Supreme Court used a problematic theory of constituent power because it did not characterize constituent power as a result of “an organic cultural, linguistic or racial community.” Scheuerman, *supra* note 11, at 259. However, in this sense, the Supreme Court followed Emmanuel Sieyès’ view of constituent power in which “[t]here is no emphasis whatsoever on the need for common ethnic roots . . .” *Id.*

rather as rational, democratic deliberators.⁴⁸ Hence, when the Supreme Court was confronted with the risks inherent in the exercise of constituent power, it stated that

within the legal and political tradition of [Colombia], dating back to the first days of the independence, there is a set of principles and beliefs which give legitimacy to the democratic system, and that will surely move the citizens to proceed with their highest responsibility, as well as will demand the Constitutional Assembly to interpret the needs and hopes of the Nation . . . to achieve a better project of life, involving convivence, peace, liberty and social justice.⁴⁹

The Supreme Court itself described this revolution as a “down-to-top” movement in which citizens, students, press, political parties, and the illegally armed revolutionary groups demanded change from high level institutions by calling for the Constitutional Assembly.

There are some comprehensive studies on the Colombian Constitutional Assembly,⁵⁰ but what needs to be highlighted here for the purposes of this Article is that the Constitutional Assembly was comprised of a diverse group of individuals. Indigenous citizens, women, former *guerrilla* members, and laymen were part of the Constitutional Assembly which went on to draft the 1991 Constitution—a constitution committed to direct democracy, to the reinforcement and promotion of representative democracy, and to giving each citizen the benefit of the rights included within said constitution.⁵¹ As President Gaviria-Trujillo stated in his final speech to the Constitutional Assembly, the 1991 Constitution included the weapons that Colombians could use to peacefully fight for their interests.

[T]he new Constitution is not born out of a few pens but of a great democratic debate in which the whole country was involved: in the plebiscite proposal in 1988, on the streets, when the students promoted the “*septima papeleta*,” in the working tables, in the electoral campaign, in the media, and of course within this Assembly. The 1991 Constitution does not belong to anyone. Therefore, it is from all the citizens and for all the citizens—like few constitutions in our history.⁵²

Since its enactment, the 1991 Constitution has been regarded as a beacon of “transformative constitutionalism.”⁵³ It introduced a long catalogue of

48. A two-fold argument can be developed here. First, it can be argued that the Court said Colombians share a common constitutional morality, and that such morality must be considered when amending or replacing the constitution. *See generally* WILFRID J. WALUCHOW, *A COMMON LAW THEORY OF JUDICIAL REVIEW: THE LIVING TREE* (Cambridge Univ. Press 2006). The second argument follows Sieyès constituent power theory by implying that in exercising the *pouvoir constituant*, the Court must respect certain standards that “justify in the name of reason and fair play its claim to deliberate and vote for the nation without any exception whatsoever” as such “the will of the nation is legitimate only when it acts in accord with the common security, the common liberty, and finally the common welfare.” *See* Scheuerman, *supra* note 11, at 260.

49. *See generally* Expediente 2214, *supra* note 46.

50. *See generally* LEMAITRE RIPOLL, *supra* note 27; Cepeda-Espinosa, *supra* note 25.

51. *See generally* LEMAITRE RIPOLL, *supra* note 27; Cepeda-Espinosa, *supra* note 25.

52. César Gaviria-Trujillo, President of Colombia, Address to the National Constituent Assembly of Colombia (July 4, 1991) (on file with author).

53. *See* Santiago García-Jaramillo & Camilo Valdivieso-León, *Transforming the Legislative: A Pending Task of Brazilian and Colombian Constitutionalism*, J. CONST. RES., Sept.–Dec. 2018, at 43, 45. *See also* Michaela Hailbronner, *Transformative*

individual, social, and economic rights, as well as limitations to the executive power; a broad chapter of mechanisms for the exercise of direct democracy; the reassurance and promotion of pluralist representative democracy; and judicial actions such as the “action of unconstitutionality”⁵⁴ (which dates back to 1910), the action of “tutela,”⁵⁵ the class action, and others. All this gave citizens the power to defend and enforce their constitution.

Although not all the goals laid out by the 1991 Constitution have been accomplished, the 1991 revolution proves that “down-to-top” processes can achieve, or at least instantiate, the appropriate dialogues for profound social change. Thus, the 1991 Constitution should be regarded as successful inasmuch as it recognized value pluralism⁵⁶ by not aiming to create a homogeneous assembly nor a homogeneous society. Rather, it created a society that recognizes citizens as agents capable of making decisions about the principles they want to live by and the lives they want to have.⁵⁷ Therefore, the 1991 Constitution is the result of a “revolutionary movement” built by various, diverse actors, and founded on common deliberation and mutual pledges. As such, it does not incorporate a single, comprehensive moral theory,⁵⁸ but rather allows the co-existence of many of them.⁵⁹ At the same time, it anticipated that disagreements would inevitably arise, and included different democratic devices to channel them.

Constitutionalism: Not Only in the Global South, 65 AM. J. COMP. L. 527 (2017) (providing a comprehensive description on transformative constitutionalism).

54. This term is also known as an *actio popularis* which gives all citizens the right to claim that a law is unconstitutional before the Constitutional Court. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 40(6).

55. “*Acción de tutela*” is an informal judicial action that any person can file in Colombia before any judge to claim the immediate protection of fundamental constitutional rights. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 86.

56. See generally ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* (1969).

57. See generally JOSEPH RAZ, *THE MORALITY OF FREEDOM* (Oxford Univ. Press 1986).

58. Although it should be noted that some authors, like Wilfrid Waluchow, think it is possible to interpret the constitution, to find, by an exercise of reflective equilibrium, a communitarian constitutional morality, which is largely context-dependent. See generally WALUCHOW, *supra* note 48. However, others, such as Andrei Marmor, oppose this concept. See generally Andrei Marmor, *What Is Law and What Counts as Law? The Separation Thesis in Context* (Cornell Legal Stud. Res. Paper No. 17–34, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3011432#:~:text=Abstract,considerations%20of%20merit%20or%20value. [https://perma.cc/B5NT-6JG3]. Nevertheless, it far exceeds the aims of this Article to undertake this debate.

59. As famously stated by Justice Wendell Holmes:

Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Lochner v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting). For a comprehensive analysis on this, see generally LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* (Harvard Univ. Press 1993); JEREMY WALDRON, *LAW AND DISAGREEMENT* (Oxford Univ. Press 1999).

Importantly, even though the Supreme Court had the final say, it recognized the importance of democratic legitimacy and reinforced the idea that the final arbiter were the people themselves. Additionally, it showed that citizens do not need to be feared or depicted as ignorant or selfish agents. To the contrary, the judiciary recognized that students and laymen were prominent participants in the “down-to-top” movement that was the 1991 revolution.

Another element to be highlighted, is that litigation, although relevant to the revolutionary movement, was not the center of the movement. Instead, the revolutionary movement was channeled through creative democratic procedures that disobeyed established rules and left the judiciary without much room to disregard the public’s will. This proves that peaceful revolutionaries can use allied institutions to leverage their position against the institutions they wish to displace.

But the 1991 revolution also shows that although the goal was to institutionalize certain rights, most of those rights only became partially theorized agreements.⁶⁰ This is because they were the result of a pluralist debate and pluralism entails strong disagreements. Therefore, some discussions are naturally postponed—especially those concerning the concrete interests protected by the rights and duties sought to be established.⁶¹ Nevertheless, this is not a *weakness* of the 1991 Constitution. Rather, it is a *strength* because these discussions promote democratic deliberation, not only at the representative level, but among all citizens. Moreover, the Constitutional Assembly and the 1991 Constitution fit what Andrei Marmor described when talking about robust constitutionalism:

[S]ometimes is it simply a bona fide attempt to construct a fair system of government; other times, it resides in the fact that political actors operate under a partial veil of ignorance: those who form the majority today know that they might find themselves in the minority in the future. Political actors would normally have an interest to secure a system of fair play when they cannot be sure in advance what is the role that they might play in that game in the future. And then, once you have a system in play that makes it difficult for the majority to ignore the interests of the minority, the system is likely to maintain its stability, just because it is difficult to change without the minority’s consent.⁶²

Additionally, the deliberative processes contemplated by the 1991 Constitution lend themselves to a provocative argument: the 1991 Constitution reinforced rather than undermined democracy because it was the result of a peaceful and democratic revolution that relied on the use of deliberation, mutual pledges, and “down-to-top” processes. In the alternative, it can be argued that the 1991 revolution was a response to the limited and restricted democracy Colombia had at the time, caused by excessive executive power, and that as such, it was not a movement against the excess

60. See generally ANDREI MARMOR, *PHILOSOPHY OF LAW* (Princeton Univ. Press 2010); Cass R. Sustein, *Incompletely Theorized Agreements Commentary*, 108 HARV. L. REV. 1733 (1994).

61. See ANDREI MARMOR, *LAW IN THE AGE OF PLURALISM* 215–33 (Oxford Univ. Press 2007).

62. *Id.* at 108.

of democracy. In all, it cannot be said that the 1991 Constitution wanted to disenfranchise citizens from decisions of rights and principles, nor to limit the power of majority political parties, rather the 1991 Constitution was about empowering citizens.

Courts faced with situations of social and legal change arising from deliberative and inclusive processes, should be cautious when exercising judicial review so as to not replace the will of the people with the will of the judiciary, or with some *pro status quo* defense embellished with constitutional arguments.⁶³ Although the 1991 Constitution shows that judicial review can be used as an effective tool for “legal revolutions,” it also sheds some light into the strong limitation of what judicial review can actually achieve. Thus, if judicial review is to be successfully exercised amidst a revolutionary moment, it cannot go beyond the will of the people.⁶⁴

III. The Plebiscite for Peace and the Constitutional Court: The 2016 Judicial Revolution

As previously mentioned, Colombian history is replete with internal conflicts. As early as its independence in 1810, the nation engaged in several civil wars that usually concluded with the enactment of new constitutions, drafted by the prevailing side.⁶⁵ In fact, Colombia had the longest civil conflict in the Western Hemisphere. Beginning in the 1950s, the conflict arose when liberals and conservatives, amidst forming a political agreement, excluded certain groups from such agreement—mainly, leftist political parties. These excluded groups formed illegal armed groups to fight what they considered was an illegitimate state. Among these groups was the Revolutionary Armed Forces of Colombia, also known as the FARC. In the beginning, the FARC fought and justified its claims under Marxist ideals, demanding mainly agrarian reforms. But eventually, the FARC, like most of the other Colombian, illegal, armed groups, ended up engaging in drug trafficking, murder, terrorism, and systematic human rights violations.⁶⁶ Several attempts to negotiate failed.⁶⁷ This was the case with the peace talks of Tlaxcala in 1992, and the peace talks within a large demilitarized portion of Colombia from 1998 to 2002.⁶⁸

63. See generally RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004); Michael Mandel, *A Brief History of the New Constitutionalism, or “How We Changed Everything So that Everything Would Remain the Same”*, 32 *ISR. L. REV.* 250 (1998).

64. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 274–77 (2009).

65. See generally VALENCIA VILLA, *supra* note 19.

66. Victor Manuel Moncayo, *Hacia La Verdad de el Conflicto: Insurgencia Guerrillera y Orden Social Vigilante*, *CHCV* 1, 99, 102, 112 (2015), <https://www.corteidh.or.cr/tablas/r33464.pdf> [<https://perma.cc/4FYG-7NSM>].

67. See *Procesos de Paz Anteriores (FARC-EP Y ELN)*, CIDOB, https://www.cidob.org/publicaciones/documentacion/dossiers/dossier_proceso_de_paz_en_colombia/dossier_proceso_de_paz_en_colombia/procesos_de_paz_anteriores_farc_ep_y_eln [<https://perma.cc/8CB9-CX5B>]. See generally June S. Beittel, *Peace Talks in Colombia*, *FAS* (2015), <https://fas.org/sgp/crs/row/R42982.pdf> [<https://perma.cc/9SCN-5JC8>].

68. Beittel, *supra* note 67, at 3–4.

Following a strong military campaign led by the Colombian government from 2002 to 2010, the FARC decided to negotiate with the Colombian government in 2010.⁶⁹ After four years of negotiations in Havana, Cuba, the two parties were able to reach an agreement (the “Peace Agreement”).⁷⁰ Although the Peace Agreement did not aim to replace the 1991 Constitution (the then-controlling constitution in Colombia), it added some transformative elements to the otherwise stable and legitimate constitution—despite its numerous amendments. These transformative elements included: (1) public policy measures to improve social welfare in the regions affected by the armed conflict, and to secure the return to civil society of the former combatants; (2) the creation of an *ad-hoc* tribunal for the trial of those involved in the armed conflict;⁷¹ (3) alternative, more lenient sanctions for

69. *Id.* at 6–7.

70. *Id.* at 18–20.

71. One of the most controversial elements of the Peace Agreement was the instauration of the *ad-hoc* tribunal, which has been subject to all sort of criticisms, mainly from the political party that promoted the opposition to the plebiscite and whose presidential candidate, Iván Duque, was elected President for the 2018–2022 term. Notably, President Duque vetoed six of the 159 articles of the Peace Agreement citing inconvenience as his justification. (Under Colombian law, presidents are empowered to veto for unconstitutionality or inconvenience). It must also be noted that under Colombian law, a presidential veto does not hold definitive power on whether a bill becomes law or not because the bill returns to Congress after presidential review, and then Congress must evaluate the alleged inconvenience and make the final decision.

Furthermore, in the particular case of this Peace Agreement, Colombia’s House of Representatives and the Inspector General (*el Procurador General*) asked the Constitutional Court to pronounce on the veto, as they considered it entailed constitutional arguments rather than convenience ones. Although the Court (through a questionable exercise of judicial review) rightfully refrained from studying such claim, it did determine that once Congress decided on the veto, the Court would review that decision. That argument by the Court could be framed under the so-called “second-order judicial delay” or “second-order deferral” method described by Rosalind Dixon and Samuel Issacharoff. “Second-order judicial delay . . . is a close ally of the kind of judicial temporizing strategies advocated by Alexander Bickel. Bickel, in *The Least Dangerous Branch*, famously argued that courts should use a variety of techniques—or ‘passive virtues’—to avoid a direct collision with the political branches.” Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, 2016 Wis. L. REV. 683, 706 (2016).

Without focusing on the details of the controversial congressional vote, the bill was, allegedly, approved entirely by the legislative branch, meaning that Congress rejected the presidential veto, and forwarded the decision to the Constitutional Court for its approval. The Court, through Order A-282 of 2019, determined that the second review was not necessary, but would become necessary if the bill was modified. Corte Constitucional [C.C.] [Constitutional Court], mayo 29, 2019, Expediente RPZ-010, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) [hereinafter Expediente RPZ-010], available at <https://www.corteconstitucional.gov.co/relatoria/autos/2019/a282-19.htm> [https://perma.cc/Z78G-622Y]. This essentially directed the president to sign the bill. Once again, the Court accomplished its objective through the “second-order deferral”—a principle it had first applies in Decision C-551 of 2003, and which is not frequently used. Corte Constitucional [C.C.] [Constitutional Court], julio 9, 2003, Sentencia C-551/03, Gaceta de la Corte Constitucional [G.C.C.] (Colom.), available at <https://www.corteconstitucional.gov.co/Relatoria/2003/C-551-03.htm> [https://perma.cc/8W5X-RLRP].

In Order A-282, Justice Guillermo Guerrero wrote a remarkable dissenting opinion that was divided into two sections. The first section focused on the need to create

former combatants, and the possibility of future political involvement for these combatants; (4) reparation measures for the victims of the conflict; (5) and mechanisms for securing truth and justice, amongst others elements.⁷² These measures were still consistent with the objectives of the 1991 Constitution because they tackled a difficult social question and sought political inclusion in order to achieve a new and more stable polity.

To secure the legitimacy of these measures, the Colombian government, without being required under the Colombian legal order, summoned a plebiscite on October 2, 2016, to decide whether Colombian citizens accepted or rejected the Peace Agreement, and (if accepted) to trigger a fast-track mechanism for the approval of laws and constitutional amendments in order to quickly implement the Peace Agreement.⁷³ It should be noted that under the fast-track process, congressional implementation of the Peace Agreement—a complex, 280-page document that included decisions on transcendental issues—was left to a “yes or no” vote, forcing citizens to either agree or reject the whole agreement.⁷⁴ The Constitutional Court upheld the constitutionality of this plebiscite, but stated that the executive branch would then be obliged to follow the outcome of the plebiscite, whatever it may be.⁷⁵

consensus in the political spheres by means of deliberative spaces in which dialogue is promoted in order to minimize disagreement in constitutional interpretation. As Justice Guerrero explains, within Congress, there should be a good faith debate on the arguments raised by the executive to veto the bill in question. Expediente RPZ-010, *supra* note 71.

In that scenario, it is not appropriate for Congress to arrogate to itself the prerogative to disqualify the objections of the government, because the Constitution imposes that, having received the project objected due to inconvenience, the second debate be repeated, insisting on its approval with a qualified majority, but prior discussion in good faith on the content of the objections. Thus, in this case, Congress, after considering the objections, as would have happened if the matter had been approached in a constructive spirit, could have insisted on the approval of the original draft, or accepted total or partial modifications. What it could not do was to refuse to re-discuss the contested articles. Since this second debate had not taken place, it is clear that the draft was not insisted on in the objection.

Id. Thus, according to Justice Guerrero, deliberation is essential in a country living under extreme political polarization.

Furthermore, the second section of his dissent focused on a technicality regarding the way in which votes were counted and a majority determined. Consequently, for Justice Guerrero, the Court’s decision is closer to “decisionism” than to reasoned judicial deliberation. *Id.*

72. See generally *ABC del Acuerdo Final*, CARTILLA PEDAGÓGICA (2016), <https://www.cancilleria.gov.co/sites/default/files/cartillaabcdelacuerdofinal2.pdf> [<https://perma.cc/TY35-JDBH>].

73. Such fast-track procedures gave the President transitory legislative powers to implement the Peace Agreement, reduced the number of debates for the approval of laws and constitutional amendments, and limited deliberation within Congress. Thus, the democratic credentials given by the plebiscite were seen as a kind of compensation for the democratic and deliberative sacrifices that the fast-track process would entail. L. 01, julio 7, 2016, DIARIO OFICIAL [D.O.] (Colom.).

74. See *Pregunta Plebiscito*, REGISTRADURÍA NACIONAL DEL ESTADO CIVIL (2016), <https://www.registraduria.gov.co/Pregunta-3.html> [<https://perma.cc/PJ9C-52NH>].

75. Corte Constitucional [C.C.] [Constitutional Court], febrero 18, 2016, Sentencia C-379/16, Gaceta de la Corte Constitucional [G.C.C.] (Colom.), available at <https://www.corteconstitucional.gov.co/relatoria/2016/c-379-16.htm> [<https://perma.cc/QVB2-B3M4>].

Moreover, if the Peace Agreement was rejected, the President would be forced to find an alternative that could achieve the same constitutional value, duty, and right to peace offered by the Peace Agreement.⁷⁶ In contrast to the 1991 revolution, this plebiscite was not preceded by a strong social mobilization. Peace talks were held behind closed doors in Cuba and were introduced during a highly polarized political situation as an agreement reached by the Colombia government and the FARC.⁷⁷

Consequently, the plebiscite was held and the Peace Agreement was rejected by a small margin of the voters.⁷⁸ As a result, the political parties opposed to the agreement were summoned to negotiate with the Colombian government their desired amendments to the agreement.⁷⁹ This was unlike the 1991 revolutionary process because the Peace Agreement did not aim to replace the Constitution, but rather to reform it in order to achieve the required social changes proper of a transition after an armed conflict. Thus, as opposed to the 1991 process, the discussions following the failed plebiscite seeking to enhance and amend the agreement took place between the main political parties and leaders, and were not open for public deliberation at the citizenry level.⁸⁰

Notably, citizens were unhappy about this because they were called to decide upon a question of principle, but then, only the powerful few had the final say on the contents of the Peace Agreement.⁸¹ Perhaps, this could have been an opportunity to open a pluralist deliberation process—involving not only those at the top (such as elite politicians), but also social movement leaders, the media, members of the lower class, and other traditionally excluded groups—in order to achieve a level of democratic legitimacy, in which “citizens reconcile themselves and each other to all the laws and

76. *Id.*

77. In part, this was due to the tremendous failure of the 1998–2002 peace negotiations that were held within a demilitarized area of Colombia and opened to the public. See generally Diego Felipe Ariza Arias, *La Zona de Distensión Del Caguán: Análisis de los Actores Económicos, Políticos y Sociales a Partir del Concepto de Estado Fallido*, UNIVERSIDAD COLEGIO MAYOR DE NUESTRA SEÑORA DEL ROSARIO (2014), <https://repository.urosario.edu.co/bitstream/handle/10336/8347/10305603892014.pdf?sequence=12> [<https://perma.cc/6NQJ-2XTR>].

78. As David Dyzenhaus and Alma Diamond recently stated in a lecture at the Conference of the Colombian Constitutional Jurisdiction, this proves that the constitutional amendments resulting from the Peace Agreement “were formally invalid” as it is “indicated by the fact that they failed to secure the assent of the Colombian people in a plebiscite of 2016, which led the executive to resort to an unprecedented ‘fast track’ [sic] procedure of Congressional approval following a period of consultation, which was itself subject to constitutional challenge.” David Dyzenhaus & Alma Diamond, *The Resilient Constitution* 15 (Jan. 14, 2019) (unpublished manuscript) (on file with author).

79. See generally *Propuestas de Renegociación del Acuerdo de Paz*, FIP (2016), <http://www.ideaspaz.org/especiales/posplebiscito/propuestas-renegociacion-acuerdo.pdf> [<https://perma.cc/6ZC3-57MQ>].

80. See generally Sandra Botero, *El Plebiscito y los Desafíos Políticos de Consolidar la Paz Negociada en Colombia*, 37 REVISTA DE CIENCIA POLÍTICA 369 (2017), available at <https://scielo.conicyt.cl/pdf/revcipol/v37n2/0718-090X-revcipol-37-02-0369.pdf> [<https://perma.cc/RL2E-GP54>].

81. It would be too superficial to assume that all those who voted “no” were represented by the political parties or leaders who sat down with the government to discuss such changes.

policies that are administered and implemented in their name.”⁸² It was a matter of paying attention to the “basic requirements about public discussion and social inclusion.”⁸³

The discussions between the government and the political parties led to a new agreement with the FARC⁸⁴ signed on November 24, 2016, which was ratified by the Colombian Congress despite the fact that people from diverse sectors and political standings were requesting a new deliberation process in order to reach democratic agreement. However, the debate on the new deliberation process was judicialized and decided by the Colombian Constitutional Court exemplifying the judicialization of politics.⁸⁵ The Court, via a complex legal interpretation of the concept of “popular endorsement,” and possibly replacing what the popular vote had evidenced during the plebiscite, decided that although the vote of the people constrained the president and prevented him from implementing the original Peace Agreement, the president could, as head of the executive branch and under his “duty to reach peace,”⁸⁶ implement the new agreement with congressional endorsement.

The Court, through Decision C-699 of 2016 (which is discussed in detail below), argued that the plebiscite was only one step in the process of achieving the required popular endorsement necessary to declare such plebiscite constitutional or legitimate. In doing so, the Court acted deferentially to the executive, which did not enjoy the same popular support it did during the 1991 revolution.⁸⁷ One could argue that the Court’s decision undermined two essential components of political deliberation: (1) direct democracy (expressed through the plebiscite); and (2) indirect democracy (expressed by congressional approval of the plebiscite).

Here, there is yet another difference with the 1991 revolution: the Colombian Congress was commonly regarded as a weak institution,⁸⁸

82. Jeremy Waldron, *Control de Constitucionalidad y Legitimidad Política*, 27 ΔΙΚΑΙΟΝ 7, 16 (2018).

83. Roberto Gargarella, Comment, *Some Reservations Concerning the Judicialization of Peace*, 59 HARV. INT’L L.J. 1, 4(2019).

84. The opposition argued that it was not a new agreement, but rather, it was the same agreement with only a few minor changes. Notably, at least one major concession was made: the final Peace Agreement was not to be incorporated into the Colombian Constitution as had been previously envisioned.

85. See generally Camila Llinás Restrepo & Daniel Currea Moncada, *Judicialización de la Política: Control de Constitucionalidad y Principios Democráticos en Conflicto*, U. ESTUDIANTES, July–Dec. 2018, at 1, 11.

86. It must be noted that pursuant to Article 22 of the Colombian Constitution, peace is both a right and a duty that attaches to each citizen. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 22. However, “the ‘right to peace’ is understood as an essentially contested concept; which has no univocal meaning as it involves problematic situations which are recognized in dissimilar ways, generating different definitions, without any of them being necessarily [] correct.” Expediente 2149, *supra* note 33.

87. See Julieta Lemaitre Ripoll, *El Movimiento Estudiantil de 1989 y la Séptima Papeleta*, TODA LA GENTE, <https://proyectos.banrepcultural.org/asamblea-nacional-constituyente/es/texto-catalogo/movimiento-estudiantil-1989-y-la-septima-papeleta> [https://perma.cc/NKK8-FZ3B].

88. See García-Jaramillo & Valdivieso-León, *supra* note 53, at 45–48. See generally Santiago García-Jaramillo, *Colombian Constitutionalism: Challenging Judicial*

although the government controlled the majority of Congress at the time. Understandably, the result was that citizens felt as if they had been excluded from the deliberation and decision-making process. This was not the public sentiment after the 1991 revolution. Moreover, the Constitutional Assembly had a pluralist origin and membership, which promoted compromise, mutual pledges, as well as genuine deliberations and inclusive dialogue.⁸⁹ In fact, appealing to Congress was not the only way to open up public deliberations: the 1991 Constitution included mechanisms, such as *cabildos abiertos*,⁹⁰ through which citizens could have also participated in the process of amending the Peace Agreement. Thus, the plebiscite itself was probably not even the best “tool” for deliberating the Peace Agreement. In fact, the plebiscite followed Carl Schmitt’s idea that people “‘can only engage in acts of acclamation, vote, say yes or no to questions’ posed to [them] from above.”⁹¹ That is, that the public “cannot counsel, deliberate, or discuss. It cannot govern or administer, nor can it posit norms; it can only sanction by its ‘yes’ the draft norms presented to it. Nor, above all, can it place a question, but only answer by ‘yes’ or ‘no’ a question put to it.”⁹² In contrast with this problematic but straightforward Schmittian view is the 1991 constitutional process that proved Colombian citizens can do better than just a plebiscitary democracy: they can discuss, deliberate, and engage in mutual pledges not only at the level of political elites or legal experts, but also at the laymen level.

After the revised Peace Agreement was ratified, the question of the peace implementation shifted from a political discussion to a constitutional one due to the review of the laws and constitutional amendments approved by Congress through the fast-track procedure.⁹³ Although this procedure could only be triggered after the Peace Agreement was “popularly ratified,” the Court understood that congressional approval of the new agreement was enough to trigger it. As such, said procedure was upheld by the Court in Decision C-699 of 2016, by a five to four majority.⁹⁴

It must be emphasized that in the 1991 Constitution, peace was included as a fundamental and constitutional right, and incorporated as both, a principle and a duty.⁹⁵ Therefore, the Court’s decision was problematic because it not only divided the Court,⁹⁶ but also the general public. For some

Supremacy Through Pluralism, 2 INT’L COMP., POL’Y & ETHICS L. REV. 317 (2019).

89. See generally Gargarella, *supra* note 83.

90. Similar to the town hall meetings in the United States.

91. Scheuerman, *supra* note 11, at 312–13.

92. *Id.* at 257–58.

93. This is highly problematic because it portrays the Constitutional Court as the final arbiter, which is the sort of decisionism that revolutions want to avoid. For a comprehensive critique of the involvement of courts in revolutionary processes, see generally Scheuerman, *supra* note 11.

94. Corte Constitucional [C.C.] [Constitutional Court], Sentencia C-699/16, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) [hereinafter Sentencia C-699/16], available at <https://www.corteconstitucional.gov.co/relatoria/2016/c-699-16.htm> [https://perma.cc/8GLF-E2SC].

95. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 22.

96. As previously indicated, this decision was approved by the Court in a five to four vote, with most dissents being only partial. Justice Luis Guillermo Guerrero filed the most

citizens, the Court's decision was a discretionary use of the democratic procedures, and a strategic shift from public deliberation processes to processes of congressional approval. Lastly, many also considered the decision a judicialization of politics.⁹⁷ This Article focuses on the last argument.

The Court's majority in Decision C-699 of 2016 focused on the "right to peace," as entrenched in the 1991 Constitution.⁹⁸ However, under the interest theory of rights, rights are only intermediary steps between the protected interests and the consequent duties. Thus, rights are highly limited and demand an open deliberation, especially in divided societies,⁹⁹ which recognize and respect value pluralism.¹⁰⁰ Conceivably, it would have been

comprehensive and profound dissenting opinion. He stated that the plebiscite was chosen as a popular participation mechanism, through which the public could either endorse or reject the Peace Agreement. For Justice Guerrero, the endorsement of the Peace Agreement by the general public was a *sine qua non* condition for the implementation of the agreement and its accompanying procedural elements (e.g., the fast-track process). Therefore, in the absence of such popular endorsement, the agreement should have been deemed unconstitutional. In not doing so, the majority's opinion redefined the uncontested concept of "popular endorsement," choosing the weakest possible definition and partly removing the legitimacy of the special procedure for implementing the Peace Agreement. Thereby transforming popular endorsement into a symbolic accessory element. Sentencia C-699/16, *supra* note 94.

Justice Guerrero stated that due to the materiality of the negotiation and the Peace Agreement, popular endorsement implied structural reforms which would impact the Constitution or the law. Thus, the President could not unilaterally determine the will of the state. In Justice Guerrero's words, "popular endorsement was not an accessory, discretionary and dispensable requirement, but it constituted a core piece of the peace strategy promoted by the President." *Id.* Additionally, Justice Guerrero wrote:

Popular endorsement, understood as the direct participation of the citizens, was conceived as the guarantee of the constitutional legitimacy of the special powers therein provided. For this reason, it is not possible to assign to such endorsement the limited scope [the majority] has in the decision, which conceives it as a consultation process to the citizenship, whose results are interpreted, endorsed and developed in good faith by the Congress of the Republic.

Id. Moreover, Justice Guerrero argued that in the event that such popular consultation mechanism failed, the appropriate solution would have been to implement the Peace Agreement through the ordinary legislative procedure which includes debate and deliberation, and concludes with a democratic decision. This procedure is seriously compromised under the fast-track process. Finally, to support his argument, Justice Guerrero turned to the spirit of the 1991 Constitution. In reference to the "down-to-top" process that led to the 1991 Constitution, Justice Guerrero explained that a "widely participatory process . . . preceded [the 1991 Constitution], the open and plural nature of the [Constitutional] Assembly, and the merits of its dogmatic and organic content, obtained from the beginning, broad citizen support, with normal dissent, but in a growing process of collective adhesion." *Id.*

Therefore, while this revolution meant to stay within the legal order, it is possible to argue that a violation of the legal order occurred at this stage, but not as a result of popular will, rather as a result of the constitutional interpretation made by the Court.

97. See generally, e.g., Llinás Restrepo & Currea Moncada, *supra* note 85.

98. Sentencia C-699/16, *supra* note 94.

99. See generally JÜRGE STEINER, MARIA CLARA JARAMILLO, ROUSILEY C.M. MAIA, & SIMONA MAMELI, *DELIBERATION ACROSS DEEPLY DIVIDED SOCIETIES: TRANSFORMATIVE MOMENTS* (Cambridge Univ. Press 2017) [hereinafter *DELIBERATION ACROSS DEEPLY DIVIDED SOCIETIES*].

100. MARMOR, *supra* note 61, at 227.

better to explore the idea of peace as a collective good (which benefits all who are subject to it), and as a background for the exercise of many other constitutional and moral rights.¹⁰¹ The ordinary discourse of constitutional rights tends to be skeptical of the content of democratic deliberations and doubtful of the capabilities of the laymen involved in such processes.¹⁰² Depicting peace as a collective good would have fostered a public culture in which people could peacefully coexist, and take pride in the inclusive agreements reached—just as they did in 1991. Further, the peace-building process could have been a “down-to-top” process used to incorporate the Peace Agreement into the basic political culture of Colombian society, thereby achieving a revolution within the legal constraints of the 1991 Constitution. This would have evaded the risk that such an important political decision would be regarded as a mere negotiation among political elites—that is, among the government, former FARC members, and other political entities. In a constitutional system that arose out of a need to create a consociation in which disagreement would be solved by mutual pledges and deliberation, the voices of common citizens should not have been silenced.¹⁰³

101. Joseph Raz claimed that the individualistic emphasis on the importance of rights can be undermined by the “collective aspect of liberal rights” because there are collective goods which do not benefit anyone unless they benefit everyone, and these rights are in the background of all other rights. As such “rights are not to be understood as inherently independent of collective goods, nor as essentially opposed to them.” RAZ, *supra* note 57, at 255. This Article relies on such depiction.

102. See Ronald Dworkin, *The Forum Principle*, 56 N.Y.U. L. REV. 469, 470 (1981). And for an overview of the continental tradition, see LUIGI FERRAJOLI, *DERECHOS Y GARANTÍAS: LA LEY DEL MÁS DÉBIL* (1999).

103. In fact, one of the most critical aspects of Decision C-699 is that for some, it failed to comply with one of the requisites that Waluchow demands for “judicial discretionary decision making.” Specifically, it failed to comply with the requirement that the judiciary should be “respectful of the duty of civility,” which asks

that judges base their discretionary decisions on reasons that all others could accept as a reasonable basis for decision. As a result, it excludes reasons deeply tied to comprehensive ideologies and doctrines not all of us share and which would be labelled by some as unreasonable. In John Rawls’ view, it excludes reliance on religious reasons and reasons stemming from controversial moral and political theories. To be sure, the surviving reasons are not necessarily ones everyone would prefer under ideal conditions of deliberation and choice. Nor are they reasons that every reasonable person in such circumstances would consider particularly strong, or ideally worthy of support but for the fact of reasonable pluralism and the need to come to some sort of mutually acceptable compromise. But they are reasons, as Rawls would have it, that such persons would all judge to be at the very least “not unreasonable.” Even those who strongly oppose the cited reasons can at least understand how reasonable persons could affirm them in justifying an exercise of public power in the circumstances of reasonable pluralism and the epistemic condition. In drawing exclusively from such reasons, judges “must cast their constitutional arguments in ways that might appeal to reasonable dissenters . . . a person who is willing to be persuaded by the better argument, assumes that reasonable moral disagreement will characterize difficult constitutional cases, and will conclude that [the act] in question is publicly justified only when the state has produced sufficiently public reasons on its behalf.” Public reasons, so construed, are “typically . . . as neutral as possible with respect to the wide range of reasonable conceptions of the good and normative political ideologies that currently exist in the [community]. They should be uncontroversial, which means that an ideal reasonable person could not

This intervention of the Constitutional Court—although permitting the implementation of the revised Peace Agreement—redefined its role as a judicial institution. Arguably, in exercising judicial review over the final Peace Agreement, the Constitutional Court solved a political question under the guise of law because the Court concerned itself with interpreting the wording of laws and constitutional amendments that had been approved by Congress to find answers to the most divisive questions regarding the Peace Agreement.¹⁰⁴ At the same time, however, the Court was speaking as an agent of the people and acting as a mediator in a political dispute. Thus, the Court could not fully endorse the agreement's implementation, but at the same time, it had to remain faithful to the public's argument that the agreements were the concretization of the right to peace. In this way, the Court was caught in a political dispute between a faction of the people and Congress.¹⁰⁵

To better illustrate this paradox, it is important to look at some other examples. For instance, on May 18, 2017, the Constitutional Court, in a five to three decision (Decision C-332 of 2017), declared unconstitutional certain parts of the Legislative Act 01 of 2016—an act which sought to amend the constitution.¹⁰⁶ Specifically, the Court declared unconstitutional those clauses that demanded executive branch approval of any amendments Congress might seek to make to the bills that dealt with the implementation of the final Peace Agreement. The Court also declared unconstitutional a clause which demanded that Congress approve or reject the bill in its entirety, rather than undertake an article-by-article inquiry before passing on the bill.¹⁰⁷ The majority of the Court believed that Congress lacked the authority to introduce such provisions because it would be a resignation of its powers to congressional deliberation.¹⁰⁸ The Court grounded this decision in its highly controversial Schmittean theory of unconstitutional constitutional amendments.¹⁰⁹ As Roberto Gargarella argued:

reasonably reject them.”

Wilfrid Waluchow, *The Misconceived Quest for the Elusive Right Answer or Dedication to a Process, Not a Result* 27–28 (Mar. 25, 2019) (unpublished manuscript) (on file with author).

104. See generally Jeremy Waldron, *Constitutionalism: A Skeptical View*, GEO. L. CTR. 1 (2010), <https://scholarship.law.georgetown.edu/hartlecture/4/> [<https://perma.cc/DJH5-KGYA>].

105. This might be at odds with the idea of the predictability of law. It seems to reinforce Scheuerman's argument in the sense that judicial review can hardly be seen as an antidote to the ills of legal decisionism because courts usually decide in highly creative ways when reading texts which have been written in broad and indeterminate language. See Scheuerman, *supra* note 11, at 272.

106. Corte Constitucional [C.C.] [Constitutional Court], febrero 6, 2017, Sentencia C-332/17, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) [hereinafter Sentencia C-332/170], available at <https://www.corteconstitucional.gov.co/relatoria/2017/C-332-17.htm> [<https://perma.cc/88RJ-MGZR>].

107. *Id.*

108. *Id.*

109. Recently, David Dyzenhaus expressed his doubts on the idea of using the Schmittean Doctrine of unconstitutional constitutional amendments in the transitional justice process of Colombia.

[The Schmittean Doctrine] relies on an idea, however muted, of a constituent power wielded by judges. Judges who exhibit fidelity to law do not work in the

From a democratic perspective, the Court's strict scrutiny of the "fast-track" law seemed totally justifiable: the government needed to show that it was doing its very best in order to "build democratic legitimacy," but instead showed that it was willing and ready to circumvent the constitutional and procedural requirements of democratic deliberation. The Colombian Constitutional Court reasonably resisted the government's ill-fated initiative, and in that way reaffirmed its commitment to deliberative democracy.¹¹⁰

Therefore, to some extent, the Court recognized the democratic deficit of the agreement implementation, and Justice Luis Guillermo Guerrero pointed out this deficit in his dissent. But the Court also recognized the strategic shift of seeking congressional ratification in a Congress where a majority of the members were on the government's side. With this in mind, the Court implicitly concluded that it was not possible to silence dissenters amidst the actual implementation of the Peace Agreement—at least not at the legislative level.

The second example is Decision C-674 of 2017 regarding the integral system of truth, justice, reparation, and non-repetition. Broadly speaking, the Court considered that the collective right to peace found its borders with the rights of the victims and the duty to collaborate with authorities in order to ensure the fulfillment of the aforementioned as included in the final Peace Agreement.¹¹¹ Therefore, the lenient treatment, benefits, rights, and guarantees assigned to former combatants of the armed conflict were subjected to the verification by competent judicial authorities (e.g., the Special Jurisdiction for Peace) to ensure that these former combatant had complied with the obligations derived from the peace process. The obligations included, but were not limited to: the laying down of weapons, the successful reintegration into civilian life, the obligation to contribute the full truth of their actions during the armed conflict, the guarantee of non-repetition, and the integral restitution of the victims.¹¹²

In that same decision, the Court added that members of the general public who had not participated in the armed conflict could not be *mandatorily* submitted to the Special Jurisdiction for Peace (the only existing *ad hoc* tribunal in Colombia) because to do so would violate their fundamental right to due process. That is, third parties who were not part of

register of power, no matter how formally powerful their position is in the constitutional order. They work in the register of authority and, moreover, in the register of constitutional or legal authority, which is by definition a constituted authority. As long as they stick to that task, they can do more than maintain the jural community. They can facilitate its expansion by helping to bring within it not only individuals and groups who had been relegated to second class status, but also individuals and groups who had taken up the cause of armed resistance to that relegation.

Dyzenhaus & Diamond, *supra* note 78, at 54.

110. Gargarella, *supra* note 83, at 18.

111. Corte Constitucional [C.C.] [Constitutional Court], noviembre 14, 2017, Sentencia C-674/17, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) [hereinafter Sentencia C-674/170], *available at* <https://www.corteconstitucional.gov.co/relatoria/2017/C-674-17.htm> [https://perma.cc/68F2-ZXNR].

112. *Id.*

the armed conflict had a constitutional right to be judged by ordinary, judiciary institutions—this was known as “the natural judge doctrine.”¹¹³ Nevertheless, the Court said that these individuals could choose to *voluntarily* submit to the jurisdiction of the *ad hoc* tribunals.¹¹⁴ This measure helped secure the legitimacy of the final Peace Agreement within members of the general public and the private sector, which feared that the Special Jurisdiction for Peace was not impartial enough.

At the same time, however, it should be noted that Decision C-674 of 2017 has been a subject of debate among social organizations and some factions who favored the final Peace Agreement. These factions claim that the Court acted as a defendant of the *status quo*, or as Michael Mandel stated in his critique of judicial review: as an agent of a faction or an elite within society.¹¹⁵ The Court tried to improve the democratic legitimacy of the final Peace Agreement and its implementation, but some feel that this was at the expense of some of the Peace Agreement’s content. Again, this tension demonstrates that such decisions are better taken after bargaining and arriving at a compromise through the deliberative channels of politics, where discussion is open to all those who are affected, and not just to jurists interpreting constitutional clauses.

Perhaps a revolution to introduce these agreements to the public would have required a more inclusive and ongoing debate among citizens, with open political participation and respect for value pluralism. Such revolution would have needed less action from the courts and more civil action from citizens who could see themselves as equals to one another despite ideological disagreements.¹¹⁶ But this is hard to achieve when, instead of an ongoing dialogue, the conversation is framed by judicial decisions in terms of winners and losers.¹¹⁷

The judicial revolution of 2016 demonstrates that one should be cautious when thinking of constitutional courts as agents for “down-to-top” transformative or “revolutionary” processes. We should not be surprised when authors like Ran Hirschl¹¹⁸ and Mandel claim that courts can be part of

113. *Id.*

114. *Id.*

115. See Mandel, *supra* note 63, at 250.

116. See DELIBERATION ACROSS DEEPLY DIVIDED SOCIETIES, *supra* note 99, at 86.

117. In one of his books, Andrei Marmor quotes Bernard Williams for the following proposition:

When the court decides a constitutional issue, it decides it in a sort of timeless fashion, declaring a timeless moral truth, as it were; such a message conveys to the losing party that it has got its profound moral principles wrong. As opposed to this, a democratic decision does not convey such a message; it tells the losing party not more than that it simply lost this time, and may win at another. It does not necessarily convey the message that the loser is morally wrong, or at odds with the basic moral values cherished by the rest of the community.

MARMOR, *supra* 9, at 154. See also WILLIAMS, *supra* 16, at 126.

118. See generally Ran Hirschl, *Looking Sideways, Looking Backwards, Looking Forwards: Judicial Review vs. Democracy in Comparative Perspective*, 34 U. RICH. L. REV. 415 (2000); Ran Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721 (2006); Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 IND. J. GLOBAL LEGAL STUD. 74 (2004).

a “hegemonic preservation”¹¹⁹ or an “antidote against democracy.”¹²⁰ It is true that courts can deliver good results in defending liberties and individual rights, but they might not be “particularly apt at dealing with issues determination of which depends on the way different alternatives affect whole communities over long periods.”¹²¹ Perhaps those changes are better, even if harder, fought in the political arena, with strong deliberations and with trust on the capabilities of ordinary citizens to engage in insightful dialogue and mutual pledges, as the 1991 revolutions illustrated.¹²²

Conclusion

Comparing the 1991 “pluralist revolution” to the 2016 “judicial revolution,” it becomes clear that today’s movements aiming to achieve deep, social change should be grounded in strong, social mobilization rather than in the judicialization of politics. Pluralist revolutions do not aim to impose ideals over a defeated side. Rather, they rely on the idea that law and legal change need to be accepted by all citizens, or at least by all affected citizens, in order to be regarded as legitimate. This public acceptance is easier to achieve when the legal changes are a result of common deliberation, compromise, and mutual pledges. However, if the legal change is one imposed from above by an elite group or institution, then the revolution will fail. This is what happened with the 2016 judicial revolution. Courts cannot act as “absolute” entities because their powers derive from the constitution,

119. Ran Hirschl argues:

[J]udicial empowerment through constitutionalization may provide an efficient institutional solution for influential groups who seek to preserve their hegemony and who, given an erosion in their popular support, may find strategic drawbacks in adhering to majoritarian policy-making processes The constitutionalization of rights is therefore not often a genuinely progressive revolution in a polity; rather, it is evidence that the rhetoric of rights and judicial review has been appropriated by threatened elites to bolster their own position in the polity. By keeping popular decision-making mechanisms at the forefront of the formal democratic political process while shifting the power to formulate and promulgate certain policies to semiautonomous professional policy-making bodies, those who possess disproportionate access to, and have a decisive influence upon, such bodies minimize the potential threat to their hegemony.

See HIRSCHL, *supra* note 63, at 12.

120. Mandel, *supra* 63, at 252.

121. RAZ, *supra* note 57, at 259.

122. It should be noted that the final Peace Agreement between the Colombian government and the FARC incorporated some public policies—such as investment in agriculture, development projects in traditionally forgotten regions of Colombia, and strengthening of state institutions within those regions—that were needed, even without the agreement, in order to remedy the structural inequalities of Colombia. However, due to the lack of a true consociation around this revolutionary movement, it seems like these policies will, unfortunately, perish as a result of the lack of democratic legitimacy of the final Peace Agreement. Thus, while some of the policies of the agreement will be implemented (e.g., demobilization of FARC combatants, and the establishment of a special jurisdiction) it seems like those policies which aimed to remedy structural inequalities will not become a reality, thereby failing to meet part of the objective of the revolution. This is an example of what Ran Hirschl argued was the “independent impact [of constitutionalization] on ameliorating the socioeconomic status of historically disenfranchised groups [which] is often exaggerated.” See HIRSCHL, *supra* note 63, at 168.

thus they must act within the legal bounds of said constitution. Accordingly, while courts can help achieve public acceptance of laws emerging from revolutions, the task of *making* that law is better left with the people who, in turn, should make laws through deliberations that acknowledge value pluralism and strict conditions of fairness.¹²³

123. During the editing process of this Article, Professor Bruce Ackerman published a book directly related to the thesis of this research. In *Revolutionary Constitutions*, Professor Ackerman introduces the concept of “revolution on a human scale.” ACKERMAN, *supra* note 5, at 28–36. While the 1991 and the 2016 revolutions explored in this Article have ambitious collective enterprises, they both fit into Ackerman’s new category. Both of these revolutions retained some aspects of the constitutional regime they were challenging but still led to serious constitutional reforms. These reforms also follow the path recently proposed by Joseph Raz, for whom any aim of reforming democratic institutions must depart from currently established institutions. Joseph Raz, Address at King’s College Online Symposium: The Verdict, Law & Society (July 2020).

Although it would exceed the scope of this Article, it would be interesting to examine how both revolutionary moments (the 1991 and the 2016 revolutions) fit into or fall outside of the four revolutionary categories newly proposed by Ackerman. The four categories include: “mobilized insurgency (Time One), through constitutional founding (Time Two) through succession crisis (Time Three) through consolidation (Time Four).” ACKERMAN, *supra* note 5, at 43. A conclusion from this Article would be that without strong mobilization, it is hard to reach consolidation. Precisely, that is the difference between the consolidated 1991 Constitution, with its strong popular roots, and the still weak application of the Peace Agreement, which lacked strong public mobilization. Perhaps constitutional courts should only act during a revolutionary insurgency if they are on the same side of the popular mobilization, but, in any event, judicial action is better reserved for the consolidation stage—at which point they would be enforcing the will of the people, and not their own.