RODRIGO UPRIMNY YEPES

Director of the Center for Law, Justice and Society (DJS) and Professor at the National University of Colombia.

Address: Centro de Estudios de Derecho, Justicia y Sociedad-Dejusticia
Carrera 4-A # 67-30 - Bogota, Colombia
Email: ruprimny@yahoo.com

ABSTRACT

In Colombia, the judicialization of politics has assumed greater proportions than in many other Third World countries where judicial prominence has become mainstream. What can have prompted the development of this phenomenon? What is its impact on the democratization of Colombian society? What are the democratic merits and the risks of judicialization? Besides attempting to provide answers to these questions, I also propose to analyze the Colombian case, through illustrative examples and a theoretical discussion on the evolution of the phenomenon.

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KEYWORDS

Judicialization of politics – Democracy – Rule of law – Judicial prominence – Constitutional justice – Independent Judiciary

JUDICIALIZATION OF POLITICS IN COLOMBIA: CASES, MERITS AND RISKS

Rodrigo Uprimny Yepes

Over the past two decades, the Colombian judicial system has not only undergone profound changes, it has also secured a firm foothold in the political arena. The decisions of the courts have, in many cases, had sizable repercussions on the overall evolution of the country. Colombia therefore has witnessed a significant judicialization of certain aspects of politics over this period.

Obviously, a central justice system and a certain amount of judicialization of politics are not exclusive to Colombia, since, for a host of different reasons, judicial prominence has become mainstream in numerous countries, developed and developing alike.[1] Nevertheless, judicialization of politics in Colombia appears to have assumed greater proportions than in other countries and, therefore, it could prove interesting to study the dynamics of this phenomenon and, more specifically, its democratic merits, but also the risks it poses.

I propose, then, in this paper, to analyze the judicialization of politics in Colombia. I shall begin by presenting some illustrative examples and then take a theoretical look at its evolution, in an attempt to identify its driving forces, as well as its merits and risks for the consolidation of our democracies.

The cases: some significant examples of the judicialization of Colombian politics

I understand very explicitly the term "judicialization of politics" to mean the fact that certain matters that were traditionally decided through political channels, and that were considered belonging to political democracy, begin to

Notes to this text start on page 64.

be decided increasingly more so by judges, or at least become far more dependent on judicial decisions, meaning that, in turn, many social actors begin to formulate their demands in legal and judicial terms. Obviously, this definition is purely descriptive and merely represents a shift in the traditional boundaries between the judicial and political systems in democratic societies, insofar as the procedural steps and the decision-making for certain matters have been transferred from the political to the judicial arena, with the legal dimensions of social action and public policy acquiring more clout.[2] Another question is whether or not the judicialization of politics is desirable democratically, a subject of ongoing debate in recent years, and one that I shall attempt to provide some answers for in this paper.

This being the case, Colombia has, over the past two decades, witnessed some important forms of judicialization of politics in numerous fields, but perhaps the most significant have been the following: (a) the struggle against political corruption and for the overhaul of political practices; (b) curtailing the abuse of government authority, in particular the "state of emergency", or what in Colombia is called a "state of exception"; (c) protecting minority groups and individual autonomy; (d) protecting stigmatized populations or those in situations of manifest weakness and, last but by no means least, (e) the management of economic policy, in virtue of the judicial protection of social rights. I shall now briefly describe each of these elements of judicialization of Colombian politics.

Judges and the struggle against political corruption and for the overhaul of political practices

Over the past decade, the Colombian judicial system has played an important role in the drive to reform political customs, in an attempt to curb political clientelism and corruption. Two examples are particularly illustrative: first, the role of the judges during the crisis of President Ernesto Samper (1994-98), who was the subject of a Congressional inquiry into charges that he had knowingly accepted money from a drug cartel for his election campaign. In this crisis, representatives from the judiciary, through their declarations and decisions, played a central role in the political landscape. It was a political crisis, but also one that was highly judicialized.[3]

The second example concerns the process of "loss of investiture", or removal from public office, decreed by the Council of State. To understand this process, we need to bear in mind that the Constitution of 1991 assigned significant powers to the judiciary to correct political misconduct and corruption, enshrining this "loss of investiture" into law. The sanction amounts to a "political death", since whoever receives it can never again occupy the position of an

elected official. The process is judicial in nature and decided by the high tribunal for administrative and disciplinary issues (the Council of State) against members of Congress who commit certain offenses, namely peddling influence, conflicts of interest or even being absent in more than six plenary sessions in which legislative bills are voted. Between 1991 and 2003, the Council of State issued some 350 indictments for loss of investiture, and in 42 cases congressmen actually lost their seats.[4]

These examples illustrate the sizable influence that judicial decisions have had on the attempts to reform political customs in Colombia.

Judicial review of legal and political emergency powers

For many decades, Colombia possessed a very distinctive democracy, since while it did not succumb to military dictatorship like many other countries in the region, it never managed to consolidate a true democracy. One of the reasons for this restricted, or "exceptional" democracy, as some analysts have labeled it, was the consistent use of the "state of siege" and the "state of exception" (or "state of emergency"), which give the president extraordinary powers, by consecutive governments. As a result, from the temporary closure of Congress during the administration of Ospina Pérez (1946-1950), in November 1949, until the promulgation of the Constitution of 1991, Colombia was in an almost permanent state of emergency, since for these 42 years, 35 were spent under a state of siege.

After the adoption of the Constitution of 1991, the Constitutional Court decided to exercise a far stricter judicial review of these powers by the government. In particular, it began to exercise a "material" control of presidential declarations of emergency, meaning that the Court analyzed whether or not a crisis was severe enough to justify the president assuming emergency powers. Previously, the evaluation was considered a political question, and as such it was the job of the president alone to determine whether or not economic turmoil or public order disturbances justified declaring a state of emergency. For its part, the Supreme Court, which was responsible for determining constitutionality prior to the Constitution of 1991, considered that this decision was not subject to judicial review and, as such, should only be submitted to the political review of Congress.[5] However, the Constitutional Court determined, from its very first decisions in 1992 until its latest rulings in 2003, that although the government should enjoy a degree of discretion to identify whether or not a crisis exists and whether or not to declare a state of emergency, its decisions are subject not only to the political control of Congress, but also to judicial review. This doctrine, therefore, has implied a judicialization of the control for declaring states of emergency; consequently, of the twelve such declarations, of

either internal disturbance or state of emergency, made between 1992 and 2002, the Constitutional Court fully ratified five, fully annulled three and partially ratified four.[6] The practical and political impact of this intervention by the Constitutional Court appears to be fairly significant, at least according to the following indicator: the amount of time spent by Colombians in states of emergency fell from 80% in the 1980s to less then 20% after the introduction of this judicial review in the 1990s.

Protection of personal autonomy and of ethnic and cultural minorities

Despite the existence of a constitutional review in Colombia since 1910, the definition and scope of the rights of the person and of minority groups was usually considered a political matter to be addressed and established by lawmakers. There are two factors that appear to have influenced this sentiment: on the one hand, the previous Constitution, in effect since 1886 but with important amendments in 1910 and 1936, had a relatively limited bill of rights; and, on the other hand, the Supreme Court, which was responsible for determining constitutionality between 1910 and 1991, saw its role as "organicistic" and "jurisdictional". That is, the court understood that its responsibility was not so much to define the scope of these rights, but essentially to assure that the "allocation of jurisdictions" between the different "organs of the State" established in the Constitution was respected. The result was that the jurisprudence of the Supreme Court during this period on matters of constitutional rights was both insufficient and extremely timid.

In contrast, after the promulgation of the Constitution of 1991, which boasts a broad bill of rights, and after the Constitutional Court began operating in 1992, the situation changed dramatically, both quantitatively and qualitatively. First of all, the number of rulings focusing on the definition of the scope of fundamental rights increased significantly. And this led the Constitutional Court to intervene, with some extremely controversial rulings, in the definition of the scope of constitutional rights and of minority groups, such as the decriminalization of drug use for addicts (sentence C-221/94) and voluntary euthanasia for terminally ill people (sentence C-239/97).[7] Similarly, the Court has protected traditionally discriminated minorities, such as people with HIV/AIDS and homosexuals. As such, homosexuality constituted a crime until 1980, and although this type of offence was abolished, several labor regimes remained in place, namely for teachers and public security forces, that enabled a person to be disciplined for homosexual behavior. The Court tackled discrimination against homosexuals at all these levels. For instance, the sentence T-097/94 protected the intimacy of homosexuals in the public security forces

and C-507/99 asserted that members of the military could not be penalized for homosexuality. Similarly, on other occasions, the Court made it impossible to expel a student for homosexual behavior (T-100/98), or penalize a teacher for the same reason (C-481/98). On a much broader level, the Court ruled that any differential treatment of a person based on their sexual preference was considered discriminatory and, therefore, unconstitutional (C-481/98).

The Court also determined, to a large degree, the scope of pluralism, not only championing equality between religions, through the annulment of the Concordat and the privileges of Catholicism, but also recognizing very broad spheres for the administration of justice by indigenous authorities.[8]

By presenting these examples, I do not mean to imply that Colombian constitutional jurisprudence was always progressive. For instance, the Court's defense of the fundamental rights of homosexuals had its limits, since it protected them against discrimination as individuals, but not as couples, determining that the law need not recognize the legal status of same-sex unions (C-098/98), that it was legitimate for the law to ban homosexual couples from adopting children (C-814/01) and that the healthcare system was not required to accept the partner of a homosexual as a beneficiary (SU-623/01). However, it is not my intent here to comment on the progressiveness of the Colombian Constitutional Court's jurisprudence, but instead only to point out that, over the past decade, the scope of constitutional rights has been defined largely by judicial decisions, which means that it is a highly judicialized issue.

The policies for stigmatized populations: prisoners and the internally displaced

Certain policies concerning the treatment of stigmatized populations and those in situations of manifest weakness have also been significantly judicialized in recent years. This has occurred primarily with prisoners and displaced persons. The former have filed numerous *tutela* suits,[9] enabling citizens to seek immediate redress for violations of their basic constitutional rights, given the overcrowding and poor conditions in Colombian prisons. After ruling on several individual *amparos*,[10] the Constitutional Court decided that it was dealing with a blanket problem, declared an "unconstitutional state of affairs" in the country's prisons and instructed the government to solve the prison overcrowding problem within a given number of months.

A similar situation arose, on a much wider scale, with the country's internally displaced persons. Due largely to the escalation of its armed conflict, Colombia has an enormous displaced population that constitutes a veritable humanitarian tragedy. Just like with the prison case, several displaced persons filed *tutelas* calling for the national and local authorities to protect their

fundamental rights. The Constitutional Court, as it did with the prisoner situation, after ruling on numerous individual *amparos*, declared an "unconstitutional state of affairs" (T-025/04) due to the inconsistency and precarious nature of state policy concerning forced displacement. In this decision, the Court ordered the national authorities to reformulate and clarify its strategies for addressing forced displacement in order to satisfy the basic needs of these persons.

These decisions illustrate the significant judicialization of certain public policies, since the decisions of the Court not only implied considerable public spending,[11] they also established priorities and orientations for government strategies in these sectors.

The judicialization of economic policy and the protection of social rights

The final, and perhaps the most significant, example of judicialization of politics has been the extremely important influence wielded by the Constitutional Court on economic policy as a result of this tribunal's mission to protect social rights. There are countless examples, so any attempt at codification runs the risk of being inadequate; but perhaps the best approach would be to present two types of intervention: individual or group protection by means of *tutela* and an abstract or general review of the constitutionality of laws with economic content.

On the one hand, the Constitutional Court has defended that social rights may be upheld by judges via the protection of constitutional rights, given that social and constitutional rights are intrinsically linked. For a social right to be protected, the lack of protection that is invoked before the judge must imply that another right, considered fundamental and immediately applicable, is affected, as is the case with the right to life. And in these cases, the protection is usually afforded through individual *tutelas*, which, as we have seen, are Colombia's equivalent to the *amparo* in other countries. Prior to 1998, judicial protection of social rights, despite the progressive character of the jurisprudence, did not provoke any serious conflicts between judges and officials from the other branches of the government. The number of *tutela* rulings for the protection of social rights was not significant and, as such, the judicial activism of the Court was only unacceptable to the very harshest critics of social constitutionalism. Furthermore, the majority of these rulings referred to cases of people contractually linked to a state healthcare, education or welfare system. After 1998, however, the situation changed dramatically, given the soaring demand for *tutela* protection of the right to health against welfare entities. The costs increased threefold: while in 1998 the demand for healthcare via *tutela* cost 4.793 billion pesos, by 1999 this figure had risen to 15.878 billion.12

Moreover, *tutelas* that formally invoke the right to health or the right to life, through which petitioners generally request treatment they deem necessary to preserve a life of dignity, numbered approximately 3,000 in 1995 and represented roughly 10% of all the *tutelas* filed to the Court that year. By the first half of 1999, this ratio had risen to 30% and the number of cases had increased to nearly 20,000, that is, nearly 40,000 per year.[13]

On the other hand, the Court has strongly affected economic policy in virtue of an abstract review of constitutionality that has led it to declare unconstitutional, either entirely or partially, certain laws that violate certain constitutional principles and rights. For instance, the Court has annulled laws extending value added tax to basic need products (C-776/03), ordered the partial indexation of salaries for civil servants (C-1433/00, C-1064/01 and C-1017/03), extended some pension benefits to certain population groups, after considering that the restriction disregarded the principle of equality (C-409/94) and banned alterations to certain pension regulations, after considering that they affect the vested rights of workers (C-754/04). All these rulings have had significant economic and budgetary implications.[14]

One of the most striking examples of the judicialization of economic policy was the intervention in the mortgage owners debt crisis in 1998 and 1999. Given the importance of this case, it is worth describing it in some detail.

In 1997, Colombia plunged into a bitter recession that, coupled with certain economic policy decisions, made life extremely difficult for thousands of middle class citizens who had contracted mortgages to pay for their homes. In a matter of months, it was said that some 90,000 people were on the verge of losing their homes and this figure rose, two years later, to 200,000 families.[15]

These debtors were largely from the middle class, people who do not usually engage in social protest. Nevertheless, the situation grew so serious that the debtors began to band together to defend themselves against the financial institutions. In 1998, they staged peaceful demonstrations and drafted petitions calling for the government and Congress to make changes to the credit system (known as UPAC) and to provide them with some relief.

Very quickly, and in response to the lack of receptiveness from the government and Congress, the debtors and their associations resorted to a judicial strategy and, in particular, submitted their claims about the rules governing the UPAC system to the Constitutional Court.

Between 1998 and 1999, the Court delivered several rulings on the UPAC system that, in general, tended to protect the debtors. Furthermore, the Court ordered a new law regulating the housing credit market to be passed within a period of seven months. This sentence placed the Court in the eye of the storm, since although the debtors and some social movements supported its rulings, business groups, some sectors of government and countless analysts fiercely

attacked the Constitutional Court, criticizing it for overstepping its boundaries and for being ignorant of the workings of a market economy, and they proposed that the Court should not rule on the constitutionality of economic legislation.

In this context, Congress deliberated and passed, at the end of 1999, a new housing credit law that incorporated, among other things, two trillion pesos (nearly 1.2 million dollars) in relief for the mortgage owners and once again pegged mortgage debts to inflation. The influence of the Court's decisions in the parliamentary debates was unmistakable.

These cases illustrate that Colombian economic policy in recent years has been strongly affected by constitutional rulings, which have not only had considerable financial implications but have also defined certain guidelines for this policy.

An initial conclusion

All these examples enable us to reach an initial conclusion: there has been a strong judicialization of Colombian politics over the past few decades, which gives rise to some obvious questions: what could have prompted the development of this phenomenon? What has its impact been on the democratization of Colombian society? In the remainder of this paper, I shall endeavor to provide some answers to these questions.

An attempt at interpretation: the driving forces of Colombian politics

An explanation of what has triggered the judicialization of politics is not easy, since the interpretations are not entirely consistent. Nevertheless, it is possible to identify some factors shared by different countries and others specific to Colombia that enable us to understand, at least partially, the logic behind this phenomenon.

Driving forces of judicialization shared by other countries[16]

One initial factor leading to judicialization both in Colombia and in other countries is the disillusionment with politics, which caused some circles to turn to the judiciary for answers to problems that, in principle, should be debated and resolved, owing to the mobilization of the citizenry, on a political level. This phenomenon is obviously not exclusive to Colombia, since the political and representation crisis is in general a factor that has profoundly influenced the current prominence of the judiciary. As such, the proliferation – or perhaps the greater transparency – of corruption has placed judges in the heart of the

political landscape, given either their permeability to corruption, or their actions to combat it, which not only pits them against the political powers, it has also converted certain officials or judges into figures of great public prominence who enjoy the backing of the citizenry. Moreover, in the social field, some sectors of the judiciary have embraced the cause of defending citizenship rights, which has led to the judicial structure, whose officials are not popularly elected, sometimes being perceived as more democratic than the government bodies whose officials are elected by popular vote, giving rise to a rather paradoxical shift in democratic legitimacy from the political system to the judicial system. Finally, many citizens consider the judiciary to be more accessible and democratic than the legislative or the executive branches, as certain conflicts can be settled more easily by the judicial structure, where there is no need for political intermediaries.

Second, this interest on the part of the citizenry to judicialize certain conflicts has sometimes been accompanied by an interest by certain political actors (parties and governments alike) to depoliticize some sensitive issues, to avoid being weighed down by the consequences of their decisions, or because they are faced with an institutional obstacle that prompts them to accept or even welcome the delegation of these matters to the judges.

A third force propelling judicialization has been the effort to strengthen the power of the judiciary and to assure its independence, which is essential for the rule of law. This process has been driven by many diverse factors in Latin America. For instance, human rights groups and social movements that opposed the authoritarian regimes advocated that a strong judiciary was essential to consolidate democracy and to guarantee people their rights. Meanwhile, international financing institutions and the Washington Consensus also backed these reforms, to provide for foreign investment, since without an independent judiciary, there can be no legal protection, nor security for property or contract rights. These forces have implied a certain strengthening of the judicial structure, and indeed a judicial branch with more personal and political independence, and equipped with more resources, has a greater chance of intervening in political processes.

Fourth, many countries have, in recent years, experienced a shift towards what some authors call neoconstitutionalism, which is characterized by the promulgation of constitutions with a long list of fundamental rights and, moreover, that are normative in nature, establishing constitutional justice systems to assure respect for these rights, even by legislative majorities. This form of constitutional justice has also helped fuel the judicialization of politics, not only given the ability of these courts to annul legislative and government decisions by invoking constitutional clauses that are essentially open to interpretation, but because it enables individual citizens or social groups to articulate their demands in the language of rights.

This internal constitutionalization of the law coincides with the relative strengthening, in recent years, of international human rights mechanisms, which have also encouraged complaints to be formulated in terms of rights and reinforced the judicial dimension of political criticism.

Possible forces specific to Colombia

The situation in Colombia, to a certain degree, simply accentuates certain trends existing in other countries, but there are some elements that seem to be specific to the country.

On the one hand, there is a weakness in the mechanisms of political representation, although this appears to run deeper in Colombia than in other countries in the region, hence the greater inclination to substitute political for judicial action. Now is not the time or the place to make a systematic presentation of this phenomenon, which has been analyzed in detail by other authors. All I shall do is point out that this has bred a deep disrespect for Congress and the so-called political class, which has enabled judges and, in particular, the Constitutional Court to play a more prominent role. As a result, what very often occurs is not that this tribunal confronts the other branches, but rather that it steps in to occupy the vacuum they have left; and this intervention is accepted as legitimate by broad sectors of society, which consider that at least one branch of government operates progressively and efficiently.

On the other hand, Colombia has an historic tradition of weak social movements compared to other peripheral or Latin American countries. And not only are these social movements infirm, but in recent years violence has significantly raised the costs and risks of keeping them running, since many leaders and activists have been murdered. These two factors – historic weakness and growing risks – tend to strengthen judicial prominence and, more specifically, that of constitutional justice. In effect, since access to constitutional justice is relatively easy, as we shall see further ahead, it is natural that many social groups will be inclined to employ legal arguments instead of relying on social and political mobilization, which comes with enormous risks and costs in Colombia.

The fact is that Colombian legal procedure makes access to constitutional justice relatively easy and inexpensive. The *acción pública* appeal has existed since 1910, enabling any citizen to challenge the constitutionality of any law, without needing to be a lawyer or observe any special formalities. But this is not all. The Constitution of 1991 created an additional device, the *tutela*, by virtue of which any person may, without any special requisites, request from any judge protection of their fundamental rights. The judge is required to decide quickly (10 days) and all sentences are forwarded to the Constitutional Court,

which decides which it will review at its discretion. This simplified access to constitutional justice has prompted the Court to play a more prominent role, since it is relatively easy for citizens to transform a complaint into a legal issue that needs to be decided constitutionally, and in a reasonable short period of time, by the constitutional justice system. And, as comparative legal studies have shown, the more access there is to the courts, the more political influence these courts wield.[17]

In Colombia, the simultaneous movement of neoconstitutionality and promotion of human rights, which also occurred in other countries, is materialized in the Constitution of 1991, which is not the product of a triumphant revolution, but instead an attempt, within an extremely complex historical context, at an agreement to broaden democracy to confront violence and political corruption. Under these circumstances, playing a very important role in the Constituent Assembly were political and social forces traditionally excluded from Colombian electoral politics, such as representatives from some disbanded guerrilla groups and indigenous and religious minorities. The composition of the Assembly, therefore, was pluralist by Colombian electoral standards. Considering this situation, many of the delegates appeared to make the following diagnosis: exclusion, lack of participation and weakness of human rights protection were the basic underlying causes of the crisis in Colombia. This explains some of the ideological orientations of the Constitution of 1991: the expansion of participation mechanisms, the establishment of State responsibility for social justice and equality, and the incorporation of a rich bill of rights and new judicial mechanisms for their protection.

All this explains the generosity afforded human rights by this Constitution, which confers a special legal force to human rights, since not only does it determine that the majority of the constitutional rules that contain these guarantees are directly applicable, but it also establishes that international human rights treaties shall prevail in the internal order and shall constitute criteria for interpreting constitutional rights. The Constitution of 1991, therefore, has a vocation for judicial application, which is conducive to a certain judicial activism in favor of human rights. Although it was not impossible in the previous constitutional order, it had less legal grounding.

On the other hand, there is also a strong tension between the social content of many of the Constitution's clauses and the development strategies that Colombian governments have implemented since 1990. As a result, while the Constitution permits privatization and certain neoliberal policies, many of its rules favor an active intervention by the State to pursue social justice, given that representatives of groups traditionally excluded from Colombian politics had a considerable influence drafting it. However, the Gaviria administration (1990-1994), which had vigorously promoted the constitutional process,

unleashed, perhaps with even greater force, an economic liberalization strategy that was clearly neoliberal. Therefore, while the Constitution to some degree demanded more State presence and an intervention in resource redistribution by the authorities, governments actually implemented development plans that tended to cut back on the social presence of the State and to allow market forces to dictate the allocation of resources.[18]

Very quickly, and for a number of different reasons, the political forces that wrote the Constitution weakened politically, meaning that one of the few institutions capable of applying the Constitution's progressive content was the Constitutional Court. And this tribunal, from its earliest rulings, decided to take on this function with vigor, taking seriously the role of judges in the development of fundamental rights. As such, the Court soon became practically the only executor of the constitutional principles.

Over the years, therefore, the Court gradually came to present itself as the executor of the values of freedom and social justice enshrined in the Constitution, allowing it to acquire a significant legitimacy in certain social sectors. But it always walked the knife's edge, since its progressiveness also triggered fierce criticism from other sectors, in particular from business circles and the government, which attacked the jurisprudence of the Court, accusing it of being populist and naïve. These players have not limited themselves to making criticisms; they have also attempted, so far without success, to pass numerous reforms to shut down the Court, or at least to seriously limit its authority.

In addition to this, certain traits exist in Colombia that are conducive to judicial activism and prominence, namely the traditional respect, at least formally, for constitutional principles and the importance of an independent judiciary.

The Constitutional Court was created by the new Constitution that the Constituent Assembly approved in 1991. However, Colombia already had a long tradition of judicial review of constitutionality, dating back to at least 1910, when the Supreme Court of Justice was recognized as the authority to rule on the constitutionality of laws. And the Supreme Court performed this function, with varying levels of fortune, for nearly eight decades, often making decisions that were very controversial, but always accepted by the political forces. As a consequence, when the Constitutional Court began operating in 1992, the Colombian legal and political culture was already very familiar with the judicial review, to the extent that few people in Colombian legal circles considered it strange that this tribunal could annul laws approved by Congress. The Colombian Constitutional Court, in spite of being a new institution, did not have to struggle for the political forces to recognize the legitimacy of the judicial review, since this was already widely accepted in Colombian legal and political circles.

Merits and risks of the judicialization of politics for the consolidation of democracy

A partial judicialization of political life doubtless has certain virtues. For instance, it can prevent the abuse of power by political bodies and by majorities against stigmatized minorities or individuals. Therefore, the language of rights occupies an important place in contemporary democracies, and the recognition and judicial protection of these rights – albeit performed by non-majority parties, which judges and constitutional courts are – should be seen not as limitations to democracy, but instead as guarantees of the prerequisites of democracy. Therefore, while they cannot boast a democratic origin, constitutional judges perform a crucial democratic role, since they are the guardians of the continuation of the democratic process.

The earlier justification for a certain amount of judicialization of politics is also linked to the importance of fundamental rights in a democratic society. The idea is that many of these rights are, first and foremost, procedural presumptions for a functioning democracy, since a true democratic debate could hardly take place if the freedoms of expression and mobilization, the right of association and political rights, etc. were not guaranteed. The existence of these rights, then, is essential for a democracy to be truly considered a regime in which citizens are free and who deliberate to govern themselves. However, for these people to be genuinely free, it is also necessary to assure them the minimum conditions of dignity, which enables them to develop as autonomous individuals. And these conditions are our fundamental rights, considered indispensable for all people to enjoy the dignity necessary to be truly free, equal and autonomous citizens. As such, these rights are also a type of material presumption for a democratic regime, since without free and equal citizens, a government could hardly be considered democratic. Therefore, if fundamental rights are both procedural and material presumptions of democracy, it goes without saying that these rights need to be guaranteed, regardless of the opinion of the majorities. Within this context, if fundamental rights are – and please forgive the redundancy – fundamental for democracy, then it is obvious that by assuring they are upheld, the judges are performing an essential democratic function.

As a consequence, and borrowing the terminology suggested by Luigi Ferrajoli,[19] although judges and constitutional courts lack formal democratic legitimacy, as they are not elected by popular vote, they do enjoy a substantial democratic legitimacy, inasmuch as they assure fundamental rights and protect the continuity and impartiality of the democratic process.

On the other hand, a certain amount of judicialization also seems inevitable when obstacles are encountered in the political system that can,

for example, cause it to lose its capacity to respond to particular types of corruption practices, when these practices grow so widespread that they become part of the system's ordinary rules of play. In such contexts, the intervention of the judiciary – an actor that is partially removed from the political system as such – can unleash a process of political reform that may otherwise have been impossible. In this vein, judicialization is not in itself harmful, since it can act as a catalyst sparking a democratic overhaul of politics.

Third, a certain amount of judicialization of politics, particularly the type associated with the protection of rights, may also serve, however paradoxical it might seem, as a mechanism of social and political mobilization, inasmuch as it empowers certain social groups and expedites their social and political action, as was the case with the mortgage owners thanks to the judicial decisions they were awarded.

Nevertheless, there are also some clear risks of an excessive judicialization of political life, since this can hamper the consolidation of our fragile democracies.

One the one hand, it can overburden the judicial system, which can start to find it difficult to assume tasks that are not entirely within its jurisdiction. Therefore, the transfer of an excessive number of problems to be resolved by judges could end up affecting the very legitimacy of the administration of justice, which does not in the long-term have the capacity to respond to such a challenge. And this occurs not only as a result of the quantity of problems that the judicial system ends up having to resolve, but also as a result of the issues involved, since the judiciary may not be the most appropriate place for some conflicts. The risks of judicial error are great.

On the other hand, judicialization may give rise to a contrast between a visible and prominent judiciary, which decides few cases, but in a spectacular fashion, while the vast majority of topics are decided by an invisible judiciary that tends to operate more routinely and whose procedure is inefficient and partial.[20] In Colombia, there is clear evidence of these routine inefficiencies, as is the case, to give just one indicator, with criminal impunity. Despite the discrepancies that exist in the country about the concept and scale of this impunity, all political analysts generally acknowledge it to be both significant and persistent. We could, therefore, reach an unwanted combination of an enormously deficient and also prominent judiciary. In this situation, the former would offset the latter, that is, the functional deficiencies of the judicial system would, to a certain degree, be compensated by an exceptional intervention by judges in major political debates. Political prominence on the one hand and functional deficiencies on the other are, therefore, closely connected: while the judiciary does not resolve its functional problems and garner strength and capability through the observance of its natural social

duties, its intervention in major political debates may be the pretext for a shift in objectives and towards an even greater weakening of its obligations.

Third, the judicialization of political conflicts almost inevitably tends to politicize, in the worst sense of the word, judicial conflicts, since the courts and processes are transformed into situations and tools to be exploited by political actors, which profoundly destabilizes the role of the judicial system as the guarantor of human rights and the rules of the democratic game. The law is no longer the general rule that society recognizes, since it is considered that the meaning of the rules can be manipulated depending on the interests at play. Public opinion, therefore, begins to distrust all judicial decisions, undermining the very legitimacy of the administration of justice. And this is even more serious in fragile democracies, since in these cases the independence of the judiciary is far from consolidated.[21]

Fourth, this excessive judicialization often leads to delays in political solutions that are necessary to confront specific problems, a situation that was illustrated by the "Process 8000" campaign against political corruption. In this case, the lack of clear rules on political parties and elections smoothed the way for the infiltration of drug money into the 1994 presidential campaign. As a consequence, the debate at the time on political reform was put off, taking a back seat to the outcomes of the Process 8000 campaign and the inquiry into the president, and was only seriously taken up again several years later.

Finally, while judicialization in countries like Colombia can be explained in part by the weakness of social movements and it is said to be able to refresh democratic politics, then undoubtedly it can also accentuate the apathy of citizens. The use of legal arguments to resolve complex social problems may give the impression that the solution to many political problems does not require democratic engagement, but instead judges and providential officials. This is serious, as not only does it imply an increase in the demobilization of citizens, but it also casts doubts on the very democratic principles, since it is the duty of officers of the judiciary – who are not elected – to defend the eventual virtues of democracy. The risks of authoritarian and anti-democratic solutions are there considerable, since society would increasingly place their trust in providential men to restore virtue and to solve problems.

This analysis leads to a conclusion, therefore, that while apparently obvious is nonetheless important: judicialization has its merits, but it also comes with risks. The challenge then is to empower its democratic potential and minimize its unwanted effects, which, from an academic point of view, should prompt us to investigate more specifically which forms of judicialization promote democratization and which, in contrast, are democratically risky.

NOTES

1. See, for example, Boaventura Santos, "Los paisajes de las justicias en las sociedades contemporáneas", in Boaventura Santos & Mauricio García-Villegas (eds.), *El caleidoscopio de las justicias en Colombia,* Bogotá, Uniandes-Siglo del Hombre-Colciencias-CES, 2001.

2. For similar concepts, see the work of Pilar Domingo, in particular her article in this issue and her paper entitled: Pilar Domingo, "Judicialisation of Politics: The Changing Political Role of the Judiciary in Mexico", in Rachel Sieder, Line Schjolden & Alan Angell (eds.), *The Judicialisation of Politics in Latin America.*, New York, Palgrave Macmillan, (in press 2005).

3. See, on this topic: Rodrigo Uprimny, "Jueces, narcos y políticos: La judicialización de la crisis política", in Francisco Leal Buitrago (ed.), *Tras las huellas de la crisis política*, Bogotá, Tercer Mundo Editores, Fescol, IEPRI, 1996.

4. On this topic, see: Fernando Cepeda Ulloa, "La pérdida de investidura de los congresistas: una herramienta eficaz contra la corrupción", in Fernando Cepeda Ulloa (Ed), *Las fortalezas de Colombia*, Bogotá, Ariel, IADB, 2004, pp. 489 ff.

5. For an introduction to the evolution of the judicial review for the use of these extraordinary powers, see Rodrigo Uprimny, "The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia", in Siri Glippen, Roberto Gargarella & Elin Skaar (Eds), *Democratization and the Judiciary*, London, Frank Cass, 2003.

6. According to the Colombian Constitution of 1991, there are three types of "states of exception": on the one hand, the "state of foreign war", for cases of international armed conflict, which has never been used; one the other hand, the "state of internal disturbance", for cases of severe disruption of public order; and, finally, the "state of emergency", for cases of serious economic crisis or natural disaster.

7. The Colombian Constitutional Court basically delivers two types of sentences: rulings on constitutionality, or an abstract review of laws, whose numbers begin with the letter "C", and decisions on what in Colombia is known as *tutela*, or protection of constitutional rights, which are those beginning with the letter "T". Rulings on constitutionality are handed down by the Plenary Chamber of the court, comprised of nine judges, while the *tutela* rulings are generally made by the various Chambers of Review, each one comprised of three judges, with the exception of unifying sentences, which combine constitutionality and *tutela* cases and are decided by the Plenary Chamber. The sentences of the Constitutional Court, then, can be identified by three elements: the caption, ("C", "T" or "SU") which indicates the type of procedure and decision; the first number, which corresponds to the sequential order of rulings in a given year; and the second number, which specifies the year. Therefore, the ruling T-002/92 is the second sentence delivered by the Court in 1992, and corresponds to a *tutela* case judged by three judges in a Chamber of Review.

8. On the efforts of the Court to protect ethnic diversity, see the work of Vítor Manuel Uribe.

9. *Tutela* suits in Colombia are the equivalent to the *amparo* in other Latin American countries. *Amparo* is a judicial suit aimed at protecting fundamental constitutional rights. It may be presented to any judge and it is decided in a few days.

10. For a definition of *amparo,* please see n. 9.

11. According to a report from the Budget Directorate of the Ministry of Finance, presented in October 2004 at a seminar on the topic, the ruling on displaced persons could cost approximately one trillion pesos, that is, nearly 400 million dollars at a revalued rate of 2500 pesos per dollar. And the decision on prisons cost around 300 billion pesos in operating expenses and some 260 billion in investments, that is, a total 560 billion pesos, which is equivalent to approximately 230 million dollars.

12. See Luis Carlos Sotelo, "Los derechos constitucionales de prestación y sus implicaciones económico-políticas", in Departamento Nacional de Planeación de Colombia, *Archivos de macroeconomía*, Documento 133, 2000.

13. See Corte Constitucional y Consejo Superior de la Judicatura, *Estadísticas sobre la tutela*, Bogotá, 1999. This trend continued in subsequent years.

14. According to the aforementioned Ministry of Finance report, the cost of these sentences is high. Two examples: sentence C-409/04 has cost, since 1995, many hundreds of millions of pesos and continues to cost the equivalent of nearly 800 billion pesos per year, that is, around 320 million dollars per year. Sentence C-776/03, on VAT, cut tax revenues by approximately 750 million pesos, or nearly 300 million dollars.

15. See the Colombian magazine *El Espectador* from 29 April 1997 and 1 June 1999.

16. On this point, see the concise presentation by Pilar Domingo: *op.cit.* Also see Javier Couso, "Consolidación democrática y poder judicial: los riesgos de la judicialización de la política", *Revista de Ciencia Política*, Vol XXIV, No 2, 2004, pp. 37 ff.

17. Herbert Jacob et al., *Courts, Law and Politics in Comparative Perspective*, New Haven, Yale University Press, 1996, pp. 396 ff.

18. On the tensions between the social content of the Constitution and the neoliberal strategies of governments in the 1990s and, in particular, the Gaviria administration, see José Antonio Ocampo, "Reforma del Estado y desarrollo económico y social en Colombia", *Análisis Político*, No 17, September/December 1992. See also Andrés López Restrepo, "El cambio de modelo de desarrollo de la economía colombiana", *Análisis Político*, N. 21, January/April 1994.

19. See Luigi Ferrajoli, *Razón y derecho,* Madrid, Trotta, 1985, pp. 855 ff.

20. On this contrast, see César Rodríguez, Mauricio Garcia and Rodrigo Uprimny, "Justice and society in Colombia: a sociological analysis of Colombian courts", in Lawrence Friedman & Rogelio Pérez-Perdomo (Eds), *Legal Culture in the Age of Globalization*, Stanford, Stanford University Press, 2003.

21. In a similar sense, see Couso: *op. cit*, pp. 43 ff.