

The Constitutional Court and Social Emancipation in Colombia*

Rodrigo Uprimny and Mauricio García-Villegas

INTRODUCTION

The purpose of this chapter is to evaluate the emancipatory potential of some rulings of the Colombian Constitutional Court. During the past nine years, the court has had a leading role in Colombian political life. In general terms, it has been vigorous in its protection of the rights of individuals and minorities, as well as in its intention to control abuses of power. The court's labors have been considerable, not only because of the sheer number of rulings it has made and the variety of subjects it has addressed, but also because it has, to a certain degree, surprised Colombian society with its progressive orientation. This explains the fact that the court has won a certain amount of appreciation and prestige from social sectors and groups that are very critical of other state bodies but that perceive in the court's decisions some of the few real opportunities for truly protecting their rights.

The Colombian constitutional experience is atypical and it appears to be unrelated to counter-hegemonic issues: on the one hand, cases related to these issues appear in a contemporary liberal capitalist state institution and, on the other hand, they make use of the law, seen as the most essential instrument for domination in this state model. How has this been possible in Colombia? Is it not contrary to common sense to talk about counter-hegemonic emancipation coming from the state? Are we then dealing with a sort of "hegemonic emancipation"? Our objective in this chapter is to explain how, and with what limitations, these cases are significant in terms of emancipation,¹ as well as how they have acquired unusual importance not only in Colombia but also in other semiperipheral countries.

* We wish to thank the following students from the National University for their valuable contributions to the empirical research in this essay: Magda Ayala, Paola Jiménez, Úrsula Mendoza, Liliana Rincón, and Ernesto Miele. We would also like to thank Professors Diego López, Rodolfo Arango, and Danilo Rojas for their comments.

The organization of this chapter largely follows from the methodology that we have employed. It was impossible to evaluate systematically the entire body of the court's work, but at the same time we felt it necessary to analyze, in empirical terms, the impact of its decisions. For this reason, we decided to combine theoretical reflection with some case studies that we thought were significant. We will start by presenting the most relevant positions in the theoretical debate regarding the potential to achieve social change through judicial decisions. We have tried to establish a "dialogue" between the arguments in this debate and the cases that we have studied in Colombian constitutional jurisprudence, taking also the social and institutional reality into account. In this exercise, we endeavor to take advantage of the analytical richness of the theoretical discussion in core countries in order to develop a new conceptual framework that can be used to understand the relationship between law and social emancipation in semiperipheral countries, and in Colombia in particular, as well as the possibilities and limitations of constitutional justice in this respect.

THE THEORETICAL DEBATE

The study of the emancipatory dimension of the rulings rendered by constitutional judges in Colombia is a topic that is less specific than it seems at first. Since the mid-1980s, judges have taken such a leading role in a significant number of democratic countries that some authors have spoken of a transfer of the burden of democratic legitimation from political bodies to judicial ones (Santos, 2001a). The judges in the limelight have been, on the one hand, criminal judges in their fight against political corruption and, on the other, constitutional judges in their defense of fundamental rights. The Constitutional Courts have assumed particular importance in the countries of Eastern Europe and in many others around the world that are in a process of democratic transition.² These courts have played a key political role, often contrary to the role foreseen for them by the reigning political system and even at times in opposition to the logic of the capitalist marketplace. This leads to a *judicialization* of political conflicts, which in its turn implies a politicization of judicial conflicts (Santos, 2001a). The Constitutional Courts of Hungary³ and South Africa⁴ are the best-known examples, but other equally important instances are the Supreme Courts of India,⁵ Russia, Korea,⁶ and Colombia, as we will show in this chapter.

However, the counter-hegemonic character of legal protagonism should be analyzed with great care since the main international development agencies—which do not exactly represent a symbol of counter-hegemonic struggle—have for over a decade been dedicating the core of their resources to promoting judicial authority.⁷ This caution is above all necessary in the sphere of civil and criminal law, since this is the privileged context of the

phenomenon of judicial globalization. In effect, a good part of these international resources are destined to increase the efficiency of those legal processes most necessary to the functioning of the capitalist market, and therefore a *prima facie* empathy can be posited between judicial efficiency and hegemonic interests.

The situation of constitutional judges appears to be different. In the first place, they have not been the privileged beneficiaries of the economic resources mentioned above, and, in the second place, their decisions usually affect essential hegemonic interests, as we will see below in the Colombian case. Thus it is important not to confuse the meaning of these parallel developments: on the one side, an increase in judicial efficacy intended primarily to protect globalized capitalist interests⁸ and, on the other, the leading role of judges in the attack on corruption and violation of fundamental rights. In general terms, different and even contrary logics are involved, although in certain circumstances they can be mutually reinforcing.⁹

After these considerations, let us return to the theoretical debate. To what extent can progressive judicial rulings engender significant social change? Is the legal struggle in the courts a profitable strategy for social movements and for the political left? Is the law an effective instrument for social emancipation? These are some of the key questions of the debate on the judiciary and social change that took place during the 1980s in the United States. During the 1970s a good part of the political struggle was directed at achieving legal reform or obtaining judicial decisions that could counter discrimination. This strategy was known as the Civil Rights Movement. A decade later, academics debated the evaluation of this process (the civil rights experience). On one side were those authors who, from the sociology of law, supported the position that significant social changes could be won through judicial decisions (Rosenberg, 1991: 21–30). On the other side were the Critical Legal Studies scholars, who led and encouraged this debate, and who took a skeptical position concerning legal battles. In their opinion the struggle for civil rights did not bring the anticipated results.¹⁰

In the semiperipheral states the law/social change debate is posited in less instrumental terms than in the core countries. That is to say, the terms of the debate are less related to the logic that links legal aims, means, and results. This might have several explanations. The first grows out of the classic distinction between the state and civil society:¹¹ in the semiperiphery, this dichotomy—as well as its derivations: law/society, public/private, law/politics—is often even more problematic than it is in the core countries. As a consequence, the autonomy of legal discourse with respect to other social and institutional discourses tends to be more precarious. The law, and particularly public law, has less autonomy from the political system. The legal system takes on in good measure the dynamics of the political system so that a type of isomorphism occurs between, on the one hand, political discourses,

which relate less to the representation of social interests than to mere ideological debates, and, on the other hand, legal norms, which follow less the technical requirements of social regulation than the political necessities of institutional legitimization. The second reason is more specific and directly linked to the first: in these countries, state law is a more precarious instrument of social influence than it usually is in the core countries. Two facts may illustrate this precariousness: one is the marked difference that exists between *law-in-books* and *law-in-action*. A good part of *law-in-books* either fails in instrumental terms or is created to fulfill aims that are different from the ones for which it was designed. The second fact is that of legal pluralism, that is, the existence of a number of official and unofficial sources of regulation that are frequently interrelated in complex interactions.

Colombia follows this general tendency of the semiperipheral countries in that the autonomy of the legal system is reduced, not only with respect to the political system—as a result of the political instrumentalization of law—but also with respect to the social system, as a result of the lack of legal effectiveness and the prevalence of legal pluralism. However, this tendency is accentuated in Colombia. Beyond the social anomie in politics that is characteristic of the entire subcontinent, there are three additional aggravating elements that are intimately interrelated. They are the following: 1) the relative failure of governments' efforts to strengthen social democracy both through agrarian reform (Findley, 1972: 923; Gros, 1988; Pinto, 1971) and through the extension of social rights; 2) the devaluation of the democratic system as a result of its militarization through the existence of a state of exception and its strongly exclusionist and clientelistic political character; and 3) the close relationship that is found in Colombia between the anomie of the political discourse and violence throughout the course of its political history (Pécaut, 1978, 1997; Deas, 1995).

Three additional points of clarification attenuate this perhaps excessively politicized image of Colombian law in favor of the state. In the first place, the hyper-legality of Colombian institutional life is related not only to an institutional strategy of legitimation but also to a civilian tradition that dates back to independence and that has made possible a certain control of the executive power through legal decisions and the electoral system. The creation of the Constitutional Court, for example, would not have been possible without the existence of a strong tradition of judicial review in Colombia. In the second place and linked to the first point, it is important to bear in mind that the use of law for institutional legitimization in Colombia is effective only to the degree that at least a minimal level of instrumental efficacy is achieved (Edelman, 1971; Bourdieu, 1986: 14). The fact that a common strategy of political legitimization is making the law live up to its claims and ambitions, that is, making law efficacious, cannot be overlooked. Finally, and this is the point most germane to the subject of

this chapter, we have to take into account that, although the production of law with legitimizing intentions has been a more or less fruitful strategy of social domination, it is also a double-edged sword. The symbols of social change and protection of rights that it embodies may be appropriated by social movements, individuals, or even by state institutions, and particularly by judges, who take the law seriously and use it as an instrument of resistance or emancipation from hegemonic power. In this case, the legal strength of the state might be a useful element in articulating emancipatory social practices, or at least in stimulating practices of resistance to hegemonic power. The Constitutional Court moves, therefore, in this border zone between institutional weakness and emancipatory social practices.

REASONS FOR THE COURT'S PROGRESSIVE ACTIVISM

The Colombian Constitutional Court's progressive activism raises at least the following question: bearing in mind that the few comparative studies that exist on judicial institutions underline that the courts and the law tend to be conservative and to reflect and protect the existing dominant interests,¹² what elements could then explain the Colombian Constitutional Court's progressive tendencies and prominent role? There is no easy answer, but there are some elements that could explain this evolution.

The Constitutional Court was created under the new Constitution that the Constituent Assembly approved in 1991. However, Colombia already had a long tradition of judicial control over constitutionality. Going back to at least 1910, the Supreme Court of Justice was granted the binding authority to rule on a law's constitutionality. 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 point that few in the judicial community thought it strange that this court had the power to annul laws that had been approved by Congress.¹³ The court could therefore act vigorously, without fear that the executive branch or the political forces would decide to shut it down, as has happened in other countries in which the first task that constitutional courts have faced has been to win legitimacy for its role.

Second, the procedural design makes the access to constitutional justice in Colombia very easy and inexpensive. Thus, since 1910, when public actions were instituted, any citizen may ask that any law be declared unconstitutional, without needing a lawyer or any other formalities. The 1991 Constitution also created the *tutela* action, by virtue of which any person, without any special requisites, may directly request that a judge intervene to protect his or her fundamental rights. It is relatively easy for citizens to transform a complaint into a legal issue that the constitutional justice system must decide upon and within a quite short period of time. As has been demon-

strated in comparative legal studies, greater access to justice brings about greater political influence for the courts (Jacob *et al.*, 1996: 396 ff.).

Thirdly, the procedural design of constitutional justice also confers enormous legal powers on the court. In practice, due to its ability to annul, for constitutional reasons, other judges' decisions, the Constitutional Court has been growing in prominence as a super-court. And this also facilitates its activism, since there tends to be more judicial activism and leadership, as comparative sociology demonstrates, in countries where most of the authority is concentrated in a single supreme court, such as in the United States. This contrasts with countries such as France where this power is distributed among different courts and jurisdictions (Jacob *et al.*, 1996: 389).

Beyond these institutional legal elements, there are two structural political factors that have stimulated the court's activism: the crisis in representation and the weakness of the social movements and opposition parties. Colombians' disenchantment with politics has led certain sectors to demand answers from the judiciary to problems that, in principle, should be debated and resolved by means of citizens' participation in the political sphere. This phenomenon is not exclusive to Colombia (Santos *et al.*, 1995), but in this country the weakness of the mechanisms for political representation runs deep, a fact that has enabled the court to assume a more prominent role. On many occasions, what has taken place is not that the court takes on other powers, but rather that it has stepped in to fill the vacuum that they have left. This intervention appears legitimate to broad sectors of society that feel that at least one power exists that acts in a progressive and able manner.

On the other hand, Colombia has a historical tradition of weak social movements, compared to other peripheral or Latin American countries.¹⁴ Furthermore, in recent years, violence has considerably raised the costs and risks of their actions—many leaders and activists have been murdered. These two factors—historical weakness and growing risks—tend to strengthen the judicial role, especially that of the Constitutional Court. In effect, since access to constitutional justice is cheap and easy, and constitutional judges tend to adopt progressive positions, it is natural that many social groups are tempted to make use of legal arguments rather than resorting to social and political mobilization, which has enormous risks and costs in Colombia.

All of the above may explain the court's activism, but an obvious question remains: why did this court take on a progressive role when it could have undertaken a different kind of activism?¹⁵ To answer this question, the characteristics of the process of constitutional transition take on considerable relevance.

The 1991 Constitution was not the product of a triumphant revolution but rather grew out of complex historical context as an attempt to come to an agreement for broadening democracy in order to confront violence and political corruption. Under these circumstances, some political and social

forces that had been traditionally excluded from running for office in Colombia played a very important role in the Constituent Assembly. These included representatives of demobilized guerrilla groups, indigenous groups, and religious minorities.¹⁶ In this pluralistic framework, the diagnosis of many of the delegates was that exclusion, the lack of participation, and weakness in protecting human rights were the basic causes of the Colombian crisis. This explains some of the ideological orientations of the 1991 Constitution: the broadening of participation mechanisms, the imposition of the duties of promoting social justice and equality upon the state, and the incorporation of a meaningful bill of rights, as well as new judicial mechanisms for their protection. The 1991 Constitution is not, therefore, in Teitel's words, "backward looking" but rather "forward looking" (1997: 214) in that, more than attempting to codify the existing power relations, it projects a model of the society to be built.

All of the above explains the Constitution's generosity on the subject of rights, including not only the classic civil and political rights, but also conferring great legal force to social rights and what are known as collective or third-generation rights. This is conducive to a certain amount of judicial activism in favor of human rights, which had less legal grounding in the previous constitution.

However, the court's active intervention in developing the progressive components of the Constitution would not have been necessary if the political forces themselves had taken on this task. But what took place was that many of the social and political actors that dominated the 1991 Constituent Assembly were considerably and rapidly weakened in the following years. The forces that have dominated Congress and the electoral scene since 1992, although not declared enemies of the 1991 Constitution, have not been committed to cultivating it.

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 the Colombian government has implemented since 1990. Thus, while the Constitution to some degree demanded more state presence and the authorities' intervention in redistribution, the government was implementing development plans that tended to cut back on the state's social presence and let the market forces assign resources. Perhaps the area most fraught with tension, although not the only one, was the field of labor law. While the 1991 Constitution enshrined important labor and union guarantees, and conferred domestic legal force to the International Labor Organization (ILO) conventions, the Gaviria government (1990-94) was pushing through a labor reform that affected job stability.

This tended over time to create a growing tension between the normative Constitution (the text, the values, and the rights set out in the charter) and the real Constitution (the relation between political forces) (Gómez, 1995).

The weakening of the political forces that wrote the Constitution in Congress, and the government's neoliberal strategies, meant that one of the few institutions that was capable of applying the 1991 Constitution's progressive content was the Constitutional Court. And the Constitutional Court, from its first rulings, decided to take on this function with vigor. Over the years, the court has therefore come to represent itself as the body that implements the values of freedom and social justice set out in the Constitution, thus gaining significant legitimacy among certain social sectors. But it continues to walk along the razor's edge since its progressivism also explains the energetic criticism coming from other sectors, particularly connected to business groups and the government, which have attacked the court's jurisprudence as populist and naive. These actors have not limited themselves to reproaches; they have also, so far unsuccessfully, attempted to pass numerous reforms to eliminate the court or at least to curtail its power considerably. Thus, on several occasions, while some sectors in Congress have tried to bring about constitutional reforms to limit the court's power, the representatives and leaders of some social movements have showered it with praise and support.

Our hypothesis to explain the court's progressive activism can thus be summarized as follows: the design of the Colombian Constitutional Justice and the legal culture make the court's significant activism institutionally possible. The crisis in representation and the weakness of the social movements are conducive to the use of legal mechanisms by certain social actors. The 1991 Constitution also stimulates a progressive vision by the court, which, because of the vacuum left by the weakening of the constituent forces, tends to see itself as the power that is responsible for implementing the values enshrined in the Constitution. The court's progressivism is made possible, in turn, by the weakness of the forces that oppose it and of the attempts at constitutional counter-reform.

There is no doubt that all of the above might never have taken place. The 1991 Constitution, and its broad bill of rights, might have had a purely rhetorical effect and served to legitimize the dominant order. This is what took place in the 1970s with the approval of human rights agreements that Colombian judges never enforced. But the court's judges decided to take advantage of the political context that we have described and to promote the Constitution's emancipatory content. And they have succeeded in doing so, at least at the legal level, although, as we have seen, with great effort and difficulty. Although things could have been different, some purely causal and contextual facts have had a decisive influence. In accordance with chaos theory, a slight variation in certain decisions could have had enormous consequences in the unfolding of constitutional jurisprudence. For example, some of the court's progressive and controversial decisions were made by a narrow margin of five to four. The slightest change in the court's composition would have led to the triumph of the opposing theses. Now, it

is a known fact that some judges considered to be progressive were elected in the Senate by a narrow margin over other candidates with more conservative political and legal orientations. If only one of these progressive judges had not been elected, then very likely some of the court's jurisprudence would never have existed. Also, at other times, attempts to suppress the court's significant powers were on the verge of succeeding. But, to date, the court has managed to hold on to its power and progressive activism. And in this way, a sort of tactical counter-hegemonic alliance has been gradually established between the Constitutional Court—or at least between some justices on the Constitutional Court—and certain social sectors that have been excluded or hindered from developing the emancipatory values enshrined in the 1991 Constitution (Cepeda, 1998: 76).

CASES

The Colombian context discussed above could therefore explain a certain progressive activism on the part of the court. But what has been the actual impact of this jurisprudence? To evaluate this issue we have decided to analyze four cases. These not only have intrinsic importance because of the impact of the court's decisions and the social movements that are involved, but also because of the very diversity of the cases, which lends itself to a comparative and contextual reflection on the emancipatory potential of constitutional justice.¹⁷

The indigenous movement

No other social movement in Colombia over the last thirty years has equaled the indigenous movement in combativeness, strength, and achievements (Gros, 1993: 11).¹⁸ Furthermore, among the Latin American indigenous peoples' movements, the Colombian movement is by far the one that has achieved the most legal and political gains (Gros, 1994: 118). This is surprising given that the share of the indigenous population of Colombia is quite small compared to other Latin American countries such as Bolivia, Mexico, and Ecuador. Moreover, the Colombian indigenous population is scattered throughout the country and is culturally very heterogeneous (Rappaport, 2000: 8).¹⁹ How, then, do we explain its strength and its achievements? One explanation may lie precisely in the fact that the percentage of the Colombian population that is indigenous is quite low and that the concessions made by the government do not represent an unacceptable price to pay for the gains in political legitimation. This would explain the lack of opposition within the dominant elites to the process of recognition and protection of indigenous cultures that was initiated with the 1991 Constitution.²⁰

The specificity of the Colombian situation, then, lies in the political will of the state, initially manifested in the support of the government for the indigenous cause in Congress, and later in the rulings of the Constitutional Court. We will highlight some of the important decisions the court has made in this matter. It has protected the right to cultural autonomy of the U'Wa people against the intended exploitation of oil by the multinational company OXI and the Colombian government in places considered by the U'Wa people as part of their territory. The decision was based on the conception held by this people that the land, including the subsoil, is sacred (Arenas, 2001). The court has limited the right to religious freedom of some indigenous people of Arauca who converted to Protestantism and tried to proselytize within indigenous territory against the regulations of traditional authorities. It has respected the decision of traditional authorities to impose physical punishment as a penalty for the commission of offenses, in opposition to the provisions of the Colombian penal code.

The most characteristic and fruitful elements of recent indigenous struggles are related to the decisions of the Constitutional Court. These elements include: an emphasis on cultural rights over economic considerations; an alliance, made possible by this emphasis, between "indigenous intellectuals"²¹ and the Constitutional Court (Rappaport, 2000: 31); and the internationalization of the indigenous political struggle. In general terms, the indigenous leaders that we have interviewed agreed that the achievements of the last decade "could not have been obtained without the backing of the court," that no other state institution has been so favorable to the movement (LZ: 24; RB: 2), that most rulings on indigenous peoples have been received by the communities as "political triumphs" (EA: 26), that frequently the court has been more generous than expected (RB: 2), or that at least "it has acted in accordance with what was established in the 1991 Constitution" (RB: 3).²² They also claim that its decisions have assisted indigenous people "to become aware of their rights" (RB: 3), have united indigenous peoples (C: 7), and have made "their struggles more visible" (LZ: 23).

However, the strengthening of the legal battle was not without controversy within the indigenous movement. There are two opposing tendencies at work: on one side are those leaders who, taking a pragmatic attitude, think that the interests of the movement are better served by adopting a strategy of negotiation with the government, without implying by this that anything fundamental is ceded.²³ Others, from a position that can be called fundamentalist, suspect any concession coming from institutions, and thus use the law only as another instrument of pressure, without any implication of accepting the law of the state.²⁴ This tension, although never reaching the point of a definitive rupture, has been creating communication problems among traditional leaders,²⁵ as well as difficulties concerning issues of representation,²⁶ strategy, and political behavior.²⁷

The trade union movement

Similar to what took place with the indigenous movement, starting in the 1960s, the trade unions' political strategy in Colombia was essentially ideological, confrontational, and very much influenced by the Marxist concept of class struggle. The 1991 Constitution was enacted at a time when the social movements, and the left in general, were in crisis. This moment coincided with the appearance of new social struggles that were generally oriented toward the recognition of minorities. The trade union movement has had difficulties adapting to this new sort of political struggle, which is more centered on recognition than economics (Fraser, 1998), not only because its interests are essentially economic, but also because of the influence that the tradition of working-class struggle continues to have on Colombian trade unionists. However, the Constitutional Court's decisions on the subject of equality, more than anything else, have facilitated the unions' adaptation to the new political contingencies.²⁸ Prior to the 1991 Constitution, the trade unions' legal strategy was limited to defending workers' rights through the negotiation of collective labor agreements. As neoliberal hiring and firing policies increasingly undermined labor law, this strategy was reduced to its minimum expression.²⁹ In this context, legal defense gained importance, fundamentally through the use of *tutela* actions. This new strategy has led to a new culture of negotiation among the trade unions, more pragmatic and less centered on staunch ideological principles.³⁰

The broadening of the legal concept of the Constitutional Court's decisions that protect workers' rights based on constitutional principles rather than labor law sparked this change of perspective in the trade unions' political action. In effect, by upholding *tutelas*, the court has ruled on certain discriminatory practices against unionized workers, practices that nevertheless did not break any labor laws. Thus, for example, the court ordered a company to rehire the unionized workers that it had laid off. Despite the fact that the layoff was carried out in accordance with all the legal requirements, the principle of equality was invoked because only unionized workers had been laid off.³¹ In a similar case, the court ordered the rehiring of 209 unionized workers of Empresas Varias de Medellín, based on International Labor Organization principles (Ruling T-568 of 1999).³²

Union leaders generally consider the workers' legal battles before the Constitutional Court as a sign of hope in a context in which workers' rights are being undermined as never before.³³ The economic crisis, state policies that encourage downsizing, and the situation of violence and insecurity that characterizes the defense of workers' rights³⁴ have seriously affected the trade unions' political strategy. In this context, the Constitutional Court's decisions have been called "a lifesaver" (AV: 2) and "an emergency resource" (AV: 4). Thus the labor activists view the court as the only legal body that

can halt with some success the deterioration of labor conditions in recent years.³⁵ At the same time, the leaders are aware that the court cannot bring about structural changes; it can only partly halt the state's onslaught against their rights. The court is therefore seen as a symbol that the trade unions should embrace to articulate a defensive and effective battle (EG: 1; AV: 4). Furthermore, the labor leaders agree that this symbol's importance is circumstantial, i.e., that it is due to the fact that the trade unions find themselves defenseless nowadays; because of this very reason, in the medium and long term it is the political struggle and not the legal battle in court that will be fundamental and decisive for workers' rights (AV: 4).

Gay rights

Gay rights groups became more visible after the 1991 Constitution.³⁶ At the same time, since then, and especially in the wake of several Constitutional Court rulings, legal regulations concerning homosexuality began to change substantially. Several labor regimes, such as those concerning educators and civil servants, provided disciplinary sanctions for homosexual conduct. The court has been attacking gay discrimination on all these fronts. Although certain aspects of the court's jurisprudence have been criticized as timid and insufficient,³⁷ in general these decisions are considered very advanced, not only by many members of gay groups in Colombia, but also by experts in other countries (Morgan, 1999: 265). How, then, has the court's jurisprudence contributed toward a greater social and legal recognition of gays?

Our interviews suggest that some gay activists saw legal and political potential in the court's generally progressive orientation. They decided to bring cases before the court in order to have it rule on gay rights. The impact of their legal victories appears to have extended beyond the legal field in that they have strengthened gays' sense of identity and self-respect. The greater visibility that gays have achieved is due not solely to the legal content of the court's decisions, which forbid discrimination, but also to the language in which the sentences are couched, and to the fact that the court has openly studied these issues; all this has meant that the subject has ceased to be taboo. Through its great legal creativity, the court's doctrine has enabled gay groups to make progress in achieving their rights, even in fields where they were not able to succeed directly in terms of constitutional justice. Thus, although the court admitted that the law restricted marital union to heterosexual couples, it declared that the Constitution did not prohibit homosexual unions. Based on this bit of constitutional doctrine, a legal team designed a marriage contract for gay couples that is made before a notary. And the first gay "weddings" have already been celebrated in Colombia, something that would have been unthinkable before the court's decisions.³⁸ Finally, both the doctrine that the court has produced and the greater visibility of the gay

movement have led some sectors in Congress to recently present a bill to fully recognize homosexual and bisexual rights.³⁹

Thus gay activists' creative use of legal resources and the court's progressive decisions have improved the legal situation of gays and have provided them with greater social acceptance. This change has been so marked that some of them have become an active political minority. However, despite the above-mentioned progress, discrimination against gays in Colombia is far from over. In some aspects, it has become more subtle. This appears to be related to the fact that the population tends to accept gays in theory but continues to have difficulties coexisting with them. Constitutional action seems to be less effective in fighting this sort of discrimination. On the other hand, what is more serious is that in Colombia there are still atrocious manifestations of violence against gays. This is especially true of gays from low-income groups who are murdered in what are known as "social cleansing" operations. Finally, despite greater visibility and a certain degree of participation in politics, it would be tenuous to claim that a solid movement exists to defend gay rights. At the most, one can say that there are groups with various interests that periodically converge to hold marches or bring a case before the courts.

The court and UPAC debtors

Starting in 1997, Colombia went into a deep recession that, combined with certain economic policy decisions, aggravated the situation of about 800,000 people who had taken loans to buy their houses in the so-called UPAC system (unit of constant purchasing power). Two years later, there was talk of 200,000 families on the verge of losing their homes (Acosta, 2000: 19 and 160).⁴⁰

These debtors were largely from the middle class, people who usually do not participate in social protests in Colombia. However, the situation grew to such proportions that the debtors began to establish associations to defend themselves from the financial institutions; they organized peaceful marches⁴¹ and sent petitions to the government and Congress, asking for changes in this financing system and for some relief for the debtors. Some debtors began to propose strategies of civil disobedience, and refused to continue making payments on their mortgages or to hand over their homes to the financial institutions.

Very soon (due to the lack of response by the government and Congress, according to some), the debtors and their associations resorted to judicial strategies and brought lawsuits before the Constitutional Court, against the norms that regulate the UPAC system. Between 1998 and 1999, the court handed down several rulings on the UPAC system, which in general tended to protect debtors. Thus it tied the UPAC to inflation, forbade interest from

being added to the capital debt, and ordered that mortgages be recalculated to relieve the debtors' situation. Furthermore, the court ordered that a new law be passed within seven months to regulate housing financing.

The public and the media gave considerable attention to these decisions. The court was placed in the eye of the storm because, although the debtors and some social movements lauded its decisions, business groups, some government sectors, and many analysts fiercely attacked it for overstepping its boundaries and for its ignorance of how the market economy operates. For these reasons, they proposed that the court should not rule on the constitutionality of economic legislation.⁴²

In this context, in late 1999 Congress debated and passed a new law on housing financing that incorporated, among other things, 2,000 billion pesos (\$1.2 billion dollars) in relief for debtors and once again tied the cost of mortgages to inflation. It is clear that without the Constitutional Court's rulings it would not have been possible to immediately modify the UPAC system, despite the social turmoil it was causing.⁴³

As we can see, the mortgage debtors' organizations were spawned in reaction to a payment crisis that threatened them with the loss of housing, and above all they sought solutions that would allow them to keep their homes. Although the debtors held street protests and engaged in political action, it was the judicial strategy, especially the cases presented before the Constitutional Court, that was dominant and that defined the movement's profile as a kind of civil disobedience with legal foundations based on constitutional arguments. The transformation of individual complaints into Constitutional Court debates and the use of other judicial instruments gave these rapidly growing organizations a certain amount of success.

It is not easy to evaluate the emancipatory potential of the mortgage debtors' movement and the court's jurisprudence. There is no doubt that the court's rulings led to a certain amount of financial relief for a significant number of debtors, and perhaps because of this they did not lose their homes. It is also true that now debtors had *more resources* for fighting eviction. Finally, constitutional litigation led to a greater articulation between the debtors and their associations, creating a middle-class civil disobedience social movement against the financial sector and the state's housing policy. Obviously, the constitutional justice system did not create the movement, but it did contribute to its dynamism. The constitutional justice litigation not only gave these debtors and their organizations considerable political visibility, it also modified the sense of their interventions. The issue was no longer about the complaints of isolated debtors, but rather a collective questioning, upheld by the court, of the state's policy on housing and the behavior of the financial institutions.

But the risks and limitations of this strategy have also been made apparent. Thus it is not clear that the court's decisions will translate into greater access

to housing for the low-income sectors since, on the one hand, some of its measures might depress the construction sector even further and, on the other hand, it appears that these measures have protected, above all, middle-class debtors, at a substantial budgetary cost for the state. Furthermore, the excessive weight of the legal strategy has limited the associations' potential, some of which have simply become centers for receiving specific complaints about problems in getting mortgages recalculated.

THE EMANCIPATORY POTENTIAL OF CONSTITUTIONAL JUSTICE

In the second part of this chapter we showed the surprisingly progressive activism of the Constitutional Court as well as the causes that have made it possible. Then we presented four case studies and discussed the way in which different social actors, after having been the beneficiaries of court decisions, have been able to articulate emancipatory social practices. In this final section, we will address the issue of the relationship between progressive judicial decisions and emancipatory social practices.

The effectiveness of the court's progressive decisions

In Colombia, governments have always shown a strong propensity for using constitutional law as a weapon of legitimation. The difficulties of political maneuvering have transformed law into a discourse that is essential to responding to citizens' demands for security and social justice. However, since the promulgation of the 1991 Constitution, this political strategy has become ambivalent. If, on the one hand, the goals of institutional legitimation have been, at least partially, achieved, on the other hand, unprecedented social expectations have been created among social groups and movements that have adopted the legal struggle for rights as an essential component of their political struggle. Therefore, it is important to distinguish between these two aspects of progressive law.

In the first place, law can be used to reactivate collective hope. Hope for a better society, like most fundamental collective values, has different facets: one of them is related to the acceptance of and confidence in the present, another to the possibility of future change through action. The first operates as a remedy for rebellion, the second as a remedy for conformity. Progressive constitutions are both a concession of the state apparatus benefiting individuals, and thus a remedy for rebellion and an indication of a potential to better citizens' rights, and thus a vehicle for promoting change and a remedy for conformity. One possible government strategy is to establish different time schedules for these two effects: laws are passed with the aim of obtaining political advantage through popular approval in the short term; there then

begins the struggle for interpretation and application of the laws within a specific set of political, economic, and social possibilities. In Colombia, governments have manipulated the phasing of these two effects, one of which is immediate, the other delayed.

But this is not the only possibility, and here the other facet of progressive law comes into play. The strategy of producing law with the aim of institutional legitimation can backfire and become a remedy for conformity rather than a remedy for rebellion. This effect originates in the profound rejection that citizens evince to any pronouncement that affects the most important *topoi* of social coexistence, such as justice or equality. Even less do they accept abuse when, in addition to being known, it is openly discussed; so a political power that, for its own gain, manipulates a situation in which injustice is seen and felt, and in addition is vocalized, finds its margin of maneuverability reduced. What has occurred with the creation of the Constitutional Court in Colombia is that, on one hand, the discourse on rights based on the Constitution has been particularly progressive and inclusive, and, on the other hand, the diffusion of this discourse in society has made its political appropriation by groups and social movements possible. Unlike what formerly occurred when rights were only on paper, during the last decade the social mobilization resulting from some of the court's decisions has been quite significant. As the cases analyzed in this chapter show, progressive jurisprudence has served more to spawn anti-conformist practices than to quench rebellion.

Accordingly, the emancipatory power of certain of the court's decisions lies in the fact that they contain a political message: they make concrete the expectations encoded in the Constitution and, to this extent, actors find in this message a pretext for political action. In other words, the court has an important role in shaping political practices because, on the one hand, it raises an emancipatory political consciousness among some excluded social groups and, on the other hand, provides possible strategies for political and legal action to remedy their situation.⁴⁴ The decisions of the court have an important constitutive dimension in that they create, help to create, or strengthen the identity of political subjects. This is especially clear in the case of the so-called new social movements that demand recognition of issues of gender, culture, or dissenting opinions. The court has contributed to forging the political identity of these actors and through this very process has forged its own identity.

To summarize, the Constitutional Court can favorably affect the social and political reality of social movements. As we have already said, this influence comes not only from the court's coercive capacity to order certain behaviors that favor the protection of individuals' rights, but also, and frequently more importantly, from its capacity to inculcate a spirit of nonconformity in the hearts and minds of the members of social movements and the people in general. This spirit of nonconformity is based on the

authoritative assertion that injustice exists and should be remedied. It is obvious that the latter symbolic effect is also frequently achieved thanks to the former instrumental effect. Each case shows a specific combination of instrumental efficacy and symbolic effects of the court's decisions. So, for example, while the trade unions and the UPAC movement show the predominance of instrumental efficacy, in the case of the gay rights movement and the indigenous movement it is the symbolic effects that seem to have been more important.

Judicial activism with emancipatory potential

The relationship between progressive judicial decisions and emancipatory social practices is a complex phenomenon; we cannot talk of a direct causal relation, much less in a country such as Colombia, where the instrumental efficacy of law is very precarious, as we have seen. The social influence of judicial decisions does not seem to be sufficiently weighty in itself to produce direct and effective instances of social change, but neither is it irrelevant to the evaluation of these changes. What kind of relation or connection exists between progressive law and social emancipation? Since it is not a simple causal relationship, we need to examine the conditions or factors that permit judicial decisions to have an impact on social emancipation. It seems to us that these factors are the following: 1) the type of judicial decision; 2) the specific social context in which the ruling is made; 3) the kind of social actor that receives the ruling; 4) the predominant political strategies of this social actor; and 5) the international environment in which emancipatory practices are developed.

The court: types of decision

From the analysis of the Colombian case studies and comparative theoretical debates (Chemerinsky, 1998) the conclusion can be drawn that the impact of a judicial decision partly depends on the nature of the writ emitted by the judge. So, it is obvious that a decision that annuls an offense or a crime is practically self-executing because, once taken by a constitutional judge, the conduct is no longer punishable and, in principle, no person can be sentenced for that offence. In turn, if an individual is incarcerated for that reason, the person can petition the judges, and even the Constitutional Court, to order his or her release. This type of decision, then, has an immediate effect. However, when a judge orders other authorities to carry out specific actions—such as building a hospital or improving prison conditions—it is quite possible that greater resistance will be encountered, since the authorities that are responsible for compliance can obstruct the enactment of

decisions through many different means if they are not in agreement with the court's criteria. They can, for instance, invoke budgetary restrictions, administrative difficulties, operational problems, and so on, and thus postpone compliance with a judge's order for a very long time. Judges cannot take action to enforce the order because the other authorities are not openly in contempt.

An important variable that affects the effectiveness of judicial decisions is, then, the type of decision. Following in part the terminology proposed by the American federal judge William Wayne (1997: 302 ff.), we can differentiate two forms of progressive judicial activism. In the first a judge can recognize rights that are disputed by political forces that consider that those rights are not clearly derived from the legal order. This activism, which Wayne calls jurisprudential activism, consists in legally decreeing certain values or conferring specific rights on certain social groups; for this reason we propose to call it value-based or ideological activism. The decisions of the Constitutional Court to decriminalize euthanasia and the consumption of drugs have this character. In other cases, the existence of a right may not be contested, but the decision that the judge makes to challenge a violation of that right may be criticized as activist by those who think that the legal solutions or remedies decreed invade the competencies of other state entities. This second form of activism is then "remedial," according to the classification proposed by Wayne, which we endorse here. In the Colombian case, a typical example of this activism is found in those court sentences that ordered the improvement of the subhuman conditions in prisons. In effect, few deny that prisoners have the right to minimal conditions of dignity, but they question whether the court, rather than the government, should be the entity that orders the authorities to carry out specific projects to achieve this objective.⁴⁵

However, there is more to the story. Perhaps it would be useful to further refine the distinction. Thus, on the subject of legal remedies, it is usually easier for a judge to enforce a prohibition than a prescription (an order to carry out specific actions or behaviors). In the first case, it is more difficult for other authorities to excuse a violation of the legal order. Therefore, we should differentiate between positive remedies (prescriptions) and negative remedies (prohibitions). Likewise, in what concerns ideological activism, at times constitutional judges act against the majority in order to "create" a right that has never been recognized in the jurisprudence, while in other cases their action tends to "preserve" a guarantee that already existed but which is threatened with elimination by political forces. For this reason, it is perhaps useful to differentiate between "innovational" and "preservationist" ideological activism.

The following table summarizes and typifies the types of decisions that can be taken by a progressive court:

Table 3.1. Types of progressive activism.

Ideological activism		Remedial activism	
<i>Innovational activism</i>	<i>Preservationist activism</i>	<i>Positive remedies</i>	<i>Negative remedies or prohibitions</i>
Decriminalization of the consumption of drugs	Protection of job stability against the deregulation of labor contracts	Improvement of prison conditions	Putting a stop to the filling of the Urrá dam

The analysis of decision types is useful in the evaluation of the potential emancipatory impact of a decision. In general, it may be assumed that it is easier to execute negative remedial orders (prohibitions), while enormous controversy and opposition can be generated by an innovational ideological activism, especially when it is expressed in prescriptions. This explains the fact that in the case studies discussed a significant part of the emancipatory impulse of the court originated in "remedial" decisions that contained prohibitions.

The decision environment: the political costs

Progressive decisions usually bring with them high political costs for the court. These costs are difficult to evaluate in a context of institutional, social, and political fragmentation such as that of Colombia. For this reason, such costs should be carefully weighed in each case, in its particular relation to an institution or a sector of political opinion. The specificity of Colombia, once again, is the tremendous fragmentation of political forces, both those that oppose as well as those that support the work of the court. This leads the court to operate in a fashion relatively independent of the political system. In these circumstances, the court makes its decisions with the tranquillity coming from the sense of being supported by public opinion, on the one hand, and, on the other, knowing that up to the present the opposition has not been able to design a political strategy that can question its institutional stability. But, at the same time, in a country at the edge of civil war and in the midst of a crisis of legitimacy that affects the whole state, it faces the uncertainty and the disquiet that arise from the prospect of being the first victim of a conservative constitutional reform. In summary, beyond the specific dangers that originate in concrete decisions against specific social and institutional actors, the court is subjected to a general danger that

functions as a sort of backdrop against which it acts. This danger, which is extremely difficult to evaluate, consists in the more or less latent possibility that the political forces unite to finish off the court through constitutional reform. This general danger acquires a similar, if less dramatic, connotation when the election of new judges takes place—as happened at the end of 2000. This posits the danger of the court's neutralization through the appointment of conservative judges.

What then is the relationship between the political costs that we have discussed and the social effect of progressive decisions? The social impact of the court's progressive decisions seem to be greater in social and political contexts in which there is a consensus on the values and principles defended by social actors and by the court. We call these contexts "consensual" to differentiate them from those in which differences predominate, which we will term "dissentious." Of course it is difficult for actual cases to conform exactly to an ideal type; what we find is that they are usually located along a spectrum of intermediary possibilities. So, for example, the case of the indigenous people, at least during the first five years of the court's functioning, is a good example of a consensual context. Since the time of the National Constituent Assembly, there has been a favorable opinion with respect to the cause of indigenous peoples. This opinion has disintegrated somewhat during recent years as a result of confrontations with the government originating in the economic costs of the indigenous movement's demands, especially those of the U'Wa people. Something similar happens with the UPAC movement, which seems to enjoy broad public support. The trade unions and the gays, however, seem to operate in a less favorable political climate in which support for their cause is relative and a significant opposition faces them.

The recipients of decisions: the vision of legal strategy

The emancipatory potential of a judicial decision is also linked to its reception by social actors. First of all, it is important to point out that there is a huge variety of social actors. Perhaps the most important factor for our model is the degree or type of internal cohesion among the decision's beneficiaries. Here we will distinguish three types. First we find the more detached actors who usually seek an individual interest and who only become engaged in collective practices when it works to the advantage of their own individual strategy. An example of this type of actor is found in the movement of those affected by UPAC. This is a very strong movement that took the court's decision as its banner, but that, at the same time, can easily disintegrate if the implementation of the court's decision presents difficulties. The second type refers to actors who are strongly united by community bonds; their priority is the general interest. The indigenous peoples are a good example of this type of social actor. They have created perhaps the most consolidated movement and the one that

is least affected by political tides. Their strength lies in the fact that their reason for opposition is the defense of community values whose legal protection is founded upon the decision of the court. This decision is then a secondary, although important, component of the movement's strength. Finally, we have those actors who are linked to a social movement whose internal cohesion depends on shared political interests. This is the classic social movement (Touraine, 1988). The case of the trade unions that fight for the interests of their members based on decisions of the court is a good illustration of this type of social actor. Their internal cohesion does not depend exclusively on the court's decisions but these latter can bring new life and energy to their political struggle.

The relative weight of the legal strategy

What influence does the court's decision have on the strategy of the counter-hegemonic struggle of social actors? Two possibilities are of interest for our purposes. The first arises when the judicial decision explains, at least in a large part, not only the emancipatory struggles of social actors but also their existence, their combativeness, their achievements. This is the case, for example, of the UPAC debtors, who found their most important element of cohesion and struggle in the court decision. Something similar can be said of the gay movement, though to a lesser extent. The second possibility occurs in cases in which the legal strategy—not perceived as essential, or not even as an important element of political struggle in the past—suddenly acquires an unusual importance at a specific time. This often coincides with a moment of crisis in the political strategy or comes at a time when the movement faces the danger of disintegration. The amount of importance the legal strategy acquires originates in great part in the decision by the court. This is the situation of the trade unions studied in this essay, as well as that of NGOs and, perhaps to a lesser degree, the indigenous peoples. In the first case we can speak of a constitutive legal strategy and in the second case of a conjunctural legal strategy.

The international dimension

As a result of the growing influence of globalization, it is unquestionably relevant to take into account the international dimension, and in particular the existence of a certain legal globalization, in order to examine the potential progressive impact of legal decisions. The case of Pinochet is a good illustration because it is beyond doubt that the Chilean Supreme Court of Justice would not have been able to lift the ex-dictator's immunity had Pinochet not previously been detained in England as a result of the extradition request of the Spanish judge Garzón. These decisions, which reflect

the existence of a certain internationalized legal space opposed to impunity, strengthened the Chilean judges in the domestic space, allowing them to take measures that would have seemed impossible just months before.

Likewise, in some of the case studies, the international context favored some of the directions of the Constitutional Court, as happened in the decisions related to labor issues where the court referred to ILO resolutions to protect trade union rights within the country. As Boaventura Santos has noted, "the democratic potential of justice will increasingly depend on the emergence of international forms of justice more suited to confront the systematic damage produced by structural conflicts at the level at which it is produced—the global one" (2001b). This does not mean, obviously, that this globalized legal or semi-legal space that is in the process of formation always works in favor of the emancipatory potential of constitutional courts. On occasion, it can be a formidable obstacle since agreements on economic integration can void many progressive judicial decisions. But it is unquestionable that the existence or deficit of international legal or political supports is a significant variable to explain the impact of the decisions of a constitutional court.

The Colombian Constitutional Court, like all constitutional courts around the world, deals with a permanent tension between the need to protect fundamental rights and the need to maintain the existing economic and institutional conditions. But this tension seems particularly strong in Colombia due to several reasons. First, there is a constitutional charter that is not only very progressive, but also very emphatic and normative in what concerns the judicial protection of fundamental rights. Second, the Constitutional Court maintains a strong political independence that derives from the weakness of the mechanisms of representative democracy, a phenomenon that, although visible in almost all the countries of Latin America, is exacerbated in Colombia as a consequence of violence. This explains both the absence of an organized political opposition to the rulings of the court and the existence of organized political support for those same rulings. The importance of the court as a political actor depends on its detachment from the traditional political system. Finally, there is a mixture in Colombia of authoritarian and democratic institutional practices that makes the work of the Constitutional Court more difficult. In fact, the country is still experiencing all the problems of state-building—in the Hobbesian sense—which explains certain very authoritarian components of the current reforms. One example is the so-called "faceless justice," through which the state seeks to obtain, practically at any cost, the monopoly over coercion, which illustrates the tendency to establish permanent exceptions to constitutional guarantees. But, on the other hand, the project of the construction of citizenship that has been developed since the 1991 Constitution is typical of more solid constitutional states. These conflicting logics—a state of exception and a project

for citizenship—directly affect the functioning of the court and explain both its power and its weakness.

In these circumstances the court has to combine, on the one hand, a rhetoric of community and social solidarity that feeds citizens' hopes, and on the other, the institutional practices that permit the maintenance of an effective state in a context of war, economic precariousness, and neoliberal globalization.

CONCLUSIONS

The effectiveness of progressive judicial decisions is increased when the following factors are combined: remedial judicial decisions, preferably determining what must not be done (prohibitions); consensual contexts or audiences; political appropriation by movements that adopt the legal strategy as a constitutive part of their political struggle and of their identity as a movement; and international support. We believe that this is the ideal combination of factors or conditions that allows progressive judicial activism to have a greater potential for bringing about emancipatory practices. It should be stressed that this is not a categorical assertion, but rather a tendency. It is not even required that all these factors be present in order to bring about emancipatory practices. Nor does the fact that these take place necessarily guarantee emancipation. Since this is an explanation that only indicates tendencies, empirical research is always indispensable for corroborating the veracity of tendencies in concrete cases. However, this does not mean that this is a mere working hypothesis. It is a postulate that may be contrasted and disproved but this should be done by means of empirical research, as we have done to substantiate it.

The second caveat is the following: for the research that supports this chapter, we selected cases that we hypothetically considered to be emancipatory. After the empirical research was carried out, we concluded that emancipatory practices had in fact resulted from the court's progressive rulings on these cases. However, it is clear that not every progressive decision leads to social emancipation. An interesting complement to this research, which we hope to undertake in the near future, would be to expand the number of cases studied to include progressive decisions that have not led to emancipatory practices. This would make our explanations more conclusive and comprehensive.

Having made these clarifications, we should now draw some conclusions. Reviewing the emancipatory practices studied here, it is possible to see that not all conditions always hold true, and that in some cases they are fulfilled to a greater degree than in others. Let us look at the elements that are lacking or incomplete in each case. In the indigenous movement, a constitutive strategy appears to be lacking; in the gay movement, the consensual element

is insufficient; in the UPAC movement, the international aspect is non-existent; the trade unions appear to lack at least three factors: the audience does not appear to be consensual, the movement is neither detached nor community-based, and the strategy is not constitutive. The trade union movement's distance from the notion of potentially emancipatory activism that we have proposed is surprising. What, then, is the explanation for the emancipatory character of the trade union practices that are connected to the court's decisions?

Perhaps the most notable difference between the case of the trade unions and the others can be made clear by referring to the distinction that is currently made between new and old social movements. While the old or classic social movements were characterized by their activism on political issues generally tied to class interests (Giddens, 1984; Touraine, 1977), the new social movements (NSMs) act on a broader range of issues, generally related to cultural concerns and to social and political recognition (Santos, 1998: 312; Fraser, 1998). The latter have mushroomed since the mid-1980s and are part of a new globalized culture of rights. They are generally led by minority groups that seek social and political recognition. The characteristics of the political struggle of these movements are consistent with the ideal factors that we have defined and, in particular, with the emancipatory struggle of the cases studied here. There are at least three elements that the NSMs and these case studies have in common. In the first place, these are new groups or movements for which the legal strategy is an essential element not only to their emancipatory struggle but also to their survival and their identity as a political group or movement. In the second place, the above is closely related to the fact that these movements are relatively dispersed and still in a period of consolidation. Finally, these movements or social groups generally seek the recognition of rights that, for the most part, can be fulfilled by rulings that contain prohibitions. The remaining elements, which appear to provide an important source of support for the NSMs (the international dimension and the consensual environment), are less important in our cases, which leads us to think that their contribution to emancipatory practices is relatively minor.

Having said this, how do we explain the fact that the trade union movement, and in particular the workers' union at the Empresas Varias de Medellín, appears to be far removed from the factors we have presented? What does it mean that most of these factors do not apply to this case? As has already been indicated, critical legal theory maintains that the legal strategy may have counterproductive effects on the global strategy of classic social movements. This is due to the fact that, in these cases, the political strategy, and not the legal one, is inherent to the movement's identity and, in consequence, the legal struggle makes sense only to the degree that it fits into the more fundamental and global political strategy. Much has been

written, especially from a Marxist perspective (Tushnet, 1984), on the dangers of concentrating a political struggle on a legal strategy. As we saw in the first section of this chapter, political struggles conducted through law are accused of obscuring the true direction of the struggles, thus stripping social movements of their ideology and alienating their members. Based on these premises, the legal critics have deduced that the legal strategy should be avoided in favor of other actions. As Santos has explained, by using the legal strategy, social movements run the risk of trivializing, depoliticizing, and disintegrating their political fights, being therefore unable to transform such fights into structural changes (2001b: 196, 201). However, it is important to bear in mind that the critical opinion that maintains that these practices are not lasting and may be counterproductive in the long run, does not preclude the fact that emancipatory practices may be achieved through the law. These criticisms have been strongly refuted in contemporary sociology of law, and our study appears to confirm the validity of this refutation in semiperipheral contexts.

In any case, the emancipatory character of the legal strategy used by unions, and particularly by the union at the Empresas Varias de Medellín, seems incontrovertible. If this is the case, we ask once again, why do our factors seem so far removed from the conditions that gave rise to these practices? Let us recall the specific conditions that provided the context for the trade union struggle at the Empresas Varias de Medellín. According to the workers interviewed, the decision to rehire the laid-off unionized workers came at a time when the union was in crisis and those affected were without hope. The *tutela* action was launched in an atmosphere of general skepticism and as a last resort. The court's favorable decision changed this scenario to such an extent that the political struggle took on a national dimension through the assistance provided by this factory union to other trade unions in similar situations. In these conditions, it is not an exaggeration to say that, for the union at the Empresas Varias, the legal strategy revived its political strength and, as a consequence, in the past two years it has taken on a central role in the context of the movement's political struggle. The weakening of the traditional union battles and the enormous expectations generated by the *tutela* explain this situation, which is undoubtedly exceptional for trade unions, in which the legal strategy assumes such a primordial importance that it appears to be practically a type of constitutive strategy, at least for the period analyzed. As such, the relative weight and importance of the legal strategy for the Empresas Varias union approximates what takes place with either community-based or detached social movements. However, we should not forget the critical warning that the legal strategy involves greater risks for the long-term struggle of classic social movements.

Something similar happens in the case of indigenous people. Here also the legal strategy was conjunctural. We have showed how the movement's

struggle before the Constitutional Court has produced important emancipatory effects. The explanation lies in the fact that over the last decade the legal strategy has become an essential element of the political fight so that the classical strategies of political confrontation have been somewhat overshadowed. But also in this case we should take into account the risks involved in using the legal strategy—the denaturalization or simply the weakening of the movement's community-based cohesion.

In summary, both classic social movements and the new social movements may achieve social emancipation by means of a legal strategy made possible by the court's progressive stance. In the case of classic social movements, for this to happen it appears to be necessary that they find themselves in a situation in which it is extremely difficult to make progress by traditional means of political struggle. Nevertheless, the risks of this strategy are clearly greater for these movements.

On this subject, it is important to bear in mind that the emancipatory purposes of the court also make it face risks. Colombia's social and institutional fragmentation is such that non-consensual contexts are increasingly prevailing over consensual ones. Under these circumstances there are two risks for the Constitutional Court. First, there is an increasing danger that the court's enemies might manage to consolidate a strategy to eliminate or curtail its powers, as has been attempted in the past. Second, there is the danger that the court, for its own protection, might adopt a conservative attitude in its decisions. These two risks affect the court's emancipatory potential. Last, but not least, the worsening of the armed conflict in recent years in Colombia might reduce the impact of the court's rulings, given the fact that many areas of the country are now controlled by illegal armed groups that obviously do not respect the legal order.

However, neither the risks nor the emancipatory potentialities are to be considered as immutable givens. Both elements should be contrasted and evaluated according to their concrete context. The case of Colombia and the theoretical discussion therefore demonstrate that it is necessary to abandon extreme positions when replying to the question of whether or not it is possible to achieve emancipatory transformation through judicial channels. The context and certain creative decisions by the actors involved have a decisive weight, and for this reason it is important to undertake comparative studies in order to reach a better contextual understanding of the possibilities and limitations of these strategies.

Our study confirms one simple but important idea. In some contexts, law in general and constitutional justice in particular can become an instrument of social emancipation. But it is not for this reason that law loses its dimension of social domination. Thus, the emancipatory possibilities of constitutional justice are limited and the predominance of judicial strategies has risks for the dynamism and creativity of social movements. In any case,

these risks should be weighed against the progressive potentialities of constitutional justice, which we have tried to describe and systematize in the previous section. Two consequences follow from this conclusion. The first is academic: it is important to develop comparative studies in order to have a better understanding of the contextual possibilities and limitations of judicial strategies. The other is political: constitutional justice can become an important tool for democratic progress whenever it is seen as a component of broader social struggles. The fulfillment of the emancipatory promises of many constitutions is too serious a matter to be left only to constitutional justices.

Notes

- 1 This means that we immediately discard the notion that hegemony is something pre-constituted, as a consolidated institutional fact. Instead, at least for the Colombian case, we will adopt an open, malleable, and constructed concept of hegemony (Laclau and Mouffe, 1985; McCann, 1994) not only in what concerns the state as an apparatus for domination, but also in what concerns social movements as victims of that domination.
- 2 On this point see Tietel (1997), Malloy (1977), Nino (1989, 1992), and Linz and Stepan (1996) as examples of an extensive bibliography.
- 3 On the Hungarian case see Zirzak (1996) and the periodic reports on and analyses of the Hungarian Court in the *Journal of Constitutional Law in Eastern and Central Europe*, in particular the following updates: 1993, Vol. II, 1; 1994, Vol. III, 3-4; 1995, Vol. IV, 3. See also *The Hungary Report*, 102 (9 April, 1995), 104 (22 April, 1995), 106 (7 May, 1995).
- 4 On the South African case see Klug (1996) and Burnham (1997).
- 5 On the Indian Supreme Court see Sripati (1998) and Crossman and Kapur (1997).
- 6 See Yang (1998).
- 7 This phenomenon is linked to what has been called "the rule of law project" promoted by international development agencies. During the last decade, rule of law reforms have been identified as a crucial mechanism for promoting development in Latin America, as well as other semiperipheral countries. Rather than a reflection of the prevailing forces in society, law is perceived as an effective instrument for promoting change. Upon this assumption several billions of dollars have been "invested" in law projects, particularly within the context of the judicial system. The major financial institutions involved are the World Bank, the United States Agency for International Development (USAID), and the Interamerican Bank for Development. See Santos (2001b).
- 8 A phenomenon of co-optation of civil justice by commercial and business interests has been noted and is well studied. See Santos *et al.* (1996) and Rodríguez (2001).
- 9 So, for example, in a country like Colombia, the increased efficiency of criminal judges, beginning with the strengthening of the Attorney General, seems to have served, at least in certain cases, to diminish impunity, which undoubtedly favors not only hegemonic interests but also the protection of fundamental rights. See Uprimny (2001).
- 10 Not everyone, however, agreed with this stance; two different positions can be identified: a radical and a moderate approach. The radicals argued that the legal strategy was an illusion (Tushnet, 1984; Balbus, 1977): on one hand it weakened the counter-hegemonic political struggle by diverting attention toward a legal reform process and, on the other, its efficacy for the collective ended up being minimal given the individualistic character of rights. The view of the moderate critics, however, was that despite the existence of a prevailing tendency toward domination, the law, at least at times, could favor social movements. Robert Gordon, for example, argued: "The categories, principles, and rhetoric of law and legal argument deliver real resources to get some leverage on social change" (1998a: 653). In his opinion the laws passed have not always benefited capitalists; they have also, although to a lesser extent, served workers, women, the poor, etc.; the marginalized can eventually turn the legal rhetoric to their advantage (1998: 646). This is then, according to Trubek, a matter that is open to investigation and cannot be decided in advance through theoretical generalization (1977: 554). Agreeing with this view, the new critics of the 1990s believe that legal reforms of a social character and against discrimination can be a useful mechanism of political struggle. This position is generally held by minority rights advocates (Minow, 1987; Crenshaw, 1988) and by scholars representing the Legal Consciousness Studies approach (Ewick and Silbey, 1998; McCann, 1985; 1994). In their opinion, the social impact of progressive judicial decisions is a complex phenomenon that has been simplified. Progressive judicial decisions cannot be categorized beforehand as mere ideological manipulation or as straightforward evidence of social change (McCann, 1994).
- 11 In the core countries, explains Santos (1998), state autonomy is an outcome of needs and interests that originate in the space of production. In Europe, industrialization preceded a parliamentary system, which followed the general interests of capitalist expansion. In the semiperiphery of the world system, however, the formation of the space of citizenship preceded social organization, and specifically the organization of production, and always maintained a great autonomy with respect to that space of power (Santos, 1998: 154).
- 12 This is due not only to the structural role of the law but also to the mechanisms for selecting judges, which favor only those who share the views of the dominant social and political forces, reserving the highest positions in the courts for them. See Jacob *et al.* (1996: 8 and 390). In a comparative study of five developed countries (USA, Germany, Japan, England, and France), the authors state that "although the details of judicial selection vary greatly, the

- outcome is similar: the men and women selected to judgeships almost always hold safe, sound, middle-of-the-road opinions." It is true that this may have changed, since in recent years judges, for different reasons, have taken on more prominent roles in nearly all countries, both developed and developing ones (Santos *et al.*, 1995).
- 13 On the legal evolution of constitutional control in Colombia, see Roza (1997).
 - 14 On this weakness, see Uprimny (1996).
 - 15 This question obviously presupposes a non-identification between activism and progressiveness, since there may be a conservative activism, such as in the US Supreme Court in the early twentieth century. Furthermore "up until recently the best known instances of court activism were politically conservative, if not reactionary" (Santos, 2001a).
 - 16 On the Constituent Assembly see Buenahora (1992). For an optimistic assessment of the democratic character of the Constituent Assembly, see Fals Borda (1991), who was one of its members.
 - 17 The empirical research was carried out over a period of eight months, with the participation of four research assistants. We conducted 25 in-depth interviews, some of them in remote places such as the Sierra de Santa Marta, where some indigenous communities live.
 - 18 The indigenous movement in Colombia has been especially strong since 1971, following the Third Assembly of the Regional Indigenous Council of Cauca (CRIC). For a history of these mobilizations see Findji (1992: 112 ff.).
 - 19 It is estimated that 64 indigenous languages and as many different worldviews exist in Colombia (LZ: 22; these symbols, here and from now on, refer to the names of the leaders who were interviewed during the research).
 - 20 However, this is not a common explanation. The receptive attitude of the state tends to be explained by more obscure purposes, such as the need to assert its intervention in indigenous territories (Gros, 1993: 13) or the desire to co-opt and disarm indigenous leaders (Rappaport, 2000: 5). Although we do not deny the possible existence of these goals, we believe that the need for institutional legitimation through a representative process predominates (Santos and García Villegas, 2001). In recognizing indigenous populations, the dominant political elite seems to have found legitimizing symbolic dividends that are greater than the risks of the relative contractual inclusion of indigenous peoples (Gros, 1997).
 - 21 Bilingual leaders who have studied in the universities of large urban centers and who perform ably in both indigenous and white environments. These intellectuals participate in elections for political offices, use the legal system, and speak out through the mass media.
 - 22 For indigenous leaders, however, this does not constitute grounds for special commendation but is simply the court's commission (GM: 4; C: 7, FT: 16). In their opinion, nothing has been given to indigenous people; the court did nothing more than recognize a right that other institutions do not recognize.

- 23 These are usually indigenous people who, thanks to the system of decentralization that has been in effect since 1986, have been elected as mayors or town councilors in municipalities located in indigenous territories.
- 24 These are leaders who defend tradition, usually advised politically by white intellectuals and anthropologists, many of whom preach a certain indigenous fundamentalism.
- 25 Some intransigent leaders argue, for example, that the indigenous question is predicated on the impossibility of communication between two worldviews, two mutually incomprehensible bodies of knowledge. According to Gabriel Muyuy, for example, "not even the most progressive and consistent magistrates can understand the essence, the thought, and the wisdom of the spiritual leaders of our communities" (GM: 4). The constitutional idea of a multicultural nation is a contradiction in terms and, therefore, indigenous people should struggle for a sovereign nation (CH: 11). The pragmatists, however, believe that cultural principles should not be an obstacle to getting benefits from the state in the political arena and through the means that the state itself defends, such as the law.
- 26 The so-called "indigenous intellectuals" spend most of their time in Bogotá or other large urban centers and only communicate from time to time with their traditional authorities, who usually understand little of the political strategy that they are advocating.
- 27 Almost all the indigenous leaders interviewed recognize that one of the major problems with the legal strategy is that those elected to public office from within their ranks adopt the vices of the traditional political class, such as corruption, clientelism, demagoguery, and so on.
- 28 According to Eduardo Garzón, union leader and head of the United Front political movement, the court has changed the trade union political culture through the *tutela* action (EG: 4).
- 29 According to Luis Alfonso Velázquez, currently there are 840 enterprises in receivership and during the past five years over 5,000 more companies have been liquidated. The Chamber of Commerce has cancelled over 32,000 commercial registers over the past 10 years. Under these circumstances, the strategy for collective negotiation has been profoundly affected (LAV: 1 and 2).
- 30 According to the union members at Empresas Varias de Medellín, starting in 1993 the role of the traditional union leader—whose sole effective strategy was political confrontation: "We must take to the streets, participate in marches [...] he who speaks to the bosses is a turncoat,"—weakened and in his place arose a leader more inclined toward pragmatism and negotiation (EEVV: 10).
- 31 This case refers to ruling T-436 of 2000, which struck down the decision by the Codensa electric company to lay off over 2,000 workers. From a legal point of view (statutory law), the laid-off workers had no recourse since they had received severance pay.
- 32 In this ruling the court ordered that laid-off workers be re-hired and receive

compensation. These workers had filed a *tutela* suit as a desperate last resort, after having attempted all other political strategies. The success of the lawsuit was such a triumph that union leaders began providing assistance to unions located in different cities around the country in order to help them prepare similar *tutela* cases.

- 33 "The court is an oasis in the middle of the desert," says Luis Eduardo Garzón (EG: 4).
- 34 According to data provided by Luis Eduardo Garzón and Luis Alfonso Velázquez, during the past ten years, 2,500 labor leaders have been killed throughout the country. Violence has affected practically all endeavors involving social or political mobilization. For more on this subject, see Pécaut, 1997.
- 35 Marcel Silva, professor of labor law and union consultant, maintains that "when there is no possibility for the right to association to prevail, when we are persecuted, when we are mistreated, when our leaders are murdered, in this very bleak picture, the court's rulings are the only thing that cheers us up" (MS: 5). Some radical labor leaders interpret this as a "carrot and stick" strategy on the part of the state. Along the same line, others feel that this is something like "granting concessions to a dying man," referring to the right to association (MS: 5).
- 36 For more about these facts and changes, see Guzmán Duque (2000). Newspaper articles also reflect the greater social and political visibility of gays. See, for example, the articles from *El Tiempo* (13 November 1994, p. 7B), entitled "Los gays de Bogotá salen a la luz" ("Gays in Bogotá come out of the closet"), from *El Espectador* (28 June 1999), "Comunidad gay da la cara" ("Gay community stands up"), or the article on lesbians in *Semana* (April 1996), "Juego de damas" ("Game of checkers").
- 37 On the subject see Motta (1998) and Guzmán (2000).
- 38 See, for example, *El Tiempo*, 13 December 1998.
- 39 See Bill No.97/99, presented by Senator Margarita Londoño (*Gaceta del Congreso* No. 305, 10 September 1999).
- 40 See also *El Espectador*, 29 April 1997 and 1 June 1999. For an economic analysis of the debtors' financial crisis, see Echeverry *et al.* (1999), and Castellanos and Suárez (1999).
- 41 In February 1999, for instance, about 2,000 people participated in a demonstration at Cali that debtors called "stations of the cross" (see *El Espectador*, February 1999). In December 1998, debtors had organized a "march of pots and pans" to complain about the fact that they were practically starving because of their mortgage payments.
- 42 The president of the Colombian Banking Association said that the court was politicized, which was "inflicting enormous economic damage to the country." For this reason, it was necessary to limit this "super power that the magistrates have today, which threatens the normal course of the national economy" (see *El Espectador*, 6 June 1999). Salomón Kalmanovitz, co-director of the Central Bank, claimed that the court had overstepped its functions, that

"Court hearings are replacing Congress," and that its rulings were an obstacle to economic development (*El Espectador*, 24 March 2000).

- 43 See *Gaceta del Congreso*, 24 December 1999, Year VIII, No. 603, pp. 5 ff and 26 ff.
- 44 This discussion does not differ greatly from the analyses of the subject in core countries (McCann, 1994; Sheingold, 1989). However, the way in which this symbolic effect operates and its specific implications are quite different in the context under examination here.
- 45 It is obvious that a sentence may often have both attributes, since it may recognize a contested right and formulate bold orders to remedy violations. Some rulings on health care have been of this kind, because the court, going beyond existing legal regulations, not only recognized that a person had the right to medical treatment (ideological activism), but also prescribed precise behaviors to the authorities (remedial activism). However, the distinction between these two types of activism, which is connected to the classical differentiation between rights and remedies, is relevant since they have different impacts and give rise to different kinds of resistance.

Bibliography

- Acosta, Amylkar (2000). *El viacruis del UPAC. Los inquilinos de la ira*. Bogotá: IDEAS.
- Arenas, Luis Carlos (2001). "Poscriptum: Sobre el Caso U'wa," Boaventura de Sousa Santos and Mauricio García Villegas (eds), *El Caleidoscopio de las Justicias en Colombia*. Bogotá: Uniandes, pp. 143-56.
- Balbus, Isaac (1977). "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law," *Law and Society Review*, 11: 571-88.
- Bourdieu, Pierre (1986). "La force du Droit, elements pour une sociologie du champ juridique," *Actes de la Recherche en Sciences Sociales*, 64, Paris: 3-16.
- Buenahora, Jaime (1992). *El Proceso Constituyente*. Bogotá: Tercer Mundo.
- Castellanos, Jorge, and Felipe Suárez (1999). "Financiación de vivienda: retos y soluciones," *Debates de Coyuntura Económica*. Bogotá, Fedesarrollo, 49: 7-18.
- Cepeda, Manuel José (1998). "Democracy, State and Society in the 1991 Constitution: The Role of the Constitutional Court, in Eduardo Posada Carbó," *Colombia: The Politics of Reforming the State*.
- Chemersinsky, Erwin (1998). "Can Courts Make a Difference?," Neal Devins and Davison M. Douglas (eds.), *Redefining Equality*. Oxford: Oxford UP, pp. 191-204.
- Crenshaw, Kimberle (1988). "Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," *Harvard Law Review*, 101: 1332-1387.
- Crossman, Brenda, and Ratna Kapur (1997). "Secularism's Last Sigh? The Hindu Right, the Courts, and India's Struggle for Democracy," *Harvard International Law Journal*, 113: 113-70.

- Deas, Malcom (1995). "Canjes violentos: Reflexiones sobre la violencia política en Colombia," in Deas and G. Daza, *Dos Ensayos Especulativos sobre la Violencia en Colombia*. Bogota: Fonade, pp. 1-86.
- Echeverry, Juan Carlos, et al. (1999). *UPAC: evolución y crisis de un modelo de desarrollo*. Bogotá: Planeación Nacional (mimeo).
- Edelman, Murray (1971). *Politics as Symbolic Action: Mass Arousal and Quiescence*. Chicago: Markham.
- Ewick, Patricia and Silbey (1998). *The Common Place of Law; Stories from Everyday Life*. Chicago: Chicago UP.
- Fals Borda, Orlando (1991). "La accidentada marcha hacia la democracia participativa en Colombia," *Análisis Político*, 14: 46-58.
- Findji, Maria Teresa (1992). "From Resistance to Social Movement: The Indigenous Authorities Movement in Colombia," Arturo Escobar and Sonia Alvarez (eds.), *The Making of Social Movements in Latin America: Identity, Strategy and Democracy*. Boulder, CO: Westview, pp. 113-33.
- Findley, Roger (1972). "Ten Years of Land Reform in Colombia," *Wisconsin Law Review*, 3: 880-923.
- Fraser, Nancy (1998). "Social Justice and the Age of Identity Politics: Redistribution, Recognition, and Participation," Grethe B. Paterson (ed.), *The Tanner Lectures On Human Values*. Vol. 19. Utah: Utah UP, pp. 3-67.
- Giddens, Anthony (1984). *The Constitution of Society*. Berkeley: California UP.
- Gómez, Juan Gabriel (1995). "Fueros y desafueros. justicia y contrarreforma en Colombia," *Análisis Político*, 25: 71-9.
- Gordon, Robert (1998). "New Developments in Legal Theory," David Kaiyrs (ed.), *The Politics of Law. A Progressive Critique*. New York: Basic Books, pp. 281-93.
- (1998a). "Some Critical Theories on Law and Their Critics," David Kaiyrs (ed.) *The Politics of Law. A Progressive Critique*. New York: Basic Books, pp. 641-61.
- Gros, Christian (1988). "Reforma agraria y Proceso de paz en Colombia," *Revista Mexicana de Sociología*, 50(1), January-March, 287-302.
- (1993). "Derechos Indígenas y Nueva Constitución," *Análisis Político*, 19, May-August: 8-24.
- (1997). "Antropología en la Modernidad," *Indigenismo y Etnicidad: el desafío neoliberal*. Bogotá: Instituto Colombiano de Antropología (ICAN), pp. 15-59.
- (1994). "Colombia indígena. Identidad cultural y cambio social," *Análisis Político*, 22, May-August: 118-20.
- Guzmán Duque, Federico (2000). *Apropiaciones: homosexuales y derecho en Colombia*. Graduate thesis. Bogotá: Departamento de Antropología de la Universidad de los Andes.
- Jacob, Herbert, et al. (1996). *Courts, Law and Politics in Comparative Perspective*. New Haven, CT: Yale UP.
- Klug, Heinz (1996). *Constitutionalism, Democratization and Constitution-Making for a New South Africa*. Madison: University of Wisconsin Law School.

- Laclau, E., and Chantal Mouffe (1985). *Hegemony and Socialist Strategy: Toward a Radical Democratic Politics*. London: Verso.
- Linz, Juan, and Alfred Stepan (1996). *Problems of Democratic Transition and Consolidation; Southern Europe, South America, Post-Communist Europe*. Baltimore, MD: Johns Hopkins University Press.
- Malloy, James (ed.) (1977). *Authoritarianism and Corporatism in Latin America*. Pittsburgh: U of Pittsburgh P.
- McCann, Michael (1985). "Resistance, Reconstruction, and Romance in Legal Scholarship," *Law & Society Review*, 26(4): 733-49.
- McCann, Michael W. (1994). *Rights at Work, Pay Equity Reform and Politics of Legal Mobilization*. Chicago: U of Chicago P.
- Minow, Martha (1987). "Interpreting Rights: An Essay for Robert Cover," *Yale Law Journal*, 96, 1860-1915.
- Morgan, Martha (1999). "Taking Machismo to Court: The Gender Jurisprudence of the Colombian Constitutional Court," *Interamerican Law Review*, 30(2): 255-342.
- Motta, Cristina (1998). "La Corte Constitucional y los derechos de los homosexuales," *Observatorio de Justicia Constitucional*. Bogotá: Siglo del Hombre, Universidad de los Andes, 290-99.
- Nino, Carlos S. (1989). "Transition to Democracy, Corporatism and Constitutional Reform in Latin America," *University of Miami Law Review*, 44(1), 129.
- (1992). "The Debate Over Constitutional Reform in Latin America," *Fordham International Law Journal*, 16(3): 635.
- Pécaut, Daniel (1978). *Orden y Violencia en Colombia 1930-1954*. Bogotá: Siglo XXI.
- (1997). "Presente, pasado y futuro de la Violencia," *Análisis Político*, 30, IEPRI, Universidad Nacional de Colombia, Bogotá, 3-36.
- Pinto, Anibal (1971). *Tres Ensayos sobre Chile y América Latina*. Buenos Aires: Solar.
- Rappaport, Joanne (2000). "Redrawing The Nation: Indigenous Intellectuals and Ethnic Pluralism in Colombia." Bogotá (mimeo).
- Rodríguez, Cesar (2001). "La justicia civil y de familia," in Boaventura de Sousa Santos and Mauricio García Villegas (eds), *El Caleidoscopio de las Justicias en Colombia*. Bogotá: Uniandes, 547-614.
- Rosenberg, Gerald N. (1991). *The Hollow Hope*. Chicago: U of Chicago P.
- Rozo, Luz Zoraida (1997). "Origen y evolución del régimen de control constitucional en Colombia," *Derecho del Estado*, 3, 45-62.
- Santos, Boaventura de Sousa (1995). "Los tribunales en las sociedades contemporáneas," *Pensamiento Jurídico*, 4. Bogotá, Facultad de Derecho, Universidad Nacional, 5-38.
- (1998). *De la Mano de Alicia; lo social y lo político en la post-modernidad*. Bogotá: Siglo del Hombre, Uniandes.
- (2001a). "Los paisajes de la justicia en las sociedades contemporáneas," in Boaventura de Sousa Santos and Mauricio García Villegas (eds), *El Caleidoscopio de las Justicias en Colombia*. Bogotá: Uniandes, 85-150.

- (2001b). "Derecho y democracia: la reforma global de la justicia," in Boaventura de Sousa Santos and Mauricio García Villegas (eds), *El Caleidoscopio de las Justicias en Colombia*. Bogotá: Uniandes, 151–207.
- Santos, Boaventura de Sousa, Maria Manuel Leitão Marques, João Pedroso, and Pedro Lopes (1996). *Os Tribunais nas Sociedades Contemporâneas. O Caso Português*. Porto: Afrontamento.
- Santos, Boaventura de Sousa, and Mauricio García Villegas (eds) (2001). *El Caleidoscopio de las Justicias en Colombia*. Bogotá: Uniandes.
- Scheingold, S. (1974). *The Politics of Rights, Lawyers, Public Policy, and Political Change*. New Haven, CT: Yale UP.
- Sripati, Vijayashri (1998). "Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead," *American University International Review*, 14, 415–95.
- Teitel (1997). "Transitional Jurisprudence, The Role of Law in Political Transformation," *Yale Law Journal*, 106, 2009–80.
- Touraine, Alain (1988). *La Parole et le Sang*. Paris: Odile Jacob.
- (1977). *The Self Production of Society*. Chicago, IL: Chicago UP.
- Tushnet, Mark (1984). "An Essay on Rights," *Texas Law Review*, 62(4), 1363–402.
- Uprimny, Rodrigo (1996). "Violencia y acción colectiva: una comparación entre Bolivia y Colombia," in AAVV, *Gobernabilidad, constitución y democracia en Colombia*. Bogotá: Universidad Nacional, 213–27.
- (2001). "Las transformaciones de la administración de justicia en Colombia," Boaventura de Sousa Santos and Mauricio García Villegas (eds.), *El Caleidoscopio de las Justicias en Colombia*. Bogotá: Uniandes, 261–315.
- Urrutia Montoya, Miguel (1976). *Historia del sindicalismo en Colombia*. Bogotá: Uniandes.
- Wayne, William (1997). "The two faces of judicial activism," David O'Brien (ed.), *Judges on Judging. Views from the Bench*. Chatham: Chatham House.
- Yang, Kung (1998). "The Constitutional Court in the Context of Democratization: the Case of South Korea," *Verfassung und Recht in Ubersee*, 31, 160–70.
- Zirzak, Spencer (1996). "Hungary's Remarkable, Radical, Constitutional Court," *Journal of Constitutional Law in Eastern and Central Europe*, 3(1), 1–56.