

Institutions and Citizens in Colombia: The Changing Nature of a Difficult Relationship*

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Abstract

From a critical perspective, this essay examines the root socioeconomic and political impact of the constitutional change that occurred in Columbia during the decade of the 90s, and the resultant model consecrated in the Political Constitution of 1991. Taking that process as a starting point, the analysis reviews the principal characteristics of the introduction and subsequent coexistence of two antagonistic models of state: The Social State of Right and the Neoliberal State convergent in the articulation of the Constitution of 1991. Also, the article studies the institutional innovations that both models introduce to the Columbian political regime, especially in regards to the justice administration, the structure of public power and the articulation of participation as the axis of democracy.

At the same time, the article reviews the elements that exemplify the coexistence of these two models, by means of analytical pursuit of the behavior of the individual and collective actors and of the concrete political facts that have formed said relation throughout the last decade of the 20th century, as well as its impact on the instability of the Columbian political regime. Finally, the essay considers the deficiencies in the political culture and the constant interference of the traditional sectors and of the armed actors as a characteristically structural obstacle to the achievement of the aspirations of the great project of democratic reform and progress contemplated in the Constitution of 1991.

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Introduction

In Colombia, the Political Constitution of 1991 provides an ideal starting point to analyze the social and political changes we have lived through during the last decade. The extraordinary event of an institutional reform undertaken within the context of a National Assembly set the stage where desired changes in the organization of the country were supposed to take place. The project was further accompanied by the ambitious proclamation of Colombia as having the first constitution in the American hemisphere with a full complement of social rights (*estado social de derecho*).

To be precise, Colombia adopted a new constitution on July 4, 1991. The next day, according to historian Malcom Deas, “Colombians woke up with a constitutional hangover.” In fact, the event signaled the beginning of a new period in republican national history in which two contradictory development models began to coexist.

On the one hand, the inauguration of the Social Constitution (as formalized in the preamble of the new charter) reflected a progressive institutional project that attempted to integrate a vast repertoire of institutional structures associated with social democratic philosophy. On the other hand, the new organism contrasted sharply with the belated adherence to the neo-liberal model formalized during the latter part of the presidency of Virgilio Barco Vargas (1986-1990).

As the decade of the 80’s gave way to the 90’s, Colombia experienced violent political and socio-economic turbulence resulting from the convergence of changes at the international and national level. On the international scene, a wave of change brought about the end of the cold war with the collapse of the Berlin Wall, the disappearance of the Soviet Union and the closure of the socialist paradigm. These events were coupled with the first shock waves, and subsequent insecurities, produced by globalization and by the adoption of neo-liberalism.

In Colombia, confusion was evident. Numerous armed groups, such as guerilla movements, paramilitary groups, and drug dealers turned “narco-terrorists,” attempted to destabilize, and possibly overthrow, the regime, which resulted in a perturbed atmosphere. Virgilio Barco’s government announced officially that it would adhere to neo-liberalism at the same time, which brought about an increase in political violence. During this period, the increase in numbers of actors participating in the conflict and the escalation of their activities reached a zenith, evidenced by the bankruptcy of the legitimate monopoly of the state’s control mechanisms. However, after a long period of indecision, conditions allowed the start of a new political project aimed at recovering legitimacy and credibility for institutions and the regime. Then, popular mobilization erupted within a project of political reform, which in turn brought about approval to call a National Convention, elections, and drawing up a new Constitution.

Looking back, with historical hindsight, one should note that, until the

National Front' pact ended, the country had been ruled by a political regime that excluded large portions of the populace and ignored a socially explosive reality. It dealt with the symptoms of conflict by appealing to reformist policies and by using extraordinary powers to apply Stage of Siege constitutional provisions. From the beginning of the period, which was called the “post-National Front” (*Desmonte” del Frente Nacional*)—which began with Alfonso Lopez (1974-1978), continued with Julio Cesar Turbay (1978-1982) and Belisario Betancur (1982-1986) and ended with Virgilio Barco (1986-1990)—government platforms relied on institutional change to preempt social crises. However, the changes attempted were directed at very specific aspects of the institutional framework (e.g. electoral, congressional, justice administration reforms, etc.). Still, it should be kept in mind that Colombia has traditionally been a society influenced by liberal French legal rhetoric, and singularly lacking in the realistic Anglo Saxon legal tradition (Lopez 2003).

Nonetheless, between August of 1989, when Luis Carlos Galan (the strongest presidential candidate for the Liberal Party) was assassinated, and June of 1991, the student initiative known as the “Seventh Ballot” (*Séptima Papeleta*)² went into effect. An intense process of political reform took place, leading to the convening, under extraordinary circumstances, of a National Constitutional Assembly.

Representatives of the main societal constituencies participated in the Assembly for the first time, and the new institutional framework included groups traditionally excluded from formal politics. The attendance of indigenous groups, black groups, religious groups (outside the Catholic Church) and recently demobilized guerrilla fighters left a feeling that the new Constitution was, in reality, an inclusive political pact (Gaviria 2001). The inclusion of groups that had been traditionally left out of the political process created euphoria and silenced the disapproval voiced by conservatives, reluctant to accept change. There was even an attempt to incorporate the active guerrilla fighters, who had been excluded from the peace process that negotiated the armed conflict that took place during the governments of Barco and Gaviria, between 1986 and 1994 (Bejarano 2001). Questions posed by skeptics who qualified the new constitutional project as a “quilt assembled with left-over cloth,” however, made it clear that this initiative did not produce the broad national consensus some claimed.

The new legal framework, seen by some analysts as one of the most ambitious and progressive projects in contemporary constitutional thought, in fact immersed the republican project in a process without a time frame, which was supposed to steer Colombia towards a democracy open to citizen participation. Characterized by this fundamental objective, the reform process went forward hand in hand with an antagonistic front, which questioned the basic features of the recently proclaimed constitutional project. The main issues were the participation of the country in a neo-liberal project and its inclusion within the logic of globalization, as explained above.

These antagonistic models co-existed, hindering the institutional framework

through which the intention of building a social constitution would materialize. This difficulty is not to be considered, as some authors have claimed (Orjuela 2003), an absolute dichotomy, given that the 1991 Constitution of Colombia reproduces content eclectically. Rather, the Constitution is founded on a philosophy and an ideology consistent with interventionist social democracy, but brings in elements from the opposite side, a liberal or neo-liberal approach, such as giving autonomy to a central bank. From this perspective, the country functioned as a derivative of the liberal social constitutional framework, an option chosen to support the political regime with a more efficient apparatus. To this end, institutional innovations from both liberal currents were adopted.

With no intention of being exhaustive, this essay will examine some of the innovations mentioned above. We will consider how new functions and purposes were assigned to branches of the public sector, concentrating on changes related to the redefinition of the equilibrium and the administration of justice. We will look also at the introduction of a higher element of participation into democracy, based on the notion that it would not replace representative groups, but rather, strengthen them; in general, the philosophical and instrumental inclusion of elements which identify the new constitutionalism. We should add that the analysis we are offering gives priority to the changes introduced into the legal system, since, within the new legal framework, the judiciary has the responsibility of making constitutional doctrine compulsory, particularly pertaining to the issue of bringing about a social constitutionalism.

Institutional Reforms

The idea of profoundly changing the socio-political and economic structures of the country also constituted an attempt to reformulate and improve the separation between the different branches of the public sector. Until the 1990's, guided by the principles of organization in the Constitution of 1886, Colombia had an intensely presidential regime, where the Executive branch was the main, and at times the only, protagonist. By declaring an exception, the Executive not only restricted citizen's rights and liberties, it also formalized those restrictions by issuing decrees under Siege provisions (*Estado de Sitio*) (Duhamel and Cepeda 1997). The purpose was not only to place "presidencialismo" under control, but also to harmonize the existing relationships within the three branches of political power.

The Division of Powers within the Three Branch System

True to its social-democratic character, the Constitution of 1991 brought about a system which, rather than achieving the separation between the three branches of government, increased their level of coordination and fluidity. The traditional scheme for the division of government powers, based on checks and balance, which prevent any of the three branches from over-extending their authority (from the perspective of classical liberalism), was the object of several initiatives within the constitutional assembly of 1991. The new constitution formalized the basis for a harmonious interchange of authority within the branches, as detailed in article 113 of the Charter, which specifies the structure of governance.

Thus, a mixed system was implemented (Cepeda 1993: 123), which increased institutional equilibrium and curtailed the powers of the presidency described above. An extension of the rights of citizens and of the functions of autonomous control entities (Treasury of the Nation, Public Ministry and National Electoral Council), coupled with mechanisms to foster direct democracy, such as elections and a Constitutional Court, reduced the concentration of power in the executive branch. All of these elements of democratization fostered an explicit transition towards a model in which citizen's rights would play a central role. The equilibrium of power within the public sector gained specific weight as members of the convention gave force of law to fundamental rights. Thus, the philosophy that supported the separation of powers would not have been jeopardized by conflicts between the executive, legislative, and judiciary branches of government, detrimental to the effective application of constitutionally protected rights.

In practice, the executive was given powers to call upon the people by conducting referenda and plebiscites, and given authority to abolish or fuse the highest administrative levels of the government.³ The office of Vice President, elected by direct vote, as the President, and not necessarily belonging to the same party, was also created. From another perspective, presidential powers were restricted by curtailing the authority of the president to name governors, who began to be chosen in popular elections. Permanent control on the continuity of secretaries was eliminated by granting veto powers. Likewise, the capacity to legislate was transferred exclusively to the legislative body and the use of Siege legal provisions was transformed into so-called of Internal Unrest provisions (*estado de conmocion interior*), which were placed under the supervision of the judiciary branch, requiring ratification by the legislative branch (Art. 212 and 213 of the Charter).

However, the decisive impact of initiatives seeking to curtail "*presidencialismo*" originated in the adoption of constitutional principles and from their interaction with the policies of the regime. The Constitution clearly aimed to restore the power of the legislative body relative to the executive by, for example, giving Congress exclusive power to pass organic legislation (in particular, budget legislation). Nonetheless, "*presidencialismo*" is still a firm trait of the

Colombian political regime. The introduction of controls of the legislative over the executive, Censorship Motions, for example, or constitutional compliance controls, have not developed into a body of norms and regulations which advance the true balance of powers. The president is still the chief of and head of the government. Censorship Motions have not been used on any minister. In addition, the incumbent government of President Uribe is involved in a project to win reelection in a way that does not respect present norms and constitutes a “manipulation” of the underlying democratic structure, according to Legislative Act number 012 of 2004. This confirms the predominance of “*presidencialismo*” in Colombia, in spite of recent proposals made by President Uribe’s own followers requesting that reelection inaugurate a new regime of semi-presidential or parliamentary-type (Proposals numbers 101/11 and 102, 2004, respectively).⁴ However, the true value of the new strategies incorporated to promote equilibrium between the branches of power makes more sense when the powers assigned to the legislative body are considered, because the duties and faculties assigned to this body gave it a leading role in areas previously reserved to executive intervention.

Since 1991, the authority to pass organic and statutory laws has been concentrated in Congress, which also has power of decision on budget matters, as we pointed out before, and can initiate Censorship Motions. Additionally, the Senate was pronounced competent on the question of decreeing Motions of Exception. From another perspective, new national and territorial divisions for the election of Senators and members of Congress, respectively, were put into effect, as well as special zoning regulations to include minorities and increase diversity of representatives in the legislative branch.

To strengthen the legitimacy of Congress, policies to improve parliamentary practices were put into effect, which had, as consequence, the creation of a Statute of Congressmen and impeachment procedures to sanction faults. The use of substitutes and of auxiliary personnel was eliminated (Art. 134) in order to establish the individual accountability of each legislator towards the citizens and other branches of government. In 1991, one of the main objectives was to bring about political reform of the Colombian democratic regime. Thirteen years after the Charter was adopted, its promoters are still pointing out that independent candidates have increased their share of parliament benches. Yet, they also criticize the dispersion of representative forces in this branch of government.⁵

Another negative aspect is the unrelenting effort to reform the Constitution in order to resuscitate the afore-mentioned situation, namely the myriad modalities in which members of parliament control nominations by means of provisions allowing them to seek support. Although the redefinition of equilibrium between the three branches of government is not yet complete, in the thirteen years that have lapsed since the new Constitution took force of law there have been eleven attempts at partial reform. Therefore, we should mention that conceptual

models defining the functions and links between different strata of authority have changed. These are no longer seen as autonomous functional opposites, endowed with the capacity to reciprocally control abuses of power.

In the social constitutional framework, the normative result of the Bill of Rights forces a more fluid exchange, subjecting its functions to the control of the Constitutional Court, which controls compliance with the Constitution. This would be indomitable proof of the strength gained by the judiciary branch since 1991. Since *presidencialismo* had repeatedly limited the powers of the other branches, the National Constitutional Assembly tried to reinforce the power of the legislative branch. This branch was considered the chambermaid of public office because of the high degree of backloging, inefficiency, and rampant impunity that resulted from the armed conflict. It lacked the legitimacy and weight that would give it independence and some degree of administrative agility and autonomy. Thus, the population faced a somewhat limited degree of freedom in its access to justice.

The Administration of Justice

The judiciary branch was one of the institutional stages where change was most intense, following the reform. The door was open to reinforce the “power of the judges,” and this new body was commissioned to bring into effect the new Constitution. In fact, the main changes experienced can be translated along two axes: the first, the organic and institutional reforms and the second, the birth of legal institutions. One of the new features was the creation of a court of law that operated beyond appeal and would consider matters of compliance with the constitution and matters of pertinence. The Constitutional Court modified jurisdictions within the system of justice as part of the effort to give citizens better access to justice. The Court’s main function was to provide orientation on how to apply the Constitution. The Constitutional Court has been one of the main hallmarks of the transition towards a Social Constitution, which, along with the inclusion of third generation or collective rights into the Charter and together with granting citizens political, social, and economic rights, illustrates the constitutional commitment to equity and justice.

However, the task of promoting substantial equity conditions for the population has repeatedly met economic, political, and technical restrictions, to the point where they seem to be purposefully thwarting the process of reform. One can therefore analyze these restrictions as ways in which the country has waged an ideological debate about what path of development it should follow. Many examples could serve the purpose of showing the underlying conflicts.

However, space limitations allow us to mention only one recent case of a clash between the constitutional court and the executive branch. It involves the government’s efforts to reform the Colombian system of social security.⁶ The

reasons given by the government are grounded on the fiscal impossibility of social security in the event of the nation having to meet financial agreements with persons who enjoyed acquired rights during the period of transition of the social security system. The Court, however, points out that refusing to acknowledge these rights, which the Constitution grants, would imply that economic arguments are admissible and sufficient to deny rights like a minimum subsistence pension. Beyond this, the Court is concerned that the executive, adopting a neo-liberal attitude, could request to ignore the constitutional basis for these rights.⁷

In effect, debates like this one, on social security, have positioned the Court as one of the most controversial institutions in Colombia, since in the fulfillment of its duties, the Court has clashed not only with other branches of power but with one of the most severe and deteriorating macro-economic features of the country. Colombia has had to tackle issues like judicial activism, the role of the Court concerning the lack of legislation on collective rights, and the economic consequences of rulings of constitutional compliance. These tensions show the contradictions between a neo-liberal development model and those belonging to a socialist market model. As ex-assembly member Antonio Navarro points out, the 1991 Constitution incorporated, at that time, different political currents, which produced a body of legislation sufficiently flexible in terms of development models.⁸

The truth is that the precarious economic conditions, so evident in Colombian reality, bring about a structural impediment to the possibility of attaining the material equity to which the social constitution aspires. This stratification produces not only economic but also social and political exclusion. The limitations to the effective operation of constitutional institutions are numerous. Thus, concerning the case of Colombia, we can apply North's (1990) institutionalist argument that institutionalizing and institutionalized agreements have a big impact on the course of the economy, both in administrative efficiency and in the distribution of wealth.

It is legitimate to reconsider the role of the Court in decisions that affect the economic dimension of constitutional rights and precepts, as well as its role in continuing to strengthen democracy, without leaving out the fact that the scarcity of available resources for material implementation often determines the outcome of legal decisions (Cifuentes 1994). This reform also created the Superior Council of the Judiciary, which is charged with vigilance and disciplinary control of officials of the judicial branch and officials of the administration. The Council was given the autonomy to function, as well as provided its own economic resources.

Thus, the objective was to give the judiciary criteria of power and provide agility to achieve the constitutional commitment of turning justice into an accessible service, desired by every Colombian. Similarly, by allowing it to manage its own patrimony, the new Constitution attempted to separate the judiciary power from the executive power and to assure its independence (Fuentes and Perafán 2003: 247-59).

Moreover, the chronic levels of impunity,⁹ traditionally the characteristic response to the violations spelled out in the penal law, were the determining factor in introducing into penal justice an institution specializing in criminal investigation and prosecution. Thus, the Office of the General Prosecutor abandoned the system of inquiry and replaced it with a system of filing accusations. The most important achievement due to this innovation is the independence granted to procedures of penal investigation, prosecution and accusation of those infringing the Penal Code, especially those who have defied the authority of the Constitution, including drug dealer cartels, guerrilla leaders, paramilitary organizations and officials involved in crimes or corruption (Gaviria 2001:62).

The creation of the Office of the Ombudsman, conceived to compliment the Ministry of Public Affairs, which was historically overseen by the National Attorney General, should also be noted. This addition to the reform sustains a real difference with the structures of the office of the Attorney General, since the purpose of creating it was to introduce the position of Ombudsman, or advocate of the people, plays, essentially, a role of promoter of fundamental rights before the authorities and private organizations. The way the Office of Ombudsman has adapted to national conditions can be observed against a background of the weakening of control experienced by the Colombian government. This diminishing of control, as we have already pointed out, can act as a stimulus for the emergence of illegal structures of power that limit citizen's rights by their capacity to deny institutional protection. From this perspective, the office of the Ombudsman has already played an important role by represented groups segregated and marginalized by violence such as refugees, who amount to more than 2 million people.

In Colombia, the refugee problem constitutes one of the worst results of the armed conflict, not only because of the human drama of people torn from their homes, but also because of the social and economic exclusion which this population experiences once it arrives in urban areas. Concerning this problem, the Ombudsman has been promoting the development of the institutional framework necessary to protect and tend to refugees.¹⁰ It should also be mentioned that constitutional legal action— individual and collective —and the establishment of a constitutional jurisdiction, which puts all judiciary officials under the control of a Constitutional Court, has had considerable impact on the social fabric of Colombia.

This meant that all judges in the Republic must harmoniously interpret the Constitution and bring a new element of legitimacy to it, the latter understood not only as equality before the law, as traditional liberalism defines it, but equality within the scope of social-democratic interventionist liberalism. Support for these new legal features was identified in the Constitution under the “fundamental rights” clauses, which extend social and economic rights and collective rights. Because of this extension of rights, it has been possible to demand them through

legal action at the Constitutional Court. Amongst them, the most common and effective has been custody, conceived to protect fundamental individual rights by providing a swift procedure, which begins less than ten days from the moment custody is requested until the moment when the existence of a violation of the rights in question is established. This instrument has as its objective to give people the certainty that their rights will be put into effect and it has been the best example of the normative force of the Constitution.

Statistically, it may be said that in the 14 years since the Charter took effect there have been numerous demand of custody: between 1992 and 2001 approximately 450 cases have been filed (Superior Council of the Judicature, 2004:24). Today, custody cases represent 70% of the volume of work handled by the Constitutional Court.¹¹ Unfortunately, the achievements in custody legislation have been blocked by regressive initiatives, such as the Justice Reform Project presented by President Uribe. Amongst its main objectives, the President's Project attempts to limit the scope of custody as a way of protecting social rights, arguing that this constitutional action has not only fostered a "government of judges," but has also created a backlog of cases at the judiciary. Moreover, this initiative attempts to reduce the functions of the Constitutional Court, amongst them its capacity for "modulation," which allows the Court to modify articles of law that violate the Constitution (Law Project number 98/204).

Beyond any curtailing of the effect of the 1991 Constitution, it may be said that the mere proposal shows the discomfort felt by many levels of political power. Those in political power feared the strength of the Constitutional Court and the popularity of constitutional actions that often contradict the objectives of the ruling model of neo-liberal economic development.

Political Participation

Another important feature of the 1991 constitutional project is the emphasis it gave to direct or "participatory" democracy, as opposed to representative democracy, as the way to advance this political regime. Alternative mechanisms of political participation were used, not in order to undermine the sense of representation, but rather to transcend from a simple electoral democracy to a higher level of participation of citizens in the political system. Later, representatives would even be favored on this basis (Tirado 2001:17).

In accordance with the objective of favoring direct political participation of citizens, the following procedures were approved: the Referendum to Repel, the Plebiscite, the Popular Legislative Initiative, the Popular Referendum, the Open Town Hall (*Cabildo Abierto*) and the Impeachment procedure (*Revocatoria del Mandato*), amongst others. All these forms of participation indicated an important purpose, namely, to open new decision-making spheres where people would have a direct impact on topics of daily public interest and concern.

The forces in favor of direct democracy attempted to establish real legal links between citizens and the administrative policies of elected officials. One could interpret this attempt as a re-enactment of the “social contract,” insofar as political links moved away from the abstract realm, since the new democratic model states that they should materialize in specific projects and programs, which citizens have the right to demand. It became even more important that government officials operate in a transparent manner and are accountable to the people. Similarly, a recent analysis of the reform introduced reveals that the inclusiveness of the system implied an innovative framework of ethical control for all elected officials: members of Congress – senators and congressmen – members of territorial assemblies and municipal officials.

This restrictive framework was defined by a set of characteristics, which the aspiring candidates who participated in popular elections had to fulfill, and by a series of requirements concerning their public conduct.¹² The innovation, in this case, comes from the fact that any petition from the citizens to a public officer or political representative has the same force as constitutional actions. It carries, therefore, the same legal force as the charter of fundamental rights established by the Constitution. Surely, this innovation is one of the main achievements of the 1991 constitutional model, which defines the Social Constitution by helping to close the gap between norms established by the law, on the one hand, and social realities, on the other.

To mention one more trait of the democratic scheme adopted in Colombia, direct democracy created a political space for so called “proposal” or “program” votes (*voto programático*). These were restricted to local and regional elections.¹³ The importance of this mechanism, regulated by laws 131 and 134 of 1994, is that it defined the conditions under which citizens participate in government; particularly, how they can remove elected officers from their positions, and the set of means at the disposal of citizens to supervise the conduct of present and future administrations (Popular Referendum, Referendum, Open Town Hall). This form of democracy has obtained, however, weak results and only partial achievements, which cannot be generalized. The explanation is to be found in institutional design or in the context in which direct democracy materialized in Colombia (Velásquez y González 2003).¹⁴

However, since expectations of transformation and the impact on alternative mechanisms of participation have been raised, two dimensions must be considered: the characteristics of the norms at the disposal of citizens and the place where those mechanisms were used. Concerning the first dimension, at the national level, numerous ways and means of participating were available, but the definition of the procedures necessary to make them effective has limited their impact.¹⁵ In this case, several reasons concerning the complexity of the regulations pertaining to political participation and the context in which politics take place in this country converge. According to opinion polls carried out by the Corona Foundation in 2002, the main obstacles preventing popular

participation are the following: lack of information (68%), mistrust (36.8%), ignorance of rights (35.1%), lack of will on the part of politicians (31.1%), lack of citizen consciousness (30%), lack of time (28.9%), the armed conflict (24.4%), lack of adequate means to produce participation (13.2%), and a rigid and demanding legislation (3.2%)¹⁶

It should be said that, at the local level, where several forms of participation such as opinion polling, project management, and control agreements to set the characteristics of public services exist, what constitutes the “supply side” of political participation has become, according to Velasquez and Gonzalez (2003:96-102), a “legislative avalanche.” According to these authors, the use of legal instruments to stimulate participation in the decade of the 90’s produced two phases of high legal production and 29 legal instruments to favor participation. In the first phase, between 1993 and 1994, 13 of the 29 extant laws (44.8%) were passed; in the second, between 1997 and 1999, eight (26.7%) were; the six remaining laws came about in 1991, with the Constitution (20.7%); one more was passed in 1995 and another one in 2000 (Supervision Law).

Today, legislation pertaining to participation is proliferating. The legislation, however, has not produced much mobilization of citizens concerned about public affairs. Until now, most of the traditional political class in Congress have regulated most of the laws, which have remained been exclusive initiatives of the state. This could show an objective of regaining legitimacy within the political system; however, it has not yet found popular support (Bejarano 2001b). It can be concluded, therefore, that the legal system designed to channel participation is part of the problem it seeks to solve. The abundant means of participation available lack the legal, technical, and information infrastructure that would allow citizens to have an impact on political decisions. Scholars of this subject have described a “bottleneck,” since the theoretical scope of the norms is wide, but they lose force each time that the government regulates participation and an attempt is made to make the legislation operative. One can even say that the law itself acts as a barrier to participation, insofar as the lack of cohesiveness within a clear and comprehensible body of legislation deprives the law of sense and meaning.

Of course, modifications of the scheme for participation did not seek to change procedures only. The modifications did indeed attempt to bring about substantive change. Therefore, we cannot conclude that legislative changes introduced by the Political Charter would have, by themselves, modified the culture in which political parties have traditionally functioned, which was a culture of clientelism (*clientelismo*), characteristic of Colombian political history.

It is necessary to be cautious when attempting to judge the progress of direct democracy in this country, since new legal instruments have not been based on the existence of a strong political culture, which would have made it possible to bridge the gap between democratic norms that foster the participation of

the people and the traditionally anti-democratic behavior of citizens. As we said above, the evolution of participation in Colombia shows how the elements found in the socio-political national scene condition and severely limit popular mobilization. First, there is no clear leadership in Colombian society, capable of uniting the population to participate effectively in politics. Second, a miserable social context where 60% of the population lives below the poverty line, 61% of the labor force is in the informal sector and where unemployment levels reach 16% in urban areas¹⁷ opens the question of whether such a high level of socio-economic exclusion can be a stimulus for participation. Objectively poor, most of the population evidently places survival as first priority, well above participation in the political sphere. Thirdly, armed violence must be taken into account as one of the main obstacles to participation in the country's affairs. For example, in 2002 the phenomenon forced almost 300 mayors to conduct business outside their jurisdiction, while 70% of the country's districts suffered the presence of guerrilla fighters (Velasquez and González: 2003:19).

This situation has created the need to use a low political profile as a condition for survival, reflecting such structural limitations that leave wide open the question of it being possible to materialize a democracy where everybody can participate. At this moment, suffice it to say that, in order to create active citizens, support is necessary. According to initiatives such as those contained in the 1991 Charter (Art. 106), participation is defined as the first principle of organization of the (Art. 2) and is both a right and a duty of every citizen (Art. 95). However, in order for promotional initiatives to coincide with civil motivation and be realistic, the cultural and social conditions necessary for citizens to participate must be reviewed.

It may be true that specific methods of democratic participation are a political achievement never seen before in Colombia. Even though successful experiences are scarce, we may conclude that participation and involvement in politics ceased to be matters of the exclusive concern of government officials and public service officers and have become part of their options in order to develop their own lives and projects. The above is not only an optimistic note. Experiences of participation certainly exist but they usually occur, in local, perhaps even anonymous contexts, and are therefore difficult to measure, as we can conclude from the study mentioned above.¹⁸

Conclusions

In Colombia, the Political Constitution of 1991 was a milestone of great significance in a series of attempts to redefine the model and the national political regime. Free from the yoke of formalist lawyerly discourse, the country started a new period of republican development, which one could regard as distinctively Colombian. Its lifespan is still unknown. Throughout the time

lapsed since the new Constitution took effect, however, structural instability in the country has not only been political, social, and economic; to a large extent, it has been institutional. The model of democratic progress defined by the social constitution, implicitly and explicitly present in many of the numerous articles of the new Constitution, has not been enough to prevent the constant blockages hindering tangible institutional change in the short- and mid-term. Two main factors have prevented the successful materialization of this new project.

First, individual and collective players from different contexts have interfered with this desired outcome and they have done so for various ideological, doctrinaire, economic, and instrumentalist reasons. Amongst others, we refer to politicians, grasping on to models that still gravitate around the Constitution of 1886 and to orthodox capitalists, whose utilitarian vision is still not sensitive to generalized social inequality. There are also the illegal armed players who continue to be marginalized from these processes of institutional change. Even the generous offers of negotiation made through the naïve model of distention and clearing of territory under the Pastrana administration have failed to overcome the exclusion of paramilitary groups (1998-2002). Nor has the marginalization of paramilitary groups been overcome by the more obstinate initiative of president Uribe to set up negotiations with them. The obstacles to change also include purists of the law and of economics, who have given priority to their inflexible vision, tied to the fundamentalisms of their disciplines which prevent them from venturing further and seeking to reduce the gap which separates models and laws, on the one side, and recognition of drastic structural changes, on the other. Second, the persistence of a set of subjective and intangible elements that gravitate around the absence of a political culture with roots in a responsible notion of citizenship. A new definition of this concept would lead to participation and, if active, would stand out in sharp contrast with the deeply rooted traditional forms of political activity such as *clientelismo* and corporatism, which produce exclusion.

During these years, Colombia has lived with coexisting opposite models, which are not mutually exclusive of each other. It is a fact that the social democratic foundations that constitute the constitutional framework have coexisted with a neo-liberal logic, formally introduced to the country after the adoption of the 1991 Charter. During the years that followed the approval of the Constitution there have been constant debates and clashes about the incongruence of positions adopted by judges of the Constitutional Court, insisting that the legislation passed should contradict neither government policy, nor the realistic stance of economists facing an increasingly precarious macroeconomic reality.

We must not forget that when the new Constitution was approved, Colombia lived a period of great optimism, resulting from a supposed liberation from the chains of centralism and from traditional political exclusion. This optimism was fed by a promising economic landscape based on the availability of energy

resources and on exceptional growth, experienced by the country during a “lost decade,” which was highly detrimental to the development of the rest of Latin America.

The political Charter is determined by its character as warrantor of rights, especially social rights. Given the demand that these types of rights be materialized with the limitations of the Colombian government at this time, we have arrived at a crossroads, which has gradually forced restrictions on the scope of even the Constitution itself. This situation transcends the debate on petty economic issues and raises serious doubts about the future possibility of institutional compromise, progressive as they may be in democratic rhetoric.

The dilemma of the country centers on the options for maximizing the function of social welfare and the possibility of clearly defining solid projects to guarantee social rights. There is so much interference to economic success in the region: from reasons such as budget deficit, excessive public expenses, high foreign debt, the overvaluation of the Colombian Peso against the US dollar, lack of resources to pay for social security, and the persistence of unemployment and of labor informality. However, in order for a successful constitutional regime to be born, there needs to be ways to overcome these obstacles and find a way to unite the two tendencies in Colombia’s constitutional framework towards social responsibility and economic growth.

Endnotes

¹ During this period liberal and conservative parties alternated in government – translator’s note

² This call, made by several student groups from universities in Bogotá and other Colombian cities became the “Seventh Ballot” movement, which in turn was the origin of the call to legal elections held on Dec. 9th, 1990, which elected the new reformist group which would write the new political Charter (Gabriel Murillo-Castaño y Rubén Sánchez 1993).

³ The government presided by Álvaro Uribe, making use of the power to reorganize the administrative structure of the fused the Ministries of Health and Labour Affairs into a Ministry of Social Security. Likewise, the ministries of the Interior and of Justice are now one.

⁴ For a recent analysis of modifications to the Colombian political regime, see: *Revista Semana*.

⁵ At the end of the year 2002, the Colombian National Electoral Council had given legal personality to 69 political parties and movements (Castro 2002: 199).

⁶ The reference here is to the General System of Social Security implemented by Law 100, 1993, where the monopoly on pensions and health was abolished and the private sector allowed to participate in providing these services by incorporating an insurance scheme similar to the one used in the USA, changing subsidies to supply into subsidies on the

demand side and introducing equity elements such as the creation of solidarity funds to pay for medical and welfare costs for the poorest segments of the population.

⁷ The latent problem inherent to effectively granting social rights is reflected by the debate between President Uribe and the Constitutional Court, which ruled that the government initiative to modify Law 100 of 1993 during the period of transition was unconstitutional. However, contradiction has been the rule in the relationship between both branches, as illustrated by several cases. In November 1998 when the government declared Economic Emergency and promoted measures such as imposing taxes on banking transactions under special authority to restructure the public sector and adjust the salaries of public servants and the court declared the attempt unconstitutional, basing the argument on subsistence wages, equality principles and procedural flaws. See Constitutional Court decisions C-136/99, C-815/99 y C-1437/2000.

⁸ According to Antonio Navarro, presidents Gaviria, Samper, Pastrana and Uribe have been neo-liberal, but the Constitution has not been (Ministry of the Interior, 2001:39).

⁹ In Colombia, impunity has been estimated at a constant 97% in recent history. This has been due to problems in investigation and prosecution and to the lack of compensation available to victims. The limited capacity to respond of justice has influenced the intensity of armed conflict, of extortion, threats and assassination attempts on judges and witnesses. See: Ombudsman 1995. 21.

¹⁰ The infrastructure available to protect refugees in Colombia is one of the most developed amongst countries experiencing armed conflicts; this is due to a constitutional norm which allows compliance with duties acquired in international agreements by way of a “Constitutional Block”. The Ombudsman has been the main promoter of legal instruments to offer warranties to refugees and victims of the conflict. According to the Consulting Office on Human Rights and Refugees – CODHES- in the year 2000 a total of 308 thousand people became refugees; from 1996 to 2000 2 million people abandoned their homes, followed by 207 thousand in 2003; these figures reveal the seriousness of the problem and the complexity of the Ombudsman’s mission.

¹¹ Fuentes y Perafán 2003: 277: data as registered by the court.

¹² The reference is to the requirements and impediments specified in the Constitution and by Law 5, 1992, Regulations of Congress. In a similar fashion, the conduct of elected members of public corporations is checked by the possibility of impeachment (*pérdida de investidura*), seeking to avoid types of conduct prohibited by the Constitution (art.179), and by the Law (Law 144, 1993 and 617, 2000) where an ethical framework applicable to elected public officer is specified.

¹³ Due to the fact that the electors choose the program their candidate to mayor or governor must adhere.

¹⁴ Unfortunately there are no systematic studies available on the process of adoption of alternative forms of participation adopted in the 1991 Charter.

¹⁵ Concerning this issue, it can be said that legal development of constitutional principles has been of inferior quality; this is the case, for example, when in order to hold a referendum to derogate a law regulations demand a petition from at least 10% of registered voters in any electoral district in order for the motion to be approved. Later,

the law can be repealed only if a half plus one voters vote and only if at least one fourth of the registered voters participate. (Art. 155 of the 1991 Constitution.). Similarly, to introduce law projects by popular initiative it is necessary to collect 5 million signatures, from a total of over 20 million voters (2003), while to elect a members of congress with powers to propose laws during four years total participation is less than 50% of the total number of voters

¹⁶ This is an opinion poll on participation of citizens in politics in 2002, sponsored by the Corona Foundation (Velásquez and González 2003:257).

¹⁷ A sound effort to compile data based on exclusion indicators in Garay (2002).

¹⁸ The reference is to citizen participation at the local level in the townships of Toribio (Cauca) Magdalena Medio, Medellín and Pasto (Velásquez and González, 2003)

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