ADVANCES IN SCIENCI

# CONSTITUCIÓN POLÍTICA DE OMBIA

- Declaración Universal de los Derechos del Hombre
- los Derechos de la Mujer Declaración de

Himnos, banderas y escudos

Carlos Lemos Simmonds Prólogo

- los Derechos del Niño Símbolos patrios.

- Declaración de

The first thirty

**Political Constitution** 

A happy birthday?

years of the

of Colombia:

66



Our national constitution turned 30 in 2021. Was it a happy birthday? Professor Diana Valencia Tello posed this question to some of the greatest experts in constitutional law, and the answers explore history, current events, and new challenges of our Magna Carta and, therefore, of our society.

By Carlos Arturo García Bonilla Photos Ximena Serrano, Mllagro Castro, Alberto Sierra y Juan Ramírez DOI https://doi.org/10.12804/dvcn\_10336.35976\_num6

> n July 4<sup>th</sup>, 1991, the National Constitution governing our country was enacted. To commemorate its thirtieth anniversary, Universidad del Rosario held a meeting led by <u>Diana Valencia Tello</u>, Professor of the Faculty of Law, with scholars, experts, and magistrates to reflect on these 30 years of history. The result of this meeting was collected in the book *Reflexiones y desafíos de la Constitución Política de* 1991

tras treinta años de su expedición (Thoughts and Challenges of the 1991 Political Constitution Thirty Years after Its Promulgation), published by Editorial Universidad del Rosario. Based on this text, and thanks to the lucid support of Professor Valencia Tello, academic editor of the issue, we prepared a small guide to navigate through the twists of our constitution.

#### Historical backgrounds

We must remember that after the <u>liberal revolutions that took</u> <u>place in the Western world at the onset of the 19<sup>th</sup> century</u>, law rose in the modern State as a means to organize all aspects of the political, social, and economic life of communities. The idea was to formulate regulations that were as objective, general, and abstract as possible to apply them equally among the population. This idealist attempt, though praiseworthy in principle, had a fundamental problem: as it was based on abstract equality, it did not consider the diversity of different social realities, thereby deepening all kinds of inequalities throughout the 19<sup>th</sup> century.

For instance, if we consider the Civil Code, we can see it establishes a principle of formal equality among people. This sounds great on paper, but in reality, there are vast differences in the population that we must take into account. To ex-

# ⋪

Although there are many challenges arising from the Constitution, three are worth mentioning: reconciling internal tensions created by the State juridical pluralism, broadening rights through the Constitutionality Block, and addressing challenges implicit in the fourth industrial revolution. emplify, there is notable inequality between the owners of the capital and those who own nothing. If we do not consider this, we run the risk of experiencing what happened in the 19<sup>th</sup> century: under the principle of equality before the law, big companies would hire many people in subhuman conditions and keep them "tied" in the new factories being consolidated in industrialized countries.

The inequalities deepened by this principle of equality caused a series of strikes and demonstrations at the end of the century, which led to rethinking the law. It then materialized in a new kind of law striving for material equality. This is the main characteristic that set off the Social State of Law, which began gaining popularity by the end of the 19<sup>th</sup> century and the beginning of the 20<sup>th</sup> century.

The Social State of Law aims to highlight the differences among people. To continue our line of thought, workers without capital would need special protection from their employers so that they do not abuse their dominant position. This was also the beginning of a law intervening more in the State, which sought to develop different industries, economic areas, or public services. The classical liberal State was thought of as a minimal State that would let people do and let things go their way, dividing public and private matters to leave the latter in the hands of the market. However, inequalities and the abuse of the dominating position exerted by the elites in power caused a shift towards the Social State of Law.

#### What happened in Colombia?

Since its birth as a nation, Colombia has experienced deep inequalities. During the 20<sup>th</sup> century, efforts were made to address these inequalities and consolidate a Social State of Law, albeit with little success.

A big part of the problem was that excessive centralism led to most resources generated in the regions staying in the main capital cities, while the remainder of the territory lacked State presence. There were no public services, and most of the population had no access to basic health and education services. Hence, the 20<sup>th</sup> century left Colombia with a big debt towards the regions and communities that were more affected by these inequalities, and assuring vital minimums for the population became essential.

In this context, the 1991 Constitution was enacted to change this situation. It is worth noting that the first article in our Constitution states that "Colombia is a Social State of Law."



#### How was the 1991 Constitution enacted?

The Magna Carta ruling over Colombia was created amid a very complex scenario. The country was likely experiencing the most violent period in its history, which permeated deeply into all levels of society and led us to understand that a new juridical regime was urgent to achieve a more egalitarian State with equitable political participation, guaranteed access to rights in a robust and solid way for all the population, administrative decentralization, and the conditions needed to overcome this structural violence. We shall remember the 1989 Marcha del Silencio (*Silence March*) after the murder of Luis Carlos Galán, which gave rise to the Movimiento de la Séptima Papeleta and, consequently, the Colombian Constituent Assembly.





We can consider that the <u>1991 Constitution</u> arose as a Peace Agreement. Under the <u>1886 Constitution</u>, there were only the Liberal Party, the Conservative Party, and a minuscule movement of left-wing, pro-communist ideas. From the <u>1991 Constitution</u>, new spaces of participation were created. It is relevant that this Constitution was signed by the three political leaders: one from the conservative party, one from the liberal party, and a representative of the demobilized M-19 movement.

## What happened with the new Constitution?

The drafting of the new Colombian Magna Carta proposes a secular, inclusive, decentralized society that grants human rights and protects the environment; a peaceful society based on respect, able to address the strong social and economic inequalities that have historically existed in the country. With The drafting of the new Colombian Magna Carta proposes a secular, inclusive. decentralized society that grants human rights and protects the environment; a peaceful society based on respect, able to address the strong social and economic inequalities that have historically existed in the country



•

Is it a happy birthday? "The short answer is yes; it has been a happy birthday. The 1991 Constitution was undoubtedly a great step forward in our history, and it has helped to build a more decentralized and collaborative country. It has been the basis to build a more peaceful and, hopefully, equitable society. The long answer is that there is still a long way to go; that there are tensions created by the Constitution itself, and also potentialities still to be developed. It is even valid to wonder if it is now falling short in light of these new social realities," concludes Professor Diana Valencia Tello from Universidad del Rosario.

this Constitution, the entirety of the Colombian State was organized in a different way to provide its structural bodies and its decentralized bodies with more autonomy. Among the most critical changes introduced by this Constitution, we can find the creation of the <u>Corte Constitucional (Constitutional Court)</u>, the <u>Acción de Tutela (Act of Protection)</u> and the <u>Bloque de Constitucionalidad (Constitutionality Block)</u>.

It is a great challenge to analyze these 30 years of our Constitution. But, to do so in a wider and more thorough way, the <u>Public Law</u> <u>research group of Universidad del Rosario</u> organized, in December 2020, the event *Treinta años de la Constitución Política de 1991: ¿un cumpleaños feliz? (Thirty Years of the Colombian Constitution: A Happy Birthday?)*, for which a wide call invited all interested people to discuss these topics by submitting a presentation proposal. The initiative received 120 presentation proposals, around which 21 workshops were organized to achieve an effective exchange of ideas for around two hours. Those participating in the debates were invited to write an article describing both their initial presentation proposal and the final reflection from the activities at the debate tables. Said conclusions were compiled in the book *Reflexiones y desafios de la Constitución Política de 1991 tras treinta años de su expedición (Thoughts and Challenges of the 1991 Political Constitution Thirty Years after Its Enactment*).

#### Main challenges of the Constitution

Although there are many challenges to our Constitution, three are worth mentioning: reconciling internal tensions created by State juridical pluralism, amplifying rights by using the constitutionality block, and addressing challenges implicit in the fourth industrial revolution.

#### Harmonizing state juridical pluralism

By attempting to establish a more horizontal juridical status, the 1991 Constitution granted a series of competences to certain bodies, which have created some conflicts around who has the last word. There is no single institution with complete autonomy, and this is where this interinstitutional dialogue becomes necessary, although this interaction does not always happen as a dialogue, but as judgments colliding with one another.

In the first chapter of the book, Professor <u>Nelcy López Cuéllar</u> comments that the conceptualization of interinstitutional dialogue starts in Canada with several constitutional and political scientists, who spoke about a conflict between the Parliament and the Supreme Court on the control mechanism for law constitutionality. The philosophical problem of law in this sense is that dialogue should occur among equals.

However, in State structures, there are power hierarchies and relationships that are not necessarily symmetric, which ultimately affect dialogue by previously defining who, in practice, has the last word.

It is part of the democratic debate to keep fostering dialogue to find the most harmonic or better agreed-upon solutions that create the fewest conflicts. The core of the problem is evident when analyzing the structure of the State. The first US Constitution was based on the theory of checks and balances. This theory aims for one power to control the other.



In this sense, the structure is designed as a power battle that does not foster dialogue. This type of structure was devised in the 18<sup>th</sup> century, but nowadays, in complex societies, in information and knowledge societies where citizens usually have more access to data and communication, a decision based only on authority or hierarchy is no longer considered fair. It is necessary to find new mechanisms that enable the involvement of different points of view and help create consensus.

The argument that took place in the initial panel was focused in the High Courts. In several cases, the Constitutional Court has been placed as the institution with the last word, notwithstanding the opinions of the Supreme Court of Justice or the Council of State. However, it is necessary to closely analyze each case because the situation is usually more complex than simple hierarchy. We know our society changes now at a more rapid pace, and a signal of this is that, only 30 years after its enaction, there are issues that raise the question of whether our Constitution is now failing to meet our current society's needs.



Part of the problem is that when institutions with well-defined competencies are established, each of them is autonomous to establish certain type of decisions. "In our legal system, there are several topics in which competence is shared among institutions, and they end up competing," explains Professor Diana Valencia.

We can find a way out of this conflict in the 1991 Constitution itself. <u>Article 113</u> establishes that the different State bodies have separate functions but collaborate with each other to reach the State goals. From this, we can infer a principle of "harmonic collaboration." In the light of this principle, dialogue strategies among courts have been promoted, such as the creation of joint rooms for members of the different (high) courts to examine matters with converging competences to avoid divergent judgements that create these "train wrecks." ↑ Having no capital, workers need special protection so that their employers do not abuse their dominating position.

# The constitutionality block as a device to amplify rights

One of the most important differences between the 1886 Constitution and the 1991 Constitution is that the latter has a more dynamic understanding of human rights. Considering the need to grant them in the broadest possible way, the international instruments for the country to be governed in these issues were elevated to constitutional status. The former constitution, in turn, considered that if a national law was in conflict with an international human rights instrument, the national law was prevalent, even if Colombia had signed and ratified said instrument.

The set of international instruments that gained constitutional status is known as the "<u>Bloque de Constitucionalidad (Constitutionality Block)</u>." In this framework, if a national law is in conflict with an international human rights instrument, the law can be declared unconstitutional.

The Constitutionality Block has three functions:

- 1. To develop constitutional rights employing international instruments for their interpretation.
- 2. To integrate new rights that are not expressly mentioned in the Constitution.
- 3. To amplify the grants to rights via mechanisms stipulated in the international instruments.

One of the most notable examples that illustrate these functions is the recognition of prior consultation and free and informed prior consent as fundamental rights of the ethnic communities. The origin of this right is the inclusion of <u>C169 - Indigenous and Tribal Peo-</u> <u>ples Convention, 1989</u>

in the Constitutionality Block. This acknowledgment shows the three functions in action.

First, there is a development in constitutional rights since the Constitution article establishes a general participation right of Colombians and a mention in the paragraph of <u>Article 330</u> on "fostering the participation" of indigenous communities in decision-making regarding natural resource exploitation. There, we can find a right that has been established in a general way, interpreted and developed specifically via C169.

Second, there is integration of rights since there was no clear and specific right for indig-



enous communities to be consulted. Including the C169 in the Constitutionality Block integrated this right to our legal system and turned it into a demandable right via judgment <u>SU-039/97</u>.

Third, guarantees were amplified since besides consolidating the definition of the right to consultation, clear mechanisms were established to ensure that the consultations to indigenous communities met minimum conditions based both on C169 and on decisions by the Inter-American Court of Human Rights. Thus, the right to previous consultation for communities was not only established as an abstract right, but was also regulated to make it effective.

The Constitutionality Block is a powerful device to amplify and grant human rights in Colombia. However, its full potential has not been yet used, and many times, it has been limited to the judicial scope. For example, the Executive Power regulated prior consultation via decree 1320 in 1998 unilaterally, ironically, without consulting with the communities. "The challenge we have is for it to be understood by all branches of public power, to make their functions effective and to develop all its capacity to protect human rights for Colombians."

#### The fourth Industrial Revolution

Notably, 105 years have passed between the 1886 and the 1991 constitutions. Over a century was needed to reach the decision that the then current Magna Carta was no longer meeting the needs of the population. We know our society changes now at a more rapid pace, and a signal of this is that only 30 years after its enaction, there are issues that raise the question of whether our Constitution is now failing to meet the needs of our current society.

Even when the new Constitution is more dynamic and flexible thanks to mechanisms such as the Constitutionality Block, there are realities that nobody could foresee. The digital revolution has created new means of forming relationships that is out of the scope of traditional juridical systems.

The <u>Agere Research Incubator</u> of Claustro del Rosario decided to address the issue of the social cost of this fourth in-



dustrial revolution by analyzing the situation in the context of delivery applications (apps). They have gained wide popularity in the latest years and have a relevant incidence in the country's economy. However, the reality behind the conditions of their workers is far from ideal.

Rappi, an app created in Bogota in 2015, has grown to become one of the most used apps in the country. It <u>delivers</u> <u>profits of around 550 million Colombian pesos</u>. The biggest challenge lies in defending working rights for "rappitenderos" ("Rappi delivery people"), who are in charge of the message and delivery services, the company's business purpose. Their legal situation is far from clear. The company categorically states that they are not their employees since there is no contract with them and that, in fact, the contract occurs between the Rappi delivery person and the client using the app.

In reality, Rappi delivery people are in a state of deep vulnerability. In spite of the great profits that the company makes, dispatchers receive a smidge amount, which forces them to work over ten hours a day to gather a vital minimum. According to Agere, approximately 70% of the service fee is collected by Rappi, while the delivery person collects the remaining 30%, that is, between \$2,000 and \$3,000 per service. Delivery The democratic debate should keep fostering dialogue to find more harmonic or better agreed-

better agreedupon decisions that do not create these many conflicts. people have no insurance, holidays, or minimum working conditions. Who is accountable for them?

Article 53 of the Constitution states that "in case of discrepancy between the practice and what arises from documents and agreements, the first should prevail—that is, what happens in practice." This is known as the primacy of reality principle. The legal twists and turns of the relationship between Rappi and its delivery people can be complex and ambiguous; however, it is clear that their reality is deplorable and that they are working in conditions that do not grant their working rights.

Let's return to the beginning of the text to review the first article of the Constitution: Colombia is a Social State of Law. Let's remember the spirit of this concept: to protect people from the abuse arising from inequalities.

It is clear that there is inequality and that it creates a deplorable situation in a vulnerable population. It is clear that to keep building the society we aimed for when we wrote our Constitution, we need to have tools to address all situations that create inequalities. If the situation remains, and we do not have the instruments to address them, we must ask ourselves whether we need new resources to face the current challenges.

### Is it a happy birthday?

"The short answer is yes, it has been a happy birthday. The 1991 Constitution was undoubtedly a great step forward in our history, and it has helped to build a more decentralized and collaborative country. It has provided the foundations to build a more peaceful and, hopefully, equitable society. The long answer is that there is still a long way to go, that there are tensions created by the Constitution itself, and potentialities still to be developed. It is even valid to wonder if it is now falling short in light of these new social realities," concludes Professor Diana Valencia Tello from Universidad del Rosario.

It is true that a country cannot be built upon decrees, and a law or constitution will not magically change society. However, it is worth remembering that communities are built around ideas and agreements, and our Constitution materializes the ideal that we have agreed upon as a community. Hence, it is vital to create these spaces of dialogue for us to reflect upon our Magna Carta. This is actually a way for us to think about ourselves as a community and to understand who we have been, who we are, and, above all, who we want to be in the future.